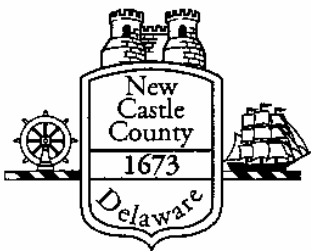


# Homeowner Association Manual



*Office of Community Governing*



Christopher A. Coons, County Executive

**NEW CASTLE COUNTY  
HOMEOWNER ASSOCIATION MANUAL  
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# INTRODUCTION

In 1965, the Delaware General Assembly mandated that New Castle County government regulate the development of land in the County. The Legislature did this by delegating the power to regulate the subdivision of all land located in unincorporated New Castle County to the County government. Included in this mandate was the County's duty to insure the conservation of property values and natural resources, including the protection of the County's agricultural lands, water resources, and industrial potential, and to afford adequate provisions for public utilities, water supply, drainage, sanitation, vehicular access, educational and recreational facilities, parkland and open space.

In response to the State's mandate, the County issued its first regulations controlling subdivision and land development in 1967. On December 31, 1997, after months of hard work by the Gordon Administration, New Castle County Council unanimously adopted the Unified Development Code that serves as the current source of regulation in land use matters. This landmark piece of legislation was the first comprehensive reform of the land use regulatory process in over thirty years. Article 27 of the Unified Development Code focuses entirely on homeowner associations.

When a developer proposes a plan for development to the County Land Use Department, Code provisions require the developer to set aside open space in subdivisions and to create adequate controls for stormwater management. The purpose of the requirement is to advance the general public welfare by preserving greenery and wildlife, providing recreation areas to community members, and protecting the residents of the County from irresponsible development. The ultimate responsibility for maintaining the private open space and common facilities provided by a developer resides with the homeowners, in the form of homeowner associations.

This manual addresses issues commonly encountered by members of homeowner associations. It focuses on three major areas. The first section provides a basic overview of homeowner associations and the covenants that obligate homeowners to be members of the association. The second section provides an explanation of corporate law principles and discusses how the association should generally operate. The third section addresses property maintenance issues. Additional information is provided that may prove helpful including answers to frequently asked questions. It is intended that this manual will be updated periodically. Accordingly, your comments are greatly appreciated.



## Maintenance Corporation

### **Formation - The Maintenance Declaration**

Prior to the transfer of any lot within a subdivision, the developer is required to file a maintenance declaration with the Recorder of Deeds in and for New Castle County. 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 deeds to their lots. Accordingly, by acceptance of the deed, a home purchaser automatically becomes a member of the maintenance corporation. The document also provides that the maintenance corporation is responsible for maintaining the open space and common facilities located within that community. The document grants the maintenance corporation the power to assess the homeowners for their share of the cost of necessary maintenance. If a homeowner fails to pay an assessment, the homeowner association 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. This means the covenants bind the land perpetually and each and every homeowner is subject to them.



## **Assessments**

The maintenance corporation is charged with the duty of maintaining the private open space and common facilities. In order to generate money for such maintenance, the maintenance declaration and the 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 association.

If the homeowner fails to pay the annual assessment, the maintenance corporation may file an action with the appropriate Justice of the Peace Court. At such time that the Justice of Peace enters a judgment against the homeowner, the maintenance corporation may transfer the judgment to Superior Court. Once the judgment is transferred, it becomes a lien on all the real estate the homeowner owns in the County.

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. 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 homeowner's property.

## **Transferring Control of the Maintenance Corporation to the Homeowners**

The maintenance corporation may be inactive during the development of the subdivision. Often, homeowners will live in a community for months or years without ever thinking about the maintenance corporation. At this time, although the homeowners are members, the developer and his or her representatives serve as the board of directors, also referred to as the governing body, 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 Code. Generally, the developer is required to send notice to all homeowners designating a time and place for a meeting. At the meeting, a new governing body will be nominated or elected from interested homeowners and the developer will resign. The transfer of control may occur in one meeting or may involve several meetings. The election process is addressed in the maintenance corporation's governing documents. When the developer resigns from the governing body, all financial records and corporate documents should be forwarded to the newly elected governing body.



## **Working Together - Membership and Management**

While membership in a maintenance corporation is mandated by County law, the decision to serve on the governing body of your maintenance corporation is strictly voluntary. The members of the governing body will have control over what occurs in the community concerning the open space. If you want to be involved in decision making, volunteer to serve on the governing body. If you do not wish to manage the association, cooperate with those who volunteered to serve. Remember, no homeowner receives a salary for serving on the maintenance's corporation management team. Service is about sacrificing time and energy and working for all members of the association. Above all, a maintenance corporation should be neighbors working together for the common cause of bettering their communities.



## WHAT IT MEANS TO BE A MAINTENANCE CORPORATION

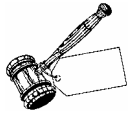
A community maintenance corporation is a legal entity formed pursuant to Delaware General Corporation Law. The body of corporate law that applies to the biggest multinational Delaware corporations also applies to the smallest homeowner association. Unlike publicly traded companies listed on exchanges such as NASDAQ or the New York Stock Exchange, a homeowner association is designed as non-stock, not-for-profit corporations. A homeowner need not own stock to be a member, but membership is automatic with the purchase of a home. Although there are differences, in many respects Delaware Corporate Law treats for-profit and not-for-profit corporations the same. Importantly, there is a concrete and predictable body of law that controls how the association should be run and the members' rights.

### **THE GOVERNING DOCUMENTS:**

#### **The Certificate of Incorporation**



Prior to the sale of any home in the community, the developer forms a maintenance corporation by filing a certificate of incorporation with the Secretary of State, Division of Corporations. The certificate of incorporation serves as a contract between the State and the association and also acts as a contract among the members of the association. The basic purpose of the certificate is to establish the association as a living entity, and state the purpose for which it was organized.



## **Bylaws**

An association's bylaws outline how the affairs of the corporation are conducted. Essentially, bylaws serve as rules among the members. The bylaws delineate the powers and duties of the governing body and define the responsibilities of each office. Bylaws may also explain voting and election procedures, terms of office, and any other information the association deems relevant. Bylaws may not contradict information provided in the Certificate of Incorporation, but may supplement it. Bylaws are not filed with the Secretary of State and are not recorded. They can be repealed, altered, amended or supplemented according to the terms stated in the bylaws.

The developer may or may not enact bylaws prior to transferring control of the maintenance corporation to the homeowners. When the homeowners take control of the maintenance corporation, the governing body should review any existing bylaws to see if changes would be beneficial to the running of the association. If bylaws do not exist or cannot be located, the governing body should create bylaws. Sample bylaws are available through the Office of Community Governing.

## **The Maintenance Declaration**

The Maintenance Declaration is recorded prior to the sale of the first lot within the subdivision, thereby binding all lots to the document. It outlines what the maintenance corporation is responsible for maintaining, and gives the association the right to make assessments.

## **Member's Rights**

If you compare your community maintenance corporation to publicly traded corporations, members' rights in a homeowner association are analogous to the rights of stockholders. Stockholders have no say in the daily running of the corporation and have minimal input in decisions made by the directors. If stockholders are unhappy with the way the affairs of the corporation are conducted, they may exercise their voting rights to remove the offending director from office. Basically, members choose those individuals they feel will best operate the corporation, and those serving on the governing body have broad discretion in running the corporation.

## **Powers and Duties of the Governing Body**

Corporate law is based on the central premise that the board of directors has the power to run the affairs of the corporation. In a non-stock corporation, the term "governing body" is used instead of "board of directors." However, the concept that certain people have broad authority to make decisions for the association is equally true to those serving on the governing body as it is for the directors of a publicly traded corporation. Specifically, Delaware General Corporation Law provides "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its Certificate of Incorporation." Under this rule, the governing body has broad discretion in running the affairs of the association but must exercise its business judgment with care, in good faith and fair dealing.

## **Corporate Fiduciary Duties**

The Delaware Code does not delineate the duties but decades of cases before the Delaware Court of Chancery have helped define a corporate director's fiduciary duties. The members of the governing body have fiduciary duties to the association to act with care, loyalty, and good faith. Below is a brief description of the duties. Keep in mind that only a court can decide if an actual breach has occurred - the examples are illustrative only.

- The duty of loyalty requires the director to place the interests of the corporation and its members ahead of his or her own interest. The director cannot benefit from a transaction to the detriment of the association. An example of a breach of the duty of loyalty would be if the treasurer looted the corporate accounts and spent the money on a home improvement project. Or, if the president hired her son to cut the grass located in the open space and paid him ten times more than the average lawn care contractor would charge.
- The duty of care requires the directors to be diligent and to make inquiries before acting on behalf of the corporation. An example of a duty of care breach would be if a director spent an exorbitant amount of money on an "automatic" pond scrubber that allegedly would clean the pond with no effort. If the director did not make reasonable efforts to ascertain the effectiveness or need for a pond scrubber, the members may be able to bring a suit seeking that the directors reimburse the corporation for the money spent on the pond scrubber.



*"We can sit here all day until the person who has hidden the agenda speaks up."*

- The duty of good faith is not as easily definable as the duties of care and loyalty. It can best be described as a requirement that the directors act honestly with the members of the corporation and with each other. If one acts under a mistaken belief that he or she believes to be true, there will be no violation. However, if the director knowingly misrepresents a material fact, a breach of the duty of good faith may occur.

It may appear that members of a governing body may regularly be subject to claims of alleged breaches of a fiduciary duty but this liability will generally attach only to obvious examples of misconduct and abuse of the member's position. It is assumed that members of the governing body exercise this broad level of discretion with good faith. This assumption is known as the "business judgment rule." Under corporate law principles, the members of a governing body will not be liable for decisions if the governing body is acting with honesty and in the interest of the maintenance corporation. Mistakes can be made as long as bad faith is not involved in the decision.

## **Authority of the Governing Body**

The governing body of a maintenance corporation can make decisions involving the open space and the maintenance corporation without consulting the other homeowners. The exception to this is where the certificate of incorporation states the powers and duties of the governing body are to be exercised subject to stated guidelines. For instance, the articles of incorporation that were adopted with the Unified Development Code provide that matters relating to membership fees and land use must be presented to the entire membership for voting. Accordingly, when the governing body develops a budget, the budget should be presented at the annual meeting and the entire membership should vote on the proposed assessments. Additionally, if the maintenance corporation proposes to speak for the community on a land use matter, that matter must be presented to the entire membership for approval.

While the governing body has broad discretion to act unless specifically limited, it may be a good practice to bring major issues to the membership to discuss. For instance, hiring contractors to cut grass and purchasing insurance on the land are routine operational issues, but deciding to hire a management company to operate the maintenance corporation may be a good issue to present to all homeowners.

Lastly, changes to the open space should be handled with great caution. Items such as landscaping, recreational equipment, walking trails etc., are most likely part of the recorded record plan, and should be maintained accordingly. Additionally, the maintenance declaration gives the corporation the power to assess for maintenance of the open space, it does not provide for improvements. Example, a maintenance corporation does not have the authority to use assessed funds to install a basketball court on the open space. In fairness to all residents, one should not be forced to pay for any improvement that did not appear on the record plan, which is what they agreed to maintain when they joined the association.

## Corporate Resolutions

Since the members of the governing body may change annually, it is a good idea to document significant decisions made by the corporation. Corporate resolutions authorized by the governing body can serve the important function of documenting decisions and preserving a record of such decisions. In fact, any document that is executed by the corporation and recorded in the Office of the Recorder of Deeds should be accompanied by a resolution of the governing body authorizing the action. Additionally, although not mandatory, contracts that are executed by the corporation should be authorized by a corporate resolution.

Resolutions need not be complicated or lengthy. They should consist of a brief explanation of the issue, a statement that the corporation has authority to take such action, and a summary of the action taken by the governing body. If a vote was involved, the resolution should state the outcome of the vote. All resolutions should be filed with the corporation's books and records and made available for review by the members of the corporation.

## Liability for Acts or Omissions of the Governing Body



Members of a governing body may be held liable for breaches of their fiduciary duties of care, loyalty, and good faith. Additionally, the maintenance corporation as an entity could theoretically be held liable for injuries occurring on open space. There are, however, four different mechanisms that may reduce the potential liability.

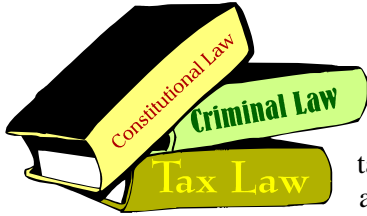
- **Statutory Immunity.** Delaware Code title 16, subchapter VI, provides protection for the Maintenance Corporation and members of the maintenance corporation from civil damages resulting from construction or maintenance of parkland. Damages cannot be recovered for any negligent act or omission of the maintenance corporation, its staff, or any person or entity with which the maintenance corporation may contract, if the act or omission occurs in connection with the construction or maintenance of the open space. The immunity provides protection to the extent damages exceed either existing liability insurance coverage applicable to the act or omission or the minimum liability insurance coverage required by law if no coverage exists.

- **Property Liability Insurance.** A general liability policy would insure the maintenance corporation as a whole against claims for damages that a person incurred from his or her use of the open space. The damages could result from a personal injury or damage to one's property. The County does not require the maintenance corporation to insure open space. As discussed above, the Delaware Code provides immunity from damages due to negligent acts or omissions. Accordingly, any policy purchased should protect against gross negligence and intentional willful and wanton infliction of injury. It is doubtful that an insurance company would provide such coverage. In fact, insurance companies are likely to provide protection against only negligent acts or omissions. The maintenance corporation must research the level of coverage provided by any property liability policy and ascertain if purchasing a policy would be redundant since the Delaware Code provides protection for negligent acts or omissions. However, a policy may be beneficial if the insurance company has a duty to defend the maintenance corporation in the event a suit is filed.
- **Exculpatory Statute.** The maintenance corporation may limit the directors' liability for the breach of fiduciary duty by providing an exculpatory clause in the Certificate of Incorporation. Title 8, section 102(b)(7) of the Delaware Code allows a provision to be added that eliminates or limits the personal liability of a director to the corporation or its members for monetary damages for breach of a fiduciary duty as a director, provided such provision does not eliminate or limit the liability of a director for: (1) any breach of the director's duty of loyalty to the association or its members; or (2) omissions not in good faith or which involve intentional misconduct or a knowing violation of the law; or (3) for any violation where the director derived an improper personal benefit. Essentially, the members may agree to limit liability for a breach of the duty of care. If the association chooses to provide this protection, the Certificate of Incorporation must be amended to add the provision.
- **Directors and Officer Liability Insurance.** Commonly known as D&O insurance, this type of policy can protect the individual directors from claims arising from breach of fiduciary duty. If a director is found liable, a D&O policy will pay for damages to the extent stated in the policy. It is common for this type of policy to allow the insurance company to defend the director in a lawsuit. Certain types of fiduciary breach, such as breach of the duty of loyalty, are generally exempted from coverage. Again, if the corporation adopts a 102(b)(7) provision, D&O insurance may not be necessary. It may however, be useful if the policy provides coverage for the legal expense in defending a lawsuit.

Before purchasing any type of insurance, or adopting amendments to the governing documents, the members of the governing body should analyze the types of risks facing the association and the members of the governing body. Protecting the corporation and the members of the governing body is important to the proper functioning of the association. While some

coverage may be beneficial, your insurance agent should be able to provide adequate coverage that will not result in over insurance and a waste of corporate assets.





### **Tax Status**

As a legally existing entity, Maintenance Corporation and property owned by maintenance corporation are subject to taxation. It is possible to escape most tax liability if the corporation files the appropriate paperwork with the taxing authority.

- **Federal Income Tax.** Maintenance Corporation are exempt from most federal income tax but the exemption is not automatic and is limited. The Treasury Department requires the maintenance corporation to apply for the exemption annually by filing a form 1120H. The exemption requires that the maintenance corporation meet the following requirements; 1) at least 60% of the corporation's income must derive from homeowner assessments, 2) at least 90% of the corporation's expenses must relate to maintaining and managing open space. Maintenance Corporation are not formed as a charity, therefore, they do not qualify for 501 status under the Internal Revenue Code. Current IRS forms and publications can be accessed via the internet at <http://www.ire.gov/forms>.
- **State Income Tax.** Maintenance corporation are exempt from corporate income taxes pursuant to title 30, section 1902(b)(4) & (5) of the Delaware Code. The corporation need not file any forms with the State of Delaware, Division of Revenue in order to be exempt from taxation. It is automatic.
- **State Franchise Tax.** Maintenance corporation are subject to association franchise taxes. The annual franchise tax report is due to the Secretary of State on or before the first day in March. The forms are available from the Secretary of State and the information required is delineated in title 8, section 502 of the Delaware Code. The cost of the tax is calculated using the number or value of capital stock. Since a maintenance corporation has no capital stock, the maintenance corporation files an annual report and pays a filing fee, currently twenty (\$20) dollars.
- **State and Local Property Taxes.** All real property located in the State is liable to taxation and assessment by the County in which the property is located. However, maintenance corporation owning parkland or open space are not liable to taxation and assessment for the parkland or open space. If your corporation is receiving tax bills, contact the Office of Community Governing for assistance.

## **Finances**

- **Budget.** The governing body must create an annual budget. The budget should contain all anticipated costs that will be incurred in the upcoming year. These costs include, but are not limited to: grass cutting, fertilizing, insurance, taxes, accounting fees, court costs, bank fees, stationary, postage, post office box, stormwater management and any other items reasonably relating to the affairs of the corporation. The members of the governing body cannot receive a salary but should not incur personal out-of-pocket costs for corporation related activities. Next, the total amount should be divided by the number of homes to arrive at a per-lot assessment. Anticipated delinquent payments or non-payments should be factored into the budget. It may take a few years of experience to "balance" your association's budget.

Sample Budget

|                     |      |
|---------------------|------|
| Grass Cutting       | 4000 |
| Playground          |      |
| Maintenance         | 600  |
| Landscaping/Mulch   | 1000 |
| Insurance           | 1080 |
| Franchise Fee       | 20   |
| Administration Cost | 300  |
| Contingency Fund    | 1000 |
| total               | 8000 |

82 Households @  
\$100

- **Books and Records.** The corporation should maintain organized books and records. A current list of the members of the association must be maintained according to Delaware General Corporation Law. A ledger should be maintained that accurately records assessments as they are paid and all debts as they are incurred and satisfied. The tax returns, County exemption records, franchise tax filings, corporate resolutions, and all other material relevant to the affairs of the association should be properly organized. Any member of the corporation has a right to review the books and records of the corporation during regular business hours and with proper notice. The member must have a proper corporate purpose relating to his or her status as a member in order to review the records. A proper corporate purpose should be liberally construed and could include access to names and addresses to solicit votes or an accounting to determine how the corporate funds are being spent.

## YOUR OPEN SPACE



As members of 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 not to disturb adjacent homeowners with 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.

## Maintenance Responsibilities



During the majority of time when homes in the subdivision are being built, the developer is responsible for constructing and maintaining the open space and common facilities located within the development. At some point, the responsibility of maintaining the open space shifts from the developer to the maintenance corporation. The timing of the shift depends on the date the subdivision was approved by the Land Use Department. What is consistent in every community is that the developer, or other entity that holds title to the open space, is responsible for maintaining the area until the title to the property is legally transferred to the maintenance corporation. The title cannot be legally transferred until the open space is inspected and approved by New Castle County and the legal documents are approved by the County Law Department. All communities receiving Land Use Department approval after December 31, 1997 are subject to the Unified Development Code. The rules contained therein provide the following maintenance responsibilities.

- **Maintenance Corporation Responsibility.** After the property is legally transferred and transfer of control is complete, the maintenance corporation is responsible for the maintenance of the open space. Upon failure of the maintenance corporation to maintain the open space, the County, after providing proper notice, may enter upon the land and perform the necessary maintenance and or repairs. The cost of the work performed by the County will be charged to the maintenance corporation or the owners of the lots within the subdivision. When the assessment is made against the maintenance corporation, it becomes a lien against all properties owned by the maintenance corporation. When the

assessment is made to a homeowner, the debt must be paid by the homeowner or the County may proceed with legal action to create a lien on the homeowner's property.

## **Ensuring Availability to all Community Members**

Within the open space, areas may not be sectioned off for the exclusive use of one homeowner or a certain group of homeowners. The open space is for the enjoyment of all the residents within the subdivision, and as such, must remain free of all unauthorized encroachments, such as sheds, private gardens, fences, line defining plant material, or any object or structure. The open space and common facilities must be available to all homeowners subject only to the payment of assessments and reasonable rules and regulations concerning the use of the open space.

## **STORMWATER MANAGEMENT FACILITIES**

Stormwater management facilities became an important part of a communities design in the early 90's. Some practices require the installation of stormwater management ponds, as the method of controlling stormwater run-off and quality.

These stormwater management ponds require some level of maintenance to operate properly. Ultimately, the maintenance corporation is responsible for maintaining the stormwater facilities located in the community. Unfortunately, many homeowner associations lack the expertise or experience in understanding the maintenance needs of these facilities. Additionally, maintenance corporation were encountering problems budgeting for the long term maintenance of the facilities. Accordingly, New Castle County launched a new initiative to ease the burden of residential stormwater management. Below is a description of the initiative. It is important to note that maintenance corporations are still responsible for routine maintenance.

### **New Castle County Stormwater Management Initiative**

Under the new initiative, New Castle County will assume responsibility for the following items if the maintenance corporation is registered with the Office of Community Governing. Registration is important because, New Castle County inspects all stormwater management facilities, once a year, and if a problem exist, that needs to be reported to the corporation for correction, the County must have current contact information.

#### **New Castle County will;**

- Assume responsibility for the annual inspection of stormwater management facilities
- Perform long-term sediment clean-out
- Replace deteriorated structural components

## **Maintenance Corporation Responsibilities;**

Maintenance corporation will continue to be responsible for routine maintenance of stormwater management facilities, such as;

- Grass cutting and trimming.
- Trash and debris removal.
- Minor sediment removal.

The Appendix contains a stormwater management facility maintenance log that can be used for record keeping for the routine maintenance tasks described above. This log may be forwarded to your landscaping contractor so that he or she is familiar with the County maintenance requirements. The report can also be used to track the condition of the pond and may prove useful when requesting the County to perform any required long term maintenance.

## **CIVIC GROUPS, MAINTENANCE CORPORATIONS, DEED RESTRICTIONS AND SNOW REMOVAL**

Maintenance corporation are different than civic associations, in that, homeowners are required by law to belong to a maintenance corporation, whereas, you may join a civic association on a voluntary basis. Civic associations can perform a very important function, because they can do things that a maintenance corporation, cannot do, such as enforcement of deed restrictions, unless specified in the Maintenance Corporations governing documents. Remember, Maintenance Corporations were established to maintain the open space and common facilities, owned by the community.



### **Enforcement of Deed Restrictions**

Deed restrictions create a private contractual arrangement between the homeowner and the rest of the community. The person purchasing the property agrees to abide by the deed restrictions. The County is not a party to these private deed restrictions; therefore, the County does not enforce them. Generally, deed restrictions are written in such a way that any affected party, which could be any homeowner, or civic association can enforce them. Deed restrictions typically have architectural review as a component. Architectural review is the process of reviewing plans for improvements on individual lots, namely, additions, sheds, fences etc., to ensure conformity with the surrounding neighborhood. This function, as well as actual monitoring and enforcement of deed restrictions, is a role best done by the civic association.



## **FREQUENTLY ASKED QUESTIONS**

### **What is a maintenance corporation?**

A maintenance corporation is a legal entity comprised of all lot owners in a subdivision. It is required in communities that have open space or other common facilities that are to be owned jointly by the homeowners. The corporation is responsible for maintaining the open space and common facilities specified on the record plan and in the maintenance declaration.

### **Why do some communities not have a maintenance corporation?**

Some smaller or older communities may be designed with no open space and common facilities and do not require a maintenance corporation. Some communities were developed with common facilities or open space that is County parkland. The parkland is maintained by New Castle County and open to all County residents.

### **When should a community accept responsibility for its maintenance corporation?**

The transfer of control of the maintenance corporation from the developer to the homeowners is a legal and mandatory process. The Office of Community Governing may serve as a resource for the developer and the homeowners to ensure the process is completed correctly.

Transfer of control of the governing body 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, and must be completed by 90%..

### **When should the community accept responsibility for the common facilities?**

For sub-divisions that received exploratory plan approval after December 14, 1997, once the deed has been legally transferred, and the homeowners control the corporation, the maintenance corporation becomes responsible for maintaining the land.

### **What happens if the maintenance corporation refuses to accept the open space or refuses to organize?**

Joining a maintenance corporation after you have accepted the deed to a lot is not an option. If a community fails to organize or accept the land, through no fault of the developer, New Castle County will do the necessary maintenance. The County has authority 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 cost incurred by maintaining the open space or common facilities.

### **Can a maintenance corporation refuse to accept open space until complaints about home construction are addressed?**

No. The transfer of open space to the Maintenance Corporation and complaints about home construction are independent issues. If you have issues relating to construction, and if you have lived in your home for less than one year, consult your home warranty company, or call New Castle County.

### **How does a community set up a maintenance corporation governing body and run elections?**

The bylaws of the association provide the election procedures. Maintenance Corporations operate similar to any association. Generally, the members of a governing body are elected by the other members. Positions of the governing body 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 governing body 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 be given information about each candidate. This can be achieved orally at a meeting or in writing to each lot owner.

Generally, each household has one vote. If two parties are listed on the deed, each party has one-half (1/2) vote. The amount of votes given to each lot may vary in older developments - check the bylaws. If a lot owner cannot attend the meeting, a proxy vote may be sufficient. The proxy transfers the voting rights to another eligible voter.

Once the election is complete, the governing body may begin running the affairs of the maintenance corporation. Within thirty (30) days after the election, the new governing body must contact the Office of Community Governing to provide it with the information about the members of the governing body. This must be completed in order to stay registered with New Castle County.

### **How does a maintenance corporation make assessments?**

Once the budget has been approved according to your bylaws, the collection of assessments may commence. Written notice is sent to the owner of each lot indicating the amount owed, including the developer if he or she still owns lots in the subdivision. If the governing body does not have the names and addresses of all of the lot owners, this information can be obtained from the developer or Office of Community Governing.

### **What if a homeowner does not pay the annual assessment?**

By accepting the deed to a lot in a subdivision with a maintenance corporation, an individual automatically becomes a member of the maintenance corporation. Thus, the homeowner is now obligated to pay the annual assessment. If the homeowner fails to pay the annual assessment or any “special assessment” the homeowner corporations may place a lien on the homeowner’s property.

### **How does a maintenance corporation file a lien on a homeowner’s property?**

First the maintenance corporation must comply with the procedures established for the collection of assessments as defined in the governing documents. If the homeowner fails to timely pay the assessment, the association may file a claim in the appropriate Justice of the Peace Court. A nominal fee will be collected for the filing of the claim. If judgment is awarded to the maintenance corporation, a lien may then be placed on the property by transferring the judgment to Superior Court.

The process for transferring a judgment to Superior Court is delineated in title 10, section 9569 of the Delaware Code. Essentially, the judgment creditor, the maintenance corporation, must file a certified transcript of the docket entries of the judgment in the Office of the Prothonotary. Once the judgment is entered, it becomes a lien on all the real estate of the debtor in the County.

### **Where can I get a copy of my governing documents?**

The developer should be able to provide a copy of all of the governing documents for your community. Once control of the association is in the hands of the homeowners, the governing body should have current copies of all governing documents including the certificate of incorporation, the maintenance declaration, and the bylaws.

## **Is there a minimum maintenance standard for storm water management facilities?**

Yes. There are four routine maintenance tasks that must be performed. The four tasks are; grass mowing, grass trimming, debris removal, and minor sediment removal.

## **How do I know if my community's open space is tax exempt?**

Private open space (providing it contains no pool) is tax exempt. If you are receiving tax bills, contact the Office of Community Governing for assistance.

## **Should my community have insurance?**

New Castle County does not require insurance on open space or insurance for the governing body. Insurance coverage may be in your community's best interest. The governing body should discuss insurance options with reputable insurance agents and assess the risks that the association and the governing body may be subject. For additional information, you may contact the Insurance Commissioner (*see* useful phone numbers).

## **How does a maintenance corporation remain in good standing with the Secretary of State, Division of Corporations?**

To remain in good standing with the Secretary of State, Division of Corporations, a maintenance corporation must file a report each year and pay the franchise fee, currently twenty dollars per year. Whenever the governing body changes, you should file a change of registered agent form with the Secretary of State, Division of Corporations, then the annual report will be mailed to some responsible person in the association.

Division of Corporations  
P.O. Box 898  
Dover, DE 19903

## **Does a maintenance corporation have to file each year with the IRS?**

Yes. The corporation must still file a tax return (form 1120H) and declare all non-exempt income, such as interest. You may obtain the appropriate form by contacting the IRS (*see* useful phone numbers) or stop by the local office at:

844 King Street  
3rd Floor  
Wilmington, DE 19801



### **Who is responsible for snow removal prior to the roads being dedicated to DeIDOT?**

Currently, there is no legislation that requires any entity to remove snow in residential subdivisions. However, an owner of property must maintain his or her property in a safe and sanitary condition. Arguably, the developer has the legal burden of ensuring internal subdivision roads are safe. Most developers or builders will clear the subdivision streets as a courtesy to the new homeowners.

### **Who is responsible for snow removal after the roads are dedicated to DeIDOT?**

DeIDOT will not clear snow from residential streets. It is up to the members of the community to arrange for snow removal. DeIDOT will provide reimbursement for snow removal under certain conditions.

### **How does a maintenance corporation qualify for snow removal reimbursement?**

The Delaware legislature adopted House Bill No. 544, as amended, on July 1, 1996. This bill stated “the Department of Transportation shall be responsible for reimbursing certain eligible organizations up to seventy-five (75) percent of its costs for snow removal services within residential developments or communities”. A policy statement is issued each year. Your community must register with the Department of Transportation by the first of November of each year, by contacting DeIDOT at 323-4480.

### **How can a community get street signs?**

Some communities would like additional signs in their area, for example, “Children at Play” signs. Contact DeIDOT for these types of requests.

### **How does a community get streetlights installed?**

The establishment of a special tax assessment district may authorize streetlights in residential areas by action of the County Council. A petition must be signed by fifty one percent (51) percent of the lot owners within the subdivision. To obtain a street light petition form, call New Castle County Department of Treasury (Denzel Hardman) at 395-5083. The homeowners will be taxed for the cost of the electricity.



### **Who should be contacted for speed bumps?**

Speed bumps are funded by your State Senator or State Representative through his or her suburban street fund account. If your community is interested, please contact your elected State officials.

### **How does a maintenance corporation force a homeowner to remove personal property, such as sheds or fences, from the open space?**

First, the homeowner association should notify the homeowner that the homeowner's property is encroaching on the open space. Often, the encroachment is unintentional and the homeowner simply misjudged the property line. If the encroachment continues, the maintenance corporation should send the homeowner a certified letter delineating the encroachment and demand removal of the encroachment in a specified time. If this fails to correct the problem, the homeowner association can file a trespass action in Chancery Court. The maintenance corporation may want to seek the assistance of an attorney to file the claim.



## DEFINITIONS

**Articles of Incorporation** - See Certificate of Incorporation.

**Assessment** - The fee allocated to each member of a maintenance corporation to pay for the costs associated with the maintenance of the community's open space and common facilities.

**Bylaws** - A document containing the rules that govern the operation of a maintenance corporation.

**Certificate of Incorporation** - A document filed with the Secretary of State, Division of Corporations that establishes the homeowner association as a legal entity. Also referred to as articles of Incorporation or the corporate charter.

**Common Facilities** - Refers to those areas located in a subdivision that are constructed for the common benefit of the residents of the subdivision. Common facilities may include, but are not limited to, stormwater management facilities, recharge systems, parks, playground equipment, recreational facilities, landscaping in common areas, common parking areas, rights-of-way and easements designated for maintenance by the maintenance corporation, and entrance signs and islands.

**Community** - A group of people living in the same locality and under the same government. When used in this manual, Community means a particular development that can be identified on a land development or subdivision plan on file with New Castle County. Also referred to as Development or Subdivision.

**DelDOT** - Delaware Department of Transportation; a State agency.

**DNREC** - Department of Natural Resources and Environmental Control; a State agency

**Declaration of Restrictions** - A legal document that lists restrictions for a community and is recorded by the developer prior to the sale of the first lot in the subdivision. The restrictions are covenants that run with the land thereby obligating all future owners to the covenants stated in the document. Also referred to as "deed restrictions."

**Deed Restrictions** - See Declaration of Restrictions.

**Developer** - The person or entity that submits a land development plan to the Department of Land Use for approval. Once the plan is approved, the developer owns the development rights of the project. It is common for a developer to sell building lots to individuals or builders. The developer is usually responsible for constructing the infrastructure in the development including sewer lines, pumping stations, roads, open space and stormwater management facilities.

**Development** - a particular community that is identified on a record plan on file with New Castle County. Also referred to as Community or Subdivision.

**Governing Body** - Duly elected individuals who are authorized to manage the affairs of the maintenance corporation. Most commonly consists of a president, vice president, secretary and treasurer. Also referred to as the board of directors.

**Governing Documents** - The documents controlling the governance and operation of the maintenance corporation. Includes the bylaws, maintenance declaration, and certificate of incorporation.

**Lien** - The right to take and hold or sell the property of a debtor as security or payment for a debt.

**Lot Owner** - an individual or entity that owns a lot identified on a record plan. The lot may be improved with a structure or unimproved.

**Maintenance Corporation** - A legal entity comprised of all lot owners in subdivision as required by the New Castle County Code. The association is responsible for maintaining the common facilities specified on the record plan and in the maintenance declaration.

**Maintenance Declaration** - A legal document that specifies the rights and obligations of the maintenance corporation.

**Maintenance Task** - One of the four routine maintenance procedures a maintenance corporation must perform to properly maintain the storm water management facility.

**Member** - an individual who belongs to a maintenance corporation.

**Office of Community Governing** - A branch of the New Castle County Land Use Department, acting as a liaison between communities and the New Castle County government.

**Open Space, Private** - A parcel of land, an area of water, or a combination of land and water within a developed site that is designed and intended for use and enjoyment by the residents of the community.

**Open Space, Public** - A parcel of land or an area of water, or a combination of land and water within a developed site that is designed and intended for use and enjoyment by the residents of the County.

**Record Plan** - A complete subdivision or land development plan, including all required supplementary data, which defines property lines, proposed streets and other improvements, and easements. The plan is recorded at the Office of the Recorder of Deeds in and for New Castle County and is also on file with the Department of Land Use. The maintenance declaration is usually referenced in a note on the record plan. All lots shown on the record plan are subject to the maintenance declaration that applies to that record plan.

**Stormwater Management** - The mitigation of the hydrologic impacts of lost natural runoff storage by the use of constructed storage facilities.

- For water quantity control, a system of vegetative, structural, and other measures that may control the volume and rate of stormwater runoff which may be caused by land disturbing activities or activities upon the land; and
- For water quality control, a system of vegetative, structural, and other measures that control adverse effect on water quality that may be caused by land disturbing activities or activities upon the land.

**Stormwater Management Facility** - A surface facility comprised of inflow structure(s), an outflow control structure, and storm water runoff from an area of land. A SWMF may either be a detention or retention facility depending upon its normal or intended dry weather condition. It may also be referred to as a common facility.

**Subdivision** - See Development.

**Unified Development Code** - The comprehensive body of law in New Castle County that regulates land use. It was adopted on December 31, 1997.

# APPENDIX

## USEFUL TELEPHONE NUMBERS

(Unless noted, Area Code for all numbers listed below is 302)

### COUNTY NUMBERS

|   |          |
|---|----------|
| Brandywine Town Center.....                           | 395-5114 |
| County Executive Office .....                         | 395-5100 |
| Customer Information and Assistance Office (CIA)..... | 395-5555 |
| Office of Community Governing.....                    | 395-5114 |
| Code Enforcement.....                                 | 395-5555 |
| County Council Offices .....                          | 395-8383 |
| Administration Department .....                       | 395-5260 |
| Finance (tax, sewer-billing info) .....               | 323-2600 |
| Human Resources .....                                 | 395-5180 |
| Legal .....   | 395-5130 |
| Clerk of the Peace .....                              | 571-7590 |
| Community Services Department .....                   | 395-5600 |
| Libraries .....                                       | 395-5600 |
| Appoquinimink .....                                   | 378-9133 |
| Bear Library .....                                    | 838-3300 |
| Claymont .....  | 798-4164 |
| Concord Pike .....                                    | 478-7961 |
| Corbit-Calloway .....                                 | 378-8838 |
| Delaware City .....                                   | 834-4148 |
| Hockessin .....                                       | 239-5160 |
| Kirkwood Highway .....                                | 995-7663 |
| La Bibliteca del Pueblo .....                         | 571-7422 |
| Newark .....  | 731-7550 |
| New Castle .....                                      | 328-1995 |
| N. Wilmington Branch Library .....                    | 761-4290 |
| Wilmington Institute Library .....                    | 571-7400 |
| Woodlawn Branch .....                                 | 571-7425 |
| Police, Fire, and Ambulance .....                     | 9-1-1    |
| Police Information Center .....                       | 395-8050 |
| Community Services Unit .....                         | 395-8050 |
| Police Non-emergency.....                             | 573-2800 |
| Land Use Department .....                             | 395-5400 |
| Public Safety .....                                   | 395-8050 |
| Recorder of Deeds .....                               | 571-7550 |
| Register in Chancery .....                            | 571-7540 |
| Register of Wills .....                               | 571-7545 |
| Sheriffs Office .....                                 | 571-7564 |
| Special Services Department .....                     | 395-5700 |
| Operations.....                                       | 395-5714 |
| Parks Design and Development.....                     | 395-5746 |

Parks Maintenance..... 395-5720  
Sewer Emergency ..... 395-5700

**STATE AGENCY NUMBERS**

Delaware Help Line..... 800-464-4357  
DelDOT  
    Road Condition Emergency..... 368-6808  
    Road Maintenance..... 323-4480  
    Snow Reimbursement Program..... 323-4480  
DNREC..... 800-662-8802  
    Fish and Wildlife Complaints..... 800-523-3336  
    Fish and Wildlife Education ..... 800-292-3030  
    Mosquito Control..... 739-3493  
    Soil Waste Authority (landfill)..... 764-2732  
    Stormwater Management..... 739-4411  
Governor's Office..... 577-3210  
Legislative Offices  
    House Republicans..... 739-4171  
    House Democrats..... 739-0477  
    Senate Democrats..... 739-5086  
    Senate Republicans..... 739-4582  
Secretary of State, Division of Corporations..... 739-3077  
Insurance Commissioner..... 577-3119

**FEDERAL AGENCY NUMBERS**

Army Corps of Engineers..... 736-9763  
Internal Revenue Service..... 800-829-1040

**MISCELLANEOUS**

Miss Utility..... 800-282-8555





Maintenance Log  
Page 2

Mechanical Components

|                   |  |  |  |  |  |  |  |
|-------------------|--|--|--|--|--|--|--|
| A. Valves         |  |  |  |  |  |  |  |
| B. Sluice Gates   |  |  |  |  |  |  |  |
| C. Pumps          |  |  |  |  |  |  |  |
| D. Fence Gates    |  |  |  |  |  |  |  |
| E. Locks.         |  |  |  |  |  |  |  |
| F. Access Hatches |  |  |  |  |  |  |  |
| G. Other          |  |  |  |  |  |  |  |

Elimination of Potential Mosquito Breeding Habitats

|  |  |  |  |  |  |  |  |
|--|--|--|--|--|--|--|--|
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|--|--|--|--|--|--|--|--|

Pond Maintenance

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|--|--|--|--|--|--|--|--|
|  |  |  |  |  |  |  |  |
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|  |  |  |  |  |  |  |  |

Other Preventative Maintenance

|    |  |  |  |  |  |  |  |
|----|--|--|--|--|--|--|--|
| A. |  |  |  |  |  |  |  |
| B. |  |  |  |  |  |  |  |
| C. |  |  |  |  |  |  |  |

*B. Corrective Maintenance*

|  |  |  |  |  |  |  |  |
|--|--|--|--|--|--|--|--|
| Removal of Debris & Sediment           |  |  |  |  |  |  |  |
| Structural Repairs                     |  |  |  |  |  |  |  |
| Dam, Embankment & Slope Repairs        |  |  |  |  |  |  |  |
| Dewatering                             |  |  |  |  |  |  |  |
| Pond Maintenance                       |  |  |  |  |  |  |  |
| Control of Mosquitoes                  |  |  |  |  |  |  |  |
| Erosion Repair                         |  |  |  |  |  |  |  |
| Fence Repair                           |  |  |  |  |  |  |  |
| Snow & Ice Removal                     |  |  |  |  |  |  |  |
| Removal of Trees, Brush, Animal Burrow |  |  |  |  |  |  |  |
| Other                                  |  |  |  |  |  |  |  |

Sediment Removal

|                            |  |  |  |  |  |  |  |
|----------------------------|--|--|--|--|--|--|--|
| A. Inlets                  |  |  |  |  |  |  |  |
| B. Outlets and Trash Racks |  |  |  |  |  |  |  |
| C. Bottoms                 |  |  |  |  |  |  |  |
| D. Other                   |  |  |  |  |  |  |  |

***C. Aesthetic Maintenance***

Work Item

|                  |  |  |  |  |  |  |  |
|------------------|--|--|--|--|--|--|--|
| Graffiti Removal |  |  |  |  |  |  |  |
| Grass Trimming   |  |  |  |  |  |  |  |
| Weeding          |  |  |  |  |  |  |  |
| Other            |  |  |  |  |  |  |  |