EFiled: Jun 27 2025 04:30PM EDT
Filing ID 76542519
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 REPLY BRIEF

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Dated: June 27, 2025

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REPLY FACTS[1]

Summit's Answering Brief misstates what the record shows and what witnesses said. It is important to correct the more egregious inaccuracies here, but it is impossible to correct them all within this Reply. Reybold respectfully submits that the Court should carefully examine the cited testimony and context when reviewing Summit's arguments.

A. Specific Deviations from Admitted Facts and Exhibits.

Seven different times,[2] Summit asserts that the cross easement in this case was "a note imposed by the County" or similar words to that effect. This is the hook for Summit's "note"-"notations" argument that it made before the Vice Chancellor and in its Answering Brief. But this contradicts the Pretrial Stipulation where Summit acknowledged that, "The Note was a requirement of the Delaware Department of Transportation to obtain its approval of the Plan."[3] That admission aligns with DelDOT's regulations governing cross easements, as discussed below.

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[1] Capitalized terms have the same meaning as in the Opening Brief. "Order __" refers to the Court of Chancery's February 28, 2025 Order; "FR __" refers to Senior Magistrate Molina's Final Post-Trial Report; "AF ___" refers to the Statement of Facts Which Are Admitted and Require No Proof in Section II of the Pretrial Stipulation and Order (*see* A0095-96); and "[Name] TR. __" refers to the trial testimony of the named witness.

[2] Ans. Br. 2, 12, 22, 23, 25, 31 and 39.

[3] AF 15. Despite acknowledging DelDOT's requirement for the cross easement, Summit argues that the Easement is "enforceable***, if at all,*** by the County." Ans. Br. 1. This, too, is a flip-flop: In other places, such as page 31 of its Answering Brief or pages 13-16 of its opening brief supporting its motion to dismiss, Summit has argued

Summit also contradicts recorded documents introduced without objection. For example, Summit contends that none of the deeds in its chain of title refer to the cross easement, and "merely state what is being conveyed is "[a]ll that certain lot … as shown on the [Plan] …."[4] In truth, every deed in Summit's chain of title (save one) recites that the conveyance is subject to all easements of record, which includes the cross easement in this case.[5]

In a related misstatement, Summit argues that Reybold knew it lacked an enforceable easement, but Summit's own witness, Perry, testified that Reybold's principal, Heisler "pointed out the note on the plan, and it was his interpretation that he had an easement" in a pre-litigation meeting with Perry and Hynansky (Summit's principal).[6]

B. Summit's Unsupported Cohen Theory

Summit also stretches the record to support a theory it first asserted in its post-trial briefing. There, Summit asserted that the contract purchaser, Cohen, hired the Engineer, Franco R. Bellafante, Inc., to submit the Plan. Summit uses this to argue

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that no one has the right to enforce the cross easement required by DelDOT.

[4] Ans. Br. 14.

[5] JX24, A0114; JX29, A0117; JX30, A0120; JX33, A0122 and JX34, A0125. *See also,* Mammarella, TR. A0327-30 (listing cross easement as an exception in the Summit Property's title policies); Tarabicos TR. A0271-72 (confirming recorded easements are part of the chain of title, binding all subsequent owners of the property).

[6] Perry, TR. A0389.

that the Plan and the Certification did not represent Carter's (the owner's) intent, even though she signed them.

Neither the Pretrial Stipulation nor Summit's Pretrial Brief mentioned Cohen. No trial testimony or exhibits established Cohen's role in the Plan's approval process, even though Summit subpoenaed Bellafante's records and deposed Bellafante's records custodian.[7] And the Magistrate found that the Plan "was a joint [effort], through which Ms. Carter, the developer, and the Engineer worked cooperatively."[8]

Summit now argues that the "fact" of Cohen's hiring Bellafante is "clear,"[9] citing Tarabicos' testimony.[10] But that testimony merely shows Summit's failed attempt to elicit such evidence:

> Q. And do you know who hired Franco Bellafante?
>
> A. I really don't. I've seen reference to someone named Cohen.
>
> Q. Howard Cohen?
>
> A. Yeah, I've seen reference. But that's -- I wouldn't know that.[11]

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[7] *See* A0011-12 (Docket) Trans. IDs 67812625 & 70385834 (subpoenas), A0016 Trans. ID 70771564 (deposition notice).

[8] FR 3, n.8.

[9] Ans. Br. 7, 37.

[10] *See* Ans. Br. 7 & n.6.

[11] Tarabicos, TR. A0282.

So, in actuality, Tarabicos stated several times that he did not know who hired Bellafante. If there was any evidence that Cohen hired Bellefante, Summit would (or should) have entered it into evidence.[12]

As a practical matter, Summit's post-trial theory about who hired Bellafante is immaterial. Only Carter could create an easement on the property she owned, and Carter signed the Plan and the Certification confirming the creation of the cross easement.

C. Mischaracterizations of the UDC

Summits also misrepresents the UDC. Summit asserts, "To be clear, this section of the UDC [§ 40.31.716A] specifically refers to the "notations" in Section 40.31.810 as 'plan notes'."[13] The truth is that Section 40.31.716A contains no reference to "notations" or Section 40.31.810.[14]

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[12] Summit also posits that Carter had no role in the development process because Cohen was copied on related correspondence while Carter was not. But the inference works equally in reverse: Cohen was copied because he was not Bellafante's client and needed updates as contract purchaser.

[13] Ans. Br. 29.

[14] *See* AR0024-26 (full text of UDC § 40.31.716).

REPLY ARGUMENT

Summit asks this Court to believe that "notes" and "notations" mean the same thing, even though the statutory framework, regulatory structure, industry practice, and Summit's own conduct say differently. All of those point in the same direction: "notations" under Section 20-70(a) refers to County-imposed conditions, while "notes" encompasses the broader category that includes both public requirements and private arrangements, like the cross easement Carter deliberately created here. In short, Carter alone possessed the authority to grant property rights in her land, and she signed the Plan creating an express easement that runs with the land. The contrary decision below should be reversed.

I. THE "NOTES" ON THE PLAN ARE NOT "NOTATIONS" ENFORCEABLE ONLY BY THE COUNTY

Summit argues "notes" and "notations" are synonymous but never explains why the Code and UDC would use different terms if they meant the same thing.

The proper reading, endorsed by the Senior Magistrate, recognizes that "notations" under Section 20-70(a) refers specifically to County-imposed conditions, while "notes" serves as the broader category encompassing all plan provisions, including privately enforceable utility and cross access easements. Text and industry usage both support this view.

A. The Code supports the note-notation distinction.

Textual evidence overwhelmingly shows the distinction between County-imposed "notations" and the broader category of "notes." Legislative drafters are "presumed to have inserted every provision for some useful purpose," and "when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended."[15]

"Notation" appears exactly once in the entire UDC – in Section 40.31.810, addressing County-imposed conditions.[16] By contrast, "note" appears throughout the UDC: Section 40.22.610 requires a "note" explaining parking waivers; Section 40.24.010 mandates a "note" alerting owners to development requirements; Section 40.25.113 requires a "note" explaining variance standards. This pattern shows that while "notations" encompasses the narrow category of County requirements under Section 40.31.810, "notes" is the broader umbrella term. "[I]t is reasonable to assume that a distinction between the terms was intended."[17]

Summit argues that revisions to Section 20-70(a) found in Section 40-31-810 of the UDC "refers to notations as notes."[18] The cited language actual reads, "All

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

[16] Summit at time faults Reybold's reliance upon the UDC (Ans. Br. 30, n.114), but at other times cites to the UDC to try to support its position (Ans. Br. 23 – 24).

[17] *Gen. Motors,* 545 A.2d at 1191.

[18] Ans. Br. 23 – 24.

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." According to Summit's logic, this means all "notations" are "notes." But basic principles of statutory construction dictate that when different words are used within the same section, they must be given distinct meanings. "Notation" is used at the beginning of the Section, but "note" is used at the end. They mean different things.

More importantly, Section 40-31-810 requires "*covenants of any kind required by the Department of Land Use*" to be recorded separately "prior to the final approval of a plan." If Summit were correct that the cross easement was a County-imposed restrictive covenant, then Section 40-31.810 requires the County to record it separately, not as a "notation" on the Plan, and the Plan would merely refer to that covenant as a "note." Those two terms are thus distinguishable.

In fact, that happened here. The County imposed restrictive covenants on Carter's property prior in a recorded Declaration, which recites that the "said restrictive covenants are hereby imposed for the benefit of New Castle County …."[19] The County knew how to impose conditions and restrictions on the Property when

[19] JX1, AR0022-23.

it required the Declaration. In contrast, it did not impose the cross easement as a "notation" or "restrictive covenant" that only the County could enforce.

Rather, Carter created the cross easement by signing the Plan and Certification. Only Carter, as owner, could create the cross easement because the County lacks authority to impose cross easements on private property. Section 40.20.420 of the UDC expressly limits the County's easement authority to "drainage, utilities, access to public utilities or drainage areas, and conservation easements" – cross easements are absent. And under Section 40.20.410, the County can "only enforce provisions that are required by [the UDC] or other provisions of this Code." Thus, the UDC limits the County's ability to create or enforce a cross easement.

Section 40.31.716.A also refutes Summit's interpretation by expressly distinguishing between "plan notes" and "private easements depicted on a record plan." Subsection 4 authorizes correction of "plan notes that were made in error," while Subsection 5 separately addresses "private easements depicted on a record plan." This provision recognizes that "notes" encompass both County requirements and private easements. If Summit were correct that all notes are merely County-imposed notations incapable of creating private rights, this distinction would be superfluous.

As explained at pages 42 – 43 of Reybold's Opening Brief, easements and restrictive covenants are qualitatively different property rights. Yet, Summit

contends that "courts have recognized so called 'easements' imposed by governmental authorities as restrictive covenants"[20] citing *Thompson v. Town of Henlopen Acres*.[21] Contrary to Summit's description, *Thompson* contains no discussion of whether an easement is a restrictive covenant. There, the "restrictive covenants" were in a deed, which characterized them as "certain conditions, covenants, restrictions, easements, agreements, and charges" or words to that effect.[22] They were not termed "restrictive covenants," and the court adopted the phrase as a shortcut reference, not as a holding that easements constitute restrictive covenants.[23]

B. Statutes governing State agencies support the note-notation distinction.

Summit next cites to record evidence of the State Fire Marshal and DelDOT's respective requests for a "note" on the Plan, implying these agencies intended to create a "notation" that only the County could enforce.[24] That is wrong as a matter of law under those agencies' organic statutes and regulations.

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[20] Ans. Br. 29.

[21] 1996 WL 117652 (Del. Ch. Mar. 7, 1996).

[22] *See* AR0011 (Deed from Henlopen Acres, Inc. to Corkran, recorded at Book 280, Page 233 in the Recorder of Deeds in and for Sussex County, Delaware).

[23] The other case Summit cites did not deal with easements at all and only mentioned the term in *dictum.*

[24] Ans. Br. 9 – 11; 22 – 23.

Under 16 *Del. C.* § 6604(1), the State Fire Prevention Commission can promulgate regulations that have the force and effect of law in the counties, cities, and political sub-divisions of this State. Those regulations are codified at 1 *Del. Admin. C.* ch. 700, and the State Fire Marshall administers and enforces those regulations.[25] The regulations require, among other things, that "[s]ite plans . . . be submitted to . . . State Fire Marshal for review and approval"[26] and that site plans include" [l]ocation of any fire lanes and their widths; and [a] ***plan note*** stating, 'All fire lanes, fire hydrants, and fire department connections shall be marked in accordance with the State Fire Prevention Regulations.'"[27] It defies logic to suggest, as Summit does, that the State Fire Marshal abdicated its power and authority to enforce its regulations to the County under Section 20-70(a) of the Code by requesting a "plan note" on the Plan.

Similarly, the DelDOT Development Coordination Manual, dealing with review of plans, provides that "Submission of a Record Plan [to DelDOT] and issuance of a letter of 'No Objection to Recordation' is required independent of the local land use agency's requirements …." [28] Consistent with the expert testimony

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[25] 1 *Del. Admin. C.* 701, ch. 1, §§ 5.1.1 , 6.1.1.

[26] 1 *Del. Admin. C.* 701, ch. 4, § 1.1.1.

[27] 1 *Del. Admin. C.* 701, ch. 4, § 4.1.1.1 (emphasis added).

[28] 2 *Del. Admin. C.* 2309-1.4.2. Section 1.8 defines "Record Plan" as "[a] complete plan which defines property lines, proposed street and other improvements, and

at trial that DelDOT seeks to minimize entrances onto state highways by use of cross easements on adjoining properties,[29] DelDOT's regulations require the use of cross easements and that such easements be shown on a record plan. Specifically, the regulations state that "[d]evelopments should minimize or eliminate access points along DelDOT frontage roads[,]" and "[w]here possible, vehicular access should be shared with the adjacent properties and/or alleys should be used for access." And "[a]ny cross-access easements shall be shown on the Record Plan for the development and recorded at the applicable local recordation office."[30]

As with the State Fire Marshall, DelDOT cannot be deemed to have abdicated to the County its authority and mandate under its governing statutes and regulations relating to the state highway system[31] by requesting that a cross easement appear as a "note" on a record plan.

Equally flawed is Summit unelaborated argument that the "second note [on the plan] was at the request of DelDOT and there is no plausible argument that it is

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easements."

[29] Forsten TR. A0173, A0206-07; Tarabicos TR. A0267; JX7, A0108; FR 6.

[30] 2 *Del. Admin. C.* 2309-3.5.7.4.

[31] *See*, *e.g.*, 17 *Del. C.* §§ 131, 141 & 146 (authorizing DelDOT "to adopt standards and regulations for . . . access to and from any state-maintained highway" and prohibiting "any crossing or entrance onto a state-maintained highway, street or road," without DelDOT's approval).

not a 'notation' as that term is used in the Code."[32] The second note reads, "The entrance/exit design depicted hereon is conceptual."[33] How this comment would constitute a "restrictive covenant" imposed by the County under Section 20-70 of the Code that only the County could enforce is a mystery itself. And regardless, only DelDOT can approve entrances onto state highways.[34]

Lastly, Summit misrepresents that the Court of Chancery "referred to notations as 'notes' on a record plan in *New Castle County v. Pike Creek Rec. Servs., LLC.*"[35] In fact, the note at issue was a requirement of the court, which "instructed the Department of Planning to 'make it clear in its decision that it is not passing upon the issues which fall outside its assigned duties.' As a result, after the Department of Planning reviewed and approved the Hogan Drive Plan in 1982, it placed the [note in question] on the recorded plan[.]" There is no reference to the note in question being a "notation," or any suggestion the language created a restrictive covenant enforceable only by the County.

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[32] Ans. Br. 26 ("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.").

[33] JX 22, A0111.

[34] *See* 17 *Del. C*. §146(b).

[35] Ans. Br. 19.

C. Industry practice supports the note-notation distinction.

Industry practice also reflects how practitioners understand the textual distinction between County requirements and private arrangements on record plans.

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.[36] Summit contends "[t]hat is not true," but the testimony that Summit cites addresses utility easements, not cross easements.[37] The testimony Reybold cited regarding cross easements establishes the point, and the unrelated testimony regarding utilities relied upon by Summit does nothing to undermine it.

Summit also contends that Tarabicos conceded that the cross easement is a note, and that the County is the only one who enforces such notes.[38] It is true that easements may be contained in notes on a plan, but "notes" are not, as Summit argues, synonymous with "notations" that the County imposes under Section 20-70 that only the County enforces. Examining the e-mail chain attached to Tarabicos' report that Summit cites to, the County's attorney states in several places that the

[36] Op. Br. 39 – 40.

[37] Ans. Br. 24 – 25.

[38] *Id*. 23.

referenced easement could be used (meaning an enforceable right to go onto the easement) by lot owners in the community:

> "The easement is enforceable against the lot owners, such that they must allow folks to walk through their property."
>
> "the easement to allow people to walk through the properties exists, and the homeowners remain bound by it."[39]

So, again, Summit contradicts the authority it cites.

Summit also premises its argument that the cross easement cannot be enforced by anyone other than the County on the cross easement's location under the heading entitled "NOTES" on the Plan.[40] But plan headings used by different engineers cannot determine whether an item contained on a record plan is a "notation" under Section 20-70(a) of the Code.

This, too, was dispelled at trial. When asked about the "NOTES" heading's significance, Forsten explained that engineers sometimes use the heading "notes" and other times use the heading "site data."[41] "It's also just a matter of style."[42] Nor does the UDC contain any requirements for specific column titles on plans.[43] To

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[39] JX40, B151.

[40] Ans. Br. 18.

[41] Forsten TR 18-19, A0177-78.

[42] *Id.* 19, A0178.

[43] *Id.* 18, A0177. Nor does the Code.

argue, as Summit does, that an engineer's stylistic choice of a column heading on a record plan determines whether all the information under that heading constitutes "notations" that only the County can enforce makes no sense.[44]

D. Summit's conduct proves the cross easement's validity.

Summit's conduct proves the cross easement's validity because Summit consistently recognized the cross easement as enforceable until this litigation began.

Although Summit now implies that Reybold knew it did not have an enforceable easement,[45] the record says differently. During pre-litigation discussions, Summit never claimed the cross easement was invalid or unenforceable. Summit's only fact witness, Perry, testified that Heisler showed Perry the Note on the Plan and Heisler explained "his interpretation that he had an easement."[46] Summit's representative objected solely on practical grounds — traffic concerns, safety issues, and potential impacts on existing tenants.[47] At trial, Perry was asked three separate times to explain Summit's objections to the cross easement, and not once did he testify that Summit believed the easement was legally invalid.[48] In other

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[44] Summit's own appendix proves the point: The plans contained in JX26, B127 and JX35, B146, use the column headings "Data Column" and "Site Data." Innumerable other recorded plans use column headings other than "Notes."

[45] Ans. Br. 14.

[46] Perry, TR. A0389.

[47] *Id*., A0386.

[48] *Id*., A0386-88.

words, Summit's objections necessarily assumed the easement's validity while raising practical concerns about its exercise.[49] Thus, Summit's current litigation position represents a complete departure from its original understanding of the easement's enforceability.

Recall, too, Summit's economic motivations. Reybold intends to construct retail shopping on the Reybold Property that would compete with Summit's older shopping center.[50] This competitive threat provides additional context for why Summit's position shifted from practical objections to legal challenges.

Even more telling, another attorney in the firm representing Summit in this case, Mammarella, twice listed the cross easement as a title insurance policy exception – including during the pendency of this litigation – signifying his agreement that the cross easement created enforceable rights encumbering the Summit Property. Caught with its hand in the cookie jar, Summit contends that Mammarella "testified that he wasn't 100 percent sure the Note was completely unenforceable."[51] Once again, the record citation provided by Summit does not state that. Wearing his litigation hat, Mammarella asserted that based on his research, no

[49] *See* FR 10-11.

[50] Heisler TR. A0227-29, A0232.

[51] Ans. Br. 43.

one could enforce the Note,[52] supporting the position taken by Summit in the litigation.[53]

Yet, when wearing his transactional hat, Mammarella took the opposite position: he listed the cross easement as an exception on the title policy, acknowledging its validity. Thus, Summit's own counsel's approach reflects settled industry practice of respecting the distinction between the narrow category of "notations" (County-imposed conditions) and the broader "notes" category that includes both public requirements and private arrangements.

Summit's attempt to dismiss this evidence as irrelevant "whataboutism" mischaracterizes the nature of conduct evidence in contract and property interpretation. Courts routinely consider how parties have interpreted and acted under similar arrangements to understand the meaning of disputed language.[54]

Summit's conduct is not a "counter-accusation" but direct evidence of how sophisticated parties in the real estate industry understand cross easement language

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[52] Mammarella TR. A0331:

Q. So was it your opinion that no one could enforce the notes?

A. The first note, yes.

[53] Mammarella TR. A0330; Transaction ID 66277606, pages 13 – 16; Transaction ID 72068428, page 49.

[54] *See Ins. Coms'r of State of Del. v. Sun Life Assurance Co. of Canada U.S.*, 21 A.3d 15, 20 (Del. 2011); *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 228 (Del. 2005).

on recorded plans. Mammarella's professional judgment about title exceptions, Hynansky's reliance on identical language for his own property, and Summit's practical rather than legal objections all demonstrate the industry understanding that such language creates enforceable private rights. This evidence shows Summit's true interpretation of the easement language when its own interests were at stake, before litigation incentives motivated it to take a contrary position.

Summit's consistent recognition of the easement's validity thus strongly suggests that Summit's current position is a *post hoc* rationalization developed solely to prevent Reybold from using the easement for competitive reasons.

E. Summit's interpretation produces absurd results.

Summit's interpretation would fail in application, too. Under Summit's theory, the County must enforce thousands of private utility easements appearing as "notes" on record plans throughout New Castle County. Summit's own expert, Casper, testified that utility easements appear on "just about every record plan for the last 25, 30 years." Yet, there is no evidence the County has ever enforced such arrangements between private parties – nor should it. Why would the County care whether Delmarva Power or Verizon can access utility lines on private property? How would County enforcement of private utility arrangements even work procedurally? Summit does not answer these basic questions because its interpretation transforms the County into an unwilling enforcer of countless private

property arrangements it has no interest in policing. This practical impossibility further exposes the error in treating every "note" as a "notation."

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

A. Only Carter could create the cross easement.

Summit's argument fundamentally misunderstands basic property law: only property owners can grant property rights in their land. As explained, DelDOT could request a cross easement and the County could aggregate agency comments, but neither had the legal authority to create an easement on Carter's property. This principle is so fundamental that Summit does not contest it; yet Summit's entire theory depends on treating the County as the easement's creator. The County's role was purely administrative – facilitating the planning process and conveying DelDOT's traffic management preferences. When Carter signed the Plan containing explicit easement language and certified it was made "at [her] direction" and was her "act and plan," she manifested her intent to create the cross easement. No one else possessed that authority.

B. The burden was on Summit to prove that Carter's words meant something other than what they said.

Reybold proved the easement's existence through Carter's signature on a Plan containing unambiguous granting language: "A cross easement is hereby established." This "plain and direct language" is all that was necessary to evidence Carter's intent to create the cross easement.[55]

[55] *See Black v. Staffieri*, 2014 WL 814122, at *2 (Del. Feb. 27, 2014).

Faced with this irrefutable evidence, Summit argues for replacement of the traditional rules governing both contractual intent and express easements. Summit's argument, accepted by the Vice Chancellor below, is that subjective intent controls written words and express easements should be subject to a clear and convincing standard, which was never the traditional rule in Delaware. As to the former, it is contrary to established law — the words of a written, signed document control so long as the words express an intent to create an easement.[56]

As to the evidentiary burden, Summit acknowledges a split of authority but relies upon a single sentence in *Buckeye Partners, L.P. v. GT USA Wilmington, LLC*,[57] where the court concluded that express easements were subject to the clear and convincing standard.[58]

A little bit of digging exposes the flaw in *Buckeye*'s pronouncement that express easements need to be proven by clear and convincing evidence, rather than by a preponderance. As explained in Reybold's Opening Brief, *Buckeye* addressed an attempt to establish an easement without a clear written instrument. And it based

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[56] *See id. See also*, *Anderson v. Unknown Claimants*, 1993 WL 1501279, at *5 (Del. Ch. Oct. 27, 1993) ("[T]here is a presumption that an executed instrument correctly states the intent of the parties."); *Colvocoresses v. W.S. Wasserman Co.*, 28 A.2d 588, 591 (Del. Ch. 1942) ("[T]he presumption that an instrument, as drawn and executed, correctly states the real intent of the parties, is difficult to overcome.").

[57] 2022 WL 906521 (Del. Ch. Mar. 29, 2022).

[58] *See* Ans. Br. 41-42.

its analysis upon a single phrase from a treatise, which stated, "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."[59] Without analysis, *Buckeye* assumed the phrase "clearly and unmistakably communicated" to imply a clear and convincing evidence standard. That assumption was wrong.

The treatise drew its statement from a Montana case, *Broadwater Development, L.L.C. v. Nelson*.[60] But *Broadwater* did not deal with evidentiary standards or mention clear and convincing evidence.

And *Broadwater*'s language actually came from an earlier Montana case, *Blazer v. Wall*.[61] *Blazer* addressed whether "an easement created by reference in an instrument of conveyance to a plat or certificate of survey adequately describing the easement is an express easement" — i.e. whether an express easement could be created by reference to a drawing, rather than descriptive words.[62] The treatise, thus, referred to Montana's requirement that an express easement can only be created by unambiguous language, not by reference or drawing. The *Buckeye* Court misread

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[59] *See* 2022 WL 906521, at *2 & n.2 (quoting 25 Am. Jur. 2d *Easements & Licenses* § 14).

[60] 219 P.3d 492, 501 (Mont. 2009).

[61] 183 P.3d 84, 98 (Mont. 2008).

[62] *See id*.

the language to speak to an evidentiary standard, and the court below compounded that error by not double-checking *Buckeye*'s reliance.

Taking a closer look at *Broadwater*, we find a rule that fits this case better than *Buckeye*'s misreading:

> "[G]ood-faith purchasers of real property are entitled to rely on publicly recorded deeds, plats, and certificates of survey . . . [and] are not required to track down unrecorded extrinsic evidence in order to ascertain the use or necessity of a purported easement depicted on a plat or certificate of survey in their chain of title."[63]

In other words, Reybold is entitled to rely upon Carter's recorded words to prove the existence of the easement, and there is no question Reybold did that. That has always been the law in Delaware, too: Express easements do not carry the heightened evidentiary burden that other easements do.[64] Therefore, the court below erred in looking beyond the words to divine an intent different from what the words say.

If the clear and convincing standard had any application, it was to Summit's defense. Because Carter's words created a presumption that the executed Plan reflected Carter's intent, Summit bore the burden to overcome presumption with clear and convincing evidence[65] – evidence Summit failed to produce. Instead, the

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[63] *Broadwater*, 219 P.3d at 501.

[64] *Berger v. Colonial Parking, Inc.*, 1993 WL 208761, at *3 (Del. Ch. June 9, 1993).

[65] *See Beckrich Holdings, LLC v. Bishop*, 2005 WL 1413305 (Del. Ch. June 9, 2005);

court below improperly shifted the burden by requiring Reybold to prove Carter's subjective intent beyond her objective manifestation in the Plan. Delaware law's objective approach to interpreting signed instruments precludes this inquiry into subjective motivations when the language is clear.

C. Carter's signature was not purely "Ministerial"

Carter's signature was not the "ministerial act" the Vice Chancellor described, but rather the "most deliberate, conscious way that a person may manifest [her] intent to consent to, and be bound by, the terms of that document."[66] The certification language itself demonstrates Carter's intentional adoption of the Plan's contents: she declared the Plan was made at her direction and acknowledged it as her act and plan. This formal acknowledgment carries particular legal weight because it reflects Carter's deliberate choice to create the cross easement to protect her remaining lands and would enhance the development potential and value of her retained property.

Killen v. Purdy, 99 A. 537, 538 (Del. 1916).

[66] *Parshalle v. Roy*, 567 A.2d 19, 27 (Del. Ch. 1989). Carter's signature on the Plan is akin to the signature of a grantor on a deed, something no one would suggest is a "ministerial act." Summit points to Bellefante and Bauer's signatures to minimize the importance of Carter's, *see* Ans. Br. 38, but those two merely certified, respectively, that the Plan represented an accurate survey of the property, and that the Department of Planning approved the recording of the Plan. JX22, A0111.

III. *GREYLAG* IS DISTINGUISHABLE

Summit's continued reliance on *Greylag 4 Maintenance Corp. v. Lynch-James*[67] misunderstands that decision and ignores the critical distinction between building restrictions within the County's police powers and cross easements that create private property rights.

The restriction in *Greylag* – a 3,000 square foot building limitation – was a classic improvement specification falling squarely within the County's regulatory purview. It was a core exercise of Article VIII of the 1982 Code, entitled "Improvement Specifications," where Section 20-70(a) appears. By contrast, cross easements create private property rights between specific landowners, benefiting particular dominant estates rather than the public generally. Building restrictions naturally fit within improvement specifications; private easements between landowners do not.

Greylag never addressed private property rights between landowners or analyzed whether easements could be created through recorded plans. *Greylag*'s broad language about "notes" was dictum addressing a specific building restriction, not a comprehensive analysis of all plan provisions.[68]

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[67] 2004 WL 2694905, at *1 (Del. Ch. Oct. 6, 2004).

[68] *Greylag* also did not address the practical implications of the decision on land use issues. The plaintiffs in the case were homeowners only concerned with stopping a neighbor's property use. *Greylag*'s short discussion of Section 20-70 did not address whether there were distinctions between notes and notations on a plan, and there is

Reading *Greylag* as Summit suggests would also conflict with *Judge v. Rago*,[69] which expressly recognized enforceable access rights created through plan recordation.[70] Summit's approach would render meaningless decades of established practice where private easements, utility rights, and other property arrangements have been created and enforced through recorded plans.

For similar reasons, Summit's attempt to distinguish *Green v. Templin*[71] fails. *Green* also recognized that private easements can be created on record plans. Although Summit contends that "[t]he plan in *Green* merely depicted an easement and does not expressly grant one [,]"[72] *Green* actually states that the landowner "reserved" the referenced easement on the plan and referred to the plan as "the document that created the Easement."[73] Just as here, the relevant deed referenced the recorded plan and noted the conveyance was "SUBJECT to all existing covenants, easements, restrictions, reservations and agreements of record."[74] The *Green* Court thus enforced the use of the easement

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no suggestion the court considered the distinction's practical significance.

[69] 570 A.2d 253 (Del. 1990).

[70] *Id.* at 256.

[71] 2010 WL 2734147 (Del. Ch. July 2, 2010).

[72] Ans. Br. 20.

[73] *Green*, 2010 WL 2734147, at *10.

[74] *Id.* at *2.

Given all of this, the Senior Magistrate properly limited *Greylag* to what it actually addressed – building improvement restrictions within the County's core powers – while preserving the enforceability of private property rights created by landowners on recorded plans.

CONCLUSION

For all of these reasons, and those stated in the Opening Brief, 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: June 27, 2025