IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANTHONY MURRAY, CHARLES H. MCKINNEY, DAVID KAMINSKY, ELIZABETH CADELL, as individuals and owners of property in the Town of Dewey Beach, Delaware, Plaintiffs, v. TOWN OF DEWEY BEACH, a municipal corporation of the State of Delaware, TOWN COUNCIL OF DEWEY BEACH, consisting of, MAYOR DIANE HANSON, JAMES LAIRD, JAMES PRZYGOCKI, MARTY SEITZ, and RICHARD N. SOLLOWAY, in their official capacity; DIANA K. SMITH, Town Manager, in her official capacity, WILLIAM D. MEARS, Town Building Official, in his official capacity, DEWEY BEACH ENTERPRISES, INC., a Delaware Corporation; and RUDDERTOWNE REDEVELOPMENT, INC., a Delaware Corporation, Defendants.	C.A. No. 6785-VCN

MEMORANDUM OPINION

Date Submitted: June 18, 2012
Date Decided: July 31, 2012

Michael W. McDermott, Esquire and David B. Anthony, Esquire of Berger Harris, LLC, Wilmington, Delaware, Attorneys for Plaintiffs.

Megan T. Mantzavinos, Esquire and Ann M. Kashishian, Esquire of Marks, O'Neill, O'Brien & Courtney, P.C., Wilmington, Delaware, Attorneys for Defendants Town of Dewey Beach, Town Council of Dewey Beach, Diane Hanson, Mayor, James Laird, James Przygocki, Marty Seitz, and Richard N. Solloway, Commissioners, Diana K. Smith, Town Manager, and William D. Mears, Town Building Official.

William T. Quillen, Esquire, Shawn P. Tucker, Esquire, and Karen V. Sullivan, Esquire of Drinker Biddle & Reath LLP, Wilmington, Delaware, Attorneys for Defendants Dewey Beach Enterprises, Inc. and Ruddertowne Redevelopment, Inc.

NOBLE, Vice Chancellor

I. INTRODUCTION

This Court dismissed the land use claims brought by the Plaintiffs based upon its conclusion that 10 *Del. C.* § 8126 applied to the actions they challenged and had extinguished their claims.[1] The Plaintiffs now move pursuant to Court of Chancery Rule 59(f), seeking reargument of a portion of the Opinion and the related order. For the reasons set forth below, the Plaintiffs' motion for reargument is denied.

II. BACKGROUND

This action arose from the attempts of the Town to settle litigation brought against it by DBE. DBE sought to redevelop Ruddertowne as a mixed-use property that would include commercial space, hotel units, and condominium units. The Town initially opposed these plans. In response to actions taken by the Town allegedly to prevent DBE from implementing its redevelopment plan, DBE filed the DBE Litigation. In an effort to settle the DBE Litigation, the Town and DBE entered into the MAR. The MAR provided that, if the Town permitted DBE to redevelop Ruddertowne in accordance with the Redevelopment Plan, DBE would, among other things, release the Town from the claims underlying the DBE Litigation.

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[1] *Murray v. Town of Dewey Beach*, 2012 Del. Ch. LEXIS 129 (Del. Ch. May 31, 2012) (the "Opinion"). The background for this litigation is set forth in greater detail there, and, for convenience, its terminology is adopted here.

The MAR also outlined the process by which the Town Council was to consider the Redevelopment Plan. In accordance with this process, the Town Council held the Special Town Meeting on February 26, 2011. At the Special Town Meeting, the Town Council approved the Resolution through which the Town Council purported to amend and approve the MAR, to approve the Record Plat Plan, and to approve the Building Permit application. On March 1, 2011, the Town published the Resolution Notice. The June Town Meeting was held on June 17, 2011. At this meeting, the Town Council gave final approval to the amenities DBE was to provide as part of the Redevelopment Plan and confirmed that the final construction plans satisfied the conditions of the Record Plat Plan; a notice describing these actions was published on June 23, 2011. On July 15, 2011, the Building Inspector issued the Building Permit to DBE. This action was filed on August 15, 2011.

The Complaint sought declaratory and permanent injunctive relief to prevent the redevelopment of Ruddertowne from moving forward. Among other things, the Plaintiffs asked the Court to enjoin implementation of the MAR and issuance of any building permit based upon the MAR, to declare the Building Permit invalid, and to declare the recordation of the MAR and the Record Plat Plan invalid. The Plaintiffs' arguments centered on two key contentions: (1) that the Redevelopment Plan set forth in the MAR violated the Zoning Code, particularly its height and use

restrictions; and (2) that the Town Council could only approve the Redevelopment Plan either by passing an ordinance related to that plan or after first passing a more general ordinance to change the Zoning Code. As explained in the Opinion, the Plaintiffs contended that the challenged actions had the effect of rezoning Ruddertowne.[2] The process utilized by the Town Council was improper, the Plaintiffs argued, because, instead of enacting an ordinance, it approved the Challenged Documents through the Resolution after engaging in the process set forth in the MAR.

DBE and the Town Defendants moved for dismissal, arguing that the Court did not have jurisdiction over the Plaintiffs' claims because either the claims had been extinguished by the Statute of Repose or the Plaintiffs possessed an adequate remedy at law that they failed to pursue.[3] In the Opinion, the Court concluded that the Statute of Repose applied to the Town Council's approval of the Challenged Documents and that the 60-day period for filing an action prescribed by § 8126 began to run upon publication of the Resolution Notice.[4] Because the Plaintiffs

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[2] *Id.* at *39.

[3] DBE and the Town Defendants also questioned whether the Plaintiffs had standing to bring their claims.

[4] With regard to the Town Council's approval of the MAR and the Building Permit, the Court concluded that these actions constituted an amendment to the Zoning Code within the scope of § 8126(a), assuming these actions had the legal effects ascribed to them by the Plaintiffs. Furthermore, to the extent that the Plaintiffs challenged the Building Inspector's approval of the Building Permit, the Court ruled that it lacked subject matter jurisdiction over that claim because the Plaintiffs possessed an adequate remedy at law. This conclusion has not been challenged by way of reargument.

filed their action more than 60 days after the publication of the Resolution Notice, the Court determined that the Plaintiffs' claims related to the Challenged Documents had been extinguished by the Statute of Repose; therefore, the Court lacked subject matter jurisdiction over the claims. Accordingly, the action was dismissed.

III. CONTENTIONS

The Plaintiffs make two primary arguments in support of their motion for reargument. First, they contend that the Complaint included a constitutional challenge to the MAR and that § 8126(a) may not be applied to constitutional challenges to zoning ordinances. Second, they argue that the Resolution Notice did not satisfy the notice requirement of § 8126(a) because the Resolution Notice did not refer to an "amendment" of the Zoning Code. According to the Plaintiffs, the specific word "amendment"—or one of the other specific words used in § 8126(a) (ordinance, code, regulation, or map)—must be used in a notice for it to meet the notice requirement of § 8126(a). Furthermore, the Plaintiffs argue, the Resolution Notice was inadequate because the Town and DBE publicly declared that approval of the MAR did not require the approval of an ordinance because it was not an amendment to the Zoning Code. In sum, the Plaintiffs contend that the Court overlooked relevant precedents that stand for the proposition that § 8126(a) may not be applied to a constitutional challenge, and the Court overlooked relevant

statutory law and facts that establish that the Resolution Notice did not satisfy the notice requirement of § 8126(a).

The Defendants ask the Court to deny the Plaintiffs' motion for reargument. According to DBE,[5] the Plaintiffs' first argument fails for two reasons. First, DBE contends that the Plaintiffs did not even allege a constitutional claim in the Complaint. Second, DBE argues, even if the Court were to accept that a constitutional claim was presented, the Plaintiffs never previously argued that constitutional claims may not be barred by § 8126(a). According to DBE, the Plaintiffs' argument that the Resolution Notice was insufficient is, likewise, unavailing. DBE claims that this argument, too, is now being raised for the first time. Furthermore, DBE asserts that the Plaintiffs themselves argued that the MAR constituted an improper amendment to the Zoning Code, and the Court, at least in part, based its ruling on this contention. Moreover, according to DBE, one does not need to use certain "magic words" in a notice to trigger the Statute of Repose. DBE claims that the Town's and DBE's public comments are irrelevant to the Court's analysis, given the detailed contents of the Resolution Notice and the Plaintiffs' argument that the MAR amended the Zoning Code. Finally, DBE

[5] The Town Defendants join DBE in this argument. *See* Town of Dewey Beach Defs.' Response in Opp'n to Pls.' Mot. for Reargument ¶ 4. The Town Defendants also argue that the Plaintiffs are merely reprising the same arguments that the Court previously rejected and that the Plaintiffs lack standing to bring the claims they assert.

argues that, even if the Resolution Notice is found to be insufficient under § 8126(a), the Plaintiffs do not challenge its sufficiency under § 8126(b).[6]

IV. ANALYSIS

A. *Legal Standard*

In order to prevail on a motion for reargument, the moving party must show that the "Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[7] A motion for reargument will be denied where the movant merely rehashes arguments the Court has already rejected or where the motion is based upon new arguments not previously raised.[8]

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[6] Section 8126(b) is the portion of the Statute of Repose that applies to the approval or denial of final or record plans. In the Opinion, the Court concluded that § 8126(b) applied to the Town Council's approval of the Record Plat Plan. *See Murray*, 2012 Del. Ch. LEXIS 129, at *43-48. In their motion for reargument, the Plaintiffs only question the application of the Statute of Repose to the approval of the MAR. In the Opinion, the Court concluded that § 8126(a) applied to the approval of the MAR. *See id.* at *38-43. Therefore, since the Plaintiffs' motion for reargument focuses solely on the applicability of § 8126(a) to the approval of the MAR, it is unsurprising that they do not challenge the sufficiency of the Resolution Notice under § 8126(b).

[7] *Miles, Inc. v. Cookson Am., Inc.,* 677 A.2d 505, 506 (Del. Ch. 1995).

[8] *MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1954442, at *1 (Del. Ch. June 29, 2007); *Miles*, 677 A.2d at 506; *Nieves v. All Star Title, Inc.*, 2010 WL 4227057, at *3 (Del. Super. Oct. 22, 2010), *aff'd*, 21 A.3d 597 (Del. 2011) (TABLE). *See also Gelof v. Prickett, Jones & Elliot, P.A.*, 2010 WL 1057500, at *1 (Del. Ch. Mar. 16, 2010) (arguments not fairly raised before a motion for reargument are barred); *Oliver v. Boston Univ.*, 2006 WL 3742598, at *1 (Del. Ch. Aug. 8, 2006) (same); *Lane v. Cancer Treatment Centers of Amer., Inc.*, 2000 WL 364208, at *2 (Del. Ch. Mar. 16, 2000) (same); 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2810.1 (3d ed. 2012) (same, regarding motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e)).

B. *Plaintiffs' Constitutional Challenge Argument*

The Plaintiffs contend that the Complaint presented a constitutional challenge to the MAR, and, citing *Town of South Bethany v. Nagy*,[9] *Buckson v. Town of Camden*,[10] and *Acierno v. New Castle County*,[11] the Plaintiffs argue that § 8126(a) may not be applied to constitutional challenges to zoning ordinances. According to the Plaintiffs, "[t]he *South Bethany* and *Acierno* cases [were] specifically cited by counsel at Oral Argument."[12] In response, DBE argues that the Complaint did not allege a constitutional claim and that, even if it did, the Plaintiffs never previously argued that constitutional claims may not be extinguished by § 8126(a).

Although the Court does not need to resolve the issue of whether the Complaint presented a constitutional claim, it notes that, at most, a constitutional claim is just barely asserted.[13] First, it is not entirely clear what type of constitutional claim it is that the Plaintiffs are contending they alleged in the Complaint. Throughout their motion for reargument, the Plaintiffs refer to "a constitutional challenge," but they never explain whether this challenge alleges a

[9] 2006 WL 4759866 (Del. Ch. May 12, 2006).
[10] 2001 WL 1671443 (Del. Ch. Dec. 4, 2001).
[11] 2000 WL 718346 (D. Del. May 23, 2000).
[12] Pls.' Mot. for Reargument ¶ 4 n.6.
[13] In support of their Court of Chancery Rule 12(b)(6) motion to dismiss, the Town Defendants, joined by DBE, argued that the Plaintiffs failed to allege adequately a procedural due process claim. Br. in Supp. of Def. Town of Dewey Beach's Mot. to Dismiss Pl.'s First Am. Verified Compl., & in the Alternative to Strike Pl.'s First Am. Verified Compl. 14-21. The Court need not, and does not, now decide whether the Plaintiffs have adequately pled a constitutional claim.

violation of the United States Constitution or the Delaware Constitution or what constitutional provisions were allegedly violated. In their Answering Brief,[14] the Plaintiffs seemingly argued that the Complaint alleges a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[15] Although, in their motion for reargument, the Plaintiffs cite portions of the Opinion and the Complaint that, perhaps, could be seen as relating to a constitutional due process claim, they explain that their constitutional claim is based on allegations that "the MAR is an unconstitutional abuse of municipal zoning police powers."[16] This statement is most easily understood as an allegation that the MAR unconstitutionally exceeded the scope of the Town's police powers.[17]

There are scant factual allegations in the Complaint that support either of these theories.[18] Regarding their "unconstitutional abuse of municipal zoning

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[14] Pls.' Combined Answering Br. in Opp'n to Defs. Town of Dewey Beach & Dewey Beach Enters. Mots. to Dismiss & Strike Pls.' First Am. Compl. ("Answering Br."). Oddly, the Plaintiffs' Answering Brief—which among all of the Plaintiffs' filings and their oral argument comes closest to articulating the basis of a possible constitutional claim—was not cited in their motion for reargument.

[15] *Id.* at 34-36.

[16] Pls.' Mot. for Reargument ¶ 2.

[17] *See Buckson*, 2001 WL 1671443, at *5.

[18] In their motion for reargument, the Plaintiffs cite the Opinion and the Town's Opening and Reply Briefs in Support of Its Motion to Dismiss Plaintiff's First Amended Verified Complaint as support for their argument that they adequately alleged a constitutional claim. Ultimately, whether the Plaintiffs adequately alleged a constitutional claim depends upon the contents of their Complaint. With regard to the Opinion, the Court only directly addressed the Plaintiffs' purported constitutional claim in one instance. Referring to an argument in the Plaintiffs' Answering Brief, the Court merely noted that "the Plaintiffs *contend* that they have adequately alleged that the Town breached their procedural due process rights." *Murray*, 2012 Del. Ch. LEXIS 129, at *30 (emphasis added).

police powers" argument, the Plaintiffs cite allegations in the Complaint that concern, primarily, the Town's alleged non-compliance with its own municipal code and charter.[19] It is unclear how such allegations relate to a challenge that the Town unconstitutionally exceeded its police powers in approving the MAR, a claim that would require the Plaintiffs to prove that the terms of the MAR were "clearly arbitrary and unreasonable [and had] no substantial relation to the public health, safety, morals, or general welfare."[20] The Plaintiffs do not appear to dispute that the Town Council had the power to amend the Zoning Code to increase the permissible height of buildings and expand the list of permissible uses to include use as a hotel.[21] Instead, the substance of the Complaint focuses on the manner in which the MAR was approved and the fact that its provisions, allegedly, were inconsistent with the Zoning Code. The Complaint does include references to "procedural due process rights" and allegations that the Town Council employed an improper process to approve the MAR. Again, though, these allegations are focused on the Town's alleged non-compliance with its own municipal code and

[19] Compl. ¶¶ 15, 57, 70, 78, 91, 93. *See also* Oral Argument on Defs.' Mot. to Dismiss Tr. ("Tr.") 47 (Plaintiffs' counsel stating that "[t]he terms of the settlement violate the zoning code . . . That's at the heart of this case.").
[20] *Town of S. Bethany v. Nagy*, 2006 WL 4759866, at *8 (Del. Ch. May 12, 2006) (quoting *Mayor & Council of New Castle v. Rollins Outdoor Adver., Inc.*, 475 A.2d 355, 360 (Del. 1984)).
[21] *See* 22 *Del. C.* § 301.

charter.[22] The Plaintiffs do not allege that they were denied notice and an opportunity to be heard regarding the Town Council's approval of the MAR.[23]

The Court does not need to resolve the question of whether the Plaintiffs adequately pled a constitutional claim—and, to be clear, this Memorandum Opinion does not resolve this question—because, before filing their motion for reargument, they never argued that the Statute of Repose may not be applied to constitutional challenges to zoning ordinances.[24] Since this argument was not raised prior to the Plaintiff's motion for reargument, it is barred. In fact, in their motion for reargument, the Plaintiffs never contend that this argument was previously raised. Instead, they cite three cases—*Town of South Bethany*, *Acierno*, and *Buckson*—that they claim stand for the proposition that that the Statute of Repose may not be applied to constitutional challenges to land use actions, and, in

[22] In fact, the most fulsome description of any procedural due process claim that can be found in the Complaint explains that the "procedural due process rights" at issue were "conferred by the Town Charter." Compl. ¶ 91. According to this formulation of the Plaintiffs' procedural due process claim, the Plaintiffs' due process rights were violated because the Town Council approved the MAR by resolution, not by enacting an ordinance. The Town's charter permits the Town's voters to hold a referendum on most ordinances approved by the Town Council. Therefore, the Plaintiffs contend that, by approving the MAR with a resolution, the Town Council denied them their charter-conferred right to seek a referendum.

[23] "To state a procedural due process claim within the context of a zoning decision, there must be an alleged deprivation of a protected property interest without notice and a meaningful opportunity to be heard." Answering Br. 34 (citing *Citizens Coalition, Inc. v. Cty. Council of Sussex Cty.*, 1999 WL 669307, at *5-6 (Del. Ch. July 22, 1999)). At best, the Complaint might be construed as alleging that the hearing available to the Plaintiffs was, in some manner, inadequate. *See* Compl. ¶¶ 55-57.

[24] This argument was not mentioned in the Plaintiffs' Complaint, Answering Brief, or presentation of oral argument on the Defendants' motions to dismiss.

a footnote, they state that "[t]he *South Bethany* and *Acierno* cases [were] specifically cited by counsel at Oral Argument."[25]

First, even if this argument was raised at oral argument (and it was not), it would not have been raised timely because it was not presented in the Plaintiffs' Complaint or Answering Brief.[26] Second, the purported citation of the *South Bethany* and *Acierno*[27] cases "by counsel" at oral argument[28] comes nowhere close to a fair presentation of the argument the Plaintiffs currently assert. The names of these cases were mentioned—not cited—by counsel for *DBE* as part of a quotation from a third case, *Sterling Property Holdings, Inc. v. New Castle County*.[29]

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[25] Pls.' Mot. for Reargument ¶ 4 n.6.

[26] The Plaintiffs attempt to elude this simple fact by claiming that the "Defendants waited until their Reply Brief to argue for the first time that the Resolution approving the MAR 'constituted' an 'ordinance[,]'" and, therefore, the Plaintiffs only had a chance "briefly" to address this contention at oral argument. *Id.* at ¶ 3 n.5. The Plaintiffs are referring to DBE's argument that the Resolution was "submitted under the subdivision and land use regulations" of the Town because it was, in part, based on the Comprehensive Plan, and it included the ratification of the working group recommendation contemplated by the Comprehensive Plan. *See* Defs. Dewey Beach Enters., Inc. & Ruddertowne Redevelopment Inc.'s Reply Br. in Supp. of Their Mot. to Dismiss First Am. Verified Compl. 5-7. But, as noted in the Opinion, the Court was not persuaded by this argument, and its ruling was not based upon it. Furthermore, DBE's primary argument in their Opening Brief in Support of Their Motion to Dismiss First Amended Verified Complaint ("DBE Opening Br.") was that the Plaintiffs' claims were extinguished by the Statute of Repose; thus, at the time they drafted their Answering Brief, the Plaintiffs were on notice to raise any legitimate arguments in opposition to application of the Statute of Repose.

[27] The *South Bethany* and *Acierno* cases the Plaintiffs cite in support of this argument—*Town of S. Bethany v. Nagy*, 2006 WL 4759866 (Del. Ch. May 12, 2006) and *Acierno v. New Castle Cty.*, 2000 WL 718346 (D. Del. May 23, 2000)—are not the same *South Bethany* and *Acierno* cases that the Court cited in the Opinion—*Council of S. Bethany v. Sandpiper Dev. Corp., Inc.*, 1986 WL 13707 (Del. Ch. Dec. 8, 1986) and *Acierno v. New Castle Cty.*, 2006 WL 1668370 (Del. Ch. June 8, 2006).

[28] Tr. 74.

[29] 2004 WL 1087366 (Del. Ch. May 6, 2004). Counsel for DBE did not specifically cite the *South Bethany* and *Acierno* cases. Instead, those case names were mentioned in the following

Furthermore, these cases were mentioned as part of DBE's argument that the Statute of Repose applies to any action that has a goal of voiding a record plan. They were not mentioned with respect to an argument that § 8126 may not be applied to a constitutional claim, and, in fact, no such argument was made at oral argument.[30] In sum, the Plaintiffs raised the argument that the Statute of Repose may not be applied to constitutional claims for the first time in conjunction with their motion for reargument, and, therefore, it is barred.

C. *Plaintiffs' Insufficient Notice Argument*

The Plaintiffs also contend that the Resolution Notice did not satisfy the notice requirement of § 8126(a), and, accordingly, the Town Council's approval of the MAR is not entitled to the protection afforded by the Statute of Repose. Basically, the Plaintiffs argue that the Resolution Notice was insufficient under § 8126(a) because it did not specifically state that approval of the MAR would "amend" an ordinance, code, regulation, or map. As a result, according to the Plaintiffs, "under Section 8126(a)'s plain language, the [Resolution Notice] *didn't*

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quotation from *Sterling* that counsel for DBE recited at oral argument: "I, therefore, will adhere to the teaching of *South Bethany* and *Acierno*, and conclude that the Statute of Repose includes within its scope actions which challenge ordinances and regulations that void (or will cause the voiding of) record plans." Tr. 74 (quoting *Sterling*, 2004 WL 1087366, at *5).

[30] Some of the Plaintiffs' counsel's comments at oral argument could be interpreted as alleging a constitutional claim. *See* Tr. 46, 54-55. For example, the Plaintiffs' counsel stated: "The zoning power is a constitutional police power that is given that has authorized these municipalities and counties to exercise that police power through the legislative process and administer that. Under Delaware law, it must be strictly adhered to." Tr. 54-55. But, such arguments stop short of positing that, because a constitutional violation was alleged, the Statute of Repose could not be applied to that claim.

actually provide the public with any notice that a Section 8126(a)-qualifying municipal action . . . had occurred."[31] The Plaintiffs also claim that the Court failed to take into account certain public comments made by the Town and DBE before the approval of the MAR when determining if the Resolution Notice was sufficient. The Plaintiffs characterize these comments as denials that the MAR would amend the Zoning Code or that it required the enactment of an ordinance. According to the Plaintiffs, these comments "establish that the Resolution Notice did not (and was never intended to) implicate the repose period of Section 8126(a)."[32] These arguments fail because they, too, are now being raised for the first time.

To begin, the Opinion was not "notably silent about whether the Resolution Notice[] . . . adequately satisfied the plain language of Section 8126(a)," as the Plaintiffs contend.[33] In the Opinion, the Court stated that, before it could conclude "that the Statute of Repose [had] extinguished a plaintiff's claim, the Court must be satisfied that the statutory requirements of the Statute of Repose were met."[34] One of these requirements, of course, is that proper notice was published. It is true that the Court did not specifically address the Plaintiffs' insufficient notice argument. The Court did not address this argument in the Opinion because the

[31] Pls.' Mot. for Reargument ¶ 11 (emphasis in original).
[32] *Id.* at ¶ 16.
[33] Pls.' Mot. for Reargument ¶ 9.
[34] *Murray*, 2012 Del. Ch. LEXIS 129, at *37.

Plaintiffs never raised it until they filed their motion for reargument; the insufficient notice argument fails, now, due to this simple fact. Instead, in opposing DBE's contention that § 8126 extinguished their claims, the Plaintiffs argued: (1) that the Statute of Repose did not apply to the approvals, by resolution, of the Challenged Documents; and (2) that, even if § 8126 did apply to these actions, the "final approvals" did not occur until the June Town Meeting and, therefore, the Complaint was filed within the 60-day period provided for in the Statute of Repose. These arguments were addressed in the Opinion.

Indeed, there appeared to be little room to dispute the sufficiency of the Resolution Notice, if it was determined that § 8126(a) applied to the approvals of the MAR and the Building Permit. As a result, the Court stated that the "key question" regarding whether "the statutory requirements of § 8126(a) were met" was "whether the approvals of the MAR and the Building Permit [were] actions of the type enumerated in § 8126(a)."[35] Once this question was answered in the affirmative, the Court was satisfied that the Resolution Notice—which specifically noted the approvals of the Challenged Documents and their authorization of the features of the Redevelopment Plan that the Plaintiffs contended resulted in an amendment to the Zoning Code[36]—was sufficient to meet the notice requirement of § 8126(a). This conclusion could have been more clearly stated in the Opinion,

[35] *Id.* at *38.
[36] *See* DBE Opening Br., Ex. 24 (Resolution Notice).

although, given the wording of the Resolution Notice, the Court's determination that the Statute of Repose applied to the approvals of the Challenged Documents, and the fact that the sufficiency of the Resolution Notice was not challenged, it seemed self-evident.

Finally, the Plaintiffs' allegations regarding the public comments of DBE and the Town do not salvage their argument that the Resolution Notice was insufficient. As explained above, the Plaintiffs' broader argument that the Resolution Notice was insufficient was not raised timely, and neither was this supporting (or related) argument that the public comments of DBE and the Town somehow prove that "the Resolution Notice did not (and was never intended to) implicate the repose period of Section 8126(a)."[37] The public comments that the Plaintiffs refer to come from answers to three sets of frequently asked questions ("FAQs") about the MAR and the Redevelopment Plan that were posted on the Town's website.[38] Specifically, the Plaintiffs reference answers from the third set of FAQs, dated February 7, 2011.[39] The answers at issue stated that the Redevelopment Plan did not need to be referred to the Planning and Zoning Commission because it was not being approved by an ordinance and that one reason why the MAR did not constitute contract zoning was because "no provision

[37] Pls.' Mot. for Reargument ¶ 16.
[38] Letter from Michael W. McDermott, Esq. to the Court, dated February 14, 2012 (Exhibits 1-3).
[39] Pls.' Mot. for Reargument ¶ 14.

of the [MAR] changes the zoning classification of the Ruddertowne property[.]"[40] While the Plaintiffs did reference the second set of FAQs, dated January 31, 2011, at oral argument in conjunction with their contention that the "final approval" of the Challenged Documents did not occur until the June Town Meeting,[41] they never previously argued that the public comments of DBE and the Town somehow generally precluded application of the Statute of Repose;[42] therefore, since this argument[43] was not raised until the Plaintiffs' motion for reargument, it is barred.[44]

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[40] Letter from Michael W. McDermott, Esq. to the Court, dated February 14, 2012 (Exhibit 3).

[41] The FAQs were also mentioned, in a manner unrelated to this new argument, in the Complaint. *See* Compl. ¶ 72.

[42] In the course of discussing a particular FAQ answer at oral argument, the Plaintiffs' counsel did state that the answers in the FAQs were, generally, misleading. Tr. 64-65. But, such a statement is a far cry from a coherent argument that, because the Town and DBE made misleading public comments before the approval of the Challenged Documents, the Resolution Notice is insufficient to meet the notice requirement of § 8126(a) or that the Defendants are, somehow, estopped from invoking the protection of § 8126(a).

[43] The Plaintiffs refer to the public comments discussed above as "contemporaneous facts" that the Court "overlooked." The facts related to the Town's and DBE's public comments were entered into the record by way of the Plaintiffs' counsel's letter to the Court, dated February 14, 2012. These facts, however, were not used to make an argument regarding the sufficiency of the Resolution Notice until the Plaintiffs' motion for reargument. Indeed, as explained above, the Plaintiffs did not raise any argument regarding the sufficiency of the Resolution Notice until their motion for reargument.

[44] Furthermore, the Plaintiffs do not cite any authority in support of this, somewhat nebulous, argument that the Defendants' allegedly misleading comments would render the Resolution Notice insufficient or estop the Defendants from invoking § 8126(a); nor do they address the fact that, despite what the Defendants may have said before the Special Town Meeting, the Resolution Notice noted that the Challenged Documents permitted the construction of a 45.67-foot-high building that could be used as a hotel. In a footnote, the Plaintiffs ominously warn that the Court's decision in the Opinion broadly expanded the scope of the Statute of Repose, potentially, to cover a multitude of municipal actions and unsavory practices. Pls.' Mot. for Reargument ¶ 15 n.13. The Plaintiffs had previously warned that a ruling in the Defendants' favor would usher in a new era of secretive, privately negotiated, ad hoc zoning decisions. *See* Tr. 59; Answering Br. 25. But, such dire prophesies ignore the unique factual circumstances of this case, factual circumstances recognized and relied upon in the Opinion. *See Murray*, 2012 Del. Ch. LEXIS 129, at *47-49. This was not an instance where municipal officials met with

All of the arguments the Plaintiffs present in support of their motion for reargument are now being raised for the first time. As a result, the Court denies this motion. To reiterate what the Court stated in the Opinion[45]: the Court's conclusion that § 8126 extinguished the Plaintiffs' claims and its denial, here, of the Plaintiffs' motion for reargument are not endorsements of the Town Council's means of approving the Challenged Documents and committing to carry out the actions contemplated by them. The convoluted manner in which the Town Council approved the Challenged Documents is not recommended and, quite possibly, may not have survived a timely challenge. But, the Plaintiffs' challenge was not timely,[46] as measured by the 60-day period set forth in § 8126, and, likewise, it is

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developers in a dark backroom surreptitiously to agree to zoning changes; then quietly published a sparse, inscrutable notice; and, finally, waited for the 60-day Statute of Repose period to run. Instead, the record shows that the redevelopment of Ruddertowne was *the* hot button political issue in Dewey Beach for *years* prior to the Special Town Meeting; the Special Town Meeting was widely publicized; the vote at the Special Town Meeting occurred after the public had the chance to comment publicly on the MAR; and the results of the Special Town Meeting were clearly reflected in the Resolution Notice and, otherwise, widely reported and publicly commented upon. In light of these facts, despite their complaints about the Defendants' public comments and their technical arguments regarding the wording of the Resolution Notice, it is unsurprising that the Plaintiffs never contend that they were *actually* unaware of the approval of the Resolution or its consequences. In short, the Court views this case as presenting a highly unusual set of facts, which would preclude it from serving as a precedent for the more extreme types of zoning shenanigans envisioned by the Plaintiffs.

[45] *See Murray*, 2012 Del. Ch. LEXIS 129, at *50.

[46] If § 8126 were a statute of limitations instead of a statute of repose, the Court would have assessed its impact under various equitable theories, thus allowing the Court to consider whether any extraordinary circumstances rendered the limitations period inequitable. *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §11.06[c], at 11-71 (2011). The Court, however, has no such latitude when dealing with time periods prescribed by statutes of repose, which are fundamentally different from statutes of limitations. "While the running of a statute of limitations will nullify a party's remedy, the running of a statute of repose will extinguish both the remedy and the right." *Cheswold*

too late for the Plaintiffs to raise new arguments as part of their motion for reargument.

V. CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for reargument is denied. An implementing order will be entered.

Volunteer Fire Co. v. Lambertson Const. Co., 489 A.2d 413, 421 (Del. 1984). Statutes of repose relate to the jurisdiction of the Court; "hence any failure to commence the action within the applicable time period extinguishe[s] the right itself and divests . . . the [C]ourt of any subject matter jurisdiction which it might otherwise have." *Id.* It is not within the Court's power to expand its own subject matter jurisdiction.