IN THE SUPREME COURT OF VIRGINIA

Record No. 210113

HELEN MARIE TAYLOR *et al.,*
Appellants,

v.

RALPH S. NORTHAM, in his Official Capacity as GOVERNOR OF VIRGINIA *et al.,*
Appellees.

PETITION FOR REHEARING

Appellants petition for a rehearing of the September 2, 2021, decision pursuant to Rule 5:37 on the basis of several fundamental errors. If those errors are allowed to stand uncorrected, the damage to the rule of law, the authority of the General Assembly, and the credibility of the Court will be profound and lasting.

The Court erred in concluding that a joint resolution does not establish public policy and is not enforceable

The Court failed to apply its own precedent that specifically held that the joint resolution in that case was enforceable. *Commonwealth v. County Board of Arlington County,* 217 Va. 558 (1977). None of the decisions on which the opinion relied addressed whether a joint resolution can establish public policy. *Arlington Board*, however, held that the joint resolution there prohibited an action by a

school board that was contrary to the intent established by that legislative enactment. *Id.* at 564, 579-80. Appellants relied on *Arlington Board* below. JA 106, 108, 647. The Governor did not challenge that reliance in his reply to Appellants' opposition to the demurrer and, therefore, waived argument on that issue. JA 197-204.

The restrictive covenants do not impose a perpetual obligation upon the Commonwealth

The Court failed to address Appellants' assertion that the Commonwealth retains the prerogative of transferring Lee Circle and the Lee Monument if, after 130 years, it chooses not to be associated with any "message" that the monument conveyed. Opening Br. at 46. Restrictive covenants may not restrict alienation. *See Hamm v. Hazelwood,* 292 Va. 153, 159-60 (2016). The Commonwealth is free to convey the Lee Circle and the Monument to a private party. The Governor did not challenge Appellants' assertion that those properties could be transferred but simply speculated that the market would be limited. Br. of Appellees at 53 n. 16.

A legislative enactment is construed according to its plain meaning

The opinion reverses long-standing precedent regarding the legislature's role in determining the public policy of the Commonwealth. It is not for the courts to establish new public policy but to respect the prerogative of the legislature and give effect to its legislative enactments when they address such policy. Appellants

were correct in relying on the 1889 joint resolution as the *sole evidence* of the public policy of Virginia on the issue. *See Akers v. Commonwealth,* 298 Va. 448, 453 (2020) (A court must apply the manifest intention of the legislature according to the language of the enactment.).

It is well-established, as the circuit court acknowledged, that "the best indications of public policy are to be found in the enactments of the [l]egislature." JA 411. Such enactments are construed according to their plain meaning and cannot be varied by extrinsic evidence. *Carr v. Forst,* 249 Va. 66, 69 (1995). Appellants objected to the admission of expert evidence to establish public policy at variance with the joint resolution. JA 227-29. Only another legislative enactment could change the public policy established by the 1889 joint resolution. *See Tvardek v. Powhatan Vill. Homeowners Ass'n,* 291 Va. 269, 279-80 (2016). The Court, however, did not rely on the 2020 Budget Amendment (Op. at 20), which purported to establish such changed public policy and which Appellants contended was unconstitutional. Opening Br. at 10-32; Reply Br. at 2-7.

The Court also looked to several recent actions in reaching its conclusion that the policy established by the 1889 joint resolution had been supplanted by a new public policy. Those are the elimination of the state holiday honoring Lee, the removal of Confederate monuments by the City of Richmond, and the General Assembly's decision to remove other Confederate monuments. Op. at 20-21. The

arbitrariness of this selection is obvious because the Court did not acknowledge: (1) that the Commonwealth currently issues license plates honoring Lee with an image of the Lee Monument on the plate (Reply Br. at 11-12); (2) that in 1970 the Commonwealth obtained and maintains the designation of the Monument Avenue Historic District for inclusion in the National Register of Historic Places ((JA 263-78); (3) that the Commonwealth in 1997 sought and obtained the more prestigious designation of the Monument Avenue Historic District as a National Historic Landmark (JA 628-29); (4) that in 2006 the Commonwealth obtained the designation of the Lee Monument for inclusion in the National Register of Historic Places (JA 280-300); and (5) that each of the six November 2020 ballot referenda to authorize removal of Confederate monuments was rejected. Reply Br. at 11-12.

A legislative enactment, such as the 1889 joint resolution, is not repealed unless a subsequent legislative enactment explicitly or by necessary implication does so. *See The Country Vintner, Inc. v. Louis Latour,* 272 Va. 402, 413 (2006). It was error for the Court to base its decision on evidence other than the 1889 joint resolution itself, which established the public policy that the Commonwealth accepted the Lee Monument, its pedestal and Lee Circle upon "the guarantee of the state that it would hold said statue and pedestal and ground perpetually sacred to the monumental purpose to which they have been devoted." JA 12. Whether the continued enforcement of that legislative enactment was unreasonable, as the Court

concluded (JA 20), was a judgment properly left to the General Assembly and not to the judiciary. *See In re Woodley,* 290 Va. 482, 490 (2015). The Court's opinion implicitly accepts that proposition: "The essence of our republican form of government is for the sovereign people to elect representatives, who then chart the public policy of the Commonwealth…." Op. at 23.

The Court misapplied the test that allows deed restrictions to be abrogated

The opinion relies upon an erroneous test of when a deed restriction can be abrogated: "We conclude that there is ample evidence that enforcement of the purported restrictive covenants would violate public policy and be unreasonable, given the change in circumstances since 1890…." Op. at 20. This test is a sharp departure from the test that has been consistently applied by the Court. *E.g., River Heights Assoc. P'ship v. Batten,* 267 Va. 262, 268-69 (2004); *Chesterfield Meadows Shopping Center Assoc., L.P. v. Smith,* 264 Va. 350, 356 (2002); *Duvall v. Ford Leasing Dev. Corp.,* 220 Va. 36, 45 (1979); *Hercules Powder Co. v. Continental Can Co.,* 196 Va. 935, 939 (1955); *Booker v. Old Dominion Land Co.,* 188 Va. 143, 148 (1948); *Tardy v. Creasy,* 81 Va. 553, 565 (1886).

Until the decision in this case, the Court had treated the test as having two separate and distinct elements. One is whether there has been a change in circumstances that is "so radical as practically to destroy the essential objects and purposes of the [covenant]." *Booker,* 188 Va. at 148. The other is whether the

covenant violates public policy. *Hercules,* 196 Va. at 939. The opinion conflates the two tests and introduces confusion and vagueness that put the enforceability of every restrictive covenant in doubt. It was error to decide that the policy and intent established by the 1889 legislative enactment can be changed because of changed circumstances or because the Court deems enforcement to be unreasonable. Only a repeal or amendment of the joint resolution by the General Assembly could establish a different public policy in this case. *See The Country Vintner*, 272 Va. at 413. That is why the General Assembly attempted to change the policy through the unconstitutional Budget Amendment at the 2020 special session.

The Court arbitrarily refused to consider the Constitution's historic preservation policy

The opinion does not address Appellants' contention that the Governor, the circuit court and this Court must at least consider the historic preservation policy established in Article XI of the Constitution of Virginia along with the other policy interests it described as it established a new public policy to supplant the 1889 joint resolution. The Court concluded that a new public policy had developed since the restrictive covenants were agreed to in 1890. Op. at 22. Failure to consider a relevant factor makes the decision arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto, Ins. Co.,* 463 U.S. 29, 42-43 (1983); *Landrum v. Chippenham & Johnston-Willis Hosps.,* 282 Va. 346, 352 (2011).

In reaching its conclusion, the Court arbitrarily considered only actions that supported its position, including the removal of Confederate monuments by the City of Richmond, while ignoring actions that were at odds with its conclusion. Op. at 20-21. *See* discussion, *supra* at page 4 (ignoring tributes to Lee). Among the actions that the Court (and the circuit court and the Governor) ignored in this decision-making process was the ratification by Virginia voters in 1970 of a revised Constitution that included for the first time provisions establishing a public policy that the Commonwealth conserve and protect its historic sites. Article XI, §§ 1 and 2. *See United States v. Blackman,* 270 Va. 68, 79 (2005) ("[Implementing] statutes evince a strong public policy in favor of land conservation and preservation of historic sites and buildings.").

The express constitutional policy to preserve historic sites deserved no less consideration than other policies cited by the Court. Op. at 20-22. It was arbitrary, for example, for the Court to rely upon the 1970 ratification of the general prohibition against racial discrimination in the revised Constitution of Virginia and the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution[1] while refusing to consider the 1970 ratification of the historic preservation provision of the Constitution of Virginia. Op. at 21, 25. Exercising the

[1] The Reconstruction Amendments were irrelevant because they were ratified years before 1890. https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical -Data/Constitutional-Amendments-and-Legislation.

authority granted by the General Assembly in Code of Virginia §§ 10.1-2204 and 10.1-2206.1 to implement Article XI, § 2, the Virginia Board of Historic Resources in 2006 recommended the Lee Monument for inclusion in the National Register of Historic Places. JA 260-300.

The Court invoked Code of Virginia §§ 2.2-2402(B) and 10.1-2202.3 in support of its position that "the Governor is the final authority with respect to the removal of government-owned memorials erected on government-owned land." Op. at 25. That was a misreading of both statutes. Section 10.1-2202.3 actually supports the argument of Appellants because it requires consideration of "the broad public interest," including the historic preservation policy that the Court ignored in reaching its conclusion. Section 2.2-2402(B) cannot override the contractual obligation of the Commonwealth reflected in the 1890 Deed and the 1889 joint resolution; moreover, that subsection does not authorize the removal of an existing memorial that has been designated by the Virginia Board of Historic Resources for inclusion in the National Register of Historic Places or located within a national historic landmark without first complying with the regulations promulgated by the Board. 17VAC5-30-90, 17VAC5-30-180, 17VAC10-20-90, 17VAC10-20-220.

Subsection B of § 2.2-2402 refers to an existing structure of the kinds described in this subsection, which means

> Any building or any appurtenant structure of any nature, which is to be placed on or allowed to extend over any property belonging to the

> Commonwealth,…and any bridge, arch, gate, fence, or other structure or fixture intended primarily for ornamental or memorial purposes, and which is paid for in whole or in part by appropriation from the state treasury….

By no fair reading does the Lee Monument come within that description of a building or appurtenant structure if for no other reason than it was not paid for in whole or part from a state appropriation. Even if the Lee Monument were construed to be included in that description, the statute would not authorize the Governor to breach a restrictive covenant. Such a breach would constitute an impairment of contract in violation of Article I, § 11 of the Constitution of Virginia and Article I, § 10 of the U.S. Constitution.

The Commonwealth cannot repudiate an agreement and continue to enjoy its benefits

The opinion utterly ignored Appellants' contention that the Commonwealth cannot lawfully repudiate an agreement that it entered and yet continue to enjoy the benefits of that agreement. Such a result allows the Commonwealth to take property without compensation in violation of the Takings Clause in the Constitution of Virginia and the United States Constitution. If the restrictive covenants are void, the law requires that the parties be restored to the conditions that existed before the agreement was entered. Opening Br. at 46 ("It is attempting to retain ownership of the land and Monument while disavowing the promises it made to obtain them.").

The erroneous and unprecedented ruling on government speech has far-reaching implications

The opinion creates an entirely novel legal doctrine -- that the government cannot make binding agreements that require it to continue or take any actions that can be construed as engaging in government speech. Will this doctrine allow a governor to cancel construction contracts for facilities that he concludes convey a message contrary the Commonwealth's public policy? Would it preclude the Museum of Fine Arts from agreeing to conditions on a donation of a work of art?

The Court's new government speech doctrine would also likely affect developers' decisions to donate property in a major development for roads and other amenities conditioned on the placement of a sign or statue that could later be deemed contrary to a new public policy. Because every sign or activity authorized by the Commonwealth's agreements arguably conveys a message, even a landowner's choice of agreeing to a permanent conservation or historical easement pursuant to Code of Virginia §§ 10.1-1009 *et seq.* would potentially be affected by the legal uncertainty resulting from the Court's September 2, 2021, opinion.

Conclusion

The Court should grant this Petition for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on September _, 2021, I caused the foregoing Petition for Rehearing to be filed electronically with the Court. I emailed a true copy to

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I further certify that this Petition for Rehearing complies with Rule 5:37(c) of the Rules of this Court.

/s/ *Patrick M. McSweeney*
_____
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