SCV: Submitted on 05-26-2015 17:08:21 EDT for filing on 05-26-2015

IN THE

Supreme Court of Virginia

RECORD NO. 141577

WETLANDS AMERICA TRUST, INC.,

Appellant,

v.

WHITE CLOUD NINE VENTURES, L.P.,

Appellee.

OPENING BRIEF OF APPELLANT

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OPENING BRIEF OF APPELLANT

ASSIGNMENTS OF ERROR

I. The trial court erred when it held that the term “farm building” is ambiguous and the building at issue is a permitted farm building. (Appendix (“App.”) pp. 179, 222C-D, 914, 917).

II. The trial court erred when it held that the prohibition against building in a “highly erodible area” is ambiguous and could be circumvented by bulldozing the area before construction. (App. p. 179, 222D, 925A, B).

III. The trial court erred when it misapplied the unambiguous restriction whereby the property must be “retained in perpetuity” predominantly in the condition established in the Baseline Documentation Report. (App. pp. 179, 222A, E-F, 929A-C).

IV. The trial court erred when it misapplied the unambiguous restriction that any use of the property cannot “impair significantly” the easement purposes. (App. pp. 179, 222D, F; App p. 446A; App. pp. 929D, E).

V. The trial court erred when it held that alteration of the topography for the parking lot and lawn area was “required in the construction of” the building and did not require WAT’s prior written approval. (App. p. 179, 222D, 925C, D).

VI. The trial court erred when it applied the common law principles for restrictive covenants to a conservation easement. (Motion for Reconsideration, pp. 4-15; App. p. 179).

VII. The trial court erred when it did not consider WAT’s claim that the bridge across the Little River violates the easement. (App. p. 179, 447, 919-920; Motion for Reconsideration, pp. 15-19).

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE VIRGINIA SUPREME COURT

Wetlands America Trust, Inc. ("WAT") respectfully states that it was aggrieved by the Final Order entered on August 1, 2014 by the Circuit Court of Loudoun County, Virginia, Honorable Burke J. McCahill presiding.

NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

This case raises fundamental and important issues regarding the interpretation and enforcement of conservation easements in Virginia. Despite highly restrictive provisions in the conservation easement at issue, the trial court held that the landowner's extensive manufacturing, retail and special events facilities and activities were not prohibited. In doing so, it incorrectly held that multiple straightforward provisions of the easement were ambiguous. It then applied the common law standard of interpreting restrictive covenants, which are not favored under Virginia law, and construed the purported ambiguities in favor of the landowner and the free use of property.

This is the wrong standard because conservation easements, unlike other encumbrances to land, are <u>favored</u> under Virginia and Federal law and provide a valuable and significant public benefit. The common law disfavoring restrictive covenants should not be applied to conservation easements because: (1) it would be repugnant to the Virginia Constitution;

(2) the General Assembly has altered the common law; and (3) circumstances are now so decidedly different that the common law is contrary to society's decided interest in conserving land and natural resources. Instead, the modern standard is that a conservation easement should be interpreted to give effect to the intention of the parties and to carry out its purpose. *See Restatement (Third) of Property: Servitudes* (2000) § 4.1. This is an issue of first impression in Virginia and of great importance to the private entities and government agencies that hold and enforce conservation easements.

The express "Purpose" of the conservation easement at issue is to ensure that the property is "retained in perpetuity predominantly in its natural, scenic, and open condition." The trial court's holdings, however, render the easement practically useless. Therefore, the citizens of Virginia received next to nothing in return for the substantial money they paid and will continue to pay in the form of tax credits and reduced tax assessments.

Wetlands America Trust, Inc. ("WAT") is the easement holder. White Cloud Nine Ventures, L.P. ("White Cloud") is the landowner. The facts of White Cloud's activities are not in dispute, and this case involves the application of the easement language to those activities. The case is complicated because the activities violate the easement in so many ways.

When the easement was created in 2001, the land was rural, pastoral land. White Cloud bought the property in 2008 and is constructing a three-level 13,952 square foot building to be used as a winery, tasting room, bakery, cheese shop, retail store, offices and events center open to the public 362 days a year. Approximately 50,000 people will visit the property each year in vehicles traveling across a lengthy road a third of the way into the property and across a substantial bridge that crosses the Little River. These facilities and activities far exceed what is allowed under the easement and are clearly prohibited.

WAT filed its Complaint on January 18, 2013, asking the trial court to declare that the facilities and their intended use violate the easement, enjoin further construction, require White Cloud to restore the property at its sole expense, and award WAT its costs and attorney's fees. WAT filed a Motion *in Limine* arguing that the easement was unambiguous and seeking to prohibit the introduction of all parole evidence and a Motion *in Limine* to limit expert testimony and the introduction of certain evidence. The Motions were argued at a hearing on March 26, 2014. By Order dated April 9, 2014, the first Motion was taken under advisement, and the second motion was granted in part and reserved in part. WAT's claim for attorney's fees and costs was bifurcated by Consent Order dated March 26, 2014.

A bench trial was held on April 7-9 and 29-30, 2014. The trial court issued a letter opinion dated June 19, 2014 ("Ltr. Op."), asking the parties to submit an order consistent with the opinion and noting their exceptions. WAT filed a Motion for Reconsideration. The Court denied WAT's Motion and entered its Final Order on August 1, 2014. This timely appeal followed.

STATEMENT OF FACTS

WAT is the holder of a "Deed of Gift of Conservation Easement" dated July 9, 2001 ("Easement") intended to preserve and protect 408 acres in Loudoun County ("Protected Property"). Appendix ("App.") pages 958-989. At that time, the Protected Property was rural, pastoral land. App. pp. 1188-1251. The Easement reduced the market value of the Protected Property by $1,555,000. App. pp. 1282-1284.

The stated "Purpose" of the Easement is to:

> Assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition, as evidenced by the [Baseline Documentation] Report, 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.

Easement § 1.1 (emphasis added).

> The specific conservation values of the Protected Property on the date of this Easement are documented in the Baseline Documentation Report ("Report") . . . Both parties agree the Report

> . . . is intended to serve as an objective informational baseline for monitoring compliance with the terms of this Easement.

Easement, p. 5. The Baseline Documentation Report ("BDR"), App. pp. 1188-1251, is also referenced in Easement Sections 3.19, 4.1, and 4.14.

The Easement protects the property in a multi-faceted manner. It includes express prohibitions such as no building or structure can be built on a "highly erodible area" or in the Little River floodplain. Section 3.3(C)(v)(vi)(vii). It includes express limitations on permitted activities such as the building at issue must be a "farm building" and agricultural activities must be "conducted in a manner consistent with the Purpose of the Easement" and cannot have a "significant impact upon . . . wildlife, their natural habitat or upon the natural ecosystem and its process." Sections 3.3(A)(iv), 3.10. It also limits the scale and impact of <u>all activities</u> such that they must "retain" the property in its "natural, scenic and open condition" per the BDR – the "objective" measuring tool - and not "impair significantly" the property's environment. Sections 1.1, 3.19 and page 5. The remedy for a breach of the Easement is to restore the property to its 2001 condition as established by the BDR. Section 4.14.

In 2005, the Protected Property was subdivided into two parcels. App. pp. 1286-1288. In 2008, White Cloud purchased one of the parcels of about 200 acres ("Property" or "Caeli Property"). Complaint and Answer ¶

21-22; App. p. 754. Chrysalis Vineyards, LLC ("Chrysalis") leases the Property from White Cloud. App. p. 259. Jennifer McCloud ("McCloud") is the General Partner of White Cloud and the Managing Partner of Chrysalis. Complaint and Answer ¶¶ 2, 5. Chrysalis owns adjoining property ("Chrysalis Property"). App. pp. 236-238. *See* App. p. 1285 (map showing layout of the properties).

Before buying the Property, White Cloud had a copy of the Easement and engaged legal counsel to review it. App. p. 132. McCloud communicated with Todd Sedgwick, the grantor of the Easement and then owner of the property, about her tentative plans for the property. He warned her: "I suspect a restaurant with attendant parking and other significant retail operations might be a problem, but a roadside stand would probably be fine." App. p. 1300. Sedgwick also contacted Mr. Marrone, associate counsel for WAT, and told him about McCloud's interest. *Id*. On October 12, 2007, Marrone wrote to Sedgwick:

> the permitted agriculture language, even read generously, would <u>not allow</u> stores, inns or restaurants . . . WAT's position is that the way the easement is written, a store, winery, restaurant, etc. is <u>not allowed</u> on the property.

App. p. 1298 (emphasis added). Sedgwick forwarded Mr. Marrone's email to McCloud. *Id*. McCloud then sent Marrone a lengthy email trying to

persuade him to change his mind. App. pp. 1304-1309. On November 16, 2007, Marrone unequivocally rejected her arguments. App. pp. 1274. With nothing further in writing from WAT, McCloud (through White Cloud) nonetheless bought the Property at her own risk on February 15, 2008.

In late 2012, and without notice to WAT, White Cloud bulldozed a large hill on the Property and installed an enormous parking lot. App. p. 266; App. pp. 1051-1058 (parking lot photographs Nov. 6 and Dec. 12, 2012). On October 31, 2012, WAT promptly sent White Cloud a cease and desist notice pursuant to Easement Section 4.14. App. pp. 1049-1050. When White Cloud refused to comply, WAT filed this lawsuit. Despite the pending lawsuit, White Cloud chose to move ahead with construction, and it was nearly complete by the time of trial. *See* App. pp. 1076-1102. (construction photographs Jan. 1 and March 7, 2014).

White Cloud's facilities include a 13,952 square foot building ("Building"), a parking lot for 180 vehicles, a septic field and well to accommodate 144 people per day, a large lawn area for picnics and special events, and electric utilities. Complaint and Answer ¶¶ 27, 28, 55; App. pp. 1016-1042; App. 266-269. An underground tunnel extends from the Building's lower level to a road below. *See* App. pp. 1076-1084. White Cloud built a road that travels well into the Property and crosses the Little

River via a bridge. App. pp. 1002-1004 (bridge), pp. 1070-1072 (road, bridge and building site), pp. 260-262. The Little River is a perennial stream and the bridge lies within its 100-year floodplain. App. pp. 337, 349, 1257-1258. The building site was originally a scenic hill visible from Route 50. Compare App. p. 1004 (photograph showing hill before construction), pp.1057-1058 (photograph showing leveled parking lot), p. 1072 (photograph showing tunnel and lawn area), App. 1077 (showing hill after leveling). To flatten the hill, between 11,850 and 16,800 cubic yards of soil were moved. App. p. 351; *see* App. p. 1259.

Activities on the neighboring Chrysalis Property are of paramount importance because those activities will be relocated into the new facilities on the Property. *See, e.g.,* App. p. 1001, pp. 271-283, pp. 285-293, pp. 1142 (April 2014 newsletter stating "we will move our tastings into a brand new building . . ."). McCloud testified in detail about the activities on the Chrysalis Property. App. pp. 242-255. They are clearly illustrated in monthly Chrysalis newsletters that include photographs, announcements and descriptions, App. pp. 1103-1150, and on Chrysalis' Facebook page, App. pp. 1151-1169. They include: a winery where grapes are pressed, turned into wine, aged, bottled, and sold to the public via wine tastings and direct sales; an Annual Jazz Festival and an Annual Bluegrass Festival at

which craft artisans sell their wares and food to ticket-buying attendees; other musical concerts; private events such as weddings, birthday parties, corporate events, and fundraisers; winemaker dinners; theater performances; pottery, art and wine-making classes; Easter egg hunts; Halloween parties; and a retail store selling, among other things, books, candles, jellies, engraved spoons, soaps, corkscrews, photographs, paintings, ornaments, skin products, various food items and coffee. *Id*.

In addition, cheese and bread will be made and sold in the Building. The milk for the cheese will be imported to the Building from cows milked on the Chrysalis Property. App. p. 278. Wheat will be milled at the local Aldie Mill and then imported to the Property. App. pp. 282, 320.

The Building will be open to the public 362 days a year. App. p. 290. In designing the Building, McCloud emailed her architect about having enough "production and retail space:"

> We have to store huge numbers of wine glasses, paper supplies, etc. just for the wine tastings. We will go through a thousand glasses a weekend, as we give the glasses away. . . (And if that's not enough… we're not even considering other ag products and public activities that may/will be coming down the pike - e.g. where are we going to store all the tables, chairs, plates, glassware, tablecloths, and tableware for winemaker dinners in the cave?)

App. pp. 1073-74. *See* App. p. 1001 (architect project is for "visitor center and retail establishment").

At trial, McCloud described how every area of the Building would be used. App. pp. 293-304; *see* App. pp. 1076-1102 (photographs of Building and facilities). The top floor (with vaulted wood ceiling and glass bottle chandelier) is for wine tastings. There will be a "wine island," screens for viewing videos, public restrooms and an outside deck with tables and chairs where customers will eat and drink. App. pp. 297-299. The public will enter on the main floor from the parking lot. The retail store and cashier are here, including a counter for tastings, along with another set of public restrooms. App. pp. 295-296, 302-303. The intent is to sell as much wine as possible from the new building. App. p. 275. There are two offices, including one for the tasting room manager. The lower floor will have the bread-maker's office, a commercial kitchen, walk-in cooler, employee staff room, equipment for cheese and bread making and a cut and wrap cheese room. App. pp. 293-295. The 96' x 20' tunnel will be used to age the wine and for delivery access. App. pp. 273, 295. An elevator serves all three levels. App. p. 294. The lawn area will be used for special events and customer picnics. App. pp. 288-289.

Very little farming has occurred on the Property since White Cloud bought it in 2008. App. pp. 1062-1063 (Interogatories Nos. 9-11), pp. 255-259. A few cows walk over from the Chrysalis Property and graze on the

Property, a few acres have been planted in cover crops, and one acre is planted with grape seedlings for transplanting to other vineyards. *Id*. No crops have been grown for human consumption. For the indefinite future, grapes grown on the Chrysalis and other properties will be pressed and processed on the Chrysalis Property and then the immature wine will be exported to the Property to be aged and bottled. App. pp. 275-276.

AUTHORITIES AND ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT HELD THAT THE TERM "FARM BUILDING" IS AMBIGUOUS AND THE BUILDING AT ISSUE IS A PERMITTED FARM BUILDING.

Section 3.3(A)(iv) states: "No building or structure of any nature shall be built or maintained on the entirety of the Protected Property other than . . . (iv) farm buildings or structures." WAT claims that the term "farm building" is unambiguous and the Building is not a farm building. App. pp. 222B-C. The trial court, however, held the term is ambiguous. App. p. 159. Whether a writing is ambiguous is an issue of law, and the trial court's conclusions in this regard are not binding on this Court. *Langman v. Alumni Ass'n of the Univ. of Va.*, 247 Va. 491, 498 (1994).

Here the analysis is simple. A farm building is a building for farming. Farming is growing crops and raising animals. The Building is not used for

growing crops or raising animals. Therefore, the Building is not a farm building.[1]

This is the same analysis undertaken in *Jernigan v. Capps*, 187 Va. 73 (1948). The restriction there stated that only one residential building could be built on each lot. The landowner's proposed building had four family units within it. The "question to be determined" was whether the proposed structure was a "residential building." *Id*. at 80. The Court held that it "is not necessary that we go to a dictionary or a law book to ascertain the meaning of 'a residential building.' Giving the words their plain and ordinary meaning, . . . such a building is one which is used for residential purposes." *Id*. Under this unambiguous language, a building designed as a dwelling for several families was a residential building. *Id*. at 80-81.

The trial court here incorrectly relied on *Scott v. Walker*, 274 Va. 209 (2007), App. p. 158, in which the issue was whether a restriction stating that property "shall [not] be used except for residential purposes" prohibited the short-term rental of a single-family dwelling. 274 Va. at 211. The Court held that the term "residential purposes" was ambiguous because it was unclear if it had a business element, was from the perspective of the

[1] To the extent the meaning of the term needed confirmation, WAT referred the trial court to the definition of "farm" which is a "piece of land used for growing of crops or raising animals." App. pp. 444B, 917.

landowner or the renter, or contained a duration component as between long and short-term use. *Id*. at 217-18. No such elements arise regarding the term "farm building." Thus, the properly analogous case is *Jernigan.*

In its Letter Opinion, the trial court wrote for 14 pages, including recitations of extensive parole evidence (which WAT moved to exclude in its Motions in Limine), before concluding that "in consideration of all the above" the term "farm building" is ambiguous. App. p. 159. This was error because the construction of an explicit deed is based on the "four corners" of the deed. *Langman*, 247 Va. at 498 ("parol evidence rule applies to . . . deeds, that express the terms of the parties' agreement").

The trial court also incorrectly found an ambiguity by considering other Easement sections, particularly Sections 3.1 and 3.10 that permit the landowner to engage in commercial agriculture. App. pp. 157-158. But "[w]here there is no conflict in any of the provisions of the deed and no repugnancy results, all parts thereof should be given effect." *Fitzgerald v. Fitzgerald*, 194 Va. 925, 929 (1953). There is no repugnancy here between a provision allowing a landowner to conduct commercial agriculture on the Property and a provision restricting buildings to "farm buildings." These different terms must each be given their plain meaning.

The trial court made the remarkable holding that a mere "nexus" to farming activities is all that is required for a farm building. App. p. 159. But the Easement allows for a "farm building" and not "a building with any nexus to farming." *See Amos v. Coffey*, 228 Va. 88, 93 (1984) ("This court is not free to rewrite a deed to express an intention that is otherwise indiscernible"). The trial court's rewrite effectively deletes the "farm building" restriction. White Cloud intends to mix grapes grown on the Chrysalis Property with grapes grown elsewhere, press and prepare them for making wine on the Chrysalis Property, and then export the immature wine to the Property to be aged, bottled and sold to the public. App. pp. 272, 276. Even if grapes are grown on the Property in the future, <u>no activity associated with growing or harvesting grapes will occur in the Building</u>. The cows that occasionally graze on the Property will be milked on the Chrysalis Property. The milk will be exported to the Property to be manufactured into cheese and sold to the public in the retail store and via shipments. App. pp. 277-281. <u>No activity related to raising or milking cows will occur in the Building</u>.

If a mere "nexus" to farming allows a building for manufacturing and retail to be a "farm building," there is almost no end to the buildings that could be allowed. Moreover, by allowing wine to be made and sold from

grapes grown on other properties, the "nexus" requirement is a nullity. Corn can be imported and made into tortillas, tobacco imported and made into cigars, cotton imported and made into t-shirts. [2] *See* App. p. 288 (in fact, McCloud said she might sell t-shirts). A grocery store would be a "farm building." Simply put, the Building is not a "farm building" and is prohibited under the Easement.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT THE PROHIBITION AGAINST BUILDING IN A "HIGHLY ERODIBLE AREA" IS AMBIGUOUS AND COULD BE CIRCUMVENTED BY BULLDOZING THE AREA BEFORE CONSTRUCTION.

Section 3.3(C)(vi) states, "No building or structure of any nature may be constructed or maintained on the Protected Property . . . (vi) on any highly erodible areas as identified by the Department of Agriculture . . .." WAT argued that this language was unambiguous, and it presented expert testimony that the Building was constructed on what was a highly erodible area pre-construction. *See* App. pp. 370-388. The trial court, however,

[2] White Cloud sought to introduce testimony from McCloud regarding the definition of "farm building" in Virginia Code Section 36-97. The trial court properly excluded such testimony under the plain meaning rule regarding unambiguous terms. App. pp. 157-162. Inexplicably, it then cited to Section 36-97 in its letter opinion. App. p. 154. Not only does this definition have no bearing on this case, it clearly limits activities to those involving products "produced in the farm." Thus, even under this inapplicable definition, White Cloud cannot import grapes or milk from other properties.

held that the landowner could circumvent this prohibition by bulldozing a highly erodible area so it is no longer highly erodible because subsection (vi) does not "prohibit the regrading of the soil prior to construction." App. p. 203. This raises a question of law reviewed *de novo* on appeal. *Langman*, 247 Va. at 498.

The trial court violated the rule that the "guiding light" is the intention of the parties "as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." *Coffey,* 228 Va. at 92. *See Joseph F. Hughes & Co. v. George H. Robinson Corp.*, 211 Va. 4, 6-7 (1970) (parties are not presumed to have included "a provision of no effect"). For Section 3.3(C)(vi) to have any effect whatsoever, it must be applied pre-grading.

The trial court's holding is surprising given this exchange when White Cloud argued the prohibition was void by bulldozer:

THE COURT: Wait a minute. Hold on with that point. That point is that your client can go out and regrade it and say, see, now it's not highly erodible? I mean . . .

MR. BURCHER: But that makes sense, doesn't it?

THE COURT: No, no, it does not to me. You have to tell me how it makes sense, because the whole idea is that you can't begin the process on anything that is highly erodible. You can't go out and grade and then say, now I've solved the highly erodible process.

Mr. BURCHER: Why not?

THE COURT: *Well, because that's what the covenant says*. App. p. 948 (emphasis added). Exactly. The prohibition is unambiguous and must be enforced as written.

The error is confirmed when applied to Section 3.3(C)(iv) (no building can be built above the 525 foot contour line). Under the void by bulldozer theory, the land could be scraped until it was below 525 feet elevation, building construction could begin, and the grantor's prohibition rendered meaningless. But perhaps the grantor wanted to preserve the natural and scenic rolling hills on his property, and these provisions were intended to carry out that purpose. There is no need or legal basis, however, to speculate. The grantor's intent is garnered from the words he used. *See supra Coffey*, 228 Va. at 92; *Sully Station II Community Ass'n v. Dye*, 259 Va. 282, 284 (2000) (intention is determined by what parties "say and not from what it may be supposed they intended to say"). Here, the grantor clearly mandated that no buildings could be "constructed or maintained" on highly erodible areas.

Because the trial court ruled that the prohibition could be rendered meaningless by bulldozer, it never decided the issue of whether the area was highly erodible pre-construction. This analysis is straightforward under 7 C.F.R. § 12.21, the Department of Agriculture's method for "Identification

of highly erodible lands criteria." App. p. 371. *See also* App. p. 925B (trial court provided with copy of 7 C.F.R. § 12.21). The erodibility index for soil is determined by multiplying the factors of rainfall and runoff (R), the degree to which the soil resists erosion (K) and the function (LS) which includes the effects of slope length (L) and steepness (S), and dividing the total by a predetermined soil loss tolerance (T). An area is "highly erodible if . . . the RKLS/T . . . equals or exceeds 8." *Id*. § 12.21(b). *See* App. p. 372.

Mr. William Sledjeski, an expert in the field who worked for the Department of Agriculture for many years, ran the calculations for the building site and determined that the value was higher than 8 in most locations. *See* App. p. 1263 (Sledjeski's transects showing values). Because the steepness (S) or slope of the land is a factor, bulldozing the land flat removes the slope, which affects the calculations and can make what was a highly erodible area no longer highly erodible.

To perform his analysis, Sledjeski relied on the preliminary site grading plan which showed the contours that existed on the property before construction, a soil map overlay and the location of the Building. App. pp. 374-377. The same or similar contour map of the Property that forms the basis for his exhibit showing his calculations was introduced without objection in several other exhibits. *See* App. pp. 996, 1000, 1419, 1421.

Sledjeski did not visit the site because it would have served no purpose; the highly erodible soils had already been destroyed by White Cloud's bulldozer without notice to WAT. App. pp. 392-393. White Cloud did not have an expert witness calculate the highly erodible index for the Building site, meaning Sledjeski's site-specific calculations were unrebutted.

III. THE TRIAL COURT ERRED WHEN IT MISAPPLIED THE UNAMBIGUOUS RESTRICTION WHEREBY THE PROPERTY MUST BE "RETAINED IN PERPETUITY" PREDOMINANTLY IN THE CONDITION ESTABLISHED IN THE BASELINE DOCUMENTATION REPORT.

The Easement refers to the BDR in five provisions. Sections 1.1, 3.19, 4.1, 4.14 and Page 5. WAT argued that White Cloud's facilities and their use do not "retain in perpetuity" the Property in the condition established by the BDR. App. pp. 222A, E-F. The trial court, however, held that "White Cloud was not required to retain the property established by the [BDR] to the extent that it has engaged in permitted uses" because placing a building "anywhere would have some negative effect on some habitat on the property." App. p. 171. This raises a question of law reviewed *de novo* on appeal. *Langman*, 247 Va. at 498. The trial court misunderstood the Easement. It contains <u>express limits</u> on <u>permitted</u>

uses.[3] Therefore, the analysis is not whether the activities are permitted, but whether the activities when taken together fail to retain the property per the BDR. For example, the Easement permits the landowner to engage in commercial agriculture. Therefore, it can plant, grow and sell crops. But in doing so, it must retain the property per the BDR, not impair significantly the conservation values, and be consistent with the Easement Purpose. In 2001, thirty-seven acres of the Protected Property were planted in crops according to the BDR. App. pp. 1191, 1194. The landowner can continue to grow crops consistent with that level of farming. The landowner, however, cannot plow the entire Property and plant crops fence post to fence post. Such activity would not "retain" the land in its natural, scenic and open condition.

Under Federal law, taxpayers may deduct the value of charitable contributions. 26 U.S.C. § 170(a)(1). Regarding conservation easements, any interest retained by the donor "must be subject to legally enforceable

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[3] *See*, *e.g.*, Section 1.1 (Purpose is to "*prevent any use* . . . which will impair significantly" the land); Section 2.1 (grantee may "*prevent any activity or use*" inconsistent with the Easement); Section 3.10 ("Permitted agricultural activities [must be] conducted in a manner consistent with the Purpose of this Easement" and "may not . . . have a significant effect upon" the environment); Section 3.12 (grading allowed with prior written approval of Grantee but shall not impair the conservation values or the Purpose of this Easement) (emphases added).

restrictions … that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation." 26 C.F.R. 1.170A-14(g)(1). When the donor reserves rights that may potentially impair conservation interests, it must provide the donee with "documentation sufficient to establish the condition of the property at the time of the gift." *Id*. § 1.170A-14(g)(5). The donee must be able to periodically inspect the property enforce the conservation restrictions, "including the right to require the restoration of the property to its condition at the time of the donation." *Id*. This Federally required restoration right is contained in Easement Section 4.14 (Grantee may "require restoration of the Protected Property to its condition on the date of this Easement as evidenced by the Report").

Here, it cannot possibly be concluded that White Cloud's extensive facilities and activities "retain" the Property in the condition identified in the BDR. The BDR is the "objective" monitoring tool chosen by the Grantor and as required by law. Easement Page 5. The BDR describes a rural, pastoral property. White Cloud's use of the Property is vastly different with 50,000 visitors and related vehicles using a substantial manufacturing, retail and special events center and enormous parking lot 362 days a year.

IV. THE TRIAL COURT ERRED WHEN IT MISAPPLIED THE UNAMBIGUOUS RESTRICTION THAT ANY USE OF THE PROPERTY CANNOT "IMPAIR SIGNIFICANTLY" THE EASEMENT PURPOSE.

The requirement that the Property be retained in its condition per the BDR, as described above, is consistent with the requirement that "any use" of the property shall not "impair significantly" the conservation values and environment. *See* Sections 1.1, 3.19. WAT argued that the total impact of White Cloud's activities violates this restriction. App. pp. 929D, E. Similar to its holding that the Property did not have to be retained per the BDR regarding permitted activities, the trial court held that permitted uses necessarily impair the property and, therefore, there was no significant impairment. App. p. 213. This raises a question of law reviewed *de novo* on appeal. *Langman*, 247 Va. at 498.

The trial court's holding is error because again the analysis is not whether the uses are permitted but whether taken together they cause significant impairment. The landowner, for example, can build a shed under Section 3.3(C) but cannot build 1,000 sheds. The baseline for determining significant impairment is the status of the property in 2001 when it was rural land visited now and again by the farmer. It is patently obvious that the totality of White Cloud's facilities and activities, including manufacturing and production of wine, bread and cheese, wine tastings, a

retail store, and special and concert events, will significantly impair the land and its ecosystems.

V. THE TRIAL COURT ERRED WHEN IT HELD THAT ALTERATION OF THE TOPOGRAPHY FOR THE PARKING LOT AND LAWN AREA WAS "REQUIRED IN CONSTRUCTION OF" THE BUILDING AND DID NOT REQUIRE WAT'S PRIOR WRITTEN APPROVAL.

Section 3.6 states that any "[g]rading, blasting or earth removal shall not materially alter the topography except . . . as required in construction of permitted buildings, ..." Section 3.12 states that Grantor "reserves the right to grade, move earth or otherwise alter the topography . . . with prior written approval of Grantee. . .." White Cloud leveled a large hill where it built the parking lot, Building, septic system and lawn area. WAT argued that this activity was (1) not required in the construction (2) of a permitted building, (3) materially altered the topography, and (4) was done without WAT's written permission. App. pp. 925C, D. The trial court, however, held that because it had already ruled that the Building was a permitted building for wine tastings and retail sales, "it would follow that the patrons of the building would need somewhere to park when visiting the building." App. p. 164.[4] It also ruled that Section 3.12 applied only to grading relating

[4] Because the trial court held that the exception applied, it failed to determine whether the topography was materially altered. The first and most prominent hill on the property from Route 50 was flattened and between 11,850 and 16,800 cubic yards of soil was moved. App. p. 351.

to water resources. This raises a question of law reviewed *de novo* on appeal. *Id*. *Langman*, 247 Va. at 498.

The trial court impermissibly rewrote (and greatly expanded) the Easement from allowing material alteration of the topography if "required in the construction" of a permitted building to allowing it if "required for the use of the occupants of a permitted building after construction." *See supra, Amos v. Coffey*; *Bank of Southside Va. v. Candelario*, 238 Va. 635, 640 (1989) ("Courts will not rewrite contracts; parties to a contract will be held to the terms upon which they agreed."). The parking lot and lawn area were not "necessary in construction" of the Building. The parking lot is for customer parking and special events. App. pp. 288-289. *See* App. p. 1006 (McCloud email: "the parking lot is REALLY BIG! . . . One idea was to set up tents in the center area of the lot . . . and have an area for vendors and even a farmer's market area.") (original emphasis). The lawn area is for customers to picnic and for special events. App. pp. 288-289.

In addition, the third paragraph of Section 3.12 unambiguously states:

> The Grantor reserves the right to grade, move earth and otherwise alter the topography . . . *with prior written approval of Grantee*, which approval shall not unreasonably be withheld for dam construction and the creation of private ponds, lakes and/or wetlands areas. Such

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See App. p. 1259 (Mr. Rolband's cut and fill analysis). This is unquestionably a material alteration of the topography.

> activity shall not impair the conservation values or the Purpose of this Easement.

(emphasis added). Although Section 3.12 is titled “Water Resources,” there is no language limiting the “written approval” requirement to water resources. Instead, it makes clear that the Grantee can withhold approval for grading for any reason, *i.e.*, it has sole discretion to approve or disapprove grading, except approval cannot be unreasonably withheld if the grading is for water resources. It is undisputed that White Cloud did not obtain WAT’s written approval to flatten the hill.

VI. THE TRIAL COURT ERRED WHEN IT APPLIED THE COMMON LAW PRINCIPLES FOR RESTRICTIVE COVENANTS TO A CONSERVATION EASEMENT.

The trial court committed error because as argued above, the terms of the Easement are unambiguous. Assuming *arguendo* that the Easement contains ambiguities, the trial court further erred when it incorrectly applied the standard of construction for restrictive covenants whereby they are "not favored," are strictly construed and provisions of substantial doubt or ambiguity are to be interpreted in favor of the free use of property. *See, e.g.*, App. p. 149 (*citing Waynesboro Village, LLC v. BMC Props.*, 255 Va. 75, 79 (1988)), 159, 163, 167. *See* Motion for Reconsideration; Final

Order.[5] As a result, the trial court construed all purported ambiguities against WAT and in favor of White Cloud. This incorrect standard was the lens through which the trial court came to view the entire case and it clouded the court's ability to see that White Cloud's facilities and activities are prohibitively extensive, substantial and disruptive.

The essential premise for the standard of construction for restrictive covenants is that restrictive covenants are "not favored." In stark contrast, and as discussed below, conservation easements are absolutely and unquestionably favored under Virginia and Federal law. Consequently, conservation easements must be construed to advance their stated purposes and goals and to protect the public's rights and benefits, which the public acquired at considerable expense.

The common law disfavoring restrictive covenants has been abrogated or altered regarding conservation easements. Virginia common law can be abrogated or altered in three ways applicable here: (1) if it is "repugnant to . . . the Constitution of this Commonwealth" (Va. Code § 1-200); (2) when "altered by the General Assembly" (*Id.*); or (3) when "the different and varied circumstances of our country render inapplicable to us,

[5] The trial court's application of law is reviewed de novo on appeal. *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574 (2005).

are either not in force here, or must be so modified in their application as to adopt them to our condition" (*Shirley v. Shirley*, 259 Va. 513, 518-19 (2000) (citation omitted)).

1. Construing conservation easements against restrictions is repugnant to the Virginia Constitution.

Article XI of the Virginia Constitution provides:

> … 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. …
>
> In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, … and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by … leases or other contracts with… private persons or corporations.

Va. Const., Art. XI, §§ 1 and 2. To carry out these Constitutional objectives, Virginia created a comprehensive scheme, described below to protect its land and waters through the granting of conservation easements. In exchange for significant tax breaks and credits, landowners are encouraged to restrict the use of their property in perpetuity. In doing so, the public obtains enforceable benefits and rights, protected by multiple parties including the holder of the easement and the Commonwealth.[6] The

[6] *Accord* Letter Opinion Virginia Attorney General, August 31, 2012 (conservation easement is "not extinguished by the application of the

common law whereby restrictions on property are disfavored and are to be construed in favor of the free use of land is repugnant to this Constitutionally approved scheme.

2. The General Assembly altered the common law as it relates to conservation easements.

In support of the public policy "expressly embodied" in Article XI of the Constitution of Virginia, the Virginia General Assembly enacted the Open-Space Land Act (Va. Code § 10.1-1700 et seq.) and the Virginia Conservation Easement Act (Va. Code § 10.1-1009 *et seq.*) ("VCEA"). *See United States v. Blackman*, 270 Va. 68, 79-80 (2005). These statutes govern the creation, duration, validity, taxation, and enforcement of conservation and open-space easements in Virginia. *See* Va. Code. § 10.1-1009 *et seq*. and § 10.1-1700 *et seq*. The General Assembly also enacted statutes creating the Virginia Outdoors Foundation "to promote the preservation of open-space lands," and the Virginia Historic Landmarks

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common law doctrine of merger of estates"). "Conservation easements, which are a recent creation of the law, stand in sharp contrast to conventional easements, such as right-of-way or recreational easements." Whereas conventional easements "are private agreements entered into for the exclusive benefit of the grantee," conservation easements are "authorized under the OSLA and VCEA in order to facilitate conservation and historic preservation in furtherance of the Commonwealth's policy to protect its natural resources and historic sites. "Conservation easements serve a much more public function than conventional easements . . . and are held and administered by the easement holder not for themselves, but on behalf of the public and in furtherance of state policy."

Commission. *Id.* at 79 (citing Va. Code § 10.1-1800). All of these statutes "evince a strong public policy in favor of land conservation." *Id.* [7]

The issue in *Blackman* was whether Virginia law allowed for the creation of an easement for land conservation and historic preservation in 1973, prior to the enactment of the Virginia Conservation Easement Act. At the outset, the Court highlighted a critical tension:

> 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."

Id. at 76. Historically, Virginia common law did not allow a landowner to create easements of "novel character" and burden the land of subsequent grantees. *Id*. at 76-77. Rather, a landowner was limited to the creation of easements permitted by the common law or by statute. Easements in gross were strongly disfavored "because they were viewed as interfering with the free use of land." *Id*.

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[7] Virginia's tax code "supplement[s] existing land conservation programs to further encourage the preservation and sustainability of Virginia's unique natural resources . . .." Va. Code § 58.1-510. *See* Section 58.1-512 (establishing tax credit at a percentage of the value of the conservation easement). The landowner receives an ongoing benefit because the fair market value of the land is reduced for tax assessment purposes. *See* VCEA § 10.1-1011. Local property taxes may also be reduced.

The Court, however, recognized that there was substantial Virginia law supporting land protection and preservation, including the 1962 amendment and clarification of Code § 55-6 regarding the transferability of easements in gross. The Court noted that since at least 1962, Code § 55-6 recognized easements in gross as interests in real property capable of being transferred by deed or will. "Because easements in gross were not transferable at common law and, indeed, were strongly disfavored, it is self-evident that this statute *materially changed the common law* and recognized "interests in or claims to real estate" beyond those traditionally recognized at common law." *Id*. at 80 (emphasis added). *Accord Piedmont Envtl. Council v. Malawer*, 80 Va. Cir. 116, 119 (Cir. Ct. of Fauquier County 2010) ("It is evident from the discussion in *Blackman* that [conservation] easements are not subject to the typical common law analysis of merger"). Based on the foregoing, the Court held in favor of land protection and that a negative easement in gross created in 1973 for the purpose of conservation and preservation was valid. *Id*. at 82.

Virginia Code Section 10.1014 states that a conservation easement is valid even if it "is not of a character that has been recognized traditionally at common law." It further states that it is valid if it "imposes a "negative burden" or "affirmative obligations" upon the property owner. All of this

makes clear that the General Assembly has altered the common law regarding conservation easements such that they are to be construed to carry out the intent of the parties and the purpose of the easement.

3. It would be a great injustice to apply the common law regarding restrictive covenants to conservation easements.

"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." *Surratt v. Thompson*, 212 Va. 191, 193 (1971). Such scrutiny mandates a finding that the common law restrictive covenant principles do not apply to conservation easements.

In the past, interpreting land use restrictions in favor of the free use of land was considered to be in the public interest because such restrictions were viewed as constraining socially productive land uses. There has been a fundamental shift, however, toward land use restrictions, particularly in the land conservation context. *See Restatement (Third) of Property: Servitudes* (2000) Ch. 4, Introductory Note; § 4.1, cmt. a. It is now recognized that imposing long-term restrictions on the development of land to protect conservation and historic resources provides significant benefits to the public. In other words, land conservation is itself a socially

productive use. This has led to legislation in all fifty states and the District of Columbia facilitating the creation and enforcement of conservation easements. The public has invested an enormous amount of resources in their acquisition.

Accordingly, in construing a conservation easement, the meaning that is consistent with or furthers the conservation and preservation purposes is the interpretation that is consonant with public policy, serves the public interest and protects the public's investment. To interpret them in favor of the free use of land is not in the interests of justice and instead impermissibly confers significant windfall benefits on the owners of easement-encumbered land at the expense of the public.

The modern standard for interpreting a conservation easement is set forth in the *Restatement (Third) of Property: Servitudes* § 4.1 (2000):

> 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.

Accord Davis v. Henning, 250 Va. 271, 274 (1995) ("In construing deeds, it is the duty of the Court to ascertain the intention of the parties, gathered from the language used, and the general purpose and scope of the

instrument in the light of surrounding circumstances.”).[8] The Restatement drafters rejected the “strict construction doctrine” where servitudes are narrowly construed in favor of the free use of land. *Id.* at § 4.1, cmt. a.[9]

The Easement should be interpreted in favor of its clear and express Purpose consistent with the public’s vested interest in land conservation and preservation and against the free, unrestricted use of land. For

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[8] Virginia law regarding the construction of easements stands in stark contrast to the restrictive covenant standard. In construing an easement granted or reserved by deed, “where the description admits of two constructions, it will be construed most favorably to the grantee.” *Hamlin v. Pandapas*, 197 Va. 659, 664 (1956) (“the grantor must generally be considered as having intended to convey all that the language he employed is capable of passing to the grantee”) (citing *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.*, 116 Va. 211 (1914)); *see also Kirby v. Town of Claremont*, 243 Va. 484, 490 (1992) ("A condition subsequent set forth in a deed of easement is to be strictly construed against the grantor and those who claim under him."); *see also Painter v. Alexandria Water Co.*, 202 Va. 431, 436 (1961) ("an instrument granting an easement of flowage must, consistent with its language, be most strongly construed against the grantor and most favorably to the grantee, and construed so as to pass to the grantee the greatest possible estate") (citations omitted); *Hite v. Luray*, 175 Va. 218, 224 (1940) (construing deed granting water rights in favor of grantee and against the grantor because "the grantor selects his own language.").

[9] This modern rule is supported by case law from other jurisdictions. *See Goldmuntz v. Town of Chilmark,* 651 N.E. 2d 864, 866 (Mass. App. Ct. 1995)(rights reserved in conservation easement construed in light of both the easement’s stated purpose and the specific restrictions in the deed); *Joslin v. Pine River Development Corp.*, 116 N.H. 814, 816-17 (1976) (“prejudice against restrictive covenants which led courts to strictly construe them is yielding to a gradual recognition that they are valuable land use planning devices” and “modern viewpoint is that the former policy of strictly construing restrictive covenants is no longer operative”).

example, to the extent the Court believes the term “farm building” is ambiguous, it should construe that term in a manner that retains the Property in its condition as established by the BDR and in its open, scenic and natural condition and does not significantly impair the environment. Such a construction favors the plain meaning definition of “farm” which is “a piece of land used for growing crops or raising animals. All of the trial court’s holdings regarding purported ambiguous terms should be reversed.

VII. THE TRIAL COURT ERRED WHEN IT DID NOT CONSIDER WAT’S CLAIM THAT THE BRIDGE ACROSS THE LITTLE RIVER VIOLATES THE EASEMENT.

Sections 3.3(C)(v) and (vii) state: “No . . . structure of any nature may be constructed . . . (v) within two hundred (200) feet of the centerline of any perennial stream or pond on the Protected Property . . . or (vii) on any 100 year floodplain . . ..” White Cloud built a bridge on the Property across the Little River, a perennial stream, and within the River’s 100-year floodplain. WAT contended that the bridge violates the Easement. App. pp. 919-920. The trial court, however, held that WAT was precluded from raising this argument at trial because it “did not contend anywhere in its Complaint that the bridge was in violation of the Conservation Easement.” App. p. 201 (*citing Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 43 (2003) (“a court is not permitted to enter a decree or judgment order based

on facts not alleged or a right not pleaded or claimed.”). This is an error of law considered *de novo* on appeal because a variance alone does not end the legal analysis. *Westgate*, 270 Va. at 574.

The variance rule is intended to prevent surprise. “Where there is no surprise to the party invoking it, there is no good reason for enforcing the rule.” *Kennedy v. Mullins*, 155 Va. 166, 180 (1930). Moreover, “where no objection has been made to the admission of evidence, or no motion is made to exclude it because of the supposed variance with the pleadings, such variance *must be* considered to have been waived.” *Culmore Realty Co. v. Caputi*, 203 Va. 403, 406 (1962) (emphasis added). Otherwise, it “would deprive parties of their right to amend their pleadings to conform with the evidence, which is permitted in proper cases under [the Virginia Code]”. *Id*. Virginia Code § 8.01-377 (formerly 8-217) expressly provides for a “Remedy when variance appears between evidence and allegations.”

Without objection, WAT introduced photographs of the bridge (App. pp. 1002-1005, 1070), aerial photographs of the Property before/after the bridge was constructed (App. pp. 1171-1187), and White Cloud’s interrogatory responses No. 9-11 (App. pp. 1059-1068)(admitting bridge was built after 2008). App. p. 23. Without objection, WAT’s expert witness Mr. Rolband located the Little River floodplain, stated that the bridge was

built within the floodplain, introduced his floodplain map, App. pp. 348-349, stated that the Little River is a perennial stream, *id*. at 337, and that the bridge is within 200' of the centerline of the Little River. *Id*. at 342. Although White Cloud made two relevance objections, *id*. at 338, 343, it never objected on the grounds that there was a variance between the Complaint and the evidence. *See Jackson v. Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 651 (1942) (party must "state the grounds of his objection, so that the trial judge may understand the precise question . . . he is called upon to decide").

White Cloud argued the <u>merits</u> of WAT's bridge claims during its Motion to Strike, App. pp. 438-444, and in closing argument. App. pp. 940-943. WAT argued the <u>merits</u> supporting the claims. App. pp. 447, 919. Only at the end of its closing argument regarding the bridge did White Cloud for the first time claim that the bridge issues were not in the Complaint. App. p. 944. But it did not argue a variance, cite any law, or seek to have any evidence excluded or claims stricken. The trial court did not allow rebuttal argument. App. p. 957.

Conservation easements create public rights and interests and "substantial justice" per Virginia Code § 8.01-377 would be served by

deciding an issue that affects those public rights. The bridge is unquestionably a prohibited structure.

CONCLUSION AND PRAYER

WHEREFORE, Wetlands America Trust respectfully requests that the Court grant this Appeal, reverse the trial court's decisions and find that: (1) the Building is not a permitted farm building; (2) White Cloud impermissibly constructed its facilities in a highly erodible area; (3) White Cloud impermissibly graded and materially altered the topography of the Property; (4) the facilities and related activities do not retain the Property in its rural and pastoral condition per the Baseline Documentation Report; (5) the facilities and related activities significantly impair the land and the purpose of the Easement; (6) the common law regarding the interpretation restrictive covenants does not apply to conservation easements and instead any ambiguous provisions in the Easement should be interpreted to carry out the intent of the parties and purpose of the Easement; and (9) the Bridge is a prohibited structure. This Court should order removal of the parking lot, Building, septic system and Bridge and restoration of the Property to its pre-construction condition as set forth in the Baseine Documentation Report and remand the case for determination of the costs and attorney's fees to be awarded to WAT per Easement Section 4.14.

WAT prays for such other and further relief, general or special, in law or in equity, to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Virginia Supreme Court has been complied with and pursuant to the Rule on this 26th day of May, 2015 fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy, have been mailed postage prepaid to:

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