

Date	June 11, 2003	Court	Tokyo District Court
Case number	2003 (Yo) 22031		
– A case in which the court found that the act of relocating a building, garden and sculptures is an extension or rebuilding of an architectural work (Article 20, paragraph (2), item (ii) of the Copyright Act).			

Reference: Article 20, paragraph (2), item (ii) of the Copyright Act

Number of related rights, etc.:

Summary of the Ruling

1. The obligee foundation, which is a U.S. corporation, alleged that it succeeded to the moral right of the author, Isamu Noguchi, a sculptor, since it was bequeathed any and all rights for the works of Isamu Noguchi based on his will, and thereby filed a petition for provisional disposition seeking an injunction against the following relocation project (the "Relocation Project") by the obligor, which is a an educational corporation managing Keio University, based on said moral right of the author. The project is disassembling the building which was jointly designed by an architect, Yoshiro Taniguchi and Isamu Noguchi and is located in the Mita Campus of Keio University (the "Building"; including a part called Noguchi Room) and relocating a part of the Building including the Noguchi Room, the garden next to the Building, which was made by Isamu Noguchi (the "Garden"), and two sculptures located therein (the "Sculptures").

In addition, the obligee teachers, who are teachers of Keio University, alleged that they have the right to enjoy cultural assets: more specifically, the right to enjoy the integrity of the world's cultural assets and that the Relocation Project for which no resolution of the council has been obtained is illegal and invalid, and thereby filed a petition for provisional disposition seeking an injunction against the Relocation Project.

2. In this ruling, the court dismissed the obligees' petition on the grounds that the obligee foundation has failed to prove, prima facie, the existence of a right that should be subject to provisional remedy since it has not been proved, prima facie, that the obligee foundation had received the "designation" prescribed in Article 116, paragraph (3) of the Copyright Act of Japan. However, in light of the nature of the case, the court mainly made the following determination, just to err on the side of safety, regarding the issue of whether the right to integrity was infringed.

(1) It can be found that an integrated combination of the Building as a whole can be considered to be a work and that the Garden was designed to be an integrated part of

the Building and can be regarded as an organic part of the Building. Therefore, it is reasonable to consider that the Building as a whole and the Garden are integrated into each other and comprise an architectural work. The Sculptures can also be considered to be a part of the components of the Garden and included in the aforementioned architectural work as long as the Sculptures are located in the places designated by Yoshiro Taniguchi and Isamu Noguchi. At the same time, those Sculptures can be independently appreciated aesthetically and can therefore be considered to be independent artistic works.

The architectural work consisting of the Building as a whole, the Garden, and the Sculptures, which are integrated into each other as mentioned above, can be considered to be a joint work of Isamu Noguchi and Yoshiro Taniguchi, while the Sculptures, which can be independently considered to be works, are works of Isamu Noguchi. Therefore, Isamu Noguchi holds the moral right (the right to integrity) for these works as a co-author or the author.

(2) The Relocation Project is going to be carried out in such manner that the Noguchi Room and the Garden including one of the Sculptures will be restored to the original state as much as possible. However, the Relocation Project will result in modifying the shape of the Building as a whole and will also cause a partial loss of the characteristics of the Noguchi Room designed by the producers, while the Noguchi Room characterizes the Building. Furthermore, the Relocation Project will cause the loss of characteristics of the Garden designed by the producers in consideration of the shape of the surrounding land, etc. Thus, it has to be said that the Relocation Project will modify the architectural work consisting of an integrated combination of the Building as a whole including the Noguchi Room, the Garden and the Sculptures, causing the loss of its integrity as a work.

(3) Article 20, paragraph (2), item (ii) of the Copyright Act restricts the author's rights for an architectural work to a certain extent and permits modification, in order to adjust a balance between the owner's right to use an architectural work to gain economic profits and the author's rights, in consideration of the limitations of the architectural work due to its social nature. In light of this point, said item is expected to be applied to any extension or rebuilding of an architectural work necessary from an economic or a practical perspective. Thus, said item would not permit an arbitrary modification based on a personal preference or a modification beyond the extent necessary.

The Relocation Project aims to construct a new school building in a limited space of a university campus for the public purpose of newly establishing the Law School by using such size of grounds calculated based on the estimated number of students, etc.

In order to respect the intention of the producers, Isamu Noguchi and Yoshiro Taniguchi, to the extent possible, the final plan was formulated by reflecting the opinions of the Preservation WG as much as possible, while the scheduled opening date of the Law School was approaching. According to the plan, although the Building including the Noguchi Room and the Garden will be disassembled and relocated once, they will be restored to their original states as much as possible.

In light of these facts, the Relocation Project can be considered to be an extension or rebuilding, etc. of an architectural work specified in Article 20, paragraph (2), item (ii) of the Copyright Act. Therefore, the Relocation Project does not infringe the moral right of the author, Isamu Noguchi (the right to integrity).

(4) The proviso to Article 60 of the Copyright Act specifies that an act of modifying a work would be permitted if such act is found not to contravene the will of the author in light of the nature and extent of the act as well as the changes in social circumstances and other conditions.

A determination as to whether the will of the author will be contravened or not must be made objectively in light of the aforementioned points. In this case, the purpose of the Relocation Project is to construct a building of such scale that is necessary to achieve a public purpose. Moreover, the plan for the Relocation Project was devised with a determination to restore the original states of the works as much as possible. Thus, the Relocation Project can be considered not to contravene the will of the author and should therefore be subject to the proviso to said Article.

Thus, even if Article 20, paragraph (2), item (ii) of the Copyright Act is not applied to the Relocation Project, the proviso to Article 60 of said Act should be considered to be applicable and permit the Relocation Project.

2003 (Yo) 22031 Case of Seeking Order of Provisional Disposition Concerning Copyright

Ruling

Obligee: The Isamu Noguchi Foundation, Inc.

Same as above: A

Same as above: B

Same as above: C

Same as above: D

Same as above: E

Same as above: F

Same as above: G

Same as above: H

Same as above: I

Same as above: J

Same as above: K

Obligor: Keio University

Main text

1. All of the petitions of the obligees shall be dismissed.
2. The obligees shall bear the petition costs.

Facts and reasons

No. 1 Objectives of the petitions

1. Principal petition

The obligor shall not conduct a relocation project to disassemble and relocate a building called Shin-Banraisha (Laboratory 2) and two sculptures titled "Mu" (Nothing) and "Gakusei" (Student) made by Isamu Noguchi, and a garden located within the red line shown in Attached Drawing (1) including the building specified in the Attachment "Property List."

2. Alternative petition

The obligor shall not conduct a relocation project to disassemble, relocate, or move the interior of a room called "Noguchi Room," which is located within the red line shown in Attached Drawing (2), in the building specified in the Attachment "Property List," the "Garden," which is located within the blue line shown in Attached Drawing (2), and two sculptures titled "Mu" (Nothing) and "Gakusei" (Student) as shown by green line in Attached Drawing (2), respectively.

No. 2 Outline of the case

The obligor corporation runs Keio University and hopes to establish Keio University Law School (the "Law School") in one of its campuses, namely, the Mita Campus located in Mita, Minato-ku, Tokyo. In order to build a new school building, the obligor corporation plans to conduct a relocation project and disassemble Laboratory 2, which was jointly designed by an architect, Yoshiro Taniguchi (deceased), and a sculptor, Isamu Noguchi (deceased) and is located in said campus (in this ruling, the entire building of Laboratory 2 shall be referred to as the "Building"), and relocate a part of the Building, the garden next to the Building, which was made by Isamu Noguchi, and two sculptures located in the garden to the third floor of the new school building. The obligee, The Isamu Noguchi Foundation Inc. ("obligee Isamu Noguchi Foundation"), alleged that it succeeded to all of the rights to the works of Isamu Noguchi after his death and that the act of the obligor constitutes infringement of the moral right of Isamu Noguchi (the right to integrity). Also, the eleven obligees other than said foundation (the "obligee teachers"), who are all teachers of Keio University, alleged that they have the right to enjoy cultural assets, more specifically, the right to enjoy the integrity of the world's cultural assets and that the obligor's act constitutes infringement of said right, and sought an injunction against the obligor's project to disassemble and relocate the Building, etc.

(1) The principal petition was filed to seek an injunction against the relocation project concerning the Building as a whole including the part called Noguchi Room, two sculptures titled "Mu" and "Gakusei," and the garden on the premise that an integrated combination of these building, sculptures, and garden can be considered to be a work created by Isamu Noguchi or a joint work created by Isamu Noguchi and Yoshiro Taniguchi. (2) The alternative petition was filed to seek an injunction against the relocation project on such part of the Building called Noguchi Room, two sculptures titled "Mu" and "Gakusei," and the garden on the premise that these building, sculptures, and garden can be considered to be Isamu Noguchi's works respectively.

No. 3 Facts on which the decision is premised (the facts undisputed by the parties and the facts that can be easily considered to be proven prima facie based on prima-facie evidence mentioned below or on the result of the hearing)

1. The parties concerned (Prima-facie evidence: Exhibits Ko 3-1, 5, 22, 27, 45, the result of the hearing)

(1) Sculptor Isamu Noguchi died on December 30, 1988.

Obligee Isamu Noguchi Foundation alleged that it succeeded to all of the rights to the works created by Isamu Noguchi based on his final will dated April 6, 1987 (the "Will"). In a document titled "Agreement Concerning Receipt, Waiver, and Return of Fund"

(Exhibit Ko 22, simply referred to as the "Agreement") with regard to the estate of the decedent, Isamu Noguchi, which was probated by the Surrogate's Court in New York Country, New York State, where Isamu Noguchi had resided, Articles 2 and 4 of the Will are quoted (the information quoted in the Agreement is as specified in the attached document titled "Will (in English)").

The obligor corporation is an educational corporation led by President L under the Private School Act (Exhibit Ko 3-1) and all of the obligee teachers are teachers of Keio University.

(2) Isamu Noguchi (1904 to 1988) is a sculptor born as an American national in Los Angeles to the mother named Leonie Gilmour. He is known for such works as "Play Mountain," "The History of Mexico," and "Black Sun." In 1970, Isamu Noguchi created fountains for the world expo in Osaka. In 1986, he represented the United States in the 1986 Venice Biennale. In the same year, he was awarded the Kyoto Prize from the Inamori Foundation at the 100th anniversary of the Architectural Institute of Japan. Also, he was awarded the National Medal of Arts (in the United States) in 1987 and the Third Order of Sacred Treasure, and the Award for Distinction in Sculpture by the Sculpture Center in New York in 1988 respectively.

Isamu Noguchi is world-famous not only as a sculptor but also as an environmental artist who places importance on harmonization with the natural environment.

A studio of Isamu Noguchi in Japan was located in Mure-cho, Kita-gun, Kagawa Prefecture. Currently, an about 5,100 square-meter "Garden Museum" is open to the public, where visitors can look at various exhibits including said studio, the place around his house named "Isamu's House," an exhibition storehouse, a stone wall circle, and "Sculpture Garden," which he carved from a part of a mountain. About 150 works, both completed and uncompleted, are displayed there, including stone sculptures and metal sculptures such as "Energy Void" (Exhibits Ko 5, 27, 45).

2. Regarding the Building, the garden, and the sculptures (Exhibits Ko 4, 5, 7, 8, 18, 25, 42, 44, 47, the result of the hearing)

(1) In 1876, a building was constructed in the Mita Campus based on the idea of Yukichi Fukuzawa, the founder of the obligor corporation, to provide a place for people to get together, communicate, and think. The building was named "Banraisha" with the hope that the building would attract many visitors (Senkyaku banrai). Banraisha, which has such close relationship with Yukichi Fukuzawa as described above, was renovated, relocated, and eventually burned down during the Second World War. In 1951, in said campus, Laboratory 2 (the Building) was constructed based on the design created by an architect, Yoshiro Taniguchi ("Taniguchi"). The people started calling this building "Shin-

Banraisha."

The architect Yoshiro Taniguchi (1904 to 1979) is a pioneer in the field of modernism architecture in Japan. He is known for such works as Toson Memorial Hall (1947), Togu Palace (1960), and National Museum of Modern Art, Tokyo (1969). He is respected as an architect who created "designs that reflect Japanese traditional purity" and was awarded the Order of Culture. Before constructing Shin-Banraisha, Taniguchi constructed Building 4 and the Student Hall in the Mita Campus of Keio University. For these buildings, he was also awarded Prizes of AIJ (Architectural Institute of Japan) in FY1949. (2) The Building is a two-story reinforced concrete building housing professors' offices, an administrative office, and also "Common Room" designed by Isamu Noguchi in the south side of the entrance on the first floor of the Building (in this ruling, hereinafter referred to as "Noguchi Room," meaning the Common Room in the Building). The Building is located in the north of the Enzetsukan (hall of public speaking; Currently designated as an Important Cultural Property), which was established by Fukuzawa Yukichi.

Isamu Noguchi created the interior of the Common Room, the garden next to the Building, and three sculptures located in the garden, namely, a sculpture titled "Mu" (created over a period from 1950 to 1951, Shirakawa-stone sculpture, 229 cm, Attached Photograph (1)), a sculpture titled "Gakusei" (created in 1951, cast square bar welding sculpture, 405 cm, Attached Photograph (2)), and a sculpture titled "Wakai Hito" (Young person) (created in 1950, cast iron sheet welding sculpture, 200 cm).

The original positional relations among the Building, the Common Room, the garden, and the aforementioned three sculptures as of the time when they were created by Isamu Noguchi are shown in the attached document titled "Situation as of the Time of Completion of the Building." Sometimes, people refer to the grouping of the Common Room, the garden, and the sculptures created by Isamu Noguchi as "Noguchi Room" (Exhibit Ko 47). However, as mentioned above, in this ruling, only the Common Room in the Building is referred to as "Noguchi Room."

(3) A. Characteristics of the interiors of the Noguchi Room

The Noguchi Room has large sliding steel-sash windows that open the room to the east side of the campus, welcoming visits by students and professors. The room also has similar sliding windows on the west side, providing a large open space toward the west. In this way, the Noguchi Room is characterized by east-west space characteristics and openness.

The floor of the Noguchi Room is divided into three multi-level sections. One section is a plaster floor that has a fitted oval table and chairs. Another section is a wooden floor

(natural cherry wood) that has a circular fireplace and two columns sandwiching the fireplace. One of these wood-surface concrete columns is a structural column, while the other column is a chimney column. The highest section is a floor with a wicker mat and a tokonoma-style display shelf ("tokonoma" is an alcove in a traditional Japanese room). This room is designed to be used as a living room providing both chair-sitting area and floor-sitting area. The overall structure of the space of the room is made of curved and straight lines and surfaces, which makes a stark contrast to the architectural space surrounded by mutually perpendicular squares.

The terra cotta tiles on the south wall show a type of relief sculpture showing lines purposefully sculpted by Isamu Noguchi.

B. Characteristics of the garden

Since the garden section is located on the cliff in the west, Isamu Noguchi created the garden by calculating the sizes of the trees grown on the western slope of the cliff in order to express the characteristics of the land of the garden. Noguchi and Taniguchi made a lot of effort to design the garden in consideration of the facts that the south part of the garden is next to the Enzetsukan and that people in the garden can see the shape of Mount Inari near there, the west part of the Enzetsukan, and the big tree behind it.

C. Characteristics of the sculptures

The sculpture titled "Mu" is placed in around the center of the garden located in the west of the Noguchi Room. The sculpture is placed in such a way that people in the Noguchi Room can see the setting sun in combination with the sculpture, which would look like a stone lantern. The location of the sculpture was determined in such a way that emphasizes the east-west axis.

The structure titled "Gakusei" was placed in a northern area of the garden located in the west side of the Noguchi Room, but was relocated to an area closer to the center of the garden when the Building was expanded in 1987 as explained below.

(4) As of 1951, in which the Building was completed, the Mita Campus of Keio University including the Building was designed in such a way that low-rise buildings surrounded a central courtyard. However, in 1959, large school buildings such as the west building and the south building were constructed. In the 1980s, high-rise buildings such as the new library and the graduate school building were constructed one after another, greatly changing the overall landscape of the Mita Campus (Exhibit Ko 7).

The current positional relations among the Building and other school buildings in the Mita Campus are shown in the attached document titled "Current Mita Campus" (Exhibit Ko 2). The Building is the one numbered 6 on this document.

Two sculptures titled "Wakai Hito" and "Gakusei" created by Isamu Noguchi had also

been relocated from the original places as of the time of the completion of the Building upon the construction of the graduate school building and the expansion of the Building. These two sculptures are currently located in the areas indicated in the attached document titled "Current Building" (Exhibit Otsu 1, Attached Drawing 06).

The Noguchi Room is currently not freely accessible by students except for the dates of events, etc. due to management reasons. A sign prohibiting entry is placed on the street next to the building that leads to the Noguchi Garden. The sculptures titled "Wakai Hito" and "Gakusei" are discolored and corroded. The Shirakawa stone of the backside of the sculpture titled "Mu" has been greatly damaged. These sculptures are in need of urgent repairs.

3. Plan of the obligor (Exhibits Otsu 1, 2, 5, the result of the hearing)

(1) The obligor corporation plans to open the Law School in April 2004. Currently, it plans to construct a new school building to be used for the Law School, etc. in the southwest area of the Mita Campus, in which the Building (Shin-Banraisha) is located. The obligor corporation plans to provide law school education by using an existing school building during FY 2004. However, from April 2005, it plans to use a new school building to fully start law school education.

(2) The obligor corporation established the "Committee to Examine the Environmental Arrangements for New Graduate Schools," based on the plan for establishing new graduate schools including the Law School, in January 2002. In March 2002, said Committee submitted a report to the obligor with regard to the construction of a new graduate school building in the currently scheduled location and the implementation of a proposal competition. In response to the report, the obligor conducted a proposal competition in March 2002. After the first examination and the second examination, the obligor corporation selected, based on the resolution adopted by the permanent council members in May 2002, the currently-effective proposal submitted by Taisei Corporation ("Taisei's proposal"). Currently, the obligor corporation plans to conduct a relocation project to construct a new school building based on the Taisei's proposal (the "Relocation Project").

The outline of the Relocation Project is as described in the attached document titled "Outlines of the Relocation Project (1) to (4)." The Building and the garden will be disassembled once, and a part of the Building including the Noguchi Room will be reconstructed on the third floor of the new school building. Also, the garden and the sculptures will be relocated. Effort will be made to restore their original states respectively as much as physically possible. In other words, not only the first floor of the Building on which the Noguchi Room is located, but also the second floor-section that is

located above the Noguchi Room will be restored. Moreover, such section of the new school building that houses the Noguchi Room will be constructed in such way that said section would be facing the same direction as the current direction. In the case of the garden section, its original state as of the time of the completion of the Building will be restored as a rooftop garden. The wisteria trellis in the terrace that is open to the western garden will also be relocated and preserved. In order to maintain the positional relations between the Noguchi Room and the section of the garden that spreads on the west side of the Noguchi Room, the western window will continue facing the western garden. The sculpture titled "Mu" in the western garden will be located in the central part of the garden that spreads in the west of the Noguchi Room so that the current positional relations between the sculpture and the Noguchi Room will be accurately restored. In the case of the sculpture titled "Gakusei," as described in 2 (4) above, the current location of the sculpture is different from its original location determined by Isamu Noguchi. A new place for relocation is still under discussion. The spiral staircase from the first floor to the second floor of the Noguchi Room will be relocated and preserved. The interior of the Noguchi Room will also be relocated by preserving as many component parts as possible (since a part of the flooring and walls and the window frames are already eroded, there is a plan to replace them with new component parts).

No. 4 Issues and the allegations of the parties concerned concerning the issues

1. Issues

(1) Validity of the petitions

A. Obligee Isamu Noguchi Foundation

B. Obligee teachers

(2) Whether the moral right of author was infringed or not (the right to integrity, Article 20, paragraph (1) of the Copyright Act)

A. Whether the Relocation Project will modify the works

B. Whether Article 20, paragraph (2), item (ii) or the proviso to Article 60 of the Copyright Act is applicable

(3) The necessity for a provisional remedy

(omitted)

No. 5. Court decision

1. Issue (1) Validity of the petitions

(1) Validity of the petitions filed by obligee Isamu Noguchi Foundation

A (A) Article 59 of the Copyright Act specifies that "An author's moral rights are

exclusive to that author, and are inalienable." Thus, it is explicitly specified that, if the author dies, the moral rights of the author would disappear as well because those rights are not subject to any assignment or succession. Based on this premise, in order to make it possible to protect moral interests after the author's death, Article 60 of said Act prohibits any conduct that would be prejudicial to the moral rights of a deceased author if the author were alive. Also, Article 116 of said Act specifies that a person who has a close relationship with the moral interests of the deceased author and is capable of reflecting the author's will most properly may exercise the right to seek an injunction, etc. against a person who committed an act of infringement such as an act of violating Article 60 of said Act. Thus, the moral rights of a deceased author can be considered to be protected to the extent that the person specified in Article 116 of said Act is entitled to exercise the aforementioned right, etc. Paragraph (1) of said Article specifies that a surviving family member (meaning a surviving spouse, child, parent, grandchild, grandparent, or sibling of the deceased author or performer) may exercise the aforementioned right, etc. Since paragraph (3) of said Article specifies that any "author or performer, in a will, may designate the person that is permitted to file the claim referred to in paragraph (1) on behalf of the surviving family members," any person other than a survivor of a deceased author could become entitled to exercise the aforementioned right, only if said person is designated in the will of the author.

In this case, a determination as to whether obligee Isamu Noguchi Foundation is entitled to exercise the right to seek an injunction, etc. against an infringer of the moral right of the author, Isamu Noguchi, should be made based on whether or not Isamu Noguchi designated obligee Isamu Noguchi Foundation in his will as a person entitled to file a claim as specified in paragraph (3) of said Article.

(B) Regarding this point, obligee Isamu Noguchi Foundation alleged that the issue of whether the moral rights of author were transferred or not has nothing to do with the issue of whether the transferred rights are exercisable or not and that the former issue should be examined by using US law as the governing law because the issue lies in the validity of a bequest, while the exercisability of the copyright should be determined based on Japanese law.

In this case, however, obligee Isamu Noguchi Foundation is seeking an injunction, etc. against the Relocation Project in order to exercise the moral right of author (the right to integrity) under the Japanese Copyright Act. As described above, the Japanese Copyright Act specifies that the moral rights of an author belong exclusively to the author and that, after the author's death, the moral rights of author would not be subject to inheritance, but may be exercised by a surviving family member specified in said Act or

a person designated in a will. Therefore, in this case, it is necessary to examine, in accordance with the Japanese Copyright Act, whether the statement included in the Will of Isamu Noguchi can be interpreted to be "designation" specified in Article 116, paragraph (3) of the Japanese Copyright Act. Such examination would be sufficient. It is unnecessary to examine the validity of the Will apart from this point. It is unnecessary to determine whether the estate of Isamu Noguchi was validly inherited by obligee Isamu Noguchi Foundation based on the Will or not.

(C) In the meantime, the Will of Isamu Noguchi was not submitted as prima-facie evidence in this case. Obligee Isamu Noguchi Foundation merely submitted the Agreement (Exhibit Ko 22), which cites Article 2 and Article 4 of the Will. The following section examines whether Article 2 and Article 4 of the Will quoted in the Agreement are sufficient to prove that "designation" specified in Article 116, paragraph (3) of the Japanese Copyright Act was made.

B. (A) Interpretation of Article 2 and Article 4 of the Will

According to section 1 of "No. 3 Facts on which the decision is premised" presented above and the following prima-facie evidence, the following facts can be considered to be proven prima facie.

a. Content of the Agreement (Exhibit Ko 22)

At the beginning of the Agreement, there are statements as follows: "Isamu Noguchi died on December 30, 1988. He left the final will (the "Will") dated April 6, 1987. The Will is lawfully recognized to have been probated by the Surrogate's Court in New York Country, New York State, on March 28, 1989." "The Will was lawfully granted by the Surrogate's Court in New York Country, New York State, to M, N, and O, who are the executors of the Will, on March 29, 1989." After these statements, the Agreement cites Articles 2 and 4 of the Will (the quotations in English are presented in the attached document titled "Will (in English)").

After the quotations of Articles 2 and 4 of the Will, the Agreement states that "In order to make a partial bequest (in terms of equity) to the undersigned (the note by the quoter: obligee Isamu Noguchi Foundation) under Articles 2 and 4 of the Will as quoted above, the executors, M, N, and O, allocate, as a consideration for the signature affixed by the undersigned to the following receipt and waiver form, to the undersigned the proprietary interests in the estate of the decedent [i] with regard to the rights to the name and trademarks "Isamu Noguchi," the goodwill embodied in them, and the right to make any kind of claim against an act of infringing said name or trademark in the past and [ii] regarding the furniture designs of Isamu Noguchi, the rights (including, but not limited to, copyrights) to manage, license, and manufacture such furniture and designs and the

right to receive royalties in connection with those rights, and all of the rights including the right to make any kind of claim against an act of infringing such furniture designs in the past." Following this statement, it is stated that "the Isamu Noguchi Foundation ... confirmed the receipt of the aforementioned rights from the executors of the Will including M as a partial bequest under Articles 2 and 4 and shall be indemnified and exempted from all of the liabilities, obligations, and accountability to be imposed on the Isamu Noguchi Foundation from now on with regard to any measures taken or not taken in connection with the estate of Isamu Noguchi and the assets distributed as described above among M and others as individuals and executors."

b. Content of Article 2 of the Will (Exhibit Ko 22)

"TWO: A. I give equal half undivided interests in my sculpture, 'Energy Void' presently located at Mure, Kagawa Prefecture, Japan, to THE ISAMU NOGUCHI FOUNDATION, INC., a charitable corporation organized and existing under the laws of the State of New York, and to THE ISAMU NOGUCHI FOUNDATION, a Japanese charitable corporation organized and existing under the laws of Japan. In the event such Foundation shall not yet have been established in Japan at the time of my death, I direct my Executors to cause such Foundation to be established in the manner provided in Paragraph E of Article FIVE of this Will, and I give such half undivided interest to such Foundation.

B. I direct that all of the rest of my sculptures, paintings and other works of art (other than any work of art required to be sold in accordance with the provisions of Paragraph D of Article FIVE of this Will), whether executed by me or otherwise, and all my literary works, manuscripts, private papers, documents and copyrights connected therewith, shall be disposed of in all respects as part of my residuary estate."

c. Content of Article 4 of the Will (Exhibits Ko 22, 31, Otsu 10 to 13)

"FOUR : ALL the residue and remainder of my property and estate, real and personal, of whatever nature and wherever situate, including any property not effectively disposed of by the foregoing provisions of this Will, but excluding any property over which I have any power of appointment or disposal which power I hereby expressly do not exercise (herein referred to as my 'residuary estate'), I give and devise to THE ISAMU NOGUCHI FOUNDATION, INC., a charitable corporation organized and existing under the laws of the State of New York, for its general purposes, provided that at the date of my death it shall be (a) an organization described in Section 2055 (a) of the Internal Revenue Code so that this bequest will be deductible for Federal estate tax purposes, and (b) an organization described in Section 170 (c) of the Internal Revenue Code to which gifts are deductible for Federal income tax purposes."

d. U.S. Copyright Act as of the time when the Will was prepared (Exhibits Ko 3, Otsu 14)

The U.S. Copyright Act enacted on October 19, 1976 did not have any provision that recognizes the copyrightability of buildings or the moral rights of authors.

Section 106 (Exclusive rights in copyrighted works) of said Act specified that "The owner of a copyright specified in this Act has the exclusive right to conduct the following acts and grant a license on the condition that the copyright owner complies with the provisions from Section 107 to Section 118:

- (i) copy a copyrighted work as a reproduction or a record;
- (ii) produce a derivative work based on a copyrighted work;
- (iii) (hereinafter omitted)"

The right of attribution, which is considered to be one of the moral rights of authors in Japan, was protected in the U.S. under the provision concerning prohibition of unfair indication under the unfair competition law, the provision of the trademark law, etc. to the same degree as the protection provided in Japan.

e. U.S. copyright law after the amendment in 1990 (Exhibits Otsu 15, 16)

In the amendment of the U.S. Copyright Act in 1990, "(8) architectural works" was added after (7) of Section 102 (a). This is the first time in the history of the U.S. Copyright Act that architectural works are considered to be copyrightable.

Furthermore, in said amendment, a new provision, Section 106A was established as a provision to recognize the moral rights of authors as follows.

"(a) Rights of Attribution and Integrity. — Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art —

- (1) shall have the right (the rest is omitted)
- (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
- (3) (omitted)
- (b) (omitted)
- (c) (omitted)

(d) Duration of rights

- (1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.
- (2) (the rest is omitted)

(e) Transfer and Waiver

- (1) The rights conferred by subsection (a) may not be transferred, but those rights may be

waived if the author expressly agrees to such waiver in a written instrument signed by the author.

(2) (omitted)"

Regarding works of visual art, the U.S. Copyright Act specifies that "A 'work of visual art' is (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author (the rest is omitted)"

Furthermore, regarding the scope of the exclusive rights in architectural works, Section 120 specifies that "(b) Alterations to and Destruction of Buildings --- Notwithstanding the provisions of section 106 (2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building."

C. On these premises, a determination should be made as to whether Isamu Noguchi "designated" obligee Isamu Noguchi Foundation in a will as specified in Article 116, paragraph (3) of the Japanese Copyright Act.

(A) As described above, Articles 2 and 4 of the Will do not contain any word explicitly indicating that Isamu Noguchi made "designation" as specified in Article 116, paragraph (3) of the Japanese Copyright Act.

Regarding this point, obligee Isamu Noguchi Foundation alleged that the word "personal" in the phrase "real and personal" (in other words, "personal property") includes the moral rights of authors and provides grounds for its allegation that it is entitled to exercise rights.

According to the prima-facie evidence (Exhibits Ko 31, Otsu 10 to 13), the term "personal property" refers to property rights in general that would be subject to remedial measures in a personal action. The scope of said term is broad, covering claims, intangible property rights, etc., but is not limited to movables. In consideration of the broad meaning of the concept "personal property," it cannot be considered that a person entitled to exercise the moral rights of the author was determined by Isamu Noguchi just because the term "personal property" is used in the Will.

(B) As described above, the Will does not contain any word that explicitly indicates that "designation" specified in Article 116, paragraph (3) of the Japanese Copyright Act was made. Although there is no word that explicitly means "designation," if an examination of the Will as a whole reveals that Isamu Noguchi intended to commission the receiver of a bequest to handle matters related to modification of his works after his death, he would be deemed to have made "designation" as specified in said paragraph.

The following section examines the Will as a whole and determines whether Isamu Noguchi intended to commission obligee Isamu Noguchi Foundation to handle matters related to modification to the Building, the Noguchi Room, the garden, or the sculptures after his death.

The content of Article 4 of the Will mentioned above can be summarized as "Isamu Noguchi gives and devises all of the property and residual estate to obligee Isamu Noguchi Foundation." Based solely on this summary, it seems to be possible to interpret that obligee Isamu Noguchi Foundation succeeded to all of the rights related to Isamu Noguchi.

However, since said Article explicitly specifies that any property "excluding any property over which I have any power of appointment or disposal which power I hereby expressly do not exercise" will be given to obligee Isamu Noguchi Foundation as "residuary estate," it would not be clear whether the copyrights to the Building, the Noguchi Room, the garden, or the sculptures have been bequeathed to obligee Isamu Noguchi Foundation in the first place, unless the content of the residuary estate can be clarified based on the Will as a whole. Also, it would be impossible to presume the intention of Isamu Noguchi with regard to any modification to these works after his death.

On the other hand, as mentioned above, obligee Isamu Noguchi Foundation merely submitted the Agreement, which quoted Articles 2 and 4 of the Will, but did not submit the Will as prima-facie evidence. Thus, in this case, the scope of residuary estate has not been determined based on the prima-facie evidence submitted by obligee Isamu Noguchi Foundation. Moreover, it cannot be proven prima facie that rights to the Building, the Noguchi Room, the garden, and the sculptures were bequeathed based on the Will in the first place.

(C) Regarding the point mentioned above, obligee Isamu Noguchi Foundation submitted Exhibit Ko 32.

However, this is the response statement sent by fax from the director of said foundation to obligee A in response to the questionnaire (Exhibit Ko 39) submitted by obligee B to the Isamu Noguchi Foundation stating "Are there any properties that have been actually excluded after the preparation of the Will?" Said response statement states that "No 'exclusion' has been made because there were no properties over which Isamu Noguchi has any power of appointment." This statement merely means that no exclusion has been made by Isamu Noguchi after the preparation of the Will and completely fails to refer to the issue of whether there were any properties over which Isamu Noguchi has any power as he expressly states in the Will that he will not exercise. Therefore, Exhibit Ko 32 mentioned above is still insufficient to determine what is included in the "residuary

estate" mentioned by Isamu Noguchi in the Will.

Moreover, as described above, as of the time when Isamu Noguchi prepared the Will, the U.S. Copyright Act does not contain any provision concerning the right that corresponds to the moral rights of authors specified in Japanese Copyright Act. (Regarding this point, obligee Isamu Noguchi Foundation submitted Exhibit Ko 43 and alleged that the right to integrity was protected to the same degree as the moral rights of authors by Section 106 (2) of the U.S. Copyright Act and the provision of the unfair competition law concerning prohibition of unfair indication, etc. However, the right to produce a derivative work specified in the aforementioned provision of the U.S. Copyright Act is the same as a copyright. Thus, said provision cannot be considered to specify the right to integrity, which is one of the moral rights of authors.) Since the U.S. Copyright Act effective at that time can be interpreted to have been established to protect the economic interests rather than the moral rights of authors, it should be considered to be impossible for Isamu Noguchi to prepare the Will in consideration of how the moral rights of the author and the right to integrity for his works should be exercised after his death.

(D) In light of these facts, based on the detailed examination of the prima-facie evidence submitted to this case, it should be considered that it has not been proven prima facie what is included in the residuary estate bequeathed to obligee Isamu Noguchi Foundation (and for which the foundation is also possibly considered to have been commissioned to exercise the moral rights of the author) based on the Will.

D. Summary

Thus, the allegation that obligee Isamu Noguchi Foundation was designated by Isamu Noguchi as specified in Article 116, paragraph (3) of the Japanese Copyright Act cannot be considered to be proven prima facie. It should be concluded that the existence of any right that should be subject to provisional remedy has not been proven prima facie. Therefore, the petitions for provisional disposition, both the principal petition and the alternative petition, filed by said obligee should be dismissed.

(2) Eligibility of the obligee teachers to file the petitions

A. The obligee teachers alleged that they have the "right to enjoy the integrity of the cultural assets" with regard to the Building, the Noguchi Room, the garden, and the sculptures.

However, the "right to enjoy the integrity of the cultural assets" as alleged by the obligee teachers above does not have any grounds under the positive law. Even after the examination of the allegation of the obligee teachers, it is not clear based on what grounds the obligee teachers consider themselves to have a legal right to make such claim.

As described above, the "right to enjoy the integrity of the cultural assets" as alleged by the obligee teachers above cannot be considered to be a legal right and cannot be subject to the provisional remedy sought in this case.

B. Moreover, the obligee teachers submitted prima-facie evidence (Exhibits Ko 17, 28, 37, 48, etc.) and alleged that the obligor corporation's act of carrying out the Relocation Project without obtaining a resolution of the council is illegal and that the obligee teachers have the right to seek an injunction against such illegal act.

However, the positive law does not provide any grounds for such allegation that the obligee teachers are entitled to directly seek an injunction against the execution of any policy of the obligor corporation, if the policy has been made in violation of the internal procedural rules. Since the allegation of the obligee teachers does not clarify the grounds based on which the obligee teachers alleged to be entitled to make such claim, the allegation of the obligee teachers is unacceptable. (According to Exhibit Otsu 18, the obligor corporation can be found to have obtained a resolution on the execution of the Relocation Project in a council meeting held on May 28, 2003.)

C. As described above, it has to be said that the obligee teachers also failed to prove, prima facie, the existence of a right that should be subject to provisional remedy. Thus, all of their petitions should be dismissed.

2. Issue (2) (Whether the right to integrity was infringed)

Based on the determination made in 1 above, all of the petitions should be dismissed because neither obligee Isamu Noguchi Foundation nor the obligee teachers can be considered to have proved the existence of a right that should be subject to provisional remedy.

Therefore, no determination needs to be made with regard to Issue (2). However, in light of the nature of this case, this court makes a determination, just to be on the safe side, regarding this issue as follows.

(1) Whether the works were modified as a result of the Relocation Project

A. Works of Isamu Noguchi

Before determining whether the works of Isamu Noguchi were modified as a result of the Relocation Project, the following section examines the details of the works of Isamu Noguchi.

(A) The obligees alleged that the Building is a joint work of an architect, Taniguchi, and Isamu Noguchi and that an integrated combination of the Building, the garden, and the sculptures is a work of Isamu Noguchi.

Regarding this point, the architect, Taniguchi, stated as follows in a magazine titled "Shin-kenchiku" (New architecture) (Issue of February 1952; Exhibits Ko 4, Otsu 3):

"After school buildings, namely, 'Building 4,' 'Building 5,' and 'Student Hall,' were constructed, 'Laboratory 2' was newly constructed... I wanted these buildings to have consistency as a design. As an architect, I hoped to express the renaissance of the 'Fukuzawa spirit' by constructing school buildings that reflect the essence of the design of the 'Enzetsukan' (1875) constructed by Yukichi Fukuzawa. These buildings are to be used by the graduate schools for legal, literature, and economic studies. For this reason, based on the idea that these buildings should have the function of providing 'opportunities for deep thinking,' I tried to seek collaboration with sister arts such as paintings and sculptures...

... This time, in the construction project for 'Laboratory 2,' I wanted to create harmonization with modern-art sculptures with the help of a sculptor, Mr. Isamu Noguchi. Mr. Noguchi was in charge of 'garden' and 'sculptures,' whereas I was in charge of 'architecture.' In particular, when it comes to the interior of the Common Room, we collaborated with each other very closely as creators. As an architect, I made an effort to give functions to the artistic designs created by the sculptor and to ensure the execution of those functions by using Japanese materials and structures. Unlike other sculptors, Mr. Noguchi is a sculptor with a deep understanding of architecture. For this reason, the two of us were able to cooperate with each other more closely than we originally thought." In an article titled "Sculpture and Architecture" published in a magazine titled "Shin-kenchiku" (Issue of October 1950), Taniguchi stated that "Mr. Isamu Noguchi and I jointly constructed a building called Shin-Banraisha on a hill in Mita, which is the result of collaboration between 'sculpture' and 'architecture.' Isamu was in charge of designing the 'garden' and the 'interior of the clubroom,' whereas I was in charge of the 'architecture' of the building. However, we did not clearly divide our roles. We worked in collaboration with each other and had comprehensive discussions using sketches, drawings, and models, through nights and days in hot summer. This building is one of the school buildings of Keio University, namely, 'Building 5,' 'Building 4,' and 'Student Hall,' which I designed. The emulation of the style of 'Enzetsukan' established by Professor Yukichi Fukuzawa in 1875 is my theme for construction design. I'm dreaming of creating 'artistic design symphony' on a hill in the Mita Campus. Shin-Banraisha will constitute one movement of said symphony." In an article published in a magazine titled "Shin-kenchiku" (Issue of February 1952, Exhibits Ko 4, Otsu 3), Isamu Noguchi stated that "The best way of expressing my idea would be creating a combination of a room and a garden... In this project, I was most delighted to find a place to integrally express my idea in a new building housing Laboratory 2. The room is open to the west. As the sun goes down behind my sculpture 'Mu,' the silhouette of the sculpture will emerge, looking like a stone

lantern illuminated by the light from the sky. An iron sculpture titled 'Gakusei' rising toward the blue sky is a gift from me to aspiring students."

As described above, Taniguchi and Isamu Noguchi found the construction of the Building including the Noguchi Room, the garden, and the sculptures as a joint project carried out by the two of them. According to the facts presented above as the facts on which the decision is premised (No. 3, 2, (1) to (4)), the Noguchi Room is a part that characterizes the Building and occupies the southern part of the first floor, which is the important part comprising the front side of the Building. The Noguchi Room is directly facing the western garden. The structure of the room is designed in such a way that it exists in harmonization with the garden. Moreover, the basic design, etc. of the Building was originally made with the anticipation that a part of the Building would be used as the Noguchi Room. Thus, the number of columns, construction style, etc. and other basic structures of the Building can be considered to be included in the design of the Noguchi Room. Based on a comprehensive evaluation of these facts and the facts found in accordance with the prima-facie evidence (Exhibits Ko 19, 20, 25 to 27, 47, etc.), it can be found that an integrated combination of the Building including the Noguchi Room as a whole can be considered to be a work and that the garden was designed to be an integrated part of the Building and can be regarded as an organic part of the Building. Therefore, it is reasonable to consider that the Building as a whole including the Noguchi Room and the garden are integrated into each other and comprise an architectural work.

Regarding the sculptures, since the structure of not only the garden as a whole but also the structure of the Noguchi Room in the Building were designed in consideration of the locations and shapes of the sculptures to be placed in the garden, the sculptures can also be considered to be a part of the components of the garden and included in the aforementioned architectural work as long as the sculptures are located in the places designated by Taniguchi and Isamu Noguchi. At the same time, those sculptures can be independently appreciated aesthetically and can therefore be considered to be independent artistic works.

(B) The architectural work consisting of the Building as a whole including the Noguchi Room, the garden, and the sculptures, which are integrated into each other as mentioned above, can be considered to be a joint work of Isamu Noguchi and Taniguchi, while the sculptures, which can be independently considered to be works, are works of Isamu Noguchi. Therefore, Isamu Noguchi holds the moral right (the right to integrity) for these works as a co-author or the author.

The following section examines whether the aforementioned integrated architectural work and the sculptures as independent works will be modified as a result of the

Relocation Project.

B. Whether the works will be modified as a result of the Relocation Project

(A) Effect of the Relocation Project on the Noguchi Room, the garden and the sculptures

As described in the section titled "Facts on which the decision is premised" (No. 3, 3, (2)), the obligor planned to relocate the Noguchi Room, the garden and the sculptures in such way that the current state of the Building, etc. will be maintained as much as possible. However, the specific parts that have to be changed from the current state as a result of the Relocation Project can be considered to be proven *prima facie* as follows based on *prima-facie* evidence (Exhibits Ko 8, 44, 47) and the result of the hearing. (Regarding the Building, it is clear that the shape of the Building as a whole will be modified as a result of the Relocation Project. The issue disputed in this case lies in whether the Noguchi Room in the Building will be modified as a result of the Relocation Project. As mentioned above, it is interpreted in this case that the Building as a whole and the garden including the sculptures are integrated into each other and comprise an architectural work, while, at the same time, the sculptures independently exist as artistic works. Therefore, before examining whether the Relocation Project will modify these works or not, it is necessary to determine the effect of the Relocation Project on the Noguchi Room, the garden, and the sculptures independently and to determine the effect on the work consisting of an integrated combination of the Noguchi Room, the garden, and the sculptures, and also on the works consisting of independent sculptures.)

a. Noguchi Room

As described in the section titled "Facts on which the decision is premised" (No. 3, 2, (3)), the Noguchi Room is open to the east side of the campus through large sliding steel-sash windows, welcoming visits by students and teachers and is also wide open to the west side through similar windows. The room is characterized by east-west space characteristics and openness. If the Relocation Project is carried out, after the relocation, the east side of the room will be blocked by a building.

Regarding interiors, etc. of the Noguchi Room, the materials of the floor (natural cherry wood) will be newly produced and colored, while the sliding steel-sash windows, which are likely to be deformed at the time of disassembly, will be newly produced. The terra cotta tiles on the south wall are also likely to be damaged at the time of disassembly. Any damaged tiles will be replaced with newly produced tiles.

b. Garden

As described in the section titled "Facts on which the decision is premised" (No. 3, 2, (3)), the garden was placed based on the calculation by Isamu Noguchi so that the garden section is located on the western cliff. In order to express the characteristics of the land

of the garden, Isamu Noguchi took into calculation the trees grown on the slope of the cliff. The south part of the garden is near the Enzetsukan and designed in such a way that people in the garden can see the landscape of Mount Inari, the west part of the Enzetsukan, and a giant tree behind it.

In the Relocation Project, the garden will be relocated on the third floor of the new school building. As a result, the garden would no longer be able to express the characteristics of the land and would look as if it were floating like a hanging garden.

c. Sculptures

As described in the section titled "Facts on which the decision is premised" (No. 3, 2, (3) and (4)), all of the sculptures need repairs. In the Relocation Project, they need to be repaired and restored to their original states.

The current location of the sculpture titled "Gakusei" is different from its original location determined by Isamu Noguchi as of the time of production. Where the sculpture should be relocated in the garden will be determined through discussions with experts. Thus, the new location is likely to be different from the current location.

(B) Based on these premises, the following sections examine whether any modification will be made to the architectural work consisting of a combination of the Noguchi Room, the garden, and the sculptures and the works consisting of independent sculptures as a result of the Relocation Project.

a. As described above, regarding the Noguchi Room, in consideration of the loss of the existing spatial characteristics of the eastern side of the Noguchi Room, and in light of the expected difficulty in restoring a reinforced concrete building once it is disassembled, as well as the difficulty in restoring the terra cotta tiles that are integrated into a wall of the Building, it has to be said that the characteristics of the Noguchi Room designed by the producer will be partially lost.

b. The sculpture titled "Mu" is located in the central part of the garden located in the west of the Noguchi Room. People in the Noguchi Room can see the sculpture in the direction of the sunset. The shape and location of the sculpture in relation to the Noguchi Room are significant factors of the structure of the garden as a whole. Therefore, it is necessary to examine whether any relocation of the position of the sculpture can be considered to be a modification to the garden as a whole. In this respect, as described above, in the Relocation Project, the sculpture titled "Mu" will be restored to its original state in terms of the location, including the positional relation with the Noguchi Room, and the facing direction, etc. Thus, the relocation of the sculpture will not solely modify the garden as a whole. Currently, the sculpture titled "Gakusei" has already been relocated from the original location determined by Isamu Noguchi. Since the current location is already

different from the original position determined by Isamu Noguchi, there is no risk that the relocation of the sculpture in connection with the Relocation Project will modify the garden as a whole.

c. However, the garden as a whole was designed by Isamu Noguchi in collaboration with Taniguchi in consideration of the trees grown on the slope of the western cliff because the garden is located in the western cliff section in an effort to express the characteristics of the land of the garden and also in consideration of other factors such as the fact that the south part of the garden is next to the Enzetsukan and that people in the garden can see the landscape of Mount Inari, the west part of the Enzetsukan, and a giant tree behind it. In the Relocation Project, the garden as a whole will be relocated in such a manner that the current state will be restored including the positional relation with the Noguchi Room. However, as mentioned above, the intention of the producers expressed in consideration of the shape of the surrounding land, etc. will no longer be reflected in the garden as a result of the Relocation Project. Thus, as far as the garden is concerned, the characteristics that the producers intended to create will be lost.

d. As described above, the sculptures can be considered to be a component part of the garden and also to be independent artistic works. A sculpture that is regarded as an independent artistic work is an expression made by the producer in the form of shapes, structures, etc. of the sculpture. Therefore, no matter where it is exhibited, the intention of the producer would be sufficiently conveyed to viewers. Thus, the aforementioned sculptures as independent works were not be modified as a result of the Relocation Project.

C. Summary

As described above, the Relocation Project is going to be carried out in such manner that the Noguchi Room and the garden including the sculptures such as the sculpture titled "Mu" will be restored to the original state as much as possible. However, the Relocation Project will result in modifying the shape of the Building and will also cause a partial loss of the characteristics of the Noguchi Room designed by the producers, while the Noguchi Room characterizes the Building. Furthermore, the Relocation Project will cause the loss of characteristics of the garden designed by the producers in consideration of the shape of the surrounding land, etc. Thus, it has to be said that the Relocation Project will modify the architectural work consisting of an integrated combination of the Building as a whole including the Noguchi Room and the garden including the sculptures such as a sculpture titled "Mu," causing the loss of its integrity as a work.

(2) Issue (2) B (Whether Article 20, paragraph (2), item (ii) or the proviso to Article 60 of the Copyright Act is applicable)

A. A comprehensive examination of the facts on which the decision is premised (No. 3,

3, (1) and (2)), the prima-facie evidence (Exhibits Ko 8, 10 to 15, 17, 24 to 26, 29, 30, 38, 37, Otsu 5, 6), and the result of the hearing has revealed that the following facts have been proven prima facie regarding how the obligor's plan to construct a new school building was devised.

(A) In response to the report submitted by the Justice System Reform Council, the obligor corporation established the New Graduate School Planning Committee (the "New Graduate School Committee") in October 2001, in which the council members and the director of each research committee in Keio University participated and started discussions about a plan for new graduate schools. After a total of six meetings at the New Graduate School Committee, the obligor corporation adopted the final resolution in February 2002 that, from the perspective that it is most desirable to establish two types of graduate schools, namely, "skills (professional)" schools and "academic" schools, as two wheels on an axle in order to nurture human resources, a law school should be established as a new graduate school in an effort to contribute to both "nurturing legal professionals" and "promoting legal studies."

The obligor corporation had school buildings in multiple campuses including the Mita Campus. For example, it has school buildings for the Graduate School of Science and Technology in Hiyoshi, school buildings for the Graduate School of Medicine in Shinanomachi, and school buildings for the Graduate School of Media and Governance in Shonan Fujisawa. The final resolution states that, in order to allow personnel exchange with other graduate schools and to achieve the new graduate school's goal of serving as facilities to be mutually shared with other graduate schools, the only option would be to construct the new graduate school in the Mita Campus, which is the center of academia, where many of the graduate schools of the obligor corporation are currently located.

In this process, the aforementioned committee also considered renting a school building in a different place and examined the criteria set by the Ministry of Education, Culture, Sports, Science and Technology concerning school buildings, which are to be followed upon establishing a graduate school or a faculty of a graduate school. Those criteria state that (1) "as of the time of application filing, there must be a guarantee that the building can be used for 10 years or longer without any problem after the fiscal year of the establishment of school" or that (2) a rented facility may be permitted only when "the amount equivalent to 10 years' worth of rents has been paid at the time of application filing." The committee found that the construction of a new school building in compliance with the condition specified in (1) above would be the only feasible option. If the obligor corporation intends to rent a school building around the Mita Campus as specified in (2) above, the amount that the obligor corporation has to pay would be estimated to be 7.2

billion yen at the least, and therefore, it had to give up on the latter option due to financial reasons.

The New Graduate School Committee also considered the possibility of acquiring an alternate site. However, such option would cost more than 6 billion yen and was found to be unaffordable for the obligor corporation.

(B) As shown in the attached document titled "Current Mita Campus," the Mita Campus has almost no remaining ground. Since all of the existing buildings have been already used as student facilities or research facilities, it was impossible to use a part of those buildings for the new graduate school, which needed a larger space.

According to the plan of the obligor corporation, the section for the law school alone needs to have a space large enough to accommodate about 690 students and 50 teachers, which means that the new school building should have a gross floor space of about 5,500 tsubo (approx. 18,182 square meters). Based on this premise, the New Graduate School Committee examined and concluded that the only feasible option would be to readjust the southwest part of the Mita Campus.

(C) The obligor corporation adopted the competition system for construction of a new school building. On March 22, 2002, the obligor corporation conducted an explanation meeting about the competition and asked the participants to prepare a draft plan that satisfies the requirements of three-year time limitation to complete the planning, designing, and construction phases, a gross floor space of about 5,500 tsubo (approx. 18,182 square meters), and reflecting ten important points. In the meeting, each competitor was given the Guidelines for Competition for Proposing a Plan for the New School Building of Keio University (Mita) (Exhibit Otsu 7-1). These guidelines specify such conditions as follows as the "important points that should be reflected in the plan": "A. Preservation of the history and central role of the Mita Campus, B. Consideration of the new building as the starting point of the redevelopment of the Mita Campus... I. Preservation and harmonization of the important buildings and the nature (including the preservation of the Noguchi Room)..."

After the competition, the proposal of Obayashi Corporation (Exhibit Otsu 7-3), the proposal of Takenaka Corporation (Exhibit Otsu 7-2), and the Taisei's proposal passed the first examination. After further examination, the Taisei's proposal was adopted based on the evaluation of the construction costs and the detailed plan to relocate the Building, etc., more specifically, the plan for providing an open space as a piloti by partially using the first floor to third floor of the new school building, aligning the eastern wall of the new school building with the eastern wall of the western school building so that such good alignment will create ample space and facilitate the flow of people, and also by paying

the greatest attention to the preservation of the environment around the Enzetsukan through greening of the former site of the Building, while also respecting the intention of Isamu Noguchi and Taniguchi regarding the Noguchi Room and the garden, and using the original materials as much as possible.

(D) On the other hand, the "Noguchi Room Preservation Working Group" (simply the "Preservation WG"), which was established in August 2002 and led by Professor P of the Keio University Faculty of Letters, interviewed 30 experts in the course of a total of eight hearings over a period from August to December 2002. The Preservation WG questioned the reasonableness of the "Noguchi Room relocation" plan presented in the Taisei's proposal, which the obligor was going to execute, and submitted a detailed report "Report and Recommendation from the Noguchi Room Preservation WG" (dated December 12, 2002; Exhibit Ko 8) to the obligor corporation, requesting a reconsideration for greater preservation of the important part of the "Shin-Banraisha" and "Noguchi Room." Furthermore, as the movement to preserve "Shin-Banraisha/Noguchi Room" spread internationally, obligee Isamu Noguchi Foundation, the Asian Cultural Council, and the Walker Art Center jointly submitted a preservation request to the obligor corporation under the name of the "International Committee for the Preservation of the Shin-Banraisha."

(E) In response to the recommendation of the Preservation WG, the obligor corporation decided to give up the original plan of relocating only the first floor of the Noguchi Room to the third floor of the new school building and adopted a new plan of relocating both first and second floors, maintaining the spiral staircase from the first floor to the second floor in order to better preserve their characteristics of the collaborative work of Isamu Noguchi and Taniguchi. The new plan was also designed to preserve the positional relations among the Noguchi Room, the wisteria trellis, and the sculptures in order to respect the intention of Isamu Noguchi and Taniguchi to position the Noguchi Room in consideration of the directions of the sculptures in the garden and the movement of the sun. Moreover, the new plan places importance on the fact that, about the sculpture titled "Mu," Noguchi commented that "The sun would light the stone lantern" (page 3 of Exhibit Ko 8), and on his motif that the setting sun can be seen through the round hole at the center of the sculpture, and the sculpture is planned to be positioned at an angle that is the same as the original angle determined as of the time of the production. Regarding the interior design of the Noguchi Room, the new plan states that the same materials will be used as much as possible, that the existing interior material and furniture will be relocated as much as possible, and that, if there is anything that cannot be relocated, expert advice will be sought after conducting research. In this way, the original Taisei's proposal was

thus modified. All of these modifications were reflected in the plan for the Relocation Project.

A proposal submitted by the obligee teachers was also considered. They proposed to preserve the Building and construct a new school building behind it (on the west side). However, due to some difficulties, namely, a smaller site area and the shade regulations, which make it impossible to construct a new school building unless its total gross floor space is cut by 2,400 square meters, this was not adopted. Other proposals were also impossible to adopt because they would require significant design changes and a longer construction period.

B. In light of the facts on which the decision is premised (No. 3, 3, (1) and (2)) and the facts mentioned in A above, the applicability of Article 20, paragraph (2), item (ii) of the Copyright Act is examined below.

As mentioned above, this case involves an architectural work consisting of an integrated combination of the Building as a whole including the Noguchi Room, the garden, and the sculptures as a joint work of Isamu Noguchi and Taniguchi, as well as independent works of Isamu Noguchi consisting of individual sculptures, namely, "Mu" and "Gakusei." Among them, the architectural work consisting of an integrated combination of the Building as a whole including the Noguchi Room, the garden, and the sculptures will be modified as a result of the Relocation Project.

Article 20, paragraph (2), item (ii) of the Copyright Act restricts the author's rights for an architectural work to a certain extent and permits modification, in order to adjust a balance between the owner's right to use an architectural work to gain economic profits and the author's rights, in consideration of the limitations of the architectural work due to its social nature from the perspective that an architectural work is not produced solely for the purpose of aesthetic appreciation, but is rather produced for practical purposes to be used as a residence, accommodation, office, school, government building, etc. In light of this point, said item is expected to be applied to any extension or alteration of an architectural work necessary from an economic or a practical perspective. Thus, said item would not permit an arbitrary modification based on a personal preference or a modification beyond the extent necessary.

In this case, as described above, the Relocation Project aims to construct a new school building in a limited space of a university campus for the public purpose of newly establishing the Law School by using such size of grounds calculated based on the estimated number of students, etc. In order to respect the intention of the producers, Isamu Noguchi and Taniguchi, to the extent possible, the final plan was formulated by reflecting the opinions of the Preservation WG as much as possible, while the scheduled opening

date of the Law School was approaching. According to the plan, although the Building including the Noguchi Room and the garden will be disassembled and relocated once, they will be restored to their original states as much as possible. In light of these facts, the Relocation Project can be considered to be an extension or alteration, etc. specified in Article 20, paragraph (2), item (ii) of the Copyright Act. Therefore, the Relocation Project does not infringe the moral right of the author, Isamu Noguchi (the right to integrity). (This conclusion would remain the same, even if the subject matter of this lawsuit is not the aforementioned architectural work consisting of an integrated combination of the Building as a whole and the garden, but, consists of the Noguchi Room part in the Building and the garden, as alleged in the alternative petition filed by the obligees. This is because the Noguchi Room will be considered to be a part of an architectural work that is subject to Article 20, paragraph (2), item (ii) of the Copyright Act, while said item will also be applied analogically to the garden due to its nature.)

C. Applicability of the proviso to Article 60 of the Copyright Act

The moral rights of author exclusively belong to one author. If the author dies, the grounds for legal protection would disappear as well (Article 59 of said Act). However, the Copyright Act provides protection for the moral rights of the author to a certain extent even after his or her death (Article 60 of said Act).

In such case, the proviso to Article 60 of the Copyright Act specifies that an act of modifying a work would be permitted if such act is found not to contravene the will of the author in light of the nature and extent of the act as well as the changes in social circumstances and other conditions.

A determination as to whether the will of the author will be contravened or not must be made objectively in light of the aforementioned points. In this case, as described above, the purpose of the Relocation Project is to construct a building of such scale that is necessary to achieve a public purpose. Moreover, the plan for the Relocation Project was devised with a determination to restore the original states of the works as much as possible. Thus, the Relocation Project can be considered not to contravene the will of the author and should therefore be subject to the proviso to said Article.

Thus, even if Article 20, paragraph (2), item (ii) of the Copyright Act is not applied to the Relocation Project, the proviso to Article 60 of said Act should be considered to be applicable and permit the Relocation Project.

(3) On these grounds, it cannot be considered to be proven *prima facie* that obligee Isamu Noguchi Foundation owns any right that should be subject to provisional remedy.

3. Conclusion

On these grounds, in this case, it cannot be considered to be proven *prima facie* that

the obligees own any right that should be subject to provisional remedy. Thus, both the principal petition and the alternative petition filed by the obligees shall be dismissed.

Therefore, the judgment has been rendered in the form of the main text.

(June 11, 2003)

Tokyo District Court, 46th Civil Division

Presiding judge: MIMURA Ryoichi

Judge: AOKI Takayuki

Judge: MATSUOKA Chiho

Attachment	Property List
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Location: 2-202-1, Mita, Minato-ku	
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House No.: 202-1-6	
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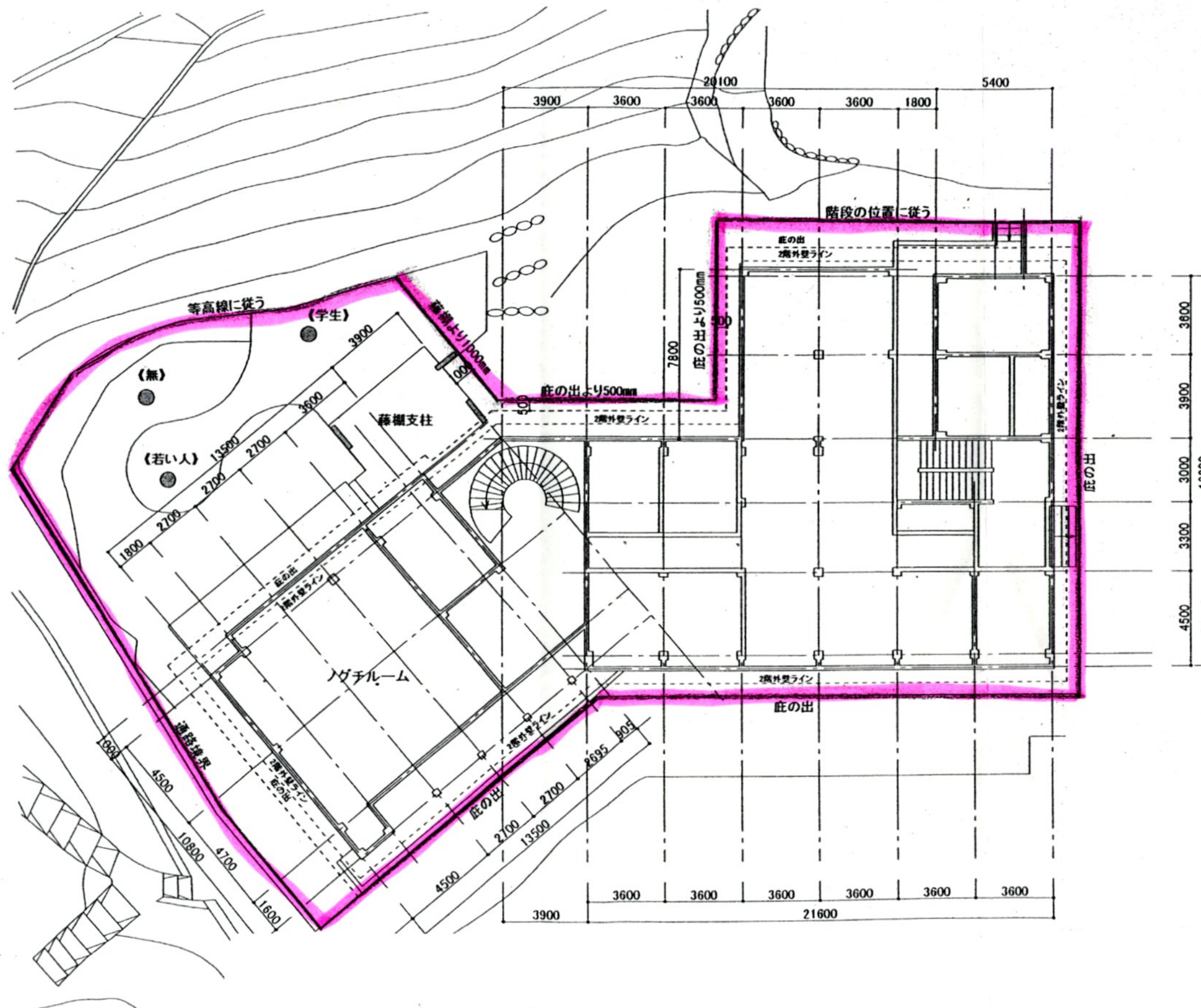
Type: Laboratory	
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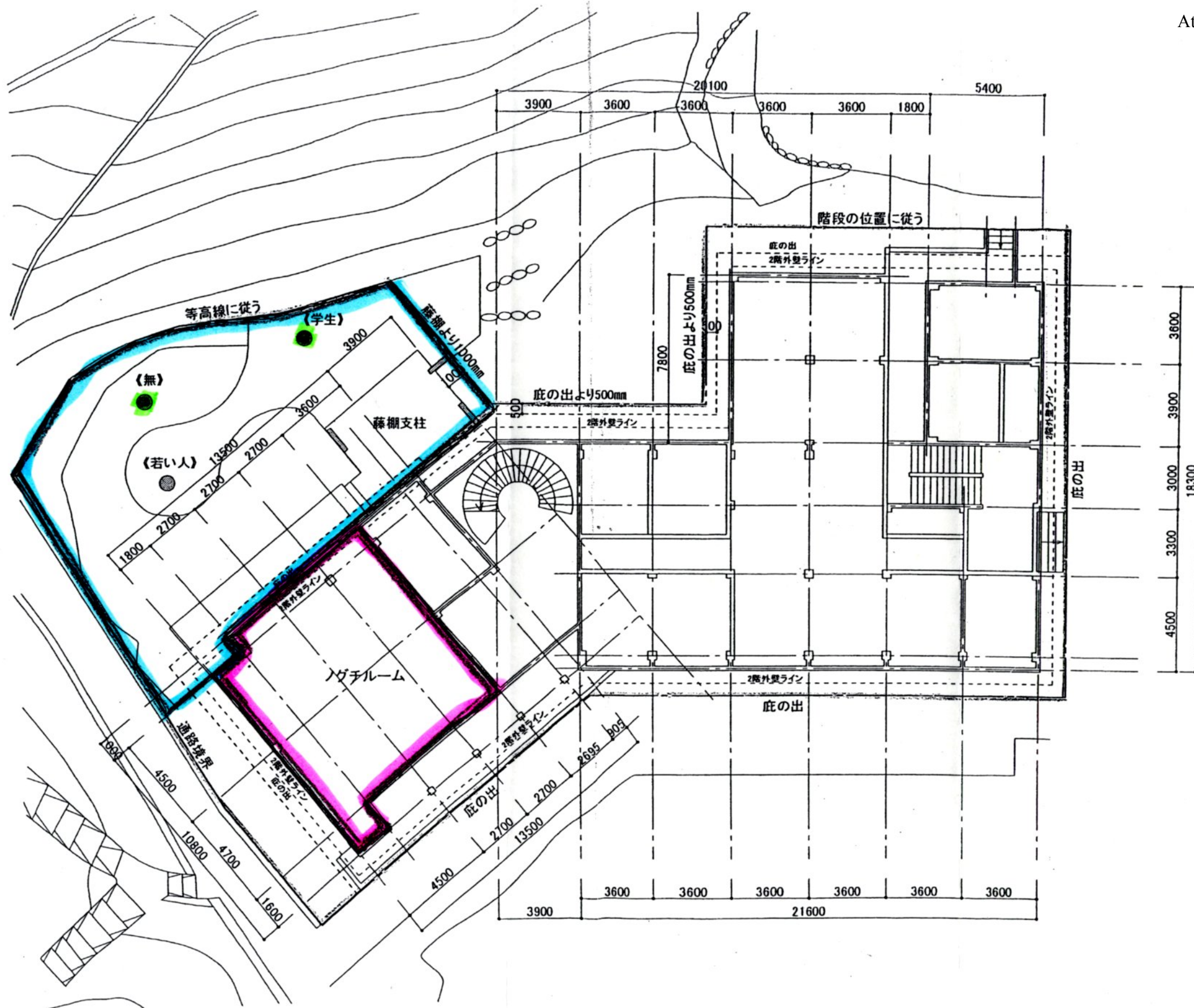
Structure: Two-story reinforced concrete building with one basement floor having a steel-framed flat roof	
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Floor space: First floor: 508.70 square meters	
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Second floor: 582.90 square meters	
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Basement: 62.10 square meters	
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別紙 本件遺言書（英文）
Will (in English)

TWO:

- A. I give equal half undivided interests in my sculpture, ' Energy Void ' presently located at Mure, Kagawa Prefecture, Japan, to THE ISAMU NOGUCHI FOUNDATION, INC., a charitable corporation organized and existing under the laws of the State of New York, and to THE ISAMU NOGUCHI FOUNDATION, a Japanese charitable corporation organized and existing under the laws of Japan. In the event such Foundation shall not yet have been established in Japan at the time of my death, I direct my Executors to cause such Foundation to be established in the manner provided in Paragraph E of Article FIVE of this Will, and I give such half undivided interest to such Foundation.
- B. I direct that all of the rest of my sculptures, paintings and other works of art (other than any work of art required to be sold in accordance with the provisions of Paragraph D of Article FIVE of this Will) , whether executed by me or otherwise, and all my literary works, manuscripts, private papers, documents and copyrights connected therewith, shall be disposed of in all respects as part of my residuary estate."

"FOUR : ALL the residue and remainder of my property and estate, real and personal, of whatever nature and wherever situate, including any property not effectively disposed of by the foregoing provisions of this Will, but excluding any property over which I have any power of appointment or disposal which power I hereby expressly do not exercise (herein referred to as my 'residuary estate'), I give and devise to THE ISAMU NOGUCHI FOUNDATION, INC., a charitable corporation organized and existing under the laws of the State of New York, for its general purposes, provided that at the date of my death it shall be (a) an organization described in Section 2055 (a) of the Internal Revenue Code so that this bequest will be deductible for Federal estate tax purposes, and (b) an organization described in Section 170 (c) of the Internal Revenue Code to which gifts are deductible for Federal income tax purposes."

彫刻 sculpture

「無」"Mu" (Nothing)



彫刻 sculpture

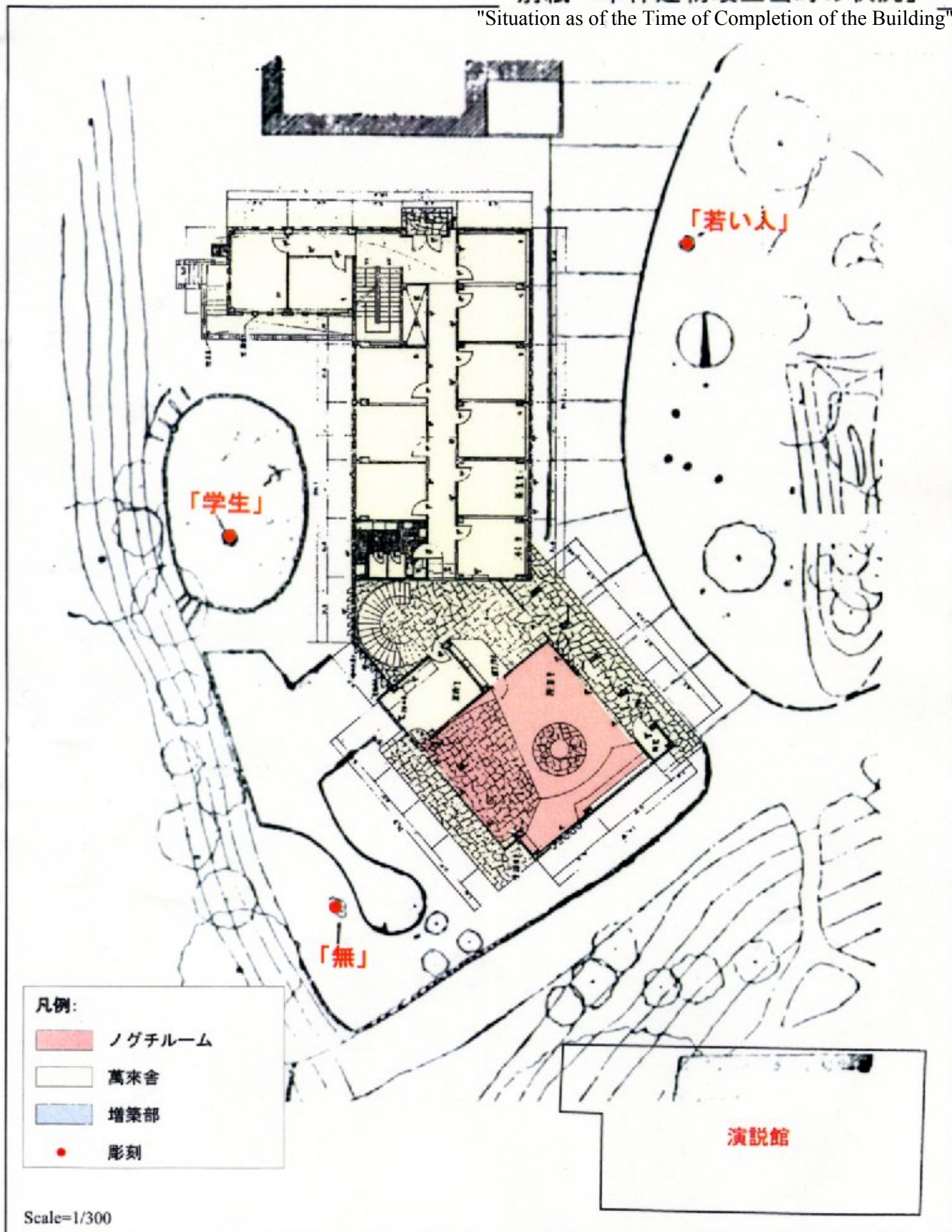
「学生」"Gakusei" (Student)



竣工当時(1950)

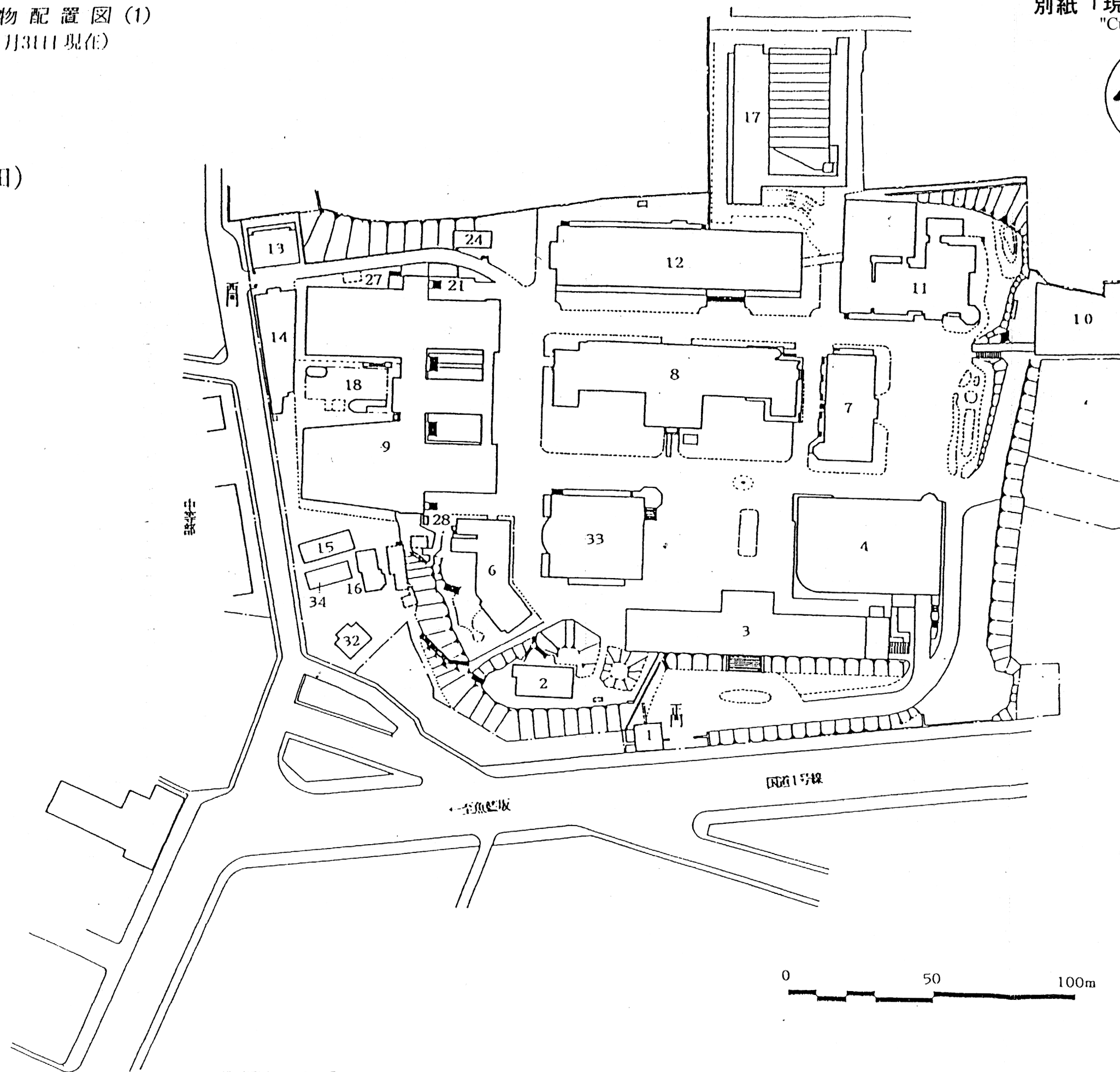
別紙「本件建物竣工当時の状況」

"Situation as of the Time of Completion of the Building"





大学(三田)



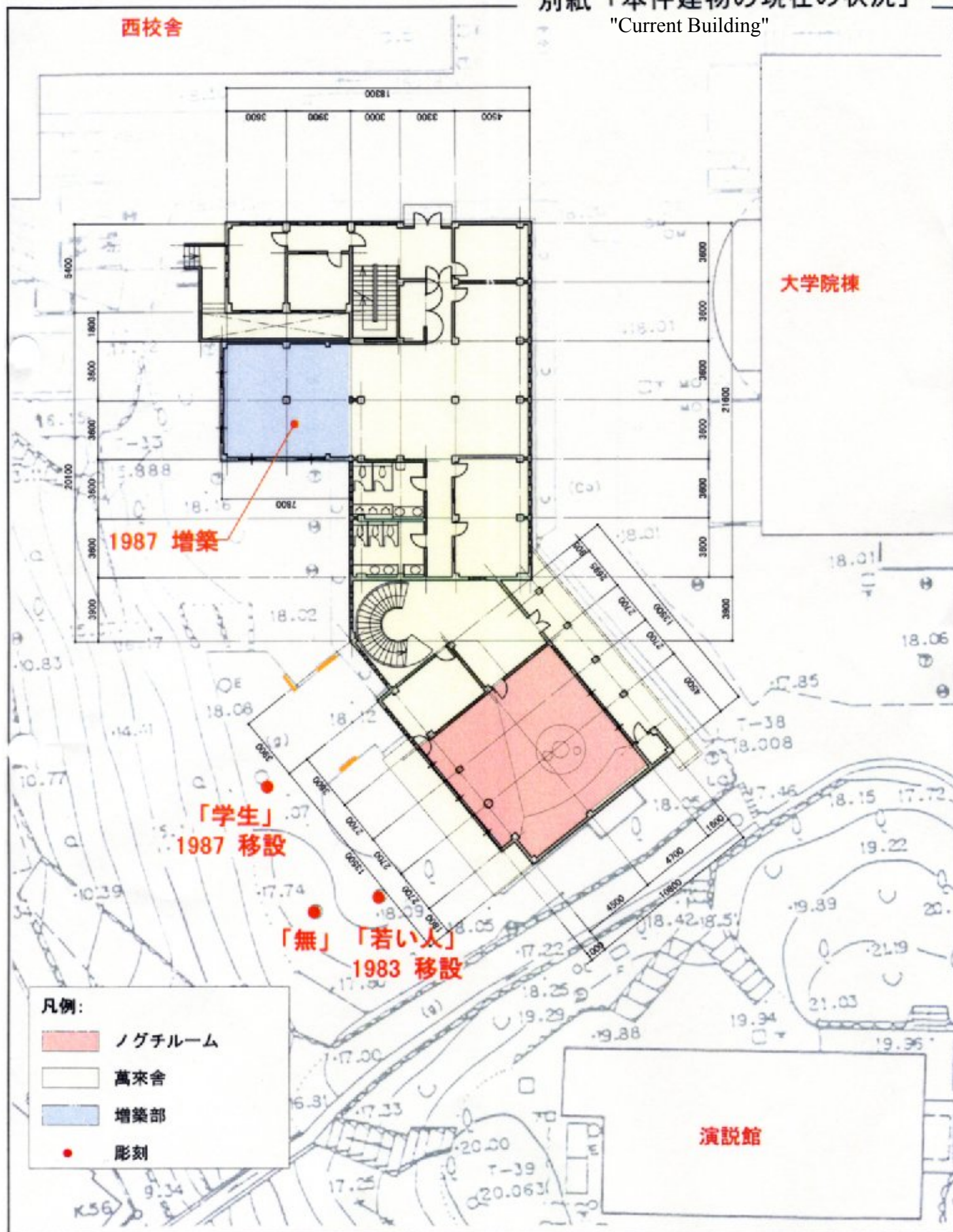
至赤羽橋

至札の辻

- 1 正門守衛室
- 2 演説館
- 3 南校舎
- 4 図書館
- 6 萬來舎
- 7 塾監局
- 8 第1校舎
- 9 西校舎
- 10 東館
- 11 図書館旧館
- 12 研究棟
- 13 西館
- 14 購買施設棟
- 15 自動車車庫
- 16 部室・作業所
- 17 北館
- 18 受変電所
- 21 食堂更衣室
- 24 労働組合事務所
- 27 物置
- 28 ゴミ置場
- 32 社会学研究科実習室
- 33 大学院校舎
- 34 プレハブ建物

現状(2003)

別紙「本件建物の現在の状況」
"Current Building"



ノグチルームの保存に関する基本方針

重要文化財である演説館は物理的に保存する。

ノグチルームは新校舎3階に移築して物理的にできる限り復元し、イサム・ノグチと谷口吉郎のコラボレーション作品の空間と精神性を継承する。

谷口吉郎設計による建物については螺旋階段とその周りの建物ファサードを復元し、そのモチーフの空間と精神性を継承する。

移築保存後のイメージ



◎《萬來舎およびノグチルーム》移築保存について

- ・《萬來舎およびノグチルーム》は新校舎屋上庭園に移設
- ・《螺旋階段を含むエントランス》《萬來舎のファサードの一部》を復元
- ・《ノグチルーム》の向きを維持
- ・《萬來舎》既存跡地を広場空間として整備
- ・ 装材・家具の保存
- ・ 現状の調査および専門家との協議による移設要領の策定
- ・ 資料および創建当時図面等の文献保存

《萬來舎およびノグチルーム》移築の際には、イサム・ノグチのデザインアプローチを継承します。《ノグチルーム》は庭園内の彫刻と、太陽の動きなど自然を介して関連付けられており、その意図を継承するために《ノグチルーム》の向きを維持します。また、イサム・ノグチが選定した素材を極力継承するために、既存の内装材・家具で移設可能なものは移築保存します。移設が困難なものや修復の必要なものについては、現在の状態について調査し、専門家と協議し対処方法を策定します。

また、《萬來舎》エントランス部分、庭園の廊下、庭園彫刻も共に移設します。

断面図

SCALE= 1/ 600



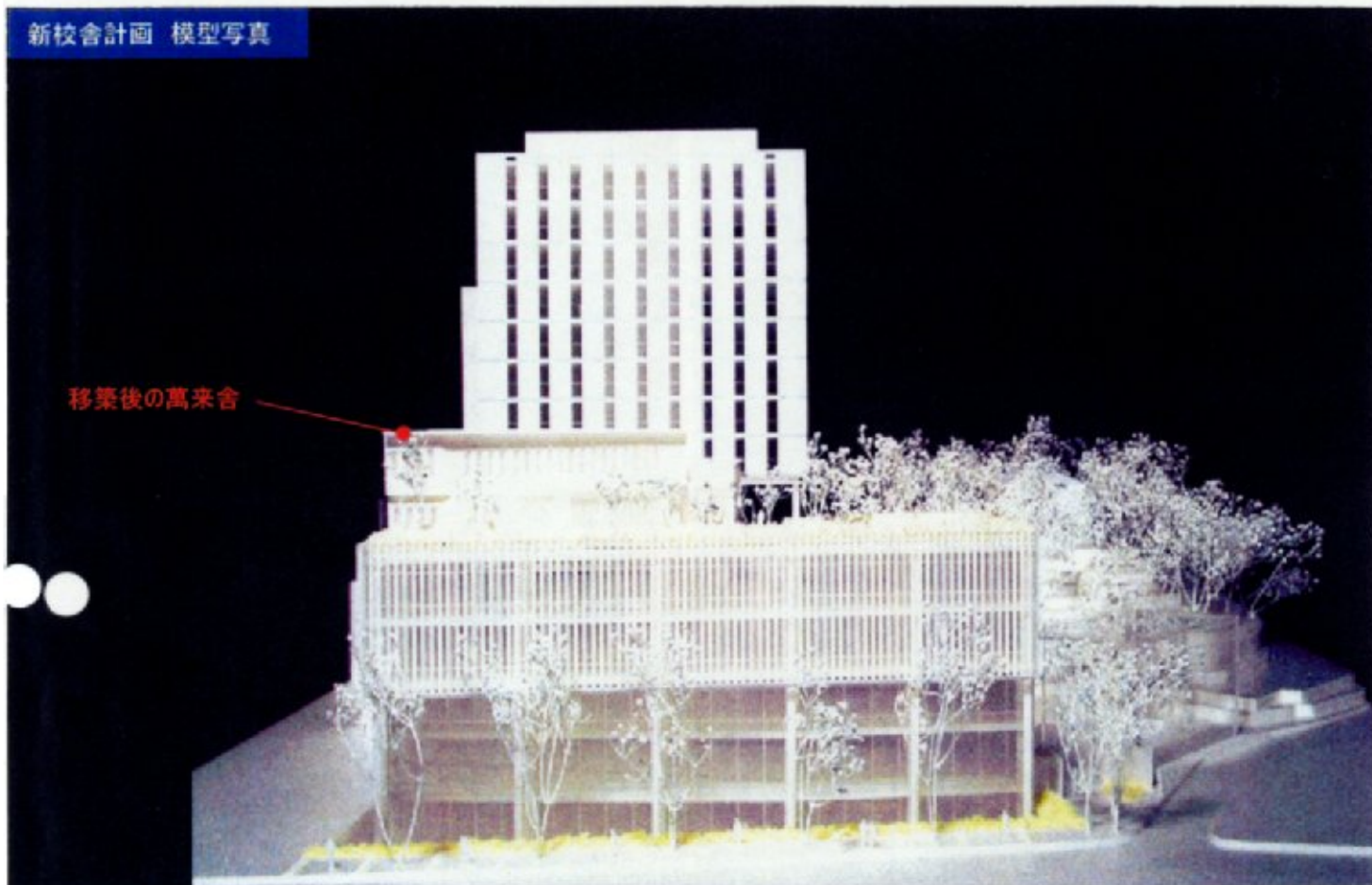
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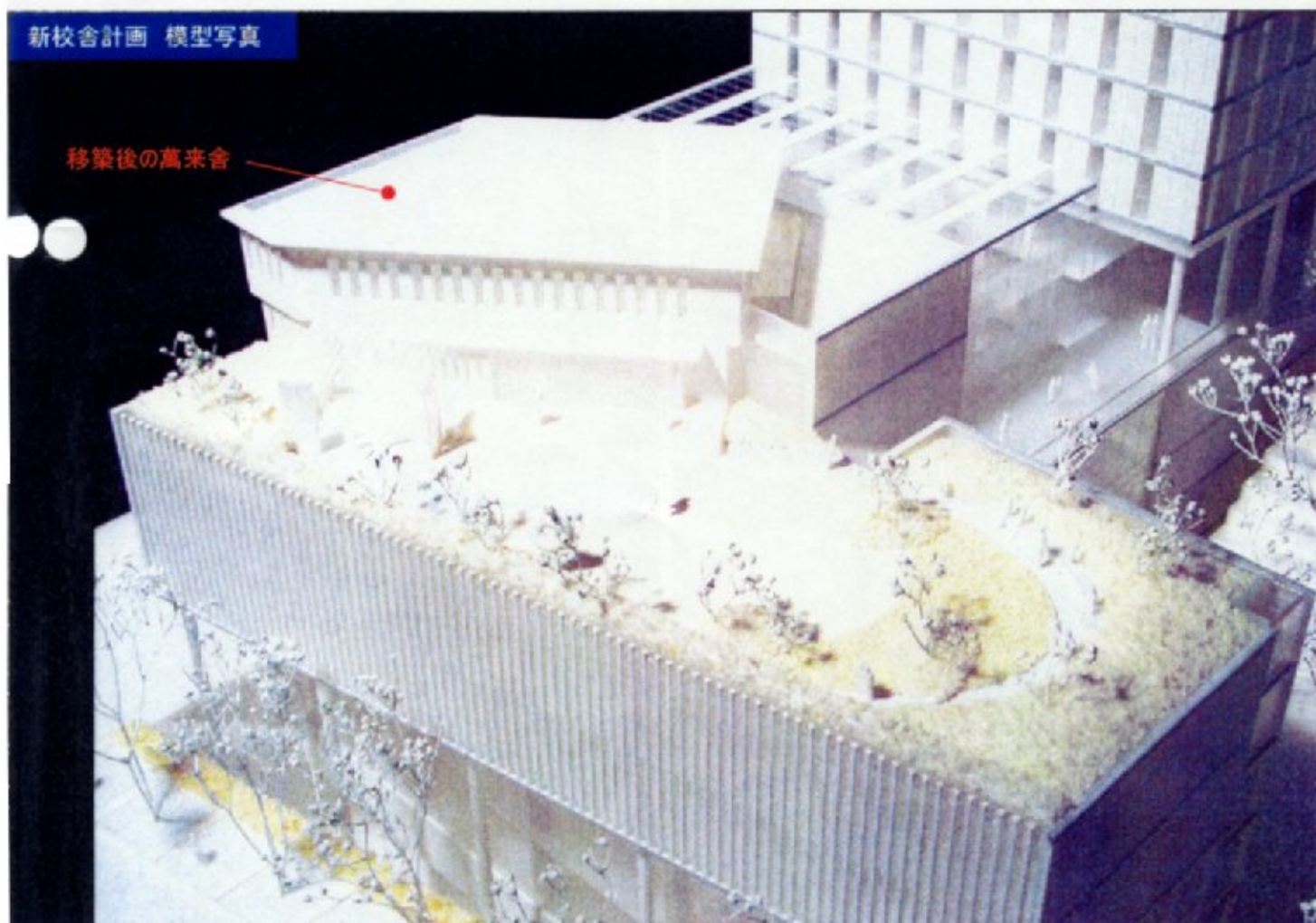
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新校舎計画 模型写真



新校舎計画 模型写真



移築後の外観イメージ



移築後の内観イメージ

