

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TOWN OF CHESWOLD, a :
municipality of the State of Delaware, : C.A. No. 270, 2017
:
Petitioner Below, :
Appellant, :
:
v. :
:
CENTRAL DELAWARE BUSINESS: Court Below: Superior Court
PARK, a Delaware general : of the State of Delaware, C.A. No.
partnership, : K13M-08-016 JJC and the Court of
:
:
Respondent Below, : Chancery of the State of Delaware,
Appellee. : C.A. No. 1574-JJC (Consolidated)

**APPELLEE CENTRAL DELAWARE BUSINESS PARK'S
ANSWERING BRIEF**

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NATURE OF PROCEEDINGS

The Business Park adopts the Town's statement of the Nature of Proceedings before this Court.

SUMMARY OF ARGUMENT

1. Vested rights determinations prevent unwarranted police power expansion in land use regulation beyond that necessary to adequately protect the general welfare. The purpose of perpetually vested land use rights is to allow property owners certainty in the use and development of land under existing zoning restrictions that adequately protect the general welfare. The police power is limited in application to those restrictions reasonably necessary to protect the general public. Vested rights determinations establish the bounds of necessity by limiting the future abridgment of property rights already encumbered with sufficient general welfare protections. The Superior Court's determination that the Business Park's property rights were perpetually vested was correct. Delaware has no divestment rule and vested means permanent. The Town knowingly agreed to vesting rather than litigation. The law of non-conforming uses will not suffer from the rare finding of vested rights.

2. The Superior Court properly held that the 2005 Stipulated Orders recognized that the Business Park acquired perpetually vested rights and the doctrine of *res judicata* provides final resolution of that matter. The Superior Court correctly applied the five factor test of *res judicata* to the facts.

3. The Superior Court properly rejected the Town's arguments that (1) it could not legally enter into the Settlement Agreement because it impermissibly bound future Town Councils and (2) that its actions amounted to illegal contract zoning as a matter of law. The Superior Court properly found the Settlement Agreement was a binding contract, respecting the Business Park's perpetual vested rights and was not illegal. The Superior Court correctly found that even if the Settlement Agreement contained an *ultra vires* act by the Town, that the Court could properly sever the offending provision and still enforce the remaining Settlement Agreement which recognized the Business Park's perpetual vested rights. The Superior Court correctly concluded that settling a contentious fact intensive vested rights litigation is beneficial to the public, to municipalities and to property owners.

RESPONSE TO APPELLANT'S SUMMARY OF ARGUMENT

1. Denied. It is specifically denied that property owners may not acquire a perpetual vested right to a given zoning or land use classification. It is further specifically denied that the Superior Court erred as a matter of law by holding that vested rights are *perpetually* vested. It is also specifically denied that the Superior Court's opinion alters the balancing test of *In re 244.5 Acres of Land*, 808 A.2d 753 (Del. 2002), in any way, because the Town conceded, by its Town Resolution, that the Business Park's property rights were already vested. The *In re 244.5 Acres*

analysis was mooted by the Town's admission, leaving the balancing test intact for future litigants.

2. Denied. It is specifically denied that the Superior Court erred in finding that *res judicata* bars the Town's attempt to abandon the 2005 Stipulated Orders and litigate the Business Park's vested rights, particularly where the settlement incorporated the Town's admission by its Town Resolution that the Business Park's rights in the 1977 zoning classification and rules were indeed vested. It is further specifically denied that the 2005 Stipulated Orders and Settlement Agreement entered into by the Town constitute illegal contract zoning since each agreement incorporated public proceedings resolving disputed claims of parties joined in pending litigation. It is further specifically denied that the Superior Court erred in finding that future Town of Cheswold Councils were bound by the Settlement Agreement and Stipulated Orders of the Superior Court and the Court of Chancery as a matter of law. It is further specifically denied that the meaning and legality of the 2005 Stipulated Orders were not previously adjudicated, given the fact both stipulations were entered as final orders of the Court of Chancery and Superior Court.

STATEMENT OF FACTS

On October 25, 2005, the Stipulation and Order of Dismissal in the 2005 Chancery Action was entered that implemented the settlement agreement negotiated between the Town and the Business Park regarding the Business Park's vested rights claims arising out of its investment and development of an ongoing industrial park in the Town of Cheswold. B43-45. The global settlement agreement negotiated between the parties consists of a draft zoning ordinance amendment called Article 5A, a unanimous resolution passed by the Town Council of the Town of Cheswold dated September 19, 2005, correspondence of legal counsel negotiating final points of agreement, and the entry of the Chancery Stipulated Order resolving, per the terms of the settlement agreement, the claims raised in that multi-count Chancery complaint (collectively the "Settlement Agreement"). B7; B36-B45. A companion Stipulated Order was entered by Superior Court to close out the Mandamus action which had been filed to force the Town to recognize its adoption of the Article 5A Land Use Code amendment A77-78; (together referred to as the "Stipulated Orders"). B43-B45; A77-78

The foundation of the Settlement Agreement was the Town's admission and recognition that the Business Park had acquired perpetual vested property rights in the continued development of the Business Park under the 1977 Town of Cheswold

Zoning Ordinance, both its M-1 zoning classifications and uses and the process and procedure for park development established in the 1977 Zoning Ordinance. A12-A38. The Town Council's unanimous public resolution of September 19, 2005 took note of the Business Park's strongly held equitable claim (asserted in detail in the pending Chancery complaint) to vested property development rights in the 1977 Zoning Ordinance and conceded the Business Park's claims were valid: "WHEREAS, the Town has been served with two lawsuits regarding the Central Business Park regarding the Park owner's insistence they have a vested interest rights to build and develop this Park under conditions set forth in the Cheswold 1977 Zoning Ordinance instead of the newly passed Land Use Ordinance dated April 4, 2005." (the "Town Resolution") B39.

The Town Resolution disclosed its misgivings about allowing the entire Business Park to retain its 1977 development requirements, but those misgivings were set aside based on the Town's acceptance of advice from its legal counsel: "WHEREAS, the Town's position is basically in agreement with vested rights but strongly believe the wording in paragraph 5A must be agreed upon by the respective attorneys and a buffer of light industrial land should be adjacent to the Strimmel Mobile Home Park." B39.

Indeed the attorneys did reach agreement on final acceptable language in 5A and the Town withdrew its demand to impose a buffer of light industrial land in the

Business Park and thus the Business Park retained its 1977 M-1 zoning classification for the entire park property as an acknowledged vested right and the vested rights ordinance of Article 5A was recognized by the Town as amending the 2005 Land Use Ordinance to perpetually protect the Business Park's vested rights. As consideration for entering into the Settlement Agreement, the parties agreed to and ultimately did execute the Stipulated Orders dismissing both the 2005 Chancery Action and the 2005 Mandamus Action. B43-B45; A77-78. Significantly, the dismissed 2005 Chancery Action articulated a detailed vested rights claim under Delaware law: "21. The Central Delaware Business Park has vested property development rights in its subdivision plan. It has invested over \$2.5 million in infrastructure improvements and land costs in good faith reliance on the existing M-1 zoning development regulations and final development plans approved by the Cheswold. *In re 244.5 Acres of Land*, 808 A.2d 753 (Del. 2002). The Town of Cheswold cannot terminate property development rights that are so vested." B22.

The Town seeks to void the contractual Settlement Agreement reached between the Town and the Business Park in 2005 by its 2013 Petition. (Dkt 1) As filed, the Petition only addresses the 2005 Mandamus Action but given the Town's stated intention to down zone the Business Park, the 2005 Chancery Action and Settlement Agreement are implicated. (Dkt 1)

The negotiation of the Business Park's vested rights claims ultimately preserved in the Settlement Agreement began with correspondence from the Town's legal counsel dated February 1, 2005. B1-B2. That letter formally presented the Business Park's claim of vested rights both as to the zoning and development requirements: "Any action by the Town to alter in any way the existing zoning for the Central Delaware Business Park or the development requirements or standards for the park that differ in any way from those in place when this development was approved will be met by the filing of litigation in the Court of Chancery for both injunctive relief and damages." B1. The Business Park's counsel then sent a formal notice of intention to file suit on March 16, 2005 to the Town in compliance with the Town Charter's claims notice requirements. B3-B5. The March 16th letter again asserted the Business Park's vested rights in the 1977 Zoning Ordinance, along with case authority, and included a draft of the Article 5A vested rights ordinance for the Town's consideration to avoid litigation. B3-B5.

The Town's legal counsel acknowledged the validity of the Business Park's vested rights claim and proposed ordinance by his letter of March 30, 2005 addressed to Town Council. B6-B7. Counsel for the Business Park then notified the Town Manager by letter of April 4, 2005 of the Business Park's insistence that its vested rights be acknowledged by the Town in the impending April 4, 2005 Town Council

meeting at which the new land use ordinance eliminating the M-1 zoning and the Business Park's vested rights was to be voted on by the Town. B8-B9.

The April 4th Town meeting saw the passage of Article 5A by voice vote, but controversy soon followed when the Town's minutes reflected a contrary action as detailed in the 2005 Chancery Complaint. B16-B21. The Business Park notified the Town's attorney by letter of May 27, 2005 that a writ of Mandamus action would be filed to compel the Town to recognize it had adopted Article 5A to protect the Business Park's vested rights. B10-B11. The Business Park also renewed its threat of filing litigation to protect its vested rights and on June 6, 2005, having received no satisfaction from the Town, counsel for the Business Park notified the Town's counsel that the threatened Chancery litigation to preserve its vested rights would be filed as well as a writ of Mandamus petition, which indeed were filed and ultimately resolved by the Settlement Agreement and Stipulated Orders negotiated between the parties and finalized on September 28, 2005 by counsel following significant negotiations and change of positions. B12; B13-B35.

Minutes of Town Council meetings in 2013 reveal that the Town now wishes to disavow the 2005 Settlement Agreement and move forward with downzoning the vacant lots in the park (several located adjacent to the Strimmel Mobile Home Park) from the M-1 zoning. B46-B50. Current Town Councilman Bob Sine (also a signatory of the September 19, 2005 Town Resolution acknowledging the Business

Park's vested rights in the 1977 Zoning Ordinance) publicly stated on September 3, 2013 that "We want the right to rezone those lots not currently in use as a M-1 property." B48.

Town Land Use Administrator and Council Person Theon Callender confirmed at her deposition that Councilman Sine expressed his intention to change the zoning of vacant lots in the Central Delaware Business Park so they conform to the current Cheswold land use ordinance and not the 1977 Zoning Ordinance. B75. The typed minutes of the September 3, 2013 Town Council meeting succinctly described the Town's desire to void the Settlement Agreement and no longer recognize the Business Park's vested rights in the 1977 Zoning Ordinance by the following entry: "M-1 Land Use Ordinance – Secretary/Treasurer Theon Callender: Mrs. Callender requested the Council to provide their opinion of what is required to resolve the M-1 issue of zoning. After discussion it was decided to inform Mr. Walton that the Council desires to make decisions and changes directed by our Land Use Ordinance for properties within the business park that were not developed but previously designated as M-1." B50.

Ms. Callender further testified in her deposition that even though she was the Land Use Administrator and a member of Council she was not aware of the existence of the September 19, 2005 Town Resolution by Town Council recognizing the Business Park's vested rights or the requirement in the vested rights provision of the

land use ordinance (the original Article 5A) that the 1977 Zoning Ordinance was to be applied to all development in the Central Delaware Business Park. B86-B91. The Town's Land Use Administrator admitted in her deposition that environmental permits and approvals for the industrial uses in the Business Park are issued by DNREC and the State Fire Marshal's office independent of the Town. B96-B102.

The underlying vested rights claims against the Town were well known before suit was even filed commencing with the Business Park's letter of February 1, 2005 and followed by the Business Park's letters of March 16, April 4, May 27 and June 6 of 2005. B1-B12. The vested rights claims were then clearly set out in the Chancery complaint. B13-B35. Both pre-suit and post-suit the Business Park steadfastly maintained the Business Park's insistence of immutable vested property rights in the 1977 Zoning Ordinance that the Town resisted until the final exchange of attorney correspondence in September 2005. B36-B45. The Town and the Business Park executed the Stipulated Orders giving up the right to litigate those underlying claims based upon the rights secured under the Settlement Agreement. The Town's unanimous 2005 Town Resolution noted this with specificity: "In return for the aforementioned agreement, the Plaintiff agrees to withdraw both lawsuits." B39.

ARGUMENT

I. VESTED RIGHTS IN DEVELOPMENT PLANS UNDER ESTABLISHED ZONING CLASSIFICATIONS ARE PERPETUAL AND FREE FROM FUTURE POLICE POWER INFRINGEMENTS.

A. Question Presented

Whether the Superior Court correctly held that the Business Park's property development rights under the established M-1 zoning classification were perpetually vested and free from future police power infringement?¹

B. Standard and Scope of Review

The Superior Court's grant of summary judgment on the issue of vested rights is a question of law that is reviewed *de novo*.

C. Merits

The Superior Court correctly held that "vested rights remain perpetually vested." Op. at 22. The Court correctly consulted existing Delaware law to conclude that there is no expiration on a vested right. Op. at 23. The Court properly held that the doctrine of vested rights "prohibits the Town from taking any legislative action that would interfere" with the Business Park's vested rights. Op. at 23. The Court properly rejected the Town's argument that the pre-vested rights balancing

¹ This question was preserved below in the Business Park's Opening Brief in Support of Its Motion for Summary Judgment (Dkt 47 at 10-19) and in the Business Park's Answering Brief in Response to Motion for Summary Judgment (Dkt 55 at 2-14)

test of *In re 244.5 Acres of Land*, 808 A.2d 753 (Del. 2002) should be applied to somehow “divest” legally established vested rights in development plans approved under established zoning classifications, correctly finding that Delaware decisions have not so limited the length of time a vested right remains vested. Op. at 22.

1. The Purpose of Perpetually Vested Land Use Rights Is To Allow Property Owners Certainty in the Use and Development of Land Under Existing Zoning Restrictions That Adequately Protect the General Welfare

Real property rights have always been perpetually vested to some degree by constitutional protection while the reach of police power restrictions on land use has always been subject to judicially imposed limitations. The police power is not constitutionally based but is derived from judicial determinations of the limits of sovereignty. *City of Wilmington v. Turk*, 129 A.2d 512, 515-516 (Del.Ch. 1925). “The origin of property rights in America can be traced to the Magna Charta in 1215, which protected the rights of property owners against arbitrary actions by the sovereign.” *Cannon v. State of Delaware Upon the Relation of the Secretary of the Department of Transportation*, 807 A.2d 556, 566 (Del. 2002). The police power is not established by the constitution, but is a judicially created concept. *In re Ceresini*, 189 A. 443, 448 (Del.Super.Ct. 1936). “Under the guise of the police power of the State, the use and enjoyment of private property cannot be subjected to arbitrary and unreasonable restrictions which clearly are *not essential* to the public good or general

welfare of the community.” *Ceresini* at 449, citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). (emphasis added)

a. The Police Power Is Limited in Application To Those Restrictions Reasonably Necessary To Protect the General Welfare

After *Euclid*, this Court imposed limitations on the extent of police power interference with private property endeavors: “the police power may not be invoked for an abridgment of the use of private property, unless the use reasonably menaces the general welfare; and that the compensation for the sacrifice of private rights is found in the protection afforded the general welfare by the exercise of the power.” *Appeal of Lloyd*, 196 A. 155, 157 (Del.Super.Ct. 1937). In *Lloyd*, this Court concluded that the founding principle of police power restrictions on property was necessity, and as such the citizens’ property rights may not be “sacrificed beyond the bounds of a reasonable necessity.” *Id.* In *Turk*, in 1925, the Chancellor warned of the danger of an ever expanding police power doctrine: “Thus was created the police power. Is there not a danger in these days of rapid advance to desired ends, of so enlarging this power which was designed simply to qualify constitutional rights as to completely destroy them?” *Turk* at 522.

b. Vested Rights Determinations Establish the Bounds of Necessity By Limiting the Future Abridgment of Property Rights Already Encumbered With Sufficient General Welfare Protections

Delaware's vested rights jurisprudence builds on *Turk*, *Lloyd*, *Ceresini* and *Euclid* to set those bounds of reasonable necessity as the point in time when reasonable zoning restrictions have been enacted to protect the general welfare and accordingly are reasonably relied upon by land owners in the expenditure of money, time and intention to develop and enjoy their property in conformity with those existing police power limitations that are already deemed reasonably sufficient to protect the general welfare.

Vested rights limits on otherwise ever-changing zoning requirements resolves the constant tension between predictable land development and unpredictable regulatory intrusions this Court recognized in *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612 (Del. 1971): "We take the occasion to emphasize, however, that the rules of certainty and stability protecting owners of real property, and the rule of reasonableness [in zoning amendments] here approved, may not permit such vacillating zoning action ordinarily." *Willdel* at 615.

In *Wilmington Materials v. Town of Middletown*, 1988 WL 135507 (Del.Ch. Dec. 16, 1988), a specific zoning classification was judicially insulated from later legislative amendment by a finding of vested rights in the existing zoning classification originally relied upon by the developer. *Id.* at *9 That vesting analysis, by the very nature of the balancing test employed, drew a boundary line against future zoning changes and infringements. *Id.* The Court in *Wilmington*

Materials essentially applied the *Lloyd* maxim of “necessity” and the *Willdel* concern for “predictability” to foreclose further sacrifice of private rights by vesting those rights within the confines of the existing “protections afforded the general welfare.” *Lloyd* at 157.

In this Court’s later opinion of *In re 244.5 Acres*, building upon the vested rights balancing test of *Wilmington Materials*, the extent of legislative imposition of police power restrictions was again curtailed by recognizing that a developer moving forward with development approvals in good faith acquired vested rights in a plan of development under the ordinances under which he was proceeding. *Id.* at 757-758. As in *Wilmington Materials*, the general welfare was deemed adequately protected by existing regulations.

In both *Wilmington Materials* and *In re 244.5 Acres*, the public interest in further amendments of existing zoning and land use ordinances was weighed against further limitations imposed on landowners engaged in the productive use of their land and that analysis resulted in setting a boundary of perpetual vested rights against further unnecessary changes. Both decisions rejected the interference of subsequent land use restrictions with the vested property rights of land owners. Neither decision limited the length of time that vested rights for property use and development were free from subsequent land use legislative restrictions.

2. The Superior Court's Determination That the Business Park's Property Rights Were Perpetually Vested Was Correct

a. Delaware Has No Divestment Rule and Vested Means Permanent.

The Superior Court correctly held that the balancing inquiry of *Wilmington Materials* and *In re 244.5 Acres* only applies when the initial claim of vested rights is being determined, not, as in this case, more than 11 years later: “The issue of delay in both the Delaware Supreme Court and the Delaware Court of Chancery cases factored into the *initial* determination of whether the developer obtained vested rights.” Op. at 22. (emphasis original) Because the Business Park already acquired its vested rights by acknowledgment of the Town as preserved in the Settlement Agreement and Stipulated Orders, the initial determination of vesting in 2005 moots any later application of the reliance-balancing test. Op. at 22.

The Court correctly refused to create a divesting test based upon the passage of time:” The passage of a period of time does not make it any more equitable to change the nature of the right after a party has relied upon it.” Op. at 23. The Court properly found that no Delaware decision limited the length of time property rights remained vested and correctly found that “[v]ested means that a person or property has acquired a right for the present and future, and that right is absolute.” Op. at 22.

b. The Town Knowingly Agreed to Vesting Rather Than Litigation

In the underlying Chancery Court filing by the Business Park in 2005, a detailed summary of the facts of substantial reliance and the state of the law of vested rights and equitable estoppel were plead by the Business Park in detail. B13-B35. Rather than litigate the issue of vested rights and be subject to the Section 1983 claims also plead, the Town knowingly, and with guidance of experienced municipal legal counsel, recognized the Business Park's vested rights in the M-1 zoning and the Business Park's approved, recorded and active plan of development, with all of the ramifications that decision entailed. The Superior Court also made note of the significance of the Towns' choice in 2005: "There is no question that the Court of Chancery could have issued a final binding decision, after trial on the merits, finding that [the Business Park's] rights were vested. Instead however, the Town was able to conserve its resources by entering into the settlement agreement in 2005, which resolved all litigation in this matter." Op. at 19. See also the Courts comment in footnote 63 of its Opinion. Op. at 23, fn 63.

c. The Town's Vesting Decision Meets the *Willdel* Concern For Predictability and the *Lloyd Maxim* of Necessity

In 1977, the Town of Cheswold imposed "abridgments" on private property by establishing the M-1 zoning district uses and regulations to protect the general welfare of its citizens. A12-A38. Applying the necessity rule of *Lloyd*, the M-1 zoning restrictions circumscribed the necessity of imposing any further abridgments

on the Business Park when the Town conceded that the Business Park's property rights had vested under the M-1 zoning restrictions. The Town correctly concluded that the Business Park's right to operate under the restrictions of the M-1 zoning ordinance had vested and by agreeing to that doctrine necessarily conceded that the reasonable and necessary abridgments of private property rights essential to protect the citizenry of Cheswold were already in place. The predictability concern of *Willdel* was satisfied by the Town's consent to vesting the Business Park's plan and zoning. *Willdel* at 615.

d. The Superior Court Properly Acknowledged the Boundary of Vesting Protects Landowners and the General Welfare

The Superior Court correctly looked to the plain meaning of the term "vested" in reaching its conclusion that "Vested means that a person or property has acquired a right for the present and future, and that right is absolute." Op. at 22 citing Black's Law Dictionary (10th ed. 2014). The Court correctly concluded that finding vested rights are perpetual complies with the public policy concerns inherent in the original determination to find the proper reliance and equities necessary to initially establish a claim of vested rights: "The doctrine [of vested rights] recognizes that, after a certain point, it would be inequitable to allow legislatures or town councils to change the law affecting the property. The passage of a period of time does not make it any

more equitable to change the nature of the right after a party has relied upon it.” Op. at 23.

3. The Law of Non-Conforming Uses Will Not Suffer From the Rare Finding of Vested Rights

Because vested rights, like equitable estoppel against the government, are rarely found, the prospect of upending the law of non-conforming uses is entirely remote, except as to those properties which indeed are found to be vested with perpetual property rights, such as the Business Park. In those rare and special cases, it is agreed that vested rights must be immune from the inferior classification of “non-conforming” in order to preserve the vested property owners ability to thrive, expand and succeed in the full enjoyment of his or her vested property while being legally compliant with the provisions of the law at the time of vesting. As the Supreme Court noted in a companion decision to *Euclid*, a municipality may not impose unreasonable or unnecessary restrictions “upon the use of private property or the pursuit of useful activities.” *State of Washington v. Roberge*, 278 U.S. 116, 121 (1928). (emphasis added) The classification of properties that have won vested rights status as “non-conforming” simply divests the owner of the pursuit of useful activities that the vesting decision already countenanced as legal, equitable and socially valuable to the general welfare.

II. THE STIPULATED ORDERS ARE ENFORCEABLE CONTRACTS WITH *RES JUDICATA* EFFECT TO PRESERVE THE BUSINESS PARK'S PERPETUAL VESTED RIGHTS

A. Question Presented

Whether the Superior Court correctly found that the Stipulated Orders incorporated a binding Settlement Agreement on the Town with *res judicata* effect barred the Town's effort to divest the Business Park's perpetual vested rights?²

B. Standard and Scope of Review

Interpretation of the 2005 Stipulated Orders implicates questions of law that are reviewed *de novo*.

C. Merits

The Superior Court correctly stated and applied the law of *res judicata* to bar the Town's attempt to divest the Business Park of its vested rights secured by the Stipulated Orders. Op. at 12-19. The Court reached this conclusion after correctly applying the principles of contract interpretation to the Stipulated Orders, which included a review of the circumstances surrounding the conclusion of the litigation between the parties by the execution of the Stipulated Orders. Op. at 14.

1. The Superior Court Correctly Applied the Five Factor Test of *Res Judicata* to the Facts

² This question was preserved below in the Business Park's Letter Memoranda to the Superior Court dated February 10, 2017. (Dkt 61)

The Court properly applied *Dover Historical Society, Inc. v. City of Dover Planning Commission* to find the five-part test of *res judicata* satisfied by the Stipulated Orders. Op. at 12 citing *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084,1092 (Del. 2006).

2. The Superior Court Correctly Construed the Stipulated Orders as Contractual Agreements Recognizing the Business Park's Vested Rights in the M-1 Zoning and Business Park Development Plan

The Court properly looked to the circumstances surrounding the formation of the Settlement Agreement and Stipulated Orders to find the Town and the Business Park intended to reach a binding agreement, without further litigation, that recognized the vesting of the Business Park's rights. Op. at 14-16. The Court's method was sound: "Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order . . . and any other documents expressly incorporated in the decree." *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). The Superior Court used both tools of contract construction (the circumstances of formation and incorporation by reference) to correctly conclude the Town and the Business Park gave up the right to litigate the issue of vested rights in exchange for specific affirmations by the Town that such rights had indeed specifically vested for the Business Park in the industrial park

development plan under the M-1 Zoning requirements. Op. at 14-16. On the issue of a finding of incorporation by reference of the Article 5A amendment into the Stipulated Orders, the Court correctly relied on *ITT Continental Baking, supra* and this Court's opinion in *Realty Growth Investors v. Council of Unit Owners*, 453 A2d 450 (Del. 1982): "A contract can be created by reference to the terms of another instrument if a reading of all documents together gives evidence of the parties' intention and the other terms are clearly identified." *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 454 (Del. 1982). As the Superior Court found after a thorough review of the facts, Article 5A was indeed incorporated by reference into the Stipulated Orders. Op. at 13-15.

3. Settling a Vested Rights Claim Does Not Implicate Contract Zoning Under Delaware Law and Is Not An Otherwise *Ultra Vires* Act of the Town

The Superior Court correctly rejected the Town's arguments alleging both *ultra vires* conduct and contract zoning bars to the enforceability of the Stipulated Orders which incorporated the Article 5A amendment. Op. at 23-31. As to contract zoning, the Court correctly distinguished the public resolution of the vested rights claims of the Business Park, settling actual pending litigation, from the closed-door agreement in *Hartman v Buckson* that involved neither public review and approval or actual pending litigation. Op. at 29-30 citing *Hartman v. Buckson*, 467 A.2d 694, 699-700 (Del.Ch. 1983).

In *Murray v. Town of Dewey Beach*, this Court let stand a challenge to a Town's authority to enter into a settlement agreement with a developer that provided for a contract-based land use approval of a large hotel/condominium project. *Murray v. Town of Dewey Beach*, 67 A.3d 388, 390 (Del. 2013). In dismissing a citizen's suit complaining that the settlement agreement amounted to contract zoning, this Court noted that the contractual settlement agreement signed between the developer and the Town was handled publicly as a zoning amendment by a resolution adopted by the Town. *Id.* at 390-391. While this Court never reached the merits of the contract zoning claim because the action was barred by the applicable 60 day statute of repose, this Court did note the paramount interest in predictability in resolving land use disputes: "Uncertainty about the validity of a zoning decision is disruptive to the community as well as the developer." *Id.* at 391. This Court had an opportunity to construe the settlement agreement as a contract, rather than a municipal land use decision, to avoid the application of the 60 day statute of repose, and declined. *Id.*

In rejecting the Town's claims that the Article 5A amendment was in itself an *ultra vires* act and therefore illegal, the Court properly dispensed with this argument as follows: (1) the *ultra vires* argument is barred by the *res judicata* effect of the Stipulated Orders, Op. at 17-18; (2) the allegedly offensive provisions of Article 5A binding future Town Councils could be severed by the Court and a complete and

binding Settlement Agreement affirming the Business Park's vested rights remains in full force, Op. at 25-27; and (3) a finding of vested rights by its very nature properly binds future Town Councils from future legislative interference with vested rights. Op. at 28.

CONCLUSION

The ever enlarging police power interference with the constitutional protection of the use and ownership of private property is properly limited by the vested rights doctrine, establishing perpetual vested rights to enjoy land under existing zoning limitations enacted to adequately protect the general welfare at the time of vesting. The Superior Court properly found the Business Park's perpetual vested rights were conclusively established by the Stipulated Orders. The Court's Opinion should be affirmed.

PARKOWSKI, GUERKE & SWAYZE, P.A.

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DATED: November 1, 2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE


TOWN OF CHESWOLD, a :
municipality of the State of Delaware, : C.A. No. 270, 2017
:
Petitioner Below, :
Appellant, :
:
v. :
:
Court Below: Superior Court
CENTRAL DELAWARE BUSINESS: of the State of Delaware, C.A. No.
PARK, a Delaware general : K13M-08-016 JJC and the Court of
partnership, : Chancery of the State of Delaware,
:
Respondent Below, : C.A. No. 1574-JJC (Consolidated)
Appellee. :

CERTIFICATE OF SERVICE

I, MARK F. DUNKLE, hereby certify that on the 1st day of November, 2017,
a copy of the foregoing APPELLEE CENTRAL DELAWARE BUSINESS PARK'S
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