

LANDMARK DUMONT, LLC,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION; BERGEN COUNTY
Plaintiff,	:	
v.	:	Docket No. BER-L-1297-14
BOROUGH OF DUMONT, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, COUNTY OF BERGEN; THE MAYOR AND COUNCIL OF THE BOROUGH OF DUMONT; AND THE PLANNING BOARD OF THE BOROUGH OF DUMONT,	:	Civil Action
Defendants,	:	COURT'S DECISION PURSUANT TO MOTION TO DISMISS
	:	

Before the Court is a Notice of Motion to Dismiss the Complaint without Prejudice for Plaintiff's Failure to Exhaust Administrative Remedies submitted on behalf of Defendants (Borough of Dumont, Mayor and Council of the Borough of Dumont, and Planning Board of the Borough of Dumont) on May 14, 2014.

Pursuant to N.J.S.A. 52:27D-309(b), Defendants contend that Plaintiff has prematurely filed a builder's remedy claim prior to exhausting its administrative remedies with the Council on Affordable Housing (COAH). Defendants emphasize that Dumont's Housing Element and Fair Share Plan filing with COAH has been pending since December 19, 2013. As the petition for substantive certification was filed in advance of Plaintiff's February 4, 2014 action in lieu of prerogative writs, Defendants argue that the exhaustion of administrative remedy requirements pursuant to Section 16 of the Fair Housing Act (FHA) apply. Defendants thus argue that they are protected from Plaintiff's builder's remedy action until such time as administrative remedies have been exhausted. Elon Associates, LLC, v. Township of Howell, 370 N.J. Super. 475 (2004); Sod Farm Associates, Et. Al. v. Township of Springfield, 366 N.J. Super. 116 (2004). Defendants contend that as the petition has already been

submitted to COAH, and that it is still under review by the Council, COAH is the only proper venue for Plaintiffs to seek to resolve its affordable housing complaints. Wayne Property Holdings, LLC, v. Township of Wayne, 427 N.J. Super. 133 (2012).

In Opposition to Defendants' Motion to Dismiss the Complaint, Plaintiff argues that the exhaustion of administrative remedies requirements under the Fair Housing Act (FHA) do not apply because Dumont's filing for substantive certification from COAH was a sham. Plaintiffs argue that Dumont waited to file for substantive certification until after the New Jersey Supreme Court had affirmed the Appellate Division's invalidation of the second iteration of COAH's third round rules on September 26, 2013. I/M/O the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013). Plaintiff also claims that not only did Dumont wait to file its petition, but that the Borough also never before participated in the administrative process for COAH after the Fair Housing Act was passed on July 2, 1985. Therefore, Plaintiffs argue that the requirement of exhausting administrative remedies should only apply if a municipality participates in the administrative process, which Dumont did not do until after Landmark had requested a rezoning of its property. Even worse, Plaintiff further argues that Dumont's filing of its Housing Element and Fair Share Plan to COAH on December 17, 2013, was a sham since Dumont relied upon a growth share formula that was already invalidated by the Supreme Court decision. As a result, Dumont's filing of its Plan had occurred at a time when COAH could not lawfully review it. Also, Dumont had never participated in the administrative process until Landmark sought a rezoning of its property for inclusionary development. As such, Plaintiff argues that there is no requirement under the Fair Housing Act that mandates Plaintiff to exhaust its administrative remedies prior to a trial on the Complaint.

Plaintiff further claims that Dumont had submitted its petition for substantive certification to COAH at a time when COAH had no rules since the third iteration of the Third Round was not even considered until May of 2014. The Supreme Court has acknowledged that exhaustion would not be

required where the agency clearly lacked jurisdiction or where the agency theoretically had jurisdiction but the subject matter of the hearing was not properly before it. Ward v. Keenan, 3 N.J. 298, 308-309 (1949). Plaintiff asserts that requiring it to exhaust its administrative remedies is a pointless exercise since the Defendant's petition is based on invalid rules and cannot be approved. Plaintiff claims that Dumont never fell within the protective ambit of N.J.A.C. 5:96-16.2 because it had not previously petitioned COAH for substantive certification under valid rules that were in effect at the time of submission. Plaintiff cites the COAH decision of In re Bethlehem Township: Order to Show Cause (COAH April 2, 1997), a matter in which COAH found the Township of Bethlehem had petitioned for substantive certification of a nullity. In Bethlehem, the Township adopted a Housing Element and Fair Share Plan that did not conform to the requirements of the FHA, and in particular, N.J.S.A. 52:27D-310. Plaintiff contends that the present matter is analogous to the decision reached by COAH in Bethlehem, COAH determined that the plan submitted by the Township of Bethlehem could not possibly create a realistic opportunity for the development of affordable housing because it was non-compliant with the FHA and COAH's own regulations, even though the Township had submitted its petition to COAH prior to the institution of a builder's remedy suit by a developer. Based on COAH's finding in Bethlehem, Plaintiff thus argues that the Defendant did not properly calculate the Borough's prospective fair share in their document submission to COAH, which fails to comply with the mandate in the Fair Housing Act that requires a Housing Element and Fair Share Plan to determine prospective fair share based upon the regional need for affordable housing.

Plaintiff further claims that the present matter is not factually similar to the cases of Sod Farm, Elon, and Wayne Properties, since the present matter is not a situation where the municipality relied on the validity of the administrative process and got caught in the subsequent rule invalidation. In the present matter, Plaintiffs contend that Dumont caught wind of a developer that wanted to develop affordable housing and decided to prepare a plan without regard for the foundation and fundamentals of

the legal framework that governed the affordable housing process. Plaintiffs note the factual differences in the aforementioned cases. In Sod Farm, the plaintiff filed a complaint seeking a builder's remedy while COAH was actively reviewing Springfield's petition for substantive certification, 366 N.J. Super. at 199-121. In Elon, the Appellate Division required the plaintiff to exhaust its administrative remedies after it invalidated Howell's substantive certification and remanded the petition back to COAH, 370 N.J. Super. at 480. In Wayne Property, the municipality received Second Round certification and applied for Third Round Certification under COAH's first iteration of the Third Round Rules, 427 N.J. Super. at 138-140. After the Appellate Division invalidated those rules, the plaintiff filed its builder's remedy suit even though the Appellate Division specifically and explicitly precluded the filing of builder's remedy suits involving any municipality that had petitioned under the invalidated rules. See I/M/O the Adoption of N.J.A.C. 5:94 and 5:95 by the Council on Affordable Housing, 370 N.J. Super. 1, 88 (App. Div. 2007). In the present matter, Plaintiff contends that Dumont never participated in the COAH process, and had adopted a sham plan based on already invalidated rules.

Moreover, Plaintiff contends that the Third Count of their Complaint is properly venued in the Law Division. Under R. 4:69, Plaintiff contends that it is the Law Division, not COAH, who has the authority to decide if Dumont's Housing Element and Fair Share Plan is arbitrary, capricious, and unreasonable. At the very least, Plaintiff contends that the Third Count of the Complaint should be resolved by this Court first. In the alternative, Plaintiff argues that even if the Court finds that Plaintiff is required to exhaust its administrative remedies before COAH, it would be manifestly unjust for the Court to dismiss Plaintiff's Third Count of the Complaint as this would result in the count being time-barred from later bringing such a challenge to the Borough's adoption of the Housing Element and Fair Share Plan. For all the foregoing reasons, Plaintiff argues that the Court should deny the Defendant's motion to dismiss the Complaint.

DECISION

In accordance with the decisions reached in Sod Farm Associates v. Twp. of Springfield, 366 N.J. Super, 116 (App. Div. 2004); Elon Associates, LLC v. Twp. of Howell, 370 N.J. Super, 475 (App. Div. 2004); Wayne Property Holdings, LLC v. Twp. of Wayne, 427 N.J. Super. 133 (App. Div.), certif. denied, ARC Equities v. Twp. of Wayne, 212 N.J. 463 (2012); Plaintiffs are required to exhaust their administrative remedies before COAH prior to filing a builder's remedy action pursuant to N.J.S.A. 52:27D-309.

Counts 1 and 2 are dismissed. Counts 3 and 4 are not dismissed at this time. The Court will determine if the resolution to have the matter go to COAH was properly done or not. This Court will not determine if the Plan submitted is substantively deficient. That will be determined by COAH.

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

Dated: June 24, 2014