

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

BULL RUN CIVIL WAR ROUND TABLE,

BLAKE MYERS

DON HACKENSON

JOHN DOWNEY

EDWARD WENTZEL,

CHARLES BALCH,

JOHN C. PETERSEN,

Petitioners,

v.

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Defendant.

FILED
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2020 OCT -7 AM 11:46
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

2020 15495
Case No.: _____

**VERIFIED PETITION FOR INJUNCTIVE RELIEF
AND RELATED DAMAGES**

COMES NOW the Petitioners BULL RUN CIVIL WAR ROUND TABLE, BLAKE MYERS, DON HACKENSON, JOHN DOWNEY, CHARLES BALCH, EDWARD WENTZEL AND JOHN PETERSEN (collectively the "Petitioners"), by counsel, who hereby submit this Complaint for Injunctive Relief against Defendant Fairfax County Board of Supervisors (collectively the "County Board"), stating in support thereof as follows:

INTRODUCTION

This complaint arises from the vote of the County Board on September 15, 2020 to remove two historic markers from the grounds of the Fairfax County Courthouse, one which was

placed there in 1904 and one which was placed in 2009. Each signifies the historic fact that the opening land engagement of the Civil War and first battle death occurred at Fairfax Courthouse on June 1, 1861. The decision by the County Board to remove these historic markers was done without any authority under state law; indeed, the Virginia Department of Historic Resources specifically stated in correspondence on August 24, 2020 that the Board of Supervisors lacked authority to remove historic markers. That position was ignored. While the removal has not yet occurred, it is imminent which explains the emergency nature of this petition. The petitioners are (i) a nonprofit historic preservation and education organization specifically dedicated to preserving Civil War history in northern Virginia, and (ii) its members who are residents and taxpayers of Fairfax County and Fairfax City, many of whom live and work in close proximity (or even next door) to the Courthouse grounds.

PARTIES AND JURISDICTION.

1. Petitioner Bull Run Civil War Round Table ("the Round Table") is a nonprofit organization which is chartered in the Commonwealth of Virginia. It is specifically dedicated to preserving historic sites related to the Civil War and to educating its members and the general public about the Civil War and its impact on northern Virginia. As explained *supra*, it has numerous members who are citizens of Fairfax County and live in close proximity to the historic markers referenced herein.
2. Petitioner Blake Myers is the Preservation Chair of the Round Table. He is a Fairfax County resident and taxpayer, residing at 10012 Marshall Pond Road, Burke Virginia. He testified at the Board of Supervisors hearing in support of leaving the Marr obelisk and the DHR Historical Marker in place.

3. Petitioner Don Hackenson is a member of the Round Table. He is a Fairfax County resident and taxpayer, residing at 4708 Lillian Drive, Alexandria (Fairfax County) Virginia. He testified at the Board of Supervisors hearing in support of leaving the Marr obelisk and the DHR Historical Marker in place.
4. Petitioner John Downey is a member of the Round Table. He is a Fairfax City resident and taxpayer, residing at 3662 Embassy Lane, Fairfax, a mile from the County courthouse. He testified at the Board of Supervisors hearing in support of leaving the Marr obelisk and the DHR Historical Marker in place.
5. Petitioner Edward T. Wenzel is a member of the Round Table. He is a Fairfax County resident and taxpayer residing at 643 Hillcrest Drive SW, Vienna VA 22180. He also is a Trustee for the "Kearney" and "Stevens" monuments which commemorate the site where the Union generals Phil Kearney and Isaac Stevens were killed on September 1, 1862 at the Battle of Ox Hill in Fairfax County (0.5 mile west of Fair Oaks Mall). He testified at the Board of Supervisors hearing in support of leaving the Marr obelisk and the DHR Historical Marker in place.
6. Petitioner Charles Balch is a member of the Round Table. He is a Fairfax County resident and taxpayer residing at 2922 Oakton Ridge Circle, Oakton, Virginia.
7. Petitioner John Chapman Petersen is a Fairfax City resident and taxpayer whose business office at 3970 Chain Bridge Road is approximately forty yards from the historic site referenced herein. He grew up at 3936 Chain Bridge Road, one block south of the historic courthouse, and his immediate family still lives on that property. He and his sisters are lineal descendants of the Thomas Moore family described herein.

8. The Petitioners, for the reasons stated herein, will suffer an injury unlike that suffered by the general public as they are personally and corporately interested in the preservation of Civil War history and historic sites, especially in the jurisdiction (Fairfax County or Fairfax City) where they reside. Most of them also live and work within a few miles of the affected markers. In at least one case, a petitioner grew up and now works "next door" to the Courthouse.
9. Defendant Board of Supervisors is a political body which is chartered by the Commonwealth of Virginia and has such powers as delegated to it by its charter and by the general law of the Commonwealth.
10. Jurisdiction and venue are proper in this Court as all actions giving rise to this Complaint occurred in Prince William County, Virginia.

STATEMENT OF FACTS

Opening Skirmish at Fairfax Courthouse

11. In late May 1861, the United States (Union) Army – not yet named the "Army of the Potomac" – had crossed the Potomac River and occupied the town of Alexandria, which was then part of Fairfax County. At this time, General Irvin McDowell, commanding the Department and Army of Northeastern Virginia, was planning to attack the growing Confederate presence at Manassas Junction as soon as possible.
12. In the early morning hours of June 1, 1861, Company B of the 2nd United States Cavalry, under the command of First Lt. Charles Tompkins, was on a scouting mission in the Fairfax Courthouse area to determine the strength of the Confederate forces that were rumored to be in that area. At approximately 3:00 am on Saturday morning, June 1, 1861, Company B surprised two Rappahannock Cavalry pickets posted one mile from the

village as it approached on the road from Falls Church. The federals captured one picket, Private John W. Ryan, and the other picket escaped sounding the alarm that the enemy was coming as he rode back to the village with Company B in hot pursuit.

13. In the village of Fairfax Courthouse were located three companies of Virginia militia, the Warrenton Rifles, the Prince William Cavalry, and the Rappahannock Cavalry, under the command of Lieutenant Colonel Richard S. Ewell. The Warrenton Rifles militiamen were residents of Fauquier County, Virginia and under the command of Captain John Quincy Marr.
14. Not expecting an attack, the Warrenton Rifles had stacked arms on the courthouse lawn and were sleeping in the early morning hours of June 1, 1861.
15. At approximately 3:30 a.m., Company B, 2nd U.S. cavalry, under the command of Lt. Tompkins, charged through the village of Fairfax Courthouse. In their initial charge, they stampeded past the courthouse but drew no fire from the sleeping Confederates who did not realize they were under attack.
16. Regrouping on the western side of town, Company B charged back in the opposite direction, again racing towards the Courthouse. By this time, the Warrenton Rifles were awake. Standing at the northeastern corner of the Courthouse grounds, the Rifles fired into the darkness, inflicting casualties on the Union cavalry who eventually veered off to the north and regrouped afterwards at Flint Hill, near present-day Oakton, Virginia.
17. When daylight broke, the body of Captain Marr was discovered in a clover field behind the courthouse, which was the left (north) end of the Warrenton Rifles skirmish line on June 1, 1861, near where the modern-day Judicial Center is located. He had been hit by a

random mine ball and killed instantly. His body was moved to the Circuit Court clerk's office and laid there, until he could be buried.

18. The engagement at Fairfax Courthouse was reported in newspapers around the United States. It represented the first land combat in the American Civil War, which would go on to one of the most significant events in American history. More than 650,000 combined federal and confederate military deaths resulted, representing nearly a fifth of the military-eligible male population. The War led to the enactment of the Emancipation Proclamation as well as the 13th Amendment, which brought freedom for four million African Americans held in slavery at the beginning of the War.

Civil War in Fairfax County

19. At the beginning of the War, Fairfax County per the 1860 census had a population of 11,834 which included 3,116 enslaved persons and 672 free African Americans.
20. Despite the fact the County voters initially opposed secession in the February 1861 referendum, the majority of white men of military age in Fairfax County fought for the Confederacy, largely under the auspices of the 17th Virginia Infantry.
21. In the aftermath of the War, the veterans of the Civil War, i.e. on the Southern side, remained a substantial population in the County and held frequent gatherings. It is not seriously disputed that they sought to remember the War from the perspective of the Confederate side; it is equally true that their collective memories form an undeniable strand of the overall history of the conflict in Virginia. Most importantly, they were dedicated to preserving sites for future generations.

Erection of Obelisk (1904) Marking "Opening Conflict"

22. In 1904, a group of Confederate veterans, the "John Marr Camp, United Confederate Veterans" erected an obelisk ("the Obelisk") on the front lawn of the courthouse, by the corner of Main Street and Chain Bridge Road, i.e. the exact site where Lieutenant Tompkins' troopers had charged past the sleeping Warrenton Rifles. The obelisk denoted the opening engagement and death of Captain Marr in the following language:

***THIS STONE MARKS THE SCENE OF THE OPENING
CONFLICT OF THE WAR OF 1861-1865, WHEN JOHN Q.
MARR, CAPT OF THE WARRENTON RIFLES, WHO WAS
THE FIRST SOLDIER KILLED IN ACTION, FELL 800 FT, 46
degrees WEST OF THIS SPOT, JUNE 1ST 1861.***

23. The Obelisk did not depict Captain Marr or any other person. It did not memorialize Captain Marr or any other person. It did not use the word "Confederate" or even "War Between the States," as nearly every other courthouse marker of that era did. It simply marked the ground where the "War of 1861-1865" began and the first soldier was killed in action. In fact, the Obelisk was unique for that time frame for the absence of any "Lost Cause" imagery or verbiage.¹ A photograph of the Obelisk and copy of the text is attached hereto as Exhibit A.

24. Years later, the United States Army donated two "naval boat howitzers" ("the Cannons") to stand alongside the obelisk. The cannons were not utilized at the June 1st skirmish, as neither side had artillery. However,

¹ As compiled by the petitioner Mr. Wentzel, the actual fundraising for the Obelisk was led by John Ballard of Fairfax County, who was a veteran of the Army of Northern Virginia. Significantly, in 1915, Mr. Ballard and his wife who lived on a farm on West Ox Road donated a plot of land to the First New Jersey Brigade Society for the erection of two monuments for Union generals Phil Kearney (New Jersey) and Isaac Stevens (Massachusetts) who were killed at that site at the Battle of Ox Hill on September 1, 1862. See The Historical Society of Fairfax County, Yearbook Vo. 21 - 1986-1988, pages 85-105 (narrating the life of John Ballard).

they were Civil War cannons, such as the type which were commonly used by the Union Army, including in battles in Virginia.

25. From 1904 going forward, the Obelisk and Cannons were well-known features in the Town of Fairfax. In fact, the "courthouse cannon" has been the logo of the Fairfax Police Youth Club since its inception in 1965.
26. In the 1920's, the United States Congressman R. Walton Moore – son of Thomas Moore, the former County Clerk of Court who was present at the original skirmish and whose family raised funds for the Obelisk -- often invited dignitaries to visit his home in the Town of Fairfax, just fifty yards from the Obelisk and Cannons, to see the actual site "where the Civil War began." Attached as Exhibit B is a copy of a photograph (circa 1924) showing President Calvin Coolidge visiting the Obelisk and Cannons with Congressman Moore.
27. In 1980, the Fairfax County courthouse was listed by the Virginia Department of Historic Resources ("DHR") as a historic site in recognition *inter alia* of the opening battle of the Civil War. The submission of the County courthouse noted the significance of the first battle as well as the Obelisk and Cannons at the northeast corner of the historic corner of the historic courthouse, i.e. the intersection of Rte. 123 and Rte. 236, where the Warrenton Rifles and Union cavalry first exchanged fire.

Erection of Historic Marker at Courthouse (2009)

28. In 2009, in expectation of the Civil War's Sesquicentennial, the Department of Historic Resources – at the request of local historic organizations – commissioned a new plaque, Historical Highway Marker B-262 ("Historic Marker"), to mark the actual site of Marr's death, i.e. 800 feet southwest of the Obelisk and Cannons. That Historic Marker is located on the courthouse grounds, approximately one hundred fifty (150) feet north of the doors to the modern courthouse.
29. The commissioning ceremony took place on July 1, 2009 and featured political leaders from Fairfax County, including the County Sheriff, County Board Members, and state representatives.
30. The Historic Marker uses the following language:

First Confederate Officer Killed: In the early morning hours of June 1, 1861, a detachment of Company B, U.S. Second Cavalry entered the Town of Fairfax Courthouse and engaged the Warrenton Rifles in the first land conflict of organized military units in the Civil War. The skirmish resulted in the death of Capt. John Quincy Marr, who was struck down by a stray bullet, the first Confederate officer killed in the Civil War. Marr's body was found at daybreak near this location.

31. The Historic Marker has remained on the courthouse property since 2009.

A copy of the Marker is attached hereto as Exhibit C.

Virginia Sesquicentennial Commission Recognizes Value of Civil War History

32. The Sesquicentennial commission, chartered by the General Assembly in 2011 and involving fifteen elected officials of both parties and multiple backgrounds, specifically examined the economic value of historic

landmarks in conjunction with studying the Civil War. The Commission completed its work in 2015, with a 74-page report which it submitted to the General Assembly ("The Civil War Sesquicentennial in Virginia: Final Impact and Lasting Legacies"). A copy is attached as Exhibit D.

33. In the report, the Commission specifically noted the need to add other viewpoints to balance the historical message of the Civil War. Notably, the Commission did not recommend tearing down any of the landmarks, much less the Obelisk or the Historic Marker (which had just been erected). In fact, it specifically noted the economic value of preserving Civil War history in Virginia.

34. Until 2020, no Fairfax County organization had recommended removing or relocating the Obelisk or the Historic Marker. The issue had never before been addressed by the Board.

General Assembly Amends Law on Memorials for War Veterans

35. In the 2020 legislative session, the General Assembly changed the law on historic monuments which is found in Virginia Code § 15.2-1812 ("Memorials for War Veterans"). Prior to that date, localities were allowed to erect but were not permitted to remove, relocate, or contextualize "memorials for war veterans." The statute defined its subject matter as "*monuments or memorials for the veterans of any war*

or conflict, or for the engagement of any war or conflict, to include [list of wars].”²

36. Under the 2020 amendments, localities were for the first time permitted to move “*such monument or memorial on the locality’s public property,*” assuming the locality went through the following specific steps:

- a. Announcing its intent to remove, relocate or contextualize the identified “memorial for war veterans;”
- b. Providing notice of “such intent,” i.e. **the actual proposed action it was intending to take**, at least thirty (30) days prior to the public hearing on that action.

37. The 2020 amendments have been cited to bring down statues depicting Confederate leaders, generals and ordinary soldiers in Alexandria, Richmond, Portsmouth, Norfolk, and Charlottesville. In every single case, the statue that was taken down was (i) a memorial for a deceased Confederate leader or Confederate veterans generally, and (ii) not marking a recognized historic site.

38. To the knowledge of undersigned counsel, no locality has attempted to use this law as a basis for taking down a historic marker.

County Notices Public Hearing, Cites Language Under 15.2-1812
But Does Not Express Intent

39. On July 14, 2020, following national protests on systemic racism in American society, the County Board voted to take up an “inventory” of

² The use of the phrase “... *or for the engagement*” references back to the phrase “veterans” as indicated both by the Section title and by the placement of the commas which demonstrate the phrase is modifying the word “veterans” and not creating a new set of eligible monuments.

Confederate-based names and monuments within Fairfax County. As part of that "inventory," the County Board specifically took notice of the Obelisk and Historic Marker which sit on County-owned property, i.e. the courthouse.

40. On August 14, 2020, the County Board issued notice of public hearing for September 15, 2020 regarding its consideration of whether to "remove, relocate, contextualize or cover" the historic markers on County-owned property at the courthouse. A copy of this notice is attached hereto as Exhibit E.

41. Notably, the County did not publish notice of "its intent" as specifically required by the statute. See Va. Code §15.2-1812(B) ("Prior to removing, relocating, contextualizing or covering any such publicly owned monument or memorial, **the local governing body shall publish notice of such intent in a newspaper having general circulation in the locality.**")

42. Rather it simply notified the public that it would be reviewing the Obelisk and Historic Marker and assorted legal options, per the language of Section 15.2-1812, without disclosing what it planned to do.

Department of Historic Resources
Protests Potential Action of County Board

43. The Virginia Department of Historic Resources is charged with preserving the history of the Commonwealth. According to its homepage, its historic highway marker program is designed to "educate the public about Virginia's history, **not to honor, memorialize or commemorate persons, events or places.** Because highway markers are not honorific in nature,

they do not serve the same purpose as monuments, statues, memorial plaques or war memorials.” See Dept. of Historic Resources, official homepage re “Historic Highway Markers” (Last updated July 8, 2020) attached as Exhibit F.

44. On August 24, 2020, the Director of the Virginia Department of Historic Resources, Ms. Julie V. Langan, wrote to the County Board via the County Attorney informing the County that “*historical markers under the Virginia Historic Highway Markers Program are neither monuments, nor memorials*” and, therefore, not subject to Section 15.2-1812. A copy of her letter is attached hereto as Exhibit G.

45. No response was made to this correspondence. Indeed, the County Board wholly ignored it as indicated *supra*.

County Board Votes to Remove Obelisk and Historic Marker

46. On September 15, 2020, the County Board held its public hearing at the County Government Center. At that time, County staff made a presentation regarding the Historic Marker and Obelisk. Little if any of the above information was included in that report.

47. Members of the public, including Board members of the Civil War Round Table, testified in support of leaving the Obelisk and Historic Marker in place. They also testified as to the insufficient notice, including the failure to state the Board’s “intent” regarding the Obelisk and Historic Marker and thus the actual purpose of the public hearing, notwithstanding the fact that neither item was under the jurisdiction of Section 15.1-1812.

48. At the conclusion of the staff report and following presentations by the public, the Board voted on a party-line vote (9-1) to remove the Historic Marker and Obelisk from County property. No mention was given to the fact neither the Obelisk nor Historic Marker actually served as a "memorial" to any war veterans. Instead the Board proceeded with a rote speech, without any evidence, about the malicious "intent" of the Obelisk and those who erected it in 1904, notwithstanding the fact that Mr. Ballard – the chief fundraiser – also erected monuments to deceased Union generals on his own Fairfax County property. *See infra*. The Minutes from the September 15, 2020 meeting relating to the Board's voted are attached hereto as Exhibit H.

49. The Board of Supervisors has announced that it will receive input from its staff regarding the Historic Marker and Obelisk on October 20, 2020. Once that occurs (and the statutory period of thirty days has occurred), the Historic Marker and Obelisk will presumably be placed in storage indefinitely. Fairfax County will lose a critical tool for teaching future generations about America's greatest conflict.

COUNT I – DECLARATORY JUDGMENT

50. Petitioners incorporate the allegations contained in Paragraphs 1 – 49.

51. There is an actual controversy between the parties as stated herein.

52. The County Board has expressed its intention to ignore state law. To wit, it has formally voted to remove the historic marker, which is a Class Six felony under Virginia law, Section 18.2-317, if done without the approval of the Commonwealth. Furthermore, it has formally

voted to remove the Obelisk despite the fact that it lacks legal authority to do so, as the Obelisk is not a "War Memorial" under the definition of Section 15.2-1812. The actions of the County Board have by definition created a justiciable issue.

53. Pursuant to Virginia Code § 8.01-184, this Court may enter an order resolving the dispute and clarifying the rights of the parties.

COUNT II – PERMANENT INJUNCTION

54. Petitioners incorporate the allegations contained in Paragraphs 1 – 53.

55. The County Board has no authority to act in this manner under Virginia law, as the subjects of its wrath are markers of historic events, not "monuments to the Confederacy" or (more pertinently) "memorials to war veterans."

56. As a result of Defendants' conduct, Petitioners will suffer irreparable harm, which is the removal of historic markers without any color of legal authority.

57. There is no adequate remedy at law to prevent Defendants' conduct.

58. This Court has the authority to grant permanent injunction requiring the County Board to comply with Virginia law, i.e. by leaving the Obelisk and Historic Marker undisturbed.

COUNT III – VIOLATION OF SECTION 15.2-1812

59. Petitioners incorporate the allegations contained in Paragraphs 1 – 58.

60. Assuming *arguendo* that either the Obelisk and Historic Marker did qualify as "war memorials" under Section 15.2-1812, the County Board failed woefully to inform the public of its pending action prior to its action on September 15, 2020 and thus permit an informed discussion on the merits. Specifically it failed to inform the public thirty days before the advertised public hearing of its "intent" to remove the "memorials," as it subsequently voted to do on September 15, 2020. That failure alone renders the Board's

action void *ab initio* as it must clearly state its intent, before holding the public hearing and voting upon said action.

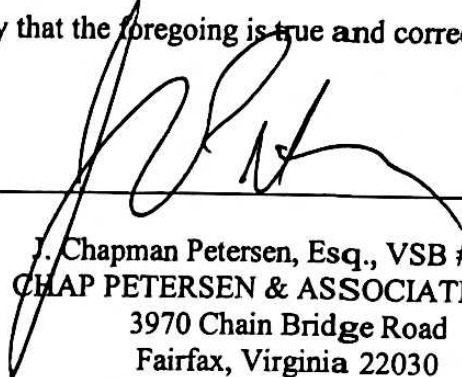
61. Under Virginia Code Section 15.2-1812.1, this Court has the authority to grant relief for any violation of that statute, including injunctive relief as well as compensatory damages, punitive damages, and attorney fees.

WHEREFORE the Petitioners respectfully request that this Court issue an order:

- declaring that the Obelisk and/or Historic Marker are not subjecting for removal by any action of the County Board;
- enjoining the County Board, both temporarily and also permanently, from taking any action against the Obelisk and/or Historic Marker;
- awarding attorney fees and costs incurred by the petitioners as permitted by law.
- awarding any other relief as deemed proper by this Court.

[SIGNATURE PAGE FOLLOWS]

I declare and verify under penalty of perjury that the foregoing is true and correct.



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Counsel for Petitioners

Commonwealth of Virginia

to-wit:

County of Fairfax

Subscribed to by J. Chapman Petersen, who personally appeared before me this 11th day of March, 2020, in my County and State aforesaid, and swore or affirmed that the above answers are true and accurate to the best of his current knowledge, information and belief.


Cristina Lazo
Notary Public

My Commission Expires 09/30/2022

Notary Registration No. 7776500

