UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

EDWARD GOODWIN,
DELANIE GOODWIN,

Plaintiffs,

v. **Case No. 3:16-cv-364/MCR/CJK**

WALTON COUNTY FLORIDA,

Defendant.
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ORDER

Plaintiffs Edward and Delanie Goodwin brought suit under 42 U.S.C. § 1983, raising First and Fifth Amendment constitutional challenges to two County ordinances that impact activities on their privately owned beachfront property in Walton County, Florida. Now pending is the Goodwins' Motion for Summary Judgment, ECF No. 68; Motion to Supplement the Record, ECF No. 89; and Motion to Exclude James J. Miller as an Expert in Customary Use of Walton County Beaches, ECF No. 64.

Initially, the Court notes that Count I, a First Amendment claim challenging a Walton County ordinance that imposed a sign ban on the beach, is moot. The Court takes judicial notice that on November 22, 2017, the undersigned ruled in a similar case challenging the same ordinance that Walton County's beach sign ban

violated the First Amendment, and the sign ban was accordingly stricken. *See Alford v. Walton County, Florida*, Case No. 3:16cv362-MCR-CJK, ECF No. 85 (N.D. Fla. Nov. 22, 2017) (striking Walton Cty. Code, §§ 22-54(g), 22-55, Ord. No. 2016-16 (June 14, 2016)). Thus, Count I and the Goodwins' motion for summary judgment as to Count I are moot. As a result, this Order only addresses Count II, a facial Fifth Amendment takings claim based on Walton County's Customary Use Ordinance. *See* Walton Cty. Code, Ch. 23, Ord. No. 2017-10 (enacted Oct. 25, 2016, amended Mar. 28, 2017, effective April 1, 2017). The Court finds that this claim is not ripe and therefore must be dismissed for lack of subject matter jurisdiction.[1]

I. Background[2]

In 1971, the Goodwins purchased beachfront property along the Gulf of Mexico in Walton County, Florida ("County"), where they built a home in 1978 that they currently occupy as their primary residence.[3] Prior to making it their permanent

[1] Although the Court rejected the County's ripeness challenge at the motion to dismiss stage, the Court finds that the issue must be revisited on summary judgment because of how the Goodwins have argued and presented their claim and due to the peculiarities of Florida law on custom. It is now apparent that the Goodwins are pursuing an as-applied challenge, as discussed *infra*.

[2] For the limited purposes of this summary judgment proceeding, the Court views "the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party," which in this case is the plaintiff. *Martin v. Brevard Cty. Pub. Sch.*, 543 F.3d 1261, 1265 (11th Cir. 2008) (internal marks omitted). The Court is mindful that "what is considered to be the facts at the summary judgment stage may not turn out to be the actual facts if the case goes to trial." *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996).

[3] The Goodwins received approval from then Florida Governor Reubin Askew to build their home seaward of a 50-foot coastal setback line, *see* ECF No. 68-3, at 69 (Delaine Goodwin Depo.).

residence in 1995, the Goodwins used the property as a rental house only, visiting only four weeks out of a year. The property is the western-most lot in the Santa Rosa Dunes subdivision, which is located approximately 5 miles west of Grayton Beach, Florida, in the area generally known as Dune Allen. ECF. No. 68-7 at 154. The subdivision consists of nine beachfront lots bordered on the east by Lot 37, a beachfront parcel that was never transferred out of government ownership and is now a public beach access, and on the west by a private condominium complex. To the north of the property was a 33-foot-wide easement allowing for a street and utilities, which was used to access the beach from 1955 to 1977. The street easement was abandoned by the County in 1977 at the request of the Goodwins. There is no recorded public beach access or easement on the Goodwins' property. There is no dispute that the legal southern, seaward (Gulf side) boundary of their property is the mean high water line, and thus their lot includes an area of dry sandy beach between the mean high water line and the vegetation line. *See* Fla. Stat. § 177.28(1).

The record reflects that on October 19, 2016, the County held a Customary Use Workshop, and Dr. James Miller, a senior level consultant in archaeology and historic preservation and a former State of Florida Archaeologist, offered evidence of the public's customary use rights on Walton County beaches. On October 25, 2016, the County held a public hearing and ultimately enacted the Customary Use Ordinance, formally titled, "Protecting the Public's Long-Standing Customary Use

of the Dry Sand Areas of the Beaches," Ord. No. 2016-23 (Oct. 25, 2016), with an effective date of April 1, 2017. By this Ordinance, the County codified Florida's common law doctrine of custom, recognizing public recreational use rights on all dry sand beach property along the Gulf of Mexico in Walton County, and regulating the public's use of that sand. The Ordinance declares, "[t]he public's long-standing customary use of the dry sand areas of all of the beaches in the County for recreational purposes is hereby recognized and protected."[4] Walton Cty. Code, § 23-2(a), Ord. No. 2017-10. In the "purpose" section of the Ordinance, the County observed that "the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 73 (Fla. 1974), expressly recognized the doctrine of customary use in the state of Florida."[5] Walton Cty. Ord. 2017-10, ECF No. 68-28. The Ordinance states that, after considering "the research and analysis of Dr. James Miller, as well as the testimony of citizens of the County," the County found that "the doctrine of customary use has applied to all of the beaches in Walton County since before 1970," and the public at large has used "the dry sand areas of all beaches in the County for recreational purposes since time immemorial."[6] *Id.*

[4] The Ordinance defines the dry sand area of the beach as "the zone of unconsolidated material that extends landward from the mean high water line to the place where there is marked change in material or physiographic form, or to the line of permanent vegetation, usually the effective limit of storm waves, whichever is more seaward." Walton Cty. Code, § 23-3(b).

[5] The *Tona-Rama* decision will be discussed *infra*.

[6] At the public workshop on customary use, Dr. James J. Miller presented a Power Point presentation entitled, "The Historical Basis for Customary Use in Walton County, Florida. ECF

The Customary Use Ordinance prohibits any "individual, group, or entity [from] impe[ding] or interfer[ing] with the right of the public at large, including the residents and visitors of the County, to utilize the dry sand areas of the beach that are owned by private entities for the uses as described in subsection (d)." *Id.* § 23-2(a). In subsection (d), the Ordinance provides that the public may, *inter alia*, walk, jog, sunbathe, with or without a beach umbrella, picnic, fish, build sand castles, and other similar traditional recreational activities on the dry sand area of the beach "owned by private entities." *Id.* at § 23-2(d). The Ordinance protects beachfront private property owners by limiting the authorized activities to recreational uses, and it also prohibits public recreation within a fifteen feet buffer zone "located seaward from the toe of the dune or from any permanent habitable structure owned by a private entity." *Id.* at § 23-2(c). This buffer zone, however, does not apply "to the Walton County Sheriff's Office, the Walton County Tourist Development Council,

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No. 83. During the presentation, Dr. Miller discussed his study of the history of public use of the beaches in Walton County in relation to the elements of the Florida's customary use doctrine. Relying on maps, computerized information, published articles and public records, as well as photographs and interviews, he constructed a chronological narrative of beach use in the county. His presentation detailed archaeological information beginning 5,000 years ago showing patterns of use and settlement locations, which reflected that for over 2,000 years, Native Americans settled in coastal locations in Northwest Florida. Dr. Miller also demonstrated the history of private ownership, dating back to the first United States Government Patent Deeds in the 1890s and conveyances shown in public records, as well as the continued patterns of public recreational use of the beaches noted in photographs from the area dating back to the 1890s and 63 published articles from 1906 through 1954, discussing visits by members of the public, how they used the beach, and the benefits of visiting the beach. His presentation showed pervasive public recreational use of the dry sand beach except for the last ten years when long-time residents stated they began to see use restrictions imposed by private owners in various spots.

the South Walton Fire District, and other emergency service providers." *Id.* The Customary Use Ordinance imposes a $500.00 fine for violations.

Prior to the Ordinance's effective date, the Goodwins filed this Fifth Amendment takings challenge and sought a preliminary injunction to preclude it from becoming effective on April 1, 2017. They assert that by allowing public recreational use and government access on all private dry sand property, the County has caused an uncompensated taking of their private property right to exclude others. The County, in turn, moved to dismiss the claim on ripeness grounds because the Goodwins had not pursued just compensation through available state court procedures. The Court denied both motions, finding that the *allegations* were sufficient to state a ripe facial physical takings claim[7] and that no irreparable harm existed to support preliminary injunctive relief because just compensation, although not requested, was available. *See Goodwin v. Walton Cty. Fla.*, 248 F. Supp. 3d 1257 (N.D. Fla. Mar. 31, 2017).

Following discovery, the Goodwins filed a motion for summary judgment, arguing that the mere enactment of the Customary Use Ordinance is a *per se* taking of their dry sand beach property. They argue both that the customary use doctrine

[7] Specifically, the Goodwins alleged that the Ordinance authorized a physical invasion of their private beach property, the mere enactment of which deprived them and all other private beachfront property owners in Walton County of the right to exclude the public from their private property.

is not part of a facial analysis and also that the County cannot establish that customary use applies to their property because they have not permitted public recreational use of their beach.

In support of summary judgment, the Goodwins presented evidence from Delanie Goodwin and a neighboring homeowner to show the Goodwins' efforts to maintain their dry sand beach as private. The record reflects that since the late 1970s when the Goodwins built their home, they have taken steps to protect the boundaries of their property and keep their dry sand property private. When neighbors located to the north constructed dune walkovers that partially encroached on the Goodwins' property, the Goodwins took them to court and had the walkovers removed, although the neighbors continued to cross the Goodwins' property. In the 1990s, the Goodwins began installing "private property" signs, posts, chains, and ropes because beachgoers began entering their home, removing patio furniture, and urinating under the house, to name a few incidences.[8] ECF No. 68-3 at 13. Despite installing the posts, chains, and ropes, Mrs. Goodwin testified that the public continued engaging in activities on their property, primarily "sunbathing, playing football, Frisbees,

[8] At one point later on, the Goodwins also built a "bird house" on the undeveloped portion of their property, which was a replica of their home, to deter beachgoers from using the undeveloped beach. Also, despite having installed a gate and a lock, the Goodwins had to remove the steps from the beach to their patio because beachgoers continued to walk up to their house.

typical beach activity."[9] ECF No. 68-3 at 14-15. Mrs. Goodwin also recalled County vehicles driving across the dry sandy area of the beach since the 1990s.[10]

William Hackmeyer has been a resident of the Santa Rosa Beach "Vizcaya" subdivision, near the Goodwins' home, since 2009 and is president of the Vizcaya Home Owners' Association. He detailed his efforts to exclude the public from his sandy beach property, and that of others in the subdivision. He and others had posted private property signs since 1996.

In May 2015, a Standard Operating Procedure ("SOP") memorandum issued by the Walton County Sheriff's Office stated that in order for sheriff deputies to respond to trespass calls on the beach, a property owner had to have the property surveyed, submit a copy of their deed and driver's license, and mark the boundaries of the property. ECF No. 68-23, at 4. In response, the Goodwins and others had their property surveyed to comply with the SOP. Mrs. Goodwin testified that an individual had been arrested on the beach for tearing down the Goodwins' signs and fences. ECF No. 68-3 at 68 (Goodwin Depo. at 67).

The County submitted affidavits of long-time residents Malcolm Patterson, Josephine Brown, Susan Burgess, Carrie Nelle Moye, Celeste Cobena, and Jim

[9] Private property signs have also been posted on the dry beach area of Vizcaya, a property approximately one mile east of the Goodwin property, since 1996. ECF No. 68-17 at 3.

[10] Also, after a hurricane in 2009, contractors drove across the sand of the beach, and the Goodwins' "no trespassing" signs were removed from their property in 2012 while they were away on vacation.

Bishop to show public use of the beach. Each of the County's witnesses attests that he or she has lived in or visited south Walton County or Santa Rosa Beach for many years, some dating back to the 40s, 50s, and 60s, and that they have always used the beach for recreational activities without interference from any property owners until the early 1970s.

The County also references the expert report and findings of Dr. Miller on which the County relied in adopting the ordinance. Dr. Miller detailed the history of how the beaches of Walton County have been used, dating back 5,000 years. His analysis purports to show a long-standing public recreational use of the dry sand areas of Walton County beaches, including Santa Rosa Beach, extending back to the late 1800s and early 1900s, well before the Goodwins purchased their beachfront property in 1970. The Goodwins challenge Dr. Miller's expert qualifications and argue that his testimony must be excluded as not helpful or relevant because it expresses an opinion on the ultimate legal issue of custom.

II. Discussion

The Goodwins argue that they are entitled to summary judgment on their facial takings claim pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

dispute as to any material fact and that the moving party is entitled to judgment as a matter of law). They argue that the Ordinance authorizes public use and government vehicle access on all private beachfront property in Walton County, with no provision for compensation, in violation of the Fifth Amendment Takings Clause. The County argues that the Goodwins have not proven a facial claim and that genuine issues of material fact exist regarding whether the Goodwins' property rights are burdened by a pre-existing state law customary use right. The Court finds that the issue of ripeness must be revisited because the arguments and evidence presented by the Goodwins, as well as Florida's customary use doctrine itself, all indicate that in fact, this is an as-applied challenge.[11]

A. Ripeness

Ripeness is a doctrine based on "considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n. 2 (2010) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n. 18 (1993)). Courts must consider both "the fitness of the issues for judicial decision" and "the hardship of withholding court consideration." *Id.* The type of challenge being

[11] The parties previously had the opportunity to fully brief the issue of ripeness. Additionally, the Court is not bound by how the litigants have designated their claims but instead examines the cause of action for what it actually is. *See Jacobs v. The Fla. Bar*, 50 F.3d 901, 905 n.17 (11th Cir. 1985).

pursued necessarily impacts the court's consideration of ripeness. For instance, a constitutional challenge to a statute or regulation may be asserted in one of two forms, either an "as-applied" challenge to the regulation's application to a plaintiff's particular circumstances or as a "facial challenge" to "the mere enactment" of the regulation. *See, e.g.*, *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992) (discussing an as-applied claim); *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 295 (1981) (stating that a facial challenge presents "no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land").

In land use disputes, an as-applied Fifth Amendment challenge is subject to the ripeness doctrine adopted in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).[12] Specifically, under *Williamson County*, an as-applied takings claim is not ripe until: (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue;" and (2) the plaintiff has sought "compensation through the procedures the State has provided

[12] On March 5, 2018, the Supreme Court granted certiorari in *Knick v. Township of Scott*, No. 17-647, to review the question of whether to reconsider *Williamson County's* exhaustion requirement, as suggested by Justices in prior cases, i.e., *Arrigoni Ent., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J. and Kennedy, J., dissenting from denial of cert.), and *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., and O'Connor, Kennedy, and Thomas, J.J., concurring in judgment).

for doing so." 473 U.S. at 186. Thus, under *Williamson County*, if an adequate state procedure exists "for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 194; *see also Agripost, LLC v. Miami-Dade Cty., Fla*., 525 F.3d 1049, 1052 (11th Cir. 2008) ("*Williamson County* boils down to the rule that state courts always have a first shot at adjudicating a takings dispute because a federal constitutional claim is not ripe until the state has denied the would-be plaintiff's compensation for a putative taking, including by unfavorable judgment in a state court proceeding.").

There is no question that Florida law authorizes a property owner to bring an inverse condemnation suit to obtain just compensation for an alleged taking of a plaintiff's property. *See Joint Ventures, Inc. v. Dep't of Transp*., 563 So.2d 622, 627 (Fla. 1990) ("Inverse condemnation affords the affected property owner an after-the-fact remedy, when there has already been a 'taking' by regulation . . . ."); *see also Pembroke Center, LLC v. State Dep't of Transp.*, 64 So. 3d 737, 740 (Fla. 4th DCA 2011); *Bakus v. Broward Cty*., 634 So. 2d 641, 642 (Fla 4th DCA 1993); *Schick v. Fla. Dep't of Agric*., 504 So. 2d 1318, 1319 (Fla. 1st DCA 1987). Under Eleventh Circuit precedent, an as-applied Fifth Amendment takings claim for just compensation must be dismissed without prejudice if there is an adequate state process for seeking compensation, because "[t]he question of ripeness goes to

whether the district court had subject matter jurisdiction." *Reahard v. Lee Cty.*, 30 F.3d 1412, 1415 (11th Cir. 1994); *see also Agripost v. Miami-Dade Cty.*, 195 F.3d 1225, 1234 (11th Cir.1999).

Notwithstanding, as recognized by the Eleventh Circuit, "*Williamson County's* finality principles do not apply to facial claims." *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013). A facial constitutional challenge "seeks to invalidate a statute or regulation itself." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). To the extent a facial *takings* claim is appropriate at all, *cf. Lingle*, 544 U.S. at 537 (finding no facial takings claim can be brought on grounds that a statute does not "substantially advance a public purpose"), the claim is a narrow one and will be successful only if the "mere enactment" of the law effects a taking under Fifth Amendment principles, *see Hodel*, 452 U.S. at 295-96 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated on other grounds by Lingle*, 544 U.S. at 537). Ordinarily, a facial claim involves a legal question that is "only minimally intertwined with the facts." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1274 (11th Cir. 2005) (First Amendment case). Importantly, in a facial challenge, "the plaintiff bears the burden of proving that the law could never be applied in a constitutional manner." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). The Supreme Court characterizes a facial challenge as "the

most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [ordinance] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1336 (11th Cir. 1999) (facial challenge unsuccessful where plaintiffs could not show the law could never be constitutionally applied). Thus, a plaintiff advancing a facial attack undoubtedly "shoulder[s] [a] heavy burden," *Salerno*, 481 U.S. at 745, to show that the law is "unconstitutional in all of its applications," *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (characterizing a facial challenge as "an uphill battle").

This preliminary issue of ripeness must be determined based on the context of Fifth Amendment principles in general and the arguments and record made in the case.

B. Fifth Amendment Principles

The Fifth Amendment Takings Clause provides that private property cannot "be taken for public use, without just compensation." U.S. Const. amend. V (applicable to the states through the Fourteenth Amendment). Importantly, the Takings Clause does not prohibit the taking of private property for a public use; rather, it requires the payment of just compensation to the property owner when a lawful taking occurs. *See Williamson Cty.*, 473 U.S. at 194. A challenge on grounds

that the statue does not advance a public purpose arises under the Due Process Clause, which is not at issue here; the Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005).[13] The focus of a takings claim is on whether a taking occurred and whether just compensation is required. Separate tests have developed for different contexts, each designed to determine if there has been a Fifth Amendment taking by focusing "directly upon the severity of the burden that government imposes upon private property rights." *Id.* at 539.

In the classic scenario, the government acquires private property for a public use by exercising its power of eminent domain. *See Id.* at 537 (citing cases). Alternatively, a government regulation can result in a taking if it "goes too far" and sufficiently interferes with the use of private property. *Murr v. Wisconsin,* 137 S. Ct. 1933, 1942 (2017) (quoting *Penn. Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)). To determine whether such a regulatory taking has occurred, courts engage in "ad hoc, factual inquiries," balancing factors such as the economic impact of the regulation and interference with investment-backed expectations against the

[13] In *Lingle,* the Court ruled that no facial takings claim can be brought on grounds that a statute was enacted without "substantially advancing" a proper public purpose. 544 U.S. at 543-45 (abrogating *Agins v. City of Tiburon,* 447 U.S. 255 (1980)). The Court explained in *Lingle* that if government action fails to meet a public use requirement or is so arbitrary as to violate due process, that is the end of the inquiry, and the Takings Clause would not come into play because "no amount of compensation can authorize such action." *Id.* at 543. There is no argument in this case that the County acted with no proper public purpose or in so arbitrary a manner as to violate due process.

character of the public purpose.[14] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978); *see also Mahon*, 260 U.S. at 415.

In addition, the Supreme Court has defined two narrow categories of *per se* takings that require compensation categorically, without engaging in the ad hoc balancing of the *Penn Central* factors. A *per se* taking[15] occurs when either (1) a government regulation deprives a property owner of "all economically beneficial use" of private property, or (2) the government imposes a "permanent physical invasion" on private property.[16] *Lingle*, 544 U.S. at 538; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) (an as-applied *per se* physical invasion taking); *Lucas*, 505 U.S. at 1019 (as-applied *per se* regulatory taking of all beneficial use).

[14] The question of what constitutes a taking for Fifth Amendment purposes can be a matter of "considerable complexity." *Gulf Power Co. v. United States*, 998 F. Supp. 1386, 1390 (N.D. Fla. 1998).

[15] Again, a *per se* taking challenge can be brought as either an as-applied or facial claim. For a discussion on the danger of conflating the concepts of a "facial" claim with a Fifth Amendment "*per se* regulatory claim," *see Granson v. City of Marathon*, 222 So. 3d 17 (Fla. 3d DCA 2016) (noting the Supreme Court, in an effort to clarify its takings tests, "has left in its wake a collection of incongruous and inadequate takings inquiries"). The Supreme Court's *Lucas* case, 505 U.S. at 1019, was an as-applied *per se* regulatory claim, and *Loretto*, 458 U.S. at 432, was an as-applied physical invasion case. A "facial" "*per se* physical taking" claim, as Goodwins contend they assert, while potentially existing, is elusive at best in the case law.

[16] A physical regulatory taking also can occur when the government secures an "exaction," that is, requiring a property owner to dedicate property to public access in exchange for a building or development permit or variance. *See Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994). No exaction in exchange for a development permit or variance is involved in this case.

The Supreme Court noted in *Loretto*, however, that not every physical invasion is a taking. *Loretto*, 458 U.S. at 435 n.12 (noting a distinction between permanent and temporary physical occupations). Nonetheless, it is axiomatic that a property owner's right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). A permanent physical occupation that "chops through the bundle" of an owner's property right sticks, depriving the owner of his use of the property, is "of such a unique character that it is a taking without regard to other factors." *Loretto*, 458 U.S. at 432 & 435. A "permanent physical occupation" constitutes a taking if the landowner's right to exclude others from the property is taken, *see id.* at 433 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)), or "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises," *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987). In sum, a "permanent physical invasion" that "eviscerates the owner's right to exclude others" is considered a "total regulatory taking[,]" requiring compensation. *Lingle*, 544 U.S. at 538-39 (quoting *Lucas*, 505 U.S. at 1019 & citing *Dolan*, 512 U.S. at 384).

Because not every physical invasion is a taking, it is necessary to examine and define the property right at issue in the taking analysis. There is no taking that

requires just compensation if "background principles" of state law, such as nuisance or property law, "independently restrict the owner's intended use of the property" or burden the title.[17] *Lingle*, 544 U.S. at 538-39 (quoting *Lucas*, 505 U.S. at 1019). When considering property rights under the Takings Clause, courts are required to "give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law," which also requires consideration of "the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment" or restrictions "that predates a landowner's acquisition." *Murr*, 137 S. Ct. at 1945 *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017). *Cf. Lucas*, 505 U.S at 1035 (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit"). According to the Supreme Court, recognizing the existing rules or understandings of state property law in relation to a takings claim is "surely unexceptional." *Lucas*, 505 U.S. at 1027-30; *see also Stop the Beach Renourishment, Inc.. v. Fla. Dep't of Env'l Prot.*, 560 U.S. 702, 732 (2010) (stressing

[17] Property rights are defined by state law. *See Stop the Beach Renourishment, Inc.. v. Fla. Dep't of Env'l Prot.*, 560 U.S. 702, 707 (2010). Thus, "property rights under the Takings Clause should be coextensive with those under state law." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017).

that property rights must be protected "as they are established under state law, not as they might have been established or ought to have been established.").

In this case, the Customary Use Ordinance purports to be justified by Florida's doctrine of customary use, which the County argues is a preexisting burden on the Goodwins' title. Thus, Florida's law on customary use must be considered in the Fifth Amendment analysis because state law informs the nature of the property right.

C. Florida's Customary Use Doctrine

Florida law both recognizes and allows regulation of a public right acquired in some areas through custom to use the dry sand area of Florida beaches for recreation. *See Tona-Rama*, 294 So. 2d at 75-78 ("No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court."); *White v. Hughes*, 190 So. 446 (Fla. 1939). According to the Florida Supreme Court, Florida's coastal beaches "require separate consideration from other lands with respect to the elements and consequences of title" because of their unique character. *Tona-Rama*, 294 So. 2d at 77. Although this general policy applies state-wide, the customary use right recognized in *Tona-Rama* was not declared to apply on a state-wide basis; instead, the right was found to exist on Florida beaches where justified by facts showing that the public's "recreational use of the sandy area adjacent to mean high tide has been ancient,

reasonable, without interruption and free from dispute." *Id.* at 78 (recognizing a customary use right on Daytona Beach). The doctrine does not give the public any ownership rights in the land, but only a recreational use right. *Id.* The landowner can continue to use the land in any manner that does not interfere with the public's customary use right. *Id.*

The doctrine of customary use has also been discussed and applied by Florida's Fifth District Court of Appeal. *See Trepanier v. Cty. of Volusia,* 965 So. 2d 276 (Fla. 5th DCA 2007) (finding issues of fact as to whether the customary use doctrine applied, requiring remand); *Reynolds v. Cty. of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995) (citing but not relying on the doctrine of customary use). The Fifth District Court of Appeal has interpreted *Tona-Rama* as instructing courts to "ascertain *in each case* the degree of customary and ancient use." *Trepanier*, 965 So.at 290 (quoting *Reynolds*, 659 So. 2d at 1191). The court explained that the inquiry involves a case by case analysis, noting, "[w]hile some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical." *Id.* at 289. "Custom is inherently a source of law that emanates from long-term, open, obvious and widely-accepted and widely-exercised practice." *Id.*

The landowner in *Trepanier* brought suit for inverse condemnation and declaratory relief to preclude the county from authorizing permits for parking on privately owned portions of the beach. After reviewing the record and finding factual disputes as to the public's historic access and use of the beach in the area, the court in *Trepanier* remanded for further factfinding, with instructions that the party claiming the customary right—in that case the county—had the burden to prove its existence. *Id*. at 289 n.16. The court noted that it is "impossible" to precisely define a general rule for the geographic area of the beach to be considered in the analysis because it will depend in each case on the way the beach has been used. *Id.* at 289. Ultimately, the county prevailed in its proof, and the landowner's inverse condemnation claim failed.[18]

In sum, these cases reflect the high value Florida places on the public's right to use coastal beaches recreationally. In Florida, privately owned beach property is burdened with a customary use right where that use has been "ancient, reasonable, without interruption and free from dispute." *See Tona-Rama*, 294 So. 2d at 78. Importantly, disputes over the application of the customary use doctrine in Florida

[18] On remand, the circuit court found that the evidence of public use of the beach since the early 1900s established that the public had obtained a customary right to use not only the sand within the plaintiff's private property but all sandy beach in that general surrounding area. As a result, the plaintiffs could not restrict public parking on their private portion of the beach. *See Trepanier v. County of Volusia*, 17 Fla. L. Weekly Supp. 782a (Fla. 7th Jud. Cir. Ct. Mar. 30, 2010).

are resolved by "ascertain[ing] in each case the degree of customary and ancient use the beach has been subjected to," which is an "intensely local" factual inquiry. *Trepanier*, 965 So. 2d at 278-91. *But see Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting from the denial of cert. and expressing a skeptical view towards the doctrine of customary use; warning against allowing custom to be asserted pretextually to deny property rights).[19]

D. Analysis

Before considering any takings analysis, the ripeness issue must be addressed. As noted above, ripeness concerns do not apply to a facial takings claim, but the Goodwins have neither argued nor attempted to show that the Ordinance is invalid in all applications, as is the gravamen of a facial claim.[20] *See Salerno*, 481 U.S. at

[19] Specifically, Justice Scalia cautioned that states cannot deprive property owners of federal constitutional rights by "invoking nonexistent rules of state substantive law." 510 U.S. 1207 (dissent from denial of cert.). He expressed concern that the customary use doctrine was a mere pretext for taking private property rights without compensation in the absence of a supporting factual record; and he instructed, "if it cannot fairly be said that [the doctrine of customary use] deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking." *Id.*

[20] The Goodwins argue that they do not have to show that the Ordinance would be unconstitutional in all applications because in *Patel*, the Supreme Court "loosened" this standard by stating that only "applications" in which the statute "actually authorizes or prohibits conduct" must be considered when evaluating a facial claim. *Patel*, 135 S. Ct. at 2451 (addressing a facial challenge to a statute authorizing warrantless searches and finding that the facial challenge was not defeated by the fact that some searches would be constitutional based on consent or exigent circumstances—because only circumstances where the statute applied were relevant to the analysis). The Court does not view *Patel* as "loosening" the facial standard. Instead, the Supreme Court rejected an argument in that case that the statute would not be unconstitutional in all circumstances because in some instances, the search would be consented to or justified by exigent circumstances. The Court said this argument amounted to a misunderstanding of how courts analyze facial challenges and explained that "the group for whom the law is a restriction, not the

745 (requiring proof that "no set of circumstances exists under which the [ordinance] would be valid" to succeed on a facial takings claim); *see also Patel*, 135 S. Ct. at 2451. Instead, the claim they attempt to prove is an as-applied claim. In their motion for summary judgment, the Goodwins argue that the customary use doctrine is a focused and localized issue, with the sole focus on whether *their* private property at Santa Rosa Dunes is burdened with a customary use right. They presented a record showing their own efforts to keep private *their* particular portion of the beach and the beach in *their* subdivision. They argue that the County cannot show a question of fact as to the existence of an ancient customary use right on Santa Rosa Beach. The record shows that the County enacted the Ordinance based on evidence of customary use along the County's entire coastline.[21] A facial challenge to this Ordinance would inevitably be deeply intertwined with the facts pertaining to the Goodwins' individual property, as they rightly contend, because the nature of their

group for whom the law is irrelevant," is the focus of the facial inquiry. This does not absolve the Goodwins from showing that there can be no constitutional "application" of the Customary Use Ordinance. The Ordinance purports to apply to all Walton County beaches, but its impact is felt only on privately owned beaches. *Patel* merely instructs that the takings analysis must focus on those relevant applications of the law.

[21] Florida law does not precisely delineate how great an area can be considered in finding or regulating customary use; the cases indicate that the custom inquiry must be more localized than the entire state's coastline but also suggest that it is not necessarily tied to a parcel-by-parcel inquiry. *See Trepanier*, 965 So. 2d at 289-90. No Florida case has addressed whether a county-wide determination regulating customary use is proper or improper. It is only clear that any determination must be made on evidence supporting the elements set out in *Tona-Rama* and that the state courts have the final responsibility to ascertain whether the elements are satisfied in each case. *See Trepanier*, 965 So. 2d at 289-91.

property right is wholly dependent on a determination of whether Florida's customary use doctrine applies. This is the same as an as-applied claim, which in this case is not ripe. In addition, a facial claim would also require evidence showing that custom does not apply to other areas impacted by the Ordinance, which the Goodwins have not presented.

The Goodwins argue that custom is a defense for the County to prove, not an element of their facial takings claim. They maintain that because there is a physical invasion, there is necessarily a *per se* unconstitutional taking and the Ordinance should be invalidated because it does not provide for just compensation. This argument misses the mark. Florida does provide an inverse condemnation remedy for physical takings. Moreover, customary use is not a mere defense in this instance. The Ordinance itself expressly invokes customary use as a preexisting background principle of state property law, and in any event the Goodwins have the burden at the outset to define the nature of the property right they contend is at issue. *See Murr*, 137 S. Ct. at 1944; *Stop the Beach Renourishment*, 560 U.S. at 732.

The Goodwins also argue that they have a valid facial takings claim related to the Ordinance's provision authorizing government access onto private beach property, which is not justified by the doctrine of custom because custom applies only to public *recreational* use rights. The Goodwins cite *Hendler v. United States*, 952 F.2d 1364, 1367 (Fed. Cir. 1991), in which the court found that an

uncompensated permanent physical invasion required compensation where government vehicles were authorized to enter the plaintiff's private land "from time to time, without permission" and installed wells on the property. Although *Hendler* lends support to the Goodwins' claim of a physical invasion or occupation, the case does not speak to ripeness or aid in resolving the nature of the property right at issue in this case. In *Hendler*, there were no alternate remedies available because the plaintiff brought suit seeking just compensation from the federal government; the availability of state law procedures was not an issue. Here, under *Williamson County*, the state must be given the first opportunity to remedy any taking that is found. *See Lucas*, 505 U.S. at 1030 & n.17 (noting where a regulation amounts to a taking, a state may choose to pay just compensation or rescind its regulation and compensate for a temporary taking). Also, to the extent the Goodwins' argument challenges the purpose of the government access portion of the Ordinance, by asserting that customary use would only justify *recreational* use not government use, the argument resembles a facial "substantially advanced" public purpose claim, which the Supreme Court rejected in *Lingle*, 544 U.S. at 540-43 (concluding that such an argument is derived from due process principles, not takings precedents; "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose").

In the Court's view, the Goodwins are pursuing an as-applied claim that is not yet ripe and thus requires dismissal for lack of subject matter jurisdiction. Considering the *Williamson County* factors, the Ordinance is final, and the Goodwins have not sought compensation through available state law procedures. Moreover, prudential concerns counsel against review in federal court at this time because the takings claim is inextricably intertwined with a unique issue of state law that is highly fact sensitive and dependent on the character of the public use of the property over many years, not purely a question of law. Thus, the issue is best fit for determination first by the state court; pursuing a customary use dispute through an inverse condemnation proceeding is consistent with the procedures followed in other Florida cases where customary use rights were in dispute. *See, e.g.*, *Trepanier*, 965 So. 2d at 279 (plaintiffs brought an inverse condemnation action and the county asserted customary use as a defense); *Reynolds*, 659 So. 2d at 1186 (inverse condemnation raised as a counterclaim). As the Eleventh Circuit has explained, the ripeness doctrine prevents "the premature adjudication of legal questions;" otherwise, courts would be compelled "to resolve matters, even constitutional matters, that may with time be satisfactorily resolved at the local level, and that may

turn out differently in different settings."[22] *Temple B'Nai Zion*, 727 F.3d at 1356 (internal quotations omitted).

Having found that the Goodwins' Fifth Amendment takings claim is not ripe, it must be dismissed without prejudice. *See Reahard*, 30 F.3d at 1415; *Agripost*, 195 F.3d at 1234. Therefore, the Goodwins' motion for summary judgment is denied, and the remaining motions are moot.

Accordingly:

1. The Goodwins' Motion for Summary Judgment, ECF No. 68, is **MOOT** as to Count I and **DENIED** as to Count II. Count I is **DISMISSED as MOOT** and Count II is **DISMISSED without prejudice** as not ripe.

2. The Motion to Exclude Dr. Miller, ECF No. 64, is **MOOT**.

3. The Goodwins' Motion to Supplement the Summary Judgment Record, ECF No. 89, is **MOOT.**

4. The Clerk is directed to close the file.

DONE AND ORDERED this 6th day of March 2018.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

[22] The Court finds *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), a case the Goodwins submitted as supplemental authority, neither comparable to nor instructive as to the property right at issue in this case, which can only be defined after a detailed factual inquiry into property use rights under Florida law.