DRAFT 2/9/05 -- 10:00 AM

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 042404

UNITED STATES OF AMERICA
Plaintiff,
v.
PETER F. BLACKMAN
Defendant.

BRIEF AMICI CURIAE OF
HISTORIC GREEN SPRINGS, INC., ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES, CHESAPEAKE BAY FOUNDATION, HISTORIC RICHMOND FOUNDATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, THE NATURE CONSERVANCY [?], PIEDMONT ENVIRONMENTAL COUNSEL, AND THE WATERFORD FOUNDATION
IN SUPPORT OF THE GOVERNMENT

of Counsel
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February 14, 2005

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I. QUESTIONS PRESENTED

A. In Virginia in 1973, would a conveyance of a negative easement in gross by a private property owner to a private party for the purpose of land conservation and historic preservation be valid?

B. In Virginia in 1973, would it be valid for a group of property owners to grant to a private grantee restrictions for the purpose of land conservation and historic preservation on their individually owned parcels of property, when: (1) the property was not being transferred by a common grantor; (2) each grant was made in consideration of similar grants to the grantee; and (3) the grantee did not own any property benefited by the restriction?

II. PRELIMINARY STATEMENT

Amici Curiae, Historic Green Springs, Inc. ("HGSI"), et al., respectfully submit this brief in support of the efforts of the United States of America to demonstrate that under Virginia common law, law of equity, and statutory law governing easements in gross, the easement conveyed by D.L. and Frances Atkins to HGSI in the 1973 Deed of Easement is a valid and enforceable conveyance of an interest in property. **Accordingly, the amici maintain that the answer to both questions certified by the district court should be answered "Yes."**

III. INTEREST OF AMICI CURIAE

The eight amici curiae are charitable foundations, involved in efforts for conservation of open-space and/or to historic preservation in the Commonwealth of Virginia for decades. They have an interest in the certified questions presented to this Court because they either: (1) hold conservation or historic preservation easements, many of them easements in gross, that were given to them by landowners prior to 1973; (2)

they held and later assigned such easements; or (3) they were founded to preserve the environmental and historic qualities of properties affected by this Court's answer to the certified questions. They are among the organizations that Judge Moon referred to when he presented the certified questions to this court. Judge Moon indicated that if negative easements for open-space conservation or historic preservation held by private entities (as distinguished from those held by "governmental bodies" specifically authorized to hold them by legislation adopted by the General Assembly in 1966) did not exist in 1973,

> not only will the Eastern View Farm conservation Easement fail, but likely so will all other HGSI easements, casting into doubt the basis of property development in Green Springs over the last twenty years. Given the far-reaching implications this issue has for the integrity of easements in the Green Springs community and those of similarly situated communities in Virginia, the Court finds that the issue is worth consideration by the supreme court of Virginia.

United States of America v. Blackman, No. 3:04CV00046, at 13 (W.D.Va. Sept. 27, 2004). This cloud of doubt cast over all such easements is enough for the following organization to hold a valid interest in the questions before this Court.

A. Historic Green Springs, Inc. ("HGSI")

[Revisions from Rae Ely to come]

In 1972 local citizens organized HGSI in response to government plans to develop a prison facility in the Green Springs area. In order to preserve the historic nature of the area, HGSI initiated an effort to designate Green Springs as a National Historic Landmark. In 1973, after the Virginia Board of Historic Resources had designated it a Virginia Historic District and recommended that it also be listed on the National Register of Historic Places, many of the landowners in the district, acting together, gave perpetual easements in gross on their respective properties to HSGI to help preserve the district. In

1978, __ years after it was listed on the National Register, HGSI conveyed the 1973 easements and other similar easements acquired since the initial gifts, to the United States Government by a Deed of Assignment dated June 6, 1978. In the Deed of Assignment, the original grantors signed the deed to reaffirm the earlier gift to HGSI and acknowledge consent to the assignment, even though it was not legally required. After the June 6, 1978 assignment, HGSI continued to receive gifts of easements in the Green Springs Historic District and assigned them to the Government.

HGSI has a unique interest in the outcome of this litigation because it arises out of one of the 1973 conveyances. By a "Deed of Easement" dated March 1973, the Atkins family granted HGSI an assignable easement over defendant's Eastern View Farm. The farm was subsequently purchased by Peter F. Blackman ("Defendant") on July 1, 2002. Id. at 3. HGSI's interest in the present litigation is clear. If both certified questions presented to this court are answered in the negative, not only will the easement on Eastern View Farm be void; the validity of all of the remaining Green Springs area conservation easement donations recorded prior to the 1988 Virginia Conservation Easement Act will be subject to challenge.

B. Association for the Preservation of Virginia Antiquities ("APVA")

Founded in 1889, APVA is America's oldest statewide preservation organization. It is dedicated to preserving, ensuring, and sharing the vitality of Virginia's irreplaceable heritage of buildings, landscapes, and archaeological sites. It achieves this mission by caring for historic places and collections, promoting preservation, and providing programs and technical services for the public. In its 116 year history, APVA has been involved in the preservation of 123 historic sites and it continues to own and manage 31

of these sites.[1] Twelve easement agreements held by APVA predate the Virginia Conservation Easement Act (see Appendix I) and could be in jeopardy if the Court answers the certified questions in the negative.

C. Chesapeake Bay Foundation

[To Come] (see Appendix I)

D. Historic Richmond Foundation

[To Come]

E. National Trust For Historic Preservation ("National Trust")

[Paul or Rob, please shorten to one page in length - see APVA and PEC submissions]

The National Trust is a private nonprofit, charitable, and educational 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. 16 U.S.C. §§ 461-468. The mission of the National Trust is to provide leadership, education, and advocacy to save America's diverse historic places and revitalize our communities. In addition to its headquarters in Washington, D.C., the National Trust operates eight regional and field offices and 25 historic sites across the country, including the fee simple ownership of five historic properties in the Commonwealth of Virginia, which are open to the public. These properties include Montpelier, in Orange County; Woodlawn and the Pope-Leighey House, in Mt. Vernon; Belle Grove, near Middletown; and Oatlands, near Leesburg. With the strong support of its 250,000 members nationwide, including more than 20,000 members and supporters in Virginia, the National Trust regularly participates in litigation, as party and as amicus curiae, to protect

[1] The remainder have been returned to the private sector or local government, often with easements and/or covenants attached to the deed.

significant historic sites and areas.

For the past several decades, the National Trust has actively encouraged the use of and has accepted conservation easements throughout the country and in Virginia. The National Trust has published numerous books and reference materials on easements, including Establishing an Easement Program to Protect Historic, Scenic, and Natural Resources (1995) and has participated with the Land Trust Alliance, in publishing the Conservation Easement Handbook (1988), the Model Conservation Easement and Historic Preservation Easement (1996), and Appraising Easements (1999), publications which set professional standards to guide the work of land trusts and other organizations holding conservation easements. The National Trust also serves as a resource center and receives hundreds of requests for information every year from preservation organizations, property owners, government officials, land trusts, and others who have questions about voluntary land conservation.

The National Trust holds approximately 100 conservation easements on historic properties nationwide, including seventeen easements on historic properties located within the Commonwealth of Virginia. These easements protect the context and views from National Trust Historic Sites and also other historic resources, many of which are not otherwise protected by local ordinances. Fifteen of the seventeen easements held by the National Trust in the Commonwealth could be negatively affected by the outcome of issues raised in this case. See Appendix I. The National Trust has a strong interest in ensuring the continued use, validity, and effectiveness of easements as important and voluntary property protection tools, which serve to preserve millions of historically and environmentally sensitive resources across the country.

The National Trust has participated as amicus curiae in support of cases involving the enforcement and validity of easements and other types of voluntary preservation tools. For example, the National Trust participated as amicus curiae in Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277 (4th Cir. 2002), cert. denied, 538 U.S. 998 (2003); and Maryland Envt'l Trust v. Gaynor, 803 A.2d 512 (Md. 2002). Based on the National Trust's experience relating to the use of easements for the protection of historic properties, the Trust believes that its participation in this amicus brief will assist the Court in resolving the important issues raised by this case.

F. The Nature Conservancy [?]

[To Come]

G. Piedmont Environmental Counsel ("PEC")

Incorporated in 1972, PEC is a non-profit organization dedicated to promoting and protecting the rural economy, natural resources, history and beauty of Virginia's Northern Piedmont. PEC's service area encompasses Albemarle, Clarke, Culpeper, Fauquier, Greene, Loudoun, Madison, Orange and Rappahannock counties. In its 33 years of existence, PEC has encouraged landowners to protect their properties by donating permanent conservation easements, primarily to the Virginia Outdoors Foundation. Through the use of conservation easements, PEC has helped landowners keep more then 200,000 acres permanently protected in working farms, open-space and forests. These easements also protect historic properties, drinking water supplies, wildlife habitat and scenic viewsheds.

PEC has an interest in the certified questions before this Court because of its interest in protecting the conservation easement program in Virginia in its entirety.

While PEC does not hold any easement donated prior to 1988, PEC is a partner with Oatlands, Inc. and the National Trust for Historic Preservation. It is also a supporting organization of the Waterford Foundation. All three of these organizations hold easements recorded prior to 1988.

Landowners that donate permanent conservation easements do so with the fair expectation that the land will be permanently protected. They also rely on the enforcement of the easements by the easement holders and courts of the Commonwealth. Any weakening of this expectation will have a chilling effect on the willingness of landowners to donate conservation easements in the future.

H. The Waterford Foundation [?]

[To Come]

IV. SUMMARY OF ARGUMENT

The ever changing common law of England, which the Commonwealth of Virginia inherited at the time of the Declaration of Independence, had a general hostility to restrictions on land use. This reflected a centuries-old struggle to free land use from some of the remaining constraints of feudalism that inhibited commerce and economic growth. But as times changed, the common law also changed. It was changed by judges who thought that "new occasions taught new duties" and "time made ancient good uncouth." It was also affected by new acts of the legislature and by the adoption of new constitutions by the people.

Question One should be answered in the affirmative. In Virginia in 1973, a conveyance of a negative easement in gross to a private party from a private property owner for the purpose of land conservation and historic preservation was valid because: (1) in 1973 conveyance of "any interest in or claim to real estate, including easements in

gross," had been authorized by a statute, enacted in 1849 and clarified in 1962; and (2) the negative easement in gross conveyed to Historic Green Springs, Inc., a private non-profit corporation, by private property owners (Blackman's predecessors in title) was not contrary to the then declared public policy of the Commonwealth to promote land conservation and historic preservation, which had been articulated in legislation enacted by the General Assembly in 1966 and reaffirmed in Article XI of the new Virginia Constitution adopted in 1971.

Similarly, Question Two should also be answered in the affirmative. In Virginia in 1973, the grant to a private grantee by a group of property owners of similar restrictions on their individually owned lands for the purpose of land conservation and historic preservation, each grant being made in consideration of similar grants to the grantee, would be viewed as an implicit "contract" or "agreement" among the owners to create an "equitable servitude." The servitude would be binding on the owners and could be enforced in equity against them, or their successors in title who took with notice. The servitude would be enforceable notwithstanding the facts that: (1) each of the grantor's title was not derived from a common grantor, and (2) the grantee of the deed of restriction did not own any property benefited by the restriction. Long before 1973, Virginia case law had adopted and applied the equitable doctrine of Tulk v. Moxhay. As such, it was clear that the intentions of the parties to an implied agreement, even if not enforceable "at law" (which is not the case here), would be enforced in equity unless the purpose of the restriction was contrary to public policy. It also was clear that a land owner whose property was restricted in this joint effort could enforce the restrictions on a fellow landowner, as well as that landowner's successors and assigns with notice. In

1973, there were no Virginia cases holding that equity required a grantee of an agreement imposing restrictions on land to own the land benefited by the restriction to enforce it against the grantor for the benefit of other landowners who had granted similar restrictions on their lands. In fact, cases in other jurisdictions that followed the Tulk v. Moxhay doctrine have permitted a grantor not owning benefited land to enforce the restriction under circumstances analogous to facts on this case.

V. STATEMENT OF THE NATURE OF THE CASE AND THE OF THE MATERIAL PROCEEDINGS

Amici adopt the Statement of the Nature of the Case and the Materials Proceedings set forth in the Brief of the Government of the United States filed on this same day.

VI. FACTS

Amici adopt the Statement of Facts set forth in the Brief of the Government of the United States filed on this same day.

VII. ARGUMENT

A. THE ANSWER TO QUESTION ONE

In 1973, a grant of a negative easement in gross by a private landowner was enforceable against each grantee and grantor, as well as their successors and assigns who took with notice of the grant.

1. The Clear Statutory Beacon

In 1973, Section 55-6 of the Virginia Code stated clearly without ambiguity that:

> **"Any interest in or claim to real estate, including easements in gross, may be disposed of by deed or will."**

(emphasis added). This section of the code had a long history. It was initially enacted in 1849 to change the then existing Virginia "common law." While patterned upon an act of

English Parliament that had similarly changed the English "common law," the 1849 statute (later Section 55-6) went beyond the act of Parliament in its scope. Judge Moncure described this legislative change to the common law in his opinion for the Court in Carrington v. Goddin, 54 Va. 587, 599-600 (1857) as follows:

> It is very clear that before the Code took effect, a bargainee of a party not in possession, actual or constructive at the time of the execution of the deed could not maintain ejectment in his own name, at least against the party at the time in the adverse possession of the land. His disability to maintain the action proceeded ... from the common law, whose maxim it was that nothing in action or entry could be granted over. A feoffment was void without livery of seisin; and without possession there could be no livery of seisin .... The statute of uses ... did not remove the disability .... But the Code has changed the common law rule by declaring that "any interest in or claim to real estate may be disposed of by deed or will." Ch. 116, § 5, p. 500. That such a change was contemplated by the revisors is manifest from their report .... They recommended the adoption of a section similar to 8 and 9 Vict. ch. 106, § 6; in which "a right of entry" is expressly named. Instead of adopting that section, which is complicated in its details, the legislature enacted the provision before quoted. Their object was to use brief and plain terms, which would be at least as extensive in their meaning as the terms used in the statute of Victoria. They could not have used more comprehensive terms than they did.

(emphasis added). This 1849 statute put Virginia literally a century ahead of many other states of the Union, which also had inherited the English common law and eventually reached the same result through case-by-case judicial decisions.

Ironically, the Virginia statute's clear order that "any interest in or claim to real estate" could "be disposed of by deed or will" became subsequently obscured by: (1) the relative rare use of easements in gross in Virginia in the rest of the 1800's; (2) the slow case-by-case evolution of the relevant common law (and equity) in other states; (3) the general debates over the nature and enforceability of "easements," "covenants," and

"servitudes" in nationwide academia during the first half of the 20th Century; and (4) the desultory stand-off within the American Law Institute in the 1940's Second Restatement of Property, Servitudes over the "black letter law" and it comments dealing with "easements in gross" and "equitable servitudes."

The basic question being debated in academia in the first half of the last century is best summed up in the Note, Assignability of Easements in Gross, 32 Yale L.J. 813, 814 (1922-23):

> These curious interests in land, here denominated easements in gross, have known a highly interesting career in the courts, and afford an excellent illustration of the extent to which words can disguise and even distort ideas. In England a standard text-writer feels justified in saying, "It is clearly established now that there is no such right known to the law as an easement in gross." .... With such a background, it might be expected that on this side of the water the easement in gross would receive eccentric treatment. Here, too, there is some authority denying to a way in gross the name of easement and even the quality of an interest in land, and fully accepting the English view that it is essentially different from its near relative, the profit in gross. But most of the American courts have been willing to accord this foundling the name of easement in gross, and to regard it as an interest in land to be protected as such, but yet an interest so "personal" in its character as to be neither assignable nor inheritable, even though the right is expressly given to the grantee, his heirs and assigns .... But upon a broader view of modern usage this seems a most astounding statement. In most instances the "right of way" of a railroad is but an easement in gross. Yet is has never been even suggested that such a right is not assignable .... Furthermore there is to be found a respectable number of decisions by highly respectable courts seemingly in flat conflict with the general rule above. Evidently there is something strangely wrong with the alleged rule.

(footnotes omitted); see also, William H. Lloyd, Enforcement of Affirmative Agreements Representing the Use of Land, 14 Va. L. Rev. 420 (1928); Reno, The Enforcement of

Equitable Servitudes in the Land: Part I, 28 Va. L. Rev. 951 (1942). For an insight into the intensity of the differences over the enforceability of easements and equitable servitudes that arose in the 1940's in the American Law Institute's Second Restatement of Property, Law of Real Covenants, project, see, e.g., Charles E. Clark, American Law Institute's Law of Real Covenants, 51 Yale L.J. 699 (1943); William F. Walsh, Covenants Running with the Land, 21 N.Y.U. L. Rev. 28, 55, et seq. (1946).

This out-of-Virginia "background haze" was briefly addressed by the Supreme Court of Virginia in 1952 where it held in a conclusory opinion that a grantee's interest was an enforceable easement in gross. Reed v. Dent, 194 Va. 156, 162, 72 S.E.2d 25, 258 (1952). The Court recognized that a homebuilder retained "an easement in gross, 'a mere personal interest in, or right to use, the land of another,'" to erect a sign on grantor property owner's land for advertising purposes.[2] Id.

The "background haze" from the other States also led to dicta in one Virginia case which was contrary to Code Section 55-6. In Lester Coal Corp. v. Lester, 203 Va. 93, 97 (1961), without any discussion of Code Section 55-6, the Court stated that:

> As related to the question before us, there are two classes of easements. The first is known as a pure easement, or an easement appurtenant, which has both a dominant and a servient estate, and is capable of being transferred and inherited. Such an easement passes with the land to which it is appurtenant .... The other class is termed an easement in gross, sometimes called a personal easement, which is not appurtenant to any estate in land, but in which the

[2] The Court cited the following authorities and cases to support its holding: 6 Michie's Jurisprudence, Easements § 5, p. 470; Borough Bill Posting Co. v. Levy, 129 N.Y.S. 740 (N.Y. App. 1911); Solana Land Co. v. Murphey, 210 P.2d 593 (Ariz. 1949); Davis v. Robinson, 127 S.E. 697 (N.C. 1925); 1 Minor on Real Property § 88 (2d ed.); Jones on Easements §§ 33,39; 28 C.J.S., Easements § 4(b), p. 634; 17 Am. Jur., Easements §§ 11, 12, pp. 932- 33; 5 Restatement of Law of Property, Servitudes § 454; 130 A.L.R. 1253, 1254; and Black's Law Dictionary p. 637 (3d ed.).

> servitude is impressed upon land with the benefit thereof running to an individual. Such an easement cannot be transferred by the individual to whom it was originally given, nor can it pass by inheritance ....

Id. at 93. Accordingly, the Lester court labeled the easement an "easement appurtenant" and held it to be enforceable.

The dicta from the Lester court was in flat contradiction of Code Section 55-6 as applied earlier in City of Richmond v. Richmond Sand & Gravel Co., 123 Va. 1, 9, 96 S.E. 204, 207 (1918):

> But … the deed contemplated the case of the easement not only for drainage of the smaller tract, but also as essential to the drainage of Highland Park, and other lands not included in the particular tract. This view removes the easement from the class of appurtenant easements to which the principle involved applies, and either constitutes an easement in gross, or else extends the area of land to which it is appurtenant, so as, at least, to include land naturally drained by the channel. If it is to be regarded as an easement in gross it is still "an interest in hand," and therefore may be disposed of by deed or will under the statutes of this State. Code, §§ 2418, 2548; 1 Minor on Real Prop., p. 115.

The court in Lester went on to hold, however, that: "We find nothing in the language of the deed, expressly or inferentially, which indicates that the parties intended that the rights be merely personal to Northern." Id. at 99. Moreover, an examination of the Court's records shows that neither Code Section 55-6, or its predecessor, or City of Richmond were cited in the briefs or addressed in oral argument. If the plaintiff's counsel had invoked Section 55-6, the easement obviously would have been enforceable even if it were an "easement in gross."

Fortunately, a year after the Lester opinion, the General Assembly cleared the air by amending Section 55-6 to sweep away any lingering doubts. Acts 1962, c. 169. The

phrase "easement in gross," which the Court in City of Richmond held to be "an interest in land" under Section 55-6, enforceable in both law and equity, was now explicit in the Code. Id. Unfortunately, Lester still is cited as if the dicta were its holding.

2. Virginia Public Policy on Land Conservation and Historic Preservation

By 1973 Virginia was fully committed to a policy of encouraging land conservation and historic preservation. It was one of the first states in the country to focus on the threats to these resources by unconstrained growth and urbanization.

In 1966, the General Assembly's Virginia Outdoors Recreation Commission ("Commission") produced a lengthy report on the potential adverse impacts on Virginia's historic, cultural, and natural resources of the state posed by growing population and urbanization. The members of the Commission were aware that land use taxation was adopted in England to encourage the preservation of open-spaces and historic places. However, they also knew that the Virginia Constitution of 1902 contained provisions that required property of the same class to be taxed equally. VA. Const. Art. 8, Sec. 168:

> **Taxable property; taxes shall be uniform as to class of subjects and levied and collected under general laws.**
>
> All property, except as hereinafter provided, shall be taxed; all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

This uniform taxation provision precluded Virginia's use of "land use" taxation as a means of encouraging property owners to conserve and protect historic properties and scenic open-spaces from development.

The legislators were also aware of the growing purchases by, or gifts to, the Federal Government of easements for conservation of places like Skyline Drive. In order

to effectively preserve such places, the members of the Commission turned to other means of inspiration, such as the National Trust of Scotland's use of the equivalent of "easements in gross" to restore and preserve historic Scottish villages. The Commission also required that easements in gross were in use in Virginia to serve other public purposes such as rail transportation, communication, power lines, pipelines, electricity and gas distribution, and other uses. In the words of Tardy v. Creasy, 81 Va. 553 (1886), by 1886, "easements in gross" were no longer "novel." Id. at 557. Their use would not be at "the fancy or caprice of any owner" (id. at 558), nor would their use be "against public policy" (id. at 565). Accordingly, the Commission recognized the potential conservation power of easements in gross and made a number of legislative recommendations that were subsequently adopted by a series of acts in 1996 designed to conserve open-space and to protect historic resources.[3]

The overall effect of these Acts was to encourage new State agencies (i.e., Virginia Board of Historic Resources and Virginia Outdoors Foundation) and local governments to move forward with vigorous programs encourage open-space and historic preservation easements. The new state agencies also began to work with charitable entities in the private sector with similar goals. The amici in this brief were in the

[3] Chapter 525 of the Acts of 1966, now Sections 10.1-2200 through 2306 of the Code of Virginia, created the Virginia Board of Historic Resources and charged it with the duty to designate historic landmarks and historic districts. It also authorized the Board to accept gifts of perpetual easements in gross for the purpose of preservation of such landmarks and districts.

Chapter 525, now Chapter 18, also created the Virginia Outdoors Foundation and authorized it to accept and hold land in free and perpetual open-space easements in gross for the protection of open-space, as well as historic landmarks.

Chapter 461 of the 1966 Acts and the Open-Space Land Act, now Chapter 17, authorized any "public body" in Virginia to acquire perpetual easements in gross for such purposes.

forefront of these efforts. See Interest of Amici Curiae, above.

The adoption of the new Virginia Constitution in 1971 provides further evidence of Virginia's ongoing commitment to historic and open-space preservation. Article XI declares the preservation of historic properties and sites to be a goal and an obligation of State Government. Section 1, entitled "Natural resources and historical sites of the Commonwealth" states that:

> 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 buildings. Further it shall be the Commonwealth's policy to protect its atmosphere, lands and water from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of Virginia.

The new Constitution also dropped Sections 168 of the 1902 Constitution, which, as discussed earlier, was thought to preclude the State's authorization of land use taxation for conservation purposes. Today, land use taxation is in effect in many counties in Virginia, providing the landowner at least a "temporary" means for conservation that a subsequent gift of an easement can make "perpetual."

B. ANSWER TO QUESTION TWO

In Virginia in 1973, it was valid for a group of property owners to grant to a private grantor restrictions for the purpose of land conservation and historic preservations on their individually-owned parcels of property when (1) the property was not being transferred by a common grantor; (2) each grant was made in consideration of similar grants to the grantee; and (3) the grantee did not own any property benefited by the restriction

Let us start by focusing on the fact that the restrictions contained in the various

deeds of easements to Historic Green Springs, Inc. were from grantors that acquired their respective parcels earlier from different grantors. Does that fact alone make the restriction unenforceable in equity against a grantor? The answer provided in Cheatam v. Taylor, 148 Va. 26, 34 (1927) is clearly "NO":

> It is not necessary, in order to sustain the equitable remedy, that there should be any privity of either estate or contract, if it clearly appears that the restriction was created for the plaintiffs, among others, or their grantor, and that the defendant had notice, actual or constructive of the restriction. There is an equitable right in the plaintiffs, variously designated, which a court of equity will protect and enforce, although there may be no remedy, or an inadequate one, at law .... Whether or not third persons, not parties to the instrument, are within its purview, is one on intention, and this intention may appear either from the instrument alone, or from the instrument with the aid of the surrounding facts and circumstances .... If a person is within the benefits intended to be conferred, he has an equitable interest which court of equity will protect.

In Cheatham, the Virginia Supreme Court discussed and applied in the equitable doctrine widely known as the doctrine of Tulk v. Moxhay. The doctrine derives its name from the English chancery case where it had its origin: Tulk v. Moxhay, Court of Chancery, England, 2 Phillips, 774, 41 Eng. Rep. 1143 (1848) (opinion of Lord Cottenham). Cheatham, at pages 36-37, cited Harlan F. Stone, The Equitable Rights and Liabilities of Strangers to a Contract, 18 Co. L. Rev. 291-324, continued in 19 Col. L. Rev. 177-91:

> In *Tulk v. Moxhay, supra*, the owner of a piece of ground sold and conveyed a part of it, described as "Leicester Square Garden," to a purchaser in 1808, who, amongst other things, covenanted that no building should ever be erected upon it. "The piece of land so conveyed passed by diverse mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenants with his vendor; but he admitted that he had purchased with notice of the covenant in the deed of 1808." The purchaser

> asserted the right to build on it, if he thought fit, and the "plaintiff, who still remained the owner of several houses in the square, filed his bill for an injunction; and an injunction was granted by the Master of the Rolls." A motion to dissolve was made before Lord Chancellor Cottenham, which was refused. The Lord Chancellor said: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as Square Garden. And it is now contended, not that the vendee could violate the contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having the power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.
>
> "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement, and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in any different situation from the party from whom he purchased."
>
> Here, then, Lord Cottenham puts the right of recovery upon "an equity attached to the land," and gives the right of recovery against any one "purchasing with notice of that equity."

Later in Cheatham, at page 37, the Court observed with apparent approval that:

> In 8 AM. Eng. Ency. L. (2d ed.), page 140, it is said: "Courts of equity, however, irrespective of whether a privity of estate exists, or whether the covenants run with the land, upon equitable grounds enforce such covenants against purchasers with notice."

At page 38, the Court quoted Northrup, the Law of Real Property, page 377:

> Restrictive covenants are most commonly made in connection with such sales of building lots, but the principle of the doctrine of Tulk v. Moxhay is, of course, applicable to other kinds of restrictions on the use of land, and equitable servitudes are created for miscellaneous purposes.

Another important opinion of the Virginia Supreme Court applying the Doctrine of Tulk v. Moxhay is Springer v. Gaddy, 172 Va. 533 (1939). Like Cheatham, the case involved the enforceability in equity of building restrictions by one landowner against another where the restriction was imposed in a deed of dedication filed by a common grantor and the defendant had notice of the restriction when he acquired the property. The Court found that "it is apparent that appellee deliberately, if not defiantly, sought to abrogate the rights of appellant in the Waycroft estate secured to him by deed of dedication." Id. at 543. It rejected defendant's argument that the plaintiff should be denied equitable relief since he had recourse in an action for damages.

Additionally, in 1955 the Virginia Supreme Court decided Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E.2d 128 (1955). There, E.I. duPont de Nemours and Co., in recognition of "the situation of a community dependent upon one industry," devised a plan to make "Hopewell a 'Selected, Diversified, Industrial Community.'" Id. at 936. Accordingly, when liquidating and disposing of its property in Hopewell, Du Pont agreed to a restrictive covenant in deeds conveyed to Hummel-Ross Fibre Corp. and Hercules Powder Co. that precluded the manufacture of chemical or

mechanical wood pulp. Id. at 937. Thereafter, Hercules obtained permission from Hummel-Ross to operate a plant that did not violate the land development restrictions on Hummel-Ross' property. Id. at 938. Years later, Continental Can Co. acquired Hummel-Ross' Hopewell property and attempted to eliminate the development restrictions and litigation followed. Id. at 938-39. In its resolution of the question of the validity of the restriction, the Virginia Supreme Court noted that the restriction was reasonable and not contrary to public policy. As such, the Court held that the restriction was valid and enforceable by Continental and was binding upon the property of Hercules.[4] Id. at 939-40.

It is clear from these three cases and the authorities cited in them that in Virginia in 1973 equity would enforce an obligation restricting the use of a landowner's property if it is pursuant to an agreement between the landowner and someone else, as long as the restriction was reasonable and not contrary to public policy.

In 1973 equity would also enforce that same obligation restricting the use of a landowner's property against the successor in title to that landowner who took with knowledge of the obligation. The obligation can arise under "Property Law," "Contract Law," or "the Law of Trusts." c.f., Springer, id. at 541.[5] The obligation can be explicit

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[4] The Court specifically rejected Hercules' argument that the restriction was not valid to protect the future industrial community of Hopewell because there was a vast quantity of forest land on which pine was growing and could be expected to grow. The Court cited Du Pont's willingness to create the covenant because of its desire "to enable Hopewell to develop into a well balanced, diversified industrial community." Hercules Powder Co., 196 Va. at 942. As such, the restriction was not contrary to public policy. Id. Moreover, it was reasonable when it was imposed to protect the community because "the drain on Virginia pine now exceeds growth…" Id.

[5] In Virginian Ry. Co. v. Avis, 124 Va 711, 718, 98 S.E. 638, 640 (1919), Judge Kelly said: "It is well settled that where the grantor has clearly restricted the use of land granted, and the restriction itself is not illegal, the covenant creates a trust which, in a

or implied. "Intention" rather than "form" is determinative. See Harlan F. Stone, Equitable Rights and Liabilities of a Stranger to a Contract, 19 Col. L. Rev. 291 (1918). After a lengthy discussion of Tulk v. Moxhay at pages 295, et seq., Stone examined alternative doctrinal justifications for the result advanced in subsequent opinions. He concludes that "none of these views conform wholly to the results reached by the decisions, but that the doctrine that the burden of restrictive comment 'follows the land' into the hands of all but innocent purchasers is an application of equity which is generally recognized and consistently applied in the law of trusts and in specific performance of contracts." Id. at 296. Later he adds:

> Only a covenant, that is to say a promise under seal, is deemed to run with the land at law, but equity will impose the obligation upon subsequent takers where the contract or agreement is not under seal. Moreover, in equity, burdens as well as benefits are deemed to affect equitable interests or "estates" in land, which of course were not subject to the legal rule. These cases make it clear that equity, in imposing a burden of restrictive covenants upon subsequent takers of the land, is doing something more than giving an equitable remedy based on a legal obligation, which runs with the land at law.

Id. 297.

Subsequent Virginia cases agree. See e.g., Oliver v. Hewitt, 191 Va. 163, 167 (1950) ("In equity, one is bound by such a personal restrictive covenant even though it does not run with the land if he takes title with knowledge of its existence ...."); Meagher v. Appalachian Electric Power Co., 195 Va. 138, 145 (1953) (Whether or not third persons, not parties to the instrument, are within its purview, is one of intention, and this intention may appear either from the instrument alone or from the instrument with the aid

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proper case, courts of equity will enforce by means of an injunction against inconsistent use."

of the surrounding facts and circumstances.). In addition to addressing the validity of the restriction, the Court in Hercules, discussed above, held that the covenant was enforceable by Continental, an assignee of the original covenantee, against Hercules, an assignee of the original covenantor. Hercules Powder Co., 196 Va. at 942. The Court found that: (1) "when Hummel-Ross purchased its land from Du Pont, the restriction was incorporated as an integral part of its deed and was intended by the parties to benefit the use of the land for the business of pulp making"; (2) "When Continental acquired the property from Hummel-Ross, it also acquired the benefit of the restriction, which was, by whatever name called, a valuable equitable right in property"; and (3) "Hercules took title to its land with actual knowledge of the restriction…." Id. at 947. Moreover, the Court, explaining "the doctrine of *Tulk v. Moxhay*," stated:

> that when, on a transfer of land, there is a covenant or even an informal contract or understanding that certain restrictions in the use of the land conveyed shall be observed, the restrictions will be enforced by equity, at the suit of the party or parties intended to be benefited thereby, against any subsequent owner of the land except a purchaser for value without notice of the agreement.

Id. at 946 citing Meagher v. Appalachian Power Co*.,* 195 Va. 138, 145, 77 S.E.2d 461; 14 Am. Jur., Covenants, Conditions and Restrictions, § 45, p. 518, § 326, p. 659; 4 Pomeroy's Equity Jurisprudence, § 1295, p. 846 (5th ed.). Accordingly, the Court held that "it would be manifestly inequitable to hold the covenant unenforceable against Hercules and confer upon it an unwarranted benefit to the detriment of Continental Can." Id. at 948. The Court, citing Booker v. Old Dominion Land Co., 188 Va. 143, 49 S.E.2d 314 (1948), noted that: "Equity will not set at naught solemn covenants voluntarily made, when to do so would enrich the covenantor or his assigns with notice thereof and injure

the covenantee or his assigns." Id.

Against this background, it is clear from the facts in this case that all of the landholders who gave perpetual easements in gross in 1973 to Historic Green Springs, Inc. did so in reliance upon their neighbors conveying similar easements to a common grantee. All of them acted for the common purpose of preserving the historic features and setting of the Green Springs Historic District. All of the easements were in documents under seal that were duly recorded. Thus, under the statutory and case law in force at the time in the Commonwealth, the easements were valid and enforceable in both law and equity against the grantor and their heirs and assigns; the easements were enforceable by Historic Green Springs, Inc. until assigned them to the Government, at which time the Government acquired the right to enforce them.

Assume for the sake of argument that in 1973 perpetual easements in gross for conservation purposes, held by a nongovernmental entity like Historic Green Springs, Inc. that did not own any property benefited by the restriction, were not valid under the common law. Even so, they would still be enforceable as "equitable servitudes" against the grantors and their successors and assigns who took with notice. The equitable servitude could be enforced by fellow grantors as part of an implicit contract.

The easements could also likely be enforceable by a grantee such as Historic Green Springs, Inc. because it has standing as an "agent" or "trustee" to enforce the equitable servitudes for the benefit of those who gave easements for the same common purpose. Cf., Neposit Property Owner's Assn v. Emigrant Industrial Savings Bank, 278 N.Y. 248, 261-62, 15 N.E. 793, [page # to be inserted] (1938), where the Court stated:

> The arguments that … the plaintiff has no right of action to enforce a covenant running with the land are based upon a

distinction between the corporate property owners association and the property owners for those whose benefit the association was formed. If that distinction may be ignored, then the basis of the argument is destroyed. How far privity of estate in technical form is necessary to enforce in equity a restrictive covenant upon use of land, presents an interesting question. Enforcement of such covenant rests upon equitable principles (*Tulk v. Moxhay*, 2 Phillips, 774; *Trustees of Columbia College v. Lynch*, 70 N.Y. 440…; *Korn v. Campbell*, 192 N.Y. 490 …, and at times, at least, the violation "of the restrictive covenant may be restrained at the suit of one who owns property or for whose benefit the restriction was established, irrespective of whether there were privity either of estate or contract between the parties or whether as action at law were maintainable;" *Chesebro v. Moers*, 233 NY 75, 80…. The covenant in this case does not fall exactly within any classification of "restrictive" covenants, which have been enforced in this State. (Cf. *Korn v. Campbell*, 192 N.Y. 49…), and no right to enforce even a restrictive covenant has been sustained in this State where the plaintiff did not own property which would benefit by such enforcement so that some of the elements of an equitable servitude are present. In some jurisdictions it has been held that no action may be maintained without such elements. But cf. *VanSaint v. Rose*, 260 Ill. 401 .... We do not attempt to decide now how far the rule of *Trustees of Columbia College v. Lynch*, *supra*, will be carried, or to formulate a definite rule as to when, or even whether, covenants in a deed will be enforced, upon equitable principles, against subsequent purchases with notice, at the suit of a party without privity of contract as estate. C.f., "Equitable Rights and Liabilities of Strangers to a Contract," by Harlan F. Stone, 18 Columbia Law Review 291. There is no need to resort to such a rule if the courts may look behind the corporate form of the plaintiffs.

The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate forum when we realize that the Neposit Property Owners' Association, Inc., is acting as the agent or representative of the Neposit Property Owners .... Only blind adherence toward ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which

would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend. Every reason which in other circumstances may justify the ancient formula may be urged in support of the conclusion that the formula should not be applied in this case. In substance if not in form the covenant is a restricted covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant.

We have considered the other contentions of the defendant and especially the defense that the alleged lien based upon the covenant set forth in the complaint constitutes an interest in land that is unenforceable under the provisions of sections 242 and 259 of the Real Property Law (Cons. Laws, ch. 50). We find the defense insufficient.

It should be noted that the covenant in the *Neposit* case was an affirmative obligation to pay an annual maintenance charge but Walsh states that "the Court said that in substances if not in farm the covenant was a restrictive covenant and privity of estate existed. Walsh, *supra*, p. 53, n.59. Thus the reasoning would apply equitably to negative and affirmative restrictions.

See also, Merrionette Manor, Improvements Home Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E. 2d 556 (1956).

VIII. POST 1973 HINDSIGHT

A. Enactment of the 1988 Virginia Conservation Easement Act

In the earlier U.S. District Court proceedings in this case, defendant Blackman argued that 1988 enactment of the Virginia Conservation Easement Act ("VCEA") (Va. Code §§ 10.1-1009, et seq.) was evidence that under Virginia "law" private charitable trusts could not hold easements in gross for conservation or preservation purposes prior to its enactment. That interpretation of the effect of VCEA enactment fails because of the reasons set forth above: (1) since 1849, easements in gross were valid pursuant to Section 55-6 of the Virginia Code for any purpose that does not offend public policy, and

(2) since 1966, the creation of conservation easements for environmental or historic conservation is not contrary to Virginia public policy (indeed, such efforts are consistent with public policy). In addition, the VCEA codified previously existing "law" regarding the validity of conservation easements held by charitable entitles and merely clarified the restrictions on such easements created after the effective date of the VCEA. In other words, the purpose of the VCEA was not to create a new right,[6] but to put limitations on an already existing right.[7]

1. VCEA's Deviations From the Uniform Conservation Easement Act Are Irrelevant

While the General Assembly developed the VCEA substantially from the Uniform Conservation Easement Act ("Model Act") (see Unif. Conservation Easement Act, General Statutory Notes, 2004 Electronic Pocket Part), it omitted the sections addressing retroactive application. Section 5(b) of the Model Act contains a specific retroactive application provision: "This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date

[6] The only new right created was a tax exemption. See Va. Code § 10.1-1011(A).

[7] The new are found in: (1) Va. Code § 10.1-1010(C) (clarifying the termination requirements of conservation easements and who may hold them); (2) Va. Code § 10.1-1014 (clarifying the circumstances in which conservation easements will be valid and that they may be altered or affected in the same manner as other easements.); (3) Va. Code § 10.1-1013 (clarifying who may bring an action affecting a conservation easement); (4) Section 10.1-1012 (imposing new notification obligations on the party responsible for recording such deeds); and (5) Section 10.1-1010(E) (requiring the easement to conform to the comprehensive governmental plan of the area where the property was located). These protective restrictions had become routine in the numerous easements for open-space conservation or historic preservation held by charitable foundations including many of the amici's prior to 1988 to assure that the easement would be deemed to be "perpetual" under the Federal Internal Revenue Code and thus qualify for an income tax deduction by the donor. See, Freeman, The Use of Easements for Historic Preservation, Law and Contemporary Problems, Duke Law School, Special Preservation Issue (Summer 1971).

unless retroactive application contravenes the constitution or laws of this State or the United States." VCEA contains no such provision (see Va. Code §§ 10.1-1009, et seq.) because it instead applied savings clauses. The first savings clause states: "This chapter does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity." Va. Code § 10.1-1010(F). The second savings clause states: "Nothing herein shall in any way affect the power of a public body under any other statute, including without limitation the Virginia Outdoors Foundation and the Virginia Historic Landmarks Board, to acquire and hold conservation easements or affect the terms of any such easement held by any public body." Obviously, there were earlier right being protected or the savings clauses would be superfluous. In fact, with respect to the first savings clause, which was adopted straight from the Model Act, the Model Act Notes state: "The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts." Unif. Conservation Easement Act § 3, Comment, 1996 Main Volume.

Accordingly, instead of delving into the perplexing nuances addressed in the "Applicability" section of the Model Act (see id. § 5), which limit retroactive application to certain circumstances, the VCEA left the applicability issue alone, relying solely on the savings clauses and the rights previously granted.

2. Legislative Intent of VCEA Was to Clarify Restrictions on Conservation Easements

The substantive portion of the VCEA begins by stating that "[a] holder may acquire a conservation easement by gift, purchase, devise or bequest." Va. Code § 10.1-1010(A). The VCEA does not limit the validity of conservation easements conveyed by

gift, purchase, devise or bequest, prior to its enactment. In fact, all the VCEA did was create a tax exemption and establish specific criteria clarifying who may hold conservation easements, when they are valid, and who may challenge them. See notes __. There is no language limiting previously recorded easements[8], instead the purpose of the Act was to have one statute controlling an clarifying a previously existing area of law. Historically, the General Assembly has enacted legislation in other fields for similar purposes and cases following such legislation have confirmed that because specific legislation is enacted to control an area of law, it does not mean that prior actions in that area of law were not previously authorized. See e.g., Anderson v. Bullock, 18 Va. 442, 444 (Va., 1815) ("The provisions of § 3299 of the Code, … were intended to enlarge the right of recoupment theretofore existing at common law, and not to impair any previous right or take away any defenses previously allowed by the common law."); see also Commonwealth ex rel. Duvall v. Hall, 194 Va. 914, 916-17 (1953) ("There is no merit in the defendants' contention that when § 8-716 was enacted in 1849 the remedy therein provided became the exclusive remedy for an action for the breach of the condition of a sheriff's bond. … the right to maintain such an action by common-law writ and declaration had been in the law for about one hundred years before that statute was enacted.").

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[8] While the VCEA indicates the date on which its requirements take effect (Va. Code § 10.1-1012), it does not indicate that conservation easements in existence prior to July 1, 1988 are invalid. Accordingly, a private foundation could hold a pre-VCEA easement. This is supported by the savings clauses and omission of an "applicability' section in the VCEA.

B. Focus of Post-1973 Supreme Court Decisions Involving Restrictive Covenants in Subdivisions

Since 1973 there have been a number of Virginia Supreme Court opinions dealing with the "validity" (or "enforceability") of restrictive covenants in subdivisions. Most of these opinions cite the case law and other authorities cited in this brief, but applied them to factual situations markedly different from the facts here, which have nothing to do with subdivisions.

Here, the first question is one "of law." It involves the validity of the gift of "an easement in gross," intended to be "perpetual;" and thus, to "run with the land." It was given by a single landowner to a private entity for the public purpose of conservation and protection of one of the State's historic resources. The second question is one of "equity." It involves a group of landowners: (1) who had no common grantor, and (2) who gave a private entity "negative" restrictions on their respective properties for the protection of a historic district that had been recognized as a Virginia Historic District by the Virginia Board of Historic Resources and recommended to the Secretary of Interior for listing on the Federal Register of Historical Places. The second question here addresses whether "the restrictions are binding upon each grantor and their successors and assigns who take title with notice of the restrictions?" As to privity, with respect to the facts in U.S. v. Blackman,, there was horizontal privity between Historic Green Springs, Inc., the grantors, and the grantors of the easements. There was also vertical privity between (1) the Atkins' and their successors in title, Mr. Blackman, and (2) HGSI and the Government.

Statements in some of the subdivision opinions, that a common grantor meets the "horizontal privity" necessary for creation of a restriction under the "common law"

doctrine of covenants “running with the land” (see, e.g., Sloan v. Johnson, 254 Va 271, 276, 491 S.E. 2d 725, 728 (1997); Sonoma Development, Inc. v. Miller, 258 Va. 163, 258 S.E. 2d 577 (1999)) should not be misinterpreted as indicating that privity requires a common donor of the grantor and grantee of the restriction outside the context of a subdivision restriction. Such statements also should not be misinterpreted to indicate that a restriction created by deed or covenant can only be enforced where it was created by, or imposed coincident with, a transfer in fee of the restricted land.

C. The ALI’s Third Restatement of Property — “Catching Back Up”

Finally, one of the most significant post-1973 events that afford us enlightened hindsight is the American Law Institute’s approval and promulgation on May 12, 1988, of a new Third Restatement of Property, Servitudes (St. Paul, MN, American Law Institute Publishers, 2000).

As pointed out above, the earlier Second Restatement of Property, Servitudes had added to, rather than helped resolve, the confusion in the national debates over the enforceability of easements in gross and equitable servitudes in the late 1940’s. The Third Restatement, on the other hand, clears the air with respect to the validity and enforceability of negative easements in gross. It general, it reaches the point as to negative easements in gross where Virginia was in 1973, after the General Assembly in 1849 enacted what is now Virginia Code Section 55-6 and Virginia’s Court subsequently sanctioned and expanded the equitable doctrine of Tulk v. Moxhay. In fact, it may have even gone beyond where Virginia stood as to the enforceability of “affirmative easements,” a subject not before the Court. The easements included here would clearly be valid under the applicable sections of the Third Restatement.

The following sections and comments from the new restatement are relevant to

the two questions involved here: [Rider 28(A) - to come]

IX. CONCLUSION

For the reasons stated, the Amici respectfully request that the Virginia Supreme Court answer both certified questions presented by the District Court in the affirmative.

Respectfully submitted,

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February 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have complied with Rules 5:26(d) and 5:30(c), Rules of the Supreme Court of Virginia, by causing to be filed on the 14th day of February, 2005, twenty copies of the foregoing Brief Amici Curiae of Historic Green Springs, Inc., et al., in Support of Appellants with the Supreme Court of Virginia, and causing on this same date to be mailed, first class, postage pre-paid, three copies of the foregoing Brief Amici Curiae of Historic Green Springs, Inc., et al., to each of the following:

___________, Counsel for Plaintiff; ___________, Counsel for Defendant.

____________, Counsel for other amici.

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