VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, et al,

Plaintiffs,

v. Case No. CL17000145-00

CITY OF CHARLOTTESVILLE, VIRGINIA, et al,

Defendants.

**REPLY BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER**

COME NOW, Defendants, by counsel, and in their Reply Brief in Support of Demurrer, state as follows:

1. Defendants rely on their arguments previously articulated in the Brief in Support of Defendants' Demurrer.
2. In addition, Defendants also rely on this Reply Brief in Support of Defendants' Demurrer.

**ARGUMENT**

**I. The Plaintiffs' standing cases are inapplicable.**

3. Generally, the cases cited by the Plaintiffs in support of their standing argument, including Mattaponi Indian Tribe v. Commonwealth, 261 Va. 266, 541 S.E.2d 920 (2001) and the various Chesapeake Bay cases all concern environmental Virginia Code sections that incorporate and apply the Article III standing test from the United States Constitution.
4. The federal standard is not relevant to this case as Virginia Code § 15.2-1812 does not incorporate the Article III standing test nor does Virginia Code § 8.01-184.





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## II. The reasoning in support of the Governor's veto of the proposed amendment to Virginia Code § 15.2-1812 and the proposed amendment itself do and should have legal consequences.

5. The Plaintiffs argue that the failed amendment to Virginia Code § 15.2-1812 has no legal consequence. (Pl. Brief p. 14.)
6. Plaintiffs cite Neal v. Fairfax Cnty. Police Dep't., 94 Va. Cir. 485 (Fairfax Co. 2016) in support of their argument that the failed 2016 amendment to Virginia Code § 15.2-1812 resulting from the Governor's veto and the stated reason for said veto should not be considered.
7. The Judge in Neal makes the point cited by Plaintiffs in a footnote relating to a statutory definition. Neal does not address the retroactivity issue. Additionally, no authority is cited in support of this statement.
8. Moreover, statutory construction provides that legislative history and extrinsic evidence is admissible if the statute is ambiguous to help ascertain the legislative intent. Virginia-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993).
9. Defendants, in this and their initial brief, first contend that the statute is unambiguous on its face and it is apparent that it does not apply retroactively.
10. However, if the Court finds that the statute is ambiguous about whether it applies retroactively, then it is appropriate to review prior versions of the statute and the legislative history of the statute. Logically and as a matter of common sense, it is relevant and appropriate to consider failed subsequent amendments and statements by

the Governor in vetoing the proposed amendments as a natural part of the statute's cumulative history and as extrinsic evidence that sheds light onto the legislature's intent with respect to the retroactivity issue.

11. Therefore, the failed subsequent amendment and the statements by the Governor in vetoing the amendment do and should have legal consequences.

**III. The statute in the Sussex case is distinguishable from the statute at issue in this case.**

12. Plaintiffs rely on Sussex Community Servs. Ass'n v. Virginia Soc. For Mentally Retarded Children, Inc., 251 Va. 240, 467 S.E.2d 468 (1996) in support of their contention that the use of "any" in a statute makes the statute retroactive in its application.

13. In Sussex, the Virginia Supreme Court was considering a Code section that was amended to *delete a restrictive time* period in favor of putting in the word "any". Id. at 244-45, 467 S.E.2d at 470.

14. This change seems to be the legislature consciously removing the date restriction in favor of broadening the statute.

15. However, it does not seem to logically follow that then every statute that uses the word "any" applies both prospective and retroactively and should always be given that effect. This point is made in the Sussex dissent. Id at 245, 467 S.E.2d at 471.

16. The Sussex opinion should be limited to the facts of that case, which are not applicable to this case.

17. In this case, the pertinent amendment relied on by Plaintiffs added the term "locality" to the Code section, but it did not also then eliminate a date restriction and add the term "any" thus making the statute retroactively applicable to localities under the

Sussex rationale. See Software AG of N.A. v. Fairfax County Bd. of Sup'rs, 40 Va. Cir. 381 (Va. Cir. 1996) ("In *Sussex,* the Supreme Court found that an amendment to Virginia Code § 36–96.6(C) operated retroactively because the General Assembly had purposefully included the word 'any' in the body of the amended statute without any words of limitation. While Code § 58.1–3984, likewise, makes ample use of the word 'any,' the word 'any' was not incorporated into the body of the statute at the time of the amendment, as in the Sussex case, but rather was part of the statutory language before the legislature amended the statute of limitations.").

## IV. There are only two conditions in the McIntire deeds, neither of which have been violated.

18. The City of Charlottesville is not required to maintain the name Jackson Park or Lee Park under the terms of the deed from McIntire.

19. "A circuit court 'considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings.'" Dodge v. Trustees of Randolph-Macon Woman's College, 276 Va. 1, 661 S.E.2d 801, 803 (2008) (quoting Ward's Equipment, Inc. v. New Holland N. Am., Inc., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997)).

20. The deeds speak for themselves and the terms of the gift and the conveyance follow the granting language in the deeds.

21. As was previously argued in Defendants' Brief in Support of Defendants' Demurrer, "whereas" recitals are the preamble to deeds and not part of the document's operative language, which would create binding conditions. Roadcap v. County School Board, 194 Va. 201, 72 S.E.2d 250 (1952).

22. There are only two explicit conditions in the passage of title to the properties: that each property perpetually be a public park and that no buildings be erected on the properties.

23. The deed is unambiguous on its face that those are the only conditions of the gifts as they follow the granting language and both deeds explicitly state "[t]his conveyance is made upon *condition* that said property ..." (emphasis added).

24. In fact, the language in the preamble of the Jackson deed supports the view that the park being called "Jackson Park" is not a condition. The deed states that McIntire "*requested* that said property be conveyed to the city and that it be known as 'Jackson Park.'" A request is by definition diametrically opposed to a requirement. A request may either be accepted *or rejected.* Whereas a requirement does not provide the same options; it must be complied with.

25. If the name of "Jackson Park" or "Lee Park" were a condition of the gifts and required, then McIntire could have simply added language to that effect in the respective deeds along with the two other explicit conditions that were and are required of the City of Charlottesville.

26. Neither of the explicit conditions have been violated nor has the City of Charlottesville or the City Council of Charlottesville taken any action or adopted any resolution that would indicate a future violation of these conditions.

WHEREFORE, for the above reasons as well as the reasons articulated in Defendants' Brief in Support of Demurrer, Defendants request that the Court GRANT Defendants' Demurrer.

Respectfully submitted,

DEFENDANTS CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*

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## CERTIFICATE

I hereby certify that a true copy of the foregoing Brief was mailed this 11th day of August, 2017 to:

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