

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-003629-19

LAKEVIEW MEMORIAL PARK
ASSOCIATION,

Plaintiff,

v.

BURLINGTON COUNTY
CONSTRUCTION BOARD OF
APPEALS, JOHN MARSHALL,
ZONING OFFICER, CINNAMINSON
TOWNSHIP, BRADLEY F. REGN,
CONSTRUCTION CODE OFFICIAL,
CINNAMINSON TOWNSHIP,

Defendants.

Decided: November 20, 2019

Denis C. Germano, attorney for plaintiff.

Alen Arnautovic, for defendants John Marshall, Zoning Officer, Cinnaminson Township and Bradley F. Regn, Construction Code Official, Cinnaminson Township (Platt & Riso, PC, attorneys).

Sander D. Friedman, for defendant Burlington County Construction Board of Appeals (Office of the County Solicitor, attorney).

APPROVED FOR PUBLICATION

June 25, 2020

COMMITTEE ON OPINIONS

SILVERMAN KATZ, A.J.S.C.¹

INTRODUCTION

This action comes before this court by way of complaint in lieu of prerogative writs pursuant to Rule 4:69-1 filed by plaintiff, Lakeview Memorial Park Association. Plaintiff seeks approval for its proposed mausoleum expansion project pursuant to N.J.S.A. 45:27-27 of the New Jersey Cemetery Act, N.J.S.A. 45:27-1 to -41 (hereinafter “Cemetery Act”), contending that Act preempts the Township’s zoning ordinance regarding issuance of zoning permits. Defendants moved, pursuant to Rule 4:6-2(e), to dismiss the complaint, contending plaintiff failed to state a claim upon which relief can be granted. Plaintiff, in combination with opposition to these motions, filed a motion for summary judgment. For the reasons set forth herein, the court concludes the New Jersey Cemetery Act does not preclude a municipality from enacting ordinances regulating the issuance of zoning permits pertaining to cemeteries. Accordingly, defendants' motions to dismiss are granted, and plaintiff’s motion for summary judgment is denied.

¹ For purposes of publication, this opinion is an abridged version of the court’s initial opinion.

PROCEDURAL HISTORY

On June 19, 2019, plaintiff, Lakeview Memorial Park Association, filed this action in the Law Division, naming as defendants the Burlington County Construction Board of Appeals (hereinafter "the CBA"); John Marshall, as the zoning officer for the Township of Cinnaminson (hereinafter "Marshall"); and Bradley Regn, as the construction official for the Township of Cinnaminson (hereinafter "Regn"). The complaint was initiated pursuant to N.J.A.C. 5:23A-2.3(d)2 as an appeal of the CBA's denial of plaintiff's application to Regn for a building permit. Plaintiff seeks: (1) a finding that the State Department of Community Affairs' (hereinafter "the DCA") approval of plaintiff's site plans pursuant to N.J.S.A. 45:27-27(b) and 27(e) of the Cemetery Act preempts the municipality's review and approval of site plans; and (2) an order directing Marshall and Regn to approve plaintiff's application for a building permit to construct a mausoleum addition on its property.

On July 31, 2019, counsel for Marshall and Regn entered an appearance and submitted a letter informing the court he had notified plaintiff that this action was frivolous in violation of Rule 1:4-8 and N.J.S.A. 2A:15-59.1, and requested plaintiff withdraw the complaint within twenty-eight days.

Thereafter, Marshall and Regn moved to dismiss the complaint pursuant to Rule 4:6-2(e), for failure to state a claim upon which relief could be granted,

contending plaintiff failed to exhaust required administrative remedies because it never submitted an application to the zoning officer for a zoning permit before seeking a building permit from the construction code official, and arguing that the Cemetery Act did not preempt the municipality's review and approval of site plans.

Thereafter, counsel for the CBA filed an appearance and a motion, also pursuant to Rule 4:6-2(e), contending the CBA lacked jurisdiction over plaintiff's matter because plaintiff had failed to submit a complete application to the construction official and, therefore, there was nothing to appeal to the CBA pursuant to N.J.A.C. 53A-2.1. The CBA also argued the Cemetery Act, specifically N.J.S.A. 45:27-27, does not preempt local site plan ordinances, and, thereby, plaintiff had failed to exhaust its administrative remedies when it failed to appeal the zoning officer's decision to the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(a).

Plaintiff filed opposition to defendants' motions to dismiss and a motion for summary judgment, arguing that: (1) the construction official's failure to issue a building permit is appealable to the CBA pursuant to N.J.S.A. 45:27-27(a); (2) the administrative remedies available to plaintiff would be futile and involve legal, not administrative, discretion; and (3) N.J.S.A. 45:27-27

supports preemption since the legislative intent of the statute was to give the power of site plan approval solely to the DCA.

On October 7, 2019, Marshall and Regn filed a reply, contending the administrative remedies available to plaintiff would not be futile and that plaintiff's application would necessitate administrative expertise and discretion in its review. They also filed opposition to plaintiff's summary judgment motion.

Thereafter, the CBA filed both its opposition to plaintiff's motion for summary judgment and a reply to plaintiff's opposition to the motions to dismiss, substantially reiterating its previous arguments, as well as arguing that local boards must be able to exercise statutory authority and review challenged actions of its officers. Plaintiff did not file a reply to defendants' opposition. The court heard argument on all motions.

FINDINGS OF FACT

Plaintiff has owned and operated Lakeview Cemetery in Cinnaminson Township (hereinafter "the Township"), Burlington County, New Jersey for over a century. Lakeview Cemetery currently has two public mausoleums. In both 1996 and 2005, plaintiff submitted applications to the Township Planning Board (hereinafter "the Planning Board") to review the site plans and issue approval for the construction of these mausoleums. The Planning Board

granted final approval of plaintiff's submissions in both cases and authorized construction of the mausoleums. Plaintiff now seeks to build an addition to the 2005 public mausoleum. This proposed project involves expanding the mausoleum to add more crypts and includes lighting, storm water management, grading, potentially signage, and more. Nothing in plaintiff's complaint or moving papers indicate what the proposed expansion sought. However, the CBA provides in its motion to dismiss that the expansion includes "erecting a new building as an addition to its existing mausoleum, as well as installing new utilities, lighting, walkways, parking areas, and sediment and erosion control devices."

Prior to applying to the Township for a building permit, plaintiff sought and obtained approval from the DCA for its proposed expansion pursuant to N.J.S.A. 45:27-27(b), which provides:

Construction shall not begin until detailed plans and specifications of the structure have been approved by the State Department of Community Affairs and the certificate of approval is filed in the office of the municipal enforcing agency where the structure is to be constructed. The State Department of Community Affairs shall not grant a certificate of approval unless it is satisfied that the proposed structure can be operated without constituting a hazard to public health or safety.

Plaintiff subsequently sent the language of N.J.S.A. 45:27-27 to Marshall, and informed him that plaintiff's proposed addition was exempt from the Planning

Board's review since the addition met the height and setback requirements of the Township's zoning ordinance and the site plans had already been approved by the DCA. Plaintiff, however, never submitted site plans to the DCA for review and approval of potential hazards posed by the mausoleum project to public health and safety. Accordingly, as conceded by plaintiff, the DCA's approval did not account for any potential health and safety hazards of the renovation to the mausoleum.

Thereafter, plaintiff submitted an application for a building permit, the required application fee, and the construction plans as reviewed and approved by the DCA to the construction official, Regn, pursuant to N.J.S.A. 45:27-27(a), which provides:

A public mausoleum shall not be constructed without obtaining a permit from the construction official of the municipality in which it is to be constructed. Failure to issue a permit is reviewable by the appropriate construction board of appeals established pursuant to the "State Uniform Construction Code Act," P.L. 1975, c. 217 (C. 52:27D-119 et seq.).

Upon receipt of plaintiff's incomplete application, Regn referred plaintiff to Marshall for assistance because plaintiff's application failed to include the required pre-approval from the zoning officer pursuant to Section 525-137 of the Township Code, which provides that "[n]o person hereafter shall erect, locate or alter any building or portion thereof, or begin or change the use of

any land, without first obtaining a zoning permit therefore." Regn, therefore, never issued a formal response to plaintiff's application for a building permit since there was not a proper application for a building permit before him upon which to make a decision.

Based on Regn's lack of a formal response to the application, plaintiff appealed to the CBA pursuant to N.J.S.A. 45:27-27(a). That appeal was not based on a decision from a local enforcing agency or officer because plaintiff failed to submit a complete application to the construction official and thus never received an official rejection or acceptance of its application.

After submitting the appeal to the CBA, plaintiff reached out to Marshall to inquire as to why the construction official had not yet acted on its application, and requested that Marshall put the reasons in writing. Thereafter, per this request, Marshall sent a letter to plaintiff's counsel advising that the construction official had not reviewed the building permit application because the zoning officer's approval is a prerequisite to review and plaintiff had never submitted an application to the zoning officer pursuant to Section 525-137(a) of the Township's Code, which provides, in pertinent part, that the application for a zoning permit:

shall be in writing; shall be addressed to the Zoning Officer . . . ; shall be signed by the owner of record of the land . . . ; shall be made on such forms as may be prescribed and furnished by the Township; shall

contain all information called for by such forms; and shall be accompanied by such plans as may be required, together with any additional information that may be requested by the Zoning Officer in order that it may be determined whether the proposed erection, location or alteration of a building or the proposed use or change of use of land will comply with the terms and provisions of this chapter, statute or order of the Board of Adjustment.

Marshall also explained he had not approved the application because he believed plaintiff must submit its site plans to the Planning Board for review and approval.

Furthermore, the letter stated that Marshall interpreted N.J.S.A. 45:27-27 to mean that site plans are not exempt from local approval; rather, he read the statute to apply only to the actual construction of mausoleums. Marshall maintained site plan approval would still be necessary to "address site clearing, parking lot expansion, lighting, water run off, grading, or other requirements of a site plan submission." Finally, he wrote that the building permit application would be denied until plaintiff obtained site plan approval from the Planning Board. Plaintiff subsequently sent Marshall's letter to the CBA to supplement its appeal.

Plaintiff admits Marshall's explanation was one which "he had communicated to [plaintiff's counsel] informally previously." Moreover, plaintiff states "it did not submit an application for a zoning permit as required

by section 525-137 of the Township code. This was an inadvertent omission — not a refusal." Plaintiff's claim that the failure to apply for a zoning permit was an "inadvertent omission" is belied by the fact that it had, on at least two previous occasions, correctly submitted a full site plan application to the Planning Board and appeared before it to obtain site plan approval. Therefore, not only was plaintiff already informed about the need for a zoning permit on this particular project, but its two previous submissions to the Planning Board and approval for mausoleum construction demonstrate plaintiff possessed sufficient knowledge of the requisite steps necessary to secure a permit for construction.

Once plaintiff filed its complaint in Superior Court, the CBA contacted the DCA on July 16, 2019 "for clarification regarding its approval of plaintiff's construction plans." The DCA responded the following day that it had completed a review and release of the proposed project on February 21, 2019, which included a review of site plans for noncompliance pursuant to N.J.A.C. 5:23-2.15(f)(1)(i), which provides, in pertinent part:

Site diagram: There shall also be filed a site plan showing to scale the size and location of all new construction and all existing structures on the site, distances from lot lines and the established street grades . . . and it shall be drawn in accordance with an accurate boundary line survey

(1) Where any of the conditions in (f)(1)(i)(1)(A) through (C) below are met, a plan shall be submitted to the Construction Official detailing the manner in which the adjoining property will be protected. . . . No permit shall be issued until such plan has been filed.

The DCA closed its response by declaring that "our Bureau is not responsible for site plan approval for the Project." Thus, the site plans for the proposed mausoleum addition have never been reviewed by either the DCA or the Township as they relate to the public health and safety of this proposed project.

CONCLUSIONS OF LAW

All defendants seek to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Plaintiff, alternately, filed a motion for summary judgment claiming that any administrative remedies would be futile and that the Cemetery Act preempts the Township's zoning ordinance regarding zoning permits. This court will first address defendants' motions to dismiss, and will then consider plaintiff's motion for summary judgment.

DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT

I. Standard of Review

In reviewing a motion to dismiss a complaint under Rule 4:6-2, the court's inquiry is limited to examining the legal sufficiency of the facts alleged

on the face of the complaint. Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Plaintiff is entitled to every reasonable inference of fact, and the court is not concerned with plaintiff's ability to prove the allegations in the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

Plaintiff's obligation is not to prove his case, but only to make allegations which, if proven, would constitute a valid cause of action. Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001).

If plaintiff's complaint has failed to articulate a legal basis that would entitle plaintiff to relief, the court must dismiss the complaint. Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Env'tl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). Generally, such a dismissal should be done without prejudice in order to permit plaintiff to file an amended complaint to cure the defects in their pleadings. Printing Mart-Morristown, 116 N.J. at 746. The dismissal, however, may be issued with prejudice if the complaint lacks even a suggestion of the claim, or if the plaintiff concedes that he has no further facts to plead without utilizing discovery. Nostrame v. Santiago, 213 N.J. 109, 128 (2013).

II. Marshall and Regn's Motion to Dismiss

Defendants Marshall and Regn assert that plaintiff's complaint should be dismissed for the following reasons: (a) plaintiff failed to exhaust the administrative remedies available to it when it failed to apply to the zoning officer for a zoning permit before seeking a building permit from the construction official as required by N.J.S.A. 40:55D-7 and Section 525-137 of the Township Code; and (b) the Cemetery Act does not preempt the specific legislative grant of authority to the Township to require site plan approval pursuant to N.J.S.A. 40:55D-38 as implemented by Section 330-100 of the Township Code.

In response to Marshall and Regn's first argument, plaintiff asserts that it "inadvertently" failed to file an application for a zoning permit. Plaintiff also argues that it did not exhaust administrative remedies since to do so would be futile based on Marshall's representation in his letter to plaintiff's counsel that the submission of site plans would be required for issuance of a permit. In addition, plaintiff contends that any available remedies would involve legal, rather than administrative, discretion. As to Marshall and Regn's second argument, plaintiff responds that the Cemetery Act preempts the Township's ordinances regarding site plan approval because a "common sense" reading of N.J.S.A. 45:27-27 gives only the DCA the power to enact building codes regulating site plan approval for mausoleum construction. Plaintiff also argues

that limiting regulation to just the DCA fulfills the Legislature's statutory intent in passing the Cemetery Act. These arguments are addressed as follows.

a. Plaintiff Must Follow the Procedures Outlined in Section 525-137 of the Township Code to Obtain a Zoning Permit Before Applying for a Permit from the Construction Official.

The New Jersey Legislature regulates land use within the State pursuant to the power vested in it by the New Jersey Constitution. See N.J. Const., art. IV, §6, ¶ 2. The Legislature subsequently empowered municipalities to oversee and regulate the use of land, "in a manner which will promote the health, safety, morals, and general welfare," when it adopted N.J.S.A. 40:55D-1 to -163, or what is commonly known as the "Municipal Land Use Law" (hereinafter "the MLUL"). See N.J.S.A. 40:55D-2. Contained therein are statutes specifically granting power to local planning boards to review and approve site plans "as a condition for the issuance of a permit for any development," see N.J.S.A. 40:5D-37, and requiring ordinances that contain provisions for an application process for development, see N.J.S.A. 40:55D-38. The MLUL tasks the municipalities with the enforcement of these provisions. See N.J.S.A. 40:55D-18.

In accordance with the MLUL, the Township enacted Section 525-137 of the Code, which authorizes when zoning permits are required and the process for obtaining one. See Cinnaminson, N.J., Code § 525-137. That ordinance

requires the submission of a "proper application" to the zoning officer to make a determination whether the proposed project complies with the provisions of the Township code and the MLUL pursuant to N.J.S.A. 40:55D-18. See N.J.S.A. 40:55D-18. Part of this process may require the submission of site plans in accordance with Section 330-100 of the Code, which provides, in pertinent part:

All applications made to the Zoning Officer for zoning permits . . . shall be accompanied with a portion of the information set forth in § 330-100 sufficient to permit the Zoning Officer and/or Site Plan Review Advisory Committee to determine whether a full site plan and submission to the Planning Board is required.

[Cinnaminson, N.J., Code § 330-100.]

These site plans must contain, "[a]t a minimum," information regarding whether there will be "[a]ny new exterior erection, construction, alteration, or conversion or any building or structure," new electrical or specialized permits required, or an increased need for parking. See *ibid.*

Plaintiff is already entirely familiar with the process outlined in Sections 525-137 and 330-100 of the Code, as evidenced by its previous applications and site plan submissions to the Planning Board to construct mausoleums in 1996 and 2005. Therefore, this court is unconvinced by plaintiff's argument that the failure to apply for a zoning permit in this instance was merely an "inadvertent omission." However, assuming *arguendo* that plaintiff's failure to

apply for a zoning permit was an "inadvertent omission," this omission does not save plaintiff's application for a building permit. Section 525-137 of the Code still requires a zoning permit before any person seeks to "erect, locate or alter any building or portion thereof, or begin or change the use of any land." See Cinnaminson, N.J., Code § 525-137.

The Township is fully empowered pursuant to its legislative grant under the MLUL to enact ordinances regulating site plan approval. As such, plaintiff must comply with the procedures outlined in the Township Code and was required to seek a zoning permit from the zoning officer. There is nothing indicated by any fact or law presented to this court that doing so would be futile. Upon plaintiff's counsel's request for more information regarding its building permit application, the zoning officer made no indication that an application for a zoning permit would be rejected, as plaintiff argues. Instead, Marshall simply stated, without having an application to review to confirm this opinion, that "I have not signed off on this application because I believe that this must be submitted to the Planning Board for a site plan review and approval." This merely suggests that plaintiff's application may need to go before the Planning Board, and it makes no indication that plaintiff would be unsuccessful in applying for a permit from the zoning officer.

In addition, the local ordinance grants the zoning officer the power to make a determination to issue a permit and as such, delegates administrative discretion to him. The zoning officer then reviews the application alongside the requirements listed in Section 330-100 for information related to any requested utility connections, landscaping, grading, drainage, etc. See Cinnaminson, N.J., Code § 330-100(4). This process relies on the zoning officer's knowledge of local land use policies and ordinances, as well as the impact of plaintiff's proposed development on the land. Hence, the ordinance calls for the zoning officer's administrative, and not legal, expertise and discretion in evaluating these applications. This court is therefore unpersuaded by plaintiff's argument that this matter only requires legal discretion and is thus exempt from exhaustion of administrative procedures.

Accordingly, this court finds that plaintiff has failed to comply with the necessary procedures to obtain a building permit. Plaintiff failed to apply for a zoning permit and, accordingly, plaintiff has failed to exhaust administrative remedies available. "The doctrine that a litigant must first exhaust his administrative remedies before he seeks judicial review is widely recognized." Central R.R. v. Neeld, 26 N.J. 172, 178 (1958). Therefore, this failure to exhaust remedies precludes a valid cause of action.

b. The Cemetery Act does not Preclude the Township from Passing Local Ordinances Regulating the Permit Process.

"The role of the court in statutory interpretation 'is to determine and effectuate the Legislature's intent.'" Marino v. Marino, 200 N.J. 315, 329 (2009) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)). First, the court must look to the plain language of the statute and read the words in accordance with their ordinary meaning, unless the Legislature has used technical terms or terms of art. Ibid. If, on the other hand, the plain meaning is not clear or is ambiguous, courts may look to extrinsic secondary sources to serve as their guide. See Daidone v. Buterick Bulkheading, 191 N.J. 557, 565-66 (2007); DiProspero v. Penn, 183 N.J. 477, 492-93 (2005). Courts must also bear in mind that "when construction involves the interplay of two or more statutes, we seek to harmonize the two, under the assumption that the Legislature was aware of its actions and intended for cognate provisions to work together." State ex rel. J.S., 202 N.J. 465, 480 (2010).

i. Plain Meaning

When examining the plain meaning of N.J.S.A. 45:27-27, the statute clearly delegates certain aspects of construction regulation to the State and certain aspects to the local municipalities. The very first section of this statute states that "[a] public mausoleum shall not be constructed without obtaining a

permit from the construction official of the municipality in which it is to be constructed." N.J.S.A. 45:27-27(a). This provision, therefore, makes the local construction official responsible for signing off on mausoleum construction, and N.J.S.A. 45:27-27(c) requires that this construction official supervise the actual construction of the structure.

This statute also delegates certain authority to the State's DCA to approve the "detailed plans and specifications of the structure" and to only do so once the DCA "is satisfied that the proposed structure can be operated without constituting a hazard to public health or safety." N.J.S.A. 45:27-27(b). In order to effectively exercise this authority, the DCA must adopt regulations governing the construction of public mausoleums in accordance with the Uniform Construction Code. N.J.S.A. 45:27-27(e).

Finally, N.J.S.A. 45:27-27(e) ensures that municipalities will not enforce their own construction codes for mausoleum construction by stating that "[a] municipality may enact zoning ordinances which provide for reasonable height and setback requirements in keeping with standards established for property immediately abutting a cemetery, but any other ordinance regulating the construction of mausoleums shall be of no effect." Thus, a plain reading of N.J.S.A. 45:27-27 indicates that the Legislature granted approval authority of construction plans and structural specifications as relates to public health or

safety to the DCA, conferred oversight of the project to the municipality through the construction official's permit approval and supervision of construction, and ensured that the municipality does not enact its own construction code for public mausoleums.

ii. "Construction"

Interpretation of this statute relies, in part, on the meaning of the word "construction." The Cemetery Act does not define "construction," but it does incorporate by way of reference the State Uniform Construction Code Act, N.J.S.A. 52:270-119 to -141.9. See, e.g., N.J.S.A. 45:27-27(a). The Uniform Construction Code Act defines "construction" as meaning the "construction, erection, reconstruction, alteration, conversion, demolition, removal, repair or equipping of buildings or structures." N.J.S.A. 52:27D-121.

This court is persuaded by Justice Zazzali's interpretation of this word within the context of the Cemetery Act in Trinity Cemetery Association v. Township of Wall, 170 N.J. 39, 53 (2001) (Zazzali, J., concurring). Justice Zazzali understood "construction" as used in the Cemetery Act to mean "the building and design of mausoleums and generally precludes local regulation of those activities." Ibid. This reading is further supported by the fact that the Cemetery Act gives approval authority for mausoleum construction to the DCA, whose "expertise generally is in supervising how buildings are to be

constructed." Id. at 55. Furthermore, Justice Zazzali opined that "[t]he fact that the Legislature requires the DCA to establish appropriate criteria for the construction of mausoleums consistent with the Uniform Construction Code suggests that the Legislature was concerned with preempting a municipality's ability to impose its own unique construction code requirements on cemetery corporations." Ibid.

iii. Legislative Intent

Any reading of a statute must effectuate the Legislature's intent. Marino, 200 N.J. at 329. Justice Zazzali's understanding of the term "construction" as used in the Cemetery Act is supported by the legislative intent of both the Cemetery Act and the MLUL. The Cemetery Act was amended in 1979 to transfer the power to regulate mausoleum construction to the DCA instead of the Department of Environmental Protection. See Sponsor's Statement to A.1491 4 (L. 1979, c. 255) (determining that the DCA was given "broad jurisdiction over most construction through the enactment of the Uniform Construction Code," and thus should oversee mausoleum construction); see also Trinity Cemetery, 170 N.J. at 55. This transfer of power was intended to give the authority to regulate construction to the agency best equipped to oversee construction issues pursuant to the Uniform Construction Code Act. See Sponsor's Statement to A.1491 4 (L. 1979, c.

255) (noting that the DCA has “expert staff in the field of construction”); see also Trinity Cemetery, 170 N.J. at 55-56. Justice Zazzali determined that provisions in the Cemetery Act “are designed to ensure that mausoleums are built in a safe manner, are subject to strict State and local oversight, and conform to uniform, statewide construction code requirements and not to contradictory local requirements.” Trinity Cemetery, 170 N.J. at 57. The 1979 amendment also provided for the DCA to promulgate regulations in accordance with the Uniform Construction Code, a provision which the legislative committee determined “is in accord with the Cemetery Act’s replacement of often contradictory local requirements with uniform State provisions.” Sponsor’s Statement to A.1491 4 (L. 1979, c. 255). In addition, the DCA Commissioner is authorized to promulgate more standards if he or she determines that the Uniform Construction Code and national codes “do not adequately protect the public interest.” Ibid.

Justice Verniero, in Trinity Cemetery, adds in his concurrence that the statute was so worded in 1979 as to clarify that only “reasonable height and setback requirements” were permitted regarding construction. 170 N.J. at 47-48 (Verniero, J., concurring) (emphasis added). There have been no further substantive changes to this section of the Cemetery Act.

As discussed above, the MLUL, on the other hand, was enacted in 1975 “[t]o encourage municipal action to guide the appropriate use or development of all lands in this State.” N.J.S.A. 40:55D-2(a). The Legislature gave municipalities the power to enforce all aspects of the MLUL, along with “any ordinance or regulation made and adopted hereunder.” N.J.S.A. 40:55D-18. This enforcement provision also includes the ability to require permits and authorizations, which may be conditioned “upon the submission of such data, materials, plans, plats and information as is authorized hereunder and upon the express approval of the appropriate State, county or municipal agencies.” *Ibid.* The MLUL empowers municipalities to regulate areas such as zoning, *see* N.J.S.A. 40:55D-62, storm water management, *see* N.J.S.A. 40:55D-93, development rights, *see* N.J.S.A. 40:55D-138, and more. Hence, the Legislature explicitly intended for municipalities to regulate areas such as zoning and land development when it enacted the MLUL.

iv. The Harmony of the Two Statutes

As this court's statutory construction in this matter requires examining the interplay of two statutory schemes, specifically the Cemetery Act and the MLUL, this court must seek to harmonize the two. *See State ex rel. J.S.*, 202 N.J. 465, 480 (2010). When reading the Cemetery Act alongside the MLUL, this court finds that the Cemetery Act does not contradict local site plan review

but merely provides another form of regulation. The Cemetery Act provides additional regulations for the construction of mausoleums, specifically the requirement that a cemetery company must seek approval from the DCA. N.J.S.A. 45:27-27(b). It also requires the cemetery company to obtain the municipality's permission to develop and use the land in such a way. N.J.S.A. 45:27-27(a). The MLUL and local ordinances thus outline how that permission should be sought and what is needed to obtain said permission.

The Township does not seek to impose its own construction code requirements on plaintiff. Rather, the Township merely seeks to effectuate its power to "guide the appropriate use or development of all lands" through the review and approval of site plans "in a manner which will promote the public health, safety, morals and general welfare" of the Township. See N.J.S.A. 40:55D-2. This is important given plaintiff's concession that there has been no governmental oversight of the public health and safety. Plaintiff admits that this project would implicate issues ancillary to the actual construction of the mausoleum, including things such as storm water management, grading, signage, and lighting. The Township does not require the zoning officer's approval so that it may regulate how the proposed expansion is built, but rather it requires the zoning officer's approval to oversee the impact this expansion will have on the development and use of the land in these areas. The DCA's

expertise rests in how the project should be constructed. The municipality's expertise is based on how the project will affect the surrounding area and the use of the land.

Although it is the DCA, pursuant to N.J.S.A. 45:27-27(b), that is tasked with approving construction plans once it is "satisfied that the proposed structure can be operated without constituting a hazard to public health or safety," the DCA's oversight of construction plans relates to the construction, operation, and continued maintenance of the structure of the project. Part of the intent and purpose of the construction regulations, as promulgated by the DCA pursuant to N.J.S.A. 45:27-27(e), are:

- (3) To permit to the fullest extent feasible the use of modern technical methods . . . consistent with reasonable requirements for the health, safety and welfare of occupants or users of buildings and structures. . . .
- (5) To insure adequate maintenance of buildings and structures throughout the State and to adequately protect the health, safety and welfare of the people.

[N.J.A.C. 5:23-1.3.]

The DCA's review does not extend to the health and safety of the surrounding land use and development of that area as part of the construction project. This is further supported by the DCA's own contention about its purview in response to defendant's counsel's inquiry regarding the DCA's final release of plaintiff's project. The Bureau of Construction Projects Review ("BCPR"),

the planning review portion of the DCA responsible for reviewing construction plans and specifications pursuant to N.J.A.C. 5:23-4.24, informed defendants' counsel that the Bureau reviewed site plans pursuant to N.J.A.C. 5:23-2.15(f)(1)(i). That provision of the administrative code requires site diagrams of the existing and proposed structures on the site, their distance from lot lines and street grades, and accessible routes for all buildings. The BCPR also stated in its response to defendant's counsel that the Bureau "is not responsible for site plan approval for the Project." Therefore, the municipality's oversight of the health and safety related to the proposed project's land use and development pursuant to the MLUL is still necessary.

Plaintiff bases its arguments that municipalities may not enact zoning restrictions related to mausoleum construction on Justice Verniero's concurrence in Trinity Cemetery. However, plaintiff admits that Justice Verniero does not even speak to the issue in this matter when it states that "[i]t is important to note that Justice Verniero's concurring opinion, the foundation on which plaintiff's argument is built, did not reach the precise issue presented here." Justice Verniero's concurrence, however, is reconcilable, rather than contradictory, to Justice Zazzali's concurrence. Justice Verniero's concurrence speaks to the municipality's impermissible restriction of a cemetery's lot size and the municipality's relegation of the mausoleum to "accessory" use through

an ordinance that was passed after the municipality had already approved the cemetery's application. Trinity Cemetery, 170 N.J. at 50 (Verniero, J., concurring). Justice Verniero takes issue, therefore, with the municipality "limit[ing] mausoleums to accessory use only and then proscrib[ing] their lot coverage." Id. at 46. He does not speak to the municipality's ability and need to regulate ancillary land use matters to the construction, such as water run-off, grading, etc. Furthermore, he does not at any point indicate that the MLUL is preempted by the Cemetery Act.

In fact, not only does the Justice never say that the Cemetery Act preempts municipal regulation, he actually recommended that the cemetery resubmit its plan to the municipality for approval and issuance of "all local permit and site plan approval from the Township." Id. at 50. Justice Verniero recognized the municipality's ability to require projects to submit to local regulations and include site plan approval.

Justice Zazzali, on the other hand, writes separately to discuss "whether a municipality may limit the number of mausoleums built in a cemetery under the Cemetery Act." Ibid. (Zazzali, J., concurring). In concluding that municipalities may limit the number of mausoleums built, Justice Zazzali discussed the scope of the DCA's review and approval and determined that its scope is limited to "supervising how buildings are to be constructed, not how

many should be constructed." Id. at 55. This does not contradict Justice Verniero's concurrence, since Justice Verniero took issue with the fact that the municipality was limiting the cemetery's use after approving it, and even stated that "the Township may approve or disapprove of Trinity's plan depending on the number of mausoleums proposed." Id. at 50. Thus, neither concurrence in Trinity Cemetery determined that a municipality may not regulate in any area related to mausoleum construction. Instead, both concurrences acknowledged permissible municipal regulations, so long as the municipality is not supplanting the Uniform Construction Code Act with its own construction code. Id. at 50-51.

Furthermore, Justice Zazzali additionally found that "where the Legislature has assigned municipalities powers and responsibilities under separate statutory provisions that do not conflict with the regulation of the 'construction' of mausoleums" then the municipality's power to regulate in these specified areas is not preempted by the Cemetery Act. Id. at 56; see also Diocese of Metuchen v. Twp. of Piscataway, 252 N.J. Super. 525, 531 (Law Div. 1991) ("It is inconceivable that the Legislature intended to transfer the governance of off-street parking from a local municipality to the [DCA] simply because the Legislature . . . subjected mausoleum construction to DCA approval").

As discussed, the Legislature has assigned specific powers to municipalities through separate statutory provisions that are relevant to plaintiff's proposed project and that do not conflict with the DCA's regulation of mausoleum construction. The MLUL permits municipalities to regulate the use and development of land, which includes implementing ordinances related to the approval of site plans. In addition, the Legislature also enacted various statutes as part of the MLUL that instruct municipalities to regulate other areas, such as storm water management, which gives the municipality the power to effectuate storm water management pursuant to its zoning authority. See N.J.S.A. 40:55D-93 to -99. Apart from the MLUL, the Legislature also passed the Soil Erosion and Sediment Control Act which grants power to the Department of Environmental Protection and local municipalities to operate a coordinated sediment control program. See N.J.S.A. 4:24-39 to -55. Plaintiff concedes that its proposed expansion would implicate storm water run-off, utilities, grading, and more. The Legislature has already given the Township the specific powers and responsibility to regulate development in ways which do not conflict with the DCA's regulation of mausoleum construction. Therefore, the Cemetery Act does not preempt the Township's requirements related to issuance of a zoning permit and site plan approval.

Since the Cemetery Act does not preclude the Township from enacting regulations pursuant to the MLUL regarding the permitting process for ancillary issues implicated by mausoleum construction, this court finds that plaintiff must follow the proper procedures outlined in the Township code to secure a zoning permit. Plaintiff has remaining procedural obligations to fulfill before it may submit its claim to this court. Accordingly, Marshall and Regn's motion to dismiss is hereby granted because plaintiff's complaint fails to state a claim upon which relief can be granted. Plaintiff's complaint is therefore dismissed, without prejudice. Plaintiff may bring this claim again only after exhausting all administrative remedies.

III. The Construction Board of Appeals' Motion to Dismiss

The CBA argues in its moving papers that plaintiff's complaint should be dismissed for the following reasons: (a) the Cemetery Act is not inconsistent with the Township's local ordinances and as such, does not preempt the local ordinances; and (b) plaintiff must first challenge the zoning officer's decision in front of the Zoning Board of Adjustment before submitting an appeal to the CBA.

As a response to the CBA's first argument, plaintiff makes the same arguments as it did to Marshall and Regn's motion to dismiss regarding the relationship between the Cemetery Act and the local ordinance, specifically

that N.J.S.A. 45:27-27(e) is wholly inconsistent and contradictory to the Township's ordinances and thus preempts the local ordinances. Plaintiff does not specifically make any counter arguments to the CBA's contention that this matter should go before the Zoning Board of Adjustment before it comes before the CBA. Rather, plaintiff argues more generally in its opposition that it is not required to exhaust administrative remedies because to do so would be futile and because this matter is not a question of administrative expertise.

a. The Cemetery Act and the Township's Ordinances are Compatible.

As discussed, this court does not find that the Cemetery Act preempts local regulation pursuant to a municipality's powers enumerated in the MLUL. Just as the Appellate Division found in Shupack v. Manasquan River Regional Sewerage Authority that "[the defendant] may comply with all of the building requirements in all three statutes and the ordinance," 198 N.J. Super. 199, 204 (App. Div. 1984), so too does this court find that plaintiff may comply with N.J.S.A. 45:27-27 in obtaining approval from the DCA as relates to the actual construction of the proposed expansion, while also complying with Section 525-137 of the Township Code in securing a zoning permit so that the zoning officer, and potentially the Planning Board, may determine how the project will affect the use of land.

b. This Matter is not Properly Before the CBA.

Plaintiff's claim is not properly before the CBA, and, as such, the CBA is not a proper party to this action. A party may file an appeal with the CBA if the construction official has failed to issue a permit pursuant to N.J.S.A. 45:27-27(a), or if the plaintiff is "aggrieved by any ruling, action, notice, order or decision of a local enforcing agency . . . including, without limitation, any refusal to grant an application or any failure to act upon an application" pursuant to N.J.A.C. 5:23A-2.1(a).

However, plaintiff never submitted a complete application for a building permit to the construction official and therefore never received a decision to subsequently appeal to the CBA. It was only after plaintiff submitted an appeal to the CBA that plaintiff reached out to the zoning officer concerning plaintiff's application for a building permit. Marshall informed plaintiff that the application was incomplete because it lacked review and approval from him as the zoning officer pursuant to Section 525-137 of the Township Code. Moreover, as discussed hereinabove, the zoning officer will only review a "proper application" when deciding whether to grant or deny an application. Since plaintiff never submitted an application to the zoning officer, there was nothing for the zoning officer to review to grant the requisite approval so that the construction official could consider plaintiff's application for a building permit.

Any disagreement plaintiff has with Marshall's letter as the opinion of the zoning officer must be appealed to the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(a), which gives that Board the authority to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance. Only after the Zoning Board of Adjustment hears that matter is a subsequent appeal to the CBA appropriate. Thus, plaintiff's claim against the CBA is not proper at this time because there is no decision or action yet on the part of the construction official to appeal to the CBA, and plaintiff has not first taken any disagreement with the zoning officer's opinion to the Zoning Board of Adjustment.

Accordingly, since plaintiff's appeal to the CBA is procedurally deficient, this court finds that plaintiff has failed to articulate a legal basis upon which it is entitled to relief. Therefore, the Burlington County Construction Board of Appeals' motion to dismiss plaintiff's complaint is granted. Plaintiff's complaint is dismissed without prejudice, which will permit plaintiff to bring a claim after going through the proper administrative procedures.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Standard of Review.

Summary judgment is appropriate only if the record demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment or order as a matter of law. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014). The questions presented in this matter are questions of law, not fact. Accordingly, this matter is ripe for this court to make a determination on plaintiff's motion for summary judgment. See Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996) (finding that the interpretation of an insurance contract is a question of law for the court to determine, and so can be resolved on summary judgment).

II. There is no Genuine Dispute as to any Material Fact.

There is no genuine dispute as to any material fact in this matter. The facts as relates to plaintiff's motion for summary judgment are identical to those listed above and, thus, this court accepts the facts as same. The parties agree on the circumstances that led to plaintiff's application before this court. The only outstanding question is legal in nature, specifically the relationship between the Cemetery Act and the Township's local ordinances regarding site plan approval and the requirements on plaintiff to secure a building permit. Accordingly, a determination on plaintiff's motion for summary judgment is appropriate here.

Plaintiff's arguments in support of its motion for summary judgment are identical to those put forth in plaintiff's opposition to defendants' motions to dismiss. As stated above, this court is unpersuaded by those arguments that the Cemetery Act preempts the ability of the municipality to govern the use and development of land and that any administrative remedies would be futile. Plaintiff's motion for summary judgment is therefore denied.

III. The Department of Community Affairs.

Should plaintiff wish to bring any future action related to this matter, the DCA must be joined as a party to that action. Although not properly requested in its complaint, plaintiff seeks a declaratory judgment from this court that the DCA must review site plans for hazards to public health and safety. Plaintiff argues that it did not submit any site plans to the DCA to review for public health and safety hazards pursuant to N.J.S.A. 45:27-27(b) because it claims to have known that the DCA does not review site plans. Plaintiff thus requests that this court instruct the DCA to review and approve site plans pursuant to N.J.S.A. 45:27-27.

The Declaratory Judgments Act, N.J.S.A. 2A:16-50 to -62, states that "[w]hen declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." N.J.S.A. 2A:16-56. Furthermore, that Act provides that "[n]o

declaratory judgment shall prejudice the rights of persons not parties to the proceeding." N.J.S.A. 2A:16-57.

The DCA will be directly implicated by any future examination of the question plaintiff brings before this court today since plaintiff is seeking a declaration on what the DCA must do related to site plan approval for mausoleum construction. Therefore, any action regarding this matter is inappropriate without the DCA as a party to the proceeding. Should plaintiff seek to bring this matter to court again, it will need to join the DCA as a party to such action.

Moreover, plaintiff failed to serve the Attorney General as required by the Cemetery Act to protect the public interest. See N.J.S.A. 45:27-5. Therefore, assuming arguendo that this court had not ruled as it herein does on defendants' motions to dismiss, plaintiff's complaint still fails for lack of proper service on the Attorney General pursuant to N.J.S.A. 45:27-5, and failure to join a necessary party pursuant to N.J.S.A. 2A:15-56.

CONCLUSION

For the reasons set forth above, defendants' motions to dismiss are granted, and plaintiff's motion for summary judgment is denied. Accordingly, plaintiff's complaint in lieu of prerogative writs is dismissed, without

prejudice, for failure to state a claim upon which relief can be granted. This court will issue an order consistent with this decision.