



ZARIN &  
STEINMETZ

January 14, 2019

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• Also admitted in DC  
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• Also admitted in NJ  
• Also admitted in MD

**Re: *Northeast Interstate Logistics Center  
Campus at Fields Corner  
Tax Map Section 45, Block 1 (the "Property")***

Dear Mr. Levine:

This letter will serve to confirm that so much of the above-referenced Property as is located in the Town of Southeast's (the "Town") OP-3 Zoning District may be used by Special Permit for a warehouse/distribution facility.

By way of background, as you know, "Light Manufacturing" is a use specifically allowable by Special Permit in the OP-3 District. (See Commercial Zoning Schedule, Attachment 5 to Town Code Chapter 138.) It is well-settled that the designation in a municipal zoning code of a use as permitted by Special Permit is "tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood," subject to it meeting the established criteria for a Special Permit. Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 628 (1997) (citation omitted).<sup>1</sup>

<sup>1</sup> See also Hamptons, LLC v. Rickenbach, 98 A.D.3d 736, 950 N.Y.S.2d 182, 184 (2d Dept. 2012) ("A special use permit is not a variance, as it does not involve varying the restrictions otherwise imposed by a zoning ordinance but, rather, involves adherence to a zoning ordinance. Moreover, while the power to grant variances is to be exercised sparingly, *the issuance of a special use permit is a duty imposed upon a zoning board, provided that all of the standards provided in the ordinance are met.* As explained by the Appellate Division, Third Department, "[v]ery clearly, where an applicant has met the standards imposed by an ordinance, the board is obligated to issue a special use permit." (emphasis added, citations omitted)).

As set forth in this letter, the Town's official planning documents, including its Zoning Code and its 2014 Comprehensive Plan Update, make clear that "Light Manufacturing" includes warehouse and distribution facilities.

**Town's Official Planning Documents Establish That  
"Light Manufacturing" Use Includes "Warehousing and Distribution Facilities"**

To begin with, the Town's 2014 Comprehensive Plan Update specifically states that uses categorized as either "Industrial or Light Industrial" "include traditional industrial uses as well as *warehousing and distribution facilities.*" (2014 Comprehensive Plan Update at 5-2 (emphasis added).) This statement alone establishes that warehouses and distribution facilities are allowed wherever Light Manufacturing is permitted in the Town.

The Town Zoning Code's definition of "Light Manufacturing" tracks the language of the 2014 Comprehensive Plan Update, establishing that this term includes "[i]ndustrial uses such as manufacturing, processing and assemblage." (Town Code § 138-4.) As discussed further below, like the 2014 Comprehensive Plan Update, the Town Zoning Code's definition of "Light Manufacturing" makes clear that it includes "traditional" industrial uses, as well as facilities that may be used for processing and assemblage, such as warehouses and distribution facilities.

As such, the plain language used in the Town's official planning documents establishes that "Light Manufacturing" includes "warehousing and distribution facilities." (See Commercial Zoning Schedule, Attachment 5 to Town Code Chapter 138; 2014 Comprehensive Plan Update at 5-2.)

**Even If The Term "Light Manufacturing" Were Ambiguous,  
Basic Canons of Statutory Construction Would Conclusively Establish That  
"Light Manufacturing" Includes Warehousing/Distribution Facility Uses**

Even if there were any ambiguity regarding the fact that warehouse/distribution facility uses are allowed in the OP-3 District, such ambiguity would have to be strictly construed against the Town and in favor of the private property rights of the Property's owner, Putnam Seabury Partners, L.P. ("Putnam, Seabury"). See Toys R Us v. Silva, 89 N.Y.2d 411, 420, 654 N.Y.S.2d 100, 105 (1996) ("Zoning restrictions, being in derogation of common-law property rights, should be strictly construed and any ambiguity resolved in favor of the property owner.")<sup>2</sup>

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<sup>2</sup> See also Town of Huntington v. Braun, 99 A.D.3d 987, 952 N.Y.S.2d 633, 634 (2d Dept. 2012) ("Possible ambiguities in zoning ordinances are to be construed against the municipality which has enacted them and seeks to enforce them."); Capital City Rescue Mission v. City of Albany B.Z.A., 235 A.D.2d 815, 658 N.Y.S.2d 388, 389 (3d Dept. 1997) ("[B]ecause zoning ordinances are in derogation of the common law, they are to be strictly construed against the municipality."); see generally N.Y. Statutes § 311 ("A statute which infringes on a common right is strictly construed.").

The Town Code's definition of "Light Manufacturing" is based upon several undefined terms, including "industrial uses" and "assemblage," which must, by law, be construed in Putnam Seabury's favor. Again, the Town Code defines "Light Manufacturing" as "[i]ndustrial uses such as manufacturing, processing and assemblage that are of a nonpolluting nature, particularly in regard to reservoir and groundwater resources, noise and air quality." (Town Code § 138-4.)

**1. The Phrase "Industrial Uses," Which Underpins The Definition Of "Light Manufacturing," Encompasses A Wide Variety of "Profit-Making Enterprises" That Rely On "Systematic Labor"**

First, the Town Code offers no real definition of the phrase "[i]ndustrial uses," such that, as a matter of law, any ambiguity in this term must be resolved in favor of Putnam Seabury's private property rights. See, e.g., Toys R Us, 89 N.Y.2d at 420, 654 N.Y.S.2d at 105. The Town Code's definition of "Industrial Use" simply refers back to the definition of "Light Manufacturing." (See Town Code § 138-4.) By law, the undefined terms "Light Manufacturing" and "Industrial" must be accorded their "plain or ordinary meaning." See, e.g., Sullivan v. B.Z.A. of Albany, 144 A.D.3d 1480, 1482, 42 N.Y.S.3d 428, 430, (3d Dept. 2016), leave to appeal denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (Table) (2017) ("If the law or ordinance at issue does not define a particular term, courts will afford such term its plain or ordinary meaning.").<sup>3</sup>

The plain meaning of the word "industrial" broadly refers to anything relating to "productive or profit-making enterprises" that depend upon "systemic labor." The word "industrial" simply means anything "of or relating to industry." Merriam-Webster online dictionary, available at <https://www.merriam-webster.com/dictionary/industrial>, last checked Jan. 2, 2019. "Industry," in turn, has a variety of meanings, including "manufacturing activity as a whole" but also including "a distinct group of productive or profit-making enterprises" and "systematic labor especially for some useful purpose or the creation of something of value." See Merriam-Webster online dictionary, available at <https://www.merriam-webster.com/dictionary/industry>, last checked Jan. 2, 2019. As such, the phrase "industrial uses" must, by law, be broadly construed to encompass a wide variety of "profit-making enterprises" that are dependent on the use of systemic labor activities, including warehouses and distribution facilities.

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<sup>3</sup> See generally N.Y. Statutes § 232 ("Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended.")

**2. “Industrial Uses” Goes Beyond Just “Manufacturing”  
To Encompass “Assemblage,” Which Corresponds To  
The Intended Warehouse/Distribution Facility Use**

The series of words used in the Town Zoning Code following the term “industrial uses” in the definition of “Light Manufacturing” show that: (i) “Light Manufacturing” is not limited to “manufacturing,” and; (ii) the term encompasses uses that correlate to warehouses/distribution facilities, including “assemblage.” The standard rule of statutory interpretation known as *ejusdem generis* establishes that the “words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated.” See N.Y. Statutes § 239; Town of Huntington v. Transon, 43 Misc.2d 912, 914, 252 N.Y.S.2d 576, 578 (Sup. Ct. Suffolk Co. 1964) (“Following that rule of interpretation known as *ejusdem generis*, general words identifying a class of objects are not strictly limited to those objects alone, but include others of the same kind or class.”), citing Black’s Law Dictionary, 4<sup>th</sup> Edition.<sup>4</sup> This holds true particularly where, as here, a series of words is used to explain the meaning of a general term.

Here, the Town Code expands on the intended meaning of the phrase “[i]ndustrial uses” by stating that it includes, but is not limited to, uses “*such as* manufacturing, processing and assemblage.” (See Town Code § 138-4 (emphasis added).) Accordingly, like the 2014 Comprehensive Plan Update, the Zoning Code’s definition of “Light Manufacturing” makes clear that it is not limited to “traditional” manufacturing. Rather, “manufacturing,” which is preceded by the phrase “such as,” is just one exemplar of the uses included within the “industrial uses” allowed as “Light Manufacturing.” Under the doctrine of *ejusdem generis*, the word “assemblage” must be construed as a distinct descriptor of the types of uses that can also qualify as “Light Manufacturing.” See Toys R Us, 89 N.Y.2d at 422, 654 N.Y.S.2d at 106 (reiterating axiom that “courts must, where possible, give meaning and effect to every word of a statute”). Again, this is consistent with the statement in the Town’s 2014 Comprehensive Plan Update that “Industrial or Light Industrial” uses “include traditional industrial uses as well as warehousing and distribution facilities.” (2014 Comprehensive Plan Update at 5-2.)

“Assemblage,” in turn, correlates to the uses envisioned for the proposed warehouse/distribution facility. The plain meaning of assemblage most relevant to this discussion is “the act of assembling.” Merriam-Webster online dictionary, available at <https://www.merriam-webster.com/dictionary/assemblage>, last checked Jan. 2, 2019. The description of the intended use in the Draft Environmental Impact Statement (“DEIS”) indicates that it will include multiple services that are forms of assemblage (as well as processing), including “handling, shipment, consolidation, repackaging, labeling, assembly, aggregation, transloading, refrigeration, [and] management.” (See DEIS at II-3.) Like assemblage (and processing), the activities that will take place in the proposed warehouse/distribution facility all involve aspects of assembling and processing goods and materials for redistribution.

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<sup>4</sup> See also N.Y. Statutes § 114 (“If there is nothing to indicate a contrary intent on the part of the lawmakers, terms of general import in a statute ordinarily are to receive their full significance.”).

**The Town's Comprehensive Plan Update Contains  
Additional Confirmation Of The Legislative Intent To Allow  
Warehouses/Distribution Facilities At The Property**

The Town's 2014 Comprehensive Plan Update contains even more evidence of the Town's intent to allow warehouses/distribution facilities at the Property, showing that the Town plans to rezone part of the Property to specifically allow "Warehouse" uses (as well as the overarching "Light Manufacturing" category) by conditional use permit as part of a new OP-MU District. (See 2014 Comprehensive Plan Update at Table 5-3 at 5-22 & Figure 5-5.) This is consistent with the 2014 Comprehensive Plan Update's declaration that the area around the I-84/Route 312 Interchange, including the Property, is intended to be a "focal point of commercial development." (Comprehensive Plan Update at 8-4; see also id. at Figure 7-1 specifically identifying the subject site as being slated for commercial development.).

Even if the Town Code did not already clearly establish that warehouses/distribution facilities are allowed at the Property, the Town's Zoning Code would still be required by law to be in accordance with the Town's duly adopted Comprehensive Plan. See N.Y. Town Law § 272-a(11). Significantly, the Court of Appeals has held that "the 'comprehensive plan' protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials." Udell v. Haas, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 894 (1968). "In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even a majority of the community." Id.

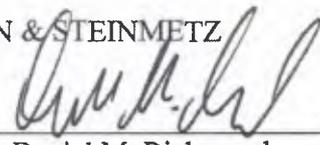
In sum, the Town's official planning documents, including the Town Code and the 2014 Comprehensive Plan Update, establish that warehouses/distribution facilities are allowed at the Property.

Putnam Seabury would appreciate your confirmation in writing of its interpretation of the Town Code. If we do not hear from you by January 22, 2019, we will assume, in any event, that you agree with the reasoning set forth in this letter.

As always, please let us know if you have any questions.

Respectfully submitted,

ZARIN & STEINMETZ

By: 

Daniel M. Richmond  
Kate Roberts

DMR/mth

cc: Putnam Seabury Partners, L.P.

JMC

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