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Case Number 36,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PIKE CREEK RECREATIONAL SERVICES, LLC,	)	No. 36,2014
Defendant-Petitioner Below, Appellant,	)	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)
v.	)	
NEW CASTLE COUNTY, Subdivision of the State of Delaware,	)	
Plaintiff-Respondent Below, Appellee.	)	

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant Pike Creek Recreational Services, LLC ("PCRS") appeals two interlocutory orders issued in a consolidated action which reflect the efforts of Appellee New Castle County (the "County") to block PCRS from constructing a mix of mostly residential improvements on about 37 acres of the former Pike Creek Valley Golf Course and Country Club (the "Former Golf Course") while leaving about 140 acres of the Former Golf Course as open space. In the first action, *New Castle County v. Pike Creek Recreational Services*, LLC, C.A. No. 5969 (Del. Ch.) (the "Chancery Action"), filed on November 9, 2010, the County sought a mandatory injunction compelling PCRS to continue to operate an 18-hole golf course on its land in perpetuity. Alternatively, the County sought a declaratory judgment requiring PCRS to hold all 177 acres of the Former Golf Course as undeveloped open space in perpetuity. To support its position, the County asked the Court to interpret, restrictively: a recorded 1964 agreement as modified by an unrecorded 1969 Amendatory Agreement (collectively, the "Agreements"); an unrecorded 1969 concept plan for all of Pike Creek Valley (± 1,363 acres); and a recorded 1971 subdivision plan for an 18-hole golf course on 199 acres. The County later amended its complaint asserting, *inter alia,* that PCRS may not redevelop or use (except as an 18-hole golf course) any portion of the

Former Golf Course without first obtaining County Council's consent under New Castle County Code § 40.41.130 (the "Restriction Change Statute").

In the second action, *Pike Creek Recreational Services, LLC v. New Castle County, et al.*, C.A. No. N10M-12-005 PRW (the "Mandamus Action"), filed on December 1, 2010, PCRS sought to compel review and approval of its development plans for approximately 175 acres of the Former Golf Course (the "Terraces Plan"), and its engineering drawings for 20 townhome lots along Hogan Drive, subdivided in 1981 (the "Hogan Lots"). PCRS asked the Court to issue a writ of mandamus as in *G.R.G. Realty v. New Castle Cnty*, 1981 WL 697909 (Del. Super. Ct. Dec. 30. 1981), which ordered the County to review and approve development plans for the Former Golf Course without asserting its own view of the Agreements as grounds for refusal. PCRS also asked the Court to hold that the County's failure to respond to PCRS's Hogan Lot drawings within the times set by law renders them statutorily approved under 9 *Del. C.* § 1309.

The Court consolidated the Chancery and Mandamus Actions (together, the "Consolidated Action") and assigned the Consolidated Action to a single judicial officer. In August 2011, the County and PCRS each moved for partial summary judgment. Judge Parkins heard oral argument on these motions in November 2011. Before deciding the motions, the Court transferred the actions in April 2013 to Judge Wallace. On September 5, 2013, Judge Wallace issued an order (the

"Order") holding that the Agreements (a) do not require perpetual operation of a golf course or forbid development of the Former Golf Course, but (b) do require "PCRS to set aside a minimum of 130 acres of land which may feasibly be developed as an 18-hole golf course." On the County's Motion for Clarification or Limited Reargument, Judge Wallace clarified that none of the land set-aside for a possible, though not required or desired, future golf course may be used in the meantime for any other purpose, including open space, unless County Council approves such other use under the Restriction Change Statute. On December 30, 2013, the Court below issued a revised order, *Pike Creek Recreational Servs., LLC v. New Castle Cnty.,* 82 A.3d 731, 753 (Del. Ch. 2013) (the "Opinion" or "Op.") reflecting the clarifications described in its opinion on the Motion for Clarification. That same day, Judge Wallace issued an opinion, *New Castle Cnty. v. Pike Creek Recreational Servs., LLC,* 2013 WL 6904387 (Del. Ch. Dec. 30, 2013) (the "Stay Opinion" or "Stay Op.") denying PCRS's Motion for Stay of Time Periods to extend the deadlines on PCRS's applications for a period equal to the over three year delay caused by the pending litigation.

On January 9, 2014, PCRS filed a motion for certification of interlocutory appeal of the Opinion and the Stay Opinion which Judge Wallace granted. On February 11, 2014, this Court entered an order accepting the interlocutory appeal. This is PCRS's opening brief on appeal.

SUMMARY OF ARGUMENT

1. The Court below erroneously interpreted the Agreements as requiring PCRS to "set aside," again, at least 130 acres of open space for an optional golf course. The original developers did this already years ago. An 18-hole golf course was constructed and operated by subsequent owners, including PCRS, until it was no longer viable. The Agreements did not require that a golf course be built and operated, and do not prohibit its being discontinued. They neither mandate nor intimate that PCRS must repeat the original "set-aside" of open space for an 18-hole golf course that will likely never again be built.

The Court below also erroneously read into the Agreements additional requirements, which are neither written nor implied, that PCRS must set-aside land of sufficient quantity, quality, contiguity and configuration to permit construction of an 18-hole golf course under present laws and regulations; and that PCRS may not use the open space thus set aside for any non-golf purpose, *even open space*. Based on these new restrictions, the Court below erred in holding that PCRS must obtain County Council's discretionary consent under the Restriction Change Statute to incorporate 140 ± acres of open space into the Terraces Plan that will not be devoted to golf course use. County Council already consented to the land being "Open Space" when it approved the Agreements, and its ministerial consent to the Terraces Plan when approved by the Land Use Department is required by law.

2. Even if the Agreements could be read as promising to set aside, and not use for any other purpose, an indeterminate number of acres for future golf course "development," the County cannot enforce that promise because (i) it has waived enforcement by taxing PCRS's 177 acres as developable; (ii) its interpretation of the Agreements constitutes illegal, and thus unenforceable, contract zoning; (iii) PCRS never signed any written agreement promising to set aside an indeterminate portion of its land for a future golf course, had no actual or constructive notice that it was accepting that duty, and cannot be held to it under the Statute of Frauds; and (iv) the Agreements do not identify PCRS's lands as distinct from the other 1,363 acres in Pike Creek Valley.

3. The Court below erred in dismissing the petition for a writ of mandamus. PCRS submitted engineering drawings for the Hogan Lots in compliance with all health, safety and welfare requirements. These drawings were deemed approved when the County failed to respond within the statutory period. County Council's adoption of two resolutions directing that no engineering approvals or building permits be issued, and its status as a litigant here, makes forcing PCRS to pursue further administrative approvals futile.

4. The Court below erred in holding that PCRS's request for a stay was not ripe and requiring PCRS to seek brief discretionary extensions that conflict with County Council's resolutions, and that would be inadequate even if granted.

STATEMENT OF FACTS

A. Parties

Appellant PCRS is a Delaware limited liability company that owns the 177 acre former Pike Creek Valley Golf Course and Country Club.

The Appellee, New Castle County, is a political subdivision of the State of Delaware with jurisdiction over the Former Golf Course.

B. The Original Developers And Their Plan

Pike Creek Valley initially comprised 1,100 ± acres assembled in the early 1960s by Frank A. Robino, Inc., Luigi Fortunato, Inc., Franklin Associates Inc. and Joseph P. Johnson, Inc., trading as Mill Creek Venture (the "Venture"). (A74.) Their vision for the residential, commercial, office, institutional and open space development of this land appears in an "Agreement" dated September 10, 1964 (the "1964 Agreement") selling 12.5 acres to Frank A. Robino, Inc., and anticipating future conveyance of the remainder of the land to various developers and builders. (A74, A7-18.) The Agreement contains stipulations regarding the future of Pike Creek Valley, including a "set-aside" of 158 acres of Open Space and possible (but not required) construction of a par 3 golf course. (A75, A101.) Four articles of the 1964 Agreement address these uses:

> 7. 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 158.0 acres minimum

* * *

10. The preliminary tentative, comprehensive master plan of Pike Creek Valley shows an area, largely zoned R-4, set aside for a par three golf course or other recreational use.... [I]f the preliminary tentative, comprehensive master plan and the application for rezoning and the ultimate zoning is amended to show the golf course area zoned C-2, [then] such area will be used for commercial recreational purposes only; or a non-profit recreational use.

* * *

12. The acreage set aside for commercial use on the updated master plan and rezoned for that purpose; whether the classifications be C-1, C-2, R-C or C-3, shall be utilized for the land uses and purposes described in the Zoning Code of New Castle County as the same now is or may hereafter be amended to restate such uses; provided, however, and as the only exception to the foregoing, the area shown on the updated master plan set aside for a par three golf course, if zoned commercial shall only be used for a recreational purpose.

* * *

15. The duration of this agreement shall be for the longer term of two periods, i.e., a period of ten (10) years or until the last dwelling unit is constructed on the SUBJECT ACREAGE within the permissible limits set forth in this agreement. On or before the end of the term of this agreement the *158 acres of open spaces* as shown on the preliminary, tentative master plan, excepting only such acreage as referred to in Article #10, and any additional acreage as provided in Article 8, shall be: conveyed without charge (a) to the Levy Court or (b) to a home owner's association at the DEVELOPERS' option.

(A12, A14, A15) (emphasis added). In December of 1964, the Levy Court rezoned the assembled land to facilitate its development. The 1964 Agreement was then recorded with the Recorder of Deeds. (A74, A76, A7.) No graphic plan depicting

an area for a par 3 golf course was attached to the 1964 Agreement or otherwise recorded, nor was any land zoned C-2 for golf course use.

C. The 1969 Amendment

On December 22, 1969, the Venture executed an Amendatory Agreement (the "1969 Amendment") expanding Pike Creek Valley by 250± acres and applying the 1964 Agreement, as amended by the 1969 Amendment, to the entire parcel. (A77, A19.) Article 3 of the 1969 Amendment changed the Open Space and golf course set-asides in the 1964 Agreement as follows:

> The provisions of Article 7 of the [1964 Agreement] as to areas set aside for specific land uses are amended to read as follows:
>
> * * *
>
> 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

(A21) (emphasis added). Article 7 of the 1969 Amendment replaced Article 10 of the 1964 Agreement with the following text:

> 10. The updated tentative comprehensive master plan of Pikecreek (*sic*) 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.

(A23.) Article 9 of the 1969 Amendment modified Article 12 of the Agreements so that it says "the area shown on the updated master plan set aside for a 18-hole golf course, if zoned commercial shall only be used for a recreational purpose."

(A24.) And Article 15 of the 1964 Agreement was changed to read:

> The duration of this agreement shall be for the longer term of two periods, i.e., a period of ten (10) years or until the last dwelling unit is constructed on the SUBJECT ACREAGE within the permissible limits set forth in this agreement. On or before the end of the term of this AGREEMENT, the 85 acres of open space, as shown on the updated preliminary temporary comprehensive master plan, together with any additional open space set aside in accordance with the provisions of Article 8, shall be: conveyed without charge either to New Castle County Council or its subordinate agency or commission or to a home owner's association at the DEVELOPERS' option.

(A24.) Thus, while increasing the "set-aside" for Open Space from 158 to 215 acres, the 1969 Amendment (unlike the 1964 Agreement) allowed a significant portion of such Open Space – at least 130 acres – to be used for a possible, but not mandatory, 18-hole golf course. The 1969 Amendment also reduced, from 158 to 85 acres the amount of Open Space that had to be donated to County Council or homeowners associations before the Agreements expired. On January 15, 1970, after approving the 1969 Amendment, County Council enacted a further rezoning ordinance applicable to Pike Creek Valley. This ordinance left unchanged the "R-4" Residential classification of the open space set-aside for an 18-hole golf course even though R-4 zoning prohibited such land from being developed or used as a golf course. (A-78, A99-100, A121.)

The updated tentative master plan prepared in conjunction with the 1969 Amendment shows approximately 199± acres labeled "Flexible Golf Course, Buffers and Open Space – Not All Committed. Schematic." (A78, A27.) It was not adopted as an ordinance or recorded. Changes made by the subsequent approval of new subdivision plans, including the number of new units and open space, were tracked internally by the Planning Department. (A93-96, A98.)

D. The 1971 Golf Course Plan

In 1971, a subdivision and land development plan laying out an 18-hole golf course on approximately 199± acres of the Pike Creek Valley (the "1971 Golf Course Plan") was approved by the Planning Department and then recorded, after which an 18-hole golf course was constructed. (A29.) To allow this use without rezoning the land, the Venture sought and obtained a Special Exception from the Board of Adjustment. (A79, A28, A29, A98, A107, A146.) This preserved the land's residential development potential for the future.

The 1971 Golf Course Plan bears a note stating that "'PRIVATE OPEN SPACE' is established in accordance with the Agreement As Amended. . . ." (A146, A155.) Nothing in this note or elsewhere on the plan suggests that this "Private Open Space" cannot be used as open space or is otherwise restricted against all uses except future golf course development. The golf course has retained its residential zoning despite being taxed as a commercial golf course and

the countywide rezoning that took place in 1998. The County's Comprehensive Development Plan consistently has designated the golf course for high density residential in fill. (A123, A194.)

E. G.R.G. Attempts to Develop the Former Golf Course

In 1982, G.R.G Realty Co. ("GRG"), having acquired the golf course land, submitted a proposed revision of the 1971 Golf Course Plan to the Planning Department (now the Department of Land Use) seeking to create 20 townhouse lots on a 1.4± acre portion of the golf course along Hogan Drive (the "Hogan Plan"). (A80, A103.) Initially, the Planning Department refused to process the plan because the then Acting County Attorney opined that no portion of the Golf Course could be developed. (A101-02.) Her position reversed a 1980 written opinion of the preceding County Attorney that portions of the golf course over and above 130 acres could be developed. (A109-10, A30.) GRG sought a Writ of Mandamus and Judge (later Justice) Christie ordered the Planning Department to perform its statutory duties, holding that interpretation and enforcement of the 1964 Agreement, the 1969 Amendment, tentative concept plans and other alleged restrictions applicable to Pike Creek Valley were matters for determination by the Courts, not by the County. *G.R.G. Realty Co. v. New Castle Cnty.*, 1981 WL 697909, at *3 (Del. Ch. Dec. 30, 1981). The County did not appeal this decision, and the Planning Department approved the Hogan Plan with a note that the

applicability and meaning of the Agreements was undetermined.[1] Thereafter, the County assigned each of the 20 Hogan Lots a separate tax parcel number, and the County has zoned, assessed and taxed each of the Hogan Lots as a buildable townhouse lot for over 30 years. (A122, A51, A35.)

Eventually GRG went bankrupt, and the bankruptcy trustee sold the Golf Course and Hogan Lots to Three Little Bakers, Inc. (A81, A104-05.) PCRS purchased the property from the Three Little Bakers in 2008 (A82), after County Council's attorney issued an opinion in 2007 confirming that portions of the golf course, including the Hogan Lots, could be developed so long as a 130 acre set-aside remained. This conclusion was supported by opinions of other County attorneys written in 1980, 1987 and 1991. (A32.)

F. PCRS Attempts to Develop the Former Golf Course

In June of 2010, having attempted without success to operate the golf course profitably, PCRS filed engineering drawings for the development of the 20 Hogan Lots with the County Department of Land Use (the "Department"). (A82-83, A106.) At first, the Department processed PCRS's engineering drawings for the Hogan Lots in accordance with the grandfathered 1981 subdivision plan (the "Hogan Plan"). Both the County and Delaware Department of Transportation

[1] The 1971 Golf Course Plan has been revised nine times, changing its configuration and reducing its size to 177 acres. Each such revision was signed by County Council, including the revisions that created 20 townhouse lots along Hogan Drive, discussed below.

("DelDOT") requested revisions, which PCRS agreed to make, that would help solve an off-site drainage problem along Hogan Drive. (A112.) However, on September 23, 2010, the Department informed PCRS that no further review would take place unless PCRS proved that development of the Hogan Lots would not violate the Agreements or concept plans applicable to Pike Creek Valley. (A52.) The County also decided, based on the engineering changes PCRS had agreed to make *at the request of the County and DelDOT*, that the Hogan Plan would no longer be regarded as "grandfathered," and that a new subdivision approval was required. PCRS timely appealed this decision to the County Planning Board (A113, A88), and filed revised engineering drawings that reverted strictly to the grandfathered Hogan Plan by eliminating the changes.

In November 2010, PCRS filed the Terraces Plan with the Department. This plan proposed construction of improvements on about 36 acres, leaving approximately 140 acres of the Former Golf Course devoted to use as open space. (A73, A106, A115, A90.) On November 9, 2010, County Council adopted Resolution 10-197, declaring that the Agreements prohibited any further construction on the Former Golf Course, including the Hogan Lots. (A114, A55-56.) This Resolution (and a subsequent one) authorized the commencement of litigation against PCRS, and directed the Department not to issue PCRS any engineering approvals or building permits for residential or other construction on

the Former Golf Course, including the Hogan Lots. (A114-15, A55-56.) Consistent with this directive, the Department made no response within the statutory time period to PCRS's revised engineering drawings for the Hogan Lots.

On December 1, 2011, having received no response from the Department within the statutorily required time, PCRS filed the Mandamus Action. (A57-65.) The County then belatedly responded to PCRS's revised engineering drawings, stating, *inter alia*, that the Hogan Lots' compliance with the Agreements was in doubt. This was underscored by a December 29, 2010 letter from the County's legal counsel warning that PCRS could proceed only at its own risk because, at the end of the review process, no approvals or permits would be issued. In recognition that this litigation would determine whether, and to what extent, PCRS's plans were viable, the parties ultimately agreed to defer the plan review process, not foreseeing that more than three years of delay would occur. Despite the impending July 8, 2014, expiration date for the Terraces Plan, the County refused PRCS's request to stipulate to a day-for-day extension until this litigation is resolved.

ARGUMENT

I. THE TERRACES PLAN COMPLIES WITH THE AGREEMENTS SO THE RESTRICTION CHANGE STATUTE DOES NOT APPLY

A. Questions Presented

Does the plain language of the Agreements require (i) the "set-aside," once again, of at least 130 acres (ii) having sufficient "quantity, quality, contiguity and configuration" to assure feasible construction under current law, in the indefinite future, of an optional, unlikely, 18-hole golf course, (iii) pending which, none of such land can be used for any non-golf purpose, including open space as shown on the Terraces Plan, (iv) without the County's discretionary consent under the Restriction Change Statute? Or does the plain language of the Agreements permit over 130 acres of the Former Golf Course to be used for open space purposes as shown on the Terraces Plan in accordance with the County's zoning and Comprehensive Development Plan? (A197.)

B. Scope Of Review

This Court reviews *de novo* a trial court's interpretation of a written agreement. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002).

C. Nothing In The Agreements Requires PCRS To Set Aside And Make No Other Use Of An Indeterminate Amount Of Its 177 Acres For Future Construction Of A "Feasible" Golf Course

The development and use of PRCS's land as proposed by the Terraces Plan, containing well over 130 acres of committed open space, complies with the plain language of the Agreements. That language requires the "set-aside," throughout Pike Creek Valley, of 215 acres of "Open Space." Of these 215 acres, 85 were to be, and undisputedly already have been, devoted to use as open space elsewhere in Pike Creek Valley, and donated to the County or homeowner associations as contemplated in the Agreements. The remaining 130 acres of open space were to be, and undisputedly already have been, "set-aside" for development of an 18-hole golf course that the original Venture had the right – but not the obligation – to build, retain and operate commercially. Such a golf course was, at the Venture's election, constructed and operated for nearly 40 years on land now owned by PCRS, before being closed. Under these circumstances, nothing in the plain language of the Agreements requires 130 acres of Open Space located within the Former Golf Course to be "set-aside," once again, for possible future construction of an unrequired, unwanted, and unlikely replacement golf course, pending construction of which this land cannot serve or be used as open space.

On the contrary, the plain language of the Agreements contemplates that land set-aside as Open Space would have non-golf uses. As noted in Article 10 of

the 1964 Agreement, the "preliminary tentative, comprehensive master plan for Pike Creek Valley" shows an area zoned R-4 "set aside for a par three golf course or *other recreational use*." (A13 § 10; emphasis added.) The same Article further provides that, if this land were ever rezoned commercial, "such area will be *used* for commercial *recreational* purposes only; or a non-profit *recreational use*." (*Id.*, Op. at 736; emphasis added.) Article 12 of the 1964 Agreement also requires that the lands shown on the tentative master plan for a par 3 golf course, if zoned commercial (which has never occurred), be used for a recreational purpose. (A15.) Clearly, the 1964 Agreement contains restricts no open space to golf course use.

The 1969 Amendment reinforced this plain language. Its substitution of the words "18-hole" for "par 3" makes clear that PCRS's land, if zoned commercial, would still have to be used for a "recreational purpose," which is much broader than golf course use. The 1969 Amendment increased the Open Space "set-aside" from 158 to 215 acres of which 130 could be used for a golf course, but did not alter the concept that land which might be used for a golf course could also serve other recreational purposes, consistent with its designation as Open Space. (A21.) ("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.") (emphasis added). The 1969 Amendment expressly recognized that the Venture was not required to build a golf course. (A23 ¶ 7) ("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 same shall be devoted to uses approved by the Department of Planning and the New Castle County Council.")

Since the parties do not dispute that construction of an 18-hole golf course commenced within five years, the requirement that any other uses of the land be approved by the County does not apply. But even if it did, nothing in the plain language quoted above requires PCRS to obtain approvals that the County has already granted. "Approved" uses of the open space set-aside for a golf course necessarily includes recognition and use of the land as "Open Space" by virtue of County Council's acceptance of the Agreements, its rezoning of the land based on them, and the Department's approval of the updated tentative comprehensive master plan for Pike Creek Valley (the "Master Plan"), on which an imprecisely depicted area of 199 acres is labeled "Flexible Golf Course, Buffers and Open Space – Not All Committed." (A27.) No further discretionary consent is needed from County Council under the Restriction Change Statute to recognize 140± acres of PCRS's land as "open space" and permit its use as such.

This conclusion is not changed by the language in Article 10 of the Agreements describing the "130 of the 215.00 set aside for open space" as being for the "specific use" of an 18-hole golf course. The very next sentence in Article 10 provides for other use of the 130 acres if construction of a golf course has not

commenced within five years. Under any rational construction of the Agreements, this language did not commit the Venture to hold in perpetuity at least 130 acres of open space for exclusive possible use as a future golf course that the Venture *could*, but *need not*, elect to construct, which could be put to no other use in the meantime, not even as "open space."

Finally, there is no language in the Agreements which requires any of the 130 acres to actually be used for golf course purposes, or in any particular fashion, or have any particular characteristics. Nor is there any language in the Agreements dictating what use may be made of lands formerly occupied by a golf course if, after being constructed and operated for decades, it was no longer economically viable and now closed. All that the plain language of the Agreements requires is that the 130 acres set-aside by the Venture for a possible golf course be treated as open space useable for recreational or other purposes. The development proposed by the Terraces Plan and the Hogan Lots complies with this requirement.

1. The Former Owners Fulfilled Their Obligations Under The Agreements So No Further Open Space Must Be Designated For A Golf Course On The Terraces Plan

By setting aside, and not rezoning, at least 130 acres of open space for a possible 18-hole golf course, the Venture satisfied all the golf course provisions in the Agreements. This satisfaction was not undone by the election to build a golf course that, after decades of operation, has been closed. The provisions of Article

7 of the Agreements stating what would happen if the land had been rezoned commercial or if the Venture failed to commence construction of a golf course within five years do not speak to the present facts. The County could have imposed use limitations by requiring restrictive notes on any of the plans it accepted from the 1971 Golf Course Plan forward. It did not. All obligations in the Agreements are now fulfilled.

2. Restrictive Covenants Should Be Interpreted In Favor of Free Use of Land

Delaware law favors the free and unhindered use of land. *Leon N. Weiner & Assocs., Inc. v. Krapf*, 623 A.2d 1085, 1088 (Del. 1993). Consistent with this principle, courts construe deed restrictions strictly and do not enlarge them by implication. *Mendenhall Village Single Homes Ass'n v. Dolan*, 655 A.2d 308 (TABLE), 1995 WL 33740 (Del. Jan. 24, 1995). Any doubt as to the meaning of a restriction should be resolved in favor of the grantee. *Gibson v. Main*, 129 A. 259, 260 (Del. 1925). Although the Court below applied these settled principles of Delaware law in finding that the Agreements do not require PCRS to construct and operate an 18-hole golf course or to hold all 177 acres of the Former Golf Course as undeveloped Open Space, the Court below erred in other important respects. The Court below departed from Delaware law by choosing a more restrictive and burdensome interpretation of the Agreements rather than a less restrictive and more sensible interpretation. Reasoning that the Venture's "commitment" to set aside

130 acres for possible future development of an optional 18-hole golf course (that the Venture might never build) would be "illusory or meaningless" if additional protective restrictions were not implied, the Court held that the Agreements imposed three unwritten, affirmative and burdensome covenants on PCRS.

First, the Court below has required PCRS to set aside, all over again, at least 130 acres of open space for possible future development of an 18-hole golf course, as if this had not already been done by the original developers decades ago. Beyond any question, the Venture's "commitment" in this regard was fulfilled when it not only set aside land for, but also constructed, an 18-hole golf course. As discussed above, nothing in the Agreements requires or intimates that, after an optional 18-hole golf course had actually been developed, constructed, operated, and discontinued after nearly 40 years due to economic unviability, a new set-aside of 130 acres must be made for a hypothetical replacement golf course that PCRS does not want and is not required to build.

Second, the Court below required PCRS to assure that whatever acreage might again be set-aside for possible future development of an optional golf course has all the necessary "physical attributes – *i.e.*, . . . sufficient quantity, quality, contiguity and configuration – to accommodate development of an 18-hole golf course" in accordance with all currently applicable laws and regulations. Nothing in the plain language of the Agreements imposed any such duty on the Venture,

nor could such a duty have been intended because the land set-aside by the Venture could not, as zoned, have been developed lawfully for a golf course.[2]

Third, the Court below required that PCRS make no other use of the "130 acres of open space" to be set-aside for "specific use of development of an 18-hole golf course." To justify this, the Court construed the word "specific" as obligating PCRS to "ensure that no less than 130 acres is set aside for a single identified use: *development* of a golf course." (Op. at 748-49, 750.) This lone use of the word "specific" is not commonly used to impose a "sole and single" use restriction.[3]

More importantly, the Court's holding ignores a more sensible, non-exclusory, interpretation of the word "specific" as used in the Agreements. Open space is generally available for a wide range of general recreation uses, and the 130 acres of open space being "set-aside" were not zoned commercial to allow a golf course use. The Venture understandably needed to emphasize that these 130 acres of open space *could* (if the Venture wished and the County permitted) be used for the specific purpose of an 18-hole golf course. No authority, logic or common sense supports the conclusion that this language was intended to limit perpetually

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[2] The likelihood that future changes to current law, which historically are always more restrictive, will ultimately make even a renewed set-aside "illusory or meaningless," was apparently not considered by the Court below.

[3] *Compare Seaford Golf and Country Club v. E.I. duPont de Nemours and Co.*, 925 A.2d 1255, 1257 (Del. 2007) (deed limited land to specific use by stating "Grantee [the Club], its successors and assigns, agree to limit the use of the Property for golf, country club and related purposes....").

all 130 acres of "open space" to the "single" and "sole" purpose of golf course development, contrary to their zoning classification, while excluding all other lawfully permitted Open Space uses.

The determination of the Court below to preserve and perpetuate a golf course "set-aside" might be understandable if Pike Creek Valley were a community in which the builder had secured governmental approvals by promising to build and operate a public golf course, or had achieved home sales by promising to provide private memberships and course privileges. But that is not the case here. No golf course was promised. Home sales did not include rights to club membership or golf course privileges. (A198.) No deeds to adjoining lots contain golf course commitments or restrictions. (A139, A140, A142.) No plan was recorded showing residential lots abutting a golf course. (A196, A198.) The Venture's "set-aside" cannot become meaningless or illusory because the Venture actually constructed a golf course and operated it for nearly 40 years. Regardless of motivation, the Court's holding below obligates PCRS beyond promises made and kept by the Venture memorialized by the plain language of the Agreements.

The two cases cited by the Court below as authority for preventing the promised set-aside from becoming "illusory or meaningless" actually support PCRS. In both *Blue Rock Manor v. Hartline*, 1992 WL 251381 (Del. Ch. Sept. 29, 1992), and *Stecher v. Tate*, 1993 WL 287618 (Del. Ch. July 28, 1993), the Court

rejected the arguments advanced by the losing party because, if accepted, they would have made *other clauses* in the deed restrictions superfluous. *Blue Rock*, 1992 WL 251381, at *3 (holding that civic association's attempted reliance on general prohibition of noxious, dangerous or offensive uses to justify removal of fence, would make restriction specifically describing a process for approving fences, illusory); *Stecher*, 1993 WL 287618, at *3-4 (holding that interpreting deed restriction to permit erection of any building approved by a committee, would make meaningless a restriction limiting buildings to homes and garages). The holding of the Court below offends *Blue Rock Manor* and *Stecher* by rendering illusory and superfluous those clauses in the Agreements providing for "recreational" and other use of "Open Space" not devoted to golf course purposes.

3. PCRS Should Not Have to Apply Under The Restriction Change Statute To Proceed As Allowed By The Agreements

The Court below relies on the word "specific" in Article 7 of the 1969 Amendment, amending Article 10 of the 1964 Agreement, to justify restricting PCRS from making any open space use of the land "set-aside" for possible golf course development, and points out that the restrictions can be "changed with the assent of the County as granted by County Council" under the Restriction Change Statute. (Stay Op. at *3.) There are two problems with this reasoning.

First, it erroneously assumes that use of the set aside "open space" in conformity with the land's R-4 zoning was not already "approved" by County

Council. In fact, "Open Spaces" were already expressly defined as an approved "land use" in the original 1964 Agreement, which was not changed by the 1969 Amendment. Second, the Court below ignores the fact that neither the Department, nor County Council, can rightfully refuse to approve a subdivision or land development plan that conforms with zoning and subdivision requirements. *Acierno v. Folsom*, 337 A.2d 309, 312, 313 (Del. 1975). The notion that the Venture intentionally restricted its Open Space land such that, if not being utilized as a golf course, which the land's R-4 zoning prohibited, the Venture had to obtain additional, discretionary approval of County Council before it could use the land as open space in accordance with it R-4 zoning, is bizarre, not supported by the plain language of the Agreements. The County actually seeks to wrest an illegal development exaction out of the Agreements by this reading. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring condition for approving development to have "essential nexus" to proposed development and "rough proportionality" to harm being addressed by condition to avoid a Fifth Amendment takings claim).[4]

The plans submitted by PCRS are consistent with the Former Golf Course's current residential zoning classification, with its designation for high-density in-fill

[4] If this interpretation is upheld, then the Court below incorrectly dismissed PCRS's constitutional takings claim as unripe. *Sherman v. Town of Chester*, --- F.3d ---, 2014 WL 1978726, at *7 (2d Cir. May 16, 2014) (vacating dismissal of takings claim on ripeness grounds because, among other things, plaintiff was not required to obtain "final decision" for claim to be ripe where "the Town used – and will in all likelihood continue to use – repetitive and unfair procedures, thereby avoiding a final decision").

on the County's Comprehensive Development Plan as previously enacted by County Council, and with its "set-aside" by the Venture as Open Space which the County approved in 1969. (A143, A144-45.) The Agreements cannot mean that PCRS now must repetitively seek superfluous discretionary approval of County Council to use the Former Golf Course in a manner already permitted by the County's zoning laws and comprehensive plan, and the plain language of the Agreements.

II. EVEN IF THE AGREEMENTS ATTEMPT TO RESTRICT AN INDETERMINATE AMOUNT OF LAND FOR A FUTURE GOLF COURSE, THE COUNTY CANNOT ENFORCE THE RESTRICTION

A. Questions Presented

Can the County enforce any restrictions in the Agreements against PCRS notwithstanding that (i) the County has taxed what it claims is already dedicated "open space" required by the Agreements as developable land; (ii) the County's proposed interpretation would render the Agreements a product of illegal contract zoning; (iii) the obligations were extinguished through merger by deed; (iv) PCRS never signed a writing containing a promise to set aside a future golf course or assume a similar obligation from the former owners; (v) even if PCRS had constructive notice of a restrictive covenant to set aside a future golf course, the Statute of Frauds remains unsatisfied; and (vi) the Agreements fail to adequately describe the area to which the restrictions apply? (A199-200, A201, A124-27, A128-29, A134-36.)

B. Scope Of Review

This court reviews *de novo* a trial court's legal conclusions. *Gotham Partners*, 817 A.2d at 170.

C. The County Cannot Enforce Any Restrictions In The Agreement

1. The County Waived Its Right To Require Open Space By Taxing PCRS's Property As If It Were Developable Land

Since the 1969 Amendment, the County has taken several actions inconsistent with its current litigation position. Collectively, these actions constitute a waiver of the County's right to enforce whatever restrictions are alleged to exist in the Agreements.[5] Of all of these inconsistent actions, the County's $1,215,500.00 assessment and taxation of the Former Golf Course, rather than exemption from taxation as provided for actual dedicated open space, is the most glaring. (A91-92.) The Court below correctly found that the County's taxation of the Hogan Lots as developable property constituted waiver. (Op. at 750.) So too here. The County should not be permitted to generate tax revenue from the Property while at the same time contending that it is dedicated open space which, under the law, should then be exempt from taxation.

2. The County's Interpretation of the Agreements Constitutes Illegal Contract Zoning

The County may exercise only the zoning authority granted to it under Title 9 of the Delaware Code. This authority does not include the power to reserve,

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[5] These actions include: (i) the County's approval and recordation of subdivision plans and deeds omitting any express restrictions (A146-87); (ii) the County's designation of the Property for high density residential and in-fill development on the updated County Comprehensive Development Plan (A107-08); (iii) the County's proactive rezoning of the Hogan Lots and Golf Course for residential uses in 1998 (A122); and (iv) its departure from legal opinions by the County Law Department and attorney for County Council. (A107, A109-10, A36-50.)

contractually, a long term discretionary veto over the use and development of 1,363 acres of land, instead of adopting appropriate zoning and subdivision laws. Contractually reserving a discretionary legislative veto over a parcel's future land uses contradicts Title 9. *See* 9 *Del. C.* §§ 1153 and 2601. The County has admitted that the enforcement powers it received under the Agreements were a quid pro quo for a rezoning, and the Court below recognized this as well. (A117-19.) The statute dictates the proper criteria for granting a rezoning; *ex parte* deals done outside the public process do not qualify. *Hartman v. Buckson*, 467 A.2d 694, 699 (Del. Ch. 1983). Those powers are therefore illegal, unenforceable at equity and invalidate County Council's effort, based on the 1964 Agreement and 1969 Amendment, to order that the Department disregard its statutory duties and refuse to issue engineering approvals or building permits. (A131-32.) Under these circumstances, only the rezoning itself remains valid. PCRS may raise this issue at any time because it does not seek to challenge the rezonings themselves, or the subsequent county-wide rezoning in 1998 resulting in the 177 acres' current "Suburban" zoning designation, just the legality of the 1964 Agreement and 1969 Amendment. (A20, A67-68.) The Court below should not have denied PCRS summary judgment on this issue, a case of first impression in Delaware.

3. Any Obligations in the Agreements Were Extinguished Through Merger by Deed

Merger is a common law real property doctrine that extinguishes the terms of a contract of sale, such as the Agreements, upon delivery and acceptance of a deed by a buyer. *Haase v. Grant*, 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008). Unless the deed itself or some other document executed at or after closing imposes a defined obligation on the seller, after closing the rights of the parties are governed by the covenants in the deed, not the agreement of sale. *Reserves Dev. Corp. v. Esham*, 2009 WL 3765497, at *6 (Del. Ch. Nov. 10, 2009); (A69-71.) On their face, the Agreements are agreements of sale identifying price, closing date and the lands to be sold. The Agreements merged, with respect to PCRS's lands, into the 1972 deed to Pike Creek Valley Country Club, Inc. (A69-71, A141.) The Court below erred by holding otherwise, and in impliedly holding that the 1971 Golf Course Plan or constructive notice revived the Agreements.

First, the Court erred as a matter of law by impliedly holding that the Agreements do not constitute an agreement of sale. The Opinion states, "The doctrine of merger, however, serves only to extinguish contracts of sale, not contracts memorializing voluntary land restrictions executed by the original owners. . . ." (Op. at 752.) The 1964 Agreement identifies the purchase price, date of settlement and the lands to be conveyed. (A8-9 at ¶ 1-2.) The 1969 Amendment did not change this. Delaware courts have consistently held purchase

price, a sufficient description of land to be sold, and the date of settlement are the essential terms of an agreement of sale.[6] *See Walton v. Beale,* 2006 WL 265489 at *5 (Del. Ch. Jan. 30, 2006), *aff'd,* 913 A.2d 569, (Del. Oct. 9, 2006) (TABLE). The Agreements qualify as an agreement of sale, therefore.

Citing *Reed v. Hassell*, 340 A.2d 157 (Del. 1979), the Court below concluded that the restrictions in the Agreements also were not subject to merger by deed because that doctrine cannot be used to extinguish obligations expressly intended to be imposed on successors and assigns. (Op. at 753.) Delaware courts, however, merge promises expressly stated as ones to be performed post-closing. *See Carey v. Shellburne, Inc.*, 215 A.2d 450, 455 (Del. 1966) (stating an executed and delivered deed merges the contract of sale), *aff'd*, 224 A.2d 400 (Del. 1966); *Van Amberg v. Bd of Governors of Sea Strand Ass'n*, 1988 WL 36127, at *4 (Del. Ch. Apr. 13, 1988) (holding contracts of sale containing a promise to create future restrictions merged). In *Reed*, the Court actually *did* merge provisions in a contract relating to whether certain easements burden title, holding the buyer to the promises contained in the deed, not the merged agreement of sale. *Reed* supports the application of merger on the instant facts because subsequent deeds did not contain any reference to the Agreements.

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[6] Judge Clarence Taylor, then serving as County attorney, contemporaneously confirmed in writing that the Agreements were sales agreements, not real covenants. (A1-6.)

The Court below also held that the Agreements fall into an exception to the merger doctrine whereby certain agreements "collateral" to closing do not merge into the deed. A "collateral agreement" is one unrelated to "title, quantity, and land use." (Op. at 752.) Delaware courts have never failed to merge any pre-closing agreement between the parties on the grounds of its being collateral except those relating to construction. *E.g., Allied Builders v. Heffron*, 397 A.2d 550 (Del. 1979) (refusing to merge agreement relating to home renovation involving settlements in Delaware and Maryland where original parties thereto were before the court); *Re v. Magness Constr. Co.*, 117 A.2d 78, 79 (Del. Super. Ct. 1955) (holding that contract which contemplated conveyance of land and the building of a house did not merge). The Court below erred in holding that Agreements are collateral when the County seeks to use them to establish restrictions as to the future uses allowed on PCRS's land. (Op. at 752.) The other cases relied on by the Court below similarly involve construction, indemnity or arbitration cases, or inapplicable exceptions from the merger doctrine like fraud.[7]

The Court below therefore erred in holding that the 1971 Golf Course Plan revived the merged Agreements. (Op. at 753). Assuming that the vague note on

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[7] *George v. Kuschwa*, 1986 WL 6588 (Del. Super. Ct. May 21, 1986) (stating construction contracts collateral), *aff'd*, 518 A.2d 983 (Del. 1986) (TABLE); *Premier Title Co. v. Donahue*, 765 N.E.2d 513 (Ill. App. Ct. 2002) (indemnity agreement); *Pryor v. Aviola*, 301 A.2d 306, 309 (Del. Super. Ct. 1973) (fraud); *cf. Haase*, 2008 WL 372471, at *4 (holding document depicting building footprint not executed by party to be charged not a collateral agreement, and therefore merged).

the 1971 Golf Course Plan references the 1969 Amendment, it simply confirmed the plan's consistency with the 1969 Amendment as the County then conceptualized it. Nor could a subsequent title holder's potential constructive knowledge of the merged 1969 Agreement revive it. The law in Delaware is that "[c]onstructive notice is normally established by properly recording the instrument that contains the alleged restriction," and "a deed or instrument lying outside [the] chain of title imparts no notice to him." *Van Amberg*, 1988 WL 36127, at *7 (declining to find constructive notice of an unrecorded document). The state of title for a parcel must depend on express statements in recorded documents meeting Statute of Frauds requirements, not on the internal, inconsistent subjective judgments of potential owners, lenders and title companies, and their access to caches of unrecorded material decades after the fact.

Even with constructive notice of the unrecorded 1969 Amendment, PCRS could not have possibly known that the County would ignore the written opinions of its own lawyers stating that only 130 more acres of open space need be dedicated under the Agreements. Constructive notice cannot undo a merger. Delaware has never recognized such an exception to the merger doctrine, nor is there any reason in equity to create one here. *Id.* at *6.

Finally, applying the merger doctrine does not produce harsh results as suggested by the Court below. The County allowed the 1971 Golf Course Plan to

be recorded after review by the Planning Department, and conveyances to take place in accordance therewith, without objection. The "County's right of enforcement" the Opinion concerns itself with came and went before merger occurred. (Op. at 753.) Recordation of the Terraces Plan would give the County far more enforcement authority to cause the 130 acres to be used perpetually for open space than it currently has as the third party beneficiary of a merged agreement of sale. It is PCRS and every property owner in Pike Creek Valley who will experience harsh results by remaining subject to litigation to enforce the Agreements as the County and neighbors interpret them.

4. The Statute of Frauds Bars Enforcement of a Set Aside of an Indeterminate Amount of Acreage for a Future Golf Course

Under the Statute of Frauds, no unexecuted document, and no unwritten covenant or agreement, can be enforced as a deed restriction running with title to real property. 6 *Del. C.* § 2714. No deeds in the chain of title of PCRS incorporate any provisions of the 1969 Amendment. (A135, A124-26.) The various unsigned tentative master comprehensive plans for Pike Creek Valley, and the unsigned 1971 Golf Course Plan as initially recorded also do not satisfy the Statute of Frauds. All subdivision and land development plans approved by the County and recorded against title to the Golf Course after 1982 are signed by the fee owner at the time but contain no textual note making any reference to the "Amended

Agreement." (A150-53.) Nor do they preclude being superseded by new plans compliant with then-current law. These revised subsequent plans, both on their face and by reason of explicit notes stating the purpose of the revised plans, have replaced and superseded all earlier recorded plans that did contain a text note, thereby eliminating the prior notes. (A149-50.) Had the golf course never been constructed in accord with the 1971 Golf Course Plan, it could have been superseded with a plan for a mixed use of residential development and open space development in accordance with the Agreements.

5. The Golf Course Restrictions Cannot Be Enforced Because the Agreements Fail To Identify Which Portions Of The 177 As Those To Be Bound

Finally, it is axiomatic that for a restrictive covenant to be valid, it must adequately describe the area to which it applies. *Bave v. Geunveur*, 125 A.2d 256, 259 (Del. Ch. 1956). There is no language in the Agreements from which PCRS or the Court below could determine which portions of the Former Golf Course are subject to the restrictions the Court below found in the Agreements. The Court below compounded this error when it concluded that PCRS must maintain a parcel with "physical attributes – *i.e.*, . . . sufficient quantity, quality, contiguity and configuration – to accommodate development of an 18-hole golf course." (Op. at 749.) There is simply no language from the Agreements on which anyone can rely to determine what lands would be subject to this requirement.

III. THE COURT BELOW ERRED IN DISMISSING THE PETITION FOR A WRIT OF MANDAMUS

A. Questions Presented

Did the trial court abuse its discretion by denying PCRS's petition for a writ of mandamus ordering the Department to perform its non-discretionary statutory duties review PCRS's engineering drawing and subdivision and land use applications notwithstanding County Council's directives not to issue engineering approvals or building permits to PCRS? (A57-65.)

B. Scope Of Review

This Court reviews the denial of a petition for a writ of mandamus for abuse of discretion. *Remedio v. City of Newark*, 337 A.2d 317, 318 (Del. 1975).

C. The Court Below Abused Its Discretion By Dismissing The Petition For A Writ Of Mandamus

PCRS sought a writ of mandamus from the Court below requiring the Land Use Department to issue approvals and building permits for the Hogan Lots and to review and approve the Terraces Plan in accordance with applicable State and County statutes and codes. In denying PCRS's writ of mandamus, the trial court erroneously concluded that until PCRS exhausts its administrative remedies by following the Restriction Change Statute process, PCRS has not demonstrated that it has no other remedy available. In reaching this conclusion, the trial court rejected PCRS's argument that administrative review would be futile in light of the Chancery Action and the Department's arbitrary refusal to review, let alone

approve, the Terraces Plan. Although Delaware law favors the exhaustion of administrative remedies, where, as here, such review would be futile, exhaustion is not required. *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1190 (Del. 1992); *Kejand, Inc. v. Town of Dewey Beach*, 1996 WL 422333, at *3 (Del. Ch. July 2, 1996) (to "waive the exhaustion requirement," there must be "a clear showing of futility"). PCRS has met this burden.

After PCRS submitted the engineering drawings for the development of the Hogan Lots, County Council adopted Resolution 10-197 on October 14, 2010, which, among other things, directed the Department not to issue engineering approvals or building permits to PCRS for construction on the Golf Course or the Hogan Lots and authorized the County to file litigation against PCRS. Likewise, Resolution 10-217, adopted by County Council on December 10, 2010, after PCRS's submission of the Terraces Plan, directed the Department not to approve PCRS's plans. The Department promptly ceased reviewing PCRS's engineering plans, in direct violation of its statutory duties.[8]

Under Delaware law, all submissions for land use approvals are deemed approved following a forty-five day period of inactivity by the County. 9 *Del. C.* § 1309.[9] There can be no dispute that the Department failed to review PCRS's

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[8] *See* 9 *Del. C.* §§ 1301(1), 1301(2)(c), 1302(2).

[9] 9 *Del. C.* § 1309 provides: "In the case of any matter required to be submitted to the Department or to the Planning Board, approval shall be presumed by the Department or Planning

engineering plans for the Hogan Lots within forty-five days of their submission. The plain language of Section 1309 does not contemplate the County lodging objections to land use plans after expiration of this forty-five day window. Yet, the Court below, in direct contradiction to the plain and unambiguous language of Section 1309, permitted the County to object to PCRS's plans after the statutorily-prescribed time period had expired. By ignoring the requirements of the statute, the trial court must be reversed. *Cromwell v. Cromwell*, 570 P.2d 1129, 1131 (Mont. 1977) (finding trial court abused discretion by ignoring statutory mandate).

Even assuming that the language in Section 1309 is merely superfluous, the record plainly establishes that exhausting administrative remedies would be futile. In issuing Resolutions 10-197 and 10-217, the County evidenced its intent to disregard its statutory duties to review and act upon PCRS's engineering plans. Further, the County's litigation position has been (and continues to be) that the Former Golf Course was dedicated to the public. In light of the County's conduct thus far, it strains credulity to believe that the County will abandon its position and process PCRS's engineering plans and the Terraces Plan if PCRS undertakes the time and expense of engaging in the Restriction Change Statute process or submits additional permit applications. Absent relief from the Court, there can be no doubt that PCRS's plans will continue to sit dormant in the Land Use Department's

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Board unless the Department or Planning Board shall have acted within 45 days of receipt thereof, unless a longer time shall have been allowed by the County Council."

office, or, if review commences, the County will refuse to issue building permits without regard to the Agreements as the County interprets them.

Further, the County's refusal to perform its statutory duties is arbitrary. Only if the Court found as a factual matter that a threat to the health, safety or welfare of the public would exist if the building permits were issued pursuant to a writ of mandamus could the Court refuse to issue the writ of mandamus. 9 *Del. C.* § 2601; UDC § 10.317. But neither the trial court nor the County identified any health, safety or welfare reasons to justify the County's refusal to review PCRS's engineering plans approved under the statute. 9 *Del. C.* § 1309. Moreover, PCRS's plans conform to the laws in effect at the time the applications were made. Accordingly, the decision of the Court below was arbitrary and should be reversed for abuse of discretion.

Moreover, the County's abuse of discretion in refusing to process the applications rose to the level of a due process violation, making PCRS's constitutional claims ripe for adjudication, contrary to the holding of the Court below. *See supra*, § I.C.(3) & n.4; *see also DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124 (2d Cir. 1998) (noting property right exists in land use permits "if the issuing agency lacked the authority to deny the permit or approval for a legitimate reason.")

IV. THE COURT ERRED IN DENYING THE STAY MOTION

A. Question Presented

Did the trial court err in refusing to enter an order staying the time periods for the Terraces Plan to obtain final record plan approval through the date of a final, non-appealable order due to the County's initiation of litigation which delayed the approval process? (A206-19.)

B. Scope Of Review

A trial court's refusal to stay administrative deadlines during the pendency of litigation, which is akin to a denial of injunctive relief ordering that the status quo be preserved pending a full trial on the merits, is reviewed for abuse of discretion. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Questions of justiciability, including ripeness are reviewed *de novo*. *XL Specialty Ins. Co. v. WMI Liquidating Trust*, --- A.3d ---, 2014 WL 2199889, at *5 n.35 (Del. May 28, 2014).

C. The Court Below Should Have Granted The Stay

Ignoring the great weight of authority from other jurisdictions that have squarely addressed this issue,[10] the Court below determined that PCRS's request to equitably toll the final expiration date was not ripe. According to the Court below,

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[10] *See, e.g., City of Bowie v. Prince George's Cnty.*, 863 A.2d 976, 990 (Md. 2004); *Preseault v. Wheel*, 315 A.2d 244, 247 (Vt. 1974); *Fromer v. Two Hundred Post Assocs.*, 631 A.2d 347, 353 (Conn. App. Ct. 1993); *Cardinale v. Ottawa Reg'l Planning Comm'n*, 627 N.E.2d 611 (Oh. App. Ct. 1993).

for the issue to be ripe, PCRS must formally request, and be denied, an extension. The conclusion of the Court below belies basic notions of fairness and equity and constitutes an abuse of discretion.

Under Chapter 40 of the UDC, the Terraces Plan will expire on July 8, 2014, absent an extension. The County may grant two three-month discretionary extensions, which could extend the expiration date to January 8, 2015. UDC § 40.31.390. No more extensions are available under the UDC, and a major land development plan like the Terraces Plan cannot be approved by January 2015. PCRS needs an extension only because the County initiated litigation, which essentially "ran down the clock" on the review period. The County should not be permitted to achieve, through the delay of litigation, the result it may not be entitled to on the merits, as the trial court permitted the County to do. Refusing to equitably toll the statutory period during the pendency of litigation opens the door for opponents of development to initiate "litigation . . . solely to cause administrative deadlines to be missed." *See City of Bowie v. Prince George's Cnty.*, 863 A.2d 976, 991 (Md. 2004). Such a result "make[s] development a pure gamble [-] success would depend on the whim of adversaries to litigate or not." *Preseault v. Wheel*, 315 A.2d 244, 248 (Vt. 1974); *see also Fromer v. Two Hundred Post Assocs.*, 631 A.2d 347, 353 (Conn. App. Ct. 1993).

CONCLUSION

The Court should reverse the Opinion and Stay Opinion and remand with instructions to enter judgment in favor of PCRS for the following reasons:

A. The plain language of the Agreements does not require that 130 acres of the Former Golf Course be "set-aside" again, or be of sufficient quantity, quality, contiguity and configuration for future construction under current law of an unrequired 18-hole golf course, or otherwise remain unused even for Open Space as allowed by law without County Council's discretionary approval;

B. Enforcement by the County is barred by doctrines of waiver, illegal contract zoning, merger, Statutes of Fraud and failure to identify restricted land;

C. The engineering plans for the Hogan Lots should be deemed "approved" and the Terraces Plan should receive review by the Department;

D. PCRS's request for a stay of the impending July 8, 2014 plan review deadline was ripe and should equitably be granted.

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