Circuit Court

OF THE

City of Richmond

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

August 3, 2020

Joseph E. Blackburn, Jr.
Blackburn, Conte, Schilling & Click, P.C.
300 West Main Street
Richmond, VA 23220

Mark R. Herring
Attorney General
Office of the Attorney General
202 N. Ninth Street
Richmond, VA 23219

Toby Heytens
Solicitor General
Office of the Attorney General
202 N. Ninth Street
Richmond, VA 23219

Jacqueline C. Hedblom
Assistant Attorney General
Office of the Attorney General
202 N. Ninth Street
Richmond, VA 23219

RE: Gregory v. Northam, et al. (CL 20-2441)

Counsel,

On July 23, 2020, the parties appeared, represented by Counsel, on Defendants' Demurrer to the Plaintiff's Amended Complaint and Plaintiff's Motion to Enter a Permanent Injunction. The

Court heard argument first on Defendants' Demurrer, then the parties presented evidence regarding Plaintiff's Motion to Enter a Permanent Injunction.

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[1] 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." Plaintiff's Exhibit B. 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. The Joint Resolution

[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."

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."

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. Plaintiff's Exhibit A. 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. 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[2] 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).

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. Memorandum in Support of Demurrer and in Opposition to Plaintiff's Motion for Permanent Injunction and Declaratory Judgment, 7-8. The Governor asserted that the erection of the Monument "was wrong then, and it is wrong now." *Id.* at 8 (referencing 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. *Id.* 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.* (referencing a 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. *Id.*

5. Plaintiff's Claim

On June 8, 2020, the Plaintiff filed a Complaint seeking to enjoin the Governor and the Department of General Services from removing the Robert E. Lee Monument. Compl. 6. The Court initially enjoined the removal until June 18, 2020. Temporary Injunction Order (June 8, 2020). Then on June 18, 2020 the parties appeared on Defendants' Demurrer and Plaintiff's Motion to extend or make permanent the temporary injunction. The Court sustained the demurrer, allowed Plaintiff twenty-one days to file an Amended Complaint, and granted Plaintiff's Motion to Enlarge the Existing Injunction. Order (June 23, 2020).

On July 8, 2020, Plaintiff filed his First Amended Complaint. That Complaint seeks declaratory judgment "that Defendants, in attempting to remove the Statue of Robert E. Lee on Monument Avenue…are exceeding their legal authority, violating their obligations to enforce the law, and willfully violating binding covenants in the Deed conveying the Statue." Am. Compl. 1. Further, Plaintiff asks the Court to enjoin Defendants' removal of the Robert E. Lee Monument for two reasons: (1) Defendants are in violation of Va. Code § 2.2-2402(B) and (2) the deed covenants of 1887 and 1890 prohibit the removal of the Monument by the Commonwealth. *Id.* at 7.

6. Defendants' Demurrer

On July 20, 2020, Defendants filed a Demurrer to Plaintiff's Amended Complaint. The Defendants assert in their Demurrer that Plaintiff lacks standing or a private right of action to assert any violation of Va. Code § 2.2-2402(B), that the Commonwealth has not waived sovereign immunity with respect to any violation of Va. Code § 2.2-2402(B), that Plaintiff's claim under Va. Code § 2.2-2402(B) fails as a matter of law, and that Plaintiff possesses no enforceable property right.

B. Analysis

Plaintiff has alleged that the Governor's intention to remove the Robert E. Lee Monument is unlawful for two reasons. First, that the Governor's plan violates Va. Code § 2.2-2402. Second, that the Governor's plan is in violation of an "affirmative covenant in gross" held by the Plaintiff. *See* Plaintiff's Brief in Opposition to Demurrer, 6-7. These arguments are discussed below in the order stated here.

1. Va. Code § 2.2-2402

Defendants assert that Plaintiff's claim under Va. Code § 2.2-2402 fails as a matter of law for four reasons. Memorandum in Support of Demurrer and In Opposition to Plaintiff's Motion for Permanent Injunction and Declaratory Judgment, 16. First, Plaintiff lacks standing to assert a violation of Code § 2.2-2402(B). *Id.* at 17. Second, Code § 2.2-2402(B) does not create a private right of action. *Id.* Third, Plaintiff's claim under Code § 2.2-2402(B) is barred by sovereign immunity. *Id.* at 19. Fourth, Plaintiff's claim under Code § 2.2-2402(B) fails as a matter of law. *Id.* If Plaintiff's claim is barred for any of the first three reasons, then it is unnecessary for the Court to reach the Defendants' fourth reason.

Statutory standing "asks 'whether the plaintiff is a member of the class given authority by a statute to bring suit.'" *Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 315 (2016) (quoting *Small v. Federal Nat'l Mortg. Ass'n*, 286 Va. 119, 125 (2013) (internal quotations omitted)). "In other words, the question is whether the legislature 'accorded this injured plaintiff the right to sue the defendant to redress his injury.'" *Id.* (quoting *Small*, 286 Va. at 125). "It is simply not enough that the plaintiff has 'a personal stake in the outcome of the controversy,' or that the plaintiff's rights will be affected by the disposition of the case." *Id.* (quoting *Small*, 286 Va. at 126). "Rather, the plaintiff must possess the 'legal right' to bring the action, which depends on the provisions of the relevant statute.'" *Id.* (quoting *Small*, 286 Va. at 126). Further, "[t]his Court has made abundantly clear that when a statute…is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is 'palpable' and shown by 'demonstrable evidence.'" *Fernandez v. Comm'r of Highways*, 842 S.E.2d 200, 202 (Va. 2020).

Upon review of the entirety of Virginia Code § 2.2-2402, the statute is silent as to any rights of the public to ensure its enforcement. The statute provides under what conditions a work

of art may be accepted, removed, relocated, or altered by the Commonwealth and under what conditions a structure intended primarily for ornamental or memorial purposes may be procured, removed, remodeled, or added to by the Commonwealth. It is completely silent as to authorizing any public action. It provides no statutory standing, and it provides no right of action under which any member of the general public with statutory standing can proceed. Therefore, the Court sustains the Demurrer as to Va. Code § 2.2-2402 on these bases alone.

Because the Court has found that Plaintiff has no statutory standing and no private right of action to bring suit under Va. Code § 2.2-2402, the Court need not explore the issue of sovereign immunity or the merits for Plaintiff's claim under Va. Code § 2.2-2402.

2. "Affirmative Covenant in Gross"

Defendants, by way of their June 16, 2020 Demurrer, assert that Plaintiff's claim of any property right is barred because Plaintiff lacks standing to assert such a claim. The Defendants, in their July 20, 2020 Demurrer, assert that "Plaintiff's amended complaint fails to remedy the flaws that led the Court to sustain defendants' first demurrer," namely that the Plaintiff lacks standing. Memorandum in Support of Demurrer and In Opposition to Plaintiff's Motion for Permanent Injunction and Declaratory Judgment, 10. Alternatively, if the Court finds that Plaintiff has standing to assert a claim for an "affirmative covenant in gross," then Defendants argue that Plaintiff's claim fails for four reasons. *Id.* First, Defendants allege that "any language purporting to restrict the Commonwealth's use of the land is merely descriptive and creates no legally enforceable obligation." *Id.* at 11. Second, "even assuming that the 1890 Deed could be read to restrict the Commonwealth's use of the land, neither that document nor the 1887 Deed conveying the land to the [Lee Monument Association] can be read to create an easement in gross." *Id.* at 12. Third, "even if either deed could be interpreted as creating a valid easement in gross, plaintiff

would not have inherited that interest." *Id.* at 13. Finally, "a perpetual restriction on the Commonwealth's use of Commonwealth owned land would be unenforceable" as a matter of public policy. *Id.* at 14.

a. General Standing to State a Claim for an "Affirmative Covenant in Gross"

"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 substantive legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Bd. of Supervisors of Fairfax Cty.*, 227 Va. 580, 589 (1984). Therefore, "as a general rule, without a 'statutory right, a citizen or taxpayer does not have standing…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, 373 (2001)). In *Howell*, the Court held that the Plaintiffs had standing to state a claim of vote dilution, reasoning that even though Plaintiff's interest was common to every qualified voter, it was not an interest held by the public at large. *Id.* at 334-35.

More akin to the interest alleged in this case, the Court in *Phillips Morris USA, Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564 (2007) 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 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"). The following year in *Chesapeake Bay Found., Inc. v. Commonwealth*, 52 Va. App. 807 (2008), the Court of Appeals stated that "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." *Id.* at 822 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)); *see also Payne*, 97 Va. Cir. at *6 ("If the City Council does move statues from the park, the plaintiffs' use and enjoyment of such park would be affected and damaged. They would be injured in the legal sense of the word."). Such substantive and direct injuries are distinguishable from the alleged injury articulated in *Lafferty v. Sch. Bd. of Fairfax Cty.*, 293 Va. 354 (2017) because such injuries are not based on "future or speculative facts" or "general distress over a general policy." *See id.* at 362.

In this case Plaintiff alleges unique familial pride in the Lee Monument as he is the great grandson of two of the grantors to the 1887 Deed. He alleges that he spent time throughout his youth and adolescence learning about the Monument and telling others about the history of the Monument. He still retains great pride in the Monument and periodically visits it to this day. Plaintiff is particularly distressed by how the Monument has been defaced in recent months. Further, Plaintiff asserts he inherited the enforcement rights of the original covenantees to the 1887 and 1890 Deeds.

Based upon the allegations and the law as set out above, the Court finds that Plaintiff's unique familial interest and aesthetic interest and use of the Lee Monument is sufficient to establish a "direct interest…in the outcome of the controversy that is separate and distinct from the interest of the public at large." *See Goldman v. Landsidle*, 262 Va. 364, 373 (2001), and therefore, Plaintiff has standing to assert his claim for an "affirmative covenant in gross."

b. Plaintiff's Claim for an "Affirmative Covenant in Gross"

Plaintiff's Brief in Opposition to the Demurrer asserts he has an "affirmative covenant in gross," which he likens to an affirmative easement in gross. Plaintiff's Brief in Opposition to

Demurrer, 6-7. An easement in gross is a mechanism by which a covenant in gross can be applied. *See Mid-State Equipment Co., Inc. v. Bell*, 217 Va. 133, 140 (1976).

An easement in gross "is an 'easement with a servient estate but no dominant estate." *Virginia Electric & Power Co. v. Northern Virginia Regional Party Authority*, 270 Va. 309, 316 (2005) (*Corbett v. Ruben*, 223 Va. 468, 472 (1982)). Put another way, "an easement in gross, sometimes called a personal easement, is an easement 'which is not appurtenant[4] to any estate in land, but in which the servitude is imposed upon land with the benefit thereof running to an individual." *U.S. v. Blackman*, 270 Va. 68, 77 (2005). "At common law, easements in gross were strongly disfavored because they were viewed as interfering with the free use of land." *Id.* "Thus, the common law rule of long standing is that an easement is 'never presumed to be in gross when it [can] fairly be construed to be appurtenant." *Id.* (quoting *French v. Williams*, 82 Va. 462, 468 (1886)). "For an easement to be treated as being in gross, the deed or other instrument granting the easement must plainly manifest that the parties so intended." *Id.*

In this case, the intention of the parties can be fairly construed to create an easement appurtenant so the Court will not presume an easement in gross. 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

[4] "An easement appurtenant…has both a dominant and servient tract and is capable of being transferred or inherited. It frequently is said that an easement appurtenant 'runs with the land,' which is to say that the benefit conveyed by or the duty owed under the easement passes with the ownership of the land to which it is appurtenant." *Blackman*, 270 Va. at 77.

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. In this way, at the time of the creation of the 1887 covenants, the Lee Monument Circle (the servient property) was burdened to benefit the surrounding land (the dominant property). Significantly, the grantors of the 1887 Deed also signed the 1890 Deed conveying the property from the Lee Monument Association to the Commonwealth of Virginia, signifying the intention that the 1887 grantors be beneficiaries of the covenants included within the 1890 Deed. Therefore, based on the intention of the parties at the time of the creation of the 1887 covenants, and based on the mandate that "an easement is 'never presumed to be in gross when it [can] fairly be construed to be appurtenant," the Court finds that the 1887 covenants created an easement appurtenant. *Id.* (quoting *French*, 82 Va. at 468); *see also 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."); *see also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 5.7 (AM. LAW INST. 2000).

Because Plaintiff has pled a case for a covenant in gross, and the Court has found that the intention of the parties can be fairly construed to create a covenant appurtenant, the Court must sustain the Defendants' Demurrer on the basis that Plaintiff has failed to state a claim for a covenant in gross. [5]

[5] Plaintiff also cannot state a claim for an easement appurtenant because he claims no legally cognizable property interest in any dominant tenement. *See Blackman*, 270 Va. at 77. Further, Plaintiff also cannot state a claim for common law covenant running with the land because he is not in vertical privity with the 1887 grantors. *See Barner*, 266 Va. at 284 ("vertical privity requires that the benefit of a restrictive covenant extend only to 'one who succeeds to some interest of the beneficiary *in the land* respecting the

3. Declaratory Judgment

Plaintiff's Amended Complaint seeks a "judicial declaration that Defendants, in attempting to remove the Statue of Robert E. Lee on Monument Avenue in the City of Richmond and allowing the defacing of such Statue and its pedestal, are exceeding their authority, violating their obligations to enforce the law, and willfully violating binding covenants in the Deed conveying the Statue, Pedestal, and land on which they sit to the Commonwealth." Am. Compl. 1.

The Court is authorized to issue declaratory judgments "in cases of actual controversy." Va. Code § 8.01-184. "A plaintiff has standing to institute a declaratory judgment proceeding if it has a 'justiciable interest' in the subject matter of the proceeding, either in its own right or in a representative capacity." *W.S. Carnes, Inc. v. Bd. of Supervisors of Chesterfield Cty.*, 252 Va. 377, 383 (1996). "To be 'justiciable,' the controversy must involve specific adverse claims that are based on present, not future or speculative, facts that are ripe for judicial assessment." *Treacy v. Smithfield Foods, Inc.*, 256 Va. 97, 103 (1998). "Additionally, a plaintiff must establish a 'justiciable interest' by alleging facts 'demonstrat[ing] rights will be affected by the outcome of the case." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 98 (2013); *see also W.S. Carnes, Inc.*, 252 Va. at 383. Further, "[t]he declaratory judgments acts do not create or change any substantive rights, or bring any other additional rights into being." *Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 318 (2016) (quoting *Charlottesville Area Fitness Club*, 285 Va. at 99; *Miller v. Highland Cty.*, 274 Va. 355, 370 (2007) (internal quotations omitted)).

As discussed above, both of Plaintiff's substantive claims fail as a matter of law. Accordingly, the Plaintiff has articulated no substantial legal right sufficient for the Court to grant

---

use of which the promise was made.'" (quoting *Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*, 215 Va. 658, 663 (1975) (emphasis added)).

a declaratory judgment. "If the [Plaintiff] ha[d] a private right of action..., but the underlying facts have not ripened into a fully enforceable cause of action, the Declaratory Judgment Act provides a procedural remedy for the unripe, but legally viable cause of action. But the Act does not *create* a right of action or, for that matter, any substantive rights at all." *Cherrie*, 292 Va. at 318. Therefore, the Court must deny any motion for declaratory judgment because Plaintiff has not articulated a legally viable cause of action.

C. Conclusion

For the reasons discussed above the Defendants' Demurrer is sustained in its entirety. Therefore, Plaintiff's First Amended Complaint for Declaratory Judgment and Injunctive Relief is dismissed with prejudice. Further, the temporary injunction put in place until August 23, 2020 by the Court's Order of July 23, 2020 is hereby dissolved.

W. Reilly Marchant, Judge

Copy: File