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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)

APPELLANT'S REPLY BRIEF

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I. THE COUNTY'S CONTRACTUAL ARGUMENTS ARE UNSOUND

This case turns on the meaning of the Agreements.[1] Since Delaware law favors the least burdensome reading of restrictive covenants (OB 20), the County is forced to contend that the Agreements are "fairly or reasonably susceptible to only one interpretation." (AB 14 n.19.) The County then insists the Venture's intent is "crystal clear" that "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 . . . unless validly changed or amended" pursuant to the Restriction Change Statute. (AB 15.) The pivotal question is therefore sharply focused: can the promises in the Agreements between the members of the Venture fairly and reasonably be read only as the County, in its capacity as a third-party beneficiary[2], urges?

The County's interpretation of the Agreements is driven not by their plain text but by a relentless determination to severely curtail any further residential development in Pike Creek Valley. Consistent with its anti-development objective, the County claims over 20,000 residents and 100+ area organizations "may be

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[1] Capitalized terms not defined herein have the same meaning as in Appellant's Opening Brief ("OB"). Appellee's Answering Brief is cited as "AB" followed by the page number.

[2] As a third party beneficiary, the County's rights are no greater than the promises in the Agreements. *NAMA Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007) ("A third-party beneficiary's rights are measured by the terms of the contract.")

impacted" by PCRS's "massive" development proposal if PCRS is allowed to include and count the Former Golf Course as community open space when calculating the density of the Terraces Plan under the UDC. (AB 13, 18.) However, the Terraces Plan proposes leaving approximately 80% of the Former Golf Course open yielding a density of well under two homes per acre. PCRS's proposed development is dramatically less dense than (i) the 15.75 units per acre in the two abutting mid-rise communities, (ii) the 7.5 units per acre in the adjoining townhouse communities, (iii) the 20 units per acre permitted by the land's original R-4 zoning (AR23-26), (iv) the 5 units per acre allowed by land's present Suburban zoning, UDC Table 07.221, and (v) the "high-density in-fill" prescribed for the land on the County's official Comprehensive Development Plan.

The Terraces Plan is not only consistent with, but is also needed, to reach at least 5,454 homes in Pike Creek Valley as expressly provided in the Agreements. (A13, 23.) The County now seeks to rewrite and reform the Venture's promises so as to thwart their intent, defeat its careful preservation of residential zoning for future development of the golf course lands, and to convert its Agreements into a perpetual anti-growth strait-jacket, even though that clearly was not, and could not reasonably have ever been, what any party to the Agreements intended.

To justify the holding below, the County misstates the plain language of the Agreements. First, the County asserts that "[o]ne of the key components of the

1969 Amendment is the *promise* of an 18-hole golf course." (AB 8 (emphasis added).) The Agreements contain no such promise. Then the County argues that "the *commitment* for an 18-hole golf course" was twice confirmed by the 1969 Amendment. (AB 9 (emphasis added).) No such commitment was made. Finally, the County states that, "[f]ollowing through on the *commitment* in the 1969 Agreement *to build a golf course* on the 'set-aside' land, the Initial Developers submitted plans to the County for a golf course." (AB 9 (emphasis added).) However, as the Court below held – a holding the County does not appeal – the Venture had no commitment or obligation to build a golf course. (Op. 748.)[3]

At most, the Agreements expressed a promise made by and among the Venture's members, in Article 10, to "set aside" 130 acres for possible, but not required, construction of an 18-hole golf course on Open Space then zoned R-4. Since this zoning prohibited golf course use, the very next sentence in Article 10 provides for alternative use of this Open Space if the Venture did not construct a golf course within five years. (A23.) Had the County rezoned the Open Space to permit a golf course that was not constructed, Article 12 of the Agreements required that the rezoned land be used instead for "recreational" purposes

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[3] The County also claims that the Venture "amended the Master Plan in not less than three places (Article 7, 10 and 12) to confirm that a minimum of 130 acres . . . must be set aside for 'a specific use' of . . . an 18-hole golf course." (AB 15 n. 22.) The term "specific use" appears only once in the Agreements, and then only with reference to possible, optional "development" of a golf course. The Venture never promised actual "development" of a golf course.

consistent with its designation as Open Space. (A15.) The County's argument that the Agreements perpetually preclude all non-golf course use of 130 acres of Open Space would nullify these provisions and must therefore be rejected. (OB 18.)

The County argues in the alternative that the UDC, enacted in 1997, justifies the lower court's opinion. Since "golf courses are not a permitted component of residential community open space under the UDC," there is now "no practical or legal way to develop a golf course on the open space lands depicted on the Terraces plan."[4] (AB 19.) The County argues that the Court below "recogniz[ed]" this in concluding that, when the Venture drafted the 1969 Amendment, it intended "beyond doubt" that "the land parcel set aside must: (1) be of 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." (*Id.*)

However, neither the "physical attributes" nor the "single use" restriction appears in the Agreements. Interjecting them leads to the absurd result that the Venture committed to set-aside, on land zoned against golf course use, 130 acres

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[4] The Terraces Plan does not seek approval to construct a golf course, so the quoted provisions of the UDC would be relevant only if PCRS were required to create one. The Court below found that no requirement exists, a holding the County did not appeal. The land's discontinued *former* golf course use does not disqualify its use as open space *now*.

for a golf course that the Venture had no obligation to build, and might never build, but that the Venture concurrently had to prove to the County was "of sufficient quantity, quality, contiguity and configuration" to accommodate actual construction of an 18-hole golf course. If the County wanted to require the Venture to assume such a commercially bizarre commitment, it could have, and should have, done so expressly. It did not.[5]

Under the Agreements as written, the Venture's only risk in setting aside land that might not support actual construction of a golf course was loss of its reserved right to create a private commercial golf course. As construed by the court below, however, the Venture's failure to set aside land on which a golf course might be constructed carried a second risk, namely, loss of the right to use the "set aside" land for any non-golf purpose, even open space. The County and court below attempt to soften this harsh result by pointing to the Venture's reservation of right to use the land for "uses approved by the Department of Planning and the New Castle County Council." (A23.) But the meaning they attribute to this plain language once again requires reading additional words into the Agreements. According to the County and the court below, PCRS can use the

[5] The court below did not specify what burden of proof PCRS must satisfy or the standards by which that proof would be judged. Presumably the County would argue that, at a minimum, PCRS would have to supply all the required surveying, land engineering and design work, at considerable cost to PCRS, to prove a golf course could be constructed. No rational purpose would have been served by the Venture obligating itself to provide such proof even though it had no obligation to construct a golf course and could not construct one on land zoned R-4.

Former Golf Course for other uses *only if discretionarily* approved by the Department and County Council. Based on this restrictive reading of the Venture's reserved right, PCRS cannot proceed without the County's discretionary consent under the Restriction Change Statute to amend the Agreements and change the graphic, undated Master Plan.[6] And PCRS must obtain this consent even though the 1971 Golf Course Plan already has been revised repeatedly without the Agreements being amended or the Master Plan being changed.[7]

Moreover, as pointed out in the Opening Brief, there is nothing to change. The Agreements already classify the golf course set-aside as "Open Space." The 1971 Golf Course Plan states that it simultaneously establishes "PRIVATE OPEN SPACE." The updated tentative Master Plan labels roughly outlined area as "Flexible Golf Course, Buffers and Open Space," "Not All Committed" to such

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[6] The lower court improperly conflated the Agreements and many graphic depictions of proposed development in Pike Creek Valley in its definition of "Master Plan." The conflation is not supported by the record. PCRS incorrectly cited the "Master Plan" in its Opening Brief. The correct cite should have been to the attachment to the County's complaint, now at AR1. There are many version of this document, none of which are recorded, adopted as a zoning ordinance or integrated into the Agreements.

[7] As shown in the Opening Brief, the 1971 Golf Course Plan calling for construction of an 18-hole golf course on 199 acres has been amended many times, changing its configuration, transferring land to the Plum Run community for open space use, reducing its size to 177 acres, and dropping all reference to restrictions in the Agreements or Master Plan, all based solely on routine administrative approvals by the Department and County Council. (OB 12 n.1.) Such approval is exactly what PCRS sought by filing the Terraces Plan for administrative review by the Department and administrative approval by County Council as required by Delaware law. *Acierno v. Folsom*, 337 A.2d 309, 313 (Del. 1975); *G.R.G. Realty v. New Castle Cnty.*, 1981 WL 697909, at *3 (Del. Super. Ct. Dec. 30, 1981). Nothing more is needed for such "uses" to be "approved by the [Department] and [County Council]" as allowed by the Agreements. (A23.)

uses. (AR1.) No amendment or change is needed because the Terraces Plan does nothing more than propose residential development of approximately 36 acres of land in accordance with its Suburban zoning and the Comprehensive Development Plan, while leaving undeveloped nearly 140 acres of Open Space, consistent with the Agreements and the Master Plan. *Cf. Regency Grp., Inc. v. New Castle Cnty.*, 1987 WL 1461610 (Del. Ch. Dec. 3, 1987) (rejecting County's attempt to block development of shopping center on lands labeled on Master Plan as "Motor Inn Site" and permitting shopping center development to proceed in accordance with its commercial zoning without any amendment to the Agreements or labels on Master Plan).[8] The County's remaining contract interpretation arguments are equally fallacious and should be rejected.

A. The "Course Of Development" Argument

Ignoring how the Agreements evolved, the County contends that the Venture committed in the 1969 Amendment to set aside and hold 130 acres of Open Space for the exclusive purpose of golf course development "throughout the course of development of the entire SUBJECT ACREAGE . . . ." The quoted language,

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[8] Amending the Agreements would require not only the approval of County Council as third party beneficiary, but also of the Venture, its successors and assigns. The County argues that PCRS, as a holder of title of "THE SUBJECT ACREAGE," is a successor to the Venture. (AB 7.) If that is true, then so are the thousands of other property owners in Pike Creek Valley. The County's effort retroactively to read compliance with the Restriction Change Statute into Article 10 of the Agreements is simply an unworkable formula proposed by the County to prevent residential development of PCRS' land. This is not what the Venture could have intended.

however, applies to Open Space uses, not optional golf courses.[9] It was originally inserted in Article 7 of the 1964 Agreement for the purpose of committing to set aside and hold, "throughout the course of development" the "following land uses" consisting of 158 acres of "Open Space" and various amounts of other land set aside for school, church and commercial uses. (A12.) The acreage set aside for these uses did not need to be held exclusively for their initially designated purpose throughout the entire course of development, because Article 8 of the 1964 Agreement explicitly allowed such land, if not purchased or used for churches or schools within a given time, to be converted to residential use. (A12-13.)

That concept did not change when the 1969 Amendment replaced the language, "Open Spaces 158.0 acres minimum" with the words, "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.) Just as land set aside for schools and churches could convert to residential use, so also could the 130 acres of Open Space set aside for a golf course revert to Open Space use, as provided in Article 12. (A15.)

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[9] The 1964 Agreement allowed the Venture to create an optional par-3 golf course. Its 1969 replacement with an optional 18-hole course did not convert the Venture's commitment from holding Open Spaces to holding land for an 18-hole golf course for the duration of development.

B. The "Specific Purpose" Argument

The County contends that the 1969 Amendment's description of the updated tentative Master Plan as showing "approximately" 130 acres "set aside for development of an 18-hold [sic] golf course" which "constitutes . . . a specific use of 130 acres of the 215.00 acres set aside for open spaces," precludes any use of the land for community open space.[10] (AB 15.) This contention requires defining the word "specific" as meaning solely "exclusive" and "single purpose." No authority is cited for this narrow definition. If the Venture had intended to bind the land for the exclusive and single purpose of a non-mandatory golf course to the exclusion of all other uses, it could clearly have said so. It did not. The Venture's identification of golf course development as "*a* specific use" (rather than "*the* specific use" as now insisted by the County) of 130 acres of Open Space makes sense; use of land as a golf course is much more limited than use of land for community open space. Having previously committed in the 1964 Agreement to use 158 acres as Open Space (unlimited by golf course development), the Venture wanted to make clear in 1969 that 130 acres of Open Space could now (optionally) be used for "a specific" purpose: *i.e.*, a golf course. This use of the word "specific" does not render it a nullity. (AB16.)

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[10] In actuality, the updated tentative Master Plan attached to the County's complaint showed an area of 199 acres labeled "flexible golf course, buffers and open space – not all committed. Schematic." (AR1.) The County's interpretation reads out the words "Buffers and Open Space" and "Not All Committed".

II. THE COUNTY CANNOT ENFORCE THE RESTRICTIONS

The Opinion correctly held that the County waived the right to enforce the Restrictions as to the Hogan Lots. (Op. 751.) This holding was not appealed by the County and its rationale is now the law of the case. PCRS has appealed the failure of the Court below to extend the same rationale to the similarly situated, contiguous Former Golf Course. The County's defense based on the same arguments that the Court below rejected as to the Hogan Lots should here be disregarded.

A. The County Waived Its Right To Enforce The Restrictions

PCRS did not raise waiver as a defense for the first time in its Opening Brief as the County argues. (AB 23.) PCRS raised the defense of waiver in its answer. (AR6-7; AR11; AR13; A107.) PCRS raised waiver as to the Former Golf Course in the briefing below. (AR15-16; AR17-18; AR19-22.) The Opinion held that waiver occurred based on zoning, taxation and failure to take judicial appeals, but only as to the Hogan Lots. (Op. 751.)

The County then argues that merely rezoning PCRS's land to the Suburban designation does not constitute waiver as a matter of law as the Opinion held. (Op. 750; AB 25.) However, in addition to this "mere" rezoning, the County has (i) approved and recorded multiple amendments to the previous record plans for the Former Golf Course that removed all alleged reference to the Agreements as

restrictions; (ii) adopted and continued to approve its official Comprehensive Development Plan designating the golf course for high-density residential in-fill; (iii) taxed the golf course instead of exempting it as open space; and (iv) "retained" the residential zoning of the 177 acres just like the Hogan Lots. (OB 28; Op. 750.) These are the same "persistent" zoning actions that supported the holding of the court below that the County waived its right to enforce the Agreements with respect to the Hogan Lots.[11] They should apply equally to the remaining land.

The County's contention that no waiver occurred because the County has consistently sought to judicially and politically enforce a "130 acre, 18-hole golf course restriction" misrepresents the facts. The County did not appeal the holding in *G.R.G.* requiring review and recordation of the Hogan Plan despite its encroachment on the Former Golf Course. (AR17-18.) Instead, it ratified the Hogan Plan by its zoning action, comprehensive development plan, and taxation of the Hogan Lots. (Op. 751.) In addition, the Court below declared invalid County Council's resolutions purporting to interpret the Restrictions, and the County did not appeal that finding. (Op. 752.) Even if taken as evidence of intent, the Resolutions and ensuing Complaint filed by the County did not seek to enforce a 130 acre, 18-hole golf course restriction. (A55, B96.) The County has sought

[11] Regardless of the evidentiary burden to prove waiver, these uncontroverted facts satisfy even the clear and convincing standard. (AB 24 n.43.)

either to compel PCRS to operate perpetually an 18-hole golf course on all 177 acres of its land or to hold and maintain all 177 acres as open space. (AR3-4; AR8-9; B122-24.) The County settled on its position – that the Agreements preclude all use of Open Space – on appeal only after the Court below declined to agree with the County's initial positions.

Finally, the County attempts to reargue the holding of the Court below that its taxation of the Hogan Lots constituted a waiver of its right to enforce the Agreements; but it did not cross-appeal and cannot obtain review of this ruling through its argument here.[12] The only issue on appeal is the failure of the Court below to apply the same rationale to the 177 acres contiguous to the Hogan Lots, which have been taxed rather than exempted as open space.[13]

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[12] The Opinion's holding that taxation of the Hogan Lots waived the County's right (if any) to enforce the Agreements as to the Hogan Lots was not appealed, which renders it binding and conclusive on the parties. *See Matulich v. Aegis Commc'ns Grp., Inc.*, 2007 WL 1662667, at *3 n.6 (Del. Ch. May 31, 2007), *aff'd*, 942 A.2d 596 (Del. 2008). The County, therefore, cannot argue that waiver cannot be based on its taxation of the Former Golf Course.

[13] The County attempts to shift responsibility for its decision to tax the Former Golf Course on its assessed value by arguing that PCRS had the responsibility to obtain an exemption to avoid taxation as assessed. (AB 25.) Ironically, the statute cited by the County for this proposition, 9 *Del. C.* § 8106A(a) ("Section 8106A") reveals the inconsistency between the County's taxation policies and its litigation position. If the County is correct that the Agreements require the Former Golf Course to be set aside as public open space and cannot be included as community open space, then Section 8106A *requires* that the Former Golf Course be exempt from taxation. The County, however, made the affirmative choice to assess the Former Golf Course and collect taxes based on that assessment and now must live with the consequences of that choice.

B. The Restrictions Would Constitute Illegal Contract Zoning If Enforced As The County Requests

Citing law primarily from other jurisdictions, the County argues the contract zoning doctrine does not apply because the Agreements are not a "bilateral" contract. (AB 27 and n.51-52.). However, a third party beneficiary has no promises to perform anyway because it is not a party. Even if the County were a party, and the sole "act" the County had to perform was the rezoning, the Agreements contemplate a myriad of further acts by the County, including discretionary post-zoning approval of an updated tentative comprehensive development plan for Pike Creek Valley and keeping track of the number of units constructed on which the duration of the Agreements depends. *Antonnucci v. Stevens Dodge, Inc.*, 340 N.Y.S.2d 979, 982 (N.Y. City Civ. Ct. 1973); (OB 29, A117-19.) Simply put, the Agreements are not unilateral.[14]

The County also argues for the first time that laches bars PCRS from raising contract zoning as a defense. (AB 26.) Almost all of the cases relied on by the County, however, relate to challenges to government actions, like the granting of a variance or adoption of a zoning ordinance, not enforcement of a private contract,

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[14] Further, the actual parties to the Agreements made numerous promises to each other, so the Agreements are not unilateral. If the parties really did not promise each other anything, then the Agreements are an illusory, unenforceable contract, and the County's rights as a third party beneficiary to them are subject to those defenses. *NAMA Holdings, LLC,* 922 A.2d at 431 ("When the beneficiary accepts the benefits of a contract, it also must accept the burdens expressed in that document.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 309 cmt. b (1981)).

and do not address contract zoning arguments.[15] (AB 26 n.50.) In the one authority relied on by the County that does address a contract zoning claim,[16] the plaintiffs challenged the grant of a variance to a neighboring property as contract zoning. The County argues here that a private contract executed fifty years ago, not incorporated into a governmental act, restricts the current landowner to one use of its land. *Cf. Peters v. Peters Auto Sales, Inc.*, 155 N.W.2d 85, 88 (Wisc. 1967) (holding that statute of limitations on breach of contract purportedly created by corporate resolution did not run until a breach was alleged).

C. Any And All Restrictions Merged With The Deed

The County argues that the Court below correctly concluded that the convenants in the Agreements did not merge into title. (AB 28.) Citing authority solely from other jurisdictions, the County insists that even though the Agreements reflect a sale of 12.5 acres,[17] they contain promises to honor restrictive covenants after closing as to an additional 1,141 acres, which the parties did not intend to

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[15] For instance, although the County asserts that *Council of South Bethany v. Sandpiper Development Corp.*, 1986 WL 13707 (Del. Ch. Dec. 8, 1986) stands for the proposition that a thirteen year delay between alleged contract zoning action and the lawsuit challenging it created a "conclusive presumption as to the measure's validity," nowhere in the opinion does the court discuss a contract zoning claim. Moreover, the "conclusive presumption" language cited by the County is not a holding of the court, but rather a discussion of a separate case in which a five year delay did *not* establish "a conclusive presumption as to the measure's validity." *Id.* at *3.

[16] *Jock v. Zoning Bd. of Adjustment of Twp. of Wall*, 2005 WL 3879580 (N.J. Super. Ct. Mar. 23, 2006).

[17] The court below initially described the Agreements as conveying 1000+ acres of land (Op. 736 n.16) but later held that the Agreements were not contracts for sale. (Op. 754.)

merge into title. (AB 29-31.) *Delaware* precedent, however, consistently supports merger of promises to perform post-closing covenants alleged to run with the land in the absence of specific anti-merger language which neither the Agreements nor any applicable deeds contain. (OB 30-34.) The fact that a promise would have to be performed post-closing has never prevented merger under Delaware law.

The County's argument also fails because the parties' intent that merger take place is clear; otherwise, inclusion of the purchase and sale language relating to 12.5 acres (which was never separately deeded) had no other practical purpose. In fact, application of merger was crucial to the entire scheme. By structuring the Agreements as an agreement of sale, the Venture automatically relieved the thousands of other current homeowners and businesses in Pike Creek Valley from the requirement to create and transfer open space, build churches and schools, keep track of the number of allowable residences yet to be built, and all the other obligations that the County claims the Agreements imposed *indiscriminately* on the Venture and *all* of its successors, assigns and transferees, including PCRS and all other owners of land in Pike Creek Valley.[18]

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[18] The County's position would put at risk the title of any landowner in Pike Creek Valley. For instance, the 1971 Golf Course Plan contemplated 199 acres would be used for the golf course. That area has been reduced to 177 acres in part due to construction of the Plum Run community. Yet there is no document to indicate that the land transferred to Plum Run (or any other portion of Pike Creek Valley) is relieved of the obligations contained in the Agreements. If the obligations run with the land, then all owners of the 1,363 ± acres have the same obligations as PCRS. If the obligations burden only the Venture, then they merged with title.

D. The Statute Of Frauds Precludes Enforcement Of The Restrictions Against PCRS

The County argues that the Statute of Frauds is satisfied because the Venture is PCRS's predecessor in title and executed the Agreements. The County, however, does not cite any instance of a real covenant being enforced that required perpetually "setting aside" an undefined portion of 1,363 ± acres for exclusive operation of a golf course. Establishing or taking substantial steps to establish a new golf course, or "proving" that real property could be used for that single purpose, does not "touch and concern" the land as required under Delaware law for the requirement to run with title. *Van Amberg v. Bd. of Governors of Sea Strand Ass'n*, 1988 WL 36127, at *6 (Del. Ch. Apr. 13, 1988).

The failure to identify the 130 acres (or more) required to serve as a golf course in the Agreements is also fatal to the County's position. The County refers only to multiple and conflicting graphic plans created *after* execution of the Agreements. These documents lack the express manifestation of intent to incorporate the after-executed documents. *Wolfson v. Supermarket Gen. Holding JCorp.*, 2001 WL 85679, at *3 (Del. Ch. Jan. 23, 2001). Moreover, none of them contain precise meets and bounds from which an objective person could determine the portion of Pike Creek Valley to which they apply. (OB 33-34.) Therefore, these documents do not satisfy the Statute of Frauds.

III. THE COURT SHOULD REVERSE THE DENIAL OF THE PETITION FOR A WRIT OF MANDAMUS

It is well-settled that a litigant, such as PCRS, need not attempt to exhaust administrative remedies where administrative review would be futile. *Levinson v. Del. Comp. Rating Bureau*, 616 A.2d 1182, 1190 (Del. 1992). By adopting Resolutions 10-197 and 10-217, County Council unequivocally directed the Land Use Department to disregard its statutory duties and not issue engineering approvals or building permits to PCRS. The same resolutions also authorized the County to commence the Chancery Action against PCRS to prevent development of the Former Golf Course and the Hogan Lots. That action sought to compel PCRS either to continue operating a golf course, or hold its land perpetually as undeveloped open space. Under these circumstances, forcing PCRS to seek administrative approval of plans that the County is strenuously litigating to prevent would be objectively futile.

The County's adoption and implementation of the Resolutions demonstrates that the County's review of PCRS's plans has "run its course." *See Salem Church (Del.) Assocs. v. New Castle Cnty.*, 2006 WL 2873745, at *4 (Del. Ch. Oct. 6, 2006) (noting that a litigant need not exhaust administrative remedies where the administrative body's "sifting process" has run its course or when the administrative body might "resolve the dispute without unnecessary or premature judicial action"). The Resolutions effectively shut down the "sifting process" so

that PCRS was forced to bring the Mandamus Action to compel. The County offers no explanation why, if PCRS made an application under the Restriction Change Statute, the County would miraculously change its position.

The Department's refusal to act upon the Hogan Plan within the County-required 20 day period and State-required 45 day period as mandated by the Resolutions creates a presumption that these plans are approved. *See* 9 *Del. C.* § 1309. Contrary to the County's argument, the only prescribed means to rebut Section 1309's presumption of approval is evidence that the County acted within forty-five (45) days of receipt of the plans. *See City of Wilmington v. Minella*, 879 A.2d 656, 662 (Del. Super. Ct. 2005) (noting that litigant must satisfy the statutory means of rebuttal to overcome statutory presumption). Absent action by the County within this time period, the presumption has not been rebutted and the plans must be deemed approved.[19] The County's claim to have been confused by PCRS's request that its revised Hogan Plan submitted on October 14, 2010, be part of the record in its appeal from the denial of its earlier application on the Hogan Lots is disingenuous. The County deliberately refused to act on PCRS's plans because that is what County Council directed it to do in the Resolutions.

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[19] The belated letter issued by the Department commenting on PCRS's engineering submission not only purports to apply current law rather than the law under which the Hogan Lots were grandfathered, it also identifies no threats to health, safety or welfare. (B92-94.) Absent evidence or specific identification of these "threats," the seal of PCRS's licensed engineer should warrant the presumption that none exist. (AR27.)

IV. THE COURT SHOULD REVERSE THE DENIAL OF THE MOTION FOR A STAY

The County's argument against the motion for a stay ignores the fact that PCRS's needs a stay because of the County's initiation of litigation. The County filed the Chancery Action to prevent PCRS from developing any portion of the Golf Course even before PCRS submitted the Terraces Plan. (OB 13-14.) Subsequently, the time periods for approval of PCRS's plans continued to run, unabated, with an expiration date of July 8, 2014, while the plan review process was halted due to this action. Even if granted the maximum two, six- month, extensions, PCRS now will have only the unexpired balance of the period encompassed by them to complete the plan review and approval process, its statutory obligations, rather than the entire three-year period (plus two extensions) it should have had. If the Terraces Plan and the Hogan Plan as presently filed are allowed to expire, PCRS will have to pay additional fees and submit new subdivision and engineering plans, a costly and time-consuming endeavor necessitated only by the County's initiation of litigation. Enforcing these deadlines against PCRS, without allowing the "delay caused by litigation to serve as a modifying or exculpatory factor[,] would produce great[] inequity." *See 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). As a matter of equity, the refusal of the Court below to grant the stay was an abuse of discretion.

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 open space comprising the Former Golf Course be "set-aside" again, and be of sufficient quantity, quality, contiguity and configuration for future construction under current law of an unrequired 18-hole golf course, pending which they cannot be used as open space unless otherwise allowed in County Council's discretion;

B. Enforcement by the County is barred by doctrines of waiver, illegal contract zoning, merger and Statute of Frauds;

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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