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2012 ICSC U.S. SHOPPING CENTER LAW CONFERENCE

CONDEMNATION CLAUSES: WHAT TO NEGOTIATE—AVOIDANCE OF PITFALLS

PRESENTATION BY GEORGE J. KROCULICK

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George J. Kroculick practices in the area of real estate law with a focus on eminent domain, including just compensation, right to take, relocation assistance and highway access management, as well as land use and land use litigation, and real estate tax relief matters. Mr. Kroculick has represented clients before local and county land use boards and has worked on lease litigation matters as well as title disputes.

Mr. Kroculick represents private property owners whose property has been claimed for transportation right of way and other public projects. He has represented private sector clients in condemnations of environmentally sensitive properties as well. Mr. Kroculick is listed in *Chambers USA: America's Leading Lawyers for Business* for real estate law and has written and lectured frequently on issues regarding condemnation law, including relocation expenses, demonstrative evidence, severance damages and the public use doctrine.

Admitted to practice in Pennsylvania and New Jersey, Mr. Kroculick is a member of the American, New Jersey and Pennsylvania bar associations. He is also a member of the editorial board of the International Council of Shopping Centers' publication, *Shopping Center Legal Update*, a member of the editorial board of the International Council of Shopping Centers' publication, *Retail Law Strategist*, and an affiliate member of the Appraisal Institute. He is a member of the board of directors of the Building Industry Association of Philadelphia, and also is a member of the IRWA and the Urban Land Institute. Mr. Kroculick is a graduate of Villanova University School of Law and a *cum laude* graduate of Villanova University.

Representative Matters

- Reduced an Atlantic City casino's taxable assessed value by more than two-thirds - from $543 million down to $165 million – and obtained a $19.5 million tax credit for the casino. The multimillion-dollar tax credit was a combination of cash payments and future credits. The settlement was approved by City Council after property tax appeals and related litigation were filed starting in 2006 in the Tax Court of New Jersey.

- Represented a commercial real estate development and management company in an appeal of a property tax assessment on a New Jersey shopping center. Successful in having the property tax assessment reduced by more than $9.8 million, resulting in tax savings of more than $1 million in the first three years for the client, including an immediate refund of over $529,000 – with the potential for savings of over $300,000 per year in property taxes in the future.
- Re-wrote the township's entire zoning ordinance, then obtained all township, county, state and federal government approvals for an approximately $50,000,000 project on 53 acres, which will consist of a 32,000 sq. ft. office building, a 32,000 sq. ft. medical center, a 14,000 sq. ft. pharmacy and a 171-unit affordable-housing apartment complex that will cater mostly to seniors. Helped to properly structure the affordable housing component of the development and assisted the client in obtaining $17.5 million in tax credit financing for the project, and $6,500,000 in federal stimulus funds. Assisted in organizing the appropriate non-profit entities for the ownership and development of the project.
- Represented property owner in a dispute with Bank of America over the interest rate earned on condemnation proceedings. The N.J. Supreme Court upheld the Appellate Division's decision in *City of Englewood v. Exxon Mobil Corporation, et al.*, 406 N.J. Super. 110 (App. Div. 2009), denying certification to appellant Bank of America (and solidifying a victory for firm client RD Management d/b/a FBB Englewood, LLC).
- In a property tax appeal filed on behalf of a shopping center owner in Allegheny County, Pa., obtained a 45-percent reduction of assessment after a major tenant declared bankruptcy. As a result of the reduction obtained after a board hearing, annual property taxes decreased more than $152,500.
- Represented major oil company in an eminent domain action. DOT condemned a small piece of the client's service station property and closed two separate access points on its corner location. Successfully argued to DOT that the loss of access would have required customers to essentially pass the pumps on a state highway and make a U-turn into the site and circle back to the pumps—showing DOT how this was unsafe and how the public understood it to be unsafe. Result was the reopening of the access points and compensation by DOT for land taken.
- Successfully represented major oil company in a partial condemnation of an oil terminal facility. Initially, the condemnor sought to take a 4.5-million gallon storage tank but only after building a temporary roadway system around the site. The original offer was $1,150,000 for the taking. Mr. Kroculick worked with the engineers and real estate professionals of the client and the condemnor to provide a resolution that saved time and money for both parties. Rather than building the temporary road system, the client would rebuild on its own property new tanks, related improvements, as well as new internal roadways and related infrastructure—all prior to the demolition of its original improvements. The condemnor did not have to expend millions of dollars on a merely temporary roadway and the client received new improvements on its own property that allowed it to continue business functions during re-construction. Mr. Kroculick's client eventually received compensation in excess of $6,000,000.

- Represented two major oil companies in the valuation phase of an eminent domain action. Demonstrating the deficiencies in the city's appraisal regarding valuation methodologies with regard to improvements and relocation expenses, Mr. Kroculick helped our clients settle the matter from an initial $3,000,000 offer to a final settlement of $7,150,000.
- Successfully represented a major oil company in an eminent domain action. The client lost a relatively narrow strip of land used for a service station along a state highway, leaving the canopy and pumps close to the road. Mr. Kroculick argued that the taking required a complete raze and rebuild of the site. Unique among the valuation arguments was "total temporary take" damages during the time required to tear down and rebuild the property. End compensation went from an initial offer of $18,000 to a settlement of more than $500,000.

Professional Activities

- American Bar Association
  - Committee on Condemnation, Zoning and Land Use Litigation
- New Jersey Bar Association
  - Land Use Law Section
- Pennsylvania Bar Association
- Philadelphia Bar Association
  - Real Property Section
- Appraisal Institute
  - Affiliate member
- Urban Land Institute
  - Programming Director, Philadelphia Capital Markets Council
- International Right of Way Association (IRWA)

Admissions

- New Jersey
- Pennsylvania
- U.S. Court of Appeals for the Third Circuit
- U.S. District Court for the District of New Jersey
- U.S. District Court for the Eastern District of Pennsylvania

Education

- Villanova University School of Law, J.D., 1983
- Villanova University, B.A., *cum laude*, 1980

Experience

- Duane Morris LLP
  - Partner, 2005-present
- Ballard Spahr Andrews & Ingersoll LLP
  - Partner, 2001-2005

Board Memberships

- Board Member and Case Brief Editor for International Council of Shopping Centers' most widely read publication, *The Retail Law Strategist*
- Editorial Board, *Shopping Center Legal Update*, publication of The International Council of Shopping Centers
- Building Industry Association of Philadelphia
  - Board of Directors
- Family "Y" of Burlington County, New Jersey
  - President of the Board of Trustees, 1992-1996

Honors and Awards

- Listed in Chambers USA: America's Leading Lawyers for Business, 2008-2012 editions

Selected Publications

- Co-author, "Key Calif. Supreme Court Decision for Developers in Resolving Construction Defect Disputes," *ICSC Legal Update Alert*, September 2012
- "How Efficient is Your Building?" *ICSC Legal Update*, Summer 2012
- Co-author, "Pa. Legislature Extends Permit Extension Act Another Three Years," *Duane Morris Alert*, July 24, 2012
- Co-author, "The DOJ's New ADA Regulations and Accessibility Guidelines," *Commercial Leasing Law and Strategy*, January 2011
- Co-author, "Eminent-Domain Reform Bill Advances in New Jersey State Senate, But Does Not Take a Big Leap ," *Duane Morris Alert*, October 21, 2010
- Co-author, "Pennsylvania Adopts Legislation Granting Automatic Extension to Development Approvals," *Duane Morris Alert*, July 12, 2010
- Co-author, "New Jersey Governor Eliminates 'Time-of-Decision' Rule in Favor of 'Time-of-Application' Rule," *Duane Morris Alert*, May 12, 2010
- Co-author, "Four New Jersey Bills Seek to Change How Government Condemns Real Estate, as U.S. Debate on Eminent Domain Continues," *Duane Morris Alert*, January 27, 2010
- "To Build or Not to Build: The Myriad Issues Facing Developers with Approved Development Sites in Today's Market," *Shopping Center Legal Update*, Fall/Winter 2009
- Co-author, "In New Jersey, a Property Owner May Recover Consequential Business Losses for a Temporary Taking," *Duane Morris Alert*, August 28, 2009
- Co-author, "What's in Your Condemnation Clause?" *Shopping Center Legal Update*, Summer 2009
- Co-author, "New Jersey Adopts Law Permitting Conversion of Age-Restricted Housing Units to Non-Age-Restricted Housing Units and Modifies Laws Concerning Affordable Housing," *Duane Morris Alert*, July 8, 2009
- Co-author, "Delaware Governor Vetoes Bill Restricting Use of Eminent Domain," *Duane Morris Alert*, July 2, 2008
- "Missouri Supreme Court Grants Shopping Center Owner Right to Sue City for Damages Caused by Threat of Condemnation, But...," *Duane Morris Alert*, June 13, 2008

- Co-author, "Florida Appellate Court Upholds Ruling that Budget Change Does Not Allow a Buyer to Cancel Contract," *Duane Morris Alert*, June 12, 2008
- Co-author, "California Voters Pass Eminent Domain Reform: Impact Limited," *Duane Morris Alert*, June 5, 2008
- Co-author, "California to Vote Again on Eminent Domain Restrictions," *Duane Morris Alert*, March 28, 2008
- "N.J. Appeals Court Provides Property Owners Second Bite at the Apple to Challenge Condemnations for Redevelopment Purposes," *Duane Morris Alert*, March 6, 2008
- Co-author, "The Importance of Condemnation and Access Clauses in Commercial Leases," *Retail Law Strategist*, November 2007
- "Nevada Joins National Trend in Responding to *Kelo* Decision on Eminent Domain," *Duane Morris Alert*, June 28, 2007
- "New Jersey Supreme Court Limits Application of Blight Designation in Ongoing National Debate over Eminent Domain," *Duane Morris Alert*, June 22, 2007
- "New York Restricts Use of Eminent Domain by Utilities, Part of National Trend," *Duane Morris Alert*, October 18, 2006
- "Illinois Latest State to Respond to *Kelo* Decision," *Duane Morris Alert*, September 5, 2006
- "Eminent Domain: Know and Assert Your Power," *Franchise Times*, September 2006
- "California Part of National Backlash Against Supreme Court's Eminent Domain Decision," *Duane Morris Alert*, May 25, 2006
- "Georgia Enacts Restrictions to Eminent Domain, Part of a National Trend," *Duane Morris Alert*, May 15, 2006
- "New Jersey Assembly Holds Hearings on Eminent Domain, Part of a National Debate," *Duane Morris Alert*, April 17, 2006
- "What *Kelo* Does Not (Necessarily) Change," *Retail Law Strategist*, February 2006

Selected Speaking Engagements

- Discussion Leader, "Condemnation Clauses: What to Negotiate—Avoidance of Pitfalls," International Council of Shopping Centers' 2011 U.S. Shopping Center Law Conference, Phoenix, Arizona, October 26, 2011
- Featured in "Blackstone to buy almost 600 shopping centers," report on Marketplace, American Public Media Radio, February 28, 2011
- Discussion Leader, "Condemnation Clauses: When to Negotiate—Including Loss of Access Due to Condemnation and Impact on Lease," International Council of Shopping Centers' 2010 U.S. Shopping Center Law Conference, Hollywood, Florida, November 6, 2010
- ICSC U.S. Shopping Center Law Conference: Eminent Domain and Its Drivers, Catalysts and Generators, Phoenix, Arizona, October 21, 2009
- Speaker, "Presenting Your Case," CLE International's 4th Annual Eminent Domain Seminar, Newark, New Jersey, April 17, 2009
- Speaker, "Eminent Domain and Condemnation" Pennsylvania Land Title Association, Stewart Title Seminar, Philadelphia, November 6, 13 and 21, 2008

- Speaker, "Severance Damages and the Cost to Cure," Lorman Education Services' Eminent Domain in New Jersey, Cherry Hill, New Jersey, March 30, 2006
- Speaker, "Severance Damages," Lorman Education Services' Eminent Domain in Pennsylvania, Lancaster, Pennsylvania, March 29, 2006
- Speaker, "What's Fair About Fair Market Value?" Lorman Education Services' Eminent Domain in New Jersey, New Brunswick, New Jersey, March 28, 2006
- Speaker, "Severance Damages," CLE International's Eminent Domain Seminar, Princeton, New Jersey, October 7-8, 2005
- Speaker, "Just Compensation, The Cost to Cure as an Element of Damages," CLE International's Eminent Domain SuperConference, Tampa, Florida, October 7-8, 2004
- Moderator, "Appraisers' Roundtable," Ballard Spahr, Princeton, New Jersey, May 19, 2004
- Moderator, "Appraisers' Roundtable," Ballard Spahr, Voorhees, New Jersey, March 10, 2004
- Speaker, "Tenant Claims," CLE International's Eminent Domain Seminar, Philadelphia, Pennsylvania, November 21-22, 2002

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EMINENT DOMAIN AND LAND VALUATION

Duane Morris' eminent domain and land valuation lawyers regularly counsel private property owners, governmental entities and quasi-governmental entities in eminent domain and land valuation matters. Our attorneys are experienced in representing both condemnors and condemnees in all phases of eminent domain proceedings and have handled highly complex takings cases involving multiple landowners and major urban projects.

With our extensive knowledge of and experience in the field of condemnation, the firm frequently handles challenging valuation issues for both developing and improved properties. We are well-versed in land use, environmental and government regulatory matters to best serve our clients' needs throughout the evaluation process. Additionally, we offer tax advice on the financial impact of receiving compensation in an eminent domain proceeding.

DUANE MORRIS ACTIVELY PARTICIPATES IN:

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BIA Building Industry Association

ULI Urban Land Institute

Appraisal Institute™

ABA American Bar Association — Section of Litigation Condemnation, Zoning & Land Use Committee

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FOR MORE INFORMATION

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The *Chambers USA* survey of the American legal profession cited Duane Morris' real estate practice and singled out its attorneys for their knowledge and experience. "Attorneys at Duane Morris are able to assist clients on a wide range of real estate matters, including leasing, restructuring, eminent domain and development. . . . Sources say: 'An outstanding firm that was very responsive and understood our expectations.'"

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- Construction
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- Eminent Domain, Condemnation and Property Valuation
- Public/Private Partnerships
- Joint Ventures
- Real Estate Investment Management
- Hospitality and Gaming Industry
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- Top-10 law firm in terms of peer-rated lawyers

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Case study titled "Duane Morris: Balancing Growth and Culture at a Law Firm" was included as part of the Harvard Business School curriculum and made available to business schools around the world for course study.

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- Ranked among national leaders in Insurance and Construction
- 59 attorneys receiving 65 citations for excellence
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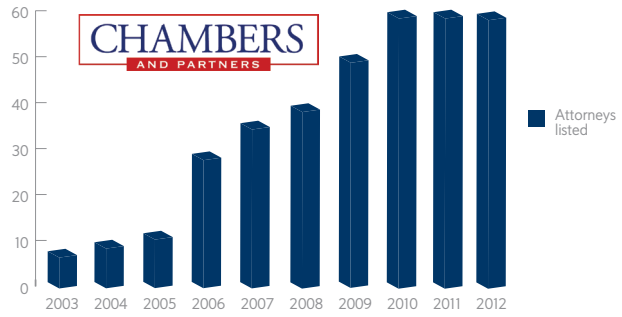

CHAMBERS ASSOCIATE

Chambers Associate reports, "There are 'high expectations for associates' at Duane Morris, who appreciate the firm's 'friendly atmosphere' and 'team-oriented culture.'"

U.S. NEWS-BEST LAWYERS BEST LAW FIRMS 2011-2012

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Deal Pipeline BANKRUPTCY LEAGUE TABLES

For Q1 2012, *The Deal* ranked Duane Morris #1 by total volume of assets handled in large bankruptcy cases. Also, *The Deal* consistently ranks Duane Morris among the most active bankruptcy practices in the world.

NATIONAL IP RANKINGS

National publications have repeatedly ranked Duane Morris among the leading U.S. law firms handling patents, trademarks, copyrights and related litigation. Rankings include among the:

- top 10 IP "litigation kings" for Fortune 100 companies by *Corporate Counsel*
- top trademark firms by *Trademark Insider*, *IP Today* and *IP Law360*

CORPORATE DEALMAKING

Some recent deals involving Duane Morris lawyers include:

HEINEKEN'S $4.6B bid for Asia Pacific Breweries, strengthening its foothold in Southeast Asia and China

GROUPON'S $950MM offering of Series G preferred stock, representing a lead member of the investor group

CITY OF CHICAGO'S $850MM bond issue representing an underwriting group of minority-owned investment banks

AUSTRALIAN GRAINCORP LTD.'S $665MM acquisition of United Malt

ZYNGA GAME NETWORK'S $500MM late-stage venture capital raise, representing major members of the investor group

CEPHALON'S acquisition of Ception Therapeutics for $350MM and up to $500MM in milestone payments, representing Ception

SUNOCO'S $350MM sale of its polypropylene subsidiary to Brazil petrochemical giant Braskem SA

THE JONES FINANCIAL COMPANIES, parent of Edward Jones, $320MM revolving line of credit, provided by a multibank syndicate

STRYKER'S acquisition of Orthovita in a $316MM all-cash tender offer for all outstanding common stock, followed by a second-step merger, representing Orthovita

ATLANTIC INDUSTRIAL'S $257.2MM sale to Atlantic Holdings, laying groundwork for future growth

BALFOUR BEATTY CAPITAL GROUP'S $123MM public-private partnership in a student-accommodation project at Florida Atlantic University

YOUKU.COM'S $50MM sixth round of funding, of a total $160MM raised by China's leading Internet video company, representing major investors

Duane Morris is a global growth sponsor of the Association for Corporate Growth, joining with this global organization to champion middle-market private investment.

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in terms of AV-rated lawyers (its highest ranking)

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> Top-10 law firm in terms of peer-rated lawyers

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CONNECTIONS & ALUMNI

> 9,541 contacts in our database have "General Counsel" in their titles

> 10,243 contacts in our database are CEOs

> 89 Duane Morris Alumni are Corporate General Counsel and a total of 176 alums are in-house corporate counsel

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WOMEN'S INITIATIVE

> *Working Mother*, *Women 3.0* and *Philadelphia* magazines have all recognized Duane Morris as one of the best law firms for women

Duane Morris WOMEN'S INITIATIVE

> Lawyers Club of San Diego 2011 Equality Survey citations for high percentage of female partners and lawyers, as well as firmwide policies that are friendly for parents and families

> Pennsylvania Bar Association Honor Roll of Legal Organizations Welcoming Women Professionals for past three consecutive years

> Women's Initiative actively fosters and expands business contacts and opportunities to enhance professional development

CISCO'S LITIGATION COUNSEL OF THE YEAR

Cisco Systems, a leading global provider of networking products and services, designated Duane Morris as winner of its Litigation Counsel of the Year Award for 2011 as a result of Duane Morris' work for Cisco on patent litigation matters.

COURTROOM & NEGOTIATING TABLE

Some recent litigations handled by Duane Morris include:

Defended WRIGHT MEDICAL TECHNOLOGY against nine-figure damages claim in patent infringement case

For HOSPITAL & HEALTHSYSTEM ASSOCIATION OF PA, won decisions to restore $808MM in state funding to malpractice insurance fund

Serve as regional trial and coordinating counsel for FORD MOTOR COMPANY for products liability matters

Defended PA DEPARTMENT OF GENERAL SERVICES against challenges in regard to almost $1B in prison construction/expansion projects

Represented foreign national in MULTI-JURISDICTION, CROSS-BORDER DEPARTMENT OF JUSTICE INVESTIGATION allegedly involving over $100MM in illegal securities sales

TOP STAFF

> American Lawyer Media's Marketing the Law Firm 50 survey: Top five in five out of seven years, including being named #1 in the nation

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EMINENT DOMAIN – THE BASICS

"[N]or shall private property be taken for public use, without just compensation."—U.S. Constitution, Amendment V (the "Takings Clause").

THE POWER OF EMINENT DOMAIN

- In basic terms, eminent domain is the power of the sovereign to take property for "public use" without the owner's consent. Scott v. Toledo, 36 F. 385, 1 L.R.A. 688 (1888).

- The power of eminent domain does not require recognition by constitutional provision, but is an inherent power of the sovereign that exists in absolute form. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S. Ct. 442, 67 L. Ed. 809 (1923); Georgia v. Chattanooga, 264 U.S. 472 , 44 S. Ct. 369, 68 L. Ed. 796 (1924). See also Burbank-Glendale-Pasadena Airport Authority v. Hensler, 83 Cal. App. 4th 556, 561, 99 Cal. Rptr. 2d 729 (2000) ("The power of eminent domain arises as an inherent attribute of sovereignty that is necessary for government to exist").

- While the power of eminent domain is inherent in organized governments, it may only be exercised through legislation or through legislative delegation. State v. Lanza, 27 N.J. 516, 530 (1958), app. dismissed, 358 U.S. 333, 79 S.Ct. 351, 3 L.Ed.2d 350 (1959), reh'g denied, 359 U.S. 932, 79 S.Ct. 606, 3 L.Ed.2d 634 (1959). See, e.g., Noble v. Oklahoma City, 297 U.S. 481 (1936).

- The scope of the sovereign power of eminent domain in the United States has always been subject to constitutional and statutory limits. U.S. Const. amend. V (the "Takings Clause") and XIV. The Takings Clause applies to the states through the Fourteenth Amendment.

LIMITATIONS ON THE POWER OF EMINENT DOMAIN

A. TAKING FOR A PUBLIC USE

- Explicit in the just compensation clause is the requirement that the taking of private property be for a public use.

- The question whether a particular intended use is a public use is a judicial one. See City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930).

- Courts have generally insisted on giving a high degree of judicial deference to the legislative determination of what constitutes a public use or public purpose. See Berman v. Parker, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."); Kelo v. City of New London, 545 U.S. 469 (2005).

B. THE RIGHT TO JUST COMPENSATION

- The most fundamental limitation is met by the provisions found in most of the state constitutions relating to the taking of property by eminent domain requiring that the condemning agency pay "just compensation." Governments, both state and federal, have the right to take private property for public use, provided that just compensation is paid. Kelo v. City of New London, 545 U.S. at 472 n. 1.

- The just compensation required by the Constitution is that which constitutes "a full and perfect equivalent for the property taken." Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

- The measure just compensation is to be taken from the perspective of the owner's loss, not the taker's gain. United States v. Miller, 317 U.S. 369, 375 (1943).

- The general standard for the determination of just compensation is the fair market value of the property, i.e., what a willing buyer would pay a willing seller. Id.

- Where only a portion of property is taken, just compensation includes any diminished value of the remaining portion (''severance damages'') as well as the value of the taken portion. Id. at 375-76.

- "Just compensation" may include compensation for a lessee's expectancy in the continued use of an improvement beyond the remaining term of the lease. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

- The legislature may prescribe more than the minimum requirement of the payment of just compensation.

C. DUE PROCESS AND NOTICE.

- Generally, property owners are entitled to notice of a governmental entities decision to take their property and due process to contest the taking or seek their claims for just compensation. However, the process and notice requirements vary from state to state. For instance, some states do not require tenants or mortgagees to get the same notice that the underlying fee owner receives. Accordingly, tenants may want to negotiate for a provision requiring the landlord to forward a copy of any such notice as the taking could impact the leasehold interest.

WHAT IS PROPERTY?

- Generally, the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." United States v. General Motors Corp., 323 U.S. 373 (1945). It denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." Id.

- What property is and the rights that attach to ownership are primarily a matter of state law. See, e.g., United States v. Cress, 243 U.S. 316 (1917).

- **Access?** There has developed a universal rule that the owner of land abutting on a street or highway has a right of access to and from the adjacent street. Nichols on Eminent Domain(R), Ch. 4, 13.23[1] (Matthew Bender, 3rd ed. 2012). The right is considered a natural easement and an incident of land ownership. It is a property right and its deprivation therefore requires just compensation. Id.; Mueller v. N.J. Highway Auth., 59 N.J. Super. 583, 158 A.2d 343, (App. Div. 1960). However, such a right is the right to reasonable, but not unlimited, access to existing and adjacent public roads. That is, "the property owner is not entitled to access to his land at every point between it and the highway but only to 'free and convenient access to his property and the improvements on it.'" Id. at 595, 158 A.2d 343; Wolf v. Department of Highways, 422 Pa. 34, 220 A.2d 868 (1966).

CONDEMNOR TAKES TITLE FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES.

- In most cases, upon notice of the filing of a declaration of taking or similar document and the offer/deposit of estimated just compensation, the condemnor will take title to the property described in the declaration of taking in a fee simple estate, free and discharged of all right, title, interest and liens of all parties. Thus, all proprietary rights and interests in the land condemned are extinguished, "and all lienors and encumbrancers, including mortgagees and lessees, are relegated for compensation to the proceeds which stands in place and stead of the land." Nichols on Eminent Domain(R), Ch. 3, § 9.01[2] (Matthew Bender, 3rd ed. 2012) citing United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, 135 F.3d 1025 (5th Cir. 1998), et al.

THE UNDIVIDED FEE OR UNIT RULE/WHO GETS A SLICE OF THE PIE?

- One Pizza. When property is taken by condemnation, the general rule is that there shall be one award of just compensation for the value of the property taken without regard to the various interests in, and claims to, the property (i.e., the Undivided Fee Rule or the Unit Rule). Thus, there will be no separate awards for individual objects or interests; only one lump-sum award. Nichols on Eminent Domain(R), Ch. 7A-G11, § G11.01[2][b] (Matthew Bender, 3rd ed. 2012) (citations omitted). Generally, once the award is determined for the whole property, the award will be divided or apportioned among the various interests according to their respective rights. See United States v. 6.45 Acres of Land, 409 F.3d 139, 146-149 (3d Cir. 2005) (district court must follow Undivided Fee Rule and erred when it determined value of land taken for public use by valuing separate legal interests of both landowner and lessees, rather than the aggregate interests and thereafter apportioning that award among the interest holders).

B. LEASEHOLD INTERESTS

- Though a condemnation may extinguish a leasehold interest, the lease is not necessarily terminated (though many courts have ruled differently).

- Generally, a party with a leasehold for years is entitled to compensation when all or a part of the property leased is taken or damaged by eminent domain. However, the rights as between the landlord and tenant with respect to the condemnation are usually governed by the terms of the lease. See Wayne Co. v. Newo, Inc., 75 N.J. Super. 100, 108 (App. Div. 1962). The lease will therefore determine the contractual obligations of the parties that survive the condemnation, such as the right to participate in the condemnation action, the right to share in the condemnation award, and rights with respect to the leasehold improvements.

- A tenant at will or tenant at sufferance is not considered to have a compensable interest in the property in a condemnation action.

- In Almota, the Supreme Court pointed out that since the owner of the property is entitled to the fair market value of the property, a tenant who owns improvements on leased land is entitled to the value of the improvements that would be obtained if the tenant sold its interest in the leasehold to a purchaser on the open market:

> Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property. In the absence of a special agreement to the contrary, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold. This rule, however, exists entirely for the protection of

> the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award. *But in apportioning the award, they are treated as personal property and credited to the tenant*. Almota, supra, 409 U.S. at 477 n.5 (citation omitted) (emphasis added).

MORTGAGE INTERESTS

- As a general proposition, when land that is subject to a mortgage is taken through the power of eminent domain, the mortgagee's interest in such property is transferred to the condemnation award. "The condemnation award is a substitute for the land when all or part of the mortgaged land is taken for public use. Thus the lien of the mortgage attaches to the condemnation award." City of Englewood v. Exxon Mobile Corporation, 406 N.J. Super. 110, 118 (App. Div.), certif. denied, 199 N.J. 515 (2009) (citations omitted).

- Stated another way:

> [a]s a result of this action by the State[,] the mortgagor's fee interest in the premises and the mortgagee's lien thereon were destroyed, and by operation of law both were transmuted to a present right to the funds deposited by the State with the clerk of the court.
>
> Id. (citing Jala Corp. v. Berkeley Sav. & Loan Ass'n, 104 N.J. Super. 394, 401 (App. Div. 1969).]

- Much like a leasehold interest, the mortgagees right to participate in the condemnation proceedings (and potentially claim that the taking is an event of default or subjects the owner to a prepayment penalty), will be governed by the mortgage itself.

SAMPLE CONDEMNATION CLAUSES

EXAMPLE 1

CONDEMNATION.

(a) Total. If the whole of the Premises shall be acquired or taken pursuant to the power of eminent domain for any public or quasi-public use or purpose, then this Lease shall terminate as of the date of title vesting in the public authority in such proceeding.

(b) Partial. If any part of the Premises shall be taken as aforesaid, and such partial taking shall render the portion not taken unsuitable in Tenant's reasonable judgment for the conduct of business, or if more than fifty percent (50%) of the Shopping Center shall be taken, then this Lease shall terminate at the election of either party after notice given to the other prior to the date of title vesting, as described in (a) above. If this Lease is not terminated as provided herein, this Lease shall continue in effect except that the Base Rent and other charges payable hereunder shall be reduced in the same proportion that the floor area of the Premises taken bears to the original floor area, and Landlord shall make all necessary repairs or alterations to the building in which the Premises are located so as to restore the portion of the building not taken to a complete architectural unit.

(c) Awards. All compensation awarded or paid upon such a total or partial taking of the Premises or the Shopping Center shall be the sole property of the Landlord; provided, however, that so long as the Landlord's award is not thereby reduced, Tenant shall also be entitled to claim, prove, and receive in any condemnation proceeding such separate awards as may be allowed for Tenant's loss.

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EXAMPLE 2

Condemnation. If any portion of the Property shall be condemned or taken in any manner for any public use or quasi public use and said taking materially affects the ability of Tenant to operate the Sign as anticipated herein, then Landlord agrees to use its best efforts to facilitate the relocation of the Sign by Tenant on the Property in a location suitable for the intended use. During the period that the Sign is inoperable, Tenant's obligation to pay rent shall be suspended until such time that the Sign is relocated. In the event that the Sign cannot be relocated or if all of the Property Site shall be condemned or taken in any manner for any public use or quasi public use, this Lease shall terminate as of the date of the actual taking and the Rent payable hereunder shall be prorated to the date of such taking. Tenant shall be entitled to any protections provided by the law.

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EXAMPLE 3

A. Ownership of the Improvements.

Lessee may move, remove or alter any building, structure, tank, curbing, pavement or driveway now or hereafter placed on said premises and may construct, build and place upon said premises such buildings, structures, tanks, curbings, pavement, driveways, machinery and other equipment as shall in its opinion be necessary or desirable to use and operate said premises, and may perform any and all acts necessary to the conduct of its business.

Lessor agrees that all buildings, structures, tanks, machinery, equipment and all other property owned by Lessee heretofore placed upon the premises, whether annexed to the freehold or not, shall remain the personal property of Lessee, and Lessee shall have the right and privilege (but shall be under no obligation) to remove such property at any time during the period of this lease or any renewal thereof.

Upon the expiration or termination of this lease or any renewal thereof, Lessee shall have a period of thirty (30) days within which to remove its property or negotiate its sale to an incoming tenant or supplier. The leaving of such property on the premises during said period, shall not make Lessee liable for storage charges or rent, and shall not constitute a hold-over tenancy.

B. Condemnation Clause.

If the demised premises or any part thereof shall be taken by or pursuant to governmental authority or through the exercise of eminent domain, or if a part only of said premises is taken and the balance of said premises in the opinion of Lessee is not suitable for the operation of a drive-in gasoline station, this lease, at the option of Lessee, shall terminate without further liability on the part of Lessee, or the rent hereunder shall be reduced in proportion to the reduction in the area of the premises, but nothing herein shall be deemed a waiver of the sole right of Lessee to any award for damages to it or to its leasehold interest caused by such taking, whether made separately or as part of a general award.

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EXAMPLE 4

Condemnation.

In the event of any exercise of the power of eminent domain as to the Leased Premises or any portion thereof or any interest therein, whether by a condemnation proceeding or otherwise, or any transfer of all or any part of the Leased Premises or any interest therein made in lieu of the exercise of the power of eminent domain prior to or during the Lease Term, including any change in access (all of the foregoing being hereinafter referred to as "Appropriation"), the rights and obligations of Landlord and Tenant shall be as follows:

1. Total Condemnation. If the whole of the Leased Premises shall be appropriated by right of eminent domain, then this lease shall cease being effective as of the date possession is required to be delivered to the appropriating authority. Notwithstanding the foregoing, Tenant shall have the right to lease the Leased Premises after the termination of this Lease from the appropriating authority under such terms and conditions as may be agreed to by Tenant and the appropriating authority. At Tenant's request, Landlord will assist Tenant by communicating Tenant's request to so lease the Leased Premises to the appropriating authority and providing any reasonable cooperation in effectuating such an arrangement.

2. Partial Condemnation/Modification or Revocation of Access. In the event of an Appropriation which does not constitute a taking of the whole of the Leased Premises or in the event vehicular access to the Leased Premises is modified, altered or revoked by valid regulation of access by the appropriating authority or entity having jurisdiction over highway control, Tenant shall have the right, but not the obligation, to elect to terminate this Lease effective as of the date possession is required to be delivered to the appropriating authority, provided that any such election is made by written notice from Tenant to Landlord on or before ninety (90) days after Tenant receives written notice of the Appropriation from the Landlord.

3. Pro-Ration of Rent. In the event this Lease is terminated pursuant to either paragraph (1) or (2) above, the Base Rent, Additional Rent, and all other obligations of Tenant shall be prorated to the date of termination, and Landlord shall immediately reimburse to Tenant all Rent and any other payments made by Tenant for any period beyond the date of termination.

4. Tenant's Damages on Termination. In the event this Lease is terminated pursuant to either paragraph (1) or (2) above, without limitation of Tenant's rights to other awards reserved below, Tenant shall be entitled to receive from the entire award or other proceeds received from the appropriating authority as a result of the Appropriation an amount equal to [the greater of]: (a) the unamortized cost to Tenant of any improvement made by Tenant to the Leased Premises, including any demolition costs incurred by Tenant in connection with the construction of such improvements plus [or] (b) the value of Tenant's leasehold. The unamortized cost to Tenant pursuant to (a) above shall be the cost of such improvements as shown on the books and records of Tenant less the depreciation thereof on a straight line basis over the useful life thereof as determined by Tenant for accounting purposes. In addition, Tenant shall be entitled to claim and receive from the appropriating authority compensation for Tenant's actual moving and relocation expenses, Tenant's trade fixtures and personal property that are not otherwise acquired by the

appropriating authority, and to the extent allowed by law, damage to Tenant's business and goodwill.

5. Continuation of Lease after Partial Appropriation. If, following any Appropriation, Tenant elects not to terminate the Lease Term pursuant to paragraph (2) above, the lease shall continue in full force and effect as to the remainder of the Leased Premises. Landlord shall, within a reasonable time after physical possession is taken of the premises appropriated, restore what may remain of any buildings and improvements at the Leased Premises (as the same may be affected thereby) to substantially the same condition they were in prior thereto, subject to reduction in size thereof. Tenant may be written notice to Landlord given within _____ days after the date of Appropriation, elect to perform the restoration rather than Landlord, in which event Landlord shall pay to Tenant out of the award or other proceeds of the Appropriation the cost of such restoration. A just proportion of the Rent and all other amounts payable by Tenant pursuant to this Lease, according to the nature and extent of the injury to Tenant's business, shall be suspended or abated during the period of restoration until the Leased Premises have been restored. Upon completion of the restoration, the Base Rent shall be abated and reduced in proportion to the reduction in the surface area of the Leased Premises as a result of the Appropriation. Tenant shall be entitled to receive out of the award or other proceeds of the Appropriation an amount equal to the unamortized cost to Tenant of any improvements made by Tenant to the Leased Premises (as defined in (4) above) which were taken or rendered unusable in the Appropriation and which cannot be restored as part of the restoration.

6. Tenant's Standing in Appropriation Proceedings. Whether or not the Lease is terminated pursuant to paragraphs (1) and (2) above, Tenant shall be entitled to actively participate in and appear in any Appropriation proceedings, and any negotiations with respect to a conveyance in lieu of such proceedings, either separately or in conjunction with Landlord. Tenant's written consent shall be required for the compromise or settlement of any action for Appropriation or fixing compensation therefor. Landlord shall provide Tenant copies of all documents and correspondence with regard to the Appropriation and the Appropriation proceedings, and shall give notice to Tenant of any meetings with the appropriating authority, its agents or representatives, and permit Tenant to attend such meetings. Landlord shall reasonably consult with Tenant so that reasonable business accommodations, if possible, can be made for Tenant as part of any consent or agreement concerning the Appropriation or the manner and form in which such Appropriation shall occur.

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EXAMPLE 6 (Landlord Friendly)

(a) In the event that all of the Premises or a substantial portion of the Premises [or the Building] is taken or condemned for a public or quasi-public use so as to render the Premises untenantable, this Lease shall terminate as of the date possession [title] shall vest in the condemnor.

(b) In the event that a portion of the Premises shall be so taken or condemned which does not render the remaining portion of the Premises untenantable, in the [reasonable] opinion of Landlord, this Lease shall terminate only as to the part of the Premises so taken, and the Base Rent shall be reduced proportionately by the square footage of the Premises taken and Tenant's Proportionate Share shall be redetermined by dividing the [rentable] square footage of the remaining Premises by the [rentable] square footage of the Building.

(c) Landlord shall have the option of terminating this Lease if less than all or a substantial portion of either the Premises or the Building is taken, but Landlord determines, nevertheless, that it is not economically feasible to continue to operate the uncondemned portion of the Building or the Premises.

(d) In the event of any total or partial taking, Tenant waives all claims against Landlord, assigns to Landlord all claims against the condemnor for leasehold damages and diminution in the value of Tenant's leasehold estate, and agrees that Tenant shall make no claim against the condemning authority by reason of condemnation or other governmental or quasi-governmental taking except business dislocation, moving expenses and other claims permitted by law which may be separately payable to tenants and which do not diminish the award otherwise payable to Landlord.

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EXAMPLE 7 (Parking Clause)

Parking Areas. Without limiting the foregoing, if any of the parking area depicted in Exhibit __ is expropriated by a public or quasi-public authority, then Landlord shall make every effort to substitute the equivalent and similarly improved lands contiguous to and properly integrated with the remainder of the site depicted on Exhibit ___. If Landlord is unable to substitute such lands, and if as a result of one or more expropriations the Minimum Parking Ration (as defined in Article ___ above) is not satisfied within the Shopping Center, then Tenant shall have the option to terminate this Lease at any time within twelve (12) months after such deprivation becomes effective by giving thirty (30) days prior notice to Landlord.

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EXAMPLE 8 (Ingress and Egress Clause)

(a) Demised Premises/Ingress and Egress. If (i) any portion of the demised premises are expropriated, or (ii) any point of ingress and egress to the public roadways, substantially as depicted on Exhibit ___ is materially impaired by a public or quasi-public authority for a period in excess of ___ (__) months so as to render, in Tenant's sole reasonable opinion, the demised premises unsuitable for the operation of Tenant's business in the normal course, then Tenant shall have the option to terminate this Lease as of the date Tenant is deprived or denied thereof by giving thirty (30) days prior notice to Landlord of such election within ninety (90) days following the date of such dispossession. During any expropriation or impairment, regardless of the length of time of such expropriation or impairment or whether or not this Lease is terminated as a result of such expropriation or impairment, Landlord shall endeavor to provide a reasonable alternative to the impaired point of ingress and egress for the duration of any such expropriation or impairment.

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COMMERCIAL INVESTMENT
Real Estate

LEGAL BRIEFS

Condemnation Concerns

Retail lease agreements should include change of access language.

by George J. Kroculick, JD, and Michael J. McCalley, JD

For retail tenants, location is perhaps the most important factor for success. However, even the best location quickly can turn bad in the wake of condemnation or modification of access to the property. Despite the upfront investment made in securing a good location, tenants often overlook the importance of including condemnation and change of access clauses in their lease agreements to adequately protect their interests. Commercial real estate professionals who represent tenants should be aware of these factors and take steps to draft condemnation and change of access clauses into their clients' leases.

CONDEMNATION CLAUSES

When drafting leases, commercial real estate professionals should be mindful that leasehold interests are compensable interests in property. Generally, if a condemnation provision is absent in a lease, it is established that tenants are entitled to proportionately share in the condemnation award for the value of its leasehold interest. However, care still must be taken to describe a tenant's ability to participate in a condemnation proceeding and distinguish between the taking of a leasehold interest, which is compensable, and the purported taking of other interests in real estate, such as lost goodwill, which may not be compensable.

While lease provisions do not determine what items are compensable, the lease terms can control most disputes between landlords and tenants. If a lease contains a condemnation clause spelling out the basis for dividing a condemnation award, such a clause will govern. Precision in drafting the lease and recognition of local laws can help to preserve a tenant's interests and avoid disputes.

The key to drafting effective condemnation clauses is providing for appropriate remedies. In this regard, comdemnation clauses may provide for leasehold termination, restoration obligations, apportionment, bonus value, and rent abatement. Clauses also may address relocation rights.

Another issue to consider when drafting leases is the distinction between total takings and partial takings. To do this, tenants should seek assurance that the condemnation clause provides sufficient discretion in the event of a condemnation. Tenants are most vulnerable in a partial taking situation where only a portion of property is taken. While the taking may appear small, it could have a huge impact on the tenant's livelihood.

For instance, a partial taking of only a few hundred square feet may reduce drive aisles, cause internal circulation problems, and make the site no longer workable for drive-throughs or deliveries. A partial taking also can affect parking, limit a site's ability to be further developed, and render a site non-conforming under existing zoning regulations.

Commercial real estate professionals should address situations where partial takings may have a significant impact on a site's workability. In this regard, tenants should seek as much discretion as possible to determine if a partial taking will materially impact the property and choose the desired remedy such as termination, restoration, or abatement.

ACCESS ISSUES

Equally important to the success of retail operations is the availability of safe and convenient access to a property. However, many leases pay little or no attention to access and the potential effects access changes can have on properties. In some cases, tenants may be in for a rude awakening should a modification of access occur.

> Take steps to draft condemnation and change of access clauses into clients' leases.

While the regulation of access under police power is not considered a taking, because of eminent domain, the owner of land abutting to a street or highway has the right of access to and from the adjacent street. However, pursuant to its police power, the government may regulate access to and from the road for the public's safety and welfare without having to pay compensation.

Therefore, the right of access is better regarded as the right to reasonable but not unlimited access to existing and adjacent public roads. In the case of *Wolf v. Department of Highways*, the court found that a property owner is not entitled to access its land at every point between it and the highway, but only to free and convenient access to its property and the improvements on it. Because of this, in similar cases since *Wolf*, it often is stated that a property owner has no vested right in the continued flow of traffic past its property.

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In addition, the rights of an abutting owner may be subordinated to the rights of the public in regard to the proper usage of highways and the right of governmental agencies to enforce proper police regulations. Under proper exercise of its police power in the regulation of traffic, a state entity or transportation authority may, among other acts, reduce the number of existing access points, install guardrails or curbing, impose vehicle weight limitations, or replace access on a highway with access on a local roadway. The inconvenience, reduction in profits, or depreciation in property value that occurs as a result of a legitimate exercise of the state's police power is considered loss or damage without injury.

Since access is a key component of property value, impairment often has significant real-world effects on the value of a commercial site. For instance, a change in access may reverse traffic flows through drive aisles, prevent delivery vehicles from safely entering or exiting the site, or force traffic to flow by a competitor's business before reaching an entry point to the tenant's property.

Tenants are wise to include lease clauses that address the potential for administrative changes in access and keep in mind that the regulation of access can be accomplished outside of the condemnation arena, and therefore not provide any compensation. Leases also should address related issues such as requiring notice to tenants, participating in access proceedings if legally permissible, and providing discretionary remedies should a change in access have a material impact on the business's operation.

What's in Your Condemnation Clause?

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What does the "condemnation clause" in your mortgage say? If you do not know, you are not alone. After all, the chances of a property being condemned and the condemnation clause coming into effect are slim. Nevertheless, there are several issues to consider when drafting a condemnation clause or entering a mortgage agreement.

I. The Sovereign Power of Eminent Domain

Eminent domain is the power of the sovereign to take property for "public use" without the owner's consent. The power of eminent domain does not require recognition by constitutional provision, but exists in absolute and unlimited form.[1] The power of eminent domain is described as an inherent attribute of the sovereign. Thus, there is no stated constitutional source of such power. Rather, only the limitations on such power must be stated positively by state law. The most fundamental limitation is met by the provisions found in most of the state constitutions relating to the taking of property by eminent domain requiring that the condemning agency pay "just compensation." The legislature, of course, may prescribe more than the minimum requirement of the payment of just compensation. Such constitutional provisions, however, neither directly nor impliedly grant the power of eminent domain, but are simply limitations upon a power already in existence that would otherwise be unlimited.[2]

II. Notice of the Taking and Rights of Mortgagees to Participate in Condemnation Cases

Whether a mortgagee is named a party in a condemnation case will likely depend on state law and how the term "condemnee" or "owner" is defined in a jurisdiction's relevant statute. In some jurisdictions, the relevant statute requires that owners and any persons having an interest in the property being condemned shall be joined as parties. In others, absent an express statutory requirement, mortgagees with a mere security interest in the property condemned need not be made a party to the action.

For example, New Jersey law requires that mortgagees be listed as potential condemnees in the complaint. However, across the Delaware River, Pennsylvania law provides only that such mortgagees receive notice of the condemnation. Moreover, the notice provision under Pennsylvania law was only added in September 2006. Prior to that date, the condemning agency was not required even to provide the mortgagee notice, potentially leaving that mortgagee in the dark about the impact that a taking could have on the property securing the mortgage. Based on the varied treatment of mortgagees in condemnations throughout the country, it is best for the mortgagee to have its condemnation clause include a provision that the condemnee provide it with written notice of any attempts by governmental agencies or other entities embodied with the power of eminent domain to acquire the subject property.

The right of mortgagees and lienholders to participate in a condemnation may depend on the mortgage language itself as well as state law. That is, some courts will allow the mortgage language to govern the mortgagee's right to participate in the condemnation. In other instances, the right of the mortgagee to participate may depend upon how that particular jurisdiction treats the mortgagee's interest. Many jurisdictions observe that the mortgage does not pass title to the mortgaged land, but only creates a security interest in the nature of a lien upon the land. Thus, because the mortgagee does not have an ownership interest in the land, certain jurisdictions may limit the mortgagee's participation. Yet, other jurisdictions may still follow common law where a mortgage is treated as conveying a defeasible title to the land mortgaged. In these situations, the mortgagee is most likely to be considered a condemnee with a right to seek compensation from the condemnor.

Due to the varied treatment of mortgages and the rights they convey, the method of participation by a mortgagee will vary from state to state. Some jurisdictions allow the mortgagee to participate fully in an action against the condemnor. Others allow the mortgagee to participate only to the extent necessary to claim its portion or allocation of the condemnation proceeds. Yet, a few jurisdictions only provide that the mortgagee maintains a remedy against the mortgagor. Consequently, mortgagees should seek to reserve the fullest protections and rights of participation as granted under the controlling law when drafting a condemnation clause.

III. Rights of Parties to the Proceeds/Impact Where Rights Are Assigned to Mortgagee

Most standard condemnation clauses address the mortgagee's right to the condemnation proceeds, and may go so far as to establish the distribution as between mortgagor and mortgagee. Typically, the clause includes a provision whereby the proceeds of any award or claim for damages in connection with any condemnation or conveyance *in lieu* of condemnation is assigned to the mortgagee. Such a clause is intended to give the mortgagee the unfettered right to the condemnation pro-

ceeds.[3] While this language protects the mortgagee's interest and gives the mortgagee a right to as much of the condemnation proceeds needed to satisfy the outstanding mortgage obligation, it may have unintended consequences.

A. Condemnor Takes Title Free and Clear of All Liens and Encumbrances

In most cases, upon notice of the filing of a declaration of taking or similar document and the offer/deposit of estimated just compensation, the condemnor will take title to the property described in the declaration of taking in a fee simple estate, free and discharged of all right, title, interest and liens of all parties. Thus, all proprietary rights and interests in the land condemned are extinguished, and all lienors and encumbrancers, including mortgagees, are relegated for compensation to the proceeds that stand in place and stead of the land.[4]

B. Total Taking

In a total taking, the condemnor takes the whole of a property. Once the condemnation proceeds that are in excess of the mortgage amount are paid or deposited, the principal amount of the mortgage may be deemed immediately paid. In this sense, the condemnor's payment or deposit of condemnation proceeds constitutes nothing less than a tender of payment to the mortgagee of the full mortgage obligation. Therefore, once the taking occurred and an award in excess of the principal owed is paid, the object of the mortgage transaction had been fulfilled.[5] That is, the borrower had received a loan and given security for it. Once the condemnor takes title to the property (usually by the filing of a declaration of taking or similar mechanism) and makes payment of its estimate of just compensation or an award of just compensation, the mortgagee with an unfettered right to the proceeds under the condemnation clause has, in essence, been tendered repayment in full.

Further, as a result of the taking, the security no longer exists, as the property is now owned by the condemning authority. No rights of possession or enjoyment of the property remain in the mortgagor, and no issues of foreclosure or redemption exist. As a result, the mortgagor's fee interest in the premises and the mortgagee's lien thereon are destroyed and, by operation of law, both interests are transmuted to a present right to the funds to be paid by the condemnor. In short, the traditional interests of mortgagor and mortgagee with respect to real property were extinguished. All that remained was money to be divided between the parties as they had agreed.[6] Consequently, in the event of a total taking of the property, a typical condemnation clause will provide that the proceeds will be applied to the sums secured by the security instrument, whether or not then due, with any excess paid to the borrower.

C. Partial Takings

The application of a condemnation clause can become trickier in a partial taking situation. A partial taking occurs when the condemnor takes less than the whole property owned by the mortgagor. As a result, a portion of the property covered by the mortgage is taken while a portion remains.

There are three primary ways in which a condemnation clause deals with a partial taking:

> First, and most often, mortgagees with superior bargaining power are able to include in their condemnation clause a provision granting them the right to all proceeds as may be necessary to satisfy the mortgage as a result of a partial taking—no matter how inconsequential the taking may be. Such funds, as in a total taking, will be applied against the outstanding principal mortgage amount and any other unpaid charges. Such a provision grants the mortgagee the greatest amount of power to receive all the funds, a portion of the funds, or no funds.
>
> Second, a condemnation clause may entitle the mortgagee to receive payment from the condemnation proceeds only to the extent the security of the mortgage is impaired. This can result in the complicated task of trying to determine how the partial taking has impacted the value of the remaining property. Under such circumstances, it is usually best to work it out with the property owner.
>
> Finally, a condemnation clause may provide a mortgagee no right to the proceeds in a partial taking. Though it is rare to see a provision explicitly depriving a mortgagee of rights in a partial taking, a mortgagee may lose its right to make a claim to any of the proceeds in a partial condemnation if the language of a condemnation clause is ambiguous enough.

In addition to determining an allocation of the proceeds and the partial release of a mortgage, a partial taking may raise a series of questions concerning the impact to the remaining property secured by the mortgage:

- Would the condemnation cause the debt service ratio of the mortgage loan to be less than the debt service coverage ratio of the mortgage loan immediately before the condemnation?
- Is the remaining property sufficient to secure the outstanding mortgage amount?
- Will the taking cause a zoning violation, health violation or building code violation?

- Will the taking have a material adverse affect on the marketability or occupancy of the remaining property?
- Would the taking impact the access, visibility or storm water drainage at the mortgaged property?
- Will utility service, such as water, be impacted as a result of the taking?

In order for a mortgagee to be satisfied with responses to such questions, a condemnation clause will usually provide the mortgagee the right to withhold a release of the mortgage (or condemnation proceeds to the mortgagor) until the mortgagee is satisfied that the remaining property is of sufficient value to secure the outstanding mortgage debt.

IV. Mortgage Rate of Interest versus Rule/Statutory Rate of Interest

Many jurisdictions provide a statutory or rule rate of interest on condemnation proceeds. That is, where the condemnor deposits its estimate of just compensation or a final award of compensation into court, the condemnees are entitled to interest thereon. Moreover, where the ultimate award is greater than the condemnor's initial deposit or payment, the condemnees are generally entitled to interest on the difference. The interest rate on deposits and/or the delta between the condemnor's estimate of just compensation and the ultimate award of just compensation are usually set by statute or rule.

Absent a condemnation, mortgagees are entitled to interest on the unpaid balance of the mortgage to the date of payment as set forth in the mortgage. However, when the land is condemned, results may vary depending on the jurisdiction. If the local law considers the mortgagee a holder of legal title, the mortgagee may be entitled to the interest rate provided by law, regardless of the rate set forth in the mortgage. Again, the condemnation has in essence terminated the mortgage, and the mortgagee's rights to compensation are not different from those of any other property owner.

Where the mortgagee has no estate in the property, but only a security interest, the results are more varied. Some jurisdictions will allow the mortgage to control the parties' rights with respect to interest. These jurisdictions provide that the mortgagee is entitled to interest at the contract rate until payment in full is made. Other jurisdictions find that because the lien was destroyed by the taking and the payment of condemnation proceeds, the mortgagee's rights were transferred to a present right to the condemnation proceeds and the mortgagee may, therefore, recover interest only at the statutory rate. Again, under this approach, the payment by the condemnor is deemed to be payment in full to the mortgagee. Consequently, in such jurisdictions, the mortgagor's obligations to make payments under the mortgage may stop on such date as the condemning agency acquires title and offers payment.

Regardless of this varied treatment, it may be best for the parties to contract for the payment of interest in the event of a condemnation. There is precedent whereby parties to a mortgage may agree, upon apportionment of the award in a condemnation action between mortgagor and mortgagee, that the mortgagee shall receive the difference between the statutory rate of interest and the contract rate of interest.

V. Prepayment Penalties

In several cases where a mortgage is prepaid as a result of a condemnation or a sale *in lieu* of or under threat of condemnation, courts have held that the prepayment penalty provided for in the mortgage need not be paid because the prepayment is not being made voluntarily. The thought is that a condemnee, who is in no way asked to have his or her property condemned, should not be made to pay this penalty.[7] This result—no payment of a prepayment penalty in a condemnation action—may even be achieved by statute.[8]

In other jurisdictions, courts may allow the contract language to control.[9] Thus, despite the fact that the prepayment has resulted from a condemnation, courts have concluded that the mortgagor must pay the prepayment penalty because of the contractual agreement to do so. Nevertheless, many jurisdictions provide by statute that such loss should be passed on to the condemnor. The objective of such a provision is to make the mortgagor whole by placing it in the same financial position it sat in prior to the taking. Further, such provisions take into account the fact that the payment was not made voluntarily, but resulted due to the sovereign's superior power of eminent domain.

VI. Payment of Mortgagee's Reasonable Attorney Fees and Costs in Condemnation

More and more, condemnation clauses in mortgages include provisions requiring a mortgagor to pay all attorney fees and costs incurred by the mortgagee in connection with a condemnation action. These expenses may include the mortgagee's attorney's work in reviewing the condemnation documents and the condemnation clause in the mortgage. They also may include the mortgagee's contact with the mortgagor or condemnor to discuss the case. And, if permitted, they may include a mortgagor's challenge to a taking, even if against the will of the mortgagor. Such fees can quickly mount up.

Obviously, such a provision represents the significant bargaining power of a mortgagee over a borrower. Hopefully, however, such a provision is not seen as a boon for counsel for a mortgagee. Rather, mortgagees and mortgagors should attempt to work out the payment of the mortgage with the condemnation proceeds on their own to minimize costs to all involved. Too often, counsel brought in for a mortgagee is unfamiliar with condemnation practice, creating unnecessary work and placing a strain on the relationship between the mortgagor and the mortgagee. In most condemnation cases involving a mortgage, the payment to the mortgagee from the condemnation proceeds can be handled with a simple phone call and a payoff statement.

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[1]*Albert Hanson Lumber Co.* v. *United States*, 261 U.S. 581, 43 S. Ct. 442, 67 L. Ed. 809 (1923); *Georgia* v. *Chattanooga*, 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1924).

[2]*See Georgia* v. *Chattanooga, supra*, 264 U.S. 472, 479-480; *United States* v. *Parcel of Land*, 100 F. Supp. 498 (D. D.C. 1951).

[3]*See City of Orange Twp.* v. *Empire Mortgage Servs.*, 341 N.J. Super. 216, 223 (App. Div. 2001) (citing *Jala Corp.* v. *Berkeley Sav. and Loan Ass'n.*, 104 N.J. Super. 394, 401 (App. Div. 1969)).

[4]3 Nichols on Eminent Domain § 9.01[2] (Matthew Bender, 3rd ed. 2007), citing *United States* v. *194.08 Acres of Land, More or Less, Situated in St. Martin Parish*, 135 F.3d 1025 (5th Cir. 1998), et al.

[5]*See Empire Mortgage, supra*, 341 N.J. Super. at 227-228; *City of Englewood* v. *Exxon Mobile Corp.*, 2009 N.J. Super. LEXIS 30 (App. Div. Feb. 10, 2009).

[6]*See, e.g., Empire Mortgage*, supra, 341 N.J. Super. at 223.

[7]*See Landohio Corp.* v. *Northwestern Mut. Life Mortg. & Realty Investors*, 431 F. Supp. 475, 480 (N.D. Ohio 1976) ("[W]hen the state coerces the sale of a mortgagor's property through the exercise of its condemnation power, the mortgagor is relieved of the contractual duty to render a prepayment premium to the mortgagee, unless the parties have explicitly agreed that such a payment shall be made even in the event that the mortgagor is forced to sell his property.")

[8]*See* California Code of Civil Procedure § 1265.240 ("Where the property acquired for public use is encumbered by a lien, the amount payable to the lienholder shall not include any penalty for prepayment").

[9]*See* note 7, *supra*.

The Importance of Condemnation and Access Clauses in Commercial Leases

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We have all heard the phrase "location, location, location" in connection with real estate literature. While it may now seem trite, the phrase still deserves a certain amount of reverence. Location, of course, is critical to the success of most commercial retail enterprises. For many retail businesses, success or failure will depend on the owner's selectivity and judgment in choosing the "right" location. In this regard, businesses may spend numerous hours scouting potential locations, reviewing whether access is safe and convenient, studying visibility and traffic patterns, and determining whether current zoning allows for their permitted use and/or optimal design in an effort to find what they believe will be a successful site.

However, a good location can quickly turn bad in the wake of a condemnation or modification of access. Despite the up-front investment made in finding a good location, relatively little time is spent drafting condemnation and access clauses that will adequately protect a tenant's interests, should there be any significant changes to a site as a result of a condemnation or modification of access. Typical condemnation clauses may be good in some cases, but they rarely seem to provide the protection that a tenant wished it had when confronted with a condemnation or change of access. Consequently, before drafting that next lease, commercial tenants should ask themselves two questions: (1) Does my condemnation clause provide me with adequate protection? (2) Are my interests protected in the event of a change in or modification of access?

Condemnation Clauses

Leasehold interests are compensable interests in property. *Silberman v. United States*, 131 F.2d.715, 717 (1st Cir. 1942). Generally, absent a provision in the lease to the contrary, it is well established that as between an owner and a tenant, a tenant is entitled to share proportionately in the condemnation award for the value of its leasehold interest. *Amoco Oil Company v. Commonwealth of Pennsylvania*, 157 Pa. Comm. 222, 227 (1993). Normally, existing rules or understandings stemming from state law create and define property interests and whether such interests are compensable in condemnation. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Still, care must be taken to distinguish between the taking of a leasehold interest, which is compensable, and the purported taking of other interests in real estate that may not be compensable (e.g., lost goodwill). Other examples include: *State, by the Com'r of Transp. v. Hess Realty Corp.*, 226 N.J. Super. 256 (App. Div. 1988), *cert. denied*, 113 N.J. 383, aff'd, 115 N.J. 229 (1989), *cert. denied*, 493 U.S. 964, 110 S. Ct. 406, 107 L.Ed.2d 371 (1989) (value of lost goodwill and business opportunity non-compensable).

For instance, in New Jersey, a tenant has a right to participate and present non-cumulative evidence of its claim in a condemnation. *New Jersey Sports & Exposition Authority v. East Rutherford*, 137 N.J. Super. 271, 279 (Law Div. 1975); *City of Atlantic City v. Cynwyd Investments*, 148 N.J. 55, 73 (1997). This is important because New Jersey follows the "unit rule," which means that there is only one award for all rights implicated by the condemnation (although relocation assistance/payments are treated separately). *Jersey City Redevelopment Agency v. Costello*, 252 N.J. Super. 247, 259 (App. Div. 1991). Thus, if there is a dispute as to who gets how much of the award, it is settled in an allocation hearing after the total award has been determined. Consequently, a condemnation clause providing that a tenant "may only participate and/or receive an award of compensation such that it will not diminish or reduce the award, judgment or settlement receivable by the Landlord," would be inconsistent with the concepts expressed above. Likewise, a clause providing that a tenant is entitled only to compensation for loss of goodwill or business opportunity might mean that such a tenant, in a state where such items are non-compensable, has contracted away any right to share in the compensation award. *Hess Realty Corp., supra.*

While provisions in a lease will not determine what items are compensable, the lease terms will control most disputes between the landlord and the tenant. Where a lease contains a condemnation clause spelling out the basis for dividing the condemnation award, such a clause will govern. Accordingly, precision in the drafting of the lease and the recognition of local laws will help to preserve a tenant's interests and may help to avoid disputes.

Drafting Remedies

The key to a condemnation clause is to provide for appropriate remedies. Condemnation lease clauses may provide for leasehold termination, leasehold extension options, restoration obligations, apportionment, bonus value and abatement of rent, and may

The Importance of Condemnation and Access Clauses

address relocation rights. It is often best simply to provide that the tenant may pursue all available remedies under common law. Additionally, it is important for the tenant that constructs improvements or fixtures on a property, should it so desire, to provide in the condemnation clause that the tenant is the owner of the improvements and fixtures and is entitled to compensation therefor, should those improvements or fixtures be taken or impacted by a condemnation. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474, 93 S. Ct. 791, 794, 35 L.Ed.2d 1 (1973) (finding that "just compensation" may include compensation for a lessee's expectancy in the continued use of an improvement beyond the remaining term of the lease).

Distinguishing Between Total Takings and Partial Takings—Drafting for Discretion

When drafting leases, tenants should seek to ensure that the condemnation clause provides them with sufficient discretion in the event of a condemnation. Further, it is important that the condemnation clause distinguishes between partial and total takings. Frequently, tenants are most vulnerable in a partial taking situation. Although only a portion of the property may be taken, the taking will have a large impact on the use of the property.

While the area taken may appear small, the taking may have a significant impact on the property. For example, a partial taking of only a few hundred square feet may reduce drive aisles, thereby causing internal circulation problems such that the site is no longer workable (e.g., drive-thrus) or preventing large delivery vehicles from making deliveries. A partial taking can significantly impact the availability of parking, potentially rendering the property non-conforming under local zoning regulations. A reduction in the size of a property can severely limit its ability to be developed, given the existing bulk requirements. A small taking at the corner of a property may eliminate the prime location for identification signs. The construction of an elevated roadway or improvement by the condemning agency on the property acquired can result in a loss of visibility of the remaining property to passing motorists. These are but a few of the effects that a partial taking can have on a property. Accordingly, when drafting leases, effort should be taken to address situations where a partial taking will have significant impact on the "workability" of a site. In this regard, tenants should seek as much discretion as possible to determine whether the partial taking has rendered the remaining property "not capable of being used for its intended or permitted use," and to choose the desired remedy (e.g., termination, restoration or abatement).

Access Clauses

Equally important to the success of retail operations is the availability of safe and convenient access to a property. However, many commercial leases provide scant attention to access and the potential impact that a change in access can have on a property or use. While a change in access can have as much of an impact as a partial condemnation of property—if not more—commercial leases are often void of any reference to the implications of a change in access. Perhaps it is because the parties to the lease believe that the condemnation clause will govern their interests, if a governmental agency modifies their access. If this is the case, commercial tenants may be in for a rude awakening, should such a modification of access occur.

1. Regulation of Access Under the Police Power Is Not a Taking

By and large, the owner of land abutting a street or highway has a right of access to and from the adjacent street. *4 Nichols on Eminent Domain* § 13.23[1] (Sackman, 3rd ed.). The right is considered a natural easement and an incident of land ownership. It is a property right and its deprivation, therefore, requires just compensation. *Id.; Mueller v. N.J. Highway Auth.*, 59 N.J. Super. 583, 158 A.2d 343, (App. Div. 1960).

It is generally accepted, however, that pursuant to the police power, a government may regulate access to and from the road for the public safety and welfare. *4 Nichols on Eminent Domain*, § 13.23[1].

Consequently, the rights of an abutting owner may be subordinated to the right of the public to the proper use of the highway and the right of governmental agencies to enforce proper police regulation. In such an instance, the regulation does not constitute a taking or condemnation for which just compensation is required. The inconvenience, reduction in profits or depreciation in the value of property that occurs as a result of a legitimate exercise of the state's police power is considered *damnum absque injuria* (loss or damage without injury in the legal sense). *See Commonwealth, Dep't of Transp. v. Nod's Inc.*, 14 Pa. Comm. 192, 321 A.2d 373 (1974); *Yegen v. City of Bismarck*, 291 N.W.2d 422 (N.D. 1980).

In other words, there is no "legal damage." There is no "taking," and the loss is not compensable.

Thus, the right of access is more properly regarded as the right to *reasonable, but not unlimited*, access to existing and adjacent public roads. That is, "the property owner is not entitled to access to his land at every point between it and the highway but only to 'free and convenient access to his property and the improvements on it.'" *Id.* at 595, 158 A.2d 343; *Wolf v. Dept. of Highways*, 422 Pa. 34, 220 A.2d 868 (1966). To this end, it is often stated that a property owner has no vested right in the continued flow of traffic past his or her property. *City of Wichita, supra*, 266 Kan. at 718. Therefore, where by virtue of state action, access is limited but remains reasonable, there is no such denial of access as entitles the

landowner to compensation. *Hession Condemnation Case*, 430 Pa. 273, 279-280, 242 A.2d 432 (1968) (a reasonable restriction to an abutting property owner's right to access does not give rise to a compensable claim); *State Highway Comm'r v. Kendall*, 107 N.J. Super. 248, 258 A.2d 33 (App. Div. 1969) (limitation of access to designated openings resulting from the installation of curbing and railing along highway); *State v. Stulman*, 136 N.J. Super. 148, 345 A.2d 329 (App. Div. 1975) (substitution of more circuitous access roads not compensable).

2. The Impact of Access Regulation

Access is a key component of property value, and the impairment of access that results from a partial taking of property often has significant real-world effects on value. For example, many retail establishments depend upon pass-by customers who, while driving by, choose to stop and purchase goods or services. These businesses require a certain traffic flow and easy access. If entry into the business establishment becomes difficult, customers will likely patronize other competing businesses that have easier or more convenient access. Consequently, an impairment of access for such businesses can mean a devastating loss of business.

Under proper exercise of its police power in the regulation of traffic, a state entity or transportation authority may:

- Reduce the number of existing access points;
- Change the width of an access point;
- Change the location of an access point;
- Re-route or divert traffic;
- Construct a traffic island;
- Install a median strip prohibiting or limiting crossovers from one lane to another;
- Use or install traffic control devices;
- Prescribe one-way traffic;
- Place restrictions on U-turns, and left and right turns;
- Install guardrails or curbing;
- Restrict the weight, size and speed of traffic on the street;
- Construct a fly-over past a property;
- Replace access on a highway with access on a local roadway; or
- Install "no parking" signs.

See Yegen, supra, 291 N.W.2d 422; *City of Phoenix v. Wade*, 5 Ariz. App. 505, 428 P.2d 450 (1967); *State v. Gannons Inc.*, 275 Minn. 14, 145 N.W.2d 321 (1966); *Painter v. State, Dept. of Roads*, 177 Neb. 905, 131 N.W.2d 587 (1964); *Darnall v. State*, 79 S.D. 59, 108 N.W.2d 201 (1961); *Iowa State Highway Commission v. Smith*, 248 Iowa 869, 82 N.W.2d 755, 73 A.L.R.2d 680 (1957); *Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D.1978); *Commonwealth, Dept. of Transp. v. Kastner*, 13 Pa. Commw. 525, 320 A.2d 146 (1974), cert. denied, 419 U.S. 1109, 95 S.Ct. 783, 42 L.Ed.2d 806 (1975); *State v. Interpace Corp.*, 130 N.J. Super. 322, 327 A.2d 225 (App. Div. 1974); *State v. Monmouth Hills, Inc.*, 110 N.J. Super. 449, 266 A.2d 133 (App. Div. 1970); *City of Wichita v. McDonald's Corp.*, 266 Kan. 708, 971 P.2d 1189 (1999).

A change in access or similar exercise of police power as described above can have myriad impacts. For example, a change in access may:

- Reverse traffic flows through drive aisles or around improvements;
- Disrupt the ability of delivery vehicles to enter or exit the site safely;
- Cause internal circulation problems such as the mixing of commercial vehicles with customer traffic;
- Cause traffic to flow by a competitor's business before reaching an entry point on the subject property;
- Create a more circuitous access route;
- Shift a primary access point from the front of a building to the back;
- Shift a primary access point from a highly traveled highway to a local roadway or connector road;
- Make access more difficult by creating the need to cross a newly constructed feeder lane;
- Limit movement entering or exiting the subject property; and
- Reduce visibility.

Simply stated, the regulation of access can turn a good location into a bad location. Given the potential impacts that a change or modification of access can have on a property, it is imperative that retail or commercial operators that enter into leases include clauses that address the potential for administrative changes in access.

Moreover, commercial operators must keep in mind that the *regulation of access can be accomplished outside of the condemnation arena* and frequently will not provide for any compensation to property owners or tenants. Accordingly, commercial leases should be drafted and negotiated to address potential issues involving loss/change of access. These issues include requiring notice to tenants, participation in access proceedings if legally permissible and an escape clause, should the operator determine that the change in access will have a material impact on business operations.

Without such clauses, a commercial tenant might be stuck at its site with no way in and no way out. ■

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CITY OF ENGLEWOOD, PLAINTIFF-RESPONDENT, v. AS TO COUNT ONE EXXON MOBILE CORPORATION, SAUDI BASIC INDUSTRIES CORPORATION, AS TO COUNT TWO SUN REFINING & MARKETING COMPANY, NEW WAY ASSOCIATES, A GENERAL PARTNERSHIP, BARRY DORN OF NEW YORK, INC., A NEW YORK CORPORATION, BARRY DORN, INC., STATE OF NEW JERSEY, DIVISION OF TAXATION, AS TO COUNT THREE FBB ENGLEWOOD, LLC, DEFENDANT-RESPONDENT, STARBUCKS CORPORATION, DEFENDANT-RESPONDENT, BANK OF AMERICA, SUCCESSOR IN INTEREST TO FLEET BANK AS SUCCESSOR IN INTEREST TO SUMMIT BANK, DEFENDANT-APPELLANT, AND STATE OF NEW JERSEY, DEFENDANT-RESPONDENT.

DOCKET NO. A-2490-07T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

406 N.J. Super. 110; 966 A.2d 1082; 2009 N.J. Super. LEXIS 30

December 10, 2008, Submitted
February 10, 2009, Decided

SUBSEQUENT HISTORY: [***1]

Approved for Publication February 10, 2009.

Certification denied by City of Englewood v. Exxon Mobil Corp., 973 A.2d 383, 2009 N.J. LEXIS 599 (N.J., May 5, 2009)

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2137-06.

CASE SUMMARY:

PROCEDURAL POSTURE: Pursuant to N.J.S.A. § 20:3-18, plaintiff city filed a condemnation action against defendants, a mortgagee and mortgagor. The mortgagee appealed orders of the Superior Court of New Jersey, Law Division, Bergen County, which awarded it counsel fees of less than the full amount incurred and, relying on R. 4:42-11, set the rate of interest the mortgagee was entitled to receive in satisfaction of its mortgage at less than the contractual rate.

OVERVIEW: At issue was at what point did the mortgagee receive the lower interest rate earned on condemnation proceeds deposited in court rather than the more favorable contractual mortgage interest rate. Relying on Empire Mortgage, the appellate court identified that point as when the funds were "available" for withdrawal by the mortgagee, but that "availability" did not equate with the actual withdrawal of the funds from court. In other words, it rejected the mortgagee's claim that the contract rate of interest ran until payment was actually made. Instead, it held that funds were "available" once the deposit was made and no impediment (i.e. lack of notice) existed for the mortgagee to apply for withdrawal of the funds on deposit. Here, although the mortgagee's withdrawal motion was initially denied due to the city's unresolved environmental remediation concerns, such delay was not attributable to any fault of the mortgagor and impacted both mortgagee

and mortgagor. Thus, there was no sound reason to doubly burden the mortgagor, who remained obligated to continue paying interest, by requiring that interest be paid at the higher contract rate to the singular benefit of the mortgagee.

OUTCOME: The trial court's award of interest was affirmed. The counsel fees award was reversed and the matter was remanded to the trial court for reconsideration and, pursuant to R. 1:7-4(a), a supporting statement of reasons under N.J. Ct. R. Prof. Conduct 1.5(a) for the amount of fees awarded.

CORE TERMS: mortgage, attorneys' fees, withdrawal, deposit, mortgagee, counsel fees, condemnation, condemnation proceeds, interest rate, deposited, notice, outstanding, rate of interest, eminent domain, mortgagor, withdraw, Law Division's, environmental, declaration, condemnation award, mortgage debt, impediment, estimated, awarding, entitled to receive, mortgage rate, fee award, deposited funds, principal amount, contract rate

LexisNexis(R) Headnotes

Civil Procedure > Parties > Joinder > Necessary Parties
Civil Procedure > Eminent Domain Proceedings > Parties
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests
[HN1]As a general proposition, when mortgaged land is the subject of the condemnation, all mortgage holders must be joined as defendants. R. 4:73-2(a).

Civil Procedure > Eminent Domain Proceedings > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests
[HN2]A total taking under eminent domain changes the interests of the parties to the mortgage. N.J.S.A. § 20:3-19. Ergo, the condemnation award is a substitute for the land when all or part of the mortgaged land is taken for public use. Thus the lien of the mortgage attaches to the condemnation award. If the entire property subject to the mortgage is condemned, the mortgagee is entitled to the entire award, or so much of it as necessary to satisfy the mortgage debt, even if the debt has not matured.

Civil Procedure > Eminent Domain Proceedings > Deposits
Civil Procedure > Eminent Domain Proceedings > Interest
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests
[HN3]When a municipality files a declaration of taking and simultaneously deposits just compensation into court pursuant to N.J.S.A. § 20:3-18, the property, which represents the security for the mortgage, is no longer owned by the mortgagor, because title vests in the condemning authority. N.J.S.A. § 20:3-19. Consequently, the mortgagee no longer has a security interest in the property, hence the logic and protection behind the terms of the mortgage, which gives the mortgagee an interest in the condemnation proceeds after a taking under eminent domain. As a result of this action by the State of New Jersey, the mortgagor's fee interest in the premises and the mortgagee's lien thereon were destroyed, and by operation of law both were transmuted to a present right to the funds deposited by the State with the clerk of the court. Interest runs on the award from the date of the commencement of the action until the date of payment of compensation.

Civil Procedure > Eminent Domain Proceedings > Deposits
Civil Procedure > Eminent Domain Proceedings > Interest
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
[HN4]A mortgagee is not entitled to collect the contractual rate of interest on the principal amount of the mortgage debt for property that is totally taken in a summary condemnation proceeding after it was mortgaged beyond a 45-day period for the mortgagee to apply for withdrawal of the estimated just compensation deposited into court by the condemnor, where (a) the deposited funds were sufficient to pay the outstanding principal balance of the mortgage debt, (b) the mortgage assigned to the mortgagee a condemnation award for a total taking and provided that such award would be

applied to the mortgage debt "whether or not then due," and (c) there was no impediment to the mortgagee applying for the deposited funds.

Civil Procedure > Eminent Domain Proceedings > Deposits
Civil Procedure > Eminent Domain Proceedings > Interest
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests
[HN5]Once a declaration of taking is filed and just compensation deposited into court, the mortgagee simultaneously assumes a right to those proceeds by operation of the mortgage, thereby extinguishing the obligations of the parties to the mortgage and leaving only the administrative task of allocating money. As to the further question of which party must bear the difference in interest rates, the mortgagor is relieved from his obligation to make payment after the condemnation award is paid into court and the funds are available for withdrawal by the mortgagee. The New Jersey Eminent Domain Act provides that the date notice of deposit is served is the date title vests with the condemnor, free and clear of any mortgage. N.J.S.A. §§ 20:3-19, -20.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN6]An award of counsel fees is only disturbed upon a clear abuse of discretion.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > American Rule
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards
Contracts Law > Contract Conditions & Provisions > General Overview
[HN7]New Jersey has a strong policy disfavoring shifting of attorneys' fees. Courts have adhered to the so-called "American Rule," which generally requires each party to pay its own attorneys' fees. Certain exceptions are recognized in R. 4:42-9 and 4:42-9(a)(1)-(8). While a contractually-based claim does not fall within any of the designated exceptions, R. 4:42-9 does not preclude a party from agreeing by contract to pay attorneys' fees. That exception to the general rule has been incorporated into R. 4:42-9.

Civil Procedure > Trials > Bench Trials
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
Contracts Law > Contract Conditions & Provisions > General Overview
Legal Ethics > Client Relations > Attorney Fees > General Overview
[HN8]The reasonableness of counsel fees applications under New Jersey law is governed by N.J. Ct. R. Prof. Conduct 1.5(a) (listing factors in determining the reasonableness of counsel fees) and R. 4:42-9(b) (requiring applications for allowance of fees to address the factors listed in Rule 1.5(a)). Rule 1.5(a) must inform the calculation of the reasonableness of a fee award in every case; a trial court must analyze these factors in determining an award of reasonable counsel fees and then must state its reasons on the record for awarding a particular fee pursuant to R. 1:7-4(a), which requires a trial court to find the facts and state its conclusions of law thereon in all actions tried without a jury. Because contractually-based claims for attorneys' fees are incorporated into R. 4:42-9, it follows that where R. 4:42-9(b) incorporates Rule 1.5(a) and where Furst v. Einstein Moomjy requires that a trial court state reasons on the record for an award based on Rule 1.5(a), that such a requirement controls in this case involving a contractually-based claim for attorneys' fees, particularly because such a requirement is fundamental to the fairness of the proceedings and serves as a necessary predicate to meaningful review.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
Legal Ethics > Client Relations > Attorney Fees > General Overview
[HN9]N.J. Ct. R. Prof. Conduct 1.5(a) provides the following factors to be applied to determine the reasonableness of counsel fees: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or

by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

COUNSEL: *Sodini & Spina, LLC*, attorneys for appellant (*Patrick J. Spina*, of counsel and on the brief).

Duane Morris LLP, attorneys for respondent FBB Englewood (*George J. Kroculick*, of counsel; *Mr. Kroculick* and *Michael J. McCalley*, on the brief).

Ferrara, Turitz, Harraka & Goldberg, attorneys for respondent City of Englewood (*William F. Rupp*, on the statement in lieu of brief).

JUDGES: Before Judges PARRILLO, LIHOTZ and MESSANO. The opinion of the court was delivered by PARRILLO, J.A.D.

OPINION BY: PARRILLO

OPINION

[*114] [**1084] The opinion of the court was delivered by

PARRILLO, J.A.D.

In this condemnation action, defendant Bank of America (BOA) appeals from orders of the Law Division setting the rate of interest BOA is entitled to receive in satisfaction of its mortgage at less than the contractual rate, and awarding BOA counsel fees less than the full amount incurred. For reasons that follow, we affirm as to the former and reverse and remand as to the latter.

The facts are relatively straightforward. FBB Englewood, LLC (FBB) owned a parcel of land at [***2] 80 East State Highway 4 in Englewood, which is the subject matter of this appeal. BOA held a mortgage on the property with an interest rate of 7.5%. Pertinent to this appeal, the mortgage, dated June 25, 1999, provided:

> (i) *Condemnation*. [FBB Englewood, LCC] hereby assigns to the Bank the proceeds of any award . . . in connection with any condemnation or other taking of the Property or any part thereof under the power of eminent domain. . . . The Bank shall be entitled to payment of all expenses incurred by it in connection with any such judgment or award, including reasonable costs and attorneys' fees. After deducting expenses, the Bank may, in its absolute discretion, use all of any part of such sums received to reduce any amounts due under this Mortgage and/or the Note or may release any or all of such sum to the Mortgagor.

On March 28 and 29, 2005, plaintiff City of Englewood (City or plaintiff) filed a verified complaint and order to show cause seeking to acquire and condemn this property along with two other adjacent parcels. [1] FBB filed a notice of appearance and BOA, as mortgagee, filed an answer, separate defenses, cross-claim [*115] and counter-claim, asserting its interest in the [***3] condemnation proceeds and seeking an order compelling the City to "immediately deposit the sum of $ 1,550,000.00 . . . the estimated value of the Premises as asserted by Plaintiff," and permitting BOA to withdraw "all such sums necessary to fully discharge the Bank's Mortgage." Following a hearing on the return date, the court denied BOA's requests, declaring that the City was duly authorized to exercise its power of eminent domain, and appointed Commissioners to appraise the property [**1085] and fix the condemnation proceeds to be paid by August 23, 2005. [2]

> 1 These other parcels, owned by Exxon-Mobile and Sun Refining, are not involved in this appeal.
> 2 The Order of Final Judgment dismissed the City's verified complaint without prejudice, pending completion of the condemnation hearing, but also provided that the complaint could be restored upon timely appeal of the Commissioner's decision.

When the Commissioners failed to file a report by the extended deadline, FBB moved, with notice to BOA, to compel the City to either file a declaration of taking and deposit just compensation with the court, or abandon the action. On January 23, 2006, the court granted FBB's motion and ordered the City to file [***4] a declaration of taking and deposit compensation into court by March 7, 2006.

In compliance therewith, on February 1, 2006, the City, pursuant to N.J.S.A. 20:3-18, filed a declaration of

taking, and thereafter, on March 2, 2006, deposited $ 1,550,000--the estimated just compensation for FBB's property--with the New Jersey Superior Court Trust Funds Unit. [3] One month later, on April 7, 2006, FBB moved to withdraw the deposited funds from the Trust Funds Unit, and to direct that a portion of the funds be paid to BOA to satisfy the outstanding balance on its mortgage. On April 20, 2006, BOA cross-moved for withdrawal, asserting its interest in the condemnation proceeds and requesting that it be paid the [*116] outstanding principal amount due on the mortgage, including accrued interest under the contract rate, and attorneys' fees. In response, FBB objected to both BOA's request for interest on the outstanding mortgage obligation at a rate greater than the current New Jersey Superior Court Trust Funds rate and its request for attorneys' fees. The City, however, objected to withdrawal by both parties due to concerns over possible environmental contamination on the property, and therefore requested [***5] that "the motions [for withdrawal] be adjourned for one cycle pending receipt of [environmental cleanup] cost estimates." Heeding the City's request, on May 16, 2006, the court denied both FBB's and BOA's requests for withdrawal, ordering that "remediation costs [first] be calculated before release of funds." [4]

3 Although BOA claims never to have received notice of the City's deposit, it is undisputed that BOA's name and place of business appear on the service list in connection with the City's March 2, 2006 letter to the Trust Funds Unit requesting deposit in accordance with the court's order.

4 Significantly, in a July 21, 2006 cross-motion, BOA certified that the trial court's denial of withdrawal on April 24, 2006 "was warranted since there are admittedly legitimate environmental concerns at the Premises."

Apparently, the environmental issue was resolved and the City no longer sought to have any estimated remediation costs held in trust. Consequently, on June 20, 2006, FBB once again moved for withdrawal and reiterated its position that although BOA should be paid an amount equal to the outstanding principal amount due on the mortgage, it was not entitled to interest on the mortgage [***6] "at a rate greater than the current New Jersey Superior Court Trust Funds rate." FBB also restated its objection to BOA's request for attorneys' fees, even though contractually based. BOA cross-moved for withdrawal, countering that FBB was attempting to "'short' BOA on the amount due for principal and interest on the BOA note/Mortgage" and "refus[ing] to pay BOA for attorneys fees and costs." In this regard, BOA certified that the outstanding balance on the mortgage as of July 13, 2006, including interest, was $ 711,905.57, and that it had incurred $ 8,213.69 in costs and attorneys' fees.

Following argument, the court found that BOA, in addition to the outstanding [**1086] principal, was only entitled to receive the 7.5% [*117] contract interest rate up to April 24, 2006--the date the court determined to be a reasonable period after the funds were deposited and BOA was able to apply for their withdrawal--but that thereafter, BOA was limited to the 4% interest rate set by the Trust Funds Unit. Thus, by order of September 18, 2006, the court, citing *Rule* 4:42-1, awarded BOA $ 720,146.26, plus any interest accruing after April 24, 2006 at the Trust Funds Unit rate. The court also held that BOA was entitled [***7] to reasonable attorneys' fees and costs, subject to a detailed breakdown and submission of a certification of services.

Both FBB and BOA moved for reconsideration. FBB argued that the order for withdrawal only provided for payment to BOA and also failed to account for FBB's overpayments to BOA from March to October 2006, when it continued to make its monthly mortgage payments of principal and interest under the mortgage terms. FBB further argued that BOA's attorneys' fees were unreasonably high. On the other hand, BOA argued that at the very least it was entitled to the mortgage interest rate up to September 18, 2006, the date of the court's order for withdrawal. BOA asserted it was owed $ 714,625.58, inclusive of principal, interest at the note rate, and attorneys' fees and costs of $ 9,036.48, which by November 17, 2006 had actually risen to $ 10,112.

In its revised order for withdrawal of December 19, 2006, the court directed the Trust Funds Unit to pay BOA $ 721,717.01, an amount reflecting the principal due on the mortgage and interest owed under the mortgage rate up to April 24, 2006, plus whatever amount of interest accrued after April 24, 2006 at the Trust Fund rate, and $ 5,000 [***8] in attorneys fees and costs. The order also directed BOA to reimburse FBB $ 55,642.48 for payments made by FBB from March to October 2006. On January 5, 2007, FBB submitted the revised order to the Trust Funds Unit, and on January 30, 2007, BOA was

paid $ 746,497.47. [5]

> 5 The amount of $ 746,497.47 reflected $ 721,717.01 in principal and contract interest up to April 24, 2006, and $ 24,780.46 in interest at the Trust Funds rate after April 24.

[*118] On appeal, BOA, relying on our decision in City of Orange Twp. v. Empire Mortgage Servs., 341 N.J. Super. 216, 775 A.2d 174 (App.Div.2001) (*Empire Mortgage*), argues that as a matter of law, a mortgagee is entitled to interest at the rate stated in the mortgage note for a reasonable period of time after the condemnation proceeds are actually made available for withdrawal. BOA also argues that the award of counsel fees was unreasonably low and unsupported by any findings. We proceed to address these issues in the order raised.

(I)

[HN1]As a general proposition, "when mortgaged land is the subject of the condemnation, all mortgage holders must be joined as defendants." *Empire Mortgage, supra*, 341 N.J. Super. at 221, 775 A.2d 174 (citing Roger A. Cunningham & Saul Tischler, 29 *New* [***9] *Jersey Practice: Law of Mortgages* § 165 at 760 (1975); R. 4:73-2(a)). [HN2]A total taking under eminent domain changes the interests of the parties to the mortgage. *See* N.J.S.A. 20:3-19. Ergo,

> the condemnation award is a substitute for the land when all or part of the mortgaged land is taken for public use. Thus the lien of the mortgage attaches to the condemnation award. If the entire property subject to the mortgage is condemned, the mortgagee is entitled to the entire award, or so much of it as [**1087] necessary to satisfy the mortgage debt, even if the debt has not matured.
>
> [*Empire Mortgage, supra*, 341 N.J. Super. at 221, 775 A.2d 174 (quoting Cunningham and Tischler, *supra*, § 165 at 761).]

[HN3]When a municipality files a declaration of taking and simultaneously deposits just compensation into court pursuant to N.J.S.A. 20:3-18, the property, which represents the security for the mortgage, is no longer owned by the mortgagor, *Empire Mortgage*, 341 N.J. Super. at 227, 775 A.2d 174, because title vests in the condemning authority. N.J.S.A. 20:3-19. Consequently, the mortgagee no longer has a security interest in the property, hence the logic and protection behind the terms of the mortgage, which gives the mortgagee an interest [***10] in the condemnation proceeds [*119] after a taking under eminent domain. *Empire Mortgage*, 341 N.J. Super. at 227, 775 A.2d 174. In other words,

> [a]s a result of this action by the State[,] the mortgagor's fee interest in the premises and the mortgagee's lien thereon were destroyed, and by operation of law both were transmuted to a present right to the funds deposited by the State with the clerk of the court.
>
> [*Jala Corp. v. Berkeley Sav. & Loan Ass'n*, 104 N.J. Super. 394, 401, 250 A.2d 150 (App.Div.1969).]

Equally clear, interest runs on the award "from the date of the commencement of the action until the date of payment of compensation[.]" *Casino Reinvestment Dev. Auth. v. Hauck*, 162 N.J. 576, 578, 745 A.2d 1163 (2000); *see also* N.J.S.A. 20:3-31. The question raised in *Empire Mortgage*, and at the crux of this appeal, is at what point does the mortgagee receive the interest rate earned on the condemnation proceeds deposited in court rather than the contractual mortgage interest rate. *Empire Mortgage* answered the question as follows:[HN4] a mortgagee is not entitled to collect the contractual rate of interest on the principal amount of the mortgage debt for property that is totally taken in a summary condemnation proceeding after it was mortgaged [***11] beyond a 45-day period for the mortgagee to apply for withdrawal of the estimated just compensation deposited into court by the condemnor, where (a) the deposited funds were sufficient to pay the outstanding principal balance of the mortgage debt, (b) the mortgage assigned to the mortgagee a condemnation award for a total taking and provided that such award would be applied to the mortgage debt "whether or not then due," and (c) there was no impediment to the mortgagee applying for the deposited funds. 341 N.J. Super. at 226-27, 775 A.2d 174. Noteworthy on this score is the fact that the *Empire*

Mortgage court granted IMC a 45--day grace period because it was joined as a party defendant *after* the deposit was made and IMC was therefore not aware of the deposit until its joinder. *Id.* at 228, 775 A.2d 174.

Save for that feature, the facts of *Empire Mortgage* are similar to those here. The City of Orange condemned property owned by Okafor, the mortgagor, and deposited just compensation into court [*120] on October 7, 1998. *Id.* at 219, 775 A.2d 174. The City amended its condemnation complaint on November 6, 1998 to join IMC Mortgage Company, who held a mortgage on the property, as an additional defendant. *Id.* at 220, 775 A.2d 174. IMC, however, did not [***12] move for an order seeking payment of funds from the condemnation proceeds on deposit with the court until January 19, 2000. *Ibid.* IMC argued that Okafor was obligated under the mortgage note to make payments at the stated interest rate of 13.5% after the condemnation proceeds were deposited into court rather than the 5.5% rate of interest [**1088] earned on the funds while on court deposit. *Id.* at 219, 775 A.2d 174. The Law Division agreed, ordering Okafor to pay IMC mortgage payments at the contract rate. *Ibid.* On appeal, we reversed and enunciated the aforecited rule, finding that without imposing a reasonable cut-off time, a lender could simply "sit back" and ignore funds it has a right to withdraw, all the while expecting the borrower to pay higher interest rates, late charges, and penalties. *Id.* at 226, 775 A.2d 174. In other words, we found it patently unfair for the borrower to pay the cost of the lender's inaction, deliberate or not. *Ibid.*

Of course, this result comported not only with notions of fairness, but as well with the law of eminent domain [6] and the terms of the very contract at issue, which in relevant part are identical to the mortgage here. [7] To reiterate, [HN5]once a declaration of taking is filed and just [***13] compensation deposited into court, the [*121] mortgagee simultaneously assumes a right to those proceeds by operation of the mortgage, thereby extinguishing the obligations of the parties to the mortgage and leaving only the administrative task of allocating money. *Ibid.* And as to the further question of which party must bear the difference in interest rates, we determined, consistent with both law and the contract in question, that the mortgagor is relieved from his obligation to make payment after the condemnation award is paid into court and the funds are available for withdrawal by the mortgagee. *Id.* at 225, 775 A.2d 174.

6 The Eminent Domain Act provides that the date notice of deposit is served is the date title vests with the condemnor, free and clear of any mortgage. *N.J.S.A.* 20:3-19, -20.

7 Compare the mortgage provision at issue here, as previously recited, with the provision in *Empire Mortgage*:

> The proceeds of any award . . . in connection with any condemnation . . . of the Property, . . . are hereby assigned and shall be paid to Lender [IMC, as successor to Empire]. In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether [***14] or not then due, with any excess paid to Borrower [Okafor].
>
> [341 N.J. Super. at 225, 775 A.2d 174.]

BOA nevertheless equates "availability" of funds with their actual withdrawal from court. But nothing in *Empire Mortgage* suggests such a generous construction. *Empire Mortgage* did not rule that the contract rate of interest runs until payment is actually made. On the contrary, when addressing the notion of "availability" of funds, we explicitly stated that "there was no impediment to [the mortgagee] *applying* for withdraw[al,]" *id.* at 228, 775 A.2d 174 (emphasis added), obviously referring to the triggering point after which the contract rate of interest terminates and the court rate applies. In fact, in fairness to the mortgagee, as noted, we even allowed the mortgagee a reasonable period after notification of deposit to prepare the application for withdrawal of the funds on deposit and to obtain a decision thereon, suggesting a grace period of 45 days to be an adequate measure of the time to accomplish this. *Ibid.*

Here, BOA was served with the City's verified complaint on May 16, 2005. It knew full well of the condemnation action. Further, BOA's name and address appear on the City's service list in connection with [***15] its March 2, 2006 deposit. Even though BOA claims not to have been notified of the deposit, it was on constructive notice with the entry of the court's January

23, 2006 order to compel, directing the City to make deposit by March 7, 2006. At the very latest, BOA received actual [**1089] notice of the deposit on April 7, 2006, when it was served with FBB's motion for withdrawal. Thus, as of April 7, 2006, no impediment existed for BOA's [*122] application for withdrawal. In fact, BOA itself applied for withdrawal on April 20, 2006, four days before the date the trial court terminated interest at the mortgage rate. BOA, therefore, was not prejudiced by any claimed lack of notice. Contrary to BOA's position, there is nothing arbitrary about the cut-off date of April 24, 2006, the trial court having considered that such a date, pursuant to *Empire Mortgage*, reflected a reasonable time from the date of the City's deposit in which BOA had an opportunity to file a motion to withdraw. Reviewed in that light, whether BOA actually received notice of the deposit is beside the point because it nonetheless moved for withdrawal within that reasonable timeframe.

To be sure, BOA's motion to withdraw was initially denied [***16] due to the City's unresolved environmental remediation concerns. But, contrary to BOA's argument, this does not necessarily mean that the funds were not "available." In the first place, it is inconsequent that the motion was denied after title had already vested in the City and the obligations of the mortgagor under the mortgage had already been extinguished. Nonetheless, the delay occasioned by the court's denial was not without impact on both FBB and BOA. Yet no sound reason exists for doubly burdening FBB, who remained obligated to continue paying interest, by requiring that interest be paid at the higher contract rate to the singular benefit of BOA. After all, the Trust Funds rate of interest is the same rate that FBB, as property owner, receives on its share of the proceeds. Moreover, FBB should not be made to suffer the additional costs of the higher interest rate where the delay was justified, as acknowledged by BOA itself in its July 21, 2006 cross motion, and as it turns out, attributable to no fault of FBB. Thus, we conclude that the funds were "available," as contemplated by *Empire Mortgage*, once the deposit was made and no impediment existed for BOA to apply for withdrawal [***17] of the funds on deposit.

We, therefore, find that BOA was awarded the proper rates of interest that it was entitled to receive. BOA received interest [*123] from the start of the action to the date it collected the condemnation proceeds, *N.J.S.A.* 20:3-31, and because April 24, 2006 is a reasonable cut-off date in which to terminate the mortgage rate and begin the Trust Funds rate, *see Empire Mortgage, supra*, 341 N.J. Super. at 225, 775 A.2d 174, the trial court did not err.

(II)

The mortgage at issue provides that "[t]he Bank shall be entitled to payment of all expenses incurred by it in connection with any such [condemnation] judgment or award, including reasonable costs and attorneys' fees." Here, BOA contends that, aside from granting a counsel fee that was unreasonably low, the court failed to state its reasons for the $ 5000 fee award or analyze the relevant factors, rendering its decision arbitrary. We agree.

[HN6]An award of counsel fees is only disturbed upon a clear abuse of discretion. *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 444, 771 A.2d 1194 (2001) (citing *Rendine v. Pantzer*, 141 N.J. 292, 317, 661 A.2d 1202 (1995)). [HN7]New Jersey has a strong policy disfavoring shifting of attorneys' fees. *McGuire v. City of Jersey City*, 125 N.J. 310, 326, 593 A.2d 309 (1991). [***18] Courts have adhered to the so-called "American Rule," which generally requires each party to pay its own attorneys' fees. *Rendine, supra*, 141 N.J. at 322, 661 A.2d 1202.

[**1090] Certain exceptions are recognized in *Rule* 4:42-9. *Kellam Assocs. v. Angel Projects, LLC*, 357 N.J. Super. 132, 138, 814 A.2d 642 (App.Div.2003); *R.* 4:42-9(a)(1)-(8). "While a contractually-based claim, such as that asserted here, does not fall within any of the designated exceptions, [*Rule* 4:42-9] does not preclude a party from agreeing by contract to pay attorneys' fees." *Kellam Assocs., supra*, 357 N.J. Super. at 138, 814 A.2d 642. That exception to the general rule has been incorporated into *Rule* 4:42-9. *N. Bergen Rex Transp. v. Trailer Leasing Co.*, 158 N.J. 561, 570, 730 A.2d 843 (1999).

[*124] The method of calculating attorneys' fees under a fee-shifting statute pursuant to *Rule* 4:42-9(a)(8) has been prescribed by *Rendine, supra*, and *Furst v. Einstein Moomjy*, 182 N.J. 1, 860 A.2d 435 (2004). *See Rendine, supra*, 141 N.J. at 316, 661 A.2d 1202 (plaintiff sought reasonable attorneys' fees under *N.J.S.A.* 10:5-27.1 in connection with her action under Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42); *Furst, supra*, 182 N.J. at 21, 860 A.2d 435 (plaintiff sought

reasonable attorneys' fees under N.J.S.A. 56:8-19 in connection [***19] with his action under Consumer Fraud Act, N.J.S.A. 56:8-1 to -20). Indeed, cases following *Furst* and *Rendine* have involved fee-shifting statutes. *See, e.g.*, R.M. v. Supreme Court of New Jersey, 190 N.J. 1, 9-13, 918 A.2d 7 (2007) (authorizing award of counsel fees under Civil Rights Act); Twp. of West Orange v. 769 Assocs., LLC, 397 N.J. Super. 244, 255-56, 936 A.2d 1023 (App.Div.2007) (affirming Law Division's award of counsel fees under N.J.S.A. 20:3-26(b)); Monogram Credit Card Bank of Georgia v. Tennesen, 390 N.J. Super. 123, 126, 134, 914 A.2d 847 (App.Div.2007) (affirming Law Division's award of attorneys' fees under Consumer Fraud Act, N.J.S.A. 56:8-1 to -20). On the other hand, courts have also applied *Furst* and *Rendine* outside the context of a fee-shifting statute. *See* Packard-Bamberger & Co., *supra*, 167 N.J. at 444-47, 771 A.2d 1194 (affirming Law Division's award of counsel fees as consequential damages for attorney malpractice); Trimarco v. Trimarco, 396 N.J. Super. 207, 217-218, 933 A.2d 621 (App.Div.2007) (awarding counsel fees under Rule 4:42-9(a)(2), which authorizes awarding counsel fees out of a court fund).

As the Court stated in R.M., *supra*, 190 N.J. at 11-12, 918 A.2d 7, [HN8]the reasonableness of counsel fees applications under State law is [***20] governed by Rules of Professional Conduct 1.5(a) [8] [*125] (listing factors in determining reasonableness of counsel fees), and Rule 4:42-9(b) (requiring applications for allowance of fees to address factors listed in RPC 1.5(a)). In this regard, the *Furst* court stated that RPC 1.5(a) "must inform the calculation of the reasonableness of a fee award in this and every case" and that "a trial court must analyze [these] factors in determining an award of reasonable counsel fees and then must state its reasons on the [**1091] record for awarding a particular fee" pursuant to Rule 1:7-4(a), Furst, *supra*, 182 N.J. at 22, 860 A.2d 435, which requires a trial court to "find the facts and state its conclusions of law thereon in all actions tried without a jury." R. 1:7-4(a). Because contractually-based claims for attorneys' fees are incorporated into Rule 4:42-9, Bergen Rex, *supra*, 158 N.J. at 570, 730 A.2d 843, it follows that where Rule 4:42-9(b) incorporates RPC 1.5(a) and where *Furst* requires that a trial court state reasons on the record for an award based on RPC 1.5(a), that such a requirement controls in this case involving a contractually-based claim for attorneys' fees, particularly "[b]ecause [such a requirement] is fundamental [***21] to the fairness of the proceedings and serves as a necessary predicate to meaningful review." R.M., *supra*, 190 N.J. at 12, 918 A.2d 7.

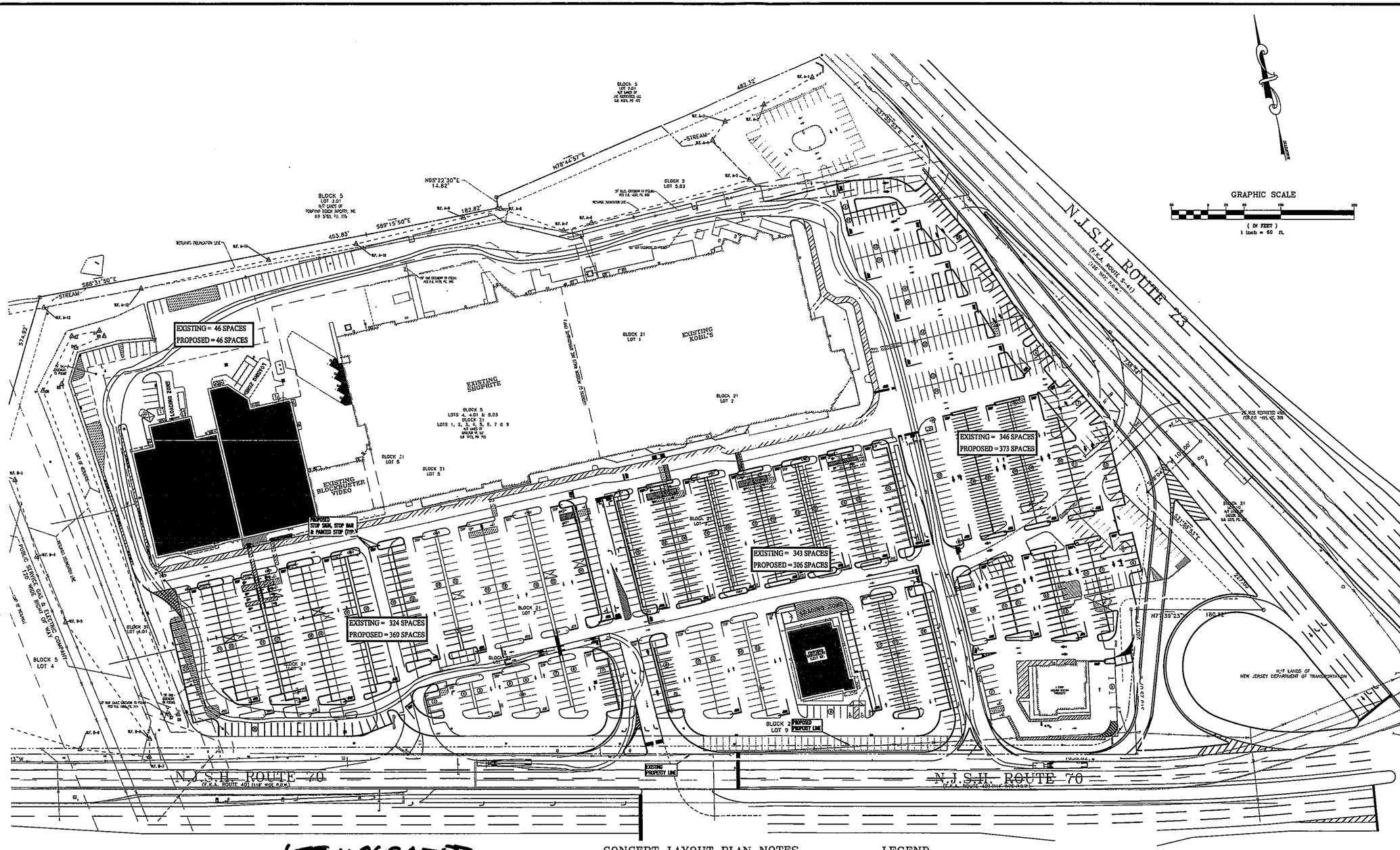
8 [HN9]RPC 1.5(a) provides the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

Here, the record is devoid of any analysis of the relevant considerations or any explanation for the $ 5000 fee award. Interestingly enough, the amount ultimately fixed by the court matches that provided in FBB's proposed revised order. Moreover, no discussion of attorneys' fees at the hearing appears to have informed the court's determination, [***22] which was less than one-half of the fees claimed to have been incurred by BOA in this matter. Such reasons, however, are required

to satisfy fundamental fairness and to accord meaningful review. *Ibid.*; *Furst, supra*, 182 [*126] N.J. at 21, 860 A.2d 435. Absent specific findings, we are constrained to remand the matter of counsel fees for reconsideration and a supporting statement of reasons.

Affirmed in part; reversed and remanded in part.



IMPACTS TO SITE:
-ACCESS TO ROUTE 73 ELIMINATED.
-MAIN DRIVE AISLE OFF ROUTE 70 SHIFTED EAST.
-SIZE OF LOT REDUCED FROM 27.77 ACRES TO 25.41 ACRES.
-NO. OF PARKING SPACES INCREASED FROM 1,059 TO 1,085.

~~FREE~~ UPGRADED TO FULL-MOVEMENT INTERSECTION.

CONCEPT LAYOUT PLAN NOTES

1. THIS PLAN REFERENCES DOCUMENTS AND INFORMATION:

   A SURVEY PREPARED BY: CONTROL POINT ASSOCIATES, INC.
   778 MOUNTAIN BLVD.
   WATCHUNG, NJ 07069
   REVISED: 6/07/2007
   JOB NO. C03068

   ARCH. DRAWING PREPARED BY: TAYLOR ASSOCIATES ARCHITECTS
   LAST REVISED 7/09/2007
   "MARLTON NJ ROUTE 70 & ROUTE 73

   "MODIFICATION OF RT. 70 ACCESS, REVOCATION OF RT. 73 ACCESS"
   PREPARED BY: NEW JERSEY DEPARTMENT OF TRANSPORTATION,
   DATED JULY 2004

   "FINAL SITE PLAN FOR MARLTON VF, LLC"
   PREPARED BY: BOHLER ENGINEERING, LLC, REV 14,
   DATED 2/27/08

2. THIS CONCEPT WAS PREPARED STRICTLY BASED UPON INFORMATION IDENTIFIED ABOVE.
3. THE CONCEPT REPRESENTED HEREIN IDENTIFIES A DESIGN CONCEPT RESULTING FROM LAYOUT PREFERENCES IDENTIFIED BY OWNER COUPLED WITH A PRELIMINARY REVIEW OF ZONING AND LAND DEVELOPMENT REQUIREMENTS AND ISSUES. THE FEASIBILITY WITH RESPECT TO OBTAINING LOCAL, COUNTY, STATE, AND OTHER APPLICABLE APPROVALS IS NOT WARRANTED AND CAN ONLY BE ASSESSED AFTER FURTHER EXAMINATION AND VERIFICATION OF SAME REQUIREMENTS AND PROCUREMENT OF JURISDICTIONAL APPROVALS.
4. THE CONCEPTUAL PLAN IS PREPARED FOR CONCEPTUAL PRESENTATION PURPOSES ONLY AND IS NOT INTENDED FOR UTILIZATION AS A ZONING AND/OR CONSTRUCTION DOCUMENT. THE EXISTING CONDITIONS SHOWN HEREON ARE BASED UPON INFORMATION THAT WAS SUPPLIED TO OUR OFFICE AT THE TIME OF PLAN PREPARATION AND MAY BE SUBJECT TO CHANGE UPON PERFORMANCE OF ADDITIONAL DUE DILIGENCE.

LEGEND

EXISTING = # OF PARKING STALLS ~~OR~~ APPROVED ON FINAL SITE PLANS

PROPOSED = # OF PARKING STALLS AFTER NJDOT IMPROVEMENTS COMPLETED

PARKING SUMMARY

EXISTING = 1059 SPACES
PROPOSED = 1085 SPACES

BOHLER ENGINEERING

CIVIL & CONSULTING ENGINEERS
SURVEYORS
TRAFFIC CONSULTANTS
GEOTECHNICAL ENGINEERS
ENVIRONMENTAL ENGINEERS
LANDSCAPE ARCHITECTS

CORPORATE OFFICE:
♦ WARREN, NJ

OFFICES:
♦ SOUTHBOROUGH, MA ♦ CHALFONT, PA
♦ ALBANY, NY ♦ TOWSON, MD
♦ PURCHASE, NY ♦ STERLING, VA
♦ RONKONKOMA, NY ♦ WARRENTON, VA

REVISIONS:			
NO.	DATE:	COMMENT:	BY:
1	2/5/7	PER NJDOT COMMENTS	PAW
2	2/28/7	PER NJDOT COMMENTS	NCR
3	3/2/07	PER TWSP. COMMENTS	PAW
4	3/4/08	REV TO INCLUDE LATEST SITE PLAN	KE

NOT APPROVED FOR CONSTRUCTION

PROJECT No.:	J030063.10
DRAWN BY:	PAW
CHECKED BY:	NCR
DATE:	12/28/2006
SCALE:	AS NOTED
CAD I.D.:	OVERLAYER-REV4

PROJECT:

PROPOSED RETAIL DEVELOPMENT

FOR

MARLTON VF, LLC

LOTS 1, 2, 3, 4, 5, 6, 7 & 9, BLOCK 21
LOTS 4, 4.01 & 5.03, BLOCK 5
EVESHAM TOWNSHIP
BURLINGTON COUNTY, NEW JERSEY

BOHLER ENGINEERING

35 TECHNOLOGY DRIVE
WARREN, NJ 07059
PH: (908) 668-8300
FX: (908) 754-4401
www.BohlerEng.com

G.B. MURRAY
PROFESSIONAL ENGINEER
NEW JERSEY LICENSE No. 43928

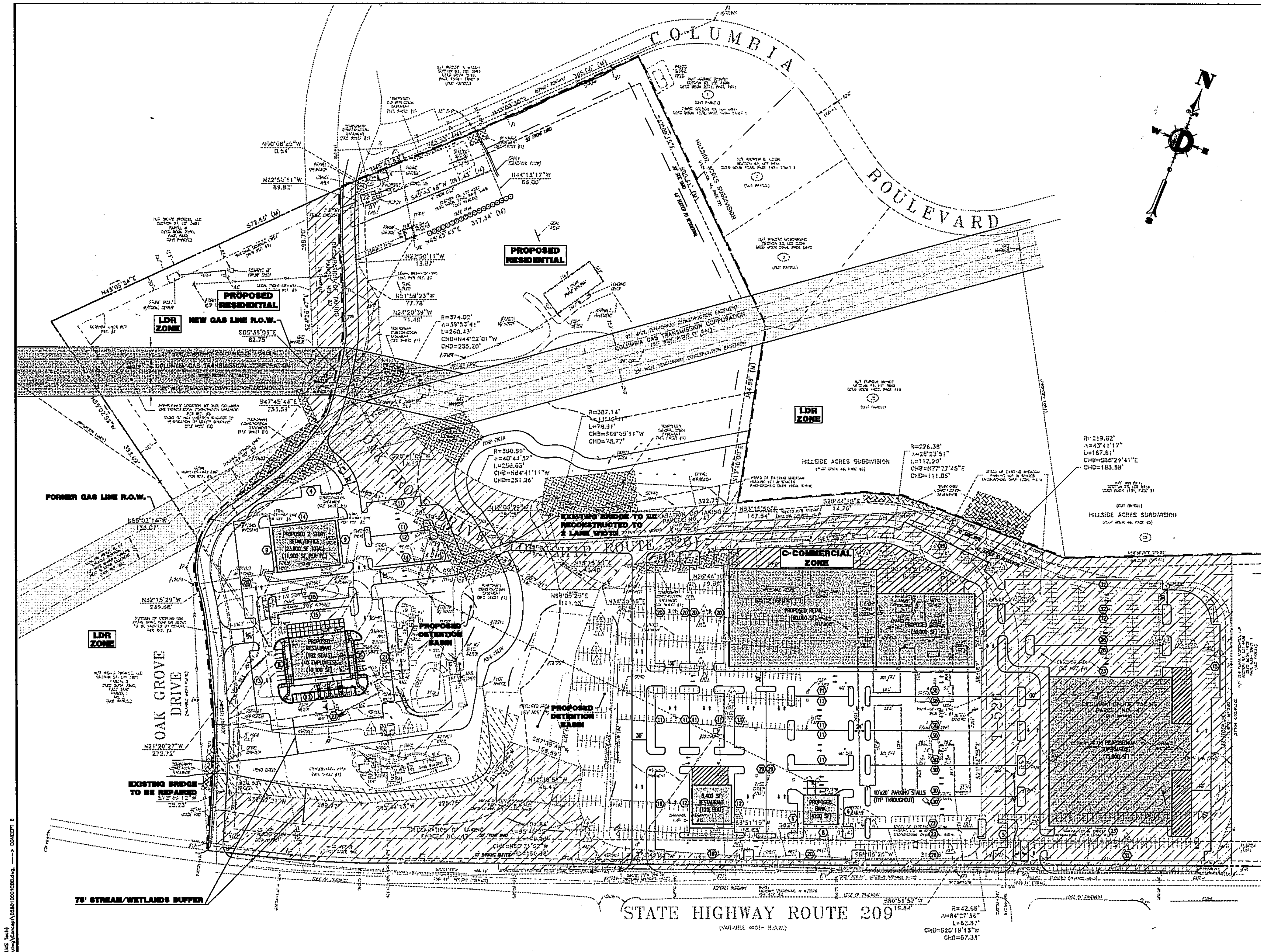
SHEET TITLE:

NJDOT LAYOUT

SHEET NUMBER:

1
OF 1

REVISION 4 - 3/4/08



TOTAL PARKING REQUIRED

RETAIL/RESTAURANT/BANK

- RETAIL – 1/200 SF OR 188,800/200 = 944
- REST. – 1/4 SEATS + 1.1/EMPLOYEE = 153 (302) (70)
- BANK – 1/200 SF + 1.1/EMPLOYEE = 30 (4200) (8)

TOTAL PARKING REQUIRED = 1127

TOTAL PARKING PROPOSED = 1134

GRAPHIC SCALE

80 0 40 80 160 320

(IN FEET)
1 INCH = 80 FT.

THIS PLAN SET IS FOR PERMITTING PURPOSES ONLY AND MAY NOT BE USED FOR CONSTRUCTION

DYNAMIC ENGINEERING
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Chester, NJ 07930
T: 908.879.9229
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TITLE: CONCEPTUAL SITE PLAN "B"

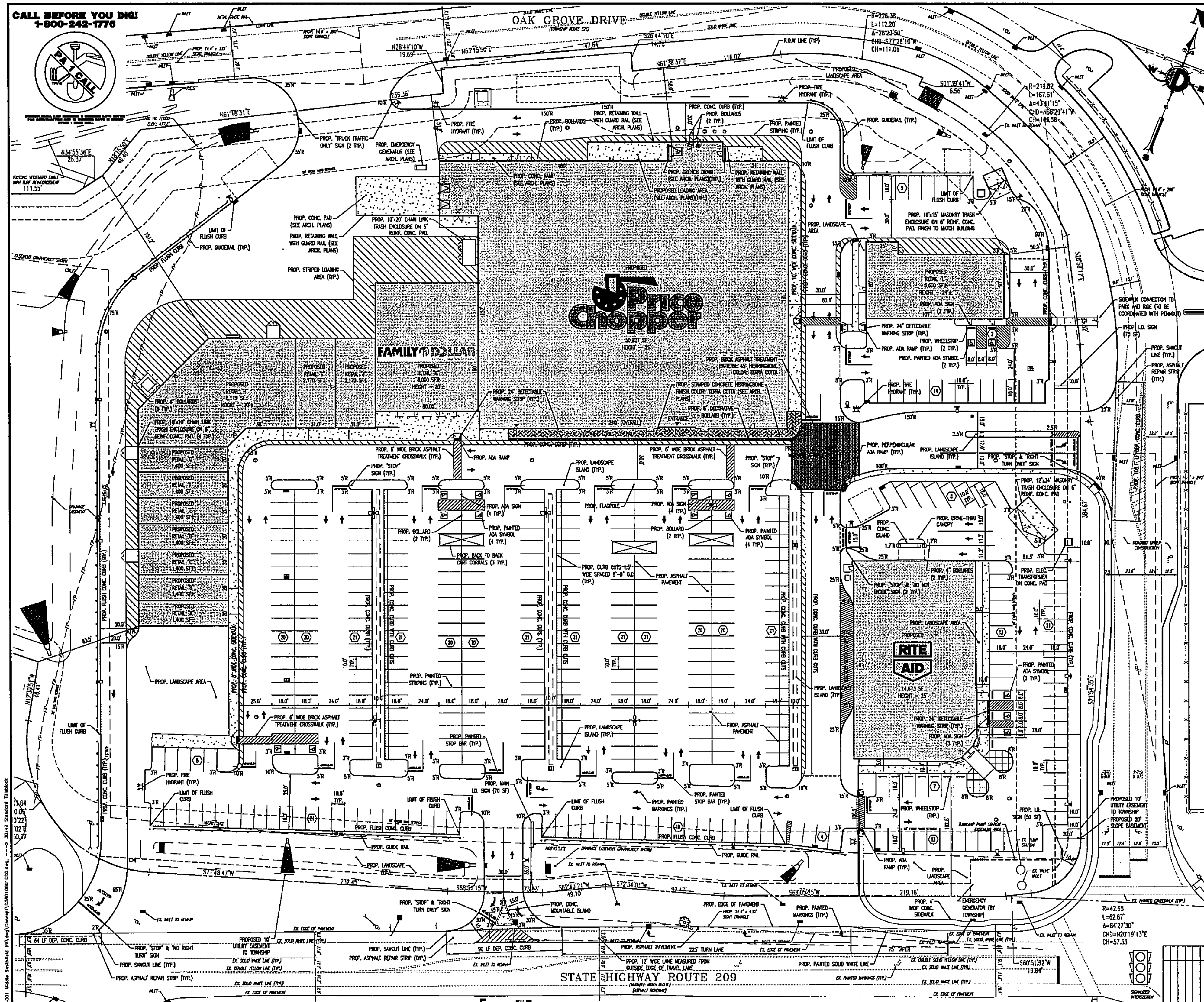
PROJECT: MIDDLE SMITHFIELD
PROPOSED DEVELOPMENT
STATE HIGHWAY 209 & OAK GROVE DR.
MIDDLE SMITHFIELD TOWNSHIP, MONROE COUNTY, PA.

JOB No: 0580-10-001	DATE: 4/29/2011
DRAWN BY: KRW/CH	SCALE: (H) 1"=80' (V)
DESIGNED BY: BWS	SHEET No: 1 OF 1
CHECKED BY: BWS	
CONSTRUCTION CHECK – DATE –	
CONSTRUCTION CHECK – DATE –	
DEC Client Code: 0580	Rev. / 0

J. G. JAWORSKI
PROFESSIONAL ENGINEER

B.W. SKAPINETZ
PROFESSIONAL ENGINEER
NEW JERSEY LICENSE No. 41983
PENNSYLVANIA LICENSE No. 077727
NEW YORK LICENSE No. 087982
CONNECTICUT LICENSE No. 27591

Rev.	Date	Comments	By



PROPOSED HEAVY DUTY PAVEMENT

GENERAL NOTES

1. THIS PLAN HAS BEEN PREPARED BASED ON REFERENCES INCLUDING: DPK CONSULTANTS, LLC, 147 UNION AVENUE, SUITE 1C, MIDDLESEX, NEW JERSEY, DATED: 7/27/2009
   DYNAMIC EARTH, LLC, REPORT OF GEOTECHNICAL INVESTIGATION, PROJECT NO.: 0279-08-007E, DATED: MAY 5, 2010, LAST REVISED: JUNE 23, 2010
   COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, "DRAWINGS FOR CONSTRUCTION OF S.R. 209, SECTION 021 IN MONROE COUNTY", JOB #5311-002, DATED: 10/27/2009
   CONTROL POINT ASSOCIATES, INC, PRELIMINARY SURVEY, SECTION 62, PORTION LOT 2900, SECTION 63, PORTION LOT 3430, SECTION 63, PORTION LOT 8043, SECTION 73, PORTION LOT 8050, SECTION 63, FORMER LOT 1258, FILE# X-035155.01, DATE: 3-14-2007
2. OWNER: WOLF KNAUSENBERGER, KNAUSENBERGER FAMILY TRUST, 3850 NAZARETH PIKE # 144, BETHLEHEM, PA 18020
3. APPLICANT: ROUTE 209 BYPASS ASSOCIATES, LLC, 355 MADISON AVENUE, MORRISTOWN, NJ 07960
4. PARCEL DATA: STATE HIGHWAY ROUTE 209 AND OAK GROVE DRIVE (TOWNSHIP ROUTE 526)
   TOWNSHIP OF MIDDLE SMITHFIELD
   MONROE COUNTY, PA
   ZONE: C (COMMERCIAL)
   USE: BANKS-PERMITTED
   USE: RETAIL-PERMITTED
5. PRIOR TO STARTING CONSTRUCTION, THE CONTRACTOR SHALL BE RESPONSIBLE TO MAKE SURE THAT ALL REQUIRED PERMITS AND APPROVALS HAVE BEEN OBTAINED. NO CONSTRUCTION OR FABRICATION SHALL BEGIN UNTIL THE CONTRACTOR HAS RECEIVED AND THOROUGHLY REVIEWED ALL PLANS AND OTHER DOCUMENTS BY ALL OF THE PERMITTING AUTHORITIES.
6. ALL WORK SHALL BE PERFORMED IN ACCORDANCE WITH THESE PLANS AND SPECIFICATIONS AND THE REQUIREMENTS AND STANDARDS OF THE LOCAL GOVERNING AUTHORITY.
7. THE SOILS REPORT AND RECOMMENDATIONS SET FORTH THEREIN ARE A PART OF THE REQUIRED CONSTRUCTION DOCUMENTS AND IN CASE OF CONFLICT SHALL TAKE PRECEDENCE UNLESS SPECIFICALLY NOTED OTHERWISE ON THE PLANS. THE CONTRACTOR SHALL NOTIFY THE ENGINEER CONSTRUCTION MANAGER OF ANY DISCREPANCY BETWEEN SOILS REPORT & PLANS.
8. SITE CLEARING SHALL INCLUDE THE LOCATION AND REMOVAL OF ALL UNDERGROUND TANKS, PIPES, VALVES, ETC.
9. THE PROPERTY SURVEY SHALL BE CONSIDERED A PART OF THESE PLANS.
10. ALL DIMENSIONS SHOWN ON THE PLANS SHALL BE FIELD VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION. CONTRACTOR SHALL NOTIFY ENGINEER IF ANY DISCREPANCIES EXIST PRIOR TO PROCEEDING WITH CONSTRUCTION FOR NECESSARY PLAN CHANGES. NO EXTRA COMPENSATION SHALL BE PAID TO THE CONTRACTOR FOR WORK HAVING TO BE REDONE DUE TO DIMENSIONS OR GRADES SHOWN INCORRECTLY ON THESE PLANS IF SUCH NOTIFICATION HAS NOT BEEN GIVEN.
11. SOLID WASTE TO BE DISPOSED OF BY CONTRACTOR IN ACCORDANCE WITH ALL LOCAL, STATE AND FEDERAL REGULATIONS.
12. ALL EXCAVATED UNSUITABLE MATERIAL MUST BE TRANSPORTED TO AN APPROVED DISPOSAL LOCATION.
13. CONTRACTOR IS RESPONSIBLE FOR ALL SHORING REQUIRED DURING EXCAVATION AND SHALL BE PERFORMED IN ACCORDANCE WITH CURRENT OSHA STANDARDS, AS WELL AS ADDITIONAL PROVISIONS TO ASSURE STABILITY OF CONTIGUOUS STRUCTURES, AS FIELD CONDITIONS DICTATE.
14. ALL CONTRACTORS MUST CARRY STATUTORY WORKERS COMPENSATION, EMPLOYERS LIABILITY INSURANCE AND APPROPRIATE LIMITS OF COMMERCIAL GENERAL LIABILITY INSURANCE (CGL). ALL CONTRACTORS MUST HAVE THEIR CGL POLICIES ENDORSED TO NAME DYNAMIC ENGINEERING CONSULTANTS, P.C. ITS SUBCONSULTANTS AS ADDITIONAL INSURED AND TO PROVIDE CONTRACTUAL LIABILITY COVERAGE SUFFICIENT TO INSURE THE HOLD HARMLESS AND INDEMNITY OBLIGATIONS ASSUMED BY THE CONTRACTORS. ALL CONTRACTORS MUST FURNISH DYNAMIC ENGINEERING CONSULTANTS, P.C. WITH CERTIFICATES OF INSURANCE AS EVIDENCE OF THE REQUIRED INSURANCE PRIOR TO COMMENCING WORK AND UPON RENEWAL OF EACH POLICY DURING THE ENTIRE PERIOD OF CONSTRUCTION. IN ADDITION, ALL CONTRACTORS WILL, TO THE FULLEST EXTENT PERMITTED BY LAW, INDEMNIFY AND HOLD HARMLESS DYNAMIC ENGINEERING CONSULTANTS, P.C., ITS SUBCONSULTANTS AND THE EMPLOYEES AND AGENTS OF THE TOWNSHIP FROM AND AGAINST ANY DAMAGES, LIABILITIES OR COSTS, INCLUDING REASONABLE ATTORNEYS' FEES AND DEFENSE COSTS, ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE PROJECT, INCLUDING ALL CLAIMS BY EMPLOYEES OF THE CONTRACTORS.
15. NEITHER THE PROFESSIONAL ACTIVITIES OF DYNAMIC ENGINEERING CONSULTANTS, P.C., AND THE EMPLOYEES AND AGENTS OF THE TOWNSHIP NOR THE PRESENCE OF DYNAMIC ENGINEERING CONSULTANTS, P.C. OR ITS EMPLOYEES AND SUBCONSULTANTS AND THE EMPLOYEES AND AGENTS OF THE TOWNSHIP AT A CONSTRUCTION/PROJECT SITE, SHALL RELIEVE THE GENERAL CONTRACTOR OF ITS OBLIGATIONS, DUTIES AND RESPONSIBILITIES INCLUDING, BUT NOT LIMITED TO, CONSTRUCTION MEANS, METHODS, SEQUENCE, TECHNIQUES OR PROCEDURES NECESSARY FOR PERFORMING, SUPERINTENDING AND COORDINATING THE WORK IN ACCORDANCE WITH THE CONTRACT DOCUMENTS AND ANY HEALTH OR SAFETY PRECAUTIONS REQUIRED BY ANY REGULATORY AGENCIES. DYNAMIC ENGINEERING CONSULTANTS, P.C. AND ITS PERSONNEL AND THE EMPLOYEES AND AGENTS OF THE TOWNSHIP HAVE NO AUTHORITY TO EXERCISE ANY CONTROL OVER ANY CONSTRUCTION CONTRACTOR OR ITS EMPLOYEES IN CONNECTION WITH THEIR WORK OR ANY HEALTH OR SAFETY PROGRAMS OR PROCEDURES. THE GENERAL CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR JOBSITE SAFETY. DYNAMIC ENGINEERING CONSULTANTS, P.C. AND THE EMPLOYEES AND AGENTS OF THE TOWNSHIP SHALL BE INDEMNIFIED BY THE GENERAL CONTRACTOR AND SHALL BE MADE ADDITIONAL INSURED UNDER THE GENERAL CONTRACTOR'S POLICIES OF GENERAL LIABILITY INSURANCE.
16. DYNAMIC ENGINEERING CONSULTANTS, P.C. SHALL REVIEW AND APPROVE OR TAKE OTHER APPROPRIATE ACTION ON THE CONTRACTOR SUBMITTALS, SUCH AS SHOP DRAWINGS, PRODUCT DATA, SAMPLES AND OTHER DATA, WHICH THE CONTRACTOR IS REQUIRED TO SUBMIT, BUT ONLY FOR THE LIMITED PURPOSE OF CHECKING FOR CONFORMANCE WITH THE DESIGN CONCEPT AND THE INFORMATION SHOWN IN THE CONSTRUCTION MEANS OR METHODS, COORDINATION OF THE WORK WITH OTHER TRADES OR CONSTRUCTION SAFETY PRECAUTIONS, ALL OF WHICH ARE THE SOLE RESPONSIBILITY OF THE CONTRACTOR. DYNAMIC ENGINEERING'S REVIEW SHALL BE CONDUCTED WITH REASONABLE PROMPTNESS WHILE ALLOWING SUFFICIENT TIME TO PERMIT ADEQUATE REVIEW. REVIEW OF A SPECIFIC ITEM SHALL NOT INDICATE THAT DYNAMIC ENGINEERING CONSULTANTS, P.C. HAS REVIEWED THE ENTIRE ASSEMBLY OF WHICH THE ITEM IS A COMPONENT. DYNAMIC ENGINEERING CONSULTANTS, P.C. SHALL NOT BE RESPONSIBLE FOR ANY DEVIATIONS FROM THE CONSTRUCTION DOCUMENTS NOT BROUGHT TO THE ATTENTION OF DYNAMIC ENGINEERING CONSULTANTS, P.C. IN WRITING BY THE CONTRACTOR. DYNAMIC ENGINEERING CONSULTANTS, P.C. SHALL NOT BE REQUIRED TO REVIEW PARTIAL SUBMISSIONS OR THOSE FOR WHICH SUBMISSIONS OF CORRELATED ITEMS HAVE NOT BEEN RECEIVED.
17. IN AN EFFORT TO RESOLVE ANY CONFLICTS THAT ARISE DURING THE DESIGN AND CONSTRUCTION OF THE PROJECT OR FOLLOWING THE COMPLETION OF THE PROJECT, DYNAMIC ENGINEERING CONSULTANTS, P.C. AND THE CONTRACTOR MUST AGREE THAT ALL DISPUTES BETWEEN THEM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE PROJECT SHALL BE SUBMITTED TO NONBINDING MEDIATION UNLESS THE PARTIES MUTUALLY AGREE OTHERWISE.
18. THE CONTRACTOR MUST INCLUDE A MEDIATION PROVISION IN ALL AGREEMENTS WITH INDEPENDENT SUBCONTRACTORS AND CONSULTANTS RETAINED FOR THE PROJECT AND TO REQUIRE ALL INDEPENDENT CONTRACTORS AND CONSULTANTS ALSO TO INCLUDE A SIMILAR MEDIATION PROVISION IN ALL AGREEMENTS WITH THEIR SUBCONTRACTORS, SUBCONSULTANTS, SUPPLIERS AND FABRICATORS, THEREBY PROVIDING FOR MEDIATION AS THE PRIMARY METHOD FOR DISPUTE RESOLUTION BETWEEN THE PARTIES TO ALL THOSE AGREEMENTS.
19. IF THE CONTRACTOR DEVIATES FROM THE PLANS AND SPECIFICATIONS, INCLUDING THE NOTES CONTAINED THEREON, WITHOUT FIRST OBTAINING PRIOR WRITTEN AUTHORIZATION FOR SUCH DEVIATIONS FROM THE OWNER AND ENGINEER, IT SHALL BE RESPONSIBLE FOR THE PAYMENT OF ALL COSTS TO CORRECT ANY WORK DONE, ALL FINES OR PENALTIES ASSESSED WITH RESPECT THERETO AND ALL COMPENSATORY OR PUNITIVE DAMAGES RESULTING THEREFROM AND IT SHALL INDEMNIFY AND HOLD THE OWNER AND ENGINEER HARMLESS FROM ALL SUCH COSTS TO CORRECT ANY SUCH WORK AND FROM ALL SUCH FINES AND PENALTIES, COMPENSATION AND PUNITIVE DAMAGES AND COSTS OF ANY NATURE RESULTING THEREFROM.
20. CONTRACTOR ACKNOWLEDGES HE HAS READ AND UNDERSTOOD THE DESIGN PHASE SOIL PERMEABILITY AND GROUNDWATER TEST RESULTS IN THE STORMWATER MANAGEMENT REPORT AND THAT THE CONTRACTORS RESPONSIBILITIES INCLUDE NECESSARY PROVISIONS TO ACHIEVE THE DESIGN PERMEABILITY IN THE FIELD.
21. CONTRACTOR TO BE ADVISED THAT THE ENGINEER WAS NOT PROVIDED WITH FINAL FLOOR PLAN DRAWINGS FOR THE BUILDING AT THE TIME OF SITE PLAN DESIGN. AS A RESULT, ENTRANCE DOOR LOCATIONS AS DEPICTED HEREON MAY NOT BE FINAL AND MUST BE CONFIRMED WITH THE ARCHITECTURAL PLANS PRIOR TO CONSTRUCTION. THE HANDICAP ACCESSIBLE PARKING SPACES AND THE ASSOCIATED RAMPS AND ACCESSIBLE ROUTE MUST COMPLY WITH THE REQUIREMENTS SPECIFIED IN THE AMERICANS WITH DISABILITIES ACT (ADA) MANUAL AND THE HANDICAP PARKING SPACES MUST BE LOCATED AS THE NEAREST SPACES TO THE ENTRANCE. CONTRACTOR TO NOTIFY OWNER AND ENGINEER IMMEDIATELY OF ANY DISCREPANCY PRIOR TO CONSTRUCTION.

ADDITIONAL TOWNSHIP NOTES:

- NO SIGNIFICANT ROCK OUTCROPS EXIST ON SITE WITHIN THE PROPOSED AREA OF DEVELOPMENT (170-152(D)(5)(g))
- NO PORTIONS OF THE LOT HAVE STEEP SLOPES PER DEFINITION AS NOTED IN SECTION 200-37.
- NO CERTIFIED HISTORIC SITE OF STRUCTURES EXIST WITHIN THE PROPOSED AREA OF DEVELOPMENT (170-152(D)(5)(j))
- SECTION 170-75 – "IMPROVEMENT CONSTRUCTION AND/OR INSTALLATION INSPECTIONS" IS TO BE INCLUDED AND AGREED UPON AS PART OF APPROVAL OF THESE PLANS.

RESTRICTIVE COVENANTS

1. SCHEDULE OF ZONING REQUIREMENTS: (SECTION 200-34 (A)(8)

ZONE REQUIREMENT	C-COMMERCIAL ZONE	PROPOSED
MIN. LOT AREA	2 ACRES	12.56 ACRES (547,074 SF)
MIN. LOT WIDTH (@ BUILDING SETBACK LINE)	250'	805'
MIN. FRONT YARD SETBACK		
OAK GROVE DRIVE (TOWNSHIP ROUTE 526)	50'	50.5'
STATE HIGHWAY ROUTE 209	50'	102.8'
MIN. SIDE YARD SETBACK	20'	83.5'
MIN. REAR YARD SETBACK	20'	N/A
MAX. BUILDING COVERAGE	45%	18.5% (101,459 ± SF)
MAX. IMPERVIOUS COVERAGE	50% (65%)*	67.7% (370,886 SF) **
MAX. BUILDING HEIGHT	3.5 STORIES / 45'***	2 STORIES / <45'

N/S: NO STANDARD N/A: NOT APPLICABLE (V): VARIANCE (E): EXISTING NON-CONFORMANCE (DW): DESIGN WAIVER
* 65% PERMITTED WHERE WATER AND SEWER SERVICE AVAILABLE
** 87.05% IMPERVIOUS EXISTING
*** WHICHEVER IS MORE RESTRICTIVE

2. PARKING (OFF-STREET PARKING) (PER ITE)(PARKING CRITERIA FROM THE ZO OF 2010 IS UTILIZED INSTEAD OF THE ZO OF 2004, UNDER THE APPLICATION WAS SUBMITTED):
   RETAIL: 1 SPACE/ 250 SF OF LEASABLE FLOOR AREA: 101,459 +/-SF TOTAL
   THEREFORE APPROX. 101,459 SF / 250 = 406 REQUIRED; 408 PROPOSED (COMPLIES)
   (PARKING AND LOADING SPACES SHALL BE USED AS INTENDED ONLY – USE FOR STORAGE, DISPLAY, ETC. IS PROHIBITED.
   - MIN. PARKING SPACE SIZE: 9'X18'; 10'X18' PROPOSED (COMPLIES)
   - MIN. DRIVE AISLE WIDTH: 24' (90 DEGREE PARKING); 24' PROPOSED. (COMPLIES)
   - DRIVE ACCESS WIDTH: MIN 25'; MAX: 30' (COMPLIES)
   - PARKING BUFFER: MIN. 10' (15' TOTAL TO ROADWAY INCL. R.O.W AREA) (COMPLIES)
   - MIN. NUMBER OF HANDICAP SPACES REQUIRED PER ADA AND SECTION 200-56(C)=9 SPACES; 15 SPACES PROPOSED (COMPLIES)
   - MIN. PARKING SETBACK FROM BUILDING: REQUIRED 10'; PROVIDED 10' (COMPLIES)
3. LOADING (OFF-STREET LOADING) (SECTION 200-57)
   LOADING SHALL BE PROVIDED SUFFICIENT TO ACCOMMODATE THE MAXIMUM DEMAND GENERATED BY THE USE AND THE MAXIMUM SIZE VEHICLE USED. (COMPLIES)
4. ALL TRAFFIC SIGNS AND STRIPING SHALL FOLLOW THE REQUIREMENTS SPECIFIED IN THE MANUAL ON "UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS" PUBLISHED BY THE FEDERAL HIGHWAY ADMINISTRATION.
5. THE BUILDING SETBACK DIMENSIONS ILLUSTRATED AND LISTED ON THE SITE PLAN DRAWINGS ARE MEASURED FROM THE OUTSIDE SURFACE OF BUILDING WALLS. THESE SETBACK DIMENSIONS DO NOT ACCOUNT FOR ROOF OVERHANGS, ORNAMENTAL ELEMENTS, SIGNAGE OR OTHER EXTERIOR EXTENSIONS UNLESS SPECIFICALLY NOTED.
6. NO REQUIRED PARKING AREA OR OFF-STREET LOADING SPACES SHALL BE USED FOR ANY OTHER USE (SUCH AS STORAGE OR DISPLAY OF MATERIALS) THAT INTERFERES WITH THE AREAS AVAILABILITY FOR PARKING.
7. OUTDOOR STORAGE OR DISPLAY SHALL NOT OCCUPY ANY PART OF THE FOLLOWING: EXISTING OR FUTURE ROW, SIDEWALK OR OTHER AREA INTENDED OR DESIGNED FOR PEDESTRIAN USE, REQUIRED PARKING AREA OR AREAS WITH A SLOPE IN EXCESS OF 25% OR IN A 100-YR. FLOODPLAIN.
8. ALL USES SHOWN ON THIS PLAN ARE SUBJECT TO THE RULES AND REGULATIONS AS ARE SET FORTH IN THE MIDDLE SMITHFIELD TOWNSHIP SUBDIVISION AND LAND DEVELOPMENT REGULATIONS AND THE MIDDLE SMITHFIELD TOWNSHIP ZONING ORDINANCE, AS BOTH ARE AMENDED.
9. BY APPROVAL OF THIS PLAN, THE TOWNSHIP OF MIDDLE SMITHFIELD HAS NEITHER CONFIRMED NOR DENIED THE EXISTENCE AND/OR EXTENT OF ANY WETLAND AREAS, WHETHER OR NOT DELINEATED ON THE PLAN, AND ANY ENCROACHMENT THEREON FOR ANY REASON WHATSOEVER SHALL BE THE SOLE RESPONSIBILITY OF THE DEVELOPER, HIS HEIRS AND ASSIGNS AND SHALL BE SUBJECT TO THE JURISDICTION OF THE ARMY CORPS OF ENGINEERS AND/OR THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE ENCROACHMENT SHALL CONFORM TO THE RULES AND REGULATIONS OF THE JURISDICTIONAL AGENCIES.
10. AN APPROVED AND COMPLETED HIGHWAY OCCUPANCY PERMIT SHALL BE REQUIRED PRIOR TO OCCUPANCY AND/OR USE.
11. AN APPROVED AND COMPLETED TOWNSHIP DRIVEWAY PERMIT SHALL BE REQUIRED PRIOR TO OCCUPANCY AND OR USE.
12. THE PROPERTY IS SUBJECT TO A UTILITY EASEMENT, TEN (10') FEET IN WIDTH, ALONG ALL STREET RIGHT-OF-WAY LINES.
13. THE OWNER, ITS SUCCESSORS AND ASSIGNS, SHALL MAKE PROVISION AND BE RESPONSIBLE FOR THE MAINTENANCE, OPERATION, REPLACEMENT AND REPAIR OF ANY AND ALL STORM WATER MANAGEMENT FACILITIES AND CONTROLS DEPICTED ON THIS PLAN AND OTHER PLANS AND DOCUMENTS SUPPORTING THE SAME. MIDDLE SMITHFIELD TOWNSHIP IS HEREBY GRANTED PERMISSION TO INSPECT ALL STORM WATER MANAGEMENT FACILITIES AND CONTROLS AT ANY REASONABLE TIME AFTER REASONABLE PRIOR NOTIFICATION TO OWNER. IF MIDDLE SMITHFIELD TOWNSHIP DETERMINES AT ANY TIME THAT ANY OF SAID STORM WATER MANAGEMENT FACILITIES OR CONTROLS HAVE BEEN ELIMINATED, ALTERED OR IMPROPERLY MAINTAINED OR REPLACED, THE THEN OWNER SHALL BE ADVISED OF THE CORRECTIVE MEASURES REQUIRED AND BE AFFORDED A REASONABLE PERIOD OF TIME UNDER THE CIRCUMSTANCES TO TAKE THE NECESSARY CORRECTIVE ACTION. MIDDLE SMITHFIELD TOWNSHIP SHALL HAVE THE RIGHT AFTER REASONABLE PRIOR NOTIFICATION TO OWNER, BUT NOT THE OBLIGATION, OF REASONABLE INGRESS, EGRESS AND REGRESS TO ANY AND ALL OF THE STORM WATER MANAGEMENT FACILITIES AND CONTROLS ON THE PROPERTY FOR THE PURPOSE OF MAINTENANCE, REPLACEMENT AND/OR REPAIR DUE TO THE FAILURE OR NEGLECT OF THE OWNER TO PERFORM THE SAME AS, AND WITHIN THE TIME, REQUIRED, OR FOR EMERGENCY REMEDIES TO THE STORM WATER MANAGEMENT FACILITIES AND CONTROLS IF NECESSARY. IF MIDDLE SMITHFIELD TOWNSHIP ELECTS TO PERFORM SUCH MAINTENANCE, REPLACEMENT AND/OR REPAIR, ALL REASONABLE COSTS (INCLUDING REASONABLE LEGAL AND ENGINEERING FEES) INCURRED BY MIDDLE SMITHFIELD TOWNSHIP IN RELATION TO ANY WORK PERFORMED BY MIDDLE SMITHFIELD TOWNSHIP PURSUANT TO THE PROVISIONS OF THIS COVENANT AND/OR THE ENFORCEMENT OF THE SAME, SHALL BE THE RESPONSIBILITY OF THE OWNER, PAYABLE BY THE OWNER, ITS SUCCESSORS OR ASSIGNS WITHIN 30 DAYS AFTER RECEIPT OF AN INVOICE FROM, AND WRITTEN DEMAND FOR REIMBURSEMENT BY, MIDDLE SMITHFIELD TOWNSHIP. IF SUCH INVOICE IS NOT PAID WITHIN SAID 30 DAY PERIOD, MIDDLE SMITHFIELD TOWNSHIP MAY ENTER A LIEN AGAINST THE PROPERTY IN THE AMOUNT OF SUCH COSTS, OR MAY PROCEED TO RECOVER ITS COSTS THROUGH PROCEEDINGS AT LAW OR IN EQUITY. THIS COVENANT SHALL RUN WITH THE LAND.

SIGNAGE TABLE
(SIGNAGE SHALL BE ADDRESSED AS A SEPARATE ISSUE/PERMIT/APPROVAL WITH THE TOWNSHIP.

SIGN	REQUIREMENTS §200-83	PROPOSED
BUILDING MOUNTED	BUILDING SIGNS PERMITTED NOT TO EXCEED 10% OF WALL AREA TO WHICH THEY ATTACHED	T.B.D. PER TENANT
FREESTANDING	ONE (1) SIGN PERMITTED PER LOT ALONG EACH STREET THE LOT ABUTS MAX. AREA: 80 SF (3-4 USES) 70 SF (5-10 USES) ONE (1) ADDITIONAL FREESTANDING SIGN OF 50 SF PERMITTED WITH MORE THAN 2 PRINCIPAL BUILDINGS ON SAME LOT. MAX. HT 20' MIN. SIGN SETBACK 10' MIN. LANDSCAPE AREA AROUND SIGN 50 SF	TWO (2) SIGNS ALONG ROUTE 209 (COMPLIES) ONE (1) SIGN ALONG OAK GROVE (COMPLIES) SIGN AREA: 70 SF (ROUTE 209-MAIN I.D.) SIGN AREA: 70 SF (ROUTE 209-2ND I.D.) SIGN AREA: 50 SF (OAK GROVE) SIGN HEIGHT: 20' MIN. SIGN SETBACK: 10' (AT OAK GROVE) 35' (RT. 209) 10' (RT. 209)

(V) VARIANCE N/S – NOT SPECIFIED TBD – TO BE DETERMINED DW – DESIGN WAIVER
* REFER TO ARCHITECTURAL PLANS FOR BUILDING SIGN DETAILS

GRAPHIC SCALE
30 0 15 30 60 120
(IN FEET)
1 inch = 30 ft.

THIS PLAN SET IS FOR PERMITTING PURPOSES ONLY AND MAY NOT BE USED FOR CONSTRUCTION

DYNAMIC ENGINEERING
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www.dynamicec.com

TITLE: CONCEPTUAL SITE PLAN "D" (10'x18' SPACES)

PROJECT: MIDDLE SMITHFIELD
PROPOSED DEVELOPMENT
STATE HIGHWAY 209 & OAK GROVE DR.
MIDDLE SMITHFIELD TOWNSHIP, MONROE COUNTY, PA.

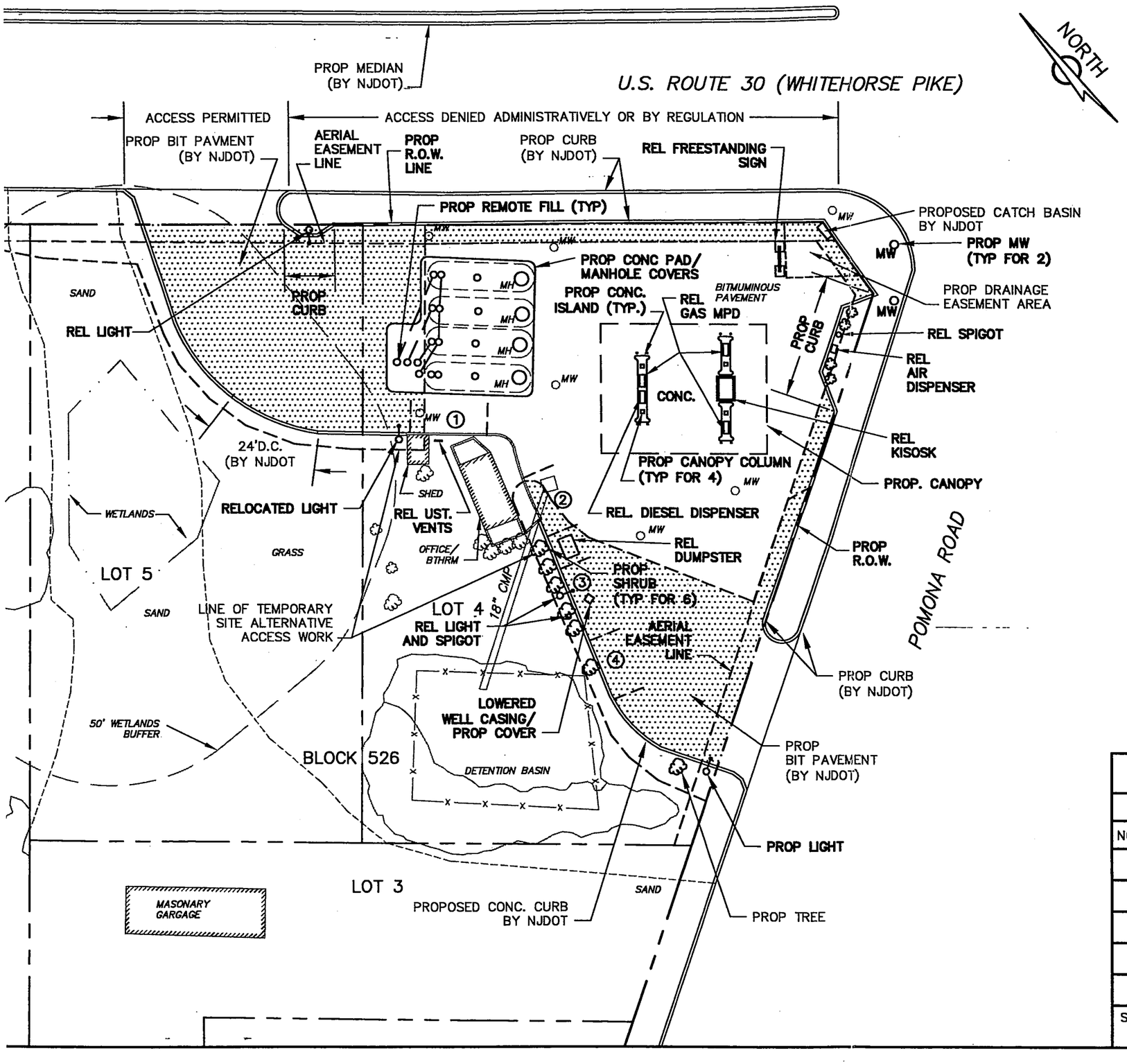
JOB No: 0580-10-001
DATE: 8/19/2011
DRAWN BY: GH
SCALE: (H) 1"=30' (V)
DESIGNED BY: BWS
CHECKED BY: BWS
SHEET No: 1 OF 1
CONSTRUCTION CHECK DATE
CONSTRUCTION CHECK DATE
DEC Client Code: 0580
Rev. # 0

J.C. SPARONE
PROFESSIONAL ENGINEER
NEW JERSEY LICENSE No. 47704
PENNSYLVANIA LICENSE No. 78835
DELAWARE LICENSE No. 17322
COLORADO LICENSE No. 39848

B.W. SKAPINETZ
PROFESSIONAL ENGINEER
NEW JERSEY LICENSE No. 41865
PENNSYLVANIA LICENSE No. 077727
NEW YORK LICENSE No. 087962
CONNECTICUT LICENSE No. 27591

Rev. | Date | Comments | By

Plotted: 08/19/11 – 9:18 AM, By: ghouston
File: P:\DECPC PROJECTS\0580 Duane Morris\10-001 Middle Smithfield PA\dwg\Concept\05801000100.dwg, ---> 30x42 Standard Titleblock



TABULATION OF BULK, AREA AND PARKING SPACE REQUIREMENTS			
ZONE HC-2	REQUIRED	BEFORE TAKING	AFTER TAKING
LOT AREA (ACRES)	1	1.06±	0.875±
WIDTH (FEET)	200	203±	187±
DEPTH (FEET)	N/A	N/A	N/A
SIDE (FEET)	25	107±	107±
FRONT (FEET)	50	82±	64±
REAR (FEET)	25	108±	108±
PRINCIPAL BUILIDING (PERCENT)	40	0.44±	0.53±
COVERAGE ACCESSORY BUILDING (PERCENT)	TOTAL BUILDING	0.16±	0.20±
SITE (PERCENT)	70	36.4±	56.4±
FREESTANDING SIGN SETBACK (FEET)	14	4±	6±
FREESTANDING SIGN AREA (S.F.)	50	96±	96±
FREESTANDING SIGN HEIGHT (FEET)	14'	23±	23±
PARKING STALLS	N/A	4	4

LEGEND AND ABBREVIATIONS

③ – PARKING STALL NUMBER
– LANDSCAPING
– UTILITY POLE
– POLE MOUNTED LIGHT FIXTURE
– SIGN

MPD. – MULTI PURPOSE DISPENSER
MW – MONTORING WELL
BOL. – BOLLARD
CONC. – CONCRETE
PROP – PROPOSED
REL – RELOCATED
ROW – RIGHT OF WAY
SDWK – SIDEWALK
S.F. – SQUARE FEET
TEMP – TEMPORARY
TYP. – TYPICAL

CHECKED: JGG

REVISIONS:

NO.	DATE:

PROPOSED CONSTRUCTION

SUNOCO, INC
ROUTE U.S. 30 (1953)
SECTION 6, PARCELS R20A, AE20B & AE20C
BLOCK 526, LOTS 4 & 5
TWP OF GALLOWAY, ATLANTIC COUNTY, NEW JERSEY

PENNONI ASSOCIATES INC.
210 MALAPARDIS ROAD
CEDAR KNOLLS, NJ 07927

SCALE:	DATE:	PAI JOB No:	EXHIBIT:
1" = 30'	MARCH 13, 2009	NJDT–0901	3–4

DRAWN BY:
URBAN ENGINEERS, INC.
2500 McCLELLAN AVE. STE. 200
PENNSAUKEN, NJ 08109-4698

REVISION OR AMENDMENT:
10/17/05: Revised parcels 116A & E116B to R116A & ER116B; revised parcel area, slope easement areas and site work area
12/2/05: Correct temporary site alternative work area

N = Plane Coordinated System N.A.D. 83

Exist. Line
Lippincott Drive
Exist. Line

D.B. 5619 P. 928
(1) S 68°10'48" W 582.26'
(2) R=450.00'; A=183.90'
Chord=S77°53'15" W 182.69'
(3) S 89°35'39" W 82.00' ℄
(4) N 00°24'21" W 178.46' ℄
(5) R=425.00'; A=202.44'
Chord=N14°03'06" W 200.53'
(6) N 27°41'51" W 587.34'
(7) N 62°18'09" E 668.00' ℄
(8) S 27°41'51" E 892.54'
(9) R=2,778.93'; A=173.06 ℄
Chord=S 25°55'25" E 173.03'

D.B. 5611 P. 925
(1) N 18°47'47" E 142.52' ℄
(2) N 77°41'51" W 17.50'
(3) N 12°18'09" E 135.00'
(4) A=78.35'
(5) N 77°28'55" W 16.02'
(6) N 12°31'05" E 409.15'
(7) S 77°28'55" E 117.50'
(8) N 12°31'05" E 63.00'
(9) S 77°28'55" E 173.03'
(10) S53°11'51" E 160.68'
(11) A=463.74'
(12) S27°41'51" E 490.00'
(13) S62°18'09" W 686.00' ℄
(14) N 27°41'51" W 400.91'
(15) A=283.76'

LOT 3
N/F Marlton Crossing, LLC

R109 MARLTON PLAZA ASSOCIATES, L.P.
AREA = 228 S.F.±
SLOPE EASEMENT AREA = 1,034 S.F.±
TOTAL TEMPORARY SITE ALTERNATIVE ACCESS WORK AREA = 9,042 S.F.±
R.A. = 15.318 AC.±
PARCEL R109 DIMENSIONS:
(1) N 62°18'09" E (D) 4' (S)
(2) S 27°41'51" E (D) 107' (S)
(3) N 29°50'01.2" W (C) 107' (S)

NOTE:
REMAINING AREA (R.A.) DOES NOT INCLUDE LANDS WITHIN THE LIMITS OF LIPPINCOTT DRIVE AND CENTRE BOULEVARD DEDICATED OR INTENDED TO BE DEDICATED TO THE TOWNSHIP OF EVESHAM.

R116A MARLTON PLAZA ASSOCIATES II, L.P.
AREA = 9,793 S.F.±
SLOPE EASEMENT AREA = 6,120 S.F.±
TOTAL TEMPORARY SITE ALTERNATIVE ACCESS WORK AREA = 0.588 Ac.±
R.A. = 16.571 Ac.±
PARCEL R116A DIMENSIONS:
(1) N 27°32'35.0" W (C) 200.00' (C)
(2) N 29°04'42.2" W (C) 694' (S)
(3) S 53°11'51" E (D) 16' (S)
(4) R=5,889.65' (D); A=466.74' (D)
(6) S 27°41'51" E (D) 476.00' (D)
(6) S 62°18'09" W (D) 4' (S)
(7) N 29°50'01.2" W (C) 66' (S)

NOTE:
REMAINING AREA (R.A.) DOES NOT INCLUDE LANDS WITHIN THE LIMITS OF LIPPINCOTT DRIVE DEDICATED OR INTENDED TO BE DEDICATED TO THE TOWNSHIP OF EVESHAM.

ER 116B MARLTON PLAZA ASSOCIATES II, L.P.
SLOPE EASEMENT AREA = 653 S.F.±
TEMPORARY SITE ALTERNATIVE ACCESS WORK AREA = 407 S.F.±
R.A. = 16.571 Ac.±

BLOCK 24.21
LOT 2
5611
925

LOT 1

TEMPORARY SITE ALTERNATIVE ACCESS WORK LINE (407 S.F.±)
TEMPORARY SITE ALTERNATIVE ACCESS WORK LINE (3,345 S.F.±)
TEMPORARY SITE ALTERNATIVE ACCESS WORK LINE (3,762 S.F.±)
TEMPORARY SITE ALTERNATIVE ACCESS WORK LINE (0.501 Ac.±)

PROPOSED R.O.W. LINE
PROPOSED MONUMENT
PROPOSED MONUMENT
SLOPE "E"(2:1)
SLOPE "E"(2:1)

MATCH LINE ROUTE 73 ℄ STA. 1253+50 SHEET NO. 1

64.016' (SET) STA. 1255+50
2.1' CALCULATED PARCEL DEPTH (STA. 1255+76±)
70.00' (SET) STA. 1256+99.86
CALCULATED PARCEL DEPTH = 7.0' (STA. 1257+99.5)
70.00' (SET) STA. 1258+99.57
32.00' (SET) TYP.

649' (S)
154' (S)
77'±

S 29°04'42.2" E
PROP. RAMP K ℄
CALCULATED PARCEL DEPTH = 14.3' (℄ "K" STA. 324+38.9±)
Exist. R.O.W. Line

PROP. RT. 73 ℄
N 27°32'35.0" W
N.J.S.H. ROUTE 73 (1953) SB
N.J.S.H. ROUTE 73 (1953) NB
Existing Base Line S 27°32'35" E
Exist. R.O.W. Line

PROPOSED MONUMENT PROP. RAMP K ℄ STA. 322+00.00; 32.00' RT.

PROP. MARLTON PIKE WEST ℄
Marlton Pike West (County Route 600)
Exist. Line

SCALE IN FEET: 50 0 50 100

CONSTRUCTION PROJECT:
ROUTE 70 & ROUTE 73
MARLTON CIRCLE ELIMINATION

COLOR CODE

RED - FEE PARCEL LINE
YELLOW - SLOPE EASEMENT LINE
BROWN - TEMPORARLY SITE ALTERNATIVE ACCESS WORK LINE

R.A. CALCULATED BY COMPUTER (C.A.D.D.) FROM DEED PLOT.

GPPM REFERENCE: SHEETS 2&3 OF 16

NEW JERSEY
DEPARTMENT OF TRANSPORTATION
ROUTE 73 (1953) SECTION 3
From Route 38 To Haddonfield - Kresson Road

PARCELS R109, R116A & ER116B
SHEET 2 OF 2

TOWNSHIP OF EVESHAM
COUNTY OF BURLINGTON
MARCH, 2004

Aa0321