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ATTORNEY GENERAL OF TEXAS

November 21, 2018

The Honorable Joe Moody  
Chair, Committee on Criminal Jurisprudence  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. KP-0224

Re: Authority and process for removing  
historical plaques in the Texas Capitol Complex  
(RQ-0226-KP)

Dear Representative Moody:

You seek an opinion regarding the removal or relocation of a plaque located inside the State Capitol.<sup>1</sup> As background, you explain that a plaque donated by the Children of the Confederacy is currently displayed inside the Capitol. Request Letter at 1. The Legislature authorized installation of that plaque in 1959. Tex. H.R. Con. Res. 104, 56th Leg., R.S., 1959 Tex. Gen. Laws 1214 (“permission of the Texas Legislature is hereby given to the Children of the Confederacy to dedicate and install a plaque in the State Capitol”). You tell us that in recent years, multiple legislators have called for removal of the plaque, finding it offensive and historically inaccurate. Request Letter at 1.<sup>2</sup> You therefore ask which officials or entities are authorized to remove or relocate the plaque and the processes for doing so. *Id.* at 2.

Section 2166.5011 of the Government Code authorizes the Legislature, the State Preservation Board (“the Board”), and the Texas Historical Commission to remove, relocate, or

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<sup>1</sup>See Letter from Honorable Joe Moody, Chair, House Comm. on Crim. Jurisprudence, to Honorable Ken Paxton, Tex. Att’y Gen. at 2 (Apr. 27, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

<sup>2</sup>The full text of the plaque provides:

Children of the Confederacy Creed

Because we desire to perpetuate, in love and honor, the heroic deeds of those who enlisted in the Confederate Army, and upheld its flag through four years of war, we, the children of the South, have united in an organization called “Children of the Confederacy,” in which our strength, enthusiasm, and love of justice can exert its influence.

We, therefore, pledge ourselves to preserve pure ideals; to honor our veterans; to study and teach the truths of history (one of the most important of which is, that the war between the states was not a rebellion, nor was its underlying cause to sustain slavery), and to always act in a manner that will reflect honor upon our noble and patriotic ancestors.

Erected by Texas Division  
Children of the Confederacy  
August 7, 1959

alter a monument or memorial located on state property. TEX. GOV'T CODE § 2166.5011(b). That section defines "monument or memorial" to include, among other items, a plaque located on state property that honors a citizen of this state for military or war-related service.<sup>3</sup> *Id.* § 2166.5011(a). The various briefs submitted in response to your request take different positions regarding whether the plaque qualifies as a "monument or memorial" under this definition.<sup>4</sup> The plaque sets forth the creed of the Children of the Confederacy, thereby recognizing that organization. A stated purpose of that organization, reflected on the text of the plaque, is "to perpetuate, in love and honor, the heroic deeds of those who enlisted in the Confederate Army." The resolution authorizing the plaque similarly acknowledged the 60,000 Texans who participated in the Confederate cause. Tex. H.R. Con. Res. 104, 56th Leg., R.S., 1959 Tex. Gen. Laws 1214. Thus, the text of the plaque itself and the resolution authorizing its installation both purport to honor individuals for war-related service. *Id.*; TEX. GOV'T CODE § 2166.5011(a).

Briefing submitted in response to your request proposes that the installation of the plaque and its stated purpose of honoring war heroes were pretexts for other messages that the Legislature intended to convey regarding the current events of the time.<sup>5</sup> While we recognize that possibility, any determination about whether a stated rationale for action is pretextual requires a factual inquiry into the intent of the actors at the time that action was taken. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511–14 (1993) (relying on the jury as factfinder to determine whether an employer's proffered reason for terminating an employee was a pretext for discrimination). This office does not have authority in the opinion process to conduct the factual inquiries necessary to make a pretext determination. *See* Tex. Att'y Gen. Op. No. JC-0326 (2001) at 3 (explaining that the opinion process cannot resolve factual disputes). And irrespective of that lack of authority, in discerning legislative intent, the courts consistently require that we look to the plain meaning of the words chosen by the Legislature. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Based on the plain language of the resolution authorizing the plaque, subsection 2166.5011(a) authorizes the removal of the plaque by the entities listed.

Thus, under both its general legislative power and section 2166.5011 of the Government Code, the Legislature possesses authority to remove or relocate the plaque. TEX. CONST. art. III, § 1; TEX. GOV'T CODE § 2166.5011(b). The Legislature approved installation of the plaque in 1959. Tex. H.R. Con. Res. 104, 56th Leg., R.S., 1959 Tex. Gen. Laws 1214. And it retains authority to move or relocate the plaque today. *See Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 743 (Tex. 1962) ("All power which is not limited by the Constitution inheres in the people, and an act of the state legislature is legal when the Constitution contains no prohibition

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<sup>3</sup>The Legislature has instructed that in construing statutes, "the singular includes the plural and the plural includes the singular." TEX. GOV'T CODE § 311.012(b). Thus, the fact that the plaque recognizes numerous individuals for their military service instead of a single individual does not change the analysis.

<sup>4</sup>*See* Letter from Honorable Eric Johnson, Tex. House of Reps., to Virginia Hoelscher, Chair, Op. Comm. at 2 (June 5, 2018) (arguing that section 2166.5011 authorizes removal of the plaque by various entities); Brief from Honorable James White, Tex. House of Reps. to Office of Att'y Gen. at 3, n.15 (June 28, 2018) (arguing that section 2166.5011 is not applicable because the plaque does not meet the definition of "monument or memorial") (briefs on file with the Op. Comm.).

<sup>5</sup>*See* Letter from Jon Schnautz, Gen. Counsel to Honorable Joe Straus, Tex. House of Reps., to Op. Comm. at 7 (June 5, 2018) (on file with the Op. Comm.).

against it.”). The Legislature has moved other historic artifacts and monuments through concurrent resolutions and could likewise use that process to relocate or remove the plaque here. *See, e.g.*, Tex. S.R. Con. Res. 42, 63d Leg., R.S., 1973 Tex. Gen. Laws 2258 (relocating a portrait of Jesse H. Jones to the museum building at Washington-on-the-Brazos).

Alongside the Legislature, the Board possesses authority to remove or relocate the plaque. *See* TEX. GOV'T CODE §§ 443.007(a)(1), 2166.5011(b)(3). The resolution authorizing installation of the plaque requires the State Board of Control, a predecessor to the Board, to “determine the specific place of honor which this worthy plaque shall occupy in the State Capitol.” Tex. H.R. Con. Res. 104, 56th Leg., R.S., 1959 Tex. Gen. Laws 1215. Thus, the Legislature gave express authority to the Board’s predecessor to determine the plaque’s setting within the Capitol. In providing such authority, however, the Fifty-sixth Legislature did not restrict a future Legislature from passing legislation to relocate the plaque. *See Cent. Power & Light Co. v. Pub. Util. Comm’n*, 649 S.W.2d 287, 289 (Tex. 1983) (“A legislature cannot prevent future legislatures from amending or repealing a statute.”).

Section 443.007 of the Government Code provides the Board with broad authority over the Capitol and its contents.<sup>6</sup> TEX. GOV'T CODE § 443.007(a)(1). That authority includes a duty to approve changes to the Capitol buildings. *Id.* § 443.007(a)(4). The Government Code also requires the executive director of the Board to “employ a curator of the Capitol,” who, among other responsibilities, must “develop a collections policy regarding the items of historic significance” in the Capitol. *Id.* § 443.006(a), (b)(5).

The Legislature authorized the Board to “adopt rules concerning the [Capitol] buildings, their contents, and their grounds,” and pursuant to that authority, the Board adopted a rule to outline the process for requesting a change at the Capitol. *Id.* § 443.007(b); *see* 13 TEX. ADMIN. CODE § 111.16. The rule defines “changes” as “any alteration, addition, relocation, or other form of renovation to the Capitol building . . . .” 13 TEX. ADMIN. CODE § 111.16(a)(1). It then divides potential changes into three categories:

- (A) construction, restoration, and repairs;
- (B) relocations/additions of furnishings and artwork;
- (C) maintenance and custodial.

*Id.* § 111.16(a)(2). And the rule provides different approval processes for specific types of change. *See id.* § 111.16(b)–(d). A request related to the plaque would likely fall within change request category (B) and would be subject to the following procedures:

- (1) A change request form must be filled out if a change (permanent additions, loans, location changes, and maintenance) related to

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<sup>6</sup>The Board consists of the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, one senator appointed by the Lieutenant Governor, one representative appointed by the Speaker of the House, and a member of the general public appointed by the Governor. TEX. GOV'T CODE § 443.003(a).

the state-owned objects of historical significance in the buildings and on the grounds is sought.

- (2) Changes to furnishings and artwork must be approved by the curator of the Capitol.

*Id.* § 111.16(c)(1)–(2). Thus, a legislator seeking a change regarding the plaque must complete a change request form and submit it to the office of the Board. The discretion to approve the change thereafter lies with the curator or the Board, if the Board chooses to become involved. *See id.* § 111.18(e) (authorizing the Board to deaccession material to refine its collection).

Briefing submitted in response to your request suggests that if the Capitol curator denies a request from a legislator to remove or relocate the plaque, the legislator may bring the request before the Board at its next open meeting for a final ruling.<sup>7</sup> The provision authorizing discussion of a change request at an open meeting of the Board falls under the subsection addressing the first category of changes relating to construction, restoration, and repairs of the Capitol. *See id.* § 111.16(b)(5). The Board did not provide the same process for denied change requests related to furnishings and artwork under subsection (c). *See id.* § 111.16(c).<sup>8</sup> Thus, while the Board may discuss any change request at an open meeting, its rules only require consideration at an open meeting of those change request denials involving construction, restoration, and repairs.

In addition to the Legislature and the Board, section 2166.5011 of the Government Code authorizes the Texas Historical Commission to remove or relocate monuments or memorials on state property. TEX. GOV'T CODE § 2166.5011(b)(2). The Legislature vested the Board with specific authority over preservation and maintenance of the Capitol and its contents, to the exclusion of other state agencies in almost all instances. *Id.* § 443.007(a)(1), (c) (“Any power or duty related to the [Capitol] buildings and formerly vested in the . . . Texas Historical Commission . . . is vested solely in the board.”). However, the statute granting authority to the Historical Commission to remove or relocate a monument applies “[n]otwithstanding any other provision of [the Government Code].” *Id.* § 2166.5011(b). The use of the word “notwithstanding” indicates that the Legislature intended subsection 2166.5011(b) to be controlling to the extent of a conflict. *See In re Lee*, 411 S.W.3d 445, 454 (Tex. 2013); *see also Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 639 (Tex. 2010). The Historical Commission therefore possesses concurrent authority with the Legislature and the Board to remove or relocate the plaque under section 2166.5011(b) of the Government Code.

You also ask whether an official or entity with authority to decide whether to remove or relocate the plaque may be compelled through a writ of mandamus to address a request for removal or relocation of the plaque or take other actions related to the plaque. Request Letter at 2. Mandamus is an extraordinary remedy, available only in limited circumstances. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Although mandamus may issue to enforce the performance of

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<sup>7</sup>*See* Brief from Honorable Eric Johnson, House of Representatives, to Virginia K. Hoelscher, Chair, Op. Comm. at 2–3 (June 5, 2018) (on file with the Op. Comm.).

<sup>8</sup>*See also* ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 156 (2012) (discussing the scope-of-subparts canon).

a nondiscretionary or ministerial act, it will not issue to control an officer's legitimate exercise of discretion. *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011). Whether and how to address a request for removal or relocation of the plaque is a discretionary function of the entities discussed above, and a court is unlikely to grant mandamus relief in such circumstances.

S U M M A R Y

The Legislature authorized installation of the Children of the Confederacy plaque inside the Capitol in 1959, and it likewise possesses authority to remove or relocate the plaque by adopting a resolution directing its removal or relocation.

Alongside the Legislature, section 2166.5011 of the Government Code authorizes the State Preservation Board and the Texas Historical Commission to remove or relocate monuments or memorials such as the plaque. Board rules establish a procedure for requesting a change to contents of the Capitol.

Whether and how to address a request for removal or relocation of the plaque is a discretionary function of the Legislature, the Board, or the Commission, and a court is unlikely to grant mandamus relief in such circumstances.

Very truly yours,



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