UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN T. AND ESTHER N. DODERO;
LIONEL AND TAMMY ALFORD, AS
CO-TRUSTEES OF THE LIONEL D.
ALFORD, JR. AND TAMMY NIX ALFORD
REVOCABLE TRUST;
DOUGLAS B. AND SHELLY L. BUSH;
ST. JOHNS FLORIDA PROPERTIES, L.L.C.;
KI FLORIDA PROPERTIES, L.L.C.;
MICHAEL D. HUCKABEE AND
JANET M. HUCKABEE AS CO-TRUSTEES
OF THE ANGUS B. WILES TRUST;
CAMPING ON THE GULF LAND, L.L.C.;
SANDY SHORES PROPERTY OWNERS
ASSOCIATION, INC.; TODD HARLICKA;
CHRISTOPHER F. CORRADO;
EDWARD AND JOY L. MCMILLIAN;
JE COASTAL PROPERTIES, L.L.C.; ERIC AND
DEBORAH WILHELM AS CO-TRUSTEES OF
THE ERIC AND DEBORAH WILHELM
REVOCABLE TRUST; DAVID A BRADFORD
AS TRUSTEE OF THE ELIZABETH M.
BRADFORD REVOCABLE TRUST DATED
JULY 12, 2012; AND PARKER H. PETIT;

Plaintiffs,

v. CASE NO.: 3:20-cv-05358-RV-HTC

WALTON COUNTY, A POLITICAL
SUBDIVISION OF THE STATE OF FLORIDA;
MICHAEL A. ADKINSON, IN HIS
OFFICIAL CAPACITY AS WALTON
COUNTY SHERIFF,

Defendants.

WALTON COUNTY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Defendant, Walton County, files its Response in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction (ECF No. 2) (hereinafter, "Motion", as follows:

The Motion (ECF No. 2) and supporting memorandum (ECF No. 3) argue that Plaintiffs are entitled to emergency relief enjoining the enforcement of the challenged County Ordinance 2020-09 on the grounds that the Ordinance violates their rights under the Fourth and Fifth Amendments to the U.S. Constitution, as well as Article I, Section 23 of the Florida Constitution, and is preempted by the Governor's Executive Orders.

Analysis

The Ordinance does not regulate any activity, essential or otherwise; it prohibits "any person to enter or remain on the beaches within Walton County" (Ordinance 20-09). The Governor declared a Public Health Emergency for the state in Executive Order 20-52. The Ordinance was enacted pursuant to the County's emergency powers under §252.38 and .46, F.S., of the Emergency Management Act and with the express authority granted by Governor's Executive Order 20-68, which reads in pertinent part:

Section 2. Beaches

> *Pursuant to section 252.36(5)(k)[1], Florida Statutes I direct parties accessing public beaches in the State of Florida to follow the CDC guidance by limiting theirs (sic)gatherings to no more than 10 persons, distance themselves from other parties by 6 feet,* ***and support beach closures at the discretion of local authorities.*** (emphasis supplied)

The Ordinance, which is expressly limited in time until April 30, 2020 (unless extended by the board of county commissioners), restricts the use of only that portion of Plaintiffs' properties consisting of beach, as defined by Chapter 22, Walton County Waterways and Beach Activities Ordinance. ("*Beach* means the soft sandy portion of land lying seaward of the seawall or the line of permanent dune vegetation.")

Violation of the Ordinance is punishable as a second-degree misdemeanor as provided in Section 252.50, Florida Statutes.

Preliminary Injunction Standard

A movant seeking a preliminary injunction must prove the following elements by a preponderance of the evidence:

(1) that they have a substantial likelihood of success on the merits; (2) that they will likely suffer irreparable harm in the absence of relief; (3) that

[1] §252.36, Florida Statues describes the Governor's emergency powers.

the threat of injury to the movant outweighs the potential harm to the opposing party should an injunction be issued; and (4) that the injunction is not adverse to the public interest. See, *GeorgiaCarry.Org, Inc., v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1322 (11th Cir. 2015), citing *Burk v. August-Richmond County*, 365 F.3d 1247, 1262-1263 (11th Cir. 2004), and *Siegel v. LePore*, 234 1163, 1176 (11th Cir. 2000) (en banc).

I. No Substantial Likelihood of Success on the Merits

While Plaintiffs acknowledge the existence of the COVID-19 crisis, none of the cases cited in support of their Motion deal with emergency situations.

A. Preemption

Plaintiffs argue that the Governor's Executive Orders 20-91 and 20-92 preempt the Ordinance because certain recreational activities which could take place in virtually any location and are not specific to the beach are identified as "essential activities." The Governor's Executive Orders 20-91 and 20-92 have not preempted the Ordinance. Neither Executive Order 20-91 nor 20-92 specifically pertains to beaches. Indeed, the term "beach" appears nowhere in either Executive Order. Section 1 of Executive Order 20-91 requires certain people to stay at home (subsection A), and provides that

"all persons in Florida shall limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities" (subsection B). Essential services and essential activities are described at Sections 2 and 3. Executive Order 20-92 merely amended Section 4 of Executive Order 20-91 to read, "[t]his Order shall supersede any **conflicting** official action or order issued by local officials in response to COVID-19. (Emphasis supplied) Unlike Executive Orders 20-91 and 20-92, Executive Order 20-68 specifically addresses beaches and states that the Governor **"support[s] beach closures at the discretion of local authorities."** (Emphasis supplied)

The Ordinance was predicated on the Governor's Executive Order 20-91 (the "stay at home" order"), the basis for which included the following:

- Positive cases of COVID-19 have continued to rise in other states in close proximity to Florida, resulting in increased risk to counties in northern Florida.
- Executive Order 20-86 required individuals driving into Florida from states with substantial community spread to self-isolate in Florida.
- Persistent interstate travel continues to pose a risk to the entire state of Florida.

- Executive Order 20-83 directed that a public health advisory be issued urging the public to avoid all social or recreational gatherings of 10 or more people and urging people to work remotely.
- That it is necessary and appropriate to take action to ensure that the spread of COVID-19 is slowed, and that residents and visitors in Florida remain safe and secure.

The Governor specifically supported and delegated to local authorities the decision to close beaches, pursuant to his emergency powers under §252.36(5)(k), F.S., in Executive Order 20-68. Importantly, the Governor did not distinguish between privately owned or public beaches in his support for closure by local officials.

Neither Executive Order 20-91 nor 20-92 superseded the authority bestowed to the County in Executive Order 20-68, nor did the County's enactment of the Ordinance conflict with any Executive Order. Executive Order 20-91 expressly extended Executive Order 20-68 for the duration of Executive Order 20-52 (the COVID-19 Public Health Emergency), i.e. until 60 days from March 9, including any extensions thereof.

Plaintiffs' preemption argument fails. They are not entitled to injunctive relief.

B. 5th Amendment

Plaintiffs argue that they have suffered a *per se* 5th Amendment Taking of their properties by physical invasion. (ECF No. 3, pp. 10-11)

The Takings Clause of the 5th Amendment provides that private property may not "be taken for public use, without just compensation." The Takings Clause does not prohibit a government from taking private property for public use, "it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Lingle v. Chevron U.S.A.*, *Inc.*, 544 U.S. 528, 537 (2005), quoting *First English Evangelical Lutheran Church of Glendale, v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose." *Lingle,* 544 U.S. at 543. When determining whether a taking has occurred, the focus is "directly upon the severity of the burden that government imposes upon private property rights." *Id.* at 539 If a government action does not meet the public use requirement, or the action violates due process because it is arbitrary, the Takings Clause is not implicated because "no amount of compensation can authorize such action."

Id. at 543[2] By alleging that the Ordinance was preempted (Count II) or enacted without legal authority (Count VI), Plaintiffs undermine their 5th Amendment claim which presupposes a legitimate public purpose. Lingle, 544 U.S. 2883-84, 2087 (The "Substantially advances" formula is not a valid takings test.)

In the context of an alleged physical invasion of private property the Supreme Court has recognized a *per se* taking if a government imposes a "**permanent** physical invasion". (emphasis supplied) *Lingle*, 544 U.S. at 538, *Loretto v. Teleprompter Manhattan ATV Corp.*, 458 U.S. 419, 432 (1982) (involving an as-applied taking by physical invasion)

Plaintiffs rely on *Loretto* for their argument that they have suffered a *per se* 5th Amendment Taking; however, their claim fails because the challenged Ordinance is only temporary in nature and states on its face that it is in effect until April 30, or unless extended by the County (presumably in the event of extensions of the existing state of emergency). Noting a distinction between permanent and temporary physical intrusions, *Loretto*

[2] In Count I (the 5th Amendment Takings claim) of the Complaint (ECF No. 1), Plaintiffs allege that the Ordinance is "in direct conflict" with the Governor's Executive Orders 20-20 and 20-19 [sic] (they meant to say 20-91 and 20-92).

made clear that not every physical invasion results in a taking. *Loretto*, 458 U.S. at 435 n. 12.

Especially significant in the context of this case is *Loretto's* cite to *United States v. Central Eureka Mining, Co*., 357 U.S. 155 (1958). In *Central Eureka Mining*, the Court found that no taking had occurred "where the Government had issued a wartime order requiring non-essential gold mines to cease operation for the purpose of conserving equipment and manpower for use in mines more essential to the war effort" *Id*. at 181… on the grounds that the Government did not occupy, use or in any manner take physical possession of the gold mines or equipment connected with them" Id. at 165-66. The Court concluded that "the temporary though severe restriction on *use* of the mines was justified by the exigency of war." *Loretto*, 458 U.S. at 431-32.

Plaintiffs acknowledge that their 5th Amendment claim is one for "the temporary taking of their properties". (ECF No. 1, p. 12) While it is true that temporarily denying a land owner <u>all use</u> of their property may give rise to a 5th Amendment taking, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987), in this case the challenged Ordinance does no such thing. Rather, it restricts only the use of that portion of Plaintiffs' properties consisting of beach, as defined by

Chapter 22, Walton County Waterways and Beach Activities Ordinance. ("*Beach* means the soft sandy portion of land lying seaward of the seawall or the line of permanent dune vegetation.")[3]

The Ordinance does not limit the Plaintiffs' use of their properties located upland of the beach, their homes, decks, balconies, or any other appurtenances or amenities not located on the beach. Plaintiffs have not alleged sufficient facts to establish a 5th Amendment Takings claim.

Further, the actions taken by the County are more akin to those circumstances discussed in *Central Eureka Mining, Co*. In the instant case Walton County's actions have taken place under the exigency of the global pandemic as opposed to war. However, the most recent United States Government Projections show that this pandemic is likely to result in over

[3] Plaintiffs' properties are adjacent to publicly owned land where their properties meet the mean high-water line. "The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. …Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest." Article X, §11 of the Florida Constitution See also §177.28(1), F.S. While these issues are not pertinent to the instant action, the vast majority of privately owned beachfront properties in Walton County are also subject to what is commonly referred to as the Customary Use litigation pending in Walton County Circuit Court, Case No. 18-CA-547, a dispute concerning whether the public has a preexisting right of use of privately owned beaches.

60,000 American deaths in as little as 12 weeks, which is more than all of the deaths in the ten (10) years of the Vietnam War. Obviously, the global pandemic would seem akin to a war in that respect. As in *Central Eureka Mining, Co*., the actions of Walton County in restricting the use of all beaches in the County cannot be seen as a taking within this context.

The Constitution contains no "reference to regulations that prohibit a property owner from making certain uses of [their] property." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302,321 (2002) Government regulations that ban certain private uses of a portion of an owner's property, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, or that forbid the private use of certain airspace, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), do not constitute a categorical taking. *Id*. at 322-23. Cases dealing with "regulations prohibiting private uses" are not controlled by precedents evaluating physical takings. *Id*. at 323

If a regulation goes "too far" it will be seen as a taking. *Id*. 326, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) Rather than adopting per se rules, courts view multiple factors in analyzing partial regulatory

takings claims, and in such cases are required to focus on the parcel as a whole. *Id*. 326-27

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a hole—here, the city tax block designated the 'landmark site.'"
>
> Id. at 327, quoting *Penn Central*, 438 U.S. at 130-131

> " 'Where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand" of the bundle is not a taking.' " *Id*. at 327, quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)

However, even if a property owner has an actionable 5th Amendment Takings claim, "[s]o long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities." *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162, 2167, 2168 (2019). "As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *Id*. at 2176-77. Plaintiffs' 5th Amendment Takings (Count I) claim specifically requests an award of "just compensation for the temporary taking of their properties". (ECF No. 1, p. 12).

Regardless of whether the Plaintiffs may be able to establish that a taking occurred, which is arguable at best, they are not entitled to injunctive relief on their 5th Amendment Takings claim.

C. 4th Amendment

"A 'seizure' of property occurs when 'there is some meaningful interference with an individual's possessor interests in that property'." Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009), quoting *Unites States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Soldal v. Cook County, Ill*., 506 U.S. 56, 61 (1992) Unquestionably, the 4th Amendment's protection against unreasonable seizures of property applies in the civil context. *Soldal,* 506 U.S. at 66-69

The protections of the 4th Amendment extend to real property but may not protect real property other than a house and its curtilage. *Presley v. City of Charlottesville*, 464 F.3d 480, 483-84 n. 3 (4th Cir. 2006) (Noting conflict between *Unites States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (a forfeiture case involving a four-acre parcel and a house) and *Oliver v. United States*, 466 U.S. 170 (1984) (holding the "open fields – land "over a mile from the home and curtilage was not encompassed within the 4th Amendment's protections.)

"To prevail on a seizure claim, a plaintiff must prove that the government *unreasonably* seized property." *Presley v. City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006), citing *Soldal*, 506 U.S. at 71 In this case the County's Ordinance prohibits "any person to enter or remain on the beaches of Walton County." The County did not seize the Plaintiffs' properties.

"'Reasonableness … is the ultimate standard'" under the 4th Amendment. *Soldal,* 506 U.S. at 71, quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 539 (1967) This determination involves a "careful balancing of governmental and private interests". *Id*., quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

This case deals with open beaches along the Gulf of Mexico, which given the definition of beach in the County's Beach Activities Ordinance ("the soft sandy portion of land lying seaward of the seawall or the line of permanent dune vegetation") would logically fall outside of the curtilage of these properties.

As noted above, the Ordinance was enacted pursuant to the Governor's declaration of a Public Health Emergency (Executive Order 20-52) and the Governor's and the County's emergency management powers under Chapter 252, Florida Statutes. The Ordinance was, in accord with

Executive Order 20-68, and enacted in response to the escalating COVID-19 crisis. The County's actions were both authorized by and consistent with the Governor's concerns as evidenced by his ratcheting-up of restrictions on a host of personal freedoms and business and property interests which absent this dire emergency situation would not likely pass muster. The Governor explicitly delegated his authority under 252.36(5)(k) to close all beaches to the County in his Executive Order 20-68, which is still in force and effect. (These are acknowledged by Plaintiffs. See ECF No. 3, pp. 4 – 5).

Even if the Court were to construe the Ordinance as a seizure of the Plaintiffs' properties, under the totality of circumstances such was reasonable, and the balancing of governmental and private interests at stake favors denying the requested injunctive relief.

D. Florida Constitution- Right to Privacy

None of the cases cited by Plaintiffs in support of their Florida right to privacy argument deal with property rights. The Ordinance does not proscribe the activities of any person; it merely prohibits the occupation of the beaches by anyone for a limited period of time. There is no expectation of privacy in an open field, or even on the front porch of someone's home. See *State v E.D.R.*, 959 So.2d 1225 (Fla. 2007)(No expectation of privacy on a front porch where visitors may appear at any time); *State v. Ware*, 2020

WL 1316579 (Fla. 1st DCA 2020)(Not released for publication) citing *Demontmorency v. State*, 401 So.2d 858 (Fla. 1st DCA 1981)(citing *Oliver v. U.S.*)(An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. Open fields, unlike the curtilage of the home, do not warrant a reasonable expectation of privacy.) The Ordinance does not implicate Florida's Constitutional Right to Privacy, and such should not serve as a basis for the imposition of injunctive relief.

II. No Irreparable Harm in Absence of Relief

At a maximum, Plaintiffs will be not be able to use a small portion of their unfenced in open beach property for a limited period of time. Under the existing emergency circumstances of the global pandemic, this restriction is reasonable. The Ordinance does not regulate any activity, it does not require the Plaintiffs to engage with members of the public or otherwise expose themselves to the virus. Rather, it merely imposes restrictions on the use of an area. If it is ultimately determined in this action that Plaintiff's use of a portion of their property for this limited time was unconstitutional, they have the ability to recover monetary relief. It cannot be said in candor that the Plaintiffs will suffer any irreparable harm.

III. Threat of Injury to Movant vs. Potential Harm to Non-Movant

The County is charged with the responsibility of supporting the Governor's efforts to protect the public from the spread of COVID-19. The Plaintiffs' only foreseeable risk is losing out on a few days on the beach. The risk to the County is a spiraling spread of infection contributing to an already dire public health crisis. The very open nature of the beach with its access to the Gulf of Mexico, its fuzzy boundary between privately owned and public areas, both "dry sand" and seaward of the mean high water line, lends itself to use, be it authorized or not, by not only the Plaintiff owners, but also members of the public who may enter the properties. The County has an obligation to fulfill its responsibilities to the public and visitors alike to safeguard against the spread of COVID-19.

IV. Adversity of injunction to Public Interest

It is hard to imagine a more important public interest than attempting to prevent the spread of a rampant, unseen, deadly pathogen which can be transmitted by both symptomatic and asymptomatic persons and has led to the deaths of tens of thousands of people already with the expectation that without stringent mitigation, the virus will result in the deaths of tens of thousands of more Americans, including people in Walton County. COVID-19 has been recognized as a worldwide pandemic by the World Health

Organization, the President of the United States, and the Governor of Florida. The world has ground to a halt. This emergent situation is both dynamic and uncertain. There are no vaccines or proven cures to combat this raging virus. The prohibition of the Ordinance is consistent with the global goal of decreasing the opportunity for contact with others and potential infection. If the imposition of an injunction leads to the infection of one person, the potential explosive consequences adversely impact the public interest.

Conclusion

Wherefore, Walton County requests that the Court deny Plaintiffs' Motion.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this response complies with the size, font, and formatting requirements of Local Rule 5.1(C), as well as the word limited set forth in Local Rule 7.1(F). This response contains 3,791 words, excluding the case style, signature block, and certificates.

/s/ William G. Warner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed this 10th day of April, 2020 via CM/ECF, which will send notice to all Counsel of record.

/s/ William G. Warner
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