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<p>Appellants/Protestants,</p> <p>V.</p> <p>MAXATAWNY TOWNSHIP BOARD OF SUPERVISORS,</p> <p>Appellee,</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA</p> <p>CIVIL ACTION – LAND USE APPEAL</p> <p>Docket No.:</p>
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**NOTICE OF LAND USE APPEAL**

NOW COMES, Appellants, by and through counsel, hereby appeal from preliminary plan approval by the Maxatawny Township Board of Supervisors of a subdivision and land use application; the following is offered in support:

**OVERVIEW**

1. This appeal comes from an expansive land development plan which was “approved” by the Maxatawny Township Board of Supervisors in under six weeks with no recommendation from the Township Planning Commission, no approval from the Zoning Hearing Board, and despite a

shocking direct financial incentive to vote “Yes” that two of the three Supervisors had by virtue of the developer’s intentional conduct.

2. Due to the outrageous indifference to the rule of law and corrupt conduct at the township level, the Board’s decision must be overturned.

**PARTIES**

**GROUNDS FOR RELIEF**

15. On or about February 26, 2021, Duke Realty Limited Partnership (the “Developer” or “Duke Realty”) submitted an application (“Original Application”) with the Board under the Maxatawny Township Subdivision and Land Use Ordinance (“SALDO”) for a development project known as Valley Logistics Park (the “Proposed Development Project” or “Proposed

Development Plan”).

16. The Proposed Development Project is in the nature of transforming approximately 278.2 acres of historic and pristine farmland into a warehouse distribution facility, which consists of 10 parcels in Maxatawny Township currently owned as shown in Table 1 below:

17. On April 30, 2021, Duke Realty submitted a revised application under SALDO to the Board in respect of the Proposed Development Project (the “Revised Application”).

18. Inscrutably, Duke Realty and the Township have refused to permit interested parties to make copies or even to take photographs of the Original Application or the Revised Application, and thus interested parties are hamstrung by the inability to carefully review the documents.

19. The Proposed Development Project involves, inter alia, relocating Hottenstein and Hilltop roads, and borders on Kutztown Road and Long Lane.

20. On June 9, 2021, the Board convened and granted approval of a preliminary plan for the Proposed Development Project (the “Preliminary Plan Approval”).

21. Based on the grounds stated herein, the grant of Preliminary Plan Approval of the Revised Application by the Board is void ab initio, and otherwise was arbitrary, capricious, against the weight of the evidence, an abuse of discretion, and contrary to law, including the guarantee for uniform standards in municipal ordinances under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

**I. The Massive Traffic Volume to be Generated is against the Health, Safety, and Welfare of the Residents of Maxatawny Township.**

22. On information and belief, the results of a traffic impact study were shared with the Board by letter dated June 9, 2021 from the Municipal Review Engineer of the Township. Such traffic impact study revealed the Proposed Development Project will have a peak of 924 trips from tractor trailers per hour—which is 15.5 trucks per minute or one truck every 3.8 seconds added to an already overwhelmed Kutztown Road and to significantly congest neighboring local roads.

23. Appellants are neighboring property-owners, or neighboring residents or both, and having regularly used Hottenstein and Kutztown roads, Long Lane, or any of the foregoing, and further enjoying, from their respective properties, a view of the historic and pristine farmland on which the Proposed Development Project will permanently alter.

**II. Massive Nighttime Lighting is against the Health, Safety, and Welfare of the Residents of Maxatawny Township.**

24. The Proposed Development Project will involve nighttime lighting of the premises.

25. The lighting as shown in the Proposed Development Project is 40 feet.

26. Under SALDO, anything in excess of 25 feet must be approved by Board and no such approval was made.

27. Appellants are neighboring property-owners, or neighboring residents or both, and the values of their respective real properties will be diminished in value as a result of nighttime lighting of the premises of the Proposed Development Project.

**III. Conflicts of Interest among the Supervisors.**

28. During all relevant times, the Maxatawny Township Board of Supervisors (the “Board”) consisted of Chairman Allen Leiby (“Leiby”), Vice Chairman Heath L. Wessner (“Wessner”), and Supervisor Judy Daub (“Daub”).

29. In the Original Application, Duke Realty disclosed that it had an equitable interest in the aforementioned parcels in Table 1.

30. As shown on Parcels D and E in Table 1, property owner Health L. Wessner had a direct financial interest in the Proposed Development Project, and was Vice Chairman of the Board.

31. In fact, Wessner’s personal residence is situated on Parcel D from Table 1.

32. As shown on Parcel B from Table 1, the owner, Jeremy S. Reinhard (“Leiby’s Son-in-Law”) is the son-in-law of Leiby and the husband of Laura (Leiby) Reinhard, the latter being the

daughter of Leiby (“Leiby’s Daughter”).

33. In the Original Application, Duke Realty disclosed that it had an equitable interest in approximately 1.0496 acres of adjoining land.

34. In the southwestern corner of the Proposed Development Project is the adjoining property at 15377 E. Kutztown Rd. (Parcel ID 63545400532149) and owned by Grace C. Haas and consisting of approximately 1.03 acres (the “Haas Property”).

35. Grace C. Haas is the sister of Leiby.

36. Prior to Preliminary Plan Approval, the Township’s Zoning and Code Enforcement Officer observed the Proposed Development Project seeks to modify the boundary of the Haas property, and limit the future use of the property.

37. By response to the Township’s Zoning Code and Enforcement Officer on April 30, 2021, Duke Realty disclosed that it has an agreement of sale with Grace C. Haas for her aforementioned parcel, but claimed “it is not part of this development plan.”

38. But for the Proposed Development Project, Duke Realty would have no interest whatsoever in the Haas Property.

39. On information and belief, Grace C. Haas has been unable to sell the Haas Property for several years and Duke Realty has offered to her an above-market price for same, which constitutes an unethical influencing on Leiby for his vote for Preliminary Plan Approval.

40. Based on the foregoing, Duke Realty’s agreement of sale with Grace C. Haas arises from and is relating to the Proposed Development Project and Duke Realty improperly attempted to circumvent the law regulating conflicts of interest for Leiby.

41. Under the Public Official and Employee Ethics Act, Leiby shall not “engage in conduct that constitutes a conflict of interest.” 65 Pa.C.S. § 1103(a).

42. Under the Public Official and Employee Ethics Act, if Leiby “in the discharge of his official duties would be required to vote on a matter that would result in a conflict of interest,” then Leiby “shall abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of his interest as a public record in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken . . .” 65 Pa.C.S. § 1103(j).

43. Under the Public Official and Employee Ethics Act, a “conflict of interest” exists if Leiby uses “the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated.” 65 Pa.C.S. § 1102.

44. Under the Public Official and Employee Ethics Act, “immediate family” means a “parent, spouse, child, brother or sister.” 65 Pa.C.S. § 1102.

45. The Public Official and Employee Ethics Act was applicable to Leiby where acting in his official capacity as Supervisor of Maxatawny Township.

46. During the Board’s June 9, 2021 meeting whether to grant Preliminary Plan Approval of the Proposed Development Project, Wessner recused himself but Leiby did not. Leiby and Daub voted to grant Preliminary Plan Approval to the Proposed Development Project.

47. Based on the foregoing, Leiby had a conflict of interest and should not have voted on June 9, 2021 on the question whether to grant Preliminary Plan Approval to the Proposed Development Project.

48. Under the guarantee of impartiality in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and in Article I, Section 11 of the Pennsylvania Constitution, no distinction is drawn whether Leiby’s Daughter’s name was on the title to the property in Parcel



B or not, because under Pennsylvania law such property is regarded as marital property and, as such, Leiby's Daughter has equitable and future interests in such property, and where — on information and belief — Leiby's Daughter and her spouse commingle their income and property, including the proceeds of any finalized land sale of Parcel B.

49. Based on the foregoing, and under the Public Official and Employee Ethics Act, 65 Pa.C.S. § 1103, Pennsylvania common law, and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 11 of the Pennsylvania Constitution, Allen Leiby had a conflict of interest, and knowingly failed to recuse, or refused to recuse, himself from voting on the Preliminary Plan Approval.

50. Under Pennsylvania common law, the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and under Article I, Section 11 of the Pennsylvania Constitution, rights require remedies, including voidance of the Preliminary Plan Approval of the Proposed Development Project by the Board due to a majority of Supervisors having a conflict of interest.

51. Under Pennsylvania and Anglo-American common law and equity, firmly-rooted at the time of ratification of the U.S. and Pennsylvania constitutions, *commodum ex injuria sua nemo habere debet*, that is, a wrongdoer should not be enabled to take advantage from his own wrong. McAllister v. Millville Mut. Ins., 640 A.2d 1283, 1285 (Pa.Super. 1994); Carr-Consolidated Biscuit Co. v. Moore, 125 F. Supp. 423, 429 (M.D. Pa. 1954); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3. At common law in Pennsylvania, municipal action taken by interested public officials is void against public policy. Commonwealth ex rel. McCreary v. Major, 22 A.2d 686 (Pa. 1941); Koslow v. Commonwealth, 540 A.2d 1374 (Pa. Commw. Ct. 1988).

52. Under Article I, Section 11 of the Pennsylvania Constitution, justice must be administered

freely “without sale,” and the courts must be open for a remedy “by due course of law.”

53. The public interest should not be thwarted, and developers should not be permitted to obtain approval of subdivision and land use applications, from municipal governing bodies by orchestrating or benefitting from conflicts of interest with public officials on those same governing bodies or employed by those same governing bodies.

54. As applied to the facts and circumstances of the instant case, which involve the Board’s adjudication of a subdivision and land use matter, the statute of 65 Pa.C.S. § 1103(j) is unconstitutional to the extent it permits public officials to vote on interested matters.

55. Under 53 P.S. § 11006-A, the Court may fashion appropriate judicial relief. Appeal of Bartkowski Inv. Group, 106 A.3d 230, 248 (Pa. Commw. Ct. 2014).

56. Based on the foregoing, under Pennsylvania common law, under 53 P.S. § 11006-A, and under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 11 of the Pennsylvania Constitution, a majority of the Board was conflicted out and the Preliminary Plan Approval should be voided and deemed denied.

#### **IV. No Special Exception for Warehousing Activity.**

57. Developer intends to begin the Proposed Development Project without approval by the Maxatawny Township Zoning Hearing Board (“ZHB”).

58. The Maxatawny Township Zoning Ordinance contains Section 407, which governs “L-I Light Industrial” districts.

59. The Proposed Development Project is within a Light Industrial district.

60. Section 407.3 of the Maxatawny Township Zoning Ordinance defines, “Uses Permitted Only by Special Exception issued by the Zoning Hearing Board,” and subsection (c) reads, “Warehousing Activity and/or Facility subject to Section 593 of this Ordinance.”

61. Section 107 of the Maxatawny Township Zoning Ordinance provides in part, “If a

discrepancy exists between any regulations contained within this Ordinance, that regulation which imposes the stricter limitation on the proposed use or structure shall apply.”

62. Section 407.3(e) of the Maxatawny Township Zoning Ordinance imposes the stricter limitation than other permitted uses for Light Industrial districts under Section 407 of such Ordinance.

63. Developer has not complied with Section 407.3(e) of the Maxatawny Zoning Ordinance.

64. Developer has not submitted any application to Maxatawny Township’s Zoning and Code Enforcement Officer, or to the ZHB, requesting special exceptions or variances in respect of the Proposed Development Project.

65. The Maxatawny Township Board of Supervisors granted Preliminary Plan Approval of the Proposed Development Project without any condition that approval is obtained from the ZHB.

**V. No Variance from the Zoning Hearing Board for Warehousing within 500 Feet of Property Containing a Residence or Playground.**

66. The Maxatawny Township Zoning Ordinance contains Section 593, “Warehousing and Wholesale Trade Establishments.”

67. Under Section 593(c) of the Maxatawny Township Zoning Ordinance, “The subject property shall be located no closer than five hundred feet (500) from any adjacent property containing a residential dwelling, school, day-care facility, park, playground, library, hospital, nursing, rest, or retirement home, or medical residential campus.”

68. The Proposed Development Project is in violation of Section 593(c) of the Maxatawny Township Zoning Ordinance.

69. On information and belief, properties which contain a residential dwelling and are within 500 feet of the Proposed Development Project include those as shown in Table 2:

70. In addition, the Proposed Development Project is within 500 feet of the Evangel Assembly of God (Parcel ID 63545400568500), a church which contains a playground.

**VI. Zoning and Code Enforcement Officer Did Not Approve Several Aspects of the Preliminary Plan Approval.**

71. The Proposed Development Project includes realignment of Hottenstein Road (the "Road Realignment")

72. The Township's Zoning and Code Enforcement Officer did not approve the Road Realignment.

73. Developer has not purchased the properties necessary to complete the Road Realignment.

74. Under Section 593(k) of the Maxatawny Township Zoning Ordinance, "The Applicant

shall designate and reserve sufficient space on the site to accommodate staged or queued vehicles awaiting loading/unloading at a rate of no less than five percent (5%) of the projected maximum number of trips per day.”

75. The Proposed Development Project does not comply with Section 593(k) of the Maxatawny Township Zoning Ordinance.

**VII. No Jurisdiction to Relocate the Kemp Burial Ground.**

76. From Table 1, Parcel A, *supra*, the property located at 4 Hilltop Road contains an historic burial ground known as the Kemp Burial Ground.

77. Among the remains of other persons, the Kemp Burial Ground reputedly contains the remains of Theobault (“Dewalt”) Kemp, who arrived in America by 1720 and is believed to be the original pioneer settler of Maxatawny Township, together with the remains of his son, George Kemp, who fought in the Revolutionary War, as well as the remains of Hannah, the only known African slave in this section of Berks County.

78. In the plans submitted with the Original Application, on Sheet No. C2.2, the Developer depicted and identified the “Kemp Burial Ground” with the notation, “Remains to [be] Relocated.”

79. The Revised Application contained no plans for maintaining and preserving the Kemp Burial Ground.

80. Developer does not have present authority from the Orphans Court Division of the Berks County Court of Common Pleas to relocate the Kemp Burial Ground.

81. The Preliminary Plan Approval was not conditioned on a final order of disinterment and reinterment by the Orphans’ Court Division of the Berks County Court of Common Pleas.

82. Under 20 Pa.C.S. § 711(1) and the standards governing disinterment as articulated in Novelli v. Carroll, 420 A.2d 469, 471 (Pa.Super. 1980), the Board did not have subject-matter jurisdiction to approve disinterment and relocation of the Kemp Burial Ground without expressly

conditioning the Preliminary Plan Approval on a final order of disinterment and reinterment by the Orphans' Court Division of the Berks County Court of Common Pleas.

**VIII. Additional Non-Compliance with Maxatawny Township Ordinances.**

83. The Proposed Development Project is non-compliant with the requirements of the Maxatawny Township Zoning Ordinance, or of SALDO, or of both and did not fully comply with all comments by the Township's Zoning and Code Enforcement Officer and the Township Municipal Engineer, including as follows:

- (a) Sewer system drainage is not shown in the plans and does not conform to Section 407.6(a) of the Township Zoning Ordinance and Section 302.1(m)(7) of SALDO.
- (b) The plans do not depict any 25 feet of screening, by trees, hedges, or plants, of all lot lines abutting residential districts and along the side and rear yard, as required by Section 407.6(j) & (k) of the Township Zoning Ordinance.
- (c) There are no offsite wells or wellhead protection plans depicted in the plans, as required for the protection of groundwater levels and quality and surface water quality under Section 501.10(g) of the Township Zoning Ordinance.
- (d) The plans do not show water service and, on information and belief, no hydrological studies have been performed, as required by Section 501.10(g) of the Township Zoning Ordinance and Section 302.1(m)(7) of SALDO.
- (e) Proposed building dimensions do not meet Ordinance requirements and neither waiver nor showing of undue hardship has been made.
- (f) Road profiles are not shown in the plans as required by Section 302.2(a) of SALDO.
- (g) Compliance with environmental standards, including Section 501.10 of the Township Zoning Ordinance, is not shown.

84. Appellants reserve the right to submit additional grounds in support of the appeal after

discovery and after they receive the entire record in this case from Maxatawny Township of which they have been previously denied by Maxatawny Township.

### CONCLUSION

**WHEREFORE**, appellants respectfully request that the Court receive additional evidence and employ experts to aid the Court, 53 P.S. § 11006-A(d) and, upon an opportunity to be heard, enter judgment in their favor and against Appellee, together with a final order which affords the following relief: (a) find, conclude, and declare the Preliminary Plan Approval by the Maxatawny Township Board of Supervisors of June 9, 2021 is arbitrary, capricious, against the weight of the evidence, an abuse of discretion, contrary to municipal ordinances, and contrary to law, including the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 11 of the Pennsylvania Constitution; (b) reverse or set aside the Preliminary Plan Approval or declare the same void *ab initio*; (c) as applied to adjudications of zoning and subdivision and land use matters, declare unconstitutional the provisions of 65 Pa.C.S. § 1103(j) to the extent interested public officials are permitted to vote in the interested matter; (d) find, conclude, and declare under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, under Article I, Section 11 of the Pennsylvania Constitution, and under 53 P.S. § 11006-A, that Duke Realty, plainly having entered into agreements to purchase the properties of Supervisor Heath L. Wessner, of Jeremy Reinhard (the son-in law of Supervisor Allen Leiby) and Grace C. Haas (the sister of Supervisor Allen Leiby), have so tainted these proceedings and require voiding of the Preliminary Plan Approval as deemed denied due to the conflicts of interest of Supervisors Wessner and Leiby; (e) certify a record of these proceedings to the Pennsylvania State Ethics Commission for investigation and review of the aforesaid actions of Supervisor Leiby; (f) preliminarily and finally enjoin Maxatawny Township Board of Supervisors from taking any

further action in these proceedings until further order of this Court; (g) retain jurisdiction of these proceedings; and (h) provides any other relief which the Court deems necessary, just, or appropriate, including amendment and supplementation of this Appeal after completing discovery and receiving the entire record.

Respectfully submitted,

**CORNERSTONE LAW FIRM, LLC**



By: \_\_\_\_\_

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Dated: July 9, 2021



**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the Case Records Public Access policy of the United Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 9, 2021

/s/ David W. Crossett  
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