

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
ROOM 401 - CITY-COUNTY BUILDING  
266-4511**

**FROM:** Lara Mainella, Assistant City Attorney  
**TO:** Board of Parks Commissioners, Eric Knepp, Kay Rutledge  
**DATE:** August 29, 2019  
**RE:** **Request to place a non-city statue / structure in a City park**

You have asked whether the Park Commission can approve a request to place a statue that was not solicited or promoted by the City in a City park for up to a month. This request is not associated with any gathering or event in the park space. Specifically, the object is an 66" tall elephant statue weighing 120 pounds with a 500 pound base and the request is from the organization PETA, who wishes to bring awareness about the treatment of elephants specifically in the circus industry.

**Background.**

The Park Commission is charged with the control of all uses of the park, per Wis. Stat. 27.08(2)(a), to "secure the quiet, orderly and suitable use and enjoyment thereof by the people" and has broad authority to do so.

As I understand it, the Park Commission does not have an established procedure for requests to place unattended objects<sup>1</sup> in a City park. Established uses of City parks include special events through Parks special event process, shelter reservations, sports and recreational club rentals, weddings, festivals, celebrations or large gatherings, all of which require an advanced approval and permit process. People also, of course, use parks for picnics, gatherings, walking, recreation, passing the time, etc. without any reservation or permit.

However, City Parks are not typically used to display unattended structures or objects. While permits for certain events can include the placement of structures like tents, tables, and other temporary equipment, these objects are usually part of the use of the park by participants in those events.

**Bucky on Parade is not a comparable event.**

One notable situation involving statues in parks (and other locations throughout the City) was the "Bucky on Parade" event, but this was very different from the request for a single elephant from an outside group. "Bucky on Parade" was a tourism initiative of UW-Madison and the Madison Sports Commission, a partner of the Greater Madison Convention and Visitors Bureau. GMCVB is the City's tourism organization, funded through a contract with the City. This tourism collaboration included 100+ Bucky Badger statues promoting the University and placed all over town. Because state law requires the Park Commission to approve all uses of the Park, this Commission was asked to approve

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<sup>1</sup> Other than equipment needed for construction or similar work on private property directly adjacent to a City Park.

the placement of Bucky statues in Parks, including one at James Madison Park, near the public sidewalk of East Gorham street, during the summer of 2018.

### **This is not a Public Art project.**

The City has a public arts program administered through the Madison Arts Commission, a committee of the City of Madison. (MGO 33.35.) MAC has procedures to award arts grants and to commission works of art for the City, which become the City's property, to be displayed as the City sees fit.<sup>2</sup> Occasionally MAC artwork is displayed in a City park; such art might include a statue or sculpture, and may be temporary or permanent, but during such display, it is considered "City" art.

Aside from this, staff have not made me aware of any procedures to approve a non-City statue to be displayed in a park.

### **Could this statue be approved?**

Whether to approve the solitary placement of a non-City statue in a park is within the purview of the Park Commission, whose authority is very broad. However, when exercising that authority, the Commission must keep in mind basic Constitutional requirements for regulating speech in a "traditional public forum." A City park is the quintessential, traditional public forum.<sup>3</sup> PETA's elephant statue could be considered a form of protected speech. However, the "message" would not be the City's speech (unlike Bucky or a MAC public art project.) Rather, it would be the speech of the group requesting its placement. Thus far, the Park Commission has no history of accepting statues containing the speech of *others*, and is not obligated to do so. While public parks are used "for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'..... "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478–79 (2009) (internal citations omitted.)

So while it is not obligated to approve this statue, if the Park Commission is inclined to approve it, several words of caution are required.

If the Park Commission approves the placement of this elephant at James Madison Park on the simple request of the group to do so, it would have a hard time saying "no" to a Nazi sculpture, a bust of Bernie Sanders, or any other sculpture one can imagine. If the physical characteristics and location are deemed safe and approvable, required insurance provided, *all* such statues would have to be allowed – absent well-crafted criteria.

If the Park Commission starts approving such requests without criteria, it may create an open "forum" for speech where there was none before. If so, it will not be able to approve some displays and reject others, on the basis of the content of the message.

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<sup>2</sup> The City has also accepted gifts of artwork, including sculptures, but it is never obligated to do so.

<sup>3</sup> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939).

## **Suggested Procedure if the Park Commission wants to approve:**

- A. Develop appropriate policies. If the Park Commission wishes to approve non-City temporary sculptures, those that are not part of a City-sponsored initiative, this office would likely advise the Commission to adopt appropriate, constitutional criteria for approval. The nature of the criteria would depend on what type of policy the Commission is interested in. A wide-open policy of approving anyone's temporary sculptures might require content-neutral criteria (size, location, duration, safety, insurance, etc.) that is not based on the subject matter of the piece or the group that is placing it there.

A more restrictive policy could be limited to topics that align, for example, with the parks' mission or with particular uses of individual parks. If the Park Commission wishes to set some guidelines for accepting certain sculptures and physical displays in City parks, this should be done thoughtfully and with careful planning and legal advice from the Office of the City Attorney. Such advice would be too lengthy for this memo.

- B. Hold an event that includes this statue as part of the event: A special event permit for a picnic, gathering, or other assembly of people can include the placement of an object such as this elephant statue *as part of the event*. Many events that include equipment and temporary displays are approved in Parks (tents, finish lines with signage, decorations, bike corrals, etc.) This equipment is part of an actual event where people are gathering and using the space for some other approvable park use. The equipment is *incidental* to the event – it is not the event itself. PETA could hold an event and bring the elephant as part of it, subject to applicable procedures for approving a special event permit. Such an event would presumably be one-day or short term consistent with park use event policies. If PETA wants to pursue this, the application should be processed like any other, according to the Commission's special event policies and procedures. Importantly - any future applications from other groups for gatherings that include a statue like this would have to be treated the same.

## **Suggested Procedure if the Park Commission does not want to approve:**

The Park Commission is not obligated to create procedures to deal with this request. The Park Commission can place the pending request on file and inform PETA that it does not have any procedures for approving unattended displays such as this elephant statue. As long as the Park Commission consistently does not entertain or approve similar requests, nothing more needs to be done.

Parklands are NOT considered a traditional public forum for the display of unattended, stand-alone objects such as sculptures or statues.<sup>4</sup>

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<sup>4</sup> "The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 480, 129 S. Ct. 1125, 1138, 172 L. Ed. 2d 853 (2009). While *Summum* focuses on permanent monuments, I could find no cases that squarely hold that a city must apply a traditional public forum analysis to a request for a temporary structure or monument in a park. *Capitol*

Why is this not the same as the Bucky statues? Again, Bucky on Parade was a project of the City's tourism agency.<sup>5</sup> It was a unique government collaboration and part of a larger City-wide and University tourism initiative. In contrast, the elephant is from an outside group approaching the City for a single display that has nothing to do with City tourism, is unrelated to the enjoyment of the park, and the City is not obligated to accept it.

## **Conclusion:**

There is no process for the Park Commission to approve the display of an object such as a statue in a City park without an associated event taking place. The Park Commission is not obligated to consider or approve such placement and this request could be placed on file. The First Amendment does not require the City to accommodate this request because parks in Madison have not been traditionally used to display statues or other objects not owned or sponsored by the City, especially not in the absence of an associated event.

"Bucky on Parade" was part of a City-wide tourism initiative and the law allows the City to promote its own message (in this case, tourism, support of the University, etc.) without accepting every other message that one might want to display in the form of a statue in a park.

Although it has no history of doing so, the Park Commission could approve the request as-is, for the temporary placement of the elephant without an associated event, subject to content-neutral safety restrictions. To do so now could "open the door" to more requests. Opening that door *without criteria* could result in the Park Commission being obligated to approve all such requests, including those with offensive or controversial messages, and could expose the City to a legal challenge if future requests are denied or handled incorrectly. If the Park Commission would like to approve requests such as this, it should develop clear policies for doing so that are in line with constitutional requirements, in consultation with the City Attorney.

A final option would be for the group to apply for a special event permit for a gathering of people, under established Parks procedures, and bring the elephant as part of that event, if the event is otherwise approvable. This approach would not require new criteria. However, future applications for gatherings with similar statues would have to be treated the same.

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*Square Review and Advisory Bd. v. Pinette* involves a temporary display by the KKK but it was an Establishment Clause case, not a Free Speech case.

<sup>5</sup> "First Amendment constraints do not apply when the...authorities engage in government speech by installing sculptures in the park." *PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005). In *Gittens*, the District of Columbia sponsored a public art program involving donkey and elephant statues and rejected one of PETA's elephants, this was not a First Amendment violation because the art project was sponsored by the District and they could select which art to display. Similarly the Park Commission could select the Bucky project for display in the park but is not obligated to select PETA's project. In fact, right now, the Park Commission is not sponsoring any art projects, not seeking more statues, and is not obligated to accept ANY sculptures.