

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEW CASTLE COUNTY,)	
a political subdivision of the State of)	
Delaware,)	
)	
Plaintiff,)	
Respondent,)	C.A. No 5969-JW
)	(consolidated with
v.)	C.A. N10M-12-005 PRW)
)	
PIKE CREEK RECREATIONAL SERVICES,)	
LLC, a Delaware limited liability company,)	
)	
Defendant,)	
Petitioner.)	

NEW CASTLE COUNTY’S MOTION FOR CLARIFICATION AND/OR LIMITED REARGUMENT OF PORTIONS OF THE COURT’S SEPTEMBER 5, 2013 OPINION

New Castle County (“County”) hereby seeks clarification of certain holdings on pages 29 and 32 from the Court’s September 5, 2013 Opinion (the “Opinion,” hereafter cited as Op. at ___). In support thereof, the County states the following:

A. Introduction

1. The Opinion holds Pike Creek Recreational Services LLC (“Developer” or “PCRS”) must set aside sufficient land for the development of an 18-hole golf course. Op. at 32 (“PCRS must, of the land at issue here, leave set aside no less than 130 acres for the specific use of development of an 18-hole golf course . . .”); Op. at 29 (holding that the restrictive covenant “does require PCRS to set aside a minimum of 130 acres of land which may feasibly be developed as an 18-hole golf course”). The Opinion, however, does not indicate whether the 130 acre 18-hole golf course set aside is to be treated as already dedicated land and/or whether the lands may be incorporated as a component of community area open space for a future residential

housing development. Clarification of the status of the golf course lands is important because it impacts the density upon which development may occur on the remaining acreage.

2. The County seeks clarification that the golf course lands are to be treated as already dedicated lands, such that the base site area for any future residential development is limited to the non-golf course lands. This clarification is warranted because the 130 acres are already set-aside for an 18-hole golf course use under the 1969 Agreement, and because golf courses cannot be constructed in community open space under the County Code. In addition, the County seeks clarification that a code compliant plan for an 18-hole golf course must be submitted to and approved by the County to assure the land set aside “may feasibly be developed as an 18-hole golf course.” Op. at 32.

B. Standard of Review

3. “A motion for clarification may be granted where the meaning of what the Court has written is unclear, and such a motion is treated, procedurally, as a motion for reargument under Court of Chancery Rule 59(f).” *Naughty Monkey LLC v. MarineMax Northeast LLC*, 2011 WL 684626, at *1 (Del. Ch. Feb. 17, 2011). A motion for reargument will be granted when “the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.” *Dishmon v. Fucci*, 2013 WL 2151695, at *2 (Del. Super. Ct. May 16, 2013). Herein, the County primarily seeks clarification of important aspects of the Opinion for the benefit of the parties and the public.

C. The Set Aside Golf Course Lands Cannot Be An Open Space Component For A Housing Development

4. The land use application¹ for the Terraces at Pike Creek previously submitted to the County impermissibly incorporates over 130 acres of land set aside for an 18-hole golf course as a component of residential open space for a proposed housing development. See Exhibit A (A000392) (stating that the Terraces plan has 131.511 total acres of open space, 78.543 acres to be “community open space,” and 52.968 acres to be set aside for a possible future recreation area).

5. The County seeks clarification of the Court’s Opinion to confirm the Developer may not incorporate the 130 acre set-aside lands (Op. 29, 32) as an open space component for residential development. If this were to occur, the County Code would be violated. Table 40.10.210 of Chapter 40 of the New Castle County Code² (commonly known as the Unified Development Code or the “UDC”), makes clear golf courses and driving ranges are not permitted as “community area open space”³ or “natural resource area open space”⁴ components

¹ A land use application is defined as “[a]ny building permit application, zoning permit application, subdivision or land development plan application, rezoning application, limited use application, special use application, variance application, appeals, or any other application made to the County which, if granted, would have the effect of permitting the development or use of land. A land use application shall also include an approved DNREC site evaluation.” UDC § 40.33.300.

² The County raised the applicability of UDC Table 40.10.210 in the prior summary judgment briefing. New Castle County’s Answering/Reply Brief In Support of its Motion for Summary Judgment at p. 2 (Oct. 16, 2011).

³ The UDC defines community area open space as “[o]ne (1) of the two (2) types of open space in a residential subdivision is community area open space. In residential subdivisions with fewer than fifty (50) acres, all open space shall be considered community area open space. In subdivisions of fifty (50) acres or greater, community area open space shall be relatively smaller, isolated, and typically internal pockets of open space not necessarily contiguous with the natural resource area open space. Such open space parcels normally will provide a function benefiting the residents of the subdivision. The homeowner’s organization, comprised of the residents of the subdivision, will own and be responsible for community area open space. Approved

of housing developments. Exhibit B. Thus, land set-aside “for the specific use of development of an 18-hole golf course” (Op. 32) cannot be a community open space component.

6. Because a golf course may not be part of community open space under UDC Table 40.10.210, the County seeks confirmation the Developer must: (1) create a separate parcel for the golf course lands set aside; and (2) not include the set aside 18-hole golf course lands as a component of housing development open space. Incorporation of lands already set-aside as a golf course into open space for a housing development would impermissibly cause a violation of the County Code and should not be allowed. *See* Op. at 62 (noting that when plans do not comply with County regulations, they are not valid on their face) (citing *Beiser v. Board of Adjustment of Town of Dewey Beach*, 1991 WL 236966, at *5 (Del. Super. Ct. Oct. 25, 1991) (noting that an invalid permit is void *ab initio*); *Miller v. Board of Adjustment of the Town of Dewey Beach*, 521 A.2d 642, 647 (Del. Super. Ct. 1986) (an illegal permit does not confer rights upon the holder)).

D. Land Set-Aside For An 18-Hole Golf Course Is Previously Dedicated Land That Cannot Be Included In The Developer’s Base Site Area Calculation

7. The lands set aside for a golf course also cannot be included as an open space component for a residential housing development pursuant to Table 40.05.420 of the UDC. Exhibit C. This table provides the method by which a developer calculates the base site area⁵

improvements, conservation and long-term maintenance will be shown on the landscape plan approved for the open space.” UDC § 40.33.300.

⁴ “Natural resource area open space” is defined as “[o]ne (1) of the two (2) types of open space in a residential subdivision of fifty (50) acres or greater. Natural resource area open space are those areas comprised of protected resources including but not limited to wetlands, floodplains, riparian buffer areas, forests, steep slopes, critical natural areas, and water resource protection areas, as well as other relatively large, contiguous open spaces.” UDC § 40.33.300.

⁵ Base site area is defined as “[a] calculated area obtained by subtracting various land areas from the gross site area.” UDC § 40.33.300. The base site area is what land can be developed – and is commonly referred to as the “developable envelope.”

and permitted density for a development. Under this table, “land previously dedicated as open space” must be subtracted from the gross site area to determine the base site area.

8. The County seeks confirmation that the 130 acre golf course set aside is previously dedicated land. Op. at 32. Since 1969, a minimum of 130 acres has been set aside for a specific use – an 18-hole golf course. See Op. at 29 (“the County . . . may insist that 130 acres must *remain* set aside for development as a golf course” (emphasis supplied)); Op. at 26 (“[t]he 1964 and 1969 Agreements . . . evidence the original owners’ clear intent to set aside, or dedicate, certain acreage as open space”). Therefore, the 18-hole golf course must be deemed dedicated under UDC Table 40.05.420. Because the land is already set-aside, the Developer should not be permitted to “double count” the open space acreage – once for the golf course set aside and again for community open space.⁶ The Court should require the golf course land to be subtracted from the gross site area to determine the developable envelope under UDC Table 40.05.420.

E. The Developer Should Be Required to File a Land Development Application for the 18-Hole Golf Course

9. The Opinion holds that petitioners, such as PCRS, who wish to alter the restrictions to which the County is a party or a beneficiary, must follow the statutory restriction change process in UDC § 40.31.130. Op. 32, 57. The Opinion further holds the Developer must set aside “a parcel of land of sufficient quantity, quality and configuration” for an 18-hole golf course to be constructed on a minimum of 130 acres. Op. at 32 (“[t]he restriction requires a 130-acre set aside”). The County seeks clarification that the Developer must prepare and obtain

⁶ Double counting of open space issues were raised in the prior summary judgment briefing. New Castle County’s Answering/Reply Brief In Support of its Motion for Summary Judgment at pp. 8-9 (Oct. 16, 2011); see also New Castle County’s Proposed Findings of Fact and Conclusions of Law at ¶ 64 (June 11, 2013) (“The already dedicated open space may not be counted twice as open space”).

approval of a code compliant land development plan through the County Department of Land Use to confirm that sufficient land is set-aside to meet the 18-hole golf course requirement, unless Developer receives County Council approval to remove the 130 acre 18-hole golf course restriction through the restriction change process.⁷

10. Under the County Code, a golf course is a permitted limited use under the NC zoning classification as a stand-alone parcel. *See* UDC Table 40.03.110A (permitting recreation, low intensity as a limited use).⁸ To build and receive approval for a new golf course, the Developer is required to submit a land use application and follow the application and approval process in the County Code for plan recordation. *See generally* UDC §§ 40.31.110-40.31.115; UDC Appendix 1.

11. Without the submission of a plan application for the new golf course, it is virtually impossible for the County to determine whether there is a sufficient quantity, quality and configuration of land that would yield a code compliant 18-hole golf course on a minimum of 130 acres. As the Court's Opinion notes, "the set-aside could be greater if more than 130 acres are required to construct an 18-hole golf course" Op. 29, n. 126. The only feasible way for the County to determine whether an 18-hole golf course can be constructed and meet all requirements of applicable law is through submission of a UDC compliant plan for an 18-hole golf course. Consequently, the County seeks clarification that the Developer is required to seek and receive approval of an 18-hole golf course plan for a minimum of 130 acres before or in conjunction with an application for development of the remaining lands currently comprising the Pike Creek Golf Course.

⁷ This issue was raised, albeit generally, in New Castle County's Opening Brief in Support of its Motion for Summary Judgment (August 5, 2011) at pages 10, 16 n.9.

⁸ Recreation, low intensity permits golf course uses. *See* UDC § 40.33.250(c).

WHEREFORE, for the reasons stated herein, New Castle County respectfully requests that its Motion for clarification and/or limited reargument be granted.

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Attorneys for New Castle County

Dated: September 12, 2013

CERTIFICATE OF SERVICE

I, Max B. Walton, hereby certify that on this 12th day of September, 2013, I caused a copy of New Castle County's Motion For Clarification And/Or Limited Reargument of Portions Of The Court's September 5, 2013 Opinion to be served by File & ServeXpress to the following:

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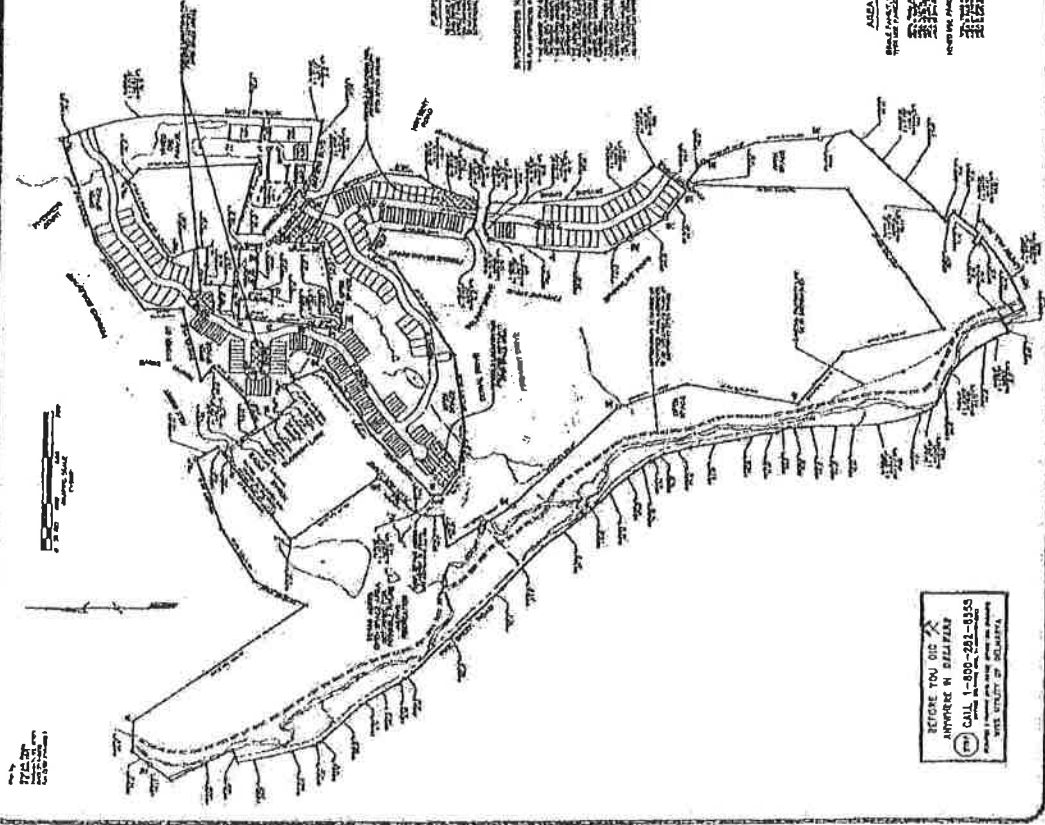
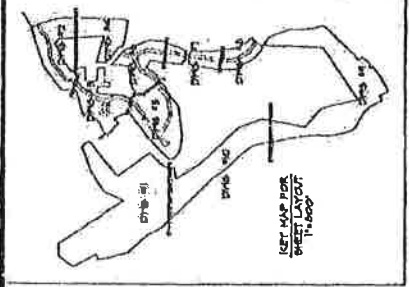
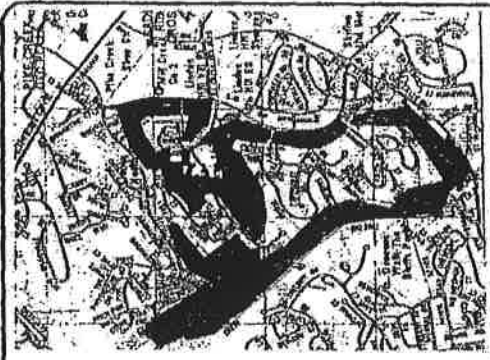
Dated: September 12, 2013

Exhibit A

NO. 1	DATE	BY
NO. 2	DATE	BY
NO. 3	DATE	BY
NO. 4	DATE	BY
NO. 5	DATE	BY
NO. 6	DATE	BY
NO. 7	DATE	BY
NO. 8	DATE	BY
NO. 9	DATE	BY
NO. 10	DATE	BY

EXPLORATORY SKETCH PLAN COVER SHEET
 MAJOR SUBDIVISION
 TERRACES AT HIRE CREEK
 MILL CREEK COUNTY, DELAWARE

HILLCREST ASSOCIATES, INC.
 1000 W. MARKET ST., SUITE 200
 WILMINGTON, DE 19801
 TEL: 336-1111
 FAX: 336-1112
 WWW.HILLCRESTASSOCIATES.COM



GENERAL NOTES

1. ALL DIMENSIONS ARE IN FEET AND INCHES.
2. ALL DISTANCES ARE MEASURED ALONG THE CENTERLINE OF THE ROAD.
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AREA EXPLANATIONS

1. ALL DIMENSIONS ARE IN FEET AND INCHES.

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10. ALL DISTANCES ARE MEASURED ALONG THE CENTERLINE OF THE ROAD.

PROPOSED DEVELOPMENT

1. BUILDING FOOTPRINTS

2. PARKING SPACES

3. DRIVEWAYS

4. LANDSCAPING

5. UTILITIES

6. EASEMENTS

BEFORE YOU DIG
 CALL 1-800-491-0335
 MISSISSIPPI STATE UNIVERSITY

Exhibit B

Sec. 40.10.210. Uses in required open space.

Table 40.10.210 lists uses that may be permitted in open space when required elsewhere in this Chapter. The uses listed are narrower subsets of the use categories listed in Table 40.03.110. In so doing, a closer match of the permitted uses to the resources' tolerance is provided. Any use not listed shall be considered prohibited.

Table 40.10.210
USES IN REQUIRED OPEN SPACE **

Y = Permitted; N = Prohibited; L = Limited Use; S = Special Use; I = Environmental Impact Assessment Report (See Section 40.10.410)														
Use	Natural Resource Area Open Space***	Community Area Open Space***	Floodway	Floodplain	Wetland	Riparian Buffer Zone 1	Riparian Buffer Zone 2	Drainage ways	Cockeysville Formation	Sinkhole	Wellhead/Recharge Areas	Steep Slopes	Forests	Historic
Agricultural														
Apiaries	I	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y
Clearing	L	L	L	N	N	N	N	L	L	N	L	I	N	L
Game farms/fish hatcheries	I	Y	I	I	I	N	I	I	N	N	N	N	N	N
Field crops	I	Y	N	Y	N	N	N	Y	Y	N	Y	N	N	Y
Orchards	I	Y	N	Y	N	N	Y	Y	Y	Y	Y	Y	N	Y
Pasture	I	Y	Y	Y	N	N	Y	N	Y	N	N	Y	N	Y
Stables	N	Y	N	N	N	N	N	N	Y	N	N	N	I	Y
Nursery	N	Y	N	L	N	N	L	Y	Y	N	Y	Y	N	Y
Recreation and Amusement: Outdoor Recreation														
Ball fields	N	Y	N	Y	N	N	N	Y	Y	N	Y	N	N	N
Day camps	N	L	N	L	N	N	L	Y	Y	N	L	N	L	L
Fishing areas	N	N	Y	Y	Y	Y	Y	Y	L	L	L	L	L	L
Hunting areas	N	N	L	L	L	L	L	L	L	L	L	L	L	L
Golf course/driving ranges	N	N	N	L	L	N	L	Y	Y	L	Y	L	L	Y
Natural area	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Nature center	N	Y	N	N	N	N	N	Y	Y	N	Y	Y	Y	Y
Picnic area/playground	N	Y	N	L	N	N	L	Y	Y	N	Y	Y	Y	Y
Pools/courts	N	Y	N	L	N	N	N	Y	Y	N	Y	N	N	Y
Shooting and archery ranges	N	N	L	L	N	N	L	L	L	L	L	N	N	N
Trails	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Water dependent use	N	N	L	L	L	L	L	Y	N	N	N	N	N	N
Utilities, Community/Region														
Public roads, bridges and appurtenances	I	N	I	I	N	I	I	Y	Y	N	L	L	L	N
Remedial or other activities mandated by State or Federal law	I	I	I	I	I	I	I	I	I	I	I	I	I	I
Private roads	I	N	I	I	N	I	I	Y	Y	N	L	L	L	N
Parking lots	I	L	N	N	N	N	N	L	L	N	L	N	N	L
Essential access	I	I	I	I	I	I	I	L	L	N	S	S	L	N
Sewer/water/utilities	Y	Y	L	L	L	L	L	Y	Y	N	S	S	L	Y
Land application of treated effluent	I	N	N	N	I	N	Y	N	N	N	I	N	Y	Y
Sewage & water treatment plants/pumping stations/dams and flood control structures	N	N	I	I	N	I	I	N	N	N	N	N	N	N
Stormwater management practices	Y	Y	N	I	N	N	Y	Y	I	N	I	N	Y	Y
Temporary Uses														
Public interest event	N	Y	N	N	N	N	N	Y	Y	N	Y	N	N	Y
Special event	N	Y	N	N	N	N	N	Y	Y	N	Y	N	N	Y

*Subdivisions less than fifty (50) acres will utilize the community area open space criteria.

**For resource standards for limited uses, refer to Division 40.10.300 and Division 40.10.400

***Permitted uses for natural resource area open space and community area open space not containing any specific natural resources. If the protection standards differ, between natural resource area open space and/or community area open space and specific resource categories, the stricter of the two will govern.

(Ord. No. 97-172, § 3(ch. 13, § 10.210), 12-31-1997; Ord. No. 98-080, § 1(ch. 13, § 10.210), 9-22-1998; Ord. No. 03-045, § 1(Exh. A), 7-8-2003; Ord. No. 04-058, § 1, 10-5-2004; Ord. No. 06-060, § 1(Exh. A), 9-26-2006; Ord. No. 10-113, § 1(Exh. A), 1-18-2011)

Exhibit C

Sec. 40.05.420. Calculation for total protected land.

Table 40.05.420 provides the procedure for calculating a site's total protected land. Step 1 determines the base site area. Steps 2—4 determine the land to be protected. All applicants, residential and nonresidential, must begin by completing this calculation. Where the site is in more than one (1) zoning class, or where the site is to be divided into residential and nonresidential uses, separate calculations are required. Any area excluded from the base site area shall not be included in the resource calculation. With approval from the Department, contiguous land of like kind may be purchased or restricted by a conservation easement to increase development potential.

Table 40.05.420
CALCULATION FOR TOTAL PROTECTED LAND

Step 1	Enter gross site area as determined by actual survey.				ac.
	Subtract land within existing roads' ultimate rights-of-way; or land within major utilities' rights-of-way (minimum 50-foot width within subject property)				- ac.
	Subtract land cut off from use by railroad, highway, or water body				- ac.
	Subtract all water bodies having an area greater than 1 acre				- ac.
	Subtract land previously dedicated as open space				- ac.
	Equals Base Site Area				= ac.
Step 2	Measure all natural resources in the base site area and enter in the Acres Measured Column 2. If resources overlap, measure only that resource with the highest resource protection ratio. These numbers provide each resource's area of land. Multiply by Resource Protection Ratio for the district Columns 3 or 4, and insert result in column 5.				
			Multiply Column 2 by Resource Protection Ratio		
	Natural Resource	Acres Measured Column 2	CN, CR, ON, OR, BP, I, HI Districts Column 3	All other districts Column 4	Protected Land Column 5
	Floodplain/Floodway		1.00	1.00	
	Wetland (see section 10.320)		1.00	1.00	
	Cockeysville Formation Drainage Area - WRPA		0.50	0.50	
	Riparian Buffer		1.00	1.00	
	Drainageways		0.00	0.40	
	Cockeysville Formation - WRPA		0.50	0.50	
	Sinkhole		1.00*	1.00*	
	Wellhead - WRPA Class A		1.00*	1.00	
	Wellhead - WRPA Class B & C		0.50	0.50	
	Recharge Areas - WRPA		0.50*	0.50	
	Slope or Geologic Sites - CNA		0.90	1.00	
	Steep slopes (< 25%)		1.00	1.00	

	Steep slopes (15--25%)		0.25	0.50	
	Rare Species Site - CNA		1.00	1.00	
	Forests, Mature - CNA **		0.70	0.85	
	Forests, Mature **		0.50	0.70	
	Forests, Young CNA **		0.40	0.60	
	Forests, Young **		0.20	0.50	
	Other CNA		0.25	0.25	
	Historic	See Article 15			
Step 3	Sum of Step 2 column equals Total Resource Land				
Step 4	Protected Resource Land equals sum of Protected Land column				
NOTES:					
* There are other standards of protection which include mandatory mitigation or construction in Article 10.					
** Any future developer shall be required to use the original forest cover as set forth in Sections 40.03.301C and E.					

(Ord. No. 97-172, § 3(ch. 13, § 05.420), 12-31-1997; Ord. No. 98-080, § 1(ch. 13, § 05.420), 9-22-1998; Ord. No. 99-075, § 1, 12-14-1999; Ord. No. 01-112, § 1(Exh. A), 3-12-2002)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEW CASTLE COUNTY,)	
a political Subdivision of the State of Delaware,)	
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Plaintiff,)	
Respondent,)	C.A. No 5969-JW
)	(consolidated with
v.)	C.A. N10M-12-005 PRW)
)	
PIKE CREEK RECREATIONAL SERVICES,)	
LLC, a Delaware limited liability company,)	
)	
Defendant,)	
Petitioner.)	

**[PROPOSED] ORDER ON NEW CASTLE COUNTY'S
MOTION FOR CLARIFICATION AND/OR LIMITED REARGUMENT**

HAVING HEARD AND CONSIDERED New Castle County's ("County") motion for clarification and/or limited reargument and Pike Creek Recreational Services LLC's ("PCRS") response thereto, the County's Motion is hereby GRANTED. The Court's September 5, 2013 Opinion is clarified as follows:

1. Because a minimum of 130 acres is set aside for the specific use of an 18-hole golf course, Table 40.10.210 of Chapter 40 of the New Castle County Code (commonly known as the Unified Development Code or the "UDC") precludes inclusion of the lands set aside as a golf course as an open space component for a residential housing development. The golf course set-aside area must be a stand-alone parcel.

2. A minimum of 130 acres were set aside for the specific use of an 18-hole golf course when the 1969 Agreement became effective. The total land area necessary for the 18-hole golf course is therefore dedicated land and must be subtracted from the gross site area in UDC Table 40.10.210.

3. PCRS (or any successor in interest) is required to submit and receive approval from the County of a code compliant land development application for a 130 acre, 18-hole golf course before or in conjunction with an application for development of the remaining lands currently comprising the Pike Creek Golf Course, unless PCRS receives County Council approval to remove the 130 acre 18-hole golf course restriction through the restriction change process.

IT IS SO ORDERED on this __ day of _____, 2013.

The Honorable Paul R. Wallace