IN THE SUPREME COURT OF THE STATE OF DELAWARE

OCEAN BAY MART INC.,	)	
	)	
Plaintiff Below, Appellant,	)	Case No. 28, 2022
	)	
	)	Upon Appeal From The
v.	)	Court of Chancery
	)	In The State of Delaware
THE CITY OF REHOBOTH BEACH DELAWARE,	)	C.A. No. 2019-0467-SG
	)	
	)	
Defendant Below, Appellee.	)	

APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR REARGUMENT

1. The Court did not misapprehend any law or facts in holding that the code interpretation rendered by the Rehoboth Beach Board of Adjustment ("BOA") established no vested right which would preclude subsequently enacted ordinances from governing pending applications.[1] Appellant's Motion for Reargument should be denied.

2. As held, "[t]he default rule is that ordinance amendments apply to pending applications for building permits."[2] The law is similarly clear that one does

[1] *Ocean Bay Mart Inc. v. City of Rehoboth Beach*, -- A.3d --, 2022 WL 4587490, at *10 (Del. Sept. 30, 2022) ("Op. *__").

[2] Op. *11 n.64 (citing *Kejand, Inc. v. Bd. of Adj. of Town of Dewey Beach,* 1993 WL 189536, at *4 (Del. Super. May 14, 1993), *aff'd,* 634 A.2d 938 (Table) (Del. 1993)).

not have a vested right to any zoning classification[3] or subdivision approval.[4] To determine if a developer has acquired a vested right to proceed in disregard of a subsequently adopted code change, courts must apply the test articulated in *In re 244.5 Acres*.[5]

3. Appellant, however, again contends that if the BOA renders an interpretation of the code pursuant to 22 *Del. C.* §327(a)(1) in response to an application, that the City may never change its code while a development application is pending.[6] Appellant cites no law for this contention because none exists. The opposite is true – "citizens have no vested rights in existing laws."[7]

4. The City does not dispute that failure to appeal a decision of the BOA precludes a challenge of the Board's decision *regarding the code that the Board interpreted* in its decision. That, however, does not establish a vested right that prevents application of subsequent statutory amendments to pending projects. While

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[3] *Croda, Inc. v. New Castle Cty.,* 2021 WL 5027005, at *4 (Del. Ch. Oct. 28, 2021), *aff'd,* 282 A.3d 543 (Del. 2022); *Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); B84-85.

[4] *Acierno v. Cloutier*, 40 F.3d 597, 620 n.17 (3d Cir. 1994); *see also Murr v. Wis.,* 137 S.Ct. 1933, 1943-50 (2017); City's Answering Brief ("AB") 2-4.

[5] Op. *8.

[6] Motion ¶¶1-2.

[7] 82 C.J.S. Statutes § 10 (2022 Update); *Smyrna Center Assoc. Inc. v. The Great Atlantic and Pacific Tea Co. Inc.*, 1992 WL 52353, at *3 (Del. Super. Feb. 10, 1992) (quoting *Hazzard v. Alexander*, 173 A. 517, 518 (Del. Super. 1934) ("a vested right is something more than a mere expectation based upon an anticipated continuance of an existing law.")).

an unappealed BOA decision may have *res judicata* or collateral estoppel effect on a future litigation regarding the correctness of the BOA's interpretive decision,[8] subsequent code amendments apply because the amended code governs pending applications that have not obtained vested rights.[9] After amendment, the Board's interpretation of the prior code is null and void because the code section the BOA *previously* interpreted no longer governs the application.

5. Even if the City had appealed the BOA decision to the Superior Court, and the legislature had amended the code while the matter was on appeal, the Superior Court is required to apply the amended ordinance rather than the previous code.[10] The same result prevails absent an appeal – the City was free to amend its code at any time.[11] Appellant's claim of vested rights is nothing more than a mere expectation that the law, as interpreted by the BOA, would not change. But the mere

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8 *See Acierno v. New Castle Cty.*, 679 A.2d 455, 459 (Del. 1996).

9 *See supra* n. 2, 11.

10 *Tunnel v. Frye,* 254 A.2d 58, 61 (Del. Super. 1969) (holding that "the Court should judge the agency's action according to the new or amended law."); *Belleview Mgt. Ass'n v. De. Alcoholic Beverage Control Commn.,* 1981 WL 383067, at *2 (Del. Super. Aug. 5, 1981) (same); 3 Rathkopf's The Law of Zoning and Planning § 37:3 (4th ed. 2022) ("The amended zoning ordinance, therefore, will control the rights of the parties…").

11 *Kejand,* 1993 WL 189536, at *2 (holding that an amended ordinance "is valid against a person who submits an application for a permit or acquires a permit prior to enactment or amendment of the ordinance."); 13 Am. Jur. 2d Buildings § 14 (2022) (stating that even after the owner has procured a writ of mandamus or injunction regarding the erection of a building, "the city may adopt an ordinance which will prevent the erection thereof…").

anticipated continuance of an existing law does not establish vested rights,[12] and the *244.5 Acres* test determines vested rights regarding a post-application change in the law.[13] The BOA's previous interpretation of a subsequently amended or clarified code provision does not create a vested right.[14]

6. Appellant contends (again) that the "Opinion overrules the . . . principal that ambiguous statutes are construed in favor of landowners."[15] This is wrong and is a rehash of the argument that this Court previously rejected when it held "[w]here uncertainty exists regarding the meaning and application of a zoning provision, no reliance on the provision can be considered reasonable until after the uncertainty is resolved."[16] Ambiguity cannot establish "good faith" for the purposes of establishing vested rights – and such ambiguity does not prevent the legislature from amending its code in response to an interpretive BOA decision for which it disagrees.[17]

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12 *See supra* n.7.

13 Op. *8.

14 The BOA appeal process will not be rendered "pointless" (Motion ¶3) as Appellant contends. The legislative body may always amend its code in response to an application, and the Courts determine whether an applicant has acquired a vested right under the *244.5 Acres* test. In practice, the governing body rarely amends the code in response to a quasi-judicial interpretation.

15 Motion ¶4. Appellant contends that it or its agents were aware of the Table of Use requirements and it detrimentally relied on code ambiguity. Motion n.3. This contention is flatly wrong. *See* AB 9-13 and 29-32; Argument Tr. 22-23.

16 Op. *11.

17 A173 (ordinance reciting the Commissioners' desire to reaffirm the decision of the Building Official).

7. Finally, Appellant contends that once the BOA ruled, the Beachwalk plan "was entitled to approval."[18] This, again, is incorrect because the plan had not even reached the Planning Commission stage of the review process – nor had a preliminary or public hearing – at the time of the BOA's decision.[19] Because the review process was in the very initial stages and had not been completed when the BOA ruled, Appellant had no right to any approval.[20] Thereafter, no vested right was established pursuant to the *244.5 Acres* standard regarding the subsequently adopted ordinances.[21] Appellant's Motion should therefore be denied and the mandate issued.

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[18] Motion ¶2. The Motion again contends code provisions at the time Philadelphia Place was approved are in the record. Motion n.4. It is not. AB 31-32. The erroneous nature of Appellant's citation for this contention (its own Motion for Reargument below) was discussed at argument. Tr. 20-21.

[19] *See* Rehoboth City Code § 236-32; Op. *10; AB 14-21.

[20] The citations in footnote 5 of Appellant's Motion are inapplicable because there was no demonstration by Appellant that all code requirements were met. In fact, in 2020, Appellant submitted a revised plan in the underlying action in an effort to rectify plan deficiencies. *See* Dkt. 45, Answering/Reply 8-11.

[21] Op. *1, *7-12.