IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

CALDERA PROPERTIES - LEWES/ REHOBOTH VII, LLC,	:	C.A. No. 07C-12-002 THG
	:	
Plaintiff,	:	
v.	:	
THE RIDINGS DEVELOPMENT, LLC, CENTEX HOMES, and BEAZER HOMES CORP.,	:	
	:	
Defendants.	:	
AND	:	
CALDERA PROPERTIES - LEWES/ REHOBOTH VII, LLC,	:	
Plaintiff,	:	
v.	:	
THE RIDINGS DEVELOPMENT, LLC, CENTEX HOMES, BEAZER HOMES CORP., and TIDEWATER ENVIRONMENTAL SERVICES, INC.,	:	
	:	
Defendants.		

THE RIDINGS DEVELOPMENT, LLC,	:	
Counterclaim Plaintiff,	:	
v.	:	
CALDERA PROPERTIES - LEWES/ REHOBOTH VII, LLC and RBS CITIZENS, N.A.,	:	
Counterclaim Defendants.	:	

DECISION AFTER TRIAL

DATE SUBMITTED: April 18, 2009

DATE DECIDED: May 29, 2009

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Graves, J

Two suits are before me; one was filed in Superior Court and the other in Chancery Court. The cases were consolidated and have proceeded as one.[1]

Caldera Properties-Lewes/Rehoboth VII, LLC ("Caldera" or "plaintiff") is the plaintiff in both actions. Defendants in the Superior Court action are The Ridings Development, LLC ("Ridings"), Centex Homes ("Centex"), and Beazer Homes Corp. ("Beazer"). Ridings filed counterclaims against Caldera in the Superior Court action. I have determined Beazer should not be a defendant. The defendants in the Chancery Court action were Ridings, Centex and Tidewater Environmental Services, Inc. ("Tidewater"). Ridings asserted counterclaims against Caldera and also asserted claims against RBS Citizens, N.A. ("Citizens"). The Court granted summary judgment in favor of Tidewater and Citizens. Thus, the only parties remaining are Caldera and defendants Ridings and Centex (sometimes collectively referred to as "defendants" and sometimes as "Centex/Ridings").

Previously, this Court considered various motions to dismiss and motions for judgments on the pleadings. *Caldera Properties - Lewes/Rehoboth VII, LLC v.*

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[1]The Supreme Court, pursuant to Del. Const. Art. IV, § 13(2), designated me to sit on the Court of Chancery for the purposes of hearing and determining all issues in the case of *Caldera Properties-Lewes/Rehoboth VII, LLC v. The Ridings Development, LLC,* Del. Ch., C.A. No. 3795-CC.

The Ridings Development, LLC, Del. Super., C.A. No. 07C-12-002 (THG), Graves, J. (June 19, 2008) ("June 19, 2008 Decision"). After issuance of that decision, the litigation ramped up. Motions for summary judgment were filed. The Court ruled on the summary judgment motions during conferences with the parties. As noted above, two rulings resulted in dismissals of the claims against Tidewater and Citizens. *Caldera Properties - Lewes/Rehoboth VII, LLC v. The Ridings Development, LLC*, Del. Super., C.A. No. 07C-12-002 (THG), Graves, J. (April 1, 2009) ("April 1, 2009 Order").

The remaining matters proceeded to trial before me in April 2009. During the five days of trial, testimony from numerous witnesses was presented and a voluminous amount of documents were entered into evidence. On April 18, 2009, the Court gave its "bottom line" decision with a promise to issue a full decision as soon as possible. This is the Court's decision after trial. It also addresses in a little more detail its decisions on the summary judgment motions. For all purposes, the date of this written decision and order, not April 18, 2009, is the effective date of the Court's decision.

SUMMARY OF DECISION

This case involves the fallout from the housing market's boom-to-bust cycle. Deals such as the one at hand, entered when everybody was making money, sometimes lack the attention to the "what if" analysis that would have made life easier for all involved. Here, the parties' inattention to the possible consequences of the real estate deal not being consummated has resulted in excessively contentious litigation which ballooned to unnecessary proportions.

Although all sorts of claims and prayers for declaratory relief have been made, the ultimate issue is whether one party should pay money to the other. The answer to this question is based on the answer to the primary issue of whether defendants Centex/Ridings are entitled to reimbursement, either by contract, unjust enrichment or *quantum meruit*, for improvements they made to plaintiff's land. The question which is of most importance to the parties is whether defendants Centex/Ridings are entitled to reimbursement for two-thirds of the costs of a wastewater treatment plant and disposal or collection system ("WWTP").[2] The short answers to all these questions is "No."

This decision does not hold that Centex/Ridings had to build a WWTP on

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[2]Although it may not be technically correct to encompass the disposal or collection system within the wastewater treatment plant, the Court, for ease of reference, employs "WWTP" to mean the disposal or collection system and the wastewater treatment plant.

Caldera's property in order to service the lots on Caldera's property. But having done so voluntarily and pursuant to the business plan of Centex/Ridings and having voluntarily walked away from their contractual right to acquire the lots which the WWTP serviced, it should be Centex/Ridings who bears the risk and financial consequences of their decision. The Centex-Caldera Agreement of Sale, as amended, dictates this result. The Ridings-Caldera Easement Agreement independently dictates this result.

To the extent equitable principles come into play, the result is the same. A contract whereby Centex would pay $1.2 million in agreed-upon liquidated damages if it, Centex, walked away from settling on the second and third phases of the Agreement of Sale cannot, and should not, be rearranged whereby Caldera would end up owing Centex/Ridings $3 to $6 million dollars due to Centex/Ridings' breach. Centex/Ridings understood the risks, accepted the risks, and will not be permitted to transfer the risks to Caldera.

This is the right result based upon the terms of the controlling documents as well as evidence which clearly establishes defendants' intent that defendants would bear these costs.

FINDINGS OF FACT

1. Caldera and Centex entered into an agreement on February 19, 2004, for the sale of real property located in Sussex County ("Agreement of Sale").

2. The Agreement of Sale basically required the following. Caldera was to sell to Centex 218.45 acres of land in eastern Sussex County ("the Property") so that Centex might construct single family homes on a subdivision of 225 building lots. The Agreement of Sale provided that the settlement on the Property would occur in three phases, with 75 single family lots being purchased in each phase. The Agreement of Sale required Caldera to have obtained all governmental and regulatory approvals or entitlements from the County and State regulatory bodies by the time of the settlement on Phase I so that Centex could proceed immediately to begin infrastructure development of the site. The full purchase price was based on the number of lots (225) times $80,000 per lot, for a total of $18 million.

3. Set forth below are pertinent provisions of the Agreement Sale.

3.(a). Section 5 sets forth the three phases of closings. The first closing was to occur 10 days from satisfaction of specified conditions precedent. The second closing was to occur 18 months after the first closing. The third closing was to occur 36 months after the first closing.

3.(b). The "DEPOSIT" provision of the Agreement of Sale appears in

section 4 and provided as follows. Centex was to deliver a $10,000 Earnest Money Deposit upon the signing of the Agreement of Sale. After the feasibility and approval period passed, Centex was to deliver $2 million. Once the $2 million was delivered, the $10,000 was to be returned to Centex. A second lien deed of trust on another property which Caldera owned ("Deposit Deed of Trust") secured the deposit. The Agreement of Sale stated:

> 4.3.2. Security for Deposit. Notwithstanding that Seller shall be in possession of all or any portion of the Deposit, any and all such monies then held by Seller shall remain subject to the terms and conditions of this Contract and shall be returned to Purchaser in the event of Seller's default or termination hereof following a failure of a condition precedent (as provided in Section 10 below) and shall be a credit to the Purchase Price at closing hereunder. ***

3.(c). Within the section of the Agreement of Sale pertaining to the feasibility and approval period, an indemnification provision appears as follows:

> 6. FEASABILITY AND APPROVAL PERIOD.
>
> ***
>
> 6.4. Indemnification. Purchaser hereby indemnifies and agrees to hold Seller and Underlying Seller harmless against and from all claims, demands and liabilities, including attorneys' fees, for nonpayment for services rendered to Purchaser, for construction liens, or for damage to persons or property arising out of Purchaser's investigation of the Property. This indemnification and agreement to hold harmless shall survive the termination of, or Closing under, this Contract.

3.(d). In Section 8, the Agreement of Sale also allowed for Caldera to use the deposit to subsidize expenses it incurred in the development approval process:

> 8. Development Approval Process. Seller agrees to undertake the following actions at Seller's sole risk and expense; provided, however, that Seller may use the Additional Deposit (in accordance with Section 4.3 above) to subsidize any expenses incurred by Seller in connection with the entitlement activities described in this Section 8. **Following Closing hereunder, Purchaser shall be responsible, at Purchaser's sole cost, for posting all bonds and completing all bonded improvements.** [Emphasis added.]
>
> ***
>
> 8.2. Preliminary Plan of Subdivision. Seller shall prepare, and diligently and continuously seek approval by Governmental Authority for, a plan layout of streets and SFD[3] Lots for the Property consistent with the Rezoning Plan and depicting SFD Lots, streets, drainage structures, ponds and easements and containing all engineering plans and documents necessary for construction or installation of the Subdivision Improvements[4] (the "**Preliminary Plan of Subdivision**"). [Emphasis in original.]
>
> 8.3. Final Site Plan and Record Plan. Seller shall diligently and continuously pursue approval by the Governmental Authorities of the final site plan for the Property. When the same shall have been approved, the appeal period therefor, if any, shall have expired without appeal having been filed, and the associated plat of subdivision shall be ready for recording subject only to payment of

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[3] "SFD" means "Single Family Detached".

[4] "Subdivision Improvements" are defined in section 22.12 of the Agreement of Sale as:

> The streets, storm water management structures, storm sewers, water lines, sanitary sewers, electric lines and other improvements necessary for construction and occupancy of SFD dwellings on the Lots.

filing fees, recording fees, and other charges, and posting of required bonds and escrow (all of which shall be the responsibility of Purchaser), Seller shall have achieved "**Final Site Plan and Record Plat**." [Emphasis in original.]

8.4. Developer's Agreement. Purchaser shall enter into a developer's agreement with Sussex County with respect to site improvement obligations that shall be imposed on the Property. [Emphasis added.]

3.(e). Section 9.5 of the Agreement of Sale addresses the condition of the land. In Section 9.5.4., it is provided in pertinent part as follows:

Purchaser, for itself and Purchaser's agents, affiliates, successors and assigns, hereby releases Seller, Seller's agents, affiliates, successors and assigns from, and waives any right to proceed against Seller and Seller's agents and affiliates for, any and all costs, expenses, claims, liabilities and demands (including attorneys' and other fees), at law or in equity, whether known or unknown, arising out of the physical, developmental, environmental (including without limitation, claims arising under environmental laws and all federal, state or other laws relating to the environmental condition of the Property or to real property generally), economic, legal or other condition of the Property which Purchaser has or may have in the future; provided, however, that the foregoing shall not release Seller from liability for a breach of any specific representation or warranty or covenant of Seller as expressly provided in the Contract. *** Purchaser hereby specifically acknowledges that Purchaser has carefully reviewed this Section 9.5, has discussed its import with legal counsel and is fully aware of its consequences. The provisions of this Section 9.5 shall specifically survive Closing or the earlier termination of this Contract. [Emphasis in original.]

3.(f). Section 17 is the Default section. Therein, it is provided in pertinent part as follows:

17. DEFAULT.

17.1 Purchaser's Default. In the event that this transaction shall fail to close because of a wrongful refusal or default on the part of Purchaser, the Deposit shall be paid by the Escrow Agent to the Seller as agreed liquidated damages. Thereafter, neither Purchaser nor Seller shall have any further obligation under this Contract. Purchaser and Seller acknowledge that if Purchaser defaults, Seller will suffer damages in an amount that cannot be ascertained with reasonable certainty on the Effective Date and that the amount of the Deposit to be paid to Seller most closely approximates the amount necessary to compensate Seller in the event of such default. Purchaser and Seller agree that this is a bona fide liquidated damages provision and not a penalty or forfeiture provision. Except for the indemnification provision in Section 6.4 above [which provision is inapplicable in this case], seller waives all other remedies including the right to recover damages in excess of the Deposit and the right to enforce specific performance. [Parenthetical added.]

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17.3. Notice. Prior to declaring a default and exercising the remedies described herein, the non-defaulting party shall issue written notice of default to the defaulting party describing the event or condition of default in sufficient detail to enable a reasonable person to determine the action necessary to cure the default. The defaulting party shall have 10 days from delivery of the notice in which to cure the default. If the default has not been cured within the 10-day period, the non defaulting party may exercise the remedies described above.

3.(g). In Section 18, there is a provision regarding Seller's possession of the Property:

18. POSSESSION; ACCESS EASEMENTS; DEVELOPMENT COOPERATION.
At each of the three (3) Closings hereunder, Purchaser shall be

granted full possession of that portion of the Property that will, upon recordation of the Record Plat, contain such SFD lots as are the subject of such Closing, as provided in Section 5 above. During the period between the First Closing and the Third Closing hereunder, Purchaser shall have the right to full, and complete access in, on, over, across and through any portions of the Property then still owned by Seller for the purpose of developing, building upon, and marketing the portions of the Property theretofore acquired by Purchaser at the First Closing or the Second Closing, as the case may be, and for the purpose of carrying out all activities ancillary thereto or in furtherance thereof Seller shall (i) grant such easements, rights-of-way, and dedications as may be required by or acceptable to any Governmental Authority or public utility companies for the purpose of acquiring and obtaining public utilities, sanitary and storm sewers, water, gas, electric and/or telephone facilities for the benefit of the Property or any portion thereof; (ii) grant such slope, grading or drainage easements as are necessary or desirable in connection with the development of the Property; (iii) grant all construction easements required by virtue of, or in connection with, Purchaser's development of the Property in phases, including the right of Purchaser to clear and grade land not yet acquired by Purchaser but lying within thirty feet (30') of Purchaser's property line; and (iv) dedicate portions of the Property for public use (including, without limitation, common green areas, park areas, open spaces, roads, rights-of-way, sidewalks and gutters) in the event that any Governmental Authority requires such dedication as a condition to the approval and/or recordation of any site plans or plats with respect to the Property.

3.(h). Section 20 sets forth the procedure for providing notices:

20. NOTICES. Any notice, request, demand, instruction or other communication to be given to either party hereunder, except where required to be delivered at the Closing, shall be in writing and shall be hand-delivered or sent by Federal Express or a comparable overnight mail service, or mailed by U.S. registered or certified mail, return receipt requested, postage prepaid, to Purchaser, Seller, Purchaser's Counsel, Seller's Counsel and Escrow Agent, at their

respective addresses set forth below. Notice shall be deemed to have been given upon receipt or refusal of delivery of said notice. The addresses and addresses for the purpose of this Section may be changed by giving notice. Unless and until such written notice is received, the last addressee and address stated herein shall be deemed to continue in effect for all purposes hereunder.

If to Seller: Caldera Properties - Lewes/Rehoboth VII, LLC
4260 Highway One
Suite 6
Rehoboth Beach, Delaware 19971

with a copy to: Archer & Greiner, P.C.
One Centennial Square
P.O. Box 3000
Haddonfield, New Jersey 08033
Attn: Gary L. Green, Esquire

If to Purchaser: Centex Homes
14121 Parke Long Court
Suite 201
Chantilly, Virginia 20151
Attn: Robert K. Davis
Division President

with a copy to: David A. Raynes, Esq.
Centex Homes
5400 Glenwood Avenue
Suite 100
Raleigh, North Carolina 27612-3228

3.(i). The following provisions of the "MISCELLANEOUS" section of the Agreement of Sale are pertinent to this litigation.

21. MISCELLANEOUS.

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21.3. Amendment. No modification or amendment of this Contract shall be of any force or effect unless in writing executed by both Seller and Purchaser.

21.4. Attorneys' Fees. If any party obtains a judgment against any other party by reason of breach of this Contract, attorneys' fees and costs shall be included in such judgment.

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21.7. Time of the Essence. Time is of the essence in the performance of all obligations by Purchaser and Seller under this Contract.

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21.9. Successors and Assigns. This Contract shall inure to the benefit of and be binding upon the permitted successors and assigns of the parties hereto; provided, however, that prior to any assignment of this Contract, the requesting party must receive the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Purchaser shall have the right, in its sole discretion, to assign this Contract to an entity in which Purchaser (i) serves as the manager or (ii) holds a fifty percent (50%) or greater ownership interest. [Emphasis in original.]

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21.12 Construction of Contract. All of the parties to this Contract have participated freely in the negotiation and preparation hereof; accordingly, this Contract shall not be more strictly construed against any one of the parties hereto.

4. The Agreement of Sale referenced and included as Exhibit C a preliminary plan of subdivision which Vista Design Group, Inc. prepared. The document indicates that the Sewer provider would be “community on site” and would service 225 single family homes. It also notes that all of the lots would be “served by private wastewater system”.

5. Marketing dictated that Phase I on the plot would go to settlement first because it was closest to the subdivision entrance on Beaver Dam Road.

6. An on-site WWTP was required for the subdivision plan in order to provide sewer treatment. The site design engineers determined that the WWTP should be located on that portion of the property designated as Phase II.

7. Centex’s due diligence study, dated March 12, 2004, noted that the cost of the WWTP would be "borne by us", i.e., a sunk cost. The due diligence study also noted that perhaps there could be some recovery of this expense in the future from a utility. There is no mention of any expectancy of a contribution from Caldera for recovery of any WWTP construction costs from Caldera or for any of the other infrastructure costs.

8. Caldera and Centex executed the first amendment to the Agreement of Sale on April 5, 2004 (“the First Amendment”).

9.(a). The First Amendment extended the period of time until April 9, 2004,

during which Centex could exercise due diligence in making a final decision as to whether to go forward with purchasing the property.

9.(b). The First Amendment also included a redistribution of how the $2 million security deposit/liquidated damages would be credited against the purchase price. In the initial Agreement of Sale, the parties agreed that since Caldera held the deposit and could apply it against the cost of obtaining the entitlements then, pursuant to Section 4.6 of the Agreement of Sale, Centex would be given the following credits against the $2 million as the takedowns took place:

Settlement on Phase I	$400,000 credit
Settlement on Phase II	$800,000 credit
Settlement on Phase III	$800,000 credit

9.(c). Internal records of Centex reflect it wanted Caldera to amend the Agreement of Sale to double the credits on the first settlement from $400,000 to $800,000. In Caldera's Exhibit 9, Ritter Farm Notes Summary, the following notes from Scott Batchelor on March 30, 2004, state:

> At the low volume the ROANA is unacceptable for 4 of the 5 years. Could you see what would happen if you got the deposit back sooner **since we will be putting in our own treatment plant and amenity package** which should serve to secure the sellers risks. Instead of 400, 800, 800, what would 800, 800, 400 do to the "LOW" returns? [Emphasis added.]

9.(d). This note is followed by a second internal note dated April 1, 2004, from Joe Ricketts stating:

> Based on the arguments put forth above, we went back to the seller and were able to negotiate more favorable terms for the return of the deposit. The Seller was agreeable to the 800-800-400 scenario....

9.(e). Thus, the First Amendment made the following modifications to the credits against the $2 million:

Settlement on Phase I	$800,000 credit
Settlement on Phase II	$800,000 credit
Settlement on Phase III	$400,000 credit

9.(f). These facts lead to the reasonable inference that not only did Centex know the WWTP was their responsibility but also Centex did not expect that Caldera would pay anything for the WWTP in the event Centex did not settle on future phases. That the WWTP would serve to secure seller's risks is contrary to the seller paying for the WWTP.

10.(a). Since the Agreement of Sale had not been terminated during the feasibility period, Centex paid the $2 million Deposit to Caldera and Caldera released the $10,000 Earnest Money Deposit to Centex.

10.(b). Caldera had delivered to Centex, in a previous, unrelated transaction between the parties, a Deposit Deed of Trust in the amount of $2 million, the

purpose of which was "to secure the return by Mortgagor [Caldera] to Mortgagee [Centex] of the Deposit ... in the amount of $2,000,000, if such return of the Deposit is required under the Contract." On April 15, 2004, the parties entered into the "First Amendment to Deposit Mortgage". Therein, the amount secured was increased from $2 million to $4 million. That increase covered the $2 million Deposit for the transaction at issue and constituted security for its return.

11. Caldera and Centex communicated regularly during the period of time that subdivision and entitlement approval was being sought. Centex was actively involved in advising Caldera how it wanted things done.

12. On January 7, 2005, Sussex County granted Caldera preliminary record plan approval to subdivide and develop the Property into 225 single family dwelling lots. This preliminary approval was on the preliminary record plan containing the condition that the WWTP would provide service to all 225 lots.

13. Because Delaware law requires that a public utility must own and operate any wastewater treatment plant servicing 50 or more customers, 26 *Del. C.* § 203D., Centex directed Caldera to seek regulatory approval by way of selecting Tidewater to be the public utility operator for the 225 lot subdivision. Tidewater agreed and, on June 29, 2005, Tidewater applied for the required certificate of public convenience and necessity ("CPCN") with the Public Service Commission

("PSC"). In the application, Tidewater explained that it was "prepared to become the wastewater utility for the subdivision." Tidewater's Application to the PSC for CPCN at p. 1. Tidewater also explained in this Application that it expected to provide wastewater services to all 225 lots of the development. *Id*. at 4.

14. On August 23, 2005, the PSC issued to Tidewater the CPCN, meaning only Tidewater could be the public utility for the 225 lot subdivision. The CPCN was conditioned upon Tidewater owning and operating the wastewater services to the entire property. Centex was aware of this.

15. In order to construct the WWTP, a permit from the Department of Natural Resources and Environmental Control ("DNREC") was required. The permit DNREC issued on September 2, 2005, for the WWTP required it to be built according to the George, Miles & Buhr engineering specifications plan. In Section G., captioned, "LEGAL REQUIREMENTS", the permit recognized and required that a public utility was going to own and operate the sewer system for the entire subdivision pursuant to the CPCN which the PSC granted. Centex was fully aware of this condition.

16. Many months prior to the October 11, 2005, settlement on Phase I, Centex entered into discussions and eventually an agreement with Beazer Homes to develop the 225 lot project as a joint venture known as The Ridings

Development, LLC ("Ridings").

17. Joshua Mastrangelo ("Mastrangelo") was the Centex employee responsible for this project and ultimately for the joint development project known as Ridings.

18. Mastrangelo and other Centex employees were actively involved in getting the development shovel-ready for purposes of proceeding with the development immediately following the settlement on Phase I. In the spring of 2005, Mastrangelo was aware of Tidewater's proposals concerning the possible options and costs/impact fees for the WWTP. The options included decisions as to whether Centex would build the plant or have Tidewater build the plant or some combination thereof. Mastrangelo also was aware of the design plans being developed for the project and that the best location for the WWTP would be on Phase II. These communications with Mastrangelo concerning the land development engineering report were ongoing and the formal engineering report was received from George, Miles & Buhr in June 2005.

19. Mastrangelo's testimony included his concern that the WWTP was on Phase II land which Centex did not own. He was worried about this as early as July 2005. While the issue was raised, it never was resolved. This concern, therefore, was recognized before the Phase I settlement of October 11, 2005, and

the granting to Ridings of an easement to build the WWTP on Phase II property. This recognition is not intended to be a criticism of Mastrangelo; it appears everyone on defendants' side of the table was unconcerned because the good times were rolling.

20. Mastrangelo pursued negotiations with George and Lynch to be the infrastructure contractor for the development. He also negotiated with the company to enter a separate contract for the construction of the WWTP.

21. On August 26, 2005, Sussex County granted Final Record Plan approval to subdivide and develop the Property into 225 single family dwelling lots ("Final Record Plan"). This Final Record Plan contained notes providing that an on-site WWTP was to be designed to serve the 225 single family homes to be built on the Property and that a "licensed operator" was to operate the WWTP in accordance with DNREC requirements for operation and maintenance of the on-site treatment facility. This requirement of an on-site WWTP tracks the site plan included in the Agreement of Sale which notes that there would be an on-site sewer provider. The Agreement of Sale site plan noted a "private" on-site provider but all parties were aware that the laws and regulations were changing at the time to require a public utility for any development of 50 customers or more. 74 *Del. Laws*, ch. 317 (2004).

22. On September 2, 2005, Delaware's DNREC's Ground Water Discharges Section ("GWDS") issued a permit to Ritter Farm, LLC c/o Caldera Properties, to construct an on-site wastewater treatment and disposal system to service the Property. The permit issued to Ritter Farm, LLC, c/o Rich Polk, Caldera Properties, was amended several times, with the last time being on October 25, 2007. One of the amendments was due to the fact that Ridings redesigned the WWTP and the amended permit allowed the WWTP to be constructed based upon the redesign and to service all 225 lots. It is undisputed that although the permit was issued to Ritter Farm, LLC, it is Ridings which utilized the permit to construct the WWTP.

23. Centex became fully aware of the projected infrastructure cost and WWTP cost well before the October 11, 2005 settlement on Phase I.

24.(a). Ridings, the joint venture between Centex and Beazer Homes, was formally created shortly before the October 11, 2005 settlement on Phase I. Specifically, on or about October 6, 2005, Centex and Beazer entered into a Limited Liability Company ("LLC") Agreement whereby they formed Ridings. Centex holds a fifty percent or greater interest in Ridings. Centex assigned all of its right, title and interest in the Agreement of Sale, as amended, to Ridings. However, the LLC Agreement did not provide for the transfer of Centex's

obligations under the Agreement of Sale to Ridings. The LLC Agreement called for Centex to oversee the land development of the Property and for Beazer to handle the joint venture's disbursements and accounting.

24.(b). Centex never formally notified Caldera of the assignment of the Agreement of Sale by Centex to Ridings. The assignment document and The Ridings Development, LLC documents were not provided to Caldera until after this litigation commenced. While Caldera may have dealt with Ridings, Centex has failed to establish an implied novation whereby Caldera agreed to release Centex and look only to Ridings as to the Agreement of Sale. Therefore, I use the term "Centex/Ridings" to describe the defendants.

24.(c). Caldera has not established that Beazer was anything more than a party to The Ridings Development, LLC and therefore, it has no claims against Beazer. Hereinafter, references to "defendants" do not include Beazer.

25. Although this event was formalized in October 2005, Beazer's people had been involved for months in investigating this project and conducting their own due diligence. The evidence establishes that Beazer's people were fully aware of the financial impact of the WWTP on the development, and that the WWTP cost was an up-front cost necessary to enable them to sell Phase I.

26. Centex and Beazer and their joint venture entity, Ridings, went into the

October 11, 2005, Phase I settlement with their eyes wide open as to subdivision costs and the fact that much of the infrastructure and WWTP would be located on Phases II and III, property Caldera owned but which was to be conveyed to the defendants later pursuant to the second and third takedowns.

27. It is reasonable to infer that the defendants were not concerned about the WWTP costs because the housing economy was "white hot" and the defendants fully intended to execute the next two takedowns and acquire all 225 lots, thereby spreading the up-front sunk costs of the infrastructure and WWTP onto the full subdivision. Although Centex/Ridings would have the option to walk away from the Agreement of Sale on Phase II and Phase III, and thereby forfeit the liquidated damages, defendants did not realistically consider that option in their plans to develop this project. The sequential takedowns were a means of eating the elephant one bite at a time. The sequential takedowns allowed Centex/Ridings to acquire the entire parcel without having to pay for it entirely at one settlement. This logically would save Centex/Ridings significant carrying costs.

28. As settlement on the first phase was approaching, the parties had to address the legal issues arising from Centex/Ridings developing the infrastructure and WWTP on land it did not own. Also, Centex/Ridings considered certain expenses in the development that initially were not contemplated to be something

for which Caldera was responsible.

29. Therefore, at the October 11, 2005 Phase I settlement, Centex and Caldera executed a second amendment to the Agreement of Sale ("Second Amendment") which addressed several items. It provided that on the settlement of the second phase, Centex would receive certain designated and specified credits against the purchase price for Phase II in the amount of $230,000, together with the actual costs Centex paid to any third- party site contractor for certain specified landscaping and silt fencing. At the Phase III settlement, Centex would receive another $230,000 credit. Thus, the Second Amendment evidences that Centex/Ridings thought certain expenses should be Caldera's and negotiations included same in the Agreement of Sale. For purposes of this trial, the omission of any mechanism to shift the costs or risks of the WWTP or other infrastructure expenses is noteworthy.

30.(a). Also in the Second Amendment, Caldera received utility cross-easements in the Phase I property of Centex in the event there was no closing of Phases II and III. If Centex closed on Phase II, but not on Phase III, then Caldera would have utility easements in Phases I and II. These became known as the cross-easements.

30.(b). The provision addressing the cross-easements specifically stated:

> 5. Grant of Easements upon Contract Termination. Purchaser hereby acknowledges and agrees that, if the Contract is terminated before the Third Closing has been consummated, Seller will require certain easement rights over the land theretofore acquired by Purchaser (at the First Closing, and/or at the Second Closing) ("Purchaser's Land"), in order to develop the property still owned by Seller (the "Retained Land"). Accordingly, Purchaser hereby covenants and agrees that, upon any such termination, Purchaser shall grant to Seller reasonable access, utility, construction, and drainage easements over portions of Purchaser's Land as necessary for the reasonable development of the Retained Land; provided, that all such easements shall be consistent with, and the use thereof shall not interfere with, the development of Purchaser's Land in accordance with approved plats, plans, and permits. [Emphasis in original.]

30.(c). Again, the parties executed this Second Amendment specifically addressing utility cross-easements without any mention of cost or risk shift to Caldera.

30.(d). In this litigation, Caldera claims Centex has refused to honor this cross-easement. I asked Caldera's counsel if she ever had tendered a recordable easement agreement to Centex/Ridings for execution. She said no. Centex/Ridings has agreed to execute an easement reflecting the Second Amendment language, so they shall do so.

31. At the October 11, 2005 settlement, Caldera, at the direction of Centex, conveyed Phase I to Ridings. On or about October 11, 2005, $800,000 of the Deposit was credited against the $6 million, to be paid to Caldera at the closing,

leaving the Deposit amount at $1.2 million.

32.(a). At the October 11, 2005 settlement on Phase I, Caldera (grantor) granted Ridings (grantee) several easements over the property encompassing Phases II and III ("Easement Agreement"). The Easement Agreement was recorded on October 19, 2005. There were, in accordance with Section 18 of the Agreement of Sale, three easements: a construction easement; a utility easement; and a slope, grading and draining easement.

32.(b). The construction easement addresses what would happen in the event the Agreement of Sale was not fulfilled. The construction easement does not contain language that the easement was perpetual while the other two clauses do contain such language.

32.(c). Set forth below is the pertinent language of the Easement Agreement.

RECITALS:

> R-1. Grantor and Grantee have entered that certain Real Estate Sale Contract, dated February 19, 2004, as amended from time to time (collectively, the "Contract") in which Grantor shall sell and Grantee shall acquire fee simple title to certain parcels of land located in Sussex County, Delaware, ... (the "Property");
>
> R-2. Grantee intends to acquire the Property in three (3) phases. Accordingly, Grantee may require (for construction purposes, for purposes of installing certain utilities and for purposes of maintaining

slopes and providing drainage) access and use by way of easements over and across those phases still owned by Grantor [Those phases of the Property, to the extent still owned by Grantor at the time of reference hereunder, are referred to herein as the "Grantor Parcels". Those phases of the Property, to the extent still owned by Grantee at the time of reference hereunder, are referred to herein as the "Grantee Parcels". In this regard, the Grantor parcels shall be deemed to include, after the first closing under the Contract, the parcels more particularly described in Exhibit B-2 and Exhibit B-3 attached hereto and, after the second closing under the Contract, solely the parcel described in Exhibit B-3 hereto. The Grantee Parcels shall be deemed to include, after the first closing under the Contract, the parcel more particularly described in Exhibit B-1 hereto and, after the second closing under the Contract, the parcels described in Exhibit B-1 and Exhibit B-2 hereto.]

R-3. Grantee has requested that Grantor grant and establish certain easements over and across the Property as described herein.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and agreements herein contained, and the sum of Ten and 00/100 Dollars ($10.00), the receipt and sufficiency of which is hereby acknowledged, Grantor and Grantee hereby agree as follows.

1. Incorporation of Recitals. The Recitals set forth above are hereby incorporated herein in the same extent as if fully set forth herein.

2. Grant of Construction Easement. *** In the event that the Contract is terminated without Grantee having acquired all of the Grantor Parcels, Grantee shall, to the extent reasonably possible, restore any such non-acquired Grantor Parcels to their original condition. This Construction Easement shall automatically terminate upon the earlier to occur of (a) Grantee's acquisition of the Property in its entirety pursuant to the Contract and (b) Grantee's completion of its development and construction work with respect to the Grantee

Parcels.

3. Grant of Utility Easement. Grantor does hereby declare, grant, convey and create in favor of Grantee, its successors and assigns, as owners of the Grantee Parcels, a non-exclusive perpetual utility easement over, across and through the Grantor Parcels (the "Utility Easement"), for the purposes of installing, constructing, reconstructing, maintaining, operating, inspecting, repairing, utilizing, relocating and replacing any and all private and public **utilities** including, without limitation, facilities for water, gas, electric, cable television, telephone, drainage of waste water, waste water collection and treatment, drainage of storm water and storm water management and detention, together with the reasonable right of ingress and egress on, over, across, through and under the Grantor Parcels for any of the foregoing purposes, which right of ingress and egress shall include the right to construct on the Grantor Parcels roadways and access-ways necessary to construct, service and maintain such facilities. Grantee shall utilize the Utility Easement in a manner that does not materially and unreasonably interfere with the use and enjoyment of the Grantor Parcels; provided that the foregoing shall not be construed so as to limit the breadth of the Utility Easement hereby granted. The Utility Easement is a perpetual easement and shall not terminate unless and until Grantee has acquired the Property in its entirety. [Emphasis added.]

4. Grant of Slope, Grading and Drainage Easement. *** The SGD Easement is a perpetual easement and shall not terminate unless and until Grantee has acquired the Property in its entirety. ***

4. [sic] Maintenance, Insurance, and Operation of Easements; Compliance with Laws. During the term that any easement granted pursuant to this Agreement is in effect, Grantee shall, at its sole expense, obtain, and maintain at all times during the term of this Agreement, all insurance coverage.... Grantee shall, at its **sole expense**, obtain and maintain in effect any and all necessary governmental permits, bonds, and approvals for its activities on or in the Easements and comply with all the applicable governmental laws,

rules, regulations and requirements that in any way affect or govern the Easements and Grantee's activities therein. [Emphasis added.]

5. Indemnification by Grantee. Grantee hereby agrees to indemnify, defend, and hold Grantor harmless from and against any and all liability, cost, or expense (including reasonable attorneys' fees) that occurs as a result of the use of the Easements by Grantee or Grantee's agents, employees, contractors, subcontractors, licensees or invitees, including, without limitation, bodily injury, death and property damage.

6. Non-Exclusive Easement. The easements granted by this Agreement shall be non-exclusive and Grantor and its successors and assigns hereby reserve the right to use the areas that are, from time to time, subject to the Easements, subject to the terms of this Agreement, provided that such use does not unreasonably interfere with Grantee's rights under this Agreement.

7. Termination of Easements; Limitations. Notwithstanding any other provision hereof, this Agreement, and the Easements created hereunder, shall automatically terminate upon the Grantee's acquisition of the Property in its entirety. ***

***

9. Provisions Run with the Land. This Agreement is intended to and shall run with, and be appurtenant to, the real property benefitted and burdened hereby and shall bind and inure to the benefit of the respective successors in title to each parcel of land described herein.

10. No Public Dedication. The easements, rights and privileges created hereby shall not extend to the public, to any governmental or quasi-governmental agency or authority or to any regulated public utility. Nothing contained in this Agreement shall be construed in any way to reflect an intention or act on the part of the Grantor to dedicate any portion of the Property to the public use or to create any prescriptive rights in the public or any governmental authority, and

any such intention is hereby specifically disclaimed.

***

12. Notices. All notices and other communication under this Agreement shall be in writing ... to the parties hereto at their respective addresses set forth below, or at such other address of which either party shall notify the other parties in accordance with the provisions hereof: ... ; if to Grantee, The Ridings Development LLC, c/o Beazer Homes Corp. 2500 Wrangle Hill Road, Bear, Delaware 19701, Attn: Joe Harris.

13. General Provisions. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Delaware. *** This Agreement may not be changed orally, but only by an agreement in writing executed by the party against whom enforcement of any waiver, change, modification or consent is sought.

14. Liens. Grantee covenants that none of Grantee's contractors, subcontractors, materialmen or laborers shall file or maintain a mechanic's lien, claim or notice of intention to file any lien or claim against or with respect to the Grantor Parcels by reason of the nonpayment by Grantee of amounts due and owing, or claimed to be due and owing, to Grantee's contractors, subcontractors, materialmen or laborers, and Grantee hereby agrees that it shall take any necessary action to bond off any such lien or claim that may be filed or maintained and does hereby indemnify and agree to defendant and hold harmless the Grantor against any such lien or claim.

32.(d). To the extent section 10, labeled "No Public Dedication", can be read to require that Ridings could not transfer to Tidewater the easement rights to operate the facility without Caldera's consent, Caldera is deemed to have granted that consent when it agreed to Tidewater obtaining the CPCN before entering this

Easement Agreement.

32.(e). Most significant to this litigation is Caldera granting to Ridings a perpetual easement allowing Ridings to construct and operate a WWTP on Caldera's property, this being primarily on Phase II but also including Phase III.

33. The WWTP easement was not granted in a metes and bounds description but rather by way of references to the purposes for which the easement was granted. When, at closing argument, I questioned the lack of a metes and bounds description for any of the easements, both parties represented that the initial Agreement of Sale, which incorporated the design plan and phases, was incorporated into the Easement Agreement by reference or as an exhibit. The Agreement of Sale is mentioned by only the legal description of the entire property and the separate phases are included as exhibits. I cannot locate any incorporation of the Agreement of Sale or design plan into the Easement Agreement. Nevertheless, I find that although the Easement Agreement does not specify a metes and bounds location of the easements on Phases II and III, both parties in fact adopted the plot plan for the development which specifically located not only the WWTP, but the pumping stations and collection system. That is the only logical conclusion. The design plot plan clearly sets forth that an on-site sewer system benefitting all 225 lots, as well as other utilities, are to be built. In other

words, by accepting the easement with the intent of the parties that the plot plan control the location of the easements, Ridings must take the bad with the good, meaning the design plot plan sets forth the easements for sewer infrastructure and all utilities for the entire development.

34. It is important to make an observation as to the events surrounding the October 11, 2005 settlement and accompanying executions of the Second Amendment and Easement Agreement. Centex/Ridings has taken the position that the Agreement of Sale is clearly an option contract. This Court granted a perpetual easement to Centex/Ridings in it June 19, 2008 Decision. The Court specifically determined that Centex/Ridings was correct in its position that it had a perpetual easement on Caldera's property because of not only the option to walk on the phase takedowns, but also on the language of the easements. Simply put, the parties recognized that they could be in the present position whereby Centex/Ridings owned a portion of the subdivision and Caldera retained a portion of the subdivision.

35. Centex/Ridings sought to protect itself in the Second Amendment as to certain expenses it thought should be attributable to Caldera. The Agreement of Sale therefore was amended to include credits toward the purchase price of Phases II and III, thereby protecting the interests of Centex/Ridings. Knowing that the

WWTP and other infrastructure was to be placed on property Centex/Ridings did not own and knowing that it would be the sole decision of Centex/Ridings as to whether or not to acquire Phases II and III, the parties did not insert into either the Easement Agreement or Second Amendment a condition which would require any contribution by Caldera to the WWTP or other infrastructure or any reimbursement to Centex/Ridings for the WWTP or other infrastructure should Centex/Ridings decide to walk. If Caldera was to have been responsible for any infrastructure costs if Centex walked, then same should have been included in either the Second Amendment or Easement Agreement. Centex/Ridings knew these projected costs well prior to the first closing on October 11, 2005.

36. With no specific language in the Agreement of Sale as amended or Easement Agreement as to Caldera contributing to the WWTP and infrastructure cost, Paragraph 9.5.4. of the Agreement of Sale concerning the general release[5] and Paragraph 14 of the Easement Agreement concerning no liens[6] become the lynch pins of this deal. This conclusion is detailed in the discussion section.

37. Centex/Ridings claims that Caldera is getting something for nothing unless Caldera contributes to the cost of the WWTP and the other infrastructure.

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[5]See page 8, *supra*, for text of this provision.

[6]See page 29, *supra*, for text of this provision.

Centex/Ridings ignores the fact that based upon the Easement Agreement, Caldera has contributed to the WWTP and other infrastructure. It is on Caldera's land that these significant assets are located, and that land never can be developed for anything else. A study of the plots and plans evidences that Caldera's contribution is not inconsequential.

38. The original bid for the WWTP from George and Lynch was $4,564,700. Following October 11, 2005, Centex/Ridings had George, Miles & Buhr redesign the WWTP to reduce the cost of the WWTP. Subsequently, Ridings executed a contract with George and Lynch for the construction of the WWTP at a cost of $3,805,000. The parties also executed an infrastructure development contract for the property in the amount of $8,479,000.

39.(a). On May 23, 2006, Caldera obtained a loan in the amount of $6.7 million from Citizens which a first mortgage lien on Phases II and III of the Property secured. The Loan Agreement dated May 23, 2006, provides that Citizens is to receive a mortgage in first lien position. Citizens was aware of the Easement Agreement and paragraph 14 of that Easement Agreement.[7] Citizens' mortgage on Phases II and III of the Property was recorded on May 25, 2006.

39.(b). At the time Citizens acquired its mortgage, Ridings had performed

[7]See page 29, *supra*, for text of that provision.

some work on the infrastructure. It may or may not have performed some work on the WWTP. These facts, however, are irrelevant to Citizens' summary judgment motion.

39.(c). In a letter dated May 24, 2006, Centex and Beazer signed an Estoppel Letter in which they confirmed that the Agreement of Sale was in full force and effect and indicated that they did not object to Caldera obtaining a loan from Citizens and mortgaging Phases II and III of the Property. In their briefing on Citizens' summary judgment motion, Ridings refused to concede the consent point; it states that the letter did not contain any specific "consent". However, during his deposition, Donald Knutson, Beazer's Regional President of the Mid-Atlantic Region, admitted consenting to the granting of Citizens' mortgage.

40. At this stage, Caldera was not involved in the project. It was not involved in the redesign, negotiations, and bidding concerning the improvements placed on Phases I, II, or III. Months go by and in the summer of 2006, Mastrangelo continues to negotiate with Tidewater in order to execute a WWTP agreement whereby Tidewater would become the public utility per the CPCN.

41. The difficulty Mastrangelo faced resulted from Centex/Ridings' decision to construct the WWTP itself. Tidewater would not agree to reimburse Centex/Ridings for the construction costs of the WWTP. Initially, the most that

Tidewater was willing to compensate Centex/Ridings for taking over the operation and running of the plant was approximately $280,000. Later this amount was raised to approximately $330,000. Tidewater's position was in line with the policy of its regulatory body, the PSC.

42. Even though it was noted in the initial due diligence report of Centex that the WWTP would be a sunken cost, there was still the hope of obtaining reimbursement from the utility. What Tidewater was offering was not satisfactory to Mastrangelo and he was persistent in continuing the negotiations in hopes of getting a better deal.

43. Centex/Ridings were aware that as long as they had not settled on 50 lots, they had a permit to pump the sewage from the houses that were sold over to the WWTP and then have it hauled away. They also knew that once they settled on the 50th house, Tidewater had to own and operate the WWTP. Centex/Ridings have not yet sold 50 houses, but since Phase I contains 75 lots and since Centex/Ridings are still selling and settling on lots in Phase I, there will come a time when Tidewater must become involved in the operation of the WWTP. This has always been known to Centex/Ridings. Therefore, when Centex/Ridings went to settle on Phase I, they knew that in order to develop and sell out that phase, they had to have Tidewater running the WWTP under the plan that Tidewater would

service all 225 lots.

44. Additionally, in his negotiations with Tidewater, Mastrangelo became concerned with the "added risk" of Tidewater requesting guarantees as to cash flow in the event the development did not proceed as planned and/or the forecast on the time line for sales was inaccurate.

45. In the fall of 2006, the lender for Centex/Ridings on this project became concerned that so much of its money was being spent for the WWTP and other infrastructure on Phases II and III, but the lender had no security in Phases II and III.

46. Everyone was aware that the real estate development and housing market in the country and in Sussex County was no longer "white hot". The market quickly was turning from good to bad.

47. The cooling housing market and the growing awareness of the amount of money invested in Phases II and III caused Mastrangelo to refocus his negotiations with Tidewater on trying to protect the investment of Centex/Ridings in Phases II and III. Specifically, Mastrangelo sought in his negotiations with Tidewater that there be some mechanism for the reimbursement of the WWTP costs.

48. Centex/Ridings sought to obtain a reimbursement of two thirds of the

WWTP construction costs if they did not settle on Phases II and III. The source of this reimbursement would have to be either from Tidewater (which would not agree) or from Caldera (which would not agree).

49. Centex/Ridings argue that the WWTP was carried on their books as a receivable, meaning they expected Caldera or someone else to compensate them in the event they did not proceed with Phases II and III. However, this accounting decision to carry the expense on the books as a receivable was made only after the market cooled and there was a recognition that so much money had been poured into Phases II and III. Additionally, this decision coincided with George and Lynch being asked to budget out the previous billings on a phase by phase basis.

50. Internal e-mails within Centex/Ridings on October 13, 2006, to Mastrangelo raised concerns about the amount of money spent on Phases II and III. It was explained that the amount of money being spent on Phases II and III was justified because the pro forma always reflected the final two takedowns would occur after the bulk of the development work was completed. This is further evidence that Centex/Ridings always intended to acquire the entire land package. The decisions made to develop Phases II and III before acquiring ownership were reasonable based upon the market conditions in 2004 and 2005.

51. Not making any headway with Tidewater, Centex/Ridings approached

Caldera with the hope that Caldera would agree to contribute or agree to reimburse it as to the costs of the WWTP. Caldera informed Centex/Ridings that it was not Caldera's problem. Caldera explained it did not enter the agreement to absorb any expenses other than the entitlement expenses prior to settlement and those it agreed to accept in the Second Amendment to the Agreement of Sale.

52. Centex/Ridings, as is customary in the construction business, kept a "log" of what was happening at its different projects. There are monthly summaries as to what has been done or needs to be done. The log provided the Court starts in January 2005, and notes that they are working on the wastewater. This continues on a monthly basis and changes in July when it says "we" need to finalize the wastewater proposal. Again this is all prior to the easement being signed on October 11, 2005.

53. Caldera is not mentioned in the log as to the wastewater problem until September 2006. Thus, the log confirms the scenario wherein Centex/Ridings is taking care of the WWTP and/or the options concerning the wastewater treatment, and it is not until the fall of 2006 that Centex/Ridings begins to look at the possibility of shifting this expense or shifting this risk to Caldera.

54. Mastrangelo then began to try to get Tidewater to agree to an impact fee for each "hook-up" or "tap-in" on the 150 lots Caldera owned in Phases II and III.

He did this without any communications with Caldera. Tidewater refused to buy into a two-party agreement, noting that without Caldera's approval, there would be no guarantees that such a fee could be collected.

55. Not making any headway with Tidewater, the next plan of attack was to seek to have the PSC impose a tariff or impact fee which would allow for the reimbursement to Centex/Ridings for the construction cost of the WWTP. PSC staff basically sent Centex/Ridings packing, advising them that the PSC would not be interested in doing this, nor would it get involved in a contractual dispute between Caldera and Centex/Ridings.

56. On December 20, 2006, Robert K. Davis, on behalf of Centex, communicated with Daniel M. McGreevy ("McGreevy"), on behalf of Caldera, as to negotiations seeking to have the per lot price significantly reduced. In that communication, Caldera became aware that the WWTP perhaps was going to be a headache if Centex did not get sufficient concessions from Caldera. Basically, the "veiled threat" communication was that the Tidewater situation was problematic for us (Centex) and can be problematic for all involved in the near future, or, to rephrase, " If you don't help us with this Tidewater sewer problem, then it's going to be your problem, too."

57. At least by January 2007, Tidewater leaked to Caldera the negotiations

with Centex/Ridings whereby Centex/Ridings was attempting to encumber the 150 lots Caldera owned. Caldera asked Centex/Ridings for a copy of any drafts of the WWTP agreement with Tidewater that may encumber Caldera's property. Centex/Ridings declined to provide a draft to Caldera.

58. The market continued to deteriorate and tension was building between Caldera and Centex/Ridings over the WWTP and the decline in the market.

59. Settlement on Phase II was scheduled to take place in April 2007 pursuant to the Agreement of Sale; i.e., 18 months after the Phase I settlement. It became apparent that, due to the aforementioned problems and especially the declining real estate market, the April settlement of Phase II was not realistic.

60. The parties initiated negotiations in an effort to save the deal by way of a reduction in the lot prices for Phases II and III, the extension of the takedowns from two phases to four phases, and what Caldera might or might not agree to pay or be responsible for concerning the WWTP if Centex/Ridings did not close on all phases. These negotiations went back and forth but were not fruitful. Offers and counter-offers were made but the parties are unable to reach a third amended agreement to the Agreement of Sale changing the terms of the settlement on Phase II.

61. On June 6, 2007, Caldera provided notice to Centex/Ridings in writing

that they were in default of the Agreement of Sale and provided them the opportunity to cure pursuant to the Agreement of Sale. Specifically, Caldera sent a letter dated June 6, 2007, to Centex Homes, 14121 Parke Long Court, Suite 201, Chantilly, Virginia 20151 to the attention of Robert K. Davis, Division President, stating as follows:

> As you know, Section 5.2 of the Agreement required the Second Closing to occur on or before 18 months following the date of the First Closing (which occurred on August 15, 2005). We have been more than patient awaiting your performance of your obligations to consummate the Second Closing, but we can wait no further.
>
> This letter shall constitute notice pursuant to Section 17.3 of the Agreement that you are in default pursuant to Section 17.1 of the Agreement for failing to consummate the Second Closing. If you do not cure such default by consummating the Second Closing within 10 days from your receipt of this letter, we shall be entitled to retain the Deposit as liquidated damages.

This letter showed that David A. Raynes, Esquire, Kenneth W. Longwood, Esquire, and William T. Hofherr ("Hofherr") were copied. Thus, notice of default was given in accordance with the Agreement of Sale.

62. On June 13, 2007, Centex/Ridings communicated to Caldera with the position that they were not in breach of the Agreement of Sale, but that Caldera was.[8] In a nutshell, Centex/Ridings claimed they could not be in breach because

[8]Ridings responded in a letter dated June 13, 2007. The letterhead stated, "Beazer Homes". The letter was signed on behalf of Ridings by William T. Hofherr, "Beazer Homes

the necessary wastewater agreement has not been signed.

63. Centex/Ridings also claimed that Caldera breached the Agreement of Sale by allowing a mortgage lien to be placed on Phases II and III without the consent of Centex/Ridings. This was a mistaken position as Centex/Ridings had agreed to the mortgage lien by way of estoppel letters.

64. The usual attorney letters then followed stating their clients' respective positions. Nevertheless, negotiations between the parties continued.

65. Caldera was prepared to accept a much lower price on its remaining 150 lots and was willing to compromise the placement of liens on Caldera's lots. The liens would be satisfied at the time a sale was made. These concessions by Caldera were conditioned upon getting to another phase settlement in order for Caldera to gain relief from its mortgage debt on Phases II and III.

66. The negotiations moved the parties toward a settlement date of September 15, 2007. That date was then pushed off to October 1, 2007, and then to October 2, 2007.

Corp. Authorized Member." Hofherr states:

> This letter is sent on behalf of The Ridings Development LLC ("Ridings"), the successor in interest to Centex Homes in and to that Real Estate Contract by and between Caldera Properties - Lewes/Rehoboth VII, LLC ("Caldera") and Centex homes dated February 19, 2004 (the "Agreement").

67. The testimony, and especially the internal e-mails of the defendants, establish that the defendants' employees who were assigned to this project were working diligently toward a settlement on October 2, 2007.

68. Defendants conducted a risk assessment as to a "deal or no deal" recommendation. The result was a recommendation that settlement occur in order to acquire the remaining lots which would allow the high basis cost of $358,000 per lot in Phase I (due to the huge upfront wastewater and infrastructure costs) to be spread on the other lots, as planned. The basis per lot would be reduced to $150,000 or lower. Basically, the risk assessment was positive because it noted that even though the market had deteriorated, Centex/Ridings would be picking up the remaining lots for a substantially reduced price. If settlement took place, the spreading of the WWTP and other infrastructure costs on the remaining lots gave the project the potential of being a success. If there was no settlement, the project was a failure.

69. GMAC was to fund the purchase by Centex/Ridings on October 2, 2007. I am satisfied that, although there were document production headaches in the preparation for settlement, GMAC had authorized the funding for the settlement on October 2, 2007.

70. At this exact same time, Cerebus became a significant player in

GMAC. GMAC was funding other projects for Beazer Homes. The Cerebus people arranged for a property inspection of several projects, including the Ridings' project for October 2, 2007.

71. With the Cerebus communications muddying the waters, combined with the lack of sales at Ridings, "Corporate"[9] at Beazer pulled the plug on the deal in the afternoon of October 1, 2007. Simply put, those higher up the food chain in the corporation made the determination that Beazer would not participate in the takedown scheduled for October 2, 2007, and therefore, the settlement was off.

72. Mastrangelo was assigned the responsibility of advising McGreevy of Caldera of this decision. This was accomplished in the late afternoon of October 1, 2007.

73. I am satisfied that there was no fraud or misrepresentation by Mastrangelo or any other of defendants' representatives as to the planned settlement on October 2, 2007. While Mastrangelo gave McGreevy a false excuse as to why the settlement was off, i.e., that GMAC would not fund, that is irrelevant. Caldera's claims are based on misrepresentations leading up to the settlement. The evidence supports a finding of fact that the entire atmosphere

[9]"Corporate" was known by all to be those in charge of the decision-making at the highest level of Centex and Beazer.

leading up to October 2nd was extremely "iffy". Caldera knew it was on an economic tightrope without a net. Caldera knew that negotiations had been going back and forth and that nobody had yet tendered to the other party a signed third amendment to the Agreement of Sale. Caldera knew that the wheels had been coming off their relationship with Centex/Ridings since the winter of 2007. The negotiations concerning a new deal had been going on for approximately eight months. While both Mastrangelo and McGreevy may have believed the deal was going to get done, that belief was based more on hope because they both knew, as Mastrangelo testified, "it wasn't over till it was over". Everyone knew that "Corporate" had the final say on any settlement and that did not usually occur until the 11th hour.

74. Caldera has failed to establish evidence that proves fraudulent misrepresentations took place as to assurances that a settlement would absolutely, positively take place on October 2, 2007. Likewise, Caldera has failed to prove a breach of the covenant of good faith and fair dealing on the part of Centex/Ridings as to the October 2, 2007 settlement. Centex/Ridings simply chose not to proceed to settlement when Beazer pulled out of the deal.

75. It is also noteworthy to comment on the fact that Caldera never has made clear exactly about what it complains. Caldera advised Centex/Ridings it

was in default of the Agreement of Sale on June 6, 2007. The Agreement of Sale, per its terms, only could be amended in writing. Although each party drafted its own third amendment to the Agreement of Sale, the parties never signed a third amendment. Perhaps the parties planned to sign something on October 2, 2007, but the Court has nothing before it that could be considered enforceable.

76. Caldera immediately sent another breach of contract letter to Centex/Ridings[10] on October 2, 2007; i.e., *deja vu*, all over again. This breach of contract letter referenced the breach first noted in the June 6, 2007 notice letter. Caldera notified both Ridings and Centex that the Agreement of Sale was terminated and it was retaining the Deposit as liquidated damages. It also stated to defendants:

> *** All improvements that you have made to the Caldera property including, without limitation, the sewer treatment and disposal plant, are now the property of Caldera, and you will have no right to use the plant.
>
> By copy of this letter to Tidewater Environmental Services, Inc., we are advising them of your default and that you have no further interest in or rights with respect to the property owned by Caldera and that therefore, the Wastewater Water Service Agreement that you have been negotiating with Tidewater is no longer appropriate and should not be executed.

77. In its letter dated October 7, 2007, Ridings explained the Easement

[10]A copy of the letter was sent to Robert K. Davis of Centex Homes as the Agreement of Sale required.

Agreement entitled it to operate the WWTP and it warned Caldera about interfering with its relationship with Tidewater.

78. On or about October 25, 2007, Caldera's attorney sent its *deja vu* letter to Centex/Ridings concerning the default and enclosed a mortgage modification agreement. The mortgage modification agreement was to reduce the mortgage Caldera had given Centex on another piece of property which protected Centex as to its $2 million liquidated damages deposit in the event Caldera was the breaching party.

79. Centex/Ridings refused to execute the agreement modifying the aforementioned mortgage.

80. In a November 5, 2007 letter, Ridings' attorney rejected Caldera's position regarding the easement and explained that it was not required to close because a condition to the closing, that utilities be available, was not met since a final agreement had not been reached with Tidewater.

81. The parties' positions continued to harden.

82. Throughout the whole time Centex/Ridings was the equitable owner of the property and was constructing the WWTP, it and Tidewater were negotiating regarding the terms and conditions of a Wastewater Services Agreement. The last drafts were circulated in September, 2007. The last draft specifically provided that

the rights and obligations of Tidewater did not begin until after Ridings acquired the remaining 150 lots. The terms never were finalized. No Wastewater Services Agreement ever was signed. According to Tidewater, a few open issues were being discussed, including the terms and conditions of a restrictive covenant, the recording of that restrictive covenant, and the duration of warranties.

83. Citizens has taken steps to foreclose on the Property and confess judgment against the individual guarantors.

84. Caldera originally filed a suit in this Court and then followed that with a suit in Chancery. Caldera had several objectives with its suits and thus, there are a multitude of claims which were asserted. Meanwhile, Centex/Ridings had its own goals, and consequently, asserted numerous counterclaims.

85. In the Superior Court case, Caldera sought declaratory judgments on a multitude of issues and also alleged breach of contract. Caldera's goals were to obtain damages for the breach of contract, to gain control over, or at least access to, the WWTP and other infrastructure built on its land, and to receive attorneys' fees. Of particular importance was Caldera's claim to have sewer access for the 150 lots on its property without having to contribute to the cost of the construction of the WWTP. Caldera also sought declaratory relief as to its claim that the default by Centex/Ridings on the Agreement of Sale extinguished the easements

granted by Caldera on Phases II and III which allowed Centex/Ridings to build the WWTP and sewer infrastructure. In its June 19, 2008 Decision, this Court denied that application, finding that Caldera had granted Centex/Ridings a "perpetual easement" which allowed Centex/Ridings to construct and operate the WWTP.

Caldera additionally asserted claims for breach of the implied covenant of good faith and fair dealing and for fraudulent misrepresentation regarding the defendants' failure to settle on October 2, 2007. Another claim of Caldera is that Centex/Ridings breached the covenant of good faith and fair dealing in its refusal to allow Caldera access to the sewer infrastructure without paying for it. Although Caldera did not plead this claim, it pursued it by amending the pleadings to conform to the evidence. Specifically, it was included as a potential claim in a teleconference prior to trial.

86. In order to protect itself in case the Court ruled no rights in law existed as to its sought-after remedies, Caldera filed suit in Chancery asserting equitable claims which would, it hoped, provide it the same relief as sought in the Superior Court action. As a part of its quest to obtain control over the WWTP, it made claims against Tidewater in the Chancery case.

87. Centex/Ridings, meanwhile, filed claims seeking to obtain reimbursement from Caldera for their sunk costs in the WWTP and other

infrastructure. Their counterclaims in both the Superior Court and the Court of Chancery seek declaratory relief which would require Caldera's 150 lots to have access to the sewer system only upon the condition that a pro rata portion of the construction costs of the WWTP be paid to Centex/Ridings. In connection with that goal, it named Citizens as a party in the Chancery action.

DISCUSSION AND CONCLUSIONS

Some of the factual findings above resolve some of the outstanding legal issues. Consequently, in order to issue rulings within the context of the legal arguments, I, at times, repeat some of the rulings set forth above.

First, I address the claims against those parties other than Caldera and Centex/Ridings.

1) Claims against Beazer

Early in this litigation, Beazer sought dismissal of the suit against it. Although I expressed concern about why Beazer should be a party, I refused to grant Beazer's pretrial motion, ruling that the facts needed to be further developed on that issue. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del.1962). The evidence at trial clarified that Beazer should not be a party in this action. The

evidence establishes that Beazer's only role in this matter was that of a partner in a Limited Liability Corporation. Caldera has not in any way established that the corporate veil should be pierced so that Beazer can be held liable on any count. Thus, all claims against Beazer are dismissed.

2) Claims against Citizens

Citizens moved for summary judgment and I granted this motion orally and by order dated April 1, 2009. Herein, I repeat my rulings and expand upon them a bit.

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del.1979). Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id*. at 681. Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If, after discovery, the

non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991), *cert. den*., 504 U.S. 912, 112 S.Ct. 1946, 118 L.Ed.2d 551 (1992); *Celotex Corp*., *supra*.

Ridings, in addition to seeking reimbursement from Caldera for the costs of the WWTP and other infrastructure on the grounds of unjust enrichment, also filed a claim seeking a determination that to the extent it was successful in obtaining a judgment for unjust enrichment against Caldera, such judgment should be deemed to have an effective date prior to the date the Citizens' mortgage on the Property was recorded.

In its motion for summary judgment, Citizens argued that Ridings was not entitled to a judgment of unjust enrichment and even if it did obtain such a judgment, that judgment could not be turned into a lien which is superior to that of Citizens.

I granted Citizens' motion for summary judgment before a final resolution was made on the unjust enrichment claim. After trial, I have ruled that Ridings' claim against Caldera fails. Ridings' claim against Citizens was dependent upon its claim against Caldera. Thus, Ridings' claim against Citizens fails, initially, because it was dependent upon the Court ruling in Ridings' favor on the unjust

enrichment claim.

However, at the time I granted the summary judgment motion, the unjust enrichment claim remained an issue for trial. Thus, at the time I decided the summary judgment motion, I assumed that Ridings could establish an unjust enrichment claim and addressed the motion based upon that assumption. Even with that assumption, I ruled that Ridings never could establish entitlement to a lien in superior position to Citizens' mortgage. For that reason, Citizens should not be a party in this litigation and the motion for summary judgment was granted in its favor.

Ridings argument was as follows. At the time it granted the mortgage, Citizens was aware Ridings was constructing the infrastructure and WWTP on the mortgaged property. Once Ridings obtained a judgment in this litigation, then that judgment should relate back to the time Ridings started working on the property, which preceded Citizens' recorded mortgage.

Ridings only cited to one Delaware case as authority for this argument, *Holland v. Eastern, Inc.*, 1978 WL 22462 (Del. Ch. Jan. 25, 1978) ("*Holland*"). That case does not support Ridings' position. In *Holland*, the parties sought to establish the priority of easements in sewer lines and a sewage treatment plant in favor of the Cape Windsor Community Association, Inc. Litigation regarding the

sewer easements had commenced at the time the mortgagee was loaning the money and obtaining the mortgage. After the mortgage was filed, the Chancery Court granted the easements. The Chancery Court ruled, in *Holland*, that the easements were superior to the mortgage and any purchaser would take the property subject to the easements. That law was based upon the law of easements, not the law of judgments. The law of easements, which gave legal title to the easements in favor of the Cape Windsor Community Association, provided:

> "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude is in use at the time of severance and is necessary for the reasonable enjoyment of the other part, on a severance of the ownership a grant of the right to continue such use arises by implication of law."

Holland v. Great Eastern, Inc., supra at *3, *quoting* 25 *Am.Jur.2d*, Easements and Licenses § 27.

Holland might be relevant if Ridings had not legally obtained an easement by way of the Easement Agreement and if the issue was whether Ridings had an equitable easement in the sewer and lines. Obtaining such relief was not necessary in this case because the parties took care of the issue by recording the Easement Agreement. Thus, everyone was aware of the easement and everyone, including Citizens, acknowledges Citizens' mortgage is subject to that easement. To repeat,

the issue the Chancery Court faced in *Holland* is not the issue this Court faces.

Instead, the issue at hand is what entity must bear the costs of the construction of the infrastructure and the WWTP. Ridings seeks to recoup those costs from the land by arguing it is entitled to something akin to a mechanic's lien[11] without actually being entitled to a mechanic's lien. Ridings seeks to impose upon the property a lien which it, as the grantee in section 14 of the October 11, 2005, Easement Agreement,[12] warranted would not be imposed upon the property.

The law in Delaware does not support Ridings' proposition that a party which performs construction on land (and which is not entitled to assert a mechanic's lien) can sue to obtain a judgment based on a claim of unjust enrichment and have that judgment turned into a lien which dates back to the time it first performed any work on the property.

Here, Citizens has the first mortgage. Ridings never will be able to obtain a lien prior to Citizens' mortgage. Thus, Citizens was entitled to summary judgment in its favor.

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[11]Mechanics' liens are purely a statutory remedy and to be entitled to such, strict compliance with chapter 27 of 25 *Del. C.* is required. Ridings cannot in any way comply with that statute.

[12]See page 29, *supra*, for text of this provision.

3) Claims against Tidewater

I now turn to Tidewater's position in this litigation. It, too, filed a summary judgment motion which the Court granted orally and by order dated April 1, 2009.

Tidewater and Centex/Ridings were negotiating a contract regarding the purchase of the WWTP when the land deal between Caldera and Centex/Ridings completely dissolved. In the Chancery action, Caldera requested the Court to order Ridings to convey the WWTP it built to Tidewater as the holder of the CPCN and to order Tidewater to assume ownership and operate the WWTP as provided under the draft of the wastewater services agreement which existed at the time of the final breakdown of negotiations on the land purchase in October 2007.

As previously noted, Ridings and Tidewater negotiated a contract whereby Tidewater would purchase the WWTP that Ridings had built on Caldera's property. The parties reviewed the last draft in September 2007, before the final breakdown of negotiations regarding Ridings' purchase of Caldera's property. The parties to the proposed agreement were Ridings and Tidewater; Caldera was not a party to it. Although Tidewater disputes Caldera's contentions that this document was in its final form and had no other issues to be worked out, there is no dispute about the following facts. The proposed contract between Tidewater and Ridings was totally, completely, and explicitly contingent upon Ridings

purchasing all 225 lots. To put it another way, the payment structure set forth in the agreement, the negotiations leading to the agreement, and the terms and conditions of the agreement were based upon Ridings purchasing all 225 lots. Ridings did not purchase all 225 lots. It only purchased 75.

No legal authority exists to support Caldera's contention that this Court should force parties to enter into an agreement whose condition precedent cannot be met.

Additionally, to the extent Caldera argues that Tidewater is indispensable because of the CPCN, I rule that issues concerning the CPCN go before the PSC and not this Court.

Thus, Tidewater should not be a party in this action, and accordingly, it was dismissed.

4) Claims between Caldera and Centex/Ridings

All of the remaining matters concern issues between Caldera and Centex/Ridings.

A) Breach of contract

Ridings agrees that it breached the contract when it did not go through with

the settlement in April 2007. Stemming from this breach are arguments concerning whether Centex is liable on the breach of contract claim, whether proper notice of the default was given, to what damages is Caldera entitled, whether prejudment interest should be awarded, and whether Caldera may recover attorneys' fees.

i) Centex's liability

Centex argues that it is not liable for the breach because the assignment of the Agreement of Sale meant it no longer was a party.

In *Schwartz v. Centennial Insurance Co.*, 1980 WL 77940, *2 (Del. Ch. Jan. 16, 1980), the Chancery Court stated:

> It is clear that a party cannot escape his duties under a contract by assigning the contract to another. Normally, an assignor remains liable as a surety for performance under an assigned contract: he must indemnify the lessor for the actor or omissions of the assignee. [Citations omitted.]

Thus, absent consent to the assignment by the other party or a novation, the assignor remains liable on the contract. *Id.*; *Lillis v. AT&T Corp.*, 2007 WL 2110587, *11 (Del. Ch. July 20, 2007), *aff'd*, 2009 WL 604917 (Del. March 9, 2009).

In this case, Section 21.9 of the Agreement of Sale provided for the

assignment which occurred without requiring prior written consent.[13] However, section 21.3 of the Agreement of Sale also requires that any amendment to the Agreement of Sale be in writing,[14] and there is nothing in writing establishing that the Agreement of Sale was amended to provide that Ridings was the party to the contract. Thus, Centex remains liable unless there was an implied novation. *Lillis v. AT&T Corp., supra*.

As further explained in *Schwartz v. Centennial Insurance Co., supra* at *3.

> A novation requires four elements: (1) a valid pre-existing obligation; (2) a valid new contract; (3) extinction of the old contract; and (4) the consent of all parties to the novation transaction. [Citations omitted.] While a novation can be implied from the acts of the parties, it must be clear that a novation is intended.

"A novation will not be presumed but must be proved, with the burden of proof thereon resting on the proponent." *Berg v. Liberty Federal Savings and Loan Association*, 428 A.2d 347, 349 (Del. 1981). As further explained in *Transportes Aereos de Angola v. Ronair, Inc.*, 693 F.Supp. 102, 107 (D.Del. 1988), Delaware law provides:

> While earlier cases suggest that a novation could be implied from the acts of the parties, in any event, the moving party must clearly demonstrate that a novation was intended. "The elements of a novation are essentially the same as in an original transaction and include a

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[13] See page 12, *supra*, for text of this provision.

[14] See page 12, *supra*, for text of this provision.

> meeting of the minds of all parties as to the substitution of the new undertaking for the old." [Citation omitted.] Therefore, it is clear that, in order for the Defendants to establish that a novation occurred, they must show that the parties mutually assented to the substitution of a new and valid contract and that the original contract was extinguished.

Centex never formally notified Caldera of the assignment of the Agreement of Sale by Centex to Ridings. The assignment document and The Ridings Development, LLC documents were not provided to Caldera until after this litigation commenced. Centex's employees continued to have contact with Caldera. While Caldera may have dealt with Ridings, Centex has failed to establish an implied novation whereby Caldera agreed to release Centex and look only to Ridings as to the Agreement of Sale.

ii) Notice issue

Centex/Ridings have argued that they did not receive notice of the default. Caldera provided notice of default to Centex and Ridings pursuant to the Agreement of Sale. Both parties were well aware of the breach and negotiated to resolve the breach. When those negotiations failed, both parties actively defended themselves. This alleged defense is meritless both legally and equitably.

iii) Damages

Centex/Ridings breached the contract in April, 2007, when they refused to go through with the second settlement. By refusing to acknowledge they had breached the contract and by refusing to release the deposit mortgage, they forced Caldera to file suit. Caldera will obtain a judgment on this issue.

The Agreement of Sale calls for Centex to purchase the entire parcel for the 225 lots. It was to do so by way of three takedowns by purchasing Phase I, Phase II and Phase III. This is not unusual in the real estate development business because it allows the buyer to reduce its carrying charges on that portion of the property which is to be developed later. The Agreement of Sale gave Centex the option of walking away from the contract before settling on Phase II and/or Phase III. However, in the event of such a "wrongful refusal or default", the cost to Centex was the liquidated damages in the amount of $1.2 million,[15] which Caldera has not established, or tried to establish, to be unreasonable and which this Court determined to be reasonable in its June 19, 2008 Decision. With the admission and findings that Centex/Ridings were in default of the Agreement of Sale, Caldera thereby is entitled to the $1.2 million remaining in liquidated damages.

[15]This is the balance from the original $2,000,000 minus the $800,000 credit given Centex at the Phase I closing.

Caldera sought, by way of its claims for fraud and breach of the implied covenant of good faith and fair dealing, to recover more than the agreed upon liquidated damages. However, because I rule below that those claims fail, I conclude Caldera is not entitled to any damages beyond the liquidated damages.

iv) Prejudgment Interest

Caldera is not entitled to prejudgment interest on the $1.2 million because it has had possession of such. However, it is entitled to prejudgment interest on the $2 million of the mortgage which Centex/Ridings refused to reduce. By refusing to sign off on the documents to reduce the mortgage, Centex/Ridings tied up $2 million of Caldera's equity at a time when Centex/Ridings knew that Caldera was suffering financial problems. Centex/Ridings is responsible for their conduct and consequently, shall pay the interest on the $2 million. This interest shall run from November 24, 2007, which is thirty (30) days after Caldera's October 25, 2007 letter demanding execution of the mortgage modification agreement.

iv) Attorneys' Fees

Caldera seeks attorneys' fees pursuant to paragraph 21.4 of the Agreement of

Sale.[16] The claims which have driven this litigation have not been about the fact the deal did not go to settlement nor about Caldera's entitlement to the $1.2 million in liquidated damages. Instead, the driving forces have been the actions seeking declaratory judgments on issues which the parties failed to clearly address in the Agreement of Sale in the event of a breach. Additionally, much of the initial litigation concerned Caldera's refusal to acknowledge the perpetual easement which this Court recognized in its June 19, 2008 Decision. Consequently, I deny Caldera's claim for attorneys' fees.

B) Centex/Ridings' Refusal to Settle on October 2, 2007

Caldera asserted claims for fraudulent misrepresentation and breach of the implied covenant of good faith and fair dealing regarding the defendants' failure to settle on October 2, 2007.

The elements of fraud, as set forth in *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983), are:

> At common law, fraud (or deceit) consists of:
>
> > 1) a false representation, usually one of fact, made by the defendant;
> > 2) the defendant's knowledge or belief that the

[16]See page 12, *supra*, for text of this provision.

representation was false, or was made with reckless indifference to the truth;
3) an intent to induce the plaintiff to act or to refrain from acting;
4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
5) damage to the plaintiff as a result of such reliance.

As I noted earlier, McGreevy testified that it was represented to him that the October 2 settlement was firm and that he relied upon that in his discussions and position with his own lender. Caldera claims this forms the basis of a misrepresentation or fraud claim because there was no settlement. Caldera argues that McGreevy was lied to. This is also a portion of the claim concerning the covenant of good faith and fair dealing.

McGreevy's communications with Mastrangelo and others in all probability led McGreevy to believe that the October 2nd settlement was going to take place. This is reasonable because the Centex/Ridings people specifically involved with this project were working hard to get the deal done. I am satisfied that, with McGreevy's knowledge and experience in the ups and downs of the market, he was aware that the settlement date was fragile. In this case, there is a history of failed compromises and renegotiations going on for many months. I am satisfied that one witness's comment that "it ain't over till it's over" was common knowledge to all involved in this proposed October 2nd settlement date. Everyone knew that

"Corporate" had the final say on any settlement and that did not usually get done until the 11th hour. Thus, the facts do not establish the first four elements of a fraud claim.

Furthermore, Caldera has not shown what damages it suffered as a result of the alleged fraud. The contract was breached when the closing did not take place in April 2007. Caldera's damages at that time were to take the liquidated damages. Caldera, in April 2007, faced the same issues it faced in October 2007: it remained in possession of undeveloped property which was worth considerably less than it once was because of the drop in the real estate market; it had to deal with its questionable status regarding hooking up to the sewer system because the Agreement of Sale did not specifically provide for that contingency in the event the deal fell through; and Caldera owed Citizens on the mortgage. Caldera, facing these very same issues in April 2007, sought to salvage the deal and worked with Ridings and Centex to do so. When the settlement did not go through in October, 2007, those same problems existed. Thus, Caldera has not shown any damages resulting from the settlement not occurring on October 2, 2007.

As noted above, Caldera argues the same facts support its claim of a breach of the covenant of good faith and fair dealing.

The implied covenant of good faith and fair dealing is explained in

Chamison v. Healthtrust, Inc., 735 A.2d 912, 920-21 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Del. 2000):

> Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract. As such, a party to a contract has made an implied covenant to interpret and to act reasonably upon contractual language that is on its face reasonable. **This implied covenant is a judicial convention designed to protect the spirit of an agreement, when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain.** It requires the Court to extrapolate the spirit of the agreement from its express terms and based on that "spirit", determine the terms that the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose. The Court then implies the extrapolated term into the express agreement as an implied covenant and treats its breach as a breach of the contract. The implied covenant cannot contravene the parties' express agreement and cannot be used to forge a new agreement beyond the scope of the written contract. [Emphasis added. Footnotes and citations omitted.]

Accord Glouchester Holding Corporation v. U.S. Tape and Sticky Products, LLC, 832 A.2d 116, 128 (Del. Ch. 2003).

The facts, as outlined above, cannot in any way be interpreted to establish that defendants used oppressive or underhanded tactics when the delayed settlement did not occur. The facts do not remotely suggest a breach of the covenant of good faith and fair dealing.

C) Centex/Ridings' Refusal to Allow Caldera Access to Sewer

Caldera amended its allegations of the complaint to argue that Centex/Ridings' refusal to allow Caldera access to the sewer infrastructure without paying for it constituted a breach of the implied covenant of good faith and fair dealing. As to this claim, I find that Caldera has not met its burden of proof.

My earlier factual findings support this conclusion. The factual and legal issues as to the conflicting positions concerning construction costs are due in large part to the failure of the initial Agreement of Sale or any amendments thereto to specifically address this contingency. The defendants' position as to their defense and claim for construction cost reimbursement was not so unreasonable to give rise to a breach of the covenant of good faith and fair dealing. Both parties made forceful arguments as to their respective positions, and both parties played hard ball concerning the negotiations and the litigation.

As I previously noted, I perceive that Caldera's position as to this claim is basically that the defendants had treated it badly because it now owns property which it did not expect to own and that property is not worth much in today's market. That does not give rise to a breach of the covenant of good faith and fair dealing. Each party is permitted to stake out reasonable positions under the Agreement of Sale and defend them. The parties negotiated as to their differences

up to October 1, 2007, and within a few months the parties were in litigation. The fact that one or both parties were wrong in their interpretation of the Agreement of Sale may give rise to a breach of contract claim, but a breach of the covenant of good faith and fair dealing does not necessarily follow. Thus, this claim fails.

D) Caldera's Obligation to Reimburse Centex/Ridings

Centex/Ridings makes several arguments as to why Caldera must reimburse it for the WWTP and other infrastructure it built on Caldera's lands. It argues the applicability of the doctrines of unjust enrichment and *quantum meruit*. During the development phase, defendants acknowledged that the sewer system was to be available for use for all 225 lots. They took the position before County Council that the Caldera lots are required to hook up to the existing WWTP pursuant to the plans as approved by the County and the Tidewater CPCN. I agree with that position. However, Centex/Ridings asserts that because it is an owner of the WWTP, it, as the sole owner, can require that Caldera reimburse it before it may hook into the system. For the reasons stated in this decision, I do not agree that Caldera must pay 2/3 of $4.1 million in order to gain access.

Before I address the various issues, I set forth the general law regarding unjust enrichment and *quantum meruit*.

With regard to unjust enrichment, the threshold inquiry is whether a contract already governs the parties' relationship. "If there is a contract between the complaining party and the party alleged to have been enriched unjustly that governs the matter in dispute, then the contract remains 'the measure of [the] plaintiff's right.'[Footnotes and citations omitted.]" *Reserves Development LLC v. Severn Savings Bank, FSB*, 2007 WL 4054231, *11 (Del. Ch. Nov. 9, 2007), *rearg. den*., 2007 WL 4644708 (Del. Ch. Dec. 31, 2007), *aff'd*, 961 A.2d 521 (Del. 2008) ("*Reserves*").

The definition of unjust enrichment is "`the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'[Footnotes and citations omitted.]" *Id*.

The elements of unjust enrichment are:

1) an enrichment

2) an impoverishment

3) a relation between the enrichment and impoverishment

4) the absence of justification, and

5) the absence of a remedy provided by law

Id.

The doctrine of *quantum meruit* is one where principles of law impose legal relationships under the name of a quasi-contract. "Quasi-contractual relationships are imposed by law in order to work justice and without reference to the actual intention of the parties." *Bellanca Corporation v. Bellanca*, 169 A.2d 620, 623 (Del. 1961). As further explained:

> A person invoking the doctrine of quantum meruit may recover the reasonable value of his services only if he establishes that the services were performed with an expectation that the recipient of the benefit would pay for them, and, further, that the services were performed, absent a promise to pay, under circumstances which should have put the recipient of the benefit upon notice that the plaintiff expected to be paid.[Footnotes and citations omitted.]

Id.

"Recovery under a quasi-contract action is the value of the services provided, not the value of the benefit received." *Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, *1 (Del. Super. Aug. 15, 2007). The *Hynansky* case is helpful in setting forth the requirements:

> In the absence of an express agreement, a plaintiff may be able to recover the reasonable value of the materials or services rendered to a defendant on a quasi-contract theory. To prevail on this theory, Plaintiff must show at trial that he provided services to Defendants and that he performed the services with the expectation that Defendants would pay for them. Plaintiff must also show that the circumstances should have put Defendants on notice that Plaintiff expected to be paid. If Plaintiff makes this showing, he may recover the reasonable value of his services under the restitutionary principle

> of quantum meruit. The phrase literally means "as much as he deserves," and is the "reasonable worth or value of services rendered for the benefit of another." [Footnotes and citations omitted.]
>
> The standard for measuring the value of the performance under quantum meruit is the amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered. [Footnotes and citations omitted.]

Id. As the Court further notes at *2:

> [Q]uantum meruit is a principle of restitution arising from a cause of action in quasi-contract. Unjust enrichment is itself a cause of action, usually but not always equitable, based on an unjustified enrichment of one party and resulting impoverishment of another party, in the absence of a remedy at law.

While keeping the elements of the doctrines in mind, I turn to the facts of this case to determine whether Caldera must reimburse Centex/Ridings for the costs of the WWTP and other infrastructure.

Centex was contractually bound to provide to the 225 lots access to the WWTP and other infrastructure by way of the Agreement of Sale as amended and Ridings was contractually bound to provide such by way of the Easement Agreement. Since contracts govern the situation, Centex/Ridings have no unjust enrichment claim. Furthermore, the contractual terms require that Centex/Ridings provide Caldera access to the WWTP and other infrastructure without payment.

The Agreement of Sale referenced and included, as Exhibit C, Vista Design Group, Inc.'s preliminary plan of subdivision. This document indicates that the

Sewer provider would be "community on site" and would service 225 single family home, and that a "wastewater system" would serve all the lots. Section 8 of the Agreement of Sale addresses the Development Approval Process. The documents required Caldera to prepare the zoning plan, apply for and seek rezoning of the property in order to develop the property as single family dwelling lots, prepare and obtain approval of the preliminary plan of subdivision as well as the final site plan and record plat. Centex/Ridings then "was required to enter into a developer's agreement with Sussex County with respect to site improvement obligations that shall be imposed on the property."

And, then, relevant to my findings regarding who was to pay for the WWTP is paragraph 9.5.4. in the Agreement of Sale.[17] Centex/Ridings argued that this paragraph only protects Caldera from third-party claims that may be made against Caldera for environmental damage or other damage Centex/Ridings might have caused and it was not meant to prevent Centex/Ridings from suing Caldera.

I employ the rules of contract construction to interpret this provision. As explained in the case of *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232-33 (Del. 1997):

> Contract terms themselves will be controlling when they establish

[17]The text of this provision appears at page 8, *supra*.

the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.FN5 When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.FN6 ***

FN5. *Rhone-Poulenc v. American Motorists Ins*., Del.Supr., 616 A.2d 1192, 1196 (1992).

FN6. Id.; *Pellaton v. Bank of New York*, Del.Supr., 592 A.2d 473 (1991).

The Use of Extrinsic Evidence in Contract Interpretation

If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.FN7 But when there is uncertainty in the meaning and application of contract language, the reviewing court must consider the evidence offered in order to arrive at a proper interpretation of contractual terms.FN8

FN7. Omitted.

FN8. *Pellaton*, 592 A.2d at 478. Contract language is not ambiguous simply because the parties disagree concerning its intended construction. The true test is what a reasonable person in the position of the parties would have thought it meant. *Rhone-Poulenc*, 616 A.2d at 1196.

Section 9.5.4., appears in section 9., which is labeled, “Seller’s Representations, Warranties and Covenants.” Furthermore, it is placed in

subsection 9.5., captioned, “Condition of the Property.”

In this case, there is no ambiguity. An objective reading of this language is that Purchaser (Centex) and its assign (Ridings) release Seller (Caldera) and waive any right to proceed against Seller for any and all costs, expenses, claims and liabilities arising out of what Purchaser does with the property physically, developmentally, environmentally, economically or legally which Purchaser may have now or may have in the future, excepting specific representations made by Seller to Purchaser. This is a general release to Seller and not an indemnification clause protecting Seller from third-party claims. This paragraph protects Caldera from Centex coming back against Caldera for environmental and developmental costs and expenses that Centex may have in the future. The attempt by Centex/Ridings to transfer the costs and risk of loss of the WWTP and other infrastructure is contrary to this language. In other words, the costs for which Centex/Ridings seek recovery are specifically excluded by this provision of the Agreement of Sale.

My conclusion the Easement Agreement required that Ridings provide sewer to the 150 lots on Caldera’s property is reached based on the following.

The easement description by Caldera as grantor to Ridings as grantee for

purposes of the WWTP is set forth in paragraph 3 of the Easement Agreement. [18] No metes and bounds descriptions exist for the location of the WWTP or the other granted easements, but the parties agree that the plot plan setting forth the phases, the roads, the WWTP and the pump stations is incorporated by reference in an exhibit to the Easement Agreement. As I earlier found, the parties adopted the plot plan for the development. That plot plan evidences that sewer will be supplied to all 225 lots by way of the easement Caldera granted to Ridings.

Relevant to this Court's decision is Paragraph 14 of the Easement Agreement,[19] captioned "Liens", which provides that the grantee (Ridings) will hold the grantor (Caldera) harmless from any expenses or liens against "Grantor Parcels". Simply put, Ridings contractually agreed, as a condition of the easement, that there would be no liens on Phases II and III. This paragraph was to protect Caldera from the failure of Centex/Ridings to pay for the WWTP and other easement improvements. The intent is that these improvements shall be the responsibility of Centex/Ridings. To now transfer the costs of the easements to Caldera would be contrary to the protection Caldera has under this paragraph and contrary to an equitable outcome. No matter what theory Centex/Ridings may

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[18]See page 27, *supra*, for text of this provision.

[19]This provision appears at page 29, *supra*.

argue, it all comes down to the fact that no transfer of the costs of the WWTP and sewer infrastructure or other utility infrastructure shall occur because Centex/Ridings was agreeing to protect Caldera from such claims. To merely pay the third-party contractors and then seek reimbursement under some other theory would turn the intent of paragraph 14 on its head. It would be illogical to defend against a third-party claim, but be able to pay the third-party and essentially assert the same lien for the costs of constructing the WWTP and sewer collection system.

Similarly, since there is no mention in the Easement Agreement of Caldera paying anything toward the WWTP for any of the 150 lots that they retained, and since in section 14 of the Easement Agreement it is specified that Ridings would protect Caldera from any liens placed on the property due to the constructions arising from the easement, I conclude that the parties never intended for Caldera to contribute to the cost of the WWTP.

There also is no basis under the theory of *quantum meruit* for reimbursement.

The Agreement of Sale was for the sale of the land. There were a few specific instances where Caldera was required to expend resources "developing" the land. Those instances are outlined in the Agreement of Sale. The fact that the parties specifically omitted provisions calling for Caldera to reimburse defendants

for the costs of the WWTP in the amendments to the Agreement of Sale and in the Easement Agreement when addressing other reimbursements and when recognizing the possibility that Caldera would continue to own the property if the deal did not go through establishes that the parties always intended for defendants to provide Caldera's lots access to the WWTP without reimbursement therefore and thereby render Centex/Ridings' claim for reimbursement meritless.

Ridings never expected Caldera to repay its costs for constructing the infrastructure or the WWTP under the contract. The contract and easement established that Ridings was to put in the infrastructure and the WWTP. The *Reserves* case is inapplicable - contrary to our facts, it was implicit in the *Reserves* case that the developer shared the cost of the infrastructure. Also, the law of that case provides that if there is a contract, the contract governs. In our case, the Agreement of Sale outlined that Ridings was to construct the infrastructure and the WWTP.

The Court has made its decision that there is no unjust enrichment to Caldera receiving access to the WWTP and the infrastructure and that *quantum meruit* is not applicable. But the Court further notes it would be difficult, if not the impossible, to determine how Caldera has been unjustly enriched. The market has collapsed, and the value of the WWTP and the infrastructure to the individual lots

could not be based on a cost of construction formula divided by 225 lots.

In this market, no one would have undertaken to build the WWTP and infrastructure at its cost for the 225 lots. Therefore, the question would be how much the remaining 150 lots have been increased in value due to having sewer service. This question is further compounded by the fact that the value of the lots as contracted, i.e., $80,000 per lot, has dropped like a stone. Donald W. Knutson testified they were not even interested in the lots at $45,000.00 a piece.

Ridings asserted that Caldera tortiously interfered with its prospective business advantage with Tidewater when Caldera, by its October 2, 2007, letter, inaccurately informed Tidewater that Ridings no longer had any rights to the wastewater treatment plant and to stop negotiating with Ridings. I factually found that the parties' took their positions regarding the WWTP in good faith. The facts and the law were not clearly on either side during this time frame. This litigation has finally resolved matters. Thus, Caldera did not tortiously interfere with Ridings' prospective business advantage with Tidewater.

Similarly, I find that Ridings' claim against Caldera alleging tortious disparagement of property rights (slander of title) fails. This claim is based on Caldera's statements to Tidewater that Ridings had no rights to the easement. Again, the facts and legal positions were not clear at this point, and Caldera did

not, as Ridings asserts, definitively know that Ridings had a perpetual easement and thus, did not wrongfully question Ridings' title.

Finally, it is difficult to infer that Caldera's communication to Tidewater during the time that Tidewater was aware of the acrimonious relationship even raised an eyebrow at Tidewater.

SUMMARY OF RULINGS

In summary, I rule as follows:

1) Centex/Ridings is the legal owner of the Buyer Constructed Improvements and Facilities constructed on Caldera land.

2) Centex and/or Ridings are contractually and equitably obligated to grant easements to Caldera and its assignees to allow reasonable access to and over the portion of the Property conveyed to Ridings at the First Closing for the purpose of utilizing improvements constructed by Defendants on such portion of the Property including but not limited to utilities, utility lines, stormwater basins and detention ponds, roads, entrances, etc., all of which have been constructed as part of the approved subdivision/land development plans for the benefit of all 225 lots in the development.

3) Caldera is not required and has no obligation to reimburse Centex/Ridings

for the value of Buyer Constructed Improvements and Facilities constructed on the land. Caldera may use the WWTP without paying Cetex/Ridings any fee.

4) All 225 residential lots are permitted to utilize the services of the WWTP.

5) Centex/Ridings continues to enjoy the perpetual easement this Court recognized in its June 19, 2008 Decision.

6) The residential developments that are to be constructed on Caldera land are permitted to annex to the Homeowners' Association ("HOA") Declarations.

7) Centex/Ridings may contract with Tidewater to operate the WWTP. Caldera has no rights to contract with Tidewater regarding the operation of the WWTP. However, the owner(s) of the 150 lots Caldera presently owns may hook up to the WWTP and obtain sewer services to those 150 lots.

8) The closing on Phase II did not occur in April but both parties were negotiating a modification of the contract and an extension of the closing date at that time. At the point on October 2, 2007, when the settlement did not occur, Caldera clearly became entitled to the liquidated damages.

9) Caldera is entitled to $1.2 million in the liquidated damages and a partial release of the Deposit Deed of Trust to reduce it to its original amount of $2 million.

10) Caldera is not entitled to prejudgment interest on the $1.2 million but is

entitled to prejudgment interest on the $2 million from November 24, 2007.

11) Because of Centex/Ridings' failure to consummate the Second Closing, Centex and/or Ridings are not entitled to recover the cost of the Reimbursable Items which were to be recouped through a credit against the purchase price.

12) Centex/Ridings did not breach the covenant of good faith and fair dealing when it refused to close on October 2, 2007.

13) Centex/Ridings did not fraudulently misrepresent anything regarding the October 2, 2007 closing and thus, Caldera is not entitled to any damages with regard to this count of its complaint.

14) Centex/Ridings' claim for unjust enrichment fails and it is not entitled to a recovery for the amount of the costs of the improvements, including financing and other costs, that Ridings made to the real estate encompassed within Phases II and III, it is not entitled to recover the amount of the costs of the wastewater treatment plant and related facilities constructed pursuant to the Easement Agreement, and it is not entitled to pre-judgment or post-judgment interest.

15) Caldera did not interfere with Ridings' contractual negotiations with Tidewater.

16) Caldera is not liable on the slander of title allegation.

17) Centex/Ridings shall execute an Easement reflecting the Second

Amendment language.

18) Citizens should not be a party to this litigation.

19) Tidewater should not be a party to this litigation.

20) Beazer should not be a party to this litigation.

IT IS SO ORDERED.