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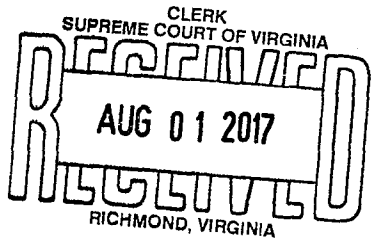

Record No.

RICHARD A. PRESSL and THERESA M. PRESSL,

Petitioners/Appellants,

– v. –

APPALACHIAN POWER COMPANY,

Respondent/Appellee.

PETITION FOR APPEAL

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	)	
Appellants,	)	
	)	
v.	)	**Record No. _____**
	)	
APPALACHIAN POWER COMPANY,	)	
	)	
Appellee.	)	
	)	

PETITION FOR APPEAL

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Virginia:

Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, and for the reasons that follow, Richard A. Pressl and Theresa M. Pressl hereby file this Petition for Appeal from the Final Order of the Circuit Court of Franklin County, Virginia, which was entered on the 4th day of May, 2017.

ASSIGNMENTS OF ERROR

I. The trial court erred in its construction of the parties' rights and responsibilities under the Flowage Easement as giving APCO the absolute authority to regulate shoreline activities on the Pressls' property, including the authority to deny the Pressls the right to construct a dock on their property, and this error in turn led the trial court to erroneously find that the

Complaint failed to allege a right to a declaratory relief that would preclude granting demurrer to APCO and that the Pressls' declaratory judgment action did not contain a factual claim. (Error preserved at R. 398-419, 584-590, T. 55).

II. The trial court erred in denying the Pressls' motion to amend their Complaint. (Error preserved at R. 375-398, 582-590).

QUESTIONS PRESENTED BY THE ASSIGNMENTS OF ERROR

I. Whether the trial court erred in its construction of the parties' rights and responsibilities under the Flowage Easement as giving APCO the absolute authority to regulate shoreline activities on the Pressls' property, including the authority to deny the Pressls the right to construct a dock on their property, and whether this error in turn led the trial court to erroneously find that the Complaint failed to allege a right to a declaratory relief that would preclude granting demurrer to APCO and/or that the Pressls' declaratory judgment Complaint did not contain a factual claim.

II. Whether the trial court erred in not allowing the Pressls to amend their Complaint.

STATEMENT OF THE CASE

On or about June 2, 2015, the Pressls filed a complaint for declaratory judgment against Appalachian Power Company (also referred to as "APCO") seeking a determination as to APCO's authority under a Flowage Right Easement Deed dated April 18, 1960 ("Flowage Easement") to require the Pressls to enter into a revocable license agreement/permit as a condition for constructing a dock on their property at Smith Mountain Lake; as to whether APCO can regulate the size

and type of dock that the Pressls may construct on their property which lies below the 800-foot elevation contour; as to whether APCO can regulate how the Pressls stabilize their shoreline by requiring them to plant vegetation below the 800-foot elevation contour; and as to whether APCO can regulate whether the Pressls may dredge on their property to improve any dock that they construct.

On or about June 23, 2015, APCO removed the case from the Franklin County Circuit Court to the U.S. District Court for the Western District of Virginia. U.S. District Court denied the Pressls' motion to remand and granted APCO's motion to dismiss, holding that APCO's easement rights gave it the authority to require the Pressls to obtain APCO's permit as a condition to constructing a dock on the Pressls' property. Pressl et. al. v. Appalachian Power Company, Case 7:15-cv-000343-NKM-RSB, 136 F. Supp. 3d. 900 (W.D. Va. Oct. 6, 2015). On November 2, 2015, the Pressls appealed to the United States Court of Appeals for the Fourth Circuit, arguing that the federal court did not have subject matter jurisdiction to hear and decide the case. The United States Court of Appeals for the Fourth Circuit, for the reasons stated in its memorandum opinion, vacated the judgment of the federal district court and remanded the case back to Franklin County Circuit Court, finding, among other things, that "since FERC regulates only APCO, the Pressls themselves could not violate the Federal Power Act by

constructing a dock." Pressl et. al. v. Appalachian Power Co., 842 F.2d 299, 306 (4th Cir. Nov. 21, 2016). On December 5, 2016, APCO filed a Motion for Rehearing and a Petition for Rehearing *En Banc*, both of which were denied.

Upon remand to the Franklin County Circuit Court, APCO filed its Demurrer. The Pressls filed their Memorandum of Law in Opposition and, in the alternative, a Motion to Amend. The hearing on the motions was held on April 11, 2017. At the conclusion of the hearing, the Court sustained APCO's Demurrer, denied the Pressls' Motion to Amend, and made several rulings interpreting the parties' respective rights under the Flowage Easement in favor of APCO, all as set out in the record of the hearing, the Final Order dated May 4, 2017, and a Letter Opinion dated May 4, 2017. It is from the trial court's Final Order that the Pressls appeal.

STATEMENT OF FACTS

On April 25, 1960, the Federal Power Commission, the Federal Energy Regulatory Commission's predecessor, issued a license to APCO, pursuant to which APCO was authorized to construct and operate a dam and/or hydroelectric power station known as the Smith Mountain Pumped Storage Project. With respect to the Pressls' property, on or about April 18, 1960 APCO acquired a flowage easement from the Thompsons, the then owners of what is now the

Pressls' property. R. 1-39, Compl., Exh. D. APCO specifically acquired an easement to:

> overflow and/or affect so much of said premises [below 800 feet contour line] as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of said river and tributaries and/or varying of the level of the so impounded waters by reason of the operation of said power station, including any pumping as part of such operation. Id.

The Thompsons also granted Appalachian the following right:

> ALSO, for the above mentioned considerations, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. Id.

The Flowage Easement further states that the Pressls' predecessor in title, the Thompsons, retained the right to:

> possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach impounded waters for recreational purposes . . . . Id.

APCO completed the construction of the dam at Smith Mountain in 1963. R. 1-39, ¶7. For much of the time Smith Mountain Lake has been in existence, APCO has not attempted to regulate the uses which waterfront property owners may make

of their property. R. 1-39, ¶35. For well over 40 years, the construction of docks on Smith Mountain Lake was regulated by local governmental authorities. R. 1-39, ¶15. These authorities have, in the past, enforced existing zoning and building codes as they pertain to dock construction without any action by APCO. Id. Many of the Pressls' neighbors and numerous other owners of waterfront properties on Smith Mountain Lake have constructed docks. Id. For many years, APCO did not assert a right to regulate docks. Instead, APCO relied upon local land use regulations for that function. R. 1-39, ¶35. The Pressls alleged that the construction of a dock would not interfere with APCO's ability to overflow the Pressls' property. R. 1-39, ¶14. The Pressls also alleged that at the time APCO was acquiring property rights, its employees made public statements that the property owners would be more than compensated by having the most ideal shoreline for recreational purposes. R. 1-39, ¶18.

The Pressls acquired 2.663 acres above 800 feet contour and 0.5 acres below 800 feet contour, all of which is located at Smith Mountain Lake in Franklin County, by deed dated June 20, 2012. R. 1-39, Exh. A. The real estate was conveyed subject to all easements affecting the real estate. Id.

Soon after the Pressls purchased their property, they began making plans to construct a dock. R. 1-39, ¶19. However, APCO informed the Pressls that it has the

authority to regulate how the Pressls use the property below the 800-foot contour level, including whether or not they could construct a dock, and made numerous arbitrary demands on the Pressls insisting that they had to use, dredge, stabilize the shoreline, and vegetate their property in particular ways. R. 1-39, ¶20. APCO also advised the Pressls that, as a condition of using their land below the 800-foot contour level, they had to execute an Occupancy and Use Permit ("Permit"). R. 1-39, ¶¶28, 29. The terms of this Permit state that it is a revocable license that APCO may revoke for any act which violates a condition imposed by APCO. R. 1-39, Exh. G. The Permit is personal in nature and does not run with the land, and it expands APCO's rights as to the Pressls' property beyond those that exist in the Flowage Easement. R. 1-39, Exh. G. Unwilling to agree to these permit terms to limit their property rights, the Pressls filed a declaratory judgment suit in the Circuit Court for the County of Franklin, Virginia, seeking the state court to interpret the Flowage Easement and APCO's rights under the Flowage Easement as it pertained to the demands imposed by APCO on the Pressls.

STANDARD OF REVIEW

The decision of a trial court on demurrer is a question of law that the Supreme Court considers *de novo*. See generally, Ayers v. Shaffer, 286 Va. 212, 212; 748 S.E.2d 86, 83 (2013). The purpose of a demurrer is to determine whether

a complaint states a cause of action upon which relief may be granted. W. S. Carners, Inc. v. Board of Supervisors, 252 Va. 377, 384; 478 S.E.2d 295, 300 (1996). A demurer tests only sufficiency of pleadings, not matters of proof. Id. If the plaintiffs' claim is a factual claim, it should not be addressed in a demurrer. Close v. City of Norfolk, 2011 Va. Cir. LEXIS 101, *32 (City of Norfolk, April 12, 2011). Since a demurrer searches the record, the defendant may not assert new matter in its demurrer; a demurrer that alleges new facts is a "speaking demurrer" and shall be stricken from record. Smith v. General Motors Corp., 35 Va. Cir. 112, 113 (1994). Presentation of evidence is not allowed on demurrer. Hackley v. Teague Enters., 16 Va. Cir. 392, **2 (1989). The facts admitted on demurer are those expressly alleged in the complaint, those which fairly can be viewed as impliedly alleged, and those which can be reasonably inferred from the facts alleged. Assurance Data, Inc. v. Malyevac, 286 Va. 137, 143; 747 S.E.2d 804, 807 (2013). In an action for a declaratory judgment, if the plaintiff's pleading alleges the existence of an actual or justiciable controversy, it states a cause of action and is not demurrable. First Nat'l Trust & Sav. Bank v. Raphael, 201 Va. 718, 721; 113 S.E.2d 683, 686 (1960). But this does not mean that a demurrer will never lie to a plaintiff's pleadings in a declaratory judgment proceeding. Id. Where the allegations of the complaint not only fail to show a right to executory relief, but

also fail to show a right to declaratory relief, there is no reason why a demurrer should not be interposed; and where it is plain on the record that there is no basis for declaratory relief, a demurrer may be properly sustained. Id.

PRINCIPLES OF LAW, ARGUMENT, & AUTHORITIES

I. The Trial Court Erred in Its Construction of the Parties' Rights and Responsibilities Under the Flowage Easement as Giving APCO the Absolute Authority to Regulate Shoreline Activities on the Pressls' Property, Including the Authority to Deny the Pressls the Right to Construct a Dock on their Property, and this Error in Turn Led the Trial Court to Erroneously Find that the Complaint Failed to Allege a Right to a Declaratory Relief that Would Preclude Granting Demurrer to APCO and/or that the Pressls' Declaratory Judgment Complaint Did Not Contain a Factual Claim.

The trial court erred in granting APCO's demurrer. The Complaint alleged an actual and justiciable controversy which arose between the parties regarding the interpretation of the Flowage Easement and their respective rights and duties. The demurrer should not have been granted. Further, pursuant to Raphael, even if there is an actual controversy, a trial court may still dismiss the case upon demurrer if there is no basis for declaratory relief. First Nat'l Trust & Sav. Bank v. Raphael, 201 Va. 718, 721; 113 S.E.2d 683, 686 (1960). The trial court erred in finding that the Pressls' case fell under this exception. The Flowage Easement does not clearly and unambiguously grant APCO the rights and impose upon the Pressls the duties

and prohibitions which the trial court declared were part of the Flowage Easement. R. 582-590.

The cardinal rule in the construction of the contracts is that the intention of the parties governs. Worrie v. Boze, 191 Va. 916, 925; 62 S.E.2d 876, 880 (1951). The court must bear in mind the situation of the parties, the subject matter of the contract and the purpose and intention of the parties in making it. Worrie v. Boze, 191 Va. 916, 925; 62 S.E.2d 876, 879 (1951). The whole of a deed and all of its parts should be considered together in order to determine the controlling intent. Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 197; 796 S.E.2d 549, 552 (2017). No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly. Haisfield v. Lape, 264 Va. 632, 637; 570 S.E.2d 794, 796 (2002). When the deed, so construed, is plain and unambiguous, the trial court is not at liberty to search for its meaning beyond the instrument itself. Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 197; 796 S.E.2d 549, 552 (2017). An instrument will be deemed unambiguous if its provisions are capable of only one reasonable construction. Id. The law, carrying into effect the intention of the parties, does not intend to restrict the rights of ownership of the real estate subjected further than is necessary to give effect to the easement, and the owner of

real estate is allowed to make all the improvements upon it, which can be consistently made with the just rights of others. See Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 202; 796 S.E.2d 549, 556 (2017).

A party may not exercise contractual discretion in bad faith, even when such discretion is vested solely in that party. Virginia Vermiculite, Ltd. V. W. R. Grace & Co., 156 F. 3d 535 (4th Cir. Dec. 4, 1997). No use can be made of an easement different from that established when the easement was created, which imposes additional burdens on the servient estate. Shooting Point, L.L.C. v. Wescoat, 265 Va. 256, 266; 576 S.E.2d 497, 503 (2003); see also McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 273; 716 S.E.2d 461, 465 (2011). This Court characterized the particular purpose of "affect" as used in the flowage easement as to "affect with water." See Brown v. Haley, 233 Va. 210, 212; 355 S.E.2d 563, 565 (1987).

The above set forth principles of Virginia contract and property law, this Court's precedent, the plain language of the Flowage Easement, and the standard of review to be applied on demurrer do not support the trial court's interpretation of the Flowage Easement that APCO has the absolute authority to regulate shoreline activities on the Pressls' property, and that APCO has the authority to deny the Pressls' right to build a dock on their property. R. 582-590. The trial court erred in its construction of the Flowage Easement, which, in turn, led the trial

court to erroneously find that the Complaint failed to allege a right to declaratory relief that would preclude granting demurrer to APCO and/or that the Pressls' declaratory judgment complaint did not include a factual claim. R. 582-590.

APCO's rights under the Flowage Easement are limited and, contrary to the trial court's findings, are not anywhere close to a fee simple interest. Contrary to the trial court's overbroad interpretation, the Flowage Easement gives APCO two specific rights: (1) the right to overflow and/or affect the Pressls' property and (2) ***at APCO's discretion***, the right to remove any and all buildings, structures, improvements, bushes, driftwood and other objects and debris of any kind. Yet, the trial court accepted APCO's argument that the right to remove, for example, a dock, is absolute, and therefore, that APCO may remove a dock for any reason. R. 130 (Demurrer p. 6), T. 2, 3, 13, 43, 47; R. 584-590. The trial erroneously found that APCO was given a veto power with respect to right to build and remove a dock. T. 43, 47. This is significant because the issue in this case is not as much a removal of a dock, as the Pressls did not build one yet, but the right of the Pressls to construct one.

The trial court ruled that APCO has the absolute right to remove or destroy docks, and that with that absolute right comes the absolute right to grant or deny permission to build a dock. The trial court thus failed to follow Haisfield v. Lape

and give meaning to the word "discretion." Id. Given the principle enunciated in Virginia Vermiculite, Ltd. V. W. R. Grace & Co., APCO's right to remove is not absolute, but it is discretionary, and is therefore subject to a reasonableness standard. Virginia Vermiculite, Ltd. V. W. R. Grace & Co., 156 F. 3d 535 (4th Cir. Dec. 4, 1997). The trial court also erroneously interpreted the word "affect" as giving APCO the authority to do just about anything on the Pressls' property. R. 582-590. This finding is contrary to this Court's narrow construction of the word affect, as used in nearly identical flowage easement, as "affect with water" in Brown v. Haley, and the trial court failed to follow the established rules of contract construction by disregarding the title of the easement, not giving meaning to all the parts of the easement, and not construing the easement as a whole. Id. The correct construction of the Flowage Easement is that APCO may remove a dock only if the exercise of its discretion is not arbitrary and capricious, if it is consistent with the particular purpose of the Flowage Easement, to overflow and/or affect by water the Pressls' property to operate and/or maintain the dam and/or power station. Given the trial court's erroneous findings, the trial court, in turn, concluded that the Flowage Easement is so broad that it amounts to nearly a fee interest, thus, granting APCO the authority to regulate shoreline activities and to deny the Pressls their right to build a dock on their property. R. 582-590.

As stated above, the trial court misconstrued the parties' rights and duties under the Flowage Easement because it misconstrued the terms "affect" and disregarded the term "discretion." The Virginia Supreme Court regards the title of the document as relevant in determination of the rights granted under the contract. See McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 272, 716 S.E.2d 461, 464 (2011). The parties titled the deed "Flowage Right and Easement Deed", not a Deed of Bargain and Sale. R. 1-39 (Exh. D). In the Flowage Easement, APCO proposes to impound waters and operate "a power station", not to regulate shoreline activities. R. 1-39, Compl., ¶15. The Flowage Easement is silent as to any authority of APCO to regulate, for example, how the Pressls stabilize the shoreline, dredge their property, or what vegetation they plant or remove, and does not in any way prohibit construction of docks.

APCO suggests that the term "affect" as used in the Flowage Easement gives it the absolute authority to regulate any and all shoreline activities. The word "affect" in the first conveyance paragraph of the Flowage Easement must be interpreted consistent with the Flowage Easement's particular purpose, with the title of the deed "Flowage Right and Easement Deed" and with the term "overflow." Indeed, in the flowage easement, the term "affect" immediately follows the term "overflow." Under the principle of *ejusdem generis,"* where a

general term follows a specific term, the general term is limited and informed by the specific term. Thus, "affect" is limited and informed by the term "overflow." The Virginia Supreme Court has correctly characterized the word "affect", as used in an identical flowage easement, consistent with the *ejusdem generis* rule of construction. In Brown v. Haley, the Supreme Court correctly characterized the particular purpose of "affect" as used in the flowage easement as to "affect with water." See Brown v. Haley, 233 Va. 210, 212; 355 S.E.2d 563, 565 (1987). The Supreme Court in Brown v. Haley has construed the APCO's right to remove narrowly:

> By deed dated September 6, 1961, Rufus R. Brown and Sallie W. Brown conveyed to Appalachian Power Company (Apco) the right to overflow and affect with water that portion of a tract of 321.75 acres to the 800-foot elevation and to enter below the 800-foot contour and clear the land for the impoundment of water. The deed reserved to the Browns the right to use the land below the 800-foot contour,..." (emphasis added) Brown v. Haley, 233 Va. 210, 212; 355 S.E.2d 563, 565 (1987).

The trial court in this case thus erred in interpreting the word "affect" broadly.

Also, if the conveyance paragraph gave APCO the broad regulatory powers over the Pressls' land as the trial court held, the paragraph which follows would be made superfluous, and that is contrary to the established rules of the contract construction. The Flowage Easement states:

> **ALSO**, for the above mentioned consideration, Grantors hereby grant to Appalachian **the further right** to enter upon said premises at any time and from time to time and, **at Appalachian's discretion**, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. R. 1-39, Compl. Exh. D. (emphasis added).

If the first paragraph was a blank check giving APCO the unfettered right to "affect" the property, there would be no need to add the language for APCO to have the right enter unto the property for the specifically enumerated purposes.

The law, carrying into effect the intention of the parties, does not intend to restrict the rights of ownership of the real estate subjected further than is necessary to give effect to the easement, and the owner of real estate is allowed to make all the improvements upon it, which can be consistently made with the just rights of others. See Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 202; 796 S.E.2d 549, 556 (2017); Patterson v. Paul, 14 LCR 128, 130; 2006 Mass. LCR LEXIS 17, **13 (Mass. Land Court Feb. 21, 2006). Therefore, the Pressls' rights must not be limited any further than is reasonably necessary for APCO to give effect to the particular purpose of the Flowage Easement, to overflow and/or affect by water to operate and/or maintain the dam and/or power station, which purpose certainly does not amount to the level of a fee simple ownership.

The Flowage Easement clearly states what the Pressls cannot do on their property. Specifically, the Pressls cannot "cause, permit or suffer any garbage, sewage, refuse, waste or other contaminating matter to be cast, drained or discharged unto the portion of said premises below contour elevation of which is 800 feet or unto or into any of the other lands or waters referred to in (a) above or directly or indirectly into such impounded waters." R. 1-39, Exh. D. Apart from this language, the Flowage Easement is silent as to anything else that the Pressls cannot do. Most significantly, the Flowage Easement does not say that the Pressls cannot build a dock. The Pressls' interpretation of the Flowage Easement as not relinquishing and preserving the Pressls' right to construct a dock on their property is also supported by the express language of the Flowage Easement. The Flowage Easement makes it clear that it is understood that the grantors have the right to possess and use said premises in any manner not inconsistent with the rights granted to APCO, and constructing a dock is not inconsistent with that right. APCO did not acquire exclusive rights or nearly a fee simple interest in the Pressls' property.

Because the trial court erroneously concluded that APCO has the absolute discretion to remove structures and that the Flowage Easement nearly amounts to a fee interest, it, in turn, erroneously concluded that there was no set of facts which

could put the issue of whether APCO can control what gets built below 800-foot contour level in any different light. R. 582-584. If the trial court correctly interpreted the Flowage Easement, it would have had to deny the demurrer to APCO because the Pressls alleged sufficient facts in the Complaint, directly and by implication, to state a claim that the Pressls have the right to build a dock, and that a dock which would be constructed on their property would not interfere with the particular purpose of the Flowage Easement, to overflow and/or affect by water the property to operate and/or maintain the dam and/or power station. R. 1-39, ¶¶14, 15.

Even if the trial court declined to construe the Flowage Easement as urged by the Pressls, it nevertheless, at least, should not have sustained demurrer, because the parties disagreed as to the meaning of the Flowage Easement and its terms. An instrument which is capable of more than one reasonable construction is not unambiguous, Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 197; 796 S.E.2d 549, 552 (2017), and its meaning can be determined by examination of extrinsic evidence. Such examination must involve both sides developing and fully and fairly presenting their evidence. A demurrer only tests sufficiency of pleadings, not matters of proof. Factual claims are not to be addressed in a demurrer.

APCO introduced the Shoreline Management Plan. T. 4-33. The Shoreline Management Plan is irrelevant to the issue of APCO's reasonable necessity to overflow and/or affect by water the Pressls' property. The Shoreline Management also was not part of the Complaint and is not part of the Flowage Easement. The Shoreline Management Plan regulates APCO and was drafted by APCO. The Flowage Easement is not broad enough to provide APCO with sufficient property rights to impose all of the terms of the Shoreline Management Plan on the Pressls because the predecessors in title to the Pressls did not convey to APCO a fee interest, all as explained above. The Shoreline Management Plan would regulate, for example, the following: details on how the Pressls can or cannot stabilize their shoreline including using rip rap; require that all new construction shall utilize puncture resistant material; require that the Pressls obtain permit to dredge; prohibit the Pressls from removing and/or adding fill material; regulate details on what vegetation can be removed, planted or trimmed; require vegetation replacement rates, and how to construct access paths and what material can be used; require that any use of or change in the features or vegetation must be authorized by APCO, require that the Pressls protect cultural resources, if discovered. SMP, §2.5 (Regulations); R. 584-590, ¶4. The plain language of the Flowage Easement is silent on all of the above matters and does not impose any of

these new and additional duties, obligations and expenses upon the Pressls. The Shoreline Management Plan expands, not limits, the scope of the Flowage Easement. It is contrary to the established principles of law to impose new and additional burdens and duties upon the Pressls, duties and burdens which even the trial court conceded were not contemplated by the parties at the time of the signing of the Flowage Easement. T. 43; Shooting Point, L.L.C. v. Wescoat, 265 Va. 256, 266; 576 S.E.2d 497, 503 (2003); see also McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 273; 716 S.E.2d 461, 465 (2011); Worrie v. Boze, 191 Va. 916, 925; 62 S.E.2d 876, 879 (1951)(holding that the court must bear in mind the situation of the parties, the subject matter of the contract and the purpose and intention of the parties in making it). The past conduct of APCO, which is relevant to the determination of the intention of the parties, is that APCO did not regulate shoreline activities and construction of docks or vegetation of premises located below the contour of 800 feet for more than 40 years. R. 1-39, ¶15. In any event, whether the Shoreline Management Plan, or any other document for that matter, represents the standard of reasonableness or set of qualifications on the right to remove should not have been resolved on demurrer. Any such determination requires a factual analysis of the terms and the trial court itself conceded it did not even read the entire Shoreline Management Plan. T. 4.

APCO's entire regulatory rights depend on the acquisition of private property rights. The Flowage Easement does not provide APCO with sufficient property rights to regulate the uses of the Pressls' property or the authority to deny the Pressls the right to construct of a dock. If APCO does want to impose the Shoreline Management Plan upon the Pressls, it must either purchase additional property rights from them or obtain them by way of eminent domain, just as the FPA and FERC contemplate. FPA, 16 U.S.C. § 814. A FERC order dated December 15, 2009, specifically stated that the issuance of the license to APCO did not convey any property rights in either real or personal property. Appalachian Power Company, 129 FERC ¶62,201, at *64610, 2009 LEXIS 2427 (2009). The FPA also does not confer upon APCO the right to enter, use, or regulate private property without the consent of the owner. City of Holyoke Gas and Electric Dept., 115 FERC ¶ 62,295 (2006). Did the plain language of the Flowage Easement waive the need for the property owner to consent to the application of the Shoreline Management Plan to their property? It did not. The trial court stated that a consent would generally be required, but found that, in this case, it was not required because the Flowage Easement was so broad that it almost amounts to a fee interest. R. 582-584. This erroneous conclusion thus allowed the trial court to erroneously find that APCO can regulate shoreline activities, as set out in the

Shoreline Management Plan, or any other document for that matter, and thus that the consent of the Pressls to the Shoreline Management Plan is not required. R. 582-584.

The trial court also erred in finding that the Flowage Easement allows APCO to subject the Pressls to a dock permitting process. R. 582-590. The plain language of the Flowage Easement does not require that, prior to a dock construction, the property owner must obtain and sign a permit from APCO for such construction which permit, in turn, obligates the property owner to comply with Shoreline Management Plan ("SMP") and APCO's FERC license. The Flowage Easement states that:

> 1. Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach the impounded waters for recreational purposes and for obtaining their domestic water supply-and water for their livestock and …;
>
> AND, FOR THE ABOVE MENTIONED CONSIDERATIONS, GRANTORS HEREBY COVENANT AND AGREE TO AND WITH APPALACHIAN THAT:
>
> (a) If Grantors exercise any of the rights set forth in 1. above or make any [other use] of said premises or of any other lands or of any waters in or to which any estate, right or privilege is now or hereafter owned or held by Appalachian, such exercise or use shall be at the sole risk of Grantors and no claims shall be made against Appalachian for any injuries or damages arising out of or in connection with such exercise or use; and such [other use] shall be deemed to be made under a revocable license from Appalachian and not adverse to any right, title,

interest or privilege of Appalachian. R. 1-39, Compl., Exh. D. (brackets added).

"Other use" is undefined in the easement, and recreational uses are specifically excluded from requiring a revocable license. APCO has argued that recreational uses do not include docks, which is implausible on its face.

The Final Order, as entered, adversely affects not only the Pressls, but also potentially, every shoreline property owner on Smith Mountain and Leesville Lakes that granted APCO a flowage easement by vastly expanding APCO's rights under the flowage easement. It places thousands of privately owned docks and marinas built absent any APCO regulation between 1960 and 2003, at risk of unfettered removal by APCO.

For all the reasons above, the trial court's Final Order must be set aside.

II. The Trial Court Erred in Denying the Pressls' Motion to Amend their Complaint.

If a trial court sustains a demurrer, the plaintiff is allowed to amend the pleading or the record, if the defect can be cured. Strader v. Metropolitan Life Ins. Co., 128 Va. 238, 246; 105 S.E. 74, **14 (1920). If, by proper amendment, the plaintiff can state a case upon the facts entitling her to maintain a cause of action, the opportunity to make such an amendment should be afforded, and failure to allow amendment would represent an error on appeal. Id. On appeal, a trial

court's decision to grant or deny a motion is reviewed under an abuse of discretion standard. Hetland v. Worcester Mut. Ins. Co., 231 Va. 44, 46; 340 S.E.2d 574, 576 (1986).

Because the trial court erroneously concluded that APCO has the absolute discretion to remove and that the Flowage Easement nearly amounts to a fee interest, it, in turn, erroneously concluded that there was no set of facts which could put the issue of whether APCO can control what gets built below 800-foot contour level in any different light. R. 582-584. This finding was in error for reasons already set forth in Part I. Given this error, the trial court erred in denying the Pressls' motion to amend their Complaint.

CONCLUSION

For the foregoing reasons, the appellants, Richard A. Pressl and Theresa M. Pressl, respectfully ask that this Court (1) reverse the judgment of the trial court and set aside the Final Order dated May 4, 2017, and (2) order the case to be remanded for further proceedings. Or in alternative, the appellants, Richard A. Pressl and Theresa M. Pressl respectfully ask that this Court reverse the Final Order and grant final judgment to the Pressls.

Respectfully submitted,

RICHARD A. PRESSL and
THERESA M. PRESSL

By: _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with Rules 5:17, and further certifies as follows:

1) The appellants are Richard A. Pressl and Theresa M. Pressl

2) Counsel for the appellant is:

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3) The appellee is Appalachian Power Company

4) Counsel for the appellee is:

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5) On this the 1st day of August, 2017, seven copies of the foregoing Petition for Appeal have been hand delivered to the Clerk of this Court and one copy has been served to opposing counsel via Federal Express at the address provided above.

6) Counsel for the appellant requests oral argument in person to a panel of this Court.

By: _____

Of Counsel
J. Frederick Watson