



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUSSEX COUNTY PLANNING &  
ZONING COMMISSION,

*Appellant,*

v.

SMOKEY HOLLOW, LLC

*Appellee.*

CA No. 440, 2025

Appeal From The Superior Court  
Of The State Of Delaware  
CA No. S24A-09-001 CAK

**APPELLANT'S AMENDED OPENING BRIEF**

**MOORE & RUTT, P.A.**

David N. Rutt, Esquire (#2694)

122 West Market Street

Georgetown, DE 19947

Ph: (302) 856-9568

Fax: (302) 856-4518

[dnrutt@mooreandrutt.com](mailto:dnrutt@mooreandrutt.com)

*Attorney for Appellant*

January 23, 2026

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## **NATURE & STAGE OF PROCEEDINGS**

The genesis of this action is the filing of an application with the Sussex County Planning & Zoning Department by Smokey Hollow, LLC, for subdivision approval under the cluster subdivision sections of the Sussex County Code for eighty-two (82) lots on an approximate 70 acre parcel. The application was reviewed by the State of Delaware Planning and Land Use Service and the staff of the Sussex County Planning Department. It then was the subject of a public hearing before the Sussex County Planning and Zoning Commission. After the hearing and the record being submitted for decision, the Planning and Zoning Commission approved the subdivision application with several conditions, two (2) of which Smokey Hollow found objectionable. Specifically, Smokey Hollow objected to the reduction of the number of approved lots from eighty-two (82) to eighty-one (81) and the requirement the final plan provide for a twenty-five (25) foot fixed buffer between lot lines and adjacent non-tidal wetlands.

Smokey Hollow sought reconsideration from the Planning and Zoning Commission of the two perceived objectionable conditions. Upon review of the record and Smokey Hollow's request, the Planning and Zoning Commission denied the reconsideration request and affirmed its prior decision.

Smokey Hollow filed a Petition for a Writ of Certiorari with the Superior Court alleging the conditions of removal of one lot and imposition of buffers was

contrary to law and asked the Superior Court to reverse the two objectionable conditions. After briefing and oral argument, the Superior Court in a decision dated October 1, 2025 agreed with Smokey Hollow and reversed the decision of the Planning and Zoning Commission and reinstated the lot to the subdivision and removed the buffer requirement. *Brief Exhibit 1*. Sussex County has now appealed the Superior Court decision to this Honorable Court.

## SUMMARY OF THE ARGUMENT

1. **The Court below did not fully and properly determine what constitutes a reasonable condition. The analysis was limited to only one part of the holding under *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Commission* without consideration of the expanded holding in the case. The lack of specificity of what constitutes a reasonable condition has created conflicting opinions and confusion among landowners, zoning boards, the public, counsel and the courts. When current opinions and sources are considered, it is evident a more objective standard is desired. In applying the truncated analysis of what is a reasonable condition, the Court erred in reversing the decision of the Sussex County Planning and Zoning Commission**
  
2. **The Sussex County Planning and Zoning Commission applied the criteria under the Sussex County Code to the Smokey Hollow site plan in determining the two conditions on approval were reasonable conditions. Condition one was the elimination of one lot and condition two was the imposition of a buffer between the wetlands on site and building lots. The Court below erred in reversing the Planning Commission and as a result the conditions on approval of the preliminary site plan should be reinstated by a reversal of the decision below.**

## STATEMENT OF FACTS

By application dated October 27, 2022, Smokey Hollow, LLC (hereafter “Smokey Hollow” or “Appellee”) submitted an application to the Sussex County Planning & Zoning Department (hereafter “Sussex County”) seeking cluster subdivision approval to subdivide an approximate 70 acre parcel into 82 lots. [A-029]<sup>1</sup> Attached to the application was a set of Proposed Conditions of Approval [A-032] which state in part:

A. There shall be no more than 82 lots within the subdivision

A. (sic)

There shall be a vegetated or forested buffer that is at least 20 feet wide adjacent to residential uses and 30 feet wide adjacent to agricultural uses installed along the permitting (sic) expressly excepting: (1) the perimeter of the site adjacent to Johnson Road; and (2) the perimeter of the site where utility and stormwater infrastructure prevents maintenance of a vegetated or forested buffer. This buffer shall utilize existing forest or similar vegetation if it exists in the buffer area. Where trees currently exist in the buffer area, stump removal or construction activities that disturb the existing grade of the area within the buffer shall be prohibited. All silt

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<sup>1</sup> *The facts set forth are drawn from the record and briefing filed with the Superior Court unless otherwise stated. The facts are not in dispute unless noted. The decision of the Court will turn on legal issues and interpretation of caselaw, statutes and the Sussex County Code as applied to those facts.*

fencing shall be located along the interior limit of the buffer area (the edge of the buffer nearest the interior development) and the Final Site Plan shall identify “Limit of Disturbance” to prevent disturbance of buffer area.

Also attached to the application was a preliminary site development plan, an environmental assessment evaluation with sketches, and the Preliminary Land Use Service (hereafter “PLUS”) review with responses. These reports often contain repetitive documentation or documents not bearing on the matter before the Honorable Court and any documents contained therein relevant to the Court’s analysis will be extracted and made part of the Appendix filed concurrently with this Opening Brief.

The Environmental Assessment and Public Facility Assessment Report (hereafter “Environmental Assessment Report”) and Sketch Plan submitted with the application, and dated August 31, 2023 begins as follows:

The subject property of this application is located in the Coastal Area according to the 2018 Sussex County Comprehensive Land Use Plan [and] the Coastal Area is among the most desirable for residential development, but also contains significant ecologically important features. [A-034]

The PLUS review contained various Delaware State agency comments and recommendations to Smokey Hollow, but also provided the responses of Smokey Hollow’s engineers to the State comments. The Department of Natural Resources

and Environmental Control (hereafter “DNREC”) commented on the Special Flood Hazard Area noting the southern and eastern borders of the site were within a 100 year floodplain requiring special consideration by Sussex County [A-036] and a comment from the Wetlands section stating in part, “As proposed for this project, do not disturb wetland areas.” [A-037] In each instance Smokey Hollow’s engineers responded they would comply with the County regulations and design the plan to avoid or minimize all impacts to the wetlands. The Environmental Assessment Report also noted that there were 16.12 acres of “federally regulated palustrine forested wetlands and 1.41 acres of perennial stream waters.” [A-038] Two maps of record show in detail the wetlands on the site. First is a map entitled “Boundary of Waters of the U.S. Including Wetlands.” [A-39]. The second is a colorized map showing the wetlands in dark green with the proposed lots superimposed. [A-040]

The application worked its way through the PLUS review process as well as the Sussex County review process. Ultimately a hearing on the application was held by the Sussex County Planning Commission on March 20, 2024. As part of Smokey Hollow’s presentation, testimony was offered by Edward Launay from Environmental Resources, Inc. Mr. Launay is a professional wetland scientist. He described the wetlands on site and indicated there would be “... two small impacts ... proposed.” [A-0050-051] One would be to a subdivision road crossing a small finger of wetlands and the second “... to one lot that requires a driveway access ...”

[A-050-051]. That lot is Lot 64 which is the subject of a condition imposed by the Planning Commission on approval. Attached is a site map showing the location of Lot 64 in relation to other lots in the cluster subdivision plan and the road that needed to be cut through the forested wetland to access it. [A-041]

The fact Lot 64 contained or was surrounded by wetlands drew the attention of at least one Planning Commission member. Ms. Wingate pointed out Lot 64 had wetlands, though she thought wetlands were on another lot too. She was advised only Lot 64 contained wetlands [A-065-066]

Prior to Mr. Launay's testimony, Smokey Hollow's counsel discussed with the Planning Commission how this parcel, which is zoned GR, or General Residential, under the Sussex County zoning districts, complied with the cluster subdivision requirements of Sussex County Code Section 115-194.3 Coastal Zone [A-106] [A-045-048]

Mr. Launay gave limited testimony regarding Lot 64. He identified its location and how it would be accessed by cutting a road through the forested wetland. He did not testify regarding the condition of Lot 64 he as a wetlands scientist would expect after a heavy rain or in the event of area flooding. When he testified, Mr. Launay verified no permits had been sought at that time for cutting the entrance to Lot 64 through the forested wetlands. [A-051].

When an application is made for subdivision approval regardless of whether it is a standard subdivision or a cluster subdivision, the plan must comply with the requirements of Sussex County Code Section 99-9C. That section of the Code was amended during the time the Smokey Hollow application was pending. Thus, Smokey Hollow was obligated to comply with the Code as enacted at the time of application. A copy of the unamended Code section is attached hereto. [A-113]

At the conclusion of Mr. Launay's testimony, Smokey Hollow's counsel addressed the seventeen (17) criteria under Code Section 99-9C as she interpreted it. [A-056-064] It was after counsel's summary that Ms. Wingate of the Planning Commission sought clarification on the wetlands of Lot 64. [A-065]

The Planning Commission then opened the meeting for public comment. No one spoke in favor. Several neighbors who bordered Lot 64 in an adjoining subdivision (Fox Haven) spoke in opposition to the plan. The minutes of the March 20, 2024 meeting [A-115] reflect their primary concerns involved:

- a) Excessive cutting of trees especially in the 30 foot perimeter buffer;
- b) Desire for an increased buffer between their properties and Lot 64;
- c) Destruction of wetlands;
- d) Water runoff from the Smokey Hollow parcel into their lots;

- e) Adequate inspections by the County during construction to assure Smokey Hollow followed any approved plans and did not encroach into the approved buffers;
- f) Suggestions lot 64 be reduced in size since it appears to be the largest lot on the plan. (Note, Lot 64 is 1.6 acres. All other lots are less than .4 acres);
- g) That Lot 64 has wetlands on it which when developed could cause runoff and flooding onto adjacent properties.

Contrary to what Smokey Hollow averred in its Petition for the Writ of Certiorari, they did not universally voice a demand to eliminate Lot 64.

To answer their concerns, Commission Chairman Wheatley had Planning Director Jamie Whitehouse speak to the questions of open space and the buffers. He explained open space did not mean clear cutting of trees, but instead means an absence of buildings and structures. He stated the site plan shows trees would remain in the perimeter buffers and the final site plan must show a landscaping plan. All work is inspected and must comply with what is finally approved. Mr. Whitehouse further explained the pending matter was for preliminary plan approval and before final approval would be granted there would need to be extensive refinement of the plan and Smokey Hollow would need to acquire all of its permits. [A-075-077]

At the conclusion of the March 20, 2024 hearing, a vote on the application was deferred. It was placed on the Commission's April 10, 2024 agenda for a vote.

On behalf of Commissioner Mears, the Assistant County Solicitor read a motion to approve the application with conditions. The transcript of the April 10, 2024 hearing is included in the Appendix. [A-119] The portions of the motion to which Smokey Hollow objects are:

1. Reason 3. “The subdivision shall have no more than 81 lots on 69.95 acres of land, resulting in a gross density which is permitted in a GR zoning district. All lots shall be at least 7,500 square feet in size. [A-121]
2. Reason 11: “ Lot 64 is an isolated lot that would be set apart from the remainder of the subdivision and it would require a crossing over forested wetlands for access. There was testimony in the record that the development of this Lot would have the most impact on not only the environment, but also the neighboring residential properties. Testimony from neighboring property owners indicated that the area where this isolated lot would be located frequently floods. For all of these reasons, the area where Lot 64 is proposed shall remain undeveloped as part of the common area of the subdivision.” [A-123]
3. Condition/Reason 12(O): “There shall be a buffer that is at least 25 feet wide from all non-tidal wetlands. There shall be minimum disturbance of trees and other vegetation within these buffer areas. Where trees

currently exist in these buffer areas, stump removal or construction activities that disturb the existing grade of the area within the buffer shall be prohibited. Required silt fencing shall be installed upland of these buffer areas (using the edge of the buffer nearest the interior development) to avoid disturbance. The “Limits of Disturbance” shall be indicated on the Final Site Plan and there shall be permanent signage every 300 feet identifying the wetlands as non-disturbance areas.” [A-127]

The motion to approve with the conditions stated passed by a vote of 5-0.

Smokey Hollow objected to the conditions stated above and by letter of counsel dated July 12, 2024 detailed the objections. [A-131] To reiterate, the objections were the removal of Lot 64 from the subdivision plan and the imposition of a 25 foot buffer adjacent to wetlands.

In support of its objection to the removal of Lot 64 from the plan, Smokey Hollow argued the only reason it was removed is because “some neighboring property owners did not like it.” It was stated Lot 64 conformed to the County regulations and was one of the most valuable lots in the community. The July 12, 2024 letter further stated “... nearby neighbors complained during the public hearing that they thought the lot was too close to their own lots and asked the lot be

eliminated.” Smokey Hollow offered to increase the perimeter buffer adjacent to Lot 64 from 30 feet to 100 feet.

The second objectionable condition in the July 12, 2024 letter was the 25 foot fixed buffer from wetlands. Smokey Hollow averred such buffers were not required by the County Code, but it offered to place an average non-tidal wetland buffer of 30 feet in place of the fixed 25 foot buffer. It was argued the rigid 25 foot buffer would result in the loss of 8 residential lots and a costly redesign of the project. Attached to counsel’s July 12, 2024 letter was a report by Mr. Launay calculating the area difference between the required fixed buffer and the proposed average buffer. [A-144] Mr. Launay offered no opinion or evidence that lots would be lost if either buffer was to be installed. The July 12, 2024 letter concludes with proposed amended conditions to address Smokey Hollow’s objections.

The request for reconsideration was on the August 21, 2024 Agenda of the Planning Commission. The approved conditions were read into the record as were the proposed amendments after which the Commissioners discussed the request and the reasons for their original votes. [A-148] The following discussion among Commission members occurred:

UNIDENTIFIED SPEAKER: We need to discuss this one.

MS. WINGATE: Yeah, I think we do.

CHAIRMAN: I think we do.

UNIDENTIFIED SPEAKER: I think so.

MS. WINGATE: That's a lot.

CHAIRMAN: That's a lot.

UNIDENTIFIED SPEAKER: It is.

UNIDENTIFIED SPEAKER: And I think the conditions that they're asking us to change our mind on were made for good reasons.

MS. WINGATE: I agree. There was a lot of discussion about Lot 64 and the area that it is - - was surrounded by the wetlands and all that.

UNIDENTIFIED SPEAKER: And flooding, and crossing the wetlands... to get to the lot.

UNIDENTIFIED SPEAKER: Which is left out of their letter.

CHAIRMAN: Well, applicants certainly can ask for anything they want to ask for.

UNIDENTIFIED SPEAKER: Right.

UNIDENTIFIED SPEAKER: Of course.

CHAIRMAN: I certainly don't blame them for asking.

UNIDENTIFIED SPEAKER: Right. Well, we make these conditions based on public testimony and site conditions, and I think, you know, we didn't just take that lot away from them, it - - we needed to, to uphold the code.

UNIDENTIFIED SPEAKER: So I'm going to make a motion that we deny the request to amend conditions of approval for 2022-28, Smokey Hollow.

MS. WINGATE: I second.

The motion was passed by a vote of 5-0.

On September 19, 2024 Smokey Hollow filed a Petition for Writ of Certiorari with the Superior Court. [A-011]

Smokey Hollow's Petition for Writ of Certiorari averred the decision of the Planning Commission imposed two conditions "... which are contrary to the County Code, or which otherwise threaten the plan's economic viability." *Petition, Paragraph 1*. The reasons asserted were the elimination of Lot 64 for the sole reason of objections by neighbors and the imposition of the twenty-five (25) foot fixed buffers from wetlands which were not reasonable conditions and were contrary to County Code requirements. It further averred the conditions were not reasonable and contrary to legal precedent. Sussex County responded that it did have the authority to impose such conditions pursuant to the Planning Commission review powers and ability to place conditions on approvals. Further the conditions were reasonable based on the application, the proposed improvements and the nature of the site.

The parties briefed their positions, and the Superior Court held oral argument on September 15, 2025. Initially, the argument centered on the question of what constitutes a “reasonable condition” [A-155 – Transcript of Oral Argument] and whether the condition eliminating Lot 64 and the condition of the fixed wetland buffers were reasonable. The Court struggled with whether any specific criteria existed that could assist him in determining what is reasonable. [A-183] Smokey Hollow’s counsel took the position minor “tweaks” in the site layout may be reasonable [A-183], but if the condition affected a project developer’s economically, it was unreasonable. [A-180; 181; 184] Counsel for Sussex County opined reasonable conditions are those the Planning Commission can impose if the development plan has an adverse impact on matters such as the environment, surrounding properties, streets, schools and so forth. [A-197] This would be based on the Planning Commission reviewing and assessing the entire record before it to determine if there are conditions that need to be imposed which will lessen the impact of the subdivision on the area. [A-198]

Under the view of Smokey Hollow’s counsel, the elimination of Lot 64 was not justified economically, nor was it reasonable since it met the specific design criteria of the Sussex County Code. The argument was the elimination of Lot 64 was due solely to objections by neighboring property owners. No mention was made of the fact, and findings of the Planning Commission, it was not part of the cluster

of lots but an outlier. Nor was mention made of the fact, and finding, Lot 64 is only accessible by cutting a street or driveway through forested wetlands to what is essentially an upland island surrounded by wetlands.

Sussex County counsel took a different view. Based on the limiting factors identified by the Planning Commission and the superior design criteria for cluster subdivisions, the elimination of Lot 64 was reasonable. By doing so, one (1) of eighty-two (82) proposed lots was eliminated so the economic impact was minimal using Smokey Hollow's criteria. Further, the forested wetlands were undisturbed, the lot eliminated was the outlier lot, the potential adverse impact on neighboring properties was remote and this was all done within the discretion vested in the Planning Commission.

The second condition objected to by Smokey Hollow was the imposition of the 25 foot fixed buffers between wetlands on site and the proposed lots. It was agreed no specific section existed in the Sussex County Code for the imposition of the buffers [A-178] at the time the Application was filed. During the pendency of the Application the Sussex County Council adopted an amendment to the Code regarding certain drainage features, wetlands and water resources and buffers adjacent to them. The Code amendment exempted pending applications including that of Smokey Hollow from its effect. Smokey Hollow argued the lack of specific criteria in the Sussex County Code, as well as Smokey Hollow's exemption from the

enacted criteria rendered the imposition of the buffer condition invalid, and it should be stricken.

Smokey Hollow further argued that since it was zoned General Residential, it was exempt from the review procedures under Sussex County Code Section 115-25F. Review Procedures for Cluster Development. [A-220] This was argued based on the language in Sussex County Code Section 115-194.3C(5) which reads:

Residential development utilizing the cluster option of Subdivision C.3 above within the AR-1 and AR-2 Residential Zoning Districts shall comply with the requirements set forth in § 115-25F of the Sussex County Zoning Code.

The Smokey Hollow's position is since the property is zoned GR (General Residential) and not AR-1 or AR-2, Section 115-194.3C(5) does not apply to this application. [A-185, 206]

Sussex County's position is since the application was for a cluster subdivision, the plans were as a cluster subdivision and presented to the Planning Commission as one, then Smokey Hollow must follow the County requirements for a cluster subdivision approval regardless of the zoning district in which it lies. [A-189]

Accepting Smokey Hollow's position on the exemption from the review criteria under Sussex County Code Section 115-25F alleviates it from meeting the superior design philosophy of a cluster subdivision. It also eliminates the requirement of complying with the environmental concerns set forth in that section. And, it would avoid Section 115-25F(4) which reads:

The Sussex County Planning and Zoning Commission may add conditions to the approval of any cluster development to protect adjacent properties and the natural environment [A-224]

The Superior Court did not rule from the bench at the conclusion of the oral argument. Rather, it issued a written opinion dated October 1, 2025. [A-012] The Court found the elimination of Lot 64 and the imposition of the fixed wetland buffers were not reasonable conditions. This was due to errors of law committed by the Planning Commission. Accordingly, the Superior Court reversed the decision of the Planning Commission as to those two conditions and ordered them stricken. This appeal by Sussex County followed.

## ARGUMENT

### **I. THE SUPERIOR COURT FAILED TO APPLY THE COMPLETE EXISTING ANALYSIS OF WHAT CONSTITUTES A REASONABLE CONDITION IN ITS OPINION REVERSING THE DECISION OF THE SUSSEX COUNTY PLANNING AND ZONING COMMISSION**

- A. Question Presented: Did the Court below properly analyze what constitutes a reasonable condition in concluding the decision of the Sussex County Planning & Zoning Commission should be reversed? No trial record exists. The question arises from a decision on a Petition for Writ of Certiorari from an administrative action.**
- B. Standard of Review: The purpose of review under a writ of certiorari is to permit the Court to review the record of a proceeding by a lower tribunal. A writ of certiorari is not the same as appellate review in that the Court on a writ of certiorari reviews the regularity of proceedings to determine if there was an error of law. It does not weigh evidence, disturb the lower tribunal's factual findings or decide the case on the merits.<sup>2</sup>**
- C. Merits.**

The question of what constitutes a “reasonable condition” in the context of restrictions a governmental zoning body can impose on a land owner’s use of land has vexed all in the process since zoning laws were enacted. There has to be a balancing of the property rights of the owners of a property upon which a certain activity is to be conducted with the rights of the public not to have the activity adversely impact them. This calls into question what role does a governmental zoning board play in this balancing and what conditions or restrictions on the activity

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<sup>2</sup> *Dorsey v. AKA Mgmt.*, 2024 WL 1173609 (Del. Super., March 18, 2024)

the zoning board may impose to protect the public while allowing the landowner's desired use.

In the pending matter, the Court below stated in its opinion:

I am left with the quandary where along the spectrum of “reasonable conditions” which the County may impose do the two conditions which Respondent seeks to impose fall? Are they designed to minimize any adverse impact on nearby landowners and residents? [A-016]

In asking the first questions, the Court identified the problem facing the parties in planning applications, i.e., what are “reasonable conditions?” In asking the second question, it is clear the Court was considering, and ultimately relying upon, the incorrect standard of determining what is a reasonable condition.

At oral argument the Court sought from counsel guidance on the law regarding reasonable conditions [A-179]. Counsel for Smokey Hollow citing this Court's holding in the case of *Tony Ashburn & Son, Inc. vs. Kent County Regional Planning Commission*<sup>3</sup>, first analyzed it as “... go along, get along” and if a plan complied with specific criteria in a zoning code it must be approved subject only to “reasonable conditions designed to minimize adverse impacts on neighboring property owners. And so you might you do that would be reasonable, you can't really affect the project economics ....” [A-179-180] Counsel for Sussex County, also citing *Ashburn* took the more expansive view and stated the Planning

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<sup>3</sup> 962 A.2d 235 (Del., 2008)

Commission could condition plan approvals on not only the underlying code, but non-code factors such as agency recommendations, school capacity issues, health, safety and welfare concerns of the community all in an attempt to harmonize the plan with regional planning so long as the conditions do not act as a denial of the application. [A-187-188] The definition submitted by counsel for Sussex County at oral argument was deemed by both the Court and Smokey Hollow’s counsel to “prove too much.” [A-160; A-168]

In its decision, the Court below accepted the definition of counsel for Smokey Hollow. The definition accepted can be boiled down based on Smokey Hollow’s counsel at oral argument to:

A reasonable condition is one that the landowner or developer solely finds reasonable regardless of any discretion available to the Planning Commission concerning the public good and which condition does not impact the developer economically.

The net result is the Planning Commission or any zoning board, is reduced to a rubber stamp on any development plan. That is not what *Ashburn*<sup>4</sup> held and clearly not what was intended.

The *Ashburn* decision must be viewed in context. First, it was an appeal from the denial of an application before the Kent County Regional Planning Commission. The case at bar was not a denial, but an approval of a plan with nineteen (19)

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<sup>4</sup> *id.*

conditions, two of which Smokey Hollow found objectionable. Second, *Ashburn* was before the Court on an appeal claiming a lack of substantial evidence to support the decision and not based on a petition for a writ of certiorari as is this case.

The decision in *Ashburn* was a majority decision. Due to the great reliance given to the decision in this case, it is important to recite the central holdings of it for this analysis:

The central dispute on this appeal concerns the scope of the Commission's discretion to approve or disapprove a subdivision application. Because "subdivision control involves the specific application of the applicable general standards to the particular facts of a proposed subdivision," the Commission has quasi-judicial power. The Commission does not exist "merely to rubberstamp every application that comes before it." Most certainly it has a measure of discretion.<sup>5</sup>

The court reviewed prior cases and adopted the following as held in the case of *DiFrancesco v. Mayor and Town Council of Elsmere*<sup>6</sup>

When people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and residents. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the ordinances. The result would be the imposition of uncertainty on all landowners respecting whether they

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<sup>5</sup> *Ashburn* at 239

<sup>6</sup> 2007 WL 1874761 (Del. Super. June 28, 2007)

can safely rely on the permitted uses conferred on their land under the zoning ordinances.<sup>7</sup>

But the Court's holding did not stop there as advocated by Smokey Hollow's counsel and adopted by the Court below. Since *Ashburn* was a majority and not unanimous decision, the majority opinion addressed the concerns raised in the dissent as follows:

The dissent implies that our interpretation of 9 Del. C. § 4811 reduces the Commission to conducting a mere compliance check of a subdivision application to verify conformity with the County Code. This mischaracterizes our position. To summarize, the Commission may condition its approval of Ashburn's subdivision application based on non-Code factors, such as agency recommendations, school capacity issues, and concerns regarding the health, safety and welfare of the community. The Commission may consider these issues and has discretion in formulating conditions on approval designed to harmonize and coordinate regional planning. But, the Commission's power to impose conditions cannot be administratively enlarged to a power to deny a conforming application outright. In this case the Commission did not approve the application with conditions. Therefore, in denying Ashburn's application, which fully complied with all provisions of Kent County Code, the Commission exceeded its statutory power.

Delaware Courts have also addressed what is a reasonable condition in cases decided prior to *Ashburn* but which have not been overturned. In the case of *Handloff v. City Council of City of Newark*<sup>8</sup> the Court recited as "a fundamental principle of zoning law":

[m]any other courts have held that the zoning authority may impose special conditions or restrictions as a prerequisite to the grant of a

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<sup>7</sup> *Id. At* \*3.

<sup>8</sup> 2006 WL 1601098 (*Del. Super., June 8, 2006*), Page 11

conditional use permit, even if the special condition being imposed is not specifically permitted in the enabling legislation, if the special conditions are reasonable, in that they bear a reasonable relation to the public health, safety and welfare and they directly relate to the granted use.

It was also recognized in the case of *Delta Eta Corp. v. City Council of the City of Newark*<sup>9</sup>

... elected municipal councils possess significant discretion when approving applications to impose restrictions or conditions that minimize the impact of construction and which are reasonably related to the promotion of health, safety, morals and general welfare of the community.

Other jurisdictions have also addressed what is a reasonable condition. For example:

“... to be reasonable, a condition must relate to a zoning ordinance standard ... Factual findings on which the condition is premised must be supported by record evidence.”<sup>10</sup>

. . . . .

A board is permitted to impose conditions on the use of a property to mitigate any potential adverse impacts from the proposed use, and is required to reduce the negative impacts to an acceptable level if it can, by imposing conditions. ... Reasonable conditions are those that advance a valid zoning interest, are supported by the record, and relate to the specific zoning ordinance at issue.<sup>11</sup>

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<sup>9</sup> 2003 WL 1342476 (*Del. Super.*, March 19, 2003) at Page 3  
<sup>10</sup> *HHI Trucking & Supply, Inc. v. Borough Council of the Borough of Oakmont*, 990 A.2d 152, 161 (*Pa. Cmwlth.*, 2010)  
<sup>11</sup> *Maubach v. Board of Supervisors of Rapho Township*, 26 A.3d 1213, 1216 (*Pa. Cmwlth.*, 2011)

Conditions may be properly imposed upon subdivision approval so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property.<sup>12</sup>

In a recent series of decisions, the power of the Sussex County Council, and by extension the Commission, to impose conditions and even deny a zoning application was ultimately affirmed by this Court. In *Stillwater Harbor, LLC v. Sussex County Planning & Zoning Commission, et al.*,<sup>13</sup> one issue was whether the County could deny the zoning application which Stillwater averred met all County ordinance criteria. See *Superior Court Order dated August 8, 2024* [A-227]. The Commission denied the application finding there were deficiencies in the application of items not specifically stated in Code § 99-9C. Stillwater argued on appeal as here the plan met all requirements and should be approved because the conditions cited to deny the application were not specifically set out in the County Code. The Superior Court found the Commission had the authority to grant conditional approval and, in that case, deny the application. The Court had to give broad deference to the County. The Order was appealed to the Delaware Supreme Court which by a one sentence order affirmed the lower Court's decision. See *Supreme Court Order* [A-234].<sup>14</sup> Not satisfied, Stillwater sought reargument by the Court en

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<sup>12</sup> *Matter of Kirquel Development, Ltd. V. Planning Board of Town of Cortlandt*, 96 A.3d 754 (Supr Ct., App. Div., 2<sup>nd</sup> Dept., N.Y., 2012)

<sup>13</sup> C.A. No. S23A-11-001 MHC (Del. Super., August 8, 2024)

<sup>14</sup> *Stillwater Harbor, LLC v. Sussex County Planning & Zoning Commission, C.A. No. 356, 2024* (Del., 2025)

banc, which the Supreme Court summarily denied. [A-235] In seeking reargument, Stillwater averred if left affirmed the prior orders would call the continuing vitality of *Ashburn* into question. [A-238] Perhaps it is time to call the continuing validity of *Ashburn* into question. Without specificity in what constitutes a reasonable condition, the decision in *Ashburn* has resulted in confusion and uncertainty. Smokey Hollow's counsel claims the *Stillwater* decisions are inappropriate since the application was denied rather than approved with conditions. The Court below adopted that thinking and found *Stillwater* was not applicable. Neither reconciled the fact that *Ashburn* also arose from the denial of an application. It is submitted that a more specific test of what constitutes a reasonable condition is timely to give guidance to all parties in the planning process.

To summarize, and to suggest, a reasonable condition is one that meets some if not all of the following:

- a) It may be based on non-code factors including agency comments, school capacity issues and concerns regarding the health safety and welfare of the community.
- b) The Planning Commission has discretion in formulating conditions to harmonize and coordinate them with regional planning.
- c) The conditions are site specific.

- d) The conditions must be rationally related to addressing in the public interest, the potential land use impact the particular use or development will have on the community.
- e) The condition must directly relate to the use granted.
- f) The condition must relate to the Ordinance standards.
- g) The imposition of the condition must be supported by the record evidence.
- h) The condition is designed to reduce negative impacts to an acceptable level.
- i) The condition must bear a reasonable relationship to the problem sought to be alleviated.

Applying what constitutes a reasonable condition to the decision of the Court below, it is evident the Court's analysis failed to properly consider all the aspects of what is or is not a reasonable condition. That well may be due to a lack of a cogent and comprehensive definition or test that can be applied. As previously noted, the Court struggled with what constituted a reasonable condition when applied to the two conditions at issue in this case.

Applying the law cited above, it is submitted the Planning Commission had the discretion to impose conditions beyond what Smokey Hollow advocates. It's discretion is not limited to minor tweaks, to negative impact on the developer's

financial proforma, or solely to conditions the developer agrees to. Rather, the Planning Commission is charged with protecting the health safety and welfare of the citizens of Sussex County when reviewing a subdivision plan. That entails assessing the factors in Sussex County Code Sections 99-9C and 115-194.3, and determining if approval of the proposed plan needs to be conditioned even it is meets all the technical requirements of the County Code. That level of discretion is broader than what the Court below opined it to be, that is, moving an entrance road a few feet or exchanging the locations of a parking lot and a storm water pond. Under Code Section 99-9C in effect when the application was filed, [A-113] the Planning Commission was charged with considering the use of wetlands in the design, the preservation of natural features, minimization of tree removal, the effect on area waterways and other aspects of the plan as it related to that section of the Code, and the location of the site. Additionally, and despite the suggestion now by Smokey Hollow that it is not bound by the cluster subdivision review procedures under Sussex County Code Section 115-25F, there are specific criteria the Planning Commission is charged with assessing and if necessary, conditioning. An example is whether the design is superior “in the reasonable judgment of the Planning Commission.” [A-221]. In reaching its conclusions, the Court below did not consider any of these powers of the Planning Commission in its analysis of what constitutes a reasonable condition. Applying the non-complete holding in *Ashburn*

as the Court did, it erred in finding the Planning Commission's conditions were invalid.

Accordingly, the decision below should be reversed and the specific conditions discussed below reinstated.

**II. THE CONDITIONS OF APPROVAL IMPOSED BY THE PLANNING COMMISSION ON THE SMOKEY HOLLOW CLUSTER SUBDIVISION WERE REASONABLE.**

**A. Question Presented: Did the Sussex County Planning and Zoning Commission properly exercise its discretion in assessing the record facts and imposing conditions on the preliminary subdivision approval? No trial record exists. The question arises from a decision on a Petition for Writ of Certiorari from an administrative action.**

**B. Standard of Review: This is before the Court on a Writ of Certiorari subject to the same scope of review stated as to Argument Section I.**

**C. Merits.**

1. The Planning Commission had the discretion to Eliminate Lot 64 from the Approved Site Plan.

The Planning Commission's preliminary approval of the cluster subdivision plan of Smokey Hollow was proper under the discretion given to it by the Sussex County Code and based on the facts of record. The result was Smokey Hollow received approval for 81 of the 82 lots under its application.

Smokey Hollow's own documentation evidences the fact this is an environmentally sensitive area of the County. There are running streams, standing water and forested wetlands on the site. Portions of the property are in the 100 year flood zone. There was testimony the area of the parcel where Lot 64 was located floods at times of heavy rain. Attached at Appendix Page A-225 is a map that Smokey Hollow submitted as a brief exhibit below. It shows the forested wetlands

in the hatched green area. The spot where Lot 64 would be located is essentially an upland island in the middle of the wetland forest. To access it, a separate road or driveway would need to be constructed from a cul-de-sac in the primary cluster of homes, then behind an existing house, through the forested wetland and out to the isolated upland area. [A-042] This would involve not only the installation of the subsurface support and the surface road, but the underground construction of sewer and water lines as well as electric and whatever utilities would need to be installed to serve the lot.

Smokey Hollow filed for a cluster subdivision. *Rothkopf*<sup>15</sup> states in Section 90:49, Powers of planning board-cluster subdivision includes the following characteristics: 1) the individual lots are generally smaller than called for in the zoning ordinance; 2) the houses are located in a central area, thus clustered; 3) the design increases the amount of open space on a site; 4) the permitted housing density is maintained; 5) it promotes improved living environments; and 6) construction is more economical. It also is a means to preserve natural resources. In the Sussex County Code, a “Cluster Development” is defined as:

A development concept which encourages and permits variations in residential developments by allowing deviation in lot size, type of dwelling, lot coverage and open space from that which is normally required as further described on the applicable residential districts. Sussex County Code § 115-4A.B., General Definitions.

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<sup>15</sup> 3 *Rathkopf, The Law of Zoning and Planning (4<sup>th</sup> Ed.)*

The Planning Commission is charged with assuring criteria are met before a preliminary plan is approved including under 115-25F(3)(a):

The cluster development sketch plan and the preliminary plan of the cluster subdivision provides for a total environment and design which are superior, in the reasonable judgment of the Planning Commission, to that which would be allowed under the regulations for the standard option.

Thus, when reviewing a cluster subdivision, the Commission has the responsibility to determine if the plan meets the criteria in the Code. As that regards Lot 64, the Commission found it was separate from the other lots which would be a violation under Code Section 115-25F(3)(a)(1), to wit:

Homes shall be clustered on the environmentally suitable portions of the tract, specifically those parts of the tract least encumbered by sensitive environmental features, including but not limited to wetlands, mature woodlands, waterways and other water bodies. This does not inhibit the development of wooded parcels.

Smokey Hollow argued below, which was adopted by the Court, that Lot 64 was eliminated solely due to opposition from neighbors who own property adjacent to the lot who appeared at the public hearing. That is incorrect. The Planning Commission took into consideration the environmental issues attendant to Lot 64. They found the lot was isolated from the other lots in the cluster; they found it would require cutting a road through a forested wetland to access it; they found based on the neighbor's testimony there is occasional flooding on the lot; and, they found that based on Code requirements the location of the lot was not suitable [A-123] [A-153]

Yes, they did consider the comments of the public, but it was only one of several reasons they focused on in eliminating Lot 64 while leaving the other 81 lots in place. A zoning board may not deny a subdivision application based solely on public comments,<sup>16</sup> but that does not preclude consideration of the public's interest, especially when the application is not denied but approved with conditions. Without weighing facts, the record supports the reasons given by the Planning Commission for elimination of Lot 64.

The Court below found the elimination of Lot 64 to be an unreasonable condition. It is not an unheard of condition in zoning circles. Though no specific case was found in Delaware on that point, other jurisdictions have found elimination of lots for environmental reasons to be a reasonable condition. In the *Kirquel Development* case previously cited,<sup>17</sup> the planning board reduced the number of approved lots to 16 of the 21 requested. The Court held:

Given the environmental constraints on the site including ... the existence of wetland ... the Planning Board's determination to eliminate certain lots and approve a 16-lot plan was rational and not arbitrary and capricious.<sup>18</sup>

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<sup>16</sup> *East Lake Partners, supra*, p. 825

<sup>17</sup> 96 A.3d 754, *supra*.

<sup>18</sup> *Kirquel, supra*, page 755

Similarly, a ten (10) lot subdivision was reduced to two (2) approved lots thus eliminating eight (8) lots from the submitted plan. On appeal the Court upheld the lot elimination finding:

... the commission acted within the scope of its authority in determining that the inevitable road construction related to the development .... would have an adverse impact on the wetlands area ...<sup>19</sup>

Applying the criteria for a reasonable condition, the Planning Commission assessed the impact the location of Lot 64 and the road necessary to access it would have on the community at large. First, the isolated lot versus the other lots in a cluster were not evidence of a superior design. More importantly and objectively, the lot could only be accessed by means of one private road that could be constructed only by the destruction of forested wetlands and trees, contrary to the requirements of Code Section 99-9C requiring minimal impact on environmentally sensitive areas. They also considered that flooding does at times occur on the site. Taken as a whole, it was reasonable for the Planning Commission to eliminate Lot 64.

The Court below was not completely objective in its assessment of Lot 64.

During the course of the oral argument the Court said in regard to Lot 64:

I looked at the plan. It looked like a kind of nice development. And I asked myself if I was going to buy this. What lot would I want to buy? And I kind of like this, setting out there, and its kind of open and on its own and it's got nice features. So what does it matter that its sitting out there by itself? [A-205]

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<sup>19</sup> *Manatuck Associates v. Conservation Commission of the Town of Fairland*, 614 A.2d 449, at page 454 (Conn. App., 1992)

It was pointed out to the Court the Commission had to remove its subjectivity in assessing plans, and it was suggested to the Court it had to do likewise. [A-205-206] Though the Court agreed with that comment, the initial statement of the Court raises an issue of objectivity in assessing the imposition of the condition.

When assessed with the criteria for what constitutes a reasonable condition previously reviewed, the elimination of Lot 64 by the Planning Commission was not arbitrary and capricious. They addressed the lot in relation to the site specific conditions. The condition was rationally related to addressing the public interest of protecting the environment in an environmentally sensitive area and the impact approving the lot may have on the community at large. The condition related directly to what was granted by bringing the concept of a cluster subdivision into compliance with a superior design. The condition related to the ordinance standards under County Code Sections 99-9C and 115-25F. The elimination of the lot was supported by the facts of record. And, the condition bore a reasonable relationship to the problem posed to the overall plan and the concerns of the public. Thus, the decision of the Court below to reverse the imposition of the elimination of Lot 64 should in turn be reversed and the condition of approval reinstated.

2. The requirement the lots adjacent to wetlands have a fixed 25 foot buffer was a reasonable condition.

The threshold question to be addressed in assessing whether the Planning Commission could make a wetland buffer a reasonable condition is whether County Code Section 115-25F applies to this application. In an eleventh hour argument, Smokey Hollow argued the design criteria for the cluster subdivision in Section 115-25F does not apply to it and thus the imposition of the buffer was invalid. It is undisputed when the application was filed, it was done so as an application for approval of a cluster subdivision under County Code Section 115-194.3. [A-108] It is also uncontested the site is zoned GR-General Residential. The application was reviewed and assessed as a standard cluster subdivision and the hearing and review process occurred as intended under County Code Section 115-25F. [A-042] Counsel for the applicant has recently argued citing Code Section 115-194.3(5) that since the parcel is zoned GR, it is not required to meet the design criteria of Sections 115-25F or 115-193.4. Section 115-193C(5) states:

Residential developments utilizing the cluster option of Subsection c(3) above within the AR-1 and AR-2 Residential Zoning Districts shall comply with the requirements set forth in Section 115-25F of the Sussex County Code.

Smokey Hollow argued on appeal that since GR is not stated in Section 115-193C(5), its application is not subject to the Section 115-25F design requirements for a cluster subdivision. That despite having its application previously reviewed

based on that criteria and code section, this was all argued as a reason not to comply with the condition of a fixed buffer from the wetlands. Further, it argues it is not subject to the setback requirements of Section 115-25F, entitled Review Procedures for Cluster Development. [A-218] That Code section addresses the design requirements and criteria the Planning Commission are to consider when reviewing the plan.

It is axiomatic that one section of a statute cannot be viewed in a vacuum. When a statute, or in this case an ordinance, is passed as a whole and not in parts, the parts must be read in conjunction with one another to produce a harmonious result.<sup>20</sup> County Code Section 115-194.3 when read as a whole clearly applies to all zoning districts within the County Coastal Area. [A-108 et. seq.] That section of the Code was amended in 2021 whereby Section 115-194.3(5) was added for the express purpose of having one design standard apply throughout the County. [A-226] Prior to the amendment there were two standards for cluster subdivisions, one in the Coastal area and one outside. The amendment brought uniformity.

The Court below erred in its opinion that the Smokey Hollow plan by virtue of the fact it is zoned GR was not subject to the review criteria under Section 115-25F. [A-026] That determination negates the obligation of Smokey Hollow to

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<sup>20</sup> *Coastal Barge v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1245 (Del. 1985)

comply with any review by the Planning Commission, clearly not the intention of County Council in adopting the ordinance. The lower Court's determination on that issue must be reversed.

The Court's ruling on the unacceptability of Section 115-25F to the subject site plan in turn negated the Planning Commission's imposition of a buffer of 25 feet from any wetlands. The Planning Commission under Section 115-25F(4) has the authority to impose conditions to protect adjacent properties and the natural environment that includes wetlands. Smokey Hollow argued below that an interior wetland buffer has no relevance to adjacent properties. It is a law of nature that water flows, often in underground or in ways not seen. Thus, protection of a wetland in one place can offer protection to other wetlands and properties downstream. The Planning Commission correctly and prudently imposed the buffer to protect the wetlands on site, but also on other properties.

Smokey Hollow argued that imposition of the wetland buffer would result in a loss of 8 lots. This was set out in the letter seeking reconsideration of the Planning Commission's approval with conditions [A-131], but in no other place in the record. At oral argument counsel admitted [A-171-172]. Attached to the letter seeking reconsideration Smokey Hollow attached a report by Mr. Launay detailing the impact of the required buffer, which has no mention of a loss of any lots. [A-144] Despite the fact the loss of 8 lots is not proper evidence of record, the Court below

cited it in footnote 12 of the Opinion in analyzing whether the buffer condition was reasonable [A-018]. That is improper and not a factor that should be considered in reversing the Planning Commission's decision. It is a factor to consider reversing the Court below.

It is agreed that the criteria under Section 115-25F or 99-9C at the time of application did not state buffers are a specific condition of approval of a subdivision, cluster or otherwise. But, the Code does permit the approvals to be conditioned. In this instance, the Planning Commission found buffers were a proper means to protect the environmental factors on site. Further, when the conditions of approval proposed by Smokey Hollow are reviewed, it could easily be assumed it anticipated such buffers. Condition A (sic.) reads in part:

There shall be a vegetated or forested buffer that is at least 20 feet wide adjacent to residential uses and 30 feet wide adjacent to agricultural uses ... [A-032]

That is, it can be read that a 20 foot buffer would/could be adjacent to residential uses. It does not say residential uses exclusively on the perimeter of the site. The Planning Commission utilized most of the verbiage in that proposed condition in approving the plan subject to the wetland buffer.

The interior wetland buffers adjacent to the residential lots were a reasonable condition. Again, using the analysis of a reasonable condition set forth previously, the condition addressed: 1) the health and safety factors of potential wetland

pollution; 2) the condition was in harmony with regional planning; 3) the condition was site specific; 4) the condition rationally related to the public interest of keeping the environment clean from the potential impact of this development; 5) the condition was directly related to the granted development of 81 lots; 6) the imposition of the condition was supported by the record; 7) it is designed to reduce negative impacts to an acceptable level; and, 8) it bears a reasonable relationship to the problem sought to be alleviated. Accordingly, the decision of the lower Court in reversing the decision of the Planning Commission to impose wetland buffers should in turn be reversed.

## CONCLUSION

For the reasons cited herein, the Sussex County Planning & Zoning Commission prays this Honorable Court will reverse the Court below and reinstate the reasonable conditions on the approval of the preliminary cluster subdivision plan filed by Smokey Hollow.

The reasonable conditions test currently the law in Delaware is vague and subject to misapplication or misinterpretation by all parties involved in the planning process for land use decisions. As a result, the lower Court in this action by its own admission struggled to formulate an analysis of the conditions. When it did, the analysis was not comprehensive of what constitutes a reasonable condition. This Honorable Court is urged to formulate a more definitive standard to eliminate vagueness and inconsistency on what is or is not a reasonable condition. Criteria is suggested for consideration.

When the full panoply of criteria is applied to the decision of the Planning Commission below, it is clear it properly exercised its discretion in imposing the conditions it did on the subdivision approval at bar. Therefore, the decision below reversing the Planning Commission should be itself reversed and the conditions on approval reinstated.

Respectfully submitted,

Moore & Rutt, P.A.

*/s/ David N. Rutt, Esq.*

David N. Rutt, Esq. (#2694)

122 W. Market Street

Georgetown, DE 19947

(302) 856-9568

[dnrutt@mooreandrutt.com](mailto:dnrutt@mooreandrutt.com)

*Attorney for Appellant*

Dated: January 23, 2026

Word Count: 9784