AGENDA #_____

CITY OF MADISON, WISCONSIN

REPORT OF: **City Attorney**

TITLE: **Resolution to establish a fair and participatory process for deciding whether or not and/or how to restrict the flow of motorized vehicular traffic on Edgewood Drive, a remnant of the Park and Pleasure Drive system.**

AUTHOR: **James M. Voss**
Assistant City Attorney

DATED: **January 24, 2005**

PRESENTED **February 1, 2005**
REFERRED
REREFERRED
REPORTED BACK
ADOPTED POF
RULES SUSPENDED
ID NUMBER **34242**

TO THE MAYOR AND COMMON COUNCIL:

As the Board of Parks Commissioners and Common Council consider the various recommendations and proposals to restrict vehicular traffic on Edgewood Drive, please be advised that our attached report of September 2, 2003 remains as the position of the Office of the City Attorney.

/s/
Michael P. May
City Attorney

REPORT OF: City Attorney

TITLE: Resolution to establish a fair and participatory process for deciding whether or not and/or how to restrict the flow of motorized vehicular traffic on Edgewood Drive, a remnant of the Park and Pleasure Drive system.

AUTHOR: James M. Voss
Assistant City Attorney

DATED: September 2, 2003

PRESENTED June 17, 2003
REFERRED Board of Park Commissioners, City Attorney, City Engineer, Comptroller (for fiscal note)
REREFERRED
REPORTED BACK
ADOPTED POF
RULES SUSPENDED
ID NUMBER **34242**

TO THE MAYOR AND COMMON COUNCIL:

The above-named resolution states in a "Whereas" clause that "the City Attorney's Office has advised the neighborhood, alders and the Board of Park Commissioners in the past that modifying the flow of traffic would be legally challenging and would have to be done carefully to avoid the invoking of a reversion clause in the grant of the easement; and"

The resolution goes on to direct: "BE IT FURTHER RESOLVED that the City Attorney is directed to investigate and recommend a course of action whereby the grant of easement and its reversion clause can be legally defended so that the likelihood that the City would lose control of the Drive is substantially minimized or eliminated. Edgewood Schools, Inc. and other abutting property owners shall be involved in this analysis and their agreement shall be solicited."

Although the City Attorney's Office has many times over the past three decades described the complex legal constraints that apply to Edgewood Drive, we have also advised that the City could further regulate automobile traffic on the Drive. It should also be noted that the legal complexity of the Drive is not only limited to the reversion clause mentioned in the resolution. Therefore, this report will not focus exclusively upon the reversion clause. The City Attorney is a statutory legal advisor whose job is to assist the Common Council in identifying and evaluating options--to point out what the benefits, detriments, advantages and disadvantages might be among the available options.

As we understand the principal "resolved" clause in this resolution, the focus of the process to be undertaken is "to determine if there should be restrictions to vehicular flow on Edgewood Drive and if so, how traffic flow should be restricted." We submit that there are several lawful traffic regulation options, ranging from no change in existing traffic regulations to potentially closing the Drive to all public automobile traffic. It is this potential option of closing the Drive to automobiles that: a) is the most legally

problematic; and b) should be regarded as an option of last resort, in the event that other options eventually prove to be "impracticable."

We will come back to discuss this legal standard of "impracticable" later in this report. First, we will briefly summarize the complex legal constraints which were outlined in the February 21, 2002 Memorandum cited in the position paper attached to the subject resolution.

Edgewood Drive is "a wooded driveway which skirts Lake Wingra immediately adjacent to Vilas Park in Madison." ***St. Clara College v. City of Madison***, March 29, 1946, Decision of the Honorable Alvin C. Reise, Dane County Circuit Judge. The trial court decision was in material part affirmed by the Wisconsin Supreme Court in ***St. Clara College v. City of Madison***, 250 Wis. 538 (1947), and is crucial to understanding these legal constraints.

Edgewood Drive, was established as a park and pleasure drive on what is now the Edgewood College campus, as a result of that certain Agreement Between the Madison Park & Pleasure Drive Association and St. Clara College, dated March 30, 1904 and recorded March 18, 1904 as Document No. 203358a in the Office of the Dane County Register of Deeds. Edgewood, Inc. and the City of Madison are successors in interest to the original contracting parties.

> "The Madison Park & Pleasure Drive Association **was organized under the provisions of ch. 55, Laws of 1899, to manage, control, and improve parks and pleasure drives in trust for the people of the City of Madison**. As a part of a comprehensive plan for the development of a park system and pleasure driveways, on or about April 5, 1904, William F. Vilas and Anna M. Vilas, his wife, offered to convey to the association, for the purpose of park and pleasure grounds, an extensive tract of land adjacent to lands owned by St. Clara College, appellant herein, upon the conditions that the tract be improved by dredging, widening, and deepening a stream connecting Lake Wingra and Lake Monona; that the Association raise not less than $10,000 by public subscription in the City of Madison for the improvement of said lands; that the association cause a driveway to be constructed through the lands owned by appellant under the contract which will hereinafter be referred to; that certain alleys and streets within the boundaries of the area be vacated and devoted to park purposes; and that the park be named 'Henry Vilas Park.' Said offer and grant were accepted by the association on April 30, 1904.
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> March 30, 1904, a contract was entered into between the appellant and the association providing that in the event the association obtained good title to lands described in the agreement, being the same lands that William F. Vilas and Anna M. Vilas, his wife, proposed to convey to the association for park purposes, and upon expending in the improvement of the same a sum of not less than $10,000, appellant would convey by deed to the association a perpetual right of way or easement **for driveway and park purposes only**,

> over, in and to a strip of land three rods in width from Edgewood avenue to what is now Woodrow street, a distance of 2,127½ feet, more particularly described in said contract, which will be referred to as Edgewood drive. . . ." 250 Wis. 540-41. (Emphasis supplied.)

This interrelationship between the establishment of both Henry Vilas Park and Edgewood Drive was central to the holdings of both the Dane County Circuit Court and the Wisconsin Supreme Court. Establishment of each depended upon the other and together they were to become part of an interconnected system of public parks and pleasure drives. The language of the 1904 Agreement which implemented the interrelationship was clearly important to the courts. It provided:

> "NOW, THEREFOR, upon obtaining by said party of the first part of good title to the lands first above described as and for the purposes of a public park, and upon the expending in the improvement thereof, as above indicated, of a sum not less than ten thousand dollars, the party of the second part hereby agrees to convey, by deed, to the party of the first part, a perpetual right of way or easement for driveway and parking purposes only, over, in and to a strip of ground three rods in width across the land above described so owned by the party of the second part, **to be held by said party of the first part in trust for the people of the City of Madison according to the terms and provisions of Chapter 55 of the Laws of 1899, for park and pleasure drive purposes only,** . . ." (Emphasis supplied. Also, the Association was the party of the first part and the College the party of the second part.)

The 1904 Agreement also contains a reversion clause which provides:

> "Said deed of said right of way or easement over, in, and to said three-rod strip of ground shall contain the further condition that should said land ever be devoted by said party of the first part, or its successors or assigns, to any other use than park and pleasure-driving purposes, then, and in that event, the same shall revert to and become the property of said party of the second part." Id. at page 542.

The courts both found that all of the conditions of the 1904 Agreement were fully and timely met by the Association and that the City as successor was entitled to a deed from the College. The case arose principally because of lack of certain maintenance of fences and the making of some surface improvements to the driveway by the City and some large truck traffic on the Drive which the College contended was contrary to the required park and pleasure drive purposes. The College sought closure of the Drive to the public and enforcement of the reversion clause. The courts concluded that the Drive had been maintained for four decades in a relatively rustic or natural state compared to normal city streets, that the minor lack of fence repairs was due to war-time lack of materials and labor, that "the improvement of the driveway was merely consistent with the change in the mode of travel from carriages to private automobiles which took place between the time the driveway was constructed and the improvement

made" and that the infrequent truck usage should be prohibited by prospective posting, but did not trigger the reversion.

However, the courts refused to grant the City's counterclaim seeking to permanently bar any such claim of reversion, the Circuit Court remarking that "Some day the City, even in a trust capacity, might violate its duty." The Decision upheld the grant of trust, that the City, as successor to the Association held the Drive "in trust for the people of the City of Madison according to the terms and provisions of chapter 55 of the Laws of 1899, for park and pleasure drive purposes only, . . ." It indicated that the law provided that if the City should fail in its duties as trustee "and by reason of such failure injury may result to any such drives, parks, boulevards . . .", then citizens might petition the Circuit Court and the Court may appoint such interim trustees "as shall be deemed necessary to protect the interests of the public in said trust . . ."

The Decision also noted that "The deed by the College was for park and pleasure drive purposes "only"; and that means only. But inherent even in that circumscription was the invitation to all the public to use it as such. . . ." (emphasis in original) **We submit that the courts' recognition of the use of the Drive by the public with their personal automobiles is a significant interpretive key that automobile traffic cannot be eliminated by the City without risking a strong claim that the City has violated its obligations as trustee to the people of Madison.**

Attorneys for the City and for Edgewood, Inc., in 1997, were mindful of these trust obligations under the 1904 Agreement and the specific case law which interpreted them 50 years earlier. Accordingly, there was intentionally no effort to try to change the original "park and pleasure drive purposes only" trust obligation of the City for the benefit of all "the people of the City of Madison." Instead the parties only; a) expanded upon the courts' recognition of the need for maintenance and improvements to reflect the changes in the mode of travel to personal automobiles by clarifying that the City could so maintain, improve and even reconstruct the Drive to carry out its trust obligation and to protect the health, safety and welfare of its users; b) reconfirmed the City's traffic control responsibilities to clearly include limiting the direction of traffic flow on the Drive, consistent with prior City Attorney opinions; and c) granted the City broader control and maintenance over landforms (grading), vegetation (tree limbs and invasive shrubs) and improvements (fences and bridges) with reasonable notice to Edgewood.

We submit that these 1997 amendments to the 1904 Agreement do not substantially change it, and in particular do not change its original purpose or the original grant of trust. Both parties and their attorneys also concurred at that time that the amendments went just about as far as we could to try to bring the Agreement into the then approaching 21st Century. With regard to potential changes in traffic regulation on Edgewood Drive, the issues are both factually and legally complex. The City has an ongoing responsibility as successor trustee to preserve the pleasure drive for the driving enjoyment of all of the people of the City of Madison and, arguably, to the assigns of William and Anna Vilas–the Regents of the University of Wisconsin System.

The advice which the City Attorney's Office has consistently given since the 1947 court cases regarding potential traffic regulation changes on Edgewood Drive is that the City's trust obligations and duties under the 1904 Agreement are to benefit all of the people of the City of Madison, not just the two principal parties to the Agreement, **and** that the Drive be maintained open to through public automobile traffic. It is important to note that the designated use restriction on the drive is "for driveway and parking purposes only" or for "park and pleasure driving purposes." (emphasis supplied)

Traffic calming improvements and/or direction of auto traffic regulations and restrictions may be considered which do not close the Drive to through traffic in at least one direction. Any other or further traffic control improvements, regulations or restrictions should minimally be carefully scrutinized against the original grant of trust and narrowly derived from data-based findings, in accordance with applicable traffic engineering principles, and also consistent with the 1997 amendments.

We further submit that completely and permanently closing the Drive to through automobile traffic would probably have to be first approved by the courts, under the "impracticable" standard mentioned earlier in this report. There is a statutory provision that flows from Article XI, Section 3a of the Wisconsin Constitution whereby a city can obtain relief from a condition of a gift or dedication, such as the 1904 Agreement condition that Edgewood Drive be held in trust for the people of the City for park and pleasure drive purposes only. Wis. Stats. § 66.1025 provides:

> **66.1025 Relief from conditions of gifts and dedications.**
> **(1)** If the governing body of a county, city, town or village accepts a gift or dedication of land made on condition that the land be devoted to a special purpose, and **the condition subsequently becomes impossible or impracticable**, the governing body may by resolution or ordinance enacted by a two-thirds vote of its members-elect either to grant the land back to the donor or dedicator or the heirs of the donor or dedicator, or accept from the donor or dedicator or the heirs of the donor or dedicator, a grant relieving the county, city, town or village of the condition, pursuant to article XI, section 3a, of the constitution.
> **(2)** (a) If the donor or dedicator of land to a county, city, town or village or the heirs of the donor or dedicator are unknown or cannot be found, the resolution or ordinance described under sub. (1) may provide for the commencement of an action under this section for the purpose of relieving the county, city, town or village of the condition of the gift or dedication.
> (b) Any action under this subsection shall be brought in a court of record in the manner provided in ch. 801. A lis pendens shall be filed or recorded as provided in s. 840.10 upon the commencement of the action. Service upon persons whose whereabouts are unknown may be made in the manner prescribed in s. 801.12.

> (c) The court may render judgment in an action under this subsection relieving the county, city, town or village of the condition of the gift or dedication.

Sub. (1) of the statute would seem to allow the City to simply accept grants from Edgewood, Inc. and the Shirley A. Kubly Trust, relieving the City of the condition of having to hold the property in trust for the people of the City of Madison for park and pleasure drive purposes only. However, we submit that the trust provision makes all of the people of the City of Madison beneficiaries of the trust, such that their rights to an Edgewood Drive park and pleasure drive cannot so simply be dissolved. Moreover, there are the potential collateral rights of the heirs, successors and assigns of William F. and Anna M. Vilas to be resolved. We believe that the complexity of the original trust condition and the interrelationship with the creation of Vilas Park, both of which were recognized by the Wisconsin Supreme Court in 1947, require that the City proceed under sub. (2) of the foregoing statute to obtain judicial relief from the trust condition.

It should also be noted that there is an evolving body of national case law based upon the language of the Uniform Conservation Easement Act, Wis. Stat. § 700.40, which grants conservation easement enforcement rights to third party individuals and to persons authorized by other laws. We submit that this statute may apply retroactively to the subject condition as a protected "conservation easement" for retaining or protecting natural, scenic or open space values and assuring the availability of Edgewood Drive for recreational or open space use. Thus, it is quite possible that public third-party individuals and even the Attorney General of Wisconsin could bring actions to enforce the original park and pleasure drive trust. This would be a further reason to proceed under the judicial relief option of sub. (2) above.

In order for a condition, such as the instant one to use the property only for park and pleasure drive purposes, to be properly deemed by a court to be "impracticable", it must be incapable of being carried out in practice. The past ninety-nine years of having successfully carried out the condition in practice would very probably rebut any present attempt to seek a judicial finding of impracticability. We believe that a thorough judicial review of the facts will examine the City's stewardship of its public trust obligation to operate and maintain Edgewood Drive as a park and pleasure drive consistent with the original and judicially interpreted intent of the 1904 Agreement.

We submit that it would be very unlikely that a court would now find the automobile use of the park and pleasure drive to be impracticable when the City has undertaken no significant additional lawful regulation or control of automobile traffic on the Drive over the last 56 years, since prohibiting heavy trucks at the direction of the Wisconsin Supreme Court. It continues to be our considered recommendation that the City first undertake some incremental regulatory and/or traffic calming measures before seeking judicial relief from automobiles on the Drive. Such judicial relief should only be found to be necessary after such automobile traffic regulatory and/or control measures are given a reasonable chance to succeed. We defer to the City Engineer and Traffic Engineer to provide their professional recommendations on the appropriate measures to be tested and/or implemented.