IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALEXANDER MAKITKA, JR., And CHUCK MULHOLLAND, Plaintiffs, v. NEW CASTLE COUNTY COUNCIL, COUNCIL PRESIDENT TOMAS KOVACH, COUNCILMAN ROBERT WEINER, COUNCILMAN PENROSE HOLLINS, COUNCILMAN JEA P. STREET, COUNCILMAN DAVIS TACKETT, COUNCILWOMAN JANET KILPATRICK, COUNCILMAN WILLIAM POWERS, COUNCILMAN JOHN CARTIER, COUNCILWOMAN LISA DILLER, COUNCILMAN JAMES WILLIAM BELL, COUCILMAN GEORGE SMILEY, COUNCILMAN TIMOTHY SHELDON, COUNCILMAN JOSEPH REDA and NEW CASTLE COUNTY DEPARTMENT OF LAND USE GENERAL MANAGER DAVID M. CULVER, NEW CASTLE COUNTY EXECUTIVE PAUL G. CLARK, NEW CASTLE COUNTY ATTORNEY AND ACTING CHIEF ADMINISTRATIVE OFFICER GREGG WILSON, And ROBINSON INVESTMENTS TWO LLC, Defendants.	)	Civil Action No. 6653-VCG

MEMORANDUM OPINION

Submitted: November 28, 2011
Decided: December 23, 2011

Alexander Makitka, Jr., Townsend, Delaware; Chuck Mulholland, Middletown, Delaware, Pro se.

James H. Edwards, Brian J. Merritt, of NEW CASTLE COUNTY LAW DEPARTMENT, New Castle, Delaware; John E. Tracey, William E. Gamgort, of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware, Attorneys for the Defendants.

GLASSCOCK, Vice Chancellor.

This case involves a challenge to the New Castle County Council's May 13, 2011, approval of the record plan for a housing development, "The Preserve at Robinson Farm." The Preserve at Robinson Farm is the joint effort of two record owners of individual parcels: the limited liability companies, Robinson Investments, LLC, and Robinson Investments Two, LLC. The Plaintiffs, however, did not name Robinson Investments, LLC, as a party, and the Defendants moved to dismiss because of the Plaintiffs' failure to join an indispensable party. Because of the time limitations embodied in 10 *Del. C.* § 8126, joinder of Robinson Investments, LLC, is now precluded; therefore, if Robinson Investments, LLC, is an indispensable party, pursuant to Court of Chancery Rule 19, this action will be dismissed with prejudice. For the reasons explained below, I find that Robinson Investments, LLC, is an indispensable party to the action, and I grant the Defendants Motion to Dismiss.

I. FACTUAL BACKGROUND

A. Parties

The Plaintiffs are southern New Castle County homeowners, Chuck Mulholland and Alexander Makitka, Jr., who claim to be adversely affected by approval of The Preserve at Robinson Farm.[1]

The Defendants are the New Castle County Council ("NCCC"); the Council President Tomas Kovach; the following Councilmen and Councilwomen: Robert Weiner, Penrose Hollins, Jea P. Street, Davis Tackett, Janet Kilpatrick, William Powers, John Cartier, Lisa Diller, James William Bell, George Smiley, Timothy Sheldon, and Joseph Reda; the New Castle County Department of Land Use General Manager David M. Culver; the New Castle County Executive Paul G. Clark; the New Castle County Attorney and acting Chief Administrative Officer Gregg Wilson; and Robinson Investments Two, LLC.

B. The Preserve at Robinson Farm

This action arises from the planned development of land located in southern New Castle County.[2] The property at issue comprises two separate parcels of land,

[1] Originally, Southern New Castle County Alliance, Inc., a Delaware non-profit, was also named as a plaintiff, but it failed to obtain counsel and was dismissed.

[2] The following facts are taken from the Complaint and the parties' briefs. The Plaintiffs, in their Response Brief to Defendants' Motion to Dismiss, state that they adopt the Defendants' statement of facts with minor clarifications regarding the reason they brought suit. Pls.' Resp.

separated by Fieldsboro Road, that were previously held by a single owner.[3] The NCCC approved separate subdivision plans for each parcel, but the owner did not undertake any development and later sold the parcels subject to the approved plans by deed to two different purchasers, as described below.

In 2005, Robinson Investments, LLC ("Robinson Investments"), and Robinson Investments Two, LLC ("Robinson Investments Two"), each purchased one of the parcels of real estate. Robinson Investments purchased the parcel to the north of Fieldsboro Road and is the record owner of that property. Robinson Investments Two purchased the parcel south of Fieldsboro Road and is the record owner of that land. As stated above, each parcel was individually approved for development; however, neither Robinson Investments nor Robinson Investments Two developed their respective parcels under those development plans.

In response to a regulatory change that allowed for higher density developments if certain conditions were met,[4] Robinson Investments and Robinson

---

Br. at 2; *see also Simon v. Navellier Series Fund*, 2000 WL 1597890, at *9 n.15 (Del. Ch. Oct. 19, 2000) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1366, at 485 (2d ed. 1990)) ("There never has been any serious doubt as to the availability of extra-pleading material on [Rule 12(b)(1)-(5), (7)] motions.").

[3] The two separate parcels were previously owned by Beatrice G. Robinson Family, LLC. Defs.' Opening Br. at 1. The Plaintiffs originally named Beatrice Robinson as a party, but the Plaintiffs, after "confirming that Beatrice Robinson had no role or interest in the filing, review process and approval of" The Preserve at Robinson Farm, dismissed Ms. Robinson as a defendant. Pls.' Resp. Br. at 1.

[4] On February 26, 2008, the NCCC adopted Ordinance 07-150, more commonly known as the "Workforce Housing Ordinance". The Workforce Housing Ordinance was intended to ensure that a variety of housing options existed for New Castle County citizens at varying income levels

Investments Two decided to combine their two separate parcels for development and they submitted a new joint subdivision plan to the New Castle County Department of Land Use ("DLU") for The Preserve at Robinson Farm on September 12, 2008. The development plan then worked its way through the regulatory and legislative processes. Pertinent to the matter here, Robinson Investments and Robinson Investments Two were required to get certain documents, such as a Voluntary School Assessment Agreement, a Maintenance Declaration, and a Master Workforce Housing agreement, reviewed, approved, and recorded before The Preserve at Robinson Farm was presented to the NCCC for final approval. After clearing the regulatory hurdles, the development plan was approved by the NCCC and recorded on May 13, 2011. Notice of the NCCC's approval was published in the News Journal on May 14, 2011.

The Plaintiffs seek to nullify the approval of The Preserve at Robinson Farm because of a number of perceived shortcomings by New Castle County. The Preserve at Robinson Farm contains a number of low income housing units. The

---

and to allow "working families to live in communities with better access to employment and educational opportunities and a range of housing types." Compl. at 12. The Workforce Housing Ordinance attempted to achieve these goals and have more low and moderate income housing built by encouraging developers through development density bonuses. These density bonuses allowed developers to increase a development's density by as much as 100% if certain restrictions were met. Since the Workforce Housing Ordinance was originally passed, the General Assembly has amended it and altered the manner in which development plans are reviewed and the incentives available for such development plans. The Preserve at Robinson Farm was submitted before the change and vested under the prior rules.

Plaintiffs allege that the county's approval of low income housing amid the corn and soybean fields (and upscale housing developments) of Appoquinimink Hundred was neither wise nor lawful. The Plaintiffs' claims center on the failure of the DLU to ensure that the plan was in compliance with the New Castle County Code[5] and the New Castle County Comprehensive Development Plan ("Comprehensive Plan")[6] and the appropriateness of the NCCC's May 13, 2011, approval of the plan.[7]

II. ANALYSIS

Under Court of Chancery Rule 12(b)(7), a defendant may move for dismissal because of a failure to join a party under Rule 19. Pursuant to Rule 19(a), the court must determine whether an absent person should be party to the

[5] The Plaintiffs specifically point to sections of the New Castle County Unified Development Code § 40.07.301 that relate to affordable housing.

[6] New Castle County is required by the Legislature to adopt a Comprehensive Plan once every five years to help guide and control future development throughout the county. 9 *Del. C.* §§ 2651, 2660; *see also Lawson v. Sussex County Council*, 1995 WL 405733, at *4 (Del. Ch. June 14, 1995). The Legislature's intention is that the NCCC, through comprehensive planning, can improve the general public welfare throughout the county. 9 *Del. C.* § 2651(a). The Comprehensive Plan addresses various planning and development issues such as transportation, economic development, housing, infrastructure, natural resources, and open spaces. 9 *Del. C.* § 2656.

[7] The Plaintiffs also seek an injunction against the DLU to insure future compliance with the 2007 Comprehensive Plan. In Count III of the Complaint, the Plaintiffs seek to have the Court enjoin the DLU from "all review and approval of building plans and permits for all 'low and/ or very low income households' . . . unless there is complete compliance with . . . [the 2007 Comprehensive Plan]." The Plaintiffs do not further this argument in their briefs. I consider it waived and dismiss it without prejudice. I merely note that "[t]his court cannot permit its jurisdiction to be invoked simply on the basis of unsubstantiated fear that a legal duty may be breached in an uncertain future." *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 536 (Del. Ch. 2005).

litigation. If an absent person should be a party, the court must then decide whether the person can be joined. If the person cannot be joined, pursuant to Rule 19(b), the court must then "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."

The Plaintiffs have brought suit against Robinson Investments Two, but not against Robinson Investments. The Defendants argue that Robinson Investments is an indispensable party to the action because Robinson Investments is: (1) the record owner of one of the parcels of land that compose The Preserve at Robinson Farm, (2) "the sole applicant on the Application for Plan review submitted to [the] DLU on September 12, 2008 . . . and (3) appears as a party in interest and record owner in other recorded documents regarding the plan, including but not limited to the (a) Master Workforce Housing Agreement, (b) Voluntary School Assessment Agreement, and (c) Maintenance Declaration."[8]

A. Robinson Investments Should be a Party to the Litigation

The Plaintiffs assert that Robinson Investments did not need to be joined pursuant to Rule 19(a) because all persons "who execute[d] the necessary forms" were served. Though the Plaintiffs are *pro se*, in their Response Brief, they state that they were "aware of Chancery Rule 19 and made effort to name all necessary

[8] Defs.' Opening Br. at 10.

parties."[9] The Plaintiffs further declare that because of prior litigation "in which some of the [P]laintiffs were involved . . . they learned the importance of naming all necessary parties."[10] The Plaintiffs, in both in their Response Brief and their supplemental Letter Memorandum, highlight that the Court in *Council of Civic Organizations of Brandywine Hundred, Inc. v. New Castle County* (*"CCOBH"*)[11] stated:

> Under the UDC, the "applicant" for approval of a major subdivision includes *the persons who execute the necessary forms* to obtain approval for the plan. Here, those persons include the owners of the property, who must consent and authorize the land use action proposed by the plan; as well as the developers who are *signatories to the Land Development Improvement Agreement* . . .[12]

The Plaintiffs' main argument as to why the owners of the property were not made party to this suit is that the person who signed the forms for the plan was Mark Handler, a managing member of both Robinson Investments and Robinson Investments Two. The Plaintiffs, however, have failed to join Robinson Investments, the owner of a property in question.

A record owner of a piece of property is a necessary party to litigation that challenges its development.[13] Here, the record owner of one of the parcels

---

[9] Pls.' Resp. Br. at 3.
[10] *Id*.
[11] 1993 WL 390543 (Del. Ch. Sept. 21, 1993).
[12] Pls.' Resp. Br. at 3; Pls.' Letter Mem. at 3 (emphasis in the originals).
[13] *Southern New Castle County Alliance, Inc. v. New Castle County Council*, 2001 WL 855434, at *2-*3 (Del. Ch. July 20, 2001) (finding that the interests of the record owners of a property

composing The Preserve at Robinson Farm, Robinson Investments, has not been named. The Plaintiffs confuse Mr. Handler's role as an agent and member of Robinson Investments and Robinson Investments Two with the two LLCs as corporate entities. The Plaintiffs allege that they "have made every effort to ensure that no persons who execute [sic] the necessary forms were excluded in [their] original filing"[14] and that "those persons include the owners of the property . . . as well as the developers who are signatories . . . [h]ere, those persons are identical."[15] The Plaintiffs are mistaken. Robinson Investments, a record owner of one of the properties, is not identical to Robinson Investments Two or Mr. Handler and has not been made a party to this suit. While Robinson Investments and Robinson Investments Two did have a common agent sign various forms, they are distinct legal entities. Robinson Investments remains the record owner of one of the properties and is a necessary party to the suit.

Because I have determined that Robinson Investments, the absent party, should be a party to this action, I must now determine whether it can be joined.

---

being developed would not be sufficiently protected by the equitable owner of a property, and that the record owners of a property were indispensable parties to an action that challenged the approval of a development record plan); *see also CCS Investors, LLC v. Brown*, 977 A.2d 301, 321-25 (Del. 2009) (reaffirming that "the owner of land that is the subject of a decision of a municipal board of adjustment is a necessary party that must be joined in an appeal of that decision" and favorably citing then-Vice Chancellor Jacobs' recognition in *Southern New Castle County Alliance* that "[w]hen the property owner and the variance applicant are distinct entities, their interests cannot be presumed to be aligned").

[14] Pls.' Letter Mem. at 5. These documents included the Master Workforce Housing Agreement, the Voluntary School Assessment Agreement, and the Maintenance Declaration.

[15] Pls.' Resp. Br. at 5-6.

B. Joinder of Robinson Investments Is Now Precluded

In this case, joinder of an additional party is now time-barred by 10 *Del. C.* § 8126(b). Section 8126 is a statute of repose that makes clear that any legal proceeding that challenges "the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the subdivision and land development regulations of such county or municipality" must be brought within 60 days of the date that the notice of the action was published in a newspaper of general circulation in the county. Because § 8126 is a "statute of repose which favors certainty . . . and the quick resolution of any claimed defects"[16] in a final or record plan for a housing development, its provisions are strictly construed and cannot be waived;[17] therefore, if a party has not been properly joined before the 60 day deadline, § 8126(b) would preclude future joinder.[18]

[16] *Lynch v. The City of Rehoboth*, 2004 WL 1238405, at *4 (Del. Ch. May 28, 2004) (noting that an amended complaint is impermissible after the limitation period found in § 8126(a) expires). Section 8126(a) is nearly identical to § 8126(b) except that it deals with zoning, and subdivision and land development, regulations.

[17] *Acierno v. New Castle County and New Castle County Dept. of Land Use*, 2006 WL 1668370, at *3-*4 (Del. Ch. June 8, 2006) (explaining that § 8126(b) is a statute of repose and "is intended to promote predictability and stability in land use and therefore must be applied strictly") (internal quotation marks removed).

[18] *Fields v. Kent County*, 2006 WL 345014, at *7 n.53 (Del. Ch. Feb. 2, 2006) ("[T]he bar to joinder of necessary parties following expiration of the Statute of Repose and [the resultant dismissal of the action] is taken as axiomatic."); *S. New Castle County Alliance*, 2001 WL 855434, at *1; *CCOBH*, 1993 WL 390543, at *6; *Admiral Holding v. Town of Bowers*, 2004 WL 2744581, at *4 (Del. Super. Ct. Oct. 18, 2004).

Notice of the NCCC's approval of The Preserve at Robinson Farm was published in the News Journal on May 14, 2011, and the 60 day deadline ended July 14, 2011; thus, Robinson Investments cannot now be joined as a party. Because Robinson Investments cannot be joined, I must now determine whether the action should proceed among the parties before me or whether Robinson Investments is an indispensable party.[19]

C. Robinson Investments Is an Indispensable Party

Robinson Investments, as the record owner of the property, should be a party to the action before me, but it cannot be joined; therefore, pursuant to Rule 19(b), I must "determine whether in equity and good conscience the action should proceed among the parties before [me], or should be dismissed, the absent person being thus regarded as indispensable." To determine whether a person is indispensable, I must consider the following 4 factors:[20]

> First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[19] *S. New Castle County Alliance*, 2001 WL 855434, at *1.
[20] Ch. Ct. R. 19(b).

"The four factors set forth in the rule are interdependent and must be considered in relation to each other as well as to the facts of each case."[21] In the instant matter, the first factor assumes the greatest importance.

1. Rule 19(b) Factor One

With respect to the first factor of Rule 19(b), I must examine to what extent a judgment rendered in a person's absence might be prejudicial to the person or those already parties. The Plaintiffs contend that Robinson Investments is not an indispensable party, as set forth in Rule 19(b), and a judgment rendered in its absence would not be prejudicial because "both limited liability companies are managed by the same individual who was served and who has a financial interest in both."[22] The Plaintiffs' argument is that the interests of Robinson Investments and Robinson Investments Two are aligned in such a way that Robinson Investments' interests would be fully represented by Robinson Investments Two. The Plaintiffs draw attention to the fact that both entities have the same address and authorized agent and that the authorized agent is a member of the same firm as Robinson Investments' counsel.[23] The Plaintiffs, however, primarily focus their analysis on the role played by the LLCs' agent Mr. Handler.

[21] *CCOBH*, 1993 WL 390543, at *3 (quoting Friedethal, Kane, and Miller *Civil Procedure* 6.5 at 341 (1st ed. 1985)).
[22] Pls.' Resp. Br. at 3.
[23] Pls.' Letter Mem. at 4-5; Pls.' Letter Mem. Exs. 32-35.

As noted above, the Plaintiffs point out that Mr. Handler represents himself as a managing member for both Robinson Investments and Robinson Investments Two, and that he signed the Master Workforce Housing Agreement, the Voluntary School Assessment Agreement, and the Maintenance Declaration in his official capacity.[24] The Plaintiffs also provide documentation showing that a Handler Management Associates, LLC, has the same address as both Robinson Investments and Robinson Investments Two.[25] The Plaintiffs assert that a letter from Beatrice Robinson to Mr. Handler indicating concern over the development plan was sent to him at Robinson Investments and is "further evidence that the person making the decisions for matters concerning the development of the former Robinson Farms properties is the same person, Mark L. Handler."[26] The Plaintiffs conclude that Mr. Handler's business, whether pursued under the name Robinson Investments or Robinson Investments Two, "is the residential development of the land parcels known as Robinson farms" and, as a result, Robinson Investments had "sufficient notice" so that "the interests of the company will be protected by its principle [sic] and their attorney."[27]

[24] Pls.' Resp. Br. at 4-5; Defs.' Opening Br. Exs. D-F.
[25] Pls.' Letter Mem. at 4; Pls.' Letter Mem. Exs. 36-37. It is unclear whether Handler Management Associates, LLC is affiliated with Mark Handler; however, based on the facts before me, I will assume, for instant purposes only, that Handler Management Associates, LLC is affiliated with Mr. Handler.
[26] Pls.' Resp. Br. at 5.
[27] *Id*.

The Plaintiffs' assertion that Robinson Investments' interests are necessarily protected by Robinson Investments Two is erroneous—while the interests of the two entities may align, this alignment is not inevitable.[28] The Plaintiffs appear to presume that Mr. Handler's "repeated signatures . . . to advance [The Preserve at Robinson Farm]" demonstrate "that there are no interests at stake that have been excluded, given that the business interests in this venture are managed by the same person."[29] This presumption is incorrect. It is true that both Robinson Investments and Robinson Investments Two have a common address, a common agent and member, and have agreed to combine their development plans; however, these facts do not necessarily mean they have an alignment of interests.[30] Robinson Investments and Robinson Investments Two are distinct corporate entities formed at different times.[31] Robinson Investments is the sole owner of a distinct parcel of real property subject to the development decision under attack in this litigation. Though currently Robinson Investments and Robinson Investments Two have

[28] I note that the Plaintiffs have not suggested that equitable reasons exist to disregard the corporate form of Robinson Investments and Robinson Investments Two or find that Mr. Handler is the alter ego of the LLCs.
[29] Pls.' Resp. Br. at 6.
[30] *See S. New Castle County Alliance*, 2001 WL 855434, at *3 ("The plaintiffs' argument appears to rest not upon a case-specific showing, but, rather, upon an implicit presumption that the interests of the record and equitable owners of subdivided, to-be-developed property will invariably [be] identical. That presumption is factually and legally unsupported."); *see also CCS Investors*, 977 A.2d at 321-25 (concluding that the potential developer and equitable owner of a property could not adequately represent the landowner's interests in an appeal of a municipal board of adjustment's decision).
[31] Pls.' Letter Mem. Exs. 32-33.

agreed to combine their development plans, the entities' interests in litigation may diverge. As it stands, I am unable to presume an alignment of interests and unable find that Robinson Investments Two will adequately protect the interests of Robinson Investments, the absent party.

The Plaintiffs argue that support for their position that there is an alignment of interests is found in *Southern New Castle County Alliance* and *CCOBH*; in fact, these cases undercut the Plaintiffs' contention.

In an action that challenged a zoning decision, *CCOBH* addressed whether rezoning applicants and owners of the property being rezoned were indispensable parties under Rule 19(b).[32] The court concluded that the applicants and owners of the property being rezoned had "a substantial interest in protecting [their] property rights in the rezoned property and [they would] suffer undue hardship and great prejudice in the event that an adverse judgment [was] rendered in [their] absence."[33]

In *Southern New Castle County*, the plaintiffs brought an action challenging the approval by the NCCC of a record plan for a housing development. The Court addressed whether a property's record owner's interest in a subdivided, to-be-developed property would be adequately protected by the equitable owner of the

[32] 1993 WL 390543.
[33] *Id*. at *7.

property, such that there would an identity of interest and the record owner would not be an indispensable party.[34] The Court held that while there may be an identity of interest between the record owner and equitable owner of a property, this confluence of interests was not inevitable, and the Court granted the defendants' motion to dismiss, in part, because the plaintiffs failed to join the record owners of the property.[35]

The reasoning behind the Court's decision was that parties' interests vary "from case to case" and "a blanket presumption" of identical interests "cannot be correct."[36] "If any presumption [was] appropriate, it [was] . . . that the interests of the record owner and the equitable owner of property are not identical."[37] The Court noted that these interests were "typically defined by contract" and that the contractual arrangements had not been disclosed.[38] Because the plaintiffs did not show that the interests of the equitable owner and the record owner of a property were identical, the court found that the existing parties would not adequately protect the interests of the absent party, and it concluded that the record owners of the property being developed were indispensable to the action.[39]

---

[34] *S. New Castle County*, 2001 WL 855434, at *3.
[35] *Id*. at *2-*5.
[36] *Id*. at *3.
[37] *Id*.
[38] *Id*.
[39] *Id*. at *3-*4.

While the absence of Robinson Investments would not prejudice the named parties, save possibly Robinson Investments Two, if this action were to proceed to judgment in favor of the Plaintiffs, Robinson Investments would be prejudiced because of its potential loss of property rights or other interests. I find that Robinson Investments would not necessarily be protected by the other named parties, and because no other remedy would be available to Robinson Investments, the record owner of a property, a judgment in its absence would be unduly prejudicial.

2. Rule 19(b) Factor Two

The second factor of Rule 19(b) requires me to examine "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided . . ."[40] "The ability to intervene in an action, although not determinative, may be viewed as a factor that lessens any potential prejudice resulting from a future judgment."[41]

Though the Plaintiffs do not specifically argue that Robinson Investments should have intervened, they do stress that Robinson Investments had notice and could protect its interests. Neither Robinson Investments nor Robinson Investments Two had notice of this action during the time period in which

[40] Ch. Ct. R. 19(b).
[41] *Miles Inc. v. Cookson America, Inc.*, 1994 WL 114867, at *5 (Del. Ch. Mar. 3, 1994).

Robinson Investments could have intervened.[42] Importantly, the relief sought here directly affects the development rights in the properties held by both Robinson Investments and Robinson Investments Two, and because the single development plan challenged involves both properties, relief cannot be crafted to avoid prejudice to Robinson Investments.

3. Rule 19(b) Factor Three

Under the third enumerated factor, I must consider "whether a judgment rendered in [Robinson Investments'] absence will be adequate." In other words, will this suit, if permitted, encourage piecemeal litigation, or otherwise be undesirable.[43] I note that full relief could be given to the Plaintiffs and a decision in favor of the Plaintiffs would not likely lead to future litigation. On the other hand, as noted above, Robinson Investments would not be able to adequately protect its interests should the matter go forward.

[42] Notice of the NCCC's approval of The Preserve at Robinson Farm was published in the News Journal on May 14, 2011, and the deadline under § 8126(b) for intervention by Robinson Investments expired July 14, 2011. The Plaintiffs filed their complaint on July 8, 2011 and Robinson Investments Two was served a copy of the summons on July 26, 2011. As discussed above, § 8126(b) is a statute of repose and even if Robinson Investments received notice from Robinson Investments Two, it could not have intervened as a party. *CCOBH*, 1993 WL 390543, at *5-*6. The Court in *CCOBH* noted that "the effect of a voluntary intervention is irrelevant because 10 *Del. C.* § 8126 is a statute of repose that precludes [the defendant] from intervening in [an action after the statute's expiration deadline], even if it had been inclined to do so." *Id.* at *6. The Court also explained that "[e]ven assuming, arguendo, that [the defendant] could have voluntarily intervened . . . despite [§ 8126] its refusal to do so would not preclude a finding that it is an indispensable party. To hold otherwise would constitute undue hardship and prejudice to [the defendant] because it would force it to waive the provisions of [§ 8126] despite clear intent of the General Assembly in enacting the statute." *Id.*

[43] *CCOBH*, 1993 WL 390543, at *6.

4. Rule 19(b) Factor Four

The fourth factor I must address concerns whether the Plaintiffs will have an adequate remedy if the action is dismissed for nonjoinder. Although the Plaintiffs will not have a remedy, because of the operation of the statute of repose, "such a dismissal here . . . will not offend equity and good conscience because nothing prevented [the Plaintiffs] from naming [Robinson Investments] as a defendant in its complaint."[44]

D. The Plaintiffs' Claims Are Dismissed With Prejudice

Where a party attempts to challenge and reverse an approved property development, the quintessential necessary parties include the record owners of the property. While the Plaintiffs did name one of the development plan's record property owners, these parties are not co-tenants; they are legally distinct entities owning distinct parcels of real property. I cannot presume that the two record property owners' interests align or that Robinson Investments' interests will otherwise be protected in this litigation. In an action challenging the approval of a development plan, each owner of a property involved has economic interests directly at stake, and an equitable result cannot be achieved in its absence. Additionally, the General Assembly, as evidenced by the draconian brevity of § 8126(b), intended any claimed defects in property development approvals to go

[44] *Id*. at *7.

forward quickly and be determined finally,[45] and although Robinson Investments' interests are at stake in this litigation, it never had an opportunity to intervene pursuant to the operation of the statute of repose.[46] Though the Plaintiffs, upon dismissal, may suffer prejudice of their own, they had the ability to serve all necessary parties; therefore, a regard for equity requires that they bear the resulting consequences. In sum, Robinson Investments is the owner of a parcel approved for development and is an indispensable non-joinable party to an action seeking to rescind that approval. Thus, I must dismiss this action. Because of my decision here, I need not reach the Defendants' alternate grounds for dismissal. An Order has been entered consistent with this Opinion.

[45] *See Lynch*, 2004 WL 1238405, at *4.
[46] *CCOBH*, 1993 WL 390543, at *6.