IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NVR, INC., Plaintiff, v. OSPREY POINT PRESERVE, LLC, Defendant.	)	C.A. No. 2025-0581-BWD
OSPREY POINT PRESERVE, LLC, Counterclaim Plaintiff, v. NVR, INC., Counterclaim Defendant.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: August 9, 2026
Date Decided: August 19, 2026

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DAVID, V.C.

Situated in the Lewes and Rehoboth Hundred in Sussex County, Delaware, west of Old Landing Road on a tributary of the Rehoboth Bay, lies the approximately 132-acre property at the heart of this dispute. The property is now the site of the Osprey Point Community, named for the impressive birds of prey frequently spotted throughout Delaware's estuary nesting atop platforms or plunging into waters to snatch fish near the surface.

A decade ago, the property was rezoned for residential use and its then-owner recorded a plan to build a housing subdivision. The property owner contracted with plaintiff NVR, Inc. ("NVR" or "Plaintiff") to build homes in the subdivision, and NVR partnered with defendant Osprey Point Preserve, LLC ("OPP" or "Defendant") to develop the property into the Osprey Point Community. OPP and NVR always intended that OPP would retain a waterfront parcel abutting the community. They later agreed that OPP would construct a commercial restaurant and marina on its parcel that would also include amenities managed by the Osprey Point Community's homeowners' association.

In 2022, with NVR's support, OPP submitted a rezoning application and proposed site plan to the Sussex County Planning & Zoning Department. The plan reflected amenities agreed to by OPP and NVR, including a bulkhead beach area, a 24-slip marina, and a private restaurant on OPP's retained waterfront parcel. NVR began selling homes in the Osprey Point Community later that year.

More than a year later, however, the Sussex County Council denied OPP's request for a zoning amendment to permit a commercial restaurant and marina. After the denial, OPP and NVR met for several months to develop a new site plan. In January 2025, OPP submitted a revised site plan to the Sussex County Planning & Zoning Department. NVR claims OPP took the plunge without its consent, failing to share the final site plan with NVR before its submission. NVR insisted that OPP withdraw the plan and rework it to include homeowner feedback. OPP refused and NVR initiated this lawsuit, seeking an order of specific performance requiring OPP to withdraw the plan, provide NVR an opportunity to approve the plan, and then resubmit it. During the litigation, NVR also ceased purchasing lots from OPP, and OPP purported to terminate the parties' agreement due to NVR's breach.

The parties' agreement gives NVR a "right to review and approve or disapprove" changes to the amenities and development plans in the community. NVR does not have a right to review and approve changes before submission to the County. It also cannot unreasonably withhold, condition, or delay approval of the plans. NVR learned of the revised site plan soon after it was submitted, had ample opportunity to review the plan, and decided to disapprove it. After a two-day trial, I conclude that NVR's decision to withhold approval was not reasonable. The revised site plan was substantially similar to the one NVR previously approved, which incorporated agreed-upon amenities. The revised site plan removed features associated with the private restaurant Sussex County Council rejected, and made other minor adjustments, but NVR could not explain why those changes were material or otherwise provided a reasonable basis to withhold approval of the plan. Instead, the record shows that NVR disapproved the revised site plan because homeowners were disappointed with the remaining amenities after Sussex County Council rejected the zoning amendment, and NVR was fishing for a way to extract additional concessions from OPP to which NVR and the homeowners were never contractually entitled. The primary concession NVR sought was for OPP to convey its retained waterfront parcel to the homeowners' association, but the parties always bargained for OPP to keep that parcel. Withholding consent to the revised site plan as leverage to coerce OPP to give up property it clearly owned was not a legitimate business purpose, and NVR's approval was unreasonably withheld.

Because NVR, and not OPP, breached the parties' agreement, OPP validly terminated. Judgment is entered for OPP as set forth below.

I. BACKGROUND

The following facts are as the Court finds them after a two-day trial held on March 9 and 10, 2026.[1]

[1] The parties' Joint Pre-Trial Stipulation and Order is cited as "PTO ¶ __". Dkt. 82. The trial transcript is cited as "Tr. (Witness) at __". *See* Dkts. 84, 85. Joint exhibits are cited as "JX __" unless otherwise defined. Dkt. 77.

A. NVR Acquires Rights To Build In Osprey Point And Partners With OPP To Develop The Community.

The 132-acre property at issue in this action (the "Property") is located in the Lewes and Rehoboth Hundred in Sussex County, Delaware, west of Old Landing Road on a tributary of the Rehoboth Bay.[2] A decade ago, the Property was owned by nonparty Robert Marshall, who decided to rezone and subdivide the Property, then a golf course, into a waterfront residential community.[3] In November 2016, the Sussex County Council approved Marshall's request to rezone the Property from agricultural to residential use.[4] The following year, Marshall recorded a plan with the Office of the Recorder of Deeds in and for Sussex County (the "Recorder of Deeds") to build a housing subdivision on the Property (the "2017 Record Plan").[5]

NVR is a residential building company incorporated in Virginia.[6] After the Property was rezoned, NVR contacted Marshall about his plans for development.[7] Those discussions resulted in an Agreement of Sale dated June 4, 2018 (the "2018 Sale Agreement") under which NVR agreed to purchase and build homes on the

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[2] JX 1 at 1; JX 6 at 1.

[3] JX 2; JX 3 at 1.

[4] PTO ¶ 5; JX 1 at 1, 3.

[5] PTO ¶ 6; JX 2.

[6] *See* PTO ¶¶ 1, 3; *see* Verified Compl. [hereinafter Compl.] ¶ 2, Dkt. 1; Answer and Countercls. of Osprey Point Preserve, LLC [hereinafter Countercls.] ¶ 2, Dkt. 13.

[7] Tr. (Ciabattoni) at 10:3–11:7.

Property.[8] The 2018 Sale Agreement contemplated that Marshall would retain three parcels identified on the 2017 Record Plan—a 5.05-acre "Outparcel," a 0.72-acre "Marina Parcel" along the Rehoboth Bay, and a 0.38-acre "Parcel P" (together, the "Retained Parcels")—which Marshall would lease to the future community's homeowners' association, once established (the "HOA").[9] The 2018 Sale Agreement included drawings and a description of two proposed boat docks with 12 slips each, situated near a parking lot with 18 spaces and 2.28 acres of "Passive Open Space."[10]

NVR is a homebuilder; it partners with third-party developers to build communities and prepare individual lots for construction. After NVR entered the 2018 Sale Agreement, it needed a development partner to bring the project to fruition. In June 2018, NVR prepared pitch materials to send to potential development partners.[11] Consistent with the 2018 Sale Agreement, NVR's pitchbook explained that Marshall would own the Retained Parcels and a "24[-]slip [M]arina w[ould] be permitted, constructed and owned by [Marshall]."[12]

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[8] PTO ¶ 7; JX 3 at 1.

[9] JX 3 at 1.

[10] *Id.*, Ex. 3.

[11] JX 4 at 1.

[12] *Id.* at 8.

Ultimately, OPP, owned by Michael and Kathleen Horsey, agreed to develop the Property into the Osprey Point Community, with NVR building the homes therein.[13] On September 19, NVR and OPP entered into an Assignment and Assumption Agreement, under which NVR assigned its rights to purchase the Property under the 2018 Sale Agreement to OPP, and OPP agreed to develop the Osprey Point Community and prepare residential lots on which NVR would build homes.[14]

B. Marshall Sells His Retained Parcels, Including The Marina Parcel, To OPP.

The following year, on November 14, 2019, Marshall and OPP entered into an Amended and Restated Purchase and Sale Agreement (the "2019 Sale Agreement").[15] The 2019 Sale Agreement, like the 2018 Sale Agreement, made clear that Marshall would own the Retained Parcels, including the Marina Parcel, as OPP developed the Osprey Point Community.[16]

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[13] PTO ¶¶ 8–9; Tr. (M. Horsey) at 365:4–22.

[14] PTO ¶ 10; JX 5.

[15] PTO ¶ 13.

[16] JX 6 at 1–2.

On April 13, 2020, Marshall signed a deed conveying the Retained Parcels to OPP.[17] Marshall recorded a new plan for the Osprey Point Community (the "2020 Record Plan"), which showed a marina would be built on the Marina Parcel.[18]

The next month, NVR filed a lawsuit against OPP and Marshall in this Court under the caption *NVR, Inc. v. Osprey Point Preserve, LLC and Robert A. Marshall*, C.A. No. 2020-0362-SG (the "2020 Litigation"), seeking to rescind the 2019 Sale Agreement.[19] In that action, NVR alleged that Marshall and OPP had breached the 2018 Sale Agreement and the Assignment and Assumption Agreement by failing to secure NVR's consent to amend the agreements to eliminate NVR's contractual rights.[20]

C. OPP Records The First Site Plan.

While the 2020 Litigation was pending, OPP prepared a site plan for the Osprey Point Community (the "2020 Site Plan").[21] The 2020 Site Plan listed "Proposed Land Use Areas" that included 45.51 acres of "Single Family Lots," 15

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[17] PTO ¶ 17; JX 8.

[18] PTO ¶ 18; JX 7. The 2020 Record Plan was approved by the Delaware Department of Transportation but otherwise did not materially differ from the previous 2017 Record Plan. *Compare* JX 2, *with* JX 7.

[19] PTO ¶ 19.

[20] Verified Compl. ¶¶ 75–98, C.A. No. 2020-0362-SG, Dkt. 1. NVR alleged in that action that "Marshall retained the below-listed three parcels, as well as an easement to access the parcels: . . . .72 acre boat dock that included the marina." *Id.* ¶ 11.

[21] JX 9.

acres of "Right-of-Way," 64.69 acres of "Open Space," and 1.11 acres of "Marina Open Space," representing the approximate combined acreage of the Marina Parcel (0.72 acres) and Parcel P (0.38 acres):[22]

PROPOSED LAND USE AREAS	
SINGLE FAMILY LOTS:	45.51 ACRES
RIGHT-OF-WAY:	15.00 ACRES
OPEN SPACE:	64.69 ACRES
MARINA OPEN SPACE:	1.11 ACRES
TOTAL MR/RPC SITE AREA:	126.31 ACRES

The 2020 Site Plan also listed "Open Space Impervious Surface Areas" that included 50.64 acres of "Open Space A," 14.05 acres of "Open Space B," and 1.11 acres of "Marina":[23]

OPEN SPACE IMPERVIOUS SURFACE AREAS:

OPEN SPACE	TOTAL AREA	IMPERVIOUS AREA	% IMPERVIOUS
OPEN SPACE A	50.64 AC.	±0.4 AC.	±1%
OPEN SPACE B	14.05 AC.	±2.0 AC.	±14%
MARINA	01.11 AC.	±0.2 AC.	±20%
TOTAL	65.80 AC.	±2.6 AC.	±4%

On August 12, after receiving approvals from the Sussex County Planning & Zoning Commission, the 2020 Site Plan was recorded with the Recorder of Deeds.[24]

[22] *Id.* at 1.

[23] *Id.*; Pl./Countercl. Def. NVR, Inc.'s Post-Trial Opening Br. [hereinafter POB] at 30, Dkt. 89.

[24] PTO ¶ 20.

D. NVR And OPP Sign A Lot Purchase Agreement.

NVR and OPP settled the 2020 Litigation in February 2021. As part of the settlement, on February 5, 2021, the parties entered into a Lot Purchase Agreement.[25] OPP agreed in the Lot Purchase Agreement to construct a marina ("Marina") on its Marina Parcel:

> [I]t is planned that a Marina will be located on and/or immediately adjacent to the Property. The "Marina" is an element of Ordinance 2475 which set the zoning of the Property on which this Agreement is based and [OPP] has undertaken responsibility for and ownership of the [M]arina . . . .[26] . . .
>
> In addition to the Amenities, [OPP] shall construct, to the extent permitted by applicable regulatory agencies, a marina (the "Marina"). The Marina will not be owned, leased or controlled by the [HOA] or [NVR]; however, to the extent possible and permitted by applicable regulatory agencies, the Marina will include a storage area suitable for kayaks, standup paddleboards or canoes to be managed by the [HOA] that individual homeowners may acquire and subject to [NVR's] approval, which shall not be unreasonably withheld, conditioned or delayed.[27] . . .
>
> [OPP] shall convey the common areas, exclusive of the Marina and any area surrounding the Marina that is reserved by [OPP], that are not Lots to the [HOA] . . . .[28]

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[25] *Id.* ¶ 21; JX 10.

[26] JX 10 at 1–2.

[27] *Id.* § 3(j).

[28] *Id.* § 10(h).

The Lot Purchase Agreement required NVR to "provide notice to, and obtain a disclosure from, its third[-]party homebuyers that the Marina plans [we]re subject to approval by the applicable governmental authority, including the Delaware Department of Natural Resources and Environmental Control[]."[29] Because the parties recognized that the regulatory approval process could result in changes to their development plans, the Lot Purchase Agreement gave NVR a right to "review and approve or disapprove" changes to development documents:

> [NVR] shall have the right to review and approve or disapprove, which approval shall not be unreasonably withheld, conditioned or delayed, any and all changes made to the proposed, submitted and/or approved development documents, including, but not limited to, the Community Association Documents, any plans, designs and drawings, including site plans, construction (all types), landscape improvements (trees, shrubs, fences and walls) and covenants, restrictions and easements of record. The parties acknowledge that the approval of the Marina may create changes to the various development documents and matters to be constructed in the vicinity of the Marina and the adjacent lots. [NVR] shall respond, in writing, within ten (10) business days of [NVR]'s receipt of the applicable document that attempts to change such documents, whether [NVR] approves said proposed changes, such approval not to be unreasonably withheld. [NVR] shall have no right to object to any such changes if [NVR] fails to respond within the ten (10) business day period.[30]

Under the Lot Purchase Agreement, "[i]n the event of any breach, failure or default by [NVR]," "[OPP's] sole and exclusive right and remedy shall be to retain

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[29] *Id.* § 3(j).

[30] *Id.* § 11(e).

the [d]eposit as full, fixed and liquidated damages, not as a penalty, whereupon the [Lot Purchase Agreement] shall terminate."[31]

E. The Parties Amend The Lot Purchase Agreement To Provide For Enhanced Amenities, Including A Commercial Restaurant And Marina.

In late 2021 or early 2022, OPP sought to increase the purchase price for lots due to increased costs.[32] On January 7, 2022, NVR and OPP entered into a First Amendment to the Lot Purchase Agreement (the "First Amendment") under which NVR agreed to a $17,000 per lot price increase.[33] In exchange, OPP agreed to build additional amenities in the Osprey Point Community, listed in Exhibit T to the First Amendment (the "Enhanced Amenities").[34] Among other amenities, OPP agreed in Exhibit T to build "a bulkheaded beach area," to "apply for permits for a 24[-]slip marina" where "the HOA will have the ability to lease one slip for a Kayak launch,"[35] and to build and operate a "[p]rivate restaurant" at the Marina.[36] These amenities were depicted in a drawing on the final page of the First Amendment, which

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[31] *Id.* § 8(a).

[32] Tr. (Ciabattoni) at 32:21–33:5.

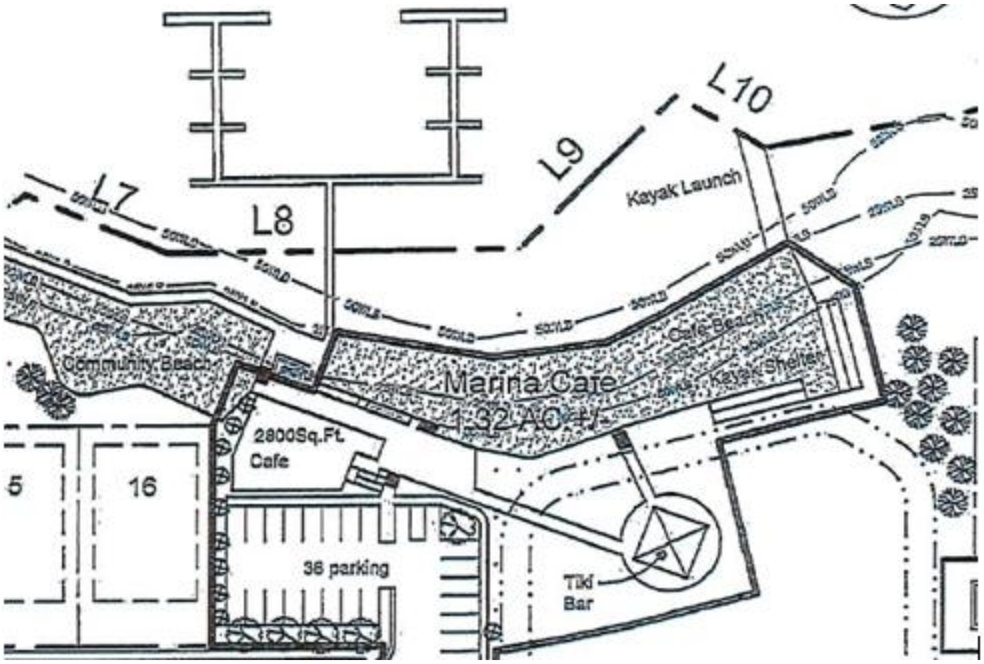
[33] PTO ¶ 23; JX 14.

[34] JX 14, Ex. T.

[35] *Id.*

[36] *Id.*

illustrates a possible configuration of the bulkhead beach area, boat slips, and restaurant on the Marina Parcel:[37]

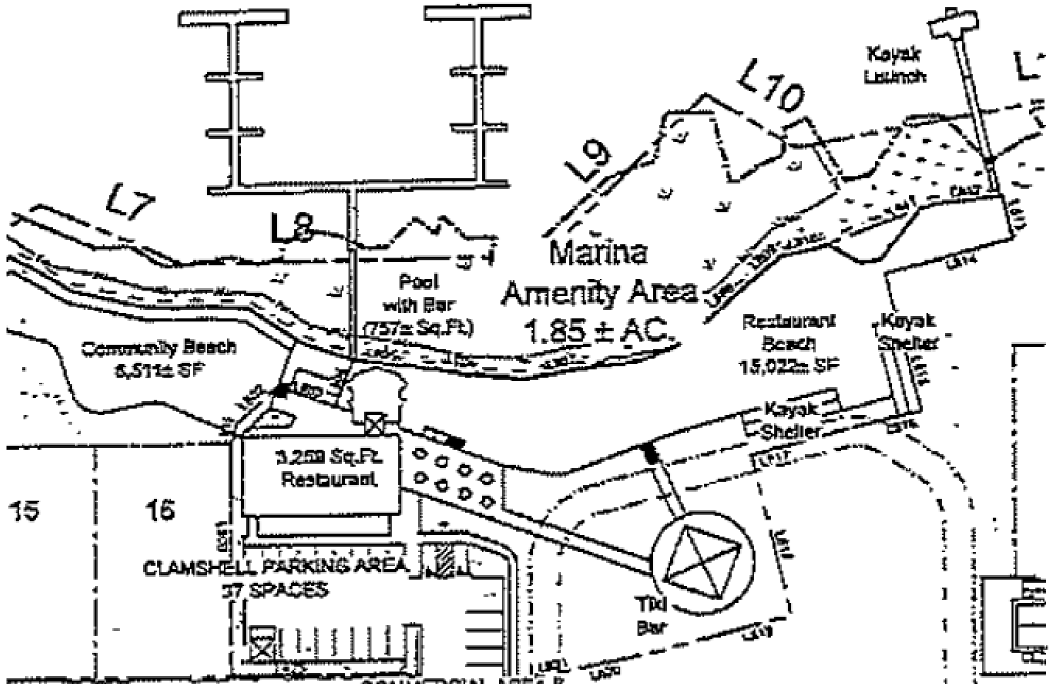


On February 14, OPP submitted an application (the "First Application") to the Sussex County Planning & Zoning Department to amend the existing zoning ordinance—which permitted only residential use of the Property—to allow for a commercial restaurant and Marina, as contemplated in the First Amendment.[38] The application included a proposed revised site plan (the "2022 Proposed Site Plan") that incorporated the Enhanced Amenities:[39]

[37] *Id.* at 25.

[38] PTO ¶ 24; JX 15 at 1.

[39] JX 15 at Tab 7.



NVR supported the First Application and the 2022 Proposed Site Plan.[40]

F. OPP Records A Declaration For The Community, Confirming That OPP Owns The Marina Parcel.

In early March, NVR purchased the first two developed lots in the Osprey Point Community from OPP.[41]

On March 31, OPP recorded a Master Declaration of Covenants, Conditions, Easements, and Restrictions for the Osprey Point Community (the "Declaration")

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[40] JX 20.

[41] PTO ¶ 25; JX 16 at 1, 4.

with the Recorder of Deeds.[42] The Declaration confirms that OPP, the "Declarant," owns the Marina Parcel, which is not subject to the Declaration:

> 2.1 Property Subject to this Declaration. The Property shall be a planned community with the name of "Osprey Point" that is held, conveyed, hypothecated, encumbered, sold, leased, rented, used, occupied and improved subject to all of the covenants, conditions and restrictions of this Declaration. The Property is subject to the Easement Agreements described in Exhibit C attached hereto as a part hereof. Notwithstanding the foregoing, the parcel labelled "Marina 1.11 AC." on the Master Plan (the "Marina Area") is not made subject to this Declaration and shall not constitute [HOA property] or a Lot, and shall not be part of the Property or the Project.[43] . . .
>
> 2.4. Development Rights. Declarant reserves the right to annex adjacent property to the community and to further subdivide and/or modify the Marina Area and obtain development approvals for the Marina Area after the date of this Declaration for the construction and operation of a Marina and/or restaurant or other improvements in the Marina Area.[44]

On May 20, NVR finalized a public offering statement (the "Public Offering Statement") for the Osprey Point Community.[45] The Public Offering Statement explained that the Osprey Point Community includes 64.69 acres of "open space" and repeatedly incorporated the Declaration by reference.[46] Further, the Public

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[42] PTO ¶ 26; JX 17 at 1.

[43] JX 17, Art. II § 2.1.

[44] *Id.* § 2.4.

[45] PTO ¶ 28; JX 18.

[46] *See generally* JX 18.

Offering Statement, like the Declaration, stated that OPP "reserve[d] the right to further subdivide and/or modify the parcel labeled 'Marina 1.11 AC.' on the Record Plan (the 'Marina Area') . . . ."[47]

G. The Sussex County Council Denies OPP's Request For A Zoning Amendment To Permit A Commercial Restaurant And Marina In The Osprey Point Community.

On June 1, NVR held an internal "community kick-off meeting" where its staff were instructed on how to market the Osprey Point Community to potential homebuyers. NVR's materials stated that a "PRIVATELY OWNED & PROPOSED" "kayak launch, boat slips, [and] restaurant" had been "submitted" to the County but were "not yet approved."[48]

On August 9, NVR sent the Sussex County Planning & Zoning Commission a letter supporting the First Application to amend the zoning ordinance to permit a commercial restaurant and Marina.[49] NVR's letter acknowledged that OPP owned the Marina Parcel.[50]

Nearly a week later, on August 15, NVR sold the first home in the Osprey Point Community.[51]

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[47] *Id.* at 7.

[48] JX 19 at 3; Tr. (Ciabattoni) at 129:16–130:1; *id.* (Morgan) at 194:12–19.

[49] PTO ¶ 29; JX 20 at 1.

[50] JX 20 at 1.

[51] JX 21 at 1.

More than a year later, on November 7, 2023, the Sussex County Council held a public hearing on the First Application, and on November 9, it issued a written decision.[52] The decision approved the First Application in part, but denied OPP's request for a zoning amendment to permit a "commercial Restaurant" and "commercial Marina amenit[ies]," instead permitting a "less intensive use as a private boat marina."[53] The decision instructed:

> A. This marina shall be an amenity for the property owners within Osprey Point and shall be limited to use by boats owned by property owners within Osprey Point. No slips shall be bought, sold, leased, or occupied by anyone other than the owners of residential units within Osprey Point. . . .
>
> F. The existing [2020] Site Plan for Osprey Point shall be revised to include this marina as an amenity for the property owners within the development. The Revised Final Site Plan shall include Condition "A" above. The Revised Final Site Plan shall be subject to the review and approval of the Sussex County Planning & Zoning Commission.[54]

H. OPP Submits A Revised Site Plan To The Sussex County Planning & Zoning Department.

Between July and December 2024, NVR and OPP met multiple times to discuss drafts of the revised site plan required under the Sussex County Council's November 9 decision.[55]

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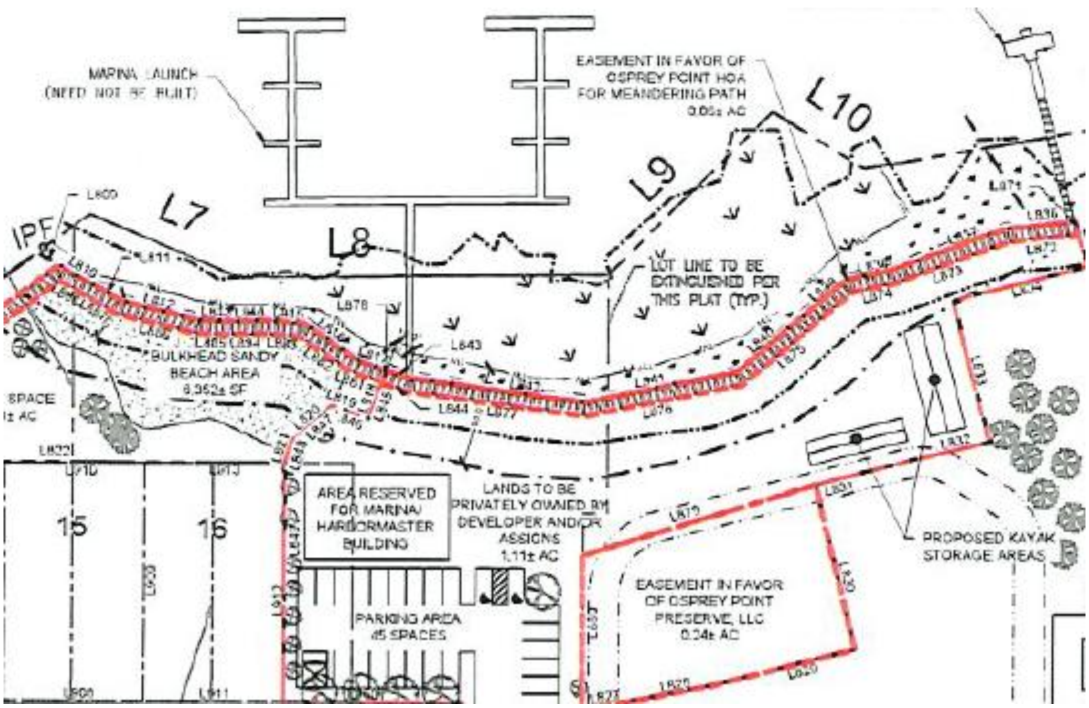
[52] JX 22 at 1.

[53] *Id.*

[54] *Id.* at 1–2.

[55] JX 23 at 1–2; JX 24 at 1.

On January 16, 2025, OPP submitted an updated site plan to the Sussex County Planning & Zoning Department (the "2025 Revised Site Plan").[56] The 2025 Revised Site Plan removed features associated with the commercial restaurant that the Sussex County Council rejected and made other modest adjustments to the 2022 Proposed Site Plan:[57]



According to OPP, principals of NVR and OPP met eight times throughout December 2024 to review drafts of the 2025 Revised Site Plan in person.[58] OPP claims that it showed NVR a copy of the final site plan during those in-person

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[56] PTO ¶ 32; JX 25.

[57] JX 25 at 2.

[58] Tr. (K. Horsey) at 485:8–487:11, 491:3–8.

meetings,[59] but NVR insists that it did not receive the final 2025 Revised Site Plan before OPP submitted it.[60]

NVR claims it first learned from a homeowner that the 2025 Revised Site Plan had been submitted.[61] On February 13, NVR emailed OPP, stating that it "d[id] not approve [OPP's] plan and [OPP was] going to have a mutiny at the council meeting with the homeowner feedback."[62]

I. Osprey Point Homeowners Express Frustration That The Enhanced Amenities Have Not Been Constructed.

On February 27, an Osprey Point homeowner made a complaint against NVR to the Delaware Department of Justice Consumer Mediation Unit, expressing concerns about the Osprey Point Community's amenities.[63]

On March 6, NVR, OPP, and the Osprey Point Community's property manager met with homeowners. At the meeting, "[h]omeowners [were] upset" about "ownership of the [M]arina" and expressed "a lot of frustration" about the

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[59] *Id.* OPP's principals, the Horseys, testified that they took "meeting notes after the December meeting" but later "discarded" them. *Id.* (M. Horsey) at 413:10–18; *id.* (K. Horsey) at 509:12–510:4.

[60] PTO ¶ 33; Tr. (Morgan) at 156:22–157:1.

[61] Tr. (Morgan) at 157:2–5.

[62] JX 27.

[63] *See* JX 31.

status of the amenities.[64] NVR tried to "bring down the temperature in the room," explaining that it seemed "[t]here was confusion" about what was "going to be built,"[65] and reminded homeowners that "[OPP] owns and has rights to a 1.1 acre parcel."[66]

Mike Ciabattoni, a former division manager at NVR, Michelle Morgan, a division manager at NVR, and Stephen Neuberger, a regional manager at NVR, all testified that at this time, NVR still understood that OPP owned the Marina Parcel.[67] But after the March 6 meeting, NVR "look[ed] into [it] further"[68] and decided based on the recorded plans that the HOA should own the Marina Parcel.[69]

On March 17, NVR's counsel sent a letter to OPP "in connection with the revised amenity plan that [OPP] submitted . . . without the required approval from [NVR]."[70] NVR's letter reiterated that NVR did not approve of the 2025 Revised Site Plan, claiming the plan "varie[d] significantly from Exhibit 'T' to the First

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[64] Tr. (Neuberger) at 322:21–323:5.

[65] *Id.* at 323:2–12.

[66] *Id.* at 323:24–324:3; *see also* JX 29 at 4.

[67] Tr. (Ciabattoni) at 24:20–25:1; *id.* (Morgan) at 229:14–17; *id.* (Neuberger) at 317:9–12; *see also* JX 33 ("Let me know if you have time tomorrow to discuss your private parcel.").

[68] Tr. (Morgan) at 173:8–13.

[69] *Id.* (Ciabattoni) at 40:23–41:12; *id.* (Morgan) at 172:19–173:2, 200:12–14.

[70] JX 32 at 1.

Amendment."[71] NVR demanded that OPP work with NVR to "design and approve a revised amenity plan that differs from the plan included in the First Amendment," insisting that "whatever plan [OPP] proposes with must have significant community support in order to be considered."[72]

J. NVR Sends OPP Notices Of Default.

On March 26, OPP's counsel responded to NVR's March 17 letter, "not[ing]" NVR's disapproval but asserting that "OPP has every right to proceed with the submission nonetheless."[73]

NVR responded with another letter on April 11, asserting that OPP had breached the Lot Purchase Agreement and would pursue legal remedies if the parties could not agree on a new site plan to submit to the Sussex County Planning & Zoning Department.[74]

On April 14, NVR sent OPP a written default notice, asserting that OPP was in default of the Lot Purchase Agreement by failing to give NVR an opportunity to review and approve the 2025 Revised Site Plan before OPP submitted it.[75] On May

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[71] *Id.* at 2.

[72] *Id.*

[73] JX 36 at 2.

[74] JX 38 at 1–2.

[75] JX 39 at 1.

16, NVR sent OPP a second default notice, adding that OPP was in breach of the First Amendment by failing to complete the Enhanced Amenities.[76]

On May 21, OPP responded to NVR's May 16 default notice, rejecting both alleged bases for default.[77]

K. Procedural History

On May 23, NVR initiated this litigation through the filing of a Verified Complaint (the "Complaint").[78]

On June 2, NVR sent a letter to Osprey Point homeowners stating that it was temporarily pausing sales in the Osprey Point Community and would "remain closed until NVR has an agreed upon path forward with [OPP] to install the [M]arina and associated amenities."[79] The letter told homeowners that NVR was "involving the Court to compel the developer to . . . [d]eclare that upon construction of the [M]arina and amenities, the developer is required to convey the [M]arina and amenities as part of the open space to the HOA."[80]

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[76] JX 40 at 1.

[77] JX 42 at 1.

[78] Compl. at 1.

[79] PTO ¶ 41; JX 43 at 1.

[80] JX 43 at 2.

The Court ordered expedition and set a trial for March 2026.[81] On June 13, 2025, OPP filed an Answer and Counterclaims (the "Counterclaims"), asserting counterclaims against NVR for fraud, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment, and breaches of the Lot Purchase Agreement.[82]

While this litigation was pending, another disagreement arose between the parties concerning NVR's obligation to purchase additional lots. OPP asserted that it "ha[d] met [its] C[onditions] P[recedent] obligations" to deliver lots for purchase but NVR improperly refused to close on the lots.[83] NVR, on the other hand, claimed the lots in question were not ready for purchase because gas and electric were not yet installed, and OPP's breaches of the Lot Purchase Agreement meant OPP could not satisfy all conditions to closing in any event.[84] On June 16, OPP sent NVR a notice of default premised on NVR's failure to close on additional lots,[85] and on January 5, 2026, OPP purported to terminate the Lot Purchase Agreement.[86]

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[81] Dkts. 12, 23.

[82] Countercls. ¶¶ 99–163.

[83] JX 44 at 2.

[84] *See id.* at 1–3; Tr. (Ciabattoni) at 21:22–22:2; *id.* (Morgan) at 180:4–181:2, 182:12–19.

[85] PTO ¶ 42; JX 45 at 1–2. NVR has not purchased lots since May 2025. PTO ¶ 54; Tr. (M. Horsey) at 409:20–22.

[86] PTO ¶ 43; JX 58.

On January 29, NVR moved for entry of a status quo order to prohibit OPP from selling lots to third parties in breach of the Lot Purchase Agreement.[87] OPP responded that it had validly terminated the Lot Purchase Agreement due to NVR's breaches.[88] The Court entered a status quo order on February 12, temporarily enjoining OPP from selling lots to third parties.[89]

The Court held a two-day trial on March 9 and 10. The parties completed post-trial briefing on August 9.[90]

II. ANALYSIS

The parties proceeded to trial on NVR's claims for breach of contract and declaratory judgment and OPP's counterclaims for fraud, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment, and breach of contract.

I begin with NVR's request for a declaratory judgment that the 2020 Site Plan designates the Marina Parcel as "open space" that OPP must convey to the HOA. Because the trial record overwhelmingly shows that OPP owns the Marina Parcel,

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[87] Dkt. 60.

[88] Dkt. 65 at 3–4, 6.

[89] Dkt. 68.

[90] POB; Def./Countercl. Pl. Osprey Point Preserve, LLC's Post-Trial Opening/Answering Br. [hereinafter DOB], Dkt. 90; Pl./Countercl. Def. NVR, Inc.'s Answering/Reply Post-Trial Br. [hereinafter PAB], Dkt. 91; Def./Countercl. Pl. Osprey Point Preserve, LLC's Post-Trial Reply Br. [hereinafter DAB], Dkt. 92.

NVR's request for a declaratory judgment is denied. I then consider NVR's claim for breach of the Lot Purchase Agreement and request for specific performance thereof. In doing so, I find that NVR, not OPP, breached the Lot Purchase Agreement, and that OPP validly terminated the agreement. These findings largely resolve or moot OPP's Counterclaims.

A. OPP Owns The Marina Parcel.

In Count II of the Complaint, NVR seeks a declaratory judgment that the 2020 Site Plan designates the Marina Parcel as "open space" that OPP must convey to the HOA.[91]

The trial record overwhelmingly refutes NVR's position that the HOA has any claim to ownership of the Marina Parcel. At all points in time prior to this litigation, OPP and NVR understood that Marshall, and later OPP, would retain the Marina Parcel. At no point did OPP ever agree to convey the Marina Parcel to the HOA. Every document in the record confirms this understanding:

- When NVR and Marshall entered into the 2018 Sale Agreement, they agreed that Marshall would retain the Marina Parcel and lease it to the HOA.[92]

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[91] Compl. ¶¶ 80–89; POB at 30.

[92] JX 3 at 1.

- Consistent with the 2018 Sale Agreement, NVR's pitch materials to development partners explained that Marshall would own the Retained Parcels and that a "24[-]slip [M]arina w[ould] be permitted, constructed and owned by [Marshall]."[93]
- In November 2019, Marshall and OPP entered into the 2019 Sale Agreement, which, like the 2018 Sale Agreement, made clear that Marshall would own the Retained Parcels, including the Marina Parcel, as OPP developed the Osprey Point Community.[94]
- In April 2020, Marshall conveyed the Retained Parcels to OPP and recorded the 2020 Record Plan, which showed a marina would be built on the Marina Parcel that OPP owned.[95]
- In the 2020 Litigation, NVR alleged in its complaint that "Marshall retained . . . parcels . . . that included the marina."[96]
- On February 5, 2021, NVR and OPP entered into the Lot Purchase Agreement, which clearly stated that "[OPP] has undertaken responsibility for and ownership of the [M]arina," "[t]he Marina will

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[93] JX 4 at 8.

[94] JX 6 at 1–2.

[95] PTO ¶¶ 17–18; JX 7; JX 8.

[96] Verified Compl. ¶ 11, 2020-0362-SG, Dkt. 1.

not be owned, leased or controlled by the [HOA] or [NVR]," and "[OPP] shall convey the common areas, exclusive of the Marina and any area surrounding the Marina that is reserved by [OPP], that are not Lots to the [HOA]."[97]

- In March 2022, OPP recorded the Declaration, which confirmed that OPP, as the Declarant, would continue to own the Marina Parcel, expressly stating that "the parcel labelled 'Marina 1.11 AC.' on the Master Plan (the "Marina Area") is not made subject to this Declaration and shall not constitute [HOA property] or a Lot, and shall not be part of the Property or the Project," and that OPP "reserve[d] the right" to "subdivide and/or modify the Marina Area and obtain development approvals for the Marina Area after the date of this Declaration for the construction and operation of a Marina and/or restaurant or other improvements in the Marina Area."[98]

- In May 2022, NVR circulated a Public Offering Statement that incorporated the Declaration by reference and echoed that OPP "reserve[d] the right to further subdivide and/or modify the parcel

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[97] JX 10 at 1–2; *id.* § 3(j); *id.* § 10(h).

[98] JX 17 at 6–7.

labeled 'Marina 1.11 AC.' on the Record Plan (the 'Marina Area') and obtain development approvals for the Marina Area . . . ."[99]

- In June 2022, NVR instructed its employees to market to potential Osprey Point homeowners that plans for "PRIVATELY OWNED & PROPOSED" amenities, including "[a] kayak launch, boat slips, [and] [a] restaurant," had been "submitted" to the County but were "not yet approved."[100]
- In August 2022, NVR sent the Sussex County Planning & Zoning Commission a letter acknowledging that OPP owned the Marina Parcel.[101]
- In a March 2025 meeting, NVR reminded Osprey Point homeowners that "[OPP] owns and has rights to a 1.1 acre parcel."[102]
- At trial, several NVR employees testified that as of March 2025, they understood that the Marina Parcel was owned by OPP, and it was not until the Sussex County Council rejected plans for a commercial restaurant and Marina, and Osprey Point homeowners became "upset"

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99 JX 18 at 5.

100 JX 19 at 3.

101 JX 20 at 1.

102 JX 29 at 4.

> with the amenities in the community, that NVR decided the HOA should own the Marina Parcel.[103]

Despite the overwhelming evidence that NVR and OPP always intended for OPP to retain ownership of the Marina Parcel, NVR argues that the 2020 Site Plan binds OPP "to subdivide and develop the land in accordance with the concepts shown on the approved record plan."[104] NVR now interprets the 2020 Site Plan to designate the Marina Parcel as "open space" that must be conveyed to the HOA in accordance with the Sussex County Planning & Zoning Commission's conditions for preliminary approval of the 2020 Site Plan.[105]

Amazingly, NVR does not ground this specious argument on any legal theory. NVR repeatedly asserts that the 2020 Site Plan is a "legally binding designation," a "binding legal act," and a "voluntary agreement," but it makes little attempt to explain how the 2020 Site Plan could divest OPP of a right to property that the parties always agreed OPP would retain.[106] NVR relies on one decision—*Reybold Venture Group IX, LLC v. Summit Plaza Shopping Center, LLC*—but that case is highly distinguishable. There, the Delaware Supreme Court found that language in a site

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[103] Tr. (Ciabattoni) at 40:23–41:12; *id.* (Morgan) at 172:19–173:2, 200:12–14.

[104] POB at 32 (quoting *Reybold Venture Gp. IX, LLC v. Summit Plaza Shopping Ctr., LLC*, 2026 WL 764251, at *5 (Del. Mar. 18, 2026)).

[105] *Id.* at 30–31.

[106] *See id.* at 30–35.

plan stating "a cross easement is hereby established" created an express easement. The Supreme Court explained that "[a]n express easement 'may be contained within the language of a deed or in a separate document'" and "[a] court may find that an express easement exists if the writing 'contain[s] plain and direct language evidencing the grantor's intent to create a right in the nature of the easement.'" *Reybold*, 2026 WL 764251, at *4 (quoting *Buckeye P'rs, L.P. v. GT USA Wilm., LLC*, 2022 WL 906521, at *29 (Del. Ch. Mar. 29, 2022)). The law of easements is inapplicable here, where NVR seeks to transfer title to real property.

Even if the standard articulated in *Reybold* applied here, listing the Marina Parcel under "Open Space" in the 2020 Site Plan is a far cry from "plain and direct language" conveying title. The 2020 Site Plan does not say that the Marina Parcel will be "open space" owned by the HOA. It identifies the Marina Parcel distinct from other common areas under HOA control, listing 64.69 acres of community-owned "Open Space" separately from 1.11 acres of "Marina Open Space."[107] Similarly, under "Open Space Impervious Surface Areas," the 2020 Site Plan identifies acreage in the community-owned "Open Space A" and "Open Space B" separately from 1.11 acres for the "Marina."[108] The 2020 Site Plan cannot

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[107] JX 9 at 1.

[108] *Id.*

reasonably be interpreted to transfer ownership of the Marina Parcel from OPP to the HOA.

Further, to the extent NVR argues that this result "would undermine the certainty and reliability of record plans in the land use planning and development process,"[109] NVR ignores that all homeowners were on record notice of the Declaration, which expressly states that the HOA will not own the Marina Parcel. *Cf. Murray v. Wang*, 1995 WL 130727, at *4 (Del. Ch. Mar. 16, 1995) ("[T]he [d]eclaration, as the enabling instrument[,] . . . is controlling to the extent there is a conflict with the [site plan]."), *aff'd sub nom. Wolstenholme v. Murray*, 670 A.2d 1341 (Del. 1995) (TABLE).

The evidence conclusively demonstrates that OPP owns the Marina Parcel.[110] NVR's request for a declaratory judgment to the contrary is denied.

B. NVR Is Not Entitled To An Order Of Specific Performance.

In Count I of the Complaint, NVR brings a claim that OPP has breached the Lot Purchase Agreement and seeks an order of specific performance directing OPP to withdraw the 2025 Revised Site Plan, provide a new plan to NVR for its approval,

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[109] POB at 34 (quoting *Reybold*, 2026 WL 764251, at *5).

[110] Because Counts I, II, III, and IV of the Counterclaims are premised on the HOA owning the Marina Parcel, they are moot. *See* Countercls. ¶¶ 99–139.

submit the NVR-approved plan to the Sussex County Planning & Zoning Department, and then install the Marina and other amenities.[111]

To prove a claim for breach of contract, a plaintiff must show: (1) the existence of a contract; (2) a breach of an obligation imposed by that contract; and (3) resulting harm. *Thomas v. Am. Midstream GP, LLC*, 2024 WL 5135828, at *5 (Del. Ch. Dec. 17, 2024), *interlocutory appeal refused*, 339 A.3d 752 (Del. 2025) (TABLE). "A party seeking to enforce a contract must prove each element of its breach of contract claim by a preponderance of the evidence." *Kuramo Cap. Mgmt., LLC v. Seruma*, 2024 WL 1888216, at *29 (Del. Ch. Apr. 30, 2024). "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not." *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

"[S]pecific performance is 'a remedy for a proven breach of contract.'" *S'holder Representative Servs. LLC v. Renesas Elecs. Corp.*, 2024 WL 5192070, at *20 (Del. Ch. Dec. 3, 2024) (emphasis omitted) (quoting *26 Cap. Acq. Corp. v. Tiger*

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[111] Compl. ¶ 78.

Resort Asia Ltd., 309 A.3d 434, 464 (Del. Ch. 2023)). To prove entitlement to specific performance, a plaintiff must demonstrate by clear and convincing evidence that "(1) a valid contract exists, (2) [it is] ready, willing, and able to perform, and (3) that the balance of equities tips in favor of [the plaintiff]." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

At trial, NVR failed to prove that OPP breached the Lot Purchase Agreement. NVR's request for specific performance must therefore be denied. Moreover, specific performance is unavailable for the additional reason that OPP validly terminated the Lot Purchase Agreement.

1. NVR Failed To Prove That OPP Breached The Lot Purchase Agreement.

NVR claims that OPP breached Sections 3(j) and 11(e) of the Lot Purchase Agreement by failing to provide the 2025 Revised Site Plan to NVR for its review and approval before submitting the plan to the Sussex County Planning & Zoning Department.[112]

Sections 3(j) and 11(e) afford NVR a right to review and approve changes to amenities and development plans. Section 3(j) states that "[NVR] shall have the right to approve any and all changes regarding the Amenities, Amenity Plans and Amenity Schedule, which such approval shall not be unreasonably withheld,

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[112] POB at 16–19.

conditioned or delayed."[113] Section 11(e) provides that "[NVR] shall have the right to review and approve or disapprove, which approval shall not be unreasonably withheld, conditioned or delayed, any and all changes made to the proposed, submitted and/or approved development documents."[114]

NVR argues that OPP breached Sections 3(j) and 11(e) by failing to give NVR an opportunity to review and approve or disapprove the 2025 Revised Site Plan before it was submitted. OPP disputes this,[115] citing testimony that OPP did provide NVR with the final plan at an in-person meeting in December 2024, though no written record supports that account.[116]

NVR's position that OPP was required to provide the 2025 Revised Site Plan to NVR *before* submitting it to the Sussex County Planning & Zoning Department is untethered to the language of the Lot Purchase Agreement. To be sure, Sections 3(j) and 11(e) gives NVR the right to approve changes to the development plan, but nothing in Sections 3(j) and 11(e) prohibits OPP from filing the plan until after NVR

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[113] JX 10 § 3(j).

[114] *Id.* § 11(e).

[115] DAB at 38 (arguing that OPP "provided NVR with a copy of the 2025 Revised Site Plan before it was submitted to Sussex County").

[116] *See* Tr. (M. Horsey) at 387:23–388:3; *id.* (K. Horsey) at 509:3–9. OPP also points to its own March 26, 2025 letter, in which it asserted that "NVR has known about the current Marina submission for many months." JX 36.

has given its approval.[117] If the parties wished to require OPP to provide NVR *advance* notice before a submission, they could have done so expressly. But as written, Sections 3(j) and 11(e) provide only that NVR has a right to approve certain changes, not that NVR must exercise that right before a plan is submitted.[118]

NVR does not dispute that it received a copy of the 2025 Revised Site Plan soon after it was submitted and had ample opportunity to "review and approve or disapprove" the plan before the Sussex County Council made a decision. NVR disapproved the plan, first in a February 13 email and again in a March 17 letter.[119] NVR argues that OPP further breached Sections 3(j) and 11(e) by refusing to withdraw the 2025 Revised Site Plan after NVR rejected it. But OPP responds,

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[117] Although NVR asked OPP to "please provide [a] final draft" of the plan in September 2024, JX 24 at 2, neither Section 3(j) nor Section 11(e) requires OPP to provide a final draft before submission.

[118] The Lot Purchase Agreement requires OPP to submit a plan for the Marina to NVR "at least thirty (30) days prior to the purchase of the Model Lot," which occurred well before the present dispute. JX 10 § 3(j); *see id.* § 11(e). The Lot Purchase Agreement does not otherwise address when OPP must provide plans to NVR for its approval. Additionally, Section 11(e) explicitly contemplates NVR may "review and approve or disapprove . . . changes made to . . . submitted and/or approved . . . documents"—in other words, documents that have *already* been submitted and/or approved. JX 10 § 11(e).

[119] JX 27; JX 32 at 1. NVR asserts that "the reasonable expectation of the parties was that if NVR exercised its right to disapprove of a plan, the parties would collaborate to develop an agreeable plan to submit to Sussex County for approval." POB at 24. Notably, however, Sections 3(j) and 11(e) give NVR only ten business days to decide whether to approve a plan, "which approval shall not be unreasonably withheld . . . ." JX 10 §§ 3(j), 11(e). Sections 3(j) and 11(e) do not contemplate the open-ended process NVR describes.

persuasively, that it is *NVR* that breached Sections 3(j) and 11(e), by unreasonably withholding approval of the 2025 Revised Site Plan.[120]

Under Sections 3(j) and 11(e), NVR's approval could "not be unreasonably withheld, conditioned, or delayed."[121] "[A] decision to deny consent . . . is not a violation of the duty of good faith and fair dealing where that decision is made for a legitimate business purpose." *Commonwealth Assocs. v. Providence Health Care, Inc.*, 1993 WL 432779, at *7 (Del. Ch. Oct. 22, 1993); *see also Union Oil Co. of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *11 (Del. Ch. Dec. 15, 2006) ("[A] party may properly withhold consent to a transaction when the decision is made for a legitimate business purpose . . . ."); *cf. Energy Transfer, LP v. Williams Cos., Inc.*, 346 A.3d 1089, 1112–13 (Del. 2023) (holding that it was not "unreasonable" for a

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[120] OPP also argues that NVR's disapproval was untimely under the Lot Purchase Agreement. Section 3(j) states that "[NVR's] failure to respond to [OPP's] request for approval within ten (10) business days shall be deemed a waiver of any objections by [NVR] and be deemed an approval of [OPP's] request." *Id.* § 3(j). Similarly, Section 11(e) provides that "[NVR] shall respond, in writing, within ten (10) business days of [NVR's] receipt of the applicable document that attempts to change such documents, whether [NVR] approves said proposed changes, such approval not to be unreasonably withheld," and "[NVR] shall have no right to object to any such changes if [NVR] fails to respond within the ten (10) business day period." *Id.* § 11(e). OPP argues that NVR received a copy of the 2025 Revised Site Plan no later than January 23, 2025, but did not inform OPP of its disapproval in writing until February 13, more than ten business days later. *See* DOB at 43 (citing JX 26). Although it is not clear when NVR first received a copy of the 2025 Revised Site Plan, it appears that NVR's disapproval was likely untimely.

[121] JX 10 §§ 3(j), 11(e).

company to withhold consent to "conduct that would potentially be damaging to the company or its shareholders").

The trial record shows that NVR did not reasonably withhold its consent to the 2025 Revised Site Plan for a legitimate business purpose. When NVR first told OPP on February 13, 2025, that it did not approve the 2025 Revised Site Plan, the only reason it gave was that OPP was "going to have a mutiny at the council meeting with the homeowner feedback."[122] NVR later claimed in a March 17 letter that the 2025 Revised Site Plan "varie[d] significantly from Exhibit 'T' to the First Amendment," but did not explain why that was the case.[123] Instead, NVR emphasized that "whatever [new] plan [OPP] proposes . . . must have significant community support in order to be considered."[124]

Despite NVR's belated contention that the 2025 Revised Site Plan materially deviated from the First Amendment, that was not true. The 2025 Revised Site Plan was substantially similar to the NVR-approved 2022 Proposed Site Plan, which incorporated the Enhanced Amenities in the First Amendment.[125] The 2025 Revised Site Plan removed features associated with the private restaurant that the Sussex

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[122] JX 27.

[123] JX 32 at 2.

[124] *Id.*

[125] JX 20.

County Council rejected,[126] like converting the restaurant to marine storage, removing a restaurant beach, and changing a Tiki bar to an easement.[127] The 2025 Revised Site Plan also improved some features for Osprey Point homeowners, including by reducing the size of the privately owned Marina Parcel from 1.32 acres to 1.11 acres, increasing parking spots, and extending walkways and roadways.[128] And the 2025 Revised Site Plan slightly modified plans for kayak storage, decking, and some pathways, but NVR has not explained why those changes were material or otherwise provided a basis to reasonably withhold consent.[129]

Instead, the trial record shows that NVR's real motivation for disapproving the 2025 Revised Site Plan is what it told OPP in February—that after Sussex County Council rejected the private restaurant, Osprey Point homeowners were disappointed with the amenities offered. NVR now says that it disapproved the 2025 Revised Site Plan to protect "the expectations and rights of the individuals who had already purchased homes within the community."[130] But again, the 2025 Revised Site Plan was largely consistent with the 2022 Proposed Site Plan (which was consistent with

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[126] JX 22.

[127] *See* JX 49 at 2.

[128] *Id.*

[129] *Id.*

[130] POB at 27.

the First Amendment), but for removing the private restaurant features to comply with Sussex County Council's decision. And the record shows that NVR marketed the Marina and associated amenities to homeowners as "proposed" and subject to County approval.[131]

In truth, NVR did not disapprove the 2025 Revised Site Plan to protect homeowners' reasonable expectations, but to extract additional concessions from OPP to which NVR and the homeowners were not contractually entitled. Indeed, the primary concession NVR sought was for OPP to convey the Marina Parcel to the HOA—but as discussed above, the parties always bargained for OPP to retain that parcel.[132] Withholding consent to the 2025 Revised Site Plan as leverage to coerce OPP into forfeiting property it clearly owned was not a legitimate business purpose.[133]

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[131] *See supra* notes 99–102.

[132] *See* JX 49 at 1 (reflecting one material difference between the 2025 Revised Site Plan and NVR's "Concept Plan"—"No private parcel"); *supra* Section II.A.

[133] Even if NVR were correct that either Section 3(j) or 11(e) required OPP to submit changes to amenities and development plans "prior to submission to any governmental authority," POB at 14, and even assuming NVR proved that OPP did not provide the final 2025 Revised Site Plan to NVR before it was submitted, it is difficult to see how OPP's breach could be material. Again, NVR received a copy of the 2025 Revised Site Plan shortly after submission and purported to exercise its right to disapprove the plan. If NVR had a reasonable basis to withhold its approval, OPP might have withdrawn the plan without issue. *See* POB at 17 ("Upon learning of the submission, NVR immediately exercised its contractual rights, asking that OPP withdraw the plan . . . ."); JX 27 (OPP

NVR did not reasonably withhold approval of the 2025 Revised Site Plan, in breach of Sections 3(j) and 11(e) of the Lot Purchase Agreement.[134]

2. OPP Validly Terminated The Lot Purchase Agreement.

OPP argues that an order of specific performance is unavailable for an additional reason: OPP validly terminated the Lot Purchase Agreement after sending a notice of default on January 5, 2026, which NVR did not cure.[135]

Section 8(a) of the Lot Purchase Agreement states:

> In the event of any breach, failure or default by [NVR] under the terms of this Agreement (which breach, failure or default is not remedied or cured by [NVR] pursuant to any other provisions hereof), or in the event of any other claims that arise out of the transaction contemplated herein, [OPP's] sole and exclusive right and remedy shall be to retain the

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explaining that it carefully considered NVR's request but decided not to withdraw the plan). But NVR's disapproval was not reasonable and was itself a breach. The fact that NVR received the 2025 Revised Site Plan after it was submitted, instead of before, made no difference to that outcome.

In arguing that OPP's purported breach was material, NVR asserts that its "approval rights were not incidental, but rather fundamental to the parties' bargain." POB at 24. This argument misses the mark because NVR had a chance to review and approve or disapprove the 2025 Revised Site Plan; this simply occurred after the plan was submitted.

[134] NVR argues, in the alternative, that OPP breached Section 3(j), which requires OPP to "construct, *to the extent permitted by applicable regulatory agencies*, a [M]arina" that "will include a storage area suitable for kayaks, standup paddleboards or canoes." JX 10 § 3(j) (emphasis added). NVR points out that OPP has not constructed the Marina yet, but OPP has not received permission from "applicable regulatory agencies" to build the Marina because the parties have not yet resolved their dispute over the plan. NVR has therefore failed to prove a breach.

[135] PTO ¶ 43; JX 58.

> Deposit as full, fixed and liquidated damages, not as a penalty, whereupon this Agreement shall terminate.[136]

OPP contends that it was entitled to terminate the Lot Purchase Agreement because NVR breached Section 2(a)(ii), which required NVR to "purchase a minimum of fifteen (15) Lots per quarter."[137] NVR's obligation to purchase lots under Section 2(a)(ii) is subject to the satisfaction of "Conditions Precedent to Settlement," defined in Section 6 to include a condition that "utilities shall have been installed and shall be active and available for immediate connection and use at the Lot line,"[138] as well as a condition that OPP "is not in default of this Agreement."[139]

In May 2025, NVR refused to purchase additional lots,[140] asserting that OPP attempted to deliver lots that failed to satisfy the Conditions Precedent to Settlement because utilities were not yet installed,[141] and that OPP was otherwise in default because OPP had breached Sections 3(j) and 11(e) of the Lot Purchase Agreement.[142]

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[136] JX 10 § 8(a).

[137] *Id.* § 2(a)(ii).

[138] *Id.* § 6(b).

[139] *Id.* § 6(d). A "default" is "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." *Default*, *Black's Law Dictionary* (12th ed. 2024). The parties do not argue that "default" means something other than a "breach" here. *See, e.g.*, PAB at 28 ("Under settled Delaware law, OPP's uncured material breach suspended any corresponding obligation by NVR to continue performance.").

[140] PTO ¶ 54; Tr. (Neuberger) at 331:17–19.

[141] JX 40 at 2.

[142] JX 10 §§ 3, 6(b), 11(e).

By June 2025, OPP delivered lots with utility hookups,[143] but NVR still refused to purchase lots on the grounds that OPP was in default of its obligations under Sections 3(j) and 11(e).

I found above that NVR, and not OPP, breached Sections 3(j) and 11(e) of the Lot Purchase Agreement. Because NVR was in default and OPP was not, OPP's termination was valid.[144] Judgment is entered for OPP on Count VII of the Counterclaims.

3. NVR Is Not Entitled To An Order Of Specific Performance.

As set forth above, NVR failed to prove that OPP breached the Lot Purchase Agreement. Because NVR did not establish an underlying breach, its request for a specific performance remedy must be denied. *See Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *8 (Del. Ch. May 13, 2005) ("[S]pecific performance is not appropriate when the [underlying] contractual provision . . . has not been breached.").

Further, because OPP validly terminated the Lot Purchase Agreement, an order of specific performance is not available. *Cf. Hexion Specialty Chems., Inc. v.*

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143 JX 44; Tr. (Neuberger) at 333:19–22 ("[A]s of today, there are enough improved lots to meet that 30-lot obligation."); PAB at 28.

144 OPP also asserts in Count V of the Counterclaims that NVR breached its obligation under Section 3(g) of the Lot Purchase Agreement to construct appropriate sidewalks in the community. OPP contends that this breach, too, provided a basis to terminate. Based on the rulings herein, it appears that this issue is moot. If the parties disagree, they should notify the Court by letter within two weeks.

Huntsman Corp., 965 A.2d 715, 760 n.120 (Del. Ch. 2008) (explaining that "specific performance would not be possible" after termination).

III. CONCLUSION

For the reasons explained above, judgment is entered for OPP on Counts I and II of the Complaint and Count VII of the Counterclaims. Counts I, II, III, and IV of the Counterclaims are moot.