IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

LIBORIO L.P.,	:	C.A. No. 05A-11-004 RFS
Appellant,	:	
v.	:	
SUSSEX COUNTY PLANNING AND ZONING COMMISSION, CHRISTINE REECE, WILLIAM GUGNO and THADDEUS NOWAKOWSKI,	:	
Appellees.	:	

MEMORANDUM OPINION

Review of Decision of Sussex County Planning and Zoning Commission: REVERSED

DATE SUBMITTED: February 1, 2008
DATE DECIDED: May 30, 2008

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STOKES, J.

Pending before the Court is an appeal which Liborio L.P. ('Liborio") has filed from a decision of the Sussex County Planning and Zoning Commission ("the Commission") granting a request that an existing open space parcel located within Fox Hollow Subdivision ("the Parcel") be changed into a building lot. This is my decision in the matter.

This case has had a tortuous procedural history. It previously was appealed to this Court. That appeal is captioned Liborio L. P. v. Sussex County Planning and Zoning Commission, *et al.*, Del. Super., C.A. No. 03A-03-004. I refer the parties to my December 6, 2007, decision on the Commission's motion to dismiss the currently pending appeal for a detailed recitation of the complex procedural history of this case.[1] In this opinion, I set forth only the information which is pertinent to the merits of the appeal.

In order to have access to the transcripts of two previous hearings in this case and consequently, have a complete record, I must consolidate this appeal with the first appeal. **Thus, it is hereby ORDERED that the case of Liborio L. P. v. Sussex County Planning and Zoning Commission, *et al.*, Del. Super., C.A. No. 03A-03-004, is consolidated into this appeal. Despite this consolidation, the caption of the pending appeal shall remain as Liborio L.P. v. Sussex County Planning and Zoning Commission, Del. Super., C.A. No. 05A-11-004 RFS.** The record,[2] briefs and appendices show the following.

In 1973, Thaddeus E. Nowakowski recorded a major subdivision known as Fox Hollow. This subdivision contained approximately 87 parcels; two of the parcels were commercial, one was the Parcel, and the remaining parcels were residential. The recorded plat of the Fox Hollow subdivision, which was received in the Recorder of Deeds office on July 10, 1973, designates the Parcel as "Open Space". The record plan was revised in 1978 and recorded. That plat also

designates the Parcel as "Open Space". In a deed dated June 1, 1979, Peddlers Village, Ltd. conveyed to Thaddeus E. Nowakowski and Janet E. Nowakowski the parcel of land "designated as OPEN SPACE on the plot of `FOX HOLLOW' ...." That same property was reconveyed by Thaddeus E. Nowakowski and Janet E. Nowakowski to themselves and Thaddeus E. Nowakowski, Jr., Kevin Nowakowski, Bruce Nowakowski, Gail Nowakowski Boyd, and Carole Nowakowski Donovan on the same date. Again, the conveyance described the conveyed land as follows: "ALL that ... land ...designated as OPEN SPACE on the plot of `FOX HOLLOW' ...." Apparently, the property was reconveyed to Thaddeus E. Nowakowski because everyone has agreed throughout this appeal that he is the record owner of the property.

In 2002, Thaddeus E. Nowakowski signed a contract to sell the Parcel to Christine Reece contingent on her being able to build a home on the Parcel. On October 3, 2002, Christine Reece and William Gugno ("applicants") filed an application with the Commission for a "Major Subdivision Plan Review" pursuant to § 99-13 of the Code of Sussex County ("Sussex County Code") in order to revise the open space parcel into a building lot.[3] Thaddeus Nowakowski is the current listed owner of the property.[4] The application notes: "PETITION SUPPLIED FROM RESIDENTS OF FOX HOLLOW VOICING NO OBJECTION". That petition contains signatures, dated August and September 2002, of persons stating they had "no objection to the lot behind Peddler's Village being changed from Open Space to a buildable residential lot."

However, in a letter dated August 12, 2005, L. Vincent Ramunno, Esquire, on behalf of Liborio, objected. Liborio, at the time, owned lots 45 and 46 (parcels 66.00 and 67.00) in the Fox Hollow subdivision, which adjoin the Parcel. It also owned, and continues to own, parcels 68.01 and 69, which constitute Peddlers Village, a commercial center adjoining the Parcel. On

February 8, 2007, Liborio sold lots 45 and 46 to Liborio Realty, LLC. There has been no substitution of the parties and the Commission attacks Liborio's standing to pursue this appeal, a matter which I discuss later in this decision.

The first hearing in this case was held on February 20, 2003. Applicant Christine Reese addressed the Commission. She explained that she and her husband wanted to convert the property to build a house on it. The neighbors to whom they spoke and who signed the petition were pleased with the idea because the property had not been maintained.

The Commission questioned whether the change could be made when there is a designated open space. It was noted that the Fox Hollow restrictions allow for an amendment of the restrictions with a 60 percent vote of the homeowners' association.[5] It also was noted that the restrictions provide that "open space parcel shall remain a non commercial use for the benefit of all the residents of the development." The Commission proceeded to consider the application but the owner and/or applicants never addressed the basic jurisdictional issue.

Ted Nowakowski, Jr. presented the following information on behalf of his father. The original deed from Fox Hollow does not mention open space. The open space was meant for the Nowakowski family and not the community. The Nowakowski family has paid the taxes on the Parcel from day one. When the grass was not cut, the Constable came to his father and they took care of the grass cutting. Over the years, he and his brother had a garden on the Parcel and grew vegetables and sold them. He and his brother sold firewood on the Parcel. "Open space" back then is not what "open space" is today. Again, the open space was for their family and not the community.

Mr. Nowakowski presented some restrictions but there were questions as to whether they

were recorded. The restrictions Mr. Nowakowski presented state: "the open space parcel shall remain a non commercial use for the benefit of all the residents of the development." He and one of the Commission members discussed what this meant; i.e., whether it allowed for the building of a home. Mr. Nowakowski argued that granting permission to build the house would only enhance the community because he does not have time to cut the grass.

Finally, Mr. Nowakowski explained that there is no homeowners' association. The homeowners never took care of the grounds.

John Gorecki testified to the following. He is the person who does all the work for the community association. The homeowners would like for a home to be built because the Parcel is an eyesore and Mr. Gorecki is the one who has to call the Constable to have it cleaned.

One of the Commission members stated that they should allow the applicants to build on the property just to see what happens. However, the Commission voted to defer action to give its counsel time to research the legal issues surrounding the application.

On March 13, 2003, the Commission addressed the application. According to the transcript of that hearing, a letter from counsel "stated that the language contained in the recorded restrictions would have little or no effect on the Commission's decision. It is taking an open area parcel, and they want to create a building lot out of it." Transcript of March 13, 2003, Hearing at 2. Without more, the Commission, by a vote of 3, with one member abstaining, voted to approve the subdivision request.

Ultimately, the Superior Court reversed and remanded the matter because the Commission had failed to determine whether open space could be made into a building lot and because the record did not support the Commission's decision. The matter was remanded so that

the Commission could perform its job. Liborio L. P. v. Sussex County Planning and Zoning Commission, Del. Super., C.A. No. 03A-03-004, Graves, J. (July 26, 2004) at 5-6.

The next hearing took place on September 8, 2005. The Commission had before it the minutes of its meetings on February 20, 2003 and March 13, 2003.

Applicant Christine Reece stated that she had signatures of 60% of the neighborhood in support of the application. Some of the signatures were from the above-referenced petition submitted at the first hearing. Other property owners provided a statement dated 2005 wherein they "consent to the modification of the PLOT of FOX HOLLOW... to permit the use of the lot that is identified as `Open Space' as a building lot and to be numbered accordingly."

Thaddeus Nowakowski, Sr. testified at this hearing. He is the original owner and developer of the subdivision of Fox Hollow. He has been paying taxes on the property for 35 years. Whenever maintenance was necessary, he took care of it. Nothing in the deed restrictions states the open space is part of the community. He and his wife operated three businesses at Peddlers Village, the adjoining commercial development. They intended to build their home on the open land. They stored topsoil on the space, kept equipment there, and his son had gardens there. There never was any commitment to turn over the property to the community.

John Gorecki spoke at this hearing, also. He has been living in Fox Hollow for over ten years. He always was told the Parcel was community property. The only time the grass was cut was when Mr. Gorecki called the Constable's office. The people in the community would like to have the land as a playground because they say it is community property.

Mr. Ramunno, a principal of Liborio, spoke. He did not present any evidence, but he did make arguments to the Commission. He argued that, twice, the plot plan was recorded with the

indication that the Parcel was "open space". The property is referred to as "open space" in the deeds. People rely on "open space" as an amenity. Once property is designated as "open space", it never can be changed into a building lot unless all of the subdivision's property owners agree. Thus, the "open space" cannot be taken away.

Mr. Ramunno explained that the impact on Liborio's commercial development is being exposed to complaints regarding noise and trash from homeowner(s) who might build on the Parcel.

Frank and Lois Menzel spoke. Their property borders the open space. Mr. Menzel stated that when he bought the property, the real estate people who sold it to him told him it was open space and that was an amenity to which he agreed. The Menzels expressed suspicion about why anyone would want to build a house on the Parcel and suggested an ulterior motive for obtaining a change in the Parcel's designation.

On October 27, 2005, the Commission considered the application. A motion was made to grant it. It passed, three to one. The motion to grant it was based upon the record and for the following reasons:

> One, the Applicants are seeking the subdivision of land in an MR Medium Density Residential District by revising an existing open space parcel into a building lot within the existing Fox Hollow Subdivision.
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> Two, the proposed subdivision generally meets the purpose of the Subdivision Ordinance in that it protects the orderly growth of the County.
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> Three, the Applicant has provided the required 51 percent agreement of the existing property owners within the Fox Hollow Subdivision.
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> Four, the land is zoned MR, which permits low-density single family residential development of this type.
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> Five, the proposed subdivision is generally in character with the existing subdivision. The 1.25-acre parcel is actually larger than the other lots in the subdivision.
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> Six, although the parcel in question was shown on the original plan as open

space, it does not appear that it was specifically designated for any particular purpose, such as a recreation area.

Seven, according to the information presented, the parcel was intended to serve as something of a buffer between the residential area of Fox Hollow and the commercial area along Route 24, now known as Peddlar's [sic] Village.

Eight, the residents of Fox Hollow have not utilized this parcel in any manner in 35 years. Rather, it has been a source of complaints and perhaps an eyesore at times due to the sporadic maintenance. While providing some spatial barrier between the residential and commercial areas, it has not had any landscaping or planting, which would have provided at least some visual buffer.

Nine, the parcel was never transferred to the Fox Hollow Homeowners Association and has never been utilized by the Subdivision. Instead, ownership has been retained for approximately 35 years by the original developer of the Subdivision. Property taxes have been continuously paid by this owner, and the property has been periodically maintained by the same.

Ten, the County's ordinance 99-13 authorizes a resubdivision or an alteration to a previously recorded plot, and the requirements have been complied with in this application. The application has been exposed to public hearings and resubdivision and alteration has been approved by no less than 51 percent of the lot owners.

Number eleven, the Commission has reviewed and considered the requirements of Section 99-9C and finds that most of these considerations would have been relevant for an initial subdivision but have little application to a resubdivision or alteration of a recorded plot. The Commission is aware of the goal of Subsection 4 in preserving open space and scenic views. The record was clear that there was nothing scenic about the view of this property and preserving open space, which is an eyesore of little value. Subsection 6 addresses screening objectionable features from neighboring properties and roadways. And it is the Commission's view that the vacant lot has done little to satisfy that consideration for 35 years and that a newly constructed residential dwelling would do far more to satisfy that requirement than the vacant lot. Finally, the newly constructed residential dwelling would, in the Commission's view, have a positive impact on property values compared with the eyesore which has existed, and the use of the property for a family -- single family dwelling would be compatible to the remainder of the Subdivision.

Twelve, the term open space is not defined in the Subdivision Ordinance. Whereas, the opposing parties acknowledge that this area was intended to act as a buffer between the commercial area and the residential community and has not been adequately and routinely maintained, it is the Commission's finding that the Fox Hollow residential community would be better served if the open space was to become a lot within the Subdivision for a single family dwelling.

And this recommendation is subject to the following conditions: One, there shall be only one single family dwelling built on this lot; and two, a fence or screening

> landscape buffer of at least six feet in height shall be constructed and maintained between the commercial property and this parcel, with the exception of an area at least 30 feet from Fairfield Road so as to not impede safe pedestrian or vehicular traffic.

Transcript of October 27, 2005, Hearing at 2-6.

The initial question is whether Liborio has standing to pursue this appeal. My conclusion on this issue will become clearer after I address the jurisdiction issue below. I rule that Liborio, which continues to own the commercial lots adjacent to the Parcel, has standing to pursue this appeal in light of the fact that the commercial lots originally were part of the Fox Hollow record plan and due to the existence of the issues regarding the dedication of the Parcel and the extent of that dedication. Poole v. The Commissioners of Rehoboth, 80 A. 683, 687 (Del. Ch. 1911).

The basic question on this appeal is the same question the Commission raised at the first hearing held on the matter: whether the Commission had jurisdiction to consider the matter before it. This question, whether the Commission could change the Parcel into a building lot, has arisen through every step of the proceedings. The Superior Court, in its July 26, 2004, decision, directed the Commission to address the issue on remand. Liborio L.P. v. Sussex County Planning and Zoning Commission, supra. The Commission addressed it only to the extent of broadly concluding that § 99-13 of the Sussex County Code "authorizes a resubdivision or alteration to a previously recorded plot...." Transcript of October 27, 2005, Hearing at 4. Liborio has argued on appeal that the Commission does not have the authority to abolish recorded open space. Appellant's Opening Brief at 13, 20-23; Appellant's Reply Brief at 6-7. The Commission's only response is that § 99-13 of the Sussex County Code gives it such authority.

A review of case law, specifically, the cases of Whilden v. Richie, 203 A.2d 617 (Del.

Ch. 1964) and Seymour v. Fairwinds Civic Association, 1980 Del. Ch. LEXIS 604 (Del. Ch. Aug. 18, 1980), shows that the owner and applicant should have filed an action in Chancery Court wherein 1) they sought to remove the cloud from the title which the designation "open space" caused and 2) they requested as an additional remedy that the "open space" designation be stricken from the plot plan. I conclude that it was inappropriate for the Commission to consider this application.

I examine the above-cited cases in detail so that the procedure is clear to the parties.

In Whilden v. Richie, 203 A.2d, the plaintiffs filed an action for specific performance of a contract by which plaintiffs, as sellers, agreed to convey to defendants, as buyers, good marketable fee simple title to certain real estate. The plat which was recorded for the development in which the parcel was located showed most of the area subdivided for residential use, but a portion was marked "PARK". Plaintiffs/sellers purchased from the developer a portion of the property marked "PARK". Every landowner in the development executed quitclaim deeds quitclaiming any right to the conveyed parcel. Plaintiffs/sellers had paid taxes on the parcel and landscaped it. No public agency did any work or executed any control over the area marked "PARK". Defendants/buyers argued that the delineation of the area as "PARK" in the approved and recorded plat constituted a dedication or an offer to dedicate the area for public use and enjoyment and thus, there was a cloud on the title. Plaintiffs/sellers argued that to the extent there was any dedication, it was for the development and not the general public and the landowners had waived any rights they may have had therein. The Court ruled as follows at 618:

> Absent some language in the controlling instrument, inter alia, evidencing such an intent, I do not believe that the general public is without any rights in a legally dedicated public park. [Citation omitted.] Since the language of the plat plan here

> involved does not delimit those who might use the park, I do not believe its use was confined solely to the residents of the development. It follows that the obtaining of the quitclaim deeds from all the residents did not automatically destroy of record what amounted at least to an offer to dedicate the area in question for a park.
>
> The evidence shows without dispute that plaintiffs own land which of record ("PARK") the developer offered to dedicate to the general public. At the time plaintiffs contracted to sell their property and convey "good" title, there was a cloud thereon represented by the recorded offer to dedicate. Whether it was ever "accepted" by appropriate public user is not important because, in any event, there is nothing of record to show that the offer has been withdrawn. The selling of the land to plaintiff was not a sufficiently unequivocal act that the court would be justified in saying that there was no cloud. Thus, the plat as it now stands creates a record cloud which prevents plaintiffs from conveying the kind of title they agreed to provide. ... Consequently, plaintiffs are not entitled to specific performance.

In the case of Seymour v. Fairwinds Civic Association, supra, plaintiffs brought an action to remove a cloud on title to real estate and for accompanying injunctive relief wherein they sought "an order by this Court directing the removal of the word `PARK' from the plot so as to enable them to sell and dispose of the parcel of real estate free from any cloud on the fee simple title that might derive from the fact that it is designated as park land on the recorded plot." Id. at *3. The recorded plot for the residential development contained an area of land marked "PARK" ("Park Parcel"). The Park Parcel remained in the name of the original owners of the development. The sons, as successors of the original owner's estate, brought the action seeking an order directing the removal of the word "PARK" from the plot so as to enable them to sell and dispose of the parcel of real estate free from any cloud on the fee simple title that might derive from the "PARK" designation on the plot.

The defendants were the Fairwinds Civic Association, certain residents of the community, and New Castle County. Defendant New Castle County took no position other than to disclaim

acceptance of the land as a park and to disclaim responsibility for maintaining the area as a public park. The remaining defendants counterclaimed for a decree that the land in question had been dedicated for community use as a park.

Evidence established that the residents of the development regularly used the Park Parcel as a park. This use started in 1959, once the area was largely developed. It continued to be used as a park until the commencement of the litigation.

The Court ruled:

> While it may still be an open question in this State as to whether or not, in the absence of a controlling statute, the recording of a plot, in and of itself, constitutes a dedication of land indicated herein as reserved for public use, it has previously been held that the recording of a subdivision plot with lands therein designated as "PARK" amounts "at least to an offer to dedicate the area in question for a park." Whilden v. Richie, Del. Ch., 203 A.2d 617 (1964). This conclusion is reinforced when lands in such a recorded subdivision are sold as numbered lots with reference to the recorded plot. [Citations omitted.] Such an offer to dedicate can be made absolute by an acceptance of the offer, and acceptance can be accomplished by public use, as well as through use by the residents of the plotted community. [Citations omitted.] The evidence establishes all the necessary elements of an offer by Lonzy W. Seymour, Sr. and his wife to dedicate the land in question as a park, and an acceptance of that offer through use of the area for the purposes intended by the public, and by the residents of Fairwinds, over the subsequent years.
>
> I also find the other arguments advanced by plaintiffs to be unpersuasive. The fact another area in the plotted Fairwinds subdivision was designated as "FUTURE PARK," and that this designation was ordered stricken and removed of record by a previous action in this Court, has no bearing on the present matter. For one thing, there was no opposition to the relief sought in the prior suit. For another, there was no indication that the land involved in the prior suit had ever been used for park or recreational purposes by the public or by residents of Fairwinds. Thirdly, the very term "future park" would seem to indicate an intention to dedicate at some later time. None of these elements are present here.

Id. at *7-8.

Also of significance is the following musing of the Court:

> In conclusion, although the point was not raised by counsel, I have some doubt as to whether the plaintiffs could have succeeded in their action without having attempted to involve all property owners of the Fairwinds subdivision in the suit. It would seem that all persons who purchased property in the subdivision based on the recorded plot would be entitled to be heard on the question of whether the recorded plot should be altered so as to do away with an area theretofore set aside on the plot as one for public recreational use within the subdivision. I am aware of nothing that would indicate that a suit against the community civic association would suffice to accomplish plaintiffs' purpose, although perhaps there is an argument that this could be made possible through deed restrictions or otherwise.

Id. at *12.

Thus, the owner and applicant in this case should have filed a suit in Chancery Court seeking to clear title regarding the "open space" designation and seeking to strike that designation from the recorded plat. Factual determinations then would be made as to whether the landowner dedicated the open space here to the owners of the residential development and the commercial development, see MacMillan v. Great Eastern, Inc., 1975 Del. Ch. LEXIS 217 (Del. Ch. Dec. 18, 1975),[6] and/or to the public. If so, a second determination must be made: whether there was an acceptance of the dedication. Poole v. The Commissioners of Rehoboth, 80 A. at 686. (In determining if there was a dedication of the beach area to the public, the Chancery Court stated, "It is a necessary element of dedication that there should be an acceptance of the property for the purpose. [Citation omitted.] The acceptance may be actual or constructive.").

If the Chancery Court should determine that the property was not open space dedicated to the rest of the neighborhood and/or the public, but instead, was property that the landowners intended to keep for themselves, then the Chancery Court would order the "open space" designation stricken from the plot. Seymour v. Fairwinds Civic Association, supra. The striking of the open space designation would render a subdivision change from the County Government

unnecessary. If, however, the Chancery Court should determine that the "open space" was dedicated and there had been an acceptance of that dedication, then the dedication became a part of the restrictions, and consequently, binding. Cashvan v. Darling, 107 A.2d 896, 902 (Del. Ch. 1954); Gibney v. Stockdale Corporation, 174 A.117, 118 (Del. Ch. 1934) (where the Court stated, "That the owner of land may lay it off in streets and lots, and expose its parcels to sale under such circumstances and convey it by deeds so worded, as to create restrictive covenants that are reciprocal as between him and his grantees and mutually binding as among the latter, may be conceded."). If the Chancery Court concluded that the open space was dedicated to the residential development, then the property would have to remain open space and could not be built upon unless appropriate steps were taken to obtain an agreement to such by the development's property owners in accordance with the deed restrictions and/or case law. If the determination was made that the open space was dedicated to the public, then the property would have to remain open space. There is no role for the Commission in any of these scenarios.

Thus, based on the foregoing, I conclude that the Commission had no jurisdiction over the matter.

Although the following discussion is unnecessary in light of the ruling I set forth above, I provide it as a guide for the Commission and those who make applications pursuant to § 99-13. The Court would not have upheld the decision below because a sufficient number of property owners in the Fox Hollow subdivision did not approve of the application.[7]

Section 99-13A. of the Sussex Code requires that 51% of the property owners approve of the application. I emphasize that the provision does not make 51% of the "total lots" in the residential development the applicable number. Instead, it states 51% of the "property owners".

Pertinent is the number of owners at the time of the second hearing in 2005. At that time, there were 122 owners of the 85 parcels, counting Mr. Nowakowski and the Parcel. The signatures of those persons who originally approved of the application in 2002 and who continued to own property in 2005 are counted. However, in the situation where there is more than one owner of a lot, both owners had to give their approval; one owner of the property could not grant the other owner's approval. Henderson v. Chantry, Del. Ch., 2002 Del. Ch. LEXIS 14 (Del. Ch. Feb. 5, 2002). Thus, whenever a husband or wife signed for the couple jointly, the Court only counts one of those names. Id. Additionally, the Court discounted the names of Marshall and Louise Wright because the owner of Lot 44 was Andrea Kennedy. The Court did count Ms. Kennedy's signature because she signed off as approving the application. Further, the Court did not count the following persons who signed the petition in 2002 because their names do not correspond to any lot number: [Indecipherable], 2011 Pickwicke; Jesse S. [Indecipherable], 2025 Wandering Lane; Nancy [Indecipherable], 2079 Wandering Lane. Finally, the Court did not count the name of Todd Archino for lot 36; the name of Faith Bland for lot 38; the name of Michael [indecipherable] for lot 42; the name of Deborah Vavala for lot 55; or the name of Jim Brown for lot 72 because none of those people were the owners of record of the respective lots in 2005. After performing these steps, there were 46 names (including Mr. Nowakowski's) remaining as approving the application. That constitutes only 38% of the property owners. That number does not support the Commission's decision that the requisite number of property owners approved the application.

In conclusion, I reverse the decision of the Commission on the ground that the Commission lacked jurisdiction to consider the issue before it.

IT IS SO ORDERED.

END NOTES

1. Liborio L.P. v. Sussex County Planning and Zoning Commission, Del. Super., C.A. No. 05A-11-004 RFS, Stokes, J. (Dec. 6, 2007).

2. The records provided by the Commission in both the appeal of Liborio L. P. v. Sussex County Planning and Zoning Commission, *et al.*, Del. Super., C.A. No. 03A-03-004 and in this appeal failed to include the documents introduced at the various hearings and incorporated as exhibits. Liborio has provided copies of those documents in its appendices. Liborio objects to various documents from the hearings in the first appeal being made a part of the record in this appeal because they were not introduced into evidence at the hearings held after the remand. The Court takes judicial notice of those documents because they are a part of the record in Liborio L. P. v. Sussex County Planning and Zoning Commission, *et al.*, Del. Super., C.A. No. 03A-03-004, which has been consolidated with this pending appeal. Consequently, the Court deems Liborio's objection meritless.

3. In § 99-13 of the Sussex County Code, which has the heading, "Resubdivision and alterations to previously recorded plats", it is provided:

> A. Before undertaking resubdivision of previously subdivided and recorded plats, the owner of those lots to be altered shall consult with the Commission staff and the County Engineer in accordance with § 99-7, who shall in turn submit recommendations to the Director. The Director shall give notice to all property owners within the subdivision, as they are identified on the assessment rolls, of the pending application. In the event the proposed resubdivision or alteration results in increased density within the subdivision, the subdivider shall provide evidence that not less than 51% of the property owners consent to the application.
>
> B. If a subdivider wishes to alter a subdivision previously recorded to create new lots, new streets or substantially change the intent of the original plat, in the opinion of the Director, the subdivider must comply with the provisions of this chapter as they would apply to the creation of a totally new subdivision and submit for review a plat in accordance with the provisions of §§ 99-10 and 99-11 of this chapter.
>
> C. If the Director determines that the proposed resubdivision or alteration to a previously recorded plat is a minor subdivision, as defined in this chapter, and that there is unanimous consent by all owners to the proposed alteration or resubdivision, the Director may grant approval to the application without referring it to the Commission for review.

4. Neither applicants nor the owner have participated in this second round of the appeal.

5.The restrictions never have been made a part of the record.

6. An issue in that case seeking specific performance was whether the corporate developer of Cape Windsor mobile home park was required to convey to the Community Association "a certain small area designated on the recorded plot and sales materials for the mobile home park as `Beach' area." MacMillan v. Great Eastern, Inc., supra at *1. An area was designated as "beach" on sales promotional brochures, on the plot hanging in the corporate office, and on the recorded plot. The Court ruled at *5-6:

> I think it clear that the defendant corporation is obligated to convey the beach area to the Community Association long with the streets, pool, sewer system and water system. To conclude otherwise would be to make a mockery of common sense. It would also, in effect, make the Court a party to a fraud upon all the purchasers of the lots in Cape Windsor who made their purchase in reliance on the advertised representation of the defendant corporation that the beach area in the development into which they were buying would remain just that - a beach area.

7. Liborio raised this argument in its briefs on appeal. The Commission did not address it at all in its answering brief.