

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, et al,

Plaintiffs,

v.

Case No. CL17000145-00

CITY OF CHARLOTTESVILLE,
VIRGINIA, et al,

Defendants.

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER

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

1. Attached is Attorney General Mark R. Herring's opinion letter dated August 25, 2017, which Defendants provide as additional support of their Demurrer.

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

Respectfully submitted,

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

8/30/17 2 pm
(Date & Time)

FILED
City of Charlottesville
Circuit Court Clerk's Office
Liezelle A. Dugger, Clerk
By *[Signature]* Deputy Clerk

By counsel:

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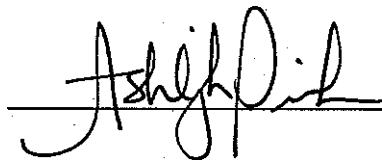
CERTIFICATE

I hereby certify that a true copy of the foregoing Brief was e-mailed and mailed this 30th day of August, 2017 to:

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August 25, 2017

Julie Langan
Director, Virginia Department of Historic Resources
2801 Kensington Avenue
Richmond, Virginia 23221

Dear Ms. Langan:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You have asked how the provisions of § 15.2-1812 of the *Code of Virginia*, or other legal restrictions, may impact the authority of a locality to remove or relocate war or veterans monuments on property owned or controlled by the locality.¹

Applicable Law and Discussion

A number of factors may impact a locality's ability to remove or relocate a war or veterans monument, and each likely presents a unique circumstance that would require careful analysis to determine which, if any, might limit local authority. Without regard to their application in an individual case, there are three categories of legal restrictions that may affect the authority of a local government. First, discussed more fully below, is the application of § 15.2-1812 of the *Code of Virginia* to the particular monument. Second, a number of monuments are subject to individual Acts of Assembly governing their construction and maintenance. Finally, some monuments may be subject to restrictions found in instruments transferring ownership of the monument to the locality or local governmental entity or restrictions imposed as a result of subsequent actions of the locality. A careful investigation of the circumstances surrounding the individual monument must be completed by the locality to determine which legal restrictions may apply.

¹ Nothing contained herein should be construed to evaluate or opine upon removal or relocation of monuments located upon state or federal property.

I. Code § 15.2-1812

a. History of the Code Section

The historical antecedent to this Code section first appeared as Section 2742 of the *Code of Virginia*. By an act of the General Assembly passed in February 1904, the circuit court of a county, with the concurrence of the county's board of supervisors, could authorize "the erection of a Confederate monument upon the public square of such county at the county seat thereof."² Once such a monument was "so erected," the statute provided that "thereafter" the locality "or any other person or persons whatever" could not "disturb or interfere" with the monument, or "prevent the citizens of [the] county from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same."³

The General Assembly subsequently enacted a number of changes to this statute. In 1910, it added the ability of a county's board of supervisors to appropriate funds "to complete or aid in the erection of a monument to the Confederate soldiers of such county," and the ability of the board to impose a special levy for these purposes, or to assist private persons, Confederate veterans, or other organizations in building such a monument.⁴ The amendment also specified that a county could finance a monument to be placed either upon the "public square" or "elsewhere at the county seat," but it did not similarly expand the protective language contained in the first paragraph of the statute.⁵ In 1930, the statute was amended to include monuments to the "World War," as well as a change in terminology from "soldiers" to "veterans" in the section concerning funding.⁶ Near the end of World War II, the reference became to a "monument or memorial" and the General Assembly included two additional conflicts, the Spanish-American War and World War II.⁷ In 1982, it added the "Korean War and Viet Nam War"⁸ to the list, and made certain non-substantive grammatical changes to the statute.⁹

In 1988, the General Assembly added three additional conflicts (the Revolutionary War, War of 1812, and Mexican War) and also changed the protective language from "if such shall be erected it shall not be lawful thereafter" to disturb or interfere with the monument or memorial, to "[i]f such are erected, it shall be unlawful" to disturb or interfere with the same.¹⁰ Other non-substantive grammatical changes appear in this Act as well.

² 1904 Va. Acts ch. 29.

³ *Id.*

⁴ 1910 Va. Acts ch. 17.

⁵ *Id.*

⁶ 1930 Va. Acts ch. 76.

⁷ 1945 Va. Acts ch. 55.

⁸ 1982 Va. Acts ch. 19. By the time of this amendment, the statute had been recodified twice, first as § 15-696 and then as § 15.1-270 of the *Code of Virginia*. In 1962, when the statute was recodified as § 15.1-270, the General Assembly replaced the term "board of supervisors" with "the governing body" of the county. 1962 Va. Acts ch. 623.

⁹ Non-substantive grammatical changes also appear in the 1910, 1930, 1945, and 1962 amendments to the statute.

¹⁰ 1988 Va. Acts ch. 284.

During a recodification of Code provisions pertaining to local governments in 1997, the General Assembly made several notable changes to this Code section. First, it now applied to any “locality,” not just a county.¹¹ It also moved the list of conflicts encompassed to a different section of the Code (former § 2.1-21), which expanded the list,¹² and it applied protections to “monuments or memorials for any war or engagement” therein. It further provided that the monument or memorial could be placed on “any” of the locality’s property and receive the protections of the statute.¹³ It otherwise simplified the language used in the section, but did not alter the prospective phrasing (“[i]f such are erected”) of the statute’s protection.

A year later, the General Assembly broadened the scope of the statute considerably by permitting localities to authorize the erection of “monuments or memorials for any war or conflict, or . . . any engagement of such war or conflict.”¹⁴ It returned the list of conflicts to the statute (as expanded in accordance with § 2.1-21),¹⁵ but the list now served only to provide well-known examples of covered conflicts. The General Assembly also expanded the locality’s authority to authorize or permit such monuments to the “geographical limits” of the locality, not just the locality’s own property.¹⁶ Finally, it added a definition of “disturb or interfere” to include “placement of Union markings or monuments on previously designated Confederate memorials or the placement of Confederate markings or monuments on previously designated Union memorials.”¹⁷ Revisions in 2005 and 2010 added specific wars or conflicts to the list in the statute, but otherwise did not alter its language.¹⁸

b. Impact of § 15.2-1812

In evaluating the impact of this Code section, it should be noted that the longstanding rule in Virginia is that statutes “are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question.”¹⁹ “The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared.”²⁰ When the General Assembly omits a clear manifestation of intent that a statutory change should apply retroactively, it generally should be concluded that the legislature did not intend such

¹¹ 1997 Va. Acts ch. 587.

¹² In particular, it expanded the list by replacing the term “Confederate . . . monuments and memorials” with monuments and memorials to the “War Between the States.” It also added the following wars: Indian Uprising [Algonquin War], French and Indian Wars, and Operation Desert Shield-Desert Storm. See 1997 Va. Acts ch. 587 and former VA. CODE ANN. § 2.1-21 (1993) (codified in current form at § 2.2-3300).

¹³ 1997 Va. Acts ch. 587.

¹⁴ 1998 Va. Acts ch. 752.

¹⁵ The amendment also made specific mention of “Confederate or Union monuments or memorials of the War Between the States.” *Id.* (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 2005 Va. Acts ch. 390 (adding Operation Iraqi Freedom); 2010 Va. Acts ch. 860 (adding the Global War on Terrorism and Operation Enduring Freedom).

With respect to the history of § 15.2-1812 outlined above, certain substantive amendments not relevant herein have been omitted, but may be found by reference to the cited Acts of Assembly.

¹⁹ *Arey v. Lindsey*, 103 Va. 250, 252 (1904).

²⁰ *Bailey v. Spangler*, 289 Va. 353, 359 (2015) (quotation marks and citation omitted).

an application.²¹ Additionally, “[i]n determining legislative intent,” Virginia courts look “both to legislation adopted and bills rejected by the General Assembly.”²² This includes House Bill 587 from the 2016 session of the General Assembly that would have expressly made § 15.2-1812 apply retroactively by inserting language providing that “[t]he provisions of this subsection shall apply to all such monuments and memorials, regardless of when erected.” Governor McAuliffe vetoed the legislation on March 10, 2016, and the General Assembly failed to override the veto.²³

Coupled with the decidedly prospective language chosen by the General Assembly in the statutory text, applying these rules of construction to the multitude of amendments to the Code section over the years shows that while it does apply to some monuments, there is a range of potential outcomes for individual monuments. First, the Code section does not apply to any monument or memorial constructed prior to 1904. The Circuit Court of Danville ruled in *Heritage Preservation Association, Inc. v. City of Danville* that it does not apply to any monument or memorial erected within an independent city prior to 1997.²⁴ Nor does it apply to a monument or memorial erected on any property other than the “public square”²⁵ at the county seat before the same year. Finally, the statute applies only to monuments or memorials for wars or conflicts or “war veterans.”²⁶

2. Individual Enactments of the General Assembly

Putting aside the impact of § 15.2-1812 of the *Code of Virginia*, a large number of monuments around the Commonwealth owe their existence to specific Acts of the General Assembly. For example, a monument erected in the City of Alexandria is subject to the provisions of Chapter 119 of the 1890 Acts of Assembly. In 1903, the General Assembly specifically authorized construction of Confederate monuments on the public squares of Mecklenburg,²⁷ Greensville,²⁸ Botetourt,²⁹ Bedford,³⁰ Campbell,³¹

²¹ *Id.* (“It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention.”) (quotation marks and citation omitted).

²² *Tabler v. Bd. of Supervisors*, 221 Va. 200, 202 (1980).

²³ See 2016 Session: HB 587 Memorials and Monuments; protection of all memorials, etc., Virginia’s Legislative Information System, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+HB587> (last visited August 21, 2017).

²⁴ Case No. CL15000500-00 (Dec. 7, 2015). The Supreme Court of Virginia declined to grant a writ in the case (Record No. 160310), both on initial petition (June 17, 2016) and on a request for rehearing (October 7, 2016).

²⁵ No definition of “public square” appears in the current Code, nor apparently historically within the Code. A number of older enactments refer to a public square as an area of land where the county courthouse, clerk’s office and other official county buildings were located. See, e.g., 1890 Va. Acts ch. 632 (describing laying out a public square for the new county seat of Wise County).

²⁶ For example, this Office previously opined that the protections of the current Code section do not extend to “memorials or markers erected to recognize the historical significance of buildings.” 2015 Op. Va. Att’y Gen. 120, 123.

²⁷ 1902-1904 Va. Acts ch. 465.

²⁸ 1902-1904 Va. Acts ch. 307.

²⁹ 1902-1904 Va. Acts ch. 130.

³⁰ 1902-1904 Va. Acts ch. 116.

³¹ 1902-1904 Va. Acts ch. 117.

Amelia,³² and King William³³ counties. Some of these Acts contain restrictions on the disturbance of the monument, others are silent, and in the case of King William, one Act contains such a restriction and a related Act does not.³⁴ Several other such enactments are found within the Acts of Assembly, both predating³⁵ and postdating³⁶ the 1904 passage of what is now § 15.2-1812.

Each jurisdiction, therefore, may find itself in a unique situation as a result of a particular Act of Assembly. The list set forth above is not exhaustive, and any locality evaluating the potential restrictions on its ability to remove or relocate a war or veterans memorial must research whether an individual Act may govern the situation presented.

3. Other Legal Constraints

In addition to the enactments of the General Assembly discussed above, other legal constraints might limit the ability of a locality to remove or relocate a war or veterans monument. For example, a monument may have been donated to the locality subject to reversionary terms or conditions in the transfer instrument triggered by the locality's attempt to remove or disturb the monument.³⁷ Or, the locality might have received funding for the acquisition, maintenance, preservation or enhancement of the monument through a grant program that places restrictions on any alteration of the monument. As an example, a grant received under the National Historic Preservation Act likely includes a Preservation Agreement³⁸ imposing certain restrictions on the receiving party, and likely would require recordation of restrictive covenants on the property on which the monument is located. Again, the specific circumstances of each monument must be investigated thoroughly to determine what restrictions may apply.

Conclusion

In my opinion, local governments must consider a number of potential restrictions that may apply to removal or relocation of a war or veterans monument as a function of general law, special Act of Assembly, or other limitations such as those imposed upon the donation or conveyance of the monument or limitations arising from participation in a preservation or funding program by action of the locality. Depending on when the monument was erected and where it is located, § 15.2-1812 of the *Code of Virginia* may or may not prohibit the locality from such actions. Careful investigation of the history and

³² 1902-1904 Va. Acts ch. 83.

³³ 1902-1904 Va. Acts ch. 58.

³⁴ Chapter 58 contains a restriction against disturbance or interference, *see* 1902-1904 Va. Acts ch. 58; Chapter 61, which authorizes the use of county funds for the monument, does not, *see* 1902-1904 Va. Acts ch. 61. Both passed the General Assembly on the same date.

³⁵ *See* 1897-98 Va. Acts ch. 320 (Rappahannock County); 1897-98 Va. Acts ch. 553 (Orange County).

³⁶ *See* 1908 Va. Acts ch. 243 (New Kent County); 1908 Va. Acts ch. 86 (King and Queen County).

³⁷ The Supreme Court of Virginia has recognized generally that reversionary clauses in deeds to the Commonwealth are enforceable. *See Commonwealth Transp. Comm'r v. Windsor Indus.*, 272 Va. 64 (2006).

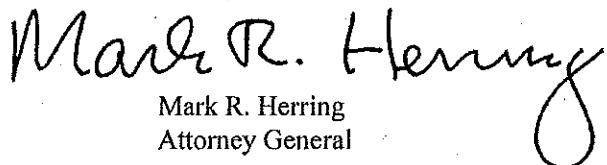
³⁸ 54 U.S.C. § 302902(b)(1)(C) (requiring a grant recipient to maintain and administer the property "in a manner satisfactory to the Secretary"). The Secretary of the Interior, through the National Park Service's Grants Manual, imposes a number of requirements to receive federal funds under the Act, including the necessity of a Preservation Agreement and restrictive covenants.

Ms. Julie Langan
August 25, 2017
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facts concerning a particular monument in a given locality should be completed to determine what, if any, restrictions might apply.

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General