



Project Name/Address: Confederate Monuments in Forest Hill Cemetery
Application Type: Recommendation to Common Council
Legistar File ID # [48643](#)
Prepared By: Amy L. Scanlon, Preservation Planner, Planning Division
Date Prepared: March 12, 2018

Background Information

Resolution 48643 directs the Board of Parks Commissioners, Equal Opportunities Commission, and Landmarks Commission to meet jointly to develop recommendations regarding the treatment of the Confederate monuments at Forest Hill Cemetery. A joint meeting was held on January 30, 2017. The minutes for that meeting are attached. The resolution describes three options for treatment of the monuments:

- To take them down and permanently remove the two Lost Cause monuments
- To leave the monuments in place but alter the messages contained therein
- To leave one or both of the Lost Cause monuments in the cemetery but erect a new monument providing detail of the false narrative of the Lost Cause and the role these monuments play in that effort.

Each Commission will meet separately to develop their recommendation for treatment that will be provided to the Common Council. After the joint meeting, Landmarks Commission Chairperson, Stuart Levitan, requested that the Landmarks Commission discuss the item after the Equal Opportunities Commission had discussed the issue and developed a final recommendation. The Equal Opportunities Commission discussed the item on February 8, 2018 and March 8, 2018. The final recommendation by the Equal Opportunities Commission is to remove the large 1906 monument, not reinstall the 1981 monument, and not install a new monument to provide recontextualization.

The City Attorney's Office provided a memo on the larger process and this memo is attached. Because Forest Hill is a designated landmark, the Landmarks Commission has the authority through the Historic Preservation Ordinance to review the removal of the monument and the installation of a new monument. The decision of the Landmarks Commission can be appealed to Common Council. Any alteration to the site will also be reviewed by the State Historic Preservation Office since the property is listed on the State and National Registers.

Recommendation

The Landmarks Commission shall make a motion to provide a treatment recommendation to the Common Council.



City of Madison

City of Madison
Madison, WI 53703
www.cityofmadison.com

Meeting Minutes - Draft LANDMARKS COMMISSION

Tuesday, January 30, 2018

6:00 PM

Warner Park Community Recreation Center
1625 Northport Drive

Joint Meeting of the Board of Park Commissioners, Landmarks Commission and Equal Opportunities Commission

1. CALL TO ORDER / ROLL CALL

Present: 5 - Marsha A. Rummel; Stuart Levitan; Lon Hill; Anna Andrzejewski and Katherine N. Kaliszewski

Excused: 2 - David W.J. McLean and Richard B. Arnesen

Others Attending: Mayor Paul Soglin, Katie Crawley (Mayor's Office), Ald. Sheri Carter, Eric Knepp (Park Superintendent), Lisa Laschinger (Parks), Laura Bauer (Parks), Ann Shea (Parks), Darin Hall (Parks), Joanne Austin (Parks), Amy Scanlon (Planning), William Fruhling (Planning), Norm Davis (DCR Director) and Josue Peralta (EOC)

The meeting was called to order at 6:03 p.m.

2. PUBLIC COMMENT

There were 31 registrations with 24 speakers (please see attached PDF of the registration forms).

Registered Speakers Tom Garver, Benjamin Nickel, Paul Sherman, Margaret Kaufman, Curtis Meffert, Alice Drake, Lesleigh Luttrell, James Mand, Ken Kalinowski, Gerhard Pechmann, John Fons, Paul Kaufman, Kathy Walsh, Kevin Walsh, George Dreckmaun, Frances Wiedenhoeff, Carl Endres, Ari Carmi, Sandra Witkauskas, Karl Bethke, David Blaska, Daniel Einstein, Julia Sherman, and Gary Von Kauwenburgs spoke.

Registrants Kerman Eckes, Donna Kirschenmann, Michelle Hornung, Darin Hall, Ruth Ann Whitehorse-Burns, Andrea Vitanieni, and Brittany Gilles did not speak.

Many of the approximately 24 registrants who spoke requested the city keep the 1906 monument at the Forest Hill cemetery. Several people asked us to respect the dead, regardless of the side they chose. Many people thought an interpretive sign would add historic context now that the c.1981 plaque was removed which named the Confederate Rest. Only a few people supported reinstalling the plaque that is currently in storage.

Several people spoke about the legacy of slavery and how it is still part of our living history and recommended removing the monument and adding a new sign to explain how the Confederate soldiers ended up at Camp Randall as POWs and Forest Hill Cemetery. One of the speakers clarified that the city was

not responsible for the deplorable condition experienced by the POWs, they suffered in cold and wet conditions and many were quite ill when they arrived and some died within days of arrival. The committee members heard from two native speakers who want the city to honor all the dead buried in our region and reminded us not to glorify war or forget genocide.

3. DISCLOSURES AND RECUSALS

There were no disclosures or recusals from the members present.

REFERRAL FROM THE COMMON COUNCIL

4. [48643](#) Establishing a Plan for the Confederate Monuments in Forest Hill Cemetery.

Sponsors: Paul R. Soglin

Attachments: [Monument Report.pdf](#)
[Forest Hill Photos.pdf](#)
[33 -- A - 1 Speedway Road - Forest Hill Cemetary .pdf](#)
[1906 Newspaper Articles.pdf](#)
[1980 & 1981 Newspaper Articles.pdf](#)
[AHA Statement on Confederate Monuments.pdf](#)
[Atlanta History Center - Status Quo Not an Option Intro & Template.pdf](#)
[Book Scan.pdf](#)
[Confederate Burials - Center for Civil War Research.pdf](#)
[Confederate Rest Historic Madison - Gajewski.pdf](#)
[Confederate Rest Monument Public Comment.pdf](#)
[Confederate Rest Monument Media Coverage.pdf](#)
[confederatestatement 817.pdf](#)
[ForestHillRulesRegs.pdf](#)
[Foresthillstatement. 817.pdf](#)
[Opinion 2016-002 Confederate Flag Memo \(Final\).pdf](#)
[Planning Magazine - Dec 2017 Goodman.pdf](#)
[SPLCwhose heritage.pdf](#)
[Joint Meeting Confederate Monuments 01302018.pdf](#)
[New York Times Article](#)
[Public Comment Emails.pdf](#)
[1.30.18 Joint Meeting Registration Statements.pdf](#)

Mayor Soglin presented a historical overview and his recommendations for the monuments. Mayor Soglin commented about the "vicious" history of Jim Crow which institutionalized slavery and the treason of the secessionist insurrection. The Mayor recommends keeping the the monument and adding a new sign with some of the words of New Orleans Mayor Mitch Landrieu's speech last May: <http://nyti.ms/2q9ASgb> that would be a 'living monument to the lies and betrayal' of the UDC and Lost Cause movement to whitewash slavery. (Ald. Samba Baldeh left the meeting at 6:09 p.m.)

Eric Knepp and Lisa Laschinger presented a summary of the history of the monuments, as well as the operational procedures and challenges within the cemetery. Even though the monument is composed of three sections, Parks Superintendent Eric Knepp reported that taking apart the monument in order to remove the section with the language about the United Daughters of the

Confederacy would not likely be possible. The legislative file has photos of the site, close-ups of the monuments, newspaper articles, public comment etc. Lisa Laschinger provided a brief summary of the history of the monuments at the meeting. Parks Supt Eric Knepp pointed out that the insignia on the plaque is a representation of the Confederate battle flag which is not permitted to be in the park per ordinance. The Parks Commission changed the policies on flags last year. The city is not planning to remove the individual stone grave markers which identify the soldiers by name. The stones are eroding and may require replacement if we intend to use them to name the individuals who are buried in the cemetery. The markers do not denote the actual location of the 140 soldiers. According to Eric, there is no record of specific platting, many of the soldiers are in a mass grave. Ms. Waterman's grave marker does represent where she is buried. (Ald. Samba Baldeh returned to the meeting at 6:30 p.m.)

There was general consensus that the resolution and the prescribed actions would be referred to the respective commissions for further discussion and formal action. To formalize the consensus of the commissions, a motion to re-refer was submitted by Madden (Equal Opportunities Commission), seconded by Rummel (Landmarks Commission).

A motion was made to re-refer to the LANDMARKS COMMISSION. The motion passed by voice vote/other.

5. ADJOURNMENT

A motion was made to adjourn. The motion passed by voice vote/other. the meeting adjourned at 8:15 p.m.

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

MEMORANDUM

TO: Norman Davis, Director of the Department of Civil Rights
Eric Knepp, Superintendent of Parks
Stu Levitan, Chair, Landmarks Commission
Corinda Rainey-Moore, Chair, Equal Opportunities Commission
Amy Scanlon, Historic Preservation Planner
David Wallner, President, Board of Park Commissioners

FROM: Doran Viste, Assistant City Attorney

DATE: February 19, 2018

RE: Questions Regarding the Confederate Rest Area Monument Resolution (File 48643) and Continuing Authority Over Forest Hill Cemetery

As directed by File [48643](#), on January 30, 2018 the Board of Park Commissioners, the Equal Opportunities Commission and the Landmarks Commission held a joint meeting on the pending resolution regarding the future of the two Lost Cause Confederate monuments in Forest Hill Cemetery. Following this meeting, some questions were raised about the resolution and the role of the Committees regarding the Lost Cause monuments in Forest Hill Cemetery moving forward. This memo attempts to address some of those questions.

The pending resolution, if adopted, would express a formal City policy on some of the issues that have been raised by the Lost Cause monuments in Forest Hill Cemetery. In addition, the resolution called for a public process to enable public comment and committee input into the future of the two Lost Cause monuments in Forest Hill Cemetery. The resolution also specifically directs the Committees to consider three options regarding the two monuments:

- Whether to take down and permanently remove the two Lost Cause monuments;
- Whether to leave the monuments in place but alter the messages contained therein; or,
- Whether to leave one or both of the Lost Cause monuments in the Cemetery but erect a new monument providing detail of the false narrative of the Lost Cause and the role these monuments play in that effort.

As written, each Committee, when considering the resolution, can make a recommendation to adopt or reject the resolution, and include one of the listed options in their recommendation (i.e., “recommend to approve, and that the City take down and remove the monuments”). Each Committee could also make a recommendation to adopt an amended version of the resolution. Any Committee recommendations about what to do with the monuments will be strictly advisory as the resolution does not expressly direct a result. Indeed, unless the resolution is amended,

the Council, when it considers the resolution, is not going to be directing a specific action. Of course, the Council could amend the resolution to direct a specific result, which, if adopted, would then become the policy of the City.

Regarding the continuing authority of the Committees over the Confederate Rest Area and Forest Hill Cemetery, as detailed in the memo prepared by my office last fall (attached), the Board of Parks Commissioners (BPC) could create a cemetery rule that would apply to the Rest Area and the monuments in question—but in the absence of that, Parks staff have operational authority over the Cemetery. Also, the Landmarks Commission does have the authority to review a Certificate of Appropriateness (“COA”) application that would be required if the decision is made to remove the Confederate monuments, or add a new monument. However, as was noted in the memo, there remain some inherent conflicts between the language of the landmarks ordinance (Chapter 41) and the workings of an operational cemetery that will need to be addressed moving forward.

Until the City, as owner of the property and acting through the Common Council, determines what changes (if any) it desires to the Confederate Rest Area, there is no proposal that triggers the issuance of a COA or any formal approval process before any of the City bodies. Once any such proposal exists, we would need to determine if any other approvals are needed, and whether they would be accompanied by any changes to the ordinances.

/s/ Doran Viste

Doran Viste

Encl.

**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.¹

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.

¹ 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 owned², 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

² 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.³ 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 Appropriateness⁴ ("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:

³ 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.

⁴ "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 gravestone⁵ 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 ground⁶ 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 mausoleum⁷. 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.

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

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

⁷ 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).

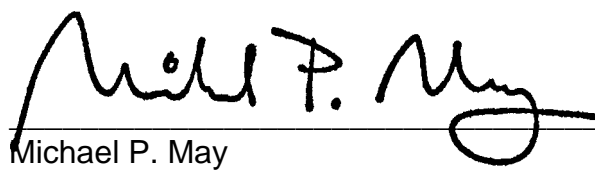
These rules of interpretation suggest that I might try to read the Historic Preservation Ordinance as applying to only those items of historical significance at Forest Hill – such as the Rest Area plaque monument at issue here – and as not applying to items that relate to the day to day operations of 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

September 19, 2017

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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