


# MEMORANDUM

To: Chatham County Board of Commissioners

From: Poyner Spruill LLP,  Chatham County Attorneys

Date: May 3, 2019, updated August 19, 2019 for public release

Re: Confederate Monument Located in Front of Historic Courthouse (the "Monument")

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The purpose of this memorandum is to provide a context for our discussion in Closed Session on May 6, 2019 as to what, if anything, the County can do with the Monument.

1. The Monument. Based on the records we have reviewed the Monument was placed in its current location pursuant to a July 8, 1907 "Order" issued by the Chatham County Board of Commissioners granting the Winnie Davis Chapter of the Daughters of the Confederacy (the "Daughters") authority to locate the Monument in front of the "court-house". The Order further provided that the "Monument may remain in the care and keeping of the said Daughters". Recently a question has arisen as to whether the Monument is owned by the Daughters or the County. Barbara Pugh, President of the Daughters, has asserted, citing a history of the Winnie Davis Chapter compiled by Mrs. Edwin R. MacKethan (the "UDC History") that in August 1907 the Monument was "the gift of the Chapter (Winnie Davis Chapter) to the County as a memorial to the Confederate Veterans, living and dead." Ms. Pugh also cites, but has not produced, newspaper articles prior to 1946 reporting that the Monument was given to the County. The UDC History is the only document we have seen which purports to support the claim that the Monument is owned by the County.

Howard Fifer, with Chatham for All, which supports removal of the Monument, has countered that the information produced by the Daughters at best indicates an intent or offer by the Daughters to give the Monument to the County, and that there are no records, documents, or other evidence that the County ever accepted the Monument. Mr. Fifer also cites N.C. Gen. Stat. § 100-2 which requires that "a monument, memorial, or work of art may not become the property of the State by purchase, gift, or otherwise, unless the monument, memorial, or work of art, or a design of the same, together with a proposed location of the same, is submitted to and approved by North Carolina Historical Commission." According to Mr. Fifer, a search of the North Carolina Historical Commission website does not include any listing or reference to the Monument or other evidence that it was ever accepted by the State or the County. It appears to us that NCGS 100-2 is not applicable to this situation since as far as we are aware there has been no claim by the Daughters or anyone else that the Monument is owned by the State. If the Monument is owned by the State then there are additional restrictions as to what can be done with it. Based on the documents we have seen thus far, and subject to further research in the County archives, it appears to us more likely than not that the Monument

is still owned by the Daughters. Ownership is important and we will of course continue to look at that issue.

2. The Law. While we do not believe that NCGS 100-2 applies to the Monument, a 2015 amendment to that statute, NCGS 100-2.1, may apply. NCGS 100-2.1 (the “Statute”) “Protection of Monuments, Memorials, and Works of Art”, limits the removal of “an object of remembrance” located on public property. An object of remembrance is broadly defined and includes Confederate monuments and the Statute provides that they can not be removed or relocated except in certain circumstances and subject to certain exceptions.

While the Statute may limit the authority of the County to remove or relocate the Monument, it is not a total prohibition on removal or relocation. The Monument may be relocated to a “site of similar prominence, honor, visibility, availability and access that are within the boundaries of the jurisdiction from which it was located.” Since the current location of the Monument is at the front door of the County’s most prominent building this may be a difficult standard to meet, although the statute requires “similar prominence” and not “the same prominence”, but realistically the restrictions on relocation make that not much of an option in this case. Another circumstance permitting removal or relocation is when removal or relocation is required to preserve the Monument. We are not aware of actions or threats of action to physically damage the Monument, so that provision would not appear to apply at the present time, but may as the situation develops. Finally, the Statute does provide one exception, assuming as it now appears that the Monument is owned by the Daughters that may be applicable, and that provision provides that an object of remembrance owned by a private party that is located on public property may be removed if it is subject to a legal agreement governing its removal or relocation.

3. Options with Respect to the Monument. Applying the law to the facts, what are the County’s options:
  - a) The Monument can remain in place. There is no requirement that it be removed or relocated, however, this is certainly not an acceptable solution to the side that is seeking removal.
  - b) The County and the Daughters (as the owner of the Monument) may agree that the Monument be removed to a mutually agreeable location at the expense of the County. This is unlikely, since the Daughters take the position the Monument is

owned by the County, and even if title were clearly established in the Daughters it is likely they would continue to oppose its removal.

- c) Relocate the Monument within the County to a site that is “similarly prominent”. The difficulties with this option were discussed above, and if such a location were found it is difficult to believe that it would be acceptable to the parties advocating removal.
- d) Cover the Monument with a solid material.
- e) Construct a ply wood structure surrounding the Monument and shielding it from view and provide spaces on the structure for each side to state it’s reasons as to why the Monument should stay or go.
- f) Leave the Monument on the Courthouse grounds but alter it by adding an explanatory plaque or otherwise reimaging or re-purposing the Monument to honor Chatham citizens who have served in all wars.
- g) Leave the Monument in place but move it to one side of the walk, and commission a statue or monument of similar size and prominence on the other side of the walk which would be memorial to the struggles and contributions of the Chatham County African American community from the end of reconstruction through the Jim Crow and Civil Rights Eras.
- h) Convene a community-based group to attempt to resolve the disagreement surrounding the location of the Monument. This could possibly be done by a charrette, which is a period of enforced, deadline driven discussions which was dramatized in the recent film “Best of Enemies” about resolving school desegregation issues in Durham in the late 60’s. This is no doubt a longshot, but it worked in a seemingly impossible situation in Durham, and may provide answers in this situation that neither side has thought of acting alone. Along these lines, another option would be to bring in a trained mediator to attempt to mediate the differences between those who wish the Monument to remain in place, and those who want it removed.
- i) Terminate the 1908 Order. The Order grants the Daughters the right to maintain the statue in its current location. The Order is most likely a license which, since it is not by its terms irrevocable, can be revoked which would terminate the right of the Daughters to maintain their property (the Monument) on County property.

The Daughters would then be asked to remove their statue within a reasonable period of time, and if they refused, which is likely, the County would then need to evaluate its options to remove the Monument. This appears to be the best option for removal absent an agreement with the Daughters.

- j) Assert the County's First Amendment Free Speech Rights under a developing doctrine of government speech to remove the Monument on the grounds that the location on County property represents government speech that at one time was consistent with the values of the County, but is now inconsistent with those values and conveys a message that is anathema to the views of the County.

If the Monument is removed, one important question that will have to be answered is "where to"? There is ongoing litigation under the Statute with respect to a monument which was removed in Winston-Salem. At one time, that monument was located on county property, but the county sold the real estate to a private party, and the City of Winston-Salem removed the monument from private property under its authority to abate public health nuisances, so a bit of a difference from the Chatham situation. Moreover, it is unlikely that a definitive decision will be reached in that case before the County wishes to act with respect to this Monument.

We look forward to further discussions on these questions and other issues.