SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4817-15T2

BOROUGH OF AVALON,

Plaintiff-Appellant,

v.

THE MARINA AT AVALON ANCHORAGE, LLC,

Defendant-Respondent,

and

SUNRISE MARINA, INC. and AVALON ANCHORAGE MARINA, LLC,

Defendants.

Argued April 26, 2017 – Decided June 5, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. C-8-16.

Daniel A. Greenhouse argued the cause for appellant (Cullen and Dykman, LLP, attorneys; Neil Yoskin and Mr. Greenhouse, on the brief).

Richard M. Hluchan argued the cause for respondent (Hyland Levin, LLP, attorneys; Mr. Hluchan, on the brief).

PER CURIAM

Plaintiff Borough of Avalon appeals from a June 20, 2016 final judgment granting defendant The Marina at Avalon Anchorage, LLC's (Anchorage) motion to dismiss the Borough's declaratory judgment complaint to invalidate the vacation of a portion of 20th Street, which the Borough did in 2010 at the behest of Anchorage's predecessor in title or, in the alternative, to compel Anchorage to construct the "public benefit improvements" its predecessor agreed to build in return for the vacation. Because none of the recorded documents in Anchorage's chain of title put it on notice that the street vacation was contingent on the construction of those improvements, we affirm.

We summarize the essential facts from the view most favorable to the Borough. In 2005, Anchorage's predecessor, Avalon Anchorage Marina, LLC (Marina), approached the Borough about rezoning the property to permit residential development and vacating the contiguous portion of 20th Street to assist in its plans to redevelop the marina. Although amenable to the idea of redevelopment, the Borough wanted Marina to maintain a fuel dock and a restaurant on the property, to create more boat slips, perhaps reinstate boat rentals, and limit residential units to one particular section of the property.

In 2007, Marina presented a site plan to the Borough's combined Planning and Zoning Board of Adjustment and formally requested the Borough to vacate a portion of 20th Street. Marina's lawyer submitted a certification in this action, averring that his client, Anchorage's predecessor, "proposed retention of a fuel dock, a public boat ramp and a public access area in consideration for the rezoning and the vacation of a portion of 20th Street." The Borough Council determined that vacating a portion of 20th Street would serve the public interest because of the public benefits included in Marina's plan, and agreed to do so in exchange for Marina's promise to construct those improvements. The lawyer certified that "[t]o the best of [his] knowledge," his client "fully intended to construct those improvements when it developed the [p]roperty."

Marina, however, did not develop the property. Instead, "[f]or reasons unrelated to the approval obtained from the Avalon Planning/Zoning Board and the [Department of Environmental Protection], as well as the street vacation approved by the Borough, [Marina] decided to sell the [p]roperty prior to commencing construction." And nothing in either the ordinance vacating the portion of 20th Street or the site plan approval expressly conditioned the street vacation on the construction of those public benefits.

The only condition contained in the Ordinance vacating the street was that Marina obtain, within two years[1], all approvals from the DEP and the Planning/Zoning Board necessary to permit construction. Specifically, the ordinance provides:

> SECTION 3: CONTINGENCY: This vacation is contingent upon Avalon Anchorage Marina obtaining all approvals from the State of New Jersey Department of Environmental Protection as may be required by the Coastal Area Facilities Review Act [(CAFRA)] and from the Avalon Planning/Zoning Board for the construction of improvements at its property located at 863 21st Street within a period of two (2) years from the date of adoption of this Ordinance. In the event Avalon Anchorage Marina fails to obtain the necessary approvals within two (2) years from the date of this Ordinance[,] the vacation shall be void and the Borough shall retain its existing right of way. Evidence of compliance with this condition shall be a resolution from Borough Council acknowledging same upon presentation of proof of the required municipal land use approvals and a CAFRA permit from the appropriate authorities.
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> [Borough of Avalon, Ordinance No. 585-2007.]

The resolution of site plan approval likewise does not condition approval on construction of the improvements designed for the public benefit. The only reference to those

[1] The Borough extended that period for an additional year with the adoption of Ordinance No. 617-2009 on May 27, 2009.

improvements is contained in that portion of the resolution summarizing the testimony at the public hearing as follows:

> 1. Applicant's engineer, A. Christopher Eaton, P.E. . . . stated that . . . the fuel docks would remain and that a boat ramp will replace the existing boat lift. . . .
>
> 2. Applicant's architect, Jerry Blackman, A.I.A. testified that . . . the proposed boat ramp would be maintained and available for public use. . . . He stated that the walkways along the water were dedicated to public use . . . .
>
> 3. Peter Lomax, the project's environmental consultant . . . indicated that based upon previous meetings with the Department of Environmental Protection, the State appeared in favor of the project, citing the public boardwalk and retention of boat slips as favorable.
>
> 5. One of Applicant's principals, Charles Johnson, testified . . . that the fuel storage would be upgraded in response to the need and demands of the boating public and a public restroom was proposed.
>
> [Emphasis added.]

Following the DEP's issuance of the CAFRA permit to Marina in March 2010, the Borough Council "[i]n reliance upon the Site Plan approval and the CAFRA [p]ermit received by [Marina], both of which included the Public Benefits, . . . adopted Resolution No. 98-2010 dated June 9, 2010, confirming that [Marina] had complied with the conditions of the Ordinances vacating a portion of 20th Street." See Resolution No. 98-2010, "A

Resolution Acknowledging and Confirming Compliance by Avalon Anchorage Marina, LLC with the Conditions Set Forth in Ordinance No. 585-2007, Adopted June 13, 2007." The Resolution sets forth the contingency contained in Ordinance No. 585-2007, recites the history of the matter, references and attaches as exhibits the "documentary proof . . . to substantiate compliance" with the contingency and resolves that "Avalon Anchorage Marina, LLC has complied with all of the conditions set forth in Ordinance No. 585-2007, . . . as amended by Ordinance No. 617-2009 . . . concerning the vacation of portions of 20th Street in the Borough of Avalon," and thus that "the public right, title and interest in, along, upon and over the land . . . be and hereby is vacated, surrendered and extinguished," and directs its recording. Resolution No. 98-2010 was recorded in the Cape May County Clerk's Office on June 14, 2010, in Book S7 at pages 423 through 489.

Marina sold the property to Anchorage in February 2012. In February 2016, Anchorage submitted a revised site plan to the Planning/Zoning Board without the fuel dock or boat ramp. Shortly thereafter, the Borough filed this action to invalidate the street vacation or compel Anchorage to enter into an agreement with the Borough "imposing permanent conditions on the Anchorage Property" requiring "that any future use . . . include

the Public Benefits" which agreement "shall be recorded in the Cape May County Clerk's Office and which conditions shall run with the land."

Judge Sandson entered an order to show cause, directing service of the complaint and setting a briefing schedule and return date. Upon receipt of the pleadings, Anchorage filed an answer and a motion to dismiss. After hearing argument, the judge directed additional briefing and set a short period for discovery in order to permit the Borough to ascertain whether Anchorage's principal had actual knowledge of Marina's agreement to construct the public benefit improvements in exchange for the vacation of a portion of 20th Street.

After conducting that discovery, the Borough conceded it was without any information to indicate actual knowledge of the agreement on the part of Anchorage. The Borough argued, however, that Anchorage failed to make reasonable inquiry into the consideration given for vacating the street; that the expiration of the CAFRA permit without construction of the public benefit improvements, resulted in a breach of the agreement, including the implied covenant of good faith and fair dealing; that none of the sworn representations of representatives of Marina, noted in the recorded documents, had been carried out; and that the failure to construct the public

benefits before expiration of the CAFRA permit resulted in both a failure of consideration and of the underlying purpose of the street vacation. The Borough maintained the absence of any public benefit rendered the street vacation ultra vires and thus null and void.

Anchorage argued, among other things, that although the Planning/Zoning Board approved a plan which contained a fuel dock and a boat ramp, nothing in the approval or the ordinances required those elements to be included in the redevelopment; that it was entitled to rely on the recorded resolution that Marina had "complied with all of the conditions . . . concerning the vacation of portions of 20th Street"; and that its right to the vacation had vested, precluding the Borough from divesting it of its property right.

Judge Sandson, relying on Island Venture Associates v. New Jersey Department of Environmental Protection, 179 N.J. 485 (2004), determined that Anchorage was not on notice of any unsatisfied condition of the street vacation and thus could not be bound to construct the improvements.

> The Court finds this matter is subject to the ordinance and resolution which provide that the street is to be vacated upon Anchorage's obtaining . . . all approvals from the State of New Jersey Department of Environmental Protection as may be required by the . . . Coastal Area

Facilities Review [A]ct and from the Avalon Planning and Zoning Board. . . . Anchorage has in fact met these conditions.

The ordinance does not specifically provide for any condition premised on public benefits. The portion of 20th Street South was vacated to [Marina]. Later Anchorage purchased it after completing a search, a proper search, certainly nothing that . . . has been presented to me shows that it was not a proper search of the Cape May County records. In their search such public interest elements were not and could not be recorded as condition of which if not met the Borough could at any time rescind the vacation of 20th Street[.]

How could that have been done? How could the . . . Borough of Avalon . . . reflect that if this was . . . truly their position? They could have established a reverter that would have been right in the street vacation. Such a reverter never existed. . . . [T]his court has seen many cases in which a municipality retains a reversionary interest. In the event certain things, specifically conditioned things are not entered it would be in the deed of vacation, it would be clearly reviewable and searchable by a buyer.

This did not happen here. I think that the interests of the sanctity of the Recording Statute here overcomes a long and protracted argument made by [plaintiff's counsel]. And I understand his argument. . . . I don't think that [counsel's] argument, if I follow it to its fair and full conclusion, would have provided a buyer of real estate with any . . . reasonable notice whatsoever of what Avalon's conditions were. The fact that it was contained . . . in one of the chain of municipal approvals leading to the vacation

I don't think is adequate. I don't think that it provides fair notice. I think that it would subvert . . . the high public interest that . . . this State has in the sanctity of its recording statutes[.]

[I]f I were to now say to [defendant] . . . that you'd better read everything because you'd better satisfy the public interest. I don't think that's what's called for in our law in this area. Additionally, as I said, there's no reverter clause in the agreement between [Marina] and the Borough indicating that the vacated portion of land would revert back to the Borough should the public interest elements not be met.

What is important to note is that there was a contingency in . . . [O]rdinance [Nos. 585-2007 and 617-2009], that does state if the approvals were not timely obtained. In fact, those were observed . . . by [Marina] and in fact they did get that, the one CAFRA extension and then they got the CAFRA permit. Thus I think it's clear that the Borough knew to include a contingency when it so desired. However no contingency was included regarding . . . the possibility of rescinding the vacated portion of 20th Street should the public interest elements not be met.

The fact is that the alleged conditions which the Borough seeks to rescind were not recorded and as such when Anchorage purchased the property after it conducted a search it was not noticed of such alleged conditions. Therefore the property was purchased with notice of what was recorded and no conditions allowing the Borough of Avalon to rescind its vacation of 20th Street were included. And I don't think that a reasonable buyer in such a case should be deprived of his ownership of real

> property based upon his own analysis of whether or not the public interest was met.

Judge Sandson thus entered a final order providing that Anchorage's right in the vacation

> is fully vested, and is not subject to any contingencies, conditions subsequent, or reverters, and as such Anchorage, and its heirs, successors and assigns, is under no obligation to provide any public benefits, including but not limited to a boat ramp, public walkway, or gasoline dock facilities at the marina located at 863 21st Street in Avalon.

This appeal followed.

We agree that Island Venture controls here. Accordingly, we affirm, substantially for the reasons expressed by Judge Sandson in his opinion from the bench. We add only the following.

We accept the Borough's contention that a municipality may vacate a portion of a public street in favor of an abutting landowner only in the public interest. See generally N.J. Const. art. VIII, § 3, ¶ 3 (prohibiting donation of land by any municipal corporation); Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 137-38 (1965) ("It is clearly established that a municipality may vacate a street where such action serves the general public interest.").

Further, the Borough would have acted well within its powers to have conditioned the vacation on the landowner's agreement to construct and maintain in perpetuity the public benefits contemplated by the grant, that is the boardwalk, boat ramp and fuel dock. See Palisades, supra, 44 N.J. at 139 (noting "a municipality has the power, and under certain circumstances the duty, to append a condition to a street vacation to assure that the land thus relieved of the public easement will be employed for the purposes upon which the municipality based its conclusions that it was for the general public interest"). The problem here is the municipality failed to do so, instead, conditioning the vacation only on the landowner obtaining its CAFRA permit and site plan approvals, neither of which compelled construction of the public benefits. There is no support for the Borough's argument that the failure to have effectively secured the public benefit intended, renders the vacation void ab initio.

Notwithstanding its failure to have drafted an effective condition to secure the benefits on which the vacation was based, the Borough may well have been able to compel the landowner requesting the street vacation to build and maintain the improvements. See id. at 130. It is, however, another matter altogether to enforce such an unexpressed restriction

against a subsequent purchaser without knowledge of the condition. See Island Venture, supra, 179 N.J. at 494 (noting a good faith, innocent purchaser is "precisely the type of purchaser whom the Legislature sought to protect when enacting the Recording Act").

The recorded resolution states in plain and unmistakable terms that Marina had "complied with all of the conditions" set forth in the Ordinances conditionally granting the street vacation and thus "the public right, title and interest in, along, upon and over the land" was thereby "vacated, surrendered and extinguished." Having reviewed each of the attachments recorded with that document, we agree with the trial court that none would put a purchaser on notice that the street vacation was contingent on any public benefit improvements.

We need not reach Anchorage's contention that because the street vacation had vested, the Borough was without authority to divest it of its right in the property, relying on Stockhold v. Jackson Township, 136 N.J.L. 264 (E. & A. 1947). We do not agree that Stockhold stands generally for the proposition, as Anchorage asserts, that "[u]nder the law in New Jersey, once the right to a street vacation has vested, neither the municipality nor the Court can impair or void such a right." As we have already observed, we think it likely the Borough could have

compelled Anchorage's predecessor in title to construct the public benefit improvements or relinquish the property vacated under the facts presented. That case, however, is not the one presented. It is enough to find, as the trial court did, that because Anchorage was a good faith, innocent purchaser without knowledge of the agreement between its predecessor and the Borough, it took title free of the unexpressed condition of which it had no notice.

We are not unmindful that this result deprives the public of the significant benefits of a public access walkway along the water, a fuel dock and a boat ramp anticipated when the Borough agreed to vacate a portion of 20th Street. We note only that the power to have effectively conditioned the street vacation on those benefits was in the Borough, and that the Recording Act shields the subsequent purchaser from having to construct the improvements having never been noticed of any such obligation. See Island Venture, supra, 179 N.J. at 495.

We affirm the dismissal of the Borough's complaint, substantially for the reasons expressed in Judge Sandson's thorough and thoughtful oral opinion of June 7, 2016.

Affirmed.