

## Appendix F

### Principles of Deed Construction

This appendix lays out the primary principles of interpreting the language in deeds.

#### 1. If a deed is unambiguous, the intent of the grantor is determined from the language of the deed

The primary consideration in construing a deed is to determine the intention of the parties executing the instrument. *Poindexter v. Molton*, 237 Va. 448, 377 S.E.2d 450 (1989); *Allen v. Green*, 229 Va. 588, 331 S.E.2d 472 (1985). Where the language of a deed clearly and unambiguously expresses the intention of the parties, no rules of construction should be used to defeat that intention. *CNX Gas Company, LLC v. Rasnake*, 287 Va. 163, 752 S.E.2d 865 (2014). Technical rules of construction are not to be invoked to defeat the intention of the grantor when that intention appears by giving to the words used their natural and ordinary import. *Fitzgerald v. Fitzgerald*, 194 Va. 925, 76 S.E.2d 204 (1953).

The grantor's intention, as expressed in the instrument, must prevail unless it is contrary to some principle of law or rule of property. *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 782 S.E.2d 131 (2016); *Auerbach v. County of Hanover*, 252 Va. 410, 478 S.E.2d 100 (1996) (in ascertaining the intent of the grantor, the deed is examined as a whole and effect given to all of its terms and provisions not inconsistent with some principle of law or rule of property); *Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979); *Fitzgerald v. Fitzgerald*, 194 Va. 925, 76 S.E.2d 204 (1953).

If a deed is clear and unambiguous, the focus is upon the language of the deed and from that source alone, its meaning is determined. *Wetlands America Trust, supra*; *Trailsend Land Co. v. Virginia Holding Corp.*, 228 Va. 319, 321 S.E.2d 667 (1984); *Irby v. Roberts*, 256 Va. 324, 504 S.E.2d 841 (1998) (in such a case, one should look no further than the four corners of the deed itself). Put another way, if the language of a deed is clear, unambiguous and explicit, and the intention is thereby free from doubt, that intention is controlling, if not contrary to law or to public policy, and auxiliary rules of construction should not be used. *Shirley v. Shirley*, 259 Va. 513, 525 S.E.2d 274 (2000).

The terms of every deed are to be understood in their plain, ordinary, and proper sense (*Wetlands America Trust, supra*), and where words have a primary meaning they must always be understood in that sense, unless the context shows that they were otherwise intended. *Lindsey v. Eckels*, 99 Va. 668, 40 S.E. 23 (1901). Words deliberately put into a deed, and put there for a purpose, are not to be lightly considered nor arbitrarily put aside. *Halsey v. Fulton*, 119 Va. 571, 89 S.E. 912 (1916). Where there is no conflict in any of the provisions of the deed and no repugnancy results, all parts thereof should be given effect. *Fitzgerald, supra*.

Oral evidence of the circumstances at the time of the deed's creation is not to be considered in giving effect to the clear, unambiguous, and explicit language of the deed. *Irby v. Roberts*, 256 Va. 324, 504 S.E.2d 841 (1998).

#### 2. If a deed is ambiguous, extrinsic evidence may be considered and rules of construction may be applied

If the language of a deed is "obscure and doubtful, it is frequently helpful to consider the surrounding circumstances and probable motives of the parties." *Swords Creek Land Partnership v. Dollie Belcher*, \_\_\_ Va. \_\_\_, 762 S.E.2d 570, 572 (2014) (concluding that the severance deed in that case was not ambiguous); *CNX Gas Company, LLC v. Rasnake*, 287 Va. 163, 752 S.E.2d 865 (2014).

Extrinsic evidence and parol evidence are admissible to resolve an ambiguity. *See, e.g., Renner Plumbing v. Renner*, 225 Va. 508, 303 S.E.2d 894 (1983). An ambiguity exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time. *Allen v. Green*, 229 Va. 588, 331 S.E.2d 472 (1985); *CNX Gas, supra*; *Renner Plumbing, supra*.

If a deed is uncertain and ambiguous, oral evidence may be received to show all the attendant circumstances existing at the time the deed was executed, including the situation of the parties and their relationship. *Camp v. Camp*, 220 Va. 595, 260 S.E.2d 243 (1979). The Virginia Supreme Court has stated when the language in a deed is “obscure and doubtful,” it is “helpful to consider the surrounding circumstances and probable motives of the parties.” *CNX Gas, supra*. However, oral contemporaneous evidence is, in general, inadmissible to contradict or vary the terms of a valid deed because the deed is the only outward and visible expression of the meaning of the parties. *Camp, supra* (to allow a deed to be varied or contradicted by verbal testimony of what passed at or before the deeds making would be to favor less trustworthy evidence to trump more certain and reliable evidence – the deed itself).

Rules of construction may be applied if the deed is ambiguous. See *Shirley v. Shirley*, 259 Va. 513, 525 S.E.2d 274 (2000).

### 3. General rules of construction when a deed is ambiguous

Following are some general rules for construing an ambiguous deed:

- *Construed against the grantor.* The language in an ambiguous deed must be construed against the grantor and in favor of the grantee. *CNX Gas Company, LLC v. Rasnake*, 287 Va. 163, 752 S.E.2d 865 (2014); *Ellis v. Commissioner*, 206 Va. 194, 202, 142 S.E.2d 531, 536 (1965). The Virginia Supreme Court has called this rule “one of the most just and sound principles of the law because the grantor selects his own language.” *CNX Gas, supra* (noting that the presumption of construing a deed in favor of the grantee is so strong that, in a prior case, the court held that where there was doubt as to whether one or two parcels were intended to be conveyed, the deed will be construed to pass title to both).
- *Grantor intended to convey all the language capable of conveying.* A grantor must be considered to have intended to convey all that the language he has employed is capable of passing to the grantee. *CNX Gas, supra*; *Hamlin v. Pandapas*, 197 Va. 659, 664, 90 S.E.2d 829, 833 (1956).
- *Entire deed considered together.* The whole of a deed and all its parts should be considered together, and effect should be given to every part of the instrument, if possible. *CNX Gas, supra*; *Auerbach v. County of Hanover*, 252 Va. 410, 414, 478 S.E.2d 100, 102 (1996). No part should be discarded as superfluous or meaningless. *CNX Gas, supra*; *Foster v. Foster*, 153 Va. 636, 645, 151 S.E. 157, 160 (1930).
- *Harmonize terms.* Where the meaning of the language is not clear, or the deed is not artfully drawn, the terms should be harmonized, if possible, so as to give effect to the intent of the parties. *CNX Gas, supra*; *Foster v. Foster*, 153 Va. at 646, 151 S.E. at 160.
- *Granting clauses and conflicting language: the common law rule and the modern rule.* At common law, the granting clause always prevailed over language repugnant to it; under the modern rule, the intent of the parties, if it is clearly and unequivocally expressed, will prevail. *CNX Gas, supra*. If it is impossible to ascertain, with reasonable certainty, the parties’ intent from the language of the deed, the common law rule still applies and the granting clause prevails. *CNX Gas, supra*; *Goodson v. Capehart*, 232 Va, 232, 236, 349 S.E.2d 130, 133 (1986). That rule applies “with particular force to exceptions in a deed that are repugnant to the granting clause.” *CNX Gas, supra*.
- *Exceptions.* Exceptions in a deed are always to be “taken most favorably for the grantee, and if it be not set down and described with certainty, the grantee shall have the benefit of the defect.” *CNX Gas, supra*, quoting *Bradley v. Virginia Railway & Power Co.*, 118 Va. 233, 238, 87 S.E. 721, 723 (1916).

### 4. The effect of a deed referencing a plat

Where a deed incorporates a plat by reference, that plat must be considered part of the deed itself. *Faison v. Union Camp Corporation*, 224 Va. 54, 294 S.E.2d 821 (1982). Even though a plat is incorporated by reference into a deed for descriptive purposes, its effect is limited to being a descriptive tool; the plat itself does not convey. *Burdette*

*v. Brush Mountain Estates, LLC*, 278 Va. 286, 682 S.E.2d 549 (2009) (cases cited therein; holding that a plat, incorporated into two deeds for descriptive purposes, could not serve as an instrument of conveyance of an easement, even though the plat had a note stating that a private easement was conveyed). Where a plat is referred to in a deed for the purpose of fixing the parcels' boundaries, the effect is the same as if it were copied into the deed. *Poindexter v. Molton*, 237 Va. 448, 377 S.E.2d 450 (1989).

In *Marble Technologies, Inc. v. Mallon*, 290 Va. 27, 773 S.E.2d 155 (2015), the issue was whether the location of an easement had moved with the changing mean high water line along the Chesapeake Bay. The 1936 deed stated that the property recipients took their property "subject to an easement on a twenty foot road as designated on the map recorded with this deed." The map depicted "S 20-00 W" as the southern end of the easement and it denoted a point where the easement made a slight bend as "980.0' S29.55W," and designated the easement as running "Along Present Mean High Water." The map noted the location of a "Stake" at the northern end of the designated "Twenty Foot Road," and depicted the easement as existing "Along Present Mean High Water." The Virginia Supreme Court concluded that the reference to the "present mean high water" line meant the line as it existed in 1936 when the map was created, and that this conclusion was confirmed by the fact that the map used metes and bounds and a stationary marker to show the easement's location. Thus, the Court held "that the map is unambiguous regarding the location of the easement. The metes and bounds descriptions and the stationary markers dispel any claim of ambiguity. Nothing on the map or in the deed indicates that the easement was to *move* with the changing coastline." *Marble Technologies*, 290 Va. at 34, 773 S.E.2d at 158.

## 5. The effect of a plat referencing a deed

References on a plat to deeds recorded incorporate the legal descriptions of those deeds into the plat and, thus, into any subsequent deeds referencing the plat. *Auerbach v. County of Hanover*, 252 Va. 410, 478 S.E.2d 100 (1996).

## 6. Descriptions of land conveyed

A deed conveying land must give such a description of the property intended to be conveyed as will be sufficient to identify it with reasonable certainty. *Chesapeake Corp. of Virginia v. McCreery*, 216 Va. 33, 216 S.E.2d 22 (1975).

Land conveyed by a single metes and bounds description means that the land is held out as a single parcel, even though the deed may refer to prior deeds that showed the land to be comprised of multiple parcels. *Diversified Development Co. v. Sendi*, 34 Va. Cir. 390 (1994).

If there is an irrevocable conflict between multiple descriptions of the property conveyed, the description that is less certain yields to the one that is more certain. *See Smith v. Chapman*, 51 Va. 445 (1853). In the absence of a contrary intent, the following order of preference rule applies where deed descriptions are inconsistent:

1. Natural monuments or landmarks.
2. Artificial monuments and established lines, marked or surveyed.
3. Adjacent boundaries or lines of adjoining tracts.
4. Calls for courses and distances.
5. Designation of quantity.

*Providence Properties, Inc. v. United Virginia Bank/Seaboard*, 219 Va. 735, 251 S.E.2d 474 (1979); *Spradlin v. Andrews*, 1999 Va. Cir. LEXIS 553 (1999). The rule, however, is not inflexible and will not be applied if to do so would frustrate the intent of the parties to the deed. *Providence Properties, supra*. Indeed, the rule is designed to effectuate the presumed intent of the parties. *Providence Properties, supra*.

In construing an ambiguous deed that contains descriptions of two parcels, but also refers to a plat that showed the land to be a single parcel, the descriptive clauses would be considered as well as the plat. *Faison v. Union Camp Corp.*, 224 Va. 54, 294 S.E.2d 821 (1982) (under circumstances, the descriptive clauses controlled).

As reflected in the list above, quantity is the least reliable method of describing land. Therefore, a description by acreage is inferior to all other deed descriptions. *Providence Properties, supra*; see also *Brunswick Land Corporation v. Perkinson*, 146 Va. 695, 132 S.E. 853 (1926) (where there is a conflict between the acreage and the boundary lines called for in a deed, it is well settled that the acreage is the less reliable indicator).

Where a map, plan, survey or deed is referred to for a description of land, it is not to be regarded as extrinsic evidence, but part of the instrument itself. *Richardson v. J. S. Hoskins Lumber Co.*, 111 Va. 755, 69 S.E. 935 (1911).

## **7. Description of easement dimensions**

A deed may expressly create an easement but fail to define specifically its dimensions. When this situation occurs and the deed language does not state the object or purpose of the easement, the determination of the easement's scope is made by reference to the intention of the parties to the grant, ascertained from the circumstances pertaining to the parties and the land at the time of the grant. *Anderson v. Delore*, 278 Va. 251, 683 S.E.2d 307 (2009); *Waskey v. Lewis*, 224 Va. 206, 294 S.E.2d 879 (1982). If the deed language states the object or purpose of the easement, the dimensions of the easement may be inferred to be what are reasonably sufficient to accomplish the object or purpose of the easement. *Anderson, supra*; *Hamlin v. Pandapas*, 197 Va. 659, 90 S.E.2d 829 (1956).

## **8. Deeds of correction**

Two deeds, the latter of which corrects a mistake or supplies an omission, may be construed together provided that they embrace the same subject matter, are between the same parties, and are related only to the same transaction. *King v. Norfolk & W. R. Co.*, 90 Va. 210, 17 S.E. 868 (1893).

## **9. Deeds that establish restrictive covenants imposing encumbrances on land**

Valid covenants restricting the free use of land, although widely used, are not favored and are strictly construed. *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 163, 782 S.E.2d 131, 137. Therefore, deeds that establish restrictive covenants imposing encumbrances on land are strictly construed against the party seeking to enforce them if the restrictions suffer from any substantial doubt or ambiguity. *Wetlands America Trust, Inc.*, 291 Va. at 162, 782 S.E.2d at 136; *Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977). The party seeking to enforce the restrictions has the burden to prove that they have been violated. *Wetlands America Trust, supra*; *Mid-State Equip. Co. v. Bell*, 217 Va. 133, 140, 225 S.E.2d 877, 884 (1976).

When a court has resolved the meaning of the disputed restrictive covenants, the restrictions will be enforced when applicable. *Wetlands America Trust, Inc.*, 291 Va. at 162, 782 S.E.2d at 136; *Mid-State Equip. Co., supra*. However, substantial doubt or ambiguity will be resolved against the restrictions and in favor of the free use of property. *Wetlands America Trust, Inc.*, 291 Va. at 163, 782 S.E.2d at 137; *Traylor v. Holloway*, 206 Va. 257, 259, 142 S.E.2d 521, 522-523 (1965).