SCOT NETHERLANDS, INC., Plaintiff-Appellant, v. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant-Respondent.

DOCKET NO. A-5156-11T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2014 N.J. Super. Unpub. LEXIS 771

November 14, 2013, Submitted
April 7, 2014, Decided

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4451-08.

COUNSEL: Peter A. Ouda, attorney for appellant.

John J. Hoffman, Acting Attorney General, attorney for respondent (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Jason T. Stypinski, Deputy Attorney General, on the brief).

JUDGES: Before Judges Sapp-Peterson and Lihotz.

OPINION

PER CURIAM

Plaintiff Scot Netherlands, Inc., a New Jersey corporation,[1] appeals from the May 11, 2012 dismissal of its inverse condemnation complaint, following a bench trial. Plaintiff asserts the judge incorrectly found the denial of plaintiff's application for fresh water and coastal wetlands permits by defendant Department of Environmental Protection (DEP), did not constitute a regulatory taking. Plaintiff seeks reversal and remand for an award of damages, arguing the regulatory scheme imposed precludes development of its 22.87 acre Atlantic City property (subject property), depriving it of economic benefit. We disagree and affirm.

1 On the eve of trial plaintiff's complaint was amended to name Scot Netherlands, LLC as the owner of the subject property.

In March, 2007, thirty years after acquisition, plaintiff submitted applications **[*2]** to the DEP seeking a coastal wetlands permit and a freshwater wetlands individual permit to fill 17.44 and 1.36 acres, respectively, of the subject property in preparation of plans to construct a 1450 space surface parking lot and two storm water management basins. At that time, the property, which is located within 1000 feet of a navigable waterway, was classified as part of the marine tidal marsh district. In a June 12, 2007 letter, the DEP denied plaintiff's applications. Without these permits, plaintiff maintains "more than 99% of [plaintiff's t]ract cannot be put to any sort of economic use[,]" except for rent from an existing billboard.

It is noted that following the denial of its permit applications, plaintiff appealed. In the action before the Office of Administrative Law, the parties stipulated "[f]urther development . . . may require [DEP] approval under the Freshwater Wetlands Act" and the proposed development cannot be approved based on current regulations as it "does not comply with the rules on [c]oastal [z]one [m]anagement set forth at *N.J.A.C.* 7:7E." An administrative law judge thereafter denied relief and the DEP Commissioner issued a final decision, affirming the denial **[*3]** of plaintiff's permit applications.

Thereafter, plaintiff filed this complaint seeking just compensation for what it characterized as the DEP's regulatory taking, in violation of the coextensive provisions of Article IV, Section 6, Paragraph 3 of the New Jersey Constitution, and the Fifth Amendment of the United States Constitution. The Honorable Michael Winkelstein presided over a five-day trial, at which the parties presented fact and expert testimony, tracing the history of the plaintiff's ownership, the property's past zoning classifications, the property's current billboard rental and generated revenue, the nature of plaintiff's proposed development, the costs associated with mitigation to accomplish development, the applicable municipal approvals, and various state and federal regulations precluding the proposed development.[2] Finally, the parties produced appraisal experts who discussed the valuation of the property as restricted and its hypothetical valuation with the requisite DEP permits.

2 The area of the proposed development is also subject to the concurrent regulatory jurisdiction of the Army Corps of Engineers.

In his oral opinion, Judge Winkelstein reviewed the testimonial **[*4]** evidence and set forth his factual findings, including credibility determinations of the witnesses. He found plaintiff's property as regulated retains economic value and plaintiff "has enjoyed and continues to enjoy some economically beneficial use of its property so as to

defeat a total . . . taking claim."[3] He noted any alleged economic impact resulting from the DEP regulations was "discount[ed]" because plaintiff failed to request the necessary permit pursuant to § 404 of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 (§ 404 permit). *See* 33 *U.S.C.A.* § 404. The judge found plaintiff could not demonstrate the likelihood of securing a necessary § 404 permit, stating "any expectation that the project would qualify for a § 404 permit in light of these criteria was simply . . . wishful thinking." Judge Winkelstein also noted the Army Corps of Engineers required between twelve and twenty-four months to review such an application, during which time the municipality modified its Master Plan, rezoning plaintiff's property from highway commercial to tidal marsh in September 2008, effectively rendering plaintiff's proposed development of remote parking a prohibited use.

3 Judge **[*5]** Winkelstein mentioned, but did not rely upon, an amelioration offer issued by the DEP, which allowed limited permitting for the installation of additional billboards on the subject property.

Further, the judge found from the time of plaintiff's acquisition, it clearly understood the subject property's use was regulated by the DEP and the Army Corps of Engineers. The regulatory provisions at the time of purchase did not support a prospect that plaintiff's proposal for filling more than twenty acres of coastal wetlands would be granted. Moreover, since plaintiff's acquisition, the city has assessed real estate taxes based upon the subject property's non-buildable wetlands character. Citing these facts along with plaintiff's lack of effort to effectuate other necessary steps for development, the judge found "plaintiff did not intend to actually develop the property, but rather, planned to propose a project that did not meet the criteria for issuance of the DEP permits, then obtain those permit denials, then file an inverse condemnation claim against the DEP."

Considering the applicable law, Judge Winkelstein concluded plaintiff did not meet its burden to prove by clear and convincing evidence **[*6]** the three prongs necessary to show government regulation constitutes a compensable taking, as identified in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Specifically, he determined plaintiff failed to demonstrate the proposed development would be viable but for the DEP regulation and offer evidence to demonstrate plaintiff's reasonable investment-backed expectations that it would not be subject to regulation. *Id.* at 127-27, 98 S. Ct. at 2661, 57 L. Ed. 2d at 650. Finally, in examining the character of the regulations burdening the property and the harm which they addressed, the judge weighed the public health and safety benefits, noting the subject property was not singled out for regulatory application. Rather, the provisions were designed to preserve the coastal waterways of the State. *See Id.* at

124, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648. *See also Mansoldo v. State*, 187 N.J. 50, 59, 898 A.2d 1018 (2006) (requiring a factual inquiry and balancing of the *Penn Central* factors when analyzing a claim for a regulatory talking). Accordingly, he dismissed plaintiff's complaint with prejudice.

On appeal, plaintiff argues the judge misapplied the **[*7]** *Penn Central* factors resulting in an erroneous conclusion that the DEP's regulatory scheme did not cause a compensable taking. The DEP refutes this argument restating the evidential support underpinning the judge's conclusion.

We do not disturb a trial court's factual findings and legal conclusions "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. . . ." *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 484, 323 A.2d 495 (1974) (citation and internal quotation marks omitted). In our review, we do not defer to a "trial court's interpretation of the law and the legal consequences that flow from established facts." *Manalapan Realty v. Manalapan Twp. Comm.*, 140 N.J. 366, 378, 658 A.2d 1230 (1995). Our review of legal issues is plenary.

We have reviewed the arguments advanced on appeal along with the record and applicable law, and reject as unfounded plaintiff's arguments challenging the trial court's findings and resultant conclusions.

"[N]ot every impairment in property value establishes a taking." *Dock St. Seafood, Inc. v. City of Wildwood*, 427 N.J. Super. 189, 202, 47 A.3d 785 (App. Div. 2011) **[*8]** (citations omitted). Use restrictions do not "necessarily result in takings even though they reduce income or profits." *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 221, 238, 608 A.2d 1377 (1992) (citations omitted). "[N]either diminution of land value itself nor impairment of the marketability of land alone constitutes a taking." *Pheasant Bridge Corp. v. Twp. of Warren*, 169 N.J. 282, 298, 777 A.2d 334 (2001).

> The mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value[.]
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> [*Palazzolo v. R.I.*, 533 U.S. 606, 625, 121 S. Ct. 2448, 2461, 150 L. Ed. 2d 592, 612 (2001).]

Judge Winkelstein credited the DEP's valuation expert finding the subject property was valued at $200,000 regardless of the DEP's regulations precluding further development as "plaintiff enjoys an economically beneficial use [the billboard] and has done so for over 30 years." Moreover, the uncontroverted testimony by the DEP's expert supported the judge's finding that **[*9]** the development as proposed would not have satisfied the requisites to secure a § 404 permit from the Army Corps of Engineers, even if the DEP had approved its permit requests.

Similarly, the evidence supports the finding that the regulations did not destroy plaintiff's reasonable "'distinct investment-backed expectations.'" *E. Cape May Assoc. v. State of N.J. Dep't of Envt'l Prot.*, 300 N.J. Super. 325, 337, 693 A.2d 114 (App. Div. 1997) (quoting *Penn Central, supra*, 438 U.S. at 124-25, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648).[4] As Judge Winkelstein noted, plaintiffs were well-aware of the federal and state regulations governing the subject property. In addition to the highly restrictive § 404 permit requirements, including that "[d]ischarges in wetlands areas should be avoided," 42 *Fed. Reg.* 37146 (1977), the DEP regulations existing at the time of plaintiff's acquisition that provided "a proposed use of costal resources is likely to be rejected or denied as the [DEP] has determined that such uses of coastal resources should be deterred." *N.J.A.C.* 7:7E-2.3(a)(4). Thus, "no reasonable inference c[ould] be drawn from the evidence that plaintiff could ever have reasonably believed it could build a casino **[*10]** on the property or any other substantial development on the site."[5] The subsequent modification of state regulations, added over the thirty-years since the subject property's acquisition, did not alter this pre-existing regulatory policy.

4 "A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874, 81 L. Ed. 2d 815, 834 (1984).

5 Contrary to plaintiff's suggestion that it intended casino development, at no time was the subject property zoned for resort development.

Finally, plaintiff does not challenge the public utility of the regulations, designed to assure clean and safe water along with preservation of natural coastal resources. Rather, plaintiff suggests the regulations impose a burden restricting the subject property's use. We reject this assertion. *See Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S. Ct. 2886, 2899, 120 L. Ed. 2d 798, 820 (1992) ("[T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long **[*11]** recognized, some values are enjoyed under an implied limitation and must yield to the police power.") (citations and internal quotation marks omitted).

We discern no flaw in Judge Winkelstein's factual findings, which are fully supported by the evidence of record. Nor do we discern error in the legal conclusions drawn from those facts. The remaining arguments advanced by plaintiff on appeal lack sufficient merit to warrant discussion in our opinion. *R.* 2-11-3(e)(1)(A).

Affirmed.