

OPINION
AND
HISTORICAL
BACKGROUND
ON
BIERSTADT PAINTINGS

FROM 1919 TO 1987

CITY CLERK'S OFFICE
FEBRUARY 24, 1992



MEMORANDUM

DATE: August 23, 1986
TO: Jerome C. Harris, Jr., City Administrator
FROM: Jacqueline R. Drakeford, City Solicitor
RE: Sale of Bierstadt Paintings

This memorandum is being submitted in response to the request of the City Council for an opinion as to (1) whether the Bierstadt paintings presently in the Municipal Court can be sold and (2) whether the sale of the paintings to establish a youth foundation can be submitted to the voters in a non-binding referendum.

The proposed referendum put forth by a resident of the City would ask the voters to decide if the Bierstadt painting(s) should be sold and the proceeds used to establish a youth foundation. It is my opinion that the proposed referendum question as formulated cannot be submitted, for the City does not have the authority to sell the paintings without Court approval. An action for declaratory judgment is the established mechanism for obtaining the legal authority to deviate from the terms of the trust held by a municipality for the public benefit. Furthermore, the State of New Jersey, as parens patriae, is the guardian of public charitable trust. As such, the Attorney General would be a necessary party to any such suit, as it is his duty to see that the public interests are protected in the administration of a public charity. N.J.S.A. 52:17A-4(c); In Re Katherine Frey Dickerson, 193 N.J. Super. 353 (Ch. Div. 1983); In re Katz's Estate, 40 N.J. Super. 103 (Ch. Div. 1956).

This is not to say, however, that a non-binding referendum is totally ruled out. Using the principle that a referendum question must relate to an action which the City has authority to take, Gamrin v Mayor and Council of Englewood, 76 N.J. Super 555 (Law Div. 1962), the Council could submit a question to the voters whether it should seek to sell the

Bierstadt paintings, and if so, to what project the voters would like the funds allocated. Thus, a question such as: "Should the City seek to sell the Bierstadt paintings?" could be put to the voters.

If such a question were put to the voters and answered in the affirmative, the Council is not bound by the vote, and can accept or reject the results of the referenda. If it decided to proceed, it would have to seek judicial approval of the sale under the doctrine of cy pres, discussed in more detail in the pages that follows.

At this point, however, another point should be brought to the Council's attention. Since the discussion of the referendum issue at the August 18, 1986 Council meeting, it has been discovered that the 60 day advance filing requirement has been amended to 74 days. Thus, it is too late to submit this question in this year's election. However, since the question is one of a recurring nature and one that will be all probability resurface in the coming months, I have set forth for the Council's consideration the legal parameters of this matter.

HISTORICAL BACKGROUND

On October 6, 1919, Dr. J. Ackerman Coles of Scotch Plains, New Jersey offered to donate two masterpiece paintings by Albert Bierstadt to the City of the Plainfield in memory of his father, the late Abraham Coles, who had as a young man taught Latin and Mathematics in a school operated by the First Presbyterian Church of Plainfield.

The two paintings, known as "Autumn in the Sierras" (also known as the "Rocky Mountain Scene") and "The Landing of Columbus" were painted by Albert Bierstadt in the late 1800's. Bierstadt, who was born in Germany in 1830, had achieved world-wide recognition for his portrayals of the American land and its people. His paintings are represented in many art museums, including the Metropolitan Museum of New York City and the Cocoran Art Gallery of Washington, D.C.

At the October 6, 1919 meeting of the Common Council of the City of Plainfield, the Council by resolution accepted Dr. Ackerman's offer and thanked him in their own behalf and in the name of the people of the City of Plainfield for his "very generous and thoughtful gift to the City". A certified copy of the resolution was sent to Dr. Coles by the City Clerk on October 10, 1919.

On October 20, 1919, Dr. Coles' letter was reported back to the Council for filing and advice given that the pictures had been placed in the Public Library "to the satisfaction of the City and to Dr. Coles the liberal donor". The Bierstadt paintings remained in the library until late 1967, when the Library Board requested they be moved due to space limitations in the new library building. The Columbus picture was placed shortly thereafter in the Municipal Courtroom where it now hangs. The Autumn in the Sierras painting was hung in the Plainfield Trust State National Bank, now the United National Bank. The two paintings were appraised in 1969 at \$55,000 and have more recently been appraised at approximately \$600,000.

The Bierstadt paintings have brought considerable publicity and attention to the City of Plainfield. There have been many requests to display the painting in this country, including a display at the U.S. Department of State in 1980, and loan to the Amon Carter Museum in Fort Worth, Texas in 1975 for a nationwide tour of 85 of Bierstadt's works. More recently, the paintings were photographed by a German firm for its 1987 fine arts calendar.

The paintings, particularly Columbus picture, have also

been a continuing source of controversy. Since at least 1965, various civil rights groups and citizens of Plainfield have criticized either the location and/or ownership of the Columbus painting because of its portrayal of Indians kneeling before Columbus and his landing party. The portrayal of the Indians has been characterized by some as a demeaning and offensive statement of colonial expansion and superiority. More specific charges have been leveled that the picture has negative visual and psychological effects on the minority citizens who must view the picture while justice is being dispensed by the Municipal Court Judge and that the money derived from sale of the paintings could be put to better use.

Numerous newspaper articles and letters recount the number of times that the issue of the Bierstadt paintings has been brought to the rail of the City Council and the lengthy discussions that have accompanied this issue. In 1977, the Office of Budget & Community Relations conducted an informal survey of approximately 1900 citizens, wherein the citizens opted on a two to one basis to retain the paintings rather than sell them. More recently, the Council has been requested to submit to the voters a non-binding referendum as to whether the paintings should be sold to establish a youth foundation. It is this more recent issue that has generated the request for the within opinion.

DISCUSSION

The governing body of a municipality or county can by resolution or ordinance submit a non-binding referendum on a question or policy pertaining to the government or its internal affairs to ascertain the sentiment of the voters. N.J.S.A. 19:37-1. Such a referendum does not compel the governing body to take action, but has been provided to encourage citizen interest and participation in municipal affairs. As such, its provisions are liberally construed. Borough of Eatontown v. Danskin, 121 N.J. Super. 68, 76 (Law Div. 1972).

The time period for submission of such request to the County Clerk, however is mandatory. Formerly 60 days, the filing deadline has now been extended to 74 days. Camden County Bd. of Chosen Freeholders v. Keating, 193 N.J. Super 100 (Law Div 1983), aff'd. 193 N.J. Super 111 (1983). At this time, therefore, the time period for submission, which would have been August 22, 1986, has elapsed and any proposed referendum must be submitted next year.

There is case law that holds that a municipality cannot submit for referenda a question that it does not have the authority to act upon or is not within its power to perform. Gamrin v. Mayor and Council of Englewood, 76 N.J. Super 555 (Law Div. 1962); Santoro v. South Plainfield, 57 N.J. Super.

498 (1959). Thus, any referendum that would be submitted must conform to the municipal authority to act.

The threshold question to be determined before a decision on referendum can be made, then, is whether the City of Plainfield has the authority to sell the Bierstadt paintings, and if so, for what purposes.

Dr. Ackerman's gift letter to the City, a copy which is attached hereto, sets forth his desire to donate two valuable and cherished paintings to the City for the benefit of the people of Plainfield and as a memorial to his father. The City was authorized to accept the gift as dedicated for public purposes pursuant to statute and apparently did so in 1919 with much enthusiasm and gratitude. In so doing, a charitable trust was created, for when a municipality accepts a gift on behalf of the City, it holds such gift in trust for the public. Coles v. City of Newark, 95 N.J. Eq. 73 (Ch. 1923); Connecticut College v. U.S., 176 F.2d 49 (D.C. Cir. 1961). In the many years that have elapsed since the acceptance of the paintings, many changes in the fabric of Plainfield's society have taken place. The change of times and heightened social consciousness has, brought about a change of heart and/or awareness on the part of some of the public with regard to the Bierstadt paintings.

A gift for the benefit of an indefinite number of persons, by bringing their minds or hearts under the influence of education or learning is charity in the legal sense. Wilber v. Owens, 2 N.J. 167, 174 (1949); George v. Braddock, 45 N.J. Eq. 757 (E. & A. 1889). Furthermore, a memorial to the memory of a loved one still constitutes a charitable gift, so long as some public benefit is derived therefrom. Woodstown Nat. Bank & Trust Co. v. Snelbacker, 136 N.J. Eq. 62; Bogert, Trusts & Trustees, Sec. 366 at 43. The fact that the donor seeks to establish a memorial to a relative does not negate the charitable nature of the act, so long as public benefit is derived therefrom. Similarly, if the general purposes for which the trust is created may reasonably be regarded as the interest of the community, the mere fact that the Court of majority of people may believe the particular purpose unwise does not serve to render the trust noncharitable. Id.

There are occasions, however, when a gift is made to a City where the intended use is either impractical, impossible, or illegal. The Cy Pres doctrine may be applied in such cases, so long as it would be consistent with the expressed will of the donor. Id.

Cy Pres is "the doctrine of nearness or approximation." Wilber v. Owens, 2 N.J. at 177; MacKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 654 (E. & A. 1905). In order to invoke this doctrine, it must appear that (1) it is impossible or impractical to carry out the donor's intention and (2) that the donor manifested a paramount intention of charity in a general sense rather than the specific purpose set forth in the trust or gift. Howard Savings Institute v. Peep, 34 N.J. 495, 501 (1961); Wilber v. Owens, supra, 2 N.J. at 177; Scott on Trusts, Sec. 399. Put differently, the trust instruments must indicate a general intention or dominant purpose that the property is to be devoted to charitable purposes regardless of the particular method of execution. If this general charitable intent is lacking, the doctrine of Cy Pres cannot be applied and the trust would lapse, or revert to the heirs or residual beneficiaries of the donor. Tp. of Cinnaminson v. First Camden Nat. Bank, 99 N.J. Super. 115, 119 (Ch. Div. 1969); 16 Rutgers Law Rev. 352, 363 (1962).

The Cy Pres doctrine, then is an intent-enforcing doctrine wherein the surmised intent of the donor is determined by a court. Recognizing that a donor rarely contemplates the possible non-fulfillment of his precise purposes, the court must make an educated guess based on the trust instrument and relevant extrinsic evidence as to what the donor would have done had he been aware of the circumstances which have frustrated his original intent. Howard Savings v. Peep, supra, 34 N.J. 501; 2A Bogert, Trusts & Trustees, Sec. 436 at 344 (1953).

There are difficult questions to be resolved in determining whether the Bierstadt gift meets the above stated criteria. The continued display or ownership of the paintings is neither impossible or illegal. Moreover, there is no requirement that the paintings remain where they are presently located, and if feasible, could be moved to a suitable location in the City. The only argument left, then, is that continued ownership of the paintings has become impractical because changed social conditions and perceptions have impaired the usefulness of the gift to the residents of Plainfield. The courts have more recently construed impossibility or impracticability to include cases where continued compliance would be highly undesirable. For instance, there have been instances where the courts have permitted discriminatory restrictions based on race, religion or creed to be deleted from language in trust instruments for scholarships or other funds dedicated to a particular charity. See, e.g. Wachovia Bank &

Trust Co. v. Bucanan, 346 F. Supp. 665 (D.C. Cir.1972); Howard Savings Bank v. Peep, supra, 34 N.J. at 4947. In such cases, the objectionable language is deleted and the trustee permitted to administer the trust fund to qualified applicants on a non-discriminatory basis, on the theory that the language of the trust evidenced the donor's intent to benefit the recipient in a general sense.

It is obvious that the Bierstadt issue cannot be so easily resolved, since the controversial portion of the paintings cannot be removed. Therefore, if the public sentiment of the City is that the picture is offensive and no longer appreciated, further consideration would have to be made by a Court as to whether an alternative disposition does no great violence to Dr. Coles intent.

There is the further condition, however, of proving that Dr. Coles had the intent to bestow charity on the City in a general basis, as distinguished from a more specific intent to donate a cherished work of art. In this vein, there is an unpublished opinion involving the City of Paterson that while not necessarily controlling, is on point. In Sterling v. Board of Library Trustees of the Paterson Free Public Library, Docket No. C-641-82 (Ch. Div. Passaic Cty. 1982), a citizens group challenged the Library Trustees' decision to sell one or more of the paintings for at least \$175,000 in order to provide sufficient funds to maintain the library for the remainder of the year. Judge Peter Ciolino issued a injunction permanently restraining the Paterson Library from selling or otherwise disposing of certain valuable oil paintings comprising the "Hobert Collection", on the grounds that the paintings were dedicated to the library as a memorial for Garret A. Hobert and that the Library Trustees held the paintings in trust for the purpose of such memorial and for the benefit of the residents of the City of Paterson. The court made its ruling despite the fact that the paintings was kept in a vault and not open to the public.

There was additional evidence in the Paterson case of the donor's wish that the paintings remain, for when asked as to what she wished to do with insurance proceeds in the event of a fire, Mrs. Hobart indicated that as this "was a memorial to my husband, placed in the care of the Public Library, I would not wish, through lack of care, to have someone else buy pictures to add to this memorial."

With regard to Dr. Coles, there is no additional written evidence on hand specifically referring to his desires

in the event another disposition of the paintings was required.

However, a reasonable estimate of Dr. Cole's intent in donating the Bierstadt paintings can be gleaned from his letter to the City. His evident interest was in the hanging of the Bierstadt paintings in the City, and there is no indication that Dr. Coles had any intention other than to share a cherished and valuable work of art with the people of Plainfield in recognition of his father's labors in the City. Dr. Cole's interest in the life and adventures of Columbus are also very much evident in his flowery and poetic tribute to Columbus. Thus, a court may well find that the generalized charitable intent necessary to apply the doctrine of Cy Pres is lacking.

This conclusion may be reinforced by a 1923 case involving Jonathan Ackerman Coles v. the City of Newark. In that case plaintiff Coles brought suit to prevent the City of Newark from moving a valuable "Indian Group" statue from the Lincoln Park site selected jointly by him and the City to another section of the Park. Coles claimed that the monument was to commemorate the historic fact that New Jersey was acquired from the Indians without bloodshed, and that the mutual selection of the site by him and the City before the completion of the gift implied a condition that the statue not be moved.

In rejecting Coles' claims, the Court held that the gift was without condition for the public purposes of ornamentation and embellishment of the City, and remotely for charity. The Court concluded that the gift rendered complete title in the City, held by it in trust, "forever and always so long as the monument endures and serves the public interest, and that the City could use the statue in a reasonable manner to beautify the city. 95 N.J. Eq. at 75. In so holding, however, the Court rejected the City of Newark's claim that it could do what it wanted with the monument, including sale or demolition. The court stated that so long as the monument served the public use, the trust would continue and that any sale or demolition of the statue would be an abuse of the trust the City owes the public, and would be enjoined upon proper application. Id.

There are compelling similarities in the Coles v. Newark case. It is quite possible that the Jonathan Ackerman Coles who in 1923 retained the firm of McCarter & English to prevent moving an Indian statue from being moved to another location is the same J. Ackerman Coles that in 1919 donated the Columbus Landing picture depicting Indians to the City of Plainfield as a tribute to his father. If so, a court could find that this same person who took offense at the moving of an object of art would not have wished the sale of the Bierstadt

paintings to fund municipal projects.

Furthermore, even if a court were to determine that Dr. Coles had the general charitable intent necessary to invoke the doctrine of cy pres, it does not necessarily follow that the court would permit the sale of the paintings to fund municipal activities. The court would sanction a use that is closely similar to the original purpose, which in this case might be narrowly construed to mean display of the work of art elsewhere. The fact that the City decides that it no longer wishes to display the painting or hold the paintings in trust for the public is not necessarily controlling, for in cases where a trustee is unwilling to act, the court will appoint a substitute trustee who would be willing to display the paintings in accordance with the donor's original wishes. See Martin v. Haycock, 140 N.J. Eq. 450, 458 (Ch. 1947).

SUMMARY

The issue of whether the City should seek to sell the Bierstadt paintings can be put to the voters, but cannot be implemented unless approved by the courts. If an application is made, the court will look to the continued usefulness of the gift, and attempt to surmise or deduce what Dr. Coles would say were he still alive. Assuming that cy pres doctrine can be invoked, the method of disposition, e.g. sale, is still subject to scrutiny to conform to the donor's wishes as nearly as possible.

CITY OF PLAINFIELD



New Jersey

P.O. Box 431
515 Watchung Avenue
Plainfield, N.J. 07061

TO: EMILIA R. STAHURA, CITY CLERK
FROM: JACQUELINE R. DRAKEFORD, CITY SOLICITOR
DATE: AUGUST 25, 1986
RE: LEGAL OPINION - SALE OF BURSTADT PAINTING

Attached please find a copy of letter from Dr. J. Ackerman Coles to the City, which should have been appended to my memorandum of August 23, 1986. Kindly distribute copies of the letter to Council members at tonight's meeting. Thank you.

JRD:v
Attachment

cc: Jerome C. Harris, Jr., City Administrator, w/encl.

Oct. 6, 1919

Dewhurst
Scotch Plains
Union County, New Jersey.

To the
Honorable Leighton Calkins,
Mayor of the City of Plainfield, N. J.
To the Honorable Thomas F. Hyland,
President of the Common Council.
To Mr. Alexander Gilbert,
President, the City Library

Received Office
of City Clerk
Oct. 6, 1919
Plainfield, N. J.

Gentlemen:

Few paintings, if any, of modern date equal in beauty, merit and historic value the two famous paintings (8 ft. by 12 ft.) by the world renowned artist Albert Bierstadt and known as "The Rocky Mountains" now in the Metropolitan Museum of New York City, and "The Landing of Columbus with his companions at San Salvador," Oct. 12, 1492.

The Columbus painting, with another depicting a Rocky Mountain Scene, a companion to the Bierstadt painting in the Corcoran Gallery in Washington, D. C. (valued at \$3500.00) are in my New York City residence, and I now offer them as gifts to you for the City of Plainfield, in memory of my father, the late Abraham Coles, A.M., M. D., Ph.D., L.L.D., who was born at Scotch Plains, Union Co., New Jersey, Dec. 26, 1813, and when a young man taught Latin and Mathematics in the School of the Rev. Dr. Bond in the basement of the First Presbyterian Church of Plainfield, N. J.

Washington Irving in his "Life of Columbus" says "Eighteen years elapsed after the time that Columbus conceived his enterprise, before he was enabled to carry it into effect, that the greater part of that time was passed in almost hopeless solicitation, amidst poverty, neglect, and taunting ridicule, that when his perseverance was finally crowned with success he was about his fifty-sixth year."

"Having scrupulously attended to all the claims of affection, loyalty, and justice upon earth, Columbus turned his thoughts to heaven. He expired with great resignation on the day of Ascension, the 20th of May, 1506, being about seventy years of age. His last words were:

"In manus tuas Domine, Commendo spiritum meum."

"Into Thy Hands, O Lord, I commend my spirit."

Awaiting a reply, I am,

Dr. Bond in the basement of the First

Baptist Church of Plainfield, N.J.

Washington Spring in his Life of Columbus says "Eighteen years elapsed after the time that Columbus conceived his enterprise, before he was enabled to carry it into effect. That the greater part of that time was passed in almost hopeless solicitation, amidst poverty, neglect, and taunting ridicule, that when his perseverance was finally crowned with success, he was about his fifty-sixth year."

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Into Thy Hands, O Lord I commend my spirit."

Awaiting a reply, I am,

Yours Respectfully,

J. A. Newman/Coles, (M. S., S. S., D.)

RESOLVED, That the members of the Common Council on their own behalf and in the name of the people of the City of Plainfield most cordially thank Dr. J. Ackerman Coles for his very generous and thoughtful gift to the City of the three master piece paintings entitled, "The Rocky Mountains", "Landing of Columbus" and "Rocky Mountain Scenery"; and

BE IT FURTHER RESOLVED, That a copy of this resolution be forwarded to Dr. Coles.

Adopted by the Common Council

October 6, 1919

Approved by the Mayor

October 8, 1919

Alvin C. Collins
Mayor

Attest:

John J. Ansell
City Clerk.

October 10, 1919.

Dr. J. Ackerman Coles,
Wenwood, N. J.

My dear Sir:-

I hand you herewith certified copy
of resolution relative to your offer to present
to this City paintings entitled "The Rocky Moun-
tains", "Landing of Columbus" and "Rocky Mountain
Scenery", which resolution was adopted by the
Common Council at its meeting held October 6, 1919.

Yours truly,

LJC

CITY OF PLAINFIELD



New Jersey

P O Box 431
515 Watchung Avenue
Plainfield, NJ 07061

MEMORANDUM

RECEIVED

AUG 19 1987

CITY CLERK'S OFFICE

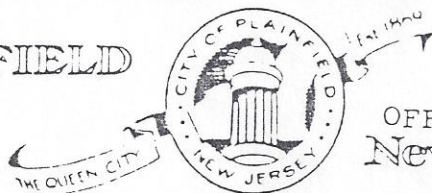
FROM: JACQUELINE R. DRAKEFORD, CITY SOLICITOR 
TO: EMILIA R. STAHURA, CITY CLERK
RE: BIERSTADT EXHIBITION
DATE: AUGUST 18, 1987

Pursuant to the City Council's request, enclosed please find original and two copies of amended resolution authorizing the exhibition of the Bierstadt paintings at the New York Historical Society. The resolution, as amended, requires that the exhibition agreement be presented to the Council for approval prior to final execution.

Kindly forward an executed copy of the resolution to myself and to Mr. Stuart Allen, so that same can be forwarded to the Historical Society. Thank you for your courteous cooperation.

JRD:fd
cc w/enc. Daniel A. Williamson, Esq.
Jerome C. Harris, Jr.
Stuart Allen

CITY OF PLAINFIELD



OFFICE OF THE CITY CLERK
New Jersey

P.O. Box 431
515 Watchung Avenue
Plainfield, N.J. 07061

August 20, 1987

Mr. Stuart Allen, Chairman
Plainfield Cultural and Heritage Commission
718 Sherman Avenue
Plainfield, New Jersey 07060

Dear Mr. Allen:

Enclosed is a certified copy of resolution adopted by the City Council at its meeting held August 17, 1987, recording the Council's intent to authorize execution of an agreement with the New York Historical Society to exhibit two Bierstadt paintings at the Historical Society Museum in New York, as stated therein.

I understand that you will communicate with the New York Historical Society to arrange for the preparation of the agreement. Upon receipt of the document, the City Council understands that copies will be provided to them for review and consideration for ratification of the same by another resolution of Council.

I take the liberty of adding my own personal note to the effect that the exhibition is to be known as "Plainfield Collection." I know for a fact that there are many Plainfields, even in New York State. It is respectfully suggested that when the paintings are exhibited that the credit should read "Plainfield, New Jersey, Collection."

Please furnish the City Clerk with copies of any correspondence you have on the subject for official filing.

Sincerely,

Emilia

EMILIA R. STAHURA
City Clerk

Enc.

cc: Mayor
City Administrator
City Solicitor
Corporation Counsel
Director of Administration and Finance
Assistant Municipal Comptroller

