NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1016-12T2

100 PATERSON REALTY, LLC,

Plaintiff-Appellant,

v.

CITY OF HOBOKEN and the
CITY COUNCIL OF THE CITY
OF HOBOKEN,

Defendants-Respondents.

Argued September 16, 2013 – Decided November 6, 2013

Before Judges Ashrafi and St. John.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2981-10.

Michael A. Oxman argued the cause for appellant (Becker Meisel, LLC, attorneys; Mr. Oxman and Martin L. Borosko, on the briefs).

William W. Northgrave argued the cause for respondents (McManimon, Scotland & Baumann, LLC, attorneys; Mr. Northgrave and Sean P. Duane, on the brief).

PER CURIAM

Plaintiff 100 Paterson Realty, LLC (Paterson) appeals from the October 24, 2012 judgment entered in favor of defendants,

City of Hoboken (City) and City Council of the City of Hoboken (Council) dismissing plaintiff's complaint in its entirety. In December 2011, plaintiff filed an order to show cause with amended verified complaint seeking declaratory relief and damages for inverse condemnation, temporary taking, pre-condemnation damages and malicious interference with prospective economic advantage. Plaintiff's claims proceeded to a four-day bench trial in June and July 2012. On September 13, 2012, the trial judge rendered an oral decision dismissing all claims for failure to sustain the burden of proof.[1] On October 24, 2012, a judgment was entered dismissing plaintiff's verified complaint in its entirety. It is from that judgment that plaintiff appeals.

We briefly summarize the facts and procedural history based on the pretrial proceedings and evidence presented at trial.

Plaintiff is the owner of real property located at 100-108 Paterson Avenue, Block 11, Lot 9 (the Property) in Hoboken. The Property consists of approximately 6000 square feet, which contains a 3000 square-foot commercial building. Plaintiff acquired the Property in 2006 for $2 million with an intention

[1] With respect to plaintiff's tortious interference claim, the trial judge also concluded that the claim failed because plaintiff did not file a notice of claim pursuant to the Tort Claims Act. N.J.S.A. § 59:8-8(a).

to develop it as a residential project. Plaintiff's principal, Ignatius Salvemini, had developed roughly a dozen properties in and around Hoboken since 1996. From the time of plaintiff's purchase through the litigation underlying this appeal, the Property has been zoned as "R3," which would permit residential development. Salvemini was aware at the time of purchase that under the 2004 Hoboken Master Plan, the Property fell within an area that had been designated as potential parkland.

In 2006, plaintiff submitted its first application to the Hoboken Zoning Board of Adjustment (the Zoning Board) for approval of a fourteen-unit project. After the initial Zoning Board hearing, plaintiff decided to withdraw its application in response to "a myriad of issues that surfaced," including "push back" from members of the public. Salvemini testified that "rather than have an adversarial relationship [with the community,] I would go back and make a few minor tweaks and adjustments."

After withdrawing its initial zoning application, in response to an open letter from the Hoboken Historical Museum & Cultural Center (the Museum) placed in a local publication soliciting space from local developers, Salvemini met with Museum officials to explore the possibility of an alternative development project on the Property. That project, named Museum

Place by plaintiff, envisioned a "ten-story mixed use development" in which plaintiff would donate the first two levels for museum space, with an additional thirty-two units of residential housing sited above.

On November 5, 2007, plaintiff filed a second application with the Zoning Board, which included requests for multiple variances before the Museum Place project could proceed. Following negotiations, Salvemini and representatives from the Museum executed a letter of intent in February 2008 to pursue the Museum Place project. A hearing before the Zoning Board was scheduled for June 17, 2008. However, before the hearing took place, the Council convened a special meeting on June 11, 2008, which would have significant ramifications to plaintiff's proposed Museum Place project.

The Council first adopted a resolution (the Block 11 Resolution) supporting the acquisition of Block 11 properties - including the Property – for use as "open space," that is, parkland. The Council then adopted a second resolution authorizing appraisals of certain properties earmarked in the master plan as potential parkland, which included the Property. At that same meeting, the Council introduced an ordinance on first reading amending Hoboken's zoning laws (the Open Space Ordinance), which would rezone the Property from R3 to open

space. Included in the Block 11 Resolution was a request that the Zoning Board "postpone consideration of all applications concerning properties referenced in [the Open Space Ordinance]." Consequently, plaintiff's application hearing was initially adjourned, and later removed from the Zoning Board's agenda, pending a final determination by the City of the zoning changes proposed in the Open Space Ordinance.[2] In October 2008, the Museum informed Salvemini that due to "altered circumstances," it had decided to withdraw from the Museum Place project.

Plaintiff then filed an action against the City for inverse condemnation in November 2008. By letter dated January 20, 2009, counsel for the Zoning Board informed plaintiff that the Council had "tabled permanently" the Open Space Ordinance. Accordingly, plaintiff was advised that its application before the Board "may move forward in the ordinary course."

In March 2009, plaintiff and the City entered into a six-month standstill agreement, later extended to October 2009, staying plaintiff's lawsuit. The stay contemplated a negotiated acquisition of the Property by the City, or, failing that,

---

[2] At the hearing on June 17, 2008, the Zoning Board's counsel informed plaintiff that it would not be conducting the actual hearing. Rather, the Zoning Board deferred consideration of plaintiff's application, pursuant to Willoughby v. Planning Bd. of Deptford, 306 N.J. Super. 266 (App. Div. 1997), pending a final action on the Open Space Ordinance.

condemnation proceedings conditioned upon the City securing sufficient non-municipal funds. If the City was unable to secure such funding, however, the standstill agreement provided that plaintiff's complaint would be restored to the active trial list. Shortly thereafter, the City had the Property appraised at $2.1 million.

In January 2010, the City notified plaintiff's attorney that while the City remained interested in a "potential acquisition" of the Property, no offer would be forthcoming because of financial constraints. Plaintiff then elected to reinstate its action against the City in or around June 2010.[3]

Seeking a "last ditch effort," as characterized by Salvemini, to recoup the costs and expenses he had incurred to develop the property, plaintiff filed an "as of right" application with the Hoboken Planning Board in January 2011. That application was for a nine-unit project that did not require any variances, thereby obviating the need for Zoning Board review. Instead, plaintiff would need only appear before the Planning Board for approval.

[3] According to plaintiff's brief, its initial action filed in November 2008 was dismissed sua sponte by the trial court, apparently for failure to prosecute. It is unclear whether the court was aware of the standstill agreement and extension. There is nothing in the record evidencing such dismissal.

On March 16, 2011, the Planning Board adopted the "City of Hoboken Reexamination Report 2010" (the Reexamination Report), which continued to designate certain properties, including the Property, as possible parkland and reiterated the City's intention to purchase those properties from the landowners. The report, however, had no effect on the zoning of the Property, which remained R3.

Salvemini testified at trial that the adoption of the Reexamination Report, as well as contemporaneous public comments by Hoboken Mayor Dawn Zimmer demonstrating her commitment to creating new parkland and the Council's prior actions, evidenced to him the City's hostility to the plaintiff's development application, and therefore rendered "fruitless" any continued attempt to develop the Property.

Plaintiff opted to withdraw its "as of right" application before the Planning Board on August 25, 2011. At trial, Salvemini explained the rationale for that withdrawal:

> It's a known fact City wants the property. For me to move forward in that climate assuming I was even able to get the approvals, . . . in my opinion no lender would ever lend money on this property. And even if they did, and I was able to build it, now I have to contend with the specter of the town taking the property at some later date, which any prospective buyer's lender is going to have to deal with. . . . And, so, this is a property that I cannot build on. No if, ands or buts. . . . [T]his

> would not be a risk that any reasonable developer would want to take.

Plaintiff presented the testimony of two expert witnesses at trial. J. Scott Anderson opined that the Reexamination Report rendered any development project "unregisterable" with the Department of Community Affairs, and thus unsalable, because it was clear that the City intended to acquire the Property within one year of the grant of any approvals. On cross-examination, Mr. Anderson conceded that the possibility of condemnation or zoning changes exists in any given real estate development, and therefore is "pretty standard" in a registration application. He also acknowledged that projects with fewer than ten units were exempt from the registration requirement.

Andrew Janiw testified that, in his opinion, no bank would finance construction for plaintiff's project due to the risk of eminent domain. He further opined that a mortgagee would be equally reluctant to grant a loan to prospective purchasers of units in the plaintiff's proposed development.

Mayor Zimmer had been deposed and a portion of her deposition testimony was included in the trial record. Mayor Zimmer expressed her support for a public park in the area of Hoboken encompassing the Property. She was aware of the standstill agreement and acknowledged that no agreement on price

was reached because the City did not have sufficient grant money. It was her opinion that the plaintiff could still build on the Property under the existing zoning designation.

In his oral decision, the trial judge related the plaintiff's three applications, two to the Zoning Board and one to the Planning Board, which were withdrawn by the plaintiff. After summarizing the facts, the judge found "[w]hile the city's actions may have resulted in the plaintiff's inability to develop the projects he was proposing, they do not otherwise deprive him of the beneficial use of the property. Tenants continue to occupy the building."

The judge further determined that plaintiff was not deprived of the beneficial use of its property such that a de facto taking had occurred. With respect to plaintiff's argument that it should be compensated for temporary taking of the Property as a result of its application being tabled, the judge concluded that plaintiff had not been deprived of all of the beneficial use of the Property, reasoning that the six or seven months involved were not significant.

On appeal, plaintiff argues that the judge erred as the City's actions in opposition to development of the Property deprived plaintiff of its beneficial use, thus resulting in an inverse condemnation for which just compensation must be paid.

Alternatively, plaintiff seeks just compensation for deprivation of beneficial use on the theory of a temporary taking.

When reviewing a decision resulting from a bench trial, "[t]he general rule is that [factual] findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)(citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We do not disturb the factual findings of the trial judge unless we are "'convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Id. at 412 (quoting Rova Farms, supra, 65 N.J. at 484); see also Beck v. Beck, 86 N.J. 480, 496 (1981). It is also well established that our review of a judge's conclusions of law is plenary. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

The Takings Clause of the Fifth Amendment to the United States Constitution, as applicable to the states via the Fourteenth Amendment, proscribes the taking of private property for public use without just compensation. Lingle v. Chevron

U.S.A. Inc., 544 U.S. 528, 536, 125 S. Ct. 2074, 2080, 161 L. Ed. 2d 876, 886 (2005). The New Jersey Constitution, article I, paragraph 20 and article IV, section 6, paragraph 3, likewise provide protections against governmental takings of private property without just compensation. Klumpp v. Borough of Avalon, 202 N.J. 390, 404-05 (2010). The constitutional protections of our State have been found to be coextensive with the federal Takings Clause. Id. at 405; OFP, L.L.C. v. State, 395 N.J. Super. 571, 581 (App. Div. 2007), aff'd o.b., 197 N.J. 418 (2008).

Government plans ordinarily do not constitute invasion or taking of property. Danforth v. United States, 308 U.S. 271, 60 S. Ct. 231, 84 L. Ed. 240 (1939); Wilson v. Long Branch, 27 N.J. 360, 374, cert. denied, 358 U.S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (1958). "The mere plotting and planning in anticipation of condemnation without any actual physical appropriation or interference does not constitute a taking." Kingston East Realty Co. v. State, 133 N.J. Super. 234, 239 (App. Div. 1975); accord Wilson, supra, 27 N.J. at 374 (no taking where there is a declaration that property is in blighted area); Rieder v. N.J. Dep't of Transp., 221 N.J. Super. 547, 555 (App. Div. 1987)(no taking upon the filing of a preservation alignment map by the Department of Transportation); Schnack v. State, 160 N.J. Super.

343, 349-50 (App. Div.)(same), certif. denied, 78 N.J. 401 (1978); Far-Gold Constr. Co. v. Borough of Chatham, 141 N.J. Super. 164, 169 (App. Div. 1976)(no taking where municipality's resolution expresses desire to acquire property for park as part of Green Acres program).

In contrast to a situation in which land has been physically invaded, there is no precise formula that courts use to determine whether a compensable "noninvasive" taking has occurred. The issue depends on the facts of the case. In this case we find that none of the plaintiff's allegations establishes that there has been a compensable taking at this time. The identification of the Property by the City as possible parkland did not prevent the plaintiff from using or developing the Property.

Specifically, in January 2009, the Zoning Board advised plaintiff that it could continue with its application. Further, all three of plaintiff's applications were voluntarily withdrawn and nothing in the record supports plaintiff's assertion that proceeding with the application before the Planning Board would be "fruitless." No action taken by the defendants, other than the hiatus before the Zoning Board while the City considered the Open Space Ordinance, posed a legal impediment to the use or development of plaintiff's Property.

Furthermore, plaintiff's allegation that it cannot build its project because of a lack of financing does not rise to the level of a taking. Lost economic opportunities allegedly occasioned by pre-taking government activity do not constitute a compensable "taking" under either the United States or New Jersey Constitutions. Barsky v. City of Wilmington, 578 F. Supp. 170, 173-75 (D. Del. 1983)(absent unreasonable delay, difficulties in renting property caused by announcement of urban renewal plan not compensable); Schoone v. Olsen, 427 F. Supp. 724, 725 (E.D. Wis. 1977)(same); East Rutherford Indus. Park v. State, 119 N.J. Super. 352, 361 (Law Div. 1972)(inability to find lessees as a result of publicity surrounding proposed sports complex did not constitute a taking). The loss of financing also does not amount to a taking. Windward Partners v. Ariyoshi, 693 F.2d 928, 929 (9th Cir. 1982), cert. denied, 461 U.S. 906, 103 S. Ct. 1877, 76 L. Ed. 2d 809 (1983).

Likewise, we find unpersuasive plaintiff's contention here that a compensable taking has occurred because prospective purchasers of condominium units may be discouraged due to concerns about obtaining financing. As the United States Supreme Court has made clear, "in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to

potential purchasers does not entitle the owner to compensation under the Fifth Amendment." Kirby Forest Indus. v. United States, 467 U.S. 1, 15, 104 S. Ct. 2187, 2197, 81 L. Ed. 2d 1, 14 (1984)(footnote omitted); accord Danforth, supra, 308 U.S. at 284-85, 60 S. Ct. at 236, 84 L. Ed. at 246; Frazier v. Lowndes County, Miss. Bd. of Educ., 710 F.2d 1097, 1100 (5th Cir. 1983); Wilson, supra, 27 N.J. at 372-73; East Rutherford Indus. Park, supra, 119 N.J. Super. at 360-61; Jersey City Redevelopment Agency v. Bancroft Realty Co., 117 N.J. Super. 418, 423 (App. Div. 1971).

Our Supreme Court has held that "a compensable taking can occur when governmental action substantially destroys the beneficial use of private property." Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n, 98 N.J. 258 (1985); accord Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108 (1968); Morris Cnty. Land Improvement Co. v. Twp. of Parsippany-Troy Hills, 40 N.J. 539, 555-57 (1963). However, it is only where "the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, [that] there has been a taking of property within the meaning of the Constitution." Washington Mkt. Enters. v. City of Trenton, 68 N.J. 107, 122 (1975).

We find no such threat in this case. Plaintiff has failed to establish that the beneficial use of the Property has been destroyed by its designation as potential parkland. The circumstances here are readily distinguishable from those cases in which the government imposed a direct restraint on the use of the property, thereby depriving the owner of all beneficial use of the land for a significant period of time. See, e.g., Schiavone, supra, 98 N.J. at 264 (governmental development corporation imposed moratorium on real estate development that barred plaintiff from developing land); Lomarch, supra, 51 N.J. 110-11 (municipal ordinance imposed one year restriction on right to develop land while municipality decided whether to purchase property); Morris Cnty. Land Improvement, supra, 40 N.J. at 539 (zoning ordinance greatly restricted plaintiff's use of swampland).

Moreover, plaintiff's reliance on Washington Market Enterprises v. City of Trenton, supra, 68 N.J. 107, is misplaced. Unlike the landowner in Washington Market, plaintiff is still able to make beneficial use of its property. At the time plaintiff initiated the action, it was free to use the Property as it chose, within the constraints of the City's zoning ordinance and other applicable regulations. No actual restriction was imposed on its rights to use the Property.

Indeed, the Property was being rented. At the time plaintiff instituted the underlying action, there was, then, no "actual or threatened interference with the use of the property of such a permanent, serious or continuing nature, to justify the conclusion that a 'taking' had occurred." Kingston East, supra, 133 N.J. Super. at 240.

Plaintiff argues that it is at least entitled to compensation for a temporary taking during the time period in which it asserts it was deprived of the ability to develop the Property, which it argued at trial was from June 2008 to January 2009. Before us, it contends that the trial judge actually found it was allegedly deprived of the beneficial use of the Property from June 2008 to March 2011. We disagree with the plaintiff's reading of the judge's decision.

The judge was clear that the plaintiff's assertion related to the period "between June 2008 and January 2009, . . . due to the tabling of its application before the board of adjustment." The judge found that plaintiff was not deprived of the beneficial use of the Property and that the time period was not significant. We discern no reason to reverse that decision, since "all property is owned subject to the power of eminent domain and . . . damages which a landowner suffers as an incident to such proceedings and the subsequent abandonment

thereof are, a loss does not give rise to an action for damages, the condemnor being in the exercise of a legal right." Liability, Upon Abandonment of Eminent Domain Proceedings, for Loss or Expenses Incurred by Property Owner, or for Interest on Award or Judgment, 92 A.L.R.2d 358-59 (1963)(emphasis added).

Plaintiff bases its argument primarily on the Court's opinion in Lomarch Corp. v. Mayor of Englewood, supra, 51 N.J. 108. There, a landowner challenged the constitutionality of a municipality's official map that reserved his land for one year for use as a park while his subdivision application was pending. Id. at 110. The Court found a temporary taking, concluding that the municipality created a unilateral option to purchase the landowner's property without paying him compensation. Id. at 113.

In a subsequent case, however, the Court limited temporary takings to those instances where the government has deprived the owner of "all beneficial use of the land for a significant period of time." Littman v. Gimello, 115 N.J. 154, 164-65, cert. denied, 493 U.S. 934, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989). The record supports the trial judge's findings that the City did not deprive the plaintiff of all beneficial use of the Property for a significant period of time.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION