EFiled: May 09 2025 04:53PM EDT
Filing ID 76246604
Case Number 124,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REYBOLD VENTURE GROUP IX, LLC, Plaintiff-Below/Appellant, v. SUMMIT PLAZA SHOPPING CENTER, LLC, Defendant-Below/Appellee.	)	No. 124,2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0982-SEM(MTZ)

APPELLANT REYBOLD VENTURE GROUP IX, LLC'S OPENING BRIEF

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Dated: May 9, 2025

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PRELIMINARY STATEMENT

Words matter. And in the realm of real property law, words create rights. This appeal raises a straightforward question: When a property owner declares in a signed, certified, recorded document that "a cross easement is hereby established," does that language in fact create a cross easement? Established Delaware property and contract law say the answer is "yes."

A property owner, Viola Carter ("Carter"), included the "cross easement" language when she certified and recorded a subdivision plan. She signed the plan, confirming it "was made at [her] direction" and was her "act and plan." At the time, she owned both the dominant and servient parcels at issue in this case. Today, Plaintiff-below, Appellant Reybold Venture Group IX, LLC ("Reybold") stands in the shoes of the dominant estate; Defendant-below, Appellee Summit Plaza Shopping Center, LLC ("Summit") occupies the servient position. When previously situated as Reybold is now, Summit maintained that identical language creates an enforceable private right. The words are the same; only Summit's convenience changed. That about-face led to this litigation.

This appeal follows divergent rulings below. The Senior Magistrate, after a full trial and thorough analysis, concluded that Carter's certification and recordation of a subdivision plan containing explicit easement language created an enforceable private right. That was the correct decision. But when Summit took exceptions, the

Vice Chancellor reversed, holding that these same words created merely a "notation" enforceable only by New Castle County officials.

Two critical errors led to the Vice Chancellor's mistaken ruling. First, she incorrectly determined that the word "notation" found in one isolated section of the New Castle County Code (the "Code") means the same thing as the word "note" found throughout the Code.[1] To reach this determination, she relied upon a dictionary and third-party grammatical source to equate the words "notation" and "note". In doing so, the Vice Chancellor ignored the context of the section in the Code in which the word "notation" appears, as well as the different use of the word "note" that appears throughout numerous other sections of the Code and the UDC. She also failed to recognize that the County has no authority to impose a cross easement on the parcels at issue in this case, so that the cross easement shown on the plan cannot be a "notation" imposed by the County.

Second, the Vice Chancellor improperly dismissed the solemnity of Carter's execution of the record plan establishing the two parcels at issue in this case, characterizing Carter's signature as simply a "ministerial act." Putting aside the fact that only the owner of property has the power to create rights in her property, that

[1] References to the "Code" refer to the 1982 New Castle County Code that was in effect in 1983, when the cross easement was created. References to the "UDC" refer to the Unified Development Code in Chapter 40 of the current New Castle County Code.

ruling is contrary to established precedent in this State that "a deliberately prepared and executed written instrument manifests the true intention of the parties." The Vice Chancellor ignored that precedent.

The implications of the Vice Chancellor's ruling stretch beyond these parcels of land. All three of the experts at trial agreed that owners and developers have long relied on subdivision plans to create private easements and other private property rights. That position is consistent with this Court's opinions recognizing the creation of private easements through recordation of record plans. Left intact, the decision below calls into question countless property rights memorialized through the same conventional means throughout Delaware. It would upend settled expectations and inject uncertainty into land records that serve as the backbone of property ownership and development.

At bottom, this case is about whether courts should take property owners at their word. When property owners employ clear language to create property rights in recorded instruments, courts should enforce those rights. Because the Vice Chancellor failed to do so here, and because that decision injects this Court should reverse.

NATURE OF PROCEEDINGS

Reybold initiated the underlying action on November 13, 2020.[2] Summit moved to dismiss Reybold's complaint, and the Magistrate denied Summit's motion.[3] Thereafter, the parties proceeded through discovery to trial.

A Magistrate in Chancery conducted a one-day trial on November 8, 2023. On July 31, 2024, the Magistrate issued her Final Post-Trial Report ("Final Report").[4] Summit filed timely exceptions to the Final Report, and the parties briefed the exceptions before a Vice Chancellor.

On February 28, 2025, the Vice Chancellor issued an Order Addressing Exceptions ("Order"), reversing the Magistrate and entering judgment in Summit's favor. Reybold appealed the Order on March 25, 2025.[5]

This is Reybold's Opening Brief on appeal.

[2] A0030 Complaint.
[3] *See generally*, A0001-29 Docket.
[4] A0457-81.
[5] *See* Ex. A.

SUMMARY OF ARGUMENT

1. Carter's certification and signature on the Plan constituted prima facie evidence of Carter's intent to create an easement. The Court of Chancery reversibly erred by disregarding the legal significance of Carter's certification and signature, by considering parol evidence, by improperly shifting burdens, and by failing to address Summit's inconsistent conduct.

2. The court below further erred by holding that Carter's Note was a "notation" under Section 20-70(A) of the Code and that the Note was only enforceable by New Castle County. That conclusion incorrectly equated "notes" with "notations" and ignored context and industry practices distinguishing between the two.

3. The Court of Chancery's Order also contravenes settled law and creates an unworkable rule that would undermine established practice, upset settled expectations in property transactions, and call into question thousands of recorded documents.

STATEMENT OF FACTS[6]

A. Creation of the Easement by Carter.

In 1983, Carter owned over 196 acres of land along Route 301 in what is now Middletown, Delaware.[7] Her landholdings included both the future Summit Property and the future Reybold Property.[8] Carter elected to sell a 2.97-acre hexagonal portion of her tract, which would become the Summit Property, to a developer for the construction of a shopping center.[9] This transaction necessitated rezoning the property from residential to commercial use and obtaining New Castle County (the "County") approval for a development plan.[10] Franco R. Bellafante, Inc. (the "Engineer") was engaged to prepare a Record Major Land Development Plan (the "Plan") subdividing Carter's land.[11]

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[6] "Order __" refers to the Order Addressing Exceptions issued by Vice Chancellor Zurn on February 28, 2025, which is attached as Exhibit A. "FR __" refers to Senior Magistrate Molina's Final Post-Trial Report, which is included at A0457-81. To maintain consistency, the Final Report is cited according to its internal numbering. "JX__" refers to the Joint Exhibits submitted at trial. "AF ___" refers to the Statement of Facts Which Are Admitted and Require No Proof in Section II of the Pretrial Stipulation and Order, which is located at A0095-96. "[Name] TR. __" refers to the trial testimony of the named witness.

[7] Order 2; AF A0095, ¶ 5.

[8] Order 2; FR 2-3; JX22, A0111.

[9] *Id*. *See* JX13, A0110; JX2, A0106; JX50, A0159.

[10] Order 2; FR 3-4; Tarabicos TR. A0261-61; Forsten TR. A0168-69.

[11] Order 3; Casper TR. A0341.

By signature dated October 28, 1983, Carter executed the Certification of Ownership on the Plan.[12] Through this certification, Carter declared that she was "the owner of the property shown on this plan," that "the subdivision plan thereof was made at [her] direction," and that she "acknowledge[d] the same to be [her] act and plan and desire[d] the same to be recorded as such according to law."[13] Carter further certified that she "voluntarily agree[d] to subdivide and develop the land in accordance with the concepts shown on the approved record plan."[14]

The Plan incorporates a "NOTES" section containing eight discrete notes.[15] The first note contained the critical cross easement language, stating: "A CROSS EASEMENT IS HEREBY ESTABLISHED BETWEEN THE SUBJECT PARCEL AND OTHER LANDS OF VIOLA CARTER, FOR VEHICULAR AND PEDESTRIAN TRAFFIC."[16] This formulation employed the present-tense "is hereby established" rather than contemplating future action.[17]

The Plan was recorded on November 9, 1983, in the Recorder's Office in and for New Castle County.[18] This recordation created a permanent public record of the Plan and its contents, providing constructive notice to all future purchasers of the

[12] Order 9. *See* JX22, A0111 Plan.
[13] JX22, A0111.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] Order 9; FR 8; AF A0095, ¶ 5; Tarabicos TR. A0270-71.

properties of the existence of the cross easement.[19] On September 20, 1984, Carter executed a deed conveying the Summit Property to Cohen Investments, Summit's predecessor in title.[20] This deed explicitly referenced the recorded Plan containing the cross easement as part of the legal description of the property.

At the time of the conveyance, Carter retained ownership of her remaining lands, including what would become the Reybold Property.[21]

Upon this severance of the previously unified ownership, the cross easement became effective between the separate parcels.[22]

B. Language and Purpose of the Cross easement.

The Note on the Plan employed present-tense, operative language that created an immediate right: "A CROSS EASEMENT IS HEREBY ESTABLISHED."[23] This precise formulation - "is hereby established" - represents classic granting language routinely used in deeds and easements to create present rights.[24] The language identified both the dominant and servient estates with specificity as "THE SUBJECT

[19] Tarabicos TR. 111-112.
[20] Order 10; JX23, A0112. Notably, Summit does not assert that Carter's signature on this recorded deed is not sufficient evidence of her intent to convey the Summit Property to Cohen Investments, instead relying on that signature for its title to the Summit Property.
[21] Order 10-11; FR 8-9.
[22] FR 16-17; Tarabicos TR. 111-112.
[23] JX22, A0111.
[24] JX22, A0111; FR 7.

PARCEL AND OTHER LANDS OF VIOLA CARTER."[25] The Note likewise defined the scope of the easement with precision as "FOR VEHICULAR AND PEDESTRIAN TRAFFIC," establishing both the nature and extent of the rights being created.[26]

All three expert witnesses at trial confirmed that cross easements are routine features in commercial development plans.[27] Such easements allow customers to move between adjacent commercial properties without re-entering public roads, improving accessibility, reducing traffic congestion, and enhancing customer convenience.[28] Richard Forsten ("Forsten"), a well-known land use attorney, testified that cross easements are typical on commercial plans for adjoining properties.[29] Larry Tarabicos ("Tarabicos"), another recognized land use attorney with decades of experience, confirmed that cross easements are "very, very common" on development plans.[30] Even Summit's expert, Carmine Casper ("Casper"), acknowledged the routine use of such arrangements.[31]

The Delaware Department of Transportation ("DelDOT") has a well-established policy of minimizing the number of entrance points ("curb cuts") onto

[25] *Id*.
[26] *Id*.
[27] Forsten TR. A0173; Tarabicos TR. A0266-67; Casper TR. 358.
[28] Forsten TR. A0173-74; Tarabicos TR. A0267; Heisler TR. A0227-29.
[29] Forsten TR. A0179.
[30] Tarabicos TR. A0267.
[31] Casper TR. A0358.

state roads.[32] Multiple curb cuts increase the potential for accidents and impede traffic flow on public roadways.[33] For this reason, DelDOT regularly requests cross easements as a condition for approving access to state roads to permit traffic to flow between parcels and not onto the immediately adjacent highway.[34] The expert witnesses confirmed that such requests are standard practice in the development process.[35] It is an admitted fact that DelDOT, and not the County, was the impetus for the cross easement on the Plan.[36]

As Tarabicos explained, "DelDOT's obsessed with reducing the number of entrances onto their highways."[37] Consistent with this policy, during the review of the Plan, DelDOT commented that "planning considerations regarding future access should be given at this time for development of other lands of Viola Carter."[38] Essentially, DelDOT foretold that it would limit free access to Summit Bridge Road from Carter's "other lands" (including the Reybold Property) when they were developed in the future.[39] That explains why Carter created the cross easement across the Summit Property – to protect her property rights in her "remaining lands".

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[32] Forsten TR. A0173, A0206-07; Tarabicos TR. A0267; JX7, A0108; FR 6.
[33] *See id*.
[34] Forsten TR. A0172-73; Tarabicos TR. A0267; JX7; JX11; AF 15.
[35] Forsten TR. A0172-74; Tarabicos TR. A0267-68; Casper TR. A0358.
[36] AF A0097, ¶15.
[37] Order 5; FR 6; JX7, A0108.
[38] *Id*.
[39] Heisler TR. A0231-32; Casper TR. A0358.

The cross easement in this case benefitted both properties by ensuring shared access to Summit Bridge Road.[40] This shared access would be particularly valuable if Carter's remaining lands were developed commercially.[41] The easement improved the development potential and value of Carter's retained lands.[42] It provided a practical solution to DelDOT's concern about multiple entrances onto Summit Bridge Road at the intersection with North Broad Street.[43] Reybold's expert witnesses testified to the value of such shared access arrangements for commercial properties.[44]

Forsten and Tarabicos both testified they had never seen anyone challenge the validity of cross easements created on record plans.[45] As Forsten explained, "I've never seen anybody not honor an easement. I mean, that's why they're there. And when I looked at those plans that I cited in my report, when I look at [the Plan], to me, as a practicing attorney in the land use area, there's an easement."[46] The experts explained that these easements are routinely enforced by the benefited properties

[40] JX22, A0111; Forsten TR. A0173-74; Heisler TR. A0217.
[41] FR 6; Heisler TR. A0227-29; JX7, A0108.
[42] Heisler TR. A0217, A0227-29.
[43] FR 6; JX7, A0108.
[44] Forsten TR. A0173-74; Tarabicos TR. A0267.
[45] Forsten TR. A0181-82; Tarabicos TR. A0270-71.
[46] Forsten TR. A0181-82.

without County involvement.[47] This testimony established the industry understanding of such easements' enforceability by private parties.[48]

Carter's signature and certification on the Plan demonstrated her approval of its contents, including the cross easement language.[49] By certifying the Plan was "made at my direction," Carter adopted its contents as her own.[50] Her certification that the Plan was "my act and plan" further confirmed her intent to be bind the properties shown on the Plan by the rights and obligations it created.[51] This formal act established Carter's intentional creation of the cross easement described in the Plan.

C. Chain of Title and Constructive Notice.

The 1984 deed from Carter to Cohen Investments referenced the recorded Plan as part of the legal description of the Summit Property, stating it conveyed "[a]ll that certain lot... as shown on the [Plan]."[52] The 1987 deed from Cohen Investments to Middletown Associates similarly referenced the Plan in its property description.[53] Each subsequent deed in the chain of title for the Summit Property continued to reference the recorded Plan, incorporating the Plan and its contents into each

[47] Forsten TR. A0181-82; Tarabicos TR. A0271-72.
[48] Forsten TR. A0181-82; Tarabicos TR. A0271-74.
[49] FR 7-8, 17-18.
[50] JX22, A0111; FR 7-8.
[51] JX22, A0111.
[52] Order 10; FR 8-9; JX23, A0112.
[53] Order 10; FR 8-9; JX24. A0114.

conveyance document. This consistent chain of references preserved the notice of the easement to each new owner, establishing an unbroken chain of title acknowledging the Plan containing the cross easement.[54]

Starting with the 1987 deed, each conveyance explicitly stated it was subject to all easements and restrictions of record.[55] This language provided additional notice beyond the Plan reference, specifically alerting purchasers to existing encumbrances on the property.[56] Such language is standard in property conveyances to alert purchasers to existing encumbrances.[57] These references further demonstrate constructive notice to Summit and its predecessors of the cross easement contained in the recorded Plan. The consistent inclusion of this language reinforced the easement's continued validity through multiple property transfers.

Thomas Mammarella ("Mammarella"), an attorney with the firm representing Summit in this litigation, issued two title insurance policies for the Summit Property: one in 2018 and another in 2022, while this litigation was pending.[58] Mammarella testified he is "meticulous" in his review of title exceptions, stating "if it's clear to me that [an exception is] not applicable, even though it's listed on the title report, I

[54] Order 10; FR 9; Tarabicos TR. A0270-71.
[55] Order 10; AF A0096 ¶10. See JX24, A0114; JX29, A0117; JX30, A0120; JX33, A0122; JX34, A0125;
[56] Order 10; FR 9; Tarabicos TR. A0270-71.
[57] *Id*.
[58] Mammarella TR. A0329.

would not list it as an exception."[59] In both policies, he included "Notes, Easements and Restrictions on Subdivision Plat of record in Microfilm No. 6945, New Castle County records" (the Plan at issue in this case) as exceptions to the coverage provided by the title policies.[60] Mammarella conceded at trial that the only easement on the Plan was the cross easement at issue in this litigation.[61] The 2022 policy was issued during this litigation, after Summit claimed the cross easement was unenforceable.[62]

Mammarella's transactional position when dealing with the Summit Property, as opposed to Summit's litigation position in this case, is consistent with established real estate practice. Tarabicos testified that once a plan with an easement is recorded, it becomes part of the chain of title for the affected properties.[63] Forsten explained that easements on recorded plans are routinely enforced by benefited parties without County involvement.[64] The experts confirmed that recorded easements run with the land to benefit and burden successor owners.[65] This testimony established the real estate industry's understanding of and reliance on the enforceability of such recorded

[59] Mammarella TR. A0326-27.
[60] JX36, 47; Mammarella TR. A0328.
[61] Mammarella TR. A0329-30.
[62] Mammarella TR. A0329.
[63] Tarabicos TR. A0271-72.
[64] Forsten TR. A0181-82.
[65] Tarabicos TR. A0271-72; Forsten TR. A0181-82.

easements.[66] Delaware courts have consistently recognized that easements created on recorded plans are enforceable by the benefited properties.

D. Reybold's Reliance and Development Plans

Jerome Heisler, Jr. ("Heisler"), the managing member of Reybold, first became interested in acquiring a portion of Carter's former lands around 2015 or 2016, initially intending to build a self-storage facility.[67] During his initial research and due diligence on the property, Heisler pulled the recorded Plan for the Summit Property.[68] Upon reviewing the Plan, Heisler discovered the Note creating the cross easement between the Summit Property and the "other lands of Viola Carter."[69] Heisler testified that the easement was one factor in Reybold's interest in acquiring the property, as it would provide valuable access to Summit Bridge Road.[70]

Heisler testified that he was familiar with cross easements from his extensive development experience and from serving on the Route 40 steering committee for almost 25 years.[71] Based on this experience, Heisler understood the Note created enforceable access rights across the Summit Property.[72] He interpreted the language "A cross easement is hereby established" as creating a present right to cross the

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[66] Forsten TR. A0181-85; Tarabicos TR. A0271-74.
[67] Order 11; FR 8-9.
[68] FR 9; Heisler TR. A0212-13.
[69] *Id*.; Order 11-12.
[70] Heisler TR. A0212-13, A0217
[71] FR 9; Heisler TR. A0213.
[72] *Id*.; Order 12.

Summit Property for vehicular and pedestrian traffic.[73] This understanding influenced Reybold's decision to pursue the acquisition of the property.[74]

Before completing the purchase, Heisler approached Summit's representatives to discuss Reybold's development plans and the use of the cross easement.[75] Reybold first approached Summit "about working out the details of a note on the plan which indicated the possibility of an easement" in 2019.[76] During these discussions, Reybold showed Summit representatives the Note on the Plan creating the cross easement.[77] Alan Perry ("Perry"), Summit's representative at trial, testified, "He [Heisler] pointed out the note on the plan, and it was his interpretation that he had an easement."[78] These discussions demonstrated Reybold's good-faith efforts to resolve the issue amicably before proceeding with the purchase.[79]

Summit's principal, John Hynansky ("Hynansky"), stated he was "not inclined to cooperate with an easement between the two properties."[80] Summit's representative, Perry, testified about concerns with traffic congestion and safety, particularly during peak hours between 4:00 and 6:00 in the evening.[81] Perry

[73] FR 9; Heisler TR. A0213.
[74] Heisler TR. A0212-13, A0220-225.
[75] FR 10; Heisler TR. A0215-16.
[76] FR 10; Perry TR. A0383.
[77] Perry TR. A0386, A0389.
[78] Perry TR A0389.
[79] Heisler TR. A0215.
[80] FR 10; Perry TR. A0384.
[81] FR 10-11; Perry TR. A0386.

expressed concerns that the easement "would create an encumbrance and problem with [Summit's] existing tenants."[82] Significantly, Summit never indicated during these discussions that it believed the easement was legally unenforceable.[83] Summit's objections were based entirely on practical concerns about traffic flow and tenant impact, not on the legal validity of the easement.[84]

Despite Summit's refusal to cooperate, Reybold proceeded with its purchase of the property, closing the transaction in the fall of 2020.[85] Reybold believed it had enforceable easement rights based on the clear language in the Note and the principles of property law.[86] The third amendment to Reybold's purchase agreement noted that Reybold had made efforts to work with Summit on "development of the Cross Easement ... but [that] such owner refuse[d] to participate in such discussions" and indicated Reybold's intent to commence legal action regarding such refusal.[87] Reybold's willingness to proceed with the purchase despite Summit's refusal demonstrated its confidence in the enforceability of the easement rights created by the Note.[88]

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[82] FR 10-11 n.41; Perry TR. A0386.
[83] Perry TR. A0386-88.
[84] FR 10-11; Perry TR. A0386-88.
[85] Order 11; FR 11-12.
[86] Heisler TR. 54, 61-66; JX41).
[87] FR 11-12; JX41, A0137.
[88] Heisler TR. A0221-22; JX41, A0137.

Following its purchase, Reybold has been working with the Town of Middletown since at least 2021 on development plans for the Reybold Property.[89] Reybold's 2022 submission includes a plan depicting a proposed retail center and storage facility.[90] The plan includes a "stub-out" to the property line where the connection to the Summit Property would be made if the cross easement were recognized.[91] Heisler testified that "the goal of this lawsuit [is] to make [the stub-out] an interconnection."[92] The inability to use the cross easement has placed Reybold's development plans in a "holding period."[93]

DelDOT will only approve "rights in, rights out" access for Reybold's property, which allows only right turns into and out of the property from Summit Bridge Road.[94] Without the ability to use the cross easement, vehicles exiting the Reybold Property cannot make left turns onto Summit Bridge Road.[95] Heisler testified that this limitation significantly reduces the property's accessibility and value: "Does having the ability to make a left-hand turn out of a property affect its value? A. Yes."[96] The cross easement would resolve this limitation by allowing

[89] Order 12; FR 11-12; JX46, A0142.
[90] FR 11-12; JX49, A0157.
[91] FR 12; Heisler TR. A0248.
[92] *Id*.
[93] Order 12; Heisler TR. A0216-17.
[94] Order 11-12; FR 12; Heisler TR. A0216-17.
[95] Heisler TR. A0217.
[96] *Id*.

access to the traffic signal at Summit's entrance, thereby enhancing the Reybold Property's value and development potential.[97] As Heisler explained, the lack of full access has adversely affected Reybold's ability to develop the property as desired.[98]

E. Litigation History

Following Summit's refusal to honor the cross easement, Reybold initiated this action seeking declaratory and injunctive relief.[99] Specifically, Reybold sought a declaratory judgment that the easement was valid and enforceable, as well as an order enjoining Summit from interfering with Reybold's use of the easement.[100]

The trial focused on the creation of the easement, Carter's intent, and the interpretation of the Code. The Court heard from three fact witnesses: Heisler for Reybold, Mammarella (Summit's attorney) for Reybold, and Perry for Summit. Three expert witnesses also testified: Forsten and Tarabicos for Reybold, and Casper for Summit.

In her final report, the Magistrate found that the Note "reserved an express easement which guarantees the plaintiff pedestrian and vehicular access through the defendant's property (and vice versa)."[101] The Magistrate concluded the language of the Note was unambiguous and reflected an intent to create an enforceable

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[97] Heisler TR. A0216-17, A0226-27; JX49, A0157.
[98] *See id*.
[99] Order 12; FR 13; A0030 Complaint.
[100] Order 12; FR 13.
[101] Order 12; FR 1.

easement.[102] And when Carter signed the Certification of Ownership on the Plan, she manifested her intent to create the cross easement.[103] The Final Report rejected Summit's argument that Section 20-70(a) of the Code stripped the easement of enforceability by private parties.[104] The Magistrate granted declaratory relief to Reybold but denied injunctive relief.[105]

On Summit's exceptions, the Vice Chancellor's Order reversed the Magistrate's decision and entered judgment in Summit's favor. In the Vice Chancellor's view, the Note was a "notation" under Section 20-70(a) of the Code and enforceable only by the County.[106] The Vice Chancellor determined that Carter's signature on the Plan was insufficient to demonstrate an intent to create a private easement, and that Reybold had not proven that she intended to create an easement burdening Summit's property. That Order led to this appeal.

[102] Order 13; FR 15-16.
[103] FR 15-18.
[104] FR 20-22.
[105] FR 1, 22-24.
[106] Order 14, 17-19.

ARGUMENT

I. CARTER'S CERTIFICATION AND SIGNATURE ON THE PLAN PROVED HER INTENT TO CREATE AN EXPRESS EASEMENT

A. Question Presented

When a property owner declares in a signed, certified, recorded document that "a cross easement is hereby established," does that language establish a cross easement without need to analyze the owner's subjective intent or consider parol evidence?

This argument was preserved below, including in Reyold's Answering Brief on Summit's Exceptions to the Final Repot, at A0546-53.

B. Standard and Scope of Review

In an appeal from the Court of Chancery, this Court "defer[s] to the trial court's evidentiary findings if supported by the record and logically determined."[107] But this Court conducts a *de novo* review questions of law, including the meaning of written documents.[108]

[107] *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 90 (Del. 1995).
[108] *See Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

C. Merits of Argument

1. Disregarding the legal significance of Carter's certification and signature was error.

A property owner's signature on a recorded document containing clear, present-tense language establishing an easement manifests that owner's intent to create such an easement. The Vice Chancellor's contrary conclusion contradicts both established Delaware precedent and basic principles of property law.

a. The certification on the Plan constituted *prima facie* evidence of Carter's intent.

When a property owner signs and records a document affecting real property, it creates a strong presumption that the document reflects the owner's true intent. As this Court recognized in *Judge v. Rago*, "[a]n easement may be created in any of several ways: by express grant or reservation, by implication, by necessity, or by prescription."[109] The "plain and direct language" on the Plan — "A cross easement is hereby established" — coupled with Carter's certification that the Plan was made at her direction and was her "act and plan," constitutes precisely such an express reservation.[110]

Delaware courts have consistently held that "there is a presumption that an executed instrument correctly states the intent of the parties"[111] And "the

[109] 570 A.2d 253, 255 (Del. 1990).
[110] *See* JX22, A0111.
[111] *Anderson v. Unknown Claimants*, 1993 WL 1501279, at *5 (Del. Ch. Oct. 27, 1993).

presumption that an instrument, as drawn and executed, correctly states the real intent of the parties, is difficult to overcome."[112] This presumption applies with particular force to a landowner's signature on a recorded document that affects real property rights.

The Vice Chancellor's decision effectively ignored this by delving into Carter's subjective intent. By requiring evidence beyond Carter's signature and certification, the Order contradicts Delaware's approach to interpreting signed and recorded instruments. After all, under Delaware law, a party's failure to read a document before signing it does not justify voiding the document later.[113] In *Newport Disc, Inc. v. Newport Electronics, Inc.*, the Court required "clear, positive and convincing evidence" to overcome the presumption of intent stated in an instrument.[114] Summit presented no such evidence.

The language of the Note could hardly be clearer: "A cross easement is hereby established . . . ." This present-tense, operative language creates an immediate property right, not future aspirations. Delaware courts recognize that no specific words are required to create an easement "so long as the writing clearly reflects the

[112] *Colvocoresses v. W.S. Wasserman Co.*, 28 A.2d 588, 591 (Del. Ch. 1942).
[113] *See Pellaton v. Bank of N.Y.*, 592 A.2d 473, 477 (Del. 1991).
[114] 2013 WL 5797350, at *6 (Del. Super. Oct. 7, 2013).

grantor's intent to create a right in the nature of an easement."[115] Here, the Note's language unambiguously demonstrates this intent.

The Vice Chancellor dismissed the significance of Carter's signature on the Plan, characterizing it as a "ministerial act."[116] But signing a document affecting real property rights is never merely ministerial. As this Court explained in *Parshalle v. Roy*, "the act of placing one's signature on a legal document, whether in writing or by a facsimile or stamp, is regarded as the most deliberate, conscious way that a person may manifest his intent to consent to, and be bound by, the terms of that document."[117] In other words, signatures have meaning.[118] By signing the certification, Carter manifested her conscious intent to be bound by the easement established in the Note.

The certification language itself is equally significant. Carter certified that the Plan "was made at my direction" and that she "acknowledge[d] the same to be my act and plan."[119] Carter's certification confirmed that the Plan was "deliberately prepared" at her direction.[120] This acknowledgment language carries particular legal

[115] *Black v. Staffieri*, 2014 WL 814122, at *2 (Del. Feb. 27, 2014).
[116] Order 29.
[117] 567 A.2d 19, 27 (Del. Ch. 1989).
[118] *See id*. *See also*, *Pellaton*, 592 A.2d at 477.
[119] JX22, A0111.
[120] *Id*.

weight because of the "heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties."[121]

Moreover, by recording the Plan, Carter gave constructive notice to all future purchasers of both properties. Delaware law has long recognized recording as evidence of intent to be bound by the recorded instrument. For example, in *Reinhardt ex rel. Eves v. Chalfant*, the Court of Chancery recognized that "right[s] result[] from the recording of [a] plot."[122] Citing *Reinhardt*, this Court, in *Judge*, confirmed that "the recording of any plot allows the owners of the depicted property to travel on reflected private streets."[123] So, Recording a record plan with easement language creates enforceable rights as a matter of law.

An express easement exists when the writing contains "plain and direct language evidencing the grantor's intent to create a right in the nature of the easement."[124] Here, the language Carter used – "A cross easement is hereby established" – is traditional granting language routinely used in deeds and easements. Thus, the Note's language meets the standard.

Even if the Note's language were somehow ambiguous – which it is not – any such ambiguity should have been resolved in Reybold's favor. If "intent cannot be

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[121] *See Fiat N Am. LLC v. UAW Retiree Med. Benefits Tr.*, 2013 WL 3963684, at *17, n.118 (Del. Ch. July 30, 2013).
[122] 110 A. 663, 664-65 (Del. Ch. 1920), *aff'd*, 113 A. 674 (Del. 1921).
[123] *Judge*, 570 A.2d at 256.
[124] *Black*, 2014 WL 814122, at *2 (quotation and citation omitted).

ascertained with certainty, a conveyance of real property must be construed broadly to favor the grantee."[125] The Vice Chancellor further erred by failing to apply the principle that ambiguities in conveyances are construed in favor of the grantee.

b. Only Carter, as property owner, could create the easement.

The Vice Chancellor's conclusion that Carter lacked the requisite intent ignores a fundamental principle of property law: only the property owner can create an easement.[126] The Engineer could prepare the Plan, DelDOT could request a cross easement, and the County could aggregate comments from various agencies, but none of those parties could independently or together create an easement on Carter's property. As testified by Summit's own expert, Casper, the Note was requested by DelDOT, not imposed by the County.[127] Even with DelDOT's request for the cross easement, and the Engineer's inclusion of the Note on the Plan, only Carter had the legal authority to grant an easement on the property she owned.

Worse, the record contained no evidence contradicting Carter's intent. Instead, the court below relied on the absence of evidence showing Carter's "involvement" in the subdivision process.[128] But that ignores that Carter's signature

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[125] *Judge*, 570 A.2d at 257 (citation omitted).
[126] *See, e.g., Oldham v. Taylor*, 2003 WL 21786217, at *4 (Del. Ch. Aug. 4, 2003) ("As one-half owners of the property, the Taylors could only encumber that which they owned.").
[127] Casper TR. A0341, A0362.
[128] Order 26.

on the Plan created a presumption that she intended its contents. Summit bore the burden to disprove that intent, not the other way around. The only relevant evidence in the record – Carter's certification that the Plan "was made at my direction" and was her "act and plan" – confirmed rather than refuted her intent.

The Plan's language unambiguously established a cross easement. Carter certified the Plan was her "act and plan."[129] She then recorded the Plan, providing constructive notice to all future purchasers. A property owner's signature on a document containing explicit easement language, followed by recordation, manifests an intent to create that easement. The court below wrongly concluded otherwise.

The Vice Chancellor also ignored that Carter had every reason to create this easement. By reserving cross-access rights, Carter protected the value and development potential of her remaining lands. The expert testimony unanimously confirmed that such cross easements are common in commercial developments precisely because they enhance property values.[130] The Vice Chancellor's conclusion that Carter would subdivide her property without protecting future access rights for her remaining lands makes no economic sense.

[129] JX22, A0111.
[130] Forsten TR. A0173; Tarabicos TR. A0267; Casper TR. A0358.

Delaware law places decisive importance on a property owner's signature on recorded documents. In *Judge*, this Court recognized that recorded plots create enforceable rights of access.[131] The Order disregards this precedent. Instead, the Vice Chancellor required "extrinsic evidence of Carter's direct involvement" beyond her signature on the Plan.[132] However, as explained above, this requirement finds no support in Delaware law, which presumes a property owner's signature manifests intent.

The Vice Chancellor's analysis further errs by focusing on who requested the easement rather than who created it. Whether DelDOT, the County or someone else requested the easement is immaterial. What matters is whether Carter, the only person with legal authority to create the easement, intentionally did so. The evidence confirms she did by certifying the Plan, recording it, and conveying the Summit Property with reference to the recorded Plan. Each act independently manifested her intent to create the cross easement. And, as the Final Report noted on page 17, "[o]nce Ms. Carter sold the shopping center property to the predecessors in interest to Summit, the reserved easement was effective."

In sum, the Vice Chancellor's decision disregards the legal significance of Carter's certification and signature on the Plan, which provided conclusive evidence

[131] 570 A.2d at 256.
[132] Order 29.

of Carter's intent and created an enforceable cross easement. The court below erred by requiring additional evidence beyond what Delaware law recognizes as sufficient to establish an express easement.

2. In reaching the opposite conclusion, the court below improperly shifted burdens and ignored Summit's inconsistent conduct.

a. The Vice Chancellor incorrectly placed the burden on Reybold to prove Carter's subjective intent.

The Court of Chancery fundamentally erred by focusing on, and requiring Reybold to produce direct evidence of, Carter's specific subjective intent.

Generally, the rules of construction that apply to contracts also apply to recorded documents, like easement grants.[133] Delaware courts apply an objective theory when interpreting recorded documents, focusing squarely on plain language as the best indicator of the parties' intent.[134] This approach provides certainty in property rights and eliminates the need for courts to engage in speculative inquiries about subjective intentions. The test is not what the parties subjectively intended a written document to mean, but what "would be understood by an objective, reasonable third party" based upon the language the parties used.[135] And if that language is unambiguous, parol evidence is barred from consideration.[136]

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[133] *See Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 5 (Del. 2002).
[134] *See Parshalle*, 567 A.2d at 27.
[135] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).
[136] *See Equitable TR. Co. v. Gallagher*, 102 A.2d 538, 542 (Del. 1954).

Here, Carter's signature on the Plan's certification objectively manifested her assent to everything contained in the Plan, including the Note stating "A cross easement is hereby established." This clear language, coupled with Carter's certification that the Plan "was made at [her] direction" and that she "acknowledge[d] the same to be [her] act and plan," provided all the evidence necessary to establish the easement's validity.

Despite acknowledging this plain language, the Vice Chancellor still focused on Carter's subjective intent to create an easement.[137] Worse, the Vice Chancellor put the burden on Reybold to prove that Carter's subjective intent matched her words.[138] That approach and burden shift contravened Delaware's well-established objective approach to written instruments. And because the court below wrongly looked to parole evidence, it permitted Summit to "talk[] the substance out of what [Carter] ha[d] put into writing."[139]

The Order also overlooked that nothing in Delaware law requires the grantor of an easement to be personally involved in drafting the instrument that creates it, any more than a signatory to a contract has to be personally involved in the drafting. For example, more than a century ago, this Court held that a party could not later assert that a party "must be held to have understood the meaning and effect of what

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[137] Order 24-26.
[138] *Id.*
[139] *Equitable TR. Co.*, 102 A.2d at 542.

they did sign" when it comes to recorded documents.[140] And in other contexts, such as shrinkwrap and clickwrap agreements, Delaware courts have recognized that participation in negotiation is not necessary to create a binding obligation.[141] To the contrary, "as long as there was a reasonable opportunity for [a party] to read the terms and reject them, [s]he is bound by them."[142]

Even if subjective intent were somehow relevant – which it is not – the Order improperly allocated the burden to Reybold to prove Carter's subjective intent. That burden should have been on Summit because when a party challenges the plain language of an executed instrument, that party bears the burden of proving by clear and convincing evidence that the language should not be given effect.[143] The same is true of the party contesting a signature on a signed instrument.[144] But here, the Vice Chancellor inverted this burden by requiring Reybold to prove Carter's

[140] *Killen v. Purdy*, 99 A. 537, 538 (Del. 1916).
[141] *See, e.g., Payne v. Samsung Elecs. Am., Inc.*, 2024 WL 726907 (Del. Super. Ct. Feb. 21, 2024).
[142] *See id*. at *6 (quotation and citation omitted).
[143] *Beckrich Holdings, LLC v. Bishop*, 2005 WL 1413305 (Del. Ch. June 9, 2005).
[144] *See, e.g., Killen*, 99 A. at 538; *In re Tax Parcel No. 09-008.00-001*, 2015 WL 230457, at *3 (Del. Ch. Jan. 16, 2015).

subjective intent, rather than requiring Summit to disprove the objectively manifested intent plainly reflected in the document Carter signed and certified.

b. Express easements in written instruments require only a preponderance of evidence, not clear and convincing evidence.

The Order compounded its error by applying an inappropriately heightened evidentiary standard for proving an express easement. Under Delaware law, the existence of an express easement need only be established by a preponderance of the evidence when the easement is created by a written instrument.

In *Beckrich Holdings, LLC*, for instance, the Court of Chancery explicitly applied the preponderance standard to determine whether a written instrument created an easement, stating: "I find that Beckrich has established by a preponderance of the evidence that the parties intended the Easement and Maintenance Agreement to grant an easement to all parties to the Agreement."[145] Similarly, in *Rago v. Judge*,[146] this Court evaluated whether certain instruments created an easement using the preponderance standard.

The Vice Chancellor erred by relying on *Buckeye Partners, L.P. v. GT USA Wilmington, LLC*,[147] to impose a clear and convincing standard.[148] *Buckeye*

[145] *Id.* at *7.
[146] *Rago v. Judge*, 1989 WL 25802, at *6 (Del. Ch. Mar. 16, 1989).
[147] 2022 WL 906521 (Del. Ch. Mar. 29, 2022).
[148] *See* Order 14-15.

addressed an entirely different context – situations where an easement is claimed without a clear written instrument – and it based its analysis upon a single phrase from a treatise.[149] In Delaware, the "clear and convincing" standard properly applies only to prescriptive easements, easements by implication, and other non-express easements that "work [a] forfeiture[] of existing property rights."[150] — or, to those who, like Summit, seek to void a recorded document.[151]

Here, the Note plainly created an express easement through written language in a recorded instrument. The Vice Chancellor's application of the clear and convincing standard constitutes reversible error that significantly skewed the analysis of the evidence presented.

c. The Order overlooked Summit's inconsistent positions regarding the easement's validity.

If the court below had any further doubts about the easement's validity, then it should have addressed Summit's own conduct, which belies Summit's litigation position. The Vice Chancellor's failure to consider this contradictory behavior further undermines the Order's conclusions.

First, Summit's attorney twice listed the cross easement as an exception to title in policies he prepared for Summit Plaza's title company – once in 2018 and

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[149] *See* 2022 WL 906521, at *2 & n.2.
[150] *Berger v. Colonial Parking, Inc.*, 1993 WL 208761, at *3 (Del. Ch. June 9, 1993).
[151] *See, e.g., Killen*, 99 A. at 538; *In re Tax Parcel No. 09-008.00-001*, 2015 WL 230457, at *3.

again in 2022 while this litigation was pending.[152] Mammarella testified that he meticulously reviews title exceptions and removes those that are inapplicable.[153] His decision to maintain the easement as an exception demonstrates his professional judgment that the easement validly encumbered the Summit Property.

Second, Summit's principal, Hynansky, created a nearly identical cross easement on a record plan for one of his own properties, the Winner Plan, and has used and enforced that easement.[154] This conduct is directly contrary to Summit's position in this litigation that such easements are unenforceable by private parties.

Third, Summit's representative, Perry, never claimed during his discussions with Reybold that the cross easement was invalid or unenforceable. Instead, Perry testified that Hynansky objected to Reybold's use of the easement solely because of safety and traffic concerns – objections that necessarily assume the easement's validity.[155]

A party's prelitigation conduct can be relevant to assessing the credibility of positions taken during litigation.[156] Here, this inconsistent conduct strongly suggests that Summit's position in this litigation is a *post hoc* rationalization developed solely

[152] Mammarella TR. A0329; JX36, 47.
[153] Mammarella TR. A0327.
[154] AF A0096, ¶¶ 12-14.
[155] *See* Perry TR. A0386, A0388.
[156] *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 228 (Del. 2005).

to prevent Reybold from using the easement for competitive reasons. The original understanding of the easement has not changed; only Summit's convenience has.

The Vice Chancellor's failure to consider Summit's contradictory conduct—especially the actions of its own attorney in recognizing the Easement in title policies—constitutes reversible error that affected the outcome of the case.

II. THE COURT BELOW ERRED IN HOLDING THAT THE NOTE WAS A "NOTATION" UNDER SECTION 20-70(A) OF THE CODE

A. Question Presented

Did the Court of Chancery err in holding that the cross easement language in the Note was a "notation" under Section 20-70(a) of the Code and therefore enforceable only by the County, when both the Code and the UDC use different terms for "notes" and "notations," explicitly recognize private easements on record plans, and limit the types of easements the County can require?

This question was preserved Answering Brief on Exceptions at A0549-53 and A0565-72.

B. Standard and Scope of Review

The standard and scope of review is as stated in the preceding section.

C. Merits of Argument

1. The Order incorrectly equated "notes" with "notations" despite textual differences.

The court below fundamentally erred in treating the term "note" appearing on the Plan as synonymous with "notation" in Section 20-70(a) of the Code.

The Code uses these distinct terms separately throughout its provisions, suggesting different intended meanings. After all, under Delaware law, legislative drafters are "presumed to have inserted every provision for some useful purpose and

construction[.]"[157] Thus, "when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended."[158]

The Vice Chancellor's conclusion that the words "note" and "notation" are identical ignores this fundamental principle of statutory interpretation and fails to put "notations" in the proper legislative context. In the Code, Section 20-70(a)'s placement in Article VIII "Improvement Specifications" contextually limited its application to physical improvements, not to private property rights like easements. Indeed, Section 20-70(c) explicitly recognizes the creation of private rights-of-way on record plans.[159]

Section 20-48(d)(12) of the Code also provides that a record plan must contain a "reference to those ***restrictions*** or agreements that run with the land that have been ***imposed for the benefit of New Castle County***," along with specific statutory language dictated by the Code.[160] No such language appears on the Plan with respect

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[157] *General Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1998).

[158] *Id.* The Vice Chancellor also supported her conclusion that a "note" is the same as a "notation" by pointing to the fact that members of the Subdivision Advisory Committee requested plan notes. Order 19-20. There is no evidence that any of the agencies intended their plan comments to only be enforceable by the County under Section 20-70a. Indeed, why would the State Fire Marshal or DelDOT give up their rights to enforce state statutes including governance of road rights-of-way to the County?

[159] "All private common areas and facilities shown on the Record Plan, such as … rights-of-way … shall be improved as required by this Chapter and by the Record Plan."

[160] "This plan is governed by, and complies with, the restrictions and agreements recorded in Deed Record____, Volume____, Page ____."

to the cross easement in the Note, because it was not imposed for the benefit of New Castle County.

Examining the use of the words "note" and "notation" within the UDC sheds further light of the Vice Chancellor's error. The term "notation" appears only once in the entire UDC – in the section at issue.[161] By contrast, the term "note" appears throughout numerous UDC sections in different contexts. The UDC contains multiple provisions using the term "note," including Section 40.22.610 (requiring a "note" explaining waiver of parking standards), Section 40.24.010 (requiring a "note" alerting lot owners of development requirements), and Section 40.25.113 (requiring a "note" explaining variance standards). This consistent pattern of usage demonstrates the County knew how to distinguish between these terms.

And the Vice Chancellor's resort to standard dictionary definitions was error, too. One of her sources — Brian Garner's *Modern English Usage* — did not include the entry the Vice Chancellor in earlier editions.[162] So, it could not have been on anyone's mind when Carter signed the Plan or when the then-existing Code was drafted.

[161] Section 40.31.810A

[162] *See* Order 17 & n.94. *See, Bryan A. Garner, A Dictionary of Modern Legal Usage*, pp. 60, 599 (2nd ed., 1995). A copy of the excerpt is included at A0610-13.

By contrast, the Final Report correctly interpreted the language. It observed that "there is nothing in the code expressly limiting a property owner from including her own notes in a plan and nothing that precludes using such notes to establish, preserve, or memorialize an express easement." That analysis correctly distinguished between County-imposed conditions in a "notation" and a property owner's creation of private property rights within "notes" on a plan.

2. Industry practice confirms this textual distinction.

When a word carries both an ordinary and specialized meaning, courts must give due weight to the specialized meaning.[163] This is especially true when context and usage show a term has a "well-understood, specialized meaning" among professionals in that area.[164]

Here, the context decisively shows "notation" has a specialized meaning distinct from the term "note" and, most importantly, the understood and undisputed usage of those terms for decades.

All three expert witnesses – including Summit's own expert – confirmed that that cross easements on record plans are common industry practice, are privately

[163] *See Ins. Coms'r of State of Del. v. Sun Life Assurance Co. of Canada U.S.*, 21 A.3d 15, 20 (Del. 2011) [hereinafter *Sun Life*]. *See also, United States v. Hansen*, 599 U.S. 762, 775 2023 ("When words have several plausible definitions, context differentiates among them. That is just as true when the choice is between ordinary and specialized meanings[.]").
[164] *See Sun Life*, 21 A.3d at 20.

enforceable, and are routinely understood as creating property rights that run with the land.

Forsten testified that "cross access easement[s]" appear "typically on commercial plans if there are adjoining properties and DelDOT or the County wants to limit curb cuts."[165] He further stated that in his 35 years of experience, he had "never seen anybody not honor an easement" created on a record plan, and "it would never cross my mind that the beneficiary of the easement would not be entitled to use and, if necessary, enforce that easement."[166]

Tarabicos similarly testified that cross easements like the one at issue are "absolutely" common and typical in the land use approval process.[167] He emphasized that DelDOT is "obsessed with reducing the number of entrances onto their highways," which explains why "they always request cross easement agreements."[168] Most importantly, Tarabicos testified that in his 35 years of experience, he had "never seen the County refer to an easement as a restrictive covenant."[169]

Even Summit's expert, Casper, acknowledged the importance and prevalence of cross easements in commercial development plans. Not a single expert testified

[165] Forsten TR. A0173.
[166] Forsten TR. A0181-82.
[167] Tarabicos TR. A0266-67.
[168] Tarabicos TR. A0267.
[169] Tarabicos TR. A0271.

that cross easements on record plans are routinely viewed as enforceable only by the County.

By disregarding this uncontradicted expert testimony, the Vice Chancellor failed to consider industry custom and practice – evidence that would have strongly supported finding that the Note created a valid, privately enforceable easement, rather than a notation only enforceable by the County.

3. The Order's interpretation would render other UDC provisions meaningless.

The Vice Chancellor's interpretation creates irreconcilable conflicts with other sections of the UDC.

Most significantly, it would render meaningless Section 40.31.716.A of the UDC, which specifically distinguishes between "plan notes" and "private easements." This section expressly authorizes the "correction of ... plan notes that were made in error" separate from the authorization to "eliminate or relocate any private easements depicted on a record plan." If all notes on plans were merely County-imposed notations, this distinction would be superfluous.

Similarly, UDC Section 40.20.420 explicitly identifies the limited types of easements the County has authority to require: "drainage, utilities, access to public utilities or drainage areas, and conservation easements." Cross easements for vehicular and pedestrian access are noticeably absent from this exhaustive list. The

Vice Chancellor's interpretation would improperly expand the County's authority beyond the express limitations in the UDC.

The Vice Chancellor's interpretation also contradicts the UDC's definition of an "easement" in Section 40.33.300 as "any portion of a parcel subject to an agreement between the property owner and another party which grants the other party the right to make limited use of that portion of the property for a specified purpose."[170] The Note creates precisely this type of limited use right — not a restriction on the free use of land that characterizes a restrictive covenant. Interpreting language that fits the statutory definition of an "easement" as instead creating a "restrictive covenant" renders the definitional distinctions of both the Code and the UDC meaningless. That is especially the case when, here, the Note creates exactly what the Code and the UDC define as an easement (a right of one party to limited use of another's property), not a restrictive covenant that would limit an owner's use of its own property.

The Vice Chancellor's interpretation also directly contradicts UDC Section 40.20.410, which provides that "[t]he provisions of the [UDC] are not intended to replace any deed restriction, covenant, easement or any other private agreement on

[170] Historically, that was the case, too. The Code defined an easement as "[a]n acquired privilege or right of use which one person has in another person's land." Section 20-3(b). The reference to "person" reinforces the private nature of this right, not a restriction imposed for the benefit of the County.

the use land ….” This provision expressly preserves private property agreements, including easements, regardless of whether they also appear as notes on a record plan. It also demonstrates the UDC itself contemplates private easements existing alongside County regulations.

Finally, Section 40.20.410 provides “The County shall only enforce provisions that are required by [the UDC] or other provisions of this Code.”[171] As noted above, UDC Section 40.20.420 has a limited list of the types of easements the County may require. Accordingly, the County could not impose the cross easement in the Note as a “condition” or a “restrictive covenant” that only the County could enforce.

4. The Order’s misplaced reliance on *Greylag*.

The Vice Chancellor’s ruling relies heavily on *Greylag 4 Maintenance Corp. v. Lynch-James*,[172] but that case is readily distinguishable. In *Greylag*, the note at issue imposed a building size restriction, stating: “All building structures shall maintain a minimum of 100 feet separation and an area of less than 3,000 sq. ft. as per off. of state fire marshall [sic].” This restriction was explicitly imposed by the State Fire Marshal as a condition of plan approval, fell within the Fire Marshal’s

[171] *See also*, Code Sections 20-25(h) and (i), noting that the County may only refuse to approve a Preliminary Major Plan for noncompliance with the provisions of the Code.
[172] 2004 WL 2694905, at *1 (Del. Ch. Oct. 6, 2004).

regulatory authority, and addressed physical improvements to the property – the precise subject matter of Article VIII of the Code, entitled "Improvement Specifications," where Section 20-70(a) appears.

By contrast, the Note in this case creates a cross easement – a private property right – not a restriction on physical improvements. This distinction is critical because Section 20-70(a) appears in Article VIII of the 1982 Code, entitled "Improvement Specifications." The statutory context strongly suggests that Section 20-70(a) was not intended to deal with every item that appears on a record plan, but was intended only to impact "notations" appearing on a plan that related to "improvements" to be constructed.

Moreover, *Greylag* did not purport to address easements or other property rights appearing on record plans. Vice Chancellor Noble's use of the word "notes" was addressing a specific building restriction, not easements or property rights on record plans. The *Greylag* decision never analyzed whether every item labeled as a "note" on a plan was a "notation" under the Code.

The court below's unwarranted expansion of *Greylag* beyond its specific factual context contradicts *Judge* and *Green v. Templin*[173], which recognize that easements can be created through recorded plans. In *Green*, for instance, the Court noted that the easement appeared on a record plan recorded prior to the plaintiff's

[173] 2010 WL 2734147 (Del. Ch. July 2, 2010), *aff'd*, 30 A.3d 782 (Del. 2011).

acquisition of the property, and the plaintiff's deed referenced the plan and recited that the conveyance was "SUBJECT to all existing covenants, easements, restrictions, reservations and agreements of record."[174] Under the matching circumstances here, the easement should be enforced.

This Court should decline to endorse such a dramatic departure from established precedent without compelling justification. Instead, the Court should adopt Senior Magistrate Molina's narrow and contextual reading of *Greylag* as limited to physical improvement restrictions imposed by governmental entities, not private property rights created by landowners.

[174] *Id.* at *2.

III. THE ORDER CONFLICTS WITH ESTABLISHED DELAWARE PROPERTY LAW PRACTICE AND POLICY.

A. Question Presented

Did the Court of Chancery err in concluding, contrary undisputed expert testimony and evidence, that easements cannot be validly created on a recorded plan in contemplation of severance or subdivision of the property?

Reybold preserved this question in its Answering Brief on Exceptions, at A0549-55 and A0561-65.

B. Standard and Scope of Review

The standard and scope of review is as stated in the preceding sections.

C. Merits of Argument

The Vice Chancellor's Order, if allowed to stand, would disrupt thousands of established property relationships throughout Delaware and create significant uncertainty in real estate law. It creates an unworkable rule that upsets established practice and undermines settled expectations in property transactions.

Established practice demonstrates widespread reliance on record plan easements. All three experts testified that cross easements are routinely created on record plans and enforced by private parties. Forsten testified that, in his 35 years of experience, he had "never seen anybody not honor an easement" on a record plan, and "it would never cross [his] mind that the beneficiary of the easement would not

be entitled to use and, if necessary, enforce that easement."[175] Similarly, Tarabicos confirmed that cross easements like the one at issue are "routinely used" and "very, very common"[176] He elaborated that a ruling that easements on record plans are unenforceable would "alter real estate practice in Delaware" and "change things completely."[177] Summit's expert, Casper, also acknowledged that record plans routinely include private easements – cross easements are common and utility easements "appear on just about every record plan for the last 25, 30 years."[178]

The established practice is not merely theoretical. Record plans commonly establish cross access easements that property owners, title insurers, and real estate practitioners have consistently recognized and relied upon. Title insurance companies routinely list such easements as exceptions in their policies, recognizing their validity and enforceability by private parties.[179] Summit's own principal, Hynansky, created an almost identical cross easement on a record plan for one of his car dealership properties and has used and enforced that easement.

The Vice Chancellor's ruling, if allowed to stand, would disrupt thousands of established property relationships throughout Delaware and create significant uncertainty in real estate law. Not only is the Order wrong (as explained above), but

[175] Forsten, TR. A0172-73.
[176] Tarabicos, TR. A0265-66.
[177] *Id*. A0273-74.
[178] Casper, TR. A0367.
[179] Mammarella, TR. A0328; JX36, A0127; JX47, A0143.

Order failed to respect Delaware's policy of respecting settled expectations in property law.[180] As this Court has recognized, stability and predictability in real property rights are essential to a functioning real estate market.[181] The decision below replaces decades of settled expectations with a novel interpretation that would require countless property owners to renegotiate access rights that were previously established through record plans.

For these reasons, the Vice Chancellor's Order should be reversed, and Senior Magistrate Molina's well-reasoned Final Report should be reinstated.

[180] *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 930 (Del. 2023); *Leon N. Weiner & Assocs., Inc. v. Carroll*, 276 A.2d 732, 735 (Del. 1971).

[181] *Id.* "There must be order and certainty in the law, especially with respect to real property. As has been often stated, it is almost as important that the law be settled as it is that the law be right, particularly where real property is involved."

CONCLUSION

For all of these reasons, Appellant Reybold Venture Group IX, LLC respectfully requests that this Court reverse the Order entered by the Vice Chancellor and reinstate the well-reasoned Final Report of the Senior Magistrate.

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Dated: May 9, 2025