

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

IN RE: Petition of the Borough of Downingtown

No. 1509-0516

**PRELIMINARY DECREE**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2009, upon consideration of the attached **Petition of the Borough of Downingtown for Approval of the Sale of Real Property:**

Hearing on the Petition shall be held on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, 2009, prevailing time, in Courtroom Number \_\_\_\_\_ of the Chester County Justice Center, West Chester, Pennsylvania.

By The Court:

\_\_\_\_\_  
J.

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

IN RE: Petition of the Borough of Downingtown

No. \_\_\_\_\_

**PROPOSED DECREE**

AND NOW, TO WIT, this \_\_\_\_ day of \_\_\_\_\_, 2009, upon consideration of the attached **Petition of the Borough of Downingtown for Approval of the Sale of Real Property**, it is hereby Ordered and Decreed that the Borough may complete the sale of a portion of the Property, as requested in the Petition, free and clear of any public rights in the area of the proposed development.

Alternatively, the Court finds that approval is not required to convey the Property pursuant to the Agreement of Sale.

By The Court:

\_\_\_\_\_  
J.

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

IN RE: Petition of the Borough of Downingtown

No. 1509 - 0516

**Petition of the Borough of Downingtown for  
Approval of the Sale of Real Property**

**FILED**

**MAR 27 2009**

Clerk of Orphans' Court  
Chester County, PA

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

BACKGROUND

1. This Petition is brought by the Council of the Borough of Downingtown (Borough) which owns a tract of land located partially in the Borough and partially in East Caln Township. The tract consists of five tax parcels, three of which are wholly in Downingtown, one of which is wholly in East Caln and one of which straddles the line between the two. A sixth tax parcel, located in East Caln and shown on the exhibits, is involved but no relief is requested with respect to that parcel.

2. Portions of the tract, some of which is known as Kardon Park, have historically been used for recreation, trail and passive park use while other sections have lain fallow. Much of the tract is environmentally contaminated. The tract subject to this Petition contains a total of 40.5 acres with 24.6 acres in the Borough of Downingtown and 15.9 acres in East Caln Township.

3. The Borough brings this Petition to clear title so that most of the portion which has not been historically used as a park may be transferred to and developed by a Buyer, with the remaining portions being substantially improved by the Buyer for public park use.

4. By making the transfer, the Borough makes substantial gains: The land is cleaned of contamination by the Buyer; the Borough receives enough funds to provide for a new and much needed fire house; many of the Borough's residents can find suitable new, affordably priced housing enabling them to remain in the community; and the Borough can use sale proceeds from the proposed development to fund municipal operations and future capital improvements. By taking over and cleaning up the area to be developed, the arrangement will forever relieve the Borough of the risk and expense of owning contaminated property; it will return non-taxable and unused property to the tax roles; and the tax benefits are an antidote to the current economic downslide facing the Borough and other municipal entities which will benefit as well.

#### JURISDICTION

5. The Court has jurisdiction under the Inalienable Property Act, 20 Pa. C.S.A. §§ 8301-8306, the Donated or Dedicated Property Act, 53 P.S. § 3386; or

sitting as a Court of Equity to address, if necessary, the application or non-application of the Public Trust Doctrine.

### FACTUAL ALLEGATIONS

6. Petitioner is the Borough of Downingtown, a borough duly organized and existing under the Pennsylvania Borough Code, 53 P.S. §§ 45101 *et seq.*, with its office at 4-10 W. Lancaster Avenue, Downingtown, Chester County, PA 19335.

7 The property subject to this action consists of the following parcels, shown on Exhibit "A":

A. Premises A is designated "A" on the attached Exhibit "A". It is an oddly shaped lot, located mostly in the Borough but partly in East Caln. It was acquired August 15, 1968 by Deed recorded at V-34, page 69, being UPI No. 11-4-23 and contains 7 acres. Premises A consists of man-made ponds created as an extension of the original millrace system fed from the Brandywine River. It had no use restrictions or limitations at the time of conveyance, but has been maintained as part of a passive park since acquisition and so far as the Borough intends, will remain for recreational use. Premises A is Tax Parcel No. 11-4-23-E;

B. Premises B Tax Parcel 40-1-23.1, located in East Caln, contains 14.3 acres. Premises C, Tax Parcel 11-4-13 in Downingtown, contains

6.8 acres. They were acquired July 25, 1968 by Deed recorded at H-38, page 110. The title to this property was originally acquired with a payment of \$12,000.00. For reasons which are unclear, but probably to obtain Project 70 funds, a subsequent deed was put on record indicating that these premises were acquired for "park purposes". Premises B had no restrictions or limitations at the time of conveyance but the later Deed of Confirmation recorded at Deed Book L38, Page 853 on October 3, 1968, contained a recital stating that the land was being acquired for recreation, conservation and historic purposes under Project 70. In 1999 Premises C was released from the Project 70 deed restriction via an Act 29 of 1999.

C. A portion of Premises B (in East Caln Township) includes a pond approximately 2.5 acres in size.

D. Premises D, containing 7.4 acres, was acquired December 5, 1974 by condemnation notice recorded to Misc. Book 261, page 128. It appears that this property was taken for park purposes. Premises D is Tax Parcel No. 11-4-14.2-E;

E. Premises E, containing 4.3 acres, was acquired June 30, 1977 by condemnation notice recorded to Misc. Book 379, page 121. It

appears that this property was taken for park purposes. Premises E is Tax Parcel No. 11-4-14-E.

F. Premises F, containing 6.92 acres, is presently used as the Borough trash and compost facility, and is included in the proposed sale of land to the Buyer. It is tax parcel 40-2-25 (East Caln) and was condemned for waterworks on August 1, 1968. It has no restrictions placed on it, so far as the Borough is aware and is not therefore the subject of this Petition.

8. Premises A through E are sometimes collectively referred to herein as the "Property" or the "Subject Property".

9. The Property contains wooded areas, grass-covered areas, and a series of ponds with improvements as follows: small parking area; a 1,560 lineal foot walking/jogging path known as the Lion's Trail; and a public monument known as the Victims of Violence Memorial. As set forth hereafter, a significant portion of the Subject Property could not be used in any convenient way by the public or for recreational purposes because of the contaminated condition of the ground. Indeed, the Act 2 closure issued by the PA Department of Environmental Protection in 1999 was based upon documented evidence that the majority of

visitors to the Property remained on the paved trails as the predominant form of recreational use.

10. Currently and historically, out of the 40.5 acre Property, approximately 12 acres are devoted to park uses, consisting primarily of the ponds and paved trails.

11. Prior to acquisition by the Borough, portions of Premises A through F were used as a quarry to remove minerals from the ground. When the quarry use ended, the exposed cavities on the Property were filled in with industrial waste by-products of industry then active in the Borough as well as for municipal waste.

12. The use of portions of the Property for dumping caused environmental contamination on those portions of it. Attached as Exhibit "D" is a plan of the property in which the area of contaminated historic fill is marked with "hash marks". Historic fill levels currently range from 4 feet in depth to as much as 12 feet in depth.

13. In or about 1999, Downingtown Borough sought clearance from the Pennsylvania Department of Environmental Protection ["DEP"] under Act 2 to permit use of the Property for park and recreation and/or commercial buildings and related parking lots.



14. On October 21, 1999, DEP approved the “Final Report for the Kardon Park Site” such that the Property could be used as a park and/or for commercial purposes.

15. The primary uses of the Property have been walking, jogging, and bike riding on paved paths with occasional use of the ponds for ice skating.

16. Since at least 1999, the Borough has engaged in a series of zoning and planning changes to revitalize the downtown area. One of the strategies identified was to develop Kardon Park for commercial or mixed use purposes. In April of 1999 Borough Council adopted a “Central Business District Revitalization Plan”. In December 1999 the Borough amended the zoning and land development ordinances, creating the Central Business District Revitalization Overlay District. In 2000 the Borough adopted a master site plan for the other Borough parks, and did not include the Subject Property. In 2004 the Borough worked on the first version of what was called the “Kardon Park Redevelopment District” and adopted the Urban Center Revitalization Plan. Each of these exercises envisioned the development of the Subject Property, all without objection.

17. The benefits to the Borough of Downingtown from development of the Subject Property, some of which are visually displayed on the attached Exhibit “B”, include:

- a. Remediates contaminated soils pursuant to a clean-up plan approved by DEP at no cost to Borough taxpayers.
- b. Increases and substantially improves the area of usable public park. Not only does it clean up the current public park area but it adds approximately 10 additional acres of park land, bringing the total public park to approximately 22 acres, more than 50 percent of the Property. In addition, paved trails will be rebuilt and increased in length by at least another 1,000 lineal feet and public parking will be rebuilt and substantially increased.
- c. Generates a positive annual fiscal impact for the Borough as well as sizable one time cash infusion to the Borough, including funds for the creation of a new fire station.
- d. Returns a tax exempt property to the tax rolls of the Borough.
- e. Provides the proceeds of the sale for municipal use in difficult economic times.
- f. Provides affordable housing for seniors, first time homebuyers, and other demographic segments whose housing needs are not currently being met in Chester County.

- g. Creates a pedestrian friendly community walkable to the town center and to the R-5 train which reduces trip dependence on the automobile and is good for the environment.
- h. Enhances the environmental quality of the ponds through the planting of extensive new wetlands plantings around the ponds' edges and through techniques to improve the flow of water to the ponds.
- i. Adds close-in resident population to the Borough which economically benefits the businesses operating in the downtown.

18. In order to secure the aforesaid benefits, the Borough, in July 2006, issued a Solicitation for Property Bids seeking proposals for the redevelopment of Kardon Park.

19. Prior to the Solicitation for Property Bids, the Borough had received verbal advice of then counsel to the Borough that the Donated or Dedicated Property Act did not apply to the proposed sale of Kardon Park.

20. Such advice was, no doubt, based on Section 6 of the Act, which provides as follows: "Nothing in this act shall be construed to limit or affect the control by a political subdivision of public lands or buildings acquired by such political subdivision by purchase or condemnation." 53 P.S. §3386.

21. Each of the Premises comprising the Property was acquired by purchase or condemnation.

22. A portion of the Property in Downingtown had been acquired with Project 70 funds. Those funds came with certain deed restrictions. Those deed restrictions have since been removed from the Downingtown portion of the Property by Act 29 of 1999.

23. The successful respondent to the Solicitation for Property Bids is a partnership between J. Loew & Associates, Inc. ["Loew"] and Progressive Housing Ventures, LLC ["Progressive"], who became the buyers under an Agreement to Purchase and Sell Real Estate, dated August 17, 2007.

24. A sketch of the proposed mixed use development of the Property is shown on Exhibit "C" attached hereto.

25. The proposed development consists of approximately 305 residential dwelling units. An additional 40 "Live Over Work" rental units plus 20,000 square feet of commercial space in the portion located in the Borough.

26. The proposed development does not adversely impact the ability of the public to continue to use the public open space for park and recreation purposes. In fact, it enhances and expands the use.

a. Indeed, the Borough of Downingtown is fortunate to have an abundance of public parks, including the Roger Hunt Gristmill Park, Johnstontown Park, Kerr Park, Sunnybrook Park, Marinelli Park, and Samuel Tabas Memorial Park.

b. All the existing parks add up to approximately 88 acres and this project adds approximately 10 more acres to that figure.

c. According to Delaware Valley Regional Planning Commission metrics, the Borough should have between 52 and 64 acres of public parks for its population size. Downingtown has at least 88 and will have 98 upon the completion of this project. In either case, the Borough will have between 24 and 46 acres of parkland more than suggested by the DVRPC standards for its current population size and well into the future.

27. The essential function of Kardon Park as a passive park is not affected by the proposed development.

28. The proposed development can occur in a manner that preserves the function of Kardon Park while bringing the benefits of redevelopment to the Borough.

29. Use of the area proposed for development as a public park has been minimal and this area of the Property is neither improved for, nor suitable for, park use.

30. Due to the environmental contamination of the soils of the Property, it is not practicable or possible to use the area proposed for development as a public park because the Borough does not have the financial resources to remediate the contamination or make required improvements.

31. The Property, even as currently used, would not be approved under current DEP requirements for use as a public park without remediation to a higher "residential" standard and it would be contrary to public health and safety to open the area of the Property proposed for development to use as park land without remediation.

32. The proposed conveyance of the Subject Property pursuant to the Agreement of Sale provides substantial benefit to the Borough as set forth above with no detriment to the function of "Kardon Park" as a passive park.

33. Implementation of the proposal of Loew and Progressive required an amendment of the Borough's Zoning Ordinance, which was enacted on March 5, 2008. Due to errors in the legal notice the Kardon Park Redevelopment District Ordinance was re-enacted on January 7, 2009 and again on April 15, 2009.

34. The Kardon Park Redevelopment District Ordinance requires conditional use approval as a condition precedent to an application for land development. An application for conditional use approval was filed on June 9, 2008 and on January 28, 2009 by Progressive and J. Loew Associates.

35. The Borough Planning Commission has met many times regarding the rezoning and conditional use applications and has voted on several occasions to give its approval. The Chester County Planning Commission has recommended approval of the rezoning of the property for the proposed development. The Pennsylvania DEP has granted approval for the environmental remediation plan for the property. Borough Council and staff have devoted an extensive amount of time in giving input and feedback to the Buyer on the proposed development since early 2007 and has conducted at least nine (9) conditional use hearings on the proposal.

36. During the conditional use process, certain citizens were opposed to the proposal and formed the Friends of Kardon Park, which appears to be an unincorporated association. Named plaintiffs Ann M. Feldman, Evelyn Hopkins, and Marion Ungrich reside in properties adjacent to the Subject Property.

37. Friends of Kardon Park and Ms. Feldman, Ms. Hopkins and Ms. Ungrich have filed a declaratory judgment and injunction action to Chester County

Docket No. 09-01028 in the Court of Common Pleas of Chester County based primarily on the Donated or Dedicated Property Act [the “Act”].

38. A neighbor, Kim Manufacturing has initiated a similar suit at Chester County Docket No. 09-01313. Kim Manufacturing which fabricates metal products and generates loud noises from its metal stamping machines has expressed concern that future residents of the proposed development will complain about the noise.

#### Relief Request 1

39. Petitioner seeks approval of this Court for the sale of the Property under the Inalienable Property Act, 20 Pa.C.S.A. §§ 8301-8306.

a. Pursuant to the Act, the Court may authorize the sale or exchange of real property “where the legal title is otherwise inalienable”.

b. To the extent that the Property is subject to use limitations as a result of statements contained in deeds or in condemnation proceedings, or by reason of application of the “public trust doctrine”, the title is otherwise inalienable, and the Borough of Downingtown is entitled to relief as set forth above..



Relief Request 2

40. In the alternative, Petitioner seeks a finding under the Donated or Dedicated Property Act, 53 P.S. § 3386 that the property is freely transferable.

- a. The Property is owned by the Borough.
- b. The Property was acquired in circumstances mirroring the golf course acquired by the City of Erie in: *InRe: Erie Golf Course. Appeal of: City of Erie, 963 A.2<sup>nd</sup> 605 (PA. Commw. 2009)*.
- c. The Court is empowered under 53 P.S. §3384 to either determine the inapplicability of the Act, or to relieve the Property of the rights of others.

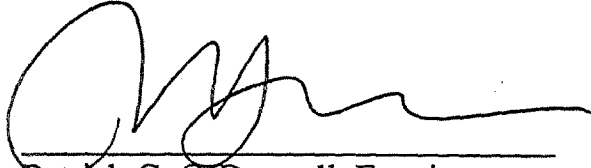
Relief Request 3

41. As a further alternative, in the event that the Court determines that neither the Inalienable Property Act, 20 Pa.C.S.A. §§ 8301-8306 nor the Donated or Dedicated Property Act, 53 P.S. § 3386, afford relief, the Borough requests that the Court exercise its equitable or legal jurisdiction, finding either that no Court approval is required for the sale of the Property, or granting equitable relief allowing the sale, transfer and development of the Property.

WHEREFORE, Petitioner prays this Honorable Court to enter an order approving the sale of a portion of the Property free and clear of any public rights in

the area of the proposed development or, in the alternative, holding that Court approval is not required to convey the Property pursuant to the Agreement of Sale.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. O'Donnell', written over a horizontal line.

Patrick C. O'Donnell, Esquire  
32 South Church Street  
West Chester, PA 19382  
Attorney ID 22105  
(61) 431-4141

Dated: March 27<sup>th</sup>, 2009

I verify that the statements made in this **Petition of the Borough of Downingtown** for **Approval of the Sale of Real Property** are true and correct. I understand that false statements made herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

  
STEPHEN T. SULLINS, MANAGER

Date 3-10-09

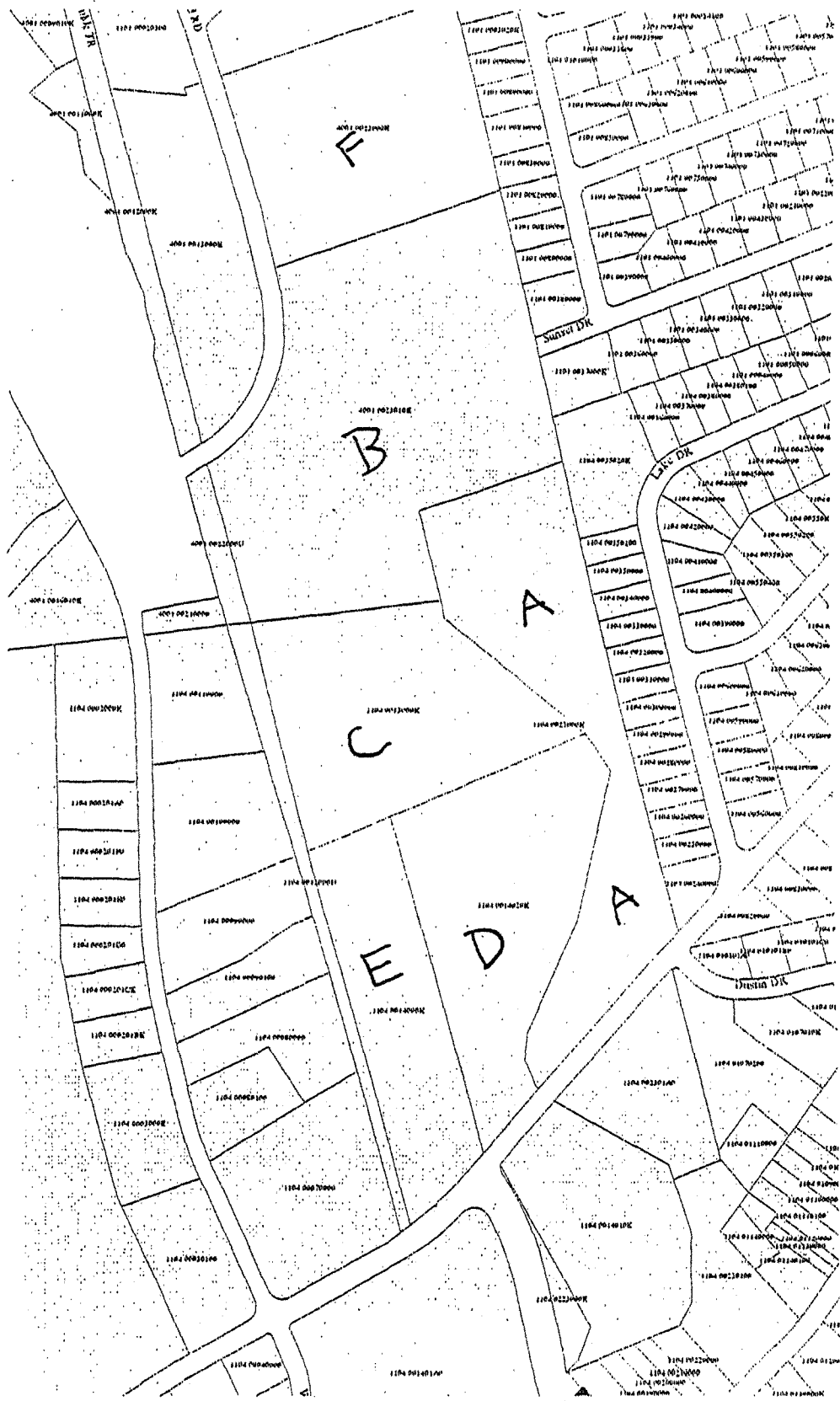
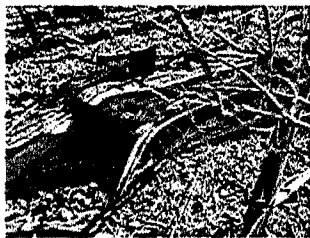


Exhibit "A"

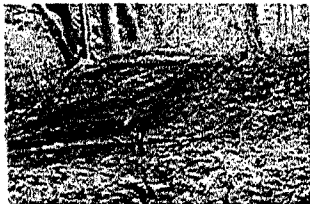
# Kardon Park Proposed Park Improvements



Existing Borough dump removed



Site cleaned up



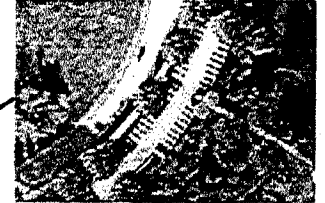
Exposed contaminated soil on trails cleaned up



Ponds cleaned up—less algae



Parking lot & trails rebuilt



New public parking



New paved paths through woods



Screening for Lake Drive homes remains



New homes screened from trail



Privacy landscaping for Victims Memorial added



**New  
Public  
Park**

New Park Property Lines ———  
Existing Trail & Parking - - - -  
New Trails & Parking . . . . .