

**CITY OF MADISON  
CITY ATTORNEY'S OFFICE  
Room 401, CCB  
266-4511**

**FORMAL OPINION 2016-002**

TO: Ald. Marsha Rummel  
Superintendent Eric Knepp

FROM: Michael P. May, City Attorney

DATE: August 4, 2016

RE: Confederate Flag Policy at Forest Hill Cemetery<sup>1</sup>

Ald. Rummel recently inquired about the City's policy on the placement of Confederate flags at Forest Hill Cemetery (the "Cemetery"), and whether the City needs to update its policy. Similar issues were raised last year and discussed at a meeting of the Equal Opportunities Commission on July 9, 2015.<sup>2</sup> This memo summarizes the current Parks Division policy applicable at the Cemetery, the current issues and trends regarding regulating Confederate flag placement at publicly owned cemeteries, and details the legal options that the City may pursue regarding this issue.

**Question Presented:**

Should the City review and update, if necessary, its existing policies with respect to the display of flags, including the Confederate flag, at Forest Hill Cemetery?

**Short Answer:**

Yes, the City should review and update the Cemetery policies regarding the display of flags. The policies are inconsistent and out of date in light of legal rulings on government property and the First Amendment. This opinion will present a number of options for the City to consider that would be constitutional under more recent court cases.

**ANALYSIS**

**History of the Cemetery**

The City of Madison opened Forest Hill Cemetery in 1857 and continues to own and operate the Cemetery today. It is a site of great historic importance for the City of Madison and the State of Wisconsin.<sup>3</sup> In accordance with state law, the Cemetery has

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<sup>1</sup> Assistant City Attorneys Doran Viste and Lara Mainella drafted much of this opinion.

<sup>2</sup> See Legislative File ID No. [39201](#).

<sup>3</sup> For a good summary of the historical background of Forest Hill Cemetery, see <http://foresthill.williamcronon.net/>.

been platted into numerous sections, with individual grave sites then being sold and used for burial. While the individual burial sites are privately owned, the City, as the owner of the Cemetery itself, is responsible for the long term care of the property, including general maintenance of the lots and grounds. Pursuant to its authority as the owner of the Cemetery, the City has created rules and regulations for the management and care of the Cemetery.<sup>4</sup> Madison General Ordinances Sec. 8.11 has delegated the management and control of the Cemetery to the Board of Park Commissioners.

### **The Confederate Rest Area**

During the Civil War, nearby Camp Randall was not only a Union Army training facility, but, for almost three months, served as a stockade for roughly 1,200 Confederate States of America (CSA) prisoners of war.<sup>5</sup> Camp Randall was ill equipped to serve as a prison camp and the prisoners were relocated to Camp Douglas near Chicago on July 2, 1862. However, during their short stay at Camp Randall, 140 CSA prisoners died of wounds or disease in Madison. Those soldiers were interred in a mass grave at Forest Hill Cemetery and eventually given their own headstones within a formally organized plot, now known as the “Confederate Rest Area.”<sup>6</sup> The Confederate Rest Area remains owned by the City,<sup>7</sup> and within the Confederate Rest Area is a City owned and maintained flagpole.

### **The Confederate Flags**

During the 4-year life of the Confederate States of America, many flags were used by both the individual armies and navies of the Confederacy, as well the government itself. Included with this memo as Attachment 1 are images of the major Confederate flags, including the Confederate National Flag (the “Stars and Bars”) and the Confederate Battle Flag.<sup>8</sup> Of note, because the CSA soldiers interred at the Cemetery served in the western arena of the Civil War and were captured early in 1862, they never served under the Confederate Battle Flag, as this flag was used by the Army of Northern Virginia under Robert E. Lee. Nor did they ever serve under the Second or Third National Flags, both of which incorporated the Battle Flag in their design.

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4 See also [Wis. Stat. Sec. 157.11](#).

5 The CSA prisoners were captured following the Confederate surrender at the Battle of Island No. 10 on April 8, 1862 on the Missouri-Kentucky-Tennessee border near New Madrid, MO.

6 Through the personal efforts of Ms. Alice Whiting Waterman in the 19<sup>th</sup> century, the Confederate Rest Area was preserved, fenced, and graves marked with stone monuments, presumably all with the City’s permission. See [http://genealogytrails.com/ala/military\\_1regt4.html](http://genealogytrails.com/ala/military_1regt4.html) Also, for a history of the CSA prisoners and Camp Randall, see <https://badgerherald.com/banter/2016/01/21/confederate-captives-in-madison-camp-randalls-history-as-civil-war-prisoner-of-war-camp/>.

7 Likely owing to the nature of the burials during a time of war, the City has retained full ownership of the Confederate Rest Area. In comparison, the City donated the plots that make up the nearby Union Soldiers’ Lot to the Federal Government in 1886. (See [https://www.nps.gov/nr/travel/national\\_cemeteries/Wisconsin/Forest\\_Hill\\_Cemetery\\_Soldiers\\_Lot.html](https://www.nps.gov/nr/travel/national_cemeteries/Wisconsin/Forest_Hill_Cemetery_Soldiers_Lot.html).)

8 See [https://en.wikipedia.org/wiki/Flags\\_of\\_the\\_Confederate\\_States\\_of\\_America](https://en.wikipedia.org/wiki/Flags_of_the_Confederate_States_of_America).

## **Current City Cemetery Rules, Policies and Practices**

The Board of Parks Commissioners has adopted formal Cemetery Rules and Regulations, addressing the use of the mausoleum, grave stone specifications, plantings, and a “Grave Decoration Clarification” adopted in 2005. Attachment 2 to this memo is a copy of the current Cemetery Rules & Regulations (the “Cemetery Rules”). The Cemetery Rules do not specifically mention flags, however, as will be discussed below, a separate Confederate Flag Policy was adopted in 2001 to address Confederate Flag placement in the Confederate Rest Area.

Even a quick review of the Cemetery Rules and current practices shows why they must be updated. Currently, gravesite flags are allowed to be placed by loved ones, cemetery staff or other members of the community. As a matter of practice, the City leaves these flags up until or so long as they do not interfere with normal maintenance activities. However, one of the Cemetery’s Rules are that artificial decorations (other than floral arrangements from November 1 through March 15) are not allowed, a rule which would appear to apply to the display of flags (assuming a flag is a “decoration”). There are other inconsistencies in the Cemetery’s Rules, policies, guidelines and practices that could be addressed by updating the Cemetery’s Rules.

### **Practical History of the Display of the Confederate Flag at Forest Hill**

Prior to 2000, the City owned and stored both the Confederate National Flag and the Confederate Battle Flag, and would fly them both on the city-owned pole located in the Confederate Rest area. The flags would be flown one week before and after Memorial Day every year. In addition, a group called the Sons of Confederate Veterans (SCV) would place small replicas of the Battle Flag on the graves at that same time. The flags would then be removed from the graves and stored by the City.

In 2000, the Board of Park Commissioners, consistent with its delegated authority, began to reexamine this policy. The Battle Flag in particular had come to be seen as a sign of a regime that supported slavery, and was also being used by some white supremacist groups as a sign of racial hatred. In May, 2000, the City Council adopted a resolution urging South Carolina to remove its Battle Flag that flew outside the Statehouse.<sup>9</sup>

Following a review of the legal issues by the City Attorney, on April 11, 2001 the Board of Park Commissioners adopted the “Confederate Flag Policy” (the “Policy”) for the Cemetery, allowing for a limited display of CSA flags in the Cemetery to “represent respect for those decedents who served in the armies of the Confederate States of America during the Civil War.” Under the Policy, a local service or historic organization could arrange for the display of CSA flags on Memorial Day only, although CSA flags would no longer be furnished or stored by the City. Battle Flags were only permitted as small, individual grave decorations, while the First National Flag and the Bonnie Blue

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<sup>9</sup> Interestingly, the amended substitute resolution adopted by the Council on May 16, 2000 struck out a clause in the original resolution that would have banned the display of the Battle Flag on City property. (Resolution No. 57296, ID No. 27740).

Flag were permitted on the City owned flagpole. The Policy is attached hereto as Attachment 3.

After the Policy was adopted, concerns were raised by the American Civil Liberties Union. Hence, on June 6, 2001 Superintendent Morgan issued "Confederate Flag Policy Guidelines" (the "Guidelines") seeking to provide City staff with a "uniform understanding of the policy." These Guidelines are attached hereto as Attachment 4. Under the Guidelines, individuals, groups or organizations were permitted to decorate graves in the Confederate Rest Area with a small CSA flag at any time, i.e. not just Memorial Day, in accordance with the Cemetery Rules relating to decorations. In addition, the Bonnie Blue and First National Flag were permitted to be flown on the City-owned flagpole on Memorial Day and Veteran's Day by individuals, groups or organizations. Finally, the Guidelines noted that individuals, groups and organizations could carry and display other flags or signs as a form of 1<sup>st</sup> Amendment freedom of speech within the Cemetery, provided they did not block the roadways, interfere with Cemetery operations or access, or use a City asset.<sup>10</sup>

The Guidelines represent the City's current practice regarding flags in the Confederate Rest Area today, although it does not appear that they were ever approved by the Board of Park Commissioners and made a formal Cemetery rule or regulation. In addition, because the grave decoration clarification that banned artificial decorations in the Cemetery was adopted by the Board of Parks Commissioners in 2005, after the Policy and Guidelines, there is some uncertainty about the continued validity of these matters.

### **National Trends Regarding the Confederate Flag**

Following the end of World War II, usage of the Confederate Battle Flag as a symbol of southern pride and as a political statement in support of segregation began to rise. It, along with the Nazi swastika, is still used prominently by white supremacist organizations to this day.<sup>11</sup> As noted just last year by Supreme Court Justice Samuel Alito:

The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred.

*Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. \_\_\_\_, 135 S. Ct. 2239, 2262, 192 L. Ed. 2d 274 (2015). Additionally, in that case, the Texas Department of Motor Vehicles Board, in rejecting a license plate design that featured the Confederate Battle Flag, found:

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<sup>10</sup> As will be discussed below, this conclusion is no longer consistent with First Amendment holdings.

<sup>11</sup> For a summary of the current issues surrounding the display of the Confederate Flag, see [https://en.wikipedia.org/wiki/Modern\\_display\\_of\\_the\\_Confederate\\_flag](https://en.wikipedia.org/wiki/Modern_display_of_the_Confederate_flag).

'it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable.' The Board added 'that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.'

*Id.* at 2245, 192 L. Ed. 2d 274 (2015) (internal citations omitted).

On June 17, 2015, Dylann Roof, a white supremacist and neo-Nazi, entered one of the oldest African-American churches in the United States, the Emanuel African Methodist Episcopal Church in Charleston, SC, and slaughtered nine African-Americans. It was soon discovered that Roof had numerous images on his personal website showing him posing with the Confederate Battle Flag. In response to this horrific action, South Carolina, which for fifty-four years had flown the Battle Flag both over its State House dome and on a nearby flagpole, finally removed the Battle Flag from the State House grounds. In addition, emboldened by the Supreme Court's June 18, 2015 ruling in *Walker*, the governors of Virginia, North Carolina and Maryland followed Texas' lead and discontinued their States' confederate flag specialty license plates. Other efforts by states and the federal government to remove the Battle Flag have occurred since the Charleston shootings.

### **Current Federal Policies**

The federal government, through the Department of Veterans Affairs, the National Park Service, and the Department of the Army administers hundreds of cemeteries that contain CSA graves. The general policy of the federal government has been that the Confederate flag may be placed at graves (sometimes with, sometimes without, the USA flag) on Memorial Day and Confederate Memorial Day, if the State where the cemetery is located observes that date.<sup>12</sup> All such flags must be provided, placed and removed by a sponsoring group, at no cost to the federal government. In addition, the National Park Service specifically prohibits flying a Confederate flag on National Park Service owned cemetery *flagpoles*. However, the VA allows a Confederate flag to be flown on VA flagpoles, at a sponsoring historical or service organization's request and expense, on a separate flagpole from the USA flag where there is a CSA mass grave and where the flag is subordinated to the USA flag.

Following the Charleston shootings, Congressional Democrats attempted to amend the appropriations bill for the National Park Service to prohibit the use of funds to implement the above noted flag policy, meaning that Confederate flags would not be permitted in the National Park Service administered cemeteries at all.<sup>13</sup> However, this effort was blocked and eventually dropped from the final appropriations bill. Additionally, legislation was introduced at that time that would prohibit the display of the

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<sup>12</sup> Only ten states that were part of the C.S.A. recognize a Confederate Memorial Day. Wisconsin, obviously, does not.

<sup>13</sup> See [H.Amdt.592 to H.R.2822](#), 114<sup>th</sup> Congress (2015-2016).

Confederate Battle Flag in national cemeteries altogether. But that bill has not advanced and has never even been considered in Committee.<sup>14</sup>

On May 19, 2016 the House of Representatives, by a 265-159 bi-partisan vote, did pass an amendment to an appropriations bill that prohibits the flying of a Confederate Flag at VA cemeteries, although it remains to be seen whether this amendment to the VA's appropriations will also be approved by the Senate.<sup>15</sup> In making his amendment to the appropriations bill, Rep. Jared Huffman (D-CA), the sponsor for the amendment, summarized the current status of the Confederate flag issue in America:

Last year, we all remember the tragic shooting at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, and how it reopened a painful but necessary national conversation about symbols like the Confederate battle flag that represent racism, slavery, and division. Rightfully, leaders in South Carolina and other Southern States, Democrats and Republicans alike, joined together to call on their States to end the display of the Confederate battle flag on government property.

The Confederate battle flag, a symbol of hate and opposition to the United States of America, has no place, no place on government property, especially not at VA cemeteries, a place where families and loved ones go to pay respect to our Nation's veterans.

Over 150 years ago, slavery was abolished. Why in the year 2016 are we still condoning displays of this hateful symbol on our sacred national cemeteries? Symbols like the Confederate battle flag have meaning. They are not just neutral, historical symbols of pride. They represent slavery, oppression, lynching, and hate. To continue to allow national policy condoning the display of this symbol on Federal property is wrong, and it is disrespectful to what our country stands for and what our veterans fight for.

Mr. Chairman, it is past time to end the public promotion of this cruel, racist legacy of the Confederacy. So let us move forward in a direction of reconciliation, unity, and justice.<sup>16</sup>

### **The Issues at Forest Hill Cemetery**

This opinion will address the treatment of the flagpole and the individual gravesites separately.

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14 See [H.R.3007](#), 114<sup>th</sup> Congress (2015-2016).

15 See [H.Amdt.1064 to H.R.4974](#) (Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2017) —114<sup>th</sup> Congress (2015-2016), May 19, 2016. Note: The placement of individual flags at CSA veterans' graves would remain unaffected by this amendment.

16 See Congressional Record-House, 114<sup>th</sup> Congress (2015-2016), [Page H2839](#).

### *The City's Flagpole*

Under the City's current Confederate Flag Policy, a private group may raise the First National Flag or the Bonnie Blue Flag, the two flags that the CSA veterans interred at the Cemetery would have served under, at the Confederate Rest Area flagpole on Memorial Day and Veteran's Day. As noted above, the federal government has banned Confederate flags on flagpoles in federal cemeteries. It has been asked whether the City has the authority to either remove the flagpole altogether, or prohibit the flying of any Confederate flag on the City-owned pole. It is my opinion that the City can do either.

A series of cases demonstrate that the government has the authority to restrict the flying of a Confederate flag on a government flagpole, especially in cemeteries. See, for example, *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002); *Jackson v. City of Stone Mountain*, 232 F. Supp. 2d 1337, 1352 (N.D. Ga. 2002); *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1310 (Fed. Cir. 2008); Andrea Cornwell, *A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals*, 56 Am. U. L. Rev. 1329, 1335 (2007).<sup>17</sup>

*Griffin* upheld the Veteran's Affairs policy that a Confederate flag could fly at Point Lookout Cemetery only two days per year. The Court found the policy to be reasonable and viewpoint neutral in light of the purpose of the national veteran's cemetery.<sup>18</sup> *Jackson* upheld the City's decision to remove a privately-owned flagpole that had been placed on a privately owned plot contrary to the City's cemetery rules and used by a private group to fly the Confederate flag.<sup>19</sup>

Furthermore, where cities have made a practice of allowing private groups to fly flags on city-owned flagpoles, the court decisions make it clear that the city may "close" the forum so that it is no longer open for others to express speech or ideas, so long as it

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17 *Reed v. Town of Gilbert*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), is a recent Supreme Court First Amendment case which has caused significant impact in the areas of sign regulation and panhandling or solicitation. *Reed* has not been applied in the context of nonpublic forums or government speech, and in our opinion, it would not be applied.

18 "Considering the esthetic judgments inherently necessary to maintain VA cemeteries as national shrines, we find that the restraints on expression imposed by 38 C.F.R. § 1.218(a)(14) are **not so unreasonable as to render the regulation facially invalid**. *Griffin's* vague allegations that some people might be prevented or discouraged from speaking do not establish that section 1.218(a)(14) will reach a substantial amount of protected speech or that its impermissible applications substantially exceed its permissible ones." *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1327 (Fed. Cir. 2002) (emphasis added).

19 "Whereas the display of Confederate flags on individual graves or the engraving of the battle flag on monuments constitutes private, protected expression that could not be confused by the public as an expression of allegiance by the City, itself, the display of a Confederate flag, flown from a tall, permanent flag pole, could suggest to the public that the City was holding itself out as a Confederate cemetery or that it was aligned with the viewpoint of the Confederacy. While the Court will assume that the City is free to espouse the latter viewpoint if it wishes, it is equally free, as the VA was in *Griffin*, to adopt a message that the cemetery is intended to be a "tranquil and non-partisan" refuge." *Jackson v. City of Stone Mountain*, 232 F. Supp. 2d 1337, 1362 (N.D. Ga. 2002).

results in viewpoint neutral policies. Thus, in *Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va.*, 894 F. Supp. 2d 768 (W.D. Va., 2012), *affirmed*, 722 F.3d 224, 231 (4th Cir. 2013), the Courts upheld the decision of the City of Lexington, Virginia to no longer allow any private flags on City-owned flagpoles, instead allowing only the flags of the governmental jurisdictions of the City of Lexington—the USA flag, the Virginia state flag or the city flag:

“[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” As such the government “is not required to indefinitely retain the open character of the facility” and may indeed close the forum as it sees fit.... “The government is free to change the nature of any nontraditional forum as it wishes.” [citations omitted]

(894 F. Supp. at 773-74.) Thus, even if the flagpole is some sort of public forum for speech, the City may change or limit those to whom it wishes to give access, so long as the resulting rules do not discriminate among different private parties’ viewpoints. Allowing a government flag, but no other flags, would be acceptable.

Most of these cases arose, however, before the United States Supreme Court developed another legal doctrine involving government speech. In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Court upheld a governmental decision to limit the types of monuments allowed on City property. The Court concluded such a display of monuments was *government* speech, and the First Amendment had no application. Similarly, in the recent decision involving Confederate flags on state-issued license plates, the Court concluded that the design of license plates was “government speech” and “[W]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” *Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. \_\_\_, 135 S. Ct. 2239, 2245, 192 L. Ed. 2d 274 (2015).<sup>20</sup>

In light of these decisions on the issue, I think it likely that a court would find the use of the City’s flagpole in the Confederate Rest Area to be a form of government speech that the City explicitly or implicitly endorsed. If that is the case, the City may decide for itself which flags to display or not display on the pole, or whether to display flags on the pole at all. However, even if the City’s policy allowing limited use of the flagpole by the Confederate groups were to create some sort of forum for others to express speech, the cases would support a decision by the City to “close” the forum to all but a limited set of approved flags, such as the USA flag, the Wisconsin state flag, the City flag, or even the Confederate flag. Finally, there is nothing preventing the City from removing the flagpole altogether and completely eliminating the forum.

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<sup>20</sup> The *Walker* court concluded that the issuance of a specialty license plate is a form of government speech and that the government is not barred by the First Amendment in determining the content of what the plates can say. The City’s decision to stop flying and placing the Confederate flags in 2001 is supported by this decision.



### *Gravesite Flags*

The analysis of gravesite flag regulations is different, and a bit more complicated, for the City.

When analyzing the First Amendment's application to speech and expression restrictions on public property, the type of "forum" involved must be determined. All of the cases dealing with government cemeteries treat cemeteries as a "nonpublic" forum:

[I]t seems quite obvious that cemeteries are nonpublic fora. It certainly cannot be said that cemeteries have traditionally been used for assembly and the free exchange of ideas. The primary purpose of cemeteries is not to facilitate the free exchange of ideas but, rather, to provide a place for citizens to bury and honor their dead.

*Warner v. City of Boca Raton*, 64 F.Supp.2d 1272, 1291 (S.D.Fla.1999). A nonpublic forum is the lowest level of forum in regards to First Amendment protections and governments have greater leeway to regulate speech in this setting:

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of *limiting a nonpublic forum to activities compatible with the intended purpose of the property*. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49, 103 S. Ct. 948, 957, 74 L. Ed. 2d 794 (1983) (emphasis added). As a nonpublic forum, any restriction on speech in a cemetery must be viewpoint neutral and reasonable:

Having determined that the Cemetery is a nonpublic forum, the Court must consider whether the City's prohibition... is viewpoint neutral and reasonable. A regulation is viewpoint neutral as long as it is "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Moreover, a regulation "need only be reasonable; it need not be the most reasonable or the only reasonable limitation."

*Warner at 1291* (internal citations and quotations omitted). However, in conducting this analysis, it is important to note that a nonpublic forum related regulation *may* discriminate based upon content, and still pass constitutional muster:

Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, **content discrimination**, which may be permissible if it preserves the purposes of that limited forum, and **viewpoint discrimination**, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

See *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995) (citing *Perry Ed. Assn., supra*, at 46, 103 S.Ct., at 955) (emphasis added).

With this framework in mind, it is apparent that the City cannot implement a Cemetery regulation banning the display of Confederate flags simply because the City does not like the message this symbol conveys. Such a regulation would likely amount to viewpoint discrimination. However, a regulation could ban the display of all flags in the Cemetery in order to preserve the purpose of the Cemetery to honor and respect the dead. Looking at the Cemetery Rules, the Policy and the Guidelines, as noted above there are conflicts that should be addressed by updating the Rules. At the very least, the Rules need to be updated to address gravesite flag displays and how existing practices can be reconciled with the ban on artificial decorations. In updating the Rules, the City Attorney's Office recommends that the City take one of the following actions, all of which would likely be found to be constitutional:

- The City could revoke the Policy and Guidelines, eliminating the confederate flag gravesite flag exemption altogether, and enforce the existing Rule that prohibits any artificial decorations at gravesites. This would effectively close the non-public forum in question, the Cemetery, to any gravesite display of any flags. As noted above, the government is permitted to close a non-public forum.
- The City could revoke the Policy and Guidelines, and then craft an exception to the existing artificial decoration rule for USA flags only on the graves of USA veterans (either at any time, or during certain periods). The City could also expand this exception to include the display of Confederate Flags within the Confederate Rest Area. Limiting the types of displays in this manner would be permissible content discrimination and would likely be seen as consistent with preserving the character of the nonpublic forum.
- The City could revoke the Policy and Guidelines, and then craft an exception to the artificial decoration rule allowing the gravesite display of any type of flag, either at any time or under certain conditions, that would apply throughout the Cemetery.

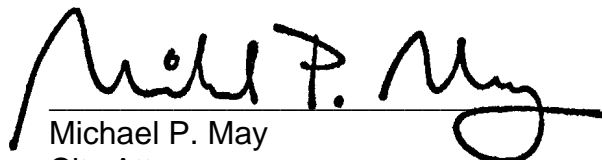
Provided the legislative record explains why the regulations are "reasonable in light of the purpose which the forum at issue serves", these regulations would likely be seen as constitutional.

## **CONCLUSION**

Ald. Rummel asked whether the City should update its policies with respect to the display of flags, including the Confederate flag, at Forest Hill Cemetery. While the City's existing Policy is lawful, the City Attorney's Office is of the opinion that the City should update the Cemetery's policies, which are inconsistent and out of date in light of legal rulings on government property and the First Amendment.

The City's current Confederate Flag Policy and Guidelines allows Confederate flags to be raised on the City-owned flagpole two times a year: on Memorial Day and Veteran's Day. It is my opinion that the City can restrict and limit access to and the content of flags upon the flagpole, or remove the flagpole altogether from the Confederate Rest Area. Indeed, eliminating the flying of Confederate flags from the flagpole would be consistent with recent steps taken by the federal government and elsewhere in the United States.

As for the gravesite flags, the City needs to update its Rules to address the inconsistency between the gravesite display of flags and the artificial decoration ban. In so doing, the City should consider revoking the Policy and Guidelines and adopting reasonable and viewpoint neutral regulations addressing gravesite flags within the Cemetery, which could include an outright ban on flags within the Cemetery, creating a USA flag or even Confederate flag exemption to the artificial decoration ban, or eliminating gravesite flag regulations altogether.

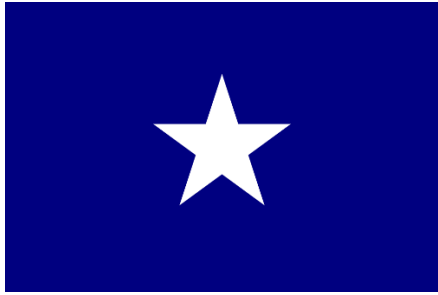


Michael P. May  
City Attorney

SYNOPSIS: The City's policies regarding display of flags, including the Confederate Flag, at Forest Hill Cemetery are out of date. More recent court rulings give the City a number of options, which this Opinion presents for consideration by the City.

**Attachment 1**  
**Flags of the Confederacy**

The Bonnie Blue Flag (1861)



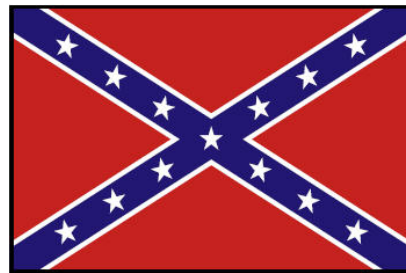
The Battle Flag of the Army of Northern Virginia (1861-1865)  
The Confederate Battle Flag



The Confederate National Flag  
The First National Flag (1861-1863)  
The "Stars and Bars"



The Second Confederate Navy Jack (1863-1865)



The Second National Flag (1863-1865)



The Third National Flag (1865)



## ATTACHMENT 2

# **FOREST HILL CEMETERY**

## Rules & Regulations

Forest Hill Cemetery and Mausoleum are owned and operated by the City of Madison for the benefit of all its citizens in accordance with Section 8.11 of the Madison General Ordinances and applicable Wisconsin State Statutes to insure proper maintenance and beauty and to prevent abuse and destruction.

In addition to the Ordinance and statutes, the following rules and regulations are set forth to govern Forest Hill Cemetery and Mausoleum. The City reserves the right to amend or change any of these rules or regulations without notice to conform with newly developed cemetery and mausoleum practices. Further, the City of Madison and Forest Hill Cemetery assumes no responsibility or liability for non-required objects and/or plantings placed on Cemetery property.

### **FOREST HILL MAUSOLEUM**

Mausoleum sales will be made by completion of a Memorial Purchase Agreement. All crypts and niches are sold with perpetual care. All crypts and niches must be paid for at the time of sale by the purchaser or by the funeral home if sale is at time of need. Purchasers of inside crypts and niches will be issued a key for access to the building for visiting loved ones.

All human remains must be embalmed before entombment can take place. All caskets are to be approved by Cemetery Management so as to meet any size specifications. Further, all caskets are to be labeled with the name of the deceased before entombment (This will normally be provided by Cemetery).

All mausoleum crypt and niche sales include use of Chapel area for committal services held during regular business hours.

Marble front niches will be sold with a specific urn and name plate. Any substitute urn requested by family must be preapproved by Cemetery Management and **NO** credit will be applied to niche price for use of substitute urn or name plate.

All crypts sold include lettering up to 25 characters. All characters over will be charged at a per letter rate.

Absolutely no live flowers or plants allowed inside the mausoleum building. Any found in violation will be removed after 24 hours and discarded. The City of Madison accepts no responsibility to save or replace any such removed articles.

### **SALE OF LOTS**

Lots sold are done so with the understanding and agreement that:

1. Title when transferred by deed from the City of Madison vests in the grantees and his/her heirs the right to use the lot for burial purposes only.

2. All lots are sold with maintenance and care.
3. Sale or transfer of title to a lot by the owner of record must be recorded with Cemetery Management.
4. The burial rights in an unoccupied lot or part of a lot, and hence the title to a lot, is not a merchantable item and may be sold or transferred by the owner of record in accordance with No. 3 above or to the City of Madison. If transferred to the City of Madison, the owner will receive the original purchase price of the lot or a proportionate share of the original purchase price if a portion of the lot is occupied or is being retained by the owner of record.
5. All lots must be paid for at the time of sale by the purchaser or by the funeral home if sale is at time of need.
6. A deed will be issued for all lots sold in Forest Hill Cemetery.

The areas located in Sections 4 and 9 designated as Forest Rest will be sold for the interment of cremated remains only.

### **INTERMENTS**

Lots in Forest Hill Cemetery may be used only for the interment of human remains, as a location for an approved memorial, and for the planting of suitable and approved flowers, shrubs, and trees. Interments on any lot shall not exceed the original intent or design of the lot.

A grave space in Forest Hill Cemetery shall be an area not less than three and one-half feet in width and nine feet in length. Each grave space may be occupied by the remains of only one individual with the following exceptions:

1. Mother or father and infant using the same container.
2. Two infants in one grave space.
3. Cremated remains.

Forest Rest lots located in Sections 4 and 9 shall be four feet square. Each lot may be occupied by as many as four standard size urns (6" x 6" x 6").

The records of sections, lots and graves as recorded in the Cemetery Office shall be considered valid and graves so reported shall not be changed nor disturbed except by complying with disinterment procedures.

Burial in Forest Hill Cemetery is permitted only upon approval by Cemetery Management of an application for interment. Application for interment shall include the following:

1. A permit for burial issued by a person authorized to issue burial permits as provided in Section 69.18 of the Wisconsin Statutes.
2. The name and address of the person authorizing the interment.
3. The section number, the lot number and the grave space in which interment is to be made.

The City of Madison and Forest Hill Cemetery are not responsible for error occurring by reason of transmission of orders by telephone nor from the lack of precise or complete instructions. The City of Madison and Forest Hill Cemetery shall not be held liable for accepting an application for interment if the application includes erroneous or illegal information or authorization, and Cemetery Management may refuse to honor an application if of the opinion there is doubt as to the correctness and validity of the application.

Cemetery Management will determine and locate the grave space upon any lot. The selection and opening of a grave may be made at Management's own discretion when proper instructions as to location are not given or when such procedure is necessary in order that a funeral will not be delayed. Forest Hill Cemetery requires a minimum of eight working hours to insure a given grave will be ready for services at a given time. The opening of a grave must be done no less than one hour before services to give the vault company time to set up.

All interments in Forest Hill Cemetery must be made in cement vaults (cremated remains excepted). The design and specifications for vaults shall be subject to approval by Cemetery Management before installation.

Service charges for all work performed by the staff of the Cemetery are to be in accord with the schedule of charges and fees available at the Cemetery Office and must be paid in advance. All overtime charges will be charged to the funeral home.

All funerals will be escorted by Cemetery personnel. All graves will be closed by Cemetery personnel on the day of the services. Weekend and holiday burials are permitted only upon approval of Cemetery Management and will normally be scheduled prior to 12:00 noon -- unless extenuating circumstances exist.

### **DISINTERMENTS**

All disinterments and necessary permits are to be arranged through a Wisconsin licensed funeral director.

### **PLANTINGS**

In order to insure a more desirable, uniform appearance and that better care may be given to all cemetery lots, all proposed tree, shrub and bush plantings are subject to the approval of Cemetery Management and shall conform to the following principles:

1. *All spiny, prickly, thorny or spreading shrubs and bushes are not permitted and will be removed.*
2. *No shrub or tree plantings are permitted on single grave lots or in Sections 35, 41, and 50.*
3. *All shrubs must be of a dwarf variety and planted next to the memorial.*

*ALL OVERGROWN, UNSIGHTLY, DETRIMENTAL OR ILLEGAL PLANTINGS, VASES OR URNS WILL BE REMOVED BY CEMETERY STAFF. THE CITY OF MADISON AND FOREST HILL CEMETERY ASSUMES NO RESPONSIBILITY OR LIABILITY FOR PLANTINGS, VASES OR URNS PLACED ON CEMETERY PROPERTY.*

All floral ground plantings must be made in front of the memorial and cannot spread more than six to eight inches from the memorial. Absolutely NO corner plantings. All urns and vases must be placed next to memorials or in line with other memorials and must be approved by Cemetery Management. Absolutely NO glass containers, unsightly tin cans, or grave blankets will be permitted.

### **SPRING & FALL CLEANUP**

Due to Wisconsin's weather patterns, the exact date of spring and fall cleanup is unpredictable. Therefore, **WE GIVE NOTICE THAT SOMETIME DURING THE MONTHS OF MARCH AND APRIL, AND THEN AGAIN IN SEPTEMBER AND OCTOBER, WE WILL BE REMOVING ALL DECORATIONS FROM ALL GRAVES** in order to tackle our biannual cleanups. If we remove your decorations before you do, they will be stored behind the mausoleum and you can pick them up there.

### **MEMORIALS**

All memorials eligible for approval must be constructed of natural stone or U.S. Standard bronze. All stone shall be of highest quality, first grade, clear stone finished in an exceptionally high quality workmanship.

Placement of all memorials and installation of all foundations on any given lot are subject to approval by Cemetery Management. Foundation Order forms are available at the Cemetery Office and must be completely filled out and filed prior to dates set by Cemetery Management. The design and specifications of each memorial shall be submitted to Cemetery Management for approval before construction of the memorial is started.

Markers shall be a minimum of 16 inches long, 8 inches wide and 4 inches thick. Markers shall not exceed 50% of the lot width in length, 12 inches in width and 26 inches in height. Any memorials that exceed the marker limitations will be considered a monument and shall not exceed 50% of the lot width in length, 14 inches in width and an overall height of 38 inches. (This would include benches, bird baths and sundials.) All above dimensions are measured from the pitch line or cut line.

Only one marker per grave space will be allowed. Monuments will be allowed on three grave lots or larger. If a monument is placed or will be placed on a lot, any markers must be set flush to the ground except when duplicating existing markers on the lot.

Memorials which are designed to include a picture or photograph attached thereto or set therein are not permitted except by Commission or Cemetery Management approval upon petition, good cause shown, a waiver of City liability for vandalism or damage thereto and upon conditions reasonably related to the health, safety and welfare to those working in or visiting the cemetery.



Government issue upright marble tablets are NOT allowed in any section other than Soldiers Rest and Section 35 except to duplicate an existing marker on the lot.

Foundations will not be constructed for any memorial, and no memorial will be allowed to be placed on a lot where assessments are delinquent and where no perpetual care fund has been established.

In addition to the foregoing rules and regulations, the following shall apply to each respective area:

- Section 35, 41 and Soldier's Rest -- All memorials in these sections shall duplicate and be of the same grade and quality of marble and granite as the existing memorials. Granite markers must be set flush to the ground.
- Section 39 -- All memorials in the first four rows from the Cemetery road shall be flush to the ground.
- Section 40 -- At no time will an upright memorial be placed in a flush row, but flush memorials may be placed in above ground rows.
- Forest Rest in Sections 4 and 9 -- Only one marker per four foot square lot will be allowed. All markers shall be made of granite or bronze, set flush to the ground, and shall not be more than 30 inches in length and 12 inches in width.

2/20/2003

## *Grave decoration clarification adopted 2005 by Park Commission:*

Cemetery management reserves the right to make exceptions to the following restrictions for it's self and other special events or circumstances that may occur.

**November 1 thru March 15 will be the only time that wreaths, wreath stands and artificial flowers are permitted on grave lots (depending upon leaf cleanup operations—check with office if in doubt).**

Cemetery rules shall include the following restrictions:

No artificial decorations (except floral arrangements placed November 1 thru March 15) shall be allowed, which will include but not be limited to, the following: Statues, sculptures or other works of art made of porcelain, ceramics, metal, wood, cloth, paper, or any other materials.

No plastic, wood, stone, metal, or other materials deemed by Cemetery Management to be non-conforming to cemetery rules will be allowed around markers or graves. This will include all mulch, edging, fencing or any other types of barriers.

No shepherd hooks or other similar devices used for hanging potted plants or other objects will be allowed on lots.

No wind chimes, pinwheels, windsocks or other similar items will be allowed in the cemetery.

No lamps, candles, solar lights, neon signs or other illuminating devices will be allowed on grave lots.

## ATTACHMENT 3

City of Madison - Parks Division  
Forest Hill Cemetery Operations  
**Confederate Flag Policy**  
(adopted on April 11, 2001)

1. The flag of the Confederate States of America (official Confederate flags or the Confederate Battle flag) may be displayed at Forest Hill Cemetery only to represent respect for those decedents who served in the armies of the Confederate States of America during the Civil War. The display of the Confederate Battle flag is limited to small individual flags arrayed only on individual graves.
2. The display of these small individual grave flags is allowed only under the sponsorship of a local service or historic organization. Confederate flags will not be furnished or stored by the City of Madison.
3. On Memorial Day (observed the last Monday in May), Confederate flags may be placed and removed with volunteer labor only, which will be organized, provided and supervised by the sponsoring organization. No City of Madison employees, while officially engaged in their City duties, may participate in this effort.
4. Only the American flag, "Bonnie Blue flag" or the "First National Flag of the Confederacy" may be flown on the flagpole in the Confederate Rest area of Forest Hill Cemetery on Memorial Day (observed on the last Monday in May). Flags flown on the flagpole must conform to U.S. Flag Protocol and City of Madison and Park Commission policy.

ATTACHMENT 4

**City of Madison – Parks Division  
Forest Hill Cemetery Operations**

**Confederate Flag Policy Guidelines**

The official Confederate flag policy was adopted by the Madison Board of Park Commissioners in April 11, 2001. The following information is provided to staff for a uniform understanding of the policy. Questions should be referred to the Superintendent of Parks or the Cemetery Manager.

1. The flags of the Confederate States of America such as the "Official Confederate flag" or the Confederate Battle flag should be displayed at Forest Hill cemetery only to represent respect for those decedents who served in the armies of the Confederate States of America during the Civil War.
2. Individuals, groups or organizations may decorate the graves of the individual Confederate soldiers in any manner desired including the display of the Confederate Battle flag or any other desired flag at any time in accordance with standard cemetery regulations relating to the placing and removal of decorations. All flags should be of the size used to decorate the individual graves of other veterans interred at Forest Hill Cemetery. Flags other than the United States flag will not be stored or furnished by the City of Madison. No City of Madison employees, while officially engaged in their City duties, will participate in displaying flags other than the United States flag.
3. For all City owned flag poles at Forest Hill Cemetery, the United States flag shall be flown in accordance with the Title 36, U.S.C., Chapter 10 "The Flag Code" as amended by P.L. 344. For historic purposes and in accordance with policy established by the Madison Board of Park Commissioners, the small City owned flag pole in the Confederate Rest area of the cemetery may be used to display the "Official Flag of the Confederacy" or the "Bonnie Blue" flag on the official United States Memorial Day in May and on Veteran's Day in November. These are the two dates that flags are flown over other veteran's areas of the cemetery. Such display shall be arranged by individuals, groups or organizations and not City of Madison employees while officially engaged in their City duties. Individuals, groups or organizations should contact cemetery staff in advance to arrange the unlocking of the flagpole. If no individual, group or organization requests to display the "Official Flag of the Confederacy" or the "Bonnie Blue" flag, City staff should display the United States flag in Confederate Rest on these dates.
4. Individuals, groups or organizations may carry and display other flags or signs as a form of protected First Amendment freedom of speech within the cemetery during normal operational hours. They may not block roadways or in any way interfere with normal cemetery operations or the access of other people to the cemetery. Contact the Madison Police Department if assistance is needed. They may not, however, use a City asset, such as a publicly owned flagpole.

06/06/01

**APPROVED**  
BY  DATE 6/6/01