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

Plaintiff's Brief: The Danville Case Is Inapposite

Summary

While the Defendants do not cite the Danville case by name, they allude to it in their Answer to Plaintiff's Motion for Temporary Injunction paragraph 5. Their Demurrer (to the extent it may bear on the issue of a temporary injunction, if at all) recites its holdings in paragraphs 3 and 4. That decision has no bearing on the case at bar. 1) The facts differ: we are here concerned with monuments to war veterans rather than a building and a flag. 2) The legal dicta in the Danville Order excluding older monuments from protection misreads the law. 3) Even applying the Danville Order's mistaken criteria, both the Lee and Jackson monuments are still protected.

1) The facts differ: this case concerns monuments to war veterans

In a Final Order entered 7 December 2015, Judge James J. Reynolds of the Danville Circuit Court determined that (i) a flag and monument commemorating the historical significance of the Sutherlin Mansion in Danville were 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 1998, and therefore the Code did not apply to monuments or memorials erected prior to 1998. Final Order, Heritage Pres. Assoc. Inc et al v. City of Danville Virginia, et al., Case No. CL15000500-00 (December 7, 2015) (Reynolds, J.) (the "Danville Order," attached as Exhibit 1).

First as to the facts: we are not here concerned with a house and a flag. This case is about heroic-sized monuments commemorating General Robert E. Lee, and General Thomas "Stonewall" Jackson, and the memorial parks named after them, that frame them. See Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/monument (defining monument as a "lasting evidence, reminder, or example of someone or something notable or great.")

In Lee Park stands the monument for Civil War veteran General Robert E. Lee, in military uniform with a sword, mounted on his war horse Traveller, in total 26 feet tall.

On February 6, 2017 City Council purported to vote 3-2 on a resolution to remove Lee; on April 17, 2017 they again purported to vote 3-2 to get rid of the monument by selling it off.

At the west entrance to the Albemarle County courthouse complex is Jackson Park, a memorial park created to frame a monumental statue of Civil War veteran General "Stonewall" Jackson, in military uniform with a sword, mounted on his war horse Little Sorrel, in total 24 feet tall. The twelve foot granite pedestal states his proper name, Thomas Jonathan Jackson, recounts Civil War battles in which Jackson fought (including Manassas, the Valley Campaign, and Chancellorsville in 1863) and on its front are two angels whose names are carved into the ivy relief: "Faith" and "Valor." Faith is praying; while Valor brandishes a sword and shield.

City Council on February 6, 2017 purported to vote a Resolution to reconfigure Jackson Park, and on April 17, 2017 they confirmed their intention to do something — exactly what they don't know yet.

There can be no question that both are "Confederate or Union monuments or memorials of the War Between the States (1861-1865)" as well as "Confederate memorials." Once erected, a locality is prohibited from disturbing them, by Va. Code §15.2-1812. There are also each a "monument, marker or memorial for war veterans" described in Va. Code §15.2-1812.1, affording an action for damages, and a "monument or memorial for war veterans described in §15.2-1812" under Va Code §18.2-137 (damaging or removal a crime).

The Danville case in contrast concerned a house: the Sutherlin Mansion; and a flag and flagpole. The court found "as a matter of fact" that while the Sutherlin Mansion was a monument commemorating the last capital of the Confederacy,

> . . . [t]he monument at issue in this litigation is not, as a matter fact, a monument "for any war or conflict, or for any engagement of such war or conflict" or for war veterans. As a monument to a building of historical significance rather than a monument to a war, conflict engagement, or war veterans, the monument at issue in this litigation is not covered by Virginia Code § 15.2-1812. Danville Final Order (Exhibit 1 page 2).

Both Charlottesville's Lee and Jackson monuments and memorial parks are exactly what Virginia Code § 15.2-1812 is meant to protect, and the Danville case is inapposite.

Monuments to wars or war veterans are entitled to the extra protection of the law, while a building may not be, according to Virginia's Attorney General Mark Herring. He opined in a letter to Danville's City Attorney in August of 2015 that:

> [T]he importance of honoring all our veterans, especially those that 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 significance of buildings . . . the plain language of §§ 18.2-137,15.2-1812 and 15.21812.1 is limited to monuments for any war or conflict or and for veterans of that war or conflict. 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. Opinion 15-050 __ Op. Va. Att'y Gen.__(2015) (online http://ag.virginia.gov/files/Opinions/2015/15-050_Whitfield.pdf) (Exhibit 2 pages 1-2 attached)("Atty General Opinion)".

The opinion also states in footnote 4 that related statutes §15.2-1812.1 and §18.2-137 suggest that "§15.2-1812 applies to monuments to war veterans, even though the text of the statue refers only to wars/conflicts, but not to war veterans." Atty General Opinion Exhibit 2 pages 1-2, [citing Prillamen v. Commonwealth, 199 Va. 401, 405 (1957) (stating statutes may be considered in pari materia when they relate to the same person or things, class of person or things, or same or related subjects)].

Though the terms "war," "conflict," and "veterans" are not statutorily defined, the plain language of these statutory provisions applies. American Tradition Inst. v. Rector & Visitors of the University of Va., 287 Va. 330, 341 (2014)(saying "[w]hen the legislature leaves a term undefined, courts must give [it] its ordinary meaning, taking into account the context in which it is used.") The monuments and memorial parks at issue commemorate specific war veterans and a specific war, they are not just a building or a

flag. The Danville order has no bearing on this case. Its conclusion is limited to those particular facts.

2) The legal dicta in the Danville Order excluding older monuments misreads the law

Once the judge found as fact that the house and flag, while monuments of a sort, were not the sort the law protects — that decided the case. Nonetheless the Danville Order in dicta went on to say that because the monument belonged to a city and not a county, it had no legal protection since it was erected prior to amendments in 1997 that changed the word "counties" to "localities." The statement offers no legal reasoning; one must conjecture what the thinking might have been. Dicta from another jurisdiction has no binding or even persuasive effect. Cf. Mattaponi Indian Tribe v. Virginia Marine Resources Com'n, 601 S.E.2d 686, 687 at n. 2, 43 Va. App. 728 (Va. App. 2004) (stating that "dicta cannot serve as a source of binding authority in American jurisprudence").

The Danville Order, and the Defendants relying on it, mistakenly look backwards because they misapply a policy of statutory construction disfavoring retroactivity (which has an exception for remedial laws, like this one). The policy only applies when the amendment might alter the relation of private parties ex post facto, create unfairness by imposing after-the-fact obligations. See Foster v. Smithfield Packing Co., Inc., 390 S.E.2d 511, 513, 10 Va.App. 144 (Va. App., 1990) (holding workers comp. claim time barred because amendment creating new rights not retroactive) ("Foster"). In Foster the amendment "created new rights and contingent liabilities which did not exist prior to July 1, 1986." When the Plaintiff Foster was working for Smithfield and contracted carpel tunnel syndrome — the syndrome was not a disease recognized or covered: "[a]t that time, claimant had no rights against Smithfield Packing and it had no duties to claimant with respect to the disease." Smithfield 390 S.E.2d 511, 513. An amendment

years later adding new coverage for carpel tunnel syndrome, the court held, did not apply retroactively back to when the Plaintiff contracted it, since at the time "it was not compensable." Smithfield 390 S.E.2d at 513. The Court opined, "[t]he General Assembly may have decided not to give retroactive effect to the statute because to do so would open the door to claims, the defense of which, by virtue of the passage of time, might be impossible." Smithfield 390 S.E.2d at 513.

The "retroactivity" argument might be considered if Confederate monuments were a new type added in 1997 — but they were not. They were always protected; they were what the law was enacted in 1904 to protect. 1904 Va. Acts Ch. 29. Each iteration, each of eleven amendments, carefully preserved the protection of Confederate monuments already erected or in progress. See Plaintiff's Brief on the Monument Protection Law, parts 1) to 5). Variations on the theme "if the same shall be so erected" (1904); "if such shall be erected"(1982); "if such are erected" (1988) are a clear expression of retrospective intent. See Cohen v. Fairfax Hosp. Ass'n, 407 S.E.2d 329, 333, 12 Va.App. 702 (Va. App., 1991)(holding retrospective intent implied by wording of remedial law) ("Cohen"). Significantly, none of the amendments in 113 years used the word "hereafter" to clarify that the law's protection was meant to be prospective only. Cohen 407 S.E.2d 329, 333 (stating that omission of the word "hereafter" negates possibility that intent is prospective only). There is no reason to think the legislature meant protection of pre-existing monuments to cease after any of the eleven amendments.

This is an historic preservation law rather than one governing the relations of private parties; it serves the public purpose of protecting veterans' memorials, and is thus remedial legislation. Cohen 407 S.E.2d 329, 331 (exploring distinction between laws affecting relations of private parties and remedial legislation); cf. E.I. DuPont de

Nemours & Co. v. Eggleston, 264 Va. 13, 17, 563 S.E.2d 685, 687 (2002)(noting "we construe remedial legislation liberally, in favor of the injured party.")

Amendments to "[r]emedial statutes which neither create new rights nor take away vested ones" are an exception to the rule of construction that an amendment altering the rights of the parties, might not relate back before its passage. See Gloucester Realty Corp. v. Guthrie, 30 S.E.2d 686, 688, 182 Va. 869, (Va., 1944) (noting the exception for remedial laws — though holding the law governing deeds of trust was not remedial, the court would not construe an amendment to interfere with existing rights of the parties).

And the Danville Order's construction, or perhaps deconstruction, of the statute was the exact opposite of what the legislature intended. As Judge Frank recited in Commonwealth v. Newsome (Va. App. 2014) (Record No. 1943-13-1, Memorandum Opinion) (Frank, J.):

> In statutory interpretation, [t]he primary objective . . . is to ascertain and give effect to legislative intent. Thus, this Court construes a statute with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it. [citations omitted].

The Danville Order misconstrued a change intended to expand the law's coverage, instead to contract it to nothingness; to defeat its purpose. All existing monuments at county seats are in cities or towns.[1] There have been none erected after 1997 to commemorate the Civil War — or for that matter the French and Indian War, or the American Revolution, or the War of 1812, or the Mexican War, or World War I, or II, or the Korean War. See Virginia Department of Historic Resources Register of Historic

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[1] The law's historic applicability to monuments erected at county seats is discussed later in the Danville brief infra. at page 15.

Places at http://www.dhr.virginia.gov/registers/register_counties_cities.htm, pdf file Register Master List (cataloguing Virginia historic sites and monuments). The Danville Order reduces the law's protection to virtually nil, by excluding from its purview all but the most recent conflicts involving the Middle East. It eviscerates the law, defeats its purpose. See Carmel v. City of Hampton, 403 S.E.2d 335, 241 Va. 457 (Va., 1991)(stating "[r]emedial statutes are to be construed liberally to remedy the mischief to which they are directed."); see also Scott v. Commonwealth, 416 S.E.2d 47, 14 Va.App. 294, 296 (Va. App., 1992) (holding a court must give effect to the legislative intent and the plain, obvious meaning of a statute).

Instead the proper approach for this court in construing the statute is the classic mischief rule, given in Elizabethan England by the Barons of the Court of Exchequer, which four centuries later in "the Virgin Queen's" namesake Commonwealth retains its vitality. Board of Sup'rs of King and Queen County v. King Land Corp., 380 S.E.2d 895, 897, 238 Va. 97 (Va., 1989) (describing"mischief rule," its antecedents in Elizabethan England, and that it "retains its vitality"in contemporary Virginia) ("Board of Sup'rs of King and Queen County"). The mischief rule considers "[e]very statute is to be read so as to 'promote the ability of the enactment to remedy the mischief at which it is directed.'" [citations omitted] Board of Sup'rs of King and Queen County, 380 S.E.2d 897. Desecration is the mischief this law remedies. This Court must interpret the law to "suppress the mischief and advance the remedy," rather than to circumscribe and circumvent the law. Board of Sup'rs of King and Queen County, 380 S.E.2d 898 (stating remedial statutes construed liberally to give effect to their purpose). The Monument Protection Law is meant to protect monuments; and that is what this Court must construe it to do.

Turning from statutory construction to the specific language of the law, on its face it protects existing monuments: any already erected. See Va Code §15.2-1812 (saying "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 [them]..."). The Attorney General's reading of it in 2015 posited no difference in when a monument was erected:

> Simply put, the statue empowers a locality to authorize and permit a monument commemorating various wars and conflicts, including veterans of those wars, and thereafter to maintain it. It also bars "authorities of the locality " from disturbing or interfering with the monument, to include removing it . . . Finally, violation of the statue is a criminal offense that may range from a Class 3 misdemeanor to a Class 6 felony, depending on the nature of the conduct. (citations omitted) (Atty General Opinion Exhibit 2 pp. 1-2)

As it happens, the criminal statue §18.2-137 that the Attorney General called in pari materia in interpreting §15.2-1812 itself was amended in 1999, to make it a crime to desecrate monuments described in §15.2-1812. See 1999 Va. Acts. Ch 625 (reflecting amendments to include war memorials covered by §15.2 -1812). Desecration of monuments old or young is a crime, regardless of that 1999 amendment. As footnote 5 of Herring's opinion states: "[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 (etc.)". He says it "is" a crime; not "might be a crime, depending on how old the monument is." What matters is criminal vandalism now, not the age of the monument; likewise Va Code §§15.2-1812 and 15.2-1812.1 read in pari materia offer remedies against desecration that happens now.

Nor does parsing the wording of §15.2 -1812 support the theory that older monuments are to be discriminated against. The law had since its inception in 1904 protected

monuments previously "erected." See Plaintiff's Brief: Virginia's Monument Protection Law and the Dillon Rule, [here incorporated by reference]. The original language "if the same shall be so erected" was amended in 1982 to read "and if such shall be erected . . ." 1982 Va. Acts Ch. 19 See Plaintiff's Brief: Monument Protection Law Exhibit 7 page 2. Then an amendment in 1988 altered it to "[i]f such are erected . . . " See Plaintiff's Brief: Monument Protection Law Exhibit 8. The 1998 change from the future tense "shall be" to present indicative "are," further confirms existing monuments are protected, as well as would be any to come.

The inclusivity of this statute is further evinced by use of the word "any." See Va. Code § 15.2-1812 (stating "[i]f 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.") (emphasis added); Va. Code § 15.2-1812.1 (saying "[i]f any monument, marker or memorial for war veterans as designated in §§ 15.2-1812 and 18.2-137 is violated or encroached upon . . . .") (emphasis added).

According to the Virginia Supreme Court, the modifier "any" is unrestrictive, meaning it includes those modified subjects already in existence and those yet to be in existence. See Sussex Community Servs. Ass'n v. Virginia Soc. for Mentally Retarded Children, Inc., 467 S.E.2d 468, 469, 251 Va. 240 1 (Va. 1996) (saying "[t]he issue in this appeal is whether Code § 36-96.6 (C) applies retroactively to restrictive covenants recorded in 1975."). In Sussex Community Servs. Ass'n, the Supreme Court interpreted the express language of Va. Code § 36-96.6(C):

> A family care home, foster home, or group home in which physically handicapped, mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family when

> construing any restrictive covenant which purports to restrict occupancy or ownership of real or leasehold property to member of a single family or to residential use or structure. [emphasis added] Sussex Community Servs. Ass'n 467 S.E.2d at 469.

The language of the section made it applicable to "any" restrictive covenant restricting occupancy to members of a single family. Construction of the word "any," added by a 1991 amendment, was deemed "pivotal in determining the intended application of the section." The Supreme Court found that the "word any, like other unrestrictive modifiers such as 'an' and 'all,' is generally considered to apply without limitation." Sussex Community Servs. Ass'n 467 S.E.2d at 469.

For a statute to be solely prospective in nature, it would be necessary to judicially amend the statute by "supplying words not found in the statute," so that the phrase would read "any award hereafter made." Sussex Community Servs. Ass'n 467 S.E.2d at 470 (citing Allen v. Mottley Constr. Co., 170 S.E. at 417; 160 Va. at 889 (1933)). The analysis used in Allen continues to be a "decisive" example of a situation where retrospective intent is expressed in legislative language." Sussex Community Servs. Ass'n 467 S.E.2d at 470 (citations omitted). The Court's conclusion in Allen, that nothing in the phrase "an award" "confines its operations to either past or future awards, but both are included" 160 Va. at 890, was equally applicable to the phrase "any covenant" as used in Sussex Community Servs. Assoc., and in the case at bar.

Just as the plain meaning of the phrase "any covenant" encompasses "all covenants of the type described in the statute without limitation, whether recorded before or after" so should the phrase "any monuments or memorials so erected" in Va. Code § 15.2-1812. The Supreme Court opinion in Sussex Community Servs. Ass 'n was rendered just two years prior to the 1998 amendment to § 15.2-1812. When interpreting the words in a

statute the Court "presumes that the General Assembly acted with full knowledge of the law in the area in which it dealt." Philip Morris Inc v. The Chesapeake Bay Foundation, 643 S.E.2d 219, 225, 273 Va. 564 (Va. 2007) (interpreting an amendment expanding availability of judicial review in accord with the expansive purpose of the legislation) [citations omitted]. Accordingly, the General Assembly must be presumed to have amended the law with full knowledge that the word "any" would be both prospective and retrospective. The word "any" includes monuments erected both before and after the amendment.

Finally, the application of the principle of the Danville Order creates an absurd result. The generic "Johnny Reb" monument at the south entrance to the Albemarle County courthouse would be protected as belonging to the county. But the world-class artwork of the Jackson monument, yards away at the same courthouse's west entrance, would lose its protection — *just because Jackson stands on city property.*

In sum, dicta without rationale from a different jurisdiction, misapplying a rule of construction, misreading the statute, and failing to give effect to the law's remedial purpose — cannot inform this Court's decision.

3) Lee and Jackson are protected even by the erroneous standards of the Danville Order

Let us assume for purposes of argument that we must look backwards, ignore the law as it stands now and interpret what it was years ago.

To start with, the Danville Order (and the Defendants relying on its premise) incorrectly reads a difference between counties and cities in the old law (cited in Plaintiff's Brief on the Monument Protection Law, Exhibit 2). The law never drew that distinction. All the

1997 amendments did by changing "county seat" to "localities," was to include towns like Danville that are not county seats. Unlike Danville, Charlottesville is a county seat, the center of administration of Albemarle County. Charlottesville's monuments were protected when the law said "at the county seat" before 1997, and still protected after the 1997 change to the word "localities."

The Complaint in paragraph 18 avers that "on or about May 21, 1924, University of President Edwin A. Alderman accepted McIntire's gift of the Lee statue on behalf of the City of Charlottesville and the County of Albemarle" [emphasis added]. The purpose and consequences of that acceptance must await development of the record with further historical evidence.

But any doubts about the coverage of the Monument Protection Law before 1998 are put to rest by the formal re-acceptance of both the Lee and Jackson monuments by the city in 1999, after the law was amended to include "localities." The Complaint avers:

> That on or about November 26, 1997 the city accepted the offer of $43,750.00 in donated funds to restore the statues of General Lee and Jackson. The city's acceptance included an agreement to maintain records of the restoration perpetually, to establish a program of periodic maintenance, and to present an appropriate ceremony celebrating the restoration. In May 1998 the city contracted bronze restorer Nicolas F. Veloz to clean and restore the bronze statues of Generals Lee and Jackson. On or about September 26, 1999 the City accepted the re-dedication of the cleaned and restored Lee in a ceremony at its unveiling.

In 1999 the law read in pertinent part: "[a] locality may, within the geographical limits of the locality, authorize and permit the erection of monuments or memorials for any

war or conflict [including] Confederate or Union monuments or memorials of the War Between the States. . . . " Va. Code § 15.2-1812 (as of the 1998 amendments) Reproduced in: Plaintiff's Brief on Virginia's Monument Protection Law (Exhibit 10 page 2). Manifestly, both Lee and Jackson are within the geographic limits of the city of Charlottesville, they are both Confederate monuments as well as memorials of the War Between the States; and whatever the situation might be with other monuments erected before 1998 — these both clearly were came within the Monument Protection Law by the city's re-authorization and re-acceptance in 1999. Neither public officials nor any other person may disturb them.

Conclusion

For the foregoing reasons, the Danville Order arguments have no bearing on the protection Virginia law affords to Charlottesville's Lee and Jackson monuments. The law protects them now, just as it always has — against removal, interference, disturbance or encroachment by local officials, or any other persons.

Respectfully submitted:

_____ (date) April 17, 2017

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CERTIFICATE OF SERVICE

I certify that I had the foregoing Plaintiff's Brief: Danville Case, hand delivered to the offices of Craig Brown, Esq., attorney for the City of Charlottesville and for the individual Defendants, on April 27, 2017 ..

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EXHIBITS

Plaintiff's Brief: Danville Case

Exhibit 1: Danville Case Final Order, Reynolds, J., 7 December, 2015

Exhibit 2: Virginia Attorney General Opinion, Mark Herring, 6 August 2015

DANVILLE
EXHIBIT 1
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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF DANVILLE

HERITAGE PRESERVATION ASSOCIATION, INC., DANVILLE CONFEDERATE MEMORIAL ASSOCIATION, INC., PITTSYLVANIA VINDICATORS CAMP NO. 828, SONS OF THE CONFEDERATE VETERANS, R. WAYNE BYRD, SR., HELEN HARRIS, FRANK HARVEY, and TONY L. LUNDY,	)	
Plaintiffs,	)	
v.	)	Case No.: CL15000500-00
CITY OF DANVILLE, VIRGINIA,	)	
Defendant.	)	

FINAL ORDER

On the 29th of October, 2015, the parties, by counsel, appeared before the Court on the plaintiffs' motion for temporary injunction and the defendant's demurrer and plea in bar.

The plaintiffs, by counsel, represented to the Court that they were withdrawing their motion for temporary injunction.

The Court then proceeded to consider the defendant's demurrer and plea in bar. Counsel previously filed memoranda on the issues presented, and counsel indicated they were prepared to proceed. The parties first presented evidence, including the agreed Stipulation of Evidence and exhibits filed on the day of the hearing and the testimony and exhibits offered by the plaintiffs. The parties then presented oral argument on the defendant's demurrer and plea in bar.

In ruling on the defendant's demurrer and plea in bar, the Court reviewed and considered the pleadings and memoranda filed in this action, the evidence presented by the parties, and the

arguments advanced by counsel on the record in open court. Based on the Court's consideration of the foregoing and for the reasons stated on the record in open court, the Court FINDS as follows:

1. As a matter of law, Resolution No. 94-9.1 is not a contract between the City of Danville and any of the plaintiffs, cannot bind future City Councils of the City of Danville, and cannot grant to any of the plaintiffs any right, interest or privilege in the City of Danville's property.

2. As a matter of law, Virginia Code § 15.2-1812 does not apply retroactively to the monument at issue in this litigation, which was donated to the City of Danville in 1994 and erected on the grounds of the Sutherlin Mansion in 1995.

3. Based on the plain language of Resolution No. 94-9.1, the monument at issue in this litigation is, as a matter of fact, a monument "commemorating the Sutherlin Mansion as the Last Capitol of the Confederacy," "recognizing the Sutherlin Mansion's historical status as the 'Last Capitol of the Confederacy,'" and "marking the Sutherlin Mansion as the Last Capitol of the Confederacy." The monument at issue in this litigation is not, as a matter fact, a monument "for any war or conflict, or for any engagement of such war or conflict" or for war veterans. As a monument to a building of historical significance rather than a monument to a war, conflict, engagement, or war veterans, the monument at issue in this litigation is not covered by Virginia Code § 15.2-1812.

Based on the above findings, the evidence and arguments presented by counsel, and for the reasons stated on the record in open court on October 29, 2015, it is ADJUDGED, ORDERED and DECREED as follows:

1. The allegations in the Complaint are insufficient as a matter of law to state a valid breach of contract claim against the City of Danville. Therefore, the Court SUSTAINS the defendant's demurrer and DISMISSES the plaintiffs' breach of contract claim with prejudice.

2. The allegations in the Complaint are insufficient as a matter of law to state a valid claim for violation of Virginia Code § 15.2-1812 against the City of Danville. Therefore, the Court SUSTAINS the defendant's demurrer and DISMISSES the plaintiffs' Virginia Code § 15.2-1812 claim with prejudice.

3. The monument at issue in this action is not covered by Virginia Code § 15.2-1812. Therefore, the Court SUSTAINS the defendant's plea in bar and DISMISSES the plaintiffs' Virginia Code § 15.2-1812 claim with prejudice.

4. The Clerk of this Court is directed to strike this matter from the active docket of this Court and to send certified copies of this Order to all counsel of record.

ENTER: This 7th day of ~~November~~ December, 2015.

Judge James J. Reynolds

DANVILLE
EXHIBIT: 1
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WE ASK FOR THIS:

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SEEN AND OBJECTED TO for the reasons noted in Plaintiff's filings and pleadings with the Court, and for the reasons stated on the record at the Hearing on October 29, 2015, to include but not be limited to the following objections:

(1) Plaintiffs object to the Court's findings and decree as to paragraphs numbered 1 of this Order, as the determination of whether or not there was a contract between the parties should have been a determination of the trier of fact, and not dismissed by a Demurrer.

(2) Plaintiffs object to the Court's findings and decree as to paragraphs numbered 2 of this Order, as Code of Virginia § 15.2-1812 *does* apply retroactively to protect the monument at issue in this litigation; that the plain language of § 15.2-1812 affirms that the statute should apply retroactively; that the plain language of § 15.2-1812 references "previously designated Confederate memorials," which is language affirming such retroactive application; and that the intent of the General Assembly of Virginia was for § 15.2-1812 to apply retroactively, in that any other construction of the statute would manifest an absurd, irrational, and unreasonable result.

(3) Plaintiffs object to the Court's findings and decree as to paragraphs numbered 3 of this Order, as the monument at issue in this litigation *is* a monument of the War Between the States, a Confederate monument, *and* a monument to war veterans, and therefore protected by Code of Virginia § 15.2-1812.

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A COPY TESTE:
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DANVILLE
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COMMONWEALTH of VIRGINIA

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August 6, 2015

W. Clarke Whitfield, Jr., Esquire
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Dear Mr. Whitfield:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

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 thereafter to maintain it. It also bars

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[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 § 15.2-1822 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

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"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.

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.

With kind regards, I am

Sincerely yours,

Mark R. Herring

Mark R. Herring
Attorney General

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§ 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 (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 (2014) (internal quotation marks and punctuation marks omitted).