

CITIZENS TO PRESERVE OVERTON PARK  
618 S. COX • MEMPHIS, TN 38104

April 26, 2010

Ms. Cynthia Buchanan  
Director of Park Services, City of Memphis  
2599 Avery Ave.  
Memphis, TN 38112

Mr. George Little  
Chief Administrative Officer, City of Memphis  
125 N. Main St., Room 308  
Memphis, TN 38103

Dear Ms. Buchanan and Mr. Little:

I am writing to submit comments on the City's draft conservation easement for the Old Forest of Overton Park, as per your request, on behalf of Citizens to Preserve Overton Park. We are not opposed to the idea of a conservation easement in principle. However, we are not convinced that a conservation easement alone can provide sufficient protection for the Old Forest.

It seems clear to us that Tennessee State Natural Area designation is the simplest, most effective, and most publicly transparent way to protect the Old Forest from inappropriate development while maintaining its value as public parkland. This irreplaceable old growth forest is precisely the type of rare and threatened natural resource that the Natural Areas Preservation Act of 1971 is intended to protect. We see no logical reason why the City of Memphis should not take advantage of this existing law.

City officials and leaders of the Memphis Zoo have stated that they strongly prefer a conservation easement, and have cited Shelby Farms as an example of how they would like to see Overton Park protected.

If we used Shelby Farms as our model for protecting Overton Park, the first step would be to legislatively designate the Old Forest as a Tennessee State Natural Area. This was done at Shelby Farms in 1988 when the Lucius Burch Jr. State Natural Area was created to protect 700+ acres of forest along the Wolf River. The next step would be to protect the natural, historic, and cultural values of the largely unforested remainder of the park with a conservation easement, as was done at Shelby Farms in 2006.

Given these facts, it would make more sense to include the entire 342-acre park in the scope of the City's proposed conservation easement. Overton Park's public areas could be divided into categories to give appropriate protection for each environment and accommodate the various needs of user groups. For example: Old Forest, Greensward, Golf Course, and Picnic/Playgrounds. The built environment could be treated as a single category or divided by facility. For example: Brooks Museum, Memphis College of Art, Memphis Zoo, City Services (maintenance area and fire station), and Streets/Parking.

The draft conservation easement we received from the City is only applicable to the Old Forest and it divides the forest into Area A (125 acres of unfenced parkland) and Area B (17 acres of fenced parkland). If this easement were expanded to include additional acreage, a substantial rewrite would obviously be required. Our below comments only apply to the easement that is currently being proposed by the City of Memphis and, as explained above, should not be construed as an endorsement of the City's proposal.

### **General Questions**

1. How and when does the City intend to conduct the baseline survey of existing conditions at Overton Park that is required for a viable conservation easement?
2. Has the Land Trust for Tennessee agreed to hold this easement? If so, what is the estimated yearly fee they will charge the City and how will it be funded?
3. Does the City intend to allow the public to review the terms of this conservation easement before it is presented to the Memphis City Council? If so, how and when will this occur?

### **General Comments**

1. It is essential that a preamble be added to the document to clearly describe the purpose and scope of the conservation easement.
2. It is essential that a clause should be added to the document granting third-party right of enforcement by any qualified entity as per T.C.A. 66-9-302(7). This definition states: *“Third-party right of enforcement” means a right expressly provided in a conservation easement to enforce any of its terms granted to a public body, charitable corporation, charitable association, or charitable trust that, although eligible to be a holder, is not a holder.*
3. We propose that the easement should be held by several Memphis-based grantees in addition to the Nashville-based Land Trust for Tennessee. Local grantees could include the Evergreen Historic District Association, the Vollentine-Evergreen Community Association, Memphis Heritage Inc., Park Friends Inc., or other qualified public bodies or charitable organizations as defined by law.

4. We propose that a clause should be added to describe the method for amending the terms of the conservation easement. Such a clause should include (as a bare minimum) a requirement that all parties to the easement will agree to any changes in the original easement, and that appropriate public notice will be given of any changes before and after they occur.
5. We propose the addition of a clause that provides for an automatic and substantial civil penalty in case the Grantor should attempt to nullify, rescind, or otherwise withdraw approval of the conservation easement in future.

### **Section I - Recitals**

Add a clause stating: “A detailed inventory of existing park uses, facilities, and natural resources has been conducted and is hereby made a part of this document for the purpose of establishing a baseline of existing conditions within the protected area.”

Replace “enhancement” with “restoration” throughout the document.

### **Section II - Grant and Agreements**

1. Grant. Delete second paragraph (“Excluded from...”) as it appears to be a typo.
2. Declaration of Restriction. No changes.
3. Permitted Uses
  - a. Change to: “routine maintenance of existing roads, trails and paths, paved and unpaved.”
  - b. Change to: “construction of new nature trails or boardwalks by Grantor, with written approval of Grantee and a public notice posted on the website of Memphis Park Services for 60 days prior to the start of construction.”
  - c. Delete.
  - d. No changes.
  - e. Delete.
  - f. Change to: “restoration of native plant communities.”
  - g. No changes.

- h. Delete.
- i. Change to: “control of non-native animals as may be necessary to protect the health, safety and welfare of the public.” Add language to clarify that any native animal (wildlife) control within the protected property must be done in accordance with state law, with appropriate legal permits, and with written approval from the Grantee.
- j. No changes.
- k. No changes.
- l. Delete.
- m. Delete. This should be addressed in a separate clause. Grantor must provide a baseline survey of existing conditions and a detailed description of any “currently planned uses” that would be allowable under this easement.
- n. Change to: “maintenance, repair, or removal of existing structures, sewer and/or utility lines.”

Add an item to permit all public park activities that are allowed by City of Memphis ordinance and are consistent with the purposes of the easement.

#### 4. Additional Permitted Uses – Area B

Change second sentence to read: “Any valid termination of said Management Agreement shall also effect a termination of any rights and duties that MZS may have under this easement, *and such rights and duties shall be thereby transferred to Grantor.*”

Remove “camping facilities.”

Plans for Area B should be made a part of this document and filed (along with any final conservation easement) in the office of the Shelby County Register of Deeds.

#### 5. Prohibited Uses.

- a. – j. No changes.
- k. Change to: “roads and parking areas other than existing roads and parking areas.”
- l – m. No changes.

Add an item to prohibit any removal of native vegetation, except as required for routine maintenance of park roads and trails.

6. Right of Entry and Enforcement.

Change last sentence to read: “In the event that Grantee or Grantee’s assigns fail to enforce the provisions of this Easement or at the invitation of the Grantee *or the filing of a written complaint by any citizen of the State of Tennessee*, the Attorney General of the State of Tennessee may enforce the provisions of this Easement by any action at law or in equity.”

7. Duration.

Add: “This Easement, including all exhibits, maps, and permitted plans, shall be filed with the Shelby County Register of Deeds.”

8. Construction. No changes.

9. Severability. No changes.

10. Hazardous Materials. Delete this clause. It does not apply to Overton Park.

11. Assignment by Grantee.

Remove all references to MZS; they have no real property interest in Overton Park. Add language to prohibit MZS from becoming a Grantee.

12. Assignment by Grantor.

Remove the reference to MZS; right of assignment should apply only to the Grantor. Add language to prohibit MZS from becoming the Grantor. Add language to clarify that any assignment made by the Grantor must be approved in writing by all Grantees and public notice given.

13. This clause is missing.

14. Maintenance and Insurance.

Delete. This clause is superfluous. The City and MZS already have an agreement regarding maintenance and insurance at the Memphis Zoo, which is spelled out in their Management Agreement (City Contract #N10713, signed on December 30, 1994).

15. Default, Right to Cure.

Delete the last sentence in this clause. Add language to allow immediate injunctive relief to halt imminent or ongoing damage to the protected resource.

16. Notices.

MZS need only receive notice on matters pertaining to the 17 acres of Old Forest currently under their control.

17. Extinguishment. No changes.

Thank you for the opportunity to comment on this draft conservation easement. As always, our group would be happy to discuss these issues further with any interested parties. We are also available at any time to meet with City officials in order to review and correct the unconscionably false fiscal note that remains attached to the Old Forest State Natural Area legislation (SB 2415/HB 2563).

We deeply appreciate the City's stated commitment to legal protection for the Old Forest, despite our current difference of opinion about the best method for doing so, and we look forward to achieving that goal together.

Sincerely yours,

Naomi Van Tol  
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cc: Mayor AC Wharton  
Rep. Jeanne Richardson  
Sen. Beverly Marrero  
Mr. James Jalenak, Memphis Zoological Society  
Ms. Martha Kelly, Park Friends Inc.