

STATE OF NEW HAMPSHIRE

Superior Court
Case No. 217-2023-cv-00424

Merrimack, ss

ARNOLD ALPERT
and
MARY LEE SARGENT,

Plaintiffs

v

STATE OF NEW HAMPSHIRE,
Commissioner Sarah Crawford Stewart, and
Commissioner William Cass,

Defendants

Plaintiffs Memorandum of Law in Support of
Objection to Defendants' Motion to Dismiss

Now come the Plaintiffs, Mary Lee Sargent and Arnold Alpert, through counsel and respectfully submit this memorandum of law in support of their objection to the Defendants' (hereafter, collectively, "the State") motion to dismiss this declaratory judgment action for want of standing and based on a claim that the Court lacks authority to order one of the two forms of requested relief; that is, re-installation of the Elizabeth Gurley Flynn Marker, Historical Marker No. 278 (hereafter, "the Flynn Marker.).

In response and as detailed below, Plaintiffs assert that the State has mischaracterized the historical marker program as "discretionary" and "political" when the statutes in question and the published policies of the Department of Natural and Cultural Resources ("DNCR"), which should be considered admissions, do not invest Commissioner Stewart with unlimited discretion.

Instead, the Division of Historical Resources, a sub-division of the DNCR, must carefully analyze applications for historic markers along straightforward guidelines that must be interpreted and applied in good faith. None of the guidelines provide for the installation of a historic marker based on whether a political leader or interest group is “fond of” or dislikes the subject of the historic marker as the State’s motion suggests. The guidelines instead concern matters of historical accuracy, scholarship and relatedness to the location proposed for the installation. As a side note, the State cites Cul-H 206.01 for the proposition that Commissioner Stewart had the authority to waive all applicable rules and regulations. The cited rule, however, does not apply here. Cul-H 206.01 permits waiver of rules in response to a documented request and with reasoning supporting waiver that is in the public interest. There is no assertion that anyone requested a waiver of any rules in this matter and, certainly, a formal waiver of applicable standards was not alleged by Plaintiffs in their Complaint which is the governing source of facts the Court must consider in a motion to dismiss. Further, there is evidence that Stewart did not order the removal of the Flynn Marker, Governor Sununu did.

Finally, the State’s motion fails to distinguish between the standards for having a historical marker approved in the first place versus the much more limited standards that apply to the removal of a historic marker that has already been approved, which was the status of the Flynn Marker. The Flynn Marker was fully approved, fabricated and installed when the DOT was ordered to take it down.

According to the DNCR policies and guidelines, historic markers may only be removed if “damaged or ...deemed, with the passage of time, to be inaccurate, lack historical context, or that include references that could be seen as inappropriate.” The same policy also requires: “If the DHR staff recommends the retirement of an Historical Highway Marker that decision will be

discussed and recorded at an SHRC meeting in the official minutes of the meeting with appropriate documentation of the reason for retirement.”

https://www.nh.gov/nhdhr/markers/documents/051223_markers_policy.pdf (Last viewed on July 25, 2023). Plaintiffs assert that the SHRC (State Historic Resources Council) was not consulted and the reason(s) for removal were not recorded in SHRC meeting minutes. Complaint at ¶ 19.

Facts

The Plaintiffs have asserted in their Complaint that they participated in the historical marker program by first applying to have Elizabeth Gurley Flynn recognized on July 8, 2021. Complaint at ¶ 7. While other members of the public theoretically could have participated in the program, there is no assertion that anyone other than the Plaintiffs participated with respect to Ms. Flynn. The Plaintiffs, as distinguished from the general public, invested their time and effort to carefully research and document Ms. Flynn’s historic significance and to establish her connection to Concord, New Hampshire. See Complaint at ¶¶ 9 and 10. In addition, the Plaintiffs had to establish community support for the marker by gathering signatures on forms prescribed by the state. 20 signatures were required. The Plaintiffs submitted 40 signatures and could have submitted more. Complaint at ¶12. The efforts to carefully research and document the biography of Ms. Flynn, her connection to Concord and to gather the requisite number of signatures all took time and resources that the Plaintiffs invested in the effort to have the Flynn Marker approved. The State does not allege that other members of the public invested time and resources in the approval process.

The DNCR has a specific term to denote petitioners who seek the approval of historical markers that also distinguishes them from the public. They are called “sponsors.” The guidelines published on the DNCR web site are replete with references to this special category of

persons who apply to have historical markers commissioned. See

https://www.nh.gov/nhdhr/markers/documents/051223_markers_nominationguidelines.pdf at 5-

6. (last viewed October 31, 2023). It is the sponsors who are also specifically assigned the responsibility to organize dedication events and the Plaintiffs discharged this responsibility that was assigned to them, and not the public, on May 1, 2023. *Id.* at 6. See also, Complaint at ¶ 15.

Moreover, the Plaintiffs' efforts were successful in that the Historical Resources Division of DNCR approved the Flynn Marker application on or about December 10, 2021 and gave final approval to the wording of the marker via email dated March 29, 2022. Complaint at ¶14. The State does not assert that any other member of the public received notice of the State's tentative or final approvals of the Flynn Marker. The Flynn Marker was then fabricated and installed by DOT in the middle of April 2023. Complaint at ¶ 15. The Flynn Marker was formally unveiled on May 1, 2023. *Id.* At this point, all costs attendant to the manufacture and installation of the Flynn Marker that needed to be incurred can reasonably be assumed to have been incurred.

Two days after the Flynn Marker was installed and unveiled, Executive Councilor Joseph Kenney complained about its installation because of Ms. Flynn's affiliation with the American Communist Party. ¶ 17. No challenge was lodged by Councilor Kenney to the historic accuracy of the marker or to Ms. Flynn's connection to Concord, New Hampshire. Commissioner Stewart, consistent with the DNCR's published policy maintained on its website, explained to the Governor and Council at the meeting of May 3, 2023 that "The purpose of [historical markers] is not to commemorate heroes, the purpose is to provide a snapshot that the local community feels is of historic value." Transcript of May 3, 2023 Governor and Council proceedings. Complaint at ¶5. The signed petition requirement established the requisite support of the local community.

Plaintiffs have alleged that the Flynn Marker was removed on May 15, 2023 and is in storage. Complaint at ¶ 20. The Plaintiffs have *not* asserted that Commissioner Stewart made a decision to remove the Flynn Marker in her absolute discretion. This assertion of fact is disputed. To the contrary, Plaintiffs have asserted that the decision to remove the Flynn Marker was illegal as the Commissioner did not consult with the State Historic Resources Council nor did she have a reason for the removal of the Flynn Marker recorded in the minutes of the Council as required by her own policies. Complaint at ¶¶ 23 and 24. The State’s assertion that the Flynn Marker was removed by Commissioner Stewart who made a completely discretionary (or political) decision is not supported by the allegations of the Complaint and is an assertion of disputed fact.

The question of whether Commissioner Stewart made a completely discretionary decision to remove the Flynn Marker or whether her decision should legally have been guided by a good faith application of the relevant statutes and (improperly adopted) rules, after consultation with an expert body, the State Historical Resources Council, is also relevant to the question of taxpayer standing. Plaintiffs allege without challenge that they are each state taxpayers and local residents. Complaint at ¶¶ 1 and 2 and footnotes 2 and 3.

Finally, information obtained through a Right to Know Request received after the Complaint was filed indicates that Governor Sununu, and not Commissioner Stewart, ordered the DOT to remove the Flynn Marker.¹ If this is true, the State’s arguments about Commissioner Stewart’s discretion are not relevant.

¹ Plaintiffs may wish leave to amend their Complaint to include this fact if the Court considers it material. The Right to Know materials provided by the State include a text from Ben Wilson, the director of the Division of Historical Resources, to two other division employees that said, “Good morning. Just a heads up. The Governor had DOT remove the marker in the middle of the night last night....”

The R.S.A. 91-A response also calls into question the good faith basis for the factual and legal allegations made by the State in their Motion to Dismiss. None of the governing statutes indicate that the Governor or the Governor and Council have any proper role in approving historical markers or ordering their removal. If the quoted text message is true, the Governor's actions were highly illegal and the decision to remove the Flynn Marker was not made by Commissioner Stewart in an exercise of her discretion. The text likely shows that Stewart did not make the removal decision at all.

Argument

A. Taxpayer Standing

In Carrigan v. New Hampshire Department of Health and Human Services, 174 N.H. 362 (2021), the Court considered the parameters of “taxpayer standing” as that term was used in the recent amendment to Part 1, Article 8 of the New Hampshire Constitution. The plaintiff in Carrigan challenged the spending of an entire department of state government because it did not conform with plaintiff's good faith view of budgetary priorities. The Court rejected plaintiff's claims for standing as too broad and required taxpayer standing to be based on challenges to specific actions or conduct.

Unlike the plaintiff in Carrigan, Plaintiffs, who are taxpayers, have challenged the specific decision to remove the Flynn Marker two weeks after it was installed. The removal occurred on or about May 15, 2023. At the time of its removal, the State had already spent funds to fabricate the sign² and spent DNCR staff time to analyze and approve the application for the Flynn Marker and DOT staff time to install it. The removal and storage of the Flynn Marker out

² State markers are paid for by the DOT. Cooperative markers are paid for by their sponsors. https://www.nh.gov/nhdhr/markers/documents/051223_markers_nominationguidelines.pdf (last viewed October 31, 2023). The Flynn Marker is a state marker.

of the public's view rendered the time and expense to approve, fabricate and install the marker a complete waste. As well, the decision to order the removal of the Flynn Marker required the expenditure of further staff time and deployment of equipment to remove the physical marker.

B. Declaratory Judgment Standing

The State has also asserted that Plaintiffs did not suffer a legal injury sufficient to satisfy standing for a declaratory judgment because the Plaintiffs' injuries are indistinguishable from any other member of the public and because the removal decision they challenge was "the discretionary decision [] of an executive branch agency." Memorandum of Law at 9. By the latter, the State intends to raise concerns of justiciability.

Addressing the latter concern first, the historical marker program is governed and defined by five statutes: R.S.A. 227-C:4, 227-C:5, 227-C:13, 236:40, and 236:41. The legislature's intent with respect to these statutes is further informed by the state's Administrative Procedures Act codified at R.S.A. ch. 541-A. Rather than improperly intruding upon discretionary executive branch decision making, as the State asserts, the Plaintiffs simply ask the Court to enforce the duly enacted statutes that use the standards of care and scholarship reasonably inferable from these statutes.

To start with the obvious, none of the relevant statutes grant the DNCR Commissioner unfettered discretionary or what the State refers to as "political authority" to rule on the approval or removal of a historical marker.

The State does not suggest the DOT Commissioner exercised any discretion in this matter. Although the DOT Commissioner's duty to install historic markers upon the petition of 20 people appears mandatory, R.S.A. 236:41 makes clear that the DOT Commissioner cannot act without the approval of the Historic Preservation Office (another name for the Division of

Historical Resources of DNCR, R.S.A. 227-C:1, VIII). The DOT Commissioner's duty to consult with the Historic Preservation Office is clearly based on the expertise of that office. The DOT Commissioner must defer to the Historic Preservation Office about "approval of the marker, its location and its wording." R.S.A. 236:41. To be clear that the legislature did not intend to designate the approval of a marker as purely discretionary, the statute requires the Historic Preservation Office to "make any investigation needed to obtain information on the event to be commemorated and on the appropriate location for the marker, including consulting historians and holding public hearings." *Id.*

The duty to make factual, non-discretionary determinations is mirrored in the statutes that govern the DNCR side of historical marker approval. The legislature expressly required DNCR to engage in formal rulemaking and to adopt rules that govern the historical marker program. R.S.A. 227-C:5, XXII. Moreover, the DNCR Commissioner is directed and specifically required to seek ratification of proposed rules by the State Historical Resources Council. R.S.A. 227-C-5. The Commissioner of the DNCR has long ignored the requirement to promulgate rules.

The State Historical Resources Council is a commission appointed by the Governor and Council with specific expertise in historic preservation. Its public members must include "at least 3 of whom... qualified in the field of architecture, history and archeology; and the others shall be qualified in other fields including, but not limited to, law, real estate, planning, architectural history, and historic preservation." R.S.A. 227-C:13. It is clear the legislature intended the decisions of DNCR regarding the historical marker program to be fully informed by experts in the field. Plaintiffs are buttressed in their understanding of the legislative intent for the historical marker program by the program's own published guidelines that state:

The New Hampshire Historical Highway Marker Program is grounded in scholarship and interpretation, both of which it is recognized can change over time. New information may be discovered, adding context or proving previous interpretations to be inaccurate; cultural shifts occur, meaning once-accepted references or interpretation may become outdated. These changes may periodically require review and revision of existing markers. For these reasons, this policy addresses not only the erection of new markers, but also revisions and the possible permanent retirement of markers.

https://www.nh.gov/nhdhr/markers/documents/051223_markers_policy.pdf (last viewed October 31, 2023.).

Again, buttressed by the DNCR's own published policies that confirm Plaintiffs' arguments and understanding, historical markers are not subject to removal in the absolute political discretion of the DNCR Commissioner. As stated on the DNCR web site, removal of markers may occur:

[I]f they: 1. Contain errors of fact that can be documented with reliable sources 2. Are so damaged, deteriorated, illegible, unstable, or unsafe that the cost of repair would approach the cost of a new marker 3. Require refurbishment and have very brief texts, and lack historical context, such that their educational value is severely limited. Such markers, generally erected during the early years of the program do not meet the modern standards of the program.

https://www.nh.gov/nhdhr/markers/documents/051223_markers_policy.pdf (last viewed October 31, 2023). The Division of Historical Resources commits to notifying sponsors if markers are considered for retirement (removal). *Id.* This also underscores the special role and significance

the DNCR and its division accord to the citizens who go to the trouble to document the history and relatedness of proposed markers and to gather the necessary signatures. The Plaintiffs, though clearly acknowledged as sponsors of the Flynn Marker, were never notified of the DOT's intent to remove the marker.

The DNCR's published policies and guidelines are relevant to understand the State's own interpretation of the governing statutes. They are admissions. Even though the policies and guidelines do not have the force and effect of rules because they were not properly promulgated, R.S.A. 541-A:22, I ("No agency rule, including a form, is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired."), the State should not be permitted to argue against these interpretations of legislative intent, especially in the context of a motion to dismiss which is only designed to test the sufficiency of Plaintiffs' pleadings and entitlement to relief.

Finally, DNCR rules, like all other administrative rules are subject to approval by the Joint Legislative Committee on Administrative Rules (JLCAR) pursuant to R.S.A. 541-A:2 and A:13. The guidelines or policies of the DNCR regarding the historical marker program were not reviewed by JLCAR because they were never formally promulgated.

Rather than the Court being asked to improperly intrude on political or discretionary decision making by the Governor and his department heads as the State asserts in its Memorandum, Plaintiffs merely seek to enforce the statutes that were duly adopted by the legislature and became the law of our state. The statutes, with their emphasis on relying on people with expertise, make clear the historical marker program is not a political or discretionary program. It is a program informed by good scholarship and research which is designed "not to commemorate heroes, the purpose is to provide a snapshot that the local community feels is of

historic value.” Transcript of May 3, 2023 Governor and Council proceedings. Complaint at ¶5. The same sentiment expressed by Commissioner Stewart to the Governor and Council continues to be displayed on the DNCR web site: “DHR’s purpose in erecting markers is to educate the public about New Hampshire’s history, not to honor, memorialize, or commemorate persons, events, or places. Because Historical Highway Markers are not honorific in nature, they do not serve the same purpose as monuments, statues, memorial plaques, or war memorials.” https://www.nh.gov/nhdhr/markers/documents/051223_markers_nominationguidelines.pdf (last viewed October 31, 2023). Moreover, as a further admission, the DNCR claims that historical markers are approved by considering certain stated priorities that also indicate the approval process is not one of unbridled political discretion. *Id.*³

Standing is not determined by proving a threshold dollar value of monetary loss. Standing depends upon a plaintiff establishing that s/he suffered a potential injury distinct from an injury that may have been suffered by the public in general.

“[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress.” Duncan v. State, 166 N.H. 630, 642-43 (2014) (citations omitted [in Teeboom]). “In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect.” Actavis

³ The priorities are:

“[M]arker proposals that meet the following criteria are more likely to be selected for production: • Has the potential to educate the public • Addresses a topic that the program has not extensively covered • Addresses the history of a community that has been marginalized or underrepresented • Reflects a breadth of historical significance that extends beyond the locality, preferably demonstrating statewide or national significance • Contributes to a more equitable geographic distribution of markers.” *Id.*

Pharma, 170 N.H. at 215, 167 A.3d 1277 (quotation omitted [in Teeboom]).

“Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest.” Id.

(quotations omitted [in Teeboom]). “Rather, the party must show that its own rights have been or will be directly affected.” Id. (quotation omitted [in Teeboom]).

Teeboom v. City of Nashua, 172 N.H. 301, 307, (2019). Teeboom was an actual standing case. It was not based on taxpayer standing under the amendment to Part 1, Article 8 of the New Hampshire Constitution.

Plaintiffs would not have standing were they simply arguing that they are deprived of the right to see the Flynn Marker and learn about Elizabeth Gurley Flynn and her birthplace of Concord. This deprivation, though significant, is clearly one that Plaintiffs share with the general public. This is not what the Plaintiffs have alleged. Nor, is this a case in which the Plaintiffs generally challenge the fidelity of an agency to the Constitution or the law. The Plaintiffs’ challenge is to the very specific actions that resulted in the removal of the approved Flynn Marker.

The Plaintiffs have alleged that they spent time and energy filing for approval of the Flynn Marker, documenting their scholarship and organizing a dedication ceremony. They also established substantial local community support for the Flynn Marker by gathering 40 local signatures. (Neither the Governor nor Councilor Kenney live in Concord where the Flynn Marker was displayed.) Plaintiffs are the sponsors of the Flynn Marker. These facts all mitigate

in favor of finding the Plaintiffs have both personal standing and standing as taxpayers and for these reasons, the Plaintiffs request the Motion to Dismiss be denied.

C. Reinstallation of the Marker

The State has made several allegations with respect to the Court's authority to order the reinstallation of the Flynn Marker. These allegations rely upon the State's assertion that a purely discretionary decision to remove the Flynn Marker was made by Commissioner Stewart and was a matter of politics (or a lack of "fondness" for Elizabeth Gurley Flynn). In the preceding sections, Plaintiffs have explained that the decision to remove the Flynn Marker was not committed to Commissioner Stewart's unlimited discretion, if she made the decision at all. She should have acted in good faith and her decision should have been based on scholarship, not politics. It is premature to address the propriety of a particular remedy at this juncture without first determining the nature of Commissioner Stewart's decision making. Plaintiffs do not waive their right to argue for reinstallation. They have alleged a legal harm and are constitutionally entitled to a legal remedy. Part 1, Article 14, New Hampshire Constitution. The Plaintiffs, however, suggest it is more productive of the Court's time and that of the litigants to further pursue this issue after standing is decided.

D. Violation of Due Process

Similarly, Plaintiffs do not waive their arguments regarding a violation of their due process rights as protected by Part 1, Articles 2 and 12 of the New Hampshire Constitution. If the Court determines that Commissioner Stewart made the removal decision and that there are no limits to Commissioner Stewart's discretion, there probably can be no violation of due process. However, if Plaintiffs' assertions regarding the limits on Commissioner Stewart's powers are correct, this issue then becomes ripe for discussion and further briefing.

E. A New Issue Crystallized by the State's Memorandum of Law

While this was only suspected at the time of filing, the State's Memorandum of Law makes clear that the Plaintiffs sponsored historical marker was removed because Elizabeth Gurley Flynn was associated with the American Communist Party. This content-based removal decision raises significant questions about Plaintiffs' First Amendment rights and the parallel rights protected under Part 1, Article 22, New Hampshire Constitution. These issues cannot be determined in response to a motion to dismiss. At the least, summary judgment after discovery is merited. The Plaintiffs reserve the right to amend their Complaint to include this cause of action.

In Shurtleff v. City of Boston, __ U.S. __, 142 S. Ct. 1583 (2022), the Supreme Court considered the implications of the city of Boston's refusal to permit the flying of a ceremonial flag on the city's flagpole because of the content or message displayed by the flag. The flag was religious in nature. Boston had previously allowed approximately 50 other private, non-governmental flags to have been flown on the offending flagpole. The organizers who sought display of their "Christian flag" sought reversal of summary judgment. The Supreme Court reversed the finding of summary judgment. The factually dependent question which prevented the grant of summary judgment against Shurtleff was whether the private "Christian flag" constituted "government speech" which would have justified Boston's decision to disallow the raising of the flag. 142 S.Ct at 1589.

"The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?" *Id.*

Boston did not have a governing written policy. Its program appeared to openly invite private citizens to participate in flying flags. Here, despite a law requiring it to do so, DNCR did not have formally promulgated rules. Plaintiffs contend DNCR's illegally established policies and guidelines are rules that were not promulgated and thus are of no legal import. DNCR's web site is an open invitation to private citizens to participate in the historical marker program.

The Court in *Shurtleff* noted that “[t]he City of San Jose, California, for example, provides in writing that its “‘flagpoles are not intended to serve as a forum for free expression by the public,’ ” and lists approved flags that may be flown “ ‘as an expression of the City's official sentiments.’ ” 142 S. Ct at 1593. Plaintiffs are unaware of any similar disclaimer contained in any of the DNCR materials, whether properly promulgated or not. As well, Commissioner Stewart's explanation of the purpose of the program, to document history and not to honor the subjects of the historical markers, is indicative of non-governmental speech which may not be subject to content limitations under *Shurtleff*.

Conclusion

For the foregoing reasons, the Plaintiffs request the Court deny the State's motion to dismiss after scheduling a hearing at which the parties may be heard. In the alternative, Plaintiffs request the opportunity to amend their Complaint.

Respectfully submitted,
Mary Lee Sargent and Arnold Alpert, Plaintiffs
By their Counsel,
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Certificate of Service

I certify that a true and exact copy of the foregoing was served upon all counsel of record through the Court's electronic filing system this 7th day of November, 2023.

/s/ Andru Volinsky