

**HISTORY OF VIRGINIA LAW**  
**ON**  
**CONSERVATION EASEMENTS**

- Restrictive covenants have historically been strictly construed against the party seeking to enforce them
- The common usage of “easement” implies a right appurtenant to another property such as a right of way for access. In fact, restrictions “in gross” have historically been looked upon with particular disfavor by the courts.
- The ownership of properties encumbered by conservation easements is turning over. The new owners may not necessarily review in depth the terms of the easement.
- In *Wetlands America Trust, Inc. V. White Cloud Nine Ventures, L.P.* 782 S.E.2d 131 (2016) (“WAT”), the Virginia Supreme Court recognized and acknowledged “that in certain significant respects the [Virginia Conservation Easement Act, Virginia Code Sections 10.1-1009 through 10.1-1016] is in derogation of the common law. However, our analysis does not end there, as this does not necessarily mean that the common law strict construction principle applied to restrictive covenants is abrogated by the VCEA.” In fact, the court went on to say that by leaving the strict construction principle in place, the General Assembly must have viewed the strict construction principle as an incentive for easement drafters to be more careful, clear, and precise when drafting easements.
- The Virginia Supreme Court further stated in WAT that when the General Assembly adopts a statute in derogation of the common law the statute itself must be strictly construed.
- In 2021, the General Assembly adopted an amendment to both the Virginia Conservation Easement Act and the Virginia Open-Space Land Act in an attempt to abrogate the common law principle of strict construction of conservation easements.

Conservation Easement Act:  
Virginia Code Section 10.1-1016.1

Open-Space Land Act:  
Virginia Code Section 10.01-1705.1

Construction. Notwithstanding any provision of law to the contrary, an easement held pursuant to this chapter shall be construed in favor of achieving the conservation purposes for which it was created.

- Query: Because the new statutes do not expressly state that the intent is to abrogate the common law principle that easements are to be strictly construed, will Virginia courts follow the intent of the new statutes?
- Do we need to be more explicit and specific regarding the conservation purposes?
- For an excellent summary of the judicial principles that have served as obstacles to the enforcement of conservation easements, please see Nancy McLaughlin's article in the Georgetown Environmental Law Review (Nancy McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 Georgetown Env't L. Rev. 167 (2022)).