TEXAS HOUSE OF REPRESENTATIVES

ERIC JOHNSON

DISTRICT 100 • DALLAS COUNTY

June 5, 2018

Via Email

Virginia K. Hoelscher
Chair, Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548
opinion.committee@oag.texas.gov

Dear Ms. Hoelscher:

I respectfully submit the following letter brief regarding Attorney General Opinion Request No. 0226-KP, which concerns the removal or relocation of the Children of the Confederacy Creed plaque (the "Plaque") located in the Texas Capitol. As explained below, the State Preservation Board is authorized to remove or relocate the Plaque. This can be accomplished either by deaccessioning the Plaque or by relocating the Plaque (to a place where it is no longer on public display) after a change request form is submitted by a state legislator. Consideration of a change request by the State Preservation Board and its staff can be compelled by mandamus if they unreasonably delay.

The State Preservation Board Has the Power to Remove or Relocate the Plaque

In 1983, the Texas Legislature enacted S.B. 147, establishing the State Preservation Board (the "Board") to "preserve, maintain, and restore" the Texas Capitol and its contents and grounds. Act of May 25, 1983, 68th Leg., R.S., ch. 476, § 1. State Senator Roy Blake, S.B. 147's author, explained that the "legislative branch has the power to order modifications of the Capitol" and at that time had delegated that authority to a number of agencies, whose "lack of coordination" caused problems in the Capitol. Senate Comm. On State Affairs, Bill Analysis, Tex. S.B. 147, 68th Leg., R.S. (2005). Senator Blake thus proposed the creation of the State Preservation Board, which would have "approval authority over all changes to the Capitol as well as responsibility for keeping up with furnishings, works of art, and landscaping." *Id.*

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Presently, the Board has the obligation to "preserve, maintain, and restore the Capitol" and "its contents and grounds" and to "approve all changes to" the Capitol, including (but not limited to) usual maintenance and "any transfers or loans of objects under the curator of the Capitol's care." TEX. GOV. CODE § 443.007(1), (4). The Curator of the Capitol (the "Curator") is charged with developing and maintaining a registration system and inventory of the contents of the Capitol. *Id.* § 443.006(2). Under these express provisions of the Government Code, the State Preservation Board has the power to remove the Plaque from the Capitol. And even if a court were to conclude that express authority had not been granted, the Board's power to remove the Plaque is implicit in the statute. *See 6th & Neches, L.L.C. v. Aldridge*, 992 S.W.2d 684, 687 (Tex. App.—Austin 1999, pet. denied) (explaining, in a case addressing the power of the Board, that agencies "have the implied authority to reasonably accomplish a delegated purpose," even if the power is not expressly enumerated in the agency's enabling statute).

Outside of the statute creating the Board and providing its powers, the Legislature has confirmed the Board's power to remove the Plaque. The Legislature has enacted a statute addressing the removal of a "monument or memorial," defined as a "permanent monument, memorial, or other designation, including a statue, portrait, **plaque**, seal, symbol, building name, or street name" located on state property and honoring a citizen of Texas for military or war-related service." TEX. GOV. CODE § 2166.5011(a) (emphasis added). A monument or memorial may be removed only "(1) by the legislature; (2) by the Texas Historical Commission; (3) **by the State Preservation Board**" or (4) to accommodate construction. *Id.* § 2166.5011(b) (emphasis added). The reference in § 2166.5011 to the State Preservation Board would have no purpose if the Legislature had not elsewhere authorized the Board to remove plaques like the one at issue here. *See, e.g.*, *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000). Section 2166.5011 thus confirms that the Legislature has given the Board the power to remove the Plaque.

The Process for Removing the Plaque

The Board has two pathways to remove the Plaque. First, the Board can deaccession the Plaque. The Board's rules permit deaccessioning materials (i.e., removal of materials from the Board's collection) both to refine the Board's collection and to "effect exchanges or purchases of material more in keeping with [the Board's] purposes." 13 TEX. ADMIN. CODE § 111.18(e)(1). The Curator of the Capitol determines what items should be deaccessioned, and the Board as well as its executive director must give their approval before an item is deaccessioned.

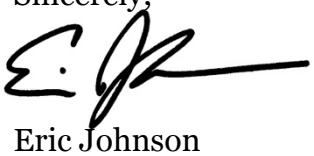
Second, a person can seek to relocate artwork on display in the Capitol by submitting a change request form. 13 TEX. ADMIN. CODE § 111.16(a)(2)(B), (c)(1). The applicable rules place no limitations on relocation, and therefore, a relocated item need not remain on display within the Capitol. The Curator must approve a relocation. *Id.* § 111.16(c)(2). If the office of the State Preservation Board—in this instance, acting through the Curator—denies a change request filed by a state legislator, the legislator may bring his or her request before the Board at its next open meeting for a final ruling on the request. *Id.* § 111.16(b)(5).

While the deaccessioning process is left to the discretion of the Curator subject to the Board and executive director's approval, a legislator is expressly given the right to have a relocation request considered by the Board if denied by the Curator. As explained below, mandamus relief is available to compel consideration of a change request by the Curator as well as by the Board itself. A writ of mandamus will issue to compel a public official to perform a ministerial act. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) An act is ministerial when the law clearly spells out the duty to be performed by the official. *Id.* A writ of mandamus may also issue to correct a clear abuse of discretion by a public official. *Id.*

Here, the rules expressly spell out the Board's obligation once the Curator denies a change request: the Board must consider the change request at its next open meeting if the legislator who made the request asks. 13 TEX. ADMIN. CODE § 111.16(b)(5). And the Board is required to meet at least twice a year. TEX. GOV. CODE § 443.004(b). Therefore, if the Board were to fail to place this matter on the agenda of its next meeting following a denial (or to conduct its semiannual meetings), mandamus should issue.

And even though the rules do not set a deadline for the Curator to take action on a change request, the Curator similarly cannot let a request languish. A writ of mandamus will issue when a public official unreasonably delays in taking official action. *Cathey & Carrell v. Terrell*, 45 S.W.2d 956, 956-57 (Tex. 1932). Should the Curator fail to act on a change request within a reasonable period of time, mandamus can issue to require the Curator to act.

Sincerely,



Eric Johnson
State Representative
District 100