

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' Memorandum of Law Regarding Reconsideration of Denial of  
Legislative Immunity and Legislative Privilege**

Plaintiffs submit this memorandum to supplement arguments advanced during the motions hearing on Friday October 26 in connection with councilor-defendants' motion for reconsideration regarding denial of legislative immunity and plaintiffs' motion to compel responsive discovery withheld by defendants on the basis of legislative privilege.

This Court's prior ruling rejecting the councilor-defendants' legislative immunity and legislative privilege is correct for three independent reasons.

First, the General Assembly's creation of a cause of action for damages to enforce the statutory prohibition against monument removal by "the authorities of the locality," *see* Va. Code §§ 15.2-1812, 1812.1, abrogates any immunity from suit that might otherwise exist. The General Assembly has rendered the individual city councilors, who are obviously among "the authorities of the locality," subject to damages liability for ordering the removal of statutorily protected monuments or memorials. *See* Va. Code § 15.2-1812 (making it "unlawful for the authorities of the locality, or any other person" to disturb or interfere with certain monuments and memorials); § 15.2-1812.1 (creating a cause of actions for damages, including litigation

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costs and attorneys' fees, "[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").

This Court remains right that "[i]t would make no sense at all for the legislature to give a remedy for such action, and then to say the local authorities are immune to and protected from any actions or efforts under the statute to do anything about it." June 13, 2018 Letter Ruling at 5. Having triggered this cause of action for violating § 15.2-1812, councilor-defendants are neither immune nor protected by legislative privilege. Courts have repeatedly recognized in other contexts the basic principle that the creation of a cause of action for damages abrogates immunity. *See, e.g., Owens v. City of Indep. Mo.*, 445 U.S. 622, 647 (1980) ("[T]he municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit."); *United States v. Georgia*, 546 U.S. 151, 159 (2006) (emphasis omitted) ("[I]nsofar as Title II [of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."); *cf. AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, 485 n.9 (2017) (stating, with respect to sovereign immunity, that "[t]he General Assembly, not the courts, wholly occupies this field of law"). The proper application of that principle here is plain.

Councilor-defendants acknowledge in their motion for reconsideration that "[s]o long as the City remains a defendant, this Court has the power to award damages and injunctive relief (if either is appropriate on the merits)." Def. Mem. in Supp. of Mot. for Reconsideration at 18. Plaintiffs agree, but councilor-defendants' acknowledgment does not go far enough because it neglects the express language of § 15.2-1812 that renders unlawful the prohibited actions of *all* "the authorities of the locality." The General Assembly's decision to target not only the City

(through its officials acting in their official capacities) and the City Council, but also individual local authorities makes good sense. The members of local governing bodies such as the Charlottesville City Council possess supervisory authority over the executive and administrative actions of local government employees. *See* City Charter § 5(b) (“The form of government for [the City of Charlottesville] shall be the city manager plan as follows: All corporate powers, legislative and executive authority vested in the City of Charlottesville by law shall be and are hereby vested in a council of five members ....”); City Charter § 5(f) (“Subject to general control by the council as provided in subsection (b) hereof, the city manager shall have full executive and administrative authority ....”). The most obvious threat to Charlottesville’s protected monuments is a supervisory command from the City Council, not a rogue employee abusing delegated authority over city property on a midnight bulldozer run.

**Second**, the General Assembly’s specific statutory directive about immunity from suit for “[t]he members of the governing bodies of any locality or political subdivision,” Va. Code § 15.2-1405, controls over more general statements about common law legislative immunity or privilege in other contexts or jurisdictions. The General Assembly has clearly expressed its intent in Virginia Code § 15.2-1405 that “[t]he members of the governing bodies of any locality or political subdivision” do not possess absolute immunity “from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body.”

*Board of Supervisors of Fluvanna County v. Davenport*, 285 Va. 580 (2013), is not to the contrary. The Supreme Court of Virginia had no occasion in that case to address § 15.2-1405 because the county supervisors there were not defendants claiming immunity from suit.

Councilor-defendants also invoke *University of Virginia Health Services Foundation v. Morris*, 275 Va. 319 (2008), but that authority actually establishes why this Court's prior ruling about controlling legislative intent is correct. In *Morris*, the General Assembly had by statute eliminated charitable immunity for any "hospital," as that term was defined in another Virginia code section. *Id.* at 331-33. The Supreme of Virginia Court reasoned that this provision did not itself eliminate the defendant medical institution's claim to charitable immunity, though, because the institution did not fit within the "express terms" of the code section defining "hospital." *Id.* at 333. Here, by contrast, councilor-defendants indisputably fit within the "express terms" of Virginia Code § 15.2-1405.

Because the councilor-defendants are "members of the governing bodies of [a] locality," this code provision speaks directly to the circumstances in which they do or not enjoy immunity from suit. The councilor-defendants' reliance on general statements about the possible immunity of local governmental officials in other contexts and jurisdictions cannot supplant the "express terms" of this Virginia code section. This Court therefore correctly ruled earlier that plaintiffs may proceed forward to prove their claims alleging that the councilor-defendants engaged in "unauthorized appropriation of funds" and "intentional or willful misconduct or gross negligence." June 13, 2018 Opinion Letter at 3 (quoting Va. Code § 15.2-1405).

Notwithstanding this Court's ruling, Defendants have continued to claim legislative privilege for scores of documents and communications among themselves and with the City Manager. And they have done so even while acknowledging that their claim of legislative privilege in this case rests on their previously rejected claim of legislative immunity. *See* Def. Mem. in Supp. of Mot. for Reconsideration at 17 (stating that "absolute legislative immunity also confers an evidentiary privilege on legislators with respect to their legislative acts"). That is

inappropriate. As this Court has previously recognized, plaintiffs are entitled to prove their case with contemporaneous evidence showing councilor-defendants' individual liability.

Third, the councilor-defendants' challenged actions are not legislative but executive or administrative or supervisory. Because common law legislative immunity attaches only to legislative acts and "the creation of legislation is the nexus that supports application of the privilege," *Isle of Wight County v. Nogiec*, 281 Va. 140, 155 (2011), plaintiffs are entitled neither to legislative immunity nor legislative privilege in connection with their non-legislative orders regarding the public display of city property in city parks.

The Charlottesville City Council is a five-member body that exercises and supervises the exercise by others of all corporate powers of the City, as well as all legislative and executive authority vested in the City. *See* City Charter § 5(b) ("The form of government for [the City of Charlottesville] shall be the city manager plan as follows: All corporate powers, legislative and executive authority vested in the City of Charlottesville by law shall be and are hereby vested in a council of five members to be elected at large from the qualified voters of the city, except as hereinafter provided."). The typical way for the council to act is by majority vote. *See* Charlottesville Ordinance § 2-77 ("In all matters pending before the city council, a majority shall govern, except in cases where otherwise specially provided."). Councilors cast their votes on specific ordinances, resolutions, or motions put before them. *See* Va. Code 15.2-1425 ("The governing body of every locality in the performance of its duties, obligations and functions may adopt, as appropriate, ordinances, resolutions and motions.").

Because councilors casting a vote may be exercising supervisory or administrative or executive authority, rather than legislative authority, the mere fact of voting on a resolution does not establish the legislative nature of councilors' activity. The specific nature of the councilors'

act needs to be investigated to determine what kind of authority the councilors are exercising in any given vote. *Cf. Alexander v. Holden*, 66 F.3d 62, 64, 67 (4th Cir. 1995) (emphases added) (determining that three members of Brunswick County, Virginia's five-member board who were sued under § 1983 in their individual and official capacities after they "*voted to eliminate* the salary of the Clerk of the Board" and "*voted to appoint* the County Manager's secretary as Clerk" lacked legislative immunity because the "commissioners were not engaged in the process of adopting prospective, legislative-type rules," but rather "were engaged in administrative employment decisions").

The Charlottesville City Manager is "the chief executive and administrative officer of the city government," Charlottesville Ord. § 2-146, and is "charged with the general supervision and control of all real and tangible personal property belonging to the city government and all streets, utility systems and other public works owned, operated or controlled by the city." Charlottesville Ord. § 2-154. The City Manager is subject to the supervisory authority of the City Council. City Charter § 5(f) ("Subject to general control by the council as provided in subsection (b) hereof, the city manager shall have full executive and administrative authority ..."). The city council resolutions at issue in this case were all orders regarding the exercise of the executive or administrative power to control "real and tangible personal property belonging to the city government." Charlottesville Ord. § 2-154.

A clear example of the non-legislative nature of the councilors' actions in this case can be seen in the City's response to this Court's order to remove the tarps from the Lee and Jackson monuments. City employees promptly removed the tarps without any need for a city council resolution. That tarp *removal* was executive or administrative action. And the initial tarp *placement* was executive or administrative as well even though ordered by councilor-defendants

rather than this Court. The councilor-defendants' individual votes on the resolution to place the tarps produced a supervisory order about how to carry out the executive or administrative authority of the City regarding the "general supervision and control of ... real and tangible personal property belonging to the city." Charlottesville Ord. § 2-154.

If the City Manager himself were to have ordered subordinate city employees on his own authority under Charlottesville Ordinance § 2-154 to place the tarps on or to relocate the Lee and Jackson monuments, those orders would have been executive or administrative actions. The City Council's actual supervisory resolutions to the same effect were no different in kind; they were simply exercises of supervisory authority over city property as accomplished by majority vote on resolutions regarding executive or administrative action.

Councilor-defendants contend in their motion for reconsideration that this court previously determined correctly that their actions in this case were legislative. But this Court's opinion did not address the distinction between those *governmental* actions of the city council that are *legislative* and those that are not. Relying on a case that involved suit only against a City itself, not individual members of its local governing bodies, this Court stated that "'Legislative' does not mean strictly regarding actual, literal legislation, but the term refers to and includes any discretionary governmental action—any action taken by a government official establishing or implementing policy." June 13, 2018 Letter Order at 4 (citing *City of Chesapeake v. Cunningham*, 268 Va. 624, 633-38 (2004)). That is not the correct legal inquiry here. With respect to the claimed absolute legislative immunity of individual city councilors, the proper question is whether their particular governmental actions at issue are legislative rather than supervisory or executive or administrative. *Cf. Alexander, supra*, 66 F.3d at 67 (distinguishing "the process of adopting prospective, legislative-type rules" from "administrative employment

decisions”). Indeed, the Court’s conclusion about the *governmental* nature of councilor-defendants’ actions here shows that they were acting within precisely the zone for which the General Assembly has *refused* to grant them absolute immunity. See Va. Code § 15.2-1405 (addressing the limited immunity from suit of “[t]he members of the governing bodies of any locality ... arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body”).

The challenged resolutions in this case made no generally applicable policy (e.g., “there shall be no Confederate monuments in Charlottesville”), but rather were supervisory directives to city employees regarding the display and disposition of the City’s own property. Moreover, councilor-defendants cannot transform those directives into legislative acts for purposes of gaining immunity in this litigation because they possess no legislative authority to order the removal of monuments protected by state law. *Cf. Alexander*, 66 F.3d at 67 (rejecting county commissioners’ attempt to treat an administrative personnel decision as a legislative action eliminating the position itself because “the Board had no authority to do so under state law”); June 13, 2018 Opinion Letter at 4-5 (“[A] case has adequately been made out that the Council and the individual councilors acted entirely without authority and contrary to law in voting to move the statues and in approving the expenditure of funds to do so and, potentially, to defend such action, so it would not be legitimate legislative action.”).

Plaintiffs do not contend that *only* votes for general ordinances may count as legislative acts. But the Supreme Court of Virginia has clearly instructed that non-voting acts must be connected to the creation of legislation in order to come within the halo of absolute legislative immunity or absolute legislative privilege: “[T]he creation of legislation is the nexus that supports the application of the privilege. Absolute privilege therefore does not attach to



communications made by participants in proceedings conducted by a board of supervisors that do not concern the creation of legislation.” Isle of Wight Cty. v. Nogiee, 281 Va. 140, 155 (2011). In this case, there has been no “creation of legislation” to provide the required nexus.

### Conclusion

Plaintiffs respectfully request that this Court DENY the councilor-defendants’ motion for reconsideration of denial of legislative immunity, GRANT Plaintiffs’ motion to compel responsive discovery materials withheld on the basis of legislative privilege, and DENY any further stay of depositions or withholding of discovery on the basis of common law legislative immunity or legislative privilege.

Respectfully submitted:

(date) NOVEMBER 1, 2018

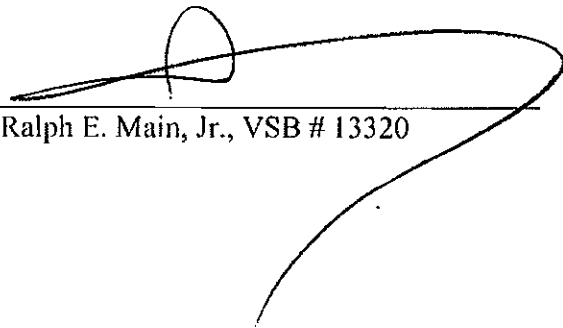
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**CERTIFICATE OF SERVICE**

I certify that I caused a true and exact copy of the foregoing Plaintiffs' Memorandum of Law Regarding Reconsideration of Denial of Legislative Immunity and Legislative Privilege to be hand delivered to the offices of Lisa Robertson, Esq., Charlottesville Deputy City Attorney, at her office address of 605 East Main Street, Charlottesville, Virginia 22902 and to the office of Richard Milnor, Esquire, at Zunka, Milnor & Carter, LTD, Counsel for Defendants, at his office address of 414 Park Street, Charlottesville, and by email to William O'Reilly, Esq., Jones Day, 51 Louisiana Ave. N.W. Washington DC 20001, at his email address of <woreilly@jonesday.com> and in addition by first class mail, postage prepaid to William O'Reilly, Esq., Jones Day, 51 Louisiana Ave. N.W. Washington DC 20001, all of the above being Counsel for the various Defendants, this 1<sup>st</sup> day of NOVEMBER 2018.



Ralph E. Main, Jr., VSB # 13320