
CITY OF HOBOKEN,
a municipal corporation of
the State of New Jersey,

Plaintiff,

v.

SHIPYARD ASSOCIATES, L.P.,

Defendant.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION
: HUDSON COUNTY
:

: DOCKET NO. HUD-L-1238-12
: Consolidated with Docket Nos.:
: HUD-L-3278-12
: HUD-L-4157-12
:

Civil Action

**BRIEF OF PLAINTIFF CITY OF HOBOKEN IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Joseph J. Maraziti, Jr., Esq.
Of Counsel

Christopher D. Miller, Esq.
On the Brief

MARAZITI, FALCON & HEALEY, L.L.P.
150 John F. Kennedy Parkway
Short Hills, New Jersey 07078
(973) 912-9008
Attorneys for Plaintiff City of Hoboken

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS.....	3
A. The North Pier	3
B. Shipyard's Application To The Hoboken Planning Board To Develop The Shipyard PUD	3
C. The Components Of The Shipyard PUD	4
D. The Hoboken Planning Board's Hearings On Shipyard's Application To Develop The Shipyard PUD	5
E. The Hoboken Planning Board's Resolution Approving Shipyard's Application To Develop The Shipyard PUD.....	7
F. The 1997 Waterfront Development Permit	8
G. The 1997 Developer's Agreement	8
H. Hoboken Plans For Waterfront Open Space And Public Recreational Use In Reliance Upon Shipyard's Commitment To Provide The Tennis Improvements, Parking Spaces and Public Access Walkway On The North Pier	9
I. Shipyard's Subsequent Applications To The Hoboken Planning Board Regarding The Shipyard PUD Project.....	10
J. Shipyard's 2008 Application To The NJDEP For A Waterfront Development Permit For Development Block G.....	12
K. Shipyard's Appeal Of The NJDEP's Denial Of Shipyard's 2008 Permit Application	15
L. Shipyard's 2011 Application To The NJDEP For A Waterfront Development Permit To Develop The "Monarch At Shipyard" Residential Project On Development Block G	16
M. Hoboken's Objection To The Monarch Project.....	17
N. Shipyard's Application To The Hoboken Planning Board For The Monarch Project	18
O. The NJDEP Issues A Waterfront Development Permit Purportedly Approving Shipyard's Monarch Project	19

LEGAL ARGUMENT	20
APPLICABLE STANDARD	20
POINT I	21
THE 1997 AGREEMENT BETWEEN SHIPYARD, HOBOKEN AND THE HOBOKEN PLANNING BOARD REMAINS IN FULL FORCE AND EFFECT	21
A. The Court’s Decision In Toll Bros. Does Not Render The 1997 Agreement Unenforceable	22
B. The Doctrine Of Equitable Fraud Bars Shipyard’s Counterclaim That The 1997 Agreement May Not Be Enforced To Compel Construction Of The Tennis Improvements	27
1. Shipyard Materially Misrepresented its Intention to Build the Tennis Improvements and Intended that Hoboken Would Rely on that Misrepresentation	27
2. Shipyard Intended for Hoboken to Rely on Shipyard’s Misrepresentation that Shipyard Would Build the Tennis Improvements	29
3. Hoboken Detrimentially Relied on Shipyard’s Misrepresentation of Shipyard’s Intent to Develop the Tennis Improvements	30
POINT II.....	33
SHIPYARD BREACHED THE 1997 AGREEMENT BY FAILING TO PROVIDE THE TENNIS IMPROVEMENTS ON THE NORTH PIER IN FAVOR OF PURSUING THE PROPOSED “MONARCH” RESIDENTIAL PROJECT.....	33
A. The Plain Language Of The 1997 Agreement Requires Shipyard To Build The Tennis Improvements On The North Pier	33
B. Shipyard’s Failure To Provide The Tennis Improvements In Breach Of The 1997 Agreement Has Deprived The Hoboken Public Of Unique Recreational And Open Space Opportunities And Substantial Economic Benefits	35
C. The Appropriate Remedy For Shipyard’s Breach Of The 1997 Agreement Is An Injunction Requiring Shipyard To Perform Its Contractual Obligation To Provide The Tennis Improvements On Development Block G	36
POINT III	38
SHIPYARD HAS BREACHED ITS PROMISE TO PROVIDE THE TENNIS IMPROVEMENTS ON THE NORTH PIER.....	38

A. Shipyard Has Made Definite And Clear Promises To Develop The Tennis Improvements On Development Block G And Intended That Hoboken Would Rely On Those Promises	39
1. Shipyard’s Sworn Testimony to the Hoboken Planning Board that the Tennis Improvements would be Built on the North Pier as Part of The Shipyard PUD.....	39
2. Shipyard’s Representations to Hoboken and the NJDEP in Support of Shipyard’s Permit Applications	41
B. Hoboken Reasonably Relied On Shipyard’s Promises To Develop The North Pier, To Hoboken’s Definite And Substantial Detriment.....	42
POINT IV	45
SHIPYARD’S COUNTERCLAIM AGAINST HOBOKEN FOR AN ALLEGED “BREACH OF THE DUTY OF GOOD FAITH” IS MERITLESS AND SHOULD BE DISMISSED WITH PREJUDICE	45
CONCLUSION	47
 <u>Cases</u>	
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986).....	20
<u>Brill v. Guardian Life Ins. Co. of Am.</u> , 142 N.J. 520 (1995).....	20
<u>East Brunswick Sewerage Auth. v. East Mill Assocs., Inc.</u> , 365 N.J.Super. 120 (App. Div. 2004)	36
<u>Estate of Cohen, ex. rel. Perelman v. Booth Computers</u> , 421 N.J.Super. 134 (App. Div. 2011) .	36
<u>Martin v. Rutgers Cas. Ins. Co.</u> , 346 N.J.Super. 320 (App. Div. 2002)	21
<u>Millar v. Pitman Bd. of Educ.</u> , 2011 WL 2417141 *2 (D.N.J. 2011).....	39
<u>Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington</u> , 194 N.J. 223 (2008).....	21
<u>Zanin v. Iacono</u> , 198 N.J.Super. 490 (Law Div. 1984).....	28
 <u>Statutes</u>	
<u>N.J.S.A. 40:55D-1</u>	23
<u>N.J.S.A. 40:55D-42</u>	24, 26

Rules

<u>R.</u> 4:46-2 (c)	20, 21
-----------------------------------	--------

PRELIMINARY STATEMENT

Plaintiff, City of Hoboken (“Hoboken”) submits this brief in support of its motion for partial summary judgment against Defendant, Shipyard Associates, L.P. (“Shipyard”). Hoboken’s motion seeks entry of an Order (i) declaring that the 1997 Agreement remains in full force and effect; (ii) finding Shipyard to be in breach of the 1997 Agreement; (iii) finding Shipyard to have breached its promise to develop the Tennis Improvements, Parking Spaces and Public Access Walkway on Development Block G; (iv) compelling Shipyard to develop the Tennis Improvements, Parking Spaces and Public Access Walkway on Development Block G; (v) enjoining Shipyard from conducting any development on Development Block G other than in strict accordance with the Architectural Plans referenced in the 1997 Agreement; (vi) reserving judgment on the issue of damages as to those claims; and (vi) dismissing Shipyard’s counterclaims against Hoboken, with prejudice.

This case is a classic example of bait and switch, in which a developer tells the public what it wants to hear in order to obtain governmental approvals – until the time comes to actually make good on those promises. In order to secure Hoboken’s approval for Shipyard to construct an expansive, lucrative, multi-faceted development project along Hoboken’s prime Hudson River waterfront, Shipyard assured Hoboken at every step of the approval process that it would provide certain public recreational and waterfront access improvements on a relatively small, waterfront portion of the project site known as the “North Pier.” Shipyard ultimately entered into a binding, written agreement with Hoboken in which Shipyard agreed that it “shall” provide those public recreational and waterfront access improvements. However, having obtained Hoboken’s approval, and having completed the profitable components of the overall project, Shipyard is now jettisoning its promise to provide the public recreational and waterfront access

improvements, and is setting its sights on even further private residential development. Shipyard's new development proposal is inconsistent with the agreement between Hoboken and Shipyard, and is also inconsistent with Hoboken's planning objectives of providing continuous public recreational opportunities and open space along the Hoboken waterfront.

In an attempt to defend Shipyard's open refusal to honor its agreement with Hoboken, Shipyard simply argues that it was never bound by the agreement to begin with; that although Shipyard agreed that it "shall" provide the public recreational and waterfront access improvements on the North Pier, Shipyard was always free to change its mind at any time, without even seeking Hoboken's consent. Shipyard's disdainful view of the 1997 Agreement is not supported by the law.

Finally, Shipyard's counterclaim against Hoboken – alleging that Hoboken's public opposition to Shipyard's attempts to develop a project entirely inconsistent with the 1997 Agreement amounts to "bad faith" – is totally meritless. Hoboken has a responsibility to the public to uphold the 1997 Agreement and to voice its objection once it became apparent that Shipyard intends to breach that agreement. In response, Shipyard seeks to silence Hoboken so as to insulate Shipyard's development agenda from public scrutiny. Shipyard's counterclaim is nothing more than a baseless, retaliatory attempt to show that Shipyard is not the only "bad actor" here.

This case is ripe for summary judgment. The plain language of the 1997 Agreement, the evidence in the record of Shipyard's repeated assurances to Hoboken that the Tennis Improvements would be built, and the public interest, all weigh heavily in favor of granting the relief requested by Hoboken. Hoboken's motion should therefore be granted.

STATEMENT OF FACTS

A. The North Pier

This litigation deals with the development of property situated on a dilapidated pier commonly referred to as the “North Pier” or “North Platform” in the City of Hoboken. The North Pier extends northward from its landward edge near the intersection of Shipyard Lane and Sinatra Drive into Weehawken Cove, running parallel to the Hudson River. Certification of Counsel (“Cert. of Counsel,” submitted herewith), Exs. F, K. The North Pier consists of two separate parcels of property: Block 264.2, Lot 1 and Block 264, Lot 2. Id. at Exs. K, I, J (at p. 3 (H005839)). Block 264.2, Lot 1 is known as “Development Block G” and is part of a larger planned unit development (PUD) along the Hudson River waterfront known as the “Shipyard PUD.” Id. at Exs. F, K. Block 264, Lot 2 is immediately adjacent to Development Block G at the northern end of the North Pier, and is owned by Hoboken. Id., Exs. I, J (at p. 3 (H005839)). Block 264, Lot 2 is physically accessible by land only by traversing across Development Block G. Id., Exs. F, E (at 7:7 – 8:17), J (at pp. 3, 4 (H005839-H005840)), I.

B. Shipyard’s Application To The Hoboken Planning Board To Develop The Shipyard PUD

On or about September 30, 1996, Shipyard submitted an application to the Hoboken Planning Board for preliminary site plan approval for a proposed Planned Unit Development comprised of residential use (1,160 units), commercial retail use (63,200 square feet), approximately 1,460 parking spaces, open space, recreational use and various streets (“Shipyard PUD”) on property including Block 262, Lot 1; Block 263, Lot 1, Block 264, Lot 1; and a portion of Block 261, Lot 1 in the City of Hoboken (“Shipyard PUD Site”). Pl.’s Statement of Material Facts, submitted herewith, at ¶ 1. On or about September 30, 1996, Shipyard also

made application to the Hoboken Planning Board for preliminary major subdivision and Planned Unit Development Approval with respect to the Shipyard PUD. Id. at ¶ 2.

C. The Components Of The Shipyard PUD

In support of its application to the Hoboken Planning Board for approval to develop the Shipyard PUD, Shipyard submitted certain project plans prepared by the architectural and planning firm of Beyer Blinder Belle to the Hoboken Planning Board, including a building impact plan and zoning tables and a landscaping plan (“Architectural Plans”). Id., ¶ 6. Page SP01 of the Architectural Plans includes several tables showing the calculations used by Shipyard to demonstrate to the Hoboken Planning Board that the Shipyard PUD would satisfy the applicable requirements of Hoboken’s Zoning Ordinance. Cert. of Counsel, Exs. F, F-2, F-3. The Architectural Plans submitted by Shipyard to the Hoboken Planning Board represent the Shipyard PUD as consisting of several buildings on Development Blocks A through G. Id., Ex. F.

Development Block A is comprised of one 13 story building containing 311 residential units, approximately 12,000 square feet of commercial retail space, a three story parking garage and one story retail. Id. Exs. F, H (at H008259). Development Block B consists of a park. Id. Development Block C consists of one 13 story residential building containing 326 residential units and a four story parking garage. Id. Development Block D consists of two new construction 11 story residential buildings, an existing “machine shop” rehabilitated as three story residential and approximately 46,000 square feet of commercial retail space, and grade level parking. Id. Development Block E consists of one 11 story building containing 71 residential units, approximately 3,000 square feet of commercial space and a four story parking garage. Id. Development Block F consists of one 13 story building containing 256 residential

units, approximately 2,250 square feet of commercial space and a 3 story parking garage. Id. Development Block G is comprised of a one-story tennis pavilion, 3 regulation size tennis courts and 44 surface parking spaces (collectively, the “Tennis Improvements”). Id. Exs. F, H (at H008259), E (at 7:7 – 8:17, explaining that parking spaces were revised from 37 spaces to 44). The Shipyard PUD also includes the “recreation pier” extending eastward into the Hudson River from roughly the end of 14th Street (“14th Street Recreation Pier”). Id., Ex. F.

The Shipyard PUD also includes a public access walkway or promenade running along the Hudson River waterfront at the edge of the Shipyard PUD. Id. This public access walkway was to extend into Development Block G so that the public could access the Hudson River waterfront via the North Pier (“Public Access Walkway”). Id.

D. The Hoboken Planning Board’s Hearings On Shipyard’s Application To Develop The Shipyard PUD

The Hoboken Planning Board conducted several hearings on Shipyard’s application to develop the Shipyard PUD. Id., Exs. C, D, E. At the hearing held on or about December 3, 1996, Shipyard submitted the Architectural Plans to the Hoboken Planning Board as evidence to be considered in support of Shipyard’s development application. Id., Exs. C (at 30:3 – 34:9), G (at p. 7 (H007130) and H007145), H (at pp. 1-3). During the December 3, 1996 hearing, Mr. Thomas P. McGinty, a licensed professional architect and planner of the firm Beyer Blinder Belle, testified as a witness on behalf of Shipyard. Id. Ex. C (at 26:9 – 27:19). With respect to Development Block G of the Shipyard PUD, Mr. McGinty testified that:

“The final *open space* feature of this project is a *recreation use* on this last development block to the north. And it includes five tennis courts, and also a walkway along this area that you know, abuts the Hudson River. It has a small tennis pavilion only as, you know, like a pro shop...*It’s part of the project*...It’s proposed as part of the project to have these five tennis courts, have a promenade along the waterfront edge, and a small tennis pavilion...So that’s the last *open space* feature to the north.”

Id., Ex. C (at 59:11 – 62:5) (emphasis added).

With respect to the tennis courts to be developed on Development Block G, Mr. McGinty further testified that:

“They are *public tennis courts*, but I believe there’ll be a, you know, fee charged to use them. So *they’re open to the public*, but there’ll be some fee involved and there’ll most likely be an operator that operates them...*They’re open to the public. They’re not an exclusive club.*”

Id., Ex. C (at 72:20 – 73-14).

During the December 3, 1996 hearing, a question arose as to what type of use the Tennis Improvements qualified as under the Hoboken Zoning Ordinance. Id., Ex. C (at 73:18 – 74:2). The Hoboken Planning Board’s planning consultant, Elizabeth Vandor, responded to that question during a subsequent hearing held by the Hoboken Planning Board on December 5, 1996. Specifically, Ms. Vandor explained:

“The tennis courts fell under our definition of quasi-public. That was the final piece to the answer from Tuesday night.”

Id., Ex. D (at 79:1-4).

On or about December 10, 1996, the Hoboken Planning Board conducted another hearing on Shipyard’s application to develop the Shipyard PUD. Id., Ex. E. During that hearing Mr. McGinty testified on behalf of Shipyard regarding the tennis courts and the issue of access to the parcel of property owned by Hoboken and adjacent to Development Block G. Specifically, Mr. McGinty testified as follows:

“MR. ORLOFF: Now, one issue that came up at the hearing a week ago involved the area on which there were proposed tennis courts. And the question came up as to how physically the town or anyone could reach the town property through their right-of-way going across that block – development Block G – that has the tennis courts. And I think there was some discussion about how do you drive a vehicle across tennis courts and the like.

Have you modified your plan to accommodate those concerns?”

“THE WITNESS: Yes, I have. We’ve gone back and looked at the design of development Block G and we have changed it to have three tennis courts now.

Basically, they've been rotated 90 degrees from their former orientation. And we've allowed for the entire 30 foot easement of the town to be in kind of an access area, which both accesses our parking and then would directly access their pier at the end.

We've preserved the one-story tennis pavilion, which has been shifted slightly...There's also been a net gain of seven parking spaces in this area by the reorganization of the parking."

"MR. ORLOFF: So that in the previous design you had in that area how many parking spaces?"

"THE WITNESS: I believe it was 37."

"MR. ORLOFF: And you now have 44?"

"THE WITNESS: Correct."

Id., Ex E (at 7:7 – 8:17)

All of the Hoboken Planning Board members voting on Shipyard's application to develop the Shipyard PUD either participated in these hearings or had read the transcripts thereof. Id. Ex. G (at p. 4, par. O). The Hoboken Planning Board carefully considered the testimony and exhibits provided by Shipyard in support of its application to develop the Shipyard PUD. Id. Ex. G (at p. 4, par. P).

E. The Hoboken Planning Board's Resolution Approving Shipyard's Application To Develop The Shipyard PUD

In reliance upon the testimony of Shipyard's witnesses during these hearings and the application materials submitted by Shipyard – including the Architectural Plans – the Hoboken Planning Board approved Shipyard's application for preliminary site plan approval and preliminary major subdivision approval with respect to the Shipyard PUD by Resolution dated January 7, 1997 (the "1997 Resolution"). Id., Ex. G (at p. 4, pars. P, 10). Paragraph 52 of the 1997 Resolution provides:

“The Applicant shall develop, prepare and improve the subject premises so as to conform with all the details as shown on the aforesaid plan and submissions...”
Id., Ex. G (at par. 52).

F. The 1997 Waterfront Development Permit

On August 5, 1997, the New Jersey Department of Environmental Protection (“NJDEP”) issued Shipyard a Waterfront Development Permit (“1997 Permit”) conditionally approving the Shipyard PUD with specific reference to the Architectural Plans submitted by Shipyard. Id., Ex. O (at H008344).

Condition 4d. of the 1997 Permit imposed the following requirement on Shipyard:

“Public access areas shall be completed and opened to the public according to the following phasing plan...public access improvements on the tennis pier are to be completed and open to the public within two years following initial occupancy of Development Block F.”

Id., Ex. O.

Additionally, condition 8 of the 1997 Permit required as follows:

“Prior to the commencement of any waterfront walkway construction, the permittee is required to show on the project plans the location of the 36 parking spaces which can be used for public access (including 6 additional spaces to be located at the northern end of the tennis pier parking area, along with proposed designating signage for these 6 spaces) to the Land Use Regulation Program for review and approval.”

Id., Ex. O.

G. The 1997 Developer’s Agreement

On or about December 7, 1997, Hoboken and the Hoboken Planning Board entered into a developer’s agreement with Shipyard (“1997 Agreement”). Pl.’s Statement of Material Facts, ¶ 11. Shipyard’s counsel had been involved in the preparation of the 1997 Agreement. Cert. of Counsel, Ex. UU (at 13:22 – 14:16). Page 2 of the 1997 Agreement states, *inter alia*, “the Developer shall construct this development project in strict accordance with the plans as presented to the Planning Board, which plans were marked into evidence.” Pl.’s Statement of

Material Facts, at ¶ 12. The plans which Shipyard presented to the Planning Board show Development Block G as developed with 3 regulation tennis courts adjacent to 44 surface parking spaces, a tennis pavilion, and an extension of the public access walkway or promenade. Cert. of Counsel, Ex. F.

Despite Shipyard's commitment in the 1997 Agreement to provide the Tennis Improvements, Parking Spaces and Public Access Walkway on Development Block G, before entering into the 1997 Agreement, Shipyard had not conducted any analysis or projection of the cost of providing the Tennis Courts, Tennis Pavilion and Parking Spaces on Development Block G. Id., Ex. L (at interrog. answer no. 73). Shipyard also had not conducted any analysis or projection of the cost of rehabilitating, reconstructing or replacing the North Pier in order to develop Development Block G. Id., Ex. L (at interrog. answer no. 75).

H. Hoboken Plans For Waterfront Open Space And Public Recreational Use In Reliance Upon Shipyard's Commitment To Provide The Tennis Improvements, Parking Spaces and Public Access Walkway On The North Pier

Hoboken's 2004 Master Plan called for the entire length of Hoboken's Hudson River waterfront to be connected by a walkway lined with parks and active recreation opportunities. Id., Ex. KK (at D0002680). As to the waterfront, the 2004 Master Plan provides:

"Hoboken's limited waterfront is a valuable asset that is not available in other areas of the City. That is to say, while most types of development can be accommodated elsewhere, uses that take advantage of water access and views can only occur on the waterfront.

"Limit development on piers. The zoning regulations covering the City's piers in the Hudson River should permit only open space, publicly accessible recreation, and limited commercial development within specific parameters..."

Id., Ex. KK (at D0002681).

Accordingly, Hoboken's Open Space Plan recommends the North Pier as the site of planned and possible new parks and recreation. Id. at (D0002681-D0002683). Hoboken's Open

Space Plan also demonstrates that Hoboken planned to develop the property it owned on the North Pier and adjacent to Development Block G with parks and recreational uses in conjunction with the Tennis Improvements to be provided by Shipyard. Id. at (D0002682-D0002683). To date, Development Block G remains vacant, dilapidated and unimproved, thereby cutting off public access to Hoboken's parcel on the North Pier. Pl.'s Statement of Material Facts, ¶¶ 8, 9, 17.

I. Shipyard's Subsequent Applications To The Hoboken Planning Board Regarding The Shipyard PUD Project

Since obtaining the Hoboken Planning Board's original approval for the Shipyard PUD, Shipyard has sought and obtained various, relatively routine approvals from the Hoboken Planning Board in order to carry out the development of most of the components of the Shipyard PUD.

On or about August 21, 1997, the Hoboken Planning Board granted final major subdivision approval to subdivide the Shipyard PUD Site into 11 tax lots. Cert. of Counsel, Ex. H (at p. 2).

The Hoboken Planning Board granted final site plan approval for Development Block D on or about October 5, 1999. Id., Ex. T (at H008795).

On or about September 7, 1999, Shipyard submitted an application to the Hoboken Planning Board for preliminary site plan approval to construct and operate a ferry stop on Block 262.1, Lot 1 of the Shipyard PUD (on the 14th Street Recreation Pier). Id., Exs. P (at p. 2), F. On January 4, 2000, the Hoboken Planning Board adopted a Resolution approving Shipyard's application. Id., Ex. P (at H008787). The January 4, 2000 Resolution acknowledged that the Hoboken Planning Board's 1997 Resolution originally approving the Shipyard PUD had provided that "no riverborne public transportation shall be included in the project without the

approval of the Planning Board of the City of Hoboken.” Id., Ex. P (at p. 2). The January 4, 2000 Resolution also recites that “No variances or design waivers are required in connection with Applicant’s plan. Applicant’s plan does not involve any conditional uses.” Id., Ex. P (at p. 5).

Final site plan approval for Development Block A was granted March 7, 2000. Id., Ex. T (at pp. 7-8).

On or about January 28, 2000, Shipyard submitted an application to the Hoboken Planning Board for amended preliminary site plan approval to develop a marina on a pier known as “Pier 3” located within the Shipyard PUD. Id., Ex. Q. The 1997 Resolution had specifically permitted the development of a marina. Id., Exs. G (at par. 38 (h)), Q (at par. E). On May 9, 2000, the Hoboken Planning Board adopted a Resolution approving Shipyard’s application for amended preliminary site plan approval to develop a marina. Id., Ex. Q (at H008769). Final site plan approval for the marina was granted by Resolution adopted by the Hoboken Planning Board on June 6, 2002. Id., Ex. U.

Shipyard made application to the Hoboken Planning Board for amended preliminary site plan approval and final site plan approval to, *inter alia*, increase the number of residential units on Development Block C from 326 (as originally approved in the 1997 Resolution) to 335. Id., Ex. R (at par. 3e). On July 1, 2003, the Hoboken Planning Board adopted a Resolution granting Shipyard’s application with respect to Development Block C. Id., Ex. R (at H008816). The Hoboken Planning Board’s July 1, 2003 Resolution recites that at that time, Shipyard had completed the development of the overall Shipyard PUD, south of 14th Street, and that Shipyard intended to proceed with the development of the portion of the Shipyard PUD north of 14th Street. Id., Ex. R (at par. 3a.).

Shipyard subsequently applied to the Hoboken Planning Board for amended preliminary site plan approval and final site plan approval to, *inter alia*, increase the number of residential units originally approved for Development Block F of the Shipyard PUD from 256 to 261. Id., Ex. S (at par. 5). The Hoboken Planning Board found, based on the testimony of Shipyard's licensed planner and architect, Mr. McGinty, that Shipyard's application would increase the public/commercial space of the Shipyard PUD from 15% of the total gross use area, as originally approved, to 22%. Id., Exs. S (at par. 9 r.), F-3 (at "ratios of gross use area" calculation). On July 6, 2004, the Hoboken Planning Board adopted a Resolution approving Shipyard's application. Id., Ex. S (at H008808).

Shipyard subsequently applied to the Hoboken Planning Board for amended preliminary and final site plan approval to increase the number of residential units originally approved for Development Block E from 71 units to 93 units. Id., Ex. T (at H008789). On or about March 4, 2008, the Hoboken Planning Board adopted a Resolution approving Shipyard's application with respect to Development Block E. Id., Ex. T (at H008799).

To date, Shipyard has substantially completed the Shipyard PUD, except for the Tennis Improvements, Parking Spaces, and Public Access Walkway on Development Block G. Id., Exs. B (at ¶ 10), L (at interrog. answer no. 6); Pl.'s Statement of Material Facts, ¶¶ 13, 14.

J. Shipyard's 2008 Application To The NJDEP For A Waterfront Development Permit For Development Block G

Shipyard allowed the in-water component of the 1997 Permit for the Shipyard PUD to expire without having developed the final phase of the Shipyard PUD (i.e., Development Block G on the North Pier). Cert. of Counsel, Exs. V (at H008307), H (H008260), UU (at 32:11 – 33:25).

On or about January 22, 2008, Shipyard sent Hoboken a copy of Shipyard's application to the NJDEP for a new waterfront development permit to repair and rehabilitate the North Pier ("Shipyard's 2008 Permit Application"). Id., Ex. V (at cover letter). The North Pier is the site of Development Block G; i.e., the location of the Tennis Improvements, Parking Spaces and Public Access Walkway which Shipyard had agreed to provide. Id. at Exs. F, J (at p. 3 (H005839)), K, I. By way of Shipyard's 2008 Permit Application, Shipyard represented to Hoboken and the NJDEP that Shipyard's intended development on the North Pier was "public access along the full length with tennis courts and a tennis pavilion." Id., Ex. V (at H008307). In support of its 2008 Permit Application, Shipyard further represented to Hoboken and the NJDEP that:

"The rehabilitation of the pier and the ability to implement the previously permitted *recreation and public open space* would aid the City in meeting its goals for providing *open space and recreational opportunities*. Further, the project would represent a *substantial new revenue source for the City*, both from direct taxes and from secondary, indirect benefits relating to the potential market created by the new development. Thus, *the development...provid[es] a use that will help enhance the economic well-being of the City as well as provide an extended range of recreational and open space opportunities...*In order to effectuate this development, repair and rehabilitation of the pier will be required." Id., Ex. V (H008317) (emphasis added).

In Shipyard's 2008 Permit Application to the NJDEP, Shipyard proposed to rehabilitate the North Pier in order to support development on Development Block G. In its application, Shipyard described the North Pier as:

"[A] low-level structure that consisted of approximately six- to eight-feet of earthen fill over a timber deck (relieving platform) that was, in turn, supported by timber piles bents that were spaced on 4-foot centers. A concrete gravity wall around the perimeter of the pier and resting on the relieving platform contained the earthen fill." Id., Ex. V (at H008305).

In Shipyard's 2008 Permit Application, Shipyard proposed to rehabilitate the North Pier by:

“install[ing] new steel sheetpile bulkhead around the perimeter of the pier within 18 inches of the existing gravity wall. Portions of the gravity wall that are compromised and may interfere with sheetpile installation would be removed...Portions of the northern end of the pier and the eastern finger projection would require removal to allow installation of the sheetpile bulkhead. Following installation of the bulkhead, the wooden piles and relieving platform would be removed and the interior of the pier would be filled with clean fill and stone.”

Id., Ex. V (at H008305).

On or about June 17, 2008, Hoboken received a copy of a letter issued by the NJDEP to Shipyard’s consultant, which letter identified several deficiencies in Shipyard’s 2008 Permit Application, including deficiencies with respect to public access to the Hudson River waterfront.

Id., Ex. W.

With respect to the public waterfront access deficiency identified by the NJDEP, Shipyard’s consultant responded on behalf of Shipyard that:

“Development of the North Pier was included as Phase 4 of the original NJDEP Waterfront Development Permit for The Shipyard (No. 0905-93-0001.6/7/8) [i.e., the 1997 Permit] and included *public recreation facilities and public access*. A request to extend The Shipyard permit will be submitted to the Department shortly. *The approved recreational development called for the construction of three tennis courts and a tennis pavilion. The public access consisted of a 16-foot wide pedestrian walkway around the eastern side and north end of the pier.*”

Id., Ex. X (at D00002064) (emphasis added).

On or about October 16, 2008, Hoboken received a copy of a letter from the NJDEP to Shipyard’s consultant. Id., Ex. Y. In that letter, the NJDEP described the development approved for Development Block G as “a recreational/open space development with a waterfront walkway component.” Id., Ex. Y, (at D0005311). In its October 16, 2008 letter, *the NJDEP found that Shipyard’s proposed method of rehabilitating the North Pier was not environmentally acceptable*. Specifically, the NJDEP found that:

“The installation of the sheet pile bulkhead and the filling of the bulkhead interior will result in the filling of an area of the Hudson River. In accordance with the Coastal Zone Management Rules, filling is discouraged in all other water areas

where there is an alternative to filling. *The applicant has not addressed any practicable alternatives that could be utilized to reduce and/or eliminate the amount of habitat being adversely affected.* For instance, the applicant failed to consider the alternatives of relocating the recreational space to an upland location or design alternatives including, but not limited to the construction of a pile supported pier. Both of these alternatives could be utilized to meet the applicant's project purpose and would drastically reduce and/or eliminate the impacts on the Hudson River. In addition, the applicant has failed to provide a plan that would compensate for the loss of aquatic habitat as a result of the reconstructed pier."

Id., Ex. Y (at D0005314).

Accordingly, the NJDEP denied Shipyard's 2008 Permit Application. Id., Ex. Y (at D0005311).

K. Shipyard's Appeal Of The NJDEP's Denial Of Shipyard's 2008 Permit Application

On or about December 23, 2008, Shipyard filed a request for an adjudicatory hearing on the NJDEP's denial of Shipyard's 2008 Permit Application. Id., Ex. Z. The NJDEP granted Shipyard's hearing request on or about March 18, 2009. Id., Ex. AA. Prior to a trial in the Office of Administrative Law ("OAL"), Shipyard and the NJDEP purportedly engaged in settlement negotiations. Id., Exs. BB, CC. On or about April 30, 2010, Shipyard submitted a proposed consent order placing the matter on the inactive case list for six months. Id., Ex. DD. On or about May 5, 2010, the OAL entered the consent order placing the matter on the inactive list for six months. Id., Ex. EE.

While Shipyard and the NJDEP were purportedly conducting these settlement negotiations regarding the denial of Shipyard's 2008 Permit Application, Shipyard assured Hoboken that Shipyard would be constructing the Tennis Improvements and Parking Spaces on Development Block G. Id., Exs. DD, EE, JJ (at 62:2-23).

On or about April 30, 2010, Shipyard submitted a request that Shipyard's appeal of the NJDEP's denial of Shipyard's 2008 Permit Application be placed on the inactive list so that

Shipyard and the NJDEP could negotiate. Id., Ex. DD. On or about October 27, 2010, Shipyard advised the OAL that “in conjunction with potential settlement” of the matter, Shipyard would be submitting a revised permit application to the NJDEP, and accordingly requested that the OAL place the matter on the inactive case list “for an additional six months or until May 4, 2011 so that the Department may consider the revised application...” Id., Ex. FF.

L. Shipyard’s 2011 Application To The NJDEP For A Waterfront Development Permit To Develop The “Monarch At Shipyard” Residential Project On Development Block G

On May 5, 2011, Hoboken received a copy of Shipyard’s revised permit application to the NJDEP (“Shipyard’s 2011 Permit Application”) for the Development Block G component of the Shipyard PUD. Id., Ex. GG. However, despite Shipyard’s representations to Hoboken during the summer of 2010 that Shipyard would construct the Tennis Improvements on Development Block G as called for in the 1997 Agreement, Shipyard’s 2011 Permit Application had *unilaterally abandoned* those improvements in favor of an entirely new development concept consisting of even further residential units (a total of 78 additional units) to be constructed in two 11-story high rise residential towers (the “Monarch” project) on Development Block G of the Shipyard PUD. Id., Ex. GG (at cover letter).

In Shipyard’s 2011 Permit Application, Shipyard represented that:

“Based on the Department’s denial of the permit, a hearing was requested by the Applicant and a meeting was held on 15 September 2009. As an outcome of that meeting, Shipyard Associates agreed to evaluate non-filling alternatives to the rehabilitation of the platform, including replacement-in-kind...Shipyard Associates reevaluated the originally proposed recreational use of the platform deck and is now proposing a combination of *residential* [*i.e.*, the Monarch project] and public access uses on the reconstructed platform.”

Id., Ex. GG (at p. 2) (emphasis added).

Nevertheless, on or about June 1, 2011, the NJDEP issued a letter to Shipyard identifying a host of deficiencies in Shipyard's 2011 Permit Application. Id., Ex. HH. In the June 1, 2011 deficiency letter, the NJDEP noted:

"The original permit application submitted for this site was for the rehabilitation of North Pier to facilitate the construction of a *recreational/open space development with a waterfront walkway* component. This project was to be accomplished by installing steel sheet pile bulk-heading around the perimeter of the existing structure, removing the remains of the existing structure and backfilling the interior with approximately 36,500 cubic yards of clean fill to the 100 year flood elevation. This proposal was subsequently denied by the Department on October 16, 2008. In accordance with N.J.A.C. 7:7-4.9 of the Coastal Permit Program Rules, if an application is denied, *the applicant may resubmit for a revised project of the same or reduced scope on the same site...* This permit application submitted to the Department on May 5, 2011 is for the replacement of the North Pier as well as the construction of two residential towers. *This revised project is not the same, is not at a reduced scope...*"

Id., Ex. HH.

Thus, the NJDEP recognized that Shipyard's proposed Monarch project was impermissible because it was not "the same" project as the Tennis Improvements, Parking Spaces and Public Access Walkway, nor was the Monarch project "at a reduced scope." Id. Indeed, the Monarch project *totally abandoned* the public waterfront recreational facilities which Shipyard had represented would be built on Development Block G as part of the Shipyard PUD and replaced it with towering residential buildings of a greatly *increased scope*. Id., Exs. F, H (at H008237), JJ (at 62:2-23). In response to NJDEPs' June 1, 2011 deficiency letter, Shipyard issued a letter *which completely ignored* that glaring defect. Id., Ex. II.

M. Hoboken's Objection To The Monarch Project

As it became apparent to Hoboken that Shipyard openly intended to renege on its commitment to provide the Tennis Improvements on Development Block G of the Shipyard PUD, as embodied in the 1997 Agreement between Shipyard, Hoboken and the Hoboken Planning Board, Hoboken publicly voiced its objection to Shipyard's 2011 Permit Application

for the Monarch project. On May 18, 2011, Hoboken's Community Development Director, Brandy Forbes, sent the NJDEP a letter objecting to Shipyard's proposed Monarch project on the basis of the project's inconsistency with Hoboken's stated planning objectives of public recreational and open space opportunities along the Hudson River waterfront. Id., Exs. KK, JJ (at 76:5 – 77:7, establishing actual date of the referenced letter as May 18, 2011). On May 20, 2011, Hoboken Mayor Dawn Zimmer also sent the NJDEP a letter which objected to Shipyard's proposed Monarch project on the bases of public health, safety and welfare. Id., Ex. LL. On or about October 5, 2011, the Hoboken City Council adopted a Resolution opposing the Monarch project as being inconsistent with Hoboken's stated planning objectives of public recreational and open space opportunities on the Hoboken waterfront. Id., Ex. NN. On October 31, 2011, Hoboken Planning Board's engineering consultant sent a letter to the NJDEP objecting to Shipyard's 2011 Permit Application for the proposed Monarch Project as being inconsistent with applicable State waterfront development regulations. Id., Ex. MM.

N. Shipyard's Application To The Hoboken Planning Board For The Monarch Project

On or about August, 25, 2011, Shipyard submitted an application to the Hoboken Planning Board for approval to construct two 11-story residential towers having 78 residential units and other accessory uses including parking, public pedestrian and emergency vehicle access and access to Hoboken's parcel of property at the end of the North Pier via a proposed street along the western perimeter of the platform (i.e., the Monarch project). Id., Ex. L (at interrog. answer no. 4). Shipyard subsequently revised its application for the Monarch project to consist of 70 residential units. Id.

On June 21, 2012, Hoboken's counsel sent a letter to the Hoboken Planning Board's counsel, with a copy of the letter being sent to Shipyard's counsel ("June 21, 2012 Letter"). Id.,

Ex. SS. In the June 21, 2012 Letter, Hoboken's counsel advised that Hoboken's position was that Shipyard's proposed Monarch project was inconsistent with the 1997 Agreement between Shipyard, Hoboken and the Hoboken Planning Board, and submitted that because the issue of Shipyard's right to proceed with the Monarch project notwithstanding the 1997 Agreement had already been submitted to this Court by way of the instant litigation (which had commenced on about March 7, 2012), the Hoboken Planning Board should dismiss Shipyard's application pending the resolution of the instant litigation. Id.

On July 10, 2012, the Hoboken Planning Board voted to deny Shipyard's Monarch application without prejudice. The Mayoral designee on the Hoboken Planning Board, and Hoboken Community Development Director Brandy Forbes each abstained from participating in the Hoboken Planning Board's decision.

O. The NJDEP Issues A Waterfront Development Permit Purportedly Approving Shipyard's Monarch Project

On or about December 2, 2011, the NJDEP issued Waterfront Development Permit No. 0905-07-0001.2 WFD 110001 ("2011 Permit"), purporting to authorize Shipyard to construct two eleven residential towers with a waterfront walkway component on the North Pier. Id., Ex. OO.

On or about April 9, 2012, Hoboken filed a notice with the State Attorney General and the NJDEP of Hoboken's intention to commence an environmental rights action in order to enforce the conditions of the 1997 Permit regarding the public access improvements and tennis improvements on the North Pier. Id., Ex. RR. Subsequently, Hoboken and Shipyard engaged in correspondence with the NJDEP regarding the requirements of the 1997 Permit as they apply to the North Pier. Hoboken has not filed an environmental rights action at this time.

On or about December 28, 2011, Hoboken filed a request with the NJDEP for an adjudicatory hearing on the NJDEP's decision to issue the 2011 Permit. Id., Ex. PP. On January 18, 2012, Hoboken supplemented its December 28, 2011 hearing request to the NJDEP. Id., Ex. QQ. Subsequently, Hoboken and Shipyard have engaged in correspondence with the NJDEP regarding Hoboken's right to be heard. To date, the NJDEP has not issued a decision to grant or deny Hoboken's hearing request.

LEGAL ARGUMENT

APPLICABLE STANDARD

A motion for summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2 (c). "A summary judgment or order, interlocutory in character, may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages)." R. 4:46-2 (c).

Under Rule 4:46-2, when deciding summary judgment motions "trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis added). A self-serving assertion alone does not create a question of material fact sufficient to defeat a summary

judgment motion. Martin v. Rutgers Cas. Ins. Co., 346 N.J.Super. 320, 323 (App. Div. 2002). Nor will a summary judgment motion be defeated by a response which is not fairly based upon disclosed sources of information; thus, the respondent must do more than show that there is merely some doubt as to the material facts. R. 4:46-2 (c), Comment.

POINT I

THE 1997 AGREEMENT BETWEEN SHIPYARD, HOBOKEN AND THE HOBOKEN PLANNING BOARD REMAINS IN FULL FORCE AND EFFECT.

Hoboken seeks a determination from this Court that the 1997 Agreement between Hoboken, Shipyard, and the Hoboken Planning Board, which governs the development of the Shipyard PUD, remains in full force and effect. Cert. of Counsel, Ex. A (at Second Count). Generally, a developer's agreement "is a contract between the developer and the municipality," in which the developer agrees to fulfill the conditions of approval and "completes the improvements within a time frame." Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 248 (2008) ("Toll Bros.") (internal quotations omitted). "The principal benefit of the developer's agreement is its ability to foster cooperation between the public and private entities and to insure a common understanding and predictability within the development process." Id. (emphasis added).

In spite of the fact that Shipyard has taken full advantage of the rights and privileges afforded by the 1997 Agreement in order to construct the substantial residential, commercial and retail components of the Shipyard PUD, Shipyard now claims that the 1997 Agreement cannot be enforced to require Shipyard to finish the final, public recreational phase of the Shipyard PUD project (i.e., the Tennis Improvements). Pl.'s Statement of Material Facts, ¶ 13; Cert. of

Counsel, Ex. B (at First Affirmative Defense and at First Count of Shipyard's Counterclaim). Shipyard's claims in that regard misapply the law.

Additionally, Shipyard's counterclaim that the 1997 Agreement cannot be enforced so as to require Shipyard to build the Tennis Improvements is barred by the doctrine of equitable fraud. Id., Exs. B (at First Count of Counterclaim), VV (at Eighth Affirmative Defense). Discovery in this litigation has yielded evidence that Shipyard never seriously intended to build the Tennis Improvements, but instead misrepresented that fact to Hoboken for the purpose of demonstrating on paper that the Shipyard PUD would comply with the requirements of the Hoboken Zoning Ordinance, and merely as a placeholder for Development Block G while Shipyard pursued Hoboken's approval of the overall Shipyard PUD.

A. The Court's Decision In Toll Bros. Does Not Render The 1997 Agreement Unenforceable.

Shipyard erroneously claims that Toll Bros. precludes the continued enforceability of the 1997 Agreement. Cert. of Counsel, Ex. B (at First Affirmative Defense and at the First Count of Shipyard's Counterclaim). Shipyard's reliance on Toll Bros. is misplaced. In Toll Bros., the Court ruled:

"A developer's agreement is a contract between the developer and the municipality that details the manner in which the conditions of approval will be fulfilled. It is ancillary to those conditions and is only enforceable to the extent that the conditions on which it is based are enforceable. Moreover, conditions of approval are not immutable; when the proportional effect of the public need generated by a project is materially changed by virtue of a significant reduction in the scope of the proposed development, the developer is entitled to an opportunity to demonstrate before the planning board that a recalculation of its contribution is warranted."

Id. at 230 (emphasis added).

As a matter of law, the Court in Toll Bros. did *not* hold that developer's agreements are unenforceable. Rather, the Court held that because the Municipal Land Use Law, N.J.S.A.

40:55D-1, et seq. (“MLUL”), prohibits a planning board from conditioning approval upon a developer paying more than a pro-rata share of the off-site improvements necessitated by the project, a developer cannot override that statutory limitation by contracting in a developer’s agreement to pay more than that statutorily permitted share. Toll Bros., 194 N.J. at 229-30. In so holding, the Court explained that a developer’s agreement may not be used to enforce a condition of planning board approval if that condition is not authorized by the MLUL. Id. at 230. However, here, Shipyard is *not* claiming that any of the conditions of the Hoboken Planning Board’s approval for the Shipyard PUD were unauthorized or otherwise unenforceable. See Cert. of Counsel, Ex. G (at ¶ 38 (a) – (m)). Thus, there is no legitimate reason why the 1997 Agreement should not be enforced.

Furthermore, the factual circumstances which were at issue in Toll Bros. are critically inapposite to the circumstances before this Court. Toll Bros. addressed the limited question of whether a developer’s agreement barred the developer in that case from applying, based on a demonstration of changed circumstances, for modification of the developer’s pro-rata share of off-tract improvement costs associated with the subject development project. Id. at 229. In Toll Bros., the scope of the original project had “radically” downsized, the developer had built “only a fraction of what had been projected,” and the developer therefor “immediately” sought to reduce its share of off-site roadway improvements. Id. at 240, 254. In stark contrast to the situation in Toll Bros., here, Shipyard is *not* seeking to modify a pro-rata share of any off-site improvement costs in order to offset any significant downsizing of the Shipyard PUD. The Tennis Improvements are part of the overall Shipyard PUD project, and are to be built on the site of the Shipyard PUD – they are not “off-site improvements.” Cert. of Counsel, Ex. C (at 59:11 – 62:5) (Shipyard’s witness testified before the Hoboken Planning Board that the Tennis

Improvements were the “final open space feature” of the Shipyard PUD and were “part of the project.”). There simply is no dispute in this case as to any off-site improvements. Id., Ex. L (at interrog. answer no. 23).

Moreover, as further distinguished from Toll Bros., Shipyard has *not* advanced any claim that a change in circumstances pursuant to section N.J.S.A. 40:55D-42 of the MLUL warrants departure from Shipyard’s commitment to develop Development Block G with public recreational uses in accordance with the 1997 Agreement. In Toll Bros., the developer had claimed that it was entitled to appear before the planning board to request a recalculation of its off-site improvement obligations due to a substantial downsizing of its original project design. Toll Bros., 194 N.J. at 246. Here, there has been *no* significant downsizing of the Shipyard PUD. To the contrary, Shipyard has substantially *finished* building the project, except for the Tennis Improvements component. Id., Exs. B (at ¶ 10), L (at interrog. answer no. 6); Pl.’s Statement of Material Facts, ¶ 13. Indeed, Shipyard has developed *additional* residential units above and beyond the number originally contemplated for the Shipyard PUD. Cert. of Counsel, Ex. L (at interrog. answer no. 51). Having long-since completed the private, residential and commercial/retail components of the Shipyard PUD, Shipyard has simply abandoned the remaining component of the Shipyard PUD (*i.e.*, the Tennis Improvements) which would have inured to the public benefit, in favor of an *entirely new project* on the same site consisting of even *further* private residential development (*i.e.*, the proposed Monarch project) which would generate more revenue for Shipyard. Statement of Material Facts, ¶¶ 13-18. The Monarch residential project which Shipyard now intends to develop on the North Pier is of a greatly *increased* scope and intensity as compared to the Tennis Improvements which Shipyard originally committed to provide on Development Block G of the Shipyard PUD. Id., Ex. HH.

Thus, the only change in circumstances that has occurred here is that Shipyard has determined to increase its profit levels at the expense of the Hoboken public.

The continued enforceability of the 1997 Agreement is further supported by the Appellate Division's recent decision in Ginsburg Dev. Cos., L.L.C. v. Twp. of Harrison, 2013 WL 362808 (N.J.Super.A.D.) ("Ginsburg," not published, attached to Cert. of Counsel as Ex. TT). In Ginsburg, a developer and a municipality had entered into a developer's agreement whereby the developer agreed to pay its pro-rata share of off-site sewer improvements. Id. at *2-3. The issue was whether there was any justification for delaying the developer's obligation under the developer's agreement to make payment for the off-site improvements until the developer had begun work on the project. Id. at *4. Although the developer had not yet begun to construct the project, the developer intended to proceed with the development in accordance with the terms of the resolution of approval. Id. at *5. However, the developer sought to delay the payment of its share of the off-site improvements beyond the date called for in the developer's agreement. Id. at *6. The developer argued that under Toll Bros., conditions of land use approvals are only enforceable when the developer actually proceeds with its project. Id. at *1. The Appellate Division rejected that argument, specifically observing that

"The heart of the case in Toll Bros. was the developer's claim that it was entitled to appear before the County Planning Board *to request a re-calculation of its off-tract improvement obligations due to the substantial downsizing of its original design*. The right to request a change in the condition of approval is codified in N.J.S.A. 40:55D-12(a). Recognition of the right for modification of condition in light of changed circumstances is related to N.J.S.A. 40:55D-42, which permits a governing body to require a developer, as a condition for approval of a subdivision or site plan, to pay the pro-rata share of the cost of improvements to off-tract facilities, such as sewerage facilities, only when reasonable and necessary and necessitated or required by construction or improvements within a subdivision or development. *Essentially, when there have been changes in the scope of the developer's project that alter the extent of required off-site improvements, a hearing is necessary to re-align the condition imposed in the*

original resolution approving the project with the actual burden imposed by the revised project.”

Id. at * 5.

Thus, the Appellate Division ruled that Toll Bros. did not apply because the developer was not requesting a modification of any of the conditions of the planning board’s approval, and the developer was also not arguing that a change in circumstances made its share of the cost of the off-site improvements improper or unfair. Id. at *6. Accordingly, the Appellate Division upheld the developer’s agreement and required the developer to make payment in accordance with the terms thereof – notwithstanding that the developer had not even begun construction on the subject project. Id. at * 1, 6.

Toll Bros. does not apply here for the same reasons. As in Ginsburg, Shipyard is *not* seeking a hearing before the Hoboken Planning Board for the purpose of demonstrating changed circumstances in order to modify a condition of the Hoboken Planning Board’s original approval. Shipyard has not alleged that any of those conditions are invalid or otherwise unenforceable. See Cert. of Counsel, Ex. G (at ¶ 38 (a) – (m)). Rather, having completed the more financially rewarding aspects of the Shipyard PUD, Shipyard is simply trying to *replace* the final, waterfront recreational component of the Shipyard PUD with even *more* residential units and private parking. Id., Exs. B (at ¶ 10), L (at interrog. answer no. 6); Pl.’s Statement of Material Facts, ¶¶ 13, 14. Shipyard has attempted to initiate proceedings before the Hoboken Planning Board for the sole purpose of constructing an *entirely different development on Development Block G, of substantially greater scope and with none of the public recreational opportunities which Shipyard had represented would be built.* Compare Cert. of Counsel, Exs. F, F1-F7 with Ex. B (at ¶ 23). As such, the Court’s decision in Toll Bros. is incongruous with the circumstances at

bar and does not render the 1997 Agreement unenforceable. The 1997 Agreement remains in full force and effect.

B. The Doctrine Of Equitable Fraud Bars Shipyard's Counterclaim That The 1997 Agreement May Not Be Enforced To Compel Construction Of The Tennis Improvements.

The First Count of Shipyard's Counterclaim against Hoboken, which seeks a judgment that the 1997 Agreement may not be enforced so as to compel Shipyard to provide the Tennis Improvements, is barred by the doctrine of equitable fraud. Cert. of Counsel, Exs. B (at First Count of Counterclaim), VV (at Eighth Affirmative Defense). Equitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party. Toll Bros., 194 N.J. at 254.

1. Shipyard Materially Misrepresented its Intention to Build the Tennis Improvements and Intended that Hoboken Would Rely on that Misrepresentation.

Leading up to the 1997 Agreement, Shipyard materially misrepresented to Hoboken that Shipyard firmly intended to develop the Tennis Improvements on Development Block G. Shipyard knew that it needed to include a minimum amount of "public/commercial" uses in the Shipyard PUD in order for it to be approved under Hoboken's Zoning Ordinance, so Shipyard presented plans showing the Tennis Improvements on Development Block G and assured Hoboken that Shipyard would build those improvements as the final phase of the project, without having undertaken *any* projection of what it would cost Shipyard to do so.

Shipyard needed to include the tennis courts on Development Block G in order to satisfy the requirements of Hoboken's Zoning Ordinance, and in order to obtain Hoboken's approval for the overall Shipyard PUD. Hoboken's Zoning Ordinance imposes special requirements on "planned unit development," as distinguished from routine development. Id., Ex. WW (at §196-

17 E(2)(b)[5][a] and [b]); see also Zanin v. Iacono, 198 N.J.Super. 490, 501 (Law Div. 1984) (given legislative purposes of planned development, planning boards must have more flexibility and power in considering applications for planned development than in dealing with routine applications for site plan approval). In support of its application to develop the Shipyard PUD, Shipyard submitted Architectural Plans to the Hoboken Planning Board which showed the components of the Shipyard PUD and how those components satisfied the requirements of the Hoboken Zoning Ordinance. Pl.'s Statement of Material Facts, ¶¶ 6, 7; Cert. of Counsel, Exs. F, F3, F5 and F6. At the time of Shipyard's application for the Shipyard PUD, Hoboken's Zoning Ordinance required that a minimum of 15%, and a maximum of 75%, of the gross use area of a planned unit development (PUD) be devoted to commercial, industrial, public or quasi-public uses. Id., Ex. WW (at §196-17 E(2)(b)[5][b]). The "RATIOS OF GROSS USE AREA" calculations set forth on the Architectural Plans explain how the components of the Shipyard PUD would meet that requirement. Id., at Ex. F3. Those calculations show that the original Shipyard PUD – including the tennis courts and associated surface parking spaces to be provided on Development Block G – *barely* satisfied the minimum 15% public/commercial use requirement of the ordinance. Id. Shipyard's calculations show that of the overall 1,771,157 square feet of the Shipyard PUD, 267,843 square feet would be devoted to "public/commercial use;" i.e., 15%. Id.

Shipyard used Development Block G to satisfy that 15% requirement. The column under "RATIOS OF GROSS USE AREA" entitled "PUBLIC/COMMERCIAL USE" shows that Shipyard included 75,843 square feet of Development Block G in the 267,843 square feet of "public/commercial" uses being counted by Shipyard toward the minimum 15%¹. Id. The

¹ Development Block G is shown on Shipyard's Architectural Plans as consisting of a total of 79,043 square feet; however, Shipyard counted only 75,843 square feet of Development Block G toward the "public/commercial use"

“RATIOS OF GROSS USE AREA” calculations also show that Shipyard availed itself of the maximum amount of residential use permissible under the ordinance (*i.e.*, 85% of total gross use area) in the Shipyard PUD. *Id.*, Exs. WW (at §196-17 E(2)(b)[5][a]), F3. Thus, the plans submitted by Shipyard to Hoboken in support of Shipyard’s application to develop the Shipyard PUD used the tennis courts and surface parking spaces on Development Block G to satisfy the *minimum* of public/commercial use required, while maximizing the amount of residential use allowed. It was those plans that Hoboken relied on in approving the Shipyard PUD. *Id.*, Exs. G (at par. 29), H (at pp. 1-3).

Notwithstanding that Shipyard *needed* to include the tennis courts and associated surface parking on Development Block G in order to show that the original Shipyard PUD complied with the minimum requirements of the Hoboken Zoning Ordinance, and notwithstanding that Shipyard agreed in the 1997 Agreement that it “shall” provide those improvements, *Shipyard had not conducted any analysis or projection of what it would cost Shipyard to undertake those improvements.* *Id.*, Ex. L (at interrog. answers nos. 73, 75). Hoboken submits that that is *not* how a sophisticated developer behaves if it genuinely intends to proceed with development.

2. Shipyard Intended for Hoboken to Rely on Shipyard’s Misrepresentation that Shipyard Would Build the Tennis Improvements.

As Shipyard proceeded with the construction of the more lucrative residential and commercial/retail components of the Shipyard PUD, Shipyard intended for Hoboken to rely on Shipyard’s commitment to ultimately develop the Tennis Improvements on the North Pier, and repeatedly assured Hoboken over time that Shipyard would proceed with the development of the

requirement. *Cert. of Counsel*, Exs. F4, F3. Thus, Shipyard did not include 3,200 square feet of Development Block G toward the “public commercial use” requirement. *Id.*, Ex. F4. The Tennis Pavilion is shown as consisting of 3,200 square feet. *Id.*, Ex. F6. As such, Shipyard apparently did not include the Tennis Pavilion in counting Development Block G toward the minimum “public/commercial use” requirement.

Tennis Improvements. In support of its attempt to secure government approval for Development Block G, Shipyard sought to persuade Hoboken and the NJDEP that:

“The rehabilitation of the pier and the ability to implement the previously permitted *recreation and public open space would aid the City in meeting its goals for providing open space and recreational opportunities*. Further, the project would represent a *substantial new revenue source for the City*, both from direct taxes and from secondary, indirect benefits relating to the potential market created by the new development. Thus, *the development...provid[es] a use that will help enhance the economic well-being of the City as well as provide an extended range of recreational and open space opportunities...*In order to effectuate this development, repair and rehabilitation of the pier will be required.”

Id., Ex. V (at H008317) (emphasis added).

Even as Shipyard was preparing to submit its 2011 Permit Application to develop the Monarch project, *Shipyard continued to assure Hoboken that Shipyard would proceed with the Tennis Improvements*. Id., Exs. FF, Z, AA – EE, JJ at (62:2-23). In April of 2010, Shipyard requested that Shipyard’s appeal with respect to Shipyard’s 2008 Permit Application be placed on the inactive list so that Shipyard and the NJDEP could negotiate a resolution. Id., Ex. DD. A few months later, in the summer of 2010, Shipyard represented to the Community Development Director of Hoboken that Shipyard would still be proceeding with the development of the Tennis Improvements. Id., JJ at (62:2-23). However, in spite of Shipyard’s repeated assurances, Hoboken discovered that the “revised permit application” ultimately submitted by Shipyard was for an *entirely new project which did not include the Tennis Improvements*. Id., Ex. GG.

3. Hoboken Detrimentially Relied on Shipyard’s Misrepresentation of Shipyard’s Intent to Develop the Tennis Improvements

In reliance upon Shipyard’s misrepresentation that Shipyard intended to construct the Tennis Improvements on Development Block G, Hoboken entered into the 1997 Agreement and planned for the development of public open space and recreational uses on Hoboken’s adjacent parcel on the North Pier. Hoboken’s 2004 Master Plan called for the entire length of Hoboken’s

Hudson River waterfront to be connected by a walkway lined with parks and active recreation opportunities. Id., Ex. KK (at D0002680). As to the waterfront, the 2004 Master Plan provides:

“Hoboken’s limited waterfront is a valuable asset that is not available in other areas of the City. That is to say, while most types of development can be accommodated elsewhere, uses that take advantage of water access and views can only occur on the waterfront.

“Limit development on piers. The zoning regulations covering the City’s piers in the Hudson River should permit only open space, publicly accessible recreation, and limited commercial development within specific parameters...”

Id., Ex. KK (at D0002681).

Accordingly, Hoboken’s Open Space Plan recommended the North Pier as the site of planned and possible new parks and recreation. Id. at (D0002681-D0002683). Hoboken’s Open Space Plan also demonstrates that Hoboken planned to develop the property it owned on the North Pier adjacent to Development Block G with parks and recreational uses in conjunction with the Tennis Improvements to be provided by Shipyard. Id. at (D0002682-D0002683). Hoboken’s Open Space plan specifically references the Tennis Improvements to be provided by Shipyard. Id.

However, although more than fifteen years have passed since Shipyard entered into the 1997 Agreement with Hoboken, and although Shipyard has completed all of the other components of the Shipyard PUD, the North Pier remains vacant, dilapidated, unimproved, and cut off from public access. Cert. of Counsel, Ex. L (at interrog. answer no. 6); Pl.’s Statement of Material Facts, ¶ 17. Consequently, Hoboken’s adjacent parcel on the North Pier – which may only be accessed through Development Block G – has also remained cut from public access, depriving Hoboken of any meaningful opportunity to realize its plans for public open space and recreational opportunities on the North Pier. Id., ¶¶ 8, 9, 17. Moreover, because the North Pier remains unimproved, Hoboken has also been deprived of the direct tax revenue and “secondary,

indirect benefits” which would have been generated by the Tennis Improvements. Cert. of Counsel, Ex. V (at H008317).

Shipyard’s intent to develop the Tennis Improvements is also belied by Shipyard’s failure to develop the Tennis Improvements on the North Pier while the original 1997 Permit for the Shipyard PUD remained valid. Although Shipyard completed most of the other components of the Shipyard PUD pursuant to the 1997 Permit, Shipyard delayed the development of the final phase on Development Block G such that the “in-water” component of the 1997 Permit expired. Cert. of Counsel, Exs. L (at interrog. answer no. 6), UU (at 32:11 – 33:25), V (at H008307). Taken together with Shipyard’s failure to conduct any analysis of the cost of the Tennis Improvements before agreeing to provide them, Shipyard’s repeated assurances that the Tennis Improvements would be built, and Shipyard’s ultimate abandonment of the Tennis Improvements once Shipyard received a new permit for Development Block G, such conduct gives rise to equitable fraud. In Toll Bros., the Court observed:

“As far as we can tell, Toll Brothers agreed to be bound by the conditions so long as it was proceeding full-throttle with the original project and immediately sought relief when that project was radically reduced in scope. *If that is not the case and there is proof that Toll Brothers continued to seek approvals and make promises that it never intended to keep, and, as a result, the County changed its position to its detriment, the County may have an equitable fraud claim.*”

Toll Bros., 194 N.J. at 254.

Equitable fraud similarly applies here. Shipyard proceeded full-throttle in developing the residential and commercial/retail components of the Shipyard PUD, all the while assuring Hoboken that the Tennis Improvements would ultimately be built on Development Block G, even though Shipyard tellingly had not undertaken *any* projection of what it would cost Shipyard to do so. Cert. of Counsel, Exs. B (at ¶ 10), L (at interrog. answers nos. 6, 73, 75), JJ at (62:2-23); V (at H008317). However, after Shipyard had finished all of the other components of the

Shipyard PUD, Shipyard abandoned its commitment to provide the Tennis Improvements and began pursuing even *further* residential development on the North Pier. *Id.*, Ex. GG. Such conduct is not consistent with a good faith intention to develop the Tennis Improvements, and Shipyard's conduct in that regard vis-à-vis Hoboken amounts to equitable fraud. Accordingly, Shipyard is barred from claiming that the 1997 Agreement cannot be enforced so as to hold Shipyard to its commitment to provide the Tennis Improvements.

POINT II

SHIPYARD BREACHED THE 1997 AGREEMENT BY FAILING TO PROVIDE THE TENNIS IMPROVEMENTS ON THE NORTH PIER IN FAVOR OF PURSUING THE PROPOSED "MONARCH" RESIDENTIAL PROJECT.

A. The Plain Language Of The 1997 Agreement Requires Shipyard To Build The Tennis Improvements On The North Pier.

Shipyard's refusal to develop the Tennis Improvements on the North Pier blatantly violates the plain terms of the 1997 Agreement. The 1997 Agreement states:

"[T]he Developer *shall* construct this development project *in strict accordance* with the plans as presented to the Planning Board, which plans were marked into evidence."

Pl.'s Statement of Material Facts, ¶ 12.

The "plans as presented to the Planning Board" include the "Building Impact Plan and Zoning Table (SP01)" and "Landscaping Plan (SP05)" (the "Architectural Plans") which were submitted by Shipyard to the Hoboken Planning Board in support of Shipyard's application to develop the Shipyard PUD. *Id.*, at ¶ 7. The Architectural Plans clearly show that Development Block G of the Shipyard PUD is to be developed with the Tennis Improvements. Cert. of Counsel, Exs. F1-F7.

Indeed, the 1997 Agreement specifically defines the Shipyard PUD as the project shown on the Architectural Plans. The 1997 Agreement provides that:

“[T]he Preliminary Site Plan Approval is for a proposed Planned Unit Development comprising 1160 residential units, 1466 parking spaces, 63,200 square feet of commercial/retail space, public open space, private open space, passive recreational use and the extension of various streets (the “Project”), all as more particularly set forth in...the architectural plans revised to January 22, 1997 prepared by Beyer Blinder Belle approved by the Planning Board...”

Id., Ex. H (at pp. 1-2).

The 1997 Agreement further provides that:

“[A]ll drawings and documents described above are on file with the City of Hoboken Planning Board and are incorporated herein by reference and made part of this Agreement.”

Id., Ex. H (at pp. 2-3).

The referenced “drawings and documents” include the Architectural Plans, which clearly show that Development Block G is to be developed with the Tennis Improvements. Id., Exs. F, F1-F7. Thus, in the 1997 Agreement, Shipyard expressly agreed that as part of the Shipyard PUD project, Shipyard must develop the Tennis Improvements on the North Pier.

The “phasing plan” incorporated into the 1997 Agreement provides further evidence as to what the parties to the 1997 Agreement intended to be developed on Development Block G. Id., Ex. H (at pp. “BK522 | PG358” - “BK522 | PG359”). Phase 7 of the Shipyard PUD is described thus:

“Development Block G comprised of a 1 story tennis pavilion, 3 regulation size tennis courts and 37 surface parking spaces.”²

Id., Ex. H (at “BK522 | PG359”).

² Although the phasing plan in the 1997 Agreement refers to “37 surface parking spaces,” the testimony of Shipyard’s witness at the hearings conducted by the Hoboken Planning Board in connection with Shipyard’s application to develop the Shipyard PUD reveals that Shipyard’s initial proposal to develop only 37 surface parking spaces on Development Block G was subsequently revised to a total of 44 surface parking spaces, as reflected on the Architectural Plans. Cert. of Counsel, Exs. E (at 7:7 – 8:17), F, F-4.

Accordingly, under the 1997 Agreement, after Shipyard had developed the money-making components of the Shipyard PUD; i.e., 1,160 residential units, 1,466 parking spaces and 63,200 square feet of commercial retail space, Shipyard was to provide the Tennis Improvements on Development Block G as the final phase of the project. Although Shipyard has substantially completed the Shipyard PUD, and even developed even *more* residential units than originally entailed as part of the Shipyard PUD, Shipyard now refuses to provide the Tennis Improvements. Id., Exs. B (at ¶¶ 10, 12, 15), L (at interrog. answers nos. 6, 51); Pl.'s Statement of Material Facts, ¶¶ 13, 14.

B. Shipyard's Failure To Provide The Tennis Improvements In Breach Of The 1997 Agreement Has Deprived The Hoboken Public Of Unique Recreational And Open Space Opportunities And Substantial Economic Benefits.

Shipyard itself acknowledges that the Tennis Improvements called for in the 1997 Agreement inure to the direct, public benefit of the City of Hoboken; not only in the form of recreational and public open space opportunities, but also financially, in the form of substantial increases in tax revenue and the enhanced marketability of property in Hoboken. In support of its attempt to secure governmental approval for Development Block G, Shipyard assured Hoboken and the NJDEP that:

"The rehabilitation of the pier and the ability to implement the previously permitted *recreation and public open space* would aid the City in meeting its goals for providing *open space and recreational opportunities*. Further, the project would represent a *substantial new revenue source for the City*, both from direct taxes and from secondary, indirect benefits relating to the potential market created by the new development. Thus, *the development...provid[es] a use that will help enhance the economic well-being of the City as well as provide an extended range of recreational and open space opportunities...*In order to effectuate this development, repair and rehabilitation of the pier will be required." Id., Ex. V (at H008317) (emphasis added).

Shipyard's attempt to replace the Tennis Improvements with even further residential units on the North Pier as part of its proposed Monarch project is totally inconsistent with the clear terms of the 1997 Agreement – if the Monarch project were to be built, these unique waterfront recreational and open space opportunities, and the “secondary, indirect benefits” thereof would be lost, to the detriment of the Hoboken public. Id., Ex. V (at H008317).

C. The Appropriate Remedy For Shipyard's Breach Of The 1997 Agreement Is An Injunction Requiring Shipyard To Perform Its Contractual Obligation To Provide The Tennis Improvements On Development Block G.

As discussed above, Shipyard's abandonment of the Tennis Improvements called for in the 1997 Agreement in favor of a completely different, substantially more intense, residential development violates the clear terms of the 1997 Agreement. Accordingly, this court should enforce the 1997 Agreement and require Shipyard to provide the Tennis Improvements on the North Pier. “Contracts are given their plain and ordinary meaning.” East Brunswick Sewerage Auth. v. East Mill Assocs., Inc., 365 N.J.Super. 120 (App. Div. 2004) (internal citations omitted). “When the terms of the contract are clear, the court must enforce them as written.” Id. at 125 (internal citations omitted). “A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument.” Id. “It has been decided many times and in many cases that the court will not make a different or better contract than the parties themselves have seen fit to enter into.” Id. “Experienced parties to developer's agreements, developers and public authorities, are well-equipped to express their intentions in clear contractual terms.” Id. at 127. “To establish a right to specific performance, the party seeking the relief must demonstrate that the contract in question is valid and enforceable at law, and that the terms of the contract are clear.” Estate of Cohen, ex. rel. Perelman v. Booth Computers, 421 N.J.Super. 134, 149-50 (App. Div. 2011). “Whether a term

of a contract is clear or ambiguous is a question of law.” Id. at 150 (internal citations omitted). The right to specific performance turns on whether the performance sought represents an equitable result. Id. at 157.

Here, the 1997 Agreement could not be more clear in terms of what Shipyard is to develop on the North Pier. The 1997 Agreement plainly states:

“[T]he Developer *shall* construct this development project *in strict accordance* with the plans as presented to the Planning Board, which plans were marked into evidence.”

Pl.’s Statement of Material Facts, ¶ 12.

As discussed above, the “plans as presented to the Planning Board” show that Shipyard is to develop the Tennis Improvements on Development Block G of the North Pier. Id., at ¶ 7. The 1997 Agreement expressly incorporates the elements of those plans into the terms of the 1997 Agreement. Cert. of Counsel, Ex. H (at pp. 2-3).

Shipyard has already availed itself of the 1997 Agreement by developing an expansive, multi-building mixed use development on prime Hoboken waterfront property — but simply refuses to provide the final, remaining public recreational and open space component. Instead, Shipyard seeks to squeeze even further private, high-rise residential development (*i.e.*, the proposed “Monarch” project) out of the last remaining parcel of the Shipyard PUD site (*i.e.*, Development Block G). Having completed all other components of the Shipyard PUD, Shipyard now claims that the Tennis Improvement component of the 1997 Agreement is not enforceable. Such self-serving “picking and choosing” of which elements of the Developer’s Agreement are enforceable and which are not should not be countenanced by this court, especially since Shipyard’s refusal to provide the Tennis Improvements is a clear detriment to the public interest. See Cert. of Counsel, Ex. V (H008317). Certainly, Shipyard would not have challenged the

enforceability of the 1997 Agreement while Shipyard was busy developing the more financially rewarding aspects of the Shipyard PUD under the aegis of the 1997 Agreement.

Furthermore, providing the Tennis Improvements – a relatively small feature of the overall project which Shipyard has already built – would not cause *any* undue hardship to Shipyard. Holding Shipyard to its commitment to develop the Tennis Improvements would be an equitable result – indeed it was the specific result the parties intended when they entered into the 1997 Agreement, and Shipyard has offered no evidence to justify Shipyard's departure therefrom.

POINT III

SHIPYARD HAS BREACHED ITS PROMISE TO PROVIDE THE TENNIS IMPROVEMENTS ON THE NORTH PIER.

In addition to the plain language of the 1997 Agreement, fairness and justice also dictate that Shipyard honor its repeated assurances to Hoboken – made for the purpose of persuading Hoboken that the overall Shipyard PUD would be not only be good for Shipyard, but also good for the Hoboken public – that the Tennis Improvements would be built on the North Pier. Shipyard has played “fast and loose” with the public agencies from whom Shipyard needed approval by representing that Shipyard would provide “open space” and “public recreation” on Development Block G. However, having since obtained those government approvals, and having since completed the revenue-generating components of the subject project, Shipyard now disavows its representations to those public agencies in an attempt to abandon its responsibility for the remaining “open space” and “public recreation” component of the project. Consequently, Hoboken requests that this court intercede to prevent such an inequitable result, and to rectify this unjust situation in favor of the public interest.

Promissory estoppel is a quasi-contract doctrine intended to apply when a party makes an otherwise unenforceable promise, but justice nevertheless requires that the court enforce the promise. Millar v. Pitman Bd. of Educ., 2011 WL 2417141 *2 (D.N.J. 2011) (unpublished opinion, attached to Cert. of Counsel at Ex. N) (citing Toll Bros.). Promissory estoppel is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment. Toll Bros., 194 N.J. at 253.

A. Shipyard Has Made Definite And Clear Promises To Develop The Tennis Improvements On Development Block G And Intended That Hoboken Would Rely On Those Promises.

Here, Shipyard has made definite and clear promises to develop the Tennis Improvements on Development Block G, with the expectation that Hoboken and the Hoboken Planning Board would rely on that promise in approving Shipyard's applications to develop the Shipyard PUD.

1. Shipyard's Sworn Testimony to the Hoboken Planning Board that the Tennis Improvements would be Built on the North Pier as Part of The Shipyard PUD.

During the initial hearing application for the Shipyard PUD, Shipyard's professional consultant, Thomas P. McGinty, testified to the Hoboken Planning Board that Shipyard would provide "open space" and "recreational use" on Development Block G as part of the Shipyard PUD. Specifically, Mr. McGinty testified that:

"The final open space feature of this project is a recreation use on this last development block to the north. And it includes five tennis courts, and also a walkway along this area that you know, abuts the Hudson River. It has a small tennis pavilion only as, you know, like a pro shop...It's part of the project...It's proposed as part of the project to have these five tennis courts, have a promenade along the waterfront edge, and a small tennis pavilion...So that's the last open space feature to the north."

Id., Ex. C (at 59:11 – 62:5) (emphasis added).

Mr. McGinty further testified that, although a fee would be charged for use, the tennis courts were to be available for use by the Hoboken public. Specifically, Mr. McGinty testified that:

“They are *public tennis courts*, but I believe there’ll be a, you know, fee charged to use them. So *they’re open to the public*, but there’ll be some fee involved and there’ll most likely be an operator that operates them...*They’re open to the public. They’re not an exclusive club.*”

Id., Ex. C (at 72:20-73-14).

At a subsequent hearing on Shipyard’s PUD application, Mr. McGinty further testified to the Hoboken Planning Board regarding the tennis courts and the associated surface parking spaces, as follows:

“MR. ORLOFF: Now, one issue that came up at the hearing a week ago involved the area on which there were proposed tennis courts. And the question came up as to how physically the town or anyone could reach the town property through their right-of-way going across that block – development Block G – that has the tennis courts. And I think there was some discussion about how do you drive a vehicle across tennis courts and the like.

Have you modified your plan to accommodate those concerns?”

“THE WITNESS: Yes, I have. *We’ve gone back and looked at the design of development Block G and we have changed it to have three tennis courts now.* Basically, they’ve been rotated 90 degrees from their former orientation. And we’ve allowed for the entire 30 foot easement of the town to be in kind of an access area, which both accesses our parking and then would directly access their pier at the end.

We’ve preserved the one-story tennis pavilion, which has been shifted slightly...There’s also been a net gain of seven parking spaces in this area by the reorganization of the parking.”

Id., Ex E (at 7:7 – 8:17)

2. Shipyard's Representations to Hoboken and the NJDEP in Support of Shipyard's Permit Applications.

After Hoboken had entered into the 1997 Agreement with Shipyard in reliance on Shipyard's representations, and after Shipyard had developed much of the Shipyard PUD project pursuant thereto, Shipyard continued to assure Hoboken not only that Shipyard would develop the Tennis Improvements on the remaining North Pier component, but also that the Tennis Improvements would greatly benefit Hoboken in terms of public open space and recreational opportunities and tax revenue. By way of Shipyard's 2008 Permit Application to rehabilitate the North Pier for development – a copy of which was sent on behalf of Shipyard to Hoboken – Shipyard represented to Hoboken that:

“The rehabilitation of the pier and the ability to implement the previously permitted recreation and public open space would aid the City in meeting its goals for providing open space and recreational opportunities. Further, the project would represent a substantial new revenue source for the City, both from direct taxes and from secondary, indirect benefits relating to the potential market created by the new development. Thus, the development...provid[es] a use that will help enhance the economic well-being of the City as well as provide an extended range of recreational and open space opportunities...In order to effectuate this development, repair and rehabilitation of the pier will be required.”

Id., Ex. V (H008317) (emphasis added).

Thus, Shipyard assured Hoboken that the Tennis Improvements to be built would further Hoboken's planning objectives of providing open space and recreational opportunities on the Hudson River waterfront, and would enhance the economic well-being of Hoboken. See also id., Ex. KK at (at D0002680-D0002681).

Moreover, in response to concerns expressed by the NJDEP regarding Shipyard's 2008 Permit Application, Shipyard's consultant represented that:

“Development of the North Pier...included public recreation facilities and public access...The approved recreational development called for the construction of three tennis courts and a tennis pavilion.”

Id., Ex. X (at D00002064) (emphasis added).

The NJDEP subsequently denied Shipyard’s 2008 Permit Application, finding that Shipyard’s proposed method of rehabilitating the North Pier was not environmentally acceptable. Id., Ex. Y (at D0005311, D0005314). However, while Shipyard was purportedly negotiating with the NJDEP regarding that permit denial and preparing to submit a “revised permit application,” Shipyard continued to assure Hoboken that Shipyard would be building the Tennis Improvements on the North Pier. Id., Exs. FF, Z, AA – EE, JJ at (62:2-23). In spite of that assurance, *the “revised permit application” which Shipyard ultimately produced had abandoned the Tennis Improvements and instead proposed a completely different project for the rehabilitated North Pier.* Id., Exs. FF, GG (at cover letter).

B. Hoboken Reasonably Relied On Shipyard’s Promises To Develop The North Pier, To Hoboken’s Definite And Substantial Detriment.

In reliance upon Shipyard’s promises that Shipyard would construct the Tennis Improvements on Development Block G, Hoboken entered into the 1997 Agreement and accordingly planned for the development of public open space and recreational uses on Hoboken’s adjacent parcel on the North Pier. Hoboken’s 2004 Master Plan called for the entire length of Hoboken’s Hudson River waterfront to be connected by a walkway lined with parks and active recreation opportunities. Id., Ex. KK (at D0002680). As to the waterfront, the 2004 Master Plan provides:

“Hoboken’s limited waterfront is a valuable asset that is not available in other areas of the City. That is to say, while most types of development can be accommodated elsewhere, uses that take advantage of water access and views can only occur on the waterfront.

“Limit development on piers. The zoning regulations covering the City’s piers in the Hudson River should permit only open space, publicly accessible recreation, and limited commercial development within specific parameters...”

Id., Ex. KK (at D0002681).

Accordingly, Hoboken’s Open Space Plan recommends the North Pier as the site of planned and possible new parks and recreation. Id. at (D0002681-D0002683). Hoboken’s Open Space Plan also demonstrates that Hoboken planned to develop the property it owned on the North Pier and adjacent to Development Block G with parks and recreational uses in conjunction with the Tennis Improvements to be provided by Shipyard. Id. at (D0002682-D0002683). Hoboken’s Open Space plan specifically references the Tennis Improvements to be provided by Shipyard. Id.

However, although more than fifteen years have passed since Shipyard entered into the 1997 Agreement with Hoboken, and although Shipyard has completed all of the other components of the Shipyard PUD, the North Pier remains vacant, dilapidated, unimproved, and cut off from public access. Cert. of Counsel, Ex. L (at interrog. answer no. 6); Pl.’s Statement of Material Facts, ¶ 17. Consequently, Hoboken’s adjacent parcel on the North Pier – which may only be accessed through Development Block G – has also remained cut off from public access, depriving Hoboken of any meaningful opportunity to realize its plans for public open space and recreational opportunities on the North Pier. Pl.’s Statement of Material Facts, ¶¶ 8, 9. Moreover, because the North Pier remains unimproved, Hoboken has also been deprived of the tax revenue and “enhanced economic well-being” which would have been generated by the Tennis Improvements. Cert. of Counsel, Ex. V (at H008317).

Furthermore, Shipyard offers no excuse to justify Shipyard’s abandonment of the Tennis Improvements. Shipyard does assert, as a purported affirmative defense, that construction of the Tennis Improvements on Development Block was “impracticable because of the denial of

necessary NJDEP Permits.” *Id.*, Ex. B (at Seventeenth Affirmative Defense). However, that argument is *totally specious*. The NJDEP *has* in fact issued a permit to Shipyard to rehabilitate the North Pier – Shipyard simply has chosen to build a towering residential project on the North Pier once it has been rehabilitated instead of the Tennis Improvements called for by the 1997 Agreement. *Id.*, Ex. OO. Moreover, the NJDEP’s denial of Shipyard’s initial application to rehabilitate the North Pier was based on the NJDEP’s determination that Shipyard’s proposed method of rehabilitating the North Pier was environmentally unacceptable – *not* that the Tennis Improvements would be an unacceptable use of the North Pier after it has been properly rehabilitated. *Id.*, Ex. Y (at D0005314). Indeed, in response to Shipyard’s 2008 Permit Application, the NJDEP provided Shipyard with alternative methods for rehabilitating the North Pier in order to provide the Tennis Improvements. *Id.* Now that Shipyard has acceded to NJDEP’s approved method of rehabilitating the North Pier, and has therefore received the necessary permit to carry out that rehabilitation, Shipyard opportunistically seeks to build a private residential development on the North Pier (*i.e.*, the Monarch Project) that will make Shipyard more money, and provide the public with fewer waterfront recreational opportunities, than the Tennis Improvements called for by the 1997 Agreement. *Id.*, Ex. UU (at 40:16 – 42:1). In spite of the 1997 Agreement, Shipyard *never once* contacted Hoboken for its approval of this entirely new project, which was never contemplated as part of the Shipyard PUD and which would completely replace the Tennis Improvements which Shipyard had agreed to provide in the 1997 Agreement. *Id.*, Ex. UU (at 49:6-18).

Given these circumstances, fairness and justice militate in favor of a judgment requiring Shipyard to make good on its commitment to Hoboken that the Tennis Improvements would be constructed on the North Pier.

POINT IV

SHIPYARD'S COUNTERCLAIM AGAINST HOBOKEN FOR AN ALLEGED "BREACH OF THE DUTY OF GOOD FAITH" IS MERITLESS AND SHOULD BE DISMISSED WITH PREJUDICE.

Shipyard's counterclaim against Hoboken for "breach of the duty of good faith" is totally preposterous and is obviously calculated to retaliate against Hoboken and Hoboken's public officials for asking this Court to enforce the 1997 Agreement. Cert. of Counsel, Ex. B (Second Count). Essentially, Shipyard claims that by publicly opposing Shipyard's proposed "Monarch" project – a project which is obviously inconsistent with, and frustrates the purpose of, the 1997 Agreement – Hoboken has breached a duty of good faith. However, it is *Shipyard* that indisputably seeks to abandon the Tennis Improvements called for in the 1997 Agreement – Hoboken stands by, and seeks to enforce, the 1997 Agreement. Pl.'s Statement of Material Facts, ¶¶ 14-16, 18. As a matter of law, Shipyard cannot demonstrate that a public body acts in bad faith by refusing to silently acquiesce in the breach of an agreement to which the public body is a party.

It is no secret that Hoboken opposes the Monarch project. Hoboken publicly opposes the Monarch project because it is plainly contrary to the 1997 Agreement and because it would deprive the Hoboken public of the unique waterfront recreational opportunities afforded by the Tennis Improvements that Shipyard agreed to provide. If Shipyard builds the Monarch project on Development Block G of the Shipyard PUD, then Shipyard cannot also build the Tennis Improvements on Development Block G. Id., ¶¶ 15, 16, 18. Indeed, Shipyard has admitted that it intends to develop the Monarch project "in place of" the Tennis Improvements. Id., ¶ 18. Accordingly, when it became apparent to Hoboken that Shipyard intended to breach the 1997 Agreement by pursuing the Monarch project instead, Hoboken availed itself of the proper legal

channels to raise its concerns: When Shipyard sought a permit from the NJDEP to develop the Monarch project on the North Pier instead of the Tennis Improvements, Hoboken raised its detailed environmental and planning concerns with the NJDEP. Cert. of Counsel, Exs. KK, JJ (at 76:5 – 77:7, establishing actual date of the referenced letter as May 18, 2011), LL, MM. Hoboken also adopted a resolution stating its official opposition to the Monarch project. Id., Ex. NN. When Shipyard submitted an application to the Hoboken Planning Board to develop the Monarch project instead of the Tennis Improvements called for in the 1997 Agreement, Hoboken's counsel advised the Hoboken Planning Board's counsel that Hoboken's position was that Shipyard's application violated the 1997 Agreement and should be dismissed pending resolution of that issue by this Court. Id., Ex. SS.

Evidently, Shipyard would prefer that Hoboken stand quietly aside and allow Shipyard to develop whatever it wants on the North Pier with minimal public awareness, notwithstanding the 1997 Agreement. However, to do so would be an abdication of Hoboken's responsibility to uphold the public interest in the implementation of the 1997 Agreement as written. Hoboken's attempts to uphold the 1997 Agreement by voicing its objections to the Monarch project do not violate any duty of good faith owed to Shipyard. If there has been any breach of a duty of good faith in this case, it is Shipyard's open refusal to abide by the 1997 Agreement by pursuing the Monarch project, without seeking the consent of Hoboken. Pls' Statement of Material Facts, ¶¶ 15, 16, 18, Cert. of Counsel, Ex. UU (at 49:7-18).


As a matter of law, Shipyard cannot establish that Hoboken's general opposition to the Monarch project constitutes a breach of a duty of good faith. Therefore, the Second Count of Shipyard's Counterclaim against Hoboken should be dismissed, with prejudice.

CONCLUSION

For all of the above reasons, Hoboken respectfully submits that its motion for partial summary judgment should be granted in its entirety.

MARAZITI, FALCON & HEALEY, LLP
Attorneys for Plaintiff, City of Hoboken

Dated: May 15, 2013

By: 

Christopher D. Miller