



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

JOHN W. NOBLE  
VICE CHANCELLOR

417 SOUTH STATE STREET  
DOVER, DELAWARE 19901  
TELEPHONE: (302) 739-4397  
FACSIMILE: (302) 739-6179

September 12, 2007

Thomas C. Marconi, Esquire  
Losco & Marconi, P.A.  
1813 North Franklin Street  
P.O. Box 1677  
Wilmington, DE 19899-1677

Richard L. Abbott, Esquire  
Abbott Law Firm  
724 Yorklyn Road, Suite 240  
Hockessin, DE 19707

Re: Mogavero v. Greenberg  
C.A. No. 776-VCN  
Date Submitted: April 2, 2007

Dear Counsel:

Plaintiffs Donald T. Mogavero and Stephanie M. Mogavero (the "Mogaveros") owned approximately 4.7 acres on Fells Lane, in New Castle County, near Wilmington, Delaware. They apparently believed—incorrectly—that their lands consisted of two parcels—one of approximately four acres, which included the Fells Mansion, and another of approximately 0.7 acres. In September 2002, they agreed to sell the four-acre parcel, with the mansion, to Defendants

Marc L. Greenberg and Nancy Ann P. Greenberg (the “Greenbergs”); they would retain the 0.7 acre parcel and build a smaller home for themselves.<sup>1</sup>

As settlement neared, the parties realized that the Mogaveros’ lands constituted only one parcel, *i.e.*, there was one 4.7 acre parcel, not two parcels of 4.0 and 0.7 acres, respectively.<sup>2</sup> This litigation, resolved at least for the moment by this post-trial letter opinion, would eventually result from that discovery.

Because the Mogaveros’ lands, under applicable New Castle County (the “County”) land use regulations, consisted of only one parcel, the Mogaveros could not complete their transaction with the Greenbergs and retain the 0.7 acre tract (the “Parcel”) without subdivision approval by the County. Thus, the parties and their counsel were confronted with the following conundrums: the Greenbergs needed to

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<sup>1</sup> Shortly after entering into the Agreement of Sale, the Greenbergs and the Mogaveros executed the Addendum, dated September 22, 2002, (PX 2) which recognized (1) the Mogaveros’ desire to retain the 0.7 acre parcel and (2) the need for several governmental approvals. At that time, no one recognized that subdivision approval would be necessary. The Greenbergs agreed to cooperate with the Mogaveros in their efforts and to give the Mogaveros an access easement across the lands which they would acquire. The Addendum anticipated that the necessary approvals might not be obtained by closing; in that event, the Greenbergs would “support any and all permits and approvals necessary to construct such residence, including but not limited to supporting any requests for variances and other approvals and permits, granting an access easement as described above and mutually acceptable to both buyer and seller, and granting any other easements necessary for utilities such as water, communications, sanitary sewer as required of the buyer after final settlement.”

<sup>2</sup> The Agreement of Sale (PX 1) at paragraph 11 recited that the “separately deeded lot of .79± acre is not included in the sale. Buyers will have right of first refusal.”

close in order to have a place to live, but they had only agreed to buy four acres; the Mogaveros still wanted to be able to build on the lands which they had intended to retain even though the Greenbergs would acquire all of the Mogaveros' lands because there was no duly established separate lot. Thus, they, with the aid of counsel, negotiated the Subdivision and Development Agreement (the "Agreement")<sup>3</sup> which defined the rights and obligations that are at issue in this litigation. The parties, however, expected that the Mogaveros would receive the necessary approvals and that the Greenbergs would reconvey the Parcel to them. The Mogaveros would have two years to determine the feasibility of building on the Parcel. If the Mogaveros were unsuccessful, the Greenbergs would pay the Mogaveros for the Parcel—at a price to be established by an appraisal based on the Parcel's status as part of the larger tract. It is necessary to quote portions of the Agreement at some length.<sup>4</sup>

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<sup>3</sup> DX 17.

<sup>4</sup> Although they entered into the Agreement, the Greenbergs were not happy. They felt "completely ambushed," especially because (1) they believed that the Mogaveros had known about the problem; (2) it was sprung on them after they had committed to vacate their home and, thus, they were in a vulnerable position. Tr. 382-84.

## **SUBDIVISION AND DEVELOPMENT AGREEMENT**

THIS SUBDIVISION AND DEVELOPMENT AGREEMENT is made and entered into this 25th day of November, 2002 by and between DONALD T. MOGAVERO AND STEPHANIE MOGAVERO (“Seller”) and MARC L. GREENBERG AND NANCY ANN P. GREENBERG (“Buyer”).

WHEREAS, Seller is the legal owner of all that certain existing subdivided parcel of land with the improvements erected thereon having an address of 2323 Fells Lane, Wilmington, Delaware 19808 and consisting of approximately 4.73 acres of land, a portion of which is depicted as being approximately as more fully described and depicted in Exhibit “A” attached hereto and made a part hereof (hereinafter the “Property”); and

WHEREAS, Seller and Buyer entered into that certain Agreement of Sale dated September 17, 2002 (the “Sales Agreement”) as amended and supplemented by an Addendum dated September 22, 2002 (the “Addendum”) wherein Buyer agreed to purchase and Seller agreed to sell approximately four (4) acres of the Property. Buyer and Seller further agreed that the remaining approximately .73 acres of the Property which was identified on a prior tax parcel map of New Castle County (the “County”) as Parcel 2A would be retained by Seller and developed by Seller with Buyer’s cooperation as provided in the Sales Agreement. Parcel 2A is generally depicted on Exhibit “B” attached hereto and made a part hereof (hereinafter the “Parcel”); and

WHEREAS, Seller subsequently discovered that the Parcel does not exist as a legally recognized subdivided parcel of land in accordance with the zoning and subdivision regulations of the County as promulgated under the Uniform Development Code of New Castle County (the “Code”) whereby Seller could retain and develop the Parcel as contemplated by the parties under the Sales Agreement; and

WHEREAS, Seller and Buyer have reached an understanding as to the process and procedures by which Seller shall undertake and complete to (1) subdivide the Property to create the Parcel; (2) obtain the various governmental authorizations and approvals to develop the Parcel with a single family dwelling and other appurtenant improvements as contemplated under the Addendum; and (3) complete the conveyance from Buyer to Seller of the title to the Parcel, together with the respective rights and obligations of the Buyer and Seller in connection therewith as expressly provided herein (collectively the "Project").

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, the parties hereto do covenant and agree as follows:

**A. SELLER'S CONTINGENCIES, COVENANTS AND OBLIGATIONS.**

1. The obligations of the Seller under this Agreement and the Settlement hereunder as to the Parcel is expressly subject to and contingent upon the ability of Seller to secure compliance with the following conditions precedent within the time periods provided herein below. In the event the foregoing contingencies are not satisfied as provided herein, then Seller may terminate this Agreement by written notice to Buyer, whereupon this Agreement shall automatically be terminated and Buyer shall pay to Seller the sum which shall be determined by a qualified appraiser mutually agreed upon by the parties and acceptable to Buyer's mortgagee (as one of the approved appraisers recognized by the Buyer's mortgagee) and licensed in Delaware to be the fair market appraised value of the Parcel as an integral part of the Property (rather than as a separate subdivided parcel of land) (the "Parcel Payment"). The Buyer and Seller acknowledge and agree that Parcel Payment figure was not previously included in the Purchase Price of the Property under the

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Agreement based on the mistaken understanding of the Seller that the Parcel was a separate subdivided parcel. Upon the payment by Buyer to Seller of the Parcel Payment, then neither party shall have any further obligations or liabilities hereunder to the other.

2. Development Plan and Site Conditions. Within two (2) years from the date Seller and Buyer complete settlement on the Property in accordance with the terms of the Sales Agreement, (the "Development Period"), Seller shall determine, in its sole opinion, whether or not the Parcel is suitable and reasonably adaptable for Seller's development of the parcel which contemplates the development of the Parcel to accommodate one (1) residential single family dwelling, together with other necessary facilities and improvements as herein discussed in compliance with the terms of the Addendum (the "Intended Development"). Seller's determination the Parcel is not suitable for the Intended Development may be based on physical conditions, excessive costs due to such conditions, environmental conditions or any other objectionable conditions existing on the Parcel which may affect the Seller's Intended Development and shall be subject to the following additional site related conditions:

[Subparagraphs (a)-(d) address several development issues, including soil conditions, wetlands, utilities, and access.]

e. there must be issued to Seller or Seller's designee, at Seller's expense, by the duly constituted public authorities, such final, irrevocable, incontestable and unappealable permits and approvals (all being referred to herein as the "Permits") including, without limitation (i) building permits; (ii) entrance and curb cut permits; (iii) environmental approvals (including but not limited to septic and well improvements); and (iv) any other licenses and other approvals, certificates, exceptions, authorizations, changes, variances and special exceptions, from any local, State or Federal governmental entity having jurisdiction over the Parcel, each of which permits may

be required or desired by Seller in connection with Seller's Intended Development. Buyer covenants and agrees to cooperate with Seller and to execute and deliver all necessary documents (subject to Buyer's review and approval, which review and approval shall not be unreasonably withheld, conditioned or delayed) in connection with application for the permits, and any appeals in connection therewith, as well as the Access, each of which may be sought in Seller's name or in Buyer's name, as Seller considered such action necessary or desirable at no cost or expense to Buyer (including Buyer's reasonable attorney's fees associated with any such review thereof).

3. Seller's Right to Terminate Agreement. Notwithstanding anything contained in this Agreement or the Addendum to the contrary, in the event the foregoing contingencies are not satisfied as provided herein, then Seller shall have the absolute right, in its sole and absolute discretion to terminate this Agreement by written notice to Buyer, whereupon this Agreement shall automatically be terminated and Buyer shall remit to Seller the Parcel Payment within one hundred twenty (120) days of written notice from Seller and upon the payment thereof, and upon Seller's receipt of the Parcel Payment, neither party shall have any further obligations of liabilities hereunder to the other.

4. The Resubdivision Plan. Subject to the terms and conditions contained herein, Seller covenants and agrees that it will cause the timely preparation, completion, filing and recording of a resubdivision plan of the Property substantially in accordance with Exhibit "B" in accordance with the Code (the "Plan") and in compliance with all other applicable Federal, State and County laws, statutes, ordinances, rules and regulations, and codes, including but not limited to building codes or other enactments of any applicable governmental agency having jurisdiction over the Property (collectively the "Laws"). The Plan shall be prepared subject to the terms and conditions of this Agreement and the Addendum and in compliance with the Code and the Laws.

5. Costs and Expenses. Seller hereby covenants and agrees to reimburse Buyer for all costs, fees and expenses, including, but not limited to, reasonable attorney's fees, incurred by the Buyer arising out of or relating to the Intended Development, the Project and any other acts undertaken hereunder by the Buyer at the request of the Seller. Seller shall be solely responsible for all costs and expenses associated with the Plan and the Project.

A. [sic B]. **BUYER'S OBLIGATIONS AND COVENANTS.**

Buyer covenants and agrees to cooperate with Seller by executing and delivering such documents, applications, plans and other agreements required to prepare, complete, file and record the Plan in accordance with the terms and conditions of this Agreement and the Addendum subject to the prior review and approval of Buyer's attorney.

1. Closing. Once all the approvals have been obtained for the Project and the Plan is recorded in the Office of the Recorder of Deeds, New Castle County, Delaware and the Release of the Mortgage is obtained, then Buyer and Seller shall conduct the closing and settlement on the Parcel . . . at a mutually agreeable time and date, which date shall not be later than thirty (30) days after Seller provides notice to Buyer of both the recording of the Plan and the recording of the Release; provided, however, in no event shall the Closing occur later than ninety (90) days after the expiration of the Development Period. Buyer shall execute and deliver to Seller a fee simple deed to the Parcel free of any liens or mortgages or other encumbrances, but subject to all existing easements and restrictions of record, any notes or other matters appearing on the Plan, together with the applicable New Castle County and State of Delaware Transfer Tax Affidavits and such other documents that may be reasonably requested or required in order to transfer title to the Parcel in accordance with the terms of this Agreement (the "Closing Documents"). The attorney for



Seller shall prepared (sic) the Closing Documents for review by Buyer's attorney consistent with the terms and conditions of this Agreement and the Addendum.

2. Release of Mortgages/Judgments. Seller shall be solely responsible for obtaining and paying any sum required by Buyer's mortgagee, in order to release the Parcel from any and all mortgages granted by Buyer with respect to the Parcel at the time of the settlement under the Agreement (collectively the "Mortgages"), including, but not limited to paying for any appraisals or other financial requirements imposed by Buyer's mortgagee in order to secure any such desired release or discharge of the Mortgages against the Parcel (the "Release"). In the event the Buyer's mortgagee does not agree to the Release for any reason what so ever [sic], then Seller shall have the option (but not the obligation) at Seller's sole cost and expense to secure substitute financing for Buyer on the Property on terms and conditions no less favorable as the terms and conditions of Mortgages, including but not limited to the interest rate and terms (the "Refinance"). Buyer agrees to reasonably cooperate with Seller to execute such applications and to secure and obtain any such Refinance as may be reasonably requested by Seller with the understanding and agreement that Seller shall be solely responsible for all costs or expenses associated with such Refinance. In the event Seller elects to secure the Refinance, then Seller may elect to extend the Closing by a reasonable time not to exceed ninety (90) days after the expiration of the Development Period in order to secure and complete the Refinance. Notwithstanding the foregoing, Buyer shall be solely responsible for obtaining any releases or discharge of any judgment or other forms of non-consensual liens against the Parcel that are created or imposed as a result of the acts or omissions of the Buyer (collectively the "Judgments").

The Agreement was executed at closing in late November 2002. After the Greenbergs took title to and possession of the entire 4.7 acre tract, the Mogaveros leisurely undertook the due diligence anticipated by Part A of the Agreement. In order to assure that they could build on the Parcel, they would need, among other agreements, and approvals, from the Greenbergs an easement delineating their driveway and accommodating utilities and, from the County, subdivision approval, septic system approval, historic review board approval, and tree removal and protected resources review.

In early January 2003, the Mogaveros reviewed a proposed design for their new home with the County's Historic Review Board.<sup>5</sup> In May 2003, the County issued a certification for septic eligibility<sup>6</sup> and, in July 2003, the Mogaveros obtained a soil-septic evaluation report that recommended the appropriate system and designated the location for its installation.<sup>7</sup> Later that month, the Mogaveros retained Merestone Consultants, Inc. ("Merestone") to secure the regulatory approvals necessary to subdivide and develop the Parcel.<sup>8</sup>

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<sup>5</sup> PX 6 at 3.

<sup>6</sup> PX 7.

<sup>7</sup> *Id.*

<sup>8</sup> PX 8.

In November 2003, a wetlands investigation of the Parcel was conducted.<sup>9</sup> In March 2004, public water availability was confirmed.<sup>10</sup> By early April 2004, Merestone had prepared the SLD-1 form (Application for Plan Review for a Minor Subdivision and Land Development) for the Parcel.<sup>11</sup>

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In April 2004, Mrs. Mogavero met with Mrs. Greenberg to go over the plans for the new house. Mrs. Greenberg was disappointed (appalled might be more accurate). She described the proposed dwelling as a “pseudo Victorian Disney World interpretation.”<sup>12</sup> Also, in her view, the Mogaveros’ planned house not only would be much larger than she had anticipated, but it would also “compromise the historical integrity of the area.” Nonetheless, the meeting was a productive one. Mrs. Greenberg inquired about what could be done to move the process along; she agreed to certain changes in the location of the driveway easement; and, importantly, she signed the SLD-1 application.<sup>13</sup> That, it was believed, would

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<sup>9</sup> PX 9.

<sup>10</sup> PX 10.

<sup>11</sup> PX 11 (the “SLD-1 Application”).

<sup>12</sup> Tr. 372.

<sup>13</sup> DX 28; Tr. 386-87.

allow the County's critical subdivision process to commence. The Greenbergs' spirit of cooperation would soon dissipate.

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Mr. Greenberg, upon learning that his wife had signed the SLD-1 application, promptly directed the Mogaveros to withdraw it (or not to file it) because he had not approved it and because his approval was necessary.<sup>14</sup> He also wanted an opportunity to review the various attachments to the application. The next day, he sent an e-mail going even further: Mrs. Greenberg's signature on the application had been in error because they were "unable to attest to the accuracy" of the information set forth.<sup>15</sup>

The Mogaveros attempted to schedule a meeting but Mr. Greenberg canceled it. Efforts to placate the Greenbergs were largely unsuccessful. The Greenbergs' counsel sent a letter, raising a number of problems and contending that the Agreement was void because it did not provide for the various variances that would be required to implement the plans. Counsel exchanged correspondence.<sup>16</sup> Amidst the disagreements, the County provided preliminary

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<sup>14</sup> DX 29.

<sup>15</sup> PX 12.

<sup>16</sup> *E.g.*, PX 14; PX 15.

(and probably resolvable) comments to the SLD-1 application.<sup>17</sup> On June 6, 2004, the Greenbergs unilaterally withdrew the SLD-1 application;<sup>18</sup> without the Greenbergs' participation in the process, the County would not consider the application. As the result of the ongoing disputes, the Greenbergs did not sign either the new SLD-1 application which was provided to them by the Mogaveros or a necessary septic system application. Recognizing that the parties would be unable to work out their disagreements, the Mogaveros brought this action.

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Another problem had arisen in late May 2004. The Greenbergs learned that a portion of the Parcel was subject to a set of restrictions that could be read to preclude construction of the new dwelling.<sup>19</sup> To allow for fulfillment of the expectations of the parties that a new dwelling would be built on the Parcel, the Mogaveros sought a formal release of the restrictions. The Greenbergs, in turn,

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<sup>17</sup> PX 16.

<sup>18</sup> At trial, Mr. Greenberg offered several reasons for withdrawing the application: because of issues related to ground water, the mature growth forest, a critical letter from the County regarding the proposed septic system, concerns about a deed restriction, and the Mogaveros' failure to pay counsel fees. Tr. 476-79, 541.

<sup>19</sup> DX 43. The Court, for present purposes, accepts that the restrictions bind the parcel and does not resolve whether the restrictions would have any impact on the Mogaveros' plans. The more obvious question of why the restrictions were not uncovered as a result of the Greenbergs' title search is a question that the Court is unable to answer.

refused to grant any release because the Mogaveros, under the Agreement, were to reacquire title to the Parcel subject to restrictions of record.

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Yet another dispute involved the payment of the legal fees incurred by the Greenbergs as a result of their attorney's review of the various submittals prepared by the Mogaveros. The Agreement requires the Mogaveros to pay the Greenbergs' reasonable fees. The Greenbergs eventually refused to move forward with the regulatory process until their legal fees were paid; the Mogaveros were unwilling to pay the legal fees unless the Greenbergs moved forward with the regulatory process. The Mogaveros paid the fees into escrow with their attorney; that was not adequate for the Greenbergs who wanted their attorney paid.<sup>20</sup> Thus, another basis for impasse was established.

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The Mogaveros assert that the recalcitrant conduct of the Greenbergs frustrated their rights under the Agreement to determine the suitability of the Parcel for the construction of the dwelling. They seek an order (1) compelling the Greenbergs to cooperate with the processes anticipated in the Agreement and (2)

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<sup>20</sup> PX 24; PX 25.

reforming the Agreement to extend the time available to them to achieve the Agreement's goals.

The Greenbergs, on the other hand, accuse the Mogaveros of a series of fraudulent and misleading actions and seek either rescission of the real estate transfer or a declaration that the Agreement is no longer in force because of the Mogaveros' behavior. In addition, they seek to recover their expenses incurred during the development period. Finally, they contend that an order in the nature of specific performance cannot be sustained on the present record.

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The Agreement required the Greenbergs "to cooperate with [the Mogaveros] by executing and delivering such documents, applications [etc.,] . . . required to prepare, complete, file and record the [plan for the intended development as set forth in the Agreement and the Addendum] subject to the prior review and approval of [the Greenbergs'] attorney."<sup>21</sup> In addition, the Agreement provided that the Greenbergs' review and approval "shall not be unreasonably withheld, conditioned or delayed."<sup>22</sup>

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<sup>21</sup> Agreement, ¶ B.

<sup>22</sup> *Id.* ¶ A.2.(e).

The Court is called upon to apply the Agreement to the conduct of the Court must “first review[] the language of the contract to determine if the intent of the parties can be ascertained from the express words chosen by the parties or whether the terms of the contract are ambiguous.”<sup>23</sup> Although the scope of a duty “to cooperate” is inevitably contextual, there is no ambiguity.<sup>24</sup> In a sense, it is an enhanced and express imposition of the duty inherent in all contracts: the duty of good faith and fair dealing.<sup>25</sup> Before turning to consideration of the duty owed by the Greenbergs under the Agreement, the Court first addresses the Greenbergs’ contention that their performance under the Agreement should be excused because they were induced to enter into the Agreement by the Mogaveros’ fraud.<sup>26</sup>

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According to the Greenbergs, the Mogaveros led them down a pathway of deceit into the Agreement and, thus, they should not be bound by the Agreement.<sup>27</sup>

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<sup>23</sup> *In re Explorer Pipeline Co.*, 781 A.2d 805, 713 (Del. Ch. 2001).

<sup>24</sup> The Greenbergs could not “unreasonably” withhold their approvals.

<sup>25</sup> *See, e.g., Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

<sup>26</sup> For similar reasons, the Greenbergs’ application for rescission is denied.

<sup>27</sup> In short, the Greenbergs contend that they were induced to enter into the Agreement by the Mogaveros’ fraud and deceit.

Under Delaware common law, a legal claim for fraud or deceit requires that plaintiff establish the following elements: (1) a false representation of material fact; (2) made by a person with knowledge that the representation is false, or with reckless indifference to the truth; (3) an intention to induce the person to whom it



They argue that the Mogaveros knew that there was no separate lot and waited until they had no choice because of their sale of their prior residence and, thus, no place to live, to spring the Agreement on them. The Mogaveros should have known that their lands consisted of one parcel; it is understandable that the Greenbergs believed that the Mogaveros had not been forthcoming. For example, the Mogaveros acquired the property in 1992; this was accomplished through one deed for a parcel of 4.73 acres.<sup>28</sup> A plot prepared as part of the process to install a swimming pool in 1995 showed a parcel of 4.73 acres.<sup>29</sup>

The listing for the Mogaveros' property was for a 4.72 acre parcel<sup>30</sup> and the first draft of the agreement of sale reflected that. However, during the negotiation process, the Mogaveros inserted the following: "separately deeded lot of .79± acre is not included in the sale." Thus, before the Greenbergs agreed to a real estate

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is made to act or refrain from acting in reliance upon it; (4) causing that person, in justifiable reliance upon the false statement, to take or refrain from taking action; (5) causing such person to suffer damage by reason of such reliance.

DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §2-3[b][1][ii], at 2-31 to 2-32 (2007). In addition "[f]or purposes of equitable fraud . . . , the plaintiff need not show that a statement was made with knowledge that it was false or in reckless disregard of the truth." *Id.* § 2-3[b][1][ii], at 2-32. *See also Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

<sup>28</sup> DX 7.

<sup>29</sup> DX 8.

<sup>30</sup> DX 9.

transaction with the Mogaveros, they were aware that a 0.7 acre parcel, out of the larger tract that was initially understood to be for sale, would be retained by the Mogaveros. With the Addendum executed only a few days after the Agreement of Sale, the Greenbergs also acknowledged their obligation to provide various easements and to cooperate with the regulatory process. A few days before closing, the Greenbergs were presented with the Agreement. With the advice of counsel, they negotiated the Agreement and agreed to it. The question, thus, is whether the Agreement imposed any material burden on them. It did not. They understood in September that the Mogaveros would keep a 0.7 acre parcel; thus, they lost no land. The only additional burden imposed upon them was cooperation in obtaining the subdivision approval. Their attorney's fees would be paid; the additional transactional costs would be borne by the Mogaveros. The other regulatory obstacles would substantially have been encountered by the Greenbergs regardless of whether the lot had already been subdivided.<sup>31</sup> In short, the difference, as far as the Greenbergs should have been aware, between an existing 0.7 acre retained lot and a to-be-created and reconveyed 0.7 acre lot was minimal

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<sup>31</sup> There is no reason to conclude that the Mogaveros were aware of the restrictive covenants that may prevent development of the Parcel.

and so insubstantial that it cannot form a basis for a fraud claim, whether characterized as a knowing misrepresentation or as an innocent misrepresentation (*i.e.*, equitable fraud). The Greenbergs' performance under the Agreement is not excused by any claim of fraud or misrepresentation against the Mogaveros.

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The Mogaveros did apply for subdivision approval, but that effort failed because Mr. Greenberg withdrew the application before the County could consider it. Mr. Greenberg attempted to justify his conduct by pointing out that the restrictions barred construction of the dwelling on the Parcel. Even if that is the correct analysis, the restrictions do not bar the subdivision. Bringing the restrictions to the attention of the Mogaveros and the County was all that was required of Mr. Greenberg; there was no basis either in law or in contract to excuse his interference with the subdivision approval process.

The documents which the Greenbergs were asked to sign were not palpably illegal. Perhaps there is room for fair disagreement about the likelihood of regulatory approval. If merely a matter of fair disagreement, the Greenbergs could not simply refuse to sign and deprive the Mogaveros of the opportunity to bring the various applications before the County. The Greenbergs could have noted their

concerns to the Mogaveros at the time they were presented with the applications and signed them, while preserving their rights and objections to the substance of the applications. The Greenbergs, by late spring or early summer of 2004, were no longer cooperating with the Mogaveros in terms of executing the various documents needed to allow for regulatory consideration. Instead they had dug in and were seeking excuses for not signing the necessary documents. Whether the documents could (or should) have been approved by the County is not the Greenbergs' concern in this context; in the absence of a clear and inherently incurable violation of the County's code—nothing which has been demonstrated by the Greenbergs—their function was to cooperate with the Mogaveros. That, however, does not necessarily deprive them of their rights, such as their contention that the restrictions do not allow for development of the Parcel.<sup>32</sup> The Mogaveros are entitled to pursue regulatory approval—and the filing of the necessary applications cannot be thwarted merely by the Greenbergs' failure to sign documents which may not please them.

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<sup>32</sup> Whether the Greenbergs waived any right to assert the restrictions (or are otherwise precluded from enforcing the restrictions against the Mogaveros under the Agreement) is a question that need not be addressed by this letter opinion.

The Greenbergs, thus, unreasonably interfered with the Mogaveros' efforts to determine the feasibility of building on the Parcel, and they failed to satisfy their contractual duty to cooperate with the Mogaveros.<sup>33</sup>

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That leaves the question of proper remedy. Whether development of the Parcel is an achievable goal remains a mystery.<sup>34</sup> The only way to bring closure to that question is to renew the efforts to obtain the necessary regulatory approvals, if the Mogaveros so choose. That would require modification of the Agreement to reinstate and extend the due diligence period. A year is a reasonable length of time; it, of course, is not the only reasonable period. A two-year extension cannot be justified, in part, because of the lackadaisical initial efforts of the Mogaveros.

Accordingly, judgment in favor of the Mogaveros and against the Greenbergs is entered. It is hereby declared that the Greenbergs have failed to

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<sup>33</sup> As for payment of their attorney's fees for his review of the various documents, there is no basis under the Agreement to condition cooperation on the prior payment of those fees.

<sup>34</sup> There are numerous challenges confronting the Mogaveros in this effort. Whether it is worthwhile, of course, is for them to decide. The solution to the "one parcel" problem adopted by the Agreement may have been the best available at the time, but it would have been difficult to implement even with all of the good faith and best efforts of all involved. Given the unhappy relationship between the Mogaveros and the Greenbergs, it is unfortunately likely that the contentiousness will continue. Although the Greenbergs have not been particularly helpful to date, they do have rights that may be affected by the Mogaveros' project, and how those rights are accommodated or limited under the Agreement necessarily remains an open question. Moreover, obtaining a release from any mortgagee of the Greenbergs may be problematic.

satisfy their duty under the Agreement to cooperate with the Mogaveros in their efforts to obtain the necessary regulatory approvals and regulatory reviews in order to determine whether or not they choose to exercise their right to reacquire the Parcel. The Agreement is reformed so that the due diligence period specified in Part A thereof is revised and extended to run from the date of this Letter Opinion until September 10, 2008. The Greenbergs shall cooperate, as anticipated by the Agreement and as outlined in this Letter Opinion, in the efforts of the Mogaveros to secure such approvals.<sup>35</sup> Costs are awarded to the Mogaveros, but any application for attorneys' fees is denied because of the absence of any conduct that would justify the deviation from the so-called American Rule regarding the award of attorneys' fees and the absence in the Agreement of any provision for an award of fees to a prevailing party.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K

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<sup>35</sup> The Greenbergs, before acting, remain entitled to obtain the "prior review and approval" of their attorney.