SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SKT MANAGEMENT LIMITED LIABILITY COMPANY, Plaintiff, v. TOWNSHIP OF IRVINGTON and THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF IRVINGTON Defendants.	APPEAL NO. A-000528-24 T2 **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO. ESX-L-8690-17 **SAT BELOW:** HON. THOMAS R. VENA, J.S.C.
SKT MANAGEMENT LIMITED LIABILITY COMPANY Plaintiff, v. 693 LYONS AVENUE-IRVINGTON HOLDING, LLC, THE PLANNING BOARD OF THE TOWNSHIP OF IRVINGTON, TSE, JOSEPH AND TSE, PATRICIA Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO. ESX-L-8306-18

PLAINTIFF'S/APPELLANT'S BRIEF

JANUARY 2, 2025
AMENDED JANUARY 16, 2025
SECOND AMENDMENT FEBRUARY 21, 2025

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PRELIMINARY STATEMENT

SKT Management, LLC's ("**SKT**" or "**Appellant**") appeal seeks to set aside the Township of Irvington's (the "**Township**") Ordinance MC3620 ("**MC3620**") which was adopted as part of the Township's misguided effort to lure a 7-Eleven convenience store into the community to the detriment of other convenience stores. 7-Eleven had considered entering the market but would not do so unless it could remain open 24 hours. Prior to the adoption of MC3620, convenience stores in the Township were required to be closed between the hours of 11:00 PM and 6:00 AM. MC3620 was adopted for the admittedly "sole purpose" of capitulating to 7-Eleven's requirement that it be allowed to remain open 24 hours a day. Pa384.

As admitted by the Township, MC3620 was drafted in such a manner as to allow the proposed 7-Eleven to remain open while other convenience stores would be placed at a competitive disadvantage by having to shutter between 11:00 PM and 6:00 AM. The Township imposed an arbitrary 2,400 square foot minimum size requirement "to prevent each and every authorized retail establishment from operating twenty-four (24) hours a day, keeping the entire Township open twenty-four (24) hours a day and to **allow the Township to control which retail establishments would be authorized to remain open over the course of the entire day**." (emphasis supplied) Pa141, ¶10. The effect of the Township's arbitrary size requirement gives 7-Eleven a competitive advantage by allowing it to operate 24

hours a day while prohibiting SKT's 1,850 square foot convenience store from staying open those same hours even though both convenience stores are immediately adjacent to each other.

Taken to the logical extreme, MC3620 precludes convenience stores containing 2,399 square feet from remaining open 24 hours while a virtually identical adjacent store containing 2,400 square feet would be permitted to remain open. MC3620's restriction based on building size discriminates against smaller convenience store operators for no valid public purpose. The Township clearly abused its police power to adopt an ordinance which creates such disparate treatment of otherwise identical retail establishments. As such, MC3620 is unconstitutional and should be vacated by this appeal.

The Trial Court erroneously decided the matter based on a question of fact, not as a question of law. Without even addressing the constitutional issues or and the Ordinance's clear discrimination against identical retail parties, the Trial Court upheld the Ordinance due to an alleged "lack of evidence" supporting the challenge. Accordingly, SKT requests this Appellate Court to conduct a *de novo* review of this important question of law: whether MC3620 is unconstitutional under N.J.S.A. Const. art. 1, par. 1 and U.S.C.A. Const. Amend. 14, §1 and an abuse of police power. As the fatal flaws in the Trial Court's erroneous decision will be apparent, MC3620 should be declared unconstitutional and vacated as a matter of law.

PROCEDURAL HISTORY

Appellant filed this action challenging the Township's and Township Council's adoption of MC3620 by Complaint in Lieu of Prerogative Writs that was adopted on September 27, 2017 (the "**Ordinance Action**"). Pa21. This ordinance was adopted in concert with a site plan application filed by 693 Lyons Avenue-Irvington Holding, LLC ("**693 Lyons**") which was the contract purchaser of 693 Lyons Avenue, Irvington, New Jersey ("**693 Property**"). The 693 Property is immediately adjacent to the property owned by SKT. Pa66, ¶¶11, 15, Pa108, Pa384.

The Township and Township Council filed their answers to the Complaint on January 18, 2019. Pa43.

On or about November 3, 2017, 693 Lyons filed an application for preliminary and final site plan approval (the "**Site Plan Application**") with the Township of Irvington Planning Board (the "**Board**") to redevelop the 693 Property with an approximately 2,552 sq. ft. 7-Eleven convenience store. Pa105-06.

The Board heard the Site Plan Application on December 13, 2017, January 18, 2018, and June 28, 2018. Pa430, ¶36. At the conclusion of the July 28, 2018 hearing, the Board voted to approve the Site Plan Application. Pa258. That vote was memorialized by way of a Resolution adopted on September 27, 2018 (the "**Board Resolution**"). Pa272-74.

SKT filed a Complaint in Lieu of Prerogative Writs on November 26, 2018,

which challenged the Board's approval of the Site Plan Application (the "**Site Plan Action**", Docket No. ESX-L-8690-17). Pa253. 693 Lyons and the Board were named as defendants to the Site Plan Action. Id. 693 Lyons filed its answer to the Complaint in the Site Plan Action on January 16, 2019. Pa335. The Board filed its answer to the Complaint in the Site Plan Action on January 10, 2019. Pa285.

Over SKT's objection, the Township and Board successfully moved to consolidate Ordinance Action and Site Plan Action. Pa385. In support of this motion, the Township stated that "[a]s part of its [Site Plan] Application before the Planning Board, through the testimony of its professionals, great weight was placed upon the fact that the 7-Eleven would be open for twenty-four (24) hours a day, which was the **sole purpose of the Ordinance** in question." Pa384.[1] The Court granted the Township's and Board's motion and entered an Order on February 26, 2019 to consolidate these actions. Pa385.

The parties then cross-moved for partial summary judgment on the Ordinance Action. Pa62; Pa133. The Court heard argument on May 20, 2020. 1T. The Court entered two Orders on May 26, 2020. One Order granted the Township's motion for partial summary judgment and dismissed SKT's Ordinance Action. Pa11. The

[1] As permitted by R. 2:6-1(a)(2) the relevant portion of a brief submitted on behalf of the Township is included in the appendix. This brief section contains a material admission against interest made by the Township in a successful effort to consolidate the Ordinance Action with the Site Plan Action.

second Order denied SKT's motion for summary judgment against the Township. In its Opinion, the Court found that there was no "evidence" to overturn MC3620. Pa1.

Although the Ordinance Action was decided, the parties still had to resolve the Site Plan Action. During the pendency of the Site Plan Action, 693 Lyons decided that it no longer wanted to redevelop the 693 Property. Pa388. As a result, 693 Lyons terminated its agreement with the owners of the 693 Property, Joseph and Patricia Tse (the "**Tses**"). Pa388.

On March 22, 2023, the Court entered an Order for SKT to amend its complaint in the Site Plan Action to join the Tses as defendants. Pa387. SKT filed an Amended Complaint on March 23, 2023. Pa424. The Tses filed an Answer to the Amended Complaint in the Site Plan Action on April 25, 2023. Pa458. The Board filed its Answer to the Amended Complaint in the Site Plan Action on April 26, 2023. Pa490. 693 Lyons did not file an answer to the Amended Complaint in the Site Plan Action. The parties then reached an agreement to resolve all issues in the Site Plan Action and, by Consent Order entered on September 13, 2024, the Site Plan Approval granted to 693 Lyons was vacated. Pa532. The Consent Order also finally resolved the consolidated actions. Although referenced in this appeal to provide relevant facts to the matter under appeal and procedural history, the Site Plan Action is **not under appeal** herein. Id.

On October 23, 2024, SKT filed its Notice of Appeal challenging the Court's decision in the Ordinance Action. Pa542. Due to a correction needed to be made to the transcript request, an amended Notice of Appeal was filed on November 5, 2024. Pa540. A Second Amended Notice of Appeal was filed on January 15, 2025 to correct the order of the cases in the caption. Pa569.

STATEMENT OF FACTS

1. THE PARTIES

A. THE PLAINTIFF/APPELLANT

SKT is a New Jersey limited liability company that owns the property located at 681 Lyons Avenue, Irvington, New Jersey ("**SKT Property**"). The SKT Property is improved with a gasoline service station and 1,477 square foot convenience store. Pa247, ¶2.

B. THE RESPONDENT/DEFENDANT TOWNSHIP OF IRVINGTON

The Township is a body politic of the State of New Jersey. Pa22, ¶¶6,7; Pa44 ¶¶6,7. The Township adopted MC3620 which is under review in this appeal. Pa542; Pa535, and Pa569.

2. OTHER RELEVANT PARTIES

A. 693 LYONS, LLC

693 Lyons was the contract purchaser of the 693 Property. Pa254, ¶6; Pa336, ¶6. 693 Lyons filed the Site Plan Application for preliminary and final site plan approval to demolish the existing improvements and redevelop the 693 Lyons

Property with a 7-Eleven branded convenience store. P254, ¶7; Pa286, ¶7.

B. **THE TSES**

The Tses own the 693 Lyons Property. Pa425, ¶5a; Pa459, ¶5a.

C. **THE BOARD**

The Board heard the Site Plan Application and granted 693 Lyons preliminary and final site plan approval to redevelop the 693 Property with a 7-Eleven convenience store. Pa425, ¶7; Pa459, ¶5a; Pa445, ¶166; Pa532. This approval was memorialized by way of the Board's September 27, 2018 Resolution. Pa445, ¶166; Pa532. That resolution was vacated as a result of the Site Plan Action. Pa532.

3. THE ORDINANCE

On September 26, 2017, the Municipal Council of the Township of Irvington ("**Township Council**") adopted MC3620 which amended and supplemented the Township Code regarding hours of operation for retail food establishments. Pa37-38. MC3620 was adopted by the Township's exercise of its general police power under N.J.S.A. 40:48-1 et seq. MC3620 was adopted without public comment or discussion by the Township Council. Pa78-79.

As stated by the Township, the "**sole purpose**" of MC3620 was to permit the proposed 7-Eleven to remain open 24 hours. Pa386. Moreover, the Township has also expressly stated that it set the 2,400 square foot minimum size limit to "**prevent** each and every authorized retail establishment from operating twenty-four (24) hours a day." [emphasis supplied]. Pa141, ¶10. The Township further admitted that

it wanted to "control which retail establishments would be authorized to remain open over the course of the entire day." Pa141, ¶10.

Through the adoption of MC3620, the Township achieved this misguided goal by requiring all stores, establishments, or places of business for the sale of meats, groceries or provisions for consumption off the premises to close between the hours of 11:00 PM and 6:00 AM. Pa37-38. An exception to this rule was, however, made for **only** "Convenience Stores" which met several conditions which miraculously matched the elements in 7-Eleven's site plan application. Pa37-38. These conditions include the requirement that to remain open, the store must contain a minimum of 2,400 square feet of space. Pa37. In addition, the store must have the following features:

- A retail security camera system as follows:
  - That is approved by the Irvington Police Department;
  - That operates 24 hours a day 7 days a week;
  - That at least include one camera completely dedicated to monitoring the public entrance door;
  - That monitor the entire area of the convenience store accessible by the public, and
  - That the video footage obtained by the security camera system must be maintained by the convenience store for no less than 30 days.

- The convenience store's register must:
  - Be visible from the adjacent street, and
  - Maintain no more than $25 to $50 in cash after the hours of 11:00 PM
- The convenience store must post the following:
  - A sign that the store policy is that no more than some pre-determined amount ($25 to $50) is kept in the register at one time and that the store will accept no larger than $20 denominations, and
  - Signs inside and outside the store to emphasize your security policy on limited cash on-hand and employee inaccessibility to the safe.
- Have signs that limit parking to 15 minutes.
- Have the following installed:
  - A door signaling system like a buzzer/bell and
  - Silent "hold-up" alarms which should also be considered.
- The convenience store must have a minimum of 2.0 foot candle around the perimeter of the premises and a minimum of 2.0 foot candle in the parking lot and the entrance of the premises. Pa37-38.

Because the Township strategically enacted MC3620 using its police powers instead of making it part of the zoning ordinance under N.J.S.A. 40:55D-62 et seq., stores that do not meet these standards would **not be entitled to variances**. Accordingly, existing convenience stores would not be allowed to seek a variance

or relief in order to compete with the 7-Eleven convenience store. See Apple Chevrolet, Inc. v. Fair Lawn Borough, 231 N.J. Super. 91, 96 (App. Div. 1989) wherein the Court held that a variance cannot be sought as part of a site plan application under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. for an ordinance passed pursuant to the municipality's general police power under N.J.S.A. 40:48-1).

As a result, MC3620 was adopted to "**solely**" to accommodate 7-Eleven's demand it be permitted to operate 24-hours per day while preventing other convenience store competitors such as SKT from the same opportunity to operated 24-hours per day. Pa386, Pa141, Pa246-48.

4. SKT'S ORDINANCE ACTION

SKT filed the Ordinance Action to challenge the validity of MC3620. SKT's overriding objection to MC3620 was to the requirement that the convenience store must contain a minimum gross floor area of 2,400 square feet in order to remain open 24 hours. Pa21.

5. EXISTING CONDITIONS OF THE SKT AND 693 PROPERTIES

A. THE SKT PROPERTY

The SKT Property is a 14,641 square foot parcel located in Irvington's B-1 Zone adjacent to the 693 Lyons Property's eastern boundary line. The SKT Property is developed with a Shell branded gasoline station and an approximately 1,477 square foot convenience store. Pa247. The convenience store built on the SKT

Property has operated on the site for decades. Pa247.

B. THE 693 PROPERTY

The 693 Lyons Property is an approximately 9,812 square foot parcel also located in Irvington's B-1 Zone at the intersection of Lyons Avenue and Ball Street. Pa426, ¶8. The 693 Lyons Property is approximately 2.5 times the minimum permitted parcel size of the B-1 zone. Pa105; Pa426, ¶9. The 693 Lyons Property's northern property line boarders the Township's R-2 Residential Zone. Pa426, ¶12. A two-family home in Irvington's R-2 Zone is to the immediate north of the 693 Lyons Property. Pa426, ¶13. The home itself is located just six (6) feet from the 693 Lyons Property. Pa108-09; Pa426, ¶13.

The 693 Lyons Property is developed with an approximately 1,700 SF single story, multi-tenant retail building containing a Rita's branded ice cream store and take-out restaurant. Pa426, ¶10; Pa108-09. The existing building on the 693 Lyons Property is mostly situated twenty (20) feet from the property's northern boundary line to the R-2 Zone as required in the B-1 Zone. Pa426, ¶¶14, 15 and 16; Pa108-09.

I. 693 LYONS' SITE PLAN APPLICATION

On or about November 3, 2017, 693 Lyons filed the Site Plan Application. Pa106-07. The Site Plan Application called for the demolition of all existing improvements on the 693 Lyons Property so that the entire site could be redeveloped with an approximately 2,552 sq. ft. 7-Eleven convenience store. Pa105; Pa257, ¶¶31,

32. The proposed 7-Eleven store was to be located .5 feet from the common boundary line with the adjacent two-family home being just a mere six and one-half (6.5) feet from the rear wall of the store. Pa105; Pa108-09; Pa257, ¶¶34. Lyon's failure to provide **any** setback - let alone the required setback to the two-family home - was necessary in order to accommodate 7-Eleven's proposed 2,552 sq. ft. building. Pa105; Pa108-09; Pa257, ¶¶34. In addition, 693 Lyons sought several other variances from the Township's Zoning Ordinance to accommodate their proposed store which met MC3620's minimum size requirement to remain open 24 hours. Pa108-09.

6. MOTION TO CONSOLIDATE ACTIONS

On January 16, 2019, the Township, Township Council, and Board filed a joint Motion to Consolidate the Ordinance and Site Plan Actions. Pa383. As part of their motion, these Defendants acknowledged that the actions address separate questions of law with separate defendants in each. Notwithstanding, the Defendants contended that consolidation was appropriate because "693 Lyons Avenue-Irvington Holding, LLC will build its 7-Eleven convenience store **only** if it can remain open for [24-hours] a day" and that the "**sole purpose** of the Ordinance in question" was to permit 7-Eleven to remain open 24-hours a day (emphasis added). Pa141; Pa385.[2]

[2] As permitted by R. 2:6-1(a)(2) the relevant portion of a brief submitted on behalf of the Township is included in the appendix. This brief section contains a material

Based on the successful assertion of the foregoing, the Court granted their motion to consolidate these matters. Pa387. Moreover, they are judicially estopped from denying the same is true. See Cummins v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996) wherein the Court stated that "[t]he doctrine of judicial estoppel operates to "bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted." N.M. v. J.G., 255 N.J. Super. 423 (App. Div. 1992). See also Levin v. Robinson, Wayne La Sala, 246 N.J. Super. 167 (Law Div. 1990); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d Cir.), cert. denied, 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988); Shell Oil Co. v. Trailer Truck Repair Co., Inc., 828 F.2d 205, 209 (3d Cir. 1987).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

The gravamen of this case is whether a municipality has the authority to enact an ordinance which restricts the operating hours of certain convenience stores while allowing similarly situated convenience stores to operate without such restrictions. Whether such an ordinance is constitutional or an arbitrary, capricious and unreasonable abuse of power is a question of law, not fact, for a court to decide.

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admission against interest made by the Township in a successful effort to consolidate the Ordinance Action with the Site Plan Action.

When rendering its decision, the Trial Court did not even address this question of law, but instead treated it as a question of fact.

The Trial Court in this case erroneously denied SKT's Motion for Summary Judgment on the grounds that there was "insufficient evidence" that MC3620 was unreasonable. Whether MC3620 is unreasonable and arbitrary is a question of **law**, not a question of **fact**. Regardless, the basis for the constitutional challenge and undisputed record on which this claim was presented to the Court below were sufficient, simple and clear to decide this case. MC3620 prohibits one store containing 2,400 square feet to remain open 24 hours while a store containing 2,399 square feet must close. This is true even if the 2,399 square foot store has enhanced safety features or other features which make it superior to the 2,400 square foot store.

The interpretation and constitutionality of an ordinance such as that raised herein is a question of law that is to be reviewed *de novo* by the Appellate Court. Bubis v. Kassin, 184 N.J. 612, 627 (2005). "Similarly, the trial judge's determination as to the meaning of the ordinance is not entitled to any deference in our analysis." Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin, 448 N.J. Super. 583, 595 (2017). See also Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002) wherein the Court held that "[t]he determination whether market demand should be considered in assessing whether a municipality's zoning ordinances are exclusionary is a question of law that we review de novo."

citing Balsamides v. Protameen Chem., Inc., 160 N.J. 352, 372 (1999); Piscitelli v. City of Garfield Zoning Board of Adjustment, 237 N.J. 333 (2019) wherein the Court held that issues of law relating to the propriety of ordinances are reviewed by the Court *de novo* "owing no deference to the interpretative conclusions of either the Zoning Board, the trial court, or the Appellate Division." Id. at 193 citing Dunbar Homes, 233 N.J. at 559.

Accordingly, this Appellate Court should review the issue of MC3620's constitutionality raised in this matter on a *de novo* basis.

POINT II

THE TOWNSHIP'S ADOPTION OF MC3620 WAS AN IMPROPER EXERCISE OF POLICE POWER AS A MATTER OF LAW. (PA4; 1T 6:21-8:11; 1T 18:7-21:5).

A. MUNICIPALITY'S POLICE POWER CANNOT PROMOTE THE PRIVATE INTERESTS OF A PARTICULAR BUSINESS. (PA4)

An Ordinance constitutes a **perversion** of a municipality's police power if its dominant purpose is to promote the private interests of a particular business such as the case herein. N.J. Good Humor, Inc. v. Board of Com'rs of Borough of Bradley Beach, 124 N.J.L. 162, 168 (E. & A. 1939) wherein the Court stated that:

> Broad as it is, the police power is not without its limitations. Its exertion must be directed to a legitimate end, i.e., the protection of a basic interest of society rather than the mere advantage of particular individuals.

See also, Home B. & L. Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed.

413 (1934). Municipalities are authorized by the Legislature to adopt ordinances as an exercise of general police power **only** to the extent that such ordinances advance "the protection of persons and property, and for the preservation of public health, safety, and welfare of the municipality and its inhabitants." N.J.S.A. 40:48-2. See also N.J. Good Humor, at 168.

A municipality's police power is limited by N.J.S.A. Const. art. 1, par. 1 which affords citizens the "guaranteed right to pursue lawful vocations unless there is a superseding public need which requires that the lawful pursuit be regulated." Southland Corp. v. Edison Township, 217 N.J. Super. 158, 173 (Law Div. 1986) aff'd o.b. 220 N.J. Super. 294 (App. Div. 1987). Based on this principle, the well settled law is that an ordinance passed with the purpose of advancing a singular private business interest invariably exceeds the limitations on municipal power and therefore is unconstitutional and void. See N.J. Good Humor, 124 N.J.L. at 168. See also Moyant v. Borough of Paramus, 30 N.J. 528, 545 (1959); Taxpayers Ass'n of Weymouth Tp. Inc. v. Weymouth Tp., 80 N.J. 6, 33 (1976) wherein the Court held that the municipal police power may not be used to protect commercial establishments from undesired competition); Fasino v. Mayor and Members of Borough Council of the Borough of Montvale, 122 N.J. Super. 304, 312 (Law Div. 1973) aff'd sub nom. 129 N.J. Super. 461 (App. Div. 1973) citing Yee Gee v. San Francisco, 235 F. 757, 763 (N.D. Cal. 1916) wherein the Court held "that a

municipality [may not] competently interfere under the guise of a police regulation with the liberty of the citizen in the conduct of his business - legitimate and harmless in its essential character - beyond a point reasonably required for the protection of the public, is too thoroughly settled to call for any extended citation of authority in its support". See also N.J.S.A. Const. art. 1, par. 1 and U.S.C.A. Const. Amend. 14, §1.

In N.J. Good Humor, the plaintiff challenged an ordinance which prohibited peddling within the municipality on the grounds that it benefited the local merchants on the basis that it was an arbitrary exercise of sovereign power. The N.J. Good Humor Court held that the police power must be exercised in the "basic interest of society rather than the mere advantage of particular individuals." N.J. Good Humor, 124 N.J.L. at 168. The N.J. Good Humor Court held that the purpose of the ordinance was to "shield the local shopkeepers from lawful competition, and thus to serve private interests in contravention of common rights." Id. at 170. Accordingly, the Court condemned the ordinance "as an **abuse** of police power". Id. at 170.

In Southland (which notably is the parent company under which 7-Eleven operates)[3], convenience store and gas station operators challenged an ordinance prohibiting their businesses from operating between the hours of 12:00 A.M. and 6:00 A.M. when other retail stores could remain open. Southland, 217 N.J. Super.

[3] See Southland, 217 N.J. Super at 160.

at 162. This was premised on the "assumption … that gasoline stations and convenience stores had higher incidences of robberies during the regulated hours than other retail businesses." Id. The plaintiffs argued that the ordinance was not reasonably related to the public's health and safety and therefore arbitrary and beyond the scope of the municipality's police power. The Southland Court found that the ordinance placed the 7-Eleven stores at a competitive **disadvantage** during the hours that they were forced to close. Id. at 165. The Southland Court also found the ordinance to be "overbroad, unreasonable and irrationally exceeds the public need." Id. at 182. Based on these findings, the Southland Court held that Edison's ordinance restricting the hours during which 7-Eleven could operate was unconstitutional as it unduly violated a citizen's right to acquire, possess and protect property. Id.

B. MC3620 Is Invalid Because It Promotes The Private Interests of a Particular Business. (PA4; 1T 6:21-8:11; 1T 18:7-21:5).

MC3620 does precisely what was prohibited by Southland, N.J. Good Humor, Hart v. Teaneck Tp., 135 N.J.L. 174, 177 (E. & A. 1947) and other cases which have addressed similar anti-competitive and overly broad exercises of police power. 7-Eleven's arguments on which it succeeded in the Southland regarding the adverse effects of being closed during the overnight hours are **identical** to SKT's claims herein. Similar to 7-Eleven arguments in the Southland case, SKT will be placed at

a competitive **disadvantage** by being closed between 11:00 P.M. and 6:00 A.M. whereas a store such as the proposed 7-Eleven for the 693 Lyons Property would be allowed to remain open 24 hours.

As admitted by the Township, MC3620 was adopted "**solely**" for 7-Eleven's benefit. By imposing the arbitrary minimum size of 2,400 square feet for a convenience store to remain open 24 hours, the Township acted to promote the private interests of 7-Eleven at the exclusion of SKT and other similar convenience stores that do not meet the arbitrarily established minimum store size. SKT and other similarly situated convenience stores have been placed at a competitive disadvantage for no reason other than the Township's desire to attract the desired 7-Eleven business to the town. Given these stark admissions by the Township coupled with the undue restrictions placed on the market competition, MC3620 is invalid as a matter of law and must be vacated in accordance with Southland, N.J. Good Humor, and Hart.

POINT III

MC3620 IS INVALID BECAUSE THERE IS NO RATIONAL BASIS TO IMPOSE A MINIMUM 2,400 SQUARE FOOT SIZE REQUIREMENT FOR STORES TO REMAIN OPEN 24 HOURS. (PA4; 1T 6:21-8:11; 1T 18:7-21:5).

While New Jersey courts have upheld ordinances which restricted hours of operations for particular businesses, the majority view is that ordinances which

restrict hours of business operation are generally invalid. Fasino, 122 N.J. Super. at 309 (closing of all businesses without regards to public health, safety, morals or general welfare is an invalid exercise of police power).

MC3620 restricts the business hours on convenience stores which have less than 2,400 square feet. There is no rhyme or reason to impose the business hours restriction on convenient stores less than 2,400 square feet. There is no additional danger to public health, safety, morals or general welfare for convenient stores with less than 2,400 square feet as opposed to convenient stores with more than 2,400 square feet. There is simply no rational basis to conclude a convenience store with 2,399 square feet poses any different danger to the public health, safety, morals or general welfare of the community where a convenient store with 2,400 square feet based on size alone. Even the Township could not assert a valid basis for this restriction. In fact, the only justification given by the Township for setting the minimum floor area was "to prevent each and every authorized retail establishment from operating twenty-four (24) hours a day, keeping the entire Township open twenty-four (24) hours a day and to allow the Township to control which retail establishments would be authorized to remain open over the course of the entire day." Pa141, ¶10. This is not a valid basis on which to exclude certain businesses from opening. Clearly, MC3620 is simply an arbitrary restriction that violates the limits of the Township's police powers and should be vacated. See Southland, N.J.

Good Humor, and Hart.

POINT IV

MC3620 IS INVALID BECAUSE IT DISCRIMINATES AGAINST OTHER CONVENIENCE STORES. (Pa4; 1T 6:21-8:11; 1T 18:7-21:5).

For an ordinance to regulate business hours, the ordinance **must** "benefit the public health, morals, safety or general welfare to pass constitutional muster under the police power." Quick Chek Food Stores v. Township of Springfield, 83 N.J. 438, 449 (1980). Ordinances restricting business hours of commercial establishment located near **residential areas** have been upheld as reasonable and related to the health, peace and comfort of those surrounding homes. Quick Chek,83 N.J. at 449. Herein, MC3620 establishes a Township wide bright line rule without any consideration of the surrounding uses.

In Quick Chek, a convenience store challenged an ordinance that no retail store in any neighborhood-commercial zone could be open between 9:00 P.M. and 6:00 A.M. except for pharmacies or restaurants. The trial court found that the narrowly crafted ordinance closing all similarly situated retail stores in neighborhood-commercial zones for the same period of time was constitutional as it was found to enhance "the health, peace and comfort of persons residing in those areas." Quick Chek, 83 N.J. at 444. The New Jersey Supreme Court affirmed the constitutionality of the ordinance on the grounds that the businesses were nestled in

a residential area and the closures benefited the public health and welfare of the residential community. Quick Chek, 83 N.J. at 449.

Both 693 Property and SKT Property are adjourning properties that abut a residential area. As such, an ordinance regulating the operating hours of businesses nestled in the residential community could be held to benefit the public health and welfare **provided** that the ordinance does not discriminate between the businesses. Hart135 N.J.L. at 177.

"Discrimination is a **fatal defect** in an ordinance." Crawford's Clothes v. Board of Com'rs of city of Newark, 131 N.J.L. 97, 98 (1944). Equal protection of the laws demands that all persons similarly situated be treated alike. N.J.S.A. Const. art. 1, par. 1 Classification cannot be arbitrary or illusory. Gundaker Central Motors, Inc. v. Gassert, 23 N.J. 71 (1956).

The Hart case recognizes that the equal protection clause is violated by an ordinance which affords different treatment to businesses of the same class. In Hart, the plaintiff challenged an ordinance which imposed hours restrictions on the operation of lunch wagons but allowed other restaurants to operate 24 hours. The plaintiff argued that the ordinance was unreasonably discriminatory against lunch wagons and thus in violation of N.J.S.A. Const. art. 1, par. 1. The Hart Court agreed, holding that lunch wagons do not differ substantially from restaurants and declared that the ordinance was invalid. Hart, 135 N.J.L. at 177 citing Crawford's Clothes,

131 N.J.L. at 97-98 wherein the Supreme Court considered a municipal ordinance which established closing hours for all retail establishments except restaurants, drug stores, delicatessen stores, etc. Newark's ordinance was declared void by the Crawford Court because the distinctions made were arbitrary. The Crawford Court also found Newark's ordinance to be invalid because, like the situation now before this Court, some of stores that were permitted to remain open sold articles which other stores closed by the ordinance ordinarily sold. This discrimination was held to be a fatal defect to Newark's ordinance. See Crawford, 131 N.J.L. at 97-98.

Similar to the Hart and Crawford, the business on the SKT Property and the proposed business on the 693 Property or any other convenience store in the Township containing 2,500 square feet are convenience stores with no discernable difference in the merchandise that they sell. In addition, the issue is further highlighted by the fact that the SKT and adjacent 693 Lyons properties are both located in the same zone and abut the same residential area. As such, **both** businesses should be subject to the same restriction of business hours to protect the health, peace and comfort of persons residing in those areas as in the Quick Chek case. See also Hart and Crawford. Anything less is discriminatory and therefore, invalid. Id.

By allowing the 7-Eleven to operate 24 hours while restricting the business hours of the convenience store on the SKT Property, the Township is shielding 7-

Eleven from lawful competition and serving the private interests of 7-Eleven. As in the N.J. Good Humor case, such a restriction is an abuse of police power.

Imposing the arbitrary 2,400 square feet minimum requirement unfairly discriminates against SKT and other convenience stores that are less than 2,400 square feet. As discrimination is a fatal defect to an ordinance, MC3620 must be declared unconstitutional and invalid. See N.J.S.A. Const. art. 1, par. 1 and U.S.C.A. Const. Amend. 14, §1

POINT V

THE TRIAL COURT'S RELIANCE ON HUTTON PARK GARDENS V. WEST ORANGE TOWN COUNCIL, 68 N.J. 543, 568 (1975) WAS MISPLACED. (Pa4).

The Trial Court's reliance on Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 568 (1975) was misplaced. The Hutton Court recognizes that an ordinance must "serve a public purpose **without arbitrariness and discrimination**." Hutton, 68 N.J. at 569.

Hutton involved a challenge to the constitutionality of a rent control ordinance which is distinguishable to the within matter. In Hutton, the issue was not whether the Township's rent control ordinance was unconstitutional on its face. Instead, the issue was whether the rent control ordinance provided a means for landlords to obtain the 'just and reasonable' return to which they were entitled. This was a question of fact, not law. While the rent control ordinance was upheld, the Hutton

Court dismissed the complaint on the grounds that the proofs in the record were insufficient on the issue of whether the ordinance provided the opportunity for a fair and reasonable return. Hutton, 68 N.J. 571.

In contrast, facts and evidence are not required to evaluate the validity of a rent control ordinance that is unconstitutional on its face. In Hutton, the Court recognized that "[u]ndoubtedly, rent control ordinances can be written which are so restrictive as to **facially** preclude any possibility of a just and reasonable return" citing cases that showed all members of industry would have to operate at a loss or that did not provide for rent increases over 14 years. See Mora v. Mejias, 223 F.2d 814 (1 Cir. 1955). The Hutton Court then distinguished that case from those which were facially invalid. Hutton, 68 N.J. 571. See also, Cromwell Assocs. v. Mayor & Council of City of Newark, 211 N.J. Super. 462, 470 (Law. Div. 1985). The Cromwell Court held that when a rent control "ordinance is so restrictive as to **facially** preclude any possibility of a just and reasonable return, a court may declare it invalid without considering the actual effect on a specified landlord." [emphasis supplied].

In contrast to the rent control ordinance at issue in Hutton, MC3620 is facially unconstitutional and should be declared invalid without the type of factual inquiry required in Hutton. The mere words on the face of MC3620 demonstrate its facially discriminatory basis.

The Trial Court failed to even address MC3620's facial invalidity and ignored the evidence that was in the record. This included the contents of MC3620 and admissions by the Township as to the basis for enacting the ordinance to satisfy 7-Eleven's demands.

In addition, the discriminatory impacts of MC3620 were highlighted by SKT's principal, Meet S. Tucker in his certification wherein he stated:

> 9. Our convenience store is not the only one I am aware of that would be hurt by Ordinance MC3620. I believe that most, if not all, of the convenience stores within Irvington that contain less than 2,400 square feet of space would suffer severe negative impacts from this discriminatory Ordinance.
>
> 10. Within close proximity to SKT's store, I am aware of 10 other stores that contain less than 2,400 square feet which I believe would also likely be hurt by the impacts of Ordinance MC3620.
>
> 11. I believe that the competitive advantage the national chains and larger convenience stores would gain under Ordinance MC3620 will only damage our ability, and the ability of other convenience stores containing less than 2,400 square feet, to compete with the national and large chain stores. The result would be to threaten the existence of SKT's business, and the business of the other stores similarly situated.

Accordingly, the Trial Court's reliance on Hutton was misplaced as Hutton addressed fact sensitive issues relating to rent control ordinance and reasonable profits as opposed to Southland, Quick Chek and Hart which are directly on point with the issues before the Court herein.

CONCLUSION

For the foregoing reasons, SKT respectfully requests this Court to prevent the Township's abuse of police power and declare the discriminatory MC3620 to be unconstitutional under N.J.S.A. Const. art. 1, par. 1 and U.S.C.A. Const. Amend. 14, §1 and therefore invalid. Accordingly, the Trial Court's decision should be reversed and MC3260 be vacated.

Respectfully submitted,
The Turteltaub Law Firm LLC
Attorneys for Appellant
SKT Management, LLC

/s/ James M. Turteltaub
JAMES M. TURTELTAUB, ESQ.

Dated: January 2, 2025
Amended January 16, 2025
Second Amendment February 21, 2025

SKT MANAGEMENT LIMITED LIABILITY COMPANY, Applicant, v. TOWNSHIP OF IRVINGTON and THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF IRVINGTON, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A- 000528-24 T2 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NOS. ESX-L-8690-17 and ESX-L-8306-18 Sat Below: Hon. Thomas R. Vena, J.S.C.
SKT MANAGEMENT LIMITED LIABILITY COMPANY, Plaintiff, v. 693 LYONS AVENUE – IRVINGTON HOLDING, LLC, THE PLANNING BOARD OF THE TOWNSHIP OF IRVINGTON, AND JOSEPH AND PATRICIA TSE Respondents.	

BRIEF OF DEFENDANTS/RESPONDENTS, TOWNSHIP OF IRVINGTON, THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF IRVINGTON AND THE PLANNING BOARD OF THE TOWNSHIP OF IRVINGTON

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PRELIMINARY STATEMENT

SKT Management, LLC ("Plaintiff-Appellant") is the owner and operator of a gasoline service station and convenience store located in the Township of Irvington ("Township or Defendant-Respondent Township"). Plaintiff-Appellant has filed this appeal from the Trial Court's determination upholding the validity of Ordinance MC 3620 ("Ordinance") that was adopted by the Township and that requires all stores, establishments, or places of business for the sale of meats, groceries or provisions for consumption off the premises to be closed between the hours of 11:00 p.m. and 6:00 a.m. The Ordinance provides an exception for convenience stores that are a minimum of two thousand four hundred (2400) total square feet and that are designed with certain specified security characteristics set forth in the Ordinance. Plaintiff-Appellant's convenience store is smaller than the minimum required under the Ordinance.

The Trial Court, recognizing that municipal ordinances are presumed valid and that a plaintiff must meet a heavy burden to overturn an ordinance, correctly held that the Plaintiff-Appellant failed to meet its heavy burden and concluded that there was insufficient evidence to support Plaintiff-Appellant's allegation that the Ordinance was enacted solely to promote the interests of another convenience store operator. Rather, the Trial Court found that the Ordinance was a proper exercise of the Township's police power, under N.J.S.A. 40:48-2, was created to lure businesses

into the Defendant-Respondent Township, was enacted after thorough research with the public safety in mind and contained an adequate factual basis to support the adoption of the Ordinance.

The Defendant-Respondent Township's adoption of the Ordinance was a proper exercise of its police power, and it must be upheld. The Ordinance was developed after careful consideration and research to achieve the goal of incentivizing certain retail establishments to become interested in the reinvestment and redevelopment of the afore the overall public good while, at the same time, accounting for the detriments that could befall the public welfare by allowing every retail establishment in the Defendant-Respondent Township to be open on a twenty-four (24) hour schedule. The Ordinance simply places reasonable conditions on establishments to operate on a twenty-four (24) hour basis.

The Ordinance provides a rational basis for the two thousand four hundred minimum (2,400) square foot size requirement and is a valid exercise of the police power for the benefit of public health, safety, morals and/or general welfare of the Defendant-Respondent Township's residents. Accordingly, for the reasons that follow, it must be upheld.

PROCEDURAL HISTORY

On or about December 8, 2017, Plaintiff-Appellant filed a Complaint In Lieu of Prerogative Writs against the Defendant-Respondent Township of Irvington and

the Municipal Council of the Township of Irvington Township or Defendant-Respondent Township Council challenging the adoption of Ordinance MC 3620 ("Ordinance"), which amended the Township Code to allow convenience stores containing a gross floor area of over two thousand four hundred (2,400) square feet to remain open for twenty-four (24) hours a day, as arbitrary, capricious, invalid and unreasonable (the "Ordinance Action"). Pa21. The Defendant-Respondent Township filed its answer to the complaint in the Ordinance Action on January 18, 2019. Pa43.

On or about November 26, 2018, Plaintiff-Appellant filed a Complaint In Lieu of Prerogative Writs against 693 Lyons Avenue-Irvington Holding, LLC ("693 Lyons") and the Planning Board of the Township of Irvington ("Defendant-Respondent Board") challenging the Defendant-Respondent Board's approval of a site plan application that had been filed by 693 Lyons (the "Site Plan Action"). Pa253. 693 Lyons filed its answer to the complaint on January 16, 2019. Pa335. The Defendant-Respondent Board filed its answer in the Site Plan Action on January 10, 2019. Pa285.

On February 26, 2019, the Court granted the Defendant-Respondent's and Defendant-Respondent Board's motion to consolidate the Ordinance Action and the Site Plan Action. Pa385.

Thereafter, Plaintiff-Appellant and the Defendant-Respondent Township filed cross-motions for partial summary judgment in the Ordinance Action. Pa62; Pa133. On May 26, 2020, the Court entered two (2) Orders, one Order granted the Defendant-Respondent Township's motion for partial summary judgment and dismissed the Ordinance Action, Pa11, the other denied Plaintiff-Appellant's motion for summary judgment. Pa1.

A Consent Order was entered on September 13, 2024 resolving the remaining Site Plan Action and finally resolving these consolidated matters. Pa532.

On October 23, 2024, Plaintiff-Appellant filed its Notice of Appeal from the Court's decision in the Ordinance Action. Pa542. On November 5, 2024, Plaintiff-Appellant filed an amended Notice of Appeal. Pa540. On January 15, 2025, Plaintiff-Appellant filed a second (2nd) Amended Notice of Appeal. Pa569.

STATEMENT OF FACTS

A. The Ordinance

On September 26, 2017, the Township adopted the Ordinance, which amended and supplemented the Township Code regarding the hours of operation for retail food establishments. Pa37-38. The Ordinance required that all stores, establishments or places of business for the sale of meats, groceries or provisions for consumption off the premises must be closed between the hours of 11:00 p.m. and 6:00 a.m. Id. The Ordinance provides an exception for convenience stores that had

a minimum of two thousand four hundred (2,400) total square feet and that are designed with certain specified security characteristics set forth in the Ordinance. Id. The Ordinance further provides that these establishments are "either otherwise regulated by law, deemed to involve minimal nuisance characteristics, necessary to the public health, safety, welfare or convenience, or some combination of the foregoing . . ." Id.

The purpose of the Ordinance was to increase the protection of persons and property in the Township and to further preserve of the public health, safety and welfare of the Township and its inhabitants, while providing residents with the convenience of twenty-four (24) hours of operation of those certain retail establishments. Pa141. The Ordinance further increases certain security requirements to those establishments that are eligible to and choose to be open twenty-four (24) hours a day, by increasing lighting requirements and requiring additional employees for the protection of persons and property in the Township and to further preserve of the public health, safety and welfare of the Township and its inhabitants. Pa141-42. "The purpose of setting a minimum number of square feet was to prevent each and every authorized retail establishment from operating twenty-four (24) hours a day, keeping the entire Township open twenty-four (24) hours a day and to allow the Township to control which retail establishments would be authorized to remain open over the course of the entire day." Id.

The Ordinance was based on the recommendations made by the Defendant-Respondent Township's Redevelopment Committee, Legal Committee and its Department of Community Development. Id. Indeed, upon becoming aware that the Township's restrictions on the hours of operation might be preventing certain retail establishments from investing in the Township's redevelopment, the Defendant-Respondent Township thoroughly analyzed the issue so that certain retail establishments would become interested in the reinvestment and redevelopment of the Defendant-Respondent Township. Id. At the same time, Defendant-Respondent Township officials took serious look at the issue of what would happen if every retail establishment in the Township were authorized to be open on a twenty-four (24) hour schedule. Id. In doing so, Defendant-Respondent Township officials analyzed surrounding municipalities and reviewed those municipalities' hours of operation ordinances. Id. As such, based upon their experience and familiarity with the Township and the analysis made by the Defendant-Respondent Township's various departments and committees, it was the Defendant-Respondent Township's reasonable determination to include in the Ordinance a requirement that convenience stores would be authorized to operate on a twenty-four (24) hour a day schedule as long as they contains a minimum of two thousand four hundred (2,400) square feet and met the security restrictions.

B. The Trial Court Decision

The Trial Court recognized that municipal ordinances are presumed valid and that a plaintiff must meet a heavy burden to overturn an ordinance. See Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564 (1975). Pa18. The Trial Court held that the Plaintiff-Appellant failed to meet that burden. Pa19. In this regard, the Trial Court stated as follows:

> [T]here is evidence - though not extensive - that the Ordinance was created to lure businesses into [the (]. Furthermore, there is evidence that the Ordinance was enacted after thorough research, and with public safety in mind. Although it may negatively affect similarly situated businesses, the Court holds that the record contains an adequate factual basis to support the Irvington Defendants' argument.

Id.

Finally, the Trial Court concluded that there was insufficient evidence to support Plaintiff-Appellant's position that the Ordinance was enacted solely to promote the interests of 693 Lyons, as Plaintiff-Appellant continues to maintain here on appeal. Id.

LEGAL ARGUMENT

POINT I

THE TOWNSHIP'S ADOPTION OF THE ORDINANCE WAS A PROPER EXERCISE OF ITS POLICE POWER

The Ordinance was adopted pursuant to the Township's statutory police powers. N.J.S.A. 40:48-2 provides as follows:

> Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, **as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants**, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

(Emphasis added).

This express delegation of police power to a municipality is reinforced by the constitutional provision that "any law concerning municipal corporations ... shall be liberally construed in their favor." N.J. Const. (1947), Art. IV, § VII, par. 11; Hudson Circle Servicenter, Inc. v. Kearny, 70 N.J. 289, 298 (1976); Divan Builders, Inc. v. Wayne Tp. Planning Board, 66 N.J. 582, 595 (1975). Moreover, ordinances are presumed valid and reasonable. The burden of proof to establish that they are arbitrary and unreasonable rests on the party seeking to overturn them. Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564 (1975). "The presumption

may be overcome only by a clear showing that the local ordinance is arbitrary or unreasonable." Hudson Circle Servicenter, Inc., supra, at 298-299 (citations omitted).

The underlying policy and wisdom of ordinances are the responsibility of the governing body and if any state of facts may reasonably be conceived to justify the ordinance, it will not be set aside. Lehrhaupt v. Flynn, 140 N.J. Super. 250, 266 (App. Div. 1976), *aff'd o.b.* 75 N.J. 459 (1978); Little Falls Tp. v. Husni, 139 N.J. Super. 74, 80 (App. Div. 1976); Hutton Park Gardens, supra, at 564-565. Thus, municipalities may enact regulatory ordinances on any subject matter of local concern that is reasonably related to a legitimate object of public health, safety or welfare, provided that the State has not preempted the field. See N.J. Builders Ass'n v. E. Brunswick Tp., 60 N.J. 222, 227 (1972); Overlook Terrace Management Corp. v. W. New York Rent Control Bd., 71 N.J. 451, 460-462 (1976); Summer v. Teaneck Tp., 53 N.J. 548, 552-555 (1969); Lehrhaupt, supra, at 259.

"The subject matter of the police power includes the authority to restrict business hours of retail establishments." See Quick Chek Food Stores v. Township of Springfield, 83 N.J. 438, 448 (1980). In Quick Chek, supra, a convenience store chain challenged an ordinance that required all retail establishments to be closed between 9:00 p.m. and 6:00 a.m. of the next day in any Neighborhood-Commercial (N-C) zone, except for pharmacies or restaurants. The Court held that the ordinance

was a constitutional exercise of the municipality's police power as it was related to the health, peace and comfort of those surrounding homes and furthered the public health and welfare of the residential community. Id. at 449. In so holding, the Court stated as follows:

> It is not an appropriate judicial function for us to question the wisdom of the Township Committee in enacting this ordinance under its general police power authority; nor to determine whether its aim could have been accomplished in some other manner. Plaintiff has failed to meet its burden of clearly demonstrating that the ordinance is arbitrary and unreasonable and does not advance the protection of the residential character of the area adjacent to the N-C zone.

Id. at 450.

In Quick Chek, supra, the plaintiff, as Plaintiff-Appellant also does here, argued that it was being discriminated against because drug stores, restaurants and non-retail establishments were not subject to the ordinance's closing hours. Id. at 451. In this regard, the Court found that the plaintiff had not produced any proof to overcome the presumption of validity, "to dispel any conceivable state of facts affording a just ground for the action stated or to establish that the classification does not rest on some ground or difference related to the object of the legislation." Id.

Other ordinances regulating hours of businesses have been consistently upheld by the Courts for a variety of businesses. See, e.g., Dock Watch Hollow Quarry Pit, Inc. v. Warren Tp., 142 N.J. Super. 103, 123 (App. Div. 1976), *aff'd o.b.*

74 N.J. 312 (1977) (quarry); Little Falls Tp. v. Husni, 139 N.J. Super. 74 (App. Div. 1976) (laundromat); Cranberry Lake Quarry Co. v. Johnson, 95 N.J. Super. 495, 512, *certif. denied* 50 N.J. 300 (1967) (quarry); Starkey v. Atlantic City, 132 N.J.L. 27 (1944) (drug store); Spiro Drug Service, Inc. v. Union City, 130 N.J.L. 1 (1943), *aff'd o.b.* 130 N.J.L. 496 (E. & A. 1943) (drug store); Richman v. Newark, 122 N.J.L. 180 (1939) (grocery store); Wagman v. Trenton, 102 N.J.L. 492 (1926) (auction sale of jewelry); Mister Softee v. Hoboken, 77 N.J. Super. 354, 370-375 (Law Div. 1962) (peddler prohibited from selling near schools between 8:30 a.m. and 3:30 p.m. and in residential zones after 9 p.m.); *Cf.* Vornado, Inc. v. Hyland, 77 N.J. 347 (1978) (upholding Sunday Closing Law, N.J.S.A. 2A:171-5.8 *et seq*. pursuant to which certain commercial businesses were forced to close on Sundays); Amodio v. W. New York, 133 N.J.L. 220 (1945) and Falco v. Atlantic City, 99 N.J.L. 19 (1923) (hours regulation of barber shops where expressly authorized by state statute).

However, an ordinance regulating business hours must tend to benefit the public health, morals, safety or general welfare to pass constitutional muster under the police power. 7 McQuillan, Municipal Corporations (3 ed. Latta 1968), § 24.330 at 222. Further, a police regulation may not impose an unnecessary, unreasonable and arbitrary restriction having no relation to the public interest. See Hart v. Teaneck Tp., 135 N.J.L. 174 (E. & A. 1947) (restricting hours of lunch wagons, but not other restaurants); Dock Watch Hollow Quarry Pit, Inc., supra, 142 N.J. Super. at 122

(although limiting daily operations to nine (9) hours is valid, restriction of that period to certain time of the day is arbitrary in view of industry practice).

In Point II of its brief, Plaintiff-Appellant argues that the Defendant-Respondent Township's adoption of the Ordinance was an improper exercise of its police power and is invalid because it purportedly promotes the private interests of a particular business. Specifically, Plaintiff-Appellant maintains that by requiring a minimum size of two thousand four hundred (2,400) square feet for a convenience store to remain open twenty-four (24) hours, the Defendant-Respondent Township acted to promote the private interests of 693 Lyons, which was seeking to establish a 7-Eleven on the site, at the exclusion of Plaintiff-Appellant and other similar convenience stores that do not meet the minimum store size. However, the Trial Court correctly concluded that there was insufficient evidence to support Plaintiff-Appellant's position that the Ordinance was enacted solely to promote the interests of 693 Lyons. Pa19. Rather, the Trial Court found that the Ordinance was created to lure businesses into the Township, that it was enacted after thorough research, with public safety in mind and that the record contained an adequate factual basis to support the Ordinance. Id.

At the trial level, Plaintiff-Appellant failed to present any evidence that the Defendant-Respondent Township Council was somehow manipulated into passing the Ordinance solely for the benefit of 693 Lyons. Nor did Plaintiff-Appellant

present any evidence that the Ordinance does not serve the public health, safety, welfare and/or morals of the Defendant-Respondent Township or that the Ordinance is not reasonably calculated to fulfill a legitimate legislative objective.

Plaintiff-Appellant's argument misconstrues the nature and purpose of the Ordinance and the power that is delegated to the Defendant-Respondent Township, pursuant to N.J.S.A. 40:48-2. Upon becoming aware that the Township's restrictions on the hours of operation may be preventing certain retail establishments from investing in the Township's redevelopment, the Defendant-Respondent Township thoroughly analyzed the issue so that such retail establishments would become interested in the reinvestment and redevelopment of the Defendant-Respondent Township. At the same time, Defendant-Respondent Township officials were concerned about the public health, safety and general welfare implications if every retail establishment in the Defendant-Respondent Township were authorized to be open on a twenty-four (24) hour schedule. Accordingly, Defendant-Respondent Township officials analyzed surrounding municipalities and reviewed those municipalities' hours of operation ordinances and, based upon that research and their experience and familiarity with the Defendant-Respondent Township, it was determined to include in the Ordinance a requirement that convenience stores would be authorized to operate on a twenty-four (24) hour a day schedule, so long as they contain a minimum of two thousand four hundred (2,400) square feet and met the

security restrictions of the Ordinance. As such, the Defendant-Respondent Township was not arbitrary, capricious or unreasonable in its determination to pass the Ordinance.

Plaintiff-Appellant argues that the Ordinance is invalid as a matter of law and must be vacated. However, Plaintiff-Appellant's strong reliance on N.J. Good Humor, Inc. v. Board of Com'rs of Borough of Bradley Beach, 124 N.J.L. 162 (E. & A. 1939), Southland Corp. v. Edison Township, 217 N.J. Super. 158 (Law Div. 1986) *aff'd o.b.* 220 N.J. Super. 294 (App. Div. 1987), and Hart v. Teaneck Tp., 135 N.J.L. 174 (E. & A. 1947) is misplaced.

In N.J. Good Humor, supra, the Court invalidated an ordinance that prohibited peddling in the municipality. The Court's decision was based on its finding that the stated purpose of the ordinance was to shield local shopkeepers from competition and, therefore, served private interests as opposed to the common good. N.J. Good Humor, 124 N.J.L. at 171. The Court determined that this motivation for the ordinance "constitutes an arbitrary use of sovereign power." Id. at 168.

N.J. Good Humor is inapposite. The ordinance in question in N.J. Good Humor represented an outright ban of a certain type of business to protect local shopkeepers. In the present case, the Ordinance simply restricts certain businesses from operating on a twenty-four (24) hour basis unless they meet the minimum floor area and security requirements, as set forth in the Ordinance. The purpose of the

Ordinance at hand was to increase the protection of persons and property in the Township and to further preserve of the public health, safety and welfare of the Township and its inhabitants while providing residents with the convenience of twenty-four (24) hours of operation of those certain retail establishments. Pa141. "The purpose of setting a minimum number of square feet was to prevent each and every authorized retail establishment from operating twenty-four (24) hours a day, keeping the entire Township open twenty-four (24) hours a day and to allow the Defendant-Respondent Township to control which retail establishments would be authorized to remain open over the course of the entire day." Id. The purpose of the Ordinance was not to protect a certain class of business from competition.

Hart v. Teaneck Tp., supra, involved the review of an ordinance that restricted the hours of operation of lunch wagons. The Court determined that there was no discernable difference between lunch wagons and restaurants in general, which made the distinction arbitrary. Hart v. Teaneck Tp., 135 N.J.L. at 178. In this regard, the Court stated that "[t]he instant ordinance is discriminatory and unreasonable in failing to include within its terms other establishments in the nature of restaurants." Id.

Unlike the ordinance in question in Hart, supra, in this case, the Ordinance does not make an arbitrary distinction between businesses of the same type but requires that those businesses meet certain criteria to operate on a twenty-four (24)

hour basis. These criteria were developed after careful consideration and research to achieve the goal of incentivizing certain retail establishments to become interested in the reinvestment and redevelopment of the Township for the overall public good while, at the same time, accounting for the detriments that could befall the public welfare by allowing every retail establishment in the Township to be open on a twenty-four (24) hour schedule.

In Southland, supra, retail gasoline station operators, oil companies and the operator of convenience stores brought an action to challenge the constitutionality of an ordinance that required retail businesses to close between 12:00 a.m. and 6:00 a.m. The stated purpose of the ordinance was to address a recent spate of robberies and violent crime that included murders and specifically targeted gas stations and convenience stores while allowing other retail establishments to remain open. 217 N.J. Super. at 162. In invalidating the ordinance, the Court noted that "[t]he [Municipal] Council intended, from the beginning of their consideration of the ordinance, to close gas stations and convenience stores, allowing all other retail operations to stay open." Id. However, with respect to convenience stores the Court found that the municipality had "no special problem with armed robbery or other violent crimes . . . from midnight to 6:00 a.m." Id. at 176. With respect to gas stations, although the Court found that the evidence showed that there was an issue

with respect to armed robberies and other violent crimes but that the legislative measure exceeded the public need. Id. at 179.

In Southland, supra, the Court held that the ordinance in question was unconstitutional as written but that "**[t]here was a sufficient public need to justify a regulatory ordinance**, however, the complete prohibition against business during the hours of midnight and 6 a.m. is overbroad, unreasonable and irrationally exceeds the public need." 217 N.J. Super. at 182. (Emphasis added). In this regard, the court took judicial notice of ordinances from surrounding municipalities that had addressed the problem of violent crime in the area in the wake of two homicides. Id. at 181. In doing so, the Court found that, while those ordinances also required that commercial establishments be closed during certain nighttime hours, they had exceptions for those establishments that met specified criteria such as having a minimum number of employees on duty, security devices and security officers. Id.

Similarly, the Ordinance in question does not represent a complete prohibition against businesses operating during the nighttime hours. Rather, like the other ordinances reviewed by the court in Southland, supra, this Ordinance places reasonable conditions on establishments to operate on a twenty-four (24) hour basis. There is a sufficient need to justify for a regulatory ordinance, such as the Ordinance, that does not outright prohibit retail establishments from operating.

Finally, as the Trial Court in the present case recognized, Southland, supra, is distinguishable from this matter. In this regard, the Trial Court stated as follows:

> The clear distinction between this case and Southland is the amount of evidence that corroborated the plaintiffs' allegation that Edison was acting unreasonably and enacted an ordinance that went well-beyond public need. Here, Plaintiff's allegations may be true: the Irvington Defendants' acted only to promote 693 Lyons' interests and smaller convenience stores will suffer. However, there is simply insufficient evidence to support this position.

Pa9.

The Defendant-Respondent Township's adoption of the Ordinance was a proper exercise of its police power, and it must be upheld.

POINT II

THE ORDINANCE'S TWO THOUSAND FOUR HUNDRED (2400) SQUARE FOOT SIZE REQUIREMENT DOES NOT LACK A RATIONAL BASIS

In Point III of its brief, Plaintiff-Appellant argues that the Ordinance is invalid because its two thousand four hundred (2400) square foot size requirement lacks any rational basis. Plaintiff-Appellant premises this argument on its assertion that "[t]here is no additional danger to public health, safety, morals or general welfare for convenient stores with less than two thousand four hundred (2400) square feet as opposed to convenient stores with more than two thousand four hundred (2400) square feet." Pb20. However, safety to the public is only one consideration when

deciding to enact local legislation that is in the interest of the overall general welfare. Indeed, the overriding purpose of the Ordinance was to encourage investment in the Township's redevelopment by the types of retail establishments that could "provide [Township] residents access to the not only convenience, but sometimes required, products without jeopardizing the order and protection of persons and property in [the Township] and to preserve the public health, safety and welfare of the Township . . . and its residents." Pa141. While safety is a factor, it is not the only consideration.

The Defendant-Respondent Township's desired objective was to balance the competing interests of attracting businesses that provide products that its residents need "without keeping the entire Township open twenty-four (24) hours a day and to allow the Defendant-Respondent Township to control which retail establishments would be authorized to remain open over the course of the entire day." Id. The Ordinance's minimum floor area requirement is relevant to this objective because larger retail establishments would be more capable of providing the larger array of products that may be required by the Township's residents.

The Ordinance in question provides a rational basis for the two thousand four hundred (2400) square foot size requirement and is a valid exercise of the police power for the benefit of public health, safety, morals and/or general welfare of the Township's residents. Accordingly, it must be upheld.

POINT III

THE ORDINANCE DOES NOT UNFAIRLY DISCRIMINATE AGAINST PLAINTIFF-APPELLANT AND OTHER CONVENIENCE STORES

In Point IV of its brief, Plaintiff-Appellant argues that the Ordinance is invalid because it purportedly discriminates against Plaintiff-Appellant and other convenience stores. Plaintiff-Appellant relies on Hart v. Teaneck Tp., supra and Crawford's Clothes v. Board of Com'rs of City of Newark, 131 N.J.L. 97 (1944). Both cases are inapposite.

As stated above, unlike the ordinance in question in Hart, supra, which restricted the hours of operation of lunch wagons but not restaurants in general, the Ordinance in this case does not make an arbitrary distinction and discriminate between businesses of the same type but requires that those businesses meet certain criteria to operate on a twenty-four (24) hour basis. These criteria were developed after careful consideration and research to achieve the goal of incentivizing certain retail establishments to become interested in the reinvestment and redevelopment of the Township for the overall public good while at the same time, accounting for the detriments that would befall the public welfare by allowing every retail establishment in the Township to be open on a twenty-four (24) hour schedule.

In Crawford's, supra, the Court considered the validity of an ordinance that restricted the hours of operation of all retail establishments. The ordinance exempted

restaurants, taverns, drugstores, delicatessen stores, liquor stores, gasoline stations, lending libraries, private schools, movie houses and theatres. Crawford's Clothes v. Board of Com'rs of City of Newark, Id at 97. In declaring the ordinance invalid, the Court stated as follows:

> We see no basis in law or in the evidence presented in this case for the distinction made in the exemptions from the operation of the ordinance above enumerated. It is not pointed out why it is proper to prohibit the sale of clothing and permit the sale of stationery supplies, to prohibit the sale of shoes and permit the sale of gasoline, to prohibit the sale of hats and permit the sale of liquor. The distinction sought to be made is arbitrary and clearly discriminatory.

Id. at 98.

Here, the Ordinance in question does not make an arbitrary distinction and discriminate between types of businesses. The Ordinance merely places certain reasonable requirements on retail food establishments if they are to remain open for twenty-four (24) hours. Convenience stores that meet the criteria set forth in the Ordinance are permitted to do so. The Ordinance does not discriminate against Plaintiff-Appellant and/or any other convenience stores.

POINT IV

THE TRIAL COURT'S RELIANCE ON HUTTON PARK GARDENS V. WEST ORANGE TOWN COUNCIL, 68 N.J. 543 (1975) WAS NOT MISPLACED

In Point V of its brief, Plaintiff-Appellant maintains that the Trial Court's reliance on Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543 (1975) was misplaced. In Hutton, supra, the Court considered the constitutionality of two (2) rent control ordinances. In upholding the constitutionality of the ordinances, the Court espoused certain precepts regarding the review of municipal legislation as follows:

> Municipalities have the power and authority to enact ordinances in support of the police power. Municipal ordinances, like statutes, carry a presumption of validity. The presumption is not an irrebuttable one, but it places a heavy burden on the party seeking to overturn the ordinance. Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience. This presumption can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest. The judiciary will not evaluate the weight of the evidence for and against the enactment nor review the wisdom of any determination of policy which the legislative body might have made.

Id. at 564-65. (Citations omitted).

In Hutton, supra, the Court found that the plaintiffs had failed to produce any evidence to meet their burden of proof to overcome the ordinances' presumption of validity. Id. at 565. Likewise, in the present case, the Trial Court found that there

was insufficient evidence to support Plaintiff-Appellant's position that the Ordinance was enacted solely to promote the interests of 693 Lyons. Pa19. The Trial Court's reliance on Hutton, supra, was related to the general precepts stated above and the lack of evidence to support Plaintiff-Appellant's claims.

Plaintiff-Appellant goes through great pains to distinguish Hutton on the basis that it did not involve a facial constitutional challenge, as Plaintiff-Appellant maintains is the case in this matter, but, instead, involved a factual inquiry into "whether the rent control ordinance provided a means for landlords to obtain the 'just and reasonable' return to which they were entitled." Pb24. Plaintiff-Appellant argues that "facts and evidence are not required to evaluate the validity of [an] ordinance that is unconstitutional on its face." Pb25. Yet, thereafter, Plaintiff-Appellant states that "[t]he Trial Court failed to even address [the Ordinance]'s facial invalidity and ignored **the evidence that was in the record**. This included the contents of [the Ordinance] and **admissions by the Township as to the basis for enacting the ordinance to satisfy 7-Eleven's demands**." Pb26. (Emphasis added). The issue regarding the purported "admissions by the Defendant-Respondent Township" represent factual inquiries in and of themselves that the Trial Court found lacking in support. The evidence, or lack thereof, that was placed on the record was very relevant to the Trial Court's determination as to the validity of the Ordinance.

To assess the validity of the Ordinance, it was necessary for the Trial Court to examine fact sensitive issues, such as whether the Ordinance was enacted to serve solely private interests and what the intent and purpose of the Ordinance is so that the Trial Court could determine whether there was an adequate factual basis to support the Ordinance or if it went beyond what was necessary to achieve its stated goal.

The Trial Court's reliance on Hutton Park Gardens v. West Orange Town Council, supra, was not misplaced and, in accordance with same, the Trial Court properly determined that there was a factual basis to support the Ordinance and that there was a lack of evidence regarding Plaintiff-Appellant's heavy burden to overcome the presumption of validity of said Ordinance.

CONCLUSION

For all of the foregoing reasons and without repeating at length, the Defendant-Respondent respectfully submits that the Trial Court's decision must be affirmed, and Plaintiff-Appellant's appeal must be dismissed in its entirety with prejudice as to said Ordinance.

Eric M. Bernstein & Associates, L.L.C.

Attorneys for Defendant-Respondents, Township of Irvington and the Municipal Council of the Township of Irvington

By: *Eric M. Bernstein*

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NJ Bar ID #014001982

Dated: May 7, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SKT MANAGEMENT LIMITED LIABILITY COMPANY, Plaintiff, v. TOWNSHIP OF IRVINGTON and THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF IRVINGTON Defendants.	APPEAL NO. A-000528-24 T2 **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO. ESX-L-8690-17 **SAT BELOW:** HON. THOMAS R. VENA, J.S.C.
SKT MANAGEMENT LIMITED LIABILITY COMPANY Plaintiff, v. 693 LYONS AVENUE-IRVINGTON HOLDING, LLC, THE PLANNING BOARD OF THE TOWNSHIP OF IRVINGTON, TSE, JOSEPH AND TSE, PATRICIA Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO. ESX-L-8306-18

PLAINTIFF'S/APPELLANT'S REPLY BRIEF

JUNE 10, 2025

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REPLY PRELIMINARY STATEMENT

The gravamen of SKT Management, LLC's ("**SKT**" or "**Appellant**") appeal is whether the Township of Irvington's (the "**Township**") Ordinance MC3620 is an abuse of police power by imposing a minimum size requirement for a convenience store to remain open twenty-four (24) hours. SKT asserts that the minimum size requirement does not directly or remotely benefit the public health, safety or general welfare, and thus Ordinance MC3620 is an abuse of police power and unconstitutional.

The Township admits that the purpose of Ordinance MC3620 is to lure new convenience stores such as the 7-Eleven into the Township and acknowledges the importance to a convenience store of being able to operate 24 hours. Shockingly, the Township further admits that the purpose of setting the minimum size was "to **prevent** each and every authorized retail establishment from operating twenty-four (24) hours a day" and "to **control** which retail establishments would be authorized to remain open over the course of the entire day". (emphasis supplied). Pa141. By its own admissions, the Township is discriminating against the smaller, local convenience stores such as SKT in order to attract the larger, national chains such as 7-Eleven.

By creating an unfair competitive advantage for 7-Eleven and other large national chains, Ordinance MC3620 would be detrimental to SKT's business and to

similarly smaller convenience stores, as certified to by SKT's Manager member. Pa247.

There is no reasonable justification to impose a minimum two thousand four hundred (2,400) square feet size requirement for a convenience store to safely operate twenty-four (24) hours. It is antithetical that a 2,399 square foot convenience store that may have **superior** security measures would **not** be allowed to operate 24 hours whereas a 2,400 square foot convenience store with **standard** security measures would be allowed to operate 24 hours. Moreover, the Township should not be permitted to "control" the competition by allowing some convenience stores to remain open while similar convenience stores are forced to close. Such a result would be clearly unfair and against the Equal Protection clause of the New Jersey Constitution. N.J.S.A. Const. art. 1, par. 1. As discrimination is a fatal defect to an ordinance, Ordinance MC3620 must be declared unconstitutional and invalid.

POINT I

BY REGULATING BUSINESS HOURS BASED ON BUILDING SIZE, ORDINANCE MC3620 FAILS TO PASS CONSTITUTIONAL MUSTER UNDER THE POLICE POWER.

"[A]n ordinance regulating business hours must tend to benefit the public health, morals, safety or general welfare to pass constitutional muster under the police power." Quick Chek Food Stores v. The Township of Springfield, 83 N.J. 438 (1980). The Township attempts to justify its regulation of business hours because it

was concerned about having too many businesses open overnight that it would have to police and thus would be a safety issue. The Township's rationale has long been settled as being an arbitrary, capricious and unreasonable basis to shutter businesses. See Fasino v. Mayor and Members of Borough Council of Montvale, 122 N.J. Super. 304, 316-17 (Law Div. 1973).

> It is one of the prime duties of governments to provide police protection. There is **no justification** for closing otherwise harmless businesses because the community otherwise may be forced to expend additional resources to provide adequate protection.

Fasino, 122 N.J. Super. at 316 [emphasis supplied].

In Fasino, owners of a 7-Eleven store challenged an ordinance requiring closing of all businesses overnight. The Borough of Montvale attempted to justify its closing ordinance on the municipality's inability to provide adequate police coverage for plaintiffs' store during the late night and early morning hours. Id. at 316. The Borough alleged that "the incidence of crime is greatest during such hours" and that it only had two police officers on duty the overnight hours. Id. at 316. As a result, the Borough claimed it was "unable to adequately cope with the problem of crime and adequately provide coverage for the shopkeeper, customer and homeowner." Id. at 316.

The Fasino Court flatly rejected the Borough's justification as being "fallacious". Id. at 316. In reaching this decision, the Fasino Court relied on a Kentucky decision, Jackson v. Murray-Reed-Sloane & Co., 178 S.W.2d 847, 848

(Ky.Ct.App.1944) which addressed the municipality's claim that it was unable to provide the necessary police protection between midnight and 4 a.m. The Kentucky Court noted that the business involved was a restaurant which "has no potential influences detrimental to public morals, but it is a useful and necessary business properly operated and [the Court was] unable to see how the closing of it between midnight and 4 A.M. would affect the health, morals, safety or welfare of the citizens of Jackson." Id. at 317. The Fasino Court also quoted the Jackson decision's holding that "[t]he fact that the city may have to go to more expense in policing the town at night should business be transacted at late hours is no reason for sustaining the ordinance. It might as well be said that an ordinance closing a respectable mercantile establishment during the afternoon hours would be constitutional because such a business attracts crowds into the town which require more policemen to handle when such a house is operating than when it is closed." Id. at 317 [1]

In support of Ordinance MC3620, the Township claims "safety" is a factor to

[1] Although a Law Division opinion, Fasino has been cited by the Appellate Division and New Jersey Supreme Court. Cf. State v. Lenihan, 427 N.J. Super. 499, 506 (App. Div. 2012), aff'd, 219 N.J. 251 (2014); Hudson Circle Servicenter, Inc. v. Town of Kearny, 70 N.J. 289, 307 (1976); Dock Watch Hollow Quarry Pit, Inc. v. Warren Twp., 142 N.J. Super. 103, 122, 23 (App. Div. 1976), aff'd, 74 N.J. 312 (1977); Little Falls Twp. v. Husni, 139 N.J. Super. 74, 82 (App. Div. 1976). In addition, see also Law Division citations in Bonito v. Mayor & Council of Bloomfield Twp., 197 N.J. Super. 390, 401 (Law. Div. 1984); Tomasi v. Wayne Twp., 126 N.J. Super. 169, 177 (Law. Div. 1973).

justify closing the smaller convenience stores. As the Fasino Court makes clear, the Township has an **obligation** to provide police protection. There is no justification to close the smaller convenience store simply because the Township does not want the obligation to police all convenience stores that may wish to remain open. If the Township deems having convenience stores open 24 hours is a risk to the public health safety and welfare, then all convenience stores should be closed. If having convenience stores open 24 hours is NOT a risk to public health, safety and welfare, then all convenience stores should have the opportunity to remain open. Allowing larger convenience stores to remain open under the pretext of "safety" is simply discrimination.

Besides minimum size restriction, Ordinance MC3620 requires the convenience stores to have certain security features such as a security camera system, silent "hold-up" alarms, and a door signaling system. SKT is not challenging these restrictions as they are reasonable restrictions related to public health, safety or general welfare.

POINT II

SIZE OF CONVENIENCE STORE HAS NO RATIONAL BASIS TO THE PUBLIC HEALTH, SAFETY & WELFARE.

In contrast to the security requirements, the minimum size requirement of MC 3620 has absolutely no rational basis to public health, safety and welfare. The

Township attempts to justify Ordinance MC3620 on the basis that it wants to **control** which convenience stores would be authorized to remain open 24 hours without keeping the entire Township open 24 hours. Db19. The feeble justification that the Township offers is that "larger retail establishments would be more capable of providing the larger array of products that may be required by the Township's residents." Db19.

A "larger array of products" simply does not meet the high standard of providing for the public health, safety and welfare. It is possible that a 2,399 square foot convenience store could carry a "larger array of products" than a 2,400 square foot convenience store. Yet, the 2,399 square foot convenience store is prohibited from staying open 24 hours whereas the 2,400 square foot convenience store is allowed to be open 24 hours. Moreover, if carrying a "larger array of products" does provide for the public health, safety and welfare, then Ordinance MC3620 should have been tailored to require the provision of those products to the extent constitutionally possible. In reality, the Township's reason that a larger store could carry a "larger array of products" is simply an excuse, not a justification for the valid exercise of police power.

The Township determined that convenience store would be authorized to operated 24 hours as long as the stores contain a minimum of 2,400 square feet based upon an alleged "thorough investigation". Db6. The Township purportedly

performed a "thorough investigation" into surrounding municipalities and reviewed those municipalities' hours of operation ordinances. Db13. Yet, the Township does not offer even one example of a surrounding municipality that restricts hours of operation based upon size of building or even the constitutionally permitted basis for doing so.

The Township further attempts to justify the minimum size requirement by stating that the goal of Ordinance MC3620 is "so that certain retail establishments would become interested in the reinvestment and redevelopment of the Defendant-Respondent Township". Db6. The Trial Court also found that the Ordinance was created to lure businesses into the Township. Db12. Again, the Township's justification is faulty. There is no reasonable relationship between restricting the size of a building and attracting new businesses.

Moreover, the Township has other tools in its toolbox to attract new businesses without abusing its police power. For example, the Township could attract new businesses by granting five-year exemptions or abatements from taxation under the Five-Year Exemption and Abatement Law. N.J.S.A. 40A:21-1 et seq. The purpose of the Five-Year Exemption and Abatement Law is "to permit municipalities the greatest flexibility possible within the constitutional limitations to address problems of deterioration and decay while preserving the salient features of the existing tax exemption and abatement programs". Id.

Alternatively, the Township could exercise its powers under the Local Redevelopment and Housing Law ("**LRHL**") to attract new businesses. N.J.S.A. 40A:12A-1 et seq. The LRHL is intended to address "conditions of deterioration in housing, commercial and industrial installations, public services and facilities".

Instead of utilizing lawful means in which to attract new businesses, the Township has chosen to abuse its police power by restricting hours for the smaller, local businesses. By restricting the hours, the Township is discriminating against the smaller, local businesses in favor of the larger, national convenience stores. Although the Township may find giving larger stores a competitive advantage as a way to lure these businesses into its community, Ordinance MC3620 must nonetheless be declared unconstitutional on the basis of discrimination and vacated.

POINT III

ORDINANCE MC3620 DISCRIMINATES AGAINST BUSINESSES OF THE SAME TYPE BASED UPON AN ARBITRARY SIZE REQUIREMENT.

While the Township claims that Ordinance MC3620 does not discriminate between **types** of businesses, it fails to acknowledge that Ordinance MC3620 does discriminate between the **same type** of businesses. Db21. Courts have consistently held that ordinances that discriminate between the same type of businesses are unconstitutional and invalid. Hart v. Teaneck Tp., 135 N.J.L. 174 (E. & A. 1947); Crawford's Clothes v. Board of Com'rs of City of Newark, 131 N.J.L. 97 (1944).

See also, Justesen's Food Stores, Inc. v. City of Tulare, 12 Cal. 2d 324 (1938) (ordinance restricting grocery stores from being open was deemed arbitrary as restaurants were allowed to be open and both businesses sold meat).

In Hart, the plaintiff argued that the ordinance discriminated against lunch wagons in favor of restaurants by requiring lunch wagons to be closed overnight. The Hart Court agreed, stating that lunch wagons did not differ substantially from restaurants as both businesses were purveyors of food. The Hart Court held that the ordinance was unconstitutional and violated N.J.S.A. Const. art. 1, par. 1.

In Crawford, the Supreme Court considered a municipal ordinance which established closing hours for all retail establishments except restaurants, drug stores, delicatessen stores, liquor stores, gasoline stations, lending libraries, private schools and theaters. Newark's ordinance was declared void by the Crawford Court because the distinctions made were arbitrary. The Crawford Court further found that the ordinance was discriminatory because some of the stores permitted to stay open sold the same merchandise as those stores that were required to close. This discrimination was held to be a **fatal defect** to Newark's ordinance. See Crawford, 131 N.J.L. at 97-98.

The discrimination in this case is obvious. The smaller, local convenience stores sell the same merchandise as the larger, national convenience stores sell. There is no distinction between the businesses. By imposing the arbitrary minimum

size requirement, the Township admittedly is seeking to attract larger new businesses by discriminating against the smaller, local convenience stores such as SKT that have served the community for years. As discrimination is a fatal defect to an ordinance, Ordinance MC3620 must be declared unconstitutional and invalid. See N.J.S.A. Const. art. 1, par. 1 and U.S.C.A. Const. Amend. 14, §1.

CONCLUSION

By imposing an arbitrary and unreasonable minimum size requirement, Ordinance MC3620 constitutes an abuse of police power and discriminates against smaller, local convenience stores. For the foregoing reasons, SKT respectfully requests this Court to declare Ordinance MC3620 to be unconstitutional under N.J.S.A. Const. art. 1, par. 1 and U.S.C.A. Const. Amend. 14, §1 and therefore invalid. Accordingly, the Trial Court's decision should be reversed and Ordinance MC3260 be vacated.

Respectfully submitted,
The Turteltaub Law Firm LLC
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SKT Management, LLC

/s/ James M. Turteltaub
JAMES M. TURTELTAUB, ESQ.

Dated: June 10, 2025