IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GDF REALTY INVESTMENTS, LTD.,	§	
PARKE PROPERTIES I, L.P.,	§	
PARKE PROPERTIES II, L.P., and	§	
	§	
***Plaintiffs*,**	§	
	§	
vs.	§	**CIVIL ACTION NO. A 00CA369SS**
	§	
GALE NORTON, Secretary, United	§	
States Department of Interior, and	§	
MARSHALL P. JONES, Jr., Acting	§	
Director, United States Fish	§	
and Wildlife Service.	§	
	§	
***Defendants*.**	§	

AFFIDAVIT OF FRED PURCELL

BEFORE ME, the undersigned authority, on this day, personally appeared Fred Purcell, a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

"My name is Fred Purcell. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

The Property at issue in this case

1. The Plaintiffs in this case ("Plaintiffs") — GDF Realty Investments, Ltd., Parke Properties I, L.P. and Parke Properties II, L.P. — are the owners of seven adjoining tracts of land located at the northwest corner of the intersection of RR 620 and RR 2222 in western Travis County ("the Property"). The Property, which consists of approximately 216 acres of undeveloped land, is sometimes referred to as the Hart Triangle Property. The location and

acreage of each of the seven tracts of the Hart Triangle Property (which includes nine separate parcels) and the relationship of the Property to the major roads in the area is shown on Exhibit 1.

2. I am a principle of Parke Properties I, L.P. and Parke Properties II, L.P., two of the plaintiffs in this case. My brother Gary Purcell and my company (Purcell Investments, Ltd.) are the sole limited partners of Parke Properties I, L.P. and Parke Properties II, L.P., the owners of an undivided 70% interest in the Hart Triangle Property. I am the sole shareholder of FP Properties, Inc., the General Partner of Parke I and Parke II. The remaining 30% interest in the Property is owned by Plaintiff GDF Realty Investments, Ltd.

3. In 1983, Gary Purcell and I first acquired an interest in the Hart Triangle Property.[1] Although various other persons and entities have had an interest in the Property since 1983, Gary and I are the only people that have had an ownership interest during that entire period. From 1983 through the present, Gary and I have owned (either individually or through limited partnerships) and sought to develop the Property. Since 1988, I have continuously attempted to obtain the approval of the United States Fish and Wildlife Service ("FWS") to develop the Property.

4. The Hart Triangle Property is located outside of the incorporated limits of the City of Austin, but within the City of Austin's extraterritorial jurisdiction. Located at the intersection of two major highways in one of the most rapidly growing areas of Texas, the Property is an extremely valuable piece of real estate. Without the unconstitutional restrictions placed on the Property by the Defendants, the current fair market value of the Property is at least $60,000,000.

---

[1] The Hart Triangle Property is part of a much larger tract of land that was known as "The Parke." Gary Purcell and I (through our limited partnerships) were part owners of The Parke.

5. Over the past 18 years, I (and my partners) have invested substantial time and money developing the Property, spending millions of dollars constructing water lines, wastewater gravity lines, force mains, lift stations and other utilities. We dedicated these utilities to the City of Austin and dedicated a right of way adjoining the highway to Travis County. Portions of the Property have been final platted, and initial approval for development was granted by the City of Austin in 1984.

6. As detailed in this Affidavit, the Defendants' land use restrictions on the Property resulting from the Endangered Species Act ("ESA") have rendered the Property undevelopable. Because we have been prohibited from making economic use of the Property, we filed for bankruptcy protection and are in substantial and imminent danger of losing the Property through foreclosure or liquidation.

The Cave Bugs found on the Property

7. The Hart Triangle Property contains numerous sinkholes and caves including: Tooth Cave, Kretschmarr Cave, Root Cave, Gallifer Cave, Amber Cave and an assortment of karst features referred to as the Cave Cluster.

8. In 1988, I became aware that the United States Fish & Wildlife Service ("FWS") had listed certain species of bugs that live in the caves and sinkholes on the Property as "endangered" under the Endangered Species Act.

9. FWS has identified six listed endangered species on the Property. The six species of "endangered" cave bugs are: (1) Bee Creek Cave Harvestman; (2) Bone Cave Harvestman; (3) Tooth Cave Pseudoscorpion; (4) Tooth Cave Spider; (5) Tooth Cave Ground Beetle; (6) Kretschmarr Cave Mold Beetle. Those species are referred to herein as the "Cave Bugs."

10. The Cave Bugs are found only in caves and sinkholes on the Property and very few other places in Travis County, Texas. The Cave Bugs are extremely small (almost microscopic) and live their entire lives underground. I have never seen a Cave Bug outside of a cave or sinkhole, nor have I ever heard of one being found outside of a cave or sinkhole. Because the caves and sinkholes on the Property are covered with gates, it is practically impossible for a human to access them without permission. Because of their very small size and subterranean existence, there are no more than a handful of people who have ever seen these Cave Bugs.

11. In the almost twenty years that I have owned an interest in the Property, I have never heard of or seen anyone making any type of commercial use of the Cave Bugs. I am not aware of any commercial market for the Cave Bugs. I am also not aware of any instance where a Cave Bug has been bought, sold, or traded, nor am I aware of any economic or commercial value of Cave Bugs.

Dedication of Cave Bug Preserves

12. In 1988, upon learning that FWS had listed the Cave Bugs as "endangered," I worked with FWS, Texas Systems of Natural Laboratories, Inc.("TSNL"), a Texas Non-Profit Corporation, and James Reddell, the scientist who discovered several of these species and is recognized as the leading expert on these cave species, to set aside preserves to protect the Cave Bugs.

13. FWS asked the landowners of the Property to fund surveys to determine what steps would need to be taken in order to protect the endangered species. At substantial cost, we agreed to do so. In 1990, following all of FWS' recommendations based on the surveys, we placed gates over the entrances to the most ecologically sensitive caves and deeded Amber Cave,

Tooth Cave, Root Cave, Gallifer Cave, Kretschmarr Cave, along with several other sink holes and buffer zones surrounding the caves to Texas Systems Natural Laboratories ("TSNL"), a non-profit organization dedicated to the research of environmental issues. I was repeatedly told by the Service, TSNL and Mr. Reddell that the preserves would protect the species. True and correct copies of the extensive correspondence, surveys and documentation relating to dedicating these preserves at FWS' request is attached as Exhibit 2.

14. In 1990, fee title to the preserves was conveyed by gift deed from the landowners of the Property to TSNL. Since then, TSNL has been responsible for the protection of the species in the deeded Cave Bug preserves. True and correct copies of the Gift Deeds are attached as Exhibit 3.

The FWS' decade-long pattern of preventing the use of the Property

15. Despite following all of the FWS' recommendations and dedicating the caves to TSNL as preserves for the Cave Bugs, FWS has persisted in using its criminal and civil enforcement authority under the take provision of the ESA to thwart the reasonable and responsible development of the Property as approved by the City of Austin.

16. After setting aside substantial and very valuable portions of the Property to protect the Cave Bugs, we attempted to proceed with development and sale of various tracts of the Property. At every turn, our development of the Property has been thwarted by FWS.

17. In 1991, we entered into a sales contract with Inland Laboratories, Inc. to develop and sell approximately ten acres of the Property. The contract required us to provide a letter from FWS indicating that the construction of the proposed project would not constitute a "take" under the ESA. Despite the fact that we had complied with all recommendations in the surveys conducted at the behest of the FWS, and had been given assurances by FWS that these preserves

would protect the Cave Bugs, and thus allow the development of the Property, FWS refused to provide such a letter. As a direct result, the contract with Inland Laboratories fell through.

18. In 1993, I was clearing brush and trash off of the Property. FWS threatened me that I was under federal criminal investigation for violating the "take" provision of the ESA for my clearing activities on the Property. FWS also told me that any development activities on the Property were prohibited without obtaining a §10(a) incidental take permit.

19. In 1994, because of FWS' threats of civil and criminal enforcement for violation of the ESA take provision, the owners of the Parke (the larger tract that includes the Hart Triangle Property) filed suit against FWS in *Four Points Utility Joint Venture, et al., v. United States of America, et al.,* Civil Action No. A 93 CA 655 SS ("the *Four Points* case"). The plaintiffs in the *Four Points* case (of whom I was one) sought, among other things, a declaratory judgment that development of the Parke (including the Hart Triangle Property) would not cause a "taking" of any endangered species, and therefore did not require an ESA §10(a) "incidental take" permit under the ESA.

20. Pursuant to a Court directive, FWS conducted an environmental review of the Parke property, including the Hart Triangle Property, and supplied us with an analysis that indicated, in part, that certain tracts of the Property could indeed be developed without causing a "take" of an endangered species:

> In particular, we believe that portions of tracts 4-13 ... could be developed without causing a take <u>if development</u>, among other things, <u>is scaled back from the canyons,</u> and surface and subsurface drainage and nutrient exchange is provided for. In addition, your client may be able to develop portions of tracts 4-13 without causing a take to black-capped vireos if sufficient survey information is received to confirm the absence of black-capped vireos in the area.

FWS letter of June 2, 1994 to John J. McKetta, a true and correct copy of which is attached hereto as Exhibit 4. Tracts 4-13 referenced in the FWS letter include the same land which comprises Tract A of the Hart Triangle Property.

21. Even in those areas where a "take" might occur, FWS told the Court that accommodations for development would be made. FWS recommended that we submit §10(a) applications for such areas:

> For the remaining portions of the Parke, although we believe that the project as proposed would likely result in a take, the Service will work with your clients and consultants during the section 10(a) permit process to modify the proposal so that the amount of take is reduced or eliminated in some areas. The need for a 10(a) permit should not be equated with a denial of development activity. Incidental take permits under section 10(a) can be issued to allow take that is incidental to an otherwise lawful activity, assuming the action does not jeopardize the continued existence of the species to be taken and the take is adequately mitigated.

June 2, 1994 FWS letter.

22. Subsequently, Judge Sparks entered an Order that dismissed the *Four Points* case, while noting FWS' representations that development could occur without further court intervention:

> The parties complied and the ultimate result was that, although much of the area could be developed without fear of a "take," some areas of land may involve "takes."

September 30, 1994 Order at 3 n.3, a true and correct copy of which is attached as Exhibit 5.

23. After the dismissal of the *Four Points* case, the properties of "The Parke" that were at issue were divided in ownership. The plaintiffs in this suit succeeded to ownership of the Hart Triangle Property. All of the seven tracts of the Hart Triangle Property had been at issue in the *Four Points* litigation.

24. Pursuant to the representations that FWS made in the *Four Points* litigation, I approached FWS about obtaining §10(a) permits for the Property. FWS informed me that I should first attempt to obtain a 10(a) permit through the Balcones Canyonlands Conservation Plan ("BCCP"). The BCCP is a regional §10(a) incidental take permit covering western Travis County and is administered by Travis County and the City of Austin. The BCCP proposes to set aside large areas of western Travis County (substantial portions of which are now privately owned) as preserves — with no development allowed — for the two species of endangered birds and six species of endangered karst invertebrates found in the area. Landowners obtain permission to develop their land through the BCCP by paying "mitigation fees" based on the amount of endangered species habitat on their property.

25. Following FWS instructions, we applied to participate in the BCCP. However, on June 17, 1997, the BCCP refused to accept our applications. Through this BCCP application process, we discovered that our property had been targeted for acquisition by the BCCP as a preserve. (We were never contacted by FWS, City of Austin, Travis County — or anyone, for that matter — about whether we wanted the Hart Triangle Property to be included in the BCCP preserve areas). At that time, BCCP informed us that the Property was "not eligible for participation using the simplified approach under the BCCP since it is entirely within the proposed preserve area." A true and correct copy of the BCCP map indicating that the Hart Triangle Property is located within a BCCP "preserve" is attached as Exhibit 6.

Plaintiffs' ESA Section 10(a) permit applications and the FWS' bad faith refusal to act on those applications

26. Having been turned down for inclusion in the BCCP process because BCCP wanted to acquire the Property at some (unspecified) future time, and still relying on FWS'

representations to the Court and the Order made upon such representations, we turned to the FWS §10(a) incidental take permit application process in hopes of obtaining permission to use and develop the Property.

27. On December 30, 1997, we filed seven applications for Section 10(a) incidental take permits — one for each of the seven tracts comprising the Property — in an effort to develop the Property. The proposed development included a shopping center, a residential subdivision, and office buildings.

28. While the permit applications were pending at the FWS, I met repeatedly with FWS to discuss proposed development plans drafted by various parties interested in purchasing one or more of the Hart Triangle tracts. FWS, however, began playing cat and mouse games with us. They employed shifting and inconsistent rationales to disapprove of all the proposed development scenarios. In fact, FWS even switched the endangered species that was supposedly the focus of concern. Previously, the black-capped vireo and golden-cheeked warbler had been the subject of attention in the *Four Points* litigation. Since 1990, when we dedicated the Cave Bug preserves, FWS had never voiced any objections to our proposed development as a threat to the Cave Bugs. However, when presented with development plans for the Property which would have no impact on these bird species, FWS abruptly changed its concern to the Cave Bugs.

29. After changing from the black-capped vireo and golden-cheeked warbler to the Cave Bugs, FWS began to take the new position that the existing preserves that we dedicated to TSNL were not adequate to protect the Cave Bugs. During 1997-1998, we brought several development plans to FWS for its approval. Only then did we discover that FWS had reversed its position that we had adequately protected the Cave Bugs with the dedicated preserves. FWS

raised objections to the plans for development on the Hart Triangle Property based on its claim that the development would "take" the endangered Cave Bugs.

30. As a result of FWS' repeated disapproval of development plans for the Hart Triangle Property, the Plaintiffs have been deprived of several lucrative opportunities for the use and enjoyment of the Property:

(a) 1997: High End Systems, Inc., wanted to purchase and develop 70 acres (comprising most of Tract C). FWS personnel, in a meeting, informed me that no development could occur above certain elevation lines. This resulted in a loss of 1 of 4 buildings proposed by High End. More importantly, it was our first notice that FWS was implicitly reversing the position that the dedicated preserves were adequate to protect the Cave Bugs as well as the position taken in taken in the June 1994 letter, that development of Tract A would not even require a §10(a) permit. After the meeting, High End terminated the contract, citing the economic impact of the FWS position.

(b) March 1998: Trilogy, a software company, wanted to develop part of Tract C. Jack Tisdale, a site plan designer who attended the High End meeting where FWS indicated it wanted no development above certain elevations, designed a site plan for Trilogy which was outside such elevation lines. However, FWS then demanded another bird survey, which Plaintiffs paid for. At the next meeting, FWS informed me that birds were not the real concern, but that because of karst invertebrates, *no proposed development* would be permitted. Trilogy canceled the project.

(c) June 1998: Having lost two contracts for office development, I then approached FWS with a new plan to use the Subject Tracts for residential purposes. On July 21, 1998, I met with FWS official David Frederick and other FWS representatives. Frederick provided a map which prohibited any development whatsoever on Tracts A, B, F & G. Development was also prohibited on a 40 acre portion of Tract C (74 acres total), and a 37.3 acre portion of Tract D (47 acres total), which FWS labeled on its map as the "NON-DEVELOPMENT AREA." A true and correct copy of the July 21, 1998 map is attached as Exhibit 7. FWS based its restriction on development based on its claim that development in this area would harm the six endangered karst invertebrates listed at the top of the map. According to the FWS map, limited development could go forward only on Tract E, a parcel which consists of steep canyon and which is inaccessible by road from RR 620 or RR 2222. In fact, FWS was now pushing us to develop the very same canyon area FWS had urged us to

avoid in its Court-ordered environmental analysis of June 2, 1994 (see Exhibit 4). At the July 21, 1998 meeting, Frederick further announced that FWS would deny all the §10(a) permit applications and would issue a jeopardy letter to us. That same day (July 21, 1998), I sent a letter to David Frederick and another FWS employee (Sybil Vossler) summarizing the issues discussed at that meeting, including Frederick's statements that: (1) no §10(a) permits would be issued for the 137 acre "NON-DEVELOPMENT AREA"; (2) there would be no mitigation allowed for take of the Cave Bugs; (3) Frederick would be writing us a "jeopardy letter" for the 137 acre "NON-DEVELOPMENT AREA"; and (3) Frederick would write us to formally deny the §10(a) permit applications. A true and correct copy of my July 21, 1998 letter to David Frederick is attached as Exhibit 8.

31. Despite Frederick's statements at the July 21, 1998 meeting, neither Frederick nor anyone at FWS would issue a letter formalizing FWS' denial of the permit applications. Repeated attempts were made by me and my attorneys to attempt to get the FWS to formally act on the permit applications. For over a year, the incidental take permit applications languished at FWS. Although it was perfectly clear that FWS was not going to allow development as they had earlier stated in their June 1994 response to the Court, and that they were not going to grant the permits, FWS refused to formally act on the permit applications.

32. FWS' delay and failure to approve any of the development plans we presented to them caused us serious financial harm. Unable to use, develop or sell any of the Property because of FWS' claim that such use will cause "take" of the Cave Bugs, we have been unable to generate income to service the loans on the Property or pay the property taxes. With foreclosure looming, and FWS completely failing to act on our permit applications, we were forced to take FWS to Court again to get them to act on the §10(a) incidental take permit applications. The Plaintiffs in this case — GDF Realty Investments, Ltd., Parke Properties I, L.P. and Parke Properties II, L.P. — filed a lawsuit seeking a declaration that our permit applications had been *de facto* denied. *GDF Realty, Ltd., et al. v. United States, et al.*, Civ. Action No. A 98 CA 772 SS

(W.D. Tex. 1998). The District Court ordered the FWS to file a pleading describing the status of Plaintiffs' permit applications.

33. The FWS responded to the Court's Order by filing a sworn Declaration by the FWS' Regional Director, Nancy Kaufman, that all of our permit applications were deficient and that the proposed use of the Property would constitute a prohibited "take" of Cave Bugs. A true and correct copy of the Kaufman affidavit is attached as Exhibit 9. Among numerous other conditions, the FWS Declaration stated that very substantial portions of the Property would have to be set aside in perpetuity as conservation areas left in their natural condition. FWS established benchmarks prohibiting any development of the Property above certain elevation contour lines. We were told by FWS that, because of the Cave Bugs, no development could occur above the 1030 contour line on one portion of the Property and no development above the 1010 contour line on another tract. The practical effect of FWS' dictates was to prohibit development on practically all of our Property. The upland area was rendered undevelopable because of FWS' claim that such development would harm the Cave Bugs, while the canyon area was undevelopable because of endangered golden-cheeked warbler habitat, steep slopes and greenbelt.

34. On June 7, 1999, the District Court held that the Declaration by the FWS' Regional Director constituted a final agency action and declared that our Section 10(a) permit applications were *de facto* denied. The District Court found that our applications had been denied by the FWS, stating:

> The evidence is overwhelming that FWS never intended to grant the plaintiffs' applications as presented and for some inexplicable reason has intentionally delayed ruling on them. The government has acted totally irresponsibly in this matter. To force the plaintiffs into economic damage by intentionally delaying a

ruling on their applications, a ruling to which they are legally entitled, is simply wrong.

Order at 6. A true and correct copy of Judgment and Order dated June 7, 1999 is attached as Exhibit 10.

35. Because FWS has denied our applications for section 10(a) permits and indicated that development of the Property would constitute a take of the Cave Bugs under Section 9, we cannot develop our property without the threat of civil and/or criminal penalties for taking endangered species.

36. FWS' restrictions on our use and enjoyment of the Property has caused and continues to cause severe economic harm. For more than a decade, we have been wholly prevented from making any economic use of the Property. As noted above, several contracts for sale and development of the Property have been terminated because of the FWS' actions. Moreover, because we have been unable to make economic use of the Property, we have been unable to generate income to pay the substantial property taxes and debt service on the Property and, consequently, stand to lose some or perhaps all of the Property through foreclosure or liquidation. We currently owe approximately $34,000.00 in delinquent property taxes on the Property. In addition, the majority of the Property is subject to indebtedness to secured notes. One note, held by Tomen America, Inc., the American affiliate of a Japanese trading company, has a balance of approximately $3.8 million. The second note, held by Service Life Insurance Co., has a balance of approximately $1.5 million.

37. In order to avoid losing this valuable parcel of property, Parke Properties I, L.P. and GDF Realty Investments, LTD. filed for bankruptcy under Chapter 11 of the Bankruptcy Code, Case No. 00-12587FM and 00-12588FM, currently pending in the United States

Bankruptcy Court for the Western District of Texas, Austin Division. We are also pursuing a takings claim for "just compensation" under the Fifth Amendment to the U.S. Constitution based on FWS' position that the property is undevelopable because of the various endangered species on the Hart Triangle Property. That case, *GDF Realty Investments, Ltd., et al. v. United States of America, et al.*, Case No. 99-513 L, is currently pending in the U.S. Court of Claims, but is not active because of the necessity of resolving this litigation first.

38. On June 2, 2000 — *after* the takings suit was filed — the Fish & Wildlife Service officially changed its position on the §10(a) incidental take permit applications. The July 21, 1998 FWS map that had indicated that all of the Property above the 1010' and 1030 contour lines was undevelopable was slightly revised. Although the maps in the June 2, 2000 Federal Register Maps indicate that a few additional acres of the Hart Triangle Property can be developed, FWS is still demanding that the vast majority of the Property be dedicated as preserves for the endangered Cave Bugs. FWS claims that development in these proposed preserve areas will cause "take" of the Cave Bugs in violation of §9 of the ESA. True and correct copies of the materials published by the Fish & Wildlife Service in the Federal Register on June 2, 2000 are attached hereto as Exhibit 11.

"FURTHER AFFIANT SAYETH NOT."

Fred Purcell

SWORN TO and SUBSCRIBED before me by Fred Purcell on this the 5th day of April, 2001.

KARINA GUTIERREZ
Notary Public, State of Texas
My Commission Expires
June 6, 2001

Notary Public in and for the State of Texas