STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Neal Kurk, et al.

v.

City of Manchester

Docket No. 216-2019-CV-00501

ORDER

Petitioners have brought this action seeking declaratory and injunctive relief. The case arises out of the planned installation of surveillance cameras on Elm Street in Manchester. The City of Manchester has moved to dismiss, arguing the issue is not ripe for adjudication and that petitioners lack standing. Petitioners object. The Court held a preliminary injunction hearing on July 9, 2019. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

The Manchester Police Department, with the approval of the Mayor and Board of Alderman, currently plans to install three permanent surveillance cameras in the area of City Hall that will monitor Elm Street to the north and south. The cameras will transmit a live feed of their recordings to the Manchester Police Department's dispatch office. Recordings will be saved for two weeks.

In 2006, the New Hampshire Legislature passed RSA 236:130. That statute provides, in pertinent part:

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> I. In this subdivision, "surveillance" means the act of determining the ownership of a motor vehicle or the identity of a motor vehicle's occupants on the public ways of the state or its political subdivisions through the use of a camera . . . that by itself or in conjunction with other devices or information can be used to determine the ownership of a motor vehicle or the identity of a motor vehicle's occupants.
>
> II. Neither the state of New Hampshire nor its political subdivisions shall engage in surveillance on any public ways of the state or its political subdivisions.
>
> . . . .
>
> V. Any person violating the provisions of this section shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.

Petitioners have brought this action seeking to prevent the installation of the cameras, arguing their use will violate the provisions of RSA 236:130.

Analysis

The City first argues that this matter is not ripe for consideration as the cameras have not been installed and thus no violation of the statute has occurred. The Court disagrees. "The distinguishing characteristic of [a declaratory judgment action] is that it can be brought before an actual invasion of rights has occurred. It is intended to permit a determination of a controversy before obligations are repudiated and rights invaded." Portsmouth Hosp. v. Indemnity Ins. Co. of North America, 109 N.H. 53, 55 (1968). "The remedy of declaratory judgment affords relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between the parties." Benson v. New Hampshire Ins. Guar. Ass'n, 151 N.H. 590, 594 (2004). Therefore, the Court finds that petitioners may properly pursue relief prior to the actual violation of the statute in question.

"However, the ability to obtain a declaratory judgment before an invasion of rights has occurred does not obviate the standing requirement that the controversy involve adverse interests that are not based upon hypothetical facts." Carlson v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, Inc., 170 N.H. 299, 303 (2017). The City argues none of the petitioners have standing to bring this action. Petitioners object, arguing both taxpayer standing and traditional common law standing.

"[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). "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." State v. Actavis Pharma, Inc., 170 N.H. 211, 215 (2017). "Rather, the party must show that its own rights have been or will be directly affected." Id.

As to common law standing, the Court finds petitioners' argument is largely based on a misreading of RSA 236:130. When construing a statute's meaning, the Court first examines its language, ascribing "the plain and ordinary meanings to words used." Garand v. Town of Exeter, 159 N.H. 136, 141 (2009). The Court does not look beyond the words to determine legislative intent if the language of the statute is clear and unambiguous, and will construe all parts of a statute together to avoid an unjust or absurd result. Id. (citing Formula Dev. Corp. v. Town of Chester, 156 N.H. 177, 178–79 (2007)). "The legislature is not presumed to waste words or enact redundant provisions

and whenever possible, every word of a statute should be given effect." Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008). The Court also "presume[s] that the legislature does not enact unnecessary and duplicative provisions." State v. Gifford, 148 N.H. 215, 217 (2002). Finally, the Court "interpret[s] statutes in the context of the overall statutory scheme and not in isolation." State v. Balliro, 158 N.H. 1, 4 (2008).

Petitioners argue that RSA 236:130 prohibits the installation of cameras that "can be used" to determine the identity of a motor vehicle's occupants. However, the Court finds their reliance on that particular language is misguided. The "can be used" phrase modifies the word "camera,"[1] and serves to define the mechanisms by which surveillance in violation of the statute can be achieved. The statute explicitly defines "surveillance" as "the *act of determining* the ownership of a motor vehicle or the identity of a motor vehicle's occupants." RSA 236:170, I (emphasis added). It is therefore not enough that the City install a camera that "can be used" to identify the occupant of a vehicle; someone must actually review the recording and make the identification.

That being said, the Court agrees with petitioners that the simple act of a government employee recognizing a vehicle or its occupants, without taking additional steps such as running a license plate through dispatch, constitutes a violation of the statute as written. The Court further agrees that it is virtually inevitable that in reviewing the footage generated by the cameras, a government actor[2] will, given enough time, recognize someone in a car on Elm Street, even if by accident. In doing so, that

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[1] Though omitted as irrelevant for purposes of this order, the statute also applies to "other imaging device[s] or any other device, including but not limited to a transponder, cellular telephone, global positioning satellite, or radio frequency identification device." RSA 236:170, I.

[2] It has been represented that the stored footage will be subject to right-to-know requests under RSA 91-A, and therefore may also be reviewed by members of the public. However, the statute only prohibits the state and its political subdivisions from engaging in surveillance.

individual will have "determin[ed] the . . . identity of a motor vehicle's occupants on the public ways of the state or its political subdivisions." RSA 236:130, I. Nevertheless, the Court finds that petitioners lack common law standing in this case.

Petitioners' argue they have standing because they "are likely to have their identifying information concerning their vehicle captured by the Elm Street surveillance cameras planned by the City." (Pls.' Obj. Mot. Dismiss at 6.) However, as set forth above, the mere capture of identifying information is not made illegal by the statute. Instead, petitioners must articulate that they will personally be identified by a City employee reviewing the footage.

Petitioners argue that the use of the cameras will "inevitably and inherently cause officers reviewing the live feed to immediately identify some motorists where the officer is familiar with the motorist, a reality that is not uncommon in a mid-sized City." (Compl. at 10.) As articulated, this is exactly the type of "generalized wrong allegedly suffered by the public at large" that does not confer standing. See Actavis Pharma, Inc., 170 N.H. at 215. Even assuming the truth of their argument, the petitioners have failed to articulate any basis to believe that they personally will be identified. Therefore, the Court finds that petitioners' allegations are simply too speculative and generalized to confer standing.

However, the Court finds that petitioners Carla Gericke and John Slattery, as property owners in Manchester, have taxpayer standing. New Hampshire recently amended its constitution to include the following language:

> [A]ny individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or

> constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

N.H. Const. Part I, Article 8. Petitioners have alleged that the City has or will spend approximately $15,000 of taxpayer funds to purchase and install the cameras in question, which will result in the potential violation of RSA 236:130. The Court finds this is sufficient to confer standing on these two petitioners. That being said, the Court finds the petitioners have failed to establish the right to preliminary injunctive relief.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade, 122 N.H. 314, 316 (1982). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015). In order to obtain preliminary injunctive relief, the moving party must generally demonstrate: (1) a likelihood of success on the merits; (2) that "there is an immediate danger of irreparable harm to the party seeking injunctive relief"; and (3) that "there is no adequate remedy at law." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "[T]he granting of an injunction is a matter within the sound discretion of the court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Dupont, 167 N.H. at 434.

With respect to irreparable harm, petitioners argue that, absent preliminary relief, their identifying information will be captured by the City's cameras. (Petr's.' Obj. Mot. Dismiss at 6.) As noted earlier, this is not a violation of the statute. However, even interpreting petitioners' claim as including the identification of motorists as prohibited by the statute, equitable relief is unavailable as the harm petitioners identify is simply a

violation of a criminal statute. It was long ago held by the New Hampshire Supreme Court that "[t]he equity powers of the court are not often, if ever, invoked or used to restrain or suppress the commission of crimes and misdemeanors, either as a substitute for the remedy by prosecution for the penalty affixed to the offense, or to obviate the necessity of repeated prosecutions." City of Manchester v. Smyth, 64 N.H. 380, 380 (1887). "The court will not interfere by injunction . . . to prevent the violation of a criminal statute when the violation does not constitute a public nuisance." New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co., 90 N.H. 368, 371 (1939). Other jurisdictions are in accord. See United States v. Zenon, 711 F.2d 476, 479 (1st Cir. 1983) ("Though a court of equity should be reluctant to enjoin the commission of a crime . . . , nonetheless injunctive relief is appropriate where the prosecution of the criminal charge is not an adequate remedy, as when the conduct is creating a widespread public nuisance or a national emergency."); Whitaker v. Prince George's County, 514 A.2d 4, 9 (Md. 1986) (finding courts will not "enjoin the further continuance or prevention of threatened illegal acts" merely because they are criminal, but where "the acts complained against constitute a nuisance or a danger to the public health and public welfare and a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may . . . grant the relief sought by the injunction"); State v. H. Samuels Co., Inc., 211 N.W.2d 417, 419–20 (Wis. 1973) (finding "a court of equity will not enjoin a crime because it is a crime," but where criminal acts also cause damage, equity will grant relief "not because the acts are in violation of the statute, but because they constitute in fact a nuisance").

Petitioners have not articulated any harm that would arise from a violation of the statute aside from the fact that a crime will have occurred. Petitioners have not made any allegation of public nuisance, and the facts of this case do not support any such argument. Petitioners' general claims of privacy are unconvincing; the information that will be captured by the cameras—the faces of individuals driving on a public way in Manchester and the license plate numbers of their vehicles—is public and in plain view of every other individual traveling on the same road.

Furthermore, the statute, as drafted by the legislature, provides for a set penalty. Violation of the law constitutes a violation-level offense if committed by a natural person, and a misdemeanor if committed by any other person. RSA 236:130, V. It is therefore apparent that the legislature deemed these criminal penalties to be an adequate remedy. Had the legislature contemplated private equity actions to combat violations of the statute, it could have expressly provided for such relief, as it has in other statutes. See, e.g., RSA 664:14-a, IV(b) ("Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper.").

For the foregoing reasons, the Court finds petitioners have failed to establish a danger of irreparable harm and the lack of an adequate remedy at law. Accordingly, petitioners' motion for preliminary injunctive relief is DENIED. Moreover, respondent's motion to dismiss is GRANTED as to petitioners Neal Kurk and Holly Seal.

SO ORDERED.

August 12, 2019

Tina L. Nadeau
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/13/2019