VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	**Case Nos.:** CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5363,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

THE EPISCOPAL CHURCH'S AND THE DIOCESE'S RESPONSIVE BRIEF REGARDING PROPERTY SUBJECT TO THE ST. STEPHEN'S 1874 DEED

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Generally, St. Stephen's Church's position is as anticipated: that the division statute, which the Deed should be read to incorporate, overcomes the Deed language we rely upon. We respond to those contentions below. We note first that the issue is not whether *denominations* could incorporate or hold property in the 19th century, nor the scope of the Contracts Clause, the points on pp. 2-3 of St. Stephen's Opening Brief. The issue is whether the Court should enforce a trust and a denominational *restriction*, which are expressly stated in the operative Deed, on the holding of property *by a local congregation*. Second, some misstatements must be corrected:

- It is flatly untrue that "[t]he Court's prior rulings in this case are dispositive of the sole legal issue before the Court" with respect to St. Stephen's. St. Stephen's Opening Brief at 6. St. Stephen's cites the Court's Contracts Clause Letter Opinion at pages 4 and 6, but even a cursory review of those pages shows that they decide what property the Contracts Clause applies to, not what is subject to § 57-9(A). Moreover, as we pointed out in our Opening Brief at 8, this Court has expressly distinguished between disputes among "members of specific local congregations" and cases where "the general church or denomination [was] an actual party to the dispute." Contracts Clause Letter Opinion (Aug. 19, 2008) at 15 & n.28. Indeed, the Court quoted and "agree[d] with" the CANA Congregations' own reliance upon the distinction: "ECUSA and the Diocese are confusing the question whether a grantor could restrict the use of church property to those members of the congregation adhering to a specific denomination, with the question whether a denomination could itself have an enforceable interest in such property." *Id.* at 16 (quoting "The CANA Congregations' Reply Br. on Supplemental Issue Pursuant to the Court's August 11, 2008, Hr'g at 4"). This Court has never decided whether the division statute prevents enforcement of a deed conveying property "In trust and for the sole use and benefit of" an Episcopal congregation, much less interpreted the language of and opined on the legal effect

of any particular deed. That is what the Court must do now.

- The Stipulation does *not* provide that "since the date of the Deed, legal title has been vested in the trustees of St. Stephen's Church *for the benefit of the congregation*." St. Stephen's Opening Brief at 6 (emphasis added). The Stipulation provides that "[s]ince the date of the Deed legal title has been vested in the trustees of St. Stephen's Church." Stipulation ¶ 6. For reasons that by now are obvious, we disagree wholeheartedly with the beneficial ownership claim that St. Stephen's falsely asserts is in the Stipulation. That point was negotiated during the Stipulation's drafting, and St. Stephen's Opening Brief blatantly misstates the stipulated facts.

- St. Stephen's makes claims about when the congregation formed that are inexplicable and unsupported by the stipulated facts. *See* St. Stephen's Opening Brief at 6 ("At the time the above vestry petition seeking appointment of trustees was filed, the local congregation envisioned by the statute in question had yet to be formed ..."); *id.* ("Sometime after the entry of the October 2, 1874, Order, the congregation was formed ..."). St. Stephen's fails to explain how there could be a "vestry of the Protestant Episcopal Church in the County of Northumberland," Stipulation ¶ 2 (quoting the Oct. 2, 1874, Order), unless there were in fact a congregation to be the vestry of. *See also* Stipulation ¶ 4 (the Deed, recorded "just over a month later" and regarding a "religious society or congregation known as the Protestant Episcopal Church"). How the date of formation is material escapes us, but nothing in the stipulated facts establishes or even supports a conclusion that St. Stephen's formed after October 2, 1874.

I. St. Stephen's suggests a fundamentally erroneous and distorted interpretation of the language of the Deed.

St. Stephen's argues that the Court should not interpret the language of the Deed as a use restriction. *See* St. Stephen's Opening Brief at 8-9 ("The language in the 1874 Deed referring to the Protestant Episcopal Church is language of identification only, used but once in the deed. As

such, this identifier should not be read permanently to restrict the use of the property solely to and by those affiliated with a particular denomination"). That argument reflects either a fundamental lack of understanding of, or a distortion of, basic principles of deed interpretation.

Deeds, at least historically, contain certain particular parts. There is the "premise" or "premises," which sets the stage by laying out matters such as "the names of the parties; the recital of whatever circumstances may be needful to explain the reasons of the transaction; the consideration which induced the deed; the recital of payment of purchase money or a part thereof; and whatever is necessary to make it clearly intelligible what is the subject of the grant and who are the grantors and the grantees." 5C MICHIE'S JURISPRUDENCE, *Deeds* § 19 (repl. vol. 2006) at 420; *accord* BLACK'S LAW DICT. 1219 (8th ed. 2004) (defining "premises" as "[t]he part of a deed that describes the land being conveyed, as well as naming the parties and identifying relevant facts or explaining the reasons for the deed").

Another part is the operative words of transfer, or granting clause. *See, e.g.*, *Lim v. Soo Myung Choi*, 256 Va. 167, 171, 501 S.E.2d 141, 143-44 (1998) ("a document purporting to convey title must contain operative words manifesting an intent to transfer the property").

Then there is the "habendum clause," which is "[t]he part of an instrument, such as a deed or will, that *defines the extent of the interest being granted and any conditions affecting the grant*. The introductory words to the clause are ordinarily *to have and to hold*." BLACK'S LAW DICT. 728 (8th ed. 2004) (first emphasis added); *see also id.* at 729 (defining "habendum et tenendum" as "To have and to hold" and explaining that "[t]his formal phrase appeared in land deeds and defined the estate or interest being transferred"). Although modern deed practices often make a habendum clause unnecessary by clearly defining the estate in the premises or grant, Virginia law recognizes and applies habendum clauses. For example, in *Culpeper Nat'l Bank v.*

Wrenn, 115 Va. 55, 59, 78 S.E. 620, 622 (1913), the Court applied "well settled rules of construction" and reversed the decree below. The lower court violated the rule that "all parts of the deed must be taken and considered together" and "that in the construction of any instrument it must be construed as a whole," *id.* at 57, 78 S.E. at 621, by ignoring the habendum:

> The decree appealed from entirely ignores the clear and explicit intention expressed in the last or habendum clause of the deed and gives effect alone to the granting clause, whereas, as already seen, *the purpose of the habendum is to define the estate which the grantee is to take, and must prevail if it appears from the whole instrument that it was intended by the habendum to restrict the estate conveyed by the words of the grant.*

Id. (emphasis added). *Accord Pack v. Whitaker*, 110 Va. 122, 126-27, 65 S.E. 496, 498 (1909).[1]

St. Stephen's now asks this Court to commit clear error by ignoring the habendum clause. The Deed's habendum provides that the grantees were:

> *To have and to hold* the said lot, parcel or piece of land with all and singular the privileges & appurtenances thereto belonging unto the said parties of second party their assigns and successors who may be legally appointed from time to time, *In trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church* for the purpose of erecting a house for divine worship and such other houses as said congregation may need, And such church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church not inconsistent with the laws and constitution of Virginia.

Stipulation ¶ 4 (emphases added). By providing that the property is to be held "[i]n trust" and "for the *sole* use and benefit of the religious society and congregation known as the Protestant Episcopal Church," the habendum clause defines the estate granted and clearly manifests an intent to restrict the estate conveyed. As the cases above state, the clause must prevail.[2]

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[1] Other parts include the reddendum (not present here) and the conclusion (irrelevant here). *See* 5C MICHIE'S JURISPRUDENCE, *Deeds* § 21 (repl. vol. 2006) at 421-22.

[2] Indeed, the premises and granting clauses of the Deed do not define an estate at all.

II. St. Stephen's offers no reason to disregard the habendum's statement that the grantee is "To have and to hold the said lot, parcel or piece of land ... In trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church ...."

A. St. Stephen's reliance on the citations to Chapter 76 of the 1873 Virginia Code is misplaced.

St. Stephen's ascribes great significance to the fact that the Deed and the Order both reference "Chapter 76 of the 1873 Virginia Code." *See* St. Stephen's Opening Brief at 6, 7. In fact, both citations are with respect to the appointment of trustees only. They have nothing to do with the ownership of the Property and attendant trust terms or use restrictions. The Order, by its very nature and terms, concerns only the appointment of trustees, not ownership.[3] And the citation in the Deed's premises serves only to identify parties. The Deed provides that it is a conveyance "... to the said parties of the second part *as trustees duly legalized and appointed by the Circuit Court of said County in pursuance of section 9, Chapter LXXVI of the code of Va. 1873* ...." The Deed's sole citation does not modify the operative words of transfer ("do bargain, sell and convey") or the habendum clause. St. Stephen's claim at p.6 that both citations show a specific intent to convey subject to the statutory right to disaffiliate is clearly erroneous.

B. The final words of the deed ("not inconsistent with the laws and constitution of Virginia") do not change the legal effect of the prior language.

St. Stephen's also argues that the final words of the Deed's habendum (quoted in full on p. 4, *supra*) have particular legal significance or confirm that the division statute supersedes the denominational language. *See* St. Stephen's Opening Brief at 6, 7. They do not. Under Virginia law, the "not inconsistent with the laws and constitution of Virginia" language is unnecessary

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[3] Trustee appointment orders have no effect on the nature or scope of congregational property ownership, other than effecting a change of legal title holders *when sought by the proper owner. Allen v. Paul*, 65 Va. 332, 343-44 (1874); *accord, e.g., Davis v. Mayo*, 82 Va. 97, 103-04 (1886).

and does not modify or defeat the previous language.

In *Norfolk v. Norfolk Landmark Pub. Co.*, 95 Va. 564, 28 S.E. 959 (1898), the Supreme Court of Virginia answered the question whether the city of Norfolk had been granted the power to tax what the state did not tax. *Id.* at 566, 28 S.E. at 960. To do that, the Court interpreted the city charter, which provided in relevant part that "the city council shall raise, annually, by taxes and assessments, in said city, such sums of money as they shall deem necessary ... in accordance with the constitution and laws of this State and of the United States." *Id.* at 566-67, 28 S.E. at 960. Those challenging the city's tax contended that the latter language referred to or incorporated a specific part of the Virginia Code – "sec. 1042." *Id.* at 567, 28 S.E. at 960. The Court rejected that contention, explaining that "in accordance with" was "the equivalent of ... 'not inconsistent with,'" and that the entire phrase "d[id] not limit or confine the taxing power of the city" to a particular Code section's provisions but rather expressed only a limitation that would have been understood even if the phrase was absent:

> The language, "in accordance with the constitution and laws of the State," is the equivalent of "not repugnant to," "not in conflict with," or "not inconsistent with" the laws and constitution of the State, and it does not limit or confine the taxing power of the city to the provisions of sec. 1042 of the general law. If this were so, it would have only been necessary for the charter to have provided that the city of Norfolk should have such powers of taxation as were prescribed by that section. The language, "in accordance with the laws and constitution of the State," only expresses a limitation upon the general power conferred that would have been necessarily understood; for no authority can be exercised otherwise than in accordance with the constitution and laws of the State, and of the United States, whether the grant of that authority be silent on the subject or not.

Id. at 567-68, 28 S.E. 960-61. The same is true here. "[N]ot inconsistent with the laws and constitution of Virginia" does not limit or confine the Deed to the provisions of what is now § 57-9(A). Had that been the intent, "it would only have been necessary for the [Deed] to have provided that the [congregation] should have such powers ... as were prescribed by that section."

Finally, any contention that a deed's restriction of church property to a specific denomination is inconsistent with the laws of Virginia is foreclosed by the long and unbroken chain of case law recognizing and enforcing denominational restrictions in deeds. *See* TEC-Diocese Opening Brief at 4-7 (discussing the line of cases beginning in 1856 in *Brooke v. Shacklett* and continuing through 1980 in *Green v. Lewis*). In all the years since, the legislature has never given the slightest indication that it intended the division statute to pre-empt and override the ability of parties to put enforceable denominational restrictions in a deed. *See* TEC-Diocese Opening Brief at 9 (discussing the presumption that the General Assembly does not intend to overturn the law as appellate courts have stated it).

Moreover, even if the Court ignored all of the above and assumed that there is a conflict between the two parts of the habendum, the former would prevail.[4] To be sure, those rules of deed interpretation would not give effect to an illegal provision; but as we have shown, Virginia case law makes it impossible to contend that a deed's restriction of church property to members

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[4] *E.g.*, *Browning v. Blue Grass Hardware Co.*, 153 Va. 20, 149 S.E. 497 (1929), listing "certain well established rules ... to be remembered" in deed construction, including:

> (1) That all parts of the deed must be considered and that construction adopted which will carry out the intent of the parties, which intent must be gathered from the language used; that the true inquiry is not what the grantor meant to express, but what the words do express....
>
> (3) That it is the duty of the court to give the proper meaning to every word used in the instrument if possible.
>
> (4) *That if it appears that two provisions of a deed are in irreconcilable conflict, the last provision yields to the first and the first must be given its full effect.*
>
> (5) *And when a provision is made in a deed in clear, explicit and unambiguous words, it cannot be revoked by implication by a later clause in the deed, but if revoked at all, must be by terms as clear, decisive and explicit as the terms by which the first estate was given.*

Id. at 26-27, 149 S.E. at 498-99 (quoting *Morris v. Bernard*, 114 Va. 630, 77 S.E. 458 (1913)) (emphases added; quotation marks and duplicate paragraph numbers omitted).

of a particular denomination is illegal.

C. St. Stephen's appeal to the "purpose of § 57-9(A)" is meritless.

St. Stephen's also offers the vague and unsupported contention that enforcing the language of the Deed "would defeat entirely the purpose of § 57-9(A)." St. Stephen's Opening Brief at 9. With that statement, St. Stephen's appears to return to the Congregations' past argument that the purpose of the statute was to protect or favor congregations in disputes with the hierarchical church to which they belong. But this Court expressly has held that favoring congregations was *not* the purpose of the division statute: "the purpose of 57-9 was to provide a rule that would allow for peaceful conflict resolution upon the occurrence of church property disputes following a division in a church or religious society." Constitutionality Letter Opinion (June 27, 2008) at 37. There is no credible argument that enforcing the parties' intent, as expressed in the Deed, defeats the purpose of "allow[ing] for peaceful conflict resolution upon the occurrence of church property disputes" between "members of specific local congregations." To the contrary, by providing clear trust terms and use restrictions in the Deed, the parties' intent *aids in dispute resolution* by removing any doubt regarding whether the Property should remain with members who continue to adhere to the denomination.

Even if one were to assume, contrary to the facts, that there is some legitimate purpose to ignoring the Deed's terms, doing so would contradict the "primary and cardinal rule of construction": "that effect must be given to [the parties'] intent whenever it is reasonably clear and free from doubt." *Culpeper Nat'l Bank v. Wrenn*, 115 Va. at 57, 78 S.E. at 621. *Accord*, *Davis v. Henning*, 250 Va. 271, 274, 462 S.E.2d 106, 108 (1995) ("In construing deeds, it is the duty of the court to 'ascertain the intention of the parties, gathered from the language used, and the general purpose and scope of the instrument in the light of surrounding circumstances'").

III. Governing case law supports our position.

St. Stephen's also discusses *Brooke*, *Hoskinson*, and *Finley*. *See* St. Stephen's Opening Brief at 7-8. Nothing in St. Stephen's discussion presents a reading of those cases in its favor. Instead, St. Stephen's attempts to convince the Court that the cases are distinguishable and "require no different result." *Id.* at 7. Our discussion of those cases in our Opening Brief (at pp. 4-7) stands, and we will not repeat it unnecessarily here.

The only distinction that St. Stephen's offers (at 7, 8) with respect to *Hoskinson* and *Finley* is that the deeds in those cases were recorded prior to 1867, while the Deed here is from 1874. The Court has held that distinction to be dispositive for Contracts Clause purposes because of the retrospective nature of those clauses. St. Stephen's offers no reason, however, why the *year* of recordation should change the interpretation of a deed's *language*; and other than the division statute arguments discredited above, there is none. To the contrary, *Hoskinson* states that the construction of substantively similar deeds "must be the same." 73 Va. at 431.[5]

Brooke itself belies St. Stephen's main argument: that a division suffices to avoid "an enforceable restriction on the use of the property only by a congregation that continued its original affiliation." St. Stephen's Opening Brief at 7-8.[6] Rather, *Brooke*'s resolution of the controversy exemplifies a close adherence to the terms of a deed, despite unusual circumstances. The *Brooke* deed provided "that the trustees are to hold the property conveyed to them, and their

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[5] St. Stephen's asserts that "this Court observed ... *Finley* is distinguishable from the present case." St. Stephen's Opening Brief at 7 (citing "Apr. 3 Op. at 69"). That page of the Opinion notes that *Finley* does not "directly address any of the issues which are the subject of this opinion, as Finley does not concern the meaning of 'division,' 'branch,' 'attach,' or 'religious society.'" Applicability Letter Opinion (April 3, 2008) at 69. It is a distortion of that Opinion to suggest that it dismisses *Finley*'s significance with respect to the present issue.

[6] Notably, St. Stephen's discussion of *Brooke* consists of a single paragraph that fails to cite or quote the case *at all*. *See* St. Stephen's Opening Brief at 7-8.

successors forever, in trust that they shall build or cause to be built thereon a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, *according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church, at their general conferences*." *Id.* at 314 (emphasis added). The *Brooke* Court analyzed the actions of the general conference and concluded that the division "was effected under certain resolutions adopted by the general conference in 1844," *id.* at 321 (quoted in Applicability Letter Opinion at 64), and that the general conference had the power to so act. *Id.* at 324-25. The plan of separation therefore was part of the "rules and discipline ... agreed upon and adopted ... at [the] general conferences" of the denomination specified in the deed. *See id.* at 323:

> If this division of the church was lawful, it is obvious, I think, that the members of the local societies in the southern organization of the church stand in the same relation to the general conference, the annual conferences, the bishops, pastors, rules and discipline of the Methodist Episcopal church south, that they occupied before the division, in respect to those of the Methodist Episcopal church.... By the express terms of the plan of separation ... the southern church is to occupy the same relation to the church property in the south that the Methodist Episcopal church before occupied in respect to it.

See also Applicability Letter Opinion at 66 (the division in *Brooke* "was formally recognized at the highest level of the hierarchy of the church, as manifested by the plan of separation"). Thus, the deed *supported* changing the focus of the inquiry to the new denomination, and employing "the same mode of enquiry" with respect to the Methodist Episcopal Church South actually upheld the deed's terms. The same cannot be said here, where it cannot be disputed that use by an Anglican Church of Nigeria or CANA congregation would allow the property to be put to a "use and benefit" other than that "of the religious society and congregation known as the Protestant Episcopal Church," thereby impermissibly overriding the express trust and use restriction in the Deed.

Respectfully submitted,

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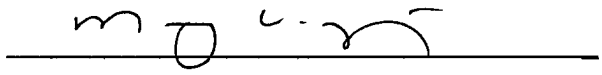

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