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Re: **Payne, et al. v. City of Charlottesville, et al.**–Motion for Summary Judgment on statutory immunity--argued March 13, 2019
Trial date Sept. 9-13, 2019; Cir. Crt. file no. CL 17–145

Dear Counsel:

This matter is before the Court on Motion of four of the individual councilor defendants (Bellamy, Galvin, Signer, and Szakos) for Summary Judgment on the issue of statutory immunity under Va. Code §15.2-1405. (This Motion was joined in orally by Councilor Fenwick at the March 13 hearing. Transcript pp. 116-132.)

The Legal Standard for Considering Summary Judgment

Summary judgment is appropriate when there is no genuine factual dispute between the parties on a material issue such that what is left for the court is a legal ruling or decision dependent upon applying the law to the facts of the case. If there is no disputed factual issue,

there is no need for an evidentiary hearing or decision by a fact-finder. Rule 3:20 of the Rules of the Supreme Court of Virginia states: "Summary judgment ... may be entered as to the undisputed portion of a contested claim.... Summary judgment shall not be entered if any material fact is genuinely in dispute." See also Jackson v. Hartig, 274 Va. 219, 232 (2007) ("Summary judgment is appropriate when 'no material facts are genuinely in dispute'." Citation omitted.); Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 5 (1954) (Rule 3:20 "provides for summary judgment in those cases ... in which the only dispute concerns a pure question of law. It applies only to cases in which no trial is necessary because no evidence could affect the result."). Carwile sets forth the purpose of this rule: "Rule 3:20 was adopted to provide trial courts with authority to bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case as made out by the pleadings, the pretrial [proceedings], and the admissions in [discovery]." Id.[1]

Application to this Case

As I did with the earlier issue of whether the statues are "monuments and memorials" to one of the wars listed in Va. Code §15.2-1812 or veterans of one of those wars, I have from the beginning of the case given much thought and consideration to this question of immunity.

Virginia Code §15.2-1405 says, in pertinent part:

> The members of the governing bodies of any locality...shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body...which does not involve the unauthorized appropriation or misappropriation of funds. However, the immunity granted by this section shall not apply to conduct constituting intentional or willful misconduct or gross negligence.

It is clear that the votes taken by the individual city councilors was in their official capacity, while engaged in city business, so Va. Code §15.2-1405 is applicable. There also is no dispute that there is immunity for all members of local governing bodies unless certain well-defined and narrow exceptions apply. The code section pierces or limits such immunity under several circumstances, two of which are gross negligence and unauthorized appropriations. The only question in this case is whether any of the exceptions come into play such that the individual counselors lose their immunity.

[1] I do not find that the Motion for Summary Judgment is defective or deficient, as Plaintiffs say. The motion is not a "pleading" under Rule 1:4. Rule 3:20 does not require detailed facts or numbered paragraphs. It is clear what the motion is based on and Plaintiffs had adequate notice and were able to respond, so I will consider the motion.

In considering whether the summary judgment motion should be granted the question to be answered is whether the pleadings and any exhibits thereto, any admissions, or other testimony or evidence previously given in prior hearings in this case, or any arguments or concessions made to the Court, show that there is no real dispute between the parties as to the facts upon which the immunity decision (viz., the existence of any exceptions) would be made. The question is not whether there could be additional evidence on the point, but whether there are sufficient facts not in dispute to resolve the matter without the need for further evidence.

There certainly is much dispute over whether the councilors were grossly negligent or whether they appropriated funds without authority, but the question is whether there are actual disputed facts, not merely disputed legal conclusions or interpretations.

Procedural Posture and Issue Presented

This issue comes before the Court in a similar posture to Plaintiffs' earlier Motion for Partial Summary Judgment on whether the statues are "monuments or memorials".

Defendants initially argued there that it was a factual question, about which there was dispute, and that they had evidence to present on the issue to show that the statues were not monuments and memorials to one of the wars listed in the statute (or veterans thereof)[2]; so argue the plaintiffs here on the immunity issue. Nevertheless, the Court there noted that while it generally was a factual or evidentiary issue for the jury whether the items were monuments or memorials to veterans of the Civil War, in this case given the evidence already presented and facts that were undisputed, the Court would not allow the matter to go to the jury, and I granted partial summary judgment on that issue.

In this current matter, Plaintiffs similarly say that it is an evidentiary matter for a jury, and that they have evidence that they wish to present on the issues of gross negligence and unauthorized appropriation, and that granting summary judgment would be premature. However, Defendants ably argue that there are certain facts already established by the evidence up to this point that would prevent, as a matter of law, a finding of gross negligence (or worse), or unauthorized appropriation, and that the Court ought not let the matter proceed to trial, and that no jury is necessary. The real—and practical—question is whether certain independent established facts insulate the individual defendants from liability (and trial) by foreclosing a finding that the exceptions to immunity set forth in the statute exist here.

[2] Defendants later acknowledged that whether the statues were monuments or memorials actually was a legal question for the court, and was a disputed conclusion but not a disputed fact.

Fundamental Facts and Undisputed Evidence

City Council voted February 6, 2017, to remove the Robert E. Lee statue from then Lee Park.[3] They had previously appointed a Blue Ribbon Commission on Race, Memorials, and Public Spaces to look into how the City's public spaces could better be used to tell a more complete story of our history, including whether such statues should be moved or recontextualized, and how possibly to reimagine or redesign the parks.

The February 6, 2017, Resolution read that "the City of Charlottesville shall remove the statue of Robert E. Lee from the park currently known as Lee Park." It also directed City staff to bring to Council "a range of...options" for the anticipated new design of the park. This resolution did not appropriate any funds or even mention funding for this project. On the same date, in another resolution the Council voted to rename Lee Park. And in a third resolution the Council directed further action toward the redesign of Lee and Jackson Parks, replacing the slave auction block plaque, and acknowledging the Freedman's Bureau, with a "projected estimated budget" for the entire exploratory project of $1,000,000. There was no actual appropriation of funds, and nothing specifically allocating or approving moneys for moving the statues. Along the way plans were solicited that included both options of moving and not moving the statues.

This Declaratory Judgment and Injunction action was filed by Plaintiffs March 20, 2017.

On April 17, 2017, Council by resolution requested bids for the purchase of the Lee statue. There was no appropriation or mention of funds, except that a successful applicant (for purchase) was to pay for the cost of removal and transportation, including "preserving the integrity of" the sculpture and park. On August 21, 2017, the Council requested that the Board of Architectural Review issue a certificate of appropriateness for the removal of both statues.

On September 5, 2017, Council ordered the removal of the Jackson statue "as soon as possible" upon a "successful resolution of the current court case." They also issued a request for bids for the disposition of the statues. No mention of funding or appropriations was made. An "amended" resolution that same date reiterated the budget cap of $1,000,000 for the entire project, but again there was no appropriation and no specific allocation for moving the statues.

In a resolution November 6, 2017, regarding the Request For Proposal (RFP) for Phase I of the Master Plan, Council stated its goal was "to create a more honest, complete and coherent narrative of Charlottesville's past...without running afoul of present Virginia laws prohibiting the movement or tampering of statuary and monuments that could be construed to be war

[3] All references to resolutions, minutes, or memoranda, unless otherwise indicated, are referring to exhibits to the pleadings or exhibits offered in prior hearings. The Attorney General's letters came later, and were not relevant.

memorials in a Virginia Court of Law." It again reiterated, for purposes of the RFP, funding of up to $1,000,000 for the project.[4]

The first mention of possibly removing the statues was almost a year before the "removal resolution", at the March 21, 2016, council meeting, where Councilor Bellamy asked that a discussion of the confederate statues be added to the April 18, 2016, meeting agenda. At the May 2, 2016, council meeting the formation of a Blue Ribbon Commission was approved, to explore relocating or adding context to the statues, and coordinating with the City Attorney for legal review of options.

Finally, for our purposes here, on September 28, 2016, Chief Deputy City Attorney Lisa Robertson wrote a memorandum to Charlene Green (manager of the Charlottesville Office of Human Rights), a member of the Blue Ribbon Commission, regarding legal issues relating to the desired removal of the Lee and Jackson statues. Among other things, after mentioning the Heritage Preservation Association Inc. et al. v. City of Danville 2015 Circuit Court opinion (see below) and summarizing Va. Code §15.2-1812, this memo contains the following statements:

"We cannot say with any certainty whether or not the provisions of the Statute govern what City Council can or cannot do relative to moving the Statues, or either of them."

"...[A]bsent an...opinion by the Virginia Supreme Court we have no way of knowing whether the Supreme Court agrees with Danville [the case opinion] on this issue."

"We cannot say, one way or the other, whether either of the Statues would be regarded by a court as one of the types of monuments or memorials that a locality is prohibited from disturbing."

"We regret that we're unable to provide you more specific legal guidance. On this particular topic, Virginia law remains unsettled, and even if it were not each case presents a different, unique set of factual circumstance to which the law would need to be applied."

Nowhere in the memorandum does Ms. Robertson tell Ms. Green that it would be unlawful or impermissible for the City Council to move the statues, or for the Blue Ribbon Commission to recommend such. She does not advise them not to pursue such a course.

At the August 21, 2017, meeting Council also voted to cover both statues with tarps, as an act of mourning for the three lives lost on August 12, 2017. Councilor Kristen Szakos

[4] Note that this was for "the completion, fabrication and installation of the Phase I and Phase II-interim Master Plan inclusive of community engagement, developing and completing schematic design options and design development drawing, construction documents, the new interpretive installation in both the Emancipation and Justice Parks, and rehabilitating the most severely deteriorated landscapes in both parks and the library grounds, knowing that ... [the] Parks will eventually be more fully redesigned subsequent to the removal of both the Lee and Jackson statutes." This obviously was much more than just moving the statues.

expressed and articulated that she did not think such would violate the then-existing temporary injunction because it would not damage the statues. No money or funding was mentioned.

Positions of the Parties

In this case, Defendants' view is not that there could not be evidence Plaintiffs might present to try to show that Council's actions amounted to gross negligence or unauthorized appropriations, but rather that there is evidence already before the Court, in the form of the resolutions and minutes of the city council meetings and a legal memorandum, that will by themselves, as a matter of law, prevent or foreclose such findings.

The individual defendants assert that there is no genuine issue of disputed material fact regarding the official actions of City Council and the individual councilors relating to the issue of their votes, such that the Court should decide that as a matter of law they cannot be found to have made an unauthorized appropriation (or misappropriation), and cannot have been grossly negligent (or acted intentionally or willfully contrary to the law).[5] Thus, they say, the statutory immunity of members of local governing bodies is not abrogated.

Plaintiffs respond that the issue of gross negligence and of whether there was an unauthorized appropriation are factual questions for the jury, on which further evidence should be presented. (Since immunity was raised in a plea in bar, the defendants would be entitled to a jury on any factual issues, and they have requested one.)

At the outset, I want to make clear here that I believe Plaintiffs are not correct in saying that by raising and arguing the statutory immunity issue now Defendants are asking the court to reconsider its prior decision on immunity a second time (i.e., third consideration). The only previous decisions I have made on immunity have been in the context of a demurrer or a plea in bar. I had ruled that Plaintiffs had pleaded enough facts to give them the opportunity to prove with evidence their case in a trial, and specifically to prove an exception to immunity under the statute. I simply noted that the statutory immunity that I ruled applied in this case did have two significant exceptions to such immunity, and that Plaintiffs had pleaded enough specific facts to potentially activate one or both of those exceptions. Therefore I believed the demurrer should be overruled and denied because it was sufficiently well pleaded, and that the plea in bar should not be sustained or granted, because it was not clear at that point that the individual defendants definitely were immune to suit under the statutes.[6] I have not changed those views.

[5] I believe I have already ruled previously that there was no misappropriation or willful, intentional misconduct and that at this point we were only talking about unauthorized appropriations or gross negligence.

[6] Furthermore, in the Reconsideration as to common law legislative immunity, I made it clear that I thought that the general common law legislative immunity did not control in this case (as it might in many other situations),

I overruled Defendants' Demurrer on immunity grounds because I felt that at that stage Plaintiffs had indeed pleaded enough to state a cause of action. I further ruled, upon reconsideration, that common law immunity did not apply for members of local governing bodies due to the language and operation of Va. Code § 15.2-1405, but that only the statutory immunity applied, and that, without regard to evidence, there were facts pleaded that could possibly sustain one of the exceptions to statutory immunity. But that did not end the inquiry, and now I am being asked to rule that, given some undisputed facts about the actions of City Council, there is no way that either of these exceptions could be established to the degree required by law, so that at this point the individual councilors should be deemed to be immune.

At this stage we are not talking about the pleaded facts but rather the evidence in the case that has been established beyond challenging; we are dealing with the various resolutions or minutes of the meetings, etc. There is no claim at any point in time that the resolutions referred to are not the official actions of the city council, or that the various minutes or transcripts are not what they purport to be. Both sides have introduced and referred to them as suited their purpose.

Defendants' argument is that given the evidence in the case (in the various exhibits and admissions), much like the Plaintiffs' argument on the "monuments and memorials" issue, there is no way that Plaintiffs case can rise to the level of "gross negligence" or "unauthorized appropriations" that the statute would require for an exception from such immunity. After a full consideration of the matter, I agree with Defendants, and I think they are right.[7] These are the only two avenues for an exception to the statutory immunity, and I will discuss them below.

<u>Discussion of Authority and Analysis</u>

<u>Unauthorized Appropriation</u>

The individual defendants assert that there was no appropriation by City Council. If there was no actual appropriation at all, then there could be no unauthorized appropriation. Therefore,

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when there is a specific state statute that clearly applies to members of local governing bodies, and there was no basis to find that the general common law immunity would trump or control the specific statutory immunity. If that were the case, it would have made the statute meaningless and not needed.

[7] Mr. O'Reilly earlier argued in the previous hearings, that a lack of immunity would chill free discussion of ideas and beneficial legislative action, and discourage individuals from being willing to stand for election; in this he may be correct. But I did not find that to be dispositive or even a pertinent consideration because I believed the General Assembly already addressed that concern and took it into account when it set a strong immunity in the statute but with some exceptions. It was not my place or role to say whether those exceptions were appropriate or not, or that the General Assembly got it wrong on the policy issue, or that the statute provides not a strong enough protection for the necessary or desired legislative freedom.

the individual councilors could not lose their statutory immunity under this exception. They argue that the term "appropriation" is a term of art, with a specific definition, and does not mean just any expenditure or anticipated expenditure. It is a formal approval and authorization of spending, and a setting aside of a certain amount of money for a specific purpose. Almond v. Day, 197 Va. 419, 426 (1955) ("set apart by formal action to a specific use"). All of the minutes and resolutions that have been offered in this case so far, as exhibits to pleadings or exhibits in prior hearings, contain no actual appropriation of funds for moving either statue. (In fact Defendants note that former City Manager Maurice Jones stated in the February 6 council meeting that this was not allocating any funds and there would need to be a separate appropriation motion to be acted on at a subsequent meeting.[8]) The approval of up to one million dollars for the redesign of the park was not a specific appropriation of funds to move the statue, but an estimate of and limitation on funds necessary for the entire project. The Court has already ruled that redesigning or renaming the parks would not violate Va. Code §15.2-1812. I believe that the definition of "appropriation", and whether such a general approval of non-specific funding is a formal appropriation, are legal questions, and not factual questions for the jury. Defendants also argue that at no time did Council formally appropriate separate money to cover the statues with tarps. All they did was approve the action, and the City Manager and staff carried out that action, without any formal appropriation.

In construing the statute I should give the words and terms used their plain meaning. The General Assembly could have used the term "expenditure" of funds. It did not. The statute does not say "unlawful expenditure", or unauthorized "expense". I cannot find that the evidence of the resolutions and minutes submitted—and whether there was an appropriation would have to be limited to the official actions of the council[9]—show any appropriation of funds to carry this out. There is no question that City Council was willing to spend money on this. But at no point did they appropriate any funds for this; there was no formal action, no dedication or setting aside of funds to the exclusion of other uses. Clearly they caused or allowed some money to be spent. But that is not the same as appropriating funds. Since there is no other authority or evidence that can reflect on whether there was an appropriation as an official action of Council, I find that immunity has not been abrogated by this exception under the facts of this case.

Gross Negligence

I have a similar view on gross negligence, perhaps even stronger. The standard for gross negligence is that a person exercise not even minimal care, virtually no care at all. Frazier v.

[8] This was one reference I was not able to confirm, but I do not believe there is any factual dispute that Mr. Jones made this statement during this discussion in the council meeting.

[9] As Courts speak through their orders, local governing bodies speak through their ordinances and resolutions.

City of Norfolk, 234 Va. 388, 393 (1987); Town of Big Stone Gap v. Johnson, 184 Va. 375, 378-79 (1945) ("absence of slight diligence, or the want of even scant care"). More to the point, "a claim for gross negligence must fail as a matter of law when the evidence shows that the defendant exercised some degree of care." Elliott v. Carter, 292 Va. 618, 622 (2016). The conduct must be outrageous, so as to "shock fair-minded persons", id., or with "utter disregard of prudence, amounting to…heedless and reckless disregard of…rights as to be shocking to reasonable men". Kennedy v. McElroy, 195, Va. 1078, 1081 (1954).

The biggest obstacle for me on gross negligence, again from the outset, is the Danville case and the City Attorney's legal opinion in the memorandum. At a minimum, Heritage Pres. Ass'n. Inc. v. City of Danville, No. CL15000500-00 (Va. Cir. Dec. 7, 2015), pet. for appeal refused, No. 160310 (Va. June 17, 2016), reh'g denied (Oct. 7, 2016), and the Charlottesville City Attorney's memorandum referring to the case, stand for the proposition that the law regarding the war memorials statute (specifically the retroactivity) was unclear. But neither the Danville case nor the City Attorney's memorandum state plainly that moving the statues under these circumstances was unlawful, or even that it likely was unlawful. The best that can be said (from Plaintiffs' position), in my view, is that they were being told that it might be against the law or prohibited by the statute, and at worst, the Danville case (though I disagree with that part of the opinion) implies that removing the statues would not violate the statute because it does not apply to statues already in existence when enacted. With both the Danville case and the City Attorney's memorandum, I do not see how a factfinder could find that the councilors' actions in discussing and voting for the statues to be moved can be found to be gross negligence.

For sure, the better part of wisdom would have been for them to wait, and not to go ahead. But the standard for the exception to statutory immunity of members of local governing bodies is not mere, simple negligence (or failing to provide reasonable care), but gross negligence, and there is a significant difference between negligence and gross negligence.[10] While it may have been negligent for City Council to vote to move the statues before receiving a firm and sound opinion from the City Attorney that such would be lawful[11], it is difficult to see how, under those items of legal advice, any other evidence would be able to convert the actions of council in voting to move the Lee statue and cover both statues to "gross negligence". Council knew that this was an open question and that such might be unlawful, but could be ruled lawful. However, they did discuss the matter, and they did not actually move the statues.

[10] "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence…It is very great negligence…" Big Stone Gap, 184 Va. at 378. "The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence." Id. at 378-79.
[11] Such clearly could be painted as simple negligence; clearly a jury could reasonably find that there was a duty of care to protect and preserve the statues, and certainly not remove or damage such, and that by voting to move them without a firm opinion of the lawfulness of such action, they violated this duty of care and were negligent.

I, thus, agree with the defendants that, in light of the Danville case, and given the City Attorney's memorandum, a finding of gross negligence would be foreclosed as a matter of law regardless of what evidence is introduced as to their intent or motive. I find, under the specific facts of this case, that the councilors' decision cannot be grossly negligent, even if it is deemed to have been negligent.

While Plaintiffs are correct that generally whether there was gross negligence (or an unauthorized appropriation, for that matter) would be a jury issue, yet under the undisputed facts (resolutions, minutes, etc.) I do not believe those are permissible outcomes. See Elliott, 292 Va. at 622 [headnotes 6-7], and Big Stone Gap, 184 Va. at 379 [5, 6]. Just as with the "monuments and memorials" issue, the fact that the parties dispute the legal conclusions and interpretations, and outcomes, does not mean that there is a true dispute about the action taken, what was passed, what the language of the resolutions was, what individual councilors said in the meetings, etc.

I do, however, think that Defendants go too far when they assert that the councilors exercised great care ("careful deliberation/consideration", "extraordinary diligence and care"). I disagree. As to legality, I do not think they exercised much care at all, certainly not sufficient, reasonable care. But I nevertheless cannot find that they exercised "no care", or not even "scant care". I also cannot say that their actions were so egregious as to shock the conscience, such as, for example, the approving of construction of an obviously unsafe bridge or an inadequate dam.

That Council "studied" the matter, or referred it to a "blue ribbon" commission, or held public hearings, in my view, does not really satisfy the duty of care for legal purposes. They could simply have been wanting to see what public opinion was and how much popular support there was for moving the statues. This in no way goes to the issue of whether such action would be legal. Certainly public opinion, even if strong and vocal, even if a majority or almost unanimous, can be wrong.[12] (And it is not even clear here that a majority of the populace was in favor of moving the statues.) The fact that Council studied it or held public hearings is a non-sequitur and begs the question. If they determined that public opinion and the majority was for it, that does not resolve the question of whether such would be lawful. It is beside the point.

Those actions by the council, in my view, do not protect or insulate them. But the Danville case, along with the City Attorney's memorandum, can and do because if City Council considered such--and it appears that they did--and they felt they had a basis to move forward,

[12] One just has to call to mind slavery or the Jim Crow era in this country, or think of Rwanda, Northern Ireland, Nazi Germany, or even French Huguenots, to realize that discerning supportive public opinion does not answer questions of legality or justice. So getting public input or discerning public sentiment does not necessarily constitute due care. In my view, that is more of a political consideration, and not preemptive of negligence.

such would not and could not be gross negligence. The city attorney did not say unequivocally that they could not remove it, or should not remove it, or that it was unlawful to do so, or that they should have waited. She said the law was unclear.

Again, while they may have acted wrongly, unwisely, or even rashly at times, I cannot say that Council did not exercise "even scant care", or that their actions were shocking and outrageous, and simply cannot allow the gross negligence claim to go forward given the evidence already in the case, no matter what other evidence might be offered, and I do not believe it should be allowed to go to the factfinder. As with the monuments and memorials issue, if the matter went to trial on this issue and a jury were to decide that there was gross negligence (possibly under a special verdict form), and that there was no immunity, I do not believe that I could let a jury verdict on gross negligence stand and would be compelled to set aside any finding of gross negligence under these facts as contrary to the law and the evidence. If that is the case, then I do not believe that that prong of the immunity exception has been or can be met and thus is not satisfied, so the immunity is still available.[13] Therefore it is appropriate to grant Defendants' motion and enter the summary judgment for this reason as well.

Conclusion

Therefore, upon a full consideration of the matter, the relevance of these inquiries is that statutory immunity under Va. Code 15.2-1405--which I have ruled is the only immunity available to a member of a local governing body--is available (apart from and despite the unavailability of common law immunity) unless there is "gross negligence" or "unauthorized appropriation". So considering all of the evidence and arguments heard and exhibits received by the Court so far in the various evidentiary hearings, I agree with Defendants that in light of the undisputed evidence, there could not be gross negligence and was no unauthorized appropriation. I do not believe that, in light of these items discussed above, any reasonable factfinder could find that the immunity was abrogated by gross negligence or unauthorized appropriations; therefore immunity still remains. No additional evidence is necessary or would be helpful in further considering this issue, so summary judgment is appropriate. Therefore I will grant the individual defendants' Motion for Summary Judgment on the grounds of statutory immunity.

[13] While deciding this issue in Defendants' favor, I want to make clear that I find them mistaken about another matter. The immunity statute, when referencing "gross negligence" as an exception thereto, is not talking about a cause of action for negligence, but an act of gross negligence in and of itself (lack of scant care). A cause of action for negligence requires an act of negligence (violation of a duty of care), causation of injury, and damages. But in the immunity statute, we are only talking about gross negligence itself—a complete lack of due care. The issues of causation and damages have no relevance, and again are red herrings. I found that to be a distraction, and I reject that argument entirely, and it formed no part of the basis for my decision.

When Defendants wanted to present evidence to attempt to show that the statues were not monuments and memorials, I found that, in light of the evidence of the statues themselves, the other evidence would not matter, and that no additional evidence would have changed the outcome. I find similarly here, that in light of the complete absence of any formal appropriation of specific funds for moving the statue under a specific plan, there was not an "unauthorized appropriation". No extrinsic evidence would change this point. We are limited to the official resolutions and minutes. As to gross negligence, in light of the reality of the Danville opinion and the memorandum of the City Attorney, I cannot find that the councilors' actions in voting to move (but not yet moving) and cover the statues were grossly negligent, even if they were negligent.[14]

The purpose of a Motion for Summary Judgment is to prevent the expenditure of time, energy, and expense on a futile point, on a matter that is self-evident, or on which no additional evidence can change the outcome. This is such a situation. This is especially true in the matter of immunity, as Defendants' counsel have so ably pointed out; they have persuasively argued that if the individual councilors are immune, it does not just mean immunity to liability, but also to participating in the suit at all, including discovery. There is authority that if they are immune from liability, they are immune from suit, and from being required to participate in any way. One practical issue here all along has been whether the individual defendants, if immune, must even be involved in the case, and how long they must respond to pleadings and motions and orders. A question raised early on is, in light of the injunctive relief requested, even if they are immune to liability, do the individual councilors need to be a party to this suit in order to be enjoined from further action, or whether they could be liable for contempt for disobeying this Court's order if they are not a part of this suit. That is a difficult question without easy resolution, and it has vexed me.[15] But I do find it unacceptable and illogical that they would not individually be subject to this Court's order, and liable to individual contempt if they were to disobey such, even if they are excused from this suit. Clearly at such point it seems that they would shed their immunity under §15.2-1405 (as such would then be not only gross negligence,

[14] I also reject Plaintiffs' argument that the statutory immunity does not apply here because Va. Code §15.2-1812 specifically covers "the authorities of a locality", and this would include individual councilors. I have already addressed this previously; I think the City Council is such an authority. My interpretation was that "authorities of the locality" are those who can act on behalf of the City. I think that City Council and the City Manager would be "authorities", and possibly the City Attorney or Police Chief, but not the individual councilors.

[15] Defendants' counsel have argued that the councilors cannot act individually but only as a body or a group (either all five, or at least a majority). They have likewise argued that one councilor's vote can accomplish nothing without the others. This also in turn raises all kinds of questions. If the Court ultimately grants the permanent injunction and orders that the statues not be removed, does this mean that the individual councilors cannot be held in contempt if they vote to move it anyway? Does it mean that only the City Council (and thus the City) can be held responsible? Does it mean that if three or four vote to move them, in defiance of a court order, all the councilors are on equal footing, since it is Council as a whole that acts?

but willful and intentional defiance). But, that specific issue is not before me at this time. However, I do not agree with Plaintiffs that the individual councilors are necessary parties. I believe that they have a right to be removed from the suit altogether. But since they could be subject to any order I enter, and could be liable for contempt for disobeying any future orders even if removed from the case, and I think they could remain a party if they wish, since they have an interest in the matter. But I believe that they are permissible parties and not necessary parties.

I ask Defendants' counsel to prepare an order reflecting the findings and rulings in this letter, over Plaintiffs' objection. Plaintiffs' exceptions to all rulings in this letter are noted, and their appeal points are preserved.

There are still other issues remaining in the case, which will continue to proceed against the City and City Council as a body. Any damages or attorney's fees ultimately assessed would be only against the City.[16] It was my intention next to reach a decision on which issues Defendants are entitled to a jury trial on, the City's motion for partial summary judgment as to the statute's applicability, Defendants' demurrer as to damages, Plaintiffs' motion for a change of venue, and Plaintiffs' motion for summary judgment as to the equal protection issue. This ruling may affect how we proceed on some of those. We have a hearing set for this coming Wednesday, July 10, at which time we can address some of these remaining issues.

Very Truly Yours,

Richard E. Moore

[16] I also am cognizant that because of the individual councilors' actions the City has incurred great expense, and will have to pay anything the Court rules is proper for damages or attorney's fees, and that means the citizens will have to pay, and that does not seem fair. But that appears to be the balance struck by the General Assembly in order to protect the political system, legislative prerogative, citizen participation, and the free flow of ideas. No doubt Plaintiffs believe that if the individual councilors had to pay for such unauthorized actions it might cause them to be more careful and circumspect. Legislative immunity serves an important purpose, but like tenured professorships, lifetime appointments, and diplomatic immunity, it is a two-edged sword. While it provides certain benefits to society, it also produces certain risks of abuse. It is not up to me to strike that balance. The General Assembly has done so. Immunity can allow local legislators to vote for what they think best without fear of a lawsuit, but can also shield them when they do something that the law does not allow. But the whole point of legislative immunity is that these are political positions and there is a political remedy and corrective available.