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IN THE SUPREME COURT OF THE STATE OF DELAWARE

OCEAN BAY MART, INC.,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	
v.	)	Case No. 28, 2022
	)	
THE CITY OF REHOBOTH BEACH, DELAWARE,	)	UPON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE
	)	
Defendant Below, Appellee.	)	IN C.A. NO. 2019-0467-SG

BRIEF FOR THE COMMITTEE OF 100 AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, OCEAN BAY MART, INC.

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***AMICUS CURIAE* AND ITS INTEREST IN THIS CASE**

The Committee of 100 (the "Committee") is a non-partisan, non-profit association of Delaware business leaders that works to promote responsible economic development and address issues that affect Delaware's economic health. Originally organized in 1967 in response to issues in land use planning and state and local finance, the Committee has evolved into a broad-based organization that functions as a positive force, as well as a critical observer. The Committee's members recognize that effectively addressing quality-of-life issues -- such as education, housing, transportation, the environment, health care, public safety, libraries, recreation, the arts, and social services -- requires a healthy economy.

Because the land development process is an important part of economic development, the Committee pays special attention to issues that affect land development. Having reviewed the Court of Chancery's decision in *Ocean Bay Mart, Inc. v. City of Rehoboth Beach,* 2021 WL 4771246 (Del. Ch. Oct. 13, 2021) ("*Ocean Bay Mart*"), the Committee believes it can offer perspective and real world observations that will assist the Court as it reviews the Court of Chancery's decision.

For these reasons, the Committee has filed a Motion For Leave To File An *Amicus* Brief in accordance with Supreme Court Rule 28, and asks the Court accept this *Amicus* Brief.

SUMMARY OF ARGUMENT

1. Ambiguity should not prevent good faith reliance. Property owners, developers, engineers, architects, brokers and others routinely consult with local government officials concerning the meaning and application of land use codes and regulations, and rely on these consultations in their planning and submission processes. Often times, these consultations are necessary because the regulations are not entirely clear or free from doubt – indeed, if they were, there would be no need for such consultations.

The *Ocean Bay Mart* decision, left undisturbed, tells property owners and others that they may not rely on such consultations where a code provision or regulation is "ambiguous," even if that consultation is confirmed in writing, and even if the writing is consistent with prior approvals and prior applications of the code provision at issue. As a result, property owners will be exposed to substantial risk and uncertainty in the development of their property, particularly if opposition forms to a particular project – because under *Ocean Bay Mart*, if there is ambiguity, there can be no good faith reliance and no protection against changes to a code or regulation.

2. <u>The *Ocean Bay Mart* Decision Effectively Reverses Long-Established Delaware Case Law Holding That Ambiguities Are Interpreted In Favor Of Property Owners</u>. Heretofore, this Court, recognizing that zoning and land use regulations are in derogation of the common law, has always recognized that if there is ambiguity in a code or statute, the ambiguity is resolved in favor of the property owner. *See, e.g., Dewey Beach Enters., Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010) ("[T]o the extent that there is any doubt as to the correct interpretation [of a zoning ordinance], that doubt must be resolved in favor of the landowner"); *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) ("the interpretation that favors the landowner controls"); *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972). The *Ocean Bay Mart* decision, for all intents and purposes, reverses this rule, because now, if a code is "ambiguous," the local government can simply change the code and apply the change to a pending plan.

3. <u>The Test For Vested Rights Is "Good Faith Reliance," And Not Mere Equitable Balancing</u>. Finally, the *Ocean Bay Mart* decision reduces the test for vested rights to one of mere "equitable balancing." However, this Court has emphasized that "[i]n the final analysis, good faith reliance on existing standards is the test." *In re: 244.5 Acres of Land*, 808 A.2d 753, 757-758 (Del. 2002). All ordinances are, presumably, enacted in the public interest, and, in particular, a local government determined to stop an unpopular project, can always put forth some seemingly compelling reasons unrelated to a particular project that justifies the additional regulation or change (and which, it just so happens, also acts to block the unpopular project). "Good faith reliance on existing standards is the test" because unless a particular code change was initiated without knowledge of a particular plan or proposed project, the good faith of the property owner should prevail over a code change initiated in reaction to an unpopular plan. A heavy bias exists in favor of a property owner and good faith reliance, and, absent a truly extraordinary and compelling reason, a property owner should prevail – particularly where a proposed change arises in reaction to an unpopular plan.

ARGUMENT

I. MERELY BECAUSE A CODE OR REGULATION IS "AMBIGUOUS" DOES NOT MEAN A PROPERTY OWNER CANNOT OBTAIN VESTED RIGHTS.

For better or worse, zoning codes, land use regulations, and the like are often not entirely clear. Faced with a less-than-clear provision, or a provision capable of multiple meanings, a property owner will often reach out to the local government official to discuss the meaning of the provision. That same property owner, or one of their professionals, such as their civil engineer, their architect or their contractor, or others in the real estate and development business, will also look at similar projects to see how the particular provision has been applied in the past. Property owners do this because they do not want to waste money. They do not want to go down the road, design a project, and then be told, "oh no, that's wrong, here's how we do it." Thus, property owners and others seek interpretation and guidance from government officials on how such provisions are applied – and they rely on that advice.

But now, with the *Ocean Bay Mart* decision, property owners are told that if a zoning provision is "ambiguous," you cannot rely. Property owners are told that if a zoning provision is "ambiguous," the government has the right to correct that ambiguity, regardless of what it may have approved in the past, regardless of what it may have said in the past and regardless of whether it said anything in writing. If

a zoning provision is "ambiguous," the property owner will be subject to whatever change the government wants to make to the provision – regardless of whether that change renders useless the property owner's submitted plan and all of the time, expense and energy put into that plan, and regardless of whether the property owner relied on past projects and written interpretations.

The Committee can find no caselaw -- in Delaware or any other state -- which supports such a rule, nor is such absence a surprise. Such a rule is inequitable and unfair. Property owners should not be left to guess about the meaning of code provisions, or "hope" that their interpretation is right. As discussed further below, heretofore, Delaware caselaw has held that an "ambiguous" zoning provision is interpreted in favor of the property owner. The *Ocean Bay Mart* decision reverses that long-established rule. If property owners can't rely on an "ambiguous" code provision, then if it is applied contrary to their understanding, they will be stuck, because they could have no "good faith" when it comes to their reading of the zoning provision.

But this is exactly why property owners talk to local governments. They want to know, in advance, how "ambiguous" zoning provisions are interpreted and applied. Any rule which holds that property owners cannot rely on governmental advice or past application of a zoning provision will only result in waste,

inefficiency, fewer projects and a host of other undesirable effects which deter property use and beneficial development.

We are, of course, addressing a property owner's "good faith." To begin, a property owner should be able to rely on the principle of *Dewey Beach Enterprises* and other cases holding that ambiguity is resolved in their favor. That alone should be enough.

But here, for Ocean Bay Mart, there was more. Ocean Bay Mart reviewed the code. It reviewed past projects. It met with the City's Building Inspector and confirmed that meeting in writing. This is exactly what the Committee would expect a responsible property owner to do. That Ocean Bay Mart would later argue to the Board of Adjustment (after the City's new Building Inspector reached a different conclusion 5 months after the plan was submitted) that its plan should be allowed to proceed, in part, because the zoning provision was "ambiguous" cannot be held against Ocean Bay Mart. It did more than just make that argument. It pointed to past projects.[1] It pointed to the writing from the first Building Inspector.

In determining whether there is "good faith," there is no categorical rule, nor should there be, that an "ambiguous" statute prohibits any finding of good faith. The determination ought to rest on what the property owner did in response to that

[1] The new Building Inspector, in issuing his contrary opinion, made no attempt to explain the City's prior approval of similar projects.

ambiguity, and, it really doesn't get much better in terms of proof of good faith than obtaining a written interpretation from the government official charged with applying the code -- a written interpretation that is consistent with prior approved projects.

In sum, ambiguity in a code provision or regulation should not be used to abrogate a property owner's good faith reliance on governmental advice and past zoning applications, and, as a result the *Ocean Bay Mart* decision must be reversed.

II. THE *OCEAN BAY MART* DECISION EFFECTIVELY REVERSES LONG-ESTABLISHED CASELAW PROTECTING PROPERTY OWNERS WHERE A CODE PROVISION OR REGULATION IS "AMBIGUOUS."

Historically, property owners have known that if a zoning provision is "ambiguous," it will be interpreted in their favor. *See, e.g., Dewey Beach Enters., Inc. v. Board of Adjustment of Town of Dewey Beach,* 1 A.3d at 310 ("[T]o the extent that there is any doubt as to the correct interpretation [of a zoning ordinance], that doubt must be resolved in favor of the landowner"); *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d at 1152 ("the interpretation that favors the landowner controls"); *Mergenthaler v. State*, 293 A.2d at 288. This only makes sense. Land use restrictions are in derogation of the common law, which favors the free use of land (subject only to nuisance claims); and, if a local government wants to restrict use, it must use clear and *un*ambiguous language in doing so. If a local government's code is ambiguous, the property owner must be permitted to proceed based upon a reading of that code favorable to that owner.

But now the *Ocean Bay Mart* decision tells us otherwise. Now, if a code is ambiguous, it cannot be relied upon in "good faith." A property owner is now charged with the knowledge that if a code provision is ambiguous, the local government may want to correct the ambiguity once it is discovered, and, if the local government does correct the ambiguity, the property owner will be bound by it. Such an outcome is directly contrary to *Dewey Beach Enterprises, Chase Alexa,*

Mergenthaler, and the many other cases which instruct local governments that they must avoid ambiguity and which provide protection to property owners who rely on the code provision as drafted.

Perversely, a rule which holds that ambiguity may be used against a property owner provides incentive to local governments to create ambiguity. After all, if there is ambiguity, and a local government (or its populace) doesn't like a proposed plan, the local government can now change the "ambiguous" provision with impunity. And, this would be true even where (i) the local government approved past projects consistent with a pending plan, and (ii) where a governmental official may have offered a written interpretation of the ambiguous provision. As long as there is ambiguity, there can be no good faith reliance, and no vested rights, and so the rule of *Dewey Beach Enterprises* ("[T]o the extent that there is any doubt as to the correct interpretation [of a zoning ordinance], that doubt must be resolved in favor of the landowner") is no more.

The *Ocean Bay Mart* decision, which effectively reverses the holding in *Dewey Beach Enterprises*, must be reversed.

And this conclusion is all the more bolstered by the facts of this case because here, in this case, the City's own Board of Adjustment, its final arbiter as to the meaning of the zoning code, *ruled in Ocean Bay Mart's favor*. The Delaware General Assembly has made municipal boards of adjustment – not city councils –

the final decisionmaker on whether an administrative official's interpretation and application of a code requirement is correct or not. 22 *Del. C.* §327. When the Board of Adjustment ruled here, that should have ended the matter so far as Ocean Bay Mart and the City were concerned.

The General Assembly did not make city councils the final arbiters, presumably because the General Assembly did not want city councils to simply amend their codes in reaction to a decision that an administrative official made with respect to a project and have that change apply to the project/interpretation that was the subject of the appeal. To allow a city council to reverse a decision of a board of adjustment by immediately amending a city code provision so as to impose the council's desired outcome would render the appeal to the board a useless act. Note too that the General Assembly has provided that appeals of board decisions go to the Superior Court, not to city councils. 22 *Del. C.* §328. This is not to say that city councils cannot amend their codes in reaction to board decisions, it is simply to say that city councils cannot, by legislative action, reverse a board decision as it applies to a particular project. A board of adjustment is the final arbiter, not the city or town or county council.

III. THE TEST FOR VESTED RIGHTS IS NOT MERE "EQUITABLE BALANCING;" RATHER, AS THIS COURT HAS STATED, "IN THE FINAL ANALYSIS, GOOD FAITH RELIANCE ON EXISTING STANDARDS IS THE TEST."

After engaging in a historical review of vested rights cases, the *Ocean Bay Mart* decision rejects this Court's previous directive that: "[i]n the final analysis, good faith reliance on existing standards is the test," *In re: 244.5 Acres of Land*, 808 A.2d at 757-758, and instead announces a new standard that: "where a municipal ordinance has changed while a property-use application is pending, the law simply requires an equitable balancing." *Ocean Bay Mart*, at *7. But this is not the test, nor should it be.

Local governments already possess great power in the area of land use. However, because land use regulation is in derogation of the common law, local governments cannot be ambiguous in the language they use. They must be precise. And they must apply the law as written, and are not free to simply add new conditions in response to a plan, whether through imposing conditions or amending their codes. To hold otherwise would, as this Court has warned against, "subject a purchaser of land zoned for a specific use to the future whim or caprice" of local passions, *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n*, 962 A.2d 235, 241 (Del. 2008) (*en banc*); and, as the Superior Court has predicted, "[t]he 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." *East Lake Partners v. City of Dover Planning Comm'n*, 655 A.2d 821, 826 (Del. Super. 1994), *aff'd*, 947 A.2d 1122 (Del. 2008).

Presumably every ordinance adopted by a local government serves the public interest. If the fact that new ordinances or regulations serve the public interest was allowed to "outweigh" a property owner's good faith reliance, the doctrine of vested rights is in severe peril. And this is particularly true, where, as here, the ordinances arose only in reaction to an unpopular plan, and, even more so, because the ordinances, when adopted, did not apply to the Ocean Bay Mart's plan.[2] If the new ordinances were so critical, why did the City not apply them to the site plan when they were first adopted in 2016?[3]

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[2] Both of the two ordinances, as adopted by the City of Rehoboth Beach (the "City") in 2016, contained language in section 2, directing that City officials only reject "new" applications inconsistent with the Ordinances, and also stated that the ordinances were subject to section 270-84 of the City's Code, which states that: "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 its zoning classification or use permitted under its existing zoning classification has been advertised for a public hearing." Thus, if a pending ordinance does not change a zoning classification or use permitted, then the ordinance does not apply to a pending application.

[3] The City may try and say that the ordinances as adopted in 2016 did apply to Ocean Bay Mart's plan, but, if that is so, why did the City then further amend its code in 2019? Why not apply the ordinances as originally enacted? The answer, or course, is that the language in the ordinances as passed (section 2) meant that the ordinances did not apply to Ocean Bay Mart's plan. That is why the City had to enact a new ordinance in 2019.

The *Ocean Bay Mart* decision cites to *Town of Cheswold v. Central Delaware Business Park*, 188 A.3d 810 (Del. 2018) for its statement regarding "equitable balancing." Yet that case was not a vested rights case, but instead addressed the applicability of a settlement agreement. In *dicta*, though, the *Town of Cheswold* decision does discuss vested rights, and, in footnote, cites a California case which stated that "[V]ested rights may be impaired by subsequent police power enactments *necessary* to protect public health or safety .... The appropriate inquiry is whether the new regulations imposed by the county on [the plaintiff's] project were '*sufficiently necessary* to the public welfare to justify the impairment.'" *Town of Cheswold*, 188 A.3d at 821, n. 59 (citation omitted; emphasis added).

Now, every local government is going to claim that *every* code change is *necessary*, but here, in Delaware, it is the State Fire Marshal, and not local municipalities, who oversees and administers compliance with the *State* Fire Code – and the State Fire Marshal approved Ocean Bay Mart's plan. To the extent that the City claims its ordinances must override Ocean Bay Mart's plan due to fire safety concerns, that is an issue that municipalities do not control. Moreover, the Committee understands that if Ocean Bay Mart had proposed 29 duplex-units, rather than 58 single-units, the Table of Use Regulations' footnote would not have been implicated at all – the point being that the density of the project would have been the same, so density should not be an issue.

Moreover, in this case, when the City first adopted the ordinances in 2016, it did not make them applicable to pending plans. It was not until the City further amended its Code, three years later, in 2019 that it made the ordinances adopted in 2016 applicable to Ocean Bay Mart's plan. If the ordinances were "necessary," why did the City not apply them immediately to all plans?

In the end, this Court's holding in *In re: 244.5 Acres of Land* was correct and should not be changed. "In the final analysis, good faith reliance on existing standards is the test." *In re: 244.5 Acres of Land*, 808 A.2d at 757-758. A review of the undisputed facts indicates that Ocean Bay Mart did act in good faith reliance on the City's Code. It reviewed the Code. It reviewed condominium projects approved under the Code. It met with the City's Building Inspector, who has responsibility for enforcing, interpreting and applying the Code. It confirmed that meeting in writing. In short, Ocean Bay Mart did everything that any prudent property owner, civil engineer, real estate broker or others would do. Notwithstanding that good faith reliance, and notwithstanding the *Ocean Bay Mart* Court's statement that Ocean Bay Mart "has made a significant and material investment here," *Ocean Bay Mart*, at *12, the *Ocean Bay Mart* Court would say that "vested rights" depends on an "equitable balancing," creating vast uncertainty.

Moreover, leaving the test as one of mere "equitable balancing" will only further embolden local governments facing unpopular plans. Opponents of a project

will call upon their elected officials to amend their code[4] and let the courts sort it out – and the judicial system is not the place for these types of judgments and disputes.

For all of these reasons, then, this Court should refuse mere "equitable balancing" as the proper test for vested rights. Absent a truly compelling reason for an ordinance to apply to a pending plan, "[i]n the final analysis, good faith reliance on existing standards is [and should be] the test."

The *Ocean Bay Mart* decision's newly created test for vested rights must be rejected in favor of the "good faith reliance" test.

[4] For example, in *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507 (Del. Ch. Dec. 16, 1988), the Town Council introduced an ordinance to change its zoning code and prohibit a pending plan the night a controversial plan was submitted to the Town.

CONCLUSION

The Committee of 100 files this brief because it is concerned. Economic development is already difficult enough. The land use process is already long and expensive and fraught with risk. Left unchecked, the changes wrought by the *Ocean Bay Mart* decision take a difficult process, and make it materially more perilous.

To suggest that a property owner cannot rely on a local government's past application of a zoning provision, and a written interpretation of that provision, because the provision is "ambiguous" is unfair and inequitable. It renders the statutory canon that ambiguous zoning provisions are interpreted in favor of property owners a nullity. And, the suggestion that "vested rights" is really nothing more than "equitable balancing" undercuts the protection of property owners who have relied in good faith on existing standards and will only further embolden opposition to an unpopular plan.

The Committee thanks the Court for its attention in this matter, hopes that the Court has found this brief helpful, and prays that the Court of Chancery's decision be reversed with respect to the issue of Ocean Bay Mart's good faith reliance and be reversed, or clarified, with respect to the characterization of the test for vested rights as merely one of "equitable balancing." Government possesses tremendous power, but zoning and land use regulation is in derogation of the common law, and where there is any doubt, a property owner who has relied in good faith on existing

regulations as applied in prior cases, particularly where that owner has received a written interpretation, should prevail, regardless of whether the existing regulations are "ambiguous" or not. Good faith reliance on existing standards should remain the test.

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