Appendix A-6
Materials Related to Draft Occupancy Covenant & Restrictions

DRAFT (3/16/16)

DECLARATION OF COVENANTS AND RESTRICTIONS

THIS DECLARATION, made the ____ day of _____, 201_, by DLV QUOGUE, LLC, a Limited Liability Company duly organized and authorized to do business in the State of _____ with offices at _____, (hereinafter called the Declarant.)

W I T N E S S E T H:

WHEREAS, the Declarant is the owner of certain real property situate in the hamlet of East Quogue, Town of Southampton, County of Suffolk, State of New York, as more specifically described in Schedule "A" annexed hereto, hereinafter referred to as the "Property"; and

WHEREAS, by resolution dated _____ the Town Board of the Town of Southampton adopted Local Law No.___ of 201__ amending §330-248 of the Zoning Law by changing the zoning classification of the Property from Residence, CR-200 to a specific Mixed Use Planned Development District to be known as The Hills Mixed Planned Development District (hereinafter referred to as "The Hills"); and

WHEREAS, The Hills is intended to be developed and operated as a seasonal resort community with a uniform plan for the use, occupancy, ownership, improvement of all lots and units in said project for the benefit of the present and future owners of said lots and units; and

WHEREAS, development and operation of the resort amenities and occupancy of the lots and units of The Hills on a seasonal basis has been recognized to provide significant environmental, social and economic benefits to the hamlet of East Quogue and the Town of Southampton; and lessen potential impacts to the East Quogue School District; and

WHEREAS, Section 330-248 ___ of the Zoning Law states:

The residences at The Hills are intended to be occupied on a seasonal basis and are not intended to be occupied as a place of primary legal residence and/or domicile. Therefore, the planned seasonal occupancy of the lots and units on The Hills shall be restricted as follows:

(a) The lots and/or units shall not be occupied as a place of primary legal or permanent residence and/or domicile;

(b) Between May 1 and October 15: no time limits on occupancy, provided, however, that the total number of days of occupancy in any calendar year shall not exceed one-hundred-eighty-three (183) days;

(c) Between October 16 and April 30 of following year: a lot or unit may not be occupied for more than thirty (30) consecutive days or an aggregate of sixty (60) days.

To guarantee compliance with this condition the applicant shall submit a Declaration of Covenants in a form approved by the Town Attorney and record such Declaration of Covenants with such restrictions as set forth above in the Office of the Suffolk County Clerk prior to the issuance of a Certificate of Occupancy."

WHEREAS, pursuant to said local law, the Declarant has made an application for and has received approval from the Planning Board of the Town of Southampton for a site plan and subdivision approval entitled "The Hills" which site plan and subdivision map were approved by resolution(s) of the Planning Board, dated _____, 201_; and filed and recorded simultaneously herewith in the Office of the Suffolk County Clerk on _____, 201__, as Map File No._____; and

WHEREAS, for and in consideration of the granting of said approvals, the Town Board and the Planning Board of the Town of Southampton have deemed it to be in the best interests of the Town of Southampton, Declarant and all prospective and future owners of the premises, and as a condition of said approvals said Town Board and Planning Board have required that the within Declaration be recorded in the Suffolk County Clerk's Office; and

WHEREAS, the Declarant has considered the foregoing and have determined that same will be in the best interests of the Declarant and subsequent owners of said premises;

NOW, THEREFORE, THIS DECLARATION WITNESSETH:

That the Declarant, for the purposes of carrying out the intentions above expressed, does hereby make known, admit, publish, covenant and agree that said premises herein described shall hereafter be subject to the following covenants, restrictions and agreements, which shall run with the land and shall be binding upon all purchasers and holders of said premises, its heirs, executors, legal representatives, distributees, successors and assigns, to wit:

(1) **Seasonal Occupancy Restrictions**. To assure that the lots and units in The Hills are occupied on a seasonal basis and are not occupied as a place of primary legal residence and/or domicile; the occupancy of the lots and units on The Hills shall be restricted as follows:

(a) At no time hereafter, shall the dwelling units erected on the lots and/or units shown on the aforesaid subdivision map be occupied as a place of primary or permanent residence or domicile;

(b) There shall be no time limits on occupancy of a lot or unit between May 1 and October 15 in any given year, provided, however, that the total number of days of occupancy in any calendar year shall not exceed one-hundred-eighty-three (183) days; and

(c) A lot or unit may not be occupied for more than thirty (30) consecutive days or an aggregate of sixty (60) days between October 16 and April 30 in any given year.

(2) **Sales and Rental Program**. The Declarant, its heirs, executors, legal representatives, distributees, successors and assigns, and the property owner or homeowner's association to be established simultaneously herewith, shall at all times hereafter manage and operate a sales and rental program of the lots and units. Said sales and rental program ("Sales and Rental Program") shall include the following conditions and restrictions:

(a) The Declarant, its heirs, executors, legal representatives, distributees, successors and assigns, and the property owner or homeowner's association to be established simultaneously herewith, shall designate a "Sales and Rental Manager" who shall manage and operate the Sales and Rental Program on behalf of the Declarant, its heirs, executors, legal representatives, distributees, successors and assigns.

(b) The Declarant, its heirs, executors, legal representatives, distributees, successors and assigns and the property owner or homeowner's association to be established simultaneously herewith, and the "Sales and Rental Manager" shall retain, reserve and be granted certain easement and use rights over the lots and units in the aforesaid subdivision map for the purpose of managing and operating the Sales and Rental Program, including the right of access over the streets and roadways in the aforesaid subdivision map for purposes of access to said lots and units.

(c) The Sales and Rental Manager shall give all prospective purchasers and tenants of the lots and units in the aforesaid subdivision map prior written notice of the aforesaid seasonal

occupancy restrictions set forth in paragraph (1) of this Declaration of Covenants and Restrictions and the prospective purchaser or tenant shall provide written acknowledgement of and their agreement to comply with the aforesaid seasonal occupancy restrictions.

(d) All Owners of the lots and units in the aforesaid subdivision map upon closing of title shall be required to register with the Sales and Rental Manager.

(e) All Owners of the lots and units in the aforesaid subdivision map shall be required to register all leases or other use and occupancy agreements, whether oral or written, with the Sales and Rental Manager.

(f) At all times hereafter, all Owners and their tenants, occupants, invitees, agents, employees, contractors, service providers, and users of the lots or units on the aforesaid subdivision map shall register their use and occupancy of the lots or units with the Sales and Rental Manager.

(g) The Sales and Rental Manager shall maintain a registry of the use and occupancy of the lots and units on the aforesaid subdivision map for the purpose of assuring compliance with the aforesaid seasonal occupancy restrictions set forth in paragraph (1) of this Declaration of Covenants and Restrictions.

(h) It shall be presumptive evidence of a violation or breach of the aforesaid seasonal occupancy restrictions if the Owner or occupant of a lot or unit in the aforesaid subdivision map, or the Owner or occupant's representative or agent, makes any representation or seeks any benefit predicted upon the occupancy of the dwelling unit erected on his/her lot or unit as a place of primary or permanent residence or domicile, including but not limited to: (a) the enrollment of a child or children in the schools of the East Quogue School District; (b) the application for any real property tax exemption, abatement or rebate predicated upon primary or permanent residence or domicile in the Hamlet of East Quogue or the Town of Southampton; and/or (c) the application for any public pecuniary benefit or service available only to primary or permanent residents or domiciliaries in the Hamlet of East Quogue or the Town of Southampton.

(i) In the event of a violation or breach of the aforesaid seasonal occupancy restrictions, the Sales and Rental Manager shall provide the Owner and occupant of the lot or unit written notice setting forth in reasonable detail the nature of such violation or breach and the specific action or actions needed to be taken to remedy such violation or breach. If the Owner and/or

occupant of the lot or unit the shall fail to take reasonable steps to remedy such violation or breach of the occupancy restrictions within thirty (30) calendar days after notice is mailed by the Sales and Rental Manager, the Declarant, its heirs, executors, legal representatives, distributees, successors and assigns; the property owner or homeowner's association to be established simultaneously herewith; and/or the Town of Southampton, shall have the right to institute any action or proceeding provided by law or in equity to enforce the aforesaid occupancy restrictions, including an injunction or damages by reason of any alleged violation or breach of any provision of this Declaration of Covenants and Restrictions, or for any other judicial remedy, and shall be entitled to receive from the Owner or occupant all costs and expenses, including reasonable attorneys' fees and court costs, in connection with said action or proceeding. Such costs and expenses shall be considered to be lien on such Owner's lot.

The Covenants and Restrictions contained herein shall be construed to be in addition to and not in derogation or limitation upon any local, state or federal laws, ordinances, regulations or provisions in effect at the time of execution of this agreement, or at the time such laws, ordinances, regulations and/or provisions may hereafter be revised, amended or promulgated.

The Covenants and Restrictions contained herein shall be enforceable by the Declarant, its heirs, executors, legal representatives, distributees, successors and assigns, the property owner or homeowner's association to be established simultaneously herewith, and the Town of Southampton, its successors and assigns, by injunctive relief or by any other remedy in equity or at law. The failure of the Town of Southampton or any of its agencies to enforce same shall not be deemed to affect the validity of this covenant nor to impose any liability whatsoever upon the Town of Southampton or any officer or employee thereof.

If any section, subsection, paragraph, clause, phrase or provision of these covenants and restrictions shall, by a Court of competent jurisdiction, be adjudged illegal, unlawful, invalid or held to be unconstitutional, the same shall not affect the validity of these covenants as a whole, or any other part or provisions hereof other than the part so adjudged to be illegal, unlawful, invalid or unconstitutional.

The within Declaration is made subject to the provisions of all laws required by law or by their provisions to be incorporated herein, and they are deemed to be incorporated herein and made a part hereof, as though fully set forth.

The within Declaration shall run with the land and shall be binding upon the Declarant, its successors and assigns, and upon all persons or entities claiming under them, and may not be annulled, waived, changed, modified, terminated, revoked or amended by the Declarant, its heirs, executors, legal representatives, distributees, successors and assigns, any Lot Owner and/or the homeowner's association to be established simultaneously herewith, unless and until approved by votes of a majority plus one of the Town Board and Planning Board of the Town of Southampton or their successors, following a public hearing.

IN WITNESS WHEREOF, the Declarant above named has executed the foregoing Declaration the day and year first above written.

DLV QUOGUE, LLC

By: _____

STATE OF NEW YORK)
ss.:
COUNTY OF SUFFOLK)

On the **____** day of **____** in the year **201_**, before me, the undersigned, personally appeared **_____,** personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

_____
NOTARY PUBLIC

BOND SCHOENECK & KING

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March 21, 2016

VIA ELECTRONIC AND FIRST-CLASS MAIL

Mr. Joseph L. Arenson
Discovery Land Co., LLC
14605 N. 73rd Street
Scottsdale, Arizona 85260
jarenson@discoverylandco.com

Dear Mr. Arenson:

You have advised us that Discovery Land Co., LLC, through its affiliated entity DLV Quogue, LLC ("DLV") is in the process of developing a luxury vacation development referred to as "The Hills Mixed Planned Development District" ("The Hills") in the Town of Southampton on Long Island, New York, which will be operated by a property manager or homeowner's association to be established as part of the development. As an inducement for the grant of the zoning and permitting by the Town which will be required to develop the property as planned, DLV proposes to obtain a seasonal use restrictive covenant ("the Covenant") from purchasers of housing units in The Hills which will prohibit each owner from occupying his or her unit as a primary or permanent residence. The Covenant would restrict unit owners to a total of thirty consecutive days or sixty aggregate days of occupancy between October 16 and April 30, with an aggregate occupancy limit of 183 days in any calendar year. The Covenant would further prohibit a unit owner from representing him or herself to be a resident of Town of Southampton for the purpose of enrolling his or her child in the East Quogue Union Free School District,[1] or obtaining any other benefit predicated on permanent legal residence in Southampton. Finally, the Covenant would provide that the Covenant and its restrictions would be enforceable by the Town.

You have requested our opinion as to the validity and enforceability of the foregoing proposed Covenant. In responding to this inquiry, we have relied upon your description of the proposed development, and have not made any independent inquiry into, or verification of, the underlying facts surrounding the scope of such development. Subject to that

[1] The East Quogue Union Free School District serves students from first through sixth grades, and then pays tuition to send those students to the Westhampton Beach School District from seventh through twelfth grades.

restriction and the further discussion below, it is our opinion that the Covenant will be valid and enforceable.

As a general rule, restrictive covenants with respect to real estate are read narrowly so as to avoid ambiguous or undue restrictions on the use and alienation of property, and to avoid results which would contravene public policy (as, for example, restrictions on alienation based upon race or religion). That said, however, seasonal use restrictions have been upheld by New York State intermediate appellate courts without any suggestion that public policy impairs the validity of seasonal restrictions.

In *Turner v. Caesar*, 291 A.D.2d 650, 737 N.Y.S.2d 426 (3rd Dep't 2002), an action to enforce a restrictive covenant involved two neighbors who had taken their titles to properties on Chenango Lake via deeds which incorporated two restrictive covenants originating in an original 1923 grant: (a) "that the premises are to be used and occupied ... only for the purpose of constructing and maintaining thereon one or more summer residences"; and (b) "that [the owner] shall not permit nor permit any nuisances upon said premises, nor any act which shall materially interfere with the health, comfort or pleasure of the owners or occupants of the remaining lands." When the defendant acquired his property in 1995 by a deed which reiterated the 1923 restrictions, he promptly built a house and moved in as a year-round resident. His neighbor sued, and the defendant moved for summary judgment dismissing the complaint. The Supreme Court, Chenango County granted the motion, finding that the phrases "summer residences" and "materially interfere" were too vague to be enforceable. On appeal, the Appellate Division, Third Department reversed with respect to the seasonal use restriction.[2]

The appellate court in *Turner* started its analysis with the proposition that "The law favors the free and unencumbered use of real property and, to that end, the courts strictly construe restrictive covenants against the party seeking to enforce them." 291 A.D.2d at 651 (citation omitted). Accordingly, the court had no difficulty finding that "The phrase 'materially interfere with the health, comfort or pleasure of the owners or occupants of the remaining lands' is patently vague and the issue of whether an activity violates the covenant would be largely subjective. In such circumstances, plaintiff will be unable to meet his burden of demonstrating the scope of the restriction and its violation by clear and convincing evidence." *Id.* at 652 (citations omitted).

By contrast, however, the court found that the seasonal use restriction *was* enforceable, even though it acknowledged that the phrase "summer residences" might be subject to conflicting interpretations.[3] Rather than void the restriction, the court reasoned as follows:

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[2] In New York State, the Supreme Court is the lowest court of general jurisdiction, and the Court of Appeals is the highest appellate court. The four Appellate Divisions are intermediate appellate courts, divided according to four geographic Departments. The Third Department encompasses the middle of the State, and does not include Long Island, which is located in the Second Department. While a Third Department decision constitutes persuasive, as opposed to binding, precedent in other Departments, research has disclosed no authority in the Second Department which would suggest a result differing from the two Third Department decisions discussed herein.

[3] The court below had found the phrase "summer residences" to be "ambiguous because the summer season can be defined by the calendar, school vacation or warm weather." *Id.* at 651.

> "Since any type or style of structure can be utilized as a summer residence, we agree that the use of the word 'summer' refers to the time of residential use. While "summer" can refer to different time periods depending on what months are taken to be the beginning and ending of that season, it surely cannot include the entire year and thus permit year-round residential use. Supreme Court should resolve the issue raised by this temporal ambiguity against plaintiff by construing 'summer' to mean the longest period of time that could reasonably be called 'summer' considering the lake's location and typical seasonal uses. As a result, Supreme Court erred in declaring the covenants to be unenforceable...."

Id. at 652. The court then went on to consider the argument which had been raised below that other Chenango Lake property owners had used their properties on a year-round basis, and some had even "listed their lake properties as their primary residence on their applications for school tax relief," *id.* at 653, and stated that "The extent of year-round use is only relevant to whether circumstances under the covenants have changed so much that enforcing the covenants against defendant would be inequitable." *Ibid.*

Ten years after is decision in *Turner v. Caesar*, *supra*, the Third Department had a second opportunity to consider the seasonal use issue on *Ruback's Grove Campers Association v. Moore*, 96 A.D.3d 1180, 946 N.Y.S.2d 687 (3rd Dep't 2012). There, the plaintiff was a membership corporation which owned an 84-acre lakeside property which was leased to its members on a long-term basis, with a lease restriction providing that each lot "shall be used as a campsite for the erection and maintenance of a camp or summer cottage, and for no other use whatsoever." 96 A.D.3d at 1181. The corporation sought a declaratory judgment that year-round use was prohibited, which was granted by the Supreme Court, Saratoga County, and affirmed by the Third Department. Again, the Third Department had no difficulty enforcing the covenant:

> "Defendants contend that the word 'summer' does not limit their year-round use of the campsites, but merely describes the type of cottage that can be built. We are unpersuaded. In interpreting the restrictive terms of a lease, we read it as a whole to determine its purpose and intent from the language employed and will enforce a clear and unambiguous agreement according to its terms [citations omitted].
>
> "In doing so, we are mindful that restrictions on the use of land are not generally favored and will not be extended by implication beyond the terms of the restriction [citation omitted]. Whether or not the language is ambiguous is a question of law for the court to decide [citations omitted].
>
> "Here, we find no ambiguity. The plain meaning of 'camp or summer cottage' in the use provision of the lease, read as a whole and giving meaning to each term, manifests an intent that the leased campsites be used on a nonpermanent or temporary basis. A camp is temporary by nature and is defined as, among other things, 'any temporary structure, as

> a tent or cabin, used on an outing or vacation' (Random House *Webster's Unabridged Dictionary* 301 [2d ed. 2001]). Likewise, summer is a temporal adjective that is integral and necessary to define the temporal limitation of the use of the campsite (*see Turner v Caesar*, 291 AD2d 650, 651, 737 NYS2d 426 [2002]). To accept defendants' argument that the words only describe the type of structure that may be built but do not affect the nature of their use would be to ignore the inherently temporary nature of the occupancy of camps and summer cottages. Accordingly, Supreme Court properly held that paragraph 7 of the lease as written precludes year-round residency in Ruback's Grove."

Ibid.

Based upon the foregoing, it is our opinion that the courts of New York will honor and enforce a clearly-drafted restrictive covenant limiting the use of real property to seasonal use.

The next issue to be considered is by whom the Covenant can be enforced.

The original rule on standing to enforce a restrictive covenant was set out in *Korn v. Campbell*, 192 N.Y. 490, 495-496, 85 N.E. 687 (1908) as follows:

> "For the particular purposes of this case such covenants may be broadly divided into three classes. In the first class may be placed those which are entered into with the design to carry out a general scheme for the improvement or development of real property. This class embraces all the various plans ... *under which an owner of a large plot or tract of land divides it into building lots to be sold to different purchasers for separate occupancy, by deeds which contain uniform covenants restricting the use which the several grantees may make of their premises. In such cases the covenant is enforceable by any grantee as against any other upon the theory that there is a mutuality of covenant and consideration which binds each, and gives to each the appropriate remedy.* Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract. [Citations omitted].
>
> "The second class embraces those cases *in which the grantor exacts the covenant from his grantee, presumptively or actually, for the benefit and protection of contiguous or neighboring lands which the former retains. In such cases the grantees, if there are more than one, cannot enforce the covenant as against each other, although the grantor, and his assigns of the property benefited, may enforce it against either or*

> *all of the grantees of the property burdened with the covenant.* [Citations omitted].
>
> "Then there is a third class, where there are mutual covenants between owners of adjoining lands *in which the restrictions placed upon each produce a corresponding benefit to the other, and in such a case, of course, either party or his assigns may invoke equitable aid to restrain a violation of the covenant.* [Citation omitted]. "

The three categories above have been expanded to include another broad category: beneficiaries of the covenant who, even if they are not in privity with the grantor, are intended to be third-party beneficiaries of the covenant. *See Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, 135-136, 159 N.E. 886, 887 (1927). Thus, in *Nature Conservancy v. Congel*, 253 A.D.2d 248, 689 N.Y.S.2d 317 (4th Dep't 1999), it was held that the owner of property abutting a parcel of land which was subject to a covenant that it be left in its natural state could, as an intended third-party beneficiary enforce the covenant against a subsequent purchaser of the parcel who intended to develop it.[4]

Accordingly, it is clear that DLV, as grantor of the property, would have standing to enforce the Covenant. *See Cole v. Hughes*, 54 N.Y. 444 (1873); *Vogeler v. Alwyn Improvement Corp.*, *supra*. Similarly, the property manager or homeowner's association to be established as part of the development would have standing to enforce the Covenant; *Ruback's Grove Campers Association v. Moore*, *supra*; *see also Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938) (property owners' association had standing to enforce a lien based upon a covenant that property owners would pay an annual fee for collective amenities).

While abutting property owners *might* have standing to enforce the Covenant, it is not presently contemplated that they will be identified as beneficiaries thereof; and it appears from existing case law that their standing might be questionable unless they were specifically so identified. *Vogeler v. Alwyn Improvement Corp.*, *supra*. However, we do not suggest that the proposed Covenant be amended to confer rights on abutting owners, because the underlying interest sought to be protected here is part of an overall *quid pro quo* between DLV and the Town of Southampton to the effect that the property will be rezoned to permit the development of The Hills on condition that there be no undue burden on municipal and school resources. The interest of abutting owners in this agreement is at least somewhat remote, and creates the possibility of litigation by a neighbor which does not reflect the interests of DLV, the homeowner's association, or the Town.

While the proposed Covenant specifically identifies the Town of Southampton as a beneficiary of the Covenant, research has disclosed no authority addressing the authority of a municipal entity to enforce a seasonal use restriction. However, we see no reason why the Town

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[4] The covenant in question, which by its terms ran with the land, further provided that "This covenant is *for the benefit of and enforceable by all parties owning property adjoining the premises hereby conveyed* and the Grantor, its successors and assigns. This Covenant is also enforceable by Nature Conservancy [which had joined as a plaintiff in the action to enforce the covenant]." 253 A.D.2d at 250, 689 N.Y.S.2d at 318 (emphasis supplied).

should not have authority to enforce the Covenant, especially if that authority were coupled with code and zoning restrictions which are clearly within the Town's power to enforce. In addition, we believe that the Town would have authority to compel the homeowner's association to take enforcement action even if the Town were to choose not to enforce the Covenant in its own name.

The proposed Covenant does not identify the East Quogue Union Free School District as an intended beneficiary, nor do we think this is necessary or advisable. While as a practical matter the Covenant is most likely to become an issue if a property owner at The Hills attempts to enroll a child in the School District, it is our conclusion that the School District may not have authority to refuse enrollment to a child simply because his/her parent is in breach of the Covenant.

While school districts are obligated to educated only those children who actually reside within their borders, *e.g. Longwood Central School District v. Springs Union Free School District*, 1 N.Y.3d 385, 388-398, 774 N.Y.S.2d 857, 859 (2004), it is also the case that the New York State Commissioner of Education, to whom residency determinations are brought on appeal pursuant to Education Law § 310 and 8 N.Y.C.R.R. § 100.2(y) would be unlikely to refuse admission to a child solely because his/her parent was in breach of the Covenant. The Commissioner of Education, although recognizing that "a person may have only one legal residence," *Appeal of Metze*, 42 Ed. Dept. Rep 40, 41 (2002), has also held that residency in one school district is not rebutted simply because a parent has claimed a home in another school district for purposes of a "STAR" real estate tax exemption which applies only to primary residences, *Appeal of Elkareh*, 24 Ed. Dept. Rep. 177 (2005); and has also held that residency is not rebutted because a parent and her child hold "tourist" visas which are inconsistent with lawful residence in the United States, *Appeal of Plata*, 40 Ed. Dept. Rep 552 (2001); *see also Plyler v. Doe*, 457 U.S. 202 (1982) (a school district may not exclude a child who otherwise meets the rest of residency simply because he/she is an "illegal alien"). The rules which has emerged is that if a child physically resides in a school district, he/she is entitled to attend school. Accordingly, if a property owner were to violate the time restrictions of the Covenant and then present a child for enrollment, it is considerably more likely than not that the Commissioner of Education would the parent's appeal and leave enforcement of the Covenant to more appropriate tribunal, *i.e.*, the courts.

In view of the decisions cited above, and also because the East Quogue Union Free School District is a "stranger" to the zoning and permitting process, we suggest that beneficiary status and enforcement authority be left to the Town and/or the homeowner's association.

Finally, while not directly germane to the enforceability of the Covenant, we note that the New York State Division of Taxation and Finance, in drawing a distinction between a "domicile" (a permanent home, of which an individual can have only one) and a "residence" for New York State income tax purposes, states that an individual will be considered a resident for tax purposes if "your domicile is not New York State but you maintain a permanent place of abode in New York State for more than 11 months of the year and spend 184 days or more in

New York State during the tax year."[5] It is appropriate, we think that the proposed Covenant has been amended to "cap" occupancy of any unit at The Hills at a maximum of 183 days; and we further recommend that homeowner's association consider some sort of notice to prospective purchasers of units with respect to state income tax status.

This opinion letter is rendered for the sole benefit of the addressee(s) hereof, and no other person or entity is entitled to rely hereon. Copies of this opinion letter may not be furnished to any other person or entity, nor may any portion of this letter be quotes, circulated or referred to in any other document without our prior written consent.

Very truly yours,

BOND, SCHOENECK & KING, PLLC

By: _____
Jeffrey A. Kehl
A Member of the Firm

cc:

Wayne Bruyn, Esq.
O'Shea, Marcincuk & Bruyn LLP
250 North Sea Road
Southampton, New York 11968

[5] https://www.tax.ny.gov/pit/file/pit_definitions.htm. A partial day is considered to be a "day" for this computation. *Ibid. But see Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592, 983 N.Y.S.2d 757 (2014) (183-day rule did not apply where taxpayer did not himself live at the premises).

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TELEPHONE (631) 283-7007

FACSIMILE (631) 287-9480

TO: DLV Quogue, LLC

FROM: Wayne D. Bruyn, Esq.

DATE: March 8, 2016

RE: Seasonal Occupancy and Residency for School District Purposes

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The Town Comprehensive Plan, as embodied in the East Quogue Generic Environmental Impact Statement, adopted, 2008, recommends that The Hills property be developed as a mixed use PDD proposal that combines housing, resort/recreation, and open space uses with protected areas for natural resources. "It is the purpose of the Recommended Plan to create a comprehensive development program for East Quogue. To that end, an integral part of the plan is a mixed use proposal that combines housing, resort/recreation, and open spaces uses with protected areas of natural resources. These uses could be developed under a Planned Development District (PDD) application and associated that would include a private golf course and/or resort/recreation uses identified in Recommendation Areas 6, 7, 7A and 7B of the plan."

"These uses in a comprehensive mixed-use plan or resort setting could also reduce the generation of number of students as compared with traditional housing by developing resort-oriented mixed-use community. A mix of uses as recommended in the plan would generate ratables without creating an increase demand on the school district and would also provide a range of jobs for the community in the tourism-related industry, which is a strong and growing job base in the local economy. With the mix of uses and even considering standard student generation rates, the Recommended Plan is expected to result in net fiscal benefit for the Town and local school district. A resort type development would further increase that fiscal benefit." (see page 7, Lead Agency Findings Statement, November 14, 2008).

The proposed lots and units in The Hills seasonal resort are intended to be owned and occupied by second-, third- and fourth-homeowners, who will occupy and use their lot or unit on a seasonal basis. Based upon the demographics of all projects developed by Discovery Land Co., it is not expected that the owners and occupants of the lots and units in The Hills seasonal resort will establish such lots or units as their actual and only residence, to wit: their primary legal or permanent residence and/or domicile. Accordingly, it is not expected that an owner or occupant of the lots and units in The Hills seasonal resort will enroll their child in the East Quogue School District to receive a tuition-free education, let alone be able to comply with the

"residency" requirements under New York State law. To provide assurances that the seasonal occupancy of the lots or units is realized, DLV has offered and will accept a specific condition incorporated into the Zoning Law and covenants and restrictions that are enforceable by the HOA and the Town that limit and restrict the occupancy as follows:

> (a) At no time hereafter, shall the dwelling units erected on the lots and/or units shown on the aforesaid subdivision map be occupied as a place of primary or permanent residence or domicile;
> (b) There shall be no time limits on occupancy of a lot or unit between May 1 and October 15 in any given year, provided, however, that the total number of days of occupancy in any calendar year shall not exceed one-hundred-eighty-three (183) days; and
> (c) A lot or unit may not be occupied for more than thirty (30) consecutive days or an aggregate of sixty (60) days between October 16 and April 30 in any given year.

The covenants also establish a notice and registration system for occupancy of the lots and units by the HOA, including a requirement that the prospective purchaser or tenant of each lot or unit shall provide written acknowledgement of and their agreement to comply with the seasonal occupancy restrictions. Moreover, the covenants further establish a presumption of a violation or breach if a lot owner or occupant seeks to apply for certain public benefits or enroll a child in the East Quogue School District on the basis of their lot or unit being their primary legal or permanent residence and/or domicile. A copy of the proposed Declaration of Covenants and Restrictions is attached hereto.

These restrictions model seasonal restrictions found in other resort developments across the country (see i.e. Assateague Point Resort) and are expressly offered to the Town under the PDD legislation and incentive zoning provisions of the NYS Town Law, §261-b. Like other covenants that will encumber the project, these restrictions will be are managed and enforced first by the HOA, but can be further enforced by the Town. Other than the lot or unit owners within the development, it is not intended that any other party have standing to enforce the covenants and restrictions. As the restrictions will be part of the Zoning Law, they cannot be changed without the Town Board authorizing same after a public hearing. With respect to enforcement, covenants are read narrowly so as to avoid ambiguous or undue restrictions on the use and alienation of property, and to avoid results which would contravene public policy (as, for example, restrictions on alienation based upon race or religion). However, seasonal use restrictions have been upheld by New York State appellate courts without any suggestion that public policy impairs the validity of seasonal restrictions, see *Turner v. Caesar*, 291 A.D.2d 650, 737 N.Y.S.2d 426 (3rd Dep't 2002); *Ruback's Grove Campers Association v. Moore*, 96 A.D.3d 1180, 946 N.Y.S.2d 687 (3rd Dep't 2012).

With respect to the residency requirements for enrolling in a school district, the general rule in New York is that a school district must provide tuition-free education to children whose parents or legal guardians reside within the district, see, Education Law § 3202[1]; *People ex rel. Brooklyn Children's Aid Socy. v. Hendrickson*, 54 Misc. 337, 104 N.Y.S. 122, affd. 125App.Div. 256, 109 N.Y.S. 403, affd. 196 N.Y. 551, 90 N.E. 1163; *Matter of Buglione*, 14 Ed. Dept. Rep. 220, 221 (1975). Where the parents or guardians reside outside of the district the child presumably resides outside the district also and is not entitled to free education; and that

this presumption may be overcome by showing that the parents or guardians have given up parental control and that the child's permanent domicile – i.e., the child's "*actual and only residence*" – is within the district (see, *Matter of Horowitz v Board of Educ.*, 217 App.Div. 233, 216 N.Y.S. 646, supra; *Matter of Buglione*, supra, at 222-223; *Matter of Van Curran*, 18 Ed Dept Rep 523, 524).

The Term "residence," for purposes of the Education Law obligating a school district to provide tuition-free education to children shall be the "*actual and only residence*" of the child.

In deciding on the proper interpretation of the phrase "actual and only residence" in Education Law §3202(4)(b), the Courts have looked to the particular words for their meaning, both as they are used in the section and in their context as part of the entire statute (see, *Matter of Ellington Constr. Corp. v. Zoning Bd. of Appeals*, 77 N.Y.2d 114, 564 N.Y.S.2d 1001, 566 N.E.2d 128; *Price v. Price*, 69 N.Y. 2d 8, 511 N.Y.S.2d 219, 503N.E.2d 684). The Courts have also considered the legislative history of the enactment and how it has been interpreted, bearing in mind "that in 'the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle' (*People v. Ryan*, 274 NY 149, 152 [8 N.E.2d 313])" (*Ferres v. City of New Rochelle*, 68 N.Y. 2d 446, 451, 510 N.Y.S.2d 57, 502 N.E.2d972).

The Courts have found that the word residence should be given its generally accepted common-law meaning – the same sense in which the term has been traditionally understood by the courts (see, e.g., *Matter of Board of Educ. v. Allen*, 29 A.D.2d 24, 285 N.Y.S.2d 487; *Matter of Horowitz v. Board of Educ.*, 217 App.Div. 233, 238-239, 216 N.Y.S. 646) and by the State Education Department in applying various sections of 559 Education Law § 3202. A child's residence is presumed to be that of his or her parents or legal guardians (*Catlin v. Sobol,* 155 AD2d 24, rev'd. on other grounds, 77 NY2d 552 (1991); *Appeal of Speckman*, 46 Ed Dept. Rep 74, Decision No. 15,444)." Residence is established by one's physical presence as an inhabitant within the district and intent to reside in the district (*Longwood Cent. School Dist. v. Springs Union Free School Dist.*, 1 NY3d 385; *Appeal of Pollock*, 46 Ed Dept. Rep 553, Decision No. 15,593; *Appeal of Peacock*, 46 Ed Dept. Rep 120, Decision No. 15,460).

The fact that a student's parent owns and pays taxes on residential property within a school district, without more, does not make parent a district resident and entitle the student to attend the district's schools, 39 Educ. Dept. Rep. 125 (1999); 41 Educ. Dept. Rep. Op. No. 14,637 (2001); 41 Educ. Dept. Rep. Op. No. 4,604 (2001); 44 Educ. Dept. Rep. Op. No. 15,098 (2004).

Thus, based upon these seasonal occupancy conditions being incorporated into the Zoning Law and the aforesaid covenants, a purchaser or occupant of a lot or unit in The Hills seasonal resort will, prior to purchase and occupancy, have actual and constructive notice of the seasonal occupancy restrictions, and will have expressly acknowledged receipt of the conditions and their agreement to abide by them. A lot owner or tenant will be hard pressed to thereafter represent to the East Quogue School District or other government agency that they have formulated the necessary intent to reside or establish such lots or units as their actual and only residence, to wit: their primary legal or permanent residence and/or domicile. Such a misrepresentation would allow the HOA or the Town to demand compliance.