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IN THE

Supreme Court of the State of Delaware

TOWN OF CHESWOLD, a municipality of the State of Delaware,
Petitioner-Below, Appellant,

v.

CENTRAL DELAWARE BUSINESS PARK, a Delaware general partnership,
Respondents-Below, Appellee.

NO. 270, 2017
On Appeal from the Superior Court of the State of Delaware C.A. No. K13M-08-016 JJC and the Court of Chancery of the State of Delaware, C.A. No. 1574-JJC (Consolidated)

APPELLANT TOWN OF CHESWOLD'S REPLY BRIEF

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INTRODUCTION

The Superior Court's sweeping pronouncement that an individual or entity can obtain an absolute and permanent vested right in a zoning designation or land use approval that prevents "legislatures or town councils" from changing "the law affecting the property" is not supported by any cited decision of any court in the nation.[1] This holding should be reversed. If affirmed, the holding would overturn decades of decisional law establishing that there is no vested right to a property's zoning classification, would functionally end counties' and municipalities' ability to establish or eliminate non-conforming uses,[2] and may prevent application of current environmental protection measures and other laws designed to protect the public. In this specific instance, the Superior Court's decision would permit CDBP to develop the remaining lots in the Business Park under little to no regulation and independent of any building code, stormwater code, or current environmental

[1] Op. 23. Abbreviated terms herein have the same meaning as assigned in the Town's opening brief. CDBP cites no opinion other than the decision below that recognizes a permanent vested property right.

[2] A non-conforming use is "an activity conducted on a parcel of land, or within a structure erected thereon, that was in existence prior to enactment of zoning restrictions which would otherwise prohibit such use." 44 Am. Jur. 3d *Proof of Facts, Zoning: Circumstances Justifying Termination of Lawful Nonconforming Use*, at § 10 (2017).

protection laws. This Court should reverse the absolute "perpetual vested rights" holding as unwise and contrary to settled law.[3]

Equally in error is the Superior Court's conclusion that *res judicata* bars the Town from "enact[ing] new legislation that will interfere with CDBP's vested rights in the Business Park," and precludes the relief sought by the Town in this case.[4] *Res judicata* does not operate to bar the Town's claims because the issues in this case are not the same claims that were the subject of the 2005 Stipulations of Dismissal, nothing in the four corners of the stipulations recognizes a *perpetual* vested right, and the Superior Court's construction of the stipulations creates an illegal contract. CDBP's arguments in support of the Superior Court's erroneous *res judicata* holding, most of which fail to address the arguments in the Town's opening brief, should be rejected and the Superior Court's decision below should be reversed.

[3] The Business Park is subject to no building code standards and minimal land use regulations under the Town's antiquated 1977 Zoning Code. Town of Cheswold's opening brief ("OB") at 5-6.

[4] Op. 9.

ARGUMENT

I. THERE ARE NO PERPETUAL VESTED RIGHTS TO LAND USE APPROVALS

Neither the Superior Court below nor CDBP has cited a single case from *any jurisdiction* holding that a vested development right remains "absolute" and perpetually vested.[5] Instead of addressing the multitude of cases from Delaware and other jurisdictions cited in the Town's opening brief holding to the contrary,[6] CDBP relies instead on Great Depression-era cases which do not even address purported perpetual vested rights.[7] Because the Superior Court's decision is contrary to settled law, CDBP's arguments blindly (and oftentimes solely) relying on the Superior Court's reasoning should be rejected.

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[5] CDBP's answering brief ("AB") claims that the Superior Court "correctly consulted existing Delaware law to conclude that there is no expiration on a vested right." AB 12. The Superior Court, however, did not cite any judicial decision for this proposition. Rather, the Superior Court relied upon a citation to the Black's Law Dictionary and Am. Jur. (rather than established Delaware law) to hold that a vested development right cannot be abridged or taken away. Op. 23. Neither the Superior Court nor CDBP cites to the controlling law of this Court, which establishes "a statute may retroactively reach property rights which have vested and may create new obligations with respect thereto, provided that the statute is a valid exercise of police power." *Price v. All American Eng'g Co.,* 320 A.2d 336, 340 (Del. 1974); OB 22, n. 32 (citing cases). CDBP fails to mention or distinguish the controlling doctrine set forth in *Price* in its answering brief, or for that matter, the numerous other cases cited in the Town's opening brief demonstrating that there is no absolute and perpetual vested right to land use classifications or approvals.

[6] *See* OB 19-23, n. 28, 29, 32, 33, 34. CDBP does not attempt to distinguish this authority.

[7] AB 13.

A. The Superior Court's Holding Of Perpetual Vested Rights Improperly Forecloses This Court's Established Balancing Test

This Court's decision in *244.5 Acres of Land*[8] requires that, in applying the vested rights test, a court must balance the public interest served by an ordinance amendment against a developer's claim that he or she detrimentally relied in good faith on the prior state of the law.[9] That balancing must be done *on a case by case, ordinance by ordinance basis* to determine if the property owner has obtained a vested right that would exempt the owner from a specific legislative enactment.[10] If any purported vested right is perpetual and "absolute" (as the Superior Court erroneously held), then the *244.5 Acres of Land* balancing of interests will never occur as applied to existing uses.[11]

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[8] 808 A.2d 753 (Del. 2002).

[9] *Id*. at 757-58.

[10] *See 244.5 Acres of Land*, 808 A.2d at 757-58; *see also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1977) (quoting, in part, *Nectow v. Cambridge*, 277 U.S. 183, 188 (1926)) (holding that to determine a Fifth Amendment regulatory takings question is essentially an *ad hoc* inquiry and holding "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1942-43 (2017) (quoting, in part, *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)) (holding that takings jurisprudence "has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances'").

[11] OB 13-16.

Although this argument is set forth at length in the Town's opening brief,[12] CDBP's brief ignores it.[13] Instead, CDBP cites ancient cases for the unremarkable proposition that the police power cannot be used for "arbitrary and unreasonable" restrictions on property.[14] The Superior Court's decision below does not merely preclude the Town from taking future "arbitrary and unreasonable" legislative action, it impermissibly prevents the Town "from taking **any** legislative action" whatsoever.[15] The Superior Court's ruling creating purported absolute perpetual vested rights errs because it precludes the balancing of the private interest against the public interest for each ordinance amendment as required by *244.5 Acres of Land*.[16]

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12 OB 14-16.

13 *See* AB 12-20.

14 AB 13 (citing *City of Wilmington v. Turk*, 129 A.2d 512, 515-16 (Del. Ch. 1925) and *In re Ceresini*, 189 A. 443, 448 (Del. Super. Ct. 1936)).

15 Op. 23 (emphasis supplied). Contrary to what CDBP contends (AB 17), an initial vested rights determination does not mean that the developer is exempt from any future regulation for all time. The *244.5 Acres of Land* balancing test must be performed for each subsequent ordinance amendment. OB 14-16.

16 CDBP relies on a 1937 decision of the Superior Court to claim that "the police power may not be invoked for an abridgment of the use of private property . . .". AB 14 (citing *Appeal of Lloyd*, 196 A. 155, 157 (Del. Super. Ct. 1937)). This is not the law and has not been the law in the past forty years. *See Willdel Realty v. New Castle Cnty.*, 281 A.2d 612, 615 (Del. 1971); *Penn Central*, 438 U.S. at 125. A legislative body, such as a Town Council, has "full and unrestrained authority to exercise its discretion in any manner it seeks [sic] fit in its wisdom or even folly to adopt." OB 38, n.65; *Salem Church (Delaware) Associates v. New Castle Cnty.*, 2006 WL 2873745, at *14 (Del. Ch. Oct. 6, 2006) (quoting *State v. Schorr*, 158 A.2d 158, 161 (Del. 1957)). Moreover, the contention that applicable land use law can never be changed has been described by the United States Supreme Court and

B. The Superior Court Decision Turns The Well Settled Law Of Non-Conforming Uses On Its Head

Recognizing that the Superior Court's "perpetual vested rights" holding establishes an entirely new analytical land use framework, CDBP attempts to soften the blow by nakedly claiming that the "prospect of upending the law of non-conforming uses is entirely remote" and that properties with vested rights are allegedly "rare and special."[17] Contrary to CDBP's contentions, under the Superior Court's decision, all nonconforming uses (which are, by definition, a confirmation that a vested right exists which exempts a particular property from a new zoning provision)[18] are eliminated. Indeed, the scope of the Superior Court's decision regarding absolute and perpetual vested rights is extremely broad. It states:

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the Court of Chancery as "simply untenable." *Salem Church,* 2006 WL 2873745, at *16 (quoting *Penn Central,* 438 U.S. at 124).

[17] AB 20.

[18] *See Storino v. Point Pleasant Beach,* 322 F.3d 293, 297 (3d Cir. 2003) ("[N]on-conforming uses are deemed to have acquired a vested right to continue in their current form regardless of new zoning provisions."). CDBP contends that non-conforming uses are "inferior" to vested rights (AB 20), but again cites no authority for this claim. Under Delaware law, after a permit is issued and substantial construction is commenced, a vested right attaches. *See Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); *Application of Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962). If the applicable zoning laws change that would otherwise preclude the vested use, that vested right to operate becomes a legally existing non-conforming use. *See supra* n. 2. Because non-conforming uses are vested uses, CDBP's claim that non-conforming uses are inferior to vested rights is wrong. Moreover, because non-conforming uses are inherently a recognition of vested rights, and because non-conforming uses are plentiful, there is nothing "rare and special" about them.

> . . . this Court finds that vested rights remain perpetually vested. The very nature of vested rights requires this conclusion. Vested means that a person or property has acquired a right for the present and future, and that right is absolute. The nature of the doctrine of vested rights also counsels against imposing a time limitation. The doctrine 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. Therefore, CDBP's rights remain vested, and this Court will not impose an expiration on that right. This doctrine prohibits the Town from taking any legislative action that would interfere with CDBP's vested rights.[19]

The decision is clear. Vested rights purportedly of any kind, in the eyes of the Superior Court, *can never* be taken away, limited, abandoned, forfeited, or amortized by legislatures or town councils.[20] Thus, unless the Superior Court's decision is reversed, non-conforming uses cannot be created or eliminated, recorded subdivision plans can never expire,[21] and a property owner could be forever exempted from compliance with future environmental and other laws.[22]

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[19] Op. 23. Footnote 109 of the Superior Court's opinion hints that the Town could potentially enact an updated building code. This statement cannot be squared with the Superior Court's broad pronouncement about absolute and perpetual vested rights.

[20] This holding overrules decades of case decisions holding to the contrary. *See* OB 19-20 n. 28, 29.

[21] The Town's opening brief establishes that if vested rights are perpetual, numerous laws that require the expiration of subdivision approvals will be rendered null and void. OB 24, n.38. CDBP's answering brief does not address this issue, and therefore it presumably agrees that if vested rights are perpetual, subdivision laws requiring expiration of plans are unenforceable.

[22] *See* OB 23-26.

The Superior Court's holding is patently inconsistent with several settled doctrines. For starters, the Superior Court's absolute "perpetual vested rights" decision is directly in contravention of this Court's decision in *Price vs. All American Eng'g Co.*,[23] which holds that "a statute may retroactively reach property rights which have vested and may create new obligations with respect thereto." The Superior Court's decision also overturns (without addressing) decades of precedent allowing the abandonment, curtailment, and amortization of vested rights for non-conforming uses.[24]

In addition to being at odds with all controlling precedent, the concept of an "absolute" and perpetual vested right should be rejected for an independent reason – it makes no logical sense. Suppose that a developer sought to develop a coal ash plant, a trash to steam plant, an oil refinery, a landfill, or other noxious use, and it was judicially declared that the property owner had acquired a vested right to use the land for the proposed use. Under the Superior Court and CDBP's formulation of vested rights,[25] the property owner would be exempt from any new regulation,

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[23] 320 A.2d at 340; *Campbell v. State*, 1986 WL 8178, at *3 (Del. Super. Ct. July 18, 1986); *see also* OB 22 n.32 (citing cases). CDBP does not mention or address these cases in its brief.

[24] OB 23-25; *see also Mayor and Council of New Castle v. Rollins Outdoor Adver., Inc.*, 475 A.2d 355, 360 (Del. 1984). The Superior Court's perpetual vested rights decision, if sustained, overrules *Rollins*, renders numerous statutes relating to non-conforming uses unenforceable, overturns numerous Delaware decisions holding that non-conforming uses are subject to gradual elimination.

[25] *See* AB 20.

including air quality standards, water quality standards, sediment and stormwater standards, construction and repair standards, new building code standards, and fire protection standards because (according to the Superior Court) "legislatures or town councils" cannot take "any legislative action that would interfere with . . . vested rights."[26] This is not, and has never been the law[27] – and it makes no sense because it precludes the legislature from adopting new laws that apply to existing uses that protect the public health, safety, and welfare.[28]

C. There Is No Vested Right To Any Zoning Classification

Although the Town's opening brief cites a bevy of cases holding that there is no vested right to any zoning classification,[29] CDBP advocates the opposite and asks this Court to place "[v]ested rights limits" on purported "otherwise ever-

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[26] Op. 23.

[27] OB 22 n.32; *see Goldblat v. Town of Hempstead, N.Y.*, 369 U.S. 590, 597 (1962) (upholding a 1958 ordinance banning excavation of sand and gravel below the water table which effectively precluded continued mining operations that were in continuous operation since 1927).

[28] The United States Supreme Court's 2017 decision in *Murr v. Wisconsin*, 137 S.Ct. at 1941-43 is instructive. In *Murr*, pursuant to a recorded development plan, the owners had two subdivided lots. Subsequent legislation made the lots non-conforming and unbuildable and the lots "merged" into a single lot. The Supreme Court held that legislation merging the lots was a valid police power action that did not constitute a regulatory taking. Contrary to what CDBP argues here, the Supreme Court rejected the claim that the property owner had a perpetual right to a prior subdivision approval.

[29] OB 19 n.28.

changing zoning requirements."[30] In so doing, CDBP (again) fails to cite or distinguish the controlling authority cited by the Town.[31] Instead, CDBP relies on an isolated passage from *Willdel Realty v. New Castle Cnty.*,[32] to claim that the Court "may not permit such vacillating zoning action ordinarily."[33]

A fair reading of *Willdel* establishes that this Court held steadfast to the underlying fundamental principal "that zoning regulations should be 'progressive, not static'" and should be "'sufficiently flexible to adjust to changed conditions in the interest of the public welfare.'"[34] The court made its precautionary statement about "vacillating zoning" because the subject property was first rezoned commercial, only to be subject to a rezoning to a different residential classification ten days later by a successor County government.[35] Even though the zoning changed rapidly, the Court sustained the legislative act of rezoning. Under *Willdel*,

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30 AB 15; *see contra Siena Corp. v. Mayor and Council of Town of Rockville*, 2017 WL 4557505, at *1 (4th Cir. Oct. 13, 2017) (upholding a change in applicable law that precluded the development approvals sought when the land use approval process was ongoing for a self-storage facility).

31 *Shellburne, Inc.*, 224 A.2d at 254; *see Acierno v. Cloutier*, 40 F.3d 597, 620 n.17 (3d Cir. 1994); *Mayor & Council of New Castle*, 475 A.2d at 360.

32 281 A.2d 612, 615 (Del. 1971).

33 AB 15.

34 *Willdel*, 281 A.2d at 614.

35 *Id*. at 615. By contrast, in this case, the subdivision plan at issue has been approved for twenty-seven years, and the Stipulations of Dismissal were filed in 2005.

there is no right to a given zoning classification and nothing therein supports the creation of a new perpetual vested rights doctrine.[36]

The remaining cases CDBP cites do not address the specific question presented in this case, namely whether a vested development right operates in perpetuity to exempt a property owner from following any laws adopted in the future.[37] Both *Wilmington Materials v. Town of Middletown*[38] and *244.5 Acres of Land*[39] applied to specific changes in the law that curtailed or eliminated the right to a proposed use sought to be immediately developed. Neither case addressed whether a vested right, once established, conferred an absolute perpetual vested right to preclude *any* future changes in the law applicable to any given property. Both cases related to a *specific* ordinance amendment where the Court was required to balance the rights and interests of the property owner against the governmental interest in the change in the law. Neither case holds that once a vested right is established with regard to one ordinance amendment, the vested

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[36] The 1971 *Willdel* decision of the Delaware Supreme Court and the *Penn Central* decision of the United States Supreme Court are contrary to the 1937 *Lloyd* decision of the Superior Court relied on by CDBP for the obsolete zoning "necessity" principle. *See* AB 14, 16. As *Willdel* and *Penn Central* are the controlling law, CDBP's reliance on *Lloyd* is misplaced.

[37] AB 15-16.

[38] 1988 WL 135507, at *1 (Del. Ch. Dec. 5, 1988).

[39] 808 A.2d at 757-58.

right forever insulates the property from *any future* legislative amendment. In the end, neither case supports the creation of an absolute perpetual vested right.[40]

[40] Both CDBP (AB 16) and the Superior Court note that the Delaware Supreme Court has never addressed the issue of delay as it relates to the vested rights calculus. As other courts have held, delay in completing development should be a significant factor in determining whether a developer is exempt from complying with subsequently enacted laws. *Salem Church*, 2006 WL 2873745, at *11 (holding that to determine good faith reliance on existing standards, "requires assessment of the effect of the pace of the development effort" and noting that "delay may defeat a vested rights claim"); *see also Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1299 (9th Cir. 1990). In this case, the subdivision plan for which CDBP claims vested rights was approved in 1990 – twenty-seven years ago. When a developer waits twenty-seven years to build, as a matter of law, there is no good faith reliance on existing standards established.

II. *RES JUDICATA* DOES NOT PRECLUDE ANY FUTURE REGULATION BY THE TOWN COUNCIL

A. The Superior Court Erred In Straying From The Plain Language Of The 2005 Stipulations Of Dismissal To Decide That *Res Judicata* Precludes The Town's Claims

Nothing in the plain language of the 2005 Stipulations of Dismissal confers a perpetual vested right for the Business Park to be free from subsequent regulation for all time.[41] CDBP does not, and cannot, dispute this fact.[42] Nor do the 2005 Stipulations of Dismissal by their plain language incorporate by reference the M-1 Amendments.[43] The 2005 Stipulations of Dismissal merely confirm that the Business Park shall "continue" with M-1 zoning and the Town was required to "amend and republish" the zoning code. Because the M-1 Amendments had already been adopted by the Town Council in April of 2005 (well before the stipulations were signed), but not published (thereby precipitating CDBP's legal

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41 A75-78. The Superior Court recognized that "the Stipulated Orders, themselves, do not specifically state that CDBP acquired vested rights. . .". Op. 13.

42 OB 29-30; AB 22-23.

43 CDBP cites *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 454 (Del. 1982) for the proposition that a contract can be incorporated by reference by the terms of another instrument. AB 23. For this proposition, *Realty Growth Investors* cites *Pauley Petroleum Inc. v. Continental Oil Co.*, 231 A.2d 450, 456 (Del. Ch. 1967), *aff'd,* 239 A.2d 629 (Del. 1968) – a citation omitted by CDBP. *Pauley Petroleum* makes clear that one of the exceptions to the incorporation by reference doctrine is "that an agreement will not be deemed to incorporate matter in some other instrument or writing except to the extent that the same is specifically set forth or identified by reference." *Id.* at 457; *see also see Delaware v. Black,* 83 A.2d 678, 681 (Del. 1951) (holding that a contract may incorporate by reference provisions in another instrument but only to the extent that the incorporated matter is specifically set forth or identified).

action), the stipulations merely required the Town Council to publish the M-1 Amendments.[44] The language of the stipulations reflect this, and nothing more, demonstrating that the M-1 Amendments were not expressly incorporated by reference into the stipulations.[45] It was in error for the Superior Court to go beyond the plain language contained within the four corners of the stipulations to render a *res judicata* ruling.

Because M-1 Amendments were not incorporated by reference into the stipulations, *res judicata* is wholly inapplicable and does not preclude the Town's claims because the courts never decided the issue of perpetual vested rights for the Business Park.[46] "[T]he presumption is that 'a law [here, the M-1 Amendments] is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'"[47] The Superior Court erred by presuming that the adopted M-1 Amendments were intended to create private contractual rights not set forth in the stipulations (based upon a

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[44] The Town is free to repeal its ordinances as the Town Council deems appropriate. OB 38 n.65; *Leon N. Weiner & Assocs., Inc. v. Carroll*, 270 A.2d 539, 541 (Del. Ch. 1970), *rev'd on other grounds*, 276 A.2d 732 (Del. 1971) (holding that a municipal legislative body has the right "to change, modify, or repeal its own ordinance," and this power "is inherent in the powers delegated to it.").

[45] A75-78.

[46] *See United States v. State of New Jersey*, 194 F.3d 426, 430 (3d Cir. 1999) ("Whether extrinsic evidence is required to interpret a consent decree is itself a question of law subject to plenary review.").

[47] *National Railroad Passenger Corp. v. Atchinson, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 466 (1985) (citation omitted).

previously adopted ordinance), and by deciding that the M-1 Amendments were incorporated by reference into the 2005 Stipulations of Dismissal when the plain language of the stipulations mandate a contrary result.[48]

B. The Superior Court Erred In Applying *Res Judicata* Because The Claims At Bar Are Not The Same Claims Presented In 2005

CDBP's brief does not respond to the Town's contention that *res judiciata* does not apply because the claims resolved in 2005 are not the same claims as the case at bar.[49] Under Delaware law, it is axiomatic that for *res judiciata* to apply "the original cause of action or the issues decided was the same as the case at bar" and it is in error to apply the doctrine when the specific claims at bar were never adjudicated.[50] The court should evaluate "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, . . . whether their treatment as a unit conforms to the parties' expectations or business

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[48] The Superior Court notes that "in terms of stipulated judgments and consent orders, courts look to extrinsic evidence for interpretation only when ambiguity exists." Op. 15 (citing *United States v. State of New Jersey*, 194 F.3d 426, 430 (3d Cir. 1999); *Fox v. U.S. Dep't of Hous. and Urban Dev*., 680 F.2d 315, 319 (3d Cir. 1982)). Yet, the Superior Court ignored this precedent and relied on evidence outside the four corners of the stipulations without first finding that the stipulations were ambiguous.

[49] OB 33-34; AB 23-25.

[50] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192-94 (Del. 2009) (citing *Dover Historical Society, Inc. v. City of Dover Planning Comm'n.*, 902 A.2d 1084, 1092 (Del. 2006)).

understanding or usage," and whether two claims derive from a common nucleus of operative facts.[51]

The claims herein are not the same claims advanced in 2005. The 2005 Superior Court Action and the Chancery Action were brought to compel the Town to publish the M-1 Amendments, and to protest any application of 2005 Ordinance to the five Business Park lots with then-pending sales.[52] Here, by contrast, the Town seeks an interpretation of the 2005 Stipulations of Dismissal and a determination that the Town is not forever precluded from exercising its police power to regulate the Business Park.[53] These claims are not derived from the same nucleus of facts, nor are they related "in time, space, origin, or motivation." The Superior Court's decision to the contrary should be reversed.

C. The 2005 Stipulations Of Dismissal, As Interpreted By The Superior Court, Are Illegal Contracts Which Cannot Be Enforced

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract [or a consent decree] to do an act that is illegal."[54] The

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51 *Id.*

52 OB 7-10.

53 OB 33-34.

54 *Sternberg v. Nanticoke Mem. Hosp.*, 62 A.3d 1212, 1217 (Del. 2013) (quoting *Marshall v. Baltimore and Ohio R.R. Co.*, 57 U.S. 314, 334 (1853)); 46 Am. Jur. 2d Judgments § 179 ("[A] consent decree cannot oblige a party to perform illegal conduct," and "the judgment itself is unenforceable when the agreement it encompasses or the relief it grants is illegal or inconsistent with the law underlying the agreement.").

manner in which the Superior Court interpreted the 2005 Stipulations of Dismissal impermissibly creates illegality.[55]

For example, the Superior Court erred when it interpreted the 2005 Stipulations of Dismissal as an agreement by the Town to bargain away its power to pass zoning legislation regarding the Business Park.[56] The Court's interpretation describes quintessential contract zoning, a bilateral agreement to forever freeze the zoning classification for the Business Park, which is *ultra vires* and illegal.[57] The 2005 Stipulations of Dismissal should not be interpreted in a manner that allows illegal contract zoning to persist.[58]

The Town also establishes that "one legislative body cannot by its legislation bind the hands of a future legislature respecting the same subject matter,"[59] and

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55 OB 34-38.

56 *See* OB 35-36.

57 Op. 13-15; *see Pike Creek Recreational Services LLC v. New Castle Cnty*., 82 A.3d 731, 737 n.17 (Del. Ch. 2013), *aff'd,* 103 A.3d 1990 (Del. 2014) (citing and quoting *Hartman v. Buckson*, 467 A.2d 694, 700 (Del. Ch. 1983) and noting that the compromise agreement between developer and town council in *Buckson* was "an invalid ultra vires exercise of municipal authority"); 101A C.J.S. *Zoning and Land Planning* § 73 (2017) ("[C]ontract zoning appears when a zoning authority . . . agrees not to alter a zoning change for a specified period of time.").

58 The authority relied upon by the Town is again largely ignored by CDBP. AB 21-25; OB 34-38.

59 Op. 24-28; *Graham v. Worthington,* 146 N.W.2d 626, 641 (Iowa 1966); *see also Glassco v. Cnty. Council of Sussex Cnty.*, 1993 WL 50287, at *5 (Del. Ch. Feb. 19, 1993) ("Council has no power by ordinance to create legal obligations that restrict the future exercise of statutorily created discretion."); *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1853) ("no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided

that the Superior Court misapplied this foundational principle of law[60] when it held that the Town Council's actions in 2005 forever precluded any future Town Council (or any future legislature for that matter) from adopting health, safety and welfare legislation related to the Business Park.[61] CDBP fails to respond to the Town's straightforward argument that any purported agreement establishing perpetual vested rights is unenforceable because the Town Council in 2005 cannot forever preclude a future legislature's legislative authority. The Superior Court erred in holding that the 2005 Stipulations of Dismissal constitute a contract that precludes future legislative action.

The slender reed upon which CDBP relies to claim that an agreement can be interpreted in a manner that permits the continuation of an illegal contract[62] is *Murray v. Town of Dewey Beach*.[63] *Murray* stands only for the unremarkable proposition that a third party may not challenge the action of a municipality granting approvals under the statute of repose in 10 *Del. C.* § 8126 after the repose period had run. The statute of repose in no way precludes a party to the initial agreement from seeking an interpretation of the 2005 Stipulations of Dismissal, nor does it preclude the Town from challenging the enforceability of an illegal and

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by the people to the legislative body, unless they are authorized to do so by the constitution which they are elected.").

60 Op. 25.

61 OB 37-38.

62 AB 24.

63 67 A.3d at 388 (Del. 2013).

ultra vires act of a prior legislative body. Nor does *Murray* preclude the legislature from changing generally applicable future laws for the benefit of the public at large. The primary case relied upon by CDBP is, therefore, inapposite.

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In sum, the Superior Court erred when it interpreted the 2005 Stipulations of Dismissal based upon a flawed construction of the stipulations that incorporated by reference an ordinance amendment previously adopted, but not published, by the Town Council. The 2005 Stipulations of Dismissal, by their plain language, do not establish any perpetual vested rights for the Business Park to be forever immune from any subsequent regulation whatsoever, and there is nothing in the four corners of the unambiguous stipulations that incorporate the M-1 Amendments by reference. Consequently, the Town is free to repeal its own legislative acts[64] and *res judicata* is inapplicable.

It was also in error for the Superior Court to construe the meaning of the stipulations to find an absolute perpetual vested right because: (1) the law does not recognize perpetual vested rights; (2) the Superior Court's construction of the stipulations is rendered illegal under principles of contract zoning; and (3) the Superior Court's construction impermissibly binds future legislators' legislative authority. None of these issues were raised and decided in 2005, and *res judicata*

[64] *See* OB 38 n.65.

does not preclude a judicial determination that vested rights are not absolute or perpetual.

Even if CDBP's prior land use approvals are deemed to be vested, such vested rights can be limited by subsequent legislation under settled law and they are not absolute.[65] As required by *244.5 Acres of Land*, any claim of vested rights by CDBP must be decided on an ordinance by ordinance basis that balances the public interest in the ordinance amendment against the developer's reliance on the existing state of the law.[66] The Superior Court's holding to the contrary is in error and should be reversed.

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65 *Price*, 320 A.2d 336; OB 22, n. 32 (citing cases).

66 808 A.2d at 757-58.

CONCLUSION

For the reasons stated herein and in the opening brief, the Town respectfully requests that the decision of the Superior Court below be reversed.

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