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Case Number 28,2022D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OCEAN BAY MART, INC.,	)	
	)	C.A.No. 28, 2022
Appellant,	)	
v.	)	Court Below: Court of Chancery
	)	of the State of Delaware
THE CITY OF REHOBOTH	)	
BEACH, DELAWARE,	)	C.A. No 2019-0467-VCG
	)	
Appellee.	)	

MOTION FOR REARGUMENT

1. Appellant seeks reargument of this Court's September 30 Opinion (Exhibit A), and respectfully submits that the Court would have reached the opposite result but for one critical oversight – the Opinion ignores the statutory role played by the Rehoboth Board of Adjustment and the legal significance of the Board's final and unappealed decision.[1] In fact, because Rehoboth failed to appeal, the Board's decision became final and binding on Rehoboth.[2]

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[1] The General Assembly has created boards of adjustment for all municipalities. 22 *Del.C.* §§ 321-332. Among their duties, Boards hear appeals from landowners who believe a zoning official has erred. 22 *Del.C.* 327(a)(1). Board decisions bind the parties, and appeals are taken to Superior Court. 22 *Del.C.* § 328; *Brittingham v. Board of Adjustment*, 2005 WL 170690 *3 (Del.Super.) (noting that a final Board decision is binding on all parties); *see also Colts Run Civic Ass'n v. Colts Neck Tp. Zoning Bd. Of Adj.*, 717 A.2d 456, 459 (N.J.Super. 1998) ("Once made, the board's decision is final and binding as to all interested parties, including enforcement officials, unless successfully appealed").

[2] Appellant raised the finality of the unappealed Board decision to the Chancery Court and this Court. *See, e.g.,* A-204, Appellant Opening Brief at 27-28, Reply Brief at 10-11; Oral Argument Tr. at 2-3 (Exhibit B).

2. Regardless of whether Ocean Bay Mart was entitled to reasonably rely upon Rehoboth officials' statements and representations,[3] or Rehoboth's past application of its Code to similar projects,[4] once the Board ruled *and Rehoboth failed to appeal*, Ocean Bay Mart was entitled, as a matter of law, to rely upon the decision's finality. Indeed, once the decision became final, there could be no dispute that Ocean Bay Mart's plan conformed with Rehoboth's Code and was entitled to approval.[5] If Rehoboth wanted to contest the Board's decision with respect to Ocean Bay Mart, Rehoboth needed to appeal to the Superior Court in accordance with the process established by the General Assembly.[6] Otherwise, Rehoboth was bound.

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[3] Throughout this litigation, Rehoboth wrongfully claimed that Ocean Bay Mart was not aware of the Rehoboth Code's Table of Use Regulations (the "one-main-building-requirement") and that Ocean Bay Mart's representative, Kathy Newcomb, did not discuss the requirement with the original Building Inspector, Terri Sullivan. In fact, Newcomb testified that they discussed the issue, A-304 – *and the City never offered any contrary testimony or evidence*. Moreover, Sullivan made clear that the "one-main-building-requirement" did not apply to condominiums when she wrote that "Having one parcel with 5 homes is allowable... additional dwellings would not be required to be subordinate to the main dwelling." A-100.

[4] The rules applicable to the "*Cottages at Philadelphia Place*" project when it was approved were the same rules applicable to Ocean Bay Mart, including the "one-main-building-requirement." A-345 n.3.

[5] Where a plan complies with applicable regulations, it is entitled to approval. *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n,* 962 A.2d 235, 241 (Del. 2008) (*en banc*).

[6] A municipality may, of course, apply code amendments to future applications – but if the government wants to change/challenge a Board decision *to which it is a party*, it needs to appeal to Superior Court.

3. In the absence of reargument, the Board of Adjustment's statutorily-created appellate role is rendered pointless. Going forward, any time a Board deems a statute ambiguous (meaning the landowner prevailed), a municipality is now free to immediately amend its code and apply that amendment to the prevailing landowner. Why? Because, under the Opinion, a landowner cannot rely on an ambiguous statute or a final, unappealed Board decision, can therefore not claim vested rights, and, absent vested rights, is bound by the amendment. The question then becomes: why appeal to a Board of Adjustment? What landowner, when faced with an adverse interpretation of an ambiguous statute, can ever hope to prevail? If the Board rules against you, you lose. If the Board rules in your favor, the government amends the ordinance, the amendment applies to you, and you lose. This was not the General Assembly's intent. The General Assembly requires appeals from the Board to go to Superior Court.

4. Moreover, the Opinion effectively overrules the long-standing principle that ambiguous statutes are construed in favor of landowners – a principle just reaffirmed by this Court:[7]

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[7] In *Jack Lingo Asset Management, Inc. v. Board of Adjustment of Rehoboth Beach*, 2022 WL 2813781 *3, 6 (Del.), this Court held that because a Rehoboth Zoning Code provision was ambiguous, it should be interpreted in favor of the landowner, and thus "the City should have permitted the Lingo proposal." That result, though, is effectively overruled by the Opinion here, as are numerous other long-standing decisions. *See, e.g., Mergenthaler v. State*, 293 A.2d 287 (Del. 1972); *Chase Alexa LLC v. Kent County Levy Court*, 991 A.2d 1148 (Del. 2010).

> when the statutory text is "reasonably susceptible" of different conclusions or interpretations [it is "ambiguous."]... In the zoning context, ... we have long held that, when an ambiguity is present, "the interpretation that favors the landowner controls." ...
>
> Local governments are empowered to reasonably restrict property use through zoning. When they do so, they must define the restrictions in clear and unambiguous terms.

But, these statements are now rendered meaningless. Municipalities are now told that if a Board deems a zoning provision ambiguous, the municipality can simply "correct" the ambiguity *and apply that correction to the landowner who just prevailed*. The General Assembly thinks otherwise and requires appeals of Board decisions go to Superior Court.

5. Finally, a statute is "ambiguous" only if it is "reasonably susceptible" of different interpretations. Under *Mergenthaler* and *Lingo*, a landowner knows that if their interpretation of a zoning provision is "reasonable," it will be upheld, even though other "reasonable" interpretations are possible.[8] Put another way, there is no "uncertainty" as to the meaning of an "ambiguous" zoning provision because all know (including municipalities) that "the interpretation that favors the landowner controls." This further explains the result in *Lingo* and earlier cases, and why

[8] Of course, if a landowners' interpretation is "unreasonable," then the landowner loses. Any reliance on an "unreasonable" interpretation cannot be in good faith. Here, Ocean Bay Mart confirmed the "reasonableness" of its interpretation of the "one-main-building-requirement" in its meeting and correspondence with Sullivan and Rehoboth's past approval of other condominium projects, including the *Cottages*.

municipalities are told "they must define [zoning] restrictions in clear and unambiguous terms." Municipalities are not free, after losing before a Board or Court, to immediately amend their code and apply that amendment to prevailing landowners because landowners may reasonably rely on the bedrock principle that "the interpretation that favors the landowner controls."

6. Reargument is appropriate where a Court has overlooked a legal principle or misapprehended the facts or law in a way that affects the outcome. *Quereguan v. New Castle County*, 2004 WL 3038025 (Del.Ch.). Appellant respectfully suggests that such has occurred here and prays this Court reconsider its Opinion. If Rehoboth wanted to reverse the Board's decision as to Ocean Bay Mart, Rehoboth was required to appeal pursuant to 22 *Del.C.* §328 as the General Assembly required. Absent a successful appeal by Rehoboth, the Board's decision is final and binding on Rehoboth as to Ocean Bay Mart.

Respectfully submitted,

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October 17, 2022

CERTIFICATE OF SERVICE

I, Richard A. Forsten, Esquire hereby certify that on this 17th day of October, 2022, a true and correct copy of the foregoing Motion for Reargument was served upon the following counsel of record in the manner indicated below:

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