

IN RE: APPLICATION OF ROUTE 115 ASSOCIATES, LLC-CONDITIONAL USE	TUNKHANNOCK TOWNSHIP BOARD OF SUPERVISORS
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TUNKHANNOCK TOWNSHIP ADJUDICATION

INTRODUCTION

Applicant, 115 Associates, LLC, seeks conditional approval from the Board of Supervisors of Tunkhannock Township relating to its proposed development of property located off of SR 115, Long Pond, Tunkhannock Township Monroe County, Pennsylvania (the "Property"). The Property is located within the General Commercial (C- 2") Zoning District.

As the plans submitted in conjunction with the conditional use application demonstrate, the company is proposing to construct a new warehouse on property located off of SR 115, Long Pond, Tunkhannock Township/The property in question (the "Property") is more particularly described in the Monroe County Recorder of Deeds Office in Book 2482, at page 574. The Property also contains Tax Parcel Identification No.: 20630300718353 and Tax Code No.: 20/11/1/36.

The Property is currently owned by Ashwal Properties, LLC. Associates has entered into an agreement of sale for the Property with Ashwal Properties, LLC, and is therefore the equitable owner.

The Board initially notes that the Applicant here, and the Tunkhannock Fishing Association, are represented by very able counsel and the quality of their presentation and questioning at the Hearing was most helpful to the Board of Supervisors. All who testified at the Public Hearing, both in favor of and against the application, were passionate, informed and pointed

in their presentation. Post Hearing Findings of Fact and Conclusions of Law were submitted by the Applicant and the Tunkhannock Fishing Association.

The Board received significant correspondence and website input from residents on the matter and each and every contact was thoroughly reviewed and considered by the Board.

A Public Hearing was conducted before the Board on March 23, 2022. Voluminous exhibits were admitted and received into the record. The Board has thoroughly reviewed and considered the hearing transcript and exhibits.

ZONING STANDARDS

The Board notes initially that a conditional use is not an exception to the Zoning Ordinance, “but rather a use to which [an] applicant, is entitled provided the specific standards enumerated in the ordinance for the [conditional use] are met by the applicant.” *Williams Holding Grp., LLC vv. Bd. Of Supervisors of W. Hanover Twp.*, 101 A.3d 1202, 1212 (Pa. Commw. Ct. 2014) (*citations omitted*); see also, *Ne. Pa. SMSA LP v. Smithfield Twp. Bd. Of Supervisors*, 433 F. Supp. 3d 703 (M.D. Pa. 2020). Under Pennsylvania law, an applicant is required to “demonstrate that the use proposed ...complies with the specific criteria of the particular ordinance, “and “[a]n applicant who satisfies this prima facie burden is entitled to approval, unless objectors in the proceeding offer credible and sufficient evidence indicating the proposed use would have a detrimental impact on public health, safety and welfare.” *Williams Holding Grp., LLC*, 101 A.3d at 1212; *Tower Co. 2013 LLC v Cecil Township Board of Supervisors*, 239 C.D. 2017, 2017 WL 6061846, at *2 (Pa. Cmmw. Dec. 8, 2017).

The relevant portions of the Tunkhannock Township Zoning Ordinance are as follows:

1208.2 Conditional Uses

Uses specified as conditional uses shall be permitted only after review and approval by the Board of Supervisors pursuant to the express standards as provided for specific

conditional uses in this Ordinance, in §1208.4, and any other applicable standards in this Ordinance.

A. Expansions - Expansions or additions to uses classified as conditional uses shall also be considered conditional uses. The addition of an accessory structure of less than five hundred (500) square feet of gross floor area shall not be considered a conditional use.

B. Procedure

1. Submission - The application shall be submitted to the designated Township official. The official may refuse to accept an application which does not provide all information required to determine compliance with this Ordinance.

2. Zoning Officer Review - The Zoning Officer may report, in writing or in person, to the Planning Commission or the Board of Supervisors stating whether the application complies with this Ordinance. The Zoning Officer may recommend a review by the Township Engineer.

3. Planning Commission Review of Conditional Use

A. In accord with §603(c)(2) of the MPC, the Township Planning Commission shall be provided with an opportunity to review any proposed conditional use. The Commission, at its option, may provide a written advisory review.

B. If such review is not received by the Board of Supervisors within the time limit within which the Board of Supervisors shall issue its decision then the Board of Supervisors may make its decision without having received comments from the Planning Commission.

4. Board of Supervisors Action - The Board of Supervisors shall conduct hearings and make decisions in accordance with §908 and §913.2 of the MPC. In granting a conditional use, the Board of Supervisors may attach such reasonable conditions and safeguards, in addition to those expressed in this Ordinance, as it determines are necessary to implement the purposes of the MPC and this Ordinance, and to protect the public health, safety, and welfare.

5. Notice - In addition to the notice and posting requirements of the MPC, notice of all conditional use hearings shall be mailed to the owners of all properties contiguous to the parcel which is the subject of the hearing not less than fourteen (14) calendar days prior to the hearing. Such notice shall be by U.S. Mail to the last known address of the contiguous owners as listed in Monroe County tax assessment records.

1208.4 Standards and Criteria for Conditional Uses and Special Exceptions

In addition to the applicable general provisions of this Ordinance and to the standards and criteria provided in this Ordinance for specific conditional uses and specific special exceptions, the standards and criteria in this §1208.4 shall be applied in the review of applications for conditional uses and special exceptions. The applicant shall supply evidence regarding compliance with the express standards and criteria contained herein; and data or evidence may be accepted from protestants. Such evidence shall be evaluated relative to the injurious impact on the public health, safety, and welfare; and, the proposed use shall be approved with appropriate conditions or denied based on said evaluation.

- A. Comprehensive Plan; Ordinances - The proposed use shall be consistent with the purposes, goals, objectives and standards of the Comprehensive Plan, this Ordinance, and all other ordinances of the Township.
- B. Location - The proposed use shall also be evaluated as to the degree to which the proposed location may be particularly suitable or unsuitable for the proposed use in terms of the physical characteristics of the site.
- C. Adverse Effects - The proposed use at the proposed location shall not result in a substantial or undue adverse effect on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or rights-of-way, adjacent property values, or other matters affecting the public health, safety, and general welfare, either as they now exist or as they may in the future be developed as a result of the implementation of this Ordinance, or any other plan, program, map or ordinance of the Township or other government agency having jurisdiction to guide growth and development.
- D. Public Improvements - The proposed use shall not impose an undue burden on any of the improvements, facilities, utilities, and services of the Township, whether such services are provided by the Township or some other entity. The applicant shall be wholly responsible for providing such improvements, facilities, utilities, and services as may be required to adequately serve the proposed use when the same are not available or are inadequate to serve the proposed use in the proposed location. As part of the application and as a condition of approval of the proposed use, the applicant shall be responsible for establishing ability, willingness, and binding commitment to provide such improvements, facilities, utilities, and services in sufficient time and in a manner consistent with this and other Ordinances of the Township. The permit approval shall be so conditioned.
- E. Additional Factors - The following additional factors shall be considered:
 - 1. Location, arrangement, size, design and general site compatibility of

buildings, lighting, and signs.

2. Adequacy and arrangement of vehicular traffic access and circulation, including intersections, road widths, pavement surfaces, dividers, and traffic controls.
3. Location, arrangement, appearance and sufficiency of off-street parking and loading.
4. Adequacy and arrangement of pedestrian traffic, access and circulation, walkway structures, control of intersections with vehicular traffic and overall pedestrian convenience.
5. Adequacy of storm water and drainage facilities.
6. Adequacy of water supply and sewage disposal facilities.
7. Adequacy, type and arrangement of trees, shrubs, and other landscaping constituting a visual and/or noise buffer between the applicant's and adjoining lands, including the maximum retention of existing vegetation.
8. Adequacy of fire lanes and other emergency zones and the provision of fire hydrants.
9. Special attention to the adequacy and impact of structures, roadways, and landscaping in areas with susceptibility to ponding, flooding and/or erosion.

1208.5 Conditions of Approval for Conditional Uses and Special Exceptions

No application shall be approved unless it is found that, in addition to complying with all of the standards and criteria enumerated above, all of the applicable standards contained in this Ordinance shall be met. In instances where the supplemental standards contained herein do not adequately protect the general health, safety, and welfare of parties affected, all conditions and safeguards deemed necessary by the Board of Supervisors or Zoning Hearing Board to protect the general health, safety, and welfare, as well as to implement the purposes of this Ordinance and the MPC, shall be imposed as conditions of approval in accord with §912.1 or §913.2 of the MPC, as the case may be. Conditions which may be imposed may include, but not be limited to, provisions for additional parking, traffic control, landscaping, setbacks, special measures addressing sales period activities, environmental controls and other measures which mitigate any potential adverse impact the use may have on adjoining uses.

The Board recognizes that the Township Zoning Ordinance does not contain any provisions that specifically regulate and govern warehouses. Regulations pertaining to warehouses are not

contained in Article 8 of the Ordinance addressing *"Standards for Specific Uses"*.

The Application is governed by Article 7 of the Ordinance which provides,"... general design standards for commercial establishments and nonresidential uses".

Section 701.1 requires certain additional setbacks and buffers for nonresidential development. The Application and plans as submitted by Associates are compliant with such requirements.

Your Board of Supervisors recognizes that the current application has been subject to review and recommendation by the Township Planning Commission.

PASSING OF SUPERVISOR MALAICO

It should be noted that recently deceased Supervisor Steve Malaico participated in the Zoning Hearing on March 23, 2022. Supervisor Malaico resigned his position for health-related reasons and Kevin Weiand was appointed by the Board of Supervisors as interim supervisor. The Applicant and the Tunkhannock Fishing Association have agreed to permit Interim Supervisor Kevin Weiand to participate in the instant decision. Correspondence from Applicant's counsel under date of April 14, 2022, and counsel for the Tunkhannock Fishing Association under date of April 12, 2022, on the participation of the Interim Supervisor is noted.

Supervisor DePiano and Supervisor Weiand have reviewed the record, exhibits, post Hearing Briefs, and all correspondence and communications on this issue.

RECUSAL OF SUPERVISOR EWALD

Your Board of Supervisors is aware of the argument that Supervisor George Ewald, by virtue of his status of an employee of Pocono International Raceway, has a conflict as his employer has an ownership in the property at issue. This issue was first raised internally at the Township by Supervisor Ewald.

As all will agree, Tunkhannock Township Supervisors are always very careful to avoid the possibility of conflict between their personal and private interests and their role as public officers.

The Public Officials and Employees Ethics Act states the people have a right to be assured the financial interests of public officers do not conflict with the public trust.

In any issue brought before the Board of Supervisors where an individual member has a conflict of interest, or there is an appearance of a conflict of interest, that supervisor should refrain from voting on the issue. Pennsylvania courts have long upheld as a fundamental public policy principle the rule that members of a governmental body cannot vote on any matter where they have a direct personal interest.

Specific legal prohibitions governing personal interest appear both in the Ethics Act and in the Second Class Township Code.

The Code also prohibits supervisors from having any personal interest in contracts over \$500.00. In cases where a contract is made with a firm employing a supervisor in a nonmanagement position, the supervisor must inform the board of such status and refrain from voting on the contract. The Code includes specific penalties for violation of the personal interest prohibition. However, courts in Pennsylvania have determined this prohibition did not apply where the connection between a supervisor and bidder is remote and there is no evidence of collusion or ulterior motive in awarding a contract.

The Township Solicitor has opined that in light of Supervisor Ewald's employment and his lack of any ownership interest in the raceway or current property owned by principals of the raceway, that Supervisor Ewald has no conflict here as any relationship to the issue is highly

remote and does not in any way violate either the Second-Class Township Code or Pennsylvania law.

Despite the sound legal judgment of our Solicitor, Supervisor Ewald remained concerned as to the appearance of impropriety and wanted to maintain his principled position as a Township Supervisor and member of our community and voluntarily recused himself from any decision making on this matter due to the perceived appearance of a conflict. The Board applauds our colleague for this position.

DISCUSSION

An applicant is entitled to a conditional use as a matter of right, unless this Board determines that the use does not satisfy the specific, objective criteria in the Township Zoning Ordinance for that conditional use.

The applicant here, Route 115 Associates, bears the initial burden of showing that the proposed conditional use satisfies the objective standards set forth in the zoning ordinance, and a proposed use that does so is presumptively deemed to be consistent with the health, safety and welfare of our Township.

Once the applicant satisfies these specific standards, the burden shifts to the objectors to prove that the impact of the proposed use is such that it would violate the other general requirements for land use that are set forth in our Zoning Ordinance, i.e., that the proposed use would be injurious to the public health, safety and welfare. *Id.* (citing *In re Drumore Crossings, L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009)).

All must be aware that a conditional use is essentially the same type of relief as a special exception, in that the use is permitted subject to certain criteria and conditions which the applicant must establish that the use will comply with certain objective criteria set out in the zoning

ordinance for that particular use. The only distinguishing feature of a conditional use application is that it is decided by the Board of Supervisors, not the Tunkhannock Township Zoning Hearing Board.

A conditional use is a use that is appropriate, in terms of the public health, safety, and welfare, for the zoning district in which it is permitted, but is subject to specific standards and more detailed and formal review. The Municipalities Planning Code ("MPC") authorizes The Board to hear and decide upon an application for conditional use in accordance with the standards contained in the Township Zoning Ordinance, provided generally that the specific application of the use would not prove injurious to the public interest.

Section 909.1(b) (3) of the MPC gives exclusive power to the governing body to render a final adjudication on an application for conditional use. The MPC describes the decision made by the governing body on a conditional use application as an adjudication. In considering the conditional use application, the governing body is acting as a quasi-judicial body and cannot advocate a particular position.

As with special exceptions, the governing body may choose to permit certain land uses in the zoning ordinance as conditional uses if they are deemed to have a significant impact on the zoning district or the whole Township, or for those uses that necessitate additional safeguards. Conditional uses are specifically listed under the applicable zoning districts and the ordinance must specify, and to use land for any of these purposes, a conditional use application would have to be filed. The governing body would then have the opportunity to thoroughly examine the proposal and to impose any reasonable safeguards necessary to implement the purposes of the ordinance and to protect the public's general welfare.

As previously noted, although a decision on the conditional use is made by the governing body and the decision on a special exception is made by the zoning hearing board, the procedures for both are generally consistent. Both require a hearing subject to public notice followed by a written decision.

Section 603(c) (2) of the MPC authorizes a governing body to allow or deny a conditional use application following a hearing and recommendations by the planning agency.

Before conducting the hearing in this matter, the Township did provide public notice of the March 23, 2022, Hearing. "Public notice" required by the MPC for a conditional use application hearing is stricter than notice required by the Sunshine Act. The public notice was published once each week for two successive weeks in a newspaper of general circulation in Monroe County, no earlier than 30 days and no fewer than seven days before the hearing. Notice was also conspicuously posted on the affected tract of land at least one week prior to the hearing.

When the application is contested or denied, Section 913.2(b) (1) of the MPC requires that the decision shall include findings of fact or conclusions based thereon, together with any reasons thereof. The MPC specifically requires that any conclusions shall reference the provisions of the MPC or the zoning ordinance relied on and the reasons why the conclusion is deemed appropriate in light of the facts found.

This written decision is being issued within 45 days of the last hearing on the conditional use application.

It must be noted that Objectors to a proposed conditional use do not meet their initial burden with respect to public health, safety or welfare criteria of a zoning ordinance by expressing generalized concerns. Rather, they must come forward with "sufficient evidence to establish that there is a high degree of probability that the use will cause substantial threat to the community." *In*

re Cutler Group, 880 A.2d 39, 43 (Pa. Cmwlth. 2005) (citation omitted). "Moreover, the degree of harm required to justify denial of the conditional use must be greater than that which normally flows from the proposed use." *Id.*

In *Appeal of O'Hara*, 389 Pa. 35, 131 A.2d 587 (1957), the Pennsylvania Supreme Court noted the following with respect to objections based on speculative future concerns:

Any traffic increase with its attendant noise, dirt, danger and hazards is unpleasant, yet, such increase is one of the inevitable accompaniments of suburban progress and of our constantly expanding population which, standing alone, does not constitute sufficient reason to refuse a property owner the legitimate use of his land. It is not any anticipated increase in traffic which will justify the refusal of a 'special exception' in a zoning case. The anticipated increase in traffic must be of such character that it bears a substantial relation to the health and safety of the community. A prevision of the effect of such an increase in traffic must indicate that not only is there a likelihood but a high degree of probability that it will affect the safety and health of the community, and such prevision must be based on evidence sufficient for the purpose. Until such strong degree of probability is evidenced by legally sufficient testimony no court should act in such a way as to deprive a landowner of the otherwise legitimate use of his land.

Id. at 596 (quotations and citations omitted).

The Board is mindful that "the burden placed on the objectors is a heavy one." *Marr Dev. Mifflinville, LLC v. Mifflin Twp. Zoning Hearing Bd.*, 166 A.3d 479, 483 (Pa. Cmwlth. 2017). Objectors "must demonstrate more than unsubstantiated concerns or vague generalities, and [m]ere speculation as to possible harm is insufficient." *Dunbar v. Zoning Hearing Bd. of City of Bethlehem*, 144 A.3d 219, 226 (Pa. Cmwlth. 2016) (internal quotation marks omitted); *see Marr Dev.*, 166 A.3d at 483 (stating that objectors "cannot meet their burden by merely speculating as to possible harm; they must show a high degree of probability that the proposed use will substantially affect the health and safety of the community") (internal quotation marks and brackets omitted). "Further, mere lay testimony of concerns regarding increased traffic ... is insufficient to support

the denial of a special exception." *Dunbar*, 144 A.3d at 226; *see Marr Development*, 166 A.3d at 484 (finding objectors' evidence insufficient to establish that proposed use would generate traffic not normally generated by that type of use where no traffic study was presented and objectors simply testified as to their opinion that traffic would increase).

The need for such flexibility in matters of evidentiary admissibility is heightened in conditional use hearings conducted by local municipalities, which have the paramount duty to protect their residents from harm to their persons and property, due to the fact that such land uses present the possibility that the property rights of neighboring landowners will be affected. *Luke v. Cataldi*, 593 Pa. 461, 932 A.2d 45, 54 (2007).

"An applicant is entitled to a conditional use as a matter of right, unless it is determined that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use." *In re Drumore Crossings L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009) (citation omitted).

The Board also finds highly significant that it is important to note that this stage of the project at issue is merely the applicant seeking conditional approval. The project will still be subject to Township review, oversight and input by virtue of the land development process within the Township.

From a thorough review of the Hearing Transcript, Exhibits and public comments that were submitted into the record, The Board of Supervisors makes the following:

FINDINGS OF FACT

1. On January 25, 2022, Applicant, Route 115 Associates, LLC (Applicant) submitted a conditional use application to the Tunkhannock Township Board of Supervisors (the "Application") requesting approval for the construction of a new warehousing facility located off

of State Route 115, Long Pond, Monroe County, Pennsylvania 18334 (the "Property").

2. The Applicant proposed the construction of a new 949,460 sq. ft. warehouse on property owned by Ashwal Properties, LLC (the "Landowner").

3. The Property is more particularly described in the Monroe County Recorder of Deeds Office in Book 2482, at page 574. The Property also contains Tax Parcel Identification No.: 20630300718353 and Tax Code No.: 20/11/1/36.

4. As stated above, a public hearing on the Application was held before the Tunkhannock Township Board of Supervisors (the "Board") on March 23, 2022. Notice of the hearing before the Board was provided in accordance with the Pennsylvania Municipalities Planning Code, 53 P.S. §1 0913.2, as well as with the provisions of the Township Zoning Ordinance.

5. The Property is located in the General Commercial ("C-2") Zoning District.

6. The Property currently is wooded and undeveloped.

7. Applicant has submitted there are no above-ground historic properties present in the project area.

8. Applicant has received clearance for potential impacts to threatened and/or endangered species which were identified by the Pennsylvania Natural Diversity Inventory (PNDI) search for the Property.

9. The Applicant has executed an agreement of sale with the Landowner whereby Applicant would purchase a 68.939-acre portion of the Property. Associates proposes to construct a 949,460 sq. ft. warehouse on the Property (the "Building").

10. The warehouse would have a maximum height of 53 ft. on the eastern and western sides of the building and a maximum height of 57 ft. on the northern and southern sides of the

building.

11. The building would be constructed of mostly prefabricated materials and would have a membrane roof.

12. Applicant intends to install a sprinkler system within the Building, Water service and water pressure on the Property will be adequate to support the installation of a sprinkler system within the building upon the installation of an accessory water tank proposed by Applicant.

13. A business is located proximate to the west. In addition, three residential structures are located proximate to the southeast.

14. At its closest point the building is located approximately 194' from the southern property line. The southern property line is directly adjacent to State Route 115.

15. Applicant also appeared before the Tunkhannock Township Planning Commission on March 9, 2022. The Township Planning Commission recommended that several conditions be attached to the approval of the Application.

16. Architectural renderings were submitted by Applicant depicting the appearance of the building from three separate locations in the Township.

17. The renderings depict a mostly off-white structure setback from tiered retaining walls. The retaining walls would be landscaped in accordance with Township regulations.

18. The color of the building as well as the retaining wall shall be approved by the Township.

19. While the building mostly will be used for warehousing space, it is anticipated that a small portion of the building may be used for office space.

20. It is anticipated that approximately 475 employees would work at the building.

21. There is sufficient electric/power capacity to serve the intended use of the Property.

Applicant has secured a "will-serve" letter from the local public utility.

22. The project proposes 485 constructed and 284 reserved off-street parking stalls throughout the Property.

23. The building also would incorporate a total of 153 dock doors with 81 being located on the northerly side of the building and 72 being located on the southerly side of the building.

ENVIROMENTAL CONDITIONS-WATER

24. Developer and owner shall comply with all regulations, laws, or permits, including but not limited to, PA DEP National Pollutant Discharge Elimination System Permit (NPDES permits, 25 Pa. Code Chapter 102 stormwater permits, and the water quality standards set forth in 25 Pa. Code Chapter 93).

25. Developer and owner must assure that the proposed conditional use warehouse, either construction or operation- will not cause or contribute to the degradation or impairment of the Exceptional Value Tunkhannock Creek and Related Exceptional Value wetlands.

26. No retail use would occur at the Property. In addition, Associates does not believe that the Property would be visited by the general public or a significant number of third parties on a daily basis.

27. Applicant submitted a soil reports for the Property. The soils existing on the Property are conducive for the proposed development.

28. Applicant also submitted a geotechnical analysis of the Property. The geotechnical conditions existing on the Property are conducive for the proposed development.

29. A portion of the southeastern corner of the Property contains a slope in excess of 15%. However, such area will not be significantly impacted by the proposed development. Any proposed impact will be mitigated by appropriate Best Management Practices.

but not limited to design criteria based on the DEP Public Water Supply Manual and Tunkhannock Township SALDO.

37. Based upon the Environmental and Community Assessment submitted by Associates, the facility would utilize 4,750 gallons of water per day.

38. A test well dug by Applicant had an estimated yield of 68 gallons per minute or 97,920 gallons per day. Water supply is therefore adequate for the proposed use and in all events is further subject to the issuance of a water supply permit by the Pennsylvania Department of Environmental Protection.

39. With respect to sewage, the anticipated daily sewage volume is 4,750 gallons per day. Applicant performed on-site testing in December, 2021, with testing results being unfavorable. New testing locations are being evaluated by Applicant and they have been precluded from testing new locations for a sewage disposal system due to winter weather conditions of the Property.

40. As a condition of approval of Applicants conditional use application, Developer and Owner shall provide proof that the site is adequate for sewage facilities of the proposed warehouse conditional use, including but not limited to DEP approval of the sewage demand for the project including flows anticipated from tractor trailer truck drivers using the facility. Soils testing for sewage disposal system and a suitable replacement area that is adequate to serve the sewage demand for the project must be performed and accepted by DEP. The approved sewage disposal areas shall be indicated on an updated plan submitted to the Township prior to the submission and approval of a Land Development Plan.

41. Any proposed sewage system on the Property will be subject to the issuance of a sewage permit by the Department of Environmental Protection.

42. Applicant believes that a location sufficient for the installation of a sewage disposal system will be found on the Property.

43. Applicant indicated that the design and location of the sewage disposal system will be provided during the land development phase of the project. In addition, and in all events, the proposed sewage system will be subject to further review and the issuance of a sewage permit by the Pennsylvania Department of Environmental Protection.

44. Section 702.2 of the Tunkhannock Township Ordinance requires that, "[a]ll uses shall be provided with a sewage disposal system meeting the needs of the proposed use and meeting the requirements of the Township and the PA DEP."

45. The Tunkhannock Township Ordinance does not require that such permit be provided at the conditional use stage of a project. In fact, Section 1208.6(A) of the Ordinance titled, "*Timing of Submission*" provides:

The Township Planning Commission and Board of Supervisors or the Zoning Hearing Board will process an application for a conditional use or a special exception, respectively, prior to, or concurrently with, land development approval, if such subdivision or land development approval is required under the provisions of the Township Subdivision and Land Development Ordinance. The intent of prior action on a conditional use or special exception is to afford the applicant the opportunity to obtain initial zoning approval before committing the resources necessary to prepare and submit a detailed plan to conform to the requirements of the Subdivision Ordinance.

46. A surface basin for the control of storm water is proposed to be located on the northwesterly portion of the Property. In addition, subsurface stormwater control structures are proposed at additional locations on the Property. The sources of runoff from the Property largely will be related to rainfall and snow melt.

47. The natural drainage courses traversing the site shall not be occupied or obstructed.

48. Applicant must design the facility to direct stormwater runoff to the constructed stormwater basins for treatment prior to release and discharge,

49. Increases in runoff rates due to the proposed improvements on the Property will be managed by storm water basins. These facilities will manage the runoff rate increases to below the allowable runoff rates in the pre-development condition.

50. During the land development phase of the project, a stormwater management plan meeting the requirements of the Tunkhannock Township Subdivision and Land Development Ordinance (the "SALDO") will be provided. See Section 701.12(A) of the Ordinance.

51. The March 4, 2022, engineering review letter issued by the Township Engineer, Mr. Eric S. Snyder, P.E., states that, "... [w]e acknowledge that the entire stormwater management design for the project will be thoroughly reviewed during the land development plan process".

52. Applicant will be required to submit an Erosion and Sedimentation Control Plan at the land development phase of the project. The Board recognizes that approval of Applicants stormwater management and erosion and sedimentation control plans will be subject to review and approval by third parties including the Monroe County Conservation District and the Pennsylvania Department of Environmental Protection.

53. In terms of solid waste, Associates estimates that only one (1) roll-off container (30 cubic yards each) will be required per month.

54. All refuse generated at he premises should at all times be stored in approved containers and shall be placed in a manner so that environmental health nuisances are minimized. All refuse not containing garbage shall be removed from the premises at least 1 times per week or as often as necessary to minimize public health nuisance. _Refuses containing garbage shall be removed from the premises at least 2 times per week, or as often if necessary to minimize public

health nuisances, by a permitted hauler to an approved solid waste facility in conformance with law.

55. The developer shall provide equal space and storage bins for both refuse and recycling materials. This requirement is to assist the County in compliance with recycling requirements.

56. During construction, construction machines will be in operation which will cause a temporary increase in noise levels. However, the Applicant will be mindful of all Township Noise Ordinances relative to Noise. The Developer shall also implement Noise Impact Analysis Measures to the satisfaction of the Township:

NOISE

57. The Township wants to minimize noise levels from trucks idling at loading docks.

58. To minimize noise from idling trucks, Applicant must limit the time trucks idle while at loading docks with signs conspicuously posted specifying a time limit for idling.

59. The Board notes that state law restricts the idling of trucks for a period not to exceed five (5) minutes.

60. Construction will be limited to the hours between 7:00 a.m. and 7:00 p.m., Monday through Friday. Work may be performed on Saturday and Sunday from 8:00 a.m. to 7:00 p.m. in accordance with the existing standards in Ordinance Number 2014-134. No construction activities are permitted outside of these hours and the developer is urged to work within normal business hours.

61. The Developer and Owners are prohibited from utilizing outside loudspeakers.

62. The Developer and Owner are urged to develop noise reduction measures for the property.

BLASTING

63. Blasting on the project is prohibited. However, the board recognizes that surface blasting is regulated by the Commonwealth of Pennsylvania at 25 Pa Code § 88.135

LIGHTING

64. Applicant submitted a lighting plan to the Board. Associates also submitted "cut-sheets" depicting the specifications for the proposed lighting.

65. The lighting proposed by Applicant is consistent with the Ordinance and Township regulations.

66. The Township Engineering review letter issued on March 4, 2022, states,"... [g]enerally, we concur with the lighting design at this time.

67. Based upon strong public concern and the recommendation of the Planning Commission, Applicant is required to the following:

- All required lighting shall be installed in compliance with the approved lighting plan. All lights used to illuminate the site shall be hooded and designed so as to reflect away from adjoining properties and public thoroughfares.
- The glare from any luminous source, including on-site lighting shall not exceed one-half (0.5) foot-candle at property line. All lighting shall be limited to that necessary for maintenance activities and security purposes. This is to allow minimum obstruction of night sky remote area views. No light shall project onto adjacent roadways in a manner that interferes with on-coming traffic.

FIRE-COMMUNITY SAFETY

68. The instant project is under the jurisdiction of the Tunkhannock Township Volunteer Fire Department herein (Fire Department"). Prior to any construction occurring on any parcel the developer or Owner shall contact the fire department for verification of current Fire Protection Requirements. The project shall comply with the current Uniform Fire Code

requirements and all applicable statutes, codes, ordinances, and standards of the fire department.

69. A standby power-generator set conforming to Electric Code shall be provided on premises. The set shall supply all functions required at full power. Set supervisors with manual start and transfer override features shall be provided at the central control station.

70. The stand-by system shall have a capacity and rating that would supply all equipment required to be operational at the same time. All emergency systems power, lighting, signal and communication facilities as applicable: fire pumps, required to maintain pressure, stand by lighting and normal circuits supplying exit signs and means of egress illumination shall be transferable to the standby source.

71. A Class I standpipe system is required.

LANDSCAPING

72. Applicant likewise submitted a proposed landscaping plan.

73. Evergreens and shrubs will be provided along the northerly and easterly boundaries of the Property.

74. In addition, landscaping will be installed along the southerly boundary of the Property and within the retaining walls to be constructed adjacent to State Route 115.

75. Shade trees likewise will be installed adjacent to the westerly access drive and within the improved off-street parking area.

76. Existing green space is intended to remain in the northwesterly, southeasterly and southerly portions of the Property.

77. Applicant will preserve natural vegetation to the greatest extent possible.

78. The properties located adjacent to the north, east and west are heavily wooded.

79. The trees to be planted by Applicant in connection with the project will be at least

eight feet (8') in height. In addition, the width of landscaping buffers on the Property will minimally be twenty feet (20') in width.

80. The landscaping proposed by Associates will be fully compliant with the Ordinance.

81. The Board directs that the property owner and "developer" shall continually maintain the property so that it is visually attractive and not dangerous to the health, safety and general welfare of both on-site users (e.g. employees) and surrounding properties. The "developer" shall ensure that all facets of the development are regularly inspected, maintained and that any defects are timely repaired. Among the elements to be maintained, include but are not limited to:

- a) Annual maintenance and repair inspections shall be conducted for all structures, fencing/walls, walks, parking lots, driveways, and signs to assure proper structural, electrical and mechanical safety and a properly operating irrigation system.
- b) Graffiti and debris shall be removed immediately with weekly maintenance.
- c) Landscaping shall be maintained in a continual healthy thriving manner at proper height for required screening. Drought-resistant, fire-retardant vegetation shall be used where practicable. Where landscaped areas are irrigated, it shall be done in a manner designed to conserve water, minimizing aerial spraying.

82. According to the Environmental and Community Assessment submitted by Applicant, animal species displaced from the Property will not be greatly affected as there is ample suitable habitat that surrounds the site.

83. In addition, no impact to waterfowl is expected since the Property is devoid of open water habitat that is favored by waterfowl.

TRAFFIC IMPACT

84. Applicant also submitted a traffic impact study (the "TIS") in support of the project application.

85. The TIS was based and prepared in accordance with industry and PennDOT

standards.

86. In fact, the project scope and extent of the study were confirmed with representatives of PennDOT through the PennDOT Scoping Application process which was submitted on August 22, 2021.

87. In addition to applying recognized industry standards, Applicant's traffic consultant performed physical traffic counts.

88. The TIS analyzed the projected impact of the project upon both the proposed access driveways on the Property and the intersections at SR 115 and SR 903, SR 115 and I-80 Eastbound ramps and SR 115 and I-80 Westbound ramps.

89. The potential impact at each of these intersections specifically was analyzed and discussed with respect to the weekday morning and afternoon peak hours. Calculating potential impact during weekday peak hours is the accepted industry and PennDOT methodology.

90. Notably, the westerly access to the Property will be used by cars. The easterly access to the Property will be used by trucks, including tractor trailers

91. The TIS projects that the westerly access drive (cars only) will accommodate 1,142 weekday trips and 571 weekday vehicles. The TIS further projects that the easterly access drive (trucks only) will accommodate 600 weekday trips and 300 weekday vehicles

92. The TIS also projects that upon completion of the project, the development will generate 170 new vehicle trips during the weekday a.m. peak hour and 190 new vehicle trips during the weekday afternoon peak hour.

93. Sight distances at both proposed access drives will exceed PennDOT's safe stopping sight distance criteria. The final design and location of the proposed access drives will be dictated by PennDOT per agency regulations and review.

94. From a traffic perspective, intersections are analyzed based upon the change in existing to proposed "Level of Service". Level of Service is graded much like educational scores with a LOS ¹"A" being the best and a LOS "F" being the worst.

95. In accordance with the TIS, all studied intersections will operate at an overall LOS "A" following the full build out of the project. LOS "A" effectively means that vehicles that travel through the intersection during the peak hour will experience an average delay of less than 10 seconds.

96. In addition, the TIS concludes that the two access drives located on the Property will operate at an overall LOS "A" following the full development of the Project.

97. The TIS also included a queue analysis. Based upon the queue analysis, projected conditions post development for each intersection and driveway will not exceed the available storage length.

98. The TIS recommended roadway improvements with respect to the eastern and western Property driveways.

99. With respect to the western Property driveway, the TIS recommends that Applicant: (i) provide a stop sign to control existing traffic; and (ii) restripe the existing two-way center left-turn lane on SR 115 to provide a 225-foot-long eastbound left turn lane.

100. With respect to the eastern Property driveway, the TIS recommends that Associates: (i) provide a stop sign to control existing traffic; and (ii) restripe the existing two-way center left hand lane on SR 115 to provide a 125-foot-long eastbound left turn lane.

101. Applicant must comply with the comments and recommendations raised by the Township Engineer in his correspondence of February 9, 2022, and March 4, 2022.

102. The Application submitted by Applicant complies with all of the provisions of the

Ordinance including those related to dimensional or bulk requirements.

103. The Developer shall provide funds to the township to create and Escrow account for the maintenance of traffic signals, if required at the site, to ease the burden of township residents.

BUFFER

104. The Developer and Owner are required to maintain a forested buffer of 30 feet for the entire property as opposed to the 25 feet buffer required in the Ordinance.

CONCLUSIONS OF LAW

1. This matter is governed by Sections 405 and 1208, and Article 7 of the Tunkhannock Township Ordinance.

2. In Tunkhannock Township, warehouses are permitted as a conditional use in the General Commercial ("C-2") Zoning District

3. Associates proposed use of the Property is therefore permitted as a conditional use.

4. As stated above, once the applicant has demonstrated compliance with the standards set out in the zoning ordinance, a permit must be granted, unless objectors prove with competent evidence that the proposed use will have a detrimental effect on the health, safety or welfare or will conflict with the expressions of general policy contained in the ordinance. Thus, the applicant for a conditional use permit has initial burden of proving compliance with the specific requirements in the zoning ordinance. After the applicant meets the initial burden, the burden is then on any objectors to show a high degree of probability that the use will adversely impact on the public interest; and a mere possibility of adverse impact is not enough.

5. Associates met its initial burden of proving compliance with the specific requirements of the Ordinance.

6. Regulations pertaining to warehouses are not contained in Article 8 of the Ordinance addressing "*Standards for Specific Uses*". Rather, the Application is governed by Article 7 of the Ordinance which provides,"... general design standards for commercial establishments and nonresidential uses". Section 701.1 requires certain additional setbacks and buffers for nonresidential development. The Application and plans as submitted by Associates are compliant with such requirements.

7. Associates has submitted a preliminary landscaping plan as required by Section 701.2. The Board need not review and approve the landscaping plan at this time. In accordance with Section 701.2, the landscaping plan will be reviewed and approved during the land development phase of the project.

8. In accordance with Section 701.4, Associates will be installing a sprinkler system within the building. The installation of a sprinkler system is standard in the industry and therefore adequate as required by Section 701.4.

9. Associates does not anticipate using hazardous substances in the building. In the event hazardous substances are used, an action and safety response plan will be developed for any remediation in accordance with Section 701.4.

10. Based on the testimony and evidence presented at the Public Hearing, the use will not violate Township noise standards.

11. Post development, the main source of any noise will be from trucks entering and leaving the Property as well as idling at loading docks will cause an increase in noise levels.

12. To minimize noise from idling trucks, Associates proposes to limit the time trucks idle while at loading docks. For example, signs will be posted specifying a time limit for idling. State law also restricts the idling of trucks for a period not to exceed five (5) minutes. 35 P.S.

4603(a) (2008).

13. In addition, Section 701.6 excepts from the Township's noise regulations,".. .
[r]adiated noise levels for vehicles or other operations subject to state or federal preemption"

14. Tractor trailers, such as those anticipated to use the building, are subject to the federal Noise Control Act. 42 U.S.C.A. § 4917(c)(I) (2012).

15. The Noise Control Act provides, in pertinent part:

Subject to paragraph (2) of this subsection but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

16. Tractor trailers using the Property are therefore exempt from Township noise regulations in accordance with Section 701.6(G) of the Ordinance.

17. Associates submitted a lighting plan in accordance with Section 701.8. Associates also submitted "cut-sheets" depicting the specifications for the proposed lighting.

18. The lighting proposed by Associates is consistent with the Ordinance and Township regulations.

19. The engineering review letter issued by the Township Engineer, Mr. Eric S. Snyder, P.E., on March 4, 2022, states: "[g]enerally, we concur with the lighting design at this time."

20. Associates will more fully discuss design and site lighting at the land development phase of the project.

21. Section 701.12(A) of the Ordinance requires that a stormwater management plan be provided.

22. A basin for the control of stormwater is proposed to be located on the northwesterly portion of the Property. In addition, stormwater control structures are proposed at additional locations on the Property.

23. During the land development phase of the project, a stormwater management plan meeting the requirements of the Tunkhannock Township Subdivision and Land Development Ordinance (the "SALDO") will be provided.

24. Section 701.12(A) of the Ordinance recognizes that a stormwater management plan need not be provided until a subdivision and land development plan has been submitted. ("Stormwater management shall be provided in accord with the Township Stormwater Management Ordinance and the Township Subdivision and Land Development Ordinance.").

25. In addition, Section 1208.6(A) of the Ordinance titled, "*Timing of Submission*" provides:

The Township Planning Commission and Board of Supervisors or the Zoning Hearing Board will process an application for a conditional use or a special exception, respectively, prior to, or concurrently with, land development approval, if such subdivision or land development approval is required under the provisions of the Township Subdivision and Land Development Ordinance. *The intent of prior action on a conditional use or special exception is to afford the applicant the opportunity to obtain initial Zoning approval before committing the resources necessary to prepare and submit a detailed plan to conform to the requirements of the Subdivision Ordinance.*

26. The engineering review letter issued by the Township Engineer, Mr. Eric S. Snyder, P.E., on March 4, 2022, expressly states that, "... [w]e acknowledge that the entire stormwater management design for the project will be thoroughly reviewed during the land development plan process"

27. It also will be necessary for Associates to submit an Erosion and Sedimentation

Control

Plan at the land development phase of the project.

28. The approval of Associates stormwater management and erosion and sedimentation control plans will be subject to review and approval by third parties including the Monroe County Conservation District and the Pennsylvania Department of Environmental Protection.

29. In Pennsylvania, an application for special exception or conditional use is not required to address issues such as sewage, stormwater management and water supply requirements. *Schatz v. New Britin Township Zoning Hearing Board*, 141 Pa. Cm with. 525, 532, 596 A.2d 294, 298 (1991). According to the Commonwealth Court:

... according to the Township, Schatz's application does not address the best interests of the Township, the convenience of the community, or the public welfare, because it does not have adequate sewage capacity, and it does not address the storm water management, water supply requirements, and may not meet the building code. We again agree with Common Pleas that *an application for special exception is not required to address such issues. Such issues are to be addressed further along in the permitting and approval process. Zoning only regulates the use of land and not the particulars of development and construction*

Id. (emphasis added).

30. Associates will therefore address stormwater management during the land development phase of the project.

31. Section 702.1 requires that all uses shall be provided with an adequate and safe water supply.

32. There is no public water available for the facility. Associates is therefore proposing the installation of a well to provide water to the Building, the water well will be constructed to comply with the requirements of the Pennsylvania Department of Environmental Protection.

It will be necessary for the Pennsylvania Department of Environmental Protection to issues

a water supply permit.

33. Based upon the Environmental and Community Assessment submitted by Associates, the facility would utilize 4,750 gallons of water per day.

34. A test well dug by Associates had an estimated yield of 68 gallons per minute or 97,920 gallons per day.

35. Water supply is therefore adequate for the proposed use and in all events is further subject to the issuance of a water supply permit by the Pennsylvania Department of Environmental Protection.

36. Associates therefore demonstrated compliance with Section 702.1.

37. Section 702.2 of the Ordinance requires that all uses be provided with a sewage disposal system meeting the needs of the proposed use.

38. With respect to sewage, the anticipated daily sewage volume is 4,750 gallons per day.

39. Associates performed on-site testing in December 2021. Such testing results were unfavorable. However, new testing locations are being evaluated by Associates.

40. Any proposed sewage system on the Property will be subject to the issuance of a sewage permit by the Pennsylvania Department of Environmental Protection.

41. Associates indicated that the design and location of the sewage disposal system will be provided during the land development phase of the project. In addition, and in all events, the proposed sewage system will be subject to further review and the issuance of a sewage permit by the Pennsylvania Department of Environmental Protection.

42. Section 702.2 of the Ordinance requires that, "[a]ll uses shall be provided with a sewage disposal system meeting the needs of the proposed use and meeting the requirements of

the Township and the PA DEP."

43. The Ordinance does not require that such permit be provided at the conditional use state of a project.

44. Moreover, and as noted above, Pennsylvania law provides that an applicant for conditional use is not required to address issues such as sewage, stormwater management and water supply requirements.

45. Associates satisfied all of the specific and objective criteria of the Ordinance for the proposed use. Once Associates established that its proposed use met the objective requirements of the Ordinance, a presumption is established that the proposed use is consistent with the health, safety and welfare of the Township. The burden then shifted to the objectors to rebut this presumption by proving that, to a high degree of probability, the proposed use would substantially affect the community/s health, safety and welfare to an extent greater than what is nominally expected from this type of use.

46. The Board finds the residents and protestants objecting to the Application did not satisfy their burden of proof

47. The residents and protestants generally complained of: (i) aesthetics; (ii) traffic; (iii) noise; (iv) lighting; and (iv) a potential, negative impact upon property values.

48. The residents and protestants also argued that the Application did not comply with the Ordinance in that Associates did not fully address stormwater and sewage requirements.

49. With respect to aesthetics, Pennsylvania law provides:

A special permit may not be denied for reasons that are solely aesthetic in character. Such reasons are insufficient to support the conclusion that a proposed use would be injurious to the public health, safety and welfare. Although the Commonwealth Court has said that aesthetics and property values are legitimate considerations in zoning decisions, a special exception may not be denied on

aesthetic grounds alone.

Robert M. Anderson, *Law of Zoning in Pennsylvania*, Vol. 1, §18.21 (2001)(emphasis added). Thus, a concern for scenic beauty is not a sufficient basis for the denial of a special exception or conditional use. See *Heck v Harveys Lake Borough*, 570, 577, 397 A.2d 15, 19 (1979). In *Heck*, the Commonwealth Court considered whether the fact that construction would partially block the view of a lake from a public road would justify the denial of a special exception application. In finding such evidence not sufficient to justify a denial, the Commonwealth Court stated:

The third finding of the Board, that the view of the lake would be blocked, is based on the testimony of three protesting residents and on the appellant's own admission that the proposed addition would block the view of the lake from the road for a 20-foot span. This reduced view of the lake was evidently considered by the Board to be contrary to the interest of the community in preserving the scenic beauty of the lake.

Id. 39 Pa. Cmwlth. at 577-78, 397 A.2d at 19 (emphasis added), Based on the weight of authority, therefore, aesthetics cannot justify a denial of the Application.

50. Moreover, a conditional use represents a legislative determination that the particular use or permission is consistent with the aesthetic factors considered in formulating the zoning plan. See Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, §5.3.11 (2007). Thus, the Township has determined that the use is consistent with aesthetic factors.

51. In addition, and in order to satisfy their burden, the residents and protestants had to further establish that the proposed use by Associates would substantially affect the community's health, safety and welfare to an extent greater than what is normally expected from this type of use. No evidence of this character was submitted.

52. In addressing whether an increase in traffic is sufficient for the denial of a conditional use or special exception application, the Pennsylvania Supreme Court has decided as

follows:

Any traffic increase with its attendant noise, dirt, danger and hazards is unpleasant, yet, such increase is one of the 'inevitable accompaniments of suburban progress and of our constantly expanding population' which, standing alone, does not constitute a sufficient reason to refuse a property owner the legitimate use of his land: Jaspelling, Green Golf Club Cm.;, supra, 374 Pa. at page 457, 97 A.2d at page 526. It is not any anticipated increase in traffic which will justify the refusal of a 'special exception' in a zoning case. The anticipated increase in traffic must be of such character that it bears a substantial relation to the health and safety of the community. A prevision of the effect of such an increase in traffic must indicate that not only is there "likelihood but a high degree of probability that it will affect the safety and health of the community, and such prevision must be based on evidence sufficient for the purpose.

*Until such strong degree of probability is evidenced by legally sufficient testimony no court should act in such a way as to deprive a landowner of the otherwise legitimate use of his land. An examination of the instant record fails to reveal evidence sufficient to justify a finding that the anticipated increase in traffic bears any substantial relation to the health and safety of this community or the requisite high degree of probability that such an increase will **597 affect adversely the health and safety of the community. The record merely indicates an anticipated minimal increase of traffic.*

Archbishop O'Hanty, 389 Pa. 35, 54, 131 A.2d 587, 596 (1957) (emphasis added).

53. Thus, "[t]here must be a high probability that the proposed use will generate traffic patterns not normally generated by this type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community." *Orthodox Minyan of Elkins Park v. Cheltenham Township Zoning Board*, 123 Pa. Cmwlth. 29, 32-33, 552 A.2d 772, 774 (1989) (citation omitted).

54. No such testimony or evidence was presented by the objectors to the Application in this regard.

55. In accordance with the TIS submitted by Associates, all studied intersections will

operate at an overall LOS "A" following the full build out of the project.; meaning that vehicles will experience of delay of less than ten (10) seconds for turning movements.

56. In addition, the TIS concludes that the two access drives located on the Property will operate at an overall LOS "A" following the full development of the Project.

57. Based upon the queue analysis set forth in the TIS, projected conditions post development for each intersection and driveway will not exceed the available storage length.

58. Accordingly, a substantial threat to the health and safety of the community as a result of traffic was not established.

59. Objectors also argued that traffic from the proposed facility would cause additional congestion on "race weekends". However, Pennsylvania law is clear that "... the fact that a proposed use would contribute to projected traffic congestion *primarily generated by other sources* is not a sufficient basis for denying the special exception.". *Orthodox Minivan of Elkins Park v. Cheltenham Township Hearing Board* 123 Pa. Cmwlth. at 32, 552 A.2d at 774 (citations omitted & emphasis added). Accordingly, the Application may not be denied upon this basis.

60. Protestants to the Application also objected on the basis that the proposed facility would cause excessive noise. However, such objections were speculative and did not rise to the level of demonstrating substantial threat to the health and safety of the community.

61. In *West Whitelnd Township v. Exton Materials, Inc.*, 11 Pa. Cmwlth. 474,314 A.2cl 43 (1974), the Pennsylvania Commonwealth Court examined whether two findings of fact issued by the zoning hearing board were sufficient to justify the denial of a special exception application. Specifically, the Court analyzed whether findings that noise created by a forced air system was comparable to a "rushing train type of noise" and that other noise was emanated from the dropping of materials were sufficient to justify denial of the application. *Id.*, 11 Pa. Comwlth.

at 480, 314 A.2d at 47. According to the Court, "[n]either finding supports the Township's contention that the Board found sufficient evidence of noise to conclude that the Township of protesting neighbors met the burden of proving that the possible noise coming from ... [the landowner's] intended use would be injurious to the public health, welfare and safety." *Id.*

62. Similarly, the Commonwealth Court found the imposition of a condition regulating noise improper where testimony and evidence established that the proposed facility would operate in compliance with township noise regulations. *Id.* at 839-40.

63. Based on the testimony and evidence presented by Associates, the use will not violate Township noise standards.

64. Post development, the main source of any noise will be from trucks entering and leaving the Property as well as idling at loading docks will cause an increase in noise levels.

65. To minimize noise from idling trucks, Associates proposes to limit the time trucks idle while at loading docks. For example, signs will be posted specifying a time limit for idling. In addition, state law restricts the idling of trucks for a period not to exceed five (5) minutes. 35 P.S. 4603(a) (2008).

66. In addition, Section 701.6(G) excepts from the Township's noise regulations, "... , [r]adiated noise levels for vehicles or other operations subject to state or federal preemption..."

67. Tractor trailers, such as those anticipated to use the building, are subject to the federal Noise Control Act. 42 U.S.C.A. § 4917(c)(1) (2012).

68. Tractor trailers using the Property are therefore exempt from Township noise regulations in accordance with Section 701.6(0) of the Ordinance,

69. No specific evidence of excessive noise was adduced by the objectors other than mere speculation.

70. No evidence demonstrating a substantial threat of noise to the health and safety of the community was established.

71. The objectors also claimed that proposed lighting on the Property would harm the health and safety of the community.

72. However, Associates submitted a lighting plan in accordance with Section 701.8 Associates also submitted "cut sheets" depicting the specifications for the proposed lighting.

73. The lighting proposed by Associates is consistent with the Ordinance and Township regulations.

74. The Township Engineer stated on March 4, 2022, states, "... [g]enerally, we concur with the lighting design at this time.

75. Applicant is encouraged to have all required lighting to be installed in compliance with the approved lighting plan. All lights used to illuminate the site shall be hooded and designed so as to reflect away from adjoining properties and public thoroughfares.

76. In addition, the glare from any luminous source, including on-site lighting shall not exceed one-half (0.5) foot-candle at property line. All lighting shall be limited to that necessary for maintenance activities and security purposes. This is to allow minimum obstruction of night sky remote area views. No light shall project onto adjacent roadways in a manner that interferes with on-coming traffic.

77. Associates also indicated its intention to more fully design and discuss site lighting at the land development phase of the project. *See Broussard v. Zoning Board of Adjustment of the City of Pittsburgh*, 907 A.2d 494,502 (2006) ("... where the plan, as submitted, addresses all of the ordinance's prerequisites for the special exception sought, and reasonably shows that the property

owner is able to fulfill them in accordance with the procedures set forth by the zoning code (as reasonably interpreted by the board), a reviewing court should not reverse the grant of such an exception on the sole basis that some of the items described in the plan may be completed at a later date." *Id.* (citation omitted)).

78. Based on the foregoing, the objectors to the project failed to demonstrate that proposed site lighting would have a substantial effect on the health and safety of the community.

79. With respect to the character of property value evidence necessary to support the denial of a conditional use application, the Pennsylvania Commonwealth Court requires more than an objector's mere speculation. For example, in rejecting an argument that a special exception application should be denied based upon a decrease in property values, the Commonwealth Court concluded:

... Finally, while Objectors' witnesses testified that property values might decrease due to the presence of a juvenile detention center increasing the fear of crime on the Peninsula, that testimony is not persuasive for several reasons: first, the testimony was mere speculation of a reaction which fails to be of the "high degree of probability" of a substantial effect on the community required, especially where the measures utilized by the County will ensure the facility is compatible with the residential nature of the community; and second, if a decrease in property values does occur, it would be no different than that usually associated with the construction of a community rehabilitation facility or half-way house, both of which are permitted uses....

Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board, 739 A.2d 644, 651 (Pa. Cmwlth. 1999).

83. Similarly, in *Soble Construction Co. v. The Zoning Hearing Board of the Borough of East Stroudsburg*, 16 Pa. Cmwlth. 599, 329 A.2d 912 (1974), the Commonwealth Court held that the burden of showing that a proposed development has a greater than normal impact on the community is not satisfied by proof that neighboring property values may decrease. *Id.*, 16 Pa.

Cmwlth. at 607,329 A.2d at 917. According to the Commonwealth Court:

Neither aesthetic reasons nor the conservation of property values nor the stabilization of economic values in a township are, singly, or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners, within the meaning of the enabling act or under the Constitution of Pennsylvania. The burden is on the township and the protecting neighbors, if there are any, to prove by evidence that the impact of the requested use in its normal operation would be injurious to the public health, safety and welfare. The protestants cannot sustain that burden by merely introducing evidence to the effect that property values in the neighborhood may decrease....

Soble, 16 Pa. Cmwlth, at 607,329 A.2d at 917.

84. Based on the foregoing, evidence of a decrease in property values cannot defeat the grant of a conditional use unless the decrease would be greater than that associated with warehousing facilities generally. No evidence of this character was presented.

85. As indicated above, it is not necessary for Associates to address sewage and stormwater design at the conditional use phase of this project.

86. First, Section 1208.6(A) of the Ordinance titled, "*Timing of Submission*" provides:

The Township Planning Commission and Board of Supervisors or the Zoning Hearing Board will process an application for a conditional use or a special exception, respectively, prior to, or concurrently with, land development approval, if such subdivision or land development approval is required under the provisions of the Township Subdivision and Land Development Ordinance. *The intent of prior action on a conditional use or special exception is to afford the applicant the opportunity to obtain initial zoning approval before committing the resources necessary to prepare and submit a detailed plan to conform to the requirements of the Subdivision Ordinance.*

87. Thus, the Ordinance expressly recognizes that issues such as sewage and stormwater design will be addressed during the land development phase of the project.

88. With respect to stormwater, Section 701.12(A) of the Ordinance recognizes that a

stormwater management plan need not be provided until a subdivision and land development plan has been submitted. ("Stormwater management shall be provided in accord with the Township Stormwater Management Ordinance and the Township Subdivision and Land Development Ordinance.").

89. Moreover, the engineering review letter issued by the Township Engineer, Mr. Eric S. Snyder, P.E., on March 4, 2022, expressly states that, "... [w]e acknowledge that the entire stormwater management design for the project will be thoroughly reviewed during the land development plan process".

90. With respect to sewage design, Section 702.2 of the Ordinance requires that, "[a]ll uses shall be provided with a sewage disposal system meeting the needs of the proposed use and meeting the requirements of the Township and the PA DEP." The Ordinance does not require that such permit be provided at the conditional use state of a project.

91. Finally, Pennsylvania, law expressly provides that an applicant for conditional use is not required to address issues such as sewage, stormwater management and water supply requirements. *Schntz v. New Britain Township Zoning Hearing Board*, 141 Pa. Cmwlth. 525, 532, 596 A.2d 294,298 (I 991)(" ... according to the Township, Schatz's application does not address the best interests of the Township, the convenience of the community, or the public welfare, because it does not have adequate sewage capacity, and it does not address the storm water management, water supply requirements, and may not meet the building code. We again agree with Common Pleas that *an application/or special exception is not required to address such issues. Such issues are to be addressed further along in the permitting and approval process. Zoning only regulates the use of land and not the particular's of development and construction ...*, " *Id.* (emphasis added)),

92. No substantial evidence was presented demonstrating that the granting of the Application would alter the essential character of the neighborhood or be detrimental to the public welfare.

93. In addition, the evidence and testimony submitted by Associates has satisfied the criteria for the issuance of a conditional use permit in accordance with the Tunkhannock Township Zoning Ordinance. The property is an appropriate location for the proposed development.

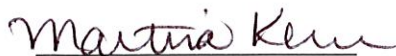
DECISION

For any and all of the foregoing reasons, the conditional use approval requested by Associates in accordance with Section 405 of the Tunkhannock Township Zoning Ordinance for the construction of a new warehousing facility located off of State Route 115, Long Pond, Monroe County, Pennsylvania 18334 is hereby GRANTED and APPROVED subject to the foregoing Conditions.

Date: 5/4/2022 :

ATTEST :

BOARD OF SUPERVISORS OF
TUNKHANNOCK TOWNSHIP



Martina Kernan


Fran DePiano, Chairperson


Kevin Wieand, Supervisor

