VIRGINIA:

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

HELEN MARIE TAYLOR *et al.*,

Plaintiffs,

v. Case No. CL20-3339-00

RALPH S. NORTHAM *et al.*,

Defendants.

PLAINTIFFS' OPPOSITION TO DEMURRER

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Plaintiffs, by counsel, submit the following in opposition to Defendants' Demurrer:

INTRODUCTION

Plaintiffs have challenged Governor Northam's order to remove the Lee Monument on two general grounds: (1) his violation of the restrictive covenant in the 1887 and 1890 Deeds (Count Four) and (2) his violations of the various provisions of the Constitution of Virginia – Article I, § 5, Article III, § 1, Article IV, § 1 and Article V, § 1 (Counts One, Two, Three and Five). Defendants' Demurrer asks the Court to rule that both legal concepts are invalid.[1]

Defendants are mistaken about the nature of Plaintiffs' claims. Owners of land intended to benefit from restrictive covenants, such as the Allen Addition Plaintiffs who rely on the 1887 and 1890 Deeds (Ex. B and Ex. C), have a well-established right to enforce the restrictive covenants that run with the land. Such covenants are a binding commitment that Governor cannot disregard. All of the Plaintiffs, who live in close proximity to the Lee Monument and allege adverse effects both pecuniary and sentimental that would result from the removal of the Lee Monument, have a right under the Constitution of Virginia to challenge the *ultra vires* actions and decisions of public officials, including the Governor.

The role of a demurrer is merely to test the legal sufficiency of the causes of action in a complaint, not to examine the sufficiency of defenses that have not yet been pled. As this Opposition will show, each of the counts of the Complaint is well-pled and supported by legal authority. Despite the plain language of the 1887 and 1890 Deeds that contain the restrictive covenant upon which Count Four is based, Defendants mistakenly contend that the language is precatory and ambiguous. They also argue mistakenly that Plaintiffs' constitutional claims in

[1] Defendants have agreed to remove Section I.b.3 of their Demurrer; therefore, this memorandum will not address matters raised in that Section.

Counts One, Two, Three and Five cannot be maintained because of lack of standing, the absence of a statutory right of action, the doctrine of sovereign immunity, and a lack of enforceability of the 1889 Joint Resolution. Ex. A. This Opposition refutes each of those arguments.

I. THE RESTRICTIVE COVENANTS ARE ENFORCEABLE.

Defendants raise various arguments against the enforceability of the covenants in the 1887 and 1890 Deeds.[2] Demurrer, 1-7. Before addressing their specific arguments in detail, it may be helpful to examine very closely the deeds themselves. The Defendants purport to find the deeds "ambiguous," "odd, multilayered," and "vague and undefined." Demurrer 2-3. To the contrary, the 1887 and 1890 Deeds are notable in that they explain exactly what the parties intended to accomplish and why they chose to structure the conveyances in the way that they did.

"In Virginia, 'all rules of construction have but one object, and that is to ascertain the intent of the parties to the instrument to be construed, and that intent when ascertained, if it controverts no rule of law or of public policy, becomes the law of the case, and full effect must be given to it.'" *Hamm v. Hazelwood*, 292 Va. 153, 161 (2016), *quoting Morris v. Bernard*, 114 Va. 630, 634 (1913). A review of the deeds themselves clearly shows that the intent of the parties was to create enforceable covenants.

A. The 1887 Deed

The 1887 Deed between the Allen family and the Lee Monument Association was not simply a conveyance of a parcel of land from the Allens to the Association.[3] If the purpose had

[2] The Demurrer does not dispute the Court's holding that the deed covenants "run with the land" and that Plaintiffs have the right to enforce them, and so it is unnecessary to revisit that issue. Letter Op. at 8-12 (Aug. 3, 2020).

[3] Defendants assert that "the original donors' acquiescence in the 1890 deed means that the language of that document superseded any possible restriction contained in the 1887 deed." Demurrer, 2 n.2. No authority is cited in support of this assertion. There is no indication in the 1890 Deed that it was the intention of the parties to supersede the restrictions in the 1887 Deed,

been merely to convey the circle of land upon which the Lee Monument was to be placed, a much simpler and briefer instrument would have sufficed. In the words of the deed, it was a "contract and arrangement between them," in which each party both received and gave consideration for the promises that they exchanged.

The first whereas clause states that the Lee Monument Association selected the property conveyed as the site for the Monument to be erected to General Robert E. Lee in consideration of the advantages of the location, and "especially of the very desirable plan and arrangement of the surroundings offered by the grantors, and their dedication of the broad avenues hereinafter more fully set forth,. . . ." 1887 Deed, Ex. C.

The second whereas clause states that the grantors (the Allen family) "in consideration of the selection of said site by said Association, have determined to make the arrangement of the surroundings and dedication of the avenues above referred to;. . . ." *Id*.

The final whereas clause states that "while it is considered impracticable to deed the avenues aforesaid directly to the City of Richmond" because they were then mostly outside of the city limits, both parties desired to consummate the contract and arrangement between them so that the Lee Monument Association could begin its work. *Id*.

The main clauses of the 1887 Deed convey the parcel of land within what is now known as the Lee Circle to the Association "[t]o have and to hold the said property or 'Circle', to the following uses and purposes and none other, towit, as a site for the Monument to General Robert E. Lee which it is the end and object of the Monument Association to erect." The Association

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and there is no reason the 1887 Deed restrictions should have been superseded by the 1890 Deed unless the restrictions in the two deeds are somehow in conflict, which they are not. The covenants in both the 1887 Deed and the 1890 Deed benefit the Allen Addition successors to the Allen family.

also executed the conveyance in "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.* (emphasis added).

The 1887 Deed goes on to describe in detail the avenues and parcels of land other than the Circle which the Allen family, "as an integral part of the general design and transaction, and as indissolubly connected with the conveyance above made of the Monument site, do hereby dedicate and set apart, to the public. . . ." *Id.*

Why did the Allen family and the Lee Monument Association make these promises to each other in the deed, rather than in a separate agreement? The answer is obvious. Both parties were making major financial commitments that were premised on the enforceability of the promises made by the other party. If the Allen family did not follow through on the "very desirable plan and arrangement of the surroundings," the Lee Monument Association might be left with its very expensive monument sitting in an empty field or an unsuitable neighborhood. If, on the other hand, the Lee Monument Association changed its mind as to the site or later decided to relocate the Lee Monument, the Allen family would be left with a much less valuable real estate development,[4] missing its centerpiece and main attraction, after dedicating much of their land to "broad avenues" that would no longer be necessary or appropriate. In these circumstances, neither party could safely rely on a separate agreement. The Lee Monument Association might fail to raise enough money to erect the monument and dissolve. The Allen family might be unable to follow through on their grand development plans and the Allen

[4] The President of the Lee Monument Association, in a presentation to the Richmond City Council and Board of Aldermen, emphasized the large increase in the value of the land within the Allen Addition, and resulting increase in tax revenue, that could be expected to result from locating the Lee Monument in the Allen Addition. *Richmond Dispatch*, October 12, 1886. Attached as Ex. E.

Addition might fall into the hands of another owner with different ideas. A separate agreement could easily have proven to be unenforceable because it would not survive changes in ownership. But if these mutual covenants were placed within the deed, they would "run with the land" and provide much more protection against a breach. The parties to the 1887 Deed knew exactly what they were doing, and their intention to create enforceable covenants for the benefit of the land retained by the Allen family is obvious from the deed itself.

B. The 1890 Deed

The 1890 Deed begins by reciting that the Lee Monument Association had "finished the work for which it was organized" and that the General Assembly had authorized by statute the Governor "to execute any appropriate conveyance of the same in token of such acceptance [of the gift of the monument] and of the guarantee of the State herein being set out." The guarantee, set out in paragraph 5, is that "she [the Commonwealth of Virginia] 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."

Although they were neither the grantors nor the grantees, the members of the Allen family are identified as parties to the 1890 Deed, and the granting clause states that the land is being conveyed by "the parties of the first part [the Lee Monument Association] in consideration of the promises by and with the approval and consent of the parties of the second part [the Allen family] who were the original grantors of the Monument Site."

Why were the members of the Allen family made parties to the 1890 deed? The reason for that is also obvious. The Lee Monument Association had "finished the work for which it was organized." When the Association went out of business, it would not be able to ensure that the Commonwealth complied with its covenants. However, if the Allen family were parties to the

1890 deed, they and their Allen Addition successors would have direct privity with the Commonwealth and would have the legal right to enforce the covenants in both the 1887 and the 1890 Deeds.

One of the most salient differences between the 1887 Deed and the 1890 Deed is the replacement of the simple "plot" attached to the 1887 Deed with a "plat" showing a very detailed plan of development for the Allen Addition, incorporated by reference in the deed. The plat, signed by the parties to the 1887 Deed, includes certifications showing it to have been recorded in the City of Richmond on April 26, 1889 and in Henrico County on April 29, 1889. It also includes a statement by the engineer who prepared the plat, Batey J. Bolton, that the plat was made "pursuant to Section 122 Chapter 486 Sessions Acts of the Assembly of Va 1887-8." That Act,[5] approved March 5, 1888, required owners of tracts of land that were to be subdivided into lots or parcels to make plats showing such lots, and streets and alleys, and to record the plats in the offices of the clerk of the proper jurisdiction. The plat commits the Allen family more specifically to the "very desirable plan and arrangement of the surroundings" promised in the 1887 deed, and shows the specific lots comprising the "dominant estate" that would benefit from the deed covenants, and whose future owners would be entitled to enforce them

C. The Deed Covenants Are Valid Restrictive Covenants.

The Defendants appear to suggest that Virginia law does not recognize restrictive covenants unless they protect the flow of air, light, artificial streams of water, or ensure the subjacent and lateral support of buildings or land. Demurrer, 1-2. However, the cases they cite do not support this argument. *Tardy v. Creasy*, 81 Va. (6 Hans.) 553 (1886), concerned covenants that the landowner would "abstain from all sorts of business on the land owned by him, of three

[5] Attached as Ex. F.

hundred and sixty-eight acres, in and around the junction, including the right to sell wares, goods, and merchandise; to keep houses of public entertainment and refreshment; and to establish and erect warehouses, factories, foundries, and shops; and that the same should apply to his heirs and assigns, who should be deprived of these privileges, and should run with the lands . . .to whomsoever hereafter devised or conveyed." *Id*., 559-60. The Court concluded that "[w]e think the covenants upon which this case rests are collateral merely — purely personal — not touching the land; that they are void as in general restraint of trade, and are against public policy and not such as the law will recognize or enforce, and which are incapable of being annexed to the land." *Id.*, 565. The covenants in this case *do* touch the land, are *not* in general restraint of trade, and *are* capable of being annexed to the land. Defendants point to the statement in *Tardy* that "the law will not permit a land-owner to create easements of every novel character and attach them to the soil." Demurrer, 2. However, they do not include the immediately following sentence of the opinion, which states "[b]ut there are many other easements [in addition to the 'well-known easements'] which have been recognized, and some of them have been of a novel kind." *Tardy*, at 557.[6] *Tardy* stands for the principle that an easement *unreasonably* restraining trade is not valid, not that the Commonwealth cannot enter into a "novel" covenant to maintain a public monument.

Defendants attempt to enlist *U.S. v. Blackman*, 270 Va. 68 (2005) in support of their misreading of *Tardy*. Demurrer, 2. *Blackman* involved a certified question whether "[i]n Virginia in 1973, would a conveyance of a negative easement in gross by a private property owner to a

[6]*See Barner v. Chappell*, 266 Va. 277, 585 S.E.2d 590 (2003), and *Lester Coal Corp. v. Lester*, 203 Va. 93 (1961), for examples of "novel" appurtenant easements recognized as valid by the Virginia Supreme Court. "The primary recognized easements are…(7) a right to place or keep something on the servant estate." Definition of "easement" in BLACK'S LAW DICTIONARY 527 (West 7th ed. 1999).

private party for the purpose of land conservation and historic preservation be valid?" *Id.,* 72. The Court answered in the affirmative. *Id.,* 82. The Court did not have before it, and did not address, the validity of negative or affirmative easements appurtenant in 1890. The Court noted, with apparent approval, that the U.S. District Court had concluded that "*Tardy* leaves open the possibility that other easements, including negative easements related to land conservation and historic preservation, would be valid if sufficiently related to the land." *Id.*, 75.

Tvardek v. Powhatan Village Homeowners Ass'n, Inc. 291 Va. 269, 784 S.E.2d 280 (2016) concerns the interpretation of the one-year statute of limitations period in the Virginia Property Owners' Association Act. It adds nothing to *Tardy* and *Blackman*.

In summary, the cases cited by Defendants do not support their argument that restrictive covenants of the kind found in the 1887 and 1890 deeds are not recognized in Virginia.

D. The Language of the 1887 and 1890 Deeds Is Neither Precatory Nor Ambiguous.

The word "precatory" means "requesting, recommending, or expressing a desire for action, but usually in a nonbinding way." BLACK'S LAW DICTIONARY 1195 (West 7th ed.1999). The words used in the covenants made by the Commonwealth do not request, recommend, or express a desire. When the Lee Monument Association agreed and covenanted "to carry out the said purpose, and to hold the said property only for the said use" in the 1887 deed, can those words be interpreted as merely the expression of a desire? How can the Commonwealth's guarantee in the 1890 Deed to "hold said Statue and pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted" and to protect and guard them, conceivably be understood as simply a non-binding expression of a wish?[7] The parties to

[7] The word "sacred" underscores the significance that the parties attached to the commitment being made. "To hold sacred" means "b. Dedicated, set apart, exclusively appropriated *to* some person or some special purpose." OXFORD ENGLISHDICTIONARY{https://www.oed.com/sacred);

the deeds used mandatory words -- "guarantee," "hold,' "guard," "protect" - because they understood that they were undertaking substantial commitments in reliance on the other parties' complying with the covenants contained in the deeds. Defendants' contention that the 1890 Deed language is "inherently ambiguous" is equally puzzling. Language is ambiguous if it "admits of being understood in more than one way or refers to two or more things at the same time." *RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A.*, 295 Va. 268, 283 (2018); *see Pocahontas Mining LLC v. Jewell Ridge Coal Corp.*, 263 Va. 169, 173 (2002) (Language is not ambiguous simply because parties disagree about its meaning.). What possible alternative reading could Defendants suggest? In return for the Lee Monument and the land on which it is situated, the Commonwealth plainly agreed to maintain it as a monument to Robert E. Lee and to guard and protect it. There is no alternative meaning in the deed language.

Defendants argue that "*nothing* about the transactions through which the land came to be owned by the Commonwealth suggests a restrictive covenant." Demurrer, 3. Nothing? Defendants suggest that the Court ignore the plain meaning of the wording of the deeds. It is impossible to read the deeds fairly without concluding that the covenants were a critical element of the "contract and arrangement" between the parties. The Allen family contributed the circle and agreed to dedicate eleven of their fifty-eight acres to broad avenues. (See the discussion *supra* at pages 2-3, and n. 3.) The Lee Monument Association contributed a magnificent monument representing 20 years of fundraising. The Commonwealth, according to Defendants,

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MERRIAM-WEBSTER DICTIONARY (https://www.merriam-webster.com/sacred (10 Aug. 2020) "b: devoted exclusively to one service or use (of a person or purpose) a fund sacred to charity"). *See* Kentucky Const. § 7 ("The ancient mode of trial by jury shall be *held sacred* and the right thereof remain inviolate.") (emphasis added). The term "sacred" was also chosen for the closing of the Declaration of Independence: "we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."

contributed nothing and made no commitments. Their position is that the covenants were meaningless verbiage and the Commonwealth could have auctioned off the Lee Monument the day after the 1890 Deed was signed. The plain language of the deeds contradicts their construction.

Defendants argue that "plaintiffs' properties can be used and enjoyed regardless of *what* stands in the middle of Lee Circle." Demurrer, 3. That is of course true, but irrelevant. The residents of a subdivision can use and enjoy their properties even if the developer violates its promise to maintain a park, and instead uses the land as a parking lot. That admitted fact does not mean that the promise is unenforceable.

Defendants maintain that "[h]ad the original owners intended to create a covenant benefitting the neighboring properties, it would have been much simpler to retain the land and promise each owner of a subdivided parcel that the plot would remain undeveloped, or would provide a site for a monument, in perpetuity." Demurrer, 3. Actually, such an alternative would have been much more complicated for the Allen family, inconsistent with their purposes, and utterly impractical. First, the Lee Monument Association would not have chosen the Allen site over competing locations had the Allen family not only donated the site but agreed to develop the Allen Addition in a way that provided a suitable setting for the Lee Monument. Why would the Association simply give the Monument to a private developer? The objective of the Lee Monument Association was to put the Lee Monument in the possession of an entity which could assure that it would be perpetually cared for, and the Allen family could not credibly provide those assurances. People die, associations dissolve, the government goes on forever. Second, a promise that the Lee Circle would remain undeveloped would have been of little value to prospective buyers of lots. A vacant traffic circle does not have a great deal of aesthetic appeal.

A promise from a developer that someday a monument of some description might be erected would obviously be far less of a draw than what the Virginia Department of Historic Resources described in 2006 as "a masterpiece of the internationally renowned academic sculptor Marius Jean Antonin Mercié" and "the culmination of a beautiful composition and urban amenity."[8] Finally, the members of Allen family would have had to make personal commitments to hundreds of different lot purchasers relating to a major public monument.[9]

In turning the Lee Monument over to the Commonwealth in return for a commitment to perpetually maintain the Monument, the Lee Monument Association and the Allen family followed the only sensible course. And including the Commonwealth's commitment in the deeds was the only way to ensure that the landowners in the Allen Addition would always have the power to ensure that the Commonwealth complied with its commitment.

E. The Deed Covenants Are Not Contrary to Public Policy.

The 1890 deed covenant guaranteeing that the State would hold the Lee statue, pedestal, and circle "perpetually sacred to the Monumental purpose to which they have been devoted" is notable in that it was made by the Governor acting on the specific instructions of the General Assembly. The actual words of the covenant were taken from the Joint Resolution of the General Assembly dated December 19, 1889, Acts of Assembly 1889, ch. 24. What greater proof could there be that the covenant was consistent with the public policy of the Commonwealth?[10]

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[8] Nat. Reg. of Hist. Places Reg. Form, Robert E. Lee Monument, VDHR # 127-0181 (Nov. 26, 2006). Attached as Ex. G.

[9] Defendants cite *Barner v. Chappell* as an example of a case where the servient estate was retained by the original developer, but the facts of that case are a cautionary tale illustrating the problems that can arise when a neighborhood must look to the original developer to maintain common amenities. *Barner v. Chappell*, 266 Va. 277, 277-81 (2003).

[10] Defendants also assert that it is, and presumably always has been, against public policy for the government to bind itself to maintain a monument, because monuments are government speech

Defendants argue that public policy and conditions have changed. There is much to be said in opposition to this argument, but this is not the place to address it, because it is an affirmative defense and a factual issue, outside the scope of a demurrer. "Upon demurrer, the test of the sufficiency of a motion for judgment is whether it states the essential elements of a cause of action, not whether evidence might be adduced to defeat it*" Lyons* v. *Grether,* 218 Va. 630, 633 (1977).

II. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CONSTITUTIONAL CLAIMS AND TO ENFORCE THE RESTRICTIVE COVENANTS.

The Court has ruled in the August 3, 2020, letter opinion that Plaintiffs have alleged general standing. Plaintiffs state the following out of an abundance of caution for the purpose of responding to Defendants' arguments concerning standing in their Demurrer.

The purpose of the standing requirement is to assure that the plaintiff has "a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Howell v. McAuliffe,* 292 Va. 320, 326 (2016). Plaintiffs must allege facts that demonstrate a justiciable interest in the subject matter of the proceeding. *W. S. Carnes, Inc. v. Board of Supervisors,* 252 Va. 377, 383 (1996). To establish such a justiciable interest, the Complaint must allege facts that "demonstrate an actual controversy between plaintiff and defendant, such that [plaintiff's] rights will be affected by the outcome." *Id.* It is enough that the complaint alleges "an identifiable trifle of some sort" by way of injury attributable to the action challenged. *Chesapeake Bay Found. v. Va. St. Water Control Bd.,* 52 Va. App. 807, 823 (2008). The threat of injury is sufficient to establish standing;

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and the government cannot be compelled to continue to communicate a message with which it no longer agrees. Demurrer, 4-5. None of the cited cases support this theory.

Plaintiffs need not allege that the injury has already occurred. *Id.; Accord, Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 361 (2017) ("actual or potential injury"); *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008) (potential damage sufficient).

Plaintiffs must have "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*, 292 Va. at 330. In *Payne v. City of Charlottesville,* Case No. CL17-145 (Charlottesville Cir. Ct. Oct. 3, 2017), the court observed that the *Howell* Court had determined that the plaintiffs there had standing despite the fact that every other voter in Virginia was similarly situated. (A copy of the letter opinion of Circuit Judge Richard E. Moore is attached as Exhibit E.) *See Eyre v. Jacob,* 55 Va. (14 Gratt.) 422, 424 (1858); *Bull v. Read,* 54 Va. (13 Gratt.) 78, 86 (1855). Judge Moore also rejected defendant's argument based on *Lafferty* that the injury alleged by the *Payne* plaintiffs, which would result from the removal of statues at issue in that case, was speculative. Exhibit F at 8-9.

The obvious attenuation of the injury alleged in *Lafferty*, the decision on which Defendants place their greatest reliance, distinguishes that case from this. 293 Va. at 361-62. The injury to Plaintiffs that would result from the removal of the Lee Monument will be direct, particularized and clearly foreseeable. Even if there were no delisting of the Monument Avenue Historic District, Plaintiffs have alleged injury, including the immediate loss of the internationally recognized sculpture from their neighborhood and diminution in the value of their properties. In *Lafferty*, the injury alleged was not so closely linked to the violation that Plaintiffs asserted as the linkage of the injury in this case to the removal of the monument. *Id.*

The Allen Addition Plaintiffs in this case have an independent basis for standing. As property owners in a subdivision with vertical privity to the original grantor of the 1887 Deed

who was also a party to the 1890 Deed for purposes of enforcement of its covenants, the Allen Addition Plaintiffs have standing to enforce the restrictive covenants. *Norfolk Southern Ry. Co. v. E. A. Breeden, Inc.*, 287 Va. 456, 464 (2014); *Levisa Coal Co.*, 276 Va. at 60, 62.

III. PLAINTIFFS' RIGHT TO BRING THIS ACTION IS DERIVED FROM THE CONSTITUTION ITSELF.

Defendants persist in arguing that Plaintiffs have no right granted by statute to challenge Governor Northam's action as *ultra vires* in Counts One, Two, Three and Five. Each of those counts asserts a constitutional claim based on violations of self-executing provisions of the Constitution of Virginia: Article I, § 5, Article III, § 1, Article IV, § 1 and Article V, § 1. In *Gray v. Va. Sec'y of Transp.,* 276 Va. 93 (2008), the Court said: "If a constitutional provision is self-executing, no further legislation is required to make it operative." *Id.*, 103. The right to bring an action to enforce a self-executing constitutional provision is derived directly from that provision and requires no statutory authorization.

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed, or the duty imposed may be enforced.

Id., 103 (quoting *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681-82 (1985); *cf. Kamper v. Hawkins*, 3 Va. (I Va. Cas.) 20, 31 (1793) (Nelson, J.).

The circumstances in *Gray* are similar to those here. There, the plaintiffs asserted that a transfer by the Secretary without legislative authorization of the Dulles Toll Road from the Virginia Commissioner of Transportation to the Metropolitan Washington Airports Authority (MWAA) was *ultra vires* and in violation of Article I, § 5, Article III, § 1 and Article IV, § 1. (A copy of the *Gray* complaint is attached as Exhibit F.) Count Two asserted that the transfer was *ultra vires* because the Dulles Toll Road, being a part of the State Highway System, was to be maintained "exclusively by the Commonwealth" pursuant to Code of Virginia § 33.1-37. Count

Three asserted that the setting and collecting of tolls for the use of the Dulles Toll Road was the exclusive responsibility of the Commonwealth Transportation Board pursuant to Code of Virginia § 33.1-269(5) and that the transfer of that responsibility and authority to MWAA was an *ultra vires* act. The references to the statutes were to establish a predicate for the unconstitutional, *ultra vires* act and did not mean that the claims were for the violation of the statutes. *See Lewis v. Whittle,* 77 Va. 415, 420 (1883) (Governors have no inherent powers, only those bestowed by the Constitution or the legislature.); *cf. Howell,* 292 Va. at 340-41; *Old Dominion Comm. for Fair Util. Rates v. St. Corp. Comm'n,* 294 Va. 168, 178 (2017) (Officers and bodies established by the Constitution exercise no inherent powers simply because they are created by the Constitution.).

The Complaint alleges that the Governor exceeded his authority in ordering the removal of the Lee Monument in part because his action was in conflict with the Joint Resolution adopted by the 1889 General Assembly and § 2.2-2402(B) of the Code of Virginia. Because the Governor does not possess inherent power to remove the Lee Monument, he must rely on legislative authorization to do so. *Lewis,* 77 Va. at 420 ("Under our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws."); *see Field v. Auditor,* 83 Va. 882, 885 (1887); *Shields v. Commonwealth,* 25 Va. (4 Rand.) 541, 545 (1826).

IV. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CONSTITUTIONAL CLAIMS.

Defendants' argument that sovereign immunity bars the claims in Counts One, Two, Three and Five is fundamentally flawed because it assumes that the claims are predicated on statutory violations, as opposed to violations of the Constitution. This distinction has been explained in the immediately preceding section of this Opposition memorandum.

In *Gray*, the Court stated the rule applicable to claims based on self-executing provisions of the Constitution of Virginia. 276 Va. at 103-06. Sovereign immunity does not bar such claims. *Id.; Digiacinto v. Rector*, 281 Va. 127, 137 (2011). A self-executing constitutional provision in and of itself constitutes a waiver of sovereign immunity. *Claffinch v. C & P Tel. Co.*, 227 Va. 68. 71-72 (1984). In this case, Plaintiffs have asserted violations by Governor Northam of Article I, § 5, Article III, § 1, Article IV, § 1 and Article V, § 1 of the Constitution of Virginia similar to the claims in *Gray*.

V. PLAINTIFFS HAVE STATED A CONSTITUTIONAL CLAIM BASED ON THE GOVERNOR'S *ULTRA VIRES* ACT THAT DISREGARDED THE STATUTORY PROHIBITION ON REMOVING MEMORIAL STRUCTURES.

Plaintiffs have asserted several constitutional claims in their Complaint (Counts One, Two, Three and Five). Each claim is based on similar facts, but each asserts a different constitutional basis for the violation. Count Five charges that the Governor's order to remove the Lee Monument constitutes an arrogation of power and an *ultra vires* act in violation of Article I, § 5, Article III, § 1, Article IV, § 1 and Article V, § 1 of the Constitution of Virginia.

The Governor possesses no inherent powers. *Lewis,* 77 Va. at 420; *see also Old Dominion Comm.,* 294 Va. at 178 (no inherent power granted merely because the State Corporation Commission is established by the Constitution). He is authorized to act only as specifically authorized by the Constitution of Virginia or by legislative authorization. *See Field,* 83 Va. at 885; *Lewis,* 77 Va. at 420; *Shields,* 25 Va. (4 Rand.) at 545. Under the Virginia constitutional framework, establishing the public policy of the Commonwealth is the prerogative of the General Assembly, not the Governor. *See Volkswagen of Am., Inc. v. Smit,* 279 Va. 327, 340 (2010); *Commonwealth v. Arlington Cnty. Sch. Bd.,* 217 Va. 558, 578-79 (1997). When the several constitutional provisions asserted as a basis for this Count are read together, any action

by the Governor that conflicts with or is in excess of his legislative authorization and his authority to act under the Constitution of Virginia constitutes an *ultra vires* act.

Defendants have contended that Governor Northam is authorized to remove the Lee Monument pursuant to Code of Virginia § 2.2-2402. As Plaintiffs have demonstrated in their Memorandum in Support of Their Motion for Temporary Injunctive Relief at 8-10, that statute not only does not authorize the Governor to remove an existing memorial structure, but it expressly prohibits such removal. Plaintiffs incorporate their previous argument in that regard here by reference. (That section is attached as Ex. J.)

VI. PLAINTIFFS HAVE STATED A CONSTITUTIONAL CLAIM BASED ON THE GOVERNOR'S ORDER TO REMOVE THE LEE MONUMENT, WHICH EXCEEDS HIS AUTHORITY UNDER ARTICLE V.

Standing alone, Article V, § 1 provides an independent basis for invalidating the Governor's removal order, as asserted in Count One. *See Field,* 83 Va. at 885*; Lewis,* 77 Va. at 420; *Shields,* 25 Va. (4 Rand.) at 545. The Court said in *Howell v. McAuliffe:*

> Deeply embedded in the Virginia legal tradition is "a cautious and incremental approach to any expansions of the executive power." *Gallagher v. Commonwealth,* 284 Va. 44, 451, 732 S.E.2d 22, 25 (2012). The tradition reflects our belief that the "concerns motivating the original framers in 1776 still survive in Virginia," including their skeptical view of the unfettered exercise of executive power. *Id.*

292 Va. at 327. In *Cochran v. Fairfax Cnty. BZA,* the Court said:

> Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals to the rule of law.

267 Va. 756, 765 (2004). Except as the Constitution grants the Governor specific powers, he is governed by the principle stated in *Cochran.* Because the Governor exercises limited power

under Article V, he exceeded such grant of power without legislative authorization or specific authorization under Article V or other provision of the Constitution.[11]

VII. PLAINTIFFS HAVE STATED A CONSTITUTIONAL CLAIM THAT THE GOVERNOR ACTED IN DEROGATION OF THE POWER VESTED IN THE GENERAL ASSEMBLY UNDER ARTICLE IV.

The Governor's removal order also violated Article IV, § 1 because it assumed the prerogative of the General Assembly to authorize the contract to take down the Lee Monument and to override the provisions of the 1889 Joint Resolution guaranteeing the preservation of the monument on Lee Circle. *See Gray,* 276 Va. at 105-06; *cf. Arlington Cnty. Sch. Bd.,* 217 Va. at 578; *Field,* 83 Va. at 885; *Lewis,* 77 Va. at 420; *Shields,* 25 Va. (4 Rand.) at 545.

VIII. PLAINTIFFS HAVE STATED A CONSTITUTIONAL CLAIM OF A VIOLATION OF THE SEPARATION OF POWERS PROVISIONS.

The provisions of the Constitution requiring separation of powers of the three branches of government – Article I, § 5 and Article III, § 1 – prohibit the Governor from exercising the authority of the General Assembly and the Judicial Branch. His order to remove the Lee Monument encroaches on the authority of the other branches of government. *Cf. Howell,* 292 Va. at 344 ("Governor McAuliffe's assertion of 'absolute' power to issue his executive order…runs afoul of the separation-of-powers principle protected by Article I, Section 7 of the Constitution of Virginia.").

"Under our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws." *Lewis,* 77 Va. at 420; *see Howell,* 292 Va. at 340-41 (citing *Lewis* and noting the Virginia tradition that is

[11] This should not be read as Plaintiffs' concession that the absence of legislative authorization could be readily remedied. The General Assembly is constrained by the impairment of the obligation of contracts clause in Article I, § 11 and Article XI, § 1 of the Constitution of Virginia.

skeptical of "the unfettered exercise of executive power"). It is the Governor's position that he can disregard the 1889 Joint Resolution of the General Assembly and declare that the 1890 Deed covenant is invalid and unenforceable. Demurrer, 3 and 5 n 3. Those are functions assigned to the Legislative and Judicial Branches, respectively. The Supreme Court has defined the effect of a joint resolution of the sort involved in this case. *Arlington Cnty. Sch. Bd.*, 217 Va. at 578-80. Whether the 1889 Joint Resolution and the 1887 and 1890 Deed covenants are valid and enforceable is a decision for the Judicial Branch.

For these reasons, the Governor's order that is the subject of this proceeding violates Article I, § 5 and Article III, § 1 of the Constitution of Virginia.

IX. THE ALLEN ADDITION PLAINTIFFS' CLAIM BASED ON THE RESTRICTIVE COVENANTS IN THE 1887 AND 1890 DEEDS IS INDEPENDENT OF PLAINTIFFS' CONSTITUTIONAL CLAIMS.

The Allen Addition Plaintiffs have a right to enforce the restrictive covenants in the 1887 and 1890 Deeds that is independent of the right of all Plaintiffs to challenge the removal order of Governor Northam under provisions of the Constitution of Virginia. *Barner v. Chappell*, 266 Va. 277, 281 (2003); *Sonoma Development, Inc. v. Miller*, 258 Va. 163, 167-69 (1999); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 5.7(2) (2003).Even if the Governor's reliance on Code of Virginia § 2.2-2402 were justified, that statute cannot and does not override the restrictive covenants in the 1887 and 1890 Deeds. The *Sonoma* Court stated:

> If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant—that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.

258 Va. at 169 (quoting *Spilling v. Hutcheson,* 111 Va. 179, 182 (1910)).

CONCLUSION

Plaintiffs request that the Court overrule the Demurrer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 14, 2020, I emailed a true copy of the foregoing Plaintiffs' Opposition to Demurrer to Jacqueline C. Hedblom, Assistant Attorney, to JHedblom@oag.state.va.us.

_____
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