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March 13, 1997

**BY HAND**

Deirdre Rosenberg, Esq.  
Division of Public Charities  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Re: Trust u/w Mary P.C. Cummings

Dear Ms. Rosenberg:

I would like to respond to two questions you raised by phone regarding our discussion of the possible sale of land held by the City of Boston under the will of Mary P.C. Cummings in Woburn and Burlington and the use of the proceeds of this sale for the development and improvement of parks within Boston.

In answer to your inquiry regarding other assets passing under the will for the benefit the City of Boston, Mrs. Cummings directed in Articles Second and Third of her will that certain named securities be held in trust for designated individuals and ultimately pass to the City of Boston as the legatee under Article Fourth of the will. She also left some land on North Market Street and a small residuary bequest. In 1929, the North Market Street property was taken by eminent domain. In 1931, the proceeds of the sale of stocks, totalling \$11,592, and amounts received under the residuary clause, totalling \$16,973, were placed in trust. The trust now holds approximately \$340,000. Another non-contiguous parcel of land in Burlington and Woburn also passed under the residuary clause; this parcel was sold in 1961 for \$25,000 and the proceeds were added to the trust.

You also inquired as to the interests of the Playground and Recreation Association of America (the "Association") under Article FOURTH of Mrs. Cummings' will. In her will, Mrs. Cummings directed that if the City of Boston "declin[ed] or fail[ed] to accept" the devise of the Woburn property, it should pass to the Association as trustee for the same purposes.

I note that the City of Boston has not declined or failed to accept the Burlington and Woburn property. It has used the property for various purposes since 1930. Its use has included a summer camp for children from Boston and a special program for disabled

individuals. Currently the expense of maintaining the property and in transporting individuals from Boston have made its continued use impractical.

The issue here is not whether the City has declined to accept Mrs. Cummings' gift, but rather how best to make use of the remaining parcels of the Cummings gift given that the donor's intended use is no longer practical or feasible. The City of Boston does not desire to decline or fail to accept the gift; on the contrary, it seeks to carry out Mrs. Cummings' intent.

It is apparent from Mrs. Cummings' will and from supporting documentation that Mrs. Cummings primarily wished to benefit the poor of Boston and not merely create a park with her Burlington and Woburn property. The proposed sale of the property and the application of the proceeds to the establishment and maintenance of parks within Boston further fulfills Mrs. Cummings' primary intent.

Her intent is evidenced by the following:

1. She gave the land to the City of Boston, not Woburn or Burlington. In 1925 she wrote Mayor Curley a letter indicating she wished the land to be "a country club for the poor-what St. Cloud is to Paris." In the same year she donated a separate tract of land in Woburn to that city as a playground for the children there. Obviously Mrs. Cummings had very different intentions for the uses of the different parcels. (See article appearing in the *Woburn Daily Times* dated December 23, 1927 describing these two gifts, attached as Exhibit A.)
2. The gift of Babylon Hill was made "in memory of her first husband, Dr. Adino Brackett Hall, of Boston, who spent considerable time and money on medical work among the needy of Boston." (*Woburn Daily Times*, October 2, 1925, attached as Exhibit B.)
3. As related by then Park Commissioner William P. Long, "In several conferences that I had with the dear old lady, I tried to have her leave the property and the trust fund to Woburn, but she insisted that inasmuch as the money [to purchase Babylon Hill] was earned by her late husband in Boston, the people of the city from which the money came should be beneficiaries." (*Woburn Daily Times*, June 10, 1931, attached as Exhibit C.)
4. Mrs. Cummings donated Babylon Hill in the belief that it would become part of Boston. She believed that Boston would become a "megalopolis," eventually encompassing Babylon Hill, which itself could then become a refuge from the City. (*Woburn Daily Times*, April 9, 1930, attached as Exhibit D.)

Ironically the park which inspired Mrs. Cummings' gift, Parc de Saint-Cloud, in Paris, France, has been enveloped by the surrounding metropolis. Attached is a letter (Exhibit E) from the French Ministère de la Culture, and an English translation, comparing the original park with its use in 1986. As stated in that correspondence, "the park of St. Cloud is no longer 'the country club of the poor' but a great park at the disposal of millions of urban dwellers living in

its proximity." Unfortunately, despite Mrs. Cummings' vision and contrary to her intent, the Cummings property is not at the disposal of the poor of Boston as it is to a large extent inaccessible and cannot be practically utilized for that purpose.

Given the independent development and growth of Woburn, Burlington and Boston in the years subsequent to Mrs. Cummings' death, rigid preservation of the Cummings' property for park purposes would be inconsistent with Mrs. Cummings' intent. Indeed, the location of the Cummings' land must be seen as subordinate to the primary purpose of her gift: to provide a place of recreation for the poor of Boston.

Massachusetts case law dictates that the gift over to the Association should be ignored in light of the need, and the City of Boston's desire, to carry out Mrs. Cummings' goal to benefit the urban poor. In Trustees of Dartmouth College v. City of Quincy, 357 Mass. 521 (1970), the Court articulated the principle that subordinate features of a charitable trust may be abandoned in order to carry out the donor's intent. This principle applies even the face of a gift over clause, Id., at 533. The Court stated that:

noncompliance with detailed provisions of a charitable trust should not give rise to a transfer to an alternate trust, if such provisions are not of controlling importance in relation to the general framework of the testator's scheme.

And quoting DiClerico, *Cy Pres*, A Proposal for Change, 47 BU Law Review 153, 192-195, the Court held that a gift over clause should:

be resorted to only when it appears to the court that more benefit to the community would be derived from the alternative disposition and that nobody would be substantially damaged by terminating the original trust. Id.

A similar result was reached in Wigglesworth v. Cowles, 38 Mass. App. Ct. 420 (1995), where the trustee of a charitable trust under the will of Roxana Cowles sought to raze certain houses which were donated to serve as a convalescent home. In holding that the donor's primary intent was not to maintain the particular trust property but to provide for the convalescent center, the Court stated that "[t]he means and methods for accomplishing that objective are secondary in nature and constitute subordinate provisions of the trust." Id., at 428. In so holding, the Court stated that the gift over clause would not become operative because such a deviation from the trust terms was well within the power of a charitable trustee, thus alleviating even the need to resort to *cy pres*.

Just as Ms. Cowles' primary intent was to establish a convalescent home, so too was Mrs. Cummings' primary intent to provide a place of "health, happiness, and fuller life to the busy people of Boston." Like the old Cowles home, Babylon Hill was not devised to the city to be maintained for its own sake. Mrs. Cummings funded the trust with Babylon Hill because that was the only property she owned - "a widow's mite" - which was suitable to accomplish

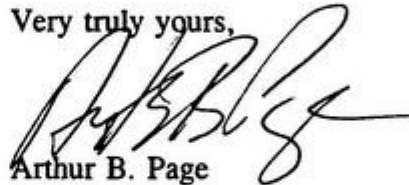
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her goal of establishing a place of beauty and rest for the city's poor. Unfortunately, it is no longer practicable for Boston to put Babylon Hill to that use.

That being so, as stated in Wigglesworth, id., "[i]t is well established that trustees reasonably may deviate from such subordinate provisions in order to achieve the testator's dominant purpose and to avoid a forfeiture of the trust."

I trust that this letter is helpful and would be pleased to meet with you again to discuss any further questions that you may have. Ideally I would like to proceed quickly with the preparation of a cy pres petition to seek Court approval for the proposed sale. Unless you require additional information at this time, I propose that we prepare a draft of the cy pres petition for your review. Thank you for your attention.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Arthur B. Page', written in a cursive style.

Arthur B. Page

cv  
Enclosures

cc: Robert Hale, Esq.