

**IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE, VIRGINIA**

FREDERICK W. PAYNE, *et al.*, )  
Plaintiffs, )  
v. )  
CITY OF CHARLOTTESVILLE, )  
VIRGINIA, *et al.*, )  
Defendants. )

Case No. CL17-145

**BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER TO THE AMENDED COMPLAINT**

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 previously filed Demurrer to the Amended Complaint.

**STATEMENT OF RELEVANT PROCEEDINGS**

On September 1, 2017, the Court held a hearing on Defendants' Demurrer to Plaintiff's original Complaint. At the hearing, the Court ruled from the bench on several aspects of Defendants' Demurrer. Subsequently, on October 3, 2017, the Court issued a written opinion that summarized and incorporated its September 1, 2017 rulings and also addressed the remaining arguments in Defendants' Demurrer. The Court's rulings were entered the following day in an Order dated October 4, 2017.

The Court granted Plaintiffs leave to file an amended complaint within 21 days from the date of the Order. Plaintiffs timely filed the operative Amended Complaint on October 11, 2017. In response, Defendants filed both a Demurrer and a Plea in Bar to Plaintiff's Amended Complaint on November 1, 2017.

FILED  
2/20/18 3:10p.m.  
(Date & Time)  
City of Charlottesville  
Circuit Court Clerk's Office  
Lizelle A. Dugger, Clerk  
By *Anita Spivy*  
Deputy Clerk

On February 5, 2018, the Court set a hearing on Defendants' Demurrer for February 27, 2018 and a hearing on the Plea in Bar for April 11, 2018. At the hearing, Plaintiffs also presented the Court with a memorandum regarding "legislative privilege," which purports to address Defendants' statements in the Demurrer to the Amended Complaint regarding legislative immunity. Defendants filed a reply to Plaintiffs' memorandum on February 12, 2018, indicating that they do not agree with Plaintiffs' position and reserving the right to offer additional argument regarding legislative immunity in subsequent briefing in support of the pending Demurrer and Plea in Bar.

### LEGAL STANDARD

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).

## ARGUMENT

The Defendants have demurred to the Amended Complaint, maintaining that it is insufficient as a matter of law on the following grounds:

- (1) Plaintiff's Amended Complaint is nearly identical to the original Complaint, with the exception of paragraphs 21A—21D, such that the Court should confirm and re-issue its prior rulings from September 1, 2017 and October 3, 2017, entered on October 4, 2017, sustaining several aspects of Defendant's Demurrer;
- (2) Plaintiffs fail to identify any terms or conditions of the gift to the City that were violated by the renaming of Jackson Park;
- (3) Plaintiffs lack legal standing;
- (4) Plaintiffs may not recover actual damages from the individual Defendants pursuant to Section 15.2-1812.1 because the statute does not authorize such relief;
- (5) The Lee and Jackson statues are not protected by Virginia Code section 15.2-1812;
- (6) The actions of the Defendants were not *ultra vires* because of specific legislation that authorizes the Defendants to operate, maintain, and improve public parks;
- (7) The City of Charlottesville and the City Council are both entitled to sovereign immunity;
- (8) Plaintiffs may not proceed against any of the individual Defendants based on their alleged motives in enacting legislation because doing so would violate the principle of legislative immunity;
- (9) Even if the individual Defendants are not protected by legislative immunity, Plaintiffs may not collect punitive damages pursuant to Section 15.2-1812.1 from the individual Defendants because enacting statue removal legislation of a kind that has been previously

upheld by the only Virginia court to consider the matter is clearly not reckless, willful, or wanton conduct.

**I. Plaintiff's Amended Complaint is Nearly Identical to the Original Complaint, Such That the Court Should Confirm and Re-issue Its Prior Rulings Sustaining Parts of Defendant's Demurrer**

Plaintiffs' Amended Complaint adds four new paragraphs of factual allegations designed to bolster Plaintiffs' assertion that the Lee statue is protected by 15.2-1812 as a "Confederate monument." Besides this new material, however, Plaintiffs' amended complaint is the same as the original one.

Accordingly, the Court should confirm and re-issue its prior rulings from September 1, 2017 and October 3, 2017, entered as an Order on October 4, 2017, that sustain several aspects of Defendant's Demurrer to the original complaint. In particular, the Court should confirm and establish that:

- Defendants' Demurrer is still sustained as to Plaintiffs' claim for money damages under Virginia Code section 15.2-1812.1 and the claim for damages is dismissed. There has been no physical damage or encroachment alleged or established with respect to either statue as contemplated by Virginia Code section 15.2-1812 or 15.2-1812.1 and claims for damages are premature.
- Defendants' Demurrer is still sustained as to Count III of the Complaint regarding violation of the terms of a gift, with the sole exception of Plaintiffs' assertion regarding the renaming of Jackson Park.

**II. Plaintiffs Fail to Identify Any Terms or Conditions of the Gift to the City That Were Violated by the Renaming of Jackson Park**

Defendants incorporate by reference herein their arguments from their brief in support of the Demurrer to the original Complaint, arguing that Plaintiffs fail to state a claim for violation

of the terms of a gift as to the renaming of Jackson Park. The Amended Complaint only identifies two conditions allegedly applicable to the gift of that park property: (i) that the property be used in perpetuity as a public park, and (ii) that no buildings be erected thereon. See Exhibits C and D to the Amended Complaint. The Amended Complaint is devoid of allegations that Defendants took or contemplated action that would violate either condition.

### **III. Plaintiffs Lack Legal Standing**

Defendants incorporate by reference herein their arguments regarding standing, from their brief in support of the Demurrer to the original Complaint and as stated by Defendants' at the hearing on Defendants' first Demurrer.

### **IV. Plaintiffs May Not Recover Actual or Compensatory Damages Pursuant to Section 15.2-1812.1 Because the Statute Does Not Authorize Such Relief**

In their Amended Complaint, Plaintiffs purport to seek a minimum of \$500 in actual or compensatory damages for each Plaintiff, from each of the individual Defendants. Plaintiffs are not entitled to this relief, however, as the statute on which they rely for their cause of action clearly limits them to a different remedy.

Section 15.2-1812.1(A) provides that:

Damages may be awarded in such amounts as necessary for the purpose of rebuilding, repairing, preserving and restoring such memorials or monuments to preencroachment condition. Damages other than those litigation costs recovered from any such action shall be used exclusively for said purposes.

Nowhere in the Amended Complaint do Plaintiffs provide factual allegations indicating that damages must be awarded for "rebuilding, repairing, preserving and restoring" the Lee or Jackson statues, let alone any allegations supporting the conclusion that \$500 for each Plaintiff is needed to restore those statues to "preencroachment condition". Indeed, the Court has already concluded that there has been no physical damage to, or encroachment upon, either of the

statutes, and the claim for damages has been dismissed. And, if any damages *were* awarded in this action, they could only be paid out for the purposes specified in the statute, such that Plaintiffs would not be entitled to receive any amount awarded. Accordingly, the Court must hold that Plaintiffs are not entitled to seek or receive actual damages in this action from any Defendant, regardless of whether any injunctive or declaratory relief is ultimately granted.

V. **The Lee and Jackson Statues Are Not Protected by Virginia Code Section 15.2-1812**

Defendants incorporate by reference herein their arguments regarding this issue, from their brief in support of the Demurrer to the original Complaint and as stated by Defendants' counsel at the hearing of Defendants' first Demurrer.

VI. **Defendants' Actions Were Not *Ultra Vires* Because of Specific Legislation That Authorizes the Defendants to Operate, Maintain, and Improve Public Parks**

Defendants incorporate by reference herein their arguments regarding this issue from their brief in support of the Demurrer to the original Complaint and as stated by Defendants' counsel at the hearing of Defendants' first Demurrer.

VII. **The Amended Complaint fails to state any grounds upon which Defendants City of Charlottesville and Charlottesville City Council may be subjected to this lawsuit, or may be liable to the Plaintiffs in damages, because they are entitled to sovereign or governmental immunity to the extent any actions are alleged against them within the Amended Complaint.**

The doctrine of sovereign immunity is "alive and well" in Virginia. *Messina v. Burden*, 228 Va. 301, 307 (1984). In *Messina*, the Virginia Supreme Court held that one of the rationales for the doctrine of sovereign immunity from suits in tort is the necessity to protect the public purse. *Messina* at 307. However, as applicable to this case, that is not the only basis for the doctrine. Equally important is the "orderly administration of government" and protection "from

burdensome interference with the performance of its governmental functions and preserves its control over...property.” *Messina* at 308.

In *Messina*, the Virginia Supreme Court reaffirmed that the doctrine of sovereign immunity serves a multitude of purposes, including “providing for the smooth operation of government”. *Messina* at 308. The protection of the doctrine not only applies to those who help run the government, such as city councilors in this case-especially for the act of voting as an elected council member, but the doctrine also extends to “local legislative bodies” such as the Charlottesville City Council and the City of Charlottesville, Virginia. *Messina* at 309. The doctrine provides immunity “from both actions at law for damages and suits in equity to restrain governmental action or to compel such action”; additionally, sovereign immunity can bar a declaratory judgment absent an express statutory waiver of immunity not present in this case. *Cunningham v. Rossman*, 80 Va. Cir. 543 (2010). (In *Cunningham* the court held that sovereign immunity extends to municipalities for actions arising from the exercise of governmental functions.)

A function is considered governmental if it is the **exercise** of an entity’s political, discretionary, or, as in this case, “legislative authority”. *Cleaves-McClellan v. Shah*, 93 Va. Cir. 459 (2016). The Resolutions attached to the Amended Complaint passed by the City Council for the City of Charlottesville are the classic example of legislative acts. The legislative acts in this case were authorized by §15.2-1425 Va. Code Ann. (1950). The City of Charlottesville and City of Charlottesville Council are entitled to sovereign immunity from claims and requests for relief, if any, against them in the Amended Complaint.

**VIII. Plaintiffs May Not Proceed Against the Individual Defendants Because the Individual Defendants are Immune from Suit and are Immune from Personal Liability for Damages**

Individuals who occupy the highest levels of the three branches of government, such as judges and elected officials, have generally been accorded absolute immunity from personal liability for their actions. *Messina v. Burden*, 228 Va. 301, 307-308, 321 S.E.2d 657, 660-661(1984). *See also 4 McQuillin on Municipal Corporations* (Elections, Officers and Employees) §12.222. (At least once in Virginia, legislative immunity has been held by a court as extending even to a locality's planning commission members, *Schaecher v. Bouffault*, No. 14-2737 (Clarke County Cir. Ct. May 7, 2014), *aff'd on other grounds*, 290 Va. 83, 772 S.E.2d 589 (2015)). By statute, *see* Virginia Code § 15.2-1405, the General Assembly has also conferred upon individual members of City Council immunity from *suit* arising from the exercise of their discretionary authority, and governmental authority.

“A corollary to the separation of powers doctrine is the concept of legislative immunity. As the majority notes, this concept is enshrined in Article IV, Section 9 of the Constitution of Virginia. However, rather than establishing the form and structure of our government, this section ensures that “legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.” *Powell v. McCormack*, 395 U.S. 486, 505, 89 S.Ct. 1944, 23 L.Ed.2d 491 66\*66 (1969). The protection of legislative immunity lies with the individual legislators “to insure that the legislative function may be performed independently without fear of outside interference.” *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980) (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975))....”

Va. Sup. Ct. Justice McClanahan, concurring in *Bd. of Sup'rs v. Davenport & Co.*, 285 Va. 580, 742 S.E.2d 59 (2013).

The U.S. Supreme Court has held that common law legislative immunity applies to local legislators, the same as legislators protected under [U.S.] Constitutional legislative immunity provisions, because the rationales for according absolute legislative immunity to federal, state



and local legislators apply with equal force. *Bogan v. Scott-Harris*, 523 U.S. 44, 2 (1998).

Legislative immunity not only protects against personal liability for damages, it also prevents legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves, and it frees them from the burden and costs of litigation.

*Supreme Court of Va. v. Consumers Union of the U.S., Inc.* 446 U.S. 719, 731-732 (1980);

*Schlitz v. Virginia*, 854 F.2d 43, 46 (4<sup>th</sup> Cir. 1988); *Baker v. Mayor of Baltimore*, 894 F.2d 679, 681 (4<sup>th</sup> Cir. 1990).

Exhibits F, G and H to the Amended Complaint establish that: Council publicly discussed the matters at issue in this lawsuit, considered recommendations of a Blue Ribbon Commission that it had appointed (*see Amended Complaint, Exhibit H*), and adopted three resolutions to implement measures that it deemed necessary to “reveal and tell the full story of race through our City’s public spaces”—actions which, regardless of whether one agrees or disagrees with them, have been undertaken in furtherance of the common good and public welfare of the community (as is evident, in particular, on the face of Exhibit H to the Amended Complaint).

Under Virginia law, Council may lawfully take action via motion, resolution, or ordinance, *see Va. Code §15.2-1425*. When Council publicly considers and discusses a proposed action in furtherance of the common good/ general public welfare, within a public meeting, and subsequently acts by public vote, it is performing a legislative function. The actions referenced in Exhibits F, G and H to the Amended Complaint are not actions that can be described as “administrative” or “ministerial” (involving no discretion, such as routine maintenance of a street, or discipline of a specific employee); they are inherently discretionary, in that they deliver an opinion and public position of city council on a matter of public concern, and take action in

furtherance of that opinion, *see, e.g., Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, --, 129 S. Ct. 1125, 1131-1133 (2009)

A government entity has a right to speak for itself...it is entitled to say what it wishes...and to select the views that it wants to express....It is the very business of government to favor and disfavor points of view....Governments have long used monuments to speak to the public...rulers have erected statues of themselves to remind their subjects of their authority and power....Government decision makers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history and local culture.

Delivering an opinion on a matter of public concern, and taking action to decide what statues they do or do not currently view as being appropriate for the two parks at issue in this case, is in fact one form of legislative action. *See, e.g., Fields v. Office of Johnson*, 459 F.3d 1, 10-11 (D.C. Cir. 2006), *cited in Bd. Of Sup'rs v. Davenport & Co.*, 285 Va. 580, 742 S.E.2d 59 (2013)(legislative actions include, but are not limited to: delivering an opinion, a speech, haranguing in debate, proposing legislation, etc.).

Plaintiffs in this case disagree with a legislative policy decision made by City Council, and they are attempting to punish councilors individually for action that was taken by them only as a group. In *Ames v. Painter*, 239 Va. 343 (1990), the Virginia Supreme Court held that "judicial review of legislative acts must be approached with particular circumspection because of the principle of separation of powers, embedded in the Constitution. That principle precludes judicial review into the motives of legislative bodies elected by the people." *Ames* at 349 (emphasis added).

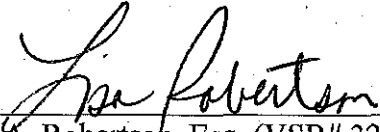
**IX. Plaintiffs May Not Recover Punitive Damages from the Individual Defendants Because Enacting Statue Removal Legislation That Has Been Previously Upheld by the Only Virginia Court to Consider the Matter is Not Reckless, Willful, or Wanton**

None of the votes or actions set forth within the Amended Complaint constitutes intentional or willful misconduct or gross negligence. None of the Defendants' votes or actions set forth within the Amended Complaint violated any clearly established law; as a result, none of their votes or actions referenced in the Amended Complaint constitutes intentional or willful misconduct or gross negligence, or any reckless, willful or wanton conduct. In fact: (i) the only previous state court opinion interpreting Virginia Code §15.2-1812 held that Virginia Code § 15.2-1812 does not apply retroactively to a monument erected within a city prior to 1997, *see Heritage Preservation Association, Inc. v. City of Danville, Virginia* (Danville Cir. Ct., Case No. CL15000500-00, Dec. 7, 2015); and (ii) the law is sufficiently unclear and unsettled that Virginia's Attorney General has recently acknowledged that "...applying these rules of [statutory] construction to the multitude of amendments to [Va. Code § 15.2-1812] over the years shows that, while it does apply to some monuments, there is a range of potential outcomes for individual monuments." (Op. Va. Att'y Gen., August 25, 2017).

Bare allegations within the Amended Complaint, of malice/improper motivations of the individual city councilors, should not suffice to subject the individual councilors to the burdens of trial, or to the burdens of broad-reaching discovery. "Government officials performing discretionary functions generally are shielded from liability for civil damages, insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Respectfully submitted,  
CITY OF CHARLOTTESVILLE, VIRGINIA,  
CHARLOTTESVILLE CITY COUNCIL, et al.,

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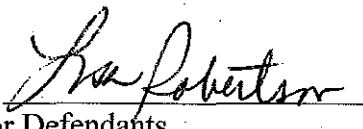
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**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of February, 2018, pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia, on or before the date of filing I served a true copy of the foregoing document to counsel of record, by electronic mail (where an e-mail address is indicated below) and also by hand-delivery to Ralph E. Main, Jr., Esq., as follows:

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