

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, et al,

Plaintiffs,

v.

Case No. CL17000145-00

CITY OF CHARLOTTESVILLE,
VIRGINIA, et al,

Defendants.

ORDER

On September 1, 2017, this Court heard argument on Defendants' Demurrer to Plaintiff's Complaint. Lisa Robertson and S. Craig Brown appeared for the Defendants, Ashleigh M. Pivonka and Richard H. Milnor appeared for the Defendants City of Charlottesville and Charlottesville City Council, and Ralph E. Main, Jr., S. Braxton Puryear, and Elliot Harding appeared for Plaintiffs.

Upon argument of counsel, and for the reasons expressed in the hearing transcript attached hereto as Exhibit A (Excerpt of Proceedings) and incorporated into this Order, the Court made the following rulings and hereby Orders as follows:

1. The Demurrer is SUSTAINED as to Count III of the Complaint (§7 of the Demurrer), and Count III is DISMISSED, with one exception: the possibility that the name "Jackson Park" may be a deed condition. The Court takes under advisement whether the deed for Jackson Park and documents relied on by Plaintiffs requires that the park remain named Jackson Park as a condition of the original gift of the Park to the City.
2. The Court takes the Demurrer as to Count II, the ultra vires claim (§6 of the Demurrer) under advisement as it is contingent on the Court's decision pertaining to the retroactivity of Virginia Code § 15.2-1812.

3. The Demurrer is SUSTAINED as to Plaintiffs' claim for money damages under Virginia Code § 15.2-1812.1 (¶5 of the Demurrer) and the claim for damages is DISMISSED. The Court finds that there has been no physical damage or encroachment alleged or established with respect to either statue as contemplated by Virginia Code § 15.2-1812 or Virginia Code § 15.2-1812.1 and that such claims for damages are premature.
4. The Court takes under advisement the issue of Plaintiffs' standing to seek a permanent injunction against Defendants (¶1 and ¶2 of the Demurrer). However, the Court finds that if the Court determines that Virginia Code § 15.2-1812 is applicable to the Lee or Jackson statues, then the Court will find that Plaintiffs have "taxpayer" standing for Count II based on allegations of taxpayer status alone, as to Count II.
5. The Court takes under advisement the issue of the applicability of Virginia Code § 15.2-1812 to the existing Lee and Jackson statues (¶3 and ¶4 of the Demurrer). In particular the Court takes under advisement whether Virginia Code § 15.2-1812 applies retroactively.

This Court notes the objection of the respective parties to all adverse rulings as to them.

It is ORDERED that the clerk forward certified copies of this Order to all counsel of record.

Entered this 4th day of October, 2017.



JUDGE

We ask for this as to the Court's ruling sustaining ¶7 of the Demurrer (as to Count III deed conditions and the renaming of the park from Lee Park to Emancipation Park) and ¶5 of the Demurrer (as to dismissal of Plaintiffs' claims for monetary damages). Defendants object to the Court's ruling on taxpayer standing, relying on arguments in their memoranda and those stated at the Demurrer hearing:

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1. SUSTAINING DEMURRER AS TO COUNT III AND DISMISSING COUNT III (EXCEPT FOR NAME JACKSON) LEE PARK NOT NAME IN TAXES, BUT GIFT RECEIVED THAT LEE SMITH WOULD BE PLACED IN ~~THE~~ ASSESS. CONTRARY TO LAW.
2. SUSTAINING AND DISMISSING CLAIM FOR MONETARY DAMAGES. SMITH DOES NOT RECEIVE PHYSICAL DAMAGE OR INCURRANCEMENT.

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FREDERICK W. PAYNE, et al.,

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Case No. CL17000145-00

CITY OF CHARLOTTESVILLE, et al.,

Defendants.

EXCERPT OF PROCEEDINGS BEFORE

THE HONORABLE RICHARD E. MOORE, JUDGE

1:45 p.m. to 5:50 p.m.

September 1, 2017

Charlottesville, Virginia

Job No. 34457

REPORTED BY: Shawna Hum Browne, RMR, CRR

1 Excerpt of Proceedings before the Honorable
2 Richard E. Moore, reported by Shawna Hum Browne, RMR, CRR,
3 Notary Public in and for the Commonwealth of Virginia at
4 large, commencing at 1:45 p.m., September 1, 2017, at the
5 Circuit Court for the City of Charlottesville, 315 East
6 High Street, Charlottesville, Virginia.

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1 (September 1, 2017)

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P R O C E E D I N G S

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(Beginning of Excerpt.)

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THE COURT: As you can imagine, I've given a
6 lot of thought to this, and I've done a lot of reading
7 on it. And I'm going to disappoint a lot of people
8 right now because I'm not going to be able to decide
9 all of the issues. I'm going to decide some of them
10 now, and I've got to do some more reading on some of
11 them. There's at least five of the cited authorities
12 that I don't feel like I've read enough. I need to
13 read or reread them, and I'm not going to do it tonight
14 because I need to digest them.

15

I don't like doing this. It just backs
16 things up further, but I need -- I think I owe it to
17 the parties to be confident in the decision that I make
18 and feel like I'm making a decision that's in
19 accordance with the law as I understand it.

20

But I am going to make some rulings and get
21 some things out of the way.

22

As to the counts based on the deed or
23 violation of deeds, I'm going to sustain the demurrer
24 as to any alleged restrictions by or violations of the
25 deed with the exception of the name of Jackson Park.

1 I'm going to let that survive for the time being. But
2 in any other allegations of this violating a term or
3 condition of the deed constituting a cause of action,
4 I'm going to sustain the demurrer.

5 I'm not -- the issue of the name of Jackson
6 Park being included in the initial deed. I did not
7 review that issue prior to hearing enough. I really
8 was focused on other things, which you can imagine.
9 I'm not ruling that it was a condition. If I say it
10 survives, it's the subject of evidentiary proof. So it
11 wouldn't be demurrable if it survives for the other
12 reasons. But I'm just not ruling at this point that
13 the plaintiffs can't attempt to prove that as a factual
14 issue.

15 So that survives for now as to the name of
16 Jackson Park. I think they've alleged enough so far to
17 keep it alive. But I'm taking that under advisement.
18 And after I review some of the other things, I may rule
19 on that without further hearing. I may sustain that as
20 well, but I'm not today.

21 In addition, I'm going to sustain the
22 demurrer based on the count relating to the renaming of
23 Lee Park. As I ruled at the injunction hearing, I did
24 not find anything in the facts pleaded that would allow
25 the Court to say that in some way was not allowed. I

1 just don't see anything in the case that says City
2 Council can't rename Lee Park. And they already have.
3 But this would not undo that.

4 As to the ultra vires claim, that's already
5 acknowledged. That either rises or falls on whether
6 1812 is retroactive. Or stated another way, whether I
7 find that 1812 applies to the statutes that were
8 already in existence at the time of its passing.

9 But if I find that 1812 does apply, then I
10 would also find standing for the ultra vires count
11 based on taxpayer standing alone, if I find that
12 survives. So I'm just letting you know where I stand
13 on that. If I find 1812 applies to the Lee statue,
14 then their allegations about expenditures of
15 significant funds without authority would survive. If
16 I find 1812 does not apply to the existing statue, then
17 the ultra vires count automatically fails, and standing
18 is moot at that point.

19 I'm also going to sustain the demurrer as to
20 the damages count for actual encroachment or damage to
21 the statue. I believe that's under 1812.1. I think
22 that the way I've read that all along, I think that the
23 damage issue or the encroachment issues in 1812.1
24 anticipates actual physical damage or encroachment. I
25 don't think it's talking about theoretical or symbolic.

1. And the damages -- it talks about the cost of
2 repairing. And I think it might talk about the cost
3 of -- it talks about cost of repairing and maybe
4 relocating or something. I've got it right here.

5 Talks about the costs necessary for
6 rebuilding, repairing, preserving, or restoring such
7 memorials. And it seems to me that's anticipated some
8 physical damage having occurred. And I don't think
9 any's occurred yet. But physical damage. I think that
10 is premature, as the City has said, and I will sustain
11 the demurrer as to that.

12 But as to the two main ones, the standing,
13 particularly for the injunction, and the applicability
14 of 1812 to the existing statue, I've got to take that
15 under advisement because I've read some of the other
16 authorities. I need to read a little more.

17 We will set a date as soon as we can.
18 Best-case scenario would be I would get a decision
19 within two to three weeks, but that might be overly
20 optimistic. And I know it won't be next week just
21 because of my schedule.

22 As to the cause of action, the demurrer as
23 to the cause of action on whether it's a war memorial
24 or a monument to veterans, I'm inclined to overrule the
25 demurrer on that. I'm not ruling that today, but I'm

1 inclined to from what I've heard. At present it seems
2 that they have pled enough facts from which adequate
3 notice to defend would be given to defend this. I
4 think clearly there's enough alleged. They know
5 they're asking this to be protected as a war memorial
6 or a memorial to veterans of wars.

7 I don't even think I have to go as far to
8 say that it has to be a Confederate war memorial. I
9 don't think that's true. I just have to determine that
10 it's clear that it's a veteran of wars, and I know they
11 have a different argument on that.

12 And again, I'm not going to make a final
13 ruling on that until I've reviewed the other two
14 because there may be some other things that I come
15 across that will change my view. But I just want you
16 to know that's my thinking on that.

17 There are two other matters which weren't
18 addressed today, and it's late. But one was the
19 recently filed injunction as to the removal of the
20 Jackson statue. Because since that time, there's been
21 further resolution by City Council that was not there
22 when this was originally filed. And when we had the
23 original injunction hearing, I specifically did not
24 address that because it didn't seem to be imminent.

25 But plaintiffs have now filed a motion to

1 expand the injunction to include the Jackson statue.
2 We're not going to argue that today, but we did address
3 that prior to the hearing.

4 And then they're also asking for a temporary
5 injunction to remove the coverings that have been
6 placed on them because they believe that also violates
7 the statue. That's also not for argument today. I
8 think it was just filed yesterday or day before. I
9 think I saw them yesterday for the first time. But we
10 do need to decide when and how you want to address
11 those.

12 So I'll hear from either of you -- any
13 questions about that?

14 I'll ask y'all to prepare the order on what
15 I have ruled on. Not everything's in your favor, but
16 I've sustained a couple of those points. And so if
17 you'll do the order and circulate it to counsel for
18 endorsement.

19 Obviously the main issue, from the Court's
20 point of view, is whether I find that 1812 applies. I
21 had my views of that before I came in here today. I
22 may or may not still have the same views. But I do
23 think the arguments were good and were helpful. And I
24 appreciate that.

25 Either way, it's one of these decisions that

1 I know people feel strongly about on either side, and
2 I'm going to disappoint somebody. I may disappoint
3 everybody. But I've got to at least satisfy me that
4 I'm applying the law correctly. That's all I can say.

5 Anything else that you want to say or put on
6 the record? Or any questions about the ruling, I
7 guess?

8 MR. MAIN: Other than we note our exceptions
9 to those rulings.

10 THE COURT: Certainly. Note your exception
11 on all of those.

12 MR. MAIN: Did you want to set the date for
13 the injunction?

14 THE COURT: Well, I wanted to see what your
15 pleasure was. Now my assistant is long gone, and she's
16 the keeper of the books. What probably would be best,
17 since there's seven of you, for y'all to talk with each
18 other and maybe come up with two or three or four
19 suggested dates to address that. I know you're going
20 to want a minimum amount of time to look at that.

21 MR. BROWN: Well, Judge, as you well know,
22 and as the other side knows, on any request for
23 injunctive relief, one of the key criteria is the
24 likelihood of succeeding on the merits. That seems
25 like that will be driven by your decision on the

1 demurrer. And I wonder if it's premature to schedule
2 that before we have that ruling.

3 THE COURT: Well, it could be. I mean,
4 obviously I already ruled at the initial injunction
5 that I thought there was a likelihood of succeeding.
6 So one view as to the actual removal of the Jackson
7 statue -- one thought is I said on the record
8 previously I might revisit that at any time. So I'm
9 inclined to go ahead and extend that temporarily
10 because I already made initial findings, and my current
11 findings haven't been announced yet.

12 But the covering is a different issue. And
13 not only is there likelihood to succeed as an issue,
14 but there's irreparable harm issue on that. So I'm
15 glad to hear what you think about that. But I think I
16 left the door open for me to extend that at the last
17 hearing. And certainly everything that applied from
18 the Lee injunctions would apply to the Jackson
19 injunction until I've ruled otherwise.

20 MR. BROWN: Although City Council has not
21 taken any action with regard to the Jackson statue.

22 THE COURT: I thought they -- I thought they
23 passed something that said they wanted to move both of
24 them.

25 MR. BROWN: It's on the agenda next week.

1 THE COURT: Okay.

2 MR. PURYEAR: Judge, that's our concern is
3 if it's on the agenda, if there's not an injunction to
4 stop them from doing it, then they'll adopt it on a
5 resolution --

6 THE COURT: What day is it on the agenda
7 next week?

8 MR. BROWN: Tuesday. It's normally a Monday
9 meeting.

10 THE COURT: Monday's a holiday.

11 MR. BROWN: That's why it's Tuesday.

12 MR. PURYEAR: Judge, we understand and
13 appreciate that scheduling this is going to be a
14 challenge. We also understand and appreciate it's
15 going to take the Court some time to make a final
16 decision. But if we wait until the Court makes a final
17 decision and then the Court's schedule and seven
18 attorneys -- we'd ask that we be able to schedule a
19 hearing on the injunction sooner rather than later, and
20 we would suggest there would be no harm to the
21 defendants doing that.

22 But it's our concern that there would be
23 irreparable harm done, and it's our position that
24 there's irreparable harm being done as we speak.

25 THE COURT: I mean, frankly, from the last

1 proceeding, as I recall it, I specifically said there
2 hasn't been any talk or effort to move Jackson. If
3 it's on the agenda, somebody has made the motion.

4 MR. BROWN: But it may very well be a
5 resolution which authorizes the removal of the Jackson
6 statue contingent on getting a favorable ruling from
7 the Court.

8 THE COURT: If you could assure me of that,
9 that would resolve that for the time being.

10 MR. BROWN: That's what I anticipate.

11 THE COURT: Okay.

12 MR. PURYEAR: Judge, our concern is there's
13 a possibility of appealing the Court's decision if we
14 disagree with the Court's decision. And what we don't
15 want is for the irreparable harm that is contemplated
16 to be done without an injunction in place.

17 THE COURT: Right.

18 MR. PURYEAR: There's nothing hurt as far as
19 the defendants are concerned with us having an
20 injunction that protects both of these monuments. And
21 we're also asking since --

22 THE COURT: Let me put it this way. I'm
23 going to be here Tuesday and Wednesday. I won't be
24 here Thursday and Friday. Monday's a holiday.

25 If the meeting is Tuesday, if there is

1 anything that goes in any direction like there's an
2 actual risk that it's going to be damaged or moved and
3 you don't have the language of "contingent on the
4 Court's ruling," I'll hear you on Wednesday at any
5 time. Because I've already -- it's already an issue
6 from last time.

7 MR. BROWN: That's fair enough.

8 THE COURT: I don't think we need full
9 notice on that.

10 MR. MAIN: That's fair.

11 MR. BROWN: We'll agree to that, Judge.

12 THE COURT: So we'll do that on Wednesday.
13 I'll be here all day. You all just let me know.

14 The real question is down the road, the
15 other -- the injunction based on covering is obviously
16 not as big a concern to them. It is a concern. They
17 filed on it. So we do need to set a time for that.

18 MR. PURYEAR: And sooner rather than later,
19 Judge.

20 THE COURT: I mean, that's going to be a
21 matter of scheduling with -- unfortunately,
22 Ms. Runner's husband has been transferred by the Air
23 Force, and I'm losing her in the next couple weeks. So
24 Ms. Shepperd is taking over. But you can schedule with
25 either one of them. Ms. Runner won't be here next

1 week, but Ms. Shepperd is here.

2 So if you want to set a time that you think
3 is adequate for just arguing the temporary injunction
4 on the covering, we'll schedule that. If it's far
5 enough out, if it's like two or three weeks out, I may
6 be able to present my decision by then. But if it's
7 like next week sometime, I'm sure that I won't. So
8 I'll just coordinate that if we can.

9 Anything else we need to do today?

10 Let me observe and thank everyone in the
11 courtroom for conducting yourself the way that you did.
12 I really don't know how I'm going to rule on this yet,
13 and I do think there are strong merits on both sides of
14 this dispute. I don't think it's one-sided. If I did,
15 I would have made the decision already. But I
16 appreciate how y'all have been respectful and conducted
17 yourself. Thank you very much.

18 MR. PURYEAR: Judge, excuse me.

19 We were granted a six-month injunction in
20 reference to General Lee's monument on the 2nd of May.
21 This is the 1st of September. We've got two months
22 left. We're going to ask for that to be extended.
23 This is obviously going to take way past the 2nd of
24 November. So the third point that we ask --

25 THE COURT: For the trial.

1 MR. PURYEAR: Yes.

2 THE COURT: Let's address that when we come
3 back. I thought about addressing that today if we'd
4 finished earlier. Clearly, I don't expect -- if I
5 don't sustain the demurrers in full, we're going to
6 have a trial, and we won't get it done before November.
7 So I'm very aware of that timetable.

8 MR. PURYEAR: Yes, sir.

9 THE COURT: But anytime really in September
10 or October is timely for extending that.

11 MR. PURYEAR: Yes, sir.

12 THE COURT: And if we get together and have
13 another hearing, we can address it then.

14 MR. BROWN: And Judge, we acknowledge you
15 reserve the right to modify on your own motion.

16 THE COURT: Okay. Thank you very much.

17 MS. ROBERTSON: And Your Honor, if I may,
18 just for the record.

19 THE COURT: Yes, you may.

20 MS. ROBERTSON: I'd like to note the City's
21 objections to the rulings that did not go in the City's
22 favor.

23 THE COURT: Oh, he already said that.

24 MR. MAIN: For us.

25 THE COURT: Well, there wasn't a lot of

1 that, but yeah.

2 MS. ROBERTSON: Thank you.

3 THE COURT: Whatever there was.

4 MS. ROBERTSON: Thank you.

5 THE COURT: The Jackson name would be one.

6 MR. BROWN: Right. So for whatever that

7 was --

8 THE COURT: So both of you put your
9 exceptions in there, and be sure they can review it and
10 endorse it.

11 MS. ROBERTSON: Thank you.

12 THE COURT: Thank you, all of you.

13 MR. MAIN: Thank you, Judge.

14 MR. PURYEAR: Thanks, Judge.

15 (Proceedings concluded at 5:50 p.m.)

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1 CERTIFICATE OF COURT REPORTER

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3 I, Shawna Hum Browne, RMR, CRR, Notary Public in
4 and for the Commonwealth of Virginia at large, and whose
5 commission expires August 31, 2018, do hereby certify that
6 I stenographically recorded the proceedings heard in the
7 Circuit Court for the City of Charlottesville, Virginia,
8 in the captioned cause, heard by the Honorable Richard E.
9 Moore, Judge of said court, on September 1, 2017.

10 I further certify that the foregoing proceedings
11 constitutes a true, accurate, and partial transcript of
12 said proceedings to the best of my knowledge and ability.

13 Given under my hand and notarial seal at
14 Charlottesville, Virginia, this 1st day of September 2017.

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Shawna Hum Browne, RMR, CRR, Notary Public

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Commonwealth of Virginia at Large

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Notary No. 302535

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Job Number 34457