SUPREME JUDICIAL LAW COURT
SITTING AS THE LAW COURT

YORK, SS STATE OF MAINE

Law Docket No. Yor-25-269

CONSTANCE L. BEANE,

Appellant,

V.

VILLAGE ON GREAT BROOK, LLC et al.,

Appellee.

On Appeal from the York County Superior Court
York County

THE BRIEF OF APPELLANT, CONSTANCE L. BEANE

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STATUTES, CASES AND AUTHORITIES

SHORT INTRODUCTION TO THE CASE

Constance L. Beane (hereafter Beane) resides at condominium Unit 31 of the Village on Great Brook Condominium located at 30 Pheasant Lane, Eliot, Maine. Appendix at 36-31 contains the facts of the case in the Complaint. Beane initially purchased Unit 31with her husband, Leo F. Beane, Jr., who died leaving her as the surviving joint tenant. In 2023 the declarant and developer of the condominium, Village on Great Brook, LLC (hereafter VGB), was before the Eliot Planning Board seeking approval for additional Units for the Village on Great Brook condominium. A number of Unit owners opposed the continued development of the condominium. Both the declarant VGB, the Village on Great Brook Unit Owners Association (hereafter the Association) and Unit owners hired lawyers and worked out an agreement whereby VGB could continue its development without further opposition from the Unit owners and the Association. In return VGB made a number of concessions, including payment of $35,000 to the Association and the conveyance of VGB's development rights for Unit 29 to the Association (also referred to as Lot 26), the area next to Beane's Unit. All of this is contained in an Agreement signed by VGB, the Association and most if not all Unit owners, including Beane. Appendix at 36-39, 51.

The signed Agreement required the Unit owners and the Association to cease opposition to VGB's additional development before the Eliot Planning Board. The

Agreement also required that the Eliot Planning Board grant approval for VGB's additional development by March 1, 2023. Appendix at 38. The Eliot Planning Board did not grant VGB approval for the development of the additional Units until March 28, 2023, approximately 27 days after the March 1, 2023 date set forth in the Agreement. Appendix at 55.

In 2024 VGB had still not paid $35,000 to the Association, nor deeded the development rights for Unit 29 (Lot 26) to the Association. In 2024 VGB began taking steps to develop Unit 29, the Unit which would be next to Beane's Unit. Beane filed a lawsuit seeking to enforce the Agreement and have the development rights to Unit 29 conveyed to the Association to stop VGB's development of this Unit. Beane also sought a preliminary injunction to stop the development of Unit 29. VGB opposed this and filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted for two reasons, one, the condition precedent of obtaining Eliot Planning Board approval by March 28, 2023 had not been met and therefore the Agreement was no longer effective and two, that Beane did not have standing to enforce the Agreement. The York County Superior Court (Martemucci, J.) found that Beane had standing to enforce the Agreement, but ruled that because the Eliot Planning Board did not approve VGB's additional Units until 27 days after the Agreement required this was a condition precedent that was not met and therefore the Agreement was no longer enforceable.

Appendix at 7-17. This ruling was not changed after Beane filed a Motion to Reconsider and Motion to Amend her Complaint and produced a letter by VGB's attorney to the Unit owners' attorney that VGB considered the timing of the Planning Board approval to have been satisfied and was seeking to have the parties continue to abide by the terms of the Agreement. Appendix at 77-90, 18-25.

This case presents the question of whether a condition precedent to the enforcement of a contract, in this case Eliot Planning Board approval of a development, which is met but is not met within the time required by the contract, and instead is met within weeks of the deadline to meet the condition precedent, voids a contract as a matter of law. Beane does not believe the timing of the performance of a condition precedent ever voids a contract as a matter of law. The party claiming to benefit from the timing of the performance of a condition precedent can always argue at trial that the timing was material, and by not meeting the condition precedent in time it should void the contract. However, when a condition precedent in a contract is satisfied, just not within the time set forth in the contract, it never voids the contract as a matter of law.

FACTS

For a Motion to Dismiss for failure to state a claim on which relief can be granted the facts pled by Beane are accepted as true. Appendix at 26-31 sets forth Beane's Complaint. The relevant facts are as follows:

The Village on Great Brook is an approximately 42 unit condominium established by a Declaration dated March 8, 2016 and recorded at Book 17194, Page 622 of the York County Registry of Deeds. This Declaration has been amended at least twenty-eight times. Village on Great Brook condominium is also shown on various plats and plans. Beane and her husband Leo F. Beane, Jr. purchased Unit 31 on April 20, 2021. Leo F. Beane, Jr. died on August 12, 2022 leaving Beane as the surviving joint tenant. In 2022 most Units in the Village on Great Book condominium had been built and sold to purchasers. Many Unit owners were unhappy because the construction of the Units, and the construction of the infrastructure within the condominium, including the roads, the stormwater management system and other improvements, were not being done properly by the developer and declarant, VGB. Many Unit owners spoke at Planning Board meetings and sent petitions to the Town of Eliot outlining problems and requesting that the Town perform a full site plan review and request a performance bond to assure that the work gets done. VGB also submitted a request for approval after the fact to accept the as-built plans, which included substantial changes from the original plan. In addition, VGB requested to split off Phases IV and V and have the land reserved by the owner for potential sale or development.

Based on this dispute between VGB and Unit owners VGB hired a bankruptcy attorney who presented residents with an Agreement for signature.

VGB said if residents didn't sign the agreement they would file for bankruptcy and walk away from the project leaving infrastructure not completed, including paving the roads. Some Unit owners hired an attorney, Peter Doyle, to represent them as a group in negotiating with VGB's bankruptcy attorney. The Unit owners, through their attorney Peter Doyle, eventually negotiated a Settlement Agreement with VGB which included the undersigned Unit Owners, the Association (which at that time was still controlled by the Declarant, VGB), and VGB. Most if not all Unit owners signed the Settlement Agreement. VGB and the Association did sign the Settlement Agreement as did Unit owner Beane. Appendix at 39, 51.

The gist of the Settlement Agreement was that VGB would do certain work, primarily on the common areas of the condominium, convey land known as Lot 26 (shown as Unit 29 on the plats and plans) to the Association, turn over control of the Association to the Unit owners, and pay $35,000 to the Association, among other requirements. Appendix at 36-39. In return the Unit owners would drop any opposition to VGB's Eliot Planning Board application, support the lifting of a stop work order, and work with VGB so that the roadwork and other improvements were done to the Unit owners' satisfaction. The Unit owners and the Association also agreed to Release VGB from any claims they might have up through the date of the Agreement. VGB received Eliot Planning Board approval for its additional Units on March 28, 2023. Appendix at 55. VGB also had the stop work order

lifted, satisfied the Town of Eliot's Performance Guaranty Requirements, and VGB completed work on the condominium.

Beane owns Unit 31, the Unit next to so-called Lot 26, which is actually 26 Pheasant Lane (and not a lot) (shown in the plats and plans as condominium Unit 29). In 2024 Beane noticed stakes in the ground and had been told that someone (not the Association) was going to buy Unit 29 and construct a new Unit at this location. Per the terms of the Agreement Unit 29 was to have been transferred to the Association.

Beane filed a Complaint on November 25, 2024 to enforce the Agreement and alleged in her Complaint that her Unit would be de-valued because another Unit would be constructed between her Unit and the road. This was not done anywhere else in the development. Beane alleged in her Complaint that the Association, and not VGB, should own development rights to proposed Unit 29. Also, VGB has not paid $35,000 to the Association as required by the Settlement Agreement. VGB received its approval from the Town of Eliot as required by the Settlement Agreement, although not in the time set forth in the Agreement. The approval was on March 28, 2023, 27 days after the Agreement date of March 1, 2023.

VGB moved to dismiss the Complaint for two reasons, one, the condition precedent of obtaining Eliot Planning Board approval by March 1, 2023 had not

been met and therefore the Agreement was no longer enforceable and two, that Beane did not have standing to enforce the Agreement. The York County Superior Court (Martemucci, J.) found that Beane had standing to enforce the Agreement, but ruled that because the Eliot Planning Board did not approve VGB's development until 27 days after the date set forth in the Agreement this was a condition precedent that was not met and therefore the Agreement was not enforceable. This ruling was not changed after Beane filed a Motion to Reconsider and Motion to Amend her Complaint and produced a letter by VGB's attorney to the Unit owners' attorney that VGB considered the timing of the Planning Board approval to have been satisfied and was seeking to have the parties continue to abide by the Agreement.

Beane timely appealed the granting of the Motion to Dismiss her Complaint, and the denial of Beane's Motion to Reconsider and Motion to Amend her Complaint, to this Court.

ISSUES

I. THE STANDARD FOR A 12(B)(6) MOTION IS THAT ALL FACTUAL ALLEGATIONS MADE BY THE PLAINTIFF ARE TREATED AS TRUE AND THE COURT DETERMINES AS A MATTER OF LAW IF THOSE FACTS COULD RESULT IN ANY CAUSE OF ACTION FOR THE PLAINTIFF AGAINST THE DFENDANT.

II. THE CONDITION PRECEDENT FOR THE ENFORCEMENT OF THE AGREEMENT, ELIOT PLANNING BOARD APPROVAL, WAS MET AND THEREFORE THE AGREEMENT IS ENFORCEABLE. THE TIMING OF THE MEETING OF A CONDITION PRECEDENT IS

NOT, AS A MATTER OF LAW, A FAILURE TO MEET THE CONDITION PRECEDENT.

III. THE YORK COUNTY SUPERIOR COURT SHOULD HAVE ALLOWED AN AMENDMENT TO BEANE'S COMPLAINT AND SHOULD HAVE CONSIDERED VGB'S ATTORNEY'S LETTER INDICATING THE TIMING OF THE PLANNING BOARD APPROVAL WAS WAIVED BY VGB.

SUMMARY OF THE ARGUMENT

The Agreement has a condition precedent that the Eliot Planning Board will approve VGB's application for additional condominium Units. This condition precedent was met. The condition precedent was met when the Eliot Planning Board gave VGB its approval on March 28, 2023. Eliot Planning Board approval was not granted by March 1, 2023, the date by which the Agreement required approval. The timing of meeting the condition precedent is not necessarily a material part of the condition precedent, and the failure to meet the timing of the performance of a condition precedent does not void an Agreement as a matter of law. The York County Superior Court was in error to hold that the untimely meeting of the condition precedent voided the Agreement as a matter of law.

There are many reasons why in this case a rigid adherence to the timing of the meeting a condition precedent is not material to whether the condition precedent is satisfied. Suppose the Eliot Planning Board began a final hearing on VGB's application on the evening of March 1, 2023, but the final decision did not happen until 1 a.m. on March 2, 2023. According to VGB's argument and the York

County Superior Court's decision the Agreement would be void. Does this make any sense? Look at this another way. Who controls the timing of the condition precedent? Not Beane, nor any other Unit owners. Instead, the timing of meeting this condition precedent is within the control of VGB and the Eliot Planning Board. Thus, to hold the timing of meeting the condition precedent against Beane and other Unit owners, on the facts of this case, makes no sense. Lastly, as a matter of law the timing of meeting a condition precedent is usually not material to satisfaction of the condition precedent. While Maine may not have a case directly on point, the Restatement (Second) of Contracts has rules that the timing of the meeting of a condition precedent is not treated the same as meeting the condition precedent. So long as the condition precedent is met the timing is not necessarily material. This is consistent with Law Court decisions holding that the timing of the performance of a contract is not necessarily a material breach. By analogy the timing of meeting a condition precedent is also not necessarily material and therefore should not be treated the same as the failure to meet the condition precedent.

I. THE STANDARD FOR A 12(B)(6) MOTION IS THAT ALL FACTUAL ALLEGATIONS MADE BY THE PLAINTIFF ARE TREATED AS TRUE AND THE COURT DETERMINES AS A MATTER OF LAW IF THOSE FACTS COULD RESULT IN ANY CAUSE OF ACTION FOR THE PLAINTIFF AGAINST THE DFENDANT.

The facts alleged in the complaint are treated as if they were admitted and the complaint is viewed in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. Bonney v. Stephens Memorial Hospital, 2011 ME 46, paragraph 16. For the purposes of a Motion to Dismiss the facts pled in the Complaint are accepted as true. Moody v. State Liquor & Lottery Comm'n, 843 A.2d 43, 46-47 (Me. 2004). Also, normally in a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted no additional facts can be added and only the Complaint and Exhibits are reviewed.

II. THE CONDITION PRECEDENT FOR THE ENFORCEMENT OF THE AGREEMENT, ELIOT PLANNING BOARD APPROVAL, WAS MET AND THEREFORE THE AGREEMENT IS ENFORCEABLE. THE TIMING OF THE MEETING OF A CONDITION PRECEDENT IS NOT, AS A MATTER OF LAW, A FAILURE TO MEET THE CONDITION PRECEDENT.

The York County Superior Court found the following was a condition precedent to the Agreement:

"The obligations of the parties hereunder are contingent upon the occurrence of the items described in subparagraphs (a)-(d) below:

a. Planning Board approval no later than March 1, 2023 of the Application as filed by VGB…."

Appendix at 12-13, 38. The Complaint asserted that the Eliot Planning Board approved VGB's application on March 28, 2023. Appendix at 55. The Eliot Planning Board approval was a condition precedent. That condition precedent was

satisfied on March 28, 2023. Eliot Planning Board approval by March 1, 2023 was not a condition precedent. While the Court or a jury could decide that obtaining Planning Board approval by the March 1, 2023 deadline was important enough to render it a condition precedent, such a question is factual and requires examination of the contract, circumstances surrounding the contract, and a determination about whether the contract would still be enforceable if there was a delay in obtaining Planning Board approval.

Maine usually follows the Restatement (Second) of Contracts. A condition precedent is defined as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." Restatement (Second) Contracts, section 224. Courts have held that timing of an event is not necessarily an event: "A condition precedent has been defined as a fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance of a promise arises." Chirichella v. Erwin, 270 Md 178, 182 (1973). (emphasis added); Mount Sinai Hospital v. 1998 Alexander Katen Annuity Trust, 110 A.D. 3d 288, 296 (Supreme Court of New York, Appellate Division) (2013). (citations omitted.) Thus, while Planning Board approval was certainly a condition precedent, the timing of this act is not "an event" like the Planning Board approval is "an event." Thus, the Planning Board

approval met the condition precedent required by paragraph 12(a) of the parties' contract.

Even if the timeliness of Planning Board approval was a condition precedent, this can be excused unless the occurrence by a certain date was a material part of the agreed exchange. Restatement (Second) Contracts, section 229, provides as follows:

"To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."

Id. The drafters of the Restatement (Second) of Contracts addressed this situation where a condition was met, but not in the time it should have occurred. In comment c to section 229 the drafters provide guidance:

"A court need not excuse entirely the non-occurrence of the condition, but may merely excuse its non-occurrence during the period of time in which it would otherwise have to occur (see Comment c to section 225), if it concludes that the time of its occurrence is not a material part of the agreed exchange. This conclusion is sometimes summed up by the phrase that "time is not of the essence."

Illustrations:

"3. A contracts to make repairs on B's house, in return for which B agrees to pay $10,000 "on condition that the repairs are completed by October 1." The repairs are not completed until October 2. A court may decide that there are two cumulative conditions, repair of the house and completion of the repairs by October 1, and that the non-occurrence of the second condition is excused to the extent of one day."

Id. Comment c and Illustration 3.

The intent of this section of the Restatement of Contracts is to avoid disproportionate forfeitures. In Capistrant v. Lifetouch National School Studios, Inc., 899 N.W. 2d 844 (Minn. App. 2017) the Court of Appeals of Minnesota interpreted an employment agreement that contained numerous provisions, including a condition precedent that the employee would return certain property upon the termination of employment in order to receive commissions after his employment ended. The Court of Appeals held that while the return of property was a condition precedent for the employer's duty to pay any commissions under the contract, the employee's forfeiture of any right to receive commissions, estimated at potentially 2.6 million dollars, was a disproportionate forfeiture and therefore not enforceable against the employee to void the contract. Id. at 854-857. (The Court of Appeals also held that the timing of the return of the company's property was not a material part of the contract. Id. at 857). See also Burger King Corp. v. Family Dining, Inc., 426 F. Supp. 485 (District Court for the Eastern District of Pennsylvania) (1977), where the Federal District Court held that the Family Dining was still entitled to exclusivity in operating Burger King restaurants in certain areas even through it had not constructed the number of restaurants in the area in the time required by the contract because the delay was not material and the construction of new restaurants, while not in compliance with the contract time,

was "nearly in compliance", so voiding the exclusivity part of the contract would amount to a forfeiture. Id. at 493-494.

Nothing in this contract indicates time is of the essence, or that this particular date (March 1, 2023) was a material part of the contract. See Raisin Memorial Trust v. Casey, 945 A.2d 1211, 1216 (Me. 2008) (The Court will consider whether a contract has language that time is of the essence in the performance of the contract, but whether time is of the essence in the performance of a contract is a matter of fact, and is determined by looking at the nature, circumstances and purpose of the contract to determine if time is of the essence.) The Law Court's discussion of what is a material breach is instructive in determining what is a material term in a contract. In determining whether there has been a material breach the Law Court analyzes the following five factors:

"1. The extent to which the injured party will be deprived of the benefit which he reasonably expects;
2. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
3. The extent to which the party failing to perform will suffer forfeiture;
4. The likelihood that the party failing to perform will cure his failure; and
5. The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

Associated Builders, Inc. v. Coggins, 722 A.2d 1278, 1280, n.1 (Me. 1999). The Law Court held in Associated Builders that a slight delay in performance, such as a slight delay in payment, if this is the performance, which delay in performance is

not done in bad faith but instead is consistent with the standards of good faith and fair dealing, will not constitute a material breach. Id. at 1280.

VGB was not harmed by a delay of almost four weeks in receiving Planning Board approval, and if it was harmed then it can raise this issue through facts developed at summary judgment or at trial and argue the timing of receiving Planning Board approval by March 1st was a material condition. There are also valid reasons that the timing of Planning Board approval would not be material. That includes that such timing almost certainly was not within the control of the Association and the Unit owners, including Beane. The Town of Eliot and VGB would have had almost exclusive control over how quickly the Planning Board approved this project. Although it is possible that VGB could show that Unit owners or the Association somehow obstructed or delayed the process, and this harmed VGB, this would be the subject of a fully developed record at trial and not ruled on in a Rule 12(b)(6) Motion.

A 12(b)(6) Motion is also usually not the appropriate procedural mechanism to dismiss a Complaint based on an affirmative defense. The allegation of the failure to meet a condition precedent is an affirmative defense to a contract action. Raja v. Ohio Sec. Ins. Co., 305 F. Supp. 3d 1206, 1248 (Federal District Court of New Mexico) (2018). In ruling on a 12(b)(6) Motion to Dismiss the Federal District Court of New Mexico held that determining whether a condition precedent

was waived required the Defendant insurance company to prove that it suffered substantial prejudice by the insured's failure to meet the condition precedent:

> "An affirmative defense succeeds on a rule 12(b)(6) motion if the complaint has a "built-in defense and is essentially self-defeating." 5B C. Wright & A. Miller, Federal Practice and Procedure, section 1357, at 713 (3d ed. 2004). Here, there is nothing in the Complaint or in the Contract indicating that Liberty Mutual suffered substantial prejudice as a result of Value Inn's failure to satisfy conditions precedent before filing this legal action. Therefore, Liberty Mutual's affirmative defense that Value Inn failed to satisfy conditions precedent before filing suit fails."

Id.

There is no evidence of harm to VGB by this 27 day delay in receiving Planning Board approval. VGB built the additional condominium units and got the benefit of the bargain-Unit owners backed down from opposing the project. Thus, VGB would have to show that it was somehow harmed by this 27 day delay. The Law Court has already signaled in the Associated Builders case that a slight delay in time for performance is not a material breach of a contract. It is easy to see why. VGB got what it wanted and what it bargained for, and waiting 27 days to get such final approval almost certainly did not cause it any harm. Also, the condition was not one Beane or other Unit owners could control, so holding Beane to the timing of the Planning Board decision is not appropriate. VGB got various releases from the Unit owners and an agreement by the Unit owners to drop their opposition to its subdivision amendment. VGB's argument is that while it got what it wanted and the benefit of the bargain, the Unit owners get nothing in return because of a 27

day delay in Planning Board approval. This argument makes no sense factually nor is it supported by the law. The Planning Board approval is a material condition precedent but the timing of the Planning Board decision is not a material part of this contract, nor is it a condition precedent.

Another way to examine this is in the following hypothetical similar to the Restatement illustration. Suppose the Eliot Planning Board met on March 1, 2023 to determine if it approved VGB's application. Suppose that the meeting then lasted beyond midnight and at 1:00 a.m. on March 2, 2023 VGB received its Planning Board approval. According to the York County Superior Court's interpretation of this condition precedent the failure to receive Planning Board approval by midnight, March 1, 2023, voided this contract. Before making such a determination that a one day delay (or any delay) invalidates a contract the Court should require the development of a factual record (through summary judgment or trial) to determine whether the timing of meeting the condition precedent was material to the contract. Planning Board approval on March 2nd (or by March 28th) should not result in the dismissal of a complaint enforcing a contract because the approval did not happen by March 1st. Instead, this issue is one for the Court or jury to determine with a developed record. It is not appropriate in a Rule 12(b)(6) motion.

III. THE YORK COUNTY SUPERIOR COURT SHOULD HAVE ALLOWED AN AMENDMENT TO BEANE'S COMPLAINT

AND SHOULD HAVE CONSIDERED VGB'S ATTORNEY'S LETTER INDICATING THE TIMING OF THE PLANNING BOARD APPROVAL WAS WAIVED BY VGB.

The Plaintiff moved to Amend her Complaint as part of her Motion for Reconsideration because she was provided a letter from VGB's attorney evidencing that VGB had waived the timing of meeting the condition precedent. A Motion to Amend a Complaint should be freely given when justice requires. M.R.Civ.P. 15(a). When such a Motion is filed after the Judgment has been issued for the Defendant on a Rule 12(b)(6) Motion the Court should normally grant such a Motion to Amend as if the Motion to Amend were made prior to the granting of a Motion to Dismiss:

"After judgment on dismissal of a complaint for failure to state a claim, the right to amend depends upon leave of court, but the admonition to allow amendment "freely" still applies. Amendment is ordinarily permitted as a routine matter, at the least the first time, if it appears that the defect can be corrected.

In fact, the United States Supreme Court has held that "the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, etc.," denial of an amendment after judgment is an abuse of discretion. It is not necessary for the court to allow the plaintiff an opportunity to amend the complaint, however, if it clearly appears that the plaintiff could not allege facts to cure the defect or change the complaint's defective basis."

2 Maine Civil Practice, section 15:3, p. 478-479 (3rd ed. 2011). The Court abused its discretion in not considering this letter and that VGB had waived the timing of the condition precedent.

After the Court dismissed the Complaint the Plaintiff obtained a copy of a letter dated April 18, 2023 from Roger A. Clement of Verrill Dana, VGB's attorney, to Attorney Peter Doyle who represented the Unit owners. Appendix at 85-86. The Plaintiff did not have this letter until after the Court dismissed this lawsuit or she would have presented it as part of her Objection. The letter was provided by another Unit owner (and I believe Board member) who became aware of the dismissal of the lawsuit. The letter by VGB's attorney provides, in the first paragraph, that VGB treats the contract as having continuing validity and requests Beane, the Association, and other Unit owners, to continue their performance of the contract:

"As we have discussed, events have somewhat overtaken this Agreement in that some of the conditions described in paragraph 12 have already been satisfied. For example, planning board approval has been granted (and VGB is willing to waive the March 1 deadline). We now need to focus on the conditions descried in paragraph 12(d). This letter is an attempt to satisfy that condition."

Appendix at 85-86. This is clear evidence VGB treated the Planning Board approval as having been met and was waiving the requirement that the approval happen by March 1, 2023. VGB then moves forward in the letter to request additional performance by the Association and Unit owners as outlined in paragraph 12(d), which requires an agreement in writing as to the specification of the "Road Work and the Non-Road Remaining Work." The York County Superior Court held that this letter was just evidence of a negotiation. This is incorrect as

this letter is evidence of waiver, and further evidence that the condition precedent was the Planning Board approval, not the timing of the approval.

The Restatement (Second) Contracts sets forth the standard for waiver or estoppel related to a condition precedent:

"The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it."

Restatement (Second) Contracts, section 230(3). Comment b to section 230(3) illustrates that statements made by the obligor waiving such condition precedent, by words, conduct, or inference, are binding on the obligor when the obligee relies on these statements:

"Under the rule stated in Subsection (3), a promise by the obligor to perform the duty regardless of the occurrence of the event is binding if the obligee has materially changed his position in reliance on it. The promise need not be in words and may be inferred from other conduct. The rule, like that stated in section 84, is sometimes thought of in terms of "waiver" or "estoppel."

Id. at comment b. See also Fritts v. Cloud Oak Flooring Co., 478 S.W. 2d 8, 11-13 (Court of Appeals of Missouri) (1972) "Any expressions or conduct of the obligee that leads the obligor reasonably to believe that performance on time will not be insisted on will operate as a waiver of the time condition, as to subsequent defaults as well as to antecedent ones. … Either at law or in equity a stipulation regarding time, though otherwise of the essence, may be waived or the injured party may elect to continue the contract in spite of the breach. (citations omitted.)"

In this case there is no inference from other conduct. The words of VGB, through its attorney, made it clear to the Association and Unit owners that the Agreement was still valid despite the delay in Planning Board approval. VGB went forward to request Beane and others continue to perform the contract and agree to the road work required by the contract. This is a clear indication of waiver or estoppel as discussed in this section of the Restatement. For this additional reason the York County Superior Court was wrong to dismiss this case for failure to meet the timing of the condition precedent.

CONCLUSION

This Court should reverse the decision of the York County Superior Court dismissing the Plaintiff's Complaint and order that the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted should be denied. The Plaintiff should be allowed to amend its Complaint to add a reference to VGB's attorney's letter purporting to waive the requirement that the Planning Board approval be obtained by March 1, 2023 and agreeing that the Planning Board approval by March 28, 2023 was acceptable to meet the condition precedent of the contract.

RESPECTFULLY SUBMITTED
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Date: 09/15/2025 /s/ Patrick S. Bedard
Patrick S. Bedard, Esq.

CERTIFICATE OF SERVICE

I, Patrick S. Bedard, Esq., hereby certify that a true copy of the foregoing, on this date, has been forwarded via electronic mail to: Benjamin E. Ford, Esq. and Erica Johanson, Esq.

Date: 09/15/2025 /s/ Patrick S. Bedard
Patrick S. Bedard, Esq.