IN THE
SUPREME COURT OF VIRGINIA

Record No. 141577

WETLANDS AMERICA TRUST, INC.,
Appellant,

v.

WHITE CLOUD NINE VENTURES, L.P.,
Appellee.

BRIEF OF THE NATURE CONSERVANCY, THE PIEDMONT ENVIRONMENTAL COUNCIL, THE LAND TRUST OF VIRGINIA, THE LAND TRUST ALLIANCE, THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, AND THE CIVIL WAR PRESERVATION TRUST D/B/A THE CIVIL WAR TRUST AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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Subject to their Motion for Leave to File Brief *Amicus Curiae*, the Nature Conservancy, the Piedmont Environmental Council, The Land Trust of Virginia, The Land Trust Alliance, The National Trust for Historic Preservation in the United States, and the Civil War Preservation Trust d/b/a The Civil War Trust (collectively, the "Land Trusts") respectfully submit this brief as *Amici Curiae* pursuant to Rule 5:30 of the Rules of this Court in support of Appellant, Wetlands America Trust, Inc. ("WAT").[1]

STATEMENT OF INTEREST

The Land Trusts are non-profit, land conservation organizations that consist of the following entities:

The Nature Conservancy (the "Conservancy"). The Conservancy is an international non-profit conservation organization founded in 1951 and incorporated in the District of Columbia. The Conservancy's mission is to preserve the lands and waters on which all life depends. The Conservancy is the largest private owner of conservation land in the United States—over 1.9 million acres. The Conservancy's nearly 4,000 staff members work in

[1] The Land Trusts state that no counsel for any party authored this brief in whole or in part and that no party made any monetary contribution toward the preparation or submission of this brief. The Land Trusts, by counsel, requested the consent of the parties to file this brief *amici curiae* pursuant to Rule 5:30 (b)(2) of the Rules of this Court. The Land Trusts obtained consent from the Appellant, but the Appellee refused to consent, thus necessitating the need for the Land Trusts to file a motion for leave to file the brief pursuant to Rule 5:30(c).

50 states and 39 countries, including at preserve sites and as part of a multitude of specialized conservation programs. The Conservancy currently holds over 2,500 conservation easements nationwide covering over 3 million acres of conservation land. Pursuant to the Virginia Conservation Easement Act, the Conservancy holds 174 conservation easements in Virginia covering over 67,000 acres of Virginia conservation land.

The Piedmont Environmental Council ("PEC"). Founded in 1972, PEC is dedicated to preserving and protecting Virginia's rural economy, environmentally sensitive and productive agricultural lands, scenic open space, and historically significant lands and structures within Virginia's Piedmont region. Like the Conservancy, PEC is qualified to hold conservation easements pursuant to the Virginia Conservation Easement Act. Through PEC's outreach, assistance and work with other land trusts, localities, and state and federal agencies, residents of the region have placed more than 340,000 acres under perpetual conservation easements. As an easement holder, accredited land trust, and conservation policy advocacy organization, PEC is committed to the policies that protect all conservation easements in Virginia.

The Land Trust of Virginia ("LTV"). LTV is a private, accredited land trust founded in 1992 with a mission to preserve agricultural land and open

space in Virginia. Currently, LTV holds 140 conservation easements on 14,424 acres of land in 10 Virginia counties. LTV monitors these properties to ensure their preservation.

The Land Trust Alliance (the "Alliance"). The Alliance is a national conservation organization that was formed in 1982 to support land trusts and conservation organizations nationwide. Based in Washington, D.C., the Alliance has several regional offices throughout the United States and represents the collective interests of nearly 1 million individual members or supporters of the Alliance's member organizations. The Alliance supports and represents 1,116 land trusts nationwide. A strong advocate for the use of conservation easements to conserve private land, the Alliance is committed to defending the permanence of conservation easements.

The National Trust for Historic Preservation in the United States (the "National Trust"). The National Trust is a privately funded nonprofit organization, chartered by Congress in 1949, to further the historic preservation policies of the United States, and to "facilitate public participation" in the preservation of our nation's heritage. 54 U.S.C. § 312102(a). With the strong support of almost 800,000 members and supporters nationwide, including over 12,900 members in the Commonwealth of Virginia, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value

in programs and policies at all levels of government. The National Trust owns five historic properties in the Commonwealth, including Montpelier in Orange County. The National Trust holds over 120 conservation easements on historic properties in 25 states and the District of Columbia, including 17 such easements in Virginia.

The Civil War Preservation Trust (the "Civil War Trust"). The Civil War Trust is the largest nonprofit organization devoted to the preservation of America's hallowed battlegrounds. The Civil War Trust has preserved nearly 41,000 acres of battlefield land in 20 states, including more than 21,900 acres in Virginia. Further, the Civil War Trust has facilitated conservation easements to protect more than 8,900 acres of critical battlefield land in the Commonwealth and frequently partners with both state agencies and non-profit land trusts to ensure the perpetual preservation of battlegrounds that shaped American history.

The Land Trusts have a direct and significant interest in the outcome of this case. By applying the common law standard disfavoring private restrictive covenants to conservation easements, the trial court implicitly rejected Virginia's strong public policy favoring land conservation and historic preservation as expressly set forth in the Virginia Constitution, the Virginia Open-Space Land Act, the Virginia Conservation Easement Act,

and other legislative enactments of the Virginia General Assembly. A ruling from this Court that the common law standard of construction applies to conservation easements would fundamentally jeopardize the viability and integrity of the statutory scheme created by the General Assembly. Further, such a ruling would not only be wholly inconsistent with the Commonwealth's vital public policy interests and relevant statutes but also adversely affect the work of the Land Trusts and other conservation easement holders to advance those public policy interests.

For instance, this Court's affirmation of the applicability of the strict common law standard to conservation easements would likely result in increased legal challenges to easement terms that would undermine Virginia's public policy supporting conservation of the Commonwealth's natural, historic, and scenic resources. Such a ruling could also undermine the intent of property owners who voluntarily donate conservation easements and could discourage others from doing so. To avoid these and other harmful effects, it is imperative that this Court recognize that conservation easements, unlike common law restrictive covenants, are favored under Virginia law to further the strong public policy of the Commonwealth in support of land conservation and historic preservation.

ASSIGNMENTS OF ERROR

The Land Trusts' arguments focus on the following granted assignment of error:

> The Trial Court Erred When It Applied the Common Law Principles for Restrictive Covenants to a Conservation Easement.

(*See* J.A. 176, 180–85.)

The Land Trusts take no position regarding the substance of the remaining assignments of error presented by the Appellant.

STATEMENT OF THE CASE

In 2001, Caeli Farms, LLC ("Caeli Farms"), the predecessor landowner to Appellee White Cloud Nine Ventures, L.P. ("White Cloud"), granted a conservation easement (the "Conservation Easement") to WAT pursuant to the Virginia Conservation Easement Act. (*See* J.A. 12–42.) The stated purpose of the Conservation Easement is to:

> assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition . . . for conservation purposes as well as permitted agricultural pursuits, and to prevent any use of the Protected Property, which will impair significantly or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem.

(*Id*.at 16; *see also id*. at 149–52.)

In February 2008, White Cloud purchased the property subject to the Conservation Easement. (*Id*. at 147.) Thereafter, disputes arose between WAT and White Cloud regarding White Cloud's development of the property and the interpretation of the Conservation Easement's terms restricting development. WAT filed suit to enjoin White Cloud's development of the property on grounds that White Cloud's actions violated the Conservation Easement. (*See generally id*. at 1–89.)

After a five-day trial, the Circuit Court of Loudon County issued a Letter Opinion that applied the common law standard of interpreting restrictive covenants to the Conservation Easement:

> Valid covenants restricting the free use of land . . . are not favored and must be strictly 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.

(*Id*. at 149.) Using this standard of construction, the trial court ruled in White Cloud's favor in virtually every instance where White Cloud challenged the easement terms as ambiguous. WAT filed a timely notice of appeal, and, on April 13, 2015, this Court awarded WAT an appeal.

STANDARD OF REVIEW

This Court reviews "a circuit court's interpretation of covenants, deeds, options, and other related documents" *de novo*. *Beeren & Barry Investments v*. *AHC*, *Inc*., 277 Va. 32, 37 (2009) (*citing Perel v*. *Brannan*, 267 Va. 691, 698 (2004); *Wilson v*. *Holyfield*, 227 Va. 184, 187–88 (1984)).

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING THE COMMON LAW PRINCIPLES FOR RESTRICTIVE COVENANTS TO A CONSERVATION EASEMENT BECAUSE VIRGINIA'S STATUTES AND STRONG PUBLIC POLICY SUPPORTING LAND CONSERVATION AND HISTORIC PRESERVATION REQUIRE COURTS TO VIEW CONSERVATION EASEMENTS FAVORABLY AND TO CONSTRUE THEM TO FURTHER THEIR CONSERVATION GOALS.

The Virginia Constitution and the state statutes authorizing conservation easements make it abundantly clear that the Commonwealth of Virginia has expressed a strong public policy favoring land conservation and historic preservation. This public policy is of vital importance to Virginians because the scenic landscape of Virginia is a treasure of extraordinary beauty, critical natural resources, and major historical significance. Further, the farms and communities that are an integral part of this scenic landscape are vital to Virginia's agricultural economy and tourism industry.

As the primary statutory tool used by state agencies and non-profit organizations to effectuate Virginia's strong policy favoring land conservation, conservation easements are favored under Virginia law and must be construed to advance their conservation goals.

A. Conservation Easements Are Fundamentally Distinct From Restrictive Covenants.

Conservation easements are distinct from other encumbrances to land. As a general matter, restrictive covenants and other restrictions on the use of land are private contracts between private parties for private benefit. *See generally* James W. Ely, Jr. & Jon W. Bruce, *The Law of Easements & Licenses in Land* § 1:1. By contrast, conservation easements are creatures of statute that were unknown at common law. Conservation easements are held by government entities or charitable organizations for conservation purposes that provide a clear public benefit. *See* Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 Denv. U. L. Rev. 1057, 1058–59 (2006).

Conservation easements allow owners of land with important conservation qualities to choose to give up the right to develop the property in a manner that would diminish those qualities and to ensure the property's permanent conservation. Because conservation easements

further important public policies and social values, rather than the interests of private parties, they are fundamentally different in their nature and purpose from common law restrictive covenants, and courts should interpret conservation easements in light of their conservation goals.

B. The Virginia Constitution and Numerous State Statutes Demonstrate That Virginia Has A Strong Public Policy Favoring Land Conservation and Conservation Easements.

The Virginia Constitution and the state statutes authorizing conservation easements expressly evince Virginia's strong public policy in support of land conservation and historic preservation. It logically follows that conservation easements—the statutory tools for furthering this public policy—are favored under the law, unlike common law restrictive covenants.

1. The Virginia Constitution expresses a clear public policy favoring the conservation and preservation of Virginia's open-spaces, natural resources, and historic sites.

Virginia's policy favoring land conservation is of such public importance that it is expressly stated in the Constitution of Virginia. Specifically, Article XI, § 1 provides:

> 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.

Va. Const. art. XI, § 1.

To implement this policy, the Virginia Constitution granted the General Assembly the authority to protect the lands and natural resources of the Commonwealth, including through "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." *Id*. § 2.

2. The statutory enactments of the Virginia General Assembly further demonstrate Virginia's clear public policy favoring land conservation and conservation easements.

In 1966, the Virginia General Assembly enacted the Open-Space Land Act, which expressly authorizes the creation of conservation easements to be held by public bodies. *See* 1966 Va. Acts ch. 461 (codified in Va. Code §§ 10.1-1700 through -1705). In enacting the Open-Space Land Act, the General Assembly made several findings that supported the need for conservation easements in Virginia, including the following:

- "the rapid growth and spread of urban development are creating critical problems of service and finance for the State and local governments;"

- "the present and future rapid population growth in urban areas is creating severe problems of urban and suburban living;"

- "the provision and preservation of permanent open-space land are necessary to help curb urban sprawl, to prevent the spread of urban blight and deterioration, to encourage and assist more economic and desirable urban development, to help provide or preserve necessary park, recreational, historic and scenic areas, and to conserve land and other natural resources;" and

- "the acquisition or designation of interests and rights in real property by public bodies to preserve permanent open space land is essential to the solution of these problems, the accomplishment of these purposes, and the health and welfare of the citizens of the State."

Id.

Along with the Open-Space Land Act, the General Assembly enacted statutes in 1966 creating the Virginia Outdoors Foundation (the "VOF"), 1966 Va. Acts. ch. 525, and the Virginia Historic Landmarks Commission, 1966 Va. Acts ch. 632. The General Assembly created the VOF "to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth." Va. Code § 10.1-800. The VOF carries out its purpose, in part, by soliciting, monitoring, and enforcing conservation easements on behalf of the Commonwealth.[2] The Virginia Historic Landmarks

[2] *See generally* http://www.virginiaoutdoorsfoundation.org (last visited May 21, 2015).

Commission, now known as the Virginia Board of Historic Resources (the "VBHR"), was established to "designate historic landmarks, including buildings, structures, districts, objects and sites which constitute the principal historical, architectural, archaeological, and cultural resources which are of local, statewide or national significance . . . ." Va. Code § 10.1-2204.[3]

In 1988, the General Assembly again made clear Virginia's strong public policy favoring the conservation of Virginia's natural beauty through the enactment of the Virginia Conservation Easement Act, Va. Code §§ 10.1-1009 through 10.1-1016. The purpose of the Virginia Conservation Easement Act "was to codify and consolidate the law of conservation easements to promote the granting of such easements to charitable organizations." *United States v. Blackman*, 270 Va. 68, 81 (2005).

Additionally, through tax incentives, Virginia has made substantial financial investments to encourage private parties to donate conservation easements. For example, in 1999, the General Assembly expanded the tax incentives for donating conservation easements by enacting the Land Conservation Incentives Act. *See* Va. Code § 58.1-510 through -513.

[3] Other state agencies hold and enforce conservation easements. These agencies include the Virginia Department of Conservation and Recreation, the Virginia Department of Forestry, and the Virginia Department of Game and Inland Fisheries.

Under the Land Conservation Incentives Act, donors of qualifying conservation easements receive credits that offset their state income tax obligations. These credits equal 40% of the fair market value of the donated interest. Va. Code § 58.1-512A.

Through Article XI of the Virginia Constitution, the enactment of the Open-Space Land Act, the Virginia Conservation Easement Act, and the Land Conservation Incentives Act, and the creation of the VOF and the VBHR, the General Assembly has made it abundantly clear that Virginia has a strong public policy favoring land conservation and historic preservation and that conservation easements are favored under Virginia law to further that public policy. *See also Blackman*, 270 Va. at 79 (emphasizing that the aforementioned statutes "evince a strong public policy in favor of land conservation and preservation of historic sites").

Virginia's strong public policy favoring land conservation has been implemented on a grand scale. According to the Virginia Department of Conservation and Recreation, as of February 2015, almost 3.95 million acres or 15.62% of the total land area of Virginia is "currently protected" land. *See* http://www.dcr.virginia.gov/natural_heritage/clinfo.shtml (last visited May 21, 2015). In a Report to the Governor of Virginia and the General Assembly of Virginia, dated September 2012, the Joint Legislative

Audit and Review Commission reported the following: (a) "a total of $1.2 billion in [land preservation tax credits] was issued for donated easements or land [in Virginia] between tax years (TY) 2002 and 2011;" (b) Virginia taxpayers "have claimed approximately $901 million of the $1.2 billion in total credits;" and (c) from 1966 through TY 2011, Virginia received $77 million in federal grants from the Land and Water Conservation Fund "for the acquisition and development of open space for conservation and recreation." *See* Joint Legislative Audit and Review Commission Report to the Governor and General Assembly of Virginia, *Dedicated Revenue Sources for Land Conservation in Virginia* 5–6,10 (Senate Doc. No. 3 Sep. 2012), *available at* http://jlarc.virginia.gov/reports.shtml (last visited May 21, 2015).

In 2012, Virginia granted approximately $60 million in land preservation tax credits to protect approximately 44,000 acres in 73 localities in the Commonwealth. Similarly, in 2013, Virginia granted approximately $76 million in land preservation tax credits to protect approximately 61,000 acres in 67 Virginia localities. *See* Report of the Department of Conservation and Recreation, *Calendar Year 2013 Land Preservation Tax Credit Conservation Value Summary* i–ii (Dec. 2014), *available at* http://www.dcr.virginia.gov/land_conservation/lpc.shtml (last

visited May 21, 2015). Under the Open-Space Land Act and the Conservation Easement Act, conservation easements are a primary tool in implementing Virginia's strong public policy favoring conservation.

C. Virginia's Strong Public Policy Is the Natural Outgrowth of a Longstanding National Policy Favoring Conservation Easements to Protect America's National Heritage.

Since the 1930's, the United States has adopted a policy of utilizing conservation easements to protect precious scenic open-spaces and undeveloped lands. In the 1930s, the U.S. Fish and Wildlife Service ("FWS") obtained 275 conservation easements in North Dakota, South Dakota, and Minnesota to preserve animal refuge areas, and, between 1965 and 1985, the FWS acquired more than 21,000 conservation easements for the protection of approximately 1.2 million acres of wetlands that served as habitat for migratory waterfowl. *See* Report on 1985 National Survey of Government and Non-Profit Easement Programs, 4 Land Trusts' Exchange 9 (Dec. 1985).

Also in the 1930s, the United States began purchasing easements throughout the nation to protect scenic views along highways. For instance, during that time period, the National Park Service purchased easements encumbering thousands of acres in Virginia and North Carolina to protect scenic views along the Blue Ridge Parkway. *Id*.

To further the national policy to preserve America's open spaces and scenic vistas, Congress enacted the Federal Highway Beautification Act of 1965, which provided a significant financial incentive for States to enact conservation easement statutes. *See The Federal Highway Beautification Act of 1965*, Pub. L. No. 89-285, 79 Stat. 1032 (codified as amended at 23 U.S.C. § 319). Title III of the legislation provided States with additional funds, equal to three percent of the federal highway funds already appropriated to each State, for highway landscaping and scenic enhancement. If a State failed to use the extra funds for highway beautification, the funds would lapse. This federal legislation led to a flurry of new state statutes authorizing the use of conservation easements to protect the nation's natural beauty and historic sites, including Virginia's Open-Space Land Act. Significantly, every State, except North Dakota, has adopted enabling legislation authorizing conservation easements.[4] 4 Richard R. Powell, *Powell on Real Property* § 34A.01 (Michael Allan Wolf, ed.) (2006).

[4] The federal government may hold perpetual conservation easements in North Dakota. *North Dakota v. United States*, 460 U.S. 300 (1982). Further, North Dakota has adopted enabling legislation authorizing historic preservation easements for a term of years. *See generally* https://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf. (last visited May 21, 2015).

Congress also created a number of tax incentives to encourage private landowners to donate conservation easements encumbering their property. Under I.R.C. § 170(h)(1), for instance, a taxpayer may deduct for income tax purposes the fair market value of a donated perpetual conservation easement. To qualify, the contribution must be a "qualified real property interest," to a "qualified organization," and exclusively for conservation purposes." *Id*. § 170(h)(1)(A)–(C).

Landowners have conveyed to federal and state government entities and charitable conservation organizations, like the Land Trusts, conservation easements encumbering approximately 40 million acres. *See* National Conservation Easement Database, *available at* http://www.conservationeasement.us (last visited May 21, 2015).

D. The Trial Court Erred in Failing to Recognize That Conservation Easements, Unlike Common Law Restrictive Covenants, Are Favored Under Virginia Law.

Relying on *Waynesboro Village* , *L.L.C. v. BMC Props*., 255 Va. 75 (1998), the trial court ruled that conservation easements, like covenants "'restricting the free use of land, although widely used, are not favored and must be strictly 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.'" (J.A. at 4 (quoting *Waynesboro Village*, 255 Va. at 80).)

Applying this standard, the trial court either expressly or implicitly resolved virtually all alleged ambiguities in the document against WAT. (*See*, *e.g.*, *id*. at 159) (resolving ambiguity in definition of term "farm building" in favor of White Cloud); (*id*. at 163) ("[A]ny doubt about whether the erodibility is to be determined before or after the site is regraded must be resolved in favor of White Cloud."); (*id*. at 167) (stating the term "ground area" "must be strictly construed and the doubt resolved in White Cloud's favor."). The trial court's application of the common law standard regarding restrictive covenants to a conservation easement is entirely inconsistent and directly conflicts with Virginia's statutes and strong public policy favoring land conservation and conservation easements.

Virginia courts operate under a statutory mandate that provides: "The 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." Va. Code § 1–200. As demonstrated in Section I(B) above, the historic common law standard regarding restrictive covenants—the very standard applied by the trial court—is in fact repugnant to the public policy expressly set forth in Article XI of the Virginia Constitution. It is also in direct contravention of the General Assembly's

enactment of the Open-Space Land Act, the Virginia Conservation Easement Act, and the Land Conservation Incentives Act, and the General Assembly's statutory creation of the VOF and the VBHR to hold conservation easements on behalf of the Commonwealth. Further, the common-law standard is ill suited to the modern conservation easement and the public need to protect open spaces, natural resources, and historic sites. As such, the common law standard should not apply to conservation easements.

As recognized by Justice Holmes, the common law is not an inflexible codification of exact or inflexible rules, it is a system based on human "experience" and the "felt necessities of the time." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). The common law necessitates constant judicial assessment of the state of relevant social needs and customs. *See Surratt v. Thompson*, 212 Va. 191, 193 (1971) ("The 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."); *Cline v. Dunlora S., LLC*, 284 Va. 102, 107 (2012) ("The common law is dynamic, evolves to meet developing societal problems, and is adaptable to society's requirements at the time of its application by the Court.")

(quotation marks and citation omitted)). Virginia has made plain the public need for preserving open spaces and natural lands. The common law is a tool that should advance rather than frustrate Virginia's vital public policy interests.

E. The Third Restatement of Property Articulates the Proper Standard for Interpreting Conservation Easements.

The proper standard for construing conservation easements is the modern standard for the interpretation of servitudes provided in the *Restatement* (*Third*) *of Property*: *Servitudes* § 4.1 (2000). Under the Restatement, 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." *Id*. § 4.1(1). The Restatement emphasizes that servitudes should be read in a manner consonant with prevailing public policy, stating that when language in a servitude is capable of more than one reasonable interpretation, "that which is more consonant with public policy should be preferred." *Id*. § 4.1(2); *see also*, *e.g*., *id*. § 7.11 cmt. a (conservation servitudes held by public bodies or charitable organizations are afforded more stringent protection because of the public interest involved); *id*. § 8.5 (conservation servitudes held by governmental bodies or conservation organizations are enforceable by

coercive remedies and other relief designed to give full effect to the purposes of the servitude). Similarly, in Virginia, conservation easements should be interpreted in a manner consistent with the Commonwealth's laws and strong public policy supporting land conservation and historic preservation, and the conservation purposes of the easements.

Several Virginia cases have recognized implicitly that traditional legal principles regarding restrictive covenants are inapplicable to cases involving conservation easements.[5] In *Blackman*, this Court considered the validity and enforceability of a conservation easement donated to a private non-profit organization before enactment of the Virginia Conservation Easement Act. In its ruling, the Court recognized the tension "between the common law preference for unrestricted rights of ownership of real property and the public policy" of the Commonwealth to conserve "historic sites and buildings." *Blackman*, 270 Va. at 76. The Court recognized that through the Virginia Constitution, the Open-Space Land Act, the Virginia

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[5] Courts in other jurisdictions have also done so. *See*, *e.g.*, *Chatham Conservation Found.*, *Inc. v. Farber*, 779 N.E.2d 134, 139 (Mass App. Ct. 2002) (finding a conservation easement "must be construed beneficially, according to the apparent purpose of protection or advantage . . . it was intended to secure or promote.") (quotation marks and citations omitted); *State v. Rattee*, 761 A.2d 1076, 1082–83 (N.H. 2000) (holding state agency's decision not to approve construction of 5,500 square foot home on land protected by agricultural conservation easement was reasonable in light of easements' statutory purpose and availability of alternative site).

Conservation Easement Act, and other statutes, Virginia has expressed "a strong public policy in favor of land conservation and preservation of historic sites and buildings." *Id*. at 79. The Court resolved the question in favor of advancing Virginia's strong public policy encouraging conservation by finding that the conservation easement at issue was valid and enforceable. *Id*. at 79–82.

In *Piedmont Environmental Council v*. *Malawer*, 2010 WL 7372393 (Fauquier Cnty. 2010), the trial court rejected application of the common law doctrine of merger to invalidate a conservation easement. The court explained that due to the strong public policy in favor of land conservation and historic preservation, conservation easements "are not subject to the typical common law analysis of merger as would be appropriate to rights of way between two adjoining tracts." *Id*. at *2; *see also Bennett v*. *Comm'r of Food and Agric*., 576 N.E.2d 1365, 1367 (Mass. 1991) (explaining that "[w]here the beneficiary of [a land use] restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force.").

Virginia's Attorney General echoed the reasoning of *Malawer* in an official advisory opinion letter dated August 31, 2012. The Attorney

General noted that "[c]onservation easements . . . stand in sharp contrast to conventional easements, such as right-of-way or recreational easements." Hon. Kenneth T. Cuccinelli, II, Op. Att'y Gen. 2 (2012). Whereas conventional easements "are private agreements entered into for the exclusive benefit of the grantee," conservation easements are "authorized under [the Open-Space Land Act] and [the Virginia Conservation Easement Act] in order to facilitate conservation and historic preservation in furtherance of the Commonwealth's policy to protect its natural resources and historic sites." *Id*. In light of this policy, the Attorney General concluded that a conservation easement is "not extinguished by the application of the common law doctrine of merger of estates." *Id*. at 4.

Virginia's public policy strongly favors preservation of its natural lands, open spaces, and historic sites. The Virginia Constitution, the Open-Space Land Act, the Virginia Conservation Easement Act, and various other Virginia statutes clearly express and support this strong public policy. Further, this Court's decision in *Blackman* affirms that policy. These authorities lead squarely to the conclusion that conservation easements are favored under Virginia law as instruments to implement and further the Commonwealth's strong public policy interests. As recognized by this Court, the Circuit Court of Fauquier County, the Attorney General of

Virginia, and courts in other jurisdictions, in the context of conservation easements, common law doctrines disfavoring restraints on the use of property should yield to strong public policy in favor of land conservation and historic preservation.

II. THIS COURT'S AFFIRMATION OF THE CIRCUIT COURT'S APPLICATION OF THE COMMON LAW STANDARD REGARDING RESTRICTIVE COVENANTS TO CONSERVATION EASEMENTS WOULD CAUSE CONSIDERABLE HARM TO THE EFFORTS OF THE LAND TRUSTS AND OTHER CONSERVATION EASEMENT HOLDERS TO CONSERVE VIRGINIA'S OPEN SPACES, NATURAL RESOURCES, AND HISTORIC SITES.

A ruling from this Court that conservation easements are subject to the common law rule requiring restrictions on the free use of property to be strictly construed against the restriction would cause serious harm to the Land Trusts and other state and non-profit entities that hold, monitor, and enforce conservation easements. Such harm would extend to the general public in Virginia, as all citizens of the Commonwealth have a stake in land conservation and historic preservation in Virginia. Further, this Court's affirmation of the application of the common law standard to conservation easements would not only have a significant chilling effect on land conservation policy in Virginia but also set precedent that could adversely affect land conservation throughout the United States.

A. Affirming Use Of The Common Law Rule Would Embolden Landowners To Challenge Conservation Easement Terms And Likely Lead To Increased Litigation.

The Land Trusts and other holders of conservation easements often face legal challenges by persons or entities seeking to engage in activities that are expressly prohibited under a conservation easement's terms or are otherwise inconsistent with the spirit and the goals of the easement. An affirmation of the trial court's application of the common law standard regarding restrictive covenants to conservation easements would result in increased legal challenges to easement terms that would have a significant adverse impact on the easement holders' limited resources, especially for the Land Trusts and other conservation easement holders that are charitable organizations.

Armed with such a ruling, well-funded commercial developers, corporations, and individuals wishing to construct commercial tourist establishments, shopping centers, restaurants, and residential developments inconsistent with applicable conservation easement terms would have a strong incentive to challenge the easement terms. The likelihood of legal challenges would only increase the legal costs for the Land Trusts and other conservation easement holders, whether public or

private, charged with monitoring and enforcing such easements.[6] Further, staff members of such entities would have to spend a disproportionate amount of time dealing with litigation.

In the context of any such litigation, application of the common-law standard would clearly favor the party challenging the conservation easement's terms and put the easement holder at a disadvantage. Such a result would be inconsistent with the Commonwealth's public policy as embodied in the Virginia Constitution and relevant statutes, in addition to the easement's conservation goals. If the challenger were to succeed, more of Virginia's open spaces, rural heritage, and historic sites would be irreversibly developed and lost forever.

Finally, this Court's decision on whether the common law standard regarding restrictive covenants should be applied to conservation easements will likely have significant precedential value beyond Virginia. Other states view Virginia as a conservation leader because of the Commonwealth's long history of recognizing conservation easements and its statutory scheme and strong public policy supporting land conservation. This Court's affirmation of the trial court's ruling on the standard of

[6] Significantly, Virginia has 35 land trusts that are qualified to hold conservation easements. *See* http://jlarc.virginia.gov/reports/Rpt429.pdf. (last visited May 21, 2015).

construction applicable to conservation easements would likely be used as precedent in attempts to undermine the validity and integrity of state statutes authorizing conservation easements across the United States.

B. Application of the Common Law Standard Would Threaten to Disrupt the Interplay and Balance Between Federal, State, and Local Conservation Policies.

A conservation easement is a statutorily created opportunity for a landowner to participate in an integrated system of land preservation that involves federal, state, and local laws aimed at protecting specifically described resources. By perpetually restricting the available uses of his property as a part of that system, a landowner is expressing a public, rather than private, intent to limit the use of his land. The interlocking policies and the public benefits that flow out of such land preservation distinguish a conservation easement from a traditional, common law restriction on land use.

Also, unlike a private restriction on land, a conservation easement must be consistent with the Comprehensive Plan of the surrounding localities. *See* Va. Code §§ 10.1-1701, 10.1-1010 (E). It is common for a conservation easement to refer to the manner in which the mandatory restrictions will benefit an associated Historic District or Scenic Byway. Rather than merely creating a private benefit for a landowner or his

successors in title, a conservation easement expresses a restriction that will forever benefit the public values through the harmonious protection of the lands surrounding historic, cultural, and scenic assets of the Commonwealth.

Should this Court uphold the circuit court's conclusion that conservation easements enjoy no greater protection than common law private restrictions on real property, it would endanger the delicate balance of federal, state, and local protections intended by the United States Congress, the Virginia Constitution, and the Virginia General Assembly to advance the goals of land conservation and historical preservation.

C. Use of the Common Law Rule Would Discourage Private Donations of Conservation Easements.

Conservation easements under the Virginia Open Space Land Act and the Conservation Easement Act are often acquired through gifts from landowners. The landowner's intent is to make a gift of a property interest triggering common and statutory laws relating to gifts. In Virginia, the donor's intent in the making of the gift should determine the interpretation of the gift. *See e.g.*, *Thomas v. Bryant*, 185 Va. 845, 852 (1946) (emphasizing that "[c]haritable gifts are viewed with peculiar favor by the courts, and every presumption consistent with the language contained in

the instruments of gift will be employed in order to sustain them. All doubts will be resolved in their favor").

In this case, the trial court's application of the common law standard minimized the intent of the donor as gleaned from the four corners of the Conservation Easement in favor of the free use of property. Accordingly, this Court's affirmation of the trial court's ruling would mean that conservation easements would be interpreted in favor of the free use of property rather than to accomplish the charitable conservation intent of donors. Such a ruling would have a chilling effect on the incentive of charitable landowners to put their property in easement. This outcome would not only reduce the incentive to donate easements on an individual basis but also threaten to erode the general public's support for conservation easements as a whole.

D. Application of the Common Law Standard Would Also Adversely Impact Farmland Conservation Efforts at the State and Local Levels.

The Commonwealth of Virginia and its localities have adopted policies and expended substantial public resources to support the use of conservation easements as a tool for protecting the Commonwealth's irreplaceable farmland. In 2001, the General Assembly established the Office of Farmland Preservation ("OFP") within the Virginia Department of

Agriculture and Consumer Services with powers and duties that include the development of:

> (i) model policies and practices that may be used as a guide to establish local purchase of development rights programs; (ii) criteria for the certification of local purchase of development rights programs as eligible to receive grants, loans or other funds from public sources; and (iii) methods and sources of revenue for allocating funds to localities to purchase agricultural conservation easements.

Va. Code § 3.2-201(A)(1). Since 2004, OFP has promulgated model policies and practices for localities to use in establishing Purchase of Development Rights ("PDR") programs, certified 18 PDR Programs established by local jurisdictions, and established an allocation formula for distributing funds to localities for the purchase of conservation easements. *See Office of Farmland Preservation*, *available at* http://www.vdacs.virginia.gov/preservation/tools.shtml. (last visited May 21, 2015).

In addition to policy and programmatic guidance, the Virginia General Assembly has appropriated $9.7 million since 2004 to assist local jurisdictions in purchasing conservation easements through their PDR Programs. As of January 2015, OFP has distributed nearly $7 million in grants to localities resulting in 59 farms and 8,014 acres of farmland being permanently protected by conservation easement. *See* Governor's

Newsroom, *Governor McAuliffe Announces More Than $1.5 Million in Farmland Preservation Grants to Six Localities*, Governor's Newsroom (Jan. 12, 2015), *available at* https://governor.virginia.gov/news room/newsarticle?articleId=7553 (last visited May 21, 2015).

The Commonwealth of Virginia's public policy, and programming and funding support for farmland preservation, has contributed to the creation of a number of robust conservation easement purchase programs sponsored by local jurisdictions. For example, the Fauquier County PDR program has used a combination of county, state, and federal funding, as well as private donations, to acquire conservation easements protecting over 10,125 acres of farmland since 2002. *See Fauquier County Farmland Purchase of Development Rights (PDR) Program Request for Applications*, *available at* http://www.fauquiercounty.gov/government/departments/AgDev/index.cfm?action=PDRProgram (last visited May 21, 2015). Albemarle County has invested nearly $12 million in local funds since 2000 for the purchase of 44 conservation easements that are permanently protecting over 8,400 acres in the county. *See Albemarle County Community Development Acquisition of Conservation Easements*, *available at* http://www.albemarle.org/albemarle/upload/images/forms_center/departments/community_development/forms/Rural_Area/AC

E_2015_Annual_Update.pdf. (last visited May 21, 2015). The City of Virginia Beach has permanently protected over 9,200 acres through the purchase of conservation easements designed to protect agricultural lands and maintain the vitality of its Agricultural Reserve Program. *See Virginia Beach Agricultural Reserve Program Fact Sheet*, *available at* http://www.vbgov.com/government/departments/agriculture/Documents/arp/20140327-AGR-ARP-ARPFactSheetFor2013.pdf. (last visited May 21, 2015).

The application of the common law rule disfavoring restrictions to the use of land threatens the efficacy of these important local programs. In fact, the Commonwealth and the various localities participating in these programs may conclude that it is too risky to make substantial investments in conservation easements if they are disfavored by Virginia's courts.[7]

[7] A ruling that conservation easements are disfavored in Virginia may also impact Virginia's efforts to preserve the Chesapeake Bay. As a signatory to the Chesapeake Bay Agreement (the "CBA"), Virginia is committed to conserving a portion of the 2 million acres goal for land conservation. Stimulating, renewing, and expanding commitments to conserve priority lands for use and enjoyment are an integral part of furthering the watershed's identity and spirit. Conservation easements play a significant role in preserving the Chesapeake Bay, and a ruling that these easements are disfavored under Virginia law would only discourage their use and take a powerful weapon out of the hand of the State to conserve one of the Commonwealth's most precious natural resources.

CONCLUSION

For the foregoing reasons, this Court should rule (a) that conservation easements, unlike common law restrictive covenants, are favored under Virginia law, (b) that the trial court erred in applying the common law standard regarding the interpretation of restrictive covenants to a conservation easement, (c) that the trial court's ruling on the applicable standard of construction of a conservation easement should be vacated, and (d) that conservation easements should be interpreted in accordance with their conservation goals and the strong public policy of the Commonwealth.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this the 22nd day of May 2015, fifteen paper copies of the foregoing Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia, (b) one (1) copy of the foregoing Brief was transmitted by electronic mail to the Clerk of the Supreme Court of Virginia, and (c) 3 paper copies of the foregoing Brief were sent via first-class U.S. mail, postage prepaid, and an electronic copy via email, to the following counsel of record for the parties:

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