IN THE

SUPREME COURT OF VIRGINIA

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WETLANDS AMERICA TRUST, INC.,

Appellant,

v.

WHITE CLOUD NINE VENTURES, L.P.,

***Appellee*.**

Record No. 141577

Brief of the Commonwealth of Virginia as *Amicus Curiae* in Support of Appellant

MARK R. HERRING
Attorney General of Virginia
JEFFREY M. BOURNE
Deputy Attorney General
***RICHARD A. MAHEVICH (VSB No. 40072)**
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (703) 934-0560
Facsimile: (703) 277-3547
rmahevich@oag.state.va.us

Counsel for the Commonwealth of Virginia as Amicus Curiae in Support of Appellant

**Counsel of record*

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PRELIMINARY STATEMENT

Pursuant to Rule 5:30 of this Court, the Commonwealth of Virginia respectfully files this brief as *Amicus Curiae* in Support of Appellant Wetlands America Trust, Inc. ("WAT") in this appeal from the decision of the Circuit Court of Loudoun County issued by letter opinion dated June 19, 2014 and entered on August 1, 2014 (the "Letter Opinion").[1] The parties have been granted numerous assignments of error and cross-error in this case, but the Commonwealth files this brief to address solely the issue of the legal standard applicable to the interpretation of conservation easements.

The Commonwealth submits that conservation easements are, by their very nature, distinguishable from restrictive covenants and should not be interpreted using the same standard. While conservation easements do restrict the use of land, they are intended to protect and preserve open space, historic assets and other vital resources of the Commonwealth and to further important public-policy interests of the Commonwealth. In support of these policies, the Commonwealth has invested heavily in the infrastructure and support necessary to encourage the donation of these easements in perpetuity. The circuit court applied an incorrect standard in

[1] JA 146.

interpreting the easement here, and, if upheld, the decision will cause difficulties in enforcing the terms of thousands of easements and in fulfilling the policies of the Commonwealth as expressed in the Constitution of Virginia and the Virginia Code.

Accordingly, the Commonwealth respectfully requests that this Court reverse the circuit court's decision with respect to this issue.

STATEMENT OF THE CASE

In 2001, Caeli Farms, LLC, the predecessor landowner to White Cloud Nine Ventures, L.P. ("White Cloud"),[2] granted a conservation easement under the Virginia Conservation Easement Act[3] to Appellant WAT.[4] The express purpose of the easement was and remains:

> to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition, as evidenced by the Report, for conservation purposes as well as permitted agricultural pursuits and to prevent any use of the Protected Property which will

[2] By virtue of its purchase of the land, White Cloud stepped into the shoes of and assumed the role of the grantor with respect to the conservation issue. *See* Va. Code Ann. § 10.1-1014 (2012) ("[A] conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."). Absent a release of record, which has never been argued in this case, a conservation easement would be binding on subsequent owners of the property.

[3] Va. Code Ann. §§ 10.1-1009 through 10.1-1016 (2012).

[4] JA 958.

> impair significantly or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem.[5]

In February 2008, White Cloud purchased the property subject to the recorded easement.[6]

After the purchase of the property, disputes arose between WAT and White Cloud regarding the interpretation of the terms of the easement. White Cloud did not dispute that the easement in question had been properly placed on the property, nor did it dispute that the easement was a restriction on the property. At issue were whether certain provisions of the easement were ambiguous and, if so, how to interpret those ambiguous provisions.

Following a five-day trial in April 2014, the Circuit Court of Loudoun County issued a final letter opinion adopting the following rule of construction with respect to the conservation easement: "under Virginia case law restrictive covenants are not favored" because restrictive covenants prevent the landowner from freely using the land.[7] Applying this rule of construction, the court found in favor of White Cloud in almost every

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[5] *Id*. at 962.

[6] *Id*. at 147.

[7] *Id*. at 149.

situation where it sought to develop the land, in contravention of the conservation purpose of the easement.[8]

For example, White Cloud constructed a parking lot on the protected property.[9] WAT objected to the parking lot because "it materially altered the topography of the property"—an alteration specifically prohibited by the terms of the easement.[10] The court found, however, that construction of the parking lot was a permitted use, on the basis that any ambiguities in the easement that might preclude the construction of the lot must be construed in favor of the property owner, not the easement holder.[11]

WAT's petition for appeal was granted on April 13, 2015. The appeal was granted on numerous assignments of error and assignments of cross-error.[12] In this brief, however, the Commonwealth addresses only the sixth assignment of error—that "[t]he trial court erred when it applied the

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[8] *See, e.g.*, *id*. at 167 (holding that ambiguity regarding restriction on ground area covered by a structure must be resolved in favor of White Cloud).

[9] *Id*. at 163.

[10] *Id.*

[11] *Id*. at 164.

[12] *Id.*

common law principles for restrictive covenants to a conservation easement."[13]

Conservation easements held by private parties and open-space easements held by public bodies, including the Commonwealth, are very similar and function in much the same way. These easements are intended to protect and preserve open space, historic resources and other vital resources of the Commonwealth and to further important public policy interests of the Commonwealth. The Commonwealth submits that both conservation easements and open-space easements are favored under the law, and that terms of such easements should be construed to achieve the valid conservation purposes set forth in the Constitution of Virginia and the Virginia Code.

Accordingly, the Commonwealth respectfully submits that the circuit court erred when it applied the standard applicable to restrictive covenants to a valid easement under the Virginia Conservation Easement Act, and asks that this Court reverse the circuit court on this point.

APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred when it applied the common law principles for restrictive covenants to a conservation easement.[14]

[13] *Id*.

ARGUMENT

A. Standard of review

The interpretation of a conservation easement created under the Conservation Easement Act, Va. Code Ann. §§ 10.1-1009 through 10.1-1016, is a question of law reviewed de novo.[15]

B. The circuit court recognized but failed to apply the proper rule of construction applicable to deeds of easement

Under accepted rules of construction, any ambiguity in a deed is resolved in favor of the grantee and against the grantor:[16]

> "Thus, an instrument granting an easement . . . must, consistent with its language, be most strongly construed

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[14] *Id*. As indicated above, of the numerous assignments of error and cross-error in this case, the Commonwealth addresses only this one.

[15] "We review de novo a circuit court's interpretation of covenants, deeds, options, and other related documents." *Beeren & Barry Investments v. AHC, Inc.*, 277 Va. 32, 37 671 S.E.2d 147 (2009) (citing *Perel v. Brannan*, 267 Va. 691, 698, 594 S.E.2d 899, 903 (2004); *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). *See also, e.g.*, *Rodriguez v. Leesburg Business Park*, 287 Va. 187, 193, 754 S.E.2d 275, 278 (2014).

[16] *CNX Gas Co. v. Rasnake*, 287 Va. 163, 167, 752 S.E.2d 865, 867 (2014). *See also Hamlin v. Pandapas*, 197 Va. 659, 664, 90 S.E.2d 829, 833 (1956); *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.*, 116 Va. 211, 221-22, 81 S.E. 93, 97 (1914); *Kirby v. Town of Claremont*, 243 Va. 484, 490, 416 S.E.2d 695, 700 (1992); *Painter v. Alexandria Water Co.*, 202 Va. 431, 436 117 S.E.2d 674, 678 (1961); *Hite v. Luray*, 175 Va. 218, 224, 8 S.E.2d. 369, 371 (1940) ("[A] deed is construed most strongly against the grantor and in favor of the grantee."); *Bailey v. Town of Saltville*, 279 Va. 627, 633, 691 S.E.2d 491, 493 (2010).

> against the grantor and most favorably to the grantee, and construed so as to pass to the grantee the greatest possible estate."[17]

"This rule has been called one of the most just and sound principles of the law because the grantor selects his own language."[18] Although the circuit court acknowledged that rule,[19] it failed to apply it correctly.

The relevant deed is the Deed of Gift of Conservation Easement in which the grantor—Caeli Farms, LLC, the original landowner—conveyed the easement to WAT, the grantee. Obviously, during the period Caeli Farms owned the property, any dispute concerning ambiguous restrictions in the easement would be resolved in favor of WAT. That rule did not change when White Cloud purchased the property from Caeli Farms subject to the recorded easement. White Cloud stepped into the shoes of the grantor and thereby undertook the grantor's obligations. Accordingly,

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[17] *Painter*, 202 Va. at 436, 117 S.E.2d at 674 (quoting 3 C.J.S., Waters, § 27-b, at 644) (1961). *See also Hamlin*, 197 Va. at 664, 90 S.E.2d at 833 (interpreting easement language and stating that "[i]n the construction of language contained in a deed the grantor must generally be considered as having intended to convey all that the language he employed is capable of passing to the grantee, and where the description admits of two constructions, it will be construed most favorably to the grantee").

[18] *Hite*, 175 Va. at 224, 8 S.E.2d at 371.

[19] JA 151.

any ambiguities in the deed should still be construed against White Cloud in favor of WAT.

The circuit court recognized the rule that ambiguity in a deed is resolved in favor of the grantee and against the grantor,[20] but it failed to apply it correctly here. Instead, it construed nearly all ambiguities in the Deed of Easement in favor of White Cloud.[21] If upheld, the circuit court's misapplication of the rule would threaten the correct interpretation of thousands of conservation and open-space easements. This Court should correct the circuit court's error.

C. The common-law rule that restrictive covenants are not normally favored does not apply to easements created pursuant to the Conservation Easement Act or the Open-Space Land Act.

The circuit court noted that "under Virginia law restrictive covenants are not favored."[22] In support of this proposition, the court quoted from this Court's decision in *Waynesboro Village, L.L.C. v. BMC Properties*:

> "Valid covenants restricting the free use of land, although widely used, are not favored and must be strictly

[20] *Id*. at 151.

[21] *See*, *e.g*., *id*. at 159-60 (construing ambiguity regarding definition of "farm building" in favor of White Cloud); *id.* at 167 (holding that ambiguity regarding restriction on ground area covered by a structure must be resolved in favor of White Cloud).

[22] *Id*. at 149.

> construed and the burden is on the party seeking to enforce them to demonstrate that they are applicable to the acts of which he complains. Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property."[23]

Virginia Code § 1-200 provides that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." This Court has also underscored that:

> [t]he nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.[24]

In light of these authorities, the circuit court's decision should be evaluated to determine whether (1) the common law as applied here is repugnant to the Constitution of Virginia; (2) the General Assembly has altered the legal landscape regarding open-space and conservation easements; or (3) the further application of the common law would be

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[23] *Id.* (quoting *Waynesboro Village, L.L.C. v. BMC Props.,* 255 Va. 75, 80, 496 S.E.2d 64, 68 (1998) (quoting *Friedberg v. Riverpoint Building Committee*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977)).

[24] *Surratt v. Thompson*, 212 Va. 191, 193, 183 S.E.2d 200, 202 (1971).

unjust. As demonstrated below, all three considerations point against the conclusion reached by the circuit court.

1. Application of the common-law rule regarding restrictive covenants to conservation and open-space easements is repugnant to the Constitution of Virginia.

In Virginia, the conservation of open space and natural resources and the preservation of historic resources have been recognized as worthy goals of public policy, the promotion of which is beneficial to the public. This Court discussed Virginia's public policy in this area in *United States v. Blackman*,[25] where it noted that the case involved stakes much larger than simply the instant dispute:

> Underlying the issue is a degree of apparent conflict between the common law preference for unrestricted rights of ownership of real property and the public policy of this Commonwealth as expressed in Article XI of the Constitution of Virginia, ratified by the people of this Commonwealth in 1970, that "it shall be the policy of this Commonwealth to conserve . . . its historical sites and buildings."[26]

The Court then examined Virginia's long history of permitting and promoting land preservation, noting that "this public policy was expressly

[25] 270 Va. 68, 613 S.E.2d 442 (2005)

[26] *Id.* at 76, 613 S.E.2d at 445.

embodied in Article XI of the Constitution of Virginia, which, since 1970, has provided" as follows:

> "§ 1. To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.
>
> § 2. In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations . . . ."[27]

It is clear that an application of the common law that impairs the Commonwealth's express policy of protecting its open spaces, its natural resources, and its heritage would be repugnant to the Constitution.

[27] *Id.* at 79, 613 S.E.2d at 447 (quoting Va. Const. art. XI).

2. Application of the common-law rule regarding restrictive covenants to conservation and open space easements is inconsistent with statutes enacted by the General Assembly.

The General Assembly has acted in a number of ways to further the conservation goals set forth in the Constitution of Virginia, and the circuit court's interpretation undermines them. The General Assembly enacted the Open-Space Land Act[28] and the Conservation Easement Act,[29] which specifically authorize the use of easements for the purpose of land conservation to protect natural, cultural and historic resources. For example, the Conservation Easement Act defines conservation easements as interests in land,

> the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.[30]

An official Opinion of the Attorney General of Virginia has likewise recognized that the statutory purpose of conservation easements is "to facilitate conservation and historic preservation in furtherance of the

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[28] Va. Code Ann. § 10.1-1700 *et seq.* (2012).

[29] Va. Code Ann. § 10.1-1009 *et seq.* (2012).

[30] Va. Code Ann. § 10.1-1009 (2012). The Open-Space Land Act includes identical language within the definition of open space easements. *See* Va. Code Ann. § 10.1-1700.

Commonwealth's policy to protect its natural resources and historic sites."[31] The Opinion goes on to underscore that "the statutory framework of [the Open-Space Land Act and the Conservation Easement Act] demonstrate[s] [that] *conservation easements serve a much more public function than conventional easements*."[32] The General Assembly has made no changes to these statutes since the Opinion was issued, and thus is understood to have acquiesced in the Attorney General's interpretation.[33]

In addition to *authorizing* conservation easements, the Commonwealth has taken steps to *encourage* and *manage* them for the benefit of the public, and has, in fact, invested heavily in those efforts. It created an agency, the Virginia Outdoors Foundation, to solicit and steward such easements on behalf of the Commonwealth.[34] It has also created the

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[31] 2012 Op. Va. Att'y Gen. 31, 32.

[32] *Id.* (emphasis added).

[33] "[T]he General Assembly is presumed to have knowledge of the Attorney General's interpretation of statutes, and the General Assembly's failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation." *Tazewell County School Board v. Brown*, 267 Va. 150, 163, 591 S.E.2d 671, 677 (2004) (quoting *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 458, 464 S.E.2d 148, 153 (1995).

[34] Va. Code Ann. § 10.1-1800 *et seq. (2012).*

Virginia Land Conservation Fund, managed by the Virginia Land Conservation Foundation, the purpose of which is to

> [a]cquir[e] fee simple title or other rights, including the purchase of development rights, to interests or privileges in property for the protection or preservation of ecological, cultural or historical resources, lands for recreational purposes, state forest lands, and lands for threatened or endangered species, fish and wildlife habitat, natural areas, agricultural and forestal lands and open space; . . . .[35]

The Foundation also provides funding to state agencies, including the Virginia Outdoors Foundation, to advance these purposes.[36] Similarly, the Virginia Board of Historic Resources is charged with the designation of historic landmarks and districts, the establishment of preservation practices and the acquisition of historic preservation easements, among other things.[37] Other agencies, including the Department of Conservation and Recreation and the Department of Forestry, routinely hold such easements and are responsible for stewardship and enforcement of their provisions. Finally, Virginia Code § 2.2-1509.4 *requires* that the Governor include in the Budget Bill a recommended appropriation from the general fund to the

[35] Va. Code Ann. § 10.1-1020(A)(1) (2012).

[36] Va. Code Ann. § 10.1-1020(A)(2) (2012).

[37] Va. Code Ann. § 10.1-2204 (2012).

Virginia Land Conservation Fund, the Civil War Site Preservation Fund and the Virginia Farmland Preservation Fund.[38]

This Court has itself recognized the evolution of Virginia's public policy towards support of conservation and open-space easements:

> The 1962 amendment and clarification of Code § 55-6 with regard to the transferability of easements in gross has facilitated, in part, Virginia's long recognition of the value of conserving and preserving the natural beauty and historic sites and buildings in which it richly abounds . . . .[39]

After tracing the long history of the General Assembly's actions in granting authority and creating agencies authorized to hold easements, the Court concluded that "[t]hese statutes evince a strong public policy in favor of land conservation and preservation of historic sites and buildings . . . ."[40]

The General Assembly has clearly altered the common law with respect to conservation and open-space easements, investing significant funds and resources into programs specifically designed to foster and promote their use. This commitment belies the Letter Opinion's conclusion that an interpretation upholding their terms is "not favored."[41]

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[38] Va. Code Ann. § 2.2-1509.4 (2014 Supp.).

[39] *Blackman*, 270 Va. at 78, 613 S.E.2d at 447

[40] *Id.* at 79, 613 S.E.2d at 447.

[41] JA 149.

3. Application of the common-law rule regarding restrictive covenants to conservation and open-space easements is unjust.

The circuit court's interpretation, if upheld, will make stewardship and enforcement more difficult, thereby undermining the continued protection of the resources that the statutes were designed to protect. For years, conservation and open-space easements have been drafted and entered into under the assumption that their terms would be construed in favor of the conservation goals espoused. As this case demonstrates, that goal becomes challenging as properties convey to third parties or pass to succeeding generations who were not privy to the original conservation goals of the easement grantor.

Virginia's statutes are drawn to allow perpetual protection of the conservation values protected by conservation and open-space easements.[42] Perpetual protection is required to receive any federal tax benefit.[43] The statutes contain provisions to protect the viability of these easements moving forward. The Conservation Easement Act creates a default mechanism to guarantee succession if an easement holder

[42] Va. Code Ann. §§ 10.1-1010, -1701, -1703 (2012).

[43] I.R.C. § 170(h)(2)(C), (5)(A); Treas. Reg. § 1.170A-14(b)(2)

disappears or becomes unqualified to hold the easement.[44] The Open-Space Land Act contains what is essentially a no-net-loss-of-open-space provision: a prohibition against either diversion or conversion of property protected by an open-space easement without replacement of the affected property by property of equal quality and character.[45]

The Conservation Easement Act was the General Assembly's response to the directive in Article XI, section 2 of the Constitution of Virginia to enact statutes carrying out the public policy set forth in Article XI, section 1.[46] As this Court has recognized, the Act "facilitated the continued creation of such easements by providing a clear statutory framework under which tax exemptions are made available to a charitable organization devoted to those purposes and tax benefits and incentives . . . to the grantors of such easements."[47]

In 1999, the General Assembly expanded the tax incentives for donating conservation easements by enacting the Land Conservation

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[44] Va. Code Ann. § 10.1-1015 (2012).

[45] Va. Code Ann. § 10.1-1704 (2012).

[46] *See Robb v. Shockoe Slip Found.*, 228 Va. 678, 683, 324 S.E.2d 674, 677 (1985).

[47] *Blackman*, 270 Va. at 81, 613 S.E.2d at 448.

Incentives Act.[48] Donors of qualifying easements receive credits that offset Virginia income-tax obligations. The credits equal 40% of the fair market value of the donated interest.[49] The grantor can also claim charitable-tax deductions for the fair market value of the donation that reduce federal and state taxable income.

These significant benefits do not come freely: specific obligations must be exchanged for the right to claim tax deductions. In return for the near-term[50] tax benefits, the General Assembly demanded natural and historic-resource protections that last *in perpetuity*. Qualifying easements are required by statute to include enforceable provisions that ensure the easement holder can enforce the conservation restrictions forever.[51] Accordingly, the Act balanced the immediate tax benefit to the grantor with an obligation by the grantor (and his successors) to forever protect the land impacted by the easement by complying with the terms of the conservation easement.

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[48] Va. Code Ann. § 58.1-510 *et seq. (2013).*

[49] Va. Code Ann. § 58.1-512(A) (2013).

[50] Originally, allowable credits could be claimed for the year of donation and carried forward for five additional years. By 2008, allowable credits could be claimed for the year of donation with unused credits potentially carried forward for ten years. *See* Va. Code Ann. § 58.1-512(C)(1) (2013).

[51] Va. Code Ann. § 58.1-512(C)(2) (2013).

Virginia's program has been successful in promoting land conservation under this program. As of January 2012:

> more than 2,500 donations of interests in land [were] made under the credit . . . cover[ing] approximately 540,000 acres in Virginia . . . . The Department of Taxation ha[d] issued $1.25 billion in credits[,] . . . and the Land Preservation Tax Credit [offset] taxpayer liabilities by $120 million in TY 2008.[52]

These conservation and open-space easements fill the land records of the county or city in which the property is located, where they must be recorded. A purchaser of property that is subject to one of these easements take title with notice of the restrictions. In fact, they are typically able to make the purchase at a reduced price *because of* the restrictions imposed by the easement.

Given the lengths to which the General Assembly has gone to preserve the protections afforded by these easements, it is not logical or consistent to conclude that the language of the easements should be interpreted in a way to disadvantage the holder of the easement. This interpretation denies the Commonwealth the benefit of thousands of

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[52] Review of the Effectiveness of Virginia Tax Preferences, Sen. Doc. 4, (published January 2012), at 49-51, Joint Legislative Audit and Review Commission. *See also* Virginia Outdoors Foundation Website (showing 761,624 acres protected by easement), *available at* www.vofonline.org (last visited May 21, 2015).

bargains in which it provided the grantor with tax credits and tax deductions in exchange for easements allowing grantees to permanently protect the important natural and historic assets. Under the framework adopted by the circuit court, landowners would be able to grant conservation easements, accept the associated generous near-term tax benefits, and later sell the property to a third party to hold free of the contemplated perpetual restrictions. That result would contravene the purposes and goals of the Open-Space Land Act, the Land Conservation Incentives Act, the Conservation Easement Act, and the Constitution of Virginia.

The circuit court repeatedly criticized the perceived failure of the WAT easement to be more specific in its prohibitions. But the perpetual nature of conservation easements requires couching both prohibitions and permitted activities in general terms. Such an approach recognizes that flexibility is essential in a document that is intended to apply in perpetuity. Conservation easements cannot be limited to balancing existing activities on the land with current environmental concerns and the need to allow the land to remain economically viable. The easements must permit the accommodation of all of these concerns in perpetuity. It is impossible to predict what forms agriculture, for instance, may take in the decades after an easement is donated. Conservation easements are, therefore, drafted

in a manner intended to provide flexibility while protecting the identified resources.

The circuit court's failure to review these easements in light of their public purpose to recognize the financial and practical implications of using the standard of review it did creates a situation that is unjust to the public, unjust to the intent of the original grantors of the easement, and unjust to grantees, who are obligated to enforce the easements that were created to promote and protect public policy but that are undermined by the circuit court's interpretation.

D. <u>Modern jurisprudence supports Appellant's interpretive approach.</u>

Finally, modern jurisprudence supports the positions argued in this brief. The Restatement (Third) of Property recognizes that servitudes should be interpreted to uphold public policy:

> A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created . . . . [U]nless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred.[53]

[53] Restatement (Third) of Property: Servitudes § 4.1 (2000).

In the case of conservation and open-space easements authorized under Virginia law, the Commonwealth's public policy is clearly to protect the natural resources that are subject to the easements.

> Expressly created servitudes are typically the result of contractual transactions . . . . [H]eavy emphasis is placed on the written expressions of the parties' intent. The fact that servitudes are intended to bind successors to interests in the land in addition to the original parties, and are generally intended to last for an indefinite period of time, lends increased importance to the writing because it is often the primary source of information available to a prospective purchaser of the land. The language should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it in the context of the parcels of land involved . . . .[54]

In other words, conservation and open-space easements should not be treated as restrictive covenants, imposed upon others merely to restrict their free use of land. Rather, they are conveyances that parties freely enter into that should be interpreted in light of the Commonwealth's strong public policy in favor of land conservation. The latter approach is the one that consistent with the laws of the Commonwealth and the prior rulings of this Court. It is not the approach taken by the circuit court in its Letter Opinion.

[54] Restatement (Third) of Property: Servitudes § 4.1(1) (2000).

CONCLUSION

The circuit court erred in failing to construe ambiguities in the deed of easement against White Cloud, the successor-in-interest to the deed's grantor. That error led the court to wrong conclusions and undermines the statutory framework adopted by the General Assembly to effect the conservation goals set forth in the Constitution of Virginia.

The circuit court failed to consider properly the differences between restrictive covenants on the one hand, and conservation and open-space easements on the other, which are favored under the law and supported by public policy. The rule applied in this case was: (1) repugnant to the Constitution of Virginia; (2) inconsistent with the statutes enacted by the General Assembly that departed from the common law; and (3) manifestly unjust in that it deprived the Commonwealth of the benefits in which it has invested by granting income-tax deductions and tax credits to easement grantors.

The Commonwealth asks that this Court overrule the circuit court's interpretation and hold that the easement should be interpreted in the manner most likely to support Virginia's public policy in favor of land conservation.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: ***/S/***_____

RICHARD A. MAHEVICH (VSB No. 40072)
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (703) 934-0560
Facsimile: (703) 277-3547
rmahevich@oag.state.va.us

MARK R. HERRING
Attorney General of Virginia

JEFFREY M. BOURNE
Deputy Attorney General

RULE 5:26(H) CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, that the foregoing brief complies with the requirements of Rule 5:26.

/S/ _____
RICHARD A. MAHEVICH (VSB No. 40072)
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (703) 934-0560
Facsimile: (703) 277-3547
rmahevich@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On May 22, 2015, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5A:19(f). A copy was emailed to Andrew G. Mauck, Esquire, counsel for appellant, at **andy@amauck.com** and E. Andrew Burcher, Esquire, counsel for the appellee at **eaburcher@thelandlawyers.com**.

In accordance with Rule 5A:4(d), I certify that this document contains 5,809 words, in compliance with Rules 5A:19(a) and 5A:21(g).

Andrew G. Mauck, VSB No. 35177
Melissa R. Tannery, VSB No. 41843
ANDREW MAUCK PLC
416 W. Franklin St.
Richmond, Virginia 23220
Telephone: (804) 512-3522
Facsimile: (804) 643-2829
andy@amauck.com
mtannery@amauck.com

Counsel for Appellant Wetlands America Trust, Inc.

Andrew Burcher, VSB No. 41310
Michael Kalish, VSB No. 73090
Walsh, Colucci, Lubeley, Emrich& Walsh, P.C.
4310 Prince William Parkway, Suite 300
Woodbridge, VA 22192
Telephone: (703) 680-4664
Facsimile: (703) 680-2161
aburcher@thelandlawyers.com
mkalish@thelandlawyers.com

Counsel for Appellee White Cloud Nine Ventures L.P.

/S/ _____
RICHARD A. MAHEVICH (VSB No. 40072)
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (703) 934-0560
Facsimile: (703) 277-3547
rmahevich@oag.state.va.us