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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The parties' opening and answering briefs reveal that this Court's interpretation of Delaware's statute of repose, 10 *Del. C.* § 8126(a), *et seq.*, is central to this appeal:

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

Id. The Court of Chancery applied § 8126(a) to bar Plaintiffs' challenge to a settlement agreement (the "MAR") entered into by and between the Town of Dewey Beach (the "Town") and a private landowner ("DBE"). The MAR contractually mandated that non-statutory procedures would govern zoning-related approvals sought by DBE, and also contractually precluded the Town, its boards and officials from adhering to otherwise applicable statutory procedures. Pls. OB 12-31; TOWN AB 10-15; DBE AB 23-28. As set forth below, applying the statute to dismiss Plaintiffs' challenge to the MAR exceeds the bounds of even the broadest permissible construction of the plain language of 10 *Del. C.* § 8126(a).

The parties' briefs also address a related question arising out of 10 *Del. C.* § 8126's application to the MAR regarding how Delaware courts should reconcile the "important public policy purpose,"

underlying repose (Op.27-29)[1] with two other "particularly difficult," policy issues involving:

> …how a municipality should go about settling a complex land use dispute with a developer when the settlement is opposed by some residents of the municipality…
> [and]
> …how to handle terms of the settlement that may be viewed as allowing the developer to engage in conduct which is inconsistent with the municipal code.

Op.18 at n.44. These conflicting policy issues were raised throughout the litigation, including by the Court itself at oral argument. A77:21-A80:10, A111:4-A115:21, A144:19-A146:14, A149:12-A154:15. And the Court specifically raised these issues in its Opinion. Op.18, 27-29. For these reasons, this Court should, respectfully, reject Defendants' cursory contention that Supreme Court Rule 8 precludes appellate review of these conflicting policy issues of first impression. DBE AB 27; Town AB 10.

As set forth below, Defendants' dismissive posture, punctuated by their "no comment regarding the cases cited…," (DBE AB 28, n.13) in support of Plaintiffs' policy-balancing arguments is tellingly tactical. It is *telling* in the sense that it is regrettably consistent with all of Defendants' and their agents' efforts to date (including the Town's Manager and Building Inspector), to avoid any meaningful independent review of the MAR's terms by anyone, including the Town's Board of Adjustment or the Town's Planning & Zoning Commission. And it is *tactical* in the sense that Defendants' desire to escape appellate review of the MAR is animated by the same reasons

[1] "Op.___" herein refers to the Court of Chancery's Memorandum Opinion dated May 31, 2012.

Defendants' eschewed judicial review of the MAR's terms by settlement stipulation or consent decree in any of the five underlying lawsuits DBE commenced against the Town.

Defendants refuse to join issue on the policy argument by simply declaring that it "smacks of a class action and there has been no class claim brought…" (DBE AB 28). But the Court of Chancery plainly identified the conflicted public policy implications of the MAR's terms that are front and center in this appeal.

Defendants do, however, join issue as to whether the MAR's incorporated Plan component was "submitted" for approval under the MAR or under the Town's zoning regulations, and also join issue as to whether the MAR's incorporated Plan component received "final" approval under the MAR's terms in February or June 2011 such that it triggered repose under 10 *Del. C.* § 8126(b). As set forth in the unambiguous terms of the MAR itself, the Town and DBE express an unequivocal intent for DBE's Plan and Building Permit to be fully incorporated in the MAR and submitted for consideration and approval *exclusively* by the Town Council and *strictly* in accordance with the detailed six-step process, procedure and schedule set out in the "Plan & Building Permit Approval Process" at Paragraph 8(a)(i)-(vi) of the MAR. Because DBE and the Town chose to submit a plan and permit for approval by privately negotiated *regulation-like* procedures instead of submitting the plan for approval under the Town's *actual* zoning regulations, application of § 8126(b) is precluded.

Likewise, the unambiguous terms of the MAR's six-step "Plan & Building Permit Approval Process" plainly express an intent for the

MAR's fully incorporated Plan component to receive "final approval" and "then be recorded as a matter of public record" after the Town Council "grant[s] all final Town approvals by a majority vote," at the "final public hearing" designated at step-six of the six-step approval process. Thus, even if repose is applicable to the MAR or its incorporated Plan component, Plaintiffs' challenge was timely filed within 60 days of the "final Town approvals" granted at the June 17, 2011 final public hearing.

COUNTERSTATEMENT OF FACTS

Defendants' separately filed answering briefs present two notably different sets of "facts" purportedly relevant to the issues on appeal. The Town's answering brief includes a six-page recitation of relevant facts, which begins with Town Manager's December 2010 execution of the MAR. DBE presents nineteen pages of "facts" going back to 2007. When DBE submitted these same "facts" to the Court of Chancery in support of dismissal, the Town objected, stating that it "respectfully request[ed] that the Court disregard [DBE's] recitation of facts…," and moved the Court "to strike portions of DBE's Statement of Facts under Chancery Rule 12(f) as impertinent to this lawsuit." A699.[2]

Here, as the Town noted below, DBE's "extremely lengthy 'Statement of Facts,'" is mostly "a recitation of the facts at issue in [] Underlying Lawsuits" that "are not necessary to consideration of the subject matter of DBE's pending Motion to Dismiss…" *Id.* Specifically, the Town objected to the following "facts" as impertinent:

> By way of example and not of limitation, while explaining the Town's current Comprehensive Development Plan, DBE states, "the phrase 'bulk standards' includes building height." DBE makes similar statements regarding "bulk standards" and building height on pages six (6) and seven (7) of its Statement of Facts section. The Statement of Facts goes on to state that: (1) the Town Comp Plan specifically provided that Ruddertowne would be shaped for

[2] *See* "DEFENDANT TOWN OF DEWEY BEACH'S RESPONSE TO DEWEY BEACH ENTERPRISES INC.'S AND RUDDERTOWNE REDEVELOPMENT, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT" at ¶ 8, ¶ 5, 8-10, Filed Dec. 13, 2011 (Transaction ID 41383697) (the "Town's Opposition to DBE's Statement of Facts") (attached hereto as Exhibit A for ease of reference).

> future development by a Town appointed "working group," also known as the "Ruddertowne Architectural Committee" or "RAC"' ; (2) the RAC was charged by the Town Commissioners with saving Ruddertowne and its long standing commercial uses from being demolished and replaced with new townhomes; and, (3) "the RAC members were appointed by the Dewey Beach Town Commission…"

Id. (internal citations omitted). The Town made it clear to the Court that DBE's "facts" were largely self-serving:

> These and other factual propositions were not only disputed in the Underlying Litigation, but indeed were at the very heart of the matters to be decided in those lawsuits.

A702. "Importantly," the Town declared, "the Town continues to dispute many of these facts." *Id.*

Plaintiffs respectfully request that this Court accord little weight to DBE's lengthy statement of disputed facts.

ARGUMENT

I. DEFENDANTS' PROFFERED INTERPRETATION OF 10 DEL. C. § 8126 CANNOT REASONABLY BE ATTRIBUTED TO THE GENERAL ASSEMBLY.

Neither the Court of Chancery, nor any of the parties, contend that 10 *Del. C.* § 8126 is ambiguous. Indeed, the Court's opinion correctly observes that "[u]nambiguous statutes do not require judicial interpretation, and 'the plain meaning of the statutory language controls.'" Op.27-28.

Yet, despite the absence of ambiguity, the Court expansively interpreted the statutory language to include, and be satisfied by, a Town resolution approving a contract and building permit that together *constituted* an "amendment to the Town's Zoning Code." Op. 29. To do so, the Court "constru[ed] §8126 broadly in order that it may fulfill its important public policy purpose." *Id.*

This conclusion is reversible error not just because it is predicated upon a departure from the plain language of 10 *Del. C.* § 8126(a), but also because it produces a result that cannot be reasonably attributed to the legislature. *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 495-96 (Del. 2012).[3]

A. Even The Broadest Permissible Construction Of The Statute's Plain Language Does Not Support Its Application To The MAR.

The Court of Chancery correctly observed that the scope of 10 *Del. C.* § 8126 is "very broad." Indeed, the statute is necessarily

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[3] *See also Sterling Prop. Holdings, Inc. v. New Castle County*, 2004 WL 1087366 (Del. Ch. May 6, 2004)(holding that "the Court is bound to apply the plain meaning of the statutory language if there is no ambiguity" and "should not apply an interpretation to a statute which leads to a ridiculous or absurd result.")(citations omitted).

broad by virtue of its enumerated list of the types of county or municipal legislative "enactments" to which repose is applicable:

> "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…"

§ 8126(a). But within that broad list, each of the types of legislative enactments have both a literal meaning, and perhaps more importantly here, also have a particular legal effect with which they are associated in the zoning context.

Nonetheless, Defendants pronounce that, "whether it expressly purported to be or not, the Resolution adopting the MAR was *clearly* a regulation…relating to zoning…" per §8126(a). DBE AB at 25, n.9. Defendants likewise insist that the February 26 Resolution both "*constituted* an ordinance, code, regulation or map, related to zoning, or any amendment thereto," (A437)(emphasis added) and, "in addition," "*represented* a regulation or ordinance related to subdivision and land development, or any amendment thereto." *Id.* But if the MAR or the February 26 Resolution approving it was intended to either amend, or actually be, an ordinance or regulation, there is no language in either that makes such an intent clear. The MAR is devoid of any contract language, and the Resolution devoid of any recital or enacting clause, that suggests it amends any provision or regulation in the Town's Zoning Code. And the reason for the absence of such language was made clear by the Town and DBE in responses to FAQs shortly before the February 26 Resolution was adopted: the MAR was not a conditional use or rezoning, would not "supplement or change the

Zoning Code," and did not "change[] the zoning classification." A486-487.

Thus, Defendants' interpretation of §8126(a) requires the transubstantiation of the February 26 resolution approving the MAR into something that Defendants previously declared it not to be—a zoning ordinance or regulation, or an effective amendment thereto.

If the General Assembly intended for 10 *Del. C.* §8126(a) to apply to a zoning resolution, a zoning contract, or a private settlement agreement relating to zoning, those items would be included in the enumerated legislative enactments expressly listed in the statute. Indeed, the General Assembly could have drafted the statute to apply non-exclusively, to "any county or municipal legislative enactment, relating to zoning…" But it did not. Accepting Defendants' boundless interpretation would also likely come as a surprise to county and municipal legislators throughout Delaware. That is, resolutions typically reserved for congratulatory proclamations and public service awards are procedurally distinct from "force of law" ordinances that are required to amend a zoning ordinance, code, regulation or map. And this is evident in Delaware law, which acknowledges specifically in the zoning context, both the literal and legal distinction between a resolution and an ordinance:

> Delaware case law recognizes the General Assembly's clear interest in seeing municipal governments adhere to the basic conditions on the exercise of their delegated [zoning] powers. Recognition of this interest is reinforced by the terms and structure of the statute. Section 4110(i) of Title 9 sets forth a detailed procedural scheme for the enactment of ordinances; and, furthermore, in enacting 9 Del. C. § 4110, the legislature clearly distinguished between enactment by "resolution" and by "ordinance,"

> expressly recognizing the distinction by the terms of the statute.

Fields v. Kent County, 2006 WL 345014, at *7 (Del. Ch. Feb. 2, 2006).[4]

Delaware enables the "legislative body of the municipality [to] provide for the manner in which the regulations and restrictions and the boundaries of the districts shall be determined, established and enforced and from time to time amended, supplemented or changed." 22. *Del. C.* § 304. In the Town of Dewey Beach, "The Town Commissioners may, from time to time amend, supplement or change, ***by ordinance***, the boundaries…or [zoning] regulations herein established." A554.[5]

In *Fields*, the Court of Chancery determined that a rezoning and a comprehensive plan amendment approved by a Levy Court resolution, "violated a statutory requirement that actions of county government having the force of law must be accomplished by ordinance." 2006 WL 345014, at *1. The Court further held:

> Land use regulation is a power delegated to counties and other municipalities by the General Assembly. As a consequence, full compliance with the conditions imposed on the exercise of that power is essential. … By employing an oral resolution, instead of an ordinance, in approving the amendment to the comprehensive plan, the Levy Court impermissibly diverged from the procedural requirements imposed on the exercise of the County's delegated regulatory powers.

Id. at *7.[6]

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[4] *Citing* 9 *Del. C.* § 4110(h)("All actions of the county government which shall have the force of law shall be by ordinance.").

[5] *See* Dewey Beach Code § 185-73 (A) (emphasis added).

[6] *See also Bay Colony Ltd. P'ship v. County Council of Sussex County*, 1984 WL 159381, at *3,*5 (Del. Ch. Dec. 5, 1984) ("The Council cannot rezone land and not do so by ordinance… Action by ordinance is necessary in order to provide the numerous procedural safeguards which

Accordingly, there is no basis under Delaware law to interpret §8126(a)'s plain language so expansively that it applies to the February 26 Town Resolution or the MAR itself, as such an interpretation cannot be reasonably attributed to the legislature.

B. Balanced Public Policy Considerations Warrant Reversal Of The Court of Chancery's Dismissal.

Defendants' answering briefs side-step Plaintiffs' argument that the Court of Chancery's application of repose under these circumstances created a public policy imbalance that should, respectfully, be addressed as a matter of first impression in Delaware. Instead, Defendants simply "stand pat" on the immovable primacy of the statute's underlying policy of certainty and finality, and their unquestionable entitlement to the benefit of that policy on these facts. *See* Town AB at 13 (insisting that "finality and certainty in land use and zoning decisions ***outweighs*** any interest in technical adherence to local zoning procedures.")(emphasis added). Defendants' mistakenly declare that, "**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." *Id.*[7]

But *Fields v. Kent County* does precisely that. In *Fields* the Court of Chancery, employing a policy-balancing perspective, provides a sound rationale to resolve precisely when "section 8126 should give way to meticulous adherence to local zoning procedures." Town AB at

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insure public participation and more reasoned and orderly Council conduct.")(emphasis added).

[7] Referring to cases cited by Plaintiffs' OB at 21, fn 11.

13. The Court begins by "acknowledge[ing] that statutes of repose, especially where real property rights are concerned, are primarily intended to grant certainty to parties potentially subject to litigation-i.e., that they are free from the threat of litigation over their interests and may plan and act accordingly." 2006 WL 345014, at *6 (emphasis added). And yet, despite the exceedingly harsh and "narrow window allowed under the Statute for the commencement of challenges," the *Fields* Court found circumstances before it ("[t]he policy interests implicated by the present litigation"), that "may be distinguished." *Id.*[8] The Court held that where a "primary private defendant," "had notice of the challenge to the rezoning…and was actively confronting the challenge…[and] was, therefore, already exposed to the vagaries of litigation…," the purpose of repose would not be "frustrated" by permitting an otherwise untimely challenge under 10 *Del. C.* §8126 to proceed. *Id.* (finding that the private defendant could have had no expectation of "refuge from the challenge now before the Court.").

Here, neither the Town nor DBE had ***any*** expectation of refuge from Plaintiffs' challenge to the MAR. Nor did they have any reasonable expectation of "certainty or finality" arising out of the zoning-related approvals they purportedly achieved by the February 26 Resolution, mostly because they knew what they did had never been done

[8] *Citing Greczyn v. Colgate-Palmolive*, 869 A.2d 866, 874 (N.J.2005) ("Even statutes of repose ... 'need not necessarily be construed rigidly. [Precedent has] confirmed that our 'approach to substantive statutes of limitations has evolved to one that recognizes that their application depends on statutory interpretation focusing on legislative intent and purposes.'" (citations omitted)).

before (i.e., zoning related approvals achieved by a Town resolution approving a private settlement contract incorporating a redevelopment plan and building permit application and including specific approval procedures that precluded independent review by the Town's officials, boards and commissions.).

Indeed, Defendants affirmatively chose the uncertainty of employing a privately negotiated approval process rather than utilizing the statutory approval process.[9] And Defendants proceeded into this uncharted territory, despite the long-running legal skirmishes surrounding the controversial project, "the subject of perhaps more public hearings, public workshops and press coverage than any project in Sussex County's history." DBE AB 4. Moreover, Defendants chose not to seek the relative certainty of the Court's imprimatur on a settlement stipulation or consent decree detailing or describing the MAR's exchanged terms and zoning approval process. Finally, the MAR's terms acknowledge its own uncertain footing: (i) providing for a voluntary, privately funded, quarter-million dollar indemnity in favor of the Town to defend challenges to the MAR (A218-219), and (ii) referencing repeatedly the contingency of the MAR's approvals being later "reversed in whole or part by a court…" (A221).

Nor could Defendants have had any reasonable expectation of "finality" following the Town's February 26 Resolution. First, the express terms of the MAR make it clear that a "final public hearing" had yet to occur, nor had "all final Town approvals" yet been

[9] *E.g.*, Defendants could have sought approval of the MAR by enactment of an ordinance.

obtained. Second, and more significantly, the efficient cause of the MAR itself, the exchange of final zoning approvals for final litigation dismissals did not occur contemporaneously on February 26 or at any point shortly thereafter. Indeed, the final exchange of mutual litigation releases and dismissals under the MAR did not occur until October 2011, long after the June 2011 final public hearing and months after Plaintiffs filed their complaint challenging the MAR. A171-172.

Though *Fields* did not involve a voluntary litigation settlement, it nonetheless identifies and then harmonizes two of the three important public policies implicated in this case: the policy of certainty and finality underlying repose "supported by the narrow window allowed…for the commencement of challenges to [zoning] amendments..." and "…the General Assembly's clear interest in seeing municipal governments adhere to the basic conditions on the exercise of their delegated powers…" *Id.* at *6-*7. Plaintiffs respectfully ask for reversal of the Order dismissing the Complaint so that consideration of the appropriate equilibrium involving the three competing public policies at issue here may occur.

II. DEFENDANTS CANNOT ESCAPE THE LEGAL IMPLICATIONS OF EXPRESSLY INCORPORATING AND SUBMITTING THE PLAN AND BUILDING PERMIT FOR CONSIDERATION AND APPROVAL UNDER THE NEGOTIATED PROCEDURES SET FORTH IN THE MAR.

10 *Del. C.* § 8126 (b) is applicable *only* to a plan "submitted under the subdivision and land development regulations of [a] county or municipality..." *Id.* The statute reads, in pertinent part:

> (b) No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the subdivision and land development regulations of such county or municipality is challenged…

Id. Defendants repeatedly conceded in briefs below that the very "purpose" of the MAR was to create an up or down approval process "under which DBE could submit a revised plan…" A235;A275 (emphasis added). Defendants now maintain in their answering briefs that DBE's plan was actually submitted under a "required" "ratification process," which "created an additional subdivision and land development step." DBE AB 34. But this purportedly "required" "ratification process" does not exist, but for the MAR and its retroactively applicable recitals. The Town specifically objected and "continues to dispute" the applicability of the "ratification process," (*infra*, Counterstatement of Facts) and the Court of Chancery was likewise "not persuaded by it." Op. 27

But even beyond concessions during litigation that the Plan was "submitted" for approval or denial under the MAR instead of under the Town's the zoning regulations, Defendants jointly stipulated in a Court of Chancery filing that the plan was to be "presented," and "approved or rejected" under the MAR:

> WHEREAS, Paragraph 8 of the MAR sets forth a process by which the Ruddertowne Redevelopment Plan and Building Permit were to be presented to the public, made the subject of public hearings, and approved or rejected by the Town Commissioners and Building Inspector;

A707.[10]

A. Paragraph 8 of the MAR Unambiguously Provided For the Final Approval of the MAR's Incorporated Plan and Permit Components After A June 17, 2011 "Final Public Hearing."

It is axiomatic that settlement agreements are contracts. *Loppert v. Windsortech, Inc.*, 865 A.2d 1282, 1285 (Del. Ch. 2004). "In interpreting the terms of a contract, the court's role is to effect the parties' intent." *Tang Capital Partners, LP v. Norton*, 2012 WL 3072347, at *5 (Del. Ch. July 27, 2012) "If a writing is plain and clear on its face, i.e., its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent." *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).

The MAR mandated a six-step "Plan and Building Permit Approval Process." A213. The plain language of the *last sentence* of the *last step* in the "approval process" unmistakably refers to the "final approval" of "DBE's plan." A214. The final step of the approval process is detailed in its entirety below:

> (vi) a final public hearing ("Hearing Two") [June 17,2011] by the Town Commissioners to review the Planning Commission's recommendations provided for herein and make a final decision regarding whether the final construction

[10] *See* STIPULATION & [PROPOSED] ORDER OF DISMISSAL WITHOUT PREJUDICE, SUBJECT TO BEING VACATED UPON THE OCCURRENCE OF A FUTURE EVENT, Filed October 13, 2011 (Transaction ID 40331988), Del. Ch. C.A. Nos. 4426, 4991, 5711, and 5833 (attached hereto as Exhibit B for ease of reference).

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

A214 (emphasis added). In fact, section 8(a)(vi) is the *only* provision of the MAR's "Plan & Building Permit Approval Process" that uses the term "final approval" and "plan" together. *Id.*

Yet, Defendants insist that "the MAR **makes clear** that the purpose of the February 26, 2011 (not the June 17, 2011) hearing" was to provide the final approval of the MAR's Plan component, (DBE AB 39), and that:

> 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.

DBE AB 38. But the MAR actually expressly references the "double approval process" Defendants so vehemently insist does not and cannot exist. Section 17(i) of the MAR concerns the timing of the litigation dismissals to be exchanged after "final approval by the Town is granted, subject to Paragraph 8 of this Agreement…" and states:

> If a *Town Commission approval* **and** *final approval of a plan* and a building permit being issued under the terms and conditions of this Agreement is not obtained as contemplated herein, then DBE reserves the right to terminate this Agreement in full and it shall thereafter have no legal force or effect as to either party whatsoever.

A220 (emphasis added). And this is the same "double approval process" that finds support elsewhere in the record. The language of the February 26, 2011 Resolution approving the MAR (which notably does not use the word "final" at all), describes the plan as "approved **subject to any conditions** listed upon the Record Plat Plan, the building permit, or both." A190 (emphasis added). And the "conditions listed upon the Record Plat Plan," made the Plan expressly "subject to the terms and conditions" of the MAR, "an integral part of this plan and [] fully incorporated herein…," which, of course, subjected the Plan component to the MAR's June 17, 2011 "final public hearing" provided at Paragraph 8(a)(vi), after which, "Upon final approval DBE's plan shall then be recorded as a matter of public record." A637,A214.

This notion of the Town Council's "conditional" approval on February 26 with a later "final approval" after the final public hearing is also supported by Defendants' public responses to FAQs concerning the timing and the triggering of Sussex County and DNREC obligations to review the redevelopment project, which are "not triggered until the Town gives *initial* approval to the project." A478-479.

The four corners of the MAR, its negotiated language fairly read and its context fairly understood, should not now be subject to a litigation-based reformation. Defendants do not, because they cannot,

point to anywhere in the language of the MAR itself or the Resolution approving the MAR (as opposed to the self-serving language of the Resolution Notice) where a "final approval" of the MAR's Plan component is specifically referenced, other than at the final step, the final public hearing, of the six-step "Plan & Building Permit Approval Process."

CONCLUSION

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

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