

Circuit Court
OF THE
City of Richmond

JOHN MARSHALL COURTS BUILDING
400 NORTH 9TH STREET
RICHMOND, VIRGINIA 23219

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RE: Taylor, et al. v. Northam, et al. (CL 20-3339)

Counsel,

On October 19, 2020, the parties appeared by Counsel for a bench trial on Plaintiffs' Complaint for Declaratory and Injunctive Relief. The factual background of this matter, which is largely uncontested, is as follows.

Background

1. The 1887 Deed

On July 15, 1887, the descendants of William C. Allen¹ conveyed the Circle at the intersection of Monument Avenue and Allen Avenue to the Lee Monument Association "to have and to hold the said property or 'Circle', to the following uses and purposes and none other, to wit, as a site for the Monument to General Robert E. Lee." Plaintiffs' Cmpl. Ex. C. The Deed was also signed by the President of the Lee Monument Association, Fitzhugh Lee, "in testimony of the [Lee Monument Association's] approval thereof, its recognition of the use and purpose to which the said piece of land is to be held, and its agreement and covenant to carry out the said purpose, and to hold the said property only for the said use." *Id.* Following the conveyance in 1887, the Lee Monument Association took steps to prepare the Circle and acquire the Pedestal and Monument in anticipation of transferring the property to the Commonwealth of Virginia.

2. The 1889 Joint Resolution

On December 19, 1889, the General Assembly approved a Joint Resolution that "authorized and requested" the Governor, "in the name and in behalf of the Commonwealth, to accept at the hands of the Lee Monument Association, the gift of the Monument...of General Robert E. Lee, including the Pedestal and Circle" upon which it stands. Plaintiffs' Cmpl. Ex. A. The Joint Resolution continued on to request that the Governor "execute any appropriate

¹ The heirs of William C. Allen who signed the 1887 Deed were Otway Allen, Roger Gregory, Bettie F. Gregory, N.M. Wilson, and Martha Allan Wilson. These individuals are referred to collectively throughout as the "1887 grantors."

conveyance...in token of such acceptance, and of the guarantee of the state that it will hold said statue and pedestal and ground perpetually sacred to the monumental purpose to which they have been devoted.” *Id.*

3. The 1890 Deed

On March 17, 1890, the Lee Monument Association conveyed the Robert E. Lee Monument, the Pedestal it rests on, and the Circle surrounding the Monument to the Commonwealth. Plaintiffs’ Cmpl. Ex. B. The Deed lists the 1887 grantors as “parties of the second part” and the State of Virginia as a “party of the third part.” *Id.* The Deed specifically provided that the Lee Monument Association “in consideration of the promises by and with the approval and consent of the parties of the second part...grant, transfer and convey unto the party of the third part with Special Warranty” the Circle at the intersection of Monument Avenue and Allen Avenue. *Id.* Also, the Pedestal and Equestrian Statue of General Robert E. Lee were conveyed. *Id.*

The Deed further provided that “[t]he State of Virginia, party of the third part acting by and through the Governor of the Commonwealth and pursuant to the terms and provisions of the Special Statute herein...in token of her acceptance of the gift and of her guarantee that she will hold said Statue and Pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted and that she will faithfully guard it and affectionately protect it.” *Id.* The Deed was signed by all of the grantors in the 1887 Deed² as well as P.W. McKinney who was both the President of the Lee Monument Association and the Governor of Virginia.³ *Id.*

² While there were five grantors on the 1887 Deed, there were six signatories on the 1890 Deed. The additional signatory was Mary McDonald Allen who had married Otway Allen.

³ *Governors of Virginia*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/Governors_of_Virginia (last visited July 27, 2020).

Plaintiffs' Claims

Counts I, II, and III of the Complaint all similarly allege that the 1889 Joint Resolution of the Virginia General Assembly is binding, and the Governor's intended removal would violate Article V, § 1, Article IV, § 1, Article I, § 5, and Article III, § 1 of the Virginia Constitution. Plaintiffs further allege in Count IV that the Commonwealth is bound by the restrictive covenants in the 1887 Deed and the 1890 Deed. As a result of the Court's prior Demurrer ruling on August 25, 2020, only Plaintiffs Massey, Heltzel, and Hostetler bring the Count IV claim as successors in title to the Allen heirs. Count V was previously dismissed by this Court's Order of August 25, 2020.

Prior to the presentation of evidence, the Court took under advisement Plaintiffs' Motion *in Limine*, Plaintiffs' Motion for Summary Judgment, and the Commonwealth's Cross-Motion for Summary Judgment. Plaintiffs' Motion *in Limine* thereafter became moot, as the Commonwealth did not call the two witnesses that Plaintiff sought to exclude.

As to both Motions for Summary Judgment, Rule 3:20 of the Supreme Court of Virginia provides that Summary Judgment "shall not be entered if any material fact is genuinely in dispute." Upon consideration of the pleadings, the argument of the parties, and the relevant law, this Court finds that there are genuine disputes as to material facts. Accordingly, the Court denies Plaintiffs' Motion for Summary Judgment and the Commonwealth's Cross-Motion for Summary Judgment.

Evidence

Plaintiffs' evidence consisted of two title reports, the first one regarding the chain of title for Plaintiffs Heltzel and Hostetler for the property located at 403 N. Allen Avenue, Richmond, Virginia (Pl.'s Ex. 1); and the second one regarding the chain of title for Plaintiff Evan Morgan Massey, Trustee, for the property located at 1833 Monument Avenue, Richmond, Virginia (Pl.'s

Ex. 2). These reports were admitted without objection, and there is no contest by the Commonwealth to the fact that they establish Plaintiffs Massey, Heltzel, and Hostetler as property owners within the Monument Avenue Historic District and within the chain of title from the original Allen heirs who originally deeded the land, upon which the Monument and pedestal were ultimately erected, to the Lee Monument Association in 1887, and which was subsequently deeded to the Commonwealth of Virginia in 1890. Plaintiff's Exhibit 3 was a newspaper article in the Evening Star dated May 31, 1890 referencing a "colored confederate" who attended the Lee Monument unveiling. Plaintiffs' evidence also included the testimony of Dr. Alexander Wise, who testified that he served as the Director of the Department of Historic Resources from 1994-2000 which launched the historic preservation movement in America. Dr. Wise further testified regarding how the Monument Avenue Historic District was made a National Historic Landmark. Finally, Plaintiffs' put forth the testimony of Theresa Rowe who testified that she is an archivist and that she catalogued Plaintiffs' Exhibit 3.

Further, upon request of the Plaintiffs and the Court's own recognition of certain undisputed facts, the Court takes judicial notice, pursuant to Va. Sup. Ct. R. 2:201 (notice of adjudicative facts), 2:202 (notice of law), and 2:203 (notice of official publications) of the following:

1. The 1887 Deed from the heirs of William C. Allen to the Lee Monument Association;
2. The 1889 Joint Resolution of the Virginia General Assembly regarding the Lee Monument;
3. The 1890 Deed from the Lee Monument Association to the Commonwealth of Virginia, conveying the Lee Monument, the pedestal it rests on, and the circle surrounding the Monument;

4. The announcement of Governor Northam on June 4, 2020 of his intention to remove the Lee Monument from Monument Avenue and relocate it;
5. That the Lee Monument is listed on the U.S. Department of the Interior's National Register of Historic Places;
6. That the Monument Avenue Historic District is registered on the Department of the Interior's National Register of Historic Places; and
7. The final report of the Monument Avenue Commission on Removal of Confederate Statues on City Property.

The Commonwealth's evidence consisted of the following:

1. The testimony of Dr. Edward Ayers;
2. The testimony of Dr. Kevin Gaines;
3. Defendants' Exhibit 1, the curriculum vitae of Dr. Edward Ayers;
4. Defendants' Exhibit 2, documents pertaining to the organization of the Lee Monument Association, and the Association of the Army of Northern Virginia, Richmond, Va., November 3rd and 4th, 1870;
5. Defendants' Exhibit 3, a copy of a page from the Richmond Planet newspaper, dated May 31, 1890;
6. Defendants' Exhibit 4, a copy of a newspaper ad for "Monument Avenue Park Lots," dated April 17, 1913;
7. Defendants' Exhibit 5, a souvenir of the Dedication of Monument to Robert E. Lee;
8. Defendants' Exhibit 6, a letter from Robert Leon Bacon to Governor Thomas B. Stanley dated December 2, 1955; and
9. Defendants' Exhibit 7, the curriculum vitae of Dr. Kevin Gaines.

Further, upon request of the Commonwealth, the Court took judicial notice pursuant to Va. Sup. Ct. R. 2:201, 2:202, and 2:203, of the following:

1. That on October 13, 2020, the General Assembly established “Juneteenth” as a holiday “to commemorate the announcement of the abolition of slavery ... and to recognize the significant roles and many contributions of African Americans to the Commonwealth and the nation.” Senate Bill 5031, House Bill 5052, Va. Gen. Assemb. (2020 Special Session 1);
2. That on March 23, 2020, the General Assembly eliminated a State holiday “honor[ing] Robert E. Lee,” 2020 Va. Acts ch. 418;
3. That on July 24, 2020 the General Assembly-created Commission charged with considering replacing the Lee statue in the U.S. Capitol voted unanimously in favor of its removal;
4. That in July 2020, the Speaker of the House of Delegates ordered the removal of a life-sized statue of Lee and seven busts depicting other ex-Confederates from the Capitol’s Old House Chamber;
5. That during June 2020, protestors toppled one Confederate monument in the City of Richmond;
6. That during July 2020, the City of Richmond removed three Confederate monuments along Monument Avenue;
7. House Budget Bill H.B. 5005, dated October 16, 2020; and
8. Senate Budget Bill S.B. 5015, dated October 2, 2020.

At the conclusion of the Plaintiffs’ evidence, and again at the conclusion of all the evidence, the Commonwealth moved the Court to strike the Plaintiffs’ claims, and the Court denied said

motions. Upon consideration of the evidence, the arguments of Counsel, and the relevant law, the Court rules as follows.

Analysis

The Court will first address the Plaintiffs' restrictive covenant claims set out in Count IV. The Court previously set out its analysis of Count IV by letter opinion of August 3, 2020 in regard to the issuance of the temporary injunction. Now having considered the evidence at trial, the Court affirms and adopts its prior August 3, 2020 analysis regarding enforcement of the restrictive covenants contained in the 1870 and 1890 deeds (*see* August 3, 2020 Letter Opinion pg. 8-11). The Court finds that the covenants "guarantee[ing] ... [the Commonwealth] to hold said statue and pedestal and circle ... perpetually sacred ... and faithfully guard it and affectionately protect it" are restrictive covenants, running with the land, and therefore ordinarily enforceable by the Plaintiffs as chain of title owners in vertical and horizontal privity with the original grantors and grantees. However, this is not an ordinary or usual case involving covenants running with the land. The Virginia Supreme Court has long held that in order to enforce deed restrictive covenants, such enforcement must not be contrary to public policy, nor should conditions have so radically changed as to practically destroy the original purposes of the covenant. *See Barner v. Chappell*, 266 Va. 277, 285 (2003); *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 944 (1955); *Ault v. Shipley*, 189 Va. 69, 76 (1849). The burden of establishing that these restrictive covenants are not enforceable as against public policy lies with the party asserting unenforceability, in this case, with the Commonwealth. *See Barner*, 266 Va. at 285; *Wallihan v. Hughes*, 196 Va. 117, 125 (1954). Virginia courts are "averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain." *Wallihan*, 196 Va. at 125.

The Virginia Supreme Court and Virginia Court of Appeals have long held that the legislature, not the judiciary, is the “sole ‘author of public policy.’” *Tvardek v. Powhatan Vill. Homeowners Ass’n*, 291 Va. 269, 280 (2016) (citing *Campbell v. Commonwealth*, 246 Va. 174, 184 n. 8 (1993)). See also *In re Woodley*, 290 Va. 482, 490 (2015); *Wallihan*, 196 Va. at 124-25; *Marblex Design Int’l, Inc. v. Stevens*, 54 Va. App. 299, 309 (2009). The U.S. Supreme Court has also long held that “[t]he legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state.” *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 565 (1911). Therefore, the “best indications of public policy are to be found in the enactments of the [l]egislature.” *City of Charlottesville v. DeHaan*, 228 Va. 578, 583 (1984) (quoting *Mumpower v. Housing Authority*, 176 Va. 426, 444 (1940)).

Given that law, and given that burden of proof, the issue becomes whether the Commonwealth put forward “clear and certain” evidence to support its position that enforcement of the restrictive covenants would be against public policy, and/or evidence that conditions have so radically changed that enforcement would no longer be in accord with the law.

Dr. Ayers and Dr. Gaines testified extensively about the conditions in the Commonwealth, and the South in general, during the period of 1865 through 1890 and beyond. Their testimony included discussion of the purposes for which the Lee Monument was erected in 1890. Although imprecise as to the sole cause and purpose, their testimony overwhelmingly established the need of the southern citizenry to establish a monument to their “Lost Cause,” and to some degree their whole way of life, including slavery. Their testimony described a post-war South where the white citizenry wanted to impose and state unapologetically their continued belief in the validity and honor of their “Lost Cause,” and thereby vindicate their way of life and their former Confederacy. It was out of this backdrop that the erection of the Lee Monument took place.

Further, Dr. Gaines testified that today the monument stands as a contradiction to present societal values. He testified that there is a “consensus that the monuments are a troubling presence.” Dr. Ayers and Dr. Gaines were questioned and cross-examined at length, with testimony at times evolving into the causes and effects of the Civil War in general. However, perhaps the most significant evidence offered by the Commonwealth, was special session House Budget Bill H.B. 5005 and Senate Budget Bill S.B. 5015. The text of the bills was offered to the Court by the Commonwealth without objection and the Court took judicial notice of them. The bills both include provisions that state:

The Department of General Services, in accordance with the direction and instruction of the Governor, shall remove and store the Robert E. Lee Monument or any part thereof.

Additionally, they state:

Notwithstanding the provisions of Acts of Assembly 1889 chapter 24, which is hereby repealed.

That Act of Assembly therein referred to is the Joint Resolution of 1889 requesting and authorizing the Governor to accept the gift of Lee Monument from the Lee Monument Association and “guaranty” that it would be held “sacred to the monumental purpose to which it had been devoted.” As of the writing of this opinion, neither bill has been signed into law by the Governor, but they both have passed their respective sides of the General Assembly.⁴ As the sole author of public policy, whether they are ultimately signed by the Governor or not, these acts of the General Assembly clearly indicate the current public policy of the General Assembly, and therefore the Commonwealth, to remove the Lee Monument from its current position on the state owned property on Monument Avenue. Plaintiffs have taken the position from the outset of this litigation

⁴ As the Court understands it, a compromise budget bill consisting of the aforementioned provisions is currently in front of the Governor.

that the General Assembly, through the 1889 Joint Resolution, established the public policy of the Commonwealth in 1889 and beyond, and so clearly Plaintiffs cannot now argue that this latest legislation doesn't evidence existing public policy.

Additionally, Plaintiffs argue that these House and Senate bills are special legislation, and as such are unconstitutional and should not be considered by the Court. "All acts of the General Assembly are presumed to be constitutional." *In re Phillips*, 265 Va. 81, 85 (2003). The prohibitions against special legislation found in Article IV, § 14-15 of the Virginia Constitution "track the minimum rationality requirements employed by longstanding due process and equal protection doctrines." *Laurels of Bon Air, LLC v. Med. Facilities of America LIV Ltd. P'ship*, 51 Va. App. 583, 597 (2008). The burden is upon the assailant of the legislation "to establish that [it] does not rest upon a reasonable basis, and is essentially arbitrary," and is therefore impermissible special legislation. *Holly Hill Farm Corp. v. Rowe*, 241 Va. 425, 432 (1991). However, the Court finds that there is no evidence that these presumptively constitutional enactments are not rationally related to the current legislative desire to remove the Lee Monument.

Further, the Court does not find that these enactments violate Article III, § 1 of the Virginia Constitution regarding separation of powers. The U.S. Supreme Court in *Bank of Markazi v. Peterson*, 136 S. Ct. 1310 (2016)⁵ held that "congressional power to make valid statutes retroactively applicable to pending cases has often been recognized." *Id.* at 1324 (citing *United States v. Schooner Peggy*, 1 Cranch (5 U.S.) 103, 110, 2 L.Ed. 49 (1801)). The Court also held that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard

⁵ Although not based on the Virginia Constitution, the Court finds this U.S. Supreme Court precedent instructive on the issue of separation of powers. *See Moreau v. Fuller*, 276 Va. 127, 136-37 (2008). *See also FFW Enterprises v. Fairfax Cty.*, 280 Va. 583, 593 (2010) ("In contrast to the federal Constitution, the Constitution of Virginia is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.") (internal quotations omitted).

to undisputed facts.” *Id.* “[The legislature], our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.” *Id.* at 1317. Based upon that authority, the Court does not find that these very recent legislative enactments are unconstitutional special legislation, either lacking rationality and/or unconstitutionally interfering with this litigation.

Considering and weighing the evidence put before the Court by the parties, the Court notes the lack of any evidence from the Plaintiffs on the issue of the public policy of the Commonwealth, other than the 1889 Joint Resolution and the 1887 and 1890 deed restrictions themselves. While the Plaintiffs did not offer into evidence the Final Report of the Monument Avenue Commission on Removal of Confederate Statues (the “Commission Report”), the Court takes judicial notice of the report, its findings, and its recommendations.⁶

The Commission Report would seem to be highly relevant. This highly qualified, racially diverse Commission, appointed by Richmond Mayor Levar M. Stoney, was created for the purpose of determining what to do with the Confederate statues on Monument Avenue, including whether or not to remove them. The Commission “mined almost two thousand letters, devoted considerable time in public forums and tirelessly researched to ensure this report reflects our diverse public and the best scholarship to craft a solution that is best for Richmond.” Commission Report at 3. After this exhaustive public process, the Commission Report recommended that only the Jefferson Davis Monument be removed, that signage be created providing context for the other monuments, including the Lee Monument, and that the erection of additional monuments be considered. Commission Report at 32-33.

⁶ The Commission Report can be found here: https://richmond.com/monument-avenue-commission-final-report/pdf_98dfbab1-3a10-52d4-ab47-f4a2d9550084.html.

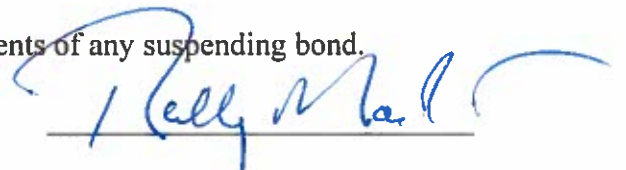
While the Court certainly finds the highly respected Commission's work and recommendations to be significant, the Commission does not establish public policy. The Commission's recommendations would seem to reflect public opinion, public input, and good faith deliberations by its highly qualified members, but as set out above, only the General Assembly establishes public policy for the Commonwealth.

In sum, the Court finds on balance that the Commonwealth has carried its burden of proving by clear and certain evidence that enforcement of the restrictive covenants in the Deeds of 1887 and 1890 would be in violation of the current public policy of the Commonwealth of Virginia. The Court therefore holds that, at this time, the restrictive covenants are unenforceable by this Court.

As to the Plaintiffs' claims set out in Counts I, II, and III, the Court agrees with the Plaintiffs to the extent that the Governor's announced and intended actions of June 4, 2020 might well have been a unilateral executive action in contravention of previously established public policy. However, given the Court's current finding of a change in that public policy, the proposed executive action would no longer contravene public policy nor be in violation of the Virginia Constitution.

Conclusion

For the reasons set out above, the Court orders that the temporary injunction against the Commonwealth herein, previously entered on August 3, 2020, is hereby dissolved effective immediately. However, pursuant to Va. Code § 8.01-631(B) and § 8.01-676.1(L), the Court orders the suspension of any execution upon this Judgment Order pending the resolution of a properly perfected appeal, and the Court further waives the requirements of any suspending bond.



W. Reilly Marchant, Judge

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