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Supreme Court gives developers leg up

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On March 31, 2008, the New Jersey Supreme Court decided *Toll Bros. v. Board of Chosen Freeholders.* The court held that a developer cannot be required by contract to provide off-tract improvements that offend the nexus and proportionality test mandated by constitutional principles and by N.J.S.A. 40:55D-42.

The court also held that a developer may seek to modify or reform an off-tract improvements obligation in a developer's agreement when the project to which such obligation relates has changed. By ruling this way, the Supreme Court not only affirmed the letter and spirit of the statutory provisions governing the imposition of off-tract improvements under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1, but also took a practical and equitable stand in resolving the problems that developers and property owners face when things don't work out as planned.

In light of the Supreme Court's ruling, developers now should be more at ease in negotiating or revisiting off-tract improvements obligations. Given the current economic slowdown affecting the real estate industry, *Toll Bros.* could not have come at a better time.

Case facts

In *Toll Bros.*, the Moorestown Foursome Partnership (Foursome) obtained conditional preliminary subdivision approvals in 1988 and 1989 for a mixed-use development in Burlington County partially located in Moorestown Township and partially in Mount Laurel Township to be known as Laurel Creek. 194 N.J. 223 (2008). The Laurel Creek project envisioned the development of 1.2 million square feet of commercial space, 47,000 square feet of space for retain use, more than 450 residential dwellings and an 18-hole golf course with a 25,000- to 30,000-square foot country club facility. In view of the size of Laurel Creek, as proposed, the Mount Laurel, Moorestown and Burlington County planning boards conditioned their preliminary approvals upon the construction of certain off-tract roadway improvements.

In granting these approvals and in devising the off-tract improvements obligation, the agencies treated Laurel Creek and an adjacent parcel in Mount Laurel Township owned by TRW Land (TRW) as a single, integrated unit for planning purposes. TRW proposed to build on this adjacent parcel an additional 500,000 square feet of commercial space to be known as the Laurel Creek Corporate Center (Corporate Center).

In the fall of 1988, Foursome issued letters memorializing its agreement to construct the off-tract improvements and in the spring of 1989, Foursome and TRW issued a joint letter, which estimated the cost of construction at about $2.1 million. Thereafter, in the early 1990s, due to financial difficulties, Foursome succeeded in completing only the golf course and country club component of Laurel Creek, abandoning the remainder of the project, while TRW's Corporate Center project languished. Moreover, neither developer undertook to install any of the required off-tract improvements.

In 1994, Toll Brothers acquired Foursome's interest in Laurel Creek and the following year entered into a developer's agreement with Burlington County to confirm its agreement to take responsibility for the off-tract roadway improvements. Beginning in 1999, Toll Brothers obtained additional approvals from the Burlington County and Moorestown planning boards and, each time Toll Brothers did so, it reaffirmed its commitment to build the off-tract improvements. In 2001, Toll Brothers also entered into a developer's agreement with Moorestown Township.

Over time, Toll Brothers changed and substantially decreased the scope of the original development plan for Laurel Creek. Plans for the corporate center also were modified downward, although not as severely. Meanwhile, the approximate cost of the required off-tract improvements rose steadily from $2.1 million to $5 million. However, notwithstanding these circumstances, neither Burlington County nor Moorestown Township were willing to adjust Toll Brothers' obligations and, consequently, a multitude of lawsuits commenced.

Lower court decisions

The trial court consolidated all the actions and found, among other things, that unlike the conditions of approval contained in a resolution, Toll Brothers had no right to a modification or reformation of its developer's agreements based upon a change in circumstances. In a reported decision, the Appellate Division affirmed the trial court with respect to its ruling on Burlington County's right to enforce its developer's agreement, but reversed the trial court's decision regarding Moorestown Township's developer's agreement. 388 N.J.Super. 103, (2006). The reason for the Appellate Division's distinction resided in the specific text of each contract.

Under Burlington County's developer's agreement, Toll Brothers had to construct all the off-tract improvements when the number of buildings for which it had received permits generated more than 18 percent of the traffic projected for development under the original plan. As such, according to the Appellate Division, Toll Brothers' downsizing was largely irrelevant to the county developer's agreement because its obligation to build out the improvements was not tied to the completion of development under the original plan but, rather, accrued upon the 18 percent trigger.

Although the Appellate Division acknowledged that the MLUL at N.J.S.A. 40:55D-42 prohibited the county from requiring Toll Brothers to build the off-tract improvements identified in the developer's agreement as a condition of approval for Toll Brothers' downsized development plan, it ruled that such limitations are inapplicable to a voluntary agreement.

Contrarily, under Moorestown Township's developer's agreement, the contractual language required staged improvements that were directly linked to the original development plan and, therefore, could not be enforced once the scope of such plan had been reduced.

Following the Appellate Division's decision, Toll Brothers asked the Supreme Court to consider the question of the enforceability of Burlington County's developer's agreement and it granted certification.

Supreme Court decision

The Supreme Court began its analysis by recognizing that "[u]nder the MLUL, a planning board may only impose off-tract improvements on a developer if they are necessitated by the development." As such, "[a] developer cannot be compelled to shoulder more than its pro rata share of the cost of such improvements ... [This] is so even if the developer is a willing participant in a separate developer's agreement." To hold otherwise would be contrary not only to the letter and spirit of N.J.S.A. 40:55D-42 "which provides the boundaries of a public entity's power with respect to off-tract improvements," but also sound public policy.

Furthermore, even if disproportionate public benefits and improvements could be obtained from developers on a truly voluntary basis, such arrangements would "[p]lainly violate the nexus and proportionality requirements in the MLUL that serve as the Legislature's check on a municipality's limited planning power[,]" and thereby would be unenforceable. A municipality's exercise of this "limited planning power" must comply with the dictates of the MLUL even if the same is expressed in a contract rather than a resolution of approval. Indeed, "[a] developer and a municipality cannot do by contract what the statute prohibits."

On the contrary, "[a] developer's agreement is an ancillary instrument, tethered to the conditions of approval, and exists solely as a tool for the implementation of the resolution establishing the conditions. Accordingly, if the resolution ... changes, the developer's agreement enjoys no independent status and must be renegotiated." As such, "[w]e do not view the ancillary developer's agreement as a bar to Toll Brothers' application for modification of the resolution setting the conditions of approval."

The court also rejected Burlington County's alternative arguments, namely, that "[e]ven if Toll Brothers is not barred from advancing a changed circumstances challenge to the conditions of approval," it is not entitled to relief because the project was not completely abandoned and "[b]ecause the County relied to its detriment on what it considered the binding developer's agreement in its later dealings with other developers."

As to the first alternative point, the court stated that limiting a developer's right to seek a modification of a condition of approval only to instances where a project is abandoned "would offend the nexus and proportionality requirements reflected in the MLUL." Respecting the county's detrimental reliance claim, the court likened this to promissory estoppel and given that "[b]oth Toll Brothers and the County knew or should have known that the conditions of approval were subject to change if the facts in the case changed and that the developer's agreement was not a stand-alone obligation[,]" the county's reliance was not reasonable and, therefore, "this argument too must fail."

In light of the court's determinations, it reversed the Appellate Division and remanded the matter to the trial court for further proceedings.

Implications

The Supreme Court's ruling in *Toll Bros. v. Board of Chosen Freeholders* was the first time the court "confronted the issue of the greater than pro-rata exactions in developer's agreements head on[.]"

This is, perhaps, a bit surprising in light of how common "the practice of entering into developer's agreements ... has become[]" and how often they are used outside the context of a general development plan, which is still the only circumstance under the MLUL, N.J.S.A. 40:55D-45.2(l), where a developer's agreement is expressly authorized.

Notwithstanding the relative novelty of this issue, the Supreme Court in *Toll Bros.* did not tread lightly but rather "rolled up its sleeves," so to speak, to get to the heart of the matter, and produced a decision that will likely serve as a helpful guide to developers and government entities alike.

Indeed, the unequivocal ruling in *Toll Bros.* made abundantly clear that a developer's agreement may not be used in contravention of "the nexus and proportionality requirements reflected in the MLUL" under N.J.S.A. 40:55D-42 and mandated by constitutional law. This mandate sets firm boundaries that will likely assist both developers and government entities in negotiating developer's agreements, make off-tract improvements obligations more predictable and protect the public from pay-to-play schemes. The ruling in *Toll Bros.* also shows how the Supreme Court in this case was determined not to let local and county government reap a windfall of public benefits at the expense of a single developer, who for one reason or another was unable or unwilling to complete a particular project as originally approved and, instead, send a firm message that such situations call for flexibility and accommodation.

The common sense (and no-nonsense) approach taken by the Supreme Court is a breath of fresh air and sorely needed, especially now, in the current financial climate where flexibility is at a premium.

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