

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 201347

HELEN MARIE TAYLOR *et al.*,

Appellants,

v.

RALPH S. NORTHAM *et al.*,

Appellees.

PETITION FOR APPEAL

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PETITION FOR APPEAL

Helen Marie Taylor, Evan Morgan Massey, Janet Heltzel, George D. Hostetler, and John-Lawrence Smith, Plaintiffs below, petition this Court pursuant to Code of Virginia §§ 8.01- 670 and 8.01-674 and Rule 5:17 of the Rules of this Court to grant them an appeal from the October 27, 2020 final order entered by the Circuit Court for the City of Richmond.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Appellants, Plaintiffs below, filed their complaint below on July 21, 2020, challenging the order of Ralph S. Northam, Governor of Virginia, that the monument erected to honor Robert E. Lee on Lee Circle at the intersection of Monument Avenue and Allen Avenue in the City be removed. Three of the Plaintiffs, Evan Morgan Massey (as trustee), Janet Heltzel and George D. Hostetler, own residences in the Allen Addition subdivision, which includes the Lee Circle. The other plaintiffs, Helen Marie Taylor and John-Lawrence Smith, own residences on Monument Avenue near Lee Circle. All of the Plaintiffs own property and reside in the Monument Avenue Historic District of the City of Richmond. R183-97.

Appellee-Defendants are Governor Northam, the Director of the Department of General Services and the Director of the Division of Engineering & Building.

R1-3.

The complaint contained five counts. Count I asserted that the 1889 joint resolution of the Virginia General Assembly is binding on Defendants and that the order to remove the Lee Monument violated Article V, § 1 of the Constitution of Virginia because the order exceeded the Governor's constitutional authority. Count II asserted that the Governor's order intruded upon the authority of the General Assembly by claiming to establish a policy in conflict with the policy announced in the 1889 joint resolution. Count III asserted that Defendants had violated the separation of powers provisions of the Constitution of Virginia, Article I, § 5 and Article III, § 1 by exercising power reserved to other branches of state government. Count IV charged that the Governor's order violated the Commonwealth's obligation under restrictive covenants contained in 1887 and 1890 deeds to which Plaintiffs Massey, Heltzel and Hostetler are successors-in-interest and beneficiaries. Count V asserted that the Governor's order was in violation of Code of Virginia § 2.2-2402(B), which prohibits removal of certain structures described in that statute. R1-32.

Following a July 23, 2020 hearing and over Defendants' opposition, the circuit court granted Plaintiffs a temporary injunction on August 3, 2020. R165-79.

On August 25, 2020, the circuit court overruled Defendants' demurrer as to Counts I, II, III and IV, but sustained the demurrer as to Count V. R360-67

Plaintiffs moved for summary judgment on October 9, 2020. R589-90. Defendants filed a cross-motion for summary judgment on October 14. R629-740. The circuit court heard arguments on October 19 on the summary judgment motions and took those motions under advisement. R817.

The trial then proceeded on October 19 with the submission by Plaintiffs of title examinations of the deeds of the Plaintiffs who own property in the Allen Addition, which were admitted without objection. R833. The court took judicial notice of numerous matters, as identified in its October 27, 2020 letter opinion. R759-61. After Plaintiffs rested, Defendants moved to strike Plaintiffs' complaint, which the court denied. R761-62.

Defendants offered the testimony of historians Edward Ayers and Kevin Gaines; several exhibits related to the Lee Monument and Monument Avenue; and numerous documents, which the court judicially noticed, reflecting actions of the General Assembly and the Speaker of the House of Delegates, the toppling by protestors of a Confederate monument to Jefferson Davis on Monument Avenue during June 2020, the removal by the City of Richmond of three other Confederate monuments along Monument Avenue during July 2020. R761.

Plaintiffs offered the testimony of Teresa Roane, the archivist of the United Daughters of the Confederacy (R966), and Alexander Wise, former Director of the Virginia Department of Historic Resources and Founding President of the American Civil War Center in rebuttal. R976.

At the conclusion of the receipt of all evidence, Defendants again moved to strike Plaintiffs' claims, which the court denied. R761-62.

The circuit court issued a letter opinion on October 27, 2020, ruling that there were genuine issues as to material facts and that Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment were denied; that enforcement of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to the current public policy of the Commonwealth and, therefore, are unenforceable; that execution of the Judgment Order would be suspended pending a properly perfected appeal enforcement of the restrictive covenants in the 1887 and 1890 deeds would be contrary to public policy; and that the requirements of any suspending bond were waived. R755-67.

On the same day as the publication date of the court's letter opinion, the Court entered an Order noting that the parties' respective motions for summary judgment and Defendants' motion to strike Plaintiffs' evidence were denied; finding that enforcement of the restrictive covenants would be contrary to current public policy, as established by the Virginia General Assembly; dissolving the

temporary injunction entered on August 3, 2020; incorporating the findings and rulings in the October 27, 2020 letter opinion; suspending execution of the Judgment Order pending the resolution of a properly perfected appeal; and waiving the requirement of any suspending bond. R768-69.

On October 28, 2020, Plaintiffs filed a motion for clarification of the circuit court's October 27 Order. R770-71. Defendants filed a response and a request for reconsideration of the order suspending judgment on October 29. R772-80. The circuit court conducted a hearing on those matters on October 29 and entered an order that amended its October 27, 2020 Order by entering final judgment in favor of Defendants, restoring its August 3, 2020 injunction for the period during which the appeal is pending, and waiving the requirement of a suspending bond or irrevocable letter of credit. R783. On the following day, October 30, the court entered an Order clarifying and adding to its October 29, 2020 Order that the August 3, 2020 injunction is not only restored but extended beyond its 90-day time limit and is to remain in effect throughout the pendency of the Plaintiffs' appeal. R784.

Plaintiffs filed their notice of appeal on October 29, 2020. R781-82.

On November 9, 2020, Defendants filed in this Court a petition for review pursuant to Code of Virginia § 8.01-626 and a motion to vacate injunction pending appeal or in the alternative to expedite proceedings. Plaintiffs filed an opposition to

each. On December 18, 2020, this Court entered orders refusing the petition for review and denying the motion to vacate. The Court took the request to expedite under advisement pending the filing of a petition for appeal. Order of this Court dated December 18, 2020 addressing Defendants’ motion to vacate injunction or in the alternative to expedite proceedings.

STATEMENT OF FACTS

1. On Thursday, June 4, 2020, at a press conference, Governor Northam announced that he had ordered the Department of General Services to remove the Lee statue, which is a part of the Lee Monument located at the intersection of Monument and Allen Avenues in the City of Richmond, “as soon as possible.” R114 n.9, 169.

2. The heirs of William C. Allen (the “Allen Heirs”), by a deed made on July 15, 1887 (the “1887 Deed”), conveyed a 200-foot in diameter circular plot of land (the “Lee Circle”), at what is now the intersection of Monument and Allen Avenues (“Lee Place”) in the City of Richmond, to the Lee Monument Association, and dedicated Monument Avenue, Allen Avenue, and Lee Place to the public. The Lee Circle and the two avenues were parts of a larger parcel of land retained by the Allen Heirs, which was shown on a plat attached to and made a part of the 1887 Deed. R24-29, 702-07.

3. The 1887 Deed provides that the Grantee agrees to hold the Lee Circle only for use as a site for the Lee Monument. R25.

4. On April 29, 1889, a plat signed by the Allen Heirs and the President of the Lee Monument Association, who was also the Governor of Virginia, was recorded in the Henrico County clerk's office pursuant to a subdivision statute enacted in 1888. This plat depicts the Lee Circle, the associated avenues, and the subdivision of the remaining land owned by the Allen Heirs into individual residential lots. R518.

5. By Joint Resolution of the General Assembly dated December 19, 1889, Acts of Assembly 1889, ch. 24 (the "1889 Joint Resolution"), the Governor of Virginia was

authorized and requested, in the name and in behalf of the commonwealth, to accept, at the hands of the Lee monument association, the gift of the monument or equestrian statue of General Robert E. Lee, including the pedestal and circle of ground upon which said statue is to be erected, and to execute any appropriate conveyance of the same, 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.

R11-12, 710-11.

6. The Lee Monument and the Lee Circle were conveyed to the Commonwealth of Virginia by a deed made on March 17, 1890 from the Lee Monument Association (the "1890 Deed"). The Allen Heirs were also parties to the 1890 Deed, and the 1889 Plat was incorporated in the deed by reference. The

land depicted on the 1889 Plat was called “THE WM C. ALLEN ADDITION.”

R713-21.

7. The 1890 Deed provides that the Commonwealth, pursuant to the terms and provisions of the 1889 Joint Resolution,

executes this instrument 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.

R14-22.

8. The Monument Avenue Historic District has been registered on the National Register of Historic Places since February 26, 1970 and has been a National Historic Landmark since December 9, 1997. The nominations were based in substantial part on the existence of the Lee Monument within the district. R315, 533-47.

9. The Robert E. Lee Monument has been registered on the National Register of Historic Places since January 5, 2007, when the U.S. Department of the Interior, National Park Service granted the application submitted by the Virginia Department of Historic Resources. R283-303, 549-69.

10. The Plaintiffs all reside in the Monument Avenue Historic District. R489.

11. Plaintiffs Evan Morgan Massey, as trustee, Janet Heltzell and George D. Hostetler own lots in the Allen Addition, within view of the Lee Monument. R571-76. Title examinations showed that these plaintiffs are successors in title to the

Allen Heirs and that there are no racially restrictive covenants in their chains of title. R571-76.

12. During the proceedings below, the 2020 Special Session of the General Assembly enacted a Budget Bill, introduced on August 18, 2020 and signed by the Governor on November 18, 2020, which included provisions repealing the 1889 Joint Resolution and directing the Department of General Services, “in accordance with the direction and instruction of the Governor,” to remove the Lee Monument (“the Budget Amendment”). HB 5005, Item 79.I. (2020 Special Session, Va. General Assembly ch. 56).

ASSIGNMENTS OF ERROR

The standard of review for each of the following assignments of error is *de novo*.

1. The circuit court erred as a matter of law in concluding that enforcement of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to current public policy as established by the Virginia General Assembly in its 2020 special session because the Budget Amendment on which the circuit court relied for that conclusion is special legislation that grants relief in this case in violation of Article IV, § 14 of the Constitution of Virginia and, therefore, cannot establish the public policy of the Commonwealth. (R500, 750-54) (reviewed *de novo*; *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 577 (2017))

2. In denying Plaintiffs' motion for summary judgment and dissolving the temporary injunction, the circuit court erred as a matter of law by declining to rule on Plaintiffs' contention that the Budget Amendment violates the prohibition against impairment of the obligation of contracts in Article I, § 11, Clause 2 of the Constitution of Virginia and Article I, § 10, Clause 1 of the United States Constitution and, therefore, it cannot establish the public policy of the Commonwealth. (R494-95, 750-54) (reviewed *de novo*; *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 577 (2017))

3. The circuit court erred as a matter of law in concluding that enforcement of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to current public policy as established by the Virginia General Assembly in its 2020 special session because the Budget Amendment on which the circuit court relied for that conclusion violates the separation-of-powers provisions in Article I, § 5 and Article III, § 1 of the Constitution of Virginia and, therefore, cannot establish the public policy of the Commonwealth. (R220-21) (reviewed *de novo*; *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 577 (2017))

4. In denying Plaintiffs' motion for summary judgment and dissolving the temporary injunction, the circuit court erred as a matter of law by declining to rule on Plaintiffs' contention that the Budget Amendment violates the rule established by this Court that a legislative act generally cannot abrogate a valid restrictive

covenant unless it is demanded by the public health, comfort or welfare and, therefore, it cannot establish the public policy of the Commonwealth. (R1019-20) (reviewed *de novo*; *Parikh v. Family Care Ctr., Inc.*, 273 Va. 284, 288-89 (2007))

5. The circuit court erred as a matter of law in declining to grant summary judgment to Plaintiffs because there was no material fact in dispute and Plaintiffs had established the grounds in law and fact for a grant of summary judgment in their favor. (R482-588) (reviewed *de novo*; *Mount Aldie, LLC v. Land Trust of Va., Inc.*, 293 Va. 190, 197 (2017); *Amin v. Cnty. of Henrico*, 286 Va. 231, 235 (2013)).

6. In denying Plaintiffs' motion for summary judgment and dissolving the temporary injunction, the circuit court abused its discretion by declining to consider and rule on Plaintiffs' contention that invalidation of the restrictive covenants in the 1887 and 1890 Deeds would be contrary to the public policy of the Commonwealth regarding historic preservation, as expressed in Article XI, §§ 1 & 2 of the Constitution of Virginia, as implemented by the Virginia General Assembly in Code of Virginia §§ 10.1-1700 *et seq.*, 10.1-2202.3, 10.1-2205, 10.1-2206.1, 10.1-2206.2, 10.1-2207 and 10.1-2212. (R495-96, 500) (reviewed *de novo*; *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 577 (2017))

STANDARD OF REVIEW

The standard of review for each assignment of error is *de novo*.

ARGUMENT

I. THE BUDGET AMENDMENT VIOLATES ARTICLE IV, § 14 OF THE CONSTITUTION AND CANNOT ESTABLISH THE PUBLIC POLICY OF THE COMMONWEALTH. (Assignment No. 1 – *de novo* review)

By any logical test, legislation that addresses a single object is special legislation. *See Alderson v. Cnty. of Alleghany*, 266 Va. 333, 337 (2003) (Legislation limited in application to a single municipality “most assuredly is special legislation.”). The Budget Amendment deals with the Lee Monument and nothing else. For that reason, it is plainly special legislation, as Plaintiffs argued below. R750-54.

The circuit court applied an inappropriate test of special legislation in this case. Relying in error on the decisions in *Holly Hill Farm Corp. v. Rowe*, 241 Va. 425 (1991) and *Laurels of Bon Air, LLC v. Med. Facilities of Amer. LIV Ltd P’ship*, 51 Va. App. 583 (2008), the court below concluded that “there is no evidence that these presumptively constitutional enactments are not rationally related to the current legislative desire to remove the Lee Monument.” R761. That is a tautology. It is irrelevant to whether the legislation is special or general. If all that is required to establish that legislation is general and not special is that the legislation be rationally related to some legislative desire, it is difficult to imagine any legislation being deemed special legislation.

The circuit court’s test is in conflict with the decision in *Alderson*. There, the Court concluded that the legislation in question was special legislation, but it was “not an unconstitutional violation of Art. IV, § 14 because it is specifically authorized by Art. VII, § 2.” 266 Va. at 337.

The rational relationship test applied in *Holly Hill* and *Laurels of Bon Air* is appropriate in reviewing classifications, which must be general and not pretextual. However, it is not the test to be applied to a challenge under the second paragraph of Article IV, § 14, which provides

The General Assembly shall confer on the courts power to grant divorces, change the names of persons, and direct the sales of estates belonging to infants and other persons under legal disabilities, and *shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals may have jurisdiction.*

(emphasis added). This language imposes a test quite different from the test applied in challenges involving other provisions of Article IV, § 14 or the provisions of Article IV, § 15, or challenges to legislative classifications. It specifically prohibits any special legislation that grants relief in pending litigation. All special legislation does not violate the Constitution of Virginia. What might otherwise be a constitutionally permissible special law violates the second paragraph of Article IV, § 14 if it grants relief in a pending judicial proceeding. Both the Budget Amendment’s limitation to a single monument and its “granting

relief’ element distinguish it from the legislative classifications addressed in *Holly Hill* and *Laurels of Bon Air*.

Holly Hill and *Laurels of Bon Air* involved a challenge based on Article IV, § 14(18) and Article IV, § 15, not the second paragraph of Article IV, § 14 that is at issue in this case. Both involved a legislative classification. The fence law in *Holly Hill* was held to be legislation having general applicability because the classification of persons covered was deemed reasonable and non-arbitrary. *Id.* at 432-33. In *Laurels of Bon Air*, the Court of Appeals held that the classification there “cannot be characterized as a ‘purely arbitrary’ legislative classification.” 51 Va. App. at 598.

Cases involving a legislative classification are deemed general in application if the classification is not arbitrary and is rationally related to the purpose of the legislation. *Bray v. Cnty. Bd. of Arlington Cnty.*, 195 Va. 31, 37 (1953). In this case, however, the unmistakable purpose of the Budget Amendment is to authorize the removal of a single object -- the Lee Monument. The legislation does not purport to establish, and could not by its nature establish, any classification. A legislative provision that relates to a single object, such as the Budget Amendment, cannot be general in its application.

An example of a special law is a charter provision because it is special by its very nature in that it deals with a single municipality. It is special legislation

regardless of whether it is a reasonable, non-arbitrary law. *See City of Portsmouth*, 205 Va. 259, 263 (1964) (A charter provision, “of course, is a special act.”).

By its terms, the Budget Amendment grants relief in this case by directing the Department of General Services to remove the Lee Monument. It also purports to repeal the 1889 Joint Resolution that supports Plaintiffs’ claim that preservation of the Lee Monument is the public policy of the Commonwealth.

The circuit court erred as a matter of law in relying upon the Budget Amendment as a valid legislative enactment that can establish the public policy of the Commonwealth because it violates the second paragraph of Article IV, § 14. R816, 1017.

**II. THE BUDGET AMENDMENT VIOLATES
THE CONTRACT CLAUSE IN ARTICLE I,
§ 11 OF THE CONSTITUTION OF VIRGINIA AND
ARTICLE I, § 10 OF THE U.S. CONSTITUTION
AND CANNOT ESTABLISH THE PUBLIC
POLICY OF THE COMMONWEALTH.
(Assignment No. 2 – *de novo* review)**

Article I, § 11 of the Constitution of Virginia provides in relevant part “that the General Assembly shall not pass any law impairing the obligation of contracts.” Article I, § 10 of the U. S. Constitution contains virtually identical language. Each provision is referred to as “the Contract Clause.” Although the Contract Clause does not negate the Commonwealth’s police power, it nevertheless “does impose some limits upon the State’s power to abridge existing contracts in

the exercise of its otherwise legitimate police power.” *Heublein, Inc. v. Dep’t of Alcoholic Beverage Control*, 237 Va. 192, 196 (1989); see *Working Waterman’s Ass’n v. Seafood Harvesters, Inc.*, 227 Va. 101, 110 (1984) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978)).

Plaintiffs argued below that the Budget Amendment violated the Contract Clause. R494-95, 500. The circuit court failed to address that argument. R755-67.

In *Heublein*, legislation that retroactively terminated at-will contracts was invalidated as an unconstitutional impairment of the obligation of contract on the grounds that the legislation was not the proper exercise of the police power because it was an effort to protect a small group of wine wholesalers from economic loss. 237 Va. at 197.

Chief Justice Marshall observed in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 645 (1819) that “the words [of the Contract Clause] were introduced to give stability to contracts.” The provision “recognizes the vital function that ‘the claim to promised advantages’ plays in any developed economic order.” I A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA at 202 (1974) (quoting III ROSCOE POUND, JURISPRUDENCE at 162-63 (St. Paul, MN. 1959)).

Dartmouth College held that an enactment of the New Hampshire legislature that revised the charter granted to the college by King George III violated the

Contract Clause. *Id.* at 654. That decision has been limited by *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548 (1914) and *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). The Court held in the former case that the railroad charter issued by the State was a contract subject to the State's power to regulate as "reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community." 232 U.S. at 558. In *Blaisdell*, the Court concluded that the Depression presented an emergency that the Framers could not have foreseen and that "the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." 290 U.S. at 437.

Spannaus qualified the broad dictum in *Atlantic Coast Line R. Co.* opinion. It acknowledged that legislative prerogative is limited in certain instances by the Contract Clause. 438 U.S. at 242.

The U.S. Supreme Court has distinguished *Blaisdell* on two separate and independent grounds. The first distinction is between legislation that negatively affects a contract only temporarily and conditionally, as in *Blaisdell*, and legislation that impairs the obligation of a contract permanently and unconditionally. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 28-29 (1977); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 63 (1935). The second distinction

is between legislation that imposes a generally applicable rule of conduct and legislation that targets a single activity or object. *Spannaus*, 438 U.S. at 249.

In *United States Trust Co.*, the repeal of a covenant between the State and bondholders was invalidated as a violation of the Contract Clause because the permanent impairment was unreasonable and unnecessary. *Id.* at 22, 28-29, 32. In *Spannaus*, the Court said that where the legislation does not impose “a generally applicable rule of conduct designed to advance ‘a broad societal interest,’” the legislation likely violates the Contract Clause. 438 U.S. at 249. That distinction was affirmed in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983). *Accord*, *Amer. Fed. of St., Cnty. & Mun. Employees v. City of Benton*, 513 F.3d 874, 882 (8th Cir. 2008); *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 504 (5th Cir. 2001).

This Court declined to adopt the *Blaisdell* exception to the prohibition of the Contract Clause in *Citizens Mut. Bldg. Ass’n, Inc. v. Edwards*, 167 Va. 399 (1937), which held that a statute authorizing the State Corporation Commission to suspend payment of indebtedness by a building association violated the Contract Clause in both the Virginia and U.S. Constitutions. It drew the distinction between the Minnesota statute at issue in *Blaisdell*, which had a conditional and temporary impact, and the Virginia statute, which permanently and unconditionally impaired the obligation of the contract in that case. *Id.* at 408-09. The Court also

acknowledged the rule stated in *Kavanaugh* that the rights of the party claiming a violation of the Contract Clause are to be determined by the law in force at the time the contract was made. *Id.* at 404 (citing *Kavanaugh*, 295 U.S. at 60).

The Budget Amendment obviously constitutes a permanent and unconditional impairment of the obligation of the restrictive covenants. It is limited to the repeal of the 1889 Joint Resolution and the superseding of the restrictive covenants that guaranteed the preservation of the Lee Monument, which bears no resemblance to “a generally applicable rule of conduct designed to advance ‘a broad societal interest.’” *Spannaus*, 438 U.S. at 249. Its singular purpose is to relieve the Commonwealth of its contractual obligation to these Plaintiffs. The Budget Amendment, therefore, should be deemed invalid as violative of the Contract Clause in Article I, § 11 of the Constitution of Virginia and the Contract Clause in Article I, § 10, Clause 1 of the United States Constitution.

Unconstitutional legislation cannot establish a basis for the circuit court’s decision that the public policy of the Commonwealth established by the 1889 joint resolution has been repealed and replaced by a different public policy purportedly established by the Budget Amendment. R752 n. 2, 816, 1017.

**III. THE BUDGET AMENDMENT VIOLATES
THE SEPARATION-OF-POWERS
PROVISIONS OF THE CONSTITUTION OF
VIRGINIA AND CANNOT ESTABLISH THE
PUBLIC POLICY OF THE COMMONWEALTH.
(Assignment No. 3 – *de novo* review)**

Plaintiffs argued below that the Budget Amendment violates the separation-of-powers provisions in Article I, § 5 and Article III, § 1 of the Constitution of Virginia. R220-21. The circuit court rejected Plaintiffs' argument relying on the decision in *Markazi v. Peterson*, 136 S.Ct. 1310 (2016). R765-66. That decision is inapposite. Unlike this case, *Markazi* involved legislation that imposed a general standard of conduct. There is no parallel between the statute in that case and the Budget Amendment, the only subject of which is the removal of the Lee Monument and the repeal of the 1889 Joint Resolution that required the preservation of that monument.

According to Professor Howard:

[A]ny case over which a court has asserted jurisdiction becomes a judicial matter, and the result of the case may not be affected by special legislation. Such a principle, that a legislative body may not intervene to dictate or influence the result of questions *sub judice*, would inhere anyway in due process of law and the separation of powers....

I A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 539-40 (1974).

As discussed in Section III, *supra*, the Budget Amendment is special legislation because it deals only with the Lee Monument. Independent of Article

IV, § 14, it violates the prohibition in Article I, § 5 and Article III, § 1 against the legislative branch interfering in matters pending before a court.

**IV. THE BUDGET AMENDMENT VIOLATES THE GENERAL RULE THAT A LEGISLATIVE ACT DOES NOT INVALIDATE A RESTRICTIVE COVENANT UNLESS REQUIRED BY THE PUBLIC HEALTH, COMFORT OR WELFARE AND, THEREFORE, CANNOT ESTABLISH THE PUBLIC POLICY OF THE COMMONWEALTH.
(Assignment No. 4 – *de novo* review)**

The circuit court erred as a matter of law by failing in its October 27, 2020 letter opinion and Order (R755-69) to address Plaintiffs’ contention below that the longstanding rule in Virginia, as in a majority of other jurisdictions, that a legislative act does not invalidate a restrictive covenant unless it is demanded by the public health, comfort or welfare compelled a ruling that the Budget Amendment is invalid. R1019-20. *See Ault v. Shipley*, 189 Va. 69, 75 (1949); *RECP IV WG, LLC v. Capital One Bank (USA), N.A.*, 295 Va. 268, 289 (2018). There was no justification based on this record for an abrogation of Plaintiffs’ restrictive covenants that was demanded by public health, comfort or welfare. A denial of property rights cannot be predicated on shifts in public attitudes. There must be a substantial threat to public health, comfort or welfare. The conditions that warrant abrogation of a restrictive covenant must be “so radical as practically to destroy the essential objects and purposes of the agreement.” *River Heights*

Ass'n P'ship v. Batten, 267 Va. 262, 268 (2004). Enforcement of the restrictive covenant must be “inequitable and oppressive.” *Ault*, 189 Va. at 72.

Invalidation of a valuable property right established by an agreement with the Commonwealth cannot be justified merely because a legislature subsequently decides the agreement should be abrogated when it chooses to send the public a different message. If that is to be the law, then no restrictive covenant and, indeed, no promise of the Commonwealth will be secure.

**V. THE CIRCUIT COURT ERRED
BY NOT GRANTING SUMMARY
JUDGMENT TO PLAINTIFFS.
(Assignment No. 5 – *de novo* review)**

Plaintiffs filed a motion for summary judgment on October 9, 2020. R482-588, 589-90. Defendants filed a cross-motion for summary judgment on October 14, stating that there was no disputed issue of material fact. R633-36. Yet, in Defendants’ opposition to Plaintiffs’ motion for summary judgment, Defendants contended that whether the restrictive covenants were void as against public policy was a factual issue that could be resolved only after evidence was heard. R615-21. The circuit court had previously ruled that a determination of constitutes the current public policy of the Commonwealth “is a factual one, and can only be determined by the Court after a hearing of evidence....” R365. The evidence that Defendants proposed to offer at trial was the testimony of Edward Ayers and Keven Gaines as purported experts on the Commonwealth’s public policy.

Defendants represented that Dr. Ayers would testify that the presence of the Lee Monument from the date of its erection was contrary to the public policy of the Commonwealth, and that Dr. Gaines would testify as to current public policy regarding monuments. R617-18, 620.

In its October 27, 2020 letter opinion, the circuit court stated:

The Virginia Supreme Court and Court of Appeals have long held that the legislature, not the judiciary, is the “sole ‘author of public policy.’” The U.S Supreme Court has also long held the “[t]he legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state.” Therefore, the “best indications of public policy are to be found in the enactments of the [l]egislature.”

(internal citations omitted). R763. Plaintiffs objected to the receipt of testimony regarding the public policy of the Commonwealth on the grounds that such testimony would be irrelevant. R492-94. The determination of what is the public policy of Virginia is a legal issue. The testimony of Defendants’ witnesses did not concern issues of fact regarding the validity and enforceability of the restrictive covenants. The opinion of a witness could not establish, modify or negate the public policy articulated in Constitution of Virginia, legislation adopted by the General Assembly or judicial precedent.

Rule 3:20 of the Rules of this Court mandates that a circuit court grant summary judgment where there are no disputed issues of material fact and the movant has shown that it is entitled to judgment as a matter of law. In denying Plaintiffs’ motion for summary judgment, the circuit court erred as a matter of law.

Carwile v. Richmond Newspapers, Inc. 196 Va. 1, 5-6 (1954). The circuit court's duty to grant Plaintiffs' motion for summary judgment was not obviated by Defendants' filing of a cross-motion for summary judgment. *Town of Ashland v. Ashland Inv. Co.*, 235 Va. 150, 154-55 (1988).

**VI. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY NOT CONSIDERING THE COMMONWEALTH'S PUBLIC POLICY REGARDING HISTORIC PRESERVATION IN DETERMINING WHETHER THE RESTRICTIVE COVENANTS ARE VALID AND ENFORCEABLE.
(Assignment No. 6 – *de novo* review)**

In the proceedings below, Plaintiffs argued that the adoption of Article XI of the Constitution of Virginia and subsequent enactment of implementing legislation regarding historic preservation compelled the conclusion that the removal of the Lee Monument was contrary to the public policy of the Commonwealth. R495-96, 500. The circuit court failed to address that argument. R755-67.

One of the significant features of the 1971 Constitution of Virginia, which Virginians ratified in 1970, is the inclusion, for the first time in the Commonwealth's fundamental law, of provisions establishing the policy of conserving natural resources and historic sites. Article XI, § 1. Although this Court held in *Robb v. Shockoe Slip Found.*, 228 Va. 674, 676-77 (1985) that this provision is not self-executing, it unquestionably declares the public policy of the Commonwealth, as this Court observed in *United States v. Blackman*, 270 Va. 68,

73 (2005). Since the decision in *Shockoe Slip Foundation*, the General Assembly has enacted extensive legislation implementing that general policy. *E.g.*, Code of Virginia §§ 10.1-1700 *et seq.* (expressly including historic sites), 10.1-2202.3, 10.1-2205, 10.1-2206.1, 10.1-2206.2, 10.1-2207 and 10.1-2212. These and other statutes “evinced a strong public policy in favor of land conservation and preservation of historic sites and buildings.” *Blackman*, 270 Va. at 73.

The General Assembly substantially strengthened the version of Article XI, § 1 that had been recommended in 1968 by the Commission on Constitutional Revision. II A. HOWARD, COMMENTARIES at 1144-45. At its 1969 extra session that considered the Commission report, the General Assembly enacted the language of Article XI, § 1 that was placed on the ballot for voter approval. Upon ratification, “[t]his statement of public policy becomes a mandate directing all arms of the State to consider the impact of proposed actions upon the Commonwealth’s environment.” HOWARD at 1146.

The circuit court declined to consider the public policy established by Article XI, § 1 and the statutes implementing the historic preservation elements of that provision, as urged by Plaintiffs. R495-96. The historic value of the Lee Monument, as described in the 2006 nomination submitted by the Virginia Department of Historic Resources to the U.S. Department of the Interior, National Park Service (R283-303), renders the absence of consideration by the circuit court

of the Commonwealth's public policy regarding historic preservation as it relates to the Lee Monument an error of law.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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I certify that on January 25, 2021, I emailed a true copy of the foregoing Petition for Appeal to Toby J. Heytens, Solicitor General, at

solicitor@oag.state.va.us, and mailed a true copy to Toby J. Heytens at 202 North Ninth Street, Richmond, Virginia 23219.

Counsel for Appellants ask for oral argument in person before a panel of this Court.

The \$50.00 filing fee will be delivered by Lantagne Legal Printing on January 25 or January 26, 2021.

/s/ Patrick M. McSweeney
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