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December 9, 2004

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Re: Breger v. Girard  
C.A. No. 20264-NC  
Dated Submitted: December 1, 2004

Dear Counsel:

Petitioner Patricia Breger and Third-Party Respondent Paul Breger (“the Bregers”) have moved, pursuant to Court of Chancery Rule 59(f), for reargument of a portion of the Court’s post-trial bench ruling of November 17, 2004.

The Court found that Respondents Donald Girard and Esther Girard (“the Girards”) had violated the use restrictions governing a subdivision known as Centreville Meadows by placing a landscaping barrier without prior written

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approval by the Architectural Reviewer (the “AR”).<sup>1</sup> The Bregers do not question that ruling. They do, however, challenge the Court’s decision to defer removal of the offending barrier pending consideration by the AR of whether the barrier should be approved. Shortly after placing the barrier, the Girards sought approval by the AR, but the AR concluded that its review was not necessary.<sup>2</sup> The Bregers fear that the AR will not fairly deal with this application on an after-the-fact basis because, in their view, it has already given tacit approval by having failed for several years since placement of the barrier to seek its removal. In addition, the Bregers assert that, as the adjoining neighbors, they have a special interest in enforcement of the applicable restriction because their home is the only one adversely affected by the barrier and, accordingly, they are entitled to enforcement of the restriction in accordance with its terms. Finally, they ask the Court “to leave the issue open pending the decision of the AR.” This would, presumably, facilitate

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<sup>1</sup> Architectural Reviewer is a defined term within the governing use restrictions. For practical purposes, it is now an architectural review committee.

<sup>2</sup> The Bregers do not contend that the AR was without power to approve the barrier if the Girards’ plan had been submitted in advance of installation.

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judicial review if the AR approves the barrier and the Bregers choose to challenge that decision.

“A motion for reargument under Court of Chancery Rule 59(f) is governed by the familiar standard requiring the moving party to demonstrate that the Court’s decision was predicated upon a misunderstanding of a material fact or a misapplication of the law.”<sup>3</sup> I am satisfied that my decision of November 17, 2004, reflected neither a misunderstanding of fact nor a misapplication of the law. Accordingly, the motion for reargument is denied.

The Bregers, in substance, challenge the Court’s decision to allow the AR to consider the appropriateness of the Girards’ barrier on an after-the-fact basis. The Girards did seek (albeit shortly after placement of the barrier but long before the Court addressed the issue) approval from the AR. The AR declined to approve the barrier, not on the merits, but, instead, on the basis that the AR did not want to be involved in every planting of trees in the community. It apparently misunderstood that the Girards’ planting would constitute a barrier that would require its approval.

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<sup>3</sup> *Goldman v. Pogo.com, Inc.*, 2002 WL 1824910, at \*1 n.1 (Del. Ch. July 16, 2002) (citations omitted).

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If the AR had approved the barrier when requested, it is unlikely that the Court would have required the removal of the barrier simply because approval was received after-the-fact. The AR was required to consider the barrier; it is neither fair nor appropriate to impose the consequences of the AR's decision solely on the Girards.

Obviously, for the barrier to remain, approval of the AR must be obtained and that approval must be granted properly. Any challenge that the Bregers may bring against any act of approval by the AR would most efficiently be pursued in a specific challenge to that action and, presumably, would include parties, such as the AR or its members, who are not participants in this action.

For the foregoing reasons, the motion for reargument is denied.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-NC