COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

August 29, 2007

John W. Paradee, Esquire
D. Benjamin Snyder, Esquire
Glenn C. Mandalas, Esquire
Prickett, Jones & Elliott, P.A.
11 North State Street
Dover, DE 19901

William W. Pepper, Sr., Esquire
Schmittinger and Rodriguez, P.A.
414 South State Street
P.O. Box 497
Dover, DE 19903-0497

Joseph Scott Shannon, Esquire
Daniel A. Griffith, Esquire
Marshall, Dennehey, Warner,
Coleman & Goggin, P.C.
1220 N. Market Street, 4th Fl.
P.O. Box 8888
Wilmington, DE 19899-8888

Re: Upfront Enterprises, LLC v. The Kent County Levy Court, et al.
C.A. No. 2678-VCN
Date Submitted: August 24, 2007

Dear Counsel:

The Petitioners have moved under Court of Chancery 59(f) for reargument of a portion of this Court's Memorandum Opinion of August 9, 2007, which

resulted in the denial of their application for interim injunctive relief precluding Respondent Kent County from enforcing its Emergency Moratorium Ordinance.[1]

The Petitioners' challenge to the Emergency Moratorium Ordinance failed because they were unable to demonstrate that irreparable harm would result in the absence of a preliminary injunction. The Petitioners, in presenting their arguments, relied upon the experiences of Petitioner Upfront Enterprises, LLC which is not prepared to satisfy the APFOs. Numerous other landowners or developers are either intervenors or potential members of an as yet uncertified plaintiff class. One of the intervening parties, Thorndyk Creek Holdings, LLC, has a better argument that the Emergency Moratorium Ordinance caused it irreparable harm. Kent County, through a vested rights process, has concluded that, as far as the APFOs are concerned, Thorndyk's project need not comply with the APFOs. Thus, but for the Emergency Moratorium Ordinance, Thorndyk may have been able to implement its development plans.

Thorndyk may well have suffered irreparable harm as the result of the Emergency Moratorium Ordinance,[2] but it does not follow that the motion for

[1] *Upfront Enters. LLC v. The Kent County Levy Court*, 2007 WL 2318588 (Del. Ch. Aug. 9, 2007). Familiarity with the facts set forth therein is presumed. Also, for convenience, the Court borrows defined terms from the Memorandum Opinion.

reargument should be granted. Motions for reargument are limited to those contentions fairly presented for decision in the first instance. Reargument, as the name suggests, is for those occasions in which the Court has overlooked or misunderstood the facts or the controlling legal principles; it is "not an opportunity, however, to . . . raise new [arguments]."[3] That precisely is what Petitioners now seek to do. The plight of Thorndyk was not fairly presented or argued to the Court when it was considering the application for a preliminary injunction. The Petitioners, as a tactical matter, chose to use Upfront's circumstances; as a consequence of their decision, Thorndyk's claims were not fully developed. Reargument simply does not provide the Court with a pathway to reach those arguments that could have been, but were not, made.[4]

---

[2] The Court need not resolve this question at this time.

[3] *See, e.g.*, *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1954442, at *1 (Del. Ch. June 27, 2007).

[4] This matter was handled on an expedited basis. The record of Upfront's experiences was more fully developed. By relying upon that factual background, the litigation process was certainly less complicated. In addition, the Petitioners assert that they did not anticipate the Court's approach to the analysis of irreparable harm. That explains how the Petitioners—or, more particularly, Thorndyk—ended up in the current predicament. It is not any fault of counsel, but the Court cannot contort the well-established principles guiding application of Court of Chancery Rule 59(f) to reach the previously known facts unique to Thorndyk.

Accordingly, for the foregoing reasons, the Petitioners' motion for reargument is denied.[5]

**IT IS SO ORDERED.**

Very truly yours,

***/s/ John W. Noble***

JWN/cap
cc: George F. Gardner, III, Esquire
Register in Chancery-K

[5] The Court does not resolve the question of whether the Levy Court's adoption of a new moratorium ordinance has mooted the challenge addressed here.

The Court notes that Petitioners' references to newly discovered evidence and excusable neglect (standards which they have not satisfied) invoke notions of Court of Chancery Rule 60(b). That rule, however, is not applicable because no final order has been entered. *See, e.g.*, *Lowe v. McGraw Hill Cos.*, 361 F.3d 335, 343 (7th Cir. 2004).