

**DE SUPREME COURT RULES IN FAVOR OF SUBDIVISION IN LAND USE DISPUTE**  
*Commission overstepped authority in denying code compliant application*

**WILMINGTON, Del.** —January 29, 2009 —The National Association of Home Builders (“NAHB”) and the Home Builders Association of Delaware (“HBA/DE”) recently collaborated with landowner Tony Ashburn & Sons, Inc in opposing a decision of the Kent County Regional Planning Commission rejecting Ashburn’s subdivision application despite its compliance with all zoning and subdivision requirements. In a significant land use decision, the Delaware Supreme Court reversed the decision finding that the Commission had exceeded its authority (*Ashburn v. Kent County Regional Planning Commission, et al.*, C.A. No. 68, 2008) and held that a subdivision plan which complies with the requirements of County Code must be approved, subject only to reasonable conditions which the County might also impose.

Ashburn, represented by Richard Forsten of Buchanan Ingersoll & Rooney, P.C., submitted a subdivision application to the Kent County Planning Services. The plan complied with all of the requirements of the Kent County Zoning Code and Comprehensive Plan. Nevertheless, the Kent County Regional Planning Commission voted to deny the application for a number of reasons including the opposition of various State agencies. Ashburn appealed the denial to the Kent County Levy Court and then to the Superior Court, arguing that the Commission lacked the power to deny the application because it complied with the applicable subdivision and zoning code requirements. The Superior Court rejected Ashburn’s arguments expressing its belief that the Commission was vested with discretion under both Delaware and Kent County Codes to reject the plan despite its conformance with all of the applicable legal requirements.

The NAHB and HBA/DE, represented by Douglas Hershman and Scott Wilcox of Bayard, P.A., joined Ashburn in its appeal of the Superior Court to the Delaware Supreme Court. In a majority opinion issued on December 5, 2008, the Delaware Supreme Court found that the Commission must approve Ashburn’s application because it met the requirements of the zoning and subdivision code. The Court, citing to the case of *DiFrancesco v. Mayor and Town Council of Elsmere*, explained that “[w]hen people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and residents.” The Court also stated that “[i]f the Commission is empowered to deny proposals that meet all applicable statutory and Code criteria, purchasers of land would be left unable to predict whether they can develop their land in accordance with the pertinent zoning ordinances, or whether instead the County may prevent development based upon non-Code related ad hoc determinations.”

The Court did not foreclose the Commission’s ability to consider and require Ashburn to comply with the comments of the State agencies. The Court held that “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 health, safety and welfare of the community” but it may not use this power to enlarge its administrative authority to deny a conforming application outright.

Ashburn’s application was referred back to the Commission, where it should be approved with conditions consistent with the comments of the State agencies.

"This case is really a victory for all property owners in Delaware," said Steve Lefebvre, Executive Director of the Homebuilders' Association of Delaware, "who are now assured that the rule of law does prevail in Delaware and that property owners are entitled to use their property in accordance with applicable regulations. I am happy that the Homebuilders' Association was able to support and contribute to this case."

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