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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PIKE CREEK RECREATIONAL SERVICES, LLC, Defendant-Petitioner Below, Appellant, v. NEW CASTLE COUNTY, Subdivision of the State of Delaware, Plaintiff-Respondent Below, Appellee.	)	No. 36, 2014 On Appeal From the Court of Chancery of the State of Delaware, C.A. No. 5969-JW consolidated with C.A. No. N10M-12-005 (PRW)

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal primarily involves the meaning of restrictive covenants on the Pike Creek Golf Course (formerly known as the Three Little Bakers golf course) ("Golf Course") executed by the prior owners in 1964 and 1969 (collectively the "Master Plan"). A7-26. The Master Plan requires that a minimum of 130 acres of land in the Pike Creek Valley must be set aside and held for an 18-hole golf course and this "constitutes a set-aside for a specific use of 130 of the 215[ ] acres set aside for open spaces." A23. The Court of Chancery's holding that the golf course restriction means what it plainly states should be affirmed. Op. 747-48.[1] Consequently, because Pike Creek Recreational Services LLC ("Developer" or "PCRS") must seek New Castle County Council approval for amendment of the Master Plan covenants, § 40.31.130 of the County Code ("Restriction Change Statute") must be followed before the golf course covenant can be modified or changed. Op. 750, 767. PCRS's attempts to ignore the restriction and/or avoid the statutory process are unavailing and should be rejected on appeal.

This case began in 2010 when PCRS shut down the Golf Course approximately a year after acquiring it, and filed applications to construct on the Golf Course 288 residential dwellings and 62,088 square feet of commercial buildings for a proposed development known as the Terraces at Pike Creek

[1] *New Castle Cty. v. Pike Creek Rec. Serv. LLC*, 82 A.3d 731 (Del. Ch. 2013) is cited herein as Op. __. *New Castle Cty. v. Pike Creek Rec. Serv. LLC*, 2013 WL 6904387 (Del. Ch.) is cited herein as Second Op. __. Appellant's opening brief is cited herein as OB _.

("Terraces"). B136. Also in 2010, PCRS sought building approvals in an attempt to construct on the Golf Course a 20-lot subdivision (first recorded in 1982), known as the Hogan Drive Townhouse Addition ("Hogan Drive"). B86.

When processing the Terraces and Hogan Drive applications, the County repeatedly advised PCRS that the Restriction Change Statute must be followed to request alteration of the restrictions, but PCRS adamantly refused.[2] Faced with this refusal, and plan applications that do not comply with the 130-acre, 18-hole golf course covenant, the County followed the Superior Court's 1981 instruction that interpretation of the Master Plan should be "determined in a judicial setting,"[3] and filed suit to force the Developer to heed the restrictions and/or to follow the Restriction Change Statute. ("Chancery Action").[4] B99-124.

Both before and after the Chancery Action was filed, the Department of Land Use ("Department") reviewed engineering applications for Hogan Drive. On September 23, 2010, the Department advised PCRS that the applications submitted, for reasons mostly unrelated to the restrictions, are not compliant with the County Code. A52-53. On October 13, 2010, the Developer appealed the

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[2] The County's Second Amended Complaint (B121), Resolution 10-217 (B97), and the County's December 28, 2010 letter (B125-26) to the Developer all make clear that the Restriction Change Statute must be followed before the Developer may proceed contrary to the 130-acre, 18-hole golf course restriction in the Master Plan. *See also* B139.

[3] *G.R.G. Realty v. New Castle Cty.*, 1981 WL 697909, at *4 (Del. Super. Ct.).

[4] The Developer filed an 80-page answer and counterclaim in the Chancery Action, which the County moved to dismiss. The Developer amended its answer and counterclaim in lieu of responding to the County's motion. Dkt. 42. The Court of Chancery thereafter stayed the County's time for responding to the counterclaim. B159, Dkt. 102.

decision to the New Castle County Planning Board ("Planning Board"). B87. The Developer also made a second application to the Department regarding Hogan Drive, and requested that the second application be incorporated into its Planning Board appeal. B88. On December 1, 2010, PCRS sought a writ of mandamus, claiming that plan applications for Hogan Drive should be presumed approved, and seeking to compel the County to review and approve the Hogan Drive and Terraces applications. ("Mandamus Action").[5] A57-A65.

In July 2011, Judge Parkins granted the County's motion to consolidate the Chancery Action[6] and the Mandamus Action, granted the County's request to file motion for partial summary judgment on the plain language of the Master Plan restrictions, and held that briefing on the Mandamus Action and the County's motion would proceed simultaneously. B141-61; Dkt. 102. The Court stayed briefing and response times for all other pending deadlines. On November 16, 2011, the Court heard oral argument on the County's summary judgment motion and on the mandamus issues. Rulings were made but were not finalized. B219-22.[7]

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[5] The Department provided its review of the second engineering submission for Hogan Drive on December 7, 2010, finding the plan to be deficient under applicable law. B92-94. The Planning Board, in two separate decisions, subsequently held that both engineering submissions for Hogan Drive (for reasons unrelated to the Master Plan) violated applicable law. B127-29; 130-35. Certiorari review was sought for both decisions, and both certiorari actions are stayed.

[6] Judge Parkins and Judge Wallace were specially appointed as Vice Chancellors.

[7] Judge Parkins held, *inter alia*, that: (1) it was the clear intent that the set-aside for the Golf Course was to run with the land; (2) the specific set-aside was, at a minimum, the 130 acres

In March, 2013, the consolidated case was reassigned to Judge Wallace. Following additional submissions, on September 5, 2013, Judge Wallace issued his decision granting the County's motion for partial summary judgment. The Court held that the Master Plan requires a minimum of 130 acres of land to be set aside and held for a specific use – an 18-hole golf course - and if the Developer desires to change this restriction, the Developer must obtain County Council's approval as required by the County Code. *See* Op. 749-50. Many of the Developer's claims were dismissed as unripe for failure to exhaust available administrative remedies, and the mandamus request was denied. *See* Op. 761-64.

On September 12, 2013, the County moved for reargument and/or clarification of the Opinion (Dkt. 105), and the Developer filed a Rule 60(b) motion and a motion to stay expiration deadlines. Dkt. 110. On December 30, 2013, the Court granted the County's motion, modified its September 5, 2013 Opinion, and denied the Developer's motions. Dkt. 104. On February 11, 2014, this Court accepted the Developer's request for interlocutory review. Dkt. 125. The Developer filed its opening brief on June 5, 2014.

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that was specified in the 1969 Amendment; (3) the restrictions were not merged into the deed; (4) the Developer had actual knowledge of the 1969 Amendment and the restrictions; (5) no party, other than the Developer, has sought to abandon the Golf Course use; and (6) the County is entitled to enforce the restrictions. B219-22.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly held that the Master Plan "provide[s] plainly that the '130 acres set aside for an 18–hole golf course' . . . was included among the 'areas set aside for specific land uses' . . . [T]he language used demonstrates the explicit original intent that the 130 acres would be dedicated to the specific single purpose of development of a golf course, and would not serve double-duty to meet some other 'open space' requirement." Op. 748.

2. Denied. The holdings below should be affirmed because: (i) the County did not waive any right to enforce the 18-hole golf course restriction through zoning; (ii) the Master Plan, first executed 50 years ago, is not a product of contract zoning, and such claim is time barred; (iii) the statute of frauds is inapplicable to restrictive covenants; and (iv) there is no requirement for a metes and bounds description for a restrictive covenant.

3. Denied. The submitted engineering applications do not comply with the County Code. Any purported presumption of approval is rebutted and the available administrative appeal remedy is not futile.

4. Denied. The Superior Court did not abuse its discretion in denying a request for a stay of expiration deadlines, especially when the Developer's plan applications, on their face, violate the Code and the Master Plan and when PCRS may request extensions that will extend the expiration deadline to January 2015.

STATEMENT OF FACTS

A. The Pike Creek Valley

The Pike Creek Valley is generally known as the area between and near Limestone Road and Polly Drummond Hill Road, just north of Newark, Delaware. At the center of the Pike Creek Valley is the 170+ acre, 18-hole golf course in question. B1. Over 20,000 residents and 100+ area organizations surround and/or and may be impacted by the development of the Golf Course. Op. 775.

B. The 1964 Agreement

The Pike Creek Valley was initially proposed by four entities – Frank A. Robino, Inc., Luigi Fortunato, Inc., Franklin Associates, Inc., and Joseph P. Johnson, Inc. ("Initial Developers"). The Initial Developers sought approvals from the County to rezone approximately 1,141 acres under the principles of a planned unit development project. On September 10, 1964, the Initial Developers voluntarily placed deed restrictions on the 1,141 acres, which are recorded with the New Castle County Recorder of Deeds ("1964 Agreement"). A7-18.

Under the 1964 Agreement, the "developer" is defined as both the party of the first part ("Seller") and the party of the second part ("Purchaser"). While Articles 1 and 2 of the 1964 Agreement contain certain sale language for 12.5 acres of land, the entire project area - all 1,141 acres - is defined as the "subject acreage." Article 3 of the 1964 Agreement states "[t]he DEVELOPER does

hereby, for itself, its successors, transferees and assigns, impose the restrictions, limitations and covenants, with respect to use and occupancy hereinafter set forth in detail upon the land hereinabove described . . . being the SUBJECT ACREAGE." A9.

The restrictions imposed by the 1964 Agreement bind the parties, their successors, and assigns, "and [are] for the benefit of the Levy Court of New Castle County, Delaware, or any governmental body which may hereafter have final zoning jurisdiction over the SUBJECT ACREAGE." A9. Articles 4 and 5 make clear that the 1964 Agreement may only be amended "after approval of said amendment by the LEVY COURT," and the "commitments and promises of the DEVELOPER . . . shall inure to the benefit of and be enforceable by the LEVY COURT OF NEW CASTLE COUNTY, or any successor organization, . . . which may hereafter be the governmental body having final zoning jurisdiction over the SUBJECT ACREAGE...".[8] A10. The 1964 Agreement also establishes set-asides for certain land uses and places limitations on the units that may be constructed.

C. The 1969 Amendment

In 1969, the Initial Developers (and successors) sought amendments to the 1964 Agreement and to the overall development of Pike Creek Valley by

[8] The 1964 Agreement permits the County to enforce it in a prospective manner, and states that the agreement "may be also prospectively enforced by the LEVY COURT instructing its County Building Inspector to refuse to issue a building permit if the issuance of such permit would violate . . . any of the terms and provisions of this agreement." A10-11.

increasing the applicable acreage from 1,141 acres to 1,363.58 acres. On December 22, 1969, the Initial Developers executed an Amendatory Agreement to the 1964 Agreement ("1969 Amendment"). A19-25. One of the key components of the 1969 Amendment is the promise of an 18-hole golf course. Article 3 states "[t]he provisions of Article 7 of the Agreement of September 10, 1964 (hereinafter the "Prior Agreement") as to areas set aside for specific land uses are amended to read as follows…". A21. Article 7, as amended, now therefore states:

> DEVELOPER covenants and agrees that the updated master plan shall provide for and that the DEVELOPER, its successors and assigns, **will set aside and hold throughout the course of development of the entire SUBJECT ACREAGE the following land uses irrespective of the ultimate zoning** of the SUBJECT ACREAGE:.....
>
> Open spaces (**including 130 acres set aside for an 18-hole golf course** and 85 acres [10% of net residential lands which shall be non-golf open space]) 215 acres
>
> The remaining acreage shall, consistent with the Zoning Classification of the areas, only be used for residential dwelling units, utilities, highway and streets, sample dwelling units, real estate sales offices and additional educational facilities, churches, open spaces, or recreational areas . . . (emphasis supplied) (A11-12, A21).

Article 10 of the 1964 Agreement was stricken by Article 7 of the 1969 Amendment and confirms the 18-hole golf course set-aside. Article 10 now reads:

> 10. The updated tentative comprehensive master plan of Pikecreek Valley **shows a minimum area of approximately 130 acres set aside for development of an 18-hold [sic] golf course. This constitutes a set-aside for a specific use of 130 of the 215.00 acres set aside for open spaces.** If for any reason construction of the golf course is not commenced within five

years from the date hereof the open space set-aside for the same shall be devoted to uses approved by the Department of Planning and the New Castle County Council. (emphasis supplied) (A23).

To confirm the commitment for an 18-hole golf course, Article 9 of the 1969 Amendment amended Article 12 of the 1964 Agreement by adding the words "18-hole" in place of "par three." A24. Article 12 of the 1969 Amendment confirms that "[a]ll of the terms and provisions of the AGREEMENT of September 10, 1964, not inconsistent with the amendatory provisions herein contained, are hereby ratified, readopted, and shall be deemed to be in full force and effect[.]"[9] A24.

D. The Golf Course Is Built

Following through on the commitment in the 1969 Amendment to build a golf course on the "set-aside" land, the Initial Developers submitted plans to the County for a golf course. A subdivision plan for the Golf Course was recorded on September 30, 1971. B36. The plan states that "private open space" is established in accordance with the "agreement as amended" designating the County as a third-party beneficiary. Also, when building the dozens of housing developments that surround the Golf Course, the builders distributed (and had homeowners sign) a version of the Pike Creek Valley master plan which informed home owners that revisions to the plan were required to be approved by County Council (the

[9] On January 15, 1970, the New Castle County Council passed the zoning changes sought by the Initial Developers. B2-35. The 1969 Amendment, however, was not recorded.

"Distributed Master Plat"). A27. The homes overlooking the Golf Course were charged a premium for the lots. Op. 754, n.160.

E. The G.R.G. Realty/Hogan Drive Litigation

In 1980, G.R.G. Realty attempted to alter the Golf Course configuration by moving holes to allow the development of additional housing units on the Golf Course lands. Initially, the County's planning department did not review G.R.G.'s plans due to the applicable Master Plan covenants. G.R.G. thereafter filed a mandamus action in Superior Court to compel review of its applications.

The Superior Court ultimately required department to review the Hogan Drive application "as to content," and held "the legal issues as to the interpretation of the contracts as to the rights of the third-party beneficiary and as to other legal issues would be left open for eventual determination by a Court" and would be "more properly determined in a judicial setting."[10] Heeding the Court's instruction that the department should "make it clear in its decision that it is not passing upon the issues which fall outside its assigned duties," the following note ("Cautionary Note") was placed on the Hogan Drive and Golf Course plans:

> This plan has been reviewed as to content and compliance with the New Castle County Subdivision and Land Development Regulations. The Department of Planning has not reviewed the Plan as to compliance with the 1964 Agreement or the 1969 Amendatory Agreement of record pertaining to the development of the Pike Creek Valley Community or any other applicable agreements per Letter

[10] *G.R.G. Realty,* 1981 WL 697909, at *2-4.

Opinion of the Superior Court dated 12/30/81 re: G.R.G. Realty vs. New Castle County 81M-MR-18.[11] (B40-41).

F. Three Little Bakers Ownership

In the early 1980s, Three Little Bakers, Inc. ("Three Bakers") purchased the Golf Course, including the lots located on the Hogan Drive subdivision plan. During its ownership, Three Bakers never applied for development approvals for Hogan Drive or for development approvals on the Golf Course.

In 1985, regarding a small portion of the Golf Course property zoned commercial, Three Bakers recorded restrictions restricting the uses on the commercial lands to "a restaurant, golf course club house, pro shop, parking lot and uses allied, ancillary and accessory to said uses, and to the golf course and other recreational facilities on said land...". B46, 115. The declaration also preserved the County's rights regarding the restrictions in the Master Plan. *Id.*

G. The Developer Purchases The Golf Course

On August 15, 2008, the Developer purchased the Golf Course from Three Bakers. Prior to title transfer, a subdivision was done to separate the dinner theater restaurant, the clubhouse, and pro shop (the commercially zoned portion of the property) from the Golf Course. Title to the commercial portion was transferred to

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[11] On April 13, 1982, the County Council adopted Resolution 82-092, which authorized the County to join an action instituted by residents "to determine whether the proposed Pike Creek Valley Golf Course Development plans would be in violation of the concept of the updated master plan . . . .". B43-44; *see also* B42; B113-14.

Pike Creek Healthcare Services LLC ("Pike Creek Healthcare"), while title to the Golf Course and Hogan Drive was taken by PCRS.[12] Pike Creek Healthcare applied for removal of the restrictions applicable to the commercial portion of the Golf Course pursuant to the Restriction Change Statute.[13] B63-66. The proposed change to the restrictions was approved by County Council. B67-69.

After obtaining the approvals for Pike Creek Healthcare, the Developer sought to develop the Golf Course. In the spring of 2010, PCRS submitted engineering applications for Hogan Drive – none of which contain any plans to relocate the golf holes depicted on the Hogan Drive record plan. B86; B40. PCRS then submitted the Terraces[14] application which eliminates the Golf Course and proposes to use the Golf Course lands as community open space, in violation of the County's Unified Development Code ("UDC").[15] The Developer seeks to include the Golf Course lands as community open space for density bonuses to potentially build over 200 more units than if the 130 acres of land is not deemed set-aside.

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12 *See* B79("[e]xcepting out and from said Parcel 1 land . . . consisting of approximately 5.3 acres, conveyed to Pike Creek Healthcare Services LLC by Deed of even date herewith from Three Little Bakers, Inc. to be recorded contemporaneously herewith").

13 The proposed change was to allow redevelopment for a 57,530 square foot, 120-bed nursing care facility, and two 9,000 square foot medical office buildings. B63.

14 The Terraces plan does not depict 140 acres of open space, as PCRS contends. OB 1, 13. The Terraces application actually depicts 131.511 total acres of open space, 78.543 acres to be "community open space," and 52.968 acres to be set aside for a future recreation area. B137.

15 Golf courses and driving ranges are not permitted as "community area open space" or "natural resource area open space" components of developments. UDC Table 40.10.210.

ARGUMENT

I. THE DEVELOPER MUST SET ASIDE AND HOLD A MINIMUM OF 130 ACRES OF LAND FOR AN 18-HOLE GOLF COURSE USE OR SEEK A CHANGE UNDER THE RESTRICTION CHANGE STATUTE.

A. Question Presented

Does the plain language of the Master Plan require the Developer "irrespective of the ultimate zoning" - to "set aside and hold" - "a minimum area of approximately 130 acres" for an "18-hole golf course" and does this set aside "constitute[] a set-aside for a specific use of 130 of the 215[ ] acres set aside for open spaces" in the Pike Creek Valley and require the Developer to follow the Restriction Change Statute to alter the 18-hole golf course restriction? Or, may the Developer simply shut down the Golf Course, and use the Golf Course lands as open space in an effort to obtain a massive density bonus of 200 or more units,[16] even though golf courses are not permitted to be used as components for housing developments under the County Code?

B. Scope of Review

This Court reviews interpretation of contractual language *de novo*.[17]

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16 *Compare* B136 with UDC §40.05.420; B248-250; *see also* Terraces Review B137-40.

17 *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC,* 55 A.3d 330, 334 (Del. 2012).

C. The Court Below Correctly Held That A Sufficient Quantity, Quality, and Configuration of Land Must Be Set Aside For An 18-Hole Golf Course Use Under The Plain Language Of The Restrictions.

The Court's holding that the Master Plan requires the Developer to set aside and hold 130 acres of land for an 18-hole golf course (unless and until the County Council approves a change through the Restriction Change Statute) (Op. 748-49) should be affirmed because the plain language of the Master Plan[18] and the intent of the drafters support the Court's holding.[19]

Article 7 of the 1964 Agreement (as amended by the 1969 Amendment) is unambiguous.[20] It requires that 215 acres of the Pike Creek Valley be reserved as open space, "including 130 acres set aside[21] for an 18-hole golf course and 85 acres [10% of net residential lands which shall be non-golf open space]" (brackets in

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[18] Deed restrictions, like contracts, should be read and interpreted in accordance with their plain and ordinary meaning. *Serv. Corp. of Westover Hills v. Guzzetta,* 2007 WL 1792508, at *4 (Del. Ch.); *Slaughter v. Rotan,* 1994 WL 514873, at *2 (Del. Ch.).

[19] *BLGH Hldgs. LLC v. enXco LFG Hldg., LLC,* 41 A.3d 410, 414 (Del. 2012) ("Where, as here, the plain language of a contract is unambiguous *i.e.*, fairly or reasonably susceptible to only one interpretation, we construe the contract in accordance with that plain meaning and will not resort to extrinsic evidence to determine the parties' intentions."); *Cain v. Delaware Sec. Inv. Inc.,* 1983 WL 18032, at *2 (Del. Ch.) ("in determining the meaning of restricting words in a deed [covenant], common and ordinary words must be given the meaning that they are ordinarily understood to have.").

[20] The "language of a restrictive covenant may be interpreted or construed only if it is ambiguous." *Schreppler v. Cannon,* 610 A.2d 727 (Table), 1992 WL 115142, at *1 (Del. Supr.).

[21] "Set aside" means "something, as land or profits, set aside for a particular purpose." Dictionary.com, http://dictionaryreference.com/browse/set-aside (last visited July 10, 2014). "'Dedicated' . . . ordinarily mean[s] 'set aside for a particular use or purpose.'" *Alcatel USA, Inc. v. Tekelec Inc.,* 2002 WL 34454104, at *11 (E.D. Tex.); *Mumaugh v. Diamond Lake Area Cable TV Co.,* 456 N.W.2d 425, 430 (Mich. App. 1990) ("[t]he legislature did not place any special significance on the meaning of the term 'dedicated' over and above its common meaning 'to set aside.'"); *Stoker v. Brown,* 583 S.W.2d 765, 767 (Tenn. 1979) (using the terms "set aside" and "dedicated" synonymously and declaring that a cemetery use must continue).

original). A21. The plain language requires the Initial Developers' successors and assigns (including PCRS), to "set aside and hold" this land for a 130-acre, 18-hole golf course, "irrespective of the ultimate zoning."

Article 10 of the 1964 Agreement, as amended by the 1969 Amendment, also makes clear that the plan for Pike Creek Valley "shows a minimum area of approximately 130 acres set aside for development of an 18-hold [sic] golf course. This constitutes a set-aside for a specific use of 130 of the 215[] acres set aside for open spaces." A23. Accordingly, the plain language of the Master Plan mandates that a minimum of 130 acres of the total open space is set-aside for a specific, 18-hole golf course use.[22] As the Court below held, the intent of the drafters to set aside 130 acres for an 18-hole golf course is crystal clear:

> [T]he language used demonstrates the explicit original intent that the 130 acres would be dedicated to the specific single purpose of development of a golf course, and would not serve double-duty to meet some other "open space" requirement. Accordingly, unless validly changed or amended, the restriction limits the 130–acre set aside to a single specific use. Op. 748.

The Developer's arguments that the specific use set-aside for an 18-hole golf course means something different than what it says (OB 16-26) should be rejected.

First, the contention that the specific use set-aside ends after the golf course is built (or whenever PCRS decides to unilaterally close it) is belied by the plain

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[22] Intent of the drafters to set-aside and hold land for the "specific use" of an 18-hole golf course is confirmed by the 1969 Agreement, wherein the title holders amended the Master Plan in no less than three places (Articles 7, 10, and 12) to confirm that a minimum of 130 acres of the 215 acres of total open space must be set aside for "a specific use" of the total "acres set aside for open spaces" – an 18-hole golf course.

language of the Master Plan. OB 16. Building a golf course and thereafter closing it does not fulfill and/or satisfy (OB 19-20) the plain requirements of Articles 7 and 10 for the specific use. The obligation to set aside and hold the land for the specific use does not end on the day after - or forty years after - a golf course is built. It continues until the 5,454 unit cap (i.e. the course of development) is reached – a number that has indisputably not been achieved.[23] A23; Op. 748 n.125.

Second, while it is agreed "that land set aside as Open Space would have non-golf uses" (OB 16), a minimum of 130 acres of the 215 acres of open space was "set aside" and held for the specific use of an 18-hole golf course. PCRS's construction, which eliminates any significance of the "specific use" set aside for an 18-hole golf course, violates the well settled rule of construction that no provision of the restriction may be rendered superfluous.[24] If the land "set aside" is not for the specific single purpose of a 130-acre, 18-hole golf course, then the set-aside requirement is not met.

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[23] The 5,454 residential dwelling unit number in the 1969 Agreement acts as a cap on the total number of units which may be constructed in the entire Pike Creek Valley. *See* 1964 Agreement Article 9 (as amended by the 1969 Agreement). A15, 20, 24. Once this number is reached, no more residential units may be constructed. PCRS contends that there are 191 units available to be built in Pike Creek – but the County believes that there are actually more than 191 units that may be constructed before the 5,454 unit total number is reached. B247. No matter the number, it is undisputed that there are less than 5,454 units constructed today.

[24] *Alta Berkely IV C.V. v. Omneon, Inc.*, 2011 WL 2923884, at *5 (Del. Super. Ct.) ("[T]he Court has honored the basic tenet of contract construction that requires courts to give meaning to all contractual terms and discourages courts from endorsing a construction that would render any contractual term superfluous.").

Third, contrary to the Developer's contentions, Article 12 (as amended by the 1969 Amendment to add the words "18-hole") does not alter the specific use set-aside in Articles 7 and 10. OB 17. Article 12 (as amended) states that "the area shown on the updated master plan set aside for an 18-hole golf course if zoned commercial shall only be used for a recreational purpose." A15, A24. It is undisputed that the land was never zoned commercial - so the contingent clause was never triggered. Even if the land were rezoned commercial, a general commitment for a recreational use of the land designated on a plat for 199 acres (OB 18)[25] does not trump the specific commitment in Articles 7 and 10 - which requires a minimum of 130 acres for an 18-hole golf course to be set aside "irrespective of the ultimate zoning."[26] Reading the Master Plan as a whole, Articles 7 and 10 make clear that, no matter what zoning classification is provided for the golf course lands, 130 acres are reserved for the specific use of an 18-hole golf course.[27]

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[25] Citing A27, the Developer claims that the area of the Golf Course is "imprecisely depicted." OB 18. To the contrary, A27 clearly depicts the location of the Golf Course and confirms the plan "can be modified only in accordance with the agreement with, and the procedures and approvals of New Castle County Council."

[26] "[S]pecific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate." *Ross Holding and Mgmt. Co. v. Advanced Realty Group*, 2010 WL 1838608, at *8 (Del. Ch.); *Flight Options International, Inc. v. Flight Options LLC*, 2005 WL 6799224, at *7 (Del. Ch.) ("It is, of course, a maxim of contract interpretation that more specific contractual terms will trump those that are more general.").

[27] *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012)("[A] court must construe the agreement as a whole, giving effect to all provisions therein. The meaning inferred from a particular provision cannot control the meaning of the entire

Fourth, the contention that the Master Plan did not require land for a "possible future golf course" to be set aside is belied by the plain language. OB 19. Under Article 10, once construction of the golf course began within five years, the land set aside was dedicated to the 18-hole golf course use. The golf course set-aside does not terminate simply because the Developer closes the Golf Course and decides to build a massive housing development instead. The Developer must follow the Restriction Change Statute to alter the set-aside for a "specific use" (a 130-acre, 18-hole golf course) if it desires to use the Golf Course lands for another purpose – such as community open space for a housing development (and thereby potentially providing PCRS a massive density bonus for the Terraces).

The foregoing demonstrates that, contrary to the Developer's contention (OB 16), the Terraces plan does not comply with the Master Plan because it completely obliterates the 18-hole golf course use. B136-40. As a practical matter, the 130 acres of open space depicted on the Terraces application is not contiguous or connected, so a 130-acre golf course could not be built on the lands purportedly set aside as open space[28] – and PCRS does not contend otherwise. *Id.* Moreover, as a matter of law, the land utilized by the Terraces for open space

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agreement if such an inference conflicts with the agreement's overall scheme or plan."); *Needham v. Savini Corp.*, 2004 WL 550853, at *3 (Del. Ch.) ("Delaware law is clear that deed restrictions must be interpreted to comport with the intent of the grantor as stated in the deed restriction in the context of the deed as a whole.").

[28] Approximately 110 acres of open space land is connected and contiguous. The remainder is small open space pockets between dwelling units and commercial land. B136; B254.

cannot be used for an 18-hole golf course because golf courses are not permitted as a component of residential community open space under the UDC.[29] Stated simply, there is no practical or legal way to develop a golf course on the open space lands depicted on the Terraces plan.[30] Recognizing this, the Court below made clear that:

> . . . beyond doubt, the restriction, unless it is changed, has three lineamental features, the land parcel set aside must: (1) be no less than 130 acres; (2) have physical attributes—i.e., be of sufficient quantity, quality, contiguity and configuration—to accommodate development of an 18–hole golf course; and (3) be set-aside, as it was originally dedicated, for the specific single use of development (or now re-development) of a golf course. Op. 749, n.129.

The Court of Chancery's plain-language interpretation of the Master Plan, and the Court's recognition that the land set aside must be sufficient to accommodate development of a 130-acre, 18-hole golf course, should be affirmed.

D. The Set-Aside For An 18-Hole Golf Course Must Continue.

The Court of Chancery's interpretation properly holds that the golf course restriction is plain on its face. Op. at 748. Where, as here, the intent of the restriction is clear, "[r]estrictive covenants and deed restrictions are recognized and

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[29] UDC Table 40.10.210 makes clear that golf courses are not permitted as "community area open space" or "natural resource area open space" components of housing developments.

[30] A golf course is a permitted limited use under the Suburban zoning classification as a stand-alone parcel. *See* UDC Table 40.03.110A (permitting recreation, low intensity as a limited use); *see also* UDC § 40.33.250(c) (Recreation, low intensity permits golf course uses). At a minimum, the Terraces plan must be revised to depict the lands set aside for a golf course on a stand alone parcel (unconnected to the proposed community) to satisfy the Code. B250.

enforced in Delaware"[31] and such covenants are "regarded as valid and will be specifically enforced as may be reasonably necessary to accomplish their purpose."[32] Despite the clarity of the restriction, the Developer nevertheless asks this Court to apply a "less restrictive" interpretation to allow it to ignore the specific-use set-aside (OB 20-21) without obtaining County Council approval.

The foundation of PCRS's plea for a "less restrictive" reading of the Master Plan is the unsupported contention that once a golf course is built, the 130-acre golf course restriction is wiped away. OB 21. Nothing in the Master Plan so states. More fundamentally, this reading ignores that the specific-use set-aside for the golf course lasts throughout the course of development - 5,454 units. Op. 238, n.125.

The Developer also seeks to overcome the Court of Chancery's plain meaning construction (Op. 748-49) by contending that the 130-acre "specific use" requirement should be construed as applying only to a wide range of open space uses (so PCRS can potentially build over 200 more units). OB 22. This is also contrary to the plain language. The phrase "specific use" was precisely chosen to make clear that there was only one permitted use of the set-aside absent a change by County Council – an 18-hole golf course.[33] The mere fact that other uses for

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31 *Laumbach v. Westgate*, 2008 WL 3846419, at *3 (Del. Ch.).

32 *Huntington Homeowners Ass'n, Inc. v 706 Inv.*, 1999 WL 499451 at *2 (Del. Ch.).

33 The Developer claims that the requirement to perpetuate a golf course might be understandable if the initial owners had promised to build a "public golf course" or "had achieved home sales by promising to provide . . . course privileges." OB 23. Beyond the plain language guarantee of the 130-acre 18-hole golf course set-aside, the Initial Developers' counsel

open spaces are allowed in the 1964 Agreement (OB 25) does not trump the specific provisions of the 1969 Amendment. The specific provisions of the 1969 Amendment prevail over the general provisions.[34]

Because neither construction of the Golf Course nor the open space definitions eliminate the specific use set-aside for an 18-hole golf course, PCRS has two choices – seek a change of the restrictive covenant under the Restriction Change Statute or demonstrate that an 18-hole golf course can be built on the lands set aside. Logically, if there is not a sufficient quantity, quality, and configuration of land for a 130-acre, 18-hole golf course, no land is set aside for the "specific use" (Op. 749, n.129) – which impermissibly renders the restriction meaningless.[35]

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represented that the golf course restriction was enforceable (B113-14), and the County Council had the proposed golf course restriction before it when passing the rezonings in the 1970s. B31 Purchasers of lots were provided the Distributed Master Plat, showing the layout of the golf course and advising that the plat could only be modified by County Council. A27. Purchasers paid premiums for golf lots. Op. 754, n. 160. These actions alone are more than sufficient to require the continuation of an ongoing golf course use. *See Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf LLC,* 715 S.E.2d 273, 282 (N.C. App. 2011) (enforcing golf course restriction even when no reciprocal benefit received by golf course owner); *Skyline Woods Homeowners Association, Inc. v. Broekemeier*, 758 N.W.2d 376, 390-95 (Neb. 2008) (holding that the "existence of the golf course should be protected by implied restrictive covenants that the property be maintained as a golf course"); *Shalimar Ass'n v. D.O.C. Enter., Ltd.,* 688 P.2d 682, 684 (Ariz. 1984) (holding that a restriction is enforceable when purchasers were promised that the owners would "develop, maintain, and operate the . . . . Golf Course.").

[34] *Ross Holding and Mgmt. Co.*, 2010 WL 1838608, at *6.

[35] PCRS contends that the Initial Developers could not have intended the specific-use set-aside because the lands allegedly were not zoned for a golf course in the 1960s. OB 22-23. However, the intent for a golf course set-aside is clear because, unquestionably, the Golf Course *was* built– so there is no doubt a golf course *could* be built. But *if* approvals for a golf course could not be obtained, the Master Plan made clear that "the open space set aside for the same *shall be devoted to uses approved by the Department of Planning and the New Castle County Council.*" (emphasis supplied) A23. The intent was to require County Council approval for any non-golf use on the 130 acres set aside for the golf course.

PCRS's tersely raised constitutional and statutory claims do not alter this conclusion. OB 25. The third-party beneficiary right of the County to enforce the restrictive covenants in the Master Plan is not abrogated by the zoning and subdivision code[36] – municipalities regularly enforce restrictive covenants.[37] Enforcement of a restriction is similarly not a development exaction.[38] Takings claims are not ripe until the Developer has exhausted all available administrative remedies (Op. 763, 767)[39] - and the Developer did not follow the Restriction Change Statute (as it did for Pike Creek Healthcare). The Court, therefore, properly dismissed the constitutional claims on ripeness grounds. Op. 767.

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[36] *Cain*, 1983 WL 18032, at *4 ("the amendment of the zoning laws *per se* does not directly effect any rights that . . . may have [been] acquired as a result of restrictive covenants running with the land."); *Warwick Park Owners Ass'n v. Sahutsky*, 2005 WL 2335485, at *4 (Del. Ch.) ("a zoning ordinance . . . cannot destroy, impair, abrogate or enlarge the force and effect of an existing . . . restrictive covenant.").

[37] *See* UDC §§ 40.01.150, 40.31.130; *City of Bowie v. MIE Properties, Inc.*, 922 A.2d 509, 532 (Md. App. 2007) (City enforcing covenant and holding "[c]ovenants would be pointless if they could not restrict the uses of a property to a greater degree than permitted by the underlying zoning of property."); *Doylestown Twp. v. Teeling*, 635 A.2d 657, 661 (Pa. Cmwlth. 1993) ("Township may enforce the conditions attached to the subdivision plan as part of the subdivision approval process . . . because those conditions constitute restrictive covenants running with the land . . ."). "Restrictive covenants are a matter of contract, . . . [and] zoning regulations constitute a governmental exercise of police power . . .". *Warwick Park*, 2005 WL 2335485, *4. When restrictive covenants and zoning ordinances conflict, the stricter of the two controls. 5 Edward H. Ziegler, Jr., Rathkopf's *The Law of Zoning And Planning* § 82:2 (4th ed. 2013); *Byrd v. City of N. Augusta*, 201 S.E.2d 744, 746 (S.C. 1974).

[38] Exactions are conditions imposed by government entities on developers for the issuance of a building permit. *B.A.M. Development, LLC v. Salt Lake Cnty.*, 128 P.3d 1161, 1169 (Ut. 2006). Here, the County is enforcing a contractual (third-party beneficiary) right to enforce voluntary restrictions that run with the land and that it is entitled to enforce.

[39] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-40 (2002); *Eastern Shore Envtl., Inc. v. Kent County Dept. of Planning*, 2002 WL 244690, at *7 (Del. Ch.). While repeated denials in extreme circumstances may render a constitutional claim ripe (OB 25, n.4), these cases are inapplicable because the Developer never sought relief under the Restriction Change Statute. Regardless, the takings claim here fails because no regulatory action of the County has denied PCRS all economically viable use of the land.

II. THE COUNTY MAY ENFORCE THE RESTRICTIONS IN THE MASTER PLAN.

A. Questions Presented

Did the Court below properly reject the Developer's attempt to avoid the plain language of the 130-acre, 18-hole golf course set-aside and failure to follow the Restriction Change Statute under theories of (1) waiver; (2) contract zoning; (3) merger by deed; (4) statute of frauds; and (5) area description?

B. Scope of Review

Legal issues are reviewed *de novo.*[40] "[F]indings of historical fact that are based on physical or documentary evidence or inferences from other facts" are "subject to the deferential 'clearly erroneous' standard of appellate review."[41]

C. The County May Enforce The Restrictions.

1. The County Has Not Waived Any Right To Enforce The 130-Acre, 18-Hole Golf Course Restriction.

For the first time on appeal, PCRS claims (without citation to the record) that the County has waived the right to enforce the golf course restriction through zoning and assessment. OB 28. As the claim was not raised below, the claim should be rejected on appeal.[42] Even if the 11th hour waiver claim is considered,

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40 *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004).

41 *Id.*

42 The waiver issue, as it relates to the 130-acre, 18-hole golf course restriction, should be dismissed because the issue was not raised below. *Kalil v. State,* --- A.2d ---, 2014 WL 2568029, at *4 (Table) (Del. Supr.) ("Because this claim was not raised in Kalil's . . . motion before the Superior Court, this Court need not address it for the first time on appeal."); Del. Supr. Ct. R. 8.

PCRS cannot establish the exacting standards required for waiver or that the County has ever waived the 130-acre, 18-hole golf course set-aside.[43]

The County's zoning of the Golf Course to a Suburban zoning classification cannot establish waiver. OB 28, n.5. For starters, case law makes clear that a zoning change does not impact prior restrictive covenants.[44] The UDC codifies this rule and makes clear that restrictive covenants require lands to "remain restricted regardless of the zoning district."[45] Further, golf courses are permitted uses in the Suburban district – and there are no stand alone open space zoning classifications in the UDC.[46] Thus, a "Suburban" zoning classification that allows for golf courses as a stand-alone use, is a logical zoning fit for a golf course. Surely, providing a zoning classification which allows for the intended golf course use is not a waiver of the golf course restriction.

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43 *Aeroglobal Capital Mgmt. LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (internal citations and quotations omitted) ("[T]he standards for proving waiver under Delaware law are 'quite exacting.' 'Waiver is the voluntary and intentional relinquishment of a known right.' It implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights. The facts relied upon to prove waiver must be unequivocal."). "The facts showing a waiver must be clear and convincing and the question of whether there has been a waiver usually is one of fact." *Egan & Sons Air Conditioning Co. v. General Motors Corp.*, 1988 WL 47314, a *9 (Del. Super. Ct.); *but see Warwick Park*, 2005 WL 2335485, at *4 (holding that waiver should be shown "at least by a preponderance of the evidence."). As waiver is generally a factual issue, the clearly erroneous standard of review should apply to appellate review of waiver claims. *Scharf*, 864 A.2d at 916.

44 *Cain,* 1983 WL 18032, at *4; *Warwick Park*, 2005 WL 2335485, at *4; *Redevelopment Com. of Greensboro v. Ford*, 313 S.E.2d 211, 213 (N.C. App. 1984) ("[W]hen a restriction is placed on property . . . , and subsequently there is a zoning change, such change will neither nullify nor supersede a valid restriction in the use of property.").

45 UDC § 40.01.150.

46 *See* UDC Article 2.

Similarly, the fact that the County assessed the land consistent with its zoning classification cannot, as a matter of law, be deemed a waiver. OB 28. To obtain an open space tax exemption, the Developer must file for the open space exemption – something that PCRS or its predecessors in interest have never done.[47] When the owner has never applied for an open space assessment exemption, the County's assessment of the land, consistent with the zoning classification, cannot be deemed a knowing and voluntary relinquishment of a known right to enforce the 130-acre, 18-hole golf course restriction.[48]

More fundamentally, no waiver or intentional relinquishment of the 130-acre, 18-hole golf course restriction can be found because the County, when applicable, has always sought to enforce the restrictions. For example, in 1982, soon after the *G.R.G.* decision, County Council adopted Resolution 82-092 seeking to enforce the restrictions. B42-44. The County also required the Cautionary Note to be placed on record plans. B40-41. The Three Bakers' additional restrictions recorded in 1985 reserved the County's claims regarding the Master Plan. B46. When other developers inquired about potentially building on golf course lands,

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[47] 9 *Del. C.* § 8106A(a); *Odessa Nat'l Golf Course LLC v. New Castle Cnty. Office of Finance*, 2014 WL 1101470, at *5 (Del. Super. Ct.) (also noting that '[t]here is a real question as to whether the 'public open space' exemption is applicable while the property still operates as a for-profit . . . business venture open to the public").

[48] In addition, an open space tax exemption is only applicable to real property required by the County to be set aside for open space in the zoning or subdivision process. 9 *Del. C.* § 8106A(a). The County *never* required the 130-acre, 18-hole golf course restriction – the Initial Developers *voluntarily* bound themselves to the applicable restrictions.

the County advised them of the process that needed to be followed to remove the restrictions. B59-62. PCRS, being the first owner to shutter the Golf Course, has been repeatedly advised, through Resolution 10-217 (A95-97) and otherwise, that the Restriction Change Statute must be followed before the golf course restrictions can be abrogated. A72-A86. Quite plainly, these consistent and repeated actions to enforce the 18-hole golf course specific use set-aside cannot be deemed unequivocal facts establishing waiver.[49]

2. The Contract Zoning Doctrine Does Not Invalidate The Master Plan.

Fifty years after the 1964 Agreement was executed and recorded, the Developer claims that the doctrine of contract zoning precludes the County from enforcing the 130-acre, 18-hole golf course restriction in the Master Plan. OB 28-29. Laches bars a challenge fifty years later.[50]

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[49] It is incorrect that the County's position here is a departure from prior legal positions. OB 28 n.5, 33. The Danner memorandum makes clear that development may be permitted "so long as 130 acres are reserved for a golf course use." A-38. The Mulholland memorandum also states that the restrictions "require 130 acres set aside for a golf course." A-30.

[50] *See Council of South Bethany v. Sandpiper Dev. Corp., Inc.*, 1986 WL 13707, at *3 (Del. Ch.). (holding that a thirteen-year delay between alleged contract zoning action and the legal challenge "erect[ed] a conclusive presumption as to the measure's validity."); *Hartman v. Buckson,* 467 A.2d 694, 699 (Del. Ch. 1983) (recognizing principle barring challenge to ordinance that has been accepted and relied upon by the public for a number of years, but refusing to apply that principle after only five years); *Jock v. Zoning Bd. of Adjustment of Twp. of Wall*, 2005 WL 3879580, *3 (N.J. Super. Ct.) (barring "zoning by contract" attack on variance that was granted more than 40 years prior); *Metro. Gov't of Nashville & Davidson Cnty. v. Hudson*, 148 S.W.3d 907, 911 (Tenn. App. 2003) (10 years); *Edel v. Filer Twp., Manistee Cnty.*, 211 N.W.2d 547, 549 (Mich. App. 1973) (18 years).

Even if the challenge to the Master Plan is not *per-se* time barred, the Court below correctly ruled that the Master Plan is "a scheme of voluntary restrictions which were conditioned upon the County's passing a zoning modification petition." Op. 736, n.17. Voluntary implementation of restrictions by the Initial Developers does not constitute "an ex parte deal done outside of the public process" or a contractually reserved "legislative veto over a parcel's future land uses." OB 29. There is nothing illegal about a private land owner voluntarily restricting the use of its land – and PCRS cites no case so holding. Here, there is no bilateral agreement between PCRS's predecessors in interest and the County–which is a prerequisite to a contract zoning claim.[51] Thus, there is no illegal contract zoning or cause to terminate the Master Plan.[52] While the voluntary imposition of restrictive

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[51] *See Wilmington Sixth Dist. Comm. v. Pettinaro Enter.*, 1988 WL 1164496, at *4 (Del. Ch.) ("in contract zoning, there is a bilateral agreement committing the zoning authority to a legally binding promise..."); *Morgan v. Nash Cty.*, 735 S.E.2d 615, 623 (N.C. App. 2012) (emphasis in original; quotations omitted) ("Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract"); Edward H. Ziegler, Jr., 3 Rathkopf's *The Law of Zoning And Planning* § 44:11 (4th ed. 2013) ("illegal contract zoning is likely to be found only where there is an express bilateral agreement that bargains away the municipality's future use of the police power.").

[52] As a matter of public policy, PCRS's contention that development controls should only be adopted through "zoning and subdivision" requirements must be rejected. OB 25. Restrictions similar to the restrictions contained in the Master Plan are common development tools to bind commitments made in the zoning and subdivision process. If such restrictions (which sometimes include commitments for sewer improvements, schools, open space, environmental cleanup, housing density, bus access, street access, parks, etc.) are unenforceable, the County would have no method to enforce them for the benefit of itself, homeowners, lot purchasers, and members of the public who rely on such commitments.

covenants is absolutely permissible,[53] at most, the Master Plan constitutes permissible conditional zoning because the County was not contractually obligated to rezone or take any action based upon the covenants proffered.[54]

3. The Master Plan Restrictive Covenants Were Not Merged Away In Any Subsequent Deeds.

The holding of the Court below that "the doctrine of merger . . . serves only to extinguish contracts for sale, not contracts memorializing voluntary land restrictions executed by the original owners – with a clear and express intent that those restrictions be imposed on their 'successors, transferees and assigns'" (Op. 753) should be affirmed because the intent of the Initial Developers was clearly to impose the restrictions contained in the Master Plan.

The Developer's merger by deed claim rests primarily on language (in Articles 1 and 2 of the 1964 Agreement) which is a contractual commitment to convey 12.5 acres of land. *See* OB 30 (stating that the Master Plan agreements constitute an agreement of sale). The Developer argues that, through this

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[53] The alleged admission that the Master Plan restrictions were a *quid pro quo* for a rezoning is incorrect. OB 29. A117-19 makes clear that the restrictions were: (1) voluntarily put in place; and (2) were attempts by the County to induce County Council to act. There was no binding bilateral commitment to rezone, and the County has never stated otherwise.

[54] *Wilmington Sixth Dist. Comm.*, 1988 WL 1164496, at *4 ("In conditional zoning . . . there is no binding obligation on the zoning authority to rezone the land even if the developer consents to the conditions proposed."); *Kerik v. Davidson Cty.*, 551 S.E.2d 186, 193 (N.C. App. 2001) (finding no contract zoning violation when there was no meeting of the minds an "no reciprocal assurances were made"); *Bucholz v. City of Omaha*, 120 N.W.2d 270, 276-78 (Neb. 1963) (same); *Dacy v. Ruidoso*, 845 P.2d 7922 (N.M. 1992) (same); 3 Edward H. Ziegler, Jr., Rathkopf's *The Law of Zoning And Planning* § 44:12 (4th ed. 2013) (stating that "courts uphold conditional rezoning so long as . . . there is no express agreement bargaining away a municipality's future use of the police power").

commitment, upon passage of title of the 12.5 acres, all of the remaining covenants and restrictions applicable to the "SUBJECT ACREAGE" (1,141 acres of land) were extinguished. OB 30-35. This argument ignores that the merger by deed doctrine "does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated into the deed, or which are not necessarily performed or satisfied by execution and delivery of the stipulated conveyance."[55]

If the parties intended the conveyance of 12.5 acres to merge out all covenants, there would be no reason to impose any restrictions on 1,141 acres of land, nor would there be any reason to amend the restrictions in 1969. The clear intent was to impose binding and enforceable restrictions.[56] PCRS fails to cite a single case, from any jurisdiction, holding that restrictive covenants like the covenants contained in the Master Plan, have been rendered unenforceable under the merger by deed doctrine.[57] The Court of Chancery below correctly held that the doctrine does not apply. Op. 752-53.[58]

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[55] *Golden v. Woodward*, 15 So.3d 664, 671 (Fla. App. 2009); *Feinstein v. Keenan,* 2013 WL 5969137, at *5 (Conn. Super. Ct.); *Kisicki v. Mid American Fin. Inv. Corp.*, 2002 WL 31654490, at * 7 (Neb. App.); *Miller v. Hutson*, 281 S.W.3d 791, 795 (Ky. 2009); *Drees Co. v. Osburg,* 144 S.W.3d 831, 833 (Ky. App. 2003); *Beck v. Smith,* 538 S.E.2d 312, 314 (Va. 2000); 77 Am. Jur. 2d *Vendor and Purchaser* § 244 (2014).

[56] To the extent there were any question regarding any intent to merge, the conveyance of 12.5 acres was expressly "[s]ubject . . . to certain covenants, conditions and restrictions upon the use and development of the herein described parcel and adjacent land, containing a total of 1141 acres to which above said instrument reference is made for a more detailed description of the aforesaid lands." A9.

[57] PCRS claims that "Delaware Courts have never failed to merge any pre-closing agreement . . . except relating to construction." OB 32. But many of the cases cited, which do not address restrictive covenants, recognize that the merger doctrine is not absolute and that

The Developer also claims that because a reference to the Master Plan was not contained in an earlier deed to the Pike Creek Valley Country Club Inc., the restrictions were merged out of existence with that deed. OB 30. However, there is nothing referenced that purports to extinguish the covenants and restrictions running with the land.[59] Moreover, PCRS's claim ignores the well settled principle that:

> [T]he enforcement of a restrictive covenant forming part of a general plan for the development of a subdivision is not affected by the fact that the restriction is omitted from the deed to the person against whom enforcement is sought, or omitted from the deeds in his chain of title, or omitted from deeds to other lots in the subdivision, if the person against whom enforcement is sought had actual or constructive notice of the restriction.[60]

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collateral agreements (and not merely construction claims) fail to merge upon deed recordation. *See, e.g. Reserves Dev. Corp. v. Esham*, 2009 WL 3765497, at *6 (Del. Super. Ct.) ("merger will not bar the enforcement of a promise that the parties clearly intended to survive the deed"); *Re v. Magness Constr. Co.*, 117 A.2d 78, 79 (Del. Super. Ct. 1955) ("Covenants collateral to the deed are exceptions to this rule."); *Reed v. Hassell*, 340 A.2d 157, 161 (Del. Super. Ct. 1975) (holding that merger issues are determined by the intent of the parties and "there are many special situations where the seller is required to comply with promises made in the sales contract even though a deed has been delivered and accepted.").

[58] It is the intent of the parties – not the form of restriction – which determines whether a restriction binds the land. Op. at 752-53 (citing *Reed*, 340 A.2d at 160); *see also* Henry J. McClintock, *Handbook of the Principles of Equity* § 125 (West 1948). And where, as here, an agreement is signed and expressly states that it "impose[s] . . . restrictions, limitations, and covenants" upon its "successors, transferees and assigns," it is unquestionably enforceable as a restriction which is not subject to merger by deed.

[59] *Leon N. Weiner & Associates, Inc. v. Krapf,* 623 A.2d 1085, 1088 (Del. 1993) (holding that a restrictive covenant may be created in a "deed of conveyance or another recorded document, e.g. a declaration of restrictions").

[60] J.E. Keefe, Jr., Annotation, *Omission From Deed of Restrictive Covenant Imposed by General Plan of Subdivision,* 4 A.L.R. 2d 1364 § 2 (1949). The key "principle" is "that a purchaser acquires property subject to those equities of which he has notice." *Jackson v. Richards,* 27 A.2d 857, 860 (Del. Ch. 1942) (citing Lord Cottingham's decision in *Tulk v. Moxhay*, Phill. Ch. 774, 41 Eng. Rep. 1142). Indeed, "if an equity is attached to the property of the owner, no one purchasing with notice of that equity can stand in a different situation…" even if the covenant is not recorded. *Id.; see also Cashvan v. Darling,* 107 A.2d 896, 901 (Del. Ch.

There is no dispute that PCRS had actual knowledge of the restrictions applicable to the Golf Course – they were forced to so admit at oral argument. Op. 749 n.128; 753 n.157; 763 n.222. Beyond this, Deed Book 621, Page 45, contained within PCRS's chain of title, states that the parcel is "[s]ubject to an Agreement between Mill Creek Venture and Frank A. Robino, Inc., dated September 10, 1964 . . . ". B58. Both the Hogan Drive plan and record plans for the Golf Course contained the Cautionary Note. B58. Record plans for the Golf Course, also contained within the chain of title,[61] made clear that "'Private open space' is established in accordance with the [1964] agreement as amended [by the 1969 Agreement] designating New Castle Co. as a third party beneficiary." B36-39. Because PCRS took title with actual, constructive, and title notice of the restrictions, the omission of a reference to the Master Plan in the 1972 deed is irrelevant. No merger by deed occurred.

1954) (holding that plaintiffs can get no aid from the fact that the plan was not recorded); *Greylag 4 Maint. Corp. v. Lynch-James*, 2004 WL 2694905, at *5 (Del. Ch.) (holding that question to be answered is whether the purchaser had actual or constructive notice of the covenant); *see also Thodos v. Shirk,* 79 N.W. 2d 733, 739 (Iowa 1956) (holding that "[t]he basis of the modern rule rests upon the equitable doctrine of notice – that he who takes land with notice, actual or constructive, of a restriction upon it will not in equity and good conscience be permitted to act in violation of the terms of the restriction.").

[61] 20 Am. Jur.2d *Covenants* § 161 (2014) ("[a] deed and the plat which includes the property granted must be read together, and whatever appears on the plat is to be considered as part of the deed"); *Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc.,* 1997 WL 525860, at *5 (Del. Ch.) ("notes on the final plan rise to the level of deed restrictions and therefore bind the land . . ."); UDC § 40.31.810A ("all notations appearing on a record plan, shall have the effect of restrictive covenants and shall run with the land covered by the record plan.").

4. The Statute Of Frauds Does Not Preclude Enforcement Of The 18-Hole, 130-Acre Restriction Of The Master Plan

PCRS's statute of frauds claim lacks merit because the 130-acre, 18-hole golf course restriction is contained in the 1964 and 1969 Agreements - both of which are signed by PCRS's predecessors in title. It has long been settled that where the County "is only attempting to enforce a deed restriction, which was signed by the . . . predecessor in title, there is no statute of frauds problem to be considered."[62] Simply, it is not necessary for the covenant to be incorporated into PCRS's deed to take it out of the influence of the statute of frauds – the covenant may be laid on the property by a separate writing, to which PCRS is not a party.[63]

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[62] *Welshire Civic Ass'n, Inc. v. Stiles,* 1993 WL 488244, at *2 (Del. Ch.). To the extent relevant, PCRS's efforts to manufacture a statute of frauds issue by reference to recorded plans (OB 35) also fails to demonstrate a statute of frauds problem. There are at least three Golf Course plans recorded with the County which are signed and contain the notation "'Private open space' is established in accordance with the [1964] agreement as amended [by the 1969 Agreement] designating New Castle Co. as a third party beneficiary." B37-39. The record plan for Hogan Drive, as well as the 1982 record plan for the Golf Course, contain the Cautionary Note and are signed. B40-41.

[63] *Heatherwood Holdings, LLC v. First Commercial Bank,* 61 So.3d 1012 (Ala. 2010) ("Nor is it necessary that the restrictive covenant running with the land should be incorporated in the defendant's deed to take it out of the influence of the statute of frauds; the servitude may be laid on the property by a separate writing, to which he is not a party, if he is in privity with and claiming under one of the parties thereto and has notice thereof."); *Leon N. Weiner & Associates, Inc.*, 623 A.2d at 1088 (holding that a restrictive covenant may be created by a declaration of restrictions); *Brumbaugh v. Mikelson Land Co.*, 185 P.3d 695, 702 n.1 (Wyo. 2008) (holding that the statute of frauds is not implicated when there is an existing declaration of restrictions and a subdivision plat). Even part performance of an oral golf course restriction takes the matter out of the statute of frauds. *Shalimar*, 688 P.2d at 688 (quoting 5 *Powell on Real Property*, ¶ 671, p. 60–20 (1980) ("It would not be fair, under such circumstances, to permit the grantor (or the grantor's successors taking with notice) to raise the absence of a writing as a defense.").

5. The Master Plan Sufficiently Identifies The Lands To Which The 18-Hole, 130-Acre Golf Course Restriction Applies.

The claim that the land area for which the golf course restriction applies cannot be ascertained is belied by the plain language of the Master Plan. OB 35. The 1964 Agreement defines the term "SUBJECT ACREAGE" by reference to specific deeds which comprise 1,141 acres of land. The 1969 Amendment similarly defines the parcels of land that outline the revised "subject acreage" consisting of 1,363 acres. A20. Just as the land area for schools, open spaces, and other uses were described, a 130-acre golf course is set-aside for a specific use on the subject acreage.

To the extent there were any questions about the lands to which the set-aside applies, the master plats and the Distributed Master Plat (A27) outline the area where the golf course would be built. Record plans for the Golf Course establish that private open space in accordance with the Master Plan. B36-39. No additional description of the lands for which the 130-acre, 18-hole golf course restriction applies is necessary. Simply, there is no metes and bounds description needed for enforcement of the requirement that 130 acres of the "SUBJECT ACREAGE" must be held for the specific use of an 18-hole golf course.[64]

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[64] *Shalimar,* 688 P.2d at 690-93 (holding that the golf course recorded on the plats had to remain a golf course in the absence of a metes and bounds description). The case of *Bave v. Guenveur,* 125 A.2d 256 (Del. Ch. 1956) does not hold to the contrary. There, the court reviewed whether a parcel of land was subject to deed restrictions applicable to Block O of

III. THE COURT OF CHANCERY PROPERLY DENIED PCRS'S PETITION FOR A WRIT OF MANDAMUS.

A. Question Presented

Did the Court below abuse its discretion in denying the Developer's petition for a writ of mandamus when: (1) the Developer refused to follow the Restriction Change Statute when processing its plans; (2) the County stated by resolution and in writing that it would process the Developer's plans; (3) the Developer's engineering plans failed to comply with County Code; and (4) the Developer failed to exhaust its available administrative remedies?

B. Scope of Review

The denial of a petition for mandamus is reviewed for abuse of discretion.[65]

C. The Court Below Properly Denied Petitioner's Request For A Writ Of Mandamus.

1. The Terraces Mandamus Claim Fails.

As stated above, the Terraces plan does not comply with the restrictions or the County Code because: (1) a minimum of 130 acres of land is not set aside for an 18-hole golf course use; and (2) a golf course is not allowed as a component of community open space under the County Code. Thus, there is no clear legal right

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Westover Hills. The applicable property descriptions did not show any intent to include the parcel within Block O, and the restrictions were therefore inapplicable. Here, by contrast, the "SUBJECT ACREAGE" is defined by deed references outlining the lands subject to the 130-acre, 18-hole golf course set-aside.

65 *Bruton v. Carroll,* 834 A.2d 826 (Table), 2003 WL 22321049, at *1 (Del. Supr.).

to the performance of a non-discretionary duty,[66] and the denial of the mandamus petition should be upheld on this basis alone. Op. 765, n. 226.

Even if the Court were to reach the Developer's arguments, mandamus was properly denied because it is settled that "mandamus will not lie unless the petitioner has no other remedy."[67] The Court below denied mandamus relief because PCRS has another remedy – the Restriction Change Statute. Op. 765. On appeal, the Developer does not contend that this remedy is unavailable; rather, it contends (even though it was successful in obtaining a restriction change for Pike Creek Healthcare) that the Court below erred in holding that PCRS failed to overcome its "high burden" of demonstrating futility.[68] OB 37. The Court did not err in holding that "PCRS cannot rely on the County's opposition to the lawsuit as a basis to claim the restriction change process would be futile." Op. 763.

Since the fall of 2010, the County has repeatedly advised PCRS that it will review the Terraces plan and that PCRS should follow the restriction change process if it desires to pursue a new use.[69] The Developer simply refused. This refusal necessitated the County's filing of suit[70] to confirm the applicability of the

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66 *Pleasanton v. Hugg,* 2010 WL 5313228, at *1 (Del. Super. Ct.).

67 Op. 761 (citing *Brittingham v. Town of Georgetown,* 2011 WL 2650691, at *2 (Del. Super. Ct.)).

68 *Salem Church (Delaware) Associates v. New Castle Cnty.,* 2006 WL 2873745, at *5 (Del. Ch.); *Kejand, Inc. v. Town of Dewey Beach*, 1996 WL 422333, at *3 (Del. Ch.).

69 *See supra* note 2.

70 The County was required to seek judicial review of the Master Plan restrictions under *G.R.G.*. *See* Second Op. at *2 (citing *G.R.G.* and holding "[t]he County brought this action to

130-acre, 18-hole golf course restriction. The County would not be before this Court if PCRS would have voluntarily followed the Restriction Change Statute process to request removal of the restriction. Instead, PCRS elected to shun the statutory process, "presumably based on its [incorrect] belief that no use restrictions on the golf course exist." Op. 763. The futility doctrine cannot be used as a refuge to avoid the very process for which the County sued to force the Developer to follow.[71]

2. The Hogan Drive Mandamus Claim Similarly Fails.

The Court of Chancery properly denied a writ of mandamus for the Hogan Drive applications pursuant to 9 *Del. C.* § 1309 – a statute that creates a presumption of approval (and not an automatic approval right) for applications not acted upon in 45 days. Op. 764. As a matter of law, mandamus cannot lie to compel a *rebuttable statutory presumption*[72] because the writ is only available to enforce a clear legal right to a non-discretionary duty.[73]

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the Court, as it should have, for a determination as to whether a particular use restriction applied to land that PCRS sought to develop.").

[71] *Neiman v. Yale University,* 851 A.2d 1165, 1174 (Conn. 2004) ("[t]he mere possibility, or even likelihood, of an adverse decision does not render a remedy futile."); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379-80 (Fed. Cir. 2007) (noting that "[t]he mere fact that an adverse decision may have been likely does not excuse a party from . . . exhausting administrative remedies").

[72] *State v. Lee,* 74 A. 4, 6 (Del. Gen. Sess. 1909) ("[T]he law presumes all persons to be innocent . . . This presumption of innocence, however, is rebuttable."); *Potter v. Gustasfon,* 192 A.2d 453, 456 (Del. Ch. 1963) (implied easements presumption may be rebutted).

[73] *Delaware Saltwater Sport Fishing Ass'n, Inc. v. Dept. of Nat. Resources,* 513 A.2d 1318, 1986 WL 17134, at *1 (Del. Supr.) ("[i]t is fundamental that a writ of mandamus will not lie to compel the performance of a discretionary duty").

Even if mandamus were a proper remedy, the presumption is rebutted under the facts in this case. On October 13, 2010, when PCRS appealed the County's September 23, 2010 review letter to the Planning Board, it expressly incorporated the revised plans.[74] B88. Recognizing that the ultimate development design of the Terraces would be impacted by the Planning Board decision, the Department put review of the plan submission on hold. B181-85.[75] On December 7, 2010, before the Planning Board hearing, the County sent its review of the revised application to PCRS, finding it deficient. B92-94. Later, the Planning Board held that the both the September 23, 2010 submission and the revised engineering applications are not Code compliant.[76] B127-35

The presumption of approval is rebutted because PCRS's submissions are deficient on their face (as the Planning Board held) – and mandamus cannot

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[74] It has long been settled that perfection of an appeal divests the lower body of jurisdiction over the cause of action. *Radulski v. Delaware State Hospital,* 541 A.2d 562, 567 (Del. 1988). The same rule applies for an administrative appeal. "When a notice of appeal from a decision of an administrative agency has been filed, the agency is divested of its inherent jurisdiction to . . . modify the decision . . .". *In re Charter Hospital of Cincinnati, Inc.*, 1990 WL 212629, at *9 (Ohio App.); *Cicchine v. Twp. of Woodbridge,* 995 A.2d 318, 322 (N.J. App. 2010) ("[t]he filing of a notice of appeal invokes the jurisdiction of the appeal tribunal and divests . . . jurisdiction except as reserved by statute or rule.").

[75] The Developer's assertion that the County's position is (and purportedly continues to be) that the land is dedicated to the public (OB 38) is simply incorrect. *See* B206-07.

[76] The contention that the Hogan Drive plans "would no longer be regarded grandfathered" if PCRS is required to follow the County Code in processing a resubdivision plan (OB 13) is incorrect. *See* UDC § 40.08.130(C) (stating that resubdivision plans that do not conform with the UDC may maintain such nonconformity but shall not increase the nonconformity).

compel a violation of the law.[77] Op. at 764.[78] Additionally, as the Court held, the presumption is also rebutted because there was no dilatory conduct by the County. Op. 765. The County reasonably held review of the revised submission because PCRS incorporated the submission into its appeal and because the ultimate design depended on the outcome of the appeal. B181-85. Under these facts, the presumption that the County acted regularly and in good faith trumps[79] any purported presumption of approval of applications – especially when PCRS's own actions caused the delayed response. B88.[80] The Court of Chancery did not abuse its discretion in denying the writ. Op. 764-65; B190-98.[81]

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[77] "Although mandamus is a legal remedy, it is governed by equitable principles . . . and will not issue to compel a violation of the law . . . Numerous cases have denied writs of mandamus where automatic approval [statutes] conflicted with other laws." *Sciortino v. Town of Trumbull*, 1999 WL 1212281, at *1 (Conn. Super. Ct.).

[78] PCRS's contention that its "plans conform to the laws in effect at the time that the applications were made" (OB 39) is not supported by the record. Just as the Planning Board twice held, the plans were never valid. *See* Op. 764. Moreover, PCRS's remedy for any alleged error of the Planning Board's decisions is properly decided in the pending certiorari cases. *Pleasanton,* 2010 WL 5313228, at *1; *Cheswold Aggregates, L.L.C. v. Town of Cheswold,* 1999 WL 743339, at *3 (Del. Super. Ct.) (holding mandamus improper when an appeal is available).

[79] Op. at 765, n. 214 (officials are presumed to carry out their duties appropriately).

[80] *See Cicchine,* 995 A.2d at 322 ("The automatic approval is intended to remedy bad faith or overreaching or dilatory conduct of the Board. It should not be applied when the inaction was inadvertent or where there is no evidence of intentional delay or inattention to the application."); *Penllyn Lands v. Bd. Of Supervisors of Lower Gwynedd Twp.,* 638 A.2d 332, 336 (Pa. Cmwlth. 1994) (holding that when there are no "evidence of bad faith or deliberate inaction on the part of township officials . . . allowing a deemed approval for non-substantive reasons despite the plan's alleged violations of Township ordinances would result in 'an undeserved windfall benefit'").

[81] The claim that applications will "sit dormant" if mandamus is not granted has no factual basis. OB 38. The County has repeatedly stated that it will process PCRS's plan applications – but the Developer must follow the Restriction Change Statute or submit plans that comply with the Master Plan covenants for the Terraces and submit Code compliant plans for Hogan. Simply, there can be no due process violation (OB 39) for the County seeking to compel the Developer to follow the very process that the Code requires to request alteration of the restrictions.

IV. THE COURT PROPERLY DENIED PCRS'S MOTION FOR A STAY.

A. Question Presented

Did the Court of Chancery abuse its discretion in denying PCRS's requests for an indefinite stay of County Code expiration deadlines, where: (1) PCRS did not attempt to process its plan during the litigation; (2) PCRS failed to request available extensions of expiration deadlines under the County Code; and (3) with applicable extensions, PCRS's plan applications will not expire until January 2015?

B. Scope of Review

The Court reviews a denial of a stay request for an abuse of discretion.[82]

C. The Court Properly Denied The Stay Request.

The denial of an indefinite stay of statutory deadlines should be affirmed at the outset because, as the Court below held, "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law"[83] – and PCRS requests a remedy that violates a statute. The UDC requires a submitted plan to be processed within given time frames[84] – and (with extensions) the Terraces application faces a statutory expiration deadline of

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82 *Parfi Holding AB v. Mirror Image Internet, Inc.*, 926 A.2d 1071, 1075 (Del. 2007).

83 Second Op. at *5 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997); *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893)).

84 *See* UDC Table 40.31.390.

January 8, 2015. As this statutory requirement cannot be disregarded by the Court, there is no abuse of discretion in denying the stay. [85]

The Court's exhaustion ruling should also be affirmed. Second Op. *6-8. An issue is not ripe[86] for review if the request is based on "uncertain and contingent events" that may not occur, or where "future events may obviate the need" for judicial intervention.[87] Where PCRS has neither sought extensions available under the Code nor been denied an extension, its request for a stay based upon uncertain events (*e.g.* an anticipation of denial) renders the stay request unripe.[88] Even if an extension request were denied, PCRS would be required to exhaust its administrative remedies before seeking judicial intervention.[89]

Further, the future events prong of the ripeness test is also not met because if the underlying decision on appeal is affirmed, the Terraces plan cannot be

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85 *See Newark Landlord Ass'n v. City of Newark*, 2003 WL 22724663, at *1 (Del. Ch.) (holding that municipal codes have the same presumption of validity as a statute). In an appropriate case, the automatic stay sought by PCRS could also cause a violation of 9 *Del. C.* § 2659(c) (requiring compliance with new traffic and environmental laws after an application is pending for five years).

86 "Ripeness . . . goes to the very heart of whether a court has subject matter jurisdiction." *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

87 *XL Specialty Ins. Co. v. WMI Liquidating Trust*, - A.3d -, 2014 WL 2199889, at *6 (Del. Supr.).

88 Under Delaware law, until the Developer "obtain[s] a final decision" on a request for an expiration extension and exercises "any of the several [County] administrative remedies available to it," the Developer's "claims will not be ripe for adjudication.'" *See Toll Bros., Inc. v. Wicks*, 2006 WL 1829875, at *7-8 (Del. Ch.).

89 Second Op. at *5-6; *Christiana Town Center, LLC v. New Castle Cnty.*, 2003 WL 21314499, at *4-5 (Del. Ch.) (dismissing an action because Plaintiff had an adequate remedy through an appeal to the Planning Board); *Hundley v. O'Donnell*, 1998 WL 842293, at *3-5 (Del. Ch.) (same).

approved because it violates the law and the restrictions. This moots the stay request and obviates the need for judicial intervention. Second Op. *8. Beyond this, even if PCRS's Terraces application expired,[90] PCRS would suffer no prejudice because it would only be required to resubmit its plan – and PCRS can cite no newly enacted County Code provisions which would impair its application upon resubmission. The fear that the County *might* adopt a new ordinance that *might* impact the Terraces plan *if* PCRS seeks to resubmit its plan after expiration in January 2015 is insufficient to establish a ripe request.[91] Second Op. *8. Public policy and the circumstances of this case mandate denial of an indefinite stay, and the stay decision should be affirmed because the Court of Chancery did not abuse its discretion.[92]

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[90] Once a plan has expired, it is void and has no legal effect. A subsequent submission must comply with the regulations as they exist on the day of such submission. UDC § 40.33.300 (definition of expire).

[91] The stay request should also be upheld because PCRS's alleged harm is self-inflicted. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.")). When the Developer has refused to recognize the 18-hole, 130-acre golf course restriction, and seeks instead to construct 288 housing units and 62,000 square feet of commercial development without any land being set aside for a golf course, and has failed to process the applications it submitted (B125-26), it should not receive the benefit of an indefinite stay of expiration deadlines.

[92] An automatic indefinite stay of land development deadlines during litigation creates a perverse incentive for developers to file suit against municipalities if the developer is dilatory. Developers should not be encouraged to sue municipalities so they can avoid statutory commands. As a matter of public policy, no *per se* automatic stay of expiration deadlines should be permitted. Stay requests, if permissible under *Reno,* 520 U.S. at 485, should be decided case by case.

CONCLUSION

For the reasons stated herein, New Castle County respectfully requests that the decisions of the Court of Chancery be affirmed and that PCRS's interlocutory appeal arguments be denied.

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