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HOUSE BILL NO. 5019

Offered June 20, 2006

A BILL to amend and reenact §§ 58.1-512, 58.1-513, and 58.1-901 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 58.1-512.1, and to repeal the second enactment of Chapter 940 of the Acts of Assembly of 2005, relating to the taxes of the Commonwealth.

Patrons—Callahan, Tata, Cosgrove, Cox, Crockett-Stark, Frederick, Gear, Hamilton, Hargrove, Hurt, Iaquinto, Joannou, Jones, S.C., Landes, Marshall, D.W., May, O'Bannon, Oder, Orrock, Peace, Purkey, Rust, Saxman, Suit, Wardrup, Welch and Wright; Senator: Chichester

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-512, 58.1-513, and 58.1-901 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 58.1-512.1 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, an amount equal to 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.

For such conveyances made on or after January 1, 2007, the tax credit for any conveyance of land or interest in land located in Virginia in the Chesapeake Bay watershed or the seaside of Northampton or Accomack Counties shall be reduced to 40% of the fair market value of the land or interest in land so conveyed, and the tax credit for any conveyance of land or interest in land located elsewhere in Virginia shall be reduced to the lesser of \$750,000 or 40% of the fair market value of the land or interest in land so conveyed. In addition, no credit shall be allowed for the conveyance of land, or interest in land, made on or after January 1, 2007, except as provided in subsection D, the provisions of which subsection shall be in addition to all other conditions and requirements under this article.

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.

For purposes of any appraisal for a conveyance under the provisions of this article, the value for any structures or other improvements to land shall be determined in accordance with law. For any otherwise qualified donation under this article, however, no more than 25% of the total credit allowed shall be for structures and other improvements to land. Further, any property which serves as the basis, in whole or in part, for a tax credit under this article shall not serve as the basis, in whole or in part, for the tax credit allowed under § 58.1-339.2 and any property which serves as the basis, in whole or in part, for the tax credit allowed under § 58.1-339.2 shall not serve as the basis, in whole or in part, for a tax credit under this article.

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 the amount of individual, fiduciary or corporate income tax otherwise due. Any portion of the credit

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57 which is unused in any one taxable year may be carried over for a maximum of ~~five~~10 consecutive
58 taxable years following the taxable year in which the credit originated until fully expended.

59 2. Qualified donations shall include the conveyance ~~in perpetuity~~ of a fee interest in real property or
60 ~~the conveyance in perpetuity of~~ a less-than-fee interest in real property, such as a conservation
61 restriction, preservation restriction, agricultural preservation restriction, or watershed preservation
62 restriction, provided that such less-than-fee interest qualifies as a charitable deduction under § 170 (h) of
63 the U.S. Internal Revenue Code of 1986, as amended. *Otherwise qualified donations of a less-than-fee*
64 *interest shall be accompanied by a statement describing how the donated interest in land meets the*
65 *requirements of § 170 (h) of the U.S. Internal Revenue Code of 1986, as amended, and the regulations*
66 *adopted thereunder. The statement shall be submitted by the taxpayer to the Department of Taxation,*
67 *with a copy also provided by the taxpayer to the Department of Conservation and Recreation, on a form*
68 *that shall be developed by the Tax Commissioner in consultation with the Secretary of Natural*
69 *Resources. The statement shall include, but not be limited to, a description of the conservation purpose*
70 *or purposes being served by the donation, the fair market value of the land being donated in the*
71 *absence of any easement or other restriction, and the public benefit derived from the donation. The*
72 *Department of Conservation and Recreation shall compile an annual report on qualified donations of*
73 *less-than-fee interests accepted by any public or private conservation agency in the respective calendar*
74 *year and shall submit the report by December 31 of each year to the Chairmen of the House Committee*
75 *on Appropriations, House Committee on Finance, and the Senate Committee on Finance. Qualified*
76 *donations shall not include the conveyance of a fee interest, or a less-than-fee interest, in real property*
77 *that has been dedicated for the purpose of fulfilling density requirements to obtain approvals for zoning,*
78 *subdivision, site plan, or building permits by a charitable organization that (i) meets the definition of*
79 *"holder" in § 10.1-1009 and (ii) holds one or more conservation easements.*

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

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

92 Pursuant to the criteria set forth in subdivisions 2 and 3, the Department of Taxation shall establish
93 and make publicly available guidelines that describe the property and the circumstances under which
94 donations of such property shall not be qualified donations. The Department shall update the guidelines
95 as necessary as determined by the Tax Commissioner. Such guidelines shall be exempt from the
96 Administrative Process Act (§ 2.2-4000 et seq.).

97 4. Qualified donations shall be eligible for the tax credit herein described if such donations are made
98 to the Commonwealth of Virginia, an instrumentality thereof, or a charitable organization described in
99 § 501 (c) (3) of the U.S. Internal Revenue Code of 1986, as amended, if such charitable organization (i)
100 meets the requirements of § 509 (a) (2) or (ii) meets the requirements of § 509 (a) (3) and is controlled
101 by an organization described in § 509 (a) (2).

102 45. The preservation, agricultural preservation, historic preservation or similar use and purpose of
103 such property shall be assured in perpetuity.

104 6. A public or private conservation agency that receives a qualified donation of a fee interest in real
105 property shall maintain the property for "real estate devoted to open-space use," as that term is defined
106 in § 58.1-3230 but not including clause (vii) of such definition, and shall not transfer such property
107 except (i) subject to the conveyance in perpetuity of a conservation easement, as that term is defined in
108 § 10.1-1009, or subject to the conveyance in perpetuity of an open-space easement, as that term is
109 defined in § 10.1-1700, or (ii) to the Commonwealth of Virginia.

110 D. The issuance of tax credits under this article shall be administered under the following conditions
111 beginning January 1, 2007:

112 1. All otherwise qualified donations shall meet objective criteria developed and adopted by the
113 Department of Conservation and Recreation. The objective criteria shall describe (i) the characteristics
114 of land that has important conservation values, and (ii) the terms of donations that are required for
115 different types of land in order to provide an appropriate level of protection for the conservation values
116 of land, including reasonable agricultural best management practices and appropriate forest
117 management plans. Such criteria shall incorporate, as applicable (without limitation), requirements
118 under the Open-Space Land Act (§ 10.1-1700 et seq.), the Virginia Conservation Easement Act

(§ 10.1-1009et seq.), and § 170 (h) of the U.S. Internal Revenue Code of 1986, as amended.

The Department of Conservation and Recreation shall provide a copy of the criteria developed or any changes to such criteria to the Chairmen of the House Committees on Finance and Appropriations and the Senate Committee on Finance at least 45 days prior its effective date.

2. In addition to meeting the objective criteria adopted by the Department of Conservation and Recreation and all other applicable requirements under law, any donation of land or interest in land located in Virginia in the Chesapeake Bay watershed or the seaside of Northampton or Accomack Counties which would generate tax credit under this article in excess of \$2.5 million, if all allowed credit were claimed, shall be approved by the Department of Conservation and Recreation in order to qualify for tax credit under this article.

As part of such approval, the Commissioner of the Department of Conservation and Recreation shall provide a written certification to a taxpayer identifying the taxpayer who made the qualified donation, the land or any interest therein donated, the date of the donation, and the amount of the tax credit for the qualified donation.

3. The Department of Conservation and Recreation shall register tax credits for any qualified donation meeting the objective criteria described in subdivision D 1 and, if applicable, the approval requirement set forth in subdivision D 2. Once a qualified donation has been registered by the Department of Conservation and Recreation, the tax credit relating to such donation shall be issued by the Department in the time frame as provided under this subdivision.

Registered tax credits shall be issued on a calendar year basis, and in no case shall the Department issue more than \$50 million in tax credits in calendar year 2007 and no more than \$75 million in tax credits in each calendar year beginning with calendar year 2008 and every calendar year thereafter. In issuing tax credits in each calendar year, the Director of the Department of Conservation and Recreation shall issue tax credits in the following order of priority: (i) first to otherwise qualified donations made on or after January 1, 2007, that have been registered by the Department of Conservation and Recreation in a prior calendar year but for which no tax credit has been issued because of the \$50 million and \$75 million calendar year limitations, and (ii) then to any other qualified donation that has been registered by the Department in the current calendar year, provided that the aggregate amount of tax credits issued pursuant to clauses (i) and (ii) shall not exceed \$50 million in calendar year 2007 and \$75 million in each calendar year beginning with calendar year 2008 and every calendar year thereafter.

Any taxpayer that has been issued a tax credit by the Director shall be allowed to use such credit for his or its taxable year that begins in the calendar year in which such credit was issued and for succeeding taxable years in accordance with the 10 consecutive taxable year carryforward provisions of this article. In addition, no taxpayer to which a credit has been transferred shall use such credit for any taxable year of such taxpayer that ended prior to the date of transfer.

4. The approval or issuance of any tax credit by the Department of Conservation and Recreation, or its Director, shall in no way be construed or interpreted as prohibiting the Department of Taxation or the Tax Commissioner from auditing any credit claimed pursuant to the provisions of this article or from assessing tax relating to the claiming of any credit under this article.

5. The Department of Conservation and Recreation shall update such objective criteria described under subdivision D 1 as necessary as determined by the Commissioner of the Department of Conservation and Recreation.

§ 58.1-512.1. Appraisal guidelines.

A. Each 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.).

B. 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 the immediate area in which the property is located. Each appraisal shall contain a clear statement by the appraiser that 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 likely need for such use in the reasonably near future in the immediate area in which the property is located.

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 that at the time the qualified donation was made there was a reasonable probability that (a) the

180 *property was physically adaptable for the highest and best use that was proposed in the appraisal,*
181 *considering without limitation factors such as slopes, flood plains, and soil conditions; (b) there was a*
182 *need or likely need for such use in the reasonably near future in the immediate area in which the*
183 *property is located; (c) the highest and best use met existing zoning requirements; and (d) in the event*
184 *the highest and best use for the property absent conservation was commercial or residential*
185 *development, existing roads serving the property were sufficient to support that type of development.*

186 § 58.1-513. Limitations; transfer of credit; gain or loss from tax credit.

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

192 B. Any tax credits that arise under this article from the donation of land or an interest in land made
193 by a pass-through tax entity such as a trust, estate, partnership, limited liability company or partnership,
194 limited partnership, subchapter S corporation or other fiduciary shall be used either by such entity if it is
195 the taxpayer on behalf of such entity or by the member, manager, partner, shareholder or beneficiary, as
196 the case may be, in proportion to their interest in such entity in the event that income, deductions and
197 tax liability pass through such entity to such member, manager, partner, shareholder or beneficiary or as
198 set forth in the agreement of said entity. Such tax credits shall not be claimed by both the entity and the
199 member, manager, partner, shareholder or beneficiary for the same donation.

200 C. ~~Any taxpayer holding a credit~~ *Any person or entity making a qualified donation* under this article
201 *may transfer unused but otherwise allowable credit that relates to such qualified donation for use by*
202 *another taxpayer on Virginia income tax returns. However, any organization described under § 501 (c)*
203 *of the U.S. Internal Revenue Code of 1986, as amended, shall not be allowed to transfer any credit*
204 *under this article. A taxpayer person or entity who transfers any amount of credit under this article shall*
205 *file a notification of such transfer to the Department in accordance with procedures and forms prescribed*
206 *by the Tax Commissioner, along with a fee of 1% of the value of the donated interest, or \$5,000,*
207 *whichever is less. Revenues generated by such fees shall be used by the Department of Taxation for*
208 *implementation of this article.*

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

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

215 F. A pass-through tax entity, such as a partnership, limited liability company or Subchapter S
216 corporation, may appoint a tax matters representative, who shall be a general partner, member/manager
217 or shareholder, and register that representative with the Tax Commissioner. The Tax Commissioner shall
218 be entitled to deal with the tax matters representative as representative of the taxpayers to whom credits
219 have been allocated or transferred by the entity under this article with respect to those credits. In the
220 event a pass-through tax entity allocates or transfers tax credits arising under this article to its partners,
221 members or shareholders and the allocated or transferred credits shall be disallowed, in whole or in part,
222 such that an assessment of additional tax against a taxpayer shall be made, the Tax Commissioner shall
223 first make written demand for payment of any additional tax, together with interest and penalties, from
224 the tax matters representative. In the event such payment demand is not satisfied, the Tax Commissioner
225 shall proceed to collection against the taxpayers in accordance with the provisions of Chapter 18
226 (§ 58.1-1800 et seq.) of this title.

227 § 58.1-901. Definitions.

228 As used in this chapter, unless the context clearly shows otherwise, the term or phrase:

229 "Decedent" means a deceased person.

230 "Federal credit" means the maximum amount of the credit for state death taxes allowable by § 2011
231 of the United States Internal Revenue Code of 1954, as amended or renumbered, or successor provision,
232 in respect to a decedent's taxable estate. The term "maximum amount" shall be construed as to take full
233 advantage of such credit as the laws of the United States may allow. ~~In no event, however, shall such~~
234 ~~amount be less than the federal credit allowable by § 2011 of the Internal Revenue Code as it existed on~~
235 ~~January 1, 1978.~~

236 "Gross estate" means "gross estate" as defined in § 2031 of the United States Internal Revenue Code
237 of 1954, as amended or renumbered, or the successor provision of the laws of the United States.

238 "Nonresident" means a decedent who was domiciled outside of the Commonwealth of Virginia at his
239 death.

240 "Personal representative" means the personal representative of the estate of the decedent, appointed,
241 qualified and acting within the Commonwealth, or, if there is no personal representative appointed,

242 qualified and acting within the Commonwealth, then any person in actual or constructive possession of
243 the Virginia gross estate of the decedent.

244 "Resident" means a decedent who was domiciled in the Commonwealth of Virginia at his death.

245 "State" means any state, territory or possession of the United States and the District of Columbia.

246 "Taxable estate" means "taxable estate" as defined in § 2051 of the United States Internal Revenue
247 Code of 1954, as amended or renumbered, or the successor provision of the laws of the United States.

248 "Value" means "value" as finally determined for federal estate tax purposes under the laws of the
249 United States relating to federal estate taxes.

250 Any reference in this chapter to the laws of the United States relating to federal estate and gift taxes
251 means the provisions of the Internal Revenue Code of 1954, and amendments thereto, and other
252 provisions of the laws of the United States relating to federal estate and gift taxes, as the same may be
253 or become effective at any time or from time to time.

254 **2. That the second enactment of Chapter 940 of the Acts of Assembly of 2005 is repealed upon**
255 **passage of this act.**

256 **3. That, except as provided in the second enactment of this act, the provisions of this act relating**
257 **to the Virginia Land Conservation Incentives Act of 1999 (§ 58.1-510 et seq. of the Code of**
258 **Virginia) shall be applicable to any conveyance of property (or the conveyance of any interest in**
259 **property) that is made on or after January 1, 2007. In addition, the increase in the carry over**
260 **period to 10 consecutive taxable years pursuant to subdivision C 1 of § 58.1-512 of the Code of**
261 **Virginia shall be applicable to any conveyance of property (or the conveyance of any interest in**
262 **property) made on or after January 1, 2007.**

263 **4. That the guidelines required under subdivision C 3 of § 58.1-512 and required under**
264 **§ 58.1-512.1 of the Code of Virginia pursuant to the provisions of this act shall first be made**
265 **publicly available no later than December 1, 2006.**

266 **5. That in developing the initial criteria pursuant to subsection D of § 58.1-512 of the Code of**
267 **Virginia as provided in the first enactment of this act, the Department of Conservation and**
268 **Recreation shall provide for adequate public participation, including adequate notice and**
269 **opportunity to provide comment on the proposed criteria. Such initial criteria shall be provided to**
270 **the Chairmen of the House Committees on Finance and Appropriations and the Senate Committee**
271 **on Finance as provided in subdivision D 1 of § 58.1-512 of the Code of Virginia no later than**
272 **November 14, 2006, and shall first be made publicly available no sooner than December 1, 2006,**
273 **and no later than December 7, 2006. For all future changes to such criteria the Department shall**
274 **comply with the Administrative Process Act (§ 2.2-4000 et seq.) of the Code of Virginia.**

275 **6. That the amendment to § 58.1-901 of the Code of Virginia pursuant to the provisions of this act**
276 **shall apply to estates of persons who die on or after July 1, 2007.**