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Re: Payne, et al. v. City of Charlottesville, et al.—ruling on temporary injunction as to coverings
Circuit Court file no. CL 17-145; hearing February 5, 2018

Dear Counsel:

I have now read the cases submitted at the hearing on February 5, along with Plaintiffs' Motion and brief and Defendants' reply brief, and reviewed the exhibits and portions of the transcripts of previous hearings.

I previously ruled¹ that Va. Code §15.2-1812 does apply to statues in existence at the time of its passage in 1997, and thus could prevent the removal of both the Lee and Jackson statues if they are proved to be monuments or memorials to a war or war veterans. This was in the context of considering a temporary injunction against moving or removing the Lee statue and the likelihood of Plaintiffs succeeding on the merits under the statute and prevailing case law.

Subsequent to the filing of the Complaint, but prior to the September hearing and October ruling, the City chose to cover both statues with plastic "tarps". In the previous hearings I had indicated that covering the statues or shielding them from view would "interfere" with the statues

¹ From the bench preliminarily on May 2, 2017, and in the demurrer decision letter of October 3, 2017 (from the September 1 hearing), and reaffirmed at the hearing on October 4, 2017.

and the public's ability to view them, but as the coverings were "temporary", I did not require removal at that time. Now, over six months later, Plaintiffs reassert their request to extend the application of the temporary injunction to the tarps.

It is helpful to recount the chronology of relevant events in this case (all dates 2017):

February 6—Charlottesville City Council votes to remove the Lee statue from then-Lee Park. It also votes to rename and redesign that park, and redesign, transform, and rename then-Jackson Park.

March 20—Plaintiffs file Complaint to prevent and enjoin this removal, renaming, redesign, and transformation, based in large part on Va. Code §15.2-1812, and ask for a temporary injunction to preserve the status quo pending trial of the matter on the merits.

April 17—Defendants file Demurrer to the Complaint.

May 2—Hearing on the temporary injunction, which is granted for six months as to moving the Lee statue (order entered June 6), but not as to the other requested relief.

July 8 and August 12—Two "rallies" or demonstrations by KKK and "alt right" groups and individuals, with counter-protests by anti-racist, "anti-fascist", and anti-statue groups and individuals. The latter event resulted in the death of Heather Heyer and, indirectly, the deaths of two Virginia State Police Officers (Lt. Jay Cullen and Pilot Berke Bates).

August 21—City Council votes to also move the Jackson statue (if the Court allowed such), and to cover or shroud ("obscure") both statues, and/or sell both statues; they were both subsequently covered.

Aug. 30—Plaintiffs file Motion to extend application of the temporary injunction to the Jackson statue and the tarps, and to extend it in time beyond the November 2 expiration date.

September 1—Hearing on the Demurrer, at which the Court scheduled a hearing on the motion for an injunction against moving the Jackson statue and the tarps covering both statues.

October 3—Decision letter issued by the Court overruling the Demurrer on two points (applicability of the statute and standing), and sustaining it on a third point (failure of the Complaint to plead facts sufficient to support a cause of action based on a Civil War memorial or monument).

Oct. 4—Hearing on Motion to extend original temporary injunction beyond the original six months and to expand it to include the Jackson statue and tarps. The Court granted the request to expand it to include the Jackson statue, but did not extend the time (given the ruling on the Demurrer), and denied the requested temporary injunctive relief as to tarps.

Oct. 11—Plaintiffs file Amended Complaint in response to ruling on Demurrer.

Oct. 24—Further hearing on extending time of injunction and applying such to the coverings, which was resolved by agreement of the parties (order entered that day), until the court finally ruled on the merits of the case. The injunction was extended beyond November 2 until the Court rules on the merits, and included the Jackson statue but did not include the coverings.

November 1—Defendants file Demurrer to Amended Complaint (hearing set for Feb. 27) and Plea in Bar (set for April 11)

Nov. 6—City Council passes resolution with a more detailed plan for redesigning both parks.

Nov. 17—Plaintiffs file Motion to Enforce Injunctive Relief and to Further and Enlarge Injunction, renewing their request to extend the injunction to the tarps after the passage of time.

So prior to the September 1 hearing Plaintiffs had moved to expand the application of the temporary injunction to both include the Jackson statue and require the removal of the tarps. At the October 4 hearing I ruled that, as to the tarps, such motion was premature. It was the Court's view that such coverings, if they remained, would in fact interfere with the statues and the public's ability to view such, but since they were temporary and did not involve physical damage--Plaintiffs did present some evidence on the risk of such--I did not find irreparable harm from a temporary placement of such coverings or "shrouds" for the purpose of mourning the death of Heather Heyer and the two State Troopers who lost their lives on August 12. The Court concluded that such a gesture was appropriate and not unreasonable, and would not have violated the statute if done only for a short, reasonable period of time, so the statute did not require removal at that time.

However, the Court also explicitly reserved the possibility that it might revisit the removal request and find irreparable harm if the coverings remained and the Court determined they were not really temporary. (Similarly, at the original hearing on the motion for the injunction in May, I did not grant any injunction as to the Jackson statue because there had

been no motion or action by City Council as to moving that statue, but I reserved the possibility of revisiting that issue in the future as well if Council took any action as to the Jackson statue.)

At the May 2 hearing, I found that the statute did apply to the statue in question, as alleged. (Tr. 277, 280, 288-89, 291). In the context of finding a likelihood of the plaintiffs prevailing on the merits and irreparable harm (Tr. 281, 288), I stated that, in my view, it would be irreparable harm not only for the Lee statue to be damaged, destroyed, or permanently removed, but “for it to be gone for any significant period of time” (Tr. 282), as would be the case if other well-known statues were removed “for a few months” and people could not see them. Regarding the public’s right to view them I stated, “during those time periods, they have lost that, they can’t get it back”. (Note: this was before City Council voted to shroud the statues.)

Furthermore, when Plaintiffs’ counsel expressed concern about the City “interfering with” the statues and the public’s right to view them by erecting a structure to make them “not observable to the public”, I replied that “they can’t put it in a sealed box”. (Tr. 53).² At that hearing, I did not enjoin the renaming of the parks, I did not enjoin any planning or design for repurposing the parks, and I did not apply the injunction to the Jackson statue or then-Jackson Park, now Justice Park. (Tr. 284-85). I also limited the temporary injunction as to moving the Lee statue to six (6) months, to November 2. (Tr. 288-89). However, I made it clear that I may revisit the issue of any “shielding” or enclosure, as well as whether to extend it to the Jackson statue, on the Court’s own motion, depending on other developments in the case. (Tr. 289, 292).

At the September 1 hearing on the Defendants’ Demurrer, the Court sustained from the bench the demurrer as to the renaming of Lee Park (now Emancipation Park), and as to the physical encroachment on the statue and resulting damages, ruling that since no action had been taken to physically move or damage it, the encroachment claim was premature. (Tr. excerpt of Court’s ruling pp. 6-8). I took under consideration three other issues: applicability of the statute, standing, and sufficiency of the pleading, eventually overruling the demurrer as to the first two and sustaining it as to the third.³ But, again, I specifically reserved to the Court the possibility of revisiting the issue as to the renaming of Jackson Park, based on the slightly different factual basis than with Lee Park (Tr. 6, 9, 12, 13-14), and such was acknowledged by Counsel for the City. (Tr. 17). The Court did not address extending the injunction as to the Jackson statue or the tarp coverings, but these matters were set for a subsequent hearing.

² I observed that Plaintiffs’ position was that planting flowers or shrubs around the statue would not “interfere with the public’s rights”, but that “a shield” would. (Tr. 247-48).

³ From the bench I had indicated that I was inclined to overrule the demurrer as to the adequacy of the pleading as to the Lee statue being a monument or memorial to a war or war veteran, as such was self-evident, but upon further review and consideration, I found such to be insufficient as pled and sustained the demurrer.

At the October 4 hearing, I denied the request for an injunction as to the tarps, but I expressed concern regarding the coverings. I did opine again that the tarps do “interfere with” the statues and the public’s right to see them and to use and enjoy the park, contrary to the statute, stating “there is no question it is interference”. (Tr. 4-5). But I believed and found it to be a justified exception for a legitimate purpose (a period of mourning) since the City said the coverings were temporary, which the Court made clear was the critical factor, and I found that thus there was no irreparable harm “at this time”. (Tr. 5). The Court reaffirmed that it might revisit this issue at some point in the future, after a passage of time, if it appeared that the covering was not temporary. Also in that hearing, because of the changed factual posture, I did extend the existing injunction to the Jackson statue, for the same reasons I had issued it as to the Lee statue. But I denied the request to extend the temporary injunction beyond November 2, as premature, pending the filing of an Amended Complaint.

It was the Court’s view that the irreparable harm required for a temporary injunction was not limited to physical harm or damage to the statue, but also included harm to the rights of the public in general and the plaintiffs in particular. Counsel for the City agreed with this analysis. (May 2 Tr. 27-28). But from the beginning, it was a matter of exempting, excepting, or excluding the tarp covering (“interference”) from the temporary injunction that I had already entered (against “moving” the statue). And I found a basis for that due to the community purpose expressed, and the temporary nature of the covering. Simply put, I believed that a short, temporary, purposeful covering would not violate the statute, and would not cause any irreparable harm to anyone’s rights, whether the public in general or the plaintiffs in particular.

The Court noted that it was accepting, at the time, the City’s representation that the covering was indeed temporary. I indicated that a “permanent obstruction was not allowed by the statute”. (Tr. 6) I stated that the statues cannot be “totally obscured” or covered. I further indicated that if it was not temporary, that “might make a difference down the road”, and that the covering “goes against the spirit of the injunction.” (Tr. 7).⁴

There also was some discussion of the motivation of expressing mourning, and the Court’s concerns along these lines. (Tr. 8). Much time was spent by counsel in the hearing addressing the suitable or appropriate period of mourning. It is not for the Court to say how long a period of mourning is or should last. That is up to the City Council. But it has not done so.

⁴ It is, and has been, of some concern to the Court that despite an injunction on moving the statue being in effect, with the statements made from the bench at the May hearing, and a pending proceeding for a broader permanent injunction, Council voted to further shield the statues without regard to or concern for whether this would violate the law, choosing not to wait for advice from the City Attorney. (Tr. Council Mtg. August 21, 2017, pages 19-21).

City Council at no time, neither initially nor in the six months since, set an official period of mourning (as is commonly done), and did not otherwise act to make it clear that the coverings were temporary. Neither at the August 21 City Council meeting, the September 1 demurrer hearing, the October 4 injunction hearing, the November 6 City Council meeting, nor at any other time did Council or its attorneys specify either a definite time period for the mourning, or a date at which the coverings would be removed. Again the appropriate period of mourning is not the issue. The issue, since the coverings were in conflict with the statute, is whether they really were “temporary”, and whether they were placed for a brief or definite period. The Court made an exception to its ruling in good faith. It was up to City Council and Defendants to determine and make clear to the public and the Court whether this mourning period was temporary or permanent. They have not done so. I can only surmise that they have not set an end time because they never meant for the coverings to be temporary, but always wanted and intended them to be permanent or at least indefinite. I do not believe that the statute allows that.

So I cannot find that Council ever intended for them to be temporary and they have never, until recently, even discussed that possibility. There is no bona fide basis or representation that the City ever intended to uncover the statues at any time, unless required to do so by the Court; there is no evidence before the court that they intended other than to “leave them there”. Every indication has been that City Council intended for the coverings to remain in place until they are replaced by something more restrictive, or the statues are moved, or the tarps are ordered to be removed.⁵ At this time I do not find them to be the type of temporary covering or shielding that I previously determined was permissible. At the recent February 5 hearing there was for the first time the possibility raised that one year would be an appropriate mourning period. But it was clear that no decision by City Council had been made along these lines. It was an unattributed suggestion or discussion. This seems to be an after-the-fact attempt to portray this as something other than originally intended. But again, as stated above, the point is that it is not for the Court to determine what an appropriate period would be and then allow it for that time. The question is whether it is in fact a temporary covering for a specific purpose. I find it is not. If Council had said at the beginning or at any time along the way that this would be a mourning period of 30 days, or 6 months, or 12 months, the Court would have given serious consideration to that. But there is nothing like that in the evidence. The Court expressed at the

⁵ While generally legislative intent is not consulted when a statute or ordinance is clear and unambiguous as to its purpose or motivation, such may be divined when such intent is not clear from the legislation itself. In this case, the Council’s approved motion is not clear as to the duration of the coverings, so the Court may consult other sources. Also, the transcript of the meeting may be consulted to verify the actual wording of the resolution reported in the minutes. Statements made or terms used by the various councilors are not binding or dispositive, but are factors for the Court to consider. In this case, the mayor used the term “in perpetuity”, another said “and leave it there”, and no one stated it would be for a brief or definite duration.

last hearing that it had grave doubts about Council's intent, and those doubts have not been dispelled.⁶

To reiterate, it is not a matter of the "mourning" having gone on too long. It is rather a matter that the City has given no indication or basis for finding that it was ever, or was ever intended to be, temporary or anything other than permanent, other than after the fact in reaction to the Court's concerns, which have been ignored in the past up until now. Such assurances, as there are, have been from counsel.

In summary: the same statute that says that the statues cannot be moved, removed, or damaged also says that they cannot be disturbed or interfered with (and the public cannot be prevented from caring for them). The City never specified the length of or an end date for the covering period, and the Court expressed concern but accepted the City's representation about the nature and purpose of the covering being actually for mourning. The Court clearly reserved to itself the possibility of revisiting the denial of the temporary injunction as to the covering if, after a time, it appeared that it was not indeed temporary. Having found that it was not, I no longer refrain from including the coverings in the injunction, and they are no longer exempted from its application. Again, I find that the irreparable harm here is based not on physical damage to the statues but, given the significant period of time that has gone by, on the obstructed rights of the public, under the statute, to be able to view the statues. Recognizing this as a legitimate harm is a policy decision that the General Assembly has already made, and is not mine to ignore.

I also find at this point that Plaintiff's remedy at law is not adequate, in that there is no other means to compel maintenance of the status quo between now and trial on the merits. And the harm to Defendants from removing the tarps and not being able to shield them until the matter goes to trial, is outweighed by the harm to Plaintiffs and the general public in not being able to view or enjoy them as intended by the Defendant City of Charlottesville itself for many years. Tourists, historians, artists, and students who come to see these notable statues, which are widely recognized as excellent works of art, one of which is on the National Register, are not able to when they are covered; their lost opportunity cannot be undone and so is irremediable.

⁶ Whether it would have affected the Court's decision if a respectful cloth bunting or fabric shroud were used instead of a large plastic bag, I cannot say for sure, but it may have affected the Court's view of how seriously it thought the Council was taking the mourning aspect of the covering. The manner and means of mourning almost always entails conveying respect. The Court does not recall any other similar situation where multiple persons were mourned in such a manner. There certainly could have been numerous ways to mourn them that did not involve covering the statue entirely or even at all--that is, without "interfering with it". I assume that any other options were deemed not adequate or appropriate and that the main thing was to cover the statues (even if with plastic). City Council cannot accomplish in one way (i.e., covering) that which is not allowed by another means (moving).

Ralph E. Main, Jr., S. Braxton Puryear, Esqs.
Lisa Robertson, Richard Milnor, Ashley Pivonka, Esqs.
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My decision today is consistent with and in fact impelled by those prior rulings and principles articulated in previous hearings, recited above. As I indicated in our recent hearing (February 5), the gravamen of removal (as contrasted to damaging, destroying, or defacing) is that the statues can no longer be seen or viewed by the public, and the continued, indefinite covering is tantamount to "removal" or building a fence around it, and has the same effect.

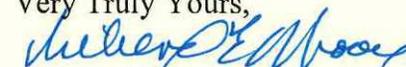
Again, this is only a temporary injunction, and if Plaintiffs are unsuccessful at trial, not only may the statues once again be covered, but they may be moved, sold, or possibly destroyed. But if Plaintiffs are successful at trial, it would mean that the statues should never have been covered to begin with, except for a brief purposeful period, as alluded to above.

Defendants still dispute the legal question of retroactivity or applicability of Va. Code §12-1812 to the Lee and Jackson statues, and whether they are monuments or memorials to the Civil War/War Between the States, as well as the legal standing of the plaintiffs. Formally those are legal and factual issues still subject to further evidence, argument, and authority at trial, but which the Court has made a preliminary ruling on in the context of the temporary injunction. The trial, set for late January 2019 for two days (with an alternate date in October 2018 if counsel agree that one day would be sufficient), will determine this latter question. The Court has ruled that plaintiffs have standing and the subject statute applies to existing statues, but there is still the question of whether they are memorials or monuments to a war or to veterans of such.

As I have previously noted, if I am wrong in this ruling and incorrect in my interpretation and application of Va. Code §15.2-1812, then there is a judicial remedy on appeal and the Virginia Supreme Court can correct my view and clarify the law. If I am correct as to the statute, then the potential remedy is a legislative one, and will rest with the Virginia General Assembly, as the citizens can attempt to have the law changed.

Consistent with this ruling I direct the City to take steps immediately to remove the coverings from both statues. As previously noted, the statute that prohibits the moving or damaging of such memorials and monuments places on the locality the duty to protect, preserve, and care for such. (And there has previously been concern expressed about whether there has been any deterioration or damage while they were covered, from moisture or otherwise.) I ask Mr. Main to prepare the order in this case reflecting the ruling in this letter, and I thank you all for your time, efforts, and presentations in this matter.

Very Truly Yours,

 2/26/18
Richard E. Moore