

# **2011 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. Kroclick, Partner**

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**George J. Kroclick** 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. Kroclick has represented clients before local and county land use boards and has worked on lease litigation matters as well as title disputes.

Mr. Kroclick 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. Kroclick 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. Kroclick 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. Kroclick is a graduate of Villanova University School of Law and a *cum laude* graduate of Villanova University.

**Representative Matters**

- 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.

### **Education**

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

### **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

### **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*, 2008-2011 editions

## Selected Publications

- 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***

- 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

## 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 condemners 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.

We also call upon outside consultants, including independent appraisers, engineers, land planners, surveyors, accountants, economic impact experts, photographers and other professionals who provide their special expertise where necessary. Since compensation for a taking may include not only the value of the property, but also severance and/or business damages, nonmonetary possibilities, such as improved access, more favorable zoning, relocation of roads, additional public services and other enhancements, should be considered. We have considerable experience in helping clients resolve their eminent domain issues through negotiating changes to a proposed project in order to minimize the impact on the parties involved.

Through our work as land valuation litigators, we have gained extensive experience in tax appeal litigation and the expanding field of regulatory takings/inverse condemnation, where the property owner's rights have been taken by a governmental entity without payment. We have a depth of experience in the intricate issues of valuation and damages. Our experience, resources and knowledge enable our clients to have a single source for advice, thereby often reducing their costs and increasing their satisfaction with the result.

Though we have a national practice, with clients located across the country, we are also able to provide local experience through our nationwide network of offices located in major cities across the United States. Our attorneys have also written and lectured extensively in the field of eminent domain and land valuation.

We have provided representation in eminent domain and land valuation matters from raw land to corporate headquarters and from residential properties to oil terminals. We have provided legal advice regarding:

- Airport development/expansion
- Apartment complexes
- Convention centers
- Educational institutions and school districts
- Highways, tunnels and bridges
- Hospitals and medical centers
- Hotels and restaurants
- Manufacturing and industrial facilities

- Office complexes
- Outdoor advertising
- Public utilities
- Research and development facilities
- Retirement and other planned communities
- Shopping centers and retail facilities
- Stadiums and amphitheatres
- Warehouses and distribution centers
- Urban redevelopment and renewal

The description of the results of any specific case or transaction contained herein does not mean or suggest that similar results can or could be obtained in any other matter. Each legal matter should be considered to be unique and subject to varying results.

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## Real Estate Practice

Duane Morris has a national and regional practice providing extensive skills and experience in virtually all real estate and development matters. We represent clients in a broad range of sophisticated and complex real estate transactions and offer a full range of services related to the purchase, sale, leasing, development, financing, joint venture, syndication, securitization, use and management of real property and real estate portfolios. Our representations include work relating to lease agreements, financing and loan documents, restructurings and workouts, condemnation, eminent domain, valuation and tax issues, purchase and sale agreement negotiations, real estate development and real estate portfolio management.

With experience in many real estate market cycles, we understand the challenges in both the up-cycles and downturns and have the depth and experience necessary to advise clients on a broad range of sophisticated issues. Our experience includes handling the routine issues involved in real estate matters, as well as determining solutions to complex and seemingly unsolvable dilemmas that require solid working relationships within the industry and a high level of understanding of the nuances of deals, regulations, profitability, leverage and liability protection. We place primary emphasis on finding practical and creative solutions to facilitate our clients' business objectives and closing transactions both advantageously and efficiently.

We represent some of the largest developers, many with signature brands, investors, lenders and real estate-oriented companies. Our clients include a wide variety of investors, property owners, residential and commercial developers, homebuilders, asset management firms, private equity firms, manufacturing and industrial companies, retailers, banks and other financial institutions, title companies, pension funds, real estate investment trusts, construction companies and contractors, insurance companies, hotel operators and public agencies. The work of the Duane Morris Real Estate Practice Group involves properties throughout the United States and abroad.

The reputation of the Duane Morris Real Estate Practice Group is built on a profound understanding of the real estate industry and how real estate businesses function. Our attorneys have a broad background in the real estate industry and have worked as registered architects, licensed mortgage brokers, certified public accountants, property appraisers and licensed real estate agents. Several Duane Morris attorneys are members of, actively involved in, and hold leadership positions in Urban Land Institute, International Council of Shopping Centers, NAIOP, community development corporations and various national and local homebuilders' and real estate professional associations and trade organizations, many of the same organizations in which our clients are involved. In addition, Duane Morris real estate attorneys include those recognized in *Chambers USA*, hold the distinguished CRE professional designation from The Counselors of Real Estate, and are Accredited Professionals under the LEED (Leadership in Energy and Environmental Design) Green Building Rating System.

Real estate transactions and projects often include other areas of the law. As a full-service firm, Duane Morris brings together the resources and experience needed by clients, giving them access to skills and resources in practice areas, such as corporate, construction, tax, securities and bankruptcy, and with attorneys whose practices overlap with other disciplines but who routinely devote substantial attention to real property matters. The firm's team approach enables clients to take advantage of additional legal resources in related areas, resulting in seamless, value-added, high-quality representation.

## Range of Services

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With a comprehensive understanding of all phases of the market cycle, the Duane Morris Real Estate Practice Group covers a broad range of complex commercial real estate practice areas. Our principal areas of practice include:

- Real Estate Development
- Acquisitions and Dispositions
- Financing
- Leasing
- Construction
- Environmental Matters and Sustainable Development
- Eminent Domain, Condemnation and Property Valuation
- Public/Private Partnerships
- Joint Ventures
- Real Estate Investment Management
- Hospitality and Gaming Industry
- Distressed Real Estate
- Zoning and Land Use
- Condominium and Homeowners Association Documentation and Registration
- Affordable Housing
- Transportation-Oriented and Smart Growth Projects
- Western Region Real Estate

## Real Estate Development

Our lawyers routinely represent both residential and commercial developers in a broad spectrum of property types, including condominiums, planned residential communities, mixed use projects, apartments, shopping centers and retail buildings, office buildings, industrial and warehouse facilities, entertainment facilities, hotels and resort facilities and healthcare facilities. Our clients include some of the largest residential real estate developers that we assist with newly constructed projects ranging from small subdivisions to major planned residential communities, mixed use and transportation-oriented development. We provide full-service counsel for development, construction and re-development of real estate projects and represent clients through the entire development process, from site evaluation, due diligence and acquisition and financing of the property to structuring, zoning, permitting, development, construction and sale or lease of the finished product. In addition, we have experience in negotiating and creating joint ventures between property owners, developers and investors to facilitate property development.

## **Acquisitions and Dispositions**

Duane Morris represents real estate owners, investors, developers and others in the purchase, sale, exchange and disposition of real property assets, including multi-asset portfolios throughout the United States. Such representations include due diligence, analyzing and effectively negotiating the acquisition and disposition of real property for commercial, residential, industrial, warehouse, manufacturing and other uses. In addition to negotiating the purchase and sale of real property, we offer tax and other advice regarding the structure of ownership entities and transactions in order to maximize benefits through the selection of appropriate ownership and investment vehicles.

## **Financing**

We advise financial institutions in the structuring, negotiating, documenting and restructuring of their financial products, as well as in their long-term and strategic objectives. We represent some of the largest national, state and foreign banks in their lending programs, as well as numerous life insurance companies. We have extensive experience representing financial institutions in syndicated and participated loans, revolving lines of credit, multistate and multi-site financings, construction financings and letter of credit-backed facilities, including acquisition, development, construction and permanent financings, as well as workouts, forbearances and foreclosures of such products when required. We are often called upon to address regulatory issues on behalf of financial institutions and financial services companies. We also defend them in lender liability claims, including class action lawsuits, as well as regulatory enforcement actions.

Our practice group takes an integrated approach to our clients' needs, providing counsel from teams of real estate, finance, tax and healthcare attorneys located throughout the firm's offices, with experience in all areas of lending, including new development, office, retail, residential, hospitality, assisted living and other healthcare facilities.

## **Leasing**

We have significant involvement with both landlords and tenants in the lease of all types of real estate properties, such as leases for industrial, manufacturing, warehouse, commercial, retail and office uses, as well as ground leases. Our leasing work ranges from small space leases to major lease transactions, and our attorneys frequently address issues, such as tenant and landlord bankruptcies, go-dark provisions and radius restrictions.

## **Construction**

In conjunction with Duane Morris' Construction Group, attorneys in the Duane Morris Real Estate Practice Group represent clients with respect to public and private construction contracts, construction management agreements, design/build agreements, architects' and engineers' contracts for owners, construction companies, and design professionals.

## **Environmental Matters and Sustainable Development**

Duane Morris attorneys regularly work with buyers, sellers and lenders to structure transactions that conform with all federal and state environmental regulations. In addition, we assist clients in obtaining land use and environmental approvals for their projects. In conjunction with the Duane Morris attorneys in the Energy, Environment and Resources Practice Group, we are involved with environmental regulation issues and remediation and environmental clean-up matters which often pose challenging issues in real estate

transactions. We have significant involvement with environmental consultants to develop comprehensive plans to manage and finance clean-up and remediation operations.

Duane Morris attorneys are deeply involved in and committed to the renewable energy and conservation markets, and attorneys in the Duane Morris Real Estate Practice Group include Accredited Professionals under the LEED (Leadership in Energy and Environmental Design) Green Building Rating System. Duane Morris attorneys assist clients seeking to construct and develop “green” and sustainable buildings and advise clients on sustainability issues. Our attorneys assist clients in meeting green building standards and obtaining LEED certification through the U.S. Green Building Counsel.

### **Eminent Domain, Condemnation, and Property 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 property owners in all phases of eminent domain proceedings and have handled highly complex takings cases involving multiple landowners and major urban projects. Our eminent domain practice includes annexation and land use issues, including the obtaining of re-zonings, variances and conditional use permits.

With our extensive knowledge of and experience in the field of condemnation, Duane Morris 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.

### **Joint Ventures**

Duane Morris attorneys represent institutional investors and developers in the formation and operation of joint ventures. The purposes of these joint ventures run the gamut of (i) product types, including office, retail, raw land, multifamily, industrial and hospitality; and (ii) investment types, including core, core-plus, value-added and opportunistic. Their work extends to joint ventures formed to address programmatic acquisitions, acquisitions of scale, renovation and development.

### **Real Estate Investment Management**

For real estate investment managers, our lawyers provide counsel on their deployment of funds allocated to real estate investment. This representation can and does involve any and all of the other core competencies referenced above.

### **Hospitality and Gaming Industry**

A unique subset of the real estate industry, the Duane Morris Real Estate Practice Group has extensive experience in the hospitality and gaming industry. Our attorneys handle all of the real estate and contractual aspects of development, management and ownership and provide legal services for hotel owners, operators and managers, casinos, restaurants and other entertainment venues.

### **Distressed Real Estate**

Duane Morris attorneys from the Real Estate, Business Reorganization and Financial Restructuring Practice Groups as well as the Banking and Financial Services Group provide a multidisciplinary approach and the experience, resources and skills necessary for clients to develop creative solutions, identify

creative opportunities and navigate emerging issues during periods of economic and financial uncertainty. With their vast experience in commercial real estate, finance, creditor rights and bankruptcy, Duane Morris attorneys assist owners, developers, investors, lenders, sellers and buyers with the acquisition, disposition, restructuring, development and financing of troubled properties and loans. Representations include negotiating and structuring complex real estate transactions, including the purchase and sale of troubled property, assets and loans at both the property level and entity level, counseling borrowers and lenders on foreclosures and deeds in lieu of foreclosure, negotiating debt restructuring, workouts, recapitalizations and forbearance agreements, and developing reorganization and restructuring strategies for troubled properties.

We assist lenders in protecting the value of their real estate collateral. We regularly work with lenders to restructure debt, stabilize troubled projects with court-appointed receivers and negotiate and consummate deed-in-lieu of foreclosure recoveries for troubled properties.

Our experience also includes:

- Completing foreclosures and execution proceedings
- Assisting in the interim management and sale of recovered real estate collateral
- Pursuing the recovery of real estate collateral in borrower-initiated bankruptcy cases
- Securing and preserving time-sensitive land use approvals for troubled developments
- Assisting in the construction, marketing and leasing of troubled real estate projects that are in receivership or are already repossessed by the lender

In addition, clients that are seeking to capitalize and take advantage of distressed situations and investment opportunities rely on our experience to identify the advantages and opportunities that distressed properties may provide.

### **Representative Matters**

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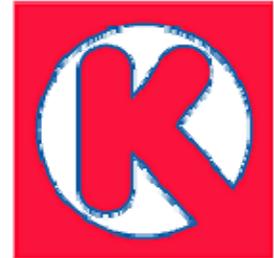
- Represented the lender in restructuring a \$167,000,000 loan involving mortgages on forty-three nursing homes in twelve states.
- Represented the purchaser of equity interests in a \$82,000,000 project in Alexandria, Virginia.
- Represented Las Vegas Sands Corporation in connection with the obtaining of a casino permit and entitlements for construction of \$900,000,000 hotel/casino and retail center in Bethlehem, Pennsylvania. The site, the former Bethlehem Steel Corporation site, is the largest brownfield site in the eastern part of the United States.
- Representation of primary equity syndicator in \$70,000,000 acquisition of interests in 460,000 square foot regional East Coast retail outlet shopping center. Structured acquisition to avoid transfer tax exposure on acquisition. Created ground lease and distribution loan structure to facilitate primary and mezzanine level securitized acquisition financing and meet commercial mortgage-backed securities rating bureau standards.
- Represent Canadian commercial real estate developer in the \$35,000,000 acquisition of a major retail project from Hamburg-based private equity fund and the resale to ING Clarion.

- Represented Cogen Technologies in obtaining the planning board and zoning board approvals for a 154MW, \$150,000,000 co-generation plant in Camden, New Jersey.
- Represented Pennrose Properties in obtaining all of their planning board and zoning board approvals for the \$120,000,000 Baldwin's Run Hope VI housing development in Camden, New Jersey.
- Representing the Gloucester County Improvement Authority as special counsel for the \$150,000,000 courthouse renovation and expansion project.
- Acted as counsel to Fortune 500 investment banking company on numerous transactions, performing a wide range of tasks related to syndicated lending, secured lending, construction lending and revolving credit facilities ranging from \$150,000,000 to \$600,000,000.
- Acted as counsel to Fortune 100 lender in transactions that substituted syndicated real estate-backed revolving lines of credit for an unsecured revolving lines of credit with different terms. Revolving line of credit had a range of \$250,000,000 to \$400,000,000.
- Represented a hotel chain in the sale of four hotels in a combined transaction in excess of \$325,000,000 where our client retained operation and management for 25 years.
- Handled real estate matters associated with complex \$135,000,000 debt refinancing by client engaged in natural gas production and distribution in Central Valley of California; matter involved particularly complex title insurance and easement issues.
- Participated in the \$780,000,000 refinancing of the Sears Tower in Chicago.
- Participated in the \$140,000,000 refinancing of a hotel in Times Square, New York, the mortgage of which encumbered ground lease, developments rights lease and fee ownership interests covering the property, together with \$130,000,000 in layered mezzanine financing.
- Participated in the \$100,000,000 acquisition and construction mortgage financing of a proposed 50 story mixed-use new building in midtown Manhattan, which included the purchase of 63,422 square feet of development rights and an inclusionary housing zoning bonus of 31,272 square feet, together with \$64,575,000 in layered mezzanine financing.
- Acted as counsel for a state university-related organization in development of \$160,000,000 proton research and treatment center that utilizes a linear accelerator to produce protons for targeted radiation treatments for cancer patients. Complex development involved a ground lease, project development agreements and project financing issues and solutions.

The description of the results of any specific case or transaction contained herein does not mean or suggest that similar results can or could be obtained in any other matter. Each legal matter should be considered to be unique and subject to varying results.

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Duane Morris Real Estate Group  
Representative Clients



JPMORGAN CHASE & CO.



i'm lovin' it®



UBS



VORNADO  
REALTY TRUST



LUKOIL



WACHOVIA

A Wells Fargo Company

Toll Brothers  
America's Luxury Home Builder™



Hampshire  
REAL ESTATE COMPANIES



BLACKROCK

DuaneMorris®

@ A GLANCE

## AM LAW 100 SINCE 2001

- > More than 700 lawyers in offices in the U.S., U.K. and Asia
- > Firm has grown 200% in past 12 years
- > Over 25% of client business conducted through multiple offices and practices



Lateral growth:  
**100 PARTNERS** joined over past 3 years

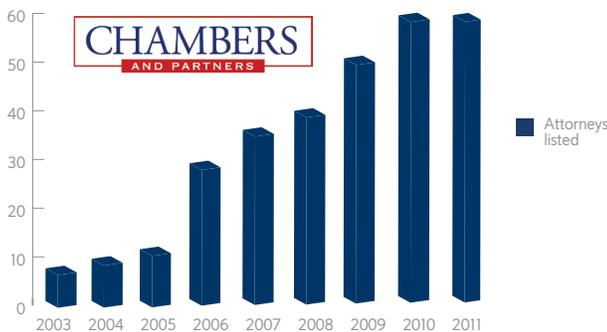
## HARVARD BUSINESS SCHOOL

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.



## CHAMBERS USA 2011

- > Ranked among national leaders in Insurance and Construction
- > 60 attorneys receiving 70 citations for excellence
- > 19 practice areas cited for excellence



## U.S. NEWS-BEST LAWYERS BEST LAW FIRMS

- > Top-tier national awards in Bankruptcy, Construction and Insurance
- > 40 citations for excellence and 6 top-tier regional awards in various practice groups



## LEADER IN BANKRUPTCY LAW

**The Deal** For Q2 2011, *The Deal* ranked Duane Morris #1 by total volume of assets handled in large bankruptcy cases. Also, *The Deal* reports that Duane Morris has more large U.S. filings than any other law firm.

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



## NATIONAL IP RANKINGS

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

- > top trademark filing firms by *Trademark Insider* and *IP Today*
- > top firms for patent litigation by *IP Law360* and *IP Law & Business*



**TOP 5** TRADEMARK LITIGATION PRACTICE in the U.S. in 2009 as ranked by *IP Law360*

## CORPORATE DEALMAKING

Some recent deals involving Duane Morris lawyers include:

### GROUPON'S \$950MM

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### 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

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**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

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**AUDIOVOX CORPORATION'S** \$166MM acquisition of global high-performance audio-solutions leader Klipsch Group and worldwide subsidiaries

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

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



## TOP STAFF

- > American Lawyer Media's Marketing the Law Firm 50 survey:
  - > Top 10 every year
  - > Top five in five of the past six years, including being named #1 in the nation
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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

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- Pittsburgh
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- Hanoi
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- > Alliance with Mexico City's Miranda & Estavillo S.C.
- > Leadership positions with international networks of independent law firms

## 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.

#### NOTES:

## **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.

NOTES:

### **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.

NOTES:

#### **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.

NOTES:

**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 untenable, 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 untenable, 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.

NOTES:

**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.

NOTES:

**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.

NOTES:

# COMMERCIAL INVESTMENT Real Estate

## LEGAL BRIEFS

# Condemnation Concerns

Retail lease agreements should include change of access language.

by George J. Kroclicik, 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, condemnation 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.

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# What's in Your Condemnation Clause?

George J. Kroclick\*  
Michael J. McCalley\*\*  
Duane Morris, LLP  
Philadelphia, PA

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.<sup>1</sup> 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.<sup>2</sup>

## 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.<sup>3</sup> 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.<sup>4</sup>

### *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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> This result—no payment of a prepayment penalty in a condemnation action—may even be achieved by statute.<sup>8</sup>

In other jurisdictions, courts may allow the contract language to control.<sup>9</sup> 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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<sup>1</sup>*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).

<sup>2</sup>*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).

<sup>3</sup>*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)).

<sup>4</sup>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.

<sup>5</sup>*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).

<sup>6</sup>*See, e.g., Empire Mortgage*, *supra*, 341 N.J. Super. at 223.

<sup>7</sup>*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.”)

<sup>8</sup>*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”).

<sup>9</sup>*See note 7, supra.*

## The Importance of Condemnation and Access Clauses in Commercial Leases

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Duane Morris LLP  
Philadelphia, PA

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); *Damall 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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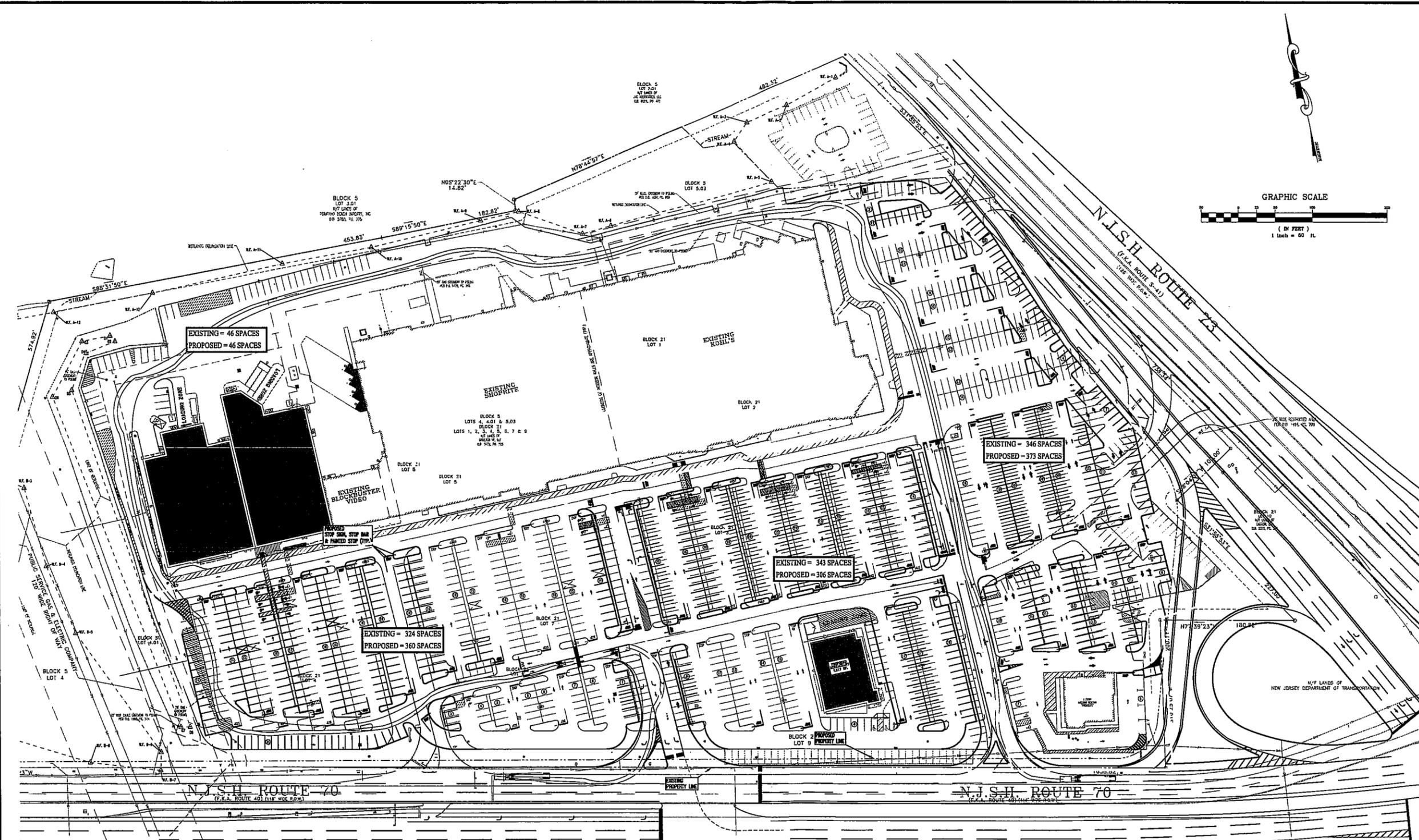
NO.	DATE	REVISIONS	BY
1	2/27/08	PER NJDOT COMMENTS	PAW
2	3/20/08	PER NJDOT COMMENTS	MCR
3	3/20/08	PER TWSP COMMENTS	PAW
4	3/4/08	REV TO INCLUDE LATEST SITE PLAN	KZ

NOT APPROVED FOR CONSTRUCTION

PROJECT NO.: J020861.10  
DRAWN BY: PAW  
CHECKED BY: MCR  
DATE: 1/27/08  
SCALE: AS NOTED  
CAD LID: OVERLAYER/REV

PROPOSED RETAIL DEVELOPMENT  
FOR  
MARLTON VF, LLC

LOTS 1, 2, 3, 4, 5, 6, 7 & 8, BLOCK 21  
LOTS 4, 4.01 & 5.03, BLOCK 5  
EYESHAM TOWNSHIP  
BURLINGTON COUNTY, NEW JERSEY



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.

**RT 73 UPGRADED TO FULL-MOVEMENT INTERSECTION.**

**CONCEPT LAYOUT PLAN NOTES**

- THIS PLAN REFERENCES DOCUMENTS AND INFORMATION:  
A SURVEY PREPARED BY: CONTROL POINT ASSOCIATES, INC.  
778 MICHIGAN BLVD.  
WATSONVILLE, NJ 07095  
REVISION: 6/27/07  
JOB NO. 050562  
ARCH. DRAWING PREPARED BY: TAYLOR ASSOCIATES ARCHITECTS  
LAST REVISED: 7/26/2007  
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
- THIS CONCEPT WAS PREPARED STRICTLY BASED UPON INFORMATION IDENTIFIED ABOVE.
- 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.
- 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**

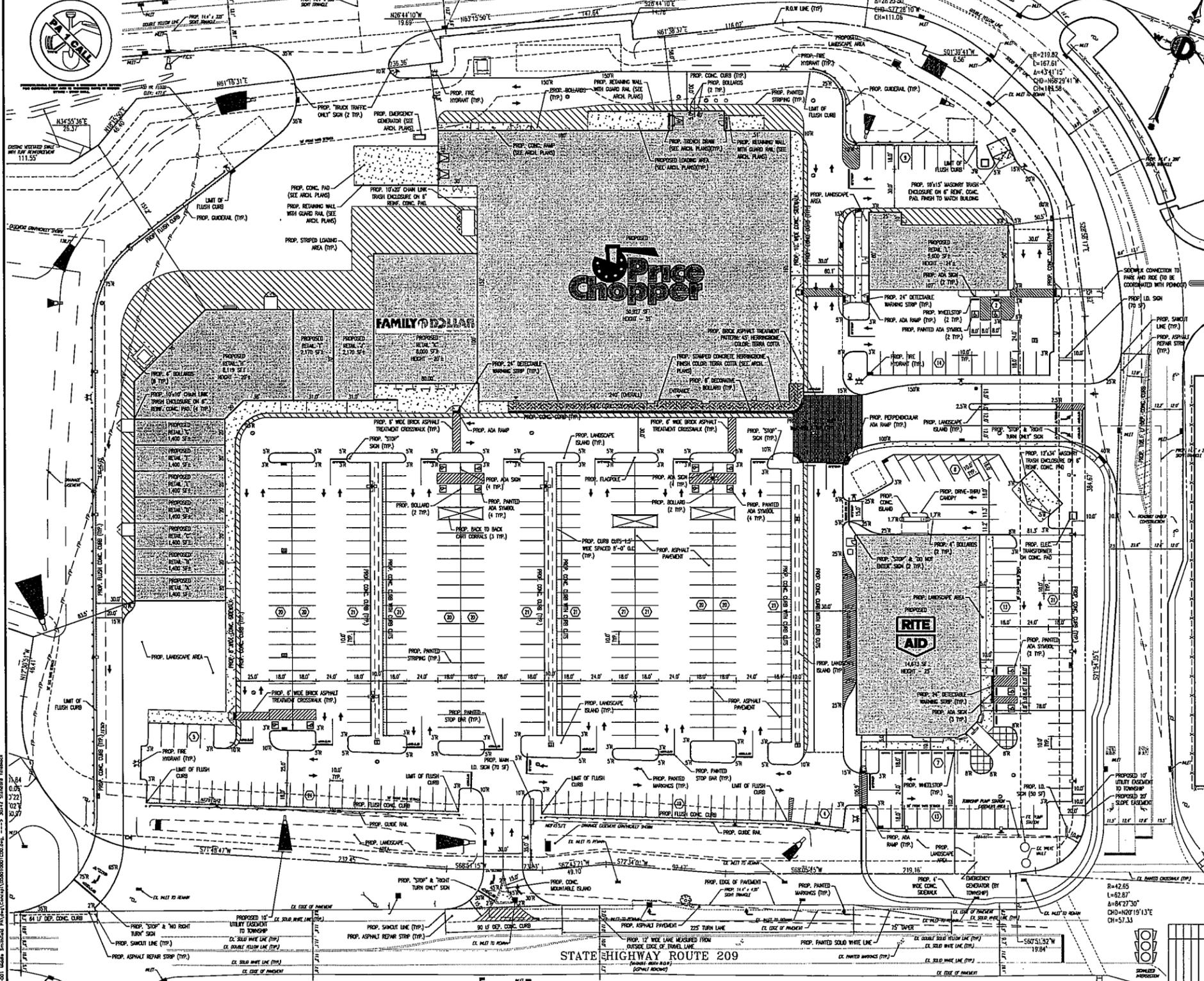
EXISTING = # OF PARKING STALLS APPROVED ON FINAL SITE PLANS  
PROPOSED = # OF PARKING STALLS AFTER NJDOT IMPROVEMENTS COMPLETED

**PARKING SUMMARY**

EXISTING = 1059 SPACES  
PROPOSED = 1085 SPACES



CALL BEFORE YOU DIG!  
1-800-242-1776



**GENERAL NOTES**

1. THE PLAN HAS BEEN PREPARED BASED ON REFERENCES INCLUDING BY CHAMBERS, LLC, 147 UNION AVENUE, SUITE 100, MIDDLE SMITHFIELD, PA 15467, DATE 12/17/2011.
2. OWNER: BULLY BROTHERS DEVELOPMENT COMPANY, 1111 BETHLEHEM, PA 16801.
3. APPLICANT: BULLY BROTHERS DEVELOPMENT COMPANY, 1111 BETHLEHEM, PA 16801.
4. PARCEL DATA STATE RECORDS: 2009 AND 044 DRIVE, (TOWNSHIP POLICE DISTRICT) TOWNSHIP OF MIDDLE SMITHFIELD, PA 15467.
5. PROP. TO DRAINAGE CONNECTION: THE CONTRACTOR SHALL BE RESPONSIBLE TO MAKE SURE THAT ALL REQUIRED PERMITS AND APPROVALS HAVE BEEN OBTAINED. NO CONSTRUCTION OR ABANDONMENT SHALL BE PERMITTED UNTIL ALL REQUIRED PERMITS AND APPROVALS HAVE BEEN OBTAINED.
6. ALL WORK SHALL BE PERFORMED IN ACCORDANCE WITH THESE PLANS AND SPECIFICATIONS AND THE REQUIREMENTS AND STATUTES OF THE LOCAL GOVERNING AGENCY.
7. THE SOIL 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 IN THE PLANS. THE CONTRACTOR SHALL VERIFY THE EXISTING CONDITIONS BEFORE ANY CONSTRUCTION BEGINS. SOILS SHALL BE PROTECTED AND NOT BE REMOVED OR DISTURBED.
8. SITE CLEARING SHALL INCLUDE THE LOCATION AND REMOVAL OF ALL UNDERGROUND UTILITIES, WELLS, ETC.
9. THE PROPERTY SURVEY SHALL BE CONSIDERED A PART OF THESE PLANS.
10. ALL MEASUREMENTS SHOWN ON THE PLANS SHALL BE TAKEN FROM THE CORNER POINTS OF THE CONSTRUCTION. CONTRACTOR SHALL NOTIFY ENGINEER IF ANY DISCREPANCIES EXIST PRIOR TO BEGINNING OF CONSTRUCTION. IN ACCORDANCE WITH THESE PLANS, THE CONTRACTOR SHALL BE PAID BY THE CONTRACTOR FOR THE WORK TO BE DONE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.
11. ALL EXISTING UNDESIRABLE MATERIALS SHALL BE TRANSPORTED TO AN APPROVED DISPOSAL LOCATION.
12. CONTRACTOR IS RESPONSIBLE FOR ALL BEING REQUIRED DURING CONSTRUCTION AND SHALL BE PERFORMED IN ACCORDANCE WITH ALL APPLICABLE ORDINANCES, AS WELL AS ANY OTHER APPLICABLE ORDINANCES.
13. ALL CONSTRUCTION SHALL BE IN ACCORDANCE WITH THE REQUIREMENTS AND APPROVALS OF THE LOCAL GOVERNING AGENCY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.
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16. CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.
17. IN AN EFFORT TO RESOLVE ANY CONFLICTS THAT MAY ARISE DURING THE COURSE OF CONSTRUCTION OF THE PROJECT, THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.
18. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.
19. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.
20. CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE LOCAL GOVERNING AGENCY.

**ADDITIONAL TOWNSHIP NOTES:**

- 1. NO PORTIONS OF THE LOT SHALL BE USED FOR ANY PURPOSES AS SHOWN IN SECTION 200-21.
- 2. ALL EXISTING UTILITIES SHALL BE PROTECTED AND NOT BE REMOVED OR DISTURBED.
- 3. SECTION 100-75 - "IMPROVEMENT CONSTRUCTION AND/OR INSTALLATION" IS TO BE INCLUDED AND AGREED UPON AS PART OF APPROVAL OF THESE PLANS.

**RESTRICTIVE COVENANTS**

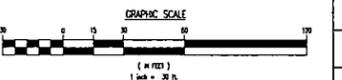
1. SCHEDULE OF TOWNSHIP REGULATIONS (SECTION 200-34 (A))

ZONE	MIN. SETBACK	MIN. FRONT YARD SETBACK	MIN. SIDE YARD SETBACK	MIN. REAR YARD SETBACK	MIN. BUILDING COVERAGE	MIN. BUILDING HEIGHT
C-COMMERCIAL ZONE	7 FEET	25'	5'	5'	45%	33 FEET / 10' MAX
PROPOSED	12.50 FEET (MINIMUM 5')	25'	5'	5'	45%	33 FEET / 10' MAX

NOTE: SETBACKS SHALL BE MEASURED FROM THE EXISTING OR PROPOSED LOT LINES. SETBACKS SHALL BE MEASURED FROM THE EXISTING OR PROPOSED LOT LINES. SETBACKS SHALL BE MEASURED FROM THE EXISTING OR PROPOSED LOT LINES.

**SIGNAGE TABLE** (CHECK SHALL BE ADDRESSED AS A SEPARATE SHEET/APPROVAL WITH THE TOWNSHIP)

REQUIREMENTS (200-43)	PROVIDER
BUILDING MARKERS	BUILDING MARKERS PERMITTED NOT TO EXCEED TOP OF WALL AREA TO WHICH THEY ATTACHED
FRESHWATER	ONE (1) SIGN PERMITTED PER LOT ALONG EACH SIDE OF THE LOT AREA MIN. AREA 10" BY 10" (10" X 10") ONE (1) SIGN PERMITTED PER LOT ALONG EACH SIDE OF THE LOT AREA MIN. AREA 10" BY 10" (10" X 10") ONE (1) SIGN PERMITTED PER LOT ALONG EACH SIDE OF THE LOT AREA MIN. AREA 10" BY 10" (10" X 10")



**DYNAMIC ENGINEERING**

145 Main Street, Suite 204  
Chesham, NJ 07924  
T: 908.878.2329  
F: 908.878.2322  
www.dynamiceng.com

**CONCEPTUAL SITE PLAN "D" (10'x18' SPACES)**

PROJECT: MIDDLE SMITHFIELD PROPOSED DEVELOPMENT

STATE HIGHWAY 209 & 044 DRIVE DR. MIDDLE SMITHFIELD TOWNSHIP, MONROE COUNTY, PA.

DESIGNED BY: J.C. SPARONE, B.W. SKAPINETZ

DATE: 05/19/2011

SCALE: 1"=30'

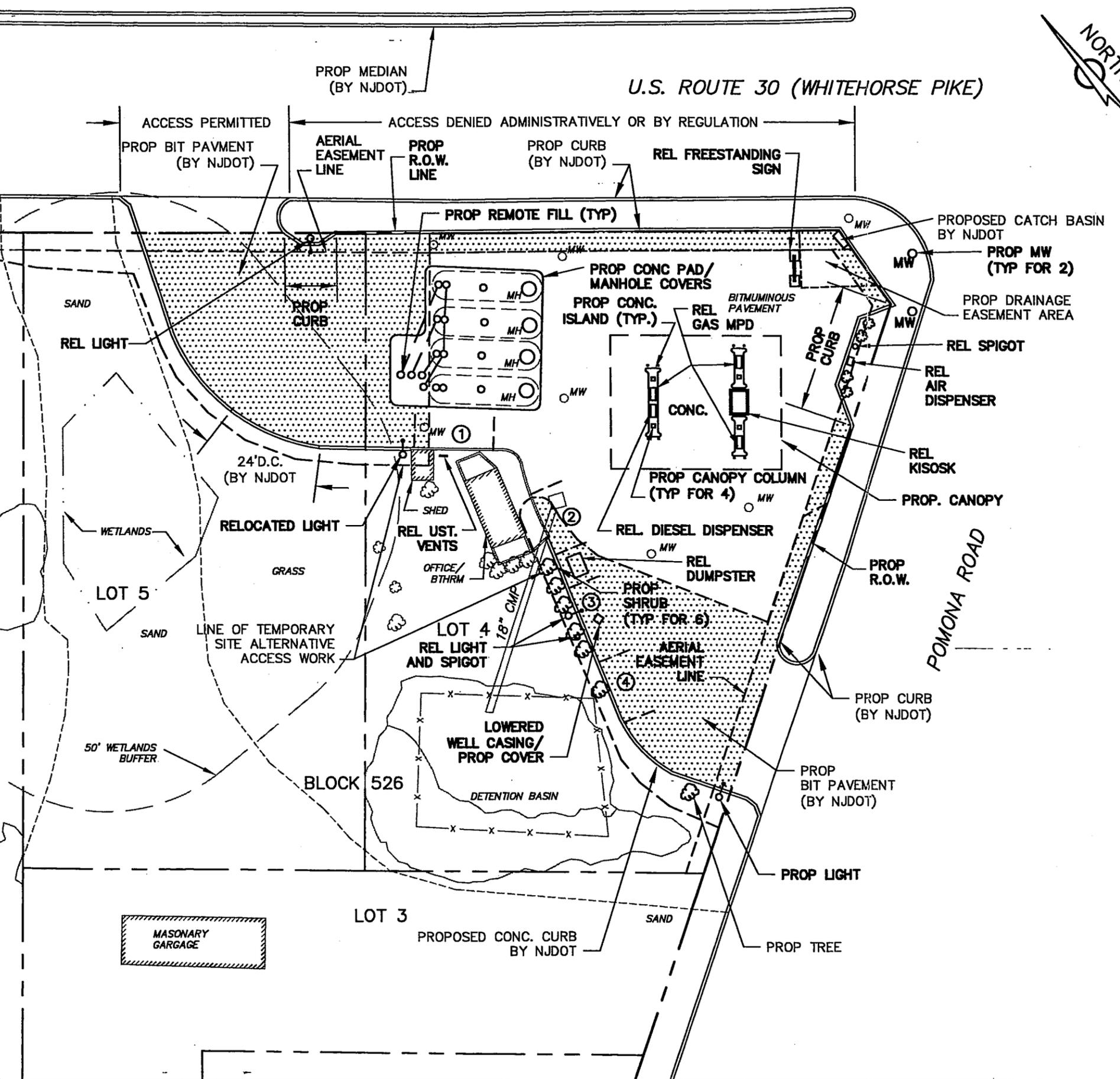
CONSTRUCTION CHECK: DATE: 05/19/2011

PROFESSIONAL ENGINEER: J.C. SPARONE, License No. 17298

PROFESSIONAL ENGINEER: B.W. SKAPINETZ, License No. 17298



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 BUILDING (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



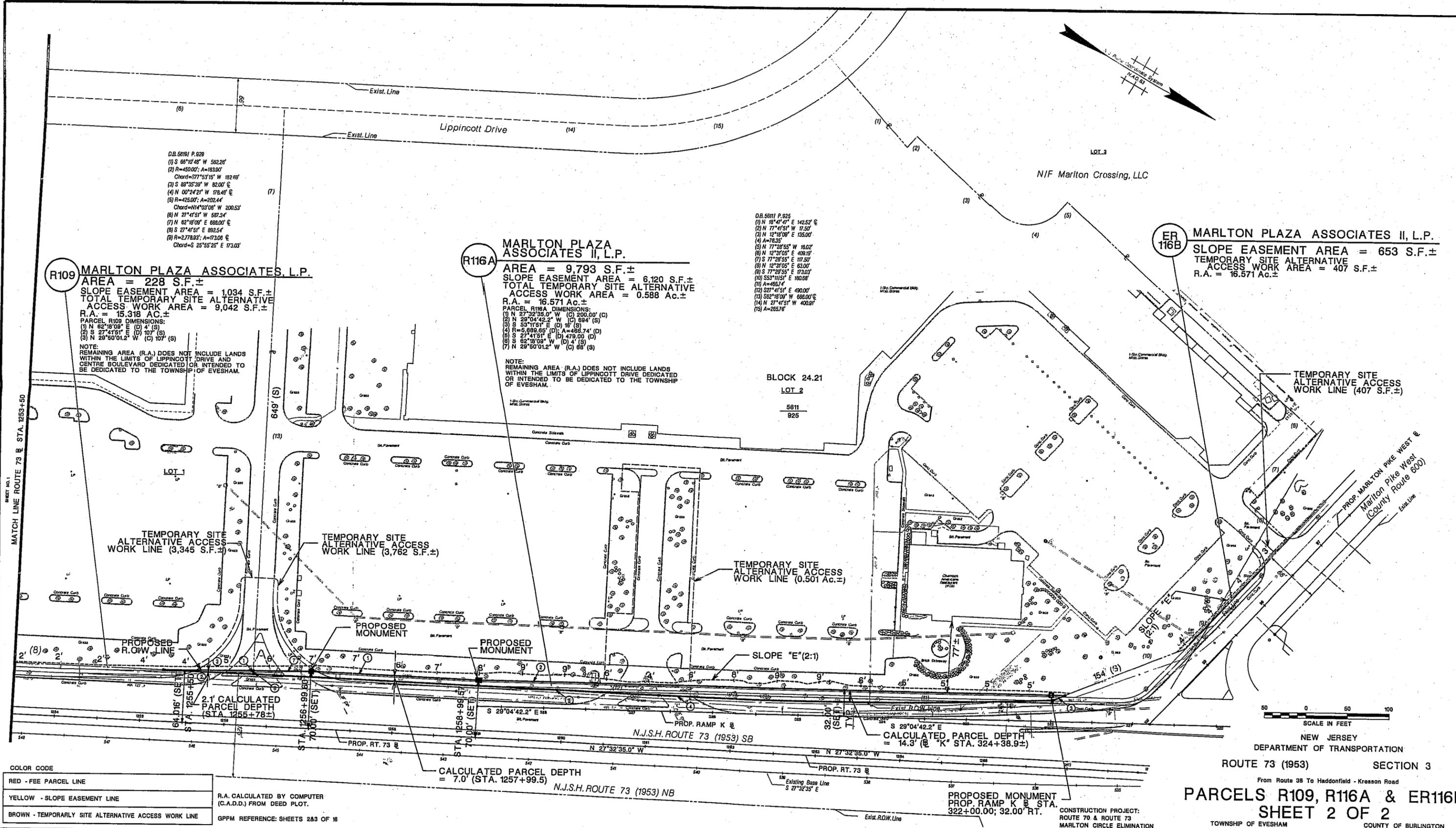
**LEGEND AND ABBREVIATIONS**

- ③ - PARKING STALL NUMBER
- ☁ - LANDSCAPING
- ⊙ - UTILITY POLE
- ⊙ - POLE MOUNTED LIGHT FIXTURE
- ⊕ - SIGN
- MPD. - MULTI PURPOSE DISPENSER
- MW - MONITORING 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		<b>PROPOSED CONSTRUCTION</b>		
REVISIONS:				
NO.	DATE:	<b>SUNOCO, INC</b> <b>ROUTE U.S. 30 (1953)</b> <b>SECTION 6, PARCELS R20A, AE20B &amp; AE20C</b> <b>BLOCK 526, LOTS 4 &amp; 5</b> <b>TWP OF GALLOWAY, ATLANTIC COUNTY, NEW JERSEY</b>		
SCALE: 1" = 30'		DATE: MARCH 13, 2009	PAI JOB No: NJDT-0901	EXHIBIT: 3-4



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

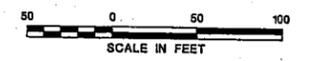


SHEET NO. 1  
 MATCH LINE ROUTE 73 @ STA. 1253+50

**COLOR CODE**

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

R.A. CALCULATED BY COMPUTER  
 (C.A.D.D.) FROM DEED PLOT.  
 GPPM REFERENCE: SHEETS 2&3 OF 18



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