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August 31, 2017

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

Via Hand Delivery

Re: *Frederick W. Payne et al v. City of Charlottesville et al*
Case No. CL17000145-00

Dear Llezelle:

Kindly file the attached Plaintiff's Memo responding to the Supplemental Reply Brief filed yesterday afternoon by Defendants' counsel.

Thank you.

Very truly yours,


Ralph E. Main, Jr.

cc: S. Craig Brown, Esquire
John W. Zunka, Esquire

received 8.31.17

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE , et al.
Plaintiffs,

v.

Case No. CL 17 - 145

CITY OF CHARLOTTESVILLE, VIRGINIA, et al.
Defendants

Plaintiff's Memo: August 2017 Attorney General Opinion

Summary

- 1) The Attorney General's advice is nonbinding.
- 2) The advice supports Count Three.
- 3) Otherwise there is nothing new, no reason to reconsider this Court's decisions.

1) The Attorney General's advice is nonbinding.

An Attorney General's opinion is advisory only. It "is not binding on the Court." Twietmeyer v. City of Hampton, 255 Va. 387, 393, 497 S.E.2d 858 (1998) (declining to follow Attorney General opinion that ordinance lacks rational basis); Neal v. Fairfax Cnty. Police Dep't (Case No. CL-2015-5902, Va. Cir., 2016)(Opinion Letter, White C.J.) at n. 5 (declining to follow Attorney General opinion that license plates are "personal information").

This opinion is a departure from the Attorney General's longstanding policy not to issue an opinion when a matter is *sub judice*:

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August 31, 2017
(Date & Time) 9:51 AM
City of Charlottesville
Circuit Court Clerk's Office
Lizette A. Dugger, Clerk
By Whitney Spivey
Deputy Clerk

. . . it is not necessary or desirable for the Attorney General to express an opinion upon matters which are currently being litigated, and it is, therefore, the policy of this Office not to do so unless requested by the court before which the matter is pending. Adherence to this policy ensures that this Office will not render opinions upon questions whose answers may bring it into conflict with judicial tribunals. . . . This practice is analogous to the declination of the United States Attorney General to render an opinion upon a question contemporaneously pending before the courts for determination. 1977-1978 Op. Atty Gen. Va. 31, Opinion of AG Marshall Coleman to George W. Jones, Memb. House of Del. (October 25, 1977)[citations omitted].

The opinion is not entitled to the weight impartial advice in the absence of litigation might have.

2) The advice supports Count Three.

The Attorney General advises “[s]ome monuments may be subject to restrictions found in instruments transferring ownership of the monument to the locality or local governmental entity or restrictions imposed as a result of subsequent actions of the locality.” Opinion 17-032, __Op Atty Gen’l __ (Virginia Department of Historic Resources) (August 25, 2017) p. 1. The opinion suggests “careful investigation of the history and facts concerning a particular monument in a given locality should be completed to determine what, if any, restrictions might apply.” Opinion pp. 5-6.

Complaint Count 3 details restrictions in the instruments transferring ownership, such as the name Jackson Park and the prohibition on other “buildings.” In recommending consideration of such restrictions, the Attorney General’s opinion supports overruling the Demurrer as to Count Three.

2) Otherwise there is nothing new, no reason to reconsider the Court's decisions.

On May 2 this Honorable Court after reviewing voluminous briefs, researching the law, and presiding over a six hour evidentiary hearing, came to a preliminary decision that the Monument Protection law applies to Charlottesville's monuments.¹ May 2 Hearing Transcript ("Tr.") pp. 10, 14, & 45 (listing pleadings and cases reviewed); Tr. pp 275 —292 (Court's conclusions on Monuments).

Nothing in the Attorney General's advice offers a reason to reconsider that determination. The advice to Virginia's Department of Historic Resources recommends guidelines to construe various types of monument authorization laws. It does not mention Charlottesville's statutes. It does not address or dispute this Court's preliminary conclusions about them.

The Attorney General's advice reiterates the incorrect reasoning in the Danville case as to "retrospective" application of an amended law. The opinion omits entirely any discussion of the exception for remedial legislation, or that proscribed conduct depends on the law at the time of the act. The Defendants already argued, the Plaintiffs rebutted, and the Court addressed at length the rationale of the Danville decision. The Court concluded it had erred. Tr. p. 280 (stating "I don't agree that this statue, as

¹ On May 2 the Court took evidence and heard argument on Plaintiffs' motion for a temporary injunction from 2:00pm to 8:02pm. Tr. Cover & p. 2; Tr. p 228 (noting the allotted two-and-a-half hours was exceeded). The Plaintiffs introduced the testimony of seven witnesses, and multiple exhibits. Tr. pp. 4, 5 & 228 (listing witnesses and exhibits; completion of evidence). The Defendants introduced limited evidence during voir dire and by cross examining Plaintiff's witnesses, but otherwise chose to offer none of their own. Tr. p 4; Tr. pp. 228 - 229 (listing witnesses; direct, cross and voir dire). After retiring to consider the briefs, evidence, and arguments, the Court returned to deliver a considered decision. Tr. pp. 265 -267 (returning for decision).

intended or written, applies only to monuments built after that statue was passed . . . [a]nd in that regard, I disagree with the opinion from Danville”).

The Court considered the facts and decided Charlottesville’s statues are Confederate monuments and war memorials. Tr. p. 38 (noting “if it wasn’t clear [they are Confederate monuments] you wouldn’t be here”); Tr. p. 277 (observing “. . . it is clearly a war memorial or a monument to a veteran of war. I mean, that’s why people are upset about it”). Accordingly the Court found the Monument Protection law applies to them. Tr. p. 277 (“[D]o the statutes, 15.2-1812, 1812.1, and 18.2-137, do they apply to this statue? . . . And I think they do apply to the Robert E Lee statue.”) Tr. p. 278 (“to me it’s inescapable, it means to cover those statues.”)

The Court reviewed the law and observed that it “strains credibility” to think the legislature intended an amendment to deny protection to existing monuments “to the Revolutionary War, World War II, World War I, the War Between the States,” or for that matter “an unpopular war” like Vietnam. Tr. pp. 278 -279 (stating purpose is to protect monuments even to “an unpopular war”); tr. p. 280 (interpretation strains credibility); tr. p. 289 (“[t]here were “thousands of these in existence at the time this was passed. I cannot believe that in their mind they were thinking, ‘this does apply to any of those, this only applies to ones in the future.’ I just don’t agree with that.”)

On what the Court called “the central issue in the case,” and “the main one” the Court found the plaintiffs “likely to prevail on the merits because of my interpretation of [Va Code §§] 1812 and 1812.1 and 137.” Tr. pp. 277 & 281. The Court observed “the locality can’t remove one of these things unless the legislature passes another statue and allows it.” Tr. p. 280. Accordingly the Court granted a temporary injunction: “the Lee statue cannot be moved, removed, or sold for six months.” Tr. p. 288.

The Court did not include the Jackson statue only because "there's been no resolution or ordinance to attempt to sell or move or damage that." Tr. p. 285. But the Court left open the possibility of revisiting the injunction if "they next pass something that says they are going to sell the Jackson statue." Tr. p 292. The City now is doing so.

Conclusion

The Court's conclusions were provisional. But nothing in the Attorney General's opinion warrants reexamining them.

Respectfully submitted:



(date) August 30, 2017

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Certificate

I hereby certify that true and accurate copies of the foregoing Plaintiff's Memo were hand delivered on August 31, 2017 to:

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City Attorney and Deputy City Attorney
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414 Park Street
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