

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANTHONY MURRAY, et al.,

Plaintiffs,

v.

TOWN OF DEWEY BEACH, et al.

Defendants

C.A. No. 6785

**TOWN OF DEWEY BEACH'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT**

BY: /s/ Megan T. Mantzavinos

Megan T. Mantzavinos, Esquire (ID No. 3802)

Ann M. Kashishian, Esquire (ID No. 5622)

Marks, O'Neill, O'Brien & Courtney, P.C.

300 Delaware Avenue, Suite 900

Wilmington, DE 19801

(302) 658-6538

Attorneys for Defendants Town of Dewey

Beach, Commissioners of the Town of

Dewey Beach, Diana K. Smith, Town

Manager, and William D. Mears, Town

Building Official

DATED: December 23, 2011

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

NATURE AND STAGE OF PROCEEDINGS..... iii

ARGUMENT..... 1

**I. THE FIRST AMENDED COMPLAINT MUST BE DISMISSED BECAUSE
PLAINTIFFS LACK STANDING TO BRING THIS LAWSUIT 1**

A. Plaintiffs Failed to Allege a Concrete and Particularized Injury in Fact..... 1

**B. Plaintiffs Lack Standing Because the Town Did Not Breach Plaintiffs’
Procedural Due Process Rights..... 4**

**II. THE TOWN JOINS IN DBE’S ARGUMENT THAT PLAINTIFFS POSSESSED
AND FAILED TO AVAIL THEMSELVES OF AN ADEQUATE REMEDY AT
LAW 7**

**III. THE FIRST AMENDED COMPLAINT MUST BE STRICKEN BECAUSE ITS
CONTENTS ARE IMPERTINENT TO THE COMPLAINT..... 9**

**IV. PLAINTIFFS’ RECITATION OF FACTS RELATING TO THE UNDERLYING
LITIGATION ARE IMMATERIAL TO THIS LITIGATION AND SHOULD BE
DISREGARDED BY THE COURT 10**

TABLE OF AUTHORITIES

Cases

Barry v. Town of Dewey Beach, 2006 Del. Ch. LEXIS 115 (Del. Ch. June 8, 2006) 2, 5, 6

Brohawn v. Town of Laurel, 2009 Del. Ch. LEXIS 82 (Del. Ch. June 16, 2008) 3

Mathews v. Eldridge, 424 U.S. 319 (1976)..... 5, 7

O’Neill v. Town of Middletown, 2006 Del. Ch. LEXIS 10 (Del. Ch. January 18, 2006) 2

Savage v. Savage, 920 A.2d 403 (Del. Ch. 2006)..... 8

Terr. of the U.S. V.I. v. Goldman, Sachs & Co., 937 A.2d 760 (Del. Ch. 2007) 5

The Citizens Coalition, Inc. v. County Council of Sussex County,
1999 Del. Ch. LEXIS 155 (Del. Ch. July 22, 1999) 5

Statutes

10 Del. C. §342 8

22 Del. C. §702 2

Rules

Chancery Court Rule 12(b)(1) iii

Chancery Court Rule 12(b)(6) iii

NATURE AND STAGE OF PROCEEDINGS

This lawsuit remains in its infancy. Plaintiffs filed their Complaint on August 15, 2011. Defendants Town of Dewey Beach, and the Commissioners of Dewey Beach, Diana K. Smith, Town Manager, and William D. Mears, Town Building Official, then moved to dismiss Plaintiffs' Complaint pursuant to Chancery Court Rule 12(b)(6) and/or Chancery Court Rule 12(b)(1). Defendant Dewey Beach Enterprises, Inc. also moved to dismiss Plaintiffs' Complaint. The Motions to Dismiss were filed on September 21, 2011. Plaintiffs filed their First Amended Complaint on October 13, 2011. Defendants moved to dismiss and/or to strike the First Amended Complaint on October 31, 2011. Plaintiffs filed a combined Answering Brief on December 13, 2011 responding to Defendants' motions to dismiss and/or to strike. Defendant Town of Dewey Beach now files its Reply Brief in Support of its Motion to Dismiss and/or to Strike Plaintiffs First Amended Verified Complaint.

Importantly, in Dewey Beach Enterprises, Inc. and Ruddertowne Redevelopment, Inc.'s (collectively, "DBE") Opening Brief in Support of its Motion to Dismiss the First Amended Verified Complaint, DBE recites numerous facts regarding the litigation that underlies Plaintiffs' instant lawsuit. (DBE OB at 1-9) Plaintiffs recite similar facts in their Answering Brief. (AB at 6-10) As stated in its Response to DBE's Motion to Dismiss the First Amended Verified Complaint, the Town of Dewey Beach ("Town") hereby respectfully reiterates its statement that such facts are not germane to this litigation or necessary to a decision regarding the Motions to Dismiss. Therefore, the Town respectfully requests that this Honorable Court reserve making official findings regarding these facts. Additionally, through the joinder contained in its motion to dismiss, the Town joined in DBE's argument that the Amended Complaint should be dismissed because Plaintiffs had an adequate remedy at law to appeal the Building Inspector's approval of the permit to the Board of Adjustment. The Town's lack of a specific reference to

the argument in its opening brief was not intended to indicate that the Town did not join the argument, particularly inasmuch as the Town's Motion was based upon Plaintiffs' lack of standing to maintain this lawsuit.

ARGUMENT

I. THE FIRST AMENDED COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING TO BRING THIS LAWSUIT

A. Plaintiffs Failed to Allege a Concrete and Particularized Injury in Fact

As discussed at length in the Town's Opening Brief, Plaintiffs' allegations consist merely of generalized grievances which are applicable to the Dewey Beach population at large and which are insufficient to confer standing. (T OB at 11-14) The Town's arguments in this regard rest solely on the averments in the First Amended Complaint, and not, as Plaintiffs appear to claim, upon extraneous facts, disputed or otherwise.¹

In their Answering Brief, the closest Plaintiffs come to alleging particularized injury is in the allegation that **some** Plaintiffs live adjacent to the Ruddertowne property. (AB at 30) Specifically, based on the *Brohawn* case, *infra*, Plaintiffs conclude that because they live adjacent to the Ruddertowne property, they have been injured by the Ruddertowne construction. (*Id.*) However, Plaintiffs misrepresent their very own Complaint in making this conclusion. Importantly, the First Amended Complaint states that the MAR and the Ruddertowne construction, "irreparably harms Plaintiffs--**some** of whom live and operate businesses on parcels immediately adjacent to the proposed DBE/RRI project--and all of whom live in a small resort community through which passes the only highway to State beaches." (Am. Cmpl. at 24) (emphasis added). Additionally, the First Amended Complaint states that Plaintiffs "are the owners of property **near or immediately adjacent to** the proposed DBE/RRI project." (*Id.* at 27) (emphasis added). Thus, in the First Amended Complaint, Plaintiffs admit their uncertainty regarding whether their "parcels" do, in fact, stand adjacent to the Ruddertowne area. Again, at

¹ And in fact, the Town has argued *ad nauseum*, in this and other papers it has filed in this matter, against the inclusion of facts not contained in the pleadings in the Parties' Motions to Dismiss.

most, Plaintiffs allege that **some** Plaintiffs live adjacent to the project, and that the rest of the Plaintiffs merely live in the vicinity of Ruddertowne. Importantly, the Town of Dewey Beach is not a large town. Nearly all of its residents may claim that they live in the vicinity of Ruddertowne.

Furthermore, Plaintiffs **concede** their inability to allege concrete and particularized injury. That is, while they make the conclusory assertion that their injuries are “personal and unique,” their support for this assertion is for the most part, nothing more than a recitation of the same generalized facts which are in the First Amended Complaint. (AB at 32) And instead of explaining how these injuries are particularized, they attempt to avoid the particularity requirement entirely through misplaced reliance on an out-of-context, inapposite statement contained in *O’Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 10 (Del. Ch. January 18, 2006) . Instead of demonstrating that they have alleged facts which meet the standard of unique and particularized injury - an essential element in establishing standing to sue - Plaintiffs attempt to argue that it is not important to deciding the issue of standing. Additionally, Plaintiffs completely fail to respond to the Town’s arguments regarding concrete and particularized injury pursuant to *Barry v. Town of Dewey Beach*, 2006 Del. Ch. LEXIS 115 (Del. Ch. June 8, 2006) -- a case in which Your Honor held that the plaintiffs lacked standing based on similar facts.²

In *O’Neill*, the Court of Chancery analyzed the Town of Middletown’s argument that the plaintiffs lacked standing to sue regarding violation of a comprehensive plan under 22 Del. C. §702. *O’Neill*, 2006 Del. Ch. LEXIS at *136-*154. The Court elaborated that,

The Town [of Middletown] relies, in large part, on the Delaware Supreme Court’s description, in *Oceanport Industries*, of its ruling in *Stuart Kingston* that, “in order to achieve standing, a plaintiff must have an interest distinguishable from the greater public.” However, the Town’s heavy reliance on this prudential element of standing analysis is misplaced. *Id.* at 140.

² For a more thorough discussion of *Barry*, see section II(B), *infra*.

Thus, the Court held in this specific context that the Town of Middletown relied too heavily on the uniqueness of the plaintiffs' injuries in arguing that the plaintiffs lacked standing. The Court did *not* conclude that uniqueness is an unimportant factor to standing analysis when the concreteness and the particularity of the alleged injuries are also at issue. And in fact, it reaffirmed the well-settled requirement that a plaintiff must establish a concrete and particularized injury in fact to a legally protected interest in order to meet its burden of establishing standing. *O'Neill*, 2006 Del. Ch. LEXIS at *138. Inasmuch as the "concrete and particularized injury" requirement is an essential element of standing, Plaintiffs' conceded failure to allege it is fatal to their lawsuit.

Instead of arguing that their alleged injuries are concrete and particularized, Plaintiffs assert that the issue of standing "turns on whether the MAR rezoned Ruddertowne." (AB at 30) Plaintiffs invoke *Brohawn v. Town of Laurel*, 2009 Del. Ch. LEXIS 82 (Del. Ch. June 16, 2008))" and *Hartman v. Buckson*, 467 A.2d 694 (Del. Ch. 1983) to make this argument. Plaintiffs cite *Brohawn* to support the contention that the rezoning of land automatically confers the potential for irreversible injury that is sufficiently real, particularized, and concrete to warrant standing. (AB at 30) Then, they invoke the *Hartman* case to claim that the MAR rezoned Ruddertowne.

In comparing the MAR to the compromise at issue in *Hartman*, Plaintiffs state that the MAR "contains all of the same zoning related references required to meet the 'legal definition of zoning.'" (AB at 32) However, nowhere in their Answering Brief do Plaintiffs quote the legal definition of zoning as listed in *Hartman*. Rather, Plaintiffs attempt to confound the definition by implying that the "zoning related references" at issue *Hartman* form the basis of this legal definition. In doing so, Plaintiffs mis-state the findings and reasoning of *Hartman*. In that case,

the Court did discuss certain “zoning related references” contained in the compromise at issue to conclude that the compromise served to rezone an area within the Town of Camden. *Hartman*, 467 A.2d at 699. However, the Court clearly stated that the legal definition of zoning is “the division of a community into zones or districts” *Id.*, something which the MAR does not even purport to do. Regardless of the MAR’s existence, Ruddertowne stands in the RB-1 zoning district established in the Dewey Beach Zoning Code. The MAR did nothing to change the RB-1 zoning district or the Ruddertowne portion of the RB-1 zoning district. Plaintiffs argument to the contrary strains both logic and imagination.

For these reasons, Plaintiffs sole argument supporting their contention that they suffer from concrete and particularized injuries in fact fails as a matter of law. Thus, Plaintiffs lack standing to bring this lawsuit. Their First Amended Complaint must be dismissed.

B. Plaintiffs Lack Standing Because the Town Did Not Breach Plaintiffs’ Procedural Due Process Rights

As discussed at length in the Town’s Opening Brief, Plaintiffs lack standing because they failed to show that the Town breached their procedural due process rights during the MAR approval process. Contrary to Plaintiffs’ claims in the Answering Brief (AB at 34), the Court’s evaluation of this issue does not require a fact-intensive inquiry. It requires only an inquiry as to whether Plaintiffs have alleged that they were deprived of a meaningful opportunity to participate in the approval process. Even the most cursory review of the First Amended Complaint makes clear that Plaintiff’s averments fall far short of the mark in this regard.

In the First Amended Complaint, Plaintiffs conclude that the MAR’s public hearings were meaningless because public officials were allegedly “prohibited” from commenting regarding the MAR’s legality. (Am. Cmpl. at 16-17) However, procedural due process requires only that the **Plaintiffs** had an opportunity to participate in the MAR approval process (T OB at

15); it does not require that **Town officials** had an opportunity to participate outside of their occupational duties. Importantly, Plaintiffs cannot sue over another person's alleged deprivation of procedural due process rights.

Likewise, Plaintiffs conclude that review of the MAR was proscribed to the point that it constituted a "rubber stamp," thereby rendering the review meaningless. (Am. Cmpl. at 17) Plaintiffs state that these conclusions constitute allegations that are sufficiently adequate to allege a procedural due process violation. (AB at 35) However, when deciding a Motion to Dismiss, the Court need not accept conclusory allegations as true. *Terr. of the U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 783 (Del. Ch. 2007). Thus, the above-listed conclusory allegations do not form the basis of an adequately alleged procedural due process claim. Because Plaintiffs had ample opportunity to participate in the MAR approval process in a meaningful time and in a meaningful manner, the Town did not violate their constitutional right to procedural due process. (T OB at 14-19) Importantly, Plaintiffs fail to argue that they were deprived of an opportunity to participate in the MAR approval process in a meaningful time and in a meaningful manner. *See The Citizens Coalition, Inc. v. County Council of Sussex County*, 1999 Del. Ch. LEXIS 155 at *16 (Del. Ch. July 22, 1999); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Instead, they mischaracterize the Town's reliance on the *Mathews* case to claim that evaluation of the due process claim requires a fact-intensive test not conducive to review upon Motion to Dismiss. (AB at 34)

Plaintiffs likewise criticize the Town's reliance on *Barry v. Town of Dewey Beach*, 2006 Del. Ch. LEXIS 115 (Del. Ch. June 8, 2006),³ stating that a "pleadings stage review of the Complaint" demonstrates considerably more substantive allegations than those alleged in *Barry*.

³ Plaintiffs cite the incorrect *Barry* case in their Answering brief, making reference to *Barry v. Town of Dewey Beach*, 2006 Del. Ch. LEXIS 190 (Del. Ch. October 27, 2006), which constitutes the intervenor-defendant's suit for attorney's fees related to *Barry v. Town of Dewey Beach*, 2006 Del. Ch. LEXIS 115 (Del. Ch. June 8, 2006).

(AB at 35) This statement is simply incorrect. Of all the cases that could possibly offer guidance regarding whether Plaintiffs have standing to bring this lawsuit, *Barry* is the most persuasive. It involves nearly identical facts and nearly identical claims against the same exact defendant (the Town of Dewey Beach) brought in the exact same Court (the Court of Chancery). Review of the *Barry* case shows that Plaintiffs' claims regarding increased traffic, decreased privacy, etc., are completely indistinguishable from the *Barry* plaintiffs' claims regarding dwelling unit density. *Barry*, 2006 Del. Ch. LEXIS at n. 41. Additionally, the Town review and public comment process regarding the conditional use permits at issue in *Barry* is nearly identical to the MAR approval procedures in this case. *Barry*, 2006 Del. Ch. LEXIS at *7-*9. Importantly, this Court found that the *Barry* plaintiffs lacked standing based both on substantive and procedural grounds, and chastised the *Barry* plaintiffs for relying on nothing more than the complaint's allegations in order to argue standing. The Court further stated that the political process offers a more appropriate venue for addressing generalized concerns similar to those advanced in *Barry*. *Barry*, 2006 Del. Ch. LEXIS at n. 41. For these reasons, Plaintiffs' attempt to distinguish *Barry* fails. Plaintiffs lack standing to bring this lawsuit.

In their Answering Brief, Plaintiffs also criticize the Town's reasoning regarding whether the Town Manager "interfered" with Plaintiffs' purported appeals to the Town Board of Adjustment ("BOA"). (AB at 36) Contrary to Plaintiffs' contention, the Town did not violate Plaintiffs' procedural due process rights when the Town Manager administratively decided not to forward the appeals to the BOA⁴. The Town Manager did not interfere with the BOA appeals process by determining whether the BOA should hear and decide an appeal. Rather, as admitted in the First Amended Complaint itself, the Town Manager merely decided not to forward the

⁴ It should not be lost on the Court that the BOA appeal papers were not signed by any of the Plaintiffs (See Exhibit A).

appeal to the BOA because it did not comply with the formal requirements of an appeal to the BOA. (T OB at 19-21) This action falls completely within the Town's Manager's duties as administrative gatekeeper for the Town. Moreover, in rejecting the appeal, the Town Manager provided detailed explanations for her reasons for doing so, which in turn afforded the appellant an opportunity to correct the defect.

In a last-ditch effort to undermine the Town's argument that it did not violate Plaintiffs' due process rights, Plaintiffs argue that *Mathews, supra*, is not applicable to this case. (AB at 34) They then proceed to evaluate the elements of the *Mathews* test in a footnote. (*Id.* at n. 15) It is well accepted that *Mathews* is one of the U.S. Supreme Court's leading cases regarding procedural due process violations. As such, it is completely applicable to Plaintiffs contention that the Town violated Plaintiffs' procedural due process rights.

For the reasons listed above, the Town did not violate Plaintiffs' procedural due process rights. Likewise, Plaintiffs have failed to adequately allege a procedural due process violation. Therefore, Plaintiffs lack standing to bring this lawsuit. Their First Amended Complaint must be dismissed as a matter of law.

II. THE TOWN JOINS IN DBE'S ARGUMENT THAT PLAINTIFFS POSSESSED AND FAILED TO AVAIL THEMSELVES OF AN ADEQUATE REMEDY AT LAW

The First Amended Complaint must be dismissed because the Court of Chancery lacks subject matter jurisdiction over this lawsuit. The Court of Chancery lacks subject matter jurisdiction where plaintiffs possess an adequate remedy at law. 10 Del. C §342. "The mere fact that a party fails to avail itself of an adequate legal remedy in a timely manner does not entitle

that party to proceed in this court rather than the court chosen by the General Assembly to handle the type of claim the party is advancing.” *Savage v. Savage*, 920 A.2d 403, 411 (Del. Ch. 2006).

In their Answering Brief, Plaintiffs claim (with much ado) that they lacked an adequate remedy at law for the following reasons: 1) they appealed the Town building inspector’s approval of the Ruddertowne building permit to the BOA; and, 2) the Town Manager impermissibly rejected that appeal. (AB at 26-27) They then suggest that the Town’s lack of reference to the Town Manager’s administrative rejection of the appeal somehow amounts to a concession that there was no adequate remedy at law.

Plaintiff’s claim regarding the Town’s lack of reference to this issue in its papers is incorrect. As noted in its statement of the Nature and Stage of the Proceedings, *supra*, the Town adopted DBE’s arguments relating to subject matter jurisdiction in its earlier papers. Moreover, because the Town’s motion and Opening Brief were directed to the issue of standing, there was no need to address the Town Manager’s administrative rejection of the appeal which was filed in the context of whether such rejection had any bearing on the existence of an adequate remedy at law.

Plaintiff’s argument that they lacked an adequate remedy at law is problematic in several other respects. First, as noted at page 8 above, there is no indication that all of the Plaintiffs even participated in the appeal. And perhaps more importantly, none of the Plaintiffs (all of whom were unrepresented at the time) signed the BOA appeal. (Exhibit A)

To the extent that Plaintiffs claim that they attempted to appeal to the BOA and that the appeal was rejected for lack of jurisdiction, their argument fails because it mischaracterizes the subject matter of the appeal and the basis for the Town Manager’s rejection. Specifically, the subject matter of the appeal was not (as Plaintiffs are now conveniently trying to claim) the

Building Official's approval of the Ruddertowne Building Permit (which might have properly invoked the jurisdiction of the BOA), but rather the Commissioners' approval of the MAR. (*See* Exhibit A) Plaintiffs possessed an adequate remedy at law because any or all of them could have appealed the Building Official's approval of the building permit. Nobody -- not even Joan Claybrook -- did that. The BOA appeal of the Commissioner's actions in approving the MAR was properly rejected by the Town Manager because it was not directed to an action of the Building Official and because the BOA lacked jurisdiction to hear the appeal. As such, it cannot form the basis for a claim that Plaintiffs lack an adequate remedy at law.

III. THE FIRST AMENDED COMPLAINT MUST BE STRICKEN BECAUSE ITS CONTENTS ARE IMPERTINENT TO THE COMPLAINT

The First Amended Complaint must be stricken because it is replete with legal conclusions. Additionally, its contents are more akin to the contents of a response brief than to the contents of an amended complaint. In their Answering Brief, Plaintiffs completely avoid addressing the Town's argument regarding the legal standard that should apply to Motions to Strike under Delaware law. (AB at 36-39) Rather, Plaintiffs recite merely one of the existing standards, apply it to the facts of this case, and come to the conclusion that opposes the Town's argument. Because Plaintiffs failed to address which standard should apply to Motions to Strike, the Town respectfully requests that this Honorable Court apply the standard that the Town seeks to have applied in its Opening Brief at pages 21-26.⁵ (T OB at 21-26) Accordingly, the Town respectfully requests that the Court strike the First Amended Complaint (or portions thereof as listed in its Opening Brief at page 26).

⁵ *See* Argument (IV) *infra* for additional discussion of the standard that should apply to Motions to Strike.

IV. PLAINTIFFS' RECITATION OF FACTS RELATING TO THE UNDERLYING LITIGATION ARE IMMATERIAL TO THIS LITIGATION AND SHOULD BE DISREGARDED BY THE COURT

Presumably in response to a similar recitation of facts contained in DBE's Opening Brief, Plaintiffs have undertaken an exhaustive recitation of their version of the Town's drafting and passage of the Comprehensive Plan in 2006 and 2007 and of concurrent efforts by DBE and its predecessor to redevelop the Ruddertowne parcel. (AB at 6-10) These background facts are the subject of only fleeting reference in the Complaint. They have no bearing on Plaintiff's claims and the subject matter the Complaint, and they have less than no bearing on the issues raised in either of the two Motions to Dismiss that are presently before this court. Any recitation of facts relating to the underlying litigation should be disregarded by the court and stricken from Plaintiffs' Answering Brief.

Under Chancery Rule 12(f), "the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Del. Ch. Ct. Rule 12(f) (2011). According to Blacks Law Dictionary, immaterial evidence is evidence "tending to prove some fact that is not properly at issue." Blacks Law Dictionary at 764 (8th ed. 2004). Additionally, an "impertinent matter" is a "matter that is not relevant to the action or defense." *Id.* at 769 (referencing Rule 12(f)).

In its Opening Brief, the Town discusses at length the standard that applies to Motions to Strike under Delaware law. Applying that standard, it is clear that the facts regarding the underlying litigation should be stricken from Plaintiff's Answering Brief because they are, indeed, irrelevant to this litigation. While they do provide background information, facts regarding the underlying litigation provide no essential information that could enrich a determination of whether Plaintiffs' instant lawsuit has merit. These facts are both voluminous

and complex; thus, analyzing them may prove more harmful than helpful to analyzing the merits if the instant lawsuit. For these reasons, facts regarding the underlying litigation should be stricken from Plaintiffs' Answering Brief. The Town respectfully prays that this Honorable Court strike these facts, contained at pages 6-10 of Plaintiffs' Answering Brief.

BY: /s/ Megan T. Mantzavinos
Megan T. Mantzavinos, Esquire (ID No. 3802)
Ann M. Kashishian, Esquire (ID No. 5622)
Marks, O'Neill, O'Brien & Courtney, P.C.
300 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 658-6538
*Attorneys for Defendants Town of Dewey
Beach, Commissioners of the Town of
Dewey Beach, Diana K. Smith, Town
Manager, and William D. Mears, Town
Building Official*

DATED: December 23, 2011