



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

OCEAN BAY MART, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
THE CITY OF REHOBOTH	)	C.A. No. _____
BEACH, DELAWARE,	)	
	)	
Defendant.	)	

**Verified Complaint**

Plaintiff Ocean Bay Mart, Inc. (“Plaintiff” or “Ocean Bay Mart”), by and through its undersigned counsel, hereby seeks a permanent injunction against the enforcement of a newly-enacted ordinance by Defendant City of Rehoboth Beach against Plaintiff, and a declaration of “vested rights,” in connection with a land use project for which Plaintiff first filed its application four years ago to the day on June 18, 2015; and, in support thereof, states as follows:

**Introductory Statement**

1. This is an action for equitable and declaratory relief.
  - a. Plaintiff is the owner of a shopping center located east of Route 1 in the City of Rehoboth Beach, Sussex County, Delaware.
  - b. Plaintiff seeks to redevelop the shopping center as a residential condominium community.
  - c. The proposed residential community will generate 89% less traffic than the shopping center, will have 1.7 acres more open space (or 21.7% more of the 7.83 acre parcel) and will result in 240 trees being planted.

d. Nevertheless, area residents have opposed the project and, in response to that pressure, the City of Rehoboth Beach has consistently engaged in behavior designed to stop the project notwithstanding the project's compliance with the City Code.

e. First, the City Building Inspector (presumably in response to political pressure) changed his mind and, after initially saying the plan was properly submitted as a site plan, said the plan needed to be reviewed as a *subdivision* plan (knowing that this meant the project could not be built as proposed).

f. Then, after the Board of Adjustment – the body charged with ultimate interpretation of the City's zoning code – reversed the Building Inspector's decision, the Planning Commission ignored the Board's binding interpretation and held that a state law, the Delaware Uniform Common Interest Ownership Act ("DUCIOA"), nevertheless made the plan a subdivision plan after all (previously the City had never reviewed a condominium plan as a subdivision plan, notwithstanding DUCIOA).

g. After the Superior Court reversed the Planning Commission's decision, the City Commissioners then amended the City Code so that Plaintiff's plan would constitute a subdivision plan and be required to undergo subdivision review – meaning that the current site plan could not be approved and that a much smaller, less dense plan would need to be submitted for review.

h. Prior to the City's recent actions to amend its code on May 17, 2019, Plaintiff had incurred over \$488,273.18 in out-of-pocket expenses related to its plan and Plaintiff is entitled to a declaration that the new ordinance does not apply to its plan under the doctrine of vested rights.

### **Jurisdiction**

2. This Court has jurisdiction pursuant to 10 *Del.C.* §341 and, because the underlying relief sought is equitable in nature, 10 *Del.C.* §6501. *See, e.g., Wilmington Materials, Inc. v. Middletown*, 1988 WL 135507 (Del.Ch.).

## Facts

### **Ocean Bay Mart Submits Its Plan, The Building Inspector Accepts (And Then Rejects) The Plan, And The Board Of Adjustment Reverses The Building Inspector**

3. Plaintiff is the owner of a 7.83-acre property located at 20674 Coastal Highway, Rehoboth Beach, Delaware (the “Property”), which is zoned C-1 under the City Zoning code. The “C-1” zoning designation permits both residential and commercial uses, and the Property is currently developed as a shopping center.

4. Plaintiff proposes to redevelop the Property from a commercial shopping center to a residential condominium community.

5. On June 18, 2015 – four years ago to the day – Plaintiff first submitted its redevelopment plan to the City for site plan review and approval. The plan proposed 63 residential condominium units in 59 buildings on approximately 7.83 acres (the “Plan”). Among other things, the conversion of the Property from an older commercial shopping center to a residential condominium community will result in 89% less traffic, additional open space of 1.7 acres (on a 7.83 acre overall site), and some 240 new trees being planted.

6. Notwithstanding the many positive benefits of the Plan, neighbors in the immediate vicinity of the Property oppose the Plan. Ironically, one of the complaints often raised by opponents is concerns about additional traffic – even though the change in use will result in an 89% traffic reduction.

7. Under the City Code, the City's Building Inspector initially reviews a plan for general conformance with the Code; and, if, he believes the plan in general conformance with the City Code, will forward the plan to the Planning Commission for a site plan review and public hearing.

8. Here, the Building Inspector initially indicated the Plan was in general conformance and forwarded the Plan to the Planning Commission for review. However, for reasons never explained, a few weeks later, the City's Building Inspector abruptly announced that the plan violated the City Code on the sole basis that "no more than one main building may be erected on a single lot" and the proposed condominium project had many individual buildings. The Inspector's statement is inconsistent with every previous condominium project in the City known to Plaintiff, where multiple condominium buildings have been constructed on the same lot (note that, to date, the City has not identified any previous condominium projects held to constitute subdivision plans).

9. Plaintiff promptly appealed the Building Inspector's pronouncement to the City's Board of Adjustment (the "Board"), the body which, under the City's Code and Delaware law, has final authority to decide questions of code interpretation.

10. On May 23, 2016, following a lengthy public hearing at which people spoke in favor of and against the appeal, the Board reversed the Building

Inspector's holding. The Board's decision was consistent with not only the language of the City Code, but also the past practice in Rehoboth Beach, where several other residential condominium projects have been approved with multiple buildings on the same lot.

11. No one appealed the Board's May 23, 2016 decision, and the time for doing so has long since run. It is final and binding on the City.

**The Planning Commission Wrongly Rejects The Plan**

12. Following the Board's decision, the matter was placed on the Commission's August 12, 2016 agenda so that site plan review could be completed. However, instead of reviewing the Plan, the Commission asked for briefing on whether it was bound by the Board's decision.

13. Briefing was performed and the Commission concluded it was bound by the Board's decision; however, 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. In making this determination, the Commission relied upon language in a Delaware statute, the Delaware Uniform Community Interest Ownership Act ("DUCIOA"), 25 *Del.C.* §81-101 *et seq.*, notwithstanding the fact that DUCIOA 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.”

14. Not only does DUCIOA not apply by its terms, but the City had never previously reviewed condominium plans as subdivision plans after the passage of DUCIOA.

### **The City Commissioners Wrongly Uphold The Planning Commission**

15. On March 21, 2017, Ocean Bay Mart, in accordance with the City Code, then appealed the Planning Commission’s “decision,” which was contrary to the earlier Board of Adjustment decision, to the City Commissioners.

16. On Friday, January 26, 2018 – ten months after the appeal was filed, and nearly three years after Plaintiff first filed its application – the Commissioners voted 4-2 to uphold the Planning Commission’s decision.

17. Ocean Bay Mart then sought certiorari review of the Commissioners’ decision in the Superior Court.

### **The Superior Court Reverses The City Commissioners**

18. On March 12, 2019, the Superior Court reversed the Commissioners’ decision, finding that the Commissioners erred as a matter of law in holding that DUCIOA applied to Ocean Bay Mart’s Plan; and, the Superior Court then remanded the matter for further proceedings.

**The City Commissioners First Amend Their Code,  
But The Amendment Does Not Apply To Pending Plans**

19. Meanwhile, while Ocean Bay Mart's Plan was in front of the Planning Commission, the City Commissioners began considering an amendment to the City Code in response to the Board of Adjustment decision. The amendment ultimately became Ordinances 1116-01 and 1016-02.

20. The issue was first discussed at the Commissioners' August 8, 2016 meeting. At the end of the discussion, the minutes indicate that the Mayor and the City Solicitor (the same City Solicitor who would later represent the Planning Commission before the Commissioners) would work together to draft appropriate ordinances. Ordinances 1116-01 and 1016-02 (the "New Ordinances") were presented to the Commissioners at a September 7 public workshop, and then discussed further at their September 16, October 21, and November 7, 2016 meetings. Ordinance 1016-02 was adopted by the Commissioners on October 21, 2016 and Ordinance 1116-01 was adopted on November 18, 2016.

21. Significantly, the New Ordinances did not state that they would apply to pending applications or plans. Moreover, no Commissioner stated that the New Ordinances would apply to Ocean Bay Mart's Plan.

22. However, while the New Ordinances were pending, the local newspaper, the *Cape Gazette*, featured a front page story about the ordinance 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. A.

23. During the public workshop on September 7, 2016 at which the New Ordinances were being discussed, one of the City Commissioners and the Mayor engaged in the following colloquy:

Comm'r McGuinness: "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 McGuinness: "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 McGuinness: "correct."

*See Partial Transcript 9/7/16 City Workshop (Ex. B).*

24. At the same workshop, the City Solicitor also explained that the New Ordinances were prospective in nature, stating:

City Solicitor: **"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."**

*See Partial Transcript 9/7/16 City Workshop (emphasis added) (Ex. B).*



25. 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* Partial Transcript 9/16/16 City Commissioners' Meeting (emphasis added) (Ex. C).

26. These statements by the Mayor and the City Solicitor are consistent with the language of the New 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* Ordinance 1116-01, Section 3 (emphasis added) (Ex D).

27. After Ocean Bay Mart sought certiorari review in the Superior Court, the Commissioners sought to dismiss the appeal and argued – for the first time – that Ordinance 1116-01 (and also Ordinance 1016-02) prohibited Ocean Bay Mart's Plan regardless of DUCIOA.

28. The Superior Court, however, refused to apply the New Ordinances to Ocean Bay Mart's Plan in the Court's March 12, 2019 decision.

**The City Further Amends Its Code Specifically  
To Prohibit Ocean Bay Mart's Plan**

29. Following remand, the City made no attempt to review the Plan. Rather, on May 17, 2019, the City Commissioners further amended the City Code with Ordinance 0519-01 (copy attached as Ex. E) which made the two New Ordinances applicable to any plan that was pending at the time the New Ordinances were adopted in the fall of 2016.

30. 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 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.

31. The clear intent of Ordinance 0519-01 was to prohibit Ocean Bay Mart's 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. So far as Ocean Bay Mart is aware, there are no other plans pending before the City to which Ordinance 0519-01 would apply.

32. In good faith reliance on the City Code as it existed in 2015, Ocean Bay Mart has incurred out-of-pocket costs and expenses in excess of \$475,742.70 in preparing and prosecuting its Plan before the City and the Superior Court. Approximately \$280,548.65 of this amount was incurred prior to January 13, 2017,

when the Planning Commission wrongly rejected the Plan based on DUCIOA; an additional \$60,154.90 was incurred through January 26, 2018, when the City Commissioners wrongly upheld the Planning Commission's decision based on DUCIOA; and an additional \$135,039.15 was incurred through March 12, 2019, when the Superior Court reversed the decision of the Commissioners and sent the matter back to them.

33. In addition to the out-of-pocket expenses incurred by Ocean Bay Mart, Ocean Bay Mart has lost rents from its shopping center during the pendency of this now 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 construction once the anticipated approvals for the Plan were granted. Ocean Bay Mart has attempted to lease space to tenants willing to lease space for a short time frame, but not surprisingly, most businesses are reluctant to enter into short-term or month-to-month leases. As a result, Ocean Bay Mart has seen the average gross rental income reduced by approximately \$84,000/year for the years 2015 through 2018, as compared to the years 2011 through 2014, for a total loss in gross rental income of approximately \$336,000 over the last four years. Ocean Bay Mart continues to suffer from

reduced rents and higher vacancy rates in 2019 and will continue to suffer beyond 2019 until the Property is redeveloped.

### **Count I – Vested Rights**

34. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully set forth herein.

35. In good faith reliance upon the City Code as it existed prior to the adoption of Ordinance 0519-01, Ocean Bay Mart has incurred out-of-pocket expenses in excess of \$475,742.70, and has lost rent and other income in excess of \$336,000.

36. Under the circumstances here, it would be inequitable to apply Ordinance 0519-01 to Ocean Bay Mart's Plan.

37. In accordance with Delaware law, based on the good faith expenditures of Ocean Bay Mart in pursuing approval of its Plan, Plaintiff is entitled to proceed with the Plan in accordance with the City Code as it existed on June 18, 2015, when the Plan was first submitted to the City for review.

### **Count II – Declaratory Judgment**

38. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully set forth herein.

39. This controversy involves the rights of the party seeking relief.

40. Ocean Bay Mart's right to proceed with its Plan under the City Code as it existed in 2015 is being asserted against the City of Rehoboth Beach, a party with an interest in contesting the claim.

41. Plaintiff's and defendant's interests are real and adverse.

42. The issue of vested rights is ripe for adjudication.

43. Vested rights is an equitable remedy and provides the basis for equity jurisdiction and the Court may therefore issue a declaratory judgment pursuant to Rule 57 and 10 *Del.C.* §6501.

44. There is no adequate remedy at law.

45. Plaintiff requests that this Court issue a declaratory judgment permitted Plaintiff to proceed with its Plan free from the application of any ordinances adopted after submission of the Plan, including Ordinance 0519-01.

### **Count III – Equitable Estoppel**

46. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully set forth herein.

47. "Equitable estoppel" is a doctrine that precludes a party from taking actions where the Court determines it would be inequitable for such party to take its actions based upon its prior conduct.

48. John Adams once famously said that "we are a nation of laws, not of men." Yet here, the City's conduct has been the opposite.

49. Here, the City has engaged in conduct which demonstrates that its purpose was not to treat Ocean Bay Mart fairly and impartially with respect to the application of the City Code to Ocean Bay Mart's Plan; rather, the evidence demonstrates that the City is prepared to ignore the law and, if the law is not favorable, to change the law, all in an extraordinary effort to stop a project solely on the basis that it is disfavored by a group of residents, including:

- the Building Inspector claiming that the proposed Plan was a subdivision plan and not a site plan despite past City practice to the contrary;
- the Planning Commission asking for briefing on whether it was bound by a Board of Adjustment's interpretation of the City Code;
- the Planning Commission's reliance on DUCIOA, despite language in DUCIOA that it did not apply and despite past City practice to the contrary;
- the City Commissioners taking 10 months to decide the administrative appeal from the Planning Commission's wrongful decision when normally such action might only take 2-3 months to resolve;
- passing the New Ordinances without any indication they would apply to the Plan and then raising the New Ordinances during the appeal to the Superior Court;
- adopting Ordinance 0519-01 after losing in the Superior Court so that the New Ordinances would apply to the Plan.

50. Here, despite the fact that Ocean Bay Mart's Plan was entitled to site plan review by the Planning Commission when submitted, and, ordinarily one would expect such review to take anywhere from 3 to 9 months, the Building Inspector, Planning Commission, and City Commissioners have repeatedly engaged in behavior which ignores the City Code and is designed to prevent the Plan from being reviewed and approved.

51. Under these circumstances, the City should be equitably estopped from taking any further actions with respect to the Plan other than for the Planning Commission to conduct a review of the Plan in accordance with the City Code as it existed on June 18, 2015. Any other result would send a message to local governments and local politicians everywhere that when an unpopular but conforming development plan is presented to them, they are free to engage in an extended campaign of delay to prevent review and, if necessary, to delay review while they change the applicable laws and regulations so as to prohibit an unpopular proposed project which otherwise is entitled to approval. Such an outcome would not be the rule of law, but would be the rule of men indeed.

WHEREFORE, for all the reasons set forth herein, Plaintiff prays that this Court:

- a) issue a permanent injunction prohibiting the City of Rehoboth Beach from applying Ordinance 0519-01 or any other ordinance adopted after submission of the Plan to the Plan;
- b) issue a declaratory judgment that the Plan is not subject to Ordinance 0519-01 or any other ordinance adopted after submission of the Plan.
- c) award such other relief as the Court deems appropriate.

Respectfully submitted,

SAUL EWING LLP

/s/ Richard A. Forsten

Richard A. Forsten, Esquire (#2543)

Pamela J. Scott, Esquire (#2413)

Elizabeth S. Fenton (#5563)

1201 Market Street, Suite 2300

Wilmington, DE 19801

(302) 421-6800

*Attorneys for Plaintiff*

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