

V I R G I N I A :

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

WILLIAM C. GREGORY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL20-2441
	)	
GOVERNOR RALPH S. NORTHAM, et al.,	)	
	)	
Defendants.	)	

DEMURRER

Plaintiff's Complaint fails to state a claim on which relief may be granted. Plaintiff fails to state any right of reverter giving him an ownership interest in the land at issue, much less the statutory on it. Plaintiff fails to state a claim that he has any right to enforce any restrictive covenant. Finally, plaintiff is not entitled to declaratory judgment because there is no actual case or controversy.

LEGAL STANDARD

A court "ruling on a demurrer . . . accepts all facts properly pled and any reasonable inferences from those facts as true and decides whether the allegations present a valid cause of action." *EMAC, L.L.C. v. Cnty. of Hanover*, 291 Va. 13, 20 (2016). But "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Id.* at 21 (citation omitted).

ARGUMENT

I. Plaintiff fails to state an enforceable property right.

As more fully set forth in Defendants' Memorandum in Opposition to Plaintiff's Motion for Permanent Injunction or, in the Alternative, to Enlarge Existing Temporary Injunction,

plaintiff has failed to state that he has any legally enforceable right in or to the land at issue.

A. The 1899 joint resolution of the General Assembly, incorporated into the Complaint by reference, on which plaintiff bases his claim for relief creates no independent legal obligations. And even if it did, plaintiff would not be entitled to an injunction because plaintiff lacks standing or a cause of action to enforce the joint resolution and because sovereign immunity would bar any such suit.

B. Plaintiff's claims based on the 1890 Deed (also incorporated into the Complaint) and plaintiff's claimed interest in the disputed land around the Lee Monument can be decided as a matter of law, without need for additional evidence. For plaintiff to have a legally enforceable interest in the land, the deed would need to have either created a contingent reversionary interest, of which plaintiff is the current beneficiary, or a restrictive covenant plaintiff is entitled to enforce. Both claims fail as a matter of law.

1. The 1890 Deed lacks any "express terms or clear implication" that its signatories intended to create a reversionary interest contingent on the Commonwealth's perpetual maintenance of the Lee Monument. *Hamm v. Hazelwood*, 292 Va. 153, 163 (2016). Even if the 1890 Deed created a contingent reversionary interest, that interest would not be enforceable through either of the remedies plaintiff seeks—an injunction or a declaratory judgment. See generally *Hamm*, 292 Va. at 153. Finally, even if the 1890 Deed had purported to create such a perpetual interest, it would be invalid as a matter of law, both because it would violate the rule against perpetuities, see Va. Code Ann. § 55.1-124(A), and because it would not be "reasonably limited in duration and scope." *Hamm*, 292 Va. at 162; see *Dunlop v. Dunlop's Ex'rs*, 144 Va. 297, 310 (1926) (holding possibility of reverter invalid because it restrained the sale of the business to anyone for the son's entire lifetime).

2. Any restrictive covenant theory also fails as a matter of law. Like contingent rights of reverter, “[c]ovenants, express or implied, which restrict the free use of land are not favored and must be strictly construed.” *Sloan v. Jonson*, 254 Va. 271, 274 (1997).

The precatory language plaintiff quotes from the 1890 Deed, promising that the Commonwealth will hold the land “perpetually sacred to the Monumental purpose” for which they have been dedicated, creates no legally enforceable rights “by definite and necessary implication.” *Shepherd v. Conde*, 293 Va. 274, 288 (2017). On the contrary, the deed conveys the property in fee simple, with special warranty, warranting successors will have the same property rights that the grantor had against all persons claiming through him, Va. Code § 55.1-355, contradicting the plaintiff’s claim that he is entitled to a property right as heir to the grantors.

In addition, the circumstances surrounding the 1890 Deed are inconsistent with the creation of a restrictive covenant, let alone one that could be enforceable by plaintiff. Restrictive covenants impose burdens on one property for the benefit of another. For the plaintiff to bring a suit to enforce the use of the granted land as a park for the Lee Monument, he would need to be the owner of land benefitted by any alleged restrictive covenant. Plaintiff, however, claims only that he is an heir or potential heir to previous owners of allegedly *encumbered* land. Because there is no benefit that runs to any particular land, let alone any parcel owned by the plaintiff, it is as though the plaintiff alleges an easement with no dominant estate. See, e.g., *Freemason St. Area Ass’n v. City of Norfolk*, 103 Va. Cir. 244 (Norfolk Cir. Ct. 2019) (analyzing claims in the preservation of a historic home by the plaintiff historic neighborhood association to being either a restrictive covenant or a negative easement). Without another party to the covenant, plaintiff has failed to allege: (i) essential elements of a restrictive covenant, and (ii) his privity to the

restrictive covenant. Therefore plaintiff has no enforceable interest in any alleged covenants regarding the use of the land granted to the Commonwealth more than a century ago.

II. Without a right of action, plaintiff is not entitled to declaratory judgment.

Without a property right to give the plaintiff an active controversy, plaintiff also is not entitled to seek declaratory judgment. A declaratory judgment is only available when there is a “case[] of actual controversy” among the parties. Va. Code § 8.01-184. The essential characteristics of a controversy as defined by Virginia’s declaratory judgments statute is that it involves “instances of actual antagonistic assertion and denial of right.” *Id.* “A justiciable controversy, for the purposes of declaratory judgment, must involve specific adverse claims, based upon present rather than future or speculative facts.” *Daniels v. Mobley*, 285 Va. 402, 408 (2013). Without any enforceable right that is being infringed by the proposed movement of the Lee Monument, plaintiff cannot bring a motion for declaratory judgment.

III. Defendants have sovereign immunity.

Finally, plaintiff’s lawsuit should be dismissed because the defendants are shielded by sovereign immunity. “As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action.” *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007). “The doctrine of sovereign immunity serves a multitude of purposes including but not limited to . . . preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.” *Id.* (alteration in the original. Internal quotation omitted.). Plaintiff openly admits he named the defendants solely in their official capacity as agents of the Commonwealth itself; the 1890 Deed that forms the basis of the plaintiff’s claimed rights also names the Governor only as the agent acting on behalf of the Commonwealth. Therefore, to bring any action against state officials

acting in their capacity as agents for the Commonwealth, plaintiff would have to state a specific statutory waiver of the Commonwealth's sovereign immunity. He has not done so. Accordingly, this case should be dismissed based sovereign immunity even if it surmounted the barriers discussed above.

CONCLUSION

Plaintiff fails to allege the existence of a contingent right of reverter, much less that he is a beneficiary of any such right. He further fails to allege the essential elements of a restrictive covenant on the land at issue. Therefore, plaintiff has failed to articulate an enforceable interest in the land deeded to Virginia for the Lee Monument. With no enforceable interest, his Complaint should be dismissed.

Dated: June 16, 2020

Respectfully submitted,

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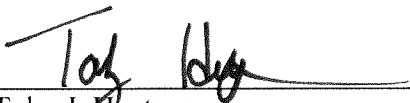
CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, a true and accurate copy of the foregoing

Demurrer was transmitted by both first-class mail and email to:

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