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IN RE:	**:**	**COURT OF COMMON PLEAS**
THE BARNES FOUNDATION,	**:**	**OF MONTGOMERY COUNTY**
A CORPORATION	**:**	**ORPHANS' COURT DIVISION**
	:	
	:	**No. 58,788**

REPLY BRIEF OF THE BARNES FOUNDATION, DR. BERNARD C. WATSON, SHELDON M. BONOVITZ, GWENDOLYN STEWART KING, STEPHANIE K. BELL-ROSE, HAROLD E. DOLEY, JR., JOSEPH NEUBAUER, ANDRÉ V. DUGGIN, AILEEN KENNEDY ROBERTS, JACQUELINE F. ALLEN, AGNES GUND, DR. NEIL L. RUDENSTINE, AND STEPHEN J. HARMELIN IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS TO THE PETITION OF ANN C. BARNES, SUE HOOD, FRIENDS OF THE BARNES, WALTER HERMAN, M.D., NANCY HERMAN, SANDRA GROSS BRESSLER, JAY RAYMOND, AND J. MARGOT FLAKS, AND THEIR PRELIMINARY OBJECTIONS TO THE PETITION OF MONTGOMERY COUNTY

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INTRODUCTION

The basic argument of the Friends Petitioners and Montgomery County in response to the preliminary objections of The Barnes Foundation is that this Court should ignore the long-established rules regarding standing and the finality of litigation because they think they have come up with a better idea than what the Court approved three years ago. The law provides no basis for such an argument. Petitioners' proposals are inadequate and untimely, but there is no need for this Court to consider them substantively because the Friends Petitioners and Montgomery County lack standing to bring their petitions or to interfere in proceedings about The Foundation's Indenture. The Foundation's preliminary objections should be sustained.

ARGUMENT

I. PETITIONERS DO NOT HAVE STANDING TO INTERVENE OR PARTICIPATE IN PROCEEDINGS INVOLVING THE FOUNDATION.

The Friends Petitioners. The Friends Petitioners do not even argue that they have standing to intervene or participate in proceedings involving The Foundation. Rather, they ask this Court to bypass the standing issue altogether, claiming that it is "immaterial." Friends Br. at 22. Since the Friends Petitioners do not contest the issue, Respondents rely on the discussion of standing — and the Friends Petitioners' lack thereof —in their initial brief.

The Friends Petitioners cite no Pennsylvania case law supporting their argument that this Court can simply ignore the standing requirement. To the contrary, the law is well-established that standing is a threshold matter that the trial court must consider at the outset. *See, e.g.*, *In re Barnes Found.*, 449 Pa. Super. 81, 84-85, 672 A.2d 1364, 1366 (1996) ("The matter of standing is jurisdictional and may not be waived by the court refusing to decide the case on a technical basis, but electing to proceed on the merits" (citation omitted)); *In re Barnes Found.*,

443 Pa. Super. 369, 377, 661 A.2d 889, 894 (1995) ("Before a court can proceed to address the merits of a controversy, it must determine whether standing exists to maintain the action").

The Friends Petitioners cite a number of federal cases to show that the question of standing sometimes can become enmeshed with the merits. Friends Br. at 25-26. But they provide no reason why this Court should become the first Pennsylvania court ever to bypass the standing requirement by relying on that idea. In particular, they never explain how their status as students, neighbors, and an organization of "friends" is somehow so enmeshed with the merits of their claims that this Court cannot address their lack of standing now. Instead, they appear to suggest that the Court use the "enmeshment" concept as an excuse to avoid any consideration of their standing at all and instead to just jump to the merits on its own motion, removing the need to consider the identity of the petitioner and any related jurisdictional niceties. They add that the Court can appoint them as *amici*, thus keeping them in the case although they have no standing to be here. *See* Friends Br. at 26-27. The Friends Petitioners cite no authority for such a procedure; in the proceedings on The Foundation's Original Petition, the Court was dealing with a case filed *by The Foundation*, not one that non-parties had asked the Court to create by itself. The Friends' proposal would turn the law of standing and jurisdiction on its head. *Cf. In re Stitzel's Estate*, 221 Pa. 227, 231, 70 A. 749, 750 (1908) (*amicus* in Orphans' Court proceeding has no authority to raise objections not put forth "by some party in interest").

In the closest thing the Friends Petitioners offer to a standing argument, they contend that, because the Original Petition proceedings they seek to open are really *in rem*, the entire world is a party to them. *See* Friends Br. at 29-31. They acknowledge, however, that the entire world cannot simply show up and participate as parties to proceedings involving The Foundation. *See* Friends Br. at 31. (Indeed, if that were the case, one would wonder what the point was

of all of the prior standing jurisprudence involving The Foundation.) Rather, they contend that, unlike the rest of the world, they are parties to proceedings involving The Foundation because they have "a personal and direct, not to mention deeply abiding, interest" in those proceedings. *Id.* This circular reasoning amounts to nothing more than a declaration, unsupported by facts or law, that the Friends Petitioners have the substantial, direct, and immediate interest required for standing. As explained in Respondents' initial brief, the law is to the contrary.[1]

Montgomery County. The primary complaint in the County's brief is that The Foundation's Trustees failed to consider the County's purported offer of what, in effect, would be a $50 million loan.[2] Yet, the County does not explain on what basis it has standing to bring a lawsuit challenging a non-profit corporation's purported failure to consider an unsolicited offer of support. Under the County's standing theory, any donor could make an unsolicited offer of a contribution or loan to a charitable institution and then sue to intervene in the affairs of that institution if the offer is not accepted. The County cites no cases supporting such a notion.

The County relies on the Commonwealth Court's decision in *In re Milton Hershey School*, 867 A.2d 674 (Pa. Commw. 2005), *see* County Br. at 14-15, but fails to note that

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1. Nowhere in their brief do the Friends Petitioners mention a substantial portion of the relief they seek in their petition, including their request for removal and surcharge of The Foundation's Trustees, and an accounting and receivership for The Foundation, none of which has anything to do with *in rem* proceedings. They thus implicitly concede that they have no standing to seek these remedies.

2. As the County explains its proposal, it would pay $50 million to The Foundation to purchase The Foundation's property and then be paid that sum back in installments, with interest ("lease payments"), at the end of which The Foundation would once again own its property. County Br. at 3. In substance, that most resembles a loan. *See, e.g.*, *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 747 n.6 (5th Cir. Apr. 1981) (discussing comparable transactions); *Sun Oil Co. v. Commissioner*, 562 F.2d 258, 261-62 (3d Cir. 1977) (same).

the Commonwealth Court's decision was reversed by the Supreme Court. *See In re Milton Hershey Sch.*, 590 Pa. 35, 911 A.2d 1258 (2006). The County insists that, as a governmental entity within which one of The Foundation's campuses is located, it has standing to bring litigation against The Foundation and force it to consider any proposals the County makes for alleged financial assistance. *See* County Br. at 7-13.[3] Yet, the County's statutory authority to create museums or aid non-profit corporations within its boundaries is a far cry from a right to intervene in the internal affairs of any non-profit corporation that happens to be located within its borders.

The County's request that the Court recognize standing on this basis would work a significant change in the law of standing in charitable proceedings. As discussed in Respondents' initial brief, it is the Attorney General who acts as *parens patriae* and speaks for the Commonwealth in these matters. It is his task to assure that public charities serve the welfare of the citizens of the Commonwealth as a whole, and not just parts of the state. "The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue," and it is the Attorney General who oversees that interest. *In re Estate of Pruner*, 390 Pa. 529, 531-32, 136 A.2d 107, 109 (1957). The County's standing theory is at war with this idea, and would pit one Commonwealth governmental entity against another in a grab for the charitable benefits. The "economic pie" in which Montgomery County seeks to share, County

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3. Under the County's theory, not only does the County have standing to intervene in The Foundation's affairs, but Lower Merion Township does as well. And fairness would seem to require that if Montgomery County can participate in this proceeding, Philadelphia should be able to do so too. Nor does the list stop there. The County says that KerFeal would be transferred to Montgomery County's ownership, after which it "would be kept as open space and serve as security for the lease payments." County Br. at 3. Presumably, the County's standing theory therefore would permit Chester County and West Pikeland Township to participate in this case, since Barnes Foundation property located within their borders would be encumbered if the County's proposal were accepted.

Br. at 12, is that of the Commonwealth, not just the County. The historical and cultural value of The Foundation's treasures similarly is in trust for the Commonwealth, not just the County.[4]

It would do grave violence to the Commonwealth's interests to hold that the County has standing in matters of public charities just so that it can advocate resolution of a charitable issue in a way that benefits only itself, rather than the citizens of the Commonwealth as a whole. Disagreement with the Attorney General about how to resolve such issues does not create standing, *Hershey*, 590 Pa. at 45, 911 A.2d at 1263, and that must be especially true when those who disagree are constituent elements of the Commonwealth itself. As the Commonwealth Court held in *In re Phila. Health Care Trust*, 872 A.2d 258, 262 (Pa. Commw. 2005), in matters involving public charities "there is only one 'Sovereign,' and that Sovereign is the Commonwealth of Pennsylvania," which "must speak with one voice" through the Attorney General.

The only case the County cites for its "governmental entity" argument has nothing to do with private charities and does not support a contrary result. In *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 838 A.2d 566 (2003), *cited at* County Br. at 7-8, the City and its Mayor brought an original action in Commonwealth Court, challenging state legislation that, among other things, repealed part of a law that was integral to the City's budgeting process, made the City eligible for a number of grants and loans, and allowed the City to seek judicial review of arbitration awards and thereby to control its costs. 575 Pa. at 561-62, 838 A.2d at 578. The Supreme Court recognized the City's standing because "[t]hese repealed provisions were of substantial benefit to the City in its efforts to develop an approved financial plan, maintain its fiscal stability, and receive assistance from [the Pennsylvania Intergovernmental Cooperation

4. The County contends that The Foundation's gallery building in Merion has historical value, but this building would remain within the County under this Court's 2004 decree.

Authority]." *Id.* Here, by contrast, the County seeks to bring litigation that would interfere with the internal workings of a non-profit corporation. Rather than challenging state legislation or the repeal of legislation that directly affects the County's financial stability, the County is attempting to sue because it is unhappy with decisions made by trustees of a private charitable institution that happens to be located within its borders. Nothing in *City of Philadelphia* alters the long-standing Pennsylvania law authorizing the Attorney General alone to speak for the public interests at stake in charitable proceedings, and this decision does not confer standing here.

II. EVEN IF PETITIONERS HAD STANDING, THEY DO NOT MEET THE REQUIREMENTS FOR INTERVENTION UNDER THE RULES OF CIVIL PROCEDURE.

At the same time they filed their briefs, both the Friends Petitioners and the County filed putative petitions to intervene, in which they attempted to convert their respective petitions to reopen the proceedings into intervention petitions. Whether or not these after-the-fact petitions are sufficient to overcome the procedural defects in Petitioners' original filings that are noted in Part I of The Foundation's initial brief, the fact remains that Petitioners still lack standing to intervene and reopen these concluded proceedings.

In addition, even if Petitioners had standing (which they do not), the Court should deny a request to intervene if "the petitioner has unduly delayed in making application for intervention ***or*** the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." PA. R. CIV. P. 2329(3) (emphasis added). Under this rule, ***either*** undue delay ***or*** prejudice to the existing parties is a sufficient ground to deny intervention. Here, ***both*** reasons for denial of the petitions apply.

Delay. Petitioners' delay was inexcusable, and they make no real effort to justify it. In one of their more remarkable arguments, the Friends Petitioners suggest that their delay

can never be "undue delay" because "it was incumbent on the trustees of The Barnes Foundation to explore any and all opportunities that would fulfill the original intent of Dr. Barnes." Friends Br. at 9. Under this argument, any late idea conjured up by someone as a ground to reopen the proceedings can never be too late because The Foundation was supposed to have thought of that idea and solicited relief under it, and therefore is to blame for not having the idea surface sooner. This theory would license anyone to come up with any new idea at any time in the future and have it considered despite the proposer's delay. The record from the Original Petition makes clear that The Foundation did explore alternative sources of relief. The *amici* in that proceeding (one of whom is a petitioner here) made a number of alternative proposals, and they could have proposed something like the County's $50 million "offer," but did not. The Foundation cannot be blamed for the undue delay reflected in these petitions.

Of course, the County's offer and the Township's zoning amendment were not actually *made* until well after the Original Petition proceedings had concluded, and petitioners point out that they thus could not have known of them until then. *See* Friends Br. at 32-34; County Br. at 16-20. But whose fault is that? The County surely knew in 2004 that it was possible to make the "$50 million offer" if it wished to do so, but it remained silent, as did the Township, even though one of its commissioners testified at the 2004 hearing (admitting, at that time, that the Township had made no changes to its rules governing visitation to The Foundation, *see* Barnes Found. Br. at 32). In fact, both the Friends Petitioners and the County admit that they were aware of the Original Petition proceedings, which were filed amidst substantial publicity more than five years ago. *See* Friends Ans. ¶ 7; County Ans. ¶ 6. They offer no reason why the County could not have made its loan offer at that time, or why the Township, which vigorously and vehemently fought The Foundation for years, could not have eased the restrictions on visita-

tion to The Foundation's gallery before 2007. *See* Friends Br. at 24 ("The Friends of the Barnes agree with The Barnes Foundation that it would have been preferable for Montgomery County to have made its recent offer of substantial financial assistance before this Court issued its December 13, 2004 ruling. Likewise, it would have been preferable had Lower Merion Township approved the recent zoning changes before this Court issued its December 14, 2004 ruling."); *cf. Stevenson v. General Motors Corp.*, 513 Pa. 411, 422, 521 A.2d 413, 419 (1987) ("Piecemeal litigation is not to be encouraged" (citation omitted)).

As The Foundation explained in its initial brief (p. 34), it has taken pains in its preliminary objections to avoid factual disputes that would require a hearing, since these petitions can be dismissed without one. The Foundation thus has based its preliminary objections on the facts as Petitioners have alleged them. But it is useful to take a quick look at those alleged facts.

The main support for the petitions is the County's supposed "offer" of the $50 million loan. But the documents filed by Petitioners make clear that there never has been such an "offer." The only official action cited by the County is the hortatory resolution passed in January 2007 — two years after this Court's decree — that said The Foundation should abandon its plans to move its gallery, "explore all means to maximize revenues from operations in Merion and work with neighbors in Lower Merion to increase visitation and financial opportunities," and "explore avenues to integrate visitation into the Philadelphia tourist experience without relocating." County Br., Ex. A. It said nothing about a $50 million loan. Nor did the two other Barnes-related resolutions passed by the County in 2007 (and not cited in its petition or Brief) mention a $50 million offer; they dealt only with retention of counsel for the County's petition.

The loan "offer" to which Petitioners refer was a letter dated June 2007 — 2½ years after the decree — from Mark Schwartz, a former lawyer for the County and the Friends Petitioners, who, because he said he personally "fe[lt] it incumbent to offer a solution to be considered between adversary parties," asked that The Foundation enter into negotiations with the County for some sort of sale and leaseback deal. *See* County Br., Ex. B. He never said that the County would agree to such a deal. Although the County's petition says that "the Montgomery County Commissioners extended [this] offer" to The Foundation, it too cites only the lawyer's letter to support that allegation, and it is not even verified by any of the Commissioners as a formal indication that they support the proposal. *See* County Pet. ¶¶ 17-21 & Ex. B. Thus, neither the County's petition nor its brief cites any ordinance, resolution, or other document signed by any County Commissioner that formally adopts this proposal or extends this supposed "offer" to The Foundation.

The terms of the purported "offer" were and remain without substance. Petitioners talk about $50 million, but Mr. Schwartz mentioned that amount only as what "Judge Ott felt was necessary for sustaining an endowment." County Pet., Ex. B. He said that the County's bond rating "puts it in a unique position to pay a purchase price equal to or in excess of" that amount, but there is no offer to actually pay that sum, and Mr. Schwartz made clear that any price would depend on a real estate appraisal. *Id.* In light of the current turmoil in the real estate and bond markets, Petitioners' mention of "50 million" is highly speculative at the least. Other terms of the "offer" such as the debt service and rent amounts are not mentioned, and it is clear that the "offer" is a work in progress, as shown by the fact that it already has been changed to include a provision permitting The Foundation to regain ownership of its property at the end of the

lease term, *see* County Br. at 3, something Mr. Schwartz's letter never mentioned. Since no formal offer is on the table, other provisions can be expected to change at whim as well.

Finally, the purported offer raises a host of legal issues. Its premise is that the County can use tax-free municipal bonds to make a low-interest loan and that The Foundation can place those loan proceeds in an investment with a greater return than the interest on the loan, thereby realizing a profit that can plug part of The Foundation's budget gap. Even assuming the County could find authority under state law for it to issue bonds in that way, the gist of this "offer" is that the parties use municipal bonds for arbitrage. But the Internal Revenue Code has detailed restrictions against use of such "arbitrage bonds" without incurring adverse tax consequences that would offset any supposed financial benefit of the plan. *See* 26 U.S.C. § 148.

It is on the basis of this "offer" — a letter sent by the County's former counsel nearly three years after this Court's decree, suggesting negotiation about the lawyer's legally-suspect personal idea — that this Court has been asked to throw out a decree that was the product of two years of litigation and to revisit the entire issue of what measures are appropriate for The Foundation's financial survival. If "too little too late" means anything, it is this. All that really is at issue here is a simple idea — that the County might finance a loan to The Foundation. The County had to know that in 2004, before this Court issued its decree. All that has happened in the intervening three years is that a lawyer who no longer represents the County put that idea in a letter and invited discussion about it. The County could have done that in 2004 or earlier. If Petitioners are permitted to reopen these proceedings on evidence like this, then it is hard to imag-

ine how an end can ever be brought to these proceedings, for anyone can write a letter suggesting some new idea at any time from now into the indefinite future.[5]

At some point, the time for new proposals and new ideas for what the Barnes should do to fulfill its mission must be at an end. At some point, the delay of those like Petitioners — who were on notice of the proceedings and had it within their power to make offers but did not — becomes undue delay. This case is long past that time.

Prejudice. Petitioners say that their late efforts to overturn the 2004 decree will not prejudice The Foundation. That argument ignores all of The Foundation's diligent efforts to carry out the actions approved by this Court. The public record reflects these many achievements, including the careful expansion of The Foundation's Board with dedicated public-minded citizens focused on fulfilling Dr. Barnes' mission in accordance with the Court's decree; The Foundation's relentless efforts to successfully raise more than $150 million to fund construction of the new art education center that will house its gallery and collection on Philadelphia's Ben-

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5. Indeed, since all that exists today is Mr. Schwartz's letter, anyone at any future time can take some action supposedly in furtherance of the Schwartz offer and claim that this action constitutes some "changed circumstance" that calls for reconsideration by the Court. For example, if these petitions are dismissed and the Commissioners then (say, three months from now) elect to pass some new resolution or ordinance finally backing some version of Mr. Schwartz's proposal (or something else), will that be another "changed circumstance" that again is supposed to cause the Court to reopen the case? The question is not far-fetched. The other "changed circumstance" on which Petitioners rely is the July 2007 zoning amendment by Lower Merion Township, which increased the permitted number of gallery visitors and, the County notes (Br. at 4), provides that the Township can grant a special exception permitting still more visitors if The Foundation so requests. If the increase in visitation now permitted by the zoning amendment is deemed insufficient to justify revisiting this Court's decree, it is easy to envision yet another petition contending that allowance of still more visitors under the grant of a special exception will have sufficiently changed circumstances to justify new proceedings.

jamin Franklin Parkway, as well as to create a substantial endowment;[6] the removal of substantial political obstacles to clearance of the Parkway site for the art education center, through arrangements for relocation of the Youth Study Center that has been occupying that location; the successful conclusion of discussions with the City over the building site, culminating in a 99-year lease of the 4.5 acre property; the widely-lauded retention, following an international search, of renowned architects for The Foundation's new facility, as well as local associate architects; the undertaking of a complex pre-schematic design phase by the architects and parking studies for the new art education center; and the hiring of an owner's representative to oversee the facility's design and construction. Taken as a whole, these are "substantial, irreversible steps," Friends Br. at 24, toward carrying out the relief approved by this Court.[7]

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6. Contrary to the speculation in the Friends' brief (p. 3), The Foundation has raised the funds it needs for relocation of the gallery, and its fundraising efforts are now focused on enhancing the endowment that will cover its future operations.

7. In one of their many scurrilous accusations, the Friends Petitioners claim that The Foundation was "not being truthful" when, in its King's Bench Petition seeking dismissal of Mr. Raymond's appeal from the 2004 decree, it averred that implementation of the relief granted by this Court might be threatened if the Supreme Court did not act immediately. *See* Friends Br. at 28. The Foundation's statements were entirely accurate. If the Supreme Court had not granted the King's Bench petition and dismissed Mr. Raymond's meritless appeal, donors who had pledged $150 million in support for The Foundation, including funds necessary to plug The Foundation's continuing budget gap, would likely have withheld their donations until completion of the appellate proceedings. A sampling of the Supreme Court's most recent decisions shows that if allowed to continue in their ordinary course through Superior and Supreme Court review, those proceedings probably would still be pending today, more than three years after this Court entered its final decree. *See, e.g.*, *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa., Dec. 27, 2007) (trial court decision: June 6, 2002); *Wimer v. Pennsylvania Employees Benefit Trust Fund*, 939 A.2d 843 (Pa., Dec. 27, 2007) (trial court decision: Sept. 10, 2002); *Gregg v. V-J Auto Parts Co.*, 2007 Pa. LEXIS 2935 (Pa., Dec. 28, 2007) (trial court decision: Nov. 10, 2003); *Commonwealth v. Mallory*, 2008 Pa. LEXIS 100 (Pa., Feb. 19, 2008) (trial court decision: Mar. 2, 2004). Without the pledged funds, The Foundation would not only have been unable to move forward with the steps it has taken toward construction of its new art education center in Philadelphia, but it likely would have faced a growing budget deficit and a serious financial crisis.

Petitioners' argument also ignores the three years of extensive and very expensive litigation involving the Original Petition. That litigation was a substantial undertaking for a non-profit charitable institution like The Foundation, and Petitioners cannot cavalierly pretend that it was of no significance.

More generally, The Foundation has engaged in a substantial campaign to win public support and financial backing for the expanded program that has been permitted by the Court's decree. Private citizens and philanthropic organizations have embraced The Foundation's new program and contributed generously to permit its fulfillment. The Foundation's campaign has not been just about raising money. It also has secured and bolstered the institution's good will in the community, which is inextricably tied to The Foundation's future success. Internally, The Foundation has been focused not just on building its new art education center in Philadelphia, but on preparing for its future under the three-campus model approved by the Court, which will bring about the most substantial changes to The Foundation since its founding 85 years ago. Employment decisions and long-term planning necessarily have had to be addressed with these changes in mind. To suddenly pull the plug on these plans and to tell all of those associated with The Foundation — both its external supporters and its internal personnel — that The Foundation must revert to its past setup in Merion undoubtedly would deflate the substantial enthusiasm that has arisen for The Foundation, undermine The Foundation's internal morale and community support, and do grave harm to The Foundation, jeopardizing any hope of future success.

Petitioners are threatening the very life of The Barnes Foundation. The time for last-minute suggestions and hypotheses is over. Because of both the undue delay and the prejudice to The Foundation, Petitioners' request for intervention should be denied.

III. THE PETITIONS SHOULD BE DISMISSED BECAUSE THE ISSUES RAISED BY THE PETITIONS HAVE ALREADY BEEN DECIDED BY THIS COURT IN A FINAL DECREE.

Both the Friends Petitioners and the County argue that this Court's final decree, entered after more than two years of extensive litigation, should be shunted aside because of supposedly unforeseen developments since that time. In making this argument, the County disclaims any interest in reopening the prior proceedings that led to this Court's final decree, though the County's lawyer, in a document the County attached to its brief (as Exhibit B), admitted that the County had retained him "to represent them in litigation to reopen proceedings" before this Court. This admission, which is binding on the County (*see* PA. R. EVID. 803(25)(B)-(D)), is consistent with the argument by the Friends Petitioners, who repeatedly emphasize that their core request is that this Court reopen the prior proceedings and reconsider its final decree.

However framed, there is no doubt that the relief both sets of Petitioners seek would require the undoing of this Court's prior decree. That decree was the product of extensive discovery, testimony from more than a dozen witnesses, consideration of hundreds of exhibits, numerous briefs setting forth contested legal issues, and two carefully crafted opinions by this Court. Moreover, as both the Friends Petitioners and the County admit, the three Foundation students who were given *amici* status in those proceedings "participated fully" in the Original Petition proceedings and strenuously objected to the relief sought by The Foundation. *See* Friends Ans. ¶ 9; County Ans. ¶ 8. The entire purpose of those proceedings was to determine whether The Foundation needed to deviate from the strict terms of its governing documents in order to continue fulfilling its mission. Testimony was offered regarding possible alternatives to The Foundation's requested relief of (among other things) relocating its gallery to Philadelphia. Testimony also was offered — even from a Township commissioner — about The Foundation's

multiple efforts to obtain changes to the onerous visitation limits imposed on it by the Township.[8]

Thus, to the extent the County (or the Township) have *now* come forward with proposals for "financial assistance" or increased visitation to The Foundation's gallery, these can not be considered unforeseen developments. They may be "new," in the sense that, for more than a decade, the Township did all that it could to restrict visitation to The Foundation and the County and Township sat on their hands throughout the Original Petition proceedings and only made these offers in 2007, more than two years after the prior proceedings had finally concluded. But the issues of financial assistance and relaxation of visitation restrictions were front and center in the Original Petition proceedings.

The Friends Petitioners imply that none of this matters because, they say, this Court's final decree is in the nature of an injunction that is always subject to revision as changed circumstances dictate. *See* Friends Br. at 21-22. They offer no support for that view. An injunction "is a court order *prohibiting* or *commanding* virtually any type of action." *Levin v. Barish*, 505 Pa. 514, 523, 481 A.2d 1183, 1187 (1984) (emphasis added); *see* also BLACK'S LAW DICTIONARY 800 (8th ed. 2004) (defining injunction as "a court order commanding or preventing an action"). But as the Friends Petitioners and the County concede (Friends Br. at 3; County Br. at 2), this Court's decree did not *prohibit* The Foundation from doing anything or *command* it to

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8. The Foundation's witnesses made clear during the Original Petition proceedings that, although expanded public visitation would be an inadequate solution to The Foundation's financial distress, The Foundation would welcome a relaxation of the Township's restrictions so that it could expand public access at those times when its gallery was not being used for The Foundation's educational programs. In that connection, The Foundation recently increased the number of individuals who can visit the gallery to 450 on each day that the gallery is open to the public and has expanded those days to five per week (Wednesday through Sunday) in July and August, when no classes are held in the gallery.

take any action. Rather, it granted The Foundation *permission* to undertake particular action, including amending its governing documents and relocating its gallery. The Court's decree has nothing in common with an injunction and is not subject to alteration whenever third parties allege that circumstances change. The Court did not keep the proceedings open or say it was retaining jurisdiction to hear future claims.

Finally, both the Friends and the County emphasize that this Court's final decree "permits" (or "authorizes") The Foundation to relocate its gallery but does not "mandate" (or "require") it. *See* County Br. at 2; Friends Br. at 3. This self-evident point proves nothing other than that, as noted above, the Court's decree is not an injunction. The Foundation's Trustees administer The Foundation; this Court, pursuant to its statutory mandate, oversees The Foundation as a public charity, but does not administer it. Thus, this Court would not *require* The Foundation to relocate its gallery. That was a decision for the Trustees, who therefore sought *permission* to amend The Foundation's governing documents and relocate the gallery to Philadelphia when they determined that this was the appropriate means to ensure The Foundation's survival. The Court's final decree granted The Foundation's request, permitting the changes to be made and the relocation to go forward. Petitioners offer no valid basis to undo that decision.

IV. PETITIONERS' SCANDALOUS AND IMPERTINENT MATTER RELATING TO THE CAPITAL BUDGET ACT SHOULD BE STRICKEN.

The County makes no effort to defend its allegations regarding the Capital Budget Act. Those allegations should be stricken. Although the Friends Petitioners are not as silent as is the County on this issue, it is clear that their allegations should be stricken as well.

The Friends Petitioners devoted much attention in their petition to the Capital Budget issue and The Foundation's purported misconduct in failing to bring this issue to the

Court's attention during the Original Petition proceedings. *See* Friends Pet. ¶¶ 22, 35, 53, 69-80, 140, 177, 188, 196 and 227. Yet, in their answer to The Foundation's preliminary objections, they admit most of The Foundation's averments regarding the Capital Budget Act, including that no money was appropriated to The Foundation during the Original Petition proceedings, the itemizations in the Capital Budget Act were nothing more than a wish list of capital projects submitted by legislators, many additional steps and approvals were required before The Foundation could receive any money from the state for a building in Philadelphia, and all of this information was publicly available before the Friends Petitioners filed their petition. *See* Friends Ans. ¶¶ 39-47. They even admit that they cannot allege (consistent with Rule 1023.1(c)(3)) that Respondents or anyone else involved in the Original Petition proceedings knew about the itemizations for The Foundation in the Capital Budget Act at the time of those proceedings, *see* Friends Ans. ¶ 48, though they nonetheless persist in their outrageous allegations.[9] By their own admission, the Friends Petitioners make clear that they had no basis to make the scandalous and impertinent allegations in their petition (and in their brief) regarding the Capital Budget Act. On this basis alone, these allegations should be stricken.

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9. *See, e.g.*, Friends Br. at 9 (accusing The Foundation's Trustees of "lining up the $107,000,000.00 in funding from the Commonwealth of Pennsylvania"); *id.* at 10 ("Despite protestations by The Barnes Foundation's leadership and the Attorney General's Office denying any prior knowledge of this 'Immaculate Appropriation' legislation, their pleas of ignorance are incredible"); *id.* at 12 ("It defies belief that neither The Barnes Foundation itself — as the subject of this legislation — nor the Attorney General's Office . . . was aware of the legislation's existence"); *id.* at 12-13 ("The Barnes Foundation and the Attorney General apparently failed to disclose the legislation's existence from this Court . . ." (*sic*)); *id.* at 35 ("It defies belief to suggest that neither the recipient of a $107,000,000.00 legislative earmark nor the Attorney General of Pennsylvania were aware of this budget itemization between the time it was enacted in 2002 and the time this Court issued its ruling in December 2004"); *see also* County Br. at 22 ("It would be unfair for the Foundation to claim prejudice for relying on a decision which was in the slightest way a product of the Foundation's own lack of full disclosure.").

The Capital Budget Act was and is a red herring. The scurrilous claims regarding it should be removed from the case.

V. THE FOUNDATION IS ENTITLED TO COUNSEL FEES FOR PETITIONERS' ARBITRARY AND VEXATIOUS CONDUCT.

The Friends Petitioners say that they are seeking only "to vindicate the charitable intentions of Dr. Barnes." Friends Br. at 37. Ignoring the large body of case law — including *Barnes*-specific case law — making clear that they have no standing to bring an action of this type, they argue that no court has ever dealt with their standing in the context of a petition to open proceedings, so that the standing cases do not apply. *Id.* They make that argument although their brief makes no effort to defend their standing in this case and tries to suggest that the Court should bypass the entire standing issue and find a way to permit them to participate in the case as *amici*. It is clear that the Friends Petitioners had no right to bring their petition and they knew it. Their repeated efforts to thwart The Foundation's conduct of its business is arbitrary, vexatious, and calls for an award of The Foundation's counsel fees as a sanction.

CONCLUSION

For the foregoing reasons and those set forth in Respondents' initial brief, Respondents respectfully request that the Court sustain their preliminary objections to the Friends Petition and the County Petition, dismiss both Petitions with prejudice, and provide the additional relief requested in the preliminary objections and supporting briefs.

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Dated: March 19, 2008.

CERTIFICATE OF SERVICE

I, Bruce P. Merenstein, hereby certify that I caused to be served the foregoing Reply Brief in Support of Preliminary Objections on March 19, 2008, by UPS Next-Day Delivery, on the following:

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