



MAINTENANCE CORPORATIONS

Required Pursuant to the *New Castle County Code*

Since 1973, the *New Castle County Code* required that any community containing private open space or common facilities must have a maintenance corporation. A maintenance corporation is a legal entity consisting of homeowners within a community. The primary responsibility of a maintenance corporation is maintaining the open space and common facilities located within the community.

Typically, the community's developer creates the legal existence of the maintenance corporation and the covenants obligating all homeowners to be members of the maintenance corporation prior to the conveyance of any home located within the community. The maintenance corporation is formed by filing a certificate of incorporation with the Secretary of State, Division of Corporations. The covenants requiring membership in the maintenance corporation are formed by filing a maintenance declaration with the Recorder of Deeds Office. Once the maintenance declaration is filed, all lots subsequently sold to home purchasers are conveyed subject to the document. The maintenance declaration provides that each lot owner within the subdivision becomes a member of the maintenance corporation when the homeowner accepts the deed to his or her lot. Accordingly, by acceptance of the deed, a home purchaser automatically becomes a member of the maintenance corporation.

As members of a maintenance corporation, homeowners, and their guests, have the right to free and uninterrupted use of all common facilities and open space. The use of open space, however, may be regulated by reasonable rules and regulations. For example, swimming in stormwater management ponds may be prohibited or hours may be posted in active recreation areas so as not to disturb adjacent homeowners by late night or early morning noise. Areas of open space may not be possessed by a homeowner for his or her own benefit. For example, a fence may not be extended into open space to increase the size of one's yard, nor may a homeowner situate a shed or garden on open space. The open space is to be shared equally by all community homeowners and their guests.

The maintenance corporation is charged with the duty of maintaining the open space and common facilities. In order to generate money for such maintenance, the maintenance declaration and the *County Code* provide that the maintenance corporation has the authority to assess each homeowner his or her pro rata share of the cost of maintaining the areas and any charges necessary for running the corporation.

If the maintenance corporation fails to adequately maintain the open space and common facilities, the County may enter upon the land and maintain the area as permitted by the *New Castle County Code* or governing documents. The County may collect all costs incurred from the maintenance corporation or from individual homeowners. If a homeowner fails to pay a County imposed charge, the County may place a lien on the owner's property.

While membership in a maintenance corporation is mandated by County law, the decision to serve on the board of directors of a maintenance corporation is strictly voluntary. The board members will have control over what occurs in the community concerning the open space. Serving on the board involves time and energy and working for the good of all members of the corporation. Above all, a maintenance corporation should consist of neighbors working together for the common cause of bettering their community.

Does My Community Have or Need a Maintenance Corporation?

Since 1973, communities that have private open space and/or common facilities have been required to have a maintenance corporation. The requirement is in the *New Castle County Code* and usually appears as a note on the community's record plan.

Why May a Community Not Have a Maintenance Corporation?

Some smaller or older communities may be designed with no open space and common facilities and thus have no need for a maintenance corporation. It is also possible that a community was developed with open space and common facilities but was not required to have a maintenance corporation. Generally, these communities were developed with common facilities or public open space that is County parkland. The parkland is open to all New Castle County residents and is maintained as part of the County park system.

Another possibility is that the developer failed to file the required documents to create a legal corporation. Or, perhaps a maintenance corporation operated years ago but through neglect, the homeowners are not actively managing it. Regardless of the situation, pursuant to the *County Code*, the record plan and the maintenance declaration, the homeowners are still responsible for maintaining the private open space located on the record plan.

Who is Required to be a Member of a Maintenance Corporation?

Prior to the transfer of any lot within a subdivision, the developer is required to file a maintenance declaration with the Recorder of Deeds. Once the document is filed, all lots that are subsequently sold to home purchasers are transferred subject to the document. The maintenance declaration provides that all lot owners within the subdivision become members of the maintenance corporation when they accept the deed to their lots. Accordingly, by acceptance of the deed, a home purchaser automatically

becomes a member of the maintenance corporation.

In rare cases, it is possible that the developer failed to file a maintenance declaration prior to the transfer of lots. In these rare circumstances, the homeowners are still obligated to maintain the open space pursuant to the provisions of the *County Code* and any and all notes appearing on the record plan. In fact, since the mid-1980's, a model maintenance declaration was part of the *County Code*. Thus, absent a recorded maintenance declaration, the terms contained in the *County Code* version will be applicable.

A maintenance corporation may be inactive during the development of the subdivision. At this time, although the homeowners are members, the developer and his or her representatives serve as the Board of Directors of the maintenance corporation. At a designated percentage of development, generally between seventy-five (75) and ninety (90) percent completion or conveyance, the developer is required to transfer control of the maintenance corporation to the homeowners.

The transfer of control from the developer to the homeowners is mandated by the *County Code* and described in detail in the maintenance corporation's governing documents, as discussed below. Generally, the developer is required to send notice to all homeowners designating a time and place for a meeting. At the meeting, a new Board of Directors will be elected from the homeowners, and the developer will turn over all financial records to the new Board.

What Rules or Laws Control Maintenance Corporations.

Maintenance corporations are required pursuant to the *County Code* and are controlled by the *County Code* and general principles of Delaware corporate law. The day-to-day functioning of a maintenance corporation is controlled by its governing documents: the maintenance declaration, the certificate of incorporation and the bylaws.

The developer, prior to subdivision plan recordation, records **the maintenance declaration**. This document creates the legal obligation for homeowners to be members of the maintenance corporation. The document also provides that the maintenance corporation is responsible for maintaining the open space and common facilities according to Code provisions. The document grants the maintenance organization the power to assess the homeowners with their share of the costs of necessary maintenance. If a homeowner fails to pay an assessment, the maintenance corporation may place a lien on the property. The declaration also provides free and uninterrupted use of all open space and common facilities to the members of the maintenance corporation. The rights and obligations created by the maintenance declaration are real covenants running with the land, which means each and every owner is subject to them, and they bind the land perpetually.

The certificate of incorporation is the legal document filed with the Division of Corporations in the Department of State that gives legal existence to the maintenance corporation. The certificate of incorporation serves as a contract between the State and

the corporation and also acts as a contract between the members of the corporation. Delaware General Corporation law delineates the required elements of the certificate. Generally, the certificate defines the authority and powers of the corporation and discusses membership in the corporation. Voting rights and rules regarding amendments to the bylaws and the certificate also are addressed in the certificate.

The bylaws provide the blueprint for the overall operation of the corporation. Bylaws may include provisions relating to the business of the corporation, the conduct of its affairs, its rights and powers, and the rights and powers of its members, directors and officers. Important features of the bylaws include the rules for meetings, board of director's powers and responsibilities, duties of officers, and a discussion of assessments.

A maintenance corporation may wish to amend its governing documents from time to time. The process for amending the certificate of incorporation and the bylaws is described within those documents.

The process for amending the maintenance declaration is described in the *County Code* and includes the need for County Council approval. First, any consent percentage stated in the declaration must be satisfied. Once membership consent is acquired, a written request for the proposed amendment must be sent to the Departments of Land Use and Law. The request must include a copy of the present restrictions, a copy of the proposed restrictions, and the reason for the change. Proof of required consent from the appropriate percentage of the homeowners must also be included in the request. The Departments of Land Use and Law then make recommendations to County Council regarding the proposed change. County Council may adopt a resolution approving the change during the County Council meeting. A fee, as designated in the *County Code*, must be submitted along with the request for the change.

The **record plan** is another important document that includes restrictions and information regarding the community's open space. The record plan is filed at the Recorder of Deeds Office. A second copy is kept on file in the New Castle County Department of Land Use. Information on the record plan may include a reference to an associated landscape plan or open space management plan. These associated plans are filed in the Department of Land Use.

When Should a Community Accept Responsibility for their Maintenance Corporation?

The transfer of control of the maintenance corporation from the developer to the homeowners is a legal and mandatory process. Transfer of control of the Board of Directors from the developer to the homeowners should be initiated by the developer prior to the issuance of seventy-five (75) percent of the building permits within the subdivision. The transfer of control, however, should not occur prior to the issuance of fifty (50) percent of the building permits within the subdivision.

What happens if the Maintenance Corporation Refuses to Accept the Open Space or Refuses to Organize?

Joining a maintenance corporation is not optional. It is an obligation created by acceptance of a deed to lot that is encumbered by maintenance responsibilities. If a community fails to organize or accept the land, through no fault of the developer, the County can send notice, issue violations, and/or perform maintenance to make the necessary improvements. In 1973, New Castle County was granted the power to enter the premises for the purpose of maintaining the common facilities to comply with the Code. If the land is owned by the maintenance corporation, the County may place a lien on each home in the subdivision until it recovers all fees incurred by maintaining the common facilities. Since a lien impairs the ability of homeowners to convey property free and clear, it is important for homeowners to comply with maintenance corporation obligations.

What if a Maintenance Corporation was Never Formed in My Community.

It is possible that a maintenance corporation was never formed for your community. In such a case, an incorporator should create a corporation by filing a certificate of incorporation with the Delaware Secretary of State, Division of Corporations. An example of a certificate of incorporation is provided in the appendix to Chapter 40 of the New Castle *County Code*. Any individual can serve as the incorporator. However, a community may wish to seek legal advice when forming a corporation and drafting corporate documents such as bylaws. Once the corporation is formed, viability then becomes a function of community support and responsibility. A maintenance corporation, like any other organization, is successful only if there is active participation by its members. The next step for the maintenance corporation is to organize a Board and run elections.

How Does a Community Organize a Maintenance Corporation Board and Run Elections?

The bylaws of the corporation provide the election procedures. Maintenance corporations operate similar to any corporation. Generally, a Board of Directors is elected and appoints the officers. The officers usually consist of a President, Vice President, Secretary, and Treasurer. However, the bylaws for your individual community should be reviewed prior to the election.

Prior to the election, nominations for the Board of Directors should be solicited. Many communities have formal resumes submitted. To ensure equality, the election must be open to all lot owners of the community. The entire community must be properly notified and given information about each candidate. This may be achieved orally at a meeting or in writing to each lot owner.

Voting rights are given to each lot owner in the community. The amount of votes given to each lot owner is provided in the bylaws. If a lot owner cannot attend the meeting, a proxy vote may be sufficient. A proxy is similar to an absentee ballot. The proxy transfers the voting rights to another eligible voter.

Once the election is complete, the Board of Directors may appoint the officers. At such time, the Board may begin running the maintenance corporation. Within thirty (30) days after the election, the new Board of Directors must contact the Office of Community Governing to provide them with the information about the officers. This must be completed in order to stay registered with New Castle County and receive assistance.

THIS DOCUMENT IS PREPARED BY THE OFFICE OF COMMUNITY GOVERNING TO PROVIDE GENERAL GUIDELINES ON MAINTENANCE CORPORATIONS; IT IS NOT INTENDED TO PROVIDE LEGAL ADVICE. COMMUNITIES SHOULD CHECK THE *NEW CASTLE COUNTY CODE*, MAINTENANCE DECLARATION, BYLAWS, RECORD PLAN AND OTHER OFFICIAL DOCUMENTS AND/OR CONSULT AN ATTORNEY, FOR DEFINITIVE INFORMATION REGARDING THEIR MAINTENANCE CORPORATION OR LAWS GOVERNING THE SAME.