

No. _____

JEFFERSON CIRCUIT COURT

DIVISION _____

FRIENDS OF LOUISVILLE PUBLIC ART, LLC
2862 Riedling Drive
Louisville, KY 40206

PLAINTIFFS

LOUISVILLE HISTORICAL LEAGUE, INC.
301 S. Peterson Avenue
Louisville, KY 40206

MARK THOMPSON
966 Cherokee Road, Unit 201
Louisville, KY 40204

GERALD R. TONER
949 Cherokee Road
Louisville, KY 40204

DEANNA M. O'DANIEL
2211 Dearing Court
Louisville, KY 40204

JAMES PRICHARD
2023 Sherwood Avenue, Apt. #1
Louisville, KY 40204

CHARLES NICHOLAS MORRIS
1013 Everett Avenue
Louisville, KY 40204

MARTINA KUNNECKE
311 Northwestern Parkway
Louisville, KY 40212

STEVE WISER
2862 Riedling Drive
Louisville, KY 40206

v.

COMPLAINT AND APPEAL

**LOUISVILLE/JEFFERSON COUNTY METRO
HISTORIC LANDMARKS AND PRESERVATION
DISTRICTS COMMISSION
444 South Fifth Street, Suite 300
Louisville, KY 40202**

DEFENDANTS

**Serve: Chris Hartman, Chair
444 South Fifth Street, Suite 300
Louisville, KY 40202**

**LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT
527 West Jefferson Street
Louisville, KY 40202**

**Serve: Greg Fischer, Mayor
527 West Jefferson Street
Louisville, KY 40202**

**LOUISVILLE METRO GOVERNMENT
CHEROKEE TRIANGLE ARCHITECTURAL REVIEW COMMITTEE
444 South Fifth Street, Suite 300
Louisville, KY 40202**

**Serve: Michael Gross, Chair
444 South Fifth Street, Suite 300
Louisville, KY 40202**

* * * * *

Come the Plaintiffs, by counsel, and, for their Complaint and Appeal, state as follows:

PARTIES

1. Friends of Louisville Public Art, LLC (hereinafter FOLPA) is a non-profit domestic limited liability company registered with the Kentucky Secretary of State. Its purpose is to protect public art in Louisville, Kentucky.

2. Louisville Historical League, Inc. (hereinafter LHL) is a non-profit domestic corporation registered with the Kentucky Secretary of State. Its purpose is to promote the appreciation and preservation of Metro Louisville's cultural heritage and historic environment.

3. Mark Thompson is a 30-year resident of the Cherokee Triangle and owns four properties there. In 1992, he was chair of a statue restoration committee supported by the City of Louisville. In 2013, he served on another restoration committee. Mayor Fischer was scheduled to speak at the 100th anniversary. Thompson also has been a major contributor to restoration efforts.

4. Gerald R. Toner is a practicing Louisville attorney and has been a resident of the Cherokee Triangle since 1976. He was the Chair of the Cherokee Triangle Neighborhood Plan in 1988. He is a past board member and officer of the Cherokee Triangle Association, Inc. He was a contributor to the prolific local historian Dr. Samuel Thomas's definitive work *Cherokee Triangle, A History of the Heart of the Highlands*, which happens to have a photograph of the Gen. Castleman Statue on its cover.

(Exhibit 1)

5. Deanna M. O'Daniel is a 41-year resident of the Cherokee Triangle who enjoys walking by the statue, taking in its artistic beauty and knowing that the icon of her neighborhood was a leader of the Louisville Legion, one of the founders of our park system and the founder of the American Saddlebred Horse Association.

6. James Prichard is a semi-retired local historian. For 23 years, he supervised the Kentucky State Archives Research Room. He has authored numerous publications and delivered papers on the Civil War era. He served on the Governor's

Underground Railroad Advisory Committee. He participated in the KET Underground Railroad documentary and submitted an essay, “Into the Fiery Furnace: Anti-Slavery Prisoners in the Kentucky Penitentiary” for the KET website.

7. Charles Nicholas Morris is a 30-year-plus resident of the Cherokee Triangle.

8. Martina Kunnecke is a local historian and civil rights activist and is President of Neighborhood Planning & Preservation, Inc.

9. Steve Wiser is an FAIA professional architect and a Fellow with the American Institute of Architects. He has written over ten history-related books on Louisville. He regularly gives walking tours of the Cherokee Triangle, always starting at the landmark Gen. Castleman Statue. His research on the Gen. Castleman Statue is attached (Exhibit 2)

10. Louisville/Jefferson County Metro Historic Landmarks and Preservation Districts Commission (hereinafter Commission) is the designated Louisville Metro agency, under Louisville Metro Ordinance 32.250 et seq., authorized to implement the provisions of that ordinance.

11. Louisville/Jefferson County Metro Government (hereinafter Louisville Metro) is the consolidated local government agency for all of Jefferson County, Kentucky.

12. Louisville Metro Government Cherokee Triangle Architectural Review Committee (hereinafter Cherokee Triangle ARC) is the entity, under Louisville Metro Ordinance 32.253, charged with implementing the duties of an architectural review committee for the Cherokee Triangle Historic Preservation District.

JURISDICTION AND VENUE

13. This Court has proper jurisdiction and venue of Plaintiffs' claims which involve the following:

- a. The actions of the Defendants which Plaintiffs believe to be in violation of Article 2 of the Kentucky Constitution which prohibits arbitrary government power,
- b. The jurisdiction this Court has under KRS 418.040 to make a binding declaration of rights,
- c. The location of subject property in Jefferson County, Kentucky,
- d. The location of all Plaintiffs and Defendants in Jefferson County, and
- e. The final actions of the Commission in application 18COA1328 which, pursuant to Louisville Metro Ordinance 32.263, have caused the Plaintiffs to be injured and aggrieved.

CAUSE OF ACTION

14. The property which is at the center of this suit is known as Parcel 075F-3000-0000, Louisville, Jefferson County, Kentucky, further described as the roundabout at Cherokee Parkway and Cherokee Road which contains the statue and plinth of United States Army General John B. Castleman and his American Saddlebred horse named Carolina (hereinafter: "Gen. Castleman Statue" as it is commonly known)

15. The Gen. Castleman Statue is located in the Cherokee Triangle Historic Preservation District.

16. In the Louisville Metro publication *Louisville Landmarks Commission Design Guidelines, Cherokee Triangle* (Exhibit 3), on page 2, a statement declares:

The statue of General John B. Castleman, erected 1913, stands as a neighborhood landmark. Castleman was President of the Board of Parks Commission and helped create the city's park system. His statue faces Cherokee Park.

On the eighth and final page of that publication is a photograph of the General Castleman Statue.

17. By its own words above, the Defendant applicant Louisville Metro admits that the Gen. Castleman Statue is a contributing element of the Cherokee Triangle District.

18. A description and history of the Cherokee Triangle on Wikipedia contains only two neighborhood photographs. Both are of the Gen. Castleman Statue. (Exhibit 4)

19. The General Castleman Statue is claimed to be owned by the Defendant Louisville Metro.

20. On June 30, 2018, the Public Art and Monuments Advisory Committee, appointed by Louisville Metro Mayor Greg Fischer, issued a Report to the Mayor (Exhibit 5). That report listed on pages 7 and 8 its criteria for evaluation of contested monuments. Those criteria are:

- a. Is the principal legacy of the subject depicted in the monument fundamentally at odds with current community values?
- b. Is the subject a potential rallying point for racist or bigoted groups?
- c. Does the subject celebrate a part of history that a majority of Louisvillians believe is fundamental to who we are and what we value?
- d. Is the monument physically accessible to all Louisvillians and visitors? Does it make a nuanced, complex history accessible to its publics?

21. The Public Art and Monuments Advisory Committee has made no

recommendation concerning the General Castleman Statue.

22. On or about August 8, 2018, Louisville Metro Mayor Greg Fischer announced his plan to remove the General Castleman Statue from its location in the Cherokee Triangle. (Exhibit 6)

23. On or about December 27, 2018, Louisville Metro submitted its application for a certificate of appropriateness seeking to remove the Gen. Castleman Statue from its location. (Exhibit 7)

24. The application was designated as Case # 18COA1328.

25. At its January 14, 2019, meeting, the Louisville Metro Commission on Public Art approved a statement supporting the mayor's decision by a vote of 5 ayes, and 3 abstentions in a meeting attended by 10 commission members. There was no mention in the minutes of the criteria recommended by the Public Art and Monuments Advisory Committee. (Exhibit 8)

26. On January 17, 2019, staff of the Louisville Metro Department of Planning & Design Services issued a "Report to the Committee" to the Cherokee Triangle ARC. (Exhibit 9)

27. In the "Report to the Committee, staff claimed that the Gen. Castleman Statue was not specifically identified as a contributing element of the Cherokee Triangle District. That conclusion is diametrically opposed to the conclusion Louisville Metro made in its publication quoted in paragraph 16 above.

28. In the same above report, staff relied on research from "Sam Thomas's book *Cherokee Triangle, A History of the Heart of the Highlands*", the same book which featured the Gen. Castleman Statue on its cover. (Exhibit 1).

29. In the same above report, staff attempted to justify removal by referring to Guidelines for Demolition in the Economic Hardship Exemption, specifically D1, D5 and D6 (actually DE1, DE5 and DE6). However, those guidelines refer only to “the case of demolition of non-contributing buildings”. (Exhibit 10, page 3)

30. However, in the same above report, staff failed to reveal important language in the Introduction to the Guidelines, which stated:

The first and most important guideline for demolition of an existing contributing structure within any historic district or any individual landmark within the City of Louisville is:

Unless the City has determined that it poses an imminent threat to life or property, do not demolish any historic structure or part of a historic structure that contributes to the integrity of any historic district or individual landmark unless: 1) the demolition will not adversely affect the district’s (or the landmark’s) distinctive characteristics, taken as a whole, retained over time 2) the demolition will not adversely affect the district’s importance as a “unified entity” composed of interrelated resources united historically or aesthetically by plan or physical development; and 3) the proposed replacement structure and development will strengthen the viability of the district as a whole.

(Exhibit 10 page 2)

31. The application was considered by the Cherokee Triangle ARC at its meeting on January 23, 2019.

32. At the January 23, 2019 meeting, one member (and only one) of the public spoke for the removal of the General Castleman Statue. That person was a resident of Jeffersonville, Indiana.

33. At the January 23, 2019 meeting, ten members of the public spoke in opposition to the application.

34. At the January 23, 2019 meeting, a motion to approve the application failed with a tie vote of three ayes and three nays. (Exhibit 11)

35. At the January 23, 2019 meeting, one of the aye votes was cast by David Marchal.

36. David Marchal is an officer and employee of the applicant Louisville Metro. He is the Deputy Director of Develop Louisville, an agency of Louisville Metro.

37. David Marchal had an obvious and legal conflict of interest as an employee of the applicant and should have recused himself from the hearing and any discussion of or voting on the application.

38. Without Marchal's aye vote, there would have been a clear denial of the application instead of a denial because of the tie. Then, a findings of fact in favor of denial would have been possible.

39. According to Louisville Metro Code Section 32.257(I), "Any application which fails to obtain at least three votes or the votes of a majority of the members present, whichever is greater, for approval or conditional approval shall be deemed to be denied." (Exhibit 12)

40. Because of the above section of the ordinance, the application was deemed to be denied.

41. Because the six Cherokee Triangle ARC members present were divided equally (three to three), it was impossible for the committee to agree on a findings of fact.

42. Legal counsel (a member of the staff of the Jefferson County Attorney) to the Cherokee Triangle ARC advised the committee that, with a tie vote, there would be no findings of fact.

43. On February 21, 2019, Louisville Metro submitted an "Appeal from

Cherokee Triangle ARC Decision Denying Metro’s Application for a Certificate of Appropriateness”. (Exhibit 13)

44. On May 9, 2019, the Commission held a public hearing on Case No. 18COA1328.

45. At the public hearing, the chair of the Commission issued a statement, allegedly upon advice of the Jefferson County Attorney, that the only duty of the Commission was to determine whether the Findings of Fact by the Cherokee Triangle ARC were clearly erroneous and that, since there were no such findings, they must be clearly erroneous and that the denial must be overturned. The chair told the Commission it was its legal obligation to overturn the denial if there were no findings of fact.

46. In a document entitled “Certificate of Appropriateness” (Exhibit 13), the Commission approved the application by Louisville Metro to remove the Castleman Statue by a vote of five ayes and three nays.

47. One of the aye votes was cast by Emily Liu, Director of the Louisville Metro Department of Planning & Design Services, and therefore an officer and employee of the applicant Louisville Metro.

48. Another of the aye votes was cast by Robert Kirchdorfer, Director of the Louisville Metro Department of Codes and Regulations, and therefore an officer and employee of the applicant Louisville Metro.

49. Both Liu and Kirchdorfer had an obvious and legal conflict of interest as employees of the applicant and should have recused themselves from the hearing and any discussion of or voting on the application.

50. Without the aye votes of Liu and Kirchdorfer, the motion for

approval would have failed and the application would have been denied.

51. In the document “Certificate of Appropriateness” (Exhibit 14), on page 8, the reason for overturning the decision of the Cherokee Triangle ARC was given as follows:

The Landmark Commission, based upon ordinance 32.257 and the Landmarks Commission By-Laws, found that the lack of Findings of Fact and Conclusions by ARC were clearly erroneous as they lacked substantial evidence to support the decision made. As a result of the Finding of the Commission the denial of the application was overturned, and pursuant to ordinance, the Landmark Commission approved the application for the removal of the Statue and plinth with conditions.

52. Reliance on the absence of Findings of Fact by the Cherokee Triangle ARC, when such findings would be impossible to develop because of the tie vote in the committee, was arbitrary, capricious and unreasonable conduct on the part of the Commission.

53. Although the applicant Louisville Metro referred to the “comprehensive guidelines for city officials to consider when determining outcomes for contested public art and monuments” in its Appeal, the Commission failed to address any of the criteria for contested monuments recommended by the Mayor’s Public Art and Monuments Advisory Committee. The Commission did not determine that: a) the principal legacy of the subject depicted in the monument was fundamentally at odds with current community values, b) that the monument is a potential rallying point for racist or bigoted groups, c) that the monument celebrates a part of history that a majority of Louisvillians believe is fundamental, or d) that the monument is not physically accessible to all Louisvillians and visitors. This is an example of an arbitrary, capricious and unreasonable decision-making process.

54. At one point in its Conclusions in the document Certificate of Appropriateness (page 8 of Exhibit 14), the Commission stated:

The proposed removal of the statue and plinth also meets the applicable Site Design Guideline ST1. The original design of the roundabout did not include a sculptural element. The design of the roundabout was intended to serve as an organizing feature for the approach to a principal Cherokee Park entrance. That relationship will remain intact.

55. At the same time, the Commission added a condition that any future public art installation on the site must be reviewed and approved by the Cherokee Triangle ARC. (page 9 of Exhibit 14)

56. Approving removal of a century-old monument because it was not original to the site and then requiring ARC approval of any new monument is an inconsistent determination and an example of arbitrary, capricious and unreasonable conduct on the part of the Commission.

57. Allowing the participation and voting of David Marchal at the Cherokee Triangle ARC hearing was a violation of due process and, therefore, an arbitrary and capricious action on the part of the Cherokee Triangle ARC.

58. Allowing the participation and voting of Emily Liu and Robert Kirchdorfer at the Commission hearing was a violation of due process and, therefore, an arbitrary and capricious action on the part of the Commission.

59. In summary, the Defendants have reached their decisions in an arbitrary, capricious and unreasonable process in many instances, but, most importantly in the following:

- a. Officers and employees of the applicant Louisville Metro were allowed to participate and vote in

proceedings involving an application by Louisville Metro.

- b. The Commission unreasonably and wrongfully concluded that a lack of findings of fact from the Cherokee Triangle ARC was an erroneous action.
- c. At no time in the final decision-making process were the recommendations of the Public Art and Monuments Advisory Committee discussed, considered or evaluated.
- d. The Applicant and staff followed the wrong guidelines for removal, by not using guidelines for contributing structures.
- e. The Commission was inconsistent in concluding that, since the statue was not original to the roundabout, it should be removed, while adding that a new monument could be added there.

RELIEF

WHEREFORE, Plaintiffs respectfully demand the following relief:

1. That the Court declare the decision of the Commission on May 9, 2019, in Case Number 18COA1328 to approve the removal of the General Castleman Statue null and void.
2. That the Court declare that the participation by voting of Louisville Metro officers and employees in this entire process was a conflict of interest and those votes shall be declared null and void and that, in any future or revised or reinstated application by Louisville Metro to remove the General Castleman Statue, no employee or officer of Louisville Metro shall be allowed to participate or vote as a member of the Cherokee Triangle ARC or the Commission.
3. That the Plaintiffs may amend this Complaint as the full record becomes available.
4. That the Court grant Plaintiffs a reasonable attorney's fee and all costs expended herein to be paid by the Defendants, and

5. All other proper relief to which the Plaintiffs may be entitled.

Respectfully Submitted,

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EXHIBITS

1. Cover of *Cherokee Triangle, A History of the Heart of the Highlands*
2. Research on General John Castleman by Steve Wisner
3. *Louisville Landmarks Commission Design Guidelines, Cherokee Triangle*, a Louisville Metro publication
4. Wikipedia description of the Cherokee Triangle
5. *Report to the Mayor* by the Public Art and Monuments Advisory Committee
6. Mayor Fischer Announcement
7. Louisville Metro Application for Certificate of Appropriateness
8. Jan. 14, 2019 minutes of meeting of Louisville Metro Commission on Public Art
9. *Report to the Committee* from PDS staff
10. *Guidelines for Demolition in the Economic Hardship Exemption*
11. *Memorandum* of the Cherokee Triangle Architectural Review Committee meeting of January 23, 2019
12. Louisville Metro Code 32.257
13. Appeal from Louisville Metro to the Landmarks Commission
14. *Certificate of Appropriateness* from Landmarks Commission