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Re: City of Charlottesville, et al. v, Pa. Light Foot Militia, et al. — Ruling on Demurrer
Circuit Court file no. CL 17–560; Hearing date: June 12, 2018

Dear Counsel:

This case is before the Court on Defendants' Demurrers to the Complaint, and a Motion to Dismiss. The matter was argued by counsel on June 12, 2018. I have considered at length the issues raised, the arguments of counsel, and the various authorities cited.

I have read the First Amended Complaint for Injunctive and Declaratory Relief, the Demurrer of Defendants Kessler and others[1], the Demurrer of Defendant Redneck Revolt, the Brief in Support of Redneck Revolt's Demurrer, the Memorandum in Support of the Demurrer of Kessler et al., Plaintiffs' Brief in Opposition to Defendants' Demurrers, the Rebuttal Brief of Defendant Redneck Revolt in Reply to Plaintiffs' Opposition, as well as some of the cases cited.

[1] There were originally 25 defendants (12 organizations and 13 individuals), all but two of whom have reached settlement agreements with Plaintiffs, but of whom several were still in the case at the time the Demurrers were filed. At this point, only Jason Kessler and Redneck Revolt remain.

Procedural Background

Plaintiffs City of Charlottesville, thirteen businesses, one business association, and three neighborhood associations filed a Complaint, and then, with leave of court, an Amended Complaint, seeking an injunction and declaratory judgment against numerous groups, organizations, and individuals to keep any non-state sanctioned militia or paramilitary groups from appearing as such in the City of Charlottesville to take part in a civil disturbance on August 12, 2018, or at any other time. Plaintiffs' Complaint is based in 1) the "strict subordination" clause of Article I Section 13 of the Constitution of the Commonwealth of Virginia, 2) the anti-paramilitary statute (Va. Code §18.2-433.2), 3) the falsely assuming the role of law enforcement statute (§18.2-174), and 4) public nuisance.

Defendants respond that Plaintiffs have no standing, and that there is no cause of action under the subordination clause, the paramilitary statute, the falsely assuming law enforcement role, or public nuisance. Among other things, Defendants assert that there is no private right of action for any of these, that the constitutional section is not self-executing, that the violation of the two criminal statutes does not provide the remedy of an injunction, and that the event is isolated and sporadic and not a public nuisance.

For reasons discussed fully below, I find that some, though not all (or even most), of the plaintiffs do have standing, and I will sustain the Demurrer in part and overrule it in part. At the outset, it is important in this case to note that the two defendants at issue here are not similarly situated, there are different factual allegations as to each, and they are not both included in each of the counts in the Complaint.

Legal Authority and Standard for Considering Demurrer

A demurrer tests the legal sufficiency of a pleading—not whether Plaintiffs will or should prevail at trial, but whether they may possibly prevail as pleaded. The issue is whether the Complaint states a cause of action for which relief may be granted. Pendleton v. Newsome, 290 Va. 162, 171, 772 S.E. 2d 759 (2015); Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001); Grossman v. Saunders, 237 Va. 113, 119, 376 S.E.2d 66, 69 (1989). A Demurrer asserts that Plaintiffs cannot possibly prevail in the matter as pleaded. Virginia is, however, a notice pleading state. The question is: does the Complaint contain sufficient legal grounds and factual recitations or allegations to support or sustain the granting of the relief requested and put the defendants on adequate notice to properly defend? If the court accepts all Plaintiff says as true, does Plaintiff then prevail? If so, the demurrer should be overruled. Put another way, given all that is alleged, is this a case where a jury or judge ought to be allowed to decide whether the allegations are true or have been proved?

In considering a demurrer the Court should not engage in evaluating evidence outside of the pleadings. A demurrer is not concerned with or dependent on the evidence—neither its strength nor a determination of whether the plaintiff can prove its case. In ruling on a demurrer the Court does not consider the anticipated proof but only the legal sufficiency of the pleadings, and it considers the facts and allegations in the light most favorable to the plaintiff. Glazebrook v. Board of Supervisors of Spotsylvania County, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003); Welding, above, 261 Va. at 226, 541 S.E.2d at 913; Luckett v. Jennings, 246 Va. 303, 307, 435 S.E.2d 400, 402 (1993). A demurrer accepts as true and considers as admitted all facts expressly or impliedly alleged or that may fairly and justly be inferred from the facts alleged. Glazebrook, Luckett, Grossman, above; Cox Cable Hampt., Rds. v. City of Norfolk, 242 Va. 394, 397 (1991). So it is the facts as pleaded upon which the court must make its ruling.

If the pleading is insufficient to give proper notice to Defendants as to the nature or basis of the claim, then the Demurrer should be sustained but Plaintiffs may be allowed the opportunity to plead more specifically to give Defendants adequate notice if the deficiency can be cured. Bibber v. McCreary, 194 Va. 394, 396-97 (1952); Va. Code §8.01-273.B.; Rule 1:8 of the Rules of the Virginia Supreme Court; see Pennsylvania-Little Creek v. Cobb, 215 Va. 44, 45 (1974). If the Complaint, even if well-pleaded, fails as a matter of law to state a cause of action upon which Plaintiffs can prevail, then the Court may sustain the Demurrer with prejudice and enter a dismissal of the case, without leave to re-plead.

In either event, the Demurrer asserts that the Complaint is not pleaded well enough to allow for or require a trial on the pleading. A Demurrer serves the purpose of eliminating the need and time for a trial, or at least postponing such until the matter is properly pleaded, with adequate notice necessary for the defendant or respondent to prepare. For that same reason, since it prevents or postpones a matter from going to trial, such should be sustained cautiously.

Standing

The one preliminary issue before the Court is whether the plaintiffs have standing to bring this action and seek the relief or remedy requested, and enforce the rights pursued.

Both Defendants demur to Plaintiffs' standing, asserting that, with one exception, none of them are so situated that they can properly bring this matter before the court.

The issue of standing is a basic one. It is concerned with who has a right and the ability to bring a matter before the courts. In simplest terms it has to do with who has an interest, legally, in the dispute. Stated another way, it has to do with whose rights are at stake.

In Howell v. McAuliffe, 292 Va. 320 (2016), two state legislators (the Speaker of the House and Senate Majority Leader) and four other registered voters filed suit against the Governor challenging and seeking mandamus relating to the Governor's granting of voting rights *en masse* to convicted felons, without individual consideration or a listing of the persons being restored. Calling standing a "threshold issue", the Court there stated, "[s]tanding concerns itself with the characteristics of the individuals who file suit and their interest in the subject matter of the case." 292 Va. at 330. It goes on to articulate that "standing can be established if a party alleges he or she has a 'legal interest' that has been harmed by another's actions." Id. "As a general rule, without a 'statutory right, a citizen or taxpayer does not have standing to seek ... relief...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." Id., *c*iting Goldman v. Landsidle, 262 VA. 364, 373 (2001).

In Howell, the defendants, also as here, argued that the plaintiffs were not situated any differently than other voters or taxpayers in the general public, and that their rights were not separate and distinct from the public at large. However, the Virginia Supreme Court rejected that argument finding that the plaintiffs would in fact be harmed by the action of the Governor, if improper. Their votes would be diluted. In explicating their ruling (and rule) on standing, the Court stated, "a litigant has standing if he has 'a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issue will be fully and faithfully developed."[2] 292 Va. at 332. Stated this way, it is clear that many of the complainants here have standing. Many of the plaintiffs were affected by the events of August 12, 2017. One can hardly say that in this situation, taken as a group, the complainants' interest is insufficient to guarantee that issues will be fully developed and argued, given their position as the municipality in which these events occurred or will occur, and as businesses or associations of residents of the downtown and adjacent areas. See Howell, 292 Va. at 335. The court in Howell determined that plaintiffs had standing even though other voters were similarly situated, ruling that each would be "directly affected" by such action. *Id.* at 332-33. Here, while many citizens and residents of the City of Charlottesville were affected by the events of August 2017, and will be affected by

[2] This phrasing of the essence of standing makes it seem that the principle is to prevent people from injecting themselves into a dispute that they really have no part in, or no real interest in. Such interest can be a mere "trifle" so long as it is real.

any such future events, many of the plaintiffs are in a position different than the public in general, based on facts pleaded in the Complaint.

In Lafferty v. School Board of Fairfax County, 293 Va. 354 (2017), the action by a school board changing its non-discrimination policy affected no legal rights of the minor plaintiff (by his parents as next friends), and any damage or harm (which would give rise to his interest) was speculative at best. The plaintiff there alleged "disappointment, anxiety, confusion, or distress," over the action of the school board, but such alone was not a cognizable legal interest, and such concerns were over possible future impacts or effects that were speculative. There was "no...articulated injury". Id. at 361-62.

But in this case the very dispute has to do with events and activities (past and future) in and near a public park in downtown Charlottesville, near where many of these businesses operate and individuals reside. This by itself sets them apart from the public in general.

Such basis for standing, however, has to be pleaded, and cannot be assumed. In this case, the Complaint states of the various plaintiffs:

> The City of Charlottesville is the municipality where these incidents occurred and are expected to occur. The City has expended hundreds of thousands of dollars in personnel and legal expenses, particularly in planning, police, and security for its citizens and residents.
>
> Champion Brewing, Escafé, Iron Paffles, Maya Restaurant, Rapture, Alakazam Toys, Alight Fund, Angelo Jewelry, Hays + Ewing Design, Wolf Ackerman Design, and Williams Pentagram, are businesses in the downtown area of Charlottesville.
>
> Mas Tapas and Quality Pie are businesses in the nearby Belmont area of Charlottesville.
>
> The Downtown Business Association (DBA) is a not-for-profit organization with over 75 members, dedicated to promoting commerce in downtown Charlottesville. The DBA and its members have spent time and resources to protect property from harm, hiring legitimate private security, and modification to premises, members closing early or not coming to work for fear of safety, losing thousands of dollars. This includes Hays + Ewing (fear to come downtown), Quality Pie (delaying construction and opening), Alakazam (locking business due to militia members being right outside), Champion Brewing (allotting additional resources to advertising and tourism support), and Wells Ackerman (business drop-off because of rally-related distractions to the company).

The Belmont Carlton Neighborhood Association, Little High Association, and Woolen Mills Neighborhood Association are all neighborhood associations of areas bordering or near to the downtown area.

Having considered the principles articulated in Howell and Lafferty, I find that the City of Charlottesville and the six individual plaintiffs Hays + Ewing, Quality Pie, Alakazam, Champion Brewing, Wells Ackerman, and the DBA have standing under the Amended Complaint as pleaded. None of the others (eight individuals and three neighborhood associations) have pleaded sufficient direct harm or interest apart from the general negative impact of the events on City residents and the general public.

The Circuit Court opinion of this Court from 2009, Judge Jay T. Swett sitting, in Coalition to Preserve McIntyre Park, et al. v. City of Charlottesville, et al., 97 Va. Cir. 364 (2009), also is instructive and consistent with my ruling. In that case several citizens and a couple organizations brought suit relating to the Meadowcreek Parkway. Standing of the plaintiffs was challenged, as here, by Defendants. After reviewing several cases on standing, the Court reiterated that standing required "sufficient interest in a particular matter to ensure the parties will be actual adversaries and that the issues in the case will be fully and faithfully developed," Id. at 368, citing Andrews v. American Health and Life, 236 Va. 221, 226 (1988), and a determination that "they are the proper parties to proceed with the suit". Id., citing Cupp v. Board of Supervisors of Fairfax County, 227 Va. 580, 589 (1984). The Court pointed out that use and enjoyment, and aesthetic and recreational values, can be the basis for a finding of standing, but it has to be that particular plaintiff's (whether an individual or group) rights that would be affected and harmed, not just a general displeasure or disagreement with an action of the governing body, and not just an allegation of general injury to the environment, for there to be a justiciable interest to sustain a declaratory judgment action. In so reasoning, the Court found that several of the plaintiffs there had a sufficient interest, from their actual use of or involvement with the subject property, to support standing, but that some of them did not and so lacked standing. The conduct of a business in the vicinity of an area, where a direct negative impact is pleaded, is no different, in principle, than use of a recreational area that is threatened by governmental action. I cannot conclude that the specified plaintiffs are not interested parties or that their interests are not protected.

It would be an unfortunate thing if citizens would have the right to ask for damages after the fact, but the same citizens would not have the ability to attempt to stop the damage in the first place. That has no logic. See Lynchburg R. St. Ry. Co. v. Dameron et al., 95 Va. 545 (1898). In a different context, but pertinent: "One does not have to await the consummation of threatened injury to obtain preventive relief". Chesapeake Bay Foundation, above, 52 Va. at 823.

The Downtown Business Association has representative standing because some of its members have standing. However, Plaintiffs have not pleaded sufficient facts to show that the neighborhood associations have standing. They have not pleaded their proximity to the downtown area or how the fear, anxiety, and confusion differs from that of the general citizenry of Charlottesville.

I will now address the substantive portions of the demurrer.

Adequacy of Pleading as to the Subordination Clause (Count 1)

Defendants assert that Count 1 does not, and cannot, state a cause of action. Plaintiffs rely on the Virginia Constitutional provision Article I, Section 13,[3] to argue that private armies, unauthorized militia, and private police forces are not allowed in the Commonwealth and are inconsistent with this constitutional provision. On this general point, the Court agrees. There appears to be no place or authority for private armies or militia apart from the civil authorities and not subject to and regulated by the federal, state, or local authorities.

Article I, Section 13 of the Virginia Constitution says, in pertinent part, that "a well regulated militia...is...proper...; and ...the military should be under strict subordination to, and governed by, the civil power." Va. Const., Art I § 13.

The two key issues here are 1) whether this constitutional provision is self-executing and, 2) whether it creates a private right of action, or only a right of enforcement in the Governor or Attorney General.

An initial question is: exactly what does this provision say and do? It certainly is aspirational language, stating principles that the military *should* be subject to the civil authorities, and that the militia ought to be "well-regulated". It is significant that the provision does not use the terms "shall", "must", or "is". However, it is not disputed that there is no statute enacted based on this provision. The fact that there has not been any statute so enacted in over 200 years logically leads to the conclusion that such is not necessary and that the provision is in fact self-executing, like so many other cited provisions in the national or state constitutions; it is not reasonable that a principle important enough to be enshrined in the constitution was never important enough to support legislation necessary to implement it. See Gray v. Virginia Sec'y of

[3] The full text of the Section reads: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under the strict subordination to, and governed by, the civil power.

Transp., 276 Va. 93, 103 (2008) (ruling that "constitutional provisions in the bill of rights...are usually considered self-executing."). I do not believe that under this provision such unregulated or independent militia or armies are permissible unless and until a bill is passed or a statute enacted. It is the Court's view that under this constitutional provision, no private army or militia would have any justified existence or authority apart from the federal, state, or local authorities.

But even if the prohibition or limitation in this provision is self-executing, as Plaintiffs claim, the remaining question is: who may enforce this self-executing provision? Clearly it refers to the civil authority. Since it is the state constitution, the highest official—the commander in chief of the armed forces and the chief executive—is the Governor. So presumptively it would be the Governor's responsibility, duty, and obligation to assure that this constitutional provision is not violated. There is insufficient basis in the law to conclude that an individual citizen or a group of citizens may act to enforce this constitutional provision.

However, in this case, while I find that this provision by itself does not create any private right of action in any individual or citizen, it is a different question as to whether the City, as the local authority, may nevertheless act in accordance with and to enforce this constitutional provision. In this case, the Governor has not issued any executive order forbidding such groups to assemble for such unlawful purposes, nor has the Attorney General filed any petition or complaint, nor moved to intervene in this pending matter. In the absence of such, I cannot find that the City must sit idly by and wait for such groups to show up and break the law and cause (or increase the risk of) harm, fear, injury, or death. The City does not need to sit on its hands and wait for someone else to act. There clearly is too much chance, as pleaded, of more violence, injury, or death. It is a difficult enough job for the local or state police, or the National Guard for that matter, to control crowds at events such as the Unite the Right rally last August. With armed but unauthorized militia groups on both sides of the dispute, bringing weapons and other military equipment into the fray, law enforcement's job is much more difficult and dangerous. This may have been part of the impetus for the constitutional provision at issue.

If there is no authority for such illegitimate militia groups—unregulated by any civil authority—the City must be able to act to keep them out of its boundaries, as such, for the safety and peace of mind of its citizens.

Dillon's Rule

Both Defendants cite the Dillon Rule (hereinafter "Dillon's Rule") as limiting the City's

authority over this matter. The Court disagrees. While the City of Charlottesville is a municipal corporation, it nevertheless has the power and authority conferred by the General Assembly in Va. Code §15.2-1102, which includes

> all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are **necessary or desirable** to secure and promote **the general welfare** of the inhabitants of the municipality and the **safety**, health, **peace**, good **order**, **comfort**, convenience, morals, trade, **commerce** and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be **in addition to any general grant of power**.

[emphasis added]. I am hard pressed to see why this provision does not grant the authority for the City to do exactly what it has done: file suit to attempt to keep armed, organized, but unauthorized military-like groups out of the city for the peace, order, safety, and welfare of its citizens as envisioned by the state constitution. While discussing Dillon's Rule, the Supreme Court of Virginia ruled that municipal governments in Virginia have, besides those powers expressly granted, also "those powers ...necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550, 554 (2008); City of Richmond v. Confrere Club, 239 Va. 77 (1990). If the Governor had issued an executive order, or the Attorney General had filed a lawsuit, or even intervened to join the pending matter as a plaintiff, it might be hard to say in this situation that it would be "necessary" or "essential" for the City to be able to pursue this matter. But I do not agree or believe that the City must stand by when unjustified and unauthorized pseudo-military or -police activity is threatening the community. I find that keeping the unauthorized, unregulated (by the civil authorities) militia out of the City by seeking a judicial remedy is indeed a "necessary *or desirable*" power, to "promote the general welfare, safety, peace, order, comfort and commerce" of the inhabitants of the municipality. I do not see that this effort is foreclosed by Dillon's Rule. (I am not asked to decide whether the City could exercise the same power if the Governor had acted.)

So while I find that the individual plaintiffs do not have a private right of action, the City of Charlottesville, as the municipality and local government responsible for the peace, safety, order, and welfare of the community and citizens within its bounds, and authority over the law enforcement agency who will be dealing with this situation, does have the right and authority to

seek the relief requested under this first count. So I sustain the demurrer as to all of the individual plaintiffs as to Count 1, but I overrule the demurrer as to the City of Charlottesville on Count 1.

The Paramilitary Statute—Virginia Code §18.2-433.2 (Count 2) [4]

Virginia Code section 18.2-433.2 (1) says that it is unlawful paramilitary activity if a person

> [t]eaches or demonstrates to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that such training will be employed for use in, or in furtherance of, a civil disorder.

Since the Complaint alleges that Defendant Kessler "knew or intended" that various techniques taught or demonstrated would be used in a civil disorder, and he facilitated the presence of such groups to instruct, demonstrate, and carry out such techniques, this states a cause of action against Kessler. See Am. Compl. ¶240.

Plaintiffs have pleaded adequate facts to show that Mr. Kessler was engaged and involved in the solicitation, training, and command of such paramilitary units. See Am. Compl. ¶¶ 109, 233. He may deny that they were paramilitary units under the statute, or that they were involved in unlawful activities under the statute, or that he was involved with them, but those are factual questions, subject to evidence, and such cannot be factors in considering a demurrer.

The next question is a matter of standing. First, the City has standing to sue under Va. Code §15.2-1102 discussed above. If the trier of fact determines that Va. Code §18.2-433.2 (1) has been violated by Defendant Kessler, the grant of authority to the City to protect to a desirable degree the "general welfare...safety....peace, good order, [etc]" also vests in the City the right to bring suit to prevent further violations.

There is an issue as to whether there can be a private right of action based on violations of statutes. Clearly the City has such a right, but on this count I find that the individual plaintiffs for whom I have found standing also have such a right as well. They must show that they are

[4] Note that Defendant Redneck Revolt is not included in Count Two, but Defendant Kessler is.

directly affected, in a way different from the general citizenry, and that they have some "special damages" that are difficult to determine or quantify, in order to seek injunctive relief based on the violation of a statute. Black and White Cars v. Groome Transportation, 247 Va. 426 (1994). I find that Black and White Cars is applicable to this case and instructive here, and that Plaintiffs have pleaded sufficient facts to support this count and present a case for the trier of fact. The same Plaintiffs that have standing (page six this letter, above) have also allegedly suffered special damages, as the Amended Complaint clearly discussed those Plaintiffs' particularized harms that are different from the general public. See Am. Compl. ¶¶ 135-151. As to the causal connection, Plaintiffs have alleged enough facts to put Defendant Kessler on notice and to create an issue of fact for the trier as to whether Kessler's actions caused the harm to plaintiffs. . At various times in the Amended Complaint, Plaintiffs reference a causal connection to the Rally.[5] The Plaintiffs also allege that Defendant Kessler caused, at least in part, the civil disorder of the Rally. See Am. Compl. ¶ 240. Therefore, there is an issue of proximate cause sufficiently pleaded. The Court finds that harms alleged in ¶¶ 135-151 are sufficiently difficult to quantify. Therefore, the individual Plaintiffs listed above also have standing.

So I overrule the Demurrer as to Count 2, as to Kessler, in favor of the City and the six non-City plaintiffs who have standing. I sustain it as to the other eleven plaintiffs.

The Paramilitary Statute--Virginia Code §18.2-433.2 (Count 3)[6]

Virginia Code section 18.2-433.2 (2) says it is unlawful paramilitary activity if a person

> [a]ssembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons intending to employ such training for use in, or in furtherance or, a civil disorder.

Plaintiffs assert that Redneck Revolt along with the various other militia-type groups, assembled with the purpose of training, practicing with, and/or being instructed in the use of firearms and other techniques…capable of causing injury or death. Plaintiffs also allege that Redneck Revolt's intent was that its actions would be used in the context of and in furtherance of

[5] See Am. Compl. ¶ 141 (Alakazam); Am. Compl. ¶ 142 (Hays + Ewing and Wolf Ackerman); Am. Compl. ¶ 143 (Quality Pie); Am. Compl. ¶ 146 (Champion Brewing).
[6] Note that Jason Kessler is not a defendant as to Count 3 (or Count 4), but Redneck Revolt is.

a civil disorder, and such is planned in the future. Since this would be violative of 18.2-433.2 (2), Plaintiffs seek an injunction, alleging that no adequate remedy at law exists, and that without an injunction there would be irreparable harm. See 1-51 Va. Remedies § 51-2 Under Black and White Cars, above, Plaintiffs must show special damages. Defendants argue that Plaintiffs have not pleaded sufficient facts specific to Redneck Revolt to support a conclusion that they were engaged in paramilitary activity, nor that there is a causal connection between Redneck Revolt's actions and the various plaintiffs' special damages, and in any event such activity falls within a statutory exception. These are all factual issues. But forming a security perimeter while carrying tactical rifles makes out a sufficient claim of paramilitary activity under this provision.

So while it is a factual issue for the trier of fact whether those special damages were proximately caused by Redneck Revolt, I believe that Plaintiffs have pleaded enough to withstand a demurrer on this point. The City "expended hundreds of thousands of dollars in preparing for and responding to the Unite the Right rally which included overtime for city employees and legal costs." Am. Compl. ¶ 135. The presence of the "paramilitary activity" increased costs by heightening the risk of violence which necessitated "additional police and security resources." Am. Compl. ¶ 135. The City has pleaded enough to create a factual issue as to whether Redneck Revolt's presence and actions, if unlawful, contributed to their special damages. But I also find that the non-City plaintiffs with standing have pleaded sufficient facts to show, as with Count 2, a sufficient causal connection between the actions of Redneck Revolt and the special damages suffered by non-City plaintiffs in regard to Count 3. While this connection may not be pleaded as strongly as with Mr. Kessler in Count 2, or as to the City in Count 3, I do find that the Complaint pleads sufficient facts, taking the Complaint as a whole, to put Defendant Redneck Revolt on notice that Plaintiffs intend to prove that their activity in violation of §18.2-433.2(2) caused or contributed to the damages alleged by those plaintiffs.

Also, I find that none of the statutory exceptions (Va. Code §18.2-433.3) are reasons to sustain the demurrer. Only ¶ 2 might apply, but such does not have to be negatived by Plaintiffs in the pleading; rather it is an affirmative defense, and as such is an evidentiary issue for trial. However, Redneck Revolt would have to show that its actions were "undertaken without knowledge of or intent to cause or further a civil disorder."

So I will overrule the Demurrer as to Count 3, as to Redneck Revolt in favor of the City and the non-City plaintiffs with standing, and sustain it as to the other plaintiffs.

Assuming a Law-Enforcement Function—Va. Code §18.2-174 (Count 4)

I find essentially the same with regard to the law enforcement statute, at least as to the City.

Virginia Code §18.2-174 states

> Any person who falsely assumes or exercises the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement office or who falsely assumes or pretend to be any such officer, is guilty of a Class 1 misdemeanor.

There are sufficient facts pleaded to support a finding that Redneck Revolt was involved in assuming the functions and duties of law enforcement, and that they were appearing to "keep the peace" and did not want the police to be anywhere around. State law specifies that "the police force of a locality…is responsible for…the safeguard of life and property" and "the preservation of peace." Va. Code § 15.2-1704. The members of Redneck Revolt were open-carrying tactical rifles in a "security perimeter" for the purpose of the defense of the community. See Am. Compl. ¶ 51, 79. This act of preservation of the peace is a police function which, it is pleaded, Redneck Revolt has taken into their own hands is an attempt to displace the police. Redneck Revolt makes the argument that it is fundamental to defend oneself and the community, in a direct contradiction to the sole prerogative of the state. Rebuttal Br. Def. Redneck Revolt Reply Pls.'s Opp. Dem., 13. However, this is unpersuasive as Redneck Revolt volunteered to perform this function, not out of necessity, but in order to "not allow the state to have a direct monopoly on the use of force." Am. Compl. ¶ 79. This is enough to put Defendant Redneck Revolt on notice as to this claim.

The City has pleaded enough facts to show it was harmed by Redneck Revolt's actions of assuming the functions of law enforcement. Preservation of the peace is a function of the City which Redneck Revolt has affected causing the City to expend time and effort on police and security resources. See Am. Compl. ¶ 135. However, unlike Count 2, the non-City plaintiffs have not pleaded sufficient facts to show that Redneck Revolt's actions of assuming the function of law enforcement were a cause of the non-City plaintiffs' damages. I view that slightly differently from Count 3, in that the allegations involving the paramilitary presence and actions of all Defendants differs in the Court's estimation, from the allegations of assuming the role and function of law enforcement, in producing the damages claimed. The City has a greater interest

in maintaining the peace and order, and supervising its police force is one of its main responsibilities and duties, so it is more harmed by a violation of §18.2-174 than the individual plaintiffs are, and I find such less of a basis of a cause of action for the non-City plaintiffs. For example, if it had been pleaded that any of them failed to call the police because they thought that Redneck Revolt was the police, and as a result direct harm occurred, that would be sufficient. But there is nothing pleaded to connect the damages specifically with a violation of this statute.

The very nature of the chaos and injury, the difficulties the police had, and the expressed intention of Redneck Revolt to preempt the police in and of itself constitutes a substantial threat to the peace, safety, and order in the event of another such rally and counter-protest. Thus they are a danger to the public.

So I overrule the Demurrer as to Count 4 as to the City, but sustain it as to all other plaintiffs.

Public Nuisance (Count 5)

I find that Plaintiffs have pleaded sufficient facts to withstand the Demurrer as to Count 5 (as to the City). In order for a public nuisance to be proceeded on, Plaintiff must show some risk of danger or harm to the safety of the community. I believe the facts pleaded do this adequately. The legal standard for public nuisance in Virginia is that "more than sporadic and isolated conditions" must be shown and it must be "substantial." Breeding ex. rel. Breeding, 258 Va. at 213. In determining whether particular conduct would present a danger to the public, a court may consider "whether it is proscribed by a statute," among other factors. Restatement (Second) of Torts § 821B(2)(b). Here, unlawful paramilitary activity and assuming the function of peace officers are both proscribed by statute as a danger to the public. See Va. Code § 18.2-433.2(2); Va. Code § 18.2-174. The City has standing and a right of action to pursue this. Under §15.2-900 the City may bring an action to abate this public nuisance.

The City pled sufficient facts to allege that due to past incidents and anticipated future events involving Defendants Redneck Revolt and Kessler, Defendants' actions present a substantial possibility or likelihood of public danger.[7] The City "expended hundreds of thousands of dollars in preparing for and responding to the Unite the Right rally which included overtime for city employees and legal costs." Am. Compl. ¶ 135. The presence of the

[7] This is not an unreasonable or unjustified conclusion in light of the fact that one person was killed and several others wounded or injured in the events of the day of the rally.

"paramilitary activity" increased costs by heightening the risk of violence which necessitated "additional police and security resources." Am. Compl. ¶ 135. The damages are a proximate result to Defendant Kessler's Count 2 action and Defendant Redneck Revolt's Count 3 and 4 actions.

Plaintiffs have pleaded sufficient facts to show the City has standing. In Ritholz v. Commonwealth, 184 Va. 339, 349-51 (1945), the Court stressed that the Commonwealth was ordinarily charged with criminal enforcement of the penal statute at issue. Ritholz created an exception which is available to the sovereign charged with the enforcement of the underlying criminal conduct. In its exercise of this enforcement authority, the Commonwealth had determined that enforcement via multiple misdemeanor prosecutions would not have been adequate to protect the public health. See Id. The injunction by the Commonwealth was found to be proper as it was an extension of the Commonwealth's ordinary enforcement authority of the penal statute at hand. Defendant Redneck Revolt states that this exception should not apply as it is a municipality, and not the Commonwealth, that is seeking the injunction, and that it has no enforcement authority. Br. Supp. Def. Dem., 26. However, in Thomas, the court found that an injunction for public nuisance by the municipality was available as "it is well settled that a court of equity has jurisdiction upon the application of the State or a *governmental subdivision* to restrain by injunction acts which are a menace to the public rights or welfare." 207 Va. at 661 (*italics* emphasis). This exception would allow the City to seek an injunction against both Defendant Kessler and Defendant Redneck Revolt as part of its enforcement authority of the public nuisance statute, Va. Code §15.2-900.

Because Plaintiffs have stated "it is unnecessary to consider the argument that non-City Plaintiffs cannot demonstrate the harm required to sustain a public-nuisance claim," this Court will not consider non-City plaintiffs standing on the public nuisance claim, and will find only that the City had standing to pursue this public nuisance claim. See Pl.s Br. Opp. Def. Dem., 43 n. 12.

The Plaintiffs have pleaded sufficient facts to support "an unreasonable interference with a right common to the general public", in this case to be free to visit and use the downtown area without fear or intimidation from organized, armed, uniformed, but unofficial military-like groups. Clearly enough facts have been pled to sufficiently allege a situation that constitutes a danger to the public.

Also, as pleaded, the activity is not "isolated and sporadic". It was planned, and is expected to occur on another specific occasion in the near future, on a date related to last year's events.[8] It is also a substantial interference. The very nature of the chaos and injury, the difficulties the police had, and the expressed intention of Redneck Revolt to preempt the police in and of itself constitutes a substantial threat to the peace, safety, and order in the event of another such rally and counter-protest. Thus they are a danger to the public.

I overrule the Demurrer on Count 5 as to the City and sustain the Demurrer on Count 5 as to all non-City plaintiffs.

Injunctive Relief

For injunctive relief to be appropriate, there must be a violation of right, inadequate remedy at law, irreparable harm if not granted, and more harm to the requesting party if not granted than to the responding party if such is not granted. Kent Sinclair, Sinclair on Virginia Remedies § 51-2 (2017). Sufficient facts have been pleaded on each of these points.

If the militia or paramilitary activity, and Defendants' presence at the public event that results in a civil disturbance, are in violation of the Virginia Constitution and at least two statutes, and if such is, causes, or contributed to a public nuisance or damages suffered by the plaintiffs, then there has been a violation of right.

I find that there is not an adequate remedy at law to prevent such before it happens, unless the Court can and does grant an injunction. The Court strongly disagrees that there is an adequate remedy at law here, if Plaintiffs are relegated to reacting after the fact, after further harm is done— after someone else if beaten, stabbed, shot, or killed. If this equitable remedy could stop or prevent such, then not to do so would be no remedy to the harm committed. It is often articulated in a murder case or wrongful death case that putting someone in prison or granting a monetary award will not make things right and or bring the person back to life. That is exactly what an inadequate remedy at law is.

I do find that there is a great risk of irreparable harm if such is not granted. This factor is satisfied in part because there is not an adequate remedy at law, as these two concepts tend to

[8] Taking into account the overall picture, there was a previous incident on July 8, 2017, then incidents on August 11 and 12, 2017, and then another on October ?, 2017, and now events are planned or anticipated on August 11 and 12 of this year. Taken as a whole, these are connected and not isolated or sporadic events.

rise and fall together, and are sometimes considered to be the same. See Sinclair on Virginia Remedies § 51-2 (2017); see also Black & White Cars, supra, 247 Va. 426 (1994) (in deciding whether to grant an injunction, the Supreme Court of Virginia analyzed these two factors as if they were one.). For example, if a person should die or be seriously injured, or a company, store, or restaurant go out of business, that would be irreparable. One can receive a monetary award, but that would not put Plaintiffs in the same position as if it had never happened, and is not adequate.

The City has pleaded enough to support a compelling interest in ensuring the peace and welfare of the community and its citizens that outweighs the hardship on the Defendants. This Court has jurisdiction "upon the application of the State or a governmental subdivision to restrain by injunction acts which are a menace to the public rights or welfare." Thomas v. Danville, 207 Va. 656, 661 (1967). Plaintiffs have alleged a wide array of harms associated with the Unite the Right Rally in August of 2017. Preventing another rally would undoubtedly be a large benefit to the plaintiffs. Furthermore, there is little harm to Defendants. This injunction would not prevent the parties from being in Charlottesville, having firearms, conveying their message, or even assembling in a non-militia manner. Therefore, the injunction would only slightly impede the interests of Defendants, making the benefit to Plaintiffs outweigh the harms.

Pursuant to the discussions above, the City and certain other plaintiffs would have standing to sue for injunctive relief under the paramilitary statute (Counts 2 and 3); only the City may seek such under the Strict Subordination Clause (Count 1), the law enforcement statute (Count 4) and public nuisance (Count 5). So I will overrule the Demurrer as to injunctive relief.

Declaratory Relief

A declaratory judgment is designed and intended to define the rights and obligations of the litigants in an actual controversy. "Declaratory judgments provide relief from the uncertainties stemming from controversies over legal rights." Green v. Goodman-Gable-Gould Co., 268 Va. 102, 107 (2004). Declaratory judgments are forward looking. But "[t]he purpose of declaratory judgments... is to 'supplement rather than to supersede ordinary causes of action and to relieve litigants of the common law rule that no declaration of rights may be judicially adjudged until a right has been violated." Id. at 106-07 (citing Williams v. Southern Bank of Norfolk, 203 Va. 657 (1962)). Finally, when "a declaratory judgment as to a disputed fact would be determinative of issues, rather than a construction of definite stated rights, status, and other relations, commonly expressed in written instruments, the case is not one for declaratory

judgment." Williams v. Southern Bank of Norfolk, 203 Va. 657, 663 (1962). Therefore, declaratory judgment is intended to be used by the courts when litigants need guidance as to legal rights, relationships, and duties, and when the issue reaches into the underlying suit as to be dispositive, declaratory relief is not appropriate.

Therefore, the only issues that it seems are appropriate for declaratory relief are as to Counts 1 and 5. There is a conflict in the asserted rights of the Defendants to assemble as private militia, and the City and the other Plaintiffs saying they do not have such a right, and the City has a right to keep them from assembling as such, either as forbidden by the state constitution, or as constituting a public nuisance. This poses a true conflict of rights as to future action. I do not think the Court should be entering a declaratory judgment as to past action (whether events of August 12, 2017, violated the criminal statutes), and I do not think that I should make pronouncements as to whether such would violate the two criminal statutes cited if done in the future.

Impact of the First and Second Amendments

Both Defendants argue that by granting Plaintiffs the relief requested, the Court would be infringing on their First Amendment (right to free speech, freedom of assembly) and Second Amendment (right to possess firearms). Redneck Revolt Demurrer ¶¶ 11,13; Redneck Revolt Brief in Support of Demurrer pg. 20; Redneck Revolt Rebuttal Brief pg. 20; Kessler Memorandum in Support of Demurrer, Part VII. I reject this argument. If the relief requested is granted, the individual defendants will still be able to come exercise their free speech rights, and assemble with each other, as well as carry a firearm, so long as such is openly carried (unless the person has a concealed weapon permit), and not concealed or brandished or used in a threatening way. See discussions in Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 543 F.Supp 198, 209-210, 216 (1982); Presser v. Illinois, 116 U.S. 252, 264-65, 267, 6 S.Ct. 580, 584, 585 (1886). Redneck Revolt contends that they were included in the suit only because of their views, to "balance things out". There is no basis for concluding that. It is true that the Alt-Right defendants numbered more in number of organizations present and sheer number of persons--there were 12 defendant organizations, two of which were with the counter protesters, and thirteen individual defendants, none of which were with the counter protesters.[9] However, the Plaintiffs, particularly the City, cannot favor one similarly behaving group over another because of point of view. There is no basis for them to oppose one set and not the other.

[9] All of the Alt right groups and all but one of the individual defendants have reached a settlement agreement and are no longer in the suit.

No one is being denied their right to speak, to assemble and protest, or even to bear firearms. But when a group comes as a unit, in uniform, with military or law enforcement weapons, equipment, tactics, and appearance, under a clear chain of command authority, looking like the police or military, and they are neither a part of or subject to the local, state, or federal military or police, and are subject to neither, this is a legitimate concern and question as to whether they may, in a specific situation, do so.

Conclusion

So I will sustain the demurrer as to standing as to several of the plaintiffs[10]. I overrule the demurrer on Counts 1, 4, and 5 as to the City, and sustain it as to all other 17 plaintiffs. I overrule the demurrer as to Counts 2 and 3 as to the City and the six other plaintiffs with standing, and sustain it as to the other 11 plaintiffs. Since we are just under three weeks to trial, I will not grant leave to file an amended complaint as to any plaintiffs found not to have standing. On each count the matter may go forward with one or more plaintiffs, and justice does not require granting leave to amend in this regard. The Motion to Dismiss is also denied.

To be clear, as you know, this decision on the Demurrer does not dictate the outcome of the case. It simply allows the case to proceed to trial upon evidence, or for further proceedings.

Trial is now set for July 30. I just entered the pre-trail scheduling order, which the parties shall keep to.

I thank you for your excellent and thorough presentations and briefs in this novel matter. I ask either Mr. McNew, Ms. McCord, or Ms. Robertson (as they elect) to prepare an order reflecting the rulings in this letter, and then to circulate it for endorsement to Mr. Woodard, Mr. Fogel, and Ms. Starsia. Please indicate the parties' objections to all adverse rulings. Exceptions to the rulings of the court are noted.

Very Truly Yours,

Richard E. Moore

Richard E. Moore

[10] Escafé, Iron Paffles, Maya Restaurant, Rapture, Alight Fund, Angelo Jewelry, Williams Pentagram, Mas Tapas and the three neighborhood associations have no standing at all on any count.