

## Appeal of Rule No: R161-18.08

OCC RECEIVED AT  
AUG 20 '18 PM1:21

I wish to appeal the adoption of the above rule regarding the final adoption of 14.4.0 (Rules for Cemeteries Owned and Operated by the City of Austin, adopted by the Director of the Parks and Recreation Board effective August 2, 2018 ([http://www.austintexas.gov/sites/default/files/files/Parks/Cemeteries/Cemetery\\_Rules\\_final\\_Aug\\_2\\_2018.pdf](http://www.austintexas.gov/sites/default/files/files/Parks/Cemeteries/Cemetery_Rules_final_Aug_2_2018.pdf)), for the following reasons:

The incorrect version of the rules was adopted and posted. On August 13, 2018, I and other stakeholders met with Ms. Kimberly McNeeley, Acting Director, Austin Parks and Recreation Department (PARD), and Mr. Anthony Segura, Assistant Director, PARD, and they informed us that the wrong version of the rules had been approved and filed. Ms. McNeeley told us that she and Mr. Segura had forwarded revisions to the Legal Department but due to a communication error these revisions were not incorporated in what was intended to be the final version of the rules.

PARD lacks any authority to impose new rules on existing grave site memorials and gardens to the extent such new rules and regulations would force the entire or substantial removal of existing memorials or gardens. It is well established under law that when a city enacts an ordinance, law, rule, or regulation that significantly affects the enjoyment or use of an existing property, that existing use must either be grandfathered for as long as the initial use continues or the city must fairly compensate the the property holder for the loss of the value or use of the property. The rules fail to grandfather existing grave site memorials or gardens for as long as the initial use continues.

PARD has utterly refused for over four years to comply with the October 17, 2013, Austin City Council resolution requiring the City Manager, in collaboration with stakeholders and a working group of the Parks and Recreation Board, to evaluate whether current cemetery policies related to grave ornamentation were appropriately sensitive to personal and cultural expressions of grieving, while preserving necessary safety for cemetery workers and respect for the values of all families. The review was supposed to be completed within six months. Instead, PARD has repeatedly engaged in bureaucratic delays and equivocations and refused to meet face-to-face with stakeholders and negotiate in good faith.

PARD has failed to properly notify the public and stakeholders throughout the rules and regulation revision process and the process was not open or transparent. Because PARD, as a government agency, has failed to give sufficient public notice, any finalization of cemetery rules and regulations are completely illegitimate, invalid, and of questionable legality. PARD's own website often was completely silent regarding meetings or the comment period for the rules. Often only those who had been involved in the process from the beginning and were on PARD's e-mail list received actual notice of meetings or deadlines, and in the past PARD has provided incorrect e-mail links or dates. No attempt was made to notify the public through other venues, such as signage or notices at the cemeteries, social media such as Facebook or Nextdoor, or local media, such as newspapers or radio announcements. Many people in Austin do not have computer or Internet access and they were effectively disenfranchised.

The proposed rules violate federal law by prohibiting ethnic or religious groups from engaging in certain religious practices or traditions. For example, it is a Jewish tradition to leave a small stone when visiting a grave site, as a symbol of the permanence of love and memory. The stones are traditionally placed on the headstone or at its foot and they are never meant to be removed. In the Jewish section of the Austin Memorial Park stones have been left by mourners and visitors for decades; there is even a receptacle holding stones for visitors to use. However, under a strict interpretation of the proposed rules, not only would the placement of the stones be prohibited, all other stones would be subject to removal by the Cemetery Administrator. This would be a blatant violation of Jewish tradition and a desecration of Jewish resting places. Title II of the United States Civil Rights Act of 1964 prohibits discrimination on the grounds of race, color, religion, or national origin in any place of public accommodation. The cemeteries are public parks and imposing any new regulation prohibiting Jewish citizens placing stones on graves when there has been no such limitation before and authorizing public employees to remove stones from Jewish graves clearly discriminates against the Jewish citizens of Austin.

In 1992, the City of Austin has implemented a Perpetual Care Trust Fund in accordance with Texas law. **This fund should be incorporated in and made part of the cemetery rules and regulations as it directly involves the maintenance of individual grave sites and the city cemeteries.** Further, PARD has failed to comply with both state law and Austin ordinances regarding the trust, has made illegal expenditures from this trust, and is illegally barring potential trustees from donating to the trust. Any rules and regulations **must be placed on hold until PARD complies with both state law and Austin ordinances, accounts for all funds, proceeds, and expenditures regarding the trust, and fully implements such a trust.**

The rules grant the Cemetery Administration extensive powers without any checks or balances. Under the rules, **the Cemetery Administrator is authorized to remove any object in a cemetery that is not specifically permitted under these rules or that the Cemetery Administrator determines to present a current or foreseeable threat to the public's health or safety.** This gives the Cemetery Administration complete and unchecked power to remove objects from grave sites based solely upon his or her discretion and **without any notice or review.** Further, **there is nothing in the rules requiring that the removal be done in a careful and caring manner or providing for the repair or remediation of any damage or injury to a grave site resulting from removal of the object.**

Nothing in the rules requires PARD to publicize the rules. This entire issue began because PARD and its agents **utterly failed to publicize or enforce the initial cemetery rules and regulations first enacted by the Austin City Council in 1978.** It was not until October of 2013 that PARD suddenly sought to retroactively apply the rules. During the intervening 26 years PARD had given both implicit and explicit permission to families to decorate graves sites with gardens and other memorials that did not comply with the rules. **PARD's demands that long-established gardens and memorial be removed, even though such removal would cause significant damage to grave sites, as well as emotional distress to families and friends of the deceased, resulted in stakeholders appealing to the city council and the city council enacting the October 17, 2013, resolution.** Because of PARD past history of neglect regarding implementation of rules and regulations, **the rules must expressly require PARD to ensure that the rules, and any proposed or adopted revisions or changes, are published and readily available to the public, including, but not limited to, prominently posting these rules on its website and making copies of the rules available at all cemeteries under its management.** Further, a written copy of the rules must be provided to persons who inquire about purchasing or who purchase a lot or space within any cemetery managed by PARD.

Also, the cemetery rules adopted on August 2, 2018 include sections regarding memorials as follows:

**"14.4.9-Memorials**

**(A) All memorials shall be installed and maintained at the owner's expense.**

(B) Only one memorial will be permitted at the head of a space. A companion or family memorial may be placed upon two or more spaces. Memorials placed at the foot of a space will be flush, centered and in alignment with adjacent memorials. The final location for memorials must be approved by the Cemetery Administrator.

(C) Space or lot corner markers must be set flush with the turf inside the boundaries of the space and may be no larger than 8 inches by 8 inches.

(D) Memorials shall be made of granite or marble with a minimum thickness of 4 inches or cast bronze of any thickness.

(E) The base of all memorials shall be 18 inches or less in width.

(F) The length of memorials shall be a minimum of 10 inches less than the width of a full sized space.

(G) Upright or raised memorials shall not exceed 42 inches in height.

(H) For a space designed for cremains, memorials shall be no larger than 24 inches tall and 10 inches wide.

(I) Memorials which contain niches for cremated remains are not permitted.

(J) All flush memorials shall be set flush with the turf.

**(K) Should any existing memorial or mausoleum become unsafe, the Cemetery Administrator shall have the right to correct the condition or remove the memorial or mausoleum. The expense of such correction, removal, or repair may be charged to the space owner."**

We are appealing this wording since the City's legal department have incorrectly interpreted the provisions in the Texas Health and Safety Code 713.011 regarding municipal regulation of cemeteries. That provision states in the Texas Health and Safety Code 713.011 – Maintenance of Municipal Cemeteries

- (a) A municipality that operates or has jurisdiction over a public cemetery shall maintain the cemetery in a condition that does not endanger the public health, safety, comfort, or welfare.
- (b) A municipality's responsibility to maintain a cemetery under this section includes:
  - (1) repairing and maintaining any fences, walls, buildings, roads, or other improvements;
  - (2) leveling or straightening markers or memorials;
  - (3) properly maintaining lawns, shrubbery, and other plants;
  - (4) removing debris, including dead flowers and deteriorated plastic ornaments; and
  - (5) promptly restoring gravesites following an interment.

City of Austin's Legal interpretation clearly removes the benefit to the public of the meanings of the words comfort and welfare in the Black's Law Dictionary which was specifically added to the Texas Statute to explain that the statute is more than just health and safety. Black Law Dictionary defines comfort as "benefit, consolation, contentment, ease, enjoyment, happiness, pleasure or satisfaction". Welfare is defined as "well-doing or well-being in any respect; the enjoyment of health and common blessings of life; exemption from any evil or calamity; prosperity; happiness". The public gain these benefits when the plots were purchased.

City's legal interpretation fails to discuss appropriately the words "comfort and welfare", and they appear to dismiss them as not important. However, they are very important to the public who purchased plots in the cemetery in good faith by being told the cemetery would always be kept in a good condition without additional charge to owners which would include all items in the State Statute. No one has ever said that the cemetery has to be perfect in every way, but with failed grounds keeping activities, the memorials are on unstable ground. They would not fail if the maintenance of the cemetery grounds were leveled and the highly paid memorial contractor, Interment Services, set the memorials correctly in the first place. The statute gives no right to the City of Austin cemetery staff to lay the memorials on the ground which is currently being done or remove the memorial, and then charge the plot owners after the fact. The City must level and straighten the memorials and not charge the plot owners or their descendants.

The cemetery rules must be written to reflect the actual meaning of the Texas Health and Safety Code.

Below is the City's Legal Department incorrect interpretation of the statute provided to Sara Hensley without consulting the Texas Attorney General:

"As we discussed, the City's position in the past has reconciled the rules and Section 713.011 of the Texas Health and Safety Code by noting that the responsibility of a municipality under the statute is to "maintain the cemetery in a condition that does not endanger the public health, safety, comfort, or welfare."

The statute does not say that everything in the cemetery must be perfect, only that conditions in the cemetery not endanger the public health, safety, comfort, or welfare. I believe PARD has justifiably focused on the words "health" and "safety" in the past because "welfare" would seem to be largely synonymous with the former and "comfort" is such an unhelpfully subjective term.

Subsection (b) of Section 713.011 states that "a municipality's responsibility to maintain a cemetery *under this section* includes..." a long list of tasks including leveling or straightening markers or memorials. Therefore, it would be a reasonable interpretation to say that the City must engage in the

Subsection (b) of Section 713.011 states that "a municipality's responsibility to maintain a cemetery under this section includes..." a long list of tasks including leveling or straightening markers or memorials. Therefore, it would be a reasonable interpretation to say that the City must engage in the leveling or straightening of markers or memorials to the extent necessary to not endanger the public health, safety, etc.

This statute does not say that the City must engage in leveling or straightening for aesthetic purposes. The statute does not say that the City is solely financially responsible for leveling or straightening and cannot seek (perhaps unsuccessfully) the financial assistance of the owners of the marker or memorial after the public has been protected.

Practically speaking – given the owners of markers and memorials are more than likely deceased – the City may rarely, if ever, be reimbursed for its work. This raises some obvious budgetary challenges for PARD that I gladly leave to others to consider. However, it does not appear that the rules or the City's traditional position are in irreconcilable conflict with the statute.

The Cemetery Rules 14.4.9-Memorials provides further direction/information.

14.4.9(K) that you've included below specifically states that the City can address the unsafe condition of a memorial that might endanger the public. I also see that proposed Rule 14.4.13 specifically reserves the City's powers to satisfy its responsibilities under TX Health and Safety Code Section 713.011 by closely following the language of the statute.

I hope these thoughts are helpful. Please let me know if you would like to discuss further.

Chad Smith"

Above appeal filed by Sharon Blythe:

Sharon Blythe  
9206 Brigadoon Cove  
Austin, Texas 78750  
512-789-6152

[blytheinaustin@yahoo.com](mailto:blytheinaustin@yahoo.com)