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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BAY ISLAND CLUB,

Plaintiff and Appellant,

v.

CALIFORNIA COASTAL
COMMISSION,

Defendant and Respondent.

G045729

(Super. Ct. No. 30-2009-00126561)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Reversed with directions.

Briscoe Ivester & Bazel, John Briscoe, David Ivester and Peter Prows for Plaintiff and Appellant.

Aaron C. Harp, City Attorney (Newport Beach) and Michael Torres, Deputy City Attorney, as Amici Curiae on behalf of Plaintiff and Appellant.

Paul J. Beard II for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiff and Appellant.

Kamala D. Harris, Attorney General, John A Saurenman, Assistant Attorney General, Jamee Jordan Patterson and Hayley Peterson, Deputy Attorneys General, for Defendant and Respondent.

* * *

The court entered judgment in favor of defendant California Coastal Commission on plaintiff Bay Island Club's petition for writ of mandate and a complaint for declaratory relief whereby plaintiff sought to overturn a condition in a permit requiring public access to a bridge it sought to rebuild. Plaintiff claims defendant had no jurisdiction to determine public access rights to private property and it abused its discretion in requiring the condition, and imposition of the condition violates due process because it takes plaintiff's property without fair compensation.

We agree that the public has no right to use the bridge and reverse the judgment, striking any conditions that would require it.

FACTS

Plaintiff, the shareholders of which are the owners of 24 single-family residences, holds title to Bay Island, a private island located in Newport Bay in the City of Newport Beach (City). Plaintiff purchased Bay Island in 1903 and 1906. Balboa Peninsula, adjacent to the island, was conveyed by the State of California to the East Newport Town Company in 1904. In July 1927 East Newport Town Company granted to plaintiff an easement "to construct, maintain, repair and replace a bridge for pedestrian and/or automobile travel" connecting the island to the peninsula. The next day East Newport Town Company deeded fee title to certain real property, including the channel under the easement, to City. The deed states the conveyance is "[s]ubject to and hereby

reserving, all rights in and over said property heretofore conveyed to” plaintiff. The deed also provides the channel is to be “forever used and maintained as a public waterway and channel” and “perpetually be kept open for the passage of boats”

In 1928 City filed a quiet title action against plaintiff and other nearby landowners. Although the record as to this lawsuit is sparse, it does contain findings of fact and conclusions of law and the judgment. The judgment, recorded in September 1928, decreed that plaintiff owned Bay Island and City owned the land East Newport Town Company had deeded to it, “subject to an easement in favor of [plaintiff] for private road and bridge purposes across [the] land”

Plaintiff built the current bridge that connects Bay Island to the peninsula in 1958. In 2006 plaintiff applied to defendant for a permit to replace it with a new 10-foot wide and 130-foot long bridge, that would also comply with the Americans with Disabilities Act and conform to seismic standards. Before the time the application was filed, plaintiff had erected a gate on the mainland side of the bridge that barred use of the bridge by the public.

In a staff report dated April 23, 2009, defendant expressed “concerns” about permitting plaintiff to build a new gate on the mainland side of the bridge, barring its public use. It noted that was the status quo but doubted the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act; all further statutory references are to this code unless otherwise designated) allowed plaintiff to “prevent the public from using a bridge that spans a publicly owned waterway.” It also pointed out that plaintiff had not provided documentation to support its claim the gate had been erected before passage of the Coastal Act. Additionally, defendant did not believe plaintiff’s easement allowed it to do so. The recommendation was to allow plaintiff to build the new bridge but to require any gate to be on plaintiff’s side of the bridge.

A staff report dated May 28, 2009 reiterated those points and also added information about letters and pictures defendant had received from members of the public asserting the bridge had been constructed on the mainland side of the bridge only after the Coastal Act was passed in 1976. Relying on that information, defendant determined placement of the gate there was improper because the gate was built without a permit from defendant. Although in the previous report staff had recommended plaintiff could keep the gate on the mainland side of the bridge until someone assumed responsibility for maintaining it and for liability, this was based on its belief the gate had initially been erected legally. Addressing plaintiff's concern about the limited scope of its easement, it asserted the easement did not give plaintiff the authority to exclude the public. Further, in response to plaintiff's argument the waterway beneath the bridge was not held in public trust, defendant noted it had consulted with the State Lands Commission about the status of the waterway.

The report stated public access "would be beneficial," allowing for different views of the "scenic waterfront area" and "additional opportunity for fishing." It also relied on various provisions of the Coastal Act, including section 30210, which mandates "maximum access [should] be provided"; section 30212, which is essentially the same, and section 30213 that encourages "[l]ower cost visitor and recreational facilities"

Defendant recommended approval of the bridge, subject to conditions, including the one in question here, that the bridge "be open to the general public for use 24-hours per day," so the public could use the bridge "for access, views, fishing, etc." This would prohibit any gate blocking access.

City wrote to defendant disagreeing with the recommendation, stating "[t]he bridge crosses land[it] likely owned" and defendant would be giving the public new rights over its land. As a result the public could be led to believe City controls or maintains the bridge, which it did not and had no intention of doing. Despite defendant's belief City would have no liability, City would very likely have to spend time and money

defending against any claim made by someone injured. Further, the public had not previously had access to the bridge.

Plaintiff also responded to the recommendation, asserting its easement did not encompass public access and it would improperly burden the easement. Part of that additional burden is exposure of both plaintiff and City to potential liability in the event of injury. Moreover, as shown by “interpretation and implementation of the easement,” the parties always intended that plaintiff would have the right to exclude the public.

In a subsequent letter, plaintiff advised it was impossible for it to allow public access to the bridge. City, which had granted the easement, opposed such use and plaintiff had no right to expand the scope of its easement. It further stated that defendant had no legal basis for imposing the condition, which would amount to a taking of private property without due process. Plaintiff also asserted that the fact public access would be beneficial was not enough to support a requirement.

Defendant then issued an addendum to its May 28 report. As to prior public access, it stated it had photographs taken in 1998 that showed no gate on the mainland side of the bridge. The signs barring admittance to the public also were erected after 1998. Defendant reiterated that the easement did not “limit who may use the bridge.” (Underscoring omitted.) It did not give credence to the designation of a “private road” in the 1928 judgment, calling it a “passing reference” (underscoring omitted), because the subject of the action was ownership of fee title to property and was not concerned with the scope of plaintiff’s easement.

The addendum stated the recommendation was not based on a public trust theory but commented that the deed transferring ownership of the property to City contains a condition that the channel be maintained as a public waterway or the property would revert to the grantor. The addendum also stated: Public waterways require the public to have access to and across them. Thus, City’s assertion that the recommendation provides new public access rights was incorrect; defendant was simply “protecting

existing” ones. (Underscoring omitted.) City’s concern about potential liability was also unfounded. Various statutes immunize it against such claims.

At the public hearing where defendant’s staff presented its report and recommendations, both plaintiff and City opposed the condition dealing with public access on the same grounds expressed in their written communications with defendant. Defendant adopted its staff’s report, including the addendum, specifically approving the permit to build the bridge on condition the public have access to it.

Thereafter, plaintiff filed its petition for writ of mandate and a complaint for declaratory relief to invalidate defendant’s requirement of public access, arguing, in part, it was a taking without compensation prohibited by the United States and California Constitutions. The court severed the constitutional claim, and denied the petition’s remaining claims. After trial, it also ruled against plaintiff on the constitutional claim.

DISCUSSION

1. Standard of Review

“Because this matter came to the trial court on a petition for a writ of mandate under Code of Civil Procedure section 1094.5, the trial court was obligated to determine ‘both whether substantial evidence supports [defendant’s] findings and whether the findings support [defendant’s] decision.’ [Citation.]” (*Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 556, italics omitted.) We use the same standard of review as the trial court and are not bound by its decision. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479.)

2. *Invalidity of Condition*

Defendant's rationale for imposing the public access condition was "protecting [the public's] existing rights." (Underscoring omitted.) It relied on letters it received from members of the public claiming the gate previously had been on the island side or in the middle of the bridge and progressively moved to the mainland side over time. Additionally, defendant had photographs showing the gate was not in its present location in 1998 and the current gate had been constructed without a permit. Defendant concludes from this that the public had the right to use the bridge. On that basis it argues that since there was substantial evidence to support its determination, the standard of review requires we affirm. This argument is flawed for several reasons.

In the original deed plaintiff was granted an easement for the bridge. In the subsequent quiet title judgment the easement was described as being "for *private* road and bridge purposes." (Italics added.) Black's defines "private" as "[r]elating or belonging to an individual, as opposed to the public" (Black's Law Dict. (7th ed. 1999) p. 1213, col. 2; accord Merriam-Webster Online Dict. <<http://www.merriam-webster.com/dictionary/private>> [as of June 14, 2012] ["intended for or restricted to the use of a particular person, group, or class"; "belonging to or concerning an individual person . . . or interest"].) The language in the judgment plainly states the easement for the bridge is for the use of plaintiff and not the general public. When a judgment is clear we have no authority to read it any way other than as written. (See *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1735.)

For the same reason we reject defendant's attempts to downplay the quiet title judgment's use of the word private. In its report and recommendations defendant dismissed the description in the judgment as only a "passing reference" (underscoring omitted) without effect. We must give credence and effect to the judgment's language.

The arguments in defendant's brief fare no better. Defendant asserts the record does not contain sufficient documentation to support plaintiff's reliance on the

judgment, because it lacked a copy of the complaint to show that the court even considered the nature of the easement. But, as stated above, the judgment's language controls and the process leading up to it does not change the ultimate result.

Nor does it matter that the specifics of the easement are included within the description of City's property, not plaintiff's. The judgment still describes the extent of the easement, and defendant's claim the court would have included the language in the description of plaintiff's interest if it was meant to define the easement is purely speculative.

Likewise, we are not persuaded by defendant's hair-splitting assertion that "private" describes the road, not the easement. The stated purpose of the easement is for a road, which runs over the bridge. Defendant has not explained how plaintiff could keep the public off the road while at the same time allowing it access to the bridge.

Defendant also claims private does not mean exclusive. Assuming this is true, it adds nothing to the discussion. The law is well established that where a nonexclusive easement is granted, "[e]very incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the *owner of the servient estate.*" [Citation.]" (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1422, italics added.) In other words, although the servient owner may use the property, so long as it does not burden the easement, third parties may not. Thus, the fact that the public may have used the bridge sometime in the past does not mean it had the right to do so or that plaintiff was prohibited from erecting the gate to keep out persons not entitled to use the easement. (See *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 707 [easement owner "may do that which is reasonably necessary to enjoy the easement"].) Given City's objection to expansion of the easement to allow public use, plaintiff's right to exclude third persons takes on even more weight.

And even if the public may have acquired some prescriptive rights to use the bridge, which we do not hold, that is not a question for defendant to decide. *LT-WR, L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4th 770 is instructive. There, plaintiff, which leased some property in the Santa Monica Mountains in Malibu, applied to the Commission for a permit for various developments on the property, including gates to exclude trespassers and no trespassing signs. After the Commission denied the permit for the gates and signs, the court reversed. The appellate court affirmed that decision.

The Commission had denied the permit after receiving letters from the public ““describing historic use”” and finding there was evidence the public had used portions of the property for riding and hiking. (*LT-WR, L.L.C. v. California Coastal Com., supra*, 152 Cal.App.4th at pp. 805-806.) The Commission determined there were ““potential”” ““prescriptive rights for public use of th[e] road”” that the gates would block. (*Id.* at p. 806, italics omitted.) The Commission also found the plaintiff’s property was within an area ““devoted to providing visitors with recreational opportunities and protecting natural habitats”” and the signs and gate would ““convey to visitors the message: keep out, visitors are not welcome.”” (*Ibid.*, italics omitted.)

While acknowledging a basic policy of the Coastal Act “is to maximize public access and recreational opportunities within coastal areas,” the court ruled that the Commission had no authority to decide whether the public had acquired prescriptive rights on the property. When it denied the permit it “decreed the existence” of those rights. (*LT-WR, L.L.C. v. California Coastal Com., supra*, 152 Cal.App.4th at p. 806.)

Defendant’s attempt to distinguish *LT-WR* fails because it is based on its incorrect premise that plaintiff has no right to bar the public from the bridge. Further, its conclusory denial that it did not decide whether the public had acquired any prescriptive rights or other interest in the easement but merely decided plaintiff’s rights does not persuade.

Nor do the Coastal Act provisions justify the condition. Defendant directs us to several statutes that it claims required its decision. These include sections 30210 (“maximum access . . . and recreational opportunities shall be provided for all the people”), 30213 (“[l]ower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided”), and 30220 (“[c]oastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses”). But section 30210 limits defendant’s authority to provide “maximum access,” directing that it be done so only when “consistent with . . . the need to protect . . . rights of private property owners,” something imposition of the condition did not do.

Finally, we reject defendant’s reliance on the condition subsequent in the deed to City that the channel is to always be maintained as a public waterway and its related finding the channel beneath the bridge is navigable. The bridge does nothing to interfere with use of the channel as a public waterway. Erection of a replacement bridge merely maintains the status quo.

In sum, even assuming there is substantial evidence to support defendant’s finding of prior public use of the bridge, that finding does not support defendant’s decision requiring public access as a condition of the permit. (*Sierra Club v. California Coastal Com.*, *supra*, 19 Cal.App.4th at p. 556.)

In light of our decision on these grounds we need not discuss any other arguments challenging the condition.

3. Severance of Condition

Plaintiff argues that if we invalidate the condition, we should sever it and leave the remainder of the permit in place. It relies on section 30900, which provides: “If any provision of this division or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or

applications of the division which can be given effect without the invalid provision or application, and to this end the provisions of this division are severable.” We agree severance is the correct remedy.

The Attorney General asserts the proper remedy is to remand to defendant “for further consideration in light of the . . . ruling.” She points to Code of Civil Procedure section 1094.5, subdivision (f), which states that on review of a decision from issuance of a writ, the court may either order the court to set it aside or deny the writ. If the court determines that the order be set aside it has discretion to require reconsideration of the underlying matter. Further, any judgment may not interfere with defendant’s discretion. Defendant argues striking the condition would interfere with its discretion but fails to explain why. Even if this was a valid argument defendant has waived it by failing to adequately brief it. (*Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 855.) That in its petition in the trial court plaintiff requested the matter be remanded for further action does not limit our power to fashion a remedy. We see no reason to remand to defendant and it has not persuaded us otherwise.

Finally, defendant argues there are other conditions in the permit related to the bridge that plaintiff did not challenge, to wit banning of no trespassing or similar signs that would keep the public off the bridge and a requirement that a gate may be erected only at plaintiff’s side of the bridge. It maintains that plaintiff did not exhaust its administrative remedies and cannot expand the scope of its writ by including a request that they be stricken on appeal. But those conditions are inextricably linked to the condition requiring public access. They fall as a part of striking the public access condition from the permit.

DISPOSITION

The judgment is reversed. That portion of condition number 2 requiring public access to the bridge, that portion of condition number 3 prohibiting signs that ban public access to the bridge, and that portion of condition number 4 requiring that any gate be constructed on the Bay Island side of the bridge are stricken from the permit. Appellant is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.