

**IN THE SUPREME COURT OF VIRGINIA**

---

**Record No. 141577**

---

**WETLANDS AMERICA TRUST, INC.,**

**Appellant,**

**v.**

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

**Appellee.**

---

**MOTION 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 FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

---

John L. Walker, III (VSB # 30055)  
Joseph R. Pope (VSB # 71371)  
WILLIAMS MULLEN  
A Professional Corporation  
200 South 10th Street (23219)  
P.O. Box 1320  
Richmond, Virginia 23218-1320  
Telephone: (804) 420-6000  
Facsimile: (804) 420-6507  
jwalker@williamsmullen.com  
jpope@williamsmullen.com

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”), by counsel, and pursuant to Rules 5:4 and 5:30(c) of the Rules of the Supreme Court of Virginia, move for leave to file a brief amicus curiae in support of the Appellant, Wetlands America Trust, Inc. (“WAT”), on the following grounds:

1. The Nature Conservancy (the “Conservancy”) is an international non-profit conservation organization that 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.

2. Founded in 1972, the Piedmont Environmental Council (“PEC”) is an accredited land trust and easement holder that 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. 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.

3. Founded in 1992, the Land Trust of Virginia (“LTV”) is a private, accredited land trust 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.

4. The Land Trust Alliance (the “Alliance”) is a national conservation organization that was formed in 1982 to support land trusts and conservation organizations nationwide. 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.

5. The National Trust for Historic Preservation in the United States (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.

6. The Civil War Preservation Trust, doing business as 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. 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.

7. The Land Trusts move for leave to file a brief amicus curiae that addresses the following granted assignment of error:

The Trial Court Erred When It Applied The Common Law Principles For Restrictive Covenants To A Conservation Easement.

The Land Trusts have a direct and significant interest in this Court's disposition of the foregoing assignment of error for the reasons set forth below.

8. The Land Trusts aver that the trial court's application of the common law standard disfavoring restrictive covenants to conservation easements is wholly inconsistent with and repugnant to Virginia's strong public policy favoring land conservation and historic preservation as expressly embodied in the Virginia Constitution, the Virginia Open-Space Land Act, the Virginia Conservation Easement Act, the Land Conservation Incentives Act, and other statutory enactments of the Virginia General Assembly. See Va. Const. art. XI, §§ 1-2; Va. Code §§ 10.1-1700 through -1705; Va. Code §§ 10.1-1009 through -1016; Va. Code §§ 58.1-510 through -513.

9. These legislative enactments and the strong public policy for which they stand demonstrate that conservation easements, unlike restrictive covenants, are favored under Virginia law to advance the Commonwealth's strong public policy. See also *United States v. Blackman*, 270 Va. 68, 79 (2005) (emphasizing that the aforementioned statutory authorities "evinced a strong public policy in favor of land conservation and preservation of historic sites...").

10. Virginia's strong public policy favoring land conservation and conservation easements has been implemented on a large 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](http://www.dcr.virginia.gov/natural_heritage/clinfo.shtml) (last visited May 18, 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, among other things, that "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." 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 18, 2015).

11. 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](http://www.dcr.virginia.gov/land_conservation/lpc.shtml) (last visited May 18, 2015).

12. In light of the foregoing, it is clear that conservation easements are a primary tool in implementing Virginia's strong public policy favoring land conservation and historic preservation.

13. In addition, the Land Trusts aver that this Court's affirmation of the trial court's application of the common law standard regarding restrictive covenants to conservation easements would:

(a) cause considerable harm to the efforts of the Land Trusts and other conservation easement holders and conservation organizations to conserve Virginia's open spaces, natural resources, and historic sites;

(b) embolden landowners to challenge conservation easement terms and likely lead to increased litigation, thus straining the financial resources of the state entities, non-profit organizations, and localities that hold and enforce such easements;

(c) undermine donative intent underlying conservation easements and discourage private donations of such easements;

(d) threaten to disrupt the interplay and the balance between federal, state, and local conservation policies;

(e) adversely impact farmland conservation efforts in Virginia at the state and local levels;

(f) contravene the modern standard for interpreting conservation easements as articulated in the Restatement (Third) of Property: Servitudes § 4.1 (2000), which reinforces that conservation easements should be interpreted in a manner consistent with prevailing public policy and the conservation goals of the easements; and

(g) set precedent that could adversely affect land conservation not only in Virginia but also throughout the United States.

14. As part of the conservation community in Virginia, the Land Trusts can provide the Court with unique insight and perspective as to how this Court's affirmation of the trial court's ruling on this issue would directly conflict with conservation efforts and policies in Virginia and beyond. Consequently, the input of the Land Trusts on this issue would be helpful and instructive to the Court.

15. For the foregoing reasons, good cause exists for granting this motion.

16. All parties to this appeal have been informed of the Land Trusts' intended filing of this motion and brief amicus curiae. Appellant



consents to the granting of this Motion and the filing of the brief amicus curiae. Appellee, on the other hand, does not consent to the granting of this Motion and the filing of the brief amicus curiae, and Appellee has indicated that it intends to file a response in opposition to this Motion.

WHEREFORE, 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 respectfully request that the Court grant them leave to file a brief amicus curiae in support of Appellant on the assignment of error noted in the motion.

Respectfully Submitted,

A handwritten signature in black ink that reads "John L. Walker, III". The signature is written in a cursive style and is positioned above a horizontal line.

John L. Walker, III (VSB No. 30055)  
Joseph R. Pope (VSB No. 71371)  
WILLIAMS MULLEN  
A Professional Corporation  
Williams Mullen Center  
P. O. Box 1320  
Richmond, VA 23218-1320  
(804) 420-6000 (Telephone)  
(804) 420-6507 (Facsimile)  
jpope@williamsmullen.com

## CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this the 21<sup>st</sup> day of May 2015, (a) the original and three (3) paper copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia, (b) one (1) copy of the foregoing Motion was transmitted by electronic mail to the Clerk of the Supreme Court of Virginia, and (c) one (1) copy of the foregoing Motion was sent via electronic mail and via first-class U.S. mail, postage prepaid, to the following counsel of record for the parties:

Andrew G. Mauck (VSB No. 35177)  
Melissa R. Tannery (VSB No. 41843)  
MAUCK & BROOKE, PLC  
416 W. Franklin St.  
Richmond, Va. 23220  
Telephone: (804) 512-3522  
Facsimile: (804) 643-2829  
[andy@amauck.com](mailto:andy@amauck.com)  
[mtannery@amauck.com](mailto: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) 680-6067  
[eaburcher@thelandlawyers.com](mailto:eaburcher@thelandlawyers.com)  
[mkalish@thelandlawyers.com](mailto:mkalish@thelandlawyers.com)  
[mkalish@pw.thelandlawyers.com](mailto:mkalish@pw.thelandlawyers.com)

Counsel for Appellee, White Cloud Nine Ventures, L.P.

The undersigned counsel further certifies that on this the 21<sup>st</sup> day of May, 2015, one (1) courtesy copy of the foregoing Motion was sent via electronic mail and via first-class U.S. mail, postage prepaid, to the following:

Steven O. Owens (VSB No. 20686)  
Senior Assistant Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
900 East Main Street  
Richmond, VA 23219  
Telephone: (804) 786-6955  
Facsimile: (804) 371-0122  
[sownes@oag.state.va.us](mailto:sownes@oag.state.va.us)

Counsel for Commonwealth of Virginia as Amicus  
Curiae in Support of Petitioner/Appellant

A handwritten signature in black ink, reading "John L. Walker, III". The signature is written in a cursive style and is positioned above a horizontal line.

28160579\_5.doc