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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2716-20**

**CITADEL WELLWOOD
URBAN RENEWAL, LLC,**

Plaintiff-Appellant,

v.

**BOROUGH OF
MERCHANTVILLE,**

Defendant-Respondent.

Argued May 3, 2022 – Decided May 25, 2022

Before Judges Hoffman, Whipple, and Geiger.

On appeal from the Superior Court of New Jersey,
Law Division, Camden County, Docket No. L-2730-
20.

Gregory J. Castano, Jr., argued the cause for appellant
(Castano Quigley, LLC, attorneys; Gregory J.
Castano, Jr., on the briefs).

Timothy J. Higgins argued the cause for respondent.

PER CURIAM

Plaintiff Citadel Wellwood Urban Renewal, LLC (Citadel) appeals from an April 22, 2021 order granting summary judgment in its favor, but asserts the remedy imposed was insufficient. We affirm the summary judgment and remedy therein. This matter started with Citadel's agreements with defendant Borough of Merchantville (the Borough) to build affordable housing.

In 2011, the Borough adopted a "Plan for Redevelopment and Rehabilitation: West Maple Avenue" (the Plan). The Borough designated Citadel as the redeveloper to acquire and rehabilitate a fifty-four-unit affordable housing development at 606 Maple Avenue, designated as Block 9, Lots 2 and 3 (the Lots). The Borough and Citadel entered into a "Redeveloper Agreement for West Maple Avenue Redevelopment Area, Merchantville, NJ" (Redeveloper Agreement), which said when the "Project" is complete, the Borough shall issue a certificate of completion (i.e., CO).¹

The Plan addressed sale and completion and referenced the Redeveloper Agreement. Section 7.1, entitled "Redeveloper Obligations," stated that:

[r]edeveloper(s) will be obligated to carry out the specified improvements as memorialized by a[n] . . .

¹ The documents repeatedly refer to a certificate of completion, not a certificate of occupancy (CO). Citadel ultimately received a CO. Neither party disputes that the issued-CO filled the purported "certificate of completion" requirement. The trial court and this court treat them interchangeably.

Agreement. The redeveloper will not be permitted to sell, lease or otherwise transfer or dispose of property within the redevelopment area without the prior written consent of the redevelopment entity, which will not be unreasonably withheld or delayed. Upon completion of the improvements within the redevelopment area, further providing inspection and verification by the redevelopment entity, a certificate of completion shall be issued to the redeveloper and the conditions determined to exist at the time the area was determined in need of redevelopment shall be deemed to no longer exist, and the land and improvements situated therein shall no longer be subject to the exercise of eminent domain.

Citadel acquired the Lots by condemnation initiated by the Borough. Citadel ultimately paid \$270,000 plus \$135,230.82 of the Borough's legal fees for the condemnation action and for processing the transfer request in this action under Section 1(a), approximately \$112,165.19 in fees for special condemnation counsel, and \$60,000 to the Borough for previously outstanding fines and liens incurred by the former property owner under Section 2(d).

On February 22, 2013, the parties entered into a Financial Agreement (Financial Agreement or the Agreement) which, in part, allowed Citadel the benefit of the payment in lieu of taxes (PILOT) program. The parties created the Agreement pursuant to the Long-Term Tax Exemption (LTTE) law, N.J.S.A. 40A:20-1 to -22, which allows an annual service charge in lieu of taxes as the PILOT program. The Redeveloper Agreement allowed for sale

after completion and required the Borough's consent, but it was silent as to the LTTE or any tax benefit and specifically ended upon issuance of the CO.

Paragraph five of the Financial Agreement requires the "Entity, it[s] successors and assigns" to pay the annual service charge to the Borough "following the substantial completion of the Project." Citadel, the entity, certified that it paid the minimum PILOT payment in the Financial Agreement for each year after 2013, when the CO was issued, and the Borough accepted those payments without comment. Paragraph eight provides that "[p]ursuant to N.J.S.A. 40A:20-9(g) . . . at any time after the expiration of one (1) year from the completion of the Project, [the Entity] may notify the Borough . . . [that] it relinquishes its status under the LTTE" Paragraph nine's limitation on entity profits would "commenc[e] on the date on which the construction of the Project is completed"

While the above paragraphs address timelines with respect to the completion of the "Project," paragraphs nineteen and twenty address requests to sell. Paragraph nineteen states:

The Borough specifically enters into this Agreement for the benefit of the Project with Citadel . . . and its managing member, Richard DePetro. The sale of the Project by the Entity, or the sale of the interests of the managing member of the Entity, the sale of the Entity, or the sale of the majority interest in

the Entity, shall render this Agreement null and void, unless the assumption of the terms, conditions and obligations of this Agreement by the transferee urban renewal entity person, partnership and/or corporation, is approved by Resolution of the Borough Council of the Borough of Merchantville, upon whose approval this Agreement and its then remaining obligation and the tax exemption of the improvements shall continue, and inure to the benefit of the transferee urban renewal entity.

It is understood and agreed that the Borough may, on written application by the Entity, consent to a sale of the Project and the transfer of the Agreement to an urban renewal person, partnership and/or corporation eligible to function under the law provided the Entity is not in default as [sic] respects any performance required of it hereunder and full compliance with the terms and conditions of N.J.S.A. 40A:20-1, et seq. has occurred and the Entity's obligation under this Agreement with the Borough is assumed by the transferee.

If the Entity has, with the consent of the Borough in which the Project is located, transferred its Project to another urban renewal entity which has assumed the then remaining contractual obligations of the transferor entity with the Borough, the transferor entity shall be discharged from any further obligation under this Agreement, and shall be qualified to undertake another Project with the same or a different municipality.

Pursuant to N.J.S.A. 40A:20-10(d), the Borough shall be entitled to an administrative fee of two (2%) percent of the then-existing Annual Service charge, for the processing of any such request for the

transferred [sic] its Project to another urban renewal entity.

The Borough recognizes and acknowledges that the Entity is a New Jersey limited partnership and as such intends to sell limited partnership interests in the Entity through syndication. The Borough specifically recognizes and consents to such syndication and sale or resale of limited partnership interests in the Entity.

Paragraph twenty continues:

Where approval or consent of the Borough is sought for an assignment of the Agreement, either the Entity or its assignee shall be required to pay to the Borough a reasonable fee for the legal services of the Borough's Attorney, as determined by the Borough Attorney, related to the review, preparation, and/or submission of papers to the Borough Council for its appropriate action on the request assignment.

In February 2020, Citadel wanted to sell the property to Maple Gardens Urban Renewal Entity (Maple Gardens or the contract purchaser or the prospective buyer). Richard DePetro, Citadel's managing member, emailed the Borough indicating the same.

It appears that we will be proceeding with the sale of Wellwood Manor to a new Urban Renewal Entity.

The purchaser is Maple Gardens Urban Renewal Entity LLC. The managing member is Sam Haikens.

I assume that the Mayor would like to meet with him, so let me know what dates and times are available.

As I have said in the past, I would rather keep it but my partners want out, so I am forced to sell.

I have attached a copy of the Certificate of Formation for the prospective buyer and his Tax ID number.

The Borough did not reply, and Citadel emailed the Borough again on April 17.

I have not received a response from you regarding my previous email regarding the above matter. I assume that city hall is closed to the public and [o]f course I hope you are doing well during this crisis.

Please let me know if the council will be meeting through the internet to conduct municipal business or if it is totally shut down for the time being. I have to plan on how to proceed with this transaction since there are contractual [timelines] to con[s]ider.

On April 22, 2020, the Borough attorney emailed Citadel's counsel.

As you are aware, the Borough . . . has been placed on notice by Richard DePetro of the prospective sale of 606 West Maple Avenue to "Maple Gardens Urban Renewal LLC." Please be advised that [p]aragraphs [nineteen] and [twenty] of the Financial/PILOT Agreement with this redeveloper on this property are such that the Agreement is null and void if Citadel Wellwood sells the property or if Rich DePetro sells out a majority interest in Citadel Wellwood, unless the subsequent buyer is approved by Resolution of the Merchantville Borough Council. The fees collectable, according to the Agreement, would be the Borough's attorney's fees and costs in the approval of the subsequent owner of the property. I believe Mr. DePetro is aware of these requirements.

The prospective buyer appears to be "Maple Gardens Urban Renewal Entity LLC," which lists S[a]muel Haikins as its Managing Member and Registered Agent, with its offices located at 21 Newwood Hills Avenue, Lakewood, New Jersey 08701. Accordingly, please see attached a preliminary request for information on the prospective buyer. Once we have received this information, we will be in touch regarding the next steps in this process. Thanks.

The Borough, therein, requested Maple Garden's cover letter, entity background and qualifications statement, references, and financial information.

Maple Gardens submitted the information to the Borough. Citadel sent the Borough a letter to say it was informed that Maple Gardens sent over a "formal request to be allowed to purchase the Wellwood Manor and continue the Tax PILOT program that is currently in place" and to ask when the Mayor and Council would vote on the matter. The Borough did not investigate or reach out thereafter. On June 29, Citadel's counsel called the Borough's attorney, who sent a letter that day.

Please allow this letter to address the recent inquiry your client, Citadel Wellwood Urban Renewal, LLC (hereinafter, the "Entity") [brought] regarding the transfer of the rights and obligations, including the . . . PILOT[], under the Financial Agreement executed by the parties

As you are aware, [p]aragraph [nineteen] of this Agreement states, in part, that "[t]he sale of the

Project by the Entity, or the sale of the interests of the managing member of the Entity, the sale of the Entity, or the sale of the majority interest in the Entity, shall render this Agreement null and void, unless the assumption of the terms, conditions and obligations of this Agreement by the transferee urban renewal entity person, partnership and/or corporation, is approved by Resolution of the Borough Council of the Borough of Merchantville"

Please allow this letter to confirm our telephone conversation of this date, whereupon I had indicated to you that I have been directed by the Mayor & Borough Council of the Borough of Merchantville to inform you that, upon the sale of the interests of the managing member of the Entity, the sale of the Entity, or the sale of the majority interest in the Entity, the Mayor & Borough Council of the Borough of Merchantville will consider this Financial Agreement to be null and void, and it will not be considering a Resolution to permit the assumption of the terms, conditions and obligations of this Agreement by a transferee urban renewal entity person, partnership and/or corporation.

Citadel did not receive further explanation for this denial. The Borough did not communicate with Maple Gardens or its references; did not list the transfer as an agenda item for review; and took no further action to consider Citadel's request.

Citadel filed a complaint in lieu of prerogative writs and argued that paragraph nineteen's restrictions no longer apply after completion of the "Project." Citadel asked the court for a declaratory judgment that Citadel

could sell with the overall agreement or that paragraph nineteen was null and void because it did not include a standard for approval of sale, so the court should de novo determine if it was reasonable to sell. Citadel argued the Borough acted arbitrarily and capriciously by denying the transfer request without investigation and denied Citadel its due process rights by not following its own steps to review the transfer.

Citadel filed a statement of issues pursuant to Rule 4:69-4, asserting no factual disputes but several legal issues consistent with those outlined in its complaint. At a conference, the parties agreed that no discovery was needed, and a case management order scheduled a January 19, 2021 trial.

Citadel submitted a trial brief with a Certification of Richard DePetro in support of its motion for summary judgment, with certified facts similar to those in the complaint, and with these exhibits: the Redevelopment Plan, the Redeveloper Agreement, statements of legal fees, the Financial Agreement, the Financial Assessment Report, the independent audit, the CO, the March through April email correspondence between Citadel and the Borough, materials submitted by Maple Gardens to the Borough, and Citadel's follow-up correspondence with the Borough.

The Borough moved to dismiss the complaint pursuant to Rule 4:6-2(e). The court denied the motion to dismiss but sua sponte converted the case from an action in lieu of prerogative writs to a breach of contracts action. Citadel moved for reconsideration and the Borough cross-moved for summary judgment.

The court considered the applications on March 11, 2021, then granted the motion for reconsideration, reinstated the prerogative writ assignment, and denied the Borough's motion for summary judgment but indicated that it would decide Citadel's motion within a few weeks. Notably, because the Borough conceded it did not communicate with or investigate Maple Gardens, the court concluded summary judgment was appropriate, finding no contested material facts that would obviate a summary judgment application. The parties agreed to the facts but not the remedy.

Ultimately, the court granted Citadel's motion for summary judgment but only ordered the Borough to make an official decision on plaintiff's request to sell the property with the tax benefits. In a written decision, the court outlined the parties' arguments for interpreting and applying the agreements.

Plaintiff advanced that the plain language of the Financial Agreement unequivocally provides that paragraph [nineteen] no longer attached to the anticipated sale, since the "project" was completed,

and that paragraph [nineteen] only restricted the transfer or assignment of the Financial Agreement during the actualization of the "project." If accepted, this meant that it could sell the property and the attached LTTE without the need for Borough consent. Plaintiff alternatively argued that defendant's action was its failure to respond and approve the sale to the potential buyer with the LTTE, and as such, was arbitrary, capricious and/or unreasonable. Defendant countered that its action or inaction did not restrict the sale of the property in that consent was unnecessary and that plaintiff was within its rights to sell the property. They could not, however, sell it with the LTTE.

The court quoted the Redevelopment Plan as not allowing a sale without consent, quoted the Redevelopment Agreement as allowing a sale once issued a CO and how the Borough should issue such, and referenced the Redevelopment Agreement as stating the same. Noting the Financial Agreement was the latest of the agreements, the court found "[i]mportantly, the Financial Agreement imposed restrictions on plaintiff's right to transfer or assign the benefits granted in that Agreement upon sale of the property." The court quoted paragraph nineteen then reviewed the parties' correspondence.

The court found that the issues herein were ripe for summary judgment. The court further found that "the term 'project' as used in the Financial Agreement is unambiguous." The court identified the dominant purpose of the

agreement as to redevelop the area with tax benefits, and Citadel's definition of "project" would frustrate that purpose.

Paragraph [four] of the Financial Agreement provides that "the [p]roject . . . shall be exempt from taxation . . . beginning on the date hereof and for a term of fifteen (15) years from the completion of the entire [p]roject."¹ The parties undoubtedly intended for the "project" to be tax exempt, even after completion of the redevelopment as expressly articulated by paragraph [four] of the Financial Agreement. Plaintiff's argument that the "project" loses its designation as such after redevelopment finds no support in the plain reading of the Financial Agreement.

The court continued its analysis, finding that the Financial Agreement refers to the redevelopment, even after the CO, as the "project."

Furthermore, the Financial Agreement implicitly refers to the redevelopment area after the issuance of the [CO] as the "project." In particular, paragraph [six] of the Financial Agreement specifically provides: "[u]pon the termination of the exemption granted, . . . the [p]roject, all effective parcels, and all improvements made thereto shall be assessed and subject to taxation." Because plaintiff maintains its tax exemption status for fifteen years after the "project" is completed¹ or properly terminated "one (1) year from the completion of the [p]roject,"¹ the "project" retains its designation post-redevelopment.

After determining that "project" was unambiguous, the court also considered the parties' course of conduct. The court discussed the parties'

correspondence and how Citadel "sought permission to sell the property . . . pursuant to the requirements in paragraph [nineteen,]" which it found "indicative that paragraph [nineteen] of the Financial Agreement was and is still applicable, despite the completion of the 'project.'" The court added that it relied on Municipal Land Use Law (MLUL) to say a CO makes a project complete.

The court concluded that:

[a]ccordingly, the Financial Agreement is clear and unambiguous as to the meaning of the term "project." The property still falls within the contractual definition of the "project," and thus, paragraph [nineteen] of the Financial Agreement is valid and enforceable. While plaintiff is free to sell the property both under the Redevelopment and Financial Agreements, the Borough's consent is required in order to transfer the tax exemption to the contract purchaser.

The court added, as to good faith and performance:

Although the plain language of the Financial Agreement is silent as to the procedure the Borough intended to undergo for Resolution approval evidencing the required consent, the implied covenant of good faith may be used "to imply absent terms and conditions into a contract where those terms and conditions 'must have [been] intended' by the parties." Seidenberg v. Summit Bank, 348 N.J. Super. at 257.^[2]

² Seidenberg v. Summit Bank, 348 N.J. Super. 243, 257 (App. Div. 2002) (alteration in original) (quoting N.J. Bank v. Palladino, 77 N.J. 33, 46 (1978)).

Thus, it concluded that:

[i]t is evident that plaintiff had a justifiable expectation that the Borough would act on the request to assign the rights and obligations of the Financial Agreement. In making this statement, the court first looks to paragraph [nineteen] of the Financial Agreement which provides that "[i]t is understood and agreed that the Borough may, on written application by [plaintiff], consent to a sale of the [p]roject and the transfer of the Agreement[.]"¹ This clearly indicates that there is a written application process for request of the transfer of the Financial Agreement upon sale.

Moreover, paragraph [twenty] of the same Agreement provides that when plaintiff seeks Borough consent to assign the Financial Agreement, either it or the contract purchaser is required to pay reasonable legal fees for the services of the Borough's attorney "related to the review, preparation, and/or submission of the papers to the Borough Council for its appropriate action on the request assignment."² The plain language sets forth the parties' unambiguous intention for the Borough to review and take the "appropriate action" when plaintiff seeks consent to sell the property and transfer the Financial Agreement. Although this provision does not explicitly define "appropriate action," it is clear that the original intent of the parties was that defendant has unilateral discretionary authority to consent to the request to assign the Financial Agreement and the PILOT contained therein, but that action was indeed necessary.

Accordingly, the plain language in paragraph [nineteen] and paragraph [twenty] indicate that the plaintiff had a reasonable and justifiable expectation

that the Borough would consider and issue a decision on plaintiff's request to sell the project and transfer or assign the Financial Agreement.

[(second, third, fourth, and fifth alterations in original).]

The court further concluded that the Borough breached the implied covenant of good faith because failing to act after requiring and receiving information about the contract purchaser, Maple Gardens, was done in bad faith. Further, the Borough exercised its unilateral discretion arbitrarily, capriciously, and in a manner inconsistent with plaintiff's reasonable expectations. Moreover, it was "difficult to imagine that the Borough believed its silence was justified under the Financial Agreement" especially because "it requested detailed information on [Maple Gardens]" and paragraph twenty required "appropriate action" for responding to a request.

The court reviewed Citadel's due process claims, but only considered the procedural due process claims because Citadel abandoned its substantive due process claims in its brief in support of summary judgment. The court, citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972), found that Citadel did not have a "legitimate claim of entitlement" to sell the property with the LTTE, i.e., to transfer the benefits in the Financial Agreement. Thus, the court found no violation of Citadel's procedural due process rights.

The court granted Citadel's motion for summary judgment and ordered the Borough to make an official decision on plaintiff's request to sell the property with the tax benefits. The court did not order the Borough to approve the sale.

Citadel appealed. It argues that the trial court erred by failing to grant the plaintiff's requested relief, in declaring that the Borough's approval of the sale of property with tax exemption is no longer required.³

"We review [a] motion for summary judgment using the same standard applied by the trial court—whether, after reviewing 'the competent evidential materials submitted by the parties' in the light most favorable to [the non-moving party], 'there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). If there is no genuine issue of material fact, we will "decide whether the trial court correctly interpreted the law."

³ The Borough's brief advises, however, that on August 9, "[a]fter investigation by an ad hoc committee . . . the Borough adopted Resolution R21-90 declining the request of [Maple Gardens] to assume the terms and conditions of the Financial Agreement between [Citadel] and the Borough" The Borough asserts that this committee reviewed documents and interviewed the principal and persons from Maple Gardens then presented a verbal recommendation to the Borough Council on August 9. This subsequent decision was not before the motion judge and is not part of this appeal.

DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), overruled on other grounds Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 563 (2012)). We review those issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

"The interpretation or construction of a written contract is usually a legal question for the court," suitable for summary judgment. Driscoll Constr. Co. v. N.J. Dep't of Transp., 371 N.J. Super. 304, 313 (App. Div. 2004). Accordingly, "[i]n the absence of a factual dispute, [the court] review[s] the interpretation of a contract de novo." Barila v. Bd. of Ed. of Cliffside Park, 241 N.J. 595, 612 (2020) (quoting Serico v. Rothberg, 234 N.J. 168, 178 (2018)). We "look at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

The motion judge's ultimate determination as to the applicability of the Financial Agreement in this sale was proper, even though the alterations to the language while quoting and the extent of review of an unambiguous provision muddied standard contract interpretation principles. "[I]f the contract into which the parties have entered is clear, then it must be enforced' as written."

In re Cnty. of Atlantic, 230 N.J. 237, 254 (2017) (alteration in original) (quoting Maglies v. Est. of Guy, 193 N.J. 108, 143 (2007)). As such, a court must be careful not to make a better contract for the parties than the one the parties made for themselves. Kotkin v. Aronson, 175 N.J. 453, 455 (2003).

Courts should read contracts "as a whole in a fair and common sense manner[,]" Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009), and "must consider contractual language "'in the context of the circumstances" at the time of drafting and . . . apply "a rational meaning in keeping with the expressed general purpose,"" Cnty. of Atlantic, 230 N.J. at 254 (alteration in original) (quoting Sachau v. Sachau, 206 N.J. 1, 5-6 (2011)). "Where an agreement is ambiguous, 'courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation.'" Id. at 255 (quoting Cnty. of Morris v. Fauver, 153 N.J. 80, 103 (1998)).

We agree the Financial Agreement, and specifically paragraphs nineteen and twenty, are unambiguous in that they require a) the Borough's consent to transfer the tax exemption in the Financial Agreement and b) the Borough to make a decision as to whether it consents to such a transfer. "It is well-settled that '[c]ourts enforce contracts "based on the intent of the parties, the express

terms of the contract, surrounding circumstances and the underlying purpose of the contract."'' Id. at 254 (alteration in original) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)). Accordingly, we consider the express language, the intent of the Financial Agreement, and the purposes of the LTTE and Project in applying the Agreement to the parties' dispute here.

We also agree with the trial judge that the Project is broader than just redeveloping housing on the Lots to obtain the CO. The "Project" is defined in the Financial Agreement at Paragraph two.

The Borough has granted and does hereby grant its approval for an urban renewal project, the nature, magnitude and description of which is disclosed in the Facilities Assessment Report and Addendum thereto, to be redeveloped under the provisions of the LTTE on the land described as and commonly known on the Official Tax Map of the Borough of Merchantville as Block 9, Lots 2 and 3 at 606 West Maple Avenue, Merchantville, New Jersey (hereinafter, the "Project"). The Borough finds that the redevelopment of the Project creates a substantial benefit to the Borough, when compared to costs, if any, associated with the tax exemption granted herein and, further, finds that such tax exemption is of significant importance in obtaining the development of the Project and in influencing the locational decisions of probable occupants of the Project.

The "Project" is used interchangeably to indicate that it surpasses the time to just redevelop housing on the Lots and get a CO. The language does

not mention a CO or a building. In this paragraph alone and throughout the Financial Agreement, the Project is at points "to be redeveloped" and at other points is complete and has "probable occupants." The term "project" is arguably broadly applied because it is broadly defined in the LTTE. See N.J.S.A. 40A:20-3(e).⁴

Paragraph four, for example, contemplates the "Project" in both short and long terms.

Pursuant to N.J.S.A. 40A: 20-9(b), the Project to be redeveloped by the Entity shall be exempt from taxation on improvements in accordance with the provisions of the LTTE and in the manner provided by

⁴ N.J.S.A. 40A:20-3(e) reads

"Project" means any work or undertaking pursuant to a redevelopment plan adopted pursuant to the "Local Redevelopment and Housing Law," P.L.1992, c. 79 (C.40A:12A-1 et al.), which has as its purpose the redevelopment of all or any part of a redevelopment area including any industrial, commercial, residential or other use, and may include any buildings, land, including demolition, clearance or removal of buildings from land, equipment, facilities, or other real or personal properties which are necessary, convenient, or desirable appurtenances, such as, but not limited to, streets, sewers, utilities, parks, site preparation, landscaping, and administrative, community, health, recreational, educational and welfare facilities, and zero-emission vehicle fueling and charging infrastructure.

this Agreement beginning on the date hereof and for a term of fifteen (15) years from the completion of the entire Project, with options to renew. . . .

[(emphases added).]

"[T]he Project to be redeveloped" contemplates that the Project is a larger definition, which is to be redeveloped, but "fifteen (15) years from completion of the entire Project" indicates the opposite, which is that the Project is just to complete the housing and get a CO, meaning the Financial Agreement must exist after the Project.

The continuation of the Agreement is clear from these provisions and is controlling, regardless of the broad and varied use of the term "Project." Paragraph nineteen says "the Borough may, on written application by the Entity, consent to a sale of the Project and the transfer of the Agreement to an urban renewal person," (emphasis added), and paragraph twenty references "[w]here approval or consent of the Borough is sought for an assignment of the Agreement," (emphasis added). Both those statements are about the transfer of the Agreement, which is an LTTE project for an LTTE tax benefit. The Agreement is contemplated separately from the "Project" and clearly continues after a CO.

The Agreement also indicates that the Borough was required to formally consider the application and take steps to do so. The Agreement gave the Borough the right to charge a fee to consider the application, specifically "a reasonable fee for the legal services of the Borough's Attorney, as determined by the Borough Attorney, related to the review, preparation, and/or submission of papers to the Borough Council for its appropriate action on the request assignment." A fee must cover work—not ignoring a request and voiding without consideration. Given that all contracts include an implied covenant of good faith, the Borough could not reasonably think the Agreement allowed it to accept a fee to unilaterally not review then reject assignment requests. See Pickett v. Lloyd's, 131 N.J. 457, 467 (1993); accord Sears Mortg. Corp. v. Rose, 134 N.J. 326, 347 (1993). Separate as a matter of law from breaching good faith implied in all contracts by failing to consider the request under the Agreement, the Borough acted arbitrarily, capriciously, and unreasonably in ignoring and denying the request without taking any official action under the LTTE.

The Borough acted arbitrarily, capriciously, and unreasonably in failing to consider the transfer request through appropriate action as the governing body applying LTTE tax law. "Where [a] statute sets forth the procedure to be

followed, no governing body, or subdivision thereof, has the power to adopt any other method of procedure." MEPT Journal Square Urb. Renewal, LLC v. City of Jersey City, 455 N.J. Super. 608, 624 (App. Div. 2018) (quoting Midtown Props., Inc. v. Twp. of Madison, 68 N.J. Super. 197, 207 (Law Div. 1961), aff'd o.b., 78 N.J. Super. 471 (App. Div. 1963)). LTTE explicitly allows parties to include a consent to transfer provision and mentions such consent would follow some sort of review process. The Borough, regardless of the general contractual obligation to act in good faith and its general governmental obligation to not act arbitrarily and capriciously, could not adopt a different procedure to not consider the request nor wait until a requested transfer occurred so it could avoid considering such requests.

LTTE does not outline a specific review procedure, however, so the Borough is entitled to apply its discretion under the Agreement and as a government actor. The court, then, is entitled to review that discretion for actions and inactions that are arbitrary, capricious, and unreasonable, but only to compel legitimate agency discretion and action. Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 103 (App. Div. 2014). "A court-issued writ of mandamus to a government official 'commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary

function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." Id. at 100 (quoting In re Resol. of State Comm'n of Investigation, 108 N.J. 35, 45, n. 7 (1987)).

When a government entity has acted, courts review the decision under a deferential standard, considering whether it was arbitrary, capricious, or unreasonable. See Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 225 (2013) (identifying the standard of review for planning and zoning board decisions under MLUL presented to appellate courts via actions in lieu of prerogative writs). The motion judge applied this standard after finding the Borough had discretion to review the transfer request. Citadel argues this is not mandamus because it is not ministerial, which is correct, but this is governmental discretion being compelled by the court because of the Borough's inaction.

Citadel was effectively arguing that paragraph nineteen no longer applied, so Citadel could ask the court to make a declaratory judgment to compel the Borough to approve the sale with the tax exemption. As we analyzed above, paragraph nineteen cannot be interpreted that way given its plain language and because to read the paragraph and Agreement as no longer applying would be against the LTTE's long-term purpose under its general

provisions. The court could only do what it did here, which was to compel the Borough to exercise its discretion under the Agreement and in a non-arbitrary, non-capricious, and reasonable manner required of all government discretionary action.

We affirm the motion judge's finding because the Financial Agreement unambiguously requires the Borough's consent to transfer the tax-exempt status, which is consistent with LTTE law. Our decision does not prejudice Citadel's ability to maintain its tax-exempt status without a sale, challenge the Borough's August 9 decision, request a different transfer, or bring any claims under other transfer requests.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION