

# North Carolina Historical Commission Meeting Minutes

November 23, 2020

## *Conference Call*

The North Carolina Historical Commission (NCHC, Commission) met via Zoom conference call on Monday, November 23, 2020. In attendance were the following commissioners: David Ruffin, Chair; Dr. Mary Lynn Bryan; Samuel B. Dixon; Dr. Valerie A. Johnson; Dr. Malinda Maynor Lowery; B. Perry Morrison Jr.; Susan Phillips; W. Noah Reynolds; and Barbara B. Snowden. Absent were commissioners Dr. David C. Dennard and Dr. Darin Waters.

Other staff members of the North Carolina Department of Natural and Cultural Resources (DNCR) in attendance included: Dr. Kevin Cherry, Deputy Secretary of the DNCR, Director of the Office of Archives and History (OAH), and Secretary of the NCHC; Phil Feagan, General Counsel, DNCR; Sarah Koonts, Director of the Division of Archives and Records (DAR); Michelle Lanier, Director of the Division of State Historic Sites and Properties (DSHSP); and Parker Backstrom, OAH administrative assistant and Recording Secretary of the NCHC.

Also, in attendance were: Karen Blum, Special Deputy Attorney General, North Carolina Department of Justice (DOJ), and General Counsel to the NCHC in matters dealing with the relocation or removal of Confederate monuments; and Matt Zeher, Video Producer for the DNCR, who facilitated the virtual transmission of the video conference call.

### **Call to Order and Opening Remarks**

Chairman Ruffin called the meeting to order at 1:01 P.M. He called roll and noted that a quorum was present.

### **Conflict of Interest Statement**

Mr. Ruffin asked each Commission member, their having had a chance to review the agenda in advance of the meeting, whether any might have a real or perceived conflict of interest pertaining to the business that would come before the Commission this day. No such concerns were expressed, and the meeting went forth.

### **Approval of Minutes**

Chairman Ruffin asked whether anyone had any changes they wish made to either set of minutes sent to them for review in advance of today's meeting. Regarding the minutes from the NCHC's September 3, 2020 meeting, Ms. Phillips asked that the title 'Professor' be replaced by the honorific 'Ms.' With no other changes requested, Mr. Morrison moved acceptance of that set of meeting minutes pending that change. That motion was seconded by Dr. Bryan and a roll call vote to accept was unanimous.

Mr. Morrison then moved to accept the meeting minutes from the September 23, 2020 meeting of the NCHC as written. That motion was seconded by Ms. Phillips, and a roll call vote to carry the motion was unanimous.

### **Former Commissioner Millie M. Barbee Resolution**

Chairman Ruffin reminded the commissioners that a letter to Governor Cooper, asking him to bestow upon former Commission chair and long-time commissioner Millie M. Barbee the title of Commissioner Emeritus, was approved by the Commission at its last meeting. He also noted that Mr. Morrison had requested that that letter be adapted into a resolution that could be sent to Ms. Barbee on behalf of the Commission, recognizing her years of exemplary service to the NCHC. Ms. Snowden commended the resolution, a draft copy of which was sent to commissioners in advance of the meeting, and moved acceptance of it. The motion was seconded by Mr. Morrison and accepted by a unanimous roll call vote.

### **Accessions and Deaccessions from State History Museums and State Historic Sites**

Dr. Cherry referred commissioners to the annotated list of items recommended by the OAH Accessions Committee (OAHAC) for accessioning into and deaccessioning out of state collections. A copy of this list, which was sent to the commissioners prior to the meeting, has been placed in the file for this meeting. He proposed presenting all accessions for the Museum of History (MOH), the Mountain Gateway Museum, the North Carolina Maritime Museums (NCMMs), and the DSHSP as a single slate for approval, and provided a very brief overview of the items. With no questions about any of the items, Dr. Bryan moved approval of the recommendations from the OAHAC. The motion was seconded by Dr. Johnson and carried on unanimous roll call vote.

The only deaccessions recommended are from the NCMMs. After a brief overview of the items on the list and a notation that all would be deaccessioned via auction, Ms. Phillips moved acceptance of the OAHAC recommendations and Mr. Morrison seconded the motion. Typically, said Dr. Cherry, deaccessions have been handled by two separate votes—the first approving the item for deaccession, the second approving the method of disposal. But addressing a question from Mr. Morrison, Dr. Cherry concurred that because the recommended method of disposal is uniform for all items, a single vote on both questions would suffice in this case. The roll call vote to deaccession the items by way of auction was carried unanimously.

Ms. Koonts was given the floor to run through the four groupings of archival materials that the DAR is requesting the NCHC approve for deaccessioning from the state archives. She explained that the deaccession process for these materials, all from the Office of the Governor pertaining to institutionalized prisoners, would transfer the legal custody of the records from the state archives back to the Governor's Office. The physical custody, she said, would remain with the archives. No discussion was forthcoming, so Mr. Morrison moved approval of the deaccession request. The motion was seconded by Ms. Snowden, and a roll call vote to carry the motion was approved unanimously.

### **Pasquotank County Confederate Monument Issue**

Mr. Ruffin directed the commissioners' attention to a petition pertaining to the removal of a confederate monument in Pasquotank County. The petitioner in this case is the North Carolina Division of Sons of Confederate Veterans (SCV), Incorporated. The petition, directed to the DNCR, asked the DNCR for a declaratory ruling on the confederate monument. DNCR Secretary

Susi Hamilton, responding on behalf of the department, denied the request for a declaratory ruling, citing precedent. The commissioners were provided with copies of both the petition and Secretary Hamilton's response letter in advance of the meeting.

Mr. Ruffin stated that although advised by legal counsel that the Commission may enter into closed session to receive legal advice from counsel on the matter, he prefers that discussion about the NCHC's decision whether to consider the SCV's request for a ruling and request for relief be conducted in open session, so as to maintain transparency on the deliberative process. This sentiment was echoed by Mr. Dixon, and no objection to proceeding in open session was heard from any member of the Commission. Mr. Dixon thereby moved that the NCHC waive its right to enter into closed session to discuss the Pasquotank County confederate monument issue. The motion was seconded by Dr. Bryan and carried by unanimous roll call vote.

The NCHC's legal counsel, Karen Blum, was given the floor. She introduced herself and stated that as general counsel to the NCHC on matters dealing with the removal or relocation of confederate monuments, the legal opinions she would offer are hers as counsel to the Commission and do not necessarily represent those of the attorney general's office. She stated for the record her understanding that the Commission opted to waive its right to discuss the petition filed by the SVC and receive legal advice in closed session.

Ms. Blum laid out a framework for subsequent discussion, explaining the basics of the petition submitted to the DNCR, explaining the statutes that pertain to confederate monuments, what parties can petition the Commission, and described what options are available to the Commission in this situation. She explained that on July 13, 2020, the Pasquotank County Board of Commissioners voted to remove the Pasquotank Confederate Soldiers Monument, located near the county courthouse in Elizabeth City. She confirmed that the Secretary of the DNCR received a petition on September 22, 2020 for a declaratory ruling regarding the applicability of N.C.G.S. 100-2.1 to the Pasquotank Confederate Soldiers Monument. As explained, Secretary Hamilton denied the petitioner's request on October 21, 2020 because it was directed to the DNCR, and because it requested relief from the NCHC, despite being directed to the DNCR. In the Secretary's letter of denial, she stated that the NCHC is an independent advisory and regulatory body with independent rule making authority, and that the matter was inappropriately directed to the DNCR. But the Secretary forwarded the petition to the NCHC for its consideration.

Ms. Blum explained that because the petition for declaratory ruling has already been denied by the DNCR, in the opinion of Ms. Blum, the matter is "dead." That said, she advised that the NCHC, if it so chooses, consider this petition, as it opted to do with the handful of citizens' petitions it received several years ago asking the NCHC to remove the Silent Sam statue on the campus of the University of North Carolina at Chapel Hill.

Ms. Blum explained that in the Pasquotank County matter the party requesting relief is the Colonel William F. Martin Camp 1521 SCV and the North Carolina Division of the SCV, hereafter referred collectively as the SCV. The Colonel William F. Martin Camp claims to be the legal successor in interest to the United Confederate Veterans and claims a reversionary interest in the Pasquotank County monument. She noted that nowhere in the petition is it alleged that the monument is state-owned.

The SCV, said Ms. Blum, is asking the NCHC to schedule an oral hearing with a briefing schedule. It also wants the NCHC to acknowledge that Pasquotank County is a political subdivision of the state and therefore subject to the provisions of the Cultural History and Artifact Management

Patriotism Act of 2015, also known as N.C.G.S. 100. The SCV is also seeking a declaratory ruling that the state or any political subdivision of the state must seek approval of the NCHC prior to relocation or removal of a monument from public property.

Special Deputy Attorney General Blum then explained what the Cultural History and Artifact Management Patriotism Act of 2015 says, and what authority it gives the NCHC in matters of monument removal. G.S. 100-2 says that a monument may not become the property of the state or be placed on state property unless it is approved by the North Carolina Historical Commission. Another statute under that chapter, G.S. 100-2.1(a), states that a monument owned by the state may not be removed, relocated, or altered without the approval of the North Carolina Historical Commission. G.S. 100-2.1(b) puts forth limitations on the removal of “objects of remembrance” from “public property,” not limited to state-owned property. In that statute an object of remembrance is defined as including monuments or a display of permanent character commemorating an event, person or military service in North Carolina History. So, the statute says an object of remembrance “on public property may not be permanently removed,” it can only be relocated, whether temporarily or permanently. There are some exceptions, though, and these exceptions are taken outside G. S. 100-2.1 in its entirety. Those exceptions are for highway markers, objects of remembrance owned by private parties on public property where there is a legal agreement, or an object of remembrance which a building inspector or similar official determined poses a threat to public safety.

Ms. Blum posed the rhetorical questions, what does all of this mean, and who is permitted to petition the NCHC? To petition the NCHC you must be a person aggrieved by an administrative action, as required under the Administrative Procedure Act. A person aggrieved is defined as a “person or group of persons of common interest directly or indirectly affected substantially in his or her or its person, property, or employment by an administrative decision.” As it pertains to the other request put forth in the petition, that for a declaratory ruling, she added that the Administrative Procedure Act says “on request of a person aggrieved, an agency shall issue a declaratory ruling as to the applicability to a given state of facts of a statute administered by the agency.”

Regarding how the NCHC may deal with these requested actions, she noted there is precedent to which the NCHC can refer. In 2013, the North Carolina Court of Appeals ruled on the matter of *Historical Preservation Action Committee and the North Carolina Division of SCV versus the City of Reidsville, North Carolina Department of Cultural Resources, North Carolina Department of Transportation (DOT), and the United Daughters of the Confederacy, North Carolina Division*. That case involved a confederate monument that was situated in the middle of a traffic roundabout in the city of Reidsville. Originally erected by the United Daughters of the Confederacy (UDC), the monument was struck by a vehicle and partially toppled. The toppled soldier and the remaining base of the monument were subsequently removed by the city. In that case the Historical Preservation Action Committee (HPAC) and the North Carolina Division of SCV petitioned the North Carolina Department of Cultural Resources (DCR) for a declaratory ruling for improper removal of the monument. HPAC claimed it suffered an economic taxpayer and aesthetic injury, and the SCV claimed to be a legal successor in interest to the United Confederate Veterans and claimed a diversionary interest.

It was found that the petitioners lacked standing in the matter, and the DCR argued that the petitioners suffered no injury that the DCR could fix by a favorable ruling. There were appeals and eventually the North Carolina Court of Appeals ruled that the groups held no economic standing, and showed no proof of any kind of lowered land value or decreased business activity. More importantly, the Court said that the petitioners had no standing to challenge the disposition of public property because the removal was not the result of actions taken by the DCR or North

Carolina Department of Transportation. The North Carolina Court of Appeals also said that there was no standing to challenge aesthetic injury, even to an environmental plaintiff, much less a plaintiff seeking judicial review of an agency decision.

Applying that precedent to the Pasquotank County case, the SCV is claiming taxpayer standing and aesthetic injury. However, nothing in the petition before the NCHC says the SCV groups are aggrieved by the action of a state agency. Contrarily, the document says that they were aggrieved by the vote of the Pasquotank County Board of Commissioners.

So, it is in Ms. Blum's opinion as the attorney for the NCHC that neither of the SCV groups has standing to bring the matter before the North Carolina Historical Commission. Even if the SCV had standing, the NCHC could offer no remedy. The SCV contends that according to G.S. 100-2.1, the state or any political subdivision of the state must seek approval of the NCHC prior to removal or relocation of a monument from public property. However, in Ms. Blum's opinion, that is not what the cited statute says. Rather, G.S. 100-2 says that monuments cannot become or be placed on state property without NCHC permission, and that monuments owned by the state cannot be removed or relocated without NCHC permission. Again, she said, there is no allegation in the petition that the monument is state-owned, nor is there an allegation in the petition that the removal was an undertaking of the state.

As stated, the SCV groups contend that counties are political subdivisions of the state, therefore, they say, the statute must apply to counties also. However, Chapter 153A lays out the right of counties to own their own property. The general statutes also allow county boards of commissioners to execute the rights and duties of the counties. Therefore, in her opinion, the NCHC does not need to approve the removal of the Pasquotank County Confederate Soldiers Monument in this case.

Concluding her analysis, Ms. Blum opened the floor to questions. Mr. Morrison asked Ms. Blum to confirm his understanding from her summary that: 1. the SCV does not have standing to bring this "petition"; 2. that the monument in question was never erected on state property and is not state-owned, so the NCHC has no authority over the monument, and; 3. that the monument is county property, and as such the county has the right to either erect it or take it down. Ms. Blum replied that as to his first two points, she believes that the SCV holds no standing, and even if it did, she does not think this "petition" is properly before the Commission because the Commission cannot "fix" what the petitioners are asking be fixed.

The SCV is asking the NCHC to issue a declaratory ruling, and claims that G.S. 100-2.1 applies to political subdivisions of the state as well, regarding its right to bring this issue before the North Carolina Historical Commission. But Ms. Blum disagrees with that interpretation of the statute. She reemphasized that Chapter 100 states that matters that deal with the giving of monuments to the state, or the placement of monuments on state property, or the removal of a state-owned monument, may be brought before the NCHC. She reemphasized that there are specific statutes dealing with counties and their boards of commissioners owning property and the rights of those entities to control their own affairs. Therefore, she concludes that the "petition" is not properly before the NCHC.

Mr. Morrison, himself an attorney, offered a simplified concept of "non-standing" for the edification of others by explaining it as a party not having the "right" to ask for relief. Ms. Blum concurred with this explanation. Additionally, she said, the SCV groups would have to be persons aggrieved, and case law defines having standing and being a person aggrieved as essentially the same thing.

Mr. Morrison asked Ms. Blum about the phrase in G.S. 100-2.1 referring to “objects of remembrance” not being county-owned but being on “public property.” He asked her whether this changes her analysis in any way. It does not, she said, because subsection a of the statute cites authority bestowed upon the NCHC, whereas subsection b says nothing about the NCHC, it simply talks about public property, and subsection a is subject to any limitations in subsection b to begin with. Summarized, subsection a states that if what is being removed is a state-owned monument, it would have to go through the NCHC, while nothing in subsection b says that all objects of remembrance on public property, regardless of ownership, would have to go through the NCHC.

Put another way, she construes those subsections of the statute together to mean that if it is a state-owned object of remembrance it goes through the NCHC, and if it is not a state-owned object of remembrance—whether it be city-owned, municipality-owned, or county-owned—it goes through the county board of commissioners. Rephrasing the second sentence, it makes no sense that counties’ affairs would have to run through the NCHC when counties have the right to own their own property, because counties have boards of commissioners to determine the rights and duties of those counties.

Mr. Morrison reframed the issue as he sees it, stating that if the NCHC opts not to consider the petition for declaratory ruling, it would be because the petitioners do not have standing. He asked Ms. Blum whether it would be beneficial to the NCHC to not only state that position, but also reference her analysis of the request, not just as it pertains to the standing issue, but including all the issues summarized. He suggests this be considered, he said, because if the decision goes to appeal and the North Carolina Court of Appeals determines that the NCHC’s refusal to issue a declaratory ruling based upon standing alone was wrong, the issue would come right back to the NCHC. But if the NCHC goes ahead and states something to the effect that its position is that county-owned property is the dominion of the county, not the dominion of the North Carolina Historical Commission, it further supports the NCHC’s decision, and might also convey a message to others out there thinking about bringing these types of requests before the Commission.

Ms. Blum responded that while it is certainly within the purview of the NCHC to issue whatever statement it wishes, it can also simply decline to hear the matter, as it did with the Silent Sam petitioners. She doesn’t recall that an official statement was issued by the Commission on that matter. Rather, it simply decided at the meeting during which that issue came up not to hear the matter. She also noted that it might be more accurate to say that the NCHC doesn’t feel it has any say over this matter, instead of saying outright that it believes this is a county matter. Mr. Morrison asked whether it would be incorrect to say that the NCHC has neither standing nor jurisdiction on this matter and just leave it at that? Ms. Blum said she isn’t sure whether it would be a jurisdictional question or a redressability question, but that it’s probably fair to say that the NCHC has no jurisdiction.

Dr. Johnson thanked Mr. Morrison for his questions about how to move forward, especially his suggestion that a way be found to preempt other parties from coming to the Commission with similar requests for redress on issues of this sort in the future. If the NCHC states its position clearly enough, she said, maybe it will potentially help head off some of those requests. Chairman Ruffin concurred with Dr. Johnson’s understanding of the points put forth by Mr. Morrison, but he reminded the commissioners that the minutes of this meeting, which are public record, will reflect the spirit of whatever ruling the Commission hands down. He also stated that any objective observer should be able to see and appreciate the substantive time, effort, and dedication this body has put into the deliberation of related matters of this nature, or fail to dismiss as non-substantive its

response to requests such as the one before the Commission today. But he also emphasized the importance of the clear establishment of proper legal avenues for recourse by citizens, especially in the current social and cultural environment when many of these objects of remembrance are by their nature controversial.

Mr. Reynolds cited Ms. Blum's reference several times during her analysis to the word "property," which he notes can be defined as either an object itself or the land upon which it is placed. He asked her to clarify how she used the term as it pertained to county-owned property. While the multiple uses of the term "property" may be a little unclear, she said, she construes references to the term as being defined in large part by context. She replied that she interprets the use of the word "property" in G.S. 100, as it relates to the historical commission—as in "... property of the state..." or "...it may not become state property..."—as pertaining to an object itself, such as a monument. The word "property" being preceded by the preposition "on," as in "...on state property..." would refer to real estate property. For example, G.S. 100-2.1(b), dealing with limitations on removal, talks about objects of remembrance on public property, which is a reference to land upon which an object resides.

Mr. Morrison asked Ms. Blum to clarify what specific action is being asked of the Commission. She again referred to the meeting at which the NCHC was asked to rule on the Silent Sam citizens' petitions. In that case the Commission simply declined to hear the matter and went no further by way of explanation. She informed the NCHC that it could simply decline to consider the current petition, if it so chooses, like it did last time, to maintain consistency. Mr. Morrison asked how the decision, once made, would be conveyed to the petitioners. For example, would it be via letter prepared by Ms. Blum and signed by the NCHC's chair? Ms. Blum again stated that the last time the Commission simply declined to hear the matter, and that that decision was not communicated in a letter or written statement but was merely reflected in the minutes of the meeting. She said, though, that the NCHC's ruling could well be conveyed in the form of a letter.

Mr. Morrison stated that if the petitioners were unsuccessful before the NCHC, they should have somewhere to appeal the NCHC's decision. If the NCHC simply declines to hear it, he wondered where the petitioners' appeal would lie. Ms. Blum refrained from offering what could be construed to be advice to the petitioners on that question but reiterated that in her opinion the petition is already dead, having been denied by the secretary of the DNCR, the agency to which the petition was addressed. Her take on the issue is that the matter was simply forwarded by the secretary of the DNCR to the NCHC, to do with it as it wished. She also pointed out that the SCV has in the past communicated directly with the NCHC by sending communications addressed to the chair of the NCHC, so should have recognized that course of action as an avenue it could have taken. In this matter they didn't so in her mind the question becomes simply, does the NCHC wish to entertain the matter or not?

Dr. Cherry noted that the case of the citizens' petition to the NCHC, circumstances were different in the fact that the request was put to the NCHC at a physical meeting, so the decision by the NCHC not to hear the matter was communicated directly to them in a face-to-face manner. And in the Reidsville case, he said, when the petitioners were found not to have standing, they did receive a letter so stating from the secretary of the NCHC. As a matter of courtesy, Mr. Ruffin said he feels it would be appropriate to send the petitioners in the Pasquotank County Confederate Soldiers Monument case a letter informing them of the NCHC's decision. This position was supported by other commissioners.

Speaking for himself and the NCHC, Mr. Ruffin thanked Ms. Blum for the diligent work she put into the matter on behalf of the Commission. Commissioner Phillips then made a motion that the North Carolina Historical Commission decline to address the petition because the matter is not properly before it. The motion was seconded by Commissioner Johnson, and passed unanimously on a roll call vote, with Commissioner Dixon having had to leave the meeting early and therefore not voting on this matter.

### **Adjournment**

At the Chair's invitation, Mr. Morrison moved adjournment. The motion was seconded by Dr. Johnson and was carried unanimously by voice vote. Chairman Ruffin adjourned the meeting at 2:11 P.M.

Respectfully submitted,

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Sarah Koonts

DRAFT