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HOUSE BILL NO. 1488

Offered January 14, 2015

Prefiled January 5, 2015

A BILL to amend and reenact §§ 10.1-1010, 10.1-1011, 10.1-1013, 10.1-1801, and 58.1-512 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 10.1-1013.1, relating to conservation easements; tax benefits; Virginia Outdoors Foundation; disputes over easement terms.

Patrons—Pogge, Anderson, Bell, Robert B., Fariss, Keam, Miller, Morris, Orrock, Ramadan, Ransone and Surovell; Senator: Garrett

Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-1010, 10.1-1011, 10.1-1013, 10.1-1801, and 58.1-512 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 10.1-1013.1 as follows:

§ 10.1-1010. Creation, acceptance and duration.

A. A holder may acquire a conservation easement by gift, purchase, devise or bequest.

B. No right or duty in favor of or against a holder ~~and no right in favor of a person having a third-party right of enforcement~~ arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

C. A conservation easement shall be perpetual in duration unless the instrument creating it otherwise provides a specific time. For all easements, the holder shall (i) meet the criteria in § 10.1-1009 and (ii) either have had a principal office in the Commonwealth for at least five years, or be a national organization in existence for at least five years which has an office in the Commonwealth and has registered and is in good standing with the State Corporation Commission. ~~Until a holder has met these requirements, the holder may co-hold a conservation easement with another holder that meets the requirements.~~

D. An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it in writing.

E. No conservation easement shall be valid and enforceable unless the limitations or obligations created thereby conform in all respects to the comprehensive plan at the time the easement is granted for the area in which the real property is located.

F. This chapter does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity, or in any way limit the power of eminent domain as possessed by any public body. In any such proceeding the holder of the conservation easement shall be compensated for the value of the easement. *This chapter does not affect the right to just compensation of the owner of property damaged or taken for public use.*

G. *A conservation easement accepted or recorded on or after July 1, 2016 whose purposes include the assurance of the availability of real property for agricultural use shall define "agriculture" to include small-scale family farming practices.*

§ 10.1-1011. Taxation.

A. Where an easement held pursuant to this chapter or the Open-Space Land Act (§ 10.1-1700 et seq.) by its terms is perpetual, neither the interest of the holder of a conservation easement nor a third-party right of enforcement of such an easement shall be subject to state or local taxation nor shall the owner of the fee be taxed for the interest of the holder of the easement.

B. Assessments of the fee interest in land that is subject to a perpetual conservation easement held pursuant to this chapter or the Open-Space Land Act (§ 10.1-1700 et seq.) shall reflect the reduction in the fair market value of the land that results from the inability of the owner of the fee to use such property for uses terminated by the easement. To ensure that the owner of the fee is not taxed on the value of the interest of the holder of the easement, the fair market value of such land (i) shall be based only on uses of the land that are permitted under the terms of the easement and (ii) shall not include any value attributable to the uses or potential uses of the land that have been terminated by the easement.

C. Notwithstanding the provisions of subsection B, land which is (i) subject to a perpetual conservation easement held pursuant to this chapter or the Open-Space Land Act (§ 10.1-1700 et seq.), (ii) devoted to open-space use as defined in § 58.1-3230, and (iii) in any county, city or town which has

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58 provided for land use assessment and taxation of any class of land within its jurisdiction pursuant to
59 § 58.1-3231 or § 58.1-3232, shall be assessed and taxed at the use value for open space, if the land
60 otherwise qualifies for such assessment at the time the easement is dedicated. If an easement is in
61 existence at the time the locality enacts land use assessment, the easement shall qualify for such
62 assessment. Once the land with the easement qualifies for land use assessment, it shall continue to
63 qualify so long as the locality has land use assessment.

64 *D. No owner of the fee interest in land that is subject to a perpetual conservation easement held*
65 *pursuant to this chapter and accepted or recorded on or after July 1, 2016, shall be entitled to any of*
66 *the tax benefits provided in this section if the easement by its terms (i) is co-held by more than one*
67 *holder, (ii) contains a third-party right of enforcement as defined in § 10.1-1009, or (iii) fails to contain*
68 *a statement notifying the fee owner of the website at which is located a current copy of the guidelines*
69 *the holder follows when enforcing the terms of an easement. Such guidelines shall provide that where*
70 *the purposes of an easement include assuring the availability of real property for agricultural use, the*
71 *word "agriculture" shall be construed to encompass small-scale family farming practices.*

72 **§ 10.1-1013. Standing.**

73 An action affecting a conservation easement may be brought by:

- 74 1. An owner of an interest in real property burdened by the easement;
75 2. A holder of the easement;
76 3. ~~A person having an express third-party right of enforcement;~~
77 4. The Attorney General of the Commonwealth; *or*
78 ~~5. 4. The Virginia Outdoors Foundation;~~
79 ~~6. The Virginia Historic Landmarks Board;~~
80 ~~7. The local government in which the real property is located; or~~
81 ~~8. Any other governmental agency or person with standing under other statutes or common law.~~

82 **§ 10.1-1013.1. Disputes; Virginia Outdoors Foundation; request for decision.**

83 *Any private owner of the fee interest in land that is subject to a perpetual conservation easement,*
84 *any holder of such an easement, including the Virginia Outdoors Foundation, or any holder of a*
85 *third-party right of enforcement may request, pursuant to regulations adopted by the Foundation, that*
86 *the Foundation issue a decision to resolve a dispute that is not part of a dispute already in litigation*
87 *and arises out of or relates to the interpretation of a conservation easement instrument made or entered*
88 *into pursuant to this chapter.*

89 **§ 10.1-1801. Powers of Foundation.**

90 The Virginia Outdoors Foundation shall have the following general powers:

- 91 1. To have succession until dissolved by the General Assembly, in which event title to the properties
92 of the Foundation, both real and personal, shall, insofar as consistent with existing contractual
93 obligations and subject to all other legally enforceable claims or demands by or against the Foundation,
94 pass to and become vested in the Commonwealth;
95 2. To sue and be sued in contractual matters in its own name;
96 3. To promulgate regulations as it deems necessary for the administration of its functions in
97 accordance with the Administrative Process Act (§ 2.2-4000 et seq.);
98 4. To accept, hold, and administer gifts and bequests of money, securities, or other property,
99 absolutely or in trust, for the purposes for which the Foundation is created. Unless otherwise restricted
100 by the terms of the gift or bequest, the Foundation is authorized to sell, exchange, or otherwise dispose
101 of and to invest or reinvest in such investments as it may determine the moneys, securities, or other
102 property given or bequeathed to it. The principal of such funds, together with the income therefrom and
103 all other revenues, shall be placed in such depositories as the Foundation shall determine and shall
104 constitute a special fund and be subject to expenditure by the Foundation without further appropriation.
105 The Foundation shall not engage in any business except in the furtherance of its objectives;
106 5. To acquire by gift, devise, purchase, or otherwise, absolutely or in trust, and to hold and, unless
107 otherwise restricted by the terms of the gift or devise, to encumber, convey, or otherwise dispose of, any
108 real property, or any estate or interest therein, as may be necessary and proper in carrying into effect the
109 purposes of the Foundation;
110 6. To enter into contracts generally and to execute all instruments necessary or appropriate to carry
111 out its purposes;
112 7. To appoint and prescribe the duties of such officers, agents, and employees as may be necessary
113 to carry out its functions, and to fix and pay such compensation to them for their services as the
114 Foundation may determine; ~~and~~
115 8. *To issue a decision on any dispute brought before it that is not part of a dispute already in*
116 *litigation and arises out of or relates to the interpretation of a conservation easement instrument made*
117 *or entered into pursuant to Chapter 10.1 (§ 10.1-1009 et seq.). All proceedings related to the*
118 *Foundation's decision shall be conducted pursuant to Article 3 (§ 2.2-4018 et seq.) of the*
119 *Administrative Process Act, except that the Foundation shall construe any terms in the easement*

instrument strictly, place upon the party seeking to enforce the instrument's terms the burden of demonstrating that the terms are applicable to the acts of which he complains, and resolve any substantial doubt or ambiguity against restrictions on the free use or alienation of the land. When interpreting the terms of an easement whose purposes include assuring the availability of real property for agricultural use, the Foundation shall construe the word "agriculture," where it is not otherwise defined, to encompass small-scale family farming practices. The Foundation's decision shall be considered a case decision as defined in § 2.2-4001, and judicial review shall be exclusively provided pursuant to Article 5 (§ 2.2-4025 et seq.) of the Administrative Process Act; and

9. To perform any lawful acts necessary or appropriate to carry out the purposes of the Foundation.

§ 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. *No conservation easement that is donated to a holder that qualifies as a charitable organization pursuant to subdivision 4 and is accepted or recorded on or after July 1, 2016 shall qualify for credit under this section unless the easement instrument complies with the provisions of subsection D of § 10.1-1011.*

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 Finance. *The report shall provide an individual listing of each such qualified donation, its fair market value, and the locality in which it is located. However, the report shall not identify the taxpayer or*

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

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

200 4. Qualified donations shall be eligible for the tax credit herein described if such donations are made
201 to the Commonwealth of Virginia, an instrumentality thereof, or a charitable organization described in
202 § 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, if such charitable
203 organization (i) meets the requirements of § 509(a)(2) or (ii) meets the requirements of § 509(a)(3) and
204 is controlled by an organization described in § 509(a)(2).

205 5. The preservation, agricultural preservation, historic preservation or similar use and purpose of such
206 property shall be assured in perpetuity. In the case of conveyances of a fee interest to a charitable
207 organization that is a "holder" as defined in § 10.1-1009, the credit shall not be allowed until the
208 charitable organization agrees that subsequent conveyances of the fee interest in the property will be (i)
209 subject to a previous conveyance in perpetuity of a conservation easement, as that term is defined in
210 § 10.1-1009, or subject to the conveyance in perpetuity of an open-space easement, as that term is
211 defined in § 10.1-1700, or (ii) conveyed to the Commonwealth of Virginia or to a federal conservation
212 agency. No credit shall be allowed with respect to any subsequent conveyances by the charitable
213 organization.

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

217 1. The taxpayer shall apply for a credit after completing the donation by submitting a form or forms
218 prescribed by the Department in consultation with the Department of Conservation and Recreation. If the
219 application requests a credit of \$1 million or more or if the donation meets the conditions of subdivision
220 3 c, then a copy of the application shall also be filed with the Department of Conservation and
221 Recreation by the taxpayer. The application shall include, but not be limited to:

222 a. A description of the conservation purpose or purposes being served by the donation;
223 b. The fair market value of land being donated in the absence of any easement or other restriction;
224 c. The public benefit derived from the donation;
225 d. The extent to which water quality best management practices will be implemented on the property;
226 and

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

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

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

242 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 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 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 under this article but subsequently disallowed or invalidated by the Department. Credits previously issued but subsequently disallowed or invalidated 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 Tax Commissioner shall make a final determination 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. 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.

c. Beginning with calendar year 2013, the maximum amount of credits that may be issued in a calendar year shall not exceed \$100 million. Beginning with the submission due on or before December 20, 2013, and in each year thereafter, the Governor shall include in "The Budget Bill" submitted pursuant to subsection A of § 2.2-1509 or in his amendments to the general appropriation act in effect submitted pursuant to subsection E of § 2.2-1509 a recommended appropriation from the general fund equal to the difference between the amount calculated pursuant to subdivision b and \$100 million, but not more than \$20 million, to be allocated as follows: 80 percent to the Virginia Land Conservation Fund to be used in accordance with § 10.1-1020, with no less than 50 percent of such appropriation to be used for fee simple acquisitions with public access or acquisitions of easements with public access; 10 percent to the Civil War Site Preservation Fund to be used in accordance with § 10.1-2202.4; and 10 percent to the Virginia Farmland Preservation Fund to be used in accordance with § 3.2-201.

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.

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

313 6. Neither the verification of conservation value by the Department of Conservation and Recreation
314 nor the issuance of a credit by the Department of Taxation shall in any way be construed or interpreted
315 as prohibiting the Department of Taxation or the Tax Commissioner from auditing any credit claimed
316 pursuant to the provisions of this article or from assessing tax relating to the claiming of any credit
317 under this article.

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

322 **2. That the Joint Legislative Audit and Review Commission shall conduct a public hearing**
323 **annually on the activities of private holders of conservation easements. The purpose of this hearing**
324 **shall be to assess whether such private holders have complied with the best practices of easement**
325 **holders, including the practices of acting according to accepted ethical principles, considering**
326 **complaints of abuse of authority, refraining from engaging in litigation, and providing**
327 **transparency in easement monitoring programs, including by posting inspection results on the**
328 **holder's public website.**