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CHATHAM CO. C.S.C.

NORTH CAROLINA CHATHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 809
BARBARA CLARK PUGH; GENE TERRELL BROOKS; THOMAS HENRY CLEGG; THE WINNIE DAVIS CHAPTER 259 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, Plaintiff, vs. KAREN HOWARD; MIKE DASHER; DIANNA HALES; JIM CRAWFORD; and ANDY WILKIE, in their official capacities as members of the Board of County Commissioners of Chatham County, North Carolina, Defendants, and CHATHAM FOR ALL and WEST CHATHAM BRANCH 5378 of the NAACP Defendant-Intervenors.	PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' AND DEFENDANTS'-INTERVENORS' MOTIONS TO DISMISS

STATEMENT OF THE CASE

This is an action in which Plaintiffs seek a declaratory judgment concerning the pursuant to G.S. § 1-253 et. seq. for the purpose of determining a question of actual controversy between Plaintiffs and Defendants with regard to the status of the Confederate monument situated at the Chatham County Courthouse in Pittsboro, its location, and the decision of Defendants to remove the monument from its present location, as well as the applicability of Article 1 of Chapter 100 of the North Carolina General Statutes.

Plaintiffs' filed their complaint, motion for temporary restraining order, and notice of

hearing on October 24, 2019.

The matter came on for hearing on October 29, 2019 before the Honorable Charles M. Viser, who entered a temporary restraining order restraining and enjoining Defendants from taking affirmative action to remove or relocate the Confederate monument pending a hearing on November 8, 2019 at which time the court would take up the issue of the propriety of a preliminary injunction.

In his order, Judge Viser found as a fact that Defendants had instructed the Chatham County Manager that the Confederate Monument would be considered a public trespass on November 1, 2019 in the event that Plaintiff Chapter failed to submit a plan to remove it was received by the county manager's office by October 1, 2019. Judge Viser went on to conclude that "a risk of immediate and irreparable harm exist(s) to the rest of this action of which there is no adequate remedy at law exists."

Plaintiffs subsequently filed a motion for preliminary injunction, upon such conditions as the Court might deem appropriate, asking that Defendants be restrained and enjoined from taking affirmative action to remove or relocate the Confederate monument pending further hearing of this action.

Thereafter, the Honorable Susan Bray denied Plaintiffs' motion for preliminary injunction, and she granted the motion to intervene which had been filed by the West Chatham branch of the National Association for the Advancement of Colored People and a group calling itself Chatham for All.

This matter is before the court upon motions to dismiss brought by Defendants and Intervenors.

STATEMENT OF FACTS

Plaintiffs' verified complaint and their affidavits tend to show that:

Plaintiffs are citizens and residents of Chatham County, as well as a duly qualified nonprofit association, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose, which is organized and existing under the provisions of Chapter 59B of the North Carolina General Statutes. See, Affidavit of Barbara Clark Pugh, annexed hereto and incorporated by reference herein.

Plaintiff Chapter began organizing a fund raising campaign after the turn of the Twentieth Century for the purpose of raising funds necessary to designing, procuring, and installing a monument in Chatham County, North Carolina which would honor those individuals who had served in the armed forces of the Confederate States of America during the Civil War. On August 23, 1907, a monument honoring the individuals who had served in the armed forces of the Confederate States of America during the Civil War was dedicated in a public ceremony conducted at the Chatham County Courthouse in Pittsboro, North Carolina. Supra, Affidavit of Barbara Clark Pugh.

Upon information and belief, Plaintiffs allege and say that the monument was accepted as a gift and that its placement at the Chatham County Courthouse was specifically authorized and directed by the Chatham County Board of County Commissioners on behalf of the citizens of Chatham County, North Carolina. By such actions, the monument became the property of the county, which has maintained the monument at public expense since it was dedicated and given to Chatham County by Plaintiff Chapter and accepted by Chatham County Board of Commissioners.

After the monument was installed, it was vandalized; and the Chatham County Board of Commissioners authorized the payment of a reward for the arrest and conviction of those responsible for the crime. In addition, the Board resolved to prosecute vigorously those responsible for the damage.

As recently as 1985, the Chatham County budget included funds for the dismantling, restoration, and reinstallation of the monument at public expense. At all times pertinent to the allegations of the complaint, Chatham County has exercised dominion and control of the monument as being owned by the County.

On August 19, 2019, the Chatham County Board of County Commissioners voted 4 to 1 to require Plaintiff Chapter to remove and relocate the monument from its present location on or before November 1, 2019. The Chatham County Board of Commissioners is on record as stating that Chatham County will remove the monument in the event that Plaintiff Chapter fails to remove and relocate the monument by said date and then the statue and it pedestal shall be declared a public trespass on November 1, 2019. By such action, Defendants have asserted that Plaintiff Chapter owns the monument, which Plaintiffs specifically deny.

Subsequent to the entry of the order by Judge Bray denying Plaintiffs' motion for a preliminary injunction and the entry of the order allowing the West Chatham branch of the National Association for the Advancement of Colored People and Chatham for All to intervene in this proceeding, the monument was removed overnight and without prior notice by Chatham County.

DISCUSSION OF LAW

PLAINTIFFS HAVE STANDING TO BRING THIS ACTION, AND DEFENDANTS' MOTION TO DISMISS OUGHT TO BE DENIED.

Three facts are not in serious dispute in this litigation: (1) that the Chatham County

Commissioners decided that the Confederate monument must be removed from its location at the Chatham County Courthouse; (2) that Plaintiff Chapter was been given until November 1, 2019 to effect such a removal; (3) that, if Plaintiff Chapter failed to remove the monument by that date, Chatham County would undertake to do so itself; and (4) declare the monument a public trespass, arguendo, charging the Winnie Davis Chapter 259 members with criminal trespass. Notwithstanding the fact that Defendants have set in motion the circumstances and events which have led to this action being brought before the court, Defendants plaintively and earnestly argue that Plaintiffs have no standing to bring this action and to seek redress of the grievances.

Plaintiffs contend that Defendants' motion is not well-founded and that it ought to be denied.

Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. *Neuse River Found., Inc. v. Smithfield Foods, Inc.,* 155 N.C.App. 110, 113, 574 S.E.2d 48, 51 (2002) (*quoting Aubin v. Susi,* 149 N.C.App. 320, 324, 560 S.E.2d 875, 878 (2002)). If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim. *Estate of Apple v. Commercial Courier Express, Inc.,* 168 N.C.App. 175, 177, 607 S.E.2d 14, 16 (2005). The party invoking the trial court's jurisdiction bears the burden of establishing that it has standing to maintain its action. *Thrash Ltd. Partnership v. County of Buncombe,* 195 N.C. App. 727, 673 S.E.2d 689 (2009). The term "standing" refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 731–32, 92 S.Ct. 1361, 1364–65, 31 L.Ed.2d 636, 641 (1972).

Under North Carolina law, in order to challenge a statute, municipal ordinance, policy, or action, a plaintiff need only demonstrate that it has been "injuriously affected" by the enactment or

policy or action. *Goldston v. State,* 361 N.C. 26, 637 S.E.2d 876 (2006). Plaintiffs submit that they have been injuriously affected by the expenditure of public funds in support of an *ultra vires* course of conduct and that such conduct violates clearly articulated public policy in that it is an assertion of authority beyond that authorized by law.

In order to establish standing, it is not necessary that a party demonstrate that injury has already occurred; a showing of 'immediate or threatened injury' will suffice for purposes of establishing standing. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (*citing River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)). Because North Carolina is a notice pleading jurisdiction, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party, including the standing of a party to bring the action. *Mangum v. Raleigh Bd. of Adjustment, supra.*

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, 961 (1968) (citation omitted).

A. <u>As taxpayers of Chatham County, Plaintiffs have standing to challenge the action of Defendants in ordering the removal of the monument because such action necessarily involves the expenditure of public funds.</u>

As long ago as 1899, the Supreme Court of North Carolina recognized that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials. *Stratford v. City of Greensboro*, 124 N.C. 127 32 S.E. 394 (1899). In *Stratford,* a taxpayer

sought to enjoin Greensboro city authorities from street construction that the taxpayer alleged was undertaken for the benefit of a private citizen rather than for the benefit of the public, and the Supreme Court upheld the right of the plaintiff to seek relief on the theory that "a taxpayer had an equitable right to sue "to prevent an illegal disposition of the moneys of the county." *Id.* at 134, 32 S.E. at 396–97 (*quoting Crampton v. Zabriskie*, 101 U.S. 601, 609, 25 L.Ed. 1070, 1071 (1879)). The court went on to observe that:

> [i]f such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities."

124 N.C. at 133–34, 32 S.E. at 396; *see also McIntyre v. Clarkson*, 254 N.C. 510, 513, 119 S.E.2d 888, 890 (1961) (a taxpayer challenged the constitutionality of a statute providing for the appointment of justices of the peace and for payment of their salaries from the general fund of the county): *Freeman v. Board of County Commissioners*, 217 N.C. 209, 7 S.E.2d 354 (1940)(two taxpayers sought an injunction to prevent a board of county commissioners from "making illegal disbursements of public funds by the payment of salaries to unauthorized persons).

Though it has since been superseded by statute as recognized in *Charlotte–Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n,* 336 N.C. 200, 443 S.E.2d 716 (1994), the holding of *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975), remains authoritative on the issue of taxpayer standing. In *Lewis,* taxpayers sued the Art Museum Building Commission, a state agency, alleging that the commission's members exceeded their statutory authority in numerous ways, including a failure to comply with the Executive Budget Act in expending funds related to constructing a proposed State Art Museum Building. *Id.* at 629, 216 S.E.2d at 137. In holding that the proceeds of tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by

state officers for a different purpose, and that citizen and taxpayer of the state may sue to restrain such illegal diversion of public funds, the Supreme Court observed that a taxpayer's right to seek equitable relief

> to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.,—is well settled.

Id.

In the present case, Plaintiffs have established a *prima facie* showing that they have standing as taxpayers in Chatham County by their affidavits and the verified complaint. It is apparent that, since Plaintiff Chapter has taken no action to remove the monument, Defendants have asserted a right to remove the monument from its present location and place it elsewhere. In fact, Defendants have done exactly that. Doing so necessarily required the expenditure of public funds which were obtained from taxes levied on Plaintiffs and their property.[1] It necessarily follows that such standing confers upon Plaintiffs the right to challenge the propriety of any such expenditure of funds by Defendants.[2]

B. <u>Plaintiffs have standing under the law of North Carolina to seek equitable relief against an act on the part of Defendants which is beyond the course and scope of their authority as the governing body of a municipal corporation.</u>

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[1] Plaintiff Chapter does not assert standing as a taxpayer on its own behalf. However, it does assert standing on behalf of its membership who are taxpayers pursuant to the provisions of G.S. § 59B-8. Plaintiff Chapter may assert a claim in its name on behalf of its members or persons referred to as "members" by it if one or more of them have standing to assert a claim in their own right, the interests it seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a "member" by it.

[2] G.S. § 6–21.7 provides: In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs. This statute permits a party that successfully challenges an action by a city or county to recover attorney's fees if the trial court makes certain findings of fact. *Etheridge v. County of Currituck*, 235 N.C.App. 469, 762 S.E.2d 289 (2014).

Historically, courts of equity recognized taxpayer's standing to challenge unlawful acts of local government. 4 Local Government Law § 29:7 (2019). Rationales for according standing were predicated variously on: (1) the vindication of the taxpayer's pecuniary interest in preventing waste or unlawful use of public funds, or property; (2) the protection of the taxpayer's interest as a cestui que trust against breach of the public trust imposed on public funds or property; and (3) recognition of the public law equivalent to the stockholder's derivative class action challenging unlawful management of the affairs of a governmental entity. *Id.*

Aside from their position as taxpayers challenging the propriety of expending public funds by Defendants in removing and relocating the monument, Plaintiffs have an alternative basis for asserting standing: the law of North Carolina specifically recognizes the right of citizens to challenge the actions of municipal corporations on the basis that such actions are beyond the course and scope of their authority. *Merrimon v. S. Paving & Constr. Co.*, 142 N.C. 539, 545–46, 55 S.E. 366, 367–68 (1906) (comparing the right of taxpayers to sue government officials for illegal disbursements with right of shareholders of a corporation to bring ultra vires shareholder suits); *compare Teer v. Jordan*, 232 N.C. 48, 51, 59 S.E.2d 359, 362 (1950)("[W]e are not disposed to deny the right of an individual who is one of those for whose benefit the law was enacted to be heard on allegations of an illegal diversion of public funds which may in some degree injuriously affect his rights as a citizen, taxpayer, and user of secondary public roads.").

In *Merrimon,* certain citizens of Greensboro alleged that defendant paving company had defectively paved a portion of Elm Street and that an injunction should be entered prohibiting payments from the City of Greensboro to the paving company. The defendants' demurrer was sustained, and the plaintiffs appealed to the North Carolina Supreme Court. Though the court affirmed the action of the trial court, Associate Justice Conner, writing for the court stated:

> That a citizen, in his own behalf and that of all other taxpayers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers- such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.-is well settled.

142 N.C. at 545-546, 55 S.E. at 367–368. Justice Conner did not stop his analysis with the foregoing statement. Instead, citing the treatise *Dillon on Municipal Corporations,* Judge Conner noted:

> Judge Dillon says that the right to maintain such action is sustained by analogy to the principle applicable to the rights of shareholders in private corporations. "In these the ultimate cestuis que trustent are the stockholders. In municipal corporations the cestuis que trustent are, in a substantial sense, the inhabitants embraced within their limits. In each case the corporation or its governing body is a trustee. If the governing body of a private corporation is acting ultra vires or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation?

Id.

Citizens and taxpayers have the right to seek equitable relief when governing authorities are preparing to put property dedicated to the public to an unauthorized use. *Wishart v. Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35 (1961) ("If the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief."). A citizen, in his own behalf and that of all other taxpayers may maintain a suit seeking to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers. *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967). In *Shaw,* citizens of Asheville sued to block awarding a cable

television franchise by the city. The trial court found for the city, and the plaintiffs appealed. The North Carolina Supreme Court reversed. Speaking for the court, Associate Justice Lake stated:

> It is well established that a municipal corporation of this State 'has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the state applicable to all municipal corporations, and the powers granted in the charter will be construed together with those given under the general statutes.'... 'Any fair, reasonable doubt concerning the existence of the power is resolved against the corporation.'...

269 N.C. at 95, 152 S.E.2d at 144; *see also Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006). A party has standing to initiate a lawsuit if he is a real party in interest; a real party in interest is one who benefits from or is harmed by the outcome of the case and by substantive law has the legal right to enforce the claim in question. *Beachcomber Properties, L.L.C. v. Station One, Inc.* 169 N.C.App. 820, 823–24, 611 S.E.2d 191, 193–94 (2005).

G.S. § 153A-12 specifically provides:

> Except as otherwise directed by law, each power, right, duty, function, privilege and immunity of the corporation shall be exercised by the board of commissioners. A power, right, duty, function, privilege, or immunity shall be carried into execution as provided by the laws of the State; a power, right, duty, function, privilege, or immunity that is conferred or imposed by law without direction or restriction as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the board of commissioners.

Implicit in this statute is the concept that a county can only exercise such authority and power as might be delegated to it in accord with the laws of the state. To the extent that a county undertakes to perform an act which is beyond its authority under the laws of the state, it is acting *ultra vires*, and a taxpayer has the right to challenge such an action.

Although a declaratory judgment action must involve an "actual controversy between the parties," plaintiffs are "not required to allege or prove that a traditional 'cause of action' exists against defendant[s] in order to establish an actual controversy." *Town of Emerald Isle v. State,* 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987); "[A] declaratory judgment should issue '(1) when [it]

will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002); *compare Metcalf v. Black Dog Realty, LLC,* 200 N.C.App. 619, 684 S.E.2d 709 (2009).

While it is true that a declaratory judgment is not available to restrain enforcement of a criminal prosecution, *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 349, 323 S.E.2d 294, 309 (1984); *see also Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 62 (1984), and that a declaratory judgment is a civil remedy which may not be resorted to try ordinary matters of guilt or innocence, *Id.,* Defendants misconstrue Plaintiffs' position. Plaintiffs are not seeking to restrain a criminal prosecution nor are they attempting to try a criminal accusation. Instead, if the monument were to be declared a public trespass, it necessarily follows that Chatham County would be denying that it owns the monument yet again. Given the unequivocal ultimatum of what would be done if Plaintiff Chapter did not remove the monument as demanded by the Board of Commissioners and that such ultimatum was specifically directed toward Plaintiff Chapter, it is fair to infer that adverse consequences would result from Plaintiff Chapter failed to do so. Such consequences could have included holding Plaintiff Chapter liable for the costs incurred in removing the monument or subjecting Plaintiff Chapter to attempts on the part of Defendants to subject Plaintiff Chapter to civil litigation or criminal prosecution.

In the instant case, there is plenary evidence that Plaintiff Chapter was responsible for funding and erecting the Confederate Monument in question. No governmental expenditures were involved in the enterprise. The statue was dedicated to Chatham County, and it was accepted by the Board of County Commissioners. Thereafter, Chatham County took action from time to time indicating that it owned the monument by taking steps to protect it against vandalism and by

expending public funds for its restoration. In the present case, Plaintiffs have not sought any relief other than that available as a declaratory judgment or as an equitable remedy such as an injunction. No claim for damages or other relief has been sought. The fact that Plaintiff Chapter funded and erected the monument itself, coupled with the fact that a specific requirement for membership in Plaintiff organizations is establishing that one is a lineal descendant of an individual who served in the government or the armed forces of the Confederacy, distinguish this specific case from those in which other organizations were denied standing when they sought to challenge the removal of Confederate monuments absent evidence of a particularized interest in the monument in question.[3] Furthermore, it cannot be forgotten that individual Plaintiffs have established that they are taxpayers in Chatham County and that they have a particularized interest in challenging actions of the county which are arguably *ultra vires.*

Plaintiffs and Plaintiff Chapter contend that a dedication of the statue to Chatham County occurred and that the county expressly accepted that dedication. Thereafter, Chatham County took specific actions manifesting a claim of ownership in the monument. Who actually owns the monument is a question of fact which is yet to be determined. If the monument is owned by Chatham County, any action contemplated or executed with regard to its location is subject to the provisions of G.S. § 100-2.1 (2019). That contention does not defeat or imperil the standing of Plaintiffs to bring this action because of the manner in which the monument was funded by

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[3] *Gardner v. Mutz,* 2019 WL 338915 (M.D. Fla. 2019)(individuals who were members of one or more remembrance organizations had no standing as individuals to challenge removal of Confederate monument erected by UDC with the approval of the City Commission of Lakeland, Florida); *McMahon v. Fenves*, 323 F. Supp. 3d 874, 881 (W.D. Tex. 2018) (Interest group had no standing to challenge removal of Confederate statues from University of Texas campus which had been funded by a bequest from a benefactor of the University of Texas in the early Twentieth Century); *compare Historical Preservation Action Committee, Inc. v. City of Reidsville,* 2013 WL 6096749 (N.C. App. 2013)(Plaintiff lacked standing to challenge agreement between United Daughters of the Confederacy and the City of Reidsville to relocate a Confederate monument which had been damaged in a motor vehicle accident).

Plaintiffs which are organizations in which a member must demonstrate a specific and legacy relationship.

G.S. § 100-2.1 provides, in pertinent part:

> An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection. An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location. As used in this section, the term "object of remembrance" means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history. The circumstances under which an object of remembrance may be relocated are either of the following:
>
> (1) When appropriate measures are required by the State or a political subdivision of the State to preserve the object.
>
> (2) When necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.

Plaintiffs contend that the foregoing statute applies to the controversy between the Parties on the basis that the Confederate Monument is an object of remembrance located on public property.[4] In the present case, Plaintiffs raised the funds necessary to design, build, and install the Confederate Monument from private sources. However, the historical record is clear that the Chatham County Commissioners expressly permitted the monument to be placed on land which it owned and which was designated as Courthouse Square. Dedication is a form of transfer, either

[4] Plaintiffs' arguments pertaining to standing apply with equal force to application of G.S. § 100-2.1 to this proceeding. Furthermore, though the statute limits the extent to which the objects of remembrance may be removed from public property or relocated, and applies to a broad array of memorials, monuments, statues and other objects, including the many Confederate monuments found on county courthouse grounds and other public property across the State, it is not self-executing in that no enforcement mechanism is provided under its terms. Indeed, if citizens were not able to bring litigation challenging the authority of local governments to remove such objects of remembrance, it is likely that such actions would escape judicial scrutiny entirely.

formal or informal, in which one grants to another public rights in their property. *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E.2d 748 (1954). The most telling evidence that Defendant Chatham County owns the monument is the fact that the county appropriated funds to remove, renovate, refurbish, and reinstall the monument in 1986.

Whether the Confederate Monument is subject to the Monuments Act is a question of law whose resolution must be predicated on the resolution of the factual question of the ownership of the statue. It is Plaintiffs' position that the stated decision of Defendants is in direct conflict with the requirements of the Monuments Act and that decision, if it is implemented, is *ultra vires* simply because no municipal corporation, whether it is a county or a city or a town, acts within the course and scope of its authority by violating the express provisions of a statute governing its conduct.[5] Therefore, Plaintiffs have standing to challenge such announced actions.

There is an additional basis for Plaintiffs to challenge the action of Defendants in removing the monument without there being compliance with the Monuments Act. Through counsel, Defendants assert that the county does not own the monument and that, at most, the county granted Plaintiff Chapter a license to place the monument upon the grounds of the historic Chatham County Courthouse. Assuming *arguendo* the validity of the prong of Defendants' argument that the county granted Plaintiff Chapter a license to place the monument on the courthouse grounds, that argument does not weaken Plaintiffs' position that the monument is owned by the county.

G.S. §153-A-158 provides, in pertinent part:

> A county may acquire, by gift, grant, devise, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the county or

[5] The provisions of G.S. 6-21.7 directing that an allowance of counsel fees and costs shall be made to the plaintiff in an action in which it is determined that the action of a city or county violated a statute or case law setting forth unambiguous limits on its authority clearly establish legislative intent that such actions are cognizable under North Carolina law.

any department, board, commission, or agency of the county.[6]

There is clear and unequivocal evidence that Chatham County gave express permission for the placement of the monument on the grounds of the courthouse. It is apparent that the monument was substantial in size and in cost. That Chatham County, through its board of commissioners, gave permission for it to be placed on the courthouse grounds is substantial evidence warranting an inference that the county was accepting the monument as a gift. In fact, there is no evidence that placement of the monument at any other location besides the courthouse was ever considered. It strains credulity to believe that Plaintiff Chapter would have funded the design, construction, and placement of the monument if had intended to retain ownership of it and have it subject to being removed from the only place which was considered for its erection.

The doctrine of *ejusdem generis*, when applicable, requires that general words of a statute which follow a designation of particular subjects or things be restricted by the particular designations to things of the same kind, character, and nature as those specifically enumerated. *State v. Lee,* 277 N.C. 242, 176 S.E.2d 772 (1970). In other words, when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind. *State v. Hinton*, 361 N.C. 207, 639 S.E.2d 437 (2007). By use of the phrase "any other lawful method," the statute expressly disclaims any statutory intent on the part of the General Assembly that property may be acquired by a county only in a particular manner. In fact, there is sufficient evidence to warrant an inference that the monument was a gift to the county from Plaintiff Chapter which was accepted by the action of the county commissioners in authorizing its placement on the courthouse grounds.

Assuming *arguendo* that Chatham County granted a license for the placement of the

[6] While Chapter 153A *presently* governs the activities and responsibilities of a county, it does not necessarily determine the validity of actions which occurred more than one hundred years ago.

monument upon the grounds of the historic courthouse, that assumption does not settle the issue concerning the ownership of the monument of the applicability of the Monument Act. It is true that a license does not require a writing, *Lee-Moore Oil Co. v. Cleary,* 295 N.C. 417, 245 S.E.2d 720 (1978), and that a license is freely revocable. *Hutchins v. Durham,* 118 N.C. 457, 24 S.E. 723 (1896). Prior to being affixed to the grounds of the historic courthouse, the monument was an item of personal property. A gift of personal property consists of a voluntary transfer of property by one to another without consideration, and its essential elements are: (1) an intent by the donor to give the donee the property in question so as to divest the donor immediately of all right, title, and control therein, and (2) delivery, actual or constructive, of the property to the donee. *Holloway v. Wachovia Bank & Trust Co., N.A.*, 333 N.C. 94, 423 S.E.2d 752 (1992). The intention to make a gift may be inferred from the relationship of the parties and from all of the surrounding facts and circumstances. *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988). For a valid gift to occur, there must be (1) donative intent, and (2) actual or constructive delivery. *In re Estate of Pope*, 192 N.C. App. 321, 666 S.E.2d 140 (2008).

Gifts of personal property, as a general rule, do not require particular formality or a writing. Plaintiffs contend that the action of the Chatham County Board of Commissioners in granting permission for the placement is some evidence of acceptance of a gift of the monument from Plaintiff Chapter. Without such action, particularly given the inherent permanence of a monument, there could have been no placement of the statue on the grounds of the historic courthouse without there having been some action on the part of the county accepting the donation of the object. The intent of the county in accepting the gift of the monument is borne out by the subsequent course of conduct in which the county expended funds for its maintenance and restoration.

Further, the threat to declare a public trespass by the Winnie-Davis Chapter 259's member is a direct threat of criminal charge of trespass pursuant to N.C.G.S. § 14-159.12(a). First degree Trespass. [7] This threat of criminal prosecution clearly permits the Winnie-Davis Chapter 259, by and through its officer to seek a determination by the Court whether any member of the Chapter could be charge with criminal trespass of public property, the grounds of the Historic Chatham County Courthouse. The officers and the members of the Chapter have be challenge by this threat of criminal prosecution, and have the right to defend themselves by seeking a declaratory judgment on the authority of the County Commissioners to prosecute a charge of criminal trespass.

(1). ***Intervenors' objections to Plaintiff's standing are not well-founded.***

Intervenors argue that Plaintiffs have no standing to bring this action on a variety of theories. Careful consideration of Intervenors' theories will establish the insufficiency of such arguments.[8]

The individual Plaintiffs' assertions that they pay county property taxes does not confer standing upon them or differentiate them from any other members of the general public.

Intervenors ignore the well-established rule in North Carolina which specifically recognizes the right of citizens to challenge the actions of municipal corporations on the basis that such actions are beyond the course and scope of their authority. *Merrimon v. S. Paving & Constr.*

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[7]Jeffrey B. Welty, Esq., Professor of Public Law and Government and Director, North Carolina defines A person commits first-degree trespass when he or she "without authorization . . . enters or remains . . . in a building of another." G.S. 14-159.12(a). The declaration off the County Commissioners that " then the statue and it pedestal shall be declared a public trespass on November 1, 2019, lands squarely within the analysis Professor Welty, to wit: Public Trespass is a criminal act sanctionable pursuant to G.S. 14-159.12(a). See, Exhibit "B", the publish analysis of Professpr Wielty, annexed hereto and incorporated by reference herein.

[8] Plaintiffs have previously addressed in considerable detail their position pertaining to standing and to the sufficiency of their complaint to state a claim upon which relief could be granted. Plaintiffs submit that such discussion addresses the arguments brought forward by Defendants in meticulous fashion and that specific arguments advance by Defendants have been fully addressed. To the extent that Intervenors have advanced contentions which are framed differently or which are addressed to other considerations, Plaintiffs have elected to reply to those arguments specifically.

Co., supra.

The individual Plaintiffs' claims that they have Confederate soldier ancestors have consistently and properly been rejected as a basis for standing.

Plaintiffs do not rest their claim to standing on the fact that they have demonstrable Confederate ancestry. Plaintiffs have made such an allegation, and Plaintiff Chapter has a requirement that such ancestry be established as a pre-requisite of membership. However, the gravamen of Plaintiffs' position is that they have the right to challenge expenditures in support of ultra vires actions by the county and that the demonstrated actions of the county are ultra vires in that they are in violation of articulated public policy as set forth in the Monuments Act. Furthermore, Intervenors' argument patently ignores the fact that Plaintiff Chapter was responsible for designing, funding, and erecting the monument, all of which tend to give Plaintiff Chapter a direct and cognizable interest in this proceeding.

Aesthetic enjoyment of a Confederate monument does not satisfy standing requirements.

Plaintiffs have ***never*** contended that they have standing based upon considerations of aesthetic enjoyment or appreciation. Plaintiffs stand or fall on their argument that they have the right to challenge expenditures in support of *ultra vires* actions by the county and that the demonstrated actions of the county are *ultra vires* in that they are in violation of articulated public policy as set forth in the Monuments Act.

Plaintiff UDC cannot show representational standing because it fails to allege any legal injury or harm suffered by its members.

Again, Intervenors' argument patently ignores the fact that Plaintiff Chapter was responsible for designing, funding, and erecting the monument, all of which tend to give Plaintiff Chapter a direct and cognizable interest in this proceeding. Furthermore, Plaintiffs' complaint manifestly alleges that individual Plaintiffs have alleged that they have the right to challenge

expenditures in support of ultra vires actions by the county and that the demonstrated actions of the county are ultra vires in that they are in violation of articulated public policy as set forth in the Monuments Act.

Plaintiffs do not, and cannot, identify any injury in fact as required by law for them to proceed.

Plaintiffs' injury in fact arises from the fact that Plaintiff Chapter was responsible for designing, funding, and erecting the monument, all of which tend to give Plaintiff Chapter a direct and cognizable interest in this proceeding; and that the individual Plaintiffs have alleged that they have the right to challenge expenditures in support of *ultra vires* actions by the county and that the demonstrated actions of the county are *ultra vires* in that they are in violation of articulated public policy as set forth in the Monuments Act.

Plaintiffs do not have standing under the Declaratory Judgment Act.

Simply stating that Plaintiffs do not have standing under the Declaratory Judgment Act, as Intervenors have done, does not make it so. Plaintiffs submit that they have been injuriously affected by the expenditure of public funds in support of an *ultra vires* course of conduct and that such conduct violates clearly articulated public policy in that it is an assertion of authority beyond that authorized by law. There is an actual and substantial controversy between Plaintiffs and Defendants concerning the monument and its ownership. That is sufficient to bring this matter within the parameters of the Declaratory Judgment Act.

(2). *Intervenors' arguments that Plaintiffs' complaint fails to state a claim are not well-founded.*

While Intervenors have set forth a multitude of arguments challenging whether Plaintiffs' complaint states acclaim upon which relief could be granted, those arguments can be dealt with summarily according to the common characteristics of the positions which they advance.

Plaintiffs have no private right of action under N.C. Gen. Stat. § 100-2.1.

Plaintiffs are not seeking to make any recovery under the Monuments Act whatsoever; nor

are they asserting a private right of action under the Act. Instead, they are asserting a fundamental right of citizens to challenge a government act or decision as being outside the scope of its authority.

Plaintiffs have failed to make sufficient factual allegations to support their claims.

Rule 8(a) provides that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief."

The North Carolina Supreme Court has concluded that by substituting the phrase "claim for relief" in place of "facts constituting a cause of action," the legislature intended to relax somewhat the strict requirement of detailed fact pleading and to adopt the concept of "notice pleading."

Sutton v. Duke, *supra* ("[w]e do not assume its choice of 'new semantics' was either accidental or casual"); *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 364 S.E.2d 380 (1988). Under "notice pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought.

E.g., Lewis v. Gastonia Air Service, Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972). A pleading will comply with Rule 8(a)(1) if it gives sufficient notice of the events or transactions which produce the claim to enable the adverse party to understand the nature of it and the basis for it and to obtain any additional information necessary by using the Rules pertaining to discovery. *Sutton v. Duke*, *supra.*

Plaintiffs' complaint is more than adequate to meet these standards.

Plaintiffs' construction of statutes and constitutional provisions is unsubstantiated.

Whether Plaintiffs' interpretation of the Monuments Act and the interplay of the United States Constitution, as well as that of the State of North Carolina, are fundamentally questions of law which are best resolved upon a full and fair hearing of competing arguments under the Declaratory Judgment Act.

C. <u>Defendants and Intervenors have asserted inconsistent positions in denying that Plaintiffs have standing while contending that Intervenors are entitled to intervene in this proceeding.</u>

Because their motion to intervene has been granted by the court, Intervenors have the same rights and obligations before the court as do Plaintiffs and Defendants. *Leonard E. Warner v. Nissan Mot. Corp.,* 66 N.C. App. 73, 311 S.E.2d 1 (1984). By allowing such motion, the court implicitly found that Intervenors had a sufficient interest in this proceeding to justify allowing them to participate in the litigation. However, Intervenors and Defendants blithely ignore the fact that neither of Intervenors has a direct and tangible interest in the litigation while arguing strenuously that Plaintiffs have no cognizable interest either as taxpayers or as an organization sufficient to clothe them with standing. Indeed, Plaintiffs respectfully submit that neither of Intervenors has any interest in this litigation other than as political activists who are seeking to maintain and enforce a decision of Defendants which is arguably *ultra vires* in that it is patently beyond the authority of Defendants as the duly elected commissioners of Chatham County. Indeed, no government has the authority, either explicitly or by implication, to ignore the requirements of positive law as the same have been declared by the legislature. Plaintiffs *qua* taxpayers and as an association of members who are taxpayers have a direct and vital interest not only in the proper expenditure of public funds raised through taxation but in the due administration of the lawful processes of government. Nonetheless, Intervenors and Defendants have sanctimoniously declared

that Plaintiffs ought to be silenced and that their facially sufficient challenges to the exercise of authority by the county be ignored.

CONCLUSION

Based on the foregoing discussion of law, Plaintiffs respectfully submit that the court should deny Defendants' motion to dismiss and find that Plaintiffs have standing to bring this action.

Respectfully submitted, this 22nd day of November 2019.

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