



REVIEW OF THE SALE OF MEMPHIS PARKS AND REMOVAL OF CONFEDERATE STATUES

February 14, 2018

Justin P. Wilson, Comptroller





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February 14, 2018

The Honorable Randy McNally
Lieutenant Governor and Speaker of the Senate
700 Cordell Hull Building
Nashville, Tennessee 37243

The Honorable Beth Harwell
Speaker of the House of Representatives
425 5th Avenue North
Suite 600 Cordell Hull Building
Nashville, Tennessee 37243

To the Speakers of the 110th Tennessee General Assembly:

Enclosed you will find a report that documents the procedures performed by our staff regarding the sale of Health Sciences Park and the easement to Memphis Park, both located in the City of Memphis, to Memphis Greenspace, Inc. and the subsequent removal of Confederate statues located on those properties.

Pursuant to your request, we reviewed whether the Memphis City Council complied with the Tennessee Open Meetings Act, *Tennessee Code Annotated* §§ 8-44-101 et seq., and whether the transactions were consistent with state and local law.

Please contact our office if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin P. Wilson".

Justin P. Wilson
Comptroller of the Treasury

SALE OF MEMPHIS PARKS AND REMOVAL OF CONFEDERATE STATUES

EXECUTIVE SUMMARY

Following an unsuccessful request to receive a waiver from the Tennessee Historical Commission (THC) allowing for the removal of the Nathan Bedford Forrest statue from Health Sciences Park, the City of Memphis sold Health Sciences Park and the easement to Memphis Park, which is commonly referred to as Memphis Park-Front, to Memphis Greenspace, Inc., a Memphis non-profit. After the sale of the properties, Memphis Greenspace, Inc. removed the statues of Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes.

At the request of the Speaker of the House of Representatives and the Speaker of the Senate of the Tennessee General Assembly, the Office of the Comptroller of the Treasury reviewed the sale of the parks as to whether the Memphis City Council complied with the Tennessee Open Meetings Act, *Tennessee Code Annotated*, §§ 8-44-101 et seq., and whether the transactions were consistent with state and local law.

Based on the review by the Comptroller's Office of Open Records Counsel, we determined that the Memphis City Council provided sufficient notice of its meetings and agendas to allow interested citizens the opportunity to attend.

In addition, Comptroller staff performed procedures to document the events that transpired and to review all applicable state and local laws regarding the sale of the parks and the removal of the statues.

We have determined that, aside from the lack of certain documentation required by the *Memphis Code of Ordinances* regarding the conveyance of property, it appears the City acted with the authority granted by the *Memphis Code of Ordinances* to sell the parks to a non-profit at less than market value. The city maintains that once the ownership was transferred, the parks were no longer public property and therefore are not subject to the prohibitions of the Tennessee Heritage Protection Act of 2016. However, there is litigation pending in Davidson County Chancery Court and a petition filed with the Tennessee Historical Commission challenging the propriety of the transfer under the Tennessee Heritage Protection Act and other state laws.

TIMELINE OF EVENTS

Through a review of documentation provided and information obtained during interviews, we have prepared the following timeline of events, with input from Bruce McMullen, Memphis City Attorney.

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| February 5, 2013 | Memphis City Council renames and rededicates three City parks: Nathan Bedford Forrest Park to Health Sciences Park; Confederate Park to Memphis Park; and Jefferson Davis Park to Mississippi River Park. |
| March 14, 2013 | Tennessee General Assembly considers and passes the Tennessee Heritage Protection Act of 2013, <i>Tennessee Code Annotated</i> § 4-1-412. |
| April 1, 2013 | The governor signs the Tennessee Heritage Protection Act of 2013 into law. The Act references protection for war memorials. Memphis contends that the statue of Nathan Bedford Forrest is not a war memorial. |
| May 29, 2013 | Sons of Confederate Veterans Nathan Bedford Forrest Camp #215 (SCV) files a complaint in Shelby County Chancery Court challenging the renaming of the parks. |
| October 21, 2013 | SCV amends its complaint, alleging that it had raised funds to place a marker at Forrest Park and claiming the City of Memphis had removed the marker. |
| August 18, 2015 | Memphis City Council adopts Ordinance #5592 in support of the removal of the Nathan Bedford Forrest statue. |
| January 1, 2016 | Mayor Jim Strickland takes office as the Memphis City Mayor. |
| March 2, 2016 | Tennessee General Assembly considers and passes the Tennessee Heritage Protection Act of 2016, broadening the application of the Act to cover historical figures. |
| March 7, 2016 | City of Memphis files a waiver petition with the THC to remove the Nathan Bedford Forrest statue under the 2013 version of the Heritage Protection Act. |
| March 11, 2016 | The governor signs the Tennessee Heritage Protection Act of 2016 into law. |
| October 21, 2016 | THC denies the waiver petition submitted by the City of Memphis. |
| November 4, 2016 | City of Memphis files a petition for declaratory order with the THC challenging the criteria used by the THC to deny the City's waiver petition. |

- August 22, 2017 First reading of Memphis City Council Ordinance #5658 that provides for selling city property to a non-profit for nominal value. Second reading September 5, 2017. Third reading September 19, 2017. Signed by Mayor Strickland on October 19, 2017.
- September 5, 2017 First reading of Memphis City Council Ordinance #5661 that calls for the Memphis City Attorney to work with the City Administration to develop and submit a plan to the Council for the removal and/or relocation of all Confederate statues and artifacts from City-owned property. Second reading September 19, 2017. Third reading October 17, 2017. Signed by Mayor Strickland on November 8, 2017.
- September 13, 2017 City of Memphis files waiver petition with the THC for a Declaratory Order as to the invalidity and the applicability of the Tennessee Heritage Protection Act of 2013 to the power of the City of Memphis to relocate the Forrest statue.
- October 5, 2017 Non-profit, Memphis Greenspace, Inc., is formed.
- October 13, 2017 THC denies the City's waiver petition and requests the appointment of an Administrative Law Judge to give an opinion on the City's Petition for Declaratory Order challenging the THC's jurisdiction. Administrative Law Judge selected October 23, 2017. Hearing date set for November 13, 2017. Hearing postponed to December 20, 2017. Hearing postponed to January 16, 2018.
- October 17, 2017 First reading of Memphis City Council Ordinance #5665, relative to the immediate removal of the Forrest Equestrian Statue and the Jefferson Davis Statue and other similar property from City owned property. Second reading November 7, 2017.
- October 24, 2017 Tennessee Court of Appeals upholds February 24, 2017, Shelby County Chancery Court order granting City of Memphis' motion for summary judgment in the matter of SCV v. City of Memphis regarding the City's authority to rename the parks.
- December 11, 2017 Memphis files petition in Davidson County Chancery Court to appeal the THC's denial of the City's waiver petition. As per Davidson County Chancery Court website, an order of voluntary dismissal was filed on January 29, 2018.
- December 15, 2017 Mayor Strickland and Memphis Greenspace, Inc. sign documents related to the sale of the parks contingent on the Memphis City Council's approval of Ordinance #5665.
- December 20, 2017 Third reading of Ordinance #5665 by Memphis City Council. Mayor Strickland signs.

- December 20, 2017 Memphis Greenspace, Inc. removes the statues of Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes from Health Sciences Park and Memphis Park-Front.
- January 11, 2018 SCV files lawsuit against City of Memphis and Memphis Greenspace, Inc. in Davidson County Chancery Court.
- January 29, 2018 Davidson County Chancery Court issues order barring Memphis Greenspace, Inc. from selling, gifting, or moving the statues of Forrest, Davis, and Mathes pending a contested case hearing before the THC within the next sixty days.
- January 30, 2018 Davidson County Chancery Court issues an order that the City of Memphis and the SCV enter into mediation by March 16, 2018 as an attempt to resolve the dispute.

PROCEDURES PERFORMED

1. Did the Memphis City Council comply with the Tennessee Open Meetings Act, Tennessee Code Annotated § 8-44-101 et seq.?

The Comptroller's Office of Open Records Counsel reviewed the actions of the Memphis City Council relative to the introduction and passage of Ordinance #5665 dealing with the sale of Health Sciences Park and Memphis Park-Front and the subsequent removal of the Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes statues.

The Tennessee Open Meetings Act provides that all meetings of a governing body must be open to the public and must be properly noticed. *Tennessee Code Annotated*, §§ 8-44-102, 8-44-103. As a governing body, the Memphis City Council is subject to the requirements of the Open Meetings Act. Accordingly, the Council's passage of Ordinance #5665 relative to the sale of Health Sciences Park and Memphis Park-Front and the immediate removal of the Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes statues occurred at a public meeting for which there was adequate public notice. Whether notice of a meeting is adequate for purposes of the Open Meetings Act depends upon whether, under the totality of the circumstances, the notice would fairly inform the public and give interested citizens a reasonable opportunity to exercise their right to attend the meeting. *Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 149 (Tenn. Ct. App. 1998).

The Memphis City Council holds regularly scheduled meetings on the first and third Tuesdays of every month. The Council posts the meeting dates on its website along with the Council agenda, committee schedules, Council documents and meeting minutes. The Council also posts the dates and times for its regularly scheduled meetings on a bulletin board outside its chambers and publishes its agenda in a Memphis newspaper of general circulation before each meeting. The Memphis City Council's website and meeting materials reveal that the Council introduced Ordinance #5665, per curiam, at a regularly

scheduled meeting on October 17, 2017. The Ordinance went before the Council for a second reading at a regularly scheduled meeting on November 7, 2017 and was placed on the agenda for a third and final reading during the December 19, 2017, regularly scheduled meeting. While the December 19, 2017, meeting recessed prior to addressing Ordinance #5665, the Council reconvened the following day, heard public comments on the Ordinance, and subsequently voted to pass the Ordinance on the third and final reading. The Council placed the Ordinance on the council agenda prior to each meeting and posted the agenda online prior to each meeting. Video of the Council's actions on the Ordinance at each meeting can be viewed on the Council website.

2. Were the transactions associated with the sale of the parks and subsequent removal of the Confederate statues consistent with state and local law?

Reviewed the Petitions to the THC for the Removal of Confederate Statues

Auditors reviewed the March 7, 2016, petition to the THC requesting to relocate the Nathan Bedford Forrest statue from Health Sciences Park to either Savannah, Tennessee or to Brice's Cross Roads National Battlefield site near Baldwyn, Mississippi. On October 19, 2016, the City of Memphis waived an opportunity to make an oral presentation to the THC but submitted a letter in support of their application. The THC denied the City's



request on October 21, 2016. They cited Criteria #12 which states, "A historic site on the National Register of Historic Places is not subject to a waiver." Memphis contends that Health Sciences Park is not on the National Register of Historic Places. Health Sciences Park was formerly known as Forrest Park and, once renamed, maintained no historic designation;

however, auditors noted that the Forrest Park Historic District remains on the National Register of Historic Places. On September 13, 2017, the City petitioned the THC for a Declaratory Order as to the invalidity and the applicability of the Tennessee Heritage Protection Act of 2013 to the power of the City of Memphis to relocate the Forrest statue. On October 13, 2017 the THC denied the City's petition for waiver to relocate the Forrest statue, and granted the City's Petition for Declaratory Order regarding the applicability of the 2013 Act to the City's relocation of the Forrest statute. The City then submitted a petition to the THC to relocate the statue declaring the statue was not a war memorial. The hearing on this matter was postponed and the City decided to pursue the option of selling the parks.

Investigated the Applicability of the Tennessee Heritage Protection Act

Auditors discussed why the City of Memphis took the position that the Tennessee Heritage Protection Act (Act) did not apply to the sale of the parks and the removal of the statues with both the Memphis City Attorney, Bruce McMullen, and Mayor Jim Strickland. They both stated that the Acts of 2013 and 2016 dealt with the removal of

statues on public property (e.g., city parks). They contended that neither Act prohibited the sale or conveyance of public property to a nonprofit. In February 2013, the city renamed Nathan Bedford Forrest Park, Confederate Park, and Jefferson Davis Park to Health Sciences Park, Memphis Park, and Mississippi River Park, respectively. The Act of 2013 did not go into effect until April 2013. That Act would have prohibited the renaming of such parks. Once the parks were renamed, the City of Memphis argued the parks no longer maintained any historic significance.

Reviewed the Authority for the City of Memphis to Sell City Property to a Non-Profit at Less Than Market Value

Tennessee Code Annotated, § 12-2-302, states in part: “In order to provide projects for a municipality and to enable construction and financing thereof on lands owned by the municipality or by a not-for-profit corporation, but for no other purpose unless authorized by law, a municipality has the following power and duties: (1) Without limitation by reason of any other provisions of law, the power to sell and convey title to a not-for-profit corporation any land and any existing building thereon owned by the municipality for such consideration and upon such terms and conditions as in the judgment of the governing body are in the interests of the municipality.”

Tennessee Code Annotated, § 12-2-501, states: “Notwithstanding any rule, regulation or other law to the contrary, any county, metropolitan government, municipality or other political subdivision of this state, upon majority vote of the local legislative body, may dispose of real property or personal property by private negotiation and sale where (1) The real or personal property is significant for its architectural, archaeological, artistic, cultural or historical associations, or significant for its relationship to other property significant for architectural, archaeological, artistic, cultural or historical associations, or significant for its natural, scenic or open condition; (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.”

The *Memphis Code of Ordinances* (Section 2-16-1(G)(1)(c))¹ specifically gives authority to the city real estate manager to convey or dispose of city property at reduced or no cost to nonprofit organizations whose use of the property will be for the benefit of the community.

¹ Ordinance 5658 amended section 2-291 of the Memphis Code of Ordinances, but according to the 1985 Code Comparative Table, the current Code of Ordinances reference would actually be to section 2-16-1. For ease of reference in this report, we will refer to the current 2-16-1 naming convention.

Reviewed Compliance with *Memphis Code of Ordinances* (Section 2-16-1(G)(1)(c))

Section 2-16-1(G)(1) states, “The city real estate manager is authorized to convey or dispose of city property at reduced or no cost to the following entities in the following order of priority:

1. Adjoining property owners;
2. A neighborhood organization in an area targeted by the city for redevelopment;
3. Nonprofit organizations whose use of the property will be for the benefit of the community, notwithstanding section 2-26-1(D) of the Code to the contrary;
4. A program implemented or assisted by a private entity or government agency which has as its goal the development of vacant or underdeveloped land or the renovation of existing improvements on city-owned land for the purpose of providing occupant-owned housing to persons who qualify for housing programs designed for moderate and low-income households and who would not otherwise be eligible for such housing;
5. Other entities or organization (profit or nonprofit) which, in the opinion of the mayor or chief administrative office of the city, are proper recipients of such property.

We found no documentation that the order of priority as listed above was followed. The Memphis City Attorney, Bruce McMullen, contends that the order of priority addressed in the Memphis Code of Ordinances only applies when the City has multiple competing entities for a piece of property. Furthermore, he stated that the sale of the parks was a very unique situation and that the properties could only be sold to an organization that would continue to maintain the parks as parks and not consider commercial development. The buyer would have to keep the parks mowed as well as ensure proper lighting and security. According to Mr. McMullen, Memphis would only consider conveying the properties to a non-profit that had the financial means to carry out those responsibilities.

Mayor Jim Strickland and Mr. McMullen stated that six or seven entities had either been contacted or approached them about buying the parks; however, these entities either did not have the financial means to maintain the parks or they wanted the parks for redevelopment purposes. During the summer of 2017, Mr. McMullen and Van Turner, Jr., Shelby County Commissioner, met and discussed the relocating of the Confederate statues and the possible sale of the parks. At these meetings, Mr. McMullen and Mr. Turner discussed Mr. Turner forming Memphis Greenspace, Inc. Mr. Doug McGowen, Memphis Chief Operating Officer, made the determination that Memphis Greenspace, Inc. would be a suitable non-profit to purchase the parks. Mayor Strickland said the City had researched and watched how other cities such as Baltimore, Birmingham, and New Orleans had handled the removal of Confederate statues.

Reviewed Compliance with *Memphis Code of Ordinances* (Section 2-16-1(G)(2))

Section 2-16-1(G)(2) establishes the process by which property is to be conveyed to the entities defined in Section 2-16-1(G)(1). The code section requires the submission of an application to the City Real Estate Department by the entity seeking ownership of the property. According to Mr. McMullen, the purpose of the application is to gauge an entity's financial strength and overall stability. Section 2-16-1(G)(2) also calls for the City Real Estate Department to complete a form providing basic information about the property, and valuation of the property.

Auditors reviewed the standard template used by the Memphis Real Estate Department for entities seeking ownership of city property. The Department did not require Memphis Greenspace, Inc. to complete the standard application. Instead, Doug McGowen, Chief Operating Officer, met with the directors and officers of Memphis Greenspace, Inc. and evaluated the criteria outlined in the application process. There is no documentation to support that this meeting took place; however, auditors spoke to Mr. McGowen and he briefed them on the meeting, told them who was present, and explained how he had determined that Memphis Greenspace, Inc. is financially capable of maintaining the parks. Mr. McGowen stated that the Memphis Greenspace, Inc. directors told City officials about several philanthropic organizations and private individuals who were interested in serving as donors, with whom Mr. McGowen was familiar. The City Attorney, Bruce McMullen, also stated that those donors wished to remain anonymous to the public, given the controversial nature of the transaction.

Auditors inquired as to whether Memphis routinely sold property without requiring an application to the City Real Estate Department. The Real Estate Department provided auditors with three instances in which the city did not require applications. The City sold buildings to the Memphis College of Arts for \$10 in December 2010, the City sold land to Calvary Rescue Mission for \$1 in March 2011, and the City sold the former Barton Library to Alpha Memphis Education Foundation for \$1 in May 2013.

The City Real Estate Department obtained an appraisal of Health Sciences Park, which valued it at \$950,000. The City Real Estate Department did not obtain an appraisal for the Memphis Park-Front property based on their belief that they were not required to do so since it was an easement rather than a park.

Mr. McGowen approved the sale of the park property. The Memphis City Council and Mayor Jim Strickland subsequently approved Ordinance #5665, providing for the sale of the parks to Memphis Greenspace, Inc. and for the removal of the Nathan Bedford Forrest, Jefferson Davis, and James Harvey Mathes statues.

Reviewed the deeds for the park properties for potential restrictions regarding the use and disposition of the property or any provisions related to the monuments located on the property.

The City Real Estate Department provided the auditors with the title work and original deeds to Health Science Park and Memphis Park-Front. Mayor Jim Strickland and

Bruce McMullen, City Attorney, advised the auditors that all original restrictions associated with the properties that were imposed on the City were also imposed on Memphis Greenspace, Inc.

Examined the Bill of Sale for the Two Parks

The City sold Health Sciences Park to Memphis Greenspace, Inc. for \$1,000 and the assignment of the easement for Memphis Park-Front to Memphis Greenspace, Inc. for \$1,000. Both bills of sale are dated December 20, 2017. The City and Memphis Greenspace, Inc. entered into restrictive covenant agreements, which require the park properties to be preserved for public purposes. The bills of sale also include provisions for the City of Memphis to buy back the parks if Memphis Greenspace, Inc. decides to sell them or if they fail to comply with the restrictions of the properties.

Reviewed the Contract Between Memphis Greenspace, Inc. and Allworld Project Management



Bruce McMullen, City Attorney, provided the auditors with a copy of the contract between Memphis Greenspace, Inc. and the company it contracted with to move the statues, Allworld Project Management. The contract was dated November 27, 2017. Mr. McMullen advised auditors that none of the sub-contractors used to remove the statues were city

employees. Mr. McMullen further advised that no city equipment was used to remove the statues.

Consideration of Nathan Bedford Forrest Gravesite and Whether Statue of Nathan Bedford Forrest was Considered a Grave Marker.

Auditors inquired of Mayor Jim Strickland and Bruce McMullen, City Attorney, if they had considered whether the Nathan Bedford Forrest statue might be a grave marker. Mayor Strickland and Mr. McMullen provided the auditors with documentation supporting their view that the statue was a monument to General Forrest and did not constitute a grave marker. The family of Confederate General Nathan Bedford Forrest and the Sons of Confederate Veterans have filed a petition with the Tennessee Historical Commission challenging the position of the City of Memphis regarding grave markers.

Furthermore, auditors also reviewed a letter from Van Turner, Jr., President of Memphis Greenspace, Inc. and Shelby County Commissioner, to the Tennessee Attorney General, Herbert H. Slatery, III, in which Mr. Turner states that the gravesites and markers at Health Sciences Park were not disturbed by the detachment and removal of the Forrest statue and that Memphis Greenspace, Inc. has every intention to continue

to respect and maintain the gravesites.

Inquired as to the Status of the Statues

Auditors inquired about the status of the Confederate statues. The letter from Mr. Turner to the Attorney General states that Memphis Greenspace, Inc. ensured that Allworld Project Management professionally packed, relocated, and stored the statues. Mr. Turner did not disclose the storage location. Bruce McMullen, City Attorney, stated that the statues are currently being stored in a secure, nondisclosed location and that Memphis Greenspace, Inc. has verbally agreed to relocate the statues to a more suitable location. Originally, the plan was to relocate the statues to the City of Savannah or to Brice's Cross Roads in Baldwin, Mississippi. However, the City of Savannah has decided they do not want the statues due to the controversy surrounding them. Mr. McMullen stated that everyone would like to see the statues remain in Tennessee and that currently the most likely location for the statues would be Parker's Crossroads.



CONCLUSIONS AND RECOMMENDATIONS

Based on our limited review of the sale of the Memphis parks and subsequent removal of Confederate statues, it appears that the Memphis City Council followed the requirements of the Tennessee Open Meetings Act. Ordinance #5665, which called for the sale of Health Sciences Park and Memphis Park-Front along with the Confederate statues and artifacts located in those parks, went before the Council three times at regularly scheduled meetings held open to the public. Additionally, the Council posted notice of its regularly scheduled meeting dates at the beginning of the year. An agenda was posted on the Council's website prior to each meeting. Ordinance #5665 was included on those agendas. It is reasonable to believe a court would find that the Council provided sufficient notice of its meetings and agendas to allow interested citizens the opportunity to attend. Citizens did attend the meetings and provided public comment on Ordinance #5665.

The Council also exercised its authority under the Memphis Code of Ordinances to sell Health Sciences Park and Memphis Park-Front to a non-profit for less than market value. The Tennessee Heritage Protection Act does not allow for the removal of historic figures from public property without seeking approval to do so from the Tennessee Historical Commission. The City of Memphis contends that, once the parks were sold to Memphis Greenspace, Inc., the park lands were no longer considered public property and the non-profit was able to contract to have the Confederate statues removed. We understand this contention is being challenged in litigation pending in the Davidson County Chancery Court.

Despite a precedent for selling properties at less than fair market value without the

documentation required in the *Memphis Code of Ordinances* (Section 2-16-1-(G)), we believe the City of Memphis did not but should have followed the guidelines as provided in its Code of Ordinances.

While the parks have been sold and the Confederate statues have been removed and stored in an undisclosed location, we recommend that the City of Memphis enter into a formal memorandum of understanding with Memphis Greenspace, Inc. for the storage and protection of the historic figures and artifacts.