

Case No. CD189-007(LC)

**CHRIS CARTER and
KAREN PIERONI**

Appellants,

vs.

LANDMARK COMMISSION,
Appellee.

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**In re 1201 Marilla Street (Removal of
the Confederate Monument)**

Appeal to the City Plan Commission

BRIEF IN SUPPORT OF THE LANDMARK COMMISSION

TO THE HONORABLE COMMISSIONERS OF THE CITY PLANNING COMMISSION:

Now comes the City of Dallas Landmark Commission (“Landmark Commission”) and the City of Dallas (“the City”) and submits this brief in support of the Commission’s decision to issue a certificate of removal of the structure commonly known as the Confederate Memorial or Confederate Monument currently located at 1201 Marilla Street. Two individuals, Chris Carter and Karen Pieroni, (“Appellants”) have appealed the Landmark Commission’s decision to the City Planning Commission (“CPC”).

A. Facts and Background

The Confederate Monument is located in what is now Pioneer Cemetery Park. Over the years, the area was used as cemeteries, with the first known burial being in 1849. The last burial occurred in 1921.

In 1896, the Confederate Monument was constructed and installed at Old City Park. It consists of four statues in a circle and a center obelisk with another statute on top. The four statues are of Jefferson Davis, Robert E. Lee, “Stonewall” Jackson, and Albert Sidney Johnston. None of those individuals have any direct connection with Dallas or Texas, except for Johnston who was

from Texas. (Record: § 5, Tr. 14). The center statue is a Confederate soldier. In 1961, the Confederate Monument was moved from Old City Park to its present location because of the construction of the R.L. Thornton Freeway.

On May 22, 2002, the City created Historic Overlay District Number 114 covering the area comprising Pioneer Cemetery. (Record: § 6, Ordinance No. 24938). The overlay district included the area where the Confederate Monument is located. As part of the ordinance, preservation criteria were adopted. The criteria provided that a person could not remove any structure in the district without first obtaining a certificate for removal in accordance with Section 51A-4.501 of the Dallas Development Code. (Record: § 6, Ordinance No. 24938, Ex. A, § 1.4). The criteria also state that “[e]xisting grave markers, monuments, and tombs are protected.” However, on the map depicting the district the Confederate Monument was referenced as the Civil War Memorial. (Record: § 6, Ordinance No. 24938, Ex. B).

Section 51A-4.501(h) provides that structures in a historic overlay district may only be removed for certain specified reasons. One of the permitted reasons for removal is “[t]he structure is noncontributing to the historic overlay district because it is newer than the period of historic significance.” Dallas City Code § 51A-4.501(h)(2)(B)(iv). In order for the Landmark Commission to grant an application for removal of a structure under this standard, the Landmark Commission must find that (1) the structure is noncontributing to the historic overlay district, (2) the structure is newer than the period of historical significance for the historic overlay district, and (3) removal of the structure will not adversely affect the historic character of the property or the integrity of the historic overlay district. Dallas City Code § 51A-4.501(h)(4)(D).

On February 13, 2019, the Dallas City Council directed the City Manager to proceed with the process for the removal of the Confederate Monument from Pioneer Cemetery Park. (Record: § 3, p. D1-1).

On February 20, 2019, the City as owner of the real property and the monument through its Director of Cultural Affairs submitted its application for the removal of the monument. (Record: § 2; § 3, pp. D1-4 through D1-6).

On March 4, 2019, the Landmark Commission held a public hearing on the City's application for removal. (Record: § 2; § 5). Staff recommended that the application be approved. (Record: § 2, p. 7 of 26; Section 3, pp. D1-1 through D1-3; § 5, Tr. 6). After reviewing the material submitted and hearing the testimony of many individuals, the Landmark Commission granted the application and a certificate of removal was issued. (Record: §1; § 4; § 5, Tr. at 105-106).

Mr. Carter and Ms. Pieroni timely filed their appeals. Dallas City Code § 51A-4.501(h)(5). (Record: §8).

B. The Standard of Review for the CPC

On appeal to the CPC, the CPC “shall give deference to the landmark commission and may not substitute its judgment for the landmark commissions’s judgment” and must affirm unless the CPC finds that the decision:

- (A) violates a statutory or ordinance provision;
- (B) exceeds the landmark commission’s authority; or
- (C) was not reasonably supported by substantial evidence considering the evidence in the record.

Dallas City Code § 51A-4.501(o). The substantial evidence review is very limited in that it requires only more than a mere scintilla of the evidence to support the decision. Thus, even if a preponderance of the evidence in the record may actually be contrary to the decision, the remaining

evidence may nonetheless amount to substantial evidence. *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012).

In reviewing the Landmark Commission’s decision, it is important to stress that the decision was for the removal of the Confederate Monument, not its demolition. (Record: § 5, Tr. at 7, 17). The City’s plan is to find a more appropriate setting with a full historical context of the Civil War and its aftermath. (Record: § 5, Tr. at 8-9, 21-22).

C. Argument

Neither the City nor the Landmark Commission is aware of any claim that the Landmark Commission’s decision violates any ordinance or statute. A review of the hearing transcript reveals no such contention.¹ To the contrary, even though the removal concerns City-owned property from City-owned land, the City sought and obtained a certificate of removal in compliance with the governing ordinance.

Similarly, the City and the Landmark Commission are unaware of any claim that the Landmark Commission exceeded its authority. The Dallas Development Code specifically grants the Landmark Commission jurisdiction to approve or deny an application for a certificate of removal. Dallas City Code § 51A-4.501(h).

Finally, there was substantial evidence to support the Landmark Commission’s finding that the Confederate Monument was non-contributing. In the context of historic tax preservation exemptions and incentives, a contributing structure is defined as “a structure that retains its

¹ There was a passing reference that removal violates the First Amendment right of free speech. (Record, Section 5, Tr. 37). The issue has already been adjudicated, free speech is not impacted. *Patterson v. Rawlings*, 287 F. Supp. 3d 632 (N.D. Tex. 2018). Indeed, the proceedings before the Landmark Commission reflect robust free speech. The same speaker also referred to criminal penalties. (Record: § 5, Tr. 37). The speaker was a plaintiff against the City and the council member and alleged criminal violations of the Texas Antiquities Code. Judgment has been rendered against those claims as well. *Johnson, et al. v. Rawlings, et al.*, No. DC-18-05460 (14th Judicial District Court of Dallas).

essential architectural integrity of design and whose architectural style is typical of or integral to a historic district.” Dallas City Code 51A-11.102. Further guidance can be found from the United States Park Service and the Texas Historical Commission. In the National Park Services’ publications related to eligibility and instructions for being listed on the National Register of Historic Sites, they state a contributing item has the characteristics of being “present during the period of time that the property achieved its significance”; “relates to the documented significance of the property”; and “possesses historical integrity or is capable of yielding important information relevant to the significance of the property”; and a noncontributing item does not relate to the historical qualities or values for which the property is significant because “it was not present during the period of time that the property achieved its significance”; “does not relate to the documented significance of the property”; or “due to alterations, disturbances, additions, or other changes, it no longer possesses historical integrity or is capable of yielding important information relevant to the significance of the property.” See <https://www.nps.gov/nr/publications/bulletins/arch/pt5.htm> ; also see https://www.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_III.htm

The Texas Historical Commission uses similar terms to describe contributing versus non-contributing items:

Contributing

- Present during period of significance, and
- Relates to the documented historical significance, and
- Possesses good degree of integrity

Noncontributing

- Not present during period of significance, or
- Not related to the documented historical significance, or
- Lacks sufficient integrity

See <https://www.thc.texas.gov/public/upload/The-Benefits-of-National-Register-Districts.pdf>; <https://www.thc.texas.gov/public/upload/preserve/survey/survey/Evaluating%20Historic%20Resources.pdf>.

The record in this case establishes that the district was created because of its use as a cemetery from 1849 to 1921. The district's historic significance and character are derived from its use as a cemetery during that time and because many of Dallas's earliest settlers are buried there. (Record: § 5, Tr. at 22-23; § 6, Landmark Nomination Form, pp. 7-22). The district's historic significance and character have no historic reference or significance to the Civil War. The Confederate Monument had no relationship or connection to the district during the period of time when the property was achieving its historical significance. The Confederate Monument was not located within the district during the period of time when the property was achieving its historical significance. The Confederate Monument adds no information to the significance of the district during the period of time when the property was achieving its historical significance. The individuals portrayed on the statues have no direct relationship to Dallas, generally, or the district, specifically. While the Confederate Monument was originally constructed in 1896, it was not within the district and was located in a park, not a cemetery. It was removed from that location and reconstructed within the district in 1961, well outside the period of historical significance. Its removal will not adversely impact the historical character or integrity of the district because it has no relevancy to why the district is considered historical. The evidence presented at the hearing supports the Landmark Commission's decision. The Landmark Commission's decisions were consistent with Staff's recommendations. (Record: § 2, p. 7 of 26; Section 3, pp. D1-1 through D1-3; § 5, Tr. 6). The City's Staff reasoning for their recommendation and Landmark

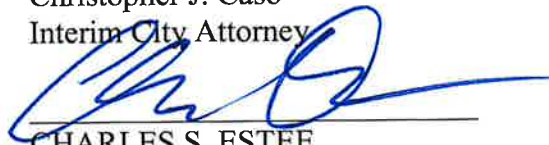
Commission's reasoning for their vote to approve the certificate of removal is clear on the record and supported by overwhelming evidence.

D. Conclusion

Because the Landmark Commission did not violate a statutory or ordinance provision, did not exceed its authority, and its decision is reasonably supported by substantial evidence in the record, the City Plan Commission must affirm the decision of the Landmark Commission. Even if the City Plan Commission could have conceivably come to a different conclusion, the City Plan Commission must give deference to the Landmark Commission's decision and the City Plan Commission may not substitute its judgment for that of the Landmark Commission. The Certificate must be affirmed.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF DALLAS AND CITY OF DALLAS LANDMARK COMMISSION

CERTIFICATE OF SERVICE

On this the 1st day of May 2019, a true and correct copy of the foregoing was sent by certified mail, return receipt requested, to the following:

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