

**Circuit Court**  
OF THE  
**City of Richmond**

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

August 3, 2020

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

Counsel,

On July 23, 2020, the parties appeared by Counsel on Plaintiffs' Motion for Temporary Injunctive Relief.

### **A. Background**

To the extent the background of this matter is relevant to the Court's analysis, it is included below.

#### **1. The 1887 Deed**

On July 15, 1887, the descendants of William C. Allen<sup>1</sup> 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' 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

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<sup>1</sup> 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."

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’ Ex. A. The Joint Resolution continued on to request that the Governor “execute any appropriate 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’ 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 Deed<sup>2</sup> as well as P.W. McKinney who was both the President of the Lee Monument Association and the Governor of Virginia.<sup>3</sup> *Id.*

#### **4. Governor's Announcement**

On June 4, 2020, Governor Ralph S. Northam announced that he would exercise his authority as the Commonwealth's chief executive to remove the Statue of Robert E. Lee from Monument Avenue and relocate it. *See* Plaintiffs' Mem. in Support of Their Mot. For Temporary Injunctive Relief. The Governor asserted that the erection of the Monument "was wrong then, and it is wrong now." Press Release, Office of the Governor, Governor Northam to Remove Robert E. Lee Statue in Richmond (June 4, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/june/headline-857181-en.html>. In accordance with the Governor's decision, he directed the Department of General Services to develop a plan to remove the Lee Monument. *See* Plaintiffs' Mem. in Support of Their Mot. For Temporary Injunctive Relief 2. That plan proposes removing the Statue in one piece from the Pedestal, then intricately dividing the Statue into three pieces when possible, along original casting joints or along the edges of cast elements or sculpted folds. *Id.*; *see also* Proposal from B.R. Howard Conservation Regarding the Removal of the Robert E. Lee Monument. This plan was submitted to and approved by the Art and Architectural Review Board.

#### **5. Plaintiff's Claim**

On July 21, 2020, Plaintiffs filed this Complaint for Declaratory and Injunctive Relief and a Motion for Temporary Injunctive Relief. Plaintiffs' Complaint proceeds in five counts. Count

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<sup>2</sup> 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.

<sup>3</sup> *Governors of Virginia*, ENCYCLOPEDIA VIRGINIA, [https://www.encyclopediavirginia.org/Governors\\_of\\_Virginia](https://www.encyclopediavirginia.org/Governors_of_Virginia) (last visited July 27, 2020).

One alleges the “1889 Joint Resolution authorizing the Governor of Virginia to accept the gift of the Lee Monument on behalf of the Commonwealth is binding on Defendants,” and that removal of the Lee Monument would be in violation of the 1889 Joint Resolution and Article V, § 1 of the Constitution of Virginia. Compl. 4. Count Two alleges that the Order to remove the Lee Monument “constitutes a violation of a duly adopted legislation action and is, therefore, a violation of Article IV, § 1 of the Constitution of Virginia.” *Id.* at 5. Count Three asserts that the Order to remove the Lee Monument “is an exercise of legislative power and constitutes an encroachment...on the legislative prerogative, responsibility and power of the General Assembly in violation of Article I, §5 and Article III, § 1 of the Constitution of Virginia.” *Id.* at 5. Count Four asserts that the 1887 and 1890 Deeds conveying the Circle on which the Lee Monument now sits from the 1887 grantors<sup>4</sup> to the Lee Monument Association and to the Commonwealth impose restrictive covenants on the Commonwealth’s use of the property, thereby prohibiting the removal of the Lee Monument. *Id.* at 6-7. Count Five alleges that Va. Code § 2.2-2402(B) “prohibits the removal of existing structures identified in that subsection that are owned by the Commonwealth, including the Lee Monument,” and that the Order to remove the Lee Monument in violation of Va. Code § 2.2-2402(B) “constitutes arrogation of power by him in violation of Article I, § 5, Article III, § 1, Article IV, § 1, and Article V, § 1” of the Virginia Constitution. *Id.* at 8. Plaintiffs also seek declaratory judgment that “the actions of Defendants to remove the monument to Robert E. Lee” violate the Constitution of Virginia, the 1889 Joint Resolution, and the provisions of the 1887 and 1890 Deeds. *Id.* at 8.

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<sup>4</sup> 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 at the “1887 grantors.”

## **B. Preliminary Injunction Standard**

In Virginia, in order for a court to grant a temporary injunction, the party seeking the injunction must establish they would “suffer irreparable harm without the injunction, and that the party has no adequate remedy at law.” *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 17-18 (2019). Beyond this showing, “granting or denying a temporary injunction is a discretionary act arising from the court’s equitable powers.” *Id.* Accordingly, courts across the Commonwealth have applied a balancing test similar to that articulated federally in *Winters v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Namely, courts evaluate (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm, (3) the balance of the equities, and (4) the public interest in issuing the injunction.

### **1. The Likelihood of Success on the Merits**

In the evaluation of the likelihood of the success on the merits, the Court first considers Plaintiffs’ general standing to assert their claims.

#### **a. General Standing**

The “concept of standing concerns itself with the characteristics of the person or entity who files suit. The point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case.” *Cupp v. Board of Supervisors of Fairfax Cnty*, 227 Va. 580 (1984). “As a general rule, without a ‘statutory right, a citizen or taxpayer does not have standing to seek mandamus 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.” *Howell v. McAuliffe*, 292 Va. 320, 330 (2016) (quoting *Goldman v. Landsidle*, 262 Va. 364 (2001)). “It is not enough to simply ‘tak[e] a position and then challeng[e] the government to dispute it,’ a

party must demonstrate a ripe justiciable controversy by alleging an ‘actual or potential injury in fact based on present rather than future or speculative facts.’” *Marrs v. Northam, et al.*, No. 200573 (Va. June 17, 2020) (quoting *Lafferty v. School Bd. of Fairfax Cnty.*, 293 Va. 354, 361, 364-64 (2017)).

In this case, Plaintiffs assert they are all landowners (or the trustee of owners) of property within the Monument Avenue National Historic Landmark District. Compl. 2. Specifically, Plaintiffs Taylor and Smith own property on Monument Avenue within the Monument Avenue Historic District. *Id.* Plaintiff Massey is a trustee of the owner of one of the parcels on Monument Avenue within “The Wm C Allen Addition,” which was a part of the 1887 Deed conveyance. *Id.* Finally, Plaintiffs Heltzel and Hostetler likewise own property on Allen Avenue within “The Wm C. Allen Addition,” which is a part of the 1887 Deed conveyance. *Id.*

“Plaintiffs enjoy certain benefits as a consequence of their ownership of real estate within that district, which will be adversely affected by any actions of Defendants to remove, damage or alter the Lee Monument.” *Id.* at 3. Specifically, they allege that “removal of the Lee Monument or significant alteration of it or any of the other monuments within the Monument Avenue Historic District could result in the loss of the National Historic Landmark designation of the district.” *Id.* If the District were to lose its National Historic Landmark designation, then the Plaintiffs would lose favorable tax treatment and there could be a reduction in property values. *Id.* Finally, Plaintiffs allege they “will also suffer injury as a result of the loss of a priceless work of art from their neighborhood and the degradation of the internationally recognized avenue on which they reside.” *Id.* at 4.

Plaintiffs’ interest in their property values and the structuring of their neighborhood provide them direct and pecuniary interests in the outcome of this litigation separate from those of

the general public. Additionally, in *Phillips Morris USA, Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564 (2007), the Supreme Court found that “plaintiffs adequately allege injury in fact when they aver that they used the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Id.* at 577 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 183 (2000)); *see also Chesapeake Bay Found., Inc. v. Commonwealth*, 52 Va. App. 807 (2008) (“aesthetic and environmental well-being...are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection...”); *see also Payne v. City of Charlottesville*, 97 Va. Cir 51, at \*7 (2017) (“aesthetic, artistic, recreational, historical, or similar losses constitute harm that is relevant in determining standing”). Based upon this precedent, Plaintiffs’ allegations regarding the injury they would suffer “as a result of the loss of a priceless work of art from their neighborhood,” and Plaintiffs’ interest in their property values, the Court finds that these Plaintiffs have sufficiently stated a claim for general standing in this case.

Having found that the Plaintiffs have general standing to state their claims, the Court next considers the likelihood of success on the merits of their claims. So long as the Plaintiffs are likely to succeed on at least one of their claims, they will satisfy this prong of the temporary injunction analysis.

**b. The Likelihood of Success on the Merits**

Count Four of Plaintiffs’ claim asserts that Plaintiffs have a right to enforce restrictive covenants that were contained in both the 1887 and 1890 Deeds. The common law doctrine of covenants running with the land requires: (i) privity between original parties; (ii) privity between original parties and their successors; (iii) an intent that the restriction will run with the land; (iv)



that the covenant ‘touches and concerns’ the land,<sup>5</sup> and (v) that the conveyance be in writing. *Sloan v. Johnson*, 254 Va. 271, 276 (1997).

### **i. Horizontal Privity**

“In order to establish horizontal privity, the party seeking to enforce the real covenant must prove that ‘the original covenanting parties [made] their covenant in connection with the conveyance of an estate in land from one of the parties to the other.’” *Sonoma Development Inc. v. Miller*, 258 Va. 163, 168 (1999). “The covenant must be part of a transaction that also includes the transfer of an interest in land that is either benefited or burdened by the covenant.” *Id.* The term ‘transaction’ is defined as ‘an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered.’” *Id.* Here, the 1887 grantors conveyed the Circle upon which the Lee Monument Association sits in exchange for the Lee Monument Association’s “covenant to carry out the said purpose, and to hold the said property only for the said use,” namely “as a site for the Monument to General Robert E. Lee.” This original conveyance establishes horizontal privity between the 1887 grantors and the Lee Monument Association.

### **ii. Vertical Privity**

“Vertical privity exists when there is privity between the original parties and their successors-in-interest.” *Barner v. Chappel*, 266 Va. 277, 284 (2003). “More precisely, vertical privity requires that the benefit of a restrictive covenant extend only to ‘one who succeeds to

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<sup>5</sup> The Restatement (Third) of Property § 3.2 (2000) eliminates the ‘touch and concern’ requirement for restrictive covenants. However, that elimination has not been recognized by the Virginia Supreme Court. See *Barner v. Chappell*, 266 Va. 277, 283 (2003); see also *Beeren & Barry Investments, LLC v. AHC, Inc.*, 277 Va. 32, 37 (2009).

some interest of the beneficiary in the land respecting the use of which the promise was made.”  
*Id.* (quoting *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*, 215 Va. 658, 663 (1975)). In this case, vertical privity not only benefits the Plaintiffs but it also binds the Commonwealth. The Commonwealth, by way of the 1890 Deed, is a successor in interest to the Lee Monument Association whose restrictive covenants are included in the 1887 Deed and expounded upon in the 1890 Deed. Further, the Plaintiffs have alleged that they are successors in interest to the grantors of the 1887 Deed and signatories to the 1890 Deed by way of the Plaintiffs owning property that was included within the dominant estate at the time the restrictive covenant was created. Compl. 7. At this stage, that allegation is sufficient for Plaintiffs to state a claim for vertical privity.

### **iii. Run with the Land**

For a covenant to run with the land, the original parties to the covenant must intend that the covenant remain connected to the land, binding the hands of whoever later obtains title to the land. *See Cheatham v. Taylor*, 148 Va. 26, 44 (1927). In this case, the original parties to the 1887 Deed clearly expressed an intention that the covenant run with the land by covenanting that the “said piece of land is to be held...only for the said use.” Further, at the time the 1887 grantors deeded the Circle upon which the Pedestal and Statute would be eventually placed, they owned all of the surrounding property and agreed that “in consideration of the selection of said site by [the Lee Monument] Association,” they would set aside property for the creation of Monument Avenue, Allen Avenue, and Lee Place because such creation was an “integral part of the general design and transaction, and as indissolubly connected with the conveyance above made of the Monument site.” The conveyance of the Circle and the set aside of the property for the creation of the surrounding avenues was provided for to explicitly allow the 1887 grantors to develop the

surrounding areas into a neighborhood. *See Barner v. Chappell*, 266 Va. 277, 280 (2003) (describing properties and covenants conveyed from a common grantor (Governor John Garland Pollard), pursuant to a common subdivision plan, via deeds that required a “park be maintained perpetually for the mutual benefit of the owners of the lots in Pollard Park.”). Therefore, the Court finds that the parties clearly intended the covenant to run with the land as the 1887 grantors developed the surrounding area.

#### **iv. Touch and Concern the Land**

Ordinarily, a covenant touches and concerns the land when it pertains to the “natural use and enjoyment of the land retained by the grantor.” *Oliver v. Hewitt*, 191 Va. 163, 166 (1950). Therefore, a mere personal restriction that is “imposed upon the use of the land conveyed...for the purpose of protecting from injurious competition the business operated by the grantor” does not touch and concern the land. *Id.* at 166-67; *see Tardy v. Creasy*, 81 Va. 553, 565 (1886) (asserting that where a covenant is ‘collateral’ or ‘purely personal,’ it does not touch and concern the land). Further, “the requirement of ‘touch and concern’ cannot be overcome by a mere declaration that a covenant runs with land.” *Harrison & Bates, Inc. v. F.R. Assocs., L.P.*, 47 Va. Cir. 468 (Richmond 1998). In this case, the 1887 Deed covenants specifically authorize the way in which the Circle can be utilized. The covenants directly impact whether the Circle is home to a statue of Robert E. Lee, any other sort of structure, or no structure at all. Therefore, the Court finds that the covenant does touch and concern the land.

#### **v. In Writing**

Finally, it is clear the covenants were in writing and included within the 1887 Deed, and by way of the 1887 grantors being signatories on the 1890 Deed, those covenants were also ratified in writing.

Therefore, at this time, the Court finds that the Plaintiffs are likely to succeed on a claim under the common law doctrine of restrictive covenants running with the land. This finding makes it unnecessary to address the likelihood of success on the remaining counts at this time.

## **2. The Likelihood of Irreparable Harm**

Plaintiffs allege that the removal of the Lee Monument “would cause immediate and irreparable injury to plaintiffs who live within view of the Monument.” Plaintiffs’ Memorandum in Support of Their Motion for Temporary Injunctive Relief, 2. As discussed above, Plaintiffs may suffer a devaluation of property values and/or a “degradation of the internationally recognized avenue on which they reside,” if the Lee Monument were to be removed. Compl. 4. Additionally, as discussed in the likelihood of success on the merits section of this analysis, Plaintiffs appear to state a claim for a restrictive covenant, and a resulting appurtenant easement, which is a real property interest that would be harmed by the removal of the Lee Monument.

The Supreme Court has repeatedly held that “the violation of a real property interest is deemed ‘irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary.’” *Norfolk Southern Ry. Co. v. E.A. Breeden, Inc.*, 287 Va. 456, 464 (2014) (quoting *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 62 (2008)). As such, this Court finds that Plaintiffs have pled that they would suffer irreparable harm, by way of a violation of their real property rights, if the Lee Monument were removed prior to this matter being fully and fairly litigated.

## **3. The Balance of the Equities**

“A defendant may avoid the imposition of the equitable remedy sought for violation of a real covenant ‘if such a remedy would create a hardship or injustice that is out of proportion to the relief sought, if the performance by the defendant would be impossible, or if the enforcement

of the decree would be unusually difficult for the court.” *Norfolk Southern Ry. Co.*, 287 Va. at 465 (quoting *Perel*, 267 Va. at 700).

In this case, issuing the temporary injunction clearly passes the test articulated in the *Norfolk Southern* case. The Monument, Pedestal, and Circle have been maintained and protected by the Commonwealth since 1890. Clearly the balance of equities favors maintaining the Monument and Pedestal in its current location pending a full and final hearing on the merits of this case. This creates no burden on the Commonwealth.

#### **4. Public Interest in Issuing the Injunction**

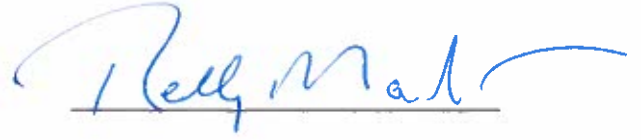
As discussed above, issuing the temporary injunction would merely maintain the status quo. However, refusing to issue the temporary injunction might well lead to the removal of the Lee Monument during the pendency of the litigation, and before a full hearing, which clearly would not be in the public interest. At this point in time, the public interest does weigh in favor of the issuance of a temporary injunction.

#### **C. Conclusion**

The Court, having thoroughly considered Plaintiffs’ Motion for Temporary Injunctive Relief, Complaint, and Exhibits, the Commonwealth’s Response at the July 23, 2020 hearing, and the relevant law, finds that the issuance of a temporary injunction while this matter is fully and fairly litigated is warranted.

To reiterate, while the Plaintiffs have filed their Complaint based on five different counts, the Court has found sufficient basis to issue a temporary injunction on one of the five counts. That fact obviates the need for the Court to address the remaining four counts at this time, but the Court will hear evidence and further argument regarding all five counts at the final hearing on

the Complaint for Declaratory and Injunctive Relief. The injunction is issued as more fully set out in the Court's Order of the same date.

A handwritten signature in blue ink, appearing to read "Reilly Marchant", is written over a horizontal line.

W. Reilly Marchant, Judge

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