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Re: In re Kent County Adequate Public Facilities Ordinances Litigation
Consolidated C.A. No. 2921-VCN
Date Submitted: March 4, 2009

Dear Counsel:

Plaintiff Chase Alexa, LLC ("Chase Alexa") has moved for reargument of the Court's February 11, 2009, Memorandum Opinion and Order[1] that rejected its vested rights claim[2] that, if successful, would have allowed it to develop

[1] *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2009 WL 445386 (Del. Ch. Feb. 11, 2009).
[2] Pending in the Superior Court is Chase Alexa's appeal of Defendant Kent County Levy Court's rejection of its vested rights claim measured under standards set by County ordinance. *See id.*, at *1, n.1.

Winterberry Woods, a proposed residential subdivision, without being subject to Defendant Kent County's Adequate Public Facilities Ordinances (the "APFOs").[3]

Chase Alexa raises two specific contentions. First, it argues that Kent County Ordinance § 187-17(D) precludes application of the APFOs to Chase Alexa's proposed project. Second, Chase Alexa argues that its good faith expenditure of $254,745.63 before the initial introduction of an APFO in June 2006 was significant and compels the conclusion that its rights to develop the project under the then-existing regulatory regime were vested.

A. *Kent County Code § 187-17(D)*

By § 187-17(D) of the Kent County Code: "The preliminary application must be submitted within six months of the preliminary conference meeting or another preliminary conference will be required and the project must meet all current standards." Chase Alexa reads the quoted language as follows: As long as the preliminary application is submitted within six months of the preliminary

[3] Under Court of Chancery Rule 59(f), a successful motion for reargument requires its sponsor to "demonstrate that the Court 'overlooked a decision or principle of law that would have had controlling effect or that the Court . . . misapprehended the law or the facts so that the outcome of the decision would be affected.'" *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2007 WL 2565566, at *1 (Del. Ch. Aug. 29, 2007) (quoting *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995)).

conference, the project will be governed by the standards in effect at the time of the preliminary conference.

Unfortunately for Chase Alexa, that is not what the quoted language fairly means. It does provide that if the applicant does not submit a preliminary plan within six months of the preliminary conference, then the applicant must comply with the regulatory scheme as it may have evolved during the interim.[4] The ordinance is silent with respect to what happens if the applicant submits a preliminary plan within six months of the preliminary conference yet the applicable standards are amended during the interim. One understands how Chase Alexa would try to draw its inference of six months of shelter from new requirements following the preliminary conference. It is unreasonable, however, to draw such inference from the silence of this provision. The Levy Court has not committed to freeze the land use standards applicable to a particular project for a particular period of time by virtue of § 187-17(D). Perhaps that would be good policy; the language to implement that policy would be easy to draft. The Levy

[4] This is, more or less, the reading given to the quoted language by the County's former planning director. *See* Michael Petit de Mange Dep., at 226.

Court, however, did not expressly adopt any such policy, and it is not for the Court to impose such a policy when supported only by silence in the land use ordinance.

Accordingly, this aspect of Chase Alexa's motion for reargument is denied.

B. *Significant Sums*

There is more to Chase Alexa's second argument, although the core of its motion ultimately derives from the Court's infelicitous word choice.

There are no absolute standards or formulae to apply in determining whether a developer may fairly claim a vested right to proceed with a project under a pre-existing regulatory scheme. Instead, this Court must balance the nature, extent and degree of the developer's reliance on the prior regulatory scheme on the one hand and, on the other hand, the nature, extent and degree of the public interest to be served by the present regulatory scheme.[5]

At one point, the Court observed that Chase Alexa had "committed well over $300,000 toward the regulatory approval effort"[6] and concluded that those expenditures would qualify as "substantial" under the teachings of *In re 244.5*

[5] *In re 244.5 Acres*, 808 A.2d 753, 757-58 (Del. 2002).
[6] *In re Kent County*, 2009 WL 445386, at *4.

Acres. At another point, however, the Court concluded that Chase Alexa, by June 2006, had not "incurred significant expenditures in pursuit of the project."[7]

Chase Alexa, by June 2006, when the first version of an APFO was introduced, had spent $254,745.63 in seeking regulatory approval and now contends that such sum was "significant." Chase Alexa breaks that number down as follows: $119,095.63 for engineering services; $75,000 paid to the Camden-Wyoming Sewer & Water Authority to purchase land necessary for its benefit and use in providing utility services; $55,000 to the Camden-Wyoming Fire Company to offset the burdens of a new residential development; and $5,650 to Kent County in application fees.[8]

Applying a label such as "significant" or "substantial" to a cost number is necessarily a relativistic effort. When viewed in isolation, it is difficult to classify $254,745.63 as insignificant or insubstantial. It is true, as the County notes, that the payments to the Fire Company were "voluntary." It is also true that the lands acquired for the Sewer and Water Authority would likely have been necessary for any residential project at the site. It is also likely true that most, if not all, of the

[7] *Id.*, at *8.
[8] Chase Alexa's Mot. for Reargument at 5-6.

preliminary engineering work performed for Chase Alexa would have been necessary for whatever project it might eventually develop. Those, however, may be little more than quibbles and do not, by themselves, fairly undercut Chase Alexa's arguments. On the other hand, when the entire projected cost of developing Winterberry Woods is considered, the $254,745.63 number does not seem quite so compelling.

One can look at the expenditure of roughly $254,000 from several perspectives, but, importantly, mere consideration of the number, standing alone, is of little help and, furthermore, is why this Court did not use the $300,000 in expenses deemed sufficient to vest rights in *In re 244.5 Acres* as a floor in this action. Expenses made in reliance must be measured against the public interest at stake, i.e., the benefit that the Levy Court hoped to achieve through implementation of the APFOs. Critical to an understanding of *In re 244.5 Acres*, and thus Chase Alexa's vested rights petition, is recognition of the public benefits to be balanced against the private expense. At stake in *In re 244.5 Acres* was only a 10-foot buffer for an agricultural lands preservation easement. The Delaware Supreme Court characterized "the public interest to be served by enforcement of

the preservation district setback [as] minimal."[9] By contrast, the objectives of the APFOs, as their names suggest, involve the delivery of core governmental and public services to the residents of Kent County. It is in this context of balancing the public interest to be served by the APFOs against the dollars spent by Chase Alexa that the relative significance or substance of these expenditures must be analyzed. Unlike the "minimal" public interest in *In re 244.5 Acres*, the public interest to be balanced here is critical; the Levy Court has concluded that the APFOs go to the quality of life in Kent County; that is a conclusion, first, with which this Court agrees and, second, which cannot be second guessed on the record before the Court because the parties have focused neither on the need for nor the appropriateness of the APFOs.

In short, the Court should have used a phrase different from the "not significant" description that it used to describe the sums expended by Chase Alexa before the first APFO was introduced. That said, the functional application of the analysis prescribed in *In re 244.5 Acres* does not change. When all of the relevant factors—those recited above as well as those addressed in the memorandum

[9] *In re 244.5 Acres*, 808 A.2d at 758.

opinion—are assessed, the balance still comes down on the side of the public interest.

For the foregoing reasons, this aspect of Chase Alexa's motion for reargument is also denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K