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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RODNEY A. MARIANI,

Plaintiff and Appellant,

v.

BRADFORD RECLAMATION
DISTRICT NO. 2059,

Defendant and Respondent.

A129816

(Contra Costa County
Super. Ct. No. C07-01934)

A property owner sued for inverse condemnation, claiming that a public agency's regulations restricting construction near levees deprived him of all economically viable use of his property without just compensation. The trial court granted summary judgment to the defendant public agency upon concluding that the action was not ripe for adjudication because plaintiff property owner never applied for a permit and thus never obtained a final administrative decision denying him use of his property. We affirm the judgment.

I. FACTS

Plaintiff Rodney A. Mariani is an attorney and represents himself in these proceedings. In 2003, plaintiff purchased a one-half interest in a ten-acre parcel located on Bradford Island and, in 2004, purchased the remaining portion. The property had an old, uninhabited dwelling in disrepair and a dock along the San Joaquin River. A levee runs through the property.

The property is located within the boundaries of the Bradford Reclamation District No. 2059 (District). The District is a public entity formed in 1921 for the purpose of reclaiming land within its boundaries by protecting and maintaining levees. The District has an easement for maintenance of the levee on plaintiff's property. The District also has regulations restricting development within 110 feet of the levee. Development near the levee requires a District encroachment permit. Applications for encroachment permits must provide detailed information on the proposed project.

Plaintiff declares that he was initially "only interested in the dock and covered berth" when he purchased the property but soon decided that he wanted to "restore" the dwelling near the levee that had been built in 1935 and was in "disrepair." Plaintiff says a District engineer and District officer told him, "[a]t some point," that the District would not allow restoration of the dwelling near the crown of the levee. Plaintiff never submitted an application for an encroachment permit.

Plaintiff sued the District in August 2007. The operative third amended complaint, filed in March 2009, states a cause of action for inverse condemnation. Plaintiff alleges: "As a direct and necessary result of the regulations of District restricting plaintiff's use of 110 [feet] of plaintiff's property, District has deprived plaintiff of the primary purpose for which the property was purchased, that is, to maintain the property as a waterfront property with a single family dwelling at or near the levee, and, in so doing, District has taken plaintiff's above-described property for which the District has not compensated plaintiff." (Capitalization altered.)

Defendant District moved for summary judgment in January 2010. Defendant presented several grounds for the motion, including that plaintiff's claim was not "ripe for adjudication because the District did not reach a final decision" regarding any application for an encroachment permit. Plaintiff opposed the motion. In July 2010, the trial court granted the motion upon finding that the action was not ripe and entered judgment in defendant's favor the following month. Plaintiff appeals to this court.

II. DISCUSSION

A. General principles

“The Fifth Amendment to the United States Constitution prohibits a taking of property for public use without just compensation. The Supreme Court has articulated two circumstances that constitute a categorical taking: where the regulation allows a permanent physical invasion of the property or where the regulation deprives the owner of all economically viable use.” (*Charles A. Pratt Construction Co. v. California Coastal Comm.* (2008) 162 Cal.App.4th 1068, 1080.) Whether a regulation becomes a taking rests on a factual inquiry into the particular circumstances of the case. (*Ibid.*) “It is only when a regulation goes ‘too far’ that it becomes a taking.” (*Ibid.*)

Generally, “a regulation which ‘denies all economically beneficial or productive use of land’ will require compensation under the Takings Clause. [Citations.] Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. [Citation.] These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from ‘forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ ” (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617-618 (*Palazzolo*)).

A threshold consideration in every regulatory takings claim is ripeness. (*Palazzolo, supra*, 533 U.S. at p. 618.) “[A] takings claim challenging the application of land-use regulations is not ripe unless ‘the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.’ [Citation.] A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of ‘all economically beneficial use’ of the property, [citation], or defeated the reasonable

investment-backed expectations of the landowner to the extent that a taking has occurred, [citation]. These matters cannot be resolved in definitive terms until a court knows ‘the extent of permitted development’ on the land in question.” (*Ibid.*)

“The impact of a law or regulation on the owner’s right to use or develop the property cannot be assessed until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction. A final administrative decision includes exhaustion of any available review mechanism. Utilization of available avenues of administrative relief is necessary because the court ‘cannot determine whether a regulation has gone “too far” unless it knows how far the regulation goes.’ ” (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 12; see also *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1279 [ripeness “is a matter of final administrative adjudication”].)

B. Plaintiff’s taking claim is not ripe for adjudication

Plaintiff alleges that the District’s regulations restricting development of a dwelling near the levee deprives him of the use of his property without just compensation. The claim is not ripe for adjudication because plaintiff never applied for a District permit to proceed with the project, and thus never obtained a final administrative decision.

Plaintiff argues that he should not be required to obtain a final administrative decision because the regulations make it clear that construction near the levee will not be allowed under any circumstances. The argument is refuted by the record. The regulations provide a specific avenue for requesting relief from the levee restrictions, and a member of the District board of trustees declared, without contradiction, that the District had issued permits to build within 110 feet of the levee.

It is impossible to assess plaintiff’s taking claim without a final decision from the District denying him an encroachment permit. “A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of ‘all economically beneficial use’ of the property, [citation], or defeated the

reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, [citation]. These matters cannot be resolved in definitive terms until a court knows ‘the extent of permitted development’ on the land in question.” (*Palazzolo, supra*, 533 U.S. at p. 618.) The court properly granted the District summary judgment.

III. DISPOSITION

The judgment is affirmed.

Sepulveda, J.*

We concur:

Reardon, Acting P.J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.