

TENNESSEE HISTORICAL COMMISSION

IN RE: CITY OF MEMPHIS

PETITION FOR DECLARATORY ORDER PURSUANT TO TENNESSEE CODE
ANNOTATED SECTION 4-5-223 and 4-5-224

To: E. Patrick McIntyre, Jr.
Executive Director and
State Historic Preservation Officer
2941 Lebanon Road
Nashville, TN 37214

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TN HISTORICAL
COMMISSION

Pursuant to Tennessee Code Annotated § 4-5-224, the City of Memphis hereby petitions the Tennessee Historical Commission (the "Agency") for a declaratory order as to the invalidity and applicability of the Agency's Rule/Criteria for Waivers under the Tennessee Heritage Protection Act of 2013 purportedly adopted by a parliamentary vote of the Agency on October 16, 2015 (the "Rule"). In support of its Petition, Petitioner alleges and will establish the following facts:

1. Pursuant to the Tennessee Heritage Protection Act of 2013 (the "Act") no statue, monument, memorial, nameplate, plaque, historic flag display, school, street, bridge, building, park, preserve, or reserve which has been erected for, or named or dedicated in honor of, any historical military figure, historical military event, military organization, or military unit ("Historical Military Memorial"), and is located on public property, may be renamed or rededicated. Tenn. Code Ann. § 4-1-412 (a) (2).

2. The Act also prevents any statue, monument, memorial, nameplate, or plaque which has been erected for, or named or dedicated in honor of certain specified Wars ("War Memorial") from being relocated, removed, altered, renamed, rededicated, or otherwise disturbed.

3. The Act expressly permits any entity exercising control of public property on which an item, structure or area described in Tennessee Code Annotated §4-1-412(a) is located to petition the Tennessee historical commission for a waiver of the Act's restrictions.

4. The Act requires that a petition for waiver shall be in writing and shall state the reason, or reasons, upon which the waiver is sought. The Commission is authorized to grant a petition for waiver, if a majority of the commission members present and voting approve the petition at any regularly scheduled meeting of the commission.

5. The commission is also authorized to include reasonable conditions and instructions to ensure that any items, structures, or areas are preserved to the greatest extent possible.

6. The Commission is an Agency under the Tennessee Uniform Procedures Act. The preamble to the 1969 Act of the General Assembly that greatly expanded the role of the Commission describes it as "the official agency for the preservation and conservation of Tennessee's heritage...." Public Acts of 1969, Chapter 98. See also Tenn. Op. Att'y Gen. No. 87-104 (June 18, 1987).

7. The Commission's website indicates that the Tennessee Historical Commission is an independent state agency, attached to the Tennessee Department of Environment and Conservation for purposes of administration.

8. The Commission is required by Tennessee Code Annotated § 4-11-103 to adopt rules for the transaction of business. In the related context of conducting a review of state structures that may be of historical significance before such structures were demolished, altered or transferred, the General Assembly required the Commission to use standards of the secretary of interior or "other criteria adopted in accordance with the Uniform Administrative Procedures Act, compiled in chapter 5 of [Title 4 of Tennessee Code Annotated].

9. The Commission also fits the definition of an agency under the Uniform Administrative Procedures Act because it was required by the Act to make rules and was authorized to determine the legal rights and privileges of a party in contested cases concerning waivers of the Act's restrictions,

including the power to adopt reasonable conditions and restrictions.

10. Any party who seeks a waiver to rename or rededicate a Historical Military Memorial or to relocate, remove, alter, rename, rededicate, or otherwise disturb an Historical War Memorial is given the statutory right to petition the Commission in writing for a waiver and to state the reasons for the proposed action in the waiver petition.

11. The Act requires the Commission to consider the Petition and the reasons given for the proposed action by the Petitioner. The Commission may grant or deny the Petition. The Act does not authorize the Commission to prevent consideration of a waiver petition or to prejudge the reasons given for a waiver through the use of preordained and preemptive rules and criteria.

12. Any meeting at which the Commission considers a written petition for a waiver under the Act is a proceeding in which the legal rights or privileges of a party to rename or rededicate a Historical Military Memorial or to relocate, remove, alter, rename, rededicate, or otherwise disturb an Historical War Memorial are at issue. Any such meeting is therefore a contested case under the Uniform Administrative Procedures Act, since the Commission is deciding the propriety of the reasons stated for the waiver in the Petition.

13. The Act does not specify any clearly defined criteria for the Commission to use in granting or denying Petitions for Waiver, which makes any meeting at which the Commission considers a written petition for a waiver a contested case under the Uniform Administrative Procedures Act, compiled in chapter 5 of [Title 4 of Tennessee Code Annotated].

14. The Commission's Waiver Criteria adopted October 16, 2015 is a statement of general applicability that is intended to implement law by establishing criteria for the granting or denial of Waivers authorized by the Act.

15. The Commission's Waiver Criteria adopted October 16, 2015 is not an Emergency Rule under Tennessee Code Annotated § 4-5-208.

16. The Commission's Waiver Criteria is not a general policy statement or a statement of internal agency procedures that are substantially repetitious of existing law, because the Act does not

specify any criteria, clearly defined or otherwise, for the Commission to use in granting or denying Petitions for Waiver.

17. The Commission's Waiver Criteria adopted October 16, 2015 is invalid pursuant to Tennessee Code Annotated § 4-5-216 which provides that any agency rule not adopted in compliance with this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose. See also *Heritage Early Childhood Dev. Ctr., Inc. v. Tenn. Dep't of Human Servs.*, 2009 WL 3029595 (Tenn. Ct. App. 2009); Tenn. Op. Atty. Gen. No. 10-09, 2010 WL 376305.

18. The Commission's Waiver Criteria as a statement of general applicability that implements law is an Agency Rule that must be preceded by notice and a public hearing in the manner prescribed by Tennessee Code Annotated §§ 4-5-201,-202.

19. It is undeniable that Commission Waiver Act Criteria Nos. 12 and 13 were not preceded by notice and hearing as required by the Uniform Administrative Procedures Act, compiled in chapter 5 of [Title 4 of Tennessee Code Annotated], since those criteria were added to previously disseminated criteria by impromptu motions of "Judge Tipton" and "Mr. Matthews" at the October 16, 2015 Meeting. Indeed, Judge Tipton's motion appears to have been designed to prejudge a waiver by the City of Memphis to relocate the Nathan Bedford Forrest Statute before a Petition for a waiver could be filed by the City and before any reasons therefor were presented to the Commission.

20. The Commission's Waiver Act Criteria is vague and ambiguous.

21. The rights and privileges of the City of Memphis are affected by the Commission's Waiver Criteria, since that criteria was the sole basis for the Commission's denial of Petitioner's Petition under the Act to Relocate the Equestrian Statue of Nathan Bedford Forrest presently located in Memphis, Tennessee.

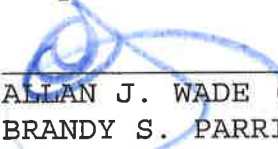
22. Section 4-5-225 of Tennessee Code Annotated provides that a declaratory judgment shall not be rendered by a court of law concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order.

WHEREFORE PREMISES CONSIDERED PETITIONER REQUESTS THAT:

1. The Commission immediately issue a declaratory order invalidating its Waiver Criteria adopted October 16, 2015 for failure to comply with the Uniform Administrative Procedures Act, compiled in chapter 5 of [Title 4 of Tennessee Code Annotated] and invalidating any action denying the Waiver Petition of the City of Memphis in reliance on such Waiver Criteria.

2. Alternatively, that the Commission discharge its statutory duty to convene a contested case hearing pursuant to Section 4-5-223 (a)(1) of Tennessee Code Annotated to consider this Petition for a declaratory Order.

Respectfully submitted,

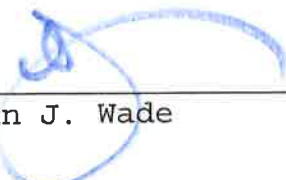


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CERTIFICATE OF SERVICE

I certify that I forwarded a copy of the foregoing document to the following individuals by U.S. mail, postage prepaid, this the 4th day of November 2016:

Mr. Max Fleisher, Esq.
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312 Rosa L. Parks Avenue, 2d Floor
Nashville, TN 37243



Allan J. Wade



TENNESSEE HERITAGE PROTECTION ACT OF 2013 (PC75)

WAIVER ACT CRITERIA (Adopted October 2015)

Non-exclusive Criteria:

1. The proposed change should service the public interest.
2. The proposed change should not have any commercial overtones.
3. The proposed change should have a reasonable relationship to the site.
4. The proposed change should have strong support from local residents.
5. The proposed change should not be duplicative of other nearby site names.
6. The proposed change should be in good taste, without derogatory or defamatory implications.
7. The proposed change should conform to the flavor of the existing names in the area.
8. The proposed change should not detract from the commemoration of the war or historical military figure (as described in the statute) previously commemorated.
9. The proposed change should not have significant economic impact.
10. The proposed change should not cause confusion for visitors interested in the site.
11. The proposed change should not diminish the historic integrity of the property.
12. A historic site on the National Register of Historic Places is not subject to a waiver.
13. A condition that should be satisfied before granting a waiver that contemplates relocation of a monument or statue is a determination by the Commission that the new location is appropriate.

FEDERAL PROGRAM REPORT

Dr. Mitchell called upon Mr. McIntyre for a report on the Federal Historic Preservation Program (Attachment #6). Mr. McIntyre mentioned highlights from the report and asked if there were any questions.

TENNESSEE HISTORICAL COMMISSION FOUNDATION

Carrington Montague was recognized as a member of the Foundation and as a significant contributor towards preservation of Civil War battlefields. A meeting of Foundation members will be held soon to plan for next year. Mr. McIntyre noted that the Foundation recently received contributions of several hundred dollars in memory of Sherry Kilgore, who had donated \$1,000 to the Foundation a few months before she died. He suggested that Commissioners consider the Foundation when they are making end-of-the year charitable donations.

TENNESSEE HERITAGE PROTECTION ACT

Mr. McIntyre referred to the copy of the proposed Tennessee Heritage Protection Act Criteria that had been emailed to each member (Attachment #7). This criteria was previously introduced at the October 2013 Commission meeting in Chattanooga but not voted on. There has been considerable press and inquiries from the public with regard to the Nathan Bedford Forrest statue in Memphis. To date, no applications for a waiver to the Heritage Protection Act have been submitted on any issue. Mr. Elliott proposed the addition of the following additional criterion to the draft document: "The proposed change should not diminish the historic integrity of a property." Judge Tipton suggested the addition of the following criterion: "any property on the National Register of Historic Places is not subject to a waiver." Ms. Moore seconded.

Mr. Matthews suggested inclusion of this criterion: "A condition that should be satisfied before granting a waiver that contemplates relocation of a monument or statue, is a determination by the Commission that the new location is appropriate."

Motion

Mr. Elliott moved, and his motion was duly seconded, that the review criteria of the Tennessee Heritage Protection Act of 2013 set forth in Attachment #7 be adopted, along with the additional criteria suggested by him, Judge Tipton, and Mr. Matthews as quoted in the preceding paragraph. Motion Carried.