EFiled: Oct 06 2022 01:06PM EDT
Filing ID 68221349
Case Number 294,2022D

IN THE

# Supreme Court of the State of Delaware

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| ALAPOCAS MAINTENANCE CORPORATION and ALAPOCAS MAINTENANCE CORPORATION BOARD OF DIRECTORS,<br><br>Defendants Below, Appellants,<br><br>v.<br><br>WILMINGTON FRIENDS SCHOOL, INC.,<br><br>Plaintiff Below, Appellee. | **No. 294, 2022**<br><br>COURT BELOW:<br><br>COURT OF CHANCERY OF THE STATE OF DELAWARE,<br>C.A. No. 2021-0655-SG |

# APPELLANTS' CORRECTED OPENING BRIEF

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Dated: October 6, 2022

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## NATURE OF PROCEEDINGS

Alapocas is a primarily residential Wilmington neighborhood consisting of 131 homes. Appellant-Defendant Alapocas Maintenance Corporation is the successor to the deed restrictions (the "Deed Restrictions") imposed by William Bancroft in creating Alapocas in the 1930s. The business and affairs of the Alapocas Maintenance Corporation, including enforcement of the Deed Restrictions, are carried on by co-Appellant-Defendant Alapocas Maintenance Corporation Board of Directors (the "AMC Board," together with the Alapocas Maintenance Corporation, the "AMC"). Appellee-Plaintiff Wilmington Friends School, Inc. ("WFS") is a private school and the owner of the only non-residential property in Alapocas.

On October 8, 2020, WFS sought AMC approval under the Deed Restrictions to build a new elementary school facility on WFS's "Upper School" campus in Alapocas (the "Lower School Proposal"). The Lower School Proposal, which WFS developed to replace the separate elementary school campus that WFS has agreed to sell to Incyte Corporation ("Incyte") for $50 million, seeks to add a new "lower" school (i.e., pre-school through fifth grade), and all that comes with one (e.g., large buildings, expanded parking, and additional street entranceways), to the existing Upper School campus in Alapocas that has housed WFS's sixth through twelfth grades for decades.

After considering WFS's request, the AMC Board denied the Lower School Proposal. In a letter dated January 7, 2021, the AMC Board explained, among other things, that "the loss of open space … that would arise from the Lower School [Proposal] would be inharmonious with the neighborhood and its surroundings and would additionally upend the neighborhood's space-building ratio." A37. It also explained that the new buildings would negatively impact "the views from adjacent and neighboring homes." *Id.*

On July 27, 2021, WFS initiated this litigation. The gravamen of WFS's complaint alleges that Paragraph 5 of the Deed Restrictions does not apply to WFS. The AMC answered on August 18, 2021, and unsuccessful mediation sessions with the late Justice Holland followed. WFS then moved for judgment on the pleadings (as to Count I) on November 29, 2021 on the sole basis that Paragraph 5 allegedly does not apply to WFS. The AMC cross-moved for judgment on the pleadings on December 17, 2021. Following briefing, argument was held on February 8, 2022.

On June 14, 2022, the Court of Chancery (the "Court") issued a 10-page letter opinion (the "Letter Opinion" or "Opinion") (attached as Ex. A) granting judgment on the pleadings in favor of WFS. The Court did not reach WFS's principal argument. Instead, it assumed that Paragraph 5 applied to WFS but limited the enforceability of the harmony criteria therein to communities with distinctive architectural styles. The Court then found, solely on the pleadings, that the AMC

Board's denial determination was arbitrarily based on its aesthetic sensibilities. The Letter Opinion did not address the outlook criteria also relied on by the AMC Board.

On July 20, 2022, the Court entered an implementing Order and Final Judgment (attached as Ex. B). On August 19, 2022, the AMC filed its notice appealing the Order and Final Judgment. This is the AMC's opening brief in support of its appeal.

## SUMMARY OF ARGUMENT

1. The Court erred as a matter of law in holding that the enforceability of harmony criteria in deed restrictions is limited to instances where a community has a distinctive architectural style. While harmony unquestionably applies in situations like those at issue in *Dolan v. Villages of Clearwater Homeowner's Ass'n, Inc.*, 2005 WL 2810724 (Del. Ch. Oct. 21, 2005) where a community has a distinctive architectural style (e.g., a Key West architectural style), harmony criteria is also enforced "where the proposed building is obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied." *BBD Beach LLC v. Bayberry Dunes Ass'n*, 2022 WL 763466, at *6 (Del. Ch. Mar. 10, 2022) (Master's Report) (citing, *inter alia*, *Lawhon v. Winding Ridge Homeowners Ass'n, Inc.*, 2008 WL 5459246, at *4, 8 (Del. Ch. Dec. 31, 2008)). The Court departed from this latter precedent in limiting its harmony analysis to instances in which a community has a distinctive architectural style, and went so far as to suggest erroneously that harmony is only enforceable under circumstances similar to those in *Dolan*. Opinion at 10 n.30 ("[A]bsent the unusual situation of a coherent development regime as in *Dolan* which in context can provide objective criteria, an appeal to harmony is simply an appeal to an aesthetic sensibility."). This unduly narrow view of the circumstances in which Delaware courts uphold the enforceability of harmony criteria was legal error.

2. The Court relatedly erred as a matter of law in finding, on the pleadings, that the AMC Board's harmony determination was arbitrarily based on its aesthetic sensibilities, rather than considering whether the Lower School Proposal was objectively incongruous with its surroundings and the greater Alapocas neighborhood. This finding was made despite the absence of any supporting allegations by WFS in its Complaint. It was also made without any consideration of the AMC Board's January 7 letter setting forth the reasons underlying the Board's denial determination, which, at a minimum, raises the issue of whether the Lower School Proposal *could* be found, as a factual matter, to be objectively incongruous with the Alapocas neighborhood. The Court instead improperly drew pleading-stage inferences in favor of WFS in finding that the AMC Board acted arbitrarily in denying the Lower School Proposal. This finding was legal error.

3. The Court separately erred as a matter of law in failing to consider the outlook criteria in Paragraph 5 of the Deed Restrictions that the AMC Board also relied on in denying the Lower School Proposal. As an initial matter, the Court's statement, without citation, that the AMC conceded "that the only one of the criteria set out in Paragraph 5 that is *not* unenforceable is 'harmony … with the surroundings,'" Opinion at 5, ignored the additional outlook criteria relied on by the AMC Board. A37; A228-30; A291. Delaware courts have separately recognized outlook as an enforceable consideration in applying deed restrictions where, as here,

another objectively enforceable factor applies too (i.e., the harmony of a proposal with its surroundings). *See, e.g.*, *Lawhon*, 2008 WL 5459246, at *8 (noting that "Delaware case law approves of evaluations made with" outlook). Outlook can moreover be objective in situations like those at issue here. Failing to consider the outlook criteria also relied on by the AMC Board was legal error.

## STATEMENT OF FACTS

### A. Alapocas and the Relevant Parties

Alapocas is a primarily residential community in North Wilmington created by William Bancroft and the Woodlawn Trustees, Incorporated ("Woodlawn"), which was Bancroft's not-for-profit corporation. A19 ¶ 13; A38. Alapocas was one of numerous Wilmington communities designed by Bancroft and Woodlawn to "create attractive neighborhoods and resist unwanted development, over crowdedness, and loss of green space." A38.

The Alapocas Maintenance Corporation is a Delaware corporation and the successor to Woodlawn by an Assignment of Rights and Easements dated February 2, 1973. A17-18 ¶¶ 2, 6. The AMC Board carries on the Alapocas Maintenance Corporation's business and affairs, including enforcement of the Deed Restrictions. A18 ¶ 7; A49 ¶ 7.[1] At the time it considered the Lower School Proposal, the AMC Board was comprised of nine volunteer residents. A39; A155.

WFS is a private school with two campuses. A17-18 ¶ 5; A76. WFS's main Upper School campus sits on an approximately 21-acre plot of land at the heart of

[1] "Deed Restrictions" refer to the Deed of Woodlawn Trustees, Incorporated, dated December 10, 1936, by which the Alapocas community (including WFS's main Upper School campus) was subjected to specific limitations, reservations, restrictions, and conditions. A17 ¶ 2; A28-33. The Deed Restrictions include, among other things, a Consent to Amendment, dated September 15, 1972, removing a racial restrictive covenant in the original indenture. A47 ¶ 2.

Alapocas and serves students from sixth through twelfth grade. Opinion at 4 n.10; A37. The Upper School campus is the only non-residential property in the Alapocas neighborhood. Opinion at 7; A364:1-6. The Lower School campus is located adjacent to the southwest portion of Alapocas and serves students from pre-school through fifth grade. A76.

### B. WFS Agrees to Sell its Lower School Campus to Incyte.

On October 11, 2019, WFS announced that it had entered into a contingent agreement to sell its Lower School campus to Incyte (the "Incyte Sale"). A19 ¶ 11; A141-44. WFS relatedly announced that as a result of the Incyte Sale it was "exploring the possibility of building a state-of-the-art lower school complex on [its] main [Upper School] campus." A141. WFS will receive $50 million from the Incyte Sale. A414. WFS has relatedly stated that it will proceed with the Incyte Sale (and thus receive the $50 million sale proceeds) regardless of whether it ultimately relocates its existing Lower School facility to the Upper School campus. A41.

### C. WFS Seeks AMC Approval of the Lower School Proposal.

On October 8, 2020, WFS formally asked the AMC Board to consider and approve WFS's pre-drafted "Declaration of Approval" seeking AMC approval under the Deed Restrictions of the Lower School Proposal ("WFS's Request for Approval"). A65-71. WFS's Request for Approval confirms that WFS seeks to add a new lower school on the Upper School campus. Specifically, WFS seeks to replace

the Upper School's acres of green fields and open space with multiple, large, multi-story buildings. A74-138. Among other things, WFS also seeks to more than double the number of parking spots on the property (to 249), A84, and add three new entrance ways onto existing Alapocas streets (two on Alapocas Drive and one on Norris Road). A79. All of this would come at the expense of the open space and green fields that predominate the Upper School campus, which will be reduced by approximately half. A77, A82. The full scale and impact of the Lower School Proposal is illustrated in the slides submitted with WFS's Request for Approval. *See, e.g.*, A77, A82, A104-05, A120.

**D. The AMC's Decision to Deny the Lower School Proposal**

WFS has previously sought AMC approval for far less significant changes to the main school building on the Upper School campus: (i) a new gymnasium in 1997, (ii) an auditorium and atrium in 2013, and (iii) additional classrooms in 2014. A169-93. The AMC accommodated WFS and approved each of these prior proposals. Indeed, before the Lower School Proposal in question, the AMC had never denied a proposed construction request of WFS. A38; A324:7-12.

But on January 7, 2021, the AMC Board informed WFS of its unanimous decision to deny WFS's Request for Approval given the fundamentally different nature and scale of the Lower School Proposal. A21 ¶ 20; A35-39. As noted in its January 7 letter, the AMC Board concluded that "[t]he Lower School [Proposal]

would substantially increase the developed areas of the WFS main campus to the detriment of the existing open, green space at the heart of the neighborhood" in a way that "would be inharmonious with the neighborhood and its surroundings and would additionally upend the neighborhood's space-building ratio." A37. In coming to this conclusion, the AMC Board also considered WFS's proposed addition of "parking lots and roadways on existing playing fields" and that the contemplated multi-story buildings would "obstruct serene views and inject crowdedness to the existing peaceful views" and increase "building light." *Id*. It additionally considered that the Lower School Proposal would negatively impact "the views from adjacent and neighboring homes." *Id.* The AMC Board therefore denied the Lower School Proposal, finding that it "would significantly, substantially, and irreparably alter the character of Alapocas by introducing buildings and vehicle traffic that are out of scale and character of the neighborhood." *Id.*

In making this determination, the AMC Board relied on Paragraphs 3 and 5 of the Deed Restrictions. A35-36.

Paragraph 3 provides that:

> Buildings to be used for schools, churches, libraries, or for recreational, educational, religious or philanthropic purposes may be erected and maintained in locations approved by said Woodlawn Trustees, Incorporated, provided the design of such building be approved by said Woodlawn Trustees, Incorporated, and further provided there has been filed in the office of the Recorder of Deeds, in and for New Castle County, an Indenture or other Instrument of Writing executed by the

> said Woodlawn Trustees, Incorporated, approving the location, design, and limiting the uses to which such buildings may be put.

A30 ¶ 3.

Paragraph 5 provides that:

> No building, fence, wall or other structure shall be commenced, erected or maintained, nor shall any addition to or change or alteration therein be made, until plans and specifications, plot plan and grading plan, or satisfactory information shall have been submitted to and approved in writing by said Woodlawn Trustees, Incorporated. *The said Woodlawn Trustees, Incorporated, shall have the right to refuse to approve any such plans or specifications which in its opinion are not suitable or desirable; and in so passing upon such plans and specifications the said Woodlawn Trustees, Incorporated, may take into consideration* the suitability of the proposed building or other structure and of the materials of which it is to be built, to the site upon which it is proposed to erect same, *the harmony thereof with the surroundings and the effect of the building or other structure as planned on the outlook from the adjacent or neighboring properties*.

A31 ¶ 5 (emphasis added). Specifically, the AMC Board relied on the "harmony" and "outlook" criteria in Paragraph 5 highlighted directly above.

### E. The Parties' Subsequent Communications

WFS responded to the AMC Board's January 7 letter on February 11, 2021. A41-44. An attachment to WFS's February 11 letter listed its specific disagreements with the denial determination, including WFS's principal argument that "Paragraph 3 of the Deed Restrictions are the only restrictions applicable to requests from WFS" and, relatedly, that "[t]he restrictions contained in Paragraph 5 of the Deed

Restrictions apply to residential lots and are not applicable to WFS's [R]equest [for Approval]." A43.

Further communication between the parties followed, including a July 1, 2021 letter to WFS in which the AMC Board invited further discussion and engagement. A55 ¶ 22; A146-47. That invitation went unacknowledged until the day WFS filed this litigation.

**F. This Litigation**

In its July 27, 2021 complaint (the "Complaint"), WFS asserted two claims for declaratory relief regarding the Deed Restrictions. A23-24 ¶¶ 29, 36. WFS also sought to "enjoin Defendants from interfering with its construction of the Lower School [Proposal]," A24 ¶ 42, and an award of attorneys' fees and costs pursuant to 10 *Del. C*. § 348(e), A24 ¶ 44. Consistent with the February 11 letter, the gravamen of the Complaint was WFS's position that Paragraph 5 of the Deed Restrictions does not apply to WFS. And while WFS also alleged, in a conclusory fashion without any specific facts or elaboration, that the AMC Board's denial under the Deed Restrictions "was not based on any objective criteria," A21-22 ¶ 21, the Complaint lacks any allegation that the Board's denial determination was arbitrary, any allegation concerning the extent to which the Board's denial determination may have been arbitrary, or any allegation regarding whether the Lower School Proposal is congruous with its surroundings and the Alapocas neighborhood.

The AMC answered the Complaint on August 18, 2021. A45-147. Following unsuccessful mediation sessions with the late Justice Holland, WFS moved for judgment on the pleadings (as to Count I) on the sole basis that Paragraph 5 allegedly does not apply to WFS. A148-168. The AMC cross-moved for judgment on the pleadings based on both (i) its position that Paragraph 5 in fact applies to WFS and (ii) the conclusory manner in which WFS had alleged that the AMC Board's denial determination lacked objective criteria. A194-233. Following briefing, argument on the parties' cross-motions was held on February 8, 2022. A303-413.

### G. The Letter Opinion

On June 14, 2022, the Court issued its Letter Opinion ruling in favor of WFS. The Letter Opinion did not reach the principal question raised by WFS as to whether Paragraph 5 of the Deed Restrictions applies to WFS. Instead, the Court "assume[d], without deciding, that [Paragraph 5 does]." Opinion at 4. Relying on *Dolan v. Villages of Clearwater Homeowner's Ass'n, Inc*., 2005 WL 1252351, at *4 (Del. Ch. May 12, 2005) (Master's Report), *aff'd*, 2005 WL 2810724 (Del. Ch. Oct. 21, 2005), the Court held that the enforceability of harmony criteria like that in Paragraph 5 is limited to instances where a community has a distinctive architectural style (e.g., a Key West architectural style). Opinion at 6-8. The Court then found, solely on the pleadings (and absent any supporting allegation in the Complaint or consideration of the AMC Board's January 7 letter), that the AMC Board's denial determination

was arbitrarily based on its aesthetic sensibilities. *Id.* at 6, 9. The Court did not address the outlook criteria also relied on by the AMC Board in denying the Lower School Proposal.

## ARGUMENT

## I. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT THE HARMONY CRITERIA IN PARAGRAPH 5 OF THE DEED RESTRICTIONS RELIED ON BY THE AMC BOARD IS UNENFORCEABLE AS APPLIED TO WFS.

### A. Questions Presented

1. Did the Court err as a matter of law in holding that the enforceability of harmony criteria in deed restrictions is limited under Delaware law to instances where a community has a distinctive architectural style? This issue was raised below at A293-95, and expanded upon by the Court at A369-72, A387-90; Opinion at 6-8, 10 n.30.

2. Did the Court err as a matter of law in finding, on the pleadings (and absent any supporting allegation in the Complaint or consideration of the AMC Board's January 7 letter), that the Board's harmony determination was arbitrarily based on its aesthetic sensibilities? This issue was raised below at A228-31; A297-98, and expanded upon by the Court at Opinion at 6, 9-10.

### B. Standard of Review

Judgment on the pleadings is warranted when, viewing all well-pleaded facts and the reasonable inferences therefrom in the light most favorable to the non-moving party, "no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993). This Court's "review of the trial court's

grant of a motion for judgment on the pleadings presents a question of law, which [this Court] review[s] *de novo*." *Id.* at 1204.

### C. Merits of the Argument

Harmony criteria in deed restrictions has regularly been enforced by Delaware courts. Contrary to the narrow view of harmony adopted by the Court, the enforceability of such criteria is not limited to instances where a community has a distinctive architectural style (e.g., a Key West architectural style). Rather, harmony criteria is also upheld "where the proposed building is obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied." *BBD Beach*, 2022 WL 763466, at *6 (citing, *inter alia*, *Lawhon*, 2008 WL 5459246, at *4, 8). Stated differently, applications of harmony criteria are also upheld where a proposal is so large or outsized that it is "out of keeping with the neighborhood." *Christine Manor Civic Ass'n v. Gullo*, 2007 WL 3301024, at *2 (Del. Ch. Nov. 2, 2007). *See* Section I.C.1.

Delaware law also does not support the Court's related factual finding, on the pleadings, that the AMC Board's application of the Deed Restrictions' harmony provision was arbitrarily based on its aesthetic sensibilities. The Court's holding was erroneous given the procedural posture of motions for judgment on the pleadings—especially given that WFS did not allege facts in the Complaint

supportive of the Court's conclusion and the Court did not consider the AMC Board's January 7 denial letter. *See* Section I.C.2.

Finally, and as underscored by both WFS's status as the lone non-residential property in Alapocas and the limitless interpretation championed by WFS below, strong policy considerations support the enforceability of harmony determinations when exercised reasonably. *See* Section I.C.3.

### 1. The Enforceability of Harmony Criteria in Deed Restrictions Is Not Limited To Communities With Distinctive Architectural Styles.

Delaware courts "regularly enforce architectural review provisions designed to ensure the overall harmony of appearance within a community." *Lawhon*, 2008 WL 5459246, at *5. Such provisions have repeatedly been upheld where the neighborhood in question "possesses a 'sufficiently coherent visual style [to enable] fair and even-handed application'" and there is "'a reasoned, non-arbitrary basis for the reviewing authority to assess whether a proposal would disrupt the visual harmony of the affected community.'" *BBD Beach*, 2022 WL 763466, at *6 (quoting *Lawhon*, 2008 WL 5459246, at *5 and *Dolan*, 2005 WL 2810724, at *4); *see also Brandywood Civic Ass'n v. Freas*, 2018 WL 3210854, at *4 (Del. Ch. June 29, 2018) (Master's Report) ("Courts have held that standards considering '… the extent to which the structure will harmonize with the surroundings,' if objectively applied, may be valid."); *Christine Manor*, 2007 WL 3301024, at *2 (similar).

More concretely, Delaware law has upheld the imposition of harmony criteria in two distinct situations: first, "where the community has distinctive characteristics of a common scheme, such as a 'Key West' architectural style," and second, "where the proposed building is obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied." *BBD Beach*, 2022 WL 763466, at *6 (citations omitted). The Court departed from this precedent by limiting its harmony analysis to the first situation. Opinion at 7.

In doing so, the Court embraced *Dolan*, which is the paradigmatic case for applying harmony criteria in the distinctive architectural-style scenario. As explained by the Court in the Letter Opinion:

> [*Dolan*] involved homes built in Key West style—stilt homes with white pea gravel from the street to and under the house. The white gravel yards were obvious to the plaintiff at the time she bought her house, and to all who viewed the development.… The homeowner-plaintiff's proposed improvement was to remove the pea gravel and replace it with pavement. That was inconsistent with the "Key West" style, which itself was a unique and coherent style including the gravel yard as a significant architectural element. The Court found, therefore, that the "visual harmony" restriction under that particular set of facts could be (and had been) applied in a non-arbitrary manner.

Opinion at 7 (citing *Dolan*, 2005 WL 1252351, at *1-2, 5, 7).

Employing *Dolan* as the lynchpin of its holding, the Court devoted significant effort to distinguishing the instant case from *Dolan*, which it described as being "strictly cabined by [its] facts." Opinion at 6-8. Indeed, the Court erroneously suggested that harmony is only enforceable under circumstances similar to those in

*Dolan*. *See id.* at 10 n.30 ("[A]bsent the unusual situation of a coherent development regime as in *Dolan* which in context can provide objective criteria, an appeal to harmony is simply an appeal to an aesthetic sensibility.").

But in doing so, the Court applied an unduly narrow view of the circumstances in which Delaware courts uphold the enforceability of harmony criteria. To be sure, harmony unquestionably applies in instances like those in *Dolan* where a community has a distinctive architectural style. It is not, however, limited to those narrow circumstances. On the contrary, Delaware cases have also repeatedly upheld harmony determinations as enforceable "where the proposed building is obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied." *BBD Beach*, 2022 WL 763466, at *6 (citing, *inter alia*, *Lawhon*, 2008 WL 5459246, at *2, 8). Indeed, multiple cases have upheld the enforceability of harmony determinations where a proposal is "incongruous with" or "deviates so much from its surroundings" as to be inharmonious. *See, e.g.*, *Christine Manor*, 2007 WL 3301024, at *2 (upholding association's determination that "[t]he erection of a 40' by 30'-1,200 square [foot]-garage," which was "out of keeping with the neighborhood," "inconsistent with the values the Declaration seeks to preserve," and "not a reasonable structure for a residential neighborhood"); *Alliegro v. Home Owners of Edgewood Hills, Inc.*, 122 A.2d 910, 912-13 (Del. Ch. 1956) (upholding association's determination even though "there is no indication

that any particular type of architecture was adopted" in the neighborhood because of a house's "modest size and the effect of that factor on the outlook from neighboring properties"); *Lawhon*, 2008 WL 5459246, at *5 (upholding association's determination that a "home's color" was "disharmonious with a presently well-developed common scheme, and its proposed perpendicular orientation would create an incongruous appearance").[2]

*Christine Manor*, which featured prominently in the briefing and at argument below, is particularly instructive. There, a homeowner built a large garage despite an association's rejection of the proposal. The association sued for lack of compliance with deed restrictions that, as here, empowered it to reject the proposal as not "suitable or desirable" because the garage was not in "harmony with the surroundings." 2007 WL 3301024, at *1. The court agreed and ordered the homeowner to remove the garage because the association had "fair[ly] and objective[ly]" concluded that it was "out of keeping with the neighborhood,"

[2] These cases, which unlike *Dolan* were the cornerstone of the AMC's arguments below, were relegated to footnote 23 of the Letter Opinion with limited discussion. *See* Opinion at 7 n.23 (purporting to distinguish *Christine Manor*, *Alliegro*, and *Lawhon* on the basis that they "all involve restrictions on residential lots made objective by visual reference to other such lots"). Importantly, none limited their holdings to residential lots. Nor would it make sense to accord the only non-residential property in an otherwise residential neighborhood *less* oversight merely because there are no other non-residential structures to compare it to. Regardless, the fact that WFS is the only school in Alapocas does not mean that *anything* of *any* size built by WFS could not be objectively incongruous with the neighborhood.

"inconsistent with the values the [restrictions] seek[] to preserve," and "not a reasonable structure for a residential neighborhood." *Id.* at *2.

Notably, the governing deed restrictions in *Christine Manor* (referred to therein as the "Declaration") did "not list size as an explicit criterion," and the court recognized that the Declaration "[did] not have the detail or the precision of restrictive covenants typically imposed today." *Id*. Nevertheless, the *Christine Manor* court made clear that the Declaration was "not as limited as [the homeowner] suggest[ed]" given that "[i]t authorizes consideration of 'the harmony [of this proposed structure] with the surroundings." *Id*. Specifically, the court observed that, while nothing in the Declaration specified a particular size limitation for the garage at issue, it "dwarfs any other existing outbuilding subject to the Declaration" and held that the structure:

> deviates so much from any other outbuildings that *the conclusion that it is not harmonious with the balance of the community is not only a fair and objective conclusion*, but it is also one that the Court can fairly and readily adopt. The other considerations identified by CMCA, such as "barn-like," all reinforce the conclusion that *[the] garage is so different from the balance of the neighborhood that the CMCA's opposition to it is reasonable and should be enforced. This is not simply a matter of the exercise of someone's subjective judgment as to aesthetics.* The CMCA identified with fair specificity its objections.

*Id.* (emphasis added).

*Christine Manor* is not an outlier. Indeed, cases like *Alliegro* and *Lawhon* confirm that harmony is not as cabined under Delaware law as the Court construed

it to be in the Letter Opinion. *See supra* at 19-20.[3] Cases outside of Delaware are in accord.[4]

[3] Under this precedent, the AMC's failure to answer, among other things, "[w]hat portion of [WFS's] land may [it] develop, consistent with AMC's understanding of 'harmony'" (Opinion at 10) was not fatal. Notably absent from *Christine Manor* and *Alliegro*, for example, were deed restrictions (or denial determinations) specifying what size garage and house would have been permissible. *See Christine Manor*, 2007 WL 3301024 at *2; *Alliegro*, 122 A.2d at 913. While deed restrictions must "provide burdened parties with adequate notice of what constitutes proper conduct," *Lawhon*, 2008 WL 5459246, at *4, this requirement applies to invalidate restrictions that "are too vague to serve these functions of notice and fairness." *Id.* at *5. Again, Delaware courts regularly uphold the enforceability of "architectural review provisions designed to ensure the overall harmony of appearance within a community." *Id*. at *4.

[4] *See, e.g*., *Moore v. Roland Park Roads & Maint. Corp*., 2018 WL 3360981, at *7 (Md. Ct. Spec. App. July 10, 2018) (upholding harmony-based denial of garage that was "too large in proportion to the house and the site"); *Normandy Square Ass'n, Inc. v. Ells*, 327 N.W.2d 101, 104 (Neb. 1982) (upholding harmony-based denial of "imposing" fence that caused "a neighborhood character change"); *Parsons v. Duryea*, 158 N.E. 761, 762 (Mass. 1927) (upholding harmony-based denial of driveway that "would be detrimental to the character and development of the immediate vicinity"). *Miami Lakes Civic Ass'n v. Encinosa*, 699 So.2d 271 (Fla. Dist. Ct. App. 1997), is particularly illustrative. The Florida appellate court there determined that, under harmony criteria, a lake-front deck was too large and "out of context with what was going on in the surrounding properties and on the lake as a whole." *Id*. at 272. In so holding, the court rejected both the trial court's determination "that the lack of criteria or guidelines governing the construction of decks[] afford[ed] the committee uncontrolled discretion in their approval or disapproval," and the homeowner's argument that "the lack of a unified scheme, pattern, or type of structure on the lakefront failed to put him on notice as to what was a permissible improvement." *Id*. at 272-73. Specifically, the court explained that the "deck was not disapproved based on its style or function," but "because it is much larger in scale than the other structures on the lake." *Id*. at 273.

*  *  *

In short, the Court erroneously limited the enforceability of harmony criteria in deed restrictions to neighborhoods with distinctive architectural styles. As the AMC Board did not rely on the architectural style of the Lower School Proposal as the basis for its denial determination, *see* A35-39, this legal error led directly to the Court's erroneous grant of judgment on the pleadings in favor of WFS. The Court relatedly erred in not considering whether the Lower School Proposal was objectively incongruous with its surroundings and the greater Alapocas neighborhood. Reversal is accordingly warranted.

**2. Harmony Criteria in Deed Restrictions Can Be Applied in a Non-Arbitrary Manner.**

As discussed above, the Court read harmony too narrowly in limiting the enforceability of harmony determinations to situations involving neighborhoods with distinctive architectural styles. *See* Section I.C.1. This legal error led to the Court's related finding that the AMC Board applied Paragraph 5's harmony criteria in an arbitrary matter, which itself was erroneous for two reasons. First, at a minimum, the AMC Board's January 7 denial letter—which the Court did not consider—provides multiple reasons why the Lower School Proposal *could* be found, as a factual matter, to be objectively incongruous with its surroundings and the Alapocas neighborhood. And second, the Court's arbitrariness determination

was procedurally improper given both the stage of the proceedings below and the factual inferences impermissibly drawn by the Court in WFS's favor.

**a. At a minimum, the Lower School Proposal could be found, as a factual matter, to be objectively incongruous with its surroundings and the Alapocas neighborhood.**

The AMC Board's January 7 denial letter sets forth the multiple reasons underlying the Board's determination that the Lower School Proposal was inharmonious with its surroundings. A35-39. Yet the Court did not even mention, much less address, this important letter—which was relied upon heavily below—in the Letter Opinion. *See, e.g.*, A35-39; A229-31; A256-58; A295-98; A378:1-15. The January 7 letter confirms that the AMC Board's denial determination was informed by more than a mere desire to "apply its sense of aesthetics—open space is better," Opinion at 9, and it additionally contradicts the Court's conclusion that "[t]he 'harmony' restriction, as applied to [WFS], is, in my view, a matter of the aesthetic sensibilities of AMC's current board," *id.* at 6.

To start, and putting aside the incorrect framework employed by the Court as addressed in Section I.C.1, the Court's conclusion that the AMC Board acted on "its sense of aesthetics" does not square with the Delaware cases distinguishing harmony criteria from "impermissible" "restrictions based on abstract aesthetic desirability." *Wild Quail Golf & Country Club Homeowners Ass'n v. Babbit*, 2021 WL 2324660, at *2 (Del. Ch. June 3, 2021) (Master's Report) (citation omitted); *see also Freas*,

2018 WL 3210854, at *4 (contrasting harmony criteria which "may be valid" "if objectively applied" with invalid standards permitting rejection "solely on the basis of aesthetic reasons"); *Welshire Civic Ass'n v. Stiles*, 1993 WL 488244, at *3 (Del. Ch. Nov. 19, 1993) (similar). That is because, contrary to the Court's holding, "decisions may be influenced by aesthetic considerations while still subject to objective standards." *Lawhon*, 2008 WL 5459246, at *5; *see also BBD Beach*, 2022 WL 763466, at *5 (finding standalone aesthetic standard invalid, but also recognizing that denial determinations "may be influenced by aesthetic considerations while still subject to objective standards") (citation omitted).

Here, the January 7 letter makes plain that, and at a bare minimum raises a factual issue as to whether, the AMC Board went beyond mere aesthetics in focusing on the size and density of the Lower School Proposal relative to that of the existing Upper School campus and the neighborhood at large. In particular, the AMC Board conveyed specific, objective reasons why the Lower School Proposal would be incongruous with the Alapocas neighborhood, including that the Proposal would "upend the neighborhood's space-building ratio." A37. The AMC Board additionally explained that, much like the garage at issue in *Christine Manor*, the sheer size of the proposed buildings "would not be suitable to the space they would occupy, as not in harmony with the existing surroundings." *Id.* The Letter Opinion does not address how either the space-building ratio or outsized scale of the Lower

School Proposal is purely aesthetic and not objectively discernable. The Court's failure to even consider the January 7 letter and the rationales of the AMC Board set forth therein belies its finding of arbitrariness as a matter of law.[5]

The January 7 letter also belies the Court's concerns that "no other Alapocas property is subject to use restriction simply because such use would decrease open space" (and the Court's related supposition that the AMC wants WFS "maintain the green and pleasant aspect of much of the Property as an amenity of Alapocas"). Opinion at 6-8. As an initial matter, the characterization of the AMC Board as "imposing a use restriction" is unsupported by any allegation in the Complaint. The AMC Board in its January 7 letter never took issue with the fact that the Upper School campus would be used for a school (which it has been since the 1930s) but, rather, with the magnitude of the Lower School Proposal which is inharmonious with

[5] The AMC Board considered other aspects of the Lower School Proposal in further support of its denial determination, including the addition of "parking lots and roadways on existing playing fields" and that the Proposal would "obstruct serene views and inject crowdedness to the existing peaceful views" and increase "building light." A37. Similar considerations have supported upholding harmony denials in other jurisdictions. *See, e.g.*, *Hawks Landing Homeowners Ass'n v. Cox*, 788 N.W.2d 383, 2010 WL 2519317, at *1, *8 (Wis. Ct. App. June 24, 2010) (upholding as "reasonable" the lower court's enforcement of an association's determination that a "three-light fixture, mounted on top of a freestanding seventeen-foot pole," should be removed, and affirming that "an important feature of the harmony the committee was trying to maintain was the '*open sky*' aspect of the subdivision" and "the reasonable inference from the layout, natural features, and topography of the subdivision that *an important characteristic of the subdivision was an 'open sky*'") (emphasis added).

both the existing campus and the broader neighborhood. A37. The related suggestion that WFS is the only Alapocas property subject to "open space" limitations separately ignores that the harmony criteria embedded in Paragraph 5 of the Deed Restrictions applies to *all* properties in the neighborhood. A31 ¶ 5. Indeed, the harmony criteria relied on by the AMC Board in denying the lower School Proposal likewise operates to police, for example, the proposed construction of residential buildings that would be too big and incongruous (a point that AMC would be prepared to demonstrate at trial).

After considering and weighing the various considerations discussed above, the AMC Board concluded that the Lower School Proposal did not present a close call, but "would significantly, substantially, and irreparably alter the character of Alapocas by introducing buildings and vehicle traffic that are out of scale and character of the neighborhood." A37. While the AMC previously approved WFS's three prior (and more modest) expansion requests, and again never previously denied a project request of WFS, *see supra* at 9, the materially larger scale of the Lower School Proposal is what sets the Proposal apart and forecloses, at the pleading stage, a finding of arbitrariness.[6]

[6] In this regard, the Court stated in the Letter Opinion that the AMC "clarified" at argument "that it has used the criteria specifically provided to its predecessor to ensure 'harmonious' development to deny the School's application, solely on the ground that it will decrease open green space in the neighborhood." Opinion at 3. But while much of the argument focused on the impact that the Lower School

### b. The Court's finding at the pleading stage that the AMC Board acted arbitrarily was procedurally improper.

The Court's finding on the pleadings that the AMC Board's denial determination was arbitrary (Opinion at 6, 9) was also procedurally improper. WFS's partial motion for judgment on the pleadings was limited to the argument that Paragraph 5 of the Deed Restrictions did not apply to WFS. A150-168. It was not until WFS's opposition to AMC's cross-motion that WFS suggested that the Court could rule in its favor as well based on the purported lack of objective criteria in Paragraph 5. A254 n.9.

Putting aside the procedural infirmities of WFS's suggestion, AMC responded that in determining whether to grant WFS judgment on this basis, factual inferences would have to be drawn in favor of AMC. A299 n.20 (citing *Desert Equities*, 624 A.2d at 1205). Yet the Court seemingly disregarded that point, stating in the Letter Opinion that "[t]he burden is on the HOA to show that its actions in enforcing the restrictions are non-arbitrary, and are reasonable as applied." Opinion at 3-4. The AMC does not dispute that it ultimately bears that burden at trial, but at the pleadings

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Proposal would have on the green, open space that predominates the central Upper School campus and greater Alapocas neighborhood, the AMC tied that impact to its primary concern that the scope of the Proposal is simply too large and transformative. *See, e.g.*, A391:13-18 ("There has to be a limit. And what we are saying is that here, and when you look at these slides in context, as opposed to just talking about greenness and open space, that this is way too much. Just like *Christine Manor*, and just like the home in *Alliegro* was too small.").

stage the AMC was entitled to all factual inferences being drawn in its favor. *See Desert Equities*, 624 A.2d at 1204-05. And depriving the AMC of such inferences here was particularly problematic as the Complaint lacks any allegation that the AMC Board's denial determination was arbitrary, any allegation concerning the extent to which the Board's denial determination may have been arbitrary, or any allegation regarding whether the Lower School Proposal is congruous with its surroundings and the Alapocas neighborhood. *See Fiat N. Am. LLC v. UAW Retiree Med. Benefits Tr.*, 2013 WL 3963684, at *12 n.87 (Del. Ch. July 30, 2013) ("[I]t would be inappropriate to take into account VEBA's allegations regarding the tax treatment of the VEBA Note because considering those allegations would require me to rely on factual allegations not contained in the parties' pleadings."); *see also W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA) LLC*, 12 A.3d 1128, 1132 (Del. 2010) ("On a motion for judgment on the pleadings this Court's review is limited to the contents of the pleadings.").

Indeed, the Court of Chancery rarely makes harmony determinations before summary judgment or trial on a more developed factual record. The *Wild Quail* case typifies this point. There, the Master ultimately held, based on post-trial factual findings, that a homeowners' association acted unreasonably in concluding that the roof color of a home addition was inharmonious with the neighborhood. *Wild Quail Golf & Country Club Homeowners Ass'n v. Babbit*, 2022 WL 211648, at *5-6 (Del.

Ch. Jan. 11, 2022) (Master's Report). Critically, however, the Master in *Wild Quail* initially denied an earlier summary judgment motion on the basis that "[t]he determination whether the [Association's] exercise of [its approval] authority [is] reasonable ... necessarily turns on the facts of the situation at hand." *Wild Quail*, 2021 WL 2324660, at *5.

*Wild Quail* is not alone. In *BBD Beach*, for example, a motion for judgment on the pleadings in an action to enforce harmony criteria was denied because "the pleadings [we]re inconclusive as to whether there [wa]s a 'sufficiently coherent visual style' in Bayberry Dunes, so a material question of fact exist[ed] whether the Harmony Standard is enforceable, which prevent[ed] the granting of the Motion." *BBD Beach*, 2022 WL 763466, at *6. And in *Freas*, a motion for judgment on the pleadings was denied on the grounds that "there [we]re material issues of fact that need to be addressed regarding the Deed Restrictions' enforceability and whether [an association's] actions were based upon objective criteria." *Freas*, 2018 WL 3210854, at *4.

*Christine Manor* and the vast majority of other cases assessing the application of harmony provisions by homeowners' associations were similarly decided after trial. *See Christine Manor*, 2007 WL 3301024 at *3 n.21; *see also, e.g.*, *Lawhon*, 2008 WL 5459246, at *4 ("This is the Court's decision after trial."); *Dolan*, 2005

WL 1252351, at *1 ("The matter was tried before me."); *Alliegro*, 122 A.2d at 912 ("[T]his is the opinion of the Court after final hearing.").[7]

The recent decision in *Civic Association of Surrey Park v. Riegel*, 2022 WL 1597452 (Del. Ch. May 19, 2022) (Master's Report), which the Court relied on at pages 8-9 of the Letter Opinion, is in accord. The Master in *Riegel* held, following trial, "that coherence was lacking in the community in question" and, thus, that the harmony deed restriction "provision [in question was] unenforceable." *Riegel*, 2022 WL 1597452, at *13. In so holding, the Master relied on her factual finding that the community lacked coherence: "[t]estimony at trial confirmed there are at least five (5) different architectural styles within Surrey Park." *Id*. The Master additionally relied on trial testimony concerning the existence of "many different kinds of

[7] The AMC recognizes that, this precedent notwithstanding, it cross-moved for judgment on the pleadings. It did so given the conclusory manner, unsupported by specific factual allegations, in which WFS alleged in the Complaint that the AMC Board's denial determination "lack[ed] any objective criteria." A23 ¶ 32; *see also* A21-22 ¶ 21. By way of example, WFS did not allege that the AMC Board's determination was arbitrary, nor did it allege anything concerning the extent to which the Lower School Proposal is congruous with its surroundings and the broader Alapocas neighborhood. At most, WFS alleged that the AMC Board's denial was unreasonable because it lacked any objective criteria. A44 ("The standards articulated in Paragraph 5 of the Deed Restrictions, and as a result, the AMC Board's analysis based on such standards, are overbroad and invalid because there is no objective basis on which to apply them."). There are no specific, well-pled facts to support this statement either, and charitably read, WFS posited that the AMC Board's application of the Deed Restrictions lacked objective criteria because Paragraph 5 itself lacks objective criteria. That position fails as a matter of law because harmony criteria in deed restrictions has repeatedly been upheld. *See supra* at 17; 19-22.

accessory buildings, including gazebos and pool houses, throughout the community." *Id.*

The stage of the proceedings at which other harmony cases have been decided underscores the impropriety of the Court's pleading-stage arbitrariness finding below. Without any evidentiary record, the Court erroneously made a fact-based arbitrariness finding based upon factual inferences in WFS's favor. Three particular examples warrant emphasis.

First, the Court found that "AMC simply wants to maintain the green and pleasant aspect of much of the Property as an amenity of Alapocas," and that the AMC Board's harmony determination was "a matter of the aesthetic sensibilities of AMC's current board, nothing more." Opinion at 6. Not only are questions of state of mind consummate issues of fact, *see, e.g.*, *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *1 (Del. Ch. May 2, 2022) (observing that "determination of parties' intentions and motivations" are "issues typically best resolved following live testimony"), but the Court's unsupported finding about the AMC's motivation additionally ignored contrary evidence—namely, the reasoning of the AMC Board set forth in the January 7 letter. *See* Section I.C.2.a. In relying on that finding, the Court deprived the AMC of the opportunity to provide evidence in support of the reasoning expressed in the January 7 letter, including why the Lower School Proposal is incongruous with its surroundings and the Alapocas

neighborhood as well as other motivations beyond aesthetics that led to the directors' denial of the Proposal.

Second, the Court found that "no other Alapocas property is subject to use restriction simply because such use would decrease open space." Opinion at 8. Not only was that not alleged by WFS (and the AMC has never taken issue with the Upper School campus being used for a school), *see supra* at 26-27, but in making that finding the Court deprived the AMC of the ability to introduce evidence confirming, for example, that other properties in the neighborhood have similarly had proposals denied as inharmonious for being oversized.

Third, the Court also found, or at a minimum strongly implied, that Alapocas lacks a "coherent visual style" such that harmony could not be validly applied. Opinion at 9 ("Finding that coherence was lacking in the community in question, the Master [in *Reigel*] found the provision unenforceable. So it is here with the near-identical Paragraph 5."). As an initial point, throughout the Letter Opinion, the Court conflated a "coherent visual style" with the distinct architectural style showcased in *Dolan*. *See, e.g.*, Opinion at 7, 10 n.30. Under Delaware law, however, the coherent visual style required to uphold a harmony determination can also be satisfied where the proposal is "obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied." *BBD Beach*, 2022 WL 763466, at *6; *see also supra* at 19-22. As such,

at a minimum, the AMC should have had the opportunity to present evidence to support that the Lower School Proposal is objectively incongruous with its surroundings and the Alapocas neighborhood. And even under the Court's narrow view of coherent visual style, whether Alapocas indeed has such a style because of the green, open space that predominates the neighborhood is an innately factual issue that precludes judgment on the pleadings.

* * *

For the foregoing reasons, the Court's arbitrariness determination was procedurally improper given both the stage of the proceedings below and the factual inferences impermissibly drawn in WFS's favor. That finding should accordingly be reversed.

**3. Policy Considerations Likewise Support Reversal.**

The AMC acknowledges, as the Court correctly noted in the Letter Opinion, the existence of policy reasons for construing deed restrictions strictly and not enforcing ambiguous or vague covenants. Opinion at 3-4. But Delaware courts have also regularly upheld and enforced harmony deed restrictions. *See supra* at 17, 19-22; *see also Dolan*, 2005 WL 1252351, at *4 ("Where, as here, the [reviewing neighborhood board] is directed to ensure that improvements are 'visually harmonious' with surrounding development, such a direction is not *per se* unenforceably vague."). And as explained below, countervailing policy

considerations support the enforceability of harmony determinations when exercised reasonably.

### a. Value of Deed Restrictions

Delaware courts recognize that, while deed restrictions burden the free use of land, the enforcement of such restrictions benefits communities as well. *See, e.g.*, *Lawhon*, 2008 WL 5459246, at *4 ("[T]he potentially negative consequences of restrictive covenants for individual landowners may be outweighed by the benefits they provide to a group of landowners seeking to preserve the nature and character of their community."). Where, as here, deed restrictions have been in place for many years, residents buy into their community with knowledge of the restrictions, and in reliance that such restrictions will operate to maintain the desirability of the community.

In this regard, a Maryland appeals court cogently explained that the language of deed restrictions before it "ma[de] plain the desire to regulate the construction of the dwellings in such a manner as to create an attractive and desirable neighborhood," and that "the parties had a right voluntarily to make this kind of contract between themselves." *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 761 A.2d 899, 915 (Md. Ct. App. 2000); *see also* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 cmt. a (2000) ("The rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs

from the often expressed view that servitudes should be narrowly construed to favor the free use of land. It is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources. The rule is supported by modern case law."). These positive aspects of deed restrictions provide a countervailing policy rationale that supports the enforcement of the Deed Restrictions as written.

**b. Reasonableness Check on Potential Overreach**

Any policy concern that a given homeowners' association may misuse its power if the enforceability of harmony criteria is countenanced here should be assuaged by the reality that any alleged unreasonableness of future denial determinations can always be challenged in court. This is nothing new. In fact, it is precisely where Delaware courts have consistently focused their analysis. *See Wild Quail*, 2022 WL 211648, at *5 (assessing the "reasonableness" of a harmony-based denial); *Dolan*, 2005 WL 1252351, at *4 ("[A] denial of permission based on lack of visual harmony will be enforced … if the decision … was reasonable."); *Vill. of Manley Civic Ass'n v. Becker*, 1997 WL 793045, at *3 (Del. Ch. Dec. 17, 1997) (noting that general restrictions like "harmony" warrant "critical[] examin[ation of] the reasonableness of judgments made by the [association]"); *Alliegro*, 122 A.2d at

913 ("[T]he crucial question to be answered is whether the defendant acted fairly and reasonably.").[8]

Relatedly, enforcing harmony criteria is consistent with many other areas in our law where determinations are made under flexible, fact-specific standards (e.g., whether someone acted reasonably in a negligence action, the definition of obscenity, and different levels of fiduciary responsibility). The fact that harmony is, by definition, contextualized does not and should not mean that such criteria is enforceable only when constrained by specific guidelines. Again, reasonableness is the natural safeguard against neighborhood association overreach.

**c. Specific Policy Issues at Play**

Strong additional policy implications specifically at issue here warrant emphasis as well.

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[8] Indeed, focusing on reasonableness is consistent with the practice in many other jurisdictions where reasonableness is the entire analysis, and deed restrictions are enforced unless they are exercised unreasonably or in bad faith. *See, e.g.*, *Encinosa*, 699 So.2d 271 at 272 ("Restrictive covenants contained within a deed which reserve the grantor's right to approve plans for improving the land are valid and enforceable against the grantee unless that right or the exercise of it is arbitrary and unreasonable.") (citation omitted); *see also* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.9 (2000) ("Questions initially raised as to the validity of design controls have largely been resolved in their favor. By imposing a requirement that design controls be exercised reasonably, courts validated discretionary design controls that might otherwise have violated public policy" and therefore "by imposing a requirement that design-control powers be exercised reasonably, courts have upheld the validity of open-ended controls that lack objective standards or guidelines.").

As an initial matter, the narrow view of harmony adopted by the Court in the Letter Opinion likely will have broader ramifications for many other common interest communities in Delaware—including, by way of non-exhaustive example, Edenridge, Fairfax, Sharpley, Surrey Park, Tavistock, Westover Hills, and Wynthorpe—which each have identical or substantively identical deed restrictions with harmony criteria. A417-94. Indeed, many of the cases discussed above feature deed restrictions with substantively identical language to those at issue here. *See, e.g.*, *Alliegro*, 122 A.2d at 911 (deed restrictions granting right "to refuse to approve any … plans … which are not suitable or desirable" based on criteria including "the harmony thereof with the surroundings"); *BBD Beach*, 2022 WL 763466, at *5 (similar); *Freas*, 2018 WL 3210854, *3 (Del. Ch. June 29, 2018) (similar); *Lawhon*, 2008 WL 5459246, at *2 (similar); *Christine Manor*, 2007 WL 3301024, at *1 n.3 (similar).

Further, that WFS is the only non-residential property in the otherwise residential Alapocas neighborhood makes the implications of applying a narrow definition of "harmony" even more problematic here. The Court recognized as much at argument. A409:18-410:2 (observing that it is not "desirable in a settled residential neighborhood" to have the AMC Board "unable to regulate the use of the school"). It naturally follows that a unique property like the Upper School campus

should be subject to more scrutiny, and not less, than all other residential properties in the neighborhood.

Yet WFS made numerous arguments below that would give it an unchecked license to develop the Upper School campus without limitation, both now and in the future, rendering the purpose and effect of the Deed Restrictions illusory. A332:24-334:1; 391:5-18; 400:5-22; A258-59; A271; A299. If WFS's position was taken to its logical conclusion, it is unclear what would be required for the AMC Board to be able to deny a proposal by WFS. Could it deny a proposal that doubled the size of developed land on the Upper School campus? Tripled the size? Increased it tenfold? Added a ten-story parking garage to the campus? In contrast, under the AMC's interpretation of the Deed Restrictions, WFS would always have the protection of judicial review in the event of perceived unreasonable denials by the AMC Board (and, again, the AMC had never previously denied a proposal of WFS in the parties' more than eight decades as neighbors). Stated differently, between the two competing positions urged by the parties here, only WFS's interpretation is limitless.

## II. THE COURT OF CHANCERY ERRED IN FAILING TO CONSIDER THE ADDITIONALLY ENFORCEABLE OUTLOOK CRITERIA IN PARAGRAPH 5 OF THE DEED RESTRICTIONS THAT WAS ALSO RELIED ON BY THE AMC BOARD.

### A. Question Presented

1. Did the Court err as a matter of law in failing to consider the additionally enforceable outlook criteria in Paragraph 5 of the Deed Restrictions that the AMC Board also relied on in denying WFS's Request for Approval? This issue was preserved at A228-30; A291.

### B. Standard of Review

This Court's "review of the trial court's grant of a motion for judgment on the pleadings presents a question of law, which [this Court] review[s] *de novo.*" *Desert Equities*, 624 A.2d at 1204; *see also* Section I.B (further explaining standard of review).

### C. Merits of the Argument

#### 1. The AMC Did Not Concede that Outlook Criteria is Unenforceable.

The Court stated in the Letter Opinion, without citation, that the "AMC concedes that the only one of the criteria set out in Paragraph 5 that is *not* unenforceable is 'harmony … with the surroundings.'" Opinion at 5. But in addition to harmony, the AMC Board's January 7 denial letter raised the effect of the Lower School Proposal on the outlook from neighboring and adjacent properties as one of the Board's bases for denying the Proposal. A37 (explaining that the Lower School

Proposal would impact the "views from adjacent and neighboring homes" and "would have a material adverse impact on the neighborhood, including neighbors' outlooks from their homes"). The AMC Board additionally raised outlook as a basis for its denial decision in its briefs below. A228-30; A291. While harmony was without question the focus at argument, the AMC's counsel was never asked if, and never indicated that, the AMC had abandoned outlook as an additional basis for its determination.

**2. Outlook Criteria Should Be Upheld as Enforceable.**

Although outlook is less well-established than harmony as an independently enforceable deed restriction criteria, this Court should uphold it as an enforceable basis for the AMC Board's denial determination here. While some Delaware courts have cautioned that "outlook" *alone* has no built-in, objective standard, *see BBD Beach*, 2022 WL 763466, at *5 ("[T]he Outlook Standard provides 'no built-in, objective standards' for the ARC to apply so it is also unenforceable."); *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 270 (Del. Ch. 1986), *aff'd*, 538 A.2d 1113 (Del. 1988) (similar), our courts have nevertheless recognized "outlook" as an enforceable consideration in applying deed restrictions where, as here, another objectively enforceable factor applies too (i.e., the harmony of a proposal with its surroundings). *See Lawhon*, 2008 WL 5459246, at *8 (noting that "Delaware case law approves of evaluations made with" outlook); *Alliegro*, 122 A.2d at 913

("Because of its modest size and the effect of that factor on the outlook from neighboring properties, plaintiffs' proposed home, as now planned, would be out of harmony with the surroundings.").

Outlook can furthermore be objective in situations like those at issue here. As courts outside of Delaware have recognized, whether a proposed structure would obscure the outlook from neighboring homes does not draw solely upon a sense of aesthetics, but rather from objective considerations such as sight lines. *See Jones v. Northwest Real Estate Co.*, 131 A. 446, 449 (Md. Ct. App. 1925) ("We have no doubt as to the validity of the provisions authorizing the appellee to withhold its approval, if the use, shape, height, materials, location, and approximate cost of the structure and the grading plan of the lot did not reasonably conform to the general plan of development, and to refuse to approve the plans for buildings which would be out of harmony in any of the particulars mentioned with other structures in the addition, or *which would interfere unreasonably with the outlook from other structures in the vicinity*.") (emphasis added); *see also Bennett v. Huwar*, 748 S.W.2d 777, 780 (Mo. Ct. App. 1988) (upholding homeowner association's denial of a proposal "because the Committee is instructed to consider, in reviewing plans for approval, the harmony of the proposed construction with the surroundings and the effect of the planned structure on the outlook from neighboring properties"); *Schoenherr v. Vernier Woods Dev., LLC*, 2002 WL 31938942, at *2-3, *5 (Mich.

App. Nov. 22, 2002) (affirming right to enforce covenant considering "the effect upon the outlook of neighboring property" that would allegedly "destroy [the property's] woods" but reversing grant of summary disposition based on evidence presented).

For these reasons, as well as the policy reasons discussed in Section I.C.3, this Court should conclude that outlook criteria is enforceable and that, at a minimum, the reasonableness of the AMC Board's reliance on outlook in denying the Lower School Proposal presents another issue of fact for consideration on remand.

## CONCLUSION

For the foregoing reasons, the AMC respectfully requests that this Court reverse the Order and Final Judgment and remand for further proceedings.

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October 6, 2022