



**IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE**

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

Plaintiffs,

v.

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

Defendants.

C.A. No. 6785-VCN

**DEFENDANTS DEWEY BEACH ENTERPRISES, INC. AND  
RUDDERTOWNE REDEVELOPMENT INC.'S REPLY BRIEF IN SUPPORT OF  
THEIR MOTION TO DISMISS FIRST AMENDED VERIFIED COMPLAINT**

William T. Quillen (No. 179)  
Shawn P. Tucker (No. 3326)  
Karen V. Sullivan (No. 3872)  
DRINKER BIDDLE & REATH LLP  
1100 N. Market Street, Suite 1000  
Wilmington, DE 19801  
Telephone: (302) 467-4200  
Facsimile: (302) 467-4201  
[william.quillen@dbr.com](mailto:william.quillen@dbr.com)  
[shawn.tucker@dbr.com](mailto:shawn.tucker@dbr.com)  
[karen.sullivan@dbr.com](mailto:karen.sullivan@dbr.com)

Dated: December 23, 2011

*Attorneys for Defendants Dewey Beach  
Enterprises, Inc. and Ruddertowne  
Redevelopment, Inc.*

**TABLE OF CONTENTS**

	<b>Page</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>PRELIMINARY STATEMENT .....</b>	<b>1</b>
<b>ARGUMENT .....</b>	<b>3</b>
<b>I.    THE COURT LACKS SUBJECT MATTER JURISDICTION TO           CONSIDER PLAINTIFFS’ AMENDED COMPLAINT .....</b>	<b>3</b>
<b>A.    PLAINTIFFS’ CLAIMS RELATED TO THE APPROVAL OF THE               RESOLUTION AND RUDDERTOWNE RECORD PLAN ARE               BARRED BY 10 DEL. C. § 8126 .....</b>	<b>4</b>
<b>1.    THE STATUTE OF REPOSE IS APPLICABLE .....</b>	<b>5</b>
<b>B.    THE STATUTE OF REPOSE BEGAN TO RUN ON MARCH 1,               2011.....</b>	<b>14</b>
<b>C.    THE COURT SHOULD DISMISS PLAINTIFFS’ CLAIMS               RELATED TO APPROVAL OF THE BUILDING PERMIT               BECAUSE PLAINTIFFS POSSESSED AN ADEQUATE REMEDY               AT LAW .....</b>	<b>21</b>
<b>D.    PLAINTIFFS LACK STANDING .....</b>	<b>30</b>
<b>II.   PLAINTIFFS’ AMENDED COMPLAINT SHOULD BE STRICKEN .....</b>	<b>30</b>
<b>CONCLUSION .....</b>	<b>31</b>

**TABLE OF AUTHORITIES**

**CASES**

*In re: 244.5 Acres of Land*,  
808 A.2d 753 (Del. 2002) ..... 10

*Amazon.com LLC v. Lay*,  
758 F. Supp. 2d 1154 (W.D. Wash. 2010) ..... 4

*Campbell v. Teaneck TP. Committee, Bergen County*,  
129 A. 757 (N.J. 1925) ..... 25

*Cape Henlopen Sch. Dist. v. Del. Interscholastic Athletic Assoc.*,  
2009 WL 388944 (Del. Super. Jan. 29, 2009) ..... 28

*In re: City of Johnstown Annexation*,  
19 Pa D. & C 715 (Pa. Quar. Sess. 1957) ..... 25

*Elcorta v. Summit Aviation*,  
528 A2d 1199 (Del. Super. 1987) ..... 28

*Hunting v. Minard*,  
23 Pa D & C 224 (Pa.Com.Pl. 1935) ..... 25

*In the Matter of the Real Property of Former Wife, K. and Former Husband, K.*,  
297 A.2d 424 (Del. Ch. 1972) ..... 29

*Savage v. Savage*,  
920 A.2d 403 (Del. Ch. 2006) ..... 28, 29

*Worldwide Salvage, Inc. v. Environmental Appeals Board*,  
1986 WL 3650 (Del. Super. Jan. 30, 1986) ..... 28

**STATUTES CODES AND RULES**

10 Del. C. § 342 ..... 29

10 Del. C. § 8126 ..... 4, 7, 13, 31

22 Del. C. §324 ..... 25, 27, 29

22 Del. C. §328 ..... 25, 27, 29

22 Del. C. §702 .....	6, 8, 11-12
Dewey Beach Municipal Code § 71-3 .....	25, 27, 29
Dewey Beach Municipal Code § 185-65 .....	6, 25, 27, 29
Dewey Beach Municipal Code § 185-66 .....	25, 27, 29
Dewey Beach Municipal Code § 185-72 .....	9-10

**OTHER AUTHORITIES**

2 Moore’s Federal Practice § 12.30 (3d ed. 2011).....	3
Charles A. Wright, Arthur B. Miller & Edward H. Cooper, 5B Federal Practice and Procedure § 1350 (3d ed. 2004) .....	3-4

## **PRELIMINARY STATEMENT**

Unfortunately for DBE, the mere filing of this action by Plaintiffs has put a multimillion dollar construction project at a complete standstill notwithstanding a record confirming substantial public support for the project, and Town approval of the project following multiple public workshops and a 4-5 hour public hearing.

In an apparent attempt to distract the Court from the facts and legal standards applicable to DBE's Motion to Dismiss, Plaintiffs spend a fair amount of time in their answering brief in an attempt to cast DBE's character in a negative light claiming, for example, that DBE acted wrongly because it brought "threats and lawsuits" against the Town of Dewey Beach. While it is certainly true DBE appealed the Town's refusal to issue it a phase 1 building permit for Ruddertowne, ultimately the Delaware Supreme Court found in favor of DBE and against the Town. Further, the DBE actions filed with this Court each stemmed from individual ordinances adopted by the Town Commission on different dates which were either inconsistent with the Town's Comprehensive Development Plan, or which were otherwise adopted in an attempt to retroactively defeat DBE's previously filed building permit applications. DBE certainly had the right to file the actions to protect its property rights, including its multimillion dollar investment in the Ruddertowne property.

As Plaintiffs are now well aware after reading DBE's opening brief, each of DBE's Chancery Court actions had to be filed within the 60 day Statute of Repose. Indeed, the Statute of Repose applicable in the current action, was the exact same 60 day statute applicable to DBE when it filed its Chancery Court actions against the Town.

Plaintiffs attempt to further distract this Court by casting further aspersions also claiming “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.” AB at 10. This is simply false. DBE never sought “significant money damages” or judgment against any Town member personally in this Court. The one federal claim brought by DBE was premised upon many of the facts set forth in DBE’s State claims, including the former Town Mayor’s threat to fire the Town Building Inspector, William Mears, if he issued DBE a building permit (Exhibit 30), and the unethical conduct of the Vice Chairman of the Planning Commission, as confirmed in a written opinion of the State of Delaware Public Integrity Commission. (Exhibit 40) The federal action did seek damages suffered by DBE, and did name certain Town officials in their personal capacity due to their inappropriate conduct.

In any case, DBE respectfully submits that the filing of its actions against the Town were not “threats” as characterized by Plaintiffs in their brief, but rather, actions reasonably brought to protect DBE’s pending building permit applications from being undone by Town politics rather than legal or sound planning merit.

## ARGUMENT

### **I. The Court lacks subject matter jurisdiction to consider Plaintiffs' Amended Complaint**

It is not DBE's intent on this Motion to enter into a discussion of the merits of the Plaintiffs' complaint. The Motion is analogous to a simple Statute of Limitation Motion in a routine automobile personal injury suit to dismiss the tort case as beyond the two year limitation period. The alleged fault of the defendant is irrelevant in deciding the Motion.

Plaintiffs do not dispute, nor could they, that the Court possesses limited jurisdiction and must dismiss an action pursuant to Rule 12(b)(1) if it appears from the record that the Court lacks subject matter jurisdiction over the claim. DBE OB at 24. Nor do Plaintiffs dispute that they, not Defendants, bear the burden of establishing subject matter jurisdiction. DBE OB at 24-25. Furthermore, Plaintiffs do not dispute that evidence extrinsic to the pleadings is relevant to a 12(b)(1) motion, and, thus, may be considered by the Court when ruling upon DBE's motion to dismiss. DBE OB at 24-25.

However, Plaintiffs complain that "DBE presents a highly unorthodox form of a pleadings-stage motion" by including material extrinsic to the pleadings. AB at 3. It appears clear that Plaintiffs are confusing the legal standards for a 12(b)(1) motion with a 12(b)(6) motion. As explained by one well respected commentator on this subject matter:

[U]nlike a 12(b)(6) dismissal, the Court need not confine its evaluation to the face of the pleadings, but may review or accept any evidence, such as affidavits, or may hold an evidentiary hearing.

2 Moore's Federal Practice § 12.30, p. 12-42 (3d ed. 2011). *See generally* Charles A. Wright, Arthur B. Miller & Edward H. Cooper, 5B Federal Practice and Procedure §

1350 (3d ed. 2004). Indeed, “For a Rule 12(b)(1) motion the rule is generally that a Court is not confined to the facts contained in the complaint and need not assume the truthfulness of the complaint.” *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1162 (W.D. Wash. 2010). Accordingly, DBE included relevant facts in its briefing so that the Court would have a better contextual understanding of the present dispute, and so that the Court may determine whether Plaintiffs have proven that the Court actually possesses subject matter jurisdiction. Further, the materials provided by DBE do not reveal a need for discovery as Plaintiffs assert in their briefing. To the contrary, they reveal that the Plaintiffs have not carried their burden of proving subject matter jurisdiction.

**A. Plaintiffs’ claims related to the approval of the Resolution and Ruddertowne Record Plan are barred by 10 *Del. C.* § 8126**

Plaintiffs’ Complaint was not timely filed. The Statute of Repose, 10 *Del. C.* § 8126, is applicable and bars the claims related to the approval of the Resolution (including the Record Plan). The Statute of Repose provides:

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

(b) No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the

subdivision and land development regulations of such county or municipality is challenged, whether directly or by collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such action occurred, of notice of such final approval or denial of such final or record plan.

Plaintiffs do not dispute DBE's assertion that the statute: is a "statute of repose"; "relates to the jurisdiction of the court"; "extinguishes the right itself and divests...the court of any subject matter jurisdiction"; and that its application is designed to "promote predictability and stability in land use matters." DBE OB at 27-28.

Furthermore, it is undisputed that DBE seeks to develop, or redevelop, its property located in the Town of Dewey Beach. (DBE OB, Ex. 2) It is also undisputed that Plaintiffs are challenging the "legality" of DBE's land use approval from the Town. Nevertheless, Plaintiffs seek to evade the Statute of Repose by two avenues. First, they claim the statute is not applicable. Second, they say, even if the statute is applicable, their lawsuit was timely filed. Plaintiffs confuse the matter by interweaving issues related to the merits of the lawsuit, rather than limiting their legal arguments to those relevant to the limited scope of DBE's Motion to Dismiss.

**1. The Statute of Repose is applicable.**

Plaintiffs erroneously claim that the Statute of Repose simply does not apply to the redevelopment of Ruddertowne. Specifically, Plaintiffs allege that DBE failed to submit its "Ruddertowne Plan" (identified as the "Record Plan" in DBE's opening brief)

under the subdivision and land development regulations of the Town.<sup>1</sup> In making this argument, Plaintiffs ignore the record, the provisions of the Zoning Code<sup>2</sup> of the Town of Dewey Beach, previously adopted Town ordinances cited in Defendants' opening brief and the intent of the Statute of Repose. In DBE's view, the Plaintiffs' claims can be dismissed summarily on consideration of three factors.

First, the Resolution adopted by the Town Commission on February 26, 2011 was, in part, based on the Dewey Beach Comprehensive Development Plan, adopted by Ordinance #587 on June 29, 2007 (the "Town Comp Plan" or "Town Ordinance"). While the Town Comp Plan is a "land development regulation" for many reasons, one overriding legal provision suffices for citation here. The Town Comp Plan undeniably carries "the force of law and **no development shall be permitted except as consistent with the Plan.**" 22 Del. C. §702(d); DBE OB, Ex. 1, Town of Dewey Beach Comprehensive Plan (2007), Introduction, p. 1 (emphasis added). It was this preexisting, force of law, Town Ordinance that introduced several legal concepts including a

---

<sup>1</sup> Interestingly, Plaintiffs' analysis fails to identify any applicable statute of limitations whatsoever. We suspect this is for good reason. Assuming, *arguendo*, that Plaintiffs' argument was accepted by this Court, the case must still be dismissed. Indeed, if Plaintiffs were correct that the 60 day Statute of Repose does not apply in this case, Plaintiffs were still required by law to appeal the Building Inspector's approval of DBE Building Permit to the Dewey Beach Board of Adjustment within 30 days of the Building Inspector's February 26, 2011 approval. Dewey Beach Municipal Code § 185-65(B). However, no Plaintiff filed an appeal of the *Building Inspector's* approval with the Dewey Beach Board of Adjustment.

<sup>2</sup> The Town's Zoning Code is also known as Chapter 185 of the Dewey Beach Municipal Code.

“ratification” requirement by the Town Commissioners before Ruddertowne could be redeveloped by DBE, or anyone else for that matter. DBE OB, Ex 1 at p. 22.

Second, in adopting the Resolution, which included the Town Ordinance required “ratification” requirement for Ruddertowne, the Town had the advice of counsel, the advantage of a mandated, thorough and open process, a public hearing, and the vote of the Town Commissioners in an open meeting consistent with the Town Ordinance “ratification” requirement. The Town Commissioners necessarily interpreted their own Town law and regulations in the enactment of the Resolution that incorporated the MAR (as amended) and the Record Plan. The good faith reliance of the Commissioners on their own interpretation of Town law, supported by professional legal advice, further confirms that the Record Plan was “submitted under the subdivision and land development regulation” of the Town.

Finally, Plaintiffs’ argument fails on its apparent necessary premise. It assumes the February 26, 2011 Resolution of the Town Commission was illegally adopted, and, therefore, cannot supply the predicate to invoke the statute. The same incorrect assumption is made as to the plat plan approval. Just the opposite is true. The Statute of Repose is only applicable where, as here, “the legality of the ‘regulation’” is challenged or “the legality of any action...granting or denying approval of a final or record plan...is challenged.” 10 *Del C.* § 8126(a) and (b). That is the entire point of the statute. Indeed, far from being evaded due to claims of illegality, the Statute of Repose was expressly designed to preclude in short order claims of illegality.

In this case, the Record Plan, which is part of DBE's revised building permit application, was submitted to both the Building Inspector and the Town Commission, and both approved it on February 26, 2011 following extensive public testimony and public comment.<sup>3</sup> When Plaintiffs allege DBE's application was "without adherence to statutory procedures" (AB at17), they simply ignore facts, evidently unfamiliar with the Town's "statutory procedures." Indeed, pursuant to the Zoning Code plat plans<sup>4</sup> are not subject to any public hearing process whatsoever. When DBE refers to "procedures not required by code" in its opening brief, it is referring to additional MAR requirements, which are founded upon a "ratification" requirement specified by the Town Ordinance. (DBE OB, Ex. 1, pp. 21-22).<sup>5</sup>

---

<sup>3</sup> Contrary to Plaintiffs' answering brief at page 10, the Record Plan was approved in accordance with the Town's Comprehensive Plan *and* its former Zoning Code. (DBE OB, Ex. 13, Resolution, Section 4(5)). A copy of the former Zoning Code is attached hereto as Exhibit 39.

<sup>4</sup> It is important to note that DBE's Record Plan was approved as a "Record *Plat* Plan."

<sup>5</sup> The Town Comp Plan, adopted into law by Town ordinance, specifically provided that "Dewey Beach should continue to negotiate with Highway One in accordance with this Comprehensive Plan". Highway One was the contact for DBE and the Ruddertowne property while the Town Comp Plan was being drafted by Town officials. The Town's Comprehensive Development specifically recognized that the Ruddertowne plans (DBE OB, Ex. 1, pp. 21-22) filed before the adoption of the Plan (Exhibit 41), which would have resulted in the demolition of all commercial uses and the construction of only townhomes, "[c]ould be considered inconsistent with this Plan." However, the Plan made clear that "[t]he working group's final agreement upon ratification by the Commissioners shall be considered consistent with the Plan." State law provides that no development may be approved by the Town unless it is consistent with the Comprehensive Plan. 22 *Del. C.* § 702(d). Thus, the "ratification" by the Town Commission, or denial thereof, had to be sought directly from the Town Commissioners before DBE could obtain legal approval of its Record Plan.

The record confirms that DBE submitted its Record Plan under the applicable provisions of the Town’s subdivision and land development regulations. Chapter 185 of the Dewey Beach Municipal Code is entitled “Zoning.” Multiple provisions of Chapter 185 are instructive. First, Chapter 185, Article X “Administrative Provisions” of the Zoning Code, provides procedures for the submission of subdivision and land development projects proposed within the municipal boundaries of the Town. Second, Section 185-65 provides that only “conditional uses” are subject to “site plan” review, and only site plan review includes a public hearing before the Dewey Beach Planning Commission<sup>6</sup> (for a recommendation) and Town Commission (for approval or denial). DBE’s plan does not propose any of the “conditional uses” listed in the Zoning Code, Section 185-25(D). Third, Section 185-71 “Building permits” requires DBE to obtain a building permit from the Town of Dewey Beach. Fourth, Section 185-72, entitled “Plat,” further requires that all such building permit applications include a drawing or a “plat” plan as part of the building permit submission process. Specifically, Section 185-72 provides:

All applications for building permits shall be accompanied by a drawing or **plat** in duplicate or as required by the Town

---

<sup>6</sup> Plaintiffs argue that the Planning Commission was denied the opportunity to fully review the Record Plan in accordance with the Zoning Code. This is simply not accurate. The Zoning Code did not provide any role for the Planning Commission in regard to a building permit approval. The MAR, however, created a special requirement for DBE to appear before the Planning Commission after it obtained Record Plan approval, not to revisit the Record Plan approval, but to assist in reviewing the voluntary Town amenities offered by DBE and to confirm that DBE’s construction plans were consistent with the already approved Record Plan. This fact further confirms that the Record Plan received the only approval intended on February 26, 2011 – not June 17<sup>th</sup>.

Building Inspector showing, with dimensions, the lot lines, the building or buildings, the location of buildings on the lot and such other information as may be necessary to provide for the enforcement of these regulations, including if necessary, a boundary survey and a staking of the lot by a surveyor and complete construction plans. The drawings shall contain suitable notations indicating the proposed use of all land and buildings. A record of the original copy of such applications and plats shall be kept at the building at all times during construction.

Dewey Beach Municipal Code, §185-72 (emphasis added).

Plaintiffs do not dispute that DBE submitted two building permit applications to the Town of Dewey Beach for the redevelopment of Ruddertowne – one on November 8, 2007 and the other on April 4, 2008. (DBE OB, Ex. 8). Both of these building permit dates (which were also not disputed in Plaintiffs’ briefing) pre-date the adoption of the new 2009 Dewey Beach Zoning Code, which is erroneously cited in Plaintiffs’ brief.<sup>7</sup> In

---

<sup>7</sup> The Ruddertowne building permit applications were grandfathered under the former Dewey Beach Zoning Code and the Town Comp Plan. *See, e.g., In re 244.5 Acres of Land*, 808 A.2d 753, 758 (Del. 2002) (“in cases, as here, where a property owner expends significant time and money on the pre-permit process, it would be inequitable to leave the owner to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities.”). In the case at bar, the MAR recognized that the Ruddertowne redevelopment project was recommended by the RAC after multiple public hearings, and that development plans were prepared by DBE and submitted to the Town **before** the adoption of the new Dewey Beach Zoning Code in 2009. Therefore, the MAR specifically provided that the Ruddertowne project “[s]hall be subject to the mixed use provisions of the **former** Dewey Beach Zoning Code and Comprehensive Development Plan, taking into account the dates of DBE’s building permit application.” DBE OB, Ex. 13, MAR ¶ 5 (emphasis added). Accordingly, unless otherwise stated in DBE’s argument related to the Statute of Repose, all references to the Zoning Code are to the former Zoning Code applicable to DBE’s grandfathered building permit applications recognized by the Town in the Resolution it adopted on February 26, 2011. However, the current Zoning Code is applicable to DBE’s argument related to the appeal of the Building Inspector’s approval of the Building Permit to the Board of

(Continued)

fact, the Record Plan specifically references these same two pending building permit applications at Note 27 of the plan. (DBE OB, Ex. 2). Note 26 of the Record Plan makes clear that the plan is part of DBE’s building permit application. (*Id.*). It is also undisputed that William Mears, the Town of Dewey Beach Building Inspector, signed the Ruddertowne Plan, evidencing his “approval” of the plan. (DBE OB, Ex. 2).

Normally, only the Building Inspector would have to “approve” DBE’s building permit application, including the Zoning Code required plat plan, pursuant to Section 185-71 & Section 71-3 of the Town of Dewey Beach Municipal Code.<sup>8</sup> However, the Ruddertowne property was subject to a specific “ratification” by the Town Commissioners before any development could be lawfully approved by the Town. Indeed, the “ratification” process, imposed by the Town Comp Plan created an additional subdivision and land development step in the process – a requirement that could not be ignored by DBE or the Town. In fact, State law specifically provides: “After a comprehensive plan or portion thereof has been adopted by the municipality in accordance to this chapter, the comprehensive plan shall have the **force of law** and no

---

(Continued)

Adjustment, and is cited therein. The appeals are different as they were not filed until after the new Zoning Code was adopted in 2009.

<sup>8</sup> Plaintiffs erroneously insist in their Complaint, as well as in their brief, that the Planning Commission was required to review DBE’s Record Plan pursuant to the Zoning Code. This is simply not accurate. The applicable Zoning Code imposed no such requirement upon DBE’s application because DBE’s Record Plan did not require site plan approval pursuant to Section 185-65 of the Zoning Code. Of course, the Town Ordinance required the Town Commission to ratify, or otherwise decline to ratify, DBE’s plan.

development shall be permitted except as **consistent with the plan.**” 22 Del. C. § 702(d) (emphasis added). This legal requirement had to be satisfied before DBE could obtain lawful approval of its Record Plan. *Id.* Thus, the Town Commissioners incorporated the “ratification” process required by law into the Resolution approving the MAR. It is undisputed that, on February 26, 2011, the Town approved the MAR (as amended), which created multiple public workshops and multiple public hearings to consider DBE’s pending and grandfathered building permit applications. The Town’s MAR further provided that the Town Commissioners would have the right to vote DBE’s Ruddertowne plat plan up or down as part of the Town Commissioner’s “ratification” process.<sup>9</sup> Thus, the MAR did not create a sub-standard process cutting out the public and the Planning Commission as Plaintiffs would like this Court to believe. Rather, the MAR created an opportunity for significant public participation and public input not normally imposed on other property owners who seek development approvals in Town.

In sum, the record is clear that DBE’s Record Plan was, in fact, “submitted” in accordance with the provisions of Chapter 185 of the Zoning Code of the Town of Dewey Beach, which was the same code applicable to all land use applicants seeking

---

<sup>9</sup> The 2007 “ratification” requirement imposed by the Town Comp Plan by ordinance was never appealed by Plaintiffs. The procedural requirements imposed in the MAR related to the required “ratification” were first approved on December 10, 2010 (DBE OB, Ex. 13, Resolution, p. 2), and then again on February 26, 2011. (DBE OB, Ex. 13, Resolution, Section 7). Notably, none of the additional procedures and requirements contained in the Town Comp Plan were ever appealed within 60 days of notice of their approval or incorporation into the MAR by Resolution. Undoubtedly, this was for good reason - why would a member of the public who opposed the redevelopment of Ruddertowne oppose the requirement of a much more open and rigorous public process before DBE could obtain approval to redeveloped Ruddertowne.

subdivision and land development approvals from the Town prior to the adoption of its new 2009 zoning code. The record also confirms that the Town imposed a special “ratification” process for the Ruddertowne property by separate Town Ordinance adopted in 2007, thereby creating an additional requirement relating to the future subdivision and land development of Ruddertowne. This additional subdivision and land development related process mandated the involvement of the Town Commissioners as the governing body of the Town.

Accordingly, the record confirms that the Statute of Repose, 10 *Del. C.* § 8126, is applicable. First, pursuant to 10 *Del. C.* § 8126(a), the Resolution (including the Record Plan) incorporating the Town Comp Plan “ratification” requirement constituted an “ordinance, code, regulation or map, related to zoning, or any amendment thereto.” 10 *Del. C.* § 8126(a). In addition, although not required to also be met by DBE to satisfy § 8126(a), both the Resolution and the Town Comp Plan represented a regulation or ordinance “related to subdivision and land development, or any amendment thereto.” 10 *Del. C.* § 8126(a). Notably, Plaintiffs entirely fail to address Section 8126(a) in their brief. Furthermore, pursuant to 10 *Del. C.* § 8126(b), DBE’s Record Plan was submitted by DBE pursuant to the “subdivision and land development regulations” of the Town. Notably, Plaintiffs ignore in their briefing that 10 *Del. C.* § 8126(b), does not require a “record plan” to be labeled a “final plan” or subject to any type of “final approval” process in order to satisfy the language of Section 8126(b).

**B. The Statute of Repose began to run on March 1, 2011**

After spending a fair amount of time in their answering brief insisting the MAR is “*ultra vires*,” Plaintiffs’ very next argument relies exclusively upon the very same MAR to argue DBE’s Record Plan approval was really not obtained from the Town until June 17, 2011. In making this argument Plaintiffs ask this Court to read the MAR and the Resolution adopting it out of context, and to ignore much of the public record, including Plaintiffs’ own actions and public statements.

First, the record clearly demonstrates that Plaintiffs had been directly engaged or otherwise kept apprised of the February 26, 2011 Town approval of the Resolution which included the Record Plan approval (DBE OB, Ex 13, Resolution, Section 2). It is undisputed that the contemplated Town Commission vote following the February 26, 2011 hearing was publically noticed and well publicized by the press. In fact, the record confirms fifty-eight (58) people testified at the February 26, 2011 public hearing over the course of 4-5 hours before the Town Commissioners’ voted. (DBE RB, Ex. 37).<sup>10</sup> Approximately half of the speakers testified in favor the Record Plan, while the other half testified against the plan (*Id.*). It is no wonder then that following the February 26, 2011 Town approval of the Resolution, Plaintiff Murray stated in a March 2, 2011 letter to the editor that:

After the 4-1 vote for the Mutual Agreement, my wife and I settled into a melancholy mood. As a music lover, Samuel Varber’s “Adagio for Strings” repeated itself in my mind. This hauntingly beautiful piece of music has

---

<sup>10</sup> While DBE provided a recording of this hearing in its opening brief, DBE has attached a transcript of that same recording to its reply brief at Exhibit 37.

been described as being full of “pathos and cathartic passion”. **The agony of defeat**, after three and half years of very hard work by an incredible and amazing group of sincere volunteers, is a **hard pill to swallow**.

DBE OB, Ex. 25 (emphasis added).

Plaintiffs do not dispute the authenticity of Plaintiff Murray’s declaration of defeat letter to the editor attached to DBE’s opening brief at Exhibit 25. Thus, the record is clear that Plaintiffs elected not to bring an action in this Court within 60 days of the March 1, 2011 legal notice of the February 26, 2011 Resolution approving the MAR – the very approval Plaintiff Murray complained of in writing only five (5) days following the February 26, 2011 public hearing.

Second, the MAR makes clear that the purpose of the February 26, 2011 (not the June 17, 2011) hearing, was to “**[a]pprove or deny the plan and building permit** application by a majority vote based upon applicable law given the date of DBE’s building permit.” DBE OB, Ex. 13, MAR ¶ 8(a) (emphasis added). Indeed, the Resolution adopted on February 26, 2011 by the Town Commissioners provides:

Section 1. The Amended Mutual Release [MAR] dated February 19, 2011 is hereby approved.

Section 2. The plan titled **Record Plat Plan** of Mixed Use Complex prepared by McBride & Ziegler, Inc. and dated February 17, 2011, with Professional Engineer Certification dated February 25, 2011 (“Record Plat Plan”), and revised building permit application dated February 22, 2011, are incorporated herein by this reference and **are hereby approved** subject to any conditions listed upon the Record Plat Plan, the building permit, or both.

\*\*\*

Section 7. This Resolution shall become **effective immediately** upon adoption by a majority of the Commissioners of the Town of Dewey Beach.

Adopted by at least a majority of the Commissioners of the Town of Dewey Beach on February 26, 2011.

DBE OB, Ex. 13, Resolution, Sections 1, 2 & 7 (emphasis added).

Unlike the February 26<sup>th</sup> hearing regarding approval of the Record Plan, the subsequent June 17, 2011 hearing was for a very limited purpose - a “final decision” regarding “whether the final **construction plans** satisfy the condition of the **approved plan and building permit** and in regard to the **voluntary amenities**.” DBE OB, Ex. 13, MAR § 8(a) (emphasis added). Plaintiffs did not cite or discuss other sections of the MAR that further explained the purpose and scope of the June 17<sup>th</sup> hearing. For example, the MAR further provides that the second Town meeting was:

(vi) A Town Meeting (Hearing Two) to accept or reject, in whole or in part, the Planning Commission’s recommendations regarding the consistency of the construction plans with the application presented at the Special Town meeting, by DBE, the gazebo, the Bay Walk, restrooms, dedicated Public Town Space (and uses therein) and whether the construction plans are consistent with the application presented by DBE. **A final decision as to the Gazebo, Bay Walk, restrooms, dedicated-Town Space (and uses therein), and whether the construction plans are consistent with the application presented by DBE shall be made at this meeting.**

DBE OB, Ex. 13, MAR ¶ 8(b)(vi) (emphasis added). Indeed, the MAR, and the Resolution that adopted the MAR, provided that any approval of the plan and building permit were to occur, if at all, at the first public hearing on February 26, 2011, not the June 17, 2011 hearing. Plaintiffs attempt to stretch the meaning of the word “final” to impose some type of double approval process for the Record Plan. No such double approval process for the Record Plan was required by the MAR. Plaintiffs fail to explain

what such a double approval process of the Record Plan would have even achieved - the answer is nothing. The June 17<sup>th</sup> hearing was created by the MAR only to finalize the public amenities and to confirm the consistency of DBE's February 26<sup>th</sup> Record Plan with construction drawings which were the only items not finalized at the February 26<sup>th</sup> public hearing – but it was recognized by the MAR these items, separate and apart from the Record Plan approval, needed to be **finalized**.

The language contained in Note 19 on the Record Plan (Exhibit 2) leads to the exact same conclusion. Note 19 provides:

Note 19 Voluntary Town Amenities: Bay Walk, Gazebo, 3,000 s.f. Town Space, 500 s.f. public bathrooms, and 5,000 s.f. Convention Center as provided in the Mutual Agreement. Subject to DNREC approval, the Bay Walk shall include a Gazebo 500 s.f. in size with seating, which shall serve as a focal point along the Bay Walk. If DBE and the Town cannot obtain DNREC approval for a 500 s.f. Gazebo DBE agrees to construct a 250 s.f. Gazebo at a location not regulated by DNREC. The Bay walk shall be maintained by DBE. **Pursuant to Paragraph 8a and 8b(vi) of the Mutual Agreement the Gazebo, Bay Walk, restrooms and Town Space, as well as the final construction plans, are subject to an additional Town Commission final approval.**

Exhibit 2 (emphasis added). The MAR, the February 26, 2011 and June 17, 2011 public hearing transcripts (DBE RB, Exs. 37 & 38),<sup>11</sup> the legal notices appearing in the *News Journal* (DBE OB, Ex.19), and the Town of Dewey Beach Commissioner minutes (DBE OB, Ex. 22), all confirm that the February 26, 2011 hearing served to approve the Ruddertowne Record Plan and building permit, and that the June 17, 2011 hearing was for the Town Commission to make a “final” decision about only the consistency of the

---

<sup>11</sup> While DBE provided recordings of these hearing in its opening brief, DBE has attached transcripts of those recordings to its reply brief at Exhibit 37 and Exhibit 38.

already approved plan with the construction drawings and the final approval of the voluntary amenities.

Perhaps most importantly, if Plaintiffs had any question or confusion in this regard they should have timely appealed to a court of law or equity within the applicable 60 day Statute of Repose from the date of the legal notice in the *News Journal* (i.e., March 1, 2011), which clearly stated in caps as follows:

**LEGAL NOTICE: ON FEBRUARY 26, 2011, THE COMMISSIONERS OF THE TOWN OF DEWEY BEACH DELAWARE ADOPTED A RESOLUTION ENTITLED “A RESOLUTION OF THE COMMISSIONERS OF THE TOWN OF DEWEY BEACH APPROVING A MUTUAL AGREEMENT AND RELEASE REGARDING THE RUDDERTOWNE REDEVELOPMENT PROJECT”. THE MUTUAL AGREEMENT ADOPTED BY THE RESOLUTION WAS ORIGINALLY EXECUTED ON DECEMBER 6, 2010, AND AMENDED ON FEBRUARY 19, 2011 AND FEBRUARY 26, 2011. THE RUDDERTOWNE PROPERTY IS LOCATED ON THE BAYSIDE OF DEWEY BEACH BETWEEN VAN DYKE AVENUE AND DICKINSON AVENUE, WITH AN ADDRESS OF 124 DICKINSON AVENUE, DEWEY BEACH, DELAWARE, 19971, AND IS ALSO KNOWN AS SUSSEX COUNTY TAX PARCEL NUMBERS 334-23.06-1.00, 334-23.06-2.00 AND 334-23.06-3.00.**

**THE RESOLUTION INCLUDED, 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. THE APPROVALS PERMIT A COMMERCIAL HOTEL USE UP TO A MAXIMUM OF 90 UNITS AND A CONDOMINIUM USE UP TO A MAXIMUM OF 120 UNITS. IF THE MAXIMUM NUMBER OF HOTEL UNITS OF 90 ARE BUILT, THE MAXIMUM NUMBER OF CONDOMINIUM UNITS THAT MAY BE BUILT IS LIMITED TO 105. THE APPROVED MAXIMUM SQUARE FOOTAGE OF THE RUDDERTOWNE MIXED USE COMPLEX IS 465,685 S.F., WITH A MAXIMUM BUILDING HEIGHT OF 45.67 FEET, MEASURED AS SET FORTH IN THE MUTUAL AGREEMENT.**

**THE ABOVE REFERENCED RESOLUTION, RECORD PLAT PLAN AND BUILDING PERMIT INFORMATION ARE AVAILABLE FOR REVIEW AT THE DEWEY BEACH TOWN HALL LOCATED AT 105 RODNEY AVENUE, DEWEY BEACH, DELAWARE 19971, PHONE NUMBER (302)227-6363. (DBE OB, Ex. 19) (emphasis in original).**

Certainly, the above legal notice required by the Statute of Repose put Plaintiffs on undeniable legal notice that the Record Plan received final approval at the February 26, 2011 public hearing. Similarly, the legal notice following the subsequent June 17, 2011 hearing, which appeared in the *News Journal* on June 23, 2011, also made clear what took place at that hearing, as well as what did not take place:

**LEGAL NOTICE: ON JUNE 17, 2011, THE COMMISSIONERS OF THE TOWN OF DEWEY BEACH DELAWARE HELD A PUBLIC HEARING IN REGARD TO CERTAIN PROVISIONS OF A PREVIOUSLY APPROVED MUTUAL AGREEMENT AND RELEASE ADOPTED BY RESOLUTION OF THE TOWN COMMISSIONERS ON FEBRUARY 26, 2011 (THE “RESOLUTION”). THE RESOLUTION RELATES TO THE REDEVELOPMENT OF THE RUDDERTOWNE PROPERTY LOCATED ON THE BAYSIDE OF DEWEY BEACH BETWEEN VAN DYKE AVENUE AND DICKINSON AVENUE, WITH AN ADDRESS OF 124 DICKINSON AVENUE, DEWEY BEACH, DELAWARE, 19971, AND ALSO KNOWN AS SUSSEX COUNTY TAX PARCEL NUMBERS 334-23.06-1.00, 334-23.06-2.00 AND 334-23.06-3.00.**

**IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN THE RESOLUTION, THE TOWN COMMISSIONERS GRANTED CERTAIN FINAL APPROVALS AT THE JUNE 17, 2011 HEARING. SPECIFICALLY, THE TOWN OF DEWEY BEACH GRANTED FINAL APPROVALS REGARDING THE LOCATION AND SIZE OF THE GAZEBO, THE BAY WALK, THE USES WITHIN THE DEDICATED TOWN SPACE AND REGARDING WHETHER THE FINAL CONSTRUCTION PLANS SATISFY THE CONDITIONS OF THE PREVIOUSLY APPROVED RECORD PLAT PLAN AND PREVIOUSLY APPROVED BUILDING PERMIT.**

**THE ABOVE REFERENCED CONSTRUCTION PLANS, PREVIOUSLY APPROVED RESOLUTION, PREVIOUSLY APPROVED RECORD PLAT PLAN AND PREVIOUS BUILDING PERMIT APPROVAL ARE AVAILABLE FOR REVIEW AT THE DEWEY BEACH TOWN HALL LOCATED AT 105 RODNEY AVENUE, DEWEY BEACH, DELAWARE 19971, PHONE NUMBER (302)227-6363. (DBE OB, Ex 32).**

Nothing in the above legal notice of approval, the notice of public hearing (DBE OB, Ex. 32), the transcript (DBE RB, Ex. 38) or the Town minutes (DBE OB, Ex. 32) suggests or implies that the Record Plan needed or received a “final” approval or otherwise required some type of double approval on June 17, 2011. Moreover, the Board of Adjustment filing raised in Plaintiffs’ own answering brief (and addressed herein, *infra*, at ¶ C) was filed based upon the finality of the February 26, 2011 Resolution approving the Record Plan, not the subsequent June 17, 2011 hearing date, which Plaintiffs now insist was the final hearing for the Record Plan. If Plaintiffs truly believed the June 17<sup>th</sup> hearing date was some type of final Record Plan approval date as they now insist they did, then there simply was no reason to attempt an appeal the February 26<sup>th</sup> actions of the Town Commission to the Board of Adjustment within 30 days thereafter which is the statutory deadline for proper appeals to the Board of Adjustment.<sup>12</sup>

In sum, when the Resolution (including the MAR) is read in the proper and complete context, it is clear that any “final” approval language in the MAR was limited to only very specific matters – *i.e.*, Town amenities and final construction plans. This is exactly why the MAR did not provide for the Planning Commission to make any

---

<sup>12</sup> Plaintiffs appeal was not a “proper” appeal because the Board of Adjustment is not empowered to hear appeals from decisions of the Town Commission.

recommendation in regard to the Record Plan itself – the Record Plan had already been approved on February 26, 2011 by the Town Commission making it irrelevant for the Planning Commission to make a recommendation in regard to the Record Plan.

This likely explains why only eleven (11) people testified at the June 17<sup>th</sup> public hearing, and not a single one of them was a Plaintiff in this case. (DBE RB, Ex. 38) Thus, essentially Plaintiffs ask this Court to somehow believe that after “three and a half years of very hard work” none of the them bothered to testify at the very public hearing that would decide once and for all the final fate of the project Plaintiffs vehemently opposed – now that is a “hard pill to swallow”. (DBE RB, Ex. 38).

Lastly, if somehow there was any question in the minds of Plaintiffs about the legality of what transpired on February 26<sup>th</sup>, Plaintiffs should have filed this action no later than 60 days following the March 1, 2011 legal notice published in the News Journal. Plaintiffs simply chose not to. Plaintiffs should not now expect this Court to ignore the record or otherwise re-write the 60 day deadline contained in the Statute of Repose.

**C. The Court should dismiss Plaintiffs’ claims related to approval of the building permit because Plaintiffs possessed an adequate remedy at law**

The facts and law central to the conclusion that the Court lacks subject matter jurisdiction over the Building Inspector’s approval of the building permit due to the presence of an adequate remedy at law are undisputed by Plaintiffs’ answering brief. Specifically: (a) Plaintiffs’ brief does not dispute that the Court lacks subject matter jurisdiction if Plaintiffs had an adequate remedy at law that they failed to timely pursue;

(b) Plaintiffs' brief does not dispute that, on February 26, 2011, Dewey Beach Building Inspector William Mears signed the Record Plan<sup>13</sup> which incorporated his approval of the Ruddertowne building permits combined into a single permit as reflected in Plan Note 27 (DBE OB, Ex. 2);<sup>14</sup> (c) Plaintiffs' brief does not dispute that "[b]ecause the Dewey Beach Code speaks in terms of 'approval' not 'issuance' [of the building permit], February 26<sup>th</sup> is the date upon which the time to appeal to the Board of Adjustment began to run"<sup>15</sup> (DBE OB at 36); (d) Plaintiffs' brief does not dispute that neither Plaintiffs nor anyone else timely appealed the **Building Inspector's approval** of the Ruddertowne building permit to the Board of Adjustment;<sup>16</sup> and (e) Plaintiffs' brief does not dispute that an

---

<sup>13</sup> The Record Plan, of course, being a "plat" submitting under the Zoning Code which he had to approve or deny by law.

<sup>14</sup> Even if Plaintiffs were to claim that the building permit was not *approved* until the July 15, 2011 date on which it was *issued*, the ultimate legal conclusion is the same – the Court lacks jurisdiction to review the building permit because the Plaintiffs failed to pursue an adequate remedy at law. Plaintiffs could have, but did not, appeal the Building Inspector's approval to the Board of Adjustment within 30 days of July 15, 2011 either.

<sup>15</sup> Plaintiffs' Amended Complaint alleges "the building permit [was] finally approved and issued thereafter on July 15, 2011...." Amended Complaint ¶ 16. However, even if the July 15, 2011 date on which the Town *issued* the building permit was the operative date for commencement of the appeal period, which it is not because the appeal time runs from the date of *approval*, it is undisputed that neither Plaintiffs nor anyone else for that matter ever appealed the Building Inspector's approval of the building permit (which included the Record Plan) to the Board of Adjustment within 30 days of February 26, 2011. And, the March 1, 2011 legal notice published in the *News Journal* (quoted, *supra*) specifically advised that the Building Inspector had approved the Ruddertowne building permit. DBE OB, Ex. 24.

<sup>16</sup> Plaintiffs' brief does note that an appeal was filed with the Board of Adjustment. However, that appeal was filed via a Town appeal form signed only by Joan Claybrook as the sole appellant. DBE OB, Ex. 26. The Claybrook appeal form expressly stated that Ms. Claybrook was appealing the "Town Council Administrative Decision on

(Continued)

appeal to the Board of Adjustment, with a right to a subsequent appeal to the Superior Court and then Supreme Court provides an adequate remedy at law to challenge the Building Inspector's approval of a building permit. Therefore, it is undisputed that Plaintiffs had an adequate remedy at law to challenge the Dewey Beach Building Inspector's approval of the Ruddertowne building permit and, as a result, this Court's lacks subject matter jurisdiction over Plaintiffs' challenge to the approval of the building permit.

Tacitly conceding that they had a means of challenging the Building Inspector's approval of the building permit, Plaintiffs argue that "no adequate legal remedy existed which . . . precludes Plaintiffs' challenge to the DBTC's approval of the Ruddertowne

---

(Continued)

Ruddertowne\MAR." DBE OB, Ex. 26. Plaintiffs do not and can not contend that Ms. Claybrook appealed anything other than approvals of the Dewey Beach Town Commissioners – not a decision by the Building Inspector. DBE OB, Ex. 26. As noted by the Town Manager in her letter rejecting the Claybrook appeal and by DBE in its opening brief, the Board of Adjustment did not have jurisdiction to hear an appeal of the Town Commissioners' approvals. Therefore, the Town Manager correctly refused to schedule a hearing for Ms. Claybrook's appeal that appealed *only* the decision of the Dewey Beach Town Commissioners. Compl. 62; DBE OB, Ex. 29, p. 2 (rejecting Ms. Claybrook's appeal as "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").

Plaintiffs failed to respond to DBE's argument that no Plaintiff was a party to the appeals filed by Ms. Claybrook. DBE OB at 36-37, fn. 44. Plaintiffs do not dispute, nor could they, that no Plaintiff signed the appeal forms filed by Ms. Claybrook. Plaintiffs baldly state in their brief that Plaintiffs Murray and Cadell filed an appeal with the Board of Adjustment, AB at 26, yet they failed to address the legal authority DBE cited that holds that individuals who do not sign the appeal papers are not parties to the appeal. *See* DBE OB at 36-37, fn. 44 (collecting authorities). Plaintiffs clearly failed to pursue the legal remedy available to them to challenge the approval of the Building Permit.

building permit because **decisions of the DBTC** are not within the appellate jurisdiction of the Town's Board of Adjustment." AB, p.26 (original capitalization, bolding underlining added herein). Thus, in their brief, Plaintiffs ask this Court to review the **Town Commissioners' approval** of the building permit, as distinguished from the **Building Inspector's approval** of the building permit. However, this request is a red herring designed to distract the Court's attention from the undisputed facts and law.

As Plaintiffs' allege in their Amended Complaint:

Because the Town's Building Inspector is the sole legal authority empowered to evaluate building permit applications and issue building permits, the DBTC's purported "final approval" of a building permit application by adoption of a Resolution on February 26, 2011 was altogether ineffective as it relates to the actual issuance of a building permit to DBE/RRI.

Amended Complaint ¶ 46 (emphasis added). Assuming, *arguendo*, that this legal conclusion is correct, it only further buttresses DBE's argument that Plaintiffs had an adequate remedy at law to challenge the building permit through a properly filed appeal with the Board of Adjustment. Indeed, if the Town Commissioners' approval of the building permit had no legal effect, then it is clear that Plaintiffs had to challenge the acts of the Building Inspector in approving the building permit – Plaintiffs never did.

Furthermore, if the Building Inspector had not approved the building permit as is required by code, DBE would not have been a valid permit today. The fact the Town Commissioners also approved the permit certainly does not affect the validity of the Building Inspector's approval, render the Building Inspector's approval unnecessary or otherwise change the fact that Plaintiffs had a means of challenging the Building

Inspector's approval with the Board of Adjustment which they chose not to pursue.<sup>17</sup>

Accordingly, this Court should reject Plaintiffs' argument that the Town Commissioners' approval of the building permit, required by the MAR, but not the Zoning Code, somehow vitiated the well-established adequate remedy at law to appeal a Building Inspector's approval to the Board of Adjustment.<sup>18</sup>

Plaintiffs make a number of accusations/arguments in their Answering Brief which are both incorrect and have no bearing on whether or not Plaintiffs had an adequate remedy at law that they failed to pursue. For example, Plaintiffs claim that the Town "intentionally and conspicuously" failed to join DBE's argument that the Court lacks subject matter jurisdiction over Plaintiffs' claims related to the building permit approval. AB at 15. *See also* AB at 2-3 (claiming that DBE makes the argument

---

<sup>17</sup> *See Campbell v. Teaneck TP. Committee, Bergen County*, 129 A. 757, 759 (N.J. 1925) (upholding passage of ordinance and stating: "I can see no harm in having afforded the taxpayers of the township a double opportunity to protest against the passage of the ordinance. *In fact the township did more than the law required of it, in order to pass an ordinance on which the people of the township had been fully heard.*"); *In re: City of Johnstown Annexation*, 19 Pa D. & C 715, 724 (Pa. Quar. Sess. 1957) (rejecting challenge to annexation based on sufficiency of the plot plan and stating "we cannot believe that the showing of more than was required by the statute would in any way invalidate the proceedings"); *Hunting v. Minard*, 23 Pa D & C 224, 251 (Pa.Com.Pl. 1935) (stating, in rejecting challenge to service, "[w]here what the law requires is done, the doing of additional superfluous acts will not vitiate the service").

<sup>18</sup> Moreover, even if the Court were to find that it has jurisdiction to review the Town Commissioners' approval of the building permit, as differentiated from the Building Inspector's approval, the Building Inspector's approval of the building permit would stand. As explained in DBE's opening brief, the Board of Adjustment, Superior Court and Supreme Court had exclusive jurisdiction over an appeal of the approval of the Building Permit by the Building Inspector. 22 *Del. C.* §§ 324 & 328; Dewey Beach Municipal Code §§ 71-3(F) 185-65 & 185-66.

“without the Town’s support”). In fact, the Town joined in **all** arguments that DBE made in its opening brief: “the Town adopts and incorporates, as if fully set forth herein, the Motion and Brief to be filed on behalf of Defendant Dewey Beach Enterprises, Inc.” Town’s Motion to Dismiss Amended Complaint at ¶ 6.

Plaintiffs further misconstrue DBE’s and the Town’s position to allege that there is a divergence of positions between DBE and the Town and that DBE and the Town have supposed “shifting litigation positions.” AB at 29. There is no divergence of positions between DBE and the Town. Nor has there been any change in DBE’s and the Town’s position on what the law mandates. Indeed, DBE and the Town’s position is supported by the law; Plaintiffs’ is not.

Plaintiffs claim that DBE argues “that the BOA had exclusive appellate jurisdiction *over the MAR*.” AB at 3 (emphasis added). DBE made no such argument. Both DBE and the Town have correctly and consistently noted that the Dewey Beach Board of Adjustment lacks jurisdiction to hear an appeal of a decision of the Dewey Beach Town Commissioners, *i.e.*, the MAR.<sup>19</sup> DBE argued, and the Town joined the argument, that the BOA had exclusive appellate jurisdiction over **the approval of the Ruddertowne Building Permit by the Building Inspector**. DBE OB at 33-37; Town Motion to Dismiss ¶ 6.

---

<sup>19</sup> 22 *Del. C.* § 324 (allowing appeals to the board of adjustment by a person aggrieved by “any decision of the *administrative officer*”) (emphasis added); Dewey Beach Municipal Code § 185-66(A) (empowering the Board of Adjustment to hear appeals of “any order, requirement, decision of determination by an *administrative official*.”) (emphasis added).

Neither the Town nor DBE has ever taken the position that an appeal of the approval of the Ruddertowne building permit by the Building Inspector<sup>20</sup> does *not* properly lie to the Board of Adjustment. That is, in fact, the only proper procedure to appeal approval of the building permit. Indeed, the Delaware Code and Dewey Beach Municipal Code make clear that appeals related to the approval of a Dewey Beach building permit belong before the Dewey Beach Board of Adjustment, Delaware Superior Court, and ultimately the Delaware Supreme Court.<sup>21</sup>

However, as discussed above, it is undisputed that the Plaintiffs (or anyone else for that matter) ever appealed the Building Inspector's approval of the Ruddertowne building permit (including the plat) to the Board of Adjustment; rather, the only appeal filed to the Board of Adjustment was in regard *only* to the actions of the Dewey Beach Town Commissioners, and even in that case none of the Plaintiffs signed on as a party to the appeal. *See* DBE OB, Ex. 26.

Plaintiffs certainly could have appealed the Building Inspector's approval of the Ruddertowne building permit. The Town Manager specifically informed Ms. Claybrook

---

<sup>20</sup> As Plaintiffs agree, under the Dewey Beach Municipal Code, the Building Inspector is the official empowered to approve or deny building permits on behalf of the Town. Dewey Beach Municipal Code § 71-3. Section 71-3(A) provides, in pertinent part: "Any person who may desire to erect, alter, repair, move, raze, or add to any building or other structure, including fences, bulkheads and retaining walls, within the Town, shall first apply to the Town for a building permit. The applicant shall submit plans and specifications therefore, and shall not deviate from the plans and specifications as approved, unless authorized in writing by the Building Inspector." Section 71-3(E) provides in pertinent part: "This section shall be administered by the Building Inspector."

<sup>21</sup> 22 *Del. C.* §§ 324 & 328; Dewey Beach Municipal Code §§ 71-3(F) 185-65 & 185-66.

that her appeal was improper because it was not an appeal of “an order, requirement, decision, or determination of an administrative official.” There is nothing in that correct statement of law from which to conclude that the Town believed that one could not appeal the Building Inspector’s approval of the building permit to the Board of Adjustment. The Town certainly responded to the improper appeal presented to it by Ms. Claybrook, but certainly could not respond to an appeal never properly presented to it. The Plaintiffs’ misapprehension of the law should not now excuse them from failing to pursue their adequate remedy at law.<sup>22</sup> In addition, Ms. Claybrook and the Plaintiffs (assuming, *arguendo*, Plaintiffs were appellants) could have filed a direct appeal to the Superior Court of Delaware. Indeed, a direct appeal to the Delaware Superior Court could have been taken within 30 days of the Town Manager’s rejection of the appeals.<sup>23</sup> Lastly, Ms. Claybrook and Plaintiffs (assuming, *arguendo*, Plaintiffs were appellants) could have also sought a *writ of certiorari* with the Superior Court of Delaware within 30 days of her appeal being rejected.<sup>24</sup> However, Ms. Claybrook and the Plaintiffs elected not to pursue a *writ of certiorari*.

---

<sup>22</sup> *Savage v. Savage*, 920 A.2d 403, 412 (Del. Ch. 2006) (“The reason for a party’s failure to pursue its legal remedy is irrelevant to the question of this Court’s jurisdiction.”).

<sup>23</sup> 22 *Del. C.* § 328. *See, e.g., Worldwide Salvage, Inc. v. Environmental Appeals Board*, 1986 WL 3650 (Del. Super. Jan. 30, 1986) (reviewing decision of administrative assistant that Board lacked jurisdiction to hear appeal).

<sup>24</sup> *Elcorta v. Summit Aviation*, 528 A2d 1199, 1201 (Del. Super. 1987); *Cape Henlopen Sch. Dist. v. Del. Interscholastic Athletic Assoc.*, 2009 WL 388944, at \*2 (Del. Super. Jan. 29, 2009).

In sum, Plaintiffs chose not to timely appeal the Building Inspector's February 26, 2011 approval of the building permit to the Board of Adjustment and, therefore, failed to timely pursue their legal remedy. Because none of the Plaintiffs appealed the decision of the Building Inspector to the Board of Adjustment within 30 days of his February 26, 2011 approval of the building permit,<sup>25</sup> Plaintiffs' claims should be dismissed. Indeed, Plaintiffs clearly had an adequate remedy at law available to them to challenge the Building Inspector's approval of DBE's building permit, but failed to act upon it.<sup>26</sup> The Plaintiffs' failure to pursue their adequate remedies at law cannot now be used by Plaintiffs to confer jurisdiction on this Court; therefore, the Court should dismiss the Amended Complaint.<sup>27</sup>

---

<sup>25</sup> The Record Plan incorporated DBE's building permit approval at Record Plan note 27.

<sup>26</sup> Moreover, even if the Court were to find that it has jurisdiction to review the Town Commissioners' approval of the Building Permit, as differentiated from the Building Inspector's approval, the Building Inspector's approval of the Building Permit would stand. As explained herein and in DBE's opening brief, the Board of Adjustment, Superior Court and Supreme Court had exclusive jurisdiction over an appeal of the approval of the Building Permit by the Building Inspector. 22 *Del. C.* §§ 324 & 328; Dewey Beach Municipal Code §§ 71-3(F) 185-65 & 185-66. Any appeal to the Board of Adjustment of the Building Inspector's approval of the Ruddertowne Building Permit is now time-barred. Dewey Beach Municipal Code § 185-65(B) (“[An appeal to the Board of Adjustment from a decision of an administrative official] shall be taken within 30 days after the decision appealed from....”).

<sup>27</sup> 10 *Del. C.* § 342; *Savage*, 920 A.2d at 411 (“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.”); *In the Matter of the Real Property of Former Wife, K. and Former Husband, K.*, 297 A.2d 424, 425 (Del. Ch. 1972) (“[t]he doors of a court of equity which would be closed to a vigilant litigant because he has a statutory remedy do not open to him upon his showing that he has ignored that remedy.”).

**D. Plaintiffs lack standing**

DBE adopts and incorporates herein by reference the arguments regarding standing made by the Town of Dewey Beach in its reply brief in support of its motion to dismiss.

**II. Plaintiffs' Amended Complaint should be stricken**

DBE adopts and incorporates herein by reference the arguments regarding the impropriety of the Amended Complaint made by the Town of Dewey Beach in its reply brief in support of its motion to strike the Amended Complaint. However, DBE continues to believe that the pending motions to dismiss should be given priority over the motion to strike, because the dismissal motions offer a practical opportunity to cut through expensive and time consuming legal maneuvering and determine if the Amended Complaint is time barred and/or fails for lack of standing as argued by Defendants.

## CONCLUSION

Plaintiffs have failed to carry their burden to prove that the Court subject matter jurisdiction over Plaintiffs' Complaint. Plaintiffs failed to prove that the claims regarding the approval of the Resolution are timely and not barred by the Statute of Repose. 10 *Del. C.* § 8126. Further, Plaintiffs failed to prove that they lacked an adequate remedy at law regarding the approval of DBE's building permit by the Building Inspector. Plaintiffs failed to show that their failure to pursue their remedies at law somehow conferred jurisdiction on this Court. Moreover, Plaintiffs lack standing. Accordingly, DBE and RRI respectfully request that the Court grant their Motion to Dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6).

Dated: December 23, 2011

### **DRINKER BIDDLE & REATH LLP**

/s/ Shawn P. Tucker

William T. Quillen (No. 179)  
Shawn P. Tucker (No. 3326)  
Karen V. Sullivan (No. 3872)  
1100 N. Market Street  
Suite 1000  
Wilmington, DE 19801  
Telephone: (302) 467-4200  
Facsimile: (302) 467-4201  
William.Quillen@dbr.com  
Shawn.Tucker@dbr.com  
Karen.Sullivan@dbr.com

*Attorneys for Defendants Dewey Beach  
Enterprises, Inc. and Ruddertowne  
Redevelopment, Inc.*