



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY MURRAY, *et al.*,
Plaintiffs
Below/Appellants,
v.
TOWN OF DEWEY BEACH, *et al.*,
Defendants
Below/Appellees.

:
:
:
: C.A. No. 480,2012
:
:
:
: On Appeal From the Order of the
: Delaware Court of Chancery,
: Dated July 31, 2012, at C.A. No.
: 6785-VCN
:

ANSWERING BRIEF OF DEFENDANTS BELOW/APPELLEES TOWN OF DEWEY BEACH,
COMMISSIONERS OF THE TOWN OF DEWEY BEACH, DIANA K. SMITH, TOWN
MANAGER, AND WILLIAM D. MEARS, TOWN BUILDING OFFICIAL

MARKS, O'NEILL, O'BRIEN &
COURTNEY, P.C.

BY: /s/ Megan T. Mantzavinos
Megan T. Mantzavinos, Esquire (ID No. 3802)
Cecil J. Jones, Esquire (admitted *pro hac vice*)
300 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 658-6538

*Attorney for Defendant Below / Appellees, Town of
Dewey Beach, Commissioners of the Town of Dewey
Beach, Diana K. Smith, Town Manager, and William
D. Mears, Town Building Official*

Dated: December 4, 2012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	III
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	2
STATEMENT OF FACTS.....	4
ARGUMENT.....	10
I. APPELLANTS' CLAIMS RELATED TO THE APPROVAL OF THE MAR ARE BARRED BY 10 <i>DEL. C.</i> § 8126.....	10
A. Question Presented.....	10
B. Scope of Review.....	10
C. Merits of Argument.....	10
II. THE COURT OF CHANCERY DID NOT ERR IN ITS APPLICATION OF 10 <i>DEL. C.</i> § 8126 (B) TO THE MAR'S PLAN COMPONENT.....	16
A. Question Presented.....	16
B. Scope of Review.....	16
C. Merits of Argument.....	16
III. THE COURT OF CHANCERY CORRECTLY APPLIED DELAWARE LAW IN DETERMINING THE COURT LACKED SUBJECT MATTER JURISDICTION OVER APPELLANTS' CHALLENGE TO DBE'S BUILDING PERMIT BECAUSE AN ADEQUATE LEGAL REMEDY EXISTED WHICH THEY FAILED TO PURSUE.....	17
A. Question Presented.....	17
B. Scope of Review.....	17
C. Merits of Argument.....	17
1. The Court of Chancery Is A Court Of Limited Jurisdiction And Was Prohibited From Hearing This Matter Because An Adequate Remedy At Law Existed.....	17
2. Appellants Wrongly Invoked Equitable Jurisdiction Because The Appeals Process Under 22 <i>Del. C.</i> § 321, <i>et seq.</i> , Is The Proper Legal Remedy For Challenging A Building Permit...	19

3.	The Court of Chancery Lacked Authority To Excuse Appellants' Failure To Pursue An Adequate Legal Remedy..	21
IV.	THE COURT OF CHANCERY CORRECTLY REJECTED APPELLANTS' CLAIMS THAT THE TOWN MANAGER WRONGFULLY INTERFERED WITH THE BOARD OF ADJUSTMENT APPEALS PROCESS BECAUSE WRIT OF MANDAMUS RELIEF WAS ANOTHER ADEQUATE LEGAL REMEDY WHICH APPELLANTS FAILED TO PURSUE.	23
A.	Question Presented	23
B.	Scope of Review	23
C.	Merits of Argument	23
1.	The Court Should Refuse To Consider Appellants' Arguments Regarding The Inadequacy Of Writ Of Mandamus Relief Under Rule 8 Because Appellants Failed To Raise This Issue Below.	24
2.	The Court Should Not Excuse Appellants' Waiver Because Their Complaints Of Error Fail To Meet The Exacting Standard Necessary To Qualify As "Plain Error."	25
3.	Assuming <i>Arguendo</i> The Court Excuses Appellants' Waiver, The Court Of Chancery Correctly Held A Writ Of Mandamus Was Another Available Legal Remedy Appellants Failed To Pursue.	26
V.	APPELLANTS FAILED TO DEMONSTRATE ANY UNIQUE OR PARTICULARIZED INJURY TO HAVE STANDING TO BRING SUIT TO CHALLENGE THE APPROVAL OF THE MAR, DBE'S PLAN AND BUILDING PERMIT.	30
A.	Question Presented	30
B.	Scope of Review	30
C.	Merits of Argument	30
1.	Appellants Lack Standing Because They Failed to Allege a Concrete and Particularized "Injury-In-Fact"	31
2.	Appellants Lack Standing Because They Failed To Allege a Procedural Due Process Error.	33
	CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases

<i>Acierno v. New Castle County</i> , 679 A.2d 455, 459 (Del. 1996)	20
<i>Appriva S'holder Litig. Co., LLC v. Appriva Med., Inc.</i> , 937 A.2d 1275, 1285 (Del. 2007)	30
<i>Barry v. Town of Dewey Beach</i> , 2006 Del. Ch. LEXIS 115, at *17 (Del. Ch. 2006)	30, 32, 33, 34
<i>Bay Colony L.P. v. Cnty. Council</i> , 1984 Del. Ch. LEXIS 452, at *3 (Del. Ch. Feb. 1, 1984)	11, 12
<i>Bell v. Burson</i> , 402 U.S. 535, 540 (1971)	34
<i>Brohawn v. Town of Laurel</i> , 2009 Del. Ch. LEXIS 82 (Del. Ch. May 13, 2009)	33
<i>Chateau Apartments Co. v. Wilmington</i> , 391 A.2d 205, 207 (Del. 1978) .	18
<i>Cheswold Aggregates, L.L.C. v. The Town of Cheswold</i> , 1999 Del. Super. LEXIS 396, at *10-11 (Del. Super. July 2, 1999)	21
<i>Christiana Town Ctr. LLC v. New Castle Cnty.</i> , 2003 Del. Ch. LEXIS 60, at *11-12 (Del. Ch. June 6, 2003)	18
<i>Clough v. State</i> , 686 A.2d 158, 159 (Del. 1996)	26
<i>Concord Towers v. McIntosh Inn</i> , 1997 Del. Ch. LEXIS 115, at *8-9 (Del. Ch. July 22, 1997)	32
<i>Council of S. Bethany v. Sandpiper Dev. Corp.</i> , 1986 Del. Ch. LEXIS 508 (Del. Ch. Dec. 8, 1986)	12
<i>Del. Solid Waste Auth. v. E. Shore Env., Inc.</i> , 2002 Del. Ch. LEXIS 37, at *4-5 (Del. Ch. Apr. 12, 2002)	31
<i>Dover Historical Soc'y v. City of Dover Planning Comm'n</i> , 838 A.2d 1103, 1110 (Del. 2003)	30, 32
<i>El Paso Natural Gas Co. v. Transamerican Natural Gas Corp.</i> , 669 A.2d 36, 39 (Del. 1995)	18
<i>Foreman v. State</i> , 994 A.2d 744 (Del. 2010)	25
<i>Hartman v. Buckson</i> , 467 A.2d 694 (Del. Ch. 1983)	14
<i>IBM Corp. v. Comdisco, Inc.</i> , 602 A.2d 74, 77 n.5 (Del. Ch. 1991); Del. Ch. Ct. R. 12(h) (3)	21

<i>In re Delta Eta Corp.</i> , 970 A.2d 1110 (Del. 2009)	26
<i>In re The Real Property of Former Wife K</i> , 297 A.2d 424, 426 (Del. Ch. 1972)	19, 22
<i>Jones v. Bd. of Adjustment of Sussex Cnty.</i> , 2007 Del. Super. LEXIS 27, at *6-8 (Del. Super. Jan. 26, 2007)	20
<i>Linn v. Del. Child Support Enforcement</i> , 736 A.2d 954, 959 (Del. 1999)	10
<i>Matthews v. Eldridge</i> , 424 U.S. 319, 334 (U.S. 1976)	33, 34
<i>Medek v. Medek</i> , 2008 Del. Ch. LEXIS 132, at *3 n.27 (Del. Ch. Sept. 10, 2008)	21
<i>O'Neill v. Town of Middletown</i> , 2006 Del. Ch. LEXIS 10 (Del. Ch. Jan. 18, 2006)	33
<i>Phillips v. Bd. of Educ.</i> , 330 A.2d 151, 154 (Del. Super. 1974)	22
<i>Pike Indus. v. City of Westbrook</i> , 45 A.3d 707 (Me. 2012)	15
<i>Ramunno v. Cawley</i> , 705 A.2d 1029, 1034 (Del. 1998)	30
<i>Remedio v. City of Newark</i> , 337 A.2d 317 (Del. 1975)	26
<i>Russell v. State</i> , 5 A.3d 622, 627 (Del. 2010)	24, 25
<i>Sandpiper Dev. Corp.</i> , 1986 Del. Ch. LEXIS 508, at *5-7	12, 13
<i>Savage v. Savage</i> , 920 A.2d 403, 408 (Del. Ch. 2006)	10, 21
<i>Schagrín Gas Co. v. Evans</i> , 418 A.2d 997 (Del. 1980)	26
<i>Shevock v. Orchard Homeowners Ass'n</i> , 621 A.2d 346, 348 (Del. 1993) ..	10, 12
<i>State v. Cooper</i> , 575 A.2d 1074, 1076 (Del. 1990)	12
<i>Sterling Prop. Holdings v. New Castle Cnty.</i> , 2004 Del. Ch. LEXIS 65, at *13 (Del. Ch. May 6, 2004)	13
<i>Stuart Kingston, Inc. v. Robinson</i> , 596 A.2d 1378, 1382 (Del. 1991) ..	31
<i>The Citizens Coalition, Inc. v. Cnty. Council of Sussex County</i> , 1999 Del. Ch. LEXIS 155, at *16 (Del. Ch. 1999)	33
<i>Walla Walla v. Walla Walla Water Co.</i> , 172 U.S. 1 (1898)	19
<i>Willis v. City of Rehoboth Beach</i> , 2005 Del. Super. LEXIS 224, at *23 (Del. Super. June 24, 2005)	20

Other Authorities

10 Del. C. § 342.....	18, 21
10 Del. C. § 564.....	26
10 DEL. C. § 8126.....	2, 10, 11, 12, 13, 14, 15, 16, 35
22 Del. C. § 321.....	19, 20
22 Del. C. § 324.....	20, 27
22 Del. C. § 327.....	20
22 Del. C. § 328;.....	20
Dewey Beach Municipal Code § 185-66.....	6, 20, 27, 28
Dewey Beach Municipal Code at sections 185-65(B) and 185-72.	6, 18, 20, 22
Title 10, Section 342 of the Delaware Code.....	19
Title 22, Sections 324 of the Delaware Code.....	18, 20, 26, 27
Title 22, Sections 327 of the Delaware Code.....	18
Title 22, Sections 328 of the Delaware Code.....	18
TOWN CHARTER OF THE TOWN OF DEWEY BEACH, § 16(c)	28, 34
Town Code under § 71-3(E)	27
Town Code under Section 73-1(F)	27
TOWN OF DEWEY BEACH CODE, § 71-3(E)	5, 27

Rules

Rule 12(b) (6)	30
Supreme Court Rule 8.....	23, 24

Constitutional Provisions

Del. Const. art. IV, § 11.....	20
--------------------------------	----

NATURE OF PROCEEDINGS

Defendants-Below/Appellees, the Town of Dewey Beach, Commissioners of the Town of Dewey Beach ("Town Commissioners" or "Town Council"), Diana K. Smith, Town Manager ("Town Manager"), and William D. Mears, Town Building Official ("Building Official" or "Building Inspector") (collectively, "Town" or "Appellees"), by and through their undersigned attorneys, Marks, O'Neill, O'Brien & Courtney, P.C., hereby submit the Town's Answering Brief on appeal. The Town adopts and incorporates by reference herein the Nature of Proceedings set forth in the Answering Brief of remaining Defendants-Below/Appellees, Dewey Beach Enterprises, Inc. and Ruddertowne Redevelopment, Inc. (collectively, "DBE").

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held the Town's approval of the MAR and Plat Plan by Resolution, accepting Appellants' allegations as true, qualified as an "amendment" to the Town's Zoning Code; thus, bringing it within the purview of 10 DEL. C. § 8126. The trial court's finding was supported by the record, broad language of section 8126, and Delaware precedent favoring broad interpretation and strict enforcement of section 8126. Appellants' narrow construction of section 8126 is contrary to Delaware law, and Appellants offer no persuasive authority to support their claim the trial court's decision "upends" a supposed "tripartite of public policy considerations."

2. Denied. The Court of Chancery did not expand the scope of 10 DEL. C. § 8126 by finding it applied to the Town's approval of the MAR and Plat Plan. Moreover, section 8126 is unambiguous the repose period is triggered on the date Notice of the challenged action is published. Notice of the approval of the MAR and Plat Plan by Resolution was published on March 1, 2011, more than 60-days prior to the filing of Appellants' Complaint. Therefore, the Court of Chancery correctly held Appellants' claims were time-barred by section 8126 and the trial court lacked subject matter jurisdiction.

3. Denied. Appellants possessed an adequate legal remedy to challenge the Building Inspector's approval of DBE's Building Permit; and therefore, the Court of Chancery was strictly prohibited from exercising equity jurisdiction. The trial court was correct that Appellants had multiple adequate legal remedies available, including by filing an appeal with the Board of Adjustment ("BOA"). In the face

of an adequate legal remedy, the trial court's jurisdictional inquiry ended, and Appellants' action was required to be dismissed. Appellants' attempt to avoid this fact by focusing on the trial court's decision regarding the availability of *mandamus* relief. Regardless, it remains the Court of Chancery was also correct in finding *mandamus* was yet another available legal remedy, which Appellants again failed to pursue.

4. Alternatively, while not reached by the Court of Chancery, Appellants also lacked standing to bring suit. Appellants' generalized complaints of vehicular and beach congestion, lack of privacy, and a diminution of aesthetic value of the *entire* community do not rise to the level of unique, concrete, and particularized injury-in-fact to establish standing. Appellants also failed to allege a procedural due process error. Hence, even setting aside the grounds relied upon by the trial court upon below, it remains the Court of Chancery lacked subject matter jurisdiction.

STATEMENT OF FACTS

This appeal arises from a protracted dispute between the Town of Dewey Beach and a group of dissatisfied property owners over a community redevelopment project. On December 6, 2010, the Town, by and through its Town Manager, entered into a Mutual Agreement and Release ("MAR") with DBE 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 the Ruddertowne properties located in the Town of Dewey Beach, Delaware (the "Ruddertowne Project"); and (2) resolve litigation involving DBE and the Town in connection with the Project.¹ The MAR also authorized the Building Inspector, subject to his approval, to issue a building permit to DBE for either condominiums or a hotel at a maximum height of 45.67 feet. As part of the agreement, DBE also voluntarily agreed to provide certain amenities to the Town for public use.² The Town Commissioners then voted to engage in a review process on December 11, 2010.³ The Town held a series of public workshops regarding the MAR's approval on: January 15, 2011; February 3, 2011; and February 5, 2011. The workshops were advertised in the local newspaper and citizens were encouraged to attend.⁴ The workshops were each well attended, including by Appellant McKinney and his attorney.⁵

Notice of the Town Commissioners' vote to approve the MAR was

¹ B001.

² B002-B004.

³ A187.

⁴ B006; B014; B017.

⁵ B021-B032.

published in the Cape Gazette on February 11, 2011.⁶ Following extensive public testimony, the Town Commissioners on February 26, 2011 voted as scheduled to approve, by Resolution, an amended MAR addressing matters raised by the public through the workshops and hearing process. The February 26, 2011 Resolution also approved DBE's proposed revised Plat Plan and Building Permit application.⁷ The Building Inspector gave his final approval of DBE's revised Building Permit application, as evidenced by his signature on the Plat Plan indicating "Approval."⁸ On March 1, 2011, the approval of the Resolution by the Town Commissioners was advertised in accordance with the Town of Dewey Beach Code in the "LEGAL NOTICE" section of the Cape Gazette, a local newspaper of general circulation.⁹

Following the approval, a local property owner and attorney, Joan Claybrook, submitted a "Request for Board of Adjustment Hearing" to the Town dated March 25, 2011, with an attached 14-page memorandum.¹⁰ Ms. Claybrook is not a party to this litigation. She was the only person listed as requesting a hearing, and the only individual who signed the form. Her property was also the only affected property listed. The nature of the request was listed on the form as: "Appeal of Decision of Town Building Official/Town Council Administrative Decision on Ruddertowne/MAR."¹¹ Ms. Claybrook's interest in the property merely stated: "[a]s a citizen and property owner."¹² The form

⁶ B018-B020.

⁷ B033-B035.

⁸ B036.

⁹ B033-B035.

¹⁰ A606-A633.

¹¹ A606.

¹² *Id.*

referenced Dewey Beach Municipal Code § 185-66 as the basis for the request.¹³ Appellants Murphy and Cadell were listed in the attached memorandum; however, neither individual was identified in the form or signed it.¹⁴ Appellants Kaminsky and McKinney were not even listed on the form or the memorandum. The focus of the memo concerned the Town Commissioners' approval of the MAR on February 26, 2011, and its alleged failure to pass an ordinance.¹⁵ None of the issues identified involved the decision of an "administrative official" under § 185-66 of the Town Code.¹⁶

On May 2, 2011, the Town Manager sent Ms. Claybrook a letter rejecting her request for hearing for failure to identify a decision of an "administrative official" as the basis for appeal.¹⁷ The letter further explained that "the Chairman of the Board of Adjustment, Mr. Leonard Read, was also consulted" regarding the Town Manager's decision.¹⁸ William Mears, Building Official, and Leonard Read, Board of Adjustment Chairman were also carbon copied on the letter.¹⁹

Ms. Claybrook responded by letter dated May 3, 2011, on her behalf and the other property owners, including Appellants Murphy and Cadell, complaining the Town Manager's rejection was improper. The letter mistakenly claimed the Town Commissioners' approval of the MAR, and Town Manager's execution, were "administrative action[s]" subject

¹³ *Id.*

¹⁴ A608.

¹⁵ A608-A623.

¹⁶ *Id.*

¹⁷ A625-A626.

¹⁸ A626.

¹⁹ A625-A626.

to review by the BOA.²⁰ Contrary to Appellants' position now on appeal, the letter clarifies that: "[t]he [March 25, 2011] Board of Adjustment appeal challenges the decision of the Town Council."²¹ Further, the letter admits the filing of the hearing request with the Building Inspector is a "ministerial function."²²

On May 13, 2011, the Town formally approved the Plat Plan and recorded it in the Sussex County Office of Record of Deeds.²³ Thereafter, on May 27, 2011, Ms. Claybrook submitted a second "Request for Board of Adjustment Hearing".²⁴ This time, Ms. Claybrook and the other property owners purported to challenge the Town Manager's decision not to forward their request for hearing to the BOA. The attached memo further complained that: "[t]he Town Hall and Town Manager serve merely a ministerial function in receiving and delivering appeals to the Board."²⁵ Thus, the memo claimed the Town Manager lacked discretion to refuse to deliver the documents they filed to the BOA. Notably, this second request made it absolutely clear Ms. Claybrook and the property owners were challenging the decision of the Town Commissioners to approve the MAR. Indeed, there is no mention at all of any actions by the Building Inspector.²⁶

On June 3, 2011, the Town Manager sent a letter to Ms. Claybrook again rejecting her request for hearing.²⁷ Once again, the Town Manager explained she lacked authority to forward the first request to the

²⁰ *Id.*

²¹ B040 (emphasis added).

²² *Id.* (emphasis added).

²³ B036.

²⁴ A628.

²⁵ A630 (emphasis added).

²⁶ A628.

²⁷ A634-A636.

BOA. The second request for hearing was also improper on its face. If Ms. Claybrook and the property owners disagreed, the Town Manager suggested to "**fil[e] for a writ of mandamus in the Superior Court.**"²⁸

Ms. Claybrook again responded by letter of June 6, 2011, stating that she and the other property owners, including Appellants Murphy and Cadell, "merely filed our papers as the form prepared by the Town Hall requires for appeals to the Board of Adjustment with the building official at Town Hall. It is a ministerial act to make the papers available to the Board."²⁹ The letter also cites Delaware case law for the proposition that an appeal to the BOA "is a necessary part of utilizing administrative remedies prior to initiating court proceedings."³⁰ Ms. Claybrook and the property owners also rejected the Town Manager's suggestion to seek *mandamus* relief in order to supposedly avoid subjecting the Town to further litigation.³¹

On June 11, 2011, in accordance with the MAR, the Town Planning Commissioners heard public testimony and issued a recommendation to the Town Commissioners exclusively regarding the construction of the public amenities DBE agreed to provide to the Town. After receiving public input, the Planning Commissioners determined the proposed construction of the amenities was consistent with DBE's existing Plan and Building Permit and recommended approval.³²

On June 17, 2011, the Town Commissioners held a public hearing in accordance with the MAR, confirmed that the proposal for the amenities

²⁸ A636 (emphasis added).

²⁹ B042 (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ B043.

³² B044-B046.

was consistent with DBE's Plan and permit, and granted approval of DBE's construction of the amenities.³³ On June 23, 2011, "LEGAL NOTICE" of the Town Commissioners' approval of the public amenities was again published in the local newspaper.³⁴ On July 15, 2011, DBE physically obtained its approved Building Permit from the Town, and paid the required permit fee.³⁵ At this juncture, DBE has now substantially commenced construction on the Project in reliance on their permit.

Appellants never filed a Petition for Writ of Mandamus as suggested by the Town Manager. Instead, on August 15, 2011, nearly five (5) months after the Town's published final approval of the Project, Appellants Murray, McKinney, Kaminsky and Cadell commenced this suit in the Court of Chancery seeking to invalidate and enjoin the enforcement of the MAR, Plat Plan and Building Permit. Appellants claimed, among other things, that the Town Commissioners' approval of the MAR constituted private contract zoning, the notice and hearing process was inadequate, and the need for an ordinance subject to referendum.³⁶ Appellants also raised, for the first time, various issues regarding the approval of DBE's Building Permit.³⁷ Appellants failed to identify the basis for the Court of Chancery to assert jurisdiction. Nor did they identify any unique or particularized injury to have standing.³⁸

³³ B047-B053.

³⁴ B054-B055.

³⁵ B039; B037-B038.

³⁶ A157-A184.

³⁷ A180.

³⁸ A180-A181.

ARGUMENT

I. APPELLANTS' CLAIMS RELATED TO THE APPROVAL OF THE MAR ARE BARRED BY 10 DEL. C. § 8126.

A. Question Presented

Whether the Court of Chancery correctly applied the Statute of Repose, Title 10, Section 8126 of the Delaware Code ("section 8126"), in dismissing the Appellants' Amended Complaint for lack of subject matter jurisdiction.

B. Scope of Review

At all stages of the proceedings, the plaintiff bears the burden of demonstrating that subject matter jurisdiction exists.³⁹ The applicable standard of review in considering a challenge to subject matter jurisdiction is "whether the trial court correctly formulated and applied legal precepts."⁴⁰ This Court exercises *de novo* review.⁴¹

C. Merits of Argument

Appellees hereby incorporate by reference as if fully set forth herein the arguments and authorities set forth in Section I, Subsection C of DBE's Answering Brief. For the reasons discussed therein, Appellants' claims regarding the Town Commissioners' approval of the MAR and Plat Plan were properly dismissed by the Court of Chancery as being barred by the Statute of Repose under section 8126 and for lack of subject matter jurisdiction.

In addition to the arguments raised by DBE, several other points are important to note which support rejecting Appellants' arguments on

³⁹ *Savage v. Savage*, 920 A.2d 403, 408 (Del. Ch. 2006).

⁴⁰ *Shevock v. Orchard Homeowners Ass'n*, 621 A.2d 346, 348 (Del. 1993).

⁴¹ *Linn v. Del. Child Support Enforcement*, 736 A.2d 954, 959 (Del. 1999).

appeal. First, Appellants argue that section 8126 is inapplicable to the MAR because it does not fall within the plain language of the statute,⁴² and urge the Court to adopt a narrow construction of the section 8126 based on a supposed "balanced tripartite of policy considerations."⁴³ However, the Court of Chancery correctly held that relevant precedent calls for section 8126 to be construed broadly, and that its interpretation is consistent with the important policy purpose of section 8126 to ensure certainty and finality.⁴⁴ Neither the plain language of the statute, nor the authorities relied upon by Appellants support a narrow construction of section 8126 or their so-called "tripartite" policy balancing theory.

The language used in section 8126(a) states that it encompasses: "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"⁴⁵ Plainly, the non-exclusive list used in the statute, and inclusion of permissive language, such as "any" and "relating to", reflects an intent for section 8126 to have broad application to municipal land use and zoning decisions.⁴⁶ Appellants' argument that the statute is inapplicable because the specific terms "contract", "agreement," or "resolution" are not mentioned runs contrary to well-settled rules of

⁴² Appellants' Opening Br., pp. 15-19.

⁴³ Appellants' Opening Br., pp. 19-28.

⁴⁴ A26-A27.

⁴⁵ 10 Del. C. § 8126(a) (emphasis added).

⁴⁶ Indeed, Vice Chancellor Noble correctly noted other courts recognize that section 8126 is "very broad". A27 (citing *Bay Colony L.P. v. Cnty. Council*, 1984 Del. Ch. LEXIS 452, at *3 (Del. Ch. Feb. 1, 1984)).

statutory construction.⁴⁷

Moreover, the trial court was also correct its interpretation of section 8126 was consistent with Delaware precedent, favoring a broad construction and strict application of section 8126. Appellants mischaracterize Vice Chancellor Noble's Opinion and misinterpret the authorities cited therein. For instance, Appellants argue that Vice Chancellor Noble erred by citing *Bay Colony* for the proposition that section 8126 applies even to incorrect decisions by a zoning authority.⁴⁸ The trial court, however, did not rely on *Bay Colony* for such a contention. Rather, Vice Chancellor Noble merely noted that *Bay Colony* does not stand for the converse proposition argued below by Appellants.⁴⁹ The trial court actually relied on *Bay Colony* in correctly finding a municipality's decision to rezone an area is an "amendment" to the zoning code, thus subject to section 8126, regardless of whether a party claims the proper statutory process was not followed.⁵⁰

Additionally, Appellants contend that Vice Chancellor Noble erred when he stated *Sandpiper*⁵¹ "squarely rejected" their argument that section 8126 does not apply when a municipality fails to adhere to the

⁴⁷ Appellants' Opening Br., p. 15. See *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990) ("Literal or perceived interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations consistent with the intent of the legislature." (citation omitted)).

⁴⁸ Appellants' Opening Br., p. 20.

⁴⁹ A32 n.76.

⁵⁰ A31-A32. Notably, other courts have cited *Bay Colony* for the same proposition. See, e.g., *Shevock v. Colonial East Ltd. P'ship*, 2007 Del. Ch. LEXIS 219, at *2 n.2 (Del. Ch. Nov. 30, 2007).

⁵¹ *Council of S. Bethany v. Sandpiper Dev. Corp.*, 1986 Del. Ch. LEXIS 508 (Del. Ch. Dec. 8, 1986).

proper statutory process.⁵² Appellants argue that Vice Chancellor Noble relied on mere dicta to reach that conclusion, which is simply untrue. The court in *Sandpiper* explicitly rejected the same argument advanced by Appellants, that *whenever* a claim alleges a failure to adhere to the statutory process section 8126(a) should not apply, stating:

[n]o authority is cited for [the petitioner's] proposition, and in my view, both authority and logic compel the precise opposite conclusion. [The petitioner's] proposition is refuted by [§ 8126(a)] itself, which does not carve out any exception for claims based upon alleged statutory invalidity.⁵³

The *Sandpiper* decision also does not support Appellants' theory application of section 8126 requires a "balancing" of "equally important public policies."⁵⁴ Rather, it stands for the proposition that the policy behind strict enforcement of section 8126 -- finality and certainty in land use and zoning decisions -- outweighs any interest in technical adherence to local zoning procedures.⁵⁵ Notably, all of the decisions cited in footnote 12 of Appellants' Opening Brief reach the same conclusion.⁵⁶ Yet, none of the decisions cited by Appellants regarding zoning regulations hold section 8126 should give way to "meticulous adherence" to local zoning procedures, and indeed, do not even deal with a Statute of Repose.⁵⁷

Finally, the cases cited by Appellants regarding the third policy in the supposed "tripartite" balancing scheme -- voluntary resolution of litigation -- also fail to support their theory. In particular,

⁵² Appellants' Opening Br., pp. 20-22.

⁵³ *Sandpiper Dev. Corp.*, 1986 Del. Ch. LEXIS 508, at *5-7; see *Sterling Prop. Holdings v. New Castle Cnty.*, 2004 Del. Ch. LEXIS 65, at *13 (Del. Ch. May 6, 2004) (citing *Sandpiper* for same the proposition).

⁵⁴ Appellants' Opening Br., p. 20.

⁵⁵ *Sandpiper Dev. Corp.*, 1986 Del. Ch. LEXIS 508, at *6-7.

⁵⁶ Appellants' Opening Br., p. 22 n.12.

⁵⁷ *Id.* at 21.

Appellants rely heavily on *Hartman v. Buckson*⁵⁸ to support their allegation the MAR constituted a private zoning contract. However, the *Hartman* decision was limited to the specific facts involved therein, which are clearly distinguishable.⁵⁹ In *Hartman*, a developer threatened litigation against the Town of Camden after refusing to approve its plan for failure to comply with a local zoning ordinance. The Town Council could not prove the enactment of the ordinance complied with Delaware law. The Town Council became "alarmed at the prospects of litigation" and quickly reached a "compromise" to approve the plan.⁶⁰

In contrast, there was no evidence the Town of Camden in *Hartman* provided the community with public notice, workshops, hearings, or invited public input. Nor did the "compromise" provide for a formal process to approve of the developer's plan, in which the members of the Town Council could vote to approve or disapprove of the "compromise".⁶¹ The "compromise" also did not appear to adequately protect the Town of Camden's interests because it allowed the developer to build even more homes than originally proposed. Most importantly, the parties in *Hartman* were also not barred by section 8126, as here, from bringing a challenge to the "compromise" at issue.

Additionally, Appellants also rely upon a non-binding decision

⁵⁸ *Hartman v. Buckson*, 467 A.2d 694 (Del. Ch. 1983).

⁵⁹ Indeed, as Appellants admit in their Opening Brief: "*Hartman* should not be construed as an 'absolute' prohibition against a Delaware municipality settling a zoning dispute." Appellants' Opening Br., p. 25.

⁶⁰ *Hartman*, 467 A.2d at 696.

⁶¹ The terms of the MAR never guaranteed DBE's plan and building permit would be approved by the Town. Indeed, as noted by DBE, the results of the approval of the MAR by the Town Commissioners was 4-1.

of the Supreme Court of Maine, *Pike Indus. v. City of Westbrook*,⁶² which affirmed the trial court's decision to uphold a consent decree involving a municipality and a private landowner. Appellants urge the Court to adopt the analysis employed by *Pike* in determining whether the trial court properly applied section 8126. Importantly, however, *Pike* also did not involve the application of a Statute of Repose. Appellants also never actually express how its reasoning supports overturning the Court of Chancery's decision, other than to flatly state Vice Chancellor Noble's application of section 8126 to the MAR supposedly lacks the same balancing of public policies.⁶³ Appellants point to nothing from Vice Chancellor Noble's Opinion to suggest the trial court did not adequately consider, to the extent they were relevant, the rights of the Town to settle litigation, and the interests of property owners in notice and public hearing. Indeed, Vice Chancellor Noble found the record showed the approval of the MAR was entirely transparent, and residents had a full and fair opportunity to participate in the process.⁶⁴

Therefore, for these additional reasons, this Court should reject Appellants' arguments on appeal, and find the Court of Chancery correctly applied the Statute of Repose under section 8126.

⁶² *Pike Indus. v. City of Westbrook*, 45 A.3d 707 (Me. 2012).

⁶³ Appellants' Opening Br., p. 26-28.

⁶⁴ See A36.

II. THE COURT OF CHANCERY DID NOT ERR IN ITS APPLICATION OF 10 DEL. C. § 8126 (B) TO THE MAR'S PLAN COMPONENT.

A. Question Presented

Whether the Court of Chancery correctly applied 10 DEL. C. § 8126(b) in determining the 60-day period of repose was triggered on the date notice of the Town's approval of the MAR and Plat Plan by Resolution was published in a newspaper of general circulation.

B. Scope of Review

This Honorable Court's standard of review is set forth in Section I, Subsection B of Appellees' Answering Brief.

C. Merits of Argument

Appellees hereby incorporate by reference as if fully set forth herein the arguments and authorities set forth in Section II, Subsection C of DBE's Answering Brief. For the reasons discussed therein, Appellants' claims regarding the Town Commissioners' approval of the MAR and Plat Plan were properly dismissed by the Court of Chancery as being barred by the Statute of Repose under section 8126 and for lack of subject matter jurisdiction.

III. THE COURT OF CHANCERY CORRECTLY APPLIED DELAWARE LAW IN DETERMINING THE COURT LACKED SUBJECT MATTER JURISDICTION OVER APPELLANTS' CHALLENGE TO DBE'S BUILDING PERMIT BECAUSE AN ADEQUATE LEGAL REMEDY EXISTED WHICH THEY FAILED TO PURSUE.

A. Question Presented

Whether the Court of Chancery correctly held it lacked subject matter jurisdiction to hear Appellants' claims regarding DBE's Building Permit, where an adequate remedy at law existed which Appellants failed to pursue.

B. Scope of Review

This Honorable Court's standard of review is set forth above in section I, Subsection B of Appellees' Answering Brief.

C. Merits of Argument

On appeal, Appellants seek to side-step the Court of Chancery's determination that a BOA hearing was an adequate legal remedy for challenging DBE's Building Permit. However, to prove the Court of Chancery erred in deciding it lacked subject matter jurisdiction, Appellants must also show a BOA hearing was somehow an "inadequate" or "unavailable" remedy. Appellants fail to attempt to make such an argument. In the absence of such proof, the Court of Chancery lacked jurisdiction. The record shows a BOA hearing was never held. The trial court lacked authority to excuse Appellants' failure to pursue an available legal remedy and was required to dismiss their claims.

1. The Court of Chancery Is A Court Of Limited Jurisdiction And Was Prohibited From Hearing This Matter Because An Adequate Remedy At Law Existed.

Delaware law confers only limited jurisdiction to the Court of Chancery and it must refuse to hear a matter where an adequate remedy

at law exists.⁶⁵ The Court of Chancery may only hear matters defined by the common law as equitable in nature, or where jurisdiction has been conferred by statute.⁶⁶ It is well-settled the Court of Chancery "does not have jurisdiction over a controversy unless the plaintiff lacks an adequate remedy at law."⁶⁷ Thus, when determining if equity jurisdiction may be invoked, "the critical jurisdictional question is whether an adequate remedy at law exists."⁶⁸ This Court has held, "the issue for the [Court of Chancery] is not whether another remedy would be preferable to the plaintiffs, but whether the available remedy at law will provide a full, adequate, and complete remedy to the plaintiffs."⁶⁹ "If a litigant can seek a remedy in a law court, or other adequate venue, that would provide full, fair, and practical relief, the Court of Chancery is without subject matter jurisdiction to hear the matter."⁷⁰

Here, as Vice Chancellor Noble correctly held, the true nature of Appellants' claim was to have DBE's Building Permit invalidated.⁷¹ The Court of Chancery further concluded equitable relief was not available because an adequate remedy at law existed -- namely, the BOA appeals process under Title 22, Sections 324, 327, and 328 of the Delaware Code.⁷² It is undisputed an appeal was never heard by the BOA regarding

⁶⁵ A40.

⁶⁶ *El Paso Natural Gas Co. v. Transamerican Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).

⁶⁷ *Id.*; see also 10 Del. C. § 342.

⁶⁸ *Christiana Town Ctr. LLC v. New Castle Cnty.*, 2003 Del. Ch. LEXIS 60, at *11-12 (Del. Ch. June 6, 2003).

⁶⁹ *Chateau Apartments Co. v. Wilmington*, 391 A.2d 205, 207 (Del. 1978).

⁷⁰ *Christiana Town Ctr. LLC*, 2003 Del. Ch. LEXIS 60, at *12.

⁷¹ A41; A184.

⁷² A41. That process is also set forth in the Dewey Beach Municipal Code at sections 185-65(B) and 185-72.

DBE's Building Permit. Hence, under Delaware law, because Appellants failed to avail themselves of an adequate legal remedy, the Court of Chancery lacked jurisdiction over their claims.⁷³

Appellants do not challenge the trial court's determination that the purpose of their Complaint was to invalidate DBE's Building Permit.⁷⁴ Appellants also appear to concede an appeal to the BOA would have provided them an adequate legal remedy.⁷⁵ There is no claim by Appellants that had an appeal been brought before the BOA they would have been unable to obtain full, adequate, and complete relief.⁷⁶ In the absence of such allegations, under the clear mandate of Title 10, Section 342 of the Delaware Code, the Court of Chancery properly held it lacked subject matter jurisdiction and was required to dismiss Appellants' Amended Complaint.

2. Appellants Wrongly Invoked Equitable Jurisdiction Because The Appeals Process Under 22 Del. C. § 321, et seq., Is The Proper Legal Remedy For Challenging A Building Permit.

Appellants could not reasonably contend that had they filed an appeal with the BOA, they would have been unable to obtain adequate relief. "An adequate remedy at law is one which (1) is as complete, practical and as efficient to the ends of justice and its prompt administration as the remedy in equity and (2) is obtainable as of right."⁷⁷ In this case, without question, the BOA appeals process under Title 22, Section 321, et seq., of the Delaware Code was both

⁷³ A42.

⁷⁴ Appellants' Opening Br., pp. 32-35.

⁷⁵ Appellants took an entirely different position in their Combined Answering Brief arguing an appeal to the BOA was not an adequate remedy. A306-A339.

⁷⁶ See Appellants' Opening Br., pp. 32-35.

⁷⁷ *In re The Real Property of Former Wife K*, 297 A.2d 424, 426 (Del. Ch. 1972) (citation omitted) (hereinafter "*In re The Real Property*").

"efficient to the ends of justice and its prompt administration" and "obtainable as of right" by Appellants.

The BOA appeals process codified under 22 Del. C. § 321, *et seq.*, was established by the General Assembly as the appropriate legal remedy for challenging municipal zoning decisions.⁷⁸ Pursuant to section 321, each municipality is directed to appoint a BOA.⁷⁹ The BOA is granted the power, under section 324, to hear appeals by any party aggrieved by a decision of an administrative officer in exercising its duties under the zoning code. Specifically, section 324 states that: "[s]uch appeal shall be taken within a reasonable time as provided by the rules of the board by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof."⁸⁰ The BOA is then required to hold a hearing and may affirm, reverse, or modify the order of the administrative official.⁸¹ Thereafter, the party may file a petition for review of the BOA's decision by the Superior Court within 30-days.⁸² Failure to timely file an appeal will result in the decision of the administrative official and the BOA to be deemed final and binding.⁸³ Finally, a party may also seek appellate review of the Superior Court's decision by the Delaware Supreme Court.⁸⁴

Given this statutory framework, the BOA appeals process certainly

⁷⁸ See *Willis v. City of Rehoboth Beach*, 2005 Del. Super. LEXIS 224, at *23 (Del. Super. June 24, 2005).

⁷⁹ See DEWEY BEACH MUN. CODE § 185-44(A).

⁸⁰ 22 Del. C. § 324; DEWEY BEACH MUN. CODE, § 185-66(A).

⁸¹ 22 Del. C. § 327; DEWEY BEACH MUN. CODE, § 185-65(C).

⁸² 22 Del. C. § 328; DEWEY BEACH MUN. CODE, § 185-72; see also *Jones v. Bd. of Adjustment of Sussex Cnty.*, 2007 Del. Super. LEXIS 27, at *6-8 (Del. Super. Jan. 26, 2007).

⁸³ *Acierno v. New Castle County*, 679 A.2d 455, 459 (Del. 1996).

⁸⁴ Del. Const. art. IV, § 11.

provided an adequate legal remedy to challenge the approval of DBE's Building Permit. Indeed, courts in Delaware have specifically held the BOA appeals process is an adequate legal remedy to challenge the decision of an administrative official.⁸⁵ Accordingly, Vice Chancellor Noble was correct that an adequate legal remedy existed; consequently, the trial court was precluded from exercising jurisdiction.

3. The Court of Chancery Lacked Authority To Excuse Appellants' Failure To Pursue An Adequate Legal Remedy.

Appellants mistakenly suggest on appeal that the Court of Chancery erred by not allowing them to invoke its equitable jurisdiction despite an available legal remedy.⁸⁶ However, the reasons a party fails to seek an available legal remedy are irrelevant to the Court of Chancery's jurisdictional inquiry.⁸⁷ Subject matter jurisdiction is a "crucial" requirement that must be satisfied at all stages of the proceedings.⁸⁸ The Court of Chancery has a duty to ensure equitable jurisdiction exists, and is obligated to dismiss the action at any point it appears the court lacks jurisdiction.⁸⁹ Here, the Court of Chancery was strictly prohibited from exercising subject matter jurisdiction because an adequate legal remedy exists.⁹⁰ It was unnecessary to even consider whether Appellants attempted to file an appeal with the BOA because it was undisputed an adequate remedy

⁸⁵ *Cheswold Aggregates, L.L.C. v. The Town of Cheswold*, 1999 Del. Super. LEXIS 396, at *10-11 (Del. Super. July 2, 1999).

⁸⁶ Appellants' Opening Br., pp. 32-35.

⁸⁷ *Savage v. Savage*, 920 A.2d 403, 408 (Del. Ch. 2006).

⁸⁸ *Medek v. Medek*, 2008 Del. Ch. LEXIS 132, at *3 n.27 (Del. Ch. Sept. 10, 2008).

⁸⁹ *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 77 n.5 (Del. Ch. 1991); Del. Ch. Ct. R. 12(h) (3).

⁹⁰ 10 Del. C. § 342.

existed and was never invoked.⁹¹ Furthermore, even if Appellants' complaints were somehow relevant, Appellants' suggestions of bad faith by the Town Manager are completely false.⁹² To the extent a hearing with the BOA on DBE's permit was not held, it was purely the result of Appellants' own dilatory conduct and procedural missteps.

Appellants attempt to re-characterize the subject of the March 25, 2011 request as seeking an appeal of DBE's Building Permit.⁹³ However, the form and attached memo make clear the subject of the appeal was the Town Commissioners' approval of the MAR and issues not involving the decision of an "administrative official."⁹⁴ Certainly, had any of the parties sought to appeal the Building Inspector's approval of DBE's Building Permit, they would have simply stated as such in either the form or lengthy 14-page memo.⁹⁵ Indeed, this fact was re-emphasized in multiple letters submitted by Ms. Claybrook on May 3, 2011 and June 6, 2011.⁹⁶ Tellingly, the second request submitted on May 27, 2011 mentioned nothing about DBE's permit.⁹⁷ Appellants' failure to avail themselves of the BOA appeals process prevents them from now complaining they were wrongly denied relief.⁹⁸

⁹¹ A41.

⁹² See *Phillips v. Bd. of Educ.*, 330 A.2d 151, 154 (Del. Super. 1974).

⁹³ Appellants' Opening Br., pp. 32-33.

⁹⁴ A608-A623; DEWEY BEACH MUN. CODE, § 185-66.

⁹⁵ *Id.* Appellants quote out-of-context a portion of the memo as evidencing an intent to challenge the Building Inspector's approval of DBE's permit. Appellants' Opening Br., p. 32 n.20. Yet, the memorandum challenges the supposed grant of the building permit to DBE "by the MAR," and not the Building Inspector. A611. In fact, the paragraph goes on to claim the Building Inspector was not involved in issuing the permit at all. *Id.*

⁹⁶ B040-B043.

⁹⁷ A625-A626.

⁹⁸ *In re Real Property*, 297 A.2d at 425 ("[Where] a litigant fails to avail himself of a remedy provided by law and is subsequently barred

IV. THE COURT OF CHANCERY CORRECTLY REJECTED APPELLANTS' CLAIMS THAT THE TOWN MANAGER WRONGFULLY INTERFERED WITH THE BOARD OF ADJUSTMENT APPEALS PROCESS BECAUSE WRIT OF MANDAMUS RELIEF WAS ANOTHER ADEQUATE LEGAL REMEDY WHICH APPELLANTS FAILED TO PURSUE.

A. Question Presented

Whether the Court of Chancery correctly applied Delaware law in rejecting Appellants' complaints the Town Manager prevented Appellants from filing a BOA appeal regarding DBE's Building Permit, where Appellants also failed to avail themselves of Writ of Mandamus relief.

B. Scope of Review

This Honorable Court's standard of review is set forth above in section I, Subsection B of Appellees' Answering Brief.

C. Merits of Argument

The Court of Chancery correctly held, had Appellants believed the rejection of their request for BOA hearing was improper, an adequate legal remedy also existed in the form of a Writ of Mandamus.⁹⁹ Appellants, again, failed to pursue this remedy. Appellants raise a new argument on appeal that *mandamus* was not an "adequate" or "available" remedy.¹⁰⁰ This theory should be rejected for multiple reasons. First, Appellants never raised any argument regarding the inadequacy of *mandamus* relief below, and are precluded from asserting it now under Supreme Court Rule 8. Second, the Court has no reason to excuse Appellants' waiver because they had multiple opportunities to raise this issue, and their complaints of alleged error do not meet the standard of "plain error." Finally, even if the Court chooses to

from pursuing that remedy because of his own lack of diligence, he cannot then rely on the absence of remedy at law as a basis for equitable jurisdiction.")

⁹⁹ A42.

¹⁰⁰ Appellants' Answering Br., p. 34.

hear Appellants' argument, it also should be rejected on its merits. The trial court correctly held *mandamus* was an available legal remedy to compel a BOA hearing, if arbitrarily refused. The record is clear that the Building Inspector and BOA were aware of the request for a hearing, and involved in the decision to reject the request. The Delaware and Town Codes assign the Building Inspector the "ministerial duty" of forwarding a hearing request to the BOA. The BOA also has a mandatory duty to hold a hearing where a request is timely and properly submitted. Hence, the Superior Court certainly had the power to compel a BOA hearing on DBE's Building Permit.

1. The Court Should Refuse To Consider Appellants' Arguments Regarding The Inadequacy Of Writ Of Mandamus Relief Under Rule 8 Because Appellants Failed To Raise This Issue Below.

Pursuant to Supreme Court Rule 8, this Court should not consider Appellants' argument because they failed to raise the issue below. Supreme Court Rule 8 states that "[o]nly questions fairly presented to the trial court may be presented for review" ¹⁰¹ This applies not only to specific objections, but also to the arguments supporting those objections. ¹⁰² Here, Appellants failed to raise any argument that *mandamus* was not an "available" or "adequate" remedy in the proceedings below. Appellants' Combined Answering Brief failed to raise this argument. ¹⁰³ Appellants also did not mention this issue in their Motion for Reargument. ¹⁰⁴ Accordingly, pursuant to Rule 8, Appellants may not present this argument for the first time on appeal.

¹⁰¹ Del. Sup. Ct. R. 8.

¹⁰² *Russell v. State*, 5 A.3d 622, 627 (Del. 2010).

¹⁰³ A336-A339.

¹⁰⁴ A577-A584.

2. The Court Should Not Excuse Appellants' Waiver Because Their Complaints Of Error Fail To Meet The Exacting Standard Necessary To Qualify As "Plain Error."

This Court may choose to consider a question not fairly presented below if it determines "the trial court committed plain error requiring review in the interests of justice."¹⁰⁵ In determining whether to excuse waiver, this Court applies the "plain error" standard of review and must find the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.'"¹⁰⁶ The "plain error" doctrine is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.'"¹⁰⁷

Here, Appellants' complained of error regarding *mandamus* relief does not meet the standard of "plain error." The Court of Chancery's decision that *mandamus* was an available remedy could not be considered a "material defect[] . . . apparent on the face of the record."¹⁰⁸ To the contrary, the trial court's decision was a correct application of Delaware law. Appellants also had the opportunity to raise their *mandamus* argument below, and failed to do so. Accordingly, the Court's refusal to consider this issue will not "jeopardize the fairness and integrity of the trial process."¹⁰⁹ Hence, the Court should refuse to consider Appellants' argument on appeal.

¹⁰⁵ *Foreman v. State*, 994 A.2d 744 (Del. 2010); *Russell*, 5 A.3d at 627.

¹⁰⁶ *Foreman*, 994 A.2d at 744 (citations omitted).

¹⁰⁷ *Id.* (citations omitted).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

3. Assuming Arguendo The Court Excuses Appellants' Waiver, The Court Of Chancery Correctly Held A Writ Of Mandamus Was Another Available Legal Remedy Appellants Failed To Pursue.

Even if the Court chooses to excuse Appellants' waiver, the Court of Chancery was correct in finding it lacked subject matter jurisdiction because of the availability of *mandamus* relief. Appellants argue on appeal that *mandamus* was not an "adequate" or "available" remedy because: "[h]ere, neither the Town's Code nor 22 Del. C. § 324 assigns any duty to the Town's Manager regarding the BOA."¹¹⁰ **Importantly, Appellants adopted the opposite position below, arguing that the Town Manager's task of forwarding their request for a BOA hearing was, indeed, a non-discretionary, "ministerial duty."**¹¹¹ Appellants now try to convince the Court to focus solely on the fact the Town Manager responded to the hearing request to show the Court of Chancery somehow erred. This overly technical argument is meritless.

A Writ of Mandamus may be issued by the Superior Court to a public official or agency to compel the performance of a duty to which the petitioner has established a clear legal right.¹¹² The Superior Court has the power to issue *mandamus* to compel the performance of a purely "ministerial" or "administrative" function, not involving the exercise of discretion.¹¹³ The petitioner must also show no other adequate remedy is available, and the official arbitrarily failed or refused to perform a statutorily defined duty.¹¹⁴

Here, the relevant statutory authority makes clear the task of

¹¹⁰ Appellants' Opening Br., pp. 34.

¹¹¹ B040-B043.

¹¹² 10 Del. C. § 564; *Clough v. State*, 686 A.2d 158, 159 (Del. 1996); *Schagrin Gas Co. v. Evans*, 418 A.2d 997 (Del. 1980).

¹¹³ *Remedio v. City of Newark*, 337 A.2d 317 (Del. 1975).

¹¹⁴ *In re Delta Eta Corp.*, 970 A.2d 1110 (Del. 2009).

forwarding a request for BOA hearing, and holding a hearing is a non-discretionary, "ministerial duty." The Delaware Code states that an appeal to the BOA "shall" be taken "by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof."¹¹⁵ Thereafter, "[t]he officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken."¹¹⁶ Pursuant to section 326, the BOA "shall" then fix a reasonable time for a hearing, give public notice, and decide the same within a reasonable time.

In relevant part, the Town Code under § 71-3(E) designates the Building Inspector as the official responsible for the administration of Building Permits.¹¹⁷ Section 73-1(F) further states that: "[an] [a]ppeal from a decision of an inspector shall be to the Board of Adjustment." The Town's Hearing Request form also requires the Building Inspector to forward a hearing request to the BOA.¹¹⁸ Upon receipt of a notice of appeal, the BOA is required to schedule a hearing, provide public notice, and decide the matter within 30-days of the hearing.¹¹⁹ Nowhere in the Delaware Code or Town Code is the Building Inspector or the BOA afforded discretion to refuse a request for a hearing to challenge a building permit. If the request for hearing is timely and properly filed in accordance with 22 *Del. C.* § 324 and Town Code § 185-66, then it must be heard by the BOA.

¹¹⁵ 22 *Del. C.* § 324.

¹¹⁶ *Id.*

¹¹⁷ TOWN OF DEWEY BEACH CODE, § 71-3(E).

¹¹⁸ *See, e.g.,* A606.

¹¹⁹ DEWEY BEACH MUN. CODE § 185-65(C).

In the instant matter, the March 25, 2011 hearing request was addressed to the "Town of Dewey Beach/Bill Mears, Building Official/Attention: Board of Adjustment."¹²⁰ Because the request purported to challenge a resolution of the Town Commissioners, and involved the administrative affairs of the Town, the Town Manager properly responded, by letter of May 2, 2011, on behalf of the Commissioners, the Building Official, and Chairman of the BOA.¹²¹ The Town Manager advised that the request was rejected because it did not challenge an "administrative decision" under § 185-66.

The record shows the Building Inspector and the BOA were well aware of the attempts by Ms. Claybrook and her group to seek an appeal of the February 26, 2011 Resolution. The Town Manager was also clearly acting with their consent and authority in rejecting the March 25, 2011 hearing request. This is evidenced by the fact the May 2, 2011 letter was copied to the Building Official and the BOA's Chairman.¹²² The May 2, 2011 letter also states: "the Chairman of the Board of Adjustment, Mr. Leonard Read, was also consulted" regarding the decision not to forward the hearing request to the BOA.¹²³

Given these facts, the Court of Chancery was correct that, even if accepting Appellants' allegations as true, it remained Appellants

¹²⁰ A607.

¹²¹ Section 16 of the Town Charter charges the Town Manager with the duty to supervise the administration of the affairs of the Town and report to the Town Commissioners. TOWN CHARTER OF THE TOWN OF DEWEY BEACH, § 16(c). The Town Manager is also responsible for the administration of all provisions of the Charter and resolutions of the Town Commission where not otherwise provided. *Id.* at § 16(f).

¹²² A625-A626.

¹²³ A625-A626. The second request for hearing on May 27, 2011 was also forwarded to the Building Official and BOA. A628. The June 3, 2011 letter from the Town Manager rejecting the second request was also copied to the Building Official and BOA. A634-A636.

could have sought a Writ of Mandamus to compel a BOA hearing.¹²⁴ Regardless of which Town Official was named, the Superior Court would have had authority to issue *mandamus* and compel the BOA to hold a hearing on DBE's Building Permit, if Appellants had timely filed a petition and proven the request was arbitrarily refused.

As admitted in Ms. Claybrook's June 6, 2011 letter, Appellants chose not to pursue this remedy because, at the time, they supposedly did not wish to subject the Town to further litigation.¹²⁵ Appellants cannot now complain on appeal that the Court of Chancery erred by refusing to hear their claim. Accordingly, the Court of Chancery was correct in finding a Writ of Mandamus was yet another available legal remedy to Appellants, and therefore, the trial court was precluded from exercising subject matter jurisdiction.

¹²⁴ A42.

¹²⁵ B043.

V. APPELLANTS FAILED TO DEMONSTRATE ANY UNIQUE OR PARTICULARIZED INJURY TO HAVE STANDING TO BRING SUIT TO CHALLENGE THE APPROVAL OF THE MAR, DBE'S PLAN AND BUILDING PERMIT.

A. Question Presented

Whether Appellants' claims were properly dismissed by the Court of Chancery, even if equity jurisdiction existed, where Appellants also failed to establish any unique or particularized injury and/or due process violation to have standing under Delaware law.

B. Scope of Review

Standing is a "threshold question" that must be resolved before a court may exercise its judicial powers.¹²⁶ Appellants bear the burden of showing that they have standing to bring suit.¹²⁷ Where standing is closely related to the merits of the case, the issue is typically determined under Rule 12(b)(6).¹²⁸ When reviewing a motion to dismiss under Rule 12(b)(6), this Court exercises *de novo* review.¹²⁹

C. Merits of Argument

While the Court of Chancery did not reach this issue, the Amended Complaint was also due to be dismissed for lack of standing. Even if accepted as true, and taking all reasonable inferences in their favor, Appellants merely alleged generalized, non-unique grievances, which cannot form a basis for standing to bring suit under Delaware law. Appellants also lacked standing because they failed to allege a procedural due process error.

¹²⁶ *Barry v. Town of Dewey Beach*, 2006 Del. Ch. LEXIS 115, at *17 (Del. Ch. 2006)(citing *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003)).

¹²⁷ *Id.*

¹²⁸ *Appriva S'holder Litig. Co., LLC v. Appriva Med., Inc.*, 937 A.2d 1275, 1285 (Del. 2007).

¹²⁹ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

1. Appellants Lack Standing Because They Failed to Allege a Concrete and Particularized "Injury-In-Fact"

Absent a statutory grant of standing, a party must show that its interest in a controversy is distinguishable from the interests of the general public or other members of the class.¹³⁰ Standing is established where: (1) a plaintiff "suffered a concrete and particularized injury-in-fact and the interest it seeks to protect is [] within the zone of interest to be protected or regulated;" (2) "there is an actual connection between the injury and conduct;" and (3) the injury will likely be redressed by a favorable decision.¹³¹

While Appellants claimed "unique, concrete, and particularized injuries," the Amended Complaint failed to allege any facts to support their bald legal conclusions.¹³² Appellants alleged they would suffer: "unnecessary increases in vehicular and pedestrian congestion"; that "the Town's . . . beaches will suffer from increased use and decreased privacy"; "loss of the community character, aesthetic value and real value of their property -- derived from the value placed upon a small resort community"; and that "[p]art of the value of [their] property and the Town itself is the aesthetic property value and community character associated with a small beach town" ¹³³

None of these alleged harms establish unique or particularized injuries to have standing. First, all persons residing in the Town and surrounding area could claim to suffer from increased congestion on

¹³⁰ *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

¹³¹ *Del. Solid Waste Auth. v. E. Shore Env., Inc.*, 2002 Del. Ch. LEXIS 37, at *4-5 (Del. Ch. Apr. 12, 2002) (internal quotations omitted) (citations omitted).

¹³² A161, A181-A183.

¹³³ A180-A182.

the roadways and decreased privacy on the beaches. Second, all property owners in the Town could claim a general interest in the community character and aesthetic value of the Town. Third, Appellants themselves alleged the community character and aesthetic value of the beach community is derived from the Town, as a whole, and not the Ruddertowne area. As demonstrated by the authorities cited by the Town below, Delaware courts have generally rejected similar vague and generalized grievances by community members as a basis for standing.¹³⁴

Appellants below cited in rebuttal vague allegations that "some of [the Appellants] . . . live and operate businesses on parcels immediately adjacent to the proposed DBE/RRI project."¹³⁵ However, unlike in *Dover Historical Soc'y*, Appellants failed to allege a similar pecuniary interest in the aesthetic value of the Ruddertowne area. Nor did they allege the value of their property was uniquely tied to the height restriction or other zoning ordinances.¹³⁶ To the

¹³⁴ A240-A247. Compare *Barry*, 2006 Del. Ch. LEXIS 115, at *9-10, 21-23, with *Dover Historical Soc'y*, 838 A.2d at 1113-16. In *Barry*, the court found similar allegations constituted "nothing more than a bald statement of interest of the sort which earlier opinions have unremittingly chastised as insufficient," and therefore, plaintiffs failed to identify "concrete and particularized injury" to have standing. *Barry*, 2006 Del. Ch. LEXIS 115, at *9-10, 21-23. Conversely, in *Dover Historical Society*, this Court held property owners in a Historic District had standing to challenge the demolition of several historic buildings and construction of a high-rise office building. *Dover Historical Soc'y*, 838 A.2d at 114. The Court noted the Town Code and historic guidelines were specially intended to preserve the district's "aesthetic standards". *Id.* at 1113. The Court also found the property owners purchased historical buildings with value tied directly to the preservation of the district's historical character. *Id.* at 1116.

¹³⁵ A180, ¶ 90.

¹³⁶ See *Concord Towers v. McIntosh Inn*, 1997 Del. Ch. LEXIS 115, at *8-9 (Del. Ch. July 22, 1997) (citation omitted) (finding standing could not exist based on a zoning code, which was not enacted for the landowners' "special benefit.")

extent any Appellants actually live adjacent to the Ruddertowne area, they also lacked standing because they could not illustrate a unique injury. Appellants also failed to demonstrate how the allegedly non-compliant construction would affect them differently than compliant construction.¹³⁷ For these reasons, Appellants failed to demonstrate a concrete and particularized injury-in-fact to have standing.

2. Appellants Lack Standing Because They Failed To Allege a Procedural Due Process Error.

Appellants also lacked standing because the Amended Complaint failed to allege a procedural due process error. Appellants were required to demonstrate an error in town procedure which denied them a meaningful opportunity to participate in the challenged process to have standing.¹³⁸ Further, standing only exists if the procedural error constitutes an injury-in-fact.¹³⁹ Here, Appellants had more than meaningful notice and opportunity to participate in the multiple public hearings, workshops, and process of the Town Commissioners' approval of the Resolution and MAR. As argued below, applying the analysis established by the U.S. Supreme Court in *Matthews v. Eldridge*,¹⁴⁰ any due process interest Appellants possessed with regard

¹³⁷ Appellants relied upon *Brohawn v. Town of Laurel*, 2009 Del. Ch. LEXIS 82 (Del. Ch. May 13, 2009), and *O'Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 10 (Del. Ch. Jan. 18, 2006) below; however, neither decision held an adjacent property owner will always be afforded standing. *Brohawn*, 2009 Del. Ch. LEXIS 82; *O'Neill*, 2006 Del. Ch. LEXIS 10. Instead, the finding of standing was "context-specific". Unlike here, each case found the proposed rezoning was inconsistent with a previously enacted Comprehensive Plan, and would drastically alter the character of property. *Brohawn*, 2009 Del. Ch. LEXIS 82, at *14-18; *O'Neill*, 2006 Del. Ch. LEXIS 10, at *149-51.

¹³⁸ *The Citizens Coalition, Inc. v. Cnty. Council of Sussex County*, 1999 Del. Ch. LEXIS 155, at *16 (Del. Ch. 1999).

¹³⁹ *Barry*, 2006 Del. Ch. LEXIS 115, at *26.

¹⁴⁰ *Matthews v. Eldridge*, 424 U.S. 319, 334 (U.S. 1976).

to the Ruddertowne Project was adequately safeguarded by having an opportunity to be heard "at a meaningful time and in a meaningful manner."¹⁴¹ Delaware courts have rejected similar allegations of due process violations, and found standing did not exist.¹⁴² Additionally, the Town Manager did not wrongfully interfere with Appellants' attempts to file an appeal with the BOA. The Town Manager acted within her authority under the Town Charter in responding to the hearing requests by Ms. Claybrook and the other property owners. None of Appellants' other allegations evidence any intent to "interfere" with their attempts to seek a BOA hearing.

For this additional reason, Appellants lacked standing to bring this lawsuit, and the Amended Complaint was required to be dismissed as a matter of law.

¹⁴¹ *Id.* at 333. In *Matthews*, the Court recognized that the "requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333. In fact, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citation omitted). See also *Bell v. Burson*, 402 U.S. 535, 540 (1971). See also *Bell v. Burson*, 402 U.S. 535, 540 (1971).

¹⁴² See *Barry*, 2006 Del. Ch. LEXIS 115, at *20-29.

CONCLUSION

For the foregoing reasons, Appellees, Town of Dewey Beach, et al., respectfully submit that the Court of Chancery's July 31, 2012 Order dismissing Appellants' Amended Complaint was correct and should be affirmed. The Court of Chancery correctly applied Delaware law in dismissing the Amended Complaint for lack of subject matter jurisdiction because Appellants' claims were time-barred by the Statute of Repose, under 10 DEL. C. § 8126, and they failed to avail themselves of an adequate legal remedy. Appellants' arguments on appeal amount to nothing more than a desperate effort to find some reason after-the-fact why they should receive a "second-bite of the apple" and continue litigating this dispute. Appellants have presented no legitimate basis to find an error of law was committed. Therefore, this Court should respectfully affirm the trial court's decision, and bring this matter to a close.