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IN THE SUPREME COURT OF THE STATE OF DELAWARE

OCEAN BAY MART, INC., Plaintiff-Below, Appellant, v. THE CITY OF REHOBOTH BEACH DELAWARE, Defendant-Below, Appellee.	)	No. 28,2022 On Appeal from C.A. 2019-0467-SG in the Court of Chancery of the State of Delaware

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

In its opinion, the Court of Chancery describes this case as a "familiar one." *Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 2021 WL 4771246 at *1 (Del.Ch.) (the "*Decision*," copy attached as Ex. A). But while the facts may be familiar, the outcome is not. The *Decision* effectively overrules established caselaw concerning statutory construction that exists to protect property owners. It threatens "uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances," something against which this Court has always guarded. *See, e.g., Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n*, 962 A.2d 235, 241 (Del. 2008) (*en banc*).

Here, Appellant Ocean Bay Mart filed its site plan (the "Site Plan") in June, 2015. Prior to that, Ocean Bay Mart reviewed the City of Rehoboth Beach Code (the "City Code" or "Code"), reviewed similar projects in the City (the Site Plan is modelled after one such project), met with the City Building Inspector regarding the applicability of certain Code provisions, and received a written confirmation of the Building Inspector's interpretation. The Site Plan was and is compliant with the Code as the Code existed when the plan was submitted. After Ocean Bay Mart prevailed in litigation in the Superior Court (which found that the Planning Commission wrongly applied a state statute to the plan), the City Commissioners,

in May, 2019 – nearly four years after the plan was first filed – amended their Code to prohibit the Site Plan.

Ocean Bay Mart promptly filed suit in Chancery claiming vested rights and equitable estoppel:

- vested rights because, by the time the Commissioners amended their Code in 2019, Ocean Bay Mart had incurred $1.1 million in costs, expenses and lost rents; and,

- equitable estoppel because (i) before filing its plan, Ocean Bay Mart had obtained a written interpretation of the City Code from the City Building Inspector consistent with similar projects already approved by the City, and (ii) when the City Commissioners first amended their Code in response to the Site Plan in the fall of 2016, those Code amendments contained language indicating they did not apply to pending plans.

Ultimately, the Court of Chancery issued its *Decision* on October 13, 2021 and denied reargument on November 18, 2021. This is Ocean Bay Mart's Opening Brief. As further explained herein, the *Decision* materially diminishes, if not eviscerates entirely, a landowner's right to rely on current land use laws. Here, despite:

- earlier real estate projects that applied Rehoboth's Code in precisely the same manner sought by Appellant;

- a written interpretation by the City's Building Inspector consistent with this past application; and,

- a Board of Adjustment (the City's ultimate authority on zoning code interpretation) decision affirming the written interpretation (after a successor Building Inspector offered a different interpretation)

the *Decision* nevertheless holds that Ocean Bay Mart's reliance on those facts was not justified, primarily because the Code provision in question was "ambiguous" and, therefore, Ocean Bay Mart should have known that future amendments were possible at any time. Moreover, in making that determination, the *Decision* ignores the City Commissioners' express command that their 2016 amendments should not be applied retroactively.

The *Decision* upends the doctrine of vested rights and equitable estoppel and leaves landowners virtually unprotected against zoning code amendments, often forged in the politics of neighborhood opposition and intended to forbid land uses that were previously permissible. The irony of this case is that the *Decision* uses the presence of ambiguity to deny an owner's good faith reliance, while Delaware law has long held that ambiguity in a land use code should be interpreted in favor of the property owner. *See, e.g., Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972); *Chase Alexa, LLC v. Kent County Levy Court,* 991 A.2d 1148, 1152 (Del. 2010). The *Decision* would render this principle meaningless because anytime in the future a land use regulation is deemed ambiguous, the local government is now free to change its code and have the change (*i.e.*, its preferred interpretation) apply to the property owner notwithstanding the rule of statutory construction long-endorsed by this Court. For these reasons, which are amplified below, the *Decision* should be reversed.

SUMMARY OF ARGUMENT

1. When the Board of Adjustment ruled in Ocean Bay Mart's favor, any question as to the compliance of the Site Plan with the City Code was resolved, and Ocean Bay Mart was entitled to have its plan approved. The mere fact that a particular ordinance is deemed "ambiguous" does not mean that a property owner cannot rely in good faith upon a written interpretation from the governmental official charged with interpreting and applying the ordinance, and upon the past application of the ordinance to similar projects. Indeed, to hold otherwise would render meaningless, and reverse, the longstanding principle that ambiguous land use statutes and regulations are interpreted in favor of the property owner.

2. Where an ordinance contains language indicating it applies to "new" applications, a property owner with a pending application is entitled to rely upon that language. "New" applications do not include pending applications. If an ordinance is intended to apply to pending applications or all applications, it must say so.

3. Under the doctrine of equitable estoppel, where a City official provides a *written* interpretation of a code provision, which interpretation is consistent with past practice, and a property owner relies in good faith on that *written* interpretation, the City will be equitably estopped from changing its code and applying that change to a property owner with a pending application. Similarly, where a City passes an ordinance which, by its terms, does not apply to pending applications, but only to "new" applications, the City will be estopped from further amending its code years later to apply those same changes to applications pending at the time of the original Code amendment.

STATEMENT OF FACTS

Background and Summary

The Ocean Bay Mart story is long, complex and arduous, but essentially boils down to several key points:

- The owner of a shopping center in need of refurbishment and modernization, Ocean Bay Mart, after investigating various options, decided to redevelop its property as a residential condominium (which is permitted by the City Code and would reduce traffic and other impacts on the surrounding community).

- Ocean Bay Mart performed due diligence and investigated the City Code and its application to other condominium projects in the City.

- A representative of Ocean Bay Mart met with the City Building Inspector (the City official charged with reviewing plans and applying the Code) and confirmed in writing with the Building Inspector how certain Code provisions apply to condominium projects – an interpretation consistent with prior projects in the City.

- Based on the written interpretation (and similar projects), Ocean Bay Mart proceeded to prepare its Site Plan and submitted the same to the City in June, 2015.

- City officials reviewed the Site Plan and offered comments, and the plan was revised accordingly. The plan was then scheduled for a public hearing.[1]

[1] Under the City Code, the Planning Commission conducts a public hearing on every site plan once the Building Inspector has deemed the plan compliant with the Code. As this Court has held, a code-compliant plan is entitled to approval, subject only to reasonable conditions which a planning commission may impose. *See Tony Ashburn, supra*; *Delta Eta Corp. v. City Council of City of Newark*, 2003 WL 1342476 (Del.Super.).

- But then, five months after receiving the plan, and despite prior statements that the plan was code compliant, the new Building Inspector interpreted the Code provision differently from the original Building Inspector in such a way as to render the Site Plan non-compliant with the City Code and the public hearing was cancelled.

- Ocean Bay Mart appealed to the City's Board of Adjustment, the ultimate arbiter of the City's Zoning Code, which ruled in Ocean Bay Mart's favor.

At this point, because the Board of Adjustment had made clear how the Code was to be applied, the Site Plan was Code compliant and ready to move forward to a public hearing and final approval.

- Instead, the Planning Commission delayed for several months, and ultimately held that a state law (the Delaware Uniform Common Interest Ownership Act, 25 *Del.C.* §81-101 *et seq.*, "DUCIOA") rendered the Site Plan a "subdivision," and therefore not in compliance with the City Code. This decision would ultimately be reversed by the Superior Court.

- Meanwhile, in the fall of 2016, while the Planning Commission delayed, the City Commissioners amended the City Code in light of the Board of Adjustment's decision – but, in doing so, the Commissioners included language in the amendments indicating that the changes would only apply to "new" applications. Consistent with this language, both the Mayor and another Commissioner stated that the amendments were not intended to apply to Ocean Bay Mart's plan.

- In May, 2019, however, shortly after the Superior Court reversed the Planning Commission on DUCIOA, the Commissioners further amended the Code to make their earlier 2016 Code changes applicable to Ocean Bay Mart after all.

- Ocean Bay Mart, promptly instituted this suit, but the three-year delay from 2016 to 2019 alone led Ocean Bay Mart to suffer additional costs and lost rents – losses that could have been mitigated had the

City made the Code amendments applicable to Ocean Bay Mart when first adopted in 2016.

All told, by the time the City Commissioners amended the Code in May, 2019, Ocean Bay Mart had incurred over $1.1 million in expenses and lost rent. *See* A-040, 050. To this day, the Site Plan remains compliant with the City Code as it existed in June, 2015, when the plan was first submitted. With that brief overview, a more complete description follows below.

The Ocean Bay Mart Property

The Ocean Bay Mart Shopping Center (the "Center"), approximately 7.7 acres in size and located on the eastern side of Route 1, was once one of the leading shopping centers in the Rehoboth area, with an A&P grocery store, a bank, a Hardee's restaurant, a furniture store, a clothing store and more. Since its heyday in the mid-70s and 80s, however, the Center has seen increased competition, as newer, more modern shopping centers and restaurants north of the Center on Route 1 have been constructed, drawing business away from Ocean Bay Mart and diminishing the Center's appeal.

Ocean Bay Mart begins to explore redevelopment options

Ocean Bay Mart first began exploring redevelopment options for the Center in 2009. A-041. Ocean Bay Mart could, of course, have chosen to modernize, upgrade and enlarge the Center, which would make it more attractive to customers, patrons and tenants, with modern restaurant chains, more stores, and other newer

shopping concepts; however, Ocean Bay Mart concluded that it made more sense to redevelop the site for residential purposes. A-041-043. Residential use is permitted by the existing zoning and would have less impact on the surrounding community, with substantially less traffic, more open space, reduced impervious coverage, and, as required by the City's Code, the planting of numerous trees. A-111, 117, 121 (89% less traffic, 1.7 acres of additional open space, 240 more trees). To Ocean Bay Mart, the lesser impacts from a residential development, as compared to a modernized shopping center, would be a classic "win/win" for Ocean Bay Mart and the surrounding neighborhood. Accordingly, Ocean Bay Mart began investigating the various residential options possible for its property, while waiting for longer term leases to wind down,[2] and getting its plans ready.

Ocean Bay Mart Confirms A Condominium Plan Is Not A "Subdivision"

As Ocean Bay Mart considered redevelopment, it concluded that a

[2] Under the City Code, once site plan approval is granted, a property owner must begin substantial construction activities within one year. City Code §236-32(J). However, no demolition may occur between May 15 and September 15; and, a demolition permit may not be issued until 30 days after the application is filed (and notice must be given to nearby residents). City Code §§105-1, 2. Thus, Ocean Bay Mart would need to move quickly once approval is granted, and it would not be possible to do so with long-term leases in place for most of the shopping center. Accordingly, beginning in the early 2010s, Ocean Bay Mart stopped entering into new long-term leases and did not renew expiring long-term leases. A-046-048. This made leasing the Center more difficult, and depressed the rents that tenants would pay, but was necessary in order to be assured of timely demolition once approvals were granted. *Id.*

condominium regime, rather than individual residential lots, made more sense. With a condominium, unit owners would not be responsible for exterior maintenance and yardwork; and, in the residential market for vacation homes and weekend getaways, as well as retirement homes, such freedom from outdoor maintenance is a major selling point. A-042-043. Moreover, with a condominium, the interior drives would not be public streets, so that the general public could be excluded from driving through the community and the condominium residents would therefore enjoy less traffic and a safer, more peaceful and secure environment. *Id.*[3]

In particular, Ocean Bay Mart was impressed with a condominium project located in the City and known as the "Cottages at Philadelphia Place." This project is on property just under one acre in size and consists of eight separate buildings, each a single condominium unit/residence, with the area between the buildings as common area maintained by the condominium association.

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[3] The main entrance to the Center on Route 1 has a full-service traffic light. Currently, southbound traffic on Route 1 is able to turn left at the light into the Center (which is east of Route 1), and then, driving through the parking lot, access local residential streets, such as Terrace Road to the south. If a condominium is constructed, local residents will no longer be able to cut through the Center's parking lot. In addition, several residences adjoining the Center have gates in their rear fences which open into the Center's parking lot. These residents and their guests often park their cars in the parking lot. It has been suggested that some opposition from local residents is driven by this loss of the shortcut and parking. A-050.

In 2013, in conducting due diligence, Ocean Bay Mart's realtor, Ms. Kathy Newcomb, met with the City Building Inspector, Ms. Terri Sullivan, whom she knew, and with whom she had met before on various projects over the years. A-043-044; 302. This is a common practice for landowners, who want to make sure that their interpretation of various Code provisions is correct before proceeding, and Ms. Newcomb has conducted many such meetings for clients over the years. A-302-303. Often times, the exact property is not disclosed, so as to prevent word from leaking out to the business community. A-303.

Ms. Sullivan told Ms. Newcomb that a condominium was not a "subdivision" – and that only "site plan" review was required. An exchange of correspondence following the meeting confirmed this. A-099, 100.[4] This was important to Ocean Bay Mart for many reasons, not the least of which was timing – a "site" plan review is faster, less complicated, and less expensive than

[4] Generally speaking, a "subdivision" of land occurs when a larger parcel of land is "subdivided" into smaller, individual parcels of land which are intended to be owned separately in "fee simple." Individual lots must meet certain zoning code requirements, such as minimum depth and width, and must front on a public street for access. City Code §236-23(C) ("each lot must front upon a public street").

With a condominium regime, a building or series of buildings is constructed, but condominium owners typically are granted only ownership of the interior area of a building or a portion of the building as their "unit." All exterior areas, such as hallways (in a multi-unit building), parking lots, and open space, typically referred to as "common elements," are owned in common by all of the unit owners, who each have an undivided interest in the common elements. A condominium plan does not create new land parcels or subdivide an existing parcel into multiple parcels, and is therefore not a "subdivision."

"subdivision" review.

During this same meeting, the Building Inspector was also asked about the application of a number of other provisions of the Zoning Code to condominiums. A-304. In particular, Ms. Newcomb specifically asked Ms. Sullivan about footnote 1 (the "Footnote") to the "Table of Use Regulations" (the "Table," appearing in the Appendix at A-028-030). The Table indicates that single-family detached dwellings are permitted in residential and commercial zones, with a Footnote that reads: "[p]rovided that no more than one main building may be erected on a single lot." City Code, §270 Attachment 1. A-030. This restriction seemed to conflict with the Cottages at Philadelphia Place and other condominium projects in the City, where multiple individual buildings of only one residential unit each have been constructed on a single lot. Ms. Sullivan explained that, for a condominium project, the Footnote did not apply, and this conversation was confirmed in the follow up correspondence. Thus, the City's Building Inspector confirmed *in writing* that the language in the Footnote did not apply to condominium projects – an interpretation consistent with other condominium projects in the City.

Ms. Sullivan's representation regarding the Footnote was especially critical to Ocean Bay Mart.[5] It confirmed that individual buildings containing only one

[5] At one point, the *Decision* takes Mr. Monigle, the principal of Ocean Bay Mart, to task because he had never personally read the Table or the Footnote. *Decision* at *9. But no developer, of course, reads every code provision applicable to a

"unit" could be constructed as part of a condominium project, which gave Ocean Bay Mart comfort that it could design its project consistent with the Cottages at Philadelphia Place. Had Ms. Sullivan indicated to the contrary, there is no dispute that, rather than a series of buildings containing just one unit each, Ocean Bay Mart could have constructed a series of semi-detached buildings, more commonly known as duplexes, without any issue, as the Footnote only applies to single-family detached dwellings. Rather than a plan with 58 single-unit buildings (which was the plan ultimately submitted), Ocean Bay Mart could have submitted a plan with 29 twin-unit (or duplex) buildings, and the Footnote would not have applied.[6]

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project – that is why the developer retains professionals. Here, whether Mr. Monigle had read the Table or not, his professionals clearly had, as Ms. Newcomb made a point to address the issue *in writing* with Ms. Sullivan. The whole point of the conversation and follow up correspondence was to determine how the Code would be applied. Mr. Monigle agreed to have Ms. Newcomb go to the City on his behalf and was aware of the outcome; whether he personally read the Table or not is of no moment.

[6] At the later hearing before the Board of Adjustment, the City Solicitor conceded that the Footnote would not apply to condominium plans with duplexes. A-157. He claimed that the seeming inconsistency (that is, that multiple duplexes are allowed, but multiple single-unit buildings are not) was due to fire safety concerns and that duplexes contained fire walls between them. However, the Site Plan complies with the State fire code and was approved by the State Fire Marshal. A-154.

Following receipt of the Building Inspector's written interpretation of the Code,[7] Ocean Bay Mart spent the next 20 months developing the concepts and site layout that would become the Site Plan for the condominium project which Ocean Bay Mart named "Beach Walk." This was a fairly intensive process, as the design requirements include extensive detailed and dimensioned drawings of each building. *See generally* City Code §236-32(C); A-044-045.

Ocean Bay Mart Submits Its Condominium Project As A Site Plan

On June 18, 2015, Ocean Bay Mart submitted its Site Plan for "Beach Walk" to the City. The plan included 58 individual buildings of one unit each, a 5-unit building, a pool, clubhouse and private drives, rather than public streets. Following submission, the Building Inspector issued a comment letter indicating several changes that needed to be made, A-105,[8] and Ocean Bay Mart promptly responded. A-107. A few weeks later, the Building Inspector left the City's employ, and the new Building Inspector issued his own comment letter, A-127, to

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[7] Ocean Bay Mart's attorney also discussed the subdivision issue with the City's attorney and was also told that a condominium was not a "subdivision" and that only site plan review was required. A-101. This conversation did not specifically address the Footnote, but was consistent with the principle that a condominium plan is not considered a "subdivision" for purposes of the City Code.

[8] Under the City Code, the City Building Inspector and various department managers review a plan for Code compliance and, once a plan is found to be in compliance, the Building Inspector forwards the plan to the Planning Commission for a public hearing. City Code §236-32(A).

which Ocean Bay Mart again promptly responded. A-132. Neither comment letter suggested the Site Plan violated the Footnote or would be considered a "subdivision." At this point, with all comments addressed, the new Building Inspector told Ocean Bay Mart that the Site Plan would be scheduled for its public hearing before the Planning Commission in December, 2015. A-148. The Planning Commission Chairman also announced that the Site Plan would be considered at the Commission's December 11, 2015 meeting. A-151.

The Building Inspector Announces A New Interpretation
And The Board Of Adjustment Rejects That Interpretation

However, on November 20, 2015 – for the first time, and despite two rounds of prior comments from the City – the new Building Inspector told Ocean Bay Mart that the Site Plan was illegal because it contained more than one building on a single parcel (*i.e.*, it violated the Footnote) and therefore needed "subdivision" approval. A-152.[9] This was the first time, some five months after the plan's

[9] Not only was the new Building Inspector's November 20 letter inconsistent with his previous comment letter, A-127, and his prior indication that the Site Plan was Code compliant, A-148, but his November 20 letter was in direct conflict with Ms. Sullivan's written confirmation that the Footnote did not apply, A-100, as well as prior condominium projects approved by the City. Moreover, after the Site Plan was submitted, it had been reviewed by Ms. Sullivan and various department managers. None suggested the plan was a "subdivision." Nor did the Planning Commission Chairman, who twice indicated (at meetings where the new Building Inspector was present) that the Site Plan was *not* a subdivision, and would be reviewed as a site plan. *See* A-126 (Chairman: "this is not a subdivision . . . [b]ecause you're not subdividing the property."); A-150 (Chairman: "the Bay Mart

submission, that anyone at the City suggested the Site Plan was a "subdivision." Ocean Bay Mart promptly appealed this decision to the Board of Adjustment, and on May 23, 2016, the Board of Adjustment ruled in Ocean Bay Mart's favor. A-159-160. No one appealed the Board's decision and it therefore became final and binding on the City. In addition, no one at the hearing indicated that the City might amend the Code if the Board ruled in Ocean Bay Mart's favor.

Thus, with the Board of Adjustment's ruling, the Site Plan was Code compliant and ready for a public hearing and approval in accordance with the City Code and Delaware law. *Tony Ashburn*, *supra*; *Delta Eta*, *supra*.

The Planning Commission Nevertheless Claims The Plan Is A "Subdivision"

Finally, three months after the Board of Adjustment's decision, the Site Plan was placed on the Planning Commission's August 12, 2016 agenda for its public hearing. But, rather than review the plan, the Commission asked for briefing on whether it was bound by the Board's decision. A-165. Although the briefing was performed, the Commission never returned to the issue. Instead, on January 13, 2017, relying on language in DUCIOA, as argued by neighborhood opponents to the Site Plan, the Commission said that the plan was a "subdivision," and that

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process is not going to be a major subdivision . . . it is not [a] subdivision. It is a condo").

unless Ocean Bay Mart submitted a "subdivision" plan within 60 days, it would consider the Site Plan rejected. *See* A-179.[10]

Ocean Bay Mart Next Appeals To The City Commissioners

Under the City Code, a Planning Commission decision is appealed to the City Commissioners. On January 26, 2018, and nearly three years after Appellant first filed its application, the Commissioners voted 4-2 to uphold the Planning Commission's decision – despite the fact that the City had never previously applied DUCIOA to a condominium plan. A-206.

The Superior Court Reverses The Commissioners

Ocean Bay Mart then appealed to the Superior Court. On March 12, 2019, the Superior Court reversed the Commissioners, finding they erred as a matter of law in holding that DUCIOA rendered the Site Plan a "subdivision." *See Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 2019 WL 1126351 at *6 (Del.Super.). Accordingly, the court remanded the matter.

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[10] In doing so, the Commission ignored language in DUCIOA which states that: "the provisions of this chapter do not invalidate any provision of any building code, zoning, subdivision, or other real estate law, ordinance, rule or regulation governing the use of real estate." 25 *Del.C.* §81-106(c). Put another way, if the Site Plan was not a "subdivision" under the City Code, then DUCIOA did not render it one. Ultimately, the Superior Court rejected the Planning Commission's decision. *See Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 2019 WL 1126351 (Del.Super.).

Meanwhile, The Commissioners Amend The Code,
But The Amendments Don't Apply to Ocean Bay Mart

Meanwhile, while the Site Plan was in front of the Planning Commission during the fall of 2016, the City Commissioners began considering amendments to the City Code. The amendments ultimately became Ordinances 1116-01 and 1016-02 (the "2016 Ordinances"). A-171, 173. The idea was first mentioned at the Commissioners' August 8, 2016 meeting. A-162. The draft ordinances were then presented to the Commissioners at a September 7 workshop, and then discussed further at their September 16, October 21, November 7, and November 18, 2016 meetings. Ordinance 1016-02 was adopted on October 21, 2016 and Ordinance 1116-01 on November 18, 2016. A-171, 173.

Significantly, the 2016 Ordinances both indicate that they would *not* apply to pending applications, except for two narrow exceptions not applicable here. Section 2 of each ordinance states as follows:

> Upon [this ordinance's] introduction and the scheduling of a public hearing by the Mayor and Commissioners, the City's Building and Licensing Department shall thereafter *reject any new application that is inconsistent with the amendments* to Chapter 270 provided in the Ordinance until such time as the Mayor and Commissioners take action on the Ordinance.

A-172, 174 (emphasis added). Each ordinance makes clear, then, that only "new" applications inconsistent with the amendments are to be rejected. Section 2 of

each ordinance also states: "This Ordinance is subject to . . . Section 270-84 of the [City Code]," which reads in part:

> No building permit shall be issued for the use of land or for the erection or extension of a building or structure thereon with respect to which an ordinance *to change* [i] *its zoning classification* or [ii] *use permitted under its existing zoning classification* has been advertised for a public hearing [until the ordinance is adopted or 90 days has passed].

Code, §270-84(C) (emphasis added). However, because neither ordinance proposed to change a parcel's zoning classification or a use permitted, neither ordinance would apply to any pending plan, including, of course, the Site Plan.

This language in the ordinances was consistent with statements made during the legislative process. First and foremost, the Mayor told the local paper that the ordinances would not apply to Ocean Bay Mart's pending Site Plan because the plan would be considered "grandfathered." A-168. During the September 7, 2016, workshop at which the 2016 Ordinances were being discussed, one of the City Commissioners and the Mayor also engaged in the following colloquy:

> **Comm'r McGuiness:** "Ok. Just let me be clear. The horse is out of the barn. He [the Building Inspector] already has something [the Ocean Bay Mart Site Plan] before him and that was presented and we're trying to tie up a loose end in the code right now?"
> **Mayor Cooper:** "I think yes."
> **Comm'r McGuiness:** "This [the proposed ordinance] has nothing to do with what he's [the Building Inspector] dealing with now [the Site Plan]?"
> **Mayor Cooper:** "I agree with you"
> **Comm'r McGuiness:** "Correct."

A-170. Prior to the 2016 Ordinances' adoption, then, neither the Mayor nor any

City Commissioner ever expressed the view that the 2016 Ordinances should or would apply to the Site Plan.

The City Further Amends Its Code To Try and Stop Ocean Bay Mart's Plan

During Ocean Bay Mart's previously-mentioned appeal to the Superior Court concerning DUCIOA, the City took the position, for the first time, that the 2016 Ordinances did, in fact, apply to the Site Plan and, therefore, the plan was properly rejected notwithstanding DUCIOA. This was in spite of the fact that neither the Planning Commission nor the Commissioners had cited to the 2016 Ordinances when rejecting the plan and, more importantly, despite the language in the 2016 Ordinances indicating they did not apply and despite the statements of the Mayor and Commissioner McGuiness.

However, because the Commissioners themselves had never applied the 2016 Ordinances to the Site Plan, the Superior Court refused to do so, instead remanding the matter back to the City. *See Ocean Bay Mart,* 2019 WL 1126351 at *3. Following remand, though, the City did *not* apply the 2016 Ordinances to the Site Plan. Rather, on May 17, 2019, the City Commissioners further amended the City Code with Ordinance 0519-01 (the "2019 Ordinance," A-189) which made the 2016 Ordinances applicable to any plan that was pending at the time the 2016 Ordinances were adopted and had still not been approved – a universe of one, the Site Plan.

But for this 2019 Ordinance, the Site Plan was (and still is) compliant with the City Code as it existed in June, 2015, when the Site Plan was first submitted.

Ocean Bay Mart's Good Faith Reliance

The *Decision* observes that Ocean Bay Mart "has made a significant and material investment here." *Decision* at *12. In fact, Ocean Bay Mart provided invoices and other detailed financial information, demonstrating that by the time of the second Building Inspector's November 20, 2015 letter, first announcing that "subdivision" approval was required, Ocean Bay Mart had incurred $339,500.86 in costs, expenses and lost rent. A-035. By the time the 2016 Ordinances were adopted, this number had grown to $576,212.44. A-038. And, by May, 2019, when the City amended the 2016 Ordinances, Ocean Bay Mart had incurred expenses and costs and foregone rent totaling $1,107,540.05. A-040. No matter what time period is used for the vested rights calculation, Ocean Bay Mart "has made a significant and material investment here."

ARGUMENT

I. MERELY BECAUSE A CODE PROVISION IS DEEMED AMBIGUOUS IS NO REASON TO DENY VESTED RIGHTS WHERE THE PROPERTY OWNER OBTAINED AN INTERPRETATION FROM THE BUILDING INSPECTOR THAT WAS CONSISTENT WITH PAST PRACTICE

A. Question Presented: Is It Legal Error To Hold That Vested Rights Cannot Accrue Because A Code Provision Is Deemed Ambiguous?

The Court of Chancery held that Ocean Bay Mart could not claim vested rights because, as part of its appeal to the Board of Adjustment, Ocean Bay Mart argued that the Footnote was "ambiguous." *See Decision* at *10. Ocean Bay Mart challenged this conclusion below. A-334.

B. Standard Of Review: *De Novo* Review Applies To Legal Conclusions

The facts here are undisputed; rather, it is the legal conclusions drawn from those facts that are the crux of this appeal. This Court reviews legal questions and issues *de novo*. *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012).

C. Merits Of The Argument: The Ambiguous Nature Of A Code Provision Does Not Foreclose Good Faith Reliance And Vested Rights, Particularly Where The City Official Has Confirmed The Interpretation Of The Code Provision In Writing And That Interpretation Is Consistent With Past City Approvals.

1. If A Property Owner's Plan Complies With The Applicable Code Provisions, It Is Entitled To Approval.

Often times, when property owners propose to develop their properties, those plans are met with public opposition from neighbors and others in the area

who prefer the status quo, would prefer another use, or simply object to any development. Pressure is brought on local politicians to take action to restrict or prohibit the unpopular plan. Left unchecked, such natural tendencies would ultimately render zoning codes meaningless and leave property owners uncertain as to what they could or could not do with their properties. But, as this Court has explained:

> When people [own] land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and residents. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the ordinances. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances.

Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n, 962 A.2d 235, 241 (Del. 2008) (*en banc*). Or, as the Superior Court once put it regarding an attempt by the City of Newark to impose additional conditions upon a site plan:

> if the Court was to accept the respondents' argument, it would turn the concept of a planned logical zoning process into one left to political whim. As such, a professionally developed plan to logically build a community in the best interest of all its citizens taking into account that community's health, safety, morals and general welfare would return to a hodgepodge of construction that simply lets the fancy of those in political power at the moment to determine what is appropriate. This situation would foster corruption and make the zoning process meaningless.

See Delta Eta Corp. v. City Council of City of Newark, 2003 WL 1342476 at *4 (Del.Super.). Ordinarily, then, a code-compliant plan will be approved, subject only to reasonable conditions. But, sometimes, code changes occur while a plan is pending, often to prevent that pending plan, and Delaware law protects property owners in these instances under the doctrine of "vested rights."

2. The "Vested Rights" Doctrine Is Intended To Protect Property Owners Such As Ocean Bay Mart.

Under Delaware law, the question of whether a subsequently-enacted ordinance affects the right of a property owner to proceed with a previously planned use is one of "substantial reliance," and is often termed "vested rights." In *Shellburne v. Roberts*, 224 A.2d 250, 254 (Del. 1966), this Court first stated:

> [a]s to the time of the zoning change, there must have been a substantial change of position, expenditures, or incurrence of obligations, made lawfully in good faith … before the landowner becomes entitled to complete the construction and to use the premises for a purpose prohibited by a subsequent zoning change.

Later, this Court affirmed the doctrine of vested rights explaining that:

> This should involve a weighing of such factors as the nature, extent and degree of the public interest to be served by the ordinance amendment on the one hand and, on the other hand, the nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded.

In re: 244.5 Acres of Land, 808 A.2d 753, 757-8 (Del. 2002) (citation omitted); but in so stating, the Court made clear that:

> **[i]n the final analysis, good faith reliance on existing standards is the test.**

Id. (emphasis added).[11] Here, the Chancery Court found that: "the Plaintiff has made a significant and material investment." *Decision* at *12. However, the *Decision* holds that because Ocean Bay Mart argued, in part, to the Board of Adjustment, that the Footnote to the Table of Use Regulations was "ambiguous," Ocean Bay Mart's reliance lacked good faith. The *Decision*, in a ruling fraught with peril for property owners in the future, states:

> The Plaintiff argued successfully before the Board of Adjustment that the Table of Use Regulations was ambiguous, and thus established that the Site Plan was in compliance with the then-ordinances, once the ambiguity was resolved in its favor. The issue here, however, is quite different. Having made the ambiguity argument, the Plaintiff was on notice that the City may have intended the more restrictive interpretation, and thus might clarify the law to accomplish that intent (as, in fact, it did). In other words, the Plaintiff is in the uncomfortable position of asking this Court to find that it reasonably relied on the fixed nature of an ordinance that it has acknowledged was ambiguous, and which it knew the City construed as requiring subdivision.

Decision at *10. Such a holding, however, misapplies the law to the uncontroverted facts and threatens all Delaware property owners' rights.

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[11] The *Decision* suggests that rather than a final analysis of "good faith reliance on existing standards," the test for vested rights is merely one of "equitable balancing." *Decision* at *7 ("where a municipal ordinance has changed while a property-use application is pending, the law simply requires an equitable balancing"), but that suggestion goes too far. The *Decision*, though, does not turn on this issue, as the *Decision* found Ocean Bay Mart lacked good faith reliance.

3. Ocean Bay Mart Relied In Good Faith On The City's Past Application Of Its Code And The Building Inspector's Written Confirmation.

The *Decision* rejects any claim of good faith reliance because Ocean Bay Mart argued, in part, that the Footnote was ambiguous. In doing so, the *Decision* ignores all of Ocean Bay Mart's and the City's actions leading up to the Board hearing, as well as the heretofore bedrock principle of land use law that ambiguous provisions are interpreted in favor of a property owner.

As recounted in the Statement of Facts, as well as in the *Decision*, Ocean Bay Mart engaged in a lengthy process before submitting its Site Plan to the City. It reviewed the Code. It reviewed other projects. It met with City officials concerning the Code's application and confirmed that application in writing.

After the Site Plan was submitted, numerous City officials reviewed and discussed the plan. For some five months, no one – no one at all – suggested the Site Plan might be a "subdivision." It was only on November 20, 2015 – after the new Building Inspector had already announced that the Site Plan complied with all code provisions and was ready for a public hearing – that this same Building Inspector changed course and announced his new view that the Footnote meant that the project required "subdivision" approval.

Ocean Bay Mart promptly appealed to the Board of Adjustment, as permitted by state law and the City Code, which rejected the new Building

Inspector's position. While Ocean Bay Mart made several arguments to the Board about the Footnote, including the City's past approvals of other condominium projects and Ms. Sullivan's written interpretation, the Board simply held the Footnote was ambiguous, meaning, of course, that the Site Plan was not a subdivision and the plan was entitled to move forward.

There should be no question but that Ocean Bay Mart was acting in good faith when it (i) reviewed other condominium projects in the City that featured exactly what Ocean Bay Mart proposed, and (ii) specifically asked the Building Inspector about the Footnote and was told, in writing, that it did not apply to condominium projects.[12] Based on the *written* interpretation of the Building

[12] The Decision refers to the meeting between Ms. Newcomb and Ms. Sullivan as "opaque" and "obscure." *Decision* at *3. But this characterization misses the meeting's significance. As Ms. Newcomb testified, property owners routinely discuss code provisions and regulations with government officials so as to determine what can and cannot be done with their property. And, here, the discussion was memorialized in writing *at the request of the Building Inspector*. A-303. If, going forward, property owners are not able to rely upon *written* interpretations from government officials charged with interpretation and enforcement of the applicable code provisions, then there is no point in having such conversations; or, put another way, if public sentiment later disapproves of these conversations, local governments will simply be free to change their codes notwithstanding prior written interpretations provided to property owners. Ultimately, the key is "good faith." There is nothing to suggest that Ocean Bay Mart was not acting in good faith when Ms. Newcomb discussed the matter with Ms. Sullivan and confirmed that conversation in writing. The whole point of the exercise was to gather information and proceed in accordance with that information – which Ocean Bay Mart then did. Had Ms. Sullivan indicated the Footnote did apply, Ocean Bay Mart would have developed a plan with duplexes rather than single-family units. But Ms. Sullivan's written interpretation was

Inspector, which was consistent with past condominium projects in the City, Ocean Bay Mart moved forward with its Site Plan in good faith. Nevertheless, the *Decision* tells Ocean Bay Mart it was wrong to rely on the written statement of the Building Inspector and the past application of the Footnote to other condominium projects because, if the Code provision was "ambiguous," then Ocean Bay Mart should have been on notice that the City might change the Footnote at any time in the future and that such change would apply to Ocean Bay Mart.

4. When The Board Of Adjustment Ruled In Ocean Bay Mart's Favor, Ocean Bay Mart's Rights Were Vested And Protected Against Subsequent Actions By The City.

Any question about the applicability of the Footnote, and Ocean Bay Mart's good faith reliance on the Code, should have ended with the Board of Adjustment's ruling. The Board is the ultimate arbiter of the City's Zoning Code, and its ruling was consistent with past City practice as well as Ms. Sullivan's written interpretation. No one appealed the Board's decision. No one suggested during the Board's public hearing that the City would just amend the Code if it lost. Once the Board ruled, any question of the Site Plan's compliance with the Code was put to rest, and Ocean Bay Mart was entitled to approval in accordance with *Tony Ashburn* and *Delta Eta.*

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consistent with similar projects in the City, and Ocean Bay Mart had no reason to believe it was not correct – indeed, it was correct, as the Board of Adjustment confirmed her interpretation.

Had the Board ruled the other way, of course, this would be a completely different case. But, the Board's ruling *supports* Ocean Bay Mart because Ocean Bay Mart was entitled to rely *in good faith* on Ms. Sullivan's written interpretation and the City's past practices. And, if there was ambiguity, Ocean Bay Mart was entitled to rely on the rule of *Mergenthaler* and *Chase Alexa*. Put another way, the Board looked at the same facts and issues as Ocean Bay Mart, and found that Ocean Bay Mart was correct.

5. The Chancery Court's Ruling Eviscerates Delaware Law Holding That Ambiguous Provisions Are Interpreted In Favor Of A Property Owner.

It is, of course, axiomatic under Delaware law that if a land use regulation is ambiguous, it is construed in favor of the property owner. *See, e.g., Chase Alexa, supra*; *Mergenthaler, supra*. This is because zoning and land use restrictions are in derogation of the common law by restricting the free use of land. *Decision* at *10; *see also Norino Properties, LLC v. Mayor & Town Council of Town of Ocean View*, 2011 WL 1219563, at 1 n. 9 (Del.Ch.). If the government wants to restrict a particular use, it must be clear and use language free from ambiguity. Otherwise, the restriction will be interpreted in favor of the property owner. *Id.*

Nevertheless, the *Decision* tells Ocean Bay Mart (and all other Delaware property owners) that they cannot rely on a Code provision that is "ambiguous" – even after securing a written interpretation of the Code provision from the

governmental official tasked with interpreting and enforcing the Code – because, according to the *Decision*, a governmental body has the absolute right to amend an ambiguous Code provision at any time and have that amendment apply immediately to the property owner. For all intents and purposes, such a holding guts the rule of *Mergenthaler* and *Chase Alexa*, and stands the caselaw on its head. Going forward, if a Code provision is ambiguous, the government need simply amend the Code provision, and the property owner will be bound by that change. There can be no reliance. Period. *Mergenthaler* and *Chase Alexa* are effectively overruled and rendered meaningless. Indeed, why bother to litigate the issue of statutory construction if the government is free to change its code once the ambiguity is raised? According to the *Decision*, where there is ambiguity, there can be no good faith, even with a written interpretation, and even with past practices.

For all the foregoing reasons, the *Decision* must be reversed. Ocean Bay Mart has the requisite good faith, "has made a significant and material investment," and therefore has vested rights.

II. BY THEIR TERMS, THE 2016 ORDINANCES DID NOT APPLY TO PENDING APPLICATIONS AND OCEAN BAY MART WAS ENTITLED TO RELY UPON THE LANGUAGE OF THE ORDINANCES.

A. Question Presented: Was It Legal Error To Hold That Ocean Bay Mart Could Not Rely On The Language Of The 2016 Ordinances Which Indicated They Did Not Apply?

The *Decision* states that, despite the actual language of the 2016 Ordinances (indicating they did not apply to the Site Plan), Ocean Bay Mart could not rely in good faith on that language. *See Decision* at *12. Ocean Bay Mart argued to the contrary below. A-222-226.

B. Standard Of Review: Questions Of Statutory Construction Are Questions Of Law Which This Court Reviews *De Novo*.

The proper interpretation of a statute or ordinance is a question of law, which this Court reviews *de novo*. *Dambro v. Meyer*, 974 A.2d 121 (Del. 2009); *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215 (Del. 1995).

C. Merits Of The Argument: The 2016 Ordinances Included Language Indicating They Would Not Apply To Pending Applications; It Was Error To Hold That Ocean Bay Mart Could Not Rely On This Language.

1. The 2016 Ordinances – By Their Terms – Did Not Apply To Ocean Bay Mart's Then-Pending Application.

When the Commissioners passed the 2016 Ordinances, Section 2 of each ordinance stated, in part, as follows:

> Upon [this ordinance's] introduction and the scheduling of a public hearing by the Mayor and Commissioners, the City's Building and

> Licensing Department shall thereafter *reject any new application that is inconsistent with the amendments* to Chapter 270 provided in the Ordinance until such time as the Mayor and Commissioners take action on the Ordinance.

See A-172, 174. Thus, Section 2 of each ordinance was clear: *new* applications would be rejected, meaning, of course, that *pending* applications were unaffected.[13]

Section 2 of each ordinance also said, in part: "This Ordinance is subject to . . . Section 270-84 of the [City Code]," which code section reads in pertinent part:

> No building permit shall be issued for the use of land or for the erection or extension of a building or structure thereon with respect to which an ordinance *to change* [i] *its zoning classification* or [ii] *use permitted under its existing zoning classification* has been advertised for a public hearing [until the ordinance is adopted or 90 days has passed].

Code, §270-84(C) (emphasis added). This section provides for retroactive application of a new ordinance *only* where the new ordinance makes a change to a "zoning classification" or "use permitted." As neither 2016 Ordinance makes such a change, neither ordinance applied to the Site Plan.

Both the Mayor and one of the Commissioners also made comments consistent with the language in the 2016 Ordinances, which only further justified

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[13] At one point, the *Decision* (at *4) observes that the Ordinances did not say that they did not apply to pending applications generally; but, such a statement ignores the rule of *expressio unius exclusio alterius est – i.e.*, the expression of one thing is to exclude the other. *See, e.g., Walt v. State*, 727 A.2d 836, 840 (Del. 1999) *citing Hickman v. Workman*, 450 A.2d 388, 391 (Del. 1982). It would be nonsensical for the ordinances to instruct city officials to reject only "*new*" applications if the Commissioners wanted the ordinances to apply to "all" applications.

Ocean Bay Mart's good faith reliance. The Mayor famously told the *Cape Gazette* newspaper that Ocean Bay Mart's project would be "grandfathered." A-168. And Commissioner McGuiness made clear that, with respect to Ocean Bay Mart, "the horse is out of the barn" and the proposed ordinances "ha[ve] nothing to do with" the Site Plan. A-170. No other Commissioner ever said anything to the contrary or ever asked that the language of Section 2 be changed. Ocean Bay Mart was entitled to rely on the language of the 2016 Ordinances.

2. Only When The City Further Amended Its Code In 2019 Could Ocean Bay Mart's Good Faith Reliance Be Said To End.

Only in May, 2019, did the City amend the 2016 Ordinances to make them applicable to the Site Plan. Only then could Ocean Bay Mart's reliance on the language of the ordinances *as enacted* come to an end. Ocean Bay Mart could not know that the City intended to further amend its Code until the City did so. If the City originally intended for the 2016 Ordinances to apply to the Site Plan, it would not have included the language of Section 2 in each ordinance.[14]

[14] It should be noted that the 2019 Ordinance does not contain the language of Section 2 from the 2016 Ordinances. This omission demonstrates that the City knew that Section 2 made the 2016 Ordinances inapplicable to the Site Plan.

3. By Waiting Until 2019 To Amend Its Code, The City Caused Ocean Bay Mart To Incur Substantial Additional Expenses And Costs And Foregone Rents.

By amending the 2016 Ordinances in May, 2019, the City has conceded (at least implicitly) that the 2016 Ordinances did not apply to Ocean Bay Mart's Site Plan as originally passed. Otherwise, the 2019 Ordinance would be surplusage and a useless act.[15] Had the 2016 Ordinances stated that they applied to pending plans *when enacted*, or omitted Section 2, Ocean Bay Mart would have brought its vested rights and equitable estoppel claims in 2016, and not lost another 3 years of time, energy and rents. While Ocean Bay Mart was forced to appeal the Planning Commission's erroneous decision on DUCIOA, it had no reason to suspect that the City would, upon losing that case, further amend its Code to prohibit the Site Plan. Ocean Bay Mart was entitled to rely upon the language of the 2016 Ordinances *as enacted*.

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[15] Until the ordinances were amended, they did not apply to the Site Plan. Otherwise, there would have been no need to amend the ordinances. An amendment to a statute implies a purposeful alteration in substance. *Stauhs v. Board of Review*, 226 A.2d 182, 185 (N.J. App.Div. 1967). If a statute amends a previous law, courts will seek to uncover the reason for the amendment by examining the old law and the changes made. *Newark v. Township of Hardyston*, 667 A.2d 193, 198 (N.J. App.Div.1995), *cert. denied*, 673 A.2d 277 (N.J. 1996). A statute should not be read so as to "render the amendments futile and abortive," *id.,* or meaningless or superfluous. *In re Sussex County Mun. Util. Auth.,* 486 *A.*2d 932, 934 (App.Div.), *cert. denied,* 501 *A.*2d 934 (N.J. 1985); *see also Gatto Design & Dev. Corp. v. Twp. of Colts Neck*, 719 A.2d 707, 709 (N.J. App. Div. 1998) (same).

III. THE CITY BUILDING INSPECTOR'S WRITTEN INTERPRETATION OF THE CODE PROVISION, CONSISTENT WITH PAST CONDOMINIUM PROJECTS, IS A CLASSIC EXAMPLE OF EQUITABLE ESTOPPEL.

A. Question Presented: Was It Legal Error To Hold That The Building Inspector's Written Interpretation Could Not Form A Basis For Equitable Estoppel?

The *Decision* holds that the City is not equitably estopped from applying the 2019 Ordinance to Ocean Bay Mart for the same reasons that Ocean Bay Mart lacks vested rights. *Decision* at *12-13. Ocean Bay Mart argued that equitable estoppel does apply. A-219-222.

B. Standard Of Review: *De Novo* Review Applies To Legal Conclusions.

The facts here are undisputed; rather, it is the legal conclusions drawn from those facts which are the crux of this appeal. This Court reviews legal questions and issues *de novo*. *Stafford v. State*, *supra.*

C. Merits Of The Argument: The City Is Estopped From Applying The Code Changes To Ocean Bay Mart.

1. Equitable Estoppel Exists To Protect Property Owners Such As Ocean Bay Mart Who Change Position Based On Governmental Actions And Instructions.

Equitable estoppel exists to protect property owners who rely upon governmental actions or instruction. Generally, a local government, in exercising its zoning powers, will be estopped when a property owner:

(1) relying in good faith,

(2) upon some act or omission of government,
(3) has made such a substantial change in position or incurred such extensive obligations and expenses,
(4) that it would be highly inequitable and unjust to destroy the rights which he has acquired.

See, e.g., Eastern Shore Environmental, Inc. v. Kent County Dept. of Planning, 2002 WL 244690, at *4 (Del.Ch.) *see also Miller v. Board of Adjustment,* 521 A.2d 642, 645-46 (Del.Super. 1986); *Disabatino v. New Castle County,* 781 A.2d 698, 702 (Del.Ch. 2000) ("a local government may be estopped from exercising its zoning powers against a property owner where the property owner, relying in good faith upon some act or omission of the government, has made such a substantial change in position or incurred such extensive obligations and expenses, that it would be highly unjust to impair or destroy the rights that the landowner has acquired."), *aff'd*, 781 A.2d 687 (Del. 2001).

Here, Ocean Bay Mart easily satisfies the requirements for equitable estoppel. Ocean Bay Mart met in good faith with Ms. Sullivan, the City's Building Inspector, seeking answers to how the Table of Use Regulations and Footnote were applied to condominium projects, particularly given similar condominium projects previously approved in the City. Ms. Sullivan confirmed *in writing* that the Footnote did not apply to condominium projects, and Ocean Bay Mart then prepared a plan consistent with that interpretation and with other previously-approved condominium projects. By the time that anyone at the City first brought

up the subject of changing its Code (in August, 2016), Ocean Bay Mart had "made a significant and material investment" (*Decision* at *12), in reliance upon Ms. Sullivan's written interpretation of the applicable Code provision. Under the circumstances, it would be "highly inequitable and unjust" to allow the City to change its Code and prohibit the project.

Although the *Decision* suggests that Ocean Bay Mart should have been on notice that the City might want to correct the alleged ambiguity, the City, in all the briefing below, never cited any case suggesting that a property owner could not rely in good faith on an ambiguous code provision; and, here, Ocean Bay Mart was not relying on ambiguity, but a written interpretation from the appropriate governmental official which was consistent with previously-approved projects.

Moreover, during the hearing before the Board of Adjustment, no one indicated the City might seek to correct the ambiguity, and no one appealed the Board's decision.

The 2016 Ordinances contained language making it clear that they did not apply to Ocean Bay Mart. To allow the City – three years later after those ordinances were adopted, and after Ocean Bay Mart had incurred substantial additional expenses and further lost rents – to further amend its Code, so as to stop Ocean Bay Mart's project is, again, the very type of "highly inequitable and unjust" behavior which equitable estoppel is designed to prevent. If the City had

made clear in 2016 that the 2016 Ordinances applied to Ocean Bay Mart's plan, Ocean Bay Mart could have taken action three years sooner and not incurred three years of additional lost rents and other expenses. Instead, the City bided its time and then amended its Code only after the Planning Commission's DUCIOA argument was rejected by the Superior Court. The City should be estopped from such behavior. A local government is not free to keep changing its code until something sticks. To hold otherwise "would [result in] the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances," *Tony Ashburn, supra,* and "would turn the concept of a planned logical zoning process into one left to political whim." *Delta Eta, supra.*

CONCLUSION

The *Decision* represents an existential moment for property owners and property rights in Delaware. If, when confronted with a ordinance which is ambiguous, a property owner cannot rely in good faith on the local jurisdiction's past application of the ordinance, as well as a written interpretation of that ordinance by the local official charged with applying the ordinance, then the doctrine of vested rights, is, for all intents and purposes, dead. Dead because, by having an ambiguity in its code, the local jurisdiction will be free to "correct" that ambiguity in a way that prevents a project, particularly an unpopular one, from moving forward. The *Decision* tells property owners they cannot rely in good faith on any ordinance that might be "ambiguous."

Moreover, the opinion puts an end to the heretofore bedrock principle that where a land use statute is ambiguous, it is to be interpreted in favor of the property owner. The *Decision* means that if an ambiguity is found, the local jurisdiction is free to change its code, and the property owner is bound by that change and its retroactive application, notwithstanding *Mergenthaler*, *Chase Alexa,* and their progeny. Going forward, a property owner will not be able to rely on these cases and they are effectively overruled.

Finally, when the local official charged with interpreting and applying the applicable code provision, provides a written interpretation consistent with past

approvals by the local jurisdiction, a property owner should be entitled to rely upon that written interpretation. There is nothing "opaque" or "obscure" about a meeting between government officials and property owners to discuss how code provisions are to be applied; and, when that meeting results in a written confirmation from the official as to what was said, a property owner should be able to rely upon that document. One can always "Monday morning quarterback" a situation and say "if only something more had been done," but a written interpretation is *meant* to be relied upon. That is why it is put in writing. The City should be equitably estopped from changing its position once Ocean Bay relied upon that writing and, in the words of the Chancery Court, "made a significant and material investment here." *Decision* at *12.

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