

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

E. D. COLE BUILDING, L.L.C., a Virginia
limited liability company,
401 Chatham Square Office Park
Fredericksburg, Virginia 22405,

and

LOCAL HOLDINGS, L.L.C., a Virginia
limited liability company,
6921 Barclay Drive
Fredericksburg, Virginia 22407,

Petitioners,

versus

COUNCIL OF THE CITY OF FREDERICKSBURG, :
715 Princess Anne Street
Fredericksburg, Virginia 22401, :

Respondent. :

Serve: Timothy J. Baroody, *qua* City Manager :
for the City of Fredericksburg
715 Princess Anne Street :
Fredericksburg, Virginia 22401. :

Case No.: CL 19-951

FILED

DEC 10 2019

FREDERICKSBURG
CIRCUIT COURT

PETITION AT LAW FOR DECLARATORY JUDGMENT

COMES NOW, before this Honorable Court, your Petitioners in respect of the instant action, *viz.*, E. D. Cole Building, L.L.C., a Virginia limited liability company, and Local Holdings, L.L.C., by and through their undersigned attorney and counsellor, *viz.*, Joseph Peter Drennan, and pursuant to the provisions of §§8.01-184, & 15.2-2306 (A)(3) of the Code of Virginia, amended, as well as the Dillon Rule of statutory construction respecting municipal corporations, followed by the Commonwealth of Virginia, respectfully, to move this Honorable Court for declaratory relief, as an aggrieved party in respect of your Petitioner's appeal herein from a certain Resolution purportedly

enacted by the Council of the City of Fredericksburg, Virginia, at the 12 November 2019, Regular Meeting of the City Council, “Granting a Certificate of Appropriateness for the Relocation of the Slave Auction Block to the Fredericksburg Area Museum”, and, in support whereof, your Petitioner would direct the attention of this Honorable Court to the following considerations, viz.:

Jurisdiction and Venue

1. That this Honorable Court properly retains jurisdiction over the instant Petition pursuant to the provisions of §8.01-184 of the Code of Virginia, as amended, under the rubric “Power to issue declaratory judgments,” inasmuch as said code section encompasses, *inter alia*, controversies involving the interpretation of a statute and a municipal ordinance, areas that are expressly within the purview of the said Code section;

2. That, concomitantly, jurisdiction is conferred by the provisions of 15.2-2306 (A) (3) of the Code of Virginia, and the corresponding provisions contained in Fredericksburg City Code § 72-23.1 (F) (2), in that your Petitioner has initiated the instant action within 30 days of the intended final decision of the City Council as regards “the Relocation of the Slave Auction Block to the Fredericksburg Area Museum”; it bears further mention herein that the aforesaid City Code provision further provides that this timely filing of a Petition for Appeal operates so as to stay the subject decision of the City Council, pending the outcome of the instant appeal;

3. That venue is properly laid with this Honorable Court as “preferred venue”, within the intendment of §8.01-261 (3) of the Code of Virginia, and, in any event, since your Petitioners’ appeal herein emanates from an action of the City of Fredericksburg City Council, venue with this Honorable Court would also be “permissible venue” within the intendment of §8.01-262 of the Code of Virginia;

Parties

4. That your Petitioner known as E.D. Cole Building, L.L.C., is a *de jure* limited liability company, organized under the laws of the Commonwealth of Virginia, on 3 September 2008, which maintains its primary place of business located at 401 Chatham Square Office Park, Fredericksburg, Virginia 22405, and, said Petitioner owns certain real estate located at 402 William Street, Fredericksburg, Virginia 22401, consisting of a historic commercial building, popularly known as “The Cole Building,” containing, as an anchor tenant, Kybecca Restaurant, is in close proximity to the Slave Auction Block, *id est, directly across the street* from the Slave Auction Block, and thus has a direct, immediate, pecuniary and substantial interest in the subject decision of the City Council of the City of Fredericksburg, from which your Petitioner now appeals;

5. That your Petitioner known as Local Holdings, L.L.C., is a *de jure* limited liability company, organized under the laws of the Commonwealth of Virginia, on 4 February 2015, which maintains its primary place of business at 6921 Barclay Drive, Fredericksburg, Virginia 22407, and said Petitioner maintains two distinct businesses at the 401 William Street, Fredericksburg, Virginia, location, *id est*, at the very same address as the Slave Auction Block, consisting of a sandwich shop business, known as “The Butcher’s Table”, as well as a butcher shop vending business, known as “Olde Towne Butcher,” and, indeed, said Petitioner’s aforesaid businesses are directly in front of the Slave Auction Block, in the historic building known as “The Planter’s Hotel,” built in the 1840s, and said Petitioner also has a direct, immediate, pecuniary and substantial interest in the subject decision of the City Council of the City of Fredericksburg, from which your Petitioners now appeal;

6. That your Respondent, *viz.*, the Council of the City of Fredericksburg (hereinafter referenced *qua* “City Council”) is the legislative body for the municipality known as the City of Fredericksburg, Virginia, and has its principal place of business at City Hall, located at 715 Princess Anne Street, Fredericksburg, Virginia 22401;

Introduction

7. That your Petitioners have initiated the instant appeal in order to halt the City Council's attempt to undertake a blatant, *ultra vires*, action, to remove an important historical landmark and structure from

a public right-of-way, at the northwest corner of the intersection of Charles Street and William Street, in the City of Fredericksburg, viz., the Slave Auction Block, where it has stood since 1846, and then cache it away inside the Fredericksburg City Museum;

8. That, whatever purpose or animating intent underlay the subject questioned action of the City Council, it was irrefragably undertaken in derogation of the Dillon Rule, which strictly delimits the authority of the City Council; accordingly, the City Council's having deigned to pass, by a 6 to 1 margin, no less, on 12 November 2019, a resolution "Granting a Certificate of Appropriateness for the Relocation of the Slave Auction Block to the Fredericksburg Area Museum", is utterly bereft of any statutory or ordinance authority, and is susceptible of being nullified by this Honorable Court;

9. That there can be no gainsaying that each of your Petitioners herein is aggrieved by the subject City Council action, by reason of the prospective diminution in tourist and traveler traffic, and, perforce, the commensurate dip in neighborhood commerce, that would likely follow from the imminent extirpation of the Slave Auction Block, from the corner of Charles and William Streets, and each has standing to pursue the instant action for declaratory relief to nullify the subject City Council action, as one of your Petitioners (E.D. Cole Building, L.L.C.) owns commercial rental real estate directly across William Street from the Slave Auction Block, which stands to decline in rentability owing to a decline in neighborhood commerce, and your other Petitioner (Local Holdings, L.L.C.), similarly, facing a prospective decline in the revenue at its two businesses, especially, at its sandwich shop, given the virtually inevitable decline in neighborhood foot traffic, tourist trolley traffic and foot traffic that would result upon the removal of such a major tourist attraction;

10. That The Cole Building, The Planter's Hotel and the Slave Auction Block, are all located within the metes and bounds of the Old and Historic Fredericksburg District (hereinafter referenced *qua* "HFD"), established in or about 1972 by a statutory enactment of the City Council, §§ 72-3, *et seq.*, of the City Code, and the 40-block HFD is listed on the National Register of Historic Places (hereinafter referenced *qua* "NRHP");

The Slave Auction Block

11. That the structure of the Slave Auction Block is a significant structure and landmark in the HFD, recognized as such, as evinced by, *inter alia*, its inclusion among the more than 350 buildings and other structures within the HFD, and, notably, it is currently listed as *qua* Item #12 among the 28 properties and districts within the City of Fredericksburg, on the NRHP, on the National Park Service's most recent listings, on 6 December 2019, as evinced by the *Wikipedia* webpage, on even date, a true xerographic copy of which is annexed hereunto, and incorporated herewith by reference thereto, as if set out in full, *qua* "Petitioners' Exhibit 'A'"; moreover, the Slave Auction Block is affixed to the property upon which it is located, *viz.*, the public right-of-way, at the northwest corner of William & Charles Streets, and is, *ipso facto*, real property;

12. That the Slave Auction Block's significance as a landmark and point of interest is further evinced by, *inter alia*, that it is listed as #14 among the 29 discrete points of interest listed in the legend of the current tourist map of Fredericksburg that is distributed at the Fredericksburg Visitor Center, and annexed hereunto, and incorporated herewith by reference thereto, as if set out in full, *qua* "Petitioners' Exhibit 'B'" is a true xerographic copy of such map;

13. That the context of the profound and poignant historical significance of the Slave Auction Block has been brought into sharp relief in a guide, endorsed by the City of Fredericksburg, and published in 2014 by the Historic Fredericksburg Foundation, Inc., entitled *Fredericksburg [.] The*

Official Guide (referenced hereinafter *qua* “The Official Guide”); specifically, among the 35 topical references respecting Downtown Fredericksburg, under rubric #35, at pp. 56 & 57 of The Official Guide, is a guide to “Planter’s Hotel and the Slave Auction Block”, and, annexed hereunto, and incorporated herewith, by reference thereto, as if set out in full, *qua* “Petitioners’ Exhibit ‘C’”, is a true copy of the front and back covers to The Official Guide, and an excerpt of pp. 56 & 57 of The Official Guide;

14. That the aforesaid excerpt from The Official Guide describes the Slave Auction Block in the starkest of terms:

“On the street corner in front of the (Planter’s) hotel stands one of the most compelling artifacts in the United States. The sandstone block was likely created as a carriage step but became known as an auction block. On this corner, auctioneers sold all types of goods, including enslaved African Americans. At least five slave sales here in the 1850s and early 1860s are documented, and many more likely took place. In the wake of one of the more successful [*sic.*] sales, a local newspaper proclaimed, ‘Fredericksburg seems to be the best place to sell slaves in the State.’”

Id. at p. 57;

15. That the The Official Guide also includes, *inter alia*, a reference to the oral history of Mr. Albert Crutchfield, an African American, whom had recalled having been “. . . sold from the (Slave Auction) block”, and shown in an early twentieth-century postcard pictured on the said page (*Id.*);

16. That, *inter alia*, the above-referenced testament of Mr. Crutchfield calls to mind with the undersigned the following apropos quotation from Elie Wiesel, during an April, 2008 interview aired on National Public Radio’s “All Things Considered” : “Without memory there is no culture. Without memory there would be no civilization, no society, no future.”¹;

¹ A transcript of the interview is posted on the npr.org website, at the following URL: <https://www.npr.org/2008/04/07/89357808/a-god-who-remembers> (last visited on 10 December 2019)

The City Counsel Lacked Authority to Order the Removal of the Slave Auction Block

17. That, as adverted to in the opening paragraph of the instant Petition, the Commonwealth of Virginia, the Supreme Court of Virginia has long followed the Dillon Rule of statutory construction, and limits the powers of local governments to those expressly granted to them by the State;

18. That, for purposes of the instant Petition, the relevant statutory provision respecting the powers expressly conferred by the State to the City of Fredericksburg respecting the latter's power to remove historic landmarks is set forth at § 15.2-2306 of the Code of Virginia, as amended, under the rubric: "Preservation of historical sites and architectural areas," and, annexed hereunto, and incorporated herewith by reference thereto, as if set out in full, *qua* "Exhibit 'D'", is a true xerographic copy of said statutory provision;

19. That the express grant of authority by the State to the City of Fredericksburg respecting the removal of a historic landmark is contained in § 15.2-2306 (A) (2), the language of which is set forth, *haec verba*, as follows:

"Subject to the provisions of subdivision 3 of this subsection the governing body *may provide* in the ordinance that no historic landmark, building or structure within any district shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the review board, or, on appeal, by the governing body after consultation with the review board."

(emphasis added);

20. That, as an aside, it bears reference in the foregoing excerpted statutory subsection to "... subdivision 3 of this subsection ..." is the statutory grant of authority which enabled the City Council to enact Fredericksburg City Code § 72-23.1 (F) (2), *id est*, the authority referenced in the opening paragraph of the instant Petition, which forms the protocol by which your Petitioners have brought the instant appeal;

21. That the provision of the said subsection that bears scrutiny here, as detailed further, *infra*, is the use of the appellation “may provide”;

22. That, pursuant to the express grant of authority contained in § 15.2-2306 of the Code of Virginia, the City of Fredericksburg established the Architectural Review Board (hereinafter referenced *qua* “ARB”) *see*: § 72-20.3 of the City Code;

23. That, pursuant to the express grant of authority contained in § 15.2-2306 of the Code of Virginia, the City of Fredericksburg also promulgated a detailed Code section, *viz.*, § 72-23.1 of the City Code, under the rubric “Historic District-certificates of appropriateness”, containing a number of ramified provisions, spelling out, explicitly, the duties, functions, operations and prerogatives of the ARB, and annexed hereunto, and incorporated herewith, by reference thereto, as if set out in full, *qua* “Petitioners’ Exhibit ‘E’”;

24. That, in pertinent part, the above-referenced § 72-23.1 of the City Code confers the sole prerogative of ordering the moving of an “historic landmark, building or structure within the HFD”, as plainly stated at the following excerpted provision of § 72-23.1(D) (3) (a):

“No historic landmark, building or structure within the HFD shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the ARB.”

(emphasis added) – full stop;

25. That, in spite of the pellucidly clear language conferring upon the ARB the sole prerogative of ordering the moving an “historic landmark, building or structure within the HFD”, the City Council did, acting on a foreshortened notice, after having amended its previously published meeting agenda, purported to vote 6 to 1, on 11 June 2019, to excise the Slave Auction Block from its location at the northwest corner of William and Charles Streets, and to place it in the Fredericksburg Area Museum;

26. That in palpable contradistinction to its 11 June 2019 *ultra vires* diktat as regards the Slave Auction Block, the City Council did, on 31 July 2019, apparently, in belated recognition of the primacy of the ARB as regards the City Council's manifest intent to move the Slave Auction Block, submit to the ARB a Verified Application for a Certificate of Appropriateness (hereinafter referenced *qua* "COA"), and annexed hereunto, and incorporated herewith, by reference, as if set out in full, *qua* "Petitioners' Exhibit 'F'", is a true copy of the said COA application (hereinafter referenced *qua* "the COA Application");

27. That, the COA Application can only be characterized, charitably, as a *post hoc* maneuver by the City Council, to attempt to get the ARB to put its *imprimatur* on the City Council's above-referenced improper 11 June 2019, respecting the Slave Auction Block;

28. That, as it happened, the ARB would have nothing of such an exercise, and did not undertake any decision as regards the COA Application;

29. That, in evident recognition of the untenable position in which the above-referenced sequence of improvident steps of the City Council had placed the ARB, ARB Chair Jon Gerlach prepared and had entered into the ARB record, respecting the COA Application, on 12 August 2019, a written entitled "*Chair's Written Statement re Moving the Slave Auction Block . . .*", and, annexed hereunto, and incorporated herewith by reference thereto, as if set out in full, *qua* "Petitioners' Exhibit 'G'", is a true xerographic copy of the Chair's said statement (referenced hereinafter *qua* "the ARB Chair's Statement");

30. That a perusal of the ARB Chair's Statement constitutes an accurate encapsulation of the predicament in which the City Council had placed the ARB, both from a factual, as well as a legal standpoint, including, *inter alia*, at footnote #2, a spot on recitation of the applicability of the Dillon Rule to the then emerging public controversy;

31. That, evidently heedless of the ARB Chair's Statement, the City Council went ahead anyway, and, at the 12 November 2019, Regular Meeting of the City Council, and purported to act, "Granting a Certificate of Appropriateness for the Relocation of the Slave Auction Block to the Fredericksburg Area Museum", and, attached hereto, and incorporated herewith by reference thereto, as if set out in full, *qua* "Petitioners' Exhibit 'H'", is a true, unexpurgated copy of the subject Order (referenced hereinafter *qua* "the 12 November Order of the City Council");

32. That, as pointed out in the ARB Chair's Statement, the 12 November 2019 Order of the City Council is irrefragably improper, *void ab initio*, and contrary to the Dillon Rule;

33. That the Dillon Rule, which was first recognized by the Supreme Court of Virginia, in the case *Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896), a decision in which the Court quoted with approval from the learned treatise 1 Dillon on Mun.Corp. (3d ed.), § 89, summed up its application as follows, *viz.* :

"[A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; Third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

Id. at 714, 25 S.E. at 1002. *Accord: County Board v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *Tabler v. Fairfax County*, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980); *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977); *City of Richmond v. County Board*, 199 Va. 679, 684, 101 S.E.2d 641, 644-45 (1958); *Donable v. Harrisonburg*, 104 Va. 533, 535, 52 S.E. 174, 175 (1905);

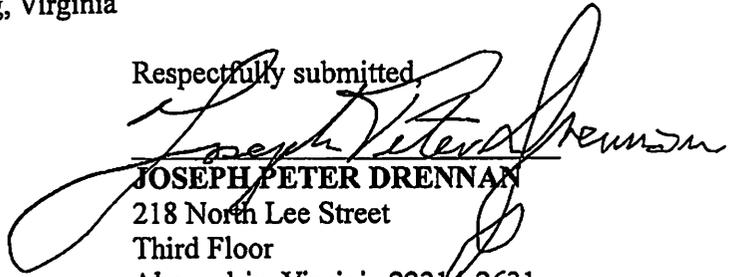
34. That, although the Dillon Rule has been applied by the Supreme Court of Virginia for over 125 years, as perspicaciously observed by ARB Chair Gerlach, in the ARB Chair's Statement, it remains the law in Virginia to this day; &

35. That, what that means, essentially, is that the City Council is denied an argument to attempt to bend the law to justify its subject improper action.

WHEREFORE, and for the foregoing reasons your Petitioners, each of them, ever pray, *inter alia*, that the instant Petition be granted; that the subject 12 November 2019 action of the City Council be vacated and voided, and that they be granted all other and further relief as this Honorable Court may deem just and proper under the existent circumstances.

Dated: 10 December 2019, at Fredericksburg, Virginia

Respectfully submitted,



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