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SENATE BILL NO. 93

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance
on February 14, 2006)

(Patrons Prior to Substitute—Senators Watkins and Hanger [SB 403])

A *BILL to amend and reenact §§ 58.1-512 and 58.1-513 of the Code of Virginia and to repeal the second enactment of Chapter 940 of the Acts of Assembly of 2005, relating to the Virginia Land Conservation Incentives Act of 1999.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-512 and 58.1-513 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-512. Land preservation tax credits for individuals and corporations.

A. For taxable years beginning on or after January 1, 2000, there shall be allowed as a credit against the tax liability imposed by §§ 58.1-320 and 58.1-400, *and in limited circumstances against the tax liability imposed pursuant to Chapter 9 (§ 58.1-900 et seq.) as such circumstances are provided in subsection D of § 58.1-513*, an aggregate amount equal to the lesser of \$600,000 or 50 percent % of the fair market value of any land or interest in land located in Virginia which is conveyed for the purpose of agricultural and forestal use, open space, natural resource, and/or biodiversity conservation, or land, agricultural, watershed and/or historic preservation, as an unconditional donation in perpetuity by the landowner/taxpayer to a public or private conservation agency eligible to hold such land and interests therein for conservation or preservation purposes.

In determining the fair market value of any land, or any interest therein, so conveyed, for purposes of the credit under this article, no value shall be included for any structures or other improvements to land.

The maximum annual amount of credit that may be claimed under this article for such conveyances shall be as provided in subdivision C 1.

B. The fair market value of qualified donations made under this section shall be substantiated by a "qualified appraisal" prepared by a "qualified appraiser," as those terms are defined under applicable federal law and regulations governing charitable contributions. The value of the donated interest in land that qualifies for credit under this section, as determined according to appropriate federal law and regulations, shall be subject to the limits established by U.S. Internal Revenue Code § 170 (e). In order to qualify for a tax credit under this section, the qualified appraisal shall be signed by the qualified appraiser, who must be licensed in the Commonwealth of Virginia as provided in § 54.1-2011, and a copy of the appraisal shall be submitted to the Department. In the event that any appraiser falsely or fraudulently overstates the value of the contributed property in an appraisal that the appraiser has signed, the Department may disallow further appraisals signed by the appraiser and shall refer the appraiser to the Real Estate Appraiser Board for appropriate disciplinary action pursuant to § 54.1-2013, which may include, but need not be limited to, revocation of the appraiser's license. Any appraisal that, upon audit by the Department, is determined to be false or fraudulent, may be disregarded by the Department in determining the fair market value of the property and the amount of tax credit to be allowed under this section.

The appraisal estimating the value of any donation upon which credits are to be based shall employ proper methodology and be appropriately supported by market evidence. The Department of Taxation shall establish and make publicly available guidelines that incorporate, as applicable (without limitation), requirements under § 170 (h) of the U.S. Internal Revenue Code of 1986, as amended, and the Uniform Standards of Professional Appraisal Practice (USPAP). The Department shall update the guidelines as necessary as determined by the Tax Commissioner. Such guidelines shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.).

Notwithstanding any other provision of law, the fair market value of a qualified donation shall not exceed the value for the highest and best use for which the property is adaptable and needed or likely to be needed in the reasonably near future. In any review or appeal before the Tax Commissioner or in any court of the Commonwealth in which the fair market value is being contested, the burden of proof shall be on the taxpayer to show there is a reasonable probability that (i) the property is physically adaptable for the highest and best use that is proposed in the appraisal and (ii) there is a need or demand for such use in the reasonably near future in the immediate area in which the property is located.

C. 1. The amount of the credit that may be claimed by a ~~taxpayer~~ *each taxpayer, including credit claimed by applying unused credits as provided under subsection C of § 58.1-513*, shall not exceed \$50,000 for 2000 taxable years, \$75,000 for 2001 taxable years, and \$100,000 for 2002 taxable years and thereafter. In addition, *for each taxpayer*, in any one taxable year the credit used may not exceed

60 the amount of individual, fiduciary or corporate income tax otherwise due. Any portion of the credit
61 which is unused in any one taxable year may be carried over for a maximum of five consecutive taxable
62 years following the taxable year in which the credit originated until fully expended.

63 2. Qualified donations shall include the conveyance in perpetuity of a fee interest in real property or
64 a less-than-fee interest in real property, such as a conservation restriction, preservation restriction,
65 agricultural preservation restriction, or watershed preservation restriction, provided that such less-than-fee
66 interest qualifies as a charitable deduction under § 170 (h) of the U.S. Internal Revenue Code of 1986,
67 as amended. ~~Qualified donations shall not include the conveyance of a fee interest, or a less-than-fee~~
68 ~~interest, in real property that has been dedicated for the purpose of fulfilling density requirements to~~
69 ~~obtain approvals for zoning, subdivision, site plan, or building permits.~~

70 3. *a. Notwithstanding any other provision under this article, credit against the tax liability imposed*
71 *by § 58.1-320 or 58.1-400 shall be allowed only for land or an interest in land that (i) meets guidelines*
72 *of objective criteria established by the Virginia Land Conservation Foundation or (ii) the Secretary of*
73 *Natural Resources has otherwise determined provides exceptional benefit to the Commonwealth in cases*
74 *in which any land or interest therein does not meet the objective criteria established by the Virginia*
75 *Land Conservation Foundation. Prior to making the determination described in clause (ii), the Secretary*
76 *shall provide written notice (describing in detail the exceptional benefit to the Commonwealth of the*
77 *land that is the subject of the donation) to the Chairmen of the Senate Committee on Finance and the*
78 *House Committee on Appropriations for their review. After the expiration of 30 days from the date of*
79 *such notice, the Secretary may make the determination described under clause (ii).*

80 *b. The objective criteria established by the Virginia Land Conservation Foundation shall describe (i)*
81 *the objective characteristics of land that has important conservation values including but not limited to*
82 *land that is located within the Chesapeake Bay watershed or that is "real estate devoted to open-space*
83 *use" as defined in § 58.1-3230 but not including clause (vii) of such definition; (ii) the objective*
84 *attributes of a donee with a commitment to preserving the conservation values of land; and (iii) the*
85 *terms of donations that are required for different types of land in order to provide an appropriate level*
86 *of protection for the conservation values of land, including reasonable agricultural best management*
87 *practices and appropriate forest management plans. Such criteria shall incorporate, as applicable*
88 *(without limitation), requirements under the Open-Space Land Act (§ 10.1-1700 et seq.), the Virginia*
89 *Conservation Easement Act (§ 10.1-1009 et seq.), and § 170 (h) of the U.S. Internal Revenue Code of*
90 *1986, as amended.*

91 4. Any fee interest, or a less-than-fee interest, in real property that has been dedicated as open space
92 within, or as part of, a residential subdivision or any other type of residential or commercial
93 development; dedicated as open space in, or as part of, any real estate development plan; or dedicated
94 for the purpose of fulfilling density requirements to obtain approvals for zoning, subdivision, site plan,
95 or building permits shall not be a qualified donation under this article.

96 In addition, if credit under this article is allowed for a portion of a recorded parcel of land, no
97 credit shall be allowed for any other portion of such parcel until at least 15 years have elapsed from
98 the time of donation. This prohibition shall not apply if (i) all owners of the parcel who have been
99 allowed credit for a qualified donation are not affiliated with the person or entity seeking credit for a
100 different portion of the parcel and (ii) in the case of an individual seeking credit, the individual has not
101 previously made a qualified donation for any portion of the parcel and is not an immediate family
102 member of any such owners.

103 Pursuant to the criteria set forth in this subdivision, the Department of Taxation shall establish and
104 make publicly available guidelines that describe the property and the circumstances under which
105 donations of such property shall not be qualified donations. The Department shall update the guidelines
106 as necessary as determined by the Tax Commissioner. Such guidelines shall be exempt from the
107 Administrative Process Act (§ 2.2-4000 et seq.).

108 35. Qualified donations shall be eligible for the tax credit herein described if such donations are
109 made to the Commonwealth of Virginia, an instrumentality thereof, or a charitable organization
110 described in § 501 (c) (3) of the U.S. Internal Revenue Code of 1986, as amended, if such charitable
111 organization (i) meets the requirements of § 509 (a) (2) or (ii) meets the requirements of § 509 (a) (3)
112 and is controlled by an organization described in § 509 (a) (2).

113 46. The preservation, agricultural preservation, historic preservation or similar use and purpose of
114 such property shall be assured in perpetuity.

115 § 58.1-513. Limitations; transfer of credit; gain or loss from tax credit.

116 A. Any taxpayer claiming a tax credit under this article shall not claim a credit under any similar
117 Virginia law for costs related to the same project. To the extent a credit is taken in accordance with this
118 article, no subtraction allowed for the gain on the sale of (i) land dedicated to open-space use or (ii) an
119 easement dedicated to open-space use under subsection C of § 58.1-322 shall be allowed for three years
120 following the year in which the credit is taken.

121 B. Any tax credits that arise under this article from the donation of land or an interest in land made

by a pass-through tax entity such as a trust, estate, partnership, limited liability company or partnership, limited partnership, subchapter S corporation or other fiduciary shall be used either by such entity if it is the taxpayer on behalf of such entity or by the member, manager, partner, shareholder or beneficiary, as the case may be, in proportion to their interest in such entity in the event that income, deductions and tax liability pass through such entity to such member, manager, partner, shareholder or beneficiary or as set forth in the agreement of said entity. Such tax credits shall not be claimed by both the entity and the member, manager, partner, shareholder or beneficiary for the same donation.

C. Any taxpayer holding a credit person or entity making a qualified donation under this article may transfer any unused but otherwise allowable credit that relates to such qualified donation for use by another taxpayer on Virginia income tax returns. However, any organization described under § 501 (c) of the U.S. Internal Revenue Code of 1986, as amended, shall not be allowed to transfer any credit under this article. A taxpayer person or entity who transfers any amount of credit under this article shall file a notification of such transfer to the Department in accordance with procedures and forms prescribed by the Tax Commissioner.

For purposes of this article, the aggregate amount of unused but otherwise allowable credit that may be transferred and claimed as credit by all taxpayers for any qualified donation means (i) the lesser of \$600,000 or 50% of the qualified donation minus (ii) the amount claimed as credit by the person or entity who made such qualified donation.

D. Any unused credit held by an individual at the time of his death may be used by the estate of such person as credit against the tax liability imposed pursuant to Chapter 9 (§ 58.1-900 et seq.) provided that the five-year carryover period described under subdivision C 1 of § 58.1-512 had not elapsed prior to the date of such individual's death. No estate, however, may transfer any unused credit described in this subsection. The use by an estate of any unused credit held by the decedent of the estate shall not be considered a transfer for purposes of this article.

DE. To the extent included in and not otherwise subtracted from federal adjusted gross income pursuant to § 58.1-322 or federal taxable income pursuant to § 58.1-402, there shall be subtracted any amount of gain or income recognized by a taxpayer on the application of a tax credit under this article against a Virginia income tax liability.

EF. The transfer of the credit and its application against a tax liability shall not create gain or loss for the transferor or the transferee of such credit.

EG. A pass-through tax entity, such as a partnership, limited liability company or Subchapter S corporation, may appoint a tax matters representative, who shall be a general partner, member/manager or shareholder, and register that representative with the Tax Commissioner. The Tax Commissioner shall be entitled to deal with the tax matters representative as representative of the taxpayers to whom credits have been allocated or transferred by the entity under this article with respect to those credits. In the event a pass-through tax entity allocates or transfers tax credits arising under this article to its partners, members or shareholders and the allocated or transferred credits shall be disallowed, in whole or in part, such that an assessment of additional tax against a taxpayer shall be made, the Tax Commissioner shall first make written demand for payment of any additional tax, together with interest and penalties, from the tax matters representative. In the event such payment demand is not satisfied, the Tax Commissioner shall proceed to collection against the taxpayers in accordance with the provisions of Chapter 18 (§ 58.1-1800 et seq.) of this title.

2. That the second enactment of Chapter 940 of the Acts of Assembly of 2005 is repealed.

3. That the provisions of this act shall be applicable to any conveyance of property (or the conveyance of any interest in property) under the Virginia Land Conservation Incentives Act of 1999 (§ 58.1-510 et seq. of the Code of Virginia) that is made on or after July 1, 2006, except that (i) the amendments to subsection B of § 58.1-512 of the Code of Virginia shall be applicable to all conveyances, regardless of the date of conveyance, (ii) the amendments to subdivision C 3 of § 58.1-512 of the Code of Virginia shall be applicable to any conveyance of property made on or after January 1, 2007, (iii) the amendments to subdivision C 1 of § 58.1-512 of the Code of Virginia shall be applicable for taxable years beginning on or after January 1, 2006, and (iv) the amendments to subsection D of § 58.1-513 of the Code of Virginia shall be applicable to estates of persons who die on or after January 1, 2006.

4. That the Virginia Land Conservation Foundation shall, pursuant to subdivision C 3 of § 58.1-512 of the Code of Virginia, establish guidelines of objective criteria for qualifying donations under the Virginia Land Conservation Incentives Act of 1999 (§ 58.1-510 et seq. of the Code of Virginia). Such guidelines shall be established and made publicly available by December 31, 2006. Such guidelines shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

5. That the guidelines required under subdivision C 4 of § 58.1-512 of the Code of Virginia pursuant to the provisions of this act shall first be made publicly available no later than October

