

UPPER SAUCON TOWNSHIP

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December 11, 2019

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**RE: Petition and Curative Amendment Filed By Kay Lehigh, LLC -
Section 484.E of the Upper Saucon Township Zoning Ordinance
Truck Or Motor Freight Terminals**

Gentlemen:

Enclosed please find the written decision of the Upper Saucon Township Board of Supervisors regarding the above-referenced matter.

If you have any questions, please contact me at 610-282-1171, ext. 1222.

Sincerely,



Thomas F. Beil
Township Manager

TFB/sd

cc: Kay Builders, Inc (via hand-delivery and electronic mail)
Renee D'Amico (via hand-delivery and electronic mail)
John Tiemann (via hand-delivery)
Thomas Dinkelacker, Esq. (via electronic mail)
Mark Ironside, Lehigh University (via electronic mail)
Erin Kintzer, Lehigh University (via electronic mail)

**IN RE: PETITION AND :
CURATIVE AMENDMENT OF :
KAY LEHIGH, LLC :**

10. The land comprising the Premises encompasses three zoning classifications, including Industrial (114.7 acres), Commercial (4.4 acres) and Age Qualified Community (AQC) Overlay. (Ex. A-7.2; NT-3, p.38)

11. The four (4) parcels which form the Premises are identified in Exhibits A-7.1 and A-7.2 as parcels 2A, 3A, 4A and 7A, with the remaining parcels in Area A owned by others. (NT-2, p. 9).

12. The Premises is bordered to the west by Route 309, an arterial road; to the south by a trucking terminal owned and operated by Terminal Leasing, Inc (Pitt-Ohio) and designated as Parcel 1A; to the south and east by East Valley Road, a local road; to the north and east by the former Center Valley Club Golf Course, identified as Parcel 8A and to the east Parcels 5A and 6A, owned by Stahler/Harmony. (Ex A-7.2 and 7.3).

13. Directly across East Valley Road from the Premises and adjacent thereto is an R-2 Zoning District and two, single-family residential subdivisions, the largest known as "Sunrise Valley." (Exhibit A-7.2; NT-2, p. 19).

14. Directly across Route 309 from the Premises and adjacent thereto is an R-3 Zoning District and a residential townhouse development known as "Countryside." (Ex. T-31; NT-2, p. 19).

15. Kay proposes to develop the Premises by consolidating the four parcels and re-subdividing the consolidated parcel into two lots, one for three (3) truck or motor freight terminals and the other for a medical office and constructing other site improvements including parking for cars and trucks; dock and trailer storage spaces and stormwater management facilities (hereinafter, "Plan"). The Plan does not reflect any AQC development. (Ex. A-3; NT-1, pp. 34-35; NT-2, pp. 9, 83; NT-3, pp. 38, 41).

16. The Plan calls for a total truck or motor freight terminal square footage of approximately 1,523,000 sq. ft. (Ex. A-3; NT 1, pp. 34-35).

17. The Township Zoning Ordinance provides for Truck or Motor Freight Terminals as conditional uses in the Industrial Zoning District. (Ex. A-4, 5, NT-1, pp. 39-40, 45).

18. Kay acknowledges that the Plan does not comply with the Township Zoning Ordinance and more particularly Section 484.E because the proposed lot containing the terminals is not located 500 ft. from the adjacent, R-3 and R-2 residential zoning districts located on the west side of Route 309 and the southeast side of East Valley Road, respectively. (Ex. T-1 and 32; NT-1, pp. 43-44).

19. Accordingly, Kay submits a curative amendment proposing to strike from the Zoning Ordinance Section 484.E in its entirety, and which reads:

The subject property shall be located no closer than five hundred feet (500') from and (OSR, R-1, R-2, R-3 and AQC) Zone and/or property containing a school, day-care facility, park, playground, library, hospital, nursing, rest or retirement home, or medical residential campus; ...

(Exhibits T-1 and 32).

20. Kay contends that Section 484.E is exclusionary and unduly restrictive and confiscatory, and that it arbitrarily and unreasonably restricts the use of the Premises for Truck or Motor Freight Terminals. (Ex. T-1, NT-1, pp. 41-44, 47).

21. Kay contends that the Premises, as presently configured with four (4) parcels, cannot accommodate a Truck or Motor Freight Terminal which meets the requirements of Section 484.E. (NT-1, p. 43-44, 47).

22. Only by eliminating Section 484.E, Kay claims, can it construct a truck or motor freight terminal use on the Premises. (NT-1, p. 39, 41).

23. The Township Zoning Ordinance, adopted in 2009, at Section 484, makes Truck or Motor Freight Terminals conditional uses in the Industrial Zone provided that they meet all applicable regulations contained within the Zoning Ordinance. (Ex. T-32; NT-1, p. 43).

24. Section 484.E establishes a 500 ft. separation zone between a heavy industrial use such as Truck or Motor Freight Terminals and residential zoning districts, such as those in which Countryside (R-3) and Sunrise Valley (R-2) are located. (NT-1, pp.41, 62-65; NT-3, pp.60-62).

25. Other uses earmarked for protection under 484.E, include schools, daycare facilities, parks, playgrounds, libraries, hospitals, nursing, rest or retirement homes and medical residential campuses, however they are not at issue in this proceeding. (NT-1, pp. 62-65).

26. The parties acknowledge and agree that any plan for the Premises must comply with Section 484.D of the Zoning Ordinance which reads:

The subject property shall have a minimum of three hundred feet (300') of contiguous road frontage along and vehicular access onto an arterial and/or collector road **as listed** in Section 320 of this Ordinance;

(Emphasis added). (Ex. T-32; NT-1, p. 51; NT-2, p. 50).

27. Section 320 of the Zoning Ordinance is titled "Road Classifications Scenic Roads & Front Yard Setbacks" and reads in the introduction to sub-section A:

For the purposes of this Ordinance, the Township's roads shall be classified in the following categories:

(Ex. T-31).

28. This introduction is followed by a table titled "Roadway Classifications & Required **Future** Right of Way Widths." (Emphasis added). (Ex. T-31).

29. The roadway classifications with their right of way widths are listed in the table as follows:

Interstates 120 ft., Arterials 90 ft., Collectors 70 ft,
Scenic Roads 90 ft.*, Locals 50 ft.

(Ex. T-31).

30. Appearing below each roadway classification is a list of specific roads, existing as of 2009, which fall within the stated classifications, with Rt. 309 listed as an "Arterial" and East Valley Road listed as a "Local" by default. (Ex. T-31; NT-3, p. 50).

31. The Section 320.A table contains what amount to two lists, including a) a list of roadway classifications and their associated rights of way and b) a list for informational purposes of specific roadways falling within those classifications as of 2009 when the Zoning Ordinance was adopted. (Ex. T-31).

32. The intent of the table is to, among other things, specify the right of way widths for future roadways. (Exhibit T-31).

33. Also relevant to the measurement of the 500' separation distance is Section 400, titled "Specific Criteria for Permitted Uses, Special Exceptions and Conditional Uses" and specifically sub-section E, titled "Setback Measurements." (Ex. T-29, NT-3, pp. 83-85).

34. Section 400.E reads as follows:

For the purposes of the Article 4 [of which Section 484 is a part], any required setbacks imposed upon any use, building and/or structure shall be measured from the boundary line of the site for which the purposed use, building and/or structure is requested, regardless of whether or not this line corresponds to a property line or a lease line.

(Ex. T-29).

35. In determining compliance with the five-hundred-foot separation distance (a form of "setback" as that term is defined), the measurement runs from the residential

zoning district line to the area designated as the site for the Truck or Motor Freight Terminal and not necessarily the property line for the property on which the terminal is situated. (Ex. T-29; NT-3, pp. 83-85).

36. The separation zone lying between the residential zoning district boundary lines and a Truck or Motor Freight Terminal site may be developed with any other use permitted in the industrial zone which is otherwise in compliance with the requirements for that use. (Ex. USTS-3 and 10; NT-2, pp 25-27, 84; NT-3, pp. 17, 60, 64).

37. In response to Kay's contentions, the Upper Saucon Township Staff offered a conceptual sketch plan, dated June 25, 2019, and revised September 30, 2019, prepared by the Township Engineer, Charles Unangst and the Township Planner, Harry Roth (hereinafter, "Alternate Plan"). (Ex. USTS-3 and 10; NT-2, pp. 13, 23-24; NT-3., pp. 16-19, 55, 65).

38. The Alternate Plan illustrates a conceptual development providing for three (3) truck or motor freight terminals totaling approximately 1,119,000 sq. ft. (all located outside the 500' separation zone), together with other uses established in the separation zone (encompassing about 200,000 sf.) including a hotel, medical office, office, bank and retail use, together with a new collector road. (Ex. USTS-10; NT-2, p. 27; NT-3, pp. 16-23).

39. The Alternate Plan complies with the Zoning Ordinance, generally, and Section 484, specifically, and represents but one feasible option for developing the site which may be adjusted or revised by the owner of the Premises as deemed appropriate. (NT-3, pp. 17, 20, 23, 28, 42, 65).

40. The 500' separation area, generally, and as depicted on the Alternate Plan not only serves to buffer the more intensive Truck and Motor Freight Terminal uses from adjacent and nearby homes but avoid confiscation of the property owner's land. (NT-3, pp. 60-64).

41. The use of a separation zone is one method and a routine practice available to planners and used by municipalities to protect residential development from more intensive, neighboring uses. (NT-3, pp. 60-65).

42. Like the Plan, proposed by Kay, the Alternate Plan requires the adjustment of the lot lines of the existing parcels which comprise the Premises. (NT-2, pp. 37, 48, 83).

43. There is no evidence of record that the Alternate Plan is not feasible or economically or financially impractical or impossible to carry out; to the contrary the Alternate Plan represents a feasible and reasonable plan for the Premises. (NT-3, pp. 17, 23, 65).

44. Although concerns were raised by Kay's engineer, Jason Englehardt, PE, LEED, AP, concerning the absence of cross-docking on the largest terminal depicted on

the Alternate Plan, the same could be accomplished by reconfiguring the dimensions of the terminal. (Ex. USTS-10, NT-4, pp. 24-26, 51-54).

45. The elimination of the 500' separation zone as proposed by the Curative Amendment and the Plan would result in only 75' buffers between the proposed Truck or Motor Freight Terminal operations and the R-2 Zoning District on East Valley Road and the R-3 Zoning District along Rt. 309. (Ex. A-3, NT-1, p. 65; NT-3, p. 64).

46. The Truck or Motor Freight Terminals proposed by Kay are subject to potential twenty-four-hour operation. (NT-1, p. 70).

47. The Kay Plan depicts 413 loading docks and 414 trailer parking spaces and as such the Truck or Motor Freight Terminals proposed by Kay are subject to truck traffic at the rate of 817 trucks per day and 1,634 truck trips per day, assuming full capacity. (Ex. A-3NT-1, pp 71-72).

48. To comply with Township parking regulations, the Kay Plan depicts 1,525 car parking spaces with the possibility that some cars would turn over 2 to 3 times per day, assuming twenty-four hour operations. (NT-1, pp. 78-80).

49. The public interest served by the separation zone includes the protection of vulnerable, residential neighborhoods and other uses from the types of adverse impacts associated with trucking operations at Truck or Motor Freight Terminals. (NT-1, p. 18; NT-3, pp. 61-65).

50. As noted above, at Finding 26, Section 484.D requires that a Truck or Motor Freight Terminal have 300' of contiguous road frontage along and access onto an arterial or collector road "as listed" in Section 320 of the Zoning Ordinance.

51. Section 320 not only lists by name or route number specific roads and highways, but also lists five (5) specific types of roads and highways, including interstates, arterials, collectors, scenic roads and locals. (Ex. T-31).

52. The Supervisors find Mr. Engelhardt not credible in his testimony that a plan for a future Truck or Motor Freight Terminal may utilize only a road listed by name or route number in the table, i.e. roads existing in 2009 when the Zoning Ordinance was originally adopted. (NT-4, pp. 8-9, 12-14, 38).

53. Mr. Englehardt's interpretation leads to the absurd result that no additional roads of any kind can be built to accommodate new development because a) any plan proposing the same would violate the Zoning Ordinance as the proposed road would not be listed in the Section 320.A table and b) any attempt to amend the Zoning Ordinance before approval of a land development plan to propose a new road would result in the addition of a non-existent road to the table.

54. The Supervisors find Messrs. Unangst and Roth credible and accept their testimony that the use of the word “future” in Section 320, includes new roads created pursuant to new land development plans. (NT-3, pp. 53-55, 65-67, 69).

55. Read as a whole the intent of Section 320 and 320.A includes the establishment of requirements for future rights of way of various classification based upon dimension, and therefore the phrase “as listed” in Section 484.D refers to the categories of roads listed in Section 320.A and not the list of specific roads within each classification; and accordingly the Supervisors find that the collector road appearing on the Alternate Plan meets the requirements of Section 484.D. (Ex. T-31).

56. The term “Collector Road” is defined in Zoning Ordinance Section 113 as follows:

A road that is designed to provide for a balance of vehicle mobility and vehicular access to adjoining property. See Section 320 for a listing of collector roads.

(Ex. T-30).

57. The Zoning Ordinance does not preclude a collector road designed as a “P” loop, i.e., a road that loops upon itself, as that phrase was used by Mr. Englehardt. (Nt-2, p.24; NT-3, p.26; NT-4, p. 39).

58. Nothing precludes the construction of future extensions of the Alternate Plan’s proposed, collector road to other roads which would eliminate the “P” loop, including an extension to East Valley Road and an extension to Center Valley Parkway, and in fact the Kay Plan proposes a connection to East Valley Road. (Ex. A-3; NT-4, pp. 39-41).

59. Indeed, the Township has undertaken planning for a road extension from the Premises to the Center Valley Parkway. (Ex. USTS- 3, 10, and 12; NT-2, p.24; NT-4, pp. 43-45).

60. Even though not a “P” loop per se, the access road on the Kay Plan, like the Alternate Plan, depicts only one point of ingress and egress for trucks. (NT-1, pp. 68-69, 76-77).

61. As proposed on the Alternate Plan, the collector road, even though a “P” loop, with one or more possible future connections, provides vehicular access to multiple different uses and properties. (Ex. USTS-10).

62. For the reasons set forth in Findings 27 through 32 and 51 through 61, the Supervisors find that Mr. Engelhardt’s testimony is conclusory and without foundation in the Zoning Ordinance and therefore is not credible and reject his testimony that the collector road appearing in the Alternate Plan fails to meet the definition of “Collector Road” in Section 113 of the Zoning Ordinance.

63. The Township Zoning Map establishes four (4) Industrial Zones, including the Premises (designated by Kay as Area A in Ex A-6) and three (3) additional areas designated as Areas B, C, and D. (Ex. A-6).

64. Area B is comprised of eight (8) parcels with the largest containing a warehouse operated by Aldi, Inc., and comprising 65.98 acres. The remaining seven (7) parcels are owned by others. (Ex. A-8.1, 8.2 and 8.3).

65. Area B can be developed with a Truck or Motor Freight Terminal under the Township Zoning Ordinance if a developer acquires the necessary properties and removes existing structures, there being access to a collector road and 50.9 acres of land available for such use after delineating a separation zone. (Ex. USTS-5; NT-2, pp. 34-35, 63).

66. Area C is comprised of fourteen (14) properties ranging from 0.60 to 53.18 acres in size. (Ex. A-9.1, 9.2 and 9.3).

67. Area C can be developed with a Truck or Motor Freight Terminal under the Township Zoning Ordinance if a developer acquires the necessary properties and removes existing structures, there being 27.2 acres of land available for such use after delineating a separation zone, however a collector road would need to be constructed. (Ex. USTS-6; NT-2, pp. 36, 69, Charles Unangst).

68. Pursuant to the requirements of the MPC, the Lehigh Valley Planning Commission (hereinafter, "LVPC") was served with a copy of the Kay Petition and related documents, and on June 6, 2019, it issued a review letter. (Exhibit T-3, T-5).

69. Although the LVPC review letter contained several, immaterial inaccuracies, LVPC concluded, among other things, that Section 484.E was consistent with the police power as it permitted the proposed use, subject to limitations on its intensity based upon adverse impacts to the community. (Ex. T-5, p.2).

70. The LVPC observed that Kay's Plan exceeded the limitations of the Zoning Ordinance as a result of the design of the development, that it could reduce the extent of the proposed development to comply with the Ordinance and that the question was one of plan design and not limitations on warehouse use. (Exhibit T-5, p.2).

71. Pursuant to the requirements of the MPC, the Township Planning Commission reviewed Kay's Petition and Curative Amendment and issued comments and a recommendation. (Ex. T-2 and 4).

72. The Township Planning Commission concluded unanimously that the Curative Amendment should be rejected because the sketch plan prepared by Hanover Engineering under the supervision of Mr. Unangst demonstrated an opportunity to comply with the provisions of Section 484.E and develop the site with approximately one

million square feet of warehousing and an additional forty six (46) acres of land available for the development of other uses permitted in the Industrial Zoning District. (Ex. T-4 and USTS-2).

73. Township Staff presented the testimony of Charles H. Unangst, PE, PLS.

74. Charles Unangst, the Township Engineer, was accepted as an expert in the field of civil engineering. (NT-2, pp. 13-14).

75. Mr. Unangst works regularly with the Township, is familiar with its Zoning and Subdivision and Land Development Ordinances and performs land development reviews. (NT-2, pp. 6-7, 38-39).

76. Mr. Unangst performed an investigation into the invalidity claim made by Kay, and opined that, to the contrary, the Premises could be developed with Truck or Motor Freight Terminals while respecting the 500' separation distance in 484.E. (NT-2, pp. 22-23).

77. Mr. Unangst, together with the Township Planner, Mr. Roth, directed the preparation of the Alternate Plan and testified that in his expert opinion the Alternate Plan was consistent with the Zoning Ordinance and represented a feasible plan for the development of the Premises with approximately 1,200,000 sf. of Truck or Motor Freight Terminals and approximately 200,000 sf. of other uses authorized in the Industrial Zone. (Ex. USTS-3 and 10; NT-2, pp. 23-28, 40; NT-3, pp. 16-17, 20-23).

78. The Supervisors find Mr. Unangst credible and accept his testimony as described above based upon his approximate 34 years of experience as a civil engineer working with commercial and industrial plans, his working knowledge of the Township Zoning Ordinance, his role in the preparation of the Alternate Plan and the compelling logic and reasonableness of his testimony.

79. The Township Staff presented the testimony of Harry B. Roth, AICP.

80. Mr. Roth was accepted as an expert in the land planning. (NT-3, p. 58).

81. Mr. Roth has been a land planner for 34 years, has extensive experience in drafting and reviewing zoning ordinances, including the drafting of the Township's Zoning Ordinance (including Section 484.E), and has served as the Township's planner for about 20 years. (USTS-8; NT-3, pp. 56-58, 60).

82. Mr. Roth testified concerning his participation in the creation, and review, of the Alternate Plan as set forth in Exhibit USTS-10, and concluded that the same was not confiscatory as it provided for other forms of development within the separation zone and provided a reasonable development opportunity for Kay. (NT-3, pp. 61-62, 66-68).

83. Mr. Roth testified that the impacts of a use such as Truck or Motor Freight Terminals extend beyond the physical building to include parking lots and loading docks, and that development within the separation zone provides an opportunity for protecting vulnerable residential zoning districts by buffering the terminal uses through the establishment of other uses. (NT-3, p. 65).

84. Mr. Roth testified that the use of separation zones allowed for a more productive and efficient use of property. (NT-3, pp. 60-62).

85. Mr. Roth testified concerning the importance of 484.E to the protection of vulnerable land uses from intensive industrial operations such as Truck or Motor Freight Terminals and the inadequacy of a simple 75' buffer. (NT-3, pp. 61-64).

86. Mr. Roth testified to the use of separation zones in other zoning ordinances. (NT-3, p. 62).

87. The Supervisors find Mr. Roth credible and accept his testimony as stated above based upon his professional experience, his knowledge of the Township Zoning Ordinance resulting from his drafting of the same, his participation in preparation of the Alternate Plan and the compelling logic and reasonableness of his testimony.

88. The Supervisors find Messrs. Unangst and Roth further credible because of the consistency of their testimony with the observations of both the Township and Lehigh Valley Planning Commissions as expressed in Exhibits T-4 and 5.

89. The Supervisors find Jason Engelhardt, PE, LEED, AP, credible to the extent that he testified that a Truck or Motor Freight Terminal could not be constructed on the Premises as presently configured with four parcels, meaning without further lot line adjustment or subdivision; however, the Supervisors reject the relevancy of such qualifications especially where, as here, the Kay Plan which he drafted proposes lot consolidations and a subdivision.

90. The use of a five-hundred-foot separation requirement is consistent with the public health, safety and general welfare for all of the reasons set forth above.

II. CONCLUSIONS OF LAW.

1. Kay's Petition and the hearings related thereto were advertised in accordance with the requirements of the Pennsylvania Municipalities Planning Code (hereinafter, "MPC").

2. All hearings on Kay's Petition were held in a timely manner in accordance with the requirements of the MPC.

3. Renee D'Amico, 3953 Stonegate Drive, Center Valley, PA, and John Tiemann, 4925 East Valley Road, Center Valley, PA, were properly granted party status.

4. The Upper Saucon Township Zoning Ordinance provides for Truck and Motor Freight Terminals in the Industrial Zoning District as a conditional use, and accordingly, the Ordinance is not exclusionary on *de jure* grounds.

5. Section 484.E of the Upper Saucon Township Zoning Ordinance, which establishes a five-hundred-foot separation zone to buffer Truck or Motor Freight Terminal uses from residential zoning districts, does not render the Upper Saucon Township Zoning Ordinance exclusionary on *de facto* grounds, inasmuch as a Truck or Motor Freight Terminal use can be reasonably established on the Premises.

6. The Upper Saucon Township Zoning Ordinance is not exclusionary on *de facto* grounds inasmuch as a Truck or Motor Freight Terminal use may be reasonably established in other Industrial Zones, including Areas B and C, as designated and depicted in Kay's Exhibits and Township Staff Exhibits.

7. Section 484.E of the Upper Saucon Township Zoning Ordinance constitutes a lawful exercise of the police power as it is a reasonable method to protect residential zoning districts and similar uses from the negative impacts of Truck or Motor Freight Terminals.

8. Section 484.E of the Upper Saucon Township Zoning Ordinance is substantially related to the protection and preservation of the public health, safety and welfare.

9. Section 484.E is not arbitrary, unduly restrictive or confiscatory, as the Upper Saucon Township Zoning Ordinance authorizes the establishment of other, industrial uses in the separation zone consistent with applicable requirements of the Zoning Ordinance for those uses.

10. The collector road incorporated into, and made a part of, the Alternate Plan is consistent with the Zoning Ordinance's definition of "Collector Road" appearing in Section 113 and consistent with the requirements of Sections 320 and 484.D.

11. The Board of Supervisors interprets the phrase "as listed" in Section 484.D to refer to the list of road classifications provided in the table found at Section 320.A and concludes further that the phrase "as listed," found in the definition of "Collector Road" at Section 113, does not form a part of the definition of that term but instead is provided for informational purposes.

12. Kay's challenge is without merit, and accordingly, Kay's Petition and Curative Amendment are denied and rejected.

13. Section 484.E shall remain a part of the Upper Saucon Township Zoning Ordinance.

III. DISCUSSION.

This matter comes before the Supervisors on a Petition and Curative Amendment filed by Kay Lehigh, LLC (hereinafter, "Petition"). The Petition was filed on May 1, 2019. Four hearings were held between August 12, 2019, and October 29, 2019. For purposes of the MPC, the final hearing occurred on October 29, 2019. At a public meeting on November 19, 2019, the Supervisors voted unanimously (5 to 0) to deny the Petition.

The Township elected to oppose Kay's Petition, and accordingly, Robert W. Gundlach, Jr., Esq., was retained to defend the Ordinance. Exhibits offered by the Township in defense of the Ordinance are identified as "USTS" Exhibits, meaning "Upper Saucon Township Staff." Exhibits offered by the Township Solicitor, relating primarily to procedural aspects of the case are marked as "T" Exhibits. Exhibits marked with an "A" constitute Kay's exhibits as the applicant.

Section 609.1 of the Pennsylvania's Municipalities Planning Code (hereinafter, "MPC") provides for landowner curative amendments. Sub-section (a) reads:

A landowner who desires to challenge on substantive grounds the validity of a zoning ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 916.1. The governing body shall commence a hearing thereon within 60 days of the request as provided in section 916.1. The curative amendment and challenge shall be referred to the planning agency or agencies as provided in section 609 and notice of the hearing thereon shall be given as provided in section 610 and in section 916.1.

(Footnotes omitted).

Property owners have a constitutionally protected right to enjoy their property. C&M Developers, Inc. v. Bedminster Tp. Zoning Hearing Bd., 820 A.2d 143, 150. That right may be reasonably limited by zoning ordinances enacted pursuant to the police power, i.e., action taken to protect or preserve the public health, safety, morality and welfare. Id.

In determining the validity of a zoning ordinance, the same is presumed constitutionally valid unless the challenging party shows that it is unreasonable, arbitrary or not substantially related to the police power interest that the ordinance purports to serve. Id., at 150-51. Generally, an ordinance will be found to be unreasonable and not substantially related to the police power if it is shown to be unduly restrictive or

exclusionary. Id., at 151. An ordinance is deemed to be arbitrary where it is shown that it results in disparate treatment of similar landowners without a reasonable basis for such treatment. Id.

In reviewing an ordinance to determine its validity, a substantive due process inquiry is employed which involves balancing a landowner's right against the public interest sought to be protected by an exercise of the police power. A conclusion that an ordinance is valid necessitates that the public purpose served adequately outweighs the landowner's right to do as it sees fit with its property. Id., citing Hopewell Tp. Bd. of Supervisors v. Golla, 452 A.2d 1337, 142 (Pa. 1982).

Zoning ordinances may be found exclusionary on two grounds, *de jure* or *de facto*. An ordinance is exclusionary on a *de jure* basis where the on it facially, totally excludes a use. It is *de facto* exclusionary where it appears to permit a use, but under such conditions that the use cannot be accomplished. Tp. of Exeter v. Zoning Hearing Bd. of Exeter Tp., 962 A.2d 653, 659 (Pa. 2009). A challenge to the constitutionality of a zoning ordinance must overcome its presumption of validity, and ordinances are valid whenever they are necessary for the preservation of public health, safety, morals or general welfare. The police power does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property. Id., at 660, citing Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Tp., 228 A.2d 169, 178 (Pa. 1967). Where the validity of an ordinance is debatable, it must be upheld. Protect PT v. Penn Tp. Zoning Hearing Bd., ___ A.3d ___, 2019 WL 5991755 (Pa. Cmwlth. 2019).

In this matter, Kay alleges that although a Truck or Motor Freight Terminal use is authorized in the Township's Industrial (I) Zoning District, Section 484.E, which provides for a five-hundred-foot separation distance between that use and residential zoning district boundaries, in fact operates to exclude the use. Accordingly, Kay's challenge is on *de facto* grounds. Kay alleges that the Zoning Ordinance, by virtue of Section 484.E, is "exclusionary, and arbitrarily and unreasonably restricts the use of [its] real property, and that the Ordinance 'as applied to [its] real property is unduly restrictive and confiscatory.'" (Ex. T-1). Kay characterizes the five hundred foot zone as an "exclusionary area." (NT-1, p.62).

With its Petition, Kay submits a plan for the Premises which proposes the consolidation of four lots into one, followed by a subdivision of the consolidated property into two lots, one for a medical office with parking and another for approximately 1,500,000 s.f. of terminal space in three buildings together with 413 loading docks, 414 trailer parking spaces and 1,525 automobile parking spaces. (Ex. A-3). Kay appears to provide for a 75' internal setback from its property lines. It proposes no separation distance other than what is created by existing roads and does not provide a detail for any enhancements within the setback such as landscape plantings or raised berms. Although Kay denies that the site is "maxed out" because it does not utilize all available impervious cover; it appears nearly so. (N -1, pp. 74-75).

In addition, Kay presented testimony to the effect that the Zoning Ordinance provides for four Industrial Zoning Districts, labeled "A" through "D." Kay's Premises is Area A. In addition to arguing that Area A, as configured without further lot consolidation or subdivision, cannot comply with Section 484. E; Kay provides testimony that Areas B, C and D are also incapable of compliance with Section 484.E as presently configured. (NT-1, pp. 46-56).

The Township Staff counters with its own plan referred to herein as the "Alternate Plan." (Ex. USTS-3 and 10). The Alternate Plan depicts the layout of three terminals, with a total of approximately 1,200,000 sf. of terminal space, together with approximately 200,000 sf. of additional development, compatible with other uses permitted in the (I) District. The Alternate Plan evidences compliance with Section 484.E with the non-terminal development depicted in, and making use of, the five-hundred-foot separation zone. The Alternate Plan evidences compliance with Section 484.D which requires that a Truck or Motor Freight Terminal property have 300' of contiguous frontage on an arterial or collector road. (Ex. T-32). The collector road enters the Premises at a point where Kay testifies that PennDOT has approved access. (NT, pp. 68-69). The Alternate Plan provides also for a stub exiting the property in the direction of Center Valley Parkway. The possible stub crosses a former golf course subject to an open space covenant. Prior to the Petition, Township Staff provided for the modification of the open space area to support the construction of that future connection. (Ex. T-3, 10, 12).

The Alternate Plan represents but one, possible plan for the development of the Premises. It is obvious that the Alternate Plan may be reconfigured with respect to points of ingress and egress, the sizes and configurations of the terminals and the sizes and types of uses which may be placed in the separation zone.

The Supervisors find and conclude that the Alternate Plan is consistent with the requirements of Section 484 and other relevant sections of the Township Zoning Ordinance. Accordingly, the inclusion of Section 484.E in the Township Zoning Ordinance does not render it exclusionary on a *de facto* basis with respect to Truck or Motor Freight Terminals.

In addition, the Township staff presented exhibits and testimony evidencing the ability to construct Truck or Motor Freight Terminals in Areas B and C while complying with Section 484.E. These exhibits and testimony show that a Truck or Motor Freight Terminal could be constructed on 50.9 Acres of land in Area B with the requisite frontage on Camp Meeting Road (a collector road). (Ex. USTS-5). With respect to Area C, a Truck or Motor Freight Terminal could be constructed on 27.2 Acres of land, subject to the construction of a collector road. (Ex. USTS-6). These exhibits and the associated testimony evidence additional grounds to conclude that Section 484.E does not render the Zoning Ordinance *de facto* exclusionary.

Kay counters with several arguments. First, Kay argues that the Alternate Plan does not reflect the Premises in its current configuration, i.e., four, separate parcels. Kay argues that if one limits consideration of the issue to the four parcels as they presently

exist, then none of the parcels, independently, can comply with Section 484.E. Thus, the Zoning Ordinance is *de facto* exclusionary. For the reasons set forth below, the Supervisors reject this argument.

Kay's second argument relates to Areas B and C. It argues that these Areas exclude terminals because they include parcels owned by others (not under Kay's control), some of which are developed. For the reasons set forth below, the Supervisors reject this argument.

Kay's third argument involves the collector road depicted on the Alternate Plan. Kay contends that the collector road does not comply with the Zoning Ordinance because it is not one of the specifically named collector roads in Section 320. In support of its claim, Kay argues that the phrase "as listed," appearing in Section 484.D, refers to the list of specifically named roads. Kay argues further that the proposed collector road does not comply with the definition of the same appearing in Section 113 of the Ordinance because it does not provide for a balance of vehicular mobility and does not connect adjacent properties. For the reasons set forth below, the Supervisors reject these arguments.

Turning to the first argument, that the Alternate Plan does not consider the Premises as presently configured in four lots, it should be noted that Kay's own Plan proposes lot consolidations and a subdivision with three trucking terminals located on one lot and the medical office building located on another. Moreover, Kay, as an equitable owner, has legal rights to, and in effect controls, the four, contiguous parcels which approximate 119 Acres. Both the MPC and the Township's Subdivision and Land Development Ordinance (hereinafter, "SALDO") authorize lot line adjustments, lot line consolidations and subdivisions. Indeed, these constitute the everyday tools of developers, and to suggest that a zoning ordinance is *de facto* exclusionary because such tools might need to be utilized, appears to the Supervisors to be disingenuous for all of the reasons set forth above. Accordingly, for these reasons the Supervisors reject Kay's first argument.

Turning to the second argument, that Areas B and C are not available for development as Truck or Motor Freight Terminals because they are comprised of parcels owned by others or are now developed, the Supervisors consider this argument inconsistent with applicable law. Where a zoning district has been zoned to permit a particular use, one may not later base a claim that the use is excluded on the fact that the land has been developed for another purpose. Moreover, there is no ongoing obligation on the part of a township to rezone for such use because vacant land is developed for another use. Montgomery Crossing Associates v. Tp. of Lower Gwynedd, 758 A.2d 285, 290-291 (Pa. Cmwlth. 2000).

In Kaiserman v. Springfield Tp., 348 A.2d 467, 469 (Pa. Cmwlth. 1975), the court addressed a claim that a zoning ordinance was exclusionary with respect to multi-family dwellings where land previously zoned for apartments had become largely developed with single-family homes. In that case, the applicants were the legal owners of 47.59

acres of land in two zoning districts which permitted only single-family detached dwellings. It was uncontested that there was no appreciable amount of vacant land remaining for multi-family dwellings. Id., at 470. The court noted that there was no attempt to show why land built for single-family dwellings could not later be developed with multi-family dwellings. The court stated that although the landowner asserted that “existing buildings must, of necessity, be demolished before apartments could be built,” there was no testimony as to why this procedure, common in other developed areas, was not viable in the Township. Id., at 471. Accordingly, the court stated:

To allow open ground in a township to be used for any purpose whatever solely because little or no undeveloped land remains in areas properly zoned for that purpose would be the antithesis of that sound planning which is the rationale for all zoning.

It is possible to imagine cases in which a zoning ordinance on its face purports to set aside a substantial portion of a township for a given use, while in reality the land is so developed, located, or otherwise encumbered that the chances of assembling land suitable for that use are virtually nil.

The record in this case, however, does not develop facts sufficient to support a finding of de facto exclusion of multifamily dwellings. Appellants have not carried the heavy burden of proof placed on them when they sought to challenge the constitutionality of the Ordinance.

Id.

The Supervisors understand that Areas B and C contain parcels owned by various entities, and that some of those parcels have structures, however simply noting the obvious, standing alone, does not in the opinion of the Supervisors overcome the strong presumption of constitutionality. Moreover, it fails to overcome the underlying legal principle that the use of land, for uses other than Truck or Motor Freight Terminals does not render the Ordinance exclusionary. For these reasons, the Supervisors reject Kay’s argument.

Kay’s third argument involves a claim that the collector road depicted in the Alternate Plan is inconsistent with Sections 484.D, 320 and 113 of the Zoning Ordinance.

Section 484.D reads:

The subject property shall have a minimum of three hundred feet (300’) of contiguous road frontage and

vehicular access onto an arterial and/or collector road as listed in section 320 of this Ordinance.

(Ex. T-32, Emphasis added).

Section 320, titled "Road Classifications, Scenic Roads & Front Yard Setbacks" reads in the introduction to sub-section A as follows:

For the purposes of this Ordinance, the Township's roads shall be classified in the following categories:

There follows a Table. This Table is titled "Roadway Classifications & Required Future Right of Way Widths." (Emphasis added). The Table lists five roadway classifications with associated right of way widths, including Interstates (120 ft.), Arterial (90 ft.), Collectors (70 ft.), Scenic Roads (90 ft.*) and Locals (50 ft.). Underneath the list of classifications and widths appears a specific list of named roads. There are no roads identified in the category of "Locals" because that is the default category.

Continuing with the Ordinance, the phrase "Collector Road," found at Section 113, relating to definitions, reads:

A road that is designed to provide for a balance of vehicle mobility and vehicular access to adjoining property. See Section 320 for a listing of collector roads.

Turning first to the question of whether the collector road appearing on the Alternate Plan is "listed" in Section 320, and reading the Ordinance as a whole; the Supervisors interpret the phrase "as listed" in Section 484.D to refer to the roadway classifications appearing in the Table. While the Table clearly includes a list of specific, named roads, including collector roads; the same are roads which are already built and made a part of the Township's road system. However, reading the Table as a whole, it is equally obvious that the same provides for "Future" roads as well. This is consistent with the definition of "Collector Road" appearing in Section 113, which the Supervisors interpret to include an actual definition with a helpful reference to Section 320 for a list of existing collector roads. This list serves to eliminate any confusion as to the classification of existing roads. Indeed, the Zoning Ordinance is replete with helpful information including lists and diagrams.

In addition, Kay's narrow interpretation of the phrase "as listed" is obviously advanced to support its claim that the Ordinance is exclusionary,¹ however it results in an interpretation leading to an absurd result. If one accepts Kay's definition of the phrase "as listed," then no future roads can be constructed in the Township pursuant to a land development plan because such roads are not "listed," and therefore do not exist. Of equal futility would be an attempt to amend the Zoning Ordinance to permit a future road

¹ Kay did not challenge the validity of Section 484.D.

appearing on a land development plan because that road would not exist until the plan is recorded, the road constructed and an offer of dedication accepted. Accordingly, any attempt to amend the Zoning Ordinance to include a proposed road would fail because the road does not exist as part of the Township's road system. If the road does not exist, then the plan cannot be approved. The argument becomes one of circular futility.

In order to give effect to all of the terms of the provisions of the Ordinance, the Supervisors view the list of specific roads not as a limiting statement, but rather as a guide to the practical application of the Ordinance. This is consistent with the reference to the list of specific roads appearing in the definition.

This interpretation is consistent with long established rules relating to statutory construction.² These rules include:

- (1). That the legislature does not intend a result that is absurd, impossible of execution or unreasonable (1 Pa. C.S.A. § 1922(1));
- (2). That the legislature intends the entire statute to be effective and certain (1 Pa. C.S.A. § 1922(2));
- (3). That the language of the ordinance must be construed, in light of the purpose of the legislation (Mann v. Lower Makefield Tp., 634 A.2d 768, 772 (Pa. Cmwlth. 1993);
- (4). That zoning ordinances are construed in accordance with the plain and ordinary meaning of their words. (Zappala Grp., Inc., v. Zoning Hearing Bd. of Town of McCandless, 810 A.2d 708, 710 (Pa. Cmwlth. 2002);
- (5). That in order to define an undefined term, one may consult definitions in statutes, regulations or the dictionary for assistance (Manor Healthcare v. Lower Moreland Tp. Zoning Hearing Bd., 590 A.2d 65 (Pa. Cmwlth. 1991)); and
- (6). That zoning ordinances are construed expansively, affording the landowner the broadest possible use and enjoyment of its land (Caln Nether Co., L.P. v. Bd. of Supervisors of Thornbury Tp., 840 A.2d 484, 491 (Pa. Cmwlth. 2004).

Finally, the Supervisors are entitled to "considerable deference" in interpreting the Zoning Ordinance. Id.

² The rules of statutory construction are applied to the interpretation of Ordinances. Trojnacki v. Bd. of Supervisors Solebury Tp., 842 A.2d 503, 509 (Pa. Cmwlth. 2004).

The word "list" is defined in Random House Webster's College Dictionary, 1999 as "a series of names or other items written or printed together in a meaningful grouping or sequence so as to constitute a record" and implies a "meaningful arrangements of items." In reading the Ordinance as a whole and giving effect to all of its terms, the Supervisors interpret the reference to the list in 484.D to include not only the specifically named roads, but the list of categories of roads. As noted above, to consider the list as being only a list of specific roads existing as of 2009 not only disregards completely the word "Future" but leads to a result that is absurd, impossible of execution, and/or unreasonable.

In addition, the Supervisors note that Kay seeks a very narrow interpretation of the phrase at issue; while any other developer, seeking to construct a new road in the Township, would seek the broader interpretation provided in this Decision.

Turning to the definition of "Collector Road," there is no requirement for a particular configuration, and Kay's expert witness so acknowledges. The Supervisors note also that the Alternate Plan represents but one possibility for the development of the Premises, and that nothing precludes the extension of an access road from the "P" loop to East Valley Road (a point of access appearing on Kay's Plan) or the construction of a road connecting the "P" loop to the Center Valley Parkway, an option which Kay's expert acknowledges is consistent with the definition. Moreover, the "P" loop would serve adjoining properties, including multiple terminal facilities and over 200,000 s. f. of other, industrial uses.

For all of these reasons, the Supervisors reject Kay's argument that the Alternate Plan fails as the result of the inclusion of an improper collector road.

Finally, the Supervisors note the testimony by Kay's expert that the primary terminal depicted on the Alternate Plan is unusual because it is not "cross-docked" and therefore not "practical." (NT-4, pp. 24-24, 52-56). Although the Supervisors do not accept this testimony, even if accurate, nothing precludes minor modifications to the Alternate Plan as noted in cross examination. (NT-4, pp. 52-56). More importantly, this testimony does not rise to the level of economic impossibility needed to render the Ordinance *de facto* exclusionary. The test is discussed in Montgomery Crossing Associates v. Tp. of Lower Gwynedd, 758 A.2d 285, 290 (Pa. Cmwlth. 2000) as follows:

The critical question is not whether one use is more profitable, but rather whether the excluded use is so unprofitable in its permitted zone as to be effectively excluded. A contrary analysis would lead to the conclusion that every zoning ordinance permitting multiple uses would unconstitutionally exclude all but the most profitable use. 'So long as the property in question may be reasonably used for purposes required by the Zoning Ordinance, the owner may not legally complain.'

Id., at 290, (Citation omitted). See also, Keinath v. Tp. of Edgmont, 964 A.2d 458, 463 (Pa. Cmwlth. 2009) (Ordinance not invalid merely because it does not permit the most lucrative use of property).).

For all of the reasons set forth above, the Supervisors conclude that Kay failed to maintain its burden of proof that Section 484.E is invalid, and accordingly, the Supervisors deny the Petition and reject the proposed, Curative Amendment.

IV. ORDER.

AND NOW, this 11th day of December, 2019, upon consideration of the Petition and Curative Amendment of Kay Lehigh, LLC., the same is hereby DENIED for the reasons set forth in the foregoing Decision.

UPPER SAUCON TOWNSHIP
BOARD OF SUPERVISORS



CHAIRMAN



VICE CHAIRMAN



SUPERVISOR



SUPERVISOR

SUPERVISOR

IV. ORDER.

AND NOW, this 9th day of December, 2019, upon consideration of the Petition and Curative Amendment of Kay Lehigh, LLC., the same is hereby **DENIED** for the reasons set forth in the foregoing Decision.

UPPER SAUCON TOWNSHIP
BOARD OF SUPERVISORS

CHAIRMAN

VICE CHAIRMAN
Stephen
Wagner

Digitally signed by: Stephen Wagner
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E = Energy Engineering and
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