

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE , et al.,
Plaintiffs,

v.

Case No. CL 17 - 145

CITY OF CHARLOTTESVILLE, VIRGINIA, et al.,
Defendants.

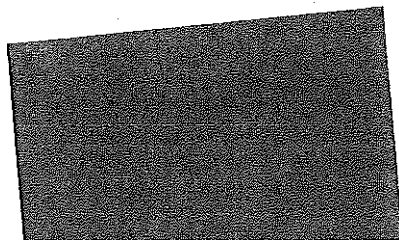
To The Honorable Judge Of The Above-Styled Court:

MOTION TO ENFORCE INJUNCTIVE RELIEF
AND
TO FURTHER AND ENLARGE EXISTING INJUNCTION

Come now Plaintiffs, by Counsel, and move this Honorable Court to enforce the injunctive relief granted May 2, 2017 by order entered June 6, 2017, as further described in this Honorable Court's letter opinion of October 3, 2017, bench ruling of October 4, 2017, and Order entered October 24, 2017, [the "October Rulings," Exhibit 1]. An order reflecting the October 3 and 4 decisions has yet to be entered and is noticed for hearing December 6, 2017. The requested relief is enforcement, furthering and enlarging the existing injunction, pursuant to Va Code §8.01-620, §8.01-624 and §15.2-1432, as amended, for the following reasons:

(1) The Plaintiffs incorporate by reference and re-aver the allegations set forth in the verified Complaint, and verified Request for Temporary Injunction filed March 20, 2017, the verified Amended Complaint filed October 11, 2017, the transcript of the May 2, 2017 temporary injunction hearing, the Court's bench ruling May 2, 2017 and the Court's Order entered June 6, 2017; the transcript of the hearing on October 4, 2017, and the Court's October Rulings, in which the Court first granted, and then enlarged and extended, an injunction against change that disturbs or interferes with, the General Robert E. Lee Monument in what was formerly Lee Park, now called by the Defendants Emancipation Park, and the General Thomas "Stonewall" Jackson

FILED
11/17 @ 11:40 A
(Date & Time)
City of Charlottesville
Circuit Court Clerk's Office
Lezelle A. Suggs, Clerk
By: *[Signature]*
Deputy Clerk



Seen + Read
REM
11/22/17

Monument in formerly Jackson Park, now called by the Defendants Justice Park [the “Monuments”]; and further state as follows:

(2) On the night of August 21-22 2017, Defendants, acting without advance notice to the public during a City Council meeting lasting until after midnight, voted on a motion to conceal both the Lee and Jackson Monuments under covers, Defendant Szakos stating that “the purpose is covering or obscuring the statues immediately” and saying that in doing so they “should seek forgiveness rather than permission;” likewise Defendant Signer expressed the intent that the cover was for purposes of “concealment” and “[t]o be in such in perpetuity” and Defendant Szakos agreed the purpose was to put a cover on each Monument “and leave it there,” and ostensibly Defendant City Council approved the motion by a “vote” of 5 - 0, though the motion was not framed as either an ordinance or resolution. Exhibit 2, City Council Aug. 21-22 Transcript pp. 8 & 21 - 22.

(3) Defendant City employees within 48 hours of the August 21- 22, 2017 “vote” covered the Lee and Jackson Monuments with black plastic tarpaulins wrapped in place with duct tape, concealing them entirely from public view [the “covers”].

(4) The Defendants neither sought nor obtained a Certificate of Appropriateness [“Certificate”] from the Board of Architectural Review [“BAR”] for the covers, which contravenes the City’s own ordinances including *inter alia* Charlottesville, Va. Code §§ 34-275 (requiring BAR approval before altering a structure in an historic district, and prohibiting alterations “architecturally incompatible with the character of the . . . protected property”); 34-275 (specifying standards for BAR review including material, texture, color, height, scale, mass and placement “visually and architecturally compatible with the site”) and 34-276 (stating no “contributing structure located within a major design control district, and no protected property, shall be moved, removed, encapsulated or demolished” without a BAR Certificate of Appropriateness) [emphasis added], and failure to obtain the Certificate is itself additional grounds for enjoining

the continued covering of the Monuments under Va Code § 15.2-1432 (stating court may enjoin "continuing violation" of ordinance).

(5) After citizens pulled the covers off the Monuments repeatedly, on or about September 19, 2017 Defendant City employees surrounded the Monuments with orange plastic fence and signs saying "City Personnel Only No Trespassing."

(6) On October 4, 2017, the Defendants, by Counsel, represented to this Court that covers put on the Monuments as a result of the "vote" during the Defendant City Council meeting August 21-22, 2017 were to be temporary. Defendants' Counsel acknowledged to the Court that Defendant City Council's "vote" did not specify a date for removing the covers. A temporary action is for a fixed period and by the Defendants' Counsel's admission, there is no fixed date for removing the covers.

(7) The Court in denying injunctive relief as to the covers October 4, 2017 stated "I'm basing this decision, that there's no irreparable harm-proof, because I'm taking the City, still, at its word that it's a temporary action." The Court further stated ". . . if there's a permanent obstruction of the statue, that is not allowed by the statute, as I understand it." The Court stated that "covering them beyond a certain, temporary point for a special purpose, I do believe that does interfere with the public's ability to enjoy the park and use the park;" and the Court repeatedly emphasized the covers had to be "a temporary thing," and that "if it turns out they're not temporary," then "the Court might make a different decision down the road." Exhibit 1, Oct 4 hearing transcript at pp. 6, 7, 8.

(8) On November 6, 2017, Defendant City Council by a 4-1 vote passed a Resolution for a two-phase process for transforming downtown parks [the "November 6 Resolution"] which states and confirms the Defendants' ongoing purpose of "screening" the Monuments. [Exhibit 3].

(9) The November 6 Resolution states Phase I including screening is to be “immediate,” “to begin immediately;” and “will have immediate visual impact.” Exhibit 3 p. 1 & 3.

(10) The November 6 Resolution funds the “completion, fabrication and installation” of Phase I including “screening” at up to \$1 million dollars, and it requires completion of the physical changes to the parks within “12 months of contract signing.” Exhibit 3 p. 3.

(11) Phase II will entail a complete redesign of the parks “after a date certain for the removal of the Lee and Jackson statues has been secured either through the Courts or the Virginia General Assembly.” Exhibit 3 p. 2.

(12) The November 6 Resolution admits the Monuments are within the BAR’s purview in that it does require BAR approval of their removal. Exhibit 3 p. 3.

(13) The Defendants’ intent to screen the Monuments immediately and until they are removed is clear and in the process of execution; screening the Monuments can no longer be asserted to be “temporary.” The Court’s “grave doubts” about the City’s purpose and “concerns about candor” have now proven to be well founded. [Exhibit 1 Oct 4 hearing transcript pp. 6-7]

(14) During the original May 2, 2017 temporary injunction hearing the Court cited as an example of a proscribed “interference” under Va. Code §15.2-1812, interfering with “the public’s access or use” by putting a monument “in a sealed box:”

MR. MAIN: Well, for example judge, the transformation may include erecting some structure around Jackson or around Lee that renders them not observable to the public.

THE COURT: Well, there is that provision in the statue that says interfering with the public’s access or use. So that’s a different issue. But that’s there, I understand that.

MR. MAIN: Right. It also says —

THE COURT: They can't put it in a sealed box.

— Exhibit 4, May 2, 2017 Hearing Transcript p. 53 Motion: Supplementing Injunction

(15) The Court's May 2, 2017 bench ruling observed inter alia "it is irreparable harm for [a monument] to be gone for any significant period of time, in my view," that even its "temporary absence" would be irreparable harm; and the Judge specified the injunction was targeted only at Defendant City acts which "interfere with the use and access to the statue." Exhibit 4, May 2, 2017 Hearing Transcript, pp. 282, 285, 288.

(16) Tourists, students, passersby, citizens of the Commonwealth and City and the Plaintiffs are unable to see and enjoy the Monuments, and are denied use and access, because they have been covered since August 2017 except for brief periods when individuals pulled off the covers and Defendant City immediately replaced them, for which reason the covers contravene Va. Code §§15.2-1812 and 15.2-1812.1.

(17) Plaintiffs are unable to ascertain the condition of the Monuments, whether trapped moisture is damaging them. The effect of winter winds and covers frozen to the Monuments, the weight of snow, and as well as ice dams, also will not be ascertainable until the damage is already done. "Anything that causes damage" was this Court's concern. [Exhibit 1 Oct 4 hearing transcript p. 7] Plaintiffs cannot protect, preserve, or care for the Monuments because of the covers and the barriers, including no trespassing signs and fences, all of which comprise an ongoing illegal infringement of Va. Code §15.2-1812, which states it shall be "unlawful for the authorities of the locality, or any other person or persons, to disturb or interfere with any monuments or memorials so erected, or to prevent its citizens from taking proper measures and exercising proper means for the protection, preservation and care of same."

(18) This Honorable Court reserved the "right to revisit" the injunction either at Plaintiffs' request or *sua sponte*, observing that whether a change is a prohibited disturbance or inter-

ference would be an “individual interpretation case-by-case.” Exhibit 4, May 2, 2017 Hearing Transcript, p. 54, 248, & 288 -289, 292.

(19) Granting further injunctive relief is in accord with Va. Code § 8.01- 624 as amended, which provides “[s]uch injunction may be enlarged or a further injunction granted by the court in which the cause is pending or by the court to whom the bill is addressed in the event the cause be not matured, after reasonable notice to the adverse party, or to his attorney of record of the time and place of moving for the same.” Enjoining ongoing violation of city ordinances is also in accord with Va. Code § 15.2-1432, for the reasons stated in ¶ 4 supra.

(20) In view of Defendant City’s annual budget of approximately \$160,000,000.00, only a substantial fine (or the prospect of incarceration of individual Defendant Councilors) will obtain compliance with this Court’s previous Orders and findings enjoining interference with the Monuments, prohibiting City acts that damage them, and requiring that the covers are to be temporary.

(21) In a similar situation of a city illegally covering and obscuring monuments, the Attorney General of the State of Alabama has requested the Court of Alabama’s 10th Judicial Circuit to levy a fine against the City of Birmingham of \$25,000 per day for each day the monuments remain obscured. That case, CV-17-903426, State of Alabama v. City of Birmingham, filed August 16, 2017, is before the Hon. Judge Michael Graffeo, who has not yet ruled on the Attorney General’s request.

Request for Relief

That Plaintiffs seek such injunctive relief as this Court may deem just pending the outcome of these proceedings, including specifically:

(1) ordering the Defendants to state a date certain within five days from the date of the Court's order for removing the covers on the Monuments, and to cease and desist from any further act or change that interferes with access, or their viewing, use, and enjoyment by the public; and

(2) to order a substantial *per diem* fine against each Defendant for every day beyond that fixed date for cover removal that the covers remain in place, which fine shall apply to any subsequent barrier or screen that interferes with access to the Monuments or their viewing, use, or enjoyment by the public;

(3) to order Defendant City to remove all fencing and no trespassing signs at the same time as the covers are removed, or in the alternative, order that citizens exercising the right under Va. Code §15.2-1812 for protection, care and preservation of monuments, may remove such fencing and signs without threat of criminal prosecution.

(4) to grant such other and further relief as may be necessary in the premises.

FREDERICK W. PAYNE *et al.*

By. _____

Counsel

We Ask For This:

Ralph E. Main, Jr.
Dygert, Wright, Hobbs & Heilberg
415 4th Street, NE
Charlottesville, Virginia 22902
(434) 979-5515
VSB # 13320

S. Braxton Puryear
Attorney at Law
121 South Main Street
Post Office Box 291
Madison, Virginia 22727
(540) 948-4444
VSB #30734

Elliott Harding
Attorney at Law
7 Locks Court
Palmyra, Virginia 22963
(434) 962-8465
VSB # 90442

Counsel for Plaintiffs

VERIFICATION

COMMONWEALTH OF VIRGINIA

CITY OF CHARLOTTESVILLE to-wit:

This day personally appeared before me, John B. Yellott Jr., who is personally known to me, and who, under penalty of perjury, made oath that the allegations and the exhibits set forth in the foregoing Motion are, according to the best of his knowledge, information and belief, true and correct. So sworn:

John B. Yellott Jr. (SEAL)
John B. Yellott Jr.

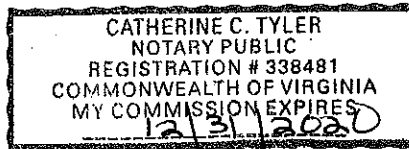
Subscribed and sworn to before me this 20th day of November 2017.

My Commission Expires: 12/31/2020

Catherine C. Tyler

Notary Public

Registration Number: 338481



CERTIFICATE OF SERVICE

I certify that I caused a true and exact copy of the foregoing Motion To Enforce Injunctive Relief and To Further And Enlarge Existing Injunction, and its exhibits, to be hand delivered to the offices of S. Craig Brown, Esq., Charlottesville City Attorney, at his office address of 605 East Main Street, Charlottesville, Virginia 22902 and to the office of John W. Zunka, Esquire, at Zunka, Milnor & Carter, LTD, Counsel for Defendants, at his office address of 414 Park Street, Charlottesville, Virginia 22902 this 20th day of November 2017.

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