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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-P-827

ALFRED NELSON & others [1]

vs.

COMMONWEALTH; TOWN OF CHATHAM, intervener.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

We affirm the Superior Court's (a) dismissal of count IV of the plaintiffs' complaint (regulatory taking); (b) allowance of summary judgment in favor of the Commonwealth against count II of the complaint (unconstitutionality of wetlands regulations); and (c) declaration of the challenged regulations' constitutionality. Our rulings rest essentially upon the reasons set forth in the May 31, 1991, memorandum and decision and order of the first Superior Court judge and the April 30, 1992, memorandum and order of the second Superior Court judge, as amplified in the thoughtful and balanced appellee's brief of the Commonwealth. [2]

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[1] Evelyn Nelson, Lewis Hicks, III, and Bernice Hicks.

[2] No record references were provided for the vast majority of the factual statements in the plaintiffs' brief. Given the prodigious size of the appendix that the plaintiffs presented to this court, their noncompliance with the mandate of Mass.R.A.P. 16(e), 365 Mass. 862 (1974) & 378 Mass. 940 (1979), not only caused the court substantial inconvenience and unnecessary expenditure of time in determining whether such statements were supported by the record, but also

As to count IV, the plaintiffs, who still reside in their seaside homes, cannot plausibly assert that they have been denied all economically viable use of their property. 3/ Even if they could, however, they have failed to demonstrate that any of the limited exceptions to the long-standing general rule, that

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would have justified our striking their entire brief, Mass.R.A.P. 16(k), 365 Mass. 863 (1974), or disregarding virtually all of its contents. See Service Publications, Inc. v. Goverman, 396 Mass. 567, 580 (1986); Boston Edison Co. v. Brookline Realty & Inv. Corp., 10 Mass. App. Ct. 63, 69 (1980).

3/ A land-use regulation does not effect a taking unless it "denies an owner economically viable use of his land." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985), quoting from Agins v. Tiburon, 447 U.S. 255, 260 (1980). Wilson v. Commonwealth, 31 Mass. App. Ct. 757, 764-765, S.C., 413 Mass. 352 (1992). It defies logic for the plaintiffs to allege, at this stage, that the Department of Environmental Protection's refusal to allow them to build seawalls amounts to a regulatory taking. "A requirement that a person follow administrative procedures for obtaining a permit is not a taking of property." Wilson v. Commonwealth, 413 Mass. at 356-357. Moreover, it is clear that the plaintiffs have not lost all economically viable use of their property. The actual use to which the plaintiffs put their properties has not at all been affected by the denial of their requests. Both homes remain intact, and it is far from a foregone conclusion that the Department will ultimately prohibit protective measures or that the homes will be claimed by the sea. See id. at 356 n.4 (plaintiffs could prevail on taking claim, that the Department would have unlawfully denied permission to construct a seawall, only by demonstrating that the Department, after all appeals periods had elapsed, would have unjustifiably denied the request and the denial "would have caused a total loss of the value of the plaintiffs' properties"). Contrast Wilson v. Commonwealth, 31 Mass. App. Ct. at 764-767 (dismissal of regulatory taking claim on Mass.R.Civ.P. 12(c) premature where homes had been overrun by the ocean; trial necessary to elicit facts to enable trial judge to make a determination on taking issue).

administrative remedies must be exhausted before resort may be had to the courts, are applicable to the circumstances of their case. Merely because a constitutional issue is alleged to be involved in their regulatory taking claim does not obviate the exhaustion requirement. See Wilson v. Commonwealth, 31 Mass. App. Ct. 757, 765, S.C., 413 Mass. 352, 356 (1992); [4] Williamson County Regional Planning Commn. v. Hamilton Bank, 473 U.S. 172, 186 (1985).

[4] We mention, in passing, our doubt that a taking analysis is even applicable to the plaintiffs' situations. "Throughout history, the shores of the sea have been recognized as a special form of property . . . subject to different legal rules from those which apply to inland property." Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 631 (1979). All titles to oceanfront property derive from the Commonwealth and remain subject to the public trust with which all such property was impressed when held by the Commonwealth through the English Crown, resulting in private owners of shorefront land holding only a qualified property interest that does not extend to interfering with or obstructing the public's rights of navigation, fishing, or other maritime activities and that may not support a taking claim. Id. at 632-637, 649; Wilson v. Commonwealth, 31 Mass. App. Ct. at 768. See also National Audubon Soc. v. Superior Court, 33 Cal. 3d 419, cert. denied, 464 U.S. 977 (1983), and Orion Corp. v. State, 109 Wash. 2d 621 (1987), cert. denied, 486 U.S. 1022 (1988) (both standing for the proposition that, to the extent challenged regulations prohibit uses or activities that would violate the public trust which it is the State's duty to protect and enforce, they are insulated from a taking challenge; since shorefront land has been held in public trust or subject to the public trust from the outset, there could not subsequently have been reasonable, investment-backed expectations in, and nothing is taken by prohibiting or regulating, activities violative of or impinging upon the interests protected by the public trust).

There has been no showing that following the administrative process to its conclusion would be futile, in the requisite sense that administrative relief is "virtually impossible" to obtain, Stock v. Massachusetts Hosp. Sch., 392 Mass. 205, 213 (1984), cert. denied, 474 U.S. 844 (1985), for whatever reason, or that there is no chance of success at the administrative level because an adverse outcome is a foregone conclusion. See Massachusetts Respiratory Hosp. v. Department of Pub. Welfare, 414 Mass. 330, 337 (1993). See also Gilbert v. Cambridge, 932 F.2d 51, 61 (1st Cir.), cert. denied, 112 S.Ct. 192 (1991).[5]

The plaintiffs' affidavits submitted in opposition to the motion to dismiss suggest, at most, considerable delay in the Department's holding of adjudicatory hearings on their appeals. Mere delay, however, does not amount to futility of the sort justifying bypassing the normal administrative processes, particularly when the plaintiffs have presented nothing to suggest the impossibility of ultimately obtaining from the

[5] The plaintiffs gain nothing by invoking G. L. c. 231A, § 2, which authorizes declaratory judgment actions as to administrative practices and procedures alleged to be unconstitutional. The Declaratory Judgment Act has codified the futility exception to the exhaustion requirement. G. L. c. 231A, § 3. In any event, application of the exhaustion requirement in a declaratory judgment action is within the discretion of the trial judge, I.S.K. Con of New England, Inc. v. Boston, 19 Mass. App. Ct. 327, 330 (1985), which the plaintiffs have failed to show was abused in any respect in this litigation. See Mazzoleni v. Cotton, 33 Mass. App. Ct. 147, 152-153 (1992).

Department permission to build their desired structures as authorized by 310 Code Mass. Regs. §§ 10.28(2) & (3) and 10.30 (1989). [6]

Finally, the plaintiffs have not, beyond conclusory assertion, demonstrated that continued delay in the Department's adjudicatory process will cause them to suffer irreparable harm before the process can run its course (a situation which, if true, might well justify excusing them from further pursuit of the administrative remedy, see Everett v. Local 1656, Intl. Assn. of Firefighters, 411 Mass. 361, 368 [1991]). The Nelsons have obtained from the Department an emergency certification (A. 1410-1415) allowing them to install a temporary sand bag revetment to protect their property pending final administrative action on their proposal to build a seawall -- an interim solution that the Nelsons do not allege, let alone prove, is or has been ineffective for its purpose. [7] Moreover, the plaintiffs have been unable to persuade either the

[5] To the extent the judge considered the plaintiffs' affidavits on the motion to dismiss, he would have been entitled in his discretion to disregard them, particularly since the only one (that of Robert E. Weaver) that asserted the Department's alleged policy against ever allowing property owners in the position of the plaintiffs the relief they sought was unexecuted, was hearsay, and was self-contradictory, since the affiant acknowledged that the Department had in fact allowed more than fifty similarly situated property owners the same relief (A. 341).

[7] For reasons not apparent in the record, the Hickses never sought such emergency relief.

Superior Court, an Appeals Court single justice, or a Supreme Judicial Court single justice that they are in danger of suffering irreparable harm (A. 1, 2, 216, 217). They have produced nothing before this court, except conjecture, that suggests those tribunals were wrong in finding no likelihood of irreparable harm pending the outcome of the normal administrative process. [8]

As to the summary judgment dismissing the plaintiffs' claim (count II) that the regulations violate the due process and equal protection guaranties, by forbidding the exercise of an unimpeded right to erect a seawall, the plaintiffs have fallen woefully short of meeting their formidable burden on appeal. They have utterly failed to establish the absence of any conceivable ground on which the regulations can be upheld or the lack of any rational relationship between the regulations and a permissible legislative objective. See Pinnick v. Cleary, 360 Mass. 1, 14 (1971); Worcester Sand & Gravel Co. v. Board of Fire Prevention Regulations, 400 Mass. 464, 467 (1987); Gilbert v. Cambridge, 932 F.2d at 65. The

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[8] Posthearing filings indicate that the administrative process is nearing completion, with the issuance of a draft environmental impact report, as required by 310 Code Mass. Regs. § 10.07 (1989), and the Department's setting of an expedited schedule for holding adjudicatory hearings on the plaintiffs' applications.

Commonwealth submitted substantial affidavit testimony from experts demonstrating that the regulations inhibiting seawall construction on coastal dunes (the areas on which the plaintiffs' properties sit) facilitate flood control and mitigate storm damage -- both express statutory purposes, see G. L. c. 131, §§ 40, 40A; cf. G. L. c. 91, §§ 2, 10, 14, 15, 17, 23 -- and that coastal dunes require more restrictive regulation than do coastal banks in order to attain the same goals.

Under the authorities, the plaintiffs could not establish a constitutional violation merely by showing, as they purported to do, that there existed a difference of opinion in the scientific community regarding the effect of seawalls on the beach environment and that there might be a possibly more reasonable way to distinguish between banks and dunes or regulate construction thereon. See Mobil Oil Corp. v. Attorney Gen., 361 Mass. 401, 417 (1972); Zeller v. Cantu, 395 Mass. 76, 85 (1985); Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge, 395 Mass. 535, 553 (1985). There was nothing irrational, arbitrary, or invidious about the Department's conscientiously crafted and scientifically based effort

to solve problems caused by unregulated construction on coastal dunes and banks.

Judgment affirmed, with double costs of appeal.[9]

By the Court (Brown, Fine, & Laurence, JJ.),

Asst Clerk

Entered: February 28, 1994.

[9] See note 2, supra.