

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

Date: September 19, 2017

**OPINION NO. 2017-002**

TO: David Wallner  
Chair, Board of Parks Commissioners

Stuart Levitan  
Chair, Landmarks Commission

FROM: Michael P. May  
City Attorney

RE: Forest Hill Cemetery and Confederate Rest Area Plaque: Jurisdiction and Authority of the Mayor, Parks Superintendent, Board of Parks Commissioners and Landmarks Commission

The City of Madison owns and operates Forest Hill Cemetery. The cemetery contains an area known as the Confederate Rest Area (the Rest Area). The Confederate Rest Area includes the graves and headstones of 140 soldiers of the Confederate States of American (CSA), who were captured during the Civil War and held at Camp Randall as prisoners of war. In addition to the individual gravestones, there is a larger monument with the names of the deceased and of the individual who helped care for the Rest Area.

There also was, until recently, a monument just outside the Rest Area with a plaque extolling the “valiant Confederate soldiers” and “unsung heroes” who are buried there. Recent national objections to the continued display of CSA monuments on public property resulted in a number of Madison residents asking for the removal of the plaque monument.

Madison Mayor Paul Soglin ordered the removal of the plaque monument, which was done by the Parks Superintendent. The monument is now in storage. The Mayor subsequently issued a statement explaining the historical background of these sorts of monuments, and why removal was appropriate.

Following the removal of the monument, Mr. Wallner asked for my opinion as to whether the Mayor and Parks Superintendent had the legal authority to remove the monument without the approval of the Board of Parks Commissioners (BPC). Mr. Levitan later asked that the opinion also address the authority of the Landmarks Commission, since Forest Hill Cemetery is a designated landmark site.

Forest Hill Cemetery is operated by the Parks Division of the City of Madison.<sup>1</sup>

**Questions Presented:**

1. Do the Mayor and Parks Superintendent have the legal authority to remove an item like the Confederate Rest Area plaque monument without approval of the Board of Parks Commissioners?
2. Do the Mayor and Parks Superintendent have the legal authority to remove an item like the Confederate Rest Area plaque monument without approval of the Landmarks Commission?

**Short Answers:**

1. Yes, the Mayor and Parks Superintendent have that authority. The law on operations of cemeteries is different than the law regarding city parks, giving much more authority to staff in cemetery operations. Although operated by the Parks Division, Forest Hill is an operating cemetery, invoking different legal authority. Since the Board has no policy on removal of monuments, the authority resides with the City administration of the Cemetery.
2. No, the Mayor and Parks Superintendent probably should have sought a Certificate of Authority from the Landmarks Commission. This opinion comes with at least two important caveats. First, this plain reading of the Historic Preservation Ordinance leads to some absurd results, such as that every grave dug, gravestone placed or tree planted at Forest Hill would require approval of the Landmarks Commission, a result the City has not historically required and cannot have intended at an operating cemetery. Second, to remedy this confusion, I recommend the ordinances be amended to clarify what actions at Forest Hill are normal cemetery operations outside the Historic Preservation Ordinance and what actions would require approval of the Landmarks Commission.

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<sup>1</sup> For more background on the history of Forest Hill Cemetery and the related issue of display of the CSA Battle Flag at Forest Hill, see Formal Opinion 2016-002:

**Discussion:**

**A. AUTHORITY OF THE BOARD OF PARKS COMMISSIONERS, THE PARKS SUPERINTENDENT AND THE MAYOR OVER CEMETERY OPERATIONS**

Forest Hill Cemetery has been a municipally owned cemetery since it was opened by the City of Madison in 1857. The Cemetery remains operational, with multiple interments, inurnments and cremation burials monthly. In accordance with state law, the Cemetery has been platted into numerous sections, with individual grave sites then being sold and eventually used for burial. While the individual burial sites are privately owned<sup>2</sup>, 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. Cemetery staff and operations are part of the Parks Division.

Under Wis. Stat. Sec. 157.50(2), the City is required to determine the system of management and operation of the Cemetery by ordinance. The City's ordinance on the management and operation of the Cemetery is MGO Section 8.11. Under this ordinance, the management and control of the Cemetery has been delegated to the BPC, who have the "power and authority to adopt such rules and regulations for the management of the Cemetery and relating to the use of the Cemetery and interments therein as they shall deem advisable." Sec. 8.11(2), MGO.

The BPC does not exercise the same authority over the Cemetery as it does over City owned park land. Under Wis. Stat. Sec. 27.08(2)(a), the BPC is statutorily empowered to govern, manage, control, improve and care for park lands, to secure the quiet, orderly and suitable use and enjoyment thereof by the people, and also to adopt rules and regulations to promote these purposes. Under this statutory authority, the BPC's authority on certain matters within a park is greater than that of even the Mayor and the Common Council. But Forest Hill Cemetery is not a park subject to this statutory grant of authority. Rather, it is a municipally owned cemetery subject to Wis. Stat. Ch. 157. Hence, the BPC's authority over the Cemetery is limited to that specifically provided for in Sec. 8.11, MGO. Consistent with this grant of authority, the BPC recently approved updated Rules & Regulations for the Cemetery on May 10, 2017.

In addition to establishing the role of the BPC, Sec. 8.11(3), MGO, also establishes the position of "Cemetery Manager" who, under the direction of the Board of Park Commissioners, has the "control and management of the Cemetery as to laying out and subdividing of the same, and the clearing up and improving of the grounds and buildings and the ornamentation thereof, and shall have charge of all interments made in the Cemetery." Under Sec. 8.11(10), the Cemetery Manager is also specifically "authorized and directed to take the same measures for the proper care and maintenance of [the Rest Area] as are taken with regard to lots in said cemetery purchased by private parties." The position of Cemetery Manager is not currently filled. Because Cemetery staff are part of the Parks Division for operational and

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<sup>2</sup> As discussed in Formal Opinion 2016-002, the Rest Area and the monuments contained therein are actually owned by the City itself. That fact does not change this analysis.

administrative purposes, the duties of the Cemetery Manager are assumed by the Parks Superintendent. The Parks Superintendent, under his employment agreement with the City, is tasked with exercising his judgment and discretion under the policy direction of the Mayor and is subject to the Mayor's supervision.

This delegation of authority under Sec. 8.11, MGO, has set up a system where the BPC provides general oversight over the Cemetery through the adoption of rules and regulations as well as monthly reporting by the Parks Division to the BPC, while the Parks Superintendent is responsible for the day-to-day operations of the Cemetery, including burials, maintenance, and the placement and removal of monuments and other improvements within the Cemetery. Of note, the Cemetery's Rules & Regulations do not have **any** provision relating to the removal of monuments or anything specific as to the monuments in and near the Rest Area, nor am I aware of any specific direction from the BPC to the Parks Superintendent about the removal or non-removal of monuments within the Cemetery.

Because there is no specific Cemetery rule pertaining to the removal of monuments in the Cemetery, and because the BPC has not directed a different result, the Parks Superintendent, as part of his operational oversight over the Cemetery, is able to order the removal of monuments within the Cemetery. Moreover, because the Superintendent follows the policy direction of the Mayor, the Mayor is able to dictate specific operational matters such as the removal of specific monuments in the Cemetery.

In conclusion, because the laws on the operation of cemeteries are different than the laws regarding city parks, City staff have much more authority over cemetery operations than they would in a park. As a result, where the BPC has not enacted a rule or regulation to the contrary or specifically directed a different result, the Mayor and the Parks Superintendent have the legal authority to remove an item, like the Rest Area plaque monument, from the Cemetery without approval of the Board of Parks Commissioners.

## **B. AUTHORITY OF THE LANDMARKS COMMISSION**

### **I. Forest Hill Cemetery's Landmark Status.**

The Common Council designated the entire Forest Hill Cemetery as a Landmark in 1990. The form nominating Forest Hill for Landmark status provides several reasons for the historical significance of the Cemetery.

Forest Hill is historically significant because its landscape architecture is a manifestation of the rural cemetery movement that was popular throughout the United States in the mid-19th century. To this end, the nomination form describes the cemetery's park-like setting, including its "high rolling ground...handsomely ornamented with Oak and other shade trees...giving the idea of the park scenery in England, or the rich views of Italy." According to the nomination form, "Forest Hill has further

significance in Madison's landscape history because it was the City's first curvilinear plat."

In addition to the significance of Forest Hill's landscape architecture, the cemetery is also historically significant because it contains numerous effigy mounds.<sup>3</sup> The Cemetery also contains the graves of several persons of transcendent importance in local, state and national history: historian Frederick Jackson Turner, Cordelia Harvey, Eston Hemings Jefferson, Robert M. LaFollette, Sr., and several other Wisconsin governors, the graves of some of Madison's earliest Jewish citizens, as well as the Rest Area, a specific section of the cemetery surrounded by a stone outcropping where 140 CSA prisoners of war who died at Camp Randall were buried in 1862. There undoubtedly are many other significant graves.

Thus, Forest Hill's historic significance as a landmark site ranges from the uniqueness of its landscape architecture to the effigy mounds that were constructed there over a thousand years ago to the historical significance of the people who have been buried there.

## II. Key Provisions of the Historic Preservation Ordinance.

Chapter 41 of the Madison General Ordinances contains the city's historic preservation ordinance. This ordinance applies to all landmarks, landmark sites, and improvements in a designated historic district. Since Forest Hill Cemetery is a designated landmark, the provisions of Chapter 41 apply. Sec. 41.09, MGO, requires a Certificate of Appropriateness<sup>4</sup> ("COA") for actions pertaining to a landmark or landmark site:

**41.09 ALTERING OR DEMOLISHING LANDMARKS.** No person may do any of the following without a certificate of appropriateness issued under Subchapter F:

- (1) Add a new structure to a landmark or landmark site.
- (2) Materially alter a landmark or the exterior of a landmark.
- (3) Demolish or relocate a landmark or any part of a landmark.
- (4) Install a sign on the exterior of a landmark or on a landmark site.
- (5) Divide any lot comprising all or part of a landmark site, or voluntarily grant any easement on that lot if doing so may impair the preservation, maintenance, exterior appearance or historic character of the landmark or landmark site.

Secs. 41.17(3) and (4), MGO, describe when COAs may be approved administratively and when they require a public hearing:

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<sup>3</sup> In addition to being included as part of the Forest Hill Cemetery landmark, the effigy mounds were also separately designated as a landmark. Thus, there are technically two landmarks at Forest Hill – the entire cemetery and the effigy mounds.

<sup>4</sup> "Certificate of Appropriateness" is an official form issued by the Preservation Planner stating that the proposed work on a designated landmark or on a building in a historic district is in accord with the requirements of the historic preservation ordinance.

- (3) Public Hearing; When Required. The Commission shall issue a notice under Sec. 41.06 and hold a public hearing on a complete application if the application proposes any of the following:
  - (a) Demolition or removal of all or part of a landmark.
  - (b) Demolition or removal of a structure in a historic district.
  - (c) Construction of a new principal structure in a historic district or on a landmark site.
  - (d) Construction of an accessory structure with a footprint larger than one hundred (100) square feet, not including decks and open porches, in a historic district or on a landmark site.
  - (e) Land divisions and combinations.
  - (f) Exterior alteration of a structure in a historic district that increases the footprint of the structure more than one hundred (100) square feet, not including decks and open porches.
- (4) Administrative Approval. The Landmarks Commission may authorize the Preservation Planner to act on an application for certificate of appropriateness on projects that do not require a public hearing, provided that the Commission shall first adopt written policies establishing which projects can be administratively approved by the Preservation Planner, and that the Preservation Planner follows the Commission's written policies when granting or denying applications under this provision.

Finally, Sec. 41.02, MGO, defines various terms that are relevant to whether a particular action requires a COA:

Landmark means

- (a) Any improvement which has architectural, cultural, or historic character or value reflecting the development, heritage or cultural characteristics of the City, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter, or
- (b) Any land of historic significance due to a substantial value in tracing the history of humankind, or upon which an historic event has occurred, and which has been designated as a landmark pursuant to the provisions of this chapter.

Landmark Site means the lot or parcel identified in the official landmark designation maintained by the City Planning Division. If a landmark designation does not identify a lot or parcel, landmark site means any lot, or part thereof, on which is situated a landmark, and any abutting lot, or part thereof, used as and constituting part of the premises on which the landmark is situated.

Improvement means any structure, landscape feature or object intended to enhance the value or utility of a property (See structure, landscape feature and object.)

Structure means any building or improvement attached to land (See building and improvement.).

Object means any improvement that is of relatively small scale or of simple construction for primarily ornamental or artistic purposes including fountains,

monuments, or sculptures (See improvement.).

Landscape Feature means any improvement to the natural landscape including plants, gardens, parks, greenways and landscaping around structures (See improvement.).

### **III. Application of the Historic Preservation Ordinance to Forest Hill.**

Under the definitions above, an item like the Rest Area plaque monument is considered an object and thus an improvement and a structure on a landmark/landmark site. Therefore, any action that would potentially demolish or remove the plaque from the cemetery would require a COA under Sec. 41.09(3), MGO, after a public hearing before the Landmarks Commission pursuant to Sec. 41.17(3)(a) and (b), MGO. Based on this plain reading interpretation of the ordinance, I conclude that neither the Mayor nor the Parks Superintendent have the legal authority to remove such an item without first getting approval from the Landmarks Commission.

As will be noted in the next section, there are grave problems with this plain reading of the Ordinance.

### **IV. My Conclusion on the Historic Preservation Ordinance Leads to Potentially Absurd and Confusing Results.**

The interpretation above, based on the plain and clear language of the Historic Preservation Ordinance, is problematic. This same interpretation applied to other improvements in the cemetery leads to potentially absurd – or at least confusing – results. For example, the addition or removal of an ordinary gravestone<sup>5</sup> would be considered an improvement that would require a COA under Sec. 41.09(1), MGO. Similarly, any plant, tree or other landscaping planted in or removed from the ground<sup>6</sup> at Forest Hill would require a COA. It might even apply to each body interred at the Cemetery. This would be an absurd result for a Landmark that is also an operating cemetery.

Despite this, the City has not historically issued COAs for the addition of an ordinary grave maker or planting. Moreover, it did not issue a COA for the removal of the flagpole near the Rest Area in 2016. Instead, COAs appear to have been issued for larger projects within the cemetery, such as major road work or work on the mausoleum<sup>7</sup>. Given this history, it certainly makes sense that those charged with maintaining and operating the cemetery on a day-to-day basis may be confused about what actions do and do not require a COA.

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<sup>5</sup> It is my understanding that new grave markers are added to the cemetery routinely, for full interments, cremation remains and inurnments.

<sup>6</sup> At Forest Hill, individuals are allowed to put plants in the ground next to a loved-one's grave marker.

<sup>7</sup> For a recent example of the City seeking a COA for large improvements at Forest Hill, see Legistar No. 46474, approved by the Landmarks Commission on March 20, 2017:

<https://madison.legistar.com/LegislationDetail.aspx?ID=2978395&GUID=A145CF0B-AA60-4406-8C32-3827F615D616>

One of the primary rules of interpreting ordinances is that a reading should avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58 ¶46. Another rule is that a court may give deference to a long standing interpretation of the law by an agency charged with administering it, *County of Dane v. Labor & Industry Rev. Comm.*, 2009 WI 9. Similarly, in the contractual setting, a court may take note of the practical application of the contract by the parties in determining its meaning, *George J. Meyer Mfg. Co. v. Howard Brass & Copper Co.*, 246 Wis. 558, 580-81, 18 N.W. 2d 468 (1945).

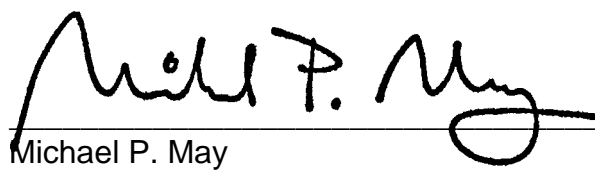
These rules of interpretation suggest that I might try to read the Historic Preservation Ordinance as applying to only those items of historical significance at Forest Hill – such as the Rest Area plaque monument at issue here – and as not applying to items that relate to the day to day operations of the Cemetery. But I cannot do that. I have no expertise in determining where that line should be drawn under the Historic Preservation Ordinance, and any such reading would be fraught with danger in its application to other landmarks, landmark sites or historic districts in the City.

Instead, I have determined that the plain reading of the Historic Preservation Ordinance would require some actions that would interfere with the City's obligation as owner and operator of the Forest Hill Cemetery. Under Sec. 41.09, MGO, it is the obligation of the owner of a landmark or landmark site to apply for a COA when required. In this case, the owner is the City. Therefore, going forward, I recommend that the City look closely at the unique situation of owning a landmark that also happens to be an operating cemetery and amend the Historic Preservation Ordinance as necessary so that it is clear what objects, improvements, and actions at Forest Hill are subject to a COA.

**Conclusion:**

Under current ordinances, the Parks Superintendent (under the direction of the Mayor) had the authority to remove the Rest Area plaque monument from Forest Hill Cemetery without obtaining the approval of the Board of Parks Commissioners.

Under current ordinances, the Parks Superintendent should have sought a COA from the Landmarks Commission to remove the Rest Area plaque monument from Forest Hill Cemetery. The Historic Preservation Ordinance requires certain actions that interfere with some aspects of the City's obligation to operate Forest Hill Cemetery, and it should be amended to make the two differing obligations clear.

  
Michael P. May  
City Attorney



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**SYNOPSIS:** Analysis of the authority of the Mayor, Parks Superintendent, Board of Parks Commissioners and Landmarks Commission over the removal of the plaque monument from the Confederate Rest Area at Forest Hill Cemetery.

**CC:** Mayor Paul Soglin  
All Alders  
Parks Superintendent Eric Knepp  
Department and Division Heads