

# Martin vs Indianapolis

## The Visual Artists Rights Act

In 1977, after living a year in a warehouse in Tribeca, unheated on weekends during the coldest winter in forty years, I left New York City with my wife and six-month-old son and returned to my hometown of Indianapolis. I got a job working at the family sheet metal fabricating business. During my first three years there, I learned the skills of bending, welding and grinding metal. Eventually, I began to realize that I could use these skills to create a large-scale sculpture. Working from my drawings, I constructed a small scale maquette out of metal. I thought that the design would fit nicely (in full scale) on a vacant plot of land near the business. Mr. John LaFollette, owner of The Tarpenning-LaFollette Co. where I worked, had bought the property and maintained its field of grass.

The property was shaped like the letter “V”, bordered on the left leg by the old Indiana Water Canal built in the early 1850's. Along the right leg ran a local street and a row of simple, wood frame houses. On the third side stood a red brick church built in the 1920's, known as Bugg's Temple.

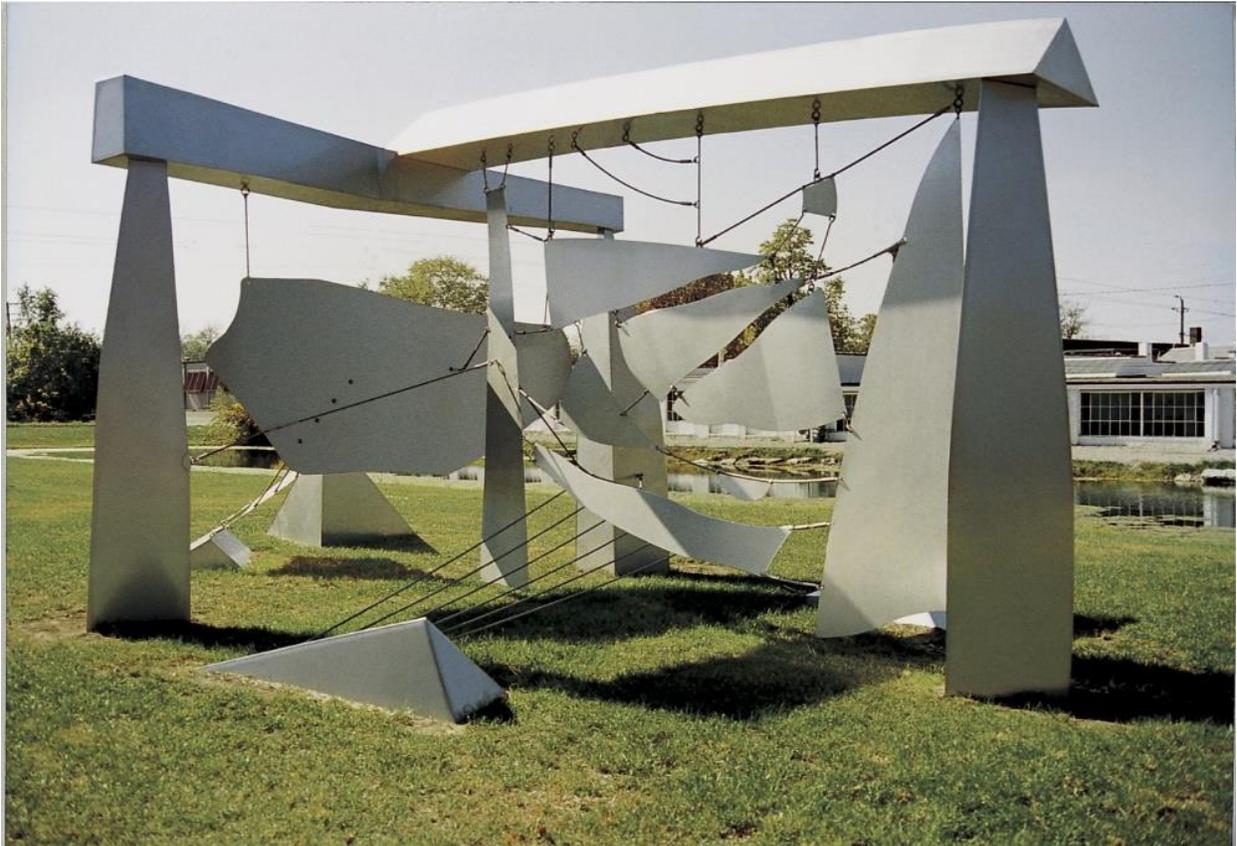
After my sculpture maquette won “Best of Show” at the 55<sup>th</sup> Annual Hoosier Salon in 1980, I asked and received permission from Mr. LaFollette to fabricate a large-scale copy of the maquette and install it on the vacant lot.

### **Sculpture Proposal and City Plans**

We knew that the city was interested in developing the old canal corridor that included Mr. LaFollette's property. During the early 1980's the city planners engaged the architectural firm of Browning, Day, Mullens and Dierdorf, to develop conceptual illustrations of the canal corridor. These were put on display for the public to view. While visiting the exhibit and studying the designs, I met Mr. Alan Day, principal architect of the firm. I described to him my sculpture and pointed out its proposed location. He agreed that it would be a nice addition to the canal development and felt that it should be incorporated into the plans.

Mr. LaFollette decided that it would be prudent to meet with the city planners and find out if they were compatible with integrating the sculpture, as Mr. Day proposed. We spoke to the Director of the Division of Planning. He recommended that I present the sculpture project

before the Indianapolis Zoning Committee, to petition them for a variance before I go proceed any further.



*Symphony #1 - 1987 - 1995*

## Variance Proposal Before the DMD

I presented my petition for a variance allowing for the sculpture's construction and installation on Mr. LaFollette's property. I showed the zoning committee the sculpture maquette, noting that it had won the 55th Annual Hoosier Salon "Best of Show" in 1980. I presented my art credentials and technical knowledge of metal work. I explained how the sculpture would be fabricated and what materials would be used. I concluded by advocating the importance of public art in the community.

Lawyers representing the city opposed the sculpture on the grounds that it might interfere with the city's plans to develop that section of the canal. Immediately following their opposition, the board president asked if I wanted to have the board vote on whether to accept or reject my proposal. Not knowing anyone on the board and concerned that the members would more than likely choose in favor of the city, I proposed to voluntarily remove the sculpture at my expense if the city acquired the property and wanted it removed. A vote was taken on those terms and

passed. A legal document was written and signed by Mr. Lafollette, myself and the Director of DMD, solidifying the agreement. Included in the document was the city's requirement to inform me in writing if it wished to have the sculpture removed. The document also stated that I had a period of ninety days after written notification to remove the sculpture. As a side note, two members of the committee informed me after the vote that I should not have compromised. They felt that I could have won without any conditions attached.



*A little help from my friends*

## Building "Symphony #1"

The next two and one-half years I spent every weekend building the sculpture I entitled "Symphony #1". Besides working a forty-hour week at the business, I labored on the sculpture one hour every weekday morning and arrived at 6:00 a.m. every Saturday and Sunday, returning home at 1:00 p.m. I built the large sculpture completely by myself, refusing generous offers of help. When I finished its installation, in 1987, I had accumulated over 1300 hours of labor. Fabricated of corrosive resistant stainless steel, the sculpture covered an area approximately 20' x 40' and rose over 14' at its tallest point. Each supporting element was welded to a thick steel base plate that was bolted to a poured concrete, steel reinforced block (4' x 4' x 4') sunk into the ground. Wire rope cables made of 5/8" diameter stainless steel were used to join 1/4" thick floating plates. All of the external welds and sharp edges were manicured to a smooth, consistent finish. There would be none, if any, maintenance required to preserve the sculpture. It was built to last. "Symphony #1" was reviewed in an article in the Indianapolis Star by critic, Mr.

Steve Mannheimer, Associate Professor at The Herron School of Art. He described "Symphony #1" as "a fine piece of public sculpture, thoroughly competent in its design and execution and, more important, a significant human gesture."

## **Business Expansion, Blight, and Remonstrance**

By 1991, the business was growing and needed additional space. Development of the northern section of the canal had stalled. Tarpenning-LaFollette Co. decided to spend \$150,000.00 and expand into an adjacent building previously leased by Mr. LaFollette to another company. Shortly after completing the move and renovations, my brother Kim and I were visited by Mr. Brad Hurt, a real estate contractor hired by the city. His blunt message was that the property had been declared blighted by the Metropolitan Board in 1982 and the city was going to purchase it under the rule of eminent domain. The monetary figure he gave us was far too inadequate to cover the costs of moving. No one, including the other businesses and residents, were aware of the blight designation. It had been passed without public notice, which was in violation of city rules. This matter was brought before a court hearing of twelve judges who ruled in the city's favor. Such furor was raised that the Mayor put a hold on the development, but eventually he determined that the development was too important for the city. We, along with other businesses, remonstrated before the Metropolitan Development Committee. I spoke favorably of the development but expressed my apprehensions that the fair market value was not enough to allow us to move and stay in business. I pointed out that our company had occupied the same plot of land since 1920; that it was a union contractor, paying taxes and providing jobs with good wages.

## **Alternate Proposal and Donation of Sculpture**

At the remonstrance, I also proposed an alternate design for the canal fronting our business. This included an ornamental wall concealing our building. In addition, I expressed a willingness to donate my sculpture, "Symphony #1", to the city with the hope that it would enhance the community's development. As a result of the remonstrances a vote on approving the city's acquisition plan was put on hold by the Board chairman. Soon afterwards, he resigned under pressure because of conflict of interest. He was the owner of a construction company that had contracts with the city.



*Stainless steel wire rope and custom designed hooks with internal threads for tightening*

## **Land Exchange Agreement and Closure Meeting**

Forward to 1993. The company and Mr. LaFollette settled on an agreement with the city in which his property was to be exchanged for another south of the city. Negotiating for the company was my brother, Kim Martin and our corporate lawyer. Knowing that the sculpture might need to be moved, I proposed (through Kim to the city negotiator) that I would like to donate it instead to the city; to keep it in the neighborhood. Also, at the final signing, I reiterated that I wished to make the donation, but requested that the city pay the expenses if they chose to move it to a nearby location. I estimated the cost to be around \$8,000.00. Present at the meeting, besides representative lawyers, were Daniel Kozlowski, Director of Metropolitan Development and Robert Shwier, special council to Mayor Stephen Goldsmith. I was informed that I would be contacted by Mr. Steve Schulmeyer, Property Acquisition Manager at the DMD, if the if the sculpture was to be moved or returned. Mr. Schulmeyer (seated next to me) and I exchanged business cards. The pertinent part of the offer was that demolition was never a consideration and never mentioned. A side note: during my discussion about the sculpture, Mr. Kozlowski entered the room to sign the documents and remarked sarcastically (and I paraphrase) "Oh, are you going back at the last minute on your intention to donate the sculpture?" I took this to mean that he was not happy that I had remonstrated against the city and that I had expressed dismay at the arrogant manner in which he debased the concerns of the residents of the canal neighborhood.



*Bugg's Temple in the background*



*Making connections*

## Why I Donated Symphony #1"

My donation of the sculpture to the city was based upon several factors. Primarily, the new location of the business would place the sculpture in a location outside public view for which it was intended. Second, as a thirty-year resident of Indianapolis, I was inspired by the city's interest in renewing the canal corridor and thought that the gift of the sculpture would be a gesture appreciated as an aesthetic addition to the city. Finally, I sincerely felt that "Symphony #1 would foster interest in promoting the inclusion of fine art in downtown Indianapolis. I had spoken before and written to the DMD and to the Mayor addressing the necessity of including art in their development plans; particularly as they wished to increase the stature of the city as a progressive, cultural center. Their 156 page, *Indianapolis Regional Center Plan 1990-2010* (UPP 770) published in 1991, states that among their objectives is to "Improve the quality of life on a day-by-day basis through the use of contemporary public art" and "Assure a dynamic and intelligent city of international reputation through use of the arts."

## Sculpture is Demolished

Without being spoken to personally and without ever receiving a written document, the sculpture was destroyed. All conditions previously set in the legal documents and reiterated at the final meeting to exchange property were blatantly ignored by the DMD. Instead, they ordered "Symphony #1" to be demolished, referring to it as a "large yard ornament".

On the morning of July 25, 1995, I was informed by employees that the sculpture was missing. I immediately called several individuals at the DMD who seemed unaware of the situation. Frustrated, I ended up calling the president of Jordan Demolition. Mr. Jordan confirmed that he had received a contract from the city to carry out the demolition. He was sorry to say that the sculpture was beyond repair; that they had used a bulldozer to tear it down. He also confided in me his disbelief that the large sculpture was to be scrapped. Because of this concern, he called the Indianapolis Museum of Art to ask if they might be interested in taking it. He waited a few days without a return call before going ahead with the demolition.



## Frustration and Informing the Press

Frustrated in my inability to get an explanation for the demolition order, I ended up contacting Steve Mannheimer, who had written the original critique on the sculpture as well as numerous articles in the Indianapolis Star promoting art along the canal. His article on July 27, 1995, stated that Paul Smith, Administrator of the Real Estate Service Division of the city's DMD, told him that we had been contacted and were told that they could do what they wanted with it. Kim Martin, who had taken the call from Mr. William Cobb, project manager for the canal, had been out of the office the morning I learned of the sculptures demise. I had mistakenly informed Mr. Mannheimer that there had been no contact with anyone in our business. However, the phone call to my brother did not exempt the city from their responsibility to one: contact **me**, the creator, builder and owner of the sculpture, two: excuse them for not being explicit in their intention to destroy the sculpture, and three: to follow our agreement that required the communication to be sent to me via registered mail indicating the ninety day grace period I had agreed to.

On the morning of July 27, I received numerous phone calls from artists and architects expressing their dismay after reading Mannheimer's newspaper article. The very first call came from Mrs. Judy O'Bannon, wife of Governor O'Bannon, a wonderful and devoted advocate for the arts in the state. Speaking to my secretary, she expressed her deep regret for the actions of the city. I had met Mrs. O'Bannon when her husband was Lieutenant Governor of the state (later

Governor). She was exceedingly kind in praising me for the design and fabrication of jewelry pins I had made exclusively for each attendee of the Lieutenant Governor's Conference hosted by Indianapolis in 1992. Knowing her place in politics, I honored her wish to keep the call anonymous (until now). I was grateful for her compassion.

## Looking For Help - The Legal Path

In mid-August I sent a letter to our corporate lawyer, Mr. Robert Lowe Jr., who represented our company in its negotiations with the city, asking for his advice on whether legal action should be taken against the city. After several letters and phone calls, he responded three months later, suggesting that I propose to the city the reconstruction of another sculpture on city property. He told me that his firm would not be interested in taking on the case.

I contacted four additional law firms in Indianapolis, especially those having experience in cases dealing with intellectual property. In every instance, I was told that there was a conflict of interest due to their relationship with the city. Under the privatization system adopted by Mayor Stephen Goldsmith, law firms were invited to bid on handling all city government cases on a yearly basis, perhaps explaining their reluctance.



I began to spend time at the city library reading books about the Visual Artists Rights Act, introduced by Senator Edward Kennedy and passed into law by Congress in 1991. One book entitled, "Legal Guide for the Visual Arts" by Tad Crawford, was very helpful explaining the new law. On December 4, 1995, I wrote him a letter describing my situation and asking for advice. He referred me to the Chicago Lawyers for the Arts. I phoned at once and spoke to Mr. Griff Morris, the lawyer on call. After hearing the general facts surrounding the demolition, Mr. Morris felt that there were components that did not fall within the requirements of the law. I thought that was the end of it. Thirty minutes later, he called back: "I've been thinking about what you told me. You might have a case after all!". He asked that I send him more specific information and supporting

documents. A few weeks later, he informed me that he had discussed my case with Mr. Scott Hodes, a lawyer in Chicago who specialized in representing artists, such as Christo. He told me to call Mr. Hodes at Ross & Hardies. After supplying everything I knew to Mr. Hodes, he along with the backing of the principles in his law firm, expressed confidence that I met all of the requirements under the Visual Artists Rights Act. On December 29, 1995, I filed the claim of summary judgement against the city, setting into motion what would result in the landmark legal case under the VARA law.

*\*Assisting me throughout the entire case was our company secretary and lawyer, Ms. Jennifer Matthews, who I owe a great deal of gratitude.*

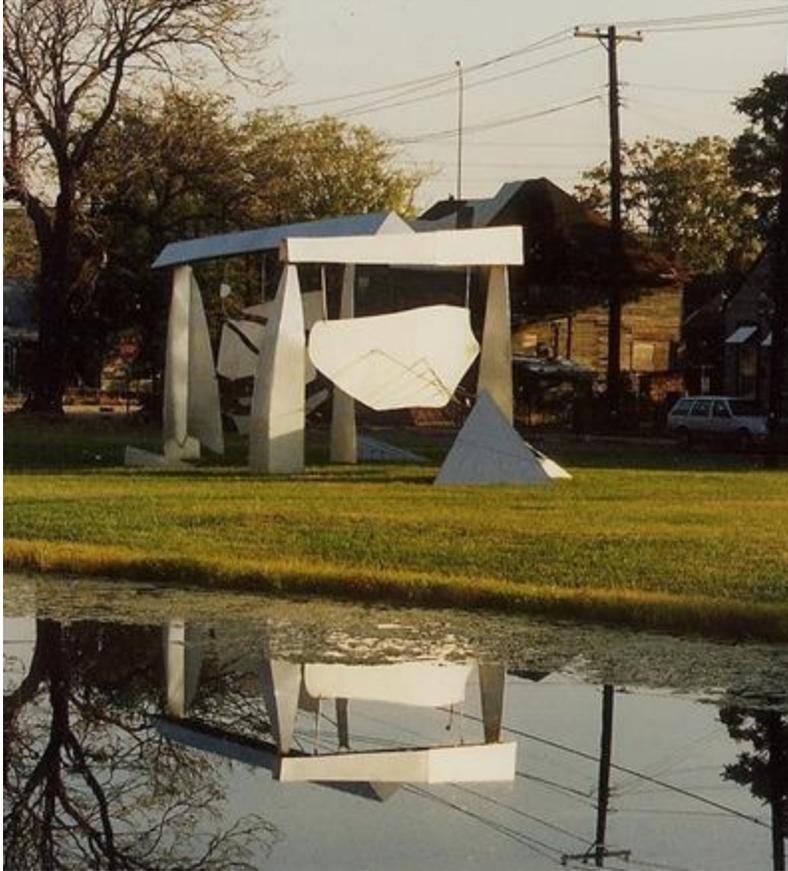
## Judge's Decision, The City Appeals

On October 3, 1997, the US District Court, Southern District of Indiana, ruled in my favor, awarding me \$20,000.00 in statutory damages and \$131,252.00 in attorney fees and costs. I had asked for \$100,000.00, which was less than the replacement cost to rebuild the sculpture. Because this was the first case adjudicated successfully under the new law, Judge Sarah Evans Barker ruled that the city's actions were intentional, rather than willful; based upon the testimony of the individuals involved in the decision to destroy the sculpture who all stated that they were unaware of the law. This placed a limit on the damage award. However, she did allow the maximum amount under a copyright infringement, stating in her decision, . . . "we recognize that \$20,000 does not compensate Martin fully for the complete loss of his artwork". She also says, ". . . we hope and expect that by awarding attorney's fees to Martin it will serve to deter municipalities and others from wantonly destroying works of art like 'Symphony #1' in future development projects."

The city appealed the decision and the case was heard by the 7th District Court of Appeals in Chicago, which voted 2 to 1 to accept the lower court's decision. The argument was decided on August 31, 1999. The case numbers are [98-4041](#) and [98-4132](#) for the appellate court decision and IP 96-0330-C-B/S for the lower court decision. Both are accessible online under [Martin vs Indianapolis](#).

Upon the legal resolution of this case, I contemplated the years of effort I had spent on its creation. I also reflected on the four years spent in litigation. The city was allowed to plead ignorance of the law, because this was the first case won by an artist under the Visual Artists Rights Act 1990 law. For this reason, there would not be a full recompense for the loss of Symphony #1". The sculpture was gone, destroyed, but hopefully my case will make it more difficult for municipalities to claim ignorance of the law.

I never received an apology from the city.



*Reflections*

## Newspaper and Magazine Articles:

The Indianapolis Star - *"Artist wins bid to erect city's largest sculpture"* - Rob Schneider, August 16, 1984

The Indianapolis News - *"Sculpture will help"*- Mark Goff, August 21, 1984

The Indianapolis Star - *"Martin orchestrates public site with 'Symphony #1' "*- Steve Mannheimer, July 12, 1987

The Indianapolis Star - *"Businessman envisions art along canal"* - Steve Mannheimer, June 14, 1992

The Indianapolis News - *"City may ditch canal project"* - Gerry Lanosga, October 22, 1992

The Indianapolis Star - *"City turns sculpture into scrap without telling the artist"* - Steve Mannheimer, July 27, 1995

Chicago Sun Times - "*Court hears case of statues vs statutes*" - Jim Kirk, April 10, 1996

The Indianapolis News - "*Artist takes on the city*" - David Mannweiler, May 21, 1996

New Art Examiner - "*Symphony Haul*" - Griff Morris, September 1996

The Los Angeles Times - "*Razing of artwork frames legal debate*"- Judy Pasternak, October 1997

The Indianapolis Star - "*Artist wins suit against city over demolished sculpture*" - Susan Schramm, October 10, 1997

The Indiana Lawyer - "*Judgement that protects artist's rights sets precedent*" - Emily Swiatek, November 25, 1997

Chicago Daily Law Bulletin - "*Beauty of art-shield law in eye of beholder*" - Molly McDonough, November 30, 1998

Art News - "*Lost Symphony*" - Hugh Eakin, January 1999

The Chicago Tribune - "*Artist wins right to his public art*" - David Mendell, September 2, 1999

The Indianapolis Star - "*City loses appeal on its demolition of artist's work*" - Doug Sword, September 4, 1999

The Indianapolis Star - "*Indianapolis again plays key role in art law*" - Steve Mannheimer, September 12, 1999

ABA Journal - "*This 'Symphony' is finished*" - Craig D. Feiser, December 1999