

The Commonwealth of Massachusetts

SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

JOHN ADAMS COURTHOUSE

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March 4, 2009

Susan Hughes Banning, Esquire
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Boston, MA 02109

RE: No. SJ-2008-0532

THE ISABELLA STEWART GARDNER MUSEUM, INC.
vs.

MARTHA COAKLEY, as she is the ATTORNEY GENERAL of the
COMMONWEALTH OF MASSACHUSETTS, PRESIDENT AND FELLOWS OF HARVARD
COLLEGE; MASSACHUSETTS GENERAL HOSPITAL and BRIGHAM AND WOMEN'S
HOSPITAL

NOTICE OF DOCKET ENTRY

You are hereby notified that on March 4, 2009, the following
was entered on the docket of the above referenced case:

Memorandum and Judgment, as on file. (Spina, J)


Maura S. Doyle, Clerk

To: Stephen W. Kidder, Esquire
Michael J. Puzo, Esquire
Susan Hughes Banning, Esquire
Cornelia R. Tenney, Esquire
Johanna Soris, Assistant Attorney General
David G. Spackman, Assistant Attorney General
Elizabeth Seaman, Esquire
Frank J. Connors, Esquire
Paul G. Cushing, Esquire
Lynne S. Viti, Esquire

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. SJ-2008-0532

THE ISABELLA STEWART GARDNER MUSEUM, INC.

vs.

MARTHA COAKLEY, AS SHE IS THE ATTORNEY GENERAL, *ET AL.*

MEMORANDUM AND JUDGMENT

The plaintiff has brought a complaint in equity, pursuant to G. L. c. 214, §§ 1 and 10B, seeking approval of an alleged reasonable deviation from the terms of the Will of Isabella Stewart Gardner. The Attorney General has been served, and assents to the prayer for relief. Also served, and assenting, are the President and Fellows of Harvard College. Massachusetts General Hospital and Brigham and Women's Hospital have been served, but have filed no answer. The Friends of Historic Mission Hill are not parties to this action, but they have been permitted to file an *amicus curiae* brief, and they oppose the relief sought.

It is important to state at the outset that the complaint does not allege a failure of the ability to carry out the primary charitable purpose of the testatrix, to which the doctrine of *cy pres* would apply. Rather, it alleges that the public interest supports a

reasonable deviation from certain subordinate terms of the will. See *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521, 531 (1970). The primary purpose of the testamentary gift is to provide a museum "for the education and enjoyment of the public forever." The plaintiff does not seek to change or supplant that purpose. The plaintiff merely requests authorization to (1) remove the carriage house, (2) create a new entrance through the East Cloister, including relocation of a sarcophagus and surrounding art objects, (3) construct a new building for administrative offices, a museum gift shop, a café, a visitor reception area, and facilities for shipping, receiving, and storage, and (4) construct a glass-enclosed pathway between buildings. These purposes are subordinate to the primary purpose.

Article Fourth of the Will permits new construction "if the Trustees deem it . . . expedient for the protection or benefit of the Museum," which they do. It does not expressly prohibit removal of the carriage house, which has fallen into a state of disrepair. Article Seventh of the Will provides for forfeiture to the President and Fellows of Harvard College if the Trustees "shall at any time change the general disposition or arrangement of any articles which shall have been placed in the first, second and third stories of said Museum" (emphasis added). Removal of the carriage house is not affected by Article Seventh. Creation of the new entrance, with relocation of the sarcophagus and surrounding art objects, is not expressly prohibited by Article Seventh, and is only a deviation from the subordinate provisions of the charitable purpose of the testamentary gift.

The overall project is in the public interest because it is conceived in response to greater wear and tear on the building by the considerable increase in usage of the museum by the public, in response to the increased risk in damage to exhibited artwork resulting from the higher level of foot traffic, and in response to the need to improve the environment for art appreciation by reducing congestion resulting from the high volume of visits to the museum.

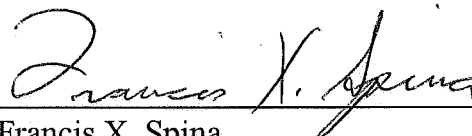
The *amicus* charges the plaintiff with a failure to consider other alternatives. The record, however, suggests otherwise. The plaintiff voluntarily submitted its proposal to the Boston Landmarks Commission for advisory design review. Part of that process required the plaintiff to explore design alternatives. The Commission concluded that retention or relocation of the carriage house was not feasible, and it approved the conceptual design of the proposed project. The plaintiff also completed an Article 80 review process with the Boston Redevelopment Authority, and a historic preservation review with the Massachusetts Historical Commission. There were a number of community meetings and public hearings, and the process provided exhaustive scrutiny and review of the plaintiff's proposed project, including consideration of alternatives. The result in each instance was an approval, or equivalent endorsement, of the plaintiff's proposed project.

I conclude that the plaintiff's proposed project is a reasonable deviation from subordinate terms of the charitable gift in the Will of Isabella Stewart Gardner. It is driven by the primary purpose of the charitable gift. It is entirely consistent with the

primary purpose. It is in the public interest because it will extend the life of the building, it will reduce the risk of harm to the art objects from the increased number of visitors to the museum, and it will make a visit to the museum more meaningful for viewing art by reducing congestion.

The plaintiff's prayer for relief is hereby ALLOWED.

By the Court,

A handwritten signature in cursive script, reading "Francis X. Spina", is written over a horizontal line.

Francis X. Spina
Associate Justice
Supreme Judicial Court

ENTERED: March 4, 2009