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September 28, 2017

Via Email Patrick.McIntyre@tn.gov

[confirmation by U.S. Mail]

Mr. E. Patrick McIntyre, Jr.
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Tennessee Historical Commission
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Dr. Reavis L. Mitchell, Jr.
Fisk University
Office of the Dean
1000 17th Ave. North
Nashville, TN 37208-3051

Re: 2013 Tennessee Heritage Protection Act Waiver

Gentlemen:

The City is in receipt of your letters dated September 27, 2017. First, City and its legislative Council (the "City") have **not** filed any notice with the Commission withdrawing its September 13, 2017 Petition for Declaratory Order presently pending before the Commission. The City requests that its 2017 Petition be heard by the full Commission at its October 13, 2017 meeting or by an administrative judge or hearing officer sitting alone as authorized by Tennessee Code Annotated § 4-5-301(a) as soon thereafter as possible.

The City also withdraws its request that its 2013 Waiver Petition be heard using the proposed rules being considered by the Commission, either as stipulated rules or as Emergency Rules. The City and its legislative Council have tried to work cooperatively with the Commission to obtain a prompt and fair hearing on the City's 2013 Waiver Petition. We offered to stipulate to rules to apply to our petition even though we were not required to do so by law. Our offer was effectively rejected. It is evident that the Commission is not inclined to hear the City's 2013 Waiver Petition anytime in the near future.

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We understand that you now take the position that the Commission did not submit the City's 2013 Waiver Petition for a vote at its October 2016 meeting. However, we received a letter from Mr. McIntyre dated October 27, 2016 in which he stated unequivocally "I am informing you on behalf of the Commission that the petition filed by the City of Memphis to relocate the equestrian statue of Nathan Bedford Forrest has been denied." We assume that Mr. McIntyre alone did not deny the Petition in his capacity as Executive Director.

By letter dated October 20, 2016, the City demanded that the hearing on the City's 2013 Waiver Petition be conducted as a contested case under Tenn. Code Ann. § 4-5-301, *et seq.* as required by law. We did not receive a response to our request. We hereby reiterate our demand that the City's 2013 Waiver Petition be conducted as a contested case under Tenn. Code Ann. § 4-5-301, *et seq.* In such event, it is not necessary that the City's petition be heard by the full commission; rather, the City's 2013 Waiver Petition may be heard by an administrative law judge or hearing officer alone or in the presence of at least a quorum of the agency.

As you know, we also petitioned the Commission on November 4, 2016 for a declaratory order that the Commission's "2015 criteria" and the denial of the City's 2013 Waiver Petition based on such criteria were invalid. The Commission never convened a contested case hearing on the petition and did not issue a declaratory order invalidating the Commission's "2015 criteria" or denial of the City's 2013 Waiver Petition. Instead, the Commission unilaterally embarked on a process to codify criteria, which will take at least sixteen (16) months from the date the Commission was notified of its mishandling of the City's 2013 Waiver Petition.

The 2013 Act undeniably grants us a right to a hearing. We do not believe that the Commission can postpone a hearing on the City's 2013 Waiver Petition indefinitely. The City's 2013 Waiver Petition could have been heard at the Commission's February or June, 2017 regularly scheduled meetings, but it was not placed on the Commission's agenda at either meeting. We believe a court of competent jurisdiction would require the Commission to conduct a hearing within a reasonable time consistent with notions of fairness and due process.

You have also misconstrued the relief we requested in our November 4, 2016 Petition for Declaratory Order; we did not request new rules or that the new hearing on City's 2013 Waiver Petition be conducted under any rules or criteria—new or old. In fact, it is our position that there were no valid rules when the Commission heard our petition in October of 2016 and that any new hearing should be decided based on the lawful rules [or lack thereof] in effect at the time of the October, 2016 hearing. Moreover, the new hearing on City's 2013 Waiver Petition must be conducted as a contested case and must be decided "... based exclusively upon the evidence of record in the adjudicative proceeding and on matters

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officially noticed in that proceeding." Tenn. Code Ann. § 4-5-314 (d). It is also permissible for agency member's experience, technical competence and specialized knowledge to be utilized in the evaluation of evidence. *Id.*

Under the circumstances, the City and its legislative Council demand that the Commission hear the City's 2013 Waiver Petition as a contested case based solely on the evidence presented without the use of any rules or criteria on October 13, 2017 or at mutually agreeable date thereafter in late October, which can occur if the Commission recesses its October 13, 2017 regularly scheduled meeting to such a mutually agreeable date.

We demand that you advise us on or before the close of business on October 4th whether the matter will be heard by the Commission on October 13, 2017 as we have requested; otherwise we will be required to take appropriate legal action.

Very truly yours,

/s/ Allan J. Wade

Allan J. Wade

Cc:

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