



LOCAL *treasures*

*Refining Philadelphia's
Cultural Heritage Policy*

BY SHARON M. ERWIN



Philadelphia, with its history of passionate civic and legal debate over its cultural treasures, has articulated to a remarkable degree the common themes and conflicting viewpoints expressed in the intense international debate over responsible cultural heritage policy. The lessons learned from the recent and very public controversies surrounding *The Gross Clinic*, the President's House and its slave quarters, *The Dream Garden* and *The Angel of Purity*, provide Philadelphia with an opportunity to critically evaluate its cultural heritage policy, informed by the international cultural heritage dynamic. As the first U.S. city to pass a citywide preservation ordinance, and with its abundant and diverse cultural heritage, Philadelphia is uniquely qualified to establish a national model for a comprehensive municipal cultural heritage policy.

"THE DREAM GARDEN" BY MAXFIELD PARRISH/LOUIS COMFORT TIFFANY Courtesy of the Pennsylvania Academy of the Fine Arts, Philadelphia. Partial bequest of John W. Merriam; partial purchase with funds provided by a grant from the Pew Charitable Trusts; partial gift of Bryn Mawr College, The University of the Arts and the Trustees of the University of Pennsylvania.

The term “cultural heritage,” which once referred to the often-monumental remains of cultures, has changed profoundly over the last sixty years. The term is defined inconsistently in various laws and conventions, but there is a clear progression, according to renowned arts lawyer Barbara T. Hoffman, toward increasingly complex and broader definitions. The broader definitions coincide with the movement away from the term “cultural property” to “cultural heritage,” a concept that includes the tangible and intangible evidence and creations of a culture. All aspects of cultural heritage policy are affected by the tension between what is or should be legally required and what — ethically — is the right thing to do in the context of competing and often divergent interests.

CULTURAL HERITAGE AND THE PHILADELPHIA EXPERIENCE

The Philadelphia experience illustrates how the proper stewardship of cultural heritage on a local level can be just as complex, ethically challenging and interdisciplinary as at the international level. While international definitions of cultural heritage are fluid and evolving, Philadelphia established a stable and notably broad policy in 1955 with its Preservation Ordinance (see sidebar). To date, and not surprisingly in a Western culture, the debate over the protection of cultural heritage in Philadelphia has been grounded in notions of property and ownership.

The legal battle in the early 1980s over William Rush’s sculptures *Comedy* and *Tragedy* involved several years of litigation until a negotiated and philanthropic resolution emerged that was significant because of its express recognition of the public’s interest. The city opposed the planned auction of the sculptures by the Edwin Forrest Home, a home for retired actors and actresses established under the will of Philadelphia’s

BY THE BOOK

Philadelphia’s Preservation Ordinance provides: The preservation and protection of buildings, structures, sites, objects and districts of historic, architectural, cultural, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia.

It defines “object” as:

A material thing of functional, aesthetic, cultural, historic or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.

Edwin Forrest, one of the most renowned actors of the 19th century. The agreement resulting from the suit — reached by the city, the home, the Philadelphia Museum of Art and the Pennsylvania Academy of Fine Arts (“PAFA”) — allowed the Philadelphia Museum of Art to acquire *Comedy* and *Tragedy* in 1985.

The recent controversy surrounding *The Gross Clinic*, following Thomas Jefferson University’s announcement that it intended to sell the Thomas Eakins masterpiece, and past controversies over proposed sales of cultural objects aroused keen debate among local residents, institutions, preservationists, scholars, arts professionals, dealers, government officials, private owners, advocacy groups and their attorneys. Equally impassioned has been the debate over the preservation of the site of the first president’s house in the United States — onetime residence of George Washington and John Quincy Adams — ignited by the discovery of the residence’s slave quarters and the profound issues of cultural identity associated with the discovery in a nation founded on principles of freedom and the rule of law.

THE DREAM GARDEN CONTROVERSY

During *The Dream Garden* controversy, many argued the importance of its historical and physical context as a site-specific work of art as a reason for keeping it in the Curtis Building, where it was installed in 1916. The Maxwell Parrish/Louis Comfort Tiffany mural’s history and people’s passionate attachment to it also brought the idea of collective ownership, or at least ownership in the public trust, to the debate over *The Dream Garden*’s future.

The Dream Garden was nominated as an historic object under the Preservation Ordinance in response to the announcement of its potential sale, and the Philadelphia Historical Commission declined to issue the demolition permit requested by the estate, required for the mural’s removal. The estate, claiming it could sell *The Dream Garden* for \$9 million but for the rejection of its permit application, appealed the historic designation.

While none of the substantive issues raised by the parties were resolved in the ensuing three years of costly litigation, *The Dream Garden* lawsuit provided time in which a philanthropic, negotiated resolution could develop, resulting in *The Dream Garden*’s preservation in the lobby of the Curtis Building. In the spring of 2001, the Pew Charitable Trusts agreed to provide \$3.5 million for the acquisition of the mural.

Three of the four charitable beneficiaries of the John Merriam estate transferred their respective interests to the fourth, PAFA, while PAFA agreed to keep *The Dream Garden* on public display in Philadelphia, using its “best efforts” to keep it in its site in the Curtis Building. Throughout *The Dream Garden* litigation, the city and others seeking to keep the mural in Philadelphia emphasized *The Dream Garden*’s context, both historical and physical. The mural, they noted, is a site-specific work of public art integral to the historic building in which it is located, the lobby of Curtis Publishing Company’s new headquarters. Removal would extract it from its unique context, an observation that resonates with the views of archeologists concerning the importance of context and contextual analysis.

The idea of collective or public ownership raised over *The Dream Garden* was based in part on the express characterization of the mural “as a contribution to public art” by Edward Bok, editor of *The Ladies’ Home Journal*, who commissioned the mural, and the public’s acceptance of that dedication through undisputed access to and enjoyment of *The Dream Garden* for eighty-five years. The estate of John Merriam represented the contrary view, echoing the respect for free trade in the market within the concept of “common culturalism.” Yet another perspective on cultural heritage policy, sometimes referred to as the position of “universal museums,” joined those expressed during *The Dream Garden* controversy in the debate surrounding *The Angel of Purity* and *The Gross Clinic*.

THE ANGEL OF PURITY AND THE GROSS CLINIC

In 2004, St. Stephen’s Episcopal Church at 10th and Market Streets decided to sell renowned sculptor Augustus Saint-Gauden’s *Angel of Purity* (*Maria Mitchell Memorial*), a large marble relief commissioned by the Weir family for the church as a memorial to their deceased daughter. The church initially offered to sell the work, installed in 1902, to the Philadelphia Museum of Art, reportedly at a discounted price. When the museum was unable to raise the funds, St. Stephen’s placed it for sale on the open market and on display in a New York gallery.

Many criticized the church because the donor’s intent was to commission the work for the church, and because St. Stephen’s was not forced to sell due to financial necessity but chose to sell to increase its endowment. Eventually, with support from a fund for major acquisitions contributed by the Annenberg Foundation, the Philadelphia

Museum of Art acquired *The Angel of Purity* (*Maria Mitchell Memorial*), which is now on display at the museum.

The role of museums in conserving art and fostering knowledge through access and education, particularly in comparison to non-museum owners of culturally significant property, has been a recurring motif in Philadelphia's debates over the proper stewardship of its cultural heritage. During the controversy surrounding *The Gross Clinic*, for example, many argued that the work's artistic and symbolic importance merited more than 500 viewers a year at Jefferson.

In a similar vein, when *The Angel of Purity* was on the market, the head of the Episcopal Diocese of Philadelphia observed that "it would be an advantage to those who care about culture to place [the relief] in a more accessible venue" where it can be seen by larger numbers of people ("Church Seeks to Sell Sculpture by Augustus Saint-Gaudens," Jim Remsen, *The Philadelphia Inquirer*, November 14, 2004). Again, these perspectives are expressed in the international cultural heritage debate over source nations retaining artifacts that they cannot afford to exhibit or that the public cannot access.

The focus on the role of museums as stewards of cultural heritage is also expressed in the "Declaration on the Importance and Value of Universal Museums" by nineteen of the world's leading museums, including the Philadelphia Museum of Art. The signatories to the Declaration urge acknowledgment that museums serve the people of every nation, act as agents in the development of culture, and foster knowledge by a continuous process of reinterpretation.

Important to an analysis of Philadelphia's cultural heritage policy is the definition of context. *The Dream Garden* presented an easy question of context because of its site-specificity. As to *The Gross Clinic*, some identified Jefferson University as its proper context, while others identified Philadelphia as its context or environment — a view that ultimately prevailed. Still others argued that *The Gross Clinic* is a national treasure rather than a local one, which ownership by Crystal Bridges Museum and the National Gallery of Art might help promote.

FUTURE OF PHILADELPHIA'S CULTURAL HERITAGE

Just as the cultural heritage debate in Philadelphia echoes the international policy debate, the laws that form the international cultural heritage legal framework have the potential to illuminate and refine Philadelphia cultural heritage policy — a policy that is best explored before passions are inflamed

by the next threatened loss of a cultural treasure. Models of "cultural nationalism," in which cultural objects within a jurisdiction are treated as parts of a national heritage, offer alternatives to consider.

One model of cultural heritage policy worth exploring is the Japanese law for the Protection of Cultural Properties, or *Bunkazai Hogo-hō*, which has the dual purpose of preserving and utilizing cultural property "so that the culture of the Japanese people may be furthered and a contribution made to the evolution of world culture." The law provides for the identification, registration and oversight of important cultural property. Ownership of a registered cultural property in Japan is considered prestigious, generally increases the value of the property, provides tax benefits, and affords conservation and maintenance advice and assistance. Owners are required to consult with the government about any proposed transfer, alteration or damage to the property. The law further requires either limited-time public access to the property or loans to a museum for a specified time. As long as the registered cultural property is carefully preserved, free movement within Japan is permitted and, with the exception of National Treasures — the most restrictive but most prestigious designation — temporary export is permitted with proper documentation and physical safeguards. Korea has a cultural heritage protection system similar to the Japanese model. In both countries, only a relatively small percentage of works, ranging from paintings and sculptures to manuscripts and historical artifacts, are designated as protected works as a deliberate policy matter. The systems establish standards of quality, preservation and documentation, resulting in a high level of care for a select portion of cultural heritage.

Japan and Korea represent but one approach that might inform Philadelphia's cultural heritage policy. Philadelphia's Preservation Ordinance works well in the absence of a dispute, and as a means of permitting public comment, transparency and time in response to unilateral decisions to remove a cultural treasure. The expense and uncertainty of litigation, however, suggest that Philadelphia consider providing support and incentives, as do Japan and Korea, to encourage voluntary acceptance of the public trust, or in the words of legal scholar Joseph L. Sax, "ownership with responsibilities." Philadelphia's experience also suggests the need to create a process for identifying truly iconic works, based on expert assessments with public participation.

Philadelphia's past controversies also have identified specific legal issues to address. *The Gross Clinic*, for example, demonstrated the benefit of distinguishing truly site-specific works, like *The Dream Garden*, from those that are intimately bound with the city and/or define Philadelphia apart from (or in addition to) a specific location. Similarly, if cultural heritage is moveable, compromises that ensure appropriate care and protections, such as temporary loans, leases or rentals, could mutually benefit the owner and the public's interest in access, educating others about Philadelphia's heritage while insuring long-term retention in Philadelphia.

Whether accomplished through the Preservation Ordinance, or through the Ordinance with innovations such as cultural easements similar to conservation easements, a deliberate and public consideration of a local cultural heritage policy, enlightened by today's broader definitions of "cultural heritage" and a comparative analysis of other policies, could create a model for local and municipal governments to follow.

Admittedly, national laws do not readily translate into municipal policy, but Philadelphia has the cultural, legal, scholarly and civic talent to discern what might work in Philadelphia within the federal and state legal framework. With the benefit of hindsight and the absence of a pending crisis, Philadelphia has an opportunity to reflect on its cultural heritage policy and how it handled the preservation of *Comedy* and *Tragedy*, *The Dream Garden*, *The Angel of Purity*, *The Gross Clinic* and, in conjunction with the National Park Service, the preservation and access to the President's House slave quarters. Notably absent from this history is the ongoing debate over The Barnes Foundation, whose relevant issues and lengthy litigation history go well beyond the scope of this discussion.

The combined efforts of many of Philadelphia's cultural, philanthropic and business leaders and institutions to keep iconic works in Philadelphia, with the aid of many Philadelphia lawyers and the passionate support of its citizens, resulted in great achievements. A greater achievement would be for Philadelphia, a pioneer in historical preservation in the United States, to again take the lead by considering a comprehensive cultural heritage policy to serve as a national model for municipal governments. ■

Sharon M. Erwin (erwin@erwinlegal.com) is principal in the Law Offices of Sharon M. Erwin and a member of the Advisory Committee to the Philadelphia Volunteer Lawyers for the Arts program.