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Case Number 124,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE SUMMIT PLAZA SHOPPING CENTER, LLC'S ANSWERING BRIEF

Dated: June 9, 2025

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PRELIMINARY STATEMENT

This case presents a straightforward question governed by the plain language of the New Castle County Code (the "Code")[1] and Delaware's well-settled law of property: When the County requires a note to appear on a record plan, identifies it as a "note," and approves the plan based on that language, does that note become a private easement enforceable by adjacent landowners? The answer is no.

The Plaintiff-Below/Appellant, Reybold Venture Group IX, LLC ("Plaintiff"), seeks to convert a County-imposed planning condition—imposed through the administrative subdivision approval process—into a private property right. That effort fails both doctrinally and factually. The Court of Chancery correctly held that the language at issue (the "Note") is a "notation" within the meaning of Section 20-70(a) of the then-operative Code. Under that provision, all "notations" on a record plan—except those relating to certificates of occupancy—have the effect of restrictive covenants enforceable solely by the County. The Note, which appears in a section labeled "NOTES," is thus enforceable, if at all, by the County. Not by Plaintiff.

[1] The 1982 version of the New Castle County Code that was in effect in 1983 when the Record Major Land Development Plan dated November 9, 1983 will be referred to hereafter as the "Code." References to the Uniform Development Code in Chapter 40 of the current New Castle County Code shall be referred to hereafter as the "UDC".

The Plaintiff's theory rests on conflating the County's use of the word "note" with a private easement created by express intent. But a note imposed by the County in connection with subdivision approval is categorically distinct from a voluntarily granted easement. The County's August 1983 memorandum expressly directed the developer's engineer to "add the following note to the plan." Viola Carter, the prior landowner, did not attend the meeting, did not communicate with the County, and did not draft or request the language. The record shows no evidence, let alone clear and convincing evidence, that she intended to create an express easement. Her only involvement was to sign the standard Certification of Ownership, a ministerial act required by the County as part of the approval process.

Plaintiff's contrary position would render Section 20-70(a) functionally meaningless. It could allow any plan note—no matter how clearly imposed by the County—to be recast as a private property right based solely on its text or an owner's signature on an approval form. That interpretation disregards statutory structure, undermines local land use authority, and ignores Delaware's settled preference for construing property restrictions narrowly and only when supported by evidence of clear intent.

The Court of Chancery correctly rejected Plaintiff's effort to manufacture private rights from a public regulatory process. The Note is a "notation" under the

Code. It operates, at most, as a restrictive covenant enforceable by the County. Plaintiff failed to show that Carter intended to grant a private easement, and the trial court was right to decline to infer one. This Court should affirm.

NATURE OF PROCEEDINGS

Plaintiff's Nature of Proceedings is an accurate statement of the proceedings. This is Defendant's Answering Brief on appeal.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Carter's signature on the Record Major Land Development Plan dated November 9, 1983 (the "Plan")[2] was not evidence of her intent to create a cross easement. The certification makes no reference to an easement or her intent to otherwise endorse the Note as her own. The Court of Chancery did not err by considering parol evidence as the Note was a "notation" as that term is used in the Code. As a "notation", the Note could not confer any private easement rights and could only be enforced by the County. Having correctly decided that issue, the court was left to consider what other evidence, if any, might establish Carter's intent to create an easement. As Carter's only involvement was her signature beneath the certification, the execution of which was a condition to obtaining subdivision approval, the Court of Chancery correctly found that she did not intend to create an easement. The Court of Chancery did not improperly shift burden as it was always Plaintiff's burden and was correct to ignore the legally insignificant conduct of Summit.

2. Denied. As mentioned above the Court of Chancery correctly determined that the Note was a "notation" under the Code and, thus, only enforceable by the County. It was obvious by the record below, prior precedent,

[2] A0111.

and ordinary use of the words “notation” and “note”, that “NOTES” on plans are notations as that term is used in the Code.

3. Denied. The Cout of Chancery’s Order does not contravene settled law. On the contrary, it maintains it. A ruling in Plaintiff’s favor would strip the County of its right to enforce notes on plans.

COUNTER STATEMENT OF FACTS

I. Howard Cohen applies to the County for approval of the Plan.

In 1983, Viola Carter owned property on Summit Bridge Road, Middletown, Delaware.[3] On September 21, 1984, Carter sold a portion of that property, Tax Parcel No. 23-001.00-084 (the "Summit Property"), to Cohen Investments.[4] Howard Cohen is the owner of Cohen Investments.[5] Prior to purchasing the Summit Property, Mr. Cohen hired Franco R. Bellafante, Inc., ("Bellafante") to draft a Record Major Land Development Plan for the Summit Plaza Shopping Center ("Summit Plaza") and submit an application to the County for subdivision approval.[6] There is no evidence that Carter was involved in the hiring of Bellafante.

According to the application, Bellafante is the applicant, and Howard Cohen is the property owner.[7] Carter is not mentioned. Attached to the application

[3] AF 5 (A0095). "AF ___" refers to the Statement of Facts Which Are Admitted and Require No Proof in Section II of the Pretrial Stipulation and Order.
[4] JX 23, A0112. "JX __" refers to the Joint Exhibits submitted at trial.
[5] Heisler Tr. 73:7-20 (A0232). "[Name] Tr. __" refers to the trial testimony of the named witness).
[6] JX 2, A0106 (Application for Plan Review); Tarabicos Tr. 123:1-7 (A0282), 126:1-8 (A0285).
[7] A0106; Tarabicos Tr. 126:2-8 (A0285).

was an exploratory sketch plan.[8] Notably absent from the exploratory sketch plan is a "NOTES" section.[9]

On July 25, 1983, the County sent Bellafante a memorandum stating that the "Department of Planning finds that this plan is generally satisfactory except for compliance with the following: . . . 4. Submit a landscape plan to this Department for review and approval."[10] Only Howard Cohen was copied on the memorandum.[11] There's no evidence that Carter received it. In response, Bellafante submitted a Preliminary Major Land Development Plan that same day.[12] The County then stated that the plan had been "quantitatively accepted by this Department for review by its Subdivision Advisory Committee[13] at its meeting of August 8, 1983, . . ." (the "SAC Meeting").[14] Howard Cohen was copied on this letter. Carter was not.

In 1983, SAC's members consisted of Ray Richter from DelDOT; a member from the Department of Natural Resources and Environmental Control; a member from the County; a member from the Department of Public Works; and a

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[8] JX 2, A0106; JX 50, A0159; Casper Tr. 183:23-184:9 (A0341-2).
[9] JX 50, A0159; Tarabicos Tr. 127:22-24 (A0286); Casper Tr. 184:10-13 (A0343). The exploratory plan also did not include any easement language.
[10] JX 3, B112; Casper Tr. 184:14-24 (A0343).
[11] JX 3, B112.
[12] *See* JX 4, B113.
[13] Herein defined as "SAC"
[14] *Id.*

member from the State Fire Marshal.[15] The purpose of the SAC Meeting was so that the County could "receive technical comments from the Subdivision Advisory Committee members and from interested parties."[16] Bellafante submitted the proposed Summit Plaza plan, and the SAC members submitted their comments shortly thereafter.[17]

On August 10, 1983, the County received comments from the Department of Public Works, which included a comment stating that "If no debris is to be buried on this site, ***a note*** must be included that states no debris is to be buried on this site."[18]

The County also received DelDOT's comments on August 10, 1983. Among its five comments, DelDOT states that the plan should "indicate that the design as shown is conceptual."[19] DelDOT also sent comments to Bellafante which were more or less the same, except that it mentioned that consideration regarding future access should be given to the development of the other lands of Viola Carter.[20] Nonetheless, on August 11, Robert Burns from the County wrote an internal memorandum describing a phone conversation he had with Ray

[15] Tarabicos Tr. 119:19-120:10 (A0278-79); Casper Tr. 185:3-10 (A0344).
[16] JX 5, B112; Casper Tr. 185:21-186:10 (A0344-45).
[17] Casper Tr. 186:18-187:16 (A0345-46).
[18] JX 9, B116-117. (emphasis added).
[19] JX 10, B118.
[20] JX 7, A0108.

Richter.[21] According to the memorandum, Mr. Burns discussed the concerns for a combined entrance and exit in the future, when and if the other lands of Viola Carter are developed.[22] Mr. Burns then stated that Mr. Richter (DelDOT) agreed and that his comments would be forthcoming.[23]

On August 12, the County received comments from the State Fire Marshal.[24] The State Fire Marshal's comments stated that: "Prior to Record Plan approval, the following shall be required: . . . 2. Provide ***plan note*** stating that all fire lanes, . . . shall be marked and/or protected in accordance with State Regulation No. 14."[25]

On August 18, after receiving the SAC members' comments, Mr. Burns sent another memorandum to Bellafante, copying the SAC members and Howard Cohen.[26] Carter was not copied.[27] The August 18th memorandum states that the County found the Summit Plaza plan to be generally satisfactory but that it was

[21] JX 11, A0109; Tarabicos Tr. 131:5-19 (A0290).
[22] JX 11, A0109.
[23] *Id*.
[24] JX 8, B115.
[25] *Id*. (emphasis added).
[26] JX 12, B119-120.
[27] *Id.*

required to comply with six directives. Four of those six directives relate specifically to notations on the Plan.[28] In fact, the fifth directive states:

> 5). Please add the following ***note*** to the plan:
>
> "A cross-easement is hereby established between subject parcel and other lands of Viola Carter for vehicular and pedestrian traffic. Also a combined entrance-exit facility may be required in the future when and if the lands labeled 'other lands of Viola Carter' are developed for use or uses other than residential".[29]

That exact language appears as the first notation on the Plan (i.e., the Note).[30]

The August 18th memorandum was sent to Bellafante, with copies to SAC members and Cohen.[31] Carter did not receive a copy. Mr. Tarabicos, one of Plaintiff's experts, ultimately conceded that the County did, and does in fact, consider such easement language as a "note".[32] Mr. Tarabicos and Mr. Casper both confirmed that this was generally the process by which notes made their way onto record plans in 1983.[33]

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[28] *See id*; JX 22, A0111; JX 8, B115; JX9, B116-117; Tarabicos Tr. 132:5-137:18 (A0291-96); Casper Tr. 188:5-189:20 (A0347-48).
[29] JX 12, B119-120.
[30] *See* JX 22, A0111; Casper Tr. 191:7-192:17 (A0350-51).
[31] JX 12, B119-120; Casper Tr. 192:2-193:5 (A0351-52).
[32] Tarabicos Tr. 136:6-11 (A0295). (Q. " . . . But you would agree with me that it just says 'Please add the following note to the plan,' and then following is the –" A. "Sure.").
[33] Casper Tr. 193:6-10 (A0352); Tarabicos Tr. 138:14-140:6 (A0297-99).

To summarize: the County's Department of Planning received comments from SAC members, they asked Bellafante to include specific notes on the Plan, and Bellafante added those notes so that the County would approve the Plan.[34] The SAC members also received a copy of the "check print" so that they could send the County their letters of no objection.[35] The County received letters of no objection from the Fire Marshal, Public Works, and DelDOT.[36] There was no evidence at trial that Carter was involved in this process in any way.

According to Mr. Casper, once the Department of Planning receives the letters of no objection, the Department sends those letters and the plan to the County Council for its approval.[37] The Plan followed this course.[38] Notably, that letter requesting the Plan's approval was sent to the secretary of the County Council, the County's attorney, Bellafante, and Howard Cohen.[39] But for the Code's requirement[40] that she sign the County's form certificate of ownership,

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[34] Casper Tr. 181:20-183:11 (A0340-42).
[35] Casper Tr. 194:13-21 (A0353).
[36] Casper Tr. 194:22-196:6 (A0353-55); JX 17, B121; JX 18, B122; JX 19, B123.
[37] Casper Tr. 196:7-12 (A0355).
[38] JX 20, B124; Casper Tr. 196:13-197:5 (A0355-56).
[39] Casper Tr. 197:6-14 (A0356); JX 20, B124.
[40] *See* New Castle Cty. C. § 20-52(d)(2) (1987) ("The record plan shall also include the following data: . . . (2) A certification of ownership, acknowledgement of pan and, when applicable, dedication, letter on the plan, ***using the form specified by the department of planning***, such certification to be acknowledged and signed by the owner of the property.") (emphasis added).

Carter was not involved in this process. The County Council ultimately approved the Plan.[41]

II. Ownership of the Summit Property and the Reybold Property.

Carter sold the Summit Property to Cohen Investments, on September 21, 1984.[42] In 1987, Cohen Investment conveyed the Summit Property to Middletown Associates.[43] The Cohen Deed[44] makes no mention of a specific cross easement between the Summit Property and the "other lands of Viola Carter."[45] It merely states that what is being conveyed is "[a]ll that certain lot . . . as shown on the [Plan] . . . ."[46]. Apart from the Plan, there's no other mention of a cross easement in the record.[47]

Middletown Associates conveyed the Summit Property to Mr. Hynansky and the Estate of Howard Cohen on May 3, 2000.[48] The following day, June 1, 2000, Mr. Hynansky and Howard Cohen's Estate transferred the Summit Property to Mr. Hynansky.[49] In 2008, Mr. Hynansky transferred the Summit Property to

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[41] JX 21, B125; Casper Tr. 197:12-22 (A0356).
[42] JX 23, A0112 (the "Cohen Deed").
[43] JX 24, A0114.
[44] JX 23, A0112.
[45] *Id.*; Tarabicos Tr. 152:16-153:21 (A0311-12).
[46] JX 23, A0112.
[47] Heisler Tr. 74:2-5 (A0233).
[48] JX 29, A0117.
[49] JX 30, A0120.

Defendant.[50] As with the Cohen Deed, the subsequent deeds in the chain of title make no specific reference to the cross easement language on the Plan and merely state that what is being conveyed is "[a]ll that certain lot . . . as shown on the [Plan] . . . ."[51]

III. Plaintiff confronts Defendant with its intention to develop its property and enforce the Note.

Mr. Heisler, Plaintiff's owner, first mentioned the Note in 2019 to Alan Perry, the person responsible for managing the Summit Property.[52] Mr. Hynansky and Mr. Perry did not think that Plaintiff had the right to enforce the Note.[53] Indeed, even throughout this litigation, Mr. Heisler has admitted that the Note is a covenant and that it could only be modified by the County Council or its successor.[54] This is consistent with Mr. Heisler's current dealings with the Town of Middletown. As of the trial, Mr. Heisler was trying to get a plan approved for the development of the Reybold Property.[55] And even though DelDOT has approved that plan, allowing right in/right out traffic, the Town of Middletown

[50] JX 33, A0122.
[51] JX 30, A0120; JX 33, A0122.
[52] Perry Tr. 218:2-7 (A0377); 224:3-19 (A0383).
[53] Heisler Tr. 60:16-20 (A0219).
[54] *Id.* at 78:24-79:14 (A0237-38) (" . . . for me to modify it, you would have to go to Town Council. I don't know if you call it a covenant or a deed restriction. . . . it's information on the plan, and you need Council to agree.").
[55] *See* JX 49, A0157.

(according to Mr. Heisler) will not approve the plan until he has a separate easement agreement with Defendant.[56]

Having failed to obtain that agreement, Mr. Heisler, on behalf of the Plaintiff, filed this lawsuit seeking to have the Court find that the Note is an enforceable easement.

[56] Heisler Tr. 86:5-91:7 (A0245-50) (reviewing JX 49 and the language on the proposed plan that states "CROSS ACCESS EASEMENT TO BE ESTABLISHED UNDER A SEPARATE AGREEMENT").

ARGUMENT

I. The Court of Chancery was correct in finding that the Note is a Notation under Section 20-70(a) of the Code.

A. Question Presented

Whether the Court of Chancery correctly held that the Note was a notation under Section 20-70(a) of the Code.

This argument was preserved below, including in the Pretrial Stipulation and Order at 15, A0084; Defendant's Answering Post-Trial Brief, at 29-40, B060-71; and Defendant's Opening Brief in Support of its Exceptions to the Final Report at 35-42, A0522-29.

B. Scope of Review

Code provision interpretation follows canons of statutory interpretation.[57] And "questions of statutory interpretation are questions of law that this Court reviews de novo."[58]

[57] *Dewey Beach Enter. Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010) (applying the "well-settled" "rules of statutory construction" to interpreting a zoning code).
[58] *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009).

C. Merits of Argument

1. The Court of Chancery's interpretation of "notation" is correct.

The Court of Chancery was correct in concluding that the word "note" was synonymous with "notation". Accordingly, notes on record plans are "notations" and must be given the effect of notations under the Code.

When the County approved the Plan in 1983, Section 20-70(a) stated:

> The provisions of this chapter, pursuant to which a record plan has been approved and ***all notations appearing on a record plan***, other than those pertaining to certificates of occupancy, when the record plan is duly recorded, ***shall have the effect of restrictive covenants*** and shall run with the land covered by the record plan against the owners who have executed the record plan, their heirs, successors and assigns and in favor the county council until the record plan is amended or superseded; provided, that ***the right to enforce such covenants shall lie exclusively with the county council*** and the fact that several parcels belonging to different owners are similarly restricted or that a restricted parcel is divided among several different owners, shall not imply the creation of any private property or contract rights, on account of reliance or otherwise, among or between such several owners.[59]

The Code does not provide a definition for the term "notations." Accordingly, it is for the Court to ascertain its meaning. "Undefined words in a statute must be given

[59] Code § 20-70(a) (emphasis added).

their ordinary, common meaning."[60] And Delaware courts often rely on dictionaries "for assistance in determining the plain meaning of undefined terms."[61] The Court of Chancery appropriately consulted Black's Law Dictionary and Garner's Modern English Usage for interpretive guidance.[62] It properly determined that the former defines "notation" as the act of making a note, while the latter, though not defining "notation" directly, treats the verbs "notate" and "note" as synonymous.[63] Indeed, Merriam-Webster defines "notation" as an "annotation" or "note".[64] Accordingly, words appearing under a "NOTES" section on a record plan are "notations".

2. The Court of Chancery's interpretation of "notation" is consistent with precedent.

The Court of Chancery has interpreted "notation" to mean notes appearing on a record plan. "When a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that

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[60] *Oceanport Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).
[61] *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227-28 (Del. 2010); *see also Charter Communs. Operating, LLC v. Optymyze, LLC*, 2021 Del. Ch. LEXIS 4, *59 (Del. Ch. Jan. 4, 2021) (relying on Black's Law Dictionary for a definition of "hearing" under Ct. Ch. R. 41(c)).
[62] Opening Br. Ex., A at 16-17 (hereafter "Op. at __").
[63] Op. at 16-17 (citing *Notation*, BLACK'S LAW DICTIONARY (4th ed. 1968) and *Note*; *Notate*; GARNER'S MODERN ENGLISH USAGE (5th ed. 2022)).
[64] "Notation." *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/notation (last accessed May 27, 2025).

interpretation."[65] In *The Greylag 4 Maint. Corp. v. Lynch-James*,[66] Vice Chancellor Noble held that a property owner could not enforce a "note" on a record plan because the Code expressly provided that the "exclusive" responsibility to enforce the note lies with the County.[67] Vice-Chancellor Noble consistently referred to the notation in question as a "note".[68] The Court of Chancery again referred to notations as "notes" on a record plan in *New Castle County v. Pike Creek Rec. Servs., LLC*.[69]

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[65] *State v. Barnes*, 116 A.3d 883, 890 (Del. 2015); *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.7 (Del. 1997) (instructing trial courts need not use extrinsic evidence to interpret an unambiguous contract but may "consider some undisputed background facts to place the contractual provision in its historical setting without violating" the foundational principles of contract interpretation); *see also Stream TV Networks, Inc. v. SeeCubic, Inc.*, 250 A.3d 1016, 1040 (Del. Ch. 2020) ("The statute must be read as a whole in a manner that will promote its purposes." (internal quotations marks and citation omitted)). Although *Eagle Industries* concerns contract interpretation, similar principles of interpretation apply to construction of statutes. *See Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001) ("It is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws.").

[66] 2004 Del. Ch. LEXIS 145 (Del. Ch. Oct. 6, 2004).

[67] *Id.* at *34.

[68] *See e.g. id.* ("Thus, by the express provisions of the code, 'exclusive' responsibility to enforce the notes appearing in record plans lies with the County.'").

[69] 82 A.3d 731, 739 (Del. Ch. 2013) (stating that the Department of Planning "placed the following ***note*** on the recorded plan") (emphasis added).

The note in *Greylag*, like the Note here, was part of a record plan that was recorded with the County.[70] The code section applicable in *Greylag*, was identical to the 1982 version of § 20-70(a).[71] Contrary to Plaintiff's argument, *Greylag* is not discernible just because the note in *Greylag* pertained to a limit on the size of a building. The note in *Greylag* states that the limit on the size of the building was at the State Fire Marshal's request.[72] That is, the note in *Greylag* was the result of a SAC member's comments on the plan. The Note appeared on the Plan through the same process—it was imposed by the County following a SAC meeting.

Nor does the Court of Chancery's interpretation of "notation" contradict the ruling in *Green v. Templin*.[73] The plan in *Green*[74] merely depicted an easement and does not expressly grant one, despite the court in *Green* stating that the plan created the easement. The issue of the easement's creation was never argued in *Green*. The only issue in *Green* was the easement's scope of use.[75]

The Plan also differs from the plan in *Green.* Here, the easement language in the Plan is referenced in the "NOTES:" section. There's no depiction of Plaintiff's

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[70] 2004 Del. Ch. LEXIS 145, at *3-4.
[71] *Id.* at *32-34.
[72] Exhibit A to Defendant's Reply Brief in Support of Its Motion to Dismiss. Dkt. No. 11, B024-025.
[73] 2010 Del. Ch. LEXIS 141 (Del. Ch. July 2, 2010).
[74] Exhibit B to Defendant's Reply Brief in Support of Its Motion to Dismiss. Dkt. No. 11, B026-27.
[75] *Green*, 2010 Del. Ch. LEXIS 141, at *30.

desired easement like there was in *Green*, making this case analogous to *Greylag*, where the note in question appeared under the "NOTES" section of the plan.[76] If Carter intended to include the easement on the Plan she could have done so just as the owners in *Green* and *Greylag* did when they chose to depict easements on their respective plans.[77] She didn't because the Note is not a private easement, it is a notation, which can only be enforced by the County.

Moreover, the trial court's interpretation of "notation" and its reliance on *Greylag* does not contradict this Court's ruling in *Judge v. Rago*.[78] In *Judge*, the Court affirmed a declaratory judgment that determined the rights to use an access way between townhouses.[79] The townhouses were located on a parcel next to Judge's parcel.[80] The townhouses were linked by a series of access ways.[81] Judge argued that he had the right to use the access ways to traverse between his property and a nearby street.[82] In its analysis, the Court reviewed land plots that depicted the at-issue rights-of-way to determine whether the owner intended to create an

[76] B024-025.
[77] The *Greylag* plan contains a depiction of an easement, which does not appear under the NOTES section. B088 n. 12, B024-25; Dkt. No. 11 Exhibit B026-27.
[78] 570 A.2d 253 (Del. 1990).
[79] *Id*. at 254.
[80] *Id.*
[81] *Id.*
[82] *Id.*

easement between its land and Judge's.[83] Plaintiff argues that *Judge* stands for the proposition that easements can be created by depicting a right-of-way on a recorded plot. That is not the issue here—there is no depiction of an easement on the Plan. Whether an easement is created by recording a depiction of an easement on a plot is not an issue in this case. Accordingly, *Judge* is inapposite.

Plaintiff fails to cite any case that state that "notes" on a record plan can be easements to be enforced by an adjacent property owner. The Note is fundamentally different than a depiction of an easement because the effectiveness of the Note is governed by Section 20-70(a), whereas the depiction of an easement is governed by the common law.

3. The County has consistently interpreted "notation" to mean a note on a plan.

As discussed above, "[w]hen a statute has been applied by . . . state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation."[84] It is undisputed that the County directed Bellafante to incorporate notes on the Plan. In its memorandum, the County specifically refers to the at-issue language as a note: "Please add the following ***note*** to the plan . . .".[85] It is undeniable that the County is referring to "notations" as "notes". The SAC

[83] *Id.* at 256.
[84] *Supra* note 65.
[85] B119 (emphasis added).

members' written comments all requested a "note," not a "notation." These agencies used the word "note," not "notation," consistent with dictionary definitions equating the two.[86]

Mr. Tarabicos, conceded that the County referred to the at-issue language as a note when it directed Bellafante to add it to the Plan.[87] It should be further stated that in an email chain that Mr. Tarabicos's attached to his report, the County presently refers to easement language on record plans as "notes".[88] According to that chain, the County is the one who enforces such notes.[89] The County is also specifically referring to easement language under the notes section of a plan as a "note".[90] Notably, Plaintiff's other expert, Mr. Forsten, testified that over his 35-year career as a real estate attorney, he did not recall ever seeing a record plan containing the word "notation."[91]

Moreover, Section 20-70(a)'s revised provision, Section 40.31.810, presently refers to notations as notes. The Code provisions are essentially the same, but

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[86] *See* A108-09; B118-120.
[87] Tarabicos Tr. 134:18-136:11 (A0293-95).
[88] JX 40, B151.
[89] *Id.* ("Similarly, notes on the Bayberry plan are enforceable against lot owners within Bayberry . . . [and] against the developer – but . . . a developer can make an application to amend or remove such notes." There's no mention of those notes being enforced by the lot owners).
[90] *Id.* ("Easements are a little different than typical record plan notes . . ." and "but as with other record plan notes . . . ."); Tarabicos Tr. 159:15-160:21 (A0318-19).
[91] Forsten Tr. 22:6; 32:8-11 (A0191).

within this version, the Code specifically refers to the notations as notes: "All agreements, restrictions or covenants of any kind required by the Department of Land Use or Law shall be recorded prior to the final approval of a plan from the Department and the documents title and recorded book and page number shall appear on the plan as a ***note***."[92]

Plaintiff, however, argues that all three expert witnesses "confirmed that cross easements on record plans are common industry practice, are privately enforceable, and are routinely understood as creating property rights that run with the land."[93] That is not true. While the experts testified that easements, especially utility easements, appear on record plans, Plaintiff's experts could not convincingly say that they were privately enforceable. Mr. Forsten testified that nearly every record plan in New Castle County contains notes with easement language related to the use of utilities.[94] Although he admitted that it was the County who imposed those utility easements notes, he insisted that they were "easements" for the benefit of the utility, despite the fact that they do not specify which utility has the right to use the "easement".[95] He also did not know who determines whether a company is

[92] UDC § 40.31.810 (emphasis added).
[93] Opening Br. at 39-40.
[94] Forsten Tr. 14:2-15 (A0173).
[95] *Id.* at 38:17-39:16 (A0197-98).

a utility for purposes of the note.[96] He provided the Court with an example of another record plan, the Back Creek Record Plan,[97] that contained so-called easements under the notes section. The Back Creek Record Plan's third note describes a 30-foot-wide drainage easement. Mr. Forsten, though, testified that the County ***would*** enforce this type of note.[98]

In fact, Mr. Forsten ultimately acknowledged that the County would enforce the Note. He stated that the County and DelDOT would enforce the second sentence of the Note and decide whether a combined entrance and exit would be required.[99] Ultimately, it was even Mr. Forsten's opinion that Plaintiff still needed the County and DelDOT's permission to use the "easement" in the Note.[100]

Both parties agree that the County and DelDOT wanted the Note to be placed on the Plan so that the County could approve the Plan. [101] And the same can be said for the other comments from the SAC members.[102] There was nothing out

[96] *Id.* at 39:17-40:9 (A0198-99).
[97] JX 27, B128.
[98] Forsten Tr. 41:8-43:3 (A0200-02).
[99] Forsten Tr. 29:12-30:9 (A0188-89).
[100] Forsten Tr. 31:8-32:6 (A0190-91) (stating that he didn't think counsel quoted anything out of context); Forsten Tr. 48:17-49:12 (A0207-08).
[101] Heisler Tr. 79:15-19 (A0238), 80:16-81:21 (A0239-40), 82:5-83:22 (A0241-42); Forsten Tr. 26:12-24 (A0185).
[102] Forsten Tr. 27:3-5 (A0186).

of the ordinary with the County's approval of the Plan.[103] In fact, Mr. Forsten said that "[t]he County requires all things that are on the plan."[104]

All of the notes on the Plan were the result of the approval process by the County. The second note was at the request of DelDOT and there's no plausible argument that it is not a "notation" as that term is used in the Code. The record is also clear that the fourth note on the Plan was imposed at the request of the State Fire Marshall and the eighth note at the request of the Department of Public Works. The Note is no different from these notes in that respect.

According to Mr. Tarabicos, only the County (and not private citizens) would be responsible for enforcing the last note on the Plan regarding the burying of debris,[105] as well as the third note relating to building material, and the fourth note relating to fire lanes and hydrants.[106] Seemingly, all of the notes on the Plan would, according to Mr. Tarabicos, be enforced exclusively by the County—all but the Note.

[103] Casper Tr. 198:21-199:1 (A0357-58).
[104] Forsten Tr. 39:4-9 (A0198).
[105] Mr. Forsten agrees. Forsten Tr. 35:12-22 (A0194).
[106] Tarabicos Tr. 154:9-156:3 (A0313-15).

4. The Court of Chancery's interpretation does not render the other UDC provisions meaningless. To the contrary, Plaintiff's interpretation would render "notations" meaningless.

Plaintiff's challenge to the Vice Chancellor's interpretation of "notation" falls flat and invites an illogical outcome that would render the term meaningless. All but two record plans before the trial court included a "NOTES" section—none contained a separate section labeled "NOTATION."[107] Yet Plaintiff asks this Court to conclude that these "NOTES" sections are somehow distinct from the notations the County requires as a condition of plan approval. They are not. And although Plaintiff points to other provisions of the Code where the County used the word "note" to argue that it knew how to use the term precisely, Plaintiff fails to offer any coherent alternative definition for "notation." If "notation" does not mean "note," then what, exactly, does it mean?

Plaintiff ignores the express language of Section 20-70(a) and argues that Carter created an easement because the Note contains the word "easement". That is circular reasoning as it assumes the very point it seeks to prove—namely, that the Note creates a private easement simply because it uses the word "easement."

[107] *See* JX 22, A0111; JX 25, B126; JX 27, B128; JX 28, B135; JX 31, B138; JX 35, B147; JX 37, B148; JX 39, B149; JX 44, B153; and JX 50, A0159 (all containing a "NOTES" section like the Plan. JX 26, B127, and JX 32, B146 contain a "DATA COLUMN" and "SITE DATA" section, respectively. These sections are also notations, and thus notes, as that term is commonly used.).

For the Court to conclude that there is a private easement, the Plaintiff must first overcome Section 20-70(a) express language prohibiting the creation of private rights.

The Note is a "notation" by virtue of Section 20-70(a) which states that where "a record plan has been approved . . . all notations appearing on a record plan, . . . shall have the effect of restrictive covenants and . . . the right to enforce such covenants shall lie exclusively with the county council."[108] The term "all" is unconditional and not associated with any limiting or qualifying language. "[I]t is one of the 'least ambiguous words in the English language.'"[109] In other words, if the Note is a notation—which by any definition of "notation" it is—and appears on a record plan, then it is a restrictive covenant that only the County can enforce. If the Note were meant to be an easement granted by Carter, to be enforced by subsequent private parties, Plaintiff must prove that she intended to create the easement by some other means. It cannot do so by simply referring to the fact that the Note uses the word "easement" because doing so would render Section 20-70(a) meaningless as not "all" notes would "have the effect of restrictive covenants."[110]

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[108] Code § 20-70(a).
[109] *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 70 (2d Cir. 2011) (citation omitted); *GEICO v. Fetisoff*, 958 F.2d 1137, 1142 (D.C. Cir. 1992).
[110] Code § 20-70(a).

Furthermore, courts have recognized so called "easements" imposed by governmental authorities as restrictive covenants.[111] That is, the use of the word "easement" by the County does not in and of itself imply the intent to create a private property right. This is consistent with Section 20-70(a), which specifically states that the notations "shall not imply the creation of any private property or contract rights".[112] If the drafters of the Code intended to exclude certain notes from having the effect of a restrictive covenant, they knew how to do so. Section 20-70(a) goes on to state that certain notes pertaining to certificates of occupancy do not have the effect of restrictive covenants. As such, the Court must conclude that the drafters of the Code knew how to specifically exclude cross easements notations because it did so for notations pertaining to certificates of occupancy.[113]

Plaintiff cites to Section 40.31.716.A of the current UDC to argue that "plan notes" and "private easements" are distinguished. To be clear, this section of the UDC specifically refers to the "notations" in Section 40.31.810 as "plan notes."

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[111] *See Thompson v. Town of Henlopen Acres*, 1996 Del. Ch. LEXIS 33, at *8-9 (Del. Ch. Mar. 7, 1996) (recognizing that an easement held by the Town of Henlopen Acres is a restrictive covenant); *see also Brett v. City of Rehoboth*, 1986 Del. Ch. LEXIS 431, at *8 (Del. Ch. June 26, 1986) (including an easement as a type of restrictive covenant) (*aff'd Brett v. Rehoboth*, 1986 Del. LEXIS 1251 (Del. Sep. 22, 1986)).

[112] Code § 20-70(a).

[113] *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (explaining the maxim of *expression unius est exclusion alterius*).

Plaintiff, nonetheless, tries to make the point that because Section 40.31.716.A differentiates between "plan notes" in subsection 4 and "private easements" in subsection 5, that the drafters of the UDC could not possibly have meant for "plan notes" to include easements. There is, however, nothing inconsistent with the way the County uses "plan notes" and "private easements depicted on a record plan" with the trial court and Defendant's interpretation of the word "notation". To the contrary, this section supports the trial court's and Defendant's interpretation. The correct interpretation is that the Note is a "notation" because it appears as a note on a record plan. The fact that Section 40.31.716.A(5) modifies the word "easements" with the adjective "private" means that it is distinguishing it from another type of easement—namely a County imposed restriction. This section of the UDC further limits these "easements" to ones "depicted on a record plan". The Note, to the extent that it can be characterized as some sort of easement, is not depicted on the plan. Accordingly, the trial court's interpretation of "notation" is consistent with this section of the UDC.[114]

[114] It should be further noted that whether the interpretation of "notation" would be inconsistent with the current UDC is not a proper argument. The trial court interpreted the 1982 version of the Code. References to the UDC should only be made to the extent "notation", as it was used in 1983, is ambiguous and the Court is seeking guidance as to how the County has referred to plan notes in practice.

Plaintiff further argues that Sections 40.20.410 and 40.20.420 of the UDC would also be contradicted by the Vice Chancellor's interpretation of "notation". The former states that: "[t]he County shall only enforce provisions that are required by [the UDC] or other provisions of this Code."[115] The latter sets out the only types of easements that the County has the power to require during the subdivision process—cross easements, not being listed.[116] Neither section makes references to "notes" or "notations", meaning that they merely establish that the County may require private actors to record an easement. Obviously, such easement could be enforced by private parties, so long as it did not appear as a note on a record plan. That said, Defendant is not arguing that the County created an easement, its argument is, and has been, that the County imposed a notation on a plan. And so, the Court must look to the Code sections that discuss notations, not easements. Furthermore, if the argument is that the "Note" was an easement, and the County did not have the authority to create a private easement, it does not ipso facto mean that Carter intended to create an easement. All it means is that the County overstepped its authority when it instructed Bellafante to include the Note on the Plan.

[115] UDC § 40.20.410.
[116] *See* UDC § 40.20.420.

Plaintiff also cites to Section 40.33.300 of the current UDC as evidence that the Vice Chancellor's interpretation of "notation" contradicts the current Code's definition of easement. There is nothing inconsistent about the Vice Chancellor's interpretation. As a restrictive covenant that can only be enforced by the County, "notation" should be interpreted to mean something other than an "easement". To the extent that the Court finds it persuasive to review the current UDC to guide in its interpretation of "notation" as it was used in the 1982 version of the Code, Section 40.33.300 states that "Words not defined in this Article shall have the meaning given in other Code Chapters or Webster's Unabridged Dictionary." As mentioned above, Webster's Unabridged Dictionary defines "notation" as a "note".[117]

[117] "Notation." *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/notation. (last accessed May 27, 2025).

II. The Court of Chancery was correct in finding that Plaintiff failed to prove that Carter intended to create an express easement.

A. Question Presented

Whether the Court of Chancery correctly held that Plaintiff failed to meet its burden in establishing that Viola Carter intended to create an easement when it signed the Certification of Ownership on the Plan?

This argument was preserved below, including in the Pretrial Stipulation and Order at 15, A0084; Defendant's Post-Trial Answering Brief at 21-29, B021-60; and Defendant's Opening Brief in Support of its Exceptions at 19-33, A0484.

B. Scope of Review

"This Court reviews questions of law *de novo*."[118] The Court "will not overturn the Court of Chancery's factual findings unless they are clearly erroneous."[119]

When construing a document, this Court considers issues involving the language of the document *de novo*.[120] To the extent that the trial court's interpretation of the document is based on extrinsic evidence, "its findings are entitled to deference 'unless the findings are not supported by the record or unless

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[118] *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 94 (Del. 2021) (citing *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014)).
[119] *Id.* (citing *Klaassen*, 106 A.3d at 1043).
[120] *See Textron Inc. v. Acument Global Techs., Inc.*, 108 A.3d 1208, 1218 (Del. 2014) (referring to a court's consideration of language in a contract).

the inferences drawn from those findings are not the product of an orderly or logical deductive process.'"[121]

C. Merits of Argument

1. Carter's signature under the Certification of Ownership is not evidence of her intent to create an easement.

"Delaware's long 'settled policy of the law favors the free use of land.'"[122] "A 'recorded document' may impose restrictions against free use if the document 'by clear and convincing evidence' 'reflect[s] an unambiguous intention to impose them.'"[123] "An easement is a non-possessory interest in real property, granted for a particular purpose, enforceable of right and not depend[e]nt for its continued existence on the will of the grantor."[124] "[E]asement[s] may be created in any of several ways: by express grant or reservation, by implication, by necessity, or by prescription."[125]

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[121] *Id.* at 1218-19 (quoting *Honeywell Intern. Inc. v. Air Products & Chemicals, Inc.*, 872 A.2d 944, 950 (Dec. 2005)).
[122] Op. at 23 (quoting *Leon N. Weiner & Assocs., Inc. v. Krapf*, 623 A.2d 1085, 1092 (Del. 1993)); *Gammons v. Kennett Park Dev. Corp.*, 61 A.2d 391, 397 (Del. 1948) (noting "the settled policy of the law which favors the free use of land and which places the burden of establishing the existence and the right to the benefit of a restriction upon him who asserts it")).
[123] Op. at 23 (quoting *Krapf*, 623 A.2d at 1088, 1092-93).
[124] *Coker v. Walker*, 2013 Del. Ch. LEXIS, at *9 (Del. Ch. May 3, 2013).
[125] *Judge*, 570 A.2d at 255.

Plaintiff argues for an express easement. "[T]the creation of an easement by express grant should be accomplished through a writing, 'containing plain and direct language evidencing the grantor's intent to create a right in the nature of an easement.'"[126] "No specific words are required so long as the writing clearly reflects the grantor's intent to create a right in the nature of an easement."[127] It's Plaintiff's position that the Certification of Ownership accomplishes this.

The Certification, however, does not contain "plain and direct language evidencing [Carter's] intent to create a right in the nature of an easement."[128] It merely states that she is the owner of the Summit Property; that the Plan was made at her direction;[129] and that she plans to record the Plan in accordance with the law and regulations of the County (i.e., the Code).[130] In other words, the Certification does not "clearly reflect [Carter's] intent to create a right in the nature of an easement."[131]

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[126] *Alpha Builders, Inc. v. Sullivan*, 2004 Del. Ch. LEXIS 162, at *13 (Del. Ch. Nov. 5, 2004) (quoting *Rago v. Judge*, 1989 Del. Ch. LEXIS 29, at *13 (Del. Ch. Mar. 16, 1989)).
[127] *Black v. Staffieri*, 2014 Del. LEXIS 88, *6 (Del. 2014).
[128] *Alpha Builders, Inc.*, 2004 Del. Ch. LEXIS 162, at *13.
[129] This is hardly possible given the facts in the record, including but not limited to the fact that Howard Cohen hired Bellafante to create the plan and have it approved by the County.
[130] *See* JX 22, A0111.
[131] *Black*, 2014 Del. LEXIS 88 at *6.

"'In determining the intent of the parties, [courts] must give the words of the [r]estrictions their plain and ordinary meaning.'"[132] "'[T]he party advocating for the land use restriction bears the burden of demonstrating the restriction is valid and enforceable.'"[133] Having already established that the ordinary meaning of "notations" means note, the Court must conclude that the intent of Carter and the County (the County having also signed the Plan) is that the Note is a notation and not a private easement.

Nevertheless, if the Court concludes that the language contained in the Plan was reasonably susceptible to different interpretations,[134] the Court of Chancery was correct in its analysis of the record and its conclusion that Carter had no intention of establishing a cross easement when she signed the Certification. To the extent there is ambiguity, the ambiguity is latent. "Latent ambiguity is where the language employed is clear and suggests a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two

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[132] Op. at 24 (quoting *Mendenhall Vill. Single Homes Ass'n v. Harrington*, 1993 Del. Ch. LEXIS 100, at *4 (Del. Ch. June 16, 1993)).
[133] Op. at 24 (quoting *New Castle Cty. v. Pike Creek Recreational Servs., LLC*, 82 A.3d 731, 746 (Del. Ch. 2013), aff'd, 105 A.3d 990 (Del. 2014)).
[134] *See In re Est. of Pedigo*, 2024 Del. Ch. LEXIS 273, *6 (Del. Ch. Aug. 1, 2024) (quoting *In re Will of Fleitas*, 2010 Del. Ch. LEXIS 229, at *16 (Del. Ch. Nov. 30, 2010)) (determining when and if an ambiguity in a document exists).

or more possible meanings."[135] Because notes on record plans do not convey private property rights (i.e. private easements) and are instead treated as restrictive covenants to be enforced by and for the benefit of the County,[136] the language in the Note could create two possible meanings if the Court entertains Plaintiff's argument that Carter's signature is evidence of her intent to create an easement. Either the Note is a private easement created by Carter when she signed the Certification or it is a "notation" as that term is used by the Code. For the sake of completeness, the Court of Chancery considered extrinsic and extraneous evidence of how and why the Note became part of the Plan and whether Carter had any intention of creating an express easement by signing a Certification of Ownership. It was correct in its determination that she was not involved with the Note and had no intent to create an easement.

2. No proof exists of Carter's intention to establish an express easement.

There is no doubt that Cohen, through Bellafante, submitted the Plan to the County for its approval. It's also clear that Cohen, and not Carter, hired Bellafante. Carter's name appears nowhere in the County's records. All the correspondence in the County's records is between the County and Bellafante with copies to Cohen.

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[135] *Id.* at *7 (citing *In the Matter of Estate of Gallion*, 1996 WL 422338, at *2 (Del. Ch. June 27, 1996)).
[136] Code § 20-70(a) (1982).

Even though Carter certified that the Plan was made at her direction, there is no evidence that Carter had anything to do with the directing of the Plan. She certainly had nothing to do with having the Note placed on it and her certification was merely a ministerial requirement of the Code.[137] All Carter did was certify that the Plan contained notations that the County imposed in accordance with the Code.

Plaintiff asks this Court to focus solely on Carter's signature. But that is half the story. Under this Court's contract interpretation principles, the Plan, a "written instrument", must be interpreted with the goal of reaching ***parties'*** intent.[138] Three individuals signed the Plan: Bellafante, Carter, and Richard Bauer (the Planning Director for the County).[139] The record is clear with respect to Bellafante and Bauer: Their intent was that the at-issue easement language be placed on the Plan as a "note".[140] And as a "note", neither the County nor Bellafante intended to create private property rights.[141] To the extent the Plan forms a presumption of the parties' intent, the presumption is that Bellafante, Carter, and Bauer intended for the easement language to be a "notation" as that term is used in the Code. Plaintiff has

[137] *See* New Castle Cty. C. § 20-52(d)(2) (1987).
[138] *See Harrington*, 1993 Del. Ch. LEXIS 100, at *4 (emphasis added).
[139] JX 22, A0111.
[140] *See* JX 12, B119.
[141] Code § 20-70(a).

not overcome that presumption, nor has it met its burden that Carter intended to create an express easement.

3. The evidence at trial overwhelmingly showed that the County required the Note to be part of the Plan.

The County required Bellafante to include the Note on the Plan as a prerequisite for its approval; and the County in its August 18th memorandum specifically called the at-issue language a "note".[142]

As explained above, the Note's plain and direct language does not evidence Carter's intent, it evidences the County's intent. The County wanted to capture DelDOT's desire to minimize the number of entrances and exits if and when "the other lands of Viola Carter" were developed for something other than residential. And so, the County captured that intent by using the words "cross easement". But that does not change the fact that the Note is a "notation". The August 18th memorandum to Bellafante unambiguously refers to the at-issue easement language as a "note": "Please add the following ***note*** to the plan . . . ."[143]

Further evidence that the Note was meant to be a "notation" and not an actual private easement is contained in the second sentence of the Note. It states: "Additionally, a combined entrance/exit facility ***may be required*** in the future

[142] *See* JX 12, B119.
[143] *Id.* (emphasis added).

when and if the lands labeled 'other lands of Viola Carter' are developed for uses other than residential."[144] The use of "may be required" raises the question of who would decide whether a combined entrance/exit is required. If the Note were the express intent of Carter, this sentence becomes meaningless because she would not have had the right to require a future combined entrance/exit facility when and if her other lands were developed. The second sentence of the Note only has meaning when it is read as a "notation" because, at the time the Plan was recorded, only the County could have enforced that provision. Mr. Forsten agrees. He stated that the County and DelDOT would enforce the second sentence of the Note and decide whether a combined entrance and exit would be required.[145]

4. The Court of Chancery applied the correct burden and did not improperly ignore Defendant's so-called inconsistent conduct.

The Court of Chancery did not flip the burden of proof. It is well-established law in Delaware that "[t]he burden of proof of the easement is on the one who asserts its existence."[146] The cases cited by Plaintiff in which it argues for a burden flip are inapposite. In *Beckrich Holdings, LLC v. Bishop*,[147] the court put the

[144] JX 22, A0111 (emphasis added).
[145] Forsten Tr. 29:12-30:9 (A0188-9).
[146] *Baynard v. Every Evening Printing Co.*, 9 Del. Ch. 127, 143 (Del. Ch. 1910) (citing *Cooper v. McBride*, 9 Del. 461 (Del. Super. Ct. 1873).
[147] 2005 Del. Ch. LEXIS 91, *24 (Del. Ch. June 9, 2005).

burden on the plaintiff, Beckrich, to prove by a preponderance of the evidence that an agreement between the parties granted it an easement. While Defendant disagrees with the burden level used in *Beckrich Holdings, LLC*, it is clear, and consistent with Delaware law, that the party seeking to assert the easement has the burden. The other two cases cited by Plaintiff are *Killen v. Purdy*,[148] and *Krapf v. Krapf (In re Tax Parcel No. 09-008.00-001)*.[149] Neither is applicable as they concern fraud and forgery allegations.[150]

The Court should not simply apply the preponderance of the evidence standard in express easement cases. Recently, Vice Chancellor Laster, in *Buckeye Partners, L.P. v. GT USA Wilmington, LLC*,[151] citing a variety of treatises,[152] applied the more appropriate clear and convincing standard burden of proof. In

[148] 99 A. 537, 538 (Del. 1916).
[149] 2015 Del. Ch. LEXIS 16, *2 (Del. Ch. Jan. 16, 2015).
[150] *Killen*, 99 A. at 538 ("We think the evidence fails to clearly establish the fact that the deed and agreement were obtained by fraud"); *Krapf*, 2015 Del. Ch. LEXIS at *9-11 ("the Petitioner has the burden of demonstrating forgery of the 1998 Deed by evidence which is clear, direct, precise and convincing.").
[151] 2022 Del. Ch. LEXIS 69 (Del. Ch. Mar. 29, 2022).
[152] 25 Am. Jur. 2d Easements & Licenses § 14 ("An express grant of an easement must be in writing, and the grantor's intent to create an easement burdening particular property for the benefit of another must be clearly and unmistakably communicated."); Easements & Licenses, § 100 ("In general, a party claiming an easement has the burden of proof, and an easement generally must be established by clear and convincing evidence." (footnotes omitted)); 3 Tiffany, Real Property § 803 (3d ed. 1939) ("Although a plaintiff in a civil action normally must meet his burden by only a preponderance of the evidence, the plaintiff must overcome a higher clear and convincing standard to prove an easement.").

Buckeye, the plaintiff tried to prove the existence of easement by prescription, by estoppel, and by an express grant. The caselaw is clear with respect to the level of burden for easements by prescription and estoppel—it's clear and convincing. There appears to be a split on express easements. Vice Chancellor Laster's approach in applying clear and convincing is the correct approach.

Notably, the clear and convincing burden is implied in the elements of proving an express easement. Recall that to create an easement, the writing must "***clearly*** reflect[] the grantor's intent to create a right in the nature of an easement"[153] Moreover, asking the court to recognize an express easement is akin to seeking specific performance. Because Delaware courts require a clear and convincing showing to authorize specific performance of a contract, applying the clear and convincing standard to an express easement would be a logical progression.[154] That said, even under the less stringent standard of preponderance of evidence, Defendant still cannot meet its burden due to the overwhelming evidence that Carter had not intention of creating an easement.

[153] *Black*, 2014 Del. LEXIS 88 at *6 (emphasis added).
[154] *See Apennine Acquisition Co., LLC v. Quill*, 2023 Del. Ch. LEXIS 96 (Del. Ch. Jan. 3, 2023) (party may only obtain specific performance of contract after meeting clear and convincing standard).

Lastly, Plaintiff's attempt to engage in whataboutism[155] should be disregarded. Mr. Mammarella's testimony is irrelevant to Carter's intent. The Court understands it would be improper to consider his opinion in this case as it is exclusively within the province of the trial judge to determine issues of domestic law.[156] Nevertheless, Mr. Mammarella's testimony is not what Plaintiff makes it out to be. Mr. Mammarella said, generally, if there was some uncertainty, it was his practice to list certain encumbrances as an exception, "even though you're not certain whether or not it actually encumbers the property."[157] Only if it were clear to him, would he not list it as an exception.[158] He testified that he wasn't 100 percent sure that the Note was completely unenforceable.[159]

With regard to Mr. Hynansky's other record plans, the Winner Plan, and any issues relating to it, are not before the Court. The "access easement" language does not even fall under the notes section of that plan. And there's no record in the case of anyone trying to challenge the enforceability of that so-called easement. The

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[155] "Whataboutism or whataboutery (as in 'what about…?') is a pejorative for the strategy of responding to an accusation with a counter-accusation instead of a defense of the original accusation." *Whataboutism*, Wikipedia, last modified January 24, 2024, https://en.wikipedia.org/wiki/Whataboutism (last visited June 9, 2025).
[156] *Itek Corp. v. Chi. Aerial Indus.*, 274 A.2d 141, 143 (Del. 1971).
[157] Mammarella Tr. 167:13-168:1 (A0326-7).
[158] *Id.* at 168:2-8, (A0327).
[159] *Id*. at 171:3-9 (A0330).

Winner Plan and its easement language have nothing to do with this case. It is completely irrelevant.

Lastly, Mr. Perry's testimony is also irrelevant when it comes to determining Carter's intent. The trial court was correct to disregard these arguments from Plaintiff.

III. The Order is Consistent with Established Delaware Property Law Practice and Policy.

A. Question Presented.

Is the Order at odds with established Delaware Property Law Practice and Policy?

Defendant preserved this question below including in its Post-Trial Answering Brief at 45-49, B076-80 and its Reply Brief in Support of its Exceptions to the Final Report at 15-20, B100-105.

B. Standard and Scope of Review

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

C. Merits of Argument

If the Court were to find that the Note is an express easement, the result would be absurd because it would call into question the County's ability to enforce notes in the future.

If the Note created a private easement, that easement could be terminated by agreement of the parties to the easement. If that were to happen, the purpose of having the Note on the Plan would be defeated. All the parties agree that the County and DelDOT wanted the Note to be placed on the Plan so that the County could approve the Plan. A finding that Carter created an express easement by signing the Plan ignores this outcome and opens the door to having private citizens

disregard the County's intent and ultimately usurp its power to enforce notes on record plans.

Furthermore, if the Court adopts Plaintiff's argument, it will create a ruling effectively stating that the County could no longer enforce easement language on record plans. Plaintiff's expert testified that nearly every record plan in New Castle County contains notes with easement language related to the use of utilities.[160] In fact, a ruling in Plaintiff's favor in this case would mean that even though the County required that those utility easement notes be put on plans, the County could never enforce those easements. Even Mr. Forsten believes that some easements contained in notes on plans are to be enforced solely by the County.[161] But a ruling reversing the trial court would call into question all "notes" containing easement language. Accordingly, the Order is consistent with established Delaware property law practice and policy.

[160] Forsten Tr. 14:2-15 (A0173).
[161] *Id.* at 41:8-43:3 (A0200-2).

CONCLUSION

For all these reasons, Appellee Summit Plaza Shopping Center, LLC respectfully requests that this Court affirm the Order entered by the Vice Chancellor.

Dated: June 9, 2025

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CERTIFICATE OF SERVICE

I, Phillip A. Giordano, hereby certify that on June 9, 2025, I caused a true and accurate copy of the foregoing *Appellee Summit Plaza Shopping Center, LLC's Answering Brief* to be served on the following counsel of record via File&Serve*Xpress*:

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