

FRIENDS of the BARNES FOUNDATION

P. O. Box 35 Merion Station, PA 19066 www.barnesfriends.org

MEMORANDUM

TO: Pennsylvania Attorney General Tom Corbett

FROM: The Friends of the Barnes Foundation

DATE: October 27, 2006

We request that your office, in its capacity as *parens patriae* for charitable foundations, re-examine the decision by the Board of Trustees of the Barnes Foundation (the "Trustees") to relocate the gallery art collection from its current location in Merion to a yet-to-be-built facility in Philadelphia. As explained below, since the December 13, 2004 decision by Judge Ott of the Court of Common Pleas of Montgomery County permitting the Trustees to relocate the art (the "Second Opinion"), several material facts have come to light (either changed circumstances or facts unknown to the Court at the time of its decision), all of which support our belief that the relocation should not be permitted.

A. Re-Cap of Prior Litigation

On September 24, 2002 the Trustees filed a petition to amend the charter and by-laws of the Barnes Foundation. As later amended, this petition sought two major changes: (a) to expand the number of Trustees from five (the number mandated in Dr. Barnes' indenture that created the Barnes Foundation) to fifteen, and (b) to relocate the Barnes' Foundation's gallery art collection from Merion to Philadelphia. The Court granted the first request in its opinion of January 29, 2004 (the "First Opinion"). By the Court's admission, the second request was more problematic, and, although it determined that the Barnes Foundation was "on the brink of financial collapse" (First Opinion, p. 24; Second Opinion, p. 2), it declined to resolve this second request without substantial further evidence.

In his First Opinion, Judge Ott was extremely critical of the role played by the Office of the Attorney General under one of your predecessors. As he stated:

The Attorney General, as *parens patriae* for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. The law of standing, which has been repeated so many times in opinions concerning The Barnes Foundation by this court and Pennsylvania appellate courts, permits only trustees, the Attorney General, and parties with a special interest in the charitable trust to participate in actions involving the trust. In

these proceedings, the three students were granted *amicus curiae* status, but their participation was limited to exploring the impact of the proposals on The Foundation's educational programs. Thus, the Attorney General was the only party with the authority to demand, via discovery or otherwise, information about other options. However, the Attorney General did not proceed on its authority and even indicated its full support for the petition before the hearings took place. In court in December, the Attorney General's Office merely sat as second chair to counsel for The Foundation, cheering on its witnesses and undermining the students' attempts to establish their issues. The course of action chosen by the Office of Attorney General prevented the court from seeing a balanced, objective presentation of the situation, and constituted an abdication of that office's responsibility. Indeed it was left to the court to raise questions relating to the finances of the proposed move and the plan's financial viability.

(First Opinion, p. 20-21; emphasis in original; footnotes omitted). This "cheerleading" continued during the hearings leading up to the Second Opinion (*See* Second Opinion, p. 25, 30, 34, 47).

In its Second Opinion, the Court granted the Trustees' request to relocate the gallery art to an un-designated site in Philadelphia. The Court found that there were three critical issues it must address: (1) Can the Barnes Foundation raise enough money through the sale of its non-gallery assets to keep the collection in Merion and achieve fiscal stability? (2) Can the facility envisioned in Philadelphia be constructed on the proposed \$100 million budget? and (3) Is the Barnes Foundation's three-campus model (Merion, Philadelphia and the Chester County farmhouse and adjacent land) feasible (Second Opinion, p. 2-3)?

The Court determined that the answers to these three questions were (1) No, (2) Yes, and (3) Yes (Second Opinion, p. 52-58).

B. Changes in Circumstance Since the two Opinions

Circumstances have changed materially since Judge Ott issued his opinion, and the answers to these three questions today are exactly the opposite of the conclusions reached by the Court.

1. Can the Barnes Foundation Survive Without the Move to Philadelphia?

In answering this question "No," the Court relied heavily on its determination that, due to continuing hostility between the Trustees and Lower Merion Township (the "Township"), there was no realistic way to determine if "augmented admissions" were possible (Second Opinion, p. 54-55). Of course, if sufficient additional income could be obtained in Merion, the move to Philadelphia would be unnecessary.

Now, however, the Township and the gallery's neighbors have demonstrated their willingness to improve access to the gallery art. In November 2005 the Latch's Lane neighbors (the "Neighbors") went before the Township's Board of Commissioners with a set of proposed changes in admission policies (set out in detail in Section C, below). These policies, if adopted by the Barnes Foundation, would generate additional annual revenues of approximately \$1 million—nearly enough (in itself) to cover the Foundation's current annual operating shortfall. In August 2006 the Township's Board of Commissioners unanimously adopted a resolution

endorsing the changes presented in the Neighbors' petition, and called for plans to relocate the Barnes Foundation to be "abandoned forever."

2. Can the Move to Philadelphia Be Made for \$100 Million?

While the Court accepted the evidence of the Barnes Foundation's witnesses that the move to Philadelphia could be made for this sum, it is obvious now that these witnesses were, at best, overly optimistic. First, the total direct cost of the project has risen from \$150 million to at least \$200 million. Judge Ott accepted the Barnes Foundation's estimate that the total cost of relocation, including a \$50 million endowment, to be \$150 million (First Opinion, p. 18; Second Opinion, p. 55-56). In May of this year, however, after claiming it had raised \$150 million, the Barnes Foundation admitted it would be required to raise another \$50 million to cover the direct costs of the move to Philadelphia (*Philadelphia Inquirer*, May 17, 2006).

Second, delays in fund-raising and issues related to the proposed new site for the gallery have substantially driven up the cost of construction. When the Court issued its Second Opinion, the Barnes Foundation represented that it would begin construction by January 2006, and the midpoint of construction would be 2007 (Second Opinion, p. 12). By late 2005, the Barnes Foundation admitted that construction would begin no *sooner* than late 2007—a delay of nearly two years (*Philadelphia Inquirer*, January 15, 2006). The effect of this delay will be that, from the time of the Barnes Foundation's March 2004 construction estimate until the mid-point of construction (now 2009 if construction actually begins in late 2007), the estimated cost of construction will have risen by at least 35% (*Engineering News-Record*). Given these past delays, further delays, and thus further cost increases, also appear highly likely.

3. Is the Three-Campus Model Feasible?

The Barnes Foundation's witnesses acknowledged the obvious about their plan—expenses would rise dramatically using three facilities instead of the current one (Second Opinion, p. 17). The Court, however, accepted their promise "to raise the funds needed to make this dream a reality" (Second Opinion, p. 57).

Elsewhere, the Court acknowledged that it had "serious concern" about the Barnes Foundation's ambitious fundraising goals, stating:

While Mr. Callahan [the Barnes Foundation's expert witness on development] was on the stand, we commented on his contagious optimism. It is clear The Foundation's Board will have to catch it. Mr. Callahan was only one of the many witnesses who acknowledged that The Foundation is raising the bar enormously above both its own fundraising abilities in the past and those of non-profits in general. "Ambitious" and "aggressive" were among the adjectives we heard to describe the target levels on which the Deloitte report [the Barnes Foundation's expert witness on the profitability of the three-campus model] is based. There is a real possibility that the development projections will not be realized, perhaps not in the first few years, but later on, when the interest and excitement about the new venture have faded. (Second Opinion, p. 57-58).

The new venture has not even begun, and already the fundraising has become a significant problem. The \$150 million pledged for the move to date has been raised entirely under the auspices of the Pew Charitable Trusts and its philanthropic allies. In May, 2006 the Pew's

director, Rebecca Rimel, announced that it would not attempt to raise further funds, even though it was by then obvious that insufficient money had been raised to carry out the move to Philadelphia (*Philadelphia Inquirer*, May 16, 2006). As we understand her statement, the Pew is no longer willing to see the move through to completion. Thus, the task of further fundraising has been left to the Trustees, who have shown no ability to manage the Barnes Foundation prudently, let alone raising significant funds on their own.

4. Fundraising and Finances of the Barnes Foundation

During the December 2003 hearings, the witnesses for the Barnes Foundation explained that it was critical for the Foundation to have a larger board, one capable of raising money. The Barnes Foundation was granted permission to increase the number of trustees from five to fifteen. However, it did not begin to add trustees until the winter of 2005 and the number of trustees has been at twelve since the fall of 2005.

During the December 2003 hearings, the Court and the Attorney General explored the terms and duration of the financial support of the Barnes Foundation by the Pew Charitable Trusts. It was revealed that once the \$150 million was raised, the interest earned from those funds would replace the financial underwriting by Pew. We know that the amount of time to raise the \$150 million was substantially longer than projected. We also know that \$25 million of that total is not in the hands of Pew or Barnes but is, instead, a grant by the Commonwealth of Pennsylvania to the City of Philadelphia which "... must be matched at least 100 percent by non-state funds." (See attached August 18 2006 letter from the Mary A. Soderberg, Executive Secretary of the Budget).

During the September 2004 hearings the fundraising projections put forth to the Court called for annual fundraising of in excess of \$4 million to cover operating expenses in excess of income.

The Attorney General must investigate why the Barnes Foundation has let a year go by with three seats on its board left empty; must investigate whether the Foundation has control of the monies raised for it by Pew et al; must investigate the current financial relationship between the Foundation and Pew et al; and must investigate the fundraising track record of the Barnes Foundation since December of 2004.

C. A Viable Option Exists Today

Fortunately, there is a real option to the costly, inefficient move to Philadelphia. The proposal presented by the Neighbors and endorsed by the Township's Board of Commissioners would increase annual admissions from 62,400 to 102,400 and thereby allow the Barnes Foundation to leave the gallery in Merion while still attaining solvency. This proposal is:

1. Increasing admission on public days from 400 to 450 per day.
2. Increasing public days by one-half day per week for the 39 weeks per year when the Barnes Foundation's schools are open.
3. Increasing public days from three to seven per week for the 13 weeks that the Barnes Foundation's schools are closed (July and August)

4. Ending the current practice of subtracting visits by school children from the permitted public total.
5. Raising admission fee to \$12, as planned for the new Philadelphia location.

The increase in the number of paying visitors per year, the increase in admission fees, along with the resulting increase in parking and gift shop revenues will generate approximately \$1 million in additional revenue per year. While expenses will also increase, they should not increase substantially.

While there still may be some annual shortfall in income, the new 15-person Board of Trustees should be able to make up the difference by fundraising. While we share the Court's doubts about the ability of the Trustees to raise tens of millions of dollars (as will be necessary should the Barnes Foundation move to Philadelphia), this much smaller amount should be within their reach.

D. The Questionable Use of Public Money in the Move to Philadelphia

While we believe the above should be sufficient to justify the Office of the Attorney General in re-examining the move of the Barnes Foundation to Philadelphia, a recent discovery has surprised all of us and we wish to share it with your office.

Only a few months ago we learned of the existence of Senate Bill 1213. Included in this bill (which became law on October 30, 2002,) was an appropriation of \$100 million for the "design and construction of a Museum facility to house the Barnes Art collection." As best we can tell, this money is to be used solely in the event that the Barnes Foundation gallery art collection is moved to Philadelphia. On September 25, 2006, we informed Judge Ott of this information. He wrote back two days later, stating that this was the first he had heard of the matter.

While the existence of this appropriation might be beyond the scope of your office, we believe that it is improper to use money raised from all Pennsylvania taxpayers to assist a private organization to move from Montgomery County (which wants to keep that organization) to Philadelphia. The existence of this fund is especially ironic because only a small fraction of that amount would be sufficient to keep the Barnes Foundation in Merion, where it belongs.

We respectfully request that the Office of the Attorney General:

1. Investigate the substantial changes in circumstances since the conclusion of the hearings to determine whether the relocation of the gallery art is still the least drastic measure needed to insure the financial well being of the Barnes Foundation.
2. Intervene in order to insure that the Barnes Foundation's financial projections are being met.
3. Direct the Barnes Foundation to immediately increase access to the art gallery in the ways that have been approved by the Foundation's neighbors and have the expressed support of the Township of Lower Merion.

4. Intervene to insure that no plan to relocate the gallery art to a facility under the control of the Philadelphia Museum of Art (or any other institution other than the Barnes Foundation) is being proposed or contemplated.
5. Investigate the history of Senate Bill 1213 and what knowledge of its provisions were known, and when they were known, by officers and trustees of the Barnes Foundation, the Pew Charitable Trusts, the Annenberg Foundation and the Lenfest Foundation, and by anyone in the employ of the law firm of Schnader Harrison. The purpose of this investigation would be to determine if there was any fraud upon the Court by the withholding or omission of this information during the hearings.

Enclosure: August 18 2006 letter from Mary A. Soderberg to Gary Adler.

The Friends of the Barnes Foundation is an organization dedicated to the preservation of the Barnes Foundation at its home in Merion, PA

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