SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1840-16T4

BIRCH INVESTMENTS, LLC,

Plaintiff-Appellant,

v.

SUSAN A. KEYMER; her heirs, devisees and personal representatives or any of their successors in right, title and interest; MR. KEYMER, spouse of SUSAN A. KEYMER, SECURITY ONE LENDING and THE STATE OF NEW JERSEY,

Defendants,

and

MONMOUTH COUNTY AGRICULTURE DEVELOPMENT BOARD and NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE,

Defendants-Respondents.

Argued February 6, 2018 – Decided April 26, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. F-007332-16.

Anthony L. Velasquez argued the cause for appellant.

Christopher L. Beekman argued the cause for respondent County of Monmouth Agriculture Development Board (The Beekman Law Firm, LLC, attorneys; Christopher L. Beekman, on the brief).

Jason T. Stypinski, Deputy Attorney General, argued the cause for respondent New Jersey State Agriculture Development Committee (Gurbir S. Grewal, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Jason T. Stypinski, on the brief).

PER CURIAM

Plaintiff appeals the denial of its motion to strike defendants' answers and to allow its tax-sale foreclosure to proceed as an uncontested matter. We reverse.

Plaintiff is the holder of a tax sale certificate[1] for unpaid taxes on Block 178.06, Lot 8 in Howell Township. That property, consisting of approximately thirty-six acres, as well as Lots 14 and 15, consisting of approximately twenty-three and seven acres respectively, were owned by Susan Keymer who failed to pay taxes on Lots 8 and 14 for multiple years; she, however, paid the $29 annual tax bill on Lot 15.

[1] Plaintiff is the assignee of the certificate from FNA Jersey Lien Services, LLC (FNA), which purchased the certificate at public sale from the Howell Township tax collector.

The Monmouth County Agriculture Development Board (Monmouth Board) and the New Jersey State Agriculture Development Committee (State Committee) (collectively, the government defendants) partnered to preserve the three-lot property as farmland pursuant to the Agriculture Retention and Development Act (ARDA).[2] The Monmouth Board, in exchange for $590,348.20, acquired a development easement[3] on all three of Keymer's parcels, the terms of which were recorded in a September 17, 2001 deed of easement (DOE).

FNA paid taxes for two years on Lot 8 following its purchase of the tax sale certificate on May 26, 2011, and thereafter sought to foreclose[4] eventually naming, among others, the government

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[2] N.J.S.A. 4:1C-11 to -31, -32 to -37.

[3] "'Development easement' means an interest in land, less than fee simple absolute title thereto, which enables the owner to develop the land for any nonagricultural purpose as determined by the provisions of this act and any relevant rules or regulations promulgated pursuant hereto." N.J.S.A. 4:1C-13(f). Implicitly, what is left after the sale of a development easement is the right to develop the land only for agricultural purposes.

[4] N.J.S.A. 54:5-82 provides: "In the absence of fraud, no action shall be brought to contest or set aside the certificate of sale, notice and affidavit of service so recorded as a deed, or to recover possession of the lands so conveyed, after the expiration of two years from the date of their record." See also N.J.S.A. 54:5-52 (providing, after two years, a certificate of sale shall create an irrebuttable presumption of the purchaser's title to the land therein described, absent evidence of fraud).

defendants which opposed plaintiff's motion to strike their answers.

The motion judge found the DOE "talks about all three parcels . . . being one parcel and there being no possible division of farmland," and noted, "the purpose of the statute is to preserve farmland and to bundle farmland together." He concluded that foreclosure of only one of the three parcels violated the DOE provision — of which he found plaintiff had or, by its own admission, should have had notice — that prohibited division of the easement-encumbered property.[5] That division, he determined, "would thwart the intended purpose of the [L]egislature and the statute, it would thwart the intended purpose of the expenditure of [$590,348.20] in taxpayers' money by permanently dividing up more than half [— thirty-six acres of the sixty-six acres —] of this restricted property." The only option available to plaintiff,

[5] The pertinent section of the deed provides:

> The land and its buildings which are affected may only be sold collectively for continued agricultural use as defined in Section 2 of this Deed of Easement. No division of the land shall be permitted. Division means any division of the Premises, for any purpose, subsequent to the effective date of this Deed of Easement.

the judge ruled, was to "recoup [its] investment" when the property was sold or refinanced; he precluded plaintiff from foreclosing.

The judge's original October 5, 2016 order was deemed a final judgment under Rule 4:42-2 by his order of December 14, 2016. The order dismissing plaintiff's foreclosure complaint was based on the judge's interpretation of the ARDA; he did not take testimony or make factual findings. Since the issue is purely legal, we independently review the applicable law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995); State v. Buckley, 216 N.J. 249, 260-61 (2013).

Our review compels us to determine if plaintiff's right to foreclose under the Tax Sale Law[6] is abrogated by the DOE provisions drawn pursuant to the ARDA. In interpreting those statutes, our goal is to determine and effectuate the Legislature's intent, Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553-54 (2009), looking first to the plain language of the statute. Hubbard v. Reed, 168 N.J. 387, 392 (2001). We seek "further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen." Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008).

[6] N.J.S.A. 54:5-1 to -137.

We are mindful of our obligation "to make every effort to harmonize separate statutes, even if they are in apparent conflict, insofar as we are able to do so." St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14 (2005) (quoting In re Adoption of a Child by W.P. and M.P., 163 N.J. 158, 182 (2000) (Poritz, C.J., dissenting)). In analyzing the statutes, we heed the Court's prescription that

> [s]tatutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole. When reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will. Statutes that deal with the same matter or subject should be read in pari materia[] and construed together as a unitary and harmonious whole.
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> [In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010) (citations omitted).]

The Tax Sale Law allows a municipal tax collector to enforce first priority liens, created by the assessment of taxes, upon a landowner's failure to pay taxes or other municipal assessments, N.J.S.A. 54:5-6 to -9, "by selling the property" in accordance with its provisions. N.J.S.A. 54:5-19. As we recognized in Caput Mortuum, LLC v. S&S Crown Servs., Ltd., 366 N.J. Super. 323, 336-37 (App. Div. 2004) (alterations in original),

> The legislative scheme is intended to transfer the burden of foreclosure from a municipality, whose primary occupation is governance, to private individuals. Simon v. Deptford Twp., 272 N.J. Super. 21, 26 (App. Div. 1994). The "legislative objective [of the Tax Sale Law] . . . is to enable local governments to realize taxes by returning property to the paying tax rolls without first expending money to foreclose or bar the equity of redemption." Ibid. In order to encourage purchasers of tax sale certificates, and thereby aid municipalities in raising revenue, the Legislature also encourages the foreclosure of these certificates.

We acknowledged that encouraging the purchase of municipal tax sale certificates was in the public interest, id. at 335, and held a

> certificate holder's interest consists of three significant rights: (1) the right to receive the sum paid for the certificate with interest at the redemption rate for which the property was sold . . . ; (2) the right to redeem from any other holder a subsequently issued tax sale certificate; and, most importantly, (3) the right to acquire title by foreclosing the equity of redemption of all outstanding interests, including the owner's.
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> [Id. at 336 (emphasis added) (citations omitted).]

In enacting the ARDA, the Legislature specifically found and declared that:

> a. The strengthening of the agricultural industry and the preservation of farmland are important to the present and future economy of the State and the welfare of the citizens of the State, and that the Legislature and the

> people have demonstrated recognition of this fact through their approval of the "Farmland Preservation Bond Act of 1981," P.L. 1981, c. 276;
>
> b. All State departments and agencies thereof should encourage the maintenance of agricultural production and a positive agricultural business climate;
>
> c. It is necessary to authorize the establishment of State and county organizations to coordinate the development of farmland preservation programs within identified areas where agriculture will be presumed the first priority use of the land and where certain financial, administrative and regulatory benefits will be made available to those landowners who choose to participate, all as hereinafter provided.
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> [N.J.S.A. 4:1C-12.]

The principal purpose of the Farmland Act is "the long-term preservation of significant masses of reasonably contiguous agricultural land within agricultural development areas adopted pursuant to this act and the maintenance and support of increased agricultural production as the first priority use of that land." N.J.S.A. 4:1C-13(h).

The ARDA created the State Committee and authorized it to use an appropriated sum of money predominately "to acquire development easements," such as the one acquired by the Monmouth Board. N.J.S.A. 4:1C-8. The landowner, after the development easement is purchased, is required to "cause a statement containing the

conditions of the conveyance and the terms of the restrictions on the use and development of the land to be attached to and recorded with the deed of the land, in the same manner as the deed was originally recorded." N.J.S.A. 4:1C-32(b). "These restrictions and conditions shall state that any development for nonagricultural purposes is expressly prohibited, shall run with the land and shall be binding upon the landowner and every successor in interest thereto." Ibid. The ARDA also recognizes that a development easement "may be permanent or for a term of [twenty] years," N.J.S.A. 4:1C-24(a)(2), and, if a landowner wishes to sell a fee simple absolute interest in land that is encumbered by a development easement, "[t]he committee shall have the first right and option to purchase the land upon substantially similar terms and conditions." N.J.S.A. 4:1C-39(a), (c).

Although the ARDA and its 1988 amendments, L. 1988 c. 4, do not address how the DOE is impacted by a tax foreclosure action, they do recognize the import of taxes and the impact of the ARDA on municipalities. If the Committee purchases farmland in an agricultural development area, the land is "held of record in the name of the State" of New Jersey. N.J.S.A. 4:1C-31.1(f). "To the end that municipalities may not suffer a loss of taxes by reason of acquisition and ownership by the State," the State is obligated to pay to the municipality "the tax last assessed and last paid

by the taxpayer upon [the] land and the improvement thereon" for the year prior to the State's acquisition. N.J.S.A. 4:1C-31.1(h). The ARDA also provides that if land is withdrawn from a municipally approved program prior to its termination date, the landowner must pay the municipality taxes not paid because of property tax exemptions granted by virtue of enrollment in the program. N.J.S.A. 4:1C-30.

We part company with the motion judge's holding that the easement granted under ARDA trumps plaintiff's right to foreclose the tax sale certificate. The importance of that foreclosure right is the cornerstone of the Tax Sale Law. As Chief Justice Weintraub noted, "Everybody knows that taxes must be paid." Bron v. Weintraub, 42 N.J. 87, 91 (1964). If they are not, municipalities cannot survive without that "lifeblood of government, the vital force needed to sustain the public interest." City of Philadelphia v. Austin, 86 N.J. 55, 65 (1981). We do not see that a certificate holder loses the statutorily-granted foreclosure right because the property is subject to a development easement.

Indeed, the right to foreclose is not disharmonious with the ARDA. The development easement, in our view, is not extinguished by the foreclosure. It is an easement in gross.

"[T]he law recognizes two types of easements, easements appurtenant and easements in gross." Rosen v. Keeler, 411 N.J. Super. 439, 450 (App. Div. 2010). "[A]n easement appurtenant requires a dominant tenement to which it is appurtenant, whereas an easement in gross belongs to its owner independently of his ownership or possession of any specific land." Vill. of Ridgewood v. Bolger Found., 104 N.J. 337, 340 (1986) (quoting Weber v. Dockray, 2 N.J. Super. 492, 495 (Ch. Div. 1949)). "An easement in gross . . . benefits no specific parcel owned by another; it is independent of and unconnected to the ownership or possession of any particular [dominant] tract." Ibid. "Conservation easements . . . are easements in gross." Ibid. And we see no reason a development easement, which is unconnected to a dominant estate, is not also held in gross.

> [I]n the majority of jurisdictions, appurtenant encumbrances such as negative easements, restrictive covenants, and servitudes are not extinguished by tax sales. The rationale usually given is that the accrued taxes being foreclosed do not include taxes on the easement or restriction, since the value (or diminution in value) of such encumbrances should have already been deducted from the assessed value of the property. The law with regard to easements held in gross is less clear.
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> With regard to conservation easements, which are generally held in gross, the Restatement (Third) [of] Property: Servitudes provides:

> Easements in gross, conservation servitudes, and servitudes owned by the public provide many benefits to a community and safeguard important public interests.[7] Extinguishment of servitudes on foreclosure of tax and other liens with abnormal priority may . . . allow . . . destruction of sites protected by conservation and preservation servitudes. . . .
>
> Unless it is very clear that the legislature intended that foreclosure of tax liens and other liens given special priority result in extinguishment of these types of servitudes, courts should interpret the statutes to avoid that result . . . .
>
> Conservation easements, and other easements, covenants and servitudes, should survive tax sales. Whether they will do so depends on the state of the law in the jurisdiction in which the property is located.
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> [4 Powell on Real Property § 34A.07(1)(d)(iii) (Wolf ed., 2000) (first, second and third alteration in original) (footnotes omitted) (quoting Restatement (Third) of Property: Servitudes § 7.9 cmt. a (Am. Law Inst. 2000)).]

We do not perceive any Legislative intent that a tax sale foreclosure extinguish an ARDA easement. To the contrary, the survival of the development easement accomplishes the

[7] The Ridgewood Court recognized "[t]he public benefits flowing from . . . a conservation easement are beyond debate." 104 N.J. at 341.

Legislature's laudable aims in enacting the Tax Sale Law and the ARDA. Municipalities would be able to collect necessary taxes and the foreclosed land would still be subject to the farmland preservation DOE.

We recognize that the right to foreclose on preserved property comes with a risk that it is subject to public-interest restrictions. A certificate holder must decide the advisability of foreclosing on a lot that is and will be subject to a DOE. Like any other investment opportunity, tax sale certificates — especially considering their handsome returns — may require due diligence by a foreclosing holder or even a prospective holder, including a search of the public records that will show any DOE.

We reject the Committee's contention that the foreclosure violates the DOE's parcel-division restriction. All three lots subject to the DOE were and are separate tax lots. The DOE did not act to consolidate all three as one lot.[8] Defendants cannot prohibit the division of what was already divided. To hold otherwise would allow owners like Keymer to sell a development easement on multiple lots and, as she did here, pay taxes on the smallest, least-taxed lot. The Legislature did not intend to

[8] We do not address merger of the lots for zoning purposes, see Loechner v. Campoli, 49 N.J. 504 (1967), an issue not before us.

create havens for tax shirkers or to deprive municipalities of needed funds. Furthermore, the lots are still contiguous – they didn't move – and all three are still subject to the DOE; the foreclosure – as we interpret it – does not defeat the agricultural purposes of the DOE.[9]

Reversed and remanded for further proceedings in connection with the tax-sale foreclosure. We do not retain jurisdiction.

[9] To the extent that the Committee's own rule makes Lot 8 non-conforming because at least half of it or twenty-five acres, whichever is less, is not tillable land, it does not vitiate the statutory right of a tax-sale certificate holder's foreclosure right. In any event, the still-restricted lot – contiguous with the other three – still complies with the rule. N.J.A.C. 2:76-6.20(a)(2)(i).