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IN RE: Petition of the : IN THE COURT OF COMMON PLEAS
Borough of Downingtown : CHESTER COUNTY, PENNSYLVANIA
: ORPHANS' COURT DIVISION
:
: NO. 1509-0516

FINAL BRIEF AND PROPOSED FINDINGS OF FACTS OF THE
RESPONDENTS, FRIENDS OF KARDON PARK,
ANN FELDMAN, MARION UNGRICH AND EVELYN HOPKINS

I. PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. Friends of Kardon Park is a non-profit corporation, incorporated pursuant to the laws of the Commonwealth of Pennsylvania and has the purpose of preserving Kardon Park in Downingtown, Pennsylvania. Ann Feldman, Marion Ungrich and Evelyn Hopkins are members of Friends of Kardon Park, as are many other persons who live and reside near Kardon Park.

2. The Respondent, Ann Feldman, is a resident of Downingtown Borough, [REDACTED]

3. The Respondent, Marion Ungrich, is a member of the Friends of Kardon Park a [REDACTED]

[REDACTED]

4. The Respondent, Evelyn Hopkins, is a member of the Friends of Kardon Park [REDACTED]

[REDACTED]

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5. All of the Respondents, Friends of Kardon Park, Ann Feldman, Marion Ungrich, Evelyn Hopkins, have standing in this matter. Further, all of the Petitioners have agreed to the standing of the Respondents, and the standing would also be allowed pursuant to the Donated and Dedicated Property Act, 53 P.S. 3381, et al.

6. Kardon Park, which is located in Downingtown, Pennsylvania, has been used as a park for the 25 to 30 years. All witnesses who testified agreed that it has been used as a park. All witnesses emphasized the main hiking trail, the Lion's Trail, was used all the time by hikers, bikers, families, etc. Other witnesses also noted the wooded areas were used and there are also trails in the wooded area which were walked on by people on a regular basis.

7. All witnesses agreed that the ponds in Kardon Park were used for ice skating in the winter when it froze over. The ponds were also used for fishing and other nature activities.

8. All witnesses agreed that there was a victims' memorial in Kardon Park in which a ceremony was held once or

twice a year where many people attended.

9. All witnesses agreed that the trails, including the Lion's Trail, was used by joggers, walkers, runners, dog walkers, bikers, etc.

10. Thomas Kiel, III, another Respondent who owns a steel manufacturing company beside Kardon Park, confirmed the active use of the main trails and also identified approximately 8 or 9 smaller trails in various wooded portions that were used regularly and repeatedly. His testimony was confirmed by Kathy Lyons. His testimony was also confirmed by Ann Feldman, Sarah Brown, and Janie McMurray.

11. Although there is contamination from past dumping in the park, the park has been cleared since 1999 by Pennsylvania's Department of Environmental Protection and the Army Corp. of Engineers for recreational and park use.

12. There has never been any restriction on the use of any of the grounds within Kardon Park. Although the Respondents' expert suggested recently in contradiction to his prior deposition testimony that an order suggested the off trail use should not be encouraged, the Borough has never put up any fences or signs or anything to suggest that the entire park cannot be used. At all pertinent times, the entire park was used by people.

13. There was an actual dedication of the core 12 acres of

the park in 1997 by Downingtown Borough Council. This was in addition to the purchase for park use of the remaining Kardon Park land.

14. The prior managing director of Downingtown Borough, Donald Greenleaf, who worked for the Borough from 1954 until his retirement in 1992, confirmed that the reasons for the purchase of the land for Kardon Park was to make it into a parkland, recreation space and open space for citizens in Downingtown area.

15. The area encompassing Kardon Park has been actively advertised as a park, even in the Borough handouts and website in 2009, including website advertisements during the last hearings in November of 2009. See Exhibits Feldman 1 and Feldman 2. The Borough of Downingtown has at all pertinent times held out Kardon Park as an actively used park and through advertisements invited members of the public to use the park.

16. Photographic evidence was also presented as to the very active use of the park during all pertinent times. See Kim Manufacturing Exhibits 3 and 4, and Feldman Exhibits F-8, F-9 and F-10.

17. The Borough maintains signs calling the park Kardon Park and recently passed an ordinance also calling it The Ponds.

18. The Petitioners, Borough of Downingtown and the developer, Sarah Peck, which to build a commercial and

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residential development in significant portions of Kardon Park. The plan calls for approximately 250 to 304 residences, plus a commercial area. The plan calls for capping the contamination by 18 inches of compact soil upon which the residences will be built. The Borough of Downingtown will get a percentage of each sale and also approximately \$3,000,000 to \$4,000,000 toward building a new firehouse.

19. Although there have been conditional use hearings, there have been no advertised hearings or hearings held actually on the proposed sale of Kardon Park. During the testimony of Ann Feldman, the Right to Know Information indicated there was only one advertisement for the sale in 2006. See Exhibits Feldman F-6 and F-7. There has never been an advertisement or public hearings directly on the sale of Kardon Park at any time. Failure to do so would be an abuse of discretion and arbitrary and capricious conduct by the Borough Council of Downingtown.

20. Although the Borough of Downingtown contends that the developer will pay to cap the contamination, the land is already able to be used as a park and cleared for such use. Further, the developer is not paying to cap the contamination. Instead, development funds of approximately \$990,000 is being received through the Pennsylvania Department of Commerce to cap the contamination. Such funds could also be available through the Pennsylvania Environmental Department if there was an

application, but none has been made.

21. No expert presented by the Petitioners were able to point to any studies as to the effectiveness of the 18 inch cap over contaminated soil for the next 100 years where there will be residential development. No developer was able to explain whether or not the numerous trees that are to be planted by the houses would break the contamination cap. Further, there was testimony of flooding, which could create additional problems for the capped contamination if residences were built on top of the soil.

22. Walter Payne, a licensed geologist employed by Pennsylvania, discussed the Golder Report and Survey of 1999 which indicated 70% of the use of the park was trails and the remainder connecting trails and the pond. He confirmed that the park could be used for recreational purposes. He indicated there have been no environmental studies as to the long term effectiveness of this kind of soil cap. The lack of long term studies was because this type of capping of contamination was a relatively new approach to dealing with contamination and there are no long term studies. The Petitioners' expert, Paul Stratman, confirmed that there have been no long term studies as to the affect of the cap proposed and its effectiveness. Mr. Stratman himself did no testing.

23. Storm water plans have raised serious concerns since

storm water plans would require the use of the ponds as opposed to new storm water basins. There is no definitive opinion as to the effect of this on flooding and contamination.

24. The plan of the developers would cut through wetlands.

25. The developer plan would increase the length of the Lion's Trail and, in essence, would create a longer trail through a residential area. But the development plan would remove the parkland and create essentially a residential trail.

26. There are no studies as to the effects of increased traffic congestion due to the numerous residences planned to be built in Kardon Park.

27. Kardon Park, in all of the acres that comprise it, has been and is an actively used park. It has been maintained by taxpayers' money and purchased through taxpayers' money.

28. The Public Trust Doctrine would prohibit the sale of the actively used park.

29. The purpose of creating Kardon Park was to create an active, outdoor park, which has not been diminished over the years.

30. The Dedicated and Donated Property Act would not be applicable because the continued use of Kardon Park as a public park is still practical and possible and it has not ceased to serve the public interest. (53 P.S. 3384)

31. Even if the Dedicated and Donated Property Act (53

P.S. 3384) would be applicable, there was arbitrary and capricious action and conduct by the Borough of Downingtown. Such arbitrary and capricious was due to the failure of the Borough Council to properly advertise the sale of the park, and to have hearings on the sale of the parks so residents could participate. Further, there was no independent appraisal, so the value of the parkland is unknown. The current sale price is very low.

32. There was no independent appraisal of the value of the Kardon Park land ever performed, provided or presented by Downingtown Borough Council to the citizens and residents.

33. Active public parkland should not be sold for short term economic gain when the parkland is actively and persistently used for its stated purpose. In this case, the motivating factor for the sale is the monies for a new firehouse and a percentage of monies for the Borough in terms of the sale of units and additional taxes. Such reasons are arbitrary and capricious and would not allow the sale of the park pursuant to the Public Trust Doctrine and also pursuant to the Dedicated and Donated Property Act.

34. Kardon Park cannot be sold or leased since it is an actively used park.

II. BRIEF LEGAL ARGUMENTS

A.) The Public Trust Doctrine should preclude the sale of Kardon Park.

The Respondents, Friends of Kardon Park, Ann Feldman, Marion Ungrich and Evelyn Hopkins, respectfully request that this Honorable Court preclude the sale of Kardon Park pursuant to the Public Trust Doctrine. The Respondents respectfully contend that Kardon Park has been actively used for twenty or thirty years as a park as established by the unrefuted trial testimony. The trails are primarily used and people walk off the trails in the park also. There are heavy wooded areas and various ponds. People use the ponds in the winter for ice-skating at times. In the summer, people use the ponds for fishing and nature. The wooded area is used at times by bird watchers and other naturalists. There are areas where monuments for dedication are used. There are also open areas where people play unorganized sports, such as football and baseball. The trails are used by hikers, runners, walkers, bicyclists, and dog walkers. The testimony confirmed Kardon Park has been and is an actively used park.

The Public Trust Doctrine was firmly established in the case of Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania, 96 A. 123 (Pa., 1915). In that case, land that was set aside for a public park was to be sold

to the University of Pennsylvania by the City of Philadelphia. A suit in equity was instituted by the Board of Trustees of Philadelphia Museums to set aside the conveyance by the City of Philadelphia to the University of Pennsylvania. The Pennsylvania Supreme Court refused to allow land held in public trust for parks to be sold. The Court, after upholding taxpayer standing (Id 122, 123), noted the following:

"The City holds, subject to trust, in favor of the community, and is but the conservator of title in the soil and has neither power nor authority to sell and convey the same for private purposes." Id 124.

The Court then noted as follows:

"... a nation, state or municipality which dedicates land that it owns in the site of a town to public use for the purposes of a park is as conclusively estopped as a private proprietor from revoking that dedication, from selling the park and from appropriating the land which it occupies to other purposes, after lots have been sold, after the town has been settled and after the park has been improved with monies raised by the taxation of its residents and taxpayers and reliance upon the grant and covenant which the dedication evidences." Id 125, 126 (emphasis added).

The Court then noted as follows:

"So long as at least the property and buildings occupied by the museum continue to be used for that purpose in good faith, the City is without power to alienate the property and thus interfere with its prior appropriation or dedication of public use." Id 125, 126.

The language can't get any clearer. Parkland cannot be sold when it is actively used. Actively used public parkland is protected by the Public Trust Doctrine, which forbids the sale

of the actively used parkland. This case is still good law and has been cited repeatedly through the present time in various court decisions. The Revised Price Act, which was the predecessor to the Inalienable Property Act was in effect at the time of the Board of Trustees case, but the Pennsylvania Supreme Court upheld the Public Trust Doctrine as being applicable. The Court did not rule the Revised Price Act allowed the sale. The Court held the Public Trust Doctrine precluded the sale of active parkland. Kardon Park is still being used vigorously for its stated purpose of a public park with trails for hiking, running, biking, etc. The Borough of Downingtown has no right to sell Kardon Park when it is actively used. The Donated or Dedicated Property Act should not trump the Public Trust Doctrine.

The Price Act or the revised Price Act was in effect when the Philadelphia Museum case was decided, but the decision clearly referenced the Doctrine of Public Trust, which precluded the sale of actively used parkland. The Commonwealth Court in In re Erie Golf Course, 963 A.2d 605, 612 (Pa. Comm., 2009) ignored the holding of the above case and the Commonwealth Court, without explanation, held the statutory provisions of the Donated or Dedicated Property Act made the Public Trust Doctrine inapplicable. But, the Pennsylvania Supreme Court has held to the contrary even where there was other statutory authority.

As recently as 2008, in the case of Pilchesky v. Redevelopment Authority of the City of Scranton, 941 A.2d 762 (Pa. Comm., 2008), the aforementioned Philadelphia Museum case was cited. In Pilchesky, a dedicated sports complex was being sold to the University. The case was remanded on the issue of standing since the Commonwealth Court found taxpayers had standing. The Opinion noted the viability of the Public Trust Doctrine. The Commonwealth Court again noted the land was dedicated to a public purpose and could not be sold when it is being actively utilized.

In Ormsby Land Company v. City of Pittsburgh, 119 A. 730 (Pa., 1923), the Pennsylvania Supreme Court again noted that land dedicated for a public street and accepted by the municipality may not be used for another purpose unless the other purpose is for public use. This is an example of the broader application of the Public Trust Doctrine. But, the case law in Pennsylvania is clear that actively used public parkland cannot be sold since the Public Trust Doctrine would preclude the same.

In the case of Hoffman v. City of Pittsburgh, 75 A.2d 649 (Pa., 1950), the question before the Pennsylvania Supreme Court was whether the City could sell land dedicated to the public use as a public square. The City wanted to sell the land for private use. Although ruling on another theory that the City

could not sell, the Court noted as follows:

"For the above reasons, it is unnecessary to discuss or decide the interesting and important constitutional question of whether the legislature can authorize a municipality to sell for a private use property which has been dedicated to the public, although some cases have held that no such authority exists, even though an incidental benefit accrues to the public and even though provisions being made for compensation to those persons who have a fee simple or revisionary interest." Id 655.

While the question was not reached, the Court referenced that the land could not be sold pursuant to the Public Trust Doctrine.

In White v. Township of Upper St. Clair, 799 A.2d 188 (Pa., Comm., 2002), residents of a township sought injunctive relief to stop the construction of a communications tower in a public park. The Commonwealth Court found standing for the residents. The Commonwealth Court cited the aforementioned Philadelphia Museums case. The Commonwealth Court noted the interest in taxpayers and the preclusion from selling public lands. In the White case, the Petition was brought pursuant to the Donated or Dedicated Property Act. The Commonwealth Court noted the following:

"Indeed, under Pennsylvania law, the Township's obligation to uphold the dedication is absolute, not discretionary. A political subdivision lacks authority to assent to the use of public land for any purpose...even a public purpose...other than the intended purpose, no matter how exigent the circumstances." Id 195.

Clearly, that language recites the public Trust Doctrine.

In the case of In re Bangor Area School District, there are two decisions of importance. The first is Bangor I found at 4 D&C 4th 343 (Ct. of Common Pleas, Northampton County, 1988). The second is the decision affirming the same found at In re Bangor Area School District (Bangor II), 567 A.2d 750 (Pa. Comm., 1989). The borough in that case sought to transfer 1.2 acres of a memorial park to the school district for a new elementary school. The Commonwealth Court again cited the aforementioned Philadelphia Museum case. The Commonwealth Court, in effect, adopted the Common Pleas decision. The Common Pleas decision discussed the Public Trust Doctrine. The Common Pleas Court, in footnote 4 of that decision noted that although the borough was trying to use the Inalienable Property Act, the court found the statute was not applicable. The Common Pleas Court noted the issue before it involved the restrictions on use created by the borough's dedication of land. The Court cited the Public Trust Doctrine, which prohibited the selling of parkland. The Court made its decision on the basis of public trust, particularly noting that a park could not be sold where it was being used. The decisions noted the park was in continuous use since 1930. The aforementioned Bangor case was specifically overruled by the Commonwealth Court in the case of In re Erie Golf Course, 963 A.2d 605 (Pa. Comm., 2009).

The Respondents emphatically argue the Public Trust Doctrine is clearly applicable to public parkland dedicated for public use that has been continuously used as a public park.

The Honorable John Herron of the Philadelphia Orphans' Court in the case of In re Estate of Robert Ryerss, 36 DE of 1896, in a well reasoned decision, recently upheld the Public Trust Doctrine and found this doctrine precluded the sale by the City of Philadelphia of Burholme Park under the Inalienable Property Act. This Opinion is docketed in Philadelphia Orphans' Court at 36 DE of 1896. That case is presently on appeal to the Commonwealth Court.

The case of Commonwealth v. Alburger, 1 Wharten 469, 1836 WL 3156 (Pa., 1836), illustrates the limits of a city's power under the common law Public Trust Doctrine. In that case, Franklin Square was dedicated to public use by William Penn (1836 WL 3156). Thomas Penn conveyed a part of Franklin Square to a religious corporation for the purpose of a cemetery. Id 5. The Court invalidated the conveyance holding that when a square has been dedicated to public use, neither the original owner nor any successor in title could thereafter convey any part of that dedicated land to any person or corporation in any way that defeats the vested right of the public (1836 WL 3156).

"When property is dedicated or transferred to public use, the use is indefinite...the corporation has not the right to these squares so as to be able to sell them, or employ them in a way variant from the object for which they were designed." Id 15.

After rights have vested in reliance upon the dedication of real property for public use, a municipality may not release or destroy the right of the public to the exclusive use of the parks or streets for the purposes for which they were granted. Ormsby Land Company v. City of Pittsburgh, 119 A. 730 (Pa., 1923). In Ormsby Land Company, the City was enjoined from leasing public property for private purposes under the common law Public Trust Doctrine.

In the aforementioned case of Hoffman v. City of Pittsburgh, 75 A.2d 649, 653 (Pa., 1950), an ordinance was adopted which authorized the City to acquire a fee simple title to property known as Diamond Square for which there was no evidence that the tract of land was dedicated for public use or that there was a formal acceptance of the dedication. The Pennsylvania Supreme Court held that because contemporaneous deeds referred to Diamond Square as a public square and because an earlier court decision referenced the public use of the land, the law conclusively presumed a grant from the original proprietor for public square purposes, thus under the Public Trust Doctrine, the municipality had "no implied or incidental

authority to alienate, or to dispose of for its own benefit, property dedicated to or held by it in trust for the public use or to extinguish the public uses in such property." Id 561. The Pennsylvania Supreme Court, in Hoffman, also stated, "This has been the law of Pennsylvania for over a century." Id 392. Since Hoffman was decided in 1950, the Public Trust Doctrine has been the law in Pennsylvania now for 160 years.

Although the Commonwealth Court has noted in the case of In re Erie Golf Course, 963 A.2d 605 (Pa. Comm., 2009), found that the Dedicated or Donated Property Act was applicable as opposed to the Public Trust Doctrine, that was done without any review of the above mentioned 150 years of case law established by the Pennsylvania Supreme Court. In fact, a review of the Erie Golf Course decision notes that the Commonwealth Court summarily rejected the Public Trust Doctrine without discussion.

"The City is correct that the trial court erred in applying the common law public trust doctrine when the statutory relief found in the act (Dedicated and Donated Property Act) applies." Id 612.

Erie Golf Course is currently on appeal. The Friends of Kardon Park, the Respondents in this case, have filed an Amicus Brief with the Pennsylvania Supreme Court in the Erie Golf Course case. The Erie Golf Course case was argued before the Pennsylvania Supreme Court on September 16, 2009 at the

Pittsburgh session.

Since Erie Golf Course is only a Commonwealth Court decision, the Pennsylvania Supreme Court decisions cited above establishing the Public Trust Doctrine and precluding the sale of actively used parkland pursuant to the Public Trust Doctrine, would still apply.

The Respondents respectfully request that this Honorable Court find that the Public Trust Doctrine is applicable since Kardon Park is an actively used park and order that Kardon Park cannot be sold.

B.) The Respondents, Friends of Kardon Park, Ann Feldman, Marion Ungrich and Evelyn Hopkins, respectfully contend that even if the Public Trust Doctrine is not applicable, the Dedicated and Donated Property Act would still preclude the sale.

A careful review of the decisions and language of the Dedicated and Donated Property Act would reveal that Kardon Park could not be sold. First, the Donated and Dedicated Property Act, under 53 P.S. 3384 notes that the Orphans' Court approval can only be obtained when the purpose of the trust is no longer practicable or possible.

"When in the opinion of the political subdivision, which is the trustee, the continuation of the original use of the particular property held in trust as a public

facility is no longer practical or possible and has ceased to serve the public interest..." (53 P.S. 3384).

In this case, the Respondents respectfully contend the park has been actively used for many years and currently is actively used as a park. Therefore, the Dedicated or Donated Property Act would not allow for the sale under any circumstances based on the clear language. The property is still being used as a public park. The park continues to serve the public interest and the use of the park is still practical and ongoing.

As noted in the first argument section, the case of In re Erie Golf Course, 963 A.2d 605 (Pa. Comm., 2009), has allowed the sale of the Erie Golf Course property pursuant to the Dedicated and Donated Property Act. As noted above, the Erie Golf Course case is on appeal and awaiting a decision by the Pennsylvania Supreme Court.

Previously in this Brief, the case of White v. Township of Upper St. Clair, 799 A.2d 188 (Pa. Comm., 2002) was discussed. This case was referenced in the discussion about the applicability of the Public Trust Doctrine. The White case involved a communication tower to be placed in a public park. The residents were upset and challenged the use of the communications tower. As noted in the previous discussion, the Commonwealth Court found that the township's obligation to uphold the dedication for a public purpose is absolute and not

discretionary. Id 195. The Commonwealth Court noted that occurred no matter how exigent the circumstances. Therefore, the White case also stands for the proposition that the Dedicated and Donated Property Act cannot allow the sale of property unless there is a showing under that act that the use of the park is no longer practical or possible and has ceased to serve the public interest. Kardon Park continues to serve the public interest and is an actively used park.

Similarly in the case of Borough of Ridgeway v. Grant, 425 A.2d 1168 (Pa. Comm., 1980), the Commonwealth Court reviewed under the Donated or Dedicated Property Act whether a fire station could be built in the park. The Court found the fire station was not consistent with the public purpose of the park. The Court again noted under the Donated or Dedicated Property Act that the property was to be used for the benefit of the public.

Under the Donated or Dedicated Property Act, Kardon Park cannot be sold. The specific language in the Donated or Dedicated Property Act (53 P.S. 3384), as quoted above, would preclude the sale.

Further, even if this Court decided the Dedicated and Donated Property Act would be applicable, this Honorable Court

still would have to exercise a review. Although there is some standard of deference, it would appear that the standard of fraud or arbitrary and capricious conduct would be the appropriate standard of review. The issues that would impact on the standard of review would be the number of public hearings on the sale (there were none except the conditional use hearings), the lack of any public advertisements (See Feldman 6 and 7), and the earlier attempts by the Borough to sell the property without Court approval circumventing the Donated and Dedicated Property Act, would have to be considered. There were no advertisements and no hearings as seen in Feldman 6 and 7. Further, there are issues of whether the environmental contamination, which would not be cleaned up, but only capped, would allow for residential properties to be safely built there. There is no scientific evidence as to the viability of the soil cap for many years when homes are built on top of it. Finally, there is an issue of the price for the sale of the property. There were no appraisals sought or anything of that nature to ascertain whether the consideration was adequate. No evidence of the value of this land was presented. The price was grossly inadequate.

In conclusion, the Respondents, Friends of Kardon Park, Ann Feldman, Marion Ungrich and Evelyn Hopkins, respectfully request this Honorable Court deny the Petition to sell Kardon Park.

This is a classic case where this parkland is protected by the Public Trust Doctrine. The 150 to 200 year common law public trust doctrine is still in effect in Pennsylvania. Even if the Dedicated and Donated Property Act was applicable, the use of the park is still active and its purpose has not become impractical. Therefore, it cannot be sold. Even if it could be sold, there is arbitrary and capricious conduct for which this Court should exercise its discretion due to the lack of hearings, lack of appraisal, and issues concerning congestion and contamination. The Respondents respectfully request this Honorable Court deny the Petition for all of the above stated reasons.

Respectfully submitted,

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