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IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY  
ORPHANS' COURT DIVISION

IN RE: Petition of the Borough of Downingtown

Consolidated Docket No. 1509-0516

**JOINT SUPPLEMENTAL TRIAL MEMORANDUM OF J. LOEW & ASSOCIATES, INC.  
AND PROGRESSIVE HOUSING VENTURES, LLC,  
AND THE BOROUGH OF DOWNINGTOWN**

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On September 23, 2009, J. Loew & Associates, Inc., Progressive Housing Ventures, LLC, and the Borough of Downingtown submitted Proposed Findings of Fact and Conclusions of Law and a Trial Memorandum. This Joint Supplemental Trial Memorandum is intended to provide further analysis based on the testimony from the hearings.

**I. Statement of the Case**

For purposes of this Supplemental Memorandum, the Property refers to UPI Nos. 11-4-23; 40-1-23.1; 11-4-13; 11-4-14.2; and 11-4-14. Exhibit P-2 is attached hereto for the convenience of the Court. Also attached is a chronology based upon the evidence presented at the hearings.

## **II. Argument**

### **A. The Predominant Use of the Park is Confined to the Paved Trail**

The testimony is fairly consistent that the predominant use of the Property occurs on the Lion's Trail and to the east toward the ponds. Use of areas to the west, which areas should not be accessed by the public due to the contamination that is present, is sporadic and insignificant. Nearly all of the photographs submitted by the Other Respondents, Exhibits Kim-4 and Kim-5, reflect usage along the Lion's Trail and the ponds, which will remain and be enhanced in conjunction with the proposed development.

The extent of the use of the park was established by Golder Associates in its submissions to DEP in 1999. In order to assess the risk to human health from the proposed use of the Property for park and commercial use, Golder relied upon a Park Use Survey conducted by the Borough of Downingtown in 1997 and 1998 to document the types and frequency of park use by typical park visitors. Exhibit P-19b, page D-7.

The surveys were conducted in May 1997, July 1997, August 1997, January 1998 and February 1998 by Borough employees. *Id.* "The surveys were generally conducted in the morning and afternoon for a period of two hours each." *Id.* The surveys were conducted from a car in the parking lot with occasional walks by the surveyor toward the other ponds. *Id.* The following information was recorded: User sex, age group; the use or activity undertaken; and the length of time the user remained in the park. *Id.*

Golder noted that the surveys were conducted during the summer months with good weather and high use conditions. *Id.* at D-8. The inference Golder makes is that the summer surveys will represent the highest use of the park.

Golder concluded that the park did not appear to be used for open-field type activities. Seventy-seven percent (77%) of the activities noted were "walking, running, jogging, biking, skating and skateboarding, which activities do not promote exposure to soils since the individuals engaged in them did not stray from the paved areas and trail. *Id.* at D-8. About twenty percent (19.5%) of the activities included a potential for exposure to the soils such as walking around the lake, walking a dog, biking to the woods, and feeding ducks. Given their limited duration (about 10 minutes or less) and non-intrusive nature, these activities would result in soil exposures "considerably less than those assumed for a 24-hour resident (residential exposure) or a daily 8-hour worker (non-residential exposure) exposure to soil." *Id.* at D-8.

Of the off-trail activities noted, only two (walking a dog and biking to the woods) would be able to occur to the west of the trail since to walk around a lake or feed the ducks, one would necessarily be to the east of the trail. Furthermore, walking a dog could very well include walking around the ponds and biking to the woods could logically occur in the north east section of the Property via the pedestrian footbridge toward Sunset Drive. Moreover, the limited time spent at the Property (10 minutes or less) underscores that the public, even if they did veer west off the trail, were simply not off the trail for any appreciable use of the areas west of the trail. These survey results, gathered before any controversy regarding the use of the Property had arisen, are the best evidence of the pattern of public use of the Property.

There was ample testimony consistent with the Golder description of the use of the Property. Even Evelyn Hopkins, who was called by the Friends of Kardon Park, testified that she never sees people off the Lion's Trail. Her testimony was consistent with that of James Bruton, Sarah Peck, Stephen T. Sullins, Anthony Madiro, Jeffrey Valocchi and Michael Antonelli. The Other Respondents' testimony did not dispute the percentage allocation of the users of the park area as stated by Golder.

The Borough did mow certain areas of the Property that had been leveled and seeded by the Borough in 1976 when some of the ponds were dredged. Testimony of Donald Greenleaf. That was well before the implications of the dumping that had occurred at the Property were fully appreciated. Moreover, given the Borough's awareness that the area to the west of the trail was rarely, if ever, used by the public and the limited amount of time people spent on the Property, the Borough clearly did not deem it necessary to physically bar access beyond allowing the wooded areas to become overgrown and inhospitable. The Borough might have, but did not, fence off the area to the west. It could still. What it could not do, without further order from DEP, is to make any use of the area west of the paved trail other than the already approved commercial use.

There was extensive and seemingly contradictory testimony regarding the presence of "trails" at the Property beyond the Lion's Trail and an area cleared through the woods by the Borough to get lawn mowers and maintenance equipment to Sunnybrook Park from the Property. It appears that this cleared area has been used by residents of the adjoining residential community as an occasional cut-through access to the Lion's Trail on the Property. It is generally not currently useable for any activity such

as jogging or pushing a stroller. The other "trails" appear from the photographs admitted into evidence to be clearings in the woods, perhaps left over from the original dumping access ways; and in one case, an area just south of Fourth Lake appears to be used as a bike jump by neighborhood children. These "trails" are not easily accessed; Ms. McMurray testified that she had twigs in her hair from climbing over a downed tree to get to a "trail."

#### **B. The Public Should Not Be Off the Paved Trail**

One of the facts apparently in dispute is whether the public should have been in the area to the west of the paved trail, especially after the DEP Act 2 Section 512 Order was signed in January of 2000. Exhibit P-21. The point of the testimony of some of the witnesses for the Other Respondents seemed to be that the contamination isn't that bad and there is no reason for people to stay out of the area west of the paved trail.

This testimony is contradicted, however, by the Golder reports and the DEP order itself. Walter Payne of DEP testified that the Act 2 Order is based upon the assumption in the Golder Risk Assessments that park users do not use the area west of the paved trail. (N.T. 9-28-09, pp. 30-32<sup>1</sup>). To the extent that assumption changes, the Act 2 Order may likewise change. A new risk assessment would be required. (N.T. 9-28-09, pp. 35-36<sup>2</sup>).

The Other Respondents studiously ignore the plain language of both the Golder reports and the Act 2 Order. The Act 2 Order divides the Property into two portions:

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<sup>1</sup> See at p. 32: Q *And those circumstances would be found in the final Act 2 report, would they not?*  
A *The circumstances would be found in the various tables in the Golder report.*  
Q *And the assumptions thereof?*  
A *That describes the basis for the park use and the calculations that were carried forward.*

<sup>2</sup> See at p. 36: A *I would be willing to suggest that a proper evaluation of those type of exposures might return a somewhat different number at the end of the risk assessment.*

The second remedial action objective identified in the Cleanup Plan was to maintain a portion of the Site as parkland while allowing other portions to be used for commercial development.

Exhibit P-21. The Order goes on to specifically limit the park use to the “current (1999) non-residential park uses.” *Id.*

The claims of continuous, significant public use of the area of the Property to the west are simply not supported by the evidence. The western portion of the Property was the subject of EPA inquiry for most of the 1990s and, as of 2000, became the subject of the Act 2 Order. It has never been devoted to park use.

As stated in the Findings and Conclusions and Trial Memoranda previously submitted, the Borough could not offer and the public could not accept recreational use of the contaminated soils. There is no evidence of public use extensive enough to establish an acceptance of dedication even were there sufficient evidence to establish an offer of dedication.

The evidence shows that Downingtown acquired the Property with the intent to devote it to park and recreation use. At the time of acquisition, that aspiration included the entire Property. As it turned out, and as the Borough elected officials have acknowledged since the mid-1990s, that aspiration was precluded by the contamination of the western area of the Property and the unexpected risk and expense of doing anything west of the paved trail. The original intent to devote the contaminated area to park use was never realized because of the expense involved. The Property was assembled between 1962 and 1977. As the former manager and former mayor acknowledged, Council may have made different decisions in the '60s and '70s had it

known then what is now known: that the development of that area as a park is just too expensive.

Other than dredging the ponds in 1976, the first improvement was made in 1984 with the installation of the Lion's Trail. Only six years later, in 1990, it began to become clear that the Property was not suitable for recreational use without substantial clean up of the contamination, the costs for which were deemed prohibitive without a private developer partner. By 1999, this reality was accepted and the Property was rezoned for a commercial use and efforts to develop and clean up the Property have continued to this day.

**C. Park Use of the Property Will Remain and be Enhanced**

There were suggestions at the hearings in this matter that the areas to the west of the paved trail, including the wooded areas of the Property, enhance the experience of being on the Property. The historical photographs show, however, that this Property was substantially abused in the 1960s and 1970s. Exhibits P-22A, P-22B, and P-22C. The wooded areas to the west are not pristine native growth forest by any stretch of anyone's imagination. Those wooded areas are trash infested scrub growth with patchy areas now labeled "trails" by the other parties to this matter. The filled, seeded "meadow" areas are soggy, lumpy and hold puddles after even light rains.

Indeed, the paved trail today has almost no areas that go through wooded lands. Exhibit P-1. This is in contrast to the proposed trail improvements, which will extend a paved trail through the wooded area to the east of the Property below Fourth Lake and will join up with the popular Struble Trail. Exhibit P-9. Currently, about twelve (12)

acres are devoted to actual park use. Exhibit Feldman 2, page 2. After development, 21.908 acres will be available for public use. Exhibit 'A' to Exhibit P-14.

The area to be improved will open new lands to the general public. The informal dirt path to Sunset Drive will be paved and the new paved trails constructed will effectively more than double the length of paved public trail on the Property. There will be three (3) added footbridges to cross the millrace. Extensive additional parking for the public will be built to augment today's inadequate parking facilities.

Most importantly, the land will be environmentally remediated, allowing any kind of public activity to take place in contrast to the limitation of active use to the paved trail currently in place under the Act 2 clearance from DEP. Not only will the new paved trails allow users to experience and enjoy nature in a serene wooded setting, the public may now safely picnic, sunbath, walk pets and explore lands that are currently off-limits. Exhibit P-9.

To mitigate the visual impacts of the new development, there will be substantial setbacks from the paved trail with landscaped berms shielding the view of trail users to the proposed residential buildings as required by the conditional use decision and order. Exhibit P-16, Conditions of Conditional Use Approval, 1. Setbacks. Moreover, the heavy wooded tree stands on the eastern side of the ponds will remain as a thick buffer for existing residents on Lake Drive; the distance from the new residences to this buffer is substantial. Exhibit P-30.

Some of the opponents to the proposed sale and development of the Property are concerned about detrimental impacts to their property values and business interests. The Borough placed conditions on the conditional use approval to mitigate



these concerns. The sale and development of the Property serves the broader interest of all of the Borough residents and provides significant benefits as noted in the Petition and substantiated by the testimony in this matter.

**D. This Honorable Court Should Grant the Relief Sought**

The Borough, J. Loew & Associates and Progressive Housing Ventures rely upon their trial memoranda for the legal arguments applicable to this matter.

For the reasons stated therein, this Honorable Court should find that neither the Donated or Dedicated Property Act [the "Act"] nor the Public Trust Doctrine apply to this matter. In the alternative, in the event the Act does apply, the record amply supports granting the relief sought by the Borough's petition.

The controlling case is *In Re: Erie Golf Course*, 963 A.2d 605 (Pa. Commw. 2009), which holds:

[A] presumption exists that municipal officers act for the public good, and the courts may not inquire into the wisdom of municipal acts absent evidence of fraud, collusion, bad faith or arbitrary action constituting abuse of power, that judicial discretion should not be substituted for administrative discretion and that courts are not super municipal bodies and should not interfere absent improper motivation of record.

*Id.* at 613, citing *Weber v. Philadelphia*, 262 A.2d 297 (Pa 1970).<sup>3</sup>

There is insufficient evidence to establish a "dedication" of the Property to the public for use as a park. At the time that the Borough dredged the ponds in 1976, there

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<sup>3</sup> The arguments of Friends of Kardon Park that there should have been public hearings on the sale or an appraisal of the Property are unencumbered by citation to any authority that either a hearing or an appraisal is required. The Request for Proposal was advertised three times in the newspaper and there were seven organizations that picked up a bid package. The testimony of Mr. Bruton establishes the public nature of all discussions of the proposed development. The Other Respondents offered evidence of the high level of publicity that the Property has engendered throughout its history. There was no abuse of discretion in the perfectly legal process undertaken by the Borough to achieve its planning goals for the Property.

was still a dispute pending regarding ownership of portions of the Property. That dispute was not resolved until 1977. Exhibit P-4. The "dedication" ceremony in 1978 was held to fulfill a contractual obligation to the Kardon family. Exhibit Kim 11b.

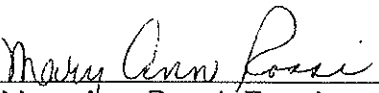
The first improvement to the Property for park use was installation of the Lion's Trail in 1984. Only six (6) years later, the Property was under investigation by the Environmental Protection Agency. There was no establishment of a public park to the west of the Lion's Trail. In fact, the DEP Act 2 Order is premised upon the assumption that the public are not using that portion of the Property, but are limiting active use to the paved trail with incidental and insubstantial activity off the paved trail. Exhibit P-21. If there is more extensive use of the area west of the paved trail than assumed by Golder, the DEP would need to reevaluate its permission for the park use to continue.


The area west of the paved trail was never practical for park use and maintenance of the status quo is not in the best interest of the public. The Court should find that the Borough can proceed with the proposed sale for development.

### III. CONCLUSION

For all of the foregoing reasons, and based upon the hearings in this matter, Downingtown Borough Council, J. Loew & Associates, Inc., Progressive Housing Ventures, LLC, and the Borough of Downingtown request that this Honorable Court grant the relief requested by the Petition of the Borough of Downingtown.

Respectfully submitted,

  
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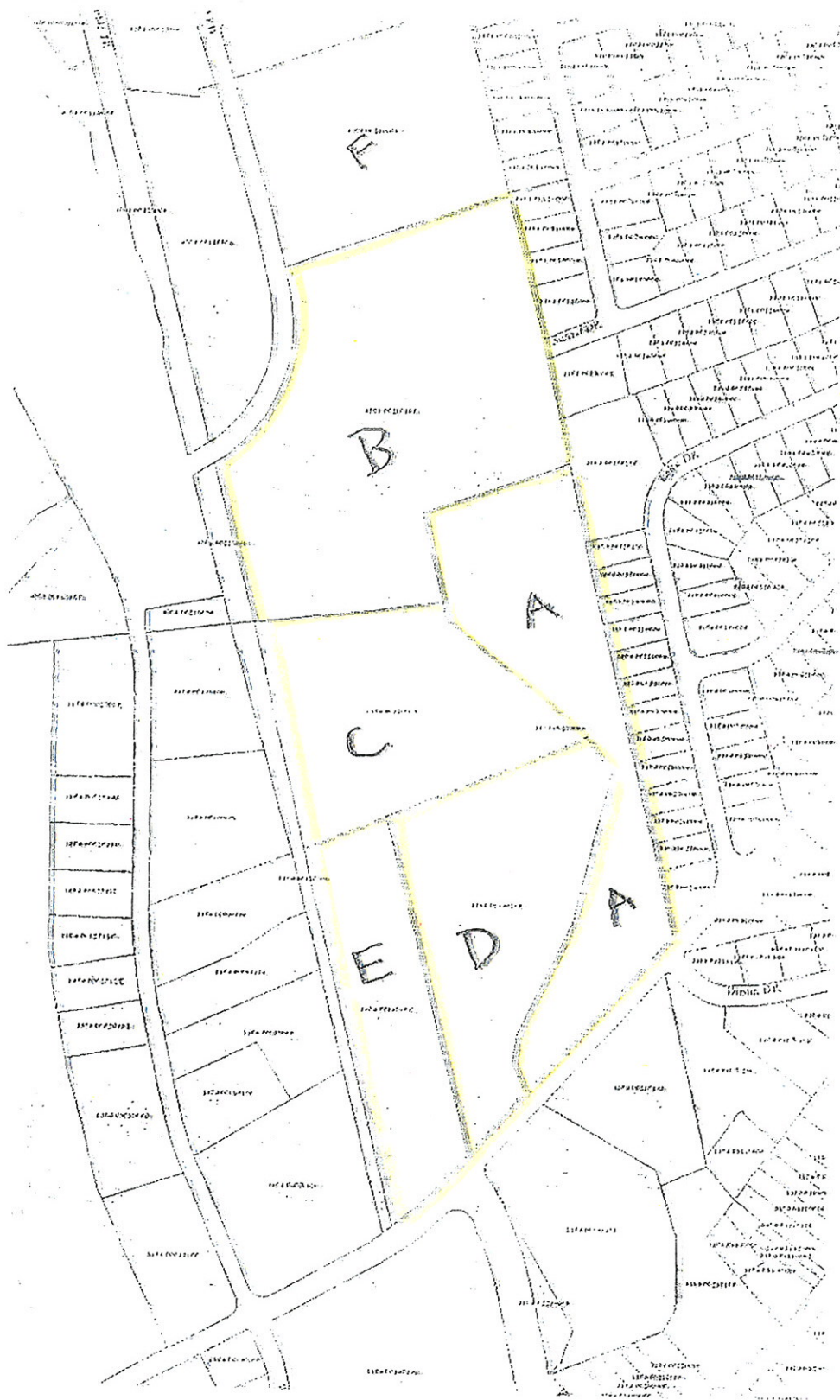


Exhibit "A"



## BOROUGH OF DOWNINGTOWN – CHRONOLOGY

Property = UPI Nos. 11-4-23; 11-4-13; 11-4-14; 11-4-14.2; 40-1-23.1

1937	Quarrying appears to begin on the Property [P-22A]
1958-1971	Property substantially disturbed for quarry use and dumping has occurred. [P-22B]
11/12/1962	Borough acquires Meisel Property; UPI 11-4-23 [P-3; Book V34, Page 69]
7/25/1968	Borough acquires 40-1-23.1 and 11-4-13 by purchase [P-3; Book H38, Page 110]
10/23/1968	Deed of Confirmation (40-1-23.1 and 11-4-13) [P-3; Book L38, Page 853]
12/5/1974	Borough acquires 11-4-14.2 by condemnation [P-3; Book 261, Page 128]
6/30/1977	Borough acquires 11-4-14 by condemnation [P-3; Book 379, Page 121]
11/17/1977	Borough Council agrees to settlement with Windsor Crossing (involved 11-4-14 and 11-4-14.2) [P-4]
10/5/1978	12-acre Kardon Park "dedicated" per agreement with Kardon Family (11-4-14 and 11-4-14.2) [Kim 11 – minutes of July 12, 1978]
7/14/1984	Lion's Trail is opened
1990	DEP/EPA becomes aware of the Property [neighbor complaint] [Madiro testimony]
1990-1996	EPA evaluation of Property under Hazard Ranking System [Golder Final Act 2 Report on disk that is part of Exhibit P-19] Borough realizes Property is contaminated and can't be used as a park [Madiro testimony].
1992	Don Greenleaf retires as Borough Manager
1993	Borough Open Space, Recreation and Environmental Resources Plan [Kim 29]
1994	Market Street Association begins work to revitalize Borough [Valocchi testimony].
July 1994	Borough Comprehensive Plan [P-26]

3/17/1999	Ordinance changing zoning of the Property to C-3 [P-6]
6/4/1999	Golder submits Cleanup Plan to DEP [P-20]
6/25/1999	Act No. 29 passed by Legislature to remove parcel 11-4-13 from Project 70 in anticipation of development.
7/1999	Golder submits Act 2 Final Report [part of P-19]
10/21/1999	DEP approves Act 2 Final Report [P-21 Findings]
1/14/2000	DEP Act 2 Section 512 Order signed [P-21]
12/14/2000	Federal Register announces \$40,000 payment by Kardon Industries, Inc. and Sonoco Products Company in connection with consent decree [P-7]
11/4/2004	Borough Urban Center Revitalization Plan [P-29]
August 2005	Resolution re: development of Kardon park [P-10]
July 2006	Kardon Park Request for Proposal -- advertised July 21, 24, 2006 for September 21, 2006 deadline and advertised September 24, 2006 for October 6, 2006 deadline [P-11]
8/17/2007	Agreement of Sale between Borough and J. Loew & Associates, Inc. and Progressive Housing Ventures, LLC [P-12, P-13]
4/3/2008	Cleanup Plan prepared for Southdown Homes, L.P. [P-19]
8/6/2008	DEP approves Cleanup Plan [P-23]
November 2008	Kardon Park Redevelopment Project -- Industrial Sites Reuse Program Funding Request [P-31]
7/1/2009	Conditional Use approved with conditions [P-16]
September 2009	Second Amendment to Agreement of Sale [P-14]

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**CERTIFICATE OF SERVICE**

I hereby certify that, on December 11, 2009, a true and correct copy of the Joint Supplemental Trial Memorandum of J. Loew & Associates, Inc., Progressive Housing Ventures, LLC, and the Borough of Downingtown was served as follows:

**VIA HAND DELIVERY**

Honorable Katherine B. L. Platt  
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**VIA U.S. MAIL**


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