

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

CASE NUMBER: 2002-CA-595-K

GALLEON BAY CORPORATION, a
Florida Corporation,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA, and
The STATE OF FLORIDA
Defendants,

FINAL JUDGMENT IN FAVOR OF DEFENDANTS
DENYING CLAIM FOR INVERSE CONDEMNATION

This Cause, having come before the Court on December 6 through December 9, 2010 and on January 21, 2011 for a trial by Court on Plaintiff's claim for inverse condemnation and the Court, having considered the evidence presented, the various pleadings and motions filed in conjunction with the trial, the written and oral closing arguments, the pertinent legal authority, the Court file, and being otherwise fully advised in the premises, hereby finds as follows:

1. This case was tried before the Court on Count I of Plaintiff's Corrected Third Amended Complaint In Inverse Condemnation wherein the Plaintiff claims that a regulatory taking of its property occurred on July 19, 2001 by operation of Monroe County's Dwelling Unit Allocation Ordinance ("ROGO") and the final decision of Defendant, Board of County Commissioners of Monroe County, Florida. At the trial, both Defendant, Monroe County, and Third-Party Defendant, the State of Florida, appeared and presented defenses to the Plaintiff's claim.

2. The issue for the Court to decide is whether the Plaintiff has proven that the Defendants are liable for a taking of Plaintiff's property. If liability is established, then damages will be determined at a subsequent jury trial. Of course, if the Plaintiff has failed to prove liability, the claim is denied at this point and the case goes no farther.

3. The legal test for evaluating a taking claim is set forth in Penn Central Transp. Co v. New York City, 438 U.S. 104(1978). First, the Court must consider, "the extent to which the regulation has interfered with distinct investment backed expectations" of the Plaintiff. Id at 124. Second, the Court must consider "the economic impact of the regulations on the claimant". Id. As to each of the 2 parts of the "Penn Central Test", the Court finds that the Plaintiff has failed to demonstrate that a taking has occurred.

4. With respect to the Plaintiff's reasonable investment backed expectations, the development history of the originally purchased acreage is a relevant factor for consideration. Reahard v. Lee County, 968 F.2d 1131 (11th Cir. Ct. 1992) at 1136-1137. In the case at bar, the property in question was purchased by Wolfgang Schleu between the years 1966 and 1969 as part of his overall purchase of about 90 acres of land on No Name Key during those years. In 1972, Mr. Schleu formed Galleon Bay Corporation, the Plaintiff in this case, and transferred the property to the corporation for purposes of development.

5. Out of the original 90 acres purchased, Galleon Bay has been able to develop 2 subdivisions and sell about 100 lots from the early 1970s until the late 1990s. The property which is the subject of this lawsuit represents 12 acres out of the original 90 acres. In deciding whether a taking has occurred, the Court should look at the property as a whole as opposed to merely the affected portions. State Department of Enviromental Regulation v. Schindler, 604 So.2d 565 (Fla.App. 2 Dist. 1992). When examining the entirety of Galleon Bay Corporation's original property holdings on No Name Key, the Court finds that the fact that the corporation has been able to develop and market a substantial portion of that property is a factor that supports a finding that the Plaintiff's original investment backed expectations have been met.

6. Another important factor bearing on the reasonable investment backed expectations of the Plaintiff is the character and condition of the property when it was acquired. In the 1960s when Wolfgang Schleu purchased the property, the Key Deer Refuge had already been established and the land was situated in a federal wildlife acquisition area. The property had no municipal electric, water, or sewer service which remains the case to this day. Essentially, Mr. Schleu made a purchase of a prime piece of natural undeveloped habitat in a remote part of the Florida Keys. Exactly what expectations he harbored with respect to the land at the time of the purchase cannot now be precisely determined. However, his actions with respect to the property do provide persuasive evidence as to what Mr. Schleu reasonably expected. As Vivian Schleu testified to at trial, her father made an agreement with Billy Moore who was affiliated with the Organized Fisherman of Florida to buy the property for purposes of establishing some sort of commercial fishing operation. Galleon Bay had in fact been successful in obtaining a Commercial Fishing Village (CFV) zoning designation for the property in the 1980s which would have allowed the type of activities contemplated by the Organized Fisherman of Florida. However, in order to consummate the deal with Mr. Moore, it was necessary that a canal be dredged to connect the basin or borrow pit on the property to the open water. In furtherance of this end, Galleon Bay did in fact apply for a dredge and fill permit in 1986. In 1989, the Florida Department of Environmental Protection denied the permit and ultimately Galleon Bay abandoned its appeal of the permit denial. As a result, the deal with Billy Moore of the Organized Fisherman of Florida did not come to fruition. Shortly thereafter, as testified to by Vivian Schleu, Galleon Bay decided to go forward with a plan to develop a 14 home subdivision which is now the subject of this taking case. In light of the character and condition of the property, the Court finds that such an expectation was not reasonable and hence, does not constitute a legally cognizable basis for a taking claim.

7. Another factor upon which the Court bases its finding that pursuit of and investment in a residential subdivision in the 1990s by Galleon Bay was not objectively reasonable is the existence of federal regulations placing severe limitations on development and the Plaintiff's knowledge of those regulations. In Paragraph 6, the Court has already made reference to the existence of the Key Deer Refuge at the time that the property was

purchased. In 1973, the U.S. Government passed the Endangered Species Act. By the time Plaintiff sought its first development permit for the subject property nearly 20 years after purchase, the Corps of Engineers was required to consult with the U.S. Fish & Wildlife Service pursuant to the Endangered Species Act before any development took place on the subject property. Upon review of the permit, the U.S. Fish & Wildlife Service issued a formal jeopardy opinion stating that the development of the subject property would jeopardize the continued existence of the Key Deer. Despite the fact that Vivian Schleu was fully aware of the federal regulations and federal government's opposition to development of the property, Galleon Bay made a decision to pursue development and expend hundreds of thousands of dollars in pursuit of that decision. As stated by the Court in the case of Good v. U.S., 39 Fed. Cl. 81, 84 (1997), affirmed, 189 F 3d 1355 (C.A. Fed., 1999), "While plaintiff is free to take the investment risks he took in this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken." Id at 114.

8. Another factor relevant to reasonable investment backed expectations for purposes of establishing a taking claim is the opportunity to recoup the *initial investment* in the property. In Good v. U.S., the federal claims court held, "In a case where a developer could recoup his initial investment in the property, but nonetheless chooses to continue to invest in development in the face of significant regulatory limitations, no reasonable expectations are upset when development is restricted or proscribed." Id at 113. In this case, prior to investing more than \$500,000 in the pursuit of residential development, Galleon Bay had the opportunity to sell the property to the U.S. Government for \$221,000. Though Galleon Bay was aware of all of the impediments to residential development, the decision was made to reject the offer and forge ahead with the plan for development. Of course, Galleon Bay was free to take that gamble. However, for purposes of obtaining compensation for a taking, the Court finds that the investment expectation was not reasonable and hence, not compensable.

9. In terms of the second prong of the "Penn Central Test", the Court must examine the economic impact of the regulations on the claimant. To make this analysis, the Court must assess, "the change in fair market value of the subject property caused by the regulatory impositions." Leon

County v. Gluesenkamp, 873 So.2d 460, 467 (Fla. 1st DCA 2004). In this case, the Court must determine the diminution in market value that can be attributed to ROGO by comparing the fair market value of the property with the ROGO restriction as of July 19, 2001 and the fair market value of the property without the ROGO restriction as of July 19, 2001. In order to prove a taking, the Plaintiff has the burden to prove that it has been deprived of all economically viable use. State Dept. of Environmental Protection v. Burgess, 772 So.2d 540, 543-544 (Fla. 1st DCA 2000). The Court finds that Galleon Bay has failed to prove that it has been denied all or substantially all economically viable use of its land.

10. Primarily with respect to this second prong of the "Penn Central Test", Plaintiff has elected to present their closing argument in the form of 3 separate motions upon which they seek specific rulings by the Court. The Court will honor Plaintiff's request for specific rulings on these motions, but will address them in a slightly different order than presented by the Plaintiff.

11. With respect to Plaintiff's renewed motion for application of the condemnation blight doctrine, "Galleon Bay prays for an Order prohibiting consideration of any evidence of "before" values of the Galleon Bay lots burdened by any regulations or restrictions that were adopted by Monroe County, the State, or the United States, on or after May 20, 1991." The Court denies this motion. The legal theory of condemnation blight does not apply to the first phase of an inverse condemnation trial wherein the Court must determine if a taking has occurred. Condemnation blight pertains to an eminent domain proceeding wherein the value of the property which has been condemned must be decided. Condemnation blight is the adverse effect on the value of property that occurs when a government announces its intent to condemn the property. Savage v. Palm Beach County, 912 So.2d 48, 51 (Fla. 4th DCA 2005). In the case at bar, there has been no evidence presented that the government has sought to condemn or announced its intent to condemn Plaintiff's property.

12. With respect to the Plaintiff's renewed motion to recognize vested rights in the Galleon Bay Subdivision Lots, the Plaintiff requests that the Court not consider any evidence or testimony regarding Monroe County land use regulations that would alter the use, or decrease the value of the

Galleon Bay subdivision and its lots, after the common law vesting date, which Plaintiff claims to be May 20, 1991. The Court finds Plaintiff's request embodied in this motion that, they be deemed vested as of May 20, 1991, to be rather extraordinary in light of the fact that the very Recommended Order relied upon by Plaintiff includes a finding that Galleon Bay subdivision be deemed vested as of April 21, 1994! The Court is unable to identify any just mechanism where the Plaintiff can somehow argue the binding effect of a particular order entered in a separate proceeding and simultaneously contend that a certain portion of that order should be altered so as to further their position. The renewed motion to recognize vested rights in the Galleon Bay subdivision lots is denied.

13. With respect to Plaintiff's renewed motion to strike Trent Marr's Testimony as required by the doctrine of the law of the case, Plaintiff contends that, because on September 12, 2006, Judge Richard Payne who presided over the jury trial on valuation, entered an Order Granting New Trial wherein he found that, after allowing Trent Marr's testimony regarding market value and highest and best use to be heard and considered by the jury, in actuality, the testimony should have been stricken and because this Order was affirmed by the Third District Court of Appeal, Trent Marr's testimony cannot be admitted into this trial on the issue of taking. The Court finds no merit to the Plaintiff's motion. Trent Marr's original testimony was given at a jury trial concerning valuation. The instant case concerns a taking which is a different issue. The order in question is simply not binding on these proceedings. The Court has considered the admissibility of Trent Marr's testimony as to the issues in this case and what he testified to in this case. The Court finds Trent Marr's testimony admissible and reliable and denies the motion to strike.

14. In actuality, it is the testimony of the Plaintiff's appraiser, Robert Gallaher, that the Court finds to be unreliable. While not striking Mr. Gallaher's testimony or disregarding it, the Court finds that his testimony regarding the property without the ROGO restriction is worthy of little weight because it is based on a number of erroneous assumptions. The Court finds that it was improper for Mr. Gallaher to appraise the property without taking into account the provisions of the Endangered Species Act and their impact on the value and marketability of the lots for residential development. Similarly, the Court finds that Mr. Gallaher's conclusion that

the Costal Barrier Resources System designation and its resultant adverse impact on the ability to obtain flood insurance had no adverse impact on the residential development potential or the market value of the property to be incredible. Further, the Court finds that Mr. Gallaher's appraisal simply does not accurately assess the dramatic adverse impact that the lack of public electricity, water, and sewer service has on the market value of Plaintiff's lots. The Court is simply not convinced that the so-called niche market of people who want to "live off grid" would enable Plaintiff, if it were not for ROGO, to sell their land for anywhere near the appraised amounts testified to by Mr. Gallaher.

15. Another serious problem with the testimony of Robert Gallaher is the manner in which he appraised the lots as to their value on July 19, 2001 assuming that ROGO applied. In Mr. Gallaher's opinion, if the lots could not be built upon, they had no use. Accordingly, he appraised the land at \$1,000 per acre by comparing it to sales of unusable land in the Everglades. The Court finds that Mr. Gallaher's dismissal of all other uses for the land other than for building to be a flawed assumption and accordingly, gives little weight to his appraisal.

16. Ultimately, the Court finds that the Plaintiff has failed to meet its burden of showing that it has been deprived of all economically viable use. In other words, the Plaintiff has failed to show that a taking has occurred. Indeed, the Plaintiff has been prevented from constructing its proposed development. However, that is not the issue. Rather, the question is, has the Plaintiff been deprived of all or substantially all of the economically viable use of the property? The Court finds that it has not. While the Plaintiff took the position that if the property could not be built upon it had no use and thus little, if any value, the Court finds otherwise.

17. The Defendant's through their case demonstrated that the property has a variety of economically viable uses. The Plaintiff could have built at least 1 house. Both the ROGO regulation and the deed restrictions for the property specifically permit aggregation of lots. Moreover, the Court finds that contrary to the Plaintiff's position, the legal principles set forth in DOT v. Jirik, 498 So.2d 1253 (Fla. 1986) do not prohibit the aggregation of lots to build a single dwelling for purposes of determining an economically viable use for the property.

18. The Court finds that per the testimony of Trent Marr, the property had an economically viable commercial fishing use for trap storage with a value of \$250,000. The Court finds that Plaintiff's arguments and attempts to undermine, attack, and discredit Mr. Marr's opinion are unpersuasive. First of all, the Court finds that trap storage is a physically and legally possible use to which the property could be put. In this regard, the Court finds Defendant's Exhibit 4, a June 29, 1990 memorandum from Vivienne Schleu/Galleon Bay to the Planning Commission, wherein on Page 4, Ms. Schleu explains why the property is suitable for trap storage, to be a piece of evidence strongly supporting the viability of trap storage. In terms of Plaintiff's argument that the deed restrictions on the property prevent commercial fishing uses in the absence of a residential dwelling, the Court disagrees. The Court simply does not interpret the word "and" which appears in the phrase, "single family residential purposes and for those uses permitted under the "Commercial Fishing Village" (CFV) zoning designation," as requiring both uses to be undertaken together. In reaching this conclusion, the Court rejects Plaintiff's argument that the Defendants and the Court are bound by the contrary interpretation of the phrase in question by Timothy J. McGarry, AICP, Director of Planning, as set forth in his January 26, 1998 letter to Mark Rosch which was admitted into evidence as Plaintiff's Exhibit 13.

19. In terms of the methodology employed by Trent Marr to arrive at his appraisal and opinions, the Court, as referenced in Paragraph 13, finds Mr. Marr's opinions to be based on neither speculation nor conjecture. The Court finds that Mr. Marr utilized his substantial experience and knowledge as to the Florida Keys real estate market in conjunction with the best available data and professional techniques to arrive at his \$250,000 figure which the Court finds to be reliable. While not dispositive for purposes of the determination of whether a taking has occurred, the Court accepts Trent Marr's opinion that, even without ROGO in place, commercial fishing represents the highest and best use which could be made of the property. In other words, the application of the ROGO ordinance did not diminish the value of the property at all. The Court simply does not accept Plaintiff's contention that their proposed residential development was viable. Rather, the Court finds that the Plaintiff faced numerous and virtually insurmountable obstacles to development which were separate and apart from the

regulations of the Defendants which are the subject of this case. However, even if the issue of highest and best use prior to ROGO was residential construction, a regulatory taking did not occur because the Court finds that despite ROGO, commercial fishing in connection with trap storage remained an economically viable use giving the property a \$250,000 value.

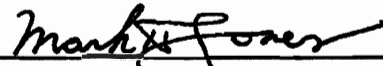
20. In addition to commercial fishing, the Court also finds that as of the date of the alleged taking, the Plaintiff's property had a value of \$130,000 for use as "ROGO lots" per the testimony of Trent Marr. Both appraisers testified to the existence of a secondary market in ROGO lots and the Defendants presented evidence that one of the lots on Plaintiff's property was in fact sold to the government as a ROGO lot. The Court does not accept Plaintiff's argument that sale of the lots as ROGO lots does not constitute a use of the property for purposes of determining whether a taking has occurred and finds that the case of Central and Southern Flood Control v. Dinkines, 165 So.2d 189 (1964) is distinguishable from the case at bar.

Wherefore, it is hereby:

Ordered and Adjudged:

1. That Plaintiff has failed to prove that its property was the subject of a regulatory taking by the Defendant.
2. That judgment is entered in favor of Defendants, Board of County Commissioners of Monroe County and State of Florida, and against Plaintiff, Galleon Bay Corporation, on the Regulatory Taking Claim set forth in Count I of Plaintiff's Corrected Third Amended Complaint In Inverse Condemnation.
3. That jurisdiction is reserved for purposes of assessing attorney's fees and costs.

DONE and ORDERED at Key West, Monroe County, Florida, this 27 day of April, 2011.



Mark H. Jones
CIRCUIT JUDGE

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