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February 25, 2021

**Via Federal Express**

Court of Common Pleas of Berks County  
Clerk of Orphan's Court  
633 Court Street  
Reading, PA 19601

**RE: IN RE: KEMP FAMILY CEMETERY**  
**Berks County Orphan's Court, No. 2020-87273**

Dear Sir/Madam:

Enclosed please find an original and one (1) copy of the Preliminary Objections of Duke Realty Limited Partnership to the Petition to Open or Strike, with Brief in Support thereof, as well as a check in the amount of \$20.00 for the filing fee. Please return a time-stamped copy to my attention in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Very truly yours,



Courtney L. Schultz

CLS/jlc  
Encls.

cc: David W. Crossett, Esquire (via e-mail)  
Kevin T. Fogerty, Esquire (via e-mail)

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DELAWARE FLORIDA ILLINOIS MARYLAND MASSACHUSETTS MINNESOTA NEW JERSEY NEW YORK PENNSYLVANIA WASHINGTON, DC

A DELAWARE LIMITED LIABILITY PARTNERSHIP

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

**IN RE: KEMP FAMILY CEMETERY**

**NO. 2020-87273**

**ORDER**

**AND NOW**, \_\_\_\_\_, 2021, the above-captioned matter is scheduled for:

a status conference on \_\_\_\_\_, 2021 at \_\_\_\_\_ a.m./p.m. in the chambers of the undersigned.

an oral argument on \_\_\_\_\_, 2021 at \_\_\_\_\_ a.m./p.m. in the courtroom of the Berks County Courthouse/Services Center assigned to the undersigned. A response brief shall be filed on or before \_\_\_\_\_, 2021.

If an amended petition is filed within 20 days of service of the preliminary objections, this Order shall be rendered moot and the status conference or oral argument shall be deemed cancelled.

Counsel are directed to meet prior to the conference/argument to reduce fact questions and legal issues to a minimum; and, further shall be authorized to settle at said meeting and status conference.

BY THE COURT:

\_\_\_\_\_  
Timothy J. Rowley, J.

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

**IN RE: KEMP FAMILY CEMETERY**

**NO. 2020-87273**

**FINAL DECREE**

**AND NOW**, this \_\_\_ day of \_\_\_\_\_, 2021, it is hereby ordered and decreed that upon consideration of Petitioners Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan's Petition to Open or Strike, the Preliminary Objections of Respondent Duke Realty Limited Partnership, and any response thereto, that Respondents' Preliminary Objections are hereby **GRANTED**, the Petition is accordingly **DISMISSED, WITH PREJUDICE**, and the Stay of the Court's July 22, 2020 Final Decree is hereby lifted and the Decree **REINSTATED** in full force and effect.

BY THE COURT:

\_\_\_\_\_  
Timothy J. Rowley, J.

Courtney L. Schultz (PA Atty ID. 306479)  
Zachary B. Kizitaff (PA Atty ID. 327568)  
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*Attorneys for Respondent,  
Duke Realty Limited Partnership*

**NOTICE TO PLEAD**

To The Plaintiff:

You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days of service, or a judgment may be entered against you.

s/ Courtney L. Schultz  
*Courtney L. Schultz, Esq.*  
*Attorneys for Respondent,  
Duke Realty Limited Partnership*

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

**IN RE: KEMP FAMILY CEMETERY**

**BRENDA WINKLER, JULI WINKLER, MEREDITH BRUNT  
GOLDEY, AND LINDA LANDIS-HEFFERNAN,  
Petitioners**

**v.**

**DUKE REALTY LIMITED PARTNERSHIP,  
CHARLES D. WESSNER, AND CAROL J. WESSNER,  
Respondents.**

**NO. 2020-87273**

**PRELIMINARY OBJECTIONS OF DUKE REALTY LIMITED  
PARTNERSHIP TO THE PETITION TO OPEN OR STRIKE**

TO THE HONORABLE JUDGES OF SAID ORPHANS' COURT:

Respondent, Duke Realty Limited Partnership ("Respondent" or "Duke"), by and through its undersigned counsel and pursuant to Pa. O.C. Rule 3.9 and Rule 1028 of the Pennsylvania Rules of Civil Procedure, hereby preliminarily objects to the Petition to Open or Strike (the "Petition to

Open”) filed by Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan (collectively, “Petitioners”).<sup>1</sup>

## **I. INTRODUCTION**

Petitioners seek an order opening or striking the Final Decree granting Duke’s Petition to Disinter the Remains at the Kemp Family Cemetery (the “Petition to Disinter”). As detailed herein, the Petition to Open is properly dismissed because Petitioners lack standing to seek to have the Final Decree opened or stricken. Petitioners were not parties to the proceedings in which the Final Decree was entered, nor did Petitioners intervene in that proceeding, and thus Petitioners may not challenge the Final Decree through the Petition to Open. Moreover, even if Petitioners were permitted to challenge the Final Decree by way of the Petition to Open, Petitioners elected to wait more than four months to file the Petition to Open and thus did not act with reasonable promptness, and they have thereby waived any objection they may have had to the relief granted. Finally, Petitioners do not have a cognizable due process interest in the remains at issue to support their claim that the Final Decree violated their due process rights. For each of these reasons, as set forth more fully herein, Duke respectfully requests that their Preliminary Objections be sustained.

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<sup>1</sup> A true and correct copy of the Petition to Open is attached hereto as Exhibit A.

## II. SUMMARY OF PERTINENT FACTS<sup>2</sup>

1. On or about June 16, 2020, Duke filed the Petition to Disinter.<sup>3</sup>
2. As set forth in the Petition to Disinter, Duke entered into a confidential purchase and sale agreement (the “Agreement”) on April 10, 2019 with Charles D. Wessner and Carol J. Wessner (the “Sellers”), current owners of a property located at 4 Hilltop Road, Maxatawny Township, Pennsylvania, 19530 (the “Property”), for purchase of the Property.
3. As part of Duke’s pre-purchase due diligence and inspection, Duke hired CHRS, Inc. (“CHRS”) to perform a Cultural Resource Assessment on the Property. CHRS discovered eighteen (18) head stones on the Property dating from the eighteenth through late nineteenth centuries and identified the burial site known as the Kemp Family Cemetery.<sup>4</sup>
4. Given the location of the Kemp Family Cemetery, which is in the middle of building three of the planned commercial development of the Property, Duke filed the Petition to Disinter seeking to disinter the remains located at the Kemp Family Cemetery and reinter them at another nearby cemetery.

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<sup>2</sup> While Duke vehemently disagrees with many of Petitioners’ factual averments, particularly those relating to the unfounded and baseless accusations that Duke engaged in misconduct and misled this Court, Duke understands that the Court must accept the averments as true and thus it will not contest the validity or accuracy of those averments in these Preliminary Objections. *See Barrel of Monkeys, LLC v. Allegheny Cty.*, 39 A.3d 559, 563 (Pa. Commw. Ct. 2012) (citing *Baker v. Cent. Cambria Sch. Dist.*, 24 A.3d 488 (Pa. Commw. Ct. 2011)).

<sup>3</sup> A true and correct copy of the Petition to Disinter is attached hereto as Exhibit B.

<sup>4</sup> Although Duke believes it was premature for the Court to order it to produce an unredacted copy of the CHRS report as Petitioners would not be entitled to take discovery in this action if the Court sustains Duke’s Preliminary Objections, Duke nevertheless produced an unredacted copy of the report to Petitioners on February 22, 2021. True and correct copies of the unredacted report and the accompanying letter from counsel for Duke to counsel for Petitioners is attached hereto as Exhibit C.

5. Following a hearing, which included testimony from fact and expert witnesses, this Court entered a Final Decree on July 22, 2020 (the “Final Decree”) granting the Petition to Disinter and authorizing Duke “to remove the headstones and disinter the remains presently buried at the Kemp Family Cemetery, and to subsequently relocate any remaining intact headstones and to reinter the remains in a nearby cemetery in Berk’s County at Petitioner’s sole cost.”

6. Over six months later, on January 29, 2021, Petitioners, who were not parties to the initial proceedings, filed the instant Petition to Open.

7. Petitioners waited until January 29, 2021 to file the Petition to Open despite admitting that they had notice of the Final Decree over four months earlier in mid-September 2020. (Petition to Open ¶ 20).

8. Petitioners attempt to excuse their delay in filing the Petition to Open by averring that in December 2020 they believed “a good faith resolution could be reached out-of-court” and they “sought to obtain counsel” to file a the Petition. (Petition to Open ¶¶ 35-39).

9. After delaying for over four months, Petitioners, claiming to be distant relatives of certain individuals who were buried in the Kemp Family Cemetery between the mid-1700s and the mid-1800s, seek to have the Final Decree opened or stricken, arguing that (i) the Final Decree “violated Due Process under the Fourteenth Amendment of the U.S. Constitution and under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution” and (ii) is “contrary to 20 Pa. C.S. § 711(1).” (Petition to Open ¶¶ 47-48).

### III. LEGAL STANDARD

10. Rule 3.9(b)(5) of the Pennsylvania Orphans' Court Rules authorizes preliminary objections for "lack of standing or lack of capacity to sue."

11. Pa. O.C. Rule 3.9(b)(4) authorizes preliminary objections in the nature of a demurrer based on the legal insufficiency of a pleading. Preliminary objections of this nature must be sustained when the facts alleged on the face of the pleading indicate that, as a legal matter, no recovery is possible. *See also* Pa. R. Civ. P. 1028(a)(4); *Mellon Bank, N.A. v. Fabinyi*, 650 A.2d 895, 899 (Pa. Super. Ct. 1994); *Commonwealth v. Percudani*, 825 A.2d 743, 745 (Pa. Commw. Ct. 2003).

12. In accordance with Pa. R. Civ. P. 1028(a)(4) (O.C. Rule 3.9(b)(4)'s civil counterpart), a party must allege all requisite elements of its causes of action along with facts to support each element. A demurrer should be sustained where the complaint, on its face, fails to establish a legal right to relief. *See, e.g., Mazzagatti v. Everingham by Everingham*, 516 A.2d 672, 675 (Pa. 1986).

13. In evaluating preliminary objections, the Court "need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Richardson v. Beard*, 942 A.2d 911, 913 (Pa. Commw. Ct. 2008), *aff'd*, 963 A.2d 904 (Pa. 2008) (emphasis added).

14. Additionally, the Court may take judicial notice of public documents in ruling on preliminary objections. *Solomon v. U.S. Healthcare Sys. of Pa., Inc.*, 797 A.2d 346, 352 (Pa. Super. Ct. 2002) (citing *Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 n. 1 (Pa. Super. Ct. 1993)).



#### IV. PRELIMINARY OBJECTIONS

##### A. Preliminary Objection No. 1 for Lack of Standing Pursuant to Pa. O.C. Rule 3.9(b)(5)

15. Petitioners were not parties to the underlying proceedings relating to Duke's Petition to Disinter and thus are not permitted to open or strike the Final Decree.

16. "Before one, not a party of record, can be heard to challenge the judgment or decree, he must obtain leave to become a party by application based on sufficient ground; intervention should only be permitted on cause shown." *In re Jordan*, 1 A.2d 152, 153 (Pa. 1938); *Howell v. Franke*, 143 A.2d 10, 11 (Pa. 1958) ("A petition to open a judgment made by a person not a party of record to the proceeding resulting in the judgment will not be heard unless an application is first made on sufficient grounds for leave to intervene.").

17. Pursuant to Pa. R. Civ. P. 2327 intervention is only proper during the pendency of the action. *See Howell*, 143 A.2d at 11; Pa. R. Civ. P. 2327 ("At any time **during the pendency of an action**, a person not a party thereto shall be permitted to intervene therein, subject to these rules . . .") (emphasis added); *see also Santangelo Hauling, Inc. v. Montgomery Cty.*, 479 A.2d 88, 89 (Pa. Commw. Ct. 1984) (explaining that "if an action is no longer pending, a court would have no power to permit intervention"). "[A]fter final adjudication such an application comes too late." *Howell*, 143 A.2d at 11. (finding that third party who sought to strike judgment was precluded from doing so); *Ziccardi v. Bush*, 61 Pa. D. & C.2d 625, 626 (Pa. Com. Pl. Ct. 1972) ("In this case petitioner seeks to open the judgment without first having sought to intervene and after the action out of which the judgment grew has long since been terminated. Obviously, this it cannot do.").

18. A non-party seeking to challenge a judgment or decree may not do so, even when she alleges that the party obtaining the judgment or decree committed fraud or misconduct. *See Howell*, 143 A.2d at 11.

19. Petitioners were not parties to Duke's Petition to Disinter and they did not otherwise seek leave to intervene prior to filing the Petition to Open.

20. Even if Petitioners had sought leave to intervene, they would not have been permitted to do so pursuant to Pa. R. Civ. P. 2327, as the Final Decree was final and the action was no longer pending.

21. Because Petitioners were properly not parties to the underlying proceeding regarding the Petition to Disinter and were not granted leave to intervene while that proceeding was pending, they may not now challenge the Final Decree through their Petition to Open.<sup>5</sup>

WHEREFORE, Respondent, Duke Realty Limited Partnership, respectfully requests that the Court sustain this Preliminary Objection and dismiss the Petition to Open or Strike of Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan, with prejudice, and to lift the stay of the July 22, 2020 Final Decree, together with any such other relief as the Court deems just and appropriate.

**B. Preliminary Objection No. 2 for Legal Insufficiency Pursuant to Pa. O.C. Rule 3.9(b)(4)**

22. Even if Petitioners were parties or were permitted to intervene to challenge the final decree – which they are not – the Petition to Open failed to alleged sufficient facts to demonstrate that striking or opening the Final Decree is appropriate.

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<sup>5</sup> Even if Petitioners argue that they did not intervene because they did not have notice of the Petition to Disinter, the Petition to Open is nevertheless an improper means by which to challenge the Final Decree. Moreover, as set forth in Section C, below, Petitioners were not entitled to notice of the Petition to Disinter in any event.

23. The Petitioners seek to open or strike the Final Decree.<sup>6</sup> A petition to open and a petition to strike are two separate forms of relief with separate remedies.

24. “A petition to strike off the judgment reaches defects apparent on the face of the record, while a petition to open the judgment offers to show that the defendant can prove a defense to all or part of the plaintiff’s claim.” *Manor Bldg. Corp. v. Manor Complex Assocs., Ltd.*, 645 A.2d 843, 845 n.2 (1994) (internal citations omitted).

i. *The Petition to Open Fails to Allege Sufficient Facts to Demonstrate that the Final Decree Was Deficient on Its Face Such that It Should Be Stricken.*

25. “A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. . . . An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.” *Cintas Corp. v. Lee’s Cleaning Servs., Inc.*, 700 A.2d 915, 917 (Pa. 1997).

26. “When deciding if there are fatal defects on the face of the record for the purposes of a petition to strike a judgment, a court may only look at what was in the record when the judgment was entered.” *Id.*

27. “[A] petition to strike is not a chance to review the merits of the allegations of a complaint. Rather, a petition to strike is aimed at defects that affect the validity of the judgment and that entitle the petitioner, as a matter of law, to relief.” *Green Acres Rehab. & Nursing Ctr. v. Sullivan*, 113 A.3d 1261, 1267 (Pa. Super. Ct. 2015).

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<sup>6</sup> It is not clear under what rule Petitioners have filed their Petition to Open. While Pa. R. Civ. P. 237.3 and 2959 both relate to opening or striking a judgment in the context of default and confessed judgments, respectively, the Final Decree is not a default or a confessed judgment. Rather, the Final Decree was entered after a full evidentiary hearing.

28. “A judgment is void on its face if one or more of three jurisdictional elements is found absent: jurisdiction of the parties; subject matter jurisdiction; or the power or authority to render the particular judgment.” *Id.* at 1268.

29. “The general rule is that if a judgment is sought to be stricken off for an irregularity, not jurisdictional in nature, which merely renders the judgment voidable, the application to strike off must be made within a reasonable time, or the irregularity will be held to be waived.” *Williams v. Wade*, 704 A.2d 132, 134 n.2 (Pa. Super. Ct. 1997).

30. “[I]f the judgment was found to be valid and fully effective, the petition to strike would be denied and timeliness would not be a factor as a petition to strike a valid judgment will be denied even if filed immediately after the entry of that judgment.” *Id.* at 134-35.

31. Here, the Final Decree was and is valid and enforceable, and none of the averments in the Petition to Open demonstrate the contrary.

32. The Petition to Open is premised on two principal theories: (i) that the Final Decree is contrary to 20 Pa. C.S.A § 711(1); and (ii) that the Final Decree was entered without notice to Petitioners. However, neither theory is sufficient to demonstrate that the Final Decree was either void or voidable.

33. It is unclear why Petitioners allege that the Final Decree was contrary to 20 Pa. C.S.A § 711(1), which simply gave the Court jurisdiction to rule upon the Petition to Disinter.

34. Specifically, 20 Pa. C.S.A. § 711 provides:

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans’ court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

(1) Decedents' estates.--The administration and distribution of the real and personal property of decedents' estates and the control of the decedent's burial.

35. While Petitioners argue that the court should have retained judicial supervision over the “methods of reinterment of ancient remains and ancient headstones and in the selection of another cemetery,” nothing in 20 Pa. C.S.A. § 711(1) requires the Court to do so. This Court properly and appropriately, after consideration of the Petition to Disinter and holding an evidentiary hearing on the matter, permitted Duke to remove the headstones and disinter the remains located at the Kemp Family Cemetery and to relocate the headstones and remains in a nearby cemetery in Berks County.<sup>7</sup>

36. Petitioners argument that that the Final Decree should be stricken because they did not receive notice of the Petition to Disinter is equally meritless. As set forth in greater detail in Section C, below, and incorporated herein by reference, Petitioners were not entitled to receive notice under either the relevant provisions of the Pennsylvania Code or the due process clauses of the United States or Pennsylvania Constitutions.

37. Even if the Final Decree was found to be voidable – which it is not – Petitioners unreasonably delayed in filing the Petition to Open and thus any irregularity in the Final Decree – which there was none – should be held to have been waived, all as explained further in Section B.ii., below and incorporated herein by reference.

38. Accordingly, Petitioners have failed to allege sufficient facts to demonstrate that the Final Decree should be stricken.

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<sup>7</sup> As reflected in the Petition to Disinter, the exhumation and relocation process was to be performed by capable third party. (Petition to Disinter ¶ 17).

WHEREFORE, Respondent, Duke Realty Limited Partnership, respectfully requests that the Court sustain this Preliminary Objection and dismiss the Petition to Strike of Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan, with prejudice, and to lift the stay of the July 22, 2020 Final Decree, together with any such other relief as the Court deems just and appropriate.

ii. *Petitioners Unreasonably Delayed in Filing the Petition to Open for More Than Four Months and Failed to Provide an Adequate Excuse for Its Delay.*

39. “A petition to open a default judgment is an appeal to the court’s equitable powers.” *Ridgid Fire Sprinkler Serv., Inc. v. Chaiken*, 482 A.2d 249, 251 (1984). “In determining whether a judgment by default should be opened, the court acts as a court of conscience.” *Id.*

40. “In order to open a default judgment, the petition to open must be: (1) promptly filed, (2) state an adequate excuse why a timely answer was not filed, and (3) show a meritorious defense.”<sup>8</sup> *Id.* “All three criteria must be met, and the three requirements must ‘coalesce.’” *Id.*<sup>9</sup>

41. Where a petitioner has failed to “exercised due diligence in protecting her rights,” she will be found to have “slept on [those] rights and thus waived any claim to any defect in the judgment not appearing of record.” *Id.* at 253.

42. Here, Petitioners readily admit that they received notice of the Final Decree by mid-September 2020. (Petition to Open ¶ 30).

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<sup>8</sup> While Petitioners would ultimately be unable to present a meritorious defense, Duke will not address this factor in detail, as it would require Duke to assert facts beyond the face of the Petition.

<sup>9</sup> Although it is not clear whether either Pa. R. Civ. P. 237.3 or Pa. R. Civ. P. 2959 govern the situation at issue here, regardless, the Petition to Open was not timely filed under Rule 237.3 or 2959 which require the petition challenging the judgment to be filed within 10 and 30 days respectively.

43. By October 2020, stories were posted in both the *Reading Eagle* and *Grave Happenings* discussing the Kemp Family Cemetery and Duke’s Petition to Disinter – stories in which Petitioners themselves provided comment or were contributors. (Petition to Open ¶¶ 32-33).

44. Petitioners aver in a conclusory fashion that they “have acted with reasonable promptness in filing this instant Petition.” (Petition to Open ¶ 53). Petitioners, however, have failed to allege sufficient facts to support this conclusion, and as such the averment is not entitled to any weight and has no evidentiary value.

45. The closest that Petitioners come to offering an excuse for their delay are the averments that on December 4, 2020, “Petitioners and others held a teleconference with Duke Realty” and believed that “a good faith resolution could be reached out-of-court” and that after December 4, 2020 Petitioners sought to obtain counsel. (Petition to Open ¶¶ 35-38). Petitioners altogether fail to allege any facts to excuse their delay in filing between mid-September, 2020 and December, 2020.

46. Moreover, Petitioners’ belief that they could obtain an out of court resolution of the matter does not adequately explain their failure to act with reasonable promptness in filing the Petition to Open. *See id.* at 253 (explaining that petitioner’s attempts to obtain a satisfactory settlement “does not adequately explain the delay in filing a petition to open”); *Hersch v. Clapper*, 335 A.2d 738, 741 (Pa. Super. Ct. 1975) (“Defendant offers no explanation for this lack of diligence other than the fact that negotiations were being conducted in an attempt to arrive at some amicable agreement to settle the controversy. This does not constitute an adequate explanation for defendant’s failure to promptly file the petition.”).

47. Likewise, Petitioners decision to delay filing the Petition to Open for more than four months is not adequately excused by their failure to obtain counsel. *See US Bank N.A. v. Mallory*, 982 A.2d 986, 996 (2009) (holding that petition to open was not promptly filed and explaining that lack of sophistication in legal matters was not an adequate excuse where petitioner did not secure counsel until six weeks after the judgment was entered). By Petitioners' own admission, they did not even attempt to secure counsel until after December 4, 2020 – over two and a half months after being put on notice of the Final Decree – and they did not secure counsel until at least December 26, 2020 – over three months after receiving notice of the Final Decree. (Petition to Open ¶¶ 38-39).

48. Petitioners failed to promptly file the Petition to Open, instead electing to wait over four months from the time that they admitted to being on notice of the Final Decree. They have not offered an adequate (or legally sufficient) reason for why the delay should be excused. *See Ridgid Fire Sprinkler Serv., Inc.*, 482 A.2d at 252-53 (collecting cases where petitions filed after a delay of less than 100 days were not timely: “*See: McCoy v. Public Acceptance Corp.*, 451 Pa. 495, 500, 305 A.2d 698, 700 (1973) (two and one-half weeks); *Pappas v. Stefan*, 451 Pa. 354, 358, 304 A.2d 143, 146 (1973) (55 days); *Dodson v. N. John Cunzolo & Associates Architectural Clay Products, Inc.*, 326 Pa.Super. 283, —, 473 A.2d 1093, 1096 (1984) (2 months); *Bottero v. Great Atlantic & Pacific Tea Co.*, 316 Pa.Super. 62, 70, 462 A.2d 793, 797–798 (1983) (unexplained six week delay following negotiations); *Mahler v. Emrick*, 300 Pa.Super. 244, 247, 446 A.2d 321, 323 (1982) (2 months); *Keystone Boiler Works, Inc. v. Combustion & Energy Corp.*, *supra* 294 Pa.Super. at 150, 439 A.2d at 795 (3 months); *American Vending Co. v. Brewington*, *supra*, 289 Pa.Super. at 33, 432 A.2d at 1036 (2½ months); *Hatgimisios v. Dave's N.E. Mint, Inc.*, 251 Pa.Super. 275, 276–277, 380 A.2d 485, 486 (1977) (37 days too long if unexplained); *Quatrochi*



*v. Gaiters*, 251 Pa.Super. 115, 124, 380 A.2d 404, 409 (1977) (63 days); *Schutte v. Valley Bargain Center, Inc.*, 248 Pa.Super. 532, 537–538, 375 A.2d 368, 371 (1977) (47 days); *Carducci v. Albright Galleries, Inc.*, 244 Pa.Super. 48, 51, 366 A.2d 577, 579 (1976) (54 days); *Hofer v. Loyal Order of Moose*, 243 Pa.Super. 342, 346, 365 A.2d 1254, 1256 (1976) (47 days); *Reliance Insurance Cos. v. Festa*, 233 Pa.Super. 61, 64–65, 335 A.2d 400, 401–402 (1975) (71 days).”).

49. Petitioners have therefore failed to set forth sufficient facts to satisfy the elements necessary to open the Final Decree.

WHEREFORE, Respondent, Duke Realty Limited Partnership, respectfully requests that the Court sustain this Preliminary Objection and dismiss the Petition to Open of Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan, with prejudice, and to lift the stay of the July 22, 2020 Final Decree, together with any such other relief as the Court deems just and appropriate.

C. **Preliminary Objection No. 3 for Legal Insufficiency Pursuant to Pa. O.C. Rule 3.9(b)(4)**

50. The Petition to Open is largely premised on the argument that Petitioners were not provided notice of the Petition to Disinter. Their argument, however, is fatally flawed as Petitioners were not entitled to receive notice.

51. Duke’s Petition to Disinter was filed pursuant to 28 Pa. Code § 1.25 which provides in relevant part:

(a) Permit. No dead human body shall be removed from its place of interment unless a disinterment permit is first secured from a local registrar who is authorized to issue a disinterment permit, according to the following requirements:

\* \* \*

(d) Exhumation and exposure. The remains of a dead body may not be exhumed and exposed to view without an order from a court of competent jurisdiction.

52. There is no notice requirement under this regulation, nor do Petitioners identify any notice requirement with respect to the disinterment of remains. They argue solely that they were entitled to notice under the due process clauses of the United States and Pennsylvania Constitutions.

53. “The due process standards of the United States and Pennsylvania Constitutions are essentially the same.” *City of Philadelphia v. Pennsylvania Ins. Dep't*, 889 A.2d 664, 670 (Pa. Commw. Ct. 2005). “Under the due process provisions of the 14th Amendment, a person has a right to a due process hearing when the following two-prong test is met: the challenged action has caused that party an injury in fact, economic or otherwise, and when the interest asserted by the plaintiff is within the zones of interests sought to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* “Stated a bit differently, under the Pennsylvania Constitution, **a person is only entitled to due process protections when there is a legitimate claim of entitlement to a property interest or other protected interest.**” *Id.* (emphasis added) “To summarize, under either Constitution, once a party is determined to have a property interest or interest in the outcome of the litigation, that person has standing to challenge the governmental action and is entitled to a due process hearing.” *Id.*

54. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise **interested parties** of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (emphasis added).

55. In other words, if a person does not have a constitutionally protected due process interest, she is not entitled to receive the rights afforded by the due process clauses of the United States or Pennsylvania Constitutions. *See City of Philadelphia*, 889 A.2d at 670.

56. Here, Petitioners fail to identify or establish a constitutionally protected interest in the ancient remains buried at the Kemp Family Cemetery, which is remotely located on the private Property of the Sellers.

57. On the contrary, while next of kin may have a quasi-property interest in the burial of remains there does not appear to be any such right in “remains buried for decades.” *Patterson v. Def. POW/MIA Accounting Agency*, 398 F. Supp. 3d 102, 120 (W.D. Tex. 2019). Even if there were a property interests in such remains, “it appears to diminish over time.” *Id.* (“Thus, without either a cognizable liberty or property interest, Plaintiffs’ procedural and substantive due process claims fail.”).<sup>10</sup>

58. Even if Petitioners were next of kin of the persons whose remains are interred at the Kemp Family Cemetery, Petitioners do not have a constitutionally protected interest in the remains necessary to support their argument that the Final Decree violated their due process rights. The ancient remains of Petitioners’ alleged distant relatives have all been interred for more than 140 years. Any interest that the decedents’ next of kin had at one time over the remains has long since dissipated.

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<sup>10</sup> While the remains in *Patterson* were unidentified, the court explained, that even if the remains had been identified, there was still no cognizable property interest in the remains. *Patterson*, 398 F. Supp. 3d at 118 (W.D. Tex. 2019) (“Putting that problem aside, and assuming for argument that the remains were identified, Plaintiffs still do not state a cognizable property interest.”).

59. Because Petitioners do not have a cognizable due process interest, the Final Decree cannot, as a matter of law, be opened or stricken on the grounds that it allegedly violated Petitioners right to due process.

WHEREFORE, Respondent, Duke Realty Limited Partnership, respectfully requests that the Court sustain this Preliminary Objection and dismiss the Petition to Open or Strike of Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan, with prejudice, and to lift the stay of the July 22, 2020 Final Decree, together with any such other relief as the Court deems just and appropriate.

**D. Preliminary Objection No. 4 for Lack of Standing Pursuant to Pa. O.C. Rule 3.9(b)(5)**

60. The remote nature of Petitioners alleged relationship with those interred at the Kemp Family Cemetery is insufficient to confer them with standing to maintain their challenge to the Final Decree.

61. “[A] party seeking judicial resolution of a controversy in this Commonwealth must, as a prerequisite, establish that he has standing to maintain the action.” *Irwin Union Nat. Bank & Tr. Co. v. Famous*, 4 A.3d 1099, 1106 (2010). “A party has standing if he is aggrieved, *i.e.*, he can show a substantial, direct, and immediate interest in the outcome.” *Id.*

62. Petitioners have not set forth sufficient facts to demonstrate that they have a substantial, direct, or immediate interest in the Final Decree permitting Duke to relocate the headstones and remains located at the Kemp Family Cemetery.

63. Any interest that Petitioners have through their purported association with the decedents’ remains is indirect and remote. By their own admissions, Petitioners are five or more generations removed from nearly all of the decedents. (Petition to Open, Ex. B).

64. Petitioners have not alleged that Duke knew of their purported association to the decedents' remains prior to September 2020, some three months after it filed the Petition to Disinter, and two months after entry of the Final Decree.

65. Petitioners do not own the land on which the Kemp Family Cemetery is located.


66. Moreover, 28 Pa. Code. § 1.25(d) – the regulation pursuant to which Duke filed its Petition to Disinter – does not even require consent of next of kin to exhume or expose a body. It only requires an order of the court which Duke obtained through the Final Decree.

67. Accordingly, Petitioners do not have a substantial, direct, or immediate interest in the disinterment and reinterment of the remains at the Kemp Family Cemetery.

WHEREFORE, Respondent, Duke Realty Limited Partnership, respectfully requests that the Court sustain this Preliminary Objection and dismiss the Petition to Open or Strike of Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan, with prejudice, and to lift the stay of the July 22, 2020 Final Decree, together with any such other relief as the Court deems just and appropriate.

Respectfully submitted,

Dated: February 25, 2021



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

**IN RE: KEMP FAMILY CEMETERY**

**BRENDA WINKLER, JULI WINKLER, MEREDITH BRUNT  
GOLDEY, AND LINDA LANDIS-HEFFERNAN,  
Petitioners**

**v.**

**DUKE REALTY LIMITED PARTNERSHIP,  
CHARLES D. WESSNER, AND CAROL J. WESSNER,  
Respondents.**

**NO. 2020-87273**

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF DUKE REALTY  
LIMITED PARTNERSHIP TO THE PETITION TO OPEN OR STRIKE**

TO THE HONORABLE JUDGES OF SAID ORPHANS' COURT:

Respondent, Duke Realty Limited Partnership ("Respondent" or "Duke"), by and through its undersigned counsel, hereby submits this brief in support of the Preliminary Objections to the Petition to Open or Strike (the "Petition to Open") filed by Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan (collectively, "Petitioners").<sup>1</sup>

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<sup>1</sup> A true and correct copy of the Petition to Open is attached to the Preliminary Objections as Exhibit A.

## **I. INTRODUCTION**

Petitioners seek an order opening or striking the Final Decree granting Duke's Petition to Disinter the Remains at the Kemp Family Cemetery (the "Petition to Disinter"). As detailed herein, the Petition to Open is properly dismissed because Petitioners lack standing to seek to have the Final Decree opened or stricken. Petitioners were not parties to the proceedings in which the Final Decree was entered, nor did Petitioners intervene in that proceeding, and thus Petitioners may not challenge the Final Decree through the Petition to Open. Moreover, even if Petitioners were permitted to challenge the Final Decree by way of the Petition to Open, Petitioners elected to wait more than four months to file the Petition to Open and thus did not act with reasonable promptness, and they have thereby waived any objection they may have had to the relief granted. Finally, Petitioners do not have a cognizable due process interest in the remains at issue to support their claim that the Final Decree violated their due process rights. For each of these reasons, as set forth more fully herein, Duke respectfully requests that their Preliminary Objections be sustained.

## **II. SUMMARY OF PERTINENT FACTS**<sup>2</sup>

On or about June 16, 2020, Duke filed the Petition to Disinter.<sup>3</sup> As set forth in the Petition to Disinter, Duke entered into a confidential purchase and sale agreement (the "Agreement") on

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<sup>2</sup> While Duke vehemently disagrees with many of Petitioners' factual averments, particularly those relating to the unfounded and baseless accusations that Duke engaged in misconduct and misled this Court, Duke understands that the Court must accept the averments as true and thus it will not contest the validity or accuracy of those averments in these Preliminary Objections. *See Barrel of Monkeys, LLC v. Allegheny Cty.*, 39 A.3d 559, 563 (Pa. Commw. Ct. 2012) (citing *Baker v. Cent. Cambria Sch. Dist.*, 24 A.3d 488 (Pa. Commw. Ct. 2011)).

<sup>3</sup> A true and correct copy of the Petition to Disinter is attached to the Preliminary Objections as Exhibit B.

April 10, 2019 with Charles D. Wessner and Carol J. Wessner (the “Sellers”), current owners of a property located at 4 Hilltop Road, Maxatawny Township, Pennsylvania, 19530 (the “Property”), for purchase of the Property. As part of Duke’s pre-purchase due diligence and inspection, Duke hired CHRS, Inc. (“CHRS”) to perform a Cultural Resource Assessment on the Property. CHRS discovered eighteen (18) head stones on the Property dating from the eighteenth through late nineteenth centuries and identified the burial site known as the Kemp Family Cemetery.<sup>4</sup>

Given the location of the Kemp Family Cemetery, which is in the middle of building three of the planned commercial development of the Property, Duke filed the Petition to Disinter seeking to disinter the remains located at the Kemp Family Cemetery and reinter them at another nearby cemetery. Following a hearing, which included testimony from fact and expert witnesses, this Court entered a Final Decree on July 22, 2020 (the “Final Decree”) granting the Petition to Disinter and authorizing Duke “to remove the headstones and disinter the remains presently buried at the Kemp Family Cemetery, and to subsequently relocate any remaining intact headstones and to reinter the remains in a nearby cemetery in Berk’s County at Petitioner’s sole cost.”

Over six months later, on January 29, 2021, Petitioners, who were not parties to the initial proceedings, filed the instant Petition to Open. Petitioners waited until January 29, 2021 to file the Petition to Open despite admitting that they had notice of the Final Decree over four months earlier in mid-September 2020. (Petition to Open ¶ 20). Petitioners attempt to excuse their delay in filing the Petition to Open by averring that in December 2020 they believed “a good faith

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<sup>4</sup> Although Duke believes it was premature for the Court to order it to produce an unredacted copy of the CHRS report as Petitioners would not be entitled to take discovery in this action if the Court sustains Duke’s Preliminary Objections, Duke nevertheless produced an unredacted copy of the report to Petitioners on February 22, 2021. True and correct copies of the unredacted report and the accompanying letter from counsel for Duke to counsel for Petitioners is attached to the Preliminary Objections as Exhibit C.



resolution could be reached out-of-court” and they “sought to obtain counsel” to file a the Petition. (Petition to Open ¶¶ 35-39). After delaying for over four months, Petitioners, claiming to be distant relatives of certain individuals who were buried in the Kemp Family Cemetery between the mid-1700s and the mid-1800s, seek to have the Final Decree opened or stricken, arguing that (i) the Final Decree “violated Due Process under the Fourteenth Amendment of the U.S. Constitution and under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution” and (ii) is “contrary to 20 Pa. C.S. § 711(1).” (Petition to Open ¶¶ 47-48).

### **III. QUESTIONS PRESENTED**

1. Should the Court sustain Duke’s Preliminary Objection and dismiss the Petition to Open pursuant to Pa. O.C. Rule 3.9(b)(4) as Petitioners were not parties to the underlying proceedings they are now challenging and did not seek to intervene in those proceeding while they were pending?

**Suggested Answer – Yes.**

2. Should the Court sustain Duke’s Preliminary Objection and dismiss the Petition to Open pursuant to Pa. O.C. Rule 3.9(b)(5) where Petitioners have failed to allege sufficient facts to demonstrate that the Final Decree was void on its face such that it should be stricken?

**Suggested Answer – Yes.**

3. Should the Court sustain Duke’s Preliminary Objection and dismiss the Petition to Open pursuant to Pa. O.C. Rule 3.9(b)(5) where Petitioners unreasonably delayed in filing their Petition to Open and have therefore waived any objection they may have had to the Final Decree?

**Suggested Answer – Yes**

4. Should the Court sustain Duke’s Preliminary Objection and dismiss the Petition to Open pursuant to Pa. O.C. Rule 3.9(b)(5) where Petitioners were not entitled to notice of the Petition to Disinter under statute, regulation, or the due process clauses of the United States or Pennsylvania Constitutions?

**Suggested Answer – Yes**

5. Should the Court sustain Duke’s Preliminary Objection and dismiss the Petition to Open pursuant to Pa. O.C. Rule 3.9(b)(4) where Petitioners have failed to allege sufficient facts to demonstrate that they have a substantial, direct, and immediate interest in the outcome of Duke’s Petition to Disinter?

**Suggested Answer – Yes**

**IV. LEGAL STANDARD**

Rule 3.9(b)(5) of the Pennsylvania Orphans’ Court Rules authorizes preliminary objections for “lack of standing or lack of capacity to sue.”

Pa. O.C. Rule 3.9(b)(4) authorizes preliminary objections in the nature of a demurrer based on the legal insufficiency of a pleading. Preliminary objections of this nature must be sustained when the facts alleged on the face of the pleading indicate that, as a legal matter, no recovery is possible. *See also* Pa. R. Civ. P. 1028(a)(4); *Mellon Bank, N.A. v. Fabinyi*, 650 A.2d 895, 899 (Pa. Super. Ct. 1994); *Commonwealth v. Percudani*, 825 A.2d 743, 745 (Pa. Commw. Ct. 2003). In accordance with Pa. R. Civ. P. 1028(a)(4) (O.C. Rule 3.9(b)(4)’s civil counterpart), a party must allege all requisite elements of its causes of action along with facts to support each element. A demurrer should be sustained where the complaint, on its face, fails to establish a legal right to

relief. See, e.g., *Mazzagatti v. Everingham by Everingham*, 516 A.2d 672, 675 (Pa. 1986). In evaluating preliminary objections, the Court “need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Richardson v. Beard*, 942 A.2d 911, 913 (Pa. Commw. Ct. 2008), *aff’d*, 963 A.2d 904 (Pa. 2008) (emphasis added). Additionally, the Court may take judicial notice of public documents in ruling on preliminary objections. *Solomon v. U.S. Healthcare Sys. of Pa., Inc.*, 797 A.2d 346, 352 (Pa. Super. Ct. 2002) (citing *Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 n. 1 (Pa. Super. Ct. 1993)).

## V. PRELIMINARY OBJECTIONS

### A. Preliminary Objection No. 1 for Lack of Standing Pursuant to Pa. O.C. Rule 3.9(b)(5)

Petitioners were not parties to the underlying proceedings relating to Duke’s Petition to Disinter and thus are not permitted to open or strike the Final Decree. “Before one, not a party of record, can be heard to challenge the judgment or decree, he must obtain leave to become a party by application based on sufficient ground; intervention should only be permitted on cause shown.” *In re Jordan*, 1 A.2d 152, 153 (Pa. 1938); *Howell v. Franke*, 143 A.2d 10, 11 (Pa. 1958) (“A petition to open a judgment made by a person not a party of record to the proceeding resulting in the judgment will not be heard unless an application is first made on sufficient grounds for leave to intervene.”). Pursuant to Pa. R. Civ. P. 2327 intervention is only proper during the pendency of the action. See *Howell*, 143 A.2d at 11; Pa. R. Civ. P. 2327 (“At any time **during the pendency of an action**, a person not a party thereto shall be permitted to intervene therein, subject to these rules . . .”) (emphasis added); see also *Santangelo Hauling, Inc. v. Montgomery Cty.*, 479 A.2d 88, 89 (Pa. Commw. Ct. 1984) (explaining that “if an action is no longer pending, a court would have no power to permit intervention”).

“[A]fter final adjudication such an application comes too late.” *Howell*, 143 A.2d at 11. (finding that third party who sought to strike judgment was precluded from doing so); *Ziccardi v. Bush*, 61 Pa. D. & C.2d 625, 626 (Pa. Com. Pl. Ct. 1972) (“In this case petitioner seeks to open the judgment without first having sought to intervene and after the action out of which the judgment grew has long since been terminated. Obviously, this it cannot do.”). A non-party seeking to challenge a judgment or decree may not do so, even when she alleges that the party obtaining the judgment or decree committed fraud or misconduct. *See Howell*, 143 A.2d at 11.

Petitioners were not parties to Duke’s Petition to Disinter and they did not otherwise seek leave to intervene prior to filing the Petition to Open. Even if Petitioners had sought leave to intervene, they would not have been permitted to do so pursuant to Pa. R. Civ. P. 2327, as the Final Decree was final and the action was no longer pending. Because Petitioners were properly not parties to the underlying proceeding regarding the Petition to Disinter and were not granted leave to intervene while that proceeding was pending, they may not now challenge the Final Decree through their Petition to Open.<sup>5</sup>

**B. Preliminary Objection No. 2 for Legal Insufficiency Pursuant to Pa. O.C. Rule 3.9(b)(4)**

Even if Petitioners were parties or were permitted to intervene to challenge the final decree – which they are not – the Petition to Open failed to alleged sufficient facts to demonstrate that striking or opening the Final Decree is appropriate. The Petitioners seek to open or strike the Final

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<sup>5</sup> Even if Petitioners argue that they did not intervene because they did not have notice of the Petition to Disinter, the Petition to Open is nevertheless an improper means by which to challenge the Final Decree. Moreover, as set forth in Section C, below, Petitioners were not entitled to notice of the Petition to Disinter in any event.

Decree.<sup>6</sup> A petition to open and a petition to strike are two separate forms of relief with separate remedies. “A petition to strike off the judgment reaches defects apparent on the face of the record, while a petition to open the judgment offers to show that the defendant can prove a defense to all or part of the plaintiff’s claim.” *Manor Bldg. Corp. v. Manor Complex Assocs., Ltd.*, 645 A.2d 843, 845 n.2 (1994) (internal citations omitted).

i. *The Petition to Open Fails to Allege Sufficient Facts to Demonstrate that the Final Decree Was Deficient on Its Face Such that It Should Be Stricken.*

“A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. . . . An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.” *Cintas Corp. v. Lee’s Cleaning Servs., Inc.*, 700 A.2d 915, 917 (Pa. 1997). “When deciding if there are fatal defects on the face of the record for the purposes of a petition to strike a judgment, a court may only look at what was in the record when the judgment was entered.” *Id.* “[A] petition to strike is not a chance to review the merits of the allegations of a complaint. Rather, a petition to strike is aimed at defects that affect the validity of the judgment and that entitle the petitioner, as a matter of law, to relief.” *Green Acres Rehab. & Nursing Ctr. v. Sullivan*, 113 A.3d 1261, 1267 (Pa. Super. Ct. 2015).

“A judgment is void on its face if one or more of three jurisdictional elements is found absent: jurisdiction of the parties; subject matter jurisdiction; or the power or authority to render the particular judgment.” *Id.* at 1268. “The general rule is that if a judgment is sought to be stricken off for an irregularity, not jurisdictional in nature, which merely renders the judgment

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<sup>6</sup> It is not clear under what rule Petitioners have filed their Petition to Open. While Pa. R. Civ. P. 237.3 and 2959 both relate to opening or striking a judgment in the context of default and confessed judgments, respectively, the Final Decree is not a default or a confessed judgment. Rather, the Final Decree was entered after a full evidentiary hearing.

voidable, the application to strike off must be made within a reasonable time, or the irregularity will be held to be waived.” *Williams v. Wade*, 704 A.2d 132, 134 n.2 (Pa. Super. Ct. 1997). “[I]f the judgment was found to be valid and fully effective, the petition to strike would be denied and timeliness would not be a factor as a petition to strike a valid judgment will be denied even if filed immediately after the entry of that judgment.” *Id.* at 134-35.

Here, the Final Decree was and is valid and enforceable, and none of the averments in the Petition to Open demonstrate the contrary. The Petition to Open is premised on two principal theories: (i) that the Final Decree is contrary to 20 Pa. C.S.A § 711(1); and (ii) that the Final Decree was entered without notice to Petitioners. However, neither theory is sufficient to demonstrate that the Final Decree was either void or voidable.

It is unclear why Petitioners allege that the Final Decree was contrary to 20 Pa. C.S.A § 711(1), which simply gave the Court jurisdiction to rule upon the Petition to Disinter. Specifically, 20 Pa. C.S.A. § 711 provides:

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans’ court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

- (1) Decedents’ estates.--The administration and distribution of the real and personal property of decedents' estates and the control of the decedent's burial.

While Petitioners argue that the court should have retained judicial supervision over the “methods of reinterment of ancient remains and ancient headstones and in the selection of another cemetery,” nothing in 20 Pa. C.S.A. § 711(1) requires the Court to do so. This Court properly and appropriately, after consideration of the Petition to Disinter and holding an evidentiary hearing on the matter, permitted Duke to remove the headstones and disinter the remains located at the Kemp

Family Cemetery and to relocate the headstones and remains in a nearby cemetery in Berks County.<sup>7</sup>

Petitioners argument that that the Final Decree should be stricken because they did not receive notice of the Petition to Disinter is equally meritless. As set forth in greater detail in Section C, below, and incorporated herein by reference, Petitioners were not entitled to receive notice under either the relevant provisions of the Pennsylvania Code or the due process clauses of the United States or Pennsylvania Constitutions. Even if the Final Decree was found to be voidable – which it is not – Petitioners unreasonably delayed in filing the Petition to Open and thus any irregularity in the Final Decree – which there was none – should be held to have been waived, all as explained further in Section B.ii., below and incorporated herein by reference. Accordingly, Petitioners have failed to allege sufficient facts to demonstrate that the Final Decree should be stricken.

ii. *Petitioners Unreasonably Delayed in Filing the Petition to Open for More Than Four Months and Failed to Provide an Adequate Excuse for Its Delay.*

“A petition to open a default judgment is an appeal to the court’s equitable powers.” *Ridgid Fire Sprinkler Serv., Inc. v. Chaiken*, 482 A.2d 249, 251 (1984). “In determining whether a judgment by default should be opened, the court acts as a court of conscience.” *Id.* “In order to open a default judgment, the petition to open must be: (1) promptly filed, (2) state an adequate excuse why a timely answer was not filed, and (3) show a meritorious defense.<sup>8</sup>” *Id.* “All three

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<sup>7</sup> As reflected in the Petition to Disinter, the exhumation and relocation process was to be performed by capable third party. (Petition to Disinter ¶ 17).

<sup>8</sup> While Petitioners would ultimately be unable to present a meritorious defense, Duke will not address this factor in detail, as it would require Duke to assert facts beyond the face of the Petition.

criteria must be met, and the three requirements must ‘coalesce.’” *Id.*<sup>9</sup> Where a petitioner has failed to “exercised due diligence in protecting her rights,” she will be found to have “slept on [those] rights and thus waived any claim to any defect in the judgment not appearing of record.” *Id.* at 253.

Here, Petitioners readily admit that they received notice of the Final Decree by mid-September 2020. (Petition to Open ¶ 30). By October 2020, stories were posted in both the *Reading Eagle* and *Grave Happenings* discussing the Kemp Family Cemetery and Duke’s Petition to Disinter – stories in which Petitioners themselves provided comment or were contributors. (Petition to Open ¶¶ 32-33).

Petitioners aver in a conclusory fashion that they “have acted with reasonable promptness in filing this instant Petition.” (Petition to Open ¶ 53). Petitioners, however, have failed to allege sufficient facts to support this conclusion, and as such the averment is not entitled to any weight and has no evidentiary value. The closest that Petitioners come to offering an excuse for their delay are the averments that on December 4, 2020, “Petitioners and others held a teleconference with Duke Realty” and believed that “a good faith resolution could be reached out-of-court” and that after December 4, 2020 Petitioners sought to obtain counsel. (Petition to Open ¶¶ 35-38). Petitioners altogether fail to allege any facts to excuse their delay in filing between mid-September, 2020 and December, 2020.

Moreover, Petitioners’ belief that they could obtain an out of court resolution of the matter does not adequately explain their failure to act with reasonable promptness in filing the Petition to

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<sup>9</sup> Although it is not clear whether either Pa. R. Civ. P. 237.3 or Pa. R. Civ. P. 2959 govern the situation at issue here, regardless, the Petition to Open was not timely filed under Rule 237.3 or 2959 which require the petition challenging the judgment to be filed within 10 and 30 days respectively.



Open. *See id.* at 253 (explaining that petitioner’s attempts to obtain a satisfactory settlement “does not adequately explain the delay in filing a petition to open”); *Hersch v. Clapper*, 335 A.2d 738, 741 (Pa. Super. Ct. 1975) (“Defendant offers no explanation for this lack of diligence other than the fact that negotiations were being conducted in an attempt to arrive at some amicable agreement to settle the controversy. This does not constitute an adequate explanation for defendant’s failure to promptly file the petition.”). Likewise, Petitioners decision to delay filing the Petition to Open for more than four months is not adequately excused by their failure to obtain counsel. *See US Bank N.A. v. Mallory*, 982 A.2d 986, 996 (2009) (holding that petition to open was not promptly filed and explaining that lack of sophistication in legal matters was not an adequate excuse where petitioner did not secure counsel until six weeks after the judgment was entered). By Petitioners’ own admission, they did not even attempt to secure counsel until after December 4, 2020 – over two and a half months after being put on notice of the Final Decree – and they did not secure counsel until at least December 26, 2020 – over three months after receiving notice of the Final Decree. (Petition to Open ¶¶ 38-39).

Petitioners failed to promptly file the Petition to Open, instead electing to wait over four months from the time that they admitted to being on notice of the Final Decree. They have not offered an adequate (or legally sufficient) reason for why the delay should be excused. *See Ridgid Fire Sprinkler Serv., Inc.*, 482 A.2d at 252-53 (collecting cases where petitions filed after a delay of less than 100 days were not timely: “*See: McCoy v. Public Acceptance Corp.*, 451 Pa. 495, 500, 305 A.2d 698, 700 (1973) (two and one-half weeks); *Pappas v. Stefan*, 451 Pa. 354, 358, 304 A.2d 143, 146 (1973) (55 days); *Dodson v. N. John Cunzolo & Associates Architectural Clay Products, Inc.*, 326 Pa.Super. 283, —, 473 A.2d 1093, 1096 (1984) (2 months); *Bottero v. Great Atlantic & Pacific Tea Co.*, 316 Pa.Super. 62, 70, 462 A.2d 793, 797–798 (1983) (unexplained six

week delay following negotiations); *Mahler v. Emrick*, 300 Pa.Super. 244, 247, 446 A.2d 321, 323 (1982) (2 months); *Keystone Boiler Works, Inc. v. Combustion & Energy Corp.*, *supra* 294 Pa.Super. at 150, 439 A.2d at 795 (3 months); *American Vending Co. v. Brewington*, *supra*, 289 Pa.Super. at 33, 432 A.2d at 1036 (2½ months); *Hatgimisios v. Dave's N.E. Mint, Inc.*, 251 Pa.Super. 275, 276–277, 380 A.2d 485, 486 (1977) (37 days too long if unexplained); *Quatrochi v. Gaiters*, 251 Pa.Super. 115, 124, 380 A.2d 404, 409 (1977) (63 days); *Schutte v. Valley Bargain Center, Inc.*, 248 Pa.Super. 532, 537–538, 375 A.2d 368, 371 (1977) (47 days); *Carducci v. Albright Galleries, Inc.*, 244 Pa.Super. 48, 51, 366 A.2d 577, 579 (1976) (54 days); *Hofer v. Loyal Order of Moose*, 243 Pa.Super. 342, 346, 365 A.2d 1254, 1256 (1976) (47 days); *Reliance Insurance Cos. v. Festa*, 233 Pa.Super. 61, 64–65, 335 A.2d 400, 401–402 (1975) (71 days).”). Petitioners have therefore failed to set forth sufficient facts to satisfy the elements necessary to open the Final Decree.

**C. Preliminary Objection No. 3 for Legal Insufficiency Pursuant to Pa. O.C. Rule 3.9(b)(4)**

The Petition to Open is largely premised on the argument that Petitioners were not provided notice of the Petition to Disinter. Their argument, however, is fatally flawed as Petitioners were not entitled to receive notice. Duke’s Petition to Disinter was filed pursuant to 28 Pa. Code § 1.25 which provides in relevant part:

(a) Permit. No dead human body shall be removed from its place of interment unless a disinterment permit is first secured from a local registrar who is authorized to issue a disinterment permit, according to the following requirements:

\* \* \*

(d) Exhumation and exposure. The remains of a dead body may not be exhumed and exposed to view without an order from a court of competent jurisdiction.

There is no notice requirement under this regulation, nor do Petitioners identify any notice requirement with respect to the disinterment of remains.

They argue solely that they were entitled to notice under the due process clauses of the United States and Pennsylvania Constitutions. “The due process standards of the United States and Pennsylvania Constitutions are essentially the same.” *City of Philadelphia v. Pennsylvania Ins. Dep't*, 889 A.2d 664, 670 (Pa. Commw. Ct. 2005). “Under the due process provisions of the 14th Amendment, a person has a right to a due process hearing when the following two-prong test is met: the challenged action has caused that party an injury in fact, economic or otherwise, and when the interest asserted by the plaintiff is within the zones of interests sought to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* “Stated a bit differently, under the Pennsylvania Constitution, **a person is only entitled to due process protections when there is a legitimate claim of entitlement to a property interest or other protected interest.**” *Id.* (emphasis added)

“To summarize, under either Constitution, once a party is determined to have a property interest or interest in the outcome of the litigation, that person has standing to challenge the governmental action and is entitled to a due process hearing.” *Id.* “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise **interested parties** of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (emphasis added). In other words, if a person does not have a constitutionally protected due process interest, she is not entitled to receive the rights afforded by the due process clauses of the United States or Pennsylvania Constitutions. *See City of Philadelphia*, 889 A.2d at 670.

Here, Petitioners fail to identify or establish a constitutionally protected interest in the ancient remains buried at the Kemp Family Cemetery, which is remotely located on the private Property of the Sellers. On the contrary, while next of kin may have a quasi-property interest in the burial of remains there does not appear to be any such right in “remains buried for decades.” *Patterson v. Def. POW/MIA Accounting Agency*, 398 F. Supp. 3d 102, 120 (W.D. Tex. 2019). Even if there were a property interests in such remains, “it appears to diminish over time.” *Id.* (“Thus, without either a cognizable liberty or property interest, Plaintiffs’ procedural and substantive due process claims fail.”).<sup>10</sup>

Even if Petitioners were next of kin of the persons whose remains are interred at the Kemp Family Cemetery, Petitioners do not have a constitutionally protected interest in the remains necessary to support their argument that the Final Decree violated their due process rights. The ancient remains of Petitioners’ alleged distant relatives have all been interred for more than 140 years. Any interest that the decedents’ next of kin had at one time over the remains has long since dissipated. Because Petitioners do not have a cognizable due process interest, the Final Decree cannot, as a matter of law, be opened or stricken on the grounds that it allegedly violated Petitioners right to due process.

**D. Preliminary Objection No. 4 for Lack of Standing Pursuant to Pa. O.C. Rule 3.9(b)(5)**

The remote nature of Petitioners alleged relationship with those interred at the Kemp Family Cemetery is insufficient to confer them with standing to maintain their challenge to the

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<sup>10</sup> While the remains in *Patterson* were unidentified, the court explained, that even if the remains had been identified, there was still no cognizable property interest in the remains. *Patterson*, 398 F. Supp. 3d at 118 (W.D. Tex. 2019) (“Putting that problem aside, and assuming for argument that the remains were identified, Plaintiffs still do not state a cognizable property interest.”).

Final Decree. “[A] party seeking judicial resolution of a controversy in this Commonwealth must, as a prerequisite, establish that he has standing to maintain the action.” *Irwin Union Nat. Bank & Tr. Co. v. Famous*, 4 A.3d 1099, 1106 (2010). “A party has standing if he is aggrieved, *i.e.*, he can show a substantial, direct, and immediate interest in the outcome.” *Id.*

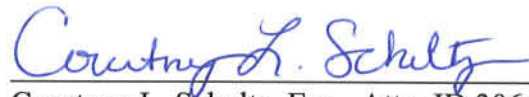
Petitioners have not set forth sufficient facts to demonstrate that they have a substantial, direct, or immediate interest in the Final Decree permitting Duke to relocate the headstones and remains located at the Kemp Family Cemetery. Any interest that Petitioners have through their purported association with the decedents’ remains is indirect and remote. By their own admissions, Petitioners are five or more generations removed from nearly all of the decedents. (Petition to Open, Ex. B). Petitioners have not alleged that Duke knew of their purported association to the decedents’ remains prior to September 2020, some three months after it filed the Petition to Disinter, and two months after entry of the Final Decree. Petitioners do not own the land on which the Kemp Family Cemetery is located. Moreover, 28 Pa. Code. § 1.25(d) – the regulation pursuant to which Duke filed its Petition to Disinter – does not even require consent of next of kin to exhume or expose a body. It only requires an order of the court which Duke obtained through the Final Decree. Accordingly, Petitioners do not have a substantial, direct, or immediate interest in the disinterment and reinterment of the remains at the Kemp Family Cemetery.

## **VI. CONCLUSION**

For the reasons set forth herein, Respondent, Duke Realty Limited Partnership, respectfully requests that the Court: (1) sustain these Preliminary Objections; (2) dismiss the Petition to Open or Strike of Petitioners, Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan, with prejudice; (3) lift the stay of the July 22, 2020 Final Decree; (4) reinstate the July 22, 2020 Final Decree with full force and effect; and (5) and grant any such other relief as the Court deems just and appropriate.

Respectfully submitted,

Dated: February 25, 2021



Courtney L. Schultz, Esq., Atty. ID 306479

Zachary B. Kizitaff, Esq., Atty. ID 327568

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**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Courtney L. Schultz  
Courtney L. Schultz  
Attorney No. 306479

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Petitioner Duke Realty Limited Partnership's Preliminary Objections to the Petition to Open or Strike and Brief in Support thereof were served this day on the following via email:

David W. Crossett, Esquire  
Cornerstone Law Firm, LLC  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
[david@cornerstonelaw.us](mailto:david@cornerstonelaw.us)

*Counsel for Brenda Winkler, Juli Winkler,  
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*Counsel for Charles D. Wessner and Carol J. Wessner*

  
Courtney L. Schultz

Dated: February 25, 2021



# EXHIBIT A

**CORNERSTONE LAW FIRM, LLC**

David W. Crossett, Esquire  
Attorney I.D. #313031  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
(610) 926-7875  
*Counsel for Petitioners*

<p><b>IN RE: HISTORIC KEMP FAMILY BURIAL GROUND</b></p> <p>Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>Duke Realty Limited Partnership, Charles D. Wessner, and Carol J. Wessner,</p> <p style="text-align: center;">Respondents.</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION</p> <p>Docket No.: 2020-X-87273</p> <p>Assigned to: Timothy J. Rowley</p>
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NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.**

**IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.**

Lawyers' Referral Service of the  
Berks County Bar Association  
544 Court Street Reading, Pennsylvania 19601  
Telephone (610) 375-4591  
[www.berksbar.com](http://www.berksbar.com)

## **NOTIFICACIÓN PARA DEFENDERSE**

Le han demandado a usted en el tribunal. Si usted quiere defenderse de las demandas expuestas en las páginas siguientes, usted debe tomar acción en el plazo de veinte (20) días a partir de la fecha en que se le hizo entrega de la demanda y la notificación, al interponer una comparecencia escrita, en persona o por un abogado y registrando por escrito en el tribunal sus defensas o sus objeciones a las demandas en contra de su persona. Se le advierte que si usted no lo hace, el caso puede proceder sin usted y podría dictarse un fallo por el juez en contra suya sin notificación adicional y podría ser por cualquier dinero reclamado en la demanda o por cualquier otro reclamo o desagravio en la demanda solicitado por el demandante. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

**USTED DEBE LLEVARLE ESTE DOCUMENTO A SU ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O NO PUEDE CORRER CON LOS GASTOS DE UNO, VAYA O LLAME POR TELEFONO A LA OFICINA EXPUESTA ABAJO. ESTA OFICINA PUEDE POVEERLE INFORMACION RESPECTO A COMO CONTRATAR A UN ABOGADO.**

**SI NO PUEDE CORRER CON LOS GASTOS PARA CONTRATAR A UN ABOGADO, ESTA OFICINA PUDIERA PROVEERLE INFORMACION RESPECTO A INSTITUCIONES QUE PUEBAN OFRECER SERVICIOS LEGALES A PERSONAS QUE CALIFICAN PARA LA REDUCCION DE HONORARIOS O QUE NO TENGAN QUE PAGAR HONORARIOS.**

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*Counsel for Petitioners*

<p><b>IN RE: HISTORIC KEMP FAMILY BURIAL GROUND</b></p> <p>Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>Duke Realty Limited Partnership, Charles D. Wessner, and Carol J. Wessner,</p> <p style="text-align: center;">Respondents.</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION</p> <p>Docket No.: 2020-X-87273</p> <p>Assigned to: Timothy J. Rowley</p>
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**PETITION TO OPEN OR STRIKE**

NOW COMES, Petitioners, Brenda Winkler, Juli Winkler, Linda Landis-Heffernan, and Meredith Brunt Goldey, by and through counsel, who hereby submit this Petition and state the following:

**PARTIES**

1. Petitioner, Brenda Winkler, is an adult and resident of Maxatawny Township (Berks County), Pennsylvania, having a mailing address of --.
2. Petitioner, Juli Winkler, is an adult and resident of Spring Township (Berks County), Pennsylvania, having a mailing address of --.
3. Petitioner, Meredith Brunt Goldey, is an adult and resident of New Hanover Township (Montgomery County), Pennsylvania, having a mailing address of --

4. Petitioner, Linda Landis-Heffernan, is an adult and resident of the State of Maryland, having a mailing address of

Respondent, Duke Realty Limited Partnership, is an Indiana limited partnership that, on

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information and belief, has appeared before the Court in this matter through its counsel, Saul

---

<sup>1</sup> Referred to as the Kemp Family Cemetery by Duke Realty.

10. Petitioners lacked notice of and were not served with the Duke Realty Reinterment Petition.

11. As shown by the attached letter to Judge Rowley by the Kutztown Area Historical Society, within the Historic Kemp Family Burial Ground are the remains of Theobault (“Dewalt”) Kemp, who arrived in America by 1720 “and is said to be the original pioneer settler of Maxatawny Township.” [Ex. A]. Additionally:

During the Revolutionary War, his son, George Kemp, was appointed captain and was present at the Battle of Germantown. George inherited and ran Levan’s Tavern, which was a way station for several signers of the Declaration of Independence, including John Adams. Hannah, the only known slave in this section of Berks County, is also buried in the Historic Kemp Family Burial Ground, as specified in the will of Captain George Kemp.

[Ex. A]. As such, “The Kutztown Area Historical Society enthusiastically supports the preservation of the Historic Kemp Family Burial Ground . . .” [Id.].

12. Those deceased persons having headstones in the Historic Kemp Family Burial Ground, and their approximate vital records, are shown in Exhibit B, Table 1.

13. Additional persons reputedly buried in the Historic Kemp Family Burial Ground, but without sufficiently preserved headstones, would include spouses or children of the persons identified in Exhibit B, Table 1, as well as the following: Theobault (“Dewalt”) Kemp (1685—1760); Elizabeth Mayer (Drescher) Kemp (1685—?); Hannah (?—?); Jacob Kemp (1665—1735); Anna Kemp (1670—?); Johannes Kemp (1771—1854); William Kemp (1784—1834); Susannah Catherine (Griesemer) Kemp (1778—1856); Dorothea Kemp (1745—?); and Vorrest Vernon Steelman (1913—?).

14. Petitioners are individually aggrieved by the Final Decree and are the next friends of all deceased persons in the Historic Kemp Family Burial Ground.

15. As shown in Exhibit B, the Historic Kemp Family Burial Ground contains the remains of Petitioners’ ancestors and, by blood and affinity, collateral relatives:

Table 2 (ancestors and collaterals of Petitioner Brenda Winkler)

Table 3 (ancestors and collaterals of Petitioner Juli Winkler)

Table 4 (ancestors and collaterals of Meredith Brunt Goldey)

Table 5 (ancestors and collaterals of Linda Landis-Heffernan)

The foregoing tables are non-exhaustive.

16. Petitioners have regularly maintained records of their genealogy and are competent witnesses to testify to their genealogy under Rules 803(13) and 803(19) of the *Pennsylvania Rules of Evidence*. Petitioners' genealogy is also supported by ancient documents, including last wills and testaments of some of the deceased.

17. Petitioners believe and aver that there are now at least 200 living descendants of persons buried in the Historic Kemp Family Burial Ground.

18. Petitioner Brenda Winkler resides less than one mile from the Subject Property.

19. Where women in the 18th and 19th centuries had higher mortality rates than today as a result of pregnancy and childbirth, it is believed and averred that males buried in the Historic Kemp Family Century may be buried with additional spouses that are not accounted for by records.

20. State and local governments in Pennsylvania did not regularly maintain birth certificates, marriage certificates, and death certificates during the 17th, 18th, and 19th centuries.

21. As stated by the Kutztown Area Historical Society, the Historic Kemp Family Burial Ground "is one of the largest" historic family burial grounds in Maxatawny Township. [Ex. A].

22. Based on the foregoing, the total number of persons buried in the Historic Kemp Family Burial Ground remains unknown at this time.

23. The Court entered the Final Decree on the request of the June 16, 2020 Petition by Duke Realty (the "Duke Realty Reinterment Petition"), which contained the following material

representations: (1) Duke Realty entered into a confidential sale agreement with Charles D. Wessner and Carol J. Wessner for the purchase of the Subject Property; (2) Duke Realty hired CHRS Historic Preservation Services, Inc. (“CHRS”) to conduct a cultural resources assessment of the property, exhibiting a report by CHRS to the Petition; (3) CHRS evaluated the persons buried at the Kemp Family Cemetery; (4) Duke Realty cannot proceed with the purchase of the Subject Property unless it can relocate and reinter the Kemp Family Cemetery; (5) Duke Realty and CHRS did not locate “any known living relatives of the decedents buried at the Kemp Family Cemetery”; (6) “no public notice is necessary in connection with the request made herein”; (7) the Kemp Family Cemetery “is currently in a state of disrepair and has no public means of access”; (8) “No individuals or entities currently provide for the maintenance or care of the Kemp Family Cemetery”; (9) since 1962 the Wessners “have never seen anyone visit, tend to, care for or maintain the Kemp Family Cemetery”; and (10) if the Duke Realty’s reinterment request is approved by the Court, then Duke Realty will “retain a capable third party to respectfully exhume the remains using archeological methods so as to cause minimal disruption to and best preserve the burial and headstones,” and reinter the same “in a to-be-determined nearby cemetery located in Berks County at its sole cost.”

24. As shown below, the Duke Realty Reinterment Petition contains material errors of facts, including as follows:

(a) There are living descendants of persons buried at Historic Kemp Family Burial Ground, reasonably known to Respondents upon due diligence.

(b) The Historic Kemp Family Burial Ground was adopted by the Berks County Association for Graveyard Preservation and other community organizations—and such information was withheld from the Court.



(c) Many persons have visited the Historic Kemp Family Burial Ground, or intended to visit the same, but were denied access by the Wessners, their tenant on the Subject Property, or both—and such information was withheld from the Court.

(d) The CHRS Report, exhibited in the Duke Realty Reinterment Petition, is deficient on its face: It contains substantial redactions and otherwise does not describe what efforts were made to locate living descendants from those buried in the Historic Kemp Family Burial Ground. Furthermore, the unredacted portions of the CHRS Report do not identify any research methodology other than to have made a minimal search through a Web site, [www.findagrave.com](http://www.findagrave.com).

(e) Petitioners believe and aver that the redacted portions of the CHRS Report will reveal unfavorable, material facts that were purposefully withheld from the Court or otherwise show that CHRS did not contact any local or community-based organizations within Berks County.

25. The Duke Realty Reinterment Petition does not identify the location of the cemetery where the remains from Historic Kemp Family Burial Ground would be reinterred.

26. The Duke Realty Reinterment Petition does not identify the service-provider that would remove the remains and headstones from the Historic Kemp Family Burial Ground, using archeologically appropriate methods.

27. The Duke Realty Reinterment Petition does not disclose how to avoid misidentification of deceased persons, who are lacking any preserved headstone in the Historic Kemp Family Burial Ground, in the absence of DNA testing.

28. On information and belief, Duke Realty has not obtained a commitment from any suitable cemetery in Maxatawny Township for the reinterment of the Historic Kemp Family Burial Ground.

29. On information and belief, Duke Realty has the ability to commercially develop the Subject

Property while maintaining historical preservation of and reasonable access to the Historic Kemp Family Burial Ground.

30. In approximately mid-September of 2020, Petitioner Brenda Winkler became informed by word-of-mouth from her of the proposed reinterment of the Historic Kemp Family Burial Ground, and informed her daughter, Petitioner Juli Winkler, of such possibility.

31. On October 11, 2020, the *Reading Eagle* published a news article about Duke Realty's proposed reinterment of the Historic Kemp Family Burial Ground, namely, "Volunteers and Descendants Clear Weeds at Threatened Maxatawny Graveyard," by Michelle N. Lynch.

32. From the aforementioned article in the *Reading Eagle*, Petitioner Linda Landis-Heffernan's family members residing in Berks County became informed of the proposed reinterment of the Historic Kemp Family Burial Ground, and as a result contacted her about it.

33. From the October 2020 edition of *Grave Happenings* (Volume 15, Issue 4), the Berks County Association for Graveyard Preservation published an article about the proposed reinterment of the Historic Kemp Family Burial Ground.

34. From the aforementioned publication of *Grave Happenings*, Petitioner Meredith Brunt Goldey became informed of the proposed reinterment of the Historic Kemp Family Burial Grounds.

35. On December 4, 2020, Petitioners and other persons held a teleconference with Duke Realty and informed the latter, inter alia, of Petitioners' ancestry and objections to the reinterment of the Historic Kemp Family Burial Ground and that the Duke Realty Reinterment Petition contained erroneous statements of fact. Despite receiving such notice, Duke Realty has made no effort to submit corrections to the Court based on the erroneous information in the Duke Realty Reinterment Petition.

36. During the same conversation on December 4, 2020, Duke Realty expressed an intent for a follow-up meeting to occur in January as a part of a good faith resolution — which induced Petitioners’ reliance that a good faith resolution could be reached out-of-court — but subsequently Duke Realty has not initiated any further contact.

37. Since December 4, 2020, Duke Realty has not committed itself on how it will proceed with archeologically-appropriate methods for reinterment of the Historic Kemp Family Burial Ground.

38. Subsequent to December 4, 2020, Petitioners diligently sought to obtain counsel and a budget to afford counsel in order to file the instant Petition.

39. The instant Petition is filed by Petitioners within 30 days of obtaining counsel.

40. As early as 1995, the Berks County Association for Graveyard Preservation had adopted the Historic Kemp Family Burial Ground for purposes of repairs and preservation.

41. On May 14, 1997, Kutztown Area High School volunteers prepared the brick wall surrounding the Historic Kemp Family Burial Ground for repairs.

42. The Berks County Association for Graveyard Preservation has regularly performed cleanup for the Historic Kemp Family Burial Ground, inclusive of the years 2008, 2010, 2011, 2014, 2016, 2018, and 2020.

43. The Court may judicially notice the following: On December 21, 2017, Governor Tom Wolf signed into law Act 65, i.e., Act of Dec. 21, 2017, No. 65, P.L. 1205 (“Act 65 of 2017”), which added Chapter 7 (“Reasonable Access to Burial Grounds”) to Title 9 of the Pennsylvania Consolidated Statutes, including a statutory mandate that took effect on February 19, 2018, “The owner of property where a private cemetery or private family cemetery is located shall grant an individual reasonable ingress and egress to a burial plot in the private cemetery or the private family cemetery for the purposing of visiting the burial plot.” 9 Pa.C.S. § 703(c).

44. Prior to Act 65 of 2017, the Wessners, their tenant at the Subject Property, or either of them, had unfettered discretion in refusing visiting to the Historic Kemp Family Burial Ground and, additionally, no statutory mandate existed in the Commonwealth of Pennsylvania in respect of reasonable access to a private cemetery or private family cemetery, such as the Historic Kemp Family Burial Ground.

45. If an evidentiary hearing is held, Petitioners will present evidence that, prior to Act 65 of 2017, persons intended to visit the Historic Kemp Family Burial Ground and had either trespassed for that purpose or were otherwise refused access by the property-owner or tenant, including as follows: attempts during the 1970s and 1980s by descendant Donald Wink; and trespass on the Subject Property in 2009 by Donald Wink to visit the Historic Kemp Family Burial Ground.

46. Petitioners were made aware of the hostility of the owner or tenant of the Subject Property towards allowing visitors to the Historic Kemp Family Burial Ground, but since the adoption of Act 65 of 2017 Petitioners intend to exercise their statutory rights of reasonable access.

## **II. Legal Bases.**

47. The Final Decree, entered without notice by publication and without any means employed of actually informing an aggrieved absentee, violated Due Process under the Fourteenth Amendment of the U.S. Constitution and under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution.

48. The Final Decree is also contrary to 20 Pa.C.S. § 711(1) and violates due process under the Fourteenth Amendment of the U.S. Constitution and under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution, by having conferred unfettered discretion on Duke Realty in the methods of reinterment of ancient remains and ancient headstones and in the selection of another cemetery, where judicial supervision over those matters should have been retained.

49. Petitioners suffered material prejudice by the failure of notice by publication and by the aforementioned noncompliance with statutory and due process requirements: The Court entered the Final Decree without Petitioners being heard and where the Court was not properly briefed by Duke Realty on the applicable equity standard where the Court must give “due regard to the interests of the public, the wishes of the decedent and the rights and feelings of those entitled to be heard by reason of relationship or association.” Novelli v. Carroll, 420 A.2d 469, 471 (Pa.Super. 1980) (quotation omitted). Further, the Court was deprived of advocate’s briefs under the Novelli factors governing reinterment petitions, that is, “(1) “the degree of relationship that the party seeking reinterment bears to the decedent”; (2) “the degree of relationship that the party seeking to prevent reinterment bears to the decedent”; (3) rites of any religious organization which “granted the right to inter the body in the first place”; (4) “the desire of the decedent,” including the desire to be buried in a specific location or with the decedent’s family; (5) “the conduct of the person seeking reinterment,” including waiver or unclean hands; (6) “the conduct of the person seeking to prevent reinterment,” including waiver or unclean hands; (7) “the length of time that has elapsed since the original interment,” generally, “the sooner the person seeking reinterment acts after the original interment, the better the chance of obtaining reinterment”; and (8) “the strength of the reasons offered both in favor and in opposition to reinterment.” Id. at 473-74.

50. Respondents have engaged in misconduct, including knowingly withholding material facts from the Court; failing to effect notice by publication or otherwise calculated to inform aggrieved absentees, including Petitioners; Respondents failing to correct material facts in prior submissions to the Court despite becoming informed of the truth; and improperly seeking to bypass judicial supervision over archeologically appropriate methods of reinterment, as well as judicial supervision over the selection of another cemetery, where judicial supervision over such matters

should have been retained.

51. Petitioners' reasons for objecting to the reinterment include: (1) the wishes of the deceased to remain buried with their loved ones and to continue undisturbed in their eternal rest which they have enjoyed for hundreds of years; (2) the benefit to the community of learning about the earliest settlers of Maxatawny Township, including the story of Theobault ("Dewalt") Kemp and Captain George Kemp from the Revolutionary War, as well as historical research on Hannah, the only recorded African American slave in that section of Berks County; (3) substantial danger in irrevocably damaging ancient remains and ancient headstones by a proposed reinterment, including the danger of misidentification in the absence of DNA testing, where some of the deceased persons do not have headstones and are buried with spouses or parents; and (4) where Respondents are prioritizing profits over any respect for the dead and the interests of the community, having the ability to do so but failing to meaningfully develop a site plan that can leave the Historic Kemp Family Burial Ground preserved where it is currently situated.

52. A true and correct proposed Answer to the Duke Reinterment Petition is appended as Exhibit C, if the Court will vacate the Final Decree.

53. Petitioners have acted with reasonable promptness in filing the instant Petition.

54. The failure of Petitioners to previously appear before the Final Decree was entered is excusable due to lack of notice or where never served with the Duke Reinterment Petition.

55. In the instant Petition as well as the proposed answer in Exhibit C, Petitioners have shown meritorious grounds to oppose the Duke Realty Reinterment Petition.

#### **INTERIM RELIEF**

56. Pursuant to law, including Pa.R.C.P. 206.5(b), Petitioners request an immediate stay of the Final Decree pending resolution of the instant Petition.

57. Pursuant to law, including 20 Pa.C.S. § 774 and Pa.R.C.P. 206.7, Petitioners request authorization from the Court to conduct discovery as in civil actions pending resolution of the instant Petition.

58. Petitioners request that Duke Realty be compelled to produce an unredacted copy of the CHRS Report.

59. At the close of discovery, Petitioners request an evidentiary hearing on the instant Petition.

**FINAL RELIEF**

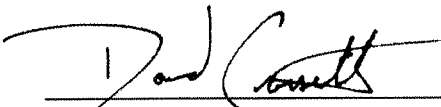
WHEREFORE, based on the foregoing, Petitioners request that the Court enter a rule to show cause in the nature of a stay of its Order filed on July 22, 2020 and to conduct discovery as in civil actions and, at the close of discovery, to hold an evidentiary hearing on this Petition and, afterwards, to enter an order, striking or, alternatively, opening the Order filed on July 22, 2020; and such other relief as the Court deems reasonable, just, or necessary.

Respectfully submitted,

**CORNERSTONE LAW FIRM, LLC**

Dated: January 25, 2020

By: \_\_\_\_\_

  
David W. Crossett, Esquire  
Attorney I.D. #313031  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
(610) 926-7875  
*Counsel for Petitioners*

**VERIFICATION**

I am Meredith Brunt Goldey, a Petitioner in the within instrument. I hereby verify that facts set forth herein are true and correct to the best of my knowledge, information and belief and that this verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 1/25/2021

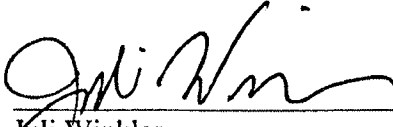
  
Meredith Brunt Goldey



**VERIFICATION**

I am Juli Winkler, a Petitioner in the within instrument. I hereby verify that facts set forth herein are true and correct to the best of my knowledge, information and belief and that this verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 01/26/2021

  
\_\_\_\_\_  
Juli Winkler

**VERIFICATION**

I am Brenda Winkler, a Petitioner in the within instrument. I hereby verify that facts set forth herein are true and correct to the best of my knowledge, information and belief and that this verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 1/25/2021

Brenda Winkler  
Brenda Winkler

**VERIFICATION**

I am Linda Landis-Heffernan, a Petitioner in the within instrument. I hereby verify that facts set forth herein are true and correct to the best of my knowledge, information and belief and that this verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 25 Jan. 2021

Linda Landis-Heffernan  
Linda Landis-Heffernan

Exhibit A

Exhibit A



**The Kutztown Area Historical Society**  
**P.O. Box 307**  
**Normal Avenue and South Whiteoak Street**  
**Kutztown, PA 19530**

January 19, 2020

The Honorable Timothy J. Rowley  
Berks County Orphans' Court  
633 Court Street  
Reading, PA 19601

Dear Judge Rowley:

The Kutztown Area Historical Society enthusiastically supports the preservation of the Historic Kemp Family Burial Ground, which is located on land originally patented by the Kemp family in the early 18th century. It is one of the largest of 17 historic family burial grounds in Maxatawny Township with the Kemp family being one of the founding families of the East Penn Valley. The burial ground is the final resting place for key figures in the early years of Maxatawny Township. Their life stories form much of the township's history. Theobault Kemp arrived in America around 1720 and is said to be the original pioneer settler of Maxatawny Township. During the Revolutionary War, his son, George Kemp, was appointed captain and was present at the Battle of Germantown. George inherited and ran Levan's Tavern, which was a way station for several signers of the Declaration of Independence, including John Adams. Hannah, the only known slave in this section of Berks County, is also buried in the Historic Kemp Family Burial Ground, as specified in the will of Captain George Kemp.

Part of the Kutztown Area Historical Society's mission is encouraging preservation of historically significant sites, structures, and material culture artifacts throughout its area of influence. Preserving the Historic Kemp Family Burial Ground is, therefore, of significant urgency to the society. The society is recognized by the Pennsylvania Historic and Museum Commission, PennDOT, and other state agencies as the official historic agency of record for Maxatawny Township and the surrounding area.

Sincerely,

Craig A. Koller  
President, Kutztown Area Historical Society

Exhibit B

Exhibit B

TABLE 1:  
ANCESTORS BURIED AT HISTORIC KEMP FAMILY BURIAL GROUND

<b>Chronologically (Oldest to Youngest)</b>	<b>Alphabetically</b>
1. Captain George L. Kemp (1749—1833)	1. Anna Maria (Kemp) Bieber (1782—1824)
2. Susanna (Levan) Kemp (1750—1823)	2. Daniel Kemp (1770—1854)
3. Daniel Kemp (1770—1854)	3. Elizabeth (Sharadin) Kemp (1804—1879)
4. Rachel (Wink) Kemp (1775—1855)	4. Captain George L. Kemp (1749—1833)
5. George L. Kemp, Jr. (1775—1830)	5. George L. Kemp, Jr. (1775—1830)
6. Anna Maria (Kemp) Bieber (1782—1824)	6. George Wink Kemp (1798—1870)
7. George Remar PM (1788—?)	7. George Remar PM (1788—?)
8. George Wink Kemp (1798—1870)	8. Hettyann Elizabeth Kemp (1845—1852)
9. Anna (Kemp) Siegfried (1801—1834)	9. Isaac Kemp (1801—1856)
10. Isaac Kemp (1801—1856)	10. Jeremiah Kemp (1850—1852)
11. Elizabeth (Sharadin) Kemp (1804—1879)	11. Rachel (Wink) Kemp (1775—1855)
12. Willoughby Kemp (1840—1842)	12. Susanna (Levan) Kemp (1750—1823)
13. Hettyann Elizabeth Kemp (1845—1852)	13. Willoughby Kemp (1840—1842)
14. Jeremiah Kemp (1850—1852)	14. Anna (Kemp) Siegfried (1801—1834)

TABLE 2:  
ANCESTORS OR COLLATERALS OF PETITIONER BRENDA WINKLER

<b>Relative</b>	<b>Relationship</b>
Theobault ("Dewalt") Kemp (1685—1760)	Sixth Great-Granduncle
Captain George L. Kemp (1749—1833)	First Cousin, Seven Times-Removed
Daniel Kemp (1770—1854)	Second Cousin, Six Times-Removed
Rachel (Wink) Kemp (1775—1855)	Fourth Great-Grandmother
George L. Kemp, Jr. (1775—1830)	Second Cousin, Six Times-Removed
Anna Maria (Kemp) Bieber (1782—1824)	Second Cousin, Six Times-Removed
George Wink Kemp (1798—1870)	First Cousin, Five Times-Removed
Anna (Kemp) Siegfried (1801—1834)	Third Cousin, Five Times-Removed
Isaac Kemp (1801—1856)	First Cousin, Five Times-Removed
Willoughby Kemp (1840—1842)	Second Cousin, Four Times-Removed
Hettyann Elizabeth Kemp (1845—1852)	Second Cousin, Four Times-Removed
Jeremiah Kemp (1850—1852)	Second Cousin, Four Times-Removed



TABLE 3:  
ANCESTORS OR COLLATERALS OF PETITIONER JULI WINKLER

<b>Relative</b>	<b>Relationship</b>
Theobault (“Dewalt”) Kemp (1685—1760)	Seventh Great-Granduncle
Captain George L. Kemp (1749—1833)	First Cousin, Eight Times-Removed
Daniel Kemp (1770—1854)	Second Cousin, Seven Times-Removed
Rachel (Wink) Kemp (1775—1855)	Fifth Great-Grandmother
George L. Kemp, Jr. (1775—1830)	Second Cousin, Seven Times-Removed
Anna Maria (Kemp) Bieber (1782—1824)	Second Cousin, Seven Times-Removed
George Wink Kemp (1798—1870)	First Cousin, Six Times-Removed
Anna (Kemp) Siegfried (1801—1834)	Third Cousin, Six Times-Removed
Isaac Kemp (1801—1856)	First Cousin, Six Times-Removed
Willoughby Kemp (1840—1842)	Second Cousin, Five Times-Removed
Hettyann Elizabeth Kemp (1845—1852)	Second Cousin, Five Times-Removed
Jeremiah Kemp (1850—1852)	Second Cousin, Five Times-Removed

**TABLE 4:**  
**ANCESTORS OR COLLATERALS OF PETITIONER MEREDITH BRUNT GOLDEY**

<b>Relative</b>	<b>Relationship</b>
Theobault (“Dewalt”) Kemp (1685—1760)	Seventh Great-Grandfather
Captain George L. Kemp (1749—1833)	Sixth Great-Grandfather
Susanna (Levan) Kemp (1750—1823)	Sixth Great-Grandmother
George L. Kemp, Jr. (1775—1830)	Fifth Great-Grandfather
Anna (Kemp) Siegfried (1801—1834)	Fourth Great-Grandmother

**TABLE 5:**  
**ANCESTORS OR COLLATERALS OF PETITIONER LINDA LANDIS-HEFFERNAN**

<b>Relative</b>	<b>Relationship</b>
Theobault ("Dewalt") Kemp (1685—1760)	Sixth Great-Grandfather
Elizabeth (Drescher) Kemp (1685—?)	Sixth Great-Grandmother
Captain George L. Kemp (1749—1833)	Fifth Great-Grandfather
Susanna (Levan) Kemp (1750—1823)	Fifth Great-Grandmother
Daniel Kemp (1770—1854)	Fourth Great-Grandfather
Rachel (Wink) Kemp (1775—1855)	Fourth Great-Grandmother
George L. Kemp, Jr. (1775—1830)	Fourth Great-Grandfather

Exhibit C

Exhibit C

**CORNERSTONE LAW FIRM, LLC**

David W. Crossett, Esquire  
Attorney I.D. #313031  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
(610) 926-7875

*Counsel for Respondents / Real Parties in Interest*

<p><b>IN RE: HISTORIC KEMP FAMILY BURIAL GROUND</b></p> <p>Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>Duke Realty Limited Partnership, Charles D. Wessner, and Carol J. Wessner,</p> <p style="text-align: center;">Respondents.</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION</p> <p>Docket No.: 2020-X-87273</p> <p>Assigned to: Timothy J. Rowley</p>
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**ANSWER TO PETITION TO DISINTER THE REMAINS AT KEMP FAMILY CEMETERY BY BRENDA WINKLER, JULI WINKLER, MEREDITH BRUNT GOLDEY, AND LINDA LANDIS-HEFFERNAN**

NOW COMES, respondents and real parties in interest, Brenda Winkler, Juli Winkler, Linda Landis-Heffernan, and Meredith Brunt Goldey, by and through counsel, who hereby submit this Answer and state the following:

1. Admitted.
2. Without sufficient information to admit or deny.
3. Without sufficient information to admit or deny.
4. Admitted in part and denied in part. Exhibit A is denied because it contains redactions, thereby concealing the entirety of the report. The balance is admitted.
5. Admitted.
6. Denied. It is specifically denied that Petitioner cannot proceed with the purchase and

commercial development of the property but for relocation of the Kemp Family Cemetery.

7. No response is needed. Otherwise, denied as a legal conclusion.

8. Admitted in part and denied in part. Denied that 28 Pa. Code § 1.25(d) has any application.

The balance is admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted in part and denied in part. Petitioners are without sufficient information whether May 23, 1879 was the last burial to occur in the Kemp Family Cemetery. The balance is admitted.

13. Denied. It is specifically denied that CHRS conducted a diligent search calculated to identify any living relatives of decedents buried at the Kemp Family Cemetery. It is specifically denied that public notice is unnecessary.

14. Admitted in part and denied in part. It is specifically denied that the Kemp Family Cemetery has no public means of access. The balance is admitted.

15. Denied. It is specifically denied that no individuals or entities currently provide for the maintenance or care of the Kemp Family Cemetery.

16. Denied. It is specifically denied that the Sellers have never seen anyone visit to or care for or maintain the Kemp Family Cemetery. Respondents are without sufficient information to answer the balance.

17. Denied. It is specifically denied that Petitioner will retain a capable third party to exhume the remains using archeological methods that will avoid disruption to the remains and headstones. It is specifically denied that Petitioner has located any cemetery near Berks County. It is further specifically denied that reinterment meets the equity standard and the factors test articulated in

Novelli v. Carroll, 420 A.2d 469 (Pa.Super. 1980) and its progeny.

**AFFIRMATIVE DEFENSES**

18. Unclean hands and fraud on the court.

**CONCLUSION**

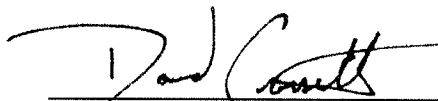
WHEREFORE, based on the foregoing, Respondents request that the Court permit discovery under 20 Pa.C.S. § 774 and, at the close of discovery, deny the Petition to Disinter the Remains at Kemp Family Cemetery; and such other relief as the Court deems reasonable, just, or necessary.

Respectfully submitted,

**CORNERSTONE LAW FIRM, LLC**

Dated: January 25, 2021

By:



David W. Crossett, Esquire  
Attorney I.D. #313031  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
(610) 926-7875  
*Counsel for Petitioners*

<p>IN RE: KEMP FAMILY CEMETERY</p> <p>Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>Duke Realty Limited Partnership, Charles D. Wessner, and Carol J. Wessner,</p> <p style="text-align: center;">Respondents.</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION</p> <p style="text-align: center;">Docket No.: 2020-X-87273</p> <p style="text-align: center;">Assigned to: Judge Timothy J. Rowley</p>
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**RULE TO SHOW CAUSE**

AND NOW, this \_\_\_\_\_ day of the month of \_\_\_\_\_, 2021, upon consideration of the Petition to Open or Strike by Petitioners, Brenda Winkler, Juli Winkler, Linda Landis-Heffernan, and Meredith Brunt Goldey, it is ordered that:

- (1) A Rule is issued upon each Respondent to show cause why the Petitioners are not entitled to the relief requested by filing an answer within 20 days of the filing of this Rule.
- (2) The Court's Final Decree filed July 22, 2020 is hereby STAYED pending further order of Court.
- (3) Pursuant to 20 Pa.C.S. § 774, the parties authorized to conduct discovery as in civil actions and Respondent Duke Realty Limited Partnership is directed to immediately produce to Petitioners an unredacted copy of the report exhibited to its Petition dated June 16, 2020, and to make available for deposition the author of such report on due form and notice as in civil actions.
- (4) At the close of 120 days, any party may praecipe for an evidentiary hearing and briefing schedule as to the instant Petition or to request an extension of discovery on good cause shown.

By the Court:

\_\_\_\_\_  
Timothy J. Rowley, J.



<p>IN RE: KEMP FAMILY CEMETERY</p> <p>Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>Duke Realty Limited Partnership, Charles D. Wessner, and Carol J. Wessner,</p> <p style="text-align: center;">Respondents.</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION</p> <p style="text-align: center;">Docket No.: 2020-X-87273</p> <p style="text-align: center;">Assigned to: Judge Timothy J. Rowley</p>
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**FINAL ORDER**

AND NOW, this \_\_\_\_\_ day of the month of \_\_\_\_\_, 2021, upon consideration of the Petition to Open or Strike by Petitioners, Brenda Winkler, Juli Winkler, Linda Landis-Heffernan, and Meredith Brunt Goldey, and any response thereto if any, it is hereby ordered and decreed as follows:

- The Final Decree filed July 22, 2020 is hereby STRICKEN and Respondent Duke Realty Limited Partnership is directed to effectuate notice of its July 16, 2020 petition by publication in a newspaper of general circulation to any other descendants of the Kemp Family Cemetery and to serve a copy on counsel for Petitioners.
- The Final Decree filed July 22, 2020 is hereby OPENED and Petitioners are directed to file an Answer within 30 days of the filing of this Order.

By the Court:

\_\_\_\_\_  
 Timothy J. Rowley, J.

**CORNERSTONE LAW FIRM, LLC**

David W. Crossett, Esquire  
Attorney I.D. #313031  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
(610) 926-7875

*Counsel for Petitioners*

<p><b>IN RE: HISTORIC KEMP FAMILY BURIAL GROUND</b></p> <p>Brenda Winkler, Juli Winkler, Meredith Brunt Goldey, and Linda Landis-Heffernan,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>Duke Realty Limited Partnership, Charles D. Wessner, and Carol J. Wessner,</p> <p style="text-align: center;">Respondents.</p>	<p>COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA</p> <p>ORPHANS' COURT DIVISION</p> <p>Docket No.: 2020-X-87273</p> <p>Assigned to: Timothy J. Rowley</p>
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**CERTIFICATE OF SERVICE**

I, Devin L. Fisher, Paralegal, certify that on Wednesday, February 03, 2021, I served true and correct copies of the within Petition to Open or Strike, accompanying exhibits and this certificate of service via USPS Certified mail, return receipt requested to the addressee as listed below:

Courtney L. Schultz, Esquire  
Zachary B. Kizitaff, Esquire  
Saul Ewing Arnstein & Lehr, LLP  
1500 Market Street  
Centre Square West, 38<sup>th</sup> Floor  
Philadelphia, PA 19002

**CORNERSTONE LAW FIRM, LLC**

  
\_\_\_\_\_  
Devin L. Fisher

# EXHIBIT B

Courtney L. Schultz (PA Atty ID. 306479)  
Zachary B. Kizitaff (PA Atty ID. 327568)  
Saul Ewing Arnstein & Lehr LLP  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19002  
(215) 972-7717  
Courtney.Schultz@saul.com  
Zachary.Kizitaff@saul.com

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

**IN RE: KEMP FAMILY CEMETERY**

**NO. 2020-X**

**PETITION TO DISINTER THE REMAINS  
AT KEMP FAMILY CEMETERY**

TO THE HONORABLE JUDGES OF SAID ORPHANS' COURT:

Petitioner, Duke Realty Limited Partnership ("Petitioner" or "Duke"), by and through its undersigned counsel, respectfully petitions this Honorable Court, pursuant to 28 Pa. Code § 1.25(d), for permission to disinter and expose to view the remains buried at the Kemp Family Cemetery, which are interred on the property located at 4 Hilltop Road, Maxatawny Township, Pennsylvania, 19530 (the "Property").

1. Petitioner is an Indiana limited partnership and is an owner, developer and manager of industrial properties, with projects including state-of-the-art bulk warehouses and modern, efficient distribution centers.

2. Petitioner entered into a confidential purchase and sale agreement (the “Agreement”) with Charles D. Wessner and Carol J. Wessner (the “Sellers”), current owners of the Property, on April 10, 2019 for purchase of the Property.

3. Pursuant to the Agreement, Petitioner has the right to inspect the Property and to terminate the Agreement, in its sole discretion, upon determining that the Property is not satisfactory. If requisite regulatory approvals cannot be obtained, then the Property would be deemed unsatisfactory.

4. As part of its pre-purchase due diligence and inspection, Petitioner hired CHRS, Inc. Historic Preservation Services (“CHRS”) to conduct a Cultural Resources Assessment of the Property, at the conclusion of which CHRS president, Kenneth J. Basalik, Ph.D., RPA, issued a report to Petitioner. A true and correct copy of excerpts from CHRS’s report is attached hereto as Exhibit A.

5. During the Cultural Resources Assessment, CHRS discovered eighteen (18) head stones on the Property dating from the eighteenth through late nineteenth centuries and identified the burial site known as the Kemp Family Cemetery.<sup>1</sup>

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<sup>1</sup> An online resource indicates that the names of the individuals buried at the Kemp Family Cemetery (also known as the Kemp Burial Ground) include the following: Hannah, Maria Kemp Bieber, Daniel Kemp, Dewalt “Theobolt” Kemp, Elizabeth Sharadin Kemp, Elizabeth Kemp, George Kemp Jr., Captain George L. Kemp, George L. Kemp, George Wink Kemp, Hettyann Elizabeth Kemp, Isaac Kemp, Jeremiah Kemp, Rachel Wink Kemp, Susanna Levan Kemp, Willoughby Kemp, Anna Kemp Siegfried, and Vorrest Vernon Steelman. See Memorials in Kemp Burial Ground, FIND A GRAVE, <https://www.findagrave.com/cemetery/2326523/memorial-search> (last visited Apr. 27, 2020).

6. If the burials cannot be relocated, Petitioner will not be able to proceed with its purchase of the Property as the proposed commercial development will not be possible given the location of the Kemp Family Cemetery, which is in the middle of the location of Building 3, as shown on the copies of the Historical Resources Location Map and Concept Plan. See Exhibit A at 5-6.

7. Accordingly, Petitioner files this Petition seeking the Court's permission to disinter and relocate the remains at the Cemetery upon acquisition of the Property, with the approval and consent of the Sellers. A true and correct copy of the Consent and Joinder of the Sellers is attached hereto as Exhibit B.

8. Under Pennsylvania law, absent permission from next of kin, the remains of a dead body may not be exhumed and/or exposed to view without an Order from a court of competent jurisdiction. See 28 Pa. Code § 1.25(d).

9. Section 711(1) of the PEF Code mandates that exclusive jurisdiction shall rest with the Orphans' Court Division as to matters pertaining to "the control of the decedent's burial." 20 Pa. C.S.A. § 711(1).

10. This Court has mandatory jurisdiction pursuant to § 711(1) as the relief requested concerns the control of the decedents' remains buried at the Kemp Family Cemetery.

11. While Petitioner is not a cemetery company, venue is proper before this Honorable Court pursuant to 20 Pa. C.S.A. § 727 as the burial ground at issue is located in Berks

County.<sup>2</sup> See 20 Pa. C.S.A. § 727 (providing that venue is proper “in the county where the burial ground, or any part thereof is located”).

12. CHRS’s report indicates that the headstones discovered at the burial ground date back to the eighteenth century, and the most recent ascertainable burial at the Kemp Family Cemetery was on May 23, 1879. See Exhibit A at 3.

13. After diligent search, including the CHRS Cultural Resources Assessment and accompanying site visit, Petitioner has not uncovered any known living relatives of the decedents buried at the Kemp Family Cemetery. Accordingly, no public notice is necessary in connection with the request made herein.

14. The Kemp Family Cemetery is currently in a state of disrepair and has no public means of access (indeed, it is nearly a mile from the closest access road). True and correct copies of photographs of the Kemp Family Cemetery taken by CHRS can be found in Exhibit A at 7-8.

15. No individuals or entities currently provide for the maintenance or care of the Kemp Family Cemetery.

16. Indeed, the Sellers built their home on the Property around 1962 and, having lived there continuously since that time, advised Petitioner that they have never seen anyone visit, tend to, care for or maintain the Kemp Family Cemetery. The Sellers also advised that neither the former tenants on the Property, nor the tenant in the house closest to the Kemp

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<sup>2</sup> Alternatively, venue is also proper pursuant to § 721(1) because the burial ground at issue is a family cemetery for members of the family who likely resided on the property or in close proximity thereto. See 20 Pa. C.S.A. § 721(1) (stating that venue is proper “where the decedent had his last family or principal residence, and if the decedent had no domicile in the Commonwealth, then in any county where any of his property is located.”).

Family Cemetery have ever reported to them having seen anyone visit or otherwise maintain the area.

17. If approved, Petitioner would retain a capable third party to respectfully exhume the remains using archeological methods so as to cause minimal disruption to and best preserve the burials and headstones. Petitioner would reinter the remains in a to-be-determined nearby cemetery located in Berks County at its sole cost.

WHEREFORE, Petitioner Duke Realty Limited Partnership respectfully requests that this Honorable Court enter an Order authorizing it to remove the headstones and disinter the remains in the Kemp Family Cemetery, and to subsequently relocate any remaining intact headstones and to reinter the remains in a nearby cemetery in Berks County, after such time as it becomes record owner of the Property.

Respectfully submitted,



Courtney L. Schultz, Esq., Atty. ID 308479  
Zachary B. Kizitaff, Esq., Atty. ID 327568  
Saul Ewing Arnstein & Lehr LLP  
1500 Market Street  
Centre Square West, 38th Floor  
Philadelphia, PA 19002  
(215) 972-7717  
Courtney.Schultz@saul.com  
Zachary.Kizitaff@saul.com

Dated: June 16, 2020



**VERIFICATION**

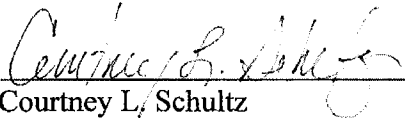
I, Nicholas P. Rakowski, P.E., of Duke Realty Limited Partnership, am authorized to make this Verification on behalf of Petitioner Duke Realty Limited Partnership, and hereby state that the facts set forth in the foregoing Petition are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. Cons. Stat. Ann. § 4904 relating to unsworn falsifications to authorities.

  
Nicholas P. Rakowski, P.E.

Dated: 6/9/2020

**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires filing confidential information and documents differently than non-confidential information and documents.

Submitted by:   
Courtney L. Schultz  
Attorney No. 306479

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Petitioner Duke Realty Limited Partnership's Petition to Disinter the Remains at Kemp Family Cemetery was served this day on the following via First Class Mail and E-Mail:

Kevin T. Fogerty, Esquire  
Law Offices of Kevin T. Fogerty  
Mill Run Office Center  
1275 Glenlivet Drive, Suite 150  
Allentown, PA 18106  
[kfogerty@fogertylaw.com](mailto:kfogerty@fogertylaw.com)  
*Attorney for Charles D. Wessner and Carol J. Wessner*

  
Courtney L. Schultz

Dated: June 16, 2020

# **EXHIBIT A**



SINCE 1981

**CHRIS, Inc.**

**Historic  
Preservation  
Services**

*Archaeology · Historic Preservation · Research*

May 9, 2019

J. Michael Davis, RLA, PP  
Senior Development Services Manager  
Duke Realty  
Eight Tower Bridge  
161 Washington Street, Suite 1020  
Conshohocken, PA 19428

RE: Maxatawny Assemblage  
Maxatawny Township, Berks County, PA  
Cultural Resources Assessment

**REDACTED**

395 N. Cannon Avenue  
Lansdale, PA 19446-2247  
[www.chrsinc.com](http://www.chrsinc.com)

Tel.: 215-699-8006  
Fax: 215-699-8901  
Email: [kbasalik@chrsinc.com](mailto:kbasalik@chrsinc.com)

# REDACTED

## Archaeological Resources

# REDACTED

- **Kemp Family Cemetery** – The cemetery has not be identified as an archaeological site; however, it appears to contain 18 head stones dating from the eighteenth through late nineteenth centuries and will require archaeological methods to exhume the burials if they are to be removed. Rules and regulations relating to the removal and reburial of human remains other than those associated with the identification of archaeological remains eligible for listing in the National Register (notification of next of kin, orphan’s court coordination, etc.) will need to be followed. Information obtained on-line indicates the names of 16 individuals, but lists two individuals twice. The cemetery is known by multiple names, including “Kemp Burial Ground” (Findagrave.com), “Kemp Graveyard” (Berks County Cemetery Records, Vol. 2 in the State Library of Pennsylvania, Call # F157.B3 Cm1002), and “Kemp Cemetery” (Strausstown Roots

website: [bergergirls.com](http://bergergirls.com)). The name derives from the family who owned the farm of which the burial ground was a component through five generations, from the second quarter of the eighteenth century through the first decade of the twentieth century. The earliest owner, German immigrant Dewalt (Theobald) Kemp (1685-1760), is reported to have been buried in the graveyard. The latest burial recorded on [Findagrave.com](http://Findagrave.com) was Elizabeth Sharadin Kemp, who died on May 23, 1879. She was the mother of Nathan S. Kemp (1827-1910). Upon his death in March 1910, Nathan's body was buried not in the family burial ground but in Kutztown's Fairview Cemetery.

# REDACTED

Sincerely,



Kenneth J. Basalik, Ph.D., RPA  
President – CHRS, Inc.

## **PROJECT DESCRIPTION**

The proposed Maxatawny logistics park will consist of 3 million square feet of institutional quality logistics real estate designed to accommodate local, regional and national warehouse, distribution, ecommerce and light manufacturing users. The project will create a 5 building logistics park which will include a new road network, ample auto and tractor trailer parking spaces, tractor trailer loading and unloading yards and associated stormwater management, landscaping, and lighting (see Figure 4). New infrastructure for public water, public sewer, electric and gas will be developed to provide the project site and surrounding area with service connections.



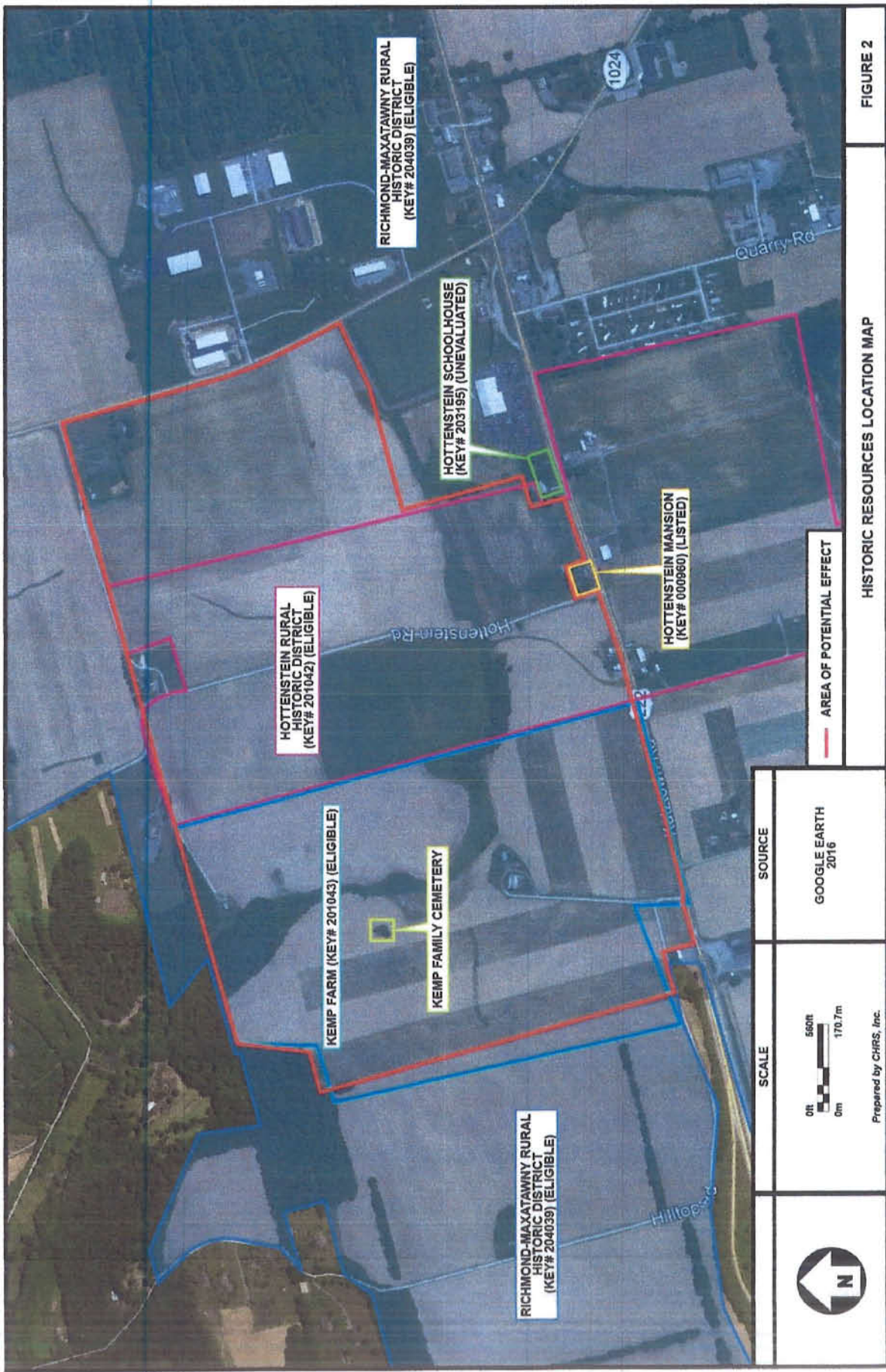


FIGURE 2

HISTORIC RESOURCES LOCATION MAP

	<p><b>SCALE</b></p> <p>0ft 500ft 0m 170.7m</p>	<p><b>SOURCE</b></p> <p>GOOGLE EARTH 2016</p>
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Prepared by CHRS, Inc.









**Photograph 7:** Kemp Farm (Key# 201043) looking southwest towards SR 0222.



**Photograph 8:** Kemp Family cemetery looking north.



**Photograph 9:** View looking east from Kemp Family cemetery [Brick wall at left] across the Kemp Farm (Key# 201043) [green area in foreground], Hottenstein Rural Historic District (Key# 201042) [light brown area], to the end of the project area [modern white farm building at far back of photograph]. The Richmond-Maxatawny Rural Historic District (Key# 204039) encompasses the whole area shown.

# **EXHIBIT B**

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


No. 2020-X

**IN RE: KEMP FAMILY CEMETERY**

**CONSENT AND JOINDER**

Charles D. Wessner and Carol J. Wessner, owners of the property located at 4 Hilltop Road, Maxatawny Township, Pennsylvania (the "Property") whereupon the Kemp Family Cemetery is situate, hereby consent to and join in the Petition to Disinter the Remains at Kemp Family Cemetery (the "Petition") and all relief requested therein, including but not limited to, the request that this Honorable Court authorize Petitioner Duke Realty Limited Partnership, once record owner of the Property, to remove the headstones and disinter the remains at the Kemp Family Cemetery, and to subsequently relocate any intact headstones and reinter the remains at a cemetery located in Berks County.

Charles D. Wessner and Carol J. Wessner also hereby acknowledge having received notice of the filing of the Petition.

  
\_\_\_\_\_  
Charles D. Wessner

  
\_\_\_\_\_  
Carol J. Wessner

Date: 06-04-2020

# EXHIBIT C



**SAUL EWING**  
**ARNSTEIN**  
**& LEHR** <sup>LLP</sup>

Courtney L. Schultz  
Phone: (215) 972-7717  
Fax: (215) 972-1839  
Courtney.Schultz@saul.com  
www.saul.com

February 22, 2021

***Via Email***

David W. Crossett, Esquire  
Cornerstone Law Firm  
8500 Allentown Pike, Suite 3  
Blandon, PA 19510  
[david@cornerstonelaw.us](mailto:david@cornerstonelaw.us)

**RE: Brenda Winkler, et al. v. Duke Realty Limited Partnership, et al.**

Dear Mr. Crossett:

On behalf of Duke Realty ("Duke"), and pursuant to the Court's February 8, 2021 Rule to Show Cause, enclosed please find an unredacted copy of the May 9, 2019 CHRS, Inc. Report, which was attached to Duke's June 16, 2020 Petition.

At your convenience, please give me a call to discuss the Petition to Open or Strike filed by your clients so that we may explore whether we can informally resolve this matter without the need for further court involvement.

Thank you.

Sincerely,



Courtney L. Schultz

CLS/CJ





May 9, 2019

J. Michael Davis, RLA, PP  
Senior Development Services Manager  
Duke Realty  
Eight Tower Bridge  
161 Washington Street, Suite 1020  
Conshohocken, PA 19428

RE: Maxatawny Assemblage  
Maxatawny Township, Berks County, PA  
Cultural Resources Assessment

Dear Mike:

This letter report outlines the potential Cultural Resources Issues for the Maxatawny Assemblage Project in Maxatawny Township, Berks County, Pennsylvania (Figure 1). CHRS, Inc. examined the historic and archaeological site files of the Pennsylvania Historical and Museum Commission, checked with Berks County and Maxatawny Township Planning Commissions, examined historic maps and historic aerial photographs, and field viewed the project. The following information was compiled.

#### Above Ground Historic Properties

Historic properties are properties that have been determined eligible for or listed in the National Register. Impacts to historic properties need to be considered when there are federal or state permits, funding, or other federal or state actions required for the project. While the County does not appear to have any ordinance applicable to this project, Maxatawny Township has an ordinance that requires that properties listed within their comprehensive plan be considered. An impact study may be required by the township for such properties. The following historic properties were identified (See Figure 2).

- Richmond-Maxatawny Rural Historic District (Key# 204039) – Eligible for listing in the National Register of Historic Places. The entire project area lies within this historic district. This historic property is listed in Maxatawny’s Comprehensive Plan.
- Hottenstein Rural Historic District (Key# 201042) – Eligible for listing in the National Register of Historic Places. The central third of the project area lies within this historic district. The building at 15401 Kutztown Road are included within this district. This historic property is listed in Maxatawny’s Comprehensive Plan.
- Kemp Farm (Key# 201043) – Eligible for listing in the National Register of Historic Places. The western third of the project area lies within this historic district. This historic property is

listed in Maxatawny's Comprehensive Plan. The property contains a family cemetery which is a contributing element to the historic property.

- Hottenstein Mansion (Key# 000960) - Listed in the National Register of Historic Places. The property is not within the project area, but is adjacent and may need to be subjected to an impact study. This historic property is listed in Maxatawny's Comprehensive Plan.
- Hottenstein Schoolhouse (Key# 203195) - This property has not been evaluated for the National Register of Historic Places. The Hottenstein Schoolhouse is adjacent to the project and may need to be subjected to an impact study. This historic property is listed in Maxatawny's Comprehensive Plan.

### Archaeological Resources

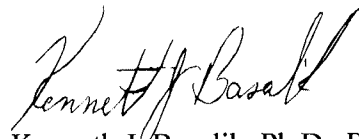
No professional archaeological work has been performed within the project area. An archaeological survey undertaken by PennDOT was performed for an intersection improvement project southeast of the project area (Figure 3). Archaeological resources are considered as part of the permitting process for both previously identified archaeological sites as well as areas that have been evaluated as having archaeological potential. The entire project area has been assessed as having high prehistoric archaeological potential by the Pennsylvania Historical and Museum Commission. Historic maps and historical aerial photographs, as well as a walk over of portions of the property as part of the assessment indicate that historic archaeological sites are present, and there is potential for other historic archaeological sites on the property near the Kemp farmhouse and at locations where historic maps and aerials have indicated other historic dwelling that once were present on the property. It may be necessary to perform an archaeological survey on portions of the property. Generally in cases where the U.S. Army Corps of Engineers (USACOE) is involved, the archaeological survey is limited to areas over which the USACOE has jurisdiction. The following prehistoric archaeological sites have been identified (see Figure 3). None of the archaeological sites have been evaluated for their eligibility for listing in the National Register of Historic Places.

- 36BK0356
- 36BK0357
- 36BK0363
- 36BK0458
- 36BK0459
- 36BK0460
- 36BK0550
- Kemp Family Cemetery – The cemetery has not be identified as an archaeological site; however, it appears to contain 18 head stones dating from the eighteenth through late nineteenth centuries and will require archaeological methods to exhume the burials if they are to be removed. Rules and regulations relating to the removal and reburial of human remains other than those associated with the identification of archaeological remains eligible for listing in the National Register (notification of next of kin, orphan's court coordination, etc.) will need to be followed. Information obtained on-line indicates the names of 16 individuals, but lists two individuals twice. The cemetery is known by multiple names, including "Kemp Burial Ground" (Findagrave.com), "Kemp Graveyard" (Berks County Cemetery Records, Vol. 2 in the State Library of Pennsylvania, Call # F157.B3 Cm1002), and "Kemp Cemetery" (Strausstown Roots

website: bergergirls.com). The name derives from the family who owned the farm of which the burial ground was a component through five generations, from the second quarter of the eighteenth century through the first decade of the twentieth century. The earliest owner, German immigrant Dewalt (Theobald) Kemp (1685-1760), is reported to have been buried in the graveyard. The latest burial recorded on Findagrave.com was Elizabeth Sharadin Kemp, who died on May 23, 1879. She was the mother of Nathan S. Kemp (1827-1910). Upon his death in March 1910, Nathan's body was buried not in the family burial ground but in Kutztown's Fairview Cemetery.

The cultural resources work that may be required will depend on the lead federal agency which is anticipated to be the USACOE. The USACOE does not ordinarily provide directions concerning the required cultural resources work until a permit has been applied for. The USACOE works in conjunction with the State Historic Preservation Office (SHPO). To initiate coordination with the SHPO, a Project Review form is required to be submitted. A Project Review forms is appended to this document.

Sincerely,



Kenneth J. Basalik, Ph.D., RPA  
President – CHRS, Inc.





# PROJECT REVIEW FORM

## Request to Initiate SHPO Consultation on State and Federal Undertakings

<b>SHPO USE ONLY</b>		Reviewers: ___/___
DATE RECEIVED:	DATE DUE:	
ER NUMBER:	HRSF: _____	

REV: 06/2018

### SECTION A: PROJECT NAME & LOCATION

Is this a new submittal?  YES  NO OR  This is additional information for ER Number:

Project Name Maxatawny Assemblage County Berks Municipality Maxatawny Township

Project Address Maxatawny Township City/State/ Zip

### SECTION B: CONTACT INFORMATION & MAILING ADDRESS

Name Kenneth J. Basalik, Ph.D. Phone (215) 699-8006

Company CHRS, Inc. Fax (215) 699-8901

Street/PO Box 395 N. Cannon Avenue Email kbasalik@chrsinc.com

City/State/Zip Lansdale PA 19446

### SECTION C: PROJECT DESCRIPTION

This project is located on:  Federal property  State property  Municipal property  Private property (check all that apply)

List all federal and state agencies and programs providing funds, permits, licenses.	Agency Type	Agency/Program/Permit Name	Project/Permit/Tracking Number (if applicable)
	State & Federal	PADEP/USACOE Joint 105 permit	

### Proposed Work – Attach project description, scope of work, site plans, and/or drawings

Project includes (check all that apply):  Construction  Demolition  Rehabilitation  Disposition

Total acres of project area: ~260 Total acres of earth disturbance: ~260

Are there any buildings or structures within the project area?  Yes  No Approximate age of buildings: 100+ years

Does this project involve properties listed in or eligible for the National Register of Historic Places, or designated as historic by a local government?	Yes <input checked="" type="radio"/>	No <input type="radio"/>	Unsure <input type="radio"/>	Name of historic property or historic districts	<ul style="list-style-type: none"> <li>• Richmond-Maxatawny Rural Historic District (Key# 204039)</li> <li>• Hottenstein Rural Historic District (Key# 201042)</li> <li>• Kemp Farm (Key# 201043)</li> </ul>
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**Please print and mail completed form and all attachments to:**

**PHMC**  
**State Historic Preservation Office**  
**400 North St.**  
**Commonwealth Keystone Building, 2<sup>nd</sup> Floor**  
**Harrisburg, PA 17120-0093**

#### Attachments – Please include the following information with this form

- Map** – 7.5' USGS quad showing project boundary and Area of Potential Effect
- Description/Scope** – Describe the project, including any ground disturbance and previous land use
- Site Plans/Drawings** – Indicate past and present land use, location and dates of buildings, and proposed improvements
- Photographs** – Attach prints or digital photographs showing the project site, including images of all buildings and structures keyed to a site plan

### SHPO DETERMINATION (SHPO USE ONLY)

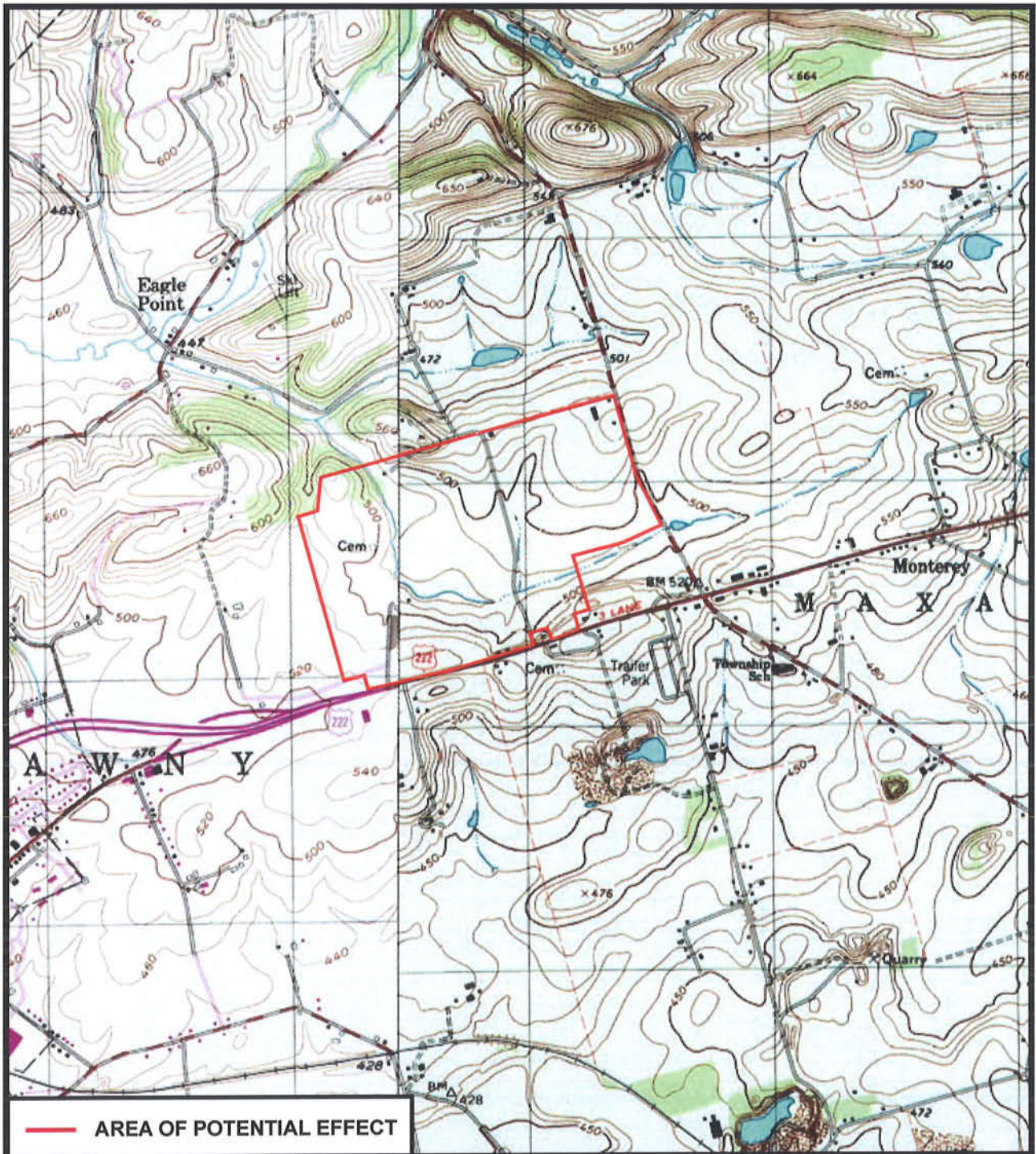
- |  |   |
|--|---|
| <input type="checkbox"/> There are <b>NO HISTORIC PROPERTIES</b> in the Area of Potential Effect | <input type="checkbox"/> The project will have <b>NO ADVERSE EFFECTS WITH CONDITIONS</b> (see attached) |
| <input type="checkbox"/> The project will have <b>NO EFFECT</b> on historic properties           | <input type="checkbox"/> <b>SHPO REQUESTS ADDITIONAL INFORMATION</b> (see attached)                     |
| <input type="checkbox"/> The project will have <b>NO ADVERSE EFFECTS</b> on historic properties: |   |

SHPO REVIEWER: \_\_\_\_\_ DATE: \_\_\_\_\_

## **PROJECT DESCRIPTION**

The proposed Maxatawny logistics park will consist of 3 million square feet of institutional quality logistics real estate designed to accommodate local, regional and national warehouse, distribution, ecommerce and light manufacturing users. The project will create a 5 building logistics park which will include a new road network, ample auto and tractor trailer parking spaces, tractor trailer loading and unloading yards and associated stormwater management, landscaping, and lighting (see Figure 4). New infrastructure for public water, public sewer, electric and gas will be developed to provide the project site and surrounding area with service connections.





— AREA OF POTENTIAL EFFECT



SCALE



Prepared by CHRS, Inc.

SOURCE

USGS 1997  
KUTZTOWN, PA

USGS 1999  
TOPTON, PA

PROJECT LOCATION MAP

FIGURE 1



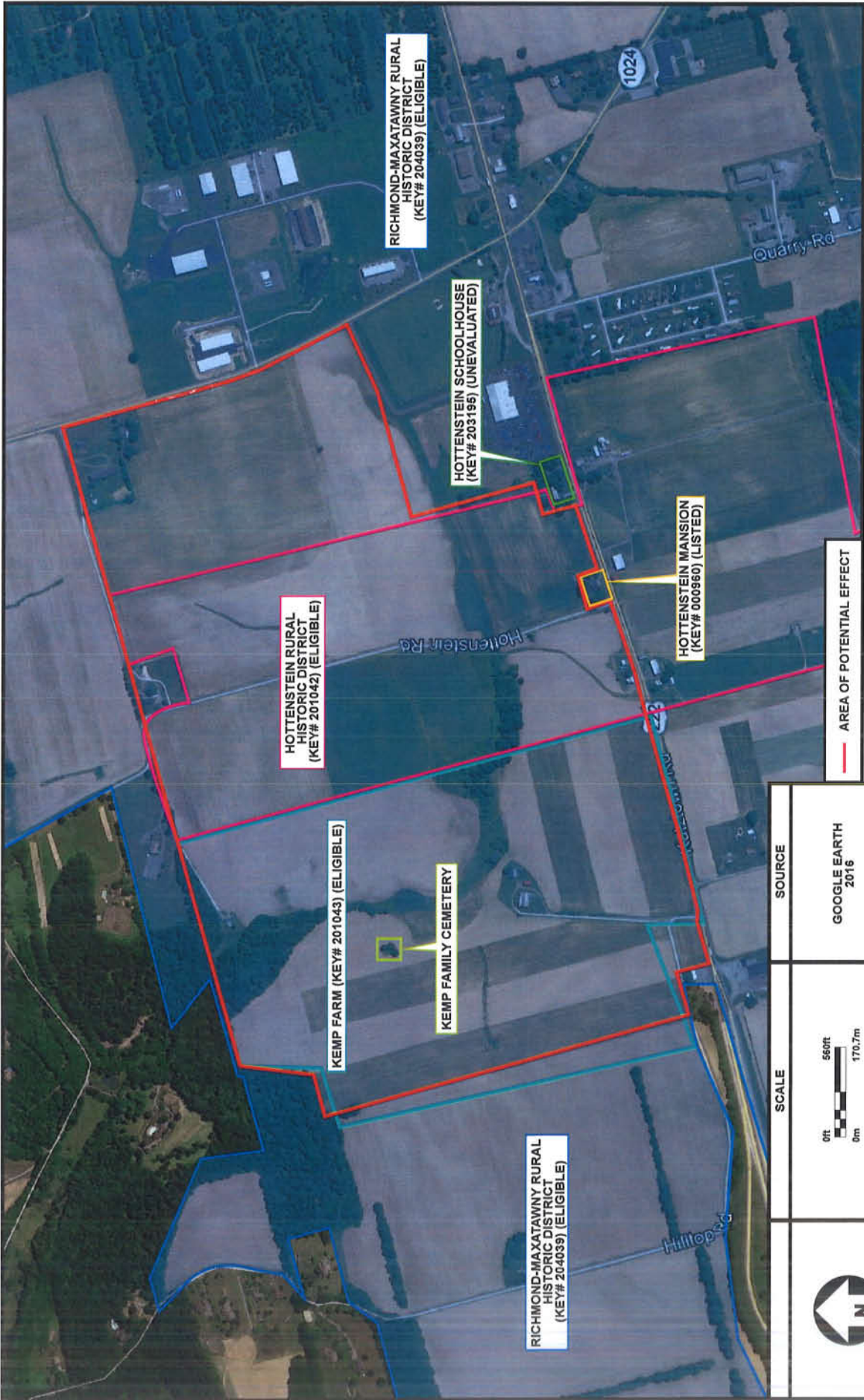


FIGURE 2

HISTORIC RESOURCES LOCATION MAP

— AREA OF POTENTIAL EFFECT

SCALE	SOURCE
 0ft 560ft 0m 170.7m Prepared by CHRS, Inc.	GOOGLE EARTH 2016



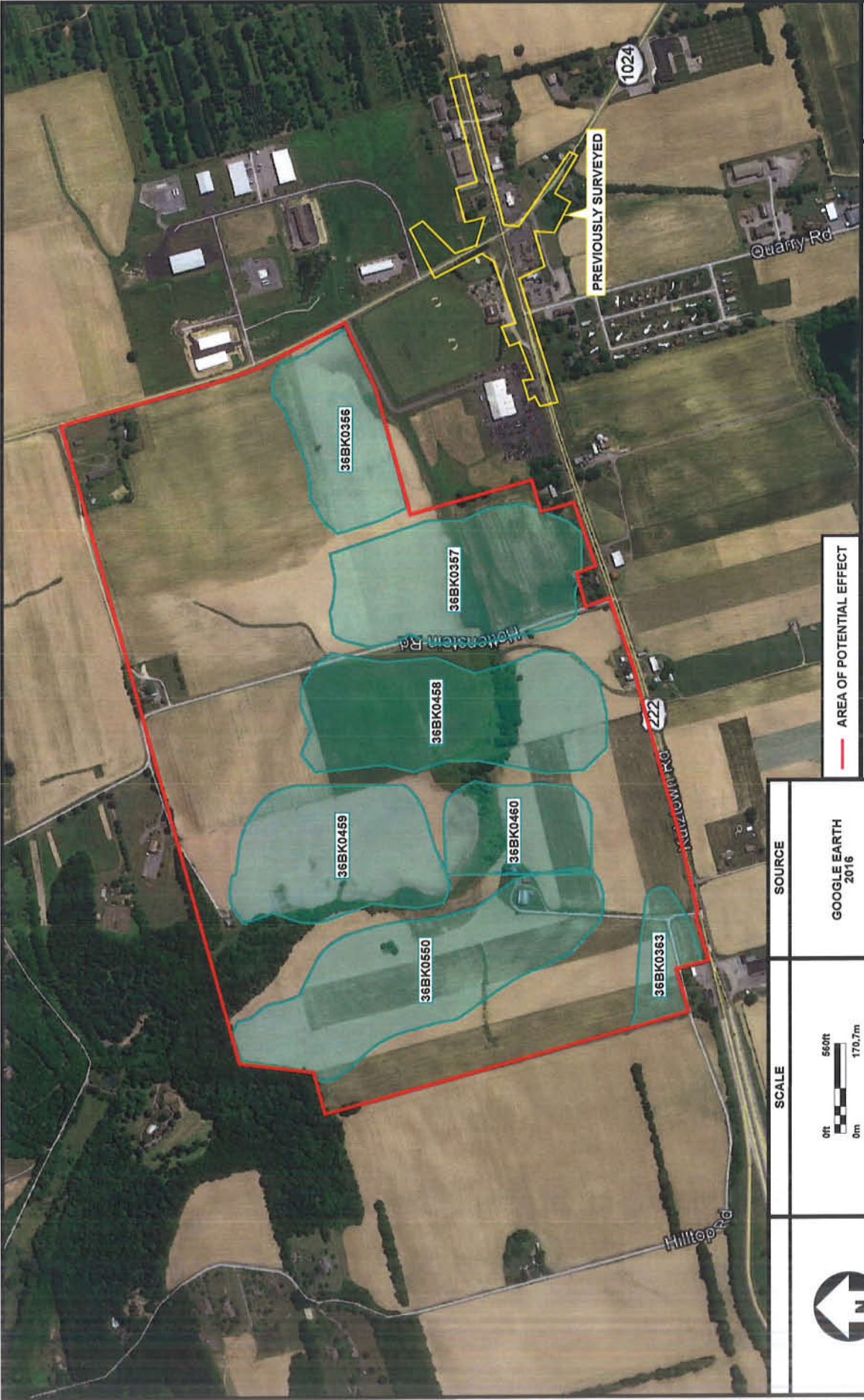


FIGURE 3

ARCHAEOLOGICAL SITES LOCATION MAP

— AREA OF POTENTIAL EFFECT

SOURCE

GOOGLE EARTH  
2016

SCALE



Prepared by CHRS, Inc.





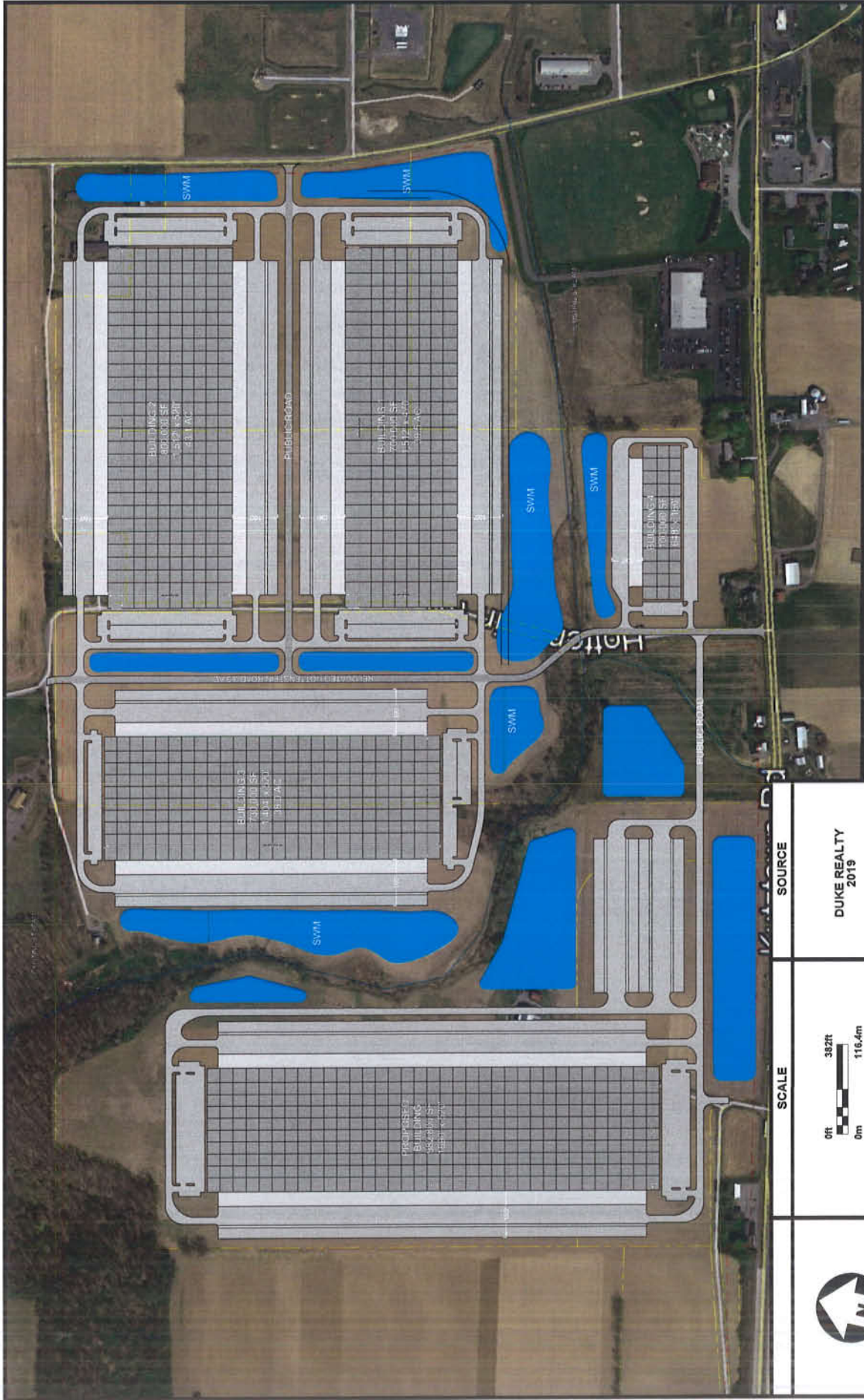


FIGURE 4

CONCEPT PLAN

SOURCE

DUKE REALTY  
2019

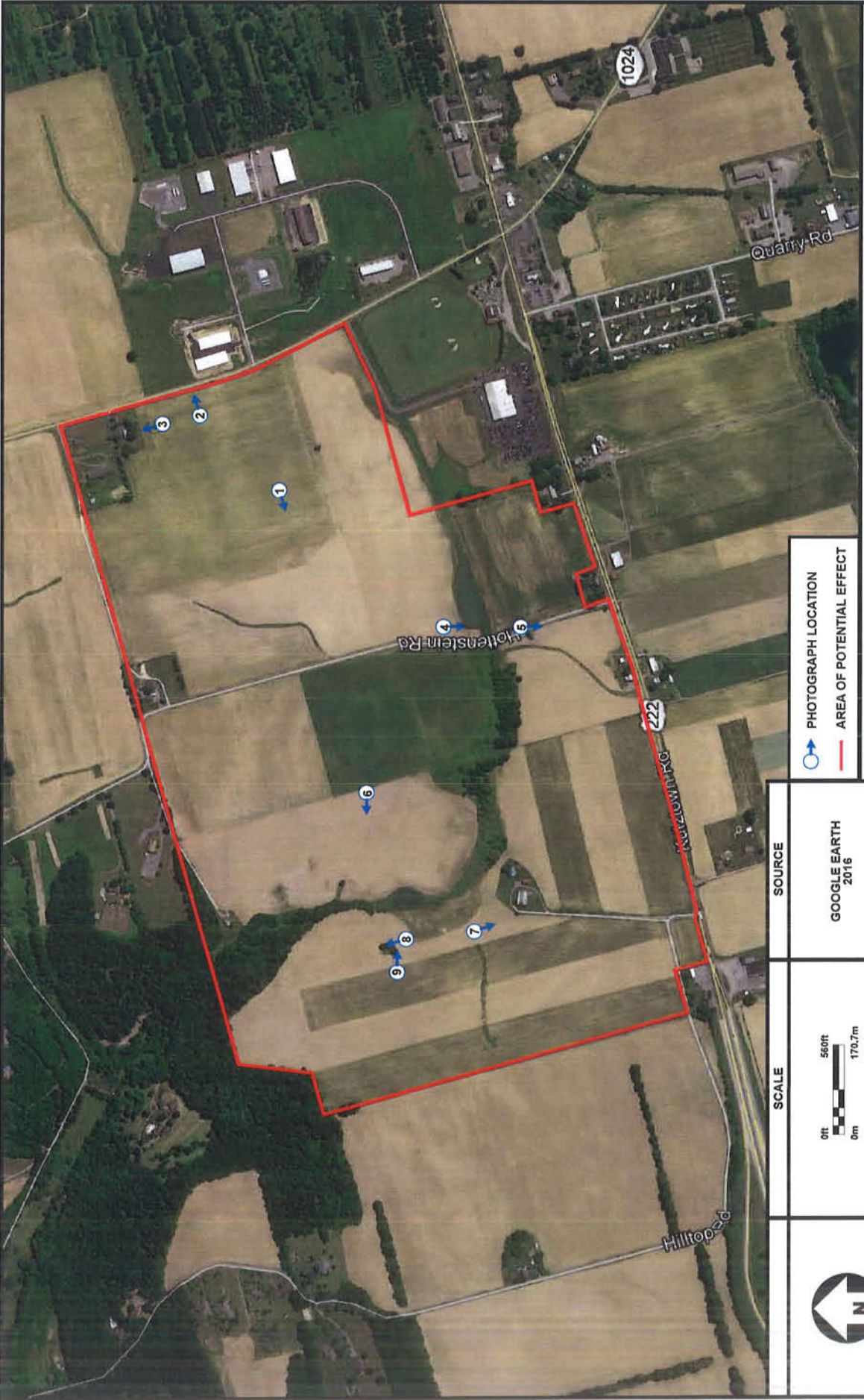
SCALE



Prepared by CHRS, Inc.







PHOTOGRAPH LOCATIONS

 PHOTOGRAPH LOCATION  
 AREA OF POTENTIAL EFFECT

SOURCE

GOOGLE EARTH  
2016

SCALE



Prepared by CHRS, Inc.





**Photograph 1:** View looking west across the project area.



**Photograph 2:** Non-contributing farm buildings to the Richmond-Maxatawny Rural Historic District (Key# 204039). The eastern edge of the project area is the cultivated area in the foreground.





**Photograph 3:** Non-contributing farmhouse to the Richmond-Maxatawny Rural Historic District (Key# 204039) in the northeastern corner of project area.



**Photograph 4 :** View looking south across Hottenstein Rural Historic District (Key# 201042). Hottenstein Mansion (Key# 000960) is the group of buildings on the left.



**Photograph 5:** View looking west across Hottenstein Rural Historic District (Key# 201042). SR 0222 passes between the barn at left and house on the right.



**Photograph 6:** View looking west across Hottenstein Rural Historic District (Key# 201042) [light brown area] to the Kemp Farm (Key# 201043) [green area in background], and Kemp Family cemetery [center background with trees on a small rise].





**Photograph 7:** Kemp Farm (Key# 201043) looking southwest towards SR 0222.



**Photograph 8:** Kemp Family cemetery looking north.



**Photograph 9:** View looking east from Kemp Family cemetery [Brick wall at left] across the Kemp Farm (Key# 201043) [green area in foreground], Hottenstein Rural Historic District (Key# 201042) [light brown area], to the end of the project area [modern white farm building at far back of photograph]. The Richmond-Maxatawny Rural Historic District (Key# 204039) encompasses the whole area shown.