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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUSSEX COUNTY PLANNING & ZONING COMMISSION,	)	No. 440, 2025
Appellant,	)	
v.	)	Appeal from the Superior Court of the State of Delaware
SMOKEY HOLLOW, LLC,	)	C.A. No. S24A-09-001-CAK
Appellee.	)	

APPELLEE'S ANSWERING BRIEF

SAUL EWING LLP
Richard A. Forsten (#2543)
Jennifer M. Becnel-Guzzo (#4492)
Mackenzie M. Sindelar (# 6692)
1201 N. Market Street, Suite 2300
Wilmington, DE 19801
(302) 421-6800 (telephone)
(302) 421-6813 (facsimile)
richard.forsten@saul.com
jennifer.becnel-guzzo@saul.com
mackenzie.sindelar@saul.com
Attorneys for Petitioner

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NATURE AND STAGE OF PROCEEDINGS

In this case, the Sussex County Planning & Zoning Commission (the "Commission") violated Smokey Hollow LLC's property rights by unilaterally imposing two conditions on Smokey Hollow's code-compliant subdivision plan that were contrary to the Sussex County Zoning Code and Delaware law. After Smokey Hollow appealed to the Superior Court, the Court struck the conditions.[1]

By way of background, the common law favors the free and unencumbered use of property, subject only to the doctrine of nuisance.[2] Because zoning codes are in derogation of the common law, they are strictly construed in favor of property owners[3] and zoning restrictions themselves may not be arbitrary or unreasonable.[4] In particular, in *Tony Ashburn & Son, Inc. v. Kent Cnty. Regional*

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[1] *Smokey Hollow, LLC v. Sussex Cnty. Planning & Zoning Comm'n*, 2025 WL 2816524 (Del.Super.). This is the decision on appeal here.

[2] *See, e.g., Walker v. Williams*, 2016 WL 6555886, at *5 (Del.Ch.) ("At common law, otherwise-lawful activities by a landowner on his property were limited only insofar as they invaded the property rights of his neighbors – that is, they were limited under nuisance doctrine.").

[3] *See, e.g., Jack Lingo Asset Management, LLC v. Board of Adjustment of City of Rehoboth Beach*, 282 A.3d 29, 34 (Del. 2022); *Chase Alexa, LLC v. Kent Cnty. Levy Court*, 991 A.2d 1148, 1152 (Del. 2010); *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972) ("[W]e must keep in mind that zoning laws are to be interpreted in favor of the occupants of the land.").

[4] *See, e.g., Papaioanu v. Commissioners of Rehoboth*, 20 A.2d 447, 449 (Del.Ch. 1941) ("under the guise of the police power of the State, the use and enjoyment of private property cannot be subjected to arbitrary and unreasonable restrictions

Planning Comm'n,[5] this Court made clear that where property owners seek to use their property as permitted by the applicable zoning code, they are entitled to do so:

> When people [own] 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 can safely rely on the permitted uses conferred on their land under the zoning ordinances.[6]

But, here, in this case, the Commission violated this fundamental principle with two of the conditions it imposed – and, indeed, its position in this case would render *Ashburn* meaningless because the Commission's ultimate position is that it (that is, the Commission) has the ultimate say over what is "reasonable" or not,

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which clearly are not essential to the general welfare of the community"); *Mayor, etc., of Wilmington v. Turk,* 129 A. 512, 522 (Del.Ch. 1925) (zoning restriction purporting to prohibit use of private nurse's private residence for in-patient care/recovery not enforceable for lack of "any proper object which the police power may legitimately serve"); *In re Ceresini*, 189 A. 443 (Del.Super. 1936) (zoning code provision prohibiting the enclosure of porches held unreasonable and an invalid exercise of police powers).

[5] 962 A.2d 235 (Del. 2008) (*en banc*).

[6] *Id.* at 241 (emphasis added).

thereby eliminating any meaningful judicial review. As the Superior Court observed in rejecting the Commission's position:

> [The Commission] seeks to drive a truck through the hole [of "reasonable" conditions] to justify *any* additional limitations. For me Respondent's position proves too much. Accepting its position would provide it limitless discretion and power to shape land developments well beyond the written Sussex County Code. It would also fly in the face of the requirement that landowners be put on written notice in advance of what is allowed.[7]

In this case, Appellant Smokey Hollow, LLC seeks to develop its 66-acre parcel of land with only 82 residential lots – a figure far below the maximum permitted by the County's Zoning Code. And, of the 66 acres, approximately 40 acres will be undeveloped open space – a figure far greater than the minimum required by the Zoning Code. More importantly, *there is no dispute that the plan complies with all of the applicable zoning and subdivision requirements* and the Commission's attorney conceded this at oral argument.[8]

Nevertheless, the Commission imposed two conditions which violate *Ashburn* and wreak substantial harm on Smokey Hollow:

1. First, in response to complaints of six lot owners in the adjoining residential subdivision, the Commission ordered the outright

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[7] *Smokey Hollow,* 2025 WL 2816524, at *1 (emphasis added).

[8] Superior Court Oral Argument Transcript at 5-6 (The Court: "I just want to make sure you agree that the specific requirements of the code were met by this application." Mr. Rutt (attorney for Commission): "the specific requirements, yes."). The transcript of the oral argument appears in Appellants' Appendix at A-155-217. *See also Smokey Hollow*, 2025 WL 2816524, at *2.

elimination of one of the residential lots (lot 64) proposed by Smokey Hollow's plan, despite the plan's (and lot 64's) compliance with all code requirements (including compliance with the County Code's required buffer distance of lot 64 from nearby properties); and,

2. Second, the Commission imposed a *fixed* 25' buffer requirement from all non-tidal wetlands, even though the applicable Code provisions require no such buffer, and, even though, after the plan was submitted, Sussex County Council adopted an ordinance creating an *average* buffer requirement which did not apply to pending plans, including Smokey Hollow's plan. The Commission's condition, if upheld, would not only impose a restriction greater than the ordinance recently-adopted by Sussex County Council, but would require a substantial re-design and re-engineering of Smokey Hollow's plan, with an estimated loss of 8 residential lots.

With both conditions, the Commission ignored the legislative judgment of County Council, and imposed far greater restrictions than the Code requires. These two conditions cannot be sanctioned – and, indeed, the Superior Court found the conditions to be unreasonable, because they ignore the judgment of County Council in enacting the applicable code requirements and ignore this Court's admonition in *Ashburn* that only "reasonable conditions" may be imposed "in order to minimize any adverse impact on nearby landowners and residents."

In fact, the Commission's two conditions here represent the very danger which this Court sought to prevent in *Ashburn*. If the Commission can simply tell a property owner to remove a lot or lots (and who's to say how many lots the Commission might order removed in the future?) – simply because a few neighbors might prefer no residential development in *their* backyards – then the

Commission is acting by "whim or caprice" and not the rule of law. And, if the Commission can ignore County Council's decision to grandfather pending plans from newly-adopted ordinances and impose greater restrictions than those newly-adopted ordinances would have imposed (if applicable), then the Commission is again acting by "whim or caprice" and not the rule of law. If the two conditions here are allowed to stand, then no property owner in Sussex County (and, ultimately, the entire state) will be able to rely on specific code requirements, but will instead be subject to whatever conditions a local planning body may fancy imposing. As the Chancery Court once observed concerning this subject:

> The law requires that local governments deal with specific land use decisions in a rational, non-arbitrary manner guided by legislative standards of general application. The singling out of particular owners for idiosyncratic treatment, just because the prevailing neighborhood wind is unfavorable, is not acceptable when the property owner has met all the criteria that the local government has established.[9]

Here, the Commission imposed two conditions[10] which are not supported by the Zoning Code or go beyond any specific criteria set forth in the Code. After Smokey Hollow's offers of compromise were rejected,[11] Smokey Hollow

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[9] *Gibson v. Sussex Cnty. Council*, 877 A.2d 54, 79 (Del.Ch. 2005).

[10] The Commission also imposed 17 conditions to which Smokey Hollow does not object.

[11] Smokey Hollow offered to move Lot 64 further from the complaining neighbors (moving it an additional 70' back, so that the total setback would be 100' from the subdivision boundary rather than the 30' the Code requires), and offered to impose

appealed, and the Superior Court struck both conditions. With respect to the elimination of Lot 64, the Court explained:

> with County Council having made the determination through its legislative process that a 30 foot buffer between a lot and the subdivision boundary is all that is required, [the Commission] is not free to ignore that determination and require an even greater setback or to eliminate Lot 64 entirely, just because nearby homeowners object to that lot. To hold otherwise would allow [the Commission] to impose requirements on Petitioner simply because "the prevailing neighborhood wind is unfavorable." Such action is "not acceptable when the property owner has met all the criteria that the local government has established."[12]

As to the fixed buffer, the Court found there were no code provisions requiring such a buffer and, like the attempt to eliminate Lot 64, the buffer requirement:

> violates *Ashburn* since the Plan complies with the specific criteria required by County Council, and the buffer is not designed to minimize any adverse impact on nearby landowners and residents.[13]

Yet despite the Superior Court's rebuke, the Commission appealed to this Court, still insisting that it has the final say as to what is reasonable or not and that its two conditions should be re-imposed. But the Superior Court did not err, the two conditions violate *Ashburn*, and the Superior Court's decision should be affirmed.

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an *average* buffer of 30' (as compared to a *fixed* buffer of 25') from non-tidal wetlands. *See* Smokey Hollow's Appendix at B-64-68. The Planning Commission rejected both offers without explanation. *See* Appendix, B-81.

[12] *Id.* at *5 (citations omitted).

[13] *Id.* at *6.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly found that the Commission could not ignore the legislative judgment of County Council and impose ad hoc conditions not designed "to minimize any adverse impact on nearby landowners and residents." The Commission's argument that reviewing courts must defer to local governments in assessing what is "reasonable" would render judicial review moot and lead to the very evils which this Court sought to avoid in *Ashburn.* As the Superior Court observed in striking the two conditions at issue here: "For me, [the Commission's] position proves too much. Accepting its position would provide it limitless discretion and power to shape land developments well beyond the written Sussex County Code. It would also fly in the face of the requirement that landowners be put on written notice in advance of what is allowed."

2. Denied. The Superior Court correctly held that the two conditions unilaterally imposed by the Commission were unreasonable. Neither requirement was designed "to minimize any adverse impact on nearby landowners and residents." The buffering requirements had nothing to do with nearby properties, and the elimination of Lot 64 ignored County Council's determination that a 30' buffer from the subdivision's boundary was more than adequate to minimize impacts on neighboring properties.

STATEMENT OF FACTS

Smokey Hollow is the owner of a 66 acres of land (the "Property") upon which it proposes an 82-lot residential subdivision using the County's cluster option. There will be approximately 40 acres of open space, and the proposed plan is far less dense than the County Code otherwise allows.[14]

Smokey Hollow submitted its initial application on October 27, 2022. Following extensive review by the Sussex County Planning & Zoning Office (the "Department"), as well as review by numerous other state agencies, Smokey Hollow proceeded to the next step in the process and submitted its preliminary subdivision plan (the "Preliminary Plan" or "Plan") on March 8, 2024. The Planning & Zoning Commission (the "Commission") then held a public hearing on March 20, 2024. During the course of the public hearing, one nearby homeowner and seven homeowners from the adjoining residential subdivision, "Fox Haven," appeared and six complained that they felt one of the proposed residential lots in Smokey Hollow (Lot 64) would be too close to their residential lots.[15] But Lot 64,

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[14] The Property is zoned GR General Residential under the County Code, which permits a maximum density of 2 single-family homes per acre. *See* County Code, §§115-42, 115-194.3(C)(3). Thus, Smokey Hollow's Plan is far less dense (i.e., proposes far fewer homes per acre) than permitted by the County Code. The Plan has a density of only 1.2 homes per acre – 40% less than the maximum. The proposed preliminary plan appears in Smokey Hollow's Appendix at B-1-81.

[15] The Fox Haven subdivision plan is recorded in the Sussex County Recorder of Deeds' Office at Document# 2020000018512, Book 310, beginning at page 45;

as set forth in the Plan, conforms to the setbacks and distances required by the County Code.[16] One of the Fox Haven residents speaking against the Plan even conceded that Lot 64 complied with the Code – she just wanted the applicable setback distance doubled.[17] Following the public hearing, the Commission voted to grant preliminary plan approval at its business meeting subject to 19 conditions.

Most of the 19 conditions which the Commission imposed are unremarkable or not otherwise objectionable.[18] However, two of the conditions are quite remarkable and objectionable. They contradict what is specifically permitted by the County Code and go beyond the "reasonable" conditions which the Delaware

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and, being a public document, this Court may take judicial notice of it. *See* DRE 201(b); *see also Hague v. Bay Landing POA, Inc.*, 2023 WL 2947453, at *2 (Del.Ch.) (taking judicial notice of information contained on a recorded subdivision plan). Sheet 2 of the Fox Haven Plan appears in Smokey Hollow's Appendix at B-83, and the lots owned by the six speakers are marked at B-82. All of these lots are set back 30' from the Fox Haven/Smokey Hollow boundary, just as Lot 64 is required to be set back.

[16] The County Code requires a 30' forested and/or landscaped buffer located along the entire outer perimeter of any portion of a major subdivision. County Code, §99-5; *see also* County Code §§115-125F, 115-194.3(C)(5). All lots must be set back at least 30' from the edge of the subdivision boundary.

[17] *See* Appellant's Appendix at A-087 ("I know there's a 30-foot buffer – we would like a 50- to 60-foot buffer.").

[18] For example, as condition "C," the Commission required: "as shown on the preliminary site plan, approximately 40 acres of the site shall remain as open space." And, in condition "G," the Commission required: "street design shall meet or exceed Sussex County standards." A list of all conditions appears in the Commission's April 12, 2024 letter appearing in Appellee's Appendix at B-59-62.

courts allow. Specifically, the Commission required:

1. The elimination of Lot 64, and reduction in the size of the proposed subdivision from 82 to 81 lots; and,

2. A *fixed* minimum buffer of 25' from all non-tidal wetlands, even though the applicable Code provisions require no such buffer, and, even though, after the plan was submitted, County Council adopted an ordinance creating a more flexible buffer requirement (which ordinance only requires an *average* buffer of 30' and which specifically exempted pending plans).[19]

In imposing these two requirements, the Commission made no attempt to justify or explain its reasons for doing so; nor did it attempt to explain why it imposed a buffering requirement more difficult and less flexible than the buffer ordinance adopted by County Council. Finally, the Commission made no attempt to discuss these conditions with the applicant or the Department prior to imposing them, and made no effort to understand the practical or financial impacts of such conditions.

Thereafter, Smokey Hollow sought reconsideration of the two conditions. With respect to the requirement to eliminate Lot 64, Smokey Hollow offered to set the lot back much further than the 30' required setback, to 100'. As to the buffer

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[19] Sussex County Council adopted Ordinance 2852 (*see* Appendix at B-32-58) requiring only an *average* buffer of 30' from non-tidal wetlands, which became effective on November 17, 2022. Council, in adopting this ordinance, recognized that there must be some flexibility given the topography of different properties, and so mandated only a minimum *average* buffer. As will be discussed, the 25' *fixed* buffer imposed by the Commission is more draconian when applied to Smokey Hollow's Plan and will result in the loss of 8 lots, but the 30' *average* buffer requirement could be met with no loss of lots.

requirement, Smokey Hollow offered to comply with the recent ordinance (Ord. 2852), even though that ordinance did not apply, and pointed out that with the *fixed* 25' buffer required by the Commission, the project would lose 8 lots, a significant financial hardship.[20] With the proposed revisions, the plan appears as follows:[21]

[20] *See* Smokey Hollow Appendix at B-64-68.

[21] A copy of this plan also appears in the Appendix at B-75-83.

However, notwithstanding Smokey Hollow's compromise offer, the Commission rejected Smokey Hollow's request at its August 21, 2024 meeting, without even allowing Smokey Hollow to speak and without otherwise engaging in conversation with Smokey Hollow.[22] This denial was memorialized in an August 29, 2024 letter from the Department.[23]

Smokey Hollow then sought review in the Superior Court which ordered the two conditions stricken. The Commission then appealed to this Court.

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[22] *See* Commission's Appendix at A-152-154. Note that the Commission members did not discuss or even mention the request regarding their buffer requirement or its inconsistency with the County Code.

[23] *See* B-81.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY ANALYZED WHETHER THE COMMISSION'S TWO CONDITIONS WERE "REASONABLE" OR "UNREASONABLE."

A. Question Presented: Did the Superior Court properly analyze whether the conditions imposed were "unreasonable"?

In its Opening Brief, the Commission spends some 10 pages (pages 19-29) arguing about what constitutes "reasonable" conditions and what considerations a court should apply in determining whether a condition is "reasonable." It cites cases from New York and Pennsylvania (as well as Delaware) which it claims should inform a court in determining whether conditions are "reasonable." But there is a problem – the Commission cites nothing in the record below where it pitched this argument about standards and factors to the Superior Court. It did not cite the out-of-state cases now cited, nor the additional Delaware cases.

Before the Superior Court, in determining whether conditions were "reasonable" or not, the Commission simply argued that it thought its conditions were "reasonable," and since it had the power and discretion to impose "reasonable" conditions, the Court should simply defer to the Commission's judgment.[24] But this no standard at all and must ultimately be rejected.

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[24] Transcript from Superior Court oral argument at 61 ("So they [the Commission] imposed these conditions which were reasonable to the Commission, which they have the right to do, and therefore it's our position they complied with the law and should be affirmed."). *See* Appellant's Appendix at A-215.

B. Standard of Review: A Superior Court decision reviewing an administrative body's decision by writ of *certiorari* is reviewed for legal error, which is *de novo* review.

This Court reviews a Superior Court decision applying *certiorari* review for legal error, and, in the absence of legal error, will affirm.[25] Here, because the Superior Court did not err as a matter of law, its decision should be affirmed.

C. Merits.

1. Where a plan or application complies with the applicable code, it is entitled to approval subject only to "reasonable" conditions "designed to minimize any adverse impact on nearby landowners and residents" – meaning that any conditions should essentially be designed to alleviate a probable "nuisance."

At oral argument before the Superior Court, the Court questioned how it should analyze whether a condition was "reasonable" or not. The Commission's position boiled down to the claim that since it (the Commission) has the power to impose "reasonable" conditions, its judgment (and its judgment alone) controls whether the challenged condition is reasonable or not. The Commission's attorney told the Court: "they [the Commission] imposed these conditions *which were reasonable to the Commission*, which they have the right to do, and therefore it's our position they complied with the law and should be affirmed."[26] But such

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[25] *See, e.g., Black v. New Castle Cnty. Bd. of License, Inspection and Review*, 117 A.3d 1027, 1029 (Del. 2015) ("We review the Superior Court's decision to affirm the Board's ruling for legal error") *citing Christiana Town Center, LLC v. New Castle Cnty.,* 2004 WL 2921830, at *1 (Del.) (''We find the [Superior Court] committed no legal error in denying certiorari review. We therefore affirm.'').

deference would render judicial review meaningless and leave property owners to the whim and caprice of administrative bodies, which this Court, in *Ashburn*, as well as other Delaware Courts, have consistently rejected.[27]

As a preliminary matter, it should be noted that with respect to the vast majority of land use plans, the question of conditions is routinely worked out in discussions between the applicant and the governing body, and most conditions are unobjectionable or otherwise common sense. Indeed, there were 19 conditions imposed here, and only 2 were challenged. As the old (but true) saying goes, "time is money," and, in the real estate and land improvement business, "any delay is deadly."[28] Thus, property owners will sometimes accept (or otherwise not challenge) conditions because the cost of the conditions is less than the time and expense that would be incurred to challenge them.[29]

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[26] *See* Appellant's Appendix at A-215.

[27] *Ashburn, supra*; *see also East Lake Partners v. City of Dover Planning Comm'n*, 655 A.2d 821 (Del.Super. 1994); *Delta Eta. v. City Council of City of Newark,* 2003 WL 1342476, at *3-4 (Del.Super.); *Cave v. New Castle Cnty.*, 850 A.2d 1128 (Del.Super.), *aff'd,* 854 A.2d 1158 (Del. 2004); *Daniel D. Rappa, Inc. v. Buck*, 275 A.2d 795 (Del.Super. 1971); *DiFrancesco v. Mayor and Town Council of Elsmere*, 2007 WL 1874761 (Del.Super.); *JNK, LLC v. Kent Cnty. Regional Planning Comm'n*, 2007 WL 1653508 (Del.Super.); *Gibson v. Sussex Cnty. Council*, 877 A.2d 54 (Del.Ch. 2005).

[28] *See Mindich Developers, Inc. v. Hunziker*, 622 F.Supp. 1513, 1517 n.3 (S.D.N.Y. 1985).

[29] Here, it has been nearly 2 years since the Commission first imposed the conditions at its April 10, 2024 meeting, meaning 2 years of additional cost

There are, it would seem, four possibilities in determining whether a condition is reasonable or not: (i) unfettered and unreviewable discretion on the part of the local government (the position espoused by the Commission); (ii) the "I know it when I see it" approach, (iii) the Superior Court's approach below which would uphold conditions going beyond applicable code requirements where their impact is modest and they are designed to lessen impacts on adjoining property owners, and (iv) the nuisance approach.

2. The Commission's claim that it should be the judge of what is "reasonable" is an unreviewable standard with no limits.

The Commission claims that it (and it alone) should be the judge of what is "reasonable;" but, as the Superior Court observed:

> Respondent seeks to drive a truck through the hole to justify any additional limitations. For me Respondent's position proves too much. Accepting its position would provide it limitless discretion and power to shape land developments well beyond the written Sussex County Code. It would also fly in the face of the requirement that landowners be put on written notice in advance of what is allowed.[30]

Put another way, the Commission (or any other agency) could always claim that a proposed condition will lessen impacts on the surrounding community and are therefore "reasonable" even if they go far beyond code requirements. If the

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increases and 2 years of lost market time. One of the two principals of Smokey Hollow, LLC has passed away during this time.

[30] *Smokey Hollow*, 2025 WL 2816524, at *1.

elimination of 1 lot will eliminate impacts, why not 5 or 10? If an increase in setback will lessen impacts, then why can't the Commission require all setbacks be doubled?

In the briefing (and argument) before the Superior Court, as well as the briefing here, the Commission offers no objective standard it is bound to follow, and makes no attempt to answer the question of whether the Commission could simply require any project be downsized 10 or 20 percent in order to lessen impacts.

As it did below,[31] the Commission cites a recent Superior Court decision, *Stillwater Harbor, LLC v. Sussex Cnty. Planning & Zoning Comm'n*,[32] to try and justify its argument that it has an unfettered right to impose conditions on a code-compliant plan. But, as the Superior Court stated, the Commission's citation to *Stillwater* is misplaced because that case "dealt with *denial* of a plan for failure to comply with the Code"[33] – which is not the situation here, where the Commission has admitted that the Smokey Hollow plan complies with the code.[34] As the

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[31] B-187-188.

[32] 2024 WL 3738698 (Del.Super.), *aff'd*, 340 A.3d 1132 (Del. 2025) (Table, Text in Westlaw, 2025 WL 1067975).

[33] *Smokey Hollow*, 2025 WL 2816524, at *2.

[34] *See* A-159-160.

Superior Court explained, *Stillwater* provides no support for the Commission here as the conditions imposed are unreasonable under *Ashburn.*

Although not raised below, the Commission now offers a multi-part test consisting of 11 factors which, it suggests, could provide guidance.[35] But even a cursory review of this "test" demonstrates that it is nothing more than an effort to give vague, unbridled discretion to the Commission in an effort to justify whatever conditions the Commission may want to impose. For example, factor "h" states that the condition must be "designed to reduce negative impacts to an acceptable level." But who is to say what is an "acceptable" level? The Commission? County Council when it first created the zoning code requirements? Or, consider that condition "f" states that a condition "must relate to Ordinance standards" but

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[35] The eleven suggested factors are:

a. It may be based on non-code factors including agency comments, school capacity issues and concerns regarding health, safety and welfare;
b. The 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; and,
i. The condition must bear a reasonable relation to the problem sought to be alleviated.

condition "a" says that a condition "may be based on non-code factors." Which is it? And how, exactly, are these eleven factors to provide guidance to property owners in determining what they can do with their property? How exactly are property owners to determine whether they should invest the hundreds of thousands of dollars preparing plans to develop their properties, only to be told that the Commission has decided that additional restrictions or limitations not present in the Code may be imposed because it has decided that the Code is too generous and that further restrictions are necessary to "reduce negative impacts to an acceptable level."

In point of fact, this mushy, unclear, vague "test" now advocated by the Commission for the first time in its Opening Brief is precisely what this Court rejected in *Ashburn* when it clearly stated that:

> When people [own] 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.[36]

This is why zoning codes, being in derogation of the common law, are interpreted

[36] *Id.* at 241 (emphasis added).

in favor of property owners. The Commission's proposed test would turn the common law's and Delaware's respect for property rights on its head, and mean that property owners could never know what uses they might be able to make of their properties. Why have zoning codes at all if the Commission is free to legislate conditions on every plan that comes before it? Indeed, one need look no further than the buffering requirement which the Commission seeks to impose. County Council specifically rejected a *fixed* buffer, and grandfathered plans under review, but the Commission ignored County Council's determinations and imposed more onerous conditions costing 8 lots (10% of the proposed lots) that the Code otherwise permits. The "test" proposed by the Commission would create the very danger *Ashburn* sought to avoid and in fact: "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." And, as a result, again, in the words of *Ashburn*: "The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances."

The "reasonable" conditions allowed by *Ashburn* are narrow; otherwise, as the Superior Court observed:

> Accepting [the Commission's] position would provide it limitless discretion and power to shape land developments well beyond the

> written Sussex County Code. It would also fly in the face of the requirement that landowners be put on written notice in advance of what is allowed.[37]

It is County Council's job, through the zoning code, to put property owners on notice, and, indeed, even Sussex County Council has recognized that vague, undefined language is not fair to property owners.[38]

The Commission's proposal would institute the very dangers and abuses which Delaware courts have consistently sought to prevent. While the Commission's proposal is untenable, the question remains as to what standard courts should apply. The following sections discuss possible standards.

3. The Justice Potter approach to "unreasonable conditions" – "I know it when I see it."

One could take an approach similar to that of Supreme Court Justice Potter Stewart, who once wrote, in trying to define what constitutes "hard-core pornography," that while he couldn't necessarily provide an exact definition, "I know it when I see it."[39] Such an approach, while perhaps providing some

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[37] *Smokey Hollow*, 2025 WL 2816524, at *1.

[38] On December 10, 2024, Sussex County Council adopted Ordinance 3061 (*see* B-84-86) revising Section 99-9C of the County Code, and, in doing so, explained in the fourth recital that "the requirement that the 17 items in Section 99-9C of the Code. . . must be 'considered' is too vague to be enforceable or to give clear direction to Sussex County, developers, landowners, or the public." These same concerns apply with equal force to the 11-factor test proposed by the Commission.

[39] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

guidance (i.e., don't do anything "too extreme" in imposing conditions) and some flexibility, is not particularly helpful to either administrative bodies or property owners going forward, other than to suggest being cautious and conservative in imposing conditions.

4. The middle ground: inexpensive and minimal changes to lessen adverse impacts.

One might take the view as the Superior Court did: that conditions "designed to minimize any adverse impact on nearby landowners and residents" are "reasonable" where, even though they go beyond what is required by code, they are not unduly expensive and will not delay a project. As the Superior Court hypothesized:

> if shifting an entrance to a project in one direction or another could easily be accomplished, so that the entrance might be further from a neighboring project but still provide safe and adequate access to the proposed project, this would be a reasonable condition because it minimizes any adverse impact on nearby landowners and residents. If the location of a stormwater pond and a parking lot could be changed so that a parking lot would be further from an adjoining property, that would be a reasonable condition because it minimizes any adverse impact on nearby landowners and residents. Requiring a berm or landscaping in an otherwise open buffer area would be a reasonable condition because it minimizes any adverse impact on nearby landowners and residents.[40]

Under the Superior Court's approach, it would not necessarily be "unreasonable"

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[40] *Id.* at *5.

to require a property owner to make relatively inexpensive changes to a code-compliant plan, so long as those changes would not cause extensive delay or extra expense to redesign or implement and where the changes would clearly minimize adverse impacts on neighboring property owners. This, of course, would likely require (and even encourage) back and forth between the governing body and the property owner (which did not occur here), as, otherwise, the governing body may not know what conditions would cause extensive delay or excessive costs.

5. The law of nuisance provides the best guidance.

In seeking how to determine whether a condition is "reasonable" or not, perhaps the best approach can be found in the common law doctrine of nuisance which was the original justification (and purpose) behind zoning codes more generally. At common law, a private nuisance exists:

> "where a defendant, although acting lawfully on his own property, permits acts or conditions 'which become nuisances due to the circumstances or location or manner of operation or performance.'" To obtain relief for a nuisance-in-fact, a plaintiff must prove by a preponderance of the evidence that "the use made by his neighbor of the neighbor's property constitutes an *unreasonable* invasion of the plaintiff's property rights, recognizing that 'the affairs of life ... cannot be carried on without mutual sacrifice of comfort.'" The Court must weigh the facts and conflicting interests of the parties involved to determine if the plaintiff seeks to protect the "reasonable or proper enjoyment of [his] property, and not some [hypothetical] unqualified right to uninfringed use." The reasonableness of the use is determined from an objective point of view; that some "invasion" of another's

> interest in the use and enjoyment of his land has occurred does not necessarily mean that the invasion is unreasonable.[41]

The common law doctrine of nuisance is, indeed, the underpinning for modern zoning law. By creating and enforcing a set of generally-applicable land use regulations, local governments are, essentially, creating expectations and telling property owners in an area what are "reasonable" uses for their properties and their neighbors' properties to reduce the potential for nuisances. One buying a home in a residentially-zoned area need not worry about whether their neighbor (whose property is also zoned residential) might erect a factory or retail business. Indeed, when the United States Supreme Court upheld the use of zoning codes in 1926, despite their impingement of common law property rights, it did so under the theory of nuisance, explaining:

> [t]he ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare…. the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, *like the question whether a particular thing is a nuisance*, is to be determined, not by an abstract consideration of the

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[41] *Walker v. Williams*, 2016 WL 3569260, at *6 (Del.Ch.) (citations omitted). Note that the quoted language deals with a "private" nuisance (that is, a nuisance only affecting the immediate area). A "public" nuisance is similar to a private nuisance, except that it affects rights enjoyed by the public at large and is, essentially, a subset of private nuisance. Given that this Court's language in *Ashburn*, which focused on the adverse effects of a plan on adjoining and nearby property owners, as compared to the public at large, Smokey Hollow contends that the standard for a private nuisance is the proper framework for evaluating the appropriateness and reasonableness of any conditions.

> building or of the thing considered apart, but by considering it in connection with the circumstances and the locality …. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.[42]

Zoning codes, then, when properly viewed, are essentially a way of reducing transaction costs and friction, and freeing property owners and the courts from what otherwise might be a plethora of burdensome lawsuits and litigation over whether this use or that use is proper for, or creates a nuisance in, a given area.

This Court's statement in *Ashburn* is consistent with this view because it essentially says that a code-compliant plan is entitled to approval and subject only to "reasonable" conditions to "minimize" "any adverse impact on nearby landowners and residents." Thus, it is presumed that when a local government enacts a zoning code, that government has made the determination as to what is reasonable and unreasonable in terms of property uses.

As long as a plan complies with applicable setbacks, height limitations, density requirements, permitted uses, and the like, the use is presumed to be reasonable and further restrictions are not necessary (or appropriate), except when a particular use might create a nuisance for neighboring property owners. Thus, in *Ashburn*, this Court held:

> When people [own] land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project

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[42] *Euclid v. Amber Realty Co.*, 272 U.S. 365, 387-88 (1926) (emphasis added).

> 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 can safely rely on the permitted uses conferred on their land under the zoning ordinances.[43]

Or, as the Court of Chancery once observed:

> The law requires that local governments deal with specific land use decisions in a rational, non-arbitrary manner guided by legislative standards of general application. The singling out of particular owners for idiosyncratic treatment, just because the prevailing neighborhood wind is unfavorable, is not acceptable when the property owner has met all the criteria that the local government has established.[44]

Not surprisingly, neighboring property owners almost universally disfavor development of adjoining and nearby properties (forgetting that their properties were once undeveloped as well). So long as property is developed pursuant to the applicable code requirements, such development should be permitted. Only where such development could potentially constitute a nuisance should conditions further limiting a property be permitted. Put another way, "reasonable" conditions should only be imposed where the development and use of a property in accordance with the applicable zoning code is likely to create a nuisance. Only such a standard will

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[43] *Ashburn*, 962 A.2d at 241.

[44] *Gibson*, 877 A.2d at 79.

truly ensure that all property owners are treated fairly and that their property rights under the common law are not unfairly burdened or taken.

6. The Superior Court properly applied *Ashburn.*

Ultimately, no matter what standard is applied (except of course, the Commission non-standard of unfettered, absolute discretion), the two conditions here fail. Whether one applies the Justice Potter Stewart standard, the standard applied by the Superior Court (inexpensive and non-time-consuming conditions that will minimize adverse impacts on neighboring properties), or a standard based on nuisance, the two conditions fail, as further analyzed in Argument II below.

II. THE TWO CONDITIONS UNILATERALLY IMPOSED BY THE COMMISSION IN THIS CASE WERE "UNREASONABLE" AND THE SUPERIOR COURT PROPERLY HELD THAT THE COMMISSION ERRED IN IMPOSING THEM.

A. Question Presented: Did the Superior Court correctly conclude that the conditions sought to be imposed were unreasonable in light of all the relevant circumstances here?

The issue before the Superior Court was whether the two conditions imposed by the Commission were "reasonable" or not. Both parties below briefed this issue and addressed it at oral argument.[45]

B. Standard of Review: A Superior Court decision reviewing an administrative body's decision by writ of certiorari is reviewed for legal error, which is de novo review.

When reviewing a decision of the Superior Court regarding its review of a lower tribunal's decision on writ of *certiorari*, the Superior Court's decision is reviewed for error of law.[46] Because the Superior Court's decision contains no such error, it should be affirmed.

C. Merits of the Argument.

The Commission wrongfully imposed two conditions, which the Superior Court found to be error of law and ordered the two conditions struck. The Superior Court's decision on each condition, as further discussed below, should be affirmed.

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[45] *See, e.g.,* A-215, 216; *see also* B-103-112, 134-145, 160-172.

[46] *See* footnote 25 *supra.*

1. The Commission cannot order the removal of a lot (Lot 64) that complies with the "specific criteria" of the Code – the objections of a few neighboring lot owners, who would prefer to see a lot eliminated or pushed even further from their own lots, is no basis to ignore Code requirements or require a lot be eliminated.

There are several single-family residential lots in the Fox Haven subdivision whose rear lot line will be located 60' from proposed rear lot line of Lot 64 in the Smokey Hollow subdivision.[47] At the public hearing, six Fox Haven lot owners objected to this (and only this) proposed lot because, they claimed, *even though it complied with the Code requirements*, Lot 64 would still be too close to their own lots. However, Lot 64, like all the lots in Fox Haven, and all the other lots in Smokey Hollow, complies with the "specific criteria" of the Code and these Fox Haven homeowners, while they might prefer not to have a lot located 60' from their backyards, are not entitled to such relief.

More specifically, all residential lots in a residential subdivision must be set back 30' from the property boundary of the residential subdivision.[48] That is, the rear property line of any lot must be 30' from the property line of the subdivision. This requirement creates a 30' buffer of open space and landscaping, maintained

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[47] *See* B-75, 82, 83.

[48] *See* County Code, Ch. 115, Zoning, Attachment 1, Table 1, note 8.

by the homeowners association, around any residential subdivision, and a total distance of 60' between lots in adjoining subdivisions.

Indeed, in creating this 30' setback requirement, County Council made the legislative determination that 60' between the rear lot lines of lots in two adjoining subdivisions was a sufficient and appropriate distance between such lots. As explained in *Gibson*, when considering land use requirements:

> County Council must address [land use policies] in a legislative fashion and not in an arbitrary fashion that subjects some property owners like the Gibsons to unwritten, subjective restrictions that the Council is not willing to impose on similarly situated property owners.[49]

Thus, with County Council having made the determination through its legislative process that a 30' buffer between a lot and the subdivision boundary is all that is required, the Commission was not, and is not, free to ignore that determination and require an even greater setback – and the Commission is especially not free to require Smokey Hollow to eliminate Lot 64 entirely – just because a handful of nearby homeowners show up at a public hearing and object to a lot they don't happen to like. Indeed, if the Planning Commission is so free, then no property owner, in seeking to develop any new residential subdivision, will be able to rely on any Code requirements, as the Commission will be able to impose even greater

[49] *Gibson*, 877 A.2d at 56.

requirements simply because "the prevailing neighborhood wind is unfavorable."[50] Such action is "not acceptable when the property owner has met all the criteria that the local government has established."[51]

Here, all of the lots in Fox Haven along the edge of the community are 30' from the Fox Haven/Smokey Hollow property line, just as all of the lots along the edge of the Smokey Hollow subdivision are 30' from the property line. Lot 64, as originally proposed, is no different than any of these other lots, including the lots of the Fox Haven residents who complained about Lot 64.

In sum, with respect to the Commission's direction that Lot 64 be removed, such condition violates *Ashburn*, as the lot complies with the specific criteria required by County Council (that is, a 30' setback from the project boundary). The condition was properly stricken.

2. The *fixed* minimum 25' non-tidal wetlands buffer imposed by the Commission ignores County Council's recent decision not to apply any buffer requirements to pending plans, and, goes far beyond the *average* buffer requirement created by Council in its recently adopted ordinance (which only applies to new plans).

When Smokey Hollow first submitted its application, the County Code did not require any buffer between a residential lot and a non-tidal wetland. However,

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[50] *Id.* at 79.

[51] *Id.*

effective after the application was submitted, County Council imposed a buffering requirement, applicable to both tidal and non-tidal wetlands, requiring an "average" buffer of 30' between a residential lot and such wetlands.[52] Significantly, though, this ordinance did not apply to applications pending at the time of its effective date, including Smokey Hollow's Plan.[53] Thus, in adopting the ordinance, County Council made the legislative decision that plans already in the pipeline would not need be redesigned to meet this new requirement – a time-consuming and not-inexpensive proposition.

The Commission, however, had other ideas. Having asked no questions of Smokey Hollow or the County Department of Planning about the buffer issue during the public hearing or otherwise, the Commission unilaterally imposed a hard and fast minimum *fixed* buffer of 25' from all wetlands for Smokey Hollow's project (but, presumably, not newer projects, which would be subject to the County's new *average* buffer ordinance).[54] If followed, this condition would result

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[52] *See* Sussex County Ord. No. 2852 in Appendix at B-32. The ordinance allows a buffer to be reduced to as little as 15', so long as a corresponding amount of the buffer is increased to 45', so as to "average" a 30' wide buffer overall. In this way, flexibility is provided in the design of a project that would not be afforded with a hard and fast distance requirement. *See* Ord. No. 2852 at 16-17.

[53] *See* Ord. No. 2852 at 27 (B-58).

[54] In its Answering Brief before the Superior Court, *and for the very first time anywhere*, the Planning Commission announced that this condition was required by a provision in the Sussex County Zoning Code. *See* B-142-145. However, as

in the elimination of 8 lots.

Again, all of this is contrary to the legislative determination by County Council that no such buffering should be required with respect to pending plans. Moreover, rather than create a hard, fast, and *fixed* buffer of 25', County Council's new ordinance only required an *average* buffer of 30' – in an obvious effort to avoid the hardships that a *fixed* buffer requirement might cause.

Although Smokey Hollow should not be subject to any wetlands buffering at all, Smokey Hollow did offer to comply with the 30' *average* buffer (its offer was rejected). As Smokey Hollow explained in its request to the Commission, a *fixed* 25' buffer requirement would require an extensive redesign of the project and result in the loss of 8 residential lots.[55] However, an *average* buffer of 30' would not result in the loss of any lots, and would actually increase the amount of

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pointed out by Smokey Hollow in its Reply Brief below, the cited provision does not apply to lands zoned GR, which is the zoning of Smokey Hollow's property. *Smokey Hollow*, 2025 WL 2816524, at *6. In its decision, the Superior Court specifically rejected the Commission's argument that the provision applied. *Id*.

Nevertheless, the Commission repeats this argument in its Opening Brief here, and even claims that Smokey Hollow only argued that this code provision did not apply "in an eleventh hour argument." Op.Br. at 36. But this claim completely misrepresents the timelines. If Smokey Hollow did not make the argument that the provision did not apply until its Reply Brief, this was only because the Commission, *until its Answering Brief below*, had never suggested that the provision did apply. In truth, it is the Commission which raised the argument at the eleventh hour. The Superior Court then asked for supplemental briefing on the point (*see* B-173) before finding the provision did not apply.

[55] *See* Smokey Hollow July 12, 2024 letter, appearing in the Appendix at B-64-68.

wetlands buffering from 5.4 acres to 6.69 acres.[56] Moreover, the *average* 30' buffer does not require the extensive redesign that a *fixed* 25' buffer requires.[57]

Simply put, Smokey Hollow cannot be subjected to the 25' *fixed* buffer imposed by the Commission. The loss of time, the expense of the necessary redesign, and the loss of 8 lots and associated revenue, all demonstrate that, even if the Commission had the discretion to ignore County Council (which it does not), such a hard and fast buffer is not a "reasonable" condition.

At the time the Commission imposed the 25' *fixed* buffer requirement on Smokey Hollow, County Council had already created the 30' *average* buffer requirement, and had already exempted pending plans (including Smokey Hollow's plan) from the requirement. The Commission is not free to ignore Council's legislative determinations in favor of its own ad hoc requirements made on whim and caprice.[58] The Superior Court's decision that the 25' *fixed* buffer should be stricken should be upheld.

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[56] Smokey Hollow made these points in its July 12, 2024 letter at 4-5. B-67-68.

[57] *Id.*

[58] Note, too, that, while *Ashburn* allows conditions to minimize adverse impacts on adjoining properties, no adjoining properties are benefitted by this fixed buffer requirement because the buffers, if required, would be all internal to the project itself.

CONCLUSION

If the Commission's two conditions are upheld here, then, going forward, it ultimately becomes a case of "Katy bar the door." No property owner, despite having a plan that complies with all of the voluminous zoning and subdivision code requirements set forth in the County Code, will ever be free to rely on that Code again. If the Commission is free to require a lot be removed because neighbors object, then why just one lot, why not five or ten? If the Commission is free to go beyond the buffer requirements created by County Council after a long and public process leading to Council's adoption of an ordinance (an ordinance which exempted pending plans) – then why have any ordinance at all? And why provide for grandfathering of pending plans? The Commission is not free to ignore Council, and ignore the grandfathering, and impose a buffer where Council has said no buffer is required.

John Adams famously said, "we are a nation of laws, not of men." But if the Commission is free to impose conditions which destroy the economics of a plan or which otherwise reject and eliminate aspects of a plan which comply with code requirements, then John Adams' statement no longer holds true. All that nearby neighbors of a proposed plan need do is flood the Commission's chambers during the public hearing and call for the elimination of lots, the doubling and tripling of buffers, and anything else they might want – and the Commission would be free to

do those things. Fortunately, Delaware law does not permit this. It protects property owners from "the prevailing neighborhood wind" and prohibits the imposition of ad hoc requirements of whim and caprice.

When this Court, in *Ashburn,* spoke of "reasonable conditions" designed to reduce adverse impacts, it did not authorize governments to simply scale back the size of a code-compliant plan. Rather, "conditions" might mean extra landscaping (trees and bushes), or berms in particular areas (to further block line of sight), or adding a turn lane at a project's entrance (so as to minimize impacts on traffic flow), or other conditions designed to reduce the impact of the plan – but not a reduction in the size or scope of a project that complies with the Code *and* not something that is contrary to a decision already made by County Council with respect to "specific criteria" (i.e., such things as setbacks, lot sizes, permitted number of lots, etc.). Otherwise, property owners truly are subject "to the future whim or caprice of the Commission" and "[t]he result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances."

The Commission has admitted that Smokey Hollow's plan complies with the applicable Code requirements. The Superior Court's decision striking the two conditions should be upheld.

To the extent the Court desires to establish further guidance on what

constitutes a "reasonable" condition, Smokey Hollow suggests that any conditions which require compliance beyond actual code requirements be based on a likelihood that, in the absence of such conditions, a "nuisance" may result. Such a standard would be consistent with the purpose of zoning codes generally (that is, to prevent incompatible uses from being located near each other and to prevent nuisance situations more generally), yet would also recognize that property owners are generally free to use their properties so long as such use does not result in a "nuisance." Property owners will still be incentivized to work with local governments on "reasonable" conditions, because time is money, but local governments will recognize that property owners are entitled to rely on the existing zoning code, subject only to situations where the code might inadvertently allow a potential nuisance to nevertheless come into being absent "reasonable" conditions.

Respectfully submitted,

/s/ Richard A. Forsten

Richard A. Forsten (# 2543)
Jennifer M. Becnel-Guzzo (#4492)
Mackenzie M. Sindelar (# 6692)
SAUL EWING LLP
1201 N. Market St., Suite 2300
Wilmington, Delaware 19801
Ph: (302) 421-6800
Fx: (302) 421-6813
richard.forsten@saul.com
jennifer.becnel-guzzo@saul.com
mackenzie.sindelar@saul.com
Attorneys for Petitioners

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