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HOUSE BILL NO. 908

Offered January 11, 2012
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A BILL to amend and reenact § 58.1-512 of the Code of Virginia, relating to the approval of land preservation tax credits prior to the conveyance of any donation of land or interest in land.

Patrons—Minchew and Webert

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-512 of the Code of Virginia is 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, 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 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 shall be 40 percent of the fair market value of the land or interest in land so conveyed.

B. The fair market value of qualified donations made under this section shall be determined in accordance with § 58.1-512.1 and 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 United States 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.

C. 1. The amount of the credit that may be claimed by 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, $100,000 for each of 2002 through 2008 taxable years, $50,000 for each of 2009, 2010, and 2011 taxable years, and $100,000 for 2012 taxable years and for each taxable year 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 that is unused in any one taxable year may be carried over for a maximum of 10 consecutive taxable years following the taxable year in which the credit originated until fully expended. A credit shall not be reduced by the amount of unused credit that could have been claimed in a prior year by the taxpayer but was unclaimed. For taxpayers affected by the credit reduction for taxable years 2009, 2010, and 2011, any portion of the credit that is unused in any one taxable year may be carried over for a maximum of 13 consecutive taxable years following the taxable year in which the credit originated until fully expended.

2. Qualified donations shall include the conveyance of a fee interest in real property or the conveyance in perpetuity of a less-than-fee interest in real property, such as a conservation restriction, preservation restriction, agricultural preservation restriction, or watershed preservation restriction, provided that such less-than-fee interest qualifies as a charitable deduction under § 170(h) of the United States Internal Revenue Code of 1986, as amended.

The Department of Conservation and Recreation shall compile an annual report on qualified donations of less-than-fee interests accepted by any public or private conservation agency in the respective calendar year and shall submit the report by December 1 of each year to the Chairmen of the House Committee on Appropriations, House Committee on Finance, and the Senate Committee on

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Finance. In preparing such report, the Department of Conservation and Recreation shall consult and coordinate with the Department of Taxation and the Departments of Forestry and Agriculture and Consumer Services to provide an estimate of the number of acres of land currently being used for "production agriculture and silviculture" as defined in § 3.2-300 that have been protected by qualified donations of less-than-fee interests. This report shall include information, when available, on land qualifying for credits being used for "production agriculture and silviculture" that have onsite operational best management practices, which are designed to reduce the amount of nutrients and sediment entering public waters. In addition, the report shall include information, when available, on riparian buffers, both vegetated/forested buffers and no-plow buffers, required by deed restriction on land qualifying for credits in order to protect water quality. This information shall be reported in summary fashion as appropriate to preserve confidentiality of information. Qualified donations shall not include the conveyance of a fee interest, or a less-than-fee interest, in real property by a charitable organization that (i) meets the definition of "holder" in § 10.1-1009 and (ii) holds one or more conservation easements acquired pursuant to the authority conferred on a "holder" by § 10.1-1010.

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

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

5. The preservation, agricultural preservation, historic preservation or similar use and purpose of such property shall be assured in perpetuity. In the case of conveyances of a fee interest to a charitable organization that is a "holder" as defined in § 10.1-1009, the credit shall not be allowed until the charitable organization agrees that subsequent conveyances of the fee interest in the property will be (i) subject to a previous conveyance in perpetuity of a conservation easement, as that term is defined in § 10.1-1009, or subject to the conveyance in perpetuity of an open-space easement, as that term is defined in § 10.1-1700, or (ii) conveyed to the Commonwealth of Virginia or to a federal conservation agency. No credit shall be allowed with respect to any subsequent conveyances by the charitable organization.

D. The issuance of tax credits under this article for donations made on and after January 1, 2007, shall be in accordance with procedures and deadlines established by the Department and shall be administered under the following conditions:

1. The taxpayer shall apply for a credit ~~after completing the donation~~ by submitting a form or forms prescribed by the Department in consultation with the Department of Conservation and Recreation. *The application shall include the dollar amount of tax credits that the taxpayer is requesting for the donation.* If the application requests a credit of $1 million or more or if the donation meets the conditions of subdivision 3 c, then a copy of the application shall also be filed with the Department of Conservation and Recreation by the taxpayer. The application shall include, but not be limited to:

a. A description of the conservation purpose or purposes being served by the donation;

b. The fair market value of land being donated in the absence of any easement or other restriction;

c. The public benefit derived from the donation;

d. The extent to which water quality best management practices will be implemented on the property; and

e. Whether the property is fully or partially forested and a forest management plan is included in the terms of the donation.

2. Applications for otherwise qualified donations of a less-than-fee interest shall be accompanied by an affidavit describing how the donated interest in land meets the requirements of § 170(h) of the United States Internal Revenue Code of 1986, as amended, and the regulations adopted thereunder. The application with accompanying affidavit shall be submitted to the Department of Taxation, with a copy also provided to the Department of Conservation and Recreation.

3. a. No credit in the amount of $1 million or more shall be issued with respect to a donation unless the conservation value of the donation has been verified by the Director of the Department of Conservation and Recreation, based on the criteria adopted by the Virginia Land Conservation Foundation for this purpose. Such criteria and subsequent amendments shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.), but the Virginia Land Conservation Foundation shall provide for adequate public participation, including adequate notice and opportunity to provide comments on the proposed criteria. The Director shall act on applications within 90 days of his receipt of a complete application and shall notify the taxpayer and the Department of Taxation of his action.

b. For purposes of determining whether a credit requires verification of the conservation value, the credits allowed under this article with respect to donations of any other portion of a recorded parcel of land within the preceding 11 years shall be aggregated with the ~~credit claimed~~ *dollar amount of tax credits being requested* for the current donation. This subdivision shall not apply if (i) all owners of the parcel who have been allowed credit for a qualified donation are not affiliated with the person or entity seeking credit for the current donation of a different portion of the parcel and (ii) in the case of an individual seeking credit, the individual has not previously made a qualified donation for any portion of the parcel and is not an immediate family member of any such owners.

c. If (i) the real property that is the subject of the donation was partitioned from or part of another parcel of land and any other portion of such parcel, or any land partitioned from such parcel of land, has been allowed a tax credit under this article (or an application for tax credit is pending) within three years of ~~such donation~~ *the application for tax credits for the current donation* and (ii) the tax credit that would otherwise be allowed to the donor for such donation is at least $250,000, then no credit under this article shall be issued with respect to such donation described in clause (i) unless the conservation value of the donation has been verified by the Director of the Department of Conservation and Recreation. The Director shall act on applications within 90 days of his receipt of a complete application and shall notify the taxpayer and the Department of Taxation of his action. Nothing in this subdivision shall be construed or interpreted (a) as allowing additional tax credit for any land or interest in land previously conveyed for which tax credit has already been allowed under this article or (b) affecting the validity of any tax credit allowed under this article for a prior conveyance of any land or interest in land.

4. a. Tax credits shall be issued on a calendar year basis, and in no case shall the Department issue more than the maximum allowed for the calendar year. The maximum amount of credits that may be issued in a calendar year shall be $100 million plus any credits previously issued *or conditionally issued* under this article but subsequently disallowed or invalidated by the Department *or forfeited by the taxpayer*. Credits previously issued but subsequently disallowed ~~or~~, invalidated, *or forfeited* shall be reissued in a subsequent calendar year. All credits shall be issued in the order that each complete application is received. ~~If within 30 days after an application for credits has been filed the Tax Commissioner provides written notice to the donor that he has determined that the preparation of a second qualified appraisal is warranted, the application shall not be deemed complete until the fair market value of the donation has been finally determined by the Tax Commissioner.~~

~~The~~*For each application received for tax credits, the Tax Commissioner may (i) determine if the requirements of this article have been met and (ii) review the reasonableness of the fair market value ascribed to the donation. Unless the Tax Commissioner provides written notice to the taxpayer that a second qualified appraisal is warranted, he shall issue any tax credits, or conditionally issue any tax credits pursuant to subdivision 4 b, within 120 days of a complete application for tax credits. Within 30 days after an application for credits has been filed, the Tax Commissioner may provide written notice to the taxpayer that he has determined that the preparation of a second qualified appraisal is warranted for purposes of determining the fair market value of the donation. The application shall not be deemed complete until the fair market value of the donation has been finally determined by the Tax Commissioner. If a second qualified appraisal is prepared, the* Tax Commissioner shall ~~make a final determination within~~ *issue any tax credits, or conditionally issue any tax credits pursuant to subdivision 4 b, within* 180 days of notifying the donor, unless the donor has filed an appeal. The donor shall have the right to appeal any decision of the Department in accordance with the provisions of Chapter 18 (§ 58.1-1800 et seq.).

If more than one complete application is received at the same time, the credits with respect to those applications shall be issued in the order that the conveyances were recorded in the appropriate circuit court of the Commonwealth. In the event that a credit requires verification of the conservation value by the Department of Conservation and Recreation and such verification has not been received at the time the maximum $100 million allowed is reached for the calendar year of the donation, such credit shall not be issued for that calendar year but shall be issued in the calendar year that the conservation value of the credit is verified by the Department of Conservation and Recreation.

b. No taxpayer shall be required to complete the conveyance of any donation in land or interest in land prior to applying for tax credits under this article. In cases in which a taxpayer has elected not to complete the proposed donation prior to applying for such tax credits, the Tax Commissioner shall provide a final written determination on the taxpayer's application within the time frames set forth under subdivision 4 a. The determination shall conditionally issue the tax credits requested in whole or in part or deny the application for tax credits. If the Tax Commissioner conditionally issues the tax credits requested, in whole or in part, the Tax Commissioner shall include in the determination the total dollar amount of tax credits conditionally issued. If the Tax Commissioner denies any portion of the tax credits requested by the taxpayer, he shall include in the determination a finding of facts and the specific

reasons for the denial. Upon receipt of a final written determination from the Tax Commissioner, the taxpayer may complete the conveyance of the proposed donation. After completion of the conveyance, in order to claim any tax credits, the taxpayer shall provide the Department with certified copies from the appropriate circuit court of the Commonwealth of the recorded deeds and instruments conveying the donation described in the taxpayer's application. The Department shall within 20 days of receipt of such copies provide the taxpayer with a written certification issuing the tax credits that were conditionally issued in the Tax Commissioner's final determination to the taxpayer

In no case shall the Department be required to issue tax credits pursuant to this subdivision if the conveyance of the land or interest in land does not conform to the donation included in the taxpayer's application for tax credits. The taxpayer shall be deemed to have forfeited any tax credits conditionally issued by the Tax Commissioner if the conveyance of the proposed donation has not been completed within the 120 days immediately following the Department's final written determination to the taxpayer. However, such forfeiture shall not preclude the taxpayer at a later date from applying for tax credits relating to the same proposed donation.

~~b~~*c*. Beginning with calendar year 2008, the $100 million amount contained in subdivision 4 a shall be increased by an amount equal to $100 million multiplied by the percentage by which the consumer price index for all-urban consumers published by the United States Department of Labor (CPI-U) for the 12-month period ending August 31 of the preceding year exceeds the CPI-U for the 12-month period ending August 31, 2006.

5. a. Any taxpayer that has been issued a tax credit by the Department shall be allowed to use such credit for his or its taxable year that begins in the calendar year for which such credit was issued and for succeeding taxable years in accordance with the 10 consecutive taxable year carryforward provisions of this article, except for any taxpayer affected by the credit limitation for taxable years 2009, 2010, and 2011. Such a taxpayer shall be allowed to use such credit for his or its taxable year that begins in the calendar year for which such credit was issued and for succeeding taxable years in accordance with the 13 consecutive taxable year carryforward provisions of this article.

b. Any taxpayer to whom a credit has been transferred may use such credit for the taxable year in which the transfer occurred and unused amounts may be carried forward to succeeding taxable years, but in no event may such transferred credit be used more than 11 years after it was originally issued by the Department or in any taxable year of such taxpayer that ended prior to the date of transfer, except for any taxpayer affected by the credit limitation for taxable years 2009, 2010, and 2011. Such a taxpayer may use such credit for the taxable year in which the transfer occurred and unused amounts may be carried forward to succeeding taxable years, but in no event may such transferred credit be used more than 14 years after it was originally issued by the Department or in any taxable year of such taxpayer that ended prior to the date of transfer.

6. Neither the verification of conservation value by the Department of Conservation and Recreation nor the issuance of a credit by the Department of Taxation shall in any 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. *However, the fair market value of any donation for which the Department has issued tax credits pursuant to subdivision 4 b shall not be subject to dispute except upon a showing of fraud or the misrepresentation of a material fact.*

E. In any review or appeal before the Tax Commissioner or in any court in the Commonwealth the burden of proof shall be on the taxpayer to show that the fair market value and conservation value at the time of the qualified donation is consistent with this section and that all requirements of this article have been satisfied.

2. That the provisions of this act shall be applicable to completed applications for tax credits under Article 20.1 (§ 58.1-510 et seq.) of Chapter 3 of Title 58.1 of the Code of Virginia made on or after January 1, 2013.