

INTRODUCED BY: Commissioner Eric L. Buckson  
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### **Ordinance 13-01**

#### **Ownership and Maintenance of Active Recreation Areas and Passive Open Spaces**

An Ordinance to amend Kent County Code, Vol. II, Chapter 187 Subdivision and Land Development, effective June 10, 2003, as amended, Article II, Word Usage and Definitions, §187-5, Definitions and Article XI, Design Requirements and Standards, §187-70, Ownership and maintenance of active recreation areas and passive open spaces to add new definitions regarding open space ownership and maintenance and include additional requirements regarding the formation of homeowners' associations.

**NOW, THEREFORE, THE LEVY COURT OF KENT COUNTY, DELAWARE, HEREBY ORDAINS:**

**Section 1:** That the Kent County Code, Vol. II, Chapter 187 Subdivision and Land Development, effective June 10, 2003, as amended, Article II, Word Usage and Definitions, §187-5, Definitions is hereby amended by adding the following underlined language in alphabetical order:

#### **COMMON FACILITIES**

All improvements and construction, including but not limited to all recreation amenities, walkways, stormwater facilities, ponds, landscaping, and sanitary sewer and other utilities not owned by Kent County, within a subdivision or land development located on open space owned jointly among all property owners.

#### **COMMON OPEN SPACE**

Land area, owned jointly among all property owners within a subdivision or land development, to be left undeveloped as part of a natural resource preservation, recreation, bufferyards, or other open space provisions of this chapter. Open space excludes areas in lots, street rights-of-way, and parking.

#### **MAINTENANCE ESCROW**

A deposit or fund held in trust or as a security until specified conditions are met as described in this Chapter and then transferred to a homeowners' association for the purpose of caring for common open spaces and facilities.

**ON-LOT SERVICES**

Routine maintenance or repair work such as landscaping, snow removal, or building upkeep performed on individual, privately owned lots or dwelling units. Such services and associated fees are separate from fees required for maintenance of commonly owned open spaces or facilities.

**Section 2:** That the Kent County Code, Vol. II, Chapter 187 Subdivision and Land Development, effective June 10, 2003, as amended, Article XI, Design Requirements and Standards §187-70, Ownership and maintenance of active recreation areas and passive open spaces is hereby amended by deleting the following bracketed language and adding the following underlined language:

**§ 187-70. Ownership and maintenance of active recreation areas and passive open spaces.**

A. Purpose. The purpose of this section is to establish standards and requirements for the maintenance of open space and common areas and inspection thereof, a process for the transfer of open space and common areas from the developer to a homeowners' association, and a property tax exemption for active recreation areas and passive open spaces.

B. Definitions. As used in this section, the following terms shall have the meanings indicated:

**ACTIVE RECREATION**

Recreational uses, areas, and activities oriented toward potential competition and/or involving special equipment. Playgrounds, sports fields and courts, swimming pools, and golf courses are examples of active recreation uses.

**COMMON FACILITIES**

All improvements and construction, including but not limited to all recreation amenities, walkways, stormwater facilities, ponds, landscaping, and sanitary sewer and other utilities not owned by Kent County, within a subdivision or land development located on open space owned jointly among all property owners.

**COMMON OPEN SPACE**

Land area, owned jointly among all property owners within a subdivision or land development, to be left undeveloped as part of a natural resource preservation, recreation, bufferyards, or other open space provisions of this chapter. Open space excludes areas in lots, street rights-of-way, and parking.

**HOMEOWNERS' ASSOCIATION**

A body of persons legally responsible for the maintenance of private open spaces and/or common facilities; also known as "maintenance corporation."

**MAINTENANCE ESCROW**

A deposit or fund held in trust or as a security until specified conditions are met as described in this Chapter and then transferred to a homeowners' association for the purpose of caring for common open spaces and facilities.

**PASSIVE RECREATION/PASSIVE OPEN SPACE**

Recreational uses, areas, or activities oriented to noncompetitive activities which either require no special equipment or are natural areas.

**ON-LOT SERVICES**

Routine maintenance or repair work such as landscaping, snow removal, or building upkeep performed on individual, privately owned lots or dwelling units. Such services and associated fees are separate from fees required for maintenance of commonly owned open spaces or facilities.

**OPEN SPACE**

Land area to be left undeveloped as part of a natural resource preservation, recreation, bufferyards, or other open space provisions of this chapter. Open space excludes areas in lots, street rights-of-way, and parking.

A.C. Ownership and maintenance required. There shall be provisions that insure that all active recreation and passive open space areas, and all other dedications and/or reservations of land not dedicated to Kent County, shall be owned and maintained by a responsible entity. These provisions shall be presented to Kent County for review and shall be in a form acceptable to Kent County. The applicant shall either:

(1) Retain ownership and maintenance responsibility of all open space areas; or

(2) Provide for and establish a legal entity such as a ~~homeowners'~~homeowners' association, community open space trust, or maintenance corporation for the purpose of ownership and maintenance of all ~~[common open space]~~active recreation and passive open space areas in the development in perpetuity. For the purposes of this Chapter, the terms homeowner association,

maintenance corporation, maintenance organization, or any similar entity shall be considered equivalent.

(3) Entities established for the maintenance of “on-lot” services to private, individual lots or dues collected for the maintenance of “on-lot” services are exempt from the requirements of this Section.

B.D. Homeowners' association requirements. If the applicant proposes to establish a homeowners' association for purposes of ownership and maintenance of common open space, such association shall be governed by the following:

(1) Membership mandatory. Membership in the organization shall be mandatory for all ~~[purchasers]~~owners of properties within the development, ~~[and their heirs and assigns.]~~ The members of the organization shall share equitably (pro rata basis per unit) the costs of maintaining common open space and recreation areas in accordance with all applicable property maintenance codes of Kent County as adopted and amended from time to time, in accordance with all record plan notes, and in accordance with procedures established by the homeowners' association.

(2) Responsibilities. The homeowners' association shall be responsible for maintenance, insurance, taxes, fees, and other ~~burdens~~expenses customary to the ownership of real property for all active recreation and passive open space areas and all improvements and constructions thereon, including but not limited to rights-of-way not dedicated to a third party, all recreation amenities, walkways, stormwater facilities, ponds, landscaping, and sanitary sewer and other utilities not owned by Kent County.

(3) Deed restrictions. Restrictive covenants shall be established that provide that in the event the homeowners' association fails to maintain the open space according to the standards of the Kent County Code and in accordance with the recorded or approved plan, the County may, following reasonable notice:

a. Demand that the deficiency of maintenance be corrected; or

b. Enter the open space area to maintain same. The cost of such maintenance shall be charged to the homeowners' association and/or individual homeowners' in accordance with the provisions of §187-70.E.2 below.

(4) If the developer collects monthly or annual dues from residents for maintenance of the active recreation and passive open space areas

prior to exceeding conveyance of 25% of the lots or units within the development, the developer shall provide a process and opportunity for election of at least 25% of the seats on the board of directors to residents to be elected by the membership of the homeowners' association. Prior to exceeding conveyance of 50% of the lots or units within the development, the developer shall provide a process and opportunity for election of at least 33% of the seats on the board of directors to residents to be elected by the membership of the homeowners' association.

(5) If the developer collects monthly or annual dues from residents while still holding a majority vote on the homeowners' association or maintenance organization, the developer shall provide a budget and financial statements related to operating the association annually to the residents. The documents shall be reviewed at an annual meeting hosted by the developer in a location convenient to the residents. A copy of the notification of the annual meeting shall be provided to the Department of Planning Services.

~~(4)(6) Third-party ownership of [passive]-open space may be permitted upon approval by the Commission under such conditions as the Commission may deem appropriate. [Appropriate deed restrictions ensuring the land will remain perpetually in passive open space must be approved by the County and recorded.]~~

E. Maintenance Escrow. The developer shall place \$300 per lot or unit within a subdivision or land development in an interest-bearing escrow account. All principal and interest that accrues in this account shall be turned over to the homeowners' association as set forth below.

(1) A deposit of \$300 shall be made to the escrow account with each initial real estate settlement and shall be verified prior to the issuance of building permits for construction of units beyond the initial eighty (80) percent of the lots or units within the subdivision. The balance of the escrow account shall be reflected on the financial statement.

(2) The developer must demonstrate that the funds have been placed in an independent escrow account separate from the operating fund of the developer.

(3) The escrow funds shall not be withdrawn by the developer or any person acting on behalf of the developer.

(4) At the time governance of the homeowners' association is transferred to the residents, the escrow collected to date plus any interest shall be transferred to the association.

(5) The balance of the maintenance escrow collected after transfer of association governance to the residents shall be provided to the homeowners' association prior to final inspection of the subdivision or land development and/or release of any county held surety bonds or letter of credit.

F. Inspection and Approval Process. These procedures shall be followed for inspections of active recreation and passive open space areas. Inspections and approvals may be made in phases if the record plan indicates a phased development sequence, or alternatively, if a phased active recreation and passive open space sequence is indicated on the landscape plan.

(1) One hundred (100) percent of the active recreation and passive open space areas shall be completed prior to issuing building permits for the final 20% of the dwelling units proposed or prior to such time as the developer transfers the maintenance responsibilities for the active recreation and passive open space areas to the homeowners' association, unless a written agreement is in place between the developer and the Department.

(2) The developer shall contact the Department, in writing, requesting an inspection of the active recreation and passive open space areas.

(3) Within ten (10) days of the receipt of the request, the Department shall coordinate an inspection of the active recreation and passive open space areas for conformance with this Chapter. The Department will notify the developer, in writing of any defects or non-compliant items found during the inspection and will specify a time period in which to correct them.

(4) When all specified defects and non-compliant items have been corrected, the developer shall notify the Department, in writing and the Department will coordinate a re-inspection of the land. At the time the Department finds that the condition of the active recreation and passive open space areas conforms to all plan specifications and any requirements under this chapter, the developer shall be notified within ten (10) days, in writing that the active recreation and passive open space areas have been approved.

G. Maintenance of Open Space and Common Facilities.

(1) Maintenance by developer. The developer of a subdivision or land development shall maintain the active recreation and passive open space areas and any improvements thereon, including but not limited to mowing and general maintenance, until the following conditions are satisfied:

- a. The active recreation and passive open space areas shown on the record plat, landscape plan, and/or related construction drawings have been constructed or installed according to the approved plans and approved as required by this Chapter;
- b. The active recreation and passive open space areas have been legally transferred to a homeowners' association according to the provisions of this chapter; and
- c. If applicable, the developer has transferred majority control of the board of directors of the homeowners' association to the residents.
- d. Developers are responsible for snow removal of vehicular travelways until those roads have been accepted into the DelDOT maintenance system pursuant to Delaware Code.

(2) Maintenance by the Homeowners' Association[~~or Maintenance Organization~~]. Once the above conditions are satisfied, active recreation and passive open space areas[~~open space and common facilities~~] shall thereafter be maintained and kept in good order and repair by the homeowners' association, [~~or maintenance organization~~].

- a. Should a homeowners' association or maintenance corporation fail to maintain and repair the active recreation and passive open space areas and any improvements thereon as required herein, the County may, in addition to any other remedy provided in this Chapter, enter upon the premises and perform such maintenance and repair, provided that at least ten (10) days notice is given to the registered agent of the homeowners' association or maintenance organization. Notice shall also be provided to individual homeowners' via regular mail.
- b. The cost of the work performed by the County shall be billed to the homeowners' association or, at the election of the County, may be charged to the owners of the lots or units within the subdivision. In the latter case, the cost shall be apportioned against each lot or unit in accordance with the provisions of the instruments, if any, governing their rights of use of enjoyment,

or in the absence of any such provisions, the apportionment shall be by pro rata share per lot or unit.

c. If the billed amount is not paid by the homeowners' association or maintenance organization, the apportioned share for each lot shall become a lien against the lots or units within the subdivision in accordance with the provisions of §175-2 of the Kent County Code.

d. After thirty (30)-days notice to the owners, the assessment provided for herein may be collected by any available legal means.

H. Transfer of Governance of Homeowners' Association. The Department shall serve as a resource for the developer and the homeowners' to ensure the transfer of control is completed correctly.

(1) Prior to transferring governance of the homeowners' association from the developer to the homeowners, the developer shall record a deed transferring ownership of all open space and common facilities from the developer or developer's limited liability corporation to the homeowners' association corporation.

(2) Legal transfer of the active recreation and passive open space areas from the developer to the homeowners' association does not relieve the developer from completing all required improvements within the time-frame established by this Chapter or any other governmental agency.

(3) Transfer of control of the homeowners' association or maintenance corporation shall occur once the subdivision is eighty (80) percent completed.

(4) The developer shall provide at least sixty (60) days written notice to each homeowner of the developer's intent to transfer control of the board of directors to the homeowners. A copy of the notice and an affidavit from the author of the letter listing the names of the homeowners to whom notice was sent shall also be provided to the Department.

(5) The developer shall supply the County with the names, addresses, and phone numbers of the homeowners serving on the board of directors.

(6) Prior to transferring majority control of the homeowners' association or maintenance corporation and all of the associated



active recreation and passive open space areas, the developer shall ensure that all expenses of the homeowner association have been paid.

I. Property Tax Exemption. Active recreation areas and passive open spaces shall be exempted from Kent County government and school district property taxes under the following conditions:

(1) The exemption shall be limited to those parcels designated on approved and recorded subdivision plats, on property located anywhere in Kent County, and identified as 1) open space; 2) conservation area; 3) utility station; 4) private road; 5) recreation, either active or passive; 6) water management; or 7) parcels serving a similar civic purpose by providing benefits to all property owners equally within the subdivision.

(2) The utilization of such parcels must be limited in perpetuity to the use designated on the plat, and no fee for access to, use of, or enjoyment of such parcels, other than dues payable by all property owners in the subdivision to a home owners association, may be charged to property owners in the subdivision.

(3) Any parcel which accommodates a business of any kind, including but not limited to golf courses, marinas, spas, country clubs, stores, restaurants, etc. and any parcel intended to be sold or otherwise transferred to a private individual or entity (other than a property owners association or third party approved by the Regional Planning Commission) are excluded from the exemption provided for herein.

(4) Applicable active recreation areas and passive open spaces shall be exempted from property tax upon their inclusion in Kent County's mass appraisal and land management records by assignment of a zero taxable assessment by the Assessment Office.

**Section 2. Severability.**

The provisions of this Ordinance are severable and if any of its provisions or any sentence, clause, or paragraph or the application thereof to any person or circumstance shall be held unconstitutional or violative of the Laws of the State of Delaware by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions which can be given effect without the invalid provision or application.


**Section 3. Effective Date.**

This ordinance shall become effective upon the date of adoption and shall be applicable to all subdivision and land development proposals for which a pre-applications conference has not been conducted.

ADOPTED BY THE LEVY COURT OF KENT  
COUNTY, DELAWARE

  
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President, Kent County Levy Court

This 22nd day of January, 2013

ATTEST:   
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Clerk of the Peace

**Synopsis:** This ordinance includes new definitions related to common areas and establishes standards for the maintenance of opens space and common areas and inspection thereof, a process for the transfer of open space and common areas from the developer to a homeowners' association, and a property tax exemption for active recreation areas and passive open spaces.