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CITY OF HOBOKEN, HUDSON TEA	: SUPERIOR COURT OF NEW JERSEY
BUILDINGS CONDOMINIUM ASSOC.,	: APPELLATE DIVISION
INC., and FUND FOR A BETTER	: Docket No. A4637-14T3
WATERFRONT,	:
	: <u>Civil Action</u>
	:
Plaintiffs/Appellants,	: On Appeal From:
	: Law Division, Hudson County
-vs.-	: Docket No. HUD-L-1238-12
	:
SHIPYARD ASSOCIATES, L.P.,	: Sat Below:
	: Hon. Patrick J. Arre, J.S.C.
Defendant/Respondent.	:
	X.

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APPELLATE BRIEF OF  
RESPONDENT FUND FOR A BETTER WATERFRONT

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Date: December 8, 2015

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## PRELIMINARY STATEMENT

The Fund for Better Waterfront ("FBW") is a New Jersey 501(c)(3) nonprofit organization, with its principal office and focus of activity located in the City of Hoboken. Since its early years, approximately 25 years ago, FBW and its supporters have been engaged in advocacy to enhance the public's access to the Hudson River within the City. In accord with its longstanding advocacy for a continuous, public waterfront park, FBW intervened in this matter in the trial court to support the City of Hoboken's efforts to enforce Shipyard's 1997 Developer's Agreement to rebuild the North Pier (identified as "Block G") as open space, including tennis courts, a tennis pavilion and a public walkway. This pier is located in the Weehawken Cove, adjacent to the Hudson River. FBW thus submits this brief in support of reversing the trial court's decision, in which the court refused to enforce a valid developer's agreement to the substantial detriment of the public.

From the public's perspective, Judge Patrick Arre's June 21, 2013 (and June 27, 2013 Order granting summary judgment to Shipyard Associates, L.P. ("Shipyard")) misapplied specific provisions of the Municipal Land Use Law ("MLUL") as well as common law principles regarding a developer's ability to alter previously agreed upon commitments in face of "changed circumstances beyond its control" to the detriment of the City,

the Hoboken Planning Board and the broader Hoboken public. Construction of residential towers on an old, dilapidated pier located in the midst of a federal coastal high hazard flood zone (Federal Emergency Management Agency's highest risk flood zone designation) does not constitute smart planning; instead, it will result in higher insurance rates for approximately 75% of Hoboken's residents. Furthermore, such construction on the North Pier is contrary to Hoboken's 2004 Master Plan, its 2010 Master Plan Re-examination Report's Open Space Plan, and Ordinances Z-263 and Z-264 enacted in 2013), the former envisioning a continuous public park on the waterfront, and the latter prohibiting the construction of residential housing on all piers within the City's waterfront district. Seen from this perspective, the trial court's decision is not just legally wrong, it is also fundamentally anti-democratic.

There is little doubt that the 1997 Resolution approving Shipyard's planned unit development ("Shipyard's PUD"), and the subsequent Developer's Agreement, in which Shipyard committed to construct that planned development in accord with the plans presented to the Planning Board (and public), represents Shipyard's commitment to the residents of Hoboken. Shipyard has a legally enforceable obligation to satisfy that commitment, short of changed circumstances beyond its control, and the

courts have a constitutional obligation to enforce such contractual commitment.

In this matter, Shipyard completed in 2011 the last of the 1,160 residential units approved by the Hoboken Planning Board for its PUD. In accord with the Developer's Agreement, Shipyard was then required to provide for the open space and recreational amenities planned for Block G, which were an integral part of the PUD. Instead, it proceeded to seek approval for the construction of two residential towers known as the "Monarch Project" that effectively usurp the open space and add yet more units to a densely built planned development. Shipyard did not present any facts to the court (or to the City or to the Planning Board in its application) justifying its refusal to adhere to its previous plans, and thus the trial court should have enforced the Developer's Agreement, as explicitly stated. Based on the record presented in this matter, the court had no justification in acting solely on behalf of Shipyard's narrow interests, especially when doing so is certain to palpably harm the City of Hoboken and its residents.

#### PROCEDURAL HISTORY

FBW restates and incorporates the procedural history of this litigation as set forth in the Initial Brief of Appellant the City of Hoboken. (Hoboken Br. at 4-13).



### STATEMENT OF FACTS

FBW restates and incorporates the extensive and detailed facts of this matter as set forth in the Initial Brief of Appellant the City of Hoboken. (Hoboken Br. at 13-33).

### STATUTORY FRAMEWORK

This litigation involves the fate of one site, a dilapidated pier/platform, known as Block G (Block 264.2, Lot 1) of a larger planned unit development, referred to herein as Shipyard's PUD; all of which, but Block G, has been completed. The entire PUD is within Hoboken's I-1(W) Zoning District. The 1997 Resolution approving the PUD (Ja11-31), and the subsequent Developer's Agreement (Ja45-63), in which Shipyard committed *inter alia*, to "construct this development with the plans as presented to the Planning Board" (Ja46) are governed by relevant provisions of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., and Hoboken's Zoning Ordinance (§196), including the Design Guidelines of the South Water Front (Ja16).<sup>1</sup>

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<sup>1</sup> On or about August 25, 2011, Shipyard submitted an amended preliminary site plan and final site plan to the Hoboken Planning Board to construct two 11-story residential towers on Block G known as the "Monarch Project" (Ja1864). Evaluation of such proposal would also entail considerations of Hoboken's 2004 Master Plan, recommending limited development on the piers, its 2010 Master Plan Re-examination Report's Open Space Plan, and, now, Ordinance Z-263 and Ordinance Z-264 (Ja1810-1815), post-Hurricane Sandy safety ordinances, which prohibit residential housing on all Hoboken piers. Such an evaluation, however, is not the subject of this appeal. (The application of Z-263 and Z-262 is at issue in A-4504-14T3)

Pursuant to N.J.S.A. 40:55D-39(b), municipalities have the authority to adopt ordinances that "set forth the limits and extent of special provisions applicable to planned developments." Such provisions may include "setting forth any requirements for timing of development among the various types of uses and subgroups." N.J.S.A. 40:55D-39(c)(6). In addition, municipalities such as Hoboken, are authorized to adopt a site plan ordinance that "ensure[s] in the case of a development which proposes construction over a period of years, the protection of the interests of the public . . . in the total completion of the development." N.J.S.A. 40:55D-39(d). Such discretionary provisions are reflected in Hoboken's Ordinance §196-27.1 (Urban Design Review for Planned developments), §196-34A(11) (permitting a "proposed timing schedule in case of a planned development whose construction is contemplated over a period of years") and §196-34A(12) (authorizing a "municipal development agreement . . . related to the planned development"). Given the location of Shipyard's PUD within the I-1(W) District, known as the Waterfront Mixed Use Sub-district, the 1997 project was also subject to the bulk requirements of §196-17 (Ja16).

In accord with §196-27.1(B), The Hoboken Planning Board was further required when approving Shipyard's PUD to make the findings and conclusions set forth in N.J.S.A. 40:55D-45,

including that "the location and purpose of the common space are adequate," "the amenities of light and air, recreation and visual enjoyment are adequate," and that "the interests of the public" are adequately protected for the full duration of the construction period. Id. (b)(c)(e). It was also directed to ensure, pursuant to §196-27.1(B)(1)(b), that Shipyard's PUD "creates a pedestrian circulation system and open space system which provides public access to and along the edge of the Hudson River and Weehawken Cove."

The MLUL does not speak directly to the circumstances when a developer may seek to amend the preliminary site plan of a specific phase or component of a PUD, such as here, without violating the terms of its initial approval. The statute permits amendment or revision of a general development plan (not applicable to Shipyard's PUD), once it has been approved only "upon application by the developer approved by the planning board." N.J.S.A. 40:55D-45.6(a). Certain changes in the percentage of residential units are permitted without violating the initial approval, but in some cases such reductions may only be valid with the prior consent of the municipality. N.J.S.A. 40:55D-45.6(b).

On the other hand, in the case of a planned development, such as Shipyard's PUD, a planning board when reviewing an application for final approval "may permit minimal deviations

from the conditions of preliminary approval necessitated by change of conditions beyond the control of the developer since the date of preliminary approval without the developer being required to submit another application" for preliminary approval. N.J.S.A. 40:55D-50(a). Implicitly, substantial deviations necessitated by change of conditions beyond the control of the developer would require a new preliminary site application; but there is no explicit language in the statute authorizing a developer to make such amended application as of right, without proof of changed circumstances that would justify reconsideration of its initial approval. Cf. N.J.S.A. 40:55D-12(a) (codifying common law right to seek "modification or elimination of a significant condition or conditions in a memorializing resolution," upon proof of changed circumstances or other good cause).

The MLUL also requires local site plan ordinances to include a provision that authorizes planning boards to permit deviations from a final approval "if caused by change of conditions beyond the control of the developer since the date of final approval and the deviation would not substantially alter the character of the development or substantially impair the intent and purpose of the master plan and zoning ordinance." N.J.S.A. 40:55D-38(e). Again, there is no language in the MLUL that requires planning boards to reconsider and approve such

deviations from a final approval without proof of changed circumstances, even if they would not impair the master plan or zoning ordinance.

As a result of the MLUL's silence on a developer's right to amend a preliminary site approval of a given component of a PUD, without proof of changed circumstances beyond the developer's control, the Developer's Agreement at issue here governs on such point. This is because Art. XI, ¶16 (which effectively requires Shipyard to secure the consent of the City of Hoboken prior to submitting a new preliminary site plan application) is not inconsistent with any provision of the statute.

#### LEGAL ARGUMENT

##### I. UNDER THE CIRCUMSTANCES OF THIS CASE, THE DEVELOPER'S AGREEMENT MUST BE ENFORCED AS A MATTER OF LAW AND PUBLIC POLICY.

In its decision, the trial court held that pursuant to the MLUL and the New Jersey Supreme court decision in Toll Bros., Inc. vs. Board of Chosen Freeholders, 194 N.J. 223 (2008) ("Toll Bros."), "Shipyard has the right to move before the planning board seeking" to amend its site plan for Block G, as previously set forth in the 1997 Resolution approving Shipyard's PUD (Ja1501:T49-4), despite the fact that Shipyard made no attempt to demonstrate an invalid initial condition nor changed circumstances justifying a significant amendment. Refusing to determine whether changed circumstances even existed, the court

supported its holding by stating that "[t]he mere existence of a developer's agreement does not divest [Shipyard] of th[e] right . . . to ask for an amendment to the conditions of approval." Ibid. T49-5. These holdings (within the factual context presented by this case) constitute errors of law and are thus subject to *de novo* review.

When the question presented on appeal is a matter of law, the decision below is subject to *de novo* review. Balsamides v. Protameen Chems. 160 N.J. 352, 372 (1999). See also East Brunswick Sewage Auth. V. East Mill Assoc., Inc., 365 N.J. Super. 120, 121-22 (App. Div. 2004) (enforceability of a developer's agreement is an issue of law subject to *de novo* review). This means that a reviewing court need not show any special deference to the trial court's opinion when it misstates or misapplies the law. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (affirming application of *de novo* review when evaluating a trial court's decision that is inconsistent with well-settled law). "[I]f the trial judge misconceives the applicable law, or misapplies it to the factual complex . . . it is the duty of the reviewing court to adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided." Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).

In this case, because the trial court misconstrued Toll Bros. with respect to the enforceability of a developer's agreement when the terms and conditions included in the resolution (and implemented in the manner set forth in the agreement) are consistent with the MLUL, are otherwise valid and remain in effect, *de novo* review is appropriate.

A. The Developer's Agreement Is Enforceable As a Matter Of Law Because the 1997 Resolution Is Valid and Remains In Effect.

In Toll Bros., the New Jersey Supreme Court portrayed a developer's agreement as "[a] contract between a developer and a public authority that details the manner in which the conditions of approval will be fulfilled." 194 N.J. at 248. Although the Court noted that such agreements are only mentioned in the MLUL with respect to general development plans, it also stated that the "practice of entering into [such] agreements on developments not covered by the statute has become common and has been recognized by some courts." Id. (quoting William M. Cox, *New Jersey Zoning and Land Use Administration* §24-7.5 at 565 (Gann 2007)). See also Hoboken Ordinance §196-34(A)(12) (authorizing "a written agreement between the municipality and developer relating to the planned development").

As such, a developer's agreement is a contract with the municipality in which the developer agrees to satisfy the terms and conditions set forth in the resolution approving the

developer's initial site plan, general development or subdivision application, and typically sets forth a time framework as well as financial commitments that are often associated with off-tract improvement contributions. Toll Bros., 194 N.J. at 248. It is nothing more and nothing less than a detailed statement of the **developer's obligations to the public**, as understood by all stakeholders and agreed to by the developer and public authorities at the time of approval.

And, finally, the developer's agreement can be enforced, if the resolution establishing the conditions remains in effect; a central principle acknowledged in Toll Bros., but unfortunately forgotten by the trial judge. Instead, the trial judge permitted Shipyard's interest in repurposing "Lot G . . . [to its] highest and best use" (Ja1497:T41-15) to prevail over the public's expectation that Shipyard would satisfy its commitments to the City of Hoboken and its residents, and that the judiciary would hold Shipyard to those promises (absent changed circumstances or other good cause).

In this case, Shipyard not only failed to demonstrate changed circumstances, but failed even to allege that new facts rendered its approved 1997 site plan for Block G impracticable, impossible or unlawful. Nonetheless, the court refused to enforce the developer's agreement, and instead simply assumed that Shipyard's amended application was an application to amend



because of changed circumstances. See Ja1500:T48-25 to T49-2 ("Based on changed circumstances, the substance of which remain somewhat unclear, Shipyard now wishes to amend the approvals granted"). Such an application, however, was never filed, and Shipyard never raised the "changed circumstances" issue with either the Hoboken Planning Board or the City. Because of these uncontroverted facts, and contrary to the trial judge's holding, the specific lessons of Toll Bros. are not applicable.

In his oral decision, Judge Arre stated,

Applying Toll Brothers to the facts of this case, this Court holds that the 1997 developer's agreement between the City and Shipyard is not an independent source of a contractual obligation and therefore Hoboken's breach of contract claim based on the alleged breach of this agreement must be dismissed with prejudice. . . . Based on changed circumstances, the substance of which remain somewhat unclear, Shipyard now wishes to amend the approvals granted so they can construct the Monarch project on Block G instead. Pursuant to the MLUL and Toll Brothers, Shipyard has the right to move before the planning board seeking this amendment.

(Ja1500-1501: T48-13 to T49-5)

Neither Toll Bros. nor the MLUL support this conclusion.

First and foremost, the factual predicates underlying the decision in Toll Bros. are not present here. In Toll Bros., a developer sought to invalidate a developer's agreement and to secure a declaration that its share of costs for off-site roadway improvements should be modified to reflect a significant reduction in the size and scope of the project from its initial

conception. Toll Bros., 194 N.J. at 239-40. The developer's claim rested on N.J.S.A. 40:55D-42, which prohibits government from requiring off-tract improvements beyond a developer's pro-rata share; pro-rata share is understood to mean improvements "that [are] necessitated by the development itself, or [are] a direct consequence of the development." Ibid. at 244 (*quoting Holmdel Builders Ass'n v. Twp. of Holmdel*, 121 N.J. 550 (1990)).

Here, off-site improvements or other ancillary conditions set forth in the initial resolution approving the project are not implicated; we are dealing with a fundamental use-change to the previously approved plan for Block G. Moreover, unlike the situation in Toll Bros., where the off-site improvements demanded by the county violated the MLUL's specific fairness requirement, the approved plan for Block G, as reflected in the developer's agreement, does not violate any provision of the MLUL. To the contrary, the recreational facility proposed for Block G was an integral component of the PUD on which the Planning Board relied when making some of the factual findings required by the MLUL (N.J.S.A. 40:55D-45) and Hoboken Ordinance §196.27.1(B).

Shipyard's failure to make a proper showing of changed circumstances or other good cause warranting reconsideration of its plans for Block G also distinguishes this case from Toll Bros.; and finally, though obvious because of the posture of

this litigation, it nonetheless deserves to be mentioned that in contrast to the facts in Toll Bros., Shipyard never approached the City to request permission to file an amended preliminary site application and never explained to either the City, the Hoboken Planning Board or the trial court its reasons for a change in plans. Fundamentally, because the 1997 Resolution approving Shipyard's PUD, including its plan for Block G, remains valid, unlike the situation in Toll Bros., the trial court had no justification to decline enforcement of the developer's agreement that implemented that Resolution. See Toll Bros., 194 N.J. at 249 ("if the resolution establishing the conditions remains in effect, the developer's agreement can be enforced."); East Brunswick Sewage Auth. V. East Mill Assoc., Inc., 365 N.J. Super. at 125-126 (enforcement of cost allocation terms of the developer's agreement, because parties were "fully capable of allocating costs for future events, either foreseeable or unanticipated"). Cf. River Vale Planning Bd. v. E & R Office Interiors, 241 N.J. Super. 391 (App. Div. 1990) (finding that once developer abandoned project for which he received site plan approval, municipality could not enforce associated developer's agreement).

Not only did the trial court misapply the holdings of Toll Bros., it also misapplied certain provisions of the MLUL. This matter involves the implementation of a PUD over a twelve-year

period. Pursuant to the MLUL, a "planned unit development" is a type of planned development, which contemplates a large area of land to be developed and constructed with mixed public, commercial or industrial uses "as a single entity according to a plan" typically in phases over a period of years. N.J.S.A. 40:55D-6. Prior to approval of such PUDs, the planning board is required to make factual findings and conclusions that the proposed PUD provides for adequate amenities with respect to "air, recreation and visual enjoyment" and that, in the case of a PUD that is to be constructed over a period of years, that the plan "protect[s] the interests of the public and of the residents, occupants and owners . . . in the total completion of the [project]." N.J.S.A. 40:55D-45.<sup>2</sup> The MLUL, however, does not explicitly deal with the situation in which a developer seeks to amend one or more components of a PUD for which it had previously received prior preliminary site approval.

As set forth in the section entitled Statutory Framework, infra. at pp 3-7, the MLUL does not address the circumstances under which a developer may seek to amend the preliminary site plan of a specific phase or component of a PUD, such as here,

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<sup>2</sup> See Hoboken Ordinance §196-27.1(B) (requiring the Hoboken Planning Board to make findings and conclusions set forth in N.J.S.A. 50:55D-45); see also §196-27.1(E) ("In considering and approving site plans [for planned developments] the Planning Board shall take into consideration the public health, safety and general welfare, the comfort and convenience of the general public and the general purposes and intent of this chapter.")

without undermining the validity of its initial approval. The statute permits revision of a general development plan, with the approval of the Planning Board, N.J.S.A. 40:55D-45.6(a), and requires the prior consent of the municipality when changes involve certain reductions in the percentage of residential units. N.J.S.A. 40:55D-45.6(b). These specific requirements pertain only to changes to an approved general development plan, and not to a plan such as the preliminary site plan that was approved for Block G in the 1997 Resolution authorizing the entire PUD.

The MLUL also authorizes a planning board when reviewing an application for final approval to permit "minimal deviations from the conditions of preliminary approval" that are beyond the control of the developer, without the developer being required to submit another application (N.J.S.A. 40:55D-50(a)); and, similarly requires local site plan ordinances to include a provision that authorizes planning boards to allow deviations from a final approval if also "caused by a change of conditions beyond the control of the developer." N.J.S.A. 40:55D-38(e) (such deviations, however, may not "substantially alter the character of the development"). Implicitly, these various provisions require planning boards, **post-approval**, to permit minor deviations caused by a change of conditions beyond the control of the developer, or deviations that do not substantially alter

the character of the development (also caused by a change of circumstances not within the control of the developer). They do not, however, support an unqualified right of a developer to file an amended application, without proof of changed circumstances that would otherwise justify board reconsideration of its initial approval.

As the New Jersey Supreme Court noted in Toll Bros. N.J.S.A. 40:55D-12(a) codifies a developer's common law right to seek "modification or elimination of a significant condition or conditions in a memorializing resolution," upon proof of changed circumstances or other good cause. Toll Bros., 194 N.J. at 247. This public notice provision, embedded in the MLUL, is thought to be "evidence" that a developer "may, at some time in the future, make a new application to the board on the basis of changed circumstances." *Id.* (citing William M. Cox, *New Jersey Zoning and Land Use Administration* §28-4.9 at 659 (Gann 2007)) This provision, however, does not give Shipyard an unqualified right to file an amending preliminary site plan for Block G without any assertion of changed circumstances beyond its control, as Judge Arre effectively held it should have the opportunity to do.

For the foregoing reasons, the MLUL does not sanction Shipyard's actions herein and the trial court's refusal to enforce the Developer's Agreement. The statutes' silence on

whether a developer has the right to amend a preliminary site approval of a given component of a PUD, without proof of changed circumstances beyond the developer's control, renders the Developer's Agreement determinative of such issue. This is because Art. XI, ¶16 (which effectively requires Shipyard to secure the consent of the City of Hoboken prior to submitting such an amended site plan application) is not inconsistent with any provision of the statute.

Refusing to respect the Developer's Agreement, Shipyard did not even seek Hoboken's consent to amend; it went directly to the Hoboken Planning Board and filed an amended site plan application, with no explanation for the substantial change (in use from open space/recreational to residential) that it proposed. In response to Shipyard's unilateral filing of an amended preliminary and final site plan application for Block G, the City filed an action seeking to compel Shipyard to proceed with the development of Block G as it had contractually promised to do. Because Shipyard did not pretend that it sought this amendment due to changed circumstances beyond its control, the trial court had no choice under law but to enforce the terms and conditions of the developer's agreement as initially approved in the 1997 Resolution. It declined to do so, and thus its decision should be reversed.

B. Absent Changed Circumstances, Shipyard Is Precluded As a Matter of Public Policy from Seeking Reconsideration of the 1997 Resolution approving Its PUD.

As established above, under the circumstances of this case, the MLUL does not preclude Hoboken from denying Shipyard the opportunity to amend its preliminary site plan application for Block G (even if it had been asked to consent), and from seeking, instead, to enforce the Developer's Agreement. Common law principles that inform land-use applications also support the City's position.

Specifically, the case law regarding an owner's ability to re-open prior approvals, modify previous conditions and propose completely new plans articulates a public policy that requires **strict adherence to prior commitments unless changed circumstances** or other good cause makes satisfaction thereof impracticable and unreasonable.<sup>3</sup> See Pierce v. Ortho

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<sup>3</sup>See e.g., Aldrich B. Schwartz, 258 N.J. Super. 300, 311-312 (App. Div. 1992) (variance condition imposed on prior owners can be lifted if invalid when imposed or upon showing of changed circumstances); Soussa v. Denville Tp. Planning Bd., 238 N.J. Super. 66 (App. Div. 1990) (property owners are able to seek recourse from Chancery Division to have restrictive covenant lifted because of changed circumstances); Allied Realty, Ltd. V. Borough of Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987) (finding that "it was incumbent on the [planning] Board to afford Allied the opportunity to show that circumstances had changed since the 1978 resolution"); Springsteel v. Town of West Orange, 149 N.J. Super. 107, 110 (App. Div. 1977) (approving township council's decision to lift the condition to which the 1963 variance was subject based on changed circumstances); Cohen v. Borough of Fair Lawn, 85 N.J. Super. 234 (App. Div. 1964) (municipal officials permitted to



Pharmaceutical, Co., 84 N.J. 58, 72 (1980) (judicial decisions are a valid source of public policy). Requiring developers to follow through on their previous commitments, as explicitly set forth in the resolution approving the plans submitted or as understood by all the parties at the time of approval, is especially important in the context of a PUD that is anticipated to be implemented in phases over a significant period of time. The public needs to be assured that such planned developments will be constructed in the manner and under the terms the board, with public input, understood at the time the several component site plans were approved. The courts recognize this principle, and accordingly have permitted amended plans to go forward in such situations only upon proof of changed circumstances; a scenario that is not present here.

A case in point is presented by the facts in Park Center at Route 35, Inc. v. Zoning Bd. of Adjustment of the Township of Woodbridge, 365 N.J. Super. 284 (App. Div. 2004), ("Park Center") involving a project that at the time it was approved, was expected by all, based on the record before the zoning board, to occur in two phases. In Park Center, the appellate court held that "the Board acted reasonably in both recognizing that it had conditioned approval upon the completion of Phase II

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lift condition as to the use of ammonia as a refrigerant since it no longer served a useful purpose).

and in refusing to amend its prior approval when Park Center sought to avoid its obligations to perform Phase II." Ibid., 365 N.J. Super. at 289. The court came to this conclusion even though it found that the board had "not imposed any requirement as to when Phase II would occur and had not described Phase II as an express condition for the granting of the approvals necessary for Phase I." Ibid., 365 N.J. Super. at 288. Rather the court based its decision on the failure of the applicant to establish that there "was a sufficient change in circumstances warranting a departure from the Board's earlier requirement that Phase II be completed." Ibid. 365 N.J. Super. at 291.<sup>4</sup>

This decision makes clear that Shipyard is obligated, as a matter of common law, either to construct Block G as initially planned and approved by the 1997 Resolution approving the entire PUD or to show that there is a sufficient change in circumstances warranting its current desire to build two residential towers on a dilapidated pier (which is now located in a federal flood hazard zone). The record indicates that Shipyard failed to meet its burden to establish changed circumstances before the trial court (or even in its application to the planning board). As a result, the trial court had one

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<sup>4</sup>Specifically, the court found that "the application to amend was about economics and not about a sudden change in the safety concerns at the existing site." Ibid. 365 N.J. Super. at 292. Such "self-imposed economic circumstance" did not justify nonperformance of Phase II. Id.

option: to compel performance. Because Judge Arre refused to compel Shipyard to complete the last phase of the PUD in accord with its previous commitments, his decision is against public policy and must be reversed.

II. THE COURT SHOULD HAVE DIRECTED SHIPYARD TO MAKE A CHANGED CIRCUMSTANCE APPLICATION BEFORE THE HOBOKEN PLANNING BOARD ONCE IT DECLINED TO MAKE SUCH DETERMINATION ITSELF.

In his decision, Judge Arre held that it was not the court's role to determine, in the first instance, whether Shipyard had met its burden to establish sufficient change in circumstances to avoid an order compelling it to perform in accord with the terms of the Developer's Agreement. He states:

[T]he argument proffered by the Tea Building and the Hoboken Planning Board that Shipyard has failed to demonstrate the necessary change of circumstances bears no relevance to the substance of these motions. The proper determination as to whether changed circumstances exist and to whether an amendment should be approved rests with the Planning Board, not the Superior Court. Therefore, whether or not Shipyard has demonstrated the changed circumstances necessary to amend its obligations will not be addressed as part of this motion. As such, the proper form to address this issue and consider whether an amendment is warranted is by application to the board which no --- which is how Shipyard initially proceeded.  
(Jal501:T49-18 to 50-6)

However, as shown above in Point IA and IB, infra., Judge Arre's statement that the question of changed circumstances has "no relevance" to whether the City of Hoboken had the legal right to enforce the Developer's Agreement is simply wrong. It

is evident from the case law that a developer's agreement may be enforced against a developer unless that entity establishes sufficient changed circumstances justifying modification of the agreement. Accordingly, the trial judge should have required Shipyard to demonstrate changed circumstances in his court room if it wanted to avoid enforcement of the developer's agreement.

However, it is clear from reading the decision that the trial judge felt that the Hoboken Planning Board should make such determination in the first instance; not the trial court. Even if this aspect of his decision is sustained on appeal, he wrongfully assumed that the amended preliminary site plan application Shipyard had filed constituted such an application, or even included any information that could form the basis of a "changed circumstances" determination. That is, once the court declined to make such determination itself, it should have directed Shipyard to file an application before the planning board that delineated the reasons for its change in plans for Block G. Rather than simply dismissing the case, the court should have made it very clear that if Shipyard did not file such application by a date certain, the court would enter an order compelling enforcement of the 1997 Resolution and associated Developer's Agreement. If the court had done so, all the parties would have been better served, and FBW and the

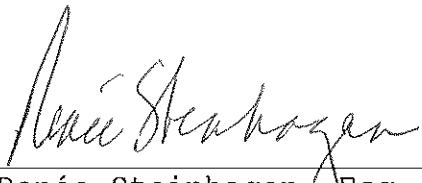
broadier public would have been able to participate in a changed circumstances hearing before the Hoboken Planning Board.

CONCLUSION

For the foregoing reasons, Judge Arre's decision granting summary judgment in favor of Shipyard and dismissing the City of Hoboken's motion seeking enforcement of the Developer's Agreement with respect to Block G should be reversed. Because Shipyard did not demonstrate sufficient changed circumstances to justify reconsideration of its approval for Block G, one block within the PUD that otherwise has been built as originally planned, it should be compelled to proceed with construction of the commercial tennis facilities, open space and pedestrian walkway for which it has already received approval.

Respectfully submitted,

NEW JERSEY APPLESEED PILC

  
Renée Steinhagen, Esq.

Date: December 7, 2015