VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CL17-145
	)	
CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER

Defendants City of Charlottesville, Virginia and Charlottesville City Council, and individual Defendants Signer, Bellamy, Fenwick, Szakos and Galvin, by counsel, submit the following authorities in support of their Demurrer previously filed herein.

STATEMENT OF PROCEEDINGS:

On March 23, 2017 eleven individuals and two organizations filed a three count Complaint against the City, the City Council and the individual members of Council, challenging the City's authority to control and regulate two City-owned parks. Count One alleges a violation of Virginia Code §15.2-1812, which the Plaintiffs allege creates "a cause of action for Plaintiffs against Defendants under Code Section 15.2-1812.1" (Complaint ¶ 36). Count Two claims that City Council acted *ultra vires* and in violation of Dillon's Rule because it had no legal authority to order the removal of a statue of Robert E. Lee from Lee Park or to rename either Lee or Jackson Park, or to place additional monuments in Jackson Park. Count Three alleges that three Resolutions passed by City Council violated unspecified terms of the gifts of the Lee and Jackson statues and the Lee and Jackson Parks by Paul McIntire to the City. The Complaint

requests a declaration that the City Council Resolutions are void, permanent injunctive relief and monetary damages. The Plaintiffs also filed a separate Motion for Temporary Injunction.

The Defendants demurred to the Complaint on several grounds and asked that it be dismissed, and filed an Answer in response to the Motion for a Temporary Injunction. After a hearing on May 2, 2017 the Court issued a temporary injunction for a period of six months that prohibited the Defendants from selling or removing the statue of Robert E. Lee from Lee Park. The Court declined to issue an injunction against the renaming of either Lee or Jackson Park[1], or the planning or designing of the transformation of either Lee Park or Jackson Park.

INTRODUCTION

The principles applicable to a trial court's consideration of a demurrer are well established:

> A demurrer tests the legal sufficiency of a motion for judgment and admits the truth of all material facts that are properly pleaded. . . The facts admitted are those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged. . . The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [motion for judgment], but only may determine whether the factual allegations of the [motion] are sufficient to state a cause of action.

Harris v. Kreutzer, 271 Va. 188, 195, 624 S.E.2d 24 (2006) (citations omitted); *accord*, Board of Supervisors of Fluvanna County v. Davenport & Co. LLC, 285 Va. 580, 585, 742 S.E.2d 59 (2013). "A demurrer, however, does not admit inferences or conclusions from facts not stated," Friends of the Rappahannock v. Caroline County Board of Supervisors, 286 Va. 38, 44, 743 S.E.2d 132 (2013) (citations omitted), nor does it admit the correctness of the pleader's conclusions of law, Bell v. Saunders, 278 Va. 49, 53, 677 S.E.2d 39 (2009).

The Defendants have demurred to the Complaint in this action, alleging that it is insufficient as a matter of law on the following grounds:

[1] City Council has since changed the names of Lee Park and Jackson Park to Emancipation Park and Justice Park, respectively.

(1) the statue of Robert E. Lee is not protected by Virginia Code §15.2-1812;

(2) the Plaintiffs have failed to adequately allege a cause of action for a violation of Virginia Code §15.2-1812.1, in that there is no allegation in the Complaint of an actual violation or encroachment upon the Lee statue;

(3) the Plaintiffs lack legal standing;

(4) the actions of the Defendants were not *ultra vires* because of specific legislation that authorizes the Defendants to operate, maintain and improve public parks; and,

(5) the Complaint fails to identify any terms or conditions of the gifts to the City of the Lee statue, the Jackson statue, Emancipation Park or Justice Park that were violated by the Defendants.

ARGUMENT

I. The removal of the Robert E. Lee statue from Emancipation Park is not prohibited by Virginia Code §15.2-1812

Count One of the Complaint (¶¶ 35 - 41) alleges that the planned removal of the statue of Robert E. Lee from Emancipation Park will violate the current version of Virginia Code §15.2-1812, a statute which first became applicable to cities and towns in 1997. While of relatively recent application to cities and towns, the origins of the statute date to 1904, the year when the General Assembly adopted the following law:

> Be it enacted by the general assembly of Virginia, That the circuit court of any county be, and it is hereby, empowered, with the concurrence of the board of supervisors of such county entered of record, to authorize and permit the erection of a Confederate monument upon the public square of such county at the county seat thereof. And if the same shall be so erected, it shall not be lawful thereafter for the authorities of said county, or any other person or persons whatever, to disturb or interfere with any monument so erected, or to prevent the citizens of said county from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same.

1904 Acts of the General Assembly Ch. 29. While the statute has since been amended on numerous occasions, primarily to add references to different wars and conflicts,[2] the scope of the law remained the same from 1904 to 1997: it authorized a County Circuit Court, with the concurrence of the County Board of Supervisors, to erect certain war memorials on the public square of such county at the county seat. The law had *no* application to, and provided no protection for, monuments or memorials erected by cities or in cities, such as the Robert E. Lee statue in Emancipation Park.

In 1997 the statute was rewritten when Title 15.1 of the Virginia Code was replaced *in toto* by Title 15.2. For the first time §15.2-1812 (previously §15.1-270) became applicable to cities and towns. The available legislative history specifically states that while the section was expanded to include all localities, there was *"no substantive change in the law"*.[3] In other words, existing memorials in cities which had not been protected prior to 1997 remained unaffected by the new legislation.

The City believes that, as a matter of law, the statute should be interpreted as written: that pursuant to the authority in §15.2-1812, a city may authorize the erection of certain memorials, and "*if such are erected*"[4] pursuant to that authority, no one can interfere with or disturb those monuments *"so erected"*. The Plaintiffs suggest a broad, liberal application of the statute: if a city had ever in its history erected a monument or memorial that was enumerated in the 1997 amended statute, the 1997 legislation divested that municipality of its longstanding control and authority over that memorial. The argument that §15.2-1812 applies retroactively to

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[2] A chart outlining the entire history of Va. Code §15.2-1812 is attached hereto as **Attachment 1**.

[3] *See* Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia, (Vol. 2 of Senate Document No. 5, pp. 506 – 507), attached hereto as **Attachment 2**.

[4] "Such" refers to an object already particularized, a "descriptive and relative word [that] refers to the last antecedent". Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 721, 167 S.E.2d 334 (1969).

a monument erected 73 years prior to the 1997 legislation is contrary to settled rules of statutory construction that strongly disfavor the retroactive application of new legislation.

A. The applicable rules of statutory construction

There are two related principles of statutory interpretation that inform the decision regarding the retroactivity of Virginia Code §15.2-1812. First, courts in Virginia have frequently recognized that Virginia law "does not favor retroactive application of statutes. . . [f]or this reason, we interpret statutes to apply prospectively 'unless a contrary legislative intent is manifest.' Bailey v. Spangler, 289 Va. 353, 358-359, 771 S.E.2d 684 (2015); *accord*, Adams v. Alliant Techsystems, 261 Va. 594, 599, 544 S.E.2d 354 (2001). While courts do not require the use of any "specific words" to indicate that the General Assembly intended legislation to have a retroactive application, *see* Board of Supervisors of James City County v. Windmill Meadows, LLC, 287 Va. 170, 180, 752 S.E.2d 837 (2014), the language used must make it clear that the General Assembly intended the legislation to apply both prospectively and retroactively, *see* Berner v. Mills, 265 Va. 408, 413 (2003) ("it is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention").

Second, in addition to requiring a clear legislative intent for retroactivity, courts have limited retroactive applications to procedural or remedial legislation, and not substantive law:

> . . . only procedural or remedial, as opposed to substantive statutes, may be applied retroactively. As the Supreme Court of Virginia has explained, "procedural or remedial statutes merely set forth the methods of obtaining redress or enforcement of rights," whereas substantive statutes "create duties, rights, or obligations." In order for [a statute] to apply retroactively, therefore, it must be procedural in nature and affect remedy only, disturbing no substantive or vested rights. The statute must also contain an expression of retrospective legislative intent.

Shen Valley Masonry, Inc. v. Thor, Inc., 81 Va. Cir. 89, 92 (City of Roanoke 2010) (citations omitted); *see also* In re Brown, 289 Va. 343, 348, 770 S.E.2d 494 (2015) ("[S]ubstantive rights,

as well as 'vested' rights, are included within those interests protected from retroactive application of statutes"). Virginia Code §15.2-1812 is clearly more than a procedural or remedial statute, as it does not "merely set forth the *methods* of obtaining redress or enforcement of rights". It creates "duties, rights and obligations" on all localities that authorize or permit a war monument or memorial, with the parties herein disagreeing on when and where those duties and obligations apply.

While these cases help to establish the analytical framework for determining whether new legislation should be applied retroactively, they are of limited application here because the courts in those cases were not analyzing Virginia Code §15.1-1812. The Defendants believe that there has been only one case that decided whether §15.1-1812 should be applied retroactively to monuments erected before 1997, when the law became applicable to cities and towns.

B. Heritage Preservation Association, Inc. v. City of Danville

The General Assembly gave no indication that it intended to apply Virginia Code §15.2-1812 retroactively to monuments or memorials already in existence, when it extended the coverage of the law to cities in 1997. That was the conclusion of City of Danville Circuit Court Judge James R. Reynolds in Heritage Preservation Association, Inc., et al. v. City of Danville, Case No. CL15000500-00 (2015). In sustaining the City's demurrer to an alleged violation of §15.2-1812, the court concluded that "As a matter of law, Virginia Code § 15.2-1812 does not apply retroactively to the monument at issue in this litigation, which was donated to the City of Danville in 1994 and erected on the grounds of the Sutherlin Mansion in 1995".[5] The monument in that case was a Confederate flag, flagpole and obelisk on the grounds of Sutherlin Mansion, the site of the last capitol of the Confederacy.

[5] A copy of the transcript of the Judge's ruling from the bench and a copy of the Final Order are attached hereto as **Attachment 3.** The Virginia Supreme Court found no reversible error in his decision and declined to hear the appeal.

In previous filings the Plaintiffs herein have summarily dismissed Judge Reynolds' ruling on retroactivity as "legal *dicta*". According to the Plaintiffs, once the Court found that the monuments "were not the sort the law protects – that decided the case." The Plaintiffs claim that the Court "in *dicta* went on to say" that the monument "had no legal protection since it was erected prior to amendments in 1997 that changed the word "counties" to "localities".[6] As shown by the attached transcript of the Judge's ruling, the Plaintiffs' attempt to portray the retroactivity ruling as a judicial afterthought is, at best, misleading.

The Danville Court decision included three separate rulings that are relevant to this case. First, as requested by the plaintiffs the Court ruled that the Confederate flag, which the City wanted to remove, was part of a "monument" that included the flagpole, an obelisk and the Sutherlin Mansion. Second, the Court agreed with the City of Danville that the flag was not protected by Virginia Code §15.2-1812, because the statute did not apply to monuments erected prior to 1997. It was only because the issue of retroactivity was a "close question" that the Court issued a third ruling – that the flag was not a monument to the Civil War, to the Confederacy, or to war veterans. The "retroactivity" issue was clearly the cornerstone of the Court's decision, and not merely *dicta* as portrayed by the Plaintiffs herein.

Judge Reynolds' conclusion is consistent with the underlying rationale for the rule of statutory interpretation that discourages a retroactive application of new legislation. As noted by the United State Supreme Court in Landgraf v. Usi Film Products, 511 U.S. 244, 265-266, 114 S.Ct. 1483 (1994),

> . . . the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. *Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.* For that reason, the "principle that the legal effect of conduct should

[6] *See* Plaintiffs' "The Danville Case Is Inapposite" Temporary Injunction brief, at p.5.

> ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.". . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

(Emphasis added; citations omitted). Today, when a Virginia city decides whether to erect a new monument or memorial commemorating a war or its war veterans, it does so with the knowledge that Virginia Code §15.2-1812 will require it to preserve and maintain that monument at that location in perpetuity. The city would therefore have the ability to "conform its conduct accordingly". Prior to 1997 there was no legislation that even arguably prevented the City of Danville from removing the Confederate flag over Sutherlin Mansion, or that prevented the City of Charlottesville from removing the Lee statue from Emancipation Park. The Plaintiffs in this action are now attempting to disrupt those "settled expectations" in a manner that will interfere with the City's substantive rights, and violate Virginia law.

C. A retroactive application of Virginia Code §15.2-1812 would impair the City's substantive rights in a manner that would violate Virginia law.

The Virginia Supreme Court has recognized that the rule disfavoring retroactive application of legislation has enhanced application when necessary to protect public entities acting in the public interest. In City of Richmond v. Supervisors of Henrico County, 83 Va. 204, 2 S.E. 26 (1887), the Court applied that rule of statutory construction to allow a city to continue with the development of a hospital on property it had acquired in an adjacent county, without complying with conditions contained in subsequent legislation:

> A statute is never construed to be retroactive, except the intent that it shall so operate plainly appears upon its face. . . " *Every statute which takes away or impairs a vested right, acquired under existing laws or creating a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective in its operation*, and opposed to those principles of jurisprudence which have been universally recognized as sound." *Especially do courts shrink from holding an act retrospective when it affects public objects and duties, and, when it affects rights accrued and acts done by law for the public interest and necessities*, it must be

presumed that the law-makers of the new act did not intend it to be retrospective, unless that intent be expressed in the language, or plainly appear upon the face of the act itself.

Id. at 212 (citations omitted, emphasis added). Clearly a retroactive application of §15.2-1812 would "create a new obligation", "impose a new duty", or "attach a new disability" for the City of Charlottesville *vis-à-vis* the Robert E. Lee statue. The City would be unable to move or relocate the statue, or take any other measures that would arguably violate the vague "disturb or interfere with" standard.

The City of Charlottesville, like every other locality in Virginia, has express statutory authority to operate, maintain, and regulate the use of its real property, including property used as public parks, and to construct improvements on property it owns. Virginia Code §§15.2-1800 and 1806. Likewise, every Virginia locality has plenary authority over the use and disposition of its personal property. *See* Virginia Code §15.2-951 ("Acquisition, disposition and use of personal property by localities generally"). An equally broad grant of authority is found in the City of Charlottesville Charter from the General Assembly: "The council of the city, except as hereinbefore provided, shall have the power within said city *to control and manage* the fiscal and municipal affairs of the city and *all property, real and personal, belonging to said city.*" City of Charlottesville Charter Sec. 14 (emphasis added). This enabling legislation from the General Assembly expressly vests the City with all the authority it needs to control and manage the Robert E. Lee statue, including removing it from Emancipation Park and disposing of it by auction, bid or donation unless, of course, those rights are impaired by a retroactive application of §15.2-1812.

When the General Assembly recodified Title 15.1 as Title 15.2 and adopted Virginia Code §15.2-1812 and made it applicable to all localities, it simultaneously adopted Virginia Code §15.2-100, which provides as follows:

> Except when otherwise expressly provided by the words, "Notwithstanding any contrary provision of law, general or special", or words of similar import, *the provisions of this title shall not repeal, amend, impair or affect any power, right or privilege conferred on counties, cities and towns by charter.*[7]

(Emphasis added). Section 15.2-1812 does not use the words "notwithstanding any contrary provision of law, general or special", as required by Virginia Code §15.2-100. The statute does, however, clearly impair the powers of the City under its Charter if it is applied to monuments or memorials already in existence in 1997, when the law became applicable to the City of Charlottesville. The Plaintiffs are therefore arguing for an interpretation that would "impair or affect" the powers of the City, contrary to the protections afforded by Virginia Code §15.2-100.

D. The Plaintiffs' "proof" of a retroactive intent: changing "shall be" to "are".

As discussed herein Virginia Code §15.2-1812 is not a procedural or remedial statute that can be applied retroactively if supported by a manifest legislative intent. It is substantive in nature, creating duties, rights, obligations and disabilities for an entity that is acting in the public interest. If, however, the remedial / substantive distinction is ignored, the question becomes whether there is any indication from the General Assembly that it intended the statute as adopted in 1997 to apply to monuments already existing in cities and towns?

In support of a "manifest legislative intent" the Plaintiffs do not rely on the 1997 statutory revisions because there is nothing in that language that supports a retroactive application. Instead, the Plaintiffs have cited a change made by the General Assembly in 1988: replacing the phrase "if such shall be erected" to "if such are erected".[8] Without citing any legislative history or any other legal authority the Plaintiffs have summarily concluded that this simple revision, adopted nine years before the law was made applicable to cities, constitutes an

[7] The prior version of this statute, §15.1-1, did not require the use of the specific words "Notwithstanding any contrary provision of law, general or special".

[8] Chapter 284 of the 1988 Acts of Assembly showing the amendments adopted that year is attached hereto as **Attachment 4**.

"instance of clear legislative intent that the law is meant to apply to all existing monuments"[9]. The Plaintiffs neglect to point out, however, that the 1988 amendments to Virginia Code §15.1-270 (the predecessor to §15.2-1812) were a reenactment of that statute (*see* the title of Chapter 284 in **Attachment 4**). The Plaintiffs' argument that this reenactment supports a retroactive application is directly contrary to the rule established by the General Assembly in Virginia Code §1-238:

> "Reenacted," when used in the title or enactment of a bill or act of the General Assembly, means that the changes enacted to a section of the Code of Virginia or an act of the General Assembly are in addition to the existing substantive provisions in that section or act, and *are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specified date.*
>
> The provisions of this section are declaratory of existing public policy and law.

(Emphasis added); *see* Berner v. Mills, 265 Va. 408, 413 (2003) (a "reenacted" statute will be applied retroactively only if the bill or act of assembly containing the legislation explicitly and unequivocally meets the requirements of §1-238).

The amendment cited by the Plaintiffs does not expressly provide that the change is effective retroactively on a specified date, as required by §1-238. To the contrary, the change represents nothing more than a routine technical update in the language used. When the Virginia Code Commission revised Title 54 in the same year[10], the words "shall be" were changed to "are" in Virginia Code §§54.1-113, 54.1-3462 (12), and 54.1-3915. In each case the accompanying Drafting Note stated, "No change in the law". The same characterization was made more recently in the 2015 revision of Title 23[11]. The Code Commission listed as one of the "technical changes" made throughout the chapter: "To the extent feasible, 'shall be' is

[9] Plaintiffs' "Veterans Monument Protection Law" Temporary Injunction brief at p.6, fn.3.
[10] Report of the Virginia Code Commission on The Revision of Title 54 of the Code of Virginia, House Document No. 23 (1988) attached hereto as **Attachment 5.**
[11] Report of the Virginia Code Commission on The Revision of Title 23 of the Code of Virginia, Senate Document No. 16 (1988) attached hereto as **Attachment 6.**

stricken in favor of 'is'". Accordingly, the semantic change from "shall be" to "are" was made in §§23.1-708, 23.1-810, 23.1-908 and 23.1-1011, and in each section the revision was described by the drafters as "technical changes". There is simply no legal, substantive basis for concluding that the legislature intended the 1988 revision to be an expression of retroactive intent, as argued by the Plaintiffs.

If the General Assembly had wanted to make Virginia Code §15.2-1812 applicable to monuments and memorials already in existence it could have made that abundantly clear, as it attempted to do during the 2016 legislative session.

E. The subsequent legislative history of Virginia Code §15.2-1812.

At the 2016 Session of the General Assembly the legislature attempted to do what was not done in 1997: make §15.2-1812 operate retroactively. House Bill 587 struck the words "If such are erected", and added the sentence "The provisions of this subsection shall apply to all such monuments and memorials, regardless of when erected". The Bill was passed in both houses of the General Assembly, but ultimately vetoed by Governor McAuliffe, who noted that it "overrides the authority of local governments to remove or modify monuments or war memorials erected before 1998".[12]

The Plaintiffs in this case are now asking the Court to do what the General Assembly was unable to do: override the Governor's veto.

[12] A copy of House Bill 587, as passed, and the Governor's Veto Statement are attached hereto as **Attachment 7.**

II. Plaintiffs have failed to allege facts to support their conclusion that the statue of Robert E. Lee is the type of monument or memorial protected by Virginia Code §15.2-1812

A demurrer does not admit the correctness of conclusions of law, nor does it "admit inferences or conclusions from facts not stated." Arlington Yellow Cab Co. v. Transportation, Inc., 207 Va. 313, 319, 149 S.E.2d 877 (1966). The Complaint in this action alleges that the statue of Robert E. Lee in Emancipation Park is a Confederate monument or memorial of the War Between the States, or a memorial to veterans of the War Between the States, and is therefore within the scope of Virginia Code §15.2-1812. The Plaintiffs fail, however, to allege any facts in the Complaint that support either of those bare legal conclusions.

If the Lee statue is a monument or memorial to the Civil War or to veterans of the Civil War, it should be evident from some inscription on the statue itself, especially since anyone inflicting significant damage on a memorial to war veterans may be guilty of a felony.[13] *See* Virginia Code §18.2-137. Similarly, under §15.2-1812 placing Union markings on a monument is prohibited only if it is a "*previously designated*" Confederate memorial. In this case there is no allegation in the Complaint that the Lee statue contains any inscription referencing the Confederacy, the Civil War, any battle occurring during the Civil War, or the veterans of the Civil War. While in most cases a statue will tell the public why it was erected, the Emancipation Park Lee statue simply does not speak for itself. And its silence is matched by the absence of any factual allegations in the Complaint.

[13] An example of a monument to Confederate veterans that is obvious from the inscriptions on the statue itself is the statue of the generic Confederate soldier in front of the Albemarle County Circuit Court. The nomination for that statue to be placed on the National Register of Historic Places refers to it as "The Confederate Memorial of Charlottesville and Albemarle County".

If the purpose of a monument is not self-evident, the intent behind the monument should be found in the words of either the donor or the grantee. The question of a statue's meaning for purposes of substantive legislation should not be decided by contemporary perceptions of the public:

> The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes."

Pleasant Grove City v. Summum, 555 U.S. 460, 477, 129 S.Ct. 1125 (2009).

While the Complaint itself is devoid of facts regarding the purpose behind the gift of the Lee statue, the Plaintiffs' attached Exhibits are instructive. The letter offering the park and the statue to the City (Plaintiffs' Exhibit A), the Resolution of the Common Council accepting McIntire's gift (Plaintiffs' Exhibit B), and the deed of the property to the City (Plaintiffs' Exhibit C) all have something in common: they do not mention the Civil War, the Confederacy, or war veterans. To the contrary, in the accepting Resolution the Council noted that:

> . . .we recognize the vision and noble impulse which enables the donor to look beyond the dark chasm of War and with steady eye and clear vision behold the triumphant day, when, freed from the curse and blighting influence of war, the nations and the peoples of the earth shall return to their peaceful pursuits.

The deed to the City is even more direct: the property had been purchased "at the instance and request of Paul G. McIntire, *who desires to erect thereon a statue of General Robert E. Lee and to present said property to the City of Charlottesville, Va. as a memorial to his parents*, the late George M. McIntire and Catherine A. McIntire. . .". (Emphasis added). *See* Jeffery Financial Group, Inc. v. Four Seasons Development, LLC, 64 Va. Cir. 7, 12 (Fairfax Co. 2003) ("Under Virginia law, a court may ignore factual allegations contradicted by authentic, unambiguous documents that properly are a part of the pleadings"). Even more detail as to Mr. McIntire's intent is shown in correspondence from when the statue was being sculpted:

> On 12 May 1922, W. O. Watson communicated with Walter Blair to tell him that Lentelli would commence work on the Lee sculpture shortly: "Mr. McIntire says it is O.K. for me to advance money on the Lee as the work progresses, and he is pleased that Mr. Lentelli will be commissioned to finish it." He added, *"I don't know if he [McIntire] ever mentioned it to you, but he did to Mr. Shrady that he wanted 'In honor of Catherine McIntire' put on the statue in some place." Watson later amended this request: "The inscription that Mr. McIntire now wants on the Lee is, 'In honor of our mother, Catherine Ann McIntire.'* He desires this only if it is in good taste to show anything on the monument, and we would like to have your judgment on this." Blair apparently discouraged it, for the statue has no inscription other than the name of the General.

National Register of Historic Places Registration Form, p. 6 (emphasis added).

The decision in Heritage Preservation Association, Inc. v. City of Danville, is once again instructive. In that case the Court found that a monument that included the third national flag of the Confederacy was not protected by §15.2-1812, primarily because of the intent expressed at the time of the donation:

> The resolution, which is the only guidance the Court really has as to the intent of the adoption, speaks to, on page 2 of the resolution, "Heritage Preservation Association has requested that the City of Danville accept this monument for the purpose of recognizing the Sutherlin Mansion's historical status as the last capitol of the Confederacy and permit its location on the grounds."

See **Attachment 3**, pp. 7 – 9. Judge Reynolds therefore found that while Virginia Code §15.2-1812 did not apply to monuments erected before 1997, even if it did apply retroactively it would not apply to a monument that was not intended as a memorial to the Civil War or to veterans of that War. On appeal the Virginia Supreme Court found no reversible error in Judge Reynolds' decision.

If the statue of Robert E. Lee in Emancipation Park was intended to be a memorial to the War Between the States, or to the veterans of that War, it should be evident from the statue, the words of the donor, or the words of the recipient of the gift. Since the Complaint fails to include any factual allegations to support a conclusion that the Lee statue is within the scope of Virginia Code §15.2-1812, the Defendants' Demurrer should be granted as to Count One.

III. The Plaintiffs have failed to adequately state a cause of action for a violation of Virginia Code §15.2-1812.1, in that there is no allegation in the Complaint of an actual violation or encroachment upon the Lee statue.

If a Plaintiff has legal standing, he or she may file a declaratory judgment action and challenge the City Council's Resolution to remove the statue of Robert E. Lee from Emancipation Park as inconsistent with Virginia Code §15.2-1812. In this case the Plaintiffs are seeking that type of declaratory relief. See Plaintiffs' Complaint at p. 15, ¶ 1. The Plaintiffs do not, however, have a cause of action pursuant to Virginia Code §15.2-1812.1.

Section 15.2-1812.1 allows an action for the recovery of damages if any protected monument or memorial "is violated or encroached upon".[14] The damages that may be awarded are those that are "necessary for the rebuilding, repairing, preserving and restoring such memorials or monuments to preencroachment condition", with such damages "used exclusively for said purposes". Punitive damages can only be recovered for reckless, willful or wanton conduct resulting in the defacement of, malicious destruction of, unlawful removal of, or placement of improper markings, monuments or statues on memorials for war veterans".

While the Plaintiffs in this action are seeking a monetary award, including punitive damages, they do not allege that the Lee statue has actually been violated or encroached upon, or otherwise damaged. To the contrary, the Complaint incorporates a letter that states that "the statue has not been disturbed, interfered with, violated or encroached upon". *See* Exhibit J to the Complaint. There are no allegations in the Complaint that contradict that statement; Plaintiffs have merely

[14] Note that the "violated or encroached upon" standard in §15.1-1812.1 is different than the "disturb or interfere with" standard in §15.1-1812.

stated that "removal of the Lee statue from Lee Park is also both a violation of the statute and an encroachment upon the statue". Complaint ¶ 37 at p. 12. Since there is no allegation that the statue has been removed, or otherwise "violated or encroached upon", the Defendants' Demurrer to the damages claim made pursuant to Virginia Code §15.2-1812.1 should be granted.

IV. The allegations in the Complaint are insufficient to show that the 13 Plaintiffs have standing to challenge the Resolution authorizing the removal of the Lee statue from Emancipation Park.

There are eleven individual Plaintiffs and two corporate Plaintiffs in this case. The Complaint fails to explain how any of their legal rights are affected by adoption of the challenged Resolution, or the removal of the Lee statue. The broad and conclusory allegations fail to show that any of the Plaintiffs have a personal stake in the outcome of the case different than the general public. As stated by the Court in Deerfield v. City of Hampton, 283 Va. 759, 764, 724 S.E.2d 724 (2012),

> Under well-settled principles, "[a] plaintiff has standing to institute a declaratory judgment proceeding if it has a 'justiciable interest' in the subject matter of the proceeding, either in its own right or in a representative capacity." To establish such an interest at the pleading stage, the plaintiff must allege facts "demonstrat[ing] an actual controversy between the plaintiff and the defendant, such that [plaintiff's] rights will be affected by the outcome of the case."
>
> Thus, when the complaint is challenged by a demurrer raising the issue of standing, a plaintiff has no legal standing to proceed in the case if its factual allegations fail to show that it actually has a "'substantial legal right'" to assert. See Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558, 708 S.E.2d 867, 870 (2011) (explaining that "[i]n order to survive demurrer . . . a complaint must allege sufficient facts to constitute a foundation in law for the judgment sought" (citation and internal quotation marks omitted)).

Each Plaintiff is "required to plead facts sufficient to claim particularized harms to rights not shared by the general public." Friends of the Rappahannock v. Caroline County Board of

Supervisors, 286 Va. 38, 49, 743 S.E.2d 132 (2013) (affirming the dismissal of a challenge to a special use permit, due to plaintiffs' failure to establish standing by pleading facts showing particularized harm).

In this case the City Council Resolution calling for the removal of the Lee statue represents a controversy or disputed issue. The Plaintiffs have strong feelings about that issue, but its resolution has no effect on their individual, legally-protected rights. When the "*actual objective in the declaratory judgment proceeding is a determination of a disputed issue rather than an adjudication of the parties' rights, the case is not one for declaratory judgment*". Charlottesville Area Fitness Club Operators Association v. Albemarle County Board of Supervisors, 285 Va. 87, 99, 737 S.E.2d 1 (2013) (emphasis added).

Perhaps in an effort to establish the requisite standing the Complaint states that many of the Plaintiffs – Payne, Yellott, Tayloe, Amiss, Weber and Smith – are "taxpayers" of the City. Tayloe, Weber and Smith are also described as having a vague and undefined "special interest" in preserving the monuments, while Plaintiffs Griffen and Earnest allegedly have an "interest" in preservation. Plaintiff Phillips is described as a collateral descendant of Paul McIntire, who will allegedly represent the McIntire family if there is an award of damages (even though the Complaint does not seek an award of damages for the McIntire family). Plaintiff Fry's only connection to the case is that he is alleged to be the great-nephew of the original sculptor of the Lee statue. Plaintiff Marshall is not a resident of the City, but allegedly spent an undefined amount to clean the Lee statue in the past. The two corporate Plaintiffs, Virginia Division, Sons of Confederate Veterans, Inc. and The Monument Fund, Inc., are alleged to have an "interest" in preserving the Lee statue. There is no allegation that their legal rights as an organization will be affected by this case.

The Complaint provides no insight on how the legal interests of Griffen, Earnest, Phillips, Fry or Marshall will be affected by the outcome in this case. *See*, e.g., Logie v. Town of Front Royal, 58 Va. Cir. 527, 531-532 (2002) ("As a general proposition it is well settled that one who is not injured by the operation or effect of a municipal ordinance or is not within its purview cannot raise questions as to its validity, such as its constitutionality or unreasonableness"). There are simply no allegations that establish standing on the behalf of those Plaintiffs.

With regard to the taxpayer Plaintiffs, paragraph 32 of the Complaint cites (i) a City staff memo that states that the cost of removing and relocating the Lee statue may be $330,000, and (ii) a Council Resolution that recommends a $1,000,000 budget for the preparation of a Master Plan for the City's North Downtown and Court Square Districts. There is no allegation that the City Council has actually approved the expenditure of any funds for the removal of the statue, and the Council Resolution makes it clear that the aforementioned $1,000,000 budget does not involve the removal of the Lee statue.

In April 2017 the Virginia Supreme Court affirmed the dismissal of a declaratory judgment action for lack of standing, including a claim of taxpayer standing, in Lafferty v. School Board of Fairfax County, ___ Va. ___, 798 S.E.2d 164 (2017). With regard to an individual plaintiff's ("Jack Doe") claim of standing, the Court noted that the complaint failed "to set forth a controversy that is justiciable, that is, where *specific adverse claims*, based upon *present rather than future or speculative facts*, are ripe for judicial adjustment." Id. (citations omitted; emphasis by the Court). The fatal flaw in the complaint was that it did "not seek a declaration of a specifically identified or actionable right belonging to Jack Doe".

With regard to the claim of taxpayer standing, the Court held that general governmental expenditures, including those necessary to implement a challenged policy, were insufficient as a

matter of law to establish standing. In the present case, time spent by City staff or City Council developing or implementing the challenged Resolution is not the type of governmental expenditure that can support taxpayer standing. The Court's opinion is quoted at length due to its relevance to the present case:

> The complaint in the instant case lacks allegations of costs or expenditures connected to the policies implemented by the Board. Indeed, the sole reference to monetary costs can be found where the complaint states that Lafferty presented evidence to the school board of the costs of defending the Board's actions in court. The cost of potential litigation to vindicate a policy, while a potential expense related to any action by a school board, is not a government expenditure authorized by the policy itself.
>
> The plaintiffs request that this Court infer costs accompanying a policy change, and to consider costs of implementing the policy. This we cannot do. First, allegations of revenue expenditures have not been pled, and any inferences as to revenue expenditures would be wholly speculative on the part of this Court. Furthermore, under such a theory, any government policy would be subject to challenge by any taxpayer due to even nominal costs of implementation. Taxpayer standing is based on a special relationship between local taxpayers and local revenue expenditures, thereby creating a "direct and immediate" relationship; taxpayer standing does not open the door to challenge any local government action.
>
> We have said that taxpayer standing does not provide a plaintiff standing "upon his bare position as a taxpayer of the city and his assertion that the zoning ordinance was invalid vis-a-vis the city's claim that it was valid." Here, the complaint makes clear that the standing of Lafferty and the Does in their individual capacity would be based on nothing other than their "bare position as . . . taxpayer[s]" and their assertion that the policy of the Board is invalid—in this case, ultra vires—vis-à-vis the Board's claim that it was valid. In *Shanklin*, this Court went on to conclude that the "situation presented . . . is nothing more than a difference of opinion between a taxpayer and his government," and not an actual controversy. The same is true here.

(Citations omitted). In this case the Plaintiffs and the City have a strong difference of opinion on whether the Lee statue should be moved. Differences of opinion, however, do not give rise to standing.

Last, the Complaint fails to allege that corporate Plaintiffs Virginia Division, Sons of Confederate Veterans, Inc. and The Monument Fund, Inc. will suffer any concrete,

particularized, and legally-cognizable injury or deprivation of any legal right if the statue is moved. The members of these corporate entities simply have a strong desire to see that the Robert E. Lee statue remains in its current location. As a matter of law that desire does not establish legal standing to pursue declaratory judgment or any other relief requested in the Complaint. *See, e.g.,* Virginia Beach Beautification Commission v. Board of Zoning Appeals, 231 Va. 415, 420, 344 S.E.2d899 (1986) ("The organization is merely a nonstock corporation with no specific property interests to be damaged").

For the reasons discussed herein the Defendants' Demurrer should be granted because the Complaint fails to allege facts sufficient to show that the Plaintiffs have standing to pursue their claims.

V. The Demurrer to Count Two of the Complaint should be granted because the actions of the Defendants were not, as a matter of law, *ultra vires.*

In Count Two of the Complaint Plaintiffs allege that the Defendants "have no legal authority to remove the Lee statue from Lee Park, to rename Lee Park, to place additional monuments in Jackson Park, or to rename Jackson Park". The Plaintiffs claim that because those actions were *ultra vires*, each member of City Council is individually liable for damages. The Complaint does not contain any allegation that explains *how* the alleged ultra vires acts of City Council actually damaged any of the Plaintiffs.

Every locality in Virginia has express authority to operate, maintain, and regulate the use of its real property, including property used as public parks, and to construct improvements on property it owns. Virginia Code §§ 15.2-1800 and 1806; City of Charlottesville Charter Sec. 14. The City has plenary authority over the acquisition, use and disposition of its personal property.

Virginia Code § 15.2-951. Even the deeds from McIntire to the City for the park properties (Plaintiffs' Exhibits C and D) expressly acknowledged that the "authorities of said city shall, at all times, have the right and power to control, regulate and restrict the use of said property". The Plaintiffs' claims in Count Two represent a series of *non sequiturs*: the City can allow one statue to be placed in a park, but does not have the authority to allow additional statues, monuments, or improvements to be placed in that same park. The City can name a park once, but after that it does not have the authority to re-name the park at a later date.

At best the Plaintiffs' *ultra vires* argument is a recasting of its argument that § 15.2-1812 prohibits removal of the statue. Since the Defendants have clear, express authority both by statute and by the City's Charter to regulate its own property, including its parks, the Demurrer to Count Two of the Complaint should be granted.

VI. The Demurrer to Count Three of the Complaint should be granted because the Complaint does not identify any terms of the gifts of the parks or the statues that have been violated by the Defendants.

Neither the deed for the property that would become Lee Park nor the deed for the property that would become Jackson Park requires the Lee or Jackson statues to remain in place in perpetuity, requires the parks to be named "Lee" or "Jackson", or prevents the City from making other improvements to the parks. As is readily apparent on the face of the two McIntire deeds, there were only two conditions on the conveyances: that the property conveyed be held and used in perpetuity by the City as a public park, and that no buildings be erected thereon. The deeds contained no other restrictions on the future use of either Park or any improvements therein. The

Complaint does not allege that the City is planning to use either property for something other than a public park, or that a building will be erected in either park. The Complaint is silent on what "term of the gifts" is allegedly being violated, which severely prejudices the City's ability to defend that claim.

The "whereas" clauses in the deeds do contain prefatory language regarding McIntire's wishes. The Lee Park deed stated that McIntire "desires to erect thereon a statue of General Robert E. Lee", and the Jackson deed noted that McIntire "requested that said property be conveyed to the said city and that it be known as "Jackson Park". These statements of Mr. McIntire's desires or requests do not create binding terms or conditions:

> Quite often the premises of a deed, in addition to naming the parties therein, contain a recital of the circumstances explaining the reason for the transaction and the consideration which induced it. . . . Conditions subsequent or special limitations should not lightly be raised by implication from a mere declaration in a deed that the grant is made for a special or particular purpose, unless the declaration is clearly coupled with words appropriate to such condition subsequent or special limitation. . . the well-recognized rule is stated to be that the mere declaration of the use to which the granted premises are to be applied does not ordinarily import a condition or limitation, but only in cases in which a reverter or forfeiture is expressly provided and in cases to which the intent to create a grant on condition or limitation is plain is the grant held to be one on condition or limitation.

Roadcap v. County School Board, 194 Va. 201, 205 – 206, 72 S.E.2d 250 (1952). Neither the Lee Park deed nor the Jackson Park deed contains a reverter or forfeiture clause. The deeds therefore do not contain a condition subsequent, the breach of which would destroy the City's title and transfer ownership back to the original grantors. *See* Martin v. Norfolk Redevelopment & Housing Authority, 205 Va. 942, 947, 140 S.E.2d 673 (1965) (a deed provision requiring a City to use the property conveyed as a park and playground, and to erect no buildings thereon, was not a condition subsequent which would require a reconveyance of the property in the event of breach).

Since the allegations of the Complaint and the attached Exhibits fail to disclose any breach of the McIntire deeds to the City, the Defendants' Demurrer to Count Three should be granted.

CONCLUSION

For the reasons cited herein the Defendants respectfully request that their Demurrer to the Complaint be granted, and that the Complaint be dismissed with prejudice

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief In Support of Defendants' Demurrer was mailed first class postage prepaid and sent by electronic mail this 10th day of July, 2017 to the following counsel for Plaintiffs:

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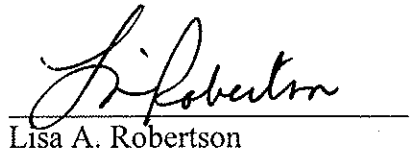

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