

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

FILED
4/10/18 e 2:25p
(Date & Time)

City of Charlottesville
Circuit Court Clerk's Office
Leanne A. Rugger, Clerk
By *[Signature]* Deputy Clerk

MOTION FOR A PROTECTIVE ORDER

COME NOW your Defendants, by counsel, and pursuant to Rule 4:1(c) of the Rules of the Supreme Court of Virginia, and they request this Court to enter a Protective Order, as follows:

(1) Pursuant to Rule 4:1(c)(1) Defendants request the Court to order that no discovery shall be had against any of the Defendants, until such time as this Court has entered one or more orders on Defendants' assertions that they are immune from suit in this action; and

(2) Pursuant to Rule 4:1(c)(1) Defendants request the Court to order that the following discovery shall not be had by Plaintiffs:

- (i). Discovery of documents, audio and video recordings, and other public records of the City that can be obtained by Plaintiffs from the City's website; provided, however, that upon request Defendants will certify that specific public records from the website are accurate copies of the records available on the City website;
- (ii). Any discovery that seeks information, documents or records pertaining to an issue other than: (A) litigation costs and reasonable attorneys' fees sought by Plaintiffs pursuant to Virginia Code § 15.2-1812.1; (B) whether or not the Statue of Robert

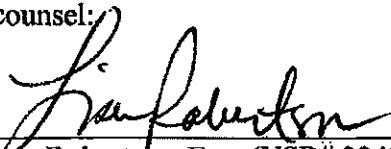
E. Lee is within the purview of Virginia Code §15.2-1812; and (C) the

Defendants' affirmative defenses.

(3) Counsel for Defendants conferred via email with counsel for Plaintiffs prior to filing this Motion, but received no response from counsel for Plaintiffs.

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

By counsel:



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Counsel for the City of Charlottesville,
and the Charlottesville City Council

CERTIFICATE OF SERVICE

I certify that on the 10th day of April, 2018, pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia, on or before the date of filing I served a true copy of the foregoing document, 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.
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Dygert, Wright, Hobbs & Heilberg
415 4th St., N.E.
Charlottesville, VA 22902

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

Signature: 
Counsel for Defendants

CERTIFICATE OF AUTHENTICITY

I, Barbara Ronan, do hereby certify and aver as follows:

1. I am employed by the City of Charlottesville, a municipal corporation and political subdivision of the Commonwealth of Virginia, and my job is to serve as paralegal and to manage the records of the City Attorney's Office;
2. The document attached to this Certificate of Authenticity is a true and accurate copy of an official record of the business of the City Attorney's office.
3. The original record, of which the attached document is a true and accurate copy, is maintained in the City Attorney's Office. The original record is within my custody. In my capacity as a custodian of these records, I am authorized to make this certification.

Barbara K. Ronan
Signature of Barbara Ronan

April 10, 2018
Date



City Attorney's Office
City of Charlottesville

MEMORANDUM

TO: Charlene Green
FROM: Lisa Robertson, Chief Deputy City Attorney
DATE: September 28, 2016
RE: Blue Ribbon Commission on Race, Memorials and Public Spaces

On behalf of the Commission, you've asked for a written opinion clarifying what the City of Charlottesville can or cannot do, under state law, relative to the statues of Stonewall Jackson in Jackson Park and Robert E. Lee in Lee Park ("Statues"). By referencing state law, it is my understanding that the Commission is specifically inquiring about the state statute that was at issue in *Heritage Preservation Association Inc., et al. v. City of Danville* (Danville Cir. Court, decided 2015).¹

The state law about which the Commission is concerned is a statute, Virginia Code Sec. 15.2-1812 (copy attached) ("Statute"). The Statute prohibits a locality, and other persons, from disturbing or interfering with certain monuments, i.e., "monuments or memorials for any war or conflict, or for any engagement of such war or conflict". In 2015 the Danville Circuit Court applied the provisions of the Statute, and determined that (i) a Danville monument commemorating the historical significance of the Sutherlin Mansion (residence of Jefferson Davis for a short period, near the end of the Civil War) is not a monument or memorial subject to the restrictions of Va. Code 15.2-1812, and (ii) the General Assembly did not make the provisions of the Statute applicable to cities until 1997, therefore the Statute doesn't apply retroactively to monuments or memorials erected prior to 1997. The Danville Circuit Court's opinion was appealed to the Virginia Supreme Court, but in June 2016 the Supreme Court declined to review the decision, issuing a brief statement that it found no reversible error in the opinion. A petition for rehearing remains pending.

What does all of this mean? 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. **In order for the Statute to govern, two things would need to be determined:**

- (1) **Does the Statute apply to any monuments or memorials erected within a city prior to 1997?** The Danville Circuit Court answered "no" to this question; however, absent an detailed written opinion issued by the Virginia Supreme Court, we have no way of knowing whether the Supreme Court agrees with Danville on this issue. A local Circuit Court decision can provide helpful analysis, but it's not binding on courts elsewhere in Virginia (Note: in March 2016 Governor McAuliffe vetoed legislation (H 587) that would

¹ You've indicated that the Commission members are aware of our previous observation that the deeds to Jackson and Lee Parks appear to contain only two conditions: (i) each property must be held and used in perpetuity by the city as a public park, and (ii) no buildings can be erected on either property.

expressly have applied the provisions of the Statute, without regard to the date on which a monument or memorial was erected. The Governor's veto was ultimately sustained). Only the Supreme Court or the General Assembly can answer this question in a manner that can be relied upon, as a matter of law.

- (2) **Are the Statues, or either of them, "monuments or memorials" for purposes of Va. Code 15.2-1812?** The provisions of Va. Code 18.2-1812 authorize localities to "*permit the erection of monuments or memorials for any war or conflict, or for any engagement of such war or conflict*", including the War Between the States (1861-1865). Localities are prohibited from disturbing or interfering with "*any monuments or memorials so erected.*" Separately, the Statute authorizes a governing body to appropriate money to aid in the erection of "*monuments or memorials to the veterans of such wars*".

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. A court would review factual information individually, with respect to each Statue, and would consider circumstances of how the Statues originally came to be placed in the City parks, and evidence of the intentions of the parties involved in that process.

Absent a court decision based on facts specific to the Lee and Jackson Statues here in Charlottesville, another way to resolve the potential applicability of Va. Code 15.2-1812 would be to seek special legislation from the General Assembly. That appears to be the path that Alexandria is taking. Recently, the Washington Post reported that the Alexandria City Council has voted to seek permission from the General Assembly to move a statue of a confederate soldier (titled "Appomattox") out of a public street right-of-way, and onto the property of an adjacent historical museum. The Appomattox statue was erected in 1889, and it occupies a location where a local regiment mustered to retreat from the City of Alexandria in 1861. Although located in public right-of-way, Appomattox is owned by the local chapter of the United Daughters of the Confederacy.

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 circumstances to which the law would need to be applied.