IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(No. 94-1-C, No. 94-10004-C, No. 94-10009-C, No. 94-10013-C, No. 94-10029-C, No. 98-39C, No. 98-3911-C, and No. 98-3912-C) (consolidated)

(Filed: November 18, 2005)

CIENEGA GARDENS, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

CHANCELLOR MANOR, *et al*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

ORDER

A post-trial, post-judgment dispute over calculation of the awards of just compensation to several of the plaintiffs in these consolidated cases has arisen. Pending before the court is the *Chancellor Manor* Plaintiffs' Motion to Reconsider and Amend Judgment, filed October 17, 2005 ("Recons. Mot."). The judgment at issue was entered on September 30, 2005, based upon the decision reported as *Cienega Gardens v. United States*, 67 Fed. Cl. 434 (2005) ("*Cienega IX*"). That decision followed a lengthy 22-day trial.

Pursuant to Rule 59(b) of the Rules of the Court of Federal Claims ("RCFC"), the court by order issued on October 25, 2005, requested that both defendant and the *Cienega Gardens*-

related plaintiffs file responses to this motion. After those responses were received, the court acted under RCFC 59(a)(1) to open the judgment to take additional testimony and to reconsider the calculation of just compensation for certain plaintiffs.[1] An evidentiary hearing was held on November 15, 2005 to address the factual issues associated with the pertinent calculations. No conceptual issues were involved, and the findings and legal conclusions reflected in *Cienega IX* have not been put in question by the controversy over calculations. Instead, the disputed matters concern the proper means of implementing the court's findings and conclusions respecting the just compensation to be awarded the *Chancellor Manor*-related plaintiffs, as set out in *Cienega IX*, 67 Fed. Cl. at 487-90. To insure that the record in these consolidated cases remained unitary and applicable in all respects to each of the consolidated plaintiffs, and that the judgment ultimately entered would be consistent for all plaintiffs, the court requested that the *Cienega Gardens*-related plaintiffs also participate in the evidentiary hearing. They did so, and the expert who had testified at trial on behalf of the *Cienega Gardens*-related plaintiffs also testified at the evidentiary hearing.

Based upon the additional evidence received at the evidentiary hearing, the *Chancellor Manor* plaintiffs' motion to reconsider and amend the judgment entered on September 30, 2005, is granted in part and denied in part. Four discrete issues were presented by the motion, and each of those disputed matters are resolved as set out below.

(1.)

The first issue concerns the treatment to be accorded an equity loan for the Chancellor Manor property in the hypothetical market scenario for that property. Initially, in causing a calculation to be prepared of the just-compensation award for that property, the *Chancellor Manor*-related plaintiffs ignored the servicing costs of such a loan in the market scenario. CM Supp. 10 (Calculation of Damages by Dr. George Karvel (Sept. 15, 2005)) ("Karvel Sept.

---

[1]At that point, the court concluded that there was a reasonable possibility that elements of the judgment entered on September 30, 2005 reflected calculations that were not as precise and accurate as they could or should have been. In making this assessment, and in acting on the Reconsideration Motion, the court has followed the principles set out in *Bannum, Inc. v. United States*, 59 Fed. Cl. 241 (2005):

> Pursuant to [RCFC] 59(a)(1), the Court may grant a motion for reconsideration when the movant shows "either that: (a) an intervening change in the controlling law has occurred, (b) evidence not previously available has become available, or (c) that the motion is necessary to prevent manifest injustice."

Id. at 243 (quoting *Citizens Fed. Bank, FSB v. United States*, 53 Fed. Cl. 793, 794 (2002)). In undertaking its analysis, the court has focused on the potential applicability of the second and third of these quoted principles.

Calcs."), for plaintiff no. 1 at 3-6;[2] *see also* Order For Entry Of Final Judgment, *Cienega Gardens v. United States*, Nos. 94-1C, etc. (Sept. 30, 2005) ("Judgment Order"), at 3. The government objected to that omission and submitted a calculation by one of its experts, Dr. Hamm, that took account of hypothetical loan servicing costs for Chancellor Manor, reducing just compensation from $17,736,039 as projected by the *Chancellor Manor*-related plaintiffs, *see* CM Supp. 10 (Karvel Sept. Calcs.), for plaintiff 1 at 2, to $9,662,788. *See* CM Supp. 9 (Declaration of Dr. William Hamm (Sept. 26, 2005)) ("Hamm Sept. Decl."), at 4 & Ex. A. The court adopted the government's recalculation in the Judgment Order. *See* Judgment Order at 2-3. In the *Chancellor Manor*-related plaintiffs' motion for reconsideration, they contend that Dr. Hamm's recalculation for the government rests upon certain factual assumptions that are not supported by factual findings or evidence. Recons. Mot. at 13-14.

At the evidentiary hearing, the parties focused upon the need for, and the terms of, an equity loan for the Chancellor Manor property in the hypothetical market scenario. Importantly, for this property, the market scenario is hypothetical and the HUD-restricted scenario is actual because the Chancellor Manor partnership never did convert from a HUD-restricted property. *See Cienega IX*, 67 Fed. Cl. at 453-54. In the actual HUD-restricted scenario, however, the Chancellor Manor partnership obtained an equity take-out under a HUD program via a second mortgage loan of $3,618,100, of which $2,119,430 was distributed to the partners. *Id*. at 487. In these circumstances, the court in *Cienega IX* ruled that the equity loan had to be taken into account as a *de facto* credit in assessing the net rents lost in the HUD-restricted scenario compared to the market scenario. *Id*. at 487-88. The method for calculating the costs and benefits in this respect was somewhat complicated by the fact that the evidence adduced at trial regarding the market scenario did not address such a loan, or the terms for such a loan. *See id*. at 487 ("Rather than calculate the difference between the value of this loan and that of a loan available in the market scenario, Dr. Karvel [the *Chancellor Manor*-related plaintiffs' expert on these matters] did not conduct any analysis of equity loans."); *see also* Judgment Order at 3. To fill this gap, the court in *Cienega IX* set out a shorthand calculation that indicated a notional benefit that should be deducted from any award respecting the Chancellor Manor property. *Cienega IX*, 67 Fed. Cl. at 488-89. That truncated calculation did not purport to be definitive because it did not take present values into consideration.

Even at this late juncture, the *Chancellor Manor*-related plaintiffs resist taking into account the servicing costs of an equity loan in the market scenario. They primarily contend that an equity loan would not have been taken out in that scenario because the resulting cash flow would have been negative. Perhaps in grudging recognition that the court has not previously accepted this argument, they have now put forward a secondary, alternative contention that such

---

[2]The additional documents received into evidence at the evidentiary hearing held on November 15, 2005, have been identified with "CM Supp." designations. The transcript of the testimony received at the evidentiary hearing has been paginated in numerical sequence after the trial transcript and thus begins at page 5204 ("Tr. 5204").

a loan, even if taken out, would have been secured on more favorable terms than those put forward by Dr. Hamm on behalf of the government.

The first contention by the *Chancellor Manor*-related plaintiffs must be, and is, rejected, even though the court accepts many of the factual premises upon which plaintiffs rely. The court has found that the partners in the *Chancellor Manor*-related partnerships were very debt-averse, cautious persons. *See Cienega IX*, 67 Fed. Cl. at 455. In this vein, for the other two *Chancellor Manor*-related properties, Oak Grove and Rivergate, on prepayment of the HUD-insured loans, the pertinent partnerships took out very low-principal-amount new first-mortgage loans that were fully amortizing over short terms, seven years for Oak Grove and ten years for Rivergate. *Id*. at 455-56. In short, the other *Chancellor Manor*-related partnerships basically refinanced the HUD-insured loans on very conservative terms without an equity take-out. Nonetheless, the situation at the Chancellor Manor property was different and that difference must be taken into account. An equity take-out did occur at the Chancellor Manor property, and that equity-loan take-out was made even though the Chancellor Manor partnership had the option, under governing law and HUD's regulations and policies, of receiving a substantially higher dividend in the HUD-restricted scenario. Tr. 5336:23–5337:21 (Test. of Hamm). Thus, to avoid an asymmetry in the comparison of rents between the market scenario and the HUD-restricted scenario for the Chancellor Manor property, which asymmetry could seriously distort the just-compensation calculation for that property, an equity loan must be built into both scenarios.

The subsidiary question of the terms for an equity loan in the hypothetical market scenario was addressed by testimony at the evidentiary hearing. Dr. Hamm had assumed that an equity take-out would take the form of a second mortgage, fully amortizing over ten years, at an interest rate of 1 and 1/4% above the contemporaneous rate on first-mortgage loans as reported by the American Council of Life Insurers ("ACLI"). CM Supp. 9 (Hamm Sept. Decl.), at 6. This projected equity loan in the market scenario in a sense matched the actual equity loan in the HUD-restricted scenario because both were second mortgages. However, the congruency stopped there. Dr. Hamm's hypothetical second mortgage in the market scenario carried a higher interest rate and was repayable over a much shorter term than the actual HUD-insured second mortgage. Thus, the cash-flow servicing requirements for his hypothetical second-mortgage loan in the market scenario were considerably higher than those for the lower-interest, longer-term loan in the HUD-restricted scenario. Moreover, the terms for a hypothetical equity loan in the market scenario were not, and could not realistically be, represented by Dr. Hamm's second mortgage. Put simply, the terms used by Dr. Hamm for an equity loan in the hypothetical market scenario for the Chancellor Manor property did not reflect what a reasonable investing partnership could or would obtain in the market scenario.

The other witnesses who testified at the evidentiary hearing addressed the terms for an equity loan. Dr. Peiser, who testified as an expert for the *Cienega Gardens*-related plaintiffs, postulated that a first mortgage would be secured that refinanced the HUD-insured loan and provided an equity take-out as well. Tr. 5302:15–5303:1 (Test. of Peiser). The resulting first mortgage would be a relatively standard loan secured by 80% of the appraised property value,

carrying an interest rate of 9.05% as reflected in ACLI data, with a 30-year amortization period. Tr. 5303:2–5304:25 (Test. of Peiser); CM Supp. 7 (Declaration of Richard Peiser (November 1, 2005)) ("Peiser Decl."), at 3-4. Dr. Peiser also indicated that such an initial loan would be refinanced in 2005 at a rate of 6%. CM Supp. 7 (Peiser Decl.), at 4. Dr. Karvel, the expert testifying on behalf of the *Chancellor Manor*-related plaintiffs, concurred in Dr. Peiser's assessment that a refinancing via a first mortgage would be more appropriate than taking out a second mortgage. Tr. 5249:4–5250:5, 5258:23–5260:3, 5260:12–5261:20 (Test. of Karvel). On prepayment of the HUD-insured loan, which the market scenario assumes, that loan would have to be refinanced in any event. Thus, a second mortgage in the hypothetical market scenario would be a needless, flawed embellishment to a new first mortgage.

The court accepts Dr. Peiser's proffered terms for an equity loan in the hypothetical market scenario for the Chancellor Manor property. The evidence adduced at the evidentiary hearing shows that those terms reflect what a reasonable property owner would endeavor to obtain in securing an equity loan. The overall evidence in the case also shows that the owners of the Chancellor Manor property, who were very conservative investors and who also controlled the management firm for the property, would have been able to obtain a first mortgage on terms at least as favorable as those that were standard. Tr. 5459:13–5460:21 (court's summation).

Dr. Peiser also calculated the effects of servicing this market equity loan on the just compensation due for the Chancellor Manor property. His calculations resulted in just compensation for that property of $10,510,121, compared with Dr. Karvel's amount of $11,733,922, and Dr. Hamm's figure of $9,662,788. *See* CM Supp. 7 (Peiser Decl.), at 4; CM Supp. 6 (Declaration of George Karvel (Oct. 17, 2005)) ("Karvel Oct. Decl."), at 3; CM Supp. 8 (Declaration of Dr. William Hamm (November 1, 2005)) ("Hamm Nov. Decl."), at 2, 4. The court accepts and adopts Dr. Peiser's calculated amount as the just compensation due the Chancellor Manor partnership as of September 30, 2005, and the judgment issued on September 30, 2005 shall be amended accordingly.

(2.)

The second issue pertains to Oak Grove and Rivergate and concerns so-called "conversion costs." In *Cienega IX*, the court found that each of the pertinent properties would have incurred costs to convert from HUD-assisted housing to market housing. *Cienega IX*, 67 Fed. Cl. at 485-87. For the *Chancellor Manor*-related properties, Dr. Karvel had used the assumption that the properties would experience "zero cash flow for the first year after prepayment." *Id*. at 487.[3] As a general matter, the court accepted Dr. Karvel's assumptions,

[3]By contrast, for the *Cienega Gardens*-related plaintiffs, Dr. Peiser "assumed that 50% of the tenants could immediately begin paying market rents and that 50% of the units w[ould] become vacant." *Cienega IX*, 67 Fed. Cl. at 486. He then "assumed that it would take six months for the propert[ies] to re-lease fully these vacant units." *Id*. The court accepted these assumptions by Dr. Peiser, even though it concluded that they were "more generous to the

including this one among others (excepting those instances where it specifically rejected individual assumptions), observing that Dr. Karvel's overall approach "provide[d] a modest bias in the government's favor." *Id*. Notably, however, Dr. Karvel's particular assumption regarding transition costs provided a strong, not a modest, bias in the government's favor in calculating net rents. Now, on reconsideration, the parties dispute how the transitional costs should be measured in the net-rent, cash-flow models for Oak Grove and Rivergate.

The conversion-cost issue is moderately complicated by the fact that in *Cienega IX*, the court ruled that the Oak Grove and Rivergate partnerships could not include the results of settlements of tenant litigation in their net rent claims because those settlements "were not directly attributable to governmental action." *Cienega IX*, 67 Fed. Cl. at 488. Conversely, the court also ruled that "HAP contracts" that extended beyond the temporary taking period could be included because the extended terms of the HAP contracts were directly attributable to the statutes and HUD policies at issue in the cases. *Id*. at 488-89.

On this issue, it is the government, not the *Chancellor Manor*-related plaintiffs, which is arguing for asymmetry in the market and HUD-restricted scenarios. In essence, Dr. Hamm would curtail the conversion period in the HUD-restricted scenario for tenants not covered by HAP contracts. CM Supp. 8 (Hamm Nov. Decl.), at 5-6. The court rejects this divergent approach to conversion for the same reasons it has refused to allow an asymmetrical approach to an equity loan for the Chancellor Manor property.

The calculations in this respect ought principally to reflect a difference in timing, and thus present value, as Dr. Peiser noted in his testimony and declaration. *See* Tr. 5311:13–5312:17 (Test. of Peiser); CM Supp. 7 (Peiser Decl.), at 5. As Dr. Peiser put it, "the conversion costs analysis is largely a time value of money analysis in the sense that it quantifies the benefit or detriment to the plaintiff[s] caused by delaying certain market conversion expenditures and losses." CM Supp. 7 (Peiser Decl.), at 5. Accordingly, Dr. Karvel's proffered adjustment of the just compensation due the Oak Grove and Rivergate partnerships is accepted and the judgment will be amended accordingly.[4] The resulting adjustment adds $197,718 to the award for the Oak Grove property and $390,901 to the award for the Rivergate property, as of March 1, 1997, the end of the temporary takings period for those properties. CM Supp. 6 (Karvel Oct. Decl.), at 4-5; CM Supp. 8 (Hamm Nov. Decl.), at 9, 11.

---

government than would be required by the plaintiffs' actual experiences." *Id*. at 485-86.

[4]At the evidentiary hearing, Dr. Karvel also presented calculations that showed the results of a conversion that followed Dr. Peiser's template rather than the one that he (Dr. Karvel) had put forward at trial. Tr. 5271:12–5286:9, 5286:13–5288:20, 5299:13–5300:22 (Test. of Karvel); *see* CM Supp. 2, CM Supp. 3, CM Supp. 4, and CM Supp. 5. The court will not now make this change because it goes beyond matters of calculation to touch on a factual issue as to which there is no evidentiary support for revision of the court's earlier findings.

(3.)

The third issue also affects the calculations of just compensation for the Oak Grove and Rivergate properties. The parties previously disputed the treatment of HUD-regulated reserves recaptured upon prepayment. At the evidentiary hearing, it became apparent that this dispute has been resolved through corresponding corrections made to calculations by experts on behalf of the parties. The resulting additional amounts are $771,050 for the Oak Grove property and $802,319 for the Rivergate property. CM Supp. 6 (Karvel Oct. Decl.), at 5-7; CM Supp. 8 (Hamm Nov. Decl.), at 7-11.[5]

(4.)

The last matter has been captioned by the parties as the "mortgage benefit," but it may be described in context as the assumption that reserve balances under both the market and HUD-restricted scenarios are paid out to the owners as cash rather than used to pay down mortgage balances. The court resolves this matter in the *Chancellor Manor* plaintiffs' favor; the reserve balances were released to the property owners upon prepayment of the HUD-insured mortgages, and the property owners could use those balances as they saw fit. Such treatment also accords with that used in addressing just compensation for the *Cienega Gardens*-related plaintiffs. *See* CM Supp. 7 (Peiser Decl.), at 9-10. This issue associated with the calculations affects the treatment of reserves addressed in point (3.) above.[6]

CONCLUSION

The *Chancellor Manor* plaintiffs' motion to reconsider and amend the judgment entered September 30, 2005, is GRANTED IN PART and DENIED IN PART. The court revises and amends the final-judgment amounts awarded to the *Chancellor Manor*-related plaintiffs as a consequence of its resolution of the issues addressed above. No change shall be made to the

---

[5]An estimate of "upgrade costs" plays a role in the reserve analysis, and Dr. Hamm suggests that the upgrade costs for Oak Grove were inflated. *See* Tr. 5436:10–5439:9 (Test. of Hamm); CM Supp. 8 (Hamm Nov. Decl.), at 7. However, Dr. Karvel adopted amounts for reserves and upgrade costs from factual testimony adduced and documentary evidence admitted at trial. Tr. 5420:1–5421:4 (Test. of Karvel). Dr. Hamm concedes that his suggestion of inflation is based upon suspicion rather than fact, *see* CM Supp. 8 (Hamm Nov. Decl.), at 7, and that suspicion is largely negated by the fact that the reserves for Oak Grove were rising even faster than the upgrade costs. *See* Tr. 5439:14–5441:16 (Test. of Hamm) (addressing the amounts reported on PCM 464, admitted into evidence at trial).

[6]Separately, Dr. Karvel has accepted certain corrections made by Dr. Hamm to his adjustments to the reserve and mortgage-benefit calculations, and those corrections affect the calculation of just compensation due for the Oak Grove and Rivergate properties. *See* CM Supp. 6 (Karvel Oct. Decl.), at 5-8.

awards for the *Cienega Gardens*-related plaintiffs in these consolidated cases. Pursuant to RCFC 54(b) and RCFC 59, the court directs entry of an amended final judgment on plaintiffs' temporary takings claims as follows:

Plaintiff	End date, *i.e.*, the end of temporary-takings period or September 30, 2005, whichever is earlier	Amount of just compensation due as of the end date
Cienega Gardens	Oct. 10, 2002	$ 7,219,000
Del Amo Gardens	Sept. 30, 2005	5,008,814
Las Lomas Gardens	Sept. 30, 2005	13,017,377
Blossom Hill Apts.	Feb. 17, 1997	2,801,347
Skyline View Gardens	Feb. 17, 1997	2,228,032
Chancellor Manor	Sept. 30, 2005	10,510,121
Oak Grove Towers	Mar. 1, 1997	1,464,761
Gateway Investors (Rivergate)	Mar. 1, 1997	1,697,241

The provisions for interest in the amended final judgment remain unchanged from those previously entered. *I.e.*, the court awards interest as an element of just compensation, payable at a rate that reflects the annual averages of the daily yields of ten-year Treasury STRIPS, compounded annually. The interest shall be paid on the amount of the just compensation due each plaintiff as of the end of the pertinent temporary-takings period, or as of September 30, 2005, whichever is earlier, and from that date to the date the plaintiffs, and each of them, actually receive payment from the United States.

It is so ORDERED.

Charles F. Lettow
Judge