

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosch
Edith Ramirez
Julie Brill
Maureen K. Ohlhausen

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In the Matter of)
)
Koninklijke Ahold N.V.,)
a corporation,)
	Docket No. C- 4367)
and)
)
Safeway Inc.,)
a corporation.)
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DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Koninklijke Ahold N.V. (“Ahold”) of certain assets of Safeway Inc. (“Safeway”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should

issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Koninklijke Ahold N.V. is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM. Ahold U.S.A., Inc., a subsidiary of Koninklijke Ahold N.V., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1385 Hancock Street, Quincy, MA 02160.
2. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, CA 94588.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Ahold” means Koninklijke Ahold N.V, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries (including, but not limited to, Ahold U.S.A. and Giant Food Stores, LLC), divisions, groups, and affiliates controlled by Ahold and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Safeway” means Safeway Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships (including, but not limited to, Genuardi’s Family Markets LP), subsidiaries, divisions, groups, and affiliates controlled by Safeway and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Ahold and Safeway, individually and collectively.

- D. “Acquisition” means Ahold’s acquisition of certain Genuardi’s supermarkets, owned and operated by Safeway, in the greater Philadelphia, PA, area pursuant to the Acquisition Agreement.
- E. “Acquisition Agreement” means the Asset Purchase Agreement by and among Genuardi’s Family Markets LP, Safeway Inc., and Giant Food Stores, LLC, dated January 4, 2012, together with the Schedules and Exhibits attached thereto, as the same may be amended from time to time in accordance with the terms hereof.
- F. “Commission-approved Acquirer” means the entity approved by the Commission to acquire the Genuardi’s Supermarket Assets pursuant to this Order.
- G. “Divestiture Agreement” means any agreement between the Respondents and a Proposed Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Genuardi’s Supermarket Assets, that have been submitted to the Commission for its approval to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the McCaffrey’s Divestiture Agreement.
- H. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.
- I. “Genuardi’s Supermarket” means the Supermarket operated by Genuardi’s Family Markets LP at 2890 South Eagle Road, Newtown, PA 18910, and includes the distribution, marketing, promotion, and sale of all products and services offered at this location.
- J. “Genuardi’s Supermarket Assets” means all Respondents’ rights, title and interest in and to all assets, tangible and intangible, used in, and/or reserved for use in, the Genuardi’s Supermarket, including as follows:
1. Leasehold interest in the premises;
 2. Fixtures and equipment;
 3. Inventory;
 4. Permits other than nontransferable permits;
 5. Goodwill generated by or associated with the Genuardi’s Supermarket;
 6. Manufacturers’ warranties solely in respect of the fixtures and equipment;
 7. Phone and facsimile numbers at the Genuardi’s Supermarket;
 8. All prepaid expenses that are adjusted pursuant to the Divestiture Agreement; and
 9. All property, title, liability, casualty and other insurance proceeds received or receivable under the Acquisition Agreement in connection

with the damage or destruction of any of the foregoing assets that would have been included but for such damage or destruction, less the amount paid by Safeway in repairing or replacing such assets prior to the closing.

For the avoidance of doubt, the Genuardi's Supermarket Assets shall include all assets in connection with the Genuardi's Supermarket, as defined herein, that Respondent Ahold acquires from Respondent Safeway pursuant to the Acquisition Agreement; *provided, however*, that the assets shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names.

- K. "McCaffrey's" means a chain of supermarkets organized, existing and doing business under and by virtue of the laws of Pennsylvania and New Jersey, with its offices and principal place of business located at 2200 Cabot Boulevard West, Langhorne, PA 19047-1842.
- L. "McCaffrey's Divestiture Agreement" means the Agreement of Purchase and Sale of Assets and Assignment and Assumption of Lease made and entered into April 12, 2012, by and between Giant Food Stores, LLC, and an affiliate of McCaffrey's.
- M. "Newtown, PA," means Newtown Township, Newtown Borough and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania, as depicted in the map attached to this Order as Appendix II.
- N. "Proposed Acquirer" means any proposed acquirer of the Genuardi's Supermarket Assets submitted to the Commission for its approval under this Order; "Proposed Acquirer" includes, as appropriate, McCaffrey's.
- O. "Supermarket" means any store that enables consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
- P. "Third-Party Consents" means all consents from any person other than the Respondents, including all landlords that are necessary to effectuate the complete

transfer to the Commission-approved Acquirer of the Genuardi's Supermarket Assets.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the date on which the Acquisition is consummated, Respondents shall divest the Genuardi's Supermarket Assets, absolutely and in good faith, as an ongoing business to McCaffrey's, pursuant to and in accordance with the McCaffrey's Divestiture Agreement, which is attached as non-public Appendix I.
- B. *Provided, however,* that if, prior to the date this Order becomes final, Respondents have divested the Genuardi's Supermarket Assets to McCaffrey's pursuant to the McCaffrey's Divestiture Agreement, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
 1. McCaffrey's is not a Commission-approved Acquirer of the Genuardi's Supermarket Assets, then Respondents shall:
 - a. immediately rescind the transaction with McCaffrey's, and
 - b. divest the Genuardi's Supermarket Assets absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, and otherwise comply with the obligations of Paragraph II, no later than sixty (60) days from the date the Commission notifies Respondents that McCaffrey's is not a Commission-approved Acquirer; or
 2. The manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph III. of this Order, to effect such modifications to the manner of divesting the Genuardi's Supermarket Assets to McCaffrey's (including, but not limited to, entering into additional agreements or arrangements, or modifying the McCaffrey's Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.
- C. Pending divestiture of the Genuardi's Supermarket Assets, Respondents shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Genuardi's Supermarket, to minimize any risk of loss of competitive potential for the Genuardi's Supermarket, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Genuardi's Supermarket Assets or the Genuardi's Supermarket, except for ordinary wear and tear; and
2. Not sell, transfer, encumber, or otherwise impair the Genuardi's Supermarket Assets or the Genuardi's Supermarket (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Genuardi's Supermarket.

D. The Divestiture Agreement approved by the Commission:

1. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreement; and
2. Shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

E. Respondents shall obtain all required Third-Party Consents prior to the Acquisition.

F. With respect to the McCaffrey's Divestiture Agreement, no later than fifteen (15) days after signing the Consent Agreement (or with respect to a proposed divestiture to another Proposed Acquirer pursuant to another Divestiture Agreement, no later than fifteen (15) days after signing that Divestiture Agreement), Respondents shall provide an opportunity for McCaffrey's (or that other Proposed Acquirer):

1. To meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the employees of Genuardi's Supermarket; and

2. To make offers of employment to any one or more of the employees of Genuardi's Supermarket;
- G. For a period of one (1) year from the date of the divestiture of the Genuardi's Supermarket Assets to the Commission-approved Acquirer, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of employees of the Genuardi's Supermarket, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Commission-approved Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to any employees who receive a written offer of employment from such Commission-approved Acquirer; *provided, however*, that this sub-Paragraph shall not prohibit Respondents from continuing to employ any employees of Genuardi's Supermarket under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Commission-approved Acquirer to such employee.
- H. The purpose of the divestiture is to ensure the continuation of the Genuardi's Supermarket as an ongoing viable enterprise engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested the Genuardi's Supermarket Assets as required by Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Genuardi's Supermarket Assets in a manner that satisfies the requirements of Paragraphs II. and III. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend

the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring person, and if the Commission determines to approve more than one such acquiring person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such person within five (5) days of receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph II.
- F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, Respondent Ahold shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Newtown, PA; or
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in Newtown, PA;

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Ahold or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Ahold's offer to purchase or lease such facility.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Ahold and not of any other party to the transaction. Respondent Ahold shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Ahold shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II. and III. of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their reports copies of all non-privileged written communications to and from such parties, all non-privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and
- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent Ahold shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondents;
- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondents made to their principal United States office, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent relating to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 16, 2022.

By the Commission.

Donald S. Clark
Secretary

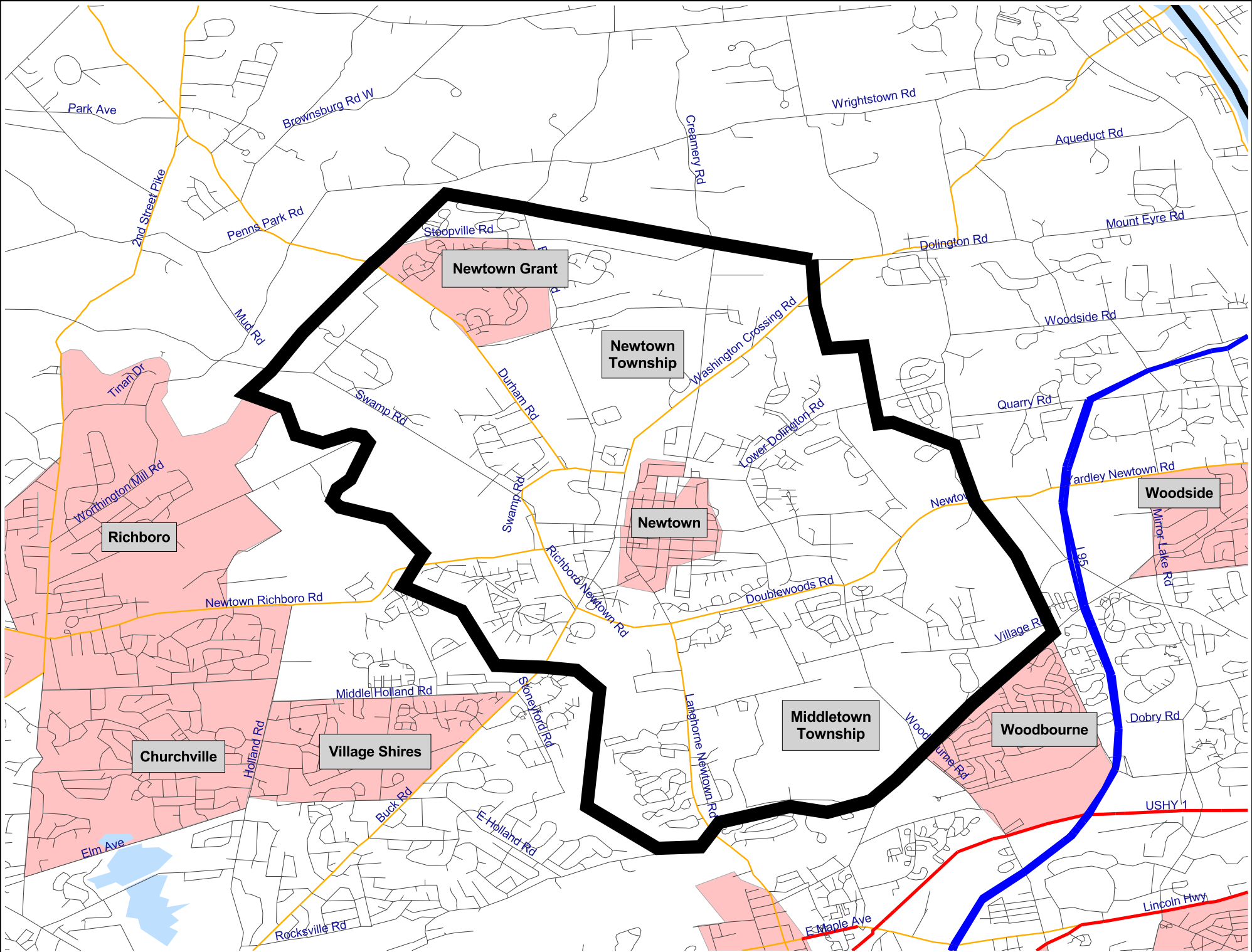
ISSUED: August 16, 2012
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Confidential Appendix I

[Redacted From the Public Version, But Incorporated By Reference]

Appendix II

[Map of Newtown, Pennsylvania]



Newtown Grant

Newtown Township

Newtown

Richboro

Woodside

Churchville

Village Shires

Middletown Township

Woodbourne