

**IN THE CIRCUIT COURT OF THE 16TH  
JUDICIAL CIRCUIT IN AND FOR  
MONROE COUNTY, FLORIDA**

**EVANOFF'S INC., a Wisconsin Corpora-  
tion,**

**Plaintiff,**

**vs.**

**ISLAMORADA, VILLAGE OF ISLANDS,  
Florida, a municipal corporation,**

**Defendant.**

**Case No. CA-P-08-414  
(Garcia, J.)**

**COMPLAINT**

Plaintiff, EVANOFF'S, Inc., sues Defendant, ISLAMORADA, VILLAGE OF ISLANDS, Florida, a municipal corporation ("Islamorada"), and alleges the following.

1. This is an action regarding real property in Islamorada, within Monroe County, Florida, located in the Upper Keys division of the 16<sup>th</sup> Judicial Circuit.

2. This is an action for deprivation of due process and for full and just compensation for the temporary and permanent taking of real property, pursuant to Art. I, § 9, and Art. X, § 6(a), Fla. Const. and Amend. V and XIV, U.S. Const., in excess of the jurisdictional limits of this court exclusive of attorneys' fees and costs.

3. This Court has jurisdiction over the parties and the causes of action alleged herein.

4. The real property that is the subject of this Complaint ("subject property"), that Plaintiff purchased in 1972, is located in Islamorada and consists of 4.6± acres. The Monroe County Property Appraiser's Alternate Key number is 1107077. A legal description of the property is attached as Exhibit A.

5. From 1972 until September 15, 1986, the subject property was zoned RU-1. RU-1 zoning permitted one single-family dwelling unit (DU) as of right.

6. On September 15, 1986, the subject property was rezoned to Sparsely Settled (SS). SS zoning permitted one DU per 2, acres as-of-right, and additional DU's were permitted with transferrable development rights (TDRs).

7. Islamorada became a municipal corporation on December 31, 1997.
8. Pursuant to Ch. 97-348, Laws of Fla., Islamorada adopted Monroe County's Comprehensive Plan and Land Development Regulations, in effect as of December 31, 1997.
9. By Ordinance 1998-13, Islamorada adopted the entirety of the Monroe County Code, in effect as of December 31, 1997.
10. On May 14, 1998, by Ordinance 1998-04, Islamorada adopted a moratorium of indefinite duration on non-residential development.
11. Islamorada's moratorium on non-residential development was extended, by Ordinances 1999-02, 1999-09, 2000-01, and 2000-12.
12. By Ordinance 2000-12, Islamorada extended the non-residential development moratorium to encompass conditional use permits, subdivision approvals, boundary changes, comprehensive plan text changes, future land use map amendments, rezonings, variances, use permits, and any kind of permit that authorized development of land. The Ordinance defined non-residential development to include non-conforming uses, marinas, new or existing hotel rooms, the creation or expansion of outdoor uses, and communications towers.
13. On February 11, 1999, by Ordinance 1999-01, Islamorada adopted a moratorium on all residential development. Said moratorium was extended by Ordinance 2000-13.
14. By Ordinance 2001-05, Islamorada adopted a Comprehensive Plan, which became effective on December 6, 2001.
15. By Ordinance 2001-16, Islamorada adopted a zoning map that designated the subject property as Native Residential (NR). NR permits one single-family DU and one "caretaker's cottage" DU if a parcel consists of at least four acres.
16. On February 21, 2002, Islamorada adopted a Rate of Development (ROD) ordinance by Ordinance 2002-17. Islamorada's name for its ROD Ordinance is Building Permit Allocation System, or BPAS.
17. Pursuant to Islamorada's ROD ordinance, only 14 applications for market-rate residential DUs will be granted in any calendar year, up to and including 2020, and said applications

are ranked according to several criteria, which include vegetation and habitat on the parcel of land to be developed.

18. On August 31, 2006, Plaintiff submitted an application to build a single-family DU on the subject property. In 2006, because of the presence of hammock trees on the subject property, Plaintiff's application was ranked 136 out of 138. As of August 2007, Plaintiff's application was ranked 145 out of 146.

19. On December 31, 2007, Islamorada had approximately 1,268 undeveloped parcels of land suitable for *residential* development, of which 146, or 11.5% were the subjects of pending building permit applications.

20. As Islamorada can only issue 14 market-rate, and 14 affordable-housing, building permits per year, and if there were 14 affordable-housing building permits applied for every year, and Islamorada continues to accept building permit applications every working day of the year, it would take over 45 years for the lowest-ranked parcel to receive a building permit. At this time, Evanoffs' application is the second-lowest-ranked application in the queue.

21. As of the date of filing this Complaint, there were 144 market-rate residential building permit applications in Islamorada's ROD queue, and there were zero affordable housing building permit applications in the ROD queue.

22. If an insignificant number of affordable housing building permits are applied for each year – which has been the case since the ROD ordinance was adopted – it will take over 90 years for the lowest-ranked parcel to receive a building permit.

23. It is reasonable to conclude that the subject property will not be eligible for a building permit for the next 90 years.

24. Islamorada has adopted two administrative "remedies" that purport to prevent the unconstitutional "taking" of undeveloped properties that cannot meet the criteria required to be awarded residential building permits.

25. The first of these is a "Beneficial Use" determination (BUD). Section 30-554 of the Islamorada Code sets forth the criteria for beneficial use relief. It reads:

(a) If necessary, the village council **may** issue a statement of remedial action, providing for beneficial use of the parcel. In order to establish entitlement to relief, an applicant for a beneficial use must demonstrate to the village council that the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application deprive the applicant of all reasonable economic use of the parcel.

(b) The remedies available to an applicant for beneficial use will include issuance of a permit or just compensation by purchase of all or some of the parcel or purchase of the development rights (leaving the parcel in private ownership) **at the fair market value immediately prior to the comprehensive plan or land development regulations in effect at the time of the filing of the beneficial use application.**

(1) Just compensation shall be the preferred option if: a) Beneficial use of the parcel has been deprived by operation of environmental policies or objectives contained in the comprehensive plan or land development regulations in effect at the time of the filing of the beneficial use application; or b) A strict, literal application or enforcement of the comprehensive plan or land development regulations in effect at the time of filing of the beneficial use application prevents all reasonable economic use of the parcel, but is required to protect the public health, welfare or safety.

(2) If just compensation is not preferred, the determination **may** allow for additional uses or density for the parcel beyond that allowed by a strict, literal application of the comprehensive plan and land development regulations in effect at the time of filing of the beneficial use application on the parcel (i.e., some additional, reasonable economic use), which **may** include the granting of an: a) Exemption; or b) Permit for development despite the offending regulation (an order shall state which offending regulations are inapplicable or waived and such a permit shall be subject to normal construction deadlines and expiration dates under this chapter); or c) Transferable development rights (TDRs); or d) Any combination of the above; or e) Any other relief the village determines appropriate and adequate to prevent a taking (i.e., which will allow for reasonable economic use of the parcel or just compensation under the goals, objectives and policies of the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application).

26. Despite its characterization as “relief,” § 30-554 (b) does not require Islamorada to affirmatively grant any relief to an applicant, nor to institute formal condemnation proceedings.

27. Reasonably concluding that it would not qualify for a building permit for decades – actually almost a century – Plaintiff submitted an application to Islamorada for a BUD, on or about January 29, 2008, and paid the required fee.

28. In a letter dated April 25, 2008, Plaintiff’s BUD application was rejected by the Islamorada Planning Director. A true copy of said letter is attached hereto as Exhibit B.

29. The Planning Director rejected the beneficial use application based on Policy 1-3.1.6 of the Comprehensive Plan, which states:

Applicants who have met all requirements of the Comprehensive Plan with regards to the Building Permit Allocation System, but are otherwise denied a permit, shall be eligible to request consideration of a beneficial use of the parcel, **upon four years elapsing** from the date of acceptance of the application by the Village.

30. Section 30-477 of the Islamorada Code sets forth the criteria for administrative relief under the ROD Ordinance. That section reads:

(a) *Eligibility.* An applicant is eligible for administrative relief under the provisions of this section if all the following criteria are met:

(1) The applicant has complied with all requirements of the building permit allocation system; (2) The subject application has not been withdrawn; and (3) The subject application has been considered in at least **four** consecutive annual allocation periods and has failed to receive an allocation award.

(b) *Application.* An application for administrative relief shall be made on a form prescribed by the director and may be filed with the department of planning and development services no earlier than the conclusion of the fourth annual allocation period and no later than 120 days following the close of the fourth annual allocation period.

(c) *Forwarding of records to village council; effect of failure to file application.* Upon the filing of an application for administrative relief, the director shall forward to the village council all relevant files and records relating to the subject applications. Failure to file an application shall constitute a waiver of any rights under this section to assert that the subject property has been taken by the village without payment of just compensation as a result of the building permit allocation system.

(d) *Public hearing* Upon receipt of an application for administrative relief, the village council shall notice and hold a public hearing at which the applicant will be given an opportunity to be heard.

(e) *Procedures.* The village council shall consider the application under the procedures established in sections 30-552 and 30-553.

(f) *Action by village council.* At the conclusion of the public hearing, the village council **may** take any or a combination of the following actions: (1) Grant the applicant an allocation award for all or part of the allocation requested in the next succeeding allocation period or extended pro rata over several succeeding allocation periods. (2) Offer to purchase the property at its fair market value. (3) Suggest such other relief as may be necessary and appropriate.

31. As Islamorada's two administrative "remedies" include unreasonable, arbitrary, and unconstitutional pre-conditions on Plaintiff's right to seek full and just compensation under the Florida and U.S. Constitutions, and contain no provisions for just compensation to applicants for said "relief," Plaintiff cannot be compelled to "ripen" its taking claim, nor to exhaust the available administrative "remedies" beyond the action it has already taken, and been rebuffed. To do so would be futile.

32. Islamorada's purported administrative remedies are designed merely to frustrate and unreasonably delay property owners from obtaining full and just compensation for the inability to use their property.

33. Because Plaintiff cannot possibly receive a building permit for a single-family home in this century, Plaintiff has been denied all, or substantially all, reasonable beneficial use of the subject property.

34. Plaintiff taking claim is ripe for adjudication by this Court.

### **COUNT I – PER SE OR AS-APPLIED REGULATORY TAKING**

35. Plaintiff re-alleges Paragraphs 1 through 35 as if set forth herein.

36. Plaintiff has been deprived of *all, or substantially all*, beneficial use of the subject property, by the operation of Islamorada's Rate-of-Development Ordinance ("ROGO").

37. Islamorada is liable to Plaintiff pursuant to Art. X, § 6(a), Fla. Const., and Amend. V, U.S. Const., for just and full compensation for the *per se* or *as-applied* regulatory taking of its property.

### **COUNT II – DUE PROCESS**

38. Plaintiff re-alleges Paragraphs 1 through 35 as if set forth herein.

39. Plaintiff was deprived of due process by the acts of Islamorada described in Paragraphs 1 through 35.

40. Islamorada is liable to Plaintiff pursuant to the Florida and United States Constitutions for said Due Process violations.

### **RELIEF SOUGHT**

Plaintiff demands judgment against Defendant, and prays that this Court:

- a) Determine that the claims presented herein are ripe for judicial review;
- b) Determine the date Plaintiff's Subject Property was taken by Defendants' regulations;
- c) Determine whether said regulatory taking was a *per se* or *as applied* taking;

- d) Determine the compensation due Plaintiff for the regulatory taking of the Subject Property, from the date the regulatory taking began until the date of trial, or the date title passes to Defendant, whichever comes first;
- e) Empanel a 12-person jury to hear testimony and determine the amount of full and just compensation due Plaintiff for the fee simple estate in Plaintiff's Property pursuant to Section 73.071, Fla. Stat.;
- f) Should Defendant elect not to condemn the Subject Property within 20 days of entry of the jury verdict on the fair market value of the fee simple estate, issue a mandatory injunction ordering Defendant Islamorada to issue a single-family home building permit and a Caretaker's Cottage permit, on the subject property;
- g) Award Plaintiff full and just compensation for the taking of the subject property, plus costs of this action, and attorneys' and expert witness fees; and
- h) Grant such other and further relief that Plaintiff is otherwise entitled to.

**DEMAND FOR JURY TRIAL**

Plaintiff demands trial by jury on all issues so triable,

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