

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

SUSSEX COUNTY, a political subdivision : C.A. No. S08C-11-032 THG
of the State of Delaware,

Plaintiffs,

v.

THE DELAWARE DEPARTMENT OF :
NATURAL RESOURCES & :
ENVIRONMENTAL CONTROL, :
an agency of the State of Delaware,

Defendants

- AND -

WHITE FARM, LLC, a Delaware Limited :
Liability Company; BAR-SGR, LLC, a :
Delaware Limited Liability Company; :
BAR-RAB, LLC, a Delaware Limited Liability :
Company; WAYNE BAKER, LLC, :
a Delaware Limited Liability Company; and :
BAXTER FARMS, INC., a Delaware :
Corporation,

Plaintiffs,

v.

THE DELAWARE DEPARTMENT OF :
NATURAL RESOURCES & :
ENVIRONMENTAL CONTROL, :
an agency of the State of Delaware,

Defendants.

MEMORANDUM OPINION

DATE SUBMITTED: November 23, 2010

DATE DECIDED: February 25, 2011

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Graves, J.

Sussex County (“the County”), private landowners collectively referred to as White Farm,¹ and Delaware’s Department of Natural Resources and Environmental Control (“DNREC” or “the Department”) are before this Court, pursuant to 29 *Del. C.* § 10141,² seeking a declaration regarding the lawfulness of Regulations Governing the Pollution Control Strategy for the Indian River, Indian River Bay, Rehoboth Bay and Little Assawoman Bay Watersheds” (“the PCS Regulations”). The ultimate question is whether Delaware’s General Assembly has granted DNREC the authority to implement regulations which create zoning laws regarding the land in the referenced watersheds. This is my decision answering that question in the negative.

1) FACTUAL AND PROCEDURAL BACKGROUND

The pertinent portions of the PCS Regulations are attached hereto as Appendix A. As the Secretary of DNREC explained in his October 15, 2008 Order adopting the PCS Regulations (“Secretary’s Order”), the PCS Regulations contain three main components:

- 1) a requirement for performance standards for new or replacement onsite wastewater treatment and disposal systems that reflect improvements in the treatment technology and a requirement for improved maintenance of all systems,
- 2) inclusion of criteria in sediment and stormwater plans to reduce nutrients in stormwater runoff, and
- 3) **a requirement that any new major land development include a riparian buffer area to reduce the nitrogen and phosphorous pollution from stormwater runoff and groundwater flows into certain designated Inland Bays’ waters within the watershed. This buffer area is to be maintained to allow the land to act as a natural filter and absorb the nitrogen and phosphorous pollution before they enter the waters and pollute**

¹The private landowners are White Farm, LLC; BAR-SGR, LLC; BAR-RAB, LLC; Wayne Baker, LLC; and Baxter Farms, Inc.

²The parties have dismissed other causes of actions so that the only issue before the Court is the lawfulness of the regulations under review. In 29 *Del. C.* § 10141(a), it is provided:

Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief.

the Inland Bays. [Emphasis added.]

Secretary's Order at 6.

The first paragraph of the Secretary's Order specifies the source of his authority for issuing this order: "Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ... under 29 *Del. C.* §§ 8001 *et seq.* [sic], 29 *Del. C.* §§ 10111 *et seq.* and 7 *Del. C.* § 6010(a), the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding." *Id.* at 1.

Because that authority is central to this decision, I address the substance of those citations.

The first citation references the entire chapter 80 of 29 *Del. C.* This chapter establishes the Department, sets forth the powers, duties and functions of the Secretary, and organizes the various divisions of the DNREC. Nothing in this chapter specifically grants the Secretary the power to promulgate regulations which address the utilization and use of land within the inland bays watersheds.

The second citation is 29 *Del. C.* §§ 10111, *et seq.* This chapter addresses the procedures for adopting agency regulations. Obviously, none of those statutes provide any zoning authority.

The final citation is 7 *Del. C.* § 6010(a). That provision states:

The Secretary may adopt, amend, modify or repeal rules and regulations, or plans, after public hearing, to effectuate the policy and purposes of this chapter. No such rule or regulation shall extend, modify or conflict with any law of this State or the reasonable implications thereof.

The policy and purposes of the chapter are set forth in § 6001(b) and (c), where it is provided:

(b) *Policy.* – In view of the rapid growth of population, agriculture, industry and other economic activities, the land, water and air resources of the State must be protected, conserved and controlled to assure their reasonable and beneficial use in the interest of the people of the State. Therefore, it is the policy of this State that:

(1) The development, utilization and control of all the land, water, underwater and air resources shall be directed to make the maximum contribution to the public benefit; and

(2) The State, in the exercise of its sovereign power, acting through the Department should control the development and use of the land, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State.

(c) *Purpose.* – It is the purpose of this chapter to effectuate state policy by providing for:

(1) A program for the management of the land, water, underwater and air resources of the State so directed as to make the maximum contribution to the interests of the people of this State;

(2) A program for the control of pollution of the land, water, underwater and air resources of the State to protect the public health, safety and welfare;

(3) A program for the protection and conservation of the land, water, underwater and air resources of the State, for public recreational purposes, and for the conservation of wildlife and aquatic life;

(4) A program for conducting and fostering research and development in order to encourage maximum utilization of the land, water, underwater and air resources of the State;

(5) A program for cooperating with federal, interstate, state, local governmental agencies and utilities in the development and utilization of land, water, underwater and air resources;

(6) A program for improved solid waste storage, collection, transportation, processing and disposal by providing that such activities may henceforth be conducted only in an environmentally acceptable manner pursuant to a permit obtained from the Department.

Within his order, the Secretary goes into more detail regarding the foundations for issuing the regulations. The first foundation consists of “the federal and state statutory regulatory authority.” *Id.* at 2. The federal authority he references is the Clean Water Act (“CWA”). The

State authority invoked is DNREC's "statutory authority to protect Delaware's waters from pollution by the issuance of permits and the promulgation of regulations. 7 Del. C. Chap. 60."

Id. The second foundation to which the Secretary cites is "the Department's exercise of its federal authority under Section 303(b) of the CWA to study Delaware's waters, to classify each of them into their appropriate uses, and to establish 'Surface Water Quality Standards' based upon each classification." *Id.* The third and fourth building blocks are not truly sources of power. The third is a study showing that Delaware's waters are not sufficiently clean. The fourth is a previously-issued set of regulations addressing the amount of nitrogen and pollution the Inland Bays can receive and continue to be deemed "exceptional waters."

The regulations themselves reference their authority. In section 1.1, it is provided:

1.1 These Regulations are adopted by the Secretary of the Department of Natural Resources and Environmental Control under and pursuant to the authority set forth in 7 Del. C. Ch. 40, 60, 66, 70, 72, and in 29 Del. C. §§ 8014(5) and 8025.

Chapter 60 of 7 Del. C. as well as the provisions of Title 29 were addressed above. Chapter 40 of Title 7 pertains to erosion and sedimentation control. Chapter 66 deals with wetlands. Chapter 70 addresses the development of industry in the coastal zones. Chapter 72 deals with subaqueous lands. Again, there is nothing in any of those statutory provisions which grant DNREC the power to zone the areas in questions.

To clarify from the start and to short-circuit a meritless argument, I conclude no federal statute or regulation gives DNREC the power it exercised here. Thus, the only issue examined in this decision is whether Delaware's General Assembly has granted DNREC the power to issue regulations directing land use and utilization in Sussex County's inland bays watersheds.

DNREC's zoning actions in the PCS Regulations, which have no specific statutory authorization, directly conflict³ with Sussex County's Zoning Ordinance § 115-193. This zoning ordinance is set forth in full in Appendix B. DNREC's entry into the zoning arena, where the County has full authority, has brought this dispute to a head.

As explained in White Farm's Brief in Support of Plaintiff's Motion for Summary Judgment at 5, the impact on landowners is as follows:

Under the PCS, up to approximately ten thousand acres of land in Sussex County would be set aside as a buffers [sic] under maximum 'buildout.' The activities within buffer areas are significantly limited. The PCS prohibits any portion of a buffer being contained on a residential lot, and requires that all lots in a residential subdivision sit outside of the buffers created by the Regulation. § 4.5. The only uses allowed without a variance are flood control structures, utility easements, stormwater practices with the furthest 25 feet, unpaved single-track trails or footpaths, and permitted road crossings. § 4.10.

The County argues that the PCS Regulations attempt to usurp its authority by making the width of the buffer zone 100 feet rather than 50 feet and by attempting "to dictate what vegetation is to be placed in the zone." Opening Brief of Plaintiff, Sussex County, in Support of Its Motion for Summary Judgment at 25. In its Combined Answering Brief and Reply Brief at 6, the County expands its argument:

It is not merely the width of the buffer (100 feet by DNREC and 50 feet by the County) [that poses a problem], but the PCS Regulations change the terminology, extends DNREC's reach to waterways not previously regulated, changes requirements for building lot lines, site plans and maintenance of the buffers. ... Further, DNREC's PCS Regulations attempt to control tax ditches which are

³DNREC, citing to *Cantinca v. Fontana*, 884 A.2d 468 (Del. 2005), argues there is no conflict since it and the County have a similar objective: to limit development in the inland bays watersheds. Basically, DNREC's argument is that so long as everyone complies with **its** regulations, there is no conflict. DNREC ignores the fact that if the County's regulations are followed, then DNREC's objective to prohibit development in specified areas is not met. There is a conflict here in every sense of the word.

clearly statutory creations with their own governance procedures....

2) QUESTION OF LAW AND STANDARD OF REVIEW

To reiterate, the question presented is whether DNREC has the authority to zone the lands in question.

In 29 *Del. C.* § 10141(e), it is provided:

(e) Upon review of regulatory action, the agency action shall be presumed to be valid and the complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner and that the complainant suffered prejudice thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful. The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted.

This Court has the authority to review questions of law when reviewing decisions of administrative agencies and boards. *Holowka v. New Castle County Board of Adjustment*, 2003 WL 21001026, *3 (Del. Super. April 15, 2003). Questions of law are reviewed *de novo*. *Id.* The statutory interpretation of zoning ordinances is a question of law and the reviewing court does not defer to the agency's interpretation of a statute. *Id.* Also constituting questions of law which the Court is to review *de novo* are "[i]ssues of subject matter jurisdiction." *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007).

Thus, the review is *de novo* because the issue requires consideration of DNREC's jurisdiction as well as statutory interpretation.

3) DISCUSSION

The PCS Regulations, in establishing buffer zones and in regulating the use and utilization of land, constitute zoning. *Farmers v. Fairness v. Kent County*, 2007 WL 1413247

(Del. Ch. May 1, 2007); *rearg. den.*, 2007 WL 1651931 (Del. Ch. May 25, 2007), *aff'd*, 940 A.2d 945, 2007 WL 4941961 (Del. 2007) (TABLE).

The power to zone resides within the General Assembly, i.e., the County has no inherent zoning authority. *New Castle County Council v. BC Development Associates*, 567 A.2d 1271, 1275 (Del. 1989); *Green v. County Council of Sussex County*, 508 A.2d 882, 889 (Del. Ch. 1986), *aff'd*, 516 A.2d 480 (Del. 1986). However, pursuant to Article II, Section 25 of the Delaware Constitution of 1897,⁴ the General Assembly is authorized to delegate this power to the counties and municipalities. The General Assembly did so by statutes: 9 *Del. C.*, ch. 69 (Sussex County); 9 *Del. C.*, ch. 26 (New Castle County); 9 *Del. C.*, ch. 49 (Kent County); and 22 *Del. C.*, ch. 3 (municipalities). *Accord Dukes v. Shell Oil Company*, 177 A.2d 785, 790 (Del. Ch. 1962) (“The legislative power is one which may be delegated to a municipal or other governing body. And, when the local authority acts in accordance with the powers conferred, it does so in its legislative capacity.”) Some of the pertinent statutes delegating this zoning power to Sussex County are 9 *Del. C.* § 7001, the Home Rule statute;⁵ 9 *Del. C.* § 6902;⁶ and 9 *Del. C.* § 6904.⁷

⁴In Del. Const., Art. II, § 25 (1897), it is provided:

The General Assembly may enact laws under which municipalities and the County of Sussex and the County of Kent and the County of New Castle may adopt zoning ordinances, laws or rules limiting and restricting to specified districts and regulating therein buildings and structures according to their construction and the nature and extent of their use, as well as the use to be made of land in such districts for other than agricultural purposes; and the exercise of such authority shall be deemed to be within the police power of the State.

⁵In 9 *Del. C.* § 7001, it is provided in pertinent part as follows:

(a) *General powers.* – The government of Sussex County, as established by this chapter, shall assume and have all powers which, under the Constitution of the State, it would be competent for the General Assembly to grant by specific

enumeration, and which are not denied by statute; including, but not limited to, any powers conferred prior to the effective date of this act by the General Assembly upon Sussex County, ... or upon the officers or employees of Sussex County, or upon counties generally, ... or upon County Councils generally. ***

(b) *Construction.* – The powers of Sussex County under this reorganization law shall be construed liberally in favor of the County, and specific mention of particular powers in the reorganization law shall not be construed as limiting in any way the general powers stated in subsection (a) of this section.

(d) *Exercise of powers.* – All powers of the government of Sussex County shall be carried into execution as provided by this title or by other law of this State or if this title or other law of this State makes no such provision, as provided by ordinance or resolution of the county government of Sussex County.

⁶In 9 *Del. C.* § 6902(a), which speaks to the power and jurisdiction of Sussex County, it is provided in pertinent part as follows:

The county government may, in accordance with the conditions and procedure specified in this subchapter, regulate the location, height, bulk and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density and distribution of population, the location and uses of buildings and structures for trade, industry, residence, recreation, public activities or other purposes and the uses of land for trade, industry, residence, recreation, public activities, water supply conservation, soil conservation or other similar purposes, in that portion of Sussex County which is not included within the corporate limits of any city or town, unless any territory within such corporate limits is included upon request made by the governing body or authority of such city or town, notwithstanding any provision or other titles or chapters of this Code to the contrary. Any real property proposed to be used for an agritourism activity as defined in this title shall be given an expedited review before the County Council.

⁷In 9 *Del. C.* § 6904(a), it is provided as follows:

Regulations adopted by the county government, pursuant to the provisions of this subchapter, shall be in accordance with the approved comprehensive development plan and shall be designated and adopted for the purpose of promoting the health, safety, morale, convenience, order, prosperity or welfare of the present and future inhabitants of Sussex County, including, amongst other things, the lessening of congestion in the streets or roads or reducing the waste of excessive amounts of roads, securing safety from fire, flood, and other dangers,

The General Assembly also enacted The Quality of Life Act of 1988, which appears at 9 *Del. C.* § 6951, *et seq.* The purpose of that act was to emphasize and promote the county governments' "establishment and implementation of comprehensive planning programs to guide and control future development." 9 *Del. C.* § 6951(a). The County and the State agencies, including DNREC, were directed to cooperate in developing the comprehensive growth plan. 9 *Del. C.* § 6951(b). The Comprehensive Land Use Plan has been adopted and zoning regulations thereafter adopted must fit in with the plan. *Green v. County Council of Sussex County*, 508 A.2d at 890. As will be examined in more detail below, DNREC must go through Sussex County and its Comprehensive Land Use Plan to have some environmental zoning laws enacted. 7 *Del. C.*, ch. 75.

In delegating these powers by statute, the State thereby has granted the counties broad authority to zone. *New Castle County Council v. BC Development Associates*, 567 A.2d at 1275; *Farmers for Fairness v. Kent County*, *supra*, 2007 WL 1413247, *5. In fact, as stated in *Hayward v. Gaston*, 542 A.2d 760, 766 (Del. 1988):

The General Assembly through grants of home rule **has ceded** primary responsibility for land use control to county and municipal governments. *See, e.g.*, 9 *Del. C.* §§ 2601, 4901, 6902; 22 *Del. C.* § 301.

In this delegation of its power over land use, the General Assembly, in effect, has **surrendered** that incident of its sovereignty to subordinate governmental entities. Thus, the counties, as well as departments of State government, can also

providing adequate light and air, preventing on the one hand excessive concentration of population and on the other hand excessive and wasteful scattering of population or settlement, promoting such distribution of population and such classification of land uses and distribution of land development and utilization as will tend to facilitate and provide adequate provisions for public requirements, transportation, water flowage, water supply, water and air pollution abatement, drainage, sanitation, education opportunities, recreation, soil fertility, food supply, protection of the tax base, securing economy in governmental expenditures, fostering the State's agricultural and other industries, and the protection of both urban and nonurban development.

claim to be agents of the State in the discharge of the sovereign's power to regulate land use. [Emphasis added.]

The limitations on this authority are that “the power may only be exercised to adopt or amend regulations that are in accordance with the ‘approved’ (§ 6904), ‘adopted’ (§6907) comprehensive development plan.” *Green v. County Council of Sussex County*, 508 A.2d at 889.

The zoning regulations which a County enacts are state law, contrary to DNREC's contentions. *New Castle County Council v. BC Development Associates*, 567 A.2d at 1275 (“When Council considers a zoning ordinance, it is acting in a legislative capacity.”); *County Council of Sussex County v. Green*, 516 A.2d at 481 (“land use regulation is a legislative function....”).

The counties and the municipalities are considered agencies of the State, *Hayward v. Gaston, supra*, and consequently, are not in any way subordinate to another State agency in the zoning arena. Of course, the General Assembly has the power to grant agencies such as DNREC powers to regulate land use and utilization, and it has done so. For instance, it has granted DNREC the exclusive power to regulate public and private beaches pursuant to the Beach Preservation Act. 7 *Del. C.*, ch. 68; *State v. Putman*, 552 A.2d 1247 (Del. Super. 1988). It has given DNREC exclusive power to control the location, extent and type of industrial development in Delaware's coastal areas pursuant to the Coastal Zone Act. 7 *Del. C.*, ch. 70. If it desires, the General Assembly can give DNREC the power to regulate the use and utilization of land in the inland bays watersheds. It has not done so.

Two chapters of the Delaware Code underscore that the Legislature has not granted DNREC the zoning power it exercised here. The first is The Quality of Life Act, 9 Del. C., §

6951, *et seq.* The General Assembly specified that the various State agencies must cooperate with the County government in preparation of a comprehensive land use plan. 9 *Del. C.* § 6951(b). The Quality of Life Act requires DNREC to bring zoning issues to it. The Quality of Life Act works in tandem with the Delaware Land Protection Act (“DLP Act”), 7 *Del. C.*, ch. 75. The DLP Act seeks to preserve open spaces in the state. Certain areas are to be designated State Resource Areas (“SRAs”) for protection by the county governments. Once areas are designated as SRAs, then DNREC is to send maps of the designated areas “to the affected county for inclusion in the conservation element of their respective comprehensive plans.” 7 *Del. C.* § 7507 (c). Then the counties must include the properties so designated in their comprehensive plans and must adopt zoning ordinances that shall apply to SRA lands. 7 *Del. C.* § 7508. “The clear intent of the SRA legislation is to protect SRA properties from development via the local zoning process.” *Cartanza v. Delaware Department of Natural Resources and Environmental Control*, 2008 WL 4682653, *1 (Del. Ch. Oct. 10, 2008) (Master’s Report), *adopted*, 2009 WL 106554 (Del. Ch. Jan. 12, 2009) (“*Cartanza*”).

If the General Assembly had considered DNREC’s general powers to include zoning powers, there would have been no need to have enacted Chapter 75 of 7 *Del. C.* By requiring the SRAs to be made a part of the county zoning process, the General Assembly has clarified that it has not granted DNREC zoning powers through DNREC’s general powers.

The decision in *Cartanza* further clarifies that DNREC does not have zoning powers except as specifically enumerated in the Delaware Code. In *Cartanza*, the Chancery Court addressed DNREC’s actions taken in connection with the DLP Act. The statute defines SRAs as “those open space lands duly identified by the [Delaware Open Space Council] and adopted by

the Department for protection.” 7 Del. C. § 7504(11). DNREC bypassed the Delaware Open Space Council and designated the SRAs. Its argument, similar to that here, was “its selection of lands as SRAs was based on scientific and conservation standards and represents the best efforts of its employees over a period of years to achieve the statutory goals of the DLP Act.” *Cartanza, supra*, 2008 WL 462653, *8. The Chancery Court did not doubt the good intentions of DNREC.⁸ However, it ruled that DNREC only could assume a legislative function to the extent the General Assembly delegated that power; DNREC could not adopt regulations or take actions inconsistent with the provisions of an enabling statute such as the DLP Act; and where it exceeded its authority delegated to it, its actions were void. *Id.* Thus, the general authority given to DNREC in the various chapters of 7 Del. C., to protect the environment was insufficient to authorize DNREC ‘s actions in *Cartanza*.

DNREC’s general authority, to control development and the use of State resources to protect the environment, is insufficient to authorize DNREC to zone in the situation at hand. DNREC has exceeded its authority and the regulations, to the extent they regulate land use and utilization in the inland bays watersheds, are void.

4) CONCLUSION

For the foregoing reasons, I declare the provisions of Section 4 of the PCS Regulations, as well as those portions of Section 5 adopting the buffer requirements under Section 4, to be void and order they be stricken. The remaining provisions of the PCS Regulations remain valid.

⁸This Court does not doubt DNREC’s good intentions in this case. It is clear DNREC is concerned about the future of this State’s resources and wishes to preserve those resources for future generations. However, DNREC’s expertise and good intentions do not give it power it does not otherwise have.

IT IS SO ORDERED.

APPENDIX A

The pertinent portions of the PCS Regulations provide:

1.0 AUTHORITY AND SCOPE

1.1 These Regulations are adopted by the Secretary of the Department of Natural Resources and Environmental Control under and pursuant to the authority set forth in 7 Del. C. Ch. 40, 60, 66, 70, 72, and in 29 Del. C. §§ 8014(5) and 8025.

2.0 DEFINITIONS

“**Buffer**” means an existing or purposely established area of vegetation which protects water resources from pollution.

“**Watershed**” means a region or area delineated by a topographical divide and draining ultimately to a particular watercourse.

4.0 Buffer Zone Established

This section requires riparian buffers in order to protect and improve water quality.

4.1 Applicability.

4.1.1 A buffer is only required for new major subdivisions and new activities requiring a site or major subdivision plan approval by Sussex County or other local government. For redevelopment projects, new improvements within the respective buffer shall be permitted at the existing set back or greater in accordance with applicable county or local ordinances.

4.1.2 This buffer provision does not apply to major subdivisions, site plans, or individual lots used for detached single family homes recorded prior to effective date of this regulation.

4.1.3 This buffer provision does not apply to any land or buildings deemed to be in agriculture use as prescribed by 9 Delaware Code 6902(b).

4.1.4 On-lot improvements requiring a site plan impacting less than 5000 square feet are excluded.

4.1.5 Excluded from the buffer provisions of this Regulation are permitted water-dependent facilities (maritime, recreational, educational or fisheries activities that cannot exist outside of the buffer by reason of the intrinsic nature of their operation) and the permitted installation, operation, repair or maintenance of any sanitary sewer system, stormwater facility, culvert, bridge, public utility, street, drainage facility, pond, recreational amenity, pier, bulkhead, boat ramp, waterway improvement project or erosion-stabilization project that has received the joint approval of the appropriate federal, state and local agencies.

4.1.6 Isolated, stormwater and farm ponds are excluded from the buffer provisions.

4.2 For purposes of this Section, buffers are hereby established for primary and secondary water features.

4.2.1 Buffers of 100 feet are hereby established landward from State-regulated wetlands, or landward from the mean high water line of all tidal waters, whichever extends farther upland, and landward from the ordinary high water mark of all other primary water features.

4.2.2 Buffers of 60 feet are hereby established landward from the ordinary high water mark of all secondary water features.

4.3 Buffer widths may be reduced to the widths specified below when combined with the provisions outlined in Section 5 and contingent upon the creation of a development-wide nutrient management plan created by a certified nutrient consultant and implemented by a certified nutrient handler in accordance with the Regulations Governing the Nutrient Management Program.

4.3.1 Buffers of 50 feet are hereby established landward from State-regulated wetlands, or the mean high water line of all tidal waters, whichever extends farther upland, and from the ordinary high water mark of all other primary water features.

4.3.2 Buffers of 30 feet are hereby established landward from the ordinary high water mark of all secondary water features.

4.4 When Section 4.3 applies, the applicant shall ensure that deed restrictions and the homeowner's association bylaws include the following statement: "This development is subject to a nutrient management plan, which shall be implemented by a certified nutrient handler. The nutrient management plan is designed to reduce pollutants entering the Inland Bays. The nutrient management plan must be maintained and implemented in accordance with the Inland Bays Pollution Control Strategy and Regulations of the Pollution Control Strategy for the Indian River, Indian River Bay, Rehoboth Bay and Little Assawoman Bay Watersheds, Delaware." In addition, the following requirements must also be met:

4.4.1 The homeowner's association must retain the nutrient management plan on file and maintain records of nutrient applications. A summary of nutrient application records must be submitted to the Delaware Department of Agriculture, Nutrient Management Program on an annual basis.

4.4.2 The homeowner's association must sign and accept any and all responsibility for implementation of these requirements.

4.5 In order to protect buffers and thus water quality, no landowner or their representative shall extend lot lines into buffers.

4.6 Determination of the areas of State jurisdiction, including the limit of State-regulated wetlands as mapped or otherwise field adjusted, the mean high water line of tidal waters and the ordinary high water line of non-tidal waters and the upland edge of buffers will be made by the Department.

4.7 No person shall submit final site plans or final major subdivision plats without including buffers as defined and described in these regulations that are clearly demarcated, designated, and recorded on such plans or plats.

4.8 Property owner(s) shall maintain the buffer in perpetuity in accordance with these

regulations. Property owners shall install boundary signs or markers or distinctive vegetation identifying the upland edge of the buffer.

4.9 Buffer property owners or managers shall manage buffers to maintain their water quality benefits.

4.10 Allowable uses within the buffer are:

4.10.1 Flood control structures, where permitted,

4.10.2 Utility rights of way/structures, where permitted,

4.10.3 Stormwater best management practices may be placed within the buffer, but no closer than 25 feet to the feature being buffered, provided that the buffer is in open space,

4.10.4 Unpaved, pervious single-track trails or footpaths no wider than 5 feet, or pervious or impervious footpaths that encompass 5% or less of the buffer area, (in instances where the trail area is greater than 5% of the buffer area, the buffer will require 1/1 mitigation on a per square foot basis), and

4.10.5 Road crossings, where permitted,

4.11 In instances where a buffer is required adjacent to a tax ditch, the right-of-way may be included as part of the buffer. Access to the ditch for maintenance purposes shall be preserved.

Some of Section 5 adopts the buffer requirements from Section 4. I set forth that section for ease of reference.

5.0 SEDIMENT AND STORMWATER CONTROLS

5.1 Sediment and stormwater runoff shall be managed for nutrient reductions where practicable.

5.2 When the Delaware Sediment and Stormwater Regulations require the creation of a permanent sediment and stormwater management plan, that plan shall be designed and implemented to include design criteria to further reduce nutrient contributions. Consistency will be determined at the conceptual stormwater plan process step. Compliance will be determined before approval of final site or subdivision plans.

5.3 Compliance with 5.2 of these Regulations shall be achieved using one of the following methods:

5.3.1 For properties that contain primary and/or secondary water features, establish buffers consistent with Section 4.2 of these Regulations; or

5.3.2 For properties that contain primary and/or secondary water features, establish buffers consistent with Sections 4.3 and 4.4 of these Regulations in combination with any of the options listed in 5.3.3 of this Section; or

5.3.3 For properties that utilize a reduced width buffer or do not contain primary or secondary water features, select any of the options listed in 5.3.3.1- 5.3.3.4 below:

5.3.3.1 Reduce nutrient contributions by the percentage required by the

TMDL [Total Maximum Daily Load] for the watershed in which the project is located, based on a comparison between the post-developed condition with and without stormwater quality management best management practices using the procedures outlined in the guidance document entitled, "Achieving Stormwater Pollution Control Strategy Reductions for Water Quality"; or

5.3.3.2 Reduce nutrient contributions so as to achieve irreducible concentrations of nutrients using the procedures outlined in the guidance document entitled, "Achieving Stormwater Pollution Control Strategy Reductions for Water Quality"; or

5.3.3.3 Reduce nutrient contributions using three practices within a treatment train using the procedures outlined in the guidance document entitled, "Achieving Stormwater Pollution Control Strategy Reductions for Water Quality"; or

5.3.3.4 Establish 30% of project parcel as forest in common open space through preservation and protection of existing forest stands or creation of new forest stands in accordance with the guidance document entitled, "Forestry Guidance for Inland Bays Pollution Control Strategies." In order to comply with the stormwater management requirements of this section, to the extent practicable, the forested area shall be an integral component of the project's stormwater management plan.

5.4 When Sections 5.3.1 or 5.3.2 apply, the buffer zone shall be established in accordance with Section 4 of these Regulations.

10.0 SEVERABILITY

Should any section, paragraph, or other part of this document be declared invalid for any reason, the remainder shall not be affected.

APPENDIX B

§ 115-193. Buffer zones for wetlands and tidal and perennial nontidal waters.

A. Definitions. As used in this section, the following terms shall have the meanings indicated:

BUFFER ZONE

An existing naturally vegetated area or an area purposely established in vegetation which shall not be cultivated in order to protect aquatic, wetlands, shoreline and upland environments from man-made encroachment and disturbances. The “buffer zone” shall be maintained in natural vegetation, but may include planted vegetation where necessary to protect, stabilize or enhance the area.

MEAN HIGH-WATER LINE OF TIDAL WATER

The average height of all the high-tide water recorded over a nineteen-year period as defined by the National Oceanic and Atmospheric Administration tidal datum.

PERENNIAL NONTIDAL RIVERS AND STREAMS

Any body of water which continuously flows during a year and which is not subject to tidal influence.

TIDAL TRIBUTARY STREAM

A stream under tidal influence, either connecting fresh or salt water.

TIDAL WETLANDS

Areas under the jurisdiction of Title 7, Chapter 66, of the Delaware Code, as the chapter appears as of the date of the adoption of this Article, as regulated and mapped by the Department of Natural Resources and Environmental Control.

WETLANDS

A private or state wetland as defined by the Delaware Department of Natural Resources and Environmental Control regulations and maps as promulgated pursuant to Chapter 66, Title 7, of the Delaware Code, as the chapter appears upon the date of the adoption of this Article.

B. A fifty-foot buffer zone is hereby established landward from the mean high water line of tidal waters, tidal tributary streams and tidal wetlands and from the ordinary high water line of perennial nontidal rivers and nontidal streams in Sussex County.

C. Excluded from buffer zone designation are farm ponds, tax ditches and other man-made bodies of water where these waters are not located on or within perennial streams. A buffer zone shall not be required for agricultural drainage ditches if the adjacent agricultural land is the subject of a conservation farm plan established with the Sussex Conservation District.

D. Excluded from buffer zone regulations are facilities necessarily associated with water-dependent facilities (maritime, recreational, educational or fisheries activities that cannot exist outside of the buffer by reason of the intrinsic nature of their operation) and the installation, repair or maintenance of any stormwater management facility, sanitary sewer system, culver [sic], bridge, public utility, street, drainage facility, pond, recreational amenity, pier, bulkhead, boat ramp, waterway improvement project or erosion-stabilization project that has received the joint approval of the County Engineering Department and the appropriate federal, state and local agencies. An existing public storm-drain system may be extended in order to complete the unenclosed gap or correct a drainage problem, subject to receiving the approval of the County Engineering Department and the appropriate federal, state and local agencies.

E. Grandfathering provision. The following types of land uses may be developed notwithstanding the provisions of this section:

(1) Existing improvements and construction as of the date of the approval of this section may continue. Alterations or expansions which shall be attached to a preexisting structure built on nonconforming land, pursuant to this section, will not be permitted unless proven that such improvement is constructed at an equal distance or landward of the preexisting structure which is most proximate to the wetland area and a variance is granted as provided below.

(2) Subdivision plats and site plans approved and of record in the office of the Director of Planning and Zoning or in the office of the Recorder of Deeds in and for Sussex County prior to the adoption of this section, originally adopted July 19, 1988, or approved and similarly of record as of the effective date of this amendment, adopted July 2, 1991, may be developed as of record and shall be subject to setbacks or buffer restrictions established for the use when originally approved. Any previously approved and similarly recorded subdivision plats and site plans, if approved prior to the original date of this section on July 18, 1988, or prior to this amendment, adopted July 2, 1991, may be amended if it is determined by the Planning and Zoning Commission that the amended plan represents an equal or less intrusive use on the buffer area or setback area.

(3) Any land upon which development has progressed to the point of pouring of a foundation or the installation of structural improvements as of the date of the approval of this section shall be permitted to be developed, provided that there shall be no further encroachment upon the buffer zone, as required in Subsection E(1) above.

F. Variances to the provisions of this section will be considered by the Board of Adjustment under the following conditions:

(1) That findings are made by the Board of Adjustment which demonstrate that special conditions or circumstances exist that are peculiar to the land or structure within the county and that a literal enforcement of provisions within the buffer zone as designated by this section would result in unwarranted hardship.

(2) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.

(3) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the designated buffer zones and in waters adjacent to buffer zones. Variances will be in harmony with the general spirit and intent of the section and any subsequent regulations.

(4) That applications for a variance will be made, in writing, to the Board of Adjustment, with a copy to the County Administrator.