V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

HELEN MARIE TAYLOR, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CL20003339-00
	)	
GOVERNOR RALPH S. NORTHAM, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION AND REQUEST FOR RECONSIDERATION OF ORDER SUSPENDING JUDGMENT

On October 19, 2020—after a temporary injunction prohibiting the Governor from removing the Lee statue had already been in place for over four months—this Court conducted a full trial on all of plaintiffs' remaining claims. Eight days later, the Court issued a letter opinion holding that *all* of those claims failed as a matter of fact and law. See Letter Opinion of Oct. 27, 2020 (Letter Op.). Specifically, the Court found 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" *and* that "the proposed executive action would [not] contravene public policy nor be in violation of the Virginia Constitution." *Id.* at 13. Accordingly, the Court "dissolved" the existing temporary injunction "effective immediately." *Id.*; accord Order of Oct. 27, 2020 at 1 (Order) ("the Court **DISSOLVES** the temporary injunction previously entered").

In the last sentence of that same opinion, however, the Court appears to have issued a new injunction pending the outcome of an appeal that plaintiffs have not yet even filed. Specifically, the Court stated that "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 resolution of a properly perfected appeal, and the Court further waives the requirements of any suspending bond." Letter Op. 13; accord Order 1 (similar). Defendants object to that aspect of the Court's ruling and ask the Court to reconsider it.[1]

1. Code § 8.01-631(B) does not permit the "suspen[sion]" of an order dissolving a temporary injunction pending an appeal that has not yet been filed. That provision states in full: "When an appeal is taken from an interlocutory order or final judgment granting, dissolving, or denying a permanent injunction, and while the appeal is pending, the trial court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

The Court's order purporting to "suspen[d] execution upon" its judgment is inconsistent with the statute for several reasons. *First*, by its plain terms, that statute requires a "pending" appeal. See Va. Code. Ann. § 8.01-631(B) ("When an appeal is taken . . . and while the appeal is pending, the trial court in its discretion may . . . ."). Because plaintiffs have not yet noticed an appeal, the prerequisite for any action by the Court has not been met. *Second*, the terms of the statute do not permit the Court to "suspend" a judgment dissolving a temporary injunction. Rather, the statute only addresses an order "granting, dissolving, or denying a *permanent* injunction," Va. Code Ann. § 8.01-631(B) (emphasis added), which this Court's recent order

[1] Defendants also urge the Court to modify its Order to underscore that it is finally resolving all of plaintiffs' claims and entering judgment in favor of defendants. To be sure, the Court's Letter Opinion "finds . . . that the Commonwealth has carried its burden" on the plaintiffs' covenant claim (Count IV) and that "the proposed executive action would no longer contravene public policy nor be in violation of the Virginia Constitution" (Counts I, II, and III), see Letter Op. 13, and the Court's Order describes itself as a "Judgment Order," Order 1. Although defendants believe this suffices to create a final decision, defendants urge the Court to clarify its order in this respect.

does not purport to do. See Letter Op. 13; Order 1. *Third*, because defendants prevailed at trial—and because defendants did not seek any relief against plaintiffs—there will be no "execution" of any judgment, much less an "execution" that could logically be "suspen[ded]." Compare *GeoMet Operating Co., Inc. v. CNX Gas Co. LLC*, 661 S.E.2d 139, 140 (Va. 2007) (requiring bond from plaintiff to suspend execution of judgment on defendant's counter claim).

Even if those problems could somehow be overcome, Code § 8.01-631 does not authorize this Court to prohibit the Governor from removing the Lee statue during the pendency of a yet-to-be filed appeal. Although that statute permits a trial court to "restore" an injunction that has been dissolved or expired or to "grant" a new one pending appeal—and plaintiffs ask the Court for precisely that relief (see Mot. to Clarify 1)—nothing in Code § 8.01-631(B) suspends the requirement to consider the factors necessary to establish temporary injunctive relief before doing so. See *GeoMet Operating Co., Inc.*, 661 S.E.2d at 140 (reversing injunction because "the record [did] not reflect that the trial court considered the factors necessary for the issuance of temporary injunctive relief"). The Court has never analyzed those factors in light of its post-trial decision, and they are plainly not satisfied here.

As this Court has explained, in determining whether temporary injunctive relief is warranted, "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)." Letter Opinion of Aug. 3, 2020, at 6. 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." *Id.*

Even assuming that plaintiffs could show a likelihood of irreparable harm, the other three factors now weigh entirely against them. Because the Court has already held that plaintiffs'

claims fail on the merits, it is difficult to see how this Court could conclude that plaintiffs have established a *likelihood* of success on appeal.[2] And given that any restored or new injunction pending appeal would prevent the Governor from taking an action this Court has already held is constitutional and consistent with the public policy of the Commonwealth, the balance of equities and public interest clearly weigh against granting further injunctive relief now that the trial is over. That is particularly true given that final "resolution of a properly perfected appeal" (Letter Op. 13) could easily take a year if plaintiffs pursue a petition for appeal in the ordinary course and use all of their available time. See Va. S. Ct. R. 5:17(a)(1) (providing that a petition for appeal may be filed as late as "90 days after entry of the order appealed from"); see also Sara Rankin, *Judge Sides with Virginia, but Lee Statue Stays Put for Now*, Associated Press (Oct. 27, 2020) (quoting plaintiffs' counsel as stating "[w]e've got a long ways to go" regarding plaintiffs' planned appeal).[3]

2. Any order purporting to grant (or, in effect, granting) a temporary injunction pending appeal also would be invalid absent a requirement that plaintiffs provide an injunction bond. Code § 8.01-631(A) establishes a general rule: "[N]o temporary injunction shall take effect

[2] To be sure, a reviewing court could potentially disagree with the Court's assessment and grant its own injunction pending appeal. But for *this Court* to grant an injunction pending appeal, it would have to determine that plaintiffs have at least some likelihood of success on the merits, which would be inconsistent with the Court's holding that defendants have established "by clear and certain evidence" that the alleged covenants are unenforceable and "the proposed executive action would [not] . . . be in violation of the Virginia Constitution." Letter Op. 13.

[3] For that reason, even if the Court disagrees with defendants' reading of Code § 8.01-631(B) or otherwise concludes that an injunction pending appeal is appropriate, it should modify its order to limit the duration of any such injunction and discourage dilatory behavior by plaintiffs. Because the Court's order dissolved a temporary injunction, plaintiffs would be permitted to pursue their appellate rights under Virginia Code § 8.01-626, which requires the aggrieved party to file a petition for review within 15 days of the order denying relief. And since appeals under Code § 8.01-626 proceed much faster than ordinary appeals, requiring plaintiffs to use that section to obtain a further injunction in a case they have already lost on the merits would mitigate (though certainly not eliminate) the prejudice to defendants of an injunction foreclosing removal of the Lee statue until an appeal is resolved.

until the movant gives bond with security in an amount that the trial court considers proper to pay the costs and damages sustained by any party found to have been incorrectly enjoined." Accord *Geomet Operating Co. Inc.*, 661 S.E.2d at 140 (reversing injunction where "the order [did not] comply with Code § 8.01-631 regarding the posting of bond by the party obtaining injunctive relief"). Although the same statute permits the excusal of the duty to post bond "in the case of a fiduciary or any other person from whom . . . it may be improper or unnecessary to require bond," Va. Code Ann. § 8.01-631(A), that exception is not without limits. "Under the rule of *ejusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words." *Martin v. Commonwealth*, 224 Va. 298, 301–02 (1982). Applied here, that rule teaches that the phrase "any other person" should understood to refer to someone *like a fiduciary*—for example, a person (such as a trustee, an executor, or a guardian) who seeks relief from the court not on their own behalf but to benefit someone else. Accord *Lomax v. Picot*, 23 Va. 247, 247 (1924) ("It is error in the Chancellor to grant an injunction, without requiring security, except in the case of executors, administrators, and other fiduciary characters."); *Deeds v. Gilmer*, 162 Va. 157, 271 (1934) (observing that "[i]t is a very exceptional case in which a court can, without abusing its discretion, grant an injunction to a person (other than a personal representative or some other person suing in a similar representative capacity) without requiring bond" and holding that "other complainants were not entitled to have the benefit of the injunctive protection for their individual claims without giving bond, merely because the receiver [who was also a plaintiff] may have been"). Because plaintiffs are plainly acting in their own interests—indeed, they seek to vindicate a restrictive covenant that would benefit *their own private property* at the expense of the Commonwealth and its

millions of other citizens—plaintiffs are not akin to fiduciaries and cannot establish any exceptional circumstances permitting the bond requirement can be excused.[4]

* * *

The first injunction prohibiting the Governor from removing the Lee statue was issued on June 8, 2020—four days after the Governor announced his decision. See Order, *Gregory v. Northam*, Case No. CL20-2441 (Richmond City Cir. Ct. June 8, 2020) (Cavedo, J.). That injunction was issued *ex parte*, before the Governor or Attorney General Mark Herring had even been notified that a suit had been filed. *Id.* The Court then extended that temporary injunction even *after* it sustained defendants' demurrer on the grounds that the plaintiff in that suit lacked standing. See Order, *Gregory v. Northam*, Case No. CL20-2441 (Richmond City Cir. Ct. June 23, 2020) (Cavedo, J.).When the Court sustained defendants' second demurrer in that case and dismissed the complaint, it immediately granted new temporary injunctive relief to these plaintiffs—who had, by then, already twice dismissed their own claims. Order, *Taylor v. Northam*, No. CL20-3339 (Richmond City Cir. Ct. Aug. 3, 2020) (Marchant, J.). After exhaustive briefing and a full trial, this Court held that all of plaintiffs' claims failed on the merits. Letter Op. 13. Nonetheless, the Court purported to suspend its order finally dissolving the last temporary injunction, thereby likely foreclosing the Governor from taking an action consistent with "current public policy of . . . the Commonwealth" for the better part of a year. *Id.*

[4] Although the Court's October 27 opinion and order cited Code § 8.01-676.1(L), that provision has no application here. That provision refers to "waiv[ing] the filing of a *suspending* bond or irrevocable letter of credit as to the *damages* in excess of, or other than, the compensatory damages." (emphasis added). As explained in the text, because the Court's decision grants no affirmative relief in favor of defendants—much less any "damages"—there is nothing to "suspend" here. Instead, the relief plaintiffs seek is actually a restored or a new temporary injunction pending appeal.

Defendants respectfully urge the Court to reconsider that part of the decision. Plaintiffs have no right to an injunction to forestall executive action that breaks no law and contravenes no rights, and the Code provisions cited in this Court's October 27 opinion and order supply no warrant for giving them one.

CONCLUSION

Plaintiffs' motion to clarify should be denied and the order purporting to prohibit the Governor from removing the Lee statue pending any appeal should be dissolved. In the alternative, the Court should modify its order to provide that an injunction pending appeal will remain in effect only if plaintiffs exercise their right to file a timely petition for review under Code § 8.01-626.

Dated: October 29, 2020

Respectfully submitted,

RALPH S. NORTHAM;
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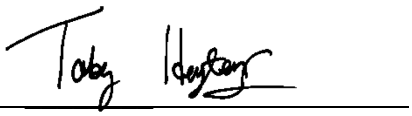
By: 

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CERTIFICATE OF SERVICE

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