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Del Corp Enterprises I, LLC,  
  
Plaintiff,  
  
v.  
  
Township of Ocean,  
  
Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-2452-14

CIVIL ACTION

**OPINION**

**Argued: October 8, 2014**

**Decided: October 9, 2014**

**Vincent J. Grasso, A.J.S.C.**

Jean L. Cipriani, Esq. appearing on behalf of the plaintiff, Del Corp Enterprises I, LLC (Gilmore & Monahan, P.C.)

Gregory P. McGuckin, Esq. appearing on behalf of the defendant, Township of Ocean (Law Offices of Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors)

**Summary**

The matter before the court is an action brought by plaintiff Del Corp Enterprise I, LLC, the owner and redeveloper of the property located at Block 131, Lot 4, seeking to declare a portion of the Township of Ocean (Township) Ordinance 2012-01 (Ordinance) invalid. Del Corp demands a declaratory judgment against the Township of Ocean that (1) the Township may not dictate the form of ownership or occupancy of a residential housing unit; (2) the Township may not bar an approved application from development due to the developer's intention to rent the residential units; and (3) the portion of the Ordinance that requires the market rate units to be "for-sale" is invalid.

The Township of Ocean seeks to dismiss the complaint by alleging: (1) Del Corp failed to join an indispensable party, namely the Ocean Township Planning Board; (2) Del Corp failed to establish necessary elements for declaratory relief under N.J.S.A. 2A:16-56. Additionally, the Township claims that the Redevelopment Plan at issue is a contract between the Township and Del Corp and cannot be changed unilaterally by Del Corp in order to achieve a greater economic benefit. Finally, the Township submits a counterclaim that the Ocean Township Planning Board had no legal authority to approve Del Corp's Preliminary and Final Major Site Plan. Consequently, the approvals are void *ab initio* because the Township had not yet adopted the Ordinance authorizing the particular uses at the time of the Planning Board's approval.

### **Background**

Pursuant to the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73 (LRHL), the Township of Ocean adopted an Economic Redevelopment Plan (ERP) designating a portion of the municipality as "areas in need of redevelopment" and obtained a "Town Center" designation for certain areas, including the property located at Block 131, Lot 4 (the subject property). Pursuant to N.J.S.A. 40A:12A-4(c), the Township Committee of the Township of Ocean designated itself to act as the Redevelopment Agency for the purpose of implementing redevelopment plans within the municipality.

Del Corp is the owner and redeveloper of the subject property. The land is included within the Route 9 Redevelopment Plan as a Town Center-Mixed Unit District pursuant to the ERP and is currently undeveloped and vacant. A previous contract purchaser of the subject property presented to the Redevelopment Committee redevelopment plans known as "Tradewinds at Waretown" (Tradewinds). By letter dated November 15, 2010, the Redevelopment Agency notified Del Corp that they have approved the Tradewinds

redevelopment plan to be moved to the Planning Board for approval. The Tradewinds redevelopment plan is comprised of a mixed-use development containing approximately 115 “market rate” residential units and 29 “affordable” residential units.

The Planning Board approved Del Corp’s application for Preliminary and Final Major Site Plan for the subject property on April 7, 2011 and memorialized the approval by Resolution 14-11-PB (the Resolution) adopted on May 5, 2011. In relevant part, the Resolution provides,

5. The applicant proposes to develop the site for mixed use consisting of 26,600 SF of commercial retail space and 144 multi-family housing units . . . .
6. The housing units would consist of 29 “affordable” housing units and 115 “*market*” housing units . . . .

The Resolution, nevertheless, conditioned the approval upon a subsequent ordinance to be adopted by the Township Committee authorizing the Redevelopment Plan:

ALL RELIEF being subject to the following conditions:

. . . .

6. That the Township adopt an *Ordinance* approving the Redevelopment Plan.

On January 12, 2012, the Township Committee introduced “Ordinance 2012-01, an ordinance amending the Route 9-Phase 1 redevelopment plan for the Tradewinds at Waretown site (Block 131 Lot 4)” (the Ordinance). The Ordinance provides that “[o]f the 144 dwelling units, 115 units are to be *for-sale* condominium units and 29 units are to be affordable rental units.” The Ordinance was adopted on February 9, 2012.

On May 2, 2014, Del Corp entered into an agreement with Asher Handler for the purchase of the subject property. According to Del Corp, the purchaser wishes to rent both the affordable and market rate units and will terminate the contract if the Township is permitted to require the market rate units to be for-sale rather than rental. The due diligence period for the Agreement for Sale will expire on September 30, 2014, which is extended to October 15, 2014. Del Corp states that the Township told Del Corp that “development of the subject property shall

be in accordance with the Amended Redevelopment Plan, and that the market-rate units may not be leased by the developer, but must be sold as fee-simple units.”

### **Findings**

Del Corp claims that it has standing under the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, because the enforcement of the Ordinance directly affects Del Corp’s property rights. According to Del Corp, “if the terms of the ordinance are enforced by the Township and the developer is not permitted to rent out the market rate units, the contract purchaser will terminate the contract.” The Township contends that there is no justiciable controversy as to the Redevelopment Plan adopted by the Ordinance because the parties agreed on the terms of the plan. The Township asserts that Del Corp, by a declaratory judgment, simply asks the court to reform the agreed Redevelopment Plan to make it easier for Del Corp to sell the property to a third-party purchaser. The Township further argues that a declaratory judgment action is inappropriate here because Del Corp fails to avail it of a remedy to seek a judicial review of the Ordinance by way of an action in lieu of prerogative writ within 45 days from the adoption of the Ordinance in accordance with R. 4:69-6(a).

Although New Jersey’s Constitution does not expressly confine the exercise of judicial power to actual cases and controversies, it is well settled that courts will not render advisory opinions or function in the abstract. Compare U.S. Const. art. III, § 2 with N.J. Const. art. VI, § 1; Independent Realty Co. v. Twp. of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005) (citing Crescent Park Tenants Ass’n v. Realty Equities Corp., 58 N.J. 98, 107 (1971); New Jersey Tpk. Auth. v. Parsons, 3 N.J. 235, 240 (1949)). New Jersey courts “decide only concrete contested issues *conclusively* affecting adversary parties in interest.” Parsons, supra, 3 N.J. at 240 (quoting Borchard, Declaratory Judgments at 34–35 (2d ed. 1941)). This policy is solidly

embedded in the New Jersey Declaratory Judgment Act (the Act), N.J.S.A. 2A:16-50 to -62. The remedial purpose of the Act is to “afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” N.J.S.A. 2A:16-51. To address such uncertainty, courts shall act “within their respective jurisdiction,” which requires an actual controversy. N.J.S.A. 2A:16-52. As such, the threshold question is whether the controversy presented is actual and bona fide. Independent Realty Co., supra, 376 N.J. Super. at 301-02 (citing Parsons, supra, 3 N.J. at 241).

Declaratory judgment is inappropriate to “discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain.” Independent Realty Co., supra, 376 N.J. Super. at 302. “[A] declaratory judgment should be withheld when the request is in effect an attempt to have the court adjudicate in advance the validity of a possible [claim or] defense in some expected future law suit.” Donadio v. Cunningham, 58 N.J. 309, 325 (1971).

For the same reason, “the declaratory judgment procedure may not be used to prejudge issues that are committed for initial resolution to an administrative forum, any more than it may be used as a substitute to establish in advance the merits of an appeal from that forum.” Independent Realty Co., supra, 376 N.J. Super. at 302 (quoting Pennsylvania Dep’t of Gen. Serv. v. Frank Briscoe Co., 502 Pa. 449, 459 (1983)). Courts may dispense with the requirement that a plaintiff exhaust administrative remedies only where administrative review will be futile, where there is a need for prompt decision in the public interest, where the issues do not involve administrative expertise or discretion and only a question of law is involved, and where irreparable harm will otherwise result from denial of immediate judicial relief. Brunetti v. New Milford, 68 N.J. 576, 589 (1975); see generally, Pressler, Current New Jersey Court Rules, Comment R. 4:69-5, at 748–49 (1975).

Del Corp also alleges that the Township's action infringes upon the constitutionally protected private property interests of Del Corp and may be a violation of equal protection under the Mt Laurel Doctrine in the State of New Jersey. Under the doctrine of "strict necessity," courts generally will adjudicate the constitutionality of legislation only if a constitutional determination is absolutely necessary to resolve the controversy between the parties. Donadio v. Cunningham, 58 N.J. 309, 325–26 (1971). The issue of "strict necessity" is closely related to the exhaustion requirement. 966 Video, Inc. v. Mayor and Twp. Comm. of Hazlet Twp., 299 N.J. Super. 501, 514 (Law Div. 1995). When a zoning ordinance is claimed constitutionally invalid as applied to a plaintiff's property, a trial court should ordinarily decline to consider such an attack on the ordinance until the plaintiff has exhausted his administrative remedy as long as the administrative remedy is adequate for the desired relief. Ibid.

Here, the court finds that Del Corp fails to present an actual controversy between Del Corp and the Township. Del Corp and the Township negotiated and agreed upon the Redevelopment Plan. Thereafter, the Township adopted the Redevelopment Plan by enacting the Ordinance pursuant to N.J.S.A. 40A:12A-7. The Ordinance indicates:

The Redevelopment Plan attached . . . for the Tradewinds at Waretown Site is hereby *adopted* and will act as an amendment to Route 9—Phase 1 Redevelopment Plan and supersede the existing zoning requirements for the area as described in the Redevelopment Plan.

The Redevelopment Plan attached in the Ordinance recites:

The design standards of this Plan provide the framework for the finalization of a redevelopment agreement with the Redevelopment Entity (Ocean Township Committee) and for development approval by the Ocean Township Planning Board.

Moreover, the correspondence attached to Del Corp's moving papers referred to the market rate "for sale" units and indicated no objection from Del Corp during the negotiation. In light of these

facts, the court agrees with the Township's argument that the Redevelopment Plan reached with Del Corp is essentially contractual in nature.

Furthermore, the record shows no objection from Del Corp during and after the adoption of the Ordinance. After the adoption of the Ordinance, Del Corp did not seek judicial review by way of an action in lieu of prerogative writ within 45 days in accordance with R. 4:69-6(a). It is after two and a half years of the enactment of the Ordinance that Del Corp now brings up this case because of a sale contract between Del Corp and a third-party purchaser.

As such, there is no controversy arising from the Ordinance which adopted the Redevelopment Plan agreed upon by the Township and Del Corp. By requesting a declaratory judgment to invalidate a portion of the Ordinance, Del Corp is essentially asking the court to reform the agreed-upon Redevelopment Plan in order to satisfy Del Corp's contractual obligation in the sale contract with a third-party purchaser. The court has also considered the fact that the terms of the sale contract between Del Corp and the third-party purchaser are unknown to the court. Conceivably, this contract may fail for other reasons, e.g. title dispute, failure to satisfy a contingency, etc. Therefore, the contract may not consummate due to other provisions which would render this question moot.

Del Corp's brief states "*if* the terms of the ordinance are enforced by the Township and the developer is not permitted to rent out the market rate units, the contract purchaser *will* terminate the contract." Because Del Corp has not demonstrated that it has applied to build apartment units contrary to the Redevelopment Plan and the Township is enforcing the terms of the Ordinance, the court concludes that Del Corp seeks a declaratory judgment here to discern the rights upon facts that are "future, contingent, and uncertain."

Even if the issue in this case is ripe for resolution, a trial court has discretion in requiring a plaintiff to first exhaust its administrative remedies. Independent Realty Co., *supra*, 376 N.J. Super. at 303. Here, the court finds that the appropriate remedy is an administrative remedy, namely that Del Corp should request the Township to amend the Redevelopment Plan to remove the “for-sale” requirement on the 115 market rate units. Upon the Township’s denial, Del Corp may appeal to the court by a prerogative writ challenge under R. 4:69-6 with a record for review. Before the Township’s final adverse determination, the issue presented by Del Corp does not conclusively affect its interest and the request for a declaratory judgment is in effect an attempt to have the court adjudicate an issue that more properly should be addressed in an administrative forum. Moreover, under the doctrine of “strict necessity,” the court will not adjudicate Del Corp’s constitutional claim because the available administrative remedy does not render a constitutional determination absolutely necessary to resolve the controversy between the parties.

Given the fact that Del Corp has not sought the administrative remedy, there is no suggestion that requiring it would be futile. Additionally, Del Corp fails to demonstrate a special circumstance that the interest of justice will require the court to dispense with the exhaustion requirement. The interest involved in this case is that Del Corp seeks to obtain a greater economic benefit from a sale contract with a third-party purchaser. It does not constitute a public interest nor an irreparable harm to warrant that the court dispense with the exhaustion requirement for a prompt decision. On the other hand, the Township has legitimate public interest in requiring Del Corp to exhaust the administrative remedy, which is to work out a Redevelopment Plan to insure a true mixed-use type of development in order to complement its overall Town Center concept. Finally, upon Del Corp’s request to amend the Redevelopment Plan, the Township may decide to allow renting. If the Township denies the request, Del Corp

may appeal the decision to the court. As such, even if the instant case involves a pure legal issue, the administrative remedy does not preclude Del Corp from seeking a remedy based on a question of law. Therefore, the court withholds the declaratory judgment and directs Del Corp to pursue administrative remedies.

Finally, the court notes that the Township conceded at trial that the procedure for approval of this Redevelopment Plan had essentially “put the cart before the horse.” More specifically, the Planning Board granted Preliminary and Final Major Site Plan approval conditioned upon the adoption of an ordinance by the Township Committee authorizing the Redevelopment Plan. This brings into question the authority of the Planning Board to act without an enabling ordinance. N.J.S.A. 40A:12A-13 (providing that a planning board shall approve applications for redevelopment in accordance with the requirements set forth by an ordinance); Jackson Holdings, LLC v. Jackson Twp. Planning Bd., 414 N.J. Super. 342 (App. Div. 2010). The Appellate Division in the Jackson case held that a planning board has no authority to approve a use of land without a valid ordinance to confer the authority. Jackson Holdings, LLC, supra, 414 N.J. Super. at 351.

In summary, the court declines to grant declaratory relief and finds that the circumstances of this case require the exhaustion of administrative remedies so that the Township can exercise its delegated discretion with respect to the request that the Redevelopment Plan permit the lease of the market rate units. If Del Corp is aggrieved by any determination of the Township, then Del Corp is entitled to bring a prerogative writ challenge to such action pursuant to R. 4:69-6. In light of the court’s finding, the court does not need to address the issue of whether Del Corp has failed to join an indispensable party under R. 4:28-1. Judgment is entered in favor of defendant the Township, dismissing plaintiff Del Corp’s complaint without prejudice as well as a dismissal of

defendant the Township's counterclaim. Each party is to bear their own costs and attorney's fees in connection with the within matter. Ms. Cipriani is to prepare the order that comports with the court's ruling.