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October 10, 2012

Via Lawyers Service
Hon. Barry P. Sarkisian, J.S.C.
Hudson County Superior Court
Brennan Courthouse
583 Newark Avenue
Jersey City, NJ 07306

Re: City of Hoboken v. Shipyard Associates, L.P.
Docket No. HUD-L-1238-12

LETTER BRIEF ON BEHALF OF SHIPYARD ASSOCIATES, L.P. IN OPPOSITION TO FUND FOR A BETTER WATERFRONT TO INTERVENE

Dear Judge Sarkisian:

Please accept this letter brief on behalf of defendant Shipyard Associates, L.P. ("Shipyard") in lieu of a more formal brief in opposition to the Fund for a Better Waterfront's ("FBW") motion to intervene in this matter.

I. Statement of Facts

Shipyard is the owner of real property known as Block 264.2, Lot 1 as shown on the Tax Assessment Map of the City of Hoboken ("Property"). Shipyard proposes to construct a residential building and associated parking known as the Monarch at Shipyard ("Project") on the Property.

Over the years, Shipyard has filed several applications for State, County and municipal approval for the Project and FBW has opposed each and every application filed by Shipyard. First, because the Property is located along the waterfront, Shipyard filed an amended application with the

New Jersey Department of Environmental Protection ("NJDEP") for a Waterfront Development Permit ("WDP") for the Project in May 2011. On August 25, 2011, Shipyard filed applications with the City of Hoboken Planning Board ("Hoboken Planning Board") and Hudson County Planning Board for site plan approval for the Project.[1] *See* Coakley Cert. Exs. C and B (Complaints against Hoboken and Hudson County Planning Boards). Subsequent to Shipyard filing applications with the Hoboken and Hudson County Planning Boards, NJDEP issued Shipyard a WDP for the Project in December 2011.

On March 7, 2012, nearly 8 months after Shipyard had filed its applications for County and municipal site plan approval, the City of Hoboken ("Hoboken" or the "City") filed the instant action alleging that Shipyard had originally proposed to construct tennis courts, a tennis pavilion and parking on the Property and erroneously claimed that, by submitting applications to amend the original site plan approval to construct a residential development on the Property, Shipyard had violated a 1997 Developer's Agreement related to the Planning Board's 1997 site plan approval of the Shipyard Planned Unit Development ("PUD") that contains the Property. Coakley Cert. Ex. A (Complaint). Hoboken's complaint is directly contrary to settled law set forth in *Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington*, 194 N.J. 223, 249 (2008), which held that a Developer's Agreement is not a source of contractual obligation. Hoboken filed its complaint as part of its orchestrated strategy with FBW and others in an attempt to delay and prevent Shipyard's approvals for the Project. *See* Coakley Cert. Ex. C (Complaint against Hoboken Planning Board). Thus, concurrent with its applications for State, County and municipal approval, Shipyard was required to defend itself against the frivolous and meritless legal action filed by Hoboken. *Id.*

Thereafter, the Hoboken and Hudson County Planning Boards denied Shipyard's respective site plan applications. *See* Coakley Cert. Exs. C and B (Complaints against Hoboken and Hudson County Planning Boards). The bases for the decisions of the Hoboken and Hudson County Planning Boards were totally different. *Id.* The Hudson County Planning Board first denied Shipyard's county site plan application by resolution dated March 21, 2012. The Hudson County Planning Board's denial was based upon the Project's alleged impact on County roadways. Shipyard appealed the Hudson County Planning Board's denial to the Hudson County Board of Chosen Freeholders ("Freeholders"), which affirmed the Hudson County Planning Board's denial by letter dated May 22, 2012. Shipyard appealed the decisions of the Freeholders and Hudson County Planning Board by filing a prerogative writ action captioned *Shipyard Associates, L.P. v. Hudson County Planning Board and Hudson County Board of Chosen Freeholders*, Docket No. HUD-L-3278-12 (J. Arre). *See* Coakley Cert., Ex. B (Complaint against Hudson County Planning Board). In the complaint in that action, Shipyard asserted claims for automatic approval as a result of delays by the Hudson County Planning Board and the Freeholders and also challenged the findings and conclusions in the Hudson County Planning Board's March 21, 2012 resolution of denial.

The Hoboken Planning Board denied Shipyard's municipal site plan application by resolution dated August 7, 2012. The Hoboken Planning Board denied Shipyard's municipal site

[1] Shipyard filed a site plan application with the Hudson County Planning Board because the Project is located along a County roadway. The Hudson County Planning Board's jurisdiction is limited to matters having a direct impact on County roadways and drainage facilities.

plan application without providing Shipyard an opportunity to be heard or present its application. Instead, the Hoboken Planning Board denied Shipyard's application without prejudice due to the instant litigation instituted by Hoboken concerning the 1997 Developer's Agreement. Shipyard appealed the Hoboken Planning Board's denial by filing a separate prerogative writ action captioned *Shipyard Associates, L.P. v. Hoboken Planning Board*, Docket No. HUD-L-4157-12 (J. Santiago). *See* Coakley Cert., Ex. C (Complaint against Hoboken Planning Board). In the complaint in that action, Shipyard asserted a claim for automatic approval as a result of the Board's refusal to hear the application as required by the Municipal Land Use Law.

During the pendency of the various applications for State, County and municipal approval for the Project, Shipyard has been faced with an orchestrated opposition from the City, the Hoboken Planning Board, FBW and others. *See* Coakley Cert. Ex. C (Complaint against Hoboken Planning Board). FBW formally opposed all of Shipyard's applications for State, County and municipal approval for the Project by, e.g., making written submissions to the State, County and municipal in the form of numerous letters and e-mail and by making arguments in opposition the applications during hearings. Furthermore, discovery in this litigation has revealed that from January through June 2012 Hoboken's attorney exchanged numerous e-mails with those opposing the Project, including FBW, and Hoboken has improperly withheld those e-mail communications as privileged notwithstanding Shipyard's objections. *See* Coakley Cert. Ex. D (Hoboken's Privilege Log). Now, nearly 7 months after Hoboken filed the instant litigation, FBW requests leave of court for it to meddle in this lawsuit and continue to delay Shipyard's approvals, even though FBW has absolutely no standing and intervention will only further delay and complicate this matter.

II. Legal Argument

FBW's motion should be denied outright because FBW has no standing to intervene in this litigation and, even if it did, which is specifically denied, all of the factors to be considered on a motion for intervention weigh against FBW joining this litigation.

A. The Standard for a Motion for Permissive Intervention

FBW's motion for intervention must be denied because FBW does not meet the standard for permissive intervention. The Court's determination of a motion for permissive intervention pursuant to Rule 4:33-2 is subject to the abuse of discretion standard. *Asbury Park v. Asbury Park Towers*, 388 N.J. Super. 1, 12 (App. Div. 2006). "The factors to be considered by the trial court in deciding an application for permissive intervention include promptness of the application, whether or not granting thereof will result in further undue delay, whether or not the granting thereof will eliminate the probability of subsequent litigation, and the extent to which the grant thereof may further complicate litigation which is already complex." Pressler, CURRENT N.J. COURT RULES, comment on R. 4:33-2 (2013), (citing *Grober v. Kahn*, 88 N.J. Super. 343 (App. Div. 1965), modified 47 N.J. 135 (1966)). "**Clearly those without standing in the first instance are also without sufficient interest to warrant intervention.**" *Id.* (emphasis added)

B. FBW Has No Standing to Intervene in this Litigation

As a preliminary matter, FBW's motion must be denied because FBW has no standing to intervene in this litigation. A party that lacks standing in the underlying litigation has no standing to intervene in the litigation. *See Mobil Administrative Services Co. v. Mansfield Tp.*, 15 N.J. Tax 583, 590 (Tax Ct. 1996). FBW seeks to intervene in this litigation to assert claims for breach of the 1997 Developer's Agreement and declaratory relief to enforce the 1997 Developer's Agreement. Leaving aside the lack of legal bases for these claims because a developer's agreement is not a source of contractual obligation, *Toll Bros., supra*, FBW has no standing because it is neither a party to, nor a third party beneficiary of the 1997 Developer's Agreement. *See* Coakley Cert. Ex. A (1997 Developer's Agreement, Ex. A to Complaint). It is black letter law that one that is not a party to an agreement cannot assert rights to that agreement unless they were intended to be a third-party beneficiary. *Rieder Cmtys. v. New Brunswick*, 227 N.J. Super. 214 , 221-22 (App. Div. 1988). Whether someone is a third-party beneficiary under New Jersey law turns on "whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts." *Rieder Cmtys.*, 227 N.J. Super. at 222 (internal quotation marks omitted) (citing *Brooklawn v. Brooklawn Housing Corp.*, 124 N.J.L. 73, 77 (E. & A. 1940); *Broadway Maint. Corp. v. Rutgers*, 90 N.J. 253, 259 (1982)). Importantly, the mere fact that a party may receive an incidental benefit from a contract does not render that party a third-party beneficiary as a matter of law. *Id.* (citation omitted). An incidental beneficiary, such as FBW, cannot enforce a contract that it is not a party to. *Parkway Ins. Co. v. N.J. Neck & Back*, 330 N.J. Super. 172, 187 (Law Div. 1998). "'Rather, for a third party to enforce a contract, it must clearly appear that the contract was made by the parties with the intention to benefit the third party' and that 'the parties to the contract intended to confer upon him the right to enforce it.'" *Id.* (quoting *Broadway Maintenance Corp.*, *supra*, at 259).

Applying this reasoning to the instant case, FBW's motion must be denied because FBW has no standing to enforce the 1997 Developer's Agreement. The proposed complaint attached to FBW's motion is nearly identical to the Complaint filed by Hoboken, asserting the same claims with nearly identical allegations. Even assuming *arguendo* that the 1997 Developer's Agreement is an enforceable contract, which is specifically denied, it is undisputed that there is no privity of contract between Shipyard and FBW such that FBW could assert a breach of contract claim against Shipyard because FBW is not a party to the 1997 Developer's Agreement. Furthermore, the 1997 Developer's Agreement for the Hoboken Planning Board's approvals of the Shipyard PUD does not in any way suggest that FBW or the public are third party beneficiaries that could enforce the 1997 Developer's Agreement. Rather, at most, FBW is merely an incidental beneficiary and cannot enforce the 1997 Developer's Agreement. *Id.* Thus, as a basic principal of contract law, FBW has no standing in this action and its motion to intervene must be denied.

C. FBW Does Not Meet Any of the Factors for Permissive Intervention

FBW's motion must be denied because FBW does not meet any of the factors for it to intervene in this litigation.

1. FBW's Motion for Intervention is Not Timely

FBW filed its motion for intervention nearly seven (7) months after Hoboken instituted this litigation. Contrary to FBW's unsubstantiated statement, the instant motion was not "promptly sought." FBW's Br. at 4. Notwithstanding the fact that FBW has been communicating with counsel for Hoboken since at least January of this year, *see* Coakley Cert. Ex. D (Hoboken's Privilege Log), it formally opposed all of Shipyard's applications for State, County and municipal approval and it was well aware of the lawsuit filed by Hoboken,[2] FBW belatedly filed the instant motion 7 months after the litigation was initiated. As a preliminary matter, FBW's formal opposition to Shipyard's State, County and municipal applications is a basis to deny FBW's motion. *See Builders League of South Jersey, Inc. v. Gloucester Cnty Utilities Authority*, 386 N.J. Super. 462, 469-471 (App. Div. 2006) (denying motion to intervene and noting that movant had an opportunity to present testimony at a fairness hearing to oppose proposed settlement). Moreover, FBW has offered absolutely no excuse for its significant delay in making this motion. FBW erroneously claims that this matter is a prerogative writ action. FBW's Br. at 4. However, Hoboken has asserted contract claims against Shipyard in this matter and Hoboken's claims in this action are based upon different facts, allegations and legal issues and are wholly separate from the prerogative writ actions that Shipyard filed to appeal the denials of its site plan applications before the Hoboken and Hudson County Planning Boards. Accordingly, FBW's motion for intervention must be denied as not timely.

2. Intervention by FBW Will Cause Undue Delay

Allowing FBW to intervene in the litigation at this late date will only further delay the court's decision in this litigation. Shipyard's legal right to obtain necessary approvals for the Project have already been significantly delayed as a result of the opposition waged by FBW in conjunction with Hoboken and others. FBW's meritless motion for intervention is just another tactic that is part of FBW's overall strategy to delay Shipyard's approvals for the Project. The parties to this case have already filed their respective pleadings, exchanged discovery and submitted discovery deficiency letters. Accordingly, discovery is nearly complete. Allowing FBW to intervene at this late date will essentially restart the litigation because the parties will be required to file responsive pleadings and restart discovery. Accordingly, FBW's motion for intervention should be denied because it will cause significant and undue delay.

3. Intervention by FBW Will Not Eliminate Subsequent Litigation

Intervention by FBW will not eliminate subsequent litigation because FBW has no standing in this matter. *See* Point II(a), *supra*. Moreover, the mere fact that this matter may be of public

[2] Because Hoboken has improperly withheld its communications with FBW as privileged Shipyard is not privy to the substance of those conversations. However, FBW cannot claim that it is not aware of Shipyard's applications or the lawsuit initiated by Hoboken because Hoboken has made it a point to publicize the filing of this lawsuit and its opposition to the Project. See e.g. Coakley Cert. Ex. E (Postings on Hoboken's website regarding the litigation). Moreover, FBW has appeared and/or submitted formal opposition to each and every agency that Shipyard has sought approvals from for the Project.

interest does not permit this Court to grant FBW's motion because FBW does not have standing in this litigation and it does not meet any of the factors for intervention. FBW's cites to *Evesham Township Zoning Bd. of Adjustment v. Evesham Township Council*, 86 N.J. 295 (1981) for the proposition that the Court should consider the public interest in deciding a motion to intervene. *Evesham,* however, is clearly distinguishable from the instant litigation because *Evesham* involved a prerogative writ action in which a third party tax payer sought to challenge the decision of the municipal council. In the instant litigation, Hoboken asserts contract claims against Shipyard relating to the 1997 Developer's Agreement, of which FBW is neither a signatory nor a third party beneficiary and, thus, has no standing to enforce. Accordingly, FBW's motion for intervention should be denied because it will not eliminate subsequent litigation.

4. Intervention by FBW Will Only Further Complicate this Matter

As explained, *supra*, FBW's intervention will only further complicate and delay this matter. This matter involves the interpretation of the 1997 Developer's Agreement of which FBW has absolutely no right to enforce. FBW was not involved in the approvals that Shipyard received from the Hoboken Planning Board in 1997 for the Shipyard PUD that resulted in the 1997 Developer's Agreement and it was not involved in the drafting of the 1997 Developer's Agreement. Accordingly, FBW has nothing to offer regarding the interpretation of or the legal effect of the 1997 Developer's Agreement. Hoboken has already asserted the claims and allegations that FBW seeks in its proposed complaint. FBW merely seeks to piggyback on to Hoboken's complaint to complicate and delay this matter by requiring Shipyard to answer to two parties instead of one. The Court should not sanction FBW's efforts to complicate this matter. Accordingly, FBW's motion to intervene should be denied because it will only unnecessarily complicate this matter.

III. Conclusion

For the foregoing reasons, Shipyard Associates, L.P. respectfully requests that the Court deny the Fund for a Better Waterfront's motion for permissive intervention.

Respectfully submitted,

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Shipyard Associates, L.P.

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