EFiled: Oct 15 2012 07:29PM EDT
Filing ID 46991312
Case Number 480,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY MURRAY, et al., Plaintiffs/Appellants, v. TOWN OF DEWEY BEACH, et al, Defendants/Appellees.	C.A. No. 480,2012 On Appeal From A Decision Of The Delaware Court of Chancery C.A. No. 6785-VCN

APPELLANTS' OPENING BRIEF

BERGER HARRIS, LLC

Michael W. McDermott (DE Bar No. 4434)
David B. Anthony (DE Bar No. 5452)
1201 N. Orange Street
One Commerce Center, 3rd Floor
Wilmington, Delaware 19801
(302) 655-1140 (phone)
(302) 655-1131 (fax)
mmcdermott@bergerharris.com
danthony@bergerharris.com

Attorneys for Plaintiffs Below/Appellants

Dated: October 15, 2012

TABLE OF CONTENTS

TABLE OF CITATIONS iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

ARGUMENT 12

I. THE COURT OF CHANCERY ERRED BY DISMISSING AS UNTIMELY PLAINTIFFS' COMPLAINT CHALLENGING THE TOWN'S AUTHORITY TO ENTER INTO THE MAR 12

A. Question Presented 12

B. Standard And Scope Of Review 12

C. Merits Of Argument 13

1. By Its Plain Terms, The MAR Does Not Fall Within § 8126 15

a. Defendants' Litigation Position Directly Contradicts Their Public Position On The MAR 16

b. Plaintiffs' Allegations Constitute More Than Just A Challenge To A Zoning Decision 17

2. The Court of Chancery's Decision Upends A Balanced Tripartite of Public Policy Considerations 19

II. THE COURT ERRED IN ITS APPLICATION OF 10 *DEL. C.* §8126 (B) TO THE MAR'S PLAN COMPONENT 29

A. Question Presented 29

B. Standard And Scope Of Review 29

C. Merits Of Argument 29

III. THE COURT ERRED BY DECLINING TO EXERCISE JURISDICTION OVER PLAINTIFFS' CHALLENGE TO THE MAR'S PERMIT COMPONENT 32

A. Question Presented 32

B. Standard And Scope Of Review 32

C. Merits Of Argument 32

TABLE OF CITATIONS

Cases

Acierno v. New Castle County,
2006 WL 1668370 (Del. Ch. June 8, 2006) 22

Admiral Holding v. Town of Bowers,
2004 WL 2744581 (Del. Super. Oct. 18, 2004) 22

Bay Colony Ltd. P'ship v. County Council of Sussex County,
1984 WL 159381 (Del. Ch. Dec. 5, 1984) 20; 22

Buckley v. Town of Wappinger,
12 A.D.3d 597 (N.Y. App. Div. 2004) 24

CML V, LLC v. Bax,
28 A.3d 1037 (Del. 2011) 12; 13

Carl M. Freeman Assoc., Inc. v. Green,
447 A.2d 1179 (Del. 1982) 21

Cleveland County Ass'n for Gov't by People v. Cleveland County Bd. Of Com'rs,
142 F.3d 468 (D.C. Cir. 1998) .....

Congregation Mischknois Lavier Yakov, Inc. v. Bd. Of Trustees for Vill. Of Airmont,
301 Fed. Appx. 14 (2d Cir. 2008) 25

Council of S. Bethany v. Sandpiper Dev. Corp., Inc.,
1986 WL 13707 (Del. Ch. Dec. 8, 1986) 20; 21

Council of Civic Org. of Brandywine Hundred, Inc. v. New Castle County,
1993 WL 390543 (Del. Ch. Sept. 21, 1993) 22

Darby v. New Castle Bedford Ed. Ass'n,
336 A.2d 209 (Del. 1975) 34

Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, et al.,
C.A. No. 4426-VCN (Del. Ch.) 5

Dewey Beach Enterprises, Inc., et al. v. Town of Dewey Beach, et al.
2010 WL 3023395 (D. Del. July 10, 2009) 5

Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, et al.,
C.A. No. 4991-VCN (Del. Ch.) 5

Dewey Beach Enterprises, Inc. v. Bd. of Adjustment of the Town of Dewey Beach,
1 A.2d 305 (Del. 2010) 5

Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, et al.,
C.A. No. 5711-VCN (Del. Ch.) 5

Dewey Beach Enterprises, Inc., et al. v. Town of Dewey Beach, et al.
C.A. No. 5833-VCN (Del. Ch.) 5; 6

Diebold Computer Leasing, Inc. v. Commercial Credit Corp.,
267 A.2d 586 (Del. 1970) 12; 32

Dunn v. Carey,
808 F.2d 555 (7th Cir. 1986) 25

Durrett v. Hous. Auth. City of Providence,
896 F.2d 600 (1st Cir. 1990) 25

Fields v. Kent County,
2006 WL 345014 (Del. Ch. Feb. 2, 2006) 22

Green v. County Council of Sussex County,
415 A.2d 481 (Del. Ch. 1980) 21

Hartman v. Buckson,
467 A.2d 694 (Del. Ch. 1983) 21; 22; 23; 24

Idaho Bus. Holdings, LLC v. City of Tempe,
2007 WL 2390889 (D. Ariz. Aug. 22, 2007) 24

Ingersoll v. Rollins Broad.,
272 A.2d 336 (Del. 1970) 34

League of Residential Neighborhood Advocates v. City of Los Angeles,
498 F.3d 1052 (9th Cir. 2007) 26

LeVan v. Independence Mall, Inc.,
940 A.2d 929 (Del. 2007) 12

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,
478 U.S. 501 (1986) 25

Neponsit Inc. Co. v. Abramson,
405 A.2d 97 (Del. 1979) 23

New Castle County Council v. BC Development Assoc.,
567 A.2d 1271 (Del. 1989) 22

Perkins v. City of Chicago Heights,
47 F.3d 212 (7th Cir. 1995) 25

Pike Indus., Inc. v. City of Westbrook,
45 A.3d 707 (Me. 2012) 25; 26; 27; 28

Rome v. Archer,
197 A.2d 49 (Del. 1964) 23

Sanders v. Sanders,
570 A.2d 1189 (Del. 1990) 12

St. Charles Tower, Inc. v. Kurtz,
643 F.3d 264 (8th Cir. 2011) 26

Shevock v. Orchard Homeowners Ass'n, Inc.,
621 A.2d 346 (Del. 1993) 22

Trancas Prop. Owners Assn. v. City of Malibu,
138 Cal. App. 4th 172 (Cal. Ct. App. 2006) 24

United States v. Beebe,
180 U.S. 343 (1901) 25

United States v. Jefferson County,
720 F.2d 1511 (11th Cir. 1983) 25

White v. City of Wilmington,
1995 WL 264572 (Del. Super. Apr. 20, 1995) 35

Statutes

10 *Del. C.* § 8126 .....*passim*

22 *Del. C.* § 303 5

22 *Del. C.* § 324 34

NATURE OF PROCEEDINGS

This case of first impression challenges a settlement agreement between a municipality and a private landowner through which zoning related approvals occurred in contravention to statutory zoning related procedures and to which Delaware's Statute of Repose, 10 *Del. C.* § 8126, is alleged to be applicable to bar any challenge to the procedures or the resulting approvals.

Plaintiffs Below-Appellants Anthony Murray, Charles H. McKinney, David Kaminsky and Elizabeth Cadell ("Plaintiffs") commenced this litigation on August 15, 2011 seeking declaratory and injunctive relief against the Town of Dewey Beach and its Town Council (the "Town" or the "Town Council") and Dewey Beach Enterprises ("DBE") (collectively, "Defendants"). Plaintiffs' sought a declaration that a "Mutual Agreement and Release" (the "MAR") entered into by and between the Defendants, was an invalid exercise of the Town's municipal authority. The Complaint sought to permanently enjoin the enforceability of the MAR itself and also enjoin zoning related decisions made final at a June 17, 2011 public hearing.

In December 2010, the Town first executed the MAR and commenced a six-step "review process" specified in paragraph 8 of the agreement. The Town held public workshops in January and February 2011, after which the Town Council adopted a February 26, 2011 Town resolution further approving the MAR and triggering the final two steps of the six-step process. The final steps required the Town Council to hold a "final public hearing" on June 17, 2011 for the purpose of granting "all final Town approvals."

Plaintiffs filed a complaint on August 15, 2011 and amended it on October 13, 2011. Defendants moved to dismiss the Complaint on the grounds that the Court lacked subject matter jurisdiction because (i) the Complaint was not timely filed, and (ii) Plaintiffs had an adequate remedy at law which they failed to pursue; or, alternatively, because (iii) Plaintiffs failed to adequately allege standing to pursue claims that the MAR unconstitutionally waived or otherwise interfered with the Town's inherent police powers to enforce its zoning regulations.

The Court of Chancery dismissed the Complaint for lack of subject matter jurisdiction, applying 10 *Del. C.* 8126, Delaware's Statue of Repose, to bar the Complaint as untimely based upon the expiration of 60-days from a March 1, 2011-published notice of the Town Council's February 26 resolution approving the MAR.[1] Plaintiffs timely moved for reargument. The Court denied the motion and entered a final order of dismissal on July 31, 2012.[2] Plaintiffs timely filed a notice of appeal in this Court on August 30, 2012.

This is Plaintiffs' Opening Brief on Appeal.

---

[1] Reference herein to the Court's May 31, 2012 Opinion will be "Op.___"

[2] Reference herein to the July 31, 2012 Reargument Opinion will be "Rearg. Op.___"

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by applying Delaware's Statute of Repose, 10 *Del. C.* §8126, to a municipal resolution approving a contract between a municipality and a private land owner that required non-statutory zoning procedures to govern the municipality's consideration and approval of a zoning related redevelopment plan proposed by the private land owner. In doing so, the Court disregarded the predicate requirements for application of the statute and created an imbalance in a tripartite of competing public policies, including those that underscore the General Assembly's delegation of zoning authority to Delaware municipalities.

2. The Court of Chancery erred by expanding the reach of the Statute of Repose's unambiguous predicate language to include the vagaries of negotiated contract language. Consequently, the Court created perpetual ambiguity as to the type and form of arrangements to which repose may, or may not, be applied, and also created uncertainty as to the timing or triggering of the statute's exceptionally short repose period.

3. The Court of Chancery erred by declining to exercise jurisdiction over claims involving the impermissible exercise of, or failure to exercise, municipal authority for which no adequate legal remedy was available, and for which only equity could redress.

STATEMENT OF FACTS

Plaintiffs are property-owners/residents of the Town and include owners of property adjacent to the redevelopment project submitted for approval under the MAR. Op.3;A158. Since its founding in 1981, the Town's Zoning Code has restricted the maximum permissible height of buildings in the Town to 35 feet.[3] Op.5;A162-163. In June and July 2007, the Town's first Comprehensive Plan was adopted and certified. Op.5-6. The Comprehensive Plan recommended the creation of three new resort business districts with "available" features that included "Relaxed bulk standards (setbacks, lot coverage, etc.)." Op.6. The Comprehensive Plan did not propose any change to the Town's long-standing 35-foot building height limitation, or even use the word "height" once in its 58 pages. A162-163. The Comprehensive Plan included the following language:

> It is the goal of this Comprehensive Plan to encourage the commercial and residential use of contiguous tracks [sic] of at least 80,000 square feet. The percentages listed herein are the ideals of this Plan, however, with the development plans filed *before the enactment of this Comprehensive Plan*, which could be considered inconsistent with this Plan, *the working group's final agreement upon ratification by the [Town Council] shall be considered consistent with the Plan.*

Op.6.(emphasis added). On April 4, 2008, after the enactment of the Comprehensive Plan, but before the enactment of the Town's new Zoning Code in January 2009, DBE submitted a redevelopment plan proposing to

[3] The 35 foot height limitation applicable to all zoning districts existed in the Town's Zoning Code both before and after the Town adopted it first Comprehensive Plan in 2007. Op.1; A159.

construct a 68-foot building on the Ruddertowne parcel.[4] A186;A273. The Comprehensive Plan specifically identified the individuals that comprised the "Comprehensive Plan Working Group." A640. DBE maintains that the reference to the "working group's final agreement" was intended to refer not to the "Comprehensive Plan Working Group," but rather, to a different group of individuals—the Ruddertowne Architectural Committee (the "RAC")—a group "charged by the [Town Council] with saving Ruddertowne and its longstanding commercial uses from being demolished and being replaced with new townhomes." A271.

In January 2009, the Town, in accordance with 22 *Del. C.* § 303, approved a revised Zoning Code in which the 35-foot height limitation remained applicable to the new zoning districts created by the Comprehensive Plan. Op.4-6;A275. In response, DBE unleashed "a wave of suits" beginning in March 2009 against the Town, the Town Council, and its current and former Town officials, some in their personal capacity, alleging various forms of official misconduct in connection with the Zoning Code revisions and the denial of DBE's proposed 68-foot April 2008-submitted plan. Op.1,6-8.[5]

---

[4] The first redevelopment plan for Ruddertowne was submitted by its prior owner in November 2007 and sought approval of a 35 foot building. This plan was eventually approved after litigation between DBE and the Town resolved issues relating to permissible density under the Town's Zoning Code. Op.6-7. *See Dewey Beach Enters., Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1 A.2d 305 (Del. 2010).

[5] *See Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 4426-VCN (Del. Ch. *filed* Mar. 17, 2009); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, No. 09-507 GMS (D. Del. *filed* July 10, 2009); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 4991-VCN (Del. Ch. *filed* Oct. 14, 2009); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 5711-VCN (Del. Ch. *filed* Aug. 12, 2010); *Dewey Beach*

DBE's lawsuits alleged that the Town and its officials acted to frustrate and nullify DBE's redevelopment plans and sought relief establishing, *inter alia,* that: (i) the "relaxed bulk standards" language in the Comprehensive Plan permitted DBE to exceed the 35-foot building height limitation through its April 2008-filed plan; (ii) the "working group" was the RAC and came to a "final agreement" about successive Ruddertowne plans that were retroactively applicable to the November 2007 plan submitted *before* the enactment of the Comprehensive Plan; and (iii) that the "working group's final agreement" was "specifically required" to be submitted for "ratification" by the Town Council under the Comprehensive Plan and was impermissibly withheld from consideration by the Town Council. Op.6-8;A273-274;A270-271.[6]

By late 2010, the Town's insurance carrier and DBE were pressing the Town Council to settle all of the pending litigation. Op.7;A163. Without first obtaining Town Council's approval, the Town Manager "executed" the MAR on December 6, 2010. Op.12;A187. The Town Council was first "presented" with the MAR on December 11, 2010, at a still-undocumented "executive session," after which they "voted to engage in the review process" set forth in paragraph 8 of the MAR.[7] Op.12;A187.

Enters., Inc. v. Town of Dewey Beach, C.A. No. 5833-VCN (Del. Ch. *filed* Sept. 20, 2010).

[6] Here, the Court of Chancery specifically noted: "The Court has not been directed to evidence that the development plan purportedly recommended by the working group and purportedly ratified by the Town Council was filed *before* the enactment of the Comprehensive Plan. Thus, it is not clear that the supposed ratification would have effectively served its intended purpose." Op.27 (emphasis added).

[7] The Town's "prolonged and habitual," "clear pattern and practice to disregard the Open Meeting requirements" of Delaware law by repeatedly

Paragraph 8, among other things, set forth a negotiated procedure and process for which "time was of the essence,"(A219) and by which the Town Council was required to consider a redevelopment plan for the Ruddertowne parcel including, *inter alia*, a Record Plat Plan (the "Plan component") and a building permit application (the "Permit component")(collectively, the "MAR's Plan and Permit components"). Op.2,8-9.

The MAR is a contract that provides litigation dismissals and releases of liability in exchange for zoning related redevelopment waivers, exemptions and approvals. A185-224. The Town, including former and current Town Council members and certain other officials (notably, the Town Manager and Town Building Official), would be dismissed with prejudice from five pending federal and state lawsuits and would also receive "at least" 3000 sq. ft. of office space for the Town's administrative offices with a $20.00 per sq. ft. "fit out" allowance. *Id.*;A164. The Town would also receive "voluntary indemnification by DBE" for up to $250,000 of legal fees and expenses for lawsuits that challenge the MAR. Op.8-9;A218-219. In exchange, the Town was required to approve both the Plan and Permit components of the MAR without any changes to the proposed 45.67 foot building height or the proposed use as a hotel, neither of which are or were permitted under the Town's Zoning Code or the Town's Comprehensive Plan. *Id.*;A215. The MAR required the Town Council to pre-approve a building permit for a period that exceeded the permissible time period set

---

using undocumented "executive sessions" to conduct public business was highlighted by an Opinion of the Office of the Attorney General of The State of Delaware issued on July 13, 2012.

forth in the Town's Code, without first getting the Town's Building Official's recommendation as to the Permit component's compliance with applicable law. A162,169-170;A213-214. The MAR likewise prohibited the Town's Planning and Zoning Commission from reviewing the Plan component's compliance with the Town's Zoning Code. A214;A284;A486.

The MAR also required the Town Council's resolution to declare that the "working group" referred to by the Comprehensive Plan would, retroactively, be considered the RAC, and also declare that the RAC's "originally recommended" 68-foot building concept plan would be deemed amended and modified retroactively to reflect a 45.67 foot recommendation. A189-191;A278. These declarations by resolution served as the Town Council's "opportunity" to retroactively carry out the ratification process purportedly "required by law" under the Comprehensive Plan. A189-190;A295-296.

The MAR's Plan and Permit components were submitted for approval by the Town Council under the negotiated, non-statutory procedures established in Paragraphs 8 and 17 of the MAR. A235;A275;A187;A219-221. Defendants acknowledge throughout their briefs that the MAR's procedures were "not [those] required by State law or Dewey Beach Code," A276-278;A283-284;A301. The MAR's six-step procedure was set forth in paragraph 8(a) as follows:

> (i) execution of this Agreement by the Town Manager [December 6, 2010];
>
> (ii) review of this Agreement by the Town Commissioners in Executive Session for legal advice [December 11, 2010];
>
> (iii) a public hearing held by the Town Commission to take public testimony regarding DBE's plan and pending building permit application ("Hearing One") [February 26, 2011];

(iv) a Special Town Meeting [February 26, 2011] immediately following such public testimony to approve or deny the plan and building permit application by a majority vote based upon applicable law given the date of DBE's building permit (hereinafter "Special Town Meeting") (During the Special Town Meeting the Ruddertowne Architectural Committee's (RAC) recommendation and report to the Town Commission ("RAC Recommendation") shall be considered by the Town Commission, and the Town Commission's vote, if positive, shall also include a ratification of the RAC Recommendation as may be specifically modified by the Town Commission);

(v) at the Special Town Meeting [on February 26, 2011], if approval is granted, the Ruddertowne Redevelopment Project shall be referred to the Planning Commission and DBE shall provide final construction plans for review to the Planning Commission. Review of final construction plans by the Planning Commission shall be for the sole purpose of: (1) making a recommendation to the Town Commission as to whether the final construction plans are consistent with the Town Commission's plan and building permit approval at the Special Town Meeting, (2) making a recommendation regarding the use of the voluntarily dedicated Town Space (and uses therein) and (3) making a recommendation regarding the Gazebo and Bay Walk.

(vi) a final public hearing ("Hearing Two") [June 17,2011] by the Town Commissioners to review the Planning Commission's recommendations provided for herein and make a final decision regarding whether the final construction plans satisfy the conditions of the approved plan and building permit and the voluntary amenities (or other voluntary assurances) agreed to by DBE at the Special Town Meeting. If the final construction plans are consistent with the Special Town Meeting approval of the plan and building permit granted by the Town Commissioners and representations of DBE made at the public hearings provided for herein, the Town Commission, after consideration of the recommendations of the Planning Commission provided for herein, shall grant all final Town approvals by a majority vote. At Hearing Two the Town Commission shall, subject to the provisions of this Agreement, also make a final decision regarding the location and size of the Gazebo (not to exceed the maximum size provided for in Paragraph 3(c) herein), the Bay Walk, and the uses within the Town Space. Upon final approval DBE's plan shall then be recorded as a matter of public record.

Op.9-10;A213-215. (Emphasis and bracketed dates added). Paragraph 8 also provided for three scheduled "public workshops" in January and

February 2011, which resulted in a "two-month question and answer process" leading up to "Hearing One" on February 26, 2011. Op.11;A178;A215;A276-277. The Town and DBE jointly published responses to three sets of "Frequently Asked Questions" (the "FAQs"). A178;A276;A457-488. In FAQs published February 7, 2011, Defendants jointly and publicly declared i) that no ordinance was required to approve the MAR; and ii) that no review of the MAR's zoning related components by the Town's Planning and Zoning Commission was required, because Town Council's approval of the MAR was not a conditional use or rezoning, would not "supplement or change the Zoning Code," and did not "change[] the zoning classification." A486-487.

In the weeks before February 26's "Hearing One", the Town published a series of five "notices of public hearing" stating that its purpose was to "consider and receive public comments regarding the [MAR]." A168-169. None of the published notices disclosed that a "Special Town Meeting" would follow the public hearing. A168. None of the published notices used the word "final" or provided notice that any "final" action would be taken on February 26. A168.

Shortly after the February 26 meetings, a March 1, 2011 notice published only in the Wilmington News Journal announced the MAR's approval by the Town's resolution (the "Resolution Notice"). A697-698. The Resolution Notice included the following statement:

> THE RESOLUTION INCLUDED, AMONG ADDITIONAL ITEMS, THE FINAL APPROVAL BY THE [Town Council] AND BUILDING INSPECTOR ON FEBRUARY 26, 2011, OF A RECORD PLAT PLAN AND BUILDING PERMIT FOR THE REDEVELOPMENT OF RUDDERTOWNE AS A MIXED USE COMPLEX INCLUDING COMMERCIAL AND RESIDENTIAL USES.

Op.13. The Town's resolution, however, only approved the Plan and

Permit components "subject to any conditions listed upon the Record Plat Plan." A190. And the Record Plat Plan was itself expressly conditioned, by its plan notes 4 and 19, upon "Paragraph 8a and 8b(vi)" and "subject to an additional Town Commission final approval" at the June 17, 2011 final public hearing. A637. The MAR at ¶8(a)(vi) also required the Plan component to await "final approval" at the June 17 final hearing before it "shall be recorded as a matter of public record." Op.10;A214. Yet, the MAR, the Town's resolution and the Record Plat Plan were all recorded, without explanation, on May 13, 2011. Op.10;A223.

Under ¶¶8 and 17 of the MAR, the Plan component received "full and final approval" on June 17. A213-215;A219-221. And on June 23, 2011, the Town published notice of "certain final approvals," stating:

> IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN THE RESOLUTION, THE TOWN COMMISSIONERS GRANTED CERTAIN FINAL APPROVALS AT THE JUNE 17, 2011 HEARING. SPECIFICALLY, THE TOWN OF DEWEY BEACH GRANTED FINAL APPROVALS REGARDING THE LOCATION AND SIZE OF THE GAZEBO, THE BAY WALK, THE USES WITHIN THE DEDICATED TOWN SPACE AND REGARDING WHETHER THE FINAL CONSTRUCTION PLANS SATISFY THE CONDITIONS OF THE PREVIOUSLY APPROVED RECORD PLAT PLAN AND PREVIOUSLY APPROVED BUILDING PERMIT.

A285. Because DBE obtained "final approval" of the Plan component "following the Town Commissioners' final review at Hearing Two…," ¶17(k) of the MAR extended issuance of the building permit for an additional thirty days following the June 17 hearing and the Permit was issued on July 15, 2011. A286;A221;A224.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY DISMISSING AS UNTIMELY PLAINTIFFS' COMPLAINT CHALLENGING THE TOWN'S AUTHORITY TO ENTER INTO THE MAR.

A. Question Presented:

Did not the Court of Chancery err by expanding the reach of Delaware's Statute of Repose, 10 *Del. C.* § 8126(a), to a settlement agreement between a municipality and a private landowner (Op.26,A153)—a contract by which the municipality obligated itself to procedures for proposed zoning related waivers, exemptions or approvals that failed to adequately safeguard the public's interest. A120-121;A159;A181;A331;A341-342.

B. Standard And Scope Of Review:

Subject matter jurisdiction is determined from the face of the complaint at the time of filing with the Court assuming the truth of all material factual allegations. *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.,* 267 A.2d 586, 590 (Del. 1970). Challenges to subject matter jurisdiction on appeal require this Court to determine whether the trial court correctly formulated and applied legal precepts. *Sanders v. Sanders,* 570 A.2d 1189, 1190 (Del. 1990).

On appellate review, a trial court's interpretation of a statute presents a question of law that is reviewed *de novo*. *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011). "The goal of statutory construction is to determine and give effect to [the] legislative intent." *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (citation omitted). Where the statutory language is clear on its face and is fairly susceptible to only one reading, the unambiguous text will be construed accordingly, unless the result is so absurd

that it cannot be reasonably attributed to the legislature. *CML V*, 28 A.3d at 1041 (citing *LeVan,* 940 A.2d at 933).

At issue in this appeal is the Court of Chancery's interpretation and application of Delaware's Statute of Repose, 10 *Del. C.* § 8126, which provides that:

> (a) No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any ordinance, code, regulation or map, relating to zoning, or any amendment thereto, or any regulation or ordinance relating to subdivision and land development, or any amendment thereto, enacted by the governing body of a county or municipality, is challenged, whether by direct or by collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.
>
> (b) No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the subdivision and land development regulations of such county or municipality is challenged, whether directly or by collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such action occurred, of notice of such final approval or denial of such final or record plan.

C. Merits Of Argument:

The Court of Chancery held, after "directly applying relevant precedent and construing §8126 broadly in order that it may fulfill its important public policy purpose," that the MAR met the statutory requirements of the Statute of Repose. Op.27-29. The Court correctly observed that, "The MAR and the Building Permit were approved by a resolution, and neither even purported to be and ordinance, code, regulation, or map." Op.28. But the Court ultimately concluded that

"the Town's Council's approval of the MAR and the Building Permit did *constitute* an amendment to the Town's Zoning Code…," (Op.28-29)(emphasis added), because:

> Actions of a municipality's governing body that serve to rezone an area are considered "amendments" to the municipality's zoning code, within the context of § 8126, even if the rezoning may be improper because it was not accomplished through an ordinance or the formal rezoning process.

Op.29-30. The Court concluded this by "assuming…the legal effect attributed to [the MAR] by Plaintiffs." A31. The Court also held that, "…in this case, the Statute of Repose may be applied without the Court's first determining that the process by which it was approved was without flaws." Op.31.[8]

These holdings constitute reversible error for two reasons: *First*, the MAR is plainly a contract approved by a Town resolution. It is not an "ordinance, code, regulation or map" and it does not by its terms purport to amend, or actually result in any amendment to, any particular "ordinance, code, regulation or map." Regardless of its purported "effect," the MAR fits nowhere into the unambiguous language contained in the statute. *Second*, Delaware's jurisprudence requiring strict municipal adherence to statutory zoning related procedures and its concomitant policy to insure procedural safeguards for public participation and orderly municipal conduct, cannot be circumvented by a municipality's negotiated agreement to obligate itself to non-statutory procedures for consideration of zoning related proposals.

[8] *See also* Op.32: "…DBE does not need to prove that the Town Council was in perfect compliance with all of the statutory procedures for approving the Record Plat Plan in order for §8126(b) to apply."

1. By Its Plain Terms, The MAR Does Not Fall Within § 8126.

Neither the MAR itself, nor the Town Council's resolution approving it, are susceptible to application of §8126. The statute does not use the terms "contract", "agreement" or "resolution", and the statute does not require challenges to private agreements or municipal resolutions, even to the extent they may "relate to zoning," to be brought within 60 days of published notice. Defendants maintain that the benefit of repose does not require the invocation of "magic words," (Rearg. Op.52) arguing in their Reply Briefs that the Town Council's resolution *both* "*constituted* an ordinance, code, regulation or map, related to zoning, or any amendment thereto," (A437)(emphasis added) *and*, "in addition," "*represented* a regulation or ordinance related to subdivision and land development, or any amendment thereto." *Id.* But the plain language of the repose statute does not, and the statute's exceedingly harsh effects should not, apply to bar a challenge to a private contract containing procedures and components that may, *or may not*, "constitute" or "represent," a repose triggering event under §8126(a).[9]

The statute's use of the specific terms "ordinance, code, regulation or map...or any amendment thereto" underscores the equally important public policies carefully balanced by the General Assembly in enacting a repose statute: Uniformity of processes and procedures that safeguard the public and guide applicant landowners and

[9] The Court's holding invites the question going forward: Under Delaware law, what things *not* specifically denominated as an "amendment" may or may not, "constitute" an amendment to an "ordinance, code, regulation or map?"

municipalities alike through zoning related decisions, *and*, certainty and finality of the decisions made in that context. That is, in order to adopt or amend a zoning related ordinance, code, regulation or map, statutory procedures and regulations insure an open and fair process for a landowner applicant as well as her neighbor. As set forth more fully below, the MAR's adoption by resolution and the strict consideration of its Plan and Permit components by negotiated procedures defeats meaningful participation by the public and by the municipality's public boards, commissions and officials. Application of repose under these circumstances dishonors, and therefore impermissibly disrupts, §8126's careful policy balance.

a. Defendants' Litigation Position Directly Contradicts Their Public Position On The MAR.

Defendants' litigation position that the MAR had a "causal connection"[10] to an ordinance or regulation amending the zoning code is directly contradicted by Defendants' public, pre-litigation, position leading up to the Town Council's February 26, 2011 resolution adopting the MAR. Joint responses to "Frequently Asked Questions" about the MAR published by Defendants on February 7, 2011, included the following

---

[10] *See* A144-146.

THE COURT: One question. Could a resident of Dewey Beach, dissatisfied with the MAR, have challenged it?

MR. TUCKER: …I would submit that if an individual member of town believed the MAR was improper, they could have brought an action in this Court within 60 days of its approval. Arguably, it was first approved on December 10th, but the amended approval was not until February 26th.

THE COURT: Are you arguing that the MAR has the protection of 8126 as well or would have the protection of 8126?

MR. TUCKER: …I think you could argue that, because the MAR is related to the plan and the resolution, that there is a causal connection if the Court wanted to get that far. I don't think Your Honor needs to get that far to grant the relief that we seek. I think it's plausible.

material representations:

> The [MAR] is a contract, but it is not contract zoning because 1) no provision of the [MAR] changes the zoning classification… (A487)
>
> The proposal outlined in the [MAR] is not a rezoning or a subdivision, nor does it require a site plan. Further,…it is not a conditional use, either… (A486)
>
> The [MAR] does not require review by Planning and Zoning Commission because it is not a conditional use approval and the MAR does not require the Town Council to take action--by ordinance–to supplement or change the Zoning Code… (A486)

Accordingly, the Court's application of §8126 to the MAR by "causal connection" [*i.e.* the MAR "constituted" or "represented" a zoning amendment] appears to be contrary to both Defendants' contemporaneous understanding of what the MAR *was* and also contrary to Defendants' public pronouncements of what the MAR *was not*.

b. Plaintiffs' Allegations Constitute More Than Just A Challenge To A Zoning Decision

Plaintiffs' complaint does much more than just allege that the MAR's "practical effect" was an illegal private zoning modification. Op.29. Plaintiffs' complaint also directly challenges the MAR as an invalid and unenforceable exercise of municipal contract authority which both interrupted Town Council's own authority and usurped the authority of Town officials, boards and commissions. A159-161;A311-313. Plaintiffs allege that the MAR was an impermissible contract exchange between Town officials and a private landowner that exempted a redevelopment plan from any independent review for legal compliance by the Town's Building Inspector, the Town's Planning & Zoning Commission and the Town's Board of Adjustment. *Id.*;A172-176;A178-180

For example, Plaintiffs allege that the MAR contractually

exempted or excused the Building Official from his statutory obligations to evaluate and determine whether the Plan and Permit components of the MAR fully complied with the Town's Code. A159;A169; A173;A178-180. In their briefing, Defendants were forced awkwardly to concede that despite the Town's Building Inspector being the only "official empowered to approve or deny permits on behalf of the Town,"(A298) the MAR's procedures specifically incorporated a "protective device"(A298) for the Town's Building Inspector in the form of a "superfluous" (A215) pre-approval of the building permit by Town Council. This negotiated procedural pre-approval served to "protect" the Town's Building Inspector by effectively exempting his statutory obligations under §§71-4 and 185-84A of the Town's code to confirm that the MAR's Plan and Permit components were in compliance with the Town's Zoning and Building Codes. A180;A562.

The complaint also alleges that independent review of the MAR's compliance with the Town's Zoning and Building Codes was likewise wrested from the Town's Planning & Zoning Commission, usurped by the Town Council under the MAR's negotiated terms. A322;A283-284. Under §185-73 of the Town's code, "any proposed amendment, supplement or change to the zoning code or the regulations governing a zoning district," required the enactment of a Town ordinance and review by the Town's Planning and Zoning Commission. A554-555. Of course, as set forth above, Defendants declared publicly *before* adopting the MAR that no ordinance was required, that it was not a conditional use and that it required no review by the Town's Planning and Zoning Commission. A486. Indeed, Defendants made certain that the MAR contractually

prohibited the Town's Planning and Zoning Commission from considering its legal compliance, by mandating a review "of very limited scope" as its "sole purpose." A214;A283-284.

This 'circle-the-wagons' approach by the Defendants—*agreeing* to avoid any review of the MAR not expressly provided for in the MAR itself-also precipitated the Town Manager's interference with a timely appeal filed by fifteen Town residents seeking review of the MAR's Permit component by the Town's Board of Adjustment. *See infra* III.C.

Accordingly, the basis for the Court's application of §8126 to the MAR—that Plaintiffs' "core" claims are mere objections to its results (*i.e.*, proposed height and use in the Plan and Permit components) as zoning code violations,(Op.25) is based upon an erroneously narrow view of Plaintiffs' broader material factual allegations. The Court erred by failing to consider how §8126 could possibly apply to bar Plaintiffs' substantive allegations challenging the Town Council's ability and authority to usurp or exempt, by negotiated contract, not just its own independent zoning authority but also the independent exercise of zoning authority by the Town's commissions, boards and building official. A172-176;A178-180.

2. The Court of Chancery's Decision Upends A Balanced Tripartite of Public Policy Considerations.

The Court's decision acknowledged that "Plaintiffs may well be correct that procedural and substantive elements of the Challenged Documents and the process by which they were approved violated the Town's code," (A37) but looked to "policy considerations" to expand §8126 to a settlement agreement. Op.30-31. The Court's reason for this expansion is appropriately premised upon the important underlying

policies eschewing lingering legal vulnerability of zoning decisions.

For support, the Court cites *Bay Colony Ltd. P'Ship v. Cty. Council*, 1984 WL 159382 (Del. Ch. Feb. 1, 1984) for the proposition that repose applies even to incorrect decisions by a zoning authority. But in *Bay Colony* the Sussex County Council actually engaged in (and notably, complied with) the formal statutory process for approving a conditional use. *Id.* Here, Defendants acknowledge that the MAR involved no such formal statutory process. The Court also cites to *Council of S. Bethany v. Sandpiper Dev. Corp., Inc.*, 1986 WL 13707 (Del. Ch. Dec. 8, 1986) to suggest that Plaintiffs' argument against the applicability of §8126 has previously been "squarely rejected." Op.30. But in dicta, *Sandpiper* merely rejected what it observed as the petitioner's most aggressive argument: that "*whenever*" a claim alleges a "violation of statutory procedural requirements" such a claim is exempt from application of §8126. 1986 WL 13707, at *2.

As detailed more fully above, Plaintiffs' complaint includes claims that are much broader and more substantive than the one claim proscribed in *Sandpiper*: Plaintiffs specifically challenge the "predicates" of the statute of repose, *i.e.* that the MAR was not an ordinance, code, regulation or map, and no "final" plan approval occurred, and Plaintiffs also challenge the MAR as an unenforceable contract that exempted or usurped municipal zoning authority.

Sandpiper speaks to this point. And in the course of doing so, *Sandpiper* also succinctly identifies the other critical issue in this appeal—*balancing* the abutting tensions of equally important public policies:

> Sandpiper's proposition is refuted by the statute of limitations itself (10 *Del. C.* § 8126(a)), which does not carve out any exception for claims based upon alleged statutory invalidity. Moreover, it is highly significant that the statute creates an extraordinarily short (60 day) period during which zoning regulations must be challenged. Such a short period evidences a legislative judgment that while there is a strong public policy favoring strict compliance with statutes establishing procedural requirements for enacting local zoning regulations, those policies are not absolute. Of considerable importance as well is the policy of repose which underlies the statute of limitations. In this case, that policy translates directly to the interest of local communities in stable land use regulatory arrangements and in freedom from the uncertainty and disruption that would result if such arrangements were permitted to remain legally vulnerable for long periods. The strength of that policy is underscored by the extraordinarily brief period allowed by the General Assembly for mounting legal challenges to zoning ordinances.
>
> In this particular case the statute of limitations was found not to apply only because one of its predicates (the publication of notice) was not established, but not by reason of any notion that the particular type of claim asserted by Sandpiper is exempt from the statute's coverage. But the policy of repose which underlies the statute continues to apply, even if for technical reasons the statute itself does not. Because of that policy, this Court is empowered, in a proper case, to reach the identical result under analogous equitable principles, namely, the doctrines of laches and estoppel.

1986 WL 13707, *2-*3 (internal citations omitted). That is, in *Sandpiper*, Delaware's strong public policy favoring strict compliance with zoning statutes and meticulous adherence to procedural safeguards when enacting local zoning regulations,[11] is pitted against Delaware's

[11] *Carl M. Freeman Associates, Inc. v. Green,* 447 A.2d 1179, 1182 (Del. 1982) (Strict compliance with statutory zoning procedures protects not only applicant land owners, but also "insure[s] public participation and more reasoned and orderly [] conduct...." by the municipal body tasked with approving or denying development plans.); *Green v. County Council of Sussex Cty.,* 415 A.2d 481 (Del. Ch. 1980), *aff'd.,* 447 A.2d 1179 (Del. 1982) (holding that a municipality "may not ignore statutorily mandated [zoning] procedures."); *Hartman v. Buckson,* 467

strong public policy favoring strict repose to promote stable and predictable land use regulatory arrangements and to insure the finality of land use decisions.[12]

In this case, a third, equally vital, public policy exerts itself—Delaware's policy favoring the voluntary resolution of

---

A.2d 694, 699 (Del. Ch. 1983) (holding that a municipality "may not, under the guise of compromise," impair its public duty by bargaining away part of its zoning power, observing that "Zoning is an exercise of the police power to serve the common good…[a] legislative function [that] may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.") (internal citations omitted); *Bay Colony Ltd. P'ship v. County Council of Sussex County*, 1984 WL 159381, at *3,*5 (Del. Ch. Dec. 5, 1984) ("The Council cannot rezone land and not do so by ordinance…Action by ordinance is necessary in order to provide the numerous procedural safeguards which insure public participation and more reasoned and orderly Council conduct."); *New Castle County Council v. BC Dev. Assoc's*, 567 A.2d 1271, 1278 (Del. 1989) (zoning action not taken in accordance with the law is deemed arbitrary and capricious); *Shevock v. Orchard Homeowners Ass'n, Inc.*, 621 A.2d 346, 349 (Del. 1993) ("We have long recognized that the inherent conflict between zoning laws and common law property rights requires the strictest compliance with all applicable procedures."); *Fields v. Kent County*, 2006 WL 345014, at *3 (Del. Ch. Feb. 2, 2006) (Delegation of land use and zoning power to municipalities by the General Assembly requires full compliance with the conditions imposed on the exercise of that power…and even "employing an oral resolution, instead of an ordinance" for zoning related approval "impermissibly diverged from the procedural requirements imposed on the exercise of the [delegated powers].")

[12] *Council of Civic Org. of Brandywine Hundred, Inc. v. New Castle County*, 1993 WL 390543, at *6 (Del. Ch. Sept. 21, 1993) *aff'd*, 637 A.2d 826 (Del. 1993) ("The relatively short statutory period mandated by 10 *Del.C.* § 8126(a) is designed to promote predictability and stability in land use."); *Admiral Holding v. Town of Bowers*, 2004 WL 2744581, at *3 (Del. Super. Oct. 18, 2004)("Just as there is a strong public policy in favor of certainty in the settlement of estates, there also exists a strong policy in favor of certainty in municipal zoning decisions. This policy must be followed strictly and cannot bend, even to other statutes."); *Acierno v. New Castle County*, 2006 WL 1668370, *4 (Del. Ch. June 8, 2006)(The statute of repose is "intended to promote predictability and stability in land use and therefore must be applied strictly").

litigation.[13]

The Court recognizes the presence of this "difficult" additional policy consideration in a footnote:

> To an extent, this case posits the question of how a municipality should go about settling a complex land use dispute with a developer when the settlement is opposed by some residents of the municipality. Particularly difficult is how to handle terms of the settlement that may be viewed as allowing the developer to engage in conduct which is inconsistent with the municipal code.

Op.18 at n.44.

It does not appear that any Delaware court has heretofore been asked to reconcile this conflicted triumvirate of public policies in the context *sub judice*—a settlement agreement between a municipality and a private landowner through which zoning approvals occur in contravention to statutory procedures and to which repose is alleged to be applicable to bar any challenge to the procedures or approvals.

The Court of Chancery, in *Hartman v. Buckson*, addressed the tension between two policies at issue here. A "compromise" between a municipality and a developer exchanging litigation releases for zoning exemptions was held to be an impermissible exercise of authority by "a private agreement to create a particular zoning district:"

> While there is no doubt about the Town's ability to compromise claims, there is no question that the Town can only compromise particular types of claims like those "claims which exist in its favor or against it and which arise out of a subject matter concerning which the municipality has the general power to contract." It may

[13] *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979) (quoting *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964)("The law, of course, favors the voluntary settlement of contested issues. Because of the fiduciary character of a class action, the court must participate in the consummation of a settlement to the extent of determining its intrinsic fairness…")).

> not, under the guise of compromise, impair a public duty owed by it. By entering into the contract in question, Camden bargained away part of its zoning power to a private citizen. It simply does not possess the authority to normally contract such authority and the fact that this agreement was in furtherance of a compromise, an attempt to avoid Buckson's threats to sue, does not make it any more valid.

467 A.2d at 696 (internal citation omitted).

And *Hartman*'s holding in this respect is consistent with other state and federal court decisions addressing the same issue.[14] For example, *Trancas Prop. Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172 (2006), involved litigation between a developer and the City of Malibu and a settlement exempting a "downsized" development from certain zoning restrictions in exchange for litigation releases and the developer dedicating "three-fourths of its acreage" to the City of Malibu. *Id.* at 175. *Trancas* held that "the agreement, however well-intended, was invalid, because it impermissibly attempted to abrogate the city's zoning authority and provisions." *Id.* *See also Buckley v. Town of Wappinger*, 12 A.D.3d 597, 598 (N.Y. App. Div. 2004)(holding that a town resolution authorizing a stipulated settlement impaired the authority of the Zoning Administrator, Zoning Board of Appeals, and the Planning Board by permitting a property use otherwise prohibited by the local zoning ordinance.).

Yet, just as *Sandpiper* appropriately acknowledged that Delaware's policy favoring strict compliance with zoning statutes and regulations

---

[14] *Idaho Bus. Holdings, LLC v. City of Tempe*, 2007 WL 2390889 (D. Ariz. Aug. 22, 2007)(declining a request by the City of Tempe for the court to place its "imprimatur" on a proposed settlement agreement that "effectively authorized the City" to disregard state and local zoning laws).

"is not absolute"—neither should *Hartman* be construed as an "absolute" prohibition against a Delaware municipality settling a zoning dispute.

Indeed, many jurisdictions have honored this important policy, by acknowledging the validity of "court-approved settlements" and "consent decrees" containing a municipality's zoning related concessions. But, of course, that policy is likewise "not absolute."[15] For example, in *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995) the Seventh Circuit acknowledged:

> …while parties can settle their litigation with consent decrees, they cannot agree to disregard valid state laws, and cannot consent to do something together that they lack the power to do individually…district courts must ensure that the consent decrees they approve respect this principle as well as the rights of third parties.

Id. at 216 (internal citations omitted); *See also Congregation Mischknois Lavier Yakov, Inc. v. Bd. of Trustees for Vill. of Airmont*, 301 Fed. Appx. 14, 15-16 (2d Cir. 2008) (declining to disrupt a "court-ordered settlement agreement" that sanctioned the building of a residential school otherwise impermissible under the village's zoning

---

[15] *See Pike Indus., Inc. v. City of Westbrook*, 45 A.3d 707, 713 (Me. 2012) (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 525-26 (1986)("As is true with every court order, a consent decree must not conflict with the requirements of applicable laws, and [] before approving a consent decree, a court must be satisfied that it does not violate the United States and [state] Constitutions, statutes, or other relevant sources of law.")). *See also Durrett v. Hous. Auth.,* 896 F.2d 600, 604 (1st Cir. 1990);*Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986)("Consent decrees are judgments as well as contracts.");*United States v. Beebe,* 180 U.S. 343, 351-55 (1901)(holding that a consent decree's force comes from agreement rather than positive law and "depends on the parties' authority to give assent."); *United States v. Jefferson County,* 720 F.2d 1511, 1517-18 (11th Cir. 1983)(holding that third parties, even those not "colorably bound by the decree" should be able to challenge the authority of the person assenting to the decree).

code); *cf. St. Charles Tower, Inc. v. Kurtz,* 643 F.3d 264, 270 (8th Cir. 2011) ("State actors cannot enter into an agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court.").

Thus, under appropriate circumstances,[16] court approved settlements or consent decrees are the vehicle that can best reconcile the three competing public policies at issue here: (i) safeguarding the public interest and confidence in zoning decisions, (ii) providing finality and certainty in those decisions, and (iii) honoring voluntary settlement of litigation.

A very recent decision by this Court's northernmost (contiguous) sister court, affirming, in part, a consent decree involving zoning related approvals, is particularly applicable here.

In *Pike Indus., Inc. v. City of Westbrook,* 45 A.3d 707 (Me. 2012) the Maine Supreme Court, as here, addressed "a matter of first impression." A trial court approved a consent decree affecting the enforcement of a land use ordinance. The decree at issue grandfathered a landowner's intended property use (quarrying activity) so as to exempt it from the municipality's current zoning code prohibition

---

[16] In *League of Residential Neighborhood Advocates v. City of Los Angeles,* 498 F.3d 1052 (9th Cir. 2007), the Court reversed a district court's approval of a settlement agreement in which the City of Los Angeles granted a conditional use permit in violation of state zoning laws. The Court concluded that the settlement agreement was invalid and unenforceable, stating that, "[b]efore approving any settlement that authorizes a state or municipal entity to disregard its own statutes in the name of federal law, a district court must find that there has been or will be an *actual* violation of that federal law." *Id.* at 1058. "A federal consent decree or settlement agreement cannot be a means for state officials to evade state law." *Id.* at 1055.

against extractive industries. *Id.* at 711. The trial court concluded that the City had the power to settle claims as part of its right to sue and be sued; that opponents to the consent decree received ample notice and an opportunity to object to the court's approval; and that it would not "second guess the [City's] judgment that it is in the City's best interest to settle the litigation with Pike rather than risk an adverse result after trial." *Id.* at 713. An appeal followed.

The Maine Supreme Court identified the issue raised on appeal as, "the standards and process a court should employ when it reviews a proposed consent decree that will substitute the decree's requirements for the otherwise applicable requirements of an existing land use ordinance." *Id.* at 713. *Pike* ultimately concluded that the trial court did not err by approving the consent decree, or err in the process or standard it used to evaluate the consent decree. *Id.* Finding that the municipality had authority to settle litigation, the Court observed:

> the regulation of land use by municipal governments does not occur in a vacuum, and municipalities necessarily exercise additional authority that may affect land use regulation. The City of Westbrook, like all municipalities, has been expressly granted the authority to sue and be sued. By necessary implication, this authority carries with it the authority to compromise disputed claims… It would be a strange public policy that authorized municipalities to sue and be sued, but then compelled them to fully litigate every case to a final judgment with no possibility of resolving the dispute through good-faith settlement negotiations.

Id. at 714. *Pike* also noted that the consent decree at issue "is distinguishable from a settlement agreement by which parties settle a purely private dispute that affects only the rights of the immediate parties to the litigation," because it "results in an exercise of judicial authority that supersedes the otherwise applicable

requirements of a validly enacted municipal zoning ordinance, thereby having an impact on the broader public within the municipality." *Id.* at 716. Accordingly, the court held, a "clear policy in favor of encouraging settlements," must be balanced against "broader policy considerations at play and the interests of third parties who will be affected by the [settlement]." Thus:

> [A] court must assure itself that the parties have validly consented; that reasonable notice has been given possible objectors; that the settlement is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; that it is consistent with the objectives of [the legislature]; and, if third parties will be affected, that it will not be unreasonable or legally impermissible as to them.

Id. at 716. *Pike* announced that the elements above must *first* be satisfied before a trial court may approve a settlement involving the enforcement of a land use ordinance, cautioning that:

> When considering these elements, courts should uphold the public policy favoring the settlement of disputed claims by deferring to the reasonable judgments and compromises made by the settling parties. However, the court's deference should be tempered by the separate public policy favoring the uniform applicability and enforcement of zoning ordinances. These considerations are encompassed by the fifth factor, which calls upon the court to consider, among other things, whether the extent to which a consent decree will interfere with a municipality's land use regulatory scheme is no greater than that reasonably needed to achieve the consent decree's objectives.

Id. at 717.

Pike provides this Court a thoughtful and well-reasoned means by which the three important public policies implicated by this appeal can be reconciled in near-perfect balance. The Court of Chancery's application of repose to the MAR lacks such balance and should, respectfully, be reversed.

II. THE COURT OF CHANCERY ERRED IN ITS APPLICATION OF 10 *DEL. C.* § 8126 (B) TO THE MAR'S PLAN COMPONENT.

A. Question Presented:

Did not the Court of Chancery err by finding that the Plan component submitted under the MAR's negotiated procedures for approval was "a plan submitted under the subdivision and land development regulations…of such municipality" within the context of §8126(b),(Op.30) and also err by determining that "final" approval of the Plan component occurred *nearly four months before* the "final public hearing" specifically required under the MAR's negotiated procedures to approve the MAR's Plan and Permit components? Op.35-36,A130-131.

B. Standard and Scope of Review:

The standard of review is the same as set forth above in I.B.

C. Merits of Argument:

In order for §8126(b) to bar challenges to a "finally" approved or denied record plan, such plan is required to have been "submitted under the subdivision and land development regulations of such county or municipality." Here, the complaint alleges, and the Defendants repeatedly concede, that the MAR's Plan component was "submitted" exclusively under negotiated procedures set forth in the MAR.[17]

Despite Defendants' acknowledgment that the MAR's negotiated procedures supplanted statutory procedures, the Court, citing §8126's

[17] Specifically, the Town and DBE both acknowledged that "The purpose of the [MAR] was to: 1) *establish a procedure* by which DBE could submit a revised plan and building permit for consideration by the Town for the redevelopment of DBE's Ruddertowne properties …" A235;A275 (emphasis added).

requisite broad construction and "policy considerations," held that it was not necessary "that the Town Council was in perfect compliance with all of the statutory procedures" and concludes that Plaintiffs' challenge adequately "falls within the realm of § 8126." Op.33-33. This conclusion, however, expands §8126's "realm" to include the endless boundaries of contract language configurations. Neither the 14-page MAR nor the 9-page Town Resolution approving the MAR (A185-A222) actually reference, cite, or identify a single provision of the Town's "subdivision and land development regulations" pursuant to which the Plan component was being submitted for approval. Stated more plainly, if the MAR's Plan component had *actually* been "submitted under the Town's subdivision and land use regulations," the Town's Building Official and Planning & Zoning Commissions would have been required to review and make a recommendation concerning the legality of the Plan component's proposed height and use elements. The MAR contractually precluded any such review. Accordingly, the statute is inapplicable to the MAR's Plan component.

The related appellate issue of *when* the MAR's Plan component actually achieved "final approval" highlights precisely why Delaware (and so many other states) eschews private zoning related agreements. FAQs jointly published by Defendants on January 31, 2011 unequivocally refer to the proposed February 26 approval of the MAR and its components as an "initial approval." A478-479.[18] And this was consistent with paragraph 8(a)(vi) of the MAR, which expressly

[18] Defendants also argued below that the February 26 Plan component approval was actually more akin to a "conditional approval." A141-142.

required "all final town approvals" to occur at the June "final public hearing,"(A214) and also consistent with Defendants' description in the FAQs of the MAR's approval process as "*culminating* in a public hearing and final vote by the Town Commission on whether to approve the project." A457 (emphasis added).

In this litigation, Defendants now maintain that the MAR's six-step process did not "culminate" in a "final vote" on the project at the June "final public hearing" but rather "culminated" nearly four months earlier at a "Special town meeting" designated as step "iv" of the MAR's six-step process. A332-335;A438-445. The detailed language of the MAR's six-step process, the language of the notices announcing the February 26 public hearing, and the Town resolution approving the MAR all defy Defendants' subsequent litigation position. The resolution, in nine pages describing the MAR's approval, does not use the word "final" once. A186-194. Five published notices announcing the February 26 public hearing do not use the word "final"—stating only that the hearing was to "consider and receive public comments regarding the [MAR]." A168;A332. And the MAR itself conspicuously describes the "final public hearing" using the word "final" more than seven times, but uses the word "final" *not once* in its description of the February 26 meetings. A213-214.[19]

Here, Defendants should not be entitled to benefit from the application of repose to a "final approval" that did not clearly occur when they stated it would occur, under the terms of an agreement they negotiated, drafted and then presented to the public.

[19] *Compare* MAR ¶8(a)(vi) *with* ¶8(a)(iii-iv).

III. THE COURT ERRED BY DECLINING TO EXERCISE EQUITABLE JURISDICTION OVER PLAINTIFFS CHALLENGE TO THE MAR'S PERMIT COMPONENT.

A. Question Presented:

Did not the Court of Chancery err by finding that Plaintiffs' failure to pursue a writ of mandamus against the Town Manager precluded its exercise of subject-matter jurisdiction over a challenge to the approval of the MAR's Permit component. Op.38-40.

B. Standard and Scope of Review:

Subject matter jurisdiction is determined from the face of the complaint at the time of filing with the Court assuming the truth of all material factual allegations. *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 590 (Del. 1970). Challenges to subject matter jurisdiction on appeal require this Court to determine whether the trial court correctly formulated and applied legal precepts. *Sanders v. Sanders,* 570 A.2d 1189, 1190 (Del. 1990).

C. Merits of Argument:

On March 25, 2011, fifteen Town residents (including two Plaintiffs) filed a timely request for a Town Board of Adjustment ("BOA") hearing seeking an "Appeal of Decision of Town Building Official \ Town Council Administrative Decision on Ruddertowne\MAR" on official Town-provided forms and accompanied by a memorandum (the "Hearing Request"). Op.14;A606. The Hearing Request *specifically* set forth a challenge to the Building Official's conduct, *i.e.* his *failure* to conduct himself in accordance with his statutory duties,[20] in

[20] The memorandum accompanying the hearing request alleged:
The building permit granted to DBE by the MAR violates the requirements of Section 185-75 of the Dewey Beach Zoning Code, which

connection with the February 26 approval of the MAR's Permit component. A611. The Hearing Request was summarily rejected—not on its merits and not by the BOA itself—but rather, by the Town Manager's unilateral determination in a letter dated May 2, 2011 that the "subject matter described in the hearing request is not within the Board of Adjustment's appellate jurisdiction." A625;A174-175.[21] On May 27, 2011, the same residents again requested a BOA hearing. They added to the original Hearing Request, an appeal from the Town Manager's May 2, 2011 letter. A628. By letter dated June 3, 2011, (A634) the Town Manager again declined to forward the request to the BOA, declaring her lack of legal authority and, again, the BOA's lack of jurisdiction, stating *inter alia*:

> *I remain convinced* that I, as Town Manager, lack the legal authority to forward your March 25, 2011 correspondence to the Board of Adjustment.
>
> ***
>
> While I understand and appreciate that the members of our Town's Board of Adjustment are very good at what they do, *I also recognize* that they are a statutory body with limited jurisdiction.
>
> ***

---

requires a two-tiered process. The first step requires the Town Building Official to determine that the site plan complies with the zoning regulations, that the uses are permitted and that the structures meet all of the height, bulk and setback requirements. The second step then allows the Town Commissioners to add any special requirements that they deem appropriate. In the case of the DBE Ruddertowne development, the Town Building Official did not certify that the development complied with the zoning code. He could not in good faith have made this finding because the Agreement violates at least six major zoning regulations. A611 (emphasis added).

[21] The Court did not consider or address Plaintiffs argument that because the Town unequivocally declared that the BOA had no appellate jurisdiction over the hearing request, Defendants are precluded from now arguing "directly to the contrary" (A338) that a BOA appeal "no doubt" (A300) was the adequate remedy at law of which Plaintiffs "clearly failed" to avail themselves. A301; A338-339.

> As I noted previously, I recognize the sensitivity of this matter…I can assure you *I have not let political agendas or overtures concerning ethical questions cloud my judgment* during the decision making process…

A634-636 (emphasis added).[22] Nonetheless, the Court determined that "even if the Plaintiffs' view of the events [surrounding the Town Manager's interference] is correct," they "once again"[23] failed to pursue an adequate remedy at law in the form of a writ of mandamus. Op.40.

But such a writ was neither "available" nor "adequate" here because mandamus is "extraordinary" relief and appropriate only where a clear legal right to the performance of a non-discretionary or ministerial duty can be established *and* there is no other adequate remedy. *Darby v. New Castle Gunning Bedford Ed. Ass'n*, 336 A.2d 209, 210 (Del. 1975); *Ingersoll v. Rollins Broad.*, 272 A.2d 336, 338 (Del. 1970). A ministerial duty is one prescribed with such precision and certainty that nothing is left to discretion. *Darby*, 336 A.2d at 211. It is a duty, "without regard to the actor's judgment as to its propriety or impropriety."[24] Here, neither the Town's Code nor 22 *Del. C.* § 324 assigns any duty to the Town's Manager regarding the BOA.

---

[22] Notably, around this same time, the Town Manager received a letter from DBE threatening additional lawsuits if she allowed the hearing request to get to the BOA. Op.14-16;A175.

[23] Contrary to Court's suggestion, here the record clearly reflects that no adverse decision of the BOA ever occurred—from which Plaintiffs could have taken an appeal to the Superior Court. Op.39.

[24] *See id.* ("…When substantial doubt exists as to the duty whose performance it is sought to coerce, or as to the right or power of the officer to perform the duty, the relief will be withheld, since the granting of the writ in such cases would render the process of the court nugatory and fruitless.")

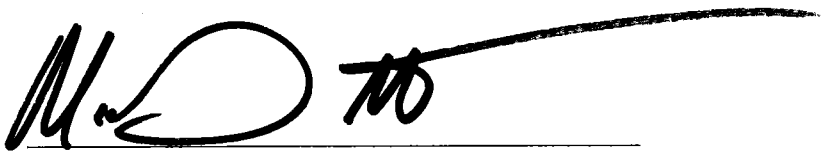
A550-554. She appears to have simply assumed a gate-keeper role to discern the propriety of the Hearing Request by assessing the BOA's jurisdictional scope.

Accordingly, mandamus could not have adequately remedied the Town Manager's misconduct, nor was such a writ available to Plaintiffs because their adequate remedy was, and remains, in equity.[25]

★ ★ ★

For the reasons set forth above, Plaintiffs respectfully ask this Court to reverse the Court of Chancery's Order dismissing the Complaint.

BERGER HARRIS, LLC



Michael W. McDermott (DE Bar No. 4434)
David B. Anthony (DE Bar No. 5452)
1201 N. Orange Street
One Commerce Center, 3rd Floor
Wilmington, Delaware 19801
(302) 655-1140 (phone)
(302) 655-1131 (fax)
mmcdermott@bergerharris.com
danthony@bergerharris.com

Attorneys for Plaintiffs Below/Appellants

[25] *See White v. City of Wilmington*, 1995 WL 264572 (Del. Super. Apr. 20, 1995) (finding a writ of mandamus unavailable where adequate remedy of injunctive relief is available).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY MURRAY, et al., Plaintiffs/Appellants, v. TOWN OF DEWEY BEACH, et al, Defendants/Appellees.	C.A. No. 480,2012 On Appeal From A Decision Of The Delaware Court of Chancery C.A. No. 6785-VCN

CERTIFICATE OF SERVICE

I, Michael W. McDermott, Esquire, certify that a copy of Appellants' Opening Brief was served upon the above defendants in the following manner and on the date indicated below:

VIA LEXIS NEXIS FILE AND SERVE

TO:

Megan T. Mantzavinos
Eileen M. Ford
MARKS, O'NEILL, O'BRIEN & COURTNEY, P.C.
300 Delaware Avenue, Suite 900
Wilmington, Delaware 19801

Shawn P. Tucker
William T. Quillen
DRINKER BIDDLE & REATH, LLP
1100 N. Market Street, Suite 1000
Wilmington, Delaware 19801

BERGER HARRIS, LLC

By: */s/ Michael W. McDermott*

Michael W. McDermott (DE ID No. 4434)
David B. Anthony (DE ID No. 5452)
1201 N. Orange Street
One Commerce Center, 3rd floor
Wilmington, Delaware 19801
(302) 655-1140 (phone)
(302) 655-1131 (fax)
mmcdermott@bergerharris.com
danthony@bergerharris.com

Attorneys for Plaintiffs below/Appellants

Dated: October 15, 2012
Wilmington, Delaware