COMMONWEALTH OF VIRGINIA

Daniel R. Bouton
P.O. Box 230
Orange, Virginia 22960
(540) 672-2433
(540) 672-2189 (fax)

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

Sixteenth Judicial Court

Albemarle Culpeper Fluvanna Goochland
Greene Louisa Madison Orange Charlottesville

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)

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

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

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

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

Richard H. Milnor, Esq.
Ashley M. Pivonka, 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 immunity and revisiting damages issue
Circuit Court file no. CL 17–145; hearing April 11, 2018

Dear Counsel:

There were two issues raised in the Plea in Bar that I deferred ruling on at our hearing on April 11, 2018, until I could further consider your arguments and the cited authorities. The first was whether the Charlottesville City Council or the individual councilors are immune from this suit, *in toto* or at least as to damages. The other is whether the Court is bound by a previous ruling on one aspect of the case--announced from the bench at the initial hearing on the demurrer on September 1, 2017 and reiterated in my decision letter of October 3, 2017 (footnote 1, therein)--or whether it has the authority and discretion to revisit its initial ruling as to the damages being sought under Va. Code §15.2-1812.1.[1]

I have now re-read the Plea in Bar and the various responses and memoranda, and have considered all of your arguments, and read many of the cases pertinent to these issues.

In the Plea in Bar, filed November 1, 2017, Defendants assert in paragraph 1 that any damages under Va. Code §15.2-1812.1 (A) and (B) are precluded by the Court's previous ruling that such are barred because I found there had been no physical encroachment or damage and ruled in the defendants' favor on that point.

[1] I expressed my second thoughts and decision to reconsider at the hearing on February 27, 2018.

Defendants also raise three points or objections based on immunity. In paragraph 4 of the Plea in Bar, they assert that both the City itself and City Council are immune under common law sovereign/governmental immunity; in paragraph 5 they assert that the individual councilors are immune both by common law legislative immunity as well as under Va. Code §15.2-1405.[2] (In a second numbered paragraph 5 Defendants address one of the exceptions in §15.2-1405.)

Plaintiffs filed a supporting memorandum in which they argue that 1) neither the City, City Council, nor the individual councilors are immune because the act of voting to move the statues (and rename the park) is not truly a legislative action or function, and 2) Defendants waived immunity by not raising the issue sooner and by participating in previous hearings without asserting it. Plaintiffs argue that the subject action taken was not an ordinance proposed and handled in the normal course, and that it was not legitimate legislative activity because City Council had no statutory authority to move the statues or expend funds for such. Plaintiffs assert that it was just administrative or ministerial action, not shielded by immunity. They also point out that the Court has already ruled that the City itself is not immune under Va. Code §§15.2-1812 or -1812.1. (See Transcript February 27, 2018, hearing, page 9.)

Defendants reply that the Plea in Bar (and the immunity issue) was not before the Court in prior proceedings, that they have raised it in the Demurrer and Plea in Bar in an appropriate and timely manner prior to trial, and that there has been no waiver. In addition they assert Virginia Code §15.2-1405 as a shield for the individual councilors.

Plaintiffs respond that the councilors are not immune under §15.2-1405 because they engaged in the "unauthorized appropriation" of funds, and such is excepted from this statutory immunity. Furthermore, Plaintiffs say that this was wrongful or at least grossly negligent behavior, so also not shielded by the statutory immunity for that reason.

As to the damages issue under §15.2-1812.1, Plaintiffs maintain that the Court's ruling from the bench was not a final order and, as an interlocutory order, is not binding on the Court, but can be revisited and modified by the Court at any time prior to trial or entry of a final order.

Immunity

Statutory immunity of City Council Members

I will address Virginia Code §15.2-1405 first. That statute reads as follows:

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[2] Defendants also raised immunity in paragraphs 7 and 8 of the Demurrer to the Amended Complaint, also filed November 1, 2017.

> The members of the governing bodies of any locality...shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body...*which does not involve the unauthorized appropriation or misappropriation of funds.* However, the immunity granted by this section shall not apply to conduct constituting *intentional or willful misconduct or gross negligence.* [Italics added]

This section applies to "members" of local governing bodies, so clearly it applies to members of the Charlottesville City Council. The first question is whether the challenged action here involved "the exercise or failure to exercise their discretionary or governmental authority". For reasons that will be discussed below, I do believe it does meet that general "legislative function" threshold.

However, the next question is whether it involves the "unauthorized appropriation or misappropriation of funds". While these terms do not appear to be explicitly defined in this statute, §15.2-102, or anywhere else in the Code, the general understanding or connotation of "misappropriation" is that it is an intentional and knowing improper expenditure, generally for one's personal benefit or for the benefit of someone other than the public.[3] See, e.g., Burk v. Porter, 222 Va. 795 (1981); Johnson v. Black, 103 Va. 477 (1905). However, "unauthorized appropriation" appears to be broader.[4] It would appear that such would be constituted by any expenditure not authorized by law. If my initial ruling on the Demurrer is correct, that the state statute prevents or prohibits the moving or removal of the statues in question, then any appropriation or approval of funds to do so arguably would be without authority, and thus would be "unauthorized". It has been adequately pleaded that such action was without authority, and Defendants have not persuaded the Court otherwise, so I believe that the Complaint is not susceptible to either a demurrer or a plea in bar on this point. If it is proved that such action taken by City Council was without authority, the immunity would be forfeited under §15.2-1405.

Secondly, there is another exclusion contained in this statute. While the first clause sets forth when the immunity does not apply from the outset, the second clause indicates when the immunity still does not apply, even if it were not a misappropriation or unauthorized appropriation (and may not involve the expenditure of funds). This is where there was "intentional or willful misconduct or gross negligence". The court has serious question as to whether Plaintiffs have pleaded enough to prove intentional or willful misconduct, but I do find that they have pleaded enough to adequately allege a case for gross negligence, under all of the

[3] Various dictionaries and thesauruses consulted define "misappropriation" (or give synonyms) as: embezzlement, fraudulent appropriation for oneself funds belonging to another, stealing, conversion, mishandling.
[4] Definitions include "without authority", not having official permission or approval, unsanctioned, illegitimate.

circumstances of the case, and Defendants have not established immunity under this code section by showing that the councilors could not be found grossly negligent. Therefore, if such is proved there would also be no immunity, so for this second reason I find that Va. Code §15.2-1405 is not a ground to sustain the Demurrer or Plea in Bar as to immunity.

Traditional Common Law Immunity

However, this still leaves common law sovereign immunity and "legislative" immunity of the members of City Council, as well as the City and City Council itself.

First, I believe Plaintiffs are wrong in their narrow interpretation of traditional legislative immunity. "Legislative" does not mean strictly regarding actual, literal legislation, but the term refers to and includes any discretionary governmental action--any action taken by a government official establishing or implementing policy. Only if the action is "ministerial", by an official, agent, or employee who has no discretion or choice in the matter, is such proprietary and non-"governmental" in this sense of the word. See discussion in City of Chesapeake v. Cunningham, 268 Va. 624, 633-38 (2004). For such ministerial or proprietary actions there would be no immunity, and the actions and any liability arising from them are judged as with anyone else.

It is the Court's view that the choice by City Council to attempt to move or remove the statues is in the legislative realm or function, in the general sense of the term. It is a matter of policy about which they had discretion or choice, and were not required to act. So I do not agree that legislative or governmental immunity is inapplicable and unavailable on the ground that this was a ministerial act and not "legislative". But the question is whether, as pleaded and in light of the Court's interpretation of the law, City Council and the individual counselors acted outside of their authority--particularly if they were doing what the statute explicitly forbids--and whether this makes a difference as to the applicability of general legislative immunity.

From the Court's initial determination, in the context of the injunction and the demurrer, that Va. Code §15.2-1812 applies, despite Defendants' argument that it should not be applied "retroactively", and since the statute explicitly prohibits and forbids the moving or removal of the statues,[5] the Court would find that a case has adequately been made out that the Council and the individual councilors acted entirely without authority and contrary to law in voting to move

[5] Regarding "retroactivity", while not previously enunciated or articulated, it would seem that even if the duty to maintain and preserve the statues from falling into disrepair might be argued to be a "retroactive" law as to statues already in existence--which I do not find--thus creating a duty that did not exist when built, the prohibition of moving or damaging such is clearly prospective, and this case has to do not with failure to maintain or keep up the statues, but rather City Council choosing to remove them. That seems to the court to be forward looking, to stop an affirmative act, not to impose a duty of upkeep, and not allowing them to fall into disrepair.

the statues and in approving the expenditure of funds to do so and, potentially, to defend such action, so it would not be legitimate legislative action. Immunity is intended for situations where the body or members act within their actual authority but, through perhaps an error in judgment or contrary to the will of the people, pursue a path that causes some harm; they then cannot be held liable, even if negligent, for authorized but detrimental or harmful decisions. Examples might be the authorizing of the building of a dam, with insufficient safeguards, and the dam fails, or, as in City of Chesapeake, above, choosing a reverse osmosis system that creates health risks. "Common law legislative immunity applies to municipal legislators when they are 'acting [with]in the sphere of legitimate legislative activity'." Board of Supervisors v. Davenport, 285 Va. 580, 589 (2013), quoting Baker v. Mayor of Baltimore, 894 F.2d 679, 681 (4th Cir. 1990). But they are not "entitled to immunity when they act beyond the scope of their employment, exceeding their authority and discretion". Cunningham v. Rossman, 80 Va. Cir. 543, 549 (2010), quoting James v. James, 221 Va. 43, 53 (1980). They cannot be sued or be held liable for policy decisions, no matter how bad, unreasonable, or unpopular, if within their authority.

I also cannot find that, under Va. Code §§15.2-1812 or -1812.1, the City of Charlottesville or City Council is immune, as that would seem to fly in the face of the explicit language and intent of those statutes. (I previously indicated such as to the City itself. Tr. 9, 2/27/18) Clearly that is a statutory scheme put in place by the state legislature for the express purpose of protecting certain monuments and memorials (statues) and forbidding localities from doing harm to or removing them, and establishing a remedy if the locality does so or attempts to. Virginia Code §15.2-1812 says that it is "unlawful for the *authorities of the locality*" to disturb or interfere with such monuments or memorials, or "to prevent its citizens from taking proper measures" for the protection, preservation and care of such. (Italics added). Clearly the General Assembly anticipated a situation just such as this. Also, Va. Code §15.2-1812.1 authorizes an action for damages from any such "violation" or encroachment. It would make no sense at all for the legislature to give a remedy for such action, and then to say the local authorities are immune to and protected from any actions or efforts under the statute to do anything about it. This would make the two statutes largely pointless, meaningless, and empty.

There may still be some question, even if Defendants are not immune, as to what damages they might be liable for, but they cannot, in any event, be immune to injunction or fines or other sanctions for disobeying court orders. The City, Council, and councilors must be amenable to a court order in this case if we are to make any sense of the statutory scheme.

So as to the immunity issues, while I find Council's action to in fact be legislative in nature and function, I also find that Plaintiffs have made out a case that such legislative action was without authority and may have been grossly negligent, and that §15.2-1405 does not grant

immunity in this case, and that Council was acting beyond its authority so it was not "legitimate" legislative activity; to grant immunity in this case and context would make §§15.2-1812 and -1812.1 meaningless as to local authorities. I do not think that was the intent of the legislature or is the effect of the statutes, read together. So while I find that Defendants at no point waived the immunity issue, for the above reasons I nevertheless overrule and reject the Plea in Bar and that part of the Demurrer asserting immunity for the City, City Council, or the individual councilors.

Damages for "Encroachment" Under Va. Code §15.2-1812.1

As to the other issue, of whether the Court may revisit, reconsider, and revise its earlier announced decision as to any damages from encroachment, under Va. Code §15.2-1812.1, I previously announced that upon reviewing the statutes in preparation for an earlier hearing I, *sua sponte*, reached the conclusion that I had interpreted the term "encroachment" and the statute too strictly or narrowly, and that I do not believe that encroachment is limited to or requires actual physical damage. At the time of my ruling--September 1, 2017--I had thought it did simply because of the statute's use of the terms "rebuilding, repairing, or restoring", all of which imply physical damage. So I thought any request for damages was premature and at best speculative.

What I stated from the bench at the initial hearing was:

> "I'm also going to sustain the demurrer as to the damages count for actual encroachment or damage to the statue. I believe that's under 1812.1. I think that the way I've read that all along, I think that the damage issue or the encroachment issues in 1812.1 anticipates actual physical damage or encroachment. I don't think it's talking about theoretical or symbolic. And the damages—it talks about the cost of repairing. And I think it might talk about the cost of—it talks about cost of repairing and maybe relocating...
>
> Talks about the costs necessary for rebuilding, repairing, preserving, or restoring such memorials. And it seems to me that's anticipat[ing] some physical damage having occurred. And I don't think any's occurred yet. But physical damage. I think that is premature, as the City has said, and I will sustain the demurrer as to that."

(Tr.7-8, 9/1/17).

But at a subsequent hearing, February 27, 2018, I stated:

> "I am having second thoughts, and I'm going to give both of you time to address this. But I would say this. To the extent that my previous rulings don't foreclose the possibility, then I want to revisit the general damages under 1812.1.

I may not be able to do that, but I'm going to take a look at that. Because I think I read the statute, interpreted it[,] wrong, and was wrong in my decision. But that's the problem of ruling from the bench.

Because if counsel will remember, there were only three matters that I reserved for deliberation, and they did not include this. This was something that I sort of ruled off the cuff from the bench, and I entered, you know, a footnote in the original ruling.

So I didn't articulate it as much as I would other decisions, but it was preserved in an order. And so to the extent that the order is clear, it may, in fact, be final even though the case is not over. So those need to be addressed.

I do think the encroachment anticipated by 1812.1, though generally physical harm, I no longer think it's required for encroachment. I did initially think it was. But when it talks about preserving and being counter to this encroachment and a pre-encroachment condition, obviously it could infer but didn't necessarily entail damage. So I think some damages could be awarded potentially."

(Tr. 7-8, 2/27/18).

I believe that the term "encroachment" is broader than I originally thought, as the statute also uses the terms "preserving" which does not imply or require any actual physical damage to have occurred, but only the threat or anticipation of such. So I find that encroachment would include any physical touching, crowding in on, blockage, interference with, or threats thereof.[6] Putting up a fence, for example, could be an encroachment that would not involve physical damage. In addition, §15.2-1812.1 also uses the term "violation" with regard to the liability for damage. (Incidentally, I believe that the tarps also constituted an encroachment or violation, in that they both touched or physically came in contact with the statues, and interfered with them, and blocked their view.) So I do not think that the statute requires or is limited to physical damage.

It also is clear under Virginia law that until a final order is entered, preliminary or partial rulings by the court on various issues or aspects of the case are "in the breast of the court" and may be revisited by the court. See Hurley v. Bennett, 163 Va. 241, 250 (1934); Freezer v. Miller, 163 Va. 180, 197, n. 2 (1934); Richardson v. Gardner, 128 Va. 676, 685, 690 (1920). A final order is one that disposes of all issues before the court and leaves nothing left to be decided. Comcast of Chesterfield County v. Board of Supervisors, 277 Va. 293, 301 (2009); James,

[6] Dictionaries consulted include "intrusion on a person's territory or rights", a gradual advance beyond usual or acceptable limits, trespass, intrusion, invasion, any entry into an area not previously occupied.

above, 263 Va. at 481 and Ragan v. Woodcroft Village Apts., 255 Va. 322, 327 (1998), both citing Daniels v. Truck & Equipment Corp., 205 Va. 579, 585 (1964); Tesla, Inc. v. Va. Auto Dealers Ass'n., 809 S.E. 2d 695, 2018 Va. App. Lexis 39 (Record No. 1180-17-2, 2018). Clearly that ruling was not a final order. (Moreover, in this case, it was not at the behest or asking of a party, but rather *sua sponte*, on the court's own motion, upon further reflection and consideration.) And I believe that the "law of the case" principle does not prevent or preclude a court from revisiting, revising, or modifying a prior preliminary ruling that it believes is wrong.

However, this ruling may still have little effect, except with regard to attorney's fees and costs, because Va. Code §15.2-1812.1 also contains a provision that states that any damages paid or recovered, other than for litigation costs and attorney's fees, must be used for rebuilding, repair, restoration, or preservation. So far there has been no actual damage and no evidence or allegation of the need for rebuilding, repair, or restoration, so there would be no need or use for damages other than "preservation". And there has been no allegation that there has been any money spent or any financial loss related to the "encroachment" on the statues or the preservation of them, other than the cost of the litigation, which is covered by a separate section of the statute. Paragraph C says that the party who initiates and prevails is entitled to the cost of the litigation and attorney's fees.[7] If Plaintiffs prevail they would be entitled, in my view, to attorney's fees and other litigation costs. But since there has been no damage that has required any repair, rebuilding, or restoration, and none has been pleaded, I maintain my original decision as to any such damages, that such would be premature and speculative. Were any to occur, that would have to be the subject of further pleading and proceedings. To the extent that my previous ruling would indicate that because there was no physical damage to the statue, Defendants would not or could not be liable for the cost of litigation including attorney's fees, I find under the statute that such ruling was wrong and I reverse that decision. In addition, while the statute might cover such, I find that there have been no sufficient facts pleaded to indicate a specific need for preservation--other than the suit itself--nor any indication of damages relating to such, other than the granting of the injunction, so I continue to sustain the Demurrer as to that element of damages, based on lack of pleaded facts.[8]

I also do not believe, based on the pleaded facts, that the case on punitive damages can go forward and I previously so ruled on February 27, 2018. Tr. 6-7, 2/27/18. I ruled there were no facts pleaded that would support a finding of "reckless, willful or wanton conduct resulting in the defacement of, malicious destruction of, unlawful removal of, or placement of improper

[7] It seems that a party who initiates but does not prevail, or a party who prevails but did not initiate, is not entitled to attorney's fees, but only the party who brought the action and proved its case.

[8] If the Plaintiffs prevail, the statues will not be moved; if they do not prevail, the City can then do as it pleases. Either way, it does not immediately appear there will be any additional actual "costs of preservation".

markings, monuments or statues on memorials for war veterans." Not only would Plaintiffs have to prove that Defendants acted recklessly, willfully and wantonly, but any recovery of punitive damages is contingent on the unlawful destruction or defacing of such monuments, or the unlawful removal of such, or the placement of improper markers on such memorials. While the plaintiffs do allege reckless, willful or wanton conduct or behavior, there are no facts pleaded that would support a conclusion of such. "Destruction or defacing" is more narrow or limited than "encroachment". There is no evidence or allegation of any destruction or defacing in this case. (That is part of the reason that I originally indicated I would sustain the demurrer as to damages under -1812.1, which ruling I am modifying this day). But my ruling as to punitive damages stands.

Conclusion

So I overrule and deny the Plea in Bar (and Demurrer) as to immunity of all of the defendants, and I rule that encroachment is not limited to and does not require actual physical damage, so Plaintiffs may be able to prove encroachment or a "violation", and Defendants could be liable for the costs of the litigation, but not for any damages for physical harm to the statue, or for repair, rebuilding, restoration, or preservation, as no such damage or cost of preservation has been alleged, so I sustain the Plea in Bar in part and overrule it in part on this point.[9]

I ask Mr. Main to prepare the order reflecting the rulings in this letter, and I thank you all for your time and efforts in this matter. I am sorry that I did not get this letter to you yesterday.

Very Truly Yours,

Richard E. Moore 6/14/18

Richard E. Moore

[9] For clarity's sake, I further reiterate my finding that the act of renaming, repurposing, or redesigning the parks to express different things, is not *ultra vires*. I have already found that there was nothing in the deed that required that the park be named Jackson Park, even though it was referred to as that, and that continuing with that name was not a condition of the gift. The only two conditions of the gift were that the land be used as a park, and that no buildings or structures be built or placed there. (Tr. 5-6, 11, 2/27/18). One can imagine that it might never have occurred to the original founders or establishers of the park (McIntire and the City) that someone would ever want to change the name of the park, and perhaps that is why it was not made a condition. But the act of moving or removing the statue would be *ultra vires* in light of §15.2-1812, because it forbids such moving or removal.

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