

IN THE CIRCUIT COURT OF THE 16<sup>TH</sup> JUDICIAL DISTRICT  
IN AND FOR MONROE COUNTY, FLORIDA

EVANOFF'S INC., a Wisconsin Corporation,

CASE NO.: CA-P-08-414

Plaintiff,

v.

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

Defendant.

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**DEFENDANT, ISLAMORADA'S MOTION TO DISMISS**

The Defendant, ISLAMORADA, VILLAGE OF ISLANDS (hereinafter referred to as "ISLAMORADA"), by and through its undersigned attorneys, and pursuant to Rule 1.140(b)(1)(6) of the Florida Rules of Civil Procedures, requests that the Court enter an Order dismissing Plaintiff's Complaint for lack of **subject matter jurisdiction** and for **failure to state a cause of action**, and as grounds therefore, would show:

1. The Complaint alleges that Plaintiff, EVANOFF'S, INC. (hereinafter referred to as "EVANOFF'S") is a Wisconsin Corporation which owns a 4.6 acre parcel of real property which is currently zoned so as to permit one (1) single family dwelling unit and one (1) caretaker's cottage. See paragraphs four (4) and fifteen (15) of the Complaint.

2. The Complaint also alleges that on February 21, 2002, ISLAMORADA adopted Ordinance 2002-17 which established a Building Permit Allocation System (BPAS) for ISLAMORADA. **The Ordinance, which is not attached to the Complaint as required by Rule 1.130(a) of the Florida Rules of Civil Procedure**, provides that "an annual allocation of building permits is necessary to ensure that appropriate phasing of new growth and development, (is)

consistent with state law and the comprehensive plan". The Complaint further alleges that pursuant to the Rate of Development (ROD)/BPAS Ordinance, a limited number of permits for new market rate residential dwelling units are available each calendar year and that the number of applications for building permits exceeds their availability. See paragraphs seventeen (17), nineteen (19), twenty (20), and twenty-one (21) of the Complaint.

3. Finally, the Complaint alleges that on August 31, 2006, EVANOFF'S submitted an application to build a single family dwelling unit and that because of environmental conditions which exist on the subject property, the BPAS Ordinance ranked other permit applications more favorably that the one submitted by EVANOFF'S. On January 29, 2008, EVANOFF'S submitted an application for a Beneficial Use Determination and on April 25, 2008, ISLAMORADA rejected the application because it was not eligible for consideration until EVANOFF'S had participated in and been denied a building permit under BPAS for a period of four (4) years. See paragraphs eighteen (18), twenty-seven (27) and twenty-eight (28) of the Complaint.

4. The Complaint fails to state a cause of action because EVANOFF'S has failed to attach a copy of the ROD Ordinance/BPAS Ordinance which forms the subject matter of this action.

Pursuant to Rule 1.130(a) of the Florida Rules of Civil Procedure, EVANOFF'S Complaint should be dismissed until a copy of the Ordinance sued on in this action is attached to the Complaint as an exhibit. See *Safeco Insurance Company v. Ware*, 401 So.2d 1129 (Fla. 4th DCA 1981) and *Samuels v. King Motor Company*, 782 So.2d 489, 500 (Fla. 4th DCA 2001).

5. Count I further fails to state a cause of action for a per se or as applied regulatory taking for the following reasons:

(a) To the extent EVANOFF'S seeks relief based on allegations that the regulations on their face affected a per se taking of EVANOFF's property, the claim is barred by the applicable four (4) year statute of limitations. See *City of Pompano Beach v. Yardarm*, 641 So.2d 1377 (Fla. 4th DCA 1994) and *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So.2d 171 (Fla. 2d DCA 1995). All elements of EVANOFF'S per se taking claim were present when the complained of regulation was adopted on February 21, 2002. The face of the Complaint demonstrates that more than four (4) years has passed, and as a result, the facial per se claim is time barred. See *Bott v. City of Marathon*, 949 So.2d 295 (Fla. 3d DCA 2007) and *Paresky v. Miam-Dade County Board of County Commissioners*, 893 So.2d 664 (Fla. 3d DCA 2005).

(b) To the extent EVANOFF'S seeks relief based on an as applied basis, the claim is premature and fails to state a cause of action for the following reasons:

(i) The Complaint fails to allege that EVANOFF'S has obtained a final decision from the ISLAMORADA Village Council as to the permitted use of the subject property. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *City of Key West v. Berg*, 655 So.2d 196 (Fla. 3d DCA 1995).

(ii) Although an application for a beneficial use determination has been filed, EVANOFF'S has done so prior to the time provided by BPAS. As such, EVANOFF'S has failed to pursue and exhaust available administrative remedies prior to the commencement of this action for a regulatory taking. See *Clay v. Monroe County*, 849 So.2d 363, 365 (Fla. 3d DCA 2003) and *Bauknight v. Monroe County*, 33 Fla. L. Weekly D 2212 (Fla. 3d DCA Sept. 17 2008).

(iii) If EVANOFF'S was permitted to bring an as applied regulatory taking claim without utilizing the procedures and administrative remedies established by ISLAMORADA's ROD Ordinance and BPAS, it would defeat the entire purpose of the regulation which is designed to allow for development in phases in order to promote water conservation, wind storm protection, energy efficiency, growth control, and habitat protection. See *Burnham v. Monroe County*, 738 So.2d 471 (Fla. 3d DCA 1999).

6. Count II fails to state a cause of action for a regulatory taking based on a denial of due process (substantive or procedural) for the following reasons:

(a) There is no substantive due process taking cause of action. See *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612 -14 (11th Cir. 1997). Similarly, where a regulation is arbitrary and capricious so as to be violative of due process, the appropriate remedy under Florida law is not compensation, but rather the regulation is invalidated. See *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation*, 640 So.2d 54 (Fla. 1994). Finally, Florida's Third District Court of Appeal has previously rejected a similar due process attack and upheld the constitutionality of a substantially identical regulation adopted by Monroe County. See *Burnham v. Monroe County*, 738 So.2d 471, 472 (Fla. 3d DCA 1999).

(b) To the extent Count II seeks relief based on a procedural due process violation, it fails to state a cause of action for the following reasons:

(i) ISLAMORADA's adoption of the complained of Ordinance constitutes a legislative act and EVANOFF'S cannot state a procedural due process claim. See

*Seventy Five Acres, LLC., v. Miami-Dade County*, 338 F.3d 1288, 1294 (11th Cir. 2003); *Busse v. Lee County, Florida*, 2008 U.S. Dist. LEXIS 36488 (Fla. M.D. May 5 2008).

(ii) The Complaint fails to set forth any violation of EVANOFF'S notice and opportunity to be heard with respect to the complained of Ordinance. If the regulation were not adopted in accordance with proper procedures, the remedy would not be a regulatory taking claim, but rather a declaration that the Ordinance was void. See, generally, *Skaggs v. City of Key West*, 312 So.2d 549 (Fla. 3d DCA 1975).

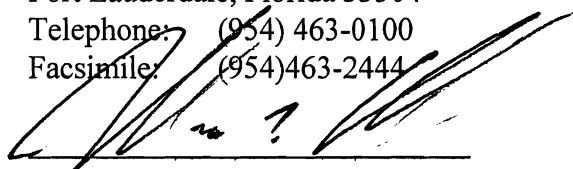
(iii) To the extent the Complaint seeks relief under federal law, the regulatory taking claim is not ripe for federal adjudication. EVANOFF'S has failed to obtain a final decision from ISLAMORADA as to the use of the subject property and has failed to pursue and exhaust available remedies for just compensation under Florida law. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

WHEREFORE, the Defendant, ISLAMORADA, requests that the Court enter an Order dismissing EVANOFF'S Complaint for the reasons and upon the authorities stated above.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. Mail to counsel on the attached Service List, this 3<sup>rd</sup> day of November 2008.

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