

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III**

SONS OF CONFEDERATE)
VETERANS NATHAN BEDFORD)
FORREST CAMP 215,)
)
Plaintiff,)
)
VS.) **NO. 18-29-III**
)
CITY OF MEMPHIS,)
MEMPHIS GREENSPACE, INC.,)
)
Defendants.)

**MEMORANDUM AND FINAL ORDER DENYING INJUNCTION;
AND ORDER FOR RULE 62.01 STAY**

Case Summary

This lawsuit was filed by a nonprofit organization concerning three Confederate statues¹ removed from two parks in December of 2017 when the City of Memphis sold the parks and Statues to Memphis Greenspace, Inc., a private nonprofit entity. Greenspace presently has custody of the Statues and is negotiating their relocation and sale.

The connection and reason the case is before this Court is Tennessee Code Annotated section 4-1-412(d), the Tennessee Heritage Protection Act (the “Act”). Because administrative agencies do not have the authority to issue injunctions as courts of law do, section 4-1-412(d) assigns a limited, temporary and immediate role to this Court that it “may issue an injunction to preserve the memorial” to the “extent necessary to

¹ The statues are of Confederate General Nathan Bedford Forrest, Confederate President Jefferson Davis, and Confederate Captain James Harvey Mathes (the “Statues”).

preserve the status of the memorial prior to a final determination by” the Tennessee Historical Commission (“THC”).

Citing Tennessee Code Annotated section 4-1-412(d), the Plaintiff, Sons of Confederate Veterans Nathan Bedford Forrest Camp 215 (“SCV Forrest Camp”), a nonprofit organization dedicated to continuing the legacy of General Nathan Bedford Forrest, seeks for this Court to issue an injunction to freeze disposition of the Statues until THC decides a pending Tennessee Code Annotated section 4-5-223 Petition filed by the SCV Forrest Camp for a declaratory order that the Statues are covered by the Act and, therefore, cannot be sold or relocated by the Defendants.

On May 14, 2018, oral argument was conducted before this Court on the Plaintiff’s application for a temporary injunction, and the matter was taken under advisement. Prior to that, while the parties briefed the injunction issues, the Court entered a temporary restraining order preventing disposition of the Statues until a ruling was issued on the temporary injunction.

As to the parties’ claims, SCV Forrest Camp asserts that the sale and removal of the Statues in December 2017 were unauthorized and void or voidable because the Statues come within the provisions of the Act, and therefore the Statues could not be removed without the Defendant City of Memphis obtaining a waiver from the THC, which the City did not have. The SCV Forrest Camp hopes to establish this in the proceedings before THC and seeks an injunction from this Court in the meantime to freeze the status quo of the Statues.

The Defendants oppose issuance of an injunction on several grounds including fundamentally the assertion that the December 2017 sale of the parks from the City to a private nonprofit corporation, Greenspace, was valid and lawful pursuant to Tennessee Code Annotated sections 12-2-302 and 12-2-501, and the sale changed the property from public to private thereby eliminating the application of the Act. Only public property is protected by the Act. The December 2017 sale, the Defendants assert, changed the property to private property not covered by the Act.

Ruling

After considering the law, the facts of record, and argument of Counsel, it is ORDERED that the Plaintiff's application for a temporary injunction pursuant to Tennessee Code Annotated section 4-1-412(d) is denied, the temporary restraining order previously entered in this case is dissolved, and the *Complaint for Injunction* is dismissed with prejudice. Court costs are taxed to the Plaintiff.

It is further ORDERED that pursuant to Rule 62.01 a stay is issued preventing the Defendants, their officers, agents, attorneys and other persons in active concert and participation, from selling, transferring, conveying, assigning or relocating the Statues removed from Health Sciences Park and Memphis Park of:

- Confederate General Nathan Bedford Forrest,
- Confederate President Jefferson Davis,
- Confederate Captain J. Harvey Mathes

sold to and presently in the custody and care of Greenspace, and that Greenspace shall continue to securely store the Statues at an undisclosed location, as promised in Greenspace's January 18, 2018 letter to Governor Haslam.

It is additionally ORDERED that by May 18, 2018, the Plaintiff shall post a \$5,000 bond to secure the stay.

It is further ORDERED that the stay shall expire on July 27, 2018, unless the Plaintiff files an appeal and seeks a Rule 62.04 Stay on Appeal, and files and has ruled upon by July 27, 2018, a Rule 62.05 bond for a stay on appeal.

The facts, law and reasoning on which these orders are based are as follows.

Applicable Law

Enacted in 2013 and amended in 2016 and with a 2018 amendment pending, the Tennessee Heritage Protection Act specifies the memorials, which the Legislature has determined as having historical significance, and prohibits local government from eliminating and removing the memorials unless the local government obtains a waiver from THC.

As a matter of law, local governments and their local officials are political subdivisions of the State and lack any independent autonomy. *Allmand v. Pavletic*, 292 S.W.3d 618 (Tenn. 2009). Actions undertaken by local officials and/or local governments in violation of state law are deemed ultra vires and are void or voidable.

There are, however, other statutes enacted by the Legislature which authorize local governments to sell real or personal property. In particular is Tennessee Code Annotated section 12-2-302(1) which allows municipalities to sell land to a nonprofit “[w]ithout limitation by reason of any other provision of law.”

Additionally pertinent is that there is presently pending before the Governor a 2018 amendment to the Act, passed by the Legislature this session, which would prohibit sales, like the one in this case, of Confederate memorials. In the 2016 Act which applies to this case there was no prohibition of a sale. The 2018 Amendment expands the Act and provides that no memorial may be sold. The difference in the two Acts is as follows, with 2016 Act, section 4-1-412(b)(1), quoted below first, then the 2018 Amendment.

2016 Act

(a) For purposes of this section:

(7) “Memorial” means:

(A) Any public real property or park, preserve, or reserve located on public property that has been named or dedicated in honor of any historic conflict, historic entity, historic event, historic figure, or historic organization; or

(B) Any statue, monument, memorial, bust, nameplate, plaque, artwork, flag, historic display, school, street, bridge, or building that has been erected for, named, or dedicated on public property in honor of any historic conflict, historic entity, historic event, historic figure, or historic organization; and

(8) “Public property” means all property owned, leased, rented, managed, or maintained by or under the authority of this state, any county,

municipality, metropolitan government, or any other public entity that is created by act of the general assembly to perform any public function.

(b)(1) Except as otherwise provided in this section, no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.

2018 Act

(b)(1) Except as otherwise provided in this section, no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.

(2) No memorial or public property that contains a memorial may be sold, transferred, or otherwise disposed of by a county, metropolitan government, municipality, or other political subdivision of this state.

Lastly pertinent is the law of Tennessee on injunctions. The power vested in this Court under section 4-1-412(d) and invoked by the SCV Forrest Camp is injunctive relief. In determining whether to issue such relief Tennessee law requires a court to consider four factors: (1) whether the movant has demonstrated a likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) the balance between the harm to be prevented and the injury to be inflicted if the injunction issues; and (4) whether granting the injunction will serve the public interest. *Denver Area Meat Cutters and Employers Pension Plan ex rel Clayton Homes, Inc. v. Clayton*, 120 S.W.3d 841, 857 (Tenn. Ct. App. 2003); *South Cent. Tennessee R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. 2001); *Curb Records, Inc. v. McGraw*, M2011-02762-COA-

R3CV, 2012 WL 4377817, at *4 (Tenn. Ct. App. Sept. 25, 2012), appeal denied (Feb. 12, 2013) (citing *Moody v. Hutchison*, 247 S.W.3d 187, 199-200 (Tenn. Ct. App. 2007)).

The foregoing law is applied below to the facts of the case and analyzed.

Application of Law to the Case

Substantial Likelihood of Success on the Merits

As to the first factor Tennessee law requires a court to assess in determining whether to issue an injunction, the law is clear, the Plaintiff cannot prevail. The wording of the 2016 Act states that for the Statues to be subject to an injunction issued by this Court or subject to determination by THC, the Statues must be located on public property.

(a) For purposes of this section:

(7) “Memorial” means:

(A) Any **public** real property or park, preserve, or reserve located on **public** property that has been named or dedicated in honor of any historic conflict, historic entity, historic event, historic figure, or historic organization [emphasis added];

* * *

(8) “**Public property**” means all property owned, leased, rented, managed, or maintained by or under the authority of this state, any county, municipality, metropolitan government, or any other public entity that is created by act of the general assembly to perform any public function [emphasis added].

* * *

(b)(1) Except as otherwise provided in this section, no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic

organization that is, or is located on, **public** property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered [emphasis added].

The December 2017 sale to the private nonprofit Greenspace converted the location of the Statues from public to private property. That conveyance was legal and valid under Tennessee Code Annotated section 12-2-302(1), quoted above, which authorizes municipalities to sell property to nonprofits.

To avoid the outcome of the 2016 Act, the SCV Forrest Camp asserts that the 2016 Act should be given the remedial effect of the 2018 wording the Legislature has now passed—to prohibit sales. This can not be done. The Court is not authorized to read provisions into the law that are not there. The Court is not authorized to use later legislation to fill gaps in previous legislation. There simply was no prohibition in the 2016 Act which applies to this case which prevented the sale that occurred in December 2017 conveying the property and Statues to a private, nonprofit entity.

The SCV Forrest Camp also argues that the four injunction factors required by longstanding Tennessee law do not have to be considered and that the Court should just issue the injunction to freeze the matter to let THC decide whether the Act applies. Required to follow Tennessee law, a court's discretion on issuing injunctions has bounds. This Court is bound by the law. It can not act outside the law. If property is not covered by law, this Court has no authority to issue an injunction. That is the case here. The Statues here are not public property. By virtue of the December 2017 sale and the

limitations at that time of the 2016 Act which did not prohibit sales, the Statues are private property beyond the control of this Court.

There also was an initial effort by the SCV Forrest Camp to show that the December 2017 sale by the City of Memphis to Greenspace was a pretext, both in terms of the money paid and control, and that the property where the Statues were located continued to be “public” property after the sale. The purpose of this argument was to fit the December 2017 sale into the definition of “public” of the 2016 Act section 4-1-412(a)(8):

(a) For purposes of this section:

(8) “Public property” means all property owned, leased, rented, managed, or maintained by or under the authority of this state, any county, municipality, metropolitan government, or any other public entity that is created by act of the general assembly to perform any public function.

The Plaintiff asserted that the sale was pretextual based upon the low sale price and some provisions in the conveyance which gave the City of Memphis some ongoing role with respect to the property. Based upon this preliminary claim of a pretextual sale, this Court moved carefully and issued a temporary restraining order to preserve the status quo while briefing and proof were provided on issuance of a temporary injunction.

The Tennessee Comptroller has now issued a report commissioned by the Tennessee Legislature that the amount paid was not a sham or irregular. The Report quotes the Memphis Code of Ordinances section 2-16-1(G)(1)(c) which authorizes the city real estate manager to convey or dispose of city property at reduced or no cost to nonprofit organizations whose use of the property will be for the benefit of the community. *Review of the Sale of Memphis Parks and Removal of Confederate Statues*, Tennessee Comptroller

of the Treasury, Feb. 14, 2018, at 8. The Report questioned whether the section 2-16-1(G)(2) process had been followed and noted that other sales had proceeded in the same manner:

Auditors inquired as to whether Memphis routinely sold property without requiring an application to the City Real Estate Department. The Real Estate Department provided auditors with three instances in which the city did not require applications. The City sold buildings to the Memphis College of Arts for \$10 in December 2010, the City sold land to Calvary Rescue Mission for \$1 in March 2011, and the City sold the former Barton Library to Alpha Memphis Education Foundation for \$1 in May 2013.

Id. at 10.

The affidavit of Deborah R. Massie, Administrator of the Real Estate Service Center for the Division of General Services for the City of Memphis, filed April 27, 2018, testifies to relying regularly on the City Code and Tennessee Code Annotated section 12-2-302(1) as authority to convey real property to nonprofits for a reduced or no cost.

10. In performing my duties as the Administrator of the Real Estate Service Center of the Division of General Services for the City of Memphis, I regularly rely on City Code § 2-291 and Tenn. Code Ann. § 12-2-302(1) as authority to convey real property to non-profit organizations for reduced or no cost. I am not aware of any City ordinance or state law that has repealed the City's powers under City Code § 2-291 or Tenn. Code Ann. § 12-2-302(1).

As to Greenspace's separateness and independence, that is established by the IRS. Greenspace has obtained IRS 501(c)(3) status. To do that, an entity must be an independent, nonprofit. 501(c)(3) status does not permit the Defendant City of Memphis and Defendant Greenspace to be the same entity or a parent, subsidiary or affiliate.

Further, the Turner and Graham affidavits filed by the Defendants establish that the City does not own, maintain, or manage Greenspace or the properties owned by Greenspace, and no public entity maintains “de facto” control over the parks in question.

There is also the authoritative source of the 2017 decision of the Tennessee Court of Appeals, *Sons of Confederate Veterans Nathan Bedford Forrest Camp #215 v. City of Memphis*, No. W2017-00665-COA-R3-CV, 2017 WL 4842336 (Tenn. Ct. App. Oct. 24, 2017), which held that Nathan Bedford Forrest Park has been validly, effectively and legally renamed Health Sciences Park.

Lastly, the Plaintiff has furnished no evidence which equals or overcomes the foregoing facts of record.

The record thus establishes that Defendant Greenspace:

- is not a public entity,
- operates fully independent of any public entity and cannot be seen as a governmental organization,
- is not a sham.

The record further demonstrates that the Defendant City of Memphis:

- does not maintain de facto control and
- does not manage or maintain Defendant Greenspace’s parks.

There is, then, no basis to issue an injunction based upon a finding that the Statues remain public property because of a sham or pretextual sale.

The Plaintiff has also alleged that the Defendants, as independent actors, conspired to illegally circumvent the obligations and duties of the Defendant City of Memphis under

the Act. The Plaintiff's proof is the content of Ordinances of the City of Memphis No. 5992, 5661 and 5665 where the City transparently stated its intention to convey the property and Statues to Greenspace. This argument fails because the December 2017 sale was not illegal under the 2016 Act. The 2018 amendment to the Act prohibiting sales was not in effect.

In sum, the Plaintiff can not prevail on factor 1 for injunctive relief because the December 2017 sale made the property in issue private. The Act does not apply to private property, and this Court has no authority under the Act over private property.

Immediate and Irreparable Harm, Balancing of the Equities, and the Public Interest

On the remaining three temporary injunction factors, all parties have merits, and these factors are equally weighted among the parties.

On the side of the Plaintiff is that one part of the history of this State includes those who fought in a historic cause and who, especially in the case of Forrest, performed innovative and unparalleled military feats and tactics which continue to be studied in military instruction. Additionally, the Legislature has decided that the Confederate history of this State should be protected and preserved and has passed the Act to accomplish that preservation. Now, though, that the Statues are the property of Greenspace, the State has no control or input on their location or disposition.

As to the City of Memphis, in the past eighteen months there have been, in connection with the Forrest Statue, several protests leading to arrests, the Statue has been

subject of vandalism several times, and the City has incurred tens of thousands of dollars to provide police monitoring of the Forrest Statue. The parks where the Statues were located have declined in usage and are not places of recreation and enjoyment. To address this, the medical institutions in the medical district formed a collaborative to redevelop the district into a multi-purpose commercial and residential center. Health Sciences Park, where the Forrest Statue was located, is an integral part of the plan to make the district more inviting for its employees, future physicians who they are recruiting and for its patient population. The continued presence of the Forrest Statue inhibited that development. Similarly, private groups funded by national philanthropic foundations have sought to repurpose Memphis Park as an integral part of the downtown riverfront development of what was once known as the Fourth Bluff. The presence of the Jefferson Davis Statue caused several sponsors to cancel events and substantial donations. It has also been an impediment to the Law School's efforts to recruit scholars. The City of Memphis seeks "to turn the page and start a new chapter of racial harmony," and have Greenspace relocate the Statues to a place where those who choose can revere and celebrate them.

As to Greenspace, it continues to be responsible for storage and security related to the Statues. This is unfair, it asserts, because the properties are plainly outside the purview of the Act and THC. As promised to Governor Haslam and as reported to the Comptroller, Greenspace wishes to transfer the Statues to a suitable host where they can be preserved and displayed in the appropriate context. Parker's Crossroads, the site of General

Forrest's legendary instruction, when encircled by the Union, to charge in both directions, is a likely location.

Thus, all the parties can demonstrate immediate and irreparable harm, a public interest, and equities which balance in their favor.

Conclusion

Under these circumstances, the tie breaker for all parties having merits on these other injunctive factors is that the Plaintiff has not demonstrated it can succeed on factor 1 of showing a legal right. The wording of the law, the 2016 Act, does not apply to private property. Yet, the Statues were located on and were removed from private property. Thus, this Court is not empowered to issue an injunction concerning the Statues, and it must dissolve the temporary restraining order.

In the event the Plaintiff determines to appeal this final order, the Court has provided for an interim stay to allow the Plaintiff time to seek an appeal and file a motion for a stay and setting a bond. A \$5,000 stay bond must be posted as a preliminary matter.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, email, or efilng as applicable to:

Douglas E. Jones
Allen J. Wade
Brandy S. Parrish
Bruce McMullen
Jennifer A. Sink
Robert Cooper, Jr.
Jason M. Pannu
Christopher L. Vescovo
Alexander H. Park
Wilson Buntin (Courtesy Copy only)

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson
Deputy Clerk
Chancery Court

May 16, 2018