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IN THE

Supreme Court of the State of Delaware

TOWN OF CHESWOLD, a municipality of the State of Delaware,
Petitioners-Below, Appellant,

v.

CENTRAL DELAWARE BUSINESS PARK, a Delaware general partnership,
Respondents-Below, Appellee.

NO. 270, 2017
On Appeal from the Superior Court of the State of Delaware C.A. No. K13M-08-016 JJC and the Court of Chancery of the State of Delaware, C.A. No. 1574-JJC (Consolidated)

CORRECTED APPELLANT TOWN OF CHESWOLD'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of a decision by the Superior Court holding, *inter alia*, that the lands contained in the Central Delaware Business Park ("Business Park"), first subdivided in 1992, have *perpetual* vested rights to develop under Town of Cheswold's ("Town") 1977 zoning code, because, among other things, the Town stipulated to the dismissal of a pair of lawsuits in 2005 (the "2005 Stipulations of Dismissal").

On August 15, 2013, the Town of Cheswold filed a miscellaneous petition seeking clarification of the 2005 Stipulations of Dismissal, or in the alternative, relief from judgment. Because several of the lots in the Business Park had been sold, the initial cases likely could not be reopened, and therefore the Town sought a special procedure to give notice of the action to the property owners.[1] A90-A123. Thereafter, Judge Clark was assigned the case upon Justice Vaughn's elevation to the Supreme Court, and following Judge Clark's designation as Vice Chancellor for purposes of this matter (A124), the two 2005 cases were consolidated with the Town's petition. A125-28. Following limited discovery, the parties filed cross-motions for summary judgment and oral argument was held on November 16, 2016. On January 6, 2017, the Court requested supplemental submissions on the

[1] Eventually, the firm Parkowski, Guerke & Swayze assumed representation of all or virtually all participating lot owners in the Business Park. *See* A104, A140.

issues of *res judicata* and collateral estoppel. A138. After receipt of the supplemental submissions, on June 6, 2017, the Superior Court granted the owners of the Business Park's cross motion for summary judgment (the "Opinion," attached hereto as Ex. A, and hereinafter "Op."), finding that lot owners in the Business Park have a *perpetual* vested right to the zoning and regulations as set forth in the Town's 1977 zoning code, and that any attempts to legislatively adopt any regulations applicable to the Business Park lands are barred by *res judicata*. On July 3, 2017, the Town filed its Notice of Appeal. A139-42.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that property owners may acquire a *perpetual* vested right to a given zoning or land use classification. Under Delaware law, it is long settled that land use regulations should be "sufficiently flexible to adjust to changed conditions in the interest of the public welfare,"[2] and there is no "vested" right to zoning and subdivision classifications. The Superior Court's Opinion improperly limits the Town's ability (and for that matter, any political subdivision's ability) to legislatively adjust its land use ordinances in the interest of public welfare by holding that "vested rights," presumably of any kind, "remain perpetually vested." Op. 22. The Superior Court's holding also impermissibly forecloses the ordinance-by-ordinance balancing test to determine vested rights as required by this Court's decision in *In re 244.5 Acres of Land*.[3]

2. The Superior Court erred in holding that *res judicata* (occasioned by the 2005 Stipulations of Dismissal) provides the owners of land within the Business Park a *perpetual* vested right to proceed under the Town's 1977 zoning code. Nothing in the 2005 Stipulations of Dismissal so states. Even if the 2005 Stipulations of Dismissal did provide for a *perpetual* vested right allowing development in the Business Park to be governed under the 1977 zoning code (which it does not), and any such agreement must be struck down because: (1) it

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[2] *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (Del. 1971).

[3] 808 A.2d 753, 757-58 (Del. 2002).

constitutes illegal contract zoning; and (2) it illegally binds the legislative discretion of future councils. Moreover, the meaning and/or legality of the 2005 Stipulations of Dismissal has never been adjudicated and therefore *res judicata* is not implicated.

STATEMENT OF FACTS

A. The Town's 1977 Zoning Ordinance

In 1977, the Town adopted the *Zoning Ordinance, Town of Cheswold, Kent County, Delaware* ("1977 Ordinance"). A12-38. The 1977 Ordinance established several zoning districts within the boundaries of the Town, including the M-1 Industrial District (the "M-1 District").[4] A21.

The M-1 District, as set forth in the Town's 1977 zoning code, outlines a list of certain permitted uses, including, storage warehouses, wholesale establishments, farm equipment sales and service, laboratories, manufacturing, and places of business of builders and contractors. *Id.* There is also a short list of specifically prohibited uses, which include manufacturing of certain dangerous materials, a limitation on certain processes (including refining and smelting), stockyards and slaughterhouses, storage of explosives, dumps, quarries, and junk yards. *Id.* The 1977 code establishes building setbacks, front and rear yard lot widths, and minimum lot widths and depths. A22-25. The final requirement is an unspecified amount of landscape screening between the M-1 district and other commercial districts. A26. Beyond these rudimentary limitations, there are no other applicable health, safety, and welfare standards. There are no standards for streets and traffic, no provision for stormwater management, no requirement to submit a site plan, no

[4] The Business Park is and has always been located within the M-1 District.

applicable building code standards, no provision (or requirement) for sanitary sewers, water service, fire hydrants, fire suppression, flood mitigation, and there are no environmental protection standards.

B. The 2005 Zoning Code And The M-1 Exemption

In April 2005, the Town adopted the *Town of Cheswold Land Use Ordinance* ("2005 Ordinance") to amend and update the antiquated 1977 Ordinance. In contrast to the 1977 Ordinance, the 2005 Ordinance provides a detailed and comprehensive framework to govern land use in the Town. The 2005 Ordinance changed certain zoning classifications within the Town, and established the permitted and proscribed uses in new or modified zones. A86. One such proposed change was to the M-1 District that is home to the Business Park. The 2005 Ordinance proposed to break the Business Park up into two new zoning districts known as the "I-1 Light Industrial" zone and the "I-2 Heavy Industrial" zone. A86.

At the time the Council was proposing the 2005 Ordinance, including changes to the M-1 District, owners in the Business Park had entered into purchase and sale agreements for five of the lots within the Business Park. A41. The purchasers of the five lots had attempted to apply for site plan review, but the Town had allegedly refused to accept the site plan applications. *Id.*

Prior to the April 4, 2005 hearing for final consideration and adoption of the 2005 Ordinance, a subdivision owner, Central Delaware Business Park (a general partnership) ("CDBP") objected to the provisions of the 2005 Ordinance that would alter the M-1 District. A41-42. At the public hearing regarding the adoption of the 2005 Ordinance, a CDBP representative alleged that the proposed change in zoning "would cause an immediate financial hardship because it would detrimentally affect five valid and binding purchase agreements for lots in the Business Park." A42.

CDBP proposed an amendment to the 2005 Ordinance under which the Business Park would: (1) retain the M-1 zoning; and (2) continue to be governed by the 1977 Ordinance. The proposed amendment was known as Article 5A. A43, A85-86. CDBP claims that it left the public hearing with the understanding that the Town Council had adopted Article 5A (hereinafter the "M-1 Amendments") as an amendment to the 2005 Ordinance, and that the Business Park would remain zoned as M-1 Industrial. A43-44. However, when the final version of the 2005 Ordinance was published, the M-1 Amendments were omitted. A46-47.

C. The 2005 Lawsuits

CDBP filed an action in Superior Court seeking a writ of mandamus to compel the Town to publish the M-1 Amendments as proposed by CDBP (the

"2005 Superior Court Action").[5] A39-51. Specifically, the writ sought to require the Town to: (1) amend and republish the 2005 Ordinance to retain the M-1 zoning classification with respect to the Business Park; (2) revise the minutes of the April 4, 2005 public hearing regarding the 2005 Ordinance; and (3) accept certain pending site plan applications for processing in accordance with the 1977 Ordinance. A49. During the same period, CDBP also filed a declaratory action in the Court of Chancery (the "Chancery Action").[6] A52-74.

D. The 2005 Stipulations of Dismissal

Prior to any decision by either court, the Town and CDBP submitted identical Stipulations of Dismissal in each court in an attempt to resolve the two actions. A75-78. Under the 2005 Stipulations of Dismissal, the Town acknowledged that the M-1 Amendments were unanimously passed on April 4, 2005. A76, A77. The Town confirmed that the "entire [Business Park] property shall continue with M-1 Zoning and site plan/building permit procedures under the 1977 Zoning Code." *Id*.[7] The Town also agreed to "amend and republish" the 2005 Ordinance "with revised maps and [an] explanatory note designating [the Business Park] as M-1 and subject to the site plan/building permit procedures

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[5] *Central Delaware Business Park v. Town of Cheswold*, C.A. No. 05M-07-021 (Del. Super. Ct. 2005).

[6] *Central Delaware Business Park v. Town of Cheswold, et al.*, C.A. No. 1574-K (Del. Ch. 2005).

[7] There are no building permit procedures, or building code standards set forth in the Town's 1977 zoning code.

under the 1977 Zoning Code." *Id.* Finally, the Town also indicated that it would "process the all [sic] pending site plan and building permit applications from CDBP and its contract purchasers and issue approvals within 10 days of execution of this stipulation . . . ."[8] A76, A78. The 2005 Stipulations of Dismissal were intended to be "separately enforceable" as Orders of the respective courts. *Id*.

E. Business Park Development

In the years since the Town adopted and published 2005 Ordinance, CDBP has retained ownership of six lots in the Business Park. A131. Each of CDBP's six lots is vacant, and none have been developed since 2004. A131-33. And even though the company is focused on selling the already developed lots (A133), none are or have recently been under agreement for sale.[9] *Id*.

Since the Town first adopted the 2005 Ordinance, it has at times considered amending certain requirements applicable to the M-1 District. However, the Town has not started the public process of discussing such changes because it previously has been threatened that any changes to the M-1 District would result in legal action to enforce the 2005 Stipulations of Dismissal. A135-36.

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[8] One exception was made for a "Heliport application" which the Town agreed to process but which it "intend[ed] to deny." A76, A78.

[9] If, in the future, regulations for the Business Park change, existing uses would likely not be impacted. These existing uses would be permitted to continue as legally existing non-conforming uses. *See* A83-85.

F. The 2013 Petition

In an effort to obtain clarity on the scope and meaning of the 2005 Stipulations of Dismissal, the Town brought the underlying action to clarify and/or seek relief from the stipulations. The Town's petition demonstrates, *inter alia*, that neither the 2005 Stipulations of Dismissal, nor the doctrine of vested rights, operate to prevent the Town from ever changing zoning regulations in the M-1 District.

Following (1) a lengthy procedural process that allowed all lot owners in the Business Park an opportunity to participate in the case, (2) discovery, and (3) consolidation of the 2005 Superior Court Action and the Chancery Action with the Town's 2013 petition, the parties filed cross-motions for summary judgment, (Dkt. 47, 48) and provided supplemental briefing as requested by the Court. A138.

G. The Superior Court's Opinion

The Court issued its decision on June 6, 2017. That decision is focused on two primary issues – and the Superior Court erred in deciding both. First, the Court held that once it is determined that a right to proceed with development is deemed vested, that right remains *perpetually* vested. Op. 22-23. The Court's decision "prohibits the Town from taking any legislative action that would interfere with CDPB's vested rights." Op. 23. Second, the Court held that even though the language incorporated into the 2005 Stipulations of Dismissal "directly

impacts the ability of future councils to modify this zoning ordinance as to CDPB," (Op. 24.) it held that *res judicata* precludes the Town from "now argu[ing] that the Stipulated Orders did not recognize CDBP's vested rights." Op. 19.

ARGUMENT

I. THERE IS NO PERPETUAL VESTED RIGHT PREVENTING FUTURE LAND USE REGULATIONS

A. Question Presented

Whether the Court erred in holding that vested rights in land use approvals, once established, remain *perpetually* vested and preclude any future legislative action?[10]

B. Standard and Scope of Review

The Court's grant of summary judgment on the issue of vested rights is a question of law that is reviewed *de novo*.[11]

C. Merits

The Superior Court's holding that once a vested development right allegedly is established, no subsequent regulations can be adopted to "change the law affecting the property," should be reversed for numerous reasons. Op. 22-23.[12] At the threshold, this holding misstates and misapplies the vested development rights test set forth in *244.5 Acres of Land,* which requires a balancing of the public

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[10] This question was preserved below in the Town's Opening Brief in Support of its Motion for Summary Judgment (Dkt. 49 at 13-17) and the Town's Answering Brief in Response to Motion for Summary Judgment. Dkt. 56 at 7-19.

[11] *In re 244.5 Acres of Land,* 808 A.2d 753, 756 (Del. 2002) ("We review *de novo* the Superior Court's granting of summary judgment on the issue of the Village's claim of vested rights.").

[12] The Superior Court's rulings regarding vested rights are not specific to the factual circumstances in this case. Rather, the Superior Court broadly states that "vested rights remain perpetually vested" and there is "no expiration on that right." Op. 23-23.

interest on an ordinance-by-ordinance basis to determine if vested development rights preclude enforcement of any ordinance amendment. Because the Superior Court did not properly apply the *244.5 Acres of Land* balancing test, it also erred in holding that delay is not a factor in the vested rights calculus. In addition, because the Superior Court's decision requires all development in the Business Park to be governed by the Town's 1977 zoning ordinance in perpetuity, it contravenes decades of decisions holding that there is no vested right to zoning classifications or land use approvals. Moreover, this holding removes a municipality's obligation to pass and enforce police power regulations relating to land use, which is contrary to settled law holding that the government may impair or even eliminate vested rights through adoption of laws enacted pursuant to the police power.

1. The Superior Court Procedurally Misapplied Delaware Vested Rights Law

The Superior Court erred in holding that the vested rights doctrine[13] *perpetually* prevents the Town from taking "any legislative action to interfere

[13] Arden H. Rathkopf, Daren A. Rathkopf, and Edward H. Ziegler, Jr., 4 *Rathkopf's The Law of Zoning and Planning* § 70:2 (4th ed. 2017) [hereinafter "Rathkopf's] "A vested [development] right is the right to initiate or continue the establishment of a use or construction of a structure which, when completed, will be contrary to the restrictions or regulations of a recently enacted zoning ordinance. If a vested right to initiate the use or complete construction is found to exist, the use or structure will generally be allowed to continue as a protected non-conforming use." *Id.* § 70:26 (stating that a vested development right is only established when "circumstances of a case would render it inequitable for the

with" any purported vested rights. The Superior Court's holding is plainly at odds with this Court's decision in *244.5 Acres of Land*, which requires a balancing of interests based upon each specific ordinance amendment adopted to determine if an applicant has vested rights to proceed with development in contravention of the newly enacted ordinance.

The Superior Court's holding that vested development rights are "absolute" and "perpetually vested" is based on a misconception. Op. 22. In the vested development rights arena,[14] vested rights do not, strictly speaking, "vest" in a formal sense.[15] Rather, a vested development right is a recognition that at some point in the development process, as a matter of equity and fairness, after substantial expenditures and good faith reliance on the existing state of the law, a developer cannot, in limited circumstances, be subject to subsequently enacted

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restrictions imposed by an amendment to an ordinance to be enforced against a particular property.")

[14] The doctrines of vested rights and equitable estoppel frequently overlap and often apply interchangeably. *Salem Church (Delaware) Assoc. v. New Castle Cnty.*, 2006 WL 2873745, at *8 and n.72 (citing *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507, at *7 (Del. Ch. Dec. 16, 1988)). Like equitable estoppel, vested rights should be invoked rarely, and should not be applied "unless there are exceptional circumstances which make it highly inequitable or oppressive to enforce the regulations," and/or to prevent a manifest injustice. *See id.* at *12 and n.107; *Two South Corp. v. City of Wilmington,* 1989 WL 76291, at *7 (Del. Ch. July 11, 1989) ("However, because of the public interest involved-particularly where the governmental body acts in furtherance of its police power-the estoppel doctrine is applied cautiously, and generally only where the circumstances require its application to prevent manifest injustice.").

[15] 4 *Rathkopf's The Law of Zoning and Planning* § 70:12 (4th ed. 2017).

laws and ordinances that could preclude or severely hinder the proposed development.[16] The vested rights analysis, however, is not one-sided, it also requires "a balancing of interests-the public interest served by a particular law's enforcement and the private interests of a plaintiff who has relied on the state of the law at the time it acted."[17] To determine if a vested development right is established, this Court requires an evaluation of the following factors:

> 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 the final analysis, good faith reliance on existing standards is the test.[18]

Procedurally, for the Superior Court to "prohibit[] the Town from taking any legislative action that would interfere with CDPB's vested rights," (Op. 23) means

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[16] *See 244.5 Acres of Land*, 808 A.2d at 754-757 (holding that a vested right was established where a new setback requirement rendered an applicant unable to build on certain lots, significantly impaired the value of twenty-eight lots, and resulted in diminished value of its project in the amount of $400,000, when the developer had already expended in excess of $300,000 for development approvals); *see also Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1298 (9th Cir. 1990) (holding that a vested right may arise where "a government agency grants a real estate developer formal permission to build a particular project and the developer incurs certain kinds of expenses in reliance . . . .").

[17] *Salem Church*, 2006 WL 2873745, at *9 (Del. Ch. Oct. 6, 2006).

[18] *In re 244.5 Acres of Land*, 808 A.2d at 757-58. In addition, there must be a substantial change of position, expenditures, or incurrence of obligations before the landowner becomes entitled to complete the construction and use the premises for a purpose prohibited by a subsequent zoning change. *See Keejand Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1993 WL 189536, at *2 (Del. Super. Ct. Mar. 14, 1993).

that there can never be a balancing of the public interest on an ordinance amendment against the developer's reliance on the state of the law under which it has proceeded.[19] The Superior Court, therefore, erred by creating a blanket prohibition against any ordinance amendment instead of evaluating the *244.5 Acres of Land* factors on an ordinance-by-ordinance basis.

Under *244.5 Acres of Land*, if the Town, for example, imposes building code requirements for new buildings in the Business Park, or if the Town imposed stormwater management regulations to control flooding, or if the Town imposed a height limit, the Court would need to balance the public interest against the developer's good faith reliance on existing standards against each of the newly enacted laws. Because the Superior Court decision impermissibly precludes "any legislative action," and because the Opinion forecloses any opportunity for Courts to engage in the balancing test required under *244.5 Acres of Land*, the Superior Court's decision is in error and should be reversed.

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[19] For example, in *244.5 Acres of Land*, the Court held that the public interest in the imposition of a larger setback was minimal. 808 A.2d at 758 ("[T]he public interest to be served by enforcement of the preservation district setback is minimal since the setback is not intended to preclude all development and the farmland activities sought to be promoted are already in place."). By contrast, in *Salem Church*, the Court held that the public interest in enforcement of current traffic and environmental standards was "far from minimal." 2006 WL 2873745, at *9. As these cases demonstrate, the vested rights balancing test changes based upon the specific statutory amendment at issue.

2. Delay Is A Factor In Determining If A Developer Has Any Vested Right To Avoid Application Of A Subsequent Ordinance Adoption

Similarly, the Superior Court erred when it held that vested rights are *perpetual* and delay in exercising such rights should not be considered in making a vested right determination. Op. 23-24. Even if a developer may have (at one time) had a vested right to be exempt from a subsequently enacted law (in this case, the 2005 rezoning), the developer does not obtain *carte blanch* to be exempt from any and all future legislative acts forever. For any subsequent law, the Court must balance the public's interest in the ordinance amendment against the developer's reliance on the prior state of the law, under which it proceeded.

Because the "vested rights" balancing test must be applied on an ordinance-by-ordinance basis,[20] as several courts have recognized, delay in seeking approvals and finalizing development is a factor in determining "good faith reliance."[21] Good

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[20] *Salem Church*, 2006 WL 283745, at *10.

[21] Indeed, to determine good faith reliance on existing standards, "requires assessment of the effect of the pace of the development effort." *Id.* at *11 (acknowledging that "delay may defeat a vested rights claim"); *Lakeview Dev. Corp.*, 915 F.2d at 1299 ("[A] government's commitment . . . is necessarily conditioned on the developer's proceeding at a pace reasonably close to that contemplated at the time the project was approved."). The rationale is clear: "If the public is to be deprived of its power to control [land use regulations] it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments." *Id*.

faith reliance wanes as time passes,[22] and it was error for the Superior Court to conclude that delay is not a factor in the vested rights calculus for a future ordinance amendment.[23]

3. The Law Does Not Recognize A Perpetual Vested Right To Zoning Or Land Use Approvals

The Superior Court's holding that the Town of Cheswold's 1977 zoning code *perpetually* governs all land use and development in Business Park, and that the Town may not take any action interfering with these purported vested rights, is legally erroneous. Op. 22-23. This holding is contrary to decisions of this Court which hold that no vested right to a zoning classification exists, and prior decisions of this Court holding that vested development rights may be impaired under the police power.

a. The Law Does Not Recognize A Perpetual, Vested Right To Act Under Previous Zoning And Land Use Laws

For over ninety years, it has been settled that zoning and subdivision laws place permissible limitations on the uses of private property.[24] The General

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[22] While a developer may have relied in good faith on existing standards in the first year of a development project, it is much more difficult to establish good faith reliance, ten, twenty, or thirty years after the initial approval. *See, e.g.*, *Meeks v. City of Buford*, 571 S.E.2d 369, 371 (Ga. 2002) (finding a 15-year delay defeated plaintiff's vested right).

[23] It is simply inequitable to endow one person with "'perpetual, vested rights' to unique favorable treatment based on decisions 'that have become obsolete or erroneous with time.'" *State v. Beltz*, 2006 WL 1627913, at *11 (Alaska Ct. App. June 14, 2006) (non-precedential).

Assembly has authorized municipalities, such as the Town of Cheswold, to legislatively regulate land use pursuant to statutory standards.[25] It is unquestioned that a municipality has the right to change (and restrict) the applicable zoning and subdivision standards in their legislative discretion, so long as the statutory standards are met.[26]

In prior decisions regarding zoning and land use actions, this Court has recognized that land use regulations "should be progressive, not static; they should be sufficiently flexible to adjust to changed conditions in the interest of the public welfare."[27] For this reason, the law in Delaware is settled – there is no vested right to any particular zoning classification.[28] Similarly, approval of a subdivision plot

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[24] *Gorieb v. Fox,* 274 U.S. 603, 608 (1927) ("[C]omprehensive zoning laws and ordinances . . . in their general scope, [are] valid under the federal Constitution. . . . State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable."); *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387-89 (1926) (holding that zoning ordinances are constitutional).

[25] Del. Code Ann. tit. 22, §§ 301-305.

[26] *See Willdel Realty, Inc. v. New Castle Cnty.*, 281 A.2d at 614 (Del. 1971) ("Zoning is a legislative action presumed to be valid unless clearly shown to be arbitrary and capricious because not reasonably related to the public health, safety, or welfare."); *Lynch v. City of Rehoboth Beach,* 2005 WL 1074341, at *1, 6 (Del. Ch. April 21, 2005) *aff'd,* 984 A.2d 407 (Del. 2006) (upholding a zoning change of property from a commercial designation to a residential designation).

[27] *Willdel,* 287 A.2d at 614.

[28] *Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); *see Acierno v. Cloutier,* 40 F.3d 597, 620 n.17 (3d Cir. 1994); *Mayor & Council of New Castle v.*

does not exempt property owners from being subject to future zoning, subdivision, and other laws designed to protect the public.[29]

By holding that the Town cannot take "any legislative action that would interfere with . . . vested rights," the Superior Court has impermissibly taken away the legislative duties of the Town to zone and pass land use and other regulations applicable to the Business Park. Op. 23. This holding is in error.

b. The Superior Court's Perpetual Vested Rights Holding Will Have Devastating Regulatory Consequences

The downstream consequences of the Superior Court's decision are potentially devastating and substantial. Regarding the matter at bar, it means that because the Business Park is forever governed by the Town's 1997 zoning code, the Town can never legislate for its citizens' health, safety, and welfare in the M-1 District. Under the 1977 zoning code, there are no governing street standards, building code standards, traffic study requirements, fire protection standards, environmental impact requirements, requirements for fire hydrants, stormwater

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Rollins Outdoor Adver., Inc., 475 A.2d 355, 360 (Del. 1984); *Reinbacher v. Conly*, 141 A.2d 453, 457 (Del. Ch. 1958); *see also Rinker v. Dubuque Cnty. Bd. Of Supervisors*, 2016 WL 1682960, at *5 (Iowa Ct. App. Apr. 27, 2016) (""[N]o property owner has a vested right in the continuation of a particular zoning classification.") (quoting *Quality Refrigerated Serv., Inc v. City of Spencer*, 586 N.W.2d 202, 206 (Iowa 1998)).

[29] The Third and Fourth Circuit have recognized that approval of a subdivision does not establish vested rights and note that "no court that has adopted such a broad conception of vested rights." *Acierno v. Cloutier*, 40 F.3d at 618; *L.M. Everhart Constr., Inc. v. Jefferson County Planning Comm'n*, 2 F.3d 48, 52 (4th Cir.1993).

management regulations, floodplain regulations, discharge limits, or sanitary sewer requirements, but the Town can never legislatively change the requirements in the 1977 zoning code because the Superior Court held that it would be purportedly inequitable to "change the law affecting the property." Op. 23.

Notably, the Superior Court did not limit its holding to what the *Town* can regulate under its zoning power – it broadly extended the vested rights analysis by holding that it would be inequitable to allow "legislatures . . . to change the law affecting the property." Op. 23-23. Under the Superior Court's view, then, any new regulation, even health and safety regulations, cannot be imposed on a property once a vested right is achieved. This logically means that the General Assembly cannot impose stricter pollution limits for air quality, water quality, noise pollution, stormwater, sanitary sewer discharge – or any new regulation whatsoever – because once a vested right to a use of a property is established it is "absolute."[30] Op. 22.

But this is not the law. "The general power of the State to preserve and promote public welfare, even at the expense of private rights, but within constitutional limitations, and by means reasonably tending to correct some evil or

[30] The Superior Court's *perpetual* vested rights decision is so broad that it could be read to preclude any new air, land or water discharge standards applicable to existing chemical companies or oil refineries.

promote some public interest, is basic."[31] Therefore, as this Court has held, even if a vested right exists, "a statute may retroactively reach property rights which have vested and may create new obligations with respect thereto, provided that the statute is a valid exercise of police power."[32] Consequently, the Superior Court's ban on any legislative actions that might bear on any purported vested right must yield to the general and well-settled rule that police power regulations may impair

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[31] *Campbell v. State*, 1986 WL 8178, at *3 (Del. Super. Ct. July 18, 1986).

[32] *Price v. All American Eng'g Co.*, 320 A.2d 336 (Del. 1974); *see also Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410, 412 (5th Cir. 1950) ("[v]ested rights in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality."); *Hass v. Citizens of Humanity, LLC*, 2016 WL 7097870, at *1 n.1 (S.D. Cal. Dec. 6, 2016) ("Even if Plaintiff had a vested right, which she does not, it is settled law in California that 'the state, exercising its police power, may impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people.'"); James A. Kushner, 2 *Subdivision Law and Growth Mgmt*., § 10:2 (2d ed. 2017) ("[V]ested rights may be extinguished by exercise of the police powers in furtherance of a legitimate public goal."); *see also Goldblat v. Town of Hempstead, N.Y.*, 369 U.S. 590, 597 (1962) (upholding a 1958 ordinance banning excavation of sand and gravel below the water table which effectively precluded continued mining operations that were in continuous operation since 1927).

purported vested rights if the balance weighs in favor of the public interest.[33] The Superior Court's ruling to the contrary is plainly in error.[34]

c. The Superior Court's Perpetual Vested Rights Holding, If Not Reversed, Will Prevent The Creation Or Elimination Of Non-Conforming Uses

The Superior Court's wide ranging conclusion that vested development rights are *perpetually* vested (Op. 23), if not reversed, will establish a *perpetual* vested right for all existing non-conforming uses of property. A non-conforming use is "an activity conducted on a parcel of land, or within a structure erected thereon, that was in existence prior to enactment of zoning restrictions which would otherwise prohibit such use."[35] If the right to a given use becomes vested because activity is conducted on a parcel of land, according to the Superior Court, the government is prohibited from taking any legislative action that interferes with

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[33] Numerous courts and commentators recognize that no vested right is permanent, and that "[v]ested rights may be lost through abandonment, recoupment, or an overriding benefit to the public." Kushner, *supra* note 31, at § 10:2; *see RC Enter. v. Town of Patterson*, 840 N.Y.S.2d 116, (N.Y. App. Div. 2007) (finding that the petitioner did not have vested rights to develop, and stating, "[i]n any event, the petitioner abandoned its plan to develop parcel 2 as demonstrated by its failure to act over a period of decades.").

[34] *MLC Auto. LLC v. Town of Southern Pines*, 702 S.E.2d 68, 75 (N.C. Ct. App. 2010); ("[N]o property owner has a *per se* vested right in a particular land-use regulation such that the regulation could remain 'forever in force, inviolate and unchanged.'"); 83 Am. Jur. 2d *Zoning and Planning* § 508 (2017) ("Zoning regulations do not create a legal right in perpetuity against the exercise of governmental power in the future.").

[35] 44 Am. Jur. 3d *Proof of Facts, Zoning: Circumstances Justifying Termination of Lawful Nonconforming Use*, at § 10 (2017).

those vested rights. Op. 22-23. Thus, no new non-conforming uses could be created (because the legislature could not take any legislative action interfering with such rights), and existing non-conforming uses could not be eliminated because the right to those uses are *perpetually* vested.

Although this Court has held that the spirit of zoning ordinances is to restrict rather than increase non-conforming uses and to secure the gradual elimination of non-conforming uses,[36] the Superior Court's Opinion sends the law in the opposite direction by giving *perpetual* vested rights to these uses. Op. 22-23. If the Superior Court's decision stands, all statutes dealing with the abandonment of non-conforming uses are rendered invalid.[37] Statutes that sunset development plans are also rendered invalid.[38] And the well settled ability of municipalities to amortize

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[36] *Hooper v. Delaware Alcohol Beverage Control Comm'n,* 409 A.2d 1046, 1050 (Del. 1979).

[37] Virtually every political subdivision has provisions allowing for termination or elimination of non-conforming uses. *See* Code of the City of Newark, 1970 § 32-51(b) ("Whenever a non-conforming use has been discontinued for a period of one year, such use shall not thereafter be re-established, and any further use shall be in conformity with the provisions of this chapter . . . ."); Code of Kent County § 205-217(C) ("In the event that a non-conforming use ceases for a period of one year or more, then the non-conforming use shall be deemed abandoned and compliance with this chapter shall be required."). If, however, a vested right is deemed *perpetual*, these statutes are likely unenforceable.

[38] If the Superior Court's permanent vested rights determination stands, it will also invalidate numerous statutes which permit the expiration or sunsetting of dated subdivision plans. *See Sterling Prop. Holdings, Inc. v. New Castle Cnty.*, 2004 WL 1087366, at *1 (Del. Ch. May 6, 2004) (discussing the five year sunsetting requirements for approved subdivisions in the New Castle County code); *see also* Code of the City of Newark, 1970 § 27-20(b)(6)(b) (five year

and take away a legally existing non-conforming use will also be eliminated.[39] Because the law allowing for the creation of and eventual elimination of non-conforming uses is settled, and due to the devastation to numerous land use planning statutes that could result if non-conforming activities are for the first time provided a *perpetual* vested rights to continue, the Superior Court's Opinion should be reversed.

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In the end, the Superior Court incorrectly held that once a use is established, it vests, and creates a *perpetual* development right. There can be no vested right to any zoning classification, and the doctrine of vested rights cannot forever bar any and all future legislation with respect to any property. Recognition of *perpetual* vested rights is contrary to sound land-use planning, governance, and environmental protections that inure on behalf of the public. It is also directly

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sunsetting); Code of Kent County § 187-14(J) (same); Code of the Town of Elsmere § 196-22(B)(6)(b) (same); Code of the Town of Georgetown § 230-75.25(A) (one year sunsetting for certain approvals). If the Superior Court's decision is not reversed, these statutes are likely null and void because (according to the Superior Court) once a right to develop vests, it is *perpetual* and cannot be taken away.

[39] *Mayor and Council of New Castle v. Rollins Outdoor Adver., Inc*., 475 A.2d 355, 360 (Del. 1984) ("We conclude that there is nothing inherently arbitrary or unreasonable in requiring the removal of existing off-site signs within three years."). Numerous other cases cited in the *Rollins* decision are in accord. *See id* at 358-59.

contradictory of settled Delaware precedent. The Superior Court's erroneous holdings should be reversed.

II. *RES JUDICATA* DOES NOT PERPETUALLY EXEMPT THE BUSINESS PARK OWNERS FROM ANY AND ALL FUTURE REGULATION

A. Question Presented

Whether the plain language of the 2005 Stipulations of Dismissal have a *res judicata* effect that *perpetually* prevents any legislative action impacting the Business Park?[40]

B. Standard of Review

Interpretation of the 2005 Stipulations of Dismissal presents questions of law that are reviewed *de novo*.[41]

C. Merits

The Superior Court's determination that *res judicata* occasioned by the 2005 Stipulations of Dismissal provide the Business Park landowners with a *perpetual* right to proceed with development under the Town's 1977 zoning code should be reversed for several reasons. First, the plain and unambiguous language of the 2005 Stipulations of Dismissal does not in any way mandate that all future development in the Business Park must be governed under the Town's 1977

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[40] This question was presented below in the Town's Supplemental Memorandum. Dkt. 62 at 3-8. The additional issues addressed in this section were preserved below in the Town's Opening Brief in Support of Summary Judgment (Dkt. 49 at 14-18) and the Town's Answering Brief in Support of Summary Judgment. Dkt. 56 at 7-14.

[41] *In re Interests of Stevens*, 652 A.2d 18, 23 (Del. 1995) ("When the issues on appeal implicate rulings of law, our review is *de novo* and this Court will set aside erroneous interpretations of applicable law.").

zoning code. Second, the Superior Court erred in incorporating by reference the M-1 Amendments when interpreting the 2005 Stipulations of Dismissal. Third, the issues raised in this proceeding are not the same issues raised in the prior action, and therefore, *res judicata* is inapplicable. Fourth, even if the M-1 Amendments were incorporated into the 2005 Stipulations of Dismissal and *res judicata* applies, the stipulations (as interpreted by the Superior Court) are unenforceable because they create illegal contract zoning and impermissibly bind future councils.

1. The Plain Language Of The 2005 Stipulations Of Dismissal Is Unambiguous

The Superior Court erred when interpreting the unambiguous language of the 2005 Stipulations of Dismissal because nothing in the stipulations provides owners of land in the Business Park a *perpetual* vested right for development to be exclusively governed under the Town's 1977 zoning code.[42] The Superior Court's interpretation, which eschews the plain language, is in error.

[42] *See United States v. State of New Jersey*, 194 F.3d 426, 430 (3d. Cir. 1999) ("Whether extrinsic evidence is required to interpret a consent decree is itself a question of law subject to plenary review."); *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) ("When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement."); *see In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (same).

In interpreting a consent order, the Court is bound by the four corners of the document and not by extrinsic factors posited by one party or another.[43] A Court should only look to extrinsic evidence to determine the scope of a consent decree where the language of the decree is ambiguous.[44] "[A] provision in a decree is ambiguous only when, from an objective standpoint, it is reasonably susceptible to at least two different interpretations."[45] Absent ambiguity, the Court need look no further than the plain language of the 2005 Stipulations of Dismissal themselves.[46]

The 2005 Stipulations of Dismissal are unambiguous. The first provision confirms that the Town will not alter the Business Park's M-1 zoning classification: "Town hereby confirms that the entire CDBP property shall continue with M-1 Zoning and site plan/building permit procedures under the 1977 Zoning Code." A75, A77. The first provision does not state that the Business Park

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43 *Harris v. City of Philadelphia*, 47 F.3d 1333, 1337 (3d Cir. 1995) ("The obligations imposed by a consent decree must be 'discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'") (quoting *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971)).

44 *State of New Jersey*, 194 F.3d at 430.

45 *Harris*, 47 F.3d at 1337 ("In addressing the question of ambiguity, [the Court's] focus remains on the contractual language itself, rather than on the parties' subjective understanding of the language."); *GMG Capital*, 36 A.3d at 780 ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.") (quoting *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1195-96 (Del. 1992)).

46 "[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts. . . . In addition [i]t is axiomatic that where the language of a contract is clear and unambiguous, it must be given its plain meaning." *Kean v. Adler*, 2003 WL 21205885, at *3 (3d Cir. May 23, 2003) (internal citations and quotations omitted).

shall continue with M-1 Zoning *in perpetuity*. For the Superior Court to read this language into the 2005 Stipulations of Dismissal impermissibly adds language to an otherwise clear and unambiguous provision.[47] By agreeing to this language, the Town in no way forfeited its right to pass any future regulations applicable to the Business Park.[48]

The second provision requires the Town to republish the 2005 Ordinance to include revised maps and add an explanatory note designating the Business Park as an M-1 zone subject to the 1977 Ordinance. A76, A77. The third provision requires the Town to republish Article 5A, which the Town Council had unanimously adopted on April 4, 2005 through a valid legislative act. A76, A77.

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[47] *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1261 n.14 (Del. 2007) ("When the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented . . . .") (quoting *Rhone-Poulenc*, 616 A.2d at 1195-96); *see Northwestern Nat. Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996) ("We find Esmark's interpretation to be untenable, because it adds a limitation not found in the contract language. . . . No limitations may be read into the clear language of the contract.").

[48] Zoning determinations are legislative acts which, by their nature, stand until they are amended, appealed, or overridden by subsequent legislative acts. *Hayward v. Gaston*, 542 A.2d 760, 769 (Del. 1988) ("[Z]oning is a legislative function, and is presumed to be valid unless shown to be arbitrary or capricious.") (internal citations omitted); *McQuail v. Shell Oil Co.*, 183 A.2d 572, 579 (Del. 1962) ("Generally, zoning authorities, acting within their prescribed legislative powers, have a wide and liberal discretion."); *Freedman v. Longo*, 1994 WL 469159, at *5 (Del. Ch. Aug. 10, 1994) ("All citizens must be understood to be on notice that the government, through proper process and within its authority, may change existing law or regulation in pursuit of the public interest.").

The fourth provision requires the Town to process the Business Park's five pending site plan and building permit applications. A76, A78. None of these provisions is ambiguous or is reasonably susceptible to two different interpretations. None provide by their plain terms a *perpetual* vested right in the M-1 zoning classification.

The provisions, when read together, merely demonstrate that the Business Park would remain zoned M-1 and would be continue to be regulated under the 1977 Ordinance.[49] The provisions do not imbue landowners in the Business Park with the right to the M-1 zoning classification in *perpetuity*, nor do they require the Town to refrain from changing any regulations applicable to the Business Park through a separate, subsequent, and independently valid legislative act.

2. The 2005 Stipulations Of Dismissal Do Not Incorporate The M-1 Amendments By Reference

The Superior Court reached its erroneous interpretation of the 2005 Stipulations of Dismissal by contending that the M-1 Amendments were incorporated by reference into the stipulations. Op. 13. The M-1 Amendments, however, were not incorporated by reference. Incorporation by reference refers to "[a] method of making a secondary document part of a primary document by including in the primary document *a statement* that the secondary document should

[49] The provisions also provided that the Town would process five then-pending site plan applications. A76, A78.

be treated as if it were contained within the primary one."[50] Mere reference to the secondary documents is not enough, the language must evidence an intent to incorporate.[51]

The 2005 Stipulations of Dismissal do not contain a statement that the M-1 Amendments should be treated as if they were contained within the stipulations. The Superior Court points only to paragraph three of the 2005 Stipulations of Dismissal to support its conclusion that the M-1 Amendments were incorporated by reference into the 2005 Stipulations of Dismissal. Op. 13. That paragraph states simply: "Town shall amend and republish the New Zoning Code to include Article 5A as unanimously passed on April 4, 2005."

This statement serves only to memorialize the agreement between the parties that the Town's legislative act would be reflected in the republished version of the 2005 Ordinance. While the statement references the M-1 Amendments as the item which the Town "shall amend and republish," it does not include a statement that the M-1 Amendments should be treated as if they are contained with the 2005 Stipulations of Dismissal. Thus, the Court erred in treating the M-1 Amendments

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[50] Black's Law Dictionary (10th ed. 2014) (defining the phrase "incorporation by reference") (emphasis added); *see* Op. at 14 n.29.

[51] 17A Am. Jur. 2d *Contracts* § 381 (2017 Update) ("In order for an instrument to be incorporated into and become part of a contract, the instrument must actually be incorporated; it is not enough for the contract to merely mention the instrument, and the referring language in the contract must demonstrate the parties intended to incorporate all or part of the referenced instrument."); *see Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *4 (Del. Super. Ct. May 10, 1994).

as incorporated by reference into the 2005 Stipulations of Dismissal and by adding *perpetual* vested rights language not contained within the four corners of the stipulations.[52] Ultimately, because the Court's interpretation adds words not contained in the stipulations, the Superior Court erred in holding that the 2005 Stipulations of Dismissal created, acknowledged, or memorialized any purported *perpetual* vested right.

3. *Res Judicata* Does Not Control Because The Causes Of Action In The 2005 Actions Are Not The Same As The Case At Bar

For *res judicata* to apply, the original cause of action or the issues decided must be the same as the case at bar, and the issues in the prior action must have been decided adversely to the plaintiff.[53] The Superior Court erred in holding that the claims of action in the instant case are identical to the claims of action ultimately decided in the 2005 Stipulations of Dismissal.

The 2005 Superior Court Action and the Chancery Action were brought to have the M-1 Amendment published, and to protest application of new 2005 Ordinance to the Business Park lands as they related to the pending sales of five

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[52] Nor could the M-1 Amendments, a legislative act by the Town Council, be incorporated into the 2005 Stipulations of Dismissal. Consent orders are interpreted as contracts, but a statute cannot be a contract, as it may be amended. *See National Railroad Passenger Corp. v. Atchinson, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 466 (1985) ("[T]he presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.") (internal quotations omitted).

[53] *Dover Historical Soc'y Inc. v. City of Dover Planning Comm'n,* 902 A.2d 1084, 1092 (Del. 2006).

lots in the Business Park. *Res judicata* does not apply here because the claims in this case are markedly different. In its 2013 petition, the Town requested clarification that it is not forever precluded by the 2005 Stipulations of Dismissal from passing any police power regulations applicable to the Business Park. The issue of the meaning, scope, and enforceability of the 2005 Stipulations of Dismissal were never litigated in 2005. Because the issues raised by the Town were never litigated or finally decided, *res judicata* is not a bar to the declaratory relief sought in this case.

4. *Res judicata* Cannot Sustain An Illegal Consent Order

Before the Superior Court, the Town argued that nothing in the 2005 Stipulations of Dismissal prevent future regulation of the Business Park, and that the stipulations should not be construed as conferring permanent vested rights in the 1977 zoning code on owners of land in the Business Park because such a construction would be violative of the doctrines of contract zoning and would impermissibly bind future legislatures. It was in error for the Superior Court to construe the 2005 Stipulations of Dismissal in a manner that continued an illegality,[54] and to conclude that *res judicata* bars the Court from determining or

[54] *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *9 (Del. Super. Ct. May 30, 2008) ("'[T]he Court must view . . . contracts as a whole and interpret them in a manner that gives 'a reasonable, lawful, and effective meaning to all the terms.' This is preferred over an interpretation which 'leaves a part unreasonable, unlawful, or of no effect.'").

considering whether any portion of the 2005 Stipulations of Dismissal violate applicable law.[55]

a. Any Agreement To Perpetually Apply The 1977 Zoning Code To All Development Activity In The Business Park Constitutes Illegal Contract Zoning

If the M-1 Amendments are viewed as an integrated component of the 2005 Stipulations of Dismissal, then they are void as illegal contract zoning. Contract zoning is "a bilateral agreement committing the zoning authority to a legally binding promise."[56] Many courts have declared contract zoning invalid *per se* as a "problematic blend of contract and police powers."[57] "[W]hen a zoning authority takes such a step and curtails its independent legislative power, it acts *ultra vires*

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[55] 46 Am. Jur. 2d *Judgments* § 179 (2017 Update) ("[A] consent decree cannot oblige a party to perform illegal conduct," and "the judgment itself is unenforceable when the agreement it encompasses or the relief it grants is illegal or inconsistent with the law underlying the agreement.").

[56] *Wilmington Sixth Dist. Comty. Comm'n. v. Pettinaro Enters.*, 1988 WL 116496, at *4 (Del. Ch. Oct. 27, 1988); *Hartman v. Buckson*, 467 A.2d 694, 699 (Del. Ch. 1983) (defining contract zoning as "the contracting by a zoning authority to zone for the benefit of a private landowner."); *see also* 101A C.J.S. *Zoning and Land Planning* § 73 (2017 Update) ("[C]ontract zoning appears when a zoning authority . . . agrees not to alter a zoning change for a specified period of time.").

[57] *Dacy v. Vill. of Ruidoso*, 845 P.2d 793, 797 (N.M. 1992); *Hall v. City of Durham*, 372 S.E.2d 564, 568 (N.C. 1988) ("this impermissible type of contract zoning depends upon a finding of a transaction in which both the landowner seeking a rezoning and the zoning authority undertake reciprocal obligations."); *Hartman*, 467 A.2d at 699 (quoting *V.F. Zahodiakin Eng. Corp. v. Zoning Bd. Of Adjust*., 86A.2d 127, 131 (N.J. 1952)) ("Zoning is an exercise of the police power . . . . It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

. . . ."[58] This is because "a municipality may not contract away exercise of its zoning power,"[59] "even under the form of a consent judgment."[60]

Any agreement by the Town to maintain the M-1 District for the Business Park in *perpetuity* constitutes illegal contract zoning and impermissibly prevents future Town Councils' from regulating for the health, safety, and welfare of the Town's citizens.[61] Thus, the only binding promise the Town *could* make was to *publish* the M-1 Amendments as part of the 2005 Ordinance that it previously passed. A better reading of the 2005 Stipulations of Dismissal, and one that avoids an *ultra vires* act, is that the Town and CDBP intended for the Business Park to remain zoned M-1 for purposes of the 2005 Ordinance, and that the 2005 Stipulations of Dismissal do not preclude future legislation applicable to the lands in the Business Park.

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58 101A C.J. S. *Zoning and Land Planning* § 73 (2017 Update).

59 *Attman/Glazer P.B. Co. v. Mayor and Alderman of Annapolis*, 552 A.2d 1277, 1282 (Md. 1989); *Larkin v. City of Burlington*, 772 A.2d 553, 557 (Vt. 2001) (same); 3 Rathkopf's *The Law of Zoning and Planning* § 44:11 (4th ed. 2017) ("[A] municipality may not contract away its police power to regulate on behalf of the general welfare.").

60 *PMC Realty Trust v. Town of Derry*, 480 A.2d 51, 53 (N.H. 1984).

61 Charter of Cheswold, 71 *Del. Laws*, c. 432 ("The Council is hereby vested with the authority to enact ordinances or resolutions relating to any subject within the powers and functions of the Town, or relating to the government of the Town, its peace and order, its sanitation, beauty, health, safety, convenience and property . . . ."); 6A *McQuillin Mun. Corp*. § 24:12 (3d ed. 2017).

b. The Unsevered Provisions Of The M-1 Amendments Are Separately Unenforceable

The Superior Court held that certain provisions of the M-1 Amendments are unenforceable because they directly impact the ability of future councils to modify zoning.[62] The Superior Court thus held one provision of the M-1 Amendments severable, but held that the remaining terms of the alleged "agreement," purportedly establishing a *perpetual* vested right, are enforceable.

The Superior Court erred because the entirety of the M-1 Amendments is unenforceable. As discussed above, there can be no vested right to a zoning approval or a land use classification. Moreover, a vested right is determined on an ordinance-by-ordinance basis under *244.5 Acres of Land*. Any agreement that allegedly recognizes an unqualified and unchecked right to proceed under the Town's 1977 zoning code, and freezes zoning or land use laws in *perpetuity*, impermissibly binds future Councils ability to legislate. The legislative function of

[62] *See* Op. 25 ("It is an accurate general statement of the law that one legislative body cannot bind the discretion of future legislative bodies.") (citing *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1853); 10A *McQuillin Mun. Corp*. § 29:102 (3d ed. 2017) ("[T]he legislative functions or governmental powers of the municipal corporation. . . [are] not binding on successor boards or councils."); 10 *McQuillin Mun. Corp*. § 29:11 (3d ed. 2017) ("Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void."); *Glassco v. Cnty. Council of Sussex Cnty.*, 1993 WL 50287, at *5 (Del. Ch. Feb. 19, 1993) ("Council has no power by ordinance to create legal obligations that restrict the future exercise of statutorily created discretion.").

the Town to regulate cannot be contracted away or bargained away.[63] If the remaining M-1 amendments are allowed to stand, the Town, by contract, will have *perpetually* divested future legislatures of their authority and responsibility to regulate for the health, safety and welfare of the Town.[64] For these reasons, the Superior Court erred in not striking the entirety of the M-1 Amendments as illegal and unenforceable.[65]

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[63] "[O]ne legislative body cannot by its legislation bind the hands of a future legislature respecting the same subject matter." *Graham v. Worthington*, 146 N.W.2d 626, 641 (Iowa 1966); *see also Glassco*, 1993 WL 50287, at *5.

[64] *McKinney v. City of High Point*, 79 S.E.2d 730, 734 (N.C. 1954) (holding that the exercise of the police power by a municipality cannot create a vested right because "[i]t is subject to amendment or repeal at the will of the governing agency which created it.").

[65] While these offending provisions remain codified in the Town Code, absent a finding that the 2005 Stipulations of Dismissal provide *perpetual* vested rights to the 1977 zoning code, the Town is free to repeal these provisions at any time. *Leon N. Weiner & Assocs., Inc. v. Carroll*, 270 A.2d 539, 541 (Del. Ch. 1970), *rev'd on other grounds*, 276 A.2d 732 (Del. 1971) (holding that a municipal legislative body has the right "to change, modify, or repeal its own ordinance," and this power "is inherent in the powers delegated to it."). Indeed, a legislative body has "full and unrestrained authority to exercise its discretion in any manner it seeks [sic] fit in its wisdom or even folly to adopt." *Salem Church*, 2006 WL 2873745, at *14; (quoting *State v. Schorr*, 158 A.2d 158, 161 (Del. 1957)). Such repeal has a retroactive effect. *Hazzard v. Alexander*, 173 A. 517, 521 (Del. Super. Ct. 1934) ("Indeed, it would seem that the simple fact, of an absolute repeal of a former statute, without any express saving clause, is so inherently significant of an intent to do away, utterly, with every thing which may have arisen under the abrogated statute, unless protected by the prohibitions of the federal constitution, as to require the courts to give the repealing act a retroactive operation.").

CONCLUSION

For the reasons stated herein, the Town of Cheswold respectfully requests that the Opinion of the Superior Court be reversed.

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