NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

DUMONT BOARD OF EDUCATION	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY
Plaintiff,	:	DOCKET NO. BER-L-2099-16
v.	:	CIVIL ACTION
BOROUGH OF DUMONT	:	DECISION
Defendant	:	

MOTION HEARD: MAY 9, 2016

DECIDED: MAY 18, 2016

Honorable William C. Meehan, J.S.C.

James L. Plosia Jr., Esq. & Jonathon F. Cohen, Esq. (Plosia Cohen Law Firm), for plaintiff, Dumont Board of Education

Gregg F. Paster (Gregg F. Paster & Associates), for defendant, Borough of Dumont

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Defendant, Borough of Dumont (hereinafter "Borough"), has moved to dismiss this action. Plaintiff, Dumont Board of Education (hereinafter "Board") opposes this motion. The Court, having read and considered the written submissions from both parties, grants Defendant's motion with prejudice.

The following facts are uncontested. On July 18, 1888, the Board acquired title to Lot 12 in Block 86, (50 Washington Avenue), in deed, recorded in the Bergen County Clerk's Office on July 23, 1888. Many years later, the Board conveyed this property to the Borough by a deed, recorded on June 15, 1962. Pursuant to an agreement dated April 26, 1962, and as referenced in the deed, the land was to be used for the purpose of a Borough Hall and other municipal purposes

within six (6) months of the date of delivery of the deed. By this deed, the Borough became the fee simple owner of 50 Washington Avenue. "A fee simple is the entire and absolute interest in property in land; it means an indefeasible legal title; the entire title and interest in land." Borgquist v. Ferris, 112 N.J. Eq. 324, 327 (1933).

From 1962 until the end of 2014, the Borough used and occupied the property for municipal purposes, among them police facilities. The Bergen County Health Department has found the property uninhabitable and so notified the Borough by a letter dated August 5, 2014. As a result, it was required that the Borough vacate the building in the winter of 2014. Currently, the Borough continues to use the property for police facilities and other municipal purposes.

The Dumont Joint Land Use Board conducted an investigation of the property on February 17, 2015, pursuant to resolution 15-76, to determine if the property qualified as an Area in need of Redevelopment. A public hearing was held by the Joint Land Use Board of Dumont on June 30, 2015. Public notice was given pursuant to N.J.S.A. 40A:12A-6 to resolve whether the property necessitated redevelopment. On June 10 and June 17, 2015 notice was given to the public by publication in the Record. N.J.S.A. 40A:12A-6(b)(3)(d) provides the criteria for notice:

> a notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel. The assessor of the municipality shall make a notation upon the records when requested to do so by any person claiming to have an interest in any parcel of property in the municipality.

The only party appearing on the assessor's tax card as a listed owner is the Borough, thus no mailed notice was issued to the Board. Moreover, the Board was not provided individualized notice as it was not a recognized claimant of an interest in the parcel of land. After the hearing, it was determined by the Joint Land Use Board that the property was an area in need of

redevelopment. On July 21, 2015, a resolution was discussed by the Borough Council designating the study area in Need of Redevelopment.

There were various attempts between the Borough and Board to discuss and negotiate the future of the property at 50 Washington Ave from February 2015 through February 2016. On February 2, 2016, a resolution was adopted by the Borough Council determining that the Borough Hall property was an area in need of redevelopment, after a public hearing occurred pursuant to N.J.S.A. 40A:12A-6. Proper notice was given to all of the necessary parties. On February 16, 2016, at a public meeting, the Landmark Dumont LLC presented a proposal to settle the builder's - remedy suit, which involved that affordable housing be available at 50 Washington Avenue. It is noted that as of February 2014, the Borough and Landmark Dumont have been involved in a builder's remedy litigation, a major portion of the litigation dealing with affordable housing units. On March 8, 2016, the Board of Education filed this law suit. Subsequent to the law suit, the Borough and Landmark's settlement agreement was approved on March 8, 2016. There was no agreement reached between the Borough and the Board.

The settlement between the Borough and Landmark has two alternatives. There are two sites located at D'Angelo Farms. One provides for construction of affordable housing solely on the D'Angelo Farm sites. The other provides for construction both at the D'Angelo Farm site and the 50 Washington Avenue site. This decision has no effect on the portion of the settlement that calls for construction on the D'Angelo Farm sites only.

ANALYSIS

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-

Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

Moreover, pursuant to R. 4:46-2, " a court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenge and that the moving party is entitled to judgment or order as a matter of law." In deciding a motion for summary judgment under R. 4:46-2, the motion judge must evaluate whether a genuine issue exists regarding a material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). The motion judge must consider:

> whether the competent materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party.

Brill, 142 N.J. at 523.

I. As to Count One of Amended Complaint

The first Count of the Plaintiff's amended complaint has been voluntarily dismissed by consent of the parties.

II. As to Count Two of Amended Complaint

In count two of Plaintiff's amended complaint, Plaintiff contends that the property, 50 Washington Avenue, is now an area in need of redevelopment because there was a failure to follow recommended repairs and practices by the Borough between 2008 and 2014.

In this matter, the property at 50 Washington Avenue is not a self-created hardship. The building on the property location is old, deteriorated, and in need of repair. The actual age of the building is unknown but it is approximately over a century old. Due to the passage of time and the age of the building, the building has normally deteriorated absent any intentional neglect on behalf of the Borough. The property contained a significant amount of asbestos, most likely occurring during its original construction and has other environmental hazards that have contaminated and adversely affected the site of years after use. The building is also contaminated with lead and mold. Thus, the building is not a product of self-created hardship. Plaintiff has offered no proof that the hazardous conditions were created by Defendant.

Accordingly Count Two of Plaintiff's complaint is hereby dismissed.

III. As to Count Three of Amended Complaint

In count three of Plaintiff's amended complaint, Plaintiff asserts that the Borough's Agreement to alienate the Borough Hall property has triggered the Board's reversionary rights.

A reversion is "a future estate created by operation of law to take effect in possession in favor of a lessor or a grantor or his heirs, or heirs of a testator, after the natural termination of a

particular estate leased, granted or devised." Fid.-Phila. Tr. Co. v. Harloff, 133 N.J. Eq. 44, 51 (1943). No prior demand for reversion has been made.

Here, any such reversionary rights have not been triggered for the following reasons. First, there has been no alienation of the property since the Borough continues to utilize the property site for municipal purposes. For example, the property site remains the physical location of the police department by use of trailers. Second, the Borough intends to use a portion of a new building for municipal offices and another portion for affordable housing under the agreement between Dumont and Landmark.

A right of first refusal, which is similar to a reverter, is not triggered because the Borough has exercised reasonable efforts to provide affordable housing at the property site, a legitimate government purpose. Affordable housing is a municipal function, and municipalities that own land have chosen to operate affordable housing throughout the state. Pursuant to N.J. Const. Art. VIII, §3, cl.1., "[t]he clearance, replaning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired." It has been recognized by New Jersey Courts that "a valid redevelopment determination satisfies the public purpose requirement." Vineland Constr. Co. v. Twp. Of Pennsauken, 395 N.J. Super 230, 250 (App. Div. 2007).

Moreover, the Borough of Dumont never intended to cease use of the property, and continues to use the property regardless of its present status. The language of the 1962 agreement between the parties reveals that the right of reverter has not been triggered at this stage and provides the following:

> "If at some future date, the Borough adopts a resolution, declaring that it is no longer in the public interest of the Borough of Dumont for the Borough to continue to use the premises, then before the Mayor and Council shall have legal right either to sell or transfer and convey the premises in question to any third

party, the Mayor and Council shall first offer to convey, transfer and give the premises to the Board of Education without any consideration to be paid for the same."

The continuous use of the property from 1962 to the present by the Borough reveals that the right of first refusal has not been triggered for the Board of Education. The Borough did not cease use of the property and intends to continue to use the property for municipal offices as well as for affordable housing purposes. Thus, the Borough will continue to use the property even after the adoption of the settlement agreement and subsequent redevelopment of the property.

Count Three of Plaintiff's amended complaint is hereby dismissed.

IV. As to Count Four of Amended Complaint

In count four of Plaintiff's amended complaint, Plaintiff contends that the redevelopment designation was arbitrary, capricious and unlawful. Here, the issue of redevelopment designation relates more specifically to the Planning Board instead of the Borough. Although Plaintiff relies on Monroe props., LLC v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1292 (App. Div. 2008) to support its assertion, Monroe is distinguished from the issue at hand before this Court. In Monroe, the City of Hoboken and a private developer entered into a contract, which prohibited the City of Hoboken from entering into any other contract with developers for a fixed time period. The contractual agreement was contingent upon the area's being designated as an area in need of redevelopment. No resolution had been adopted by the City of Hoboken to permit the Board to study the area as a redevelopment designation. Conversely, in this instant matter, the Borough has been involved in a year of resolutions, communications, investigations, and an assessment of the property prior to any attempts to settle litigation with Landmark. Further, all powers contained in N.J.S.A. 40A:12A-8 are available to a municipality when a redevelopment plan has been adopted. Thus, since the matter in Monroe is distinguished from the issue before

this Court and is an unpublished opinion, it is not binding upon this Court pursuant to R. 1:36-3, nor is it persuasive.

Additionally, Plaintiff has referenced a portion of the dissent from 62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack, 221 N.J. 129, 156-57 (2015), to support its position regarding the need of particularity in findings to qualify an "area in need of redevelopment." The Court recognizes that the dissent of 62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack is also not controlling or binding authority over this Court

Therefore, Count Four of the Plaintiff's amended complaint is hereby dismissed.

V. As to Count Five of Plaintiff's Amended Complaint

In count five of Plaintiff's amended complaint, Plaintiff alleges that the settlement agreement violates local redevelopment and housing law.

Here, Plaintiff has failed to demonstrate that there was an affirmative act of bad faith in relation to the settlement agreement and condition of the municipal buildings located at 50 Washington Avenue. The building located at 50 Washington Avenue is a century old and in a deteriorating state, contaminated with asbestos, lead, mold, and requires extensive maintenance to be suitable for use.

The Borough has acted in good faith in complying with its constitutional obligation to provide affordable housing. Affordable housing is a municipal function. Although the use of the property will be altered, the purpose still serves a legitimate government interest. It will house municipal offices by serving the public to provide housing for low to moderate income families. Moreover, the use of the property complies with the language of the 1962 agreement between the Borough and the Board.

Count Five of the Plaintiff's complaint is dismissed.

As such, and for the foregoing reasons, the defendant's motion to dismiss is hereby **GRANTED WITH PREJUDICE** and without cost.

Dated: May 18, 2016

William C. Meehan, J.S.C., Retired on Recall