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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3460-20**

SAND PIT VOLLEYBALL, LLC,

Appellant,

v.

**FORT MONMOUTH ECONOMIC
REVITALIZATION AUTHORITY,**

Respondent.

Submitted November 28, 2022 – Decided April 12, 2023

Before Judges Smith and Marczyk.

On appeal from the Fort Monmouth Economic
Revitalization Authority.

Kelly Law, PC, attorneys for appellant (Charles P.
Kelly, of counsel; Bradley Latino, on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Donna Arons, Assistant Attorney General,
of counsel; Matthew Reagan, Deputy Attorney General,
on the brief).

PER CURIAM

Plaintiff Sand Pit Volleyball, LLC appeals from a June 16, 2021 final agency determination by FMERA Fort Monmouth Economic Revitalization Authority (FMERA) awarding the right to purchase and develop certain property to a competitor. In response to a request for proposals issued by FMERA, four bidders submitted proposals, including plaintiff. After reviewing the submissions, FMERA determined plaintiff's proposal was non-compliant, and it awarded development rights to another bidder. After plaintiff challenged the award, FMERA referred the matter to a hearing officer, who issued an initial decision upholding the award. FMERA adopted the decision as final, and plaintiff appeals, seeking rescission of the award as well as modification and reissuance of the request for proposals. For the reasons that follow, we dismiss the appeal as moot.

I.

FMERA was created by the Legislature to oversee the redevelopment of a closed military base located in three Monmouth County communities: Tinton Falls, Eatontown, and Oceanport. See N.J.S.A. 52:27I-41. On June 17, 2019, FMERA issued a Request for Offer to Purchase (RFOTP) a 7.8-acre parcel of land called the "Expo Theater." The RFOTP also included option terms, which

permitted bidders to purchase two additional parcels of land, consisting of a total of 26.9 acres (Optional Parcels).

On August 16, 2019, FMERA received proposals from four separate bidders, including plaintiff. FMERA rejected two bidders' proposals, including plaintiff's bid, for failure to comply with the express terms of the RFOTP. Plaintiff's proposal included its offer to purchase the Optional Parcels, but not an offer to purchase the Expo Theater parcel, an express requirement of the RFOTP. FMERA evaluated and scored the two qualifying proposals, and next entered into negotiations with the owners of the highest scoring proposal, River Development Equities, LLC (RDE). After some negotiation with FMERA, RDE eventually withdrew its proposal and FMERA entered into negotiations with Academy Sports Fields – Eatontown, LLC (ASF).

On March 24, 2021, almost nineteen months after receipt of the two qualifying proposals from RDE and ASF, FMERA adopted a resolution accepting ASF's offer. It issued a conditional notice of award to the entities THAT submitted proposals on April 13, 2021.

Plaintiff appealed FMERA's notice of award on April 28, 2021, and FMERA referred the matter to a hearing officer. Neither plaintiff nor FMERA requested a hearing or oral argument. Concluding the matter was appropriate

for decision on the existing record and applicable law, the hearing officer made findings, including that: FMERA properly rejected plaintiff's proposal as not responsive to the terms of the RFOTP; FMERA properly exercised its discretion to award the contract to ASF; and FMERA's decision to award a contract to ASF did not violate its development goals and objectives as stated in the RFOTP.

On June 16, 2021, FMERA issued a final agency decision, adopting the hearing officer's findings and upholding the selection of ASF. On July 13, 2021, ASF, the last remaining qualified bidder, withdrew its proposal. On July 21, 2021, FMERA authorized issuance of a new RFOTP which encompassed the Expo Center, the Optional Parcels, and additional lands totaling approximately 289 acres of land. The property cited in this new RFOTP was referred to as the "Mega Parcel."

Plaintiff appealed FMERA's final decision on July 30, 2021, unaware that ASF had withdrawn its offer and that FMERA had issued an updated RFOTP.

During the ensuing months, the Mega Parcel RFOTP was amended, terminated, then ultimately re-issued as FMERA wrestled with COVID-19 pandemic-related delays to its process and added a new property to the RFOTP package. Ultimately, FMERA re-issued an amended Mega Parcel RFOTP which in turn solicited proposals that were due June 6, 2022.

Plaintiff challenges FMERA's 2019 final agency decision, essentially contending the agency was arbitrary, capricious, and unreasonable in disqualifying plaintiff as non-compliant. Plaintiff specifically argues that its offer to purchase the Optional Parcels alone complied with the RFOTP as written.

While the relief plaintiff seeks in its merits brief is unclear, plaintiff sought rescission of the award to ASF and, effectively, consideration of its proposal by FMERA during the 2019 RFOTP process before the hearing officer. In other words, plaintiff wanted an opportunity for competitive negotiation with FMERA based on its initial proposal, one it contends was compliant with the original RFOTP terms.

FMERA has ceased negotiations with RDE and ASF regarding the terms and conditions of the 2019 RFOTP, and it reissued and amended the RFOTP to include additional terms and conditions, including new parcels offered for sale and development. Given these realities, it is unclear what, if any, remedy would be available to plaintiff if it was successful on the merits of its appeal. This raises the question of mootness.

II.

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010) (citing Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231, (App. Div. 2000)). "An issue is 'moot when our decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" Redd v. Bowman, 223 N.J. 87, 104 (2015) (quoting Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 221-22 (App. Div. 2011)). Nonetheless, we may rule on cases where the issues "are of substantial importance and are capable of repetition while evading review" Advance Elec. Co., Inc. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002) (citing Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 165 (1998)).

The scope of our review in an appeal from a final decision of an administrative agency is limited. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 17 (2011) (citing In re Herrmann, 192 N.J. 19, 27 (2007)). The agency's decision should be upheld unless there is a "clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Ibid. (quoting Herrmann, 192 N.J. at 27-28). This analysis focuses on three issues:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995) (citing Campbell v. Dep't. of Civ. Serv., 39 N.J. 556, 562 (1963)).]

Additionally, we are not "bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

III.

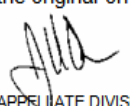
Plaintiff seeks relief from a 2019 RFOTP process that, for all purposes, ended when FMERA issued a 2021 RFOTP (the Mega Parcel RFOTP), subsuming the 2019 properties within a much larger parcel. As a statutorily created economic revitalization authority, FMERA had the power to issue requests for proposals as well as acquire and/or dispose of any parcel in its project area. N.J.S.A. 52:27I-26 (e), (j). On this record, it follows FMERA had the discretion to abandon the 2019 RFOTP process it initiated and begin a new RFOTP process, one with a larger property footprint and revised redevelopment objectives. See Gannett Outdoor Co., Inc. v. Atlantic City, 249 N.J. Super. 217

(1991). Even though the 2019 RFOTP process had concluded, pursuant to the Mega Parcel RFOTP, plaintiff was free to submit a proposal on or before the response due date of June 6, 2022.

Given the non-viability of the 2019 RFOTP, answering the question of whether plaintiff's response to the 2019 RFOTP was compliant "can have no practical effect on the existing controversy." Redd, 223 N.J. at 104 (2015). For these reasons, we do not reach the merits of plaintiff's appeal.¹

Appeal dismissed as moot.

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


CLERK OF THE APPELLATE DIVISION

¹ For the sake of completeness, we note that had we concluded the matter was not moot, we would defer to the findings of FMERA'S agency decision and affirm. The record shows the "Expo Theater" term in the 2019 RFOTP required interested respondents to make an offer to purchase that property. Plaintiff made no such offer, and there was no reasonable interpretation of the 2019 RFOTP terms and conditions that would permit plaintiff to bid on the Optional Parcels alone. Plaintiff failed to sustain its burden to show FMERA was arbitrary, capricious and unreasonable in its final decision.