EFiled: Feb 03 2021 03:02PM EST
Filing ID 66306705
Case Number 309,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PIKE CREEK RECREATIONAL SERVICES, LLC, a Delaware Limited Liability Company,	)	No. 309, 2020
Plaintiff Below / Appellant,	)	Court Below: Delaware Superior Court
v.	)	C.A. No. N19C-05-238 PRW
NEW CASTLE COUNTY, a Political Subdivision of the State of Delaware,	)	
Defendant Below / Appellee.	)	

REPLY BRIEF ON APPEAL

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Dated: February 3, 2021

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INTRODUCTION[1]

The County goes to great lengths to obfuscate and portray PCRS as a density-ravenous, developer run amok. While PCRS presents legal argument based on the plain language meaning of Section 150 and the Agreement, the Answering Brief inundates this Court with a slew of inaccurate arguments and factual assertions to distract this Court from the legal errors in the Opinion and PCRS's compliance with Delaware law, for example, the County erroneously asserts that:

- PCRS failed to preserve its argument concerning Article 15 of the Agreement on appeal, even though the argument was raised in three separate briefs and at oral argument;[2]
- PCRS failed to argue the legal impact of the Comprehensive Development Plan below, despite the fact that it was addressed in two separate briefs and at oral argument;[3]
- PCRS seeks density greater than the UDC allows, notwithstanding that the Compromise Plan increases the amount of open space required under the Master Plan and proposes the construction of two

[1] The Reply Brief incorporates the defined terms set forth in the Opening Brief.

[2] *See* A0047; A0053; A0366; A0379, A0381-83; A0631; A0695-99; A0701-02; A0716.

[3] *See* A0373-76; A0412-616; A0641-44; A0710-12; A0747-49.

fewer units than the number of units permitted under the Property's current Suburban zoning; 230 fewer units than provided under the Agreement; and 313 fewer units than the Comprehensive Development Plan and map series allow;[4]

- The Compromise Plan was the product of coercion. To be clear, a majority of the community group (whose members were approved by the local councilperson) supported the Compromise Plan after two years of meetings. The ballot vote of the community group was either for or against the 224 unit Compromise Plan, after having previously considered 60 unit and 454 unit concepts;[5] and
- PCRS failed to address numerous land use issues, namely traffic, schools, drainage, historic preservation, and the maintenance of open space, even though such issues are not required by law to be addressed at that stage of the land use process.[6]

Having corrected these inaccuracies and otherwise dispelled these myths, this Reply focuses on the legal errors warranting a reversal of the Opinion. The Answering

[4] *See* A0121; A0208; A0434.

[5] *See* A0031-33; A0291-94; B0134.

[6] *See* NCCO CODE §40.27.110.

Brief largely ignores the trial court's construction of Section 150 in favor of endorsing the end result, even though the issue of statutory construction is PCRS's first and principal argument on appeal, because the County likes the result and it cannot muster any justification for the trial court's unilateral decision to include a materiality requirement in the analysis. The County also fails to construe the Agreement as a whole in violation of Delaware law, in which it, like the trial court, is unable to harmonize its flawed reading of the Agreement with Article 15. As a result, the County continues to pick-and-choose from those portions of the Agreement it finds favorable and render the remainder of the Agreement meaningless. Finally, the County adopts an overly expansive view of the Opinion, in which the trial court's ruling on the arguments set forth in Section I of the Opening Brief did not render those asserted in Section II moot.

For the reasons set forth in the briefing, the trial court should be reversed on appeal.

ARGUMENT

I. THE TRIAL COURT'S ANALYSIS OF SECTION 150 AND THE AGREEMENT CONSTITUTED LEGAL ERROR.

The Opinion reflects the trial court's failure to construe Section 150 and the Agreement in accordance with Delaware law. The Answering Brief overlooks the trial court's interpretation of Section 150, which amounted to legal error and tainted the remainder of the analysis. The County largely concedes this point, electing to defend this appeal on its interpretation of select portions of the Agreement. Like the trial court, the County picks-and-chooses from portions of the Agreement in order to reach its desired result. As a result, material portions of the Agreement are rendered meaningless. By construing Section 150 in accordance with Delaware law, this Court will find that the UDC altered the Agreement.

A. The County Largely Ignores The Trial Court's Construction of Section 150.

The Answering Brief largely ignores the trial court's failure to adhere to principles of statutory construction. The County elects to bypass PCRS's principal argument, because there is no defense for the trial court's construction of Section 150. Instead, the County skips to the end of the Opinion, because it likes the result. The trial court's process was flawed from its inception however, and the subsequent analysis bears the taint of legal error.

In its interpretation of Section 150, the trial court not only deviated from traditional, statutory construction, but also engaged in judicial legislation. The word, 'altered,' commands center stage in this Court's analysis of Section 150. 'Altered' is not a defined term. Section 40.33.000 of the UDC provides that undefined words "shall have the meaning given in other Code Chapters or *Webster's Unabridged Dictionary*."[7] *Webster's* defines the present tense[8] of 'altered' as "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) *without changing into something else*[.]"[9] The online edition provides a nearly identical definition.[10] The trial court relied on the definition of another word, 'alteration,' from *Black's Law Dictionary*, in which the secondary source defined 'alteration' as "an act done to an instrument, after its execution, whereby its meaning or language is changed."[11] The definition of 'alteration' represents a slight, but substantive deviation from the plain language of 'altered,'

[7] NCCO CODE §40.33.000 (emphasis in original).

[8] *See* NCCO CODE §40.33.100A.

[9] Alter, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 63 (3d ed. 1986) (emphasis added).

[10] *The Merriam-Webster Online Dictionary* defines "alter" as "to make different without changing into something else." See www.merriam-webster.com/dictionary/alter?src=search-dict-hed (last visited: January 27, 2021).

[11] *PCRS IV*, 238 A.3d 208, 215 (Del. Super. 2020).

because an 'alteration' requires a change in meaning. This is the first fatal flaw in the trial court's analysis, in which it ignored the express instruction of County Council regarding the interpretation of the UDC and employed a dissimilar definition of the critical word in Section 150.

This initial flaw taints the remainder of the trial court's analysis in a substantive manner. Based on the definition of 'alteration,' which requires a change in meaning, the trial court opined that "an alteration is material if it would change the burdens, liabilities, or duties of a party or changes the operation of any of its terms."[12] Section 150 does not include a materiality component. In fact, Section 150 makes no reference to 'material' or any variation thereof. Rather, County Council elected not to modify 'altered' through the use of an adverb. Despite the unambiguous, statutory text, the trial court incorrectly interpreted Section 150 through a materiality lens.

The trial court's inclusion of a materiality component constitutes the next fatal flaw. The materiality requirement does not take root in the statutory text, but rather the explanation of a material alteration in *Black's Law Dictionary*.[13] The source states that "[a]n alteration is material if it (1) changes the burden of a party (as by

[12] *Id.* at 216.

[13] *See* Alteration, BLACK'S LAW DICTIONARY 97 (11th ed. 2019).

changing the date, time, place, amount, or rate of interest), (2) changes the liabilities or duties of any party (as by adding or removing the name of a maker, drawer, indorser, payee, or cosurety), or (3) changes the operation of an instrument or its effect in evidence (as by adding words or negotiability, changing the form of an endorsement, or changing the liability from joint to several)."[14] The Opinion's explanation of the meaning of 'altered' tracks *Black's Law Dictionary* almost verbatim.[15] While a court may consult a dictionary,[16] the dictionary does not replace the statutory text, plain language meaning, or legislative intent,[17] particularly where the legislators provided specific instructions for construing the text. Yet, in this instance, the trial court required PCRS to show that the UDC materially altered the Agreement.

Having rewritten Section 150 to include a materiality component never contemplated by County Council, the trial court travels further down the wrong path by concluding that the legislation "is implicated if the UDC purports to ban what the

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[14] *Id.*

[15] *See id*.

[16] *Ingram v. Thorpe*, 747 A.2d 545, 548 (Del. 2000).

[17] *See Speiser v. Baker*, 525 A.2d 1001, 1008 (Del. Ch. 1987) ("While it is our responsibility to accord to clear and definite statutory words their ordinary meaning, the process of interpretation cannot be—and has never been—entirely a dictionary-driven enterprise.").

[Agreement] grants, or forbid what the [Agreement] requires."[18] This finding provides further evidence of the trial court's flawed analysis. Section 150 does not require the UDC to ban the implementation of the terms and conditions of a prior restrictive covenant. By its plain language, Section 150 concerns whether the UDC "altered" the prior restrictive covenant. The statutory text provides no basis to conclude that the County Council contemplated a ban, and thus, the trial court erred.

The trial court's flawed logic culminates in its finding that "the UDC does not work an alteration on [the Agreement] unless it imposes a requirement mutually irreconcilable with one already contained in the [Agreement]."[19] This 'mutually irreconcilable' language lacks support in the statutory text. It contradicts the trial court's prior explanation that "an alteration is material if it would change the burdens, liabilities, or duties of a party[.]"[20] Further, the 'mutually irreconcilable' language lacks consideration for the lawful effect of its application under any circumstance other than the trial court's crafted hypothetical. These errors become evident in the trial court's failure to consider whether the UDC altered the Agreement if the UDC imposed an enhanced restriction on the Property, i.e., more restrictive limitations.

[18] *PCRS IV*, 238 A.3d at 216.

[19] *Id.*

[20] *Id.*

Had the trial court adhered to the plain meaning of Section 150, it would have concluded that the UDC altered the Agreement, because the Opinion already states that the Agreement was less restrictive than the UDC[21] and that "[t]he UDC introduces an additional restriction" on the Property.[22] Thus, even if one accepts the trial court's flawed analysis, its application warrants a finding that the UDC altered the Agreement.

B. The County, Like The Trial Court Fails To Construe The Agreement In Its Entirety.

If one construes the Agreement as a whole, which the case law requires, PCRS is entitled to construct 5,454 units. PCRS's position finds support in the unambiguous language of the Agreement,[23] including, but not limited to Articles 3, 4, 9 (as modified by the 1969 Amendment), 15, and 16. The failure to interpret the Agreement in its entirety renders critical language meaningless.

The legal analysis begins with Article 9, which provides that 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

[21] *See id.*

[22] *Id.* at 217.

[23] The County agrees that the Agreement is unambiguous. *See* Ans.Br, pp. 17, 21-23.

the [Property.]"[24] The amendment of the 1964 Agreement to increase the number of units from 4,500 to 5,454 evidences the Developer's intent that the number of units set forth in Article 9 would be constructed.[25] The Developer intended to develop the Property "under and pursuant to a comprehensive master plan, applying the principles of a planned unit development[.]"[26] Consistent therewith, the Property would not be subject to further restrictions capable of preventing the Developer from "accomplish[ing] all of the aspects of the preliminary, tentative comprehensive plan … and would not be more restrictive than the limitations imposed upon [the Developer] by the terms of [the Agreement]."[27] The plain language of the Agreement and intent of the Developer is clear—development of the Property would be coordinated to allow for the construction of 5,454 units.

[24] A0081, as modified by A0092.

[25] *See id.*

[26] A0075. *See also* Ans.Br., p. 17.

[27] A0084. The trial court misconstrued Article 16, as having "illustrate[d] the assumptions the [Developer] made regarding future zoning conditions in the Pike Creek Valley." *PCRS IV*, 238 A.3d at 216. There is no support for this conclusion within the plain language. To the contrary, Article 16 expressly states that the Developer "covenant[ed] and agree[d]" to its terms. A0084. The Article does not include the word, 'assumption,' or any variation thereof, let alone list assumptions purportedly made by the Developer regarding the Property, beginning in 1964 and continuing thereafter. *See* A0083-84.

Articles 3, 4, and 15 leave no room for doubt. The Agreement was entered into "for the benefit of" the Developer and the County.[28] Any revisions to the Agreement, which may result in a change to the planned development of the Property, would require the consent of the Developer and approval from County Council.[29] This planned development would remain in place for 20 years or the construction of 5,454 units, whichever occurrs last.[30]

Like the trial court, the County is unable to reconcile the unambiguous language of Article 15.[31] Although the trial court quoted the Article in the fact section,[32] it ignored the Article's lawful effect. This omission is material, in which the following questions remain unanswered—if the Developer does not have a right to construct 5,454 units, then (1) what does Article 15 mean and (2) when does the Agreement expire? The Developer's use of the word, 'shall,' renders the language of Article 15 mandatory, and thus, the Agreement was intended to expire.[33] The fact that certain acts of material consequence will occur upon the expiration of the

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[28] A0077.

[29] A0078.

[30] A0083-84.

[31] *See* Ans.Br., pp. 19-20.

[32] *See PCRS IV*, 238 A.3d at 215.

[33] A0083. The County agrees. *See* Ans.Br., p. 20.

Agreement provides further support for this conclusion.[34] Since neither party asserts that the Agreement expired upon the passage of 20 years,[35] it must expire upon the construction of "the last dwelling unit … within the permissible limits set forth in this agreement."[36] Otherwise, the restrictions would run in perpetuity. In order to give effect to the Developer's intent, this Court must interpret the Agreement as a whole, in which Article 9, when read in conjunction with Articles 3, 4, 15, and 16, provides for the construction of 5,454 units. Accordingly, the UDC altered the Agreement.[37]

C. The Answering Brief Offers Only Distraction And Relatively No Analysis Regarding Article 15.

The County incorrectly asserts that PCRS did not raise several arguments before the trial court. PCRS advocated for a reading of the Agreement as a whole in order to give effect to the intent of the parties, bar the County from cherry picking those favorable portions of the Agreement, and to prevent the County from

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[34] *See* A0084.

[35] *See generally id.*

[36] A0083-84.

[37] The parties agree that only 5,000 units have been constructed. *See* A0225. However, the County maintains that only fifty-five units may be constructed. *See* B0139.

frustrating the purpose of the Agreement.[38] Citing Article 15,[39] PCRS argued that the positions undertaken by the County "prevent[] PCRS from ever reaching the 5,454 family dwellings contemplated by the Agreement."[40] The County had the 'final say' below, and it devoted a portion of its reply brief to Article 15.[41] Finally, counsel had ample opportunity to not only address this point at oral argument, but also move to strike any improper arguments.[42] The County's failure to seek relief demonstrates the shortcoming of its argument on appeal.

The County also incorrectly asserts that PCRS's reliance on Article 15 represents an "appellate flip flop."[43] This argument amounts to nothing more than fanciful rhetoric, as the County fails to support this position with fact or law.[44] In fact, the County does not cite to the record to substantiate its claim. The fact remains that the Agreement expires by its own terms once "the last dwelling unit is

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[38] *See* A0041-53.

[39] *See* A0047; A0053; A0366; A0379, A0381-83.

[40] A0047.

[41] *See* A0631.

[42] *See* A0695-99, A0701-02, A0716.

[43] Ans.Br., p. 20.

[44] The County does not cite any legal authority, for example, estoppel, waiver, or law of the case.

constructed[,]" and subsequent development would be subject to the Comprehensive Development Plan.[45] PCRS's position before the Department, the trial court, and on appeal has been consistent – PCRS is entitled to construct 5,454 units – because the Property has been subject to the requirements of Articles 3, 4, 9, 15, and 16 at all relevant times. Although the trial court failed to give effect to Article 15, this Court should not make the same legal error.

D. The County's Reading Of Article 16 Yields An Absurd Result.

The County seeks to subvert the contractual harmony of the Agreement through its competing interpretation of Article 16. The County asserts that the Article constitutes nothing more than the Developer's promise not to object to the rezoning of the Property under a planned unit development classification (PUD).[46] The express language of the Agreement does not support this proposition. Article 16 provides that the Property may be rezoned as PUD "or similar type[] of zoning …, provided that"[47] any rezoning permits development of the Property as contemplated by the Developer and the rezoning is not "more restrictive than the limitations imposed upon [the Developer] by the terms of [the Agreement]."[48] The Developer

[45] A0083.

[46] *See* Ans.Br., pp. 17-18.

[47] A0084.

[48] A0084.

agreed to Article 16 in furtherance of the intended purpose of constructing 5,454 units. After all, the Agreement did not become effective until County Council approved the requisite zoning.[49] Despite this evidence, the County asserts that the Developer consented to a rezoning of the Property under a classification other than PUD,[50] even if such rezoning would prevent the construction of 5,454 units. This interpretation is absurd. First, Article 16 encompasses both PUD and "similar types of zoning."[51] Second, the Article is conditional. Any rezoning must allow for the contemplated development set forth in the Agreement and "not be more restrictive than … the terms of [the Agreement]."[52] Third, if the Developer had agreed to enhanced restrictions of any sort, it would have limited the density provided under the Agreement and undercut its ability to monetize the Property. Despite the plain language, the County construes the Agreement in a manner that lacks basis in the text and economic reality. This absurd result cannot stand.

[49] *See* A0077; A0090; A0140; A0160-89.

[50] *See* Ans.Br., p. 18.

[51] A0084.

[52] *Id.*

E. The County Incorrectly Argues That PCRS Failed To Raise Its Density Argument Below.

In addition to the restrictions preventing PCRS from constructing 5,454 units, the UDC also bars PCRS from treating the golf course as open space for purposes of calculating density. The County asserts that PCRS did not raise this argument below, and thus, it is waived on appeal. The County is incorrect. PCRS previously argued that "in 2003, the County amended the UDC further to, *inter alia*, specifically prohibit golf course uses in open space—an open space use explicitly permitted in the [Agreement]."[53] Ordinance 03-045 was the topic of additional briefing, in which the County possessed the final opportunity to address the Court.[54]

The County is further mistaken through its reliance on decisional law from the Consolidated Action, in which the Superior Court made it abundantly clear that it did not and would not decide issues relevant to the UDC:

> Many of the County's arguments have been grounded in its enforcement of the UDC. The Court's decisions, however, have been, and continue to be, based solely on interpretation of the Agreements that comprise the Master Plan and one particular land-use restriction created thereby. But how the terms of that restrictive covenant might either coincide or diverge from UDC requirements is simply beyond the reach of the Court's limited opinion here.[55]

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[53] A0029. *See also* A0034, A0047.

[54] *See* A0312-13; A0328-29; A0337-38; A0375; A0644; B0142-43, B0172-73.

[55] *PCRS II*, 2013 WL 6904387, *2 (Del. Ch. Dec. 30, 2013).

The Opinion confirmed this point.[56] Thus, the issue remains ripe for adjudication.

The adoption of Ordinance 03-045, which prohibits the counting of a golf course as open space, altered the Agreement. The Answering Brief proves inconsistent, if not misleading. It initially states that a golf course may serve as open space in certain circumstances, none of which are applicable.[57] While fully aware of PCRS's intentions, the County attempts to rebut the Opening Brief by arguing that a golf course may be "treated as open space under the [Agreement] so long as it is not a component of homeowner controlled open space within a subdivided community or in a natural open space area."[58] A second red herring. Next, the County inexplicably states that "the [g]olf [c]ourse remains as open space for purposes of the [Agreement] and is counted as such …"[59] The Answering Brief is divorced from reality, because the Department issued a negative recommendation based on an entirely different interpretation of the UDC. Finally, hidden in a footnote, the County concedes PCRS's argument by stating that "the UDC … prevents land

[56] *PCRS IV*, 238 A.3d at 215 ("This case is unusual in that the matter at issue is *not* whether the [Agreement] prohibits or permits a particular use. The barrier to the contemplated development lies in the UDC …") (emphasis in original).

[57] *See* Ans.Br., pp. 28-29.

[58] *Id.* at 29.

[59] *Id.*

previously dedicated as open space from being used in the density calculation."[60] This prohibition alters the Agreement in violation of Section 150 by, *inter alia*, changing the classification of the golf course (Article 7), denying PCRS the ability to construct 5,454 units (Article 9), imposing more restrictive limitations on the Property (Article 16), and preventing the Agreement from expiring according to its own terms (Article 15).

F. The County Seeks To Evade The Plain Language Of The Agreement.

PCRS's construction of the Agreement is not only reasonable, but also gives effect to its plain language meaning. The County seeks to escape the lawful consequence of the Agreement by arguing that the plain language gives rise to an illegality that must be stricken in favor of a lawful result.[61] Both PCRS and the Court agree that the Agreement is unambiguous.[62] An unambiguous agreement cannot be reasonably susceptible to different interpretations.[63] The plain language must control.[64] Under this legal landscape, this Court must give effect to the intent of the

[60] *Id.*

[61] *See id.* at 21-22.

[62] *See id.* at 17, 21-23.

[63] *See Bd. of Adjustment of Sussex Co. v. Verleysen*, 36 A.3d 326, 331 (Del. Ch. 2012).

[64] *See Service Corp. of Westover Hills v. Guzzetta*, 2007 WL 1792508, *4 (Del. Ch. June 13, 2007).

parties and determine what the plain language of the Agreement *actually* provides. The County wants this Court to determine what the Agreement *should* provide. If this Court concludes that portions of the Agreement constitute an illegality, the entire Agreement must be stricken,[65] in which case, all future development must conform with the Comprehensive Development Plan and map series.

As an alternative to its illegality argument, the County attempts to reconcile the Opinion by arguing that the ruling below reflected "settled authority" that where a restrictive covenant and regulation conflict, "the stricter of the two control."[66] The County made the same argument before the trial court.[67] Like the Answering Brief, the County's submissions below failed to establish the settled authority. This shortcoming is relevant, because Section 150 expressly undermines the County's position. Under Section 150, County Council provided that the restrictive covenant shall prevail.[68] Accordingly, the County's efforts to reconcile the Opinion with Delaware law fail.

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[65] PCRS addressed the County's illegality argument at A0383-389, A0729-31.

[66] Ans.Br., p. 25. Notably, the County does not cite to Delaware law as evidence of the "settled authority." *Id.*

[67] *See* A0329-32.

[68] *See* NCCO CODE §40.01.150.

II. PCRS'S ADDITIONAL ARGUMENTS ARE RIPE FOR ADJUDICATION.

The County argues in conclusory fashion that the trial court's decision concerning Section 150 rendered the remainder of PCRS's arguments moot. The County is mistaken. Each of the arguments set forth in Section II of the Opening Brief provide an independent basis for relief , which the trial court never addressed. That omission warrants a remand, if not an outright reversal.

A. The County Must Accept The Benefits And The Burdens.

The County agrees that it takes the Agreement "subject to the benefits and burdens contained therein."[69] The County further agrees that the Agreement is unambiguous and the parties must take it as they find it.[70] Despite these concessions, the County has subverted the plain language and cherry picked those portions which it finds favorable. In doing so, the County has denied the density created under the Agreement, barred PCRS from constructing 5,454 units, imposed more restrictive limitations, and prevented the Agreement from expiring under its own terms, thereby precluding certain acts from occurring and subjecting the Property to the Agreement

[69] Ans.Br., p. 39.

[70] *See id.*

in perpetuity. These actions are contrary to Delaware contract law[71] and the longstanding policy that the County "is bound by the terms of the [Agreement.]"[72]

In an effort to maintain the status quo, in which it continues to skirt the burdens of the Agreement, the County urges this Court to conclude that sections of the Agreement are illegal, thereby necessitating an alternate construction of the express language. This argument is flawed. First, although the County contends that the Agreement is unambiguous, it advocates for an interpretation that does not reflect the plain language. Second, to the extent that the plain language meaning constitutes an illegality, then the entire Agreement falls, because the Agreement is not severable.[73] In such instance, all future development would be subject to the Comprehensive Development Plan.

B. Sections 40.01.300D1 And D2 Provide An Independent Basis For Relief.

Although Section 40.01.300D1 provides that the adoption of the UDC "shall not affect any act done," the UDC supplanted the prior ordinances approving the density for the Property, which was a condition precedent to the Agreement going into effect.[74] This act not only limits PCRS's right to construct 5,454 units, but also

[71] *See Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976).

[72] A0192.

[73] *See* A0383-89; A0729-31.

[74] *See* A0077; A0090.

denies the density created under the Agreement, subjects the Property to more restrictive limitations, prevents portions of the Property from being counted as open space, and prohibits the Agreement from expiring under its own terms. Despite the language of Section 40.01.300D1, it is abundantly clear that the UDC has affected Resolution 64-932 and Ordinance 69-75, which approved the upzoning of the Property consistent with the Agreement, in a negative and material fashion.

Subsection D2 also provides a separate basis for relief. The County asserts that this subsection fails, because the legislation only bars the repeal of prior ordinances, resolutions and rules "so far as they may continue to apply."[75] The County abruptly cut its citation to Subsection D2 short. The regulation actually states that the provisions of prior ordinances, resolutions, and rules shall "remain[] in force … so far as they may continue to apply to … any transaction or event or any limitation or any right or obligation or the construction of any contract already affected by such [legislative act], notwithstanding the repeal of such provisions."[76] The Answering Brief states that the Levy Court and the County Council each adopted ordinances, which rezoned the Property.[77] The rezoning of the Property was

[75] *See* Ans.Br., p. 33.

[76] NCCO CODE §40.01.300D2.

[77] *See* Ans.Br., p. 32.

necessary for the Agreement to take legal effect.[78] Since Resolution 64-932 and Ordinance 69-75 applied to a transaction, event, right, obligation, or the construction of a contract covered under Subsection D2, these legislative acts were not repealed by the adoption of the UDC . To the contrary, the upzoning of the Property remains in effect by operation of Section 40.01.300D2.

Despite the County's claims, the language of Subsection D2 provides a clear exception to the UDC, in which the prior legislative act "shall be deemed to have remained in force from the time when they began to take effect … notwithstanding the repeal of such provisions [by the ordinance adopting the UDC]."[79] In light of this express language, the County next argues that Subsection D2 only applies if "the UDC impact[s] a substantive right."[80] The County invokes a retroactivity analysis, which is not applicable, particularly since Subsection D2 plainly states that the adoption of the UDC shall not repeal the provisions of a prior legislative act. Nevertheless, the UDC impacted substantive rights under the Agreement, including, but not limited to the ability to construct 5,454 units and the requirement that the Agreement expire according to its own terms. Thus, the County's arguments fail.

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[78] *See id.*

[79] NCCO CODE §40.01.300D2.

[80] Ans.Br., p. 34.

C. The Comprehensive Development Plan Carries The Force Of Law.

The Answering Brief attempts to downplay the lawful effect of the Comprehensive Development Plan and map series despite the plain language of 9 DEL. C. § 2659. The County first argues that PCRS failed to assert the argument below. The County is incorrect. The Comprehensive Development Plan was addressed in the summary judgment briefing[81] in which the County possessed the 'last word' on the matter below. Notably, the County did not ask the trial court to strike the argument.

The County largely questions the legal impact of the Comprehensive Development Plan. The authority to regulate land use rests with the General Assembly.[82] The General Assembly delegated said authority to the County pursuant to state statute.[83] The General Assembly limited the County's exercise of said authority to actions "in conformity with" with the Comprehensive Development Plan

[81] *See* A0373-76; A0412-616; A0641-44; A0710-12; A0747-49.

[82] *See Green v. Cty. Council of Sussex Cty.*, 508 A.2d 882, 889 (Del. Ch. 1986).

[83] *See* 9 DEL. C. § 2659.

and map series.[84] Accordingly, the Comprehensive Development Plan "shall have the force of law."[85]

The comparison of the permitted density under the UDC (1.3.-1.5 units per acre) and the Comprehensive Development Plan (1-3 units per acre) in the Answering Brief provides an incomplete picture. While the 1.3-1.5 units per acre density falls within the range of permissible density under the Comprehensive Development Plan, the County relies on other provisions of the UDC to prevent PCRS from obtaining this density. For example, the prohibition against counting the golf course as open space effectively limits PCRS's ability to build on its 173.957+ acre tract to fifty-five units.[86] Applying the low range of permissible density under the UDC (1.3 acres per unit), PCRS should be able to construct at least 226 units, which is two more than the 224 units sought under the Compromise Plan.[87] The Answering Brief employs a misinformation campaign concerning the adequacy of traffic studies, schools, preservation of historic buildings, and land management, none of which is accurate or relevant, to paint PCRS as a greedy developer and

[84] 9 DEL. C. § 2651(b).

[85] 9 DEL. C. § 2659(a).

[86] *See* Ans.Br., p. 39.

[87] Under *Farmers for Fairness*, the Comprehensive Development Plan effectuated a rezoning of the PCRS Property, thereby allowing up to 3 units per acre. *See Farmers for Fairness v. Kent Cty. Levy Ct.*, 2012 WL 295060, *3-5 (Del. Ch. Jan. 27, 2012).

distract this Court from the inconvenient truth. The public record offers the only defense to the County's war on truth. The bottom line is that PCRS's claims do not represent a 'land grab,' but rather a fair and impartial enforcement of its rights under the law.

The County also fails to adequately explain how it can continue to apply portions of the UDC in conflict with the Comprehensive Development Plan and map series. *Green* stands for the proposition that county government may only exercise its authority to regulate land use in conformity with the Comprehensive Development Plan.[88] *Brohawn* echoes this sentiment.[89] *Farmers for Fairness* agrees.[90] The County cites *Donnelly* to subvert this authority, but *Donnelly* concerns municipalities, which are distinguishable from counties in this context.[91] In light of this case law, the County asserts that the adoption of the Comprehensive Development Plan does not repeal any provision of the UDC. As a threshold matter, the County has never demonstrated how the prohibition against counting the golf

[88] *See Green*, 508 A.2d at 889.

[89] *See Brohawn v. Town of Laurel*, 2009 WL 1449109, *5 (Del. Ch. May 13, 2009) (striking various zoning ordinances "in direct contravention of the mandate in the August, 2006 Comp Plan … [and] contrary to the stated intentions of the Comp Plan and the State[.]").

[90] *See Farmers*, 2012 WL 295060, at *3.

[91] *See id.* at *6 fn 39.

course as open space conforms with any comprehensive development plan. In addition to this foundational flaw, the County's argument ignores legal authority. First, Ordinances 06-140 and 11-109, which adopted the relevant comprehensive development plans, expressly repealed all prior ordinances and resolutions in conflict therewith.[92] The County frequently used this type of language in its ordinances to effectuate change.[93] Second, *Farmers for Fairness* found that the adoption of a comprehensive development plan and/or plan map is capable of rezoning real property.[94] Because portions of the UDC prevent development of the PCRS Property in conformity with the density requirements of the Comprehensive Development Plan, they may not be enforced.

[92] *See* A0434; A0614-16.

[93] Compare A0414; A0616; B0173.

[94] *See Farmers*, 2012 WL 295060, at *3.

CONCLUSION

This Court should reverse the Opinion and direct the trial court to enter judgment as a matter of law in favor of PCRS.

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Dated: February 3, 2021