PETRIKIN, WELLMAN, DAMICO,
BROWN & PETROSA
BY: H. FINTAN McHUGH, ESQUIRE
ATTORNEY I.D. No. 82097
THE WILLIAM PENN BUILDING
109 CHESLEY DRIVE
MEDIA, PA 19063
(610) 565-2670

Attorney for Respondents,
Kim Manufacturing Company
and Stewart Hall, L.P.

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

IN RE:	Petition of the Borough of Downingtown	: : :	No. 1509-0516

BRIEF OF RESPONDENTS,
KIM MANUFACTURING COMPANY AND STEWART HALL, L.P.

I. INTRODUCTION:

The present case involves a request by the Borough of Downingtown for permission to sell a longstanding public park for temporary financial gain. The Kardon Park properties were expressly acquired to serve as a passive park, and they effectively served this purpose for decades. In order to focus this Honorable Court's attention away from the proposed development of the park, the Borough has focused its own attention on the Lions Trail and the lakes to the east of the Lions Trail. The preservation of these undevelopable lands as required open space and wetlands in the development's common areas does not hide the fact that Kardon Park would be replaced by a mixed use commercial/townhouse development, with future generations having no concept of the park that was lost. The proposed development is certainly not an "improvement" or "addition" to Kardon Park, all 40.5 acres of which have served as a passive park with beautiful vistas of meadows and trees. The Borough dedicated and maintained these properties as a passive park, yet the current administration argues that the park should be developed because the sale would provide a financial benefit and because the park cannot be converted to more active park uses for which it was never intended. These proffered reasons provide no basis upon which a public park can be sold under Pennsylvania law.

Pennsylvania law provides that the dedication of public land can be shown through express actions or can be implied through actions that show an intention to dedicate. In the present case, the dedicated park purpose of the Kardon Park properties was specifically referenced in the Borough's recorded deeds and condemnation documents, and was repeatedly affirmed through the Zoning Ordinance and Zoning Map, the Comprehensive Plan of 1994, the Open Space, Recreation and Environmental Resources Plan of 1993, Resolution 2001-3 (which identified all 5 parcels as a "park"), Resolution 79.8 (which stated the Borough's intent to hold the land

"for permanent parks and recreation purposes"), as well as various other Borough Council minutes and official actions. The dedicated park purpose of these properties was also demonstrated through an October 5, 1978 public dedication ceremony and through decades of park maintenance and improvements. The Borough dredged the lakes and filled, graded, seeded and mowed the fields. The Borough also erected "Kardon Park" signs, constructed a parking lot, a paved trail, a footbridge leading to an unpaved trail, exercise stations, a water fountain, picnic tables, benches, light fixtures and park rules/regulations signs. The Borough unequivocally dedicated these properties to serve as a passive recreational park and offered these properties to perpetual public usage.

The Borough's offer of these properties to the public was accepted through decades of recreational use by the public. Although much of the foot traffic has been focused on the Lions Trail that winds though this linear park, it is the natural setting of the park that defines its character. The proposed "improvements" to the park consist essentially of a paved trail stub where there is already an actively used unpaved trail. The Borough's and the Developer's focus on the lack of active use of Kardon Park ignores the fact that the proposed "new parkland" would also be passive parkland. In essence, the proposed development would destroy half of the park and place townhouses and parking lots within a few steps of the trail.

The Borough's complaints about underground contamination ignore not only the fact that Kardon Park is a public park, but also the fact that it has been authorized to continue as a park by the Pennsylvania Department of Environmental Protection (DEP) and the United States Environmental Protection Agency (EPA). Although members of the current Borough Council have raised concerns over contamination, these concerns belie their past actions and the decades of actions of other Borough officials and the public at large. These concerns also ignore the fact that the Borough would retain title to many of the contaminated areas, and would be risking exposure of underground contaminates during the excavation. The Borough's ordinances and resolutions confirm that the real purpose of selling Kardon Park is financial in nature.

The issues of contamination and fiscal impact have no relevance to the present request to sell a public park. All of the parties in this action have acknowledged through their pleadings that the Kardon Park properties were either purchased or condemned, so the Donated or Dedicated Property Act (DODPA) does not apply to this case. The Borough's reliance on the Erie Golf Course case is misplaced because that case was based on the DODPA. Even if the DODPA's inquiry of a property's "practical use" was relevant, the evidence demonstrated that the park has very practically served as a passive park for over 31 years. The Borough and the Developer have focused on the Borough's inability to use Kardon Park as an active park, but this focus is misplaced because the site was never intended to serve as an active park and because Pennsylvania law recognizes that passive parks are afforded the same protection as active parks.

Because the evidence of public dedication and acceptance is overwhelming, the present case is governed by the public trust doctrine. Under the public trust doctrine and related case law on dedicated properties, the principles of dedication and acceptance mirrors contract law principles of offer and acceptance: the municipality holds the property out to the public, and the public accepts it through usage. The resulting bond requires the municipality to hold the property in trust for the public. Because Kardon Park was unequivocally offered to the public for passive park purposes and used by the public for these purposes, the Borough is prohibited from selling half of the park and dedicating the remainder to a private development.

II. FACTUAL BACKGROUND:

A. The Park and the Proposed Sale:

Kardon Park consists of 40.5 acres located along the border of the Borough of Downingtown and East Caln Township. Exhibit Kim-2. The park has served as a passive recreational park since 1978, and provides an area where citizens can be surrounded by sweeping vistas of lakes, meadows and trees. In addition to the Lions Trail that winds through the park, there are numerous unpaved trails, a parking lot, two footbridges, exercise stations, a water fountain, picnic tables, benches, light fixtures, park signs and other park amenities. Exhibits Kim-3a-3k, Kim-4a-4v, Kim-31, Kim-36, Kim-37, Feldman-8. Kardon Park is the only park of its size and character in the Borough.

Under the most recent amendment to the Agreement of Sale, the Borough proposes to sell about half of the park to the Developer for 305 townhomes, 40 residential loft-style dwellings and over 20,000 square feet of commercial space. Exhibits P-14, P-16, Kim-17. Most of the area outside of the ponds would be constructed upon, with only a thin strip remaining for the trail to the west of 2nd Lake and 3rd Lake, and another small wetland area remaining between Lakes 3 and 4. Exhibits P-14, Kim-25a, Kim-25b. The remainder of the park would be owned by the Borough but could be used for the development's utilities and other improvements. Exhibit P-14 at ¶ 2. The areas owned by the Borough would also serve as the development's common areas and would be used to satisfy the development's requirements for open space and wetland replacement. Id.; Exhibits Kim-25a, Kim-25b. The ponds would also be used for stormwater discharge from the development's parking lots, roadways and other impervious areas. Exhibit P-14 at ¶ 2(iii). The Borough has already granted conditional use approval to the proposed development. Exhibit P-16.

B. Evidence of the Borough's Dedication of Kardon Park:

Kardon Park consists of five tax parcels that were acquired and dedicated for the purpose of creating a passive park. The Borough initially acquired parcel 11-4-23 on November 12, 1962 by purchase from Kathryn Meisel. This 7.6 acre parcel is mostly

covered by ponds known locally as 2nd Lake and 3rd Lake, which have been publicly used for fishing and ice skating for as long as any of the witnesses could remember. In 1968, the Borough acquired parcels 40-1-23.1 and 11-4-13, respectively consisting of 19.84 acres and 1.28 acres that are separated by the East Caln / Downingtown Borough boundary. This purchase was confirmed through an October 3, 1968 Deed of Confirmation stating that "[t]his indenture is given to provide land for recreation, conservation and historical purposes, as defined in the 'Project 70 Land Acquisition and Borrowing Act, as approved June 22, 1964, P.O. 131.'" Exhibit Kim-8 at p. 3.

The two parcels along Pennsylvania Avenue were acquired after a series of legal disputes in the 1970's, wherein the Borough sought to incorporate them to the surrounding parkland and the Kardon family companies sought to have them developed for townhouses. The Borough initially zoned these properties as "Park / Open Space," which designation was contested by the Kardons through a Curative Amendment challenge that was appealed to the Court of Common Pleas. Exhibit Kim-11a. The Kardons also filed an inverse condemnation action in the Court of Common Pleas, seeking over $500,000 in damages. Id.; N.T. 11/23/09 (Don Greenleaf's testimony).[1] While these two actions were pending, the Borough condemned parcel 11-4-14.2, which consists of 7.48 acres along Pennsylvania Avenue. The Declaration of Taking for this parcel stated that "[t]he purpose of the condemnation is to expand and enlarge recreation places and space within the borough limits." Exhibit Kim-9. Borough Council's Ordinance # 74-25, which was filed as part of the condemnation, stated in Section 3 that the parcel was appropriated "for public park and other recreational purposes." The Borough also condemned parcel 11-4-14, which consists of a 4.373 acre parcel to the west of parcel 11-4-14.2 along Pennsylvania Avenue. The Declaration of Taking and related Ordinance # 77-12 for this parcel contained the same statements of purpose that were made for parcel 11-4-14.2. Exhibit Kim-10. The condemnation actions were also contested by the Kardons, and all four lawsuits were settled in 1977 under an agreement whereby the Borough would pay consideration and name the land as "Morris Kardon Park." Exhibit Kim-11a.

Following the settlement with the Kardons, Borough Council planned and set a date for the Kardon Park dedication ceremony. Exhibits Kim-11b, Kim-11c. On October 5, 1978, a public dedication ceremony was held. As shown on Exhibit Kim-1, the Mayor, Borough Manager and members of Borough Council stood before a sign reading "Kardon Park" along Pennsylvania Avenue, with the fields and trees of the current park properties appearing in the background.[2] All five parcels were thereafter opened to the public as a passive recreational park. These facts were confirmed through the uncontested testimony of Donald Greenleaf, who was the Borough Manager at the time, and Frank Manetta, who sat on Borough Council in the 1970's and held various other positions at the Borough over the years. Messrs. Greenleaf and Manetta explained that the Kardon Park properties were specifically acquired to serve as a passive recreational park. Mr. Manetta stated that "we had a dream" of creating the park that exists today and Mr. Greenleaf specifically stated:

[1] Don Greenleaf's 11/23/09 testimony was not transcribed as of the date that this Brief was filed.
[2] Don Greenleaf marked the location of this sign along Pennsylvania Avenue on Exhibit Kim-31.

> The Borough wanted that to be open space so when you walked through there you would have a nice passive area with the grass around there so you would be able to observe the birds and have a nice quiet area when you walked.

N.T. 9/28/09 at 26. Messrs. Greenleaf and Manetta also explained that the Borough did not intend the properties to be used as an active park, because the Borough already had such a park located just a block away. Exhibit P-39 ("Kerr Park").

On May 16, 1979, Borough Council passed a Resolution authorizing the payment of matching funds needed for a state Community Development Program grant application for park and recreation projects. The Resolution specifically referenced Kardon Park and the Borough's intent to hold and use the land "for permanent parks and recreation purposes." Exhibit Kim-11d. Mr. Greenleaf recalled that the Borough also obtained federal grant monies to help improve Kardon Park. Off-site fill dirt was brought in to cover the former dump sites and fill in the swamps and irregular surfaces that formerly characterized the site. In addition, the ponds were dredged of silt, which was used to fill in these areas. The total amount of fill material was by all accounts very substantial. Following the filling and grading of these areas, the Borough planted grass seed and regularly mowed them. The transformation of the park through the creation of level, grassy areas was also explained by Kathleen Lyons and Thomas Kiely, who identified these areas on Exhibit Kim-31.

In 1984, the Borough constructed the parking lot and paved trail with the assistance of the local Lions Club. N.T. 9/28/09 at 27. On July 14, 1984, a public dedication ceremony was conducted with a plaque commemorating the gift and naming the trail as the "Lions Trail." Exhibit Kim-3f.[3] In the following decades, the Borough maintained and installed improvements consistent with its passive park usage, including the installation of footbridges, exercise stations, a water fountain, picnic tables, benches, light fixtures, "Kardon Park" signs and park rules/regulations signs. Exhibits Kim-3a-3k, Kim-4, Kim-6, Kim-31. The Victims' Memorial was installed around 2004, featuring an angel sculpture, pavers, benches, flower beds and ornamental trees and plantings. Exhibit Kim-3a, Kim-4g, Kim-4h.

The Borough's dedication of Kardon Park as a public park is also evidenced through various official documents and publications issued after the park's opening. The 1989 and 1991 Official Zoning Maps respectively identified Kardon Park as part of the zoning districts entitled "public park" and "park." Exhibits Kim-12a, Kim-12b. In 2001, Borough Council passed Resolution 2001-3, which renamed the park as "The Ponds." Exhibit Kim-13. The Resolution specifically listed the parcel numbers for all 5 properties, and collectively referred to them as "that certain park … [that] has previously been known as and referred to as 'Kardon Park.'" Jamie Bruton, who testified at trial that Kardon Park was not a park and should instead be called a "dump," was on

[3] Two months previously, a similar plaque was installed at Kardon Park, commemorating the contributions of the late Jack Woodward, the Borough's Superintendant of Streets and Parks. Exhibit Kim-3f.

Borough Council when Resolution 2001-3 was passed. N.T. 9/28/09 at 5. Even after the current Borough Council started its development push, it passed a Resolution in August of 2005 referring to the site as "Kardon Park." Exhibit Kim-14. Even as late as the day of trial, the Borough was distributing materials referring to the site as "Kardon Park" and "public parkland." Exhibits Feldman-1, Feldman-5, Kim-15.

The passive park purpose of the Kardon Park properties was further affirmed in Downingtown Borough's Comprehensive Plan of 1994 (Exhibit Kim-28) and Open Space, Recreation and Environmental Resources Plan of 1993 (Exhibit Kim-29). Anthony Madiro, who also testified at trial about how Kardon Park should properly be called a "dump," served as Mayor during the preparation and adoption of both of these plans.[4] The Comprehensive Plan's Map 8-1 identifies all of Kardon Park as "Protected Open Space." Map 10-1, entitled "Future Land Use Patterns," designates Kardon Park as "Conservation/Open Space," as distinguished from Kerr Park's designation of "Recreation/Open Space." In contrast to Conservation/Open Space areas such as Kardon Park, Recreation/Open Space areas such as Kerr Park were specifically "designated for active recreation use." Exhibit Kim-28 at p. 10-27.[5] Page 10-26 states that the Borough's Conservation/Open Space areas included 180 acres in 1994, while Borough Manager Steven Sullins testified that this amount was currently only 87 acres.

In the Open Space, Recreation and Environmental Resources Plan of 1993, Map 1 identifies all areas west of the Lions Trail as "Parklands/Open Space." Page 6-8 confirms that "Kardon Park complements Kerr Park by offering open space with passive characteristics." In Map 5 (entitled "Recreational Planning Districts") and Map 6 (entitled "Final Recommendations"), Kardon Park is identified as "Borough Recreation Lands" with an overlay area of "Existing Linear Park" that follows the Lions Trail and areas west of the trail.[6] At the end of the Open Space Plan, a Walking Tour Guide has the words "Kardon Park" written over the areas to the west of the Lions Trail. Through this Plan and the numerous other official documents, the Borough unequivocally declared all of the Kardon Park properties to be a passive public park.

The Borough and the Developer presented no witnesses or evidence to contradict the testimony and documentary evidence relating to the Borough's dedication of Kardon Park as a passive public park.[7] Mr. Bruton in fact acknowledged that the

---

[4] In the acknowledgements for the Open Space Plan, it references that the Mayor, among others, was of "immeasurable value to the authors during the preparation of this plan."

[5] In Appendix A to the Comprehensive Plan, a public opinion survey indicated that the most valuable leisure activities were: (1) walking or jogging, followed by (2) nature enjoyment and hiking. Exhibit Kim-28 at p. A-2. The public also responded strongly in favor of preserving open space/recreation areas, with 52% of people citing overdevelopment as a reason to leave the Borough. Exhibit Kim-28 at p. A-7.

[6] Page 1-10 states that "[t]ypically, municipal parks tend to emphasize active recreation … but interest in more passive areas and linear parks is growing. Linear parks are natural or man-made corridors that provide various modes of recreational travel like walking, biking, and horseback riding." In spite of the statements at trial that the Borough has a surplus of parkland, the Borough stated that "there is less neighborhood park land in this district than recommended." Exhibit Kim-29 at p. 6-13.

[7] The Borough presented no substantive evidence to undermine the historical actions of dedication, but did make an *ad hominem* attack on Mr. Greenleaf, suggesting that he was angry at the Borough for refusing his request for a pension. Mr. Greenleaf explained that this had nothing to do with his testimony

reason that Kardon Park was put up for bid through a public Request for Proposal was because "this is public property." N.T. 9/23/09 at 15. Although the public dedication and acceptance of Kardon Park had already been long cemented, the Borough implied that this bond had somehow been undermined by the more recent efforts of Borough Council and local commercial organizations to develop the property. However, Mr. Bruton acknowledged that the prior attempts to develop the property for a bank use was done "without a public process," and the current process did not start until the past couple of years. N.T. 9/23/09 at 62-66. He and the other Borough witnesses admitted that there were no advertised public notices stating that Borough Council would be making a decision on whether to sell Kardon Park.[8]

Mr. Bruton also acknowledged that the Ordinance identifying Kardon Park as a redevelopment initiative was not adopted until 2005, and made no mention of protecting human health from contamination exposure. N.T. 9/28/09 at 67. The Ordinance merely mentions that it was intended to "stimulate economic redevelopment of the area, increase the tax base and provide patronage to the downtown business district." Exhibit Kim-14 at p. 2. Likewise, the Borough did not adopt its Urban Center Revitalization Plan until November 4, 2004, and this was drafted with economic revitalization goals in mind.[9] The Downingtown Main Street Association "played a large role" in the original efforts to sell Kardon Park from 1999-2000. N.T. 9/23/09 at 66. These attempts never resulted in a signed agreement of sale, and there were no advertised public notices or hearings on any prior attempts to sell the park. N.T. 9/23/09 at 62-64.

Most importantly for the present inquiry, the Borough never closed off any portion of Kardon Park from public access, and continued its mowing and other park maintenance activities. N.T. 9/23/09 at 51-52. The Borough also never posted "keep out" or warning signs anywhere at Kardon Park, even though it posted a warning sign about deer ticks, which naturally would suggest off-trail park use. N.T. 9/23/09 at 85. In fact, when the Borough's land planner, Thomas Comitta, was first presented with a list of Borough parks around 2000, he inquired as to why Kardon Park was not listed. Mr. Comitta testified that Kardon Park was not listed because a former Borough solicitor made the legal determination that grant money was not available to improve the park. As explained *infra,* the Borough's recent revitalization efforts and legal determinations about available grant monies did nothing to undermine the dedicated public park status of Kardon Park.

---

and that the dispute had been "resolved." As with Mr. Manetta, Mr. Greenleaf confirmed that he simply wanted to preserve a park that he and other officials worked so hard to create.

[8] Mr. Madiro further admitted that there were no other hearings on the sale of the property other than the vote on the Agreement of Sale in 2007 and the vote on the Amendment to Agreement of Sale in August of 2009. N.T. 9/28/09 at 52. He also acknowledged that Borough Council never discussed the sale of Kardon Park being put on a referendum for public vote. N.T. 9/28/09 at 44.

[9] The Kardon Park Redevelopment District Ordinance (which rezoned the park specifically to fit the type of plan proposed by the Developer) was not introduced until 2008 and not enacted until 2009. It also failed to contain any statements of protecting the public from contamination. N.T. 9/28/09 at 41; Exhibit P-15.

C. Evidence of Public Acceptance of Kardon Park:

The public's longstanding usage of Kardon Park, which was only welcomed by the Borough, confirms both the Borough's intended dedication and the public's acceptance of this passive park. In addition to the testimony of Messrs. Greenleaf and Manetta, a number of other witnesses testified about the transformation of the site and its historic use by the public. Thomas Kiely testified that since the early 1970's, he visited his father's business at Kim Manufacturing Company, which is located immediately to the west of parcels 11-4-13 and 40-1-23.1. Exhibit Kim-2. He recalled the Borough's dumping on these properties and described the swampy, "moonscape" character that these properties exhibited in the 1970's. He described the significant amount of clean fill that capped the historic fill in these areas, which were transformed into level, grassy meadows. Over the years, he witnessed various types of public use of the Kardon Park properties, including walking/hiking, dog walking, bicycling, bird watching, cross-country skiing, unorganized ball playing, band practice and fishing. These activities were certainly not limited to the paved Lions Trail, and Mr. Kiely specifically confirmed that the areas west of the trail have been used by the public. He believed that the use surveys referenced in the Golder Report from the late 1990's accurately characterized the public's use of the park at that time, as well as at the present time.

Mr. Kiely took a number of photographs during a brief walk-through of the park on the morning of Mother's Day 2009, which depict some of the park amenities and ways in which the park benefits the public. These photographs show that there is a "Welcome to Kardon Park" sign at both ends of the park, specifying the rules and regulations applicable to public usage of the park. Exhibit Kim-3a. Mr. Kiely also mentioned that there is a deer tick warning sign at Kardon Park, which naturally implies off-trail usage. Mr. Kiely's photographs show that Kardon Park is virtually uninterrupted by signs of commercial or residential development. Exhibits Kim-3b, Kim-3j. The Victim's Memorial is currently located in a serene setting with an open field and trees in the background. Exhibit Kim-3a.[10] There are other memorials and monuments in the park, as well as exercise stations and instructional guides. Exhibit Kim-3f. There are also a number of unpaved trails (including two wooden foot bridges) and a series of wider, grassy "cut-throughs" that people use to get from one area of the park to another. Exhibits Kim-3c, Kim-3d, Kim-3j.[11] Mr. Kiely used a green pen to outline the perimeters of the grassy areas at Kardon Park (labeled A through F), and he and Sarah Brown used a brown pen to identify a number of unpaved trails and cut-throughs that are used by the public (labeled 1 through 12). Exhibit Kim-31.[12] In addition, Don Greenleaf marked with a red pen the locations of a former "Kardon Park" sign as well as park

[10] The natural backdrop in this photograph and many of the other photographs would be replaced by buildings in the proposed development.

[11] Although the grassy cut-throughs may not have worn trails such that one would typically see in a wooden area, Mr. Kiely and the other historical use witnesses confirm that people walk through these cut-throughs, which connect different parts of the park.

[12] The location of foot bridges was also designated with the letters "FB" on Exhibit Kim-31.

benches and former structures that were used by the Boy Scouts for camping purposes. Many of these markings appear on the west side of the Lions Trail.

The Borough called Michael Antonelli to testify that the unpaved trail system was not as extensive as represented. Mr. Antonelli is not only employed by the Borough, but he is also in favor of the development of Kardon Park. Mr. Antonelli acknowledged that his inspection and photographing of these areas occurred after the leaves had fallen and covered the forest floor. He and other witnesses also confirmed that the Borough discontinued its mowing activities during the course of this lawsuit, such that the grassy cut-throughs and fields had become overgrown and obstructive to pedestrian use. Exhibits Kim-36, Kim-37. The beginning of the change to these areas can be seen in Exhibits Kim-37f and Kim-37h, and the difference in the visibility of the trails can be seen by comparing the day-of-trial photographs (Kim-36) with the prior photographs in Exhibits Kim-3 and Kim-37. Mr. Kiely explained that he did his best to identify the locations of the trails on the aerial tax map, but acknowledged that he was neither a surveyor nor a draftsman. Janie McMurray confirmed that Mr. Kiely may have connected trails 6 or 9 with the wrong park of grassy area "A". She clarified her belief that there was a trail leading from grassy area "B" to the peninsula extension of grassy area "A", near the southeast corner of parcel 11-4-13. The more recent aerial photograph of Exhibit P-1 shows this connecting area between grassy areas "A" and "B", even though the tree canopy obscures many other areas. As cited more fully below, Mr. Bruton acknowledged the heavy usage of trail 2, and both Mr. Madiro and Mr. Antonelli confirmed that a trail exists in the area of trail 3, connecting trail 2 with the baseball field at Sunnybrook Park on Lake Drive. Mr. Antonelli also admitted the existence of trail 2 leading to Sunset Drive, trail 4 along 4th Lake and trail 8 on the west side of the Lions Trail.

Testimony was given from other fact witnesses about the public's usage of Kardon Park. As an example, the top photograph shown on Exhibit Kim-3k was explained to depict 46 cars parked in the parking lot and along the access drive during a cold but sunny February day. The blue sign in this photograph was explained to have instructions directing the public to find additional parking at the nearby Kerr Park parking lot. At a later date in 2009, the Borough installed a post-and-rail fence along the access drive to exclude people from parking there. Exhibit Kim-4d. Other examples of public usage can be seen in Ann Feldman's photographs that were marked as Exhibits 4a-4v. These include ice skating, school bus visitations, sun bathing, dog walking and fishing. In addition to the fact that these photographs show usage of the areas west of the Lions Trail, they demonstrate that the woods and fields around the trail provide its distinctive natural setting. Frank Manetta explained that Kardon Park was like Downingtown Borough's little Central Park, and Mr. Kiely noted that the general character of the park was similar to Central Park and Valley Forge National Park, except that the public makes more use of the off-trail areas at Kardon Park.[13] The testimony of Ann Feldman,

[13] Although the Borough Manager, Steven Sullins, testified that off-trail travel is prohibited at Kardon Park and that people using these areas would be "trespassers," this statement belies the long-standing permission by the Borough of the public usage of these areas. Mr. Sullins in fact acknowledged that the

Sarah Brown, Kathleen Lyons and Janie McMurray confirm that their families and the public at large have historically used the off-trail areas on both sides of the Lions Trail. In closing, Janie McMurray explained that Kardon Park was the only park of its size and character in Downingtown Borough, and explained that the proposed development would completely change the experience of someone walking through the park. While the park currently allows people to get away from virtually all signs of modern civilization, Ms. McMurray explained that walking on the proposed trail would feel like walking through the common areas of a townhouse development.

The Borough's evidence about the use of Kardon Park was focused on active park use instead of passive park use. N.T. 9/23/09 at 12 (Jamie Bruton defining "active park" acreage). The Borough did this notwithstanding its understanding of the passive nature of this park. Among the other acknowledgments listed above, the Borough applied for a grant from the Department of Community Economic Development on July 29, 2008, wherein the Borough represented that "the Borough has managed the site as a municipal park, reserved for passive recreation." Exhibit Kim-26; N.T. 9/23/09 at 82-83. The Borough failed to present any substantial evidence to undermine the fact that Kardon Park is a passive park.

The Borough submitted the Golder Report surveys as the most objective evidence of park usage. While many of the park users in this survey remained on the paved trail, 19.5% of them conducted off-trail activities, including dog-walking and biking to the woods. Exhibit P-19a at p. C-7. Contrary to the assertions of the Borough and the Developer, the Golder Report never stated that the off-trail activities were limited to the pond areas east of the Lions Trail, and the references to dog-walking and biking to the woods demonstrates that this conclusion is incorrect. The Borough's witnesses nonetheless testified that people "never" used the areas west of the Lions Trail. N.T. 9/23/09 at 29; N.T. 9/28/09 at 10. Mr. Madiro even went so far as to say that people never use the grassy area adjacent to the parking lot or near the Victims' Memorial. N.T. 9/28/09 at 10. These statements contradicted not only the Golder Report, but also other statements of Messrs. Bruton and Madiro. Mr. Bruton admitted that there was a "very active bike trail" (later identified as trail 2 on Exhibit Kim-31) leading to Sunset Drive, N.T. 9/23/09 at 83, and Mr. Madiro acknowledged the existence of another trail (later identified as trail 3 on Exhibit Kim-31) leading from this wooded area to the softball field at Sunnybrook Park. N.T. 9/28/09 at 9.[14] In addition, the Borough's witnesses acknowledged relatively limited use of Kardon Park, so their testimony of public usage is of limited value.[15] Most importantly, it was uncontested that Downingtown Borough never restricted public access or otherwise interfered with Kardon Park from serving as a passive park, and its sudden cessation of mowing during the pendency of this case is

---

Borough has never taken any measures to exclude people from these areas, and maintained these areas for decades in a manner that is consistent with public usage.

[14] Mr. Madiro also admitted that a "Kardon Park" sign previously was posted along on Pennsylvania Avenue. N.T. 9/28/09 at 36. He also admitted that a current "Kardon Park" rules and regulation sign faces south towards Pennsylvania Avenue, such that a person looking at the sign would be able to look between the signposts to see the grassy area to the west of the Lions Trail. N.T. 9/28/09 at 62.

[15] Mr. Bruton gave limited testimony about how often he uses Kardon Park, and Mr. Madiro admitted that he typically just drives by the park and only walks the trail "a couple of times a year." N.T. 9/28/09 at 36.

a self-serving and half-hearted attempt to suggest otherwise. The Borough never posted "keep out" or warning signs anywhere at Kardon Park, even though it posted a warning sign about deer ticks. N.T. 9/23/09 at 85.

D. Evidence of Contamination:

Although the Borough's primary concern in selling Kardon Park is financial in nature, the Borough also attempted to show that Kardon Park cannot be used as a park due to past contamination by the Borough and its former paper companies. Messrs. Bruton and Madiro expressed concerns over contamination and claimed that the Borough needed to rid itself of liability issues related to the contamination. However, it was uncontested that the Borough would retain ownership of many of the contaminated areas, and would be risking exposure of underground contaminates during the excavation process. Exhibit P-14; N.T. 9/23/09 at 75-76. Although Messrs. Bruton and Madiro asserted that the 1999 Act 2 Order prohibits the continued recreational use of Kardon Park, they both sat on Council and were integrally involved in the Kardon Park redevelopment process in 2008, when the Borough represented in its DCED grant application that "[i]n 1999, the site received an Act 2 liability release for recreational use from the PA Department of Environmental Protection." Exhibit Kim-26; N.T. 9/23/09 at 82-83. For purposes of the present case, the Borough now asserts that the 1999 Act 2 Order prohibits the continued recreational use of Kardon Park.

Although Mr. Bruton gave his own layman's opinion as to the significance of the 1999 Act 2 Order from DEP, he admitted that DEP never determined that the Order was violated due to the subsequent use of Kardon Park. N.T. 9/23/09 at 56.[16] He also acknowledged that nothing prevents the Borough from applying for an amendment of the Order, which was exactly what the Developer in this case has done.[17] N.T. 9/23/09 at 58-59. The Borough never attempted to sell or lease the Kardon Park properties to any conservancy entities, such as the Brandywine Conservancy, that would maintain it as a park. N.T. 9/23/09 at 54-56. Although the testimony of Walter Payne (DEP's geologist who was intimately involved with Kardon Park) confirmed that DEP never prohibited Kardon Park from continuing its current passive park use, Mr. Bruton's testimony demonstrated that the Borough or its successors could freely apply for an amendment of the Order to continue the park use. The Borough never applied for such an amendment, never determined whether another entity would be interested in applying for such an amendment, and was never required to seek an amendment in the first place.

[16] Even according to Mr. Bruton's interpretation that the intent of the Act 2 Order was for the areas west of the trail and south of the municipal boundary to be developed, he acknowledged that there was nothing preventing the Borough from selling that area to a commercial developer, and nothing permitting it to be developed for townhouses. N.T. 9/23/09 at 65.

[17] In fact, the Act 2 Order's permission of a certain area to be used for "future non-residential commercial use" merely restricts residential use, which required the Developer to obtain an amendment of the Order as part of their proposed townhouse development. Exhibit Kim-22.

In an attempt to show that contamination prevents Kardon Park from being used as a park, Mr. Bruton stated he saw debris in the woods, such as bottles, a couple old gas cylinders, an old steel drum and an "old Corvair … or parts of it." N.T. 9/23/09 at 21-22. Mr. Bruton is not an expert and his opinion does nothing to undermine DEP's approval or the extensive analysis of Golder Associates. In any event, Mr. Kiely testified that he personally inspected these articles, and determined that they could be removed by hand (the car was only a roof and door panel). He and numerous other fact witnesses also explained that Kardon Park has no visible signs of dumping, and no witnesses (including the Borough's witnesses) testified that the limited amount of debris could be seen from any of the trails or open areas of the park. Although the evidence demonstrated that the debris in the woods could be pulled out without any real effort, the Borough instead chose to cite these items in support of their sale efforts. Most importantly, the Borough's witnesses presented no evidence to show how the limited amount of debris in the woods has prevented Kardon Park from serving its intended purpose for decades.

Although Mr. Madiro testified that he previously saw "bubbling fluorescent green chemicals" at the site, he never recommended that any portion of Kardon Park be closed or posted with warning signs. N.T. 9/28/09 20-21. He also admitted that he was aware that the Borough's groundskeepers were mowing the fields to the west of the trail, but never required them to stop mowing or wear masks to protect them from the claimed risks of contamination. N.T. 9/28/09 at 22. He served as Mayor when the EPA performed its investigation of Kardon Park in the early 1990's, but he never mentioned anything about fluorescent green bubbling chemicals to the EPA. Mr. Madiro instead announced that "there is nothing in the park above the ground that should affect anybody" when he was fending off contamination claims in 1992. N.T. 9/28/09 at 30-31; Exhibit Kim-32. He also stated at that time that the EPA informed him that no warning signs were required at Kardon Park. N.T. 9/28/09 at 31; Exhibit Kim-33. Although he warned the citizens in 1992 not to "go off half-cocked" because the EPA determined that levels of contaminants at Kardon Park did not require emergency action, he changed his position at trial to state that people could not run or play in the park without becoming contaminated. N.T. 9/28/09 at 32-34. Mr. Madiro admitted that he "never beat that contamination drum until the redevelopment proposal came about involving the intervenors in this case." N.T. 9/28/09 at 36.

In addition to the testimony of Messrs. Bruton and Madiro, the Borough presented evidence about the 1999 DEP review of Kardon Park, including the Final Act 2 Report of Golder Associates (also known as the "Golder Report"). The Developer also presented testimony from Paul Stratman of Advanced Geoservices, who gave his interpretation of DEP's review and the Golder Report. The Golder Report was approved by DEP, which issued an Order under Section 512 of Act 2 stating that "[t]he Site is currently used as a public park and for passive recreation," and that under this use scenario, "any risk to human health is within an acceptable range, as set forth in the Act 2 regulations." See Exhibit Kim-22 at p. 2, ¶¶ C-D. The Act 2 Order also referred to an alternative development scenario "*allowing* other portions to be used for commercial development." Id. at ¶ D (emphasis added).

Although Mr. Stratman interpreted the Act 2 Order to mean that the areas west of the Lions Trail were off-limits to the public, it was uncontested that the "Future Use Map" included in the Order was based on the 1999 Conceptual Development Model Plan that was submitted by the Borough to DEP as a potential alternative to the continued park use. Exhibits Kim-22, Kim-23. Mr. Stratman's own Cleanup Report contained no findings of unacceptable risks of continued park use and no conclusions that DEP restricted the future use of Kardon Park.[18] Mr. Stratman acknowledged that his testimony at the conditional use proceedings was completely different than his testimony at the trial in this case. His position during those hearings was that "there is no need for any re-clearance under Act 2 unless there is a significant change in use of this park." When Mayor Bruno specifically asked him about the western side of the property, "what, if any, harm is there in leaving the property as it is?" Mr. Stratman answered that "DEP has gone through and given the sign off back in 1999." When Councilman Gazzerro asked him about whether the contamination levels were acceptable, he stated that "this site is approved for recreational exposure in its current condition." This is the same position that was stated by the Borough to DCED in 2008. Exhibit Kim-26; N.T. 9/23/09 at 82-83. Mr. Stratman and the Borough have nonetheless attempted to override their prior statements based on a future use plan that was submitted by the Borough to DEP as part of the 1999 development effort.

Mr. Stratman's own Remedial Action Plan contradicted his speculation that DEP's intent was to restrict the use of the contaminated portions of the park. This Plan showed the "Estimated Limit of Historic Fill" as encompassing virtually all of the areas outside of the ponds, a much larger area than the area Mr. Stratman asserted to be restricted. Exhibit P-19 Advanced Geoservices Cleanup Plan at Remedial Action Plan.[19] His speculation about the intent of the Act 2 Order also defies the fact that the alternative commercial scenario from 1999 showed a greater exposure risk than the continued park use scenario. Exhibit P-19 Golder Associates Final Act 2 Report at p. 31. He acknowledged that nothing in the Act 2 Order implies that grass, trees or other passive park features were prohibited from growing west of the trail. Rather than restricting public access to these areas, the Order actually stated that the entire park was studied and that no unacceptable risks were determined for human contact. Exhibit Kim-22 at p. 2, ¶¶ B-D.

[18] Mr. Stratman has brought his own family to Kardon Park, including the off-trail areas. Neither Mr. Stratman nor any other witnesses presented evidence that anyone has ever been harmed by contamination from Kardon Park since it was opened in 1978.

[19] The invisible municipal boundary that served as the northern edge of the shaded portion of DEP's Future Use Map had no bearing on the limit of historic fill, and Mr. Stratman admitted that the heaviest concentrations of lead were on the Borough's compost/fill lot, known as parcel number 40-1-23 (which was released from this lawsuit shortly before trial). According to Mr. Stratman, the Borough was required to install silt fences and other protective measures before commencing earth movement activities on this ground.

As testified by Walter Payne, DEP does not become involved in use restrictions and defers to local zoning laws on these issues.[20] Mr. Payne explained that DEP was merely authorizing the potential commercial development of the shaded areas on the Future Use Map in the event that the Borough proceeded with the development. In determining DEP's intent behind the Act 2 Order, Mr. Payne's testimony is infinitely more reliable because he works for DEP while Mr. Stratman works for the Developer in this case. As confirmed by Mr. Payne, Kardon Park can continue to be used indefinitely for its current purposes, and no areas need to be closed off from the public. As part of the Developer's Act 2 amendment application, Mr. Payne issued an August 6, 2008 letter confirming that the "site" (referring to all 5 properties) is currently used as a "recreational park" and that "[a] risk assessment has determined that current conditions do not pose an unacceptable risk to human health under this land use scenario." Exhibit Kim-24. The letter also confirms that contamination risks only arise from the proposed development of Kardon Park, which "includes the disturbance of wetlands areas and the potential for soil erosion/runoff." Id. Mr. Payne's testimony and actions diffused any speculation that DEP prohibited the continued passive park use of the areas west of the Lions Trail.

The contextual evidence from 1999 provides further confirmation of DEP's intent in issuing the Act 2 Order. DEP issued an October 5, 1999 letter, explaining that the Act 2 Order related to the continued park use as well as the alternative development proposal. Exhibit Kim-20 (referencing uses that are "present (as a park), continued (as a park) and alternate future uses (commercial))." In its October 21, 1999 letter approving the Final Act 2 Report, DEP explained the approval in terms of alternative future scenarios, and stated that under the park use scenario, "there is no remedial action objective necessary to protect human health and the environment from direct contact exposures to the identified regulated substances in soil media." See Exhibit Kim-21 at p. 2. Mr. Stratman provided no response to these statements that were issued contemporaneously with the Act 2 Order.

Although the Borough's and Developer's witnesses speculated that the 1999 Act 2 Order prohibited the continued park usage of areas west of the trail, DEP never determined that the Order has been violated by subsequent park use. DEP in fact reviewed the use of Kardon Park as part of the 2008 Act 2 amendment process, but never determined that use patterns had changed or that the limited use of off-trail areas needed to stop.[21] Mr. Stratman's Cleanup Report in fact stated that "[c]urrent conditions and land use in the Park are consistent with the exposure assumptions made as part of the original risk assessment contained in the Final Act 2 Report." Exhibit P-19 Advanced Geoservices Cleanup Report at Appendix B. Mr. Stratman and Mr. Payne both testified that the Act 2 Order would only be subject to a "reopener" if a substantial

[20] Mr. Payne clarified that in the Act 2 process, DEP merely reacts to a proposal that is submitted by a landowner, and an approval is tailored to a specific proposed use. The process is intended to approve specific uses and is not intended to be restrictive, especially where a risk assessment determines that there are no open exposure pathways that involve unacceptable health risks.

[21] In addition to DEP's repeated investigations of Kardon Park, the federal EPA conducted its own investigation in 1991. Although EPA required some limited fill material to be removed, the case was closed without additional remediation requirements or use restrictions.

change in exposure conditions occurs, such as in a change from a nonresidential use to a residential use.[22] There was no evidence of any "substantial change in exposure conditions" since 1999 that would suggest a violation of the Act 2 Order, and DEP's actions and testimony confirmed that the Order has not been violated. No substantial evidence was presented to prove that DEP prohibited the continued passive park use of the areas to the west of the Lions Trail.

The Borough and the Developer repeatedly suggested that the Golder Report showed that people only walked east of the Lions Trail in 1999. As noted above, the Golder Report merely stated that 19.5% of the park users conducted off-trail activities, including dog-walking and biking to the woods. Exhibit P-19a, Appendix C at p. C-7. Mr. Payne confirmed that there are no statements in the Golder Report that people only use the areas east of the Lions Trail. In addition, the Report contained a risk assessment for groundskeepers, who would be mowing the lawns to the west of the Lions Trail, and determined that dust and other exposures to these groundskeepers involved risks that were well within acceptable ranges. Exhibit P-19a at p. C-17 and Table C-5.

The Golder Report's conclusions also contradict Mr. Stratman's speculation as to why DEP could have intended to place use prohibitions on Kardon Park. The Report plainly stated that that the subsurface contamination does not pose any risk that would prevent Kardon Park or any portion of it from continuing its dedicated passive park purpose. In fact, under recreational exposure factors that were characterized as "conservative,"[23] Golder's summary conclusion was that:

> ... the surface soil at Kardon Park does not pose a cumulative risk to park users in excess of the statutory threshold. Furthermore, the estimated carcinogenic risks are well over an order of magnitude less than the maximum carcinogenic risk level specified by PADEP for developing cleanup levels at a Site.

Exhibit P-19a at pp. C-16 and C-17, Exhibit P-19a at p. C-19 ("no unacceptable human health risks have been identified for exposure to surface soil").[24]

Golder actually performed two risk assessments: one for the "current park use scenario" and one for the "planned future commercial/park use scenario." The park use assessment reflected risks for the *continued future* use of the site as a park. Exhibit P-

[22] Mr. Stratman was not aware of any instance where DEP has reopened a case that has been given an Act 2 approval.

[23] The park use risk assessment actually stated that "it is very likely that the estimates calculated in this risk assessment overestimate the potential risks associated with the COPCs in surface soil at Kardon Park." Exhibit P-19a at p. C-19.

[24] Mr. Payne confirmed that the conclusions of the Golder Report were that direct human contact for the durations and frequencies associated with recreational use of the property and routine maintenance/landscaping was acceptable without the need for capping, soil removal or other remedial alternatives.

19 Golder Associates Final Act 2 Report[25] at p. 34 ("[t]he SC Report presented a baseline risk assessment for current use of the Site as a park and for the continued future use of the Site as a park"). The commercial scenario was proposed by the Borough to DEP as a potential alternative use for the site.[26] Significantly, the alternative commercial scenario showed a greater exposure risk than the continued park use scenario. Exhibit P-19 Golder Associates Final Act 2 Report at p. 31. In the Final Act 2 Report, Golder concluded that the results of the risk assessment for continued park use showed the following:

> … the risks due to potential direct contact exposures of both park users and park groundskeepers to constituents in environmental media at the Site are within limits established by the Commonwealth of Pennsylvania and by PADEP. In fact, the estimated excess lifetime health risks are approximately one to two orders of magnitude less than the allowable upperbound excess lifetime risk specified in the Pennsylvania Act 2 Statute …

Exhibit P-19 Golder's Final Act 2 Report at p. 35.

Mr. Stratman's Cleanup Plan contained no disagreements with the findings in the Golder Report, and confirmed that Kardon Park could continue its current recreational use indefinitely. At the very beginning of the Cleanup Plan, he stated that "[i]n the Final Act 2 Report, Golder concluded that no unacceptable risk to human health or the environment existed for use of the Site as a recreational park, and the Site was granted Act 2 clearance for recreational use." Exhibit P-19 Advanced Geoservices Cleanup Plan at pp. 1-2. In Appendix B to the Cleanup Report, which is entitled "Supplemental Investigation Results and Risk Assessment," Mr. Stratman drafted a letter report dated March 6, 2008 to Walter Payne of DEP, stating that "[t]he conclusions of [the 1999 Final Act 2 Report] were that direct human contact for the durations and frequencies associated with recreational use of the property and routine maintenance/landscaping was acceptable without the need for capping, soil removal or other remedial alternatives." Exhibit P-19 Advanced Geoservices Cleanup Plan at Appendix B.

---

[25] The Golder Report is included as a CD-ROM as part of Exhibit P-19, the Advanced Geoservices Cleanup Plan.

[26] The Golder Report explained that after the initial risk assessment was submitted, a subsequent risk assessment was performed in order to evaluate an offer made by a commercial investor to develop a portion of the park:

> A third party investor approached the Borough of Downingtown with interest in commercially developing a portion of the park for commercial office use. Consequently, an additional risk assessment was completed to assess the commercial use of a portion of the park. This risk assessment is presented in Appendix D of this Final Report.

Exhibit P-19 Golder Associates Final Act 2 Report at p. 35. Significantly, DEP's designation of the "future non-residential commercial use" area in the Act 2 Order is identical with the area of commercial buildings and parking lots shown on the Borough's 1999 development plan. Compare Exhibits Kim-22 and Kim-23.

Under the proposed Cleanup Plan, none of the contaminants would be removed from the site, as they would simply be moved around and covered with another 18 inches of dirt fill. This is the same concept that was employed in the 1970's by Downingtown Borough and "the Kardon people", when "dirt fill [was] put in here where the Borough dump was and some of the paper company." N.T. 9/28/09 at 24-25 (testimony of Don Greenleaf).[27] Although the backfilling may not have been done to today's environmental standards, it was uncontested that the amount of dirt placed over the dump areas was substantial. Mr. Stratman added that the proposed cleanup would also involve the installation of a geotextile membrane, but acknowledged that this would be a permeable fabric that would only be used in limited areas such as around tree roots. The vast majority of the cap would simply involve dirt fill, and Mr. Stratman admitted that the cap could become compromised in the future.

Notwithstanding the Borough's and the Developer's claims about DEP's restrictions on the areas west of the Lions Trail and south of the municipal boundary, the Developer has proposed and the Borough has given conditional use approval to a development plan that was not designed to fit inside this area. Compare Exhibits Kim-17 and Kim-22. There are townhouses, roadways, parking areas and other related installations located outside of this area, and the amended Agreement of Sale confirms that all areas of Kardon Park (even those owned by the Borough) can be used for the development's utilities, stormwater storage and other needs. Exhibit P-14 at ¶ 2. Mr. Stratman testified that some of the excavation for this site would need to be up to 8 feet deep, such as where utilities would need to be installed, and the testimony and evidence demonstrated that the park is prone to flooding. See, e.g., Exhibit Kim-6, Exhibit Kim-30 at Map 5. Mr. Stratman agreed that contamination could be exposed in connection with future excavation activities, and the Borough could be exposed to liability if that occurred.

E. Evidence of Revitalization and Land Planning Concepts:

Although the Borough and the Developer presented very little evidence to challenge the historical dedication and passive park usage of Kardon Park, the Borough presented a significant amount of evidence in support of its position that the development of Kardon Park would be a good idea from a fiscal and land planning perspective. The Borough's first witness was Jamie Bruton, the current Vice President of Borough Council, who testified that the primary goal of the development was to provide economic benefits to the Borough. The economic goals underlying the development were also explained by Jeff Vallochi (former President of the Downingtown Main Street Association), Steven Sullins (the current Borough Manager) and Anthony Madiro, Jr. (the current President of Borough Council). These witnesses focused their attention on the economic opportunity rather than the public's right to continue enjoying the park. Roughly $2.3 million of the sale proceeds are presently earmarked for the Minquas Fire Company. Exhibit P-12. Although Mr. Madiro has served in "all of the

[27] The Borough's current claims about how contamination prevents the active use of Kardon Park ignores the fact that the Borough contributed to the contamination through its own dumping. N.T. 9/23/09 at 87.

capacities in the Fire Company, with the exception of chief," N.T. 9/28/09 at 42, he stated that this had nothing to do with his voting in favor of the sale.

Messrs. Bruton and Madiro admitted that the proceeds of the sale of Kardon Park have not been designated for replacement parkland, and that there has been no replacement park set aside in the Borough. N.T. 9/23/09 at 72; N.T. 9/28/09 at 65-66. Despite the amounts at issue, the Borough's witnesses could not recall any appraisals being conducted before Borough Council authorized the execution of the Agreement of Sale to the Developer in this case. N.T. 9/23/09 at 102; N.T. 9/28/09 at 47-48. Mr. Madiro also did not recall Borough Council obtaining any independent expert about the environmental condition of Kardon Park, and merely relied upon the Developer's environmental expert. N.T. 9/28/09 at 48-49.

The land planning objectives were explained by the Borough's independent land planning consultant, Thomas Comitta. Mr. Comitta was hired by the Borough to create the 2000 Master Site Plan Study for the Downingtown Borough Park System (Exhibit P-28) and the 2004 Urban Center Revitalization Plan (Exhibit P-29). He explained that when he was hired by the Borough, he was familiar with Kardon Park and wondered why it was not included in the list of parks that was submitted to him by the administration at the time. He explained that the decision was made that Kardon Park was not an "official" park based on the former solicitor's determination that public grant money was not available for the park. Because the focus at that time had shifted to the economic promise of Kardon Park, Mr. Comitta's plans do not refer to Kardon Park as a park, and instead characterize it as an "economic development project." Exhibit Kim-29 at p. 8-2. Although the economic gains of developing Kardon Park have been exhaustively analyzed, neither Mr. Comitta nor any other Borough witness testified that an analysis was performed on the economic feasibility of the passive park use.

Andy Detterline and Sarah Peck also testified about the market for mixed-use developments and other attributes of the proposed development. Ms. Detterline gave generalized statements about how the proposed development would increase nearby property values and operate as a "transition" between the industrial/commercial properties along Wallace Avenue and the residential properties in the Lake Drive neighborhood. However, she was not an appraiser and acknowledged that no appraisals had been performed to show that the values of these adjacent properties would increase due to the replacement of adjacent parkland with a mixed use development. The testimony of the surrounding property owners (as well as common sense) strongly suggested otherwise. In providing an example of how the construction of townhouses could increase nearby property values, Ms. Detterline likened the replacement of Kardon Park with the replacement of a beer distributorship and auto body shop in Ardmore.

The Developer's principal, Sarah Peck, also testified about how the proposed development would benefit the neighborhood. Leaving aside the fact that much of the park would be gone, she focused her attention on the length of the paved park trails in the proposed development. Although she testified that the length of trails would be

tripled, she acknowledged that about 50% of the "new" trail length was counted by using an off-site PECO right-of-way, where the Borough intends to extend the Struble Trail regardless of whether this proposed development is constructed. The remaining "new" trails consist of a sidewalk along Norwood Road serving the northern townhouse clusters and a stub trail connecting the Lions Trail to Sunset Drive. Exhibit P-30. The testimony from all parties confirmed that there is an existing unpaved trail with a footbridge that is actively used for access to Sunset Drive, and numerous witnesses testified about other unpaved trails throughout Kardon Park. Exhibit Kim-31. Ms. Peck admitted that her concept of "new" parkland was based on a difference in accessibility—i.e. more people would be able to use a paved trail than an unpaved trail.

Ms. Peck's plan shows that pedestrians, bicycles and strollers would need to cross over a parking lot and potentially the development's spine road in order to access the Struble Trail. Exhibits Kim-17, P-30. Ms. Peck also testified about the minimal setbacks[28] between this dense townhouse development and the Kim Manufacturing's steel fabrication business and other intensive uses along Wallace Avenue. She described increased public parking for the trail, but admittedly would not be able to prevent the use of these parking spaces by people visiting the commercial center, the live-work lofts or the 305 townhouses. She offered no effective response to the testimony of the other witnesses about how the proposed development would turn a beautiful, natural park into a smaller area that will feel like the common area of a commercial/townhouse complex.

III. ARGUMENT:

A. Generally:

The primary legal issue in this case is whether the public trust doctrine applies because Kardon Park has been dedicated and accepted as a passive public park. Once there has been an acceptance by the public, the dedication becomes irrevocable under the well-established precedent of the public trust doctrine. Under this doctrine, parklands and other public properties are held by a municipality in trust for the benefit of the public, and cannot be freely sold in the manner sought by the Borough in this case. The Borough has undeniably dedicated Kardon Park as a passive park, and the public has cemented the public nature of this property through longstanding acceptance and usage for passive park purposes.

The Borough and the Developer contend that the public trust doctrine has been abrogated by the recent 4-3 Commonwealth Court decision of In Re: Erie Golf Course, 963 A.2d 605 (2009). This case made no such determination and has already been argued on appeal to the Pennsylvania Supreme Court. The Commonwealth Court's

[28] As shown on Exhibit Kim-17, at the boundary with the Kim Manufacturing property, the distance from the property line to the nearest townhouse appears to be less than the width of the townhouse. The same applies to the setback between the Lions' Trail and the closest townhouse to the trail. The nearest parking spaces also appear to be less than their own width from the trail.

misapprehension of critical facts and legal principles suggests that the Supreme Court may reverse the Commonwealth Court's decision. More importantly, the Erie Golf Course was based on the Donated or Dedicated Property Act (DODPA),[29] and all of the parties in this case agree that the DODPA does not apply because the Kardon Park properties were acquired by either condemnation or purchase.[30] The abrogation argument also ignores the fact that numerous decisions (including Supreme Court precedent) have applied the public trust doctrine since the DODPA was enacted. The Erie Golf Course case did not abrogate the public trust doctrine and is entirely distinguishable from the facts of this case.

Even if the DODPA was applicable and the Erie case determined that the public trust doctrine was completely abrogated, the Borough would not be entitled to relief under the DODPA. The Borough failed to present any substantial evidence that Kardon Park could not be practically used as a passive park, in order to obtain relief under Section 4 of the DODPA.[31] The evidence demonstrated overwhelmingly that the park has effectively served as a passive park for over 31 years. The Borough and the Developer have focused on the Borough's inability to use Kardon Park as an active recreational park, but this focus is misplaced because the site was never intended to serve as an active recreational park.

Likewise, the Borough presented no proof to show that the Kardon Park properties are inalienable, as would be required if the Inalienable Property Act.[32] The Borough and the Developer cited no cases that would suggest that this arcane law has abrogated the public trust doctrine. In any event, the evidence demonstrated that the Borough never attempted to transfer the properties to an entity that would maintain them for park or open space purposes. In the absence of any transfer attempts and in the absence of any evidence that the continued passive park use is impractical, the Borough would not be entitled to relief under the DODPA or the Inalienable Property Act.

The Borough's sale of Kardon Park is also prohibited under the requirements of the Borough Code. It was uncontroverted that the Borough executed the Agreement of Sale and its amendments without first obtaining the required appraisal, as required by Section 201(4) of the Code, 53 P.S. § 46201(4). The purchase price would be paid more than 60 days after the bid acceptance, and the Borough executed the Agreement of Sale without any appraisal or properly advertised public notice.

Aside from the numerous legal prohibitions of the proposed sale of Kardon Park, the sale would make no sense from a practical or public policy standpoint. Kardon Park has been held out to the public for decades and has become an irreplaceable resource to the people of Downingtown and surrounding communities. Allowing this public park

[29] 53 P.S. §§ 3381-3386.
[30] 53 P.S. § 3386.
[31] The Borough also had no authority under the DODPA to allocate $2,360,500 of the sale proceeds to a third party fire company, and acknowledged that it failed to provide substitute parkland in the Borough.
[32] 20 Pa.C.S.A. § 8301 *et seq.*

to be sold for a short-lived financial windfall would not only involve the loss of an irreplaceable resource, but would erode the public trust in political subdivisions to protect public properties such as parks. Parklands should be measured in terms other than their economic contributions, and the usefulness of passive parks should not be confused with the usefulness of active parks. Pennsylvania law recognizes that passive parks are afforded the same protections as active parks. Simply stated, allowing parks like Kardon Park to be permanently lost is not an appropriate way of providing financial assistance to municipalities.

B. The *Erie Golf Course* Case And the Donated or Dedicated Property Act Do Not Apply to This Case:

According to the Borough and the Developer, the Erie Golf Course case holds that the public trust doctrine cannot apply where a statutory remedy exists under the DODPA. The Borough and the Developer even suggest that following Erie, the public trust doctrine has been "superseded" and "abrogated" by the DODPA. While the Commonwealth Court issued no such holding, the Court clearly determined that the DODPA applied to the facts of that case. In contrast, the parties in this case have acknowledged that the DODPA does *not* apply to the Kardon Park properties, which were all acquired by condemnation or purchase.[33] Therefore, according to the Borough's and the Developer's own positions, the statutory remedy of the DODPA would not apply and could not supersede the public trust doctrine under the facts of this case. The conclusions of the Borough and the Developer are based not only on an exaggerated reading of Erie Golf Course, but also on the assumption that the DODPA applies to this case. Because the DODPA does not apply, the Erie Golf Course decision has little or no relevance to this case.

The Borough's and Developer's flawed reasoning and interpretation of the Erie Golf Course case is compounded by their argument that because the DODPA does not apply to this case, the only applicable law is the Eminent Domain Code. Specifically, these parties rely on Section 310(a) of the Code, which permits the transfer of condemned property after 21 years only where the condemnor "abandons the purpose for which the property has been condemned". The Borough and the Developer ignore this restrictive language and contend that there are no restrictions upon the Borough's ability to sell Kardon Park. As a threshold matter, only the two properties along Pennsylvania Avenue (tax parcels 11-4-14 and 11-4-14.2) were acquired by condemnation, so the Eminent Domain Code could not apply to the remaining Kardon Park properties. In any event, there has been no evidence that the passive park use has been abandoned, so Section 310(a) would not apply to either of the condemned properties. Moreover, it is significant that there is only one reported decision applying

[33] All of the parties have acknowledged that the DODPA does not apply because Section 6 specifically excludes purchased or condemned properties from the application of the Act. 53 P.S. § 3386.

Section 310 of the Code, and it has no relevance to the present facts.[34] The numerous cases on the public trust doctrine mention no conflict with this obscure and limited provision, which has no bearing on condemned properties that have been publicly dedicated and accepted through longstanding public use. If taken to its logical conclusion, the Borough's argument that there are no restrictions upon its ability to sell condemned and dedicated public property would lead to absurd results. For instance, a dedicated public roadway could be sold by the municipality for private use without any restrictions. The law would never allow such an absurd result, and Section 310(a) of the Code clearly does not allow dedicated public properties to be freely sold 21 years after condemnation. Section 310(a) of the Code has no application to the two condemned properties in Kardon Park that have long been dedicated and used as a public park.

Aside from the fact that the DODPA does not apply to this case, there are a number of other material distinctions between this case and the Erie Golf Course case. The property at issue in Erie was a public golf course, which in terms of maintenance is an entirely different animal than a passive park. In fact, the golf course property needed $2,252,000 in improvements. Id., 963 A.2d at 607. Additionally, the City had "permanently closed" the golf course. Id. In contrast, Downingtown Borough never closed or rendered any portion of Kardon Park off-limits to the public, and its sudden cessation of mowing during the pendency of this case is a self-serving and half-hearted attempt to suggest otherwise. It was uncontested that the Borough never posted "keep out" or warning signs anywhere at Kardon Park, even though it posted a warning sign about deer ticks. N.T. 9/23/09 at 85. Moreover, a passive park is not intended to involve heavy foot traffic throughout the property, and the lack of active use is not required for a passive park to qualify as a park (see cases cited infra on this issue). In contrast, the Erie Golf Course had large manicured greens and fairways, and golfers would be expected to travel wherever their balls may lie. This type of use was not intended for Kardon Park, which could continue serving its intended passive park use indefinitely with nominal maintenance by the Borough. The Erie Golf Course case is therefore distinguishable on both its facts and the applicable law.

C. *Erie Golf Course* Did Not Abrogate the Public Trust Doctrine:

As noted above, the Erie Golf Course decision was based on the DODPA, which does not apply to the Kardon Park properties. Although this distinction renders Erie irrelevant, it is worth noting that the Commonwealth Court's decision did not abrogate the longstanding public trust doctrine, as suggested by the Borough and the Developer. The decision contains no such bold statement, and the Commonwealth Court would not even be able to abrogate a doctrine that has been well established by the Supreme Court. The Commonwealth Court merely held that the DODPA applies "when there is a formal record of acceptance and dedication of donated property," and overruled a pair

[34] See Biernacki v. Redevelopment Authority of City of Wilkes-Barre, 32 Pa.Cmwlth. 537, 379 A.2d 1366 (1977)(involving issue of who was an indispensible party to an action seeking a reconveyance to a condemnee after the abandonment of a street widening project).

of contrary Commonwealth Court decisions. Id., 963 A.2d at 612. In addition, the Supreme Court promptly elected to review this 4-3 decision of the Commonwealth Court, so this limited holding could be reversed on appeal.

Significantly, the public trust doctrine is supported by more than a century of cases, including 50 years of precedent since the DODPA's enactment in 1959.[35] The implication that the DODPA somehow replaced the public trust doctrine ignores the fact that the public trust doctrine has been affirmed by multiple decisions that were issued after the DODPA was enacted. See, e.g., White v. Township of Upper St. Clair, 799 A.2d 188 (Pa.Cmwlth. 2002); Pilchesky v. Redevelopment Authority of the City of Scranton, 941 A.2d 762 (Pa.Cmwlth. 2008); Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86 (1973); Borough of Ridgway v. Grant, 56 Pa.Cmwlth. 450, 425 A.2d. 1168 (1981); Vutnoski v. Redevelopment Authority of City of Scranton, 941 A.2d 54, 56 (Pa.Cmwlth. 2006); Appeal of the Borough of Bangor, 130 Pa. Cmwlth. 143, 567 A.2d. 750 (1989)(Bangor II); Appeal of the Borough of Bangor, 4 Pa. D.&C. 4th 343 (1989)(Bangor I)("[i]t is noted that the Borough of Ridgway case was decided subsequent to the enactment of 53 P.S. § 3381 *et seq.*"). The public trust doctrine has absolutely not been abrogated by the DODPA, and the DODPA does not take precedence over all types of dedicated properties.

In the Commonwealth Court's 2002 decision in White, supra, the Court determined that the residents' attempt to enforce the municipal duty under the DODPA was "redundant of the common law duty" relating to the public trust doctrine. Id., 799 A.2d at 200. The Commonwealth Court clearly did not view the DODPA as abrogating or even being inconsistent with the public trust doctrine. The Erie Golf Course decision references the White decision with approval, so there can be no question that the DODPA is consistent with the public trust doctrine. Id., 963 A.2d at 611. Had the Commonwealth Court intended to boldly abrogate a doctrine that is supported by numerous Supreme Court decisions (as well as its own decisions), the Court would certainly have stated as much.[36] In the absence of any statutory language in the DODPA or language in the Erie Golf Course decision confirming that all dedicated and accepted public properties are now covered exclusively by the DODPA, there is no support for the Borough's and Developer's position that the public trust doctrine has been abrogated. The holding of Erie was limited to its facts and was not intended to rewrite the standards for the preservation of public properties in Pennsylvania.

---

[35] See P.L. 1772 of 1959.

[36] Likewise, the DODPA could not be construed to abrogate well-established common law upholding the enforceability of deed restrictions. See, e.g. Vernon Volunteer Fire Dept. v. Connor, 579 Pa. 364, 855 A.2d 873 (2004); Doylestown Township v. Teeling, 160 Pa.Cmwlth. 397, 635 A.2d 657 (1994)(holding that subsequent purchasers were bound by restrictive covenant against further subdivision). Just as municipalities frequently seek to enforce such restrictive covenants in their favor, municipalities should not be entitled to disregard the enforceability of restrictive covenants upon their own properties. In the present case, the Deed of Confirmation on parcels 40-1-23.1 and 11-4-13 and the Declaration of Taking on parcels 11-4-14 and 11-4-14.2 specify the limited purposes to which those properties can be used. Had the Erie Golf Course Court intended the DODPA to take precedent over all common law principles governing restrictions on public properties, the Court would effectively have abrogated its own precedent upholding the enforceability of deed restrictions. Such an unreasonable result cannot be imputed to the limited holding of the Erie Golf Course case.

The DODPA and the public trust doctrine are entirely consistent, and the DODPA merely provides a relaxed standard of public trust due to the lacking element of public acceptance. Section 2 specifically confirms that the DODPA only applies to dedicated properties "where no formal record appears as to acceptance by the political division", and Section 4 only permits relief where "the court is satisfied upon hearing the evidence that there is no acceptance by implication arising out of public user or otherwise". 53 P.S. §§ 3382, 3384. The public trust doctrine and the DODPA in fact complement one another in dealing with different kinds of dedicated properties. For instance, a vacant and unimproved lot may be governed by the DODPA if it was dedicated by a private entity for municipal purposes, and the municipality would need to satisfy the DODPA's procedural requirements before converting the property to a different use.[37] However, once that lot is publicly accepted (such as through an ordinance or other actions sufficient to confirm a public opening for the dedicated use), a trust arises in favor of the public that must be honored by the municipality. The latter property would be governed by the public trust doctrine and the municipality would not be able to break the public trust by mere application to the Orphans' Court. Contrary to the positions of the Borough and the Developer in this case, the DODPA does not trump the public trust doctrine, and the public trust doctrine likewise does not trump the DODPA. Both laws complement one another, and the DODPA merely provides a relaxed standard of public trust due to the lacking element of public acceptance.[38]

[37] The evidence of this case demonstrated that the Borough would not be entitled to relief even if the DODPA applied. In addition to the fact that the Borough failed to present substantial evidence to support a determination that the park serves no practical purpose, Messrs. Bruton and Madiro admitted that there has been no replacement park set aside and that the proceeds of the sale of Kardon Park have not been designated for replacement parkland. N.T. 9/23/09 at 72; N.T. 9/28/09 at 65-66.

[38] It is worth noting that the relaxed standard under the DODPA is not as relaxed as the Borough and the Developer would have it. Although these parties have acknowledged that the DODPA does *not* apply to the Kardon Park properties, they have attempted to borrow from and exaggerate the inapplicable discretionary standard under Section 4 of the DODPA, 53 P.S. § 3384. However, Section 4 does not grant the level of unfettered discretion espoused by these parties, as evidenced by its requirement of Orphans' Court approval. In addition, Section 5 grants notice, intervention and public hearing rights to the Attorney General and private parties. 53 P.S. § 3385. The involvement of the Attorney General confirms that the legislature was mindful of potential public trust interests that may be implicated when a political subdivision attempts to sell a park or other public property. The right of the public to present evidence in opposition to such a sale would be a pointless concession if the DODPA's restrictions were replaced by the standard of review applicable to administrative or legislative actions. If dedicated properties could be sold based on unsubstantiated statements of opinion, municipally-owned properties such as the Brandywine Battlefield could be sold so long as the municipality represents that historical records do not disclose evidence of an acceptance, or that the continued use of these properties is no longer profitable. Absent evidence amounting to fraud, the Attorney General, the public and the Orphans' Court itself would be powerless to prevent such sales, according to the arguments espoused by the Borough and the Developer. Most importantly, the DODPA does not apply, so Section 4's discretionary standard cannot restrict this Honorable Court's ability to conduct a meaningful review of this case.

D. The Public Trust Doctrine Prohibits the Proposed Sale of Kardon Park for a Private Development:

In arguing that half of Kardon Park is subject to private development, the Borough and the Developer assert that these areas have never been used as a public park. The primary flaw in this assertion is its failure to recognize the distinction between active parkland and passive parkland, the latter of which was the dedicated purpose of Kardon Park. The pleadings of the pro-sale parties are rife with references to a lack of "active" park usage. It is telling that these pleadings also speak at length about the potential usefulness of Kardon Park for economic revitalization and "tax rolls." The Borough and the Developer ignore the critical fact that Kardon Park was acquired for passive park purposes and has adequately served these purposes since its acquisition. The Borough's inability to install baseball fields or other intensive uses should not distract this Honorable Court's attention away from the fact that Kardon Park has become exactly what Don Greenleaf, Frank Manetta and the original planners intended—a passive park where citizens can walk through nature, taking in the open fields, trees and wildlife. The proposed development would replace these fields and tree lines with parking lots and roof lines located just a few feet west of the trail. Exhibit Kim-17.[39] It was uncontested by all of the witnesses that the underground contamination does not interfere with the ability of grass and trees to grow, and Walter Payne of the DEP confirmed that Kardon Park can continue its current use indefinitely.[40] The fact that these areas have not been converted to ball fields only underscores the fact that these areas have properly served their dedicated passive park purposes.

Pennsylvania's public trust doctrine cases confirm that passive parks such as Kardon Park are to be held in trust for the public, and that active use of these parks is not required. For instance, in Borough of Ridgway v. Grant, 56 Pa.Cmwlth. 450, 425 A.2d 1168 (1981), the Commonwealth Court considered whether a fire house could be built on a park that served both passive and active uses. In concluding that the proposed non-park use would violate the public trust doctrine, the Court explained:

> Dedication results when a land owner offers property for public use and it is accepted by the public. P.L.E. Dedication s 2. Here, the Borough not only accepted the deed, but has equipped, maintained, and improved the land as a park for almost 60 years. There can be no doubt that the Borough has manifested a clear and unequivocal intention to devote Grant Park to park purposes only. The public, in turn, has used the land as a park solely for park purposes for the

[39] The development plan actually shows parking lots just a few feet away from the trail, and the closest townhouse would be less than its own width away from the trail. See Exhibit Kim-17. The Developer's failure to provide any real setback makes its claim of "screening of the development" seem ridiculous.

[40] Mr. Payne actually stated that this vegetation growth would be encouraged because it helps to reduce the negligible exposure risks at the park.

> same number of years. Clearly, there has been an intent to dedicate and an acceptance thereof.
> …
> Having concluded that the subject deed of dedication imposed a charitable trust upon Grant Park of which the Borough is trustee and the public is the beneficiary, we now proceed to determine whether the placement of a fire engine house there is consistent with the dedication. We hold that it is not. **'A public park may be defined as a tract of ground kept more or less in its natural state, or embellished by the planting of additional trees and flowers and devoted to the purposes of pleasure, recreation and amusement.'** …
> …
> … **a public park may provide for pleasure, recreation and amusement in many forms. In the instant case, Grant Park appears to be a somewhat restful area dotted with shade trees, some playground areas and a small ball field**. The Borough proposes to use 4800 square feet of this small neighborhood park and playground as a site for a fire engine house. The inherently unpredictable and intrusive nature of a fire engine house is hardly conducive to a restful atmosphere nor to the safety and welfare of small children who are the most frequent users of this park. It is a matter of common knowledge that when there is a fire the emphasis necessarily must be upon speed. One can easily imagine the noise and confusion as volunteers race their cars to the engine house, don their equipment and then rush away in speeding fire trucks to the scene of the fire all of which is preceded or accompanied by sirens and whistles. In our opinion, this is not 'pleasure,' 'recreation,' or 'amusement,' although it is certainly a serious and necessary service.

Id. at 455-457, 425 A.2d at 1170-1171 (emphasis added; citations and footnotes omitted).

In Bernstein v. City of Pittsburgh, 366 Pa. 200, 77 A.2d 452 (1951), the Supreme Court recognized that "[i]In modern times the principal purpose of a park, namely public recreation, is not limited to physical recreation but includes aesthetic recreation and mental and cultural entertainment as well." Id. at 206-207, 77 A.2d at 455. Passive parks have long been recognized as a legitimate use of public property, as the Supreme Court recognized in the 1903 case of Laird v. City of Pittsburgh, 205 Pa. 1, 54 A. 324 (1903):

> [A] public park, in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground .... 'a piece of ground, in or near a city or town, inclosed and kept for ornament and recreation'. ... a piece of ground, usually of considerable extent set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as an opportunity for open air recreation.'

Id. at 5, 54 A. at 325 (citations omitted). See also In re Condemnation of Lands of Laughlin, 814 A.2d 872, 876 -877 (Pa.Cmwlth. 2003)(affirming Judge Sanchez and holding that West Whiteland Township's purpose was proper in acquiring passive park space at the busy intersection of Route 30 and Route 100[41]). Although common sense dictates that an acceptance need not be shown by public use of the entire property, this principle is supported by Pennsylvania case law. Schmidtt v. Carbondale, 257 Pa. 451, 101 A. 755 (1917)(holding that public use of a part of the dedicated property indicating an intention to accept the dedication fixes the right of the public to the whole although some of the land may not have actually been used); see also Easton v. Koch, 152 Pa.Super. 327, 31 A.2d. 474 (1943).

Perhaps the most instructive case on the issue is the Commonwealth Court's decision in White v. Township of Upper St. Clair, 799 A.2d 188 (Pa.Cmwlth. 2002). In White, township residents challenged a township's authorization of a cell tower to be constructed in a public park that was conveyed to the township under a deed limiting the property to recreational uses. The Commonwealth Court described the property as a passive park:

> Since its acquisition by the Township in 1985, Boyce Park has remained an undeveloped parcel of land. The park consists of approximately 200 acres of rolling hills, meadows, forest, and wetlands traversed by hiking trails; it serves as a preserve for wild flora and fauna. The Township's 1995 Comprehensive Plan designated Boyce Park for public recreation, which it described as 'natural open space,' and recited the Township's commitment to preserve its open space.

Id. at 190-191. In holding that the construction of the cell tower could be challenged under the public trust doctrine, the White Court explained as follows:

> 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 other purpose -- even a public purpose --

[41] It is worth noting that the Laughlin Court found it significant that the park purpose of this property was consistent with statements in West Whiteland's Comprehensive Plan.

> other than the intended purpose, no matter how exigent the circumstances.

Id. at 195. As in the Laughlin decision cited above, the White decision relied on the municipality's Comprehensive Plan as proof of a dedicated purpose for a passive park. In the present case, the dedicated passive park purpose of the Kardon Park properties was repeatedly affirmed through Downingtown Borough's Comprehensive Plan, Open Space, Recreation and Environmental Resources Plan, Zoning Ordinance and Zoning Map, Ordinance 2001-3 (which referenced all 5 properties as a "park"), Council Resolutions, publications and other official actions. The public's longstanding usage of Kardon Park confirms the public's acceptance of this passive park. Compared to other relevant cases, the evidence of dedication and acceptance in this case is overwhelming, and the public trust doctrine clearly protects Kardon Park as a passive park.

One of the public trust doctrine's seminal cases is the Supreme Court's decision in Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania, 251 Pa. 115, 96 A. 123 (1915). In that case, the Supreme Court held that after a property had been dedicated and accepted for public use, the City of Philadelphia held the property in trust for the public and could not convey it to a private party. Id. at 125, 96 A. at 126. As with many subsequent public trust doctrine decisions, this holding was phrased in contract terms of offer and acceptance, and provided that the resulting bond is irrevocable. Id. at 125, 96 A. at 126 ("the city is without power to alienate the property"); see also White, 799 A.2d at 193 ("[d]edication, like a contract, requires both offer and acceptance, and once there is acceptance, in whatever form it takes, dedication is irrevocable"); Pilchesky v. Redevelopment Authority of the City of Scranton, 941 A.2d 762, 764 (Pa.Cmwlth. 2008)("there must be both an offer and acceptance and, once that is complete, dedication is irrevocable").[42] Even an important public purpose will not justify the abandonment of the terms of the dedication. See Meig's Appeal, 62 Pa. 28 (1869)(holding that the Borough of York had no power to "assent" to the erection of a military barracks and hospital by the U.S. Army on public parkland during the Civil War); Borough of Ridgway, supra (prohibiting the construction of a fire station in a public park); Borough of Bangor, supra (prohibiting the construction of a badly needed

[42] In addition to contract principles, Pennsylvania cases have also recognized estoppel principles in the context of dedicated properties. For instance, a party may be estopped from denying the existence of a street if that party or its predecessor references the street in a recorded plan or deed. In re Warnock St., 189 Pa.Super. 624, 152 A.2d 789 (1959); Hawkes v. City of Philadelphia, 264 Pa. 346, 351, 107 A. 747, 749 (1919); In re Brooklyn Street, 118 Pa. 640, 646, 12 A. 664, 666 (1888); cf. Vinso v. Mingo, 162 Pa.Super. 285, 286, 57 A.2d 583, 584 (1948); Taylor v. Gross, 195 Pa.Super. 225, 171 A.2d 613 (1961); Tursi v. Parry, 135 Pa.Super. 285, 5 A.2d 339 (1939). Estoppel principles are relevant to the present action because third parties such as Stewart Hall, L.P. have been induced into action by virtue of the Borough's longstanding treatment of Kardon Park as a park (which includes the recording of deeds and condemnation documents). Mr. Kiely explained that Stewart Hall, L.P. would not have purchased the Kim Manufacturing property for $800,000 if he had known about the Borough's plans to sell Kardon Park for a townhouse development. Although the longstanding manufacturing use of and noise at the Kim property can continue notwithstanding any nonconformity with current regulations, Richland Twp. v. Prodex, Inc., 160 Pa.Cmwlth. 184, 634 A.2d 756 (1993), the Borough's permission of nearby residences to be constructed has an obvious impact on the Kim property. The Borough should therefore be estopped from denying the continuation of this park use after other parties have relied on the Borough's actions.

elementary school in a borough park); White, supra (holding that township had no authority to permit the construction of a cell tower in a public park). The fact that many of these decisions have been recently issued confirms that the public trust doctrine is alive and well, notwithstanding the limited holding of Erie Golf Course.

It has been consistently held that a dedication may be proven by any actions that confirm an intention to dedicate. Leistner v. Borough of Franklin Park, 771 A.2d 69 (Pa.Cmwlth. 2001); Coffin v. Old Orchard Development Corp., 408 Pa. 487, 186 A.2d 906 (1962); Vendetti Appeal, 181 Pa.Super. 214, 220, 124 A.2d 448, 451 (1960). No particular formality is required to constitute an offer of dedication, Borough of Lehighton v. Katz, 75 Pa.Cmwlth. 88, 462 A.2d. 889 (1983), and a dedication of land may be express (such as through a formal offer) or may be implied from the acts of the parties. Milford Borough v. Burnett, 288 Pa. 434, 438-39, 136 A. 669, 671 (1927); Township of Millcreek v. A Piece of Land Fronting on Montpelier Ave., 181 Pa.Super. 214, 124 A.2d. 448 (1956); White, supra. Furthermore, dedication of land may be shown by a single act, or from a series of acts, all consistent with and pointing to an intention to dedicate. Khenhans v. Northampton Traction Co., 60 Pa.Super. 641 (1915); White, supra. Even a landowner's mere acquiescence to public use of the land may demonstrate a dedication of that land to public use. Cotter v. Philadelphia, 194 Pa. 496, 45 A.2d 336 (1900).

Applying these principles to this case, it is beyond question that the Kardon Park properties were dedicated to public use as a passive park. As explained more fully in the factual background section of this Brief, the dedicated park purpose of Kardon Park was specifically referenced in the Borough's recorded deeds and condemnation documents, and was repeatedly affirmed through the Zoning Ordinance and Zoning Map, the Comprehensive Plan of 1994, the Open Space, Recreation and Environmental Resources Plan of 1993, Resolution 2001-3 (which identified all 5 parcels as a "park"), Resolution 79.8 (which stated Borough's intent to hold the land "for permanent parks and recreation purposes"), as well as through various other Borough Council minutes and official actions. The dedicated park purpose of these properties was also demonstrated through an October 5, 1978 dedication ceremony as well as through decades of park maintenance and improvements. The Borough dredged the lakes and filled, graded, seeded and mowed the fields. The Borough also erected "Kardon Park" signs, constructed a parking lot, a paved trail, a footbridge leading to an unpaved trail, exercise stations, a water fountain, picnic tables, benches, light fixtures and park rules/regulations signs. The Borough unequivocally declared these properties to serve as a passive recreational park and offered these properties to continual public usage.

As with a dedication, an acceptance of an offer of dedication may take many forms, and may be implied through actions that confirm an intention to accept a property for public purposes. See, e.g., White, supra; Pilchesky, supra; Trustees of Philadelphia Museums, supra; Borough of Ridgeway, supra; Milford Borough v. Burnett, supra (upholding acceptance based on longstanding public use). An acceptance may even be demonstrated where public usage is lacking but public funds are applied to the dedicated purpose. See Easton v. Kotch, 152 Pa.Super. 327, 336, 31 A.2d. 747, 751 (1943)(although evidence was not presented as to public use, public acceptance was

sufficiently evidenced by City's formal action and expenditure of public funds in pursuance of the dedicated purpose). The relevant cases make clear that no benchmark exists for public actions evidencing an acceptance, and each case should be determined on its own facts. By no means is the public's active use required, as such a standard would make it impossible to establish passive parks. Borough of Ridgway, supra; White, supra; Easton, supra; Schmidtt, supra.

In suggesting that a more active use of Kardon Park was required in this case, the Developer has cited the case of Appeal of Leech (Dormont Borough Appeal), 371 Pa. 84, 89 A.2d 351 (1952). As with the other positions of the Developer and the Borough, the reliance on Appeal of Leech is predicated on the mistaken assumption that an active use is required for the public to accept a park property. As cited above, there are numerous passive park cases that contradict this assumption. In addition, the Appeal of Leech case was entirely distinguishable. The property at issue was a vacant municipal lot that was never incorporated into the adjacent Dormont Park that featured active park uses such as swimming pool and other recreational facilities.[43] The Supreme Court determined that the evidence overwhelmingly failed to demonstrate that the property was a public park, because it was treated as an "unfenced, unimproved and unkempt plot of ground." Id. at 90, 89 A.2d at 354. The Court further noted that the lot was sporadically used by "residents of the neighborhood and not the public at large." Id. at 89, 89 A.2d at 354. The vegetation at the property was determined to be weeds instead of grass, and Dormont Borough's occasional mowing activities were determined to be "part of the local campaign for the elimination of ragweed." Id.[44] In contrast, the present case involves uncontested evidence that Downingtown Borough for decades regularly mowed the fields and grassy areas at Kardon Park, at least until the present lawsuit was filed. The evidence in this case also demonstrated a variety of other improvements and maintenance activities by the Borough, through the use of public funds. In addition, the evidence was overwhelming that members of the general public (as opposed to just neighborhood children) regularly used Kardon Park for its intended passive park purposes. Everyone who has ever visited Kardon Park has enjoyed its beautiful scenery, and many people have used the unpaved trails for walking and the fields for picnicking, ball playing, nature watching, etc. Kardon Park has nothing in common with the unused, weedy field at issue in the Appeal of Leech case, especially considering the fact that Kardon Park was never intended to feature swimming pools and other recreational facilities like the adjacent park in Dormont Borough. No such active uses were necessary for Kardon Park to become a public park.

In arguing that parklands can be lawfully converted, the Developer relies on the case of Shields v. Philadelphia, 405 Pa. 600, 176 A.2d 697 (1962). This case is entirely distinguishable and does not support the development of Kardon Park. Although the Shields case allowed a portion of an unimproved and essentially unused park to be

[43] The Superior Court's opinion contains additional discussion about the active uses on the adjacent park property. Appeal of Leech, 170 Pa.Super. 130, 134, 84 A.2d 787, 790 (1951).

[44] The Appeal of Leech case is nonetheless instructive in that the Court reiterated the holding of Easton, supra, that a property's conversion to a public park can be demonstrated through a municipality's maintenance activities. Id. at 89, 89 A.2d at 353.

converted for little league baseball purposes, there was no real "conversion" of the park use. The real question was whether baseball-related improvements could be installed notwithstanding a statement in the grantor's will that "no buildings shall be erected thereon other than those required for the comfort of the people, and also that the garden and trees shall be preserved as far as possible." Id. at 602, 176 A.2d at 698. The Shields case stands in stark contrast to the present case, because Kardon Park was dedicated as a passive park and is proposed to be converted to commercial buildings, private residences, streets and parking lots. Contrary to the position of the Developer, the Shields case does not suggest that Kardon Park can be converted in any manner that is remotely similar to the proposed commercial/townhouse development.

The public's acceptance of Kardon Park is undeniable by any reasonable standard. The usage of off-trail areas and existence of well-worn paths in the woods was virtually uncontested, aside from some incredible and self-serving testimony from witnesses who rarely visit the park. At a minimum, there were no denials of the aesthetic value that the trees and meadows add to this passive park. Although the witnesses gave differing accounts about the extent of off-trail foot traffic, the Borough acknowledged and all parties seemed to agree that the Golder Report surveys provide the most objective data on this traffic. While many of the park users in this survey remained on the paved trail, 19.5% of them conducted off-trail activities, including dog-walking and biking to the woods. Exhibit P-19a, Appendix C at p. C-7. Contrary to the assertions of the Borough and the Developer, the Golder Report never stated that the off-trail activities were limited to the pond areas east of the Lions Trail, and the references to dog-walking and biking to the woods demonstrates that this conclusion cannot even be inferred from the context of the Report.[45] In addition, the Borough's and Developer's employment of the term "use" denotes only foot traffic, and ignores how people use the natural setting of this passive park. If a paved trail is the only portion of a park that is truly used, then people should expect to feel as refreshed by using a downtown sidewalk as they would on a path through Valley Forge National Park or New York City's Central Park.

The Borough simply disregards the public's use of these off-trail areas, and boldly declares in its Petition that the proposed commercial/residential development will actually "add approximately 10 acres" of parkland to this property. The fact that the Borough's "new parkland" will be passive parkland shows the Borough's own belief that passive areas count as parkland. The "public commons" shown in the development plan is a ridiculously small area surrounding the Victims' Memorial, where there is currently a much larger grassy area. Exhibit Kim-25a. Much of the proposed "new parkland" would be covered by water and newly installed wetlands that are legally required due to the destruction of the existing wetlands areas at the park. Exhibits Kim-25a and Kim-25b.[46] The public's ability to view and visit the fields and wooded trails will

[45] Mr. Bruton admitted this fact in his testimony. N.T. 9/23/09 at 96. The Report's study of groundskeepers mowing the lawns at Kardon Park also confirm that areas west of the Lions Trail were considered.

[46] The evidence demonstrated that these areas have traditionally been heavily used by people who enjoy visiting the ponds and fishing (see Exhibits Kim-4i - Kim-4n), but the proposed plan would make them

be gone forever, and the public's access to the ponds for fishing and observation will be severely limited by the wetlands that will encircle virtually all of the pond edges.

The evidence supporting Kardon Park's dedication and public acceptance as a passive park is overwhelming, and the public trust doctrine requires the Borough to hold this park in trust for its dedicated purpose. Active use of Kardon Park was neither intended nor required, and regular foot traffic need not cover the entire park under Pennsylvania law. Although the Borough has made and can continue to make improvements that are consistent with the park's dedicated purpose, the Borough cannot convert these properties to a mixed use development with publicly owned common areas. The Borough stands in the role of a trustee for the benefit of the public, and cannot self-deal by accepting payment for this public asset.[47] The Borough is required to uphold the public trust created by its dedication and the public's acceptance of this undeniable park, and the upholding of this trust would involve little cost and many enduring benefits.

E. The Borough's Claims about Contamination And Revitalization Are Irrelevant and Meritless:

The evidence presented by the Borough and the Developer focused predominantly on claims about how contamination interferes with the active use of the park and how the park does nothing to revitalize the Borough's budget and local economy. The park was never required to be an active park, and the subsurface contamination does not prevent the land from being used for its dedicated passive purpose. Likewise, there is no legal significance to the revitalization issue, as Pennsylvania law does not require parks to be income-generating resources. Such a standard would jeopardize all public parks in Pennsylvania, and the public trust doctrine allows no such result.

Even if the contamination issue had relevance in this case, the evidence demonstrated that the subsurface contamination does not prevent Kardon Park or any portion of it from serving its dedicated passive park purpose. Although much of the foot traffic at Kardon Park has been focused on the paved Lions Trail, various activities have been conducted outside of the paved trail. As noted above, the Golder Report itself acknowledges that while many of the park users remain on the paved trail, 19.5% of

---

inaccessible to wheelchair users and all pedestrians who would be unwilling to climb through the wetland vegetation and mud. A person would obviously not be able to reel in a fishing line through reeds and brush. The designation of these areas as "open space" is a misnomer because the wetlands will effectively close off access to the ponds, all because the Developer seeks to maximize its use of the western part of the tract.

[47] The Borough's conflicts of interest are further highlighted by the agreement of sale and the conditional use process. The Borough has an interest in maximizing the number of townhomes due to its percentage interest in each of the Developer's sales. See Exhibits P-12, P-16. Whereas the Borough might otherwise require developers to limit density, increase setbacks and open space, the Borough has required very minimal setback and has allowed its own parkland to be used to satisfy the Developer's requirements for open space, stormwater management areas, wetland areas, utilities, etc.

them conducted off-trail activities, including dog-walking and biking to the woods. Exhibit P-19a, Appendix C at p. C-7. In fact, under recreational exposure factors that were characterized as "conservative", Golder's summary conclusion was that:

> ... the surface soil at Kardon Park does not pose a cumulative risk to park users in excess of the statutory threshold. Furthermore, the estimated carcinogenic risks are well over an order of magnitude less than the maximum carcinogenic risk level specified by PADEP for developing cleanup levels at a Site.

See Exhibit P-19a, Appendix C at pp. C-16 and C-17. Golder performed a risk assessment for the "current park use scenario" and one for the "planned future commercial/park use scenario", and the alternative commercial scenario showed a greater exposure risk than the park use scenario. Exhibit P-19 Golder Associates Final Act 2 Report at p. 31. In its Final Act 2 Report, Golder explained that the results of the risk assessment for continued park use show the following:

> … the risks due to potential direct contact exposures of both park users and park groundskeepers to constituents in environmental media at the Site are within limits established by the Commonwealth of Pennsylvania and by PADEP. In fact, the estimated excess lifetime health risks are approximately one to two orders of magnitude less than the allowable upperbound excess lifetime risk specified in the Pennsylvania Act 2 Statute …

Exhibit P-19 Golder Associates Final Act 2 Report at p. 35.

The Golder Report was approved by DEP, which issued an Order under Section 512 of Act 2 stating that "[t]he Site is currently used as a public park and for passive recreation", and that under this use scenario, "any risk to human health is within an acceptable range". Exhibit Kim-22 at p. 2, ¶¶ C-D. Although Paul Stratman interpreted the Act 2 Order to mean that the areas west of the Lions Trail were off-limits to the public, the "Future Use Map" included in the Order was clearly based on the 1999 Conceptual Development Model Plan that was submitted by the Borough to DEP as a potential alternative to the continued park use. Compare Exhibits Kim-22 and Kim-23. Mr. Stratman's own Cleanup Report contained no findings of unacceptable risks of continued park use and no conclusions that DEP restricted the future use of Kardon Park.[48] He and the Borough have nonetheless attempted to override these admissions based on a future use plan that was submitted by the Borough to DEP as part of its 1999 development effort. Mr. Stratman's speculation that DEP's intent was to restrict

[48] Mr. Stratman also acknowledged that his testimony at the conditional use proceedings was different than his testimony at the trial in this case. When Mayor Bruno specifically asked him about the western side of the property, "what, if any, harm is there in leaving the property as it is?", he answered that "the DEP has gone through and given the sign off back in 1999."

use of the contaminated portions of the park defy his own Remedial Action Plan that showed the "Estimated Limit of Historic Fill" as encompassing virtually all of the areas outside of the ponds. Exhibit P-19 Advanced Geoservices Cleanup Report at Remedial Action Plan.[49] His speculation about the intent of the Act 2 Order also defies the fact that the alternative commercial scenario from 1999 showed a greater exposure risk than the continued park use scenario. Exhibit P-19, Golder Associates Final Act 2 Report at p. 31. His speculation also defies the Borough's 2008 representation to DCED that "the site received an Act 2 liability release for recreational use from the PA Department of Environmental Protection." Exhibit Kim-26; N.T. 9/23/09 at 82-83.

As testified by Walter Payne, DEP does not become involved in use restrictions and defers to local zoning laws on these issues. Mr. Payne explained that DEP was merely authorizing the potential commercial development of the shaded areas on the Future Use Map in the event that the Borough proceeded with the development. In determining DEP's intent behind the Act 2 Order, Mr. Payne's testimony is infinitely more reliable because he works for DEP while Mr. Stratman works for the Developer in this case. As explained by Mr. Payne, Kardon Park can continue to be used indefinitely for its current purposes, and no areas need to be closed off from the public. There is simply no merit to the Borough's theory that contamination prevents the continued use of this property as passive park.

Although the contamination argument espoused by the Borough and the Developer is predominantly based on the Act 2 Order, it is significant that DEP never determined that the Order has been violated by the current park use patterns. DEP reviewed the usage of Kardon Park as part of the 2008 Act 2 amendment process, but never determined that the use patterns had changed or that the limited use of off-trail areas needed to stop.[50] Once again, the argument of the Borough and the Developer is flawed because of their misapprehension of the active park - passive park distinction. If Downingtown Borough had installed a football field at Kardon Park, DEP may have taken a different approach. However, no such changes occurred and all of the testimony confirmed that the usage today is similar to the usage in the late 1990's, when the surveys underlying the Golder Report were conducted. In addition, Mr. Stratman and Mr. Payne both testified that an Act 2 Order would only be subject to a "reopener" if there were a substantial change in exposure conditions, such as in a change from a nonresidential to residential use. Because Kardon Park has remained a passive park and can lawfully continue this use indefinitely, the recitations about contamination preventing active park usage are irrelevant.

The Borough's claims about how contamination prevents the active use of Kardon Park also ignores the fact that the Borough contributed to the contamination

[49] The invisible municipal boundary that served as the northern edge of the shaded portion of DEP's Future Use Map had no bearing on the limit of historic fill, and Mr. Stratman in fact admitted that the heaviest concentrations of lead were on the northern parcel number 40-1-23. This parcel is not part of Kardon Park and the Borough has already begun excavation activities of this ground.

[50] In addition to DEP's repeated investigations of Kardon Park, the federal EPA conducted its own investigation in 1991. Although EPA required some limited fill material to be removed, the case was closed without additional remediation requirements or use restrictions.

through its own dumping. N.T. 9/23/09 at 87. The Borough therefore contributed to the hardship upon which it now relies for equitable relief. The doctrine of unclean hands and other analogous cases hold that parties such as the Borough cannot obtain equitable relief if they have created their own hardship. Sprague v. Casey, 520 Pa. 38, 46, 550 A.2d 184, 188 (1988)("he who seeks equity must do equity"); In re Francis Edward McGillick Foundation, 406 Pa.Super. 249, 263, 594 A.2d 322, 329 (1991)(holding that a party guilty of wrongdoing should be denied equitable relief); cf. Graff v. Scanlan, 673 A.2d 1028, 1035 (Pa.Cmwlth. 1996)(holding that a party who landlocked himself cannot obtain an easement by necessity over an adjacent property); Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh, 543 Pa. 415, 425, 672 A.2d 286, 291 (1996)(holding that party who left himself without sufficient room for further development was not entitled to zoning relief to allow further development). The Borough has admitted that it helped to create the hardship upon which it now relies as a basis for equitable relief.

The Borough's evidence about revitalization and tax benefits also has no bearing on the legal status of Kardon Park.[51] As a practical matter, parks are rarely if ever intended to serve as revenue-generating properties, and their value should be measured more in terms of quality of life benefits to local citizens. As the many public trust cases provide, municipalities hold parks in trust for the benefit of these citizens, and sale proceeds and tax benefits are incapable of breaching this trust. Sale proceeds and tax benefits would be assumed in the sale of any public park, and Downingtown Borough stands in no special position of immunity from the public trust doctrine. In addition, the financial benefits to the Borough would be largely or entirely gone in a decade, and the citizens would be left without the only park of this size and character in the Borough. Without the public trust protecting parklands from such sales, all parks would be jeopardized by temporary whims and budgetary needs, and the stock of available parks would eventually whittle away. The Borough's revitalization claims are short-sighted and have absolutely no legal significance in this case.

As with the evidence of contamination and revitalization, there is no relevance to the evidence presented about land planning objectives, the design of the townhouse development and the existence of a market for mixed-use developments. If this was a zoning or land development appeal to the Court of Common Pleas, these issues would naturally be relevant to the Court's review. However, Orphans' Court review of the sale of Kardon Park is based on the public trust interests involved with the Borough's ownership of a public park, and land planning concepts have no bearing on whether these interests prevent the sale of Kardon Park for private development. Accordingly, no legal significance is attributable to the testimony and evidence presented on these issues by Mr. Comitta, Ms. Detterline and Ms. Peck.[52]

[51] It is telling that the Borough's land planner, Thomas Comitta, was surprised when Kardon Park was not included on the list of parks supplied to him by the Borough. Mr. Comitta testified that Kardon Park was not listed because a former Borough solicitor made the legal determination in 2000 that Kardon Park was not an "official" park because grant money was not available to improve the park.

[52] In any event, the evidence and common sense contradict the generalized statements about how the proposed development would increase nearby property values and operate as a "transition" from the industrial/commercial properties along Wallace Avenue and the residential properties in the Lake Drive

F. The Inalienable Property Act Does Not Allow the Sale of Kardon Park:

The Borough has also made a parenthetical request for relief under the Inalienable Property Act, 20 Pa.C.S.A. § 8301 *et seq.* This argument is based on a purported "cloud raised by the possibility that the property is subject to procedures under the Donated and Dedicated Property Act, or the problems associated with the now replaced public trust doctrine … ."[53] As a threshold matter, the applicability of legal regulations is a legal issue and would not constitute a "cloud" on legal title in the traditional sense. In addition, the legal determination would be made as part of this case, so there would be no outstanding legal issue once the determination is made.

The Borough and the Developer have cited no cases that would suggest that this arcane law has abrogated the public trust doctrine, and no such cases in fact exist. As with the DODPA, numerous public trust cases have been issued since the Inalienable Property Act replaced the Revised Price Act of 1917. This Act provides a general remedy to owners of properties that are subject to impractical deed restrictions and rights of reversions,[54] and was not intended to apply to publicly accepted parklands that are more specifically addressed by the public trust doctrine. For instance, if one cousin conveys a property to another cousin under the condition that it can only be conveyed to either of their children, the Inalienable Property Act would allow relief in the event that both of them die without children. In contrast, if a property is acquired by a municipality for park purposes and is held open as a park for decades, a public trust arises that is specifically governed by the public trust doctrine. The Inalienable Property Act has no place in such a context.

---

neighborhood. The lack of any meaningful setback from the western edge of Kardon Park would place this dense townhouse development up against a longstanding steel fabrication business as well as other intensive uses that feature trucks, backhoes and commercial traffic. The Developer presented no appraisal to show that the values of these adjacent properties would increase as a result of being next to townhomes, and common sense dictates otherwise. Likewise, the values of the Lake Drive homes could only be expected to decrease due to the replacement of adjacent parkland with a mixed use development.

[53] See Borough's Trial Memorandum at p. 12.

[54] 20 Pa.C.S.A. § 8301(1)(iii) allows for the sale of real property where "corporations of any kind hav[e] no capacity to convey" property. Section 1(1)(v)(B) confirms the limited scope of the Act and the limited scope of relief available:

> … the court shall have the power to consider all of the circumstances and to grant such equitable relief as shall be just and proper and impose such restrictions upon the use of the funds to be derived from the sale of real property as the court shall deem to be appropriate to further the religious, beneficial or charitable purpose reflected in the deed containing the reversion, possibility of reverter or right of reentry for condition broken.

20 Pa.C.S.A. § 8301(1)(v)(B).

In any event, the Borough presented no evidence showing deed rights of reversion to the Borough's predecessors in title, and presented no evidence to show that the Kardon Park properties are inalienable. Mr. Bruton acknowledged that the Borough never attempted to sell or lease the Kardon Park properties to the Brandywine Conservancy or similar organizations that might be interested in preserving a park or open space use. N.T. 9/23/09 at 54-56. He admitted that he was not aware of anything that would stop the Borough from leasing some or all of the Kardon Park properties to another entity, and that he had no way of knowing whether such entities would take ownership of Kardon Park. Id. Even according to Mr. Bruton's belief that the Act 2 Order limited the southwestern quadrant of the park to commercial development, he acknowledged that there was nothing preventing the Borough from selling that area to a commercial developer, and nothing permitting it to be developed for townhouses. N.T. 9/23/09 at 65. He also acknowledged that nothing prevents the Borough from applying for an amendment of the Order, which was exactly what the Developer in this case has done. N.T. 9/23/09 at 58-59. The fact that the Developer in this case has already obtained approval for a residential use (which was the only express prohibition in the Act 2 Order) only confirms that there is nothing stopping the Borough or any prospective purchasers from continuing the park use.

The Borough's claim about a cloud on title also ignores the fact that the Borough created this situation by dedicating these properties to 31 years of public park use. The principles and cases cited above on self-created hardships and unclean hands would prevent the Borough from seeking equitable relief to overcome its past actions. The Inalienable Property Act does not apply, and the Borough would not be entitled to relief under the facts of this case.

G. The Proposed Sale of Kardon Park Would Violate the Borough Code:

The Borough's sale of Kardon Park is also unlawful under the terms of the Borough Code. Section 201 of the Code requires Boroughs to meet specific requirements before selling real property, and the present sale fails to meet these requirements because: (i) an appraisal was not properly obtained; (ii) the full purchase price was not paid within sixty (60) days of the bid acceptance; (iii) the prospective payment of $2,360,500 to a third party fire company is unauthorized; and (iv) each property owned by the Borough was not separately subjected to the required bidding process. See 53 P.S. § 46201(4)(i). The claims that record title has not yet transferred ignores the fact that equitable ownership of these lands has already passed to the Developer, and also ignores the fact that the Agreement of Sale gives the Developer the right to sue for specific performance. Because equitable title has already passed, the violations of the Borough Code have already occurred.[55]

Messrs. Bruton and Madiro could not recall any appraisals being conducted to determine the fair market value of Kardon Park before Borough Council agreed to sell

[55] The Borough also waived its right to Orphans' Court approval when it accepted the bid for the sale of the Kardon Park properties and consummated the sale with the Developer.

the property. N.T. 9/23/09 at 102; N.T. 9/28/09 at 47-48.[56] The Borough's failure to meet this requirement is critical because of the amounts at stake. There were no other hearings on the sale of the property other than the vote on the Agreement of Sale in 2007 and the vote on the Amendment to Agreement of Sale in August of 2009. N.T. 9/28/09 at 52.[57] There is no foundation for any rational decision, and no opportunity for public input, without a proper public advertisement and a formal record.

The Borough's sale of Kardon Park also does not provide for a single payment of the purchase price, but instead provides for piecemeal payments as individual lots are sold. The satisfaction of the Borough Code is therefore impossible. Contrary to the Developer's request for a directory reading of the Borough Code, the operative term in Section 201 is "shall." The Borough Code does not include exceptions to allow a developer to defer the payment until it has gone through subdivision, improvement and piecemeal sale of lots. Although the Developer in this case has argued that the Borough Code would prevent boroughs from maximizing the overall sale price of their properties, the Code also protects boroughs from situations where a development breaks down before the money is recouped from the developer. Ms. Detterline acknowledged, and common knowledge will confirm, that developments at times fail before they come to fruition. The danger of this occurring is particularly high because of the current housing market, and because the proposed development involves the excavation of contaminated and flood prone ground with unknown risks, costs and liabilities.

H. Public Policy Concerns Strongly Oppose the Proposed Sale:

Aside from the legal deficiencies underlying the proposed sale of Kardon Park, the sale would make no sense from a practical or public policy standpoint. Kardon Park has been held out to the public for decades and has become an irreplaceable resource to the people of Downingtown and surrounding communities. Allowing this public park to be sold for a short-lived financial windfall would not only involve the loss of an irreplaceable resource, but would erode the public trust in political subdivisions to protect public properties such as parks. This eroded trust would in turn have a chilling effect upon individuals who are considering a grant for the public benefit, and upon municipal officials who might attempt to preserve open space or otherwise enhance public resources. As an example, Frank Manetta and Don Greenleaf never imagined that Kardon Park would be sold for private development, and have attempted to prevent the development even though they do not live in the immediate vicinity of the park. Their willingness to become involved in this case more than 30 years after the dedication attests to the fact that municipal officials have an interest in preserving the park systems that they helped to create.

[56] Mr. Madiro also did not recall Borough Council obtaining any independent expert about the environmental cleanup at Kardon Park, and merely relied upon the Developer's environmental expert. N.T. 9/28/09 at 48-49.

[57] Mr. Madiro admitted that Borough Council never discussed the sale of Kardon Park being put on a referendum for public vote. N.T. 9/28/09 at 44

Both the offering party and the accepting public have reasonable expectations that the offer and acceptance will be honored under their mutually assented terms. Allowing this bond to be broken has obvious due process implications, not only with respect to the parties who make dedications for specific purposes, but also with respect to the members of the public who have acquired rights to enjoy public properties. In addition, many public grant programs and tax relief programs require the recording of restrictive covenants to assure that funding will be used for public purposes, and municipalities should not be permitted to dissolve such restrictions and undermine such programs through mere statements of opinion. In the present case, the Borough acquired two of the Kardon Park properties using Project 70 funds, and improved the lakes and meadows through a federal grant for park improvement. Although the Borough has now obtained a bill that will "transfer the Project 70 restrictions" to Johnsontown Park, the evidence confirmed that this was already an active park in the Borough, so the "restrictions" are redundant and meaningless. The obvious purpose of the grants from the Commonwealth and the federal government was for the improvement of parkland at Kardon Park. The Borough's acceptance of the grants should estop the Borough from subsequently attempting to convert these properties to private use. See, e.g., Kreutzer v. Monterey County Herald Co., 560 Pa. 600, 606, 747 A.2d 358, 361 (2000)(doctrine of equitable estoppel recognizes the enforceability of a representation that leads another to rely justifiably thereon to his own detriment). The conversion would also erode the trust of governmental entities that make such grants, the trust of municipal officials and private citizens who dedicate properties to public use, and the trust of the public in the permanency of their park systems.

The urge to preserve parkland resources has been competing with the urge to harvest these resources for as long as parklands have been in existence. Lobbying for national parkland protection of forests that could otherwise be utilized for short-term gains, President Theodore Roosevelt explained how the most "practical" analysis of these competing interests requires a broader and more long-term view of usefulness:

> Closely entwined with keeping unmarred the beauty of your scenery, of your great natural attractions, is the question of making use of, not for the moment merely, but for future time, of your great natural products. … There is nothing more practical than the preservation of beauty, than the preservation of anything that appeals to the higher emotions of mankind. … I believe we are past the stage of national existence when we could look on complacently at the individual who skinned the land and was content for the sake of three years' profit for himself to leave a desert for the children of those who were to inherit the land. I think we have passed that stage.

A Compilation of the Messages and Speeches of Theodore Roosevelt, 1901-1905, Alfred Henry Lewis (1906). In the same way that the present generation may look back

without questioning President Roosevelt's preservation of our national parklands, the future generations of Downingtown Borough should be able to look back without questioning the preservation of Kardon Park.

The Borough's proposed sale of Kardon Park serves as merely one example of how parklands and other public properties may be subject to shortsighted political whims and budgetary needs. Parklands and other public properties rarely pay for themselves, and should be measured in terms other than their economic contributions. Likewise, the measure of usefulness of passive parks should not be confused with the usefulness of active parks, and the lack of ball fields or jungle gyms should not expose all passive parks and open spaces to private sale and temporary gains. Chester County's open space policies demonstrate the strong public sentiment in favor of preserving open space, and the same policies should apply to the preservation of the County's passive parklands. It is therefore critical that this Honorable Court issue a decision that considers the non-monetary benefits of Kardon Park and other passive parks.

IV. CONCLUSION:

The Kardon Park properties were undeniably dedicated to serve as a passive park, and they effectively served this purpose for decades. The bond resulting from the Borough's dedication and the public's acceptance requires the Borough to hold Kardon Park in trust for the public benefit. The Erie Golf Course case clearly did not abrogate the public trust doctrine and was based on the Donated or Dedicated Property Act, which does not apply to this case. The Borough has failed to disprove the dedication and acceptance, and has failed to demonstrate any facts that would entitle it to the requested relief. The Borough's claims of contamination and revitalization are without merit and provide no basis upon which a public park can be sold under Pennsylvania law.

A cursory review of the development plan and amended Agreement of Sale shows that Kardon Park would not be improved by the proposed development. The Borough's recent reduction in the acreage included in the sale makes no difference because the development plan has not been changed and the remaining open areas would predominantly consist of wetlands and ponds. The proposed sale of half of the park cannot even be characterized as "splitting the baby" because the eastern part of the tract would become marshy and largely unwalkable common areas of the proposed development. People who use the trail would walk alongside parking lots and in the shadows of townhouses, whereas they currently walk alongside open meadows and in the shadows of trees. Even if Pennsylvania law permitted the "baby splitting" of public parklands, the proposed development in this case would totally destroy Kardon Park's dedicated purpose of providing citizens an area where they can get away from civilization for a while. There are no similar parks in the Borough, and it is respectfully requested that this Honorable Court protect Kardon Park for future generations to enjoy.

Respectfully submitted,

PETRIKIN, WELLMAN, DAMICO,
BROWN AND PETROSA

By: _____
H. FINTAN MCHUGH, ESQUIRE
Attorney for Respondents,
Kim Manufacturing Company and
Stewart Hall, L.P.

PETRIKIN, WELLMAN, DAMICO,
BROWN & PETROSA
BY: H. FINTAN McHUGH, ESQUIRE
ATTORNEY I.D. NO. 82097
THE WILLIAM PENN BUILDING
109 CHESLEY DRIVE
MEDIA, PA 19063
(610) 565-2670

Attorney for Respondents,
Kim Manufacturing Company
and Stewart Hall, L.P.

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

IN RE:	Petition of the	:	
	Borough of Downingtown	:	No. 1509-0516
		:	

CERTIFICATE OF SERVICE

I hereby certify I am this date serving a copy of the within pleading upon the following persons by First Class Mail addressed as follows:

Patrick C. O'Donnell, Esquire
32 South Church Street
West Chester, PA 19382

Samuel C. Stretton, Esquire
301 South High Street
P. O. Box 3231
West Chester, PA 19381-3231

Mary Ann Rossi, Esquire
MacElree Harvey, Ltd.
17 West Miner Street, P. O. Box 660
West Chester, PA 19381-0660

Charles E. Donohue, Esquire
Deputy Attorney General
Office of Attorney General
Commonwealth of Pennsylvania
21 South 12th Street, 3rd Floor
Philadelphia, PA 19107-3603

PETRIKIN, WELLMAN, DAMICO,
BROWN & PETROSA

Date:_____ BY: _____

H. FINTAN MC HUGH, ESQUIRE
Attorney for Respondents,
Kim Manufacturing Company and
Stewart Hall, L.P.