

Strict Construction of Instruments of Conveyance for Easements

Description

Wavell v. Lengel, 2021 Va. Cir. LEXIS 158, Case No. CL20000484-00 (Amherst Co. Cir. Ct. July 12, 2021).

Strict construction of canons of legal interpretation are presented in Amherst County Circuit Court's recent decision, *Wavell v. Lengel*, 2021 Va. Cir. LEXIS 158, Case No. CL20000484-00 (July 12, 2021). (A copy of the opinion is [attached](#).) Therein, The Hon. Michael T. Garrett held that notes on a subdivision plat did not create an express easement for Wavell because it was a "boiler plate" text referencing any existing easements but stopped noticeably short of expressly creating and conveying an easement in favor of Plaintiff, Wavell, against Defendant, Lengel's, property. The Court failed to find necessary words of conveyance sufficient to memorialize an intention to grant any easement in favor of Wavell with respect to using a private road through Lengel's gate and property in an abutting subdivision in Buffalo Hills to access Wavell's Amherst Plantation property.

Under longstanding, well-established Virginia law, any provision in an instrument that purports to create an easement shall be strictly construed. See *Chesapeake & Potomac Telephone*, 247 Va. 136, 139, 439 S.E.2d 369 (1994) (holding that the rule in Virginia regarding easement provides that a provision in an instrument claimed to create an easement must be strictly construed with any doubt being resolved against the establishment of the easement). While there are admittedly no particular magic words or terms of art required to create an easement, the intention to grant an easement must be so manifest and clear on the face of the instrument that no other construction or interpretation is plausible. See *id.* The instrument must contain operative words of conveyance sufficient to demonstrate a manifest intention to grant an easement. See *id.*

The Amherst Circuit Court ruled there was no express easement found in the instruments of subdivision nor in the recorded deeds for the Wavell and Lengel properties. See *Wavell*, 2021 Va. Cir. LEXIS, at *5. With regard to Wavell's argument that the plat for Buffalo Hills Subdivision (the "Plat") and its notes were sufficient to create an easement, the Court disagreed, instructing, the Plat at issue, even when signed and generically notated, did not sufficiently constitute an instrument of conveyance, as there must be such an instrument, even if not necessarily a deed containing operative words of conveyance sufficient to demonstrate the manifest intention to grant an easement. *Id.*, at *6-7. Judge Garrett found notes of "boiler plate" language merely referencing existing easements in a plat stopped short of creating an easement, consistent with *Burdette v. Brush Mountain Estates, LLC*, 278 Va. at 299 (citing *Corbett v. Ruben*, 223 Va. 468, 471, 290 S.E.2d 847 (1982)). See *Wavell*, at *8. Ultimately, Lengel prevailed, as the Court found deeds, instruments of subdivision, and plats, inclusive of text and notes therein, did not create an express easement for Wavell to traverse across Lengel's property to reach his own property; Wavell had no legal right to use the property of Lengel; Wavell's request for an injunction was denied; and his request for an order requiring Lengel to remove her private locked gate was denied. See *id.*

The Court cautioned in *Wavell* when reviewing title instruments or plats, to focus upon express, strictly construed text, clear and manifest on its face to demonstrate intention to create and grant an easement

with requisite operative words of conveyance.

If you have any questions or would like to discuss the impact of this significant new opinion, please contact Jim Windsor at (757) 873-6308 or jlwindsor@kaufcan.com, or Lisa Hudson Kim at (757) 491-4017 or lhkim@kaufcan.com.



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Lisa is Of Counsel in the firm's Virginia Beach office and a member of the Bankruptcy, Creditors' Rights and Business Restructuring; Lender Representation; Consumer Finance; and Real Estate Claims and Title Insurance Solutions practice groups. She served as law clerk to The Honorable Douglas O. Tice, Jr., Chief Judge (Retired) of the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division. Her bankruptcy experience covers mega commercial bankruptcies representing landlords, employees, pension holders, and creditors, as well as consumer cases representing mortgage servicers, lenders, dealerships, finance companies, and investors. Lisa has twenty years of litigation experience, including before the Court of Appeals for the Fourth Circuit, Supreme Court of Virginia, and United States Supreme Court. She is an AV® Preeminent-rated litigator by Martindale-Hubbell. Her legal background spans bankruptcy and creditors' rights, including adversary proceedings, collections, consumer and commercial litigation, real estate, title insurance, professional liability defense, and civil litigation. Among recent appellate wins, she successfully prosecuted her first writ of certiorari before the Virginia Supreme Court's writ panel and

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James is a partner with Kaufman & Canoles and is based in the firm's Virginia Beach office. He is the Chairman of the firm's Real Estate Claims & Title Insurance Solutions Group. Mr. Windsor is rated an AV Preeminent lawyer with over 36 years of experience and expertise in counseling and litigation involving title insurance, real property, construction, mechanic's liens, bond claims, mortgage lending, creditors' rights, commercial and banking law. He has written a book, a law review article, many other articles, and given over 120 seminars on topics of interest to the real estate and construction industry. Mr. Windsor was selected by peers and recognized by Virginia Business magazine as a member of "Virginia's Legal Elite" • 2003-2004, 2007-2014 and 2016-2020 in the area of Construction Law; and listed in Virginia Super Lawyers 2006, 2010-2018 and 2021 in the area of Real Estate. He was selected by peers and recognized by Best Lawyers in America 2018-2022 in the area of Real Estate. In 2018, he was listed as a "Top Rated Lawyer in Construction Law" • in the American Lawyer & Corporate Counsel Magazine. In 2013, 2018-2019, Mr. Windsor was listed as a "Top Rated Lawyer in Insurance Law" • in the American Lawyer & Corporate Counsel Magazine and, in 2018, he was listed as "Top Rated Lawyer in Litigation Law" • in the American Lawyer & Corporate Counsel Magazine. He was rated as a "Top Rated Lawyer in Insurance Law" •, Martindale-Hubbell 2013. In 2017-2021, Mr. Windsor was listed as a "Top Lawyer" • by CoVaBiz. He received the "Distinguished Service Award" • from the Virginia Land Title Association in 2015-2016.

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