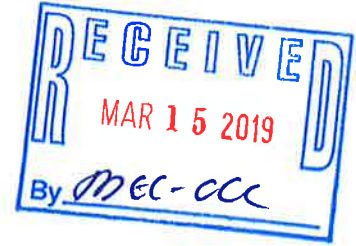


STATE OF TENNESSEE
HISTORICAL COMMISSION



IN THE MATTER OF:

THE DESCENDANTS OF NATHAN
BEDFORD FORREST

THC 18-001

SONS OF CONFEDERATE
VETERANS, NATHAN BEDFORD
FORREST
CAMP # 215

Petitioners,

Re: MEMPHIS STATUTES
(Petition for Declaratory Order)

Docket Number 04.47-150937J

SONS OF CONFEDERATE VETERANS,
NATHAN BEDFORD FORREST CAMP # 215'S
APPEAL OF
INITIAL DECLARATORY ORDER
AND DENIAL OF PETITION TO RECONSIDER

1. Introduction

Sons of Confederate Veterans Nathan Bedford Forrest Camp # 215 (hereinafter "SCV") submits this petition asking the Tennessee Historical Commission to review and reject the Initial Order dated January 25, 2019 (hereinafter the "Initial Order") as well as the Order Denying Petition for Reconsideration dated February 28, 2019 (hereinafter "Denial Order").

Although addressed in more detail below, one of the issues which the SCV believes was incorrectly decided below and that warrants this appeal is whether the Heritage Protection Act of 2016, Tennessee Code Annotated § 4-1-412, (the "Heritage Protection Act") prohibited a local government, in this instance the City of Memphis, from selling or otherwise conveying title to any

“memorials”, as defined in the Act, without first obtaining a waiver from the Tennessee Historical Commission to remove, alter or disturb such memorials from government ownership and/or the protection under the Heritage Protection Act. The statutory prohibition is not limited to *physical* removals but would include prohibitions on any act or omission by a government entity that would have the effect of removing a memorial from the protections of the Act, such as by renaming a road, bridge or building or purportedly changing legal title to a memorial.

The Legislature stated in the Public Chapter that the Act was remedial and required a broad construction for the purpose of providing maximum protection to public memorials. Reading the Act as silent on the intentional removal, alteration and disturbance of memorials by selling them and thus converting them from public to non-public *without first obtaining a waiver* is inconsistent with the Legislative intent that the Act be construed to provide maximum protection to the memorials.

The Denial Order recognizes that the issue was before the Administrative Law Judge but the Denial Order erroneously reads the statute as allowing a government to sell - *without first obtaining a waiver from the Tennessee Historical Commission* - memorials to third parties in circumstances where the sale would remove the item from the protections of the Act. The Denial Order also misapplies other statutes which were not in conflict with the Heritage Protection Act under the well established rules of statutory construction.

2. Procedural and Factual Status

On May 25, 2018, the Tennessee Historical Commission referred this matter for initial determination by the Administrative Judge. That referral included the entire Amended and Superseding Petition for Declaratory Order which had been filed by the UDC and the Descendants of Nathan Bedford Forrest on April 5, 2018 (hereinafter the “Amended Petition”).

The Amended Petition contained specific factual allegations relating to the acts of the City

of Memphis to sell its “interests” in the parks and memorials. Those parks and memorials were, at least prior to December 20, 2017, protected publicly owned memorials under the Heritage Protection Act. The Amended Petition presented the issue of whether a sale of public property that is or which included memorials protected under the Heritage Protection Act but which sale would have the effect of removing the memorials from public ownership, and thus the protections of the Act, is prohibited by the Act unless a waiver is first granted by the Tennessee Historical Commission.

The Amended Petition set forth facts showing that the City of Memphis had been repeatedly denied a waiver by the Tennessee Historical Commission to “remove” the Forrest Equestrian statute. The Amended Petition also set forth facts showing that the City of Memphis, as a result of those denials, had intentionally designed a scheme to “remove”, “alter” or “disturb” these memorials by attempting to remove them from the Act’s protections by merely altering legal title and then physically removing them from public lands by claiming that they were no longer “publicly” owned and thus no longer protected.

That scheme assumed that no waiver would be required for the physical removals because the memorials would no longer be legally titled in the name of a local government. However, the scheme was illegal *ab initio* because, for example, the Act’s protections are written so that if broadly construed to maximize protections, as the Legislature mandated in the Act, the non-physical transactions which would have the effect to removing memorials from the scope of coverage of the Act were also prohibited unless a waiver was first obtained.

The Amended Petition set forth the following facts

The Forrest Statue, including the base and Equestrian Statue that was attached thereto for more than 110 years, has served since 1905 as the headstone of the graves of Lt. General Nathan Bedford Forrest and Mary Montgomery Forrest. Amended Petition at ¶ 2.

The Forrest Statute is a memorial regarding a historical conflict, historic entity, historic event, historic figure or historic organization under the definition of Tenn. Code. Ann. § 4-1-412. For more than 110 years and until December 20, 2017 the Forrest Statute and the related base and graves were located on property owned, leased, rented, managed, or maintained by the City of Memphis. Amended Petition at ¶ 3.

The Forrest Statue, as both a historical gravesite and memorial, was protected by the Tennessee Historic Protection Act of 2016. Amended Petition at ¶ 4.

The statues of Jefferson Davis and Captain Mathes were memorials protected by the Tennessee Heritage Protection Act of 2016. They were located on property under the control of the City of Memphis, Tennessee, and were protected by the Tennessee Heritage Protection Act of 2016. Amended Petition at ¶ 5.

The Heritage Protection Act of 2016 imposed an affirmative duty on the City of Memphis to ensure and to take steps to ensure that no real or personal property that is or may be subject to the Act “may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered” unless a waiver is first obtained from the Tennessee Historical Commission. Amended Petition at ¶ 6.

On or about December 20, 2017, the City of Memphis illegally transferred the land referred to as Health Sciences Park in Memphis, Tennessee, by Warranty Deed and Bill of Sale recorded with the Register’s Office of Shelby County, Tennessee, together with restrictive covenants, an option to purchase, and other documents associated with said Health Sciences Park denoted herein. Amended Petition at ¶ 7 and Exhibit 1 thereto.

The property(ies) transferred in the December 20, 2017, transactions are still listed on the National Registry of Historic Places and as such is/are significant for its architectural, archaeological, artistic, cultural or historical associations or significant for its natural, scenic or open

condition. Amended Petition at ¶ 8.

The City of Memphis devised and pursued a course of action relative to the gravesite, protected parks, and protected memorials that was intended to circumvent the City's affirmative duties under the Tennessee Heritage Protection Act of 2016 to ensure that protected real or personal property would not "be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered." Amended Petition at ¶ 9.

On and after the conveyances that were devised by the City of Memphis in an effort to avoid its duties under the Act, Memphis Greenspace, Inc., acting in coordination with public officials from the City, including law enforcement officials, removed the statues from their respective parks during the night of December 20, 2017. Amended Petition at ¶ 11.

On or about December 20, 2017, the City of Memphis also transferred the easement associated with the Memphis Park which contained therein a Bill of Sale to the said Jefferson Davis and Captain Mathes memorials, which were likewise protected by the Tennessee Heritage Protection Act of 2016. (See Deed of Conveyance, Bill of Sale, Restrictive Covenants, Option to Purchase, and other documents associated with the said transfer of Memphis Park denoted as cumulative Exhibit # 3). Amended Petition at ¶ 15.

The transfers referenced in the Amended Petition were contrived by the City of Memphis acting independently and in concert with Memphis Greenspace, Inc., solely or primarily for the purpose of evading the City's duties under and the limitations imposed by the Tennessee Heritage Protection Act of 2016. Amended Petition at ¶ 17.

These transactions were insufficient as a matter of law to remove the memorials from the protections of the Act since the Act provides for the mandatory means by which protected properties and memorials must be held, administered, and protected by a local government. Amended Petition at ¶ 18.

As to the transfers, Tenn. Code Ann. § 4-1-412 (b)(2) required that the public entity having responsibility for maintaining a memorial, or a non-profit entity acting with the permission of a public entity, shall have the authority to take proper and appropriate measures, and exercise proper and appropriate means for the care, preservation, protection, repair, restoration, and renovation of the memorials. Amended Petition at ¶ 20.

On or about December 20, 2017, Memphis Greenspace, Inc., and the City of Memphis violated their duties of maintenance of the said memorials by selling and removing the monuments and causing substantial damage in the removal and transportation of the said memorials. Amended Petition at ¶ 21.

The City of Memphis by and through its various departments and agents knowingly and intentionally assisted Memphis Greenspace, Inc., in accomplishing the removal of the said memorials in violation of the Tennessee Historic Preservation Act of 2016 and otherwise in violation of state law that was relevant to these historic assets and which would have been material and relevant to any waiver which otherwise was required to have been obtained pursuant to the Act. Amended Petition at ¶ 22.

The memorials were in existence prior to January 1, 1970, and as such are protected by The Tennessee Heritage Protection Act as codified in Tenn. Code. Ann. § 4-1-412, which protection continues as to the memorials and parks, whether ultimately determined to be legal or illegal, of the City of Memphis and Memphis Greenspace, Inc. Amended Petition at ¶ 26.

In the Amended Petition, the Petitioners also enumerated a number of “causes of action” related to the Heritage Protection Act, its scope and application.

- That the statues and properties addressed in this Petition were and continue to be subject to the protections of the Heritage Protection Act. Amended Petition, p. 10, ¶ 1.

- That the Heritage Protection Act prohibits any sale or conveyance of any protected properties or memorials, which sales or conveyances are designed for the purpose of circumventing the Acts protections. Amended Petition, p. 10, ¶ 1.

- That the language contained in Tenn. Code Ann. § 4-1-412(b)(1) that states “except as otherwise provided in this section, no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is or is located on public property may be removed, renamed, relocated, altered, rededicated or otherwise disturbed or altered” prohibited any course of action by the City of Memphis to circumvent or defeat its obligations to protect, preserve, and maintain these protected assets. Amended Petition, p. 10, ¶ 1.

- That a mere change in the name of a public park or memorial that existed prior to 1970 is ineffective to defeat the protections of the Heritage Protection Act either as to the public real property itself and/or as to memorials contained or existing therein. Amended Petition, p. 11, ¶ 2.

- That the conveyances by the City of Memphis on or about December 20, 2017 did not remove the public real property and/or the memorials located therein from the protections of the Heritage Protections Act. Amended Petition, p. 11, ¶ 3.

- That the transfers by the City of Memphis violated the duty of the public entity to maintain the statues codified in Tenn. Code Ann. § 4-1-412. Amended Petition, p. 11, ¶ 5.

- That the transfers and subsequent actions by the City of Memphis violated the Heritage Protection Act by removing the statues, including Tenn. Code Ann. § 4-1-412 (b)(1) by removing, relocating, altering, or disturbing the said memorials. Amended Petition, p. 11, ¶ 6.

- That the City of Memphis has breached its affirmative duties under the Historic Preservation Act in that it attempted to convey protected properties not only in violation of the Heritage Protect Act, but also in violation of Tenn. Code Ann. § 12-2-501 and that full compliance with Tenn. Code Ann. § 12-2-501 would have been a material and necessary element of seeking and

obtaining a waiver under the Historic Preservation Act. Amended Petition, p. 11, ¶ 7.

- That the removal of the Forrest Statue (or parts thereof) from the graves without a Court Order violates the Family Burial Grounds Protection Act codified in Tenn. Code Ann. § 46-8-102 and § 39-16-402 and constitutes a further violation of the Historic Preservation Act and also that full compliance with the Family Burial Grounds Protection Act would have been a material and necessary element of seeking and obtaining a waiver under the Historic Preservation Act. Amended Petition, p. 12, ¶ 8.

While the Amended Petition touched on a number of issues, the foregoing “causes of action” clearly demonstrated that one issue within the scope of the Amended Petition was the issue of whether the proposed sell, transfer or conveyance of a public park or public memorial that is protected under the Heritage Protection Act would first require a waiver from the Tennessee Historical Commission. That prohibition on removing, altering or disturbing a memorial from the broad protections of the Act is important to the issue of whether the sales and conveyances by the City of Memphis required a waiver and whether, in the absence of a waiver, the sales are voided by operation of the Act.

It is undisputed that the Tennessee Historical Commission never granted a waiver of any kind. In the absence of a waiver, the sales and conveyances of the publicly owned and protected assets to a non-public entity for the purpose of stripping the Act’s protections from those memorials was an illegal and prohibited removal, alteration or disturbance of protected historical memorials.

The Amended Petition contained several “prayers”. See, Amended Petition pp. 12-14, ¶¶ 1-9. The Initial Order identifies these same requests as the scope of the matter before the ALJ. Initial Order, pp. 2-3. These included the following which specifically requested a declaratory ruling on whether a proposed sale or disposition of publicly owned or held memorials would require

a waiver from the Tennessee Historical Commission because such transaction would constitute a removal, alteration or disturbance of a memorial from the scope and protections of the Act. These issues are clearly raised as indicated in the following bold provisions of the original requests for declaratory order

1. Pursuant to the Tennessee Heritage Act of 2016, did the prohibition regarding moving and/or disturbing the statues in question become affixed to the properties and memorials subject to this Petition, **whereby a transfer of the properties and/or memorials, if otherwise legal, remained subject to the prohibitions, duties and obligations imposed by the Tennessee Historic Preservation Act of 2016 or its predecessor.**

* * *

3. **Whether the prohibitions and duties imposed by the Tennessee Historic Preservation Act of 2016 prohibit the City of Memphis from transferring the said statues to Memphis Greenspace, Inc. even if such conveyance may have been otherwise within the City's discretion.**

* * *

6. Are the transfers alluded to hereinabove in violation of Tenn. Code Ann. § 12-2-501 and as such prohibited by law, including the prohibitions and protections imposed by the Tennessee Historic Preservation Act of 2016 and if so **whether compliance with Tenn. Code Ann. § 12-2-501 is a necessary and material element of seeking and obtaining a waiver under the Tennessee Historic Preservation Act of 2016 to the extent that such statute imposes additional requirements on a contemplated transaction or conveyance.**

* * *

7. Have the representatives of the City of Memphis and representatives of Memphis Greenspace, Inc., violated the laws concerning desecration of the grave and/or conspiracy to desecrate a grave as such laws may apply to properties and/or memorials that are protected by the Tennessee Historic Preservation Act of 2016 and, if so, **whether compliance with the Family Burial Grounds Protection Act codified in Tenn. Code Ann. § 46-8-102 and § 39-16-402 is a necessary and material element of seeking and obtaining a waiver under the Tennessee Historic Preservation Act of 2016 to the extent that such statutes impose additional requirements on a contemplated transaction or conveyance.**

The Amended Petition and the referral by the Tennessee Historical Commission thus expressly raised the issue of whether the proposed sales by the City of Memphis required a waiver

under the Historic Preservation Act and, in some instances, whether such a waiver would have further required compliance with other application state protection laws such as the Family Burial Grounds Protection Act.¹ The Initial Order never addresses the issue of whether a local government plan or proposed action, such as a sell or conveyance, with respected to a protected memorial requires that the government entity first obtain a waiver from the Tennessee Historical Commission.

3. Argument

In the Initial Order, the Court did not make a specific factual or legal finding as to whether the parks, related graves and memorials were protected, at least prior to December 20, 2017, under the Heritage Protection Act. Petitioner submits that the matter is undisputed and that these parks (having had historical names prior to 1970) and the memorials themselves were clearly subject to the Heritage Protection Act.

The Initial Order omits any discussion of the scope of the prohibitions contained in Tennessee Code Annotated § 4-1-412(b) relative to whether a proposed sale by a local government of publicly owned parks and memorials could be made without first obtaining a waiver under the Heritage Protection Act. The Initial Order never addresses the scope of the Legislature's remedial mandate as to the Act's application nor the prohibitions on any actions that would have the effect of removing, altering or disturbing a protected memorial either physically or from the scope of the Act's protections.

The Initial Order assumes that the sales dated December 20, 2017, are unchallenged and legally permissible - even under the Heritage Protection Act . The Initial Order analyzed that once

¹ Although the Tennessee Historical Commission may not have direct enforcement authority over these other statutes, it is reasonable foreseeable and within the scope of the Commission's waiver discretion to have required as a condition to any waiver that the petitioner comply with "all other applicable laws".

the sales were consummated that the properties and memorials were no longer “public” and thus no longer protected. An error in the Initial order is the failure to recognize that the very sale itself was a prohibited transaction under the Act that required a waiver from the Tennessee Historical Commission since it had the effect of removing, altering or disturbing these memorials from the scope of the Act’s protections.

Further, the Initial Order failed to address the merits of issues 5, 6, 7 and 9 because, the ALJ concluded, those issues also touch on collateral and coordinated state statutes which pertain to graves and historic properties. While those other statutes standing alone may not be within the jurisdiction of the Heritage Protection Act, the Amended Petition shows that no waiver could have been issued under the Heritage Protection Act unless all other applicable state laws were also satisfied. There are at least two other state statutes which directly address the unique historic natures of the parks, properties and memorials relative to the Amended Petition.

I. The Tennessee Heritage Protection Act of 2016 prohibited a public entity from taking any action that would result in any removal, relocation, alteration or other disturbance of a memorial, including the removal of such memorial from the scope of the Act’s protections, unless the public entity first obtained a waiver from the Tennessee Historical Commission.

A construction of the Heritage Protection Act concluding that it prohibited the City of Memphis from enacting ordinances and carrying out its “Implementation Plan” specifically to remove, alter or disturb the memorials from the protections of the Act and simultaneously removing them physically from the public parks without obtaining a waiver from the Tennessee Historical Commission is mandated by the required remedial interpretation of the Act.

The Legislature’s intent was to protect these historical public memorials as permanent public memorials. The Legislature intended to outlaw local government removals, alterations and

disturbances of such memorials as had taken and was taking place in other states. Indeed, the Legislature's repeated amendments to the Act were specifically in response to continuing efforts by the City of Memphis that started as early as 2013 to remove all Confederate memorials from within the boundaries of the city.

The Legislature's statutory protection of memorials was broadly worded to remove unilateral local government discretion over these issues. The Legislative protections require prior state approval in contested administrative hearings involving interested parties before there could be any change in the status, physical or otherwise, of a memorial.

The purpose of the Act was to prohibit local government actions that would remove, alter, disturb or destroy the historical and public nature of these memorials. Thus, the prohibitions under the 2016 Act on any actions that would "remove", "alter" or "disturb" such memorials is sufficiently broad to prohibit any local government scheme to attempt to circumvent the Act without having to enumerate every possible category of physical or other action that might have the consequence of removing the memorial from the scope of the protections of the Act.

The Initial Opinion is erroneous in this regard since it indicates that the absence of the word "sale" from the Act suggests that the Legislature did not intend to prohibit unregulated sales of memorials without the need for waivers. It is incongruous with the Legislative mandates to contemplate a scenario under which the Legislature's enactment of the Heritage Protection Act somehow was intended to allow local governments to change legal title to publicly owned and protected memorials, and thereby remove, alter and destroy them without any state review and waiver whatsoever.

So long as the memorials remained titled in the name of the local government that the governmental entity was absolutely prohibited from engaging in far less destructive actions such as simple repositioning the memorials, enhancing the memorials, altering in any way the memorials,

or “otherwise disturbing” the memorials without following a detailed procedure for state oversight, review and discretionary approval. It is not possible in light of the Legislative mandates to conclude that the Legislature knowingly intended to create a massive hole in the remedial statutory scheme that would allow local governments to destroy or completely remove memorials from the protections of the Act by simply changing legal title, selling or perhaps even giving the publicly owned memorials away to non-government entities without first obtaining a state waiver. If that were the case, the entire Act would be rendered moot.

These public assets were memorials under the Heritage Protection Act and thus protected public assets under that Act (in addition to other statutory protections such as the grave protection act) - at least through December 15, 2017 (or December 20, 2017 depending on which date on the conveyance documents is controlling). It is undisputed that the city’s ordinances state that it was acting intentionally and specifically to develop a plan to physically “remove” the memorials from the public parks and, more specifically, to “remove” them from the Legislature’s protections and state oversight as set forth in the Heritage Protection Act.

It is undisputed that the City of Memphis wanted to make sure that the public parks would remain publicly available and freely accessed by the public after the memorials were removed and that the City would have oversight (through its enforcement powers in the Restrictive Covenants). The City also retained a repurchase option on the parks and memorials. Indeed, it is foreseeable that “once the dust settles” that Memphis Greenspace will simply reconvey these parks, with the memorials having been removed, to the City of Memphis for it to pursue its “redevelopment” plans as also discussed in the resolutions and ordinances.

It is undisputed that the City’s removal scheme took place immediately after the Tennessee Historical Commission denied the City’s most recent waiver request in October 2017. It appears from the comments in the City’s own contemporaneous ordinance and its “Implementation Plan”

that the City then realized that the judicial review of that state's denial could not be concluded prior to the City's April 2018 Martin Luther King celebrations.

It is undisputed that the City officials executed the transfer documents at least 5 days before the City passed an ordinance to authorize change of legal title, i.e., the "sale", of the parks, graves and other memorials.

It is undisputed that the City's scheme to have the memorials removed from the parks was implemented during the darkness of night within hours of the time that the City enacted the ordinance authorizing the changes in legal title.

There is no evidence that the City offered to sell these parks, graves and memorials to any historical or preservation entity, such as the Sons of Confederate Veterans or the United Daughters of the Confederacy, perhaps because such other entities would have likely fully preserved the parks, graves and memorials exactly as they had been for the preceding century. The evidence indicates that the only specific entity identified by the City was one that City officials conspired with a county commissioner to form anew with the apparent understanding that this entirely new public benefit not for profit shell entity would, as the City had attempted to do for several years, remove the memorials from these public parks as soon as humanly possible.

The scheme was illegal from the very inception because it was a planned circumvention of the waiver requirements under the Act.

The City had tried repeatedly to get a statutory waiver, thus acknowledging the Act's protections of at least the Forrest Equestrian statue. The City's inability to obtain a waiver apparently motivated it to devise a plan to do exactly what the Heritage Protection Act prohibited - removing, altering or disturbing protected memorials without first obtaining a waiver from the Tennessee Historical Commission. The fact that the removal scheme called for the memorials and their host parks to be removed, altered and disturbed by placing "legal title" in the name of a public

benefit nonprofit corporation does not change the fact that the removal scheme, ordinances and implementation were all illegal acts to “remove,” “alter,” and “disturb” memorials physically and from the scope of the Act’s protections.

This illegal removal scheme was developed and documented in the City’s own records and ordinances. The ordinances recite that the Tennessee Historical Commission had repeatedly denied waiver requests from the City to remove the Forrest Equestrian statue. The ordinances, as late as October 2017, instructed city officials to continue to pursue a waiver from the Tennessee Historical Commission and, if unsuccessful, from reviewing courts. The City stated in its ordinances that it later decided not to follow the Act’s statutory procedures but that it would seek the equivalent of vigilante self-help through the “Implementation Plan” with Memphis Greenspace, Inc. This change in the removal strategy appears to have surfaced, at least in the City’s ordinances, when it realized that it had to move forward without a waiver so that the removals of the Confederate memorials would occur prior to the April 2018 Martin Luther King celebration.

The Act’s language describing the prohibitions, particularly when there was no evidence that any such park or memorial had ever been sold by a local government in Tennessee, are stated in terms broad enough in Tennessee Code Annotated § 4-1-412(b) to prohibit any sale or change in legal title that is done without a state waiver particularly when such sale or change of legal title is done for the express purpose of removing, altering, other otherwise disturbing a protected memorial:

(b)(1) Except as otherwise provided in this section, **no memorial** regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, **may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.**

(emphasis added) The Act prohibited government entities from doing anything - no matter how descriptively cast - that would have the effect or consequence of physically removing or altering a memorial *but also anything that would have the effect of removing a park or memorial from the*

broad protections imposed by the Legislature.

The objective of the City of Memphis concerning these parks and their memorials, from at least 2015 through its implementation of its removal scheme in December 2017, was for one purpose - the removal of the Confederate monuments not only from these public parks but also from the protections imposed by the Tennessee Legislature. Because the City engaged in vigilante self-help to pursue an objective for which the Tennessee Historical Commission had repeatedly denied its consent, the City's actions in enacting the ordinances and adopting and enacting the implementation plan were all violations of the Act, of state law and consequently void.

The violations of state law occurred even before the execution of the conveyance documents because it was the enactment of the ordinances and the local government's creation of the removal scheme to circumvent the Tennessee Historical Commission's oversight duty which was illegal under the Act. It is not as if the mayor's signatures on the conveyance documents somehow magically erased the fact that the City had been and was specifically acting to remove, alter and disturb the memorials from both the protections of the Act as well as physically effecting their removal from what would still be treated as public parks after the changes in legal title based on the Restrictive Covenant Agreements.

The City of Memphis had no authority to engage in any actions, including enacting ordinances or signing conveyance documents, in violation of state law. *Allmand v. Pavletic*, 292 S.W.3d 618 (Tenn. 2009). Actions undertaken by local governments in violation of state law are *ultra vires*, void or voidable.

“[w]hen a municipality fails to act within its charter or under applicable statutory authority, the action is *ultra vires* and void or voidable.” In summary, under Tennessee law a municipal action may be declared *ultra vires* “(1) because the action was wholly outside the scope of the city's authority under its charter or a statute, or (2) because the action was not undertaken consistent with the mandatory provisions of its charter or a statute.”

Allmand v. Pavletic, 292 S.W.3d 618, 626 (Tenn. 2009) (citations and footnote omitted)

The Final Order should find and conclude that any actions by a local government that would have the effect of removing, altering or disturbing *the status* of parks or memorials as protected by the Heritage Protection Act is prohibited by Tennessee Code Annotated § 4-1-412(b)(1).

II. A local government would have to satisfy the relevant requirements of each statute concerning the parks and memorials or the transaction, even if approved by the Tennessee Historical Commission, would be *ultra vires* and void.

Under the Heritage Protection Act any removal, alteration or disturbance of a memorial required a waiver from the Tennessee Historical Commission. Although not specifically addressed in the Act, such a waiver from the state under the Act would with reasonable, if not absolute, certainty also have required that any proposed changes permitted by a waiver would also be in full compliance with other applicable laws. If that were not so, the failure to comply with other laws would render any such changes *ultra vires* and void.

The Initial Order does not address the relevance of other statutes to the issue of the availability of a waiver under the Heritage Protection Act. Tennessee Code Annotated § 12-2-501, enacted in 2013, deals with the local government sale of real or personal property that is “significant for architectural, archeological, artistic, cultural, or historical associations, or significant for its natural, scenic or open condition.” Under §12-2-501, sales of unique historical properties are restricted and can only occur if the conditions in that statute are met. The sale must be to a nonprofit corporation or trust. The purchasing entity must have a “purposes” clause which expressly includes the preservation or conservation of such unique properties. The *deed* of conveyance must impose preservation and conservation duties on the nonprofit. The nonprofit cannot reconvey the protected assets without making sure that the protections and covenants run with the land. Finally, public

access to the assets must be maintained “where appropriate” as would be the case with public parks.

(2) The real or personal property is to be sold to a nonprofit corporation or trust whose **purposes include the preservation or conservation of real or personal properties of architectural, archaeological, artistic, cultural, historical, natural or scenic significance**; and

(3) A **preservation agreement or conservation agreement is placed in the deed conveying the property** from the county, metropolitan government, municipality or other political subdivision of this state to the nonprofit corporation or trust. The nonprofit corporation or trust shall **only dispose of or use such real or personal property subject to covenants or other legally binding restrictions that will promote the preservation or conservation of the property, and, where appropriate, secure rights of public access.**

Tennessee Code Annotated § 12-2-501 (emphasis added).

Thus, if a local government wanted to sell a historical park or site, perhaps a grave, to a nonprofit corporation, under Tennessee Code Annotated § 12-2-501, any such sale must be made subject to protective conservation agreements, preservation agreements that are *set forth in the deed* and, where appropriate, *continued public access*. Consequently, a local government seeking a waiver under the Heritage Protection Act would have to demonstrate compliance with § 12-2-501 for the proposed sale or conveyance or the waiver could not be legally issued. To that extent - the Tennessee Historical Commission could and should condition any such waivers that it might grant on making sure that the proposed conveyance would also comply with Tennessee Code Annotated § 12-2-501.

In addition, Tennessee Code Annotated § 46-8-103 - the grave protection act - must be satisfied. This was apparently realized by the City of Memphis. This statute requires that a deed to real property which contains a grave site or crypt must contain a reference thereto and to the statutory duties of the transferee. Thus, if the City of Memphis had presented a request for a waiver under the Heritage Protection Act for the Forrest gravesite or headstone, it would have been required also to demonstrate compliance with this Grave Site Protection Act in order to be issued a waiver.

Certainly, the Tennessee Historical Commission could and would require that any such waiver that is sought to approve the sale or transfer of a memorial that includes a gravesite would require compliance with the grave protection act.

From the very inception, the City's publicly stated goal was to remove these protected historical memorials from these public parks with or without compliance with the Heritage Protection Act. Why? Simply because they were all memorials to Confederate soldiers which the City classified as a "nuisance" that must be abated.²

State laws address the boundaries within which a local government is authorized to act. In light of these various statutes, in order for a local government to sell or convey a public park or public property which has historical significance, which is or contains statutory "memorials" under the Heritage Protection Act and/or which contains a gravesite, a local government would have to comply with the Heritage Protection Act, the grave site protection Act and other statutes. Certainly, the Tennessee Historical Commission would be acting appropriately to require such compliance and

² The City of Memphis stated as follows in its Implementation Plan:

The City Administration concurs in the Findings of the City Council that the Forrest and Jefferson Davis statues are public nuisances and are unfit for service or use by the City since their continued presence is inconsistent with the purpose, intent and future land uses of the Medical Overlay District and with the Riverfront Development Plans, which is to support the development and investment efforts of the State and other institutions in the medical district and surrounding neighborhoods and the efforts of the University of Memphis Law School's efforts to be recognized nationally as a first tier institution of legal training and scholarship open to all races, creeds and persons irrespective of national origins.

Also, all statues and artifacts honoring Confederate protagonists, like the Forrest equestrian statue and the Jefferson Davis statue located on City owned property, constitute a public nuisance under Tennessee law and also potentially infringe upon the civil rights of the significant majority of the population of the City. For these reasons, all statues and artifacts honoring Confederate protagonists, like the Forrest equestrian statue and the Jefferson Davis statue, should be removed from City owned property. The City's continued ownership of these assets is an impediment to their immediate removal and/or relocation. This recommendation is also consistent with the City's arrangements with other private non-profit organizations to manage and/or control public parkland using private funds.

to even condition the issuance of a waiver on compliance with other applicable protectionists acts.

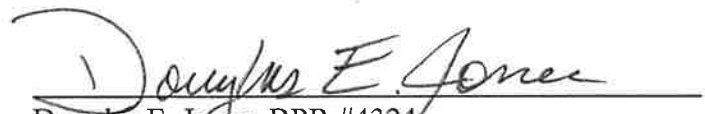
The Initial Order does not address at all whether the Heritage Protection Act contemplates or would allow the issuance of a waiver by the Tennessee Historical Commission if other applicable state laws prohibited the proposed transaction or imposed conditions which the waiver application did not address or satisfy.

4. Conclusion

Petitioner submits that the Initial Order and the Denial Order should not become final and that the Tennessee Historical Commission should reject the conclusions contained therein and should reconsider the matters set forth in the Amended Petition to specifically address the issues therein. Those issues include specifically whether a local government can sell or convey memorials protected under the Act without first obtaining a waiver from the Tennessee Historical Commission. Indeed, the issue is heightened in historical significance when the undisputed facts show that the local government's actions were specifically designed and intended to physically remove - if not destroy - memorials protected by the Act yet to retain the "parks" as open to and available at no cost to the public.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent, postage prepaid, via U.S. Mail (or hand delivered) to **Steven R. Stout and Emily H. Urban**, Assistant General Counsels, Tennessee Department of Environment & Conservation, Office of General Counsel, 2nd Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee 37243 and to **H. Edward Phillips III**, 219 3rd Avenue North, Franklin, Tennessee, 37064-2504 and that the **original has been hand delivered to the Secretary of State**, Administrative Procedures Division, William R. Snodgrass Tower, 8th Floor, 312 Rosa L. Parks Avenue, Nashville, Tennessee 37243-1102 on this the 14th day of March, 2019.

A handwritten signature in cursive script that reads "Douglas F. Jones". The signature is written in black ink and is positioned to the right of the main text block.