
In The
Supreme Court of Virginia

RECORD NO. 200790

**THE CITY OF CHARLOTTESVILLE, VIRGINIA and
CHARLOTTESVILLE CITY COUNCIL,**
Appellants,

v.

**FREDERICK W. PAYNE, JOHN BOSLEY YELLOTT, JR.
(aka Jock Yellott), EDWARD D. TAYLOE, II, BETTY JANE
FRANKLIN PHILLIPS, EDWARD BERGEN FRY,
VIRGINIA C. AMISS, STEFANIE MARSHALL, CHARLES L.
WEBER, JR., VIRGINIA DIVISION, SONS OF CONFEDERATE
VETERANS, INC., ANTHONY M. GRIFFIN, BRITTON FRANKLIN
EARNEST, SR., and THE MONUMENT FUND, INC.,**
Appellees.

**BRIEF ON STANDING AND RELIEF AVAILABLE FOR
APPELLEES INDIVIDUAL PLAINTIFFS AND
VIRGINIA DIVISION, SONS OF CONFEDERATE VETERANS, INC.**

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STATEMENT OF THE CASE (STANDING)

The pleadings aver that in 2017 Charlottesville's City Council [the "City"] violated Va. Code §§15.2-1812 and 1812.1 in voting resolutions to remove the statues of Confederate General Robert E. Lee, and Lt. General Thomas Jonathan "Stonewall" Jackson. The Plaintiffs filed suit in March 2017. In May 2017 the Court below granted a temporary injunction. Thwarted in physical removal, in August 2017 the City tried instead removing the statues from public view, permanently concealing them under tarps. After six months, in February 2018 the Court ruled the tarps also violated the law and the temporary injunction.¹

In its October 3, 2017 Letter Opinion ruling on a City demurrer, the Court below found four different grounds for Plaintiffs' standing to sue. All twelve Plaintiffs had statutory standing to bring an action under former Va. Code §§15.2-1812 and 1812.1; five Plaintiffs had local taxpayer standing challenging *ultra vires* tax money expenditures; seven Plaintiffs had individual standing by establishing a particularized interest apart from the public at large; and one Plaintiff

¹ Revised Second Amended Complaint ["RSAC"] ¶28 (Lee statue removal) ¶30D (Jackson statue removal) ¶30A (grant of temp. inj.) ¶30B-C (permanent tarps) ¶30I (Court's ruling indefinite tarps illegal), **JA 687-91**.

corporation had representative standing derived from two members with individual standing.²

In October 2019 the Court granted Plaintiffs a permanent injunction, and a declaratory judgment that the City had acted *ultra vires*. In January 2020 in its Final Order, the Court granted an award of costs and attorneys' fees.³

STATEMENT OF FACTS (STANDING)

The Court below found initially that six, later reduced to five, Plaintiffs were City taxpayers: "Payne, Yellott, Tayloe, Amiss, Weber and Smith."⁴ The Revised Second Amended Complaint averred "an unlawful and illegal expenditure of funds."⁵ Specifically, the Plaintiffs challenged \$3,000 spent by the City on

² 10.3.17LtrOp p. 7-14 (discussion of general principles of standing at 8- 12; fact finding and ruling on individual standing and corporate derivative standing statutory standing at 9 -11 & 12-13; local taxpayer standing at 13-14; statutory standing ruling at 12-13), **JA 258-65**; 12.6.17Ord (standing), **JA 382-84**.

³ 6.13.18LtrOp and 11.9.18Ord (holding physical damage not necessary for eligibility for attorneys fees under Va. Code §§15.2-1812 & 1812.1), **JA 456-64, 570-74**; 10.15.19Ords: Permanent Injunction, Declaratory Judgment, **JA 1011-1020**; 1.21.20LtrOp and 1.29.20FinalOrd (awarding attorneys fees), **JA 1035-48, 1049-54**.

⁴ Plaintiff Lloyd Smith died June 25, 2018. His name was removed from the Second Amended Complaint. 11.17.18LtrOp p. 14 (granting leave for 2nd Amended Complaint, and Smith's departure from case caption), **JA 581**.

⁵ RSAC ¶30H (\$1 million budget), **JA 690**; ¶32 (specific amounts for statue removal), **JA 691-92**; RSACExhH, **JA 18**; 10.3.17LtrOp p.14 (taxpayers' standing to challenge "unlawful and illegal expenditures"), **JA 265**.

concealment tarps and the City's intent to spend approximately \$700,000 on monument removal. According to the City's own estimates, moving the Lee monument would cost \$370,000; moving the Jackson monument, \$330,000.⁶ The expenditures were part of a \$1 million budget for RFP's the City Council voted to solicit for park redesign.⁷

The Court below also found the pleadings established a personal interest in preserving the statues apart from the public at large for eight, later seven, Plaintiffs: Payne, Yellott, Tayloe, Marshall, Weber, Smith, and the two corporations Virginia Division, Sons of Confederate Veterans, Inc. ["Sons of Conf. Vets"] and the Monument Fund.⁸ Plaintiff Monument Fund "has an interest in preserving and protecting both statues, its purpose being to support historic preservation with a focus or emphasis on monuments, memorials, statues and the grounds thereof."⁹ In

⁶ RSACExh H (City Resolution on RFP for park master plan: "Redesign Lee Park, independent of the Lee statue while retaining its ability to function as a community gathering place" and RFP must "allow for . . . implementation of the final Master Plan as adopted by City Council with a projected estimated budget not to exceed \$1,000,000"). The note beneath under the first asterisk on page 2 says: "The Robert E. Lee statue will be relocated as per 3:2 majority vote by City council on February 6, 2017." **JA 18**; RSACExh J (City Public Works estimate on cost of statue removals), **JA 25**.

⁷ RSAC ¶32, **JA 691-92**; 2.5.18Tr, **JA 402-03**; RSAC ¶¶30A-C, **JA 688-89**.

⁸ RSAC ¶¶2-12, **JA 673-76**; 10.3.17LtrOp (Court's recital of Complaint allegations and ruling on individual standing and corporate representative standing at pp. 9-11 & 12-13), **JA 260-63**.

⁹ 10.3.17LtrOp p. 10, **JA 261**.

addition (regarding its representative standing) two officers, its Chair, Ms. Marshall, and its Executive Director Mr. Yellott, had pleaded an individual particularized interest.¹⁰ Plaintiff Yellott, Executive Director of The Monument Fund, "worked to preserve both statues," uses one or both of the parks daily, and "conducts historic tours of the monuments."¹¹ Plaintiff Payne "utilizes and enjoys" both Lee and Jackson Parks and the statues on a regular basis.¹² Plaintiff Weber "has a special interest in the protection and preservation of war memorials and monuments located in Charlottesville, these two in particular." Sons of Conf. Vets likewise "has an interest in preserving and protecting both statues and parks," and standing "by virtue of its purpose and involvement with these two statues."¹³

In addition, the court below found four of the original Plaintiffs pled financial as well as personal interests: Tayloe, Smith, Marshall, and Sons of Conf. Vets. Plaintiffs Tayloe, Smith, and Sons of Conf. Vets. participated in funding the 1997-99 restoration of the statues of Generals Lee and Jackson under the November 1997 letter contract signed by City Manager O'Connell accepting donated funds, and promising the City would keep perpetual records of the restoration and "plan and

¹⁰ RSAC ¶¶3,8, **JA 674, 675**; 10.3.17LtrOp, **JA 262**.

¹¹ 10.3.17LtrOp p. 9, **JA 260**.

¹² 10.3.17LtrOp p. 9, **JA 260**.

¹³ RSAC ¶11, **JA 676**; 10.3.17LtrOp pp. 10 - 11, **JA 261-62**.

present an appropriate ceremony celebrating the restorations with the Donor's participation."¹⁴ Marshall, Chair of The Monument Fund, Inc., more recently expended "her own funds and time in cleaning the Lee statue and removing graffiti in 2011 and 2015."¹⁵

Finally, the pleadings showed all individual Plaintiffs and both corporations demonstrated their interest in monument preservation, "an interest in the matter" being the sole requisite for statutory standing under former Va. Code §15.2-1812.1.¹⁶

In summary, the Court below determined the Revised Second Amended Complaint pleaded facts establishing local taxpayer standing for five Plaintiffs, individual standing for seven (five individuals and two corporations), corporate representative standing for one, and statutory standing for all twelve.¹⁷

¹⁴ RSAC ¶¶4,11, **JA 674, 676**; 5.2.2017Exh 14 (Letter City Manager O'Connell to Lloyd Smith accepting donated funds for 1998-1999 restoration of Lee and Jackson statues), **JA 71**; 10.3.17LtrOp (Court's recital of Complaint allegations and ruling on individual standing and corporate representative standing standing at pp. 9-11 & 12-13) **JA 260-62, 263-64**.

¹⁵ RSAC ¶8, **JA 675**; 10.3.17LtrOp p. 10, **JA 261**.

¹⁶ 10.3.17LtrOp, p. 13 **JA 264**.

¹⁷ 10.3.17LtrOp p. 7-14, **JA 258-65**.

CITY ASSIGNMENTS OF ERROR ADDRESSED

3. The court erred by adjudicating claims for declaratory and injunctive relief, because the doctrine of taxpayer standing does not provide a basis for the Payne plaintiffs to assert an action against the City for declaratory judgment that the City's resolutions violated Va. Code §15.2-1812, or for a permanent injunction prohibiting removal of the Statues.

2. The trial court erred in construing the provisions of Va. Code §§15.2-1812 or §15.2-1812.1 to authorize a civil action against the City for declaratory judgment or a permanent injunction prohibiting the City from removing statues of Robert E. Lee and Thomas J. Jackson (together "Statues") from its parks, because neither §15.2-1812 nor §15.2-1812.1 authorizes such actions. [addressed to the extent it contests standing].

QUESTION PRESENTED

Did the Plaintiffs have standing to sue the City for an injunction and declaratory judgment, and an award of costs and attorneys fees?

STANDARD OF REVIEW

Standing is a question of law reviewed *de novo*. See, e.g., *Howell v. McAuliffe*, 292 Va. 320, 330 (2016) [*"Howell v. McAuliffe"*]. If one ground for standing is established, no others need be considered. *Howell v. McAuliffe*, 292 Va. at 335 n. 6. In addressing standing the Court accepts as true the facts in the pleadings, as well as any facts that may be reasonably and fairly implied or inferred from them. *Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 572 (2007) [*"Philip Morris"*].

ARGUMENT

Appellees the individual plaintiffs and Sons of Confederate Veterans are presenting separately a brief on standing and relief available from the Monument Fund's brief on the applicability of Va. Code §§15.2-1812 and 1812.1 [all collectively, "Plaintiffs"] in the interest of judicial economy. As to standing, the Court need read no further than Part I: failing to contest all grounds is fatal to the City's taxpayer standing challenge. Part II addresses why the decisions in the Court below on individual, representative, taxpayer, and statutory standing were correct. Part III considers Plaintiffs' standing to seek relief with or without Va. Code §§15.2-1812 and 1812.1. This, to rebut the assertion there never was, or no longer is, a basis "for plaintiffs to maintain this suit or to obtain any form of relief," which is apparently a standing argument though not couched as such.¹⁸

I. Failing to contest all grounds is fatal to the City's standing challenge.

When one ground for standing suffices, alternative grounds need not be considered. See, e.g. *Howell v. McAuliffe*, 292 Va. at 335 n. 6. See also *Manchester Oaks Homeowners Ass n, Inc. v. Batt*, 284 Va. 409, 422 (2012) (stating where

¹⁸ The City asserts in Assignment of Error II there never was a cause of action to sue the City. The Attorney General suggests under the amended law there *no longer* is one. Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Appellant ["Atty Gen'l Amicus Brief"] p. 28 (arguing Plaintiffs' cause of action and hence standing to seek relief expired when the new law took effect).

assignments of error "leave multiple bases for the challenged ruling uncontested, our review is satisfied [if] any one of them provides a sufficient legal foundation for the ruling)" ["*Manchester Oaks*"].

The City Petition for Appeal does not challenge seven Plaintiffs' standing under general principles, nor the Monument Fund's corporate representative standing. Nor does the City assign error to the Court's finding all Plaintiffs had an interest in the matter for statutory standing. The City only contests the relief statutory standing affords, in Assignment of Error II. Assignment of Error III is limited to controverting "the doctrine of taxpayer standing."

The City left alternative grounds of standing unchallenged. That ends the standing inquiry. *Manchester Oaks*, 284 Va. at 421; *Howell v. McAuliffe*, 292 Va. at 335 n. 6.

II. The Court determined all plaintiffs showed the requisite interest

Standing is a preliminary appraisal whether Plaintiffs' pleadings show "a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Howell v. McAuliffe*, 292 Va. at 332. As an overview, the individual standing determination asks whether a plaintiff has a particularized interest apart from the public at large; representative standing whether a corporation's members have standing; local

taxpayer standing whether the Plaintiffs are taxpayers contesting *ultra vires* tax money expenditures by a locality (past, present, or future); and statutory standing asks, are these the Plaintiffs the law invites to enforce it?¹⁹

A. Seven Plaintiffs had a particularized interest; one corporation also representative standing

Individual standing requires the pleadings to show a Plaintiff's particular interest in the subject matter. *Howell*, 292 Va. at 332; *Philip Morris*, 273 Va. at 578. Personal recreational use and aesthetic interest are sufficient for standing, regardless of pecuniary interest. *Philip Morris*, 273 Va. at 578; *Chesapeake Bay*, 52 Va. App. at 823.²⁰ Nonetheless three Plaintiffs did plead a pecuniary interest: Plaintiffs Tayloe, and Sons of Confederate Veterans, had funded the 1997-1999 restoration of the Lee and Jackson monuments under contract with the City.²¹ Plaintiff Marshall

¹⁹ See generally *Howell v. McAuliffe*, 292 Va. at 332 (defining individual standing); *Philip Morris*, 273 Va. at 578 (exploring relation between individual, corporate representative standing, under federal statute); *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 363 (2017) (holding local taxpayer standing requires showing a "connection to government expenditures").

²⁰ *Philip Morris* and *Chesapeake Bay* concern a federal standard more stringent than standing under state law, but the Court below noted that they articulate the general principles that "aesthetic, artistic, recreational, historical, or similar loss constitutes harm that's relevant." 10.3.17LtrOp p. 11, **JA 262**.

²¹ 10.3.17LtrOp pp. 9-10, **JA 260-61**; Nov. 26, 1997 Letter City Manager O'Connell to Lloyd Smith accepting donated funds for 1998-1999 statue restoration; "ceremony to celebrate the restoration"; 5.2.17Exh 14, **JA 70-71**.

expended her own money and time cleaning the Lee statue and removing graffiti in 2011 and again in 2015.²²

For public interest litigation "[a]n identifiable trifle of some sort will suffice," so long as it is distinct from that of the public at large. *Chesapeake Bay Found., Inc. v. Commonwealth*, 52 Va. App. 807, 823 (2008). The "basic idea ... is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 611-613 (1968) (citing James Madison's willingness to fight over "three pence" if a principle is at stake; examples of trivial injuries supporting standing).

The Court initially ruled that the pleadings showed six individual plaintiffs, later reduced to five, had demonstrated sufficient personal use and interest in statue preservation apart from the public at large, for individual standing under general principles.²³ Both corporations, The Monument Fund and Sons of Conf. Vets had "an interest in preserving and protecting both statues and parks (Sons of Conf. Vets in addition contributed funds towards their restoration in 1997) and standing under

²² 10.3.17LtrOp pp. 9-10, **JA 260-61**.

²³ Payne, Yellott, Tayloe, Marshall, the late Lloyd Smith, and Weber. As indicated earlier the Court's grant of leave for amending the Complaint included removing Smith's name. See note 4 *supra*.

general principles."²⁴ Corporate Plaintiff the Monument Fund also had representative standing derived from its Chair, Ms. Marshall, and its Executive Director Mr. Yellott, each of whom had individual standing. See *Philip Morris*, 273 Va. at 577 (stating representational standing requires that the organization include "at least one member with standing to present, in his or her own right, the claim . . . pleaded by the association").

It bears repeating that the City Assignments of Error contest none of this: neither the facts nor the conclusions of law that seven Plaintiffs had individual standing. This renders pointless the City's taxpayer standing challenge in Assignment of Error 3. See, e.g. *Howell*, 292 Va. at 335 n. 6 (noting one ground for standing suffices; alternative grounds need not be considered).

B. Five Plaintiffs had local taxpayer standing (Assignment of Error 3)

Local taxpayer standing, the only type the City does challenge, considers whether the Plaintiffs are taxpayers contesting *ultra vires* tax money expenditures by the locality. See *Lafferty*, 293 Va. at 363 (2017); see also *Gordon v. Bd of Supervisors*, 207 Va. 827, 830-31 (1967) (stating taxpayers have "right to resort to equity to restrain local government officials from exceeding their powers ...") [*Gordon*].

²⁴ 10.3.17LtrOp p. 11, **JA 262**.

Local taxpayer standing requires only pleading "a connection to government expenditures." *Lafferty*, 293 Va. at 363. It does not require a unique injury or proprietary right as the City argues (though several taxpayer Plaintiffs did in addition plead personal or financial involvement in statue preservation and maintenance).²⁵

The City brief incorrectly attempts to graft onto Virginia's taxpayer standing doctrine the inapplicable federal "case and controversy" standard. See *Asarco Incorporated v. Kadish*, 490 U.S. 605, 617 (1989) (noting state courts "are not bound by ... federal rules of justiciability...") [*Asarco*]. Taxpayer standing to contest local expenditures differs from the more stringent federal requirements, because the peculiar relation of the "taxpayer to the [municipal] corporation makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" *Asarco*, 490 U.S. at 613. In Virginia, as elsewhere, taxpayer plaintiffs have standing to sue localities even if as individuals they might lack specific injury. *Lafferty*, 293 Va. at 363 (noting local taxpayers may have standing even when no individual injury alleged); see also, *Taxpayer Suits, A Survey and Summary*, 69 Yale L.J. 895, 895-898 (1960) (surveying state cases, noting taxpayer plaintiffs everywhere have

²⁵ City taxpayers Payne, Yellott, and Tayloe had plead personal interests. Plaintiff Tayloe also had pleaded financial involvement in the 1997-1999 statue restoration. RSAC ¶¶2,3,4,7, **JA 673-75**.

standing even if as individuals they might lack specific injury) cited in *Gordon*, 207 Va. at 831.

Initially six, later five individual Plaintiffs asserted local taxpayer standing in the Revised Second Amended Complaint.²⁶ The City does not contest that these five Plaintiffs are City residents, pay City taxes, and challenged a City use of tax money as *ultra vires*. The City appears to controvert only how much was actually at risk, or already spent. The City is incorrect both on the facts and on the law.

As to the facts, the pleadings stated that the City budgeted \$1 million for the park master plan including the Lee monument relocation.²⁷ The City anticipated moving the Lee monument would cost \$370,000; the Jackson monument \$330,000.²⁸ The City Manager confirmed the \$1 million budgeted for park renovation included monument removal, verified the \$370,000 and \$330,000 cost estimates for the statue removals, and conceded that the City had spent about \$3,000 on tarps to conceal the

²⁶ Payne, Yellott, Tayloe, Amiss, Weber and the late Lloyd Smith. RSAC ¶¶2,3,4,7,9, **JA 673-75**; 10.3.17LtrOp pp. 13-14, 15, **JA 264-66**.

²⁷ RSACExh H (City Resolution on RFP for park master plan: "Redesign Lee Park, independent of the Lee statue while retaining its ability to function as a community gather place" and RFP must "allow for . . . implementation of the final Master Plan as adopted by City Council with a projected estimated budget not to exceed \$1,000,000"). The note beneath under the first asterisk on page 2 says: "The Robert E. Lee statue will be relocated as per 3:2 majority vote by City Council on February 6, 2017." **JA 17**.

²⁸ RSACExh J (City Public Works estimate cost of statue removals) **JA 25**.

monuments.²⁹ The Court below rightly concluded that a "connection to government expenditures ... is not lacking here."³⁰

As to the law, Virginia taxpayers have standing to sue localities over unauthorized uses of tax money whether past, present, or future. See e.g. *Arlington County v. White*, 259 Va. 708, 712-714, 722 (2000) (holding local taxpayers had standing to stop current and future *ultra vires* expenditures of tax money on health benefits for domestic partners) ["*Arlington County*"]; *Appalachian Elec. Power Co. v. Town of Galax*, 173 Va. 329, 333-34 (1939) (taxpayers had standing to prevent future unauthorized issuance of local bonds); *Johnson v. Black*, 103 Va. 477, 480, 491-492 (1905) (sustaining taxpayer suit requiring repayment of salaries paid *ultra vires* to current Board of Supervisors, and to their predecessors over the past 11 years).

The actual and prospective City expenditures were *ultra vires* under former Va. Code §§15.2-1812 and 1812.1, which explicitly prohibited authorities of a locality from disturbing, interfering with, or removing monuments. See *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 (2012) (stating when ordinance

²⁹ RSAC ¶32, **JA 691-92**; see 5.2.17Tr pp 179-181 (City Mgr. Maurice Jones confirming cost estimates on statue removal) **R 4261-4263** (cited to digital record where omitted from JA).

³⁰ 10.3.17LtrOp p. 13, quoting *Lafferty*, **JA 264**.

enacted by local governing body conflicts with statute enacted by General Assembly, statute must prevail). Now presumably, the City could pass a new resolution -- provided it comports with the amended law. But under the old law the City resolution was illegal, unauthorized, and the decision to void it stands. Va. Code §1-239 (stating no new act of the General Assembly shall affect any right accrued, or claim arising before the new act takes effect).

The City also protests the Court framing its decision as a declaratory judgment.³¹ But local taxpayers challenging *ultra vires* expenditures have standing for any and all equitable relief including an injunction and a declaratory judgment. See, e.g., *Gordon*, 207 Va. at 827-28 (taxpayers seeking declaratory judgment that loans expending tax money are *ultra vires*); see also *Arlington*, 259 Va. at 710 (stating "[t]axpayers sought a declaration that the County lacked the authority to extend coverage to the newly defined category of domestic partners..."). Even in the US Supreme Court case the City cites, the taxpayers were "seeking a declaration that the state statute governing mineral leases on state lands . . . is void, and also seeking appropriate injunctive relief." *Asarco Incorporated v. Kadish*, 490 U.S. at 610.³²

³¹ 10.15.19 Ord -Dec. J., **JA 1024-28**.

³² The City's argument seems to arise out of a misreading or misapplication of Part A of the *Lafferty* decision construing statutory standing under the Declaratory Judgment Act, which is inapposite here. *Lafferty* Part B addresses traditional taxpayer standing. Compare *Lafferty*, 293 Va. at 354 Part A, Declaratory Judgment Act with Part B, taxpayer standing for relief.

However one frames the Court's decision: whether it "found," "ruled," "held," or as here, "declared" that the City Resolution was *ultra vires*, the Court's October 15, 2019 Order was right. cf. *Miller v. Highland County*, 274 Va. 355, 372 (2007) (stating even if "circuit court has reached the correct result for the wrong reason," we affirm). The decision was narrowly tailored to void only the City Resolution to remove the Lee statue, but not the Jackson resolution because it was conditioned on a legal ruling in the City's favor.³³ In sum, the five taxpayer Plaintiffs had standing for the equitable relief granted.

C. All twelve plaintiffs had statutory standing

Statutory standing only asks whether the law offers these Plaintiffs a cause of action. *Cherrie v. Va. Health Systems, Inc.*, 292 Va. 309, 315 (stating statutory standing determines whether Plaintiffs are members of the class given authority to file suit); *Small v. Fannie Mae*, 286 Va. 119, 126 (2013) (stating statutory standing asks not whether the plaintiff has a personal stake, merely whether he is one of those the statute affords a remedy).

Prior to the amendments to Va. Code §15.2-1812.1 effective on July 1, 2020, "any person having an interest in the matter" could bring an action for encroachment upon a publicly owned war memorial, provided the attorney for the locality had not

³³ 10.15.19 Ord-Dec. J., **JA 1025**.

already done so, as this Court stated in its recent Order in *Levar Marcus Stoney, Mayor v. Anonymous*.³⁴ Here the pleadings established each Plaintiffs' interest in preserving veterans and war monuments, and that the City Attorney had refused to bring an action.³⁵ The Court below concluded that all Plaintiffs had statutory standing and a cause of action under the former Virginia Code §15.2-1812.1.³⁶

The City Assignments of Error do not contest Plaintiffs' statutory standing as interested persons; only the relief available. One sentence in the City Petition for Appeal argued in passing there could be no “matter” without physical harm -- but the City Opening Brief appears to abandon even this point.³⁷ The matter for which

³⁴ In that case with the statutory right of action no longer available, the anonymous plaintiff otherwise had no justiciable interest. Unpublished Order, *Levar Marcus Stoney, Mayor v. Anonymous*, Record No. 200901, 26 Aug. 2020, pg. 6 [*“Stoney Order”*].

³⁵ RSAC ¶33 (City Attorney refused to bring action within 60 days) **JA 692**; RSAC ¶¶2-13 & ¶34 (stating each plaintiffs' involvement in preserving and protecting monuments, and that they are persons having an interest in the matter), **JA 673-76, 692**. Corporations are considered “persons” for purposes of statutory construction. Va. Code §1-230.

³⁶ 10.3.17LtrOp pp. 9-10 (reciting each plaintiffs' statement of interest in pleadings); 12-13 (regarding statutory standing). The Court also noted that “[n]o one who has standing under the conventional principles would not have standing under this statute.” **JA 260-61, 263-64**.

³⁷ City Pt'n for Appeal pp. 11-12 (stating “Yet, on the face of Va. Code §15.2-1812.1, the legislature authorized nothing other than for “any person having an interest in the matter” to bring a civil action for recovery of certain damages. In this case, there is no “matter”— the RSAC does not allege, and has never alleged, any physical harm to either Statue . . .”).

Plaintiffs had standing was protecting monuments against local authorities bent on removal or desecration: first preventing the statues' physical removal, and then taking off the tarps intended permanently to hide them.³⁸ Plaintiffs pleaded, and the Court found, both interference with and an encroachment upon the statues under §§15.2-1812 and 1812.1.³⁹

As to the City's argument the Plaintiffs had to wait for physical harm, a plaintiff need not "await the consummation of the threatened injury to obtain preventive relief. If the injury is certainly impending that is enough [for standing]." *Chesapeake Bay*, 52 Va. App. at 823; see also *Reston Hsp.Ctr. v. Remley*, 59 Va. App. 96, 109-11 (2011) (holding plaintiff had standing to avert in advance the

³⁸ See 6.6.17Ord-Temp.Inj., **JA 81-84** (proscribing disturbing and interference with monuments, including prospective removal of the Lee monument); 6.19.18Ord Enforcing and Enlarging Temp.Inj., **JA 465-68** (holding tarp coverings are a disturbance or interference, ordering removal); 11.17.18LtrOp, **JA 578** (stating: "I have ruled that a tarp covering the statue is an encroachment, and that there could be other encroachments short of physical damage and harm.") 10.15.19Ord - Perm. Inj., **JA 1011-12** (merging and incorporating by reference the previous orders and letter opinions, enjoining "disturbing, interfering with, violating, or encroaching upon Lee or Jackson monuments).

³⁹ RSAC ¶37 (pleading encroachment) **JA 693**; 2.23.18LtrOp and 6.19.18Ord (tarps disturbed and interfered with statues) **JA 404-11, 465-68**; 6.13.18 LtrOp and 11.9.18Ord (stating tarps were an encroachment that interfered with the statues and blocked their view), **JA 461-63, 570-74**; 11.17.18 LtrOp and 1.8.19Ord (granting leave for 2nd amended complaint stating parks changes permitted but not "screening, concealment, encroachment, or interference with statues" — all cited and explicitly incorporated by reference in the 10.15.19Ord-Perm. Inj., **JA 1011-12.**), **JA 575-81, 653-5.**

possibility of competitive harm). Here the harm was both impending and actual: the City had passed a Resolution decreeing removal; budgeted a million dollars; estimated specific costs in hundreds of thousands for removing each of the two monuments -- and had spent tax money on tarps for concealing them. The City asserts a statutory cause of action is available only after irreparable damage is done, but not to stop it in the first place. That "has no logic," the Court below rightly concluded.⁴⁰ Courts do not construe a statute to arrive at an absurd result. See *Ragan v. Woodcroft Village Apts*, 255 Va. 322, 325-26 (1998).

The Court below stated (and the City apparently does not differ) that the three statutes affording protection to monuments, Va. Code §§15.2-1812, 1812.1 and 18.2-137 are to be read together.⁴¹ It is "a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished." *Prillaman v. Commonwealth*, 199 Va. 401, 406 (1957). The Attorney General's 2015 opinion expounding on the relation between

⁴⁰ 10.3.17LtrOp p. 13, **JA 264**.

⁴¹ 10.3.17LtrOp p. 12, **JA 263**. See City Brief p. 22, also calling Va. Code §§15.2-1812, 1812.1 and 18.2-137 "related statutes;" (citing the 2015 Virginia Attorney General opinion "resolving differences in wording among the three statues by resort to the canon of *in pari materia*.") On the following page the City argues that even read together, equitable relief was excluded. That is contradicted by the unequivocal text of former Va. Code §15.2-1812.1(C) (stating "[t]he provisions of this section shall not be construed to limit the rights of any person, organization, society, or museum to pursue any additional civil remedy otherwise allowed by law").

former Va. Code §§15.2-1812, 1812.1 and 18.2-137 *in pari materia*, said their purpose was to prevent desecration of war monuments and veterans' memorials.⁴² The Court below correctly concluded that Va. Code §15.2-1812.1 enforces the §1812 prohibition on local authorities disturbing or interfering with monuments, so "'statutory standing' would apply to any action relating to the enforcement of these statutes."⁴³

III. Plaintiffs' standing conferred eligibility for all relief granted (Assignment of Error 2)

City Assignment of Error 2 controverts whether former Va. Code §§15.2-1812 and 1812.1 "authorize a civil action against the City." The Attorney General's amicus brief argues even if Plaintiffs had a cause of action under the old law, under the amended law "there is no [longer a] basis for plaintiffs to maintain this suit or obtain any form of relief, including an award of attorneys fees."⁴⁴

⁴² Op. 15-050, Op. Va. Att'y Gen'l (2015) (online at http://ag.virginia.gov/files/OPinoins/2015/15-150_Whitfield.pdf) (stating ". . . the importance of honoring all our veterans, especially those that have given their lives and paid the ultimate sacrifice for us, our country and our freedom, cannot be overstated. These brave men and women deserve our full support, and the General Assembly has chosen to extend certain protections to monuments honoring their service").

⁴³ 10.317LtrOp p. 12 (stating statutes construed *in pari materia*), **JA 263**.

⁴⁴ See, Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Appellant ["Atty Gen'l Amicus Brief"] p. 28 (arguing Plaintiffs' cause of action and hence eligibility for injunctive relief expired when the new law took effect).

Both are incorrect. Plaintiffs had statutory standing for all forms of relief granted. And the pleadings provide alternative grounds for standing for all relief, then and now, regardless of statutory standing. See *Manchester Oaks*, 284 Va. at 422 (stating if multiple bases for the ruling, Court's review satisfied if any one of them provides a sufficient legal foundation).

A. Statutory standing conferred eligibility for all relief

To reiterate, the Court below determined all Plaintiffs had standing as persons "having an interest in the matter" to enforce former Va. Code §15.2-1812 against the authorities of the locality breaking the law, through the private right of action in Va. Code §15.2-1812.1.⁴⁵ See *Cherrie*, 292 Va. at 315 (stating "statutory right of action no doubt exists when a statute expressly authorizes it"). Former Va. Code §§15.2-1812 and 1812.1 afforded a right of action against local authorities in much the same way as Virginia's Freedom of Information Act, which allows "any person" recourse against officials who violate Virginia's open government laws. See Va. Code §2.2-3713(A)(1) (allowing "any person" to sue a local public body).

⁴⁵ 10.3.17LtrOp p. 13, **JA 264**.

The simplest, clearest proof Plaintiffs' had a statutory right of action against the City is that the legislature amended the law to do away with it.⁴⁶

- There was no need of an amendment to grant localities authority to move or remove a monument -- if the old law already allowed it. 2020 Va. Acts ch. 1100, amending Va. Code §15.2-1812(A)
- The legislature pointlessly forbade suing a locality, its officers or employees -- if the old law offered no right of action against them. 2020 Va. Acts ch. 1100, amending Va. Code §15.2-1812.1(A)(1).
- If the old law was already limited to physical damage, why amend it to delete "disturb or interfere with" and "violation or encroachment" -- and substitute "damaged or defaced?" 2020 Va. Acts ch. 1100, amending Va. Code §15.2-1812(A) & §15.2-1812.1(A).

The City's (and the Attorney General's) reading that there never was a cause of action would render the 2020 amendments pointless. But amendments are construed as purposeful, never pointless or futile. See *Cape Henry Towers v. National Gypsum Co.*, 229 Va. 596, 600-01 (1985); *Shaw v. Com.*, 9 Va. App. 331,

⁴⁶ See e.g., *Stoney Order*, pg. 6 regarding amendments to Va. Code §§15.2-1812 and 1812.1: "[t]his change demonstrates legislative intent to exclude a member of the public, like Anonymous, who asserts no more than an 'interest' in the removal of a war memorial from seeking a judicial remedy related to such removal."

334 (1990) (we do not "ascribe to the General Assembly a futile gesture"); see also *Williams v. Commonwealth*, 190 Va. 280, 293 (1949) (stating "[w]e must assume that the legislature did not intend to do a vain and useless thing").

As to equitable relief in an action under Va. Code §15.2-1812.1, again the text of the statute is dispositive: "[t]he provisions of this section shall not be construed to limit the rights of any person, organization, society, or museum to pursue any additional civil remedy otherwise allowed by law." Va. Code §15.2-1812.1(C). The Court in *Frank Shop, Inc. v. Crown Cent. Petroleum Corp.*, 264 Va. 1 (2002) ("*Frank Shop*") considered a similar provision. The statute at issue in *Frank Shop* listed remedies (including attorneys fees) -- but disgorgement of profits was not among them. Still, the statute expressly allowed "such other remedies, legal or equitable, including injunctive relief, as may be available to the party damaged by such violation." *Id.* at 8. The Court concluded that "the language employed cannot be read to exclude the remedy of disgorgement of profits." *Id.* at 10. Likewise here, though §1812.1 does not list equitable remedies (and could not, in all their variety) an injunction and declaratory judgment are additional civil remedies §1812.1(C) explicitly allows. Indeed, for the first 96 years Va. Code §15.2-1812 existed, before the 2000 addition of §1812.1, equitable relief would have been Plaintiffs' only recourse. See *Black and White Cars, Inc. v Groome Tramp, Inc.*, 247 Va. 426, 432

(1994) (holding normally no private right of action for injunction to enforce ordinance, unless violation results in damage difficult to quantify).

In two letter opinions, the Court below found standing to invoke Va. Code §15.2-1812.1 included a mandatory award of litigation costs and attorney's fees if Plaintiffs prevailed in preserving monuments, as they did.⁴⁷ The City broke the law. The City, not the citizens who called them to account, must bear the cost. See *Lambert*, 293 Va. at 251 (2017) (noting General Assembly's intent to encourage private parties to enforce the statute through civil litigation); see also *Perdue v. Kenney*, 559 U.S. 542, 552 (2010) (stating purpose of fee shifting is encouraging capable counsel to take on public interest cases).

The Attorney General argues the 2020 amendments negate Plaintiffs' standing for attorneys fees. But an amendment does not affect a right accrued or claim arising before it takes effect. Va. Code §1-239 (stating no act repealing a law shall affect any right accrued, or claim arising before the new act of the General Assembly takes effect). The litigation cost and attorney's fees award Final Order entered January 29,

⁴⁷ 6.13.18LtrOp p 6-91(stating Court's finding of encroachment under §1812.1 means Plaintiffs entitled to attorneys fees and costs); **JA 461-64**; 1.21.20LtrOp (attys fees) **JA 1035-48**;1.29.20Ord **JA 1049-51** RSAC ¶¶23,41 and Request for Relief ¶¶2,6, **JA 686, 694, 696-98**. See *Lambert v. Sea Oats Condo Assoc.*, 293 Va. 245, 251 (2017) (party required only to notify their opponent that it seeks attorneys' fees). The Court below stated Plaintiffs "have sought, from the outset, attorneys fees" and the City was well aware that pointless litigiousness would increase the cost. 1.21.20 LtrOp pp. 1-3, **JA 1035-37**

2020 was a right accrued and claim that arose five months before the new law took effect July 1, 2020.⁴⁸ The award stands. See also *Hollowell v. Marine Res. Com'n*, 56 Va. App 70, 80 (2010) (holding change of regulation mooted underlying claim does negate statutory attorney's fees award to prevailing party where fees already incurred") [citations omitted].

B. Individual Plaintiffs with a particularized interest or local taxpayer standing were eligible for equitable relief regardless of statutory standing.

The Plaintiffs' interest was not created exclusively by statute. *Howell v. McAuliffe*, 292 Va. at 336 (rejecting argument statutory remedy was exclusive). Plaintiffs also had individual and local taxpayer standing for equitable relief.

Individual standing: Seven of the Plaintiffs had standing as individuals to sue for an injunction, even without statutory standing.⁴⁹ The Court's fact finding on the balance of equities and irreparable harm would have sustained the injunction,

⁴⁸ 1.21.20LtrOp (attys fees) **JA 1035-1048**; 1.29.20Ord **JA 1049-51**. See legislative history of 2020 Va. Acts Ch 1101 at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB183> (indicating text still being rewritten in March 2020; Governor signed it April 10, 2020, taking effect July 1, 2020).

⁴⁹ See 10.3.17LtrOp p. 11 (finding "all Plaintiffs except Phillips, Fry, Amiss Griffin and Earnest have individual standing"), **JA 262**.

apart from the City's violation of Va. Code §15.2-1812 and the private right of action in §1812.1.⁵⁰

The Plaintiffs asserted three grounds for recovering their attorneys' fees: the statutory award, as damages; and an equitable award.⁵¹ If the Court below had ruled Va. Code §15.2-1812.1 inapplicable, attorneys fees would still be recoverable in equity. See e.g. *Hall v. Cole*, 412 U.S. 1, 4-6 (1973) (discussing common law origins of equitable power to award attorneys fees); see also *Carlson et al. v. Wells et al.*, 281 Va. 173, 188-189 (2011) (listing examples of equitable attorneys fee awards). The Court below noted that the City's pointless litigiousness, controverting the incontrovertible, increased the Court's burden and the expense to the Plaintiffs.⁵² An equitable attorneys' fees award would have been warranted.

⁵⁰ 5.2.17Tr. pp. 15-264 (Plaintiffs' and experts' testimony on harm, and counsels' argument) **R 4097-4144**; 5.2.17Tr. pp 267-294 (ruling from the bench, findings on balance of equities and irreparable harm) **R 4045-4082**; 6.6.17Ord (granting temp. inj., incorporating by ref. ruling from bench), **JA 81-85** (cites to the digital record where omitted from JA).

⁵¹ 8.19.19 Motion for Attys Fees ¶ (2) **R 3556**; 8.23.19 Lit. Cost and Atty's Fees Points & Auth. pp. 2-5, **R 3590-3595** (cited to the digital record, omitted from JA).

⁵² The Court below noted Mayor Signer had told the City Council on the dais that moving the statues was not allowed by the law. And "[t]hey were on notice of the provision that would require the City to be responsible for attorneys fees if Plaintiffs were to prevail." 1.21.20LtrOp pp. 1-3, 6, **JA 1035-37, 1040**. The City needlessly disputed whether statues of Confederate Generals Lee and Jackson were Confederate monuments or memorials; whether the City had authorized or permitted them to remain in the parks -- and evaded discovery intended to narrow the issues. The City's obduracy increased the cost. 1.21.20LtrOp p. 5 n. 5 (reviewing City's pointlessly

Corporate representative standing: derived from and in effect the same as individual standing: the Monument Fund would have eligibility for injunction, and attorneys fees as an equitable award.

Taxpayer standing: Local taxpayer standing included eligibility for equitable relief including the injunction and declaratory judgment, and again, if appropriate as an equitable award, attorneys' fees. *Gordon*, 217 Va. at 827 (stating local taxpayer standing allows all equitable remedies); *Lynchburg & R. St. Co. v. Dameron*, 95 Va. 545, 546 (1898) (jurisdiction of court of equity to restrain municipal corporation upon taxpayer suit "too well settled to admit of dispute"). Even absent Va. Code §§15.2-1812 and 1812.1 the City Resolution was *ultra vires* on other constitutional and statutory grounds.⁵³ Alternative grounds were not argued below since the clear violation of Va. Code §§15.2-1812 and 1812.1 obviated the need.

disputing issues that seemed self-evident; which increased the expense of the case), **JA 1039-40**.

⁵³ RSCAHEXh F, the February 6, 2017 City Council Resolution to remove the Lee monument, only says "approved by City Council" without indicating who voted yea or nay, a fatal defect. Va. Const. Art. VII §7 (requiring "[o]n final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded . . . ") **R 8600**, see e.g. *Town of Madison, Inc. v. Ford*, 255 Va. 429, 438 (1998) (upholding decision that ordinance was null and void because recorded vote failed Va. Const. Art. VII §7 requirement to record names and how they voted). In addition, a contemporaneous Resolution indicates the Lee removal Resolution vote was 3-2. **R 8602**. The Lee statue is an improvement considered part of the park property. Without a three-fourths supermajority, the City Council resolutions to remove and sell the statue contravened Article VII, §9 of the Virginia Constitution and Va. Code §15.2-2100(A) (cites to digital record when omitted from JA).

In conclusion, Plaintiffs' past and ongoing eligibility for equitable relief rebuts the argument there is no longer a "basis for plaintiffs to obtain any form of relief."⁵⁴ Seven Plaintiffs had, and have, standing to sue for equitable relief as individuals, and five as taxpayers contesting tax money expenditures -- entirely apart from statutory standing to enforce Va. Code §15.2-1812 by using the private right of action in Va. Code §15.2-1812.1.⁵⁵

To end where we began: Plaintiffs had standing under several theories to obtain all the relief granted. With one ground established, no others need be considered. *Howell*, 292 Va. at 335 n. 6.

CONCLUSION

Public officials cannot be allowed to break the law with impunity. On this, citizens no matter what their politics would agree. The Plaintiffs' standing to call the City to account is incontrovertible. Now three years later, Judge Moore's decision that the parties would be actual adversaries and the issues fully and fairly developed is corroborated by the 10,000 page record reflecting a "massive effort" in "one of the most complex cases I have ever heard or been involved in."⁵⁶

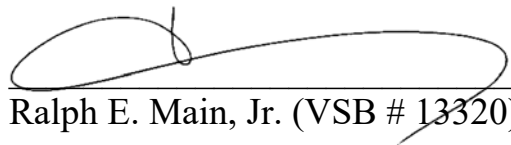
⁵⁴ Brief of the Commonwealth, p 28.

⁵⁵ 10.15.19Ord-Damages, **JA 1029-31**; 9.13.19Tr (finding harm established but unquantifiable) **R 7320-7735** (cite to the digital record, omitted from JA).

⁵⁶ Jan. 21, 2020 Op.Ltr p. 5 (Court calling it "a massive effort;" "one of the most complex cases I have ever heard or been involved with"), **JA 1039**.

The Plaintiffs respectfully request the Court to affirm Judge Moore's Order: Declaratory Judgment, affirm Judge Moore's Final Order awarding costs and fees, and to remand for calculation of attorneys' fees and appeal costs for defending the judgment on the claim under former Va. Code §15.2-1812.1. With respect to the permanent injunction, Plaintiffs request that the Court either order the Circuit Court to exercise its concurrent jurisdiction over dissolution of the injunction while this appeal is pending, or remand for dissolution of the permanent injunction to conform to the amended law at the conclusion of this appeal.

Respectfully submitted for the Individual Plaintiffs and Virginia Division, Sons of Confederate Veterans, Inc.


Ralph E. Main, Jr. (VSB # 13320)

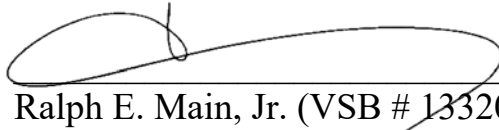
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 5:26 in that its length is less than fifty pages, and otherwise complies with Va. Sup. Ct. rules in form and format.

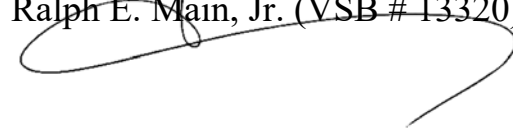


Ralph E. Main, Jr. (VSB # 13320)

October 8, 2020
(date)

CERTIFICATE OF SERVICE

I certify that I caused a true and exact copy of the foregoing Brief on Standing and Relief Available for Appellee Individual Defendants and Sons of Confederate Veterans to be timely served by email to Lisa Robertson, Charlottesville Acting City Attorney, at robertsonl@charlottesville.gov, and to John C. Blair, formerly City Attorney now Acting City Manager at blairjc@charlottesville.gov, Counsel for Appellants; with courtesy copies to Amici Curiae The Attorney General for the Commonwealth of Virginia via Toby J. Heytens, SolicitorGeneral@oag.state.va.us; and Former-Defendant Charlottesville City Councillors, via counsel of record William G. Laxton, Jr., wglaxton@jonesday.com.

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