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Re: *Sterling Property Holdings Inc. v. New Castle County*
C.A. No. 20408-VCN
Date Submitted: January 28, 2013

Dear Counsel:

Plaintiff Sterling Property Holdings, Inc. (“Sterling”) and Defendant New Castle County (the “County”) have filed cross-motions to enforce an August 31, 2007 Settlement Agreement.¹ The parties dispute the fees to be charged by the County in its multi-stage land use application review process, specifically those

¹ App. to Pl.’s Opening Br. in Supp. of its Mot. to Enforce Settlement Agreement (“Pl.’s App.”) Ex. 2 (“Settlement Agreement”).

relating to the County's final stage review of record plan applications (the "Review Fees").²

In 2009, the County increased its Review Fees.³ On June 13, 2011, Sterling submitted its record plan application to the County for review,⁴ and on May 8, 2012, the County rejected Sterling's application on the grounds that the Review Fees had not been paid.⁵ Sterling argues that it should pay the Review Fees in effect at the time of the Settlement Agreement in 2007,⁶ but the County contends that Sterling should pay the Review Fees currently in effect (at the filing of its record plan).⁷

After briefing its cross-motion to enforce, Sterling submitted a letter to the Court referring to 9 *Del. C.* § 3010 ("Section 3010").⁸ Section 3010 requires that the New Castle County Council (the "County Council") approve fees established

² Pl.'s App. Ex. 10.

³ Pl.'s App. Exs. 8-9.

⁴ Pl.'s App. Ex. 5.

⁵ Pl.'s App. Ex. 6.

⁶ Pl.'s Opening Br. in Supp. of its Mot. to Enforce Settlement Agreement 5 ("Sterling Br."); Pl.'s App. Ex. 8.

⁷ Def.'s Opening Br. in Supp. of its Mot. to Enforce the Settlement Agreement and Answering Br. in Opp'n to Pl.'s Mot. to Enforce 31 ("County Br."); Pl.'s App. Ex. 10.

⁸ Letter from Richard L. Abbott, Esq. to the Court, dated Nov. 5, 2012 ("Pl.'s Section 3010 Letter").

by the New Castle County Department of Land Use (the “Department”) and that such fees be proportioned to the cost of reviewing and approving plans.⁹ Sterling argues that neither of these Section 3010 requirements has been met with regard to the 2009 increase in Review Fees,¹⁰ a position with which the County disagrees.¹¹ The County further argues that Sterling’s Section 3010 argument should not be considered on cross-motions to enforce without a separate hearing.¹²

I. BACKGROUND

A. The Litigation

Sterling first filed this action in 2003, challenging the sunseting of a record plan for the Red Lion Village subdivision, a 688-unit mobile home park on 153 acres in New Castle County. Sterling had obtained the County’s approval and recorded its Red Lion Village plan in 1975.¹³

⁹ 9 *Del. C.* § 3010.

¹⁰ Pl.’s Section 3010 Letter.

¹¹ Letter from Max B. Walton, Esq. to the Court, dated Nov. 8, 2012 (“Def.’s First Section 3010 Letter”); Def.’s Reply Br. in Supp. of its Mot. to Enforce the Settlement Agreement (“County Reply Br.”) 22-27.

¹² Letter from Max B. Walton, Esq. to the Court, dated Jan. 28, 2013 (“Def.’s Second Section 3010 Letter”).

¹³ *Sterling Prop. Hldgs., Inc. v. New Castle Cnty.*, 2004 WL 1087366, at *1 (Del. Ch. May 6, 2004) (“*Sterling I*”).

On December 31, 1997, the County adopted extensive revisions to its land use regulations in the form of the New Castle County Unified Development Code (the “UDC”).¹⁴ The UDC included a five-year sunset provision: any plan approved and recorded by December 31, 1997 upon which construction had not commenced before December 31, 2002 would expire.¹⁵ Sterling challenged the validity of the UDC sunset provision and its applicability to Sterling’s recorded Red Lion Village plan.¹⁶

On May 6, 2004, the Court rejected Sterling’s challenge to the UDC’s sunset provision as time-barred by the Statute of Repose,¹⁷ which limited any challenges to the UDC to the sixty-day period after it was validly enacted.¹⁸ Thereafter, Sterling amended its complaint.¹⁹ Successful negotiations ensued, and the parties executed the Settlement Agreement on August 31, 2007. The Court stayed this action, on September 7, 2007, to allow for implementation of the Settlement Agreement.

¹⁴ New Castle County Code, Ch. 40 (the “UDC”).

¹⁵ UDC § 40.01.130B-D.

¹⁶ Pl.’s Compl. ¶¶ 44-46.

¹⁷ 10 *Del. C.* § 8126.

¹⁸ *Sterling I*, at *1-2.

¹⁹ Pl.’s Amended Complaint.

B. The Settlement Agreement

Under the Settlement Agreement, Sterling would prepare a subdivision development plan (the “New Plan”) for the 205 acres it owned on both sides of Old Porter Road in Bear, Delaware (the “Property”).²⁰ The New Plan would also involve the County rezoning the Property to a Suburban Transition (“ST”) zoning classification.²¹ If Sterling received “final, non-appealable approval of the ST rezoning and the New Plan,” it would agree to stipulate to dismissal of its action with prejudice and to rescind its Red Lion Village plan.²²

Phase I of the Settlement Agreement anticipated that Sterling would work with the Department on the New Plan until the Department decided that the New Plan would “constitute an approvable pre-exploratory and exploratory sketch/rezoning submission under the New Castle County Code.”²³ The Department would then “support final approval of the New Plan . . . provided that the development plan complie[d] with the requirements of the County Code.”²⁴

²⁰ Settlement Agreement A.1.

²¹ Settlement Agreement A.1.

²² Settlement Agreement B.4.

²³ Settlement Agreement A.2.

²⁴ Settlement Agreement A.6.

Even with initial approval, however, nothing in the Settlement Agreement required the Department “to approve Sterling’s land use application for the Property at the exploratory, preliminary, or record plan stage unless the submission meets all requirements of applicable law.”²⁵

Phase II of the Settlement Agreement provided for Sterling to “diligently pursue all approvals required for the rezoning of the Property,” to “meet all exploratory plan and preliminary plan requirements prior to County Council’s review and decision on the proposed rezoning,” and to “satisfy all code requirements prior to recordation of any land use plan for the Property.”²⁶ Nothing in the Settlement Agreement relieved “Sterling or the County of their obligations to obey all Federal, State, and County laws, ordinances, regulations, and policies in seeking rezoning and/or subdivision approval for the Property” and in implementing its terms.²⁷

²⁵ Settlement Agreement A.6.

²⁶ Settlement Agreement B.1.

²⁷ Settlement Agreement D.2.

C. The First Motion to Enforce

After the parties successfully completed Phase I of the Settlement Agreement, Sterling submitted two separate plan applications for subdivision and rezoning to the County on March 27, 2008: the Vistas at Red Lion, Section I and Section II.²⁸ At the time, the County had a three-stage application review process, of exploratory, preliminary, and record plans.²⁹ On October 8, 2008, the Department refused to approve Sterling's exploratory plan, issuing an Exploratory Plan Report indicating that Sterling needed a jurisdictional determination from the United States Army Corps of Engineers ("Corps of Engineers") as to whether the wetlands proposed to be disturbed in the New Plan were within federal jurisdiction.³⁰

On December 12, 2008, Sterling filed its first Motion to Enforce Settlement Agreement, arguing that any demand made by the Department beyond the requirements of the UDC was both contrary to the terms of the Settlement

²⁸ Pl.'s App. Ex. 3.

²⁹ Pl.'s App. Ex. 8.

³⁰ Pl.'s Mot. to Enforce Settlement Agreement Ex. B, Dec. 9, 2008.

Agreement and beyond the County's authority.³¹ On December 29, 2008, the Court held that the Settlement Agreement contemplated "a land use approval process that included not only the substantive provisions of the County Code, but also the procedural processes attendant to obtaining land use approval."³² The Court then denied Sterling's first motion to enforce on the grounds that Sterling should seek alternative relief through an administrative appeal.³³

Sterling then appealed the Department's Exploratory Plan Report to the New Castle County Board of Adjustment, which reversed the Department's determination.³⁴ The Board of Adjustment concluded that the Department was not given authority under the County Code to require that Sterling obtain a jurisdictional determination from the Corps of Engineers.³⁵ Sterling only had to generate a wetlands report indicating whether any federal jurisdictional wetlands were implicated, and only if that were the case could the Department require a

³¹ *Id.* ¶¶ 3, 9-11, Dec. 9, 2008.

³² *Sterling Prop. Hldgs., Inc. v. New Castle Cnty.*, (Del. Ch. Dec. 29, 2008) (TRANSCRIPT) ("Sterling I") at 63.

³³ *Sterling II*, at 63-64.

³⁴ Pl.'s App. Ex. 1, at 6.

³⁵ Pl.'s App. Ex. 1, at 3.

permit and not a jurisdictional determination from the Corps of Engineers.³⁶

Sterling then proceeded with its applications.

D. The County Code and Fee Changes

In 2009, the County changed certain fees relating to land use applications.³⁷ It raised the fee for a preliminary plan with a rezoning from \$2,000 plus \$100 per acre to \$3,000 plus \$300 per acre (the “Rezoning Fee”). It increased the stormwater management and erosion and sediment control plan review and site inspection fee, from \$125 per acre to \$375 per acre affected. It raised the major plan residential subdivision fee, from \$500 plus \$20 per lot to \$5,000 plus \$200 per lot and/or dwelling unit.

On or about October 21, 2009, the County passed an ordinance modifying the County’s three-step review process (exploratory, preliminary, and record stages). Effective on January 1, 2010, the preliminary plan review stage was eliminated. The Rezoning Fee, which used to accompany the preliminary plan,

³⁶ Pl.’s App. Ex. 1, at 5.

³⁷ Pl.’s App. Exs. 7-10.

would now be paid with the record plan.³⁸ Applications filed before January 1, 2010 were processed by the County under the three-step process, and plans filed on or after January 1, 2010 would be processed under the new two-step review process.

E. Preliminary and Record Plan Submissions

Sterling submitted one of its Vistas at Red Lion preliminary plans with preliminary plan fee (and rezoning) on November 14, 2008, and the other with preliminary plan fee (and rezoning) on September 24, 2009.³⁹ According to the County, Sterling paid contemporaneous Rezoning Fees with its preliminary plans without making the argument that it ought to pay 2007 Rezoning Fees instead.⁴⁰ The Department's October 28, 2010 report on Sterling's preliminary plans then required Sterling to submit its final record plans on or before December 15, 2010.⁴¹ On November 10, 2010, the County granted Sterling a three-month extension of

³⁸ Pl.'s App. Ex. 10. According to the County, "[b]ecause the Rezoning Fee was paid by Sterling at the old preliminary plan stage, no Rezoning Fee is [now] due at the record plan stage." County Br. 6 n.8; *Sterling Prop. Hldgs., Inc. v. New Castle Cnty.*, (Del. Ch. Jan. 15, 2013) (TRANSCRIPT) ("Tr.") at 42.

³⁹ Pl.'s App. Ex. 3.

⁴⁰ Def.'s Br. 6.

⁴¹ App. in Supp. of Def.'s Opening Br. in Supp. of its Mot. to Enforce the Settlement Agreement and Answering Br. in Opp'n to Pl.'s Mot. to Enforce ("Def.'s App.") Ex. 4.

the final record plan deadline, until March 15, 2011.⁴² On March 8, 2011, the County Council approved the Property's rezoning. On March 10, 2011, the County granted Sterling a second and final three-month extension of the deadline, until June 15, 2011.⁴³ On June 13, 2011, Sterling submitted part of its final record plan applications to the County.⁴⁴ Sterling did not submit record plan engineering applications to the County until April 2012.⁴⁵ On May 8, 2012, the County rejected Sterling's record plan application on the grounds that no Review Fees were enclosed.⁴⁶

F. The Review Fees Dispute

Sterling did not accompany its record plan applications with Review Fees. According to its calculations, under the 2007 fee schedule Sterling would have had to pay \$40,200 as Review Fees,⁴⁷ but under the fee schedule at the time it

⁴² Def.'s App. Ex. 4.

⁴³ Def.'s App. Ex. 5.

⁴⁴ Pl.'s App. Ex. 5.

⁴⁵ County Br. 8; Sterling Answering & Reply Br. 2, 5.

⁴⁶ Def.'s App. Ex. 6.

⁴⁷ Pl.'s App. Exs. 7-8.

submitted its record plan applications, it would have had to pay \$207,710, for a difference of \$167,510.⁴⁸

Sterling claims that sometime in June 2011, a representative of Sterling and representatives of the County met and discussed possible ways to resolve the Review Fees dispute.⁴⁹ The discussions purportedly centered around a potential compromise involving: (i) deferral of payment of the Review Fees until a home building permit was issued for both sections of the New Plan, and (ii) at the rates applicable at the time building permit applications were submitted.⁵⁰ The County's briefs do not mention these purported June 2011 meetings.⁵¹

On July, 20, 2011, Sterling's counsel, Richard L. Abbott, Esq. ("Abbott"), participated in a phone call with New Castle County Attorney and then-Acting Chief Administrative Officer, Gregg E. Wilson, Esq. ("Wilson").⁵² Initially,

⁴⁸ Pl.'s App. Ex. 7, 9-10. Sterling's calculations reflect a higher number, one which it has used throughout briefing and oral argument (\$268,310). That higher number includes the Rezoning Fee which, as discussed *supra*, the County has stated that Sterling has already paid and does not have to pay at the record plan stage. Sterling's calculations provide enough detail for the Court to subtract the Rezoning Fee in order to find the amount of current Review Fees that Sterling would have to pay. Pl.'s App. Ex. 7. The County does not dispute these numbers. Tr. 42.

⁴⁹ Sterling Br. 18.

⁵⁰ Sterling Br. 18.

⁵¹ Compare Sterling Br. 18 with County Br. 7-9, 16-20; County Reply Br. 17-19.

⁵² Def.'s App. Ex. 2, Affidavit of Gregg E. Wilson, Esq. ¶ 5 ("Wilson Aff."); Sterling Br. 18-19.

Abbott stated Sterling's position that final Record Plan review fees in effect at the time of the execution of the 2007 Settlement Agreement should be paid, a position Wilson disagreed with.⁵³ The parties dispute what happened next on the call.

According to Wilson, it was Abbott who offered the potential compromise of paying the applicable 2012 fees for the record plan submission while seeking to postpone the payment until the time of the first building permit application.⁵⁴ Abbott, on the other hand, contends that it was instead Wilson who proposed the compromise.⁵⁵ Abbott claims that he accepted Wilson's offer of compromise, and at Wilson's suggestion agreed to prepare a draft Amendment to the Settlement Agreement (the "Amendment") in order to memorialize the agreement.⁵⁶ In response, Wilson states that he only informed Abbott that he would discuss the compromise proposal with the County Executive, but that "[a]t no point during the July 20, 2011 teleconference or thereafter" did he agree to Abbott's proposal.⁵⁷

⁵³ Wilson Aff. ¶ 6; Sterling Br. 19.

⁵⁴ Wilson Aff. ¶ 6.

⁵⁵ Sterling Br. 19; Aff. of Richard L. Abbott, Esq., Oct. 18, 2012 ("Abbott Aff.") ¶¶ 5-6.

⁵⁶ Abbott Aff. ¶ 6.

⁵⁷ Wilson Aff. ¶ 6.

On August 12, 2011, Abbott drafted and forwarded the proposed Amendment to Wilson.⁵⁸ The Amendment contained language that the Review Fees “shall not be due and payable to the County until the first application for a building permit for the first home in each Section One and Section Two [of the Vistas at Red Lion plan] are applied for, respectively,”⁵⁹ and provided that the amount of Review Fees would be determined based on rates in effect when the first building permit for each of the Plans were submitted.⁶⁰

Wilson states that he was out of town and unavailable from August 8, 2011, and did not return to the office until August 22, 2011.⁶¹ On August 23, 2011, Abbott followed up with an e-mail to Wilson regarding the Amendment.⁶² According to Sterling, Wilson did not respond.⁶³ Counsel then had a conversation in September 2011.⁶⁴ According to Wilson, he advised Sterling’s counsel at that point that he did not agree to any proposal in July 2011, and would not have made

⁵⁸ Pl.’s App. Ex. 12 (“Amendment”).

⁵⁹ Amendment ¶ 2.

⁶⁰ Amendment ¶ 3.

⁶¹ Wilson Aff. ¶ 8.

⁶² Wilson Aff. Ex. B.

⁶³ Sterling Br. 20.

⁶⁴ Wilson Aff. ¶ 11; Sterling Br. 20.

such an agreement.⁶⁵ On September 27, 2011, Abbott followed up on the Amendment with an e-mail to Wilson. In a response e-mail on the same day, Wilson denied having ever reached an agreement with Abbott.⁶⁶

G. The Second Motion to Enforce

After the County rejected Sterling's record plan application on May 8, 2012,⁶⁷ on August 9, 2012 Sterling filed its second Motion to Enforce Settlement Agreement, and on September 17, 2012, the County filed its Cross-Motion to Enforce the Settlement Agreement. These motions are now before the Court.

H. 9 Del. C. § 3010

Section 3010 pertains to the County's imposition of land use fees, including the 2009 increase in Review Fees. It provides:

The Commission [Department] shall establish a uniform schedule of fees to be paid by the subdivider and to be proportioned to the cost of processing a subdivision submitted for review and approval of the Commission. No schedule established by the Commission shall become effective unless and until approved by the County Council.⁶⁸

⁶⁵ Wilson Aff. ¶ 11.

⁶⁶ Wilson Aff. Ex. C.

⁶⁷ Def.'s App. Ex. 6.

⁶⁸ By 9 *Del. C.* § 3001(1), "Commission" means the Regional Planning Commission of New Castle County for purposes of 9 *Del. C.* § 3003 (land subdivision regulations); otherwise, the term means the Department.

Section 3010 has three components. First, it is up to the Department to establish a uniform schedule of fees relating to subdivision plans (which includes the Review Fees). Second, any fees so established have to be proportioned to the cost of processing subdivision plans submitted for review and approval. Third, any such fees must be approved by the County Council.

II. CONTENTIONS

Sterling's motion to enforce contains four arguments as to why Sterling should pay 2007 and not current Review Fees. First, Sterling argues that because the Settlement Agreement between the parties was reached in 2007, the Review Fees in effect at that time should govern. Second, Sterling claims that Delaware's Quality of Life Act grandfathers Sterling into the Review Fees as they were in 2008.⁶⁹ Third, Sterling asserts that the County is bound by the representations its attorney purportedly made during the July 20, 2011 phone call regarding the proposed Amendment. Finally, Sterling challenges the 2009 increase in Review

⁶⁹ 9 *Del. C.* § 2651 *et seq.*

Fees on statutory grounds.⁷⁰ Sterling claims that the 2009 increase in Review Fees was not adopted in compliance with Section 3010 because: (i) the County Council did not validly approve the increase, and (ii) the Review Fees as they now stand are not proportioned to the costs of reviewing and approving plans.⁷¹

The County's cross-motion to enforce instead asserts that Sterling has breached the Settlement Agreement by (i) failing to pursue its plan applications diligently and (ii) submitting its record plan applications without the required fees. The County seeks either specific performance of the Settlement Agreement requiring Sterling to submit UDC-compliant record plan applications and to pay the 2012 Review Fees within 30 days, or in the alternative, for the Court to enter an order voiding both the Vistas at Red Lion and Red Lion Village plans, and to dismiss Sterling's case with prejudice.⁷²

⁷⁰ Although Sterling initially challenged the increase in Review Fees on constitutional grounds, Sterling Br. 12-17, it has since abandoned that argument. Tr. 17. It now asserts that the 2009 increase in Review Fees does not meet the requirements of Section 3010.

⁷¹ Pl.'s Section 3010 Letter.

⁷² County Br. 13.

In response to Sterling’s motion to enforce, the County insists that Sterling is required to pay current Review Fees together with its record plan application. First, the County claims that the terms of the Settlement Agreement require that Sterling pay current Review Fees. Second, the County argues that the Quality of Life Act does not entitle Sterling to an earlier schedule of Review Fees. Third, the County disputes Sterling’s characterizations of the July 20, 2011 phone call. Finally, the County argues that either (i) the requirements of Section 3010 have been met, or (ii) Sterling’s Section 3010 arguments should not be heard on cross-motions to enforce the Settlement Agreement.

The Court will first address the four arguments in Sterling’s motion to enforce. It will then turn to the County’s cross-motion to enforce.

III. ANALYSIS

A. The Settlement Agreement

1. The Terms of the Settlement Agreement

The Settlement Agreement is silent as to whether 2007 or current Review Fees should apply. The relevant provisions, identified by the parties, are that Sterling must “obey all . . . County laws, ordinances, regulations and policies in

seeking . . . subdivision approval for the Property,”⁷³ and that nothing shall require the Department to “approve Sterling’s land use application[s] for the Property at the exploratory, preliminary, or record plan stage unless the submission meets all requirements of applicable law.”⁷⁴ Under applicable law, “[a]ll applications shall be accompanied by a fee.”⁷⁵ The parties agree that fees are due with Sterling’s record application, but dispute the amount to be paid.

“Settlement Agreements are contracts and Delaware courts examine them under well-established law surrounding contract interpretation.”⁷⁶ “Delaware adheres to the “objective” theory of contracts—a contract’s construction should be that which would be understood by an objective, reasonable third party.”⁷⁷ “Clear and unambiguous language should be given its ordinary and usual meaning.”⁷⁸ “Although the law . . . generally strives to enforce agreements in accord with their

⁷³ Settlement Agreement D.2

⁷⁴ Settlement Agreement A.6.

⁷⁵ UDC § 40.31.320 (“Fees. All applications shall be accompanied by a fee.”); UDC § 40.31.114A (requiring a fee).

⁷⁶ *Schwartz v. Chase*, 2010 WL 2601608, at *4 (Del. Ch. June 29, 2010) (citations omitted); *see also Fox v. Paine*, 2009 WL 147813, at *5 (Del. Ch. Jan. 22, 2009), *aff’d*, 981 A.2d 1172 (Del. 2009) (TABLE).

⁷⁷ *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007) (citing *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *4 (Del. Ch. 1999)).

⁷⁸ *W.L. Gore & Assocs., Inc. v. Wu*, 2006 WL 2692584, at *15 (Del. Ch. Sept. 15, 2006) (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. July 17, 2006)).

makers' intent, [the Court] considers 'objective acts (words, acts and context)' the best evidence of that intent."⁷⁹

The Settlement Agreement provides that "all requirements of applicable law" must be satisfied at each stage of the application process.⁸⁰ Upon reaching the record plan stage, the County would evaluate Sterling's record plan submissions according to applicable laws. Fees are part of those applicable laws.⁸¹ Nothing in the Settlement Agreement freezes the laws that record plans are to be evaluated under to those applicable in 2007. If a law governing record plans changed after the August 31, 2007 Settlement Agreement date, but before the date of Sterling's record plan submission, the County would have been bound to evaluate Sterling's record plans under the newer version of that particular law. Sterling initiated the record plan stage of the application process when it submitted its record plans on June 13, 2011.⁸² Sterling's record plans were not yet complete until April 2012, when Sterling submitted its record plan engineering

⁷⁹ *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3d Cir. 2005) (quoting *Haft v. Haft*, 671 A.2d 413, 417 (Del. Ch. 1997)); *see also NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).

⁸⁰ Settlement Agreement A.6.

⁸¹ UDC § 40.31.320 ("Fees. All Applications shall be accompanied by a fee."); UDC § 40.31.114A (requiring a fee).

⁸² Pl.'s App. Ex. 5.

applications.⁸³ It is at the point when the County had a full record plan application to evaluate that the “applicable law” provision of the Settlement Agreement comes into play. The Review Fees to be paid in this instance, therefore, are those applicable at the time a party submits a full record plan application for the County’s review.⁸⁴

2. Implied Covenant of Good Faith and Fair Dealing

Sterling argues that the implied covenant of good faith and fair dealing requires that the 2007 fees schedule apply.⁸⁵ Under Delaware law, “the implied covenant attaches to every contract,”⁸⁶ including settlement agreements. The implied covenant cannot be used to grant “plaintiffs, by judicial fiat, contract provisions that they failed to secure for themselves at the bargaining table,”⁸⁷ and is “not a license to rewrite contractual language just because the plaintiff failed to

⁸³ County Br. 8; Pl.’s Answering Br. in Opp’n to Def.’s Mot. to Enforce Settlement Agreement & Reply Br. in Supp. of its Mot. to Enforce (“Sterling Answering & Reply Br.”) 5.

⁸⁴ The issue might arise where a party, as here, submits a partial record plan application and draws out the process until completing the final record plan much later. Here, the County has not sought a difference in Review Fees between June 13, 2011 (when Sterling initiated its record plan application) and April 2012 (when Sterling’s record plan application was otherwise complete). The only change in the Review Fees disputed by the parties is the 2009 increase.

⁸⁵ Sterling Br. 9.

⁸⁶ *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992)).

⁸⁷ *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004).

negotiate for protections that, in hindsight, would have made the contract a better deal.”⁸⁸ Sterling can only invoke the implied covenant if it is clear from the Settlement Agreement that a term would have been agreed to, had the parties “thought to negotiate with respect to that matter.”⁸⁹ The Court’s inquiry “should focus on what the parties likely would have done if they had considered the issue involved.”⁹⁰

Sterling seeks to read an implied term into the Settlement Agreement providing that Sterling’s plans and rezoning would be subject to the UDC provisions (and fees) in effect as of the date that the parties entered into the Settlement Agreement.⁹¹ According to Sterling, the parties would have likely agreed upon this term had they considered the issue when negotiating the

⁸⁸ *Winshall v. Viacom Int’l, Inc.*, 55 A.3d 629, 637 (Del. Ch. 2011) (citing *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1032–33 (Del. Ch. 2006) (“[I]mplied covenant analysis will only be applied when the contract is truly silent with respect to the matter at hand, and only when the court finds that the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them.”); *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (when analyzing the implied covenant, the Court “must assess the parties’ reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal.”)).

⁸⁹ *Winshall*, 55 A.3d at 637 (citing *Dunlap*, 878 A.2d at 442; *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986)).

⁹⁰ *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) (quoting *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).

⁹¹ Sterling Br. 9.

Settlement Agreement.⁹² While the benefits to Sterling of such a term are apparent, it is much less certain that the County would have agreed to it. The County, for instance, could have reasonably sought to preserve its flexibility in increasing Review Fees to protect against potential future hikes in the relative costs of processing and reviewing subdivision plans. The party seeking to invoke the implied covenant must establish that the other contracting party would have agreed to such a term had the parties considered the matter.⁹³ Sterling's argument that "the County would not likely have objected to Sterling's position in that regard, since it too wished to conclude this litigation and bring closure pursuant to a successful implementation of the Settlement Agreement" is insufficient to invoke the implied covenant.⁹⁴

3. Anti-absurdity doctrine

Sterling raises the anti-absurdity doctrine to argue that current Review Fees should not apply. According to Sterling, if the Settlement Agreement is susceptible to multiple interpretations, the interpretation requiring Sterling to pay

⁹² Sterling Br. 9.

⁹³ See *Dunlap*, 878 A.2d at 442; *Katz*, 508 A.2d at 880.

⁹⁴ Sterling Br. 9-10.

current Review Fees should be rejected because “no reasonable person would have ever entered into the Settlement Agreement” expecting such large increases in Review Fees.⁹⁵ Under the doctrine, an interpretation of an ambiguous contract is unreasonable if it “produces an absurd result or one that no reasonable person would have accepted when entering the contract.”⁹⁶

What Sterling is protesting is what it considers to be the unfair magnitude of increase to the Review Fees. Sterling, however, has not successfully established that the Settlement Agreement is susceptible to multiple interpretations. Even assuming *arguendo* that Sterling could show this, the increase in Review Fees does not necessarily rise to the level that “no reasonable person” would have accepted in entering the Settlement Agreement. It seems unlikely that a reasonable person would have rejected a provision merely acknowledging that the County could later increase its Review Fees to recoup its costs in processing and reviewing plan applications.⁹⁷

⁹⁵ Sterling Answering & Reply Br. 9.

⁹⁶ *Osborn v. Kemp*, 991 A.2d 1153, 1159–60 (Del. 2010).

⁹⁷ Sterling relies upon *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010), which confirms that “[s]tatutes must be construed as a whole in a way that gives effect to all of their provisions and avoids absurd results.” There the County provision addressing the preliminary stage of a development application provided that if the preliminary application was

That is what Section 3010 addresses. Under Section 3010 fees charged by the County for land use applications (including the Review Fees) have “to be proportioned to the cost of processing a subdivision submitted for review and approval of the Commission.”⁹⁸ In protesting the magnitude of the 2009 increase in Review Fees, Sterling is protected by the proportionality requirement in Section 3010.⁹⁹

not “submitted within six months of the preliminary conference meeting,” then “another preliminary conference [would] be required and the project [would] be required to [meet] all current standards.” The Court concluded that to avoid an absurd result and to avoid reducing the critical language to surplusage, the language had to be construed to mandate compliance with subsequently-enacted standards only if the preliminary application had not been filed within six months of the preliminary conference. As the Court recognized, the “process of obtaining subdivision approval takes time.” Having to satisfy shifting standards once that stage of the project had commenced, if the timeframe established by the ordinance was met, made no sense. The answer to Sterling’s argument is direct: *Chase Alexa* construed an ordinance provision that contained a grace period to accommodate the realities of real estate development. Once the process was underway, there were certain limits on the County’s ability to change the rules. Sterling, in contrast, had not reached any specific phase of the development process when it entered into the Settlement Agreement, including that stage where the fees were assessed as the County now seeks to impose them. Moreover, no language in the Settlement Agreement is rendered surplusage by the County’s proposed reading because nothing in the Settlement Agreement is comparable to the provision in *Chase Alexa* that caused so much debate—“the project must meet all current standards”—if another preliminary conference was necessary because six months had elapsed.

⁹⁸ 9 Del. C. § 3010.

⁹⁹ Both the implied covenant of good faith and the anti-absurdity doctrine generally address fundamental unfairness. Here, the fee increases about which Sterling complains have an aura of unfairness, but, statutorily, the fee increase is to be grounded in an allocation of costs incurred by the County in processing such applications. If the County followed Section 3010, then the fees which it charges are proportional, and it is not easy to characterize such an allocation as unfair.

In sum, the County acted in accordance with the Settlement Agreement's terms—expressed or implied—when it sought to collect the Review Fees.

B. The Quality of Life Act

Sterling argues that the Quality of Life Act¹⁰⁰ protected it from any increase in Review Fees after it filed its application in 2008.¹⁰¹ The Quality of Life Act provides that “[a]ny application for a development permit filed or submitted prior to adoption or amendment under this subchapter of a comprehensive plan or element thereof shall be processed under the comprehensive plan, ordinances, standards and procedures existing at the time of such application.”¹⁰² Because Sterling's March 2008 application counts as a development permit under the Act,¹⁰³ Sterling contends that its full application should be processed “under the comprehensive plan, ordinances, standards and procedures” existing in March 2008, and before the Review Fees increase in 2009. The question is whether the

¹⁰⁰ 9 *Del. C.* § 2651 *et seq.*

¹⁰¹ Sterling Br. 10.

¹⁰² 9 *Del. C.* § 2659(c) (“Section 2659(c”).

¹⁰³ The term “development permit” is defined under the Quality of Life Act to include any “zoning permit, subdivision approval, rezoning . . . or any other official action of local government having the effect of permitting the development of land.” 9 *Del. C.* § 2652(b).

increase in the Review Fees constitutes an “adoption or amendment . . . of a comprehensive plan or element thereof” under Section 2659(c).

The “2007 New Castle County Comprehensive Development Plan Update” became effective July 26, 2007 (the “2007 Comprehensive Plan”). The 2007 Comprehensive Plan contains, in Appendix B, a list of “documents that are directly aligned in accordance” with the 2007 Comprehensive Plan and are “therefore included as essential parts of the plan” (“Appendix B”). Appendix B is titled “Relationship to Existing Documents,” and contains a statement that the “policies of [the 2007 Comprehensive Plan] are intended to directly coincide and support” the documents listed. The UDC is listed as one of the documents in Appendix B.

According to Sterling, Appendix B’s reference to the UDC incorporates the entirety of the UDC, in effect on July 26, 2007, into the 2007 Comprehensive Plan. The July 26, 2007 UDC, in turn, contained Appendix 2, which set out the Review Fees as they were then (“Appendix 2”). When the County increased the Review Fees in 2009 through a modification of Appendix 2, this, Sterling argues, in turn amended the 2007 Comprehensive Plan because of Appendix B’s reference to the

UDC.¹⁰⁴ Sterling first submitted its application in March 2008. If the 2009 increase in Review Fees constitutes an amendment to the 2007 Comprehensive Plan,¹⁰⁵ Section 2659(c) would preserve Sterling's expectation of the Review Fees existing before the 2009 increase.

Although the Review Fees are part of the UDC which is one of the twenty-four separate entries in Appendix B, it does not necessarily follow that the Review Fees constitute an "element" of the 2007 Comprehensive Plan. First, the modification of the Review Fees was not accomplished by an amendment of the Comprehensive Plan. Second, the Quality of Life Act is addressed to those components of the Comprehensive Plan that have the force of law as the result of their status as part of the Comprehensive Plan. The Comprehensive Plan maps have the force of law.¹⁰⁶ Indeed, they are the only part of the Comprehensive Plan

¹⁰⁴ Tr. 15.

¹⁰⁵ The County argues that Section 2659(c) does not apply because Sterling's filed its application in 2008 after the adoption of the 2007 Comprehensive Plan, and Section 2659(c) only applies when an "application for a development permit [is] filed or submitted prior to adoption or amendment . . . of a comprehensive plan or element thereof . . ." County Br. 20-21; County Reply Br. 15. This, however, depends upon a mischaracterization of Sterling's position. Sterling's argument is that the County's 2009 increase in Review Fees counts as an amendment to the 2007 Comprehensive Plan for the purposes of Section 2659(c), one which occurred after Sterling filed its applications in 2008. Sterling Answering & Reply Br. 11-13.

¹⁰⁶ 9 *Del. C.* § 2652(2).

which has the force of law as a result of their status as part of the Comprehensive Plan. The review fees are independent of the Comprehensive Plan maps. Because “the legislative restriction on retroactive land use ordinances [under the Quality of Life Act] is limited to amendments of a Comprehensive Plan and to amendments of the elements of the Comprehensive Plan,”¹⁰⁷ the Quality of Life Act does not encompass such fee increases and, thus, affords no solace to Sterling.¹⁰⁸

In addition, New Castle County Code § 28.01.003E provides that:

. . . policies, reports, plans, maps, maps series and other materials to which reference is made shall be regarded as part of the comprehensive development process and as relevant background material, but shall not be or become part of the comprehensive development plan adopted hereby, unless [such material] has been or will be separately adopted or approved by ordinance as being part of the comprehensive development plan.

¹⁰⁷ *Upfront Enters. LLC v. Kent Cnty. Levy Court*, 2007 WL 2459247, at *6 (Del. Ch. Aug. 9, 2007) (applying comparable Quality of Life Act applicable to Kent County).

¹⁰⁸ The introductory text of Appendix B is somewhat confusing and, without much effort, it could be read as an attempt to cloak every document on the list with constraints applicable to the Comprehensive Plan. It seems unlikely that the drafters, however, intended such a far-reaching and cumbersome result. Similarly, it seems unlikely that the legislative intent was to restrict fee modifications under both the Quality of Life Act and under Section 3010. Perhaps Sterling’s argument, if correct, would best be viewed as seeking to take advantage of an unintended and collateral consequence of placing the UDC on a list of many documents that would inform someone seeking to comply with the Comprehensive Plan of the extensive range of constraints on land development in New Castle County.

Therefore, Appendix 2 to the UDC is not incorporated as an element of the 2007 Comprehensive Plan by way of Appendix B, and Section 2659(c) does not preclude the increase in Review Fees.

C. The July 20, 2011 Phone Call

Sterling claims that it reached a settlement of the Review Fees dispute with the County during the July 20, 2011 phone call between counsel for the parties. The County, however, denies having made such an agreement with Sterling.¹⁰⁹

In order for there to have been an agreement on the July 20, 2011 phone call, Sterling and the County must have agreed to all material terms of the settlement and intended to be bound by them. The alleged settlement has two material terms: (i) that the Review Fees would be deferred until the building permit application stage, and (ii) would be charged at the applicable rates at that time. Unfortunately, the only two participants on the July 20, 2011 phone call, Abbott and Wilson, have submitted competing accounts of what transpired.

¹⁰⁹ In addressing factual disputes within the context of a motion to enforce a settlement agreement, the Court, when assisted only by a paper record, employs the summary judgment standard. Thus, the moving party must demonstrate that there are no material facts in dispute and that it is entitled to enforcement of the settlement agreement as a matter of law.

The only documentation subsequent to the July 20, 2011 phone call, other than Abbott and Wilson’s competing affidavits, is the e-mail sent by Abbott to Wilson on August 12, 2011,¹¹⁰ an e-mail to which Wilson did not respond. While the language of the e-mail describes the Amendment as “proposed” and asks for Wilson’s approval of the Amendment, Abbott argues that he “would have never prepared an amendment to the Settlement Agreement unless the County had agreed to be bound by express settlement terms,”¹¹¹ and that “at that point the only thing that remained was the wordsmithing of language needed to memorialize the settlement” that Wilson and Abbott had agreed upon.¹¹² With respect to the language of the August 12, 2011 e-mail, Abbott claims that the e-mail was “couched in language . . . intended to provide Wilson with some cover” due to Wilson’s role as “a political appointee.”¹¹³

The factual record is insufficient at this stage for the Court to decide what occurred during the parties’ discussions relating to a potential settlement of the

¹¹⁰ Pl.’s App. Ex. 12.

¹¹¹ Abbott Aff. ¶ 8.

¹¹² Abbott Aff. ¶ 9.

¹¹³ Abbott Aff. ¶ 12.

Review Fees dispute either before or during the July 20, 2011 phone call. An evidentiary hearing will be required to resolve the question.¹¹⁴

D. Section 3010

Section 3010 states that:

The Commission [Department] shall establish a uniform schedule of fees to be paid by the subdivider and to be proportioned to the cost of processing a subdivision submitted for review and approval of the Commission. No schedule established by the Commission shall become effective unless and until approved by the County Council.¹¹⁵

The parties do not dispute that the Department sets fees relating to land use,¹¹⁶ or that the Review Fees as set out in Appendix 2 were part of a “uniform schedule of fees” established by the Department.¹¹⁷ The parties, however, dispute the other two Section 3010 requirements, that: (1) any fees so established have to be

¹¹⁴ The County also asserts that its attorney, who at the time was also acting as the County’s Chief Administrative Officer, lacked authority to enter into the Amendment described by Sterling. Several themes are sponsored by the County: the County attorney lacked authority to bind the County; the purported agreement would violate the County Code; and the purported agreement would run afoul of the Settlement Agreement’s proscription against oral modification. Before the attorney’s authority can be determined, the question of what (if anything) did he agree to must first be addressed. Because this is a clear, factual dispute between counsel as to what was said and whether there was an agreement, the summary judgment standard precludes the Court from now resolving this contention.

¹¹⁵ 9 *Del. C.* § 3010.

¹¹⁶ UDC § 40.31.320D.

¹¹⁷ County’s Reply Br. 22; Pl’s Section 3010 Letter at 1.

proportioned to the cost of processing a subdivision submitted for review and approval of the Department, and (2) any such fees have to be approved by the County Council.¹¹⁸

Sterling claims that the total amount of current Review Fees is not proportioned to the actual costs of the Department's processing of Sterling's record plans, because as Sterling asserts, the "overhead and cost of one County Engineer, one County Planner, and . . . County Council resolution approval would not even cost \$100,000."¹¹⁹ The County, however, cites the total projected fees received by the planning division of the Department and compares it against its total salary and benefits obligations to make the argument that the fees are in fact proportionate.¹²⁰

Sterling also argues that the County Council never approved the Department's 2009 increase in Review Fees.¹²¹ It contends that any changes to Appendix 2 were never approved by the County Council.¹²² The County Council did not, for instance, approve an ordinance containing the revised Appendix 2 and

¹¹⁸ 9 *Del. C.* § 3010.

¹¹⁹ Pl.'s Section 3010 Letter at 2.

¹²⁰ County's Reply Br. 22-23.

¹²¹ Pl.'s Section 3010 Letter at 1.

¹²² Tr. 18.

the increased Review Fee rates. Sterling claims that such a formal approval, a specific statement by the County Council that it approved the fee increase, was required under Section 3010.¹²³ At oral argument on the cross-motions to enforce, the County submitted budget reports indicating expenditures that the County Council had approved,¹²⁴ but not a specific approval by the County Council of the fees set by the Department or of Appendix 2 as modified.¹²⁵

“This Court possesses the inherent power to manage its own docket, including the power to stay litigation on the basis of comity, efficiency, or simple common sense.”¹²⁶ The question of whether the 2009 increase in Review Fees was valid, turns on whether the increased fees were proportioned to the cost of processing record plans submitted for the Department’s review and approval, and whether the County Council properly approved the 2009 increase in Review Fees. Because the Section 3010 arguments made by Sterling arose after briefing on

¹²³ Tr. 19-20.

¹²⁴ Oral Argument Ex. 16.

¹²⁵ Tr. 48.

¹²⁶ *Paolino v. Mace Sec. Int’l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009) (citing *Salzman v. Canaan Capital P’rs, L.P.*, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996) (“To enable courts to manage their dockets, courts possess the inherent power to stay proceedings.”); *Phillips Petroleum Co. v. ARCO Alaska, Inc.*, 1983 WL 20283, at *4 (Del. Ch. Aug. 3, 1983) (granting stay in favor of pending arbitration based on “common sense”)).

cross-motions to enforce, the record is insufficient as to the validity of the 2009 increase. The Court therefore stays the current action pending litigation on Section 3010's requirement of proportionality and whether the County Council properly approved the 2009 increase: both questions upon which the development of a further factual record is necessary.¹²⁷

E. The County's Cross-Motion to Enforce the Settlement Agreement

The County, in its cross-motion to enforce, alleges that Sterling has breached the Settlement Agreement in two ways.¹²⁸ First, the County argues that Sterling has failed to meet the Settlement Agreement's requirement that Sterling "diligently pursue and process all reviews and requests for approval" relating to its Vistas at Red Lion plan applications.¹²⁹ The County granted Sterling extensions until June 15, 2011 to submit its record plan applications, and Sterling submitted part of them on June 13, 2011. According to Sterling, it was delayed in the County's rezoning process for a number of months in 2011, and the County represented to

¹²⁷ The County supplemented the record on this issue after oral argument. Aff. of Edward Milowicki. See Letter of Richard L. Abbott, Esq. to the Court, dated Feb. 25, 2013; Letter of Max B. Walton, Esq. to the Court, dated Feb. 28, 2013.

¹²⁸ County Br. 10.

¹²⁹ Settlement Agreement D.1.

Sterling that it need only submit as much of the final record plan package as possible prior to June 15, 2011.¹³⁰ Sterling claims that the County agreed that certain plans normally contained in the full set submitted at the final record plan stage could be submitted after June 15, 2011.¹³¹

The fact that the County was willing to accept Sterling's record plan engineering applications in April 2012, and issued a determination on them in May 2012, indicates that the County was still working with Sterling to process its record plans prior to the Review Fees dispute. The County therefore cannot argue, now, that Sterling failed to meet the Settlement Agreement's requirement that Sterling pursue its requests for approval diligently. After all, Sterling is still seeking to pursue its request for approval of its plans with this litigation, and the relevant provision of the Settlement Agreement has not been breached.

Second, the County argues that Sterling has breached the Settlement Agreement by submitting land use applications without the fees required by the County Code.¹³² As the Settlement Agreement requires that Sterling "obey all

¹³⁰ Sterling Answering & Reply Br. 5.

¹³¹ Sterling Answering & Reply Br. 2.

¹³² County Br. 11.

Federal, State, and County laws, ordinances, regulations and policies in seeking rezoning and/or subdivision approval for the Property and implementing the terms of the Settlement Agreement,¹³³ the County argues that Sterling has thus breached the Settlement Agreement. Sterling claims that the County agreed that Sterling would not need to file a check for Review Fees by the June 15, 2011 deadline due to the Review Fees dispute,¹³⁴ and the County concedes that it has attempted to work with Sterling to resolve the dispute.¹³⁵

Because there still are crucial questions to be resolved regarding the Review Fees dispute between the parties, including whether the 2009 increase in Review Fees was valid under Section 3010, and whether the parties reached a settlement of the Review Fees dispute on the July 20, 2011 phone call, the County's cross-motion to enforce cannot yet be resolved.

IV. CONCLUSION

For the foregoing reasons, Sterling's motion to enforce as based on the express language of the Settlement Agreement and based on the Quality of Life

¹³³ Settlement Agreement D.2.

¹³⁴ Sterling Answering & Reply Br. 2.

¹³⁵ County Reply Br. 3.

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Act's grandfathering provisions is denied. Its motion as based upon the alleged Amendment between counsel fails at this time because of disputed material facts. Consideration of its argument based on Section 3010 is deferred with the expectation that it will be addressed in a more appropriate procedural posture.¹³⁶ Finally, the County's cross-motion to enforce is deferred pending resolution of the remaining open issues presented by Sterling's motion.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹³⁶ Nevertheless, it is not the Court's intent at this point to preclude Sterling from raising this issue. The Court's concerns partially relate to whether it is fair to the parties to address such a significant issue in the context of what should be a narrow proceeding to enforce a settlement agreement. This issue was not raised until the briefing was well underway, and the County supplemented the record after oral argument.