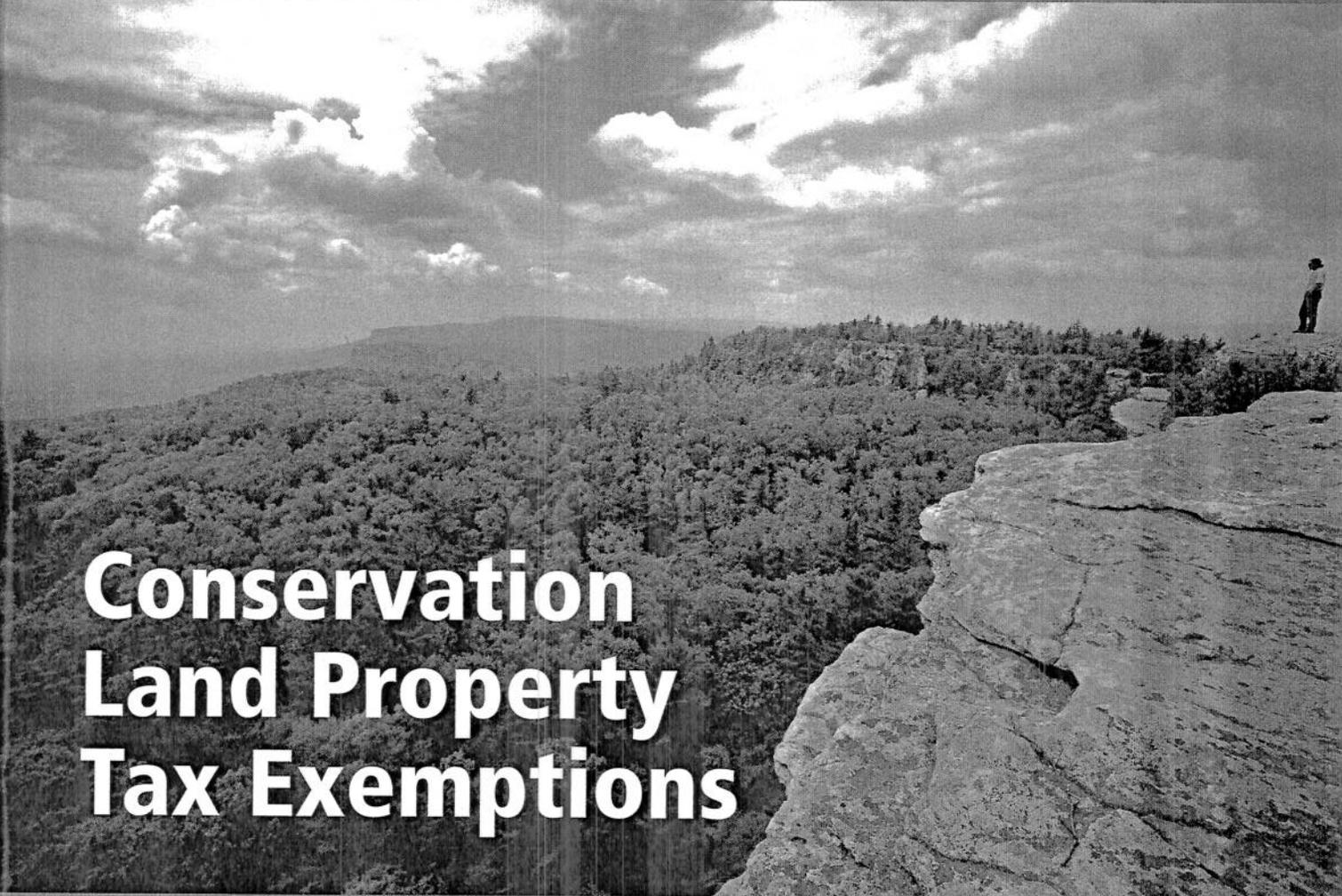


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# Journal



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BY THOMAS A. DICKERSON



JUSTICE THOMAS A. DICKERSON has been writing about travel law for 39 years. His works include his annually updated law books, *Travel Law*, Law Journal Press (2015) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2015), as well as more than 350 legal articles, many of which are available at [www.nycourts.gov/courts/9jd/taxcertatd.shtml](http://www.nycourts.gov/courts/9jd/taxcertatd.shtml). This Article May Not Be Reproduced Without Permission Of the Author and NYSBA.

## When Does “Free of Charge” Become “Pay What You Wish But You Must Pay Something”?

The New York City (the City) Metropolitan Museum of Art (the Met) is one of the world’s great art museums. Located on the Upper East Side of Manhattan, the Met’s collection boasts 1.5 million objects representing five millennia of world history. About 6.2 million people visit the Met each year, including more than 100,000 New York City schoolchildren, who visit the museum for free. About 20% of visitors live in the City, with similar percentages visiting from the tri-state area and the rest of the United States. The other 40% of visitors come from around the world. Under the “pay-what-you-wish” admission policy, the average contribution is about \$10. However, museum costs run about \$50 per visitor. “According to its most recent financial statement, the museum’s annual revenues are \$345 million – 10 percent from ‘pay-as-you-like’ admissions, 10 percent from membership fees, 7.5 percent from city subsidies and 25 percent from profits generated by its \$2.5 billion endowment. The rest come from charitable donations.”<sup>1</sup>

This article discusses the consolidated cases of *Grunewald v. Metropolitan Museum of Art* and *Saska v. Metropolitan Museum of Art*<sup>2</sup> and addresses the question of what should be the admission charge to enter the Met, if any. Should it be “free of charge” as originally intended when the Met began operations in the 1870s or “pay what

you wish but you must pay something”?<sup>3</sup> The first admission charge was authorized in the 1970s, 100 years after the Met opened.

### The Case

In the consolidated cases before New York State Supreme Court Justice Kornreich, the plaintiffs asserted, inter alia, several causes of action including (1) breach of the 1878 lease between the Met and the City (asserted as purported third-party beneficiaries) by failing to provide free admission; (2) violation of Chapter 476 of the Laws of 1893 (the 1893 Act) by charging admission; (3) violation of the N.Y. General Business Law (GBL) § 349 regarding admission costs;<sup>4</sup> and (4) misrepresentation regarding admission costs. In response, the Met sought to dismiss the first two causes of action based upon the 1893 Act and the 1878 lease.

### At the Creation: The Act and the Lease

As noted by the court in *Saska*,  
On July 21, 1853, Central Park was created. . . . On April 18, 1870, the New York State Legislature created the Museum “for the purpose of . . . encouraging and developing the study of the fine arts, and the application of arts to manufacture and practical life, of advancing the general knowledge of kindred subjects and, to that end, of furnishing popular instruction and rec-

reation.” . . . On April 5, 1871, the legislature authorized the Parks Department to build the Museum in Central Park. . . .<sup>5</sup>

In 1892 the state legislature authorized “funding of up to \$70,000 each year for the Museum . . . provided that the Museum ‘be kept open and accessible to the public hereafter free of all charge throughout the year.’” Regarding the lease, it was executed in 1878 “whereby the City granted a perpetual, rent-free lease to the Museum [providing that it] be kept open and accessible to the public free of charge from ten o’clock AM until half an hour before sunset.”<sup>6</sup>

### The “Serious Budget Deficit”

“In 1970, to address a serious budget deficit, the Museum sought to charge an admission fee so that it could continue to provide the same level of public access in a fiscally responsible manner.”<sup>7</sup> The City approved subject to conditions, such as that “[t]he amount of the admission fee is left entirely to the individual’s discretion and that advice to that effect be conspicuously posted,” and “[t]he proceeds derived from this program shall be used by the Museum for operating expenses only.”<sup>8</sup>

### Paying Only One Cent

Since the 1970s, the Met’s policy has been to post signs which read, “Pay what you wish but you must pay something.” In 1975, Thomas Hoving,

then the Met's director, responded to a letter from the Commissioner of the Parks Department inquiring about the admission fee sign.

Over the years since we instituted the discretionary admissions policy, we have from time to time had visitors who insist upon their right to pay one cent. Under the policy this is perfectly permissible, although of course it does nothing to achieve our purposes of keeping down the annual deficit in operating funds. Most of our visitors are more generous and appreciative, however, so that the average contribution from those not admitted free anyway (such as members, students, children, persons over age 65, servicemen, etc.) fluctuates between about \$.85 and \$.95 per person.<sup>9</sup>

### The Decision

[T]he relevant inquiry is whether plaintiffs have standing to sue the Museum for its failure to admit all members "free of charge" which they argue violates the 1893 act and the . . . lease. The Museum contends that: (1) there is no private right of action under the 1893 act; and (2) defendants cannot sue for breach of the lease as third-party beneficiaries.<sup>10</sup>

The court agreed with the Met on both issues.

### The Reality of Modern Times

It is clear that plaintiffs are part of the class which the 1893 act was intended to benefit. Indeed, the 1893 act was intended to benefit both plaintiffs and the Museum. Specifically, it was enacted to educate and enlighten New York City's citizenry, foster commerce and trade, and provide funding to the Museum so that it could afford to provide free access to the public. However, by 1970, inflation, legislative inaction and budgetary constraints eroded the efficacy of the 1893 act's goal. By that point, and even more so today, \$70,000 was simply not enough to

fund the cost of providing free access to the public while maintaining the quality and quantity of the Museum's vast art collection. . . . [T]he real question is whether the goal of the 1893 act – providing a mechanism to make access free for the public and affordable for the Museum in order to educate and foster commerce – is furthered by allowing plaintiffs to stop the Museum from charging admission, when doing so would put the Museum's ability to provide the current level of access in jeopardy. The answer is no.<sup>11</sup>

### Nudging Visitors to Donate

All members of the public can afford to visit the Museum under the present scheme. For those without means, or those who do not wish to express their gratitude financially, a de minimis contribution of a penny is accepted. Admission to the Museum is de facto free for all. Actual access, provided in a way that "nudges" visitors to donate, is not incompatible with the 1893 act. Such a policy furthers the goal of the 1893 act – providing sufficient funding

to ensure access to all. On the other hand, plaintiffs' lawsuit, at best, would undermine the ability of the Museum to provide free access. . . . At worst, it might well push the Museum to charge for exhibitions, which might include a substantial percentage, if not the majority, of the art on exhibit. A large part of the Museum's operating funding would be cut and the objective of educating the public and encouraging commerce undermined.<sup>12</sup> ■

1. Ben Bedell, *Met Museum's 'Pay What You Wish' Policy Is Upheld*, N.Y.L.J. (Feb. 6, 2015).
2. 42 Misc. 3d 548 (Sup. Ct., N.Y. Co. 2013), *aff'd*, 2015 WL 463764 (1st Dep't Feb. 5, 2015).
3. See Bedell, *supra* note 1, "Patrons now are asked to pay a 'suggested' admission price of \$25 per adult."
4. For a discussion of GBL § 349, see Thomas A. Dickerson, *Consumer Protection Chapter 98 in Commercial Litigation in New York State Courts*: 4th ed. (Robert L. Haig ed.) West & NYCLA (2015).
5. *Saska*, 42 Misc. 3d at 551.
6. *Id.* at 552.
7. *Id.*
8. *Id.* at 552–53.
9. *Id.* at 554.
10. *Id.* at 555–56.
11. *Id.* at 557.
12. *Id.* at 557–58.



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