NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0787-10T1

JOSEPH CIAGLIA,

Plaintiff-Appellant/
Cross-Respondent,

v.

WEST LONG BRANCH ZONING
BOARD OF ADJUSTMENT,

Defendant,

and

BOROUGH OF WEST LONG BRANCH,

Defendant-Respondent/
Cross-Appellant.

Argued September 21, 2011 - Decided October 25, 2011

Before Judges Graves, J. N. Harris, and Koblitz.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4484-06.

Peter H. Wegener argued the cause for appellant/cross-respondent (Bathgate, Wegener & Wolf, attorneys; Mr. Wegener, of counsel; Rui O. Santos, on the brief).

Gregory S. Baxter argued the cause for respondent/cross-appellant (Caruso & Baxter, P.A., attorneys; Mr. Baxter, on the brief).

PER CURIAM

This is an inverse condemnation case against the Borough of West Long Branch (the Borough). Plaintiff Joseph Ciaglia appeals from the September 15, 2010 dismissal of his complaint seeking remedies for a regulatory taking occasioned by the refusal of the West Long Branch Board of Adjustment (the Board of Adjustment) to grant variances to permit a viable use of an isolated undersized lot.[1] We reverse and remand for further proceedings.

I.

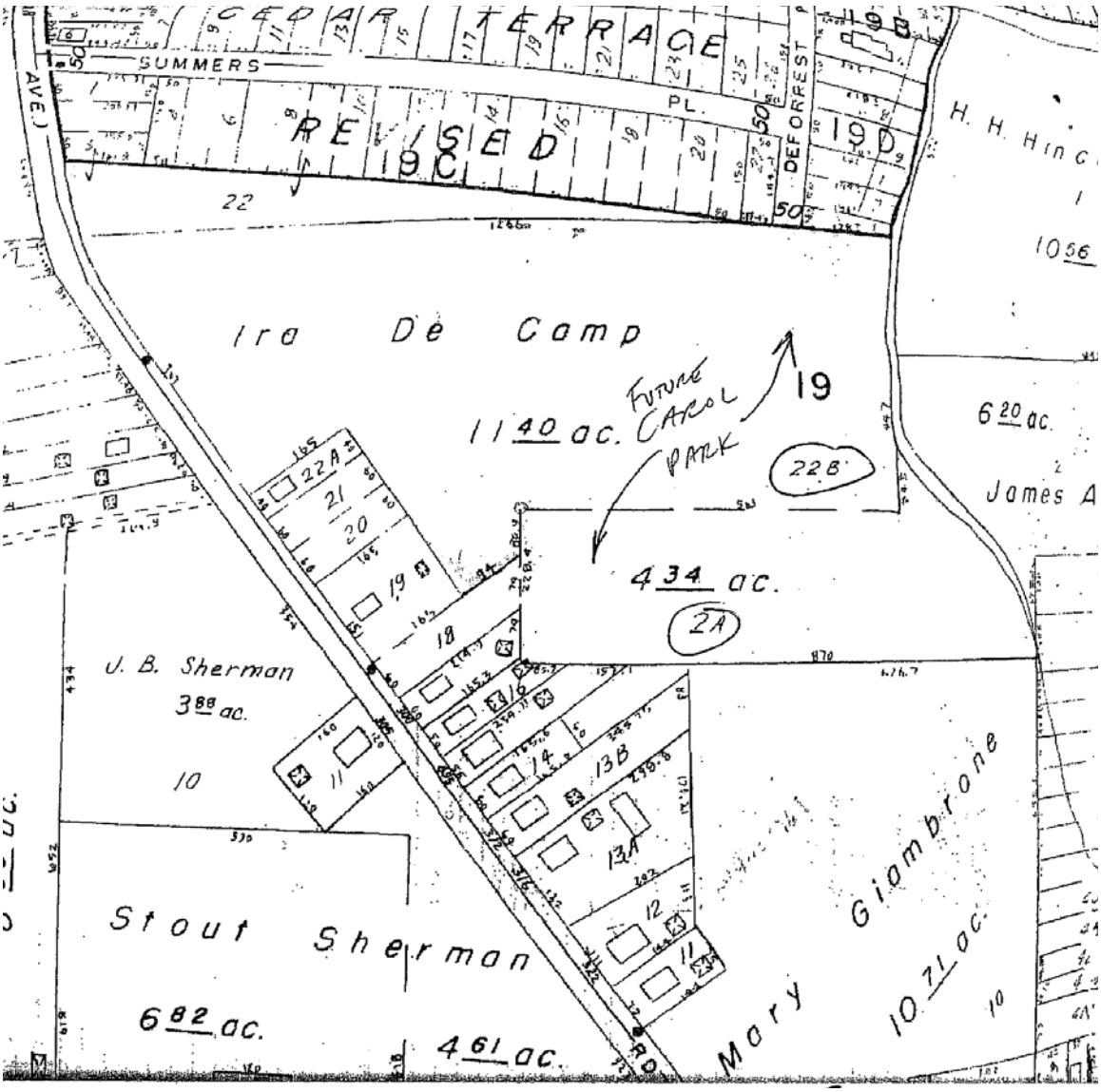
The Law Division decided this matter in the context of competing cross-motions for summary judgment. Accordingly, we view the facts as undisputed —— both parties asserted that there were no genuine issues of material fact in dispute and the matter could be resolved as a matter of law.

A.

Ciaglia is the current owner of vacant land located on De Forrest Place in West Long Branch. The property comprises an isolated remnant lot, consisting of an area of 7,142 square

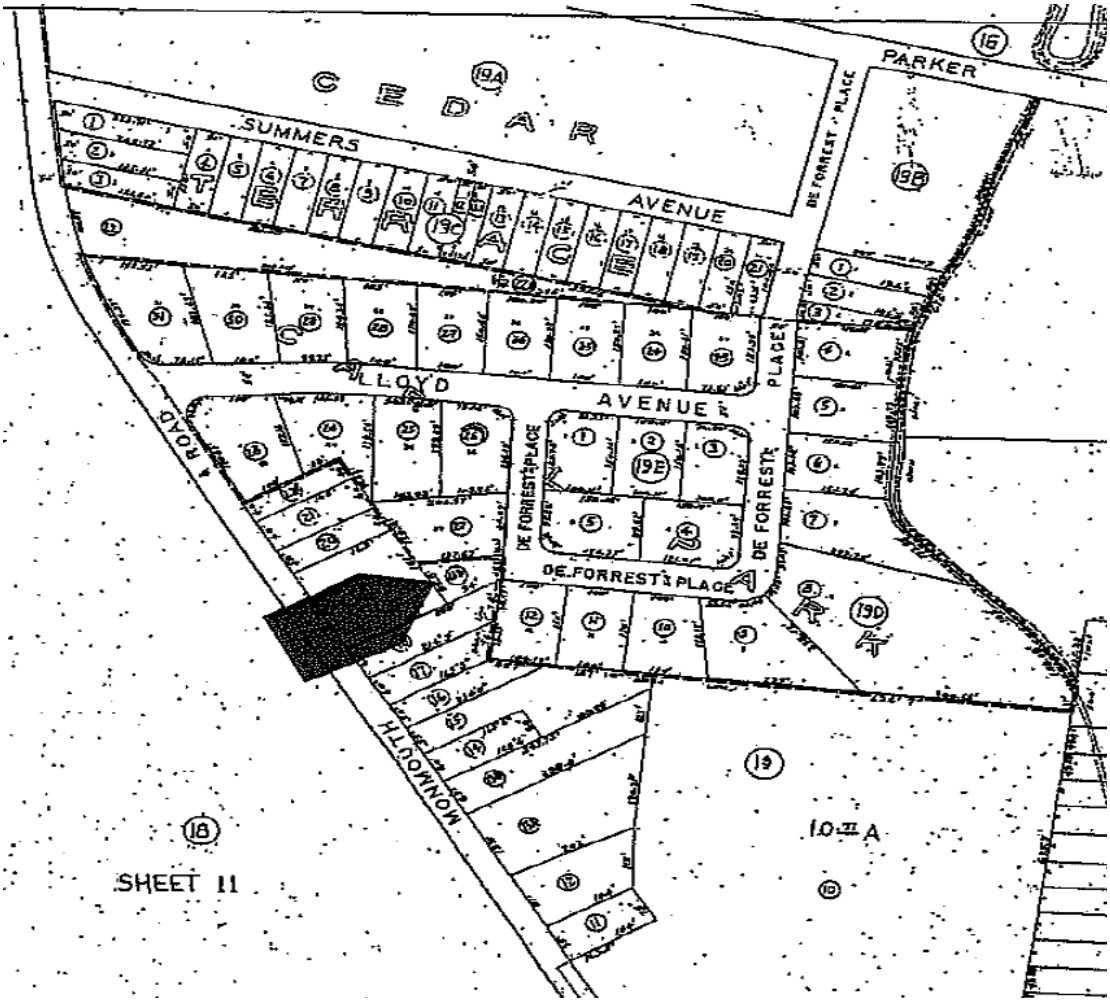
[1] Ciaglia also seeks review of the April 15, 2011 order of the Law Division that was entered pursuant to our temporary remand. That order (1) allowed the supplementation of the record and (2) confirmed the dismissal of the complaint via an additional reason bottomed upon limitation of action grounds. Based upon the Law Division's added rationale, the Borough abandoned its cross-appeal as moot.

feet, which is presently designated as Block 19, Lot 20 on the Borough's tax assessment map. Prior to its subdivision in 1957, the parcel was originally part of a larger tract of land designated as Block 19, Lot 22B, which totaled approximately 11.40 acres.[2] The following is an excerpt from what the record refers to as a "1941 Survey by Franklin Survey Co.":



[2] Because the subject lot has had two designations at different times —— first as Lot 22B, and then as Lot 20 —— we refer to it by both labels.

In March 1957, the West Long Branch Planning Board (Planning Board) approved an application to subdivide Lot 22B and adjoining Lot 2A (consisting of 4.34 acres). The resultant subdivision —— named Carol Park —— created Lloyd Avenue and extended De Forrest Place, and yielded twenty-eight lots (including the subject lot). The following illustration (highlighting the subject lot) is from one of the Borough's tax assessment maps[3] presented in the record:



[3] The Borough began to assess and collect local property taxes against the subject lot as a separate parcel in 1957, and has continued to do so.

The land that is the subject of this appeal was designated as Lot 22B on the subdivision map filed with the Monmouth County Clerk's Office in August 1957. The trapezoidal lot is shown with access to De Forrest Place along its approximate forty-five feet of frontage.[4]

The Borough's land use controls in effect in 1957 placed the subdivision in a residential district known as Dwelling Zone C. These regulations —— part of West Long Branch's zoning ordinance —— required each lot to have "lot frontage of not less than 100 feet and a depth of not less than 150 feet." The then-newly created Lot 22B did not comply with these zoning requirements because it had deficient frontage and less than 150 feet in depth. Despite these discordances, the Planning Board approved the subdivision with the municipal engineer certifying that the subdivision map "conforms with all the laws of the state and the municipal ordinances and requirements applicable thereto."[5]

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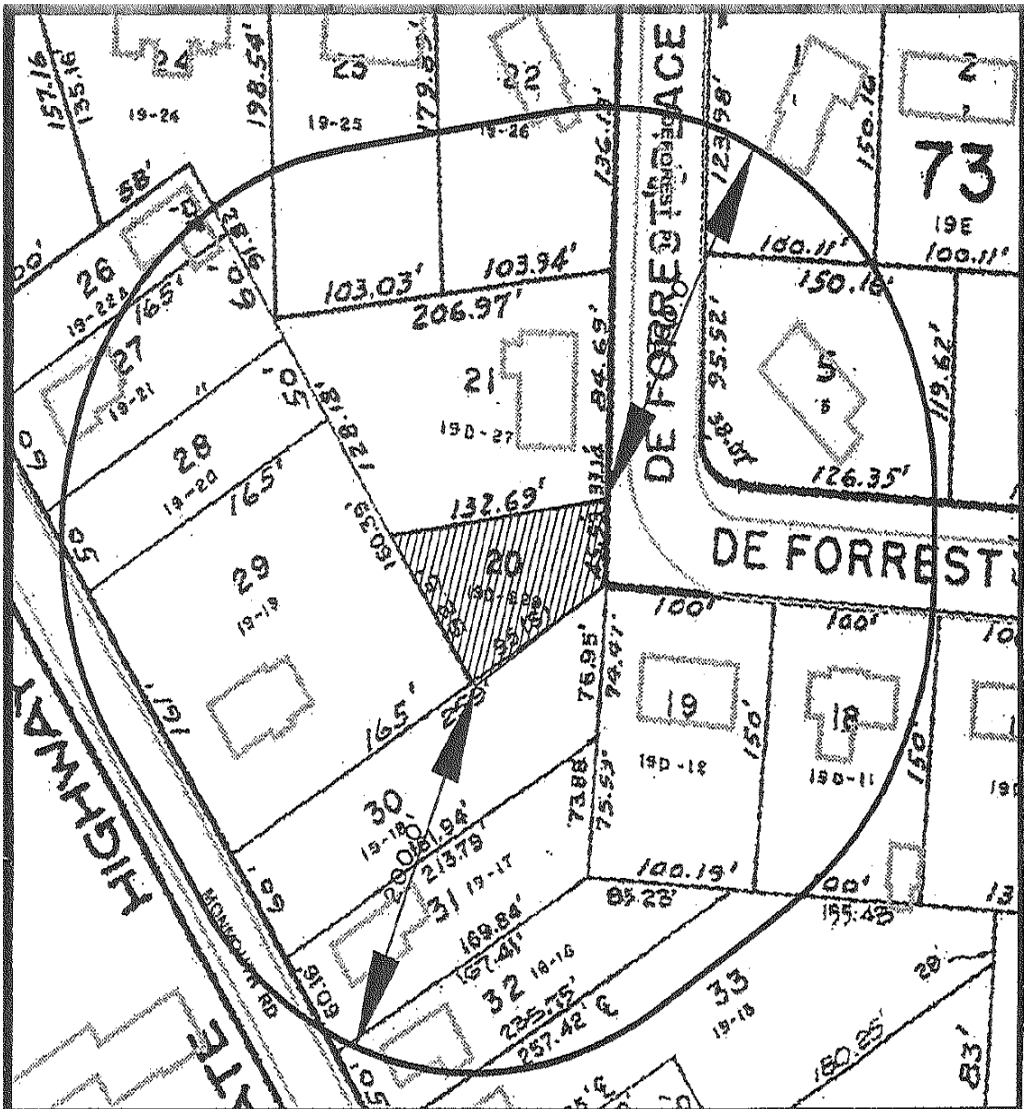
[4] In a 1980 Certificate of Tax Sale for unpaid municipal liens, the lot is designated as 60 De Forrest Place.

[5] We, along with the parties, are hampered in our review of the history of the subdivision because the municipal archives do not contain the records, resolutions, or minutes that would illuminate the exact process that created the discordant subject lot. See Berninger v. Bd. of Adj. of Midland Park, 254 N.J. Super. 401, 407 (App. Div. 1991) (noting the difficulties attendant to parsing decades-old land use decisions, especially (continued)

At some point not disclosed in the record, the Borough's land use regulations became more restrictive. The lot became subject to the regulations of the Borough's R-22 zone, which requires a minimum lot area of 22,500 square feet and 150 feet of street frontage. A graphical depiction of the current neighborhood (with the subject lot shaded) is presented below:



(continued)
where no objecting party had sought judicial intervention for nearly fifty years), aff'd, 127 N.J. 226 (1992).

B.

When the subdivision application was filed, the undivided land was owned by Ira and Gussie De Camp (collectively De Camp), who had acquired it several decades earlier. One month after subdivision approval was obtained (but several months before the subdivision map was actually filed with the Monmouth County Clerk), De Camp conveyed all of the subdivided lots —— except for then-Lot 22B —— to Davis & Taylor Corp.[6] In December 1958, De Camp conveyed Lot 22B to Russell and Lynn Dieffenbach (collectively Dieffenbach). The record does not suggest that the Borough ever challenged the De Camp sale of the lot to Dieffenbach or even sought to set aside the transfer as an illegal conveyance, subdivision, or re-subdivision.

Ciaglia's immediate predecessor in title, Sylvia Borst (Borst), came into ownership after first acquiring an assignment of the Borough's Tax Certificate for the Dieffenbach property when the assessed taxes on the lot went unpaid. In 1988, Borst obtained legal title to the lot through an in rem tax foreclosure. Borst had once owned separate parcels to the rear and side of the subject lot, formerly designated as lots 18 and

[6] The record does not clearly reflect the identity of who actually applied for subdivision approval. However, we presume that even if Davis & Taylor Corp. were the applicant, De Camp acquiesced in, and approved of, the application. Accordingly, we refer to the applicant as the subdivider, making no distinction between Davis & Taylor Corp. and De Camp.

19 (now lots 30 and 29, respectively), but she sold them in 1980, long before acquiring legal title to Lot 20. Thus we do not consider the implications of the merger doctrine in land use law. See Jock v. Zoning Bd. of Adj. of the Twp. of Wall, 184 N.J. 562, 578 (2005).

In 1994, Borst applied to the Board of Adjustment for a variance for Lot 20, which she identified merely as an undersized lot, to permit the construction of a one-family dwelling. The Board of Adjustment denied the application, noting in its memorializing resolution the need for several dimensional variances, including: lot area; lot width; front, rear, and side yard setbacks; and lot coverage. A concept plan submitted with the variance application proposed a two-story building fronting on De Forrest Place with floor area of approximately 1100 square feet per floor.

Borst appealed the denial to the Law Division in an action in lieu of prerogative writs. The court remanded the matter to the Board of Adjustment "for further proceedings by the Board [of Adjustment] to allow [Borst] to present all relevant evidence/testimony affecting her application accompanied by appropriate findings by the Board [of Adjustment] as to [Borst's] complete application under N.J.S.A. 40:55D-70(c)(1) [and] (2)." In 1997, the Board of Adjustment again denied

Borst's application, concluding that Borst had "failed to sustain the burden of proof."

Rather than commencing a new action in lieu of prerogative writs, Borst filed a motion seeking to restore the original action that had resulted in the remand. We infer from the limited record that the motion was granted because Borst was then permitted to amend her complaint to join the Borough and assert an inverse condemnation claim in addition to seeking relief from the ultimate variance denial by the Board of Adjustment.

In January 1998, while the matter was pending before the Law Division, Borst entered into a stipulation dismissing the Board of Adjustment from the action with prejudice. Six months later, the Law Division dismissed the remainder of the action —— the inverse condemnation claim against the Borough —— with prejudice, due to Borst's failure to provide discovery, pursuant to Rule 4:23-5(a)(2).

Things remained quiescent on the litigational front for several years. Then, as a prelude to another lawsuit, Ciaglia entered into a contingent[7] contract with Borst to purchase Lot 20

[7] The contract for sale stated: "The within contract is contingent upon subdivision approval and any necessary bulk variances from the Borough of West Long Branch." The contract was silent regarding the nature of the subdivision; we presume (continued)

for $35,000. It is undisputed that at the time the contract was executed, the lot was vacant and unimproved, just as it had been since its creation in 1957. The geometry and dimensions of the lot remained unchanged since its formation.

In 2006, Ciaglia submitted his first variance application to the Board of Adjustment seeking to construct a single-family home with outside dimensions of thirty feet by forty feet. The application requested five dimensional variances for "[l]ot area, lot frontage and width, front yard set back, rear yard set back, [and] side yard set back." Ciaglia averred that he had "sought to acquire neighboring property and was unable to do so."

The Board of Adjustment provisionally denied (but did not dismiss) the application based upon the land use version of res judicata,[8] having determined that Ciaglia's proposal was "the same or substantially the same" as the application first submitted by Borst in 1994. The Board of Adjustment, however, allowed Ciaglia to submit amended plans that nevertheless required several dimensional variances, but which the Board of

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(continued)
the bulk variances related to the construction of a permitted dwelling.

[8] See William M. Cox & Stuart R. Koenig, New Jersey Zoning and Land Use Administration §28-3.2 (2011) (noting, among other things, that for res judicata to bar a second land use application, it must be substantially similar to the first).

Adjustment found were "substantially different from the Borst Application."

On the merits, the Board of Adjustment denied the variances, resolving, in part, the following:

> The lot was not created as a building lot. The property was abandoned by a prior owner and taken by the Borough for non-payment of taxes. The limited size of the lot could be considered a self-imposed hardship by a predecessor in title.
>
> . . . .
>
> The proposed house is too large for the small size of the lot, it is too intense, and the lot is less than one third of the requirement for the Zone. Too many trees will be removed, there are too many variances required for this size of a house and there is only [forty-five feet] frontage where 150 [feet] is required.

In denying the application, the Board of Adjustment expressed its "possible consideration of a plan for a house of 1,500 [square feet] or less, or a house that would meet the R-15 Zone requirements."

Following this setback, Ciaglia —— as the contract purchaser of the lot —— filed a three-count complaint in lieu of prerogative writs in September 2006, seeking (1) a reversal of the Board of Adjustment's decision on his variance application (count one), (2) "damages for wrongful inverse condemnation" from the Borough (count two), and (3) a declaration that, as

applied, the Borough's R-22 zoning regulations were unconstitutional (count three).

In its answer, the Borough requested bifurcation of the inverse condemnation claim from the challenge to the action of the Board of Adjustment. The first Law Division judge involved in this matter properly acceded to the bifurcation request and tried Ciaglia's challenge to the Board of Adjustment first. In July 2007, the court, by a written opinion, affirmed the Board of Adjustment's denial of Ciaglia's amended variance application.

The trial court rejected the Board of Adjustment's finding that any hardship was self-created. It found, after reviewing the principles outlined in Dallmeyer v. Lacey Township Board of Adjustment, 219 N.J. Super. 134 (Law Div. 1987), that Ciaglia had "clearly met [his] burden by showing that there was undue hardship and that [Ciaglia] did attempt to contact adjacent property owners regarding purchase of the property." In so many words, the Law Division held that Ciaglia had properly satisfied the so-called positive criteria of N.J.S.A. 40:55D-70(c)(1).

However, the court further concluded that the Board of Adjustment had not acted arbitrarily, capriciously or unreasonably in finding that Ciaglia did not satisfy the negative criteria of the statute, and held that the court would not reverse the variance denial. The court noted that the Board

of Adjustment "acknowledged that the lot may be too small to use as a building lot and, as such, recognizes the possibility that such a decision may amount to confiscation thus requiring condemnation by the municipality."

After this ruling, Ciaglia submitted another application[9] to the Board of Adjustment based upon its earlier indication that it might favorably entertain the approval of a much smaller dwelling. The Board of Adjustment denied this updated variance application, again citing Ciaglia's inability to satisfy the negative criteria. Despite this final denial, Ciaglia proceeded to acquire the land from Borst and became the owner of Lot 20 in July 2009, almost three years after commencing the action in lieu of prerogative writs.

Thereafter, Ciaglia moved for summary judgment on his inverse condemnation claim. The Borough filed a cross-motion for summary judgment asserting that (1) the statute of limitations barred the action for inverse condemnation and (2) Ciaglia's hardship was self-imposed. A second Law Division judge was assigned to this phase of the litigation. In a written opinion, that judge denied summary judgment to Ciaglia, granted the Borough's cross motion, and dismissed the complaint.

[9] The proposed dwelling was limited to 1,620 square feet (including an attached garage), compared to the prior application in which the proposed house consisted of 2,245 square feet plus a detached garage of 320 square feet.

The motion judge ruled that the subdivider's 1957 application for a substandard lot constituted a self-imposed hardship that was imputed to its successors in interest, namely Ciaglia. The imputation, therefore, disqualified Ciaglia from inverse condemnation relief. The judge further held that the Borough's treatment and taxation of the lot over the succeeding fifty years did not estop it from asserting a self-imposed hardship. Lastly, the judge concluded that the statute of limitations did not bar Ciaglia's action because the owners of the lot had not exhausted all remedies to support an inverse condemnation claim. However, on our remand, the judge amended his prior opinion, finding the statute of limitations to have expired following the long passage of time following the dismissal of Borst's inverse condemnation complaint in 1998. This appeal ensued.

II.

We do not write upon a blank slate in our resolution of this appeal. Eminent domain claims, including those of an inverse condemnation nature, are guided by the core constitutional principle barring "private property [from] be[ing] taken for public use, without just compensation." U.S. Const. amend. V; Kelo v. City of New London, 545 U.S. 469, 477, 125 S. Ct. 2655, 2661, 162 L. Ed. 2d 439, 450 (2005). The Takings Clause is "made applicable to the States by the

Fourteenth Amendment." Id. at 472, 2658, 447 (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897)).

Similar principles are well-established in this State. "The New Jersey Constitution provides protections against governmental takings of private property without just compensation, coextensive with the Takings Clause of the Fifth Amendment of the United States Constitution." Klumpp v. Bor. of Avalon, 202 N.J. 390, 405 (2010); see also N.J. Const. art. I, ¶ 20.

Under these federal and state provisions, the government is prohibited "'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Greenway Dev. Co. v. Bor. of Paramus, 163 N.J. 546, 553 (2000) (quoting In re Plan for Orderly Withdrawal, 129 N.J. 389, 414 (1992) (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554, 1561 (1960)). A property owner must be "deprived of all or substantially all of the beneficial use of the totality of his property" in order to bring a claim for inverse condemnation. Ibid. (citation and quotation marks omitted).

Takings jurisprudence "is informed by two separate legal doctrines: the right of the State to take private property for the public good, which arises out of the necessity of

government, and the obligation to make just compensation, which stands upon the natural rights of the individual, guaranteed as a constitutional imperative." Twp. of W. Orange v. 769 Assocs., LLC, 198 N.J. 529, 537 (2009) (citing Hous. Auth. of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2, 7 (2003) (citations omitted)); see also Mansoldo v. State, 187 N.J. 50, 58 (2006).

A constitutional taking may occur by a physical taking, in which the government acquires title to or authorizes a physical appropriation of private property, or by a "regulatory taking, through which a government regulation deprives the property owner of all economically viable use of" its land. Klumpp, supra, 202 N.J. at 405. By either method, the Takings Clauses require government to compensate the property owner. Ibid.

It is well-settled that not every impairment in value constitutes a taking. Karam v. Dep't of Envtl. Prot., 308 N.J. Super. 225, 235 (App. Div.), aff'd, 157 N.J. 187 (1998), cert. denied, 528 U.S. 814, 120 S. Ct. 51, 145 L. Ed. 2d 45 (1999). Our Court, however, has narrowed the application of this constitutional provision to only certain instances of government interference with private property. See Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 210 (1991) (holding that the "[d]iminution of land value" and the "impairment of the marketability of land" do not constitute "takings"); City of

Long Branch v. Jui Yung Liu, 203 N.J. 464, 486 (2010) (noting that there is no government taking for property that claimants never owned).

One well-recognized paradigm for a takings claim arises when municipal zoning regulations are applied to isolated undersized parcels of land. We addressed the requirements for perfecting an inverse condemnation claim based upon zoning in Moroney v. Mayor and Council of Borough of Old Tappan, 268 N.J. Super. 458 (App. Div. 1993), certif. denied, 136 N.J. 295 (1994). In that case, we clarified that a plaintiff aggrieved by restrictive land use controls must first seek a variance and challenge any denial in the Law Division:

> Absent a decision denying a hardship variance that was binding upon plaintiffs, they had every right, even the duty, to first seek relief under the Municipal Land Use Law in effect at the time before they could claim inverse condemnation. Until the owner has exhausted all remedial measures, a landowner cannot meet the burden of proving that the ordinance deprived the owner of all economically viable use of the land.
>
> [Id. at 465 (internal citations omitted).]

In Moroney, the "[p]laintiffs were denied a hardship variance to construct a single family house" on their "undersized, isolated lot." Id. at 461. The plaintiffs "filed a complaint in lieu of prerogative writs seeking to reverse the denial of the variance application . . . or, in the alternative, to compel the Borough

to commence condemnation proceedings." Ibid. The Law Division entered an order affirming the denial of the hardship variance, and determined that an inverse condemnation occurred as of that date. Ibid. We reasoned that in order to demonstrate a taking through application of a restrictive zoning ordinance, the landowner must show "that the regulations have destroyed all economically viable use of the property." Id. at 463 (citing Klein v. N.J. Dep't. of Transp., 264 N.J. Super. 285, 294 (App. Div. 1993)). "[T]he issue of whether inverse condemnation had occurred was not ripe for determination prior" to the Law Division affirming the denial of the variance. Moroney, supra, 268 N.J. Super. at 465.

A heightened sensitivity on the part of local land use agents must be observed when landowners seek to develop remnant parcels, in order to avoid regulatory takings that would be funded by the municipal treasury. This concern finds support in the recognition that public resources are scarce, and policy decisions as to their expenditure are best left to elected officials. Boards of adjustment have thus been admonished to "remember to be conscientious in [their] review of the facts [in hardship variance applications for isolated undersized lots] since outright denial may amount to confiscation thus requiring condemnation by the municipality." Dallmeyer, supra, 219 N.J. Super. at 146.

The creativity and imagination of landowners present a myriad of ways that a parcel of land may be developed. Accordingly, it is common that multiple iterations of a development plan may be presented to a land use agency for approval. Additionally, as is evident from this case, landowners may —— subject to frivolous or duplicative filings —— make a series of materially different applications to local land use agencies in efforts to obtain variance relief and thereby avoid the public expense of an inverse condemnation. The most effective check on this process is the principled ability of a board of adjustment to declare that a latter application is not sufficiently unlike a former application, thereby invoking land use res judicata[10] and dismissing the matter.

Notwithstanding the clear applicability of Moroney to the facts of this case, the Borough argues that Ciaglia is vicariously responsible for the land use faux pas of two others: (1) the 1957 subdivider and (2) Borst. As for the former, the Borough argues that the predicament in which Ciaglia finds himself was created by the subdivider's choice to create a discordant lot; as for the latter, the Borough contends that

[10] We emphasize that Ciaglia's last two variance applications to the Board of Adjustment were not rejected on res judicata grounds, thus satisfying his obligation to exhaust all avenues before insisting that government buy his interest in the land.

Borst's 1998 abandonment of her inverse condemnation litigation started the six-year[11] countdown of the statute of limitations, and by the time Ciaglia raised his claim in September 2006, the limitation of actions bar was already in place. We disagree with both arguments.

We start with Ciaglia's supposed derivative fault stemming from Borst. The Borough argues that because Ciaglia stepped into the shoes of his immediate predecessor in title, he was obliged to suffer her fate of being unable to pursue a recycled claim for inverse condemnation. It contends that the preclusive effects of (1) the passage of more than six years and (2) collateral estoppel or res judicata (not of the land use variety) make it unfair to allow Ciaglia to pursue his constitutionally-based remedies.

As noted, Borst's grievances with the Board of Adjustment and the Borough over the development of Lot 20 had been dismissed with prejudice due to her litigational inaction in 1998. Ironically, since a Moroney claim does not accrue until "the Law Division affirm[s] the denial of the hardship variances," id. at 465; see, e.g., United Savings Bank v. State, Department of Environmental Protection, 360 N.J. Super. 520, 525-27 (App. Div. 2003); Medical Center at Princeton v. Township

[11] See Klumpp, supra, 202 N.J. at 409.

of Princeton Zoning Board of Adjustment, 343 N.J. Super. 177, 218-219 (App. Div. 2001), Borst did not have to add an inverse condemnation claim to her 1997 amended complaint because the Law Division had never affirmed the denial of Borst's variance application. Her right to seek such remedies had not yet ripened. Nevertheless, she did plead the cause of action, and it was dismissed with prejudice for discovery delinquencies pursuant to Rule 4:23-5(a)(2).

"[W]hen the time and notice requirements of Rule 4:23-5 have been satisfied and an order dismissing the case with prejudice is entered, that dismissal constitutes an adjudication on the merits." Albarran v. Lukas, 276 N.J. Super. 91, 95 (App. Div.) (citing Feinsod v. Noon, 261 N.J. Super. 82 (App. Div. 1992)), certif. denied, 137 N.J. 314 (1994). Accordingly, such an order for dismissal precludes the party against whom the order was entered from asserting the same cause of action in a subsequent complaint. Feinsod, supra, 261 N.J. Super. at 85.

The Borough's argument that Borst's dismissal with prejudice bars Ciaglia from bringing an independent cause of action for inverse condemnation fails for two reasons. First, it neglects to recognize that the adjudication of an inverse condemnation action is peculiarly fact sensitive and must be individually tailored to the particular circumstances at the time the claim is presented. Under the rarefied exhaustion

requirement for inverse condemnation claims, Borst, at any time, could have submitted a materially different variance application that would not be barred on land use res judicata grounds, and thereafter seek relief from the Law Division if the Board of Adjustment denied her application. The Rule 4:23-5(a)(2) dismissal with prejudice has no place as a permanent embargo in the realm of regulatory takings jurisprudence. If the Law Division had determined that the subsequent denial of variance relief was proper Borst would have had a new independent cause of action for inverse condemnation, which would not have been barred by her 1998 delinquencies. In like fashion, Ciaglia's subsequent submissions —— not infected with land use res judicata —— stand on their own and consign the 1998 dismissal with prejudice to the trash bin of irrelevance.

The second reason why the Borough's argument fails is because it misreads what courts have stated regarding a plaintiff "standing in the same shoes as his predecessor in title in these situations." Chirichello v. Zoning Bd. of Adj. Monmouth Beach, 78 N.J. 544, 554-55 (1979). We have explained that the aforementioned proposition pertains to the availability of relief from zoning restrictions. More specifically, the availability of a hardship variance depends always on how the hardship was created, not on who suffers from it at the time of application for a variance. See Egeland v. Zoning Bd. of Adj.

of the Twp. of Colts Neck, 405 N.J. Super. 329, 333 (App. Div.), certif. denied, 199 N.J. 134 (2009); see also Davis Enter. v. Karpf, 105 N.J. 476, 481-82 (1987). Essentially, "[i]f an owner who was entitled to a variance on hardship grounds sells to a buyer who knows that the Lot does not conform, the right to a variance is not lost as a result of the buyer's knowledge." See William M. Cox & Stuart R. Koenig, New Jersey Zoning and Land Use Administration §6-2.9(c) (2011) (citing Harrington Glen, Inc. v. Mun. Bd. Adj. of Bor. Leonia, et al., 52 N.J. 22, 28 (1968); Chirichello, supra, 78 N.J. at 556-57).

The Borough further contends that what rendered Lot 20 inutile was not local zoning regulations, but rather was the voluntary and purposive act of Ciaglia's distant predecessor who obtained (or acquiesced in) the subdivision in 1957. We note that the lot was created with the full authorization of the Planning Board, pursuant to the Municipal Planning Act, N.J.S.A. 40:55-1.1 to -1.42 (repealed by L. 1975, c. 291). The creation of discordant lots is not unheard of. See Green Meadows at Montville, L.L.C. v. Planning Bd. of Montville, 329 N.J. Super. 12, 22 (App. Div. 2000) (affirming the grant of two lots in an eight-lot subdivision that did not conform to certain lot geometry and depth). Although the process of obtaining permission for a discordant lot in 1957 differs widely from the process today, see, e.g., Loechner v. Campoli, 49 N.J. 504, 512

(1967), we are confident that the Planning Board granted its approval for the filing of the subdivision map with its eyes wide open and in conformity with existing law. Certainly, no evidence to the contrary has been provided. Thus, at the time of its creation, the subject lot was as potentially developable as the other twenty-seven lots approved by the Planning Board, even though it was the runt of the litter.

The Borough's argument is further eroded by its post-1957 up-zoning of the area to the R-22 zone, which rendered the lot's (1) frontage further deficient (forty-five feet provided, versus 150 feet required) and (2) minimum lot area fifty per cent more inadequate (7,142 square feet provided, versus 22,500 square feet required). Truly, when Ciaglia exhausted his efforts with the Board of Adjustment in 2009, it was the Borough's extant land use regulations that zoned the lot into idleness, not events that occurred fifty-two years earlier.

To the extent that the Borough has advanced other arguments casting vicarious fault on Ciaglia, we find that they are wholly without merit. R. 2:11-3(e)(1)(E).

III.

Based upon our review, we are satisfied that Ciaglia was entitled to substantially the same remedy awarded in Moroney. That is, a judgment requiring the Borough to commence procedures pursuant to the Eminent Domain Act of 1971 (the Act), N.J.S.A.

20:3-1 to -50 leading to its acquisition of Lot 20. We leave it to the Law Division to decide whether to appoint commissioners sua sponte, see Moroney, supra, 268 N.J. Super. at 461, or to oblige the Borough to follow some or all of the procedural minutiae of the Act.[12] See, e.g., 769 Assocs., LLC, supra, 198 N.J. at 537.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

[12] We leave it to the Law Division to decide, for example, whether the Borough must follow the prelitigation requirements of the Act. See, e.g., City of Atl. City v. Cynwyd Invs., 148 N.J. 55, 69 (1997); City of Passaic v. Shennett, 390 N.J. Super. 475, 482-83 (App. Div. 2007); Casino Reinvestment Dev. Auth. v. Katz, 334 N.J. Super. 473, 481 (Law Div. 2000).