TR Investor, LLC v. Manatee Cnty.

Court of Appeal of Florida, Second District

February 3, 2023, Decided

No. 2D21-2061

Reporter
2023 Fla. App. LEXIS 747 *; 48 Fla. L. Weekly D 249

TR INVESTOR, LLC; NORTH RIVER LAND LV, LLC; AND CARGOR PARTNERS VI - BUCKEYE 928, LC, Appellants, v. MANATEE COUNTY, FLORIDA, Appellee.

Prior History: [*1] Appeal from the Circuit Court for Manatee County; Charles Sniffen, Judge.

Core Terms

wetland, buffer, Landowners, exaction, dedication, regulations, regulatory taking, trial court, comprehensive plan, common area, homeowners', permanent, cause of action, physical invasion, private property, land use, conditioned, easement, just compensation, subdivision, developers, thirty-foot, acres, space, land use regulation, physical occupation, amended complaint, adjacent, monetary, occupied

Case Summary

Overview
HOLDINGS: [1]-The County's wetland buffers did not amount to an illegal exaction as it did not require any dedication of land or monetary payment as a condition of approval of the landowners' development permit, and nothing in the landowners' amended complaint or the documents incorporated therein suggested otherwise; [2]-In the order dismissing the original complaint, the trial court hinted that the landowners were attempting to allege a regulatory taking of a small portion of its property that could potentially provide relief via an economic benefit/diminution of value analysis, but they failed to file such a cause of action, as the landowners failed to state a cause of action in count two that the County's wetland buffer regulations operated as a taking in the form of a permanent physical occupation by the government, its agents, or the public at large.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Administrative Law > Separation of Powers > Constitutional Controls > Nondelegation Doctrine

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Constitutional Law > State Constitutional Operation

HN1 **Constitutional Controls, Nondelegation Doctrine**

The Florida Constitution mandates the conservation and protection of Florida's natural resources, *Art. II, § 7, Fla. Const.* And the Florida Legislature has instructed the State and all local governments to implement and enforce land use regulations that protect and conserve wetlands and the natural functions of wetlands, *§ 163.3177(6)(d)2 j, Fla. Stat.* (2021).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN2 **Zoning, Comprehensive Plans**

Prospective developers may request approval to develop within the wetland or wetland buffers—and thereby impact the area—provided they satisfy the

requirements of the Comprehensive Plan and LDC, Manatee County, Fla., Land Dev. Code § 706.4.A. Developers must submit an application accompanied by a wetland impact study, which shall include an impact avoidance and minimization analysis that demonstrates the necessity of the impact, § 706.4.A-B. The application and request to develop within the wetland or wetland buffer must be made in conjunction with, or as a component of, the related development approval for the entire site, such that it can be reviewed and approved by the approving authority (Department Director, Hearing Officer or Board) reviewing the proposed development, § 706.4.A.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] Standards of Review, De Novo Review

The appellate court reviews a trial court's order granting a motion to dismiss de novo. In determining whether to dismiss a complaint for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff. A motion to dismiss tests the legal sufficiency of the complaint and does not determine factual issues. To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Family Law > Marital Duties & Rights > Property Rights > Homestead Rights

Constitutional Law > Bill of Rights > State Application

HN4[] Fundamental Rights, Eminent Domain & Takings

The *Fifth Amendment to the United States Constitution*, *U.S. Const. amend. V*, prohibits the taking of private property for public use without just compensation. This constitutional guarantee applies to the federal government directly and to the states through the Fourteenth Amendment, *U.S. Const. amend. XIV*. The takings clause, also sometimes referred to as the just compensation clause, is also repeated in the *Florida Constitution, Art. X, § 6(a), Fla. Const.*

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Inverse Condemnation > Regulatory Takings

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

HN5[] Fundamental Rights, Eminent Domain & Takings

A taking may result from (1) a direct government appropriation of private property or (2) government regulation of private property. Not all government regulations amount to a taking, however. In regulatory takings cases, the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Inverse Condemnation > Regulatory Takings

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

HN6[] Fundamental Rights, Eminent Domain & Takings

The United States Supreme Court has recognized four main categories of regulatory takings challenges. Two categories of regulatory action are generally deemed to be per se takings for Fifth Amendment purposes. The first occurs where a government regulation requires an owner to suffer a permanent physical invasion of her

property. In such physical taking cases, the government must provide just compensation no matter how minor the permanent physical invasion. The second type of regulatory taking occurs where a government regulation completely deprives an owner of all economically beneficial use of her property. In such total regulatory taking cases, with few exceptions, the government must provide just compensation. Outside these two relatively narrow categories, the third category of regulatory takings involves regulations that fall short of effecting a per se taking and are analyzed appropriately under the ad hoc factual inquiry outlined in.

Real Property Law > Inverse Condemnation > Remedies

HN7 **Inverse Condemnation, Remedies**

In the most general sense, an exaction is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted. Such exactions must satisfy the doctrine of unconstitutional conditions, under which the government may not require a person to give up a constitutional right—here 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.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Impact Fees

Environmental Law > Land Use & Zoning > Constitutional Limits

Transportation Law > Bridges & Roads > Dedication

Real Property Law > ... > Transfer Not By Deed > Dedication > Elements

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN8 **Zoning, Impact Fees**

Due to the unique nature of the land use permitting process, the U.S. Supreme Court devised a special application of the doctrine of unconstitutional conditions. In and the Court established the essential nexus and rough proportionality tests to define the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public. Specifically, courts must first determine whether an essential nexus' exists between a legitimate state interest and the permit condition exacted by the city. In other words, does the government have a legitimate purpose in demanding the exaction? If the court finds that a nexus exists, it must then decide the required degree of connection between the exaction and the projected impact of the proposed development. In other words, is the exaction demanded roughly proportional to the government's legitimate interests? This test has come to be known variously as the "rough proportionality" test or the Nollan/Dolan test. Early Supreme Court land use exaction jurisprudence considered exactions to be land-use decisions conditioning approval of development on the dedication of property to public use.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Environmental Law > Land Use & Zoning > Constitutional Limits

Real Property Law > ... > Transfer Not By Deed > Dedication > Elements

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

HN9 **Fundamental Rights, Eminent Domain & Takings**

Keeping in line with Supreme Court land use exactions jurisprudence, the appellate court has applied the Nollan/Dolan analysis to land exactions in land use permitting cases wherein the government has conditioned permit approval upon the dedication of private property for a public purpose.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN10 **Natural Resources & Public Lands, Wetlands Management**

To develop within the wetland buffers, prospective developers, such as the Landowners, must submit an

application accompanied by a wetland impact study, which shall include an impact avoidance and minimization analysis that demonstrates the necessity of the impact, Manatee County, Fla., Land Dev. Code § 706.4.A-B. The application and request to develop within the wetland buffer must be made in conjunction with, or as a component of, the related development approval for the entire site, such that it can be reviewed and approved by the approving authority.

Torts > ... > Compensatory Damages > Types of Losses > Permanent Injuries

HN11[] **Types of Losses, Permanent Injuries**

The Court explained that to the extent that the government permanently occupies physical property, it effectively destroys the rights to possess, use and dispose of property. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Third, although the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

HN12[] **Fundamental Rights, Eminent Domain & Takings**

Importantly, regulations that prohibit the development on certain portions of the tract do not in themselves effect an unconstitutional taking. Rather, the focus is on the nature and extent of the interference with the landowner's rights in the parcel as a whole in determining whether a taking of private property has occurred.

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Christopher M. De Carlo, Whittni M. Hodges and William E. Clague, Manatee County Attorney's Office, Bradenton, for Appellee.

Judges: SLEET, Judge. VILLANTI and BLACK, JJ., Concur.

Opinion by: SLEET

Opinion

SLEET, Judge.

TR Investor, LLC; North River Land LV, LLC; and Cargor Partners VI - Buckeye 928, LC (collectively, Landowners), appeal the trial court's final order dismissing the case with prejudice. Because the trial court properly concluded that the Landowners could not state a cause of action for an unlawful exaction or a permanent physical occupation upon their land by Manatee County, we affirm.

I. BACKGROUND

This is a regulatory takings case involving landowners who obtained a permit to develop a subdivision in Manatee County. At issue are the Manatee County land use regulations that require wetland buffers as a condition to obtaining the County's approval to build certain subdivisions. The Landowners contend that requiring them to set aside thirty-foot buffers adjacent to wetlands is tantamount to an unconstitutional taking without just compensation. **[*2]** We disagree.

A. Wetlands Protection Regulations

HN1[] The Florida Constitution mandates the conservation and protection of Florida's natural resources. *Art. II, § 7, Fla. Const.* And the Florida Legislature has instructed the State and all local governments to implement and enforce land use regulations that "[p]rotect[] and conserve[] wetlands and the natural functions of wetlands." *§ 163.3177(6)(d)2.j, Fla. Stat.* (2021); *see, e.g.*, *§§ 163.3201* (requiring implementation of comprehensive plans through "local regulations on the development of lands and waters within an area"), *163.3202(2)(e)* (requiring land use regulations for "the protection of environmentally

sensitive lands" at the local level), 187.201(9)(a) (requiring land use regulations for the protection of "natural habitats and ecological systems, such as wetlands" at the state level), Fla. Stat. (2021).

The challenged land use regulations in this case were adopted pursuant to the *Local Government Comprehensive Planning and Land Development Regulation Act*. § 163.3161(1), Fla. Stat. (1987). The County developed and adopted the Comprehensive Plan and the Land Development Code (LDC), which contained provisions related to the protection and conservation of wetlands.

The Comprehensive Plan, Policy 3.3.1.5, contains the following wetlands protection policy:

> **Policy 3.3.1.5**. Protect all wetlands and watercourses from land development activities **[*3]** by requiring the establishment of natural area buffers adjacent to all post-development wetlands and watercourses within a watershed overlay. Land alteration or removal of vegetation shall be prohibited in any buffers established according to this policy except to allow the removal of nuisance plant species, small areas of impervious surface for stormwater outfalls, and to allow public access consistent with natural resource protection. Such buffers shall be established according to the following schedule except as provided in Policy 3.3.1.5:
>
> 1) Buffers a minimum fifty (50) feet in width shall be established adjacent to all non-isolated wetlands (hydrologically connected or federal and state jurisdictional wetlands), and along all in-flowing watercourses located in the WO District and all Outstanding Florida Waters and Aquatic Preserve;
>
> 2) *Buffers a minimum thirty (30) feet in width shall be established adjacent to all isolated wetlands and other wetlands not listed in (1) above*;
>
> 3) Through the development review process, wider wetland buffers may be required for areas containing significant wetlands, for watershed protection, and to implement the goals, objectives, and policies of this **[*4]** Comprehensive Plan. (See Policies 2.9.4.4, 3.3.2, 4.1.2, and 4.1.4)

Manatee County, Fla., Comprehensive Plan, Policy 3.3.1.5 (2021) (emphasis added). Section 706.7 of the County's LDC implements the buffer requirement and provides, in relevant part, as follows:

> **706.7. - Wetland Buffers**.
>
> Generally, a wetland buffer of at least fifty (50) feet shall be observed from the most landward extent of any post-development jurisdictional wetland contiguous with the Terra Ceia Aquatic Preserve, the Sarasota Bay Outstanding Florida Water, or the Little Manatee Outstanding Florida Water, and the inflowing watercourses within the Watershed Protection Overlay Districts. *A wetland buffer of at least thirty (30) feet shall be observed from the most landward extent of all post-development wetlands that are not contiguous with the above-named water bodies or within the Watershed Protection Overlay Districts . . . .*

Manatee County, Fla., Land Dev. Code § 706.7 (2021) (emphasis added).

HN2[↑] Prospective developers, such as the Landowners, may request approval to develop within the wetland or wetland buffers—and thereby impact the area—provided they satisfy the requirements of the Comprehensive Plan and LDC. *See* Manatee County, Fla., Land Dev. Code § 706.4.A. Developers must submit an application accompanied by a wetland impact study, **[*5]** which "shall include an impact avoidance and minimization analysis that demonstrates the necessity of the impact." *Id.* at § 706.4.A-B. The application and request to develop within the wetland or wetland buffer must be "made in conjunction with, or as a component of, the related development approval for the entire site, such that it can be reviewed and approved by the approving authority (Department Director, Hearing Officer or Board) reviewing the proposed development." *Id.* at § 706.4.A.

B. Factual Background and Procedural History

Between 2016 and 2018, the Landowners each applied for and received a "Final Site Plan/Preliminary Plat" approval from the County to develop residential subdivisions on land that contains noncontiguous wetlands. To receive the approval, the Landowners had to comply with the provisions of the County's Comprehensive Plan and the LDC that required them to set aside thirty feet of upland property located adjacent to any wetlands. This wetland buffer area was not to be developed on or otherwise disturbed.

The Landowners did not request approval to impact the wetlands or wetland buffer area, thus foregoing the opportunity for the approving authority to review what, **[*6]** if any, impact its development would have

upon the wetlands situated on the respective properties. Instead, the Landowners submitted a request to the County to reduce the thirty-foot buffer to a five-foot buffer after learning, during a separate permitting process, it received approval from the Southwest Florida Water Management District to mitigate secondary wetland impacts with either (a) a five-foot planted wetland buffer or (b) no wetland buffer with the installation of protective fencing. Because the LDC prohibits the County from granting a variance that is inconsistent with the Comprehensive Plan, the County denied the request.

Consequently, the Landowners chose to develop their properties as residential subdivisions in accordance with the County's subdivision development process and the wetland buffer regulations in Policy 3.3.1.5 of the Comprehensive Plan. As such, 4.90 acres of ***TR Investor***'s 100-acre property, 2.69 acres of North River Land's fifty-five-acre property, and 4.61 acres of Cargor Partner's 932-acre property were declared to be wetland buffers. The County did not require a conservation easement over the wetland buffers but instead treated the buffer area as an open **[*7]** space/common area and required the area to be delineated as a separate tract on the proposed subdivision plat. Because section 336.4 of the LDC requires all "common area" in a proposed subdivision be dedicated by plat to the entity responsible for maintaining the community, the Landowners dedicated the common areas, including the wetland buffers, to their respective homeowners' associations.

Thereafter, the Landowners filed a two-count complaint against the County. In count one, they sought declaratory relief for an unconstitutional land exaction in violation of the *Fifth Amendment to the U.S. Constitution* and *article X, section (6)(a), of the Florida Constitution.* The Landowners sought a declaration that the Comprehensive Plan, Policy 3.3.1.5, as applied to them through section 706.7 of the LDC, absent any type of individualized analysis of whether the thirty-foot wetland buffers were necessary and proportional to developmental impact, imposed an unconstitutional land exaction under the *Fifth Amendment to the U.S. Constitution* and *article X, section (6)(a), of the Florida Constitution.* The Landowners asserted that the required wetland buffers constituted an unlawful exaction because the County required them to set aside wetland buffers that they could not develop in any way, that they could not divest themselves of the interest in, and that they were required to convey as a common area to the communities' associations. **[*8]**

Count two, brought solely by ***TR Investor***, alleged an inverse condemnation claim pursuant to *article X, section 6(a), of the Florida Constitution*, and sought monetary compensation for the per se taking of ***TR Investor***'s wetland buffer zones. Specifically, ***TR Investor*** asserted that the required thirty-foot wetland buffer dedication to the community association via plat and declaration constituted a de facto taking of a conservation easement interest without the payment of full compensation from the County.

The County moved to dismiss the complaint for failure to state a cause of action as to both counts. The trial court granted the motion without prejudice to the Landowners filing an amended complaint within twenty days. The trial court found that the Landowners failed to allege in count one that the County effected a taking for a public or private purpose because the County's wetland buffer requirements operated as a development restriction rather than a per se physical taking where it did not require a dedication of land to the County. The trial court also found that ***TR Investor*** failed to allege in count two that it had been subject to a regulatory taking that deprived it of all economically beneficial or productive uses of the entire **[*9]** property.

In December 2020, ***TR Investor*** alone filed its first amended complaint. It did not amend count one but instead realleged count one by referencing the allegations in the original complaint "to preserve for purposes of appeal the issue of dismissal of count one of the original complaint." ***TR Investor*** amended count two to allege that the County's required dedication of the wetland buffer common area to the homeowners' association amounted to a physical invasion or occupation of ***TR Investor***'s property by "another private third-party" for the "use and benefit of another private third-party," namely the subdivision homeowners' association.

The County responded by filing a motion to dismiss the first amended complaint. The trial court again dismissed the complaint. As to count one, the trial court found no newly alleged facts or legal authority to support the allegations, and it incorporated its previous ruling dismissing count one. As to count two, the trial court found that ***TR Investor*** did not and could not allege that the County's wetland buffer regulations required any forced dedication of its property or interest therein to the County or to the public such that it constituted **[*10]** a permanent physical invasion of its property. The trial court found the dedication of the wetland buffer was solely to and for the benefit of the homeowners

represented by the homeowners' association, which ***TR Investor*** itself created, and was land from which all homeowners had the right to exclude others.

Thereafter, the trial court granted the County's motion to dismiss the complaint and entered its final order dismissing the case with prejudice as to all the Landowners. This appeal ensued.

II. ANALYSIS

HN3[↑] We review a trial court's order granting a motion to dismiss de novo. *All Ins. Restoration Servs., Inc. v. Heritage Prop. & Cas. Ins. Co., 338 So. 3d 448, 449 (Fla. 2d DCA 2022)*. In determining whether to dismiss a complaint for failure to state a cause of action, "allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." *Nat'l Collegiate Student Loan Tr. 2006-4 v. Meyer, 265 So. 3d 715, 719 (Fla. 2d DCA 2019)* (emphasis omitted) (quoting *Swope Rodante, P.A. v. Harmon, 85 So. 3d 508, 509 (Fla. 2d DCA 2012)*). "A motion to dismiss tests the legal sufficiency of the complaint and does not determine factual issues." *Id.* (quoting *Haskel Realty Grp., Inc. v. KB Tyrone, LLC, 253 So. 3d 84, 85 (Fla. 2d DCA 2018)*). "To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Id.* (quoting *Havens v. Coast Fla., P.A., 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013)*).

Hence, we must decide whether the Landowners sufficiently alleged in count one that the County's **[*11]** wetland buffer regulations operate as a taking in the form of an illegal exaction and whether ***TR Investor*** sufficiently alleged in count two a taking by a physical invasion or occupation by the County such that it divested ***TR Investor*** of ownership of the wetland buffers.

A. Regulatory Takings Jurisprudence

HN4[↑] The *Fifth Amendment to the United States Constitution* prohibits the taking of private property for public use without just compensation. This constitutional guarantee applies to the federal government directly and to the states through the *Fourteenth Amendment*. *Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980)*. The takings clause, also sometimes referred to as the just compensation clause, is also repeated in the Florida Constitution. *Art. X, § 6(a), Fla. Const.* ("No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.").

HN5[↑] A taking may result from (1) "a direct government appropriation . . . of private property"[1] or (2) "government regulation of private property." *Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)*; *see also Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021)*. Not all government regulations amount to a taking, however. *See Cedar Point Nursery, 141 S. Ct. at 2072* ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (quoting *Pa. Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*)). In regulatory takings **[*12]** cases, "the analysis must be driven 'by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." '" *Murr v. Wisconsin, 137 S. Ct. 1933, 1943, 198 L. Ed. 2d 497 (2017)* (quoting *Palazzolo v. Rhode Island, 533 U.S. 606, 617-18, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)*).

HN6[↑] The United States Supreme Court has recognized four main categories of regulatory takings challenges.[2] *Lingle, 544 U.S. at 548*. Two categories of

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[1] Some examples include "when [the government] uses its power of eminent domain to formally condemn property," "when [it] physically takes possession of property without acquiring title to it," or "when it occupies property—say, by recurring flooding as a result of building a dam." *Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021)*.

[2] While Florida's Takings Clause jurisprudence recognizes physical and regulatory takings, much of the regulatory takings jurisprudence seems to indicate only one type of regulatory taking—regulations or conditions that "completely deprive[] [a landowner] of all economically beneficial use of their land." ***Fla. Fish & Wildlife Conservation Comm'n v. Daws, 256 So. 3d 907, 914 (Fla. 1st DCA 2018)***; *see also* ***Ocean Palm Golf Club P'ship v. City of Flagler Beach, 139 So. 3d 463, 471 (Fla. 5th DCA 2014)*** ("To determine whether a government regulation of land use amounts to a taking of property, the court must determine whether the government action deprived the owner of all economically beneficial use of the land."). However, the deprivation of all economically

regulatory action are generally deemed to be per se takings for *Fifth Amendment* purposes. The first occurs where a government regulation "requires an owner to suffer a permanent physical invasion of her property." *Id. at 538* (citing *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)*). In such "physical" taking cases, the government must provide just compensation no matter how minor the permanent physical invasion. *Id.* The second type of regulatory taking occurs where a government regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Id.* (second alteration in original) (emphasis omitted) (quoting *Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)*). In such "total regulatory taking" cases, with few exceptions, the government must provide just compensation. *Id.* ("We held in *Lucas* that the government must pay just compensation for such 'total regulatory takings,' except to the extent that 'background principles **[*13]** of nuisance and property law' independently restrict the owner's intended use of the property." (quoting *Lucas, 505 U.S. at 1026, 1032*)). Outside these two relatively narrow categories, the third category of regulatory takings involves regulations that fall short of effecting a per se taking and are analyzed appropriately under the ad hoc factual inquiry outlined in *Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)*. *Lingle, 544 U.S. at 538*; *see also Palazzolo, 533 U.S. at 617* ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." (citing *Penn Cent., 438 U.S. at 124*)). The fourth category of regulatory takings involves land use exactions that are analyzed under *Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)*, and *Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)*. The two regulatory taking theories at issue in our case are land use exactions and *Loretto* physical takings.

B. Land use Exactions as a Regulatory Taking

The Landowners first argue that the County's wetland buffers requirement amounted to an illegal exaction under the fourth category of regulatory takings. We disagree.

HN7[] "In the **[*14]** most general sense, an 'exaction' is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted." *St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1223 (Fla. 2011)* (quoting *St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 9 (Fla. 5th DCA 2009)*), *rev'd on other grounds*, *570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)*; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)* (describing exactions as "land-use decisions conditioning approval of development on the dedication of property to public use"). Such exactions must satisfy the doctrine of unconstitutional conditions, under which

> the government may not require a person to give up a constitutional right—here 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.

Dolan, 512 U.S. at 385.

HN8[] Due to the unique nature of the land use permitting process, the U.S. Supreme Court devised a "special application of the 'doctrine of unconstitutional conditions.'" *Lingle, 544 U.S. at 547*. In *Nollan* and *Dolan*, the Court established the "essential nexus" and "rough proportionality" tests to define the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public. *Nollan, 483 U.S. at 837*; *Dolan, 512 U.S. at 391*. Specifically, courts "must first determine **[*15]** whether [an] 'essential nexus' exists between [a] 'legitimate state interest' and the permit condition exacted by the city." *Dolan, 512 U.S. at 386* (citing *Nollan, 483 U.S. at 837*). In other words, does the government have a legitimate purpose in demanding the

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beneficial use of an owner's land is only one of the four types of regulatory takings recognized by the U.S. Supreme Court in *Lingle*. Florida's conflicting explanation of regulatory takings law appears to trace back to a 1990 Florida Supreme Court case, *Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622, 625 (Fla. 1990)*. Published nearly fifteen years before the U.S. Supreme Court explicitly delineated the four types of regulatory takings in *Lingle* and roughly three years before the Court decided *Dolan*, *Joint Ventures* only discussed direct government appropriations under the government's power of eminent domain and regulatory takings that deprive the landowner of all economically beneficial use of property. *Joint Ventures, 563 So. 2d 624-25*.

exaction? If the court finds that a nexus exists, it must then decide the required degree of connection between the exaction and the projected impact of the proposed development. *Id.* In other words, is the exaction demanded roughly proportional to the government's legitimate interests? *See* *id. at 391* ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the *Fifth Amendment*."). This test has come to be known variously as the "rough proportionality" test or the "*Nollan/Dolan* test."

Early Supreme Court land use exaction jurisprudence considered exactions to be "land-use decisions conditioning approval of development on the dedication of property to public use." *See* *City of Monterey, 526 U.S. at 702*; *see also* *Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)* ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property." (alteration in original) (quoting *E. Enters. v. Apfel, 524 U.S. 498, 554, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998)* (Breyer, J., dissenting))). For example, in *Nollan*, the California Coastal Commission, acting pursuant **[*16]** to the requirements of state law, required the Nollans to dedicate an easement to allow the public to cross over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home. *483 U.S. at 829*. Similarly, in *Dolan*, the City of Tigard conditioned Florence Dolan's permit to redevelop her storefront upon a requirement that she dedicate some of her land as a public greenspace and a pedestrian/bicycle path. *512 U.S. at 380*. However, nearly twenty years later, in *Koontz*, the U.S. Supreme Court extended land use exactions that are subject to the *Nollan/Dolan* test to include monetary exactions placed upon a landowner in exchange for a permit to develop his private property. *570 U.S. at 612*. There, the St. Johns River Water Management District conditioned Koontz's permit to develop a small portion of his property on paying to improve fifty acres of state-owned property miles away from his proposed development. *Id. at 602*.

Absent dedications of private land for public purposes and excessive monetary exactions, the Supreme Court has not applied *Nollan/Dolan* to similar land use restrictions imposed by the County for wetland buffers.

HN9[↑] Keeping in line with Supreme Court land use exactions jurisprudence, this court has **[*17]** applied the *Nollan/Dolan* analysis to land exactions in land use permitting cases wherein the government has conditioned permit approval upon the dedication of private property for a public purpose. For example, in *Highlands-in-The-Woods v. Polk County, 217 So. 3d 1175 (Fla. 2d DCA 2017)*, Polk County conditioned its approval of a development permit upon the condition that the developer install a reclaimed water system in the subdivision and dedicate the private land upon which it was situated to the County. This court determined that the dedication of private land in exchange for permit approval triggered the application of the *Nollan/Dolan* standard. *Id. at 1179*.

Thus, the requisite developer contribution generally consists of either a land dedication or a monetary payment, neither of which we have in the instant case. Here, the Landowners contend that by leveraging the discretionary benefit of development approval against its mandatory thirty-foot wetland buffer requirement, the County has been able to obtain property rights—the conservation, enhancement, and restoration of several acres of uplands—that it could not otherwise obtain without paying "full compensation" under *article X, section 6(a), of the Florida Constitution.* We disagree. Contrary to the Landowners' contention, the County never obtained any property **[*18]** rights in return for the permit approval; it never received an easement, *cf.* *Nollan, 483 U.S. at 829*, a land dedication, *cf.* *Dolan, 512 U.S. at 380*, or any money payment, *cf.* *Koontz, 570 U.S. at 611*.

Instead, the Landowners retained complete ownership of the wetland buffer area. They retained the right to use the buffers for all authorized uses, and importantly, they retained the right to exclude others from the property. The Landowners later conveyed the buffers to the communities' homeowners' associations pursuant to section 336.4 of the LDC. However, despite section 336.4's requirement that *all* common spaces in a proposed subdivision[3] be dedicated by plat to the entity responsible for maintaining the community, the Landowners only challenge the land use regulations regarding the wetland buffer area. But their suggestion

[3] The common areas are collectively owned by the lot owners through the homeowners' association and are solely for the private, nonpublic use and benefit of the lot owners in the subdivision. *See* *§ 720.304(1), Fla. Stat.* (2020) ("All common areas and recreational facilities serving any homeowners' association shall be available to parcel owners in the homeowners' association served thereby and their invited guests for the use intended for such common areas and recreational facilities.").

that the County's dedication requirement is intended to create a de facto conservation easement in favor of the County is belied by the fact that *all common areas*—wetland buffers, perimeter buffers, retention ponds, drainage facilities, and amenities—must be dedicated to a homeowners' association.

The Landowners also claim that the required wetland buffers constituted an unlawful exaction because they could not develop the buffers in any way. But such argument ignores **[*19]** the procedures the County has in place to request approval to do so. ***HN10***[⬆] To develop within the wetland buffers, prospective developers, such as the Landowners, must submit an application accompanied by a wetland impact study, which "shall include an impact avoidance and minimization analysis that demonstrates the necessity of the impact." Manatee County, Fla., Land Dev. Code § 706.4.A-B. The application and request to develop within the wetland buffer must be "made in conjunction with, or as a component of, the related development approval for the entire site, such that it can be reviewed and approved by the approving authority (Department Director, Hearing Officer or Board) reviewing the proposed development." *Id.* at § 706.4.A. Here, however, the Landowners did not submit applications or wetland impact studies to the County in conjunction with the development approval proposal in order to request a reduction of the buffer areas. Instead, they claim they submitted a request to the County Building and Development Services Department to allow a reduction from a thirty-foot buffer to a five-foot buffer based on approval it received from the Southwest Florida Water Management District, a separate agency with no authority under the LDC to **[*20]** approve such reductions.

Finally, we note that the Landowners also contend that the County is doing indirectly what this court did not allow in *Manatee County v. Mandarin Development, Inc., 301 So. 3d 372, 373 (Fla. 2d DCA 2020)*. However, that case is factually distinguishable because the regulation at issue there, section 706.8.B of Manatee County's LDC, "require[d] developers to grant to [Manatee] County a conservation easement over existing 'wetlands and associated wetland buffers' that developers [did] not impact as part of their development." *Mandarin Development, Inc. v. Manatee County*, No. 2015-CA-2563, 2017 WL 11542439, at *1 (Fla. Cir. Ct. Jan. 30, 2017). No such easement is required by the regulation at issue in the instant case. Furthermore, this court's affirmance of the taking determination in that case was without comment. As such, that case offers no legal analysis to support the Landowners' arguments in the instant case.[4]

We therefore conclude that the County's wetland buffers do not amount to an illegal exaction. The County did not require any dedication of land or monetary payment as a condition of approval of the Landowners' development permit, and nothing in the Landowners' amended complaint or the documents incorporated therein suggests otherwise. Accordingly, the trial court correctly determined that the Landowners failed to state a cause of action in count one.

C. *Loretto* Physical Takings [*21]

TR Investor also argues on appeal that the County's wetland buffers amounted to a per se *Loretto* physical taking under the first category of regulatory takings, *see Lingle, 544 U.S. at 538*, because it had been divested of all its rights in that portion of its property when it was required to dedicate the buffers to the homeowners' association as a common area. We disagree.

In *Loretto, 458 U.S. at 423-24*, a landlord challenged the right of a cable television company to place cable components on the roof of a New York City apartment building she owned. Loretto alleged that the company's installation constituted a taking without just compensation. The Supreme Court ruled that the cable installation, which involved plates, boxes, wires, bolts, and screws attached to Loretto's building's roof and exterior wall, constituted a permanent physical invasion for which compensation must be paid. *Id. at 438*. ***HN11***[⬆] The Court explained that "[t]o the extent that the government permanently occupies physical property, it effectively destroys [the rights 'to possess, use and dispose' of property]." *Id. at 435* (quoting *United States v. Gen. Motors Corp., 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945)*). "First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* "Second, **[*22]** the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id. at 436*. Third,

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[4] Although section 706.08.B of the County's LDC is inapplicable to our analysis, we note the County recently amended that section to require an individualized *Nollan/Dolan* analysis of rough proportionality when it subjects permit approval upon the dedication of a conservation easement.

although "the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.*

HN12[⬆] Importantly, regulations that "prohibit[the] development on certain portions of the tract do not in [themselves] effect an unconstitutional taking." *State, Dep't of Env't Regul. v. Schindler, 604 So. 2d 565, 568 (Fla. 2d DCA 1992)* (emphasis omitted) (quoting *Fox v. Treasure Coast Reg'l Plan. Council, 442 So. 2d 221, 225 (Fla. 1st DCA 1983)*). Rather, "[t]he focus is on the nature and extent of the interference with the landowner's rights in the parcel *as a whole* in determining whether a taking of private property has occurred." *Id.* This can be seen in *Florida Game & Fresh Water Fish Commission v. Flotilla, Inc., 636 So. 2d 761 (Fla. 2d DCA 1994)*, where this court rejected a development company's claim that it suffered a physical taking when the Florida Game and Fresh Water Fish Commission imposed buffer zones around bald eagle nests on its property, thereby preventing the development of forty-eight acres of the landowner's 173-acre property. This court **[*23]** concluded that there was no physical taking because "[a]s a factual matter, Flotilla lost neither the right to possess nor convey the affected areas, and further retained the right to use the property in any way that would not disturb the eagles' natural habitat." *Id. at 764*.

In the instant case, ***TR Investor*** asserts that the County committed a per se taking due to a grant of physical occupation by divesting ***TR Investor*** of ownership of the wetland buffers and forcing their conveyance, as common property, to the Twin Rivers homeowners' association. It alleges that the de facto easement gives strangers the right to pass to and fro over ***TR Investor***'s property and does not leave it with the ability to exclude those third parties. It also claims that the buffer regulations leave it without any practical use or value in its land. We disagree.

There was no physical invasion here like there was in *Loretto, 458 U.S. at 439*, where cable components physically occupied a portion of Loretto's property. ***TR Investor***'s argument that the physical invasion occurs in allowing strangers to pass to and fro over its property is unavailing. Neither the County's regulations requiring wetland buffers nor its regulations requiring common areas **[*24]** be dedicated to an entity responsible for maintaining the community require that strangers be allowed to pass over a developer's property. Any such allowance would be of ***TR Investor***'s own doing pursuant to its Declaration, which permits use of common areas, such as the wetland buffers, by owners who may "delegate [their] right of use of the Common Property to the members of [their] family, tenants or social guests, subject to th[e] Declaration."[5] Furthermore, use of the common areas is still available to owners such that the buffer regulations did not leave ***TR Investor*** without any practical use or value in its land. Thus, it is clear that ***TR Investor*** retained complete ownership of the wetland buffers and all of its property rights, including the right to exclude others.

In the order dismissing the original complaint, the trial court hinted that the Landowners were attempting to allege a regulatory taking of a small portion of its property that could potentially provide relief via an economic benefit/diminution of value analysis under *Penn Central, 438 U.S. at 124-25*.[6] However, the Landowners failed to file such a cause of action, and the trial court correctly dismissed ***TR Investor***'s amended complaint because ***TR Investor*** **[*25]** failed to state a cause of action in count two that the County's wetland buffer regulations operated as a taking in the form of a permanent physical occupation by the government, its agents, or the public at large.

III. CONCLUSION

Accordingly, the Landowners' complaint failed to state a cause of action that the County's wetland buffer regulations operated as a taking in the form of an exaction (count one) or a permanent physical occupation by the government, its agents, or the public

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[5] This language clearly does not extend to the public at large. Any expansion or contraction of this provision could certainly be a subject for future association action, just as the association retains the right to "dedicate or transfer all or any part of the Common Property to any public agency, district or authority." Whether the association does so in the future, however, would be a private and voluntary decision, unrelated to the "required acquiescence" necessary for the Developer to state a facially sufficient per se takings claim. *See Yee v. City of Escondido, 503 U.S. 519, 527, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)* (quoting *FCC v. Fla. Power Corp., 480 U.S. 245, 252, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987)*).

[6] We do not address the viability of a cause of action for a regulatory taking for which the *Penn Central* analysis would apply.

at large (count two). Because the Landowners did not attempt to amend count one after the trial court dismissed the original complaint without prejudice and because the complaint is clearly not amendable with respect to count two, we affirm the trial court's final order dismissing the case with prejudice. *See Butler Univ. v. Bahssin, 892 So. 2d 1087, 1089 (Fla. 2d DCA 2004)* ("Leave to amend may be denied when a party has abused the privilege to amend or when 'it conclusively appears there is no possible way to amend the complaint to state a cause of action.'" (quoting *Fla. Nat'l Org. for Women, Inc. v. State, 832 So. 2d 911, 915 (Fla. 1st DCA 2002)*)).

Affirmed.

VILLANTI and BLACK, JJ., Concur.

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