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IN THE

Supreme Court of the State of Delaware

PIKE CREEK RECREATIONAL SERVICES, LLC,
a Delaware Limited Liability Company,
Plaintiff Below/Appellant,
v.
NEW CASTLE COUNTY,
a Political Subdivision of the State of Delaware,
Defendant Below/Appellee.

No. 309,2020
On Appeal from the Superior Court of the State of Delaware
C.A. No. N19C-05-238 PRW

CORRECTED APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In 2013, rejecting Pike Creek Recreational Service LLC's ("PCRS") contention that no enforceable deed restrictions exist on the Pike Creek Golf Course ("Golf Course"), the Court of Chancery held that the applicable restrictions in the 1964 and 1969 Agreements (the "Restrictive Covenants") (A0075-95) required PCRS to set aside a minimum of 130 acres for the development of an 18-hole golf course, and that if PCRS desired to develop in contravention of the applicable Restrictive Covenants, PCRS was required to seek a change in the deed restrictions under §40.31.130 of the New Castle County ("County") Code ("Restriction Change Statute").[1]

Eventually, PCRS decided to pursue a deed restriction change request. This time, PCRS agreed that the Restrictive Covenants are enforceable, but asserted (contrary to the plain language of the Restrictive Covenants) that the Restrictive Covenants exempted PCRS' lands from the requirements of the County's Unified Development Code ("UDC") and comprehensive rezonings that occurred concurrently with the adoption of the UDC in 1997. Further, PCRS asserted that because the Restrictive Covenants applicable to the Pike Creek Valley allow "not more than 5,454 units," and because approximately 5,000 have been

[1] *New Castle Cnty. v. Pike Creek Recreational Servs. LLC* ("*PCRS I*"), 82 A.3d 731, 736 n.13 (Del. Ch. 2013), *aff'd*, 105 A.3d 990, 2014 WL 7010183 (Del. Dec. 3, 2014).

built, it has the *unqualified* right to build 454 additional units on its property even though construction of those 454 units would be a violation of the UDC. As the Superior Court recognized, through this ploy, PCRS is attempting "to avoid application of UDC density restrictions enacted years before it took ownership or began development efforts." Op. 3.[2] For this and many other reasons, both the New Castle County Planning Board and the New Castle County Department of Land Use recommended against PCRS' deed restriction change application. A0016-26.

Thereafter, the parties executed an agreement to resolve the question of whether PCRS is guaranteed the right to build up to 454 units on its property when the applicable UDC zoning laws will not allow it. A0223-042. Cross-motions for summary judgment were briefed and argued before the Superior Court and, on August 14, 2020, judgment was entered in the County's favor. Applying the plain language of the 1964 and 1969 Restrictive Covenants, the Superior Court held that the "not more than 5,454 unit" limitation in the applicable restrictions was a "limitation, not a grant," (Op. 13) which caps "the total number of households permissible in the total subject acreage." The Superior Court went on to hold:

> The UDC introduces an additional restriction, limiting the density of households independent of that cap. Because both restrictions are solely limitations on household construction, adhering to one cannot possibly interfere with obedience to the other. Since there is no

[2] The Superior Court's Opinion is cited herein as "Op.__".

> conflict of obligations, the UDC does not work an alteration. Both sets of restrictions and limitations apply.

Op. 14. The Court also opined that "any development or redevelopment in the Pike Creek Valley must still be consistent with the UDC, a law of general applicability independent of the Covenant." Op. 14-15.

PCRS filed its appeal of the Superior Court's decision to this Court on September 15, 2020, and filed its opening brief on December 17, 2020.

SUMMARY OF ARGUMENT

1. The Superior Court Properly Interpreted The UDC And The Restrictive Covenants.

A. Denied. The 1964 and 1969 Restrictive Covenants confer certain obligations on PCRS as the successor to the Covenantors, and the County is a third party beneficiary of the Restrictive Covenants.

B. Denied as Stated. The UDC creates certain allowances for existing deed restrictions, none of which implicate the Restrictive Covenants.

C. Denied as Stated. Any exclusion set forth in UDC Section 150 is inapplicable to this case because nothing in the UDC alters the Restrictive Covenants. Any development or redevelopment in the Pike Creek Valley must still satisfy the requirements of the UDC, a law of general applicability independent of the Restrictive Covenants.

D. Denied. Nothing in the Restrictive Covenants applicable to PCRS' property guarantees it the unqualified right to build an additional 454 units, and, as such, no provision in the Restrictive Covenants was altered by the UDC.

E. Denied. The Superior Court properly held that the adoption of the UDC in no way altered the Restrictive Covenants applicable to PCRS' property.

F. Denied. The Restrictive Covenants do not provide PCRS any right to build 454 units on its property in violation of County law. The Superior Court's interpretation is correct and does not deprive PCRS of any purported rights.

G. Denied. The Superior Court properly interpreted the Restrictive Covenants and the County Code.

2. The Superior Court Was Not Required To Resolve Other Arguments And Implicitly Denied Them.

A. Denied as Stated. The Superior Court correctly interpreted the 1964 and 1969 Restrictive Covenants and the applicable provisions of the UDC which were dispositive of all issues in the case.

B. Denied. The Superior Court was not required to address and rule upon other provisions of the UDC in dismissing PCRS' claims. If considered, the claims lack merit.

C. Denied. PCRS' development plan applications do not comply with County law.

D. Denied. The Ordinance adopting the County's Comprehensive Plan does not impliedly repeal the County's zoning and subdivision laws in the UDC.

E. Denied. The County is not required to accept an illegal provision or an interpretation of the Restrictive Covenants that violates applicable law or is not supported by the plain language of the Restrictive Covenants.

F. Denied. PCRS' claims lack merit and the judgment of the Superior Court should be affirmed.

STATEMENT OF FACTS

A. The Pike Creek Valley And The 1964 Restrictive Covenants

The Pike Creek Valley is generally known as the area between and near Limestone Road and Polly Drummond Hill Road, just north of Newark, Delaware. The initial Pike Creek Valley development concept was proposed by four entities – Frank A. Robino, Inc., Luigi Fortunato, Inc., Franklin Associates, Inc., and Joseph P. Johnson, Inc. (collectively, "Covenantors"). The Covenantors sought approvals from the County to rezone approximately 1,141 acres. *See* A0077, ¶ 3.

When the Pike Creek Valley was first proposed, a planned community development (commonly known as a planned unit development ("PUD"))[3] (*see* B0141 at 2) of this type was a fledgling concept. Because the New Castle County Code in existence in the 1960s did not contain provisions for PUDs, the Covenantors sought individual rezonings to implement their PUD concept.[4]

In an effort to induce the Levy Court to rezone the land for the proposed development consisting of 1,141 acres and, *inter alia*, commercial space and residential housing units, the Covenantors voluntarily executed covenants running

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[3] A PUD is a mixed-use development plan which may include "varying densities of residential, light industrial, office research and commercial uses." *PCRS I,* 82 A.3d at 736 n.13 (citing *Del. Racing Ass'n v. McMahon*, 340 A.2d 837, 839 (Del. 1975)).

[4] The 1964 Restrictive Covenant set forth the Covenantors' intent to develop pursuant to a PUD concept. *See* A0075 (noting that the Covenantors sought to apply principles "of a planned unit development").

with the land which would be effective "only" if the Levy Court acted "favorabl[y] and in accordance with the application for rezoning" they submitted – which occurred. A0077, ¶2. The County was not a party to the Restrictive Covenants, and the Restrictive Covenants were voluntarily imposed by the Covenantors.[5]

The restrictions imposed by the 1964 Restrictive Covenant binds the parties, their successors, and assigns, "and [are] for the benefit of the Levy Court of New Castle County, Delaware, or any governmental body which may hereafter have final zoning jurisdiction over the SUBJECT ACREAGE. . . ." A0077-78, ¶3. Paragraph 5 makes clear that the "commitments and promises of the DEVELOPER . . . shall inure to the benefit of and be enforceable by the LEVY COURT OF NEW CASTLE COUNTY, or any successor organization . . . which may hereafter be the governmental body having final zoning jurisdiction over the SUBJECT ACREAGE . . . ." A0078, ¶5. By and through this language, the County became a third-party beneficiary to the restrictions.[6] Paragraph 16 of the 1964 Restrictive Covenant contains the Covenantors' covenant to not object to a future rezoning to a PUD classification:

> DEVELOPER covenants and agrees that in the event that provision shall be made in the applicable zoning law for planned unit

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[5] *PCRS I*, 82 A.3d at 735, 736 n.17 ("The County was not a party to the 1964 Agreement, nor did the 1964 Agreement bind the County to rezone the land; the 1964 Agreement merely establishes a scheme of voluntary restrictions which were conditioned upon the County's passing a zoning modification petition.").

[6] *Id.* at 736.

> development districts or similar types of zoning the SUBJECT ACREAGE may be appropriately zoned thereunder, provided that such rezoning would permit DEVELOPERS to accomplish all of the aspects of the preliminary, tentative comprehensive plan and of the updated master plan and would not be more restrictive than the limitations imposed upon DEVELOPER by the terms of this agreement.

In other words, Paragraph 16 provides that if the County adopts a future PUD zoning, the Covenantors conditionally agree to accept that zoning as to the subject acreage.

B. The 1969 Amendment

In 1969, the Covenantors (and their successors) sought amendments to the 1964 Restrictive Covenant and to the overall development. On December 22, 1969, the Covenantors executed an Amendatory Agreement to the 1964 Restrictive Covenant ("1969 Amendment"), which, among other things, increased the permissible number of dwelling units in the Pike Creek Valley from 4,500 to 5,454. A0088-95. Pertinent to the present appeal, Paragraph 9 of the Restrictive Covenants, as amended by the 1969 Amendment, now reads as follows (emphasis supplied):

> The DEVELOPER, on its own behalf and on behalf of its successors and assigns, covenants and agrees that **not more than** 5,454 family dwelling units will be constructed or erected on the SUBJECT ACREAGE known as Pike Creek Valley . . .

In 1971, the then-owners sought permission to develop the Golf Course via a special exception, thereafter recorded a plan for the Golf Course, and built the Golf

Course. After a succession of initial owners, the Golf Course was sold to Three Little Bakers Inc. ("Three Little Bakers") in 1982, which operated the Golf Course until Three Little Bakers sold it to PCRS in 2008.

C. UDC Adoption And Amendment

About a decade before Three Little Bakers sold the Golf Course to PCRS, on December 31, 1997, the County adopted the UDC. The UDC's adoption was a "major overhaul of the land use regulations for the County."[7] The UDC is a compilation of all development oriented regulations for the County and includes regulations on zoning, subdivision, design, concurrency, impact fees, and signs. At the time of the adoption of the UDC, the official zoning of numerous properties was changed. For example, a large portion of the Golf Course was rezoned to a Suburban zoning classification. B0142, ¶6.[8]

In 2003, the County Council considered numerous changes to the UDC. On July 8, 2003, the County Council passed Substitute No. 1 to Ordinance No. 03-045 as Amended by Amendment #2. B0172-0227. That Ordinance, among other things, changed Table 40.10.210 of the UDC to preclude golf courses and driving ranges in Community Area Open Space.

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[7] *Kirkwood Motors, Inc. v. New Castle Cnty. Bd. of Adjustment*, 2000 WL 710085, at *3 (Del. Super. Ct. May 16, 2000).

[8] The Golf Course has remained zoned "Suburban" since that date. B0139, ¶4.

D. PCRS Purchases The Golf Course And Pursues Development

PCRS purchased the Golf Course in 2008. Soon thereafter, PCRS shut down the Golf Course and filed applications to construct 288 residential dwellings and 62,088 square feet of commercial buildings for a proposed development known as the Terraces at Pike Creek ("Terraces"). After the application was filed, the County notified PCRS that the proposed development did not comply with the UDC and that the Restrictive Covenants precluded the proposed development. Litigation was thereafter commenced to determine the meaning and enforceability of the Restrictive Covenants (hereafter the "Chancery Action").

E. The Prior Opinions

The Court of Chancery granted (in part) the County's motion for summary judgment in the Chancery Action and held:

> So the two Agreements provide plainly that the "130 acres set aside for an 18–hole golf course", or more precisely "the development of an 18–hole golf course", was included among the "areas set aside *for specific land uses*." Moreover the language used demonstrates the explicit original intent that the 130 acres would be dedicated to the specific single purpose of development of a golf course, and would not serve double-duty to meet some other "open space" requirement. Accordingly, unless validly changed or amended, the restriction limits the 130 acre set aside to a single specific use. . . . [T]he County, as a third-party beneficiary of the 1964 and 1969 Agreements, may insist that 130 acres must remain set aside for development as a golf course.[9]

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[9] *PCRS I*, 82 A.3d at 748-49 (internal quotations and citations omitted).

The Court of Chancery also held that "PCRS is required to follow the Restriction Change Statute where applicable if it wishes to modify the restrictive covenant found by the Court to exist and described above."[10] In a separate Opinion, the Court of Chancery held that, regarding future land development submissions relating to the Golf Course, "the County must carry out its own coextensive duties as both (1) the reviewing and approving authority for any PCRS development plan for the land in question and (2) a third-party beneficiary of the restrictive covenant that is attached to a portion of that land."[11]

This Court affirmed the Court of Chancery's decisions.

F. The PCRS Working Group

In 2016, PCRS advised that it intended to submit a restriction change application to the County. PCRS thereafter formed a working group of selected nearby residents to review the Terraces Plan. According to a PowerPoint presentation submitted by PCRS, PCRS presented the plan alongside the argument that it could build up to 454 units on the Golf Course under the Restrictive Covenants.[12] Presented with a choice between the prospect of 454 units or the 224 units proposed by PCRS, by a bare majority (6-5 vote), the PCRS selected working

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10 *PCRS I*, 82 A.3d at 767.

11 *New Castle Cnty. v. Pike Creek Recreational Servs. LLC* ("*PCRS II*"), 2013 WL 6904387, at *3 (Del. Ch. Dec. 30, 2013), *aff'd,* 105 A.3d 990, 2014 WL 7010183 (Del. Nov. 14, 2014).

12 *See* B0001-0012.

group approved the plan. The deciding vote of the working group was cast by a member who did not attend the final meeting. A0294, ¶24.

G. The Deed Restriction Change Application And The County's Recommendation

PCRS submitted a revised application for the Terraces with a request for a deed restriction change on November 1, 2018. *See* A0244. That application sought approval for PCRS to build 224 dwelling units on the non-golf course lands and to remove the golf course restriction. A public hearing on the application before the Planning Board was held on December 4, 2018. At the public hearing, the residents of Pike Creek almost uniformly spoke out against the proposal – citing density and other factors as a primary concern. B0013-0137.

On February 19, 2019, the Planning Board and the Department both recommended against the deed restriction change application. The Department's recommendation against the restriction change is based on numerous reasons, including, but not limited to: (1) there is no concrete mechanism in place for the management of the open space; (2) PCRS' proposal for "semi-private" open space is not well defined, and no concrete proposal is provided regarding who is responsible for the maintenance and upkeep if the deed restriction change is granted; (3) the density proposed is significantly higher than what is allowed absent a deed restriction change and is antithetical to County planning goals; (4) the proposal eliminated any opportunity for active recreation; and (5) numerous

land use related issues are not addressed, including, but not limited to, traffic, impact on schools, drainage issues, impact on the historic Klair House, and maintenance, access, and management of the open space. A0116-126. The Planning Board's recommendation largely followed the Department's recommendation.

H. PCRS's Request For A Stay Of The Administrative Proceedings And For Judicial Intervention

Following the recommendations, PCRS requested that the parties seek judicial resolution of ostensibly two legal issues, specifically: (1) whether Paragraphs 9 and 16 of the Restrictive Covenants, by their plain language, preclude the County from imposing zoning and other density controls; and (2) whether the Restrictive Covenants trump adopted zoning legislation passed by County Council. Thereafter, PCRS and the County entered into a Litigation Agreement wherein the parties agreed to a complaint that would be filed to resolve the issues regarding the meaning and operation of Paragraphs 9 and 16 of the Restrictive Covenants. A0223-042.

The matter was thereafter submitted to the Superior Court for a decision on the parties' cross-motions. The Superior Court held that, under the plain language of the 1964 and 1969 Restrictive Covenants, the 5,454 cap acted as a limitation – not a guarantee of future units. Op. 12-13. As such, because the Restrictive Covenants were not altered by the UDC, "any development or redevelopment in

the Pike Creek Valley must still be consistent with the UDC, a law of general applicability independent of the Covenant." Op. 14-15. This appeal followed.

ARGUMENT

I. THE RESTRICTIVE COVENANTS DO NOT GUARANTEE ANY FUTURE DEVELOPMENT DENSITY, AND, AS SUCH, THE RESTRICTIVE COVENANTS REMAIN UNALTERED BY THE ADOPTION OF THE UDC

A. Question Presented

Should the Superior Court's holding that no provisions in the Restrictive Covenants were altered by the County's adoption of the UDC be sustained when nothing in the plain language of the Restrictive Covenants guarantees that 5,454 units can be built and when nothing therein prevents any future zoning changes or density limitations on any specific property in the Pike Creek Valley?

B. Scope Of Review

This Court reviews questions of law, including contract interpretation and statutory interpretation, *de novo*.[13]

C. Merits

The Superior Court's holding that the UDC does "not work an alteration" of the Restrictive Covenants should be affirmed because, as the Superior Court held, nothing in the Restrictive Covenants acts as a grant of a right to build 5,454 units and because a Restrictive Covenant, by definition, is a servitude. Op. 12.

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[13] *Urdan v. WR Cap. P'rs, LLC*, -- A.3d --, 2020 WL 7223313, at *6 n.17 (Del. Dec. 8, 2020); *Walker v. State*, 230 A.3d 900, 2020 WL 2125803, at *1 (Del. May 4, 2020).

1. Legal Standard For Review Of The Meaning Of The Covenants

When interpreting the Restrictive Covenants, "[g]eneral principles of contract construction" control.[14] The primary goal is to give effect to the intent of the parties.[15] "In construing deed restrictions, courts apply the plain meaning of the words. . . "[16] Because the plain language controls, the "language of a restrictive covenant may be interpreted or construed only if it is ambiguous."[17] If found ambiguous, the restrictive covenant is strictly construed.[18] "[A]s a general rule, the party advocating for the land use restriction [here, PCRS] bears the burden of demonstrating the restriction is valid and enforceable."[19]

2. Paragraphs 9 And 16 Of The Covenants Do Not Insulate PCRS From Subsequently Adopted UDC Requirements

At the heart of all of PCRS' arguments is its flawed contention that the Restrictive Covenants "created a right to construct 5,454 units on the Property."

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14 *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *5 n.34 (Del. Ch. Dec. 15, 2005).

15 *See Sassano v. CIBC World Mkts. Corp.,* 948 A.2d 453, 462 (Del. Ch. 2008); *Mendenhall Vill. Single Homes Ass'n v. Harrington*, 1993 WL 257377, at *2 (Del. Ch. June 16, 1993).

16 *Service Corp. of Westover Hills v. Guzzetta*, 2007 WL 1792508, at *4 (Del. Ch. Jun. 13, 2007).

17 *Schreppler v. Cannon*, 610 A.2d 727, 1992 WL 115142, at *1 (Del. May 8, 1992).

18 *PCRS I*, 82 A.3d at 746.

19 *Id.* (citing *Alliegro v. Home Owners of Edgewood Hills, Inc.*, 122 A.2d 910, 912 (Del. Ch. 1956) & *Gammons v. Kennett Park Dev.*, 61 A.2d 391, 397 (Del. Ch. 1948)).

PCRS' Opening Brief ("OB") 25. Because the plain language of the Restrictive Covenants do not so provide, all of PCRS' claims must be rejected.

Paragraph 9 of the Restrictive Covenants is easily understood by its plain meaning. The Covenantors can build "no more than 5,454 units." No language in Paragraph 9 *guarantees* that the Covenantors or their successors can build 5,454 units in the Pike Creek Valley. There is no ambiguity in the language – the Covenantors reserved no unqualified right to build 5,454 units. As the Superior Court properly held, based upon the plain and unambiguous language, Paragraph 9 acts as a limitation to build "not more than 5,454" units. Op. 12.

Similarly, Paragraph 16 does not provide a guarantee that zoning or the density of development for the properties in the Pike Creek Valley could never be changed; rather it "illustrates the assumptions the landowners made regarding future zoning conditions in the Pike Creek Valley." Op. 13. Paragraph 16 provides that "in the event that provision shall be made in the applicable zoning law for planned unit development districts or similar types of zoning the SUBJECT ACREAGE may be appropriately zoned thereunder . . . ." This means that if the County adopts a PUD zoning classification, then the Covenantors "covenant[] and agree[]" that the Pike Creek Valley area may be appropriately zoned as a PUD. Plainly, because the Pike Creek Valley was developed under the principles of a PUD, the Covenantors agreed to not object to a PUD classification in the future.

However, the Covenantors' promise not to object to a potential future PUD zoning classification was conditional: "provided that such rezoning . . . would not be more restrictive than the limitations imposed upon DEVELOPER by the terms of this agreement." Thus, the Covenantors' agreement that the Pike Creek Valley may be appropriately zoned under a future PUD ordinance (e.g., its covenant to not object to a rezoning) only applies if the PUD ordinance is not more restrictive than the restrictions imposed by the Covenantors.

Paragraph 16 only applies to a future PUD Ordinance and does not in any way apply to any other types of land use ordinances that may apply to any portion of the Pike Creek Valley at a future date. Again, because the Pike Creek Valley was never zoned a PUD (B0141-42, ¶2), at most this "final clause [Paragraph 16] illustrates the assumptions the landowners made regarding future zoning conditions in the Pike Creek Valley." Op. 13. There is absolutely no guarantee in Paragraph 16 that zoning or other density for any property in the Pike Creek Valley would never change – Paragraph 16 can only be interpreted as a covenant to not object to future PUD zoning.

Contrary to PCRS' contentions, the Restrictive Covenants *themselves* contemplate that future rezonings may occur that limit density. For example, Paragraph 12 provides that if the Golf Course is zoned commercial, then the Golf Course property "shall only be used for a recreational purpose." A0083, ¶12.

Clearly the drafters of the Restrictive Covenants contemplated that the Golf Course could be rezoned, and if it were rezoned to a commercial classification, density on that parcel would be severely restricted because it could "only be used for a recreational purpose." This language would not have been included if the Covenantors desired to insulate the Golf Course property from any potential future rezonings or density limitations.

Stated plainly, Paragraph 9 is a limitation that allows not more than 5,454 units, and Paragraph 16 does not restrict future rezonings for any classifications in the then-existing County Code. Nor does the plain language prevent application of later enacted zoning legislation that impacts the Golf Course.

3. PCRS' Paragraph 15 Argument Is Barred And Is Plainly Wrong

On appeal, PCRS argues that pursuant to Paragraph 15 of the Covenant, if PCRS were barred from constructing 5,454 units, the Restrictive Covenant could continue in perpetuity, allegedly "contrary to the Developer's . . . intent." OB 26. Except for a few fleeting references in PCRS' answering and reply brief (A0379, 0381, 0383), Paragraph 15 was not mentioned in the Superior Court proceedings until oral argument. A0698-99. As PCRS' current Paragraph 15 argument was not adequately raised before the Superior Court, it is waived.[20]

[20] Supr. Ct. R. 8; *Clouser v. Doherty,* 175 A.3d 86, 2017 WL 3947404, at *5 (Del. Sept. 7, 2017) ("Because Clouser did not raise any of these arguments before the Superior Court, we will not consider them for the first time on appeal.").

Even if the Paragraph 15 argument is considered, it in no way impacts the Superior Court's ruling. For starters, the argument that the Restrictive Covenants expire when the 5,454 unit cap is reached is contrary to the position taken by PCRS in the Court below and before the County. A0245 (land use counsel stating that the *maximum* number of dwelling units permitted to be constructed is 454).[21]

Even if PCRS' appellate flip flop is permitted, nothing in Paragraph 15 acts as a guarantee that no zoning or density changes could be adopted by County Council for any property in the Pike Creek Valley. The clause merely sets forth a duration of the Restrictive Covenant and nothing more. The Restrictive Covenant lasts until the "last dwelling unit is constructed on the SUBJECT ACREAGE within the permissible limits set forth in this agreement." Nothing in the plain language of Paragraph 15, however, mandates or requires that 5,454 units be built or prevents the County from adopting zoning and subdivision laws for the Pike Creek Valley that are more restrictive than the laws existing in 1964 or 1969.[22]

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[21] *See also* A0701-02; A0028 (contending that 5,454 units were reserved); A0030 (contending that the 5,454 is a "dwelling threshold"); A0032; A0046-47; A0053; A0195-96; A0206-07; A0314-15.

[22] If it were the intent of the Covenantors to insulate themselves from any future zoning or density limitations, they could have simply stated:

> By acceptance of these restrictions, the County Council agrees to not pass any zoning or other laws that might prevent or preclude the development of a minimum of 5,454 family dwelling units in the Pike Creek Valley or that otherwise limit density to less than 5,454 units.

The Superior Court properly held that because the Paragraph 9 limitation of "not more than 5,454" units is a cap on the Pike Creek Valley development, and the 5,454 unit number is a limitation and "not a grant," because a restrictive covenant, by its very nature, is a servitude. Op. 12-13. Nothing in the language of Paragraph 15 changes that result.

4. PCRS' Construction Of The Covenants Must Be Rejected Because It Creates An Illegality

Even if the Restrictive Covenants were deemed ambiguous (and no ambiguity exists), PCRS' claim that the Covenantors unilaterally granted themselves the ability to build 5,454 units in the Pike Creek Valley and exempted the Pike Creek from future zoning changes because they voluntarily imposed and recorded Restrictive Covenants, must be rejected because such an act constitutes illegal contract zoning. Indeed, it is a bedrock legal principle that "where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law."[23]

Naturally, this is not what the Restrictive Covenant states. While PCRS wishes that the Restrictive Covenant was drafted differently, it cannot alter the plain language.

[23] *Great N. Ry. Co. v. Delmar Co*., 283 U.S. 686, 691 (1931); *EDM & Assocs., Inc. v. GEM Cellular*, 597 A.2d 384, 390-91 (D.C. 1991) ("[A] contract fairly open to two interpretations, one of which will make it legal and one of which will make it illegal, must always be given the construction that makes it legal."). PCRS advocates for a free use of land construction in the event of ambiguity. OB 17. That interpretive rule should be deemed on the lowest rung of the interpretive ladder. A0641.

An agreement by the County to exempt the Covenantors from any future zoning or subdivision laws constitutes illegal contract zoning, which is "a bilateral agreement committing the zoning authority to a legally binding promise."[24] Contract zoning is invalid *per se* as a "problematic blend of contract and police powers."[25] "[W]hen a zoning authority takes such a step and curtails its independent legislative power, it acts *ultra vires* . . . ."[26] Further, it is hornbook law that illegal "contract zoning appears when a zoning authority . . . agrees to not alter a zoning change for a specified period of time."[27]

Recognizing this, the Superior Court rejected PCRS' interpretation and properly held "the Covenant could not possibly give the landowners any rights enforceable against the Levy Court or its successors, since Delaware forbids contract zoning." Op. 13. Because interpreting the voluntarily imposed Restrictive

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[24] *Wilm. Sixth Dist. Cmty. Comm. v. Pettinaro Enters.*, 1988 WL 116496, at *4 (Del. Ch. Oct. 27, 1988); *PCRS I*, 82 A.3d at 736 n.17; *Hartman v. Buckson*, 467 A.2d 694, 699 (Del. Ch. 1983) (defining contract zoning as "the contracting by a zoning authority to zone for the benefit of a private landowner").

[25] *Dacy v. Vill. of Ruidoso*, 845 P.2d 793, 797 (N.M. 1992); *Hartman*, 467 A.2d at 699 (quoting *V.F. Zahodiakin Eng. Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131 (N.J. 1952)) ("Zoning is an exercise of the police power . . . . It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

[26] 101A C.J.S. *Zoning and Land Planning* § 73 (2019); *see also Attman/Glazer P.B. Co. v. Mayor & Alderman of Annapolis*, 552 A.2d 1277, 1282 (Md. 1989); 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 44:11 (4th ed. 2019) (a municipality "may not contract away its police power to regulate on behalf of the general welfare.").

[27] 101A C.J.S. *Zoning and Land Planning* § 73 (2019).

Covenants as guaranteeing 5,454 units and establishing an indefinite freeze on any zoning changes in the Pike Creek Valley (and the Golf Course) is not supported by the plain language of the Covenants, would require an interpretation constituting illegal contract zoning, would impermissibly bind the hands of future County Councils,[28] and would impermissibly take away the County Council's legislative authority for zoning,[29] the Superior Court's interpretation of the Restrictive Covenants should be affirmed.

5. The Adoption Of The UDC In No Way Altered The Restrictive Covenants

When interpreting a statute, the goal is to "determine and give effect to [the] legislative intent,"[30] and when the statute is unambiguous, the plain language controls.[31] Here, the statutory sentence relied upon by PCRS states that "[n]o prior restrictive covenants that have been entered into in which New Castle County is a

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[28] *Glassco v. Cnty. Council of Sussex Cnty.*, 1993 WL 50287, at *5 (Del. Ch. Feb. 19, 1993) ("Council has no power by ordinance to create legal obligations that restrict the future exercise of statutorily created discretion."); 10A MCQUILLIN MUN. CORP. § 29:103 (3d ed. 2019) (a contract involving "legislative functions or governmental powers of the municipal corporation. . . [is] not binding on successor boards or councils."); A0341-42.

[29] There is simply no vested right to any zoning or land use classification. *Kapa Alpha Educ. Found. Inc. v. City of Newark*, C.A. No. 19M-10-175-ALR, at ¶6 & n.9 (Del. Super. Ct. Dec. 17, 2019) B0231-0236 (citing cases); A0347-48. The County Council has the ability to change zoning at any time. *See Willdel Realty, Inc. v. New Castle Cnty.*, 281 A.2d 612, 614 (Del. 1971).

[30] *Watt v. Rescare Home Care*, 81 A.3d 1253, 1260 (Del. 2013).

[31] *State v. Murray*, 158 A.3d 476, 482 (Del. Super. Ct. 2017) (citing *In re Adoption of Swanson*, 623 A.2d 1095, 1096–97 (Del. 1993)).

beneficiary shall be altered by the provisions of this Chapter."[32] As the Superior Court properly held, the adoption of the UDC in no way *altered* any of the Restrictive Covenants applicable to the Pike Creek Valley.

The Covenantors limited the total number of family dwelling units on the "Subject Acreage" (1,363.58 acres) to not more than 5,454. Again, as the Superior Court correctly held, "[t]he UDC introduces an additional restriction, limiting the density of households independent of that cap. Because both restrictions are solely limitations on household construction, adhering to one cannot possibly interfere with obedience to the other. Since there is no conflict of obligations, the UDC does not work an alteration. Both sets of restrictions and limitations apply." Op 14.

The only way that there could be an "alteration" of the Restrictive Covenants is if the Restrictive Covenants guaranteed 5,454 units could be built without any laws being passed (zoning or otherwise) which would limit zoning changes or density restrictions on *any* property in the Pike Creek Valley.[33] The

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[32] UDC §40.01.150.

[33] PCRS contends that "the trial court implicitly concluded that Section 150 could never alter a prior restrictive covenant, thereby rendering Section 150 meaningless." OB 19. This contention is belied by the Superior Court's Opinion which states "[i]f the UDC forbade golf courses, for example, that restriction would be in conflict with an affirmative obligation in the Covenant and create an alteration." Op. 13. When the Superior Court provides a specific example of when Section 150 applies, there is no implicit conclusion that Section 150 can never apply. *See also infra* p. 40-41 for the appropriate interplay between restrictive covenants and zoning ordinances.

Restrictive Covenants do not so state, and to interpret them as such, as discussed above, would be illegal contract zoning.

PCRS spends pages unfairly criticizing the Superior Court for its interpretation of the statute, in which it quoted the *Black's Law Dictionary* definition of "material alteration." OB 16-19; Op. 11. The Superior Court, however, did not hold that no "material alteration" occurred and therefore *did not invoke a materiality requirement*; rather, the Court opined, consistent with settled authority, that because there are two sets of limitations, the stricter of the two control.[34] Plain and simple, one does not alter the other because the Restrictive Covenants do not (and cannot) grant the unqualified right to build 5,454 units. As the Superior Court held, "[s]ince there is no conflict of obligations, *the UDC does not work an alteration*. Both sets of restrictions and limitations apply." Op. 14 (emphasis supplied). Thus, the Superior Court held there was no alteration *whatsoever*.

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[34] 34 AM. JUR. 3D *Proof of Facts* 339 § 4 (2019) ("[i]f the covenant is less restrictive than the zoning ordinance, the ordinance prevails, and if the covenant is more restrictive than the zoning ordinance, the covenant prevails."); 8 MCQUILLIN MUN. CORP. § 25:10 (3d ed. 2019) ("[W]here covenants impose restrictions which are less severe than the restrictions of a zoning ordinance, the provisions of the ordinance will control and become superior in force to the less restrictive provisions of the covenants."); *see also* 5 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 82:2 (4th ed. 2019); *Inabinet v. Booe*, 202 S.E.2d 643, 644 (S.C. 1984); *Wahrendorff v. Moore*, 93 So.2d 720, 722 (Fla. 1957); A0330-32.

Similarly, PCRS' criticism of the Court's statement that "Section 150 is implicated if the UDC purports to ban what the Covenant grants, or forbid what the Covenant requires" (OB 16) has no foundation whatsoever. The Superior Court recognized that for the UDC to alter the Restrictive Covenants, application of the UDC would need to change the meaning of the Restrictive Covenants. Op. 11. The only way, therefore, that the UDC could conceivably alter the Restrictive Covenants is to take away something that is granted by the covenant or forbids what the covenant requires.[35] Because no provision in the Restrictive Covenant mandates that 5,454 units be constructed or otherwise bans zoning changes in the Pike Creek Valley, the UDC does not effectuate any alteration of the Restrictive Covenants.

The bottom line is this – nothing in the UDC "alters" or "changes" any requirement of the Restrictive Covenants. Absent an alteration, and none exists here, UDC §40.01.150 is inapplicable. "[T]he UDC does not work an alteration . . . [and] [b]oth sets of restrictions and limitations apply." Op. 14. The Superior Court's decision should be affirmed.

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[35] PCRS claims that the Superior Court should not have characterized the Restrictive Covenants as a limitation, but instead a grant. OB 19. PCRS' construction is contrary to Paragraph 9 of the Restrictive Covenants, and Paragraph 3 which clearly states that the Covenantors sought to impose "restrictions, limitations, and covenants" on the lands and "[s]aid restrictions shall be for the benefit of . . . New Castle County." *See also infra* note 38.

6. PCRS' Construction Of Section 150 Is Erroneous

PCRS' claim that its reading of Section 150 is purportedly "reasonable and reflects consistency" with other sections of the UDC *it* identifies (OB 22) is erroneous because it ignores other pertinent provisions of the County Code. For example, UDC §40.01.100 states, except for certain enumerated instances, all development within the County and "all land use applications made to the County shall comply with the provisions of this Chapter." Section 150 is not one of the enumerated exceptions, and the legislative intent is for all new applications to comply with the UDC.[36]

Further, PCRS' reading of Section 150, which it contends contains a "legislative carve-out for prior restrictive covenants" (OB 21) is belied by Section 160, which states "[t]he Department may accept for processing, at its discretion, any subdivision or land development plan that conflicts with this Chapter when such conflict is related to the provisions of a restrictive covenant, the covenant is not more than five (5) years old, the covenant was a condition of a rezoning adopted before December 31, 1997, and New Castle County was a beneficiary." PCRS' reading of Section 150 impermissibly renders Section 160 meaningless because if any alteration prevented application of the UDC, Section 160 would never apply. The statutory scheme cannot be interpreted so that the plain language

[36] A0637-39. As discussed in Section II D below, Section 40.01.300D does not support PCRS' arguments.

of §40.01.100 and Section 160 are rendered meaningless by Section 150.[37] As such, all new development in the County, regardless of any privately enacted deed restriction, must follow the UDC.[38]

7. PCRS' New Ordinance 03-045 Argument Also Fails

PCRS, for the first time on appeal, argues that by adoption of Ordinance 03-045, which adopted UDC Table 40.10.210, the County "altered" Paragraph 7 of the Covenants regarding open space. Again, arguments such as this, which were not presented to the Superior Court, are waived.[39]

But even if the argument is considered, it has no validity. PCRS contends that Ordinance 03-045 "prohibits the golf course from being treated as open space." OB 27-28. This is categorically false. UDC Table 40.10.210 outlines the uses that may be permitted in open space. In the Table, golf courses and driving ranges are permitted in several open space areas (1) in drainage ways; (2) the

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[37] *See* OB 19 (stating provisions cannot be rendered meaningless); *Lowicki v. State*, 237 A.3d 809, 2020 WL 4354903, at *3 (Del. July 29, 2020) ("courts construe a statute to give effect to all its provisions, so that no part is inoperative or superfluous, void or insignificant, and so that one section does not destroy another, unless a provision is the result of obvious mistake or error.").

[38] PCRS' contention that a voluntarily recorded restrictive covenant could create a binding grant of rights and supersede validly adopted zoning laws (OB 26) is absurd. Functionally, PCRS' contention would mean that any property owner could, the day before the UDC was adopted, file a deed restriction naming the County as a beneficiary, and could dictate zoning, density, and the uses of their own particular private property – thwarting the legislative zoning and land use authority of the County Council. It is also absurd because if only one acre of land remained, PCRS would be permitted to build 454 units on it.

[39] *See supra* note 20.

Cockeysville formation, and as a limited use in (3) certain riparian buffer open space areas, and (4) in floodplain and wetland open space areas. Golf courses, however, are prohibited from being used as "Community area open space" – which is defined as open space for a residential subdivision which is owned by a homeowners association, comprised of the residents of the subdivision who shall be responsible for the open space.[40]

The County in no way prohibits the Golf Course from being treated as open space under the Restrictive Covenants so long as it is not a component of homeowner controlled open space within a subdivided community or in a natural open space area.[41] Golf courses are permitted in Suburban zoning districts[42] and the Golf Course remains as open space for purposes of the Restrictive Covenants and is counted as such because 130 acres must be set aside and held for the development of an 18-hole golf course. Even if an "additional burden" was imposed as PCRS alleges (OB 28), the Restrictive Covenants were not altered in any way, and Section 150 is not implicated. Similarly, no provision of Paragraph 7

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40 UDC §40.33.300 (Definitions).

41 B0143, ¶8. Table 40.05.420 of the UDC precludes not only Community Area Open Space from being a component of the density area calculation, but also prevents land previously dedicated as open space from being used in the density calculation. In the previous litigation, the Court of Chancery held the language used in the Restrictive Covenants "would not serve double-duty to meet some other 'open space' requirement." *PCRS I,* 82 A.3d at 748.

42 UDC Table 40.03.110A (demonstrating that recreation, low intensity is a limited use in the Suburban zoning district. Recreation, low-intensity is defined by UDC §40.33.250C as allowing golf courses).

of the Restrictive Covenants is in any way altered by UDC Table 40.10.210. Consequently, this newly raised claim, if considered, should be rejected.

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In sum, because no language in the Restrictive Covenants affirmatively guarantees 5,454 units will be constructed, and because nothing in the Restrictive Covenants prevents the County from adopting zoning and development laws applicable to the Golf Course, the adoption of the UDC and the relevant provisions thereof does not in any way alter the Restrictive Covenants. Because PCRS' interpretation is contrary to the plain language of the Restrictive Covenants[43] and impermissibly attempts to enlarge the scope of the Restrictive Covenants by implication,[44] PCRS' contentions should be rejected, and the decision of the Superior Court should be affirmed.

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[43] *See Nw. Nat'l Ins. v. Esmark, Inc*., 672 A.2d 41, 44 (Del. 1996) (holding the Court may not engraft "a limitation not found in the contract language").

[44] *See Mendenhall Vill. Single Homes Ass'n v. Dolan*, 1994 WL 384579, at *2 (Del. Ch. July 13, 1994), *aff'd*, 655 A.2d 308, 1995 WL 33740 (Del. Jan. 24, 1995).

II. THE SUPERIOR COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE COURT'S HOLDING RENDERED PCRS' ARGUMENTS MOOT OR THE ARGUMENTS WERE OTHERWISE WAIVED

A. Question Presented

Should the Superior Court's ruling be affirmed when arguments now made by PCRS were rendered moot by the Superior Court's holding, were otherwise waived, and ultimately lack merit as a matter of law?

B. Scope Of Review

This Court reviews questions of law, including contract interpretation and statutory interpretation, *de novo*.[45]

C. Merits

The Superior Court's decision sufficiently addresses all issues that are pertinent to PCRS' claims. Specifically, PCRS' citations to other County Code provisions not specifically cited by the Superior Court need not be resolved because the Court's decision on the Section 150 "alteration" issue is dispositive of PCRS' arguments on appeal. Similarly, PCRS' Comprehensive Plan arguments were waived below, cannot be revived here, and otherwise lack merit. And, its claims regarding the County having to accept the benefits and burdens of the Restrictive Covenants are irrelevant because the Superior Court correctly held that there is no right to a guaranteed 5,454 units in the Restrictive Covenants.

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[45] *Urdan*, 2020 WL 7223313, at *6 n.17; *Walker*, 2020 WL 2125803, at *1.

D. Sections 40.01.300D1 And D2 Of The UDC Are Inapplicable Because PCRS Misconstrues The Restrictive Covenants

The Superior Court was not required to address PCRS' UDC §40.01.300D1 and D2 arguments below because the Court held that both sets of restrictions and limitations (i.e. the Restrictive Covenants and the UDC provisions) apply to PCRS' development proposal. This holding is dispositive of the UDC §40.01.300D1 and D2 arguments presented on appeal.

As a threshold matter, PCRS contends that the Levy Court "approved the 1964 Agreement and the 1969 Amendment by Ordinance." OB 31. No citation is given for this contention, and this contention is belied by prior opinions concerning the Restrictive Covenants and by the plain language of the Restrictive Covenants. In *PCRS I*, the Court of Chancery held that the Covenantors voluntarily recorded the Restrictive Covenants in an effort to induce the County Council to adopt the proposed rezonings.[46] Each of the Covenants plainly state that they are effective only if the County passes the proposed rezonings. A0077; A0090. As such, no ordinance approved the Restrictive Covenants; rather the Restrictive Covenants were effective when the rezoning ordinances were passed. But the Restrictive Covenants themselves were never *adopted* by ordinance.

Section D1 states that "[t]he repeal of prior ordinances, resolutions, rules and regulations, provided for in the ordinance adopting this Chapter, shall not affect

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[46] *PCRS I*, 82 A.3d at 735, 736 n.17.

any act done . . .” This section is plainly inapplicable to the case at bar for two reasons. **First**, no act done was affected by the adoption of the UDC. As the Superior Court held, the Restrictive Covenants do not guarantee that 5,454 units can be built or insulates any property in the Pike Creek Valley from a future zoning action. Thus, no provision in the Restrictive Covenants was “affected” by the UDC because both sets of restrictions apply. **Second**, the repeal of prior Ordinances has no impact on the Restrictive Covenants because they were not adopted by Ordinance to begin with. Thus, there is no undoing of “prior legislative acts” as it relates to the Restrictive Covenants as PCRS contends. OB 31-32.

PCRS’ Section D2 argument fails for similar reasons. That section states “[a]ll the provisions of ordinances, resolutions, rules and regulations repealed by the ordinance adopting this Chapter shall be deemed to have remained in force from the time when they began to take effect, *so far as they may continue to apply* . . .” (emphasis supplied). Here, because the Superior Court held that the UDC did not alter the Restrictive Covenants and did not repeal the Restrictive Covenants, Section D2 is inapplicable. For this reason, the Superior Court was not required to address PCRS’ contentions because the argument was rendered moot by the Court’s other holdings. And, similar to D1, because the Restrictive Covenants were not adopted by Ordinance, they do not constitute “resolutions, rules, and regulations” of the County. Finally, the D2 language is also inapplicable because it

applies only in "so far as they [prior ordinances, resolutions and rules] continue to apply." UDC § 40.01.100 makes clear that "all development within the County and all land use applications made to the County shall comply with the provisions of this Chapter" unless otherwise exempted. No specific exemption applies to PCRS' 224 unit development proposal; therefore, no prior rules apply.[47]

Even if these savings clause code sections were applicable, they only apply in the absence of express legislative direction to the contrary and in instances where procedural rights under the UDC impact a substantive right.[48] No substantive rights are implicated because the Restrictive Covenants do not provide PCRS the substantive right to build 5,454 units, there are no substantive rights in a land use application that was not pending at the time of the adoption of the UDC (*see* UDC § 40.01.100), and there is no substantive right to any zoning classification whatsoever.[49]

In the end, because the Superior Court properly rejected PCRS' claim that the Restrictive Covenants guarantee 5,454 units, the Superior Court's decision on the Section 150 claims is dispositive of the Section D1 and D2 claims.

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47 *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1036 (Del. 2012) ("When construing a statute, we must 'give effect to the whole statute, and leave no part superfluous.'").

48 *See Monacelli v. Grimes*, 99 A.2d 255, 266 (Del. 1953) (interpreting 1 *Del. C.* § 104 which mirrors the language in UDC §40.01.300).

49 *See supra* note 29.

E. PCRS' Comprehensive Development Plan Arguments Were Waived And Are Without Merit.

PCRS claims that the County's Comprehensive Development Plan, without regard to any provision of the UDC, permits it to build "173-519 units." OB 34. PCRS has waived this argument for several reasons. **First,** it is in breach of the litigation agreement between the parties because it adds a new claim. A0224, ¶4 & Exhibit A thereto. **Second,** there is no claim relating to the Comprehensive Plan pled in the Complaint. A0066-72. **Third,** PCRS did not raise the Comprehensive Plan claim until its reply brief below and waived the ability to raise the argument. A0018; A0373; A0641.[50] For these reasons, the Superior Court was not required to address PCRS' Comprehensive Plan claims because they were not properly raised below.

Even if the claim were properly raised, it is not a serious argument[51] because it is wholly without merit.[52] PCRS avers that because the Comprehensive Plan's

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[50] *Murphy v. State,* 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim . . .").

[51] *B.E.T., Inc. v. Bd. of Adjustment of Sussex Cnty.,* 499 A.2d 811, 812 (Del. 1985) (quoting former cannons of judicial ethics and holding that the Court should address "serious arguments of counsel").

[52] *Brown v. State*, 170 A.3d 148, 2017 WL 3573788, at *1 (Del. Aug. 17, 2017) (noting that the Superior Court did not address an argument but affirming the Superior Court's decision because the argument was without merit); *Hall v. Maritek Corp.*, 182 A.3d 113, 2018 WL 1256117, at *1 (Del. 2018) ("Without addressing the other grounds for dismissal that the Superior Court did not address and may well have had merit, we affirm the Superior Court's decision . . .").

legal concept map (a/k/a the future land use map) designates PCRS' property as "low density" (1-3 units per acre), that somehow mandates that PCRS should be afforded greater density than the UDC allows. OB 34-35. The contention that the UDC was amended by implication through the adoption of the Comprehensive Plan to permit increased density not otherwise allowed by the UDC should be rejected for several reasons.

The Suburban zoning designation applicable to PCRS' property allows 1.3-1.5 units per acre – within the range established by the Comprehensive Plan.[53] The language in Ordinance 11-109 which adopted the Comprehensive Plan states that ordinances "in conflict" are repealed. A0414.[54] Contrary to PCRS' contentions (OB 35), there is no "conflict" with the Comprehensive Plan because the plan designates this area as low density residential, 1-3 units per acre, and the Suburban zoning classification allows the same density.

Beyond this, the County's "comprehensive plan is intended to serve as a 'large scale and long term' planning document [and] [i]t 'cannot . . . serve

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53 UDC §40.04.110.

54 This is a materially different case than *Brohawn v. Town of Laurel*, 2009 WL 1449109, at *5 (Del. Ch. May 13, 2009) whereby the Town's comprehensive development plan designated an area as a mixed use, but where the area was zoned commercial upon annexation. Similarly, PCRS' citation to *Farmers for Fairness v. Kent County Levy Court*, is inapplicable because the Court of Chancery ultimately held that the Petitioners lacked standing because the adoption of the Comprehensive Plan did not change any density regulations applicable to Petitioners' properties. 2013 WL 3333039, at *2-5 (Del. Ch. July 1, 2013).

unyieldingly as guide[s] to detailed questions of zone designation.'"[55] The purpose of the UDC is, in fact, to implement the Comprehensive Plan and "to establish standards, procedures, and minimum requirements, consistent with the Comprehensive Development Plan, which regulate and control the planning and subdivision of lands."[56] All zoning districts have the purpose of implementing the Comprehensive Plan.[57] By no means did the adoption of the Comprehensive Plan's legal concept map repeal any provision of the UDC by implication.[58]

Any argument that the Suburban zoning density standards in the UDC need not be satisfied based upon the adoption of the Comprehensive Plan is wrong based upon a plain review of NCC Code §28.01.003C – the interpretation provision. That section states:

> The adoption of the comprehensive development plan shall have the force and effect set forth in 9 *Del. C.* § 101 et seq. (Counties); provided that, in accordance with 9 *Del. C.* § 2659 (Legal status of comprehensive plan), the land use concept map which forms a part of the comprehensive development plan shall have the force of law as to all future rezoning and **shall not be regarded as changing any existing zoning district or classification or the zoning and other land development regulations applicable thereto**, unless and until

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55 *Donnelly v. City of Dover*, 2011 WL 2086160, at *4 (Del. Super. Ct. Apr. 20, 2011) (citation omitted).

56 UDC §40.01.010.

57 UDC §40.02.200.

58 *Du Pont v. Du Pont,* 87 A.2d 394, 399 (Del. 1952) ("repeals by implication are never favored.").

> the County Council shall adopt a specific ordinance accomplishing such change (emphasis supplied).[59]

Based upon the plain language of the Code, the Comprehensive Plan did not repeal any provision of the UDC by implication or otherwise. Indeed, the Comprehensive Plan "must be read in conjunction with prior land use legislation of the . . . legislative body."[60] Thus, PCRS' claim that any provision of the UDC was repealed or otherwise changed by adoption of the 2012 Comprehensive Plan to allow it to build between "173-519" units when the UDC only permits approximately 55 units (B0139, ¶6) absent a deed restriction change should be rejected outright as contrary to the plain language of the Code and legislative intent of numerous provisions of the UDC and NCC Code §28.01.003C. Because PCRS' Comprehensive Plan claim was waived, and it is not serious or credible, the Superior Court did not err by not specifically addressing it.

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[59] NCC Code §28.01.003C was amended to specifically reference the 2012 Comprehensive Plan. *See* A-0413. "When the . . . [County Council] enacts a later statute in an area covered by a prior statute, it is assumed that they have in mind that prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict. . .". *City of Rehoboth v. McKenzie*, 2000 WL 303634, at *5 (Del. Super. Ct. Feb. 29, 2000), *aff'd*, 755 A. 2d 389 (Del. 2000). Here, by amending NCC Code §28.01.003C to reference the updated 2012 Comprehensive Plan, the County Council intended for the UDC to be construed in conjunction with the Comprehensive Plan adoption. *See* A0425 (recommendation report).

[60] *Barn Hill Preserve of Del., LLC v. Bd. of Adjustment of the Town of Ocean View*, 2019 WL 2301991, at *3 (Del. Super. Ct. May 29, 2019).

F. The County Is Taking The Restrictions As It Finds Them – PCRS Desires To Interpret The Restrictive Covenants Contrary To Their Plain Language

The County does not dispute that a third-party beneficiary, such as the County here, absent illegality,[61] takes an agreement "as [it] finds it," subject to the benefits and burdens contained therein.[62] But the same holds true for PCRS.

PCRS' argument attempts to impermissibly expand the scope of the Restrictive Covenants to mean something that they do not say.[63] Paragraph 9, by its plain language, is not a guarantee for future density. As the Superior Court held, it is a limitation that the Covenantors would build "not more than 5,454" units. Op. 12. Similarly, PCRS' (waived) Paragraph 15 argument is flawed because, again, there is no guarantee of any future density for the entirety of the Pike Creek Valley. And plainly, as the Superior Court held, Paragraph 16 is not a guarantee that zoning of any property in the Pike Creek Valley limiting density could never be adopted. Rather, Paragraph 16 "illustrates the assumptions the landowners made regarding future zoning conditions in the Pike Creek Valley" (Op. 13), it is not promise that zoning would not be changed for any property in the Pike Creek Valley.

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61 *See infra* note 64.

62 *Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976); *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007).

63 The Restrictive Covenants cannot be "enlarged by implication by the courts." *Mendenhall Vill.*, 1994 WL 384579, at *2.

Even if there were any ambiguity in the Restrictive Covenants, the Courts must construe the covenants in a manner that does not create an illegality – and, as the Superior Court correctly held, the Restrictive Covenants could not be construed as a density grant or a promise to never change zoning. Indeed, the Restrictive Covenants "could not possibly give the landowners any rights enforceable against the Levy Court or its successors, since Delaware forbids contract zoning." Op. 13.[64] It is PCRS who is attempting to distort the plain meaning of the Restrictive Covenants – and PCRS must take the covenant as it finds it.

In the end, PCRS' attempt to have voluntarily imposed private Restrictive Covenants trump zoning and other UDC laws must be rejected. "[R]estrictions in deeds or contracts must yield to a reasonable exercise of the police power through zoning where they stand in the way of reasonable use of the zoning power to promote the public safety, health, morality or welfare."[65] Thus, "[i]f the covenant is less restrictive than the zoning ordinance, the ordinance prevails, and if the covenant is more restrictive than the zoning ordinance, the covenant prevails."[66] Indeed, "a zoning ordinance cannot override or impair a restriction limiting the use

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64 The third party beneficiary rules apply only to "contractual provisions [that are] *otherwise enforceable*." *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983) (emphasis supplied); *McQuirk v. Donnelley*, 189 F.3d 793, 798 n.8 (9th Cir. 1999) ("[A] third party beneficiary cannot recover under a contract [term] that is unenforceable."); A0347; A0647.

65 8 MCQUILLIN MUN. CORP. § 25:10 (3d ed. 2019).

66 34 AM. JUR. 3D *Proof of Facts* 339 § 4 (2019).

of property, nor can it relieve the land from such restriction; but a zoning ordinance may be more restrictive than a restrictive covenant."[67]

Because the UDC does not alter the Restrictive Covenant, and because both the UDC and the Restrictive Covenants apply, the Superior Court's decision that "any development or redevelopment in the Pike Creek Valley must still be consistent with the UDC, a law of general applicability independent of the Covenant" (Op. 14-15) should be affirmed.

[67] *City of Gatesville v. Powell*, 500 S.W.2d 581, 583 (Tex. Civ. App. 1973); *see also supra* note 34.

CONCLUSION

For the reasons stated herein, the County respectfully requests that the well-reasoned decision of the Superior Court be affirmed.

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