

STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DIVISION
Docket No. 216-2019-cv-00501

CARLA GERICKE
63 Durette Court
Manchester, NH 03102

and

JOHN “BRINCK” SLATTERY
77 Durette Court
Manchester, NH 03102

v.

CITY OF MANCHESTER
One City Hall Plaza
Manchester, NH 03101

**PETITIONERS’ MOTION FOR SUMMARY JUDGMENT SEEKING A
DECLARATORY JUDGMENT PURSUANT TO RSA 491:22**

NOW COME Petitioners Carla Gericke and John “Brinck” Slattery (collectively, the “Petitioners”) and respectfully move for summary judgment seeking a declaration, pursuant to RSA 491:22, stating that the Manchester Police Department’s planned use of surveillance cameras on Elm Street will violate RSA 236:130 because the cameras can and will cause the Department to determine the ownership of a motor vehicle or the identity of a motor vehicle’s occupants. Alternatively, if this Court is not inclined to grant summary judgment in Petitioners’ favor at this stage, Petitioners will proceed to discovery on the nature and implementation of Manchester’s planned use of surveillance cameras on Elm Street, including on the degree to which the Department and individual officers will be identifying individual motorists.

INTRODUCTION

As this Court concluded on Page 4 of its August 12, 2019 Order, (i) “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 [RSA 236:130] as written”; and (ii) “it is virtually inevitable that in reviewing the footage generated by the cameras, a government actor will, given enough time, recognize someone in a car on Elm Street, even if by accident.” Notwithstanding this Court’s statement that the Department’s plan will inevitably violate the law, the Department has publicly stated that it will continue to implement its plan—a plan that ultimately will subject the Department and its individual officers reviewing surveillance footage to significant liability. *See* RSA 236:130, 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.”). The Department has shown no willingness to enforce RSA 236:130 or its penalties despite its obligation to do so.

To be clear, Petitioners are not seeking in this Motion preliminary or permanent injunctive relief in which Petitioners would need to establish irreparable harm or an inadequate remedy at law. These elements of injunctive relief—which this Court concluded Petitioners could not satisfy in its August 12, 2019 Order—are not at issue in this Motion. Rather, this Motion seeks only, consistent with this Court’s April 12, 2019 order, a declaration under RSA 491:22 stating that the Department’s plan will violate RSA 236:130. *See Portsmouth Hosp. v. Indem. Ins. Co.*, 109 N.H. 53, 55 (1968) (“The distinguishing characteristic of the [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.”) (emphasis added). As this Court has already concluded that this case is ripe and that Petitioners Gericke and Slattery have taxpayer standing, the question of whether a declaratory judgment should issue is effectively the only remaining question in this case. *See* Aug. 12, 2019 Order, p. 2 (“[T]he Court

finds that petitioners may properly pursue relief prior to the actual violation of the statute in question.”).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. This summer, the Manchester Police Department, with the approval of the Mayor and Board of Aldermen, plans to set up three permanent surveillance cameras in the area of City Hall. The surveillance cameras will look north and south on Elm Street. See Exhibit D to Affidavit of Gilles Bissonnette (“Bissonnette Aff.”) (Paul Feely, “Paul Feely’s City Hall: Aldermen, Craig, Police Commission All Back Downtown Cameras,” *Union Leader* (Apr. 28, 2019)); City Answer ¶ 10 (admitting this fact).

2. As part of this plan, the City plans to contract with PELMAC Industries, Inc. to purchase three surveillance cameras at a total cost of approximately \$14,424 (including accessories and installation). These three surveillance cameras consist of two Axis Q6125-LE PTZ network cameras and one Axis Q6000-E Mk II PTZ network camera. See Exhibit C to Bissonnette Aff. (Apr. 22, 2019 Email and attachments); City Answer ¶ 11 (admitting these facts).

3. The Manchester Police Department and its officers will monitor and observe the images captured by these surveillance cameras 24-hours-a-day through a live feed transmitted to the Department’s dispatch office. See Exhibit D to Bissonnette Aff. (Paul Feely, “Paul Feely’s City Hall: Aldermen, Craig, Police Commission All Back Downtown Cameras,” *Union Leader* (Apr. 28, 2019)); Exhibit G to Bissonnette Aff. (Pat Grossmith, “City Will Press on with Street Cam Plan; ACLU Says Doing So is ‘Committing Crime,’” *Manchester Ink Link* (Aug. 13, 2019)); City Answer ¶¶ 10, 11 (admitting that a live feed will be transmitted to the Department’s dispatch office, and that the images will be regularly monitored).

4. Though the City has stated that its intent is not to monitor traffic, these surveillance cameras will nonetheless capture motorists' faces, license plates, and other identifying information concerning motorists. See City Answer ¶ 12 (not denying this fact). As Chief Capano informed the Mayor and Board of Aldermen on April 16, 2019, the surveillance cameras "can basically see far and go close up to keep an eye on what is going on Elm Street." See Exhibit D to Bissonnette Aff. (Paul Feely, "Paul Feely's City Hall: Aldermen, Craig, Police Commission All Back Downtown Cameras," *Union Leader* (Apr. 28, 2019)). Chief Capano also stated to the *Union Leader* that, with the surveillance cameras, "we can monitor the north and south ends of Elm Street in both ways." *Id.* He added: "[T]he cameras will have the ability to zoom in, zoom out, and pan around for better views These particular cameras we are looking (at) are very high quality." *Id.*

5. The surveillance cameras being purchased by the City are sophisticated with significant zooming functionality. See City Answer ¶ 13 (not denying this fact). The two Axis Q6125-LE PTZ network surveillance cameras have the following specifications:

[It] offer[] discreet and unobtrusive surveillance. Its clever dome design effectively conceals the direction of the lens, and its integrated, automatically adaptable IR LED illumination enable surveillance in total darkness (up to 200 m (656 ft) or more depending on the scene). The camera provides full scene fidelity and sharp images both above and below the horizon thanks to Sharpdome technology

See Exhibit C to Bissonnette Aff. (Apr. 22, 2019 Email and attachments). Axis Communication's promotional video of this surveillance camera shows its ability to zoom in on people's faces from far away, as well as its ability to view images clearly in the dark. See <https://www.youtube.com/watch?v=eIGoQbkHIb0> (promotional video of Axis Q6125-LE PTZ network camera functionality entitled, in part, "Discrete surveillance 24/7"). The one Axis Q6000-E Mk II PTZ network camera being purchased by the City has the following specifications:

[It] offers a full 360° overview and high detail in one click together with high pan/tilt/zoom precision when integrated with any outdoor-ready camera in the AXIS Q60 Series or AXIS Q61 Series Its four 2-megapixel sensors provide a panoramic field of view over large areas. The standard lens can be replaced with either a 6 mm or a 16 mm lens, reaching HDTV 1080p resolution to focus[] on an area of specific interest. The four camera heads offer flexible positioning with tilt functionality for maximum adjustment, according to the desired scene.

See Exhibit C to Bissonnette Aff. (Apr. 22, 2019 Email and attachments); see also <https://www.youtube.com/watch?v=txAJjSm7jOU> (promotional video of Axis Q6000-E Mk II PTZ network camera functionality).

6. The Department will store the recordings from these surveillance cameras for fourteen days. See Exhibit D to Bissonnette Aff. (Paul Feely, “Paul Feely’s City Hall: Aldermen, Craig, Police Commission All Back Downtown Cameras,” *Union Leader* (Apr. 28, 2019)).

7. The City has acknowledged that the surveillance footage would be subject to Chapter 91-A—while also subject to any limitations for law enforcement records under *Montenegro v. City of Dover*, 162 N.H. 641 (2011). See City Answer ¶ 14. Thus, the public likely will gain access to these recordings and could take steps to identify motorists.

8. Petitioner Carla Gericke lives in Manchester, New Hampshire. She was a candidate for New Hampshire Senate in District 20 during the 2016 and 2018 general elections. As a candidate and private citizen activist, Ms. Gericke has been an advocate for privacy rights. When the City of Manchester announced its plans to install surveillance cameras on Elm Street, Ms. Gericke organized a protest against this plan that was held on April 9, 2019 at City Hall Plaza. Ms. Gericke explained: “As a Manchester resident, I am concerned about the escalating Orwellian police actions that are taking place without any oversight or input from the community.” See Exhibit A to Bissonnette Aff. (Mark Hayward, “‘1984 Is Not an Instruction Manual’ - Activists Rally Against Police Video Surveillance in Downtown Manchester,” *Union Leader* (Apr. 9,

2019)). As Ms. Gericke’s Facebook page for the event states: “Concerned about the increased Orwellian policing happening in Manchester? Worried about deadly shootouts, chemical weapon deployments, school lockdowns, and now cameras downtown WITHOUT ANY PUBLIC DISCUSSION? Join me at a rally on Tuesday 4/9 at 5PM. I’ll bring the soapbox, you bring your passion! We can, and should, do better!” See Exhibit B to Bissonnette Aff. (Facebook Protest Event Page). This event drew approximately 40 protesters. Ms. Gericke owns her home on Durette Court in Manchester and, thus, she pays property taxes that go directly to the City and the surveillance cameras that it plans to place on Elm Street. Accordingly, Ms. Gericke has standing to challenge the use of these surveillance cameras as a taxpayer. See N.H. Const. Pt. I, art. 8 (“The public ... has a right to an orderly, lawful, and accountable government. Therefore, any 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”). Moreover, as a Manchester resident, Ms. Gericke travels regularly on Elm Street. See Petitioners’ Verif. Petition ¶ 2. She is also greatly concerned about how Manchester’s use of surveillance cameras may chill First Amendment activity in the areas in which they are located.

9. Petitioner John “Brinck” Slattery lives in Manchester, New Hampshire. He is a communications director for a technology startup company in the City. Mr. Slattery owns his home on Durette Court in Manchester and, thus, he pays property taxes that go directly to the City and the surveillance cameras that it plans to place on Elm Street. Accordingly, Mr. Slattery has standing to challenge the use of these surveillance cameras as a taxpayer. See N.H. Const. Pt. I,

art. 8 (“The public ... has a right to an orderly, lawful, and accountable government. Therefore, any 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 ...”). Moreover, as a Manchester resident, Mr. Slattery travels regularly on Elm Street. Mr. Slattery’s office is on Hanover Street and, thus, he drives every day of the week on Elm Street to get to and from work. Mr. Slattery is very concerned about the City’s proposed use of these surveillance cameras, as he values personal liberty and believes that the police should not treat residents and visitors as criminal suspects. He strongly believes that law enforcement agencies have accumulated too much surveillance technology and leeway to use it indiscriminately against people who are not suspected of having committed a crime. *See* Petitioners’ Verif. Petition ¶ 3.

STANDARD

To prevail on a motion for summary judgment, the moving party must “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party “must put forth contradictory evidence under oath, sufficient ... to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial ...” *Phillips v. Verax*, 138 N.H. 240, 243 (1994) (citations and quotations omitted). A fact is material if it affects the outcome of the litigation under the applicable substantive law. *Palmer v. Nan King Rest., Inc.*, 147 N.H. 681, 683 (2002). In considering a party’s motion for summary judgment, the evidence

must be considered in the light most favorable to the non-moving party, together with all reasonable inferences therefrom. *Sintros v. Hamon*, 148 N.H. 478, 480 (2002).

ARGUMENT

Consistent with New Hampshire’s unique “live free or die” history of protecting the privacy of its citizens against government intrusion, the General Court enacted a law in 2006 sponsored by Representative Neal Kurk—RSA 236:130—that was intended to end the use of camera surveillance on public roadways in order to help ensure that the government does not create a “surveillance state.” Under RSA 236:130, with some exceptions not applicable here, a government entity in New Hampshire cannot “engage in surveillance on any public ways of the state or its political subdivisions.” RSA 236:130, II. “Surveillance” is defined, in part, as “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.” RSA 236:130, I.¹ Under RSA 236:130, V, “[a]ny 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.”

The City’s planned use of surveillance cameras will violate RSA 236:130 because the City’s scheme—which will capture motorists’ vehicles, faces, and license plate information—will inevitably and inherently cause officers reviewing the live feed to “determin[e] the ownership of

¹ In *State v. Njogu*, 156 N.H. 551 (2007), the New Hampshire Supreme Court concluded that the terms “transponder, cellular telephone, global positioning satellite, or radio frequency identification device” in RSA 236:130 modified the phrase “any other device.” Thus, according to the Court, to satisfy the definition of “any other device” under RSA 236:130, the device must—like a “transponder, cellular telephone, global positioning satellite, or radio frequency identification device”—have the ability to track or monitor the movement of a motor vehicle via a signal transmitted through or from the device. Because the issue here concerns “cameras” specifically enumerated in RSA 236:130—not the phrase “any other device” in RSA 236:130—the limitation imposed on the definition of “any other device” in *Njogu* is inapplicable here.

a motor vehicle or the identity of a motor vehicle’s occupants” under RSA 236:130, especially where the reviewing officer is familiar with the motorist (a reality that is not uncommon in a mid-sized City). For example, when a reviewing officer sees his neighbor, the Mayor, or the police chief driving by in the regularly-viewed live feed, that officer will have—whether deliberately or not—identified the motorist in violation of RSA 236:130. This reviewing officer will have committed—whether intentionally or not—a violation-level offense, and the Department will have committed a misdemeanor offense. *See* RSA 236:130, V. The Department, as it must, appears to acknowledge that its monitoring of camera footage *will* permit “incidental recognition” of some motorists’ identities. *See* Answer ¶ 28. However, RSA 236:130 contains no exemption for identifying motorists “incidentally.”

Indeed, as this Court explained in its August 12, 2019 Order, (i) “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 [RSA 236:130] as written”; and (ii) “it is virtually inevitable that in reviewing the footage generated by the cameras, a government actor will, given enough time, recognize someone in a car on Elm Street, even if by accident.” This Court’s correct analysis settles the matter. However, notwithstanding this Court’s statement that the Department will “inevitably” violate the statute, the Department has publicly stated that it still plans to install these surveillance cameras—a decision that needlessly exposes the Department and its individual officers to significant liability.

It is likely because police officers viewing such surveillance recordings have the ability to instantly identify a motorist that—as the legislative history makes clear—all participants in the legislative process believed that RSA 236:130 effectively acted as a total bar on surveillance cameras capturing motorist information. As former Department of Safety Assistant Commissioner

Earl Sweeney told the Senate Committee on Transportation and Interstate Cooperation on April 5, 2006 when this law was being considered:

There is one aspect of the bill that will probably not effect law enforcement but could affect local police I should mention. Some states, some police departments set up cameras to monitor, for example, the downtown business district to detect or deter burglaries, vandalism, drug dealing. Since this is general use rather than case specific directed at a particular individual or a particular crime at a specific time and place, if this bill passes we do not believe that this usage would be allowed in New Hampshire without specific legislation at a future time legalizing it.

So I think for example, if the police in Lebanon decided they want to put those cameras in they would have to come to the legislature to get a bill that would authorize this

Exhibit E to Bissonnette Aff., at LEG060, 066 (2006 Legislative History of RSA 236:130).

Assistant Commissioner Sweeney further described the scope of RSA 236:130 to the *Union Leader* in 2013:

“[The police] can put (surveillance cameras) up in London. They can have a camera on every street corner, but that is illegal in New Hampshire,” Sweeney said, if the license plate and vehicle occupants are identifiable

Police can't set up video surveillance "just because there was a lot of misbehaving" on a certain street, Sweeney said, adding the highway surveillance law is not widely known.

Exhibit F to Bissonnette Aff. (Nancy West, “NH Laws on Public Surveillance Read in Different Ways,” *Union Leader* (June 22, 2013)) (emphasis added) (“In 2013, Manchester Police Chief David Mara said his department does use surveillance cameras on public ways without a warrant, but only rarely. ‘If that’s the law, nobody’s ever heard of it,’ Mara said of RSA 236:130, which is known as Highway Surveillance Prohibited.”).

In short, in setting up these surveillance cameras, the City of Manchester is doing the very type of surveillance that RSA 236:130 was intended to prevent. As Petitioner Representative Kurk stated before the Senate Transportation and Interstate Cooperation Committee:

[This] is a bill that basically says that the state shall not take general surveillance pictures of the citizens traveling on the state highways. The purpose is to avoid becoming like

London and perhaps New York City where there are surveillance cameras [There are over] 300 of them throughout the city [of London] taking pictures of people, not because of anything that has happened. Not to investigate a crime but just to have a record. I think that is not the way New Hampshire should go and the House agreed as did the [House] Transportation Committee All [this bill] does is that it says that there can be no generalized surveillance

Exhibit E to Bissonnette Aff., at LEG053-54 (2006 Legislative History of RSA 236:130) (emphasis added).

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that:

- A. The Court, pursuant to RSA 491:22, issue a judgment declaring that the City of Manchester's planned use of surveillance cameras on Elm Street will violate RSA 236:130 because the cameras can and will cause the Department to determine the ownership of a motor vehicle or the identity of a motor vehicle's occupants; and
- B. Alternatively, if this Court is not inclined to grant summary judgment in Petitioners' favor at this stage, order the parties to file a joint case structuring plan addressing discovery on the nature and implementation of Manchester's planned use of surveillance cameras on Elm Street, including on the degree to which the Department and individual officers will be identifying individual motorists; and
- C. The Court issue any such other relief as may be just and proper.

Respectfully submitted,

Petitioners Carla Gericke and John "Brinck" Slattery,

By and through their attorneys with the American Civil Liberties Union of New Hampshire Foundation,

/s/ Gilles Bissonnette

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August 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Summary Judgment has been served electronically on August 29, 2019.

/s/ Gilles Bissonnette
Gilles Bissonnette