IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

MANDARIN DEVELOPMENT, INC.,
a Florida Corporation,

Plaintiff,

v. **Case No. 2015-CA-2563**

MANATEE COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

FINAL JUDGMENT

This matter came before the Court on the non-jury trial of a Complaint seeking declaratory relief by Plaintiff, MANDARIN DEVELOPMENT, INC. ("Mandarin") against Defendant, MANATEE COUNTY, FLORIDA ("the County"). The trial was conducted from November 15-17, 2016, as to (1) Plaintiff's Count I - Violation of Due Process - Facial; and (2) Count III - Violation of Takings Clauses.[1] Having heard the parties' arguments, having received testimonial and documentary evidence, and having considered the court file and applicable law, the Court finds as follows:

The property at issue in the complaint, commonly known as "Riva Trace" (hereinafter referred to as "the Property), is a 41.2-acre land parcel in Manatee County, Florida. Mandarin alleges that certain conditions imposed upon the development of the Property pursuant to Policy

[1] On November 11, 2016, the Plaintiff withdrew Count II of the Complaint, the As-applied Violation of Due Process claim, and elected to proceed only on Count I and Count III.

3.3.1.5 of the Manatee County Comprehensive Plan (the "Plan") and Section 706.8.B of the Manatee County Land Development Code (the "LDC")[2], hereinafter collectively referred to as the "Challenged Regulations," deprive it of due process and result in a taking of Mandarin's Property. The basis of Mandarin's claims is an allegation that the Challenged Regulations violate the doctrine of unconstitutional conditions.

Policy 3.3.1.5 of the County's Plan requires buffers a minimum of fifty (50) feet in width for property adjacent to all inflowing watercourses located in the Watershed Overlay and all Outstanding Florida Waters and Aquatic Preserves and a minimum thirty (30) feet for property adjacent to all isolated wetlands. The purpose of the Watershed Overlays is to "[m]aintain or improve the water quality and quantity in Lake Manatee, Evers Reservoir, and Peace River Watershed Overlay (WO) Districts for the purpose of ensuring a continued supply of drinking water at lowest possible cost to the current and future residents of Manatee County and component jurisdictions." *See* Plan, Conservation Element, Objective Section 3.2.1. Among these special overlay districts is the Evers Reservoir Overlay District, of which the Braden River is an inflowing watercourse. *Id.* For areas of significant wetlands and for watershed protection, Policy 3.3.1.5 provides that these buffer widths may be increased. The provision of the LDC challenged by Mandarin implements this policy, restricting development in wetlands and wetland buffers.

Section 706.8.B of the LDC requires developers to grant to the County a conservation easement over existing "wetlands and associated wetland buffers" that developers do not impact as part of their development, for the purpose of enforcing the wetland preservation and buffering requirements of the Plan and LDC. The evidence at trial established that Section 706.8.B requires

[2] In addition to Policy 3.3.1.5 of Manatee County's Comprehensive Plan and Section 706.8.B of the Land Development Code, Mandarin's complaint also included Sections 706.7, 706.7.A, 706.7.B and 336.4 of the LDC. At trial, the Plaintiff withdrew its claims as to these additional sections of the LDC.

the dedication of a conservation easement over the wetlands and associated wetland buffers within Riva Trace. The conversation easement provides no right of access to the general public for recreation or any other purpose. The other Challenged Regulation, Policy 3.3.1.5, determines the areas to be protected from development.

In 2004, Kimball Hill Homes Florida, Inc., applied to the County for approval of a Preliminary Site Plan for a 41.2 acre, 152-unit multi-family development on the Property adjacent to the Braden River. The applicant was required, per Plan Policy 3.3.1.5, to delineate a 50' wide "wetland buffer" contiguous to all wetlands existing on the property. The County's stated purpose behind the buffer requirement was to protect wetlands from post-development activities. That portion of the Property abutting the Braden River triggered an automatic 50' buffer. An "in-flowing" stream bisecting the site also required the same buffer on both sides of the watercourse. The total area encompassed within the mandated buffer was 6.2 upland acres, comprising roughly 13% of the overall property.

In 2006, after changing the Property's use strictly to single-family, and having reduced the subdivision to 86 units, the applicant's Preliminary Site Plan for "Riva Trace" was approved by the Manatee County Commission. Notably, the extent of the wetland buffer area remained fixed in spite of the applicant's 43% reduction in development density.

On August 27, 2007, the County administratively approved a Final Site Plan for the project. By letter sent to the applicant's representative, the County conditioned its approval upon a list of stipulations set forth by various County departments. One condition required by the County was that "No lots shall be platted through any . . . wetland or wetland buffer." Another condition required by the Natural Resources Division required the dedication to the County of a conservation easement over all wetlands and wetland buffer areas, consistent with Section 719.11.1.3 (now

Section 706.8.B) of the LDC. The purpose stated in the LDC for the dedication of the easement was to: (a) preserve and protect the conservation value of the property; (b) allow County access to monitor and enforce its easement; and (c) prevent inconsistent activity. LDC, Section 706.8.B.1-3. Per the explicit LDC requirement, this conveyance of a private property interest to the County was also a prerequisite to plat approval. No compensation to the landowner is provided for this easement.

In December 2007, the undeveloped Property was sold to Riva Trace, LLC. The new landowner changed the subdivision's design and obtained revised Preliminary Site Plan approval. The revised Final Site Plan was approved on August 16, 2010. Included within the County's approval letter was the previous condition mandating conveyance of a conservation easement over the wetlands and wetland buffer areas to the County.

The applicant complied with the required condition and conveyed to the County a 9.55 acre conservation easement over both on-site wetlands and upland buffer areas. The easement was accepted on February 28, 2012. Having conveyed this easement interest, the landowner was then permitted to record its final subdivision plat. On March 15, 2012, title to the property transferred to Mandarin, which was assigned all rights, title and interest therein. Neither Riva Trace, LLC, nor Mandarin, expressed an objection to the buffer/easement conditions prior to plat approval.

Prior to development of the Property, Mandarin made inquiry to County staff regarding the purpose of the mandatory imposition of the wetland buffer, and the necessity for the full 50' width thereof, but was afforded no relief. Eventually, the landowner retained legal counsel who wrote a letter to the Building & Development Services Department asking for a reduction in the buffer area over that portion of the property not adjacent to the Braden River. The response from the County Attorney's Office stated that "[n]either the Comprehensive Plan or the Land Development

Code provide legal authority for either the Board of County Commissioners or the staff to reduce the 50-foot-wide wetland buffer." Presently, Riva Trace is a platted and fully constructed residential subdivision.

On June 2, 2015, Mandarin filed a three-count complaint for declaratory relief in the Circuit Court. Mandarin alleged that the required wetland buffer and conservation easement conditions were unlawful exactions of private property in violation of the doctrine of "unconstitutional conditions." Specifically, it alleged that the County's conditions violated Constitutional standards which require governmentally imposed land-use conditions, such as exactions of private property interests, to be "roughly proportionate" to any actual impacts from the proposed development.

Applicable Law

Florida's Constitution, similar to the United States Constitution, prevents government from taking private property for a public purpose without full compensation paid to the owner. Article X, § 6(a), Fla. Const. (1968). Private property is also protected by Florida's Due Process Clause. Article I, Section 9, Fla. Const. (1968); as well as by the Fifth and Fourteenth Amendments to the United States Constitution. A citizen may not be compelled by the government to surrender these, or any other constitutional safeguards, in order to secure a discretionary benefit. *Frost v. Railroad Commission of State of Cal.*, 271 U.S. 583, 592-594 (1926); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This concept is known as the "doctrine of unconstitutional conditions," and has been applied extensively to land use decisions. *Parks v. Watson*, 716 F.2d 646, 650-653 (9th Cir. 1983).

In the last three decades, the United States Supreme Court has issued opinions regarding land use exactions, whose sum rule states that governmental entities attaching "dedication" conditions to development approvals must tailor these exactions to the negative impacts anticipated to be generated from the proposed development. The three seminal decisions are

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013).

Nollan held that the condition imposed by the government must serve the same purpose as would a refusal to issue the approval, so as not to function as "an out-and-out plan of extortion." *Id.* at 837. In reaching this conclusion, the *Nollan* Court was "inclined to be particularly careful...*where the actual conveyance of property is made a condition* to the lifting of a land-use restriction, since in that context there is a *heightened risk* that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841 (emphasis supplied). The Court held that the government's authority to exact such conditions was limited by the Fifth and Fourteenth Amendments in that the government may not require a person to give up a constitutional right—for example, the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property (an "essential nexus" must exist between the "legitimate sate interest" and the permit condition exacted by the government). *Id.* at 837.

The Supreme Court again evaluated the legitimacy of land-use exactions in *Dolan v. City of Tigard*. As a condition of redeveloping her storefront, Ms. Dolan was required to dedicate a public greenspace and pedestrian/bicycle pathway. She challenged the conditions on grounds that the City had failed to demonstrate any "quantifiable burdens" created by her store that would justify the dedication demanded of her. *Dolan*, 512 U.S. at 386. Although finding that the *Nollan* essential nexus requirement had been met by the City, the Court determined that the dedication conditions imposed upon Ms. Dolan had not been *quantified*; and that the City had failed to demonstrate any negative impacts created by the project that would necessitate a mitigating dedication. *Id.* at 393, 395-396.

The *Dolan* Court, then, set forth part two of the land-use exactions test, which required the *government* to make an affirmative showing that the exaction was "roughly proportional" to the anticipated impacts from the development. The Court held that, while "no precise mathematical calculation is required...the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The *Nollan* and *Dolan* requirements are nearly identical to the exaction standard previously adopted in Florida law, including the Second District Court of Appeal in *Lee County v. New Testament Baptist Church,* 507 So.2d at 629.

Koontz held that land-use regulatory programs are covered under the *Nollan/Dolan* doctrine, even though the governmental permission is discretionary, and even if the landowners "voluntarily" enter into it. *Id.* 2594. Notably, one of the exactions demanded of the applicant-landowner in *Koontz* was a conservation easement, similar in kind to the easement at issue herein.

Mandarin does not assert that the County's wetland buffer and conservation easement requirements are irrational, nor that they are unrelated to a valid public benefit. Instead, Mandarin argues that both Plan Policy 3.3.1.5 and LDC Section706.8.B violate the "rough proportionality" test from *Dolan* because neither provision is tethered to the anticipated impacts of the proposed development.

Count I - Violation of Due Process - Facial

Count I alleges a "facial" violation of due process under the U.S. Constitution and the Florida Constitution. As noted above, Mandarin alleges that the Challenged Regulations, on their face and by their mere enactment, violate the unconstitutional conditions doctrine.

Only with respect to Section 706.8.B of LDC, because this provision requires the dedication of an interest in land, the Court reviews it under the heightened standard of scrutiny

applicable under the federal and state decisions governing exactions. The evidence at trial demonstrated that the conservation easement required by Section 706.8.B applies regardless of the wetland impacts created by the development. Accordingly, Section 706.8.B of the LDC violates the U.S. Constitution and Florida Constitution by requiring an exaction without consideration of the specific impacts of the development.

While Section 706.8.B of the LDC requires the dedication of the conservation easement, it merely references the required wetland buffer in order to determine the size of the conservation easement. By contrast, Plan Policy 3.3.1.5 does not require a dedication of land to the County. Rather, Policy 3.3.1.5 operates as a development restriction and setback, independently of Section 706.8.B. As such, Policy 3.3.1.5, as a matter of law, is not subject to the heightened scrutiny that applies to land use exactions under the federal unconstitutional conditions doctrine. For these reasons, Policy 3.3.1.5 is subject to a standard facial substantive due process inquiry.

Except for judicial review of cases involving land use exactions, long standing and well-settled constitutional law applies the rational basis test as the appropriate standard for determining the legality of a facial substantive due process challenge to a land use regulation under both the Federal and Florida Constitutions. *See, e.g., Gary v. City of Warner Robins, Ga.*, 311 F.3d 1332, 1339 (11th Cir. 2002); *Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 781 (Fla. 2004). Under the rational basis standard of review, "a law will be upheld if it is ... [ ] ... fairly debatable whether the purpose of the law is legitimate and it is fairly debatable whether the methods adopted in the law serve that legitimate purpose." *Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 20-21 (Fla. 3d DCA 2016).

Plan Policy 3.3.1.5 seeks to protect statutorily defined wetlands through the use of wetland buffers. Protection of the natural environment and natural resources is a well-recognized legitimate

public purpose of land use regulations, and a valid use of local government police power to prevent injury to the public health, safety and welfare. *See, e.g. Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 932 (Fla. 1995); *Graham v. Estuary Props.*, 399 So. 2d 1374, 1381 (Fla. 1981); *Lee Cty. v. Morales*, 557 So. 2d 652, 655 (Fla. 2d DCA 1990).

The extensive evidence presented by the County at trial established that the wetland buffers required by Plan Policy 3.3.1.5 serve a legitimate purpose of preserving and protecting wetland areas and drinking water from land development activities and that Policy 3.3.1.5 is rationally related to that purpose. Accordingly, Count I fails in challenging the constitutionality of Policy 3.3.1.5. However, this Court finds that the imposition of the conservation easement pursuant only to section 706.8.B does not survive the application of the heightened standard of scrutiny for an exaction. Therefore, the Court finds in favor of Mandarin only as to the challenge to the facial validity of section 706.8.B.

Count III - Violation of Takings Clauses

Count III alleges that the application of Section 706.8.B of the LDC to the Property has resulted in a per se violation of the Takings Clause of the Fifth Amendment to the United States Constitution and of Article X, Section 6(a) of the Constitution of the State of Florida. The complaint asserts that because this requirement was imposed on Mandarin, who did, in fact, accede to the County's demands by conveying an easement over the wetland and buffer area, the County has *per se* taken that property interest.

In Florida, an easement constitutes a property interest within the ambit of constitutional protection. Article X, Sec. 6(b), Florida Constitution (1968); *Kendry v. State Road Department*, 213 So.2d 23 (Fla. 4th DCA 1968); *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla. 1964). Further, the public conservation easement demanded from Mandarin herein is even more

restrictive and more of a "burden" on the land, than that involved in *Nollan* (a joint use, public beach access). The terms of the negative easement exacted from Mandarin not only require public access by County officials at "reasonable times;" but, more significantly, it deprives the grantor-owner of the right to *any* "surface use, except those purposes which retain the land or water area in a natural condition," thus forbidding the "construction of buildings, roads, signs, billboards, or other structures on or above ground." All reasonable private economic uses of the 9.55 acres burdened by the conservation easement are thus eliminated. A loss of the ability to exclude, coupled with the complete loss of all reasonable economic use, without compensation, constitute an unconstitutional taking.

As noted in *Koontz*, "we began our analysis in both *Nollan* and *Dolan* by observing that if government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Koontz*, 133 S.Ct. at 2598-99, citing *Nollan*, 483 U.S. at 831 and *Dolan*, 512 U.S. at 384. The completed conveyance of a public conservation easement to the County falls within the same rule. A *per se* taking occurred in this case on February 28, 2012, the date of acceptance by the County.

The County presents several arguments in defense. It first contends that the conservation easement is not an exaction but instead a mere "development restriction" designed to protect the status quo. The County's contention is belied by the very terms of Section 706.8.B. The owner may not receive plat approval until the easement is dedicated. Additionally, the evidence presented at trial demonstrates that the easement conveyance differs entirely from traditional development restrictions in that it requires an actual *conveyance* of a property interest, through a publicly-recorded instrument. This is unlike any other "traditional" development restrictions such as front, side, and rear yard setbacks, impervious surface ratios, and height constraints, which do not require

a recorded conveyance of a property interest to solidify their purpose. The California Coastal Commission, (and the dissent) maintained a similar argument in *Nollan*. The majority responded, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest, but rather (as Justice Brennan contends) '**a mere restriction on its use**,' . . ., is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831.

The County further contends that the regulations at issue are not for the 'public benefit," but rather to protect against harm to the environment. However, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court discarded the "harm v. benefit" test in determining compensability for a severe use restrictions, finding that "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern . . . ." 505 U.S. at 1026 (1992). Justice Scalia declared that, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings,' which require compensation, from regulatory 'deprivations' that do not." *Id.* at 1026.

Accordingly, and in harmony with the ruling in Count I, this Court determines that Section 706.8.B requires the exaction of a conservation easement as a blanket condition of plat approval, in violation of the doctrine of unconstitutional conditions. Because this provision was, in fact, applied to Mandarin, who under implicit coercion, conveyed a 9.55 acre conservation easement to the County without compensation, a *per se* taking has occurred.

County's Affirmative Defenses

The County previously raised several affirmative defenses. These defenses were argued at two separate summary judgment proceedings held on September 27, 2016 and November 10, 2016. The Court has previously ruled on these defenses. Those rulings and Orders are incorporated and

adopted herein in full: Order on Defendant, Manatee County's Motion For Final Summary Judgment, entered October 13, 2016; Order Denying Defendant, Manatee County's Amended Motion For Final Summary Judgment, entered November 16, 2016; and Order Denying Defendant, Manatee County's Motion For Final Summary Judgment Regarding The Affirmative Defense of Statute of Limitations, entered November 17, 2016.

Accordingly, based on the foregoing, it is hereby **ORDERED, ADJUDGED** and **DECLARED** as follows:

1. With regard to Count I, the Court finds in favor of Mandarin, only as to that part of Mandarin's due process claims in Count I which challenge Section 706.8.B of the Manatee County Land Development Code. In order to allow the County to cure the constitutional defects in Section 706.8.B , the effect of the Court's ruling is abated for 365 days from the date of entry hereof.

2. Mandarin's claim in Count I as to Policy 3.3.1.5 of the Manatee County Comprehensive Plan is **DENIED**.

3. With regard to Count III, the County has *per se* unlawfully taken Plaintiff's property interest by requiring and accepting the conveyance of a conservation easement without compensation therefor.

4. The County is taxed with of all reasonable costs of Mandarin, pursuant to law.

5. The Court retains jurisdiction of this cause for purposes of supplemental relief pursuant to Section 86.061, Fla. Stat.

DONE and **ORDERED** in Manatee County, Florida, on this 24 day of January 2017.

Don T. Hall

Don T. Hall, Circuit Judge

Copies to:

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