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: DEMURRER

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I. The standard for review of a demurrer

For purposes of a demurrer the Defendants are deemed to admit the truth of facts the Complaint avers, facts implied from those, and facts that may be fairly and justly inferred. See W.M. Schlosser Co., Inc. v. Board of Sup'rs of Fairfax County, 245 Va. 451, 452, 28 S.E.2d 919 (1993) ("Schlosser").

In deciding a demurrer the Court may consider only grounds the demurrer specifically states. Va. Code § 8.01-273(A) (saying "[n]o grounds other than those stated specifically in the demurrer shall be considered by the court"); see T C Midatlantic Dev. Inc. v. Commonwealth, 280 Va. 204, 214, 695 S.E.2d 543, 549 (2010) (reversing grant of demurrer in part, because grounds not specifically stated).

II. The Demurrer specifies no grounds to contest several Complaint averments

The Jackson statue is a Confederate monument (Complaint ¶¶ 1, 16, 17, 19, 21 & 22). Demurrer ¶ 4 controverts only whether the Lee statue is "a monument or memorial to any of the wars enumerated in the statute," not the Jackson statue.

The Jackson statue, Jackson park, and Lee park are all "subject to and protected by" the Monument Protection law if it is deemed "retroactive." Complaint ¶ 25 avers the law applies to both the Lee and Jackson statues and both parks. Demurrer ¶ 3 asserts the law "was not in existence" and so does not apply "to either statue or Park" (sic). Demurrer ¶ 4 then asserts even if the law is deemed "retroactive" the Lee statue is not a Confederate monument. Demurrer ¶ 4 does not contest that if "retroactive," the law applies to the Jackson statue, and to both parks.

The City's 1999 reauthorization and reacceptance brings the Lee monument within the 1997 amendment to Va Code §15.2-1812. The Demurrer does not mention, or specify grounds to controvert, this averment in Complaint ¶ 21.

All Plaintiffs have statutory standing to invoke the Monument Protection Law. Demurrer ¶1 (d) incorrectly asserts that corporate representative standing is recognized in Virginia "only when specifically authorized by the legislature" (an error addressed *infra.* Section III D, at p. 9). Otherwise the Demurrer does not specify grounds to contest statutory standing. Demurrer ¶ 1 controverts only whether the Plaintiffs plead an immediate, pecuniary, and substantial interest sufficient for individual standing.

City taxpayers have taxpayer standing. Demurrer ¶ 1 nowhere questions the Plaintiffs' standing as taxpayers to challenge unauthorized City expenditures as *ultra vires.* Demurrer ¶ 2 asserts only that on the merits, the issue is "not ripe for adjudication."

Count Three: renaming of Jackson Park violates the terms of McIntire's gifts. Demurrer ¶ 7 asserts there were two conditions, neither violated. The Demurrer nowhere addresses that the name "Jackson park" was a term of both the Jackson park deed, and the City acceptance (Complaint ¶¶ 19 and Exhibits D and E). The Defendants' brief improperly argues whether a "whereas clause" is binding, but this issue was not raised in the Demurrer. We object.

Count Three: McIntire's gift created a trust. The Demurrer does not contest that the City holds McIntire's gifts of land and statues "in trust for the use, benefit and enjoyment of its citizens, including Plaintiffs Payne, Yellott, Tayloe, Amiss, Weber and Smith" (Complaint ¶ 50).

Defendants' personal liability. — The Demurrer does not challenge Complaint ¶¶ 39 - 41, stating the individual Defendants acted outside their legal authority in a grossly negligent, reckless, wanton, and intentional manner, are not immune from liability, and are personally subject to damages including punitive damages.

III. Standing for Each Plaintiff

The Demurrer contests all the Plaintiffs' individual standing — but only individual standing (Demurrer ¶ 1(a) - (d)). The Plaintiffs have compiled a table summarizing the four types of standing, and how each Plaintiff meets that standard, drawn from Complaint averments and law and cases cited below [Exhibit 1].

A. Statutory standing under the Monument Protection law

All the Plaintiffs have statutory standing for an injunction to protect and preserve monuments, and as "persons having an interest in the matter" meeting the criteria in Va. Code §§15.2-1812, and 1812.1. See e.g. Reston Hospital Center LLC v. Remley, 59 Va. App 96, 106, 717 SE 2d 417, 422, (2011) (upholding statutory standing if party "is one that the legislature intended to allow access to the courts") ("Reston").

Virginia's Monument Protection Law is relatively unusual because it empowers citizens to stop their own local authorities from disturbing or interfering with (including removal of) monuments or memorials to wars or war veterans. Va Code § 15.2-1812 (barring "authorities of the locality" from disturbing or interfering with a monument or to prevent citizens from preserving it); Va Code § 15.2-1812.1(A)(1) (saying violation allows action for damages against local authorities by interested person); Va Code § 15.2-1812.1(C) (preserving rights of any person, organization, society, or museum to pursue any additional remedies). Virginia's Attorney General Mark Herring explained "because of the importance of honoring all our veterans" the General Assembly has extended certain "protections to monuments honoring [their] service." Opinion 15-050 __ Op. Va. Att'y Gen. __ (2015) ("Atty General Opinion").

The law envisions two independent bases for statutory standing. The first is the original empowerment of citizens to preserve and protect monuments. Enlisting citizens as a check on their local officials was found in the earliest 1904 enactment of the

law, preserved in 12 amendments through the next 113 years, and remains part of the law today. Compare 1904 Va. Acts Ch. 29 with Va Code §15.2-1812. The second is an after-the-fact action allowing "any person having an interest in the matter" to sue for damages in §15.2-1812.1 added by an amendment in 2000, which retained all existing civil remedies in §15.2-1812.1 (C).

This is a broad but not a blanket invitation to the courthouse. Like Virginia's Freedom of Information Act which offers all Virginia citizens a right of enforcement against government officials, the Monument Protection Law is a statutory right afforded to Virginia citizens, just for being citizens — so long as they seek to protect the types of monuments the statue lists. Compare Va. Code § 2.2-3700(B);(C) (stating Freedom of Information Act intended for the "people of the Commonwealth;" "citizens of the Commonwealth"); Va. Code § 2.2-3704 (public records open to "citizens of the Commonwealth") with Va. Code §15.2-1812 (stating "citizens" may take whatever measures necessary to protect a listed monument). cf. Reston, 59 Va. App at, 106 see also West Creek Med. Ctr., Inc. v. Romero et al. (Record No. 0963-13-2) (Va. App., 2014) (Memorandum Op., Huff, J.)("West Creek") (stating statutory standing asks whether "party . . . is one that the legislature intended to allow access to the courts").

The Complaint avers facts indicating all Plaintiffs are Virginia residents and persons interested in the preservation of the monuments, as detailed in Exhibit 1. They all seek to stop city officials from removing the General Robert E. Lee monument and interfering with the General Thomas J. ("Stonewall") Jackson monument. The Complaint describes both the General Robert E. Lee and Lieutenant General Thomas Jonathan ("Stonewall") Jackson monuments, as Confederate monuments and memorials to veterans of the War Between the States. Complaint ¶¶ 1, 16, 17, 21, 22 & 31. The Complaint states grounds for all Plaintiffs to have statutory standing to seek an injunction to protect the Lee and Jackson monuments, under Va. Code §15.2-1812.

The decision in Mattaponi Indian Tribe v. Commonwealth, 261 Va. 366, 377, 541 S.E. 2d 920, 923 (2001) ("Mattaponi") on statutory standing is analogous. There as here, an amalgam of Plaintiffs banded together: an unincorporated alliance of organizations and individual riparian owners, including the Mattaponi Indian tribe (a 1,100-member unincorporated association); the Chesapeake Bay Foundation, Inc; Mattaponi and Pamunkey Rivers Association; and the Sierra Club (collectively, the "Alliance") to enforce a remedial law. See Mattaponi, 261 Va. at 377. There as here, the injuries complained of included cultural diminishment: "the failure to consider cultural values" of the tribe as well as diminished "educational and recreational pursuits." Mattaponi, 261 Va. at 372. 372. The court held the Alliance and the tribe met the statutory criteria for standing to challenge the water supply project permit at issue. Mattaponi, 261 Va. at 378.[1] Likewise here the Plaintiffs are citizens invoking a remedial statute intended to protect historic war monuments and veterans' memorials, and they are the "persons with an interest in the matter" the statute invites to enforce it.

Demurrer ¶ 5 asserts (on the merits of the cause of action) no physical harm has happened, so the Monument Protection Law is not yet triggered. The Plaintiffs need not wait for the bulldozers for standing for an injunction to prevent imminent harm. Chesapeake Bay Found. v. Com. ex rel. State Water Control Bd., 52 Va. App. 820, 830, 667 S.E.2d 844, 852 (2008) (reciting "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief") ("Chesapeake Bay 2008"). The Complaint and its exhibits aver that City Council purported to vote for a resolution to remove the Lee statue in February 2017. Complaint ¶ 28 & Exhibit F. They also resolved to transform Jackson park, and rename it. Complaint ¶ 30. The Complaint further avers that the resolutions were a vote "to disturb or interfere with, to include removal of, damaging, or defacing, the aforesaid monuments, which constitute

[1] The Court also found individual standing for the Mattaponi tribe, that it "possesses in its own right justiciable interests." Mattaponi, 261 Va. at 378.

monuments or memorials for the War Between the States." Their stated decision; their resolve to commit the act, an impending threat — is sufficient. Chesapeake Bay 2008, 52 Va. App. at 823 (reciting that "[i]f the injury is certainly impending that is enough").

The Plaintiffs meet both the standards of the older and of the second, newer provision for statutory standing, the action for damages under Va Code §15.2-1812.1, as averred in Complaint ¶ 31. The enforcement provision added in 2000 requires only a violation and inaction by the City Attorney. See Virginia Code § 15.2-1812.1. Here the "violation" is a violation of the law: unlawful City Council action and encroachments as alleged in Complaint ¶¶ 23, 24, 26 and 27, and 28 - 34. The City Attorney has filed no action, undertaken no prophylactic measures. It then falls to "any person having an interest in the matter" to do so.

Standing is only a preliminary inquiry: whether the Plaintiffs have a legitimate issue to bring to the courthouse, regardless of whether once inside they might prevail. Reston 59 Va. App at 105 (stating "we are not concerned with whether the plaintiff will ultimately prevail on the legal merits of an issue"). Regardless of the eventual decision on the applicability of the Monument Protection Law, all the Plaintiffs have statutory standing to invoke it.

B. Taxpayer standing to challenge tax expenditures *ultra vires*

In addition to statutory standing under the Monument Protection Law discussed above, the Complaint properly avers City citizen Plaintiffs have standing simply as taxpayers challenging unlawful tax money expenditures. Complaint ¶¶ 2, 3, 4, 7, 9, 10, 12 & 32 [as detailed in Exhibit 1] aver that Plaintiffs are City residents, pay City taxes, and are challenging unauthorized City expenditures. See Arlington County et al. v. White, et al., 259 Va. 708, 710, 528 SE 2d 706 (2000) (recognizing taxpayer standing to challenge *ultra vires* county acts) ("Arlington County"). In an April 2017 case, the Virginia Supreme Court confirmed the pleading required for taxpayer standing

to challenge unauthorized tax expenditures, a case the Defendants rely on (while incorrectly arguing grounds not stated in the Demurrer): Lafferty v. School Bd. of Fairfax Cty., __ Va __ , 798 S.E. 2d 165 (2017) ("Lafferty") [Defendants' Brief p. 19.]

Lafferty determined that a taxpayer lacked standing for failing to allege "that key element: the connection to government expenditures." Lafferty p. 7. __ Va. __ .Since "allegations of revenue expenditures have not been pled" the Court denied him standing. Lafferty p. 8. __ Va. __ . In contrast, here the Plaintiffs' Complaint and Exhibits did aver that "key element." Complaint ¶ 32 says *inter alia,* that "implementation of the aforesaid Resolutions will involve considerable expenditure of taxpayer funds"; and recites "the estimated cost of removing and relocating the Lee monument would be $330,000" [citing Complaint Exhibit I]. Complaint ¶ 32 also cites Exhibit H, "a budget not to exceed $1,000,000 to implement the provisions of the Resolution." Complaint ¶¶ 28 - 33 and the Exhibits cited, detail a series of City Council votes and resolutions, which were unauthorized expenditures of tax money.

The rule that taxpayers — just as taxpayers — have standing to thwart local officials expending tax money outside their legal authority is long established and well settled. cf. Lynchburg & R. St. Ry. Co. v. Dameron et al., 95 Va. 545, 546, 28 S.E. 951, 951, (1898) (stating [t]he jurisdiction of a court of equity to restrain a municipal corporation and its officers from [levying taxes or issuing bonds without authority] upon the application of one or more taxpayers . . . is too well settled to admit of dispute"). The City residents and taxpayers enumerated in Exhibit 1 all have standing for Count Two, *ultra vires* tax expenditures by City officials.

C. Individual standing

Only if the Plaintiffs had no statutory standing, no standing as taxpayers, and no standing as beneficiaries of the trust resulting from McIntire's gifts (Complaint ¶

50) — would they need to show individual standing. Nonetheless the Complaint averred facts sufficient for individual standing for each Plaintiff, detailed in Exhibit 1.

Individual standing to enjoin City action requires an individual particularized interest, more than a grievance shared by the public at large. cf. Mattaponi, 261 Va. at 373 (finding individual standing for tribe based on cultural interest in river preservation). There is no such thing as *de minimis* when it comes to that interest. "An identifiable trifle of some sort" suffices, so long as that trifle, that trivial interest, can be articulated and traced to a particular plaintiff. Chesapeake Bay 2008 52 Va. App. at 823 (holding minor recreational use; aesthetic interest suffices).

In Chesapeake Bay 2008, the Supreme Court concluded that Plaintiffs stating they use the affected area and "are persons for whom the aesthetic and recreational values of the area will be lessened," offered an adequate claim of particularized injury. Chesapeake Bay 2008, 52 Va. App. 822, 824 (impairing "aesthetic value of the rivers as an educational resource" sufficed as a threat of harm). This 2008 case and the 2001 Mattaponi decision relaxed the rigid ruling in the much earlier 1986 Virginia Beach Beautification decision (cited in Defendants' Demurrer Brief p. 21) that aesthetic injury alone did not suffice.[2] Likewise another case, Philip Morris USA v. Chesapeake Bay Found., 273 Va. 564, 573 - 581, 643 S.E.2d 219, 226-28, (2007) (exploring difference between statutory, individual, and representational standing) ("Philip Morris") reversed a demurrer dismissing the Chesapeake Bay Foundation challenge of a water quality

[2] The 1980's case was Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of the City of Virginia Beach, 231 Va. 415, 344 S.E. 2d 899, 902-03 (1986) (denying standing to a Plaintiff raising an aesthetic objection) ("Virginia Beach Beautification"). The case concerned a zoning variance and the stringent "aggrieved person" standard for standing. Chesapeake Bay, Mattapotomi and other cases have now held that in a public interest lawsuit, an aesthetic or cultural objection suffices for individual standing so long as it is particularized to that plaintiff. The public interest in those cases was environmental; here it is enforcing a law protecting monuments for veterans and the memorial parks that frame them.

permit for largely aesthetic reasons: their members used and enjoyed the James River for boating, kayaking, and swimming. Philip Morris, 273 Va. at 578.

Following these more recent precedents, in Coalition to Preserve McIntire Park, et al., v. City of Charlottesville, et al., Case No 9000084-00 (2009, unpublished, Swett, J.) [the "McIntire Park case"] [excerpts appended as Exhibit 2] in Charlottesville Circuit Court Judge Jay Swett properly found sufficient individual interest to grant standing to sue the City to some of a loose coalition of citizen activists who opposed paving what is now the John Warner Parkway through McIntire Park, though he denied standing to others who showed no particularized injury. That case parallels the one at bar insofar as a group of individual Plaintiffs sued to stop City action; it differs in that theirs was a weaker case with no preservation law to enforce; no taxpayer standing to contest illegal expenditures. There as here, individuals said they personally used and enjoyed the park. That was sufficient. Trifling though the interest might appear, it was a specific aesthetic use particular to them. Likewise here the Plaintiffs allege use and enjoyment, and also specific money expenditures to preserve the monuments, detailed in Exhibit 1. They each plead facts sufficient for individual standing.

D) Corporate representative standing

The Court of Appeals of Virginia expressly rejected the premise asserted in Defendants' Demurrer ¶ 1(d) that "Virginia does not recognize representational standing unless authorized by statute." The Court rejected it no less than three times in succession in one case, confirming corporate representative standing for the Chesapeake Bay Foundation based on the standing of its members — the third time saying the Defendants had "struck out." Chesapeake Bay Foundation, Inc. v. Commonwealth ex. rel. Va. State Water Control Bd., 46 Va.App. 104, 114 - 118, 616 S.E.2d 39, 45 (2005) (rejecting assertion that Virginia does not recognize representational standing unless authorized by statute) ("Chesapeake Bay 2005"); Chesapeake Bay Found. Inc. v.

Commonwealth ex rel. Virginia State Water Control Bd., 56 Va.App. 546, 556, 695 S.E.2d 549. 553 (2010)(revisiting "again" representational standing five years later on an interlocutory appeal, and reconfirming it exists)("Chesapeake Bay 2010"); Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. Water Control Bd. (Va. App., 2014)(Record No. 1897-12-2) (Memorandum Opinion, unpublished) (rejecting yet again the challenge to representational standing, holding this third time the Defendants had "struck out"). ("Chesapeake Bay 2014," together the "Chesapeake Bay cases").

As detailed in Exhibit 1, the Complaint states facts that establish both representative standing and also individual standing as "persons interested in the matter" in their own right, for the corporate Plaintiffs: the Monument Fund, Inc. (Complaint ¶12) and the Virginia Division, Sons of Confederate Veterans, Inc. (Complaint ¶11).

IV. Count One: Monument Protection Law states a cause of action

The Complaint avers that "the Lee statue and the Jackson statue are Confederate monuments and memorials of the War Between the States" as well as "memorials to war veterans of the War Between the States" protected "by the provisions of Section 15.2-1812 of the Code of Virginia, 1950, as amended" (Complaint ¶¶ 1 & 22). Complaint ¶ 24 states that Section 18.2-137 of the Code of Virginia, 1950, makes it a criminal offense to "unlawfully . . . remove . . . any monument or memorial for war veterans described in §15.2-1812." Count One avers statutory violations, in that the "purported action of members of City Council directing the removal of the Lee statue from Lee Park is a direct violation of Code Section 15.2-1812." (Complaint ¶¶ 36 & 37). Removal is also a crime, a "violation of Code §18.2-137 (Complaint ¶ 38).

The Complaint requests declaratory and injunctive relief. Complaint p. 15 & "Whereas" ¶¶ 1 & 2. The Complaint also requests damages and attorneys fees and costs as against Defendants individually for acting in a "grossly negligent, willful and wanton manner." (Complaint ¶ 40 & Complaint p. 15, "Whereas" ¶¶ 3 & 4).

A. <u>The Demurrer incorrectly disputes Lee is a "Confederate monument"</u>

Demurrer ¶ 4 alleges the Plaintiffs have failed "to allege any facts demonstrating that the statue of Robert E. Lee is a monument or memorial to any of the conflict enumerated" in the Monument Protection law.

Complaint ¶ 1 avers both the Lee and Jackson "monuments are memorials of the War Between the States and to veterans of that war." Both Lee and Jackson are referred to by their military titles: "General Robert E. Lee" in Complaint ¶ 1 as well as ¶¶ 16, 17, 21 ("Generals Lee and Jackson") and "Lieutenant General Thomas Jonathan Jackson" in Complaint ¶ 1 as well as ¶¶ 19 and 21. Complaint ¶ 19 refers to "<u>Confederate</u> Lieutenant General Thomas Jonathan Jackson" [emphasis added]. Complaint ¶¶ 22 and 31 aver that the Lee and Jacksons statues are "Confederate monuments and memorials of the War between the States," and "memorials to war veterans of the War Between the states."

Complaint Exhibits A, B, C, D and I also refer to Lee and Jackson by military title: "General Lee" and "General Jackson." Exhibit B in particular is the City's resolution accepting McIntire's gift noting his purpose "to beautify the park and erect in the center thereof an equestrian statue of our beloved hero, General Robert E. Lee." Exhibit I, prepared by the City public works department discussing removal of the monuments is titled "Lee and Jackson Memorial Monuments," and suggests as one removal option "delivery to a Civil War site." (p. 2 ¶6).

The Defendants acknowledge a Demurrer is deemed to admit Complaint factual averments. cf. Defendants' Demurrer Brief at p. 2. The Demurrer concedes that the Jackson statue is a Confederate monument. The Demurrer's challenge to the Lee statue, in the face of all these Complaint averments, is without substance. It is a matter of common knowledge who Robert E. Lee was, and why a statue of him is a Confederate monument and memorial to a veteran of the War Between the States. cf. Delk v. Columbia Healthcare Corp., 259 Va. 125, 127, 523 S.E. 2d 826, 833 (2000) (overturning demurrer on cause of action for emotional distress from sexual assault concluding "it is common knowledge" that sexual assault can result in AIDS, a deadly disease, even if not explicitly pleaded); Bragg v. Ives, 149 Va. 482, 488, 140 S.E. 656 (1927) (reversing demurrer, complaint about proposed undertaking establishment in residential neighborhood may state cause of action for nuisance: it is "within the common knowledge of man," that "those mute reminders of mortality, the hearse, the chapel, the taking in and carrying out of bodies . . . cannot help but have a depressing effect upon the mind of the average person").

B. The Demurrer inaccurately asserts the law was not in existence

The Demurrer ¶ 4 asserts that Virginia Code §15.2-1812 "was not in existence at the time the Lee statue and the Jackson statue were erected." What matters is what the law is now, not what it was then. It is long settled that in considering proscribed conduct the court looks to what the law is when the Defendant's act occurs. See e.g. Va. Code §18.2-173 (defining removal of a protected monument as a crime); Cool v. Commonwealth, 94 Va. 799, 801 - 802, 26 S.E. 411, 412 (Va, 1896) (holding indictment omitting date of offense failed, because amended law made offense a felony or only misdemeanor, depending on date of the Defendant's act).

Demurrer ¶ 4 errs as a matter of historical fact: the predecessor to today's law was very much in existence when Jackson in 1921 (Complaint ¶ 19) and Lee in 1924

(Complaint ¶¶ 17 & 18) were erected. A précis of the Monument Protection law's origins and evolution is attached as Exhibit 2. The law originated in 1904. It had then and still has two main parts: a Dillon Rule authority for expending public money for erecting war monuments and veterans' memorials, and an absolute prohibition against disturbing them once erected. See 1904 Va. Acts Ch. 29. The Dillon Rule authority and the prohibition on removal initially applied to Confederate monuments at the county seat. After 113 years and 12 amendments, the prohibition now precludes localities from disturbing or interfering with monuments and memorials to a long list of conflicts erected anywhere within a locality's "geographic area." Compare, e.g., 1904 Va. Acts Ch. 29, with Va. Code §15.2-1812, as amended.

C. The Law always protected existing monuments

The legislative intent from the very beginning in 1904 was to protect these very monuments and memorials, and the twelve amendments have simply refined and expanded the protection afforded by the law. The original law protected all monuments once erected: " . . . if the same shall be so erected, it shall not be lawful thereafter for the authorities of said county, or any other person or persons whatever, to disturb or interfere with any monument so erected . . . " 1904 Va. Acts Ch. 29 [emphasis added]. Amendment #1 added language to permanently care for, protect or preserve existing monuments, and authorized appropriations for monuments already existing or in progress, as well as those to come. Amendment #2 likewise provided a funding mechanism for care and preservation of existing monuments. Amendment #7 changed the future perfect passive to the present indicative: "[i]f such shall be erected" to "[i]f such are erected," further clarifying it applies to existing monuments. Amendment #9 expanded the law's protection explicitly to proscribe removal of existing monuments. The entire 113-year history of the law has been continuous expansion, widening coverage, and greater protection; never reduction or exclusion of monuments. In all its

iterations it has always prohibited local officials and any other persons from disturbing or interfering with existing monuments.

The Defendants' brief cites the Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia (Vol. 2 of Senate Document No 5, pp. 506 - 507, their Attachment 2, which says that in 1997 "there was no substantive change in the law." This supports the Plaintiff's position, because it confirms the law protected monuments erected before 1997, and still protected them after 1997.

The Defendants' Brief brings up the failed 2016 amendment, when a majority of the General Assembly passed legislation to overturn the Danville ruling, but the Governor vetoed it. Defendants' Brief p. 12. A failed amendment has no legal consequence. cf. Neal v. Fairfax Cnty. Police Dep't, Opinion Letter, Case No. CL-2015-5902 at n. 3 (Va., Cir. 2016, Smith, J.) (responding to arguments about vetoed legislation: "this Court is bound by the statute as it exists. It would be improper, under these circumstances, for this Court to attempt to divine how the statute may someday read or how it may have read, or what was the intent of the General Assembly in passing legislation that [the governor] subsequently vetoed.") The Monument Protection law remains in force in Virginia and the Plaintiffs properly invoke it.

D. The Danville case is inapposite

The Defendants' brief debates the extent to which the retroactivity rationale in Heritage Pres. Assoc. Inc et al v. City of Danville Virginia, et al., Case No. CL15000500-00 (December 7, 2015) (Final Order, Reynolds, J.) (the "Danville decision") is *dicta.* Defendants' Demurrer Brief p. 7. However one labels it, that aspect of the Danville decision erred — and in any event it is not binding on any other Circuit Court in the Commonwealth. The "retroactive effect" 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 originally enacted in 1904 to

protect. 1904 Va. Acts Ch. 29. The argument might be considered if the Defendants' decision to remove the Lee monument occurred decades ago. It did not. The decision occurred in February 2017. (Complaint ¶28.) The Defendants are bound by the law as it is today. The law proscribes removing monuments that exist, now.

The Danville rationale, and the Defendants' brief relying on it, mistakenly look backwards because they misapply a policy of statutory construction disfavoring retroactivity (which the Defendants acknowledge has an exception for remedial laws, like this one) (Defendants' Brief p. 6). That policy of statutory construction is intended to prevent amendments from altering the relation of private parties *ex post facto*, create unfairness by imposing after-the-fact obligations. See Foster v. Smithfield Packing Co., Inc., 10 Va. App. 144 - 149, 148, 390 S.E.2d 511, 513 (1990) (holding workers compensation 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." Foster, 10 Va. App. at 148 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." Foster, 10 Va. App. at 147. An amendment years later adding coverage for carpel tunnel syndrome did not apply retroactively back to when the Plaintiff contracted it, since at the time "it was not compensable." Foster, 10 Va. App. 148. 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." Foster, 10 Va. App. 148.

This historic preservation law serves the remedial purpose of protecting veterans' memorials. Cohen v. Fairfax Hosp. Assn'n 12 Va. App. 702, 705, 407 S.E.2d 329, 331 (1998) (exploring distinction between laws affecting relations of private parties

and remedial legislation) ("Cohen"). Remedial legislation as the Defendants admit "may be applied retroactively." Defendants' Demurrer Brief at 6. 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. Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 873, 30 S.E.2d 686, 688, (1944).

And the Danville Order rationale's construction, or perhaps deconstruction, of the statute was the exact opposite of what the legislature intended. It would exclude all monuments in cities erected before 1997. A multitude of monuments to the French and Indian War, or the American Revolution, or the War of 1812, or the Mexican War, or the Civil War, or World War I, or II, or the Korean War, or the Vietnam War, would lose protection; it excludes all but the most recent memorials to conflicts involving the Middle East. An amendment intended to broaden the law's coverage cannot be construed instead to eviscerate the law, to defeat its purpose. See Carmel v. City of Hampton, 241 Va. 457, 460, 403 S.E.2d 335 (Va., 1991)(stating "[r]emedial statutes are to be construed liberally to remedy the mischief to which they are directed").

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 (Atty General Opinion Exhibit 2 pp. 1-2) The Attorney General called *in pari materia* in interpreting §15.2-1812 the criminal statue §18.2-137 which itself was amended in 1999, making the desecration of monuments described in §15.2-1812 a crime. See 1999 Va. Acts. Ch 625 (reflecting amendments to include war memorials covered by §15.2-1812). Desecration of all monuments is a crime, regardless of that 1999 amendment. As

footnote 5 of Attorney General 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 now.

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]. The Virginia Supreme Court has stated that the word "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., 251 Va. 240, 243 -245, 467 S.E.2d 468, 469 (1996) ("Sussex").

In addition to considering the words in the statute the Court should consider a word it does not use: "hereafter." None of the 12 amendments in 113 years used the word "hereafter" to clarify that the law protects only monuments erected after that amendment. Sussex, 251 Va. 240, 243 (stating that Court cannot judicially amend statue to insert word "hereafter"); Cohen 12 Va. App. 702, 710 (stating that omission of the words "hereafter made" negates possibility that intent is prospective only).

In sum, *dicta* 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.

E. The Monuments meet even the erroneous Danville standard

Any doubts regarding the coverage of the Monument Protection Law before 1997 are put to rest by the City's formal re-acceptance of the cleaned and restored Lee and Jackson monuments as stated in Complaint ¶21. As of 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). Manifestly, both the Lee and Jackson statues are within the geographic limits of the city of Charlottesville, they are both Confederate monuments as well as memorials to veterans of the War Between the States; and whatever the situation might be with other monuments erected before 1998 — these both clearly came within the Monument Protection Law by the City's re-authorization and re-acceptance in 1999.

V. Count Two: City acts *ultra vires* states a cause of action

Complaint Count Two ¶¶ 42- 47 follows inexorably from Count One; from the determination that Va. Code § 15.2-1812 prohibits local officials from removing the Lee monument. The Complaint states removal is not only unauthorized, it is illegal. Va. Code § 15.2-1812 (stating "it shall be unlawful for authorities of the locality, or any other person or persons, to disturb or interfere with [which] includes removal of, damaging or defacing monuments") (Complaint ¶22).

Virginia observes the Dillon Rule: local governments are not sovereign in themselves and exercise "only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." [citations omitted] Sinclair v. New Cingular Wireless PCS, LLC, 283

Va. 567, 727 SE 2d 40, 44 (2012) ("Sinclair"). It is a rule of strict construction. Tabler v. Board of Supr's of Fairfax County, 221 Va. 200, 202, 269 SE 2nd 358 (1980) ("Tabler").

In this case, the legislature absolutely prohibits removal of the Lee monument, in Va Code §15.2-1812. City officials are expending tax money on an illegal endeavor, and the Plaintiffs properly state a cause of action to thwart it. Complaint ¶ 14 asserts that the powers of City Council are "conferred by the General Assembly of the Commonwealth of Virginia;" Complaint ¶ 43 states the Defendants "have no legal authority to remove the Lee statue from Lee Park, to rename Lee Park, to place additional monuments in Jackson Park, or to rename Jackson Park." Complaint ¶ 44 explicitly cites the Dillon Rule, and Complaint ¶45 states the members of City Council have "acted outside the scope of their lawful authority." That properly avers a cause of action for acts *ultra vires*.

Demurrer ¶ 2 objects that claims of the City taxpayer Plaintiffs "are not ripe" because the Complaint "fails to state any specific expenditure of public funds." To the contrary, The Complaint and Exhibits do aver unauthorized expenditures of public funds, and specific amounts to be expended, as detailed *supra.* in the standing argument p. 7. Complaint ¶¶ 28 - 32, 44, 45, & 46 and Complaint's request for relief, pp. 15 & 16, specify unauthorized acts, and seek a declaratory judgment and injunction as against prospective expenditures of public money, as well as damages to reimburse unauthorized expenditures thus far. The issue is ripe for adjudication.

Demurrer ¶ 6 asserts that the Defendants' acts are not *ultra vires* because the City has authority to "operate, maintain regulate and improve" parks, so they may redesign and rename Lee and Jackson Parks, citing Virginia Code §§15.2-1800, and 15.2-1806. That authority is modified and limited by Article 3 of the same title: Virginia Code §15.2-1812. They cannot disturb or interfere with a Confederate monument, according to a provision in Article 3 of the same title: Virginia Code §15.2-1812. The

Demurrer does not controvert that Jackson is a Confederate monument; only that Lee is. Whether in either park a change amounts to authorized maintenance and improvement, or an unauthorized disturbance or interference which is *ultra vires*— building a box to obscure a monument or just planting a tulip — will entail case-by-case decisions. Count Two as well, was properly pleaded.

VI. Count Three: Violation of McIntire's gifts, states a cause of action

Demurrer ¶ 7 in challenging Count Three erroneously asserts the Complaint "identifies only two conditions:" that the properties be used as parks and that there be no buildings, and states neither condition was violated. The Complaint does not assert these are only two conditions; to the contrary it details the violation of several other terms of McIntire's gifts — for example, changing the name of Jackson park. Complaint ¶¶ 19, 30, 47, 48, 51, 53 & 54; Exhibits D& E.

The Defendant's brief, not the Demurrer, controverts whether the City is bound to use the name Jackson Park. We object to the Defendants' brief arguing grounds not specified in the Demurrer, and object as well to their brief citing an exhibit not in the Complaint, McIntire's correspondence, gleaned from the National Register of Historic Places Registration form. Defendants' Brief pp 14-15.

The Defendants' Demurrer brief at p. 23 deprecates the term "to be known as Jackson Park" for occurring only in a "whereas clause." The brief is inaccurate: the Complaint and its exhibits aver the name "Jackson Park" is specified both in the deed, and also in the City's acceptance of the deed "upon those terms and conditions." Complaint ¶ 19 refers to and Complaint Exhibit E (admittedly difficult to read) reproduces, an extract from the Minutes of the Charlottesville Board of Alderman on January 13, 1918, which reads:

> The Mayor presented a deed from Paul G. McIntire to the City of Charlotesville conveying to it the "McKee' property to be known as "Jackson Park." Said deed was read and the gift accepted upon the terms and conditions as therein set forth. [quotes in the original].

Neither the deed wording nor the City's acceptance can be considered precatory or without purpose. "No word or clause in [a deed] will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." Squire v. Virginia Housing Dev. Auth, 287 Va. 507, 516, 758 S.E. 2d 55 (2014) see also Minner v. Lynchburg 1204 Va. 180, 189, 29 S.E. 2d 673 (1963) (saying "a deed will be so interpreted as to make it operative and effective in all its provisions . . . . Every word, if possible, is to have effect). The name Jackson Park was part of the conveyance's stated purpose, explicitly stated in quotes in the City's acceptance "on those terms and conditions." It should be given effect.

The Defendants' brief relies on cases discouraging courts from construing deed conditions to work a forfeiture or reversion and defeat a vested estate. Defendants' Brief p. 23, citing Roadcap v. County School Bd. of Rockingham County, 194 Va. 201, 72 S.E.2d 250, 253 & 254 (1952) ("Roadcap") and Martin v. Norfolk Redevelopment & Housing Authority, 205 Va. 942, 140 S.E. 2d 673 (1965) ("Martin") Neither the Complaint nor the Demurrer furnish grounds for this argument: the Complaint does not seek a forfeiture or reversion (Complaint ¶¶ 15-16, request for relief).[3] The Demurrer nowhere mentions forfeiture or reversion. Cases reciting the general policy disfavoring forfeiture and reversion are not pertinent to the case at bar.

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[3] For purposes of standing Complaint ¶ 5 describes Plaintiff Phillips as representing the interest of the McIntire family "in the event of a reversion or forfeiture or monetary damages" — but the whole point of the litigation is to restore the *status quo ante*, to avoid the consequence of a breach, whatever that might be.

Roadcap was about a premature attempt to enforce a condition upon a contingency that had not occurred and might never occur: "if the public free school system now in force in Virginia ever becomes extinct." Roadcap, 194 Va. at 201, 203. In contrast, the Jackson Park term has vested. The City accepted and implemented the terms of the conveyance, and the name Jackson Park graced the park for nearly 100 years. That the Jackson Park deed includes no reverter or forfeiture clause begs the question of what does happen when a promise faithfully kept for 100 years, is broken? Plaintiffs seek an injunction to return to the *status quo ante*, to avoid whatever might follow from a breach.

Martin arose out of an eminent domain proceeding to quiet title by buying out any reversionary interests from a 1922 park conveyance, and held that once a timed condition was met, fee simple title vested in the City without condition. Martin, 205 Va. at 942 - 943 & 947. It is inapplicable because the name Jackson Park was not a timed condition; there was no date by which the requirement had to be met, nor upon which the obligation expired.

Further, Complaint ¶ 50 says that the City holds McIntire's gifts "in trust for the use, benefit and enjoyment of its citizens, including Plaintiffs Payne, Yellott, Tayloe, Amiss, Weber and Smith" [emphasis added]. Complaint Exhibit B indicating that the City accepted the gift of Lee Park "on behalf of the city of Charlotesville and all the citizens thereof" may give rise either to an express trust, or to a resulting trust. See Cody v. U.S., 348 F. Supp. 2d 682, 692 (E.D. Va., 2004) (summarizing Virginia law on trusts; express, resulting and constructive). The grantor McIntire conveyed title to the grantee, City of Charlottesville. See Austin v. City of Alexandria, 265 Va. 89, 95, 574 S. E. 2d 289, 292, (2003) (stating title transfer necessary for trust). The beneficiary was a third party, city citizens: "the city of Charlotesville and all the citizens thereof." Complaint Exhibit C; see in re Dameron, 155 F. 3d 718, 722 (4th Cir. 1998) (discussing trust created

when parties "manifest an intention that certain property be held in trust for the benefit of a third party"). McIntire's intention as grantor and the City's intention as grantee was "that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . . no technical words or formula of words are required to create an express trust." Cody 348 F. Supp. 2d at 692. The Complaint properly pleads the trust in Complaint ¶ 50 and breach of the terms in Complaint ¶ 51, and neither the Defendants' demurrer nor their brief contests this issue.

Complaint ¶ 51 states the resolutions on removing the Lee monument and renaming and reconfiguring the parks violate the terms of McIntire's gifts, citing Complaint Exhibits F, G, and H. Complaint ¶ 52 asserts that the City cannot modify the terms of McIntire's gifts. Complaint ¶ 53 further states that the Resolutions on selling the Lee statue and renaming the parks are in violation of the terms of the gifts, and are void. Complaint ¶ 54 states that the City is in violation of "the terms and intentions of the original gifts of the statues and parks, thereby creating a cloud of the title to the detriment of the residents and taxpayers." The Complaint request for relief p 15 -16 asks for declaratory relief and injunction, to return to the *status quo ante*. The Demurrer contests none of these averments.[4]

In Count Three the Plaintiffs have properly stated cognizable causes of action upon which relief can be granted, and h the Demurrer must be denied.

[4] Demurrer ¶ 6 contesting Count Two asserted that the City has authority to rename and reconfigure the parks. Demurrer ¶ 7 contesting Count Three does not make the same argument, or any argument, that the City has authority to abrogate the terms of McIntire's gifts or the trust.

Conclusion

The Plaintiff respectfully requests that the Court deny the Defendants' Demurrer in its entirety.

Respectfully submitted:

_____ (date) August 1, 2017

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Certificate of Service

I certify that on August 1, 2017, I had the foregoing Plaintiff's Brief: Demurrer, hand delivered to:

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Respectfully submitted:

_____ (date) August 1, 2017

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Exhibit 1

Table: standing for each Plaintiff

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STANDING
EXHIBIT: 1
PAGE: COVER LETTER

July 15, 2009

HAND-DELIVERED

Hon. Jay T. Swett, Judge
Charlottesville Circuit Court
315 East High Street
Charlottesville, VA 22902

Re: *Coalition to Preserve McIntire Park v. City of Charlottesville & VDOT*

Your Honor:

Enclosed for your consideration and endorsement is the final order in the above-styled matter. Should you have any questions regarding this order, please do not hesitate to contact this office or that of the Attorney General.

Thank you for your attention to this matter.

Sincerely,

Francesca Fornari

Francesca Fornari
Assistant City Attorney

enclosure

Rec
7-15-09

Exhibit 1— Standing

	Monument Protection Law	Ultra Vires	Individual standing	Corporate standing
	Statutory standing: citizen of Virginia, seeking to preserve monument to veteran of listed war; "interested person"	City taxpayer and resident whose taxes are funding city action, including salaries, already expended and to be spent on unauthorized and illegal endeavor	Particular harm, even if "trivial," different from the public at large	Individual (interest of the corporation); and/or representative derived from individual standing of members of corporation
Plaintiff & fact source				
Frederick Payne Complaint ¶ 2 & ¶¶ 32, 34.	✓	✓	Utilizes both parks and monuments on a regular basis; also Charlottesville citizen, taxpayer, and voter, and a beneficiary of McIntire resulting trust.	
John Bosley Yellott, Jr Complaint ¶ 3 & ¶¶ 32, 34.	✓	✓	Utilizes both parks daily; teaches history using the monuments; Charlottesville citizen, taxpayer and voter also financial interest outcome of litigation; serves as Executive Director of The Monument Fund, Inc. established for their preservation, also as Charlottesville citizen, beneficiary of McIntire resulting trust.	
Edward D. Tayloe II Complaint ¶ 4 ¶¶ 32, 34.	✓	✓	Combat veteran; past President Lee-Jackson Foundation; special interest in war memorials; also as Charlottesville citizen, a beneficiary of McIntire resulting trust.	
Betty Jane Franklin Phillips Complaint ¶¶ 5 & 34	✓		Collateral descendant of McIntire; represents interests of McIntire family.	

Edward Bergen Fry Complaint ¶ 6 & ¶¶ 32, 34.	✓		Great-nephew of sculptor Henry Shrady; particular interest in protecting artwork which is companion piece to US Grant memorial sculpture, because of ancestral connection to sculptor.
Virginia C Amiss Complaint ¶ 7 & ¶¶ 32, 34.	✓	✓	Charlottesville citizen, a t registered voter and taxpayer, beneficiary of McIntire resulting trust.
Stefanie Marshall Complaint ¶ 8 & ¶¶ 32, 34.	✓		Virginia citizen (Albemarle County) Chair, The Monument Fund, Inc., personally expended money and effort cleaning and removing graffiti from Lee Monument
Charles L Weber, Jr. Complaint ¶ 9 & ¶¶ 32, 34.	✓	✓	Combat veteran, special interest in preservation and protection of war memorials; also spokesperson for The Monument Fund, Inc.; also as Charlottesville citizen and taxpayer, and beneficiary of McIntire resulting trust.
Lloyd Thomas Smith Complaint ¶ 10 & ¶¶ 32, 34.	✓	✓	Charlottesville citizen and taxpayer; combat veteran; special interest in preservation and protection of war memorials; also agent for private citizens who donated money for Lee and Jackson Monument restoration in 1997-1999; also as Charlottesville citizen, a beneficiary of McIntire resulting trust.

Virginia Div., Sons. of Conf. Veterans Inc. "(SCV") Complaint ¶ 11 & ¶34	✓		Virginia corporation, and citizen, "interested person" under Mon. Prot. law for preserving Confederate monuments; SCV have an interest in in preserving and protecting Lee and Jackson and their parks; contributed funds to 1997-1999 restoration	Derived from individual standing of Plaintiffs Griffin and Earnest
Anthony M. Griffin Complaint ¶ 11 & ¶ 34	✓		Virginia citizen, SCV Division Commander, express interest in preserving and protecting Lee and Jackson and their parks.	
Britton Franklin Earnest, Sr. Complaint ¶ 11& ¶ 34	✓		Virginia citizen, Heritage Defense Coordinator for SCV, express interest in preserving and protecting Lee and Jackson and their parks.	
The Monument Fund, Inc. Complaint ¶ 12 & ¶¶ 32, 34.	✓	✓	Virginia corporation, and citizen, "interested person" under Mon. Prot law for preserving Confederate monuments; Fund created for express purpose of saving monuments, and park improvements	Derived from individual standing of Plaintiffs Yellott, Marshall, and Weber