

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: December 5, 2006

OPINION NO. 06-004

TO: Alderperson Noel Radomski, District 19

FROM: Michael P. May, City Attorney

RE: Public Access to Marshall Park from Thorstrand Road

You have requested a legal opinion to address several questions relating to members of the general public accessing Marshall Park as pedestrians from Camelot Drive, and a fencing question.

The area in question is on the west side of Madison, north of University Avenue and East of Allen Boulevard, near Lake Mendota, Marshall Park and the boundary between the City of Madison and the City of Middleton. The answers to your questions are complex, involving limitations in easements and grants of land, the rights of landowners and the public, and a private road. In order to better understand our answers, we have attached a map of the area to this opinion.

The questions, as we understand them, are as follows:

1. What is the legal status of members of the public accessing Marshall Park as pedestrians via Camelot Drive, using a public pedestrian easement to Thorstrand Road, the Thorstrand Road right-of-way, and the so-called "North Road" (located on City park lands, from Thorstrand Road to the former North Estate residential parcels which are leased by the City of Madison to private individuals)?
2. How is public access on the private Thorstrand Road affected, if at all, by City ownership of property on either end (Marshall Park on the northwest and the cul de sac at the east end of Thorstrand Road), and/or by the City's use of Thorstrand Road for the installation of public water and sanitary sewer mains, and the City Streets Division's refusal to maintain Thorstrand Road or to provide trash and recyclable collections thereon?
3. Has the public acquired access rights in crossing the vacant parcel located at 1814 Camelot Drive (Lot 7, Mendota Estates) by prescription or adverse use over 20 years or more, under the applicable statute? A related question is whether the owners of said parcel may enclose it to prevent access by the public?

4. Can public access occur from Camelot Drive to Thorstrand Road via the existing 15 foot public pedestrian, bicycle, water main and sanitary sewer easement on the Glynn property at 1818 Camelot Drive (Lot 4, Certified Survey Map #7083)?
5. The City's Ground Lease Agreements with the private owners of the North Estate homes in Marshall Park require the lessee/owners to erect a split-rail fence around the perimeter of the leased premises at the owners' expense. Can this provision be enforced by the City? Or has the Lease requirement been forever waived by the alleged verbal acquiescence of a former City employee?

QUESTION ONE: STATUS OF PEDESTRIAN PARK ACCESS VIA THORSTRAND ROAD AND THE USE OF "NORTH ROAD."

Pedestrian access to Marshall Park from Thorstrand Road is an issue which has arisen from time to time over the past decade or more. In 2002, an informal legal opinion was issued that the use of the private Thorstrand Road to access Marshall Park from Camelot Drive and other points east was "legally doubtful." Additional recent inquiry, focused by other related questions and a closer review of recorded instruments of conveyance, lends further support to this conclusion.¹ Thorstrand Road and its spur appear to have been created as private roads by the historic owners/developers of a large parcel of land located between what is now University Avenue and the Lake Mendota shoreline. These land owners/developers periodically created and conveyed several parcels (divided the larger parcel outlined in grey on the map) for private residential purposes, mainly using metes-and-bounds legal descriptions rather than a land subdivision plat or certified survey map (CSM), together with an undivided right of easement for ingress and egress upon these adjacent private roads from University Avenue. Consequently, there are now 18 separate residential parcels from that larger parcel with direct access along Thorstrand Road and 4 more that have access from a spur to the north.²

1 The owners of Thorstrand Road might even argue that unauthorized access amounts to unlawful trespass. However, it is not the function of the City Attorney to opine on such private property rights; and, therefore, we take no formal position on the question of possible trespass on the private road.

2 It is interesting to observe that this incremental metes-and-bounds means of subdividing lands for residential purposes, much of which occurred prior to this area being annexed from the Towns of Middleton and Madison in 1955, would probably be actively opposed by the City today, as in violation of Sec. 16.23, MGO. We also note that Sec. 236 16(3), Wis. Stats., requires all subdivisions abutting on a navigable lake (such as Lake Mendota) to provide public access at least 60 feet wide to the lake which is connected to existing public roads. The subject system of private roads with no public lake access would not be in compliance with these regulations.

However, the penalties and remedies for violations of these laws are essentially limited to forfeitures (for which the statute of limitations has long ago tolled) and injunctive proceedings to prevent or overturn the actions. We conclude that the likelihood of injunctive relief against the present property owners more than fifty years after Thorstrand Road was created is remote.

The status of Thorstrand Road as a private road has not significantly changed over more than six decades, even though further land divisions and other development activities have occurred that have led to further questions (numbered 2 through 4 above) about how such activities may or may not have affected the "private" status of Thorstrand Road.

I conclude that the public's right of access to Marshall Park via Thorstrand Road has not changed and that there is no such public right of access. Some nuances of this primary conclusion as it relates to other conveyances is discussed below.

In 1978, the City acquired the North Estate lands for expansion of Marshall Park, an acquisition that included a right of ingress and egress from University Avenue on the existing private roads (Thorstrand and its spur). Some have argued that this acquisition opened those private roads up to public travel to and from Marshall Park. However, that is not the case. Although there had been a consistent reservation of access rights on the private roads by the original owners for possible conveyance of access to future buyers of other parcels to be created, the City's acquisition documents do not evidence a broad conveyance to the City of public access on the private roads. Rather, the City received only "a perpetual easement in common with others for ingress and egress over the existing driveway . . . to the private concrete road [Thorstrand]; thence over the said existing private concrete road in the southwesterly direction to Highway 12, now known as University Avenue."

In 1980-81, CSM #3631(replaced by CSM #3633) was produced for clarification of this City acquisition, and the two separate lots (Lots 3 and 4) that were leased by the City back to the purchasers of the North Estate residential dwellings on the larger park property acquired by the City. Three notes on the CSM relate to the aforementioned "North Road", a 12-foot access strip on the City acquired lands, leading to the driveway and private concrete road described in the 1978 deeds to the City. Note 2 states: "Lessees of Lots 3 and 4 shall be responsible for the maintenance, repair and replacement of the 12-foot access strip across Lots 1, 2, 3 and 4." Note 4 states: "The use of the 12-foot access strip by the owner [City], successors and assigns of Lot 2 shall be limited to inspection, maintenance and emergency purposes." Note 5 states: "The owner of Lot 2 [City] and its invitees shall have superior rights to cross and recross the 12-foot access strip where located on Lot 2."

Use of this "North Road"/12-foot access strip by park users has been the subject of some extended debate over the years. The owners of the North Estate homes, located on the CSM Lot 3 and 4 parcels that are leased to them from the City, are responsible for maintenance of the access strip under the CSM Note 2, and they clearly desire to limit City use of the strip to the inspection, maintenance and emergency purposes stated in Note 3. However, the same lessees of Lots 3 and 4 also prefer a narrow interpretation of the superior public right (by the City's invitees) described in Note 5 to use this North Road access strip. The lessees have indicated previously that they do not object to some selected use of the access strip by their Thorstrand Road neighbors

and their guests, but they do not want other park users from Camelot Drive and beyond to gain Marshall Park access via the North Road access strip.

The City of Madison retains the underlying fee ownership of the "North Road" access strip, except where it crosses CSM Lot 1. The principal use of all of Lot 2, including the North Road access strip, is for public park purposes. The ability of the park using public to cross and recross this strip is unrestricted and superior to the access rights of the City's lessees. The unfettered use of the strip by park users in this area of Lot 2 is particularly necessary due to the presence of a substantial ravine that is evident from the topographical overlay detail on the attached map. Each contour represents a 2 foot deviation in elevation and any park users in the area of this ravine must use the "North Road" access strip, for their own safety and convenience. We further submit that it would be impractical and unfair for the City to allow use of the "North Road" access strip by only certain Thorstrand Road residents and guests approved by the City's lessees, but to prevent or deny its use by all other members of the public, regardless of how entry to it was achieved. That is not to say that the City condones unauthorized use of other private ways to obtain entry to the "North Road" access strip. However, the City is not the enforcer of access rights on private ways outside of the City-owned parklands.

It has been suggested by some that the City ownership of a cul de sac on the east end of Thorstrand Road and the parklands on the other end of Thorstrand and its short spur which leads to the "North Road" access strip to the City's parklands somehow legally opens up all of Thorstrand Road to the park using public. We find no recorded or other legal authority in support and, therefore, do not agree that it does. But, as stated above, the City also does not have any authority to patrol Thorstrand Road for violators.

I conclude that, as a practical and legal matter, the public using Marshall Park may use the 12 foot access strip (a.k.a., "North Road"). But neither this right nor other City ownership has transformed Thorstrand Road into a public road open to the public.

QUESTION TWO: INSTALLATION OF PUBLIC INFRASTRUCTURE ON AND LACK OF CITY SERVICES ON THORSTRAND ROAD

Likewise, City installation of underground public sewer and/or water mains has no effect upon the private status of the balance of Thorstrand Road. The City does have access to Thorstrand Road for purposes of providing emergency services and maintaining public infrastructure installed within the Thorstrand right-of-way. This access was acquired with the dedication of the cul de sac on the east end of Thorstrand for public road purposes in 1993, and with the subsequent extension of public water and sewer mains west of that dedicated cul de sac, within the Thorstrand private road right-of-way. However, with the exception of one CSM (#5915) on the west end and the dedicated public pedestrian, bicycle, water main and sanitary sewer easement discussed below, the water and sewer mains within the private, central portion of the Thorstrand Road right-of-way were installed without a formal easement document, as a result of verbal

permission given by the owners to the City Engineer. City refusal to collect trash and recyclables on this substandard-sized private street is consistent with its unavailability to the traveling public.

QUESTION THREE: PUBLIC ACCESS BY PRESCRIPTION OR ADVERSE USE

Has the public acquired access rights in crossing the vacant parcel located at 1814 Camelot Drive (Lot 7, Mendota Estates) by prescription or adverse use over 20 years or more, under the applicable statute? I conclude the public has not acquired such rights.

Sec. 893.28(3), Wis. Stats., provides on its face in material part that: "The mere use of a way over unenclosed land is presumed to be permissive and not adverse." We decline to offer an opinion as to whether the owners of said parcel may enclose it to prevent access by the public. These comments also apply to the above-mentioned Lot 1 of CSM #3633, and to the private Thorstrand Road and its spur.

QUESTION FOUR: ACCESS FROM CAMELOT DRIVE TO THORSTRAND ROAD

Can public access from Camelot Drive to Thorstrand Road occur via the existing 15-foot public pedestrian, bicycle, water main and sanitary sewer easement on the residential property at 1818 Camelot Drive (Lot 4, CSM #7083)? Although the answer to this secondary question may not be determinative of the principal question of public access from Camelot Drive to Marshall Park, it explains a portion of the puzzle.

Public access from Camelot Drive to the cul de sac on the east end of Thorstrand Road can occur via the existing 15 foot public pedestrian, bicycle, water main and sanitary sewer easement on the residential property at 1818 Camelot Drive. This does include a lawful connection between the easement, which shares the southwesterly portion of a private easement for pedestrian travel to the lake shown on Lot 1 of CSM #7083, as recorded in Vol. 173 of Records, at Page 45, as Document # 1263498, and the City-owned cul de sac on Thorstrand.³ Both the 15-foot easement and the cul de sac were dedicated to the City in 1993 by CSM #7083.

Despite the existence of this easement, there still is no public right of access from Camelot Drive to Marshall Park. There is a public pedestrian right-of-way between the 15-foot public easement across the property at 1818 Camelot Drive and the City's public cul de sac on Thorstrand. However, then there is a public pedestrian way gap from the northwestern edge of the cul de sac, along the balance of the private Thorstrand Road itself, all the way over to the City's parkland, Lot 2 of CSM 3633.

³ The prior recorded easement for pedestrian travel to the lake (Doc. # 1263498) is not for the benefit of the general public, as would have been required under existing Sec. 236.16(3), Wis. Stats. Instead, it was carefully reserved to certain purchasers of the individual private residential lots and their respective guests and invitees for lake access, but not for access by the general public. However, the northern end of the public easement acquired in 1993 overlaps with the southwesterly end of the private easement to the lake

If the City wants to establish a pedestrian right-of-way from Camelot Drive to Marshall Park through all of Thorstrand Road, as most likely would or should have been required at a minimum for any land subdivision in full compliance with applicable state and local subdivision requirements, it will likely now have to acquire such easement rights through this existing private road by eminent domain.

I conclude that there is a public pedestrian easement right-of-way from Camelot Drive to the cul de sac on the eastern end of Thorstrand Road, but this right of way does not extend westerly along Thorstrand Road to provide public access to Marshall Park.

QUESTION FIVE: FENCING REQUIREMENT IN GROUND LEASE AGREEMENTS

The Ground Lease Agreements between the City and the private owners of the North Estate homes in Marshall Park include the following provisions:

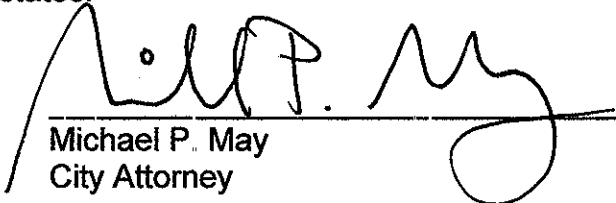
- Article VI - Obligations of Lessee, provides in Section B that: "The Lessee shall, at a minimum, be required to erect and maintain a standard forty-two (42) inch high, 2-rail, split-rail fence more or less along the boundary between the parklands and the demised [rental] lands."
- Section B further provides in material part that: "Should Lessee fail to erect said screening materials . . . , as set forth herein, . . . if such maintenance and repair is not undertaken by Lessee within ten (10) days after receipt of written notice, Lessor shall have the right to enter on the demised lands . . . and perform the necessary erection, . . . , the cost of which shall be added to monthly rent and borne by Lessee."
- Article V - Rights and Privileges of Lessor, Section 2, provides as follows: "All actions relating to policy determination, modification of this Lease, termination of this contract, and any similar matters affecting the terms of this Lease shall emanate from the Landmarks Commission, Board of Park Commissioners and Lessor's Common Council, or their successors and assigns."

The City Parks Division now desires to enforce the fencing requirement in the Lease. The Lessee argues, alternatively, that the fencing requirement was verbally waived by a former City Real Estate employee, that the parties had actually agreed to delete this requirement from the final draft of the Lease, and that the City's failure to enforce it over the past twenty-five years prevents its enforcement now. However, no former or current City employee has the legal authority to waive the Lease fencing provision. It is clear from the rights reserved by the City in the recorded Lease that any modification or change in the terms of the Lease, such as the alleged waiver of the fencing requirement, would have to be first duly authorized and approved by the Landmarks Commission, Board of Park Commissioners and Common Council, probably through an

adopted resolution. Otherwise, it would not be valid. It is also clear that the inclusion of the fencing requirement and the means to enforce it in the signed Lease, which was not limited by any expiration date, means that the parties did intend to include rather than delete it, and that it can still be enforced by the City. There have also been two negotiated and recorded addenda to the Lease which did not alter or otherwise affect the fencing requirement. All that is required to initiate the fencing requirement is the issuance of the requisite written notice from the City to the Lessees.

CONCLUSION

I conclude that Thorstrand Road remains a private road. While the public may have access to certain public easements as noted above, there is no full public access from Camelot Drive to Marshall Park. The City retains the right to enforce a fencing requirement in a lease of the North Estates.



Michael P. May
City Attorney

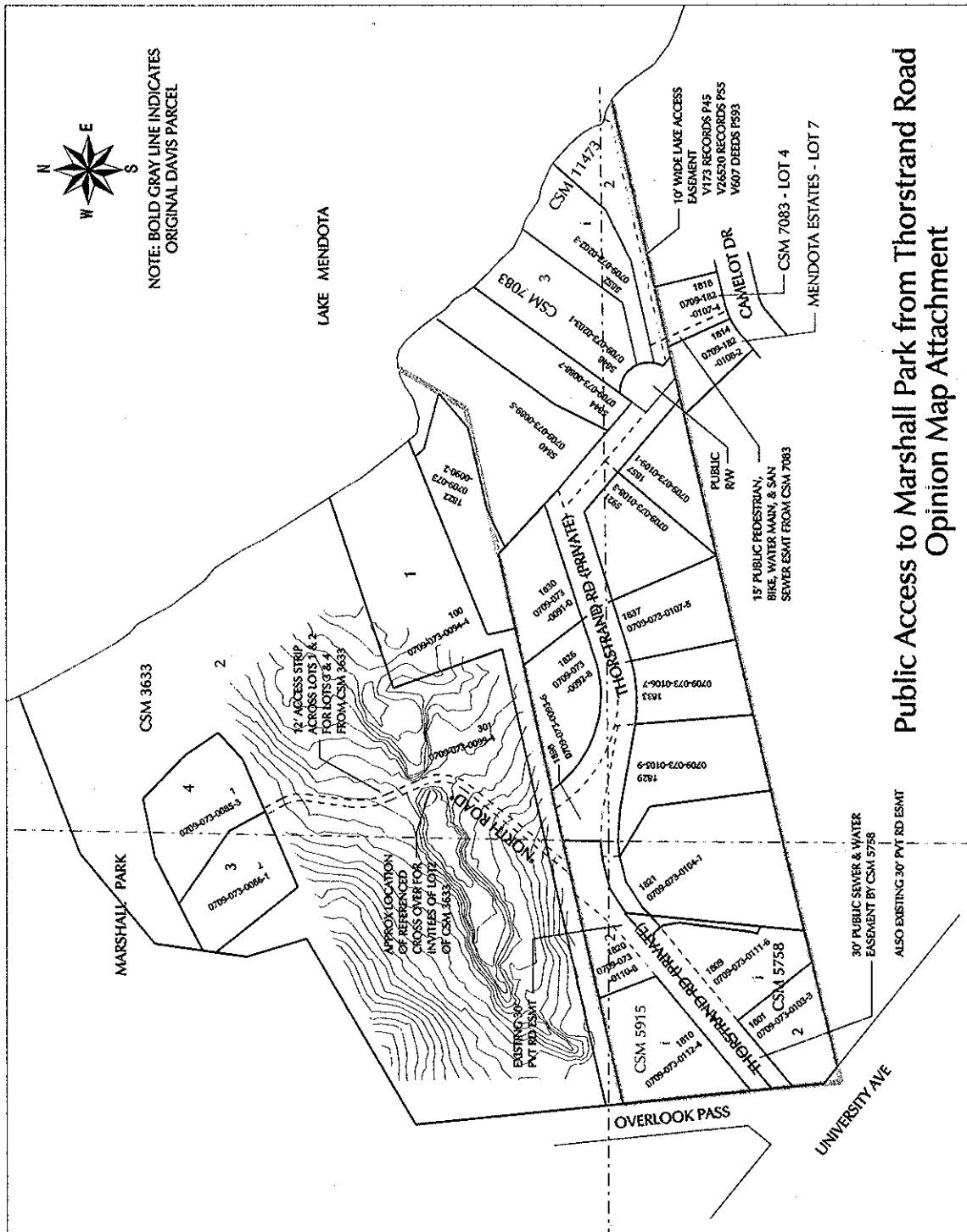
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CC: Mayor Dave Cieslewicz
All Alders
James P. Morgan, Parks Superintendent
Larry D. Nelson, City Engineer

SYNOPSIS: Public rights of access and private rights of property owners in the Marshall Park-Thorstrand Road area discussed.



NOTE: BOLD GRAY LINE INDICATES ORIGINAL DAVIS PARCEL



Public Access to Marshall Park from Thorstrand Road Opinion Map Attachment

30' PUBLIC SEWER & WATER EASEMENT BY CSM 5758
ALSO EXISTING 30' PVT RD ESMIT

15' PUBLIC PEDESTRIAN, BICYCLE, WATER MAIN, & SAN SEWER ESMIT FROM CSM 7083

10' WIDE LAKE ACCESS EASEMENT
V173 RECORDS P45
V26520 RECORDS P55
V607 DEEDS P553

LAKE MENDOTA

MARSHALL PARK

OVERLOOK PASS

UNIVERSITY AVE

THORSTRAND RD (PRIVATE)

CAMELOT DR

CSM 3633

CSM 7083

CSM 5915

CSM 5758

CSM 7083 - LOT 4

MENDOTA ESTATES - LOT 7

12' ACCESS STRIP
ACROSS LOTS 3 & 4
FOR LOTS 5 & 6
FROM CSM 3633

APPROX LOCATION
OF REFERENCED
CROSS OVER FOR
INVERTS OF LOT 1
OF CSM 3633

EXISTING 30' PVT RD ESMIT

30' PUBLIC SEWER & WATER EASEMENT BY CSM 5758

ALSO EXISTING 30' PVT RD ESMIT

15' PUBLIC PEDESTRIAN, BICYCLE, WATER MAIN, & SAN SEWER ESMIT FROM CSM 7083

10' WIDE LAKE ACCESS EASEMENT
V173 RECORDS P45
V26520 RECORDS P55
V607 DEEDS P553