IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JNK, LLC, a Delaware limited liability company,	:	C.A. No: 06C-03-066(RBY)
Appellant,	:	
v.	:	
THE KENT COUNTY REGIONAL PLANNING COMMISSION; BILL HOLMES; KEN EDWARDS; DENISE KAERCHER; PHIL SMETANA; JACK MELVIN; PAUL DAVIS, CLIFTON COLEMAN; THE KENT COUNTY LEVY COURT; DAVID R. BURRIS; RONALD D. SMITH; ALLAN F. ANGEL; P. BROOKS BANTA; DONALD A. BLAKEY; RICHARD E. ENNIS; and HAROLD J. PETERMAN,	:	
Appellees.	:	

OPINION AND ORDER
Upon Consideration of an Appeal by JNK to Reverse Kent County Regional Planning Commission's Denial of Preliminary Subdivision Application
REMANDED

Submitted: February 23, 2007
Decided: May 9, 2007

John W. Paradee, Esq., Prickett, Jones & Elliott, Dover, Delaware, on behalf of Appellant.

Daniel A. Griffith, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, on behalf of Appellees.

Young, J.

Before the Court is an appeal by JNK, LLC ("the Appellant") from a decision of the Kent County Levy Court ("the Levy Court") to affirm the Kent County Regional Planning Commission's ("the Commission") denial of a preliminary subdivision application. For the foregoing reasons, the decisions of the Commission and the Levy Court are **REMANDED** for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

The Appellant owns over 342 acres of land located in Little Creek Hundred, Kent County and identified as Tax Parcel #LC-00-038.00-01-10.00-000 and #LC-00-039.00-01-02.00-000 (henceforth, "the Property"). The Property is comprised of land on the north and south sides of Fast Landing Road, approximately 1,500 feet east of East Denneys Road and directly west of the Town of Leipsic. The Property is surrounded by the Leipsic River, its tributaries (most notably the Dyke Branch) and its associated wetlands.

On July 27, 2005, the Appellant filed an application for subdivision plan approval, designated Subdivision Application #SL-05-31, with the Kent County Department of Planning Services ("the Department"). The Appellant sought to subdivide the Property for a development, known as the "The Landings,"[1] with proposed average density of 0.39 unit per acre. At the time of this application, the Property was zoned Agricultural Conservation,[2] and was outside of Kent County's Growth Zone Overlay District.[3]

The Appellant's application included a sketch plan indicating that 132 homes

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[1] The Property was formerly known as the Staats Property Residential Subdivision Project.

[2] Kent County Code ("*KCC*") § 205-49.

[3] *See KCC* § 205-397.2. This statute is not threatened by the recent decision in Farmers for Fairness, et al. v. Kent County, et al., Del. Ch., C.A. No. 2122, Chandler, C.(May 1, 2007) (mem. Op.), for, as the Chancellor noted, the precedential effect of his decision was "only forward looking, and does not threaten past regulations."

would be built on the Property. That is in addition to the 30 homes already under construction along Fast Landing Road pursuant to a previous subdivision application, known as the Snowland Subdivision. By way of comparison, according to the 2000 Census, the Town of Leipsic consists of 89 dwelling units, and has a population of 203.

When the Appellant submitted its subdivision plan approval application, it also attended a preliminary conference, at which it met with State agency planners to discuss its plans for the Property. This discussion took place as part of the Preliminary Land Use Service (PLUS) process.[4] The comments of the State agency planners were mailed to the Appellant in letter format on August 17, 2005. The Appellant replied on November 14, 2005.

Next, the Appellant submitted a preliminary plan of the proposed development of the Property to the Commission. On October 6, 2005, the Commission held a public hearing on the Appellant's preliminary plan. During this hearing, the Commission received testimony from the Appellant regarding several recommendations made by the Department based on the comments elicited as a result of the PLUS review process and the sketch plan provided by the Appellant to the Department.

Of the recommendations discussed, the Commission was most concerned with the Appellant's failure to provide the Department with information regarding the functionality, maintenance and ownership of the community septic system planned for the Property. The Commission was interested in receiving additional information, because community septic technology was new to Kent County. The Commission was concerned about the possibility of a system's failure, and the attendant damage to the environment and cost to the homeowners and the county government, should a failure occur. The Appellant stated it could not provide more detailed information

[4] *See* 29 *Del. C.* 9201, *et seq*.

just 48 hours after it had received the Department's recommendations, suggesting that it would provide more detailed information at the Commission's October 13, 2005 business meeting.

The Commission also took public comment at the meeting. Seven people rose in opposition to the Appellant's application, all of whom lived or had property near the Appellant's proposed subdivision. Many were concerned about the impact that the Appellant's community septic system would have on the Leipsic River, especially given the millions of federal, state and local dollars that were spent to convert the Town of Leipsic from individual on-site septic systems to a public septic system known as the Northeast Sanitary Sewer District. Further, the public expressed concerns about the impact that the Appellant's proposal would have on the surrounding wetlands, given that some of the lot lines encompassed areas which the local residents recognized as wetlands, as neighboring farmland and as the territory of the adjacent Naudain Cemetery. Other comments about the Appellant's application touched on the possibility of flooding on the Property and the size of the Appellant's proposed subdivision, when compared to that of the Town of Leipsic.

On October 13, 2005, the Commission convened a business meeting at which it allowed the Appellant to supplement the record of the public hearing with testimony regarding the community septic system that it proposed to place on the Property, and about which the Commission had requested more information at the October 6 meeting. The Appellant relied on Evan Andrews, an engineer, to provide this additional information. As to the type of community septic system, Mr. Andrews explained that the Appellant's application contemplated the use of a drip-irrigation system that would include aspects of a conventional wastewater plant, which would then slowly drip-irrigate the effluent into the ground for disposal over approximately seven acres of open land on the Property. Mr. Andrews stated that only two or three of these systems have been permitted in Delaware, but several others are now going through the permitting process.

As to the location of the system on the Property, Mr. Andrews admitted that it would be located near the wetland line or flood plain line. Doug Berry, also employed by the Appellant, stated that he did not know how close the system would ultimately come to the wetlands, but that it would never be closer than 100 feet.

As to the ownership of the system, Mr. Andrews stated that it was "anticipated" that the Appellant would contract with a private utility company to take over operation of the community septic system after the completion of the subdivision. According to the proposed anticipation, the homeowners association would not be responsible for the operation or maintenance of the proposed community septic system.

After more questioning by the Commission regarding the community septic system and other issues, a motion to table the Appellant's application pending an archaeological survey of the Naudain Cemetery was placed before the Commission. That motion failed. A motion to table the application pending more information regarding the community septic system and an environmental study was made, but withdrawn. Eventually, the Commission, citing "testimony given", decided by a vote of four to three to deny the Appellant's preliminary subdivision plan based on: the health, safety and welfare of the public; the environmental health, safety and welfare of the Leipsic River; and the lack of information about the proposed community septic system.[5] The next day, on October 14, 2005, the Appellant, pursuant to 9 *Del. C.* § 4811 and *KCC* § 187-85(A), appealed the Commission's decision to the Levy Court.

The Levy Court convened a hearing on the appeal from the Commission's denial of the Appellant's application on February 27, 2006. Following argument by the Appellant and the Commission, the Levy Court deliberated on the appeal in public. By a four to three voice vote, the Levy Court affirmed the Commission's

[5] This determination was memorialized in a letter from the Commission to the Appellant on December 22, 2005.

decision. The four Levy Court Commissioners who voted to affirm the Commission's decision cited, among other things, the lack of information regarding the community septic system in support of their vote to affirm. The dissenting Levy Court Commissioners maintained that the information requested by the Commission was not required at the preliminary plan application stage.

Following the Levy Court's decision, the Appellant invoked 9 *Del. C.* § 4818 and *KCC* § 187-85(C), and appealed to this Court.[6]

DISCUSSION

The Court begins by noting that this appears to be the first disapproval of a subdivision application to reach the Superior Court pursuant to 9 *Del. C.* § 4818. As such, before the Court addresses the merits of the appeal, it is necessary to set out the authority of the Commission and the parameters of the procedure created by the Delaware General Assembly for the review of the Commission's decisions. That requires the Court to turn to the law governing subdivision applications, the Regional Planning Statute ("the Statute"), and the Kent County Code.

I. The Regional Planning Statute, 9 *Del. C.* § 4801, *et seq.*

In the mid-1960s, the General Assembly undertook an overhaul of county government in each of Delaware's three counties.[7] Drastic changes occurred to the north and south with the governments of New Castle and Sussex counties being transformed from the levy court system, which had governed since Delaware's days as a British colony to a new county council based form of government.[8] While Kent

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[6] For future reference, counsel are reminded of their obligations concerning civility, with the suggestion to reduce the rhetorical BTU's. See: *In the Matter of...Richard L. Abbott,* 2007 WL 1295819.

[7] *See* William W. Boyer, Governing Delaware: Policy Problems in the First State 90 (Univ. of Delaware Press 2000).

[8] *See Id.*

County retained its levy court, changes did occur. For the purposes of this appeal, the most pertinent of those changes was the creation of the Regional Planning Commission.

A. The Commission Is Vested With Police Power and With Discretion in Assessing a Preliminary Subdivision Plat.

The Commission is an administrative agency of the Levy Court,[9] created by the General Assembly to "promot[e] health, safety, prosperity, and general welfare, as well as . . . [to] secur[e] coordinated plans for . . . improvements and utilities . . . in that portion of Kent County which is not included within the corporate limits of any city or town [in the county]."[10] By this act, the General Assembly provided for local control of land subdivision in the unincorporated portions of Kent County. In so doing, the General Assembly vested a portion of its police power in the Commission. In this manner, the Statute serves as the enabling act, empowering the Commission to enact regulations governing the subdivision of land in the County.[11] Furthermore, the Commission uses this grant (which is notably a grant of police power, not merely ministerial obligations) in part, to "review and render decisions on all applications for either preliminary or final approval of subdivision and/or land development plans."[12]

In undertaking its assigned duties, the power exercised by the Commission is largely administrative. Indeed, at least one treatise has stated that if "the plat conforms to the requirements of the regulations, it must be approved."[13] However,

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[9] *KCC* § 187-12.

[10] 9 *Del. C.* § 4802.

[11] *See* 9 *Del. C.* § 4811(d) ("Every such plat shall be prepared upon cloth of such size and character, with such notations, information and markings, and accompanied by such data and information as the Commission may, *by regulation* prescribe . . . .").

[12] *KCC* § 187-12.

[13] 5 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 90:5 ("The function performed by the planning board or other approving authority in respect to plat approval is considered administrative.").

that does not mean the Commission exists merely to rubberstamp every application that comes before it. The Commission necessarily must possess some quasi-judicial power, "since subdivision control involves the specific application of the applicable general standards to the particular facts of a proposed subdivision."[14] Thus, the Commission's possession of this quasi-judicial power means that it transcends a merely ministerial role. It is vested with limited discretion.

B. The General Assembly Established an Appellate Procedure for Review of the Decisions of the Commission.

Once a preliminary subdivision plat has been submitted, the Commission may, in its discretion, determine that the plat must be approved, conditionally approved, denied or tabled.[15] The Statute provides that, following the Commission's recordation of its decision, any approval or disapproval may be appealed to the Levy Court within 30 days.[16] The Levy Court may then affirm or deny, in whole or in part, the decision of the Commission, or remand the matter for further proceedings.[17] The appellate determination of the Levy Court is then appealable to the Superior Court of Kent County.[18] The plain language of the Statute indicates that the General Assembly intended the foregoing provisions to create a two-tiered appellate procedure for reviewing the subdivision decisions of the Commission. This procedure is unique to Kent County, in that it provides a statutory right to a direct appeal to the Kent County Superior Court of the County's subdivision decision; whereas, a writ of certiorari is needed for the Superior Court to review subdivision decisions made by the New

[14] *Id.*

[15] 9 *Del. C.* § 4811.

[16] *Id.*

[17] *Id.*

[18] 9 *Del. C.* § 4818.

Castle and Sussex county governments.[19]

Thus, the Appellant properly invoked the Court's appellate jurisdiction by filing its Notice of Appeal. However, at the same time, the Appellant also requested a writ of mandamus and declaratory judgment, and set out a litany of counts as if this were also a civil complaint. The "complaint" portion of the Appellant's Notice of Appeal alleges the following counts against the Commission, the Levy Court, and the individual members of these governmental bodies: (1) violation of the Delaware Freedom of Information Act ("FOIA"); (2) unlawful deprivation of the Appellant's vested rights; (3) equitable estoppel of the Appellees' decision to deny the Appellant's subdivision plan application; (4) doctrines of *res judicata* and collateral estoppel prevent the Appellees from denying the Appellant's subdivision plan application;[20] (5) denial of the Appellant's procedural due process rights; (6) denial of the Appellant's substantive due process rights; (7) denial of the Appellant's equal protection rights; (8) demand for attorneys' fees; and (9) claims of personal liability against the individual members of the Commission and the Levy Court. When the Court was presented with the Appellees' Motion to Dismiss these counts for failure to state a claim for which relief could be granted, pursuant to Superior Court Civil Rule 12(b)(6), the Court stated that such a motion was premature, because a civil action cannot be contemplated until the Appellant exhausts or abandons its administrative remedies, which include an appeal to this Court.[21] At this point, the Court's attention is directed toward fulling the administrative remedy provided by the Statute, of which the Appellant continues to avail itself.

C. Appellate Review Is to Be on the Record.

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[19] *Hundley v. O'Donnell*, 1998 WL 842293, at *3, n. 7 (Del. Ch.).

[20] The Appellant has since conceded that the doctrines of *res judicata* and equitable estoppel are, in fact, not applicable.

[21] *JNK, LLC v. The Kent County Regional Planning Commission, et al.*, Del. Super., C.A. No. 06C-03-066, Young, J. (December 11, 2006) (Letter Op.).

When the Commission exercises its quasi-judicial powers to deny a subdivision application it must state "the grounds" for the disapproval "upon the records of the Commission and a copy of such statement shall be furnished to the applicant."[22] As stated previously, if a subdivision application is denied, the Statute provides the applicant with a right to appeal the Commission's decision to the Levy Court. The clear and unambiguous language of these provisions indicates that the Levy Court is to preside over an appeal on the record, especially since the Statute does not empower the Levy Court to make a new determination based on facts not submitted to the Commission.[23]

As the Commission must state the "grounds" for its decision, when the Levy Court hears an appeal from the Commission, it too must provide its reasoning. According to the Statute, the Levy Court is to provide its reasoning in a "written decision . . , which . . . shall set forth the legal and factual basis for the refusal of the county government to permit the recording of the plat in the manner requested."[24] The reason for such a requirement is that the appellate process is not complete, since an aggrieved applicant has a statutory right to a direct appeal to this Court.

D. The Standard of Review

While the General Assembly has created an appellate procedure, it has not provided an appellate standard. Because this Court has concluded that the Commission is an administrative agency vested with discretionary, quasi-judicial powers, the Court holds that, when the Levy Court reviews a decision of the Commission, it must abide by the appellate standards established for the review of administrative action. Generally, these standards provide that, in reviewing the

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[22] 9 *Del. C.* § 4811.

[23] *See* 9 *Del. C.* § 4811 ("Any approval or disapproval, after its recordation by the Commission, may be appealed to the county govemment within 30 days.").

[24] 9 *Del. C.* § 4818.

administrative action of a planning commission, a reviewing tribunal must look to the record to inquire as to whether substantial evidence exists to justify the planning commission's action.[25] In addition, the planning commission bears the responsibility for stating the reasons for the action taken.[26]

Both of these general statements are in keeping with settled Delaware law on appellate review of an administrative decision.[27] Thus, this Court holds that the scope of review on appeal to the Levy Court from a decision of the Commission is limited to the correction of errors of law and to the determination of whether or not substantial evidence exists on the record to support the Commission's findings of fact and conclusions of law. Our courts have consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[28] In addition, substantial evidence is "more than a scintilla but less than a preponderance."[29] On appeal, a reviewing tribunal does not have the "authority to weigh evidence, determine the credibility of witnesses or make independent factual findings."[30] If the Commission's decision is supported by substantial evidence, the

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[25] 2 James A. Kushner, *Subdivision Law and Growth Management*, § 8.10[1].

[26] *Id*. ("The court will confine review to the reasons for the action taken by the planning commission . . , and will inquire whether the action taken was arbitrary, capricious, or otherwise not in conformity with the law.").

[27] *See Reeves v. Conmac Sec.*, 2006 WL 496136, at *3 (Del. Super. 2006) ("The Delaware Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency. The function of the reviewing Court is limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law, and is free from legal error."); *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, at *2 (Del. 2004) ("It is settled law that a quasi-judicial tribunal must state the basis for its decision, in order to allow judicial review.").

[28] *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981) (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

[29] *Id*. (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

[30] *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

Levy Court "must affirm the ruling unless it identifies an abuse of discretion or a clear error of law."[31] Questions of law are reviewed *de novo*.[32] When the applicant appeals the determination of the Levy Court, the Superior Court replicates the role of the Levy Court and reviews the Commission's decision in the manner discussed above.[33]

II. The Merits of the Appeal

The Court finds that, despite the Parties' arguments to the contrary, its appellate function is stymied by the failure of the Commission to elucidate its reasons for denying the Appellant's application. Therefore, the Court cannot reach the merits of the appeal.

Following the two hearings on the Appellant's application, the Commission discussed the application and offered two failed motions before settling on a motion to deny the application. The commissioner who proposed that the Commission deny the application stated that "there appears to be an issue with health, safety and welfare of the public; the environmental health, safety and welfare of the Leipsic River; and the potential of the unknown drip system which has been presented."[34] While this language generally references the Commission's inherent police powers, it lacks any reference to specific facts adduced at the hearings or specific legal provisions within the Statute or the Kent County Code that would support the Commission's

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[31] *Bolden v. Kraft Foods*, 2005 WL 3526324 , at *2 (Del. 2005) (citing *DiGiacomo v. Bd. of Public Educ.*, 507 A.2d 542, 546 (Del. 1986)).

[32] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (citing *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)).

[33] *Johnson Controls, Inc. v. Fields* 758 A.2d 506, 509 (Del. 2000) (When presented with an appeal from the Industrial Accident Board, the Delaware Supreme Court has stated that it is to replicate the role of the Superior Court and review "the Board's decision to determine whether its factual findings are supported by substantial evidence.").

[34] By a vote of four to three this motion became the Commission's determination on the Appellant's application.

determination on the Appellant's subdivision application. Without such references, this Court is unable to undertake its appellate function to determine whether or not substantial evidence exists on the record to support the Commission's findings of fact and conclusions of law.[35]

While no Delaware case law directly controls the sufficiency of the record for appellate review in cases of preliminary subdivision applications, Delaware case law on the topic in zoning cases, and New Jersey case law on the topic in preliminary subdivision applications, is instructive. Our courts are often forgiving when it comes to the sufficiency of the record on appeal. However, they are also clear that, in the realm of zoning determinations, the material serving as the basis for the decision of the lower tribunal must enable the reviewing court to perform its appellate function effectively.[36]

Moreover, when the New Jersey Superior Court, Appellate Division, in *Pizzo Mantin Group v. Township of Randolph*,[37] faced a situation similar to the one confronting this Court, in the case *sub judice*, it concluded that the Planning Board's decision denying a preliminary subdivision application was insufficient for proper

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[35] By implication, the Levy Court could not have exercised its review authority since the Commission's decision was insufficient at that stage in the appellate process as well.

[36] *See New Castle County Council v. BC Development Associates*, 567 A.2d 1271, 1276 (Del. 1989) (The Supreme Court stated that "[w]hen [New Castle County] Council makes a rezoning decision without establishing the basis for its action, it thwarts the ability of a court to provide effective review." Furthermore, when the Council "simply 'creates a record' and relies upon that record to justify its decision, the record must prove to be an adequate substitute for a more formal explanation. Thus, Council's reasons must be clear from the record. If several possible explanations for a given decision appear on the record, the reviewing court must not be left to speculate as to which evidential basis Council favored."). *See also*, *Kwik-Check Realty Co., Inc. v. Bd. of Adjustment of New Castle County*, 369 A.2d 694, 699 (Del. Super. 1977), *aff'd*, *Bd. of Adjustment, New Castle County v. Kwik-Check Realty Co., Inc.*, 389 A.2d 1289 (Del. 1978) ("The Board must particularize in terms of findings of fact, as well as conclusions of law, to enable this Court, in the exercise of its function of appellate review, to determine if substantial evidence supports such findings.").

[37] 618 A.2d 676 (N.J. Super. A.D. 1993).

appellate review.[38] In that case, the local planning board had held that the subdivision site "present[ed] a variety of severe environmental constraints which the proposal [did] not adequately accommodate" and denied the preliminary subdivision application.[39] Specifically, the Planning Board denied the application because it was concerned: (1) that a significant portion of the tract contained slopes exceeding 25 percent; (2) that the design would require the removal of significant amounts of soil that would cause erosion; (3) that the "wetlands-averaging waiver" sought from the New Jersey Department of Environmental Protection and Energy would not be adequate to meet local concerns; (4) that the steep slopes accompanied by the soil removal would "cause a major environmental impact upon the general area, and particularly upon . . . two trout streams;" and (5) that "the proposed loop roadway would result in an 'inappropriate traffic flow' and would not promote the public safety because it would be constructed upon the 'most steeply sloped and environmentally sensitive areas of the site.'"[40]

The *Pizzo Mantin Group* Court reversed the Planning Board's determination, remanding the matter so that the Planning Board could make its determination on the subdivision application "in context of standards encompassed in the subdivision and, if pertinent, the zoning ordinance," rather than based on reference to the general police power based purposes of the enabling act.[41] On appeal, the New Jersey Supreme Court affirmed the substantive reasoning of the Superior Court,[42] but held that the matter should be remanded to the Superior Court's Trial Division to

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[38] *Id*. at 680.

[39] *Id*. at 678.

[40] *Id*.

[41] *Id*. at 680.

[42] *Pizzo Mantin Group v. Township of Randolph*, 645 A.2d 89, 97 (N.J. 1994).

undertake the analysis requested by the Appellate Division.[43]

In the case at bar, this Court, like the *Pizzo Mantin Group* Court, has found that the Commission's determination, while certainly implicating the Commission's statutorily derived police power concern for the "health, safety, prosperity, and general welfare" of the people of Kent County, lacks the factual and legal specificity required for appellate review. Furthermore, the Appellees' own briefing demonstrates that the Commission's decision lacks the specificity required for this Court to perform its duty, for the Appellees' brief contains numerous speculative factual and legal reasons justifying the Commission's decision, all of which go beyond the Commission's stated reason for denial. Accordingly, the Court cannot form an opinion as to the propriety of the decision. Put another way, as the arguments for affirmance made by the Appellees' counsel both at the Levy Court and here were based on reasoning other than that expressed by the Commission, this Court views these arguments as post-hoc rationalizations. As such, this Court cannot accept them as the basis for upholding the Commission's action.[44] Just as the Court will not attempt to divine meaning from the Commission's statement, neither will it accept attempts at the same by counsel. Rather, the review would be based on articulated reasoning by the Commission itself.[45] Thus, the Commission's decision must make reference to subdivision regulations, and any other pertinent regulations that will serve to guide the Commission's discretion and thereby prevent ad-hoc decision-making. Therefore, as the Commission's decision has not met that requirement based on the aforementioned Delaware zoning case law and persuasive New Jersey

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[43] *Id.*

[44] *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168-169 (1962) (citing *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

[45] *Id.*

subdivision case law, remand to the Commission is called for.[46]

On remand, a new review of the Appellant's application should be made by the Department; the Commission should hold the required hearings; and then the Commission should make factual and legal findings, with an eye toward specific provisions of the Kent County Code, which should be cited in the Commission's final determination.[47] When the Commission makes its decision based on the regulations, it must base its decision on those regulations plainly applicable at the preliminary plan stage. That would be that when the Commission acts, it take steps to ensure that its decision is sufficiently specific to be subjected to judicial scrutiny of this Court.

In the determination currently before this Court, the Commission expressed concern with the Appellant's decision to use a community septic system in an area the Commission has deemed ecologically sensitive. In ordering remand, the Court is not reversing the Commission's concern regarding the proposed community septic system. Rather, as stated previously, remand is necessary so that the Commission can make its determination based on the subdivision regulations, the zoning regulations and any other pertinent regulations contained within the *KCC*. In so doing, the Court notes that the applicable regulations are those that were in force at the time the Appellant originally submitted its application to the Department.

Based on the copy of the *KCC* submitted to this Court, one such pertinent provision of the zoning regulations that should be analyzed by the Department and/or the Commission is *KCC* § 205-49. According to this provision, in an area zoned Agricultural Conservation, "village development" may be permitted at a density of one unit per acre, but only if the property has individual on-site septic and water.

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[46] Remand to the Commission is required in this case because the Commission, rather than the Court, possesses the expertise necessary to make findings as to the applicable *KCC* provisions.

[47] The Court notes that a second PLUS review is unnecessary given the fact that the concerns expressed by the State agencies are not based on Kent County's subdivision and zoning regulations.

Additionally, the Commission could also consider *KCC* § 187-53(D), which provides the requirements for sanitary sewerage facilities for subdivisions. Subsection 10 states that such facilities shall be required in accordance with Table X-2. The Table applies its sanitary sewerage facilities requirements based on the location of the subdivision and the number of proposed lots. The seemingly pertinent portion of the Table provides that all subdivisions located outside of the growth zone and designated low density are required to have individual on-site septic systems, and that subdivisions with 51 or more proposed lots are required to have such septic systems in conjunction with a density of one dwelling unit per four acres with a +/- 25% variation in lot size. That is in contrast to similarly situated proposed developments inside the growth zone and outside the growth zone, but not designated low density, which are, apparently, allowed multiple sewer options.[48]

III. Conclusion

Accordingly, this matter is **REMANDED** to the Commission for proceedings consistent with this opinion. Jurisdiction is not retained.

SO ORDERED.

/s/ Robert B. Young
J.

RBY/sal
oc: Prothonotary
cc: Opinion Distribution

[48] The Department and/or the Commission should also refer to the guidelines for interpreting subdivision regulations contained within *KCC* § 187-11(C).