



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY MURRAY, et. al	)	
	)	No.: 480, 2012
Plaintiffs below/Appellants,	)	
	)	
v.	)	On Appeal from the
	)	Court of Chancery
TOWN OF DEWEY BEACH, et. al	)	C.A. No. 6785 - VCN
	)	
Defendants below/Appellees.	)	

ANSWERING BRIEF OF DEFENDANTS BELOW/APPELLEES
DEWEY BEACH ENTERPRISES, INC. AND RUDDERTOWNE REDEVELOPMENT, INC.

Dated: November 29, 2012

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TABLE OF CONTENTS

	Page
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	3
STATEMENT OF FACTS.....	4
ARGUMENT.....	23
I. PLAINTIFFS' CLAIMS RELATED TO THE APPROVAL OF THE MAR ARE BARRED BY 10 DEL. C. § 8126	23
A. Question Presented.....	23
B. Scope of Review.....	23
C. Merits of Argument.....	23
1. The Resolution of the Town Council Falls Within § 8126	24
2. Nothing Was Upended by the Opinion Below; Rather, the Plaintiffs Are Upending Established Delaware Law by Attempting to Introduce a New Theory on Appeal	26
II. THE COURT OF CHANCERY DID NOT ERR IN ITS APPLICATION OF 10 DEL. C. § 8126(B) TO THE MAR'S PLAN COMPONENT	29
A. Question Presented.....	29
B. Scope of Review.....	29
C. Merits of Argument.....	29
1. The Court Below Correctly Held That Because Approval Of The Record Plat Plan Was Purported To Be Undertaken In Accordance With the Comprehensive Development Plan, The Record Plat Plan Approval Triggered 10 Del. C. § 8126(b)	29
2. The 60-day Statute of Repose of Both 8126(a) and (b) Began to Run on March 1, 2011 When the Commissioners' February 26, 2011 Approval of the Resolution was Published	35

TABLE OF CONTENTS
(continued)

	Page
III. THE LOWER COURT CORRECTLY HELD THAT THE AVAILABILITY OF AN ADEQUATE REMEDY AT LAW PRECLUDED EQUITY JURISDICTION OVER PLAINTIFFS' CHALLENGE TO RUDDERTOWNE'S APPROVAL	43
A. Question Presented.....	43
B. Scope of Review.....	43
C. Merits of Argument.....	43

TABLE OF CITATIONS

	Page(s)
CASES	
<i>In re 244.5 Acres of Land,</i> 808 A.2d 753 (Del. 2002)	11, 31
<i>Admiral Holding v. Town of Bowers,</i> 2004 WL 2744581 (Del. Super. Oct. 18, 2004)	4
<i>Bay Colony Ltd. P'ship v. Cty Council,</i> 1984 WL 159382 (Del. Ch. Feb. 1, 1984)	25
<i>Cape Henlopen Sch. Dist. v. Del. Interscholastic Athletic Assoc.,</i> 2009 WL 388944 (Del. Super. Jan. 29, 2009)	7
<i>Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.,</i> 489 A.2d 413 (Del. 1984)	23, 24
<i>Council of S. Bethany v. Sandpiper Dev. Corp.,</i> 1986 WL 13707 (Del. Ch. Dec. 8, 1986)	24, 28, 30
<i>Darby v. New Castle Gunning Bedford Educ. Assoc.,</i> 336 A.2d 209 (Del. 1975)	45, 46
<i>Dewey Beach Enters., Inc. v. Bd. of Adjustment,</i> 1 A.3d 305 (Del. 2010)	8
<i>Dewey Beach Enters., Inc. v. Bd. of Adjustment,</i> 2009 WL 2365676 (Del. Super. July 30, 2009)	8
<i>Dewey Beach Enters., Inc. v. Town of Dewey Beach,</i> 2010 WL 3023395 (D. Del. July 30, 2010)	9
<i>Elcorta v. Summit Aviation,</i> 528 A.2d 1199 (Del. Super. 1987)	47
<i>Floyd v. Mayor of Baltimore,</i> 946 A.2d 15 (Md. Ct. Spec. App. 2008), <i>aff'd</i> , 966 A.2d 900 (Md. 2009)	47
<i>Green v. County Council,</i> 415 A.2d 481 (Del. Ch. 1980)	28
<i>Haberkorn v. Sears, Roebuck, Co.,</i> 427 P.2d 378 (Ariz. Ct. App. 1967)	47
<i>People v. Krueger,</i> 495 N.E.2d 993 (Ill. App. Ct. 1986)	47

<i>People v. SD Dept. of Soc. Servs.,</i> 799 N.W.2d 408 (S.D. 2011)	47
<i>Russell v. State,</i> 5 A.3d 622 (Del. 2010)	27, 43, 44, 45
<i>Sanders v. Sanders,</i> 570 A.2d 1189 (Del. 1990)	43
<i>Savage v. Savage,</i> 920 A.2d 403 (Del. Ch. 2006)	50
<i>Sterling Prop. Holdings, Inc. v. New Castle County,</i> 2004 WL 1087366 (Del. Ch. May 6, 2006)	23, 24
<i>Torres v. Oakland Scavenger Co.,</i> 487 U.S. 312 (1988)	47
<i>Williamson v. State,</i> 981 A.2d 1174 (TABLE) (Del. 2009)	44, 45
<i>Worldwide Salvage, Inc. v. Env'tl. Appeals Bd.,</i> 1986 WL 3650 (Del. Super. Jan. 30, 1986)	46

STATUTES, RULES & REGULATIONS

10 Del. C. § 342	49
10 Del. C. § 8126	<i>passim</i>
10 Del. C. § 8126(a)	24, 25, 35
10 Del. C. § 8126(b)	3, 29, 30, 31
22 Del. C. § 324	16, 43, 48
22 Del. C. § 328	46
22 Del. C. § 702	5
22 Del. C. § 702(d)	29, 34
Dewey Beach Mun. Code § 1-16	6
Dewey Beach Mun. Code §§ 71-3(F)	16, 48
Dewey Beach Mun. Code § 185-25(D)	32
Dewey Beach Mun. Code § 185-65	16, 32, 48
Dewey Beach Mun. Code § 185-66	16, 48

Dewey Beach Mun. Code § 185-72	33
Del. Ct. Ch. R. 12(b) (1)	23, 29
Del. Ct. Ch. R. 12(h) (3)	24
Sup. Ct. R. 8	<i>passim</i>

NATURE OF PROCEEDINGS

Plaintiffs Below/Appellants filed a Complaint with the Court of Chancery on August 15, 2011 seeking to invalidate and enjoin the following: (i) the Town Commissioners' approval of a Mutual Agreement and Release ("MAR"); (ii) the Town Commissioners' approval of a Record Plat Plan; (iii) the Building Inspector's approval of the Building Permit; and (iv) the Town Manager's administrative rejection of two purported appeals to the Board of Adjustment.

On September 14, 2011, Defendants Below/Appellees Dewey Beach Enterprises, Inc. and Ruddertowne Redevelopment, Inc. (collectively "DBE") moved to dismiss the Complaint. The remainder of the defendants below/appellees (collectively "the Town") also moved to dismiss the Complaint. The Court of Chancery ordered a briefing schedule on the motions to dismiss. On September 21, 2011, both DBE and the Town filed opening briefs arguing that the Court of Chancery lacked subject matter jurisdiction because: 1) Plaintiffs lacked standing to bring their claims; 2) Plaintiffs' claims attacking the Town Commissioners' approval of the MAR and the Record Plat Plan were time-barred and extinguished by 10 Del. C. § 8126; 3) Plaintiffs had an adequate remedy at law, which they failed to pursue, to challenge the approval and issuance of the Building Permit; and 4) Plaintiffs lacked standing to challenge the Town Manager's administrative rejection of the two purported appeals because Plaintiffs were not parties to the appeals, and, even if they had been, the appeals were improperly filed and an adequate remedy at law existed, but was not timely pursued.

On October 13, 2011, the day their answering brief was due, instead of filing their answering brief, Plaintiffs filed an Amended Complaint. The Amended Complaint requested the same relief as the Complaint, except that it omitted any request for relief related to the Town Manager's actions.

Because the Plaintiffs' Amended Complaint did not remedy the Court of Chancery's lack of jurisdiction, DBE and the Town again both moved on October 31, 2011 to dismiss Plaintiffs' Amended Complaint. The Court of Chancery ordered a briefing schedule on the motions to dismiss. On November 16, 2011, both DBE and the Town filed opening briefs. Plaintiffs filed a combined answering brief on December 13, 2011. Subsequently, both DBE and the Town filed reply briefs.

The Court of Chancery heard Oral Argument on the second Motion to Dismiss on February 27, 2012. On May 31, 2012, the Court of Chancery issued its Memorandum Opinion, granting the motions to dismiss on the ground of lack of subject matter jurisdiction. Plaintiffs filed a motion for reargument on June 7, 2012, which the Court of Chancery denied in a second Memorandum Opinion dated July 31, 2012, finding that all arguments presented by Plaintiffs in support of their motion were being raised for the first time. On August 30, 2012, Plaintiffs filed a Notice of Appeal to this Court. The Court issued a briefing schedule, and Plaintiffs filed their opening brief on October 15, 2012. On October 31, 2012, DBE filed a motion to affirm, which the Court denied on November 5, 2012. This is DBE's Answering Brief on appeal.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly applied 10 *Del. C.* § 8126, a statute of repose, to the Resolution (which included the MAR, Record Plat Plan, and Building Permit) and correctly held that Plaintiffs' failure to appeal the approval of these documents within the 60-day period provided by that statute deprived the court of jurisdiction.

2. Denied. The Court of Chancery correctly applied 10 *Del. C.* § 8126(b) to the Record Plat Plan, correctly held that the 60-day statute of repose period contained in that statute began to run on March 1, 2011, and correctly held that Plaintiffs' failure to appeal the approval of this document within 60 days following March 1, 2011 deprived the court of jurisdiction.

3. Denied. The Court of Chancery correctly held that it did not have jurisdiction to hear Plaintiffs' claims because Plaintiffs had an adequate remedy at law in the form of a *writ of mandamus* that they failed to pursue. In addition, none of the Plaintiffs were a party to the two attempted appeals by Ms. Claybrook to the Board of Adjustment.

4. DBE incorporates by reference as if fully set forth herein the arguments and authorities set forth in Section IV of the Town's Answering Brief regarding standing.

5. This case has intricate facts (18 pages herein), but is not difficult in legal resolution. There is simply a large pre-answer record.

STATEMENT OF FACTS

After more than four years of extensive public hearings and public input into the redevelopment of Ruddertowne, an existing commercial property located in the core of Dewey Beach, the Town of Dewey Beach Commissioners (also known as the Town Council) approved the project on February 26, 2011. This redevelopment project has been the subject of perhaps more public hearings, public workshops and press coverage than any project in Sussex County's history.

By Resolution, the Town approved Ruddertowne for redevelopment because the property was already zoned for commercial and residential uses (i.e., mixed-use type development) and the Town's Comprehensive Development Plan specifically provided a "ratification" mechanism for the future redevelopment of Ruddertowne for mixed-use purposes.

To understand the long and costly four-year journey to obtain the February 26, 2011 approval for Ruddertowne's redevelopment, it is necessary to start at the beginning - the adoption of Ordinance #587 of Dewey Beach's Comprehensive Development Plan - a plan the Town adopted into law that specifically sought the redevelopment of Ruddertowne for the betterment of the Town of Dewey Beach, including its residents and visitors. Indeed, the Comprehensive Plan was adopted into law in order to, *inter alia*, "encourage a pattern of appropriate and sustainable economic development that meets the needs of residents, property owners, business owners, and visitors." C14.

Town of Dewey Beach Comprehensive Development Plan Ordinance #587

On January 13, 2007, with the guidance and assistance of the University of Delaware Institute for Public Administration and legal

counsel, the Town Commissioners adopted into law Ordinance #587, which constituted the Town's very first Comprehensive Development Plan (the "Town Comp Plan").¹ C2-63. The public's extensive participation in the creation of the Town Comp Plan lasted more than two years. C13. The public-participation process was aided by periodic updates to the Town's website and significant local press coverage. *Id.* Following its adoption into law and certification by the State of Delaware Office of Management and Budget, State Planning and Coordination, in 2007, the Town Comp Plan carried the "force of law" requiring that "no development shall be permitted [in Dewey Beach] except as consistent with the plan." 22 Del. C. § 702.

Among other things, the Town Comp Plan identified a "central area" of the Town for rezoning to a new zoning district called "Resort Business-1 (RB-1)." The Town Comp Plan describes the new RB-1 district as "the most intensely developed, most dense, zone" in the Town. C30. It is undisputed that Ruddertowne, owned by Defendant DBE, is located in this RB-1 zoning district. C62.

Subject to certain conditions, the Town Comp Plan prescribed "relaxed bulk standards (setbacks, lot coverage, etc.)" for contiguous tracts of land in the RB-1 district consisting of at least 80,000 square feet for mixed use projects permitted as an "alternate method of development." C30. It is undisputed that the Ruddertowne property is at least 80,000 square feet. In addition, the phrase "bulk

¹ The Town Comp Plan was readopted by Ordinance #597 on or about June 29, 2007.

standards" includes building height.² Thus, the Ruddertowne property satisfied the zoning requirements. C64.

Further, the Town Comp Plan specifically provided that Ruddertowne would be shaped for future development by a Town appointed "working group," also known as the "Ruddertowne Architectural Committee" or "RAC." C29-30. Further, the Town Comp Plan, which was adopted into law by Ordinance #587, specifically required "ratification" by the Town Commissioners before any development of Ruddertowne would be considered "consistent" with the Town Comp Plan and legally approvable by the Town Commission. *Id.*

The Ruddertowne Architectural Committee

RAC³ was charged by the Town Commissioners with saving Ruddertowne and its longstanding commercial uses from being demolished and replaced with new townhomes. C66. On June 29, 2007, RAC, after three public hearings and significant public input, specifically on DBE's proposal, recommended that Ruddertowne be redeveloped as a mixed

² See Dewey Beach Mun. Code § 1-16 (defining "bulk" as "[a] term used in this Code to describe the *size and shape* of a building or structure and its relationship to other buildings, to the lot area for a building, density and to open spaces and yards"). C745-57.

³ Plaintiffs' argument in their opening brief that the RAC was somehow not the "working group" contemplated by the Town Comp Plan was not made by Plaintiffs in the court below, and should now be excluded pursuant to Sup. Ct. R. 8. Indeed, the Town Comp Plan, adopted into law by Town ordinance, specifically provided that "Dewey Beach should continue to negotiate with Highway One in accordance with this Comprehensive Plan". Highway One was the contact for DBE and the Ruddertowne property while the Town Comp Plan was being drafted by Town officials. The Town's Comprehensive Development specifically recognized that the Ruddertowne plans filed before the adoption of the Plan (C1041), which would have resulted in the demolition of all commercial uses and the construction of only townhomes, "[c]ould be considered inconsistent with this Plan." However, the Plan made clear that "[t]he working group's final agreement upon ratification by the Commissioners shall be considered consistent with the Plan."

use project at 68 feet in height, which RAC found consistent with the "relaxed bulk standards" set forth in the Town Comp Plan for the RB-1 zoning district. C68-77. RAC's recommendation was based upon a 68-foot concept plan for the redevelopment of Ruddertowne as a mixed use project including a hotel. C79-80.

DBE Stock Purchase

After the Town Comp Plan was adopted by Town Ordinance with "relaxed bulk standards" permitting greater building height in the RB-1 zoning district, and following RAC's June 29, 2007 recommendation for Ruddertowne to be redeveloped as a mixed use (i.e., commercial and residential) project at 68 feet in height consistent with the Town Comp Plan, DBE's stock was purchased on October 31, 2007 for 12.5 million dollars by Ruddertowne Redevelopment, Inc. ("RRI"). C82. RRI's stock is held by three individuals. These are the same three principals of DBE today.

Dewey Beach Election

Dewey Beach Town Commissioner elections are held every year, and candidates are not required to be Delaware residents. All Dewey Beach property owners may vote in each election, regardless of whether they are Delaware residents. A Town election was held on September 15, 2007, after the official RAC recommendation, and two new members were elected to the Town Commission. C84-85. Unfortunately, shortly following this particular election cycle, things began to adversely change for DBE and the Ruddertowne project, despite the adoption into law of the Town Comp Plan and RAC's strong support of the redevelopment of Ruddertowne.

DBE's Building Permit Applications & Litigation

On November 8, 2007, DBE submitted a redevelopment plan and building permit application to the Town of Dewey Beach to construct a 35 foot structure at Ruddertowne (the "Phase I Plan & Building Permit Application"). C87. On April 4, 2008, DBE submitted a second redevelopment plan and building permit application to construct a phase II and phase III at Ruddertowne - phase II was proposed as 48 foot building and phase III was proposed at 68 foot building consistent with the RAC recommendation ("Phase II & III Plan & Building Permit Application"). C90.

However, the Town of Dewey Beach refused to approve either of DBE's applications. C88-90. As a result, DBE had little choice but to file an appeal to the Dewey Beach Board of Adjustment ("BOA") challenging the Town's refusal to approve the Phase I Plan & Building Permit Application or the Phase II & Phase III Plan & Building Permit Application. C92-113. Eventually, the Town scheduled an appeal hearing to consider only the Town's denial of DBE's Phase I Plan & Building Permit Application. The BOA denied DBE's Phase I Plan & Building Permit Application appeal, and DBE appealed the BOA decision to Delaware Superior Court, which affirmed the BOA decision. *Dewey Beach Enters., Inc. v. Bd. of Adjustment*, 2009 WL 2365676 (Del. Super. July 30, 2009) (Ex. A). That decision was reversed by this Court which ruled in favor of DBE on July 30, 2010. *Dewey Beach Enters., Inc. v. Bd. of Adjustment*, 1 A.3d 305 (Del. 2010).

DBE also filed an action in the United States District Court for the District of Delaware against the Town of Dewey Beach and certain

individuals whom DBE alleged violated certain constitutionally protected rights and State ethical requirements.⁴ The Town of Dewey Beach and the individual defendants filed a motion to dismiss DBE's federal claims. By decision of the District Court, also dated July 30, 2010, six (6) of DBE's federal claims survived the motions to dismiss, thereby leaving DBE's federal claims and Phase II & III Plan & Building Permit Application pending a trial and final decision in the District Court. *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, 2010 WL 3023395 (D. Del. July 30, 2010) (Ex. B).

DBE filed additional actions as the result of four separate ordinances adopted by a majority of the new Town Commission on various dates, all of which post-dated DBE's previously filed plans and building permit applications. Multiple actions were necessary due to the string of separate ordinances adopted by the Town Commission on different dates and the short 60 day statute of repose.⁵ DBE alleged each ordinance was designed, in part, to frustrate DBE's pending plans and building permit applications already on file with the Town.

All of the above actions have now been voluntarily dismissed, without prejudice, pending the result of this current appeal.

⁴ For example, the former Town Mayor's threat to fire the Town Building Inspector, William Mears, if he issued DBE a building permit for phase 1 (C273-77), as confirmed by Mr. Mears' testimony before the BOA, and the unethical conduct of the Vice Chairman of the Planning Commission, as confirmed in a written opinion of the State of Delaware Public Integrity Commission (C1013-40). The federal action did seek damages suffered by DBE, and did name certain Town officials in their personal capacity due to their inappropriate conduct.

⁵ Perhaps ironically, Plaintiffs complain loudly about the number of lawsuits DBE filed against the Town, yet it was the very same statute of repose at issue in the case at bar that required DBE to file such actions within 60 days of each legislative act or forever forfeit its right of appeal under 10 Del. C. § 8126.

Charter Amendment

On June 30, 2008, after DBE's plans and building permit applications had been officially filed with the Town, a Town Charter change created a brand new referendum process mentioned in Plaintiffs' Amended Complaint. Put simply, this newly adopted referendum process was a veiled attempt by the then Town Commissioners to frustrate DBE's pending redevelopment plan and building permit applications filed with the Town on November 8, 2007 and April 4, 2008, again, before the newly enacted referendum process. C87, C90.

Town of Dewey Beach Zoning Map Ordinance #634

In accordance with the Town Comp Plan, on January 10, 2009, the Town of Dewey Beach adopted Ordinance #634, which rezoned Ruddertowne and other surrounding properties to the new RB-1 zoning designation in accordance with Map 9 of the Town Comp Plan. C115, C117-18.

The Mutual Agreement and Release

On December 6, 2010, four (4) Town of Dewey Beach election cycles after DBE's principals began the process of redeveloping Ruddertowne, the Dewey Beach Town Manager, DBE, and Ruddertowne Redevelopment Inc. (collectively "DBE") entered into a Mutual Agreement And Release (the "MAR") C127-65. The MAR, *inter alia*, set forth a procedure by which DBE could submit a revised plan and building permit application for consideration by the Town for the redevelopment of Ruddertowne. The MAR provided for far more public input and participation than otherwise required by the applicable Town Zoning Code.⁶ The process

⁶ The Ruddertowne building permit applications were grandfathered under the former Dewey Beach Zoning Code and the Town Comp Plan. See, e.g.,

set forth in the MAR to consider the approval of the revised plan and building permit application was unanimously approved by the Dewey Beach Town Commissioners on December 11, 2010. C167. The terms of the MAR made explicitly clear that DBE's revised plan and building permit application were at all times subject to an extensive public workshop and public hearing process (C141-43), and that DBE's revised plan was at all times strictly subject to approval or disapproval by the Town of Dewey Beach Commissioners following the multiple public workshops and a public hearing process.

The MAR could not have been any more clear in this regard.

Specifically, the MAR provided:

(h) All zoning related approvals provided for in this Agreement are **strictly subject to approval** by the Town Commissioners as contemplated herein, and the Town Manager's signature shall not be a substitute for any such zoning approvals that must be obtained by DBE pursuant to the terms of this Agreement. If such zoning approvals are

In re 244.5 Acres of Land, 808 A.2d 753, 758 (Del. 2002) ("In cases, as here, where developers expend large sums of money on the pre-permit process, it would be inequitable to leave an applicant to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities."). In the case at bar, the MAR recognized that the Ruddertowne redevelopment project was recommended by the RAC after multiple public hearings, and that development plans were prepared by DBE and submitted to the Town **before** the adoption of the new Dewey Beach Zoning Code in 2009. Therefore, the MAR specifically provided that the Ruddertowne project "shall be subject to the mixed use provisions of the **former** Dewey Beach Zoning Code and Comprehensive Development Plan, taking into account the dates of DBE's building permit application." C135 (emphasis added). Accordingly, unless otherwise stated in DBE's argument related to the Statute of Repose, all references to the Zoning Code are to the former Zoning Code applicable to DBE's grandfathered building permit applications recognized by the Town in the Resolution it adopted on February 26, 2011. However, the current Zoning Code is applicable to DBE's argument related to the appeal of the Building Inspector's approval of the Building Permit to the BOA, and is cited therein. The appeals are different as they were not filed until after the new Zoning Code was adopted in 2009.

not obtained pursuant to Paragraph 8 of this Agreement, this Agreement shall be of no force or effect.

C148 (emphasis added). The MAR further provided:

(m) WITH THE EXCEPTION OF THE PLAN & BUILDING PERMIT APPROVAL PROCESS PROVIDED IN PARAGRAPH 8 OF THIS AGREEMENT, WHICH SHALL BE IMPLEMENTED UPON THE EXECUTION OF THIS AGREEMENT BY THE DEWEY BEACH TOWN MANAGER, **THIS AGREEMENT IS EXPRESSLY CONDITIONED UPON ITS APPROVAL BY A MAJORITY VOTE OF THE DEWEY BEACH TOWN COUNCIL** [a/k/a the Town Commission].

C149 (capitalization in original, emphasis added).

As provided in the MAR, the Town held three (3) public workshops in Dewey Beach even though no such workshops were required by State law or the applicable Town Zoning Code. C745-1011. In fact, the Town even provided a two-month written question and written answer process by which written questions from the public regarding Ruddertowne and the MAR were responded to by the Town upon its web site. Again, no such process is required by State law or the Dewey Beach Code. The Town held public workshops on January 15, 2011, February 3, 2011, and February 5, 2011. C176-78. Each workshop was well advertised in the local paper. C180-91. Each workshop was also well attended as evidenced by the public sign-in logs (C193-207), and public comment was permitted at each public workshop (C208).

Following the three public workshops, on February 5, 2011 and February 26, 2011, the Dewey Beach Town Commissioners held public hearings regarding DBE's proposed revised plans and building permit application. Both the February 5, 2011 and February 26, 2011 public hearings were well advertised. C210-29. Both public hearings were also well attended as evidenced by the public sign-in log (C231-38), both hearings permitted public comment (C306-585). In fact, the

public hearing on February 26th was attended by approximately 111 people and included 4 to 5 hours of public comment. C231-43, C306-585. The hearings were also well covered by the media. C247-59.

At the February 26, 2011 public hearing, and following extensive public comments, the Dewey Beach Town Commission voted to approve the Resolution along with an Amended MAR. C136. Despite the argument made in the Amended Complaint that the extensive workshops and public hearings were somehow "illusory," the public record confirms just the opposite to be true. Indeed, the amendments to the MAR adopted on February 26, 2011 addressed matters raised by the public through the previous public workshops and public hearings. C137-65. The Resolution also approved DBE's proposed revised plan, entitled the "Record Plat Plan of Mixed Use Complex" (the "Record Plat Plan"), including a hotel use component. C132.⁷ The Record Plat Plan provides that the MAR was an "integral part of the plan" and that the MAR was "fully incorporated therein by reference." C64. The MAR did not serve to rezone Ruddertowne as the rezoning of the Ruddertowne property had already been enacted more than two years earlier by Ordinance #634, adopted into law by the Town on January 10, 2009. C117-18.

As part of the Resolution approval process, the Dewey Beach Town Commissioners, consistent with the Town Comp Plan's legal requirements, also ratified RAC's recommendation for the development of Ruddertowne, but with a **reduction** in building height from the 68

⁷ Contrary to Plaintiffs' opening brief, hotel uses were not a prohibited use under the applicable Town Zoning Code for mixed use projects such as Ruddertowne. C978.

feet originally recommended by RAC, to only 45.67 feet. C133. The reduction in building height from 68 feet to 45 feet was the direct result of not just months, but many years of public input into the redevelopment of Ruddertowne. The Town Commissioners explicitly found that DBE's revised plan was consistent with the Town Comp Plan and its "relaxed bulk standard" and "most dense" provisions. Specifically, the Resolution, approved by a vote of 4 of the 5 then-sitting Town Commissioners, provided that:

WHEREAS, the Town Commissioners find that locating the Ruddertowne redevelopment project submitted by DBE under the alternative method of development option within the RB-1 district, a district specifically designated as the **"most intensely developed, most dense, zone"**, strikes a reasonable balance between allowing urban growth and redevelopment that ensures the Town's economic vitality while also accurately defining the community;

WHEREAS, the Town Commissioners find that the proposed Ruddertowne redevelopment project strikes a reasonable balance between the various goals of the Town's Comprehensive Development Plan, and is therefore **consistent with the Town's Comprehensive Development Plan**;

WHEREAS, the Town Commissioners find that the proposed Ruddertowne Redevelopment project will promote the health, safety, and general welfare of the Dewey Beach community.

C130-31 (emphasis added). Also, on February 26, 2011, the Dewey Beach Building Inspector approved DBE's revised plan and building permit application as confirmed by the Building Inspector's signature on the plan indicating "Approval." C64.

Thus, after expending 12.5 million dollars to purchase Ruddertowne in 2007 (not including carrying costs, engineering fees and litigation costs and expenses over the past five (5) years) (C82), and after reducing the height of its redevelopment proposal from the original 68 feet recommended by RAC to 45.67 feet, DBE received Town approval of its revised plans and building permit, allowing DBE to

move forward with a project the Town determined would attract family-friendly tenants and uses and would expand family choices for the Dewey Beach community year round. C129.

In addition to substantial press coverage of the Town's approval and public hearing, on March 1, 2011, the approval by the Town Commissioners of the Resolution, as well as the Building Inspector's separate building permit approval, were clearly and unmistakably advertised in the "LEGAL NOTICE" section of the newspaper as follows:

LEGAL NOTICE: ON FEBRUARY 26, 2011, THE COMMISSIONERS OF THE TOWN OF DEWEY BEACH DELAWARE ADOPTED A RESOLUTION ENTITLED "A RESOLUTION OF THE COMMISSIONERS OF THE TOWN OF DEWEY BEACH APPROVING A MUTUAL AGREEMENT AND RELEASE REGARDING THE RUDDERTOWNE REDEVELOPMENT PROJECT". THE MUTUAL AGREEMENT ADOPTED BY THE RESOLUTION WAS ORIGINALLY EXECUTED ON DECEMBER 6, 2010, AND AMENDED ON FEBRUARY 19, 2011 AND FEBRUARY 26, 2011. THE RUDDERTOWNE PROPERTY IS LOCATED ON THE BAYSIDE OF DEWEY BEACH BETWEEN VAN DYKE AVENUE AND DICKINSON AVENUE, WITH AN ADDRESS OF 124 DICKINSON AVENUE, DEWEY BEACH, DELAWARE, 19971, AND IS ALSO KNOWN AS SUSSEX COUNTY TAX PARCEL NUMBERS 334-23.06-1.00, 334-23.06-2.00 AND 334-23.06-3.00.

THE RESOLUTION INCLUDED, AMONG ADDITIONAL ITEMS, THE FINAL APPROVAL BY THE DEWEY BEACH TOWN COMMISSIONERS AND BUILDING INSPECTOR ON FEBRUARY 26, 2011, OF A RECORD PLAT PLAN AND BUILDING PERMIT FOR THE REDEVELOPMENT OF RUDDERTOWNE AS A MIXED USED COMPLEX INCLUDING COMMERCIAL AND RESIDENTIAL USES. THE APPROVALS PERMIT A COMMERCIAL HOTEL USE UP TO A MAXIMUM OF 90 UNITS AND A CONDOMINIUM USE UP TO A MAXIMUM OF 120 UNITS. IF THE MAXIMUM NUMBER OF HOTEL UNITS OF 90 ARE BUILT, THE MAXIMUM NUMBER OF CONDOMINIUM UNITS THAT MAY BE BUILT IS LIMITED TO 105. THE APPROVED MAXIMUM SQUARE FOOTAGE OF THE RUDDERTOWNE MIXED USE COMPLEX IS 465,685 S.F., WITH A MAXIMUM BUILDING HEIGHT OF 45.67 FEET, MEASURED AS SET FORTH IN THE MUTUAL AGREEMENT.

THE ABOVE REFERENCED RESOLUTION, RECORD PLAT PLAN AND BUILDING PERMIT INFORMATION ARE AVAILABLE FOR REVIEW AT THE DEWEY BEACH TOWN HALL LOCATED AT 105 RODNEY AVENUE, DEWEY BEACH, DELAWARE 19971, PHONE NUMBER (302)227-6363.

A698 (capitalization in original).

All of the Plaintiffs were aware, or should have been aware, of the Town's February 26, 2011 Resolution approval. C261-71. In fact, the record confirms that Plaintiff Tony Murray was well aware of the February 26, 2011 hearing. For example, in a February letter to the editor, Plaintiff Murray wrote: "Emotions are running deep in the little Dewey Beach during the run up to the Saturday, Feb. 26 vote by the Dewey Beach town commissioners on the proposed mutual agreement and release between the town and Dewey Beach Enterprises." C263.

After the February 26th vote, Plaintiff Murray wrote again to the editor on March 2, 2011, and described the February 26th Ruddertowne approval hearing as "the agony of defeat." Plaintiff Murray wrote: "After the 4-1 vote for the Mutual Agreement, my wife and I settled into a melancholy mood... The agony of defeat, after three and a half years of very hard work by an incredible and amazing group of sincere volunteers, is a hard pill to swallow." C261. The record further confirms that the co-Plaintiffs, McKinney, Kaminsky, and Cadell were also well aware, and in some cases directly involved, with the Ruddertowne public workshops and/or public hearings. C264-71.

However, none of the Plaintiffs brought a timely appeal challenging the Town Commission's approval of the Resolution within 60 days of the above publication of Resolution approval, as required by 10 *Del. C.* § 8126. Further, none of the Plaintiffs timely appealed the Dewey Beach Building Inspector's approval of the building permit to the BOA within 30 days, as required by 22 *Del. C.* § 324, and §§ 71-3(F), 185-65(B) & 185-66 of the Dewey Beach Municipal Code.

First Administrative Appeal

On March 25, 2011, Joan Claybrook⁸ (not a plaintiff in this action) appealed what she described as the "**Town Council** Administrative Decision on Ruddertowne/MAR" by filing a "REQUEST FOR BOARD OF ADJUSTMENT HEARING" form with the Town. A606-A607 (emphasis added). Ms. Claybrook did not, however, appeal the Building Inspector's approval of the revised plan and revised building permit application. Ms. Claybrook was the sole person who signed the Town of Dewey Beach official BOA hearing form as the "Applicant(s)." Ms. Claybrook referenced an attachment on her appeal application called a "Memo of Request." However, no "Memo of Request" was attached to her appeal; instead, a "Memorandum: To Accompany Request for Board of Adjustment Hearing On the Ruddertowne Redevelopment Project" was attached to the official appeal form ("Memorandum"). A608-A623. The Memorandum listed the typewritten names of 15 people it was allegedly "from," including Plaintiff Cadell and Plaintiff Murray. However, neither Plaintiff Cadell nor Plaintiff Murray is identified as an applicant upon the Board's official form. Moreover, neither Plaintiffs Cadell nor Murray signed the official appeal form as required or the Memorandum upon which their names appear. A606-A623. By letter dated May 2, 2011, the Dewey Beach Town Manager rejected the appeal as being improperly filed. A625-A626.

⁸ "Joan Claybrook (born June 12, 1937) is an American lawyer who served as President of Public Citizen from 1982 until she announced her resignation on December 9, 2008." Wikipedia, JOAN CLAYBROOK, http://en.wikipedia.org/wiki/Joan_Claybrook (last visited Nov. 29, 2012).

Plat Plan of Ruddertowne Recorded

On May 13, 2011, the February 26, 2011 Town-approved Record Plat Plan entitled the "RECORD PLAT PLAN OF RUDDERTOWNE MIXED USE COMPLEX" was recorded in the Sussex County Office of the Recorder of Deeds, State of Delaware. C64. As indicated plainly upon the face of the Record Plat Plan, the plan was approved by the Town Commissioners of Dewey Beach and the Town Building Inspector. *Id.* The Record Plat Plan approved by the Town Commission on February 26, 2011, plainly stated it was an "alternative method of development" available to RB-1 zoned land consisting of at least 80,000 square feet consistent with the Town Comp Plan. The Record Plat Plan did not serve to rezone Ruddertowne, as Ruddertowne was rezoned to RB-1 more than two years earlier by Ordinance #634, adopted into law by the Town Commissioners on January 10, 2009. C117-18.

Second Administrative Appeal

On May 27, 2011, by filing another "Request for Board of Adjustment Hearing" form, Joan Claybrook (again, not a plaintiff in this action) appealed the decision of the Town Manager rejecting her original appeal of March 25, 2011. A628. Although not referenced upon the standard BOA form, an attachment entitled "Appeal to The Board of Adjustment" was included with the appeal form. Plaintiffs Cadell and Murray are again listed on the attachment, but, as was the case with her first appeal, are not identified as an "Applicant(s)," nor did either sign the official appeal form or the attachment provided by Ms. Claybrook. The appeal was premised upon the legal position that the Town Manager served a "ministerial function."

Indeed, as Ms. Claybrook explained in her appeal, "The Town Hall and Town Manager serve merely a ministerial function in receiving and delivering appeals to the Board." A630. By letter dated June 3, 2011, the Town Manager of the Town of Dewey Beach rejected the second administrative appeal as being improperly filed. A634-A636.

The Public Amenities & Construction Plans

The February 26th Resolution set forth a process that required DBE to participate in two additional public hearings of limited scope regarding voluntary public amenities offered by DBE to the Town specifically: (1) a Gazebo; (2) a Bay Walk expansion; (3) public restrooms; and (4) dedicated Town Space. C143. Lastly, the February 26th Resolution provided that DBE was required to confirm during these two public hearings that its construction plans were consistent with DBE's Record Plat Plan and revised building permit application approved by the Town Commission by Resolution, and its Building Inspector, at the prior February 26, 2011 public hearing. C141-43.

In accordance with the process approved in the Resolution adopted on February 26, 2011, on June 11, 2011, the Town of Dewey Beach Planning Commission convened to hear public testimony and issued a recommendation to the Town Commissioners regarding only the (1) Gazebo; (2) Bay Walk; (3) public restrooms; and (4) dedicated Town Space. The Planning Commission also heard public testimony regarding whether DBE's construction plans were consistent with DBE's application approved on February 26th. The Planning Commission hearing and recommendation were not required by the applicable Town Zoning Code, but were agreed to by DBE and the Town in the February

26th Resolution in order to provide an opportunity for additional public input and review of the voluntary public amenities, and to confirm that DBE's construction plans were consistent with the Record Plat Plan previously approved at the February 26, 2011 public hearing. Following public input, the Planning Commission supported DBE's proposed public amenities, and found that DBE's construction plans were consistent with DBE's application. C279-81.

Pursuant to the process agreed to in the February 26th Resolution, on June 17, 2011, the record confirms that Dewey Beach Town Commissioners held a public hearing regarding only the (1) Gazebo; (2) Bay Walk; (3) public restrooms; and (4) dedicated Town Space. C283-97. The record also confirms that the Town Commissioners heard public testimony regarding whether DBE's construction plans were consistent with DBE's revised application approved on February 26th. *Id.* Following the public hearing and consideration of the Planning Commission's favorable recommendation, the Town Commissioners granted final approval of the: (1) Gazebo; (2) Bay Walk; (3) public restrooms; and (4) dedicated Town Space. C279-81, C291-93. The Dewey Beach Town Commissioners also found that DBE's construction plans were consistent with DBE's application previously approved by them on February 26, 2011. *Id.* In fact, the record could not be more clear that the June 17th meeting of the Town Commission was held regarding the approval of the voluntary public amenities and consistency of the February 26th approved application with the construction drawings. In fact, there was never any public advertisement, agenda item or new vote upon the previously approved February 26th Record Plat Plan or adopting

Resolution. On June 23, 2011, the following public notice appeared in the newspaper, again confirming the sole purpose and result of the June 17th public hearing was the final approval of the voluntary public amenities and confirmation that DBE's construction plans were consistent with its February 26th application approval:

LEGAL NOTICE: ON JUNE 17, 2011, THE COMMISSIONERS OF THE TOWN OF DEWEY BEACH DELAWARE HELD A PUBLIC HEARING IN REGARD TO CERTAIN PROVISIONS OF A PREVIOUSLY APPROVED MUTUAL AGREEMENT AND RELEASE ADOPTED BY RESOLUTION OF THE TOWN COMMISSIONERS ON FEBRUARY 26, 2011 (THE "RESOLUTION"). THE RESOLUTION RELATES TO THE REDEVELOPMENT OF THE RUDDERTOWNE PROPERTY LOCATED ON THE BAYSIDE OF DEWEY BEACH BETWEEN VAN DYKE AVENUE AND DICKINSON AVENUE, WITH AN ADDRESS OF 124 DICKINSON AVENUE, DEWEY BEACH, DELAWARE, 19971, AND ALSO KNOWN AS SUSSEX COUNTY TAX PARCEL NUMBERS 334-23.06-1.00, 334-23.06-2.00 AND 334-23.06-3.00.

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.

THE ABOVE REFERENCED CONSTRUCTION PLANS, PREVIOUSLY APPROVED RESOLUTION, PREVIOUSLY APPROVED RECORD PLAT PLAN AND PREVIOUS BUILDING PERMIT APPROVAL ARE AVAILABLE FOR REVIEW AT THE DEWEY BEACH TOWN HALL LOCATED AT 105 RODNEY AVENUE, DEWEY BEACH, DELAWARE 19971, PHONE NUMBER (302)227-6363.

C299-300 (capitalization in original).

At no time during the June 17th hearing did the Town Commissioners re-approve the Resolution approved on February 26th nor the related MAR, Record Plat Plan or building permit incorporated into the Resolution. Indeed, no such re-approvals were ever sought or required by the February 26th Resolution, which only required the final approvals of the voluntary public amenities and a determination

regarding the consistency of DBE's February 26th application approval with the construction plans.

DBE Obtains Building Permit and Begins Construction

DBE physically obtained its February 26th approved building permit from the Town Building Inspector on July 15, 2011, and paid the code-required building permit fee of \$480,000.00 to the Town of Dewey Beach before commencing construction this past summer. C302. Prior to the filing of this action by Plaintiffs, DBE spent additional costs by commencing construction work at Ruddertowne. C304.

The Present Action

On August 15, 2011, Plaintiffs Murray, McKinney, Kaminsky and Cadell filed an action in the Court of Chancery challenging the validity of the MAR approved by the Dewey Beach Town Commission on February 26, 2011, and the related Record Plat Plan and building permit approved by the Town Commission and the Dewey Beach Building Official on the same date. The action came nearly four months after the expiration of the applicable 60 day statute of repose found at 10 Del. C. § 8126.

ARGUMENT

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

A. Question Presented:

Does the Statute of Repose, 10 Del. C. § 8126, support the lower court's dismissal of the First Amended Complaint for lack of subject matter jurisdiction?

B. Scope of Review:

The court below granted a motion to dismiss for lack of subject matter jurisdiction under Del. Ct. Ch. R. 12(b)(1) and review is *de novo*. New arguments not raised below are reviewed under Sup. Ct. R. 8 and Supreme Court cases interpreting the rule.

C. Merits of Argument:

The Delaware General Assembly enacted a statute setting a specific and unambiguous 60-day period within which parties may appeal land use related decisions. Section 8126 of Title 10 is a statute of repose. In analyzing statutes of repose, this Court has held, "[B]ecause the statute of repose is a substantive provision, it relates to the jurisdiction of the court; hence, any failure to commence the action within the applicable time period extinguishes the right itself and divests...the court of any subject matter jurisdiction which it might otherwise have." *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984) (internal quotation omitted). The statute of repose precludes consideration even of claims that a legislative body has taken *ultra vires* action or that the action was void *ab initio*. *Sterling Prop. Holdings, Inc. v.*

New Castle County, 2004 WL 1087366, at *4 (Del. Ch. May 6, 2006) (Ex. C); *Council of S. Bethany v. Sandpiper Dev. Corp.*, 1986 WL 13707, at *2 (Del. Ch. Dec. 8, 1986) (Ex. D). Section 8126 must be "very strictly construed" and "cannot bend." *Admiral Holding v. Town of Bowers*, 2004 WL 2744581, at *4 (Del. Super. Oct. 18, 2004) (citation omitted) (Ex. E). "It is in the nature of a statute of repose that hardships may result, but the legislative judgment is expressed unambiguously in the Statute of Repose." *Sterling*, 2004 WL 1087366, at *5 n.25 (internal citation omitted).

1. The Resolution of the Town Council Falls Within § 8126.

On appeal, the Plaintiffs do not question that the pertinent statute, 10 Del. C. § 8126, is a statute of repose and, if applicable, not only trumps the claims as untimely but also extinguishes both the remedy and the right. *Cheswold*, 489 A.2d at 421. If the claim ceases to exist, there can be no subject matter jurisdiction. *Id.* A statute of repose forecloses equitable balancing, because the cause of action is gone. A64. "Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the court shall dismiss the action." Del. Ct. Ch. R. 12(h)(3).

The Plaintiffs argue that neither the MAR nor the Resolution that adopted the MAR "is...an ordinance, code, regulation or map" or an amendment thereto and they do not fit into a triggering category in § 8126(a). The court below pointedly rejected this argument. A30-A32. The Vice Chancellor addressed Plaintiffs' argument that the Town Council had effected a rezoning of the Ruddertowne property. A31 n.75 As Vice Chancellor Noble explained, "[A]ssuming the Town Council's

approval of the MAR and the building permit had the legal effect attributed to it by the Plaintiffs, ... Town's Council's approval of the MAR and the Building Permit did constitute an amendment to the Town's Zoning Code[.]” A30-A32 (citing *Bay Colony Ltd. P'ship v. Cty Council*, 1984 WL 159382, at *1-*2 (Del. Ch. Feb. 1, 1984) (Ex. F) (finding conditional use permit “in effect ... an amendment to the Zoning Code,” making § 8126 applicable)). Thus, for purposes of DBE's motion to dismiss, the lower court accepted Plaintiffs' legal position as true, i.e., that the approval of the MAR resulted in an effective amendment to the Town's Zoning Code.⁹

The Plaintiffs also make frequent complaint in their brief about alleged illegality. See, e.g., OB at 17.¹⁰ However, Plaintiffs' argument fails on its premise. It assumes the February 26, 2011 Resolution of Town Council was illegally adopted and produced an illegal result and, therefore, cannot supply the predicate to invoke the statute. Just the opposite is true. The statute of repose is applicable only where, as here, “the legality of the [Code amendment or regulation] is challenged.” 10 Del. C. § 8126(a). That is the entire point of the statute. Far from the statute of repose being

⁹ In addition to the Court's approach, note the pertinent phraseology of § 8126(a) is “in which the legality of any ordinance, code, regulation or map, relating to ... zoning is challenged ...” The word “regulation” is used generically as opposed to being expressly tied to specific statutory or land development regulation. Whether it expressly purported to be or not, the Resolution adopting the MAR was clearly a “regulation... relating to zoning.” 10 Del. C. § 8126(a); see also *Bay Colony*, 1984 WL 159382 at *2 (“The word ‘regulation’ means ‘a rule or order prescribed for management or government.’”).

¹⁰ Citations to “OB” refer to Plaintiff's Opening Brief on appeal to this Court (Filing ID 46991312).

evaded due to claims of illegality, the statute of repose was expressly designed to preclude, in short order, claims of illegality.

In adopting the Resolution, including the Town Ordinance required "ratification" for Ruddertowne found in the Town Comp Plan, the Town had the advice of counsel, the advantage of a mandated, thorough and open process, public hearings, and the vote of the Town Commissioners in an open meeting consistent with the Town Ordinance "ratification" requirement. The Town Commissioners necessarily interpreted their own Town law and regulations in the enactment of the Resolution that incorporated the MAR (as amended) and the Record Plat Plan. The good faith reliance of the Commissioners on their own interpretation of Town law, supported by legal advice, deserves deference and further confirms that the Record Plat Plan was "submitted under the subdivision and land development regulation" of the Town.

2. Nothing Was Upended by the Opinion Below; Rather, the Plaintiffs Are Upending Established Delaware Law by Attempting to Introduce a New Theory on Appeal.

The first argument of the Opening Brief culminates with a 9 ½ page argument that the decision below "Upends A Balanced Tripartite of Public Policy Considerations," which includes the concept of contract zoning. OB at 19.¹¹ But Plaintiffs cite **no** Delaware law to support the proposition that such a "Balanced Tripartite" exists as a legal matter to be "Upended." In fact, it is Plaintiffs who are upending

¹¹ The "Tripartite" evidently is (i) "strict compliance with zoning statutes and meticulous adherence to procedural safeguards when enacting local zoning regulation;" (ii) "Delaware's strong public policy favoring strict repose to promote stable and predictable land use regulatory arrangements and to ensure the finality of land use decisions;" and (iii) "the voluntary resolution of litigation." OB at 21-23.

established Delaware law and, in particular, land title law. Indeed, Plaintiffs admit: "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*..." OB at 23. That statement correctly includes the court below and directly implicates Rule 8 of this Court's Rules.

Supreme Court Rule 8 states that "[o]nly questions fairly presented to the trial court may be presented for review..." This applies not only to specific objections, but also to the arguments supporting those objections. *Russell v. State*, 5 A.3d 622, 627 (Del. 2010). Plaintiffs' question simply was not presented to the trial court. Rule 8 contains a "very narrow exception" that allows this Court, in rare cases, to consider and determine a question not fairly presented to the trial court if "the interests of justice so require." *Id.*; Del. Sup. Ct. R. 8. The "interests of justice," however, do not "require" that this Court "consider and determine" this question."¹² Words such as "tripartite" (usually an adjective) and "triumvirate" (usually refers to a ruling body of three persons), cannot conceal the effort without proper cause to raise a question on appeal not presented to the trial court.

¹² The Plaintiffs here have engaged throughout in piecemeal litigation. The original motion to dismiss was filed by DBE and the Town on September 14, 2011. Defendants' Opening Briefs in the Court of Chancery were filed on September 21, 2011, formally raising the statute of repose issue, among others. Thus, Plaintiffs have been on record notice that 10 Del. C. § 8126 was being raised by DBE and the Town for over 14 months. It should also be noted that the court below said in denying reargument: "All of the arguments the Plaintiffs present in support of their motion for reargument are now being raised for the first time." A64.

Moreover, the Plaintiffs' argument has no merit. It smacks of a class action and there has been no class claim brought in either the initial complaint or the amended complaint. The argument amounts to no more than a balancing of equities approach, ignores the consequence of a statute of repose and fails to recognize that the Plaintiffs' claims have been extinguished and cannot be balanced. A64. If Plaintiffs cannot win, due to a statute of repose, in a two position contest, their situation simply does not improve by adding the Town's interest in settlement to the mix as a third factor.¹³

¹³ It is hard to respond briefly to Plaintiffs' discussion of the *Sandpiper* case, OB at 21-23, except to say the court below made correct and good use of the case (A32-A34), which use the Plaintiffs seem to want to belittle. DBE has no comment regarding the cases cited in footnote 11 of OB 21-22 except to note that none of them involve the issue before the Court. *But see Green v. County Council*, 415 A.2d 481, 486 (Del. Ch. 1980).

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:

Did the lower court correctly apply 10 Del. C. § 8126(b) to the MAR's plan component?

B. Scope of Review:

The court below granted a motion to dismiss for lack of subject matter jurisdiction under Del. Ct. Ch. R. 12(b)(1), and review is *de novo*.

C. Merits of Argument:

- 1. The Court Below Correctly Held That Because Approval Of The Record Plat Plan Was Purported To Be Undertaken In Accordance With the Comprehensive Development Plan, The Record Plat Plan Approval Triggered 10 Del. C. § 8126(b).**

While the statute of repose does not require both paragraphs (a) and (b) to be triggered for the 60 day appeal period to run, paragraphs (a) and (b) were both triggered in the case at bar. The record below confirms that the Town Comp Plan was adopted into law by a Town Ordinance. C5. Plaintiffs' brief does not dispute this fact. The court below correctly held that the Town Comp Plan carries the "force of law" pursuant to 22 Del. C. § 702(d). A35 n.82. Again, Plaintiffs do not dispute this fact. The record below also confirms that DBE submitted the Record Plat Plan to Town Council for "ratification" pursuant to specific language contained in the Town Comp Plan. C30. Again, Plaintiffs do not dispute that the Resolution adopted on February 26th purported to follow the "ratification" requirement of the Town Comp Plan for Ruddertowne.

Instead, Plaintiffs argue that the Record Plat Plan was not submitted in strict accordance with applicable statutory requirements of the subdivision and land development regulations of the Town. OB at 30. In fact, Plaintiffs "double down" on this claim and boldly assert in their brief that "[n]either the 14-page MAR nor the 9-page Town Resolution approving the MAR actually reference, cite, or identify a single provision of the Town's 'subdivision and land development regulations'..." OB at 30. This is simply not accurate, and suggests that Plaintiffs have still not fully read the Resolution or Record Plat Plan approved by the Town well over a year ago. The Resolution plainly states: "This project structure of mixed commercial and residential use shall be subject to the **mixed use provisions** of the former **Dewey Beach Zoning Code** and **Comprehensive Development Plan**, taking into account the dates of DBE's building permit application." C135(emphasis added).

Further, the February 26, 2011 Resolution adopting the MAR plainly provided that the Record Plat Plan was "approved" and **incorporated by reference into the Resolution**. C132(emphasis added). Contrary to Plaintiffs' opening brief, the Record Plat Plan, in fact, also cites to specific sections of the Town's code. C64.

Perhaps more importantly, Plaintiffs overlook the fact that 10 Del. C. § 8126(b) requires a claim related to an alleged defect in a statutory requirement be made within the 60 day statute of repose period. A33-A34 (citing *Council of S. Bethany*, 1986 WL 13707, at *2). Indeed, as with their argument as to paragraph (a) of the statute of repose, Plaintiffs' argument fails on its apparent necessary premise.

It assumes the February 26, 2011 Record Plat Plan was illegally adopted, and, therefore, cannot supply the predicate to invoke the statute. Just the opposite is true. Again, the statute of repose is applicable only where, as here, "the legality of any action...granting or denying approval of a final or record plan...is challenged." 10 Del C. § 8126(b). That is the entire point of the statute. Far from being evaded due to claims of illegality, the Statute of Repose was expressly designed to preclude in short order claims of illegality.

In sum, Plaintiffs in a broad sweep attack suggest the MAR was an illegal contract illegally adopted which DBE and the Town dreamed up out of whole cloth. That attack is simply not true. As the court below correctly held, "[B]ecause approval of the Record Plat Plan was part of a process that purported to be undertaken in accordance with the Comprehensive Plan - which the Court concludes is a 'subdivision and land development regulation' for purposes of § 8126(b) - § 8126(b) is applicable." A34-A35.

The Record Plat Plan Complied With Applicable Town Law

While the court below did not need to reach this issue, DBE's plan was submitted and processed by the Town in accordance with the **former** Dewey Beach Zoning Code C745-1011 as well as the Town Comp Plan's "ratification" process. Indeed, the Town made a formal finding that the former code was applicable because DBE's building permit applications pre-dated the Town's new zoning code.¹⁴

¹⁴ The Ruddertowne building permit applications were grandfathered under the former Dewey Beach Zoning Code and the Town Comp Plan. See, e.g., *In re 244.5 Acres of Land*, 808 A.2d 753, 758 (Del. 2002) ("In cases, as here, where developers expend large sums of money on the

Thus, when Plaintiffs allege DBE's application was without adherence to statutory procedures, they simply ignore facts, evidently unfamiliar with the Town's applicable "statutory procedures." Pursuant to the applicable former Town code, Ruddertown's plat plan was not subject to any formal public hearing process. It was the MAR that DBE voluntarily entered into which created the rigorous public process required by the Town Commissioners in the MAR that DBE's plan was ultimately subjected to.

Indeed, the record confirms that DBE submitted its Record Plat Plan under the applicable provisions of the Town's subdivision and land development regulations. A brief summary of the applicable Town Zoning Code provisions is in order. Chapter 185 of the Dewey Beach Municipal Code is entitled "Zoning." Multiple provisions of Chapter 185 are instructive as to the proper review of plat plans. First, Chapter 185, Article X of the Zoning Code, entitled "Administrative Provisions," provides procedures for the submission of subdivision and land development projects proposed within the municipal boundaries of the Town. Second, Section 185-65 provides that only "conditional uses" are subject to "site plan" review, and only site plan review includes a public hearing before the Dewey Beach Planning Commission (for a recommendation) and Town Commission (for approval or denial). DBE's plan does not propose any of the "conditional uses" listed in the Town zoning code, Section 185-25(D). Third, Section 185-71, "Building Permits," requires DBE to obtain a building permit from the

pre-permit process, it would be inequitable to leave an applicant to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities.").

Town of Dewey Beach. Fourth, Section 185-72, entitled "Plat," further requires that all such building permit applications include a drawing or a "plat" plan as part of the building permit submission process.

Specifically, Section 185-72 provides:

"All applications for building permits shall be accompanied by a drawing or plat in duplicate or as required by the Town Building Inspector showing, with dimensions, the lot lines, the building or buildings, the location of buildings on the lot and such other information as may be necessary to provide for the enforcement of these regulations, including if necessary, a boundary survey and a staking of the lot by a surveyor and complete construction plans. The drawings shall contain suitable notations indicating the proposed use of all land and buildings. A record of the original copy of such applications and plats shall be kept at the building at all times during construction."

Dewey Beach Mun. Code, §185-72.

Plaintiffs do not dispute that DBE submitted two building permit applications to the Town of Dewey Beach for the redevelopment of Ruddertowne - one on November 8, 2007 and the other on April 4, 2008. C87, C90. Both of these building permit dates (which were never disputed in Plaintiffs' briefing) pre-date the adoption of the new and current 2009 Dewey Beach Zoning Code, which is cited and solely relied upon in Plaintiffs' brief. Even the Record Plat Plan specifically references these same two pending building permit applications at Note 27 of the plan. C64. Note 26 of the Record Plat Plan makes clear that the plan is part of DBE's building permit application. *Id.* The record confirms that William Mears, the Town of Dewey Beach Building Inspector, signed the Ruddertowne Plan, evidencing his "approval" of the plan. *Id.*

Normally, only the Building Inspector would have to "approve" DBE's building permit application, including the Zoning Code required

plat plan, pursuant to Sections 185-71 & 71-3 of the Town of Dewey Beach Municipal Code. However, the Ruddertowne property was subject to a specific Comprehensive Plan "ratification" by the Town Commissioners before any development could be lawfully approved by the Town. C30. The "ratification" process imposed by the Town Comp Plan created an additional subdivision and land development step in the process - a requirement that could not be ignored by DBE or the Town. In fact, State law specifically provides: "After a comprehensive plan or portion thereof has been adopted by the municipality in accordance to this chapter, the comprehensive plan shall have the force of law and no development shall be permitted except as consistent with the plan." 22 Del. C. § 702(d). This legal requirement had to be satisfied before DBE could obtain lawful approval of its Record Plat Plan. *Id.* Thus, the Town Commissioners incorporated the "ratification" process required by law into the Resolution approving the MAR. It is undisputed that, on February 26, 2011, the Town approved the MAR (as amended), which created multiple public workshops and multiple public hearings to consider DBE's two pending and grandfathered building permit applications. The MAR further provided that the Town Commissioners would have the right to vote DBE's Ruddertowne plat plan **up or down** as part of the Town Commissioners' "ratification" process. Thus, the MAR did not create a sub-standard public process cutting out the public and the Planning Commission as Plaintiffs claim. Rather, the MAR created an opportunity for significant public participation and public input not normally imposed on other property owners who seek development approvals in Town.

In sum, the record is clear that DBE's Record Plat Plan was, in fact, "submitted" in accordance with the provisions of Chapter 185 of the former Town Zoning Code of the Town of Dewey Beach, which was the same code applicable to all land use applicants seeking subdivision and land development approvals from the Town prior to the adoption of its new 2009 zoning code. The record also confirms that the Town imposed a special "ratification" process for the Ruddertowne property by separate Town Ordinance adopted in 2007, thereby creating an additional requirement relating to the future subdivision and land development of Ruddertowne. This additional subdivision and land development related process mandated the involvement of the Town Commissioners as the governing body of the Town.

2. The 60-day Statute of Repose of Both 8126(a) and (b) Began to Run on March 1, 2011 When the Commissioners' February 26, 2011 Approval of the Resolution was Published.

Following a public hearing on February 26, 2011, the Town Council approved a Resolution including, *inter alia*, the approval of the amended MAR, as set forth in Section 1 of the Resolution, and approval of the Record Plat Plan, as set forth in Section 2 of the Resolution. C132. The February 26th public hearing followed three public workshops and an earlier public hearing on the proposed MAR and Record Plat Plan. C171, C176-259, C306-585. At each of the public workshops and the public hearings, the public was permitted to comment on whether the Commissioners should or should not approve the MAR including the Record Plat Plan. C171, C208, C306-585. Each workshop and public hearing was well advertised and well attended, and the approval of the Resolution was well covered in the media. C171, C176-

259, C306-585. Furthermore, the record confirms that each of the Plaintiffs was either directly involved with, or otherwise aware of, the Ruddertowne workshops and/or public hearings. C261-71. Most importantly, the February 26th approval of the Resolution was advertised in the "legal notice" section of a paper of general circulation in Dewey Beach on March 1, 2011. A697-A698. The Record Plat Plan, the approval of which was included in the Resolution, was subsequently recorded in the Office of the Sussex County Recorder of Deeds. C64.

Nevertheless, Plaintiffs claim that the March 1st approval of the MAR was essentially irrelevant to the legal analysis before the court below. In so arguing, Plaintiffs ask this Court to read the MAR and the Resolution out of context and to ignore much of the public record, including Plaintiffs' own actions and public statements.

The record clearly demonstrates that Plaintiffs had been directly engaged or otherwise kept apprised of the February 26, 2011 Town approval of the Resolution, including the Record Plat Plan approval. C132. It is undisputed that the contemplated Town Council vote following the February 26th hearing was publically noticed and well publicized by the press. In fact, the record confirms 58 people testified at the February 26th public hearing over the course of 4-5 hours before the Town Council voted. C306-585. Approximately half of the speakers testified in favor the Record Plat Plan, while the other half testified against the plan. *Id.* It is no wonder then that following the February 26, 2011 Town approval of the Resolution, Plaintiff Murray stated in a March 2, 2011 letter to the editor that:

"After the 4-1 vote for the Mutual Agreement, my wife and I settled into a melancholy mood. As a music lover, Samuel Barber's 'Adagio for Strings' repeated itself in my mind. This hauntingly beautiful piece of music has been described as being full of 'pathos and cathartic passion.' The agony of defeat, after three and half years of very hard work by an incredible and amazing group of sincere volunteers, is a hard pill to swallow."

C261.

The record, of course, is clear that Plaintiffs elected not to bring an action in this Court within 60 days of the March 1, 2011 legal notice of the February 26, 2011 Resolution approving the MAR - the very approval Plaintiff Murray complained of in writing only five days following the February 26, 2011 public hearing.

Second, the MAR makes clear that the purpose of the February 26, 2011 (not the June 17, 2011) hearing was 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." C141. Indeed, the Resolution adopted on February 26, 2011 by the Town Commissioners provides:

Section 1. The Amended Mutual Agreement and Release dated February 19, 2011 is hereby approved.
Section 2. The plan titled Record Plat Plan of Mixed Use Complex prepared by McBride & Ziegler, Inc. and dated February 17, 2011, with Professional Engineer Certification dated February 25, 2011 ("Record Plat Plan"), and revised building permit application dated February 22, 2011, are incorporated herein by this reference and are hereby approved subject to any conditions listed upon the Record Plat Plan, the building permit, or both.

Section 7. This Resolution shall become effective immediately upon adoption by a majority of the Commissioners of the Town of Dewey Beach.
Adopted by at least a majority of the Commissioners of the Town of Dewey Beach on February 26, 2011.

C142, C146.

Unlike the February 26th hearing regarding approval of the Record Plat Plan, the subsequent June 17, 2011 hearing was for a limited purpose - a "final decision regarding whether the final construction plans satisfy the conditions of the approved plan and building permit and the voluntary amenities." C142. Plaintiffs did not cite or discuss other sections of the MAR that further explained the purpose and scope of the June 17th hearing. For example, the MAR further provides that the second Town meeting was:

(vi) A Town Meeting (Hearing Two) to accept or reject, in whole or in part, the Planning Commission's recommendations regarding the consistency of the construction plans with the application presented at the Special Town meeting by DBE, the gazebo, the Bay Walk, restrooms, dedicated Public Town Space (and uses therein) and whether the construction plans are consistent with the application presented by DBE. A final decision as to the Gazebo, Bay Walk, restrooms, dedicated-Town Space (and uses therein), and whether the construction plans are consistent with the application presented by DBE shall be made at this meeting.

C143. Indeed, the MAR, and the Resolution that adopted the MAR, provided that any approval of the plan and building permit were to occur, if at all, at the first public hearing on February 26, 2011, not the June 17, 2011 hearing. Plaintiffs attempt to stretch the meaning of the word "final" to impose some type of double approval process for the Resolution and the Record Plat Plan adopted therein. No such double approval process for the Record Plat Plan was required by the MAR. Plaintiffs fail to explain what such a double approval process of the Record Plat Plan would have even achieved - the answer is nothing. The June 17th hearing was created by the MAR only to finalize the public amenities and to confirm the consistency of DBE's February 26th Record Plat Plan with construction drawings which were

the only items not finalized at the February 26th public hearing - but it was recognized by the MAR that these items, separate and apart from the Record Plat Plan approval, needed to be finalized.

The language contained in Note 19 on the Record Plat Plan leads to the exact same conclusion. Note 19 provides:

Note 19 Voluntary Town Amenities: Bay Walk, Gazebo, 3,000 s.f. Town Space, 500 s.f. public bathrooms, and 5,000 s.f. Convention Center as provided in the Mutual Agreement. Subject to DNREC approval, the Bay Walk shall include a Gazebo 500 s.f. in size with seating, which shall serve as a focal point along the Bay Walk. If DBE and the Town cannot obtain DNREC approval for a 500 s.f. Gazebo DBE agrees to construct a 250 s.f. Gazebo at a location not regulated by DNREC. The Bay walk shall be maintained by DBE. Pursuant to Paragraph 8a and 8b(vi) of the Mutual Agreement the Gazebo, Bay Walk, restrooms and Town Space, as well as the final construction plans, are subject to an additional Town Commission final approval.

C64. The MAR, the February 26, 2011 and June 17, 2011 public hearing transcripts (C306-743), the legal notices appearing in the News Journal (C210-29), and the Town of Dewey Beach Commissioner minutes (C242-44), all confirm that the February 26, 2011 hearing served to approve the Ruddertowne Record Plat Plan and building permit, and that the June 17, 2011 hearing was reserved for the Town Council to make a "final" decision about only the consistency of the February 26th approved plan with the construction drawings and the final approval of the voluntary amenities.

Perhaps most importantly, if Plaintiffs had any question in this regard they should have timely appealed to a court of law or equity within the applicable 60 day statute of repose period from the date of the legal notice in the News Journal (i.e., March 1, 2011).

The above legal notice required by the statute of repose put Plaintiffs on undeniable notice that the Record Plat Plan received final approval at the February 26, 2011 public hearing. Similarly, the legal notice following the subsequent June 17, 2011 hearing, which appeared in the News Journal on June 23, 2011, also made clear what took place at that hearing, as well as what did not take place.

Nothing in the June 23rd legal notice of approval, the notice of public hearing (C283), the transcript (C587-743) or the Town minutes (C288-94) suggests or even implies that the Record Plat Plan needed or received a "final" approval or otherwise required some type of second approval on June 17, 2011.

In addition, the BOA appeal raised in Plaintiffs' opening brief was filed based on the finality of the February 26, 2011 Resolution approving the Record Plat Plan, not the subsequent June 17, 2011 hearing date, which Plaintiffs now insist was the final hearing for the Record Plat Plan. If Plaintiffs truly believed the June 17th hearing date was some type of final Record Plat Plan approval date as they now insist they did, then there simply was no reason to attempt an appeal of the February 26th actions of the Town Commission to the BOA within the 30 day statutory deadline for appeals to the BOA.

In sum, when the Resolution (including the MAR) is read in the proper and complete context, it is clear that any "final" approval language in the MAR was limited to very specific matters - i.e., Town amenities and final construction plans. This is exactly why the MAR did not provide for the Planning Commission to make any recommendation in regard to the Record Plat Plan itself - the Record Plat Plan had

already been approved on February 26, 2011 by the Town Commission making it irrelevant for the Planning Commission to make a recommendation in regard to the Record Plat Plan.

This likely explains why only 11 people testified at the June 17th public hearing, and none of them was a Plaintiff in this case. C587-743. Essentially, Plaintiffs ask this Court to believe that after "three and a half years of very hard work," none of the them bothered to testify at the very public hearing that would decide once and for all the final fate of the project they vehemently opposed. C261.

If there was any question in the minds of Plaintiffs about the legality of what transpired on February 26th, they should have filed this action within 60 days after the March 1st legal notice published in the News Journal. Plaintiffs simply chose not to do so. Plaintiffs should not now expect this Court to ignore the record or re-write the 60 day deadline contained in the statute of repose.

Therefore, as the court below held, the March 1, 2011 publication of the February 26th approval is the correct controlling date for determining whether the Complaint and Amended Complaint were timely filed. A697-A698. The later June 17, 2011 public hearing does not alter this conclusion. The June 17th public hearing was limited solely to consideration of the amenities DBE voluntarily agreed in the MAR to provide (i.e., public restrooms, bay walk, gazebo and dedicated Town space), and comparison of the construction plans to DBE's February 26th application approval. Following the June 17th public hearing, the Commissioners rendered approval as to these matters only,

none of which affect the prior February 26th approval of the Resolution. In fact, the public record confirms that at no time did the Commissioners re-approve the February 26th Resolution at the subsequent June 17th hearing. C587-743.

It is undisputed that no appeal was filed by any of the Plaintiffs with the Court of Chancery (or any other court) within 60 days of the March 1, 2011 public notice of the February 26th Resolution adoption. Accordingly, Plaintiffs' Complaint filed on August 15, 2011, nearly 5 months later, and Amended Complaint filed even later on October 13, 2011, were properly dismissed by the court below because both were filed more than 60 days after the public notice of the approved Resolution. This result is mandated by 10 *Del. C.* § 8126, as the court below correctly held.

In sum, both DBE and the Town should be permitted to rely upon the certainty that section 8126 provides to approvals of development plans and land use decisions. Otherwise, both the Town's goal of "allowing urban growth and redevelopment that ensures the Town's economic vitality" and DBE's economic expectation of developing its property in accordance with the approved plan would be unfairly thwarted. Moreover, failing to dismiss the time-barred challenge to the Resolution would have contravened the General Assembly's mandate.

III. THE LOWER COURT CORRECTLY HELD THAT THE AVAILABILITY OF AN ADEQUATE REMEDY AT LAW PRECLUDED EQUITY JURISDICTION OVER PLAINTIFFS' CHALLENGE TO RUDDERTOWNE'S APPROVAL.

A. Question Presented:

Did an adequate remedy exist at law for Plaintiffs to challenge the Town Manager's refusal to permit an appeal to the BOA?

B. Scope of Review:

"On a question of subject matter jurisdiction, [the] standard of review is whether the trial court correctly formulated and applied legal precepts." *Sanders v. Sanders*, 570 A.2d 1189, 1190 (Del. 1990). The scope of review is *de novo*. *Id.*

C. Merits of Argument:

Plaintiffs argue in their opening brief that a *writ of mandamus* was neither "available" nor "adequate" because such a writ is "appropriate only where a clear legal right to the performance of a non-discretionary or ministerial duty can be established," and "neither the Town's Code nor 22 Del. C. § 324 assigns any duty to the Town's Manager regarding the BOA." OB at 34. This argument fails both because Plaintiffs failed to raise it in the court below, and because Plaintiffs nonetheless failed to pursue other available legal remedies.

Supreme Court Rule 8 states that "[o]nly questions fairly presented to the trial court may be presented for review..." This applies not only to specific objections, but also to the arguments supporting those objections. *Russell v. State*, 5 A.3d 622, 627 (Del. 2010). Plaintiffs failed to raise the argument that *mandamus* was neither "available" nor "adequate" as a remedy in the court below.

Accordingly, pursuant to Rule 8, Plaintiffs should be precluded from raising this argument for the first time with this Court on appeal.

Rule 8 contains a "very narrow exception" that allows this Court, in rare cases, to consider and determine a question not fairly presented to the trial court if "the interests of justice so require." *Id.*; Del. Sup. Ct. R. 8. In their opening brief to this Court, however, Plaintiffs do not argue that any special circumstances exist that would allow this exception to apply. To fall under this exception, the lower court's error must be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process," such that it rises to the level of "plain error." *Russell*, 5 A.3d at 627. "The only errors that satisfy this threshold are those which amount 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." *Id.* (internal quotations omitted).

Williamson v. State, 981 A.2d 1174 (TABLE), at *3 (Del. 2009) (Ex. G) provides an example of an error that satisfies this exacting standard. In *Williamson*, the State acknowledged that the lower court erroneously sentenced the appellant. Accordingly, even though the appellant conceded that he failed to argue below that the Superior Court lacked authority to impose the sentence, this Court found the "interests of justice" exception satisfied.

Here, the lower court's holding that *mandamus* was an available legal remedy is far from a "material defect[]" ... apparent on the face

of the record.” Unlike in *Williamson*, where the lower court erroneously sentenced the appellant, the lower court’s holding in this case hardly “jeopardize[s] the fairness and integrity of the trial process.” Plaintiffs had every opportunity to raise their *mandamus* argument in the court below, but failed to do so. Moreover, nothing in the record even remotely supports the proposition that the lower court’s ruling on *mandamus* was “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.” Accordingly, this Court should not consider Plaintiffs’ argument on appeal because Plaintiffs never fairly presented it to the trial court, and otherwise failed to argue that they satisfy the “extremely limited” exception to Rule 8. *Russell*, 5 A.3d at 628.

Even had Plaintiffs presented this new argument with the court below, Plaintiffs’ argument fails. Plaintiffs rely on *Darby v. New Castle Gunning Bedford Educ. Assoc.*, 336 A.2d 209 (Del. 1975) in support of their argument that *mandamus* was not available as a remedy because it requires “a clear legal right to the performance of a non-discretionary or ministerial duty,” and neither the Town code nor Delaware law assigns any duty to the Town Manager regarding the BOA. OB at 34. In *Darby*, however, the plaintiff sought a *writ of mandamus* to compel a School Board to submit to fact-finding in its negotiations with teachers over a new contract. 336 A.2d at 210. This Court found that the applicable statutory scheme required mutual agreement as a condition precedent to fact-finding, and held that the act of agreement could not be compelled by *mandamus*. *Id.* at 211.

No act of agreement was necessary in the instant case for the Town Manager to forward an appeal to the BOA. Rather, forwarding an appeal to the BOA is just the sort of "non-discretionary or ministerial duty" contemplated by *Darby*. Plaintiffs even argue that the Town Manager "improperly interfered with the BOA appeal" (A346), and that she "appears to have simply assumed a gate-keeper role" (OB at 35). Thus, it logically follows, accepting Plaintiffs' own characterization of the Town Manager as having no role, that the court below correctly found that Plaintiffs could have sought a *writ of mandamus* to compel the Town Manager to forward the appeal to the BOA, or to otherwise compel the BOA to schedule a public meeting to consider Plaintiffs' appeal. Even Ms. Claybrook described the Town Manager's role as "ministerial" in her own appeal filed with the Town, which is overlooked in Plaintiffs' opening brief. A630. As Ms. Claybrook further argued in her appeal, "The Board of Adjustment can and should act to hear the March 25, 2011 appeal irrespective of the belief of the Town Manager." A629. Thus, *mandamus* was an appropriate legal remedy never pursued by Plaintiffs or Ms. Claybrook.

Moreover, *mandamus* was but one of **three** legal remedies available to Plaintiffs of which Plaintiffs failed to avail themselves. As a second available legal remedy, Plaintiffs could have filed a direct appeal to the Superior Court of Delaware within 30 days of the Town Manager's rejection of the appeal. 22 *Del. C.* § 328.¹⁵ Finally, as a

¹⁵ See, e.g., *Worldwide Salvage, Inc. v. Env'tl. Appeals Bd.*, 1986 WL 3650 (Del. Super. Jan. 30, 1986) (Ex. H) (reviewing decision of administrative assistant that Board lacked jurisdiction to hear appeal).

third available legal remedy, Plaintiffs could have sought a *writ of certiorari* with the Superior Court of Delaware, also within 30 days of the Town Manager's rejection of the appeal.¹⁶ Plaintiffs, however, elected not to pursue either of these legal remedies. Instead, they did nothing. There was simply was no excuse for Plaintiffs to disregard available legal remedies - let alone a legal remedy (i.e., a *writ of mandamus*) specifically identified in writing by the Town. A636.

In finding that Plaintiffs could have pursued a *writ of mandamus*, the lower court specifically declined to decide whether Plaintiffs were even "parties to [the] attempted appeal and whether the appeal related solely to the Town Council's actions or also encompassed the Building Inspector's approval of the Building Permit." A41. Although the court below did not need to reach this issue, the record reveals that Plaintiffs were not actual parties to the attempted appeals,¹⁷ and

¹⁶ *Cape Henlopen Sch. Dist. v. Del. Interscholastic Athletic Assoc.*, 2009 WL 388944, at *2 (Del. Super. Jan. 29, 2009) (Ex. I); *Elcorta v. Summit Aviation*, 528 A.2d 1199, 1201 (Del. Super. 1987).

¹⁷ Plaintiffs failed to respond to DBE's argument before the court below that no Plaintiff was a party to the appeals filed by Ms. Claybrook. Plaintiffs do not dispute, nor could they, that no Plaintiff signed the appeal forms filed by Ms. Claybrook. Further, Plaintiffs failed to address the legal authority DBE cited in the court below holding that individuals who fail to sign appeal papers are not parties to the appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) (court did not have jurisdiction over an appellant whose name was inadvertently left off the notice appeal and did not sign notice of appeal); *People v. SD Dept. of Soc. Servs.*, 799 N.W.2d 408, 412 (S.D. 2011) (failure to sign notice of appeal deprives appellate court of jurisdiction); *Floyd v. Mayor of Baltimore*, 946 A.2d 15 (Md. Ct. Spec. App. 2008), *aff'd*, 966 A.2d 900 (Md. 2009) (dismissing from appeal purported appellants that did not sign the notice of appeal but filed affidavits stating they wished to be parties); *People v. Krueger*, 495 N.E.2d 993 (Ill. App. Ct. 1986), *appeal denied* (Ill. Dec. 4, 1986); *Haberkorn v. Sears, Roebuck, Co.*,

that the appeal related to the MAR challenged the approval by Town Commissioners, not the approval by the Building Inspector. Thus, Plaintiffs also failed to pursue the statutory legal remedy of appealing the Building Inspector's approval of the Building Permit to the BOA in the first place.

Both the Delaware Code and the Dewey Beach Municipal Code specify that an appeal from the Building Inspector's approval or denial of a building permit is to be taken to the BOA. 22 Del. C. § 324; Dewey Beach Mun. Code §§ 71-3(F), 185-65, 185-66. However, the record reveals that Plaintiffs never appealed the Building Inspector's approval of the Ruddertowne Record Plat Plan or Building Permit to the BOA. Indeed, not a single Plaintiff to this appeal signed on as a party to Ms. Claybrook's appeal of the Ruddertowne approval. A606-A623. Rather, the only appeal filed to the BOA was filed by Joan Claybrook (not a party to this appeal) in regard to the actions of the Dewey Beach Town Commissioners, not the Building Inspector. *Id.* Thereafter, the Town Manager specifically informed Ms. Claybrook in writing that her appeal was improper because it was not an appeal of an "order, requirement, decision, or determination of an **administrative official.**" A625 (emphasis added).

Plaintiffs, however, maintain in their opening brief that the appeal set forth a challenge to the failure of the "Building Official" to conduct himself in accordance with his statutory duties. OB at 32.

427 P.2d 378 (Ariz. Ct. App. 1967) (notice of appeal purported to be on behalf of a married couple but only signed by the wife and followed with letters to the Court by the husband was deemed to be an appeal only by the wife).

In support of this assertion, Plaintiffs incompletely cite to Ms. Claybrook's memorandum that accompanied her appeal. However, a complete and fair review of Ms. Claybrook's memorandum reveals that no appeal was ever taken from the Building Inspector's approval. Indeed, as Ms. Claybrook stated in her memorandum: "The Agreement violates the Town Zoning Code because the **Commissioners** do not have the authority under the Code to approve building permits.... The **Commissioners** cannot even approve a site plan if the Building Official has not first determined that the plan complies with the basic zoning code regulations." A611 (emphasis added). Moreover, the Claybrook appeal form expressly stated that Ms. Claybrook was appealing the "Town Council Administrative Decision on Ruddertowne\MAR," not the Building Inspector's decision. A606. Thus, Ms. Claybrook was clearly appealing what the Commissioners had done, not what the Building Inspector had done.

It is worthy of notation that Plaintiffs completely ignore the record which confirms the Building Inspector had actually signed and approved the Record Plat Plan. C64. Apparently, neither Ms. Claybrook nor Plaintiffs reviewed the signatures and approvals listed on the face of the Record Plat Plan before Ms. Claybrook filed her appeal of the Town Commissioners' decision.

In sum, the Court of Chancery lacks jurisdiction over a claim for which a party had an adequate remedy at law. 10 Del. C. § 342. The record also confirms that neither Plaintiffs nor Ms. Claybrook timely appealed the Building Inspector's February 26, 2011 approval of the building permit to the BOA and, therefore, failed to timely pursue a

legal remedy. Furthermore, even if Ms. Claybrook's appeal of the actions of the Town Commissioners constituted a proper appeal with the Town, Plaintiffs (and Ms. Claybrook) had not one, but three adequate remedies at law available to them following the Town's rejection of the appeal - i.e., *writ of mandamus*, direct appeal to the Superior Court, and a *writ of certiorari* - but failed to act upon any of them. Plaintiffs' failure to pursue one or more of their adequate remedies at law cannot now be used by Plaintiffs to confer jurisdiction on the Court of Chancery.¹⁸ Thus, this Court should uphold the Court of Chancery's dismissal of Plaintiffs' Amended Complaint.

Dated: November 29, 2012

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¹⁸ *Savage v. Savage*, 920 A.2d 403, 411 (Del. Ch. 2006).

CERTIFICATE OF SERVICE

I, Shawn P. Tucker, hereby certify that a copy of the foregoing
**Answering Brief of Defendants Below/Appellees Dewey Beach Enterprises,
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