IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

OCEAN BAY MART, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
THE CITY OF REHOBOTH BEACH, DELAWARE,	)	C.A. No. 2019-0467-SG
	)	
	)	
Defendant.	)	

PLAINTIFF OCEAN BAY MART, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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NATURE AND STAGE OF THE PROCEEDINGS

You don't change the rules in the middle of the game, and you certainly don't change them at the end. Yet this is exactly what defendant City of Rehoboth Beach has done. After the plaintiff, Ocean Bay Mart, Inc., submitted a site plan (the "Site Plan") for the redevelopment of its property from an older, somewhat-dated commercial shopping center into a modern residential condominium community (a plan that will result in 89% less traffic, create 1.7 acres of additional open space, and cause the planting of over 240 trees), various City officials "interpreted" different parts of the City Code in ways never before done in an effort to stop the project. And, then, when those "interpretations" were held wrong, the City Commissioners explicitly changed the City Code to prohibit Ocean Bay Mart's plan – a change made nearly four years after Ocean Bay Mart first submitted its Site Plan and after Ocean Bay Mart had spent hundreds of thousands of dollars in engineering and attorneys' fees, and had foregone hundreds of thousands of dollars in lost rent, all in pursuit of Ocean Bay Mart's otherwise lawful and permissible plan.

The City's behavior here is contrary to the rule of law, as well as simple fair play and equity. Under Delaware law, property owners are entitled to rely on existing subdivision and zoning codes when making plans for their properties; and where, as here, a property owner has relied in good faith on an existing code, a local government is not free to simply change that code – whether due to opposition from

local residents or otherwise. The well-established doctrine of vested rights is designed to protect property owners, and that doctrine applies here, where Ocean Bay Mart relied on the existing code such that it would be unjust to allow the City to change its code under these circumstances. Moreover, the City's conduct in waiting until 2019 to amend its code – nearly four years after Ocean Bay Mart submitted its plan and incurred hundreds of thousands of dollars of additional expenses and lost revenue – is such that the City should be equitably estopped from applying the amendment here.

This is Ocean Bay Mart's Opening Brief in support of its Motion for Summary Judgment. As shown herein, there are no material facts in dispute and Ocean Bay Mart is entitled to judgment as a matter of law.

QUESTIONS PRESENTED

I. **Is Ocean Bay Mart entitled to proceed with its site plan under the doctrine of "vested rights" where Ocean Bay Mart incurred out-of-pocket expenses of approximately $480,000 and lost rent in excess of $600,000 based on its good faith reliance on the City's Zoning Code as it existed at the time of filing its plan in June, 2015 until the City amended its Zoning Code in May, 2019?**

II. **Is the City equitably estopped from enforcing its May, 2019 code amendment where the City Building Inspector and the City Solicitor had both indicated that no "subdivision" approval was needed for a condominium plan well before Ocean Bay Mart submitted its plan in June, 2015, and where, after the plan was submitted, the City adopted two ordinances in 2016 to address the issue going forward but did not make those 2016 ordinances retroactive to Ocean Bay Mart's plan? Put another way, should the City be equitably estopped from applying its May, 2019 code amendment to Ocean Bay Mart's plan when the City waited nearly four years after Ocean Bay Mart first submitted its plan to amend the code?**

STATEMENT OF FACTS

The Ocean Bay Mart Shopping Center 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, larger, 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.

By way of brief overview, this statement of facts covers the time period from 2009, when Ocean Bay Mart first began considering redevelopment of the shopping center, to 2015, when Ocean Bay Mart first submitted its plans, to 2019, when the City amended its code in an effort to stop Ocean Bay Mart's plan. Along the way, before the 2019 amendment, various City officials engaged in "interpretations" of the City Code and the Delaware Code that were soundly rejected by either the City's own Board of Adjustment or the Superior Court. Only in 2019 – almost four years to the day after Ocean Bay Mart first submitted its site plan to the City – did the City amend its Code in an effort to specifically prohibit Ocean Bay Mart's plan. All told, Ocean Bay Mart incurred total costs of over $1 million in out-of-pocket expenses and lost rent.

Ocean Bay Mart begins to explore redevelopment options

Ocean Bay Mart began exploring redevelopment options for the center in 2009. Ocean Bay Mart could, of course, have chosen to modernize, upgrade and enlarge the center, which would make the center 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. Monigle Aff. ¶¶2-3 (Ex. A). Residential use is permitted by the existing zoning and would be more beneficial for the surrounding community, resulting in substantially less traffic, more open space, reduced impervious coverage, and, as required by the City's Code, the planting of numerous trees. *See* PLUS Response Letter, pp. 2, 8, 12 (Ex. B) (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 neighboring and nearby properties. Accordingly, Ocean Bay Mart began investigating the redevelopment of its property and spent several years evaluating various options, all while waiting for longer term leases to wind down,[1] and getting its plans ready. Monigle Aff. ¶¶2-10.

[1] 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

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

As Ocean Bay Mart considered redevelopment, it concluded that a 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. Monigle Aff. ¶5. 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.*[2]

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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 will 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. *See* Monigle Aff. ¶¶13-15. This made leasing the center more difficult, and depressed rents, but was necessary in order to be assured of timely construction once approvals were granted. *Id.*

[2] The main entrance to the shopping 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 shopping center (which is east of Route 1), and then, driving through the parking lot, is able to access local residential streets, such as Terrace Road to the south. If a condominium is constructed, Terrace Road residents will no longer be able to cut through the Ocean Bay Mart parking lot. In addition, several residences along Terrace Road have gates in their rear fences which open into the shopping center parking lot. These residents often park their cars in the shopping center and have guests park cars there as well. It has been suggested to Ocean Bay Mart that opposition from at least some local residents is driven (no pun intended) by this

In 2013, Ocean Bay Mart's realtor discussed with the City Building Inspector whether a residential condominium would need to go through a "subdivision" review and was told no – only site plan review was required. *See* Exs. C and D.[3] Later, on June 27, 2014, Ocean Bay Mart's attorney discussed the same 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. *See* Schrader Aff. ¶4 (Ex. E). Ocean Bay Mart's attorney then emailed Ocean Bay Mart informing it of this conversation. *Id.* In fact, so far as Ocean Bay Mart is aware, the City has never heretofore considered a

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potential loss of the shortcut through the shopping center as well as the loss of parking in the center. Monigle Aff. ¶23.

[3] 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"). Buildings constructed on a lot must meet certain setback requirements.

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." 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. Condominium units are not subject to minimum sizes and do not have frontage requirements. Given the many differences between a condominium regime and a traditional residential subdivision, it is not surprising that the City would not require a condominium plan to undergo a "subdivision" review nor is it at all surprising that multiple residential condominium buildings would be permitted on the same parcel of land.

condominium plan to be a "subdivision" plan.[4]

Throughout 2014 and the first part of 2015, Ocean Bay Mart developed the concepts and site layout that would become the plan for the condominium project Ocean Bay Mart named "BeachWalk." 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); Monigle Aff. ¶10.

Ocean Bay Mart Submits Its Condominium Project As A Site Plan

On June 18, 2015, Ocean Bay Mart submitted its Site Plan for "BeachWalk" to the City. The Building Inspector then issued a comment letter indicating several changes that needed to be made, Ex. F,[5] and Ocean Bay Mart promptly responded. Ex. G. The Building Inspector subsequently left the City, and the new Building Inspector then issued his own comment letter, Ex. H, to which Ocean Bay Mart again promptly responded. Ex. I.[6] At this point, with all comments addressed, the

[4] Ocean Bay Mart asked the City in discovery to identify any instances prior to Ocean Bay Mart where a proposed condominium plan was reviewed as a "subdivision" plan, and the City identified no such instance.

[5] Under the City Code, the City Building Inspector and Department managers have 30 days to review a plan for general compliance and then, once general compliance is determined, the Building Inspector forwards the plan to the Planning Commission for a public hearing. *See generally* City Code §236-32(A).

[6] Meanwhile, while Ocean Bay Mart was responding to comments from the City and waiting for review by the Planning Commission, Ocean Bay Mart took the Site Plan through the State's "PLUS" review process, *see* 29 *Del.C.* §9201 *et seq.*, and obtained State Fire Marshal approval for the plan. *See* Exs. B and J.

Building Inspector told Ocean Bay Mart that the Site Plan would be scheduled for its public hearing before the Planning Commission in December, 2015.[7]

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 Building Inspector told Ocean Bay Mart that the Site Plan was illegal because it contained more than one building on a single parcel and therefore needed "subdivision" approval. *See* Ex. M.[8] Ocean Bay Mart promptly appealed to the Board of Adjustment, and on May 23, 2016, the Board of Adjustment ruled in Ocean Bay Mart's favor. *See* Ex. N. No one appealed the Board's decision and it is therefore final and binding on the City.

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[7] The Building Inspector, in fact, emailed Ocean Bay Mart's engineer to tell him the matter was scheduled to be heard by the Planning Commission at its December 11, 2015 meeting. Ex. K. In addition, at the Commission's November 13, 2015 meeting, the Chairman stated that the public hearing would be December 11. *See* Nov. 13, 2015 Tr. at 16 (Chairman: "[the Site Plan] will go forward to a public hearing and we will have that on the 11th of … December") (Ex. L).

[8] Not only was the Building Inspector's November 20 letter at odds with the previous Building Inspector's letter (Ex. D) and the City Solicitor's statement to Ocean Bay Mart's attorney (Ex. E), but the Building Inspector had been at previous Planning Commission meetings in September and November of 2015, where the Commission chairman stated that the Site Plan was not a subdivision, but a condominium that would be reviewed under the site plan provisions of the City Code. *See* Sept. 11, 2015 Tr. at 6 (Chairman: "this is not a subdivision . . . [b]ecause you're not subdividing the property.") (Ex. O); Nov. 13, 2015 Tr. at 12 (Chairman: "the Baymart process is not going to be a major subdivision . . . it is not [a] subdivision. It is a condo") (Ex. L). At no point during those meetings did the Building Inspector ever claim or suggest that the Site Plan was a subdivision.

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

Following the Board's decision, the matter was placed on the Planning Commission's August 12, 2016 agenda for review of the Site Plan. However, instead of reviewing the plan, the Commission asked for briefing on whether it was bound by the Board's decision. *See* Aug. 12, 2016 Minutes at 9 (Ex. P).

Briefing was performed, but after asking for the briefing, the Commission never addressed the issue of whether it was bound or not. Instead, on January 13, 2017, the Commission refused to consider Ocean Bay Mart's Plan and said that, unless Ocean Bay Mart submitted a full "subdivision" plan for review within 60 days, it would consider the Plan rejected. *See* Jan. 13, 2017 Minutes at 5 (Ex. Q). In making this determination, the Commission relied upon certain language in a Delaware statute, the Delaware Uniform Community Interest Ownership Act ("DUCIOA"), 25 *Del.C.* §81-101 *et seq.*, and claimed, as a result of this language, that Ocean Bay Mart's Site Plan was, nevertheless, a "subdivision." In doing so, the Commission chose to ignore other language in DUCIOA, which states, in pertinent part, "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 Ocean Bay Mart's Site Plan was not a "subdivision" plan under the City Code, then DUCIOA did not convert it to a "subdivision" plan. Of course, as already stated in

footnote 4, the City had never previously reviewed a residential condominium plan as a subdivision plan based upon DUCIOA (or otherwise). Nevertheless, in January, 2017, the Planning Commission made clear it would reject the Ocean Bay Mart's Site Plan unless resubmitted as a "subdivision" plan.

Ocean Bay Mart Next Appeals To The City Commissioners

Under the City's Code, a Planning Commission decision may be appealed to the City Commissioners, and, on March 21, 2017, Ocean Bay Mart appealed. Ten months later, on January 26, 2018, and nearly three years after Plaintiff first filed its application, the Commissioners voted 4-2 to uphold the Planning Commission's decision – despite the same language in DUCIOA which the Planning Commission chose to ignore and despite the fact that the City had never previously reviewed a condominium as a subdivision.[9] *See* Decision at 7 ("Planning Commission made the proper decision in applying 25 *Del.C.* §81-105(b) [DUCIOA]") (Ex. R).

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[9] Indeed, at the City Commissioners' January 26, 2018 hearing on the appeal, the City Solicitor, in response to a question from a commissioner, specifically acknowledged that no condominium had ever been reviewed as a subdivision plan following the passage of DUCIOA. The exchange was as follows:

Comm'r McGuiness: "Have we done in the City of Rehoboth, ever since 2009 [the year DUCIOA was adopted], any condominium projects?"

City Solicitor: "I think we have, and if your question is going to be: did we subject them to subdivision review, the answer would be no."

(Ocean Bay Mart is not aware of any transcript having been prepared of this hearing; however, an audio file of the hearing is available on the City's website at

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 resulted in Ocean Bay Mart's plan being considered a "subdivision" plan. The court acknowledged and gave effect to the language in DUCIOA that the Planning Commission and City Commissioners both ignored. *Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 2019 WL 1126351 (Del.Super.) (Ex. S). Accordingly, the court remanded the matter.[10]

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

Meanwhile, while Ocean Bay Mart's Site Plan was in front of the Planning Commission, the City Commissioners began considering amendments to the City Code in response to the Board of Adjustment's decision. The amendments ultimately became Ordinances 1116-01 and 1016-02 (Exs. U and V, the "2016

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https://cityofrehoboth.civicweb.net/Portal/MeetingInformation.aspx?Org=Cal&Id=312 and the cited language begins at the 3 hour, 45 minute, 47 second mark).

[10] Because the court remanded the matter back to the City, the decision is interlocutory and the City needed to seek an interlocutory appeal if it wished to contest the ruling. The City did not do so. Later, the City tried to have the Court's decision declared final (so it could appeal), but the Superior Court rejected that effort. *See Ocean Bay Mart, Inc. v. City of Rehoboth Beach,* 2019 WL 2511893 (Del.Super.) (Ex. T). As a result, the City is presently bound by the Superior Court's determination that DUCIOA does not apply, although perhaps someday the City may be able to have the Supreme Court review the issue.

Ordinances"). The idea was first discussed publicly at the Commissioners' August 8, 2016 meeting. *See* Aug. 8, 2016 Minutes at 1 (Ex. W). The 2016 Ordinances were presented to the Commissioners at a September 7 public 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 was adopted on November 18, 2016. *See* Exs. V & U.

Significantly, the 2016 Ordinances do not state that they would apply to pending applications or plans. Moreover, no Commissioner stated that the 2016 Ordinances would apply to Ocean Bay Mart's Plan. However, while the 2016 Ordinances were pending, the local newspaper, the Cape Gazette, featured a front page story about the ordinances, including comments from the Mayor:

> [Mayor] Cooper said the proposed changes will not apply to the Beach Walk project because it would be considered grandfathered.

(A copy of the article is attached as Ex. X). During the September 7, 2016, public workshop at which the 2016 Ordinances were being discussed, one of the City Commissioners and the Mayor 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 application] 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 Ocean Bay Mart application]?"
> **Mayor Cooper:** "I agree with you"

Comm'r McGuiness: "correct."

See Sept. 7, 2016 Tr. (Ex. Y). At the same workshop, the City Solicitor also explained that the 2016 Ordinances were prospective in nature, stating:

> we're talking about one project [the Ocean Bay Mart project] that is proceeding now in the City that this language [Ord. Nos. 1116-01 and 1016-02] doesn't address. I think Mr. Tello [an opponent of Ocean Bay Mart's plan] suggests that arguably it could address it because there hasn't been a permit issued to that project yet. This though is meant to deal with for all times future. People should know that only one single-family dwelling is permitted in whatever zoning districts you all designate going forward. So that question is put to bed, that's the only question being put to bed by this ordinance.

Id. The City Solicitor reiterated his conclusion 9 days later at the Commissioners' September 16 meeting, explaining that:

> this clarifying ordinance, although it would clarify for future applications, I don't think it does anything to the [Ocean Bay Mart] application that's pending . . .

See Sept. 16, 2016 Tr. at 6 (Ex. Z). These statements by a Commissioner, the Mayor and the City Solicitor are all consistent with the language of the 2016 Ordinances themselves. Section 3 of each ordinance states as follows:

> This Ordinance is subject to the pending ordinance doctrine and Section 270-84 of the [City Code]. Upon its 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 Ord. 1116-01, Sec. 3 (emphasis added) (Ex. U); Ord. 1016-02, Sec. 3 (Ex. V). Thus, the language of each ordinance only required any "*new* application that is inconsistent with these amendments" be rejected. By implication and plain reading, then, pending applications would not be subject to the ordinances.

Further bolstering this conclusion is the fact that the 2016 Ordinances also reference City Code Section 270-84. Section 270-84(C) provides for retroactive application of a new ordinance only where the new ordinance makes a change to a "zoning classification" or "use permitted."[11] As neither Ordinance 1116-01 nor Ordinance 1016-02 makes such a change, neither ordinance applies to Ocean Bay Mart's plan under Section 270-84(C).

Thus, in adopting the 2016 Ordinances, the Mayor, a Commissioner, and the City Solicitor all indicated that the ordinances would not apply to Ocean Bay Mart's Site Plan, and, more importantly, the very language of the Ordinances made clear they were not intended to apply to pending applications. Moreover, the 2016 Ordinances were adopted prior to the Planning Commission's January 13, 2017 meeting (at which the Commission said it would not review Ocean Bay Mart's plan

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[11] Section 270-84(C) states in applicable part (emphasis added):

> 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].

unless it was resubmitted as a subdivision plan within 60 days), and the Planning Commission made no attempt to apply the ordinances to the Site Plan. Similarly, when the City Commissioners affirmed the Planning Commission's rejection of the Site Plan in 2018, they made no reference to their own, earlier 2016 Ordinances.

And yet, after Ocean Bay Mart sought certiorari review in the Superior Court of the Commissioners' decision, the Commissioners argued – for the first time – that the 2016 Ordinances prohibited Ocean Bay Mart's Plan irrespective of DUCIOA. However, because the Commissioners themselves had not applied the 2016 Ordinances to the Site Plan, the court refused to apply the ordinances to the plan in the first instance. *See Ocean Bay Mart,* 2019 WL 1126351 at *3.

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

Following remand, the City made no attempt to review the Site Plan, nor did it attempt to 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 (copy attached as Ex. AA) which made the 2016 Ordinances applicable to any plan that was pending at the time Ordinance 0519-01 was adopted. Specifically, Ordinance 0519-01 states:

> Notwithstanding any other provision of the Rehoboth Beach Code to the contrary, any application submitted for a major subdivision, minor subdivision, site plan approval, partitioning or other division of land pending at the time of adoption [of] Ordinances 1016-02 and 1116-01 and which are not finally approved as of April 1, 2019 shall comply

with all requirements of Ordinances 1016-02 and 1116-01 prior to obtaining final approval and recordation.

The clear intent of Ordinance 0519-01 was to prohibit Ocean Bay Mart's Site Plan – a plan which conformed with the City's Code when it was submitted in June, 2015 and a plan that should have been approved within 3-9 months after its initial submission.[12] Indeed, so far as Ocean Bay Mart is aware, at the time Ordinance 0519-01 was adopted, there were no other plans pending before the City to which Ordinance 0519-01 would apply.[13]

Ocean Bay Mart's Good Faith Reliance

Out-of-pocket expenses total $480,874.64. In good faith reliance on the City Code as it existed in 2015, Ocean Bay Mart incurred out-of-pocket costs and expenses of approximately $480,874.64 in preparing and prosecuting its Site Plan before the City and the Superior Court through the introduction of Ordinance 0519-

[12] Even more distressing, had the City reviewed Ocean Bay Mart's Site Plan in the fall or winter of 2016, or the spring, summer, fall or winter of 2017 or 2018, the review would, in all likelihood, have been completed well before Ordinance 0519-01 was adopted in May, 2019 – put another way, the City wrongfully delayed consideration of the Site Plan for nearly four years and then adopted an ordinance which, if applicable, prohibits approval of the plan. *See* Monigle Aff. ¶8 (in 2014, the Avenue Inn project, including a hotel, restaurant, and commercial shops, obtained site plan approval in under 4 months; in 2017, Cape Henlopen School District obtained site plan approval in under 5 months).

[13] The City has identified no other plans to which Ordinance 0519-01 would apply.

01 in April 2019. Monigle Aff. ¶11. These amounts included engineering and design fees, application and permit fees, and attorneys' fees.

Lost rent for 2015-2018 is conservatively estimated at $602,556.92. In addition to the out-of-pocket expenses incurred by Ocean Bay Mart, Ocean Bay Mart also suffered lost rent during the pendency of this now more-than-four-year-old process. More specifically, because the City Code requires a property owner to begin substantial construction within 12 months of receiving site plan approval (City Code §236-32(J)), Ocean Bay Mart began arranging for tenants' leases to expire on or before December 31, 2015 so that Ocean Bay Mart would be in a position to begin demolition and construction once the anticipated approvals for the Site Plan were granted. *See* Monigle Aff. ¶¶13-15. In fact, this process began in the early 2010s, when Ocean Bay Mart decided not to enter into new long-term leases, so that it would not be precluded from redeveloping the site as a result of such leases. *Id.* Not surprisingly, this decision made it difficult to lease space in the shopping center, as most potential tenants will not enter into short-term leases, and those who do pay lesser rents. *Id.* Mr. Keith Monigle, the principal of Ocean Bay Mart, described this situation to the Planning Commission at its December 9, 2016 meeting. *See* Dec. 9, 2016 Tr. at 14 ("there aren't very many people that want to be involved in a business and start a new business or start to move a business to your location and then those

folks get the boot when, you know, you're approved") (Ex. BB). As a result, the amount of rent which Ocean Bay Mart received from tenants fell precipitously. *Id.*

As set forth in the affidavit of Mr. Keith Monigle, the average yearly rental for the shopping center from 2006 through 2014 was approximately $469,660.51, whereas the average yearly rental for 2015 through 2018 was $319,021.28 – meaning that over the years 2015 through 2018, the average loss was $150,639.23/year or $602,556.92 total during the four-year period from 2015 through 2019 when the City changed its Code with Ordinance 0519-01. *See* Monigle Aff. ¶¶16-20.[14] Ocean Bay

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[14] The $602,556.92 lost rent figure is actually on the conservative side. This is so because it uses average annual rents from 2006 through 2014 as its starting point, even though Ocean Bay Mart stopped renewing long-term leases and entering into long-term leases in the early 2010s (meaning that rents began to decrease in the early 2010s). If one looks only at average yearly rents for the period 2006 through 2010, that average yearly rent was $515,044.49. The lowest annual rent total for this five-year period was $490,534.65, while the highest annual rent total since 2010 was $426,762.39 in 2012. By including the years 2011-2014 in calculating the lost annual rent total for the years 2015-2018, the calculated loss is lower. If one only compared rents from the period 2006-2010 to the rents from the period 2015-2018, the total lost rent $784,092.84, or approximately $181,532.92 more than the $602,556.92 figure calculated using rents from 2006 through 2014. Monigle Aff. ¶¶ 20-22.

Moreover, Ocean Bay Mart is only including "lost" rent for the period 2015 through 2018 in determining its reliance figure. However, Ocean Bay Mart's reliance on the City Code actually began well before 2015, as long-term tenants began to leave the center before 2015. Thus, a case can be made that the lost rent calculation should include lost rents for some of the years before 2015 (meaning its lost rent number would be even higher); however, Ocean Bay Mart has elected to take a more conservative approach. Monigle Aff. ¶¶20-21. Whether lost rents are $602,556.92 or $784,092.84, the fact remains that Ocean Bay Mart has lost substantial rental income as a result of its reliance on the City Code. Indeed, the lost rental income

Mart, of course, continues to suffer from reduced rents and higher vacancy rates while the approval process plays out – a process which has now exceeded four years.

Meanwhile, virtually all of the costs of the shopping center are fixed (property taxes, maintenance, insurance, etc.) and those don't vary based on the number of tenants or the amount of rent tenants are paying. Property taxes are the same regardless of the number of tenants. Insurance is the same. Landscaping and parking lot maintenance are the same. *See* Monigle Aff. ¶22. Ocean Bay Mart must still pay these costs regardless of the occupancy level of the center. Thus, lost rent is an additional component of Ocean Bay Mart's reliance on the City Code as it existed before 2015 through the City's May 2019 amendment.

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figure alone justifies a finding of vested rights even before combining the lost rental income with the $480,874.64 in out-of-pocket expenses.

ARGUMENT

I. BECAUSE THERE IS NO MATERIAL FACT GENUINELY IN DISPUTE, SUMMARY JUDGMENT IS APPROPRIATE.

The purpose of summary judgment is to avoid a useless trial where there is no issue of material fact. *See Tomalewski v. State Farm Life Ins. Co.*, 494 F.2d 882, 884 (3d Cir. 1974); *Steen v. Cnty. Council of Sussex Cnty.*, 476 A.2d 642, 645 (Del. Ch. 1989) (*citing Bershad v. Curtiss-Wright*, 535 A.2d 840 (Del. 1987)); *Nicolet, Inc. v. Nutt*, 552 A.2d 146 (Del. 1987). Summary judgment is appropriate if it is clear that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CT. CH. R. 56(c). In other words, the "trial court must determine whether the plaintiffs on the summary judgment record proffered evidence from which any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence." *Cerberus Intern., Ltd., v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

Here, the undisputed facts demonstrate that Ocean Bay Mart is entitled to summary judgment. Ocean Bay Mart expended substantial sums in good faith reliance on the City's Code only to have the City turn around years later to adopt a new ordinance specifically to derail Ocean Bay Mart's Site Plan. Such is not the rule of law, and Ocean Bay Mart is entitled to a declaration that it may proceed with its Site Plan under the doctrines of vested rights and equitable estoppel.

II. THE DOCTRINES OF VESTED RIGHTS AND EQUITABLE ESTOPPEL ARE INTENDED PRECISELY FOR SITUATIONS SUCH AS THAT PRESENT HERE – TO PROTECT PROPERTY OWNERS WHO HAVE RELIED IN GOOD FAITH ON AN EXISTING CODE FROM CHANGES TO THAT CODE

A. 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 (Del. 1966), our Supreme Court 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.

Id. at 254. The Supreme Court later 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] the final analysis, good faith reliance on existing standards is the test.**

Id. (emphasis added).

In obtaining vested rights, then, the central focus is on the amount of good faith expenditures. "What level of expenditure will suffice to constitute substantial reliance cannot be determined by any magic formula. That inquiry is necessarily fact specific and must take into account all relevant circumstances." *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507, at *8 (Del.Ch.) (Ex. CC). In *Wilmington Materials*, expenditures of approximately $80,000 were found sufficient to create vested rights. In *Raley v. Stango*, 1988 WL 81162 (Del.Ch. July 28, 1988) (Ex. DD), $5,500 did not establish vested rights. In *Acierno v. New Castle County*, 2000 WL 718346 *10 (D.Del. May 23, 2000) (Ex. EE), the District Court found $38,500 "does not rise to the level of substantial reliance," while in *244.5 Acres of Land*, the developer had expended approximately $312,479.88 which was found sufficient. 808 A.2d at 755.

B. Ocean Bay Mart Satisfies The Elements Necessary For A Finding Of Vested Rights

Under the applicable standards, Ocean Bay Mart is entitled to a declaration of vested rights in its favor. As demonstrated, Ocean Bay Mart has expended funds of approximately $480,874.64 through the adoption of Ordinance 0519-01, and has suffered lost rental income of approximately $602,556.92, for a total of $1,083,431.56. All of this was based, in good faith, on the City's Code as it existed in June, 2015, and, indeed, as it existed through April, 2019, when Ordinance 0519-

01 was adopted – only with the adoption of that ordinance did the City adopt a Code provision specifically requiring "subdivision" approval for pending plans such as Ocean Bay Mart's Site Plan (indeed, Ocean Bay Mart's plan was the only plan affected by the ordinance).

One might expect the City to try and argue that the public interest in Ordinance 0519-01 somehow outweighs Ocean Bay Mart's good faith reliance, but any such attempt is belied by the facts. First, at the time the 2016 Ordinances were adopted, the language in the ordinances (that the building inspector should only reject "any new application that is inconsistent with the amendments" as well as the reference to City Code §270-84) demonstrate that the 2016 Ordinances were not meant to apply. Moreover, the public statements made by the Mayor, a City Commissioner, and the City Solicitor all indicated that the ordinances would not apply to Ocean Bay Mart's then-pending plan. If the 2016 Ordinances were so critical, they would have been made explicitly applicable to pending plans in 2016 when they were adopted – not three years later.

C. The City Is Equitably Estopped From Applying The 2016 Ordinances To Ocean Bay Mart.

Closely related to the doctrine of vested rights is the doctrine of equitable estoppel. In the land use context, if a county, town, or other zoning authority engages in conduct which initially encourages a landowner to rely on existing zoning regulations and then later attempts to prohibit that same landowner's plans by

changing the zoning code, or by acting in bad faith, or by passing new regulations designed to thwart a landowner's intended use, the zoning authority will be equitably estopped from applying the new regulations to the landowner. Equitable estoppel focuses on the conduct of the government and whether it would be inequitable to allow a government to repudiate its own conduct; vested rights, by comparison, focuses on whether a landowner acquired rights which the government cannot take away by regulation. The two doctrines are similar but distinct. A finding of vested rights does not depend on actual conduct by a governing body as a landowner can obtain vested rights merely through substantial reliance; a finding of equitable estoppel does require conduct or statements by the governing authority. Here, we have both vested rights and equitable estoppel.

Generally, a local government, 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.) (Ex. FF) *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, there are numerous actions by the City that factor into the equitable estoppel analysis. First, in 2013, the Building Inspector wrote a letter stating that a condominium plan only required site plan review. This letter was later confirmed by the City Solicitor in a conversation with Ocean Bay Mart's attorney in 2014. And, of course, the Board of Adjustment ruled in Ocean Bay Mart's favor. As to the 2016 Ordinances, themselves, there were contemporaneous comments made by the Mayor, a City Commissioner and the City Solicitor, as well as the language in the ordinances themselves. Moreover, neither the Planning Commission itself nor the City Commissioners during their review of the Planning Commission's decision, indicated that the 2016 Ordinances would apply or were designed to apply – indeed, if the City had wanted the 2016 Ordinances to apply, the City would have said so, as it did in the language of Ordinance 0519-01. Given all these facts, and given the extensive costs incurred by Ocean Bay Mart and the foregone rent, it would be highly inequitable and unjust to allow the City to apply Ordinance 0519-01 to Ocean Bay Mart's Site Plan.

Summing up, the City is equitably estopped from applying the 2019 Ordinance to Ocean Bay Mart's Site Plan because (i) Ocean Bay Mart relied, in good faith, on (ii) the actions and inactions of the City in passing the 2016 Ordinances and not otherwise enacting any legislation that would apply to the Site Plan until May, 2019, and (iii) Ocean Bay Mart has incurred substantial expenses and made a substantial change in position, such that (iv) it would be highly inequitable and unjust to destroy Ocean Bay Mart's right to proceed with its Site Plan – a plan that was permitted to proceed under the City Code and state law until the City's adoption of Ordinance 0519-01 some four years after Ocean Bay Mart filed its Site Plan.

D. Arguments And Defenses Which The City Might Raise Are Inapplicable Or Without Merit.

The City might be anticipated to raise any number of arguments as to why Ocean Bay Mart is not entitled to vested rights or equitable estoppel, but none of these reasons are sufficient to deny relief.

1. The City may argue that the 2016 Ordinances as originally adopted apply to the Site Plan and therefore any expenses incurred after their adoption were not incurred in good faith; but the ordinances do not so apply – why else adopt Ordinance 0519-01?

In an effort to reduce the amount of Ocean Bay Mart's good faith reliance, the City might argue that the 2016 Ordinances apply to the Site Plan or otherwise mean that funds expended and rents foregone after their adoption cannot be included in

the amount of good faith expenditures. Such an attempt, though, would be misplaced for many reasons.

To begin, as described in the Statement of Facts, the Mayor and other City officials indicated that these ordinances *would not* apply to Ocean Bay Mart's then-pending plan. More importantly, language in the City Code indicates that the 2016 Ordinances do not apply to the Site Plan. The ordinances recite that section 270-84(C) of the City Code applies to them, and that code section 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 its zoning classification** or **use permitted** under its existing zoning classification has been advertised for a public hearing until [the ordinance is adopted or rejected].

§270-84(C) (emphasis added). This language means that a new or pending ordinance will only be applied to pending applications *if* the ordinance is for a "change in zoning classification" or a "use permitted." The 2016 Ordinances do neither, and so these ordinances do not apply to Ocean Bay Mart's Site Plan. There is, of course, a strong presumption against legislation applying retroactively. *See, e.g., United States Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other"); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, §41 at 262 ("Since the presumption is a canon of

interpretation . . . a statute can explicitly or by clear implication be made retroactive."). And, if there was any doubt or ambiguity about the applicability of the 2016 Ordinances here, such doubt would be resolved in Ocean Bay Mart's favor. *See, e.g., Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010); *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972).

Thus, consistent with the Mayor's statement, the language of the ordinances, and the applicable legal principles, the Planning Commission made no effort to apply the 2016 Ordinances to the Site Plan after the ordinances were adopted. Similarly, the Commissioners themselves made no effort to apply the ordinances to the plan when they reviewed the decision of the Planning Commission. This failure is telling – because it demonstrates that the City did not believe the ordinances applied (at least until it claimed to the contrary in Superior Court).

Yet most telling of all is what the Commissioners did following the Superior Court's remand. Upon remand, rather than simply apply the 2016 Ordinances to the Site Plan, the Commissioners further amended the City Code. They adopted Ordinance 0519-01 which, by its terms – and but for Ocean Bay Mart's vested rights – made the 2016 Ordinances specifically applicable to Ocean Bay Mart's still-pending plan.

However, if the 2016 Ordinances already applied to the Site Plan, then the Commissioners' adoption of Ordinance 0519-01 was, essentially, a waste of time,

or put another way, surplusage. *See Chase Alexa,* 991 A.2d at 1152 *citing Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) ("words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible"). Further, an amendment to a statute ordinarily 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) (*citing Stauhs, Newark v. Township of Hadyston,* and *In re Sussex County Mun. Util. Auth.*).

In sum, if the earlier 2016 Ordinances applied to Ocean Bay Mart's plan, then there was no need to take any further action to amend the City Code in 2019. By adopting Ordinance 0519-01, the Commissioners affirmed what the Mayor and others said in 2016 – that the 2016 Ordinances as originally enacted did not apply to

the Site Plan. To suggest otherwise would render Ordinance 0519-01 meaningless and surplusage.

2. And, of course, the City will argue that the expenditures incurred by Ocean Bay Mart are not enough; but $1 million is more than sufficient.

Finally, one might expect the City to simply argue that Ocean Bay Mart hasn't expended enough funds in good faith reliance. Not so. Even before considering lost rental income, Ocean Bay Mart is out of pocket nearly half-a-million dollars. This is certainly a significant sum under the circumstances. When lost rent is considered (as it should be) the figure is over $1 million. In *In re: 244.5 Acres*, a little more than $300,000 spent in good faith developing a 65-acre parcel was held sufficient to vest rights. 808 A.2d at 754, 757. Here, Ocean Bay Mart has spent substantially more on a parcel one-tenth that size. The expenditures are sufficient and justify a finding of vested rights and equitable estoppel.

CONCLUSION

Ocean Bay Mart did what every prudent developer would do. It considered various options to redevelop its property. It reviewed the applicable City Codes. It spoke with City officials and confirmed that no "subdivision" review was required, only site plan approval. It determined that a 63-unit residential condominium project – which is permitted under the existing zoning and would lead to 89% less traffic, more open space, and 240 new trees – was the best option. And that is what it sought. Legally and in good faith.

When the City Building Inspector, after 5 months and 2 comment letters, announced that each building would need to be on its own lot and therefore "subdivision" approval was needed, the Board of Adjustment (itself a City body) reversed that decision. When the Planning Commission applied DUCIOA to claim the Site Plan was a "subdivision," the Superior Court reversed that decision. Only in 2019, with the adoption of Ordinance 0519-01 – enacted almost 4 years after the submission of the Site Plan – did the City amend its Code in such a way that a "subdivision" plan would be required.

The doctrines of vested rights and equitable estoppel are designed specifically to address situations such as this. Governments aren't free to simply change the rules in the middle of the game, particularly in a case like this, where the property

owner has expended hundreds of thousands of dollars and foregone hundreds of thousands of dollars of rent.

As John Adams famously said, "we are a nation of laws, not of men." This Court should hold that the doctrine of vested rights applies here and that Ocean Bay Mart is free to proceed with its Site Plan in accordance with the City Code as it existed on June 18, 2015. Alternatively, this Court should find the City is equitably estopped from applying Ordinance 0519-01 based on the City's own actions and statements in 2013, 2014, and 2016 and its decision to wait nearly 4 years after the Site Plan was submitted before adopting Ordinance 0519-01.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Forsten, do hereby certify that on this 2nd day of July, 2020, I caused to be served a true and correct copy of Ocean Bay Mart, Inc.'s Opening Brief in Support of its Motion for Summary Judgment via File and Serve Xpress upon the following counsel of record:

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