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Case No. 6785-VCN

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

ANTHONY MURRAY, CHARLES H. MCKINNEY, DAVID KAMINSKY, ELIZABETH CADELL, as individuals and owners of property in the Town of Dewey Beach, Delaware,

Plaintiffs,

v.

TOWN OF DEWEY BEACH, a municipal corporation of the State of Delaware, TOWN COUNCIL OF DEWEY BEACH, consisting of, MAYOR DIANE HANSON, JAMES LAIRD, JAMES PRZYGOCKI, MARTY SEITZ, and RICHARD N. SOLLOWAY, in their official capacity; DIANA K. SMITH, Town Manager, in her official capacity, WILLIAM D. MEARS, Town Building Official, in his official capacity, DEWEY BEACH ENTERPRISES, INC., a Delaware Corporation; and RUDDERTOWNE REDEVELOPMENT, INC., a Delaware Corporation,

Defendants.

C.A. No. 6785-VCN

MEMORANDUM OPINION

Date Submitted: February 27, 2012
Date Decided: May 31, 2012

Michael W. McDermott, Esquire and David B. Anthony, Esquire of Berger Harris, LLC, Wilmington, Delaware, Attorneys for Plaintiffs.

Megan T. Mantzavinos, Esquire and Ann M. Kashishian, Esquire of Marks, O'Neill, O'Brien & Courtney, P.C., Wilmington, Delaware, Attorneys for Defendants Town of Dewey Beach, Town Council of Dewey Beach, Diane Hanson, Mayor, James Laird, James Przygocki, Marty Seitz, and Richard N. Solloway, Commissioners, Diana K. Smith, Town Manager, and William D. Mears, Town Building Official.

William T. Quillen, Esquire, Shawn P. Tucker, Esquire, and Karen V. Sullivan, Esquire of Drinker Biddle & Reath LLP, Wilmington, Delaware, Attorneys for Defendants Dewey Beach Enterprises, Inc. and Ruddertowne Redevelopment, Inc.

NOBLE, Vice Chancellor

I. INTRODUCTION

Defendant Town of Dewey Beach, Delaware, (the "Town") attempted to settle litigation brought against it and various Town officials—many of whom are also defendants in this action—by Defendant Dewey Beach Enterprises, Inc. and Defendant Ruddertowne Redevelopment, Inc. (together with Dewey Beach Enterprises, Inc., "DBE") (all of the defendants together, collectively, the "Defendants"). DBE sought to redevelop Ruddertowne, a commercial property located near the center of the Town, as a mixed-use property that would include commercial space, hotel units, and condominium units. Most of DBE's redevelopment plans, including the one that was eventually approved, envisioned a building that exceeded the 35-foot height restriction in the Town's zoning code[1] (the "Zoning Code").

DBE's redevelopment plans were a topic of heated debate and were vociferously opposed by many of the Town's residents and officials. The Town's refusal to grant DBE the building permits it needed for the Ruddertowne project set off a wave of suits brought by DBE against the Town[2] (the "DBE Litigation"). In

[1] Dewey Beach C. ch. 185.

[2] *See Dewey Beach Enters., Inc. v. Town of Dewey Beach*, No. 09-507 (D. Del. filed July 10, 2009); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 4426-VCN (Del. Ch. filed March 17, 2009); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 4991-VCN (Del. Ch. filed Oct. 14, 2009); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 5711-VCN (Del. Ch. filed Aug. 12, 2010); *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. No. 5833-VCN (Del. Ch. filed Sept. 20, 2010).

an attempt to settle the DBE Litigation, the Town and DBE entered into an agreement, which was amended twice, entitled "Mutual Agreement and Release" (the "MAR"). The MAR set forth a relatively detailed plan for the redevelopment of Ruddertowne (the "Redevelopment Plan"), including amenities that DBE would provide the Town in connection with the redevelopment, and a process by which the Town was to consider the Redevelopment Plan. The MAR provided that if the Town permitted DBE to redevelop Ruddertowne in accordance with the Redevelopment Plan, DBE would, among other things, release the Town from the claims underlying the DBE Litigation.

Following the process outlined in the MAR, Defendant Dewey Beach Town Council (the "Town Council") approved the MAR, a record plat plan (the "Record Plat Plan"), and a building permit (the "Building Permit") that was also approved and issued by the Town's Building Inspector (the "Building Inspector"). The plaintiffs—Anthony Murray, Charles H. McKinney, Davis Kaminsky, and Elizabeth Cadell (together, collectively, the "Plaintiffs")—challenge these actions, primarily upon the bases that they constitute impermissible contract zoning and that the MAR, the Building Permit, and the Record Plat Plan (together, the "Challenged Documents") violate numerous aspects of the Town's zoning, building, and land use regulations. The Plaintiffs seek a declaratory judgment and an injunction permanently enjoining enforceability of the MAR and issuance of

any building permit based upon the MAR. The Defendants move to dismiss this action, arguing that this Court lacks subject matter jurisdiction and that the Plaintiffs lack standing to bring the suit.

II. THE PARTIES

The Plaintiffs are owners of real property in the Town.

Defendant Town of Dewey Beach is a Delaware municipal corporation. It is located along Delaware's Atlantic coastline in eastern Sussex County.

Defendant Town Council is the elected governing body of the Town.

Defendant Diane Hanson is, and was at all relevant times, the Mayor of the Town and a member of Town Council (a "Commissioner").

Defendants James Laird, James Przygocki, Marty Seitz, Anna Legates, Joy Howell, and Richard N. Solloway are current or former Commissioners.

Defendant Diana Smith was the Town's Town Manager (the "Town Manager").

Defendant William Mears is, and was at all relevant times, the Town's Building Inspector (the Town, Town Council, and all of the individual defendants, together, collectively, the "Town Defendants").

Defendant Dewey Beach Enterprises, Inc. is a Delaware corporation. It owns the Ruddertowne property, which it seeks to redevelop.

Defendant Ruddertowne Redevelopment, Inc. is a Delaware corporation. In October 2007, it acquired all of the stock of Dewey Beach Enterprises, Inc. Currently, all of Ruddertowne Redevelopment, Inc.'s stock is held by three individuals who were also the three principals of Dewey Beach Enterprises, Inc.

III. BACKGROUND[3]

A. *The Town's Zoning Code and Comprehensive Plan*

Allegations that the Redevelopment Plan violated the Town's zoning, building, and land use regulations are central to the Plaintiffs' claims. The Town's current Zoning Code was adopted by the Town Council on January 10, 2009.[4]

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[3] Unless otherwise noted, the factual background is taken from the First Amended Verified Complaint (the "Complaint" or "Compl."). The Town Defendants moved for dismissal under Court of Chancery Rule 12(b)(6). *See* Br. in Supp. of Def. Town of Dewey Beach's Mot. to Dismiss Pl.'s First Am. Verified Compl., & in the Alternative to Strike Pl.'s First Am. Verified Compl. 7-8. While, as a general rule, the Court is limited to considering only the facts alleged in the complaint when deciding a motion to dismiss under Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the complaint, and documents not relied upon to prove the truth of their contents. *Orman v. Cullman,* 794 A.2d 5, 15-16 (Del. Ch. 2002). Consideration of the documents extrinsic to the Complaint cited throughout this Memorandum Opinion is appropriate, as these documents are integral to and incorporated into the Complaint. If any such documents were to not be considered integral to and incorporated into the Complaint, consideration of them is still appropriate, as the Court ultimately decides the motions to dismiss on the Court of Chancery Rule 12(b)(1) grounds advanced by DBE. The Court may consider materials extrinsic to the complaint when deciding a Rule 12(b)(1) motion. *See Acierno v. New Castle Cty.*, 2006 WL 1668370, at *3 (Del. Ch. Feb. 15, 2006).

[4] Dewey Beach C. ch. 185. The parties disagree about whether the Building Permit application and the Record Plat Plan were subject to the current Zoning Code or the former Zoning Code. The Plaintiffs cited the current Zoning Code in their brief and submitted a courtesy copy of the current Zoning Code to the Court. *See* Pls.' Combined Answering Br. in Opp'n to Defs. Town of Dewey Beach & Dewey Beach Enters. Mot. to Dismiss & Strike Pls.' First Am. Compl. ("Pls.' Answering Br."); Letter from Michael W. McDermott, Esq. to the Court, dated February 14, 2012. The Defendants contend that the former Zoning Code is applicable. *See* Defs. Dewey Beach Enters., Inc. & Ruddertowne Redevelopment Inc.'s Reply Br. in Supp. of Their Mot. to Dismiss First Am. Verified Compl. ("DBE Reply Br.") 10. Ultimately, the Court's

Importantly, the Zoning Code restricts the maximum permissible height of buildings in the Town to 35 feet.[5] Also, the Zoning Code does not list use as a hotel as a permitted use of Resort Business 1 ("RB-1") zoned property.[6] Chapter 71 of the Town's code governs the issuance of building permits by the Town. Relevant to this case, § 71-3(G) provides that building permits issued by the Town "shall be valid for one year from the date of issue, and may be renewed one time for one additional year . . . , except in extraordinary circumstances, an additional renewal may be allowed subject to [Town Council] approval."

In accordance with 22 *Del. C.* § 303, the Town has adopted a comprehensive plan. The Town's current comprehensive plan (the "Comprehensive Plan") was adopted in June 2007 and certified in July 2007.[7] Notably, the Comprehensive Plan provides that:

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decision on these motions does not turn on which Zoning Code is applicable, and, for this reason, the Court need not resolve this matter. Throughout this Memorandum Opinion, the Court will apply the Town's current Zoning Code, and all references to the Zoning Code will be to the current Zoning Code, unless otherwise noted.

[5] Dewey Beach C. at § 185-46. The former Zoning Code also included a 35-foot height limitation.

[6] *See* Dewey Beach C. at § 185-25.

[7] Defs. Dewey Beach Enters., Inc. & Ruddertowne Redevelopment Inc.'s Opening Br. in Supp. of Their Mot. to Dismiss First Am. Verified Compl. ("DBE Opening Br."), Ex. 1 (Town of Dewey Beach Comprehensive Plan) (Comprehensive Plan).

> It is the goal of this Comprehensive Plan to encourage the commercial and residential use of contiguous tracks [sic] of at least 80,000 square feet. The percentages listed herein are the ideals of this Plan, however, with the development plans filed before the enactment of this Comprehensive Plan, which could be considered inconsistent with this Plan, the working group's final agreement upon ratification by the [Town Council] shall be considered consistent with the Plan.[8]

The Comprehensive Plan also states that the RB-1 zoning district is to be the "most intensely developed, most dense, zone" and that "relaxed bulk standards" are available for certain large tracts of land located in the RB-1 zone.[9]

B. *The Ruddertowne Property*

Ruddertowne consists of three contiguous parcels of land near the center of the Town.[10] These parcels encompass at least 80,000 square feet of land and are located in the RB-1 zoning district.[11]

C. *The DBE Litigation*

DBE's plans to redevelop Ruddertowne are a long-running source of contention and litigation. Although the Town supports DBE's current Redevelopment Plan, it previously opposed such plans. DBE first applied for a building permit in November 2007.[12] At that time, the Building Inspector

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[8] *Id.* at § 2-3.
[9] *Id.*
[10] Compl., Ex. 1 (A Resolution of the Commissioners of the Town of Dewey Beach Approving a Mutual Agreement and Release Regarding the Ruddertowne Redevelopment Project) ("Resolution") 1.
[11] *Id.* at 3.
[12] *See Dewey Beach Enters., Inc. v. Board of Adjustment*, 1 A.3d 305, 306 (Del. 2009).

reviewed its application and issued a referral letter.[13] Initially, the Town Solicitor agreed with the Building Inspector that the redevelopment plan complied with all applicable Zoning Code requirements, but he later reversed this position and advised DBE that it would not receive a building permit because the redevelopment plan did not satisfy certain minimum lot area requirements.[14] DBE appealed this decision to the Town's Board of Adjustment (the "BOA"), which upheld the denial of DBE's building permit on July 7, 2008.[15] The Superior Court affirmed the BOA's decision, but, on July 30, 2010, its decision was reversed by the Supreme Court.[16] The Town continued to oppose DBE's redevelopment plans, though, and DBE filed a slew of suits, the DBE Litigation, against the Town and many of its current and former officials and Commissioners challenging actions it alleged were impermissible and intended to frustrate its redevelopment plans.[17]

According to the Plaintiffs, it was the Town's desire to settle this litigation—a desire allegedly heightened by pressure exerted by its insurer—that led the Town to enter into the MAR. The DBE Litigation has been dismissed without prejudice in accordance with the terms of the MAR, which DBE and the Town claim have

[13] *Id.* at 307.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 307, 310.
[17] *See supra* note 2.

been met.[18] The action now before the Court is brought by owners of real property in the Town challenging the validity of the Challenged Documents and the process used to approve them.

D. *The MAR*

Generally, the MAR served as the means by which the Town and DBE settled the DBE Litigation. The MAR set forth a relatively detailed redevelopment plan for Ruddertowne.[19] Pursuant to the MAR, DBE agreed to a broad litigation release applicable to the Town and its officials, employees, and insurers that would take effect upon the Town's approval of the Redevelopment Plan, the Town's approval of the Building Permit, and the expiration of the applicable appeal periods.[20] The Town agreed to a similar release.[21] DBE also agreed to indemnify (within certain limits) the Town, its officials, and its employees against any claim brought against them related to the approval of the Redevelopment Plan and the Building Permit.[22]

The Redevelopment Plan permitted the development of hotel and condominium units in a building with a height up to 45.67 feet.[23] It also required

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[18] *See Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. Nos. 4426-VCN, 4991-VCN, 5711-VCN, 5833-VCN (Del. Ch. Oct. 13, 2011) (ORDER).
[19] Resolution, Ex. B (MAR) §§ 1-3.
[20] *Id.* at § 11.
[21] *Id.* at § 12.
[22] *Id.* at § 13.
[23] *Id.* at §§ 1-2.

DBE to provide certain amenities and to agree to additional restrictions on the use of the space.[24] The amenities to be provided included a convention center, space dedicated to the Town, a bay walk with a gazebo, parking spaces, and public restrooms.[25] Additionally, under § 7, the MAR provided that any building permit issued pursuant to the process outlined in § 8 would be valid for three years and automatically eligible for two one-year renewals, with the potential of receiving a third one-year renewal, subject to the Town Council's approval.

Section 8 of the MAR established the approval process by which the Town was to consider the Record Plat Plan and the Building Permit application. Section 8 is reproduced in its entirety:

> (8) Plan & Building Permit Approval Process:
>
> a. The process shall include: (i) execution of this Agreement by the Town Manager; (ii) review of this Agreement by the Town Commissioners in Executive Session for legal advice; (iii) a public hearing held by the Town Commission to take public testimony regarding DBE's plan and pending building permit application ("Hearing One"); (iv) a Special Town Meeting immediately following such public testimony to approve or deny the plan and building permit application by a majority vote based upon applicable law given the date of DBE's building permit (hereinafter "Special Town Meeting") (During the Special Town Meeting the Ruddertowne Architectural Committee's (RAC) recommendation and report to the Town Commission ("RAC Recommendation") shall be considered by the Town Commission, and the Town Commission's vote, if positive, shall also include a ratification of the RAC Recommendation as may be specifically modified by the Town Commission); (v) at the Special

[24] *Id.* at § 3.
[25] *Id.*

Town Meeting, if approval is granted, the Ruddertowne Redevelopment Project shall be referred to the Planning Commission and DBE shall provide final construction plans for review to the Planning Commission. Review of final construction plans by the Planning Commission shall be for the sole purpose of: (1) making a recommendation to the Town Commission as to whether the final construction plans are consistent with the Town Commission's plan and building permit approval at the Special Town Meeting, (2) making a recommendation regarding the use of the voluntarily dedicated Town Space (and uses therein); and (3) making a recommendation regarding the Gazebo and Bay Walk; (vi) a final public hearing ("Hearing Two") by the Town Commissioners to review the Planning Commission's recommendations provided for herein and make a final decision regarding whether the final construction plans satisfy the conditions of the approved plan and building permit and the voluntarily 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 than [sic] be recorded as a matter of public record.

b. Schedule. Provided that weather conditions permit, a quorum is available, meeting space is available, and the proper public notice has been provided, the schedule shall be:

(i) Prior to December 11, 2010 -- execution of this Agreement by the Town Manager [and DBE];

(ii) December 11, 2010 -- review of this Agreement by the Town Commissioners in Executive Session for legal advice and, based upon the legal standards applicable to DBE in light of the date of its building permit application, discuss what the Commission believes may be the appropriate standards applicable to DBE's pending application. Announce to the public that this Agreement has been executed and is contingent upon approval by the Town Commission. After the announcement, correspondence providing public workshop dates shall be prepared and sent to the public;

(iii) January 15, 2011, at 2:00 p.m. -- First public workshop;

February 3, 2011, at 6:00 p.m. -- Second public workshop;

February 5, 2011, at 10:00 a.m. -- Third public workshop/public hearing;

(iv) February 26, 2011 (Hearing One) -- public hearing held by the Town Commission to take public testimony regarding DBE's proposed Structure, surrounding development, and pending building permit application.

(v) February 26, 2011 -- (Special Town Meeting) A Special Town Meeting immediately following the February 26, 2011 public hearing to approve or deny DBE's proposed Structure, surrounding development, plan and building permit application. The building permit approval shall be subject to the Building [Inspector's] recommendation to the Town Commissioners as to compliance with applicable sections of the Dewey Beach Code and Comprehensive Plan. DBE may agree to waive the requirement that the Town Commissioners approve or deny DBE's proposed Structure, surrounding development, plan and building permit application during the Special Town Meeting for a period of fourteen days due to any unforeseen circumstances that may arise during the Special Town Meeting. If the Town Commission approves DBE's plan and building permit, the Town Commission shall refer the matter to the Planning Commission for a recommendation to the Town Commissioners regarding the proposed Gazebo, Bay Walk, restrooms, dedicated

> Town Space (and uses therein), and whether the construction plans are consistent with the application presented by DBE subject to the provisions of this Agreement.
>
> (vi) A Town Meeting (Hearing Two) to accept or reject, in whole or in part, the Planning Commissions' [sic] 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 Public Town Space (and uses therein), and whether the construction plans are consistent with the application presented by DBE shall be made at this meeting. In order to give the Planning Commission sufficient time to review the plans and building permit, as well as sufficient time to make a recommendation to the Town Commissioners, Hearing Two shall be held no sooner than ninety (90) days, and no later than 120 days, following Hearing One (i.e., February 26, 2011).

E. *Approval of the MAR, the Building Permit, and the Record Plat Plan*

The Town Manager executed the MAR on December 6, 2010. On December 11, 2010, the Town Council met in an executive session and voted to engage in the review process provided in § 8 of the MAR. A special Town meeting occurred on February 26, 2011 (the "Special Town Meeting") and another Town meeting was held on June 17, 2011 (the "June Town Meeting"). Two public hearings were held before the Special Town Meeting. Notice of these public hearings was published before the hearings occurred, and the notice stated that the

hearings were being held "to consider and receive public comments regarding . . . [the proposed MAR]."[26]

At the Special Town Meeting, the Town Council adopted the Resolution.[27] Among other things, the Town Council purported, through the Resolution, to amend and to approve the MAR, to approve the Record Plat Plan submitted by DBE, and to approve DBE's revised Building Permit application dated February 22, 2011.[28] A copy of the approved, amended MAR was attached to the Resolution as Exhibit B. Following the adoption of the Resolution on February 26, 2011, the Town published notice of the Resolution's adoption (the "Resolution Notice") on March 1, 2011.[29] The Resolution Notice stated that the MAR had been adopted by the Resolution and that "THE RESOLUTION INCLUDED, AMONG ADDITIONAL ITEMS, THE FINAL APPROVAL BY THE [Town Council] AND BUILDING INSPECTOR ON FEBRUARY 26, 2011, OF A RECORD PLAT PLAN AND BUILDING PERMIT FOR THE REDEVELOPMENT OF RUDDERTOWNE AS A MIXED USE COMPLEX INCLUDING

[26] Compl. ¶ 41 n.5 (quoting the "Notice of Public Hearing"). *See also* DBE Opening Br., Ex. 19 (Notice of Public Hearing).
[27] *See supra* note 10.
[28] *Id.* at §§ 1-2.
[29] DBE Opening Br., Ex. 24 (Resolution Notice); *see also* Compl. ¶¶ 38, 42.

COMMERCIAL AND RESIDENTIAL USES."[30] The MAR and the Redevelopment Plan were recorded on May 13, 2011.[31]

On March 25, 2011, a request for a BOA hearing regarding the MAR was filed. The parties disagree about exactly who should be considered to have filed the request[32] and what actions it sought to challenge. The Plaintiffs claim that the request was filed by fifteen Town property owners, including two of the Plaintiffs, and that it challenged "the Town Manager's decision to execute a private contract [the MAR] by and between the Town and [DBE]."[33] On April 29, 2011, the chairman of the BOA sent an email to the Town Manager informing her that the BOA would hear the appeal and asking for authority to engage legal counsel. The Town Manager refused to accept the hearing request formally and declined to forward it to the BOA, in effect, denying the property owners a BOA hearing. In a May 2, 2011, letter sent to Ms. Claybrook, the Town Manager informed her that the request

> identifie[d], as the basis of the appeal, a decision of the [Town Council], which is not an "administrative official." Because the request [did] not identify an "order, requirement, decision, or determination of an administrative official" from which the appeal has

[30] Resolution Notice (emphasis in original).
[31] Compl. ¶ 54.
[32] The form used to request an appeal, a "Request for Board of Adjustment Hearing," was signed by only one person, non-party Joan Claybrook, although a memorandum attached to the form purported to be from fifteen people. *See* DBE Opening Br., Ex. 26 (Request for Board of Adjustment Hearing, dated March 25, 2011).
[33] Compl. ¶ 60.

> been requested, Town Hall has concluded through its administrative review process that the appeal [was] improper as filed and it [could not] be forwarded to the [BOA].[34]

A second request for a BOA hearing was filed on May 27, 2011. This request challenged the Town Manager's refusal to accept the first request. The Town Manager sent a letter to Ms. Claybrook dated June 3, 2011, in which she reiterated her reasons for not accepting the first request and explained that a challenge to the Town Council's actions should have been pursued in court.[35] Furthermore, she stated that:

> Your latest correspondence is another appeal to the [BOA], this time from what you identify as my decision to refuse the March 25, 2011 appeal to the [BOA]. This latest correspondence flows from and is inextricably linked to the improperly filed March 25, 2011 correspondence. This most recent correspondence is another clear attempt to circumvent the express requirements of the Delaware Code and is also an improper request, in part, due to another failure to serve the Town Manager, as the administrative official whose decision is being appealed, with a notice of the appeal, as required by law. Again, there were more appropriate means of review available that the property owners involved simply chose not to pursue, including filing for a writ of mandamus in the Superior Court.[36]

On June 7, 2011, the chairman of the BOA again asked the Town Manager for authority to engage legal counsel and indicated that the BOA intended to consider the second request. The Town Manager responded to the chairman of the BOA in a letter dated June 8, 2011, in which she declared that the second request

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[34] DBE Opening Br., Ex. 27 (Letter from Town Manager to Joan Claybrook, dated May 2, 2011).
[35] DBE Opening Br., Ex. 29 (Letter from Town Manager to Joan Claybrook, dated June 3, 2011).
[36] *Id.*

was "simply not properly filed and it would therefore be improper and create a bad precedent if the appeals were to be considered by the [BOA]."[37] According to the Plaintiffs, the Town Manager had been advised that permitting the BOA to review the MAR would violate the terms of the MAR and precipitate more litigation by DBE against the Town, the BOA, and the BOA members in their individual capacities. The Town Manager warned the chairman of the BOA of this litigation risk in the June 8 letter and also stated that the "Town Council would also have an action against the [BOA] since an appeal hearing would put the decision of the Town Council at issue."[38] The BOA never heard either of the appeals, and no actions related to these requests were filed in Superior Court.

The June Town Meeting was held on June 17, 2011. On June 23, 2011, notice of the actions taken at the June Town Meeting was published. The notice stated, in part:

> ON JUNE 17, 2011, THE [Town Council] HELD A PUBLIC HEARING IN REGARD TO CERTAIN PROVISIONS OF A PREVIOUSLY APPROVED [MAR] ADOPTED BY RESOLUTION OF THE [Town Council] ON FEBRUARY 26, 2011 . . . IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN THE RESOLUTION, THE [Town Council] GRANTED CERTAIN FINAL APPROVALS AT THE JUNE 17, 2011 HEARING. SPECIFICALLY, THE [Town] GRANTED FINAL APPROVALS REGARDING THE LOCATION AND SIZE OF THE GAZEBO, THE BAY WALK, THE USES WITHIN THE DEDICATED TOWN

[37] Compl. ¶ 65 (quoting the June 8, 2011, letter from Town Manager to the chairman of the BOA).
[38] *Id.* at ¶ 68 (quoting the June 8, 2011, letter from Town Manager to the chairman of the BOA).

SPACE AND REGARDING WHETHER THE FINAL CONSTRUCTION PLANS SATISFY THE CONDITIONS OF THE PREVIOUSLY APPROVED RECORD PLAT PLAN AND PREVIOUSLY APPROVED BUILDING PERMIT.[39]

About one month after the June Town Meeting, on July 15, 2011, the Building Inspector issued the Building Permit to DBE.[40] This action was filed on August 15, 2011. On September 15, 2011, the Town and DBE filed, with this Court, a "Stipulation and [Proposed] Order of Dismissal Without Prejudice, Subject to Being Vacated Upon the Occurrence of a Future Event" asking the Court to dismiss without prejudice the DBE Litigation actions filed in this Court.[41] In the proposed order, the Town and DBE stipulated that the terms of the MAR had been met, that the applicable appeal periods had run, and that the parties to the DBE Litigation had executed the releases appended to the MAR.[42] The Court entered the proposed order on October 13, 2011.[43]

IV. CONTENTIONS

In short, the Plaintiffs contend that DBE's Redevelopment Plan—set forth in the MAR and authorized by the approval of the Challenged Documents—violated the Town's zoning and building regulations and that the Town Council did not

[39] DBE Opening Br., Ex. 33.
[40] Compl., Ex. 2 (Building Permit).
[41] *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. Nos. 4426-VCN, 4991-VCN, 5711-VCN, 5833-VCN (Del. Ch. Sept. 15, 2011) (PROPOSED ORDER).
[42] *Id.*
[43] *Dewey Beach Enters., Inc. v. Town of Dewey Beach*, C.A. Nos. 4426-VCN, 4991-VCN, 5711-VCN, 5833-VCN (Del. Ch. Oct. 13, 2011) (ORDER).

employ the proper process to change the applicable law.[44] According to the Plaintiffs, the process used to approve the Challenged Documents amounted to impermissible contract zoning. Throughout their Complaint and Answering Brief, the Plaintiffs point to numerous ways in which, they allege, the Redevelopment Plan and the process used to approve it violated the Town's code.[45] They argue that the authorized height of the Ruddertowne building, 45.67 feet, violated the Town's 35-foot height limit; that use as a hotel is not permitted by the Zoning Code; and that the Building Permit's three-year duration, with two automatic one-year renewals, violated § 71-3(G) of the Town's code. The Plaintiffs also contend that, since approval of the Challenged Documents implicitly changed the Zoning Code, such actions could only have been accomplished by enactment of an ordinance,[46] not by adopting a resolution; therefore, according to the Plaintiffs, the Resolution was an *ultra vires* act of the Town Council. Notably, the Plaintiffs allege that, had the Town Council passed an ordinance, the Town's residents would have had "the power to petition to request reconsideration [of the ordinance]

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

[45] The description of the Plaintiffs' contentions above is not meant to be an all-inclusive list of the arguments the Plaintiffs made regarding the substantive and procedural failings of the Redevelopment Plan and the process used to approve it.

[46] *See* Dewey Beach C. at § 185-73.

by [the Town Council] . . . and to approve or reject it at a referendum election."[47] The Plaintiffs point to numerous other alleged violations of the Town's code that occurred in conjunction with the approval of the Challenged Documents. In addition to the actions of the Town Council, the Plaintiffs also challenge the Building Inspector's issuance of the Building Permit.

The Plaintiffs seek a declaratory judgment declaring that approval of the MAR was an *ultra vires* act of the Town Council, that the Building Permit is invalid, and that the recordation of the MAR and the Record Plat Plan is invalid. The Plaintiffs also ask this Court to enjoin permanently the enforceability of the MAR and issuance of any building permit based upon the MAR. Finally, the Plaintiffs request an award of costs, including reasonable attorneys' fees and expenses.

The Defendants have moved for dismissal of this action. DBE and the Town Defendants filed separate motions and briefs, and each joins in the other's arguments. DBE contends that the Plaintiffs' claims should be dismissed under Court of Chancery Rule 12(b)(1) because this Court lacks subject matter jurisdiction over these claims. There are two parts to this argument. First, DBE contends that, to the extent the Plaintiffs are challenging the Town Council's approval of the Challenged Documents, the Court lacks subject matter jurisdiction

[47] Dewey Beach (Charter) § 23(a)(13)(a).

because the Complaint was filed after the period provided for in the applicable statute of repose, 10 *Del. C.* § 8126 (the "Statute of Repose"). According to DBE, this 60-day period began to run after the Resolution Notice was published on March 1, 2011, following the Special Town Meeting. Second, to the extent that the Plaintiffs challenge the Building Inspector's issuance of the Building Permit, DBE argues that the Court does not have subject matter jurisdiction because an adequate remedy at law was available to the Plaintiffs. A challenge to an administrative action, DBE contends, must first be brought to the BOA, the decision of which can then be reviewed by the Superior Court.

The Plaintiffs contend that DBE's argument fails for numerous reasons. First, the Plaintiffs argue that the Statute of Repose does not apply to the challenged actions because the MAR and the Record Plat Plan were not "submitted under the subdivision and land use regulations" of the Town.[48] Second, even if § 8126 did apply, the Plaintiffs argue, the "final approval" of the Challenged Documents did not occur until the June Town Meeting, and, therefore, the Complaint was filed within the 60-day period following the date of publication of the "final approval" of the challenged actions. Third, the Plaintiffs contend that there were no adequate remedies at law available to them because the BOA did not have jurisdiction over the Town Council's approval of the Building Permit. It is

[48] 10 *Del. C.* § 8126(b).

also possible to read in the Plaintiffs' Answering Brief an argument that any possibility of appealing a decision to the BOA was merely illusory, since the Town Manager had acted to frustrate such requests in the past.

In response, DBE argues that the Resolution was "submitted under the subdivision and land use regulations" of the Town because it was, in part, based on the Comprehensive Plan, and it included the ratification of the working group recommendation contemplated by the Comprehensive Plan. Moreover, DBE contends that the Plaintiffs' argument regarding the applicability of the Statute of Repose fails because "the Statute of Repose was expressly designed to preclude in short order claims of illegality," and the Plaintiffs' argument is based on the assumption that the Resolution was illegally adopted.[49]

The Town argues that the Complaint should be dismissed because the Plaintiffs lack standing.[50] According to the Town, the Plaintiffs have failed to allege either a concrete and particularized injury-in-fact or a procedural due process error. The crux of the Town's argument is its contention that, for an injury to be concrete and particularized, it must be different from any harm suffered by the rest of the public. The Town contends that the Plaintiffs' alleged injuries—increased traffic and pedestrian congestion, increased use of the Town's beaches,

[49] DBE Reply Br. 7.
[50] The Town also moved to strike the Complaint under Court of Chancery Rule 12(f). Because the Court concludes that this action should be dismissed, it will not assess the arguments related to the Town's motion to strike.

decreased privacy, loss of community character, loss of aesthetic value and real value of their property—constituted nothing more than general grievances suffered by the Town's population at large.

The Plaintiffs argue that the MAR served to rezone Ruddertowne, and, under *Brohawn v. Town of Laurel*,[51] plaintiffs that own property adjacent to or in close proximity to rezoned land could suffer "irreversible injury [that] is sufficiently real, particularized, and concrete to warrant standing."[52] The Plaintiffs allege that some of them own property adjacent to Ruddertowne. Furthermore, the Plaintiffs assert that their alleged injuries are personal and unique. Finally, the Plaintiffs contend that they have adequately alleged that the Town breached their due process rights.

V. ANALYSIS

A. *Court of Chancery Rule 12(b)(1) Standard*

The Court of Chancery, a court of limited jurisdiction, "will dismiss an action for want of subject matter jurisdiction if it appears from the record that the Court does not have jurisdiction over the claim."[53] The plaintiff bears the burden of establishing this Court's subject matter jurisdiction.[54] The Court may consider evidence extrinsic to the Complaint when assessing a Court of Chancery

[51] 2009 WL 1449109 (Del. Ch. May 13, 2009).
[52] *Id.* at *4.
[53] *Acierno*, 2006 WL 1668370, at *3 (internal quotation and citation omitted).
[54] *Id.*

Rule 12(b)(1) motion, and "where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof."[55]

B. *The Statute of Repose*

10 *Del C.* § 8126 provides that:

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

[55] *Id.* (internal quotation and citation omitted).

Although perhaps not readily apparent, the provisions of § 8126 are jurisdictional in nature.[56] Referring to a different statute of repose, 10 *Del. C.* § 8127, the Supreme Court explained:

> [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.[57]

As a result, DBE's argument that the Plaintiffs' claims were extinguished by the Statute of Repose is properly analyzed under Rule 12(b)(1), and the Court may consider evidence extrinsic to the Complain.

The Statute of Repose "is intended to promote predictability and stability in land use and therefore must be applied strictly."[58] The strong public policy underlying § 8126 is one in favor of certainty and finality in municipal land use decisions.[59] Certainty and finality are especially important in the contexts of zoning and the approval of record plans because they allow a landowner who has received a desired rezoning or approval of development plans to "move forward with his investment after 60 days without a challenge with the comfort that

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[56] *See id.* at *4; *Sterling Prop. Hldgs., Inc. v. New Castle Cty.*, 2004 WL 1087366, at *3 (Del. Ch. May 6, 2004); *S. New Castle Cty. Alliance, Inc. v. New Castle Cty. Council*, 2001 WL 8555434, at *1 (Del. Ch. July 20, 2001).
[57] *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 421 (Del. 1984) (internal quotation and citation omitted).
[58] *Acierno*, 2006 WL 1668370, at *4 (internal quotation and citation omitted).
[59] *Admiral Hldg. v. Town of Bowers*, 2004 WL 2744581, at *2 (Del. Super. Oct. 18, 2004).

subsequent judicial action will not impair his investment expectations."[60] For these reasons, the Statute of Repose must not only be applied strictly, but also construed broadly.[61] Indeed, this Court has stated that the provisions of the Statute of Repose are "very broad" and apply to "any ordinance, code, regulation, or map relating to zoning, or subdivision and land development."[62]

C. *Applicability of the Statute of Repose*

As explained above, at the core of the Plaintiffs' claims for declaratory and injunctive relief are their arguments that the Challenged Documents violate the Town's zoning and building regulations and that they were approved using a process that, likewise, violated the process established in the Town's code. Also, as previously explained, DBE's subject matter jurisdiction argument consists of two parts. The Court's discussion of § 8126 relates only to the approval of the Challenged Documents by the Town Council and the process employed by the Town Council to do so. DBE's § 8126 argument does not relate to the challenged actions of the Building Inspector.

The Plaintiffs contend that the Statute of Repose does not apply to the challenged actions because the challenged actions simply are not of the type

[60] *Sterling*, 2004 WL 1087366, at *5 n.25.
[61] *See id.*
[62] *Bay Colony Ltd. P'ship v. Cty. Council*, 1984 WL 159382, at *2 (Del. Ch. Feb. 1, 1984).

protected by § 8126. The Plaintiffs argue[63] that § 8126(a) is not applicable because they are not challenging 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,"[64] since the Town Council approved the Challenged Documents through a *resolution*. Similarly, the Plaintiffs argue[65] that § 8126(b) is not applicable because the Record Plat Plan was submitted under the process prescribed in the MAR and, therefore, was not "submitted under the subdivision and land use regulations" of the Town.[66]

DBE's primary counterargument is that the challenged actions are covered by § 8126 because the Resolution was, in part, based on the Comprehensive Plan—which was adopted by an ordinance—and it included the ratification of the working group recommendation contemplated by the Comprehensive Plan. Therefore, according to DBE, this link to the Comprehensive Plan is sufficient to bring the challenged actions within the scope of § 8126(a), which covers challenges to ordinances and regulations related to zoning, and § 8126(b), which covers challenges to record plans "submitted under the [municipal body's] subdivision and land development regulations."

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[63] *See* Oral Argument on Defs.' Mots. to Dismiss Tr. ("Tr.") 87.
[64] 10 *Del. C.* § 8126(a).
[65] Pls.' Answering Br. 18-19.
[66] 10 *Del. C.* § 8126(b).

To the extent that this argument depends upon the proposition that the purported ratification was effective for the purpose set forth in the Comprehensive Plan (*i.e.*, to make a development plan that is inconsistent with the Comprehensive Plan consistent with it), the Court is not persuaded by it, at least at the present time. According to the terms of the Comprehensive Plan, the recommendation and ratification process DBE refers to could have been applied to "development plans filed before the enactment of [the] Comprehensive Plan."[67] The Court has not been directed to evidence that the development plan purportedly recommended by the working group and purportedly ratified by the Town Council was filed before the enactment of the Comprehensive Plan. Thus, it is not clear that the supposed ratification would have effectively served its intended purpose.[68]

Before concluding that the Statute of Repose has extinguished a plaintiff's claim, the Court must be satisfied that the statutory requirements of the Statute of Repose were met. This requires the Court to engage in statutory construction. "The rules of statutory construction are well settled," and "[t]he goal, in all cases, is to ascertain and give effect to the intent of the legislature."[69] Unambiguous statutes do not require judicial interpretation, and "the plain meaning of the

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[67] Comprehensive Plan § 2-3.

[68] The Court does not, because it need not, decide at this time whether the ratification process was a necessary precursor to the Redevelopment Plan's being consistent with the Comprehensive Plan.

[69] *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000) (internal quotation and citation omitted).

statutory language controls."[70] "An ambiguous statute should be construed in a way that will promote its apparent purpose and harmonize it with other statutes within the statutory scheme."[71] In this case, the Court's construction of the Statute of Repose is informed by the prior case law interpreting § 8126. The Court reaches its conclusion that the requirements of the Statute of Repose were met by directly applying relevant precedent and construing § 8126 broadly in order that it may fulfill its important public policy purpose, as this Court has done in the past.

The Court will first assess whether the statutory requirements of § 8126(a) were met, leaving aside, for now, whether this action was filed within the applicable 60-day period, which will be addressed later. The key question is whether the approvals of the MAR and the Building Permit[72] are actions of the type enumerated in § 8126(a). The MAR and the Building Permit were approved by a resolution, and neither even purported to be an ordinance, code, regulation, or map. Therefore, in order to meet the requirements of § 8126(a), these actions must constitute an amendment to an "ordinance, code, regulation or map, relat[ed] to zoning" or an amendment to a "regulation or ordinance relat[ed] to subdivision and land development."[73] The Court concludes that the Town Council's approval of

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[70] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932-33 (Del. 2007) (internal quotation and citation omitted).
[71] *Id.* at 933 (internal quotation and citation omitted).
[72] The Town Council's approval of the MAR and Building Permit will be assessed under § 8126(a). Its approval of the Record Plat Plan will be assessed under § 8126(b).
[73] 10 *Del. C.* § 8126(a).

the MAR and the Building Permit did constitute an amendment to the Town's Zoning Code, assuming that the Town Council's approval of the MAR and the Building Permit had the legal effect attributed to it by the Plaintiffs.[74] Quite simply, the Plaintiffs allege that the challenged actions effected a rezoning of the Ruddertowne property, a rezoning that, they argue, was impermissible.[75] Actions of a municipality's governing body that serve to rezone an area are considered

[74] DBE appears to suggest, in an alternative argument, that the Town Council's approval of the Challenged Documents was simply an "extra" procedure not required for DBE's redevelopment of Ruddertowne to move forward. This argument, apparently, posits that only the Building Inspector's approval and issuance of the Building Permit were truly needed. If proven, this argument would undermine the very basis of the Plaintiffs' claims, as they relate to the Town Council's actions; it is an argument more properly presented within the context of a motion to dismiss for failure to state a claim. For purposes of DBE's Rule 12(b)(1) motion, the Court will assume that the challenged actions of the Town Council had the legal effects ascribed to them by the Plaintiffs: to authorize the redevelopment of Ruddertowne in accordance with the terms set forth in the MAR, which, the Plaintiffs contend, violated the Town's code and were approved in a manner that, likewise, violated the Town's code.

[75] Compl. ¶ 31 ("At its very essence, the MAR effectuated a private modification of the Town's zoning regulations specifically and exclusively for the benefit of the [DBE] property and thereby created a private means to obtain a building permit that would otherwise fail to conform to the Town's Zoning Code."); Answering Br. 2-3 (noting that "zoning approvals" were "achieved through the MAR" and that Ruddertowne was "privately rezoned"); *id.* at 3-4 (stating that the question of whether the MAR rezoned Ruddertowne is "at the heart of the Complaint"); Tr. 44-45 (arguing that the MAR included "public zoning approvals"); *id.* at 49 (characterizing the MAR as "exchanging litigation dismissals for the creation of a particular unique zoning district comprised of specific parcels" and stating that the MAR "resulted in zoning approvals and the issuance of a building permit that facially violates both the current and former zoning code"). Although the Plaintiffs state in paragraph 73 of the Complaint that "[n]o resolution, petition or ordinance was ever approved or enacted which amended, supplemented or changed the 35-foot building height limitation in the Town's Zoning Code," this is best understood as a statement that no action was taken *utilizing the appropriate process* to do so. As explained above, at the heart of the Plaintiffs' claims is the contention that the Challenged Documents had the effect of rezoning Ruddertowne. Just two paragraphs later in the Complaint, in paragraph 75, the Plaintiffs make it clear that this is what they were really arguing in paragraph 73 when they state: "[the Town Council] failed and/or refused to effectuate by ordinance the private zoning arrangement contained in the MAR, and thereby failed to comply with the statutorily mandated procedures for effectuating a change to the Town's Zoning Code or a Town zoning regulation."

"amendments" to the municipality's zoning code, within the context of § 8126, even if the rezoning may be improper because it was not accomplished through an ordinance or the formal rezoning process.[76] An amendment to a municipality's zoning code falls within the ambit of § 8126(a).[77] As such, the Town Council's approval of the MAR and the Building Permit is subject to § 8126(a).

The Plaintiffs' argument regarding the inapplicability of § 8126(b) fails for similar reasons. The Plaintiffs contend that the Record Plat Plan was submitted for the approval of the Town Council under the process set forth in the MAR, not under the "subdivision and land development regulations" of the Town, and, therefore, § 8126(b) is inapplicable. The Plaintiffs also point to, what they claim are, procedural shortcomings in the process employed by the Town Council.[78]

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[76] *See Bay Colony*, 1984 WL 159382, at *1-2. In *Bay Colony*, the Court concluded that the Sussex County Council's approval of a conditional use permit that allowed commercial uses in a residential zone was "in effect, for practical purposes, an amendment to the Zoning Code" because it "permitted a . . . substantial change in land use." *Id.* at *1. As a result, the Court concluded that § 8126 was applicable to the approval of the conditional use permit. *Id.* In *Bay Colony*, the Court noted that the Sussex County zoning scheme empowered the County Council to grant conditional use permits and that the Court's conclusion regarding the applicability of § 8126 might not apply "where conditional use permits are not granted by the legislative body." *Id.* at *2. This point was made, apparently, simply to illustrate that § 8126 is, presumably, not applicable when a conditional use permit is granted by an executive official and not a "governing body." *See id.* at *2; 10 *Del. C.* § 8126(a) (providing that § 8126(a) applies to certain actions taken by "the governing body of a county or municipality"). The Court does not view this comment in *Bay Colony* as supporting the Plaintiffs' argument that § 8126 should not apply to the challenged actions of the Town Council because the proper process—adoption of an ordinance, according to the Plaintiffs—was not utilized or because the Town Council's actions were, otherwise, void *ab initio* or *ultra vires* acts. This argument has been squarely rejected by the Court. *See Council of S. Bethany v. Sandpiper Dev. Corp., Inc.*, 1986 WL 13707, at *2 (Del. Ch. Dec. 8, 1986).

[77] *See Bay Colony*, 1984 WL 159382, at *1-2.

[78] *See* Pls.' Answering Br. 20-21; Tr. 58-59.

DBE counters that the process set forth in the MAR and undertaken by the Town Council to approve the Challenged Documents, including the Record Plat Plan, served as the ratification process contemplated in the Comprehensive Plan; thus, the Record Plat Plan *was* submitted under the "subdivision and land development regulations" of the Town. The Plaintiffs respond that, for this purpose, it does not matter whether the MAR process served as the ratification process, because the Comprehensive Plan is not a "subdivision and land development *regulation*."

DBE and the Plaintiffs hold differing views regarding the validity of the process used by the Town Council to approve the Record Plat Plan. The Court concludes that, in this case, the Statute of Repose may be applied without the Court's first determining that the process by which it was approved was without flaws. This conclusion is based upon both the policy underlying the Statute of Repose and the specific facts of this case. In *Sandpiper Development Corp.*, the Court addressed an argument positing that "whenever a claim is advanced that a zoning ordinance is invalid by reason of having been enacted in violation of statutory procedural requirements, that claim falls outside the scope of [§ 8126(a)]."[79] The Court rejected this argument due to the policy underlying the Statute of Repose. In *Sandpiper Development Corp.*, the Court explained:

[79] *Sandpiper Dev. Corp.*, 1986 WL 13707, at *2.

> [I]t is highly significant that the statute creates an extraordinarily short (60 day) period during which zoning regulations must be challenged. Such a short period evidences a legislative judgment that while there is a strong public policy favoring strict compliance with statutes establishing procedural requirements for enacting local zoning regulations, those policies are not absolute. Of considerable importance as well is the policy of repose which underlies the [Statute of Repose]. In this case, that policy translates directly to the interest of local communities in stable land use regulatory arrangements and in freedom from the uncertainty and disruption that would result if such arrangements were permitted to remain legally vulnerable for long periods. The strength of that policy is underscored by the extraordinarily brief period allowed by the General Assembly for mounting legal challenges to zoning ordinances.[80]

Indeed, this "strong policy in favor of certainty in municipal zoning decisions . . . must be followed strictly and cannot bend, even to other statutes."[81]

The Court concludes that these policy considerations are equally applicable to § 8126(b) and the approval of record plans. As a result, DBE does not need to prove that the Town Council was in perfect compliance with all of the statutory procedures for approving the Record Plat Plan in order for § 8126(b) to apply. Such a requirement would largely undermine the purpose of the Statute of Repose, which seeks to establish certainty with regard to land use decisions made by the governing bodies of municipalities and counties. The Court concludes that, because 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

[80] *Id.* (citations omitted).
[81] *Admiral Hldg.*, 2004 WL 2744581, at *2.

concludes is a "subdivision and land development regulation" for purposes of § 8126(b)[82]—§ 8126(b) is applicable.[83] Moreover, the Court notes that the process of considering and approving the Record Plat Plan (and the Redevelopment Plan it was based upon) took place in public after multiple public hearings; the approval of the Record Plan Plat was, allegedly, part of a rezoning; and notice of the Record Plat Plan's approval was published.

In sum, the policy underlying the Statute of Repose—one in favor of certainty and finality in municipal land use decisions—is crucial to the Court's conclusions. As explained above, the Plaintiffs' claims challenge actions that meet the statutory criteria to fall within the realm of § 8126. But, beyond mere compliance with the words of the Statute of Repose, applying § 8126 in this instance clearly serves to carry out the policy it embodies. The Plaintiffs do not dispute that the effect of the approval of the Challenged Documents was a

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[82] The Statute of Repose must be construed broadly so that it may serve its important policy goal of providing finality and certainty to zoning and land use decisions of municipalities and counties. Pursuant to 22 *Del. C.* § 702(d), the *entire* comprehensive plan adopted by a *municipality* has "the force of law and no development shall be permitted except as consistent with the plan." This is in contrast to the somewhat more limited legal effect of the comprehensive plans of counties. Only "the land use map or map series" of a county's comprehensive plan has the force of law. 9 *Del C.* § 2659(a); *see also O'Neill v. Town of Middletown*, 2006 WL 205071, at *38 n.272 (Del. Ch. Jan. 18, 2006). Since development that is inconsistent with a municipality's comprehensive plan is not permitted, the Court concludes that, given the broad construction of the Statute of Repose, the Comprehensive Plan is a "subdivision and land use regulation" for purposes of § 8126(b).

[83] As explained above, the Court's conclusion is not based upon a determination that the process employed meets all of the statutory requirements for the Town Council's approval of a record plan. Instead, it merely recognizes that the process employed triggered the 60-day time limit for bringing a claim set forth in § 8126(b).

significant change to the Town's zoning and/or land use regulations; indeed, this contention is at the heart of their claims. The dispute over the redevelopment of Ruddertowne has played out over many years, over many Town election cycles, in numerous public hearings, in various courts, and in the press. By the time the Town Council voted on the Challenged Documents, the issues were well-known to the Town's residents and property owners. It is difficult to imagine that interested property owners did not already have a hardened opinion regarding the Redevelopment Plan. The Plaintiffs did not need a long period of time following the Special Town Meeting to decide whether they approved of the Town Council's actions. Furthermore, beyond the public notice of the hearing that preceded the Special Town Meeting, that meeting and its subject matter were widely covered by the press before the meeting occurred.[84] The results of the Special Town Meeting, likewise, were widely covered by the press,[85] in addition to being published in the Resolution Notice. Without question, the process of considering and approving the Challenged Documents was public.

The Plaintiffs chose not to obtain judicial review of the Town Council's actions shortly after the publication of the Resolution Notice, as the law requires. As the Superior Court stated after explaining that the policy behind § 8126 suggests that its time limit should not be tolled, "choices were made and those

[84] DBE Opening Br., Exs. 16, 19.
[85] DBE Opening Br., Exs. 22, 23, 25.

choices have consequences . . . this fact is true in every instance a limitation is applied."[86] The Court's conclusion that § 8126 extinguished the Plaintiffs' claims is in no way an endorsement of the Town's handling of this matter. The Plaintiffs may well be correct that procedural and substantive elements of the Challenged Documents and the process by which they were approved violated the Town's code. But, the General Assembly has decided that such challenges must be brought promptly, and this Court has repeatedly recognized the strong policy behind this legislative decision. The Court has applied the Statute of Repose in the past despite its, sometimes, exceedingly harsh effects, which have even been termed "draconian."[87] The Court must do so, again, here.

D. *The Publication of Notice of the Final Approval*

The Plaintiffs also argue that, even if the Statute of Repose does apply to the approval of the Challenged Documents, notice of their "final approval" was not published until at least June 23, 2011, when notice of the June Town Meeting was published in The News-Journal.[88] This argument is based upon the Plaintiffs'

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[86] *Admiral Hldg.*, 2004 WL 2744581, at *4 (quoting *Moore v. Graybeal*, 1989 WL 17430, at *7 (Del. Ch. Feb. 24, 1989)).

[87] *Lynch v. City of Rehoboth*, 2004 WL 1238405, at *4 (Del. Ch. May 28, 2004) (Master's Report).

[88] *See* DBE Opening Br., Ex. 33. The Court notes that the Plaintiffs' argument focused solely on the wording of § 8126(b), which speaks in terms of the "final approval" of a record plan. Section 8126(a), on the other hand, speaks in terms of the "adoption" of an ordinance, code, regulation, map, or amendment. The Court understands this argument as suggesting that the "adoption" of the resolution that approved the MAR and the Building Permit also did not occur until the June Town Meeting.

contention that, under the terms of the MAR, "final approval" of the Challenged Documents could not occur until the June Town Meeting.[89] At the very least, the Plaintiffs argue, the wording of the MAR was confusing with regard to when the "final approval" would occur; the Court should not expect ordinary citizens to undertake a detailed legal analysis of the MAR; and any ambiguity regarding when the "final approval" occurred should be resolved in favor of the Plaintiffs, since the Defendants were the ones who drafted and implemented the MAR process.

DBE contends that the "final approvals" referenced in the MAR with regard to the June Town Meeting simply referred to the last few matters that needed to be approved at that time, namely details of the amenities DBE was to provide to the Town and the consistency of the construction plan with the Record Plat Plan that was approved at the Special Town Meeting. According to DBE, the Challenged Documents received "final approval" at the Special Town Meeting, and the requisite notice, the Resolution Notice, was published in The News-Journal on March 1, 2011.[90]

The Court concludes that the 60-day Statute of Repose period started running upon the publication of the Resolution Notice. Subsections 8126(a) and 8126(b) both provide for a 60-day period after which suits related to their

[89] *See* Pls.' Answering Br. 22-24 (quoting MAR § 8(a)(vi)).
[90] Resolution Notice.

respective subject matters cannot be brought. In both of these subsections, the 60-day period begins running at

> the date of publication in a newspaper of general circulation in the county or municipality in which such [adoption or action] occurred, of notice of [the adoption or final approval] of such [ordinance, code, regulation, map, or amendment or such final approval or rejection of such final or record plan].[91]

The Challenged Documents were approved by the Town Council by means of the Resolution, which stated as such, unambiguously, in sections one and two. Crucially, the Resolution Notice stated that the MAR was "adopted by the [R]esolution," and "the [R]esolution included . . . the final approval by [the Town Council] and [the Building Inspector] . . . of [the] [R]ecord [P]lat [P]lan and [B]uilding [P]ermit."[92] A simple application of the Statute of Repose to these facts reveals that March 1, 2011, the date the Resolution Notice was published, is the date that the 60-day period began to run.[93] Even if the MAR did contain some ambiguity regarding when the appropriate "final approval" would occur, that would not alter the unambiguous language of § 8126 and the Resolution Notice. Because the Plaintiffs' suit was filed after the end of the 60-day Statute of Repose

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[91] 10 *Del. C.* § 8126(a)-(b).
[92] Resolution Notice.
[93] The Plaintiffs' concern regarding the ability of a municipality's citizens to understand, from a reading of the MAR, when the 60-day period would begin to run focused on the fact that the MAR was, according to the Plaintiffs, a "privately negotiated contract," but the same concerns would likely arise if citizens were required to parse legalese-laden ordinances to divine this information. Such concerns were likely a reason that § 8126 provides that the 60-day period begins running upon the publication of an appropriate notice.

period that began to run on March 1, 2011, their claims challenging the actions of the Town Council were extinguished by § 8126.

E. *Possession of an Adequate Remedy at Law*

The Plaintiffs also challenge the Building Inspector's approval [94] and issuance of the Building Permit. DBE contends that the Court lacks subject matter jurisdiction over claims related to the Building Inspector's approval and issuance of the Building Permit because the Plaintiffs had an adequate remedy at law that they failed to pursue. The Court does not have subject matter jurisdiction over matters where there is a sufficient remedy at law.[95] The "jurisdictional inquiry is a serious one involving a close examination of the plaintiff's claims and desired relief, not a perfunctory verification of the plaintiff's 'incantation of magic words' sounding in equity." [96] To determine whether the Plaintiffs have met the jurisdictional threshold, the Court "must review the allegations of the complaint as a whole to determine the true nature of the claim."[97]

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[94] The Plaintiffs contend that the Building Inspector never formally recommended the Building Permit to the Town Council, perhaps implying that the Building Inspector never approved the Building Permit. *See* Compl. ¶ 44. According to DBE, the Building Inspector's approval and signing of the Record Plat Plan also evidenced his approval of the Building Permit. Regardless, it is undisputed that the Building Inspector actually issued the Building Permit. Even if he had not yet formally approved the Building Permit by the time he issued it, his issuance of the Building Permit would also constitute his approval of it.

[95] 10 *Del. C.* § 342.

[96] *Savage v. Savage*, 920 A.2d 403, 408 (Del. Ch. 2006) (citation omitted).

[97] *Christiana Town Center, LLC v. New Castle Cty.,* 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003).

Here, the Plaintiffs' true aim is to have the Building Permit invalidated because, they claim, its approval and issuance by the Building Inspector were improper due to the Redevelopment Plan's alleged noncompliance with the Zoning Code. Both state law and the Town's code make it clear that such challenges to the decisions of a municipal administrative officer should be brought to the BOA. By 22 *Del. C.* § 324, "[a]ppeals to the [BOA] may be taken by any person aggrieved . . . by any decision of [an] administrative officer." Likewise, the Town's code allows appeals to the BOA from a decision of an administrative officer.[98] Indeed, § 71-3(F) of the Town's code, which specifically addresses building permits, provides: "Appeal from a decision of [the Building Inspector] shall be to the [BOA]." A decision of the BOA may be appealed to the Superior Court,[99] and, of course, a decision of the Superior Court may be appealed to the Supreme Court.[100]

A BOA hearing related to the approval of the Challenged Documents was requested. DBE and the Plaintiffs disagree about whether any of the Plaintiffs were parties to this 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. The Court need not decide these questions, though, because it

[98] *See* Dewey Beach C. at § 185-65(B); *id.* at § 185-66(A).
[99] 22 *Del. C.* § 328(a); Dewey Beach C. at § 185-72.
[100] Del. Const. art. IV, § 11.

is undisputed that the BOA never heard any appeal related to the Building Inspector's approval and issuance of the Building Permit. As such, the Plaintiffs failed to avail themselves of an adequate remedy at law.

The Plaintiffs complain that the appeal was not heard because the Town Manager improperly refused to forward the hearing request to the BOA, and, when an appeal of the Town Manager's actions was filed with the BOA, the Town Manager, again, interfered in the BOA appeal process. Essentially, the Plaintiffs argue that it was impossible for them to utilize the BOA appeal process due to the Town Manager's wrongful interference. Even if the Plaintiffs' view of the events is correct, they once again failed to pursue an adequate remedy at law. The Plaintiffs (or the appropriate party) could have sought a writ of mandamus[101] from the Superior Court. There are no allegations that the Plaintiffs (or anyone else) sought a writ of mandamus to compel the Town Manager to forward the purported appeal of the Building Inspector's approval of the Building Permit to the BOA. Since there was an adequate remedy at law available to the Plaintiffs for their claims related to the Building Inspector's approval and issuance of the Building Permit that the Plaintiffs failed to pursue, this Court lacks subject matter jurisdiction over these claims.

[101] 10 *Del. C.* § 564.

VI. CONCLUSION

For the foregoing reasons, the Court grants the Defendants' motions to dismiss.[102] The Town's motion to strike, which is rendered moot, is denied. An appropriate order will be entered in accordance with this Memorandum Opinion.

[102] Thus, the Court does not need to address the Town's argument that the Plaintiffs lack standing.