

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' Motion to Strike Equal Protection Affirmative Defense**

The Plaintiffs by Counsel, move this Honorable Court to strike the Defendant's Affirmative Defense No. 8, Equal Protection, for the following reasons:

(1) A Motion to Strike tests the sufficiency of a defensive pleading such as an affirmative defense. Va. Code Ann. §8.01-274.

(2) The Defendants' Affirmative Defense #8, in its entirety, reads as follows:

8. Virginia Code §15.2-1812, as applied to the City in this case, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I Section 11 of the Constitution of Virginia. [Answer Defense #8, attached Exhibit 1].

(3) The Affirmative Defense states no facts.

(4) The Affirmative Defense offers no explanation of how Virginia Code §15.2-1812 violates the federal and state Constitutions.

(5) Affirmative Defense No. 8 is therefore insufficient as a matter of law.

FILED  
11.13.15 10:38am  
(Date & Time)

City of Charlottesville  
Circuit Court Clerk's Office  
Lizella A. Dugger, Clerk

By Antonia Spina  
Deputy Clerk

**Request for Relief**

The Plaintiffs by Counsel, move this Honorable Court to strike with prejudice the Defendant's Affirmative Defense No. 8 raising the issue of Equal Protection.



(date) November 3, 2018


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Counsel for Plaintiffs

Exhibit 1 — Defendants' Answer

**CERTIFICATE OF SERVICE**

I certify that I caused a true and exact copy of the foregoing Motion to Strike Affirmative Defense 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 13<sup>th</sup> day of NOVEMBER 2018.



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

Case No. CL17-000145-000

**ANSWER**

**TO AMENDED COMPLAINT**

COME NOW your Defendants, by counsel, and submit their grounds of defense and answers to the allegations of the Amended Complaint filed by the Plaintiffs in this case, as follows:

1. Each of the defendants is immune from suit under the provisions of Virginia Code § 15.2-1405 and under the common law doctrines of legislative immunity, official immunity and/or sovereign or governmental immunity.

2. None of the Defendants' votes or actions violated any clearly established law; as a result, none of their votes or actions can constitute intentional or willful misconduct or gross negligence, nor can they be characterized as reckless, willful or wanton conduct. In fact: (i) the only previous state court opinion interpreting Virginia Code §15.2-1812 held that Virginia Code § 15.2-1812 cannot be applied retroactively to a monument erected within a city prior to 1997, see *Heritage Preservation Association, Inc. v. City of Danville, Virginia* (Danville Cir. Ct., Case No. CL15000500-00, Dec. 7, 2015); and (ii) the law is sufficiently unsettled that Virginia's Attorney General has recently acknowledged that, particularly within independent cities,

“...applying these rules of [statutory] construction to the multitude of amendments to [Va. Code § 15.2-1812] over the years shows that, while it does apply to some monuments, there is a range of potential outcomes for individual monuments.” (Op. Va. AG, August 25, 2017).

3. Pursuant to a proper Dillon's Rule construction of the provisions of Virginia Code §15.2-1800 and § 15.2-1806, and pursuant to express provisions of the deeds attached to the Amended Complaint, Defendants City of Charlottesville and the Charlottesville City Council have legal authority: to rename Lee [Emancipation] and Jackson [Justice] Parks, to re-design said parks, to remove existing statues, to add new statues or other works of art, or remove landscaping, signage or other improvements within said parks.

4. The current provisions of Virginia Code § 15.2-1812, § 15.2-1812.1 and § 18.2-137 do not prohibit the removal of the Lee Statue, and also would not prohibit removal of the Jackson Statue. Each Statue was erected in the 1920s. Neither Virginia Code § 15.2-1812 nor §18.2-137 applied to the Lee Statue or the Jackson Statue prior to 1997. Additionally:

a. Virginia Code §15.2-1812 (which is referenced in § 15.2-1812.1 and 18.2-137) does not apply retroactively to statues erected in cities prior to 1997;

b. Even if Virginia Code § 15.2-1812 (which is referenced in § 15.2-1812.1 and 18.2-137) is applied retroactively to the Lee and Jackson Statues, neither of those statues is a monument or memorial enumerated, designated or described in §15.2-1812;

c. Even if Virginia Code § 15.2-1812 (which is referenced in § 15.2-1812.1 and 18.2-137) is applied retroactively to the Lee and Jackson Statues, the Amended Complaint fails to allege any basis for finding that any of the Defendants has disturbed or

interfered with either statue, as the term "disturb or interfere with" is defined in § 15.2-1812;

d. None of the Defendants' actions, as set forth within the Amended Complaint, is conduct for which punitive damages are available under Virginia Code § 15.2-1812.2(B); and

e. On its face, Virginia Code § 18.2-137 does not apply to a locality that is the owner of a monument or memorial; further, Defendants' actions, as set forth within the Amended Complaint, have been undertaken under a bona fide claim of right.

4. Neither the Lee Statue or the Jackson Statue has been violated or encroached upon in a manner for which any damages may be awarded under Virginia Code § 15.2-1812.1(A). The ruling set forth in ¶ 3 of this Court's October 4, 2017 Order is incorporated here by reference.

5. Defendants are not answerable to any Plaintiffs who have no legal standing to assert the claims presented in the Amended Complaint.

6. Neither the Lee Statue nor the Jackson Statue is privately owned; therefore, even if they are subject to the provisions of Virginia Code § 15.2-1812, none of the organizations that are named Plaintiffs in this case may recover damages.

7. Virginia Code § 15.2-1812 does not permit an award of compensatory damages to any of the individual or entity/organizational Plaintiffs.

8. Virginia Code § 15.2-1812, as applied to the City in this case, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I Section 11 of the Constitution of Virginia.

9. The terms "monument" and "memorial" are capable of multiple meanings, depending on the context in which used. Such terms, when used in common parlance, do not always refer to a specific thing. For example, a "monument" may be a marker, or a synonym for "statue". A "memorial" may be a commemoration of an individual, without being a reference to a group or movement of which such individual was a part. If Defendants, or any of them, have used the terms in statements, resolutions or correspondence, the use of such terms is not an admission that a statue is a monument or memorial to the specific things identified in Virginia Code § 15.2-1812, § 15.2-1812.1 or § 18.2-137.

10. Defendants cannot be enjoined, and are not liable for damages or punitive damages, because Virginia Code §§ 15.2-1812, 15.2-1812.1 and 18.2-137 contain no definitions that allow the Defendants to ascertain whether or not those statutes apply to either of the Statues, neither of which specifically identifies itself as a monument or memorial to the Confederacy, or to any wars or conflicts, or veterans of any wars or conflicts, referenced in the statutes. Unlike the City's Dogwood Vietnam Memorial, the Confederate Soldier Memorial at the Albemarle County Courthouse, and the Iwo Jima Memorial, the Lee and Jackson Statues contain no inscriptions identifying any specific intention or purpose.

FURTHER, Defendants' answers to the averments set forth within various paragraphs set forth within the Amended Complaint are as follows:

¶1. Admitted that the Amended Complaint concerns two public parks and two public statues located in the City of Charlottesville, Virginia. One park was known as Lee Park, and is now named Emancipation Park, and is improved by a statue of Robert E. Lee. One park was known as Jackson Park, and is now named Justice Park, and it is improved by a statue of Thomas

Jonathan "Stonewall" Jackson. Admitted that both parks and statues were donated to the City by Paul Goodloe McIntire. Statements identifying either of the statues as being a "monument" or "memorial" to a specific person, war, conflict of a war, or to veterans of such war or conflict, state legal conclusions and are denied.

¶2. Defendants are without personal knowledge of whether Plaintiff Payne utilizes and enjoys both parks and the statues erected therein on a regular basis; therefore, Defendants deny such allegations. The characterization of the statues in the parks as "monuments" is a stated legal conclusion and is denied. Otherwise the allegations of ¶ 2 are admitted.

¶3. Defendants are without personal knowledge of how Plaintiff Yellott has worked to preserve both the Lee and Jackson statues, or whether Plaintiff Yellott has a financial interest in the outcome of the litigation, uses one or both parks daily, or personally conducts history tours describing the monuments; therefore, Defendants deny such allegations. The characterization of the statues in the parks as "monuments" is a stated legal conclusion and is denied. Otherwise the allegations of ¶ 3 are admitted.

¶4. Defendants admit that Plaintiff Tayloe is a resident of the City, a registered voter in the City, owns real estate in the City, and pays City real estate and personal property taxes. Characterizations of the Lee and Jackson Statues as "war memorials and monuments" state legal conclusions and are denied. Defendants are without personal knowledge of the other allegations of ¶ 4; therefore, they deny the same.

¶5. Defendants are without personal knowledge of the allegations set forth within ¶ 5 and therefore deny the same.

¶6. Defendants admit that Henry Shrady is a sculptor of note who created the bronze sculpture known as the "Ulysses S. Grant Memorial", which is located in Union Square, west of



the United States Capitol Building. Characterization of the Lee statue as a "monument" states a legal conclusion and is denied. Defendants are without personal knowledge of the other allegations in ¶ 6 and therefore deny the same.

¶7. The allegations in ¶ 7 are admitted.

¶8. Characterization of the Lee Statue as a "monument" states a legal conclusion and is denied. Otherwise, Defendants are without personal knowledge of the allegations in ¶ 8 and therefore deny the same.

¶9. Defendants are without personal knowledge of any "special interest" Plaintiff Weber may have in the Lee or Jackson Statues, and therefore deny the allegation that he has such interest. Characterization of the statues as "war memorials and monuments" states a legal conclusion and is denied. Otherwise, the allegations of ¶ 9 are admitted.

¶10. Defendants are without personal knowledge of any "special interest" Plaintiff Smith may have in the Lee or Jackson Statues, and therefore deny the allegation that he has such interest. Characterization of the statues as "war memorials and monuments" states a legal conclusion and is denied. Defendants admit that a group of private citizens donated money for the restoration of the Lee and Jackson statues 1997, but Defendants are without personal knowledge of Plaintiff Smith's agency relationship with any such citizens, and therefore deny that allegation. The individual Defendants were not participants in any negotiations between the City and any third party during the 1990s, and have no personal knowledge thereof, or of Plaintiff Smith's role therein. Otherwise, the allegations of ¶ 10 are admitted.

¶11. Characterization of the Lee and Jackson statues as "monuments" states a legal conclusion and is denied. Defendants are without personal knowledge of the other allegations in ¶ 11 and therefore deny the same.

¶12. Characterization of the Lee and Jackson statues as "monuments" states a legal conclusion and is denied. Defendants are without personal knowledge of the other allegations in ¶ 12 and therefore deny the same.

¶13. Admitted.

¶14. Admitted that the City Council is the governing body of the City. Admitted that the City has powers expressly granted by the General Assembly of the Commonwealth of Virginia, those necessarily or fairly implied from expressly granted powers, and powers that are essential and indispensable.

¶15. Admitted only that, as of the date of this pleading, Defendants Signer, Bellamy, and Galvin are members of City Council.

¶16. Defendants admit that Exhibit A is a letter from R.A. Watson dated February 5, 1918 to the Mayor of the City, and that the letter speaks for itself. Admitted that Exhibit B is a true copy of a Resolution approved by the City Common Council, and that the Resolution speaks for itself. Defendants are without knowledge as to what document Plaintiffs are referring to as "the deed" and deny any allegations purporting to characterize the contents of such deed.

¶17. Defendants admit that Exhibit C is a true copy of the deed recorded in the Circuit Court Clerk's Office in Deed Book 32 at Page 7, and that the Deed speaks for itself. The Resolution attached to the Amended Complaint as Exhibit A speaks for itself. Defendants are without knowledge or information as to who is alleged by Plaintiffs to have "officially dedicated" the land and statue on May 21, 1924, and as to the alleged significance of an "official dedication", and therefore denies the same.

¶18. None of your Defendants has first-hand knowledge of any facts alleged in Paragraph 18, and therefore they can neither admit or deny such allegations and they demand strict proof thereof.

¶19. Defendants admit that Exhibit D is a true copy of the deed recorded in the Circuit Court Clerk's Office in Deed Book 32 at Page 240, and that the Deed speaks for itself. The characterization of words within Exhibit D as "stipulating" that the property be known as Jackson Park states a legal conclusion and is denied. Admitted that Exhibit E is a true copy of an Extract from Minutes of the Board of Aldermen held on January 13, 1919, and that Exhibit E speaks for itself. Admitted that, after the date of Exhibit E, McIntire donated the Jackson Statue to the City and caused it to be placed in Jackson Park. Defendants are without knowledge or information as to who is alleged by Plaintiffs to have "dedicated" the park and statue to the City on October 19, 1921, and as to the alleged significance of any such "dedication", and therefore denies the same.

¶20. Allegations in ¶ 20 are admitted.

¶21. The Defendants are without knowledge or information as to who is alleged by Plaintiffs to have "re-dedicated" the Lee Statue to the City (as the statue was already owned by the City) on or about September 26, 1999, and deny that the alleged "re-dedication" has any legal significance. Characterization of the Lee Statue as a "monument" states a legal conclusion and is denied. Otherwise the allegations of ¶ 21 are admitted.

¶21A. Characterizations of the Lee Statue as a "monument" and as a "memorial" are statements of legal conclusions and are denied. Defendants deny that the Lee Statue is a monument or memorial, of any category or type listed within Virginia Code § 15.2-1812,

15.2-1812.1 or 18.2-137; further, Defendants deny that "war veteran" is a term used in any of the referenced statutes. Otherwise, the allegations in ¶ 21A are admitted.

¶21B. Admitted.

¶21C. Characterizations of the Lee Statue as a "monument" or "memorial" are statements of legal conclusions and are denied. Defendants deny that "war veteran" is a term used in Virginia Code § 15.2-1812, 15.2-1812.1 or 18.2-137. Otherwise, the allegations in ¶21C are admitted.

¶21D. Characterizations of the Lee Statue as a "monument" or "memorial" are statements of legal conclusions and are denied. Defendants deny that the Lee Statue is a monument or memorial to the War Between the States. Otherwise, allegations in ¶ 21D are admitted.

¶21E. Defendants admit that the Charlottesville City Council adopted a resolution dated May 2, 2016, and that the resolution speaks for itself. Defendants deny that the resolution contains any statement that either the Lee or Jackson statue is a monument to the Confederacy or a memorial to war veterans.

¶21F. Denied.

¶21G. Characterizations of the Lee Statue as a "monument" or "memorial" are statements of legal conclusions and are denied. None of your Defendants has first-hand knowledge of any facts alleged in Paragraph 21G, and therefore they can neither admit nor deny such allegations and they demand strict proof thereof.

¶22. Characterizations of either the Lee or Jackson Statues as a "Confederate monument" or "memorial of the War Between the States" or "memorial to war veterans of the

War Between the States" are statements of legal conclusions and are denied. Virginia Code § 15.2-1812 speaks for itself.

¶23. All of the statements in Paragraph 23 are characterizations of the provisions of Virginia Code § 15.2-1812, 15.2-1812.1 and/or 18.2-137 and are statements of legal conclusions and are denied. The referenced statutes speak for themselves.

¶24. Virginia Code § 18.2-137 speaks for itself.

¶25. The statements within Paragraph 25 are statements of legal conclusions and are denied.

¶26. All of the statements in Paragraph 26 are characterizations of the provisions of Virginia Code § 15.2-1812 and are statements of legal conclusions and are denied. Virginia Code § 15.2-1812 speaks for itself.

¶27. All of the statements in Paragraph 27 are characterizations of the provisions of Virginia Code § 18.2-137 and are statements of legal conclusions and are denied. Virginia Code § 18.2-137 speaks for itself.

¶28. Admitted that the document attached to the Amended Complaint as Exhibit F is an accurate copy of a Resolution adopted by City Council on the date specified therein. The Resolution speaks for itself. Admitted that Defendants Szakos, Bellamy and Fenwick voted for the Resolution and that Defendants Signer and Galvin voted against the Resolution.

¶29. Admitted that the document attached to the Amended Complaint as Exhibit F is an accurate copy of a Resolution adopted by City Council on the date specified therein. The Resolution speaks for itself. Admitted that Defendants Szakos, Bellamy and Fenwick voted for the Resolution and that Defendants Signer and Galvin voted against the Resolution.

¶30. Admitted that the document attached to the Amended Complaint as Exhibit H is an accurate copy of a Resolution adopted by City Council on the date specified therein. The Resolution speaks for itself. Admitted that Defendants Szakos, Bellamy, Fenwick, Signer, and Galvin voted in favor of the Resolution.

¶31. All of the statements in Paragraph 31 are statements of legal conclusions and are denied. Denied that the Defendant City Councilors acted with no knowledge of or regard for the cost of their actions; the legality of the Resolutions is the central legal issue to be resolved in this case.

¶32. Admitted.

¶33. Admitted that Exhibit J is an accurate copy of correspondence sent by the City Attorney, and that the letter speaks for itself. Denied that Virginia Code § 15.2-1812.1(A)(1) requires the City Attorney to bring an action against the organization to which he serves as legal counsel; admitted that the City Attorney did not bring an action against his client within 60 days from the date of the referenced correspondence.

¶34. Defendants deny that the Plaintiffs have interests sufficient to establish legal standing to bring this action; admitted that each of the Plaintiffs is "interested" in this matter in the non-legal sense of that term

¶35. Defendants incorporate herein and re-aver the allegations set forth in Paragraphs 1 through 34.

¶36. Denied.

¶37. Denied.

¶38. Denied.

¶30. Admitted that the document attached to the Amended Complaint as Exhibit H is an accurate copy of a Resolution adopted by City Council on the date specified therein. The Resolution speaks for itself. Admitted that Defendants Szakos, Bellamy, Fenwick, Signer, and Galvin voted in favor of the Resolution.

¶31. All of the statements in Paragraph 31 are statements of legal conclusions and are denied. Denied that the Defendant City Councilors acted with no knowledge of or regard for the cost of their actions; the legality of the Resolutions is the central legal issue to be resolved in this case.

¶32. Admitted.

¶33. Admitted that Exhibit J is an accurate copy of correspondence sent by the City Attorney, and that the letter speaks for itself. Denied that Virginia Code § 15.2-1812.1(A)(1) requires the City Attorney to bring an action against the organization to which he serves as legal counsel; admitted that the City Attorney did not bring an action against his client within 60 days from the date of the referenced correspondence.

¶34. Defendants deny that the Plaintiffs have interests sufficient to establish legal standing to bring this action; admitted that each of the Plaintiffs is "interested" in this matter in the non-legal sense of that term

¶35. Defendants incorporate herein and re-aver the allegations set forth in Paragraphs 1 through 34.

¶36. Denied.

¶37. Denied.

¶38. Denied.

¶39. Defendants' answers to Paragraphs 21, 22, 23 and 24 are incorporated herein and re-averred. The allegations in the second, third and fourth sentences of Paragraph 39 are admitted. Defendants affirmatively allege that the statutes are unclear as applied to the Statues at issue in this case; there are no inscriptions on the Statues which proclaim them to be the types of monuments or memorials referenced in the statutes; an opinion subsequently issued by the Virginia Attorney General on August 25, 2017 agrees with the City Defendants' contention that Virginia Code §§ 15.2-1812, 15.2-1812.1 and 18.2-137 do not apply to the Statues at issue in this case; and the only available opinion of a court of law (Danville Cir. Ct., Case No. CL15000500-00, Dec. 7, 2015) also favors the City Defendants' legal position.

¶40. Denied. The statements in Paragraph 40 state legal conclusions and are denied.

¶41. Denied. The statements in Paragraph 41 state legal conclusions and are denied.

¶42. Defendants incorporate herein and re-aver the allegations set forth in Paragraphs 1 through 41.

¶43. Denied. The statements in Paragraph 43 state legal conclusions and are denied.

¶44. Denied. The statements in Paragraph 44 state legal conclusions and are denied.

¶45. Denied. The statements in Paragraph 45 state legal conclusions and are denied.

¶46. Denied. The statements in Paragraph 46 state legal conclusions and are denied.

¶47. Defendants incorporate herein and re-aver the allegations set forth in Paragraphs 1 through 46.

¶48. The Defendants are without knowledge or information as to Plaintiffs' intended meaning for the term "charitable gifts" and therefore deny same. Defendants admit that Exhibits A through E to the Amended Complaint are accurate copies of resolutions and deeds documenting the City's acceptance of gifts of property by Paul Goodloe McIntire to the City, for



two parks. The City admits that the Lee Statue and the Jackson Statue were paid for and erected in the City's parks by Paul Goodloe McIntire.

¶49. Admitted.

¶50. The statements in Paragraph 50 appear to state legal conclusions and are denied. Also Defendants are without knowledge or information as to Plaintiffs' intended special meaning for the phrase "...*in trust* for the use, benefit, and enjoyment of its citizens," therefore they deny same.

¶51. Denied.

¶52. Defendants admit that Lee [Emancipation] and Jackson [Justice] Parks are each subject to a restrictive covenant that requires that it be "used in perpetuity...as a public park, and that no buildings be erected thereon." See Exhibits C and D to the Amended Complaint.

Otherwise, the allegations of Paragraph 52 are denied.

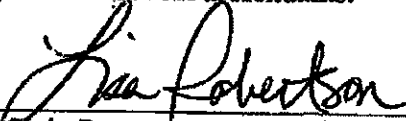
¶53. Denied.

¶54. Denied.

WHEREFORE, Defendants City of Charlottesville, Virginia and Charlottesville City Council, and individual Defendants Signer, Bellamy, Fenwick, Szakos and Galvin, by counsel, pray that the Amended Complaint be dismissed with prejudice, that the Court deny all of the relief requested by Plaintiffs, and that the Defendants recover from Plaintiffs their costs expended in this action.

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

By counsel for the Defendants:



S. Craig Brown, Esq. (VSB # 19286)

City Attorney

Lisa A. Robertson, Esq. (VSB# 32486)

Chief Deputy City Attorney

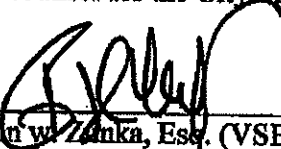
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By counsel for the City of Charlottesville, Virginia and the Charlottesville City Council:



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**CERTIFICATE**

I hereby certify that a true copy of the foregoing pleading was e-mailed and mailed this  
16<sup>th</sup> day of January, 2018 to:

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