

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE, VIRGINIA

FREDERICK W. PAYNE, JOHN BOSLEY)
YELLOTT, JR., et al.,)
Plaintiffs,)
v.)
CITY OF CHARLOTTESVILLE,)
VIRGINIA, CHARLOTTESVILLE CITY)
COUNCIL, et al.,)
Defendants.)

Case No. CL17-000145-000

DEMURRER

TO PLAINTIFFS' AMENDED COMPLAINT

COME NOW your Defendants, by counsel, and submit their Demurrer to the Amended Complaint filed by the Plaintiffs in this case, as follows:

1. Plaintiffs have failed to state a cause of action for damages against any of the Defendants under Virginia Code § 15.2-1812.1(A) or (B); in relation thereto, the Amended Complaint contains no allegations different than those in the original Complaint. The Court's ruling in ¶ 3 of its Order entered October 4, 2017 in this action is incorporated herein by reference.

2. Plaintiffs have failed to state a cause of action for damages or other relief against any of the Defendants under Count Three of the Amended Complaint, because the Amended Complaint contains no allegations different than those in the original Complaint. The Court's ruling in ¶ 1 of its Order entered October 4, 2017 in this action is incorporated herein by reference.

3. Plaintiffs have failed to state a cause of action for damages or other relief against any of the Defendants under Count Three of the Amended Complaint, as to the renaming of Jackson [Justice] Park, in that the Amended Complaint only identifies two conditions allegedly applicable to the gift of that park property to the City: that the property be used in perpetuity as a public park, and that no buildings be erected thereon. *See* Exhibits C and D to the Amended Complaint. The Amended Complaint is devoid of allegations of actions taken or contemplated by the Defendants that would violate either condition.

4. The Amended Complaint lacks factual allegations sufficient to demonstrate that the Plaintiffs have any cognizable legal right that can be adjudicated in this action. The Court's ruling in ¶ 1 and ¶ 3 of its Order entered October 4, 2017 in this action are incorporated herein by reference.

a. As to the issue of legal standing, the Amended Complaint contains no allegations different than those in the original Complaint. As to legal standing, the Defendants hereby incorporate by reference their assertions in ¶¶ 1 and 2 of the Demurrer to the original Complaint ("First Demurrer"); the arguments presented within their brief in support of their First Demurrer; their arguments presented and objections noted within the Court's September 1, 2017 hearing of the First Demurrer; and their objections and exceptions noted within the Court's orders disposing of the First Demurrer.

b. The General Assembly has not conferred organizational standing on any entities for purposes of Va. Code 15.2-1912.1. Even if the Statues are subject to the provisions of Virginia Code § 15.2-1812, Plaintiffs Virginia Division, Sons of Confederate Veterans, Inc. and The Monument Fund, Inc. (or any of their members, on

their behalf) do not own the Statues and as organizations are not authorized to bring an action for the recovery of damages against the Defendants under Va. Code § 15.2-1812.1(A)(1).

c. Virginia Code § 15.2-1812.1 does not authorize the award of compensatory damages to any of the Plaintiffs.

5. The provisions of Virginia Code § 15.2-1812 (referenced within § 15.2-1812.1) do not apply to the Lee Statue or the Jackson Statue, because: (i) § 15.2-1812 did not apply to the Lee Statue or the Jackson Statue prior to 1997, and (ii) § 15.2-1812 does not apply retroactively to statues erected in cities prior to 1997. Your Defendants hereby incorporate by reference all of the following: the assertions set forth within ¶ 3 of the Defendants' First Demurrer; the arguments presented within their brief in support of their First Demurrer; their arguments presented and objections noted within the Court's September 1, 2017 hearing of the First Demurrer; and their objections and exceptions noted within the Court's orders disposing of the First Demurrer.

6. The allegations in the Amended Complaint fail as a matter of law to state any *ultra vires* action or violation of Dillon's Rule of statutory construction (Count Two of the Complaint) relative to the Plaintiffs' objections to the renaming or redesign of the Lee [Emancipation] and Jackson [Justice] Parks, because all localities have express statutory authority to operate, maintain, regulate and improve their real property, including property used for public parks. *See* Virginia Code §§ 15.2-1800 and 15.2-1805. Exhibits C and D attached to the Amended Complaint acknowledge that the deeds conveying the park property to the City expressly

recognize that the City was retaining the “right and power to control, regulate and restrict the use” of both parks.

7. The Amended Complaint fails to state any grounds upon which Defendants City of Charlottesville and Charlottesville City Council may be subjected to this lawsuit, because they are entitled to sovereign or governmental immunity for the actions set forth within the Amended Complaint.

8. The Amended Complaint fails to state any grounds upon which individual Defendants Signer, Bellamy, Fenwick, Szakos and Galvin may be subjected to this lawsuit, because:

a. The individual Defendants are immune from suit under Virginia Code § 15.2-1504, as well as the common law doctrines of legislative immunity and/or official immunity; and

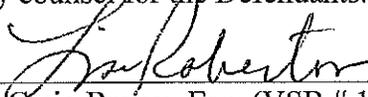
b. None of the votes or actions set forth within the Amended Complaint constitutes intentional or willful misconduct or gross negligence. None of the Defendants’ votes or actions set forth within the Amended Complaint violated any clearly established law; as a result, none of their votes or actions referenced 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).

WHEREFORE, Defendants City of Charlottesville, Virginia and Charlottesville City Council, and individual Defendants Signer, Bellamy, Fenwick, Szakos and Galvin, by counsel, state that, for the reasons cited herein, the Plaintiffs have failed to allege facts upon which relief can be granted, even if the facts as alleged by the Plaintiffs are assumed to be true; deny that the Plaintiffs are entitled to the relief prayed for in the Amended Complaint; and pray that this Demurrer be sustained and that this action be dismissed and that they recover of Plaintiffs their costs expended in this action.

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

By counsel for the Defendants:



S. Craig Brown, Esq. (VSB # 19286)

City Attorney

Lisa A. Robertson, Esq. (VSB# 32486)

Chief Deputy City Attorney

P.O. Box 911, 605 E. Main Street, 2nd Floor (City Hall)

Charlottesville, Virginia 22902

Tel. (434)970-3131

Email: brownc@charlottesville.org ; robertsonl@charlottesville.org

By counsel for the City of Charlottesville, Virginia and the Charlottesville City Council:

John w. Zunka, Esq. (VSB # 14368)

Richard H. Milnor (VSB #14177)

Ashleigh M. Pivonka, Esq. (VSB# 89492)

Zunka, Milnor & Carter, Ltd.

P.O. Box 1567, 414 Park Street

Charlottesville, Virginia 22902

Tel. (434) 977-0191

Facsimile: (434) 977-0198

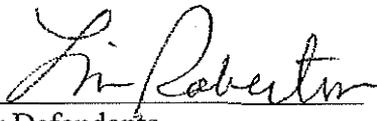
CERTIFICATE OF SERVICE

I certify that on the 1st day of November, 2017, 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, by electronic mail (where an e-mail address is indicated below) and also by U.S. Mail, first-class, postage pre-paid, to counsel of record, as follows:

Ralph E. Main, Jr., Esq.
rmain@charlottesvillelegal.com
Dyert, Wright, Hobbs & Heilberg
415 4th St., N.E.
Charlottesville, VA 22902

S. Braxton Puryear, Esq.
P.O. Box 291, 121 S. Main St.
Madison, VA 22727
sbpuryear@verizon.net

Elliott Harding, Esq.
3373 Worth Crossing
Charlottesville, VA 22911

Signature: 
Counsel for Defendants