In the

Supreme Court of Virginia

At Richmond

Record No.

THE CITY OF CHARLOTTESVILLE, VIRGINIA,
CHARLOTTESVILLE CITY COUNCIL,

Petitioners-Appellants,

– v. –

FREDERICK W. PAYNE, JOHN BOSLEY YELLOTT, JR., THE MONUMENT FUND, INC., 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.,

Respondents-Appellees.

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

1. **The trial court erred when it interpreted the provisions of Virginia Code §§15.2-1812 and 15.2-1812.1 to allow award of attorneys' fees and costs against the City, because Payne neither alleged nor proved any damages or attorneys' fees recoverable under §15.2-1812.1, §15.2-1812 does not authorize attorneys' fees, and the complaint identifies no other basis for recovery of attorneys' fees**. (*Error preserved: 10/26/2018 Hr'g Tr.86:3-6; 11/19/2018 Hr'g Tr. 30:23-24 and 32:4-6; 01/14/2019 Hr'g Tr. 138:22 to 139:22; 07/31/2019 Hr'g Tr. 93:23-94:1 and 94:23-95:4 and 100:13-22 and 124:2-25; 09/11/2019 Hr'g Tr. 34:14-20; 09/13/2019 Hr'g Tr. 741:12-14; and by Defs.' objections/exceptions to: Order (06/19/2018), Order (04/10/2019), Order (09/11/2019), Order: Damages (10/15/2019), and the Final Order (1/29/20)*).

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.** *(Error preserved: 04/11/2018 Hr'g Tr. 30:5-33:12; 07/31/2019 Hr'g Tr. 92:16-23 and 93:3-22 and 100:13-22 and 124:2-25; 9/11/2019 Hr'g Tr. 34:14-20 and 38:22-25 and 45:15-24 and 48:7-8; and by Defs.'objections/exceptions to: Order (10/04/2017), Order (12/06/2017), Order (06/19/2018), Order (11/09/2018), Order (01/08/2019), Order (04/10/2019), Order (09/11/2019), Order: Declaratory J. (10/15/2019), Order: Permanent Inj. (10/15/2019), and the Final Order (1/29/20)*).

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.** (*Error preserved: Ltr. Op. (10/3/2017), p.16; 07/31/2019 Hr'g Tr. 94:19-22 and 99:13-100:7 and 100:13-22 and 104:2-105:20 and 107:12-108:7; 09/11/2019 Hr'g Tr. 34:14-20 and 38:22-25; and by Defs.' objections/exceptions to: Order (10/04/2017), Order (12/06/2017), Order 04/10/2019), Order (09/11/2019), Order: Declaratory J. (10/15/2019), Order:Permanent Inj. (10/15/2019) and the Final Order (1/29/20)*).

4. **Va. Code §15.2-1812 (1997, as amended) does not govern the City's Statues, which were erected in the 1920s, and the trial court erred by interpreting the statute as operating retroactively to prohibit removal of the Statues from the City's parks.** *(Error preserved: Hr'g Tr. 09/01/2017 17:20-22; Ltr. Op. (10/3/2017), p.16; 07/31/2019 Hr'g Tr. 13:1-9 and 95:5-12 and 95:17-96:2 and 100:13-22 and 108:8-24; 09/11/2019*

Hr'g Tr. 34:14-20 and 38:22-25; and by Defs.' objections/exceptions to: the Order (06/06/2017); the Order (10/24/2017), the Order (12/06/2017), the Order (04/10/2019), the Order (06/19/2018), the Order (07/03/2019), the Order (09/11/2019), the Order: Declaratory J. (10/15/2019), the Order: Permanent Inj. (10/15/2019), and the Final Order (1/29/20)).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On February 6, 2017, the Charlottesville City Council ("City Council") approved three resolutions, stating its intention to remove a statue of Robert E. Lee ("Lee Statue") from a City park, to rename the park, and to develop a master plan for the redesign of its Downtown historic area, including parks. (10/11/2017 Amend. Compl., Exhs. F, G, H). Frederick W. Payne, et al. (referred to collectively either as "Payne" or the "Payne plaintiffs") instituted suit in Charlottesville Circuit Court (03/20/2017 Compl.) seeking: (i) declaratory judgment that the City resolutions are *ultra vires*, (ii) temporary and permanent injunctive relief prohibiting removal of the Lee Statue, (iii) damages, and (iv) attorneys' fees and litigation costs, all under the provisions of Va. Code Ann. §§15.2-1812 or 15.2-1812.1.

The operative complaint at the time of Trial was the Revised Second Amended Complaint ("RSAC"), filed April 5, 2019. The RSAC includes allegations as to the Lee Statue and a statue of Confederate General Thomas J. Jackson ("Jackson Statue") (together, the "Statues") and incorporates by reference the exhibits attached to Payne's 10/11/2017 Amend. Compl. (Exhs. A-J). In response the City filed its Plea in Bar, Demurrer, Answer, Affirmative and Other Defenses to the RSAC (05/06/2019), incorporating by reference its previous demurrers and pleas in bar.

Payne filed a Mot. for Partial Summ. J. (11/13/2018) asking the court to rule that the Statues are monuments or memorials for veterans of the War Between the States, under Va. Code §§15.2-1812, 15.2-1812.1 and 18.2-137. The City filed a Cross Mot. For Summ. J. (12/10/2018) asking the court to find, as a matter of law, that the City did not authorize and permit the Statues to be erected as war memorials described in Va. Code §15.2-1812. In Ltr. Op. (04/25/2019) and Order (7/03/2019) the court determined the Statues to be "monuments or memorials to Confederate Generals Robert E. Lee and Thomas Jonathan Jackson as veterans of the Civil War or War Between the States" and "Confederate monuments or memorials to veterans of the War Between the States".[1] The court denied the City's Cross Mot. in a bench ruling (07/31/2019 Hr'g Tr. 6:8-13:7), the City filed its Motion for Reconsideration of the bench ruling (08/28/2019). The court denied the City's Mot. for Recons. from the bench (09/03/2019 Hr'g Tr. 10:6-13:8) and entered the Order (09/03/2019) reflecting its ruling, with the City's objections/exceptions noted. (09/03/2019 Hr'g Tr. 14:19-15:2).

Payne also filed a Mot. for Partial Summary Judgment on Permanent Inj. and Declaratory J. (04/30/2019). The City filed two cross motions: a Not./Cross Mot. for Partial Summ. J. on Count I (07/24/2019), and a Not./Cross Mot. for Partial Summ. J. on Count II and Count III (07/24/2019). The court denied the City's cross motions, and

[1] *See also* 09/01/2017 Hr'g Tr. 141:16-18, where the court stated, "I don't even think I have to go as far to say that it has to be a Confederate war memorial. I don't think that's true."

within its Order (09/11/2019) the court adopted its prior rulings and orders in the case, *see* 09/11/2019 Order, p. 2. The court granted Payne's 04/30/2019 motion, *see* Order: Permanent Inj. (10/15/2019). The Order: Declaratory J. (10/15/2019) grants Payne's request for declaratory judgment. In ruling on the parties' summary judgment motions, the Court considered the legislative history of Va. Code §15.2-1812, ordinances, resolutions, and "all the things that were exhibits and attachments" to the parties' filings in the case.[2] (09/11/2019 Hr'g Tr. 35:1-22).

Trial of the case proceeded September 11, 12 and 13, 2019. Ultimately, the court determined that Payne failed to establish damages recoverable under Va. Code §15.2-1812.1. 10/15/2019 Order: Damages. From the bench, the court ruled that Payne is entitled to attorneys' fees under Va. Code §15.2-1812 or §15.2-1812.1. 09/13/2019 Hr'g Tr. 726:12-741:14. By its 10/31/2019 Order: Case Status, the court specified that the various orders entered on 10/15/2019[3] were not final orders. By its Final Order (01/29/2020) the court awarded Payne the amount of $364,989.60 as attorneys' fees, plus filing fees of $441.00 and service costs of $250.00. The City filed its Notice of Appeal on February 18, 2020.

[2] With one exception (09/11/2019 Hr'g Tr. 35:11-14). *See also* City's 12/10/2018 Not./Mot. for Judicial Notice and 09/01/2017 Hr'g Tr. 19:2-24:11.
[3] Order: Damages; Order: Declaratory J.; Order: Permanent Inj.

STATEMENT OF FACTS

The City of Charlottesville owns two equestrian statues, both installed in public parks of the City in the 1920s. One depicts Confederate General Robert E. Lee ("Lee Statue") (RSAC, ¶18), the other, Confederate General Thomas J. Jackson ("Jackson Statue") (RSAC ¶19) (together, the "Statues"). Local benefactor Paul G. McIntire ("Donor McIntire") donated the land for each of the public parks to the City in 1918 (RSAC ¶¶ 17, 19). As a condition of his gifts, Donor McIntire required the land to remain in use as public parks, 10/11/2017 Amend. Compl., Exhs. C and D, but the RSAC does not allege that the Donor placed conditions on his gifts of the Statues. RSAC ¶¶16-20; Ord (10/4/2017) [4]. Both Statues are listed on the National Register of Historic Places as significant works of art by famous sculptors, not as commemorations of historical events, 05/02/2017 Hr'g Tr. 117:2-15 and 126:1-127:5. The National Register Nomination Forms are official government publications of which the court must take judicial notice (Va. Code §8.01-388; Hr'g Tr. 05/02/2017 112:14-21), *see* Ex. 2 and Ex.3 to City's 12/10/2018 Not./Cross-Mot. for Partial Summary J.

During the 1920s, during an era known as the City Beautiful Movement, cities across the country improved public spaces with art (05/02/2017 Hr'g Tr. 129:17-23 and 130:9-22). During this period the General Assembly expressly authorized localities, by

[4] Finding that there is no *ultra vires* claim apart from Va. Code §15.2-1812; *see also* Ltr. Op. (10/03/2017), p.1, fn.1.

general law, to beautify and otherwise improve their public parks. *See* statutes referenced in City's 12/10/2018 Mot. for Judicial Notice.[5]

Payne's RSAC does not allege that, by an individual Act of Assembly enacted prior to 1997, the General Assembly either enabled the City to erect the Statues as war memorials described in Va. Code §15.2-1812, or prohibited their removal as such from the City's parks. From 1904 to 1997, the General Assembly generally enabled only the authorities of counties and their circuit courts to "authorize and permit the erection of a Confederate monument upon the public square at the county seat," and prohibited disturbance or interference with any such erected monuments. *See* 04/27/2017 Pltfs.' Br.: Va.'s Veterans Monument Protection Law and the Dillon Rule", Exhs. 1-12 and City's 07/10/2017 Br. in Supp. of Defs.' Demurrer, Attach. 1. None of the pre-1997 versions of Va. Code §15.2-1812 mentions cities, *id*. Until 1997 no local authorities, *other than* counties and county circuit courts, were authorized or restricted by these laws, and Payne's RSAC does not allege that the City erected the Statues in the 1920s by authority of the statutory antecedents of Va. Code §15.2-1812.

[5] Code of the City of Charlottesville (1908), §1038, and Code of Virginia (1919 and 1924) §3032 (every city and town, by general law, had the power to "…in their discretion to establish and maintain parks…and cause the same to be laid out, equipped or beautified…."). *See also* 09/01/2017 Hr'g Tr. 19:2-24:11 *and* City's 12/10/2018 Not./Mot. for Judicial Notice.

In the 1920s the City enjoyed broad and express authority conferred by general law to establish, lay out, equip, beautify and maintain public parks.[6] "These new parks…and statues already given to the City by Mr. McIntire have added beauty to the City which is without equal…." RSAC, ¶20. *See also* RSAC, Ex. B (stating Donor McIntire's purpose to "beautify" a City park, by erecting an "equestrian statue"). From 1908 to 1997, within the City's Charter, the General Assembly conferred an even broader grant of local authority for the City to "control and manage…all property, real and personal, belonging to said city." Charlottesville Charter (1946), §14, 1946 Va. Acts, ch. 384; Charlottesville Charter (1908), §14, 1908 Va. Acts, ch. 285.[7]

In 1997 the General Assembly recodified Title 15.1 of the Virginia Code, in its entirety ("Recodification"). Within Va. Code §15.2-1812, previously §15.1-270, the General Assembly substituted the word "locality" where, previously, only the word "county" or "circuit court" appeared. The legislative history prepared by the Virginia Code Commission states that, while the section was expanded to include all localities, there was "no substantive change in the law." 1997 Senate Document 5, pp. 505-506, Attach. 2 to City's 07/10/2017 Br. in Supp. of Defs' Demurrer. Confirming its intention not to affect powers conferred by an existing City Charter, the General Assembly simultaneously adopted Va. Code §15.2-100:

[6] See fn. 5.
[7] *See* fn. 5

> "Except when otherwise expressly provided by the words, "Notwithstanding any contrary provision of law, general or special", or words of similar import, the provisions of this Title shall not repeal, amend, impair, or affect any power, right or privilege conferred on counties, cities and towns by charter."

Va. Code §15.2-100 (1997, ch. 587).

A February 2017 resolution declared the City Council's intent to remove the Lee Statue from its park. (RSAC, ¶28 and Ex. F). In August 2017 City Council voted to cover the Statues with a black fabric, in mourning for lives lost the weekend of August 12, 2017. RSAC ¶¶ 30 B and 30 C; Payne's 08/30/2017 filing: Tr. of City Council Mtg. Aug. 21, 2017, 22:9-12 and 25:4-6. On September 5, 2017, City Council adopted a resolution stating its intention to remove the Jackson Statue from a City park pending resolution of this lawsuit in the City's favor (RSAC ¶30 D). Neither the RSAC, nor any prior iteration of Payne's complaint, alleges any physical harm to the Statues caused by any of these votes or actions.

ARGUMENT AND STANDARD OF REVIEW

I. THE TRIAL COURT ERRED WHEN IT INTERPRETED THE PROVISIONS OF VIRGINIA CODE §15.2-1812 AND §15.2-1812.1 TO ALLOW AWARD OF ATTORNEYS' FEES AND COSTS AGAINST THE CITY, BECAUSE PAYNE NEITHER ALLEGED NOR PROVED ANY DAMAGES OR ATTORNEYS' FEES RECOVERABLE UNDER §15.2-1812.1, §15.2-1812 DOES NOT AUTHORIZE ATTORNEYS' FEES, AND THE COMPLAINT IDENTIFIES NO OTHER BASIS FOR RECOVERY OF ATTORNEYS' FEES.

STANDARD OF REVIEW: A trial court's construction of a statute is a pure question of law that will be reviewed *de novo* on appeal. *In re Brown,* 289 Va. 343, 347, 770 S.E.2d 494, 496 (2015).

ARGUMENT AND AUTHORITIES: Statutory authority for award of attorneys' fees and litigation costs is in derogation of the common law and subject to strict interpretation; a statute allowing recovery of attorneys' fees is "not to be enlarged in its operation by construction beyond its express terms." *Cherry v. Lawson Realty Group,* 295 Va. 369, 376, 812 S.E. 2d 775, 779 (2018); *Chacey v. Garvey,* 291 Va. 1, 10-11, 781 S.E.2d 357, 361 (2015). Contrary to this rule of statutory construction, the trial court interpreted Va. Code §15.2-1812.1 as "…obviously an inclusive, remedial provision, and should be interpreted liberally and broadly…." Ltr. Op. 10/03/2017, p. 13; 01/14/2019 Hr'g Tr. 102:19-25.

Va. Code §15.2-1812 neither authorizes any civil action nor any recovery of attorneys' fees. Va. Code § 15.2-1812.1(C) states: "the party who initiates and prevails in ***an action authorized by this section*** shall be entitled to the cost of the litigation, including reasonable attorney's fees" [emphasis added]. Only one civil action is authorized by Va. Code §15.2-1812.1: "an action for recovery of damages….necessary for the purposes of rebuilding, repairing, preserving, and restoring such memorials or monuments to preencroachment condition". Va. Code §15.2-1812.1(A). The statute's mention of this one type of action signals that other civil actions, omitted from mention, are not authorized. *Virginia Dept. of Health v. NRV Real Estate,* 278 V. 181, 188, 677 S.E.2d 276, 279 (2009).

The City persistently noted that Payne's various complaints alleged no physical harm to the Statues causing any damages recoverable under the statute, and therefore there could be no basis for award of attorneys' fees, or any other relief, under Va. Code §15.2-1812.1. By Order (11/09/2018) the court dismissed, *with prejudice,* all claims seeking an award of damages based on physical harm to either Statue. Predictably, Payne did not, at trial, prove any damages recoverable under Va. Code §15.2-1812.1, because no damages were necessary for the expressed statutory purposes. Order: Damages (10/15/2019). Nonetheless, the court liberally construed Va. Code §15.2-1812.1 as allowing both permanent injunctive relief and recovery of attorneys' fees. 01/14/2019 Hr'g Tr. 102:19-25; 09/13/2019 Hr'g Tr. 728:24-729:6 and 730:22-732:13; Ltr. Op. (10/3/2017), p. 13.

That Payne packaged their request for injunctive relief together with requests for damages and declaratory judgment does not provide a legal basis for the court to enlarge the operation of Va. Code §15.2-1812.1(C). "In an action encompassing several claims, the prevailing party is entitled to an award of costs and attorneys' fees only for those claims for which (a) there is a contractual or statutory basis for such an award, and (b) the party has prevailed." *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 428-429, 732 S.E.2d 690, 702 (2012); *Ulloa v. QSP, Inc.,* 271 Va. 72, 83, 624 S.E.2d 43, 50 (2006). Va. Code §15.2-1812.1(C) does not limit the rights of any person to pursue "any additional civil remedy ***otherwise allowed by law***" [emphasis added]; however, this wording is unambiguous: no such "additional civil remedy" is authorized by §15.2-1812.1. Nowhere within Payne's RSAC does Payne set forth a statutory basis for recovery

of its attorney's fees *other than* Va. Code §15.2-1812.1; as a result, any request for award of attorneys' fees has been waived. Va. Sup. Ct. R. 3:25(B).

II. 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.

STANDARD OF REVIEW: Whether or not a party has established standing is a matter of law reviewed *de novo* on appeal. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686-687, 709 S.E.2d 150, 154-155 (2011). When a litigant asserts standing based on a statutory provision, the question is essentially one of statutory construction, that is, whether or not the legislature intended to confer standing on the litigant to bring that action. *Small v. Federal Nat. Mortg. Ass'n*, 747 S.E.2d 817 (2013). A trial court's construction of a statute is a pure question of law that will be reviewed *de novo* on appeal. *In re Brown,* 289 Va. 343, 347, 770 S.E.2d 494, 496 (2015) (2015).

ARGUMENTS AND AUTHORITY: Throughout this case, the court was of the view that "[I]t [§15.2-1812.1] is obviously an inclusive, remedial provision, and should be interpreted liberally and broadly to further the purposes of the statute and accomplish its ends." Ltr. Op. 10/3/2017, p. 13; 04/11/2018 Hr'g Tr. 9:23-10:4; 01/14/2019 Hr'g Tr. 102:19-25; 09/13/2019 Hr'g Tr. 728:24-731:25. 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"[8] to bring a civil action for recovery of certain damages. §15.2-1812.1(A)(1). In this case, there is no "matter"—the RSAC does not allege, and has never alleged, any physical harm to either Statue; by Order (11/09/2018) the court granted the City's demurrer and dismissed, *with prejudice,* all claims seeking an award of damages based on physical harm to either Statue; no damages were necessary for the purposes authorized by the statute. Order: Damages, (10/15/2019). Payne's RSAC is premised on the assertion that the City's resolutions, if carried out, will violate the proscriptions of §15.2-1812; however, Va. Code §15.2-1812 authorizes no civil actions. "We would never infer a 'private right of action' based solely on a bare allegation of a statutory violation." *Cherrie v. Va. Health Svcs.,* 292 Va. 309, 315, 787 S.E.2d 855,858 (2016) (citations omitted). The trial court had no basis for exercising jurisdiction over the RSAC's claims for declaratory or injunctive relief.

a. **Sovereign Immunity bars Payne's actions for declaratory and injunctive relief**

Notwithstanding the specific statutory enforcement scheme within Va. Code §15.2-1812.1 and §18.2-137, the trial court inferred a civil right of action by Payne for both declaratory and injunctive relief. 09/13/2019 Hr'g Tr. 730:17-731:15; Order: Declaratory J. (10/15/2019). The court denied the City's assertions of sovereign immunity, deeming the city council's votes not to be "legitimate" legislative activity, and observing that to grant immunity "…would seem to fly in the face of the explicit

[8] Va. Code §15.2-1812.1(A).

language and intent of those statutes." Ltr. Op. (6/13/2018), pp. 4-6; Order (04/10/2019), ¶(3)(c).

In this case, the issue of sovereign immunity governs Payne's standing to bring an action against the City. The doctrine of sovereign immunity is not limited to being a bar to actions sounding in tort, but bars all actions at law for damages, suits in equity to restrain governmental action or to compel such action, and declaratory judgment proceedings. *Afzall v. Commonwealth,* 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005), citing *Alliance to Save the Mattaponi,* 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005). In particular, sovereign immunity bars any action for prospective injunctive and declaratory relief that seeks to compel the Commonwealth or its political subdivisions to comply with state statutory or non-Constitutional law. *Digiacinto v. Rector & Visitors of George Mason University,* 281 Va. 127, 138, 704 S.E.2d 365, 371 (2011). Within the RSAC the Payne plaintiffs specifically seek to compel the City to comply with Va. Code §15.2-1812 and, just like the complaint in *Digiacinto,* Payne's RSAC presents an anticipatory action for declaratory and injunctive relief.

A waiver of sovereign immunity may not be implied, but rather must be "explicitly and expressly stated in the statute." *Gray v. Va. Sec. of Transp.*, 276 Va. 93, 102, 662 S.E.2d 66, 71 (2008); *Ligon v. County of Goochland,* 279 Va. 312, 319, 689 S.E.2d 666, 670 (2010). The General Assembly has not waived sovereign immunity within Va. Code §15.2-1812; in fact, Va. Code §15.2-1812 does not address methods of enforcement. Within Va. Code §15.2-1812.1 the General Assembly chose only to

prescribe a limited civil right of action for damages. The damages action works in concert with Va. Code §18.2-137, which provides a criminal process and penalties for certain actions made unlawful by Va. Code §15.2-1812. At best, the provisions of Va. Code §15.2-1812.1(C) preserve any waiver of sovereign immunity that may be granted within some *other* law authorizing a civil action against the City, but Payne's RSAC cites no such other law. The trial court erred by inferring a right of action by Payne for declaratory and permanent injunctive relief against the City from the provisions of Va. Code §15.2-1812.1 and §15.2-1812.

b. **A right of action for declaratory judgment must be conferred by statute**

Courts may not adjudicate declaratory judgment actions asserted by litigants who challenge a governmental action, if the challenge is not otherwise authorized by a statute. *Cherrie v. Va. Health Svcs.,* 292 Va. 309, 315, 787 S.E.2d 857-858 (2016);*Charlottesville Area Fitness Club Operators Ass'n, et al. v. Albemarle Cnty. Bd. Sup'rs et al.,* 285 Va. 87, 100, 737 S.E.2d 1, 8 (2013), *citing Miller v. Highland Cnty.,* 274 Va. 355, 371-372, 650 S.E.2d 532, 540 (2007). Va. Code §15.2-1812.1 does not authorize an action for declaratory relief, or a related injunction; the provisions of §15.2-1812.1(C) clearly signal legislative intent that civil remedies, other than actions for specified damages, must be found in other statutes. "We assume that the legislature chose, with care, the words it used when it enacted the relevant statute." *Barr v. Town & Country Properties, Inc.,* 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); *Alger v. Commonwealth,* 267 Va. 255, 590 S.E.2d 563 (2004).

Payne's RSAC cites no other statute conferring a private right of action for declaratory relief, or a related injunction, for enforcement of the prohibitions of Va. Code §15.2-1812, and "[n]o court can base its decree on facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed." *Potts v. Mathieson Alkali Works,* 165 Va. 196, 207, 181 S.E. 521, 525 (1935).

c. When a statute specifies a remedy, courts may not infer other remedies

The enforcement mechanisms set forth within Va. Code §15.2-1812, §15.2-1812.1 and §18.2-137 did not exist at common law; they have been created entirely through the enactment of a statutory scheme. Where the General Assembly has specified a particular statutory remedy, a court may not infer a different method of judicial enforcement. *Cherrie v. Va. Health Svcs.,* 292 Va. 309, 315-16, 787 S.E.2d 855, 858 (2016).

The remedies specified in the statutory scheme at issue in this case include criminal process against a person who unlawfully removes a monument or memorial described in §15.2-1812[9] and a private civil action for recovery of certain damages in limited circumstances[10]. The mention of one specific civil action within §15.2-1812.1 implies that other types of civil actions, omitted from mention, were not intended to be conferred by the legislature within that statute. *Virginia Dept. of Health v. NRV Real Estate,* 278 V. 181, 188, 677 S.E.2d 276, 279 (2009). The trial court should not have inferred a statutory basis for Payne's actions for declaratory and injunctive relief.

[9] Va. Code §18.2-137
[10] Va. Code §15.2-1812.1(A)

Cherrie, 292 Va. 309, 315-16, citing *Vansant & Gusler, Inc. v. Washington,* 245 Va. 356, 359-60, 429 S.E.2d 31, 33 (1993).

III. 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

Virginia recognizes a right of action for declaratory judgment based on "taxpayer standing" only to challenge the legality of local government expenditures. *Lafferty v. School Bd. of Fairfax County*, 293 Va. 354, 363, 798 S.E.2d 164, 169 (2017); *Goldman v. Landsidle,* 262 Va. 364, 372, 552 S.E.2d 67, 71 (2001). "[T]he common thread in the line of cases cited in *Goldman* relies on a key element: a direct, immediate connection to government expenditures." *Lafferty, id.* Revenue expenditures must be specifically alleged; inferences by a court as to revenue expenditures would be "wholly speculative". *Lafferty, id.,* at 363.

In an effort to establish taxpayer standing to support their action for declaratory relief, the RSAC alleges that Payne Plaintiffs Payne, Yellott, Tayloe, Amiss, and Weber pay certain taxes within the City. (RSAC ¶¶ 2, 3, 4, 7, 9); however, there is no allegation that the City Council actually approved the expenditure of any funds for removal of either Statue, and the resolution referred to in RSAC ¶30 (RSAC Ex. H) makes clear that a referenced $1,000,000 budget does <u>not</u> include any funds for removal of either

Statue. The RSAC's allegations cannot be the basis of a taxpayer action for declaratory judgment relative to specific expenditures, or, by extrapolation, an injunction prospectively prohibiting removal of the Statues from City parks. (Va. Code §8.01-189 specifies that "[t]he pendency of any action at law or suit in equity brought merely to obtain a declaration of rights or a determination of a question of construction shall not be sufficient grounds for the granting of any injunction.")

Within RSAC ¶30.C Payne refers to an expenditure of $6,000 for black tarpaulins that covered the Statues for a period after August 12, 2017. This expenditure does not relate in any way to the resolutions to remove the Statues from City parks (RSAC ¶¶ 28, 30 D), and there is no allegation that the tarpaulins physically damaged either Statue. The allegation in RSAC ¶30 C, that the City covered the Statues, and the allegation in RSAC ¶32, that the City expended $3,000 each for two covers, are insufficient to confer authority upon the court to enter the Order: Declaratory J. (10/15/2019) or the Order: Permanent Inj. (10/15/2019). At best, the allegations in RSAC ¶¶30 C and 32 could confer taxpayer standing upon the Payne plaintiffs only to seek a declaration as to the legality of the already-spent $6,000.00.

When the "…actual objective in a declaratory judgment proceeding is a determination of a disputed issue rather than an adjudication of the parties' rights, the case is not one for declaratory judgment." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty Bd. Sup'rs,* 285 Va. 87, 99, 737 S.E.2d 1, 7 (2013); *Williams v. Southern Bank of Norfolk,* 203 Va. 657, 663, 125 S.E.2d 803, 807 (1962). Referring to the City Council's

votes to remove the Statues from its parks, and Payne's belief that those votes violated the prohibitions of Va. Code §15.2-1812, Payne consistently contended: "this case is about the rule of law."[11] This is a bold and clear admission that the court was being asked to determine a controversial public or political issue ("defending history against an intolerant present", 09/13/2019 Hr'g Tr. 656:18-23) rather than an adjudication of the Payne plaintiffs' taxpayer rights. Even the court admitted, "**[t]his case has always been about the injunction.**" 09/13/2019 Hr'g Tr. 732:8-13 [Emphasis added]. At the conclusion of almost three years of litigation, neither the Order: Declaratory J. (10/15/2019) nor the Order: Permanent Inj. (10/15/2019) mentions a local government expenditure. The Payne plaintiffs never had taxpayer standing to assert their claims for declaratory judgment, or related prospective injunctive relief, and the court was without authority to adjudicate those claims.

IV. VA. CODE §15.2-1812 (1997, AS AMENDED) DOES NOT GOVERN THE CITY'S STATUES, WHICH WERE ERECTED IN THE 1920S, AND THE TRIAL COURT ERRED BY INTERPRETING THE STATUTE AS OPERATING RETROACTIVELY TO PROHIBIT REMOVAL OF THE STATUES FROM THE CITY'S PARKS.

STANDARD OF REVIEW: A trial court's construction of a statute is a question of law that will be reviewed *de novo* on appeal. *In re Brown*, 289 Va. 343, 347, 770 S.E.2d 494, 496 (2015).

[11] 5/2/2017 Hr'g Tr. 16: 8-10 and 16:20-22; 12/19/2018 Hr'g. Tr. 49:3-4; 1/16/2019 Hr'g Tr. 23:3-4, 84:19-20, 85:6-7, 91:15-19, 100:8-11; 9/11/2019 Hr'g Tr. 94:13-20, 132:8-11, 133:7-9, 136:1, 137:16-20; 9/13/2019 Hr'g Tr. 582:13-21, 656:18-23.

ARGUMENT AND AUTHORITIES: Va. Code §15.2-1812 was enacted in 1997 as part of a recodification of Va. Code Title 15.1, now Title 15.2 (the "Recodification"). Prior to the 1997 Recodification, §15.201812 conferred no authority upon cities, nor did it restrict cities in any way. The City's Statues could not have been erected pursuant to Va. Code §15.2-1812, or any of its antecedents, and they are not subject to its prohibitions. *Accord, Heritage Pres. Ass'n., Inc. v. City of Danville,* No. CL15000500-99 (Dec. 7, 2015), *pet. for appeal refused,* No. 16031- (Va. June 17, 2016), *reh'g denied* (Va. Oct. 7, 2016); 2017 Op. Va. Att'y Gen. No. 17-032, 2017 WL 3901711 (Ltr. From Atty Gen. Mark R. Herring to Julie Langan, Dir., Va. Dep't. of Historic Res. (08/25/2017); 2018 Op. Va. Atty Gen. No. 17-047, 2018 WL 4945133 (Ltr. From Atty Gen. Mark R. Herring to Stephen W. Mullins, Dickenson Cnty. Att'y (09/28/2018).

a. The language of Va. Code §15.2-1812 does not manifest a legislative intent for retroactive operation

Va. Code §15.2-1812 states, in relevant part: "[a] locality may…**authorize and permit** the erection of **monuments or memorials for any war or conflict**…**[if] such are erected**, it shall be unlawful for the authorities of the locality…to disturb or interfere with any monuments or memorials **so erected**…." [Emphasis added]. Early in this litigation the court ruled that Va. Code §15.2-1812 applies to "monuments or memorials covered by that statute and in existence within a city prior to 1997". Order (12/06/2017), ¶3. *See also* Order (04/10/2019), ¶(3)(b), *citing* Ltr. Op. (10/03/2017) and Ltr. Op. (02/23/2018)

p.1 fn.1. The court's statutory interpretation is not based upon the wording of Va. Code §15.2-1812 or its legislative history; the language of §15.2-1812 does not clearly manifest an intention for the proscriptions of the statute to be applied to statues in existence within a city prior to 1997.

The words used in Va. Code §15.2-1812 should be interpreted in accordance with their common usage. *First,* the statute's proscriptions apply only to "such" monuments or memorials that "are" "so erected". "Such" means "previously characterized or specified" or "having a quality already or just specified", and is "used to avoid repetition of a descriptive term". *Webster's Third New International Dictionary* 2283 (1976). The word "so" means "in a manner or way that is indicated or suggested", e.*g., id.* at 2159. The word "such" refers to the memorials the statute authorizes to be erected[12], and the word "so" refers to the manner in which the memorials are erected—i.e., pursuant to the authority conferred by the statute. *Second*, the words "are erected" necessarily restricts the statute's application to war memorials erected after July 1997. *See Carr v. United States*, 560 U.S. 438, 449-450 (2010)(if the legislature intended retroactive operation "it presumably would have varied the verb tenses"). "Given the well-established presumption against retroactivity…it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's

[12] *Sharlin v. Neighborhood Theatre, Inc.,* 209 Va. 718, 721, 167 S.E.2d 334 (1969)(the word "such" refers to the last antecedent).

enactment". *Id.,* at 450 n.6. [13] Just as under federal law, "[W] e interpret statutes to apply prospectively 'unless a contrary legislative intent is manifest.'" *Bailey v. Spangler*, 289 Va. 353, 358-59, 771 S.E.2d 684, 686 (2015), *citing Bd. Of Sup'rs v. Windmill Meadows, LLC*, 287 Va. 170, 179-80, 752 S.E.2d 837, 842 (2014).

Courts will not infer an intention for retroactivity, absent a strong manifestation. *Bailey v. Spangler, 289 Va. 353, 359, citing Ferguson v. Ferguson,* 169 Va. 77, 87, 192 S.E.2d 774, 777 (1937). It is evident from the court's Ltr. Op. 10/3/2017, pp. 4-7, that the trial court did not assign significance to the relationship between the "authorizing" words ("localities may erect….") and the "proscriptive" words ("if such are erected, it shall be unlawful….."). Further, as to the words "are erected" the court casually observed that the words refer simply to "….if they are built. A building is built". 05/02/2017 Hr'g Tr. 279:15-22.

In Ltr. Op. 10/3/2017, at p. 5, the court stated "[T]he General Assembly had to have in mind those monuments and memorials already erected. Nothing else would make sense." Legislative intent must be determined from the words of the statute itself, not from a court's notions about the purpose of a statute. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993); *accord Carter v. Nelms,* 204 Va. 338, 346, 131 S.E.2d 401, 406 (1963).

[13] This paragraph is based on a section within the 12/20/2018 Councilor Defs. Br. in Supp. of Demurrer to Pltfs. Sec. Amend. Compl., prepared by attorneys of the law firm JONES DAY, to whom credit is hereby given.

The court discussed its reliance on *Sussex Community Services Association v. The Virginia Society for Mentally Retarded Children, Inc.,* 251 Va. 240, 467 S.E.2d 468 (1996), a case in which the General Assembly interpreted the use of the word "any" (a word not used in §15.2-1812) within an amendment of one specific statute, even while admitting that *Sussex* is "not on all fours with the present case." Ltr. Op. 10/03/2017, p. 7. The court acknowledged that "a strictly technical reading of the statute and the legislative history might reach [the result argued by the City]" id., at p. 6.

Sussex involves the exact reverse of this case: originally, a statute applied only to restrictive covenants executed after July 1, 1986, and then the legislature amended the statute to delete the date and to insert the word "any" in front of the words "restrictive covenants". The court's reliance on *Sussex* ignored the enactment of Va. Code §15.2-1812 as part of a general recodification of Title 15.2. To explain the provisions of §15.2-1812 (1997) the Va. Recodification Commission provided a drafting note, stating: "No substantive change in the law; this section is expanded to include all localities". 07/10/2017 City Br. In Supp. of Demurrer, Attach. 2[14]. The trial court should have accepted the drafting note as being persuasive that the General Assembly did not intend the statute to operate retroactively to statues such as the City's. *Butcher v. Commonwealth,* 838 S.E. 2d 538, 544, 2020 Va. LEXIS 10, 15-16, 2020 WL 939273 (2020) (citations omitted) ("there is a presumption that a recodified statute does not make

[14] 1997 Senate Doc. 5, at p.505-506.

substantive changes in the former statute, unless a contrary intent plainly appears in the statute."); *accord Newberry Station Homeowners' Ass'n v. Bd. Of Sup'rs*, 285 Va. 604, 617, 740 S.E.2d 548, 555 (2013).

The court inferred a legislative intention of retroactivity from the list of wars within the current provisions of §15.2-1812. The court stated that "logic and common sense" preclude a conclusion that the General Assembly would have expected a city to erect, after 1997, new monuments or memorials to bygone wars. Ltr. Op. 10/3/2017, p.4 and pp.6-7. This premise is not the type of clear manifestation contemplated by established rules of statutory construction. Before applying a statute retroactively, legislative intent must be "manifest beyond reasonable question", *Arey v. Lindsey,* 103 Va. 250, 252, 48 S.E. 889, 890 (1904). The court's rulings fail to set forth a basis, consistent with established rules of construction, for finding any such manifestation within the list of wars in Va. Code §15.2-1812. Any reasonable question should be resolved against retroactive operation. *Shilling v. Commonwealth,* 4 Va. App. 500, 507, 259 S.E.2d 311, 315 (1987)(internal citations omitted).

b. The City's substantive legal rights must be protected from retroactive application of the obligations and proscriptions of §15.2-1812

Substantive rights are legal interests that must be protected from retroactive application of statutes. *In re Brown,* 289 Va. 343, 348, 770 S.E.2d 494, 496 (2015); *Shiflet v. Eller,* 228 Va. 115, 120, 319 S.E.2d 750, 753 (1984). "Substantive rights…are included within that part of the law dealing with creation of duties, rights, and obligations, as opposed to

procedural or remedial law, which prescribes methods of obtaining redress or enforcement of rights." *Shiflet v. Eller, id*. Va. Code §15.2-1812 plainly creates rights and imposes obligations; on its face, the statute does not prescribe any method of obtaining redress. The court construed Va. Code §15.2-1812 as remedial, because it could not imagine what the General Assembly would have been thinking if the statute were intended only to apply prospectively.[15] Yet neither the words of the statute nor the legislative history of Va. Code §15.2-1812 support the Court's inferences as to the General Assembly's purpose in changing the wording of §15.2-1812 during the 1997 Recodification. The court erroneously interpreted the statute "in a way that amounts to a holding that the legislature did not mean what it actually has expressed." *Crawford v. Haddock*, 270 Va. 524, 528 (2005).

The trial court's interpretation also ignored the litigants' Dillon Rule points and arguments, matters of which the 1997 General Assembly is presumed to have been aware.[16] Payne's RSAC alleges the Statues were erected in City parks in the 1920s; the City cited the court to statutes that conferred broad and express legislative authority upon the City to establish and beautify public parks. Significantly, Payne's RSAC fails to allege

[15] Ltr. Op (10/03/2017) p.4-5, fn.2-3; Ltr. Op. (06/13/2018) p. 5; 04/11/2018 Hr'g Tr. 9: 23-10:4; 01/14/2019 Hr'g Tr. 102:19-25; 07/31/2019 Hr'g Tr. 115:1-23 and 120:13-17; 09/13/2019 Hr'g Tr. 739:25 - 740:7.

[16] Payne's Pltfs. Br.: Va.'s Veterans Monument Protection Law and the Dillon Rule" (04/27/2017); City's Demurrer to Compl. (07/10/2017); City's Arguments, 09/01/2017 Hr'g Tr. 18:21-25:17; City's Not./Cross Mot. for Summ. J. (12/10/2018); City Councilors' Br. in Supp. of Demurrer to Pltfs. Sec. Amend. Compl. (12/20/2018); City's Mot. for Recons. (08/28/2019).

that, prior to 1997, the legislature expressly authorized the Statues to be erected by the City as any type of monument/ memorial described in Va. Code §15.2-1812, or imposed any restrictions or obligations upon the Statues, and "[n]o court can base its decree on facts not alleged." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935). Under the Dillon Rule of statutory construction, the power of a municipality must be exercised pursuant to an express grant from the legislature. *National Realty Corp. v. City of Virginia Beach,* 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968), *cited in Shilling v. Jimenez*, 268 Va. 202, 208, 597 S.E.2d 206, 209 (2004). As works of art/ sculpture installed to beautify City parks, the donated Statues were lawfully erected, without expenditure of public funds, consistent with the City's legislatively granted powers. On the other hand, the court's retroactive application of Va. Code §15.2-1812 may render the City's actions in the 1920s unlawful under a Dillon Rule analysis (*void ab initio*), and certainly would subject the City to duties and obligations it did not have prior to 1997. Both results must be avoided. "Every statute which…creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective…and opposed to those principles of jurisprudence which have been universally recognized as sound.'" *City of Richmond v. Sup'rs of Henrico Cnty.,* 83 Va. 204, 212, 2 S.E. 26, 30 (1887). "Especially do courts shrink from holding an act retrospective when it affects public objects and duties, and, when it affects rights accrued and acts done by law for the public interest." *Id.,* at 212. By application of established law disfavoring retroactive operation of statutes, the unsound results

referenced in *City of Richmond v. Sup'rs of Henrico County* resolves, consistent with the Dillon Rule.

When a locality undertakes action expressly authorized by the legislature (such as installing donated works of art as improvements within public parks), its actions are to be presumed valid, *Bd. of Sup'rs v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959). This presumption can be effected by a statutory interpretation that the provisions of Va. Code §15.2-1812 do not apply retroactively in the unique circumstances of Charlottesville's Statues. Prior to 1997 the City enjoyed a broad, substantive legal right under its municipal Charter to make decisions regarding the management and disposition of its real and personal property; its power decide to remove the Statues, or any other park improvements, was unrestricted. In 1997, the General Assembly expressly preserved this charter authority, within Va. Code §15.2-100 (1997 Acts of Assembly, c. 587). Payne's RSAC does not allege that, prior to 1997, the City's Charter powers were diluted by any Act of Assembly regulating either Statue, or imposing an obligation requiring either Statue to be permanently maintained *in situ*. Construing Va. Code §15.2-100 together with §15.2-1812 (1997), it is clear that the General Assembly's intention was for prospective application of §15.2-1812 to any city which enjoyed broad charter authority with which the prohibitions of Va. Code §15.2-1812 might conflict.

Retroactive operation of the statute may also impair the City's substantive duties and obligations. When the City accepted title to the parks in the 1920s, the City acquired

a duty under the Virginia Constitution to follow a public, political process before taking any action that would permanently restrict or encumber its ownership interest in park property. If the legislature intended a retroactive operation of Va. Code 15.2-1812 (1997, as amended), then its enactment of the statute may have circumvented Va. Constitution, Article VII, § 9, which assigns localities the exclusive power to determine the use and disposition of locally-owned property. According to this Constitutional provision, the General Assembly may itself be without power to retroactively enact a statutory prohibition in the nature of a restrictive covenant. *See Sch. Bd. of Carroll County v. Shockley,* 160 Va. 405, 413-415, 168 S.E.2d 419, 422-423 (1933); 09/01/2017 Hr'g Tr. 128:8-13; *see also* 2004 Op. Va. Atty. Gen. No 00-062 (decision to grant a conservation easement must comply with Art. VII, §9). On the other hand, if Va. Code §15.2-1812 is not applied retroactively, there is no question that the City's Constitutional obligations remain unaffected. "A statute will be construed to avoid a constitutional question whenever this is possible." *Yamaha Motor Corp. v. Quillian,* 264 Va. 656, 665, 571 S.E.2d 122, 126-127 (2002).

The proscriptions of Va. Code §15.2-1812, if they can ever be applied to veterans' memorials erected in cities prior to 1997, could only apply: (i) to cities whose legislatively-authorized war memorials were subject to proscriptions similar to those within §15.2-1812, by virtue of individual Acts of Assembly enacted prior to 1997, or (ii) to war memorials erected at the public square at a county seat, by authority of the pre-

1997 iterations of §15.2-1812. Charlottesville's Statutes do not fall into either category, and Payne's RSAC does not allege otherwise.

CONCLUSION

The City prays that the Order: Permanent Injunction (10/15/2019), the Order: Declaratory Judgment (10/15/2019) and the Final Order (01/29/2020) be vacated by the Virginia Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with Rule 5:17, and further certifies as follows:

1) The appellants are THE CITY OF CHARLOTTESVILLE, VIRGINIA, and CHARLOTTESVILLE CITY COUNCIL

2) Counsel for the appellants are:

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3) The appellees are FREDERICK W. PAYNE, JOHN BOSLEY YELLOTT, JR., THE MONUMENT FUND, INC., 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, and BRITTON FRANKLIN EARNEST, SR.

4) Counsel for the appellees are:

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5) On this 15th day of June 2020, a true copy of this petition was uploaded to the VACES management system. On this same date a copy has been served to opposing counsel via U.S. mail (to Mr. Main) and via email (to Mr. Main, Mr. Puryear and Mr. Walsh) at the addresses provided above.

6) Counsel for the appellant does desire to state orally to a panel of the Court the reasons why the petition for appeal should be granted, either in person or by conference telephone call, as the Court may determine.

7) Counsel for the appellant is not court appointed.

LISA A. ROBERTSON VSB#32486