

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MURPHY AUTO GROUP, INC.,)
)
 Appellant,)
)
 v.)
)
 FLORIDA DEPARTMENT OF)
 TRANSPORTATION,)
)
 Appellee.)
 _____)

Case No. 2D19-1236

Opinion filed November 20, 2020.

Appeal from the Circuit Court for Polk
County; Gerald P. Hill, II, and
Mark F. Carpanini, Judges.

David Smolker, R. Clay Mathews and Jane
C. Graham of Smolker, Bartlett, Loeb,
Hinds & Thompson, Tampa, for Appellant.

Mark Miller of Pacific Legal Foundation,
Palm Beach Gardens; Christina M. Martin
of Pacific Legal Foundation, Palm Beach
Gardens (substituted as counsel of
record); and Daniel T. Woislaw of Pacific
Legal Foundation, Arlington, Virginia,
Amicus Curiae in support of Appellant.

Marc Peoples, Assistant General Counsel
of Department of Transportation, for
Appellee.

SILBERMAN, Judge.

In this inverse condemnation action, Murphy Auto Group, Inc., seeks review of a final summary judgment in favor of the Florida Department of Transportation (FDOT). Murphy's claims arose from conditions FDOT placed on the issuance of a drainage connection permit sought by Murphy as part of a project to connect Murphy's commercial property to U.S. Highway 27. Murphy asserted that certain drainage improvements exacted by FDOT constituted a taking rather than a legitimate exercise of FDOT's regulatory power because the required improvements were not roughly proportional to the project's drainage impacts. FDOT contended, among other things, that it was exercising its proprietary rights as owner of the roadway rather than its police powers. The trial court agreed with FDOT and determined that any claim for damages was therefore barred by sovereign immunity. We reverse and remand for further proceedings.

This case centers around Murphy's development of commercially zoned property to be anchored by a Toyota dealership in Polk County. Vehicular access to and from the property is via U.S. 27, which is owned and managed by FDOT. In the course of development, Murphy sought a driveway connection permit to construct acceleration/deceleration turn lanes within the existing U.S. 27 right-of-way to provide access to and from the dealership. To complete the lane construction, Murphy proposed to fill in an existing drainage ditch owned and operated by FDOT that spanned the length of Murphy's property.

Murphy was also required to obtain a drainage connection permit due to the increase in impervious asphalt in the right-of-way. FDOT initially proposed that

Murphy dedicate twelve feet along its property's frontage to reestablish the drainage ditch. Murphy declined to dedicate the property and countered with a proposal to use the existing drainage collection system and grant FDOT a drainage easement around an existing retention pond for any necessary expansion. FDOT instead required that Murphy, at its sole expense, reconstruct the drainage collection system as a condition for approval of the drainage connection permit. Murphy dedicated the drainage easement, expanded the pond, constructed the turn lanes, and reconstructed the drainage collection system. The reconstruction cost Murphy over \$650,000.

Murphy filed an inverse condemnation action asserting in claim one that the drainage improvements exacted by FDOT constituted a taking because they were not roughly proportional to the project's drainage impacts.¹ This claim centered around the application of the unconstitutional conditions doctrine set forth in Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987), and Dolan v. City of Tigard, 512 U.S. 374, 384 (1994). FDOT defended in part by asserting that Nollan and Dolan did not apply because FDOT was exercising its proprietary, as opposed to regulatory, power and that any claim for damages was therefore barred by sovereign immunity. The parties filed cross-motions for summary judgment, and the trial court entered an order granting FDOT's motion and denying Murphy's motion. The court then entered a final summary judgment that incorporated this order.

¹Murphy proceeded on an amended complaint that was again amended at the summary judgment hearing to revert its allegations in count one to those in the original complaint. The amended complaint contained two additional causes of action against FDOT. While the trial court also entered judgment in favor of FDOT on counts two and three in the final summary judgment, Murphy does not challenge those rulings on appeal.

Our review of an order granting summary judgment based on a question of law is de novo. White v. Advanced Neuromodulation Sys., Inc., 51 So. 3d 631, 634 (Fla. 2d DCA 2011) (citing Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003)). Under the Takings Clauses in both the United States Constitution and the Florida Constitution, governmental entities may not take private land for a public purpose without paying just compensation. Amend. V, U.S. Const.; Art. X, § 6, Fla. Const. "One of the principal purposes of the Takings Clause is 'to bar 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.' " Dolan, 512 U.S. at 384 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

In Nollan, the Supreme Court addressed the constitutionality of the government's requiring landowners to convey an easement over their beach-front property as a condition for the approval of a development permit. 483 U.S. at 827. The Court recognized that the government had the power to deny the development permit and concluded that power "must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." Id. at 836. "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the [regulatory] power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." Id. at 836-37. However, to be constitutional that alternative must bear an "essential nexus" to the justification for the prohibition. Id. at 837.

In Dolan, the Supreme Court addressed the constitutionality of a condition for approval of a development permit requiring a landowner to dedicate portions of her

property for improvement of a government-owned storm drainage system and as a pedestrian/bicycle pathway. 512 U.S. at 380. In so doing, the Court addressed the question it left open in Nollan of the requisite extent of the nexus between the government-imposed exactions and the asserted impacts of the development project. Id. at 377. The Court explained that the government's actions invoked the unconstitutional conditions doctrine, under which our "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." Id. at 385.

In applying the unconstitutional conditions doctrine to land-use exactions, the Dolan court said it must first decide whether there was an "essential nexus" between the permit condition and the legitimate state interest behind it. Id. at 386. If such a nexus exists, the court must then apply the "rough proportionality" test to make an individualized determination of whether the exactions are roughly proportional to the projected impacts of the proposed development. Id. at 386, 391.

In this case, the trial court concluded that Nollan and Dolan did not apply because FDOT did not condition the drainage connection permit on the donation of a real property interest by Murphy. The court found that because Murphy was seeking to develop FDOT's land "to convey and store the additional stormwater runoff," FDOT was exercising its proprietary, as opposed to its regulatory, power in conditioning the use of its drainage collection system. Thus, the court determined that any claim for damages against FDOT was barred by sovereign immunity. However, the unconstitutional

conditions doctrine clearly applies under Koontz v. St. Johns River Water Management District, 570 U.S. 595, 605-06 (2013).

In Koontz, the landowner sought permits from the government to develop 3.7 out of 14.9 acres of the owner's wetlands. Id. at 599, 601. The owner proposed to raise the elevation of the 3.7 acres on the northern edge of his property, grade land on the southern edge of the site, and install a dry-bed pond to control stormwater runoff from a building and parking lot to be built. To mitigate any environmental damage to the wetlands, the owner offered to deed the government a conservation easement on eleven acres. Id. at 601.

The government did not agree to the proposal and proposed two different concessions. Id. First, the owner could limit development to one acre and deed the balance to the government as a conservation easement. In the alternative, he could proceed with the original plans if he agreed to hire contractors to make improvements to government-owned land several miles away. Id. at 602. Specifically, he could pay to have them fill in ditches on one parcel of land or replace culverts on another.

The Supreme Court concluded that the unconstitutional conditions doctrine as set forth in Nollan and Dolan should be applied to determine whether the land-use exactions constituted a taking. Id. at 604. The Court rejected the argument that the doctrine did not apply because the government did not demand a property interest as a condition for permitting. Id. at 611-12. The Court explained that the government's demand that the owner spend money to make improvements to government-owned land operated upon the owner's property interest "by directing the owner of a particular piece of property to make a monetary payment." Id. at 613.

The Kootnz court reasoned that because of the direct link between the owner's property and the monetary exaction, the case implicated the concern underlying the unconstitutional conditions doctrine: "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue." Id. at 614. A refusal to apply the doctrine would make it easy for the government to "evade the limitations of Nollan and Dolan" by simply providing an owner the choice of dedicating an easement or paying an amount of money equivalent to the value of the easement. Id. at 612.

In this case, as in Koontz, the government first proposed that the landowner dedicate a portion of its property in order to obtain a permit. When the landowner refused, the government demanded that the landowner spend money to improve government-owned land as a condition of permit approval in the course of the owner's development of its own land. FDOT's demand that Murphy spend money to reconstruct FDOT's drainage collection system operated upon Murphy's interest in its commercial property "by directing the owner of a particular piece of property to make a monetary payment." Id. at 613. This is a land use exaction because it burdened Murphy's right to develop its commercial property by providing access to and from the dealership.

FDOT argues that its exaction of improvements to its drainage collection system merely involved a proprietary determination of whether to provide access to its roadway facilities. We cannot agree. FDOT's position involved permitting decisions made in connection with its regulation of a landowner's right of access to the State

Highway System. See § 335.181, Fla. Stat. (2012). Thus, the trial court was required to apply the unconstitutional conditions doctrine to determine whether there was an essential nexus and rough proportionality between the monetary exactions and the effects of Murphy's development project.²

We decline to address FDOT's tipsy coachman argument for affirmance on the basis that the drainage improvements exacted by FDOT satisfy the unconstitutional conditions doctrine. Resolution of this issue requires a factual determination regarding whether the drainage improvements exacted by FDOT were roughly proportional to the project's drainage impacts. Appellate courts "cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." Salazar v. Hometeam Pest Def., Inc., 230 So. 3d 619, 622 (Fla. 2d DCA 2017) (quoting Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009)).

In conclusion, the trial court erred in granting FDOT's motion for summary judgment on count one on the basis that FDOT was exercising its proprietary, as opposed to regulatory, power and that any claim for damages was therefore barred by sovereign immunity. We reverse the portion of the final summary judgment ruling in favor of FDOT on count one and remand for further proceedings.

Reversed and remanded.

²To the extent FDOT suggests that the improvements it required Murphy to make were necessitated by Murphy's rejection of FDOT's initial proposal that Murphy dedicate frontage to reestablish the drainage ditch, this does not alter our conclusion that the rough proportionality test must be met. We also note that the record does not reflect whether the initial proposal would have satisfied that test.

VILLANTI and SLEET, JJ., Concur.