



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 REPLY BRIEF**

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

David N. Rutt, Esquire (#2694)  
Ryan T. Adams, Esquire (#6256)

122 West Market Street  
Georgetown, DE 19947

Ph: (302) 856-9568

Fax: (302) 856-4518

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

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

*Attorneys for Appellant*

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## **NATURE AND STAGE OF PROCEEDINGS**

Appellee, Smokey Hollow, LLC (hereafter “Smokey Hollow”), sought preliminary approval of a cluster subdivision site plan from the Appellant, Sussex County Planning & Zoning Commission (hereafter “Commission”). The application was for eighty-two (82) lots on approximately seventy (70) acres. The Commission granted preliminary approval with conditions.

Smokey Hollow objected to two of the conditions. One (1) of the eighty-two (82) lots was to be eliminated, and a twenty-five (25) foot fixed buffer between the lots and interior wetlands was required. Smokey Hollow sought Commission reconsideration of those, but the reconsideration was denied. Approval of the subdivision plan stood with all original conditions.

Smokey Hollow filed a Writ of Certiorari with the Superior Court seeking reversal of the objectional conditions averring it had met all requirements for approval under the County Code. Smokey Hollow pled the Commission lacked discretion to impose conditions which it deemed unreasonable, and thus they are void and unenforceable. The Commission responded claiming the County Code and caselaw granted the Commission discretion which it properly exercised approving the application. The Superior Court accepted Smokey Hollow’s arguments and reversed the Commission on the allegedly objectionable conditions.

The Commission appealed the Superior Court Order. The Opening Brief was filed with this Court and thereafter amended on January 23, 2026. Smokey Hollow filed its Answering Brief on February 17, 2026. This is the Commission's Reply Brief.

## SUPPLEMENTAL STATEMENT OF FACTS

The Commission relies on its Statement of Facts in its Amended Opening Brief. However, certain facts alleged in Smokey Hollow's Answering Brief require response or clarification.

On Page 9 of the Answering Brief, Smokey Hollow states two conditions on the approval of the cluster subdivision plan are objectionable because they contradict what is specified in the County Code and go beyond reasonable conditions Delaware Courts allow. The first objection does not acknowledge the *County Code Section 99-9.C.*, in effect when the application was filed states, "In addition to the other provisions contained within this Article, the approval of a subdivision shall include consideration of the following (among others):

(2) Minimal use of wetlands and floodplains.

(5) Minimization of tree, vegetation and soil removal and grade changes.

(9) Prevention of pollution of surface and groundwater.

(10) Minimization of erosion and sedimentation, minimization of changes in groundwater levels, minimization of increased rate of runoff, minimization of potential for flooding and design so that groundwater recharge is minimized.

(17) Effect on area waterways" (*See A113-114*).

Smokey Hollow's factual statements concerning the disregard for the County Code also fail to acknowledge *County Code Section 115-25F(4)*: "The Sussex

County Planning and Zoning Commission may add conditions on the approval of any cluster development to protect adjacent properties and the natural environment.”

(A 224) Therefore, the County Code contains provisions allowing the Commission to impose conditions on cluster subdivision approvals taking into consideration criteria to protect the environmental in the area where the subdivision is located, and not limited solely to protection of adjacent properties.

The second objection, that is, the decision of the Commission going beyond what the Delaware Courts allow, is at the crux of this case. There are limited guidelines of what constitutes a reasonable condition. The Commission, being familiar with the plan, the comprehensive land use map, and the subdivision’s location, has a better idea of conditions to be imposed to protect the natural environment than any other entity in the process. The fixed buffer condition from non-tidal wetlands was a rational exercise of powers delegated to the Commission by the County Council in enacting the County Code sections cited above.

Smokey Hollow also avers in its Facts the Commission made no effort to justify or explain reasons for imposing the conditions. (*Answering Brief, p.10*) The Commission approved the cluster subdivision application on April 10, 2024. Following are excerpts from the findings and motion applicable to the conditions Smokey Hollow finds objectionable allegedly imposed without justification. (A 120-128)

Mr. Mears' motion as is follows:

... One, the applicant is seeking approval of a cluster subdivision on Land Zone GR, General Residential, located within the coastal area of the 2019 comprehensive plans future land use map.

... Two ... For the reasons stated later in this motion, only 81 lots shall be permitted.

... Seven, the subdivision provides for a total environment and design that is superior to a standard subdivision, including a substantial amount of open space and buffers. It also complies with the design requirements and review procedures for our cluster subdivision in the coastal area.

... Nine, the cluster design avoids intrusion onto the wetland areas within the site and provides sufficient buffering between the wetlands and the developed portions of the site.

11, (sic) Lot 64 shown on the preliminary subdivision plan is an isolated lot that would be set apart from the remaining subdivision, and it would require 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 the neighboring property owners indicates that the area where this lot – this isolated lot would be located frequently floods. For all these reasons, the area where Lot 64 is proposed shall remain undeveloped as part of the common area of the subdivision.

12, (sic) This approval is subject to the following conditions:

A, there shall be no more than 81 lots within the subdivision. The area where Lot 64 is shown on the final site plan shall remain undeveloped as open space.

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, again, 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.

Smokey Hollow argued if the fixed 25 foot buffer is permitted, it will lose 8 lots in the project (*Answering Brief*, p. 11). That “fact” appears in the record only in the letter sent by Smokey Hollow’s counsel to the Commission seeking reconsideration of the conditions (*A 131*). There are no citations in the letter to any document or evidence to support that statement. Attached to counsel’s letter as Exhibit 3 (*A 144*) is a letter authored by Edward Laumay, their expert soil scientist, with input from Atlantic Group & Associates, the project engineer. Calculations were made to determine the difference in acreage on the project for fixed buffers versus average buffers proposed by Smokey Hollow. The expert’s letter does not identify a loss of any building lots due to the fixed buffer, nor does it indicate the fixed buffer would reduce any lot below the minimum 7,500 square foot lot required in a cluster subdivision. The letter does not indicate how many lots would be impacted. The fixed buffer only applied to lots adjacent to non-tidal wetlands, and not all lots. In summary, there is no data supporting Smokey Hollow’s stated “fact” that fixed buffers adjacent to non-tidal wetlands would result in the loss of any building lots, much less the 8 averred, despite an expert analysis of the impact of the buffer requirement on the site.

## SUMMARY OF REPLY ARGUMENT

I. Smokey Hollow's Nature and Stage of Proceeding offered arguments on the case merits. Smokey Hollow heavily relies on this Court's decision in *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Commission*, but only directs the Court to a portion of the holding. When the entire holding is analyzed in conjunction with the case at bar, the objectionable conditions are reasonable.

II. The Commission submits the Court below erred in reversing the imposition of the contested conditions on approval of Smokey Hollow's cluster subdivision. The Superior Court did not acknowledge prior caselaw recognizing the Commission's degree of discretion in formulating conditions on approval. Smokey Hollow suggested several alternative tests, most of which are inapplicable. The test it suggested to equate a reasonable condition with a test for prohibiting a nuisance benefits the Commission.

III. The Superior Court erred in reversing the Commission's conditional approval of Smokey Hollow's cluster subdivision eliminating one building lot (Lot 64) and requiring a 25 foot fixed buffer between lots and non-tidal wetlands. Lot 64 was eliminated because it was located in an extremely environmentally sensitive area and required wetland disturbance for access, in addition to neighbor's comments. The fixed buffer was to protect the wetlands and surrounding areas.

There is no proof of record the imposition of those buffers negatively impacted Smokey Hollow.

## ARGUMENT

### I. SMOKEY HOLLOW’S NATURE AND STAGE OF PROCEEDINGS CONTAINED ARGUMENT ON THE MERITS REQUIRING RESPONSE

#### A. As Below, Smokey Hollow and the Superior Court failed to address the holding of *Tony Ashburn & Son, Inc. v. Kent Cnty. Regional Planning Commission*<sup>1</sup> in its entirety.

The Nature and Stage of Proceedings required by Supreme Court Rule 14(b)(iii) are typically succinct and objective. In this case the Answering Brief’s Nature and Stage of Proceedings stated arguments going to the merits of the case requiring response.

Foremost is Smokey Hollow’s failure adopted by the Court below, to fully analyze the merits based on the complete holding in *Ashburn*.<sup>2</sup> Smokey Hollow merely cites a portion of the holding, that is, only the portion it believes justifies its position. (*See Answering Brief, p.2*) There is more to *Ashburn* to be considered.

Prior to the statement cited by Smokey Hollow, this Court states:

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>3</sup>

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<sup>1</sup> 962 A.2d 235 (Del. 2008) (*en banc*)

<sup>2</sup> 962 A.2d 235 (Del. 2008) (*en banc*)

<sup>3</sup> *Ashburn at 239*

Importantly, the appeal in *Ashburn* was from a *denial* of the zoning application, unlike the application under review. It is also important to acknowledge the decision was a majority, not unanimous, decision. The dissent was concerned the majority opinion reduced the subject Commission's role to a mere rubberstamp.

To allay that concern, the majority opinion further held:

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.

Thus, *Ashburn* recognizes planning boards have discretion in imposing conditions after considering non-code factors. The goal is to harmonize the subdivision plan with *regional* planning. As in this case, the Commission can consider how Smokey Hollow's application will impact not only the neighbors adjacent to the project, but also the surrounding area. What the Commission cannot do, and did not do here, is deny the application by imposition of conditions. Smokey Hollow received 98.78% (81/82) of the lots it sought, and fixed buffers were limited

to lots adjacent to interior non-tidal wetlands. It received virtually everything it sought. The Commission had a sound basis under the Code, and in fact, in imposing the conditions.

The Court below opined the position of the Commission “proves too much,”<sup>4</sup>. Yet, the Court does not adequately state what is “too much” or what limitations should be imposed when the applicant received substantially all it requested. The Court’s analysis reduces the Commission authority to a rubberstamp contrary to the powers granted the Commission by the County Council, and the *Ashburn* holding.

Smokey Hollow’s Nature and Stage of Proceedings argues that Commission Counsel below agreed at oral argument “... that the plan complies with all of the applicable zoning and subdivision requirements.” (*Answering Brief*, p. 3). That misconstrues the discussion between the Court and counsel, which was:

THE COURT: All right let me start, Mr. Forsten. Is it your position – and I believe it is, but I just want to confirm that the application your client made met all county code requirements?

MR. FORSTEN: Yes.

THE COURT: Mr. Rutt, do you agree with that?

MR. RUTT: The specific code requirements under 99-9C, yes. However, there are other aspects under the

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<sup>4</sup> *Smokey Hollow, LLC v. Sussex County Planning & Zoning Commission, C.A. No. S24A-09-001 CAK (Del. Super., October 1, 2025) Opening Brief Exhibit 1, p. 3.*

law that give the Planning Commission discretion, which I'll get into –

THE COURT: Okay. Yeah, we're going to get – we're going to get that to – that in a minute. But I just want to make sure you agree that the specific requirements of the code were met by this application.

MR. RUTT: The specific requirements, yes.

[A 159-160]

Clearly, any agreement the application complied with the Code requirements was subject to the right of the Commission to impose conditions.

Smokey Hollow also argues that imposition of the two conditions will “wreak substantial harm on Smokey Hollow.” (*Reply Brief*, p. 3) It avers the elimination of Lot 64 was due to complaints by neighboring landowners, failing to acknowledge the Commission's findings that Lot 64 is isolated, is not within the cluster of all other lots, is surrounded by wetland forest, that access to Lot 64 requires destruction of some wetland forest, and that various agencies had advised against destruction of or encroachment on wetlands. This head in the sand denial by Smokey Hollow of undisputed facts does not justify reversing the Commission's conditional approval of the subdivision plan by removal of a lot that clearly is an outlier.

Smokey Hollow claims the condition of the fixed 25 foot buffer between lots and non-tidal wetlands is devastating to its financial pro forma, arguing there is no codified basis for imposing that condition, an argument accepted by the Superior

Court. Both ignore the facts stated in the Reply Statement of Facts. Nothing exists in the record and particularly the expert's report attached to the letter seeking reconsideration supporting an argument the fixed buffer results in a loss of any lots. How can that be unreasonable? It ignores the codification of the ability of the Commission to impose conditions on approval to protect the environment.

Lastly, the argument ignores the *Ashburn* holding that the Commission can impose reasonable conditions for *approval* so long as the conditions do not work a denial of the plan. The *Ashburn* majority which reversed the denial of a plan and not an approval with conditions, actually counters the statement in the Answering Brief that the imposition of conditions in this case represents "... the very danger which this Court sought to prevent in *Ashburn*" (*Answering Brief, p.4*) The danger the *Ashburn* court sought to prevent was a denial based on conditions, not the approval with reasonable conditions.

Smokey Hollow argues if the Commission is allowed to eliminate one lot, how many more may it eliminate if the condition is deemed reasonable? Yet Smokey Hollow argues repeatedly it will lose 8 lots if the buffer condition is affirmed without one shred of evidence that such a loss is true. There is no basis to reverse the condition because a developer thinks it is unreasonable. The Commission is charged with assessing the entire record and if necessary, imposing

conditions that will allow the plan to proceed while also protecting the environment and the public.<sup>5</sup>

Smokey Hollow cites the holding in *Gibson v. Sussex County Council*<sup>6</sup> for the proposition the objection of neighbors is not a reason to deny a zoning application, and that the Commission's decisions cannot be arbitrary and capricious. That case is inapposite to this case. It was decided on an appeal from a denial of an application and not from an approval with conditions. The *Gibson* case came before the Court as a denial of a zoning application by County Council and not a planning decision by the Commission. When the County Council considers a zoning application, it acts in a legislative capacity, but when the Commission reviews a plan, it acts in a ministerial and quasi-judicial capacity to apply the County Code provisions to the plan.<sup>7</sup> The *East Lake* court recognized that in exercising its authority, the Dover Commission had the power to impose conditions on approval to minimize adverse effects on adjoining property owners and the general public considering factors cited in the applicable code.

The Commission applied the provisions of *County Code Section 99-9C* in its application approval.<sup>8</sup> In so doing it imposed reasonable conditions to protect the

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<sup>5</sup> *Sussex County Code § 115-25(F)*

<sup>6</sup> 877 A.2d 54 (Del. Ch., 2005)

<sup>7</sup> *East Lake Partners v. The City of Dover Planning Commission*, 655 A.2d 821, 823-825 (Del. Super., 1994)

<sup>8</sup> A 113

neighboring properties and the general public. The Smokey Hollow site is in an environmentally sensitive area with wetlands on the site as well as the surrounding area. The Commission acted reasonably imposing conditions to protect those resources.

## II. THE SUPERIOR COURT DID NOT CORRECTLY ANALYZE WHETHER THE COMMISSION'S CONDITIONS WERE REASONABLE

### A. The Superior Court did not apply the entire *Ashburn* holding to the conditions on appeal.

The Answering Brief accuses the Commission of failing to present to the Superior Court parameters of what constitutes a “reasonable condition.” (*Answering Brief*, p. 13). The argument alleges the Commission simply stated if the Commission imposes a condition on approval, it is reasonable per se. That is incorrect.

At oral argument the Commission argued to the Court what is a reasonable condition varies case to case.<sup>9</sup> Each application must be reviewed holistically to determine if the site plan meets the criteria of *County Code § 99-9C*, and, in this instance, the standard of a superior design since it is a cluster subdivision. *County Code § 115-25F(3)(a)(1)* requires the homes are to be clustered on the environmentally suitable areas of a site which least encumber sensitive environmental features.

Commission counsel further stated to the Superior Court the Commission pursuant to *Ashburn* had the authority to impose conditions upon consideration of non-Code factors such as agency recommendation, school capacity issues, and public health, safety and welfare issues. *A 188*. Based on an analysis of the record,

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<sup>9</sup> *A 187*

the Commission could impose conditions to harmonize and coordinate the pending site plan with regional planning so long as the conditions did not effectively deny the site plan.

The Court was further directed to the Superior Court decision in *Stillwater Harbor, LLC v. Sussex County Planning & Zoning Commission*,<sup>10</sup> which was affirmed by this Court. A discussion of that case is found in the *Amended Opening Brief at page 25*. The Superior Court's Order held the Sussex County Planning Commission had the authority to impose conditions. Smokey Hollow argues *Stillwater* is not applicable because the application in that case was denied (*Answering Brief p. 17*), but so too were the applications considered in *Ashburn, Gibson* and *East Lake*.

The Superior Court then asked Smokey Hollow's counsel what parameters should be considered in determining whether a condition was reasonable. Counsel suggested the standard should be, "... go along to get along". *A 179*. He further boiled down the criteria to 1) if the developer does not like the condition, it is not reasonable; and 2) if there is a financial impact on the developer it is not reasonable. (*A 183*) No consideration was given to the interest of neighboring property owners

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<sup>10</sup> 2024 WL 3738698 (Del. Super) aff'd 340 A.3d 1132 (Del. 2025) (Table, Text in Westlaw, 2025 WL 1067975)

or the surrounding region. Counsel frankly admitted that since *Ashburn* there has been no caselaw announcing a standard for a reasonable condition. (*A 183*)

It can be surmised the Commission being the entity with “boots on the ground” can better assess conditions on approval to harmonize a site plan with the Code criteria and the surrounding area. However, that was not what the Superior Court felt proper. Instead, the Court adopted the standard espoused by Smokey Hollow to the point the written decision stated virtually verbatim the examples counsel for Smokey Hollow gave at oral argument. Compare comments at *A 182-183* with pages 10 and 11 of the Superior Court decision, *Opening Brief Exhibit 1*.

With those positions in mind, Smokey Hollow now offers its suggestion regarding the analysis to be applied for what is a reasonable condition.

**B. Smokey Hollow incorrectly avers allowing the Commission discretion in imposing conditions creates an unreviewable standard without limits.**

Despite repeated holdings of this and other Delaware courts that the Commission has the discretion to impose reasonable standards on approval of site plans, Smokey Hollow rejects that axiom in favor of no discretion unless approved by the developer. That flies in the face of *Ashburn* relied on so heavily by Smokey

Hollow, as well as the holdings in *East Lake*,<sup>11</sup> and *Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc.*<sup>12</sup>

The Amended Opening Brief reviewed Delaware cases and those in other jurisdictions where conditions were imposed. A summary of the conditions (*Amended Opening Brief, p. 26*) was prefaced by “... a reasonable condition is one that meets some if not all the following:” Smokey Hollow morphed those suggestions for what can be considered a reasonable condition into “a multi-part test of 11 factors ...” It then attacked the factors courts have deemed to be valid criteria for a reasonable condition by calling them “... mushy, unclear, vague ...” (*Answering Brief, p. 19*) It argued adopting any of the suggested criteria will result in allowing the Commission the unbridled discretion to impose conditions that only the Commission deems to be reasonable.

Obvious Smokey Hollow on behalf of itself and similarly situated developers does not want any restrictions placed on site plan approvals. Contrary to the *Ashburn* holdings, Smokey Hollow wants the Commission reduced to a rubberstamp entity. When Smokey Hollow’s position is viewed in total regarding any discretion vested in the Commission, it is clear it is all about the money without any consideration to the public.

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<sup>11</sup> 655 A.2d 821 (*Del. Super., 1994*)

<sup>12</sup> 1997 WL 525860 (*V.C. Steele, Del. Ch., July 22, 1997*)

**C. Smokey Hollow stunningly equates consideration of what is a reasonable condition to Justice Stewart’s Test of what constitutes hard core pornography.**

Smokey Hollow resorted to suggesting a test for a reasonable condition for site plan approval is one espoused by U.S. Supreme Court Justice Potter Stewart in determining what constitutes hard core pornography. Justice Stewart famously wrote he could not give an exact definition of hard core pornography, but “I know it when I see it.”<sup>13</sup> It is difficult to reconcile a test for a reasonable condition on a site plan approval with the intent to protect the public and/or the environment with a test identifying hard core pornography. Smokey Hollow attempted to do so by reducing the “test” to “... don’t do anything ‘too extreme’ in imposing conditions” (*Answering Brief*, p. 22) It then admits such a “test” is not too helpful.

If it is not “too helpful”, why even go there? It only smacks of an element of desperation.

**D. The test posited by Smokey Hollow and adopted by the Superior Court that a reasonable condition is one that is inexpensive and with only a minimal impact ignores the rights of neighboring property owners and the general public.**

As pointed out, Smokey Hollow’s position on what is a reasonable condition is reduced to no financial impact on the developer and one the developer accepts. If

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<sup>13</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion)

a condition violates that standard, Smokey Hollow opines the condition is unreasonable per se.

Smokey Hollow further considers a reasonable condition to be one that can be quickly satisfied without any imposition on the developer's time and wallet. The Commission as a governmental body is by its nature charged with serving and protecting the citizens of Sussex County. The financial impact of a condition imposed on a developer is not a criteria under *County Code 99-9C* the Commission must consider.

**E. Application of the law of nuisance favors the imposition of reasonable conditions to protect adjacent landowners and the public.**

Smokey Hollow argues the law of nuisance is the best guide to determine what's a reasonable condition. It concluded conditions should be imposed only if the development and property use in compliance with a zoning code is likely to create a nuisance. (*Answering Brief*, p. 26) Citing the decision of then Master Glasscock in *Walker v. Williams*,<sup>14</sup> Smokey Hollow concluded the standard to apply is that of a private nuisance, that is, the use to be restricted must be an unreasonable invasion on the rights of adjoining and nearby owners and not the public at large. That ignores the holding in *East Lake*,<sup>15</sup> that states a commission may consider the

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<sup>14</sup> 2016 WL 3569260

<sup>15</sup> 655 A.2d 821 (Del. Super. 1994)

impact on regional planning, and *Ashburn*<sup>16</sup> that allows consideration of agency recommendations, school capacity issues and the health, safety and welfare of the community at large. Thus, a public nuisance analysis is the better guideline. That is, consideration of the public at large.

In the context of the Smokey Hollow site, the Commission's consideration was not solely on the neighbors as argued by Smokey Hollow, but also the wider environmental impacts of the plan. There are 17 acres of non-tidal wetlands on the 70 acre site as well as a tax ditch with a continual flowing stream. It is universally known that water flows and does not stop at the boundaries of a property. Wetlands act like a sponge and like a saturated sponge, water will leak out. The Commission had to consider from the public at large aspect the impact the Smokey Hollow plan would have on not only surrounding neighbors but the entire region. The property is in an environmentally sensitive area not limited to the Smokey Hollow site but a large region that's part of the Delaware coast. What constitutes an offensive use that may be a nuisance is to be measured by a reasonable man standard.<sup>17</sup> That is, what may not be offensive to one person may be to another and the Commission must weigh the conflicting views and if necessary, impose conditions to protect the public. Smokey Hollow stated in its Answering Brief, pp. 25-26, "..... Restrictions are not

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<sup>16</sup> 96 2 A.2d 325 (Del. 2008)

<sup>17</sup> *Fenton v. Longwill*, 1987 WL 19559 at p. 8 (C. Allen, Del. Ch., Nov. 5, 1987)

necessary (or appropriate), except when a particular use *might* create a nuisance ....”

And, “Put another way, ‘reasonable’ conditions should only be imposed when the development and use of a property in accordance with the applicable zoning code *is likely* to create a nuisance.” (*emphasis added*) The Commission opined the site plan under review as filed might and was likely to create a nuisance and thus imposed the conditions under review.

**F. The Superior Court did not correctly apply *Ashburn*.**

For the reasons stated, the Commission firmly believes the Superior Court failed to correctly apply the holdings in *Ashburn*. The Court focused on only one aspect of the holding and did not consider the discretion permitted the Commission in imposing reasonable conditions.

**III. THE TWO CONDITIONS IMPOSED BY THE COMMISSION WERE REASONABLE AND THE SUPERIOR COURT ERRED IN REVERSING THEM.**

**A. The Commission could rightfully eliminate Lot 64 when it was not in keeping with the superior design standard and negatively impacted the environment.**

Smokey Hollow in its Answering Brief continued to lean into the “fact” neighbors objected to the buffers between their properties and Lot 64 as the sole reason the lot was eliminated as a condition of approval. As stated, the Commission’s findings on approval were that Lot 64 was isolated, not part of the clustered parcels, and access to the lot required disturbance of wetlands. Yes, the concern of the neighbors was one factor, but not the sole or even primary factor considered by the Commission. That is evident not only in the initial vote on the application (*A 122-123*) but also on the reconsideration (*A 153*).

Smokey Hollow offered to increase the buffer between Lot 64 and the adjoining neighbors’ lots, but that was not the Commission’s primary concern. Increasing the buffer would not address the impact the lot would have on the wetlands nor cure the fact it was located outside the cluster. Its location violated *County Code § 115-25F(3)(a)(1)* that states:

Homes shall be clustered on the environmentally suitable portions of the tract, specifically those portions 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.

Lot 64 was not in the cluster, its site was environmentally sensitive, there were impacts on wetlands, and the access required not only crossing wetlands but removing mature trees. The fact is, Lot 64 was essentially an upland island surrounded by non-tidal wetlands and not suitable to be developed. The Commission rightfully eliminated it from the site plan when approved.

**B. The Commission as part of its charge to protect the environment imposed a fixed buffer between non-tidal wetlands and the lots.**

Smokey Hollow argues there was no code requirement for interior buffers when the application was filed. That is correct. However, the argument ignores the codified authority of the Commission to place conditions on a site plan approval to protect adjacent properties and the natural environment. *County Code § 115-25 F(4)*. In exercise of that authority, and again considering the entire site and surrounding area, the Commission conditioned approval of the site plan on a 25 foot wide fixed buffer between interior lots and non-tidal wetlands.

Smokey Hollow argues that imposing the fixed interior buffer not only violated the County Code at the time of filing, but is contrary to a subsequent ordinance adopted requiring such a buffer with an average 30 foot dimension. It further argues that requiring such a buffer would result in the loss of 8 lots and require a substantial redrafting of the site plan.

Smokey Hollow at least five times argued the loss of 8 lots (*Answering Brief*, pp., 11, 20, 33 (2x), 34). Yet as previously detailed no proof exists the buffer requirement would result in the loss of any lots. There is no proof the buffer requirement would result in any lots being reduced to less than 7,500 square feet, another condition of approval (*A 121*). There is no evidence of record detailing how many lots would be affected since not all lots in the subdivision are adjacent to non-tidal wetlands. There is simply no proof the imposition of the fixed buffer would have an economic or other impact on the developer, a standard exposed by Smokey Hollow as creating an unreasonable condition per se.

To the contrary, the fixed buffer will protect the non-tidal wetlands from disturbance when the properties are developed. It will protect the wetlands after homes are built and lawns are fertilized. It will assure that the environmental concerns are protected in a reasonable manner. Recall, Smokey Hollow suggested in its discussion of nuisance law that a reasonable condition is one that “might” or “is likely too” alleviate a nuisance. There can be no dispute that the fixed buffer “might” or “is likely too” alleviate negative environmental impacts on the non-tidal wetlands. Thus, applying the nuisance test espoused by Smokey Hollow, the fixed interior buffers adjacent to non-tidal wetlands is a reasonable condition.

## CONCLUSION

For the reasons stated in the Amended Opening Brief and this Reply Brief, the Commission prays this Honorable Court will reverse the ruling of the Superior Court below and reinstate the conditions of the elimination of Lot 64 and the requirement for interior buffers adjacent to the non-tidal wetlands in its approval of the Smokey Hollow cluster subdivision site plan.

Respectfully submitted,

Moore & Rutt, P.A.

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

David N. Rutt, Esq. (#2694)

Ryan T. Adams, Esq. (#6256)

122 W. Market Street

Georgetown, DE 19947

(302) 856-9568

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

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

*Attorney for Appellant*

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