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

Plaintiffs' Brief in Opposition to Plea in Bar

Introduction

Defendants' Plea in Bar reiterates six arguments, most of which this Honorable Court already decided as a matter of law in two demurrer decisions.

We respond to each of the six points in order. Four we believe, are decided and moot; a fifth largely decided but for a procedural question taken under advisement as of this writing. The last live issue is whether the individual City Councillors should remain as Defendants. That we address in Point (5) below.

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Standard of review for a plea in bar

A plea in bar is intended to shorten the litigation by reducing it to a single issue which if proven, bars recovery. Tomlin v. McKenzie, 251 Va 478, 479, 468 S.E. 2d 882 (1996). Where no evidence is offered, the Plaintiff's pleadings are taken as true. Lostrangio v. Laingford, 261 Va. 495, 500, 544 S.E. 2d 357 (2001) (reversing plea in bar, holding town's July 4 celebration not shielded by immunity statute).

None of the six grounds asserted in the Defendants' Plea in Bar pleads a fact to be proved. [Plea in Bar, Exhibit 1]. Instead, the Defendants reargue points of law the Court decided on previous demurrers, after hearings September 1, 2017 and February 27, 2018.

"The law should afford one full, fair hearing relating to a particular problem—but not two." The Funny Guy LLC v Lecego, 293 Va 135, 143, 795 S.E. 3d 887 (2017) (holding demurrer decision precludes relitigating dispute creating "needlessly fragmented litigation") quoting Kent Sinclair, Guide to Virginia Law & Equity Reform and Other Landmark Changes § 11.01, at 246 (2006); cf. also Ferguson v. Stokes, 287 Va. 446, 450-52, 756 S.E. 2d 455, 12-13 (2014) (confirming plea in bar rightly denied because in effect it revived controversy previously resolved). Instead of shortening the proceedings, a redundant Plea in Bar complicates and prolongs them.

The Court's review at this point should be properly limited to the one remaining live issue, whether the individual Councillors remain Defendants, addressed in Point (5).

We here incorporate by reference our briefs for the two previous demurrer hearings, and this Honorable Court's demurrer decisions. We dispose of the six grounds in the sequence the Defendants' Plea in Bar presents them.

(1) General damages include litigation costs

Plea in Bar point one contests whether the Amended Complaint pleads a cause of action for money damages. The Court notified the parties on February 27, 2018 of the reconsidered decision that litigation costs expended in preserving monuments are recoverable as general

damages under Virginia Code §§15.2-1812 and 1812.1. February 27, 2018, Transcript p. 7. This is a question of law. The Plea in Bar alleges no facts and could offer none, to contest it. Plea in Bar Point 1 is properly overruled.

The Court's reading of Virginia Code §15.2-1812.1 is correct. To preserve means to "keep something as it is." Cambridge English Dictionary [online at https:// dictionary.cambridge.org/us/dictionary/english/preserve] The Plaintiffs' lawsuit preserved the Lee Monument in place, thwarting City Councillors determined to remove and sell it. Damages for preserving a monument include litigation costs. Virginia Code §15.2-1812.1 (A) (2). "The party who initiates and prevails in an action authorized by this section shall be entitled to an award of the cost of the litigation, including reasonable attorney's fees." Virginia Code §15.2-1812.1 (C). Plaintiffs are entitled to recover as damages the litigation costs.

On February 27, 2018 Court took under advisement only the procedural question, whether the Fall 2017 demurrer ruling on general damages can be revisited. As stated in our March 16, 2018 brief here incorporated by reference, the Court can revisit the decision.

(2) Count Three of the Amended Complaint is now moot

In the Demurrer hearing February 27, 2018 the Court decided the last remaining issue in Amended Complaint Count Three, that preserving the name Jackson Park was not a condition of the conveyance. Plea in Bar Point 2 contesting the efficacy of Count 3 is moot.

(3) Renaming Jackson Park is also moot

As stated above, this Court already said the City can rename Jackson park. Plea in Bar Point 3 debating the name change too is moot.

(4) The City is not immune from suit; *this too is moot*

The Court ruled from the bench on February 27, 2018, "I'm not going to find that the City is immune. I think that flies in the face of the whole purpose of the statue." February 27, 2018 Transcript p. 9.

That is the law of the case. The Plea in Bar alleges no facts and could offer none, to controvert this decision. Plea in Bar Point 4 is moot.

The Court's decision was well founded. To reiterate: the Monument Protection law states "it shall be unlawful for the authorities of the locality, or any other person or persons" to disturb or interfere with a monument. Virginia Code §15.2-1812. "Locality" or "local government" as used in Title 15.2 "shall be construed to mean a county, city, or town as the context may require." Virginia Code §15.2-102. The law was amended in 2000 to add §15.2-1812.1 which invites "any person having an interest in the matter" to sue to preserve a monument (apart from and in addition to injunctive relief already available under §15.2-1812 preserved in §15.2-1812.1 (C).) Damages include the cost of the litigation to preserve a monument, as this Court has concluded.

As stated in our brief for the September 1, 2017 demurrer hearing, both the original statue and the 2000 amendment adding §1812.1 call for a citizen right of action against their own local officials. The Defendants' brief offers the experimental theory that only the Attorney General can enforce the law. [Defendants brief. p 8] That theory is belied by the absence in the statute of the words "Attorney General," and presence of "any person having an interest in the matter." The law clearly is intended to allow any citizen, including organizations, to thwart local authorities bent on desecration of war memorials. See Board of Sup's of King & Queen Cnty v. King Land Corp., 238 Va 97, 280 S.E. 2d 895 (1989) (stating law must be liberally interpreted to remedy the evil at which it aims).

It is unclear how Gray v. Sect'y of Trans., 276 Va 93, 102, 662 S.E. 2d 66 (2008) ["Gray"] supports the Defendants [Defendants brief. p 6]. Gray confirmed "self-executing" provisions in the Virginia Constitution waive the state's sovereign immunity. Gray, 276 Va at 106. "Self-executing" means "if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced." Gray, 276 Va. at 103-104. By that standard the Monument Protection law is self-executing. Were it in the Virginia Constitution it would waive the state's sovereign immunity. It is only in the Virginia Code though, in Title 15.2 concerning cities and counties. It only waives sovereign immunity for cities and counties.

The Defendants' reliance on Digiancinto v. Rector & Visitors of George Mason University, 281 Va. 127, 704 S.E. 2d 365, 371 (2011) is likewise misplaced [Defendants' Brief p. 5]. George Mason University is a public university; a state agency, in that case held to be acting under statutory authority. Digiancinto, 281 Va at 139. State agencies are not "localities" or "local authorities" subject to the Virginia Code §15.2-1812, which explicitly strips localities of the authority to remove monuments.

For the same reason, the decision in Ligon v County of Goochland, 279 Va 312, 689 S.E. 2d 666 (2010) ["Ligon"] is inapposite [Defendants' Brief p. 6]. That case addressed whether an "employer" under the whistleblower law, Virginia Fraud Against Taxpayers Act (VFATA), Code §§ 8.01-216.1 *et seq.* includes a county. The Court concluded that without an "explicit reference to the Commonwealth and its political subdivisions," the act applies only to private employers, not public employers shielded by sovereign immunity. Ligon, 279 at 318. Here in contrast, Virginia Code §15.2-1812 explicitly refers to localities and to local authorities. It is not a question of missing words. The words are there.

Moreover (again, as per our brief for the February 27, 2018 hearing) under longstanding case-law the City is not immune from suit for proprietary functions. The Defendants' demurrer admits the City sought to "maintain, regulate and improve real property" in deciding to sell both monuments [Demurrer ¶6, emphasis added]. Maintenance of City property is a proprietary function for which neither the City nor its officials are shielded. See e.g. Robertson v. Western Va. Water Auth., 287 Va. 158, 160-161, 752 S.E.2d 875 (2014) (reversing summary judgement, holding sewer maintenance is proprietary and outside sovereign immunity) ["Western Va. Water"]; Woods v. Town of Marion, 245 Va. 44, 46-47, 425 S.E.2d 487 (1993) (holding street ice clearing and waterworks repair are maintenance and thus proprietary functions, not shielded) ["Woods"]; Hoggard v. City Of Richmond, 172 Va. 145, 157, 200 S.E. 610 (1939) (surveying law of proprietary vs. governmental functions; holding operation of municipal swimming facility is proprietary and not shielded) ["Hoggard"] [emphasis added]. Likewise the City's decision to sell both monuments is commercial in character, which under the case law is a proprietary function not shielded by sovereign immunity. Hoggard 172 Va. at 150, citing Bolster v. City of

Lawrence, 225 Mass. 387, 388, 114 N.E. 722 (1917) (stating *inter alia* that an act is proprietary, and not shielded, if "voluntarily undertaken for [the city's] own profit and commercial in character"). The prospective sale of monuments reflected in City Council resolutions, is outside the shield of sovereign immunity.

Finally, even if the City's decision to remove a monument is mislabeled legislative, that does not preclude judicial inquiry. To the contrary, the Court has jurisdiction to take evidence and decide whether the legislation was reasonable. Concerned Taxpayers of Brunswick County vs. Brunswick County et al., 249 Va. 320, 455 S.E. 2d 712 (1995) ["Concerned Taxpayers"]. City Council resolutions contravening the law cannot be considered reasonable.

(5) City Council and the individual Councillors are proper parties

Virginia Code §15.2-1812 prohibits "the authorities of the locality" from removing a standing monument. The authorities of the locality are properly and indeed required, Defendants.

In an action under a statue requiring the "governing body" to be named as a party, "that body is a required party defendant." Miller et al. v. Highland County et al., 274 Va. 355, 367, 650 S.E. 2d 532 (2007) ["Miller"] (holding Board of Supervisors, and not just Highland County, required as named party). The Miller case concluded "locality" and "board of supervisors" are not synonymous; each is a "distinct legal entity." Miller, 274 Va. at 364-365. A statute providing for contesting the zoning variance decision of a local "governing body" requires preserving the distinction between these "separate legal identities;" and naming each "as a party defendant." Miller, 274 Va. at 367. Likewise here Charlottesville's City Council is a distinct legal entity from the City. Both are required to be named as parties.

Both City Council and the individual Councillors are also necessary parties under Virginia Supreme Court Rule 3:12 (requiring joinder of all parties in whose absence relief cannot be afforded). Relief in this case may entail rescinding illegal resolutions, and altering others. Only individual Councillors can vote on resolutions; only City Council as a body ordains them.

(A) Unauthorized expenditures strip local officials of immunity

As the Court is aware, Virginia Code §15.2-1405 excepts from local officials' immunity "the unauthorized appropriation or misappropriation of funds." The Amended Complaint states that the individual Defendants acted outside their authority in appropriating considerable tax money for an illegal enterprise and it is fairly construed from the Exhibits that city salaries have been expended. Complaint ¶¶ 32 & 45.

Both the individual Defendants' acts, and the expenditures in furtherance of those acts, are outside statutory immunity by the explicit terms of §15.2-1405. That ends the inquiry: individual City Councillors are properly named as Defendants. The statute curtails whatever immunity they might otherwise assert.

As stated in our Demurrer brief, the case-law is long settled that local authorities who step outside their legal authority are properly brought before the Court, enjoined from illegal acts, and required to recompense illegally diverted funds. See Burk v. Porter, 222 Va. 795, 797-798, 284 S.E.2d 602, 604 (1981) (reversing demurrer: taxpayers are entitled to sue Board of Supervisors members to reimburse moneys spent on junket) ["Burk"]; Lynchburg & R. St. Ry. Co v. Dameron, 95 Va. 545, 550, 28 S.E. 951 (1898) (sustaining injunction against city of Lynchburg, its officers and agents). Public officers must be held responsible for transgression of their authority. Johnson v. Black, 103 Va. 477, 484, 49 S.E. 633, 635 (1905) (holding taxpayers may compel aberrant county officials to repay salaries) ["Johnson"]; but see Concerned Taxpayers 249 Va. at 334 (stating only funds diverted to personal benefit need be repaid).

We note that in the Concerned Taxpayers case the Court confirmed dismissing individual Supervisors because of their explicit statutory authority to expend funds for waste management services. Concerned Taxpayers, 249 Va. at 333-334. They'd made no unauthorized appropriations, nor illegally diverted public funds. Here in contrast, Virginia Code §15.2-1812 specifically strips the local officials of authority to remove monuments. They are properly called to account for the money expended without authority.

(B) The individual Defendants can assert no legislative privilege

We must respectfully differ with the view that anything discretionary City Councillors do is immune from judicial scrutiny under legislative privilege.

To begin with, the City Councillors had no discretion to remove a monument. Virginia Code §15.2-1812, 1812.1 and the criminal provision Virginia Code 18.2-137 curtailed their discretion. Illegal acts assuredly are not beyond Court review. Cf. U.S. v. Brewster, 408 U.S. 501, 528 (1972) (holding legislative privilege does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions). That is the fundamental difference between this situation and cases like Bogan v Scott- Harris, 523 US 44 (1998) (holding legislative privilege shields decision to cut city department from budget) ["Bogan"]. A budget cut is within City officials' normal purview. But removing a monument is prohibited to Charlottesville City Councillors. They can claim no immunity for what is outside "the sphere of legitimate legislative activity." Bogan 523 US at 54.

Moreover, not everything discretionary is legislation. Supervisory or administrative acts are outside legislative privilege. Robertson v. Mullins, 29 F. 3d 132, 134 (4th Cir. 1994) (holding termination of employee was supervisory and administrative, not legislative function) ["Robertson"]; see also Isle of Wight County v. Nogiec, 281 Va. 140, 155-156, 794 S E 2d 83 (2011) (holding report to Board of Supervisors not legislative activity and not privileged) ["Isle of Wight"]; accord Anderson v. Herbert, 347 Wis. 2d 321, 830 N.W. 2d 704 (Wis. App. 2013) (concluding County Administrator's statements before Board of Supervisors not engaged in legislating not immune, citing Isle of Wight).

A local governmental body acts in a legislative capacity only when it adopts edicts of general applicability, "prospective, legislative-type rules." On this, the Robertson decision observes, every "court of appeals agrees." Robertson, 29 F. 3d at 134 -135 (citations omitted); accord State ex rel Dahlen v. Ervin, 974 P 2d 264, 158 Or App. 253 (1999) (laws of general applicability are legislative; administrative decisions are the details of implementation). Specific, one-off acts are administrative or executive. See also Bechard v. Rappold, 287 F.3d 827, 829

(9th Cir., 2002) (whether act is ad hoc or formulates policy, and whether it applies to just a few specific situations or the public at large, determines if it is legislation).

City Councillors heaped opprobrium upon one statue and ordered it removed — not all statues, just one. That might be mistaken for a discretionary act (if so, abuse of discretion since it is illegal). But it was not legislative. It was administrative.

The Defendants concede that in arguing that removal of the Lee monument is within their authority as park maintenance. Demurrer ¶6. Maintenance of city property is administration, a proprietary function, not shielded by immunity. See Robertson v. Western Va. Water, 287 Va. at 160 (stating sewer maintenance is proprietary function outside immunity); see also Junior v. Reed, 693 So. 2d 586 (Fla. Dist. Ct. App. 1997) (Commissioner's dispatching a maintenance crew to clean cemetery not legislative function protected by immunity).

Legislative privilege only extends as far as preserving the integrity of the legislative process. Greenburg v. Collier, 482 F. Supp. 200, 204 (E.D. Va. 1974) (distinguishing political activities which are unprotected from legislative process which is). Free debate is not being suppressed. The individual Defendants are capably represented by counsel; unlike the Plaintiffs they are not paying for lawyers. If general damages are awarded the City will underwrite them. The case is neither inquiring into nor hampering any City Councillor, in legislative duties. There is no reason to afford the shelter of legislative privilege.

(C) The individual Defendants acted recklessly and willfully

The Amended Complaint states the individual Defendants acted "with no knowledge or regard for the cost or legality of their actions, and in total disregard of the language of Virginia Code §15.2-1812." Amended Complaint ¶31. They were "charged with knowledge of the applicable statues;" moreover "there was discussion about obtaining an opinion from the Attorney General . . . before any action was taken [and] no such opinion was ever requested or issued." Amended Complaint ¶ 39.

In February 2017 when the Defendants purported to vote on the Resolution to remove the Lee monument, they had before them:

(1) the statutory scheme, including Virginia Code §§15.2-1812 and 1812.1 clearly prohibiting local authorities from removing memorials to veterans and allowing any person having an interest in the matter to sue if they do; and Virginia Code §18.2-137 making monument removal a crime;

(2) an Attorney General Opinion stating the law applies: "it is my view that §15.2-1812 of the Code of Virginia applies to monuments for any war or conflict, including an engagement of such war or conflict, but not to memorials or markers erected to recognize the historical significance of buildings." Opinion by Attorney General Mark Herring, for W. Clarke Whitfield, Jr, Danville City Attorney, 2015 Va. A.G. 120 (August 17, 2015)[Exhibit 2];

(3) The opinion in the Danville case concluding on the facts that the Sutherland mansion and a flag and flagpole were outside the protection of Virginia Code §15.2-1812, which as an afterthought in *dicta* suggested that the law did not apply to monuments erected before 1997, Heritage Preservation. Assoc. Inc. et al v. City of Danville Virginia, et a1., Case No. CL15000500-00 Final Order (Va. Cir. 2015, Reynolds, J);

(4) A memorandum from then Charlottesville Deputy City Attorney Lisa Robertson to Charlene Green for the Blue Ribbon Commission on Race, Memorials and Public Spaces, incorporated as Appendix G to their report to City Council in December 2017, stating "[w]e 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;" that "Virginia law is unsettled . . ." and that absent "a Court decision based on facts specific to the Lee and Jackson statues" another way to resolve the question would be "to seek special legislation from the General Assembly." [Exhibit 3].

Instead of applying to the General Assembly as recommended by the Deputy City Attorney, or seeking a declaratory judgement from this Honorable Court, or even asking for a

clarifying Attorney General opinion — they rushed to vote a Resolution to remove the Lee monument. This was certainly intentional and willful, and grossly negligent, and for that reason as the Amended Complaint states they "are not immune from liability for intentional or willful misconduct or gross negligence under Section 15.2-1405 of the Virginia Code of 1950, as amended." Complaint ¶ 39.

They deliberately triggered this lawsuit: "[s]everal members of City Council acknowledged that the matter would likely precipitate litigation." Amended Complaint ¶39. They cannot now lament it is inconvenient to participate.

(6) Punitive damages for defacement or malicious destruction is moot

Plea in Bar Point six is misnumbered five. Again, as indicated above, the Court decided February 27, 2017 that the Amended Complaint did not plead "defacement or malicious destruction or removal" allowing punitive damages under Virginia Code §15.2-1812.1, Transcript p. 6 -7 (a different inquiry from intentional or willful misconduct or gross negligence under Virginia Code §15.2-1405). Plea in bar Point 6 is moot.

REQUEST FOR RELIEF

The Plaintiffs respectfully request the Court to overrule Plea in Bar Point 1, declare points 2, 3, 4, and 6 moot, overrule point 5, and to state that what remains for trial under the present Amended Complaint is only whether the Lee and Jackson monuments are monuments to the War Between the States and memorials to war veterans, and general damages including litigation costs, attorneys fees, and damages for unauthorized expenditures.

Respectfully submitted:

_____ (date) March 23, 2018

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CERTIFICATE OF SERVICE

I certify that I caused a true and exact copy of the foregoing Plaintiffs' Brief in Opposition to Plea In Bar to be hand delivered to the offices of Lisa Robertson, Esq., Charlottesville Acting City Attorney, at her office address of 605 East Main Street, Charlottesville, Virginia 22902 and to the office of John W. Zunka, Esq., at Zunka, Milnor & Carter, LTD, Counsel for Defendants, at his office address of 414 Park Street, Charlottesville, Virginia 22902 this 23RD day of March 2018.

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

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE, VIRGINIA

FREDERICK W. PAYNE, JOHN BOSLEY YELLOTT, JR., et al., Plaintiffs,	)	
v.	)	Case No. CL17-000145-000
CITY OF CHARLOTTESVILLE, VIRGINIA, CHARLOTTESVILLE CITY COUNCIL, et al.. Defendants.	)	

PLEA IN BAR

COME NOW your Defendants, by counsel, and submit this Plea in Bar to the Amended Complaint filed by the Plaintiffs in this action, as follows:

1. Plaintiffs' claims for monetary damages under Virginia Code § 15.2-1812.1(A) and (B) are barred by the ruling set forth within ¶ 3 of the Court's October 4, 2017 Order, because the Amended Complaint contains no allegations different than the original Complaint in relation to such claims.

2. Count Three of the Amended Complaint is barred by the ruling set forth within ¶ 1 of the Court's October 4, 2017 Order, because the Amended Complaint contains no allegations different than the original Complaint in relation to Count III.

3. Count Three of the Amended Complaint (as to the re-naming of Jackson Park) is barred because the terms of the gift of Jackson [now Justice] Park by Paul Goodloe McIntire to the City do not require that the park be named Jackson Park, or that it must remain so in perpetuity.

4. The Defendants City of Charlottesville and the Charlottesville City Council are immune from suit pursuant to the common law doctrine of sovereign/ governmental immunity.

5. Defendants Atri Michael Signer, Wesley Jomont Bellamy, Robert Francis Fenwick, Jr., Kristin Layng Szakos and Kathleen Mary Galvin are each immune from suit pursuant to the common law doctrines of legislative immunity and/or official immunity, and the statutory provisions of Virginia Code § 15.2-1405.

5. The allegations set forth within the Amended Complaint, as a matter of law, do not constitute intentional or willful misconduct or gross negligence.

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

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CERTIFICATE OF SERVICE

I certify that on the 1st day of November, 2017, pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia, on or before the date of filing I served a true copy of the foregoing document, by electronic mail (where an e-mail address is indicated below) and also by U.S. Mail, first-class, postage pre-paid, to counsel of record, as follows:

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Exhibit 2

Opinion by Attorney General Mark Herring, for W. Clarke Whitfield, Jr., Danville City Attorney, 2015 Op. Va. A.G. 120 (August 17, 2015)

AG Op. COUNTIES, CITIES AND TOWNS: BUILDINGS, MONUMENTS AND LANDS GENERALLY, 2015 Va. AG 120 (15-050)

COUNTIES, CITIES AND TOWNS: BUILDINGS, MONUMENTS AND LANDS GENERALLY

Section 15.2-1812 applies to monuments for any war or conflict, including an engagement in such war or conflict, or for war veterans, but not to memorials or markers erected to recognize the historical significance of buildings.

W. Clarke Whitfield, Esquire,
Danville City Attorney

August 6, 2015 **[Page 121]**

ISSUE PRESENTED

You inquire whether a memorial or marker erected to recognize the historical significance of a building is subject to the protections of § 15.2-1812 of the *Code of Virginia.*

APPLICABLE LAW AND DISCUSSION

Beginning in 1904, the General Assembly has enacted laws authorizing local monuments and memorials (collectively, simply "monuments") to wars and veterans[1] Section 15.2-1812, as enacted in 1998, permits localities to erect monuments for "any war or conflict." in relevant part, it states:

> A locality may . . . authorize and permit the erection of monuments or memorials for any war or conflict, or for any engagement of such war or conflict . . . . If such are erected, 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. For purposes of this section, "disturb or interfere with" includes removal of, [or] damaging or defacing monuments or memorials . . .[2]

Simply put, the statute empowers a locality to authorize and permit a monument commemorating various wars or conflicts,[3] including veterans of those wars,[4] and **[Page 122]** thereafter to maintain it. It also bars "authorities of the locality" from disturbing or interfering with the monument, to include removing it. Further, it bars the locality's "authorities" from preventing maintenance of the monument by citizens. Violation of the statute is a criminal offense that may range from a Class 3 misdemeanor to a Class 6 felony, depending on the nature of the conduct.[5]

The terms "war," "conflict," and "war veterans" are not statutorily defined. "When the legislature leaves a term undefined, courts must give [it] its ordinary meaning, taking into account the context in which it is used."[6]

The importance of honoring all of our veterans, especially those who have given their lives and paid the ultimate sacrifice for us, our country and our freedoms, cannot be overstated. These brave men and women deserve our full support, and the General Assembly has chosen to extend certain protections to monuments honoring their service. The General Assembly has not chosen, however, to extend that same level of protection to memorials erected to recognize the historical significance of buildings. Here, the statutes do not address protecting monuments commemorating the historical significance of buildings. The plain language of §§ 18.2-137, 15.2-1812 and 15.2-1812.1 is limited to monuments for any war or conflict and for veterans of those wars and conflicts. Accordingly, it is my view that § 15.2-1812 applies to monuments commemorating certain wars and veterans of those wars, but not to monuments commemorating buildings. **[Page 123]**

CONCLUSION

For the reasons stated, it is my view that § 15.2-1812 of the Code of Virginia applies to monuments for any war or conflict, including an engagement in such war or conflict, or for war veterans, but not to memorials or markers erected to recognize the historical significance of buildings.

FOOTNOTES

[1] *See, e.g.*, 1904 Va. Acts ch. 29.

[2] VA. CODE ANN. § 15.2-1812 (2012). A "locality" means "a county, city, or town as the context may require." VA. CODE ANN. § 1-221 (2014).

[3] Virginia Code § 15.2-1812 identifies 15 wars or conflicts from the Algonquin (1622) to Operation Iraqi Freedom (2003-).

[4] A related statute, § 15.2-1812.1, authorizes suits for civil damages for violating § 15.2-1812. In doing so, it characterizes § 15.2-1812 as applying to monuments for "war veterans." A second related statute, § 18.2-137, also characterizes § 15.2-1812 as applying to monuments or memorials for "war veterans" by referring, to "any monument or memorial for war veterans described in § 15.2-1812" (emphasis added). Thus, in short, while § 15.2-1812 refers only to monuments to wars or conflicts, two closely related statutes characterize it as referring to monuments for war *veterans*. It is well accepted that statutes may be considered *in pari materia* when they relate to the same person or things, the same class of persons or things, or to the same subject or to closely connected subjects or objects. *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4 (1957). For that reason, it is my view that § 15.2-1812 applies to monuments to war veterans, even though the text of the statute refers only to wars/conflicts, but not to war veterans.

[5] A violation involving unlawful damage, defacing, or removal of a monument without intent to steal, et cetera, is a Class 3 misdemeanor, punishable by a fine of not more than $500. A violation with intent to cause injury where the damage is less than $1,000 is a Class 1 misdemeanor, punishable by up to twelve months in jail and/or a fine of up to $2,500. A violation with intent to cause injury where the damage is $1,000 or more is a Class 6 felony, punishable by imprisonment of not less than one nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both. *See* VA. CODE ANN. §§ 18.2-137(a) (2014); 18.2-10(f) (2014); and 18.2-11(a), (c) (2014).

[6] *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330, 341, 756 S.E.2d 435 (2014) (internal quotation marks and punctuation marks, omitted).

Exhibit 3

Memorandum by Charlottesville Chief Deputy City Attorney Lisa Robertson
September 28, 2016

Report to City Council
Blue Ribbon Commission on Race, Monuments, and Public Spaces
(December 19, 2016) Appendix G

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.

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George H. Dygert, Retired
Ralph E. Main, Jr., Of Counsel

March 23, 2018

Llezelle A. Dugger, Clerk
Charlottesville Circuit Court
315 East High Street
Charlottesville, Virginia 22902

Via Hand Delivery

Re: *Frederick W. Payne et al. v. City of Charlottesville et al.*
Case No. CL17-145

Dear Ms. Dugger:

Kindly file the enclosed Plaintiffs' Brief in Opposition to Plea in Bar among the papers in this cause.

Thank you.

Very truly yours,

Ralph E. Main, Jr.

cc: Lisa Robertson, Esquire
Richard H. Milnor, Esquire

rec'd 3.23.18