

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

ANTHONY MURRAY, et al.

Plaintiffs,

v.

TOWN OF DEWEY BEACH, et al.

Defendants.

C.A. No: 6785-VCN

**PLAINTIFFS' COMBINED ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS
TOWN OF DEWEY BEACH AND DEWEY BEACH ENTERPRISES
MOTIONS TO DISMISS AND STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT**

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December 13, 2011

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PRELIMINARY STATEMENT

Four residents of the Town of Dewey Beach, Delaware (the “Town”) filed a complaint (as amended, the “Complaint”) challenging the Town’s entry into a “Mutual Agreement and Release” (the “MAR”) with a private owner/developer of land in the Town, Defendant Dewey Beach Enterprises, Inc. (“DBE”).

Beginning in 2007, DBE set out to redevelop property located in the center of Town (“Ruddertowne”) by proposing to construct what would be the Town’s largest and tallest building—a building with a hotel nearly twice as tall as permitted under the Town’s zoning code. After review by the Town, its officials and commissions, the Ruddertowne plan was not approved because, among other reasons, it contained height and use elements not permitted under the Town’s zoning code. In response, DBE chose a path forward centered upon threats and lawsuits. Over the next three years, DBE filed six separate lawsuits against the Town and its public officials. Eventually through the MAR, DBE and the Town exchanged litigation and liability releases for approval of a revised Ruddertowne plan that contained height and use elements not permitted under the Town’s zoning code.

Plaintiffs’ Complaint presents timely and justiciable issues of law and fact concerning the Town’s authority to make such zoning related approvals by private agreement [the MAR] instead of by strict conformity with statutory procedures and regulations governing zoning approvals. It seeks a declaration that the MAR is *ultra vires* and a permanent injunction prohibiting construction in accordance with the zoning changes purportedly approved through the MAR.

Throughout their briefs, the Town and DBE (collectively, “Defendants”) acknowledge masquerading their private zoning contract as a sanctioned public exercise of extra-statutory zoning authority. They highlight: (i) three public workshops “not required by law” held mid-winter (January) in a beach community; (ii) two or more public hearings also “not required by

code,” which included a simulated “Final Public Hearing” that turns out to have occurred nearly four months after purportedly “final” zoning related approvals were made; (iii) a superficial review, “only very limited in scope,” by the Town’s Planning and Zoning Commission; and (iv) the admittedly “superfluous” approval of the Ruddertowne plan and building permit by the Dewey Beach Town Council (“DBTC”). Defendants insist that these machinations represent “more than adequate procedural protections” contained in the MAR. In doing so, Defendants are forced to acknowledge that the zoning approvals achieved through the MAR circumvented strictly applicable statutory zoning laws, regulations and procedures.

Defendants move to dismiss on grounds that this Court lacks subject matter jurisdiction because (i) the Complaint was not timely filed, (ii) Plaintiffs had an adequate remedy at law which they failed to pursue; and (iii) Plaintiffs failed to adequately allege standing to pursue their claims. Each of Defendants’ arguments in favor of dismissal fails.

Defendants’ timeliness challenge fails because in order for the 60-day repose period found at 10 *Del. C.* § 8126(b) to apply, a development plan is required to have been “submitted under the subdivision and land development regulations of such [Town].” The Ruddertowne plan plainly was not. It was submitted for consideration exclusively under a privately negotiated, extra-statutory process and procedure set forth in the MAR. And Defendants don’t get it both ways—private zoning approval *and* statutory repose. Assuming *arguendo* that 10 *Del. C.* § 8126(b) is applicable, under the express terms of the MAR, no “final” Ruddertowne approvals occurred before the June 17, 2011 “Final Public Hearing.” Plaintiffs’ Complaint was timely filed within 60 days thereof.

The second argument fails because the adequate remedy at law that DBE alleges was available to Plaintiffs—an appeal to the Town’s Board of Adjustment challenging the MAR—

was declared by the Town to be unavailable to a group of property owners (including two of the Plaintiffs *sub judice*) who filed a March 2011 appeal challenging the MAR. The Town was unequivocal six months ago: a challenge to the MAR was “not within the Board of Adjustment’s appellate jurisdiction.” DBE, of course without the Town’s support, now argues directly to the contrary—that the BOA had exclusive appellate jurisdiction over the MAR of which Plaintiffs failed to avail themselves.

The challenge to Plaintiffs’ standing, while not equally inconsistent, is equally unpersuasive. Defendants ignore non-conclusory, verified allegations of injuries-in-fact that Plaintiffs’ will suffer as adjacent property owners to the privately rezoned Ruddertowne. Plaintiffs standing to challenge the MAR also arises from a Complaint that adequately alleges that the MAR’s private terms proscribed any meaningful or independent public review by the Town’s Planning and Zoning Commission and the Town improperly intervened to prevent any meaningful or independent public review by the Town’s Board of Adjustment.

DBE presents a highly unorthodox form of a pleadings-stage motion—attaching nearly 300 documents and 200 digital megabytes of extrinsic information. In almost twenty (20) pages of a “Statement of Facts,” DBE does not cite a single factual allegation contained in the Complaint. Instead, DBE invites the Court to accept as pleadings stage “facts,” hotly disputed issues of law and fact from its six separate lawsuits against the Town recently dismissed without prejudice.¹ DBE also declares as “facts,” contentions that are at the very heart of the Complaint:

¹ Notably in a footnote, DBE “reserves its rights” to resurrect and re-litigate certain of the now-claimed record “facts” in the event that the MAR is invalidated or they choose to cancel it. Defendant Dewey Beach Enterprises Opening Brief in Support of Dismissal “DBE OB” at fn.15; Fns. 10, 12. DBE’s “rights-reserved” “fact” declarations include:

- “the phrase bulk standards includes building height;”
- “[t]he Ruddertowne property satisfied all [] zoning requirements;”

“The MAR did not rezone Ruddertowne...,” “The Record Plan did not serve to rezone Ruddertowne...”² DBE, *at the very least*, makes abundantly clear the need for a more credible and fully developed record by its attempt to construct a pleadings-stage record essentially from the whole cloth of its voluminous attachments (including, *inter alia*: 5 DVD’s containing digital audio files; deposition transcript excerpts; newspaper articles and editorials; maps, sketches and drawings; unauthenticated meeting agendas, minutes and sign-in sheets; and a carefully limited selection of email and letter communications by and between DBE and the Town, its officials, boards and commissions).

• “[i]n accordance with the Town Comp Plan, on January 10, 2009, the Town of Dewey Beach adopted Ordinance #634 which, among other things, rezoned Ruddertowne.”¹
DBE OB 5, fn.6, 10, 13, 18 fn. 10, fn 12, fn 15.

² DBE OB at 13, 18.

PROCEDURAL HISTORY

The Dewey Beach Town Council voted to engage in the review process specified in the MAR on December 6, 2010. Under the MAR's terms, the Final Public Hearing on the MAR was held on June 17, 2011. Plaintiffs original Complaint was filed on August 15, 2011. Defendants moved to dismiss the original complaint on September 13, 2011. In accordance with Court of Chancery Rule 15(aaa), Plaintiffs amended and supplemented their Complaint on October 13, 2011. Defendants filed separate briefs in support of their renewed motions to dismiss on November 16, 2011. This is Plaintiffs' combined brief in opposition to the motions to dismiss.

STATEMENT OF FACTS

Beginning in or around 2007, plans emerged to convert the commercially zoned Ruddertowne property located in the center of the Town to residential use under the Town's then-existing zoning code. *Dewey Beach Enterprises, Inc., et al. v. Town of Dewey Beach, et al.*, 09-cv-507-GMS (D. Del.) Complaint at 22 (July 10, 2009). According to DBE, the Town encouraged consideration of mixed-use commercial redevelopment instead of exclusively residential redevelopment. *Id.*

To that end, in June of 2007, DBE presented to the Town the first of a series of proposals for a mixed-use commercial and residential Ruddertowne complex. *Dewey Beach Enterprises, Inc., et al. v. Town of Dewey Beach, et al.*, C.A. No. 5833-VCN (Del. Ch.) Complaint at 27 (Sept. 20, 2010). DBE's initial concept plan included, *inter alia*, a welcome center, a bayside boardwalk, public restrooms and parking, a convention center and a 68-foot hotel and condominium complex. *Id.* A Ruddertowne Architectural Review Committee (the "RAC") was empaneled and voted affirmatively to forward the initial Ruddertowne plan to the Town's Planning and Zoning Commission for review. *Id.* In July 2007 the Dewey Beach Town Council ("DBTC") introduced an ordinance relating to the initial Ruddertowne plan. *Id.* The Ruddertowne plan was subsequently rejected by the Planning and Zoning Commission and DBTC. *Dewey Beach Enterprises, Inc., et al.*, C.A. No. 5833-VCN, *Complaint* at 27.

At all times since the Town was incorporated in 1981, the Town's zoning code has restricted the permissible height of buildings to a maximum of 35 feet—applicable to all new construction as well as the modification of every existing building in each of the Town's

designated zoning districts.³ Plaintiffs' First Amended Verified Complaint at paras. 18, 21. ("Compl.").⁴

In mid-2007, around the same time that DBE proposed its initial concept plan for Ruddertowne, the Town adopted a Comprehensive Plan (the "Comprehensive Plan"), which recommended the creation of three new resort business zoning districts. Compl. 24-25, fn. 3. The Comprehensive Plan proposed that Ruddertowne be rezoned to one of the new zoning districts, designated "RB-1," where "relaxed bulk standards (setbacks, lot coverage, etc.)" would be "available" to certain owners of contiguous property. Compl. 24. The Comprehensive Plan did not address the Town's existing 35-foot building height limitation and did not once include the word "height" in the 58-page document. *Id.*

In January 2009, the Town adopted an ordinance revising its zoning code, regulations and maps (the "Town's 2009 Zoning Code") in accordance with the Comprehensive Plan. DBE's Opening Brief "DBE OB" at 10. The Town's 2009 Zoning Code contained the same 35-foot building height limitation that existed before the zoning code was revised in accordance with Comprehensive Plan. Compl. 19-20. The legislative intent for the height limitation was expressly stated in Town's 2009 Zoning Code:

The zoning regulations and districts as herein established are designed to promote the health, safety, morals, convenience, order, prosperity and general welfare of the present and future inhabitants of the Town of Dewey Beach, Delaware. *These interests may be promoted by restricting the height, number of stories and size of buildings and other structures; ...*

³ Oddly, the Town refers to the 35 foot building height limitation that has continuously existed *in its own zoning code since 1981* as "this supposed 35' height limitation." Town's Opening Brief ("Town OB") at 5.

⁴ For the Court's convenience, attached hereto as **Exhibit A** is a copy of Plaintiffs' First Amended Complaint (which includes a copy of the MAR at exhibit 1 thereto.).

Compl. 19 (Emphasis added) (quoting Town’s 2009 Zoning Code at § 185-3).⁵

After the defeat of its initial concept plan for Ruddertowne and after the Town adopted the Comprehensive Plan, DBE presented a number of alternative concept plans at various heights from 35 feet up to 68 feet. DBE OB 7-8. In connection with those alternative plans, DBE insisted that the Comprehensive Plan’s “available” “relaxed bulk standards (setbacks, lot coverage, etc.)” language rendered inapplicable the Town Zoning Code’s 35-foot building height limitation. Compl. 24, fn. 3.

Determined to build Ruddertowne as it saw fit, DBE unleashed a torrent of lawsuits against the Town, the DBTC, and certain current and former Town officials, all alleging various forms of official misconduct in connection with the denial of the Ruddertowne plan and seeking to invalidate the 35-foot building height limitation:

- March 2009: DBE sued the Town in the Delaware Court of Chancery. *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, Commissioners of Dewey Beach, Dell Tush, Marc Appelbaum, Richard Hanewinckel, Diane Hanson and Marty Seitz*, C.A. No. 4426-VCN (Del. Ch.) (March 17, 2009));
- July 2009: DBE sued the Town in the United States District Court for the District of Delaware. *Dewey Beach Enterprises, Inc. and Ruddertowne Redevelopment, Inc. v. Town of Dewey Beach, et al.*, 09-cv-507-GMS (D. Del.) (July 10, 2009);
- October 2009: DBE filed a second Chancery Court action. *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, Commissioners of Dewey Beach, Mayor Richard N. Solloway, Marc Appelbaum, Diane Hanson, James Przygocki, and Marty Seitz*, C.A. No. 4991-VCN (Del. Ch.) (Oct. 14, 2009).

Compl. 14, fn. 2.

⁵ The Town’s 2009 Zoning Code also specifically cites at section 185-3.1, the “enabling legislation,” for its enactment of a height limitation, Delaware Code Title 22, Section 301, which, “permits the legislative bodies of incorporated towns to regulate such matters as the height, number of stories and size of buildings and other structures...” Compl. 20 (Emphasis added).

In addition to the above-referenced lawsuits, DBE sued the Town's Board of Adjustment in 2008, seeking clarification of the Town's initial approval (and later rejection of) a scaled-down Ruddertowne plan, which included a 35-foot building. *Dewey Beach Enterprises, Inc. v. Board of Adjustment of the Town of Dewey Beach*, 2009 WL 2365676, C.A. No. S08A-08-002 (Del. Super.). Both the BOA and the Delaware Superior Court affirmed the Town's rejection of the plan, but the Delaware Supreme Court reversed. *Dewey Beach Enterprises, Inc. v. Board of Adjustment of the Town of Dewey Beach*, 1 A.2d 305, No. 465, 2009 (July 30, 2010)(reversing denial of Ruddertowne plan and holding that the density of the proposed mixed use structure did not violate the residential lot size requirements under the Town's zoning code.).

Accordingly, as of July 2010, DBE had in-hand approval to commence construction of a mixed-use Ruddertowne project, without any density restrictions, at a height of 35 feet. *Id.* Instead of commencing construction, DBE filed its fifth and sixth lawsuits against the Town, the DBTC, and former Town officials.⁶ Compl. 14, fn. 2.

These 2010 lawsuits were, in some part, duplicative of DBE's earlier-filed actions. They alleged official misconduct by the Town and its officials designed to interrupt DBE's efforts to redevelop Ruddertowne through "protracted animosity toward the developer and toward initiatives to revitalize the Dewey Beach commercial center even though the initiatives are consistent with the Comprehensive Plan" and the Town's failure to strictly "comply with State procedural requirements" in adopting zoning-related legislation. *See* Complaint, 5833-VCN at

⁶ *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, Commissioners of Dewey Beach, Mayor Richard N. Solloway, Commissioners of Dewey Beach, Marc Appelbaum, Diane Hanson, James Przygocki, and Marty Seitz*, C.A. No. 5711-VCN (Del. Ch.)(filed Aug. 12, 2010);

Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, Commissioners of Dewey Beach. Mayor Richard N. Solloway, Marc Appelbaum, Diane Hanson, James Przygocki, and Marty Seitz, C.A. No. 5833-VCN (Del. Ch.)(filed Sept. 20, 2010).

44-47; Complaint, 5711-VCN at 24. All of the Complaints filed by DBE prayed for significant money damages from the Town and sought to recover personal damages from many of the former Town officials.

By late 2010 and early 2011, DBE and the Town's insurance carrier were pressing the Town to settle the litigation onslaught, prompting DBE to offer a *quid pro quo*. Compl. 26. The MAR emerged with terms that included approval of a revised Ruddertowne plan including height and use elements impermissible under the Town's zoning code, in exchange for, *inter alia*: (i) dismissal of litigation; (ii) releases from personal liability; (iii) a quarter-million dollars of legal indemnity for the Town; and (iv) 3,000 square feet of dedicated Town office space in the new Ruddertowne building, including a twenty dollar (\$20.00) per square foot "fit-out" allowance. Compl. 28, 29. On December 6, 2010, the Town Manager executed the MAR and shortly thereafter, in executive session, the DBTC "voted to engage in the review process provided in Paragraph 8 of the MAR." Compl. 27.

The MAR's Review Process

Through a privately negotiated "review process provided in Paragraph 8 of the MAR," DBE was permitted to submit for approval a plan and a building permit that contained various elements inconsistent with the Town's 2009 Zoning Code, including (i) a nonconforming building at a height of 45.67 feet and (ii) a building's nonconforming use as a hotel. Compl. 23, 28-30. Critically, if the review process resulted in the "authorized [] issuance of a building permit to DBE to build either condominiums or a hotel at a maximum height of 45.67 feet," such approval (upon expiration of the time to appeal) would trigger the prompt and final dismissal of all litigation commenced by DBE against the Town and its current and former officials. Town's Opening Brief ("Town OB") at 2; Compl. 30-32.

Both the Town and DBE acknowledge *repeatedly* that the MAR's processes and procedures for Ruddertowne's "Plan and Building Permit Approval" were "not required by State law or Dewey Beach Code," (DBE OB 11, 12, 13 fn.11, 18 fn.14, 19, 36 fn.43). Defendants thereby concede supplanting the statutory zoning approval processes and procedures set forth in the Town's 2009 Zoning Code:

- "The purpose of the [MAR] was to: 1) *establish a procedure* by which DBE could submit a revised plan and building permit for consideration by the Town for the redevelopment of DBE's Ruddertowne properties ..." Town OB 2;
- "*The process set forth in the MAR* to consider the approval of the revised plan and building permit application was unanimously approved by the [DBTC] on December 11, 2011." DBE OB 10;
- "*The MAR, inter alia, set forth a procedure* by which DBE could submit a revised plan and building permit application for consideration by the Town for the redevelopment of Ruddertowne." *Id.*;
- "The February 26th Resolution *set forth a process* that required DBE to participate in two additional public hearing of very limited scope" *Id.* 18;
- "In *accordance with the process approved in [the MAR]* adopted on February 26, 2011, on June 11, 2011, the Town of Dewey Beach Planning Commission convened to hear public testimony" DBE OB 19;
- "*Pursuant to the process* agreed to in the February 26th [MAR], on June 17, 2011, the record confirms that the Dewey Beach Town Commissioners held a public hearing..." *Id.*

Compl. 32 (emphasis added).

More specifically, the MAR's privately negotiated "zoning related approvals" are alleged in the Complaint to have deviated from the Town's 2009 Zoning Code requirements because: (i) any proposed amendment, supplement or change to the zoning code or the regulations governing a zoning district would have required submission to the Town's Planning and Zoning Commission for review and the enactment of a Town ordinance as set forth in Section 185-73;

(ii) any approval of a conditional (or nonconforming) use would have required submission to the Planning and Zoning Commission for review and the enactment of a Town ordinance under Section 185-74; (iii) a variance from any zoning ordinance, code or regulation, would have required application to and approval from the Town's Board of Adjustment as set forth in Section 185-64, *et seq.*; and (iv) a site plan approval involving a mixed-use structure would have required an "acceptability review by the Town Building Code Official," a review by the "Town Planner," and review by both the DBTC and Town Building Code Official "for compliance with the requirements of...this chapter [Chapter 185 of the Town's zoning code]." Compl. 32.

The MAR's "Plan and Building Permit Approval Process" for Ruddertowne

The DBTC held a public hearing on February 26, 2011, followed by a "Special Town Meeting" that same day, at which the DBTC adopted a Resolution approving the MAR. Compl 35. In doing so, DBE and the Town contractually obligated themselves to honor the MAR's timelines, declared to be "of the essence," and follow the negotiated procedures set forth in the "Plan and Building Permit Approval Process" at paragraph 8 of the MAR.⁷ Compl. 35.

After the MAR's February 26 approval, the "Plan and Building Permit Approval Process" required the Ruddertowne plan to be submitted for a review "of very limited scope" by the Town's Planning and Zoning Commission. Compl. 35-37; MAR Paragraphs 8(a) and (b)(v-vi); DBE OB 18. This limited review, "was not required by Code, but was agreed to by DBE and the Town in the [MAR]." DBE OB 19. Under normal circumstances, the Town's Planning and Zoning Commission "is authorized to investigate, report and recommend changes to the zoning code in Dewey Beach and has full authority to investigate and review any other matter

⁷ In accordance with Paragraphs 8(a) and (b) of the MAR, the DBTC's approval of the MAR on February 26, 2011 followed three "public workshops" that were held on January 15, February 3 and February 5, 2011.

referred to it by the Town Commissioners.” *Dewey Beach Enterprises, Inc., et al. v. Town of Dewey Beach, et al.*, 2010 WL 3023395, at * 1, 09-cv-507-GMS (D. Del. July 30, 2010). The MAR, however, contractually *prohibited* the Town’s Planning and Zoning Commission from exercising its authority to review or recommend whether the Ruddertowne Plan conformed with the Town’s Zoning Code. Compl. 30, 58 DBE OB 19. The Town’s Planning and Zoning Commission conducted this limited review on June 11, 2011. *Id.*

Also after the MAR’s February 26 approval, the “Plan and Building Permit Approval Process” required a “Final Public Hearing, (“Hearing Two”),” to be held by DBTC “no sooner than ninety (90 days), and no later than 120 days, following Hearing One (*i.e.*, February 26, 2011).” Compl. 35-37; MAR at 8(a) and (b)(v-vi). The DBTC held the Final Public Hearing on June 17, 2011. DBE OB 19.

At the June 17 Final Public Hearing, the DBTC was required by the express terms of the MAR to make “a *final* decision regarding whether the *final* construction plans satisfy the conditions of the approved plan and building permit” and, if so, grant “all *final* Town approvals by a majority vote.” MAR at 8(a)(v) (emphasis added). On June 17, in accordance with the MAR, the Ruddertowne plan received “full and final approval” of “all zoning related approvals” and “building permit applications.” Compl. 37; DBE OB 19-20; MAR at 8 and 17(h),(i),(k), and (n). On June 23 the Town published a public notice detailing “Certain Final Approvals” granted by the DBTC at the June 17 Final Public Hearing. DBE OB 20-21. In accordance with paragraph 17(k) of the MAR (“If final approval is obtained by DBE...following the Town Commissioners’ final review at Hearing Two...”) the Town issued DBE’s building permit on July 15, within 30 days of the June 17 Final Public Hearing. DBE OB 21.

The Town's March 1, 2011 Public Notice

A few weeks after the MAR was approved by Resolution at the February 26 “Special Town Meeting”, and nearly four months before the June 17 “Final Public Hearing” required by the MAR, DBE published a notice that described the February 26 Resolution as having resulted in “among additional items, the *final* approval by the Dewey Beach Town Commissioners and Building Inspector on February 26, 2011, of a RECORD PLAT PLAN and BUILDING PERMIT for the redevelopment of Ruddertowne as a mixed used complex including commercial and residential uses.” Compl. 38 (emphasis added).

The contents of that March 1, 2011 notice contradicted the explicit language of the “Plan & Building Permit Approval Process” at paragraph 8 of the MAR, which required that “final” approval of DBE’s plan and building permit would not occur until the “Final Public Hearing.” Compl. 39-40. Specifically, the MAR provided that at the June 17 Final Public Hearing the DBTC would “make a *final* decision regarding [] the *final* construction plans...,” and “after consideration of the recommendations of the Planning Commission provided for herein, shall grant *all final Town approvals* by a majority vote,” and “*also make a final decision* regarding the location and size of the Gazebo [], the Bay Walk, and the uses within the Town Space. Upon *final approval* DBE’s plan shall then be recorded as a matter of public record.” Compl. 41. Notably, despite the requisite exchange that should have been triggered under the MAR by a “final” approval achieved in February 2011 (and upon “expiration of [] applicable appeal periods,”), the parties took no steps to dismiss the lawsuits until September 14, 2011. Compl 51-52.

LEGAL ARGUMENT

THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE COMPLAINT WAS TIMELY FILED, THERE WAS NO ADEQUATE REMEDY AT LAW, AND PLAINTIFFS HAVE ADEQUATELY ALLEGED STANDING.

DBE's challenge to the Court's subject matter jurisdiction is "broken into two pieces." DBE OB 25. *First*, DBE argues that "the Court lacks subject matter jurisdiction over the challenge to the [MAR] because it is time-barred by 10 *Del. C.* § 8126" (DBE OB 25). *Second*, DBE argues that "the Court lacks subject matter jurisdiction over the challenge to the Building Permit approval and issuance thereof because Plaintiffs had, but failed to pursue, an adequate remedy at law."⁸ DBE OB 25. The Town joins DBE's first argument (Town OB 4), but as described in Section I.C. *infra*, intentionally and conspicuously avoids DBE's second argument.

For its part, the Town also presents two challenges to the Court's subject matter jurisdiction, seeking dismissal for lack of standing to maintain the lawsuit because of (i) Plaintiffs' failure to adequately allege a unique "injury-in-fact" and (ii) Plaintiffs' failure to adequately allege a "procedural due process error." Town OB 8, 14. DBE joins both of the Town's arguments. DBE OB 26 fn.22.

The Standard of Review

DBE's motion to dismiss may be reviewed under Court of Chancery Rule 12(b)(1), whereby a claim will be dismissed if it appears from the record that this Court lacks subject matter jurisdiction over the claim. *E. Shore Envtl., Inc. v. Kent County Dept. of Planning*, 2002

⁸ While DBE's Opening Brief also asserts that Plaintiffs' claims are "neither equitable in nature nor made pursuant to a statute conferring jurisdiction on this Court," DBE's argument is limited to the "two pieces" set forth above. DBE presents no argument to support this bald contention and does not otherwise challenge the inherently equitable nature of the injunctive and declaratory relief prayed for in the Complaint.

WL 244690 (Del. Ch. Feb. 1, 2002). The Court will construe all record facts in favor of the non-movant, and “review the allegations of the complaint as a whole to determine the true nature of the claim.” *Calagione v. City of Lewes Planning Comm'n*, 2007 WL 4054668 (Del. Ch. Nov. 13, 2007).

The Town’s motion to dismiss is properly considered under Rule 12(b)(6) rather than 12(b)(1) because the issue of standing is related to the merits. *Appriva S’holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1280 (Del. 2007). Here, because the Town does not argue that this Court lacks the *authority* to grant the relief requested, but rather cannot grant relief to *these Plaintiffs*, “the motion is more properly decided under Rule 12(b)(6) because the plaintiff has failed to plead a necessary element of a cognizable claim, not because the court does not have jurisdiction.” *Id.* Where the Court determines that “the jurisdictional facts are intertwined with the facts central to the merits of the dispute, it is the better view . . . [that] the entire factual dispute is appropriately resolved only by a proceeding on the merits.” *Id.* at 1285.

In considering a motion under Rule 12(b)(6), the Court must accept all well-pleaded factual allegations as true. *Winshall v. Viacom Int’l, Inc.*, 2011 WL 5506084, at *4 (Del. Ch. Nov. 10, 2011). Additionally, the Court must “accept even vague allegations . . . as well pleaded if they give the defendants notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the [motion to dismiss] unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.” *Id.* (internal quotations omitted).

I. PLAINTIFFS' COMPLAINT WAS TIMELY FILED

A. The Statue Of Repose Is Inapplicable Here Because The Ruddertowne Plan Was Not "Submitted Under The Subdivision And Land Development Regulations" Of The Town.

Delaware law requires approval of zoning, development and land use plans to meticulously adhere to procedural safeguards, and observe "strictest compliance with all applicable procedures." *Bay Colony Ltd. P'ship v. County Council of Sussex County*, 1984 WL 159381, at *3,*5 (Del. Ch. Dec. 5, 1984). *See also Shevock v. Orchard Homeowners Ass'n, Inc.*, 621 A.2d 346, 349-50 (Del. 1993) (citing *Carl M. Freeman Associates, Inc. v. Green*, 447 A.2d 1179, 1182 (Del. 1982)). Strict compliance protects not only applicant land owners, but also "insure[s] public participation and more reasoned and orderly [] conduct...." by the municipal body tasked with approving or denying development plans. *Id.* If DBE's arguments as set forth are correct, under Delaware law a developer could artificially (and improperly) eliminate the risk of public challenges to rezoning and development plans through: (i) private contract provisions that orchestrate "final" approval of land use plans months before any "final public hearing" is held; or (ii) private contract provisions that retroactively modify and approve previously rejected zoning plans without adherence to statutory procedures. Neither the Delaware General Assembly nor the Delaware Courts sanction such a repugnant result.

Section 8126 of Title 10 of the Delaware Code governs official actions of a county or municipality finally granting or denying approval of zoning and planning actions. It provides a 60-day period of repose following the date of publication of such official "final" action during which a suit must be brought to challenge the action's legality. The statute, entitled "County and municipality zoning and planning actions," reads in relevant part:

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.

10 *Del. C. 8126(b)* (emphasis added). This statute expressly applies to bar an untimely challenge to a plan (approved or denied) that was “submitted under the subdivision and land development regulations of such county or municipality.” *Id.*

Here, neither the 14-page MAR nor the 9-page Town Resolution approving it, reference, cite or identify a single section or provision of the Town’s subdivision and land development regulations under which the Ruddertowne plan was submitted. Likewise, the actual Record Plat Plan approved under the MAR scrupulously avoids any citation or reference to the Town’s zoning, planning or subdivision of land regulations in each of the 29 “Plan Notes.” This includes Plan Note 6 which purports to identify Ruddertowne’s “Existing Zoning”:

6. EXISTING ZONING.

Resort Business-1 (RB-1). Pursuant to the 2007 Dewey Beach Comprehensive Development Plan, as certified by the State of Delaware, this zone is intended to be the most intensely developed, most dense, zone in the Town of Dewey Beach. This plan is consistent with the provisions of the 2007 Dewey Beach Comprehensive Development Plan, including, but not limited to, the relaxed bulk standards for the RB-1 zoning district (setbacks, lot coverage, etc.) available to contiguous tracks of land of at least 80,000 square feet in size.

DBE OB Exh. 2, at note 6. (emphasis added).

While Plan Note 6 pronounces its consistency “with the provisions of the Town’s 2007 Comprehensive Plan,” it does not, *because it cannot*, declare or confirm the plan’s consistency with *any* section of the Town’s subdivision or land development regulations (*i.e.*, Section 185-25 (RB-1 Resort Business District) or the actual regulations governing the RB-1 zoning district provided at “Table 2 – Bulk Zoning Standards in All Districts” and “Table 3 – Permitted Uses in

Resort Business Districts.”). Instead, as referenced copiously in both the Plan Notes and throughout the MAR, DBE cites the Ruddertowne plan’s consistency with the Town’s 2007 Comprehensive Plan for its authority to disregard the height and use limitations applicable to the RB-1 zoning district as set forth in Section 185-25 and Tables 2 and 3 of the Town’s Zoning Code. In this inherently contradictory way, the MAR purports to comply with the Town’s 2007 Comprehensive Plan while simultaneously running afoul of the Town’s then-applicable zoning code.

Here, both of the Defendants expressly and repeatedly acknowledge in their briefs that the Ruddertowne plan was “submitted” under procedures set forth in the MAR, a private zoning contract, rather than submitted under the Town’s subdivision and land development regulations as required by 10 *Del. C.* §8126:

The MAR, *inter alia*, set forth a procedure by which DBE could submit a revised plan and building permit application for consideration by the Town for the redevelopment of Ruddertowne.

The purpose of the Resolution [the MAR] was to: 1) establish a procedure by which DBE could submit a revised plan and building permit for consideration by the Town for the redevelopment of DBE’s Ruddertowne properties ...

DBE OB 10; Town OB 2 (emphasis added).

Thus, the best Defendants can argue is that the Ruddertowne Plan was “submitted under the Town’s 2007 Comprehensive Plan,” the purported authority cited in Plan Note 6. Defendants’ argument is erroneous because a municipality’s comprehensive plan is not the same as a municipality’s “subdivision and land development regulations,” particularly where, as here, the Town had separate statutory subdivision and land development regulations in place before, during and after adoption of the Town’s 2007 Comprehensive plan—regulations revised *in accordance* with the Comprehensive plan.

DBE's reliance on the Town's 2007 Comprehensive Plan as a grant of authority to deviate from the Town's 2009 Zoning Code is misplaced. This is evident in the language of the very first paragraph of the Comprehensive Plan itself:

This Comprehensive Development Plan is intended to serve as a document for the future development of Dewey Beach. It has been adopted by the Town Council and is given official recognition as a guide for future planning efforts of the community and its representatives. The legal means for the implementation of the goals and objectives of this plan are included in zoning codes and other municipal codes and ordinances.

DBE OB Exh. 1 at p. 1 (emphasis added). And this is consistent with Delaware law:

(c) The comprehensive plan shall be the basis for the development of zoning regulations as permitted pursuant to Chapter 3 of this title. Should a jurisdiction exercise its authority to establish municipal zoning regulations pursuant to Chapter 3 of this title, it shall, within 18 months of the adoption of a comprehensive development plan or revision thereof, amend its official zoning map to rezone all lands within the municipality in accordance with the uses of land provided for in the comprehensive development plan.

10 *Del. C. 702(c)* (emphasis added). And here, DBE concedes that the Town's 2009 Zoning Code was revised and adopted "in accordance with" the Comprehensive Plan:

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

DBE OB 10.

Accordingly, because the Town's 2009 Zoning Code, as revised in accordance with the Comprehensive Plan, *expressly* prohibits construction of any building in the RB-1 zoning district exceeding 35 feet in height, and *expressly* prohibits use as a hotel, the MAR could not have been submitted under the Comprehensive Plan. Furthermore, the MAR could not have legally "authorized the issuance of a building permit to DBE to build either condominiums or a hotel at a maximum height of 45.67 feet," unless it first rezoned the Ruddertowne parcel or otherwise

amended the regulations applicable to Ruddertowne’s RB-1 zoning district. Such rezoning or amendment would have required the MAR’s procedures to strictly conform to the “subdivision and land development regulations” of the Town. *Shevock v. Orchard Homeowners Ass’n, Inc.*, 621 A.2d 346, 349-50 (Del. 1993)(citing *Carl M. Freeman Associates, Inc. v. Green*, 447 A.2d 1179, 1182 (Del. 1982)(“We have long recognized that the inherent conflict between zoning laws and common law property rights requires the strictest compliance with all applicable procedures.”)); *see also Bay Colony Ltd. P’ship v. County Council of Sussex County*, 1984 WL 159381, at *3,*5 (Del. Ch. Dec. 5, 1984) (“Action by ordinance is necessary in order to provide the numerous procedural safeguards which insure public participation and more reasoned and orderly Council conduct... [Rezoning] must not be ... done without meticulous following of all procedural safeguards.”); *Hartman v. Buckson*, 467 A.2d 694 (Del. Ch. 1983) (holding that a municipal legislative council may not ignore statutorily mandated zoning and land use procedures.).

Because the Ruddertowne plan was submitted under the MAR’s privately negotiated procedures—procedures concededly “not required by code,”—Defendants cannot maintain that the Ruddertowne plan approved under the MAR was “submitted under the subdivision and land development regulations” of the Town as required by 10 *Del. C.* § 8126. Having failed to submit the plan for final approval “under the subdivision and land development regulations,” the statutory repose period is inapplicable.

Alternatively, dismissal is inappropriate because Plaintiffs’ Complaint *at least* raises credible issues of law and fact—both as to the applicability of the statute of repose and also as to whether the MAR rezoned Ruddertowne—such that the defenses raised by the motions cannot be resolved on this pleadings stage record.

B. Plaintiffs Complaint Was Timely Filed Even If, *Arguendo*, 10 Del. C. 8126 Applies Because The Complaint Was Filed Within 60 Days Of The June 17, 2011 “Final Public Hearing” Where, Under The Terms Of The MAR, “Full And Final Approval” Of The Ruddertowne Plan Occurred.

The MAR’s “Plan & Building Permit Approval Process” set forth a six-step procedure for consideration and approval of the Ruddertowne Plan:

- (i) execution of this Agreement by the Town Manager [*which occurred on December 6, 2010*];
- (ii) review of this Agreement by the Town Commissioners in Executive Session for legal advice [*which occurred on December 11, 2010*];
- (iii) a public hearing⁹ held by the Town Commission to take public testimony regarding DBE’s plan and pending building permit application (“Hearing One”) [*which occurred on February 26, 2011*];
- (iv) a Special Town Meeting¹⁰ [*which occurred on February 26, 2011*] 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 Town Meeting [*on February 26, 2011*], if approval is granted, the Ruddertowne Redevelopment Project shall be referred to

⁹ The Town published at least five “notices of public hearing” in the weeks before the February 26, 2011 meeting stating that the meeting was to “consider and receive public comments regarding the [MAR].” Compl. 41, fn.5; DBE OB Exh. 19.

¹⁰ None of the “notice[s] of public hearing” published in connection with the February 26, 2011 hearing provided public notice of the “Special Town Meeting,” or its putative purpose – to “finally” approve Ruddertowne’s Plan and Building Permit. Indeed, none of the notices even disclosed that any “final” action would be taken. Compl. 41, fn.5; DBE OB Exh. 19.

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 [*which occurred on June 11, 2011*] 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") [*which occurred on June 17, 2011*] by the Town Commissioners to review the Planning Commission's recommendations provided for herein and make a final decision regarding whether the final construction plans satisfy the conditions of the approved plan and building permit and the voluntary amenities (or other voluntary assurances) agreed to by DBE at the Special Town Meeting. If the final construction plans are consistent with the Special Town Meeting approval of the plan and building permit granted by the Town Commissioners and representations of DBE made at the public hearings provided for herein, the Town Commission, after consideration of the recommendations of the Planning Commission provided for herein, shall grant all final Town approvals by a majority vote. At Hearing Two the Town Commission shall, subject to the provisions of this Agreement, also make a final decision regarding the location and size of the Gazebo (not to exceed the maximum size provided for in Paragraph 3(c) herein), the Bay Walk, and the uses within the Town Space. Upon final approval DBE's plan shall then be recorded as a matter of public record.

Compl. Exh. 1, MAR at §8(a)(i-vi) (Emphasis and bracketed dates added).

DBE argues that "final" approval of the Ruddertowne Plan occurred at the February 26 "Special Town Meeting" instead of at the June 17 "Final Public Hearing." DBE OB 27-31. This argument defies the MAR's plain language and common sense.

To credit DBE's interpretation would, in essence, mean that final does not really mean final. DBE argues now that only "certain" final approvals occurred at the June 17 Final Public Hearing, "none of which affect the prior February 26, 2011 approval..." DBE OB 31. DBE argues that "in fact . . . at no time did the [DBTC] re-approve the February 26th Resolution at the subsequent June 17th hearing." *Id.* But the plain language of the MAR mandates a "final public

hearing” as the final step in a six-step “Plan and Building Permit Approval Process.” *See generally* Compl. 39-54. And nowhere in the language of the MAR does it provide for any “final” zoning related approvals to occur except during or after the time designated for the Final Public Hearing. *Id.* (noting use of the word “final” seven times in connection with MAR’s description of the Final Public Hearing, and noting absence of the word “final” in any other step of the “Plan and Building Permit Approval Process”). As Plaintiffs allege, the Final Public Hearing was for the purpose of making the “final decisions” and “final approvals” referenced abundantly throughout paragraphs 8 and 17 of the MAR. Compl. 34-54.¹¹

And while DBE now insists that it should be able “to rely upon the certainty” that the 60-day repose period Section 8126 provides, (DBE OB 32), so too should interested citizens be able to rely, particularly in the zoning context, upon both (i) the word final meaning final, and (ii) a “final public hearing” actually being the hearing during or after which final zoning related approvals are made.

DBE likewise tortuously argues that a “final approval” triggering application of 10 *Del. C.* § 8126(b) occurred by the MAR’s purported February 26, 2011 “ratification” of a recommendation made by a Town-empowered volunteer group in June 2007—a recommendation retroactively modified in 2011 to conform to the Ruddertowne Plan submitted in connection with the MAR. DBE OB 30-31. In support of its argument, DBE relies on a section of the Town’s 2007 Comprehensive Plan that concerns a mechanism to ratify the “ideal” relative percentages of

¹¹ In the MAR, “Final approval” of the Ruddertowne Plan is made expressly “subject to the provisions of Paragraph 8,” and “all zoning related approvals provided for in this Agreement are *strictly subject* to approval by the Town Commissioners *as contemplated herein...*” MAR at 17(h) and (i) (emphasis added). “If such zoning approvals are not obtained pursuant to Paragraph 8 of this Agreement, this Agreement shall be of no force or effect.” MAR at 17 (h). And if such “final approval” “is not obtained as contemplated herein” DBE may terminate the MAR without recourse. MAR at 17(i).

floor area square footage permissible for mixed use structures.¹² *Id.* DBE’s argument, however, fails in any respect to demonstrate how 10 *Del. C.* § 8126 is applicable to a purported “ratification.”

If anything, Defendants’ arguments highlight precisely why strict adherence with statutory zoning procedures—versus private contractual zoning procedures—is required under Delaware law. *See, e.g., Bay Colony Ltd. P’ship v. County Council of Sussex County*, 1984 WL 159381, at *3,*5 (Del. Ch. Dec. 5, 1984). A lay citizen trying to understand the implications of how zoning related approvals may affect her own property can refer to published statutes and regulations, as well as the jurisprudence concerning the same. If Defendants are correct, municipal citizens may now be required to peel back (and attempt to understand) layers of language contained in privately negotiated contracts governing municipal zoning approvals—layers of language that, as here, create an alternate universe for municipal zoning approvals where a Final Public Hearing is not what it purports to be.

¹² Specifically, the section of the Town’s 2007 Comprehensive Plan relied on by DBE states:

Utilizing these elements, the following criteria are presented for consideration for new Commercial Overlay Districts. [RB-1, RB-2 and RB-3] It is the goal of the 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 enactment of this Comprehensive Plan, which could be considered inconsistent with this Plan, the working group’s final agreement upon ratification by the Commissioners shall be considered consistent with this Plan.

DBE OB Exh. 1 at p. 21-22 (emphasis added).

C. No Adequate Legal Remedy Existed Which Now Precludes Plaintiffs' Challenge To The DBTC's Approval Of The Ruddertowne Building Permit Because Decisions Of The DBTC Are Not Within The Appellate Jurisdiction Of The Town's Board Of Adjustment.

Through the MAR's "Plan and Building Permit Approval Process," the DBTC was required to consider, approve and issue Ruddertowne's building permit. Compl. 23, 30; Town OB 2; DBE OB 10; MAR § 8, 17(n). The Complaint alleges that shortly after approval of the MAR, fifteen Dewey Beach property owners, including Plaintiffs Murray and Cadell, took an appeal on March 25, 2011 (the "BOA Appeal") to the Town's Board of Adjustment (the "BOA"). Compl. 59-68.

The BOA Appeal specifically challenged, in addition to many other aspects of the MAR, the building permit granted by the DBTC. *Id.* DBE OB Exh. 26.¹³ On April 29, 2011, the BOA's Chairman notified the Town Manager that the BOA intended to hear the property

¹³ DBE's brief attaches the BOA Appeal, which states in relevant part:

The Agreement violates the Town Zoning Code because the Commissioners do not have the authority under the Code to approve building permits. That authority resides with the Town Building Official who can only issue a building permit if he determines that buildings and their use comply with the zoning code regulations. (Section 71-8(a)). (Interestingly, DBE cites this rule in one of their lawsuits.) The Commissioners only have the authority to change the zoning code by ordinance if the majority believes a change is in the best interests of the Town. The Commissioners cannot even approve a site plan if the Building Official has not first determined that the plan complies with the basic zoning code regulations (Section 185-75(b)(1))...

...The building permit granted to DBE by the MAR violates the requirements of Section 185-75 of the Dewey Beach Zoning Code, which requires a two-tiered process. The first step requires the Town Building Official to determine that the site plan complies with the zoning regulations, that the uses are permitted and that the structures meet all of the height, bulk and setback requirements. The second step then allows the Town Commissioners to add any special requirements that they deem appropriate. In the case of the DBE Ruddertowne development, the Town Building Official did not certify that the development complied with the zoning code. He could not in good faith have made this finding because the Agreement violates at least six major zoning regulations.

DBE OB Exh. 26 (emphasis added).

owners' appeal and requested independent counsel to "help guide us on the complicated legal issues involved with this appeal." Compl. 61. Immediately, the Town Manager intervened and notified the appellants that the BOA Appeal was "improper as filed," "[b]ecause the request identifies, as the basis of the appeal, *a decision of the Dewey Beach Town Council, as a legislative body, and not an order, requirement, decision, or determination of an administrative official...*" Compl. 62; DBE OB Exh 29 p. 2. (emphasis added). A few days later, on May 2, the Town Manager clarified the Town's position, stating that "in addition, the subject matter described in the hearing request is not within the Board of Adjustment's appellate jurisdiction." Compl. 62; DBE OB Exh. 27.

On May 27, some of the same property owners filed a second appeal to the BOA and the BOA chairman again notified the Town that he intended to proceed. Compl. 63, 64. The Town Manager responded, once more, by declaring that the second appeal was not within the BOA's appellate jurisdiction. Compl. 65. The Town Manager also invited the appellants as, "[i]ndividuals, seeking independent review, alleged to have been aggrieved by the Town Commissioners' decision regarding the Ruddertowne matter," to seek recourse through "proper legal avenues available" in Delaware's "well respected" court system. Compl. 63-66; DBE OB Exh. 29.

At about the same time, the Town Manager also received a letter from DBE threatening more legal action if the second BOA Appeal was permitted to proceed. Compl. 67. On the same day as receiving DBE's letter, the Town Manager wrote to the BOA's Chairman concerning the "the appeals presented on behalf of several property owners" cautioning that "setting a [BOA] hearing on this matter" would likely result in even more "legal action by Dewey Beach Enterprises against the Town of Dewey Beach, the [BOA] as a body and the individual members

of the [BOA] personally...” Compl. 68. Incredibly, the Town Manager went so far as to raise the specter of legal action *by the DBTC against the BOA* if it dared to accept the BOA Appeal and undertake a review of the MAR, suggesting that, “[t]he Town Council would also have an action against the Board since an appeal hearing would put the decision of Town Council at issue.” Compl. 68.

Despite this unequivocal position taken by the Town just six-months ago, DBE, the Town’s co-defendant, now asks the Court to accept a position directly to the contrary in support of its motion to dismiss. DBE OB 33-37. DBE argues that there is “no doubt” that the BOA “appeal process provides an adequate remedy at law...” (DBE OB 35), and that Plaintiffs “clearly” failed to avail themselves of their exclusive remedy—an appeal to the BOA. DBE OB 36.¹⁴ In doing so, DBE is reduced to arguing that the BOA indeed had exclusive appellate jurisdiction over a challenge to the building permit issuance under the MAR as a decision by an administrative official—and not a legislative act—of the Town. Compl. 33-37.

This cramped position forces DBE to retreat from the MAR’s explicit terms, now declaring as “superfluous” the DBTC’s approval of the building permit, and explaining how DBE now believes the MAR to have *actually* worked:

... DBTC-approval was merely a “protective device for the building inspector...”
* * *

In the case *sub judice*, the revised building permit approval was incorporated into the Building Inspector’s approval of the Record Plan on February 26, 2011 as reflected in Record Plan note 27.

DBE OB 18 fn.14, 36, fn.43.

In other words, DBE argues that the MAR’s privately negotiated, extra-statutory procedures may simultaneously support both DBE’s and the Town’s position that: (i) the Town

¹⁴ Of course, this is the only argument asserted by DBE that the Town does not join.

properly denied an appeal to the BOA for lack of jurisdiction because building permit approval under the MAR was a *legislative act* by the DBTC; and (ii) this Court lacks jurisdiction because building permit approval under the MAR was an *administrative act* of a Town official for which the BOA has exclusive jurisdiction. DBE's argument concerning how the MAR's private provisions purportedly *actually* operated, thus, openly and directly contradicts the Town's prior, unequivocal position concerning how the MAR's private provisions purportedly *actually* operated. Defendants' shifting litigation positions demonstrate precisely why the MAR is inherently flawed. And it shows that Plaintiffs acted reasonably and promptly to challenge the MAR and seek independent review of its zoning plan and permit related approvals.

As with repose, the Town and DBE should not be permitted to have it both ways. That is, if they pursued Ruddertowne's zoning approvals through strict statutory compliance—they would likely be entitled to both the benefits of statutory repose and the benefits of an exclusive and adequate statutory remedy. By electing to pursue Ruddertowne's zoning approvals through private extra-statutory procedures, there is no repose and no adequate statutory remedy. The Town understood this when it directed the BOA appellants to seek independent review in Delaware's courts. This Court should not, respectfully, heed DBE's contrary position.

II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE MAR

A. Plaintiffs State Well Pleaded Non-Conclusory Injuries-in-Fact.

Defendants' briefing in support of dismissal creates a pleadings stage record replete with disputed jurisdictional facts relating to standing intertwined with the disputed facts concerning the ultimate merits of the claims for equitable relief. This inclines directly against dismissal and in favor of resolving the entire factual dispute by a proceeding on the merits. *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d at 1285; *see also Brinckerhoff v. Enbridge Energy Co.*,

Inc., 2011 WL 4599654 (Del. Ch. Sept. 30, 2011) (dismissal under 12(b)(6) standard improper where plaintiff could recover under “any reasonably conceivable set of circumstances susceptible of proof.”).

1. Plaintiffs Were Injured By The Rezoning Of Ruddertowne.

The Court of Chancery directly and succinctly addressed the issue of citizen-standing in the context of a municipal zoning dispute in *Brohawn v. Town of Laurel*. 2009 WL 1449109 (Del. Ch. May 13, 2009). In *Brohawn*, Chancellor Chandler held that “[o]nce land has been rezoned the potential for irreversible injury is sufficiently real, particularized, and concrete to warrant standing,” and “[t]he impact on plaintiffs, who live on property adjoining the rezoned properties, is self-evident.” *Id.* at *4. The Court also held that even those plaintiffs not living adjacent to rezoned property would likely have standing if they lived in “close proximity” because they would fall within the “zone of interests to be protected.” *Id.*

Here, the Complaint details non-conclusory facts supporting allegations that Plaintiffs are owners of property adjacent to Ruddertowne and suffered injuries as the result of the MAR’s rezoning of the Ruddertowne parcel. Compl. 1-5, 15, 19-25, 30-33; MAR at ¶¶ 1-9. Defendants acknowledge Plaintiffs’ status as adjoining property owners but insist that “the MAR did not serve to rezone Ruddertowne...” DBE OB 13,18. Accordingly, and consistent with *Brohawn*, the challenge to Plaintiffs’ standing turns on whether the MAR rezoned Ruddertowne.

Under Delaware law, the MAR’s express terms and provisions “meets the legal definition of zoning.” *Hartman v. Buckson*, 467 A.2d 694, 699 (Del. Ch. 1983).

Hartman involved, as here, a Delaware municipality (the Town of Camden), an owner/developer of land within the municipality (Buckson), and a citizen’s challenge (Hartman) brought in the Court of Chancery to declare as *ultra vires* a private “compromise” agreement

between the municipality and developer which resulted in zoning related approvals for the developer's land. *Id.* *Hartman's* other facts are also remarkably similar to those *sub judice*. There, the developer put the Town of Camden on notice that he was prepared to litigate the invalidity of a zoning ordinance that he contended unduly affected his ability to develop his property as he saw fit. 467 A.2d at 696. The Town's council, "apparently alarmed at the prospects of litigation and the incidental expenses associated with it, entered into a 'compromise' agreement with Buckson." *Id.* The "compromise" permitted Buckson to place 68 houses on 8.193 acres—an allowance that was "substantially different" from an earlier council-approved plan that "would have allowed only 53 houses on 10.919 acres." *Id.*

In defending the "compromise," the Town insisted that it had engaged in "an appropriate exercise of [it's] inherent authority to compromise claims against it." 467 A.2d at 699. The Court of Chancery disagreed, finding that the "compromise" between the Town and Buckson was "a private agreement to create a particular zoning district for the benefit of Buckson." *Id.* In concluding that "[o]verall, the agreement meets, in this Court's view, the legal definition of zoning, that is, the division of a community into zones or districts," the Court found that the "compromise" contained all of the hallmarks of a zoning decision:

- a plot plan previously submitted as the basis for the street plan and layout;
- the Town's subdivision regulations which were deemed applicable;
- the developer's responsibility for on-site improvements in particular areas;
- the parties' agreement that the plot plan attached to the agreement is to be the plan accepted except for "minor or insignificant adjustments in property lines and street locations" as required.

Id. (citing 82 Am.Jur.2d *Zoning & Planning* § 79; Anderson, *American Law of Zoning* § 9.01 (2nd Ed.)(other citations omitted)). The Court also elaborated upon the Town's lack of inherent authority to exercise its public duty as municipal zoning authority through a private contract:

While there is no doubt about the Town’s ability to compromise claims, there is no question that the Town can only compromise particular types of claims like those “claims which exist in its favor or against it and which arise out of a subject matter concerning which the municipality has the general power to contract.” It may not, under the guise of compromise, impair a public duty owed by it. By entering into the contract in question, Camden bargained away part of its zoning power to a private citizen. It simply does not possess the authority to normally contract such authority and the fact that this agreement was in furtherance of a compromise, an attempt to avoid Buckson’s threats to sue, does not make it any more valid.

Id. (citing 56 Am.Jur.2d *Municipal Corporation, Etc.* § 806; 82 Am.Jur.2d *Zoning & Planning* § 17 (other citations omitted)).

The MAR, like the “compromise” at issue in *Hartman*, contains all of the same zoning related references required to meet “the legal definition of zoning” including: a revised Plat Plan; references to selected regulations of the RB-1 zoning district purportedly applicable under the Town’s Comprehensive Plan; the developer’s responsibility for various public improvements; and an agreement for consideration and approval of a plan and building permit. MAR at ¶¶ 1-8. Also like the “compromise” in *Hartman*, the MAR created only one district by its private terms: Ruddertowne.

2. Plaintiffs’ Injuries Are Personal And Unique.

Defendants acknowledge Plaintiffs’ alleged injuries resulting from the MAR. Town OB at 4, 11 (citing allegations that Plaintiffs’ “live and operate businesses adjacent to [Ruddertowne],” and referencing allegations of increased vehicular congestion, loss of privacy, and “irreparable injury from loss of community character, aesthetic value and real value of their property”). Plaintiffs also allege that the Town, through the MAR, violated Delaware law by failing to conform with statutory zoning procedures—thereby denying Plaintiffs their cognizable interest in reliance on the Town’s duty to publicly (versus privately) administer its zoning authority and denying their fundamental right to participate in the referendum process. Compl.

89-91. Plaintiffs allege that all of these harms arise from Ruddertowne’s illegal rezoning and represent injuries to interests the Town’s zoning code “seeks to protect.” *Id.* See also Town OB at 9, 13 (citing Section 185-3 of the Dewey Beach municipal code and acknowledging that the Plaintiffs live within the jurisdiction of the Town’s zoning code, as well as nearby to the Ruddertowne property, and recognizing them as members of the class whose “interests it [the Town’s zoning code] seeks to protect...”).

Defendants’ arguments make clear that their challenge is *not* to the *adequacy* of Plaintiffs’ allegations as cognizable injuries, but rather a challenge to the injuries as being not adequately *exclusive* to the four citizen-Plaintiffs, and therefore, not sufficiently “unique:”

These harms constitute generalized grievances that are not even remotely particularized or concrete because anyone who lives in Dewey Beach may claim that they suffer from these exact same harms...

...even Plaintiffs who live adjacent to the Ruddertowne project lack *unique* injury.

Many Dewey Beach residents live adjacent to the Ruddertowne project; thus, Plaintiffs in this lawsuit are not *unique* as a result of the proximity of their properties to the Ruddertowne project.

Town OB 11-13 (emphasis added).

This Court has previously ruled that, “heavy reliance on this prudential element of standing analysis is misplaced.” *O’Neill v. Town of Middletown*, 2006 WL 205071, at *28 (Del. Ch. Jan. 18, 2006). In *O’Neill*, the Court explained that such a narrow view of the uniqueness required for an injury—similar to the view now proffered by Defendants, “would effectively deny all municipal residents the opportunity to maintain an action simply because the residents share a relatively equivalent interest in planned growth within a municipality.” *Id.* (noting, as here, the Town’s misplaced reliance on the “*Oceanport Industries*” and “*Stuart Kingston*”

cases). Indeed, the *O'Neill* Court explained that even injuries “only incrementally distinguishable from that of their neighbors,” do not, of themselves, preclude standing:

It would be ironic to deny the Plaintiffs capacity to bring this action essentially for the reason that its injuries are shared by too many residents of the municipality, when such generalized harms are, at its core, what the statute is designed to prevent. To rule otherwise here, when the Plaintiffs are close-by municipal residents of the rezoned site and will clearly experience detriment to interests protected by the statute, would effectively deny standing to any private municipal citizen to bring an action of this type...

Id. at *29, 31 (internal citations omitted).

Because Plaintiffs have alleged that they are owners of property within the Town’s zone of publicly protected interests and have suffered real and particularized injuries-in-fact resulting from the private rezoning of Ruddertowne they have adequately alleged standing to pursue their claims.

B. The Complaint Adequately Alleges The Town Breached Plaintiffs’ Procedural Due Process Rights.

Defendants also argue that Plaintiffs do not have standing to challenge the MAR because they have “fail[ed] to allege an error in procedural due process.” Town OB 14. To state a procedural due process claim within the context of a zoning decision, there must be an alleged deprivation of a protected property interest without notice and a meaningful opportunity to be heard. *The Citizens Coalition, Inc. v. County Council of Sussex County*, 1999 WL 669307, at *5-6 (Del. Ch. July 22, 1999). As set forth above, and despite Defendants purported reliance on a fact intensive test not appropriate for a pleadings stage analysis,¹⁵ Defendants do not seriously

¹⁵ To the extent the *Mathews* factors are applicable here, each of the factors militate in favor of denying Defendants’ motions to dismiss either on the merits or for lack of a fully developed record. As to the first factor, Plaintiffs, as property owners within the zone of interest to be protected by the Town’s ordinances, have a strong interest in the Town making zoning decisions in strict conformity with its zoning code, and not by private contract. With respect to the second factor, the risk of erroneous deprivation here is very high because the Defendants, as alleged in the Amended Complaint, created a contractual zoning scheme

challenge the notion that an illegal rezoning Ruddertowne would have deprived Plaintiffs of a protected property interest. Rather, Defendants focus almost exclusively upon (i) the adequacy of the notices and the ample opportunities for Plaintiffs to be heard concerning the MAR, and (ii) the proper authority of the Town Manager to deny the BOA from considering a challenge to the MAR. DBE OB 16-20.

Defendants' rely on *Barry v. Town of Dewey Beach*, 2006 WL 1668352 (Del. Ch. Oct. 27, 2006) to support their first argument. In *Barry* the Court decided on summary judgment that a Complaint only seeking to vindicate a "common concern for obedience to the law," with "no other evidence [] offered in support of standing," would be insufficient to merit standing. *Id.* at *6. Here, a pleadings stage review of the Complaint shows that Plaintiffs have set forth considerably more substantive allegations, which if accepted as true, adequately allege standing to seek redress for a procedural due process violation.

For example, the Complaint alleges that the public hearings were meaningless because the MAR contractually restricted or prohibited the Town's public officials, boards and commissioners from publicly commenting on whether the MAR complied with the applicable sections of the Town's zoning code. Compl. 55-57. Similarly, Plaintiffs allege that the Town's Planning and Zoning Commission review was so carefully proscribed by privately enforceable procedures that it constituted a mere "rubber stamp"—and rendered the review meaningless. Compl. 58. Plaintiffs also allege that Defendants intentionally orchestrated approval of the MAR by Resolution, instead of by Ordinance, because it would preclude Plaintiffs, or any other Town citizen, from seeking review and reconsideration by public referendum under the Town's

where full and complete public comment by officials was proscribed and the adoption of the MAR was not reviewable by the BOA. Finally, the third factor also tilts in Plaintiffs' favor because the Town has no legitimate interest in enforcing a contract zoning scheme that runs afoul of its zoning laws and regulations.

Charter. Compl. 69, 70. Accordingly, because the Complaint sets forth specific allegations which state a *prima facie* procedural due process violation, *Barry* does not support dismissal here.

Finally, Defendants argue that the Town did not violate Plaintiffs' procedural due process rights because the Town Manager acted within the scope of her authority when she blocked the BOA from reviewing the MAR. The Complaint alleges that the Town Manager improperly interfered with the BOA appeal by declaring the MAR a purely legislative function not reviewable by the BOA. Compl. 59-68.¹⁶ In doing so, Plaintiffs allege that the Town deprived them of a meaningful opportunity to be heard through independent BOA review of the MAR. Moreover, the Complaint alleges that the Town violated sections 185-65 through 67 of the Town's Code by prohibiting the BOA from accepting the appeal and reviewing the MAR. *Id.* at ¶ 66. These are classic allegations of flawed procedural process. Accepting these allegations as true and drawing all reasonable inferences in Plaintiffs' favor, as the Court respectfully must on Defendants' motion to dismiss, dictates a finding that Plaintiffs adequately alleged violations of their due process rights. Accordingly, Plaintiffs have standing to challenge the MAR.

III. THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE IT IS SUBSTANTIVELY FLAWED.

The legal standard governing a motion to strike under Court of Chancery Rule 12(f) is well settled. Motions to strike are disfavored and granted sparingly, and then only if clearly warranted, with all doubt being resolved in favor of the non-moving party. *See Phillips v. Delaware Power & Light Co.*, 194 A.2d 690 (Del. 1963). Indeed, this Court has characterized striking a pleading under Rule 12(f) as a "drastic remedy." *Sealy Mattress Co. of New Jersey*,

¹⁶ Crediting DBE's argument regarding an adequate remedy at law would only further erode Plaintiffs' procedural due process rights as it would ensure that the MAR is never reviewed.

Inc. v. Sealy, Inc., 1987 WL 15254 at *3 (Del. Ch. July 20, 1987) (“Motions to strike a pleading are not favored and are sparingly granted, both because they are often dilatory in nature and involve a *drastic remedy*.”) (Emphasis added.) *Cf.* 5C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1380 at 394 (3d ed.) (instructing that striking a portion of a pleading is a “drastic remedy” and, thus, motions to strike under Rule 12(f) are viewed with disfavor and infrequently granted).

Justifying entitlement to such “drastic” relief requires the moving party to overcome a “considerable burden,” since a motion to strike “should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy.” *See Nicastro v. Rudegeair*, 2007 WL 405475 at *1 (Del. Ch. Nov. 13, 2007). In deciding a Rule 12(f) motion, “[t]he Court must consider two factors: (1) whether the challenged portions of the pleading are relevant to an issue in the case; *and* (2) whether the challenged portions are unduly prejudicial. *Id.* at *2 (emphasis added).¹⁷

Applying these principles here dictates denying Defendants’ Motion to Strike.

A. The Challenged Portions Of The Complaint Are Facially Relevant To The Issues Of The Case.

Defendants argue that “the entire [Amended] Complaint should be stricken as impertinent.” Town OB 25. In doing so, Defendants impermissibly attempt to recast their Rule 12(b)(6) motion under the guise of Rule 12(f) because the question of whether the Complaint “assists” a plaintiff in stating a claim should be decided under Rule 12(b)(6), not Rule 12(f). *Salem Church (Delaware) Associates v. New Castle County*, 2004 WL 1087341 at *1 n.2 (Del. Ch. May 6, 2004). Moreover, “impertinence in equity pleading signifies that which is irrelevant

¹⁷ Notably, the Superior Court decision Defendants rely upon, *Fossette v. Taylor*, 2007 WL 1784090 (Del. Super.), contains virtually no discussion of the Rule 12(f) standard and has never been cited in another decision.

and which does not in consequence belong in the pleading. The word does not include the idea of offending propriety.” *Suplee v. Eckert*, 122 A.2d 918, 919 (Del. Ch. 1956).

Here, although Defendants identify 12 paragraphs they claim are irrelevant to Plaintiffs’ claim, Defendants fail to state why these paragraphs are irrelevant because to do so would be an exercise in futility. Each of the Complaint’s 106 paragraphs contain factual allegations that go directly to the heart of Plaintiffs’ claim that the MAR represents a private zoning agreement in violation of the “procedures, processes, laws and regulations applicable to Zoning changes and the issuance of building permits in the Town.” Compl. 32. Because the allegations in the Amended Complaint are related to Plaintiffs’ claims, Defendants’ motion to strike should be denied.

B. The Challenged Portions Of The Complaint Are Not Unduly Prejudicial.

A motion to strike should be “denied where there is no showing of prejudice to the moving party if the attacked allegations are left in the pleadings.” *Fowler v. Mumford*, 102 A.2 535, 538 (Del. Super. 1954). Defendants contend that portions of the Complaint should be stricken because it contains some argumentative statements and conclusions of law. For example, Defendants complain that paragraphs 18 and 94 of the Complaint are legal conclusions or merely argumentative responses.¹⁸

¹⁸ Paragraph 18 of the Amended Complaint states as follows:

The unique property interests (and unique injuries to the Plaintiff property owners) at stake in this case are direct, personal and substantial, and draw a straight line to the community character and aesthetic property value interests of business and residential property owners in a small coastal town (approximately one mile long and two blocks wide) which has remained firmly committed since its 1981 incorporation to a uniformly applicable height restriction that permits no building in the Town—residential, commercial or otherwise—to exceed 35 feet in height.

Defendants claim that these alleged argumentative statements are prejudicial because “it allows the Plaintiffs to side-step important rules in Chancery Court Procedure.” Town OB 25-26. In other words, Defendants argue they are prejudiced by an amended pleading that seeks to cure alleged pleading deficiencies because it constitutes an unfair procedural advantage for Plaintiffs.

Crediting Defendants argument would turn Court of Chancery Rule 15(aaa) on its head. Plaintiffs’ original complaint was met with a motion to dismiss. In turn, Plaintiffs exercised their right under Rule 15(aaa) to amend their complaint to cure any perceived pleading deficiencies. Following the rules of civil procedure cannot serve as a basis for granting Defendants the “drastic” relief they seek. Accordingly, Defendants’ motion to strike must be denied.

Paragraph 94 states as follows:

Plaintiffs are irreparably injured by the loss of the community character, aesthetic value and real value of their property—derived from the value placed upon a small resort community of twenty-two blocks long and mostly two blocks wide with a unique and uniformly applicable building height limitation—a 35-foot building height limitation that has stood the test of nearly thirty years of commercial and residential development and redevelopment. Part of the value of Plaintiffs’ property and the Town itself is the aesthetic property value and community character associated with a small beach town free from high-rise hotels, condominiums and apartment buildings.

CONCLUSION

For all the foregoing reasons, Defendants' motions to dismiss and motion to strike should be denied.

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Dated: December 13, 2011
Wilmington, Delaware

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Party	Party Type	Attorney	Firm	Attorney Type
CADELL, ELIZABETH	Plaintiff	Gottesman, Brian M	Berger Harris LLC	Attorney in Charge
CADELL, ELIZABETH	Plaintiff	McDermott, Michael W	Berger Harris LLC	Attorney in Charge
CADELL, ELIZABETH	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
KAMINSKY, DAVID	Plaintiff	Gottesman, Brian M	Berger Harris LLC	Attorney in Charge
KAMINSKY, DAVID	Plaintiff	McDermott, Michael W	Berger Harris LLC	Attorney in Charge
KAMINSKY, DAVID	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
McKINNEY, CHARLES H	Plaintiff	Gottesman, Brian M	Berger Harris LLC	Attorney in Charge
McKINNEY, CHARLES H	Plaintiff	McDermott, Michael W	Berger Harris LLC	Attorney in Charge
McKINNEY, CHARLES H	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
Murray, Anthony	Plaintiff	Gottesman, Brian M	Berger Harris LLC	Attorney in Charge
Murray, Anthony	Plaintiff	McDermott, Michael W	Berger Harris LLC	Attorney in Charge
Murray, Anthony	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge

 Recipients (7) Service List (7)

Delivery Option	Party	Party Type	Attorney	Firm	Attorney Type	Method
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Service	Dewey Beach Enterprises Inc	Defendant	Tucker, Shawn P	Drinker Biddle & Reath LLP-Wilmington	N/A	E-Service
Service	Dewey Beach Enterprises Inc	Defendant	Quillen, William T	Drinker Biddle & Reath LLP-Wilmington	Attorney in Charge	E-Service
Service	RUDDERTOWNE REDEVELOPMENT INC	Defendant	Sullivan, Karen V	Drinker Biddle & Reath LLP-Wilmington	Attorney in Charge	E-Service
Service	RUDDERTOWNE REDEVELOPMENT INC	Defendant	Tucker, Shawn P	Drinker Biddle & Reath LLP-Wilmington	N/A	E-Service
Service	RUDDERTOWNE REDEVELOPMENT INC	Defendant	Quillen, William T	Drinker Biddle & Reath LLP-Wilmington	Attorney in Charge	E-Service
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<u>CADELL, ELIZABETH</u>	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
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<u>HANSON, DIANE MAYOR</u>	Defendant	No Answer on File	Firm TBD	N/A
<u>Howell, Joy</u>	Defendant	No Answer on File	Firm TBD	Attorney in Charge
<u>KAMINSKY, DAVID</u>	Plaintiff	Gottesman, Brian M	Berger Harris LLC	Attorney in Charge
		McDermott,		Attorney in

<u>KAMINSKY, DAVID</u>	Plaintiff	Michael W	Berger Harris LLC	Charge
<u>KAMINSKY, DAVID</u>	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
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<u>Legates, Anna</u>	Defendant	No Answer on File	Firm TBD	Attorney in Charge
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<u>McKINNEY, CHARLES H</u>	Plaintiff	McDermott, Michael W	Berger Harris LLC	Attorney in Charge
<u>McKINNEY, CHARLES H</u>	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
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<u>Murray, Anthony</u>	Plaintiff	Gottesman, Brian M	Berger Harris LLC	Attorney in Charge
<u>Murray, Anthony</u>	Plaintiff	McDermott, Michael W	Berger Harris LLC	Attorney in Charge
<u>Murray, Anthony</u>	Plaintiff	Harris, John G	Berger Harris LLC	Attorney in Charge
N/A	N/A	Noble, John	DE Court of Chancery Civil Action	Primary Judge
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<u>RUDDERTOWNE REDEVELOPMENT INC</u>	Defendant	Tucker, Shawn P	Drinker Biddle & Reath LLP-Wilmington	N/A
<u>RUDDERTOWNE REDEVELOPMENT INC</u>	Defendant	Quillen, William T	Drinker Biddle & Reath LLP-Wilmington	Attorney in Charge
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<u>SMITH, DIANA K</u>	Defendant	No Answer on File	Firm TBD	N/A
<u>Solloway, Richard N</u>	Defendant	No Answer on File	Firm TBD	N/A
<u>TOWN COUNCIL OF DEWEY BEACH</u>	Defendant	No Answer on File	Firm TBD	N/A
<u>Town of Dewey Beach</u>	Defendant	Mantzavinos, Megan T	Marks O Neill O Brien & Courtney PC-Wilmington	Attorney in Charge

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