NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5231-14T3

EQR-LPC URBAN RENEWAL
NORTH PIER, LLC and
EQR-LINCOLN URBAN RENEWAL
JERSEY CITY, LLC,

Plaintiffs-Respondents,

v.

CITY OF JERSEY CITY,

Defendant-Appellant.

APPROVED FOR PUBLICATION

NOVEMBER 15, 2017

APPELLATE DIVISION

Submitted March 8, 2016 – Decided July 22, 2016

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2105-14.

Jeremy Farrell, Corporation Counsel, attorney for appellant (Mary Ann Murphy, Assistant Corporation Counsel, on the briefs).

K&L Gates, LLP and Craig M. White (Baker & Hostetler, LLP) of the Illinois bar, admitted pro hac vice, attorneys for respondent (Anthony P. La Rocco and Mr. White, on the brief).

PER CURIAM

By leave granted, the City of Jersey City (City) appeals from an April 10, 2015 order granting partial summary judgment

to plaintiffs on Count II of their complaint, holding that financial agreements entered into in 2000 and 2001 incorporate 2003 amendments to the Long Term Tax Exemption (LTTE) Law, N.J.S.A. 40A:20-1 to -22, and a May 29, 2015 order denying reconsideration. The City claims that plaintiffs, EQR-Lincoln Urban Renewal Jersey City, LLC (EQR-Lincoln) and EQR-LPC Urban Renewal North Pier, LLC (EQR-North Pier), attempted to circumvent a tax abatement agreement by improperly changing their allowable profit rate so as to avoid paying the City any excess net profit. The City argues that the trial court misinterpreted the 2000 and 2001 financial agreements, warranting reversal. We agree and therefore reverse and remand for further proceedings.

I.

We discern the following facts from the record, viewed in the light most favorable to the non-moving party. See Robinson v. Vivirito, 217 N.J. 199, 203 (2014). Plaintiffs are limited liability companies that qualify as urban renewal entities under the LTTE Law. Each plaintiff entered into a separate financial agreement with the City to obtain a property tax exemption relating to an urban renewal project involving construction of an apartment building. Among other things, the financial

agreements require plaintiffs to pay the City an "annual service charge" in lieu of property taxes.

Hudson Pointe Agreement

On August 10, 2000, the City and EQR-Lincoln entered into a financial agreement (Hudson Pointe Agreement), which provides for a tax exemption in exchange for construction of improvements on real estate located at 153 Warren Street in Jersey City.[1] One month earlier, the City adopted Ordinance 00-083, approving the tax exemption for the project and setting forth the following essential terms of the agreement:

> (a) Term: the earlier of 25 years from the date of the adoption of this Ordinance, or 20 years from the date of Substantial Completion of the Project;
>
> (b) Annual Service Charge: 15% of annual gross revenue as defined in the financial agreement estimated at $577,381.00;
>
> (c) Project: A six (6) story residential building, containing approximately one hundred eighty-one (181) market rate residential rental units with adjacent parking for approximately two hundred six (206) cars; and
>
> (d) Property: Block 60, Lots 31, 32, and 50, and Block 65, part of Lot 1G, consisting of 4.34 acres.

[1] At the time, the project was known as the Tidewater Basin Redevelopment Plan.

The Hudson Pointe Agreement further provides that EQR-Lincoln is the lessee of the real estate under the terms of a long-term ground lease, while the owner and lessor of the real estate is EQR-Lincoln Hudson Pointe, LLC.

North Pier Agreement

On September 7, 2000, the City and EQR-North Pier entered into a financial agreement (North Pier Agreement), which follows the same format as the Hudson Pointe Agreement – it provides for a tax exemption, in exchange for improvements on a parcel of real estate located at Harborside North Pier. In August 2000 and February 2001, the City adopted Ordinances 00-090 and 01-015 approving the tax exemption for the project and setting forth the following essential terms of the agreement:

> (a) Term: the earlier of 25 years from the date of the adoption of this Ordinance, or 20 years from the date of Substantial Completion of the Project;
>
> (b) Annual Service Charge: 15% of annual gross revenue as defined in the financial agreement estimated at $1,108,593.00, subject to statutory increases over the term of the tax exemption;
>
> (c) Project: A seven (7) story residential building, containing approximately two hundred and ninety-six (296) market rate residential rental units with adjacent garage facility and the

> construction of a public walkway; and
>
> (d) Property: Block 10, Lots 12, 13 and part of 7, consisting of 3.69 acres.

The North Pier Agreement provides that EQR-North Pier is the lessee of the real estate under the terms of a long-term ground lease, while the owner and lessor of the real estate is EQR-Lincoln North Pier, LLC.

Both financial agreements state, in "Section 1.1 Governing Law," that the agreements "shall be governed by the provisions of the [LTTE Law], as amended and supplemented, N.J.S.A. 40A:20-1 et seq., Executive Order of the Mayor S-039," and specific authorizing City Ordinances. Both financial agreements also provide:

> In consideration of the tax exemption, the Entity shall make payment to the City of an amount equal to the greater of: the Minimum Annual Service Charge or an Annual Service Charge equal to 15% of the Annual Gross Revenue in the first full year after the Lease Up Period. The Annual Service Charge shall be billed initially based upon the Entity's estimates of Annual Gross Revenue as set forth in its Financial Plan, attached hereto as Exhibit 6. Thereafter, the Annual Service Charge shall be adjusted in accordance with this agreement.

In addition, both financial agreements require plaintiffs to pay any excess net profits to defendant:

> During the period of tax exemption as provided herein, the Entity shall be subject to a limitation of its profits [and, in the case of a corporation, the dividend payable by it] pursuant to the provisions of N.J.S.A. 40A:20-15.
>
> . . . .
>
> In the event the Net Profits of the Entity, in any fiscal year, shall exceed the allowable Net Profits for such period, then the Entity, within 90 days after the end of such fiscal year, shall pay such excess Net Profits to the City as an additional service charge[.]

The financial agreements also include the following definition of "Allowable Profit Rate":

> The percentage per annum arrived at by adding 1.25% to the annual interest percentage rate payable on the Entity's initial permanent mortgage financing. If the initial permanent mortgage is insured or guaranteed by a government agency, the mortgage insurance premium or similar charge shall be considered as interest for this purpose. If there is no permanent mortgage financing, or if the financing is internal or undertaken by a related party, the Allowable Profit Rate shall be arrived at by adding 1.25% per annum to the interest rate per annum which the municipality determines to be the prevailing rate on mortgage financing on comparable improvements in Hudson County. The provisions of N.J.S.A. 40A:20-3(b) are incorporated herein by reference.

Additionally, both financial agreements include "General Definitions" sections that further define the term "Law," as follows:

> Law – Law shall refer to the [LTTE Law], as amended and supplemented, N.J.S.A. 40A:20-1, et seq.; Executive Order of the Mayor S-039, relating to long term tax exemption, as it may be amended and supplemented; [and the City Ordinance(s)], which authorized the execution of this Agreement and all other relevant Federal, State, or City statutes, ordinances, resolutions, rules and regulations.

The financial agreements further state that "in the event of a conflict between the Application and the language contained in the Agreement, the Agreement shall govern and prevail. In the event of conflict between the Agreement and the Law, the Law shall govern and prevail."

In early 2014, plaintiffs submitted an Auditor's Report and excess-net-profits calculation to the City for 2013, as required by the financial agreements. Plaintiffs calculated their allowable profits using the 12% allowable profit rate provided in the 2003 amendments to the LTTE Law, rather than the rate calculated by adding 1.25% to the annual-interest-percentage rate payable on the Entity's initial permanent mortgage financing, as provided in the version of the statute in effect at the time of each financial agreement. Using the amended

rate, plaintiffs did not have excess net profits, and thus did not owe any excess-net-profit payment to the City.

After receiving plaintiffs' excess-profits calculation, the City sent a default notice demanding payment of $665,575.25 in excess profits for 2013. In a follow-up letter, defendant notified EQR-Lincoln that "[y]our reliance on the calculation found in the Long Term Tax Exemption Law as amended in 2003 is rejected."

EQR-Lincoln paid the disputed excess-net-profits amount for 2013 "under protest," with full reservation of rights. This followed a similar dispute and payment "under protest" of excess profits for years prior to 2013, in the amount of $2,266,345.

The record indicates that from 2006 to 2012, excess profit had been generated by each plaintiff; however, instead of paying the excess profit to the City each year as an additional service charge, each plaintiff paid the excess profit over to a related entity, instead of the City.[2]

On May 9, 2014, plaintiffs filed a two-count complaint seeking a declaratory judgment against the City. Count I seeks

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[2] The City notes that, notwithstanding the fact that the amendment changing the calculation methodology was enacted in 2003, plaintiffs had utilized the agreed-upon rate in calculating their allowable net profit prior to 2014. However, as noted, plaintiffs avoided paying the excess profits to the City by funneling them to related corporate entities.

a judgment declaring that the applicable law and financial agreements permit plaintiffs to pay "excess rent" to affiliated entities under certain ground leases, with the effect of eliminating the "excess net profit" that plaintiffs might otherwise owe to the City. Count II seeks a judgment declaring that the parties' financial agreements incorporate future changes to applicable law, such that plaintiffs may calculate their "allowable profit rate" in accordance with the 2003 amendments to the LTTE Law.

On March 13, 2015, plaintiffs moved for partial summary judgment on Count II of their complaint, seeking entry of an order holding that the financial agreements entered into in 2000 and 2001 incorporate the 2003 amendments to the LTTE Law, and control the calculation of net profits and allowable net profit for years subsequent to 2003. In granting partial summary judgment, the trial judge concluded that this case turned on a contract interpretation dispute. The judge reasoned the express language of the contract, "as amended and supplemented," demonstrates that the parties agreed to incorporate future amendments to the LTTE Law in their financial agreements. He further concluded that the 2003 amendments to the LTTE Law applied to the financial agreements, and that legislative history supported his conclusions of what he found was "an

unambiguous interpretation of the contract." The City moved for reconsideration, which the judge denied.

On July 23, 2015, we granted the City's motion for leave to appeal. On August 5, 2015, plaintiffs filed a motion to determine damages and defendant filed a cross-motion for a stay pending appeal. On August 21, 2015, the trial court entered an order granting defendant's cross-motion for a stay pending appeal.

On appeal, the City asserts the trial court erred in its summary judgment ruling because the LTTE Law did not sanction plaintiffs' unilateral changes to their financial agreements. At the center of the dispute between plaintiffs and the City is a matter of contract interpretation; specifically, whether the financial agreements incorporated future amendments to the LTTE Law, including the provisions of the 2003 amendments relating to the calculation of excess net profits.

We begin with a review of the pertinent changes to the LTTE Law. In 2000, N.J.S.A. 40A:20-3(b) (emphasis added) read:

> "Allowable profit rate" means the percentage per annum arrived at by adding 1 1/4% to the annual interest percentage rate payable on the entity's initial permanent mortgage financing. If the initial permanent mortgage is insured or guaranteed by a governmental agency, the mortgage insurance premium or similar charge, if payable on a per annum basis, shall be considered as

> interest for this purpose. If there is no permanent mortgage financing the allowable profit rate shall be arrived at by adding 1 1/4% per annum to the interest rate per annum which the municipality determines to be the prevailing rate on mortgage financing on comparable improvements in the county.

In 2003, the LTTE Law was amended in response "to technical problems which [had] arisen in the implementation of these laws and substantive issues raised in a series of recent court decisions." Senate Econ. Growth, Agric. & Tourism Comm., Statement to S. 2402, at 1 (March 17, 2003). The Legislature amended the LTTE Law effective July 9, 2003, so that it currently reads:

> "Allowable profit rate" means the greater of 12% or the percentage per annum arrived at by adding 1 1/4% to the annual interest percentage rate payable on the entity's initial permanent mortgage financing. If the initial permanent mortgage is insured or guaranteed by a governmental agency, the mortgage insurance premium or similar charge, if payable on a per annum basis, shall be considered as interest for this purpose. If there is no permanent mortgage financing the allowable profit rate shall be the greater of 12% or the percentage per annum arrived at by adding 1 1/4% per annum to the interest rate per annum which the municipality determines to be the prevailing rate on mortgage financing on comparable improvements in the county.

[N.J.S.A. 40A:20-3(b) (emphasis added).]

We review the trial court's entry of summary judgment in accordance with the standard set forth in Rule 4:46-2(c). State v. Perini Corp., 221 N.J. 412, 425 (2015) (citations omitted). That standard compels a court to grant summary judgment "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). When there is no issue of fact, and only a question of law remains, we review that question de novo; the legal determinations of the trial court are not entitled to any special deference. Gere v. Louis, 209 N.J. 486, 499 (2012) (citation omitted); Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995). When "summary judgment is based on an issue of law, we owe no deference to an interpretation of law that flows from established facts." Perini Corp., supra, 221 N.J. at 425 (citing Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013)).

Contractual interpretation is a legal matter ordinarily suitable for resolution on summary judgment. Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). The touchstone for interpretation is the parties'

shared intent in reaching the agreement. Pacifico v. Pacifico, 190 N.J. 258, 266 (2007). So long as that intent is evident from the contract's clear, unambiguous terms, the agreement will be enforced as written. Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493 (App. Div.), certif. denied, 127 N.J. 548 (1991).

To the extent any ambiguity exists, that is, to the extent that a contractual term is susceptible to more than one reasonable interpretation, Powell v. Alemaz, Inc., 335 N.J. Super. 33, 44 (App. Div. 2000), a court may discern the parties' intent from evidence bearing on the circumstances of the agreement's formation, Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269 (2006), and of the parties' behavior in carrying out its terms, Savarese v. Corcoran, 311 N.J. Super. 240, 248 (Ch. Div. 1997), aff'd, 311 N.J. Super. 182 (App. Div. 1998). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales, supra, 249 N.J. Super. at 492 (citations omitted). In interpreting a contract, the focus is on "the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to

attain . . . ." Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 339 (App. Div.) (citation and internal quotation marks omitted), certif. denied, 188 N.J. 353 (2006). In that regard, the court may not re-write a contract or grant a better deal than that for which the parties expressly bargained. Solondz v. Kornmehl, 317 N.J. Super. 16, 21 (App. Div. 1998).

Applying these principles, we conclude the language of the financial agreements did not support the entry of summary judgment in favor of plaintiffs.

First, the express language embodied in the contracts does not support the motion judge's interpretation. Notably, the section of the contracts that defines the profit calculation tracks the pre-2003 LTTE Law terms. Specifically, to the extent that the financial agreements describe the pre-2003 method of calculating "allowable profit rate" in Section 1.2, Subsection ii, this is essentially a word-for-word recitation of the LTTE Law, N.J.S.A. 40A:20-3(b), as it existed in 2000 before the 2003 amendments. Repeating this language, as opposed to simply incorporating the LTTE Law by reference, indicates the parties' intent that this calculation method would control.

In addition, we find that the language in the financial agreements qualifying the LTTE Law, "as amended and

supplemented," references any amendments or supplements that became effective on or before the date of the financial agreements; it does not include future amendments and supplements as plaintiffs argue. Instead, the only reasonable interpretation of the "as amended and supplemented" language refers to amendments and supplements made to the LTTE Law after its initial adoption in 1991 that had become effective on or before the date the financial agreements were executed. The LTTE Law cannot be viewed in a vacuum; rather, it was amended after its enactment and before the execution of the financial agreements at issue. See, e.g., Millennium Towers Urban Renewal LLC v. Mun. Council of Jersey City, 343 N.J. Super. 367, 380 (Law Div. 2001) ("The Long Term Tax Exemption Law was enacted in 1991 and subsequently amended in 1992 following the passage of the Local Development and Housing Law.").

This interpretation is even more compelling in the context of the entire contract. In defining the "Law," the financial agreements state that this refers to: "the Long Term Tax Exemption Law, as amended and supplemented, N.J.S.A. 40A:20-1, et seq., Executive Order of the Mayor S-039, relating to term tax exemption, as it may be amended and supplemented . . . ." (Emphasis added). This different wording indicates that the Executive Order of the Mayor may be amended and supplemented,

whereas the LTTE Law has already been amended and supplemented. See Krosnowski v. Krosnowski, 22 N.J. 376, 387-88 (1956) ("Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing and every word of it, will, if possible, be given effect."). Accordingly, we conclude that "as amended and supplemented" simply meant that the financial agreements intended to reference the version of the LTTE Law as it existed in 2000, including any amendments or supplements to the statute that followed the law's initial enactment, up to the date of the contracts under review.

We further find it contrary to fundamental public financing concepts for the Legislature to adjust the terms of municipal tax abatement contracts after the fact. See N.J.S.A. 40A:20-2, N.J.S.A. 40A:12A-2. And, we do not find that the Legislature intended to do so in the 2003 LTTE amendments. While the legislative intent must be considered when a court is interpreting a statute or new legislative amendments, "all doubts are resolved against those seeking the benefit of a statutory exemption[,] which in turn is based upon the fundamental principle of equality of the taxation burden." Teaneck Twp. v. Lutheran Bible Inst., 20 N.J. 86, 90 (1955) (citations omitted).

When the LTTE Law was amended in 2003, it ratified and validated all existing financial agreements, including "the structure and methods used to calculate excess profits." N.J.S.A. 40A:20-22. We interpret this to mean that the Legislature did not intend to disrupt the financial terms of existing contracts. Contrary to plaintiffs' position, "[i]t is well established that courts and legislatures are loath to apply the effect of a statute retroactively." Chase Manhattan Mortg. Corp. v. Spina, 325 N.J. Super. 42, 48 (Ch. Div. 1998), aff'd, 325 N.J. Super. 1 (App. Div. 1999). Rather, the purpose and effect of N.J.S.A. 40A:20-22 is to validate pre-existing contractual arrangements, so that municipalities, and thus the taxpayers, receive the benefit of their bargains.

The City also claims plaintiffs were violating the financial agreements by funneling their excess profits to an affiliate as "excess rent." We agree with plaintiffs that this claim was not addressed in the trial court's decision under review, and hence was not within the scope of our order granting leave to appeal. See R. 2:2-4; Towpath Unity Tenants Ass'n v. Barba, 182 N.J. Super. 77, 81 (App. Div. 1981).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION