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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

GULF BEACH HOTEL, INC.,)
)
 Plaintiff,)
)
 v.)
)
 GULF STATE PARK AUTHORITY,)
 et al.,)
)
 Defendants.)

CIVIL ACTION NO.
CV 2005-1409

FILED
CIRCUIT COURT OF
MONTGOMERY COUNTY
2007 OCT 19 AM 10:51

PARTIAL MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Gulf Beach Hotel, Inc., and moves this Honorable Court for partial summary judgment. As grounds for said Motion, Plaintiff states that there are no genuine issues of material fact and Gulf Beach Hotel, Inc. is entitled to a judgment in its favor as a matter of law. Plaintiff's Motion is supported by the evidence submitted in the Narrative Statement of Undisputed Facts and all exhibits hereto, the depositions and all exhibits to each, and upon the pleadings.

WHEREFORE, for the reasons set forth herein, Plaintiff moves pursuant to Rule 57 of the Alabama Rules of Civil Procedure and the Alabama Declaratory Judgment Act for a judgment which declares that Defendants are not permitted to build a hotel and convention center at Gulf State Park that involves a lease for a term greater than the six or twelve year term limits set by the State Park Concession Act codified at *Ala. Code* § 9-14-27, that fails to consider the per capita income and average family income of Alabamians in its design and costs in accordance with *Ala. Code* § 9-14B-7, that fails to be operated exclusively by employees of the Department of Conservation and Natural Resources in compliance with Amendment 617, that violates the State Land Sales Act in *Ala. Code*

§ 9-15-70, *et seq.*, or that violates Amendment Article IV § 93 of the Alabama Constitution by creating a state interest in private enterprise or by engaging in works of internal improvement or the lending of money or credit for works of internal improvement without specific constitutional authority.

NARRATIVE STATEMENT OF UNDISPUTED FACTS

The Alabama Department of Conservation and Natural Resources ("the Department") has many functions and duties, most notably a duty to maintain, supervise, operate and control all state lands not specifically committed to other state departments and a duty to recommend to the Legislature such legislation as may be needed to protect, conserve, increase or make available or useful wildlife and other natural resources, state parks, monuments and historical sites in Alabama (*Ala. Code* 1975 § 9-2-2). The Department is allowed, by statute, to enter into contracts with persons, firms or corporations via concession contracts but none can be granted for a term which exceeds six or twelve years, the latter and longer term being allowed only if a contracting party expends major monetary sums to improve, furnish or enlarge existing or new facilities (*Ala. Code* 1975, § 9-14-27), and none can be consummated without written approval of the Attorney General, the Governor and the Chief Examiner of the Department of Public Accounts (*Ala. Code* 1975, § 9-14-28). Also by statute ("the Land Sales Act"), real property owned by the State of Alabama, including leasehold interests, is subject to Article 9 of the *Code*, and a separate constitutional provision forbids the State from engaging in works of internal improvement, or lending money or credit for works of internal improvement, or being interested in private enterprises, without specific constitutional authority. (*Ala. Code* 1975 § 9-15-70, Art. IV, § 93, *Constitution of Alabama*).

By way of Amendment 617 to the *Constitution of Alabama*, ratified in 1998, the sale and issuance of \$110,000,000 in bonds to finance improvements at State Parks was also approved, and this constitutional provision unequivocally requires that all State Park System land and facilities must be “exclusively and solely operated and maintained by the Department of Conservation and Natural Resources.” Defendants justify the legality of their plans by pointing to an Attorney General Opinion issued by Troy King. That Opinion states:

The provisions of section 213.32 and article XI of the Alabama Constitution are not applicable to the proposed transaction **because no funds from the bond issue under this section were used** for improvements at Gulf State Park before the property that is the subject of the transaction was removed from the park.

See Attorney General Opinion no. 2005-116 dated 4/20/2005, emphasis supplied. Even setting aside the issue of whether this public beach front property has been “removed from the park,” this “justification” fails because, as will be shown, it simply is not the case that no bond funds were used as part of the transaction.

Robert Childree is the Alabama State Comptroller (Robert Childree Deposition, p. 9). In August of 2006, he documented \$3,936,543.09 spent by the State from State Park System improvement funds, through an architectural firm called “TVS” (Childree Deposition, pp. 15-21), and he confirmed that the revenue source of these funds was State Park bond proceeds and interest, all of which were held in an account numbered “1085.” (Childree Deposition, pp. 19, 27-28). TVS has, in turn, paid some of these funds to various entities involved in the transaction, amongst them: Strategic Advisory Group, a hotel marketing consultant (Anthony Peterman Deposition pp. 9-12); PKF Consulting (Peter Keim Deposition, p.149); Spa Concepts International (Eva Jensch Deposition

p. 14); and Benchmark (Bruce Burkhalter Deposition, p. 13). In addition, TVS has been paid over \$ 1 million from the proceeds of the bond issue to draw up plans for the proposed luxury hotel.

In 2001, the Department recommended, and the Legislature enacted, *Ala. Code* §§ 9-14B-1 through 9-14B-22, creating the Gulf State Park Authority and authorizing the sale and issuance of an additional \$70,000,000 in bonds to finance a hotel and convention center at Gulf State Park. This bond issue was never submitted to the voters for approval and these bonds have never been issued or sold. (Lawley Deposition, p. 26). The Joint Legislative Committee for State Parks was required to hold public hearings in connection with this project, and consideration of the per capita income and average family income of Alabamians is required as a condition precedent to planning and approving design and costs for lodging facilities at Gulf State Park and any and all other parks in the system with lodging and overnight facilities. (*Ala. Code* 1975 § 9-14B-7). According to the most recent federal census, the per capita income and average family income of Alabamians are \$18,189 and \$37,062, respectively. See U.S. Census Bureau Alabama QuickFacts.¹

A Gulf State Park and Convention Center was originally conceived in the early 1970's, and opened in 1974. (Hugh Branyon Deposition, pp. 36-37). In compliance with contract term limits provided by statute, the Department leased its operation to a private company for a six-year term, followed by another six-year term. (Branyon Deposition, pp. 38-39). Later, the State operated the same hotel and convention center on its own, and did so profitably, before Hurricane Ivan blew it away in 2004. (Branyon Deposition, pp. 35, 91). After Hurricane Ivan, the Superintendent of the Gulf State Park, a 46-year Department veteran, became aware of pending arbitration proceedings to

¹ QuickFacts is a publication made available by the U.S. Census Bureau at <http://quickfacts.census.gov>. The most recent per capita money income is from 1999 and median household income, i.e., average family income, is from 2004.

determine the extent of insured losses at the Park, and then he heard of a proposal to build a "five star" luxury hotel in its place. (Branyon Deposition, pp. 26, 109). A copy of the arbitration award is attached to this Narrative Summary as Exhibit A.

James Griggs, Director of the Department's State Lands Division, is also a lawyer and was an Assistant Attorney General of Alabama before taking over the Lands Division in 1989. (James Griggs Deposition, pp. 7-8). According to Mr. Griggs, the State cannot lease or sell real estate having a value of more than \$20,000 without complying with the "Land Sales Act" (*Ala. Code 1975 § 9-15-70, et seq.*), and he candidly admits that there is not a front foot, or probably even a front inch, of Alabama beach property that fails to exceed this value. (Griggs Deposition, pp. 15-16). His expert opinion is that the Department therefore cannot "get around" the Land Sales Act by leasing land to Auburn University, because Auburn would also have to comply with the Land Sales Act if it tried to lease state land to a private developer. (Griggs Deposition, p. 25-26).

Mark Easterwood, who is currently the Parks Director for the Department of Conservation and Natural Resources, is familiar with the "1085 account" and legal ramifications surrounding Amendment 617 to the *Constitution of Alabama* (Mark Easterwood Deposition, pp. 50-54). He admits that the Constitution provides – if bond money is expended on any project in the state parks to renovate or construct a hotel – that Department of Conservation employees must operate and control that facility. (Easterwood Deposition, pp. 50-54). He also knows that bond money has already been spent on this project because he was involved with the accountant for the Department, Becky Brasfield, in generating the paperwork by which approximately \$1,800,000 was reimbursed to the Department's "1085" fund after "the departmental attorneys made a decision that they needed to go through and determine how much money was spent on that project so it could be paid back to

the bond fund.” (Easterwood Deposition, pp. 23-29). He also knows that the “1085 ” fund contains only bond money. (Easterwood Deposition, pp. 29-31). Even so, and in spite of the fact that he holds the position he does at the Department, he has only heard about a memorandum of understanding executed by Commissioner Lawley and Auburn University – he does not know any of its details, or its duration, or whether it mentions a private developer – so he has no opinions on the legal issues embraced by it. (Easterwood Deposition, pp. 42-45). But he is able to confirm that the Commissioner and the West Paces Hotel Group and Auburn University continue to pursue a Gulf State Park hotel and convention center concept involving \$100,000,000 to \$120,000,000 which is to come from the West Paces Hotel Group, (Easterwood Deposition, p. 71-74), and he is able to confirm that there have been discussions between him and the Commissioner regarding having to go to the Legislature to ask it to change the law restricting lease terms to a maximum of 12 years if this Department/Auburn/West Paces concept is to go forward. (Easterwood Deposition, 88-89).

“TVS” is an Atlanta architectural firm. It was hired by the Gulf State Park Authority via a resolution of its Board of Directors approved on April 17, 2002 (Patricia Haigler Deposition, pp. 10-11), and later the Gulf State Park Authority’s Board of Directors approved hiring a pre-opening consultant, Benchmark Management Company, at another meeting held in Montgomery on January 12, 2003. (Haigler Deposition, pp. 14-15). The Department loaned a million dollars to the Gulf State Park Authority, and deposited State Park bond money into its “1085” account. (Haigler Deposition, pp. 11-12, 16-19). Payment of these bond funds went to TVS to design a “master plan” for the entire Gulf State Park and to do design work for a new convention center hotel. (Scott Sickeler Deposition, pp. 15-16). TVS initially viewed the Department as “owner” for the project, but later envisioned doing the same work for an entity it described as the “Convention Center

Authority" (Sickeler Deposition, p. 19-21). But for now, due to the pendency of this civil action, it has placed this project and its \$86,000,000 price tag "on hold." (Sickeler Deposition, pp. 32, 52).

"Benchmark" is a company headquartered in The Woodlands, Texas (near Houston) that was hired to provide "technical services" to the Department and the Gulf State Park Authority in connection with their plans to build a hotel and convention center at Gulf State Park. (Burkhalter Deposition, pp. 9-12). Benchmark was paid approximately \$360,000 from bond proceeds designated for state parks (Burkhalter Deposition, p. 13), and it envisioned the project as a future competitor for the Perdido Beach Resort, which is owned by the Plaintiff in these proceedings. (Burkhalter Deposition, p. 16). Benchmark projected a cost of \$115,000,000 for the project and, in this connection, worked closely with a hotel marketing consultant called "Strategic Advisory Group" and a spa consultant ("Spa Concepts International") that envisioned "health-conscious college-age professional" clientele with incomes of "\$75,000 and up" from the "Atlanta market" for the new hotel and convention center – a clientele expected to be interested in sea spray body wraps, body masques, aroma wraps, sugar sand body scrubs and the like for prices per treatment that Benchmark initially predicted might fall in the \$80 to \$85 range. (Burkhalter Deposition, pp. 21, 32-35).

"Spa Concepts International," a California firm, was actually hired by TVS in 2003, upon Benchmark's recommendation (Jensch Deposition, pp. 7-12), though it was ultimately paid "by the State of Alabama Parks System." (Jensch Deposition, p. 14). Spa Concepts International actually planned a "resort style spa" where "high prices tend to further enhance the prestige of the facility" because "in the spa industry many times it is perceived that the more expensive your packages are the better your facility is." (Jensch Deposition, pp. 18-19, 30). Hence, its plans for treatment packages at Gulf State Park that would cost \$170 to \$299 (Jensch Deposition, p. 44) and include not

only sugar sand body scrubs but also seaweed hydrotherapy, Vichy showers, herbal steam rooms, sea oats body masques, aroma therapy massages, lymphatic drainages, hot stone treatments, VIP couples rooms, and private rooms "with fine china and glassware" because Spa Concepts International decided that "the taxpayers of Alabama should provide these products for people that want to come and pay for them." (Jensch Deposition, pp. 30-33, 37-42).

"Strategic Advisory Group" is a feasibility and advisory consultant paid initially by the Alabama Gulf Coast Convention and Visitors Bureau, beginning "around the year 2000," but its payment source shifted to TVS in 2002. (Peterman Deposition, pp. 9-12). It was paid "between \$200,000 and \$400,000" that "could have" come from a \$110,000,000 bond issue. (Peterman Deposition, pp. 13-14). Strategic Advisory Group saw the Perdido Beach Resort, owned by Plaintiff, as primary competition for the proposed new Gulf State Park hotel and convention center, particularly for "group business" (Peterman Deposition, pp. 22-25), because the Alabama Gulf Coast is a "drive in" market, rather than a "fly in destination" (Peterman Deposition, p. 38), and because the Perdido Beach Resort is "the nicest property on the Gulf Coast in Alabama." (Peterman Deposition, p. 46). Strategic Advisory Group also envisioned the Gulf State Park project as a tax exempt "four star property" with a three meal restaurant, concierge service and valet service. (Peterman Deposition, pp. 56-57, 76).

"PKF Consulting" analyzed the proposed project for the Department and foresaw a "five-star" complex with a "huge grand opulent hotel" like a Ritz-Carlton or St. Regis that would appeal to "an upscale clientele with higher income." (Sean Showers Deposition, pp. 10-15). In 2004 it was told by the Department that Auburn University was being brought into the project so that the State of Alabama would be able to proceed with having its site developed by the private sector. (Peter

Keim Deposition, pp. 106-109). It was also told that it should plan for a "four-star" hotel built to look like the Ritz in Naples, with "four-star" service (Keim Deposition, p. 122-123), but the Department also advised that if bond issue funds were used, the State would have to operate it. (Keim Deposition, p. 127). At first, PKF was paid by the Convention and Visitors Bureau, but later its payment source became TVS. (Keim Deposition, p. 149).

Robert Craft, a board member of the Alabama Gulf Coast Convention and Visitors Bureau in Baldwin County, oversaw withdrawal of support for the project by the cities of Orange Beach and Gulf Shores. (Robert Craft Deposition, pp. 38, 63). The cities did not consider the previous deal viable if the Gulf State Park's hotel and convention center was to be operated and maintained by State employees. (Craft Deposition, p. 65-66). Then, in June of 2006, Craft's fellow board member (and CEO of the Convention and Visitors Bureau), Herbert Malone, learned that Commissioner Lawley's bond consultants (Sterne Agee & Leach) had concluded that the \$70,000,000 bond issue for the project was not feasible because financial backing was insufficient, and because State employees would have to operate it. (Herbert Malone Deposition, pp. 107-113). This news, and arrival of Auburn University and the West Paces Hotel Group on the Park development scene, resulted in Malone's Convention and Visitors Bureau joining the cities of Orange Beach and Gulf Shores in their withdrawals (Malone Deposition, pp. 137-140), leaving behind TVS plans and designs that had been purchased with State Park bond money and commissioned by the Gulf State Park Authority. (Malone Deposition, pp. 85-86). Malone actually saw withdrawal by the cities coming a couple of years before, when he sent his Convention and Visitors Bureau a memorandum explaining that a hotel and convention center at Gulf State Park would be subject to the Alabama Land Sales and Leasing Act according to the Department's own staff (Malone Deposition, pp. 172-

175), and he reported to them a "stated fact" from counsel for the Department: that any convention center and hotel would have to be "operated and maintained" by Department of Conservation and Natural Resources personnel. (Malone Deposition, pp. 179-180).

Richard Liles, who was Director of Operations for the Department both during the Siegelman and Riley administrations (until his retirement in 2006), admits that Alabama law requires that any hotel and convention center at Gulf State Park be operated by State employees, and he admits this was the position of the Department at all times prior to Commissioner Lawley's appointment. (Richard Liles Deposition, p. 9-14, 70-71). He also admits that a hotel and convention center at Gulf State Park must take into consideration the per capita and average family income of all Alabamians. (Liles Deposition, p. 28).

Barnett Lawley came onto the scene in 2003 as newly elected Governor Bob Riley's commissioner of the Department. He was sworn in one morning in January and was sent by the Governor that afternoon to meet with the TVS architects in Atlanta. (Barnett Lawley Deposition, pp. 11-15). When he arrived, he found plans for a project with "a lot of glitz and glitter" that he found "overwhelming," in part because he's just not "a spa guy." (Lawley Deposition, p. 22). Later, he attended a meeting at Governor Riley's office where representatives of the Perdido Beach Resort appeared and opposed the project (Lawley Deposition, p. 27), and he subsequently reviewed the books of the Perdido Beach Resort in connection with its claim that the Alabama Gulf Coast market would not support another hotel and convention center (Lawley Deposition, p. 28), but that view was dispelled in his mind at a cabinet retreat, where he was introduced to a fellow named Horst Schulze with the West Paces Hotel Group, a man who ended up helping Lawley pitch the glitz-and-glitter plan, with a "four-diamond hotel" included, to the Auburn Board of Trustees. (Barnett Lawley

Deposition, pp. 33-42). The result was a "memorandum of understanding" which appears as Exhibit B to this narrative summary. Lawley admits that leasing Gulf State Park land to Auburn does not "get them around the competitive bid law," but he hopes it will get them around having to operate it with State employees. (Lawley Deposition, pp. 50-54). He concedes that bond money was used to pay TVS and that only \$1,800,000 of it has been "repaid to the bond fund" (Lawley Deposition, pp. 50-54, 63-64, 76-77), but he doesn't know if the average Alabamian can afford a four-diamond hotel. He admits that the \$1,800,000 bond money payback was at least in part an effort to strengthen the Department's position in this litigation, as is his notion that if State park land is leased to Auburn University it might somehow cease to be "park land." (Lawley Deposition, pp. 94-95, 114). He believes Auburn is needed in the deal due to financial and purchasing restrictions, and because he thinks Auburn may be able to hire a private operator, because State employees are not, in Lawley's opinion, the kind of "special people" that are needed to run something of this magnitude. (Lawley Deposition, pp. 189-190, 195).

Meanwhile, over at the West Paces Hotel Group, selling condominiums on this State owned public park property has been considered as a way to finance this project, but the Commissioner isn't willing to go that far. (Philip Keb Deposition, pp. 18-19). West Paces continues to endorse a "four-star hotel" concept, with plans for a 17,300 square foot spa (Keb Deposition, pp. 24-34), and it hopes to have the State lease land to "an Auburn affiliated entity" that will, in turn, sublease it to a developer that will, in turn, allow West Paces to operate it. (Keb Deposition, pp. 48-49). But the West Paces Hotel Group has never heard anything about having to make it affordable for average Alabamians (Keb Deposition, p. 59), and it is looking to the State of Alabama to pony up "\$20,000,000 to \$30,000,000 plus infrastructure improvements to get this job done." (Keb

Deposition, pp. 73-74). But Auburn is its only client in this deal (Andy Wildman Deposition, pp. 13-14), and West Paces admits that it plans to make an equity contribution to the project of "zero." (Wildman Deposition, p. 100).

CONCLUSION


The actions of the Defendants are clear violations of Alabama statutes and constitutional provisions. Current plans call for a four or five star hotel and convention center that will include a 17,300 square foot spa and be operated by West Paces Hotel Group and its employees. The average room rate will be at least \$200 a night. (John Russell Deposition, p. 46). The people of Alabama, through their Legislature and Constitution, have set up a framework for the operation and maintenance of State properties. State Parks are to be operated and maintained by employees of the Department of Conservation and Natural Resources. Any lease of State Park lands is limited in its duration to a maximum of twelve years. In planning and designing lodging facilities at the Gulf State Park the per capita income and average family income of Alabamians must be considered. Defendants attempt to circumvent the requirements of Alabama's statutes and Constitution by transferring the property to Auburn University who will in turn sublease the property to a private company who will develop and manage the hotel and conference center. It is a basic tenet of law that Defendants cannot do indirectly what they are prohibited from doing directly. *Jefferson County Bd. of Ed. v Alabama Bd. of Cosmetology*, 380 So.2d 913, 915 (Ala. 1980); *Richardson v. Stanford Properties, LLC*, 897 So.2d 1052, 1059 (Ala. 2004).

There are no factual issues in dispute and this matter is ripe for adjudication at this stage of the proceeding. Defendants have not endeavored to conduct any discovery whatsoever. Plaintiff is plainly entitled to a partial summary judgment and declaration that Defendants are not permitted to

build a hotel and convention center at Gulf State Park that involves a lease for a term greater than the six or twelve year term limits set by the State Park Concession Act codified at *Ala. Code* § 9-14-27, that fails to consider the per capita income and average family income of Alabamians in its design and costs in accordance with *Ala. Code* § 9-14B-7, that fails to be operated exclusively by employees of the Department of Conservation and Natural Resources in compliance with Amendment 617, that violates the State Land Sales Act in *Ala. Code* § 9-15-70, *et seq*, or that violates Amendment Article IV § 93 of the Alabama Constitution by creating a state interest in private enterprise or by engaging in works of internal improvement or the lending of money or credit for works of internal improvement without specific constitutional authority.

Respectfully Submitted,

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