

**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, and the
State of Florida,**

Defendants.

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

AMENDED COMPLAINT

Plaintiff, EVANOFF'S, Inc., sues Defendants, ISLAMORADA, VILLAGE OF ISLANDS, Florida, a municipal corporation ("Islamorada"), and the STATE OF FLORIDA, 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 16th Judicial Circuit.

2. Counts I demands a Declaratory Judgment, pursuant to Ch. 86, Fla. Stat. (2008), finding Defendant Islamorada's Building Permit Allocation System (BPAS) ordinance (Ordinance No. 2002-17), and its Beneficial Use Determination regulations, § 30-554 of the Islamorada Code, unconstitutional on Due Process grounds pursuant to Art. I, § 9, Fla. Const., and Amendments V and XIV, U.S. Const.

3. Count II is a regulatory taking claim, and a demand for an eminent domain trial pursuant to Chapter 73, Fla. Stat, requiring Defendants to pay full and just compensation for the regulatory taking of Plaintiff's real property that is the subject of this Complaint, pursuant to Art. X, § 6(a), Fla. Const., and Amendments V and XIV, U.S. Const., in excess of \$15,000, exclusive of attorneys' fees, interest, and costs.

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

PARTIES

5. Plaintiff is Evanoff's, Inc., a Wisconsin corporation.

6. Defendants are Islamorada, Village of Islands, Florida, a municipal corporation (hereinafter “Islamorada”), and the State of Florida (a/k/a “State”)

FACTS

7. Plaintiff is the owner of the real property that is the subject of this Complaint, which Plaintiff purchased in 1972 (the Subject Property). The Subject Property is located within the boundaries of Islamorada, and consists of 4.6± acres of upland. The Monroe County Property Appraiser’s Alternate Key number is 1107077. A legal description of the Subject Property is attached as Exhibit A.

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

9. In 1979, the Florida Keys was designated an Area of Critical Concern (ACSC) by the Florida Legislature, granting the State super-legislative authority over all land development in the Florida Keys.

10. On September 15, 1986, the subject property was rezoned by Monroe County, with the approval of the Florida Department of Community Affairs and the Florida Administration Commission, to Sparsely Settled (SS). At that time, SS zoning permitted one Dwelling Unit (“DU”) per acre as-of-right, and additional DU’s were permitted if one could acquire transferable development rights (TDRs).

11. Islamorada became a municipal corporation on December 31, 1997.

12. Pursuant to Ch. 97-348, Laws of Fla., Islamorada was required to adopt Monroe County’s Comprehensive Plan (ComPlan) and Land Development Regulations (LDRs) as they were in effect on December 31, 1997.

13. By Ordinance 1998-13, Islamorada adopted the Monroe County Code in effect as of December 31, 1997.

14. On February 11, 1999, by Ordinance 1999-01, Islamorada adopted a moratorium on the acceptance of building permit applications for residential development, thereby prohibiting

any development on the Subject Property. Ordinance 1999-01 was, according to its terms, to expire no later than December 31, 2000, unless extended.

15. On December 14, 2000 (1st reading) and January 11, 2002 (2nd reading), by Ordinance 2000-13, Islamorada extended the residential development moratorium to December 31, 2001, unless extended.

16. On April 26, 2001, by Ordinance 2001-05, Islamorada adopted a Comprehensive Plan, that became effective on December 6, 2001, following approvals by the State of Florida.

17. 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.

18. On January 10, 2002, by Ordinance 2002-03, Islamorada extended the residential building permit application moratorium to no later than December 31, 2002, unless extended.

19. On December 20, 2001 (1st reading) and February 21, 2002 (2nd reading), by Ordinance 2002-17, a copy of which is attached hereto as Exhibit B, Islamorada adopted a “Rate of Development” (ROD) ordinance, which it dubbed the “Building Permit Allocation System,” or “BPAS,” ordinance. The BPAS ROD did not become effective until after it was approved by the State of Florida.

20. On August 22 (1st reading) and September 12, 2002 (2nd reading), by Ordinance 2002-25, Islamorada extended the residential building permit application moratorium to no later than July 15, 2003, unless extended.

21. On information and belief, Islamorada began accepting residential building permit applications on or about July 15, 2003, 53 months after the moratorium was established on February 11, 1999.

22. Pursuant to Islamorada’s BPAS ROD ordinance (currently 2002-17), only 14 applications for market-rate residential DUs will be granted in any calendar year and said applications are ranked according to several criteria, which include vegetation and habitat on the parcel of land to be developed.

23. Islamorada's BPAS ROD ordinance is heavily weighted against residential development on vacant land that has hammock trees on it.

24. On August 31, 2006, Plaintiff submitted an application to build a single-family residence on the subject property. Because of the presence of hammock trees on the subject property, Plaintiff's application was ranked 136 out of 138 permits in the BPAS ROD queue. As of August 2007, Plaintiff's application was ranked 145 out of 146.

25. 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.

26. 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 if Islamorada continues to accept that number of building permit applications annually, it would take over 45 years for the lowest-ranked parcel to receive a building permit. When the Complaint was filed, Evanoffs' application was the second-lowest-ranked in the queue.

27. As of the date of filing the Complaint in this action, 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.

28. If the number of affordable housing building permits applied for each year remains at the aforesaid level (zero) – 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.

29. It is reasonable to conclude that the subject property will not be eligible for a building permit for more than 50 years.

30. Islamorada has adopted an administrative proceeding that purports to prevent the unconstitutional "taking" of undeveloped properties that cannot meet the criteria required to be awarded residential building permits.

31. This proceeding is called 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).

32. Despite its characterization as “relief,” § 30-554 (b) does not require Islamorada to affirmatively grant any relief to an applicant, nor does it require Islamorada to institute formal condemnation proceedings to acquire the properties that are not granted development approvals, nor does it require Islamorada or the State to pay full or just compensation as required by the Florida and United States Constitutions.

33. Reasonably concluding that it would not qualify for a building permit for many decades, on or about January 29, 2008 Plaintiff submitted an application to Islamorada for a BUD, paying the required, substantial fee, currently \$2,850.

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

35. The Planning Director rejected the BUD 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.

36. 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.

37. Contrary to settled law in Florida and the other states and territories of the United States of America, the Village of Islamorada has reserved to itself – the condemning authority –

the sole authority to determine the compensation that it must pay to acquire land from a person or entity that is not permitted to develop said land.

38. Furthermore, Islamorada charges a \$2,850 fee for landowners to obtain a Beneficial Use Determination, which is an unconstitutional impediment to landowners' right to be paid full and just compensation when they are unable to use their land.

39. Islamorada's administrative remedy for landowners who have no right to develop their undeveloped land is unreasonable, arbitrary, and unconstitutional, and interferes with Plaintiff's right to obtain full and just compensation under the Florida and U.S. Constitutions.

40. Said administrative remedy contains no provision for just and full compensation to applicants for said "relief," and Plaintiff may not be compelled to "ripen" its taking claim by way of the BUD process, because the BUD process, and its \$2,850 fee, are unconstitutional.

41. Islamorada's purported administrative remedy is designed to unreasonably delay property owners from obtaining full and just compensation, and to drive down the compensation due the landowner by the process known as Condemnation Blight.

42. Because Plaintiff cannot receive a building permit for a single-family home for many decades, if at all, Plaintiff has been denied all, or substantially all, reasonable beneficial use of the subject property.

43. Plaintiff applied for a building permit on August 31, 2006. Said permit has been denied *sub silentio*, and Islamorada will not, under its regulations, be able to issue a permit to Plaintiff for at least 45 years. Plaintiff's taking claim is ripe for adjudication by this Court.

COUNT I – VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS

44. Plaintiff re-alleges Paragraphs 1 through 43 as if set forth herein. Plaintiff brings Count I pursuant to Art. X, § 6(a), Fla. Const., the Due Process Clauses of Amends. V and XIV, United States Constitution, 42 U.S.C. § 1983, and Chapter 86, Fla. Stat. (2008).

45. Defendants' acts alleged herein have established unconstitutional land development regulations, specifically the BPAS ROD and BUD regulations, *supra*, depriving Plaintiff of the

right to full and just compensation, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Said ordinances are unconstitutional not because they prevent the use of property, but because they do not provide Plaintiff with a direct route to an eminent domain proceeding that will result in full and just compensation as required by the United States and Florida Constitutions. *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984), *Joint Ventures v. Florida Dept. Transp.*, 563 So. 2d 622 (Fla. 1990).

46. Islamorada's BPAS ROD ordinance (Ordinance No. 2002-17, and its BUD regulations, § 30-554 of the Islamorada Code, and BUD application fee, are unconstitutional and violate Art. X, § 6(a), Fla. Const., and the Due Process Clauses of Amends. V and XIV, United States Constitution, and must be declared null and void.

COUNT II – REGULATORY TAKING

47. Plaintiff re-alleges Paragraphs 1 through 43 as if set forth herein. Plaintiff brings Count II pursuant to the Taking Claus of the Fifth Amendment, United States Constitution, 42 U.S.C. § 1983, and Article X, Section 6(a), of the Florida Constitution.

48. Plaintiff was deprived of all, or substantially all beneficial use of the Subject Property by the actions of Defendants described in Paragraphs 1 through 42 above.

49. Defendants are liable to Plaintiff for the regulatory taking of the Subject Property, with the amount of full and just compensation to be determined by the Court with the aid of a jury.

RELIEF SOUGHT

On Count I: Plaintiff prays for this Court to enter a declaratory judgment pursuant to Chapter 86, Fla. Stat. (2008), declaring unconstitutional Islamorada's Building Permit Allocation System (BPAS) ordinance (Ordinance No. 2002-17, and its Beneficial Use Determination regulations, § 30-554 of the Islamorada Code, as violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 9, of the Florida Constitution.

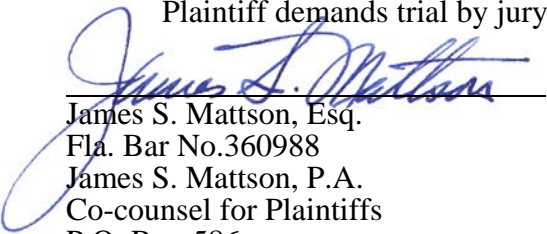
On Count II: Plaintiff pray for this Court to enter judgment in their favor and against Defendants based on Defendants' violations of the Takings Clause of the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and Article X, Section 6(a), of the Florida Constitution.


In addition, Plaintiff prays that this Court to:

- 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) Bifurcate Count II of this proceeding into a bench trial on liability and a jury trial on compensation;
- d) Award just and full compensation to Plaintiff for Defendants' violations of its right to be free from regulatory takings and substantive due process violations, pursuant to the United States and Florida Constitutions;
- e) Award statutory attorneys' fees, expert witness fees, and court costs to Plaintiff pursuant to Chapters 73 and 74, Fla. Stat. (2008).;
- f) Award attorneys' fees, court costs, and litigation expenses pursuant to 42 U.S.C. § 1988, to Plaintiff as the prevailing party under the United States Constitution; and
- g) 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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CERTIFICATE OF SERVICE

I certify that I served, by facsimile transmission to 954-463-2444, and by first-class mail, postage prepaid, a copy of the foregoing on **MICHAEL T. BURKE, ESQ.**, Counsel for Defendant, Johnson, Anselmo, et al., PA, 2455 East Sunrise Blvd, Ste 1000, Ft. Lauderdale, FL 33034, this 7th day of January 2009. A courtesy copy was sent to Mr. Burke by e-mail.


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Co-counsel for Plaintiffs