SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1720-21

TIMOTHY NUGENT and MELANIE NUGENT,

Plaintiffs-Appellants,

v.

JAMES G. GRANT and YVONNE GRANT,

Defendants-Respondents.

and

INN AT SALEM COUNTRY CLUB,

Defendant.

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Submitted May 3, 2023 – Decided July 7, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Salem County, Docket No. C-000009-19.

Telsey Law LLC, attorneys for appellants (Adam I. Telsey, on the briefs).

James G. Grant, respondent pro se.

PER CURIAM

This matter arises from a property dispute between plaintiffs Timothy and Melanie Nugent and defendants James G. Grant, Yvonne Grant, and The Inn at Salem Country Club, LLC, a bed and breakfast with a catered banquet facility owned and operated by the Grants. The parties are neighbors with properties located along the Delaware River, adjacent to Oakwood Beach, a public beach in Elsinboro Township (Township). The dispute pertains to a publicly accessible parking lot and an unapproved walkway (accessway) that connects the parking lot to Oakwood Beach. Both the parking lot and the walkway are located at the southern end of defendants' property.

Plaintiffs filed suit alleging defendants' use of the parking lot and walkway constituted a nuisance and was not permitted without planning board approval. After cross-motions for summary judgment were denied on October 16, 2020, a bench trial resulted in the dismissal of plaintiffs' nuisance claim and a partial injunction of defendants' use of the walkway in an order entered January 31, 2022. Plaintiffs now appeal from the Chancery Division orders denying

summary judgment, rejecting their nuisance claim, and granting partial injunctive relief following the trial.

On appeal, plaintiffs raise the following points for our consideration:

> 1. DEFENDANTS' USE OF THE BEACH ACCESS IS A NUISANCE AND PLAINTIFFS' RIGHT TO THE PROTECTION OF THE QUIET USE AND ENJOYMENT OF THEIR HOME REQUIRES THE IMPOSITION OF AN INJU[N]CTION REGARDING THE SOUTHERN ACCESSWAY.
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> 2. PLANNING BOARD APPROVAL WAS REQUIRED AND THE COURT ERRED BY FAILING TO ISSUE AN INJU[N]CTION RELATIVE TO THE SOUTHERN ACCESSWAY.
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> 3. THE TRIAL COURT ERRED BY FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF . . . PLAINTIFFS WITH REGARD TO . . . [DEFENDANTS'] FAILURE TO OBTAIN PLANNING BOARD APPROVAL FOR THE SOUTHERN ACCESSWAY.

Having considered the arguments in light of the record and applicable legal principles, we reject each of the points raised and affirm.

In the two-count complaint filed on May 22, 2019, plaintiffs asserted that the Elsinboro Township Planning Board (Planning Board) had approved the Grants' 2011 application "to use the[ir] property as their principal residence and a bed and breakfast with banquet and meeting room[s]." Despite the fact that "[t]he [a]pplication did not propose any additional use on the Grant [p]roperty,"

plaintiffs alleged that the Grants "established an accessway between a parking lot on [their] property and the beach for the public to access the beach by foot."

According to plaintiffs, "[t]he [a]ccessway was not . . . part of the 2011 [p]lanning [b]oard [a]pplication and was not approved by the Planning Board," nor was the adjacent parking lot "approved to be used in connection with the [a]ccessway." Nonetheless, because the Grants have repeatedly "promot[ed] the [a]ccessway to the public" and "ha[ve] taken no steps to direct people to the proper designated access point on the northern side of the Grant [p]roperty," the accessway "is consistently used by the public" for access to the beach.

In count one, plaintiffs alleged that "[t]he additional activity occurring on the Grant [p]roperty was not approved by the Planning Board" and constituted a "violation of the [Board's] approvals." In count two, plaintiffs alleged that inasmuch as the "[a]ccessway and adjacent parking area are located approximately [fifty] feet from the Nugent [p]roperty" and the Nugents are "forced to endure significant amounts of foot traffic and motor vehicle traffic only feet away from [their] home," allowing the Grant property to serve as public access to the beach "has resulted in an unreasonable interference with . . . [p]laintiffs' use and enjoyment of [their p]roperty which . . . constitutes nuisance." As a result, the complaint sought "[a] judgment immediately

enjoining and restraining the use of the Grant [p]roperty as a public access point to the beach."

At the close of discovery, both parties moved for summary judgment. Defendants essentially argued they were entitled to dismissal of the complaint with prejudice as a matter of law, and plaintiffs argued defendants were required to obtain the Planning Board's approval for the walkway providing public access to the beach. Based on the statements of material facts submitted by the parties in support of their respective motions, see R. 4:46-2, it was undisputed that the beach and accessway in dispute "did not exist in 2011 when the [P]lanning [B]oard approved . . . the Grants' site plan application and request for bulk variances." Instead, the accessway was created over "a [fifty]-foot berm at Oakwood Beach" that was constructed by the U.S. Army Corps of Engineers in December 2014 as part of a multi-million-dollar beach replenishment project "to reduce the risk of future storm damages" in the wake of Hurricane Sandy. The beach project included agreements between the State and the Township requiring public access points to the beach every one-half mile.

Further, it was undisputed that the Grants' 70.83-acre property consisted of three separate tracts with different ownership rights, much of which was apportioned to the New Jersey Department of Environmental Protection

(NJDEP) by a conservation easement. Specifically, tract one "was sold outright" to NJDEP's Fish and Wildlife Division. Tract two was "deed restricted as Preserved Open Space" with public access, meaning that the Grants could not restrict public access. Tract three "was deed restricted as Preserved Open Space" but "closed to the public at the discretion of the Grants," meaning that the Grants could permit public access but were not required to do so.

Tract one bordered plaintiffs' property and separated the parties' properties. The parking lot at issue in the case was split between tracts two and three. Because half of the parking lot was subject to tract two's public access requirement, defendants had no control over the public's use of that half. The accessway or walkway at issue in the case connected the parking lot to the beach and was located on tract three, which permitted public access at the discretion of the Grants. One of the public beach accessways required under the agreement between the State and the Township was located on the north end of the Grants' property, away from plaintiffs' property. The walkway at issue, located on the southern side of the Grants' property, was not considered a public accessway under the agreement.

Following oral argument conducted on October 16, 2020, the trial judge issued an oral opinion and memorializing order denying summary judgment to both parties. The judge explained:

> [T]he disagreement between the parties as to whether the alleged activity constitute[s] a nuisance combined with the dispute o[f] whether the Grants' land use is reasonable given the availability of easements between [the] Grants and the State of New Jersey . . . [are] genuine issues of material fact. That[,] coupled with . . . plaintiff[s'] . . . main argument . . . [that] planning board approval is required because this is a business use and . . . defendant[s] arguing that it is not a business use, but only access to the public, . . . [is a q]uestion of fact.
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> Therefore, . . . based upon all those issues, summary judgment would not be appropriate by either at this time . . . because there[are] genuine issues of fact between the two part[i]es.

During the ensuing three-day bench trial conducted from November 3, 2021, to January 10, 2022, plaintiffs presented testimony from seven witnesses, including both plaintiffs; defendant James Grant;[1] Division of Fish and Wildlife Director David Golden; Township Mayor Sean Elwell; the Township Clerk, who authenticated certain public records; and a public safety telecommunicator, who authenticated plaintiffs' 911 call records. Various exhibits were also introduced

[1] Defendants' counsel withdrew prior to trial and the Grants have been self-represented since.

at the trial, including the Township's land use ordinance, a survey map depicting plaintiffs' and defendants' properties, photographs of the parking lot and walkway in question, and various police reports.

Both Golden and Elwell testified about the beachfront replenishment project and the agreements the Township entered with the State to provide the public with "access points" to the newly constructed Oakwood Beach. Golden also explained the State's conservation easements on defendants' property and recounted that the Division of Fish and Wildlife had planted trees on tract one "along [plaintiffs'] property line" because of plaintiffs' complaint about "headlights . . . shining in."

Elwell testified about "concerns" he received from the public about the northern access point to the beach on defendants' property. He related that the concerns were "[l]argely focused around parking." According to Elwell, the northern access point offered limited curbside "street parking" on Slape Avenue, and the number of parking spots was further reduced by obstructionist residents who would "park[] their [own] vehicles" on the street or place "some object in the road" to block open spots. Due to these tactics, Elwell explained that people would park in defendants' parking lot and then "walk[] from the parking lot to the northern access point[]." Elwell, who also served on the Planning Board,

acknowledged that the Planning Board had approved the parking lot for parking "in conjunction with the bed and breakfast" but admitted that the approval did not "discuss the [walkway]."

Timothy[2] testified that when he first purchased his property in late 2015, life was "[q]uiet." He explained that his property was "the last house on a dead[-]end road," and that he and Melanie "based [their] purchase upon the fact that the public access [to the beach] was at the north end of [defendants'] property." He stated that "everything changed a couple months later" when he began experiencing "problems" with the public's use of defendants' parking lot and walkway, which were approximately 100 feet from his property line.

Timothy claimed that defendants created the "[walkway] in March 2016 . . . for a fishing tournament" to "avoid problems with neighbors . . . [on] the north side of the property." After the fishing tournament, the walkway was used by "[e]verybody that visited the property" and remained "very popular" because there was plenty of parking, with approximately forty spaces, and it was "the only place in the town where there [was] a porta-potty . . . for the public to use while . . . on the beach." According to Timothy, "[ninety-nine] percent" of

[2] Because of the common surnames, we refer to the parties by their first names and intend no disrespect.

the people who park in defendants' parking lot "use the [walkway] to access the beach."

When asked how the parking lot and walkway have impacted his family, Timothy testified that he and Melanie are "woken up [at] all hours of the night" due to sounds and lights. He stated that "people are allowed access to the beach after hours through [defendants'] property" and that "lights" would "shin[e] . . . in [their] house" when "cars pull[ed] in[to] the lot." He admitted that "[t]here were no loud noises," but explained he would regularly hear "car doors slamming" and "people . . . on the beach" late at night, in violation of municipal curfew ordinances for beachgoers. He also claimed that people would drink on the beach and then use the "trash can provided" near the walkway to discard empty containers.

Melanie's testimony focused on the parking lot and the problems that it had caused her family. Melanie testified that she witnessed beachgoers "drinking," "smoking," "urinating," and "having sex" in the parking lot. She stated that because of this conduct, she no longer allowed her six-year-old son to play by himself outside "unless [she was] sitting right there." She also claimed that she no longer slept in her bedroom due to the lights and sounds and had spent the last five years "sleep[ing] in a recliner" in a different room.

Melanie explained that when cars pulled into the parking lot, their headlights would swirl in both her and her son's bedrooms. She was "constantly being woken up in the middle of the night" due to "nuisance noise" from the parking lot that would "magnify through th[e] area." According to Melanie, there was "never loud music," but the sounds of "people getting out [of their cars], hollering to each other, [and] talking back and forth" were "just enough to . . . keep people awake." She also stated the "blipping" sound cars made when they were locked would "echo[]" and cause "dogs [to] go nuts."

Both Timothy and Melanie acknowledged that Oakwood Beach was a "public beach." However, they both felt a need to personally police the beach because the Township was not enforcing its own ordinances that set a curfew. Both plaintiffs also testified that they felt "threatened" when they tried to police the beach. Specifically, Timothy testified that on one occasion a beachgoer "wanted to fight" him after he told a group of "[people] on the beach that the beach [was] close[d]." Since then, Timothy has resorted to calling the police and has made "about 300 phone calls to the police department" to report curfew violations.

James confirmed that the NJDEP had planted a row of trees to abate plaintiffs' concerns and stated that an eight-foot-tall fence was also erected to

further protect plaintiffs' privacy. He explained that the walkway was established by the Army Corps of Engineers when the beach replenishment project was completed in 2016, and he had maintained the walkway by "cut[ting] back some of the brush along the entire berm." He further acknowledged that he had utilized his property to sponsor "not for profit" fishing tournaments that have had a beneficial impact on the community.

After the trial concluded, the judge entered an order on January 31, 2022, dismissing plaintiffs' private nuisance claim and denying plaintiffs' request for injunctive relief related to the parking lot because "[p]laintiffs did not meet the objective standard for [n]uisance by clear and convincing evidence," and "did not meet their burden in establishing that the public parking lot violate[d] Municipal or State code[s]." However, the judge granted plaintiffs partial injunctive relief because "[d]efendants did not receive proper approvals by the . . . Planning Board to build, uphold, or operate the walkway." As a result, the judge ordered defendants to refrain from "advertis[ing] use of the walkway" unless they "receive . . . Board approvals to do so." Defendants were, however, permitted "to use the . . . walkway for personal permissive use and [were] not required to police, monitor, or otherwise restrict th[e] walkway."

In an accompanying written opinion, the judge first assessed credibility, generally finding all the witnesses, particularly plaintiffs, "subjectively" credible. Then, the judge made specific findings of fact based on his credibility determinations, and conclusions of law based on the governing legal principles.

In rejecting the nuisance claim in relation to the parking lot, the judge found persuasive the fact "that the parking lot and walkway . . . [did] not directly [border] . . . [p]laintiff[s'] property." The judge explained:

> Along the north property line of [p]laintiff[s'] property is a grassy lot controlled by the NJDEP. The NJDEP representative[,] . . . Golden[,] explained that to help alleviate a potential issue of lighting, from headlights in the parking lot . . . , crossing that area and shining into . . . [p]laintiff[s'] property[,] . . . the NJDEP planted several trees in the grassy area. Notably, that area is roughly one hundred feet wide, a fact testified to by multiple witnesses. . . .
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> So, when both [p]laintiff[s] . . . testified that lights and noise from that parking lot are so intrusive into . . . [p]laintiff[s'] home that they cannot sleep[,] the [c]ourt did not find that testimony objectively credible. Car lights, people talking, and other potential light and noises from a parking lot cannot be considered an objective nuisance from over one hundred feet away. Not only does the one-hundred-foot zone provide a distance buffer for noise and light[,] but [d]efendant[s], in partnership with the NJDEP, have previously discussed the annoyance issue and planted trees to help prevent it.

> The [c]ourt finds that people are using that public parking lot at various times of the day and night during the year. However, the simple use of a parking lot at night cannot be considered an objective nuisance. This simply does not show injury to health or discomfort to ordinary people or to an unreasonable extent. The [c]ourt bases that decision [o]n the fact that residential properties throughout the state border public parking lots, restaurants, bars, casinos, and several other businesses which have traffic throughout the day and night. Many of those properties do not have the benefit of a buffer zone as in this case.

Further, after balancing the parties' needs, the judge found "by clear and convincing evidence that the balance weighs in favor of . . . [d]efendant[s]." The judge explained that defendants' bed and breakfast and catering service were "properly approved by the . . . [P]lanning [B]oard" and "[e]ach of those uses" required people to "use the south parking lot . . . at all times [of the] day and night throughout the year." The judge also noted that the NJDEP's conservation easement prevented either party from "restrict[ing] public access to the parking lot in that area."

Similarly, in rejecting plaintiffs' claim that the walkway created a nuisance, the judge concluded plaintiffs failed to meet their burden. The judge explained:

> The issue raised is that the walkway allows people to access the beach at all times. The walkway is a dirt path on the south side of . . . [d]efendant[s'] property. It

> connects with the . . . parking lot over public access land and extends approximately sixty feet to the beach on the west. The pled issue is that the public access walkway to the public beach from the public or permissible public parking lot is not approved by the required planning board action and allows continued violations of the beach's municipal ordinances.
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> When asked about the . . . nuisance that the unauthorized access to the beach creates for . . . [p]laintiff[s], [Timothy] responded by stating that he is forced to [p]olice the beach. He continued to say that the late-night beach goers simply ignore the signs posted at the ends of the walkway and therefore he must enforce the town's ordinances. . . . It is clear . . . [p]laintiffs believe . . . [d]efendants should be actively enforcing the adherence to the State['s] beach restrictions and because they do not do so[,] . . . [p]laintiffs have taken on the burden.
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> It is the opinion of the [c]ourt that that burden is self-created. It is not the job nor the obligation of . . . [p]laintiffs nor . . . [d]efendants to police a State [p]ublic [b]each. The [T]ownship and the State are responsible for enforcement of the City and State regulations on the beach. Any nuisance . . . [p]laintiffs claim based on the need to police the beach is self-created. Notably, there is also no objective evidence that the reported violations interfered with . . . [p]laintiff[s'] enjoyment of the property. There was some testimony about loud music at night after the beach's curfew, but it was not a constant and would not []rise to the level of a nuisance.

The judge also pointed out that the purported nuisance acts are to be expected when "one's property" is adjacent to "a public beach."

Turning to the variance issue, the judge acknowledged that defendants' site plan and bulk variance application for their property was approved by the Planning Board. According to the judge, among other things, the approval "gave [defendants] permission[] to use their property for both commercial and residential use" in order "to create a bed and breakfast, catering business, and to partner with the NJDEP in creat[ing] various nature preserves throughout the property." Upon reviewing the Township's ordinance for preliminary site plan requirements, the judge found that the ordinance "specifically enumerated" that an application "to build, maintain, or use [a] walkway[]" was required. Because defendants had never applied for approval of a walkway, the judge determined plaintiffs "proved by clear and convincing evidence the need for site-plan approval as it pertains to the walkway on the [s]outh side of [d]efendants[']property." Thus, the judge granted "plaintiff[s'] requested injunctive relief," restraining defendants from "maintaining and using the [s]outh [walkway]" until they "receive [p]lanning [b]oard approval."

In dicta, the judge "suggest[ed] that the [P]lanning [B]oard consider granting [defendants'] application" because "[t]he walkway [was] in-line with the intent of the site plan and variance[,] which state[d] that [d]efendants [were] zoned for structures [that] support 'recreational, cultural, and civic uses.'" The

judge also theorized that if defendants were to donate to the NJDEP the land on which the walkway was located, "the walkway would be free for public use with its only restrictions being that of State and Township law and ordinances on the public beach."

On February 11, 2022, plaintiffs filed a timely notice of appeal. While the appeal was pending, on July 28, 2022, defendants finalized their donation of the land that contained the walkway to the NJDEP.[3]

On appeal, plaintiffs primarily argue the judge's decision rejecting their nuisance claim was not supported by the evidence presented at trial and was "against the weight of the evidence."

"'Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review . . . .'" D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). "[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" Mountain Hill, L.L.C. v. Township of Middletown, 399 N.J. Super. 486, 498 (App. Div.

[3] On the eve of trial, defendants had filed a second motion for summary judgment, asserting that they had donated the land that included the walkway to the State, but that the donation process was lengthy. The judge denied the motion.

2008) (quoting State v. Barone, 147 N.J. 599, 615 (1997)). Nor do we ""disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice."" D'Agostino, 216 N.J. at 182 (quoting Seidman, 205 N.J. at 169). Instead, we "'ponder[] whether . . . there is substantial evidence in support of the trial judge's findings and conclusions.'" Sipko v. Koger, Inc., 214 N.J. 364, 376 (2013) (second alteration in original) (quoting Seidman, 205 N.J. at 169). Legal conclusions, however, are reviewed "de novo." D'Agostino, 216 N.J. at 182.

Pertinent to this appeal, "[t]he essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959). In evaluating whether a private nuisance exists, a trial court must weigh "the conflicting interests of property owners" and "the reasonableness of the defendant's mode of use of his [or her] land." Id. at 449. "The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of the conflicting interests." Ibid.

In Traetto v. Palazzo, 436 N.J. Super. 6 (App. Div. 2014), we explained that a plaintiff must satisfy two elements to establish a private nuisance: "(1)

injury to the health or comfort of ordinary people to an unreasonable extent, and (2) unreasonableness under all the circumstances, particularly after balancing the needs of the [defendant] to the needs of the [plaintiff]." Id. at 12 (quoting Malhame v. Borough of Demarest, 162 N.J. Super. 248, 261 (Law Div. 1978)). "[The p]laintiff bears the burden of proving each element by clear and convincing evidence." Ibid.

Under the first element, "disturbances concomitant with residential living can rise to the level of nuisance if, based on proximity, magnitude, frequency, and time of day, they cause some residents 'more than mere annoyance, . . . temporary physical pain[,] and more than usual anxiety and fright.'" Id. at 12-13 (alterations in original) (quoting Malhame, 162 N.J. Super. at 263); see also Lieberman v. Township of Saddle River, 37 N.J. Super. 62, 67 (App. Div. 1955) ("[T]he character, volume, frequency, duration, time, and locality are relevant factors in determining whether the annoyance materially interferes with the ordinary comfort of human existence."). Also relevant, though not dispositive, is whether the conduct and the disturbances it generates comply with "controlling governmental regulations." Traetto, 436 N.J. Super. at 13. "Those factors, however, are elements of a factual essence to be resolved

from the credibly established circumstances of the particular case." Lieberman, 37 N.J. Super. at 67-68.

If the complaining party establishes the first element, the second element requires the trial court to balance the utility of the conduct generating the disturbances with the harm such conduct causes to the complaining party. Traetto, 436 N.J. Super. at 13. Stated differently, "[t]he utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff." Sans, 29 N.J. at 449 (emphasis omitted). Under the second element, "[t]he question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his [or her] business." Ibid.

Here, a review of the record supports the judge's conclusion that plaintiffs failed to establish by clear and convincing evidence that the alleged annoyances and disturbances from the use of the parking lot and walkway to access the beach were substantial enough to constitute a nuisance. Critical to the judge's finding was the fact that the buffer zone that separated plaintiffs' property by over 100 feet was sufficient to alleviate disturbances from the use of the parking lot and walkway. Moreover, as a public beach, neither plaintiffs nor defendants were permitted to deny public access, and the public would still have been able to

park their cars in the "public use" portion of the parking lot on tract two and access the beach through the approved northern access point as well as the other access points located every half-mile along the Township's coastline. Therefore, we are satisfied that the judge correctly applied the Traetto nuisance test, and we discern no basis to intervene.

Although plaintiffs agree with the judge that "site plan approval was . . . required for the [walkway]," they take issue with the judge's "suggest[ion] that the [P]lanning [B]oard consider granting [defendants'] application." They argue that by providing this additional language, the judge went "beyond his jurisdiction." We have explained that "[d]ictum is a statement by a judge 'not necessary to the decision then being made[,]' and 'as such it is entitled to due consideration'" but is "'not binding.'" Bandler v. Melillo, 443 N.J. Super. 203, 210-11 (App. Div. 2015) (second alteration in original) (first quoting Jamouneau v. Div. of Tax Appeals, 2 N.J. 325, 332 (1949); and then quoting Nat'l Mortg. Co. v. Syriaque, 293 N.J. Super. 547, 554 (Ch. Div. 1994)). Here, the judge's suggestion was "'not necessary to the decision'" and was merely dicta. Id. at 210 (quoting Jamouneau, 2 N.J. at 332).

Finally, plaintiffs challenge the judge's denial of summary judgment, arguing the judge "incorrectly determined that an issue of fact existed, with

respect to the land use argument." According to plaintiffs, because they prevailed on the land use issue at trial, the judge's denial of summary judgment should be reversed. Plaintiffs' claim that the judge erred in denying summary judgment is a moot issue. "An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." In re N.J. Dep't of Env't Prot. Conditional Highlands Applicability Determination, Program Int. No. 435434, 433 N.J. Super. 223, 234 (App. Div. 2013) (quoting Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)). Granting summary judgment in plaintiffs' favor on the land use issue would "'have no practical effect on the existing controversy'" and would leave plaintiffs in the same exact position. See ibid. (quoting Greenfield, 382 N.J. Super. at 258).

Affirmed.