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Re: Frederick W. Payne et al. v. City of Charlottesville, et al. — Ruling on Demurrer
Circuit Court file no. CL 17–145; Hearing date: Sept. 1, 2017

Dear Counsel:

This case comes before the Court on Defendants' Demurrer to the Complaint. The matter was argued by counsel on September 1, 2017. The Court has considered at length the authorities cited and arguments made.

Procedural Background

Plaintiffs allege several grounds why City Council, under state law, may not move or remove the statue of Robert E. Lee from what was formerly Lee Park and is now Emancipation Park, and seek a declaratory judgment, injunctive relief, and damages. Defendants demur to every count of the Complaint.

The Court decided some issues relating to the Demurrer from the bench at the hearing on September 1.[1]

[1] The Court ruled that the Plaintiffs had not sufficiently pled any actual physical encroachment or damage to the statue, so any request for damages under §15.2-1812.1 is premature and speculative, that a there is no *ultra vires*

There are three main issues remaining for the Court to address and decide. First, does Virginia Code §15.2-1812 apply in this case to statues in existence when the law was enacted. Second, do the Plaintiffs, or any of them, have standing to bring this matter before the Court. And third, have Plaintiffs sufficiently pleaded that the statue of General Robert E. Lee in what is now Emancipation Park and was heretofore Lee Park a memorial or monument to the Civil War (War Between the States) or to a veteran of that war.

Legal Authority and Standard for Considering Demurrer

A demurrer tests the legal sufficiency of a pleading—not whether Plaintiffs will or should prevail at trial, but whether they may possibly prevail as pleaded. The issue is whether the Complaint states a cause of action for which relief may be granted. Pendleton v. Newsome, 290 Va. 162, 171, 772 S.E. 2d 759 (2015); Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001); Grossman v. Saunders, 237 Va. 113, 119, 376 S.E.2d 66, 69 (1989). A Demurrer asserts that Plaintiffs cannot prevail in the matter as pleaded. The question is: does the Complaint contain sufficient legal grounds and factual recitations or allegations to support or sustain the granting of the relief requested and put the defendants on adequate notice to properly defend? If the court accepts all Plaintiff says as true, does Plaintiff then prevail? If so, the demurrer should be overruled. Put another way, given all that is alleged, is this a case where a jury or judge ought to be allowed to decide whether the allegations are true or have been proved?

In considering a demurrer the Court should not engage in evaluating evidence outside of the pleadings. A demurrer is not concerned with or dependent on the evidence—neither its strength nor a determination of whether the Plaintiff can prove its case. In ruling on a demurrer the Court does not consider the anticipated proof but only the legal sufficiency of the pleadings, and it considers the facts and allegations in the light most favorable to the plaintiff. Glazebrook v. Board of Supervisors of Spotsylvania County, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003); Welding, above, 261 Va. at 226, 541 S.E.2d at 913; Luckett v. Jennings, 246 Va. 303, 307, 435 S.E.2d 400, 402 (1993). A demurrer accepts as true and considers as admitted all facts expressly or impliedly alleged or that may fairly and justly be inferred from the facts alleged. Glazebrook, Luckett, Grossman, above; Cox Cable Hampt., Rds. v. City of Norfolk, 242 Va. 394, 397 (1991). So it is the facts as pleaded upon which the court must make its ruling. But any exhibit or attachment to the pleadings is considered part of the pleading.

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count apart from §15.2-1812, that the renaming of Lee Park was not prohibited by the statute even if it does apply to prevent the moving, removal, or damage of the statue, and that the terms of the Lee property deed only required that the property be used as a park and that no building be erected on it.

If the pleading is insufficient to give proper notice to the Defendants as to the nature or basis of the claim, then the Demurrer should be sustained but the Plaintiffs may be allowed the opportunity to plead more specifically to give Defendants adequate notice if the deficiency can be cured. Bibber v. McCreary, 194 Va. 394, 396-97 (1952); Va. Code §8.01-273.B.; Rule 1:8 of the Rules of the Virginia Supreme Court; see Pennsylvania-Little Creek v. Cobb, 215 Va. 44, 45 (1974). If the Complaint, even if well-pleaded, fails as a matter of law to state a cause of action upon which Plaintiffs can prevail, then the Court may sustain the Demurrer and enter a dismissal of the case.

In either event, the Demurrer asserts that the Complaint is not pleaded well enough to allow for or require a trial on the pleading. A Demurrer serves the purpose of eliminating the need and time for a trial, or at least postponing such until the matter is properly pleaded, with adequate notice necessary for the defendant or respondent to prepare. For that same reason, since it prevents or postpones a matter from going to trial, such should be sustained cautiously.

The two preliminary issues before the Court are whether Va. Code §15.2-1812 applies to the statues existing in cities in 1997, and whether, if so, the plaintiffs have standing, under §15.2-1812.1 or otherwise, to enforce it.

The Applicability of Virginia Code §15.2-1812

The Statute

Virginia Code §15.2-1812, in pertinent part, says:

> A locality may...authorize and permit the erection of monuments or memorials for any war or conflict...to include the following monuments or memorials: Algonquin (1622), French and Indian (1754-1763), Revolutionary (1775-1783), War of 1812 (1812-1815), Mexican (1846-1848), Confederate or Union monuments or memorials of the War Between the States (1861-1865), Spanish-American (1898), World War I (1917-1918), World War II (1941-1945), Korean (1950-1953), Vietnam (1965-1973) [and four other conflicts since 1990].
>
> 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 any monuments or memorials so erected, or to prevent its citizens from taking proper measures and exercising proper means for the protection, preservation and care of same. For purposes of this section, "disturb or interfere with" includes removal of, damaging or defacing monuments or memorials, or, in the case of the War Between the States, the placement of Union markings or

> monuments on previously designated Confederate memorials or placement of Confederate markings or monuments on previously designated Union memorials.

The statute then goes on to refer to "the erection of monuments or memorials to the veterans of such wars."

Applicability and "Retroactivity"

As to the first issue, Defendants assert that the Complaint does not and cannot state a cause of action because §15.2-1812, despite its clarity of purpose and intent, does not apply to the statue in this case, and all of Plaintiff's counts are dependent upon that code section. Defendants are asking the Court to rule that the referenced statute does not apply, and was not intended to apply, to monuments or memorials already erected and existing in cities at the time the legislation was passed in 1997, and that as a result thereof there is no prohibition or constraint against the City of Charlottesville or City Council moving or removing such. They are asking this court to find, as a result, that as a matter of law Plaintiffs cannot prevail in this matter. Defendants argue this ably, but I cannot find that this statute does not apply to the Robert E. Lee statue, and I do not find that as a matter of law Plaintiffs cannot prevail, and that a trial is precluded on this ground.

This Court's ruling is based on the content and wording of the statute itself. The main purpose of the statute, as argued by the parties, appears to be to extend protection to war memorials and monuments in cities as previously protected in counties. It also authorizes the construction of memorials and monuments. So this statute was expanding protections as well as the power and authority originally applicable to the counties. It is presumed that every portion of a statute is purposeful and not of no effect. The statute, along with §15.2-1812.1 and §18.2-137 read together, gives protection to memorials and monuments to the Algonquin War, French and Indian War, Revolutionary War, War of 1812, Mexican War, Spanish-American War, World War I, World War II, Korean War, Vietnam War, and four more recent conflicts. If the court were to rule that it only applied to protect statues built under this statutory authority and after this date, one would have to conclude that when this statute was passed in 1997, the General Assembly intended and expected such memorials and monuments to the named conflicts to be erected after that date, and that all of the then-existing monuments to all of those past wars and those soldiers in every city throughout the Commonwealth were not protected. This I cannot do. Logic and common sense prevent me from reaching such a conclusion.[2] It seems inescapable

[2] It is certainly conceivable that a certain war could fall into disfavor by the citizens of a certain municipality—be it Mexican War, Spanish-American War, or, as we know, the Viet Nam War, or even World War I or World War II by a community whose traditions and sympathies, may not agree with the stance of the United States in 1917 or 1941-45. I find it impossible to think that when this bill was passed, it was the intended effect that none of the existing monuments in cities were protected. If certain groups now wished to tear down or move or obstruct any Viet Nam

that the General Assembly had to have had in mind those monuments and memorials already erected. Nothing else would make sense.

Both sides addressed the issue of when a statute may be applied retrospectively. A general rule of statutory interpretation is that a statute is not to be applied retroactively[3] unless the legislature clearly manifested its intent to do so, and such must come from the language of the statute, but such does not need to be express or explicit. Bailey v. Spangler, 289 Va. 353, 358-59 (2015); Berner v. Mills, 265 Va. 408, 413 (2003).

Sussex Community Services Association v. The Virginia Society for Mentally Retarded Children, Incorporated, 251 Va. 240 (1996) addresses this issue and is cited and argued by both parties. Sussex involved a declaratory judgment action regarding the effect of a statute on covenants and restrictions on lots and subdivisions that were in existence at the time the statute was passed. The statute there does not explicitly say that the bill was intended to be retroactive, nor does it explicitly say that it would apply to covenants and restrictions already in existence.

The Court there states "statutes are generally presumed to be prospective in their application unless the General Assembly has manifested its clear intent to apply the statute retroactively." 251 Va. at 242, citing Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 875 (1944). The statute there said "A family care home, foster home, or group home...shall be considered for all purposes residential occupancy by a single family when construing any restrictive covenant which purports to restrict occupancy or ownership of real or leasehold property to members of a single family..." As did the appellants in Sussex, the Defendants here argue that there is no manifested legislative intent to apply such retroactively. As here, there was no explicit language saying "this statute shall apply to past or already existing restrictive covenants". It was a matter for judicial construction. The Court in Sussex interpreted the use of the word "any" to imply that this would apply to any past or future restrictive covenant. The Court in Sussex cites Allen v. Mottley Construction, Co., 160 Va. 875, 889-90 (1933) for the proposition that "in order to apply the statue prospectively only, it would be necessary for

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memorials, because of the unpopularity of that war or a majority's views as to the appropriateness of that war (as have existed in previous decades), or if some areas become an enclave for neo-Nazis, and vote to tear down monuments previously erected honoring veterans of World War II (or World War I for that matter) that fought against Germany and Italy and the fascists, or honoring those who fought to rescue and vindicate the victims of the Holocaust, is there really a credible sense or perception that it was the intention of the General Assembly that such locality could not be stopped pursuant to this statute unless such monuments or memorials were built after 1997 (and that such existing monuments or memorials are not protected)? The court cannot conclude thus.

[3] There is a question as to whether this application is entirely retrospective, in that it clearly is remedial to prevent or remedy damage to such monuments or memorials, and that is prospective in application. See Board of Supervisors v. King Land Corp., 238 Va. 97 (1989).

judicially amend the statute, 'supplying words not found in the statute' so that the phrase would read 'any award hereafter made'." Id. at 243. The Allen case construed "an award" to apply to "awards made both before and after the statutory amendment". Id. But obviously that was not explicitly stated. The Court in Sussex goes on to say "we have never imposed a requirement that any specific word or phrase be used in order to support a finding of clear legislative intent of retroactive application." Id. at 245.[4]

When the appellant there argued that such amendments affecting existing covenants and restrictions should only be applied prospectively or to future such, the Court stated that this would make the amendment meaningless, citing Cape Henry Towers, Inc. v. National Gypsum Co., 229 Va. 596, 600 (1985) for the principle that "statutory amendments are presumed purposeful and not unnecessary or vain." Id. at 245. In this case, to offer protection for statues erected by cities to the Algonquin War, French and Indian War, Revolutionary War, War of 1812, Mexican War, Civil War, Spanish American War, World War I, World War II, and Viet Nam War only if built after 1997 seems absurd and would make the statute virtually meaningless as to the protections purportedly offered, as there is no realistic reasonable expectation that additional monuments or memorials to these wars (with the possible exception of the last three) would yet be built, and there were numerous such already in existence which had to be on the mind of the legislators.

This seems evident in the statute, giving it its plain common sense meaning. The General Assembly could have said that the cities now have same authority as counties as to monuments and memorials built hereafter or that the statute only applies to statues erected in the future. That would have been easy. Or it just as easily could have said explicitly this applies to all existing monuments and memorials, or already built. But it would seem to restate the obvious to say in this statute, for example, that "this statute protects all of the existing monuments and memorials to the Revolutionary War and War of 1812, not just those we build in the future."

The Court acknowledges that a strictly technical reading of the statute and the legislative history might reach that result, saying 20 years after passage that the General Assembly only applied this to cities thereafter, and intended that it protected statues that were monuments and memorials to the Revolutionary War, the Civil War, the Mexican War, the Spanish American War, and World War I, if they were built or erected after 1997. But I find it impossible to believe that by including cities to expand the effect of this protective legislation, the General Assembly was really saying and intended to say to the cities: "you may finally now construct memorials to the Revolutionary War, Mexican War, Civil War, Spanish-American War, World

[4] Granted the statute in Sussex had a different legislative history, in which the word "any" was inserted by amendment, such does not appear to be the sole or dispositive reason the Court decided Sussex as it did, but such was cited as being consistent with the Court's interpretation.

War I, but such are protected (and you cannot move or damage or destroy them) only if you build them now and all of the statues that exist are not protected." I think such defies common sense and logic, from the internal words and structure of the statute. I cannot find that it is the limited, or intended, effect of this statute.[5]

Though not on all fours with the present case, Sussex is substantially similar and weighs in favor of a broader application of applicability to already existing memorials and monuments. I find the issue regarding the interpretation of the term "any" not that much different than the issue before the court relating to §15.2-1812. I do not read this opinion as restrictively as Defendants do. I simply read it differently. But that "manifest intent" is no stronger in the statute in Sussex than here, and the Court there said it applied to undercut existing restrictive covenants. This seems no different than placing a burden on localities to protect and care for such existing monuments and memorials when the bill was passed and became law. Those who had purchased land before subject to and with the benefit of restrictive covenants were affected.

I also understand and find the term "such monuments or memorials" to refer to all memorials and monuments erected in memory of the enumerated wars and to honor those veterans, not just those erected under the authority of this statute after 1997, the more narrow construction urged by the defendants. All things considered, I believe that the General Assembly meant for this provision to apply to all such statues then existing and built in the future.

So the Demurrer is overruled as to its claim of lack of a cause of action based on the inapplicability of Va. Code §15.2-1812.

The Court realizes there is a contrary ruling by the Circuit Court for the City of Danville, in a slightly different context, as well as a contrary opinion by the Attorney General of the Commonwealth. Those are not binding on this court or controlling precedent or authority, but are useful so far as their reasoning and conclusions are persuasive. The Court has considered those and simply reaches a different conclusion.

Standing

Defendants also demur to Plaintiffs' standing, asserting that none of them are so situated such that they can properly bring this matter before the court.

[5] The fact that an amendment recently was offered, and passed, and vetoed by the governor, cuts both ways. It could easily have been an attempt by the General Assembly to clarify what they believed the statute already said and what was intended when passed, or it could have been an effort to make the statute say something that it did not already say. But the same could be said of current efforts to give (or confirm) powers to localities to be able to decide whether to move, remove, or modify such monuments and memorials. It would be interesting to see how many such statues, monuments, and memorials have been erected since 1997. Also, it is impossible for the Court to conclude that §18.2-137 would not make it a crime to damage such statues erected before 1997.

General Standing

The issue of standing is a basic one. It is concerned with who has a right and the ability to bring a matter before the courts. In simplest terms is has to do with who has an interest, legally, in the dispute. Stated another way, it has to do with whose rights are at stake.

The recent case of Howell v. McAuliffe, 292 Va. 320 (2016), is instructive, and a good starting point. In Howell, two state legislators (the Speaker of the House and Senate Majority Leader) and four other registered voters filed suit against the Governor challenging and seeking mandamus relating to the Governor's granting of voting rights *en masse* to convicted felons, without individual consideration or even listing of the names of the persons whose rights were purportedly restored. Calling standing a "threshold issue", the Court there states, "Standing concerns itself with the characteristics of the individuals who file suit and their interest in the subject matter of the case." 292 Va. at 330. It goes on to articulate that "standing can be established if a party alleges he or she has a 'legal interest' that has been harmed by another's actions." *Id.* "As a general rule, without a 'statutory right, a citizen or taxpayer does not have standing to seek ... relief...unless he [or she] can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large." *Id.*, citing Goldman v. Landsidle, 262 VA. 364, 373 (2001).

In Howell, the defendants, also, as here, argued that the plaintiffs were not situated any differently than other voters or taxpayers in the general public, and that their rights were not separate and distinct from the public at large. However, the Virginia Supreme Court rejected that argument in that the plaintiffs would in fact be harmed by the action of the Governor, if improper. Their votes would be diluted. In explicating their ruling (and rule) on standing, the Court further states, "a litigant has standing if he has 'a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issue will be fully and faithfully developed."[6] 292 Va. at 332. Stated this way, it is clear that the complainants here have standing. There is no question in this case that these requirements are easily complied with. One can hardly say that in this situation the complainants, taken as a group, have an insufficient interest in the subject matter to guarantee that issues will be fully developed and argued, and their position, as citizens, as voters, as taxpayers, as users of these two parks, and as individuals expressly interested in history and the preservation of monuments in general, and in the heritage of the Civil War in particular. See Howell, 292 Va. at 335. However, even more to the point, if this were a dispute between private parties, or an issue of general governmental action, such rule of having an interest distinct from the public at large may be applied more strictly. The court in

[6] This phrasing of the essence of standing makes it seem that the principle is to prevent people from injecting themselves into a dispute that they really have no part in, or no real interest in. And as Plaintiffs point out, such interest can be a mere "trifle" so long as it is real.

Howell determined that plaintiffs had standing even though every other voter was similarly situated, ruling that each would be "directly affected" by such action. *Id.* at 332-33. So that threshold concern is satisfied.

By contrast, in Lafferty v. School Board of Fairfax County, 293 Va. 354 (2017) the action by a school board changing its non-discrimination policy affected no legal rights of the minor plaintiff (by his parents as next friends), and any damage or harm (which would give rise to his interest) was speculative at best. The plaintiff there alleged "disappointment, anxiety, confusion, or distress," over the action of the school board, but such alone was not a cognizable legal interest, and such concerns were over possible future impacts or effects that were speculative. There was "no...articulated injury", but just "future or speculative facts", and "general distress over a general policy does not alone allege injury sufficient for standing". 293 Va. at 361-62.

But in this case the very dispute has to do with a public park, specifically the use and enjoyment of a public park and a certain statue[7] there by those who have used and enjoyed such park and are overtly involved in preserving such monuments and memorials. If the City Council does move such statues from the park, the plaintiffs' use and enjoyment of such park would be affected and damaged. They would be injured in the legal sense of the word, in contrast to people who never used the park(s).[8]

Such basis for standing, however, has to be pleaded, and cannot be assumed. In this case, the Complaint states of the various plaintiffs:

> Frederick W. Payne is a Charlottesville resident, property owner, and taxpayer, who "utilizes and enjoys" both parks and statues on a regular basis.
>
> John Bosley Yellott, Jr. ("Jock") is a Charlottesville resident, property owner, taxpayer, who "uses one or both parks daily" and conducts historic tours of the park; he is Executive Director of The Monument Fund, and has worked to preserve both statues.
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> Edward D. Tayloe II is a Charlottesville resident, property owner, and taxpayer, and is a past president of The Lee-Jackson Foundation, which helped pay for the restoration of the

[7] The Jackson statue at now Justice Park (formerly Jackson Park) is not directly the object of this proceeding, as at the time filed there had been no action taken by the City to move such, though the renaming of that park is before the court. There have been recent developments related to this matter but still not before the court on this demurrer.

[8] One can imagine many disputes or decisions by a municipality that a citizen disagrees with but in which they really have no direct stake in (e.g., a zoning dispute not relating to the plaintiff's residence, neighborhood, or use of the property involved, etc.).

statue in 1997-99, and he "has a special interest in the protection and preservation of war memorials and monuments located in" Charlottesville, these two in particular.

Betty Jane Franklin Phillips is a descendant of the donor Paul Goodloe McIntyre; she may have a reversionary interest in the park property.

Edward Bergen Fry is a descendant of the sculptor of the Lee statue Henry Shrady and has "an interest in" protecting the Lee statue.

Virginia C. Amiss is a Charlottesville resident, property owner, and taxpayer.

Stefanie Marshall is Chairman of The Monument Fund, Inc., and has expended her own funds and time in cleaning the Lee statue and removing graffiti in 2011 and 2015.

Charles L. Weber, Jr., is a Charlottesville resident, property owner, and taxpayer, and "has a special interest in the protection and preservation of war memorials and monuments located in" Charlottesville, these two in particular.

Lloyd Thomas Smith, Jr., is a Charlottesville resident, property owner, and taxpayer and "has a special interest in the protection and preservation of war memorials and monuments", and participated in the funding for the restoration of such in 1997, 1998, and 1999, and negotiated with the City regarding such.[9]

The Virginia Division of the Sons of Confederate Veterans, has an interest in preserving and protecting both statues and parks, and contributed funds towards restoration of the statues.

Anthony M. Griffin is a resident of the Commonwealth of Virginia and is the Commander of the Sons of Confederate Veterans, Virginia Division.

Britton Franklin Earnest, Sr. is a resident of the Commonwealth of Virginia and a member of the Board of Directors of the Sons of Confederate Veterans, Virginia Division, and is Heritage Defense Coordinator.

The Monument Fund, has an interest in preserving and protecting both statues, its purpose being to support historical preservation with a focus or emphasis on monuments, memorials, statues, and the grounds thereof.

[9] I find that the fact that Tayloe, Weber and Smith are veterans does not create or add a basis for general standing, and would not unless the memorial or monument involved had to do with the war they served in. I also find that financing this litigation does not confer or bestow standing if such was not already there; one cannot bootstrap standing by paying for the lawsuit. I find that Mr. Fry has a personal, but not a legal interest.

Having considered the principles articulated in Howell and Lafferty, I find that all of the individual plaintiffs except Phillips, Fry, Amiss, Griffin, and Earnest have individual standing under general principles. All of the others except Weber have pleaded direct involvement with this statue. I find that The Monument Fund has representative standing, in that one or more of its members have individual standing, and I find that while it has not been shown that the Sons of Confederate Veterans, Virginia Division, have representative standing, in that none of their members are shown to have individual standing, I find that it has individual standing by virtue of its purpose and involvement with these two statues.

The cases of Mattaponi Indian Tribe v. Commonwealth of Va., DEQ, et al., 261 Va. 366 (2001), Chesapeake Bay Foundation, Inc. v. Commonwealth of Va. ex rel. Va. State Water Control Board, 52 Va. App. 807 (2008), and Philip Morris USA Inc. v. Chesapeake Bay Foundation, Inc., 273 Va. 564 (2007), are not particularly helpful or controlling, for reasons put forth by the City. They are all under a specific statutory provision (Virginia Code §62.1-44.29) relating to standing not pertinent here. However, the Court is not relying on such cases in reaching the conclusion that the parties have standing as outlined above. And to the extent that those cases articulate general principles relating to standing, they are not inconsistent with the Court's ruling here. They do point out that aesthetic, artistic, recreational, historical, or similar losses constitute harm that is relevant in determining standing, and that such have value and are not speculative or irrelevant merely because they are not pecuniary or financial. Chesapeake Bay Foundation v. Commonwealth, 52 Va. App. at 822-23.

The Circuit Court opinion of this Court from 2009, Judge Jay T. Swett sitting, in Coalition to Preserve McIntyre Park, et al. v. City of Charlottesville, et al., CL09-84, also is instructive and consistent with my ruling. In that case several citizens and a couple organizations brought suit relating to the Meadowcreek Parkway. Standing of the plaintiffs was challenged, as here, by the City. In reviewing several cases on standing, the Court reiterated that standing required "sufficient interest in a particular matter to ensure the parties will be actual adversaries and that the issues in the case will be fully and faithfully developed," page 6 of the opinion, citing Andrews v. American Health and Life, 236 Va. 226 (1988), and a determination that "they are the proper parties to proceed with the suit". *Id.*, citing Cupp v. Board of Supervisors of Fairfax County, 227 Va. 580, 589 (1984). In citing Philip Morris and Chesapeake Bay Foundation cases, above, the Court points out that use and enjoyment, and aesthetic and recreational values, can be the basis for a finding of standing, but it has to be that particular plaintiff's (whether individual or group) rights that would be affected and harmed, not just a general displeasure or disagreement with an action of the governing body, and not just a general allegation of injury to the environment for there to be a justiciable interest to sustain a declaratory judgment action. In so reasoning, the Court found that several of the plaintiffs there

had a sufficient interest, from their actual use of or involvement with the subject property, to support standing, but that some of them did not and so lacked standing. Also, in another environmental case, State Water Control Board v. Crutchfield, 265 Va. 416 (2003), use of the area was sufficient to confer standing. The use of a public park is no different, in principle, than use of a recreational area. I cannot conclude that the specified plaintiffs are not interested parties or that their interests are not protected.

Standing under Va. Code §15.2-1812

Apart from general standing above, Va. Code §§15.2-1812 and -1812.1 anticipate localities attempting to move, remove, destroy, or damage such monuments or memorials, as well as the local authorities and their legal counsel doing nothing to stop or prevent it.

> [I]t shall be unlawful for the authorities of the locality…to disturb or interfere with any monuments or memorials… "*[D]isturb or interfere with*" *includes removal of, damaging* or defacing…[§15.2-1812]

> If any monument…or memorial for war veterans as designated in §§15.2-1812 and 18.2-137 is violated or encroached upon, an action for the recovery of damages may be commenced by the following:…the attorney for the locality in which it is located; or, if no such action has commenced within sixty days following any such violation or encroachment, by any person having an interest in the matter;…[§15.2-1812.1]

That is the situation we have here. In the event that the City Attorney does not take action, any interested citizen ("any person with an interest in the matter") is authorized to bring such. While on the surface it appears that such provision only applies to the monetary damages section when the statue has been violated, encroached on, or damaged in fact (§15.2-1812.1), when read together with two other statues enacted at the same time it would appear that such "statutory standing" would apply to any action relating to the enforcement of these statutes.

The Attorney General's opinion of August 6, 2015, addressed by both counsel, acknowledges in discussing these very statutes, the principle that "statutes may be considered 'in pari materia' when they related to…the same subject or to closely connected subjects or object", citing Prillamen v. Commonwealth, 199 Va. 401, 405 (1957). So just as "war veterans" was read into part of one statute, it would seem that the standing provision should have no different application if it is for an injunction under §15.2-1812 or damages under §15.2-1812.1. It would be an *interesting thing indeed if citizens would only have the right to ask for damages after the fact* because the City Attorney does not, but that same citizen would not have the ability to attempt to

stop the damage in the first place. That has no logic. See Lynchburg R. St. Ry. Co. v. Dameron et al., 95 Va. 545 (1898), below. In a different context, but pertinent: "One does not have to await the consummation of threatened injury to obtain preventive relief". Chesapeake Bay Foundation, above, 52 Va. at 823. And this would not intrude on the City Attorney's authority, as such citizens could only do so if the City Attorney does not act.

It is the court's view that all of the named defendants would have standing under 15.2-1812.1 as it is obviously an inclusive, remedial provision, and should be interpreted liberally and broadly to further the purposes of the statute and accomplish its ends. No one who has standing under the conventional principles would not have standing under this statute. So I find that all plaintiffs have standing under §15.2-1812.1.

Taxpayer Standing under §15.2-1812.1

Finally, taxpayer standing alone is not sufficient to support every challenge to governmental action. In Lafferty v. School Board of Fairfax County, 293 Va. 354 (2017), a plaintiff sought a declaratory judgment and an injunction against the Fairfax County School Board, regarding its non-discrimination policies. The Court found that general taxpayer status does not necessarily confer standing to challenge all governmental actions or policies. "[T]axpayer standing does not open the door to challenge any local government action". 293 Va. at 364, citing Goldman, above, 262 Va. at 372. There, the Court concluded that it was "nothing more than a difference of opinion between a taxpayer and his government" and not an actual controversy, quoting City of Fairfax v. Shanklin, 205 Va. 227, 230 (1964). The key to the plaintiff not having taxpayer standing in Lafferty was the lack of a "connection to government expenditures". *Id.* at 363. However, that factor or component is not lacking here with regard to the *ultra vires* count.

Lynchburg & R. St. Ry. Co., above, is an example of a case where that factor is present. In Lynchburg, a group of taxpayers challenged a bond issue as *ultra vires*. The Court there, first acknowledging that "the jurisdiction of a [Circuit] [C]ourt...to restrain a municipal corporation and officers from levying and collecting an unauthorized tax, or from creating an unauthorized debt, upon the application of one or more taxpayers of the [city],...is too well settled to admit of dispute", 95 Va. at 546, 28 S.E. at 951, goes on to say, "[t]he fact that securities, when issued by a municipal corporation, may be void in the hands of innocent holders, is no sufficient reason why the taxpayers of the corporation should not have the right to call upon a court of equity to prevent them from being issued, and provide a remedy which will at once reach the whole mischief,....and thus avoid a multiplicity of suits." 95 Va. at 547, 28 S.E. at 952 (cases cited

omitted). Accord, Arlington County v. White, 259 Va. 708 (2000), where a group of taxpayers brought an *ultra vires* action against the county alleging it lacked the authority to extend certain self-funded health insurance benefits (although standing appears not to have been contested).

In this case, as to the *ultra vires* count (since I have ruled that §15.2-1812 applies), taxpayers would have standing to challenge what they assert is an unlawful and illegal expenditure of funds. For similar reasons as articulated in Howell, above, the fact that other taxpayers may be similarly affected does not prevent Plaintiffs from having standing.

Thus, irrespective of the first two grounds or bases of standing discussed above, the following plaintiffs have taxpayer standing for pursuing the *ultra vires* count (unauthorized expenditures of money to move the Lee statue): Payne, Yellott, Tayloe, Amiss, Weber and Smith.

Adequacy of Pleading as to the Nature of the Statue as a Monument or Memorial to a War or its Soldiers

We now come to the main substantive part of the demurrer.

Defendants assert that there are not sufficient facts pled to prove that the subject statue in Lee Park is a monument or memorial to the War Between the States (Civil War) or a veteran thereof. In various places the Complaint refers to General Robert E. Lee. In addition there are exhibits attached to the Complaint, which may be considered a part of the pleading; they refer variously to "an equestrian statue of our beloved hero, General R.E. Lee", or "the Lee statute". However, in the Court's view Plaintiffs do not plead any specific fact to establish the statue as a monument or memorial to the War Between the States (American Civil War). Plaintiffs argue that it is "common knowledge" who Robert E. Lee is. That may be, but does not resolve the issue.

Plaintiffs do make a good and credible argument that Robert E. Lee falls into that category of individuals who are so well known that people automatically know who they are and what they stand for, so simply alleging that it is a statue of him is sufficient. To be sure there are individuals, such as George Washington, Abraham Lincoln, Harriet Tubman, Martin Luther King, Jr., Rosa Parks, Mother Teresa, and Mahatma Gandhi, who are so well known, and whose names conjure up certain characteristics or ideas, that people know who they are and what they stood for, such that using their name could be sufficient in certain circumstances, to infer from that certain facts, and thus in this case, that the pleading thus establishes that this was a monument or memorial to the Civil War or a veteran thereof.

And I gave great consideration to this point since Virginia is a notice pleading jurisdiction. The test of a demurrer from an adequacy of pleading point of view, is whether, if every fact pleaded is proved, allowing for reasonable inferences, that party would prevail However, the case law is replete that it must be specific facts pleaded, and not just conclusions of law. Friends of the Rappahannock v. Caroline County, 286 Va. 38, 44 (2013), citing Arlington Yellow Cab Co. v. Transportation, Inc., 207 Va. 313, 319 (1966); Bell v. Saunders, 278 Va. 49, 53 (2009); Fox v. Custis, 236 Va. 69, 71 (1988), citing Ames v. American National Bank, 163 Va. 1, 37-38 (1934). Plaintiffs argue that just pleading Robert E. Lee is sufficient because everyone knows that he was the Commanding General of the Army of Northern Virginia, and *de facto,* at the end of the Civil War, of the entire Confederate forces and later the preeminent symbol of the Confederacy. However, I conclude that pleading that it is a statue of General Robert E. Lee, by itself, is simply not enough. If we were dealing, for example, with a statue of him in Lexington, Va., in civilian clothes, in his later years, or a statue of him as a young First Lt. in the U.S. Army when he was an engineer at Fort Monroe, in Hampton, Va., or when he was Superintendent of the U.S. Military Academy at West Point, none of those statues, if proved, would show it was a memorial or monument to the Civil War or a veteran thereof. Nothing in the pleadings or attachments makes any reference, with regard to the Lee statue, to the War Between the States, the Civil War, or to any other war, for that matter, or to him being a veteran thereof. (The same is not true as to the Jackson statue or property.) There is one reference in Exhibit I to a "Civil War site" as an alternative location, but I find that is not enough.

In the Court's view, the pleading that the statue of Robert E. Lee is a Confederate monument or memorial is a conclusion of law, or at best is an inference to be drawn from pleaded facts. But I find the pleaded facts insufficient. In paragraph 1 of the Complaint, it is stated that "both monuments [Lee and Jackson] are memorials of the War Between the States and to veterans of that war", and in paragraph 22, "Confederate monuments and memorials of the War Between the States" and "memorials to veterans". (Also see paragraph 31.) But that, in fact, is something to be proved under the statute. It is not an underlying fact. I do not think it can be assumed. Saying so does not make it so. That would be one of the disputed assertions of the case. Plaintiffs simply have not pleaded enough specific facts to support the stated allegations. It simply is asking too much to assume it is such a monument or memorial because of his name.

So I will sustain the demurrer as to the third point, and in keeping with this Court's practice in such cases, I will allow Plaintiffs 21 days to file an amended complaint, since it is a matter of pleading and notice, and the defect is one that is amenable to being cured, and not a matter of not being able to prevail as a matter of law. Bibber, above, 194 Va. at 397. Also, while I find there are not sufficient specific facts pleaded to withstand the demurrer on this point,

Defendants clearly know what Plaintiffs intend to prove and (in light of the attachments and briefs and the earlier hearing) how they intend to do so, so I find that it does not prejudice the defendants to allow Plaintiffs to file an amended Complaint and plead more specific facts, if they can.[10]

Conclusion

So I will overrule the demurrer on the first two points, and sustain it on the third, with leave granted to Plaintiffs to file an amended Complaint within 21 if they be so advised. The case or Complaint is not dismissed, and the injunction is still in effect until November, and such shall remain in effect, unless Plaintiffs do not file an amended complaint within 21 days of entry to the order, or unless such deadline is modified by further order of this court. Since Plaintiffs prevailed on two of the three points, I ask Mr. Main to prepare an order reflecting the Court's ruling in this matter, and circulate it to Defendants' Counsel for their endorsements over their objection and noting their exception to the court's ruling, unless the parties agree that Defendants' counsel shall draft the order, in which case the Court would defer to them.

To be clear, as you know, this decision on the Demurrer does not dictate the outcome of the case. It simply allows the case to proceed to trial or for further proceedings.

I thank you for your excellent and thorough presentations and briefs in this matter.

Very Truly Yours,

Richard E. Moore

[10] Evidence was presented in the injunction hearing on this point, and facts were mentioned in Plaintiffs' brief, but a demurrer is confined to the pleadings, and I must not consider evidence outside of the pleadings and attachments thereto unless such is stipulated or conceded by the opposing party, and no one has agreed or conceded that I could consider such. Briefs are not a part of the pleadings.