COMMONWEALTH OF VIRGINIA

Timothy K. Sanner
P.O. Box 799
Louisa, Virginia 23093
(540) 967-5300
(540) 967-5681 (fax)

Cheryl V. Higgins
501 E. Jefferson St., 3rd Floor
Charlottesville, Virginia 22902
(434) 972-4015
(434) 972-4071 (fax)

Susan L. Whitlock
135 West Cameron Street
Culpeper, Virginia 22701
(540) 727-3440
(540) 727-7535 (fax)

Sixteenth Judicial Court

Albemarle Culpeper Fluvanna Goochland
Greene Louisa Madison Orange Charlottesville

Richard E. Moore
614 East High Street
Charlottesville, Virginia 22902
(434) 970-3760
(434) 970-3038 (fax)

Dale B. Durrer
P.O. Box 230
Orange, Virginia 22960
(540) 672-2433

Claude V. Worrell
350 Park Street
Charlottesville, Virginia 22902
(434) 970-3473
(434) 970-3501 (fax)

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Ralph E. Main, Jr., Esq.
Dygert, Wright, Hobbs & Heilberg
415 4th Street, N.E.
Charlottesville, Va. 22902

Lisa Robertson, Dep. City Attorney
Charlottesville City Atty's Office
P.O. Box 911
Charlottesville, Va. 22902

S. Braxton Puryear, Esq.
P.O. Box 291
Madison, Va. 22727

Richard H. Milnor, Esq.
Zunka, Milnor, and Carter, LTD
P.O. Box 1567
Charlottesville, Va. 22902

Re: **Payne, et al. v. City of Charlottesville, et al.**–Ruling on Attorney's Fees and costs
Argued September 13, 2019; Cir. Crt. file no. CL 17-145

Dear Counsel:

The remaining issue in this case is that of attorneys' fees and costs of litigation. The question is whether--and if so, how much--attorneys' fees and costs should be assessed against the City of Charlottesville and awarded to Plaintiffs as the prevailing party in this matter. Plaintiffs are asking for $554,751.60 in attorneys' fees, and $ 49,286.83 in costs, for a total of $604,038.43.

Plaintiffs have sought, from the outset, attorney's fees and costs under Virginia Code §15.2-1812.1, should they be the prevailing party in this matter. Virginia Code §15.2-1812.1 C states that "The party who initiates and prevails in an action authorized by this section shall be entitled to an award of the cost of the litigation, including reasonable attorney's fees."

There are four primary questions in this regard:

1) Does the attorney's fee and cost provision in §15.2-1812.1 apply to a request for declaratory judgment and injunction under §15.2-1812?

2) If so, are the Plaintiffs the prevailing party in this case?

3) If Plaintiffs are entitled to reasonable attorney's fees, what are the reasonable fees in this case?, and

4) What costs are allowed to be reimbursed under the statute?

Does the Attorney's Fee provision in §15.2-1812.1 apply to §15.2-1812 and the relief granted in this case?

The Court has already decided and announced its ruling from the bench that the attorney's fee provision in §15.2-1812.1 does apply to this proceeding and the relief granted under §15.2-1812.

It is my view, as I believe was argued earlier by both Plaintiffs and Defendants at different points, that these two statutes should and must be read *in pari materia*--that is, together as one (along with §18.2-137). See this Court's letter ruling of October 3, 2017, on the demurrer, page twelve, and bench ruling 9/13/19, Transcript pp. 726-27. The statutes relate to each other, and §15.2-1812.1 overtly refers back to §15.2-1812 and §18.2-137. (Virginia Code §15.2-1812 is the civil statute that makes it "unlawful for the authorities of [a] locality…to disturb or interfere with", or remove, damage, or deface, such war memorials or monuments, or prevent the preservation of them, and §18.2-137 makes it a crime to destroy or damage such.)

The court has ruled that the vote to move the statues was contrary to the law and called for action not allowed under the statute, and was subject to the statute and amenable to an injunction, and that Plaintiffs were entitled to the enjoining of such proposed action, and that they did not have to wait until the damage was done before proceeding under this statute to seek relief. Virginia Code §15.2-1812.1 allows for damages for certain encroachment, including physical damage but not limited to that. It also allows and authorizes a private action if the attorney for the locality does not step in to take protective action. That is what happened here. It also sets forth certain guidance as to the damages recoverable. The court ruled that there was encroachment and the threat of imminent harm, but found that there was no actual physical damage or destruction of the statues, at least not by City Council or the City.[1] The Court did rule that there was in fact harm from covering the statues, but that that damages were not easily quantifiable, and that no firm basis in the evidence was given for the Court to estimate or determine those damages. So there has been no award of monetary damages.

However, the operative provision in the statute as to attorney's fees, quoted above, states that the party who brought the action, if it prevails, is entitled to reasonable attorney's fees and costs. This is an interesting provision, in that it does not simply award attorney's fees to the prevailing party, but only to the prevailing party if that is the party who brought the action. Thus, if the City had prevailed, it would not have been entitled to recover its fees and costs from the plaintiffs. It is only if a person brings such an action and prevails that he may recover. So the party who brings the action but is not successful is responsible for his own fees and costs.

[1] Plaintiffs never asserted there was actual physical damage or harm to the statues.

This clearly evinces an intent to encourage--certainly not discourage--such lawsuits by private citizens when the protection of such war monuments and memorials is not shouldered by the locality, and when the locality itself ignores such responsibility (or actually, as here, is inclined to violate it itself). Such a statutory provision should be construed liberally to accomplish its intended purpose and achieve those ends.

Defendants have argued that the attorney's fees provision is and should be limited to relief sought under §15.2-1812.1, relating to damages, and not any action under §15.2-1812, and that since no damages were awarded, no attorneys' fees may be. This is a possible reading but I think not the better, or the most reasonable or appropriate, one. If these statutes are to be read together for any reason they should be read together for all purposes.

Clearly it was the intent of the General Assembly to encourage citizens (and minimize the disincentive of litigation costs) to act on this authority not only by having their own attorney's fees covered if they prevailed, but also by declaring them not responsible for the other side's attorney's fees even if they failed.

Therefore, the key initial inquiry in this case is whether Plaintiffs prevailed.

Did the Plaintiffs Prevail in this case?

In the Court's view the plaintiffs unquestionably prevailed in this case. From the outset it was clear from the pleadings, the evidence, and the arguments of counsel, that the main goal of Plaintiffs was to prevent the statues from being removed, sold, or destroyed. They articulated this specifically in many of the hearings. The injunction and declaratory judgment were the core or heart of this case and the relief they requested. Plaintiffs did ask for damages, but clearly they were neither significant in amount ($500 per councilor, $3000 for the tarps, etc.), nor crucial to their most desired outcome. In addition, from the beginning, they conceded that there had been no actual damage or destruction of the statues, but the whole purpose and impetus for their filing suit was to prevent such damage or destruction. Again, as the Court stated at an earlier stage of the proceedings[2], it would make no sense to say that they had to wait until the damage had been done before they could act (or to be entitled to recover attorneys' fees).[3]

In any event, as Plaintiffs' counsel has repeatedly articulated and argued, over two years ago the City Council voted to move the Robert E. Lee statue, and subsequently indicated its desire and intention to move the Jackson statue, and both are still here and an injunction has been granted. The "prevailing party" is the one in whose favor judgment was rendered. Lambert v. Sea Oats Condo Ass'n, 293 Va. 245, 256 (2017), footnote 5, citing West Square, L.L.C. v.

[2] See Court's letter ruling on Demurrer of October 3, 2017, pp. 12-13.

[3] This would encourage parties, otherwise acting in good faith to prevent such damage or destruction, to wait and allow the harm or damage to occur so that they could ask for and be reimbursed for attorneys' fees. This makes no sense, is contrary to reason and public policy, and, I think, the intent of the statute.

Communication Techs., 274 Va. 425, 433 (2007). Clearly Plaintiffs have prevailed. Just as clearly, the City, who resisted this action and fought the plaintiffs and opposed this relief as vigorously as any case I have been involved in, did not prevail. They did not get what they were seeking—permission to remove, sell, or destroy the statues. There is no other reasonable interpretation of this case and its outcome. There certainly were a few rulings along the way that favored Defendants, or some of them, and some claims or issues Plaintiffs did not prevail on—monetary damages and immunity of the individual councilors, for example. But none of those made the City or City Council the prevailing party nor stopped the plaintiffs in their main objective. In the proverbial sense, the City and Council won a few battles but lost the war.

I have already stated from the bench in the last hearing (September 13, 2019) that I believe that the mandatory attorney's fee provision in §15.2-1812.1 C. does apply, and that Plaintiffs did prevail, so I was going to award attorneys' fees, but for various reasons was inclined at that time not to award all of the attorneys' fees Plaintiffs are asking for.

I find that I am bound to award reasonable attorneys' fees under the statute. So this brings us to what are reasonable attorney's fees to which Plaintiffs are entitled.

What is a Reasonable Attorney's Fee Award?

Discussion of Case authority

Lambert v. Sea Oats, above, 293 Va. at 254, reiterates some of factors a court should consider in determining the reasonableness of an attorney fee request:

1) the time and effort expended by the attorney,
2) the nature of the services rendered,
3) the complexity of the services,
4) the value of the services to the client,
5) the results obtained,
6) whether the fees incurred were consistent with those generally charged for similar services, and
7) whether the services were necessary and appropriate.

Lambert cites Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 430 (2012), quoting Chawla v. BurgerBusters, Inc., 255 Va. 616, 623 (1998). In Lambert, as in this case, there was a statute that required attorneys' fees to be awarded to the prevailing party. 293 Va. at 254. The question was what was reasonable. The "prevailing party" was defined as the one in whose favor judgment was rendered. Id. at 256, footnote 5. While stating that the results obtained are a factor to be considered, and ruling that the award of attorneys' fees is not mathematically limited by the damages awarded, the Court does state further that "Damages are of course irrelevant in cases in which none are sought, such as those for … injunctive relief. These cases tend to be

binary, and 'the result obtained' is clear based on whether the relief sought was granted or denied." Id. at 256, footnote 4.

Looking at these factors, the time and effort expended in this case by Plaintiffs' counsel was enormous. This case was lengthy (having been filed in March 2017), and very time-consuming, with numerous pleadings and responsive pleadings, motions, briefs, memoranda, extensive discovery, and very many hearings or other court appearances. The Court finds that Plaintiffs' counsel exerted maximum effort, as did Defendants' various attorneys.

The nature of services rendered was very broad and varied, and not unitary or monolithic. They obviously included meeting with clients, fact investigation, legal and historical research, filing pleadings, motions, briefs; and memoranda, and responding to the same filed by Defendants (including demurrers and pleas in bar), conducting discovery, preparing exhibits, evidentiary hearings, legal argument, and other court appearances, correspondence with opposing counsel, and securing expert witnesses. It involved a massive effort, performed largely by two attorneys and one paralegal.

As to the complexity of the case, it was extremely complicated. This case was one of the most complex cases I have ever heard or been involved in. The case involved statutory construction and interpretation, multiple plaintiffs and multiple defendants, issues of standing, questions of whether the statues were war monuments or memorials and whether the statute applied to such monuments and memorials already erected, whether such were approved or accepted by the locality, common law and statutory immunity, separation of powers, municipal law and the allocation of powers between state and local authorities and the Dillon Rule, lengthy and contested discovery, damages issues, and an equal protection claim. There were more motions and filings, and hearings and court appearances[4] in this case than any other case I can recall. There were more attorneys involved in and appearing in this case than I have ever known (addressed in detail on page 8, below). Plaintiffs' motions, requests, and briefs were opposed and challenged by Defendants at every turn.[5] Defendants also initiated many such of their own.

[4] There were at least 22 hearings or court appearances. I have not counted the motions, but they far exceed that.

[5] Defendants disputed some issues that to the Court seemed self-evident. They contested that these two statues were monuments or memorials to the Civil War/War Between the States or veterans thereof. As the Court has observed from the bench and in letter, it appears obvious that the statue of Lee, the commander of the Confederate forces, is a monument and memorial to him, as he is in military uniform riding his well-known horse Traveller. The Jackson statue is even more so, as he appears to be in battle, also in uniform and on his well-known horse Little Sorrel, who is in an active posture, and the names of three battles or campaigns from the Civil War are actually on the statue. That they are monuments to Civil War generals is the very reason they are so offensive to many and the reason the City wanted to move them in the first place. What they are was acknowledged in a rededication ceremony in the recent past, and was noted on a Civil War Trails marker that had been in place until this litigation. Defendants did the same thing as to whether these monuments and memorials were authorized, permitted, approved, or accepted by the City, when they clearly were, in the beginning when the gifts were made to the City, when they were approved by Council, when they were dedicated in a large ceremony, when they were cleaned, restored, and rededicated a number of years ago, and when the Civil War Trails marker was allowed to be installed. There is no indication whatsoever that they were not there with the permission and authorization of the city. In fact the statues have been lauded on the City's website, at least up until recently.

Defendants fought this case vigorously. There is nothing wrong with this; indeed, it is entirely legitimate and appropriate, and was a good example of our adversarial system at work. However, this figures prominently, in the Court's mind, in determining whether the time spent and work put on this case by Plaintiffs' counsel was reasonable, and I do not see how Defendants expected Plaintiffs would respond and prosecute the suit other than just as vigorously. Lambert acknowledges that attorneys' fees legitimately "will … vary based on the vigor with which the opposing party responds." 293 Va. at 257

The value of the services to the client was obviously very great, given both the effort and resources allocated by them and statements made on the record by various plaintiffs

As to the results obtained, the main objective of plaintiffs from the beginning clearly was accomplished. Throughout the proceeding Plaintiffs' counsel reiterated that their main goal was to obtain an injunction and prevent the statues from being removed, damaged, or destroyed.

The attorneys' hourly rates charged are entirely reasonable and consistent with those customarily charged in this area, in these courts. This was conceded by Defendants, except as to Mr. Walsh, who certainly is a legal specialist.

The sole factor at issue, and the only legitimate question raised in the case, is as to whether the fees being asked for were for services both necessary and appropriate. This is the focus of the discussion and analysis.

As to the appropriateness of the fees charged and sought, an initial question for the Court is "are the total amount of legal services provided and fees requested unreasonable and excessive in and of themselves?"

As to the necessity for and appropriateness of the attorneys' fees as a whole, in the aggregate, and the fairness of assessing such a large amount to the City, when the councilors voted to move the statues and fight the lawsuit, they had to know that it would cause great expense to City of Charlottesville. While not found to be grossly negligent, Council knew of the statute and, with input from the City Attorney, knew that there was a significant question as to whether such vote and approved action violated the statute. The City Attorney told them the law was unclear, and Mayor Signer at one point said that moving the statues was not allowed by the law. They were on notice of the provision that would require the City to be responsible for attorneys' fees if Plaintiffs were to prevail. This was not hidden from them. This was a risk they were willing to take and thus put in jeopardy public funds for this purpose.

The time spent by both sides on those issues was caused by the City and was unnecessary and seemingly accomplished nothing. But by the Defendants taking such positions and contesting the matters, the Plaintiffs had to respond and take further time. They should be reimbursed for such time, which was a large part of the case. Defendants also similarly objected to or did not answer certain interrogatories (or answered them evasively) that they could have answered, resulting in additional hearings. The purpose of such discovery is to narrow the issues and find out what truly was a contested trial issue. Defendants' approach created additional unnecessary time entries by Plaintiffs' counsel on issues Plaintiffs ultimately prevailed on.

Not only did they know that they might have to pay the plaintiffs' attorneys' fees, but both the City and the individual counselors chose to hire outside counsel in addition to, and not in lieu of, the City Attorney, at additional expense to the City and its taxpayers. Council determined that this was not a case where they were content with the City Attorney and his personnel and resources. They reasonably would know that this would result in more work and time by Plaintiffs' attorneys, thus higher legal fees, subject to the above-referenced attorneys' fees provision. Furthermore, four of the five councilors retained separate outside counsel, hiring JonesDay, one of the largest law firms in the country, if not the world. The firm has indicated that they were representing those defendants *pro bono*, so at no charge at all. I think since the beginning of their involvement in the case (which was not from the outset), there have been a total of 14-17 different attorneys involved in the case representing the various defendants; JonesDay alone had 9-10 or more[6], often two or three seated at counsel table for a hearing, and also sometimes 1-4 others in the courtroom. This was a huge allocation of legal personnel. The court has assumed that all of these attorneys were doing work on the case, and that they were not just window dressing. At least five different attorneys (Mr. O'Reilly, Ms. Mankodi, Ms. Franklin, Ms. Harding, and Mr. Rider-Longmaid) argued various points and motions before me, and I am sure that each of them worked on the written motions, memoranda, and briefs that they argued; I also suspect that other attorneys worked on the briefs.[7]

The City should not be heard to say that the amount of time and work put in by Plaintiffs' attorneys, and their resulting fees, were *per se* unreasonable or excessive, and I don't believe they have said this. The total number of hours for the time spent by JonesDay and Zunka, Milnor & Carter had to be just as great as, and very likely much greater than, that submitted by Plaintiffs' counsel, which was largely shouldered by two attorneys.[8] The fact that the JonesDay attorneys were not charging fees does not mean that Plaintiffs' counsel did not have to respond to what they filed, nor that they should similarly work for free. It was reasonable for Plaintiffs to spend significant time considering and responding to their many filings and arguments.

The JonesDay attorneys had significant involvement in the case, but even if I exclude them entirely, there still were at least four and I think five or six attorneys that appeared on behalf of the remaining two defendants, representing the City and City Council. I have trouble finding Plaintiff counsel's time as a whole unnecessary, unreasonable, or excessive.

However, Defendants reiterate that Plaintiffs are only entitled to recover attorneys' fees from them for claims that they prevailed on, and they argue that some of Plaintiffs time is for claims or issues on which they were not successful, and thus they are not entitled to attorneys' fees for those items. In this they are correct. So the only real question in this case as to attorneys' fees is how to apportion the attorneys' fees taking into account the claims or issues

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[6] Plaintiffs assert that at one time Defendants' counsel admitted there were 15 attorneys from JonesDay involved in the case. I do not recall this.

[7] There were yet other JonesDay attorneys whose appearance *pro hac vice* was approved by the Court, and they may have appeared or been on brief as well (viz., Healy, Mizer, Overby, Sooknanan, and Walsh; perhaps others).

[8] If this were a situation where 2-3 local attorneys were opposed only by the City Attorney's office and paid staff, that would likely weigh heavily on what is deemed reasonable. But that is not what we have here. Far from it.

that Plaintiffs did not prevail on (e.g., damages, immunity) and the time spent thereon. Chawla v. BurgerBusters, Inc., 255 Va. 616, 624 (1998) states that the attorney's fees awarded must be related to claims the applicant prevailed on, not those that were non-suited or otherwise abandoned, or on which the requesting party was unsuccessful, and cannot be for duplicative work, unnecessary tasks, or unsuccessful claims. See also, Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 429-420 (2012); Ulloa v. QSP, Inc., 271 Va. 72, 82, 83 (2006), citing Chawla, above, 255 Va. at 624.

The Court eventually sustained the Plea in Bar by the individual councilors on the ground of statutory legislative immunity; they were dropped from the case, and the remaining Defendants (City and City Council) have argued that much of the proceedings and time spent on them by the attorneys were for issues relating only to the individual defendants.[9] In addition, Plaintiffs also spent at least some time and argument on damages issues, which they also did not prevail on, as well as one count in the original Complaint (violation of the terms of gift), and the renaming of the parks, both of which the Court decided against Plaintiffs.

So there were some tasks that were not directly related to the claims Plaintiffs prevailed on. But many of the issues in the case were intertwined. While some of JonesDay's efforts were focused specifically on immunity and whether the individual councilors should be in case at all, much else they argued was parallel to and reiterated the same claims and arguments as Counsel for the City and City Council (both the City Attorney's office and Zunka, Milnor & Carter); some were virtually the identical, and they often joined in each other's motions. Plaintiffs had to respond to or counter the arguments of both sets of counsel, on the issues common to both.

I believe I have a basis to make this determination and I can draw a reasonable conclusion. I heard the entire case and all proceedings, and reviewed all the filings. I have reviewed the time logs, submitted by Plaintiffs' counsel, along with the timetable of filings and related events, as well as the digital court filings record and the briefs and memoranda filed, and have attempted to eliminate or deduct those hours and fees that I believe were attributable to the issues that Plaintiffs did not prevail on. Defendants argue that Plaintiffs filings do not give a substantial enough basis for the Court to make a determination; I do not agree. First, Lambert states that this requirement "does not require the court to pore over pages and pages of billing records to evaluate the reasonable of each line-item." 293 Va. at 257 (which I have done anyway). While it is not permitted to award fees for what clearly was not related to what they prevailed on, and there must be some basis to conclude the legal services were in support of or

[9] The Councilors were named in the case in the beginning in part because they were the individuals who constituted City Council who voted, and there was a legitimate question as to whether they were required or necessary parties, apart from any personal liability, since any injunction granted would have to be enforced against them. Also, if there was any liability under the ultra vires claim, it only made sense that if there was any reimbursement to be ordered for taking action contrary to their authority it would make no sense for the City to have pay this, as one unauthorized expenditure from the public funds would be followed by another remedial expenditure from the public funds. In the end, however, the Court concluded that there was not sufficient evidence to support a finding of gross negligence or unauthorized appropriation, which were prerequisites to lifting the statutory immunity of local governing body members, so they were released from the suit.

related to the claims they prevailed on, I believe there is a basis to do this. The records I have reviewed are fairly detailed. Mr. O'Reilly and his colleagues did not get involved in the case until July 27, 2018. The Complaint was filed in March 2017, 16 months earlier. Certainly much was done in the case before the councilors had separate counsel; there had already been numerous motions, briefs, hearings, and rulings by the time the four councilors retained separate counsel. Prior to that time the City Attorney and Zunka, Milnor & Carter represented all defendants and all the issues were intertwined. Also, the immunity issue was first raised November 1, 2017, in the Plea in Bar, but was not directly argued until later; the individual councilors were released from the case July 6, 2019. Only a portion Plaintiffs' and Defendants' counsels' time was spent on the violation of terms of gift count, the renaming issue, and the immunity and damages issues. I conclude that only 20% (or less) of Plaintiffs' attorneys' reported time was spent on matters relating to matters Plaintiffs did not prevail on, including the liability of individual councilors, the gift terms, immunity, and damages issues. There is no indication, and no reasonable basis for concluding, otherwise.

And once the two sets of outside counsel were retained, many of their positions—the applicability of the statute to these statues, standing issues, the City's adoption of the statues, equal protection, etc.—were the same. In many instances, while the different defense attorneys filed additional briefs, Plaintiffs position was the same, and they had to consider and respond to both. So it cannot be, and need not be, parsed out like that in this case (with the exception of the immunity, gift, and damages issue).[10] The overwhelming bulk of their time, pleadings, motions, and argument was spent on issues that they prevailed on: the temporary injunction, standing, the applicability of the statute to these statues, their being monuments and memorials, their having been permitted and accepted by the City, and equal protection.

The Defendants acknowledge that, if attorneys' fees are awarded, the figure testified to by Plaintiffs' expert witness ($182,819) is reasonable for the time period he addressed (up to July 26, 2018), except that they argue that certain deduction should be made for the items Plaintiffs did not prevail on.

So what is really at issue here is the time logged since July 2018, and what should be deducted. However, one does not always need an expert to testify in order to prevail on a request for attorney's fees—Seyfarth, Shaw v. Lake Fairfax Seven Ltd. Prtnrshp, 253 Va. 93, 96. Moreover, in this case, where an expert did testify as to a significant time period, if it is the same attorneys doing similar work, there is no reason to think that their other time is any less reasonable than what the expert testified to and approved. So the question for the Court is what figure between $180,000 and $500,000 I award.

Time spent by each attorney and paralegal

[10] In fact, there really were two immunity issues: common law legislative immunity, which the Plaintiffs prevailed on, and statutory immunity, which the individual defendants ultimately prevailed on. Nevertheless, even the common legislative law immunity Plaintiffs prevailed on related only to the individual councilors and not the City, so I will not allow that time either (below).

I will not allow any of the fees requested for the law students/clerks. I respect and value their work, but I view them as support staff and believe that is part of the attorneys' overhead, and should come out of the actual attorney's fees. So that is a total of $3340, which I will deduct from the amount requested. (I do view the paralegal fees differently, as by and large Mr. Yellott's time will be doing at a lower rate, what the attorneys would otherwise do, and would actually save money, but I will deduct some of his fees on other grounds, below.)

With one adjustment addressed below, I will allow all of Mr. Harding's time as it was at the beginning of the case, and it is clear he was working on the main Complaint and early injunction hearings, virtually all of which Plaintiffs prevailed on. There is no indication from the records or reason to believe that he did anything on the immunity or damages issues, but only on the Complaint and the response to the Demurrer.

The real question is how much of Mr. Main's, Mr. Puryear's, Mr. Walsh's, and Mr. Yellott's time was spent on proceedings or matters Plaintiff's did not prevail on. Defendants also contest Mr. Walsh's rate (they do not for Mr. Main or Puryear). The requested fees are $131,114.50 for Mr. Main, $126,060 for Mr. Puryear, $103,390 for Mr. Walsh, $12,443 for Mr. Haring, and $181,744 for Mr. Yellott.

To reiterate, Plaintiffs prevailed on most of the main issues in the case:

1) The temporary injunction, including extending it to the Jackson statue and the tarps, and the removal of the tarps.
2) That the Plaintiffs (most of them) had standing.
3) That the statutes applied to monuments and memorials already in existence.
4) That the City of Charlottesville had authorized, permitted, and accepted these memorial statues.
5) That their existence and protection did not violate the Equal Protection Clause.
6) That a permanent injunction should be granted.

The two main issues Plaintiffs did not prevail on were the statutory immunity of the individual counselors and any monetary damages being proved or awarded. The two lesser issues (Count III, regarding the terms of the gift of the land and statues, and the renaming of the parks) were disposed of early in the case, and did not account for much time.

I do not believe that Plaintiffs are required, when drafting a pleading with multiple counts, such as the Complaint here, to separately break down and log their time for each individual count or issue in the pleading. I think that if the time logged is clearly for something they did not prevail on, then I should not award attorney's fees for that, and if it clearly was for something they did prevail on, then I should. Otherwise, the only fair and reasonable thing is for the Court, from the entire case (the time entries themselves, and all of the evidence in the case, and other circumstances), to make a reasonable estimate or approximation of the time that was reasonably spent on the matters they prevailed on, excluding what was likely for what they did not prevail on. These would then qualify as "necessary" attorneys' fees.

I have reviewed all of the time logs for Mr. Main, Mr. Puryear, Mr. Walsh, Mr. Yellott, and Mr. Harding. I have compared their individual entries and descriptions with both their timetable of events in the case, and the Court's file.

It is my view that as to Mr. Main, Mr. Puryear, and Mr. Yellott, Plaintiffs have understated the fees to be deducted due to relating to issues Plaintiffs did not prevail on, particularly the immunity issues. Plaintiffs state that only $6463.50 was due to these issues (based on Mr. Main's, Mr. Harding's, and Mr. Yellott's time, and none for Mr. Puryear). I shared Ms. Robertson's view that this could not be all the time attributable to such. In my review of the time logs, I found over $7000 of fees of Mr. Main, and over $5000 of fees of Mr. Puryear that appeared to be attributable to issues such as the term of gifts count (Count III), opposition to the renaming of the parks, damages, and the immunity of the individual councilors, all issues Plaintiffs did not prevail on. (This does not include Mr. Yellott's time, and I will get to his in a moment.) Furthermore, from my having presided at all of the hearings, and reviewed all of the pleadings, motions, briefs, and memoranda, it is my firm view that up to 20% of the time put in the case by Mr. Main and Mr. Puryear would have been attributable to work on these issues.

Having concluded that no more than 20% of their total attorney time was spent on the issues Plaintiffs did not prevail on (mainly the statutory immunity issue and monetary damages, as well as the lesser issues of the term of gift, renaming, and punitive damages), I so find by a preponderance of the evidence, and I will limit their recovery by this amount. (I will deduct additional amounts from Mr. Yellott's bill for different reasons.) I believe this is supported by the time logs in conjunction with the pleadings, briefs, and memoranda filed, the in-court arguments, and court file. Using their submitted figures, that would mean that approximately $26, 222.90 of Mr. Main's requested attorney's fee, and $25,212.00 of Mr. Puryear's requested fee would be attributable to claims and material issues that they did not prevail on, and I will deduct these amounts from their attorneys' fees to be awarded. Therefore, I will award $104,891.60 in attorney's fees to Mr. Main, and $100,848 to Mr. Puryear.

As to Mr. Yellott, it appears that he performed, as a paralegal assisting Mr. Main and Mr. Puryear, the bulk of the research and drafting of pleadings, motions, briefs, and memoranda. From his records I think it likely, also, that he spent more than 20% of his time on some of the issues that Plaintiffs did not prevail on, specifically the term of gifts count, the historical records relating to the renaming, damages, and immunity, perhaps as much as 25-30%. Furthermore, as pointed out at trial by Ms. Robertson's cross-examination, a good bit of his listings are for more administrative tasks, such as photocopying, filing, collating, delivering, and the like. I do not think that these administrative tasks should be included as reimbursement of attorneys' fees. Moreover, several of his listings include time attending court hearings. Again, while I do not think it unreasonable or improper for Mr. Yellott to have attended all of those hearings—indeed I think it was very reasonable, proper, and advisable—I do not think his attendance there constituted legal services that the City should be responsible for when usually both Mr. Main and Mr. Puryear were present, and sometimes Mr. Walsh as well. I think his attendance at the trial, like the law clerks' duties, is in the category of administrative tasks and support, mainly for the

convenience and benefit of the attorneys, and not actual legal work such as legal research and drafting. Therefore, taking these three categories of activities into account, and conclude that up to half of Mr. Yellott's time was spent on either issues that Plaintiffs did not prevail on or tasks that I do not think are or should be compensable as attorney's fees, I will reduce his portion of the fee request by half, or $90,872.

Mr. Walsh's situation is somewhat more complicated. He was called in on particular, discrete issues, initially the history, construction, and application of the statutes, and a possible appeal of the injunction (which I do not find unreasonable for Plaintiffs to prepare for, and it relates to an issue they prevailed on), and ultimately the equal protection challenge. However, between Oct. 16, 2018, and April 18, 2019, he spent a significant amount of time on legislative immunity (53.1 hours), including Defendants' mandamus petition (8.9 hours), which Plaintiffs did not prevail on and related to the individual councilor defendants. Therefore I will deduct from his time compensable by the City 62 hours at $700/hour, or $43,400.

In addition, Defendants say that $700 per hour is unreasonable for work performed outside of his area of expertise. However, I think that everything he was asked to assist on took advantage of his expertise, so I reject that argument. Particularly on the equal protection issue, he took the laboring oar, and was more than just a consultant, and in court argued the case adeptly and successfully. The bulk of his time after May 10, 2019, was spent on the equal protection issue (58.8 hours), and I will compute that at the $700/hour, for a total of $41,160. However, on the other matters, I do think that in line with the testimony about the standard rates for experienced attorneys in this area, I will compute his time for the other matters at $500/hour (which is just over 2/3 of his normal rate). The balance of his time I find to be 30.7 hours, so I will allow $15,350. Using these figures and adjustments, I will award $56,510 as a reasonable fee for his services.

Finally, revisiting Mr. Harding, while he put no time in either of the main issues Plaintiffs did not prevail on (damages and immunity), the Complaint did include Count III (violation of the terms of the gift), and the Injunction Petition included opposing the renaming of the parks, both of which Defendants prevailed on, so I will reduce his fee by the estimate included in Plaintiff's consented-to reductions ($575). So I will award $11,868 for his time.

I want to make clear, on the items I am disallowing (such as the law clerks or Mr. Yellott's administrative services, or even regarding the individual immunity, damages, the jury request, or the change of venue), I am not saying that their services were unreasonable or not appropriate or helpful. The issue is simply whether the City should be responsible for those, and I find that they should not. This does not mean that they should not have been paid what they were paid, but rather I am just not going to hold the City accountable for the higher fees under that statute.

So considering all of the evidence, I will award Plaintiffs $364,989.60 in attorneys' fees (being $104,892.60, $100,848, $90,872, $56,510, $11,868). (This is roughly 2/3 of what Plaintiffs were asking for, and twice what Defendants suggested.) This leaves the "costs" issue.

Litigation Costs

There is a significant question, however, with regard to "costs" requested by Plaintiffs ($49,286.83, some of which beyond $32,286.83 appears to have been projected but not spent). Virginia Code §15.2-1812.1 C states that "The party who initiates and prevails in an action authorized by this section shall be entitled to an award of *the cost of the litigation*, including reasonable attorney's fees." (emphasis added).

The statute does not define "the cost of litigation". Plaintiffs, have asked, beyond attorneys' fees and filing and service costs and fees, for the reimbursement of certain expenses incurred during the litigation to support the suit. These include expert witness fees, copying costs, office supplies, etc. Defendants assert that this is neither anticipated nor allowed by the statute or the applicable case law.

Upon a reading of Advanced Marine Enters. v. PRC, Inc., 256 Va. 106 (1998), I am inclined to agree. See also Chacey v. Garvey, 291 Va. 1 (2015). The statute could have said all "expenses of the suit", or "expert witness fees", or the like, but it simply says "costs". This has been construed to mean simply filing and service fees. Many of the other charges would be included in overhead, subsumed in attorneys' fees, or else costs that the litigating party simply has to bear. So I will disallow the costs, other than the filing fees and service fees.

I am persuaded that I should not award the "expenses" of litigation, which would include transcript costs, copying costs, mailing costs, etc. Again I find that such are the overhead for running an office, and are to be subsumed by the attorney's fees awarded. I do think that the term "cost of litigation" has been defined as the costs required to bring the case to court (filing and service fees only). West Square case, 274 Va. at 433,435, cited above, involved the awarding of other expenses, but that was by contract, not by statute or operation of law, and furthermore, that contract provision there allowed for the recovery of "all *expenses and* court costs". (Emphasis added.) We do not have similar language here. Particularly I do not think it included the transcript costs. Frankly, while the transcripts were very helpful to the court and I am sure to counsel as well, I think they are simply a cost of doing business. They are not required for filing the suit nor for prosecuting it. I view them like copying costs and mail. So I will disallow the $49,286.83, with the exception of the $441 filing fee and the various service fees paid by Plaintiffs, if not included in the $441.

So it is only the attorneys' fees and filing and service fees that I am ordering to be paid, in the amount of $365,430.60 plus any additional service fees.

I will direct that the Defendant City pay this amount to Plaintiffs' counsel in full within 90 days of the date of this letter, or else, in its discretion, make payments of $73,886.12 (20% of the total) monthly, beginning 30 days from entry of the order or March 1, whichever is earlier.

I ask Mr. Main or Mr. Puryear to prepare an order setting forth the findings and rulings in this letter as well as those announced from the bench on September 13, 2019, over Defendants'

objection for Ms. Robertson's and Mr. Milnor's endorsement. The order may be submitted over the objection of both Defendants (because I have allowed more fees than they think appropriate), and Plaintiffs (because I did not allow all of the fees and costs asked for).

I thank you for all of your time, effort, and zealous representation in this long, difficult, demanding, and well-tried case.

Very Truly Yours,

Richard E. Moore