

Strict Construction of Instruments of Conveyance for Easements
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 "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 "[t]he 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.