IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: KENT COUNTY ADEQUATE	:	
PUBLIC FACILITIES ORDINANCES	:	**CONSOLIDATED**
LITIGATION	:	**C.A. No. 2921-VCN**

MEMORANDUM OPINION AND ORDER

Date Submitted: July 10, 2008
Date Decided: February 11, 2009

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NOBLE, Vice Chancellor

A developer buys a large and expensive tract of land for the purpose of constructing a residential community. It moves forward at a reasonable pace, engages engineers, pursues preliminary land use approvals with the municipal government, incurs material expenses, learns that the applicable subdivision ordinances might be amended, continues with its land use efforts, and hears some representatives of the municipal government state that projects like its project will be grandfathered. As time goes by, the new ordinances are adopted and, because the developer's project is not grandfathered, the developer will incur additional burdens.

Relying upon concepts of vested rights and equitable estoppel, the developer has come to court in an effort to escape the burdens of the new ordinances.

Before the Court are cross-motions for summary judgment.[1]

[1] Also pending are the developer's appeals in the Superior Court from the municipal government's denial of the developer's request for a vested rights exception and a declaratory judgment action in the Superior Court seeking relief similar to that sought in this action. Those matters are not addressed in this memorandum opinion. Instead, counsel are asked to advise the Court as to whether those matters need to be addressed, in light not only of the conclusions reached here, but also in light of the developer's view that the municipal government should not be adjudicating vested rights claims and the fact that the declaratory judgment action largely tracks the claims presented in this Court.

I. BACKGROUND[2]

Petitioner Chase Alexa, LLC ("Chase Alexa") agreed in February 2004 to purchase a 166-acre tract in Kent County, Delaware.[3] Chase Alexa planned to subdivide the property for a low density residential community, a use consistent with the property's zoning. At the time, it paid a $20,000 nonrefundable deposit and seven months later paid an additional $480,000 nonrefundable deposit on the property.

In May 2005, Chase Alexa submitted concept plans to the Kent County Department of Planning Services for its proposed subdivision to be known as Winterberry Woods. A $250 fee accompanied the application. Chase Alexa's representatives met with County Planning officials who reviewed and approved the pre-application concept plans. Its representatives also contacted the Department of Natural Resources and Environmental Control ("DNREC") to report Chase Alexa's intent to use on-site wastewater disposal services. Chase Alexa also submitted its first Preliminary Land Use Service ("PLUS") application to the Office of State Planning Coordination ("OSPC"). During this period, it also had

[2] The parties have cross-moved for summary judgment. They have not identified any material factual disputes and they agree, in conformance with Court of Chancery Rule 56(h), that the Court may address this matter as if submitted "for decision on the merits based on the record." Although there are no facts in dispute (with one minor exception), the question of whether the inferences that can be drawn from them are undisputed is a more difficult one.

[3] Respondents are current and former members of the Kent County Levy Court and the Kent County Planning Commission. References to the County may include some or all of the Respondents.

discussions with the Camden-Wyoming Fire Department and the Camden-Wyoming Sewer and Water Authority ("CWSWA").

On November 25, 2005, the Kent County Levy Court introduced Ordinance No. LC-05-17, otherwise known as the Adequate Public Facilities Ordinance ("APFO").[4] The purpose of this ordinance was to offset the impact of land development on important public services, such as roads, schools, water utilities, and emergency services. The President of the Levy Court commented at the meeting that the ordinance would be effective retroactive as of that date but he also indicated that anyone with a "subdivision in the pipeline already in the works" would not be affected by the ordinance. The following day, Chase Alexa donated $55,000 to the Camden-Wyoming Fire Department in light of the impact that Winterberry Woods might have upon fire and emergency medical services. On December 13, 2005, Chase Alexa met with the CWSWA and determined that the CWSWA would provide water and sewer services to the subdivision. Shortly thereafter Chase Alexa attended a PLUS meeting.

In January 2006, Chase Alexa borrowed $3 million and proceeded to purchase the property. At that time, it also paid CWSWA $677,466 in impact and application fees.[5]

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[4] The APFO, from these modest beginnings, has spawned substantial litigation.

[5] In the event that Winterberry Woods is never developed, a substantial portion of these funds will likely be recovered by Chase Alexa.

Chase Alexa, during this period, was also working toward satisfying various County requirements. On March 15, 2006, Chase Alexa submitted revised concept plans and paid another $250 fee. It also attended another pre-application meeting with representatives of the Planning Office; at that meeting, the revised concept plans were approved. No mention was made by County officials of any obligation to comply with the APFO. Later, in March, Chase Alexa submitted another PLUS application to OSPC. Several weeks later, it attended another PLUS meeting. Not long after that, Chase Alexa paid another $75,000 to CWSWA for a parcel upon which the water tower necessary to provide public water service to the subdivision would be erected. Chase Alexa, by the end of May 2006, had received two sets of PLUS comments from the OSPC.

On June 13, 2006, the Levy Court introduced four new APFOs which broke out the various component pieces: roads (Ordinance No. LC-06-27), schools (Ordinance No. LC-06-28), emergency medical services ("EMS") (Ordinance No. LC-06-29), and central water (Ordinance No. LC-06-30). These new ordinances were referred to the Regional Planning Commission, without comment by the Levy Court.

The following day, Chase Alexa donated another $83,000 to the Camden-Wyoming Fire Department because of the potential impact of Winterberry Woods on the Department's services.

Chase Alexa filed with the County's Planning Office an application for preliminary subdivision plan approval on July 11, 2006. The application was accepted by the Planning Office. No indication was given that Chase Alexa might have to satisfy the recently introduced APFOs. The checklist used by the Planning Office to confirm all submission requirements made no reference to the APFOs.

The Regional Planning Commission held its public hearing on the APFOs on July 19, 2006. Shortly thereafter, the Planning Commission voted unanimously in favor of all four APFOs. The Kent County Planning Office approved the subdivision's name and the names of its proposed streets. On September 6, 2006, the Planning Office issued its staff recommendation report which recommended approval of the preliminary subdivision application. At no point, did the staff report suggest that the subdivision would be required to comply with the new APFOs. The Regional Planning Commission held a public hearing on September 6, 2006, to consider the Winterberry Woods subdivision application. The Regional Planning Commission granted preliminary subdivision plan approval on September 14, 2006, finding, *inter alia*, that "the application meets all code requirements." Again, no mention of compliance with the proposed APFOs was made.

A little over a month later, on October 17, 2006, APFO Central Water was adopted. There were inconsistent comments about retroactivity, but the County

Administrator indicated that the APFO Central Water would be retroactive to the date it was introduced.[6]

A week later, the APFO EMS was considered and adopted, although it was conditioned upon the General Assembly's repeal of 29 *Del. C.* § 9124(b), which expressly prohibited such an ordinance.[7]

Chase Alexa continued to make some progress with its subdivision process. On December 19, 2006, the Delaware Public Service Commission approved water service through the CWSWA.

On March 27, 2007, the Levy Court adopted the last two of the APFOs—roads and schools. The County Administrator announced at that meeting that "any project that has not gone through its completion, in terms of recordation, would be subject to the ordinance." Chase Alexa asserts that this is the first time that it was told that it would be required to comply with the APFOs.

The APFOs contain a means of obtaining a vested rights exemption from their retroactive application. Chase Alexa sought a vested rights exemption, but its application was denied by the Levy Court.

When it became clear in March 2007 that the County would seek to apply the APFOs retroactively to the Winterberry Woods project, Chase Alexa had only

[6] The confusion was enhanced when the County attorney stated, "It is always made clear, that if you have an application pending, that any change in the law would not be applicable to you."
[7] The General Assembly would repeal the blocking section the following year.

received preliminary subdivision plan approval. It had not received State Fire Marshall or DelDOT approval—although those approvals typically come further along in the approval process. It had not secured approval of the Kent Conservation District. Chase Alexa in the interim has received approvals from the State Fire Marshall (June 18, 2007), from DelDOT (September 26, 2007), from the CWSWA (November 30, 2007), and from the Kent Conservation District (January 14, 2008). It is a reasonable inference that, but for the APFOs, the Winterberry Woods subdivision would have been ready for final subdivision plan review and approval by early 2008.

In getting to this point, Chase Alexa spent more than $5 million acquiring and developing Winterberry Woods, and it appears the project satisfies all pre-APFO requirements for final subdivision approval. Of the sums expended, approximately $3.5 million was spent to acquire the property.[8] Application fees in the amount of $5,250 were paid to the Kent County Planning Department. The CWSWA received $752,466. Contributions in the amount of $138,000 were made to the Camden-Wyoming Fire Department. The balance went primarily to surveying, engineering, and design fees.

[8] There is some inconsistency in the briefing. This number may be closer to $3 million.

II. CONTENTIONS

Chase Alexa contends that it is entitled to move forward with Winterberry Woods under the pre-APFO standards because of the vested rights doctrine and because the County is equitably estopped from enforcing the APFOs against it.[9] Each of these doctrines will be considered in turn.

III. ANALYSIS

A. *Vested Rights*

Any consideration of a claim of vested rights under Delaware law begins with *In re 244.5 Acres*.[10] The developer in that case was in the process of securing subdivision approval from the City of Dover. After preliminary approval had been secured but before the final plan was approved, an agricultural lands preservation district was established adjacent to the project site. An adjacent agricultural lands preservation district would have impact on the developer's lots by requiring a 50-foot setback (instead of the 40-foot setback imposed by the City). The additional setback would have reduced the number of buildable lots and impaired the value of others. The Delaware Supreme Court rejected a vested rights test tied tightly to whether a final permit (i.e., a building permit) had been issued and, instead, concluded that the vested rights (or substantial reliance) analysis "should involve

[9] These claims appear as Count XVI (vested rights) and Count XXI (equitable estoppel) in Petitioners' Fourth Amended Petition.
[10] 808 A.2d 753 (Del. 2002).

'a weighing of such factors as the nature, extent and degree of the public interest to be served by the ordinance amendment on the one hand and, on the other hand, the nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded . . . .'"[11] That opinion recognized that "where developers expend large sums of money ["more than $300,000" was the figure used] on the pre-permit process, it would be inequitable to leave an applicant to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities [for land use approval]."[12] The Court emphasized that the loss of ten feet of setback would not materially impair the public interest: "Here, the public interest to be served by the 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."[13] As the Court concluded its description of the appropriate balancing test, "[i]n the final analysis, good faith reliance on existing standards is the test."[14]

Thus, there is no bright line test or objective formula to guide the Court. Although receipt of final permits would be evidence of substantive reliance, it is

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[11] *Id.* at 757-58 (quoting *Urban Farms, Inc. v. Borough of Franklin Lakes*, 431 A.2d 163, 172 (N.J. Super. 1981). *See also Salem Church (Delaware) Assocs. v. New Castle County*, 2006 WL 2873745, at *8-9 (Del. Ch. Oct. 6, 2006).
[12] *In re 244.5 Acres*, 808 A.2d at 758.
[13] *Id.*
[14] *Id.*

not essential that the developer have the permits in hand in order to prevail on a vested rights claim. Conversely, merely because the developer has started the land use approval process does not necessarily freeze the regulatory constraints on his project. Of course, the further the developer has gone along the land use approval path, the stronger his claim becomes. With these principles in mind, the Court turns to the specific facts of Chase Alexa's application.[15]

1. The Regulatory Pathway

By the time the final APFOs were adopted in March 2007 and it became absolute that the Winterberry Woods project would not be grandfathered under the terms of the APFOs, Chase Alexa had obtained a favorable staff recommendation from the County Planning Department and approval from the Planning Commission for its preliminary subdivision plan. In addition, it had made progress in its efforts to obtain water and sewer service from the CWSWA. It had not, however, achieved many essential approvals: DelDOT highway entrance permit; State Fire Marshall fire protection plan review; CWSWA sewer district extension;

[15] A brief comment on the County's administrative "vested rights" remedy is appropriate. It is not for the County to adjudicate vested rights claims as a matter of constitutional law, and it finally appears, based on the County's position at oral argument, that it does not now take that position. The APFOs all had a "vested rights" exception. There is nothing that prohibits the County from determining that applicants who have engaged in certain conduct or reached a certain stage in the regulatory process should be exempted from newly-imposed requirements. The County's standard need not be coterminous with those standards governing the constitutional analysis, but the County's process is, however, not the same as constitutional adjudication which is properly the domain of the judiciary.

Kent Conservation District storm water management plan; DNREC storm water discharge permit; and finally, approval for its final subdivision plan from any level of the County regulatory structure.

Also, when the first APFO was introduced at the end of November 2005, Chase Alexa had only obtained concept plan approval from the County Planning Department and submitted its first PLUS application.

2. Costs Incurred[16]

The parties debate the regulatory costs incurred by Chase Alexa.[17] Chase Alexa points to as much as $1.5 million as having been spent to date in gaining the necessary approvals. Apparently, it claims that approximately $900,000 had been

[16] Chase Alexa relies upon its acquisition costs of approximately $3 million. Use of acquisition costs in determining a vested rights claim is problematic because it would differentiate between those who had held their lands for some time and those who had only recently acquired them. Moreover, acquisition cost usually is by far the largest component of project costs. Perhaps there may be exceptional circumstances, but, in general, when one buys real property for development purposes, one buys with the knowledge that zoning and land use regulations may change; it is in the nature of zoning and land use contracts that their standards continue to evolve. Moreover, in *In re 244.5 Acres*, the Court did not factor in the cost of the developer's then-recently acquired land. Its focus, instead, was on the regulatory compliance efforts and the costs associated with those efforts. In *Raley v. Stango*, 1988 WL 94748 (Del. Ch. Sept. 14, 1988), this Court held that acquisition cost was not included in the substantial reliance (vested rights) analysis although the result might be different "if the record established that the land owner paid a premium that was directly related to the intended use of the property." *Id.* There is no basis for concluding that Chase Alexa paid anything other than the prevailing fair market price for the property. That the property could be used for residential development may have made it more valuable and, thus, more costly, than if it were limited to farming use. But, nonetheless, the price was simply fair market value. Moreover, it is worth noting that the APFOs did not preclude, or even limit, the residential use of the property.

[17] There is a minor, immaterial factual debate about one payment to the CWSWA claimed to have been made by Chase Alexa. Its resolution is not necessary.

spent by October 2006 when the first APFO was approved.[18] That included a substantial payment to the CWSWA[19] and "voluntary" contributions to the Camden-Wyoming Fire Department.

The County concedes engineering costs of $288,000. When coupled with the nonrefundable fees necessarily paid, Chase Alexa has committed well over $300,000 toward the regulatory approval effort. Thus, it is fair to characterize its expenditures as "substantial," at least as that term was used in *In re 244.5 Acres*, even though it has been almost a decade since the costs were incurred in that action and in the period since, the cost of obtaining project approvals, partly because of the increasing complexity of land use regulation, has escalated.[20]

3. Public Interest

The public policy interest advanced by the APFOs is significant. The population increase accompanying a large residential subdivision puts pressure on available capacity for essential public services—education, transportation,

[18] See Chase Alexa's Opening Br. in Supp. of its Mot. for Summ. J. on its Vested Rights and Equitable Estoppel Claims at 41.

[19] It appears that most of these funds can be recovered it Chase Alexa does not pursue the project.

[20] Resolving the cost figures from a paper record is not without its uncertainties. It is worth noting that Chase Alexa has incurred significant costs since it became aware that the County would take a firm position that Winterberry Woods is subject to the APFOs. Costs incurred after that point clearly cannot be considered as evidence of reliance. Part of the difficulty is simply trying to match the expenditures with the knowledge and perception at any time that Chase Alexa had—or should have had—with respect to the likelihood that its project would be subject to the APFOs.

emergency medical services, and utilities, all matters affecting public health and welfare. Finding a means to pay for the necessary additional capacity is both important and challenging. Perhaps the APFOs are the right way to find the additional funds; perhaps they are not. That, however, is a policy debate properly committed to the Levy Court in the absence of action by the General Assembly.

The impact of the APFOs on individual subdivision projects is primarily financial, although delay and implementation problems with DelDOT are possible. That stands in contrast to the more typical change in land use regulations that might occur during the design and approval process. Ordinarily, the risk confronting a developer would be more substantive changes in the zoning regulations: for example; density; setback, i.e., factors requiring tangible modification. That the benefit and the burden of the APFOs may be considered primarily economic does not diminish the scope of either the benefit or the burden.[21]

Thus, in this case, the public benefit sought through enactment of the APFOs is important. In contrast, the Supreme Court in *In re 244.5 Acres*, plainly considered the loss of an additional ten feet of setback from an agricultural district to be *de minimis*. When it came to the harm to the public interest if the developer

[21] Although the ten-foot setback at issue in *In re 244.5 Acres* had a tangible effect on that subdivision's design, the impact was still analyzed on an economic basis. The loss of buildable lots and the impact on some of the other lots was estimated at $400,000.

were not subject to the additional setback, the Supreme Court found little to weigh on the public side of the balance. In this case, however, the public interest in preserving the applicability of the APFOs to the Winterberry Woods project is entitled to significant weight in the balancing process.[22]

4. Good Faith Reliance

The process by which the APFOs were adopted was convoluted, marked by fits and starts, and subject, at times, to inconsistent statements by public officials—all circumstances that can be part of a legislative effort directed to a difficult and sometimes contentious public policy debate balancing quality of life concerns against reasonable economic expectations and the need for additional housing. Indeed, the composition of the Levy Court changed significantly during the course of the APFO effort.

When Chase Alexa contracted to purchase the Winterberry Woods property, it had no reason to anticipate enactment of the APFOs. Before Chase Alexa had incurred any major expense or made material progress toward obtaining approval for the Winterberry Woods project, the first APFO was introduced. Although the ordinance would evolve, its introduction put Chase Alexa and others on notice that the County was considering a significant new approach to assuring funds for

[22] For example, one estimate of the economic benefit to the local school district under APFO Schools places the mitigation payment to be made by Chase Alexa in the range of $800,000.

essential public services through the subdivision process. That initial draft ordinance had an effective date of its introduction and no grandfathering provision.[23] Indeed, throughout the legislative process, the effective date generally was June 2006.[24] The question was not so much the effective date, but, instead, the question was whether the ordinance would be applied retroactively to projects in the "pipeline" as of June 2006. The APFOs did not purport to grandfather any project.

Chase Alexa identifies four discrete events which, in its view, demonstrate both its reliance on the pre-APFO standards of subdivision regulation and the reasonableness of that reliance:[25]

a. *Statement of the Levy Court President*

When the first APFO was introduced in June 2006, the Levy Court President stated, "Anyone having a subdivision in the pipeline already in the works is not affected by this ordinance. . . . [I]f you have had a pre-application meeting, you are in the system." By this time, Chase Alexa had had its pre-application meeting and its project was in the "pipeline." The President of Levy Court, however, is but

[23] Kent County's Opening Br. in Supp. of its Mot. for Summ. J. on Pet'r Chase Alexa's Mot. for Summ J. on its Vested Rights and Equitable Estoppel Claims at App. at B-1 ("County App.").
[24] See County App. at B-2-B-5 (the four APFO ordinances as introduced separately). Indeed, these ordinances all had vested rights provisions and retroactive dates back to June 2006. Why a vested rights provision would be included if projects in the "pipeline" were to be exempted from the reach of the APFOs is a question with which the Petitioners have struggled.
[25] Reply Br. of Chase Alexa at 8.

one member. He cannot bind his fellow members and, presumably, he cannot bind subsequent Levy Courts.[26] Regardless of what he might think, say or expect, the text of the ordinance is the most important (if not the only) guidance document and it did not provide for grandfathering. Chase Alexa, understandably, may have taken heart from the President's comments; substantial reliance was not, however, justified.

b. *The County Attorney's Statement*

Second, in October 2006, the County attorney at the public meeting when the APFO Central Water was approved, stated "it is always made clear, that if you have an application pending, then any change in the law would not be applicable to you." Of course, Chase Alexa's application had been in the "pipeline" for approximately one year. Aside from the question of whether a spontaneous comment from the County attorney at a public meeting can bind the County (or provide a basis for some third party's reliance) and whether he was expressing a legal opinion or just speculating, the full text of his comments, as reflected in the minutes, is not as clear as Chase Alexa would suggest:

> Mr. Petit de Mange [then-County Planning Director] pointed out that Section 4 of the Ordinance, the effective date provision, says the Ordinance shall be effective upon enactment retroactive to the date of introduction. The date of introduction of this Ordinance was June 13, 2006.

[26] *See, e.g.*, *Glassco v. County Council of Sussex County*, 1993 WL 50287, at *5 (Del. Ch. Feb. 19, 1993).

The concern Mr. Peterman [a Levy Court Commissioner] had was if something has gone through the pipeline and they might have 10 or 15 lots and then go back and try to make it affordable. He does not know what the cost would be to put in a system on 10 lots. He was wondering if Mr. Petit de Mange could help him.

There is a Section 2 which deals with Vested Rights and there is a process for those situations, says Mr. Petit de Mange. An applicant can present information to the County that demonstrate that they were substantially relying upon the Ordinance as it existed prior to the enactment of this and Levy Court can make a decision on it, whether or not it is a valid request. He said Mr. Townsend [the County Attorney] crafted much of the language and he may want to expound on it.

Mr. Townsend said two things: 1) A number of Ordinances such as this have received consideration of Levy Court over the period of the last six to twelve months. It is always made clear, that if you have an application pending, then any change in the law would not be applicable to you. 2) In acknowledgment of a considerable amount of case law that is very specific, the Section 2 that was referred to makes it very clear that for those developers or individuals who have substantially relied to their detriment on the current state of the law, may make application to receive a hearing from Levy Court to request an exemption from the Ordinance. In previous discussions, in the absence of this law, the absence of this Section 2 that has been crafted, he believes the Court would intercede on behalf of an applicant who indicated that a considerable amount of money and time was devoted and that money and time has been wasted and they have been harmed in some way by a requirement that they complied with. This Section 2 probably is not critical to this particular Ordinance. You will see Sections with provisions like this in subsequent Adequate Public Facility Ordinances where it will be more critical.[27]

[27] County App. at B-51.

First, the County attorney's comments are fairly limited to the ordinance that was being considered at the time, APFO Central Water. Second, a fair reading of what he said relates to other ordinances. Indeed, there was discussion about a vested rights provision, as reflected in the minutes, and, if the ordinance itself was to provide a grandfathering provision, there would be no apparent need for a vested rights section. Although Chase Alexa's reading, certainly in isolation, is the better reading, at most, the County attorney's comments were ambiguous and would provide only limited support to Chase Alexa's position. Perhaps it is best understood as simply one more aspect of an uncertain series of events.

c. *Preliminary Conference*

As part of the land use approval process, the County conducts a preliminary conference at which a checklist to govern the process is reviewed with the applicant in accordance with Kent County Code § 187-17A, which provides: "Before undertaking the preparation of a major subdivision plat, the applicant shall consult with the [County] staff to . . . determine the zoning regulation and other requirements relating to or affecting the proposed subdivision." Of course, the pre-application checklist did not refer to the APFOs because at that time there were no APFOs. Chase Alexa does not seem to argue that once the checklist is prepared, the County can never change its zoning or subdivision ordinances. If that is its argument, any such argument would fail. All the Planning staff can do—because it

is not the staff that amends zoning ordinances or subdivision ordinances—is to guide the applicant based on the ordinances that govern the process at the time. Perhaps the staff can be forward-looking in some circumstances, but the future of the APFOs at the time of the preliminary conference was uncertain.

d. *Staff Recommendation Report and RPC Approval*

Chase Alexa points out that, when it received preliminary site plan approval from both the County Planning staff and the Planning Commission, no mention was made that the APFOs would be binding on its project. Of course, no APFOs had been adopted at that time, but no one in that part of the planning process can control the future actions of the Levy Court. It is hard to fault the Planning Commission or the Planning staff for neither imposing nor discussing requirements that had not been adopted by the Levy Court.

* * *

That there was uncertainty about the retroactive effect of the APFOs within the development community, including Chase Alexa, is confirmed by correspondence sent on July 18, 2006, by Chase Alexa's counsel requesting that the APFOs provide for grandfathering.[28] This does not, as the County seems to argue, demonstrate that the development community knew that there was not going to be grandfathering. Instead, it strongly suggests that there was concern and

[28] County App. at B-46 (APFO 0494).

uncertainty about the course the County would follow as to that issue. Ultimately, the presence of that concern and uncertainty cuts against any finding that Chase Alexa reasonably relied upon the isolated instances where there were suggestions that grandfathering might result.

In sum, Chase Alexa, until it was certain that the County's position would preclude grandfathering, incurred substantial expenditures in its efforts to obtain subdivision approval for Winterberry Woods. It understandably had hope that its project would be grandfathered, but there was so much uncertainty—indeed, confusion might be the better word—surrounding how the APFOs would be implemented that reasonable reliance at any time after the introduction of the first APFO in June 2006 is difficult to sustain.[29] At that point, it had not incurred significant expenses in pursuit of the project. Moreover, even as of the adoption of the last of the APFOs in March 2007, only the preliminary site plan approval, which, of course, was the stage at which the developer in *In re 244.5 Acres* was, had been granted by the County. Many regulatory hurdles remained. This is simply not a case where the developer had proceeded far enough down that regulatory path to claim that he was entitled to keep moving forward without the impact of the regulatory adjustments.

[29] The APFOs in their various mutations had retroactive dates back to introduction and vested rights provisions.

Finally, the public benefit to be achieved by the APFOs is significant. In the required balancing, especially after the minimal public benefit accorded the ten-foot additional setback in *In re 244.5 Acres*, this factor must be given greater emphasis because of the benefits that the APFOs would confer on the public health and welfare through the funding of essential public facilities.

On balance, the Court concludes that the bulk of Chase Alexa's efforts were exerted and expenses were incurred after it was on notice that there was significant uncertainty as to how the APFOs might be applied to its project. That precludes a finding that Chase Alexa has vested rights (or substantially and reasonably relied upon the state of the subdivision ordinance without the burdens of the APFOs) and, accordingly, the Respondents are entitled to summary judgment on Chase Alexa's vested rights claim.

B. *Equitable Estoppel*

Relying upon the same facts, Chase Alexa contends that the County is equitably estopped from enforcing the APFOs against it. Equitable estoppel against the government here is similar to the vested rights doctrine.[30]

> An equitable estoppel claim arises where (i) a party that is acting in good faith (ii) relies on affirmative acts or representations of the government (iii) by making substantial improvements to property, and (iv) it would be inequitable to allow the government to impair or

[30] *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507, at * 7 (Del. Ch. Dec. 16, 1988).

destroy the rights the property owner has thereby acquired.[31]

Estoppel is applied against the government cautiously, and "only where the circumstances require its application to prevent manifest injustice."[32]

The Court's discussion of Chase Alexa's effort to prove reliance in the context of its vested rights analysis is dispostive of this claim as well. Ultimately, Chase Alexa has not demonstrated that it relied upon affirmative acts or representations of the government in incurring substantial expenditures.

Reference to *Wilmington Materials*, nonetheless, may be instructive. There, the Mayor had "caused the Town Solicitor to issue an official, formal opinion advising [petitioner] that its intended uses were permitted under the zoning code."[33] No such, specific, focused, concrete, or direct communication to Chase Alexa or, as far as the record demonstrates, the development community generally was ever forthcoming from the County as it found its way to adopt the APFOs.

Accordingly, the Respondents are entitled to summary judgment in their favor on Chase Alexa's claim of equitable estoppel.

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[31] *Eastern Shore Envtl., Inc. v. Kent County Dept. of Planning*, 2002 WL 244690, at *4 (Del. Ch. Feb. 01, 2002) (citing *Disabatino v. New Castle County*, 781 A.2d 698, 702 (Del. Ch. 2000), *aff'd*, 781 A.2d 687 (Del.2001)).

[32] *Delaware River & Bay Auth. v. Del. Outdoor Adver., Inc.*, 1998 WL 83056, at *4 (Del. Ch. Feb. 20, 1998) (citations and internal quotations omitted).

[33] *Wilmington Materials*, 1988 WL 135507, at *8.

IV. CONCLUSION

For the foregoing reasons, the Respondents' Motion for Summary Judgment with respect to Count XVI and Count XXI of the Fourth Amended Petition is granted, and Chase Alexa's corresponding Motion for Summary Judgment is denied.

IT IS SO ORDERED.