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June 29, 2012

File No. 15179-0004
Via Electronic Mail
Followed by Regular Mail

Kevin J. Coakley, Esquire
CONNELL FOLEY LLP
85 Livingston Avenue
Roseland, NJ 07068

Re: Planning Board of the City of Hoboken
Shipyard Associates, LP Amended Site Plan/Final Site Plan Application
Block 264.2, Lot 1

Dear Mr. Coakley:

This will acknowledge receipt of your letter under date of June 28, 2012 with regard to the above. I respectfully disagree with a number of your observations and comments.

At the outset, there is no question that Shipyard Associates ("Shipyard") agreed in the 1997 Developer's Agreement ("Agreement") to construct the Shipyard Planned Unit Development ("PUD") strictly in accordance with the original development approvals that were granted by the Planning Board ("Board") in 1997. Those approvals expressly required that Development Block G be developed with a tennis pavilion, tennis courts and a parking lot. There is likewise no question that both the City of Hoboken ("City" and/or "Hoboken") and the Board were parties to and signators of the Agreement and that the Agreement requires the written consent of all three parties to any significant changes or modifications to the project.

Unlike the minor adjustments to the project that were previously approved without the need for a written amendment, Shipyard's pending application to construct two 10-story residential towers on Block G in lieu of the previously promised tennis pavilion, tennis courts and parking lot is a major and significant change and deviation from the original approvals and clearly requires an amendment documenting the advance consent of all parties. This should occur before Shipyard unilaterally attempts to invoke the Board's site plan review jurisdiction and after the City and the Board consent to the amendment. To my knowledge, Shipyard has never sought either the City's or the Board's consent to this major modification. Further, it is my understanding that nearby property owners and other interested parties have requested that the

City require strict adherence to the Agreement. These parties may very well be determined by the Court to be third party beneficiaries of the Agreement.

Moreover, I also strongly feel that your reading and interpretation of the Supreme Court's decision in Toll v. Burlington County Planning Board is both inaccurate and misplaced. Initially, there were no municipal developer's agreements in connection with the Toll project that required strict adherence to the original development approvals that were granted by either the Moorestown or Mount Laurel Planning Boards or that required either or both communities to provide their consent to subsequent modifications to the original approvals. Instead, the Developer's Agreement at issue in the Toll case was with Burlington County and primarily addressed the developer's County off-site roadway improvement and funding obligations based upon the calculated impact from its development when factoring traffic impacts from nearby development projects in both Moorestown and Mount Laurel. Toll secured amended approvals from the Moorestown Planning Board after the County Agreement was signed which reduced its traffic impacts and financial contribution obligations. As such, it sought an adjustment of its pro-rata roadway improvement obligation from the County. The County refused to adjust and modify Toll's pro-rata funding and improvement obligations which resulted in the litigation. This situation is vastly different and clearly distinguishable from the Agreement that Shipyard executed with Hoboken and its Planning Board wherein it committed to construct the PUD strictly in accordance with the original approvals that the Board granted in 1997.

Developer's Agreements are common place and are typical with respect to complex and large-scale PUDs such as the Shipyard project. They benefit not only developers and the host municipality but third parties who may decide to acquire, develop and/or occupy properties in proximity to the project in reliance upon the agreements, commitments and promises that are made in the Agreement. Indeed, Developer's Agreements provide for certainty of governing regulations; development predictability; commitments for public facilities and on- and off-site infrastructure improvements; and enhance the municipality's ability to implement and facilitate comprehensive planning goals and objectives. They are enforceable in accordance with their terms and amendments must be consented to by all parties.

Your letter also implies that the Planning Board has intentionally delayed action on the Shipyard application. Once again, this is clearly not the case. Initially, the Hudson County Planning Board denied Shipyard's County application several months ago which necessitated significant revisions to the development plans after Shipyard's local application was filed in 2011. Secondly, significant revisions to the plans were made by Shipyard in response to the review letters on Shipyard's original plans issued by the Board's Engineer and Planning Consultant in an effort, among other things, to mitigate and reduce the number of required variances noted in the review letters. Those revised plans were recently submitted and the Board's professionals are still in the process of reviewing same. New review letters will be

generated in response to the revised plans. And finally, the City initiated litigation against Shipyard in March of 2012 to enforce the 1997 Agreement and require that Block G be developed with a tennis pavilion, tennis courts and a parking lot as originally approved. Shipyard thereafter filed its Answer to the City's Complaint and asserted several Counterclaims. The First Count of the Counterclaim specifically focuses on whether the Agreement precludes Shipyard from appearing before the Planning Board to secure amended development approvals for Block G without the advance consent of the City. Indeed, Paragraphs C and D in the Prayer for Relief in Count I expressly petition the Court as follows:

> "C. Declaring and finding that Shipyard has the right to request a change of the approval in the 1997 Resolution, including the right to request that it construct two residential towers on Development Block G in the place of the Tennis Pavilion, Tennis Courts and Parking Spaces;
>
> D. Declaring and finding that the 1997 Agreement does not preclude Shipyard's right to request a change of the approval in the 1997 Resolution, including the right to request that it construct two residential towers on Development Block G in the place of the Tennis Pavilion, Tennis Courts and Parking Spaces." [underlining added for emphasis].

As such, Shipyard itself has petitioned the Court to declare and determine whether it has the right to apply for and attempt to secure amended approvals from the Planning Board for Block G despite the existence of the Agreement that it signed 15 years ago wherein it committed to construct the project in accordance with the 1997 approvals. Moreover, the City recently filed its Answer to Shipyard's Counterclaims. The City is asserting in its First Affirmative Defense that Shipyard's Counterclaim is defective because it fails to join the Planning Board to the litigation to globally resolve all issues with respect to the enforceability and interpretation of the Agreement. As you know, the Rules of Court require that all parties to an agreement be named and joined in any litigation which seeks enforcement of same. In short, the interpretation and enforcement of the Agreement is squarely before the Court (at the request of both the City and Shipyard) and by necessity must be resolved by the Court before the Planning Board can reasonably be expected to exercise site plan review jurisdiction over an amended development proposal for Block G that significantly deviates from the original PUD approval and may impact third party beneficiaries (i.e. nearby property owners and other interested parties).

You also indicate in your letter that Shipyard disagrees with Ms. Banyra's June 8 and June 21, 2012 letters calling out five (5) variances that she feels are still required despite Shipyard's recent revisions to the development plans. Two of the variances deal with the definition of a PUD Development Block and the calculation of gross developable area. The

position that she is taking on these issues in the instant matter is exactly the same as applied several years ago in the Maxwell House PUD application. As indicated over the phone, if Shipyard disagrees with Ms. Banyra's interpretation of the Zoning Ordinance, it is free to seek an interpretation from the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(b). As you know, Zoning Boards have exclusive jurisdiction over requests for interpretation of a zoning ordinance. In the alternative, Shipyard can accept Ms. Banyra's interpretations and variance determinations and apply for variance relief before the Planning Board. Variance applications must be filed and the variances will, of course, have to be described in detail in the Public Hearing Notices that must be published and mailed to adequately inform the public.

You previously indicated that Shipyard elected to remain before the Planning Board and apply for the variances. Shipyard now appears to be taking a contrary position and indicates that it will not file variance applications. This issue is also significant from a timing point of view in light of your assertion that the deadline within which the Board must take action on this application is quickly approaching. Shipyard has yet to file an application for variance relief which means that the time period within which the Board must take action has not even commenced.

In any event, due to the pendency of the City's litigation seeking strict adherence to the Agreement, Shipyard's position that the Board should exercise site plan review jurisdiction during the pendency of the litigation without Shipyard applying for the five variances noted by Ms. Banyra, and Shipyard's position that the time for formal action by the Board is quickly approaching which may result in an automatic approval, I believe that the only reasonable course of action for the Board to take is to indeed take action on the application by dismissing it without prejudice until all of these issues are resolved. Shipyard's right to re-file is thereby protected and preserved if it is the prevailing party in the pending litigation after the Planning Board is properly joined. This will be my recommendation to the Board on July 10th, which is the reason that I called you last week as a courtesy so that Shipyard could decide whether or not to shoulder republication costs for a Public Hearing on July 10th that will not occur. Shipyard is proceeding at its own risk and expense should it decide to publish and mail new notices under these circumstances.

Please call should you have any questions.

Very truly yours,

RONALD C. MORGAN

RCM/lkc

cc: Nicole Dory, Esquire
Daniel Weaver
Brandy A. Forbes, AICP, PP
Maritza Emanuelli, Board Secretary
Joseph J. Maraziti, Jr., Esquire