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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2963-07T3

EDWARD W. KLUMPP and NANCY M. KLUMPP,

Plaintiffs-Appellants,

v.

BOROUGH OF AVALON,

Defendant-Respondent.

Argued May 18, 2009 – Decided July 31, 2009

Before Judges Lisa, Sapp-Peterson, and Alvarez.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, L-651-04.

Richard M. Hluchan argued the cause for appellants (Ballard Spahr Andrews & Ingersoll, LLP, attorneys; Mr. Hluchan, of counsel; Robert P. Duffield, II, on the brief).

Michael J. Donohue argued the cause for respondent (Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys; Mr. Donohue, of counsel and on the brief).

PER CURIAM

Plaintiffs, Edward W. and Nancy M. Klumpp, appeal from the dismissal of their claims against the Borough of Avalon (the Borough) by order entered January 29, 2008. We affirm.

Plaintiffs are the record owners of land identified on the Borough's Tax Map as Block 74.03, lots 2, 4 and 6 (the property), located at the eastern end of 75th Street. The Borough maintains a protective engineered sand dune system constructed on the beach, from 13th Street to 80th Street, on land that includes the property.

Plaintiffs built a summer home on the property in 1960. It was leveled in early March 1962, during the coastal northeastern storm notorious for the devastation that it wrought on New Jersey's coastline.

Over the years since the storm, the Borough adopted several resolutions and ordinances intended to advance the construction, protection and maintenance of the engineered dune project. These are extensively detailed elsewhere. See Raab v. Borough of Avalon, 392 N.J. Super. 499 (App. Div.), certif. denied, 192 N.J. 475 (2007); Klumpp v. Borough of Avalon, No. A-0911-05 (App. Div. January 29, 2007). Suffice it to say here that on August 15, 1962, Resolution No. 62-102 declared the restoration of "the sand dunes, vegetation, and other protections [that] existed along the shoreline" to be in the Borough's best interests. The resolution authorized Borough representatives to enter any property "to be used as protective barriers to take control and possession thereof, and to do such acts as may be

required, including removing, destroying or otherwise disposing of any property located thereon without first paying any compensation therefor."

In November 1962, the Borough initiated a property-exchange program "as a means of compensating property owners whose lots had been taken as a result of the storm." Raab, supra, 392 N.J. Super. at 505. Nonetheless, "[d]espite this tacit acknowledgment of a taking," the Borough continued to tax property owners for their lots.[1] Ibid.

In April 1963, the Borough regraded and reconstructed the beach and dune area. The initial dune rebuilding project was completed in 1965. The Borough has since continued to maintain the engineered dune, including the property, installing protective dune fencing, planting vegetation, removing trash and refuse, and supplementing the dune with sand from other areas. In June 1968, the Borough adopted Ordinance No. 393, the "Beach Protection Ordinance," delineating the dune line west of the property and prohibiting the removal or rearrangement of sand on any land to the east of the designated dune line.

In the summer of 1997, plaintiffs' prior attorney corresponded with the Borough's counsel regarding the adoption

[1] As an aside, the record does not indicate if plaintiffs, whose factual circumstances are quite similar to those of the Raab plaintiffs, participated in that process.

of the various ordinances and resolutions, which made it impossible for plaintiffs to rebuild their summer home. Counsel for the Borough acknowledged that plaintiffs could not rebuild, but denied that the ordinances effectuated a taking, asserting that, instead, they merely regulated activities on the dune for the benefit of the community. The Borough refused to compensate plaintiffs for a taking.

The Borough has sent a tax bill every year to date since plaintiffs acquired the property. Although the assessed value for the property was designated as only approximately $100, plaintiffs continued to pay. The tax bills from 1993 to 2005 came to forty-six cents annually. On the Borough's official map, the property is marked as privately owned rather than as "beach exempted" publicly-owned land. In July 2002, plaintiffs received a notice, as did all other property owners in the Borough, informing them that a property revaluation for tax purposes was anticipated in the near future. Plaintiffs' deed is the last recorded document conveying ownership of the property.

In March 2003, plaintiffs applied for an individual Coastal Area Facility Review Act (CAFRA) permit from the New Jersey Department of Environmental Protection (DEP) to construct a single-family residence on the property. On November 13, 2003,

plaintiffs' counsel notified the Borough that the DEP would not entertain the application unless plaintiffs could demonstrate that they had access to the property. Counsel asserted that because the Borough's construction and maintenance of the dune denied plaintiffs access, a taking had occurred entitling plaintiffs to just compensation. Three additional letters to the Borough followed, but no responses were received. Plaintiffs subsequently filed their initial Law Division complaint on November 18, 2004, seeking a declaration that they had the pedestrian and vehicular access necessary to develop a single-family residence on the property.

When the Borough answered the initial complaint, it admitted that plaintiffs owned the property, but it raised adverse possession, N.J.S.A. 2A:14-30, as a separate defense. The Borough also filed a counterclaim seeking: title to the property by adverse possession, an easement by prescription in the public interest, and/or an easement under the public trust doctrine.

On August 22, 2005, Judge Perskie granted defendant's motion for summary judgment in its entirety. The decision was appealed, and in January 29, 2007, we issued a per curiam unpublished opinion remanding the matter for further proceedings. Klumpp v. Borough of Avalon, supra, slip op. at

16. First, we determined that the record lacked proofs supporting the judge's determination that the Borough had been continuously in possession of the property since the early 1960s. Id. at 13. Second, we found that the "related question of whether the Borough has the ability to provide or authorize . . . access" to the property could not be answered on the summary judgment record. Id. at 15.

After the remand, plaintiffs amended their complaint, adding counts for damages for the Borough's alleged continuing trespass and for ejectment. The Borough's original counterclaim, seeking title and extinguishing any ownership interest in plaintiffs, was reinstated. The Borough further sought a judgment declaring that it effectuated a taking in 1962; that plaintiffs' sole remedy was to pursue legal action within six years of the taking; that the taking deprived plaintiffs of title to the land; and that the Borough was the legal and equitable owner of the property. On remand, the matter was tried based on stipulated facts, documents provided in a joint appendix, the record previously made, and "relevant facts from the Raab decision."

Judge Perskie, who presided over the bench trial on the remand, found that after the 1962 storm, the Borough took "functional possession of the property," by including it within

the Borough's dune line area and by constructing and maintaining an engineered dune. Once the end of 75th Street was vacated,[2] access to the property was limited by the necessary fencing and vegetation. A footpath extends from the vacated end of 75th Street to the beach, cutting across a portion of the property.

Judge Perskie also found that the Borough was required, in accord with the State's regulatory scheme involving the United States Army Corps of Engineers, the DEP, and other funding agencies, to maintain the dune area for purposes of coastal protection. The Borough, Judge Perskie said, "is not permitted to abandon the dune area or fail to maintain it as a coastal protection device." He determined that because of its obligations related to the dune, the Borough lacks the legal capacity to provide plaintiffs with access to the property.

Significantly, Judge Perskie concluded that there were "no equities" applicable to the resolution of this legal dispute. Plaintiffs were well aware of the Borough's actions in clearing their lot of storm debris and then constructing the dune. By 1997 at the latest, plaintiffs were corresponding with the Borough because the dune project and related resolutions and ordinances made use of the property impossible. On the other

[2] On September 3, 1969, the Borough adopted Ordinance No. 416, which vacated the section of 75th Street that had previously provided access to the property.

hand, the Borough took the property without affording compensation to plaintiffs and without definitively acknowledging it during the relevant period. Judge Perskie described it as "without any semblance of due process or compliance with statutory requirements." By construction of the dune and adoption of the various related ordinances, the Borough exercised exclusive possession and control over the property.

Additionally, Judge Perskie determined that the 1979 re-zoning of the property, from residential use to public use, constituted a regulatory taking. He also opined that because plaintiffs did not demand compensation, they were not barred by any statute of limitations. As we previously found, claims for access by an adjoining landowner are not subject to statute of limitations defenses. Klumpp v. Borough of Avalon, supra, slip op. at 12-13. Additionally, the claims for trespass and ejectment, which were based on "continuing offenses," could not be time-barred.

To summarize, Judge Perskie entered a judgment that the Borough's conduct constituted a taking by way of inverse condemnation, and that plaintiffs were obliged to contest the acquisition years ago, when they first learned of the dune project and the subsequent ordinances and resolutions. Additionally, the 1979 re-zoning deprived plaintiffs of any

functional use of the property and therefore constituted a regulatory taking.

Judge Perskie denied plaintiffs' claims for access, damages for trespass, and ejectment because plaintiffs' bare legal title alone could not "support" those claims. Additionally, he dismissed the Borough's counterclaim, including acquisition of title by adverse possession, prescriptive easement, and operation of the public trust doctrine.

We review the trial court's findings mindful that they should be disturbed only if they are "so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974) (citation omitted). So long as they are supported by substantial and credible evidence in the record, the trial judge's findings will be upheld. Id. at 484.

I.

Both the federal and state constitutions prohibit the government from taking property without paying just compensation. Littman v. Gimello, 115 N.J. 154, 161, cert. denied, 493 U.S. 934, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989). In an inverse condemnation case, a property owner alleges that the government took the property without the payment of just compensation. Pappas v. Bd. of Adjustment of Borough of Leonia,

254 N.J. Super. 52, 56 (App. Div.), certif. denied, 130 N.J. 9 (1992). A taking by inverse condemnation "does not occur in compliance with statutorily imposed procedures. The essence of the cause of action is a de facto taking of private property under the power of eminent domain." Van Dissel v. Jersey Cent. Power & Light Co., 152 N.J. Super. 391, 404 (Law Div. 1977), aff'd, 181 N.J. Super. 516 (App. Div. 1981), certif. denied, 89 N.J. 409 (1982), vacated on other grounds, 465 U.S. 1001, 104 S. Ct. 989, 79 L. Ed. 2d 224 (1984). Inverse condemnation thus provides a remedy designed to insure that the owner whose land was taken de facto receives just compensation. Ibid.

In Raab, supra, 392 N.J. Super. at 510, we found that inverse condemnation could occur in either of two ways: (1) when the "excessive use of the state's police power" results in "regulatory schemes that operate effectively to deprive" the owner of all or substantially all of the property's beneficial uses, or (2) when "the state physically occupies private property for public use." In this case, the adoption of several ordinances and resolutions enabled the Borough to construct and maintain its protective engineered sand dune system. After construction, dunes were maintained with vegetation, fencing, and the appropriate replenishment of sand. The Borough's contracts with other government entities indeed mandates

maintenance of the dunes. Essentially, the Borough has been in possession of the land since 1962. Hence, we agree with Judge Perskie that inverse condemnation has occurred, and that the Borough is the true owner of the property.

Plaintiffs argue that the tax bills, Borough records, and recorded title ownership indicate that they continue to be the true owners of the property. These are indicia of plaintiffs' bare legal title, however, and nothing more. The conduct of the Borough since 1962 has made plaintiffs' property completely useless, and essentially unavailable to them for any purpose.

It is the taking of possession without payment that constitutes the very essence of inverse condemnation. The fact that plaintiffs have legal title does not refute that conclusion. The proposition that "only the holder of legal title can be an 'owner' of property finds no support either in our jurisprudence or in everyday conversation." Jock v. Zoning Bd. of Adjustment of Twp. of Wall, 371 N.J. Super. 547, 556 (App. Div. 2004), rev'd on other grounds, 184 N.J. 562 (2005). Once plaintiffs became aware of the physical occupation of the property by the Borough, the burden shifted to them to recover just compensation.

Plaintiffs rely on an unpublished opinion, Milgram v. Ginaldi, No. A-1906-06 (App. Div. July 15, 2008), certif.

denied, 197 N.J. 259 (2008), for the proposition that the government cannot acquire an interest in land except through compliance with the procedures spelled out in the Eminent Domain Act, N.J.S.A. 20:3-1 to -50. That case, however, involved the narrow issue of whether the State, by way of preliminary injunction, could force a private property owner to grant a perpetual public access easement. Milgram v. Grinaldi, supra, slip op. at 9. This case is entirely dissimilar factually and theoretically. Principles of inverse condemnation control here.

II.

Plaintiffs also contend that the trial court erred in finding that a regulatory taking occurred in 1979 since the issue was not properly before the court and since, in their view, the adoption of the re-zoning ordinance did not amount to a regulatory taking. Although the issue of the regulatory taking is moot because we have determined that inverse condemnation occurred by way of the Borough's physical occupation of the property, we make the following brief comments.

First, plaintiffs understood that the question was intrinsic to the circumstances of this case when the matter was heard before Judge Perskie. During oral argument, although

plaintiff's counsel initially objected to the discussion, a lengthy exchange ensued on the subject.

Second, there is ample support in the record for the conclusion that a regulatory taking occurred. A regulatory taking does not occur unless the regulatory scheme denies the property owner of all practical use of the property in question, substantially destroys all beneficial uses, or makes a reasonable return on investment impossible. Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 210-11 (1991). Mere diminution in land value or impairment in the marketability of the property does not result in a regulatory taking. Id. at 210.

We agree with Judge Perskie that several of the Borough's municipal ordinances effectively denied any practical use of the property and substantially destroyed any beneficial use, including Ordinance No. 393, which prohibited the removal or redistribution of sand on the property, and Ordinance No. 614, which re-zoned the property from residential to public use. No reasonable return on any investment in the property can be imagined under these circumstances. Thus, a regulatory taking occurred.

In support of the position that no regulatory taking occurred, plaintiffs look to the language contained in Ordinance No. 202-86:

> Development is prohibited on beaches and dunes, except for development that has no prudent or feasible alternative in an area other than a beach or dune, and that will not cause significantly adverse long-term impacts on the natural functioning of the beach and dune system, either individually or in combination with other existing structures, land disturbances or activities.

It seems to us that the language of the ordinance is extremely narrow in focus, as it prohibits development on beaches and dunes unless the project can only be constructed on a beach or a dune. A single-family dwelling does not fall into that category. We note that the ordinance also states categorically that any construction that would have "adverse long-term impacts" on the dune system is "prohibited." Construction of a single-family dwelling on the engineered dune would likely have that effect. Plaintiffs' reliance on this ordinance is therefore misplaced.

We find that Judge Perskie's conclusions were supported by substantial and credible evidence in the record. Inverse condemnation occurred here by both the Borough's physical occupation of plaintiffs' property for public use and its adoption of the regulatory scheme to support the protection of the engineered sand dune. A regulatory taking of the property occurred as well.

Affirmed.