357-23

New Jersey Commissioner of Education

Final Decision

Friends of Team Charter School, Inc.,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

Synopsis

In this twice remanded matter, petitioner challenged the respondent Board's attempt to exercise its right of reversion regarding the Maple Avenue School – one of several properties transferred from the Board to the Newark Housing Authority (NHA) under the terms of a 2016 site disposition and development agreement (Agreement) in which the NHA agreed to convey the buildings to third parties to benefit the Board and the City of Newark. Petitioner purchased Maple Avenue School from a third party in March 2020 for development as a public charter school. In April 2020, the Board filed a Superior Court suit against the NHA, seeking to exercise its right to reversion based on the argument that NHA had failed to complete a site project and that the property was not being used for one of the Agreement's permitted uses. Petitioner filed the within matter, alleging that the Board was not authorized to file the Superior Court complaint and had failed to comply with facilities regulations. The issue for resolution here is the novel legal question of whether the Superior Court action could constitute land acquisition and/or a school facilities project that is subject to applicable statutes and regulations; this requires careful interpretation of relevant provisions of the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-1 to -48 and related regulations.

On remand, the ALJ concluded that the Superior Court litigation was not a school facilities project, finding, *inter alia*, that: the litigation does not meet the definition of a school facilities project under *N.J.A.C.* 6A:26-1.2; the Board was neither attempting to purchase the Maple Avenue School nor trying to acquire it by condemnation, gift, or grant; if the Board succeeds in Superior Court, the property will revert back to the Board based on language in the Agreement; and *N.J.A.C.* 6A:26-7.1, which describes the process by which school districts or the School Development Authority may obtain Commissioner approval for land acquisition in connection with school facilities projects, does not apply.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the enforcement litigation is not a school facilities project or land acquisition as contemplated under EFCFA and related regulations. Accordingly, the Board was not required to seek approval from the Commissioner prior to initiating the ligation aimed at reacquiring land upon which it previously operated a public school that could potentially be utilized for a future school facilities project. The Board's motion for summary decision was granted and the petition was dismissed.

357-23
OAL Dkt. No. EDU 10019-21 (EDU 04320-21 on remand)
Agency Dkt. No. 55-4/21

New Jersey Commissioner of Education

Final Decision

Friends of TEAM Charter Schools, Inc.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and respondent Board's reply thereto, have been reviewed and considered.

By way of introduction, this matter, which the Commissioner twice remanded to the OAL for further proceedings, has a protracted procedural history. The sole legal question to be resolved is whether a pending Superior Court enforcement action initiated by respondent to reclaim title to the former Maple Avenue School site "could constitute land acquisition and/or a school facilities project, subject to applicable statutes and regulations." *Friends of Team Charter Sch., Inc. v. Bd. of Educ. of the City of Newark, Essex Cnty.*, Commissioner Decision No. 258-21 at 4-5 (October 19, 2021).

Resolution of this novel legal question requires interpretation of relevant provisions of the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-1 to -48, and related regulations. The Legislature "enacted EFCFA to fulfill its constitutional obligation to fund new

school construction mandated by th[e] Court in *Abbott v. Burke*." *Lonegan v. State*, 176 *N.J.* 2, 6 (2003); *Abbott v. Burke*, 153 *N.J.* 480, 524 (1998). EFCFA "regulat[es] the planning, design, and construction of school facilities" and "is intended to ensure the educational adequacy of such facilities and the safety of students who attend them." *Bd. of Educ. of Clifton v. Zoning Bd. of Adj. of Clifton*, 409 *N.J. Super.* 389, 441 (App. Div. 2009). In particular, the legislation aims to address facilities-related inadequacies among the State's school districts. *Lonegan v. State*, 174 *N.J.* 435, 458 (2002) (quoting *N.J.S.A.* 18A:7G-2(b)).

"Amendments to the EFCFA in 2007 established the School Development Authority (SDA) to provide for the financing and construction of school facility projects in low-income districts – which the statute refers to as 'SDA districts.'" *Educ. Law Ctr. v. N.J. Dep't of Educ., Off. of Sch. Facilities*, Commissioner Decision No. 217-13 at 2 (June 13, 2013) (citing *N.J.S.A.* 18A:7G-3).[1] The Legislature recognized that "[e]ducational infrastructure inadequacies are greatest in the SDA districts where maintenance has been deferred and new construction has not been initiated due to concerns about cost." *N.J.S.A.* 18A:7G-2(c). Consequently, it required the State to "fund the entire cost of repairing, renovating and constructing the new school facilities determined by the Commissioner of Education to be required to meet the school facilities efficiency standards in the SDA districts" while also "protect[ing] the interests of taxpayers who will bear the burden of this obligation." *N.J.S.A.* 18A:7G-2(c), (d).

Accordingly, EFCFA provides "for the planning, financing, and construction of" school facilities projects and "sets out a detailed process for the[ir] proposal, review, and approval" by the Commissioner. *E. Orange Bd. of Educ. v. N.J. Schs. Constr. Corp.*, 405 *N.J. Super.* 132, 136-40 (App. Div. 2009); *Bd. of Educ. of Clifton,* 409 *N.J. Super.* at 439. As a SDA district, "Newark's traditional

[1] These districts were historically referred to as "Abbott districts." *E. Orange Bd. of Educ. v. N.J. Schs. Constr. Corp.*, 405 *N.J. Super.* 132, 136 (App. Div. 2009).

public schools receive one hundred percent facilities funding" under EFCFA. *J.D. ex rel. Scipio-Derrick v. Davy*, 415 *N.J. Super.* 375, 377 (App. Div. 2010).

The material facts in the instant matter are undisputed. In 2016, the Board transferred title of the Maple Avenue School site, along with other underutilized school sites, to the Newark Housing Authority (NHA) for nominal consideration, to be redeveloped pursuant to a Site Disposition and Development Agreement (Agreement). In so doing, the Board sought to save money, generate revenue for capital improvements, increase city tax ratables, and enhance employment opportunities for Newark residents. The Agreement required the NHA to "work diligently to investigate and identify feasible housing, redevelopment and economic development opportunities at each Site (each, a 'Site Project')."

Article V, Section 5.2 of the Agreement sought to create a right of reversion to the sites exercisable by the Board "if and to the extent, the NHA has not developed a Site Project or demonstrable plans for such Site" within three years of the Agreement's execution. The Agreement permitted NHA to transfer title of the sites to third parties to effectuate Site Projects, subject to various restrictions, so long as any such transfer granted reversionary rights to NHA to be exercised if certain performance milestones were not met. The Agreement further provided that "[t]his right of reversion shall not be included in any deed, or otherwise recordable document, from [the Board] to NHA for any Site; and if requested by NHA or any third party developer, [the Board] shall execute and deliver a document to discharge this right of reversion."

In December 2017, the NHA sold the Maple Avenue School site to a third party, 33 Maple Urban Renewal, LLC. The Board received approximately $1 million from the sale. In March 2020, 33 Maple Urban Renewal, LLC sold the site to petitioner for $10 million. Petitioner leased the site,

which underwent substantial renovation, to TEAM Academy Charter School, Inc., to house over five hundred charter school students.

In April 2020, the Board filed a complaint in the Superior Court, Chancery Division, claiming that the NHA violated the Agreement in various ways. Among the remedies requested by the Board was to compel the NHA to exercise its right of reversion to the Maple Avenue School site—which the Board claimed was allegedly developed and utilized for an improper purpose contrary to the Agreement—so that the Board could then exercise its own right of reversion and reclaim title to the site. In an amended complaint, the Board added petitioner as a defendant and alleged that it tortiously interfered with the Agreement. The Superior Court trial is on hold pending the outcome of the instant matter before the Commissioner.

In April 2021, petitioner filed the instant matter with the Commissioner. In short, petitioner alleged that because the Superior Court litigation was aimed at reacquiring the Maple Avenue School site, the litigation constituted a school facilities project under EFCFA and related regulations and therefore required both a Board resolution and Commissioner approval prior to its commencement. It also alleged that, absent approval from the Commissioner, the Board was prohibited from undertaking land acquisition or development activities for any planned school facilities project at the site. For those reasons, petitioner sought an order restraining the Board from further prosecuting the Superior Court litigation.

The matter was transmitted to the OAL for a contested hearing, and the Board moved for summary decision. In July 2021, the ALJ issued an Initial Decision granting the Board's motion upon concluding that the Agreement is not a school facilities project and that, in any event, the petition was untimely filed. The Commissioner disagreed with the ALJ's conclusion that the petition was untimely. Additionally, while the Commissioner concurred that the Agreement was not a school

facilities project, she remanded the matter in October 2021 for further proceedings to determine whether the Superior Court litigation "could constitute land acquisition and/or a school facilities project, subject to applicable statutes and regulations."

Thereafter, once the matter returned to the OAL, the parties cross-moved for summary decision. In October 2022, the ALJ issued an order denying the motions for summary decision and concluding that it would be premature to decide whether the Superior Court litigation constituted a school facilities project prior to the Superior Court's ruling in that matter. The ALJ reasoned that if the Superior Court ruled against the Board, then the instant petition would be moot.

Petitioner sought interlocutory review of the ALJ's October 2022 order. In November 2022, the Commissioner again remanded the matter to the OAL upon concluding that the question of whether the filing of the Superior Court complaint required approval of the Board via resolution, or of the Commissioner as a school facilities project, was ripe for review. The Commissioner explained that these determinations depend upon an application of the school laws, which are within the Commissioner's jurisdiction. Furthermore, the Commissioner disagreed with the ALJ that a ruling against the Board in the Superior Court matter would render the petition moot. The Commissioner indicated that if it is determined that the Superior Court complaint constitutes a school facilities project, and the Board should have obtained approval of that project from the Commissioner prior to filing the complaint, then the complaint should not proceed.

Once the matter returned to the OAL for a second time, the ALJ considered supplemental briefs and issued an Initial Decision in September 2023 in which she granted the Board's motion for summary decision. Citing the definition of "school facilities project" found in *N.J.A.C.* 6A:26-1.2, the ALJ concluded that the Superior Court litigation was not a school facilities project because it was neither new construction to meet the housing needs of unhoused students, nor rehabilitation to

keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building. Next, citing the definition of "land acquisition" found in *N.J.A.C.* 6A:26-1.2, the ALJ concluded that the Superior Court litigation was not a land acquisition because the Board was neither attempting to purchase the Maple Avenue School nor attempting to acquire it by condemnation, gift, or grant. The ALJ reasoned that if the Board succeeds in Superior Court, then the property will revert to it based upon language in the Agreement. The ALJ further found that *N.J.A.C.* 6A:26-7.1, which describes the process by which a school district or the SDA may obtain Commissioner approval for land acquisition "in connection with a school facilities project," did not apply.

In their exceptions, petitioner primarily argues that contrary to the ALJ's findings and conclusions, the Board violated EFCFA and related regulations by failing to obtain Commissioner approval to commence the Superior Court litigation. Specifically, petitioner contends that the ALJ ignored the definition of school facilities project found in *N.J.S.A.* 18A:7G-3 and misinterpreted the regulations when she erroneously concluded that the Superior Court litigation was neither a school facilities project nor a land acquisition. Relying upon the statutory definition, petitioner asserts that a school facilities project includes related "legal services" and "site acquisition." Consequently, according to petitioner, the Superior Court litigation satisfies the statutory definition of school facilities project. Citing *N.J.A.C.* 6A:26-7.1, petitioner also contends that a "land acquisition" requires Commissioner approval even if not part of a school facilities project.

Alternatively, petitioner argues that even if the litigation is neither a school facilities project nor a land acquisition, it constitutes "preconstruction activities" per *N.J.A.C.* 6A:26-3.9(b)(1), a "capital project" per *N.J.A.C.* 6A:26-3.1(a), and a project to "acquire an existing facility" per *N.J.A.C.* 6A:26-7.3(a), all of which require the Commissioner's approval. Petitioner claims that because the

ALJ failed to decide these issues, the Initial Decision is facially deficient. In addition, petitioner contends that the ALJ ignored and failed to address the fact that the Board violated EFCFA and related regulations as it did not approve the filing of the Superior Court litigation via resolution or motion.

In reply, the Board argues that the ALJ correctly determined that the Superior Court litigation is not a school facilities project. It contends that was the only question before the ALJ, and that petitioner's exceptions attempt to impermissibly broaden the scope of the remand. The Board maintains that the Superior Court litigation is an attempt to exercise its already-existing property and contract rights regarding the Maple Avenue School site, and asserts that petitioner has not cited any legal authority holding or suggesting that a lawsuit to enforce contract and property rights can be considered a school facilities project within the meaning of *N.J.A.C.* 6A:26-1.2. In addition, the Board argues that neither EFCFA's plain language nor its legislative history supports petitioner's argument. It maintains that just as not every legal action involving a school board arises under the school laws, not every action involving a school property is a school facilities project—even if the property at issue may be the subject of a school construction or rehabilitation project at some point in the future.

Upon review, the Commissioner adopts the ALJ's findings of fact and conclusions of law, as modified. The Commissioner holds that the Board's filing of the Superior Court complaint to enforce the Agreement and reclaim title to the former Maple Avenue School site neither violated EFCFA nor the related regulations. The Commissioner concurs with the ALJ that the enforcement litigation is neither a school facilities project nor a land acquisition as contemplated under EFCFA and the regulations. Consequently, neither EFCFA nor the related regulations required the Board to seek approval from the Commissioner prior to initiating the litigation aimed at reacquiring land

upon which it previously operated a public school that could potentially be utilized for a future school facilities project. To the extent that the ALJ focused primarily upon the regulatory definition of school facilities project and regulations pertaining to land acquisition in her analysis, the Commissioner modifies the Initial Decision as explained herein to include analysis of the statutory definition of school facilities project, the overall statutory scheme, and legislative intent.

EFCFA broadly defines "school facilities project" as "the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings and equipment, and shall also include, but is not limited to, site acquisition, site development, the services of design professionals, such as engineers and architects, construction management, legal services, financing costs and administrative costs and expenses incurred in connection with the project." *N.J.S.A.* 18A:7G-3. Per EFCFA's regulations, "[t]o qualify as a school facilities project, the project must be new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building." *N.J.A.C.* 6A:26-1.2. In addition, the regulations specify that school facilities projects not only include new construction and rehabilitation, but also "[a]cquisition of existing buildings to accommodate unhoused students." *N.J.A.C.* 6A:26-3.2(a).

Because EFCFA "provided only limited funding" for school facilities projects, the legislation "established a fairly complex procedure for the allocation of those limited resources among the many school districts in need of funds for renovations or new buildings; first, through a long range planning stage within each district, *N.J.S.A.* 18A:7G-4, and then through the approval of specific projects on a district-by-district basis." *E. Orange Bd. of Educ.,* 405 *N.J. Super.* at 144 (citing *N.J.S.A.*

18A:7G-5). Accordingly, to qualify for funding for a school facilities project, "[e]ach school district must submit to the DOE [Department of Education], for review and approval, a long-range facilities plan [LRFP] addressing the district's school facilities needs and its plans to meet those needs in the following five years" in accordance with *N.J.S.A.* 18A:7G-4. *Bd. of Educ. of Clifton,* 409 *N.J Super.* at 439. Districts may, at any time, submit amended LRFPs to the Commissioner for approval. *N.J.S.A.* 18A:7G-4(c). Additionally, districts "seeking to fund a project must submit a detailed application to the Commissioner" separate and apart from the LRFP. *E. Orange Bd. of Educ.*, 405 *N.J. Super.* at 139. Pursuant to *N.J.S.A.* 18A:7G-5(d)(1) and *N.J.A.C.* 6A:26-3.2(b), "Any district seeking to initiate a school facilities project shall apply to the commissioner for approval of the project."

The Commissioner reviews the application to determine whether it is eligible for funding under EFCFA. Specifically, the Commissioner assesses whether the proposed project is consistent with the district's LRFP and compliant with facilities efficiency standards. *N.J.S.A.* 18A:7G-5(e). If the project is compliant, then the Commissioner "shall calculate the preliminary eligible costs of the project." *N.J.S.A.* 18A:7G-5(f). For SDA district projects, the preliminary eligible costs "equal the estimated cost as determined by the development authority."[2] *Ibid.* Generally, the Commissioner must decide whether to approve the application within 90 days from the date it is deemed complete. *N.J.S.A.* 18A:7G-5(e); *N.J.A.C.* 6A:26-3.3(a), (b). If more time is needed, the Commissioner may take an additional 60 days to render a decision. *Ibid.* If, however, the decision is not made prior to the expiration of the additional 60 days, the project is automatically deemed approved. *Ibid.*

[2] Because of the aforementioned funding limitations, applications from SDA districts are also evaluated based upon the project's educational priority ranking and the Statewide strategic plan, developed in accordance with *N.J.S.A.* 18A:7G-5(m). *N.J.S.A.* 18A:7G-5(e).

Once a school facilities project is approved, certain additional steps must be completed by the Commissioner if the project involves an SDA district. *N.J.S.A.* 18A:7G-5(h)(2). For instance, "the Commissioner must prepare a preliminary report describing the project along with, among other factors, its costs and priority ranking." *E. Orange Bd. of Educ.*, 405 *N.J. Super.* at 139 (citing *N.J.S.A.* 18A:7G-5(h)(2)). "After receiving the Commissioner's preliminary report, the [SDA] must submit to the Commissioner detailed recommendations with regard to the project." *Ibid.* (citing *N.J.S.A.* 19A:7G-5(i)). "The Commissioner and the [SDA] then work together to determine what changes must be made before a project receives final approval." *Id.* at 139-40. "No construction may commence until the Commissioner 'transmits to the [SDA] a final project report and the district complies with the approval requirements for the local share, if any, pursuant to [*N.J.S.A.* 18A:7G-11.]'" *Id.* at 140 (quoting *N.J.S.A.* 18A:7G-5(j)). "For the SDA districts, the State share shall be 100% of the final eligible costs." *N.J.S.A.* 18A:7G-5(k).

"The paramount goal when interpreting a statute is to 'determine and give effect to the Legislature's intent.'" *Facebook, Inc. v. State*, 254 *N.J.* 329, 353 (2023) (quoting *State v. Lopez-Carrera*, 245 *N.J.* 596, 612 (2021)). "The plain language of a statute 'is typically the best indicator of intent.'" *Ibid.* (quoting *Lopez-Carrera*, 245 *N.J.* at 613). "When the text is clear, [the] inquiry is complete." *Ibid.* (quoting *Malanga v. Twp. of W. Orange*, 253 *N.J.* 291, 311 (2023)). If the text is ambiguous, "extrinsic materials, including legislative history" may be considered. *Malanga*, 253 *N.J.* at 311. Regulations are interpreted "in the same manner" as statutes. *L.R. v. Camden City Pub. Sch. Dist.*, 238 *N.J.* 547, 558 (2019).

The Commissioner holds that the Board's enforcement litigation, which could potentially result in the reacquisition of title to the Maple Avenue School site based upon the Agreement's

terms, does not fall within the plain language statutory or regulatory definitions of school facilities project.

First, the litigation itself is not "planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility." *N.J.S.A.* 18A:7G-3. If the litigation is decided in the Board's favor, it may result in a future reacquisition of the Maple Avenue School site based upon the Agreement's terms. But because the litigation's outcome is uncertain, an application from the Board to the Commissioner for approval of a school facilities project involving the Maple Avenue School site prior to the commencement of the litigation was unnecessary.

Second, the litigation itself is not "new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building." *N.J.A.C.* 6A:26-1.2. It is an enforcement lawsuit claiming various parties breached the Agreement. Similarly, the litigation itself is not "[a]cquisition of existing buildings to accommodate unhoused students." *N.J.A.C.* 6A:26-3.2(a). Again, the outcome of the litigation is uncertain. Therefore, an application from the Board to the Commissioner for approval of a school facilities project involving the Maple Avenue School site prior to the commencement of the litigation was not necessary.

The unique factual scenario presented here was clearly neither contemplated by the Legislature nor by those who drafted the regulations, and petitioner has not cited any decisional law on point that directly supports its position. But in keeping with the legislative intent and constitutional obligations to the public-school students in our state, it is important to recognize that EFCFA requires the Commissioner to review and approve school facilities projects to ensure their

educational adequacy and safety. *Bd. of Educ. of Clifton*, 409 *N.J. Super.* at 441; *N.J.S.A.* 18A:7G-5(e). That review must include assessment of whether the project is consistent with the district's LRFP and compliant with facilities efficiency standards. *N.J.S.A.* 18A:7G-5(e). Also inherent in the review process is the need to protect taxpayers' interests. *N.J.S.A.* 18A:7G-2(c), (d).

Petitioner's position that the Board should have been required under EFCFA to obtain Commissioner approval prior to filing the enforcement litigation is not consonant with these goals. In other words, the Commissioner's approval of the filing of the enforcement litigation at such an early stage—with its outcome unknown—would not fulfill the legislative intent. As a practical matter, the Commissioner cannot be expected to conduct a thorough review of a school facilities project for educational adequacy and safety, and to render a fully informed decision in an expedited manner as required by EFCFA when the project's location is as yet unconfirmed. Moreover, neither EFCFA nor the regulations set any deadline for the filing of a school facilities project application; the districts decide when to initiate a project. *See N.J.S.A.* 18A:7G-5(d)(1) ("Any district seeking to initiate a school facilities project shall apply to the commissioner for approval of the project.").[3]

Furthermore, the Commissioner rejects petitioner's contention that because the phrases "legal services" and "site acquisition" appear in the statutory definition at *N.J.S.A.* 18A:7G-3, the litigation itself constitutes a school facilities project.

Applications for school facilities projects are initiated by districts seeking funding. *See East Orange Bd. of Educ.*, 405 *N.J. Super.* at 139 (explaining that districts "seeking to fund a project must submit a detailed application to the Commissioner"). The Legislative history of EFCFA makes clear that "legal services" and "site acquisition" were included as part of the broad statutory definition of

[3] That said, the statute is clear that no construction on SDA projects may commence without first obtaining all required Commissioner approvals. *N.J.S.A.* 18A:7G-5(j). Petitioner is not alleging that the Board has commenced construction absent the required approvals.

school facilities project as "preliminary eligible costs," specifically "soft costs," for which districts could receive funding in connection with a school facilities project. *See Sponsor's Statement to S. 200* 84 (Feb. 17, 2000) ("[P]reliminary eligible costs for all school construction projects . . . will include State support of 'soft costs' including site acquisition, site development, issuance costs, legal fees, and fees for professional services."); *S. Educ. Comm. Statement to S. 2000* 2 (May 4, 2000) (repeating same language). There is nothing in the record to indicate that the Board is seeking State funding under EFCFA to potentially reacquire the Maple Avenue School site via litigation.

The Commissioner also holds that the enforcement litigation does not constitute "land acquisition" as contemplated under a plain language reading of EFCFA and its regulations.

EFCFA addresses funding of land acquisition as part of school facilities projects. *N.J.S.A.* 18A:7G-45(a) states that the SDA may "fund[] 100% of the cost of the acquisition of land for the construction of a school facilities project." Although not defined in EFCFA, *N.J.A.C.* 6A:26-1.2 defines "land acquisition" as "an acquisition of land, whether by purchase, condemnation, or by gift or grant, to be used as a school site."

The enforcement litigation, in and of itself, is not a land acquisition. It is a matter brought to enforce the Board's rights under the Agreement. Even assuming the Board prevails, it will not be reacquiring the Maple Avenue School site as contemplated under *N.J.A.C.* 6A:26-1.2., i.e., "by purchase, condemnation, or by gift or grant." Instead, the Board's case is premised upon its position that it is entitled to reacquire the site based upon a reversionary interest expressed within the Agreement. "A reversionary interest is any future interest left in a transferor or his successor in interest." *Restatement of the Law, Property* § 154 (Am. Law Inst. 1936). Essentially, the Board is claiming that it retained an interest in the Maple Avenue School site even after the sale of the

property. Because the enforcement litigation is not a land acquisition as defined by the regulations, *N.J.A.C.* 6A:26-7.1, which describes the process by which districts, or the SDA on behalf of a district, may obtain approval (and ultimately, funding) for land acquisition "in connection with a school facilities project," is inapplicable to the enforcement litigation.

Additionally, EFCFA's regulations explain that "[s]chool districts may seek to acquire land as part of a school facilities project or prior to approval of a school facilities project." *N.J.A.C.* 6A:26-3.12(b). Thus, "acquisition of land" can be a "preconstruction activity" that is "undertaken prior to submission of a school facilities project application." *N.J.A.C.* 6A:26-3.9(b)(1). However, school facilities projects in SDA districts are constructed by the SDA. *N.J.A.C.* 6A:26-3.5(a). If the district is an SDA district, then the SDA is the entity that undertakes preconstruction activities following authorization by DOE. *N.J.A.C.* 6A:26-3.9(b)(1). An enforcement lawsuit filed by the Board, therefore, is not a preconstruction acquisition of land as contemplated under EFCFA's regulatory scheme as it is not being undertaken by the SDA.

Petitioner's alternative claims—that even if the litigation is neither a school facilities project nor a land acquisition, it constitutes "preconstruction activities" per *N.J.A.C.* 6A:26-3.9(b)(1), a "capital project" per *N.J.A.C.* 6A:26-3.1(a), and a project to "acquire an existing facility" per *N.J.A.C.* 6A:26-7.3(a)—lack merit for several reasons. At the outset, the ALJ was under no obligation to decide these issues because they are beyond the scope of the remand. Further, the petition failed to assert any claim that the enforcement litigation constituted "preconstruction activities" or a "capital project." Moreover, as noted previously, the litigation does not constitute preconstruction activities as contemplated under the regulations because it was not undertaken by the SDA.

While the petition did cite *N.J.A.C.* 6A:26-7.3(a), which pertains to the acquisition of an existing facility, the Commissioner finds that said regulation is inapplicable to the enforcement

litigation. In January 2022, the Board sought a major amendment to its LRFP, which the DOE approved in March 2022. According to page seven of the DOE's summary of the LRFP, as amended, the Board intends to demolish the former Maple Avenue School and construct a new Maple Avenue School. Thus, even if it successfully reclaims title to the property, the record reflects that it intends to demolish the existing facility at the Maple Avenue School site. For these reasons, the record fails to support petitioner's assertion that the Commissioner should have approved the existing facility "in accordance with *N.J.A.C.* 6A:26-3", per *N.J.A.C.* 6A:26-7.3(a), prior to the commencement of the enforcement litigation.

Additionally, petitioner incorrectly asserts in its exceptions that the ALJ's September 2023 Initial Decision ignored and failed to address whether the Board violated EFCFA and related regulations by declining to approve the Superior Court litigation via resolution or motion. On the contrary, the record confirms that the ALJ's September 2023 Initial Decision adequately addressed the issue, and the Commissioner concurs with her findings and conclusions. The ALJ found that "[t]he filing of the [Superior Court] Complaint and Amended Complaint were not authorized by a resolution by the Board." Initial Decision, at 3. The ALJ further found that "[r]espondent argues that the pursuit of litigation does not require the Board's or the Commissioner's approval." *Ibid.* In her analysis, the ALJ concluded that "[t]he regulations [*N.J.A.C.* 6A:26-3.2(b)(13)] require a resolution from the Board of Education of the district authorizing the submitting of the application to the Department of Education for a school facilities project." *Id.* at 4. Ultimately, however, the ALJ concluded that the enforcement litigation was not a school facilities project. *Id.* at 5. Consequently, although not explicitly stated by the ALJ, it follows that a Board resolution was not required under EFCFA or its regulations prior to commencement of the enforcement litigation.

Finally, the Commissioner emphasizes that the holding in this matter is limited to the unique facts presented in this case, i.e., that the Board's filing of the Superior Court litigation to enforce the Agreement and reclaim title to the former Maple Avenue School site neither violated EFCFA nor the related regulations; that the enforcement litigation at issue here is neither a school facilities project nor a land acquisition as contemplated under EFCFA and the regulations; and that neither EFCFA nor the related regulations required the Board to seek approval from the Commissioner prior to initiating the enforcement litigation. If the Board ultimately obtains title to the Maple Avenue School site and decides to initiate a school facilities project at that location in the future, then it will be expected to follow the process set forth in EFCFA and related regulations.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2023
Date of Mailing: December 6, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT.NO. EDU 04320-21
AGENCY DKT. NO. 55-4/21

FRIENDS OF TEAM CHARTER SCHOOL, INC,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Thomas O Johnston, Esq. for petitioners (Johnston Law Firm LLC, attorneys)

Matthew J. Tharney, Esq., for respondent, (Sattiraju & Tharney, LLP, attorneys)

Record Closed: July 14, 2021 Decided: July 23, 2021

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter having been opened before the Office of Administrative Law by Matthew J. Tharney Esq., attorney for respondent on motion for summary decision on

May 3, 2021, in lieu of an answer to the petition. Petitioner filed opposition to the motion on June 23, 2021. Respondent filed a reply to the opposition on July 14, 2021.

FACTUAL DISCUSSION

By way of background, in April 2016, Newark Board of Education (Board or NPS or respondent) entered into a site disposition and development agreement (Agreement) with the Newark Housing authority (NHA). The Board agreed to transfer twelve school buildings to NHA. NHA agreed to convey those buildings to third parties for the benefit of the Board and the City of Newark.

There is also a provision in the agreement that states Article 5.2 which states "Any sites conveyed to the NHA shall be subject to a right of reversion exercisable by NPS (Newark Public Schools) if and to the extent the NHA has not developed a site project or demonstrable plans for such site within three years from the date of execution of this agreement.

The agreement clearly states in Article 5.4(1) Site Projects that NHA shall work diligently to investigate and identify feasible housing, redevelopment and economic development opportunities at each site project.

Maple Avenue School was included in the agreement. The Board transferred title of Maple Avenue School to NHA on June 30, 2016.

Petitioner alleges that on November 16, 2017, the Board executed and delivered a second Bargain and Sale deed to the property with a covenant against Grantor's acts which states that it has done no acts to encumber the property. Petitioner also states that an affidavit of title dated November 16, 2017, stated that the Board has not allowed any interest to be created which affects its ownership and use of the property and that there are no other legal obligations that can be asserted against the property. Petitioner did

not include the bargain and sale deed or the affidavit of title in the opposition or the petition.

On or about December 27, 2017, NHA sold the Maple Avenue School property 33 Maple Avenue Urban renewal LLC (33 Maple LLC). On March 12, 2020, 33 Maple LLC sold the property to petitioner. Petitioner is developing the property as a public school.

On April 6, 2020, the Board filed a complaint in Superior Court Chancery Division Essex County titled Newark Board of Education v. Newark Housing Authority Docket No ESX-C 67-20. The Complaint is for breach of covenant of good faith and fair dealing, tortious interference with contract, and unjust enrichment. The Board sought to enforce its rights to reversion to the Maple Avenue School on the grounds that a site project had not been completed and the property was not being used for one of the agreements permitted uses.

On April 27, 2020, an amended complaint was filed naming plaintiff as a defendant. The amended complaint was served on plaintiff on May 4, 2020. The Board filed a second amended complaint on August 31, 2020. Plaintiff filed a motion to dismiss the Superior Court Complaint on October 2, 2020. That motion was denied on December 20, 2020. Petitioner alleges that the filing of the Complaint and amended complaint were not duly authorized by the Board, because it was not listed in the Board's minutes from July 1, 2019, to January 15, 2021. Petitioner alleges that there were no resolutions authorizing the complaint. Petitioner filed this matter with the New Jersey Department of Education on or about April 13, 2021.

LEGAL ANALYSIS AND CONCLUSION

Respondent seeks to summarily dismiss petitioner's claim. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954).

Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

N.J.S.A. 18a:6-9 provides:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

The issue is whether this matter arises under school laws. Count One of the petition states school district expenditures must be approved by a school board. There is a question of fact as to whether this matter arises out of school laws.

N.J.A.C. 6A: 26-1.2 defines school facility project as:

> "School facilities project" means the acquisition, demolition, construction, improvement, repair, alteration, modernization, renovation, reconstruction, or capital maintenance of all or any part of a school facility or any other personal property necessary for, or ancillary to, any school facility. School facilities project includes, but is not limited to, fixtures; furnishings and equipment; site acquisition; site development; services of design professionals such as engineers and architects; construction management; legal services; financing costs; and administrative costs and expenses incurred in connection with the project. To qualify as a school facilities project, the project must be new construction to meet the housing needs of

> unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building. Maintenance projects intended solely to achieve the design life of a school facility and routine maintenance do not constitute school facilities projects.

In this matter, the Site Disposition and Development Agreement between the Board and NHA states the purpose of the agreement is for NPS to realize expense savings and generate revenue for capital improvement, while also increasing the tax ratables for the City and enhancing job and employment opportunities for city residents. The fact that school buildings were sold by NPS to NHA does not make the purpose of the agreement a school facility project. The agreement clearly states in Article 5.4(1) Site Projects that NHA shall work diligently to investigate and identify feasible housing, redevelopment and economic development opportunities at each site project. The Agreement also has a reversion of property to NPS "if and to the extent the NHA has not developed a site project or demonstrable plans for such site within three years from the date of execution of this agreement." The Board wants to enforce this provision in the superior court case. The Board by its Complaint in Superior court is attempting to enforce a term of the agreement with NHA.

I **CONCLUDE** that this matter is not a school facilities matter.

N.J.A.C. 6A:3-1.3(i) requires that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

> Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid. Its purposes are to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may

> have a fair opportunity to defend and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.
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> The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Id. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow supra at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Ibid. (citation omitted).
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> N.J.A.C. 6A:3-1.13 states:
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> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

Petitioner was put on notice of the Superior Court action when it was served with the amended complaint on May 4, 2020. Petitioner knew of the Superior Court matter and filed a motion to dismiss the superior court matter on October 2, 2020. Petitioner 's belief that the Superior Court complaint was not filed does not negate the fact that petitioner was notified of the action and did not file a petition with the Department of Education within ninety days of May 4, 2020.

I **CONCLUDE** that the petition was not timely filed.

ORDER

Based on the foregoing, it is **ORDERED** that the Motion of the Board for summary decision is **GRANTED**. Because the petition was not filed timely, it is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 22, 2021

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: July 22, 2021

Date Mailed to Parties: July 22, 2021

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