# PRESENTATION OF ROBERT HENLEY LAMB

# TO THE

# HOUSE AND SENATE FINANCE SUBCOMMITTEE

# STUDYING VIRGINIA'S

# LAND CONSERVATION TAX CREDIT

Monday, August 29, 2005,

12:00 noon

House Room C, General Assembly Building

Richmond, Virginia

My name is Robert Henley Lamb, an attorney practicing with the Washington, D.C. law firm of Wright & Talisman, P.C. However, I am a Richmond resident and native. Professionally, I worked as a legislative assistant to former Democratic Congressman David E. Satterfield III of Richmond and subsequently as a Professional Staff Member for the Republicans on the U.S. House Committee on Energy and Commerce, where I focused mainly on environmental legislation. Thereafter, I served as a Washington Representative for the American Petroleum Institute before entering private practice.

I am not speaking on behalf of any of the boards on which I serve. Currently I have the privilege of serving on some Virginia boards, all of which have a strong preservationist mission: the George C. Marshall Foundation, the Museum of the Confederacy, and the Capital Region Land Conservancy. I was honoured to have the opportunity to spend two tours in Vietnam as a combat infantry officer with the First Marine Division; Marines perform a different kind of preservation. I should especially mention my paternal grandmother, Janie Preston Boulware Lamb, who—during her 10-year stint as president of the Association of the Preservation of Virginia Antiquities—gave her ancestral plantation home of "Smithfield" in Montgomery County, Virginia to the APVA. I should also mention that my uncle, Aubin Boulware Lamb, placed a conservation easement on his Spotsylvannia County farm of "St. Julien." That action of his gave much publicity to the conservation easement program because it was a subject of a front page article in the *Sunday Free-Lance Star* of July 27, 2003.

Regarding conservation easements, my focus has been largely in Spotsylvannia County and, to a lesser degree, Orange County. That could change because of my

membership on the board of the recently formed Capital Region Land Conservancy. I believe that approximately one-half of the conservation easement acreage in Spotsylvannia is from easements written by me. In my easement work I have had the opportunity to work with the Virginia Outdoors Foundation and the Department of Historic Resources. I would like to especially commend Leslie Trew of the VOF and Calder Loth of DHR for their professionalism. Of course, in the easement process I also work with county planners, engineers, and appraisers.

My perspective is influenced by reaction to the pertinent aspects of the report JCS-02-05 prepared by the staff of the U.S. Joint Committee on Taxation entitled "Options to Improve Tax Compliance and Reform Tax Expenditures." Title VIII. F. of that dealt with conservation easements. On June 8, 2005, I attended a hearing on land conservation held by the U.S. Senate Committee on Finance. Chairman Charles E. Grassley is expected to introduce legislation dealing with the abuses detailed in both the hearing and in a series of articles in *The Washington Post*. Nevertheless, I would be astonished, based on the statements of the senators on the Committee on Finance, as well as from my conversations with committee counsel, if the legislation once introduced were injurious to conservation easements. I do not think it will contain the Draconian recommendations of JCS-02-05 for a deeply reduced percentage amount of the charitable deduction or the bizarre restriction in the case of personal residence use. I do think they will crack down on façade easements, require more pertinent information on federal forms, look at substance of transactions rather than the forms thereof, increase penalties for abuse, prohibit deductions for some of the types of transactions most subject to abuse, and demand strict requirements for appraisers.

As pointed out by the Land Trust Alliance on that occasion: "Private landowners hold 70% of the undeveloped land in America and they are essential for the conservation of America's natural heritage." At that hearing, The Nature Conservancy pointed out that under conservation easements:

- Property remains privately owned and landowners often continue to live on the property;
- Many types of private land use, such as farming, ranching and timber harvesting, can continue;
- The land can remain productive, generating jobs and tax revenues to support local government services; and
- The tax benefits are a flexible financial incentive for good stewardship that a landowner can tailor to meet his or her own needs.

To which I would add that it allows a State to acquire valuable land well below market price and offload much of the enforcement responsibilities onto private parties.

I have some suggested changes to applicable provisions of the Code of Virginia or the Virginia Land Conservation Incentives Act of 1999 relating to conservation tax credits that I respectfully offer for your consideration.

**1. Tax credits should be inheritable**

Rewrite Section 58.1-513.C. to read as follows:

"Unused but otherwise allowable credit under this article may be transferred or inherited for use by another taxpayer on Virginia income tax returns. The taxpayer who transfers or inherits any amount of credit under this article shall file a notification of such transfer

or inheritance to the Department in accordance with procedures and forms prescribed by the Tax Commissioner."

Reason:

1. Increased incentive for potential donors of a property interest—especially those who are sick or elderly.

2. Allow fuller utilization of bargained for credits in the case of transferees for value.

3. The second sentence of the current provision could be improvidently and harshly interpreted to the effect that if the taxpayer died without filing a transfer notification, then the credit would expire.

**2. State Agency easement templates should be given deference by the Virginia Department of Taxation.**

The Virginia Land Conservation Incentives Act of 1999 should be amended to add a new section as follows:

"Section ( ). That the Department of Taxation is authorized to recognize the tax credits for a donation of a conservation easement made prior to January 1, 2006, notwithstanding any determination of the Internal Revenue Service regarding the qualification of such easement under IRC Section 170(h), provided that: (i) the donation occurred on or before December 31, 2005; and (ii) the credit holder can establish that the wording of the easement relied upon a template provided by a State Agency."

Reason:

1. The May 19, 2005 hypothetical ruling of the Virginia Tax Commissioner, notwithstanding reliance upon advice and templates given to easement donors by a State Agency (such as the Virginia Outdoors Association) in cooperation with

the Virginia Attorney General's staff, erroneously stated that the 2002-2004 easements failed to qualify under IRC Section 170(h). That ruling was withdrawn on July 22, 2005, but the subsequent ruling on that date is still troublesome because in suggesting that the Department could make its own decision, it is unclear whether that would extend to a Section 170(h) determination before IRS action thereon. (I attach a letter from me relating to that initial ruling).

2. Such an amendment is proper and has precedent in that it would be similar to Acts of 2005, c.846, Section 1, which relates to advice from the Department of Taxation concerning the transfer ability of credits or donations made prior to 2002. The July 22, 2005 ruling noted that the statute provided no authority for the Department to allow an exception.

**3. Appraisers should be sanctioned if they substantially or fraudulently overstate the value of the contributed property.**

To that end, amend Section 58.1-512.B. as follows:

In the penultimate sentence thereof, delete the word "falsely" and insert in lieu thereof "substantially". In the last sentence thereof, delete "false or fraudulent" and insert in lieu thereof "substantially or fraudulently overstated".

Reason:

1. The word "false" gives the appearance that it could encompass situations where the appraiser valuation was only modestly higher than that which was deemed accurate by the Department of Taxation or the IRS, as the case may be.

2. Good appraisers of easements are hard to come by and they have plenty of other business, so they may be reluctant to do easement evaluations because of the perception of a low threshold sanction.
3. When the scrupulous fear to tread, others with less scruples may thrive.

**4. Extend the carryover period from 5 years to 20 years.**

Section 58.1-512.C.1. is amended by deleting "five" and inserting in lieu thereof "twenty".

Reason:

1. This will encourage greater use of the tax credits by the original donor and the natural objects of his bounty, especially in the case of high value donations.
2. This could have the effect of spreading out the tax consequence of the credit to the Commonwealth over a greater period of time.
3. It may have the effect of increasing the bargaining power of the donor when it comes to transfer of credits.

I also have some suggestions involving related provisions of the Code of Virginia

**1. The official comprehensive plan for the area in which the prospective easement would be located should be a factor, though not necessarily a decisive one, if a potential open-space easement is to be held by a State Body that is a state agency.**

Consequently, amend Section 10.1-1701 as follows:

Immediately before the first sentence of the second paragraph insert the following:

"The use of such property for open space by a Public Body that is a state agency shall take into consideration the official comprehensive plan for the area in which the property

is located and should conform to such plan, unless the state agency determines that a different use of the open space land to be protected is of paramount State importance."

In the first sentence of such existing second paragraph insert immediately after "land" the words "for a Public Body that is not a state agency".

Reason:

1. The easement program is a State initiative in pursuit of values endorsed by the Commonwealth. Given that Virginia is a Dillon Rule State and localities only have such power as specifically granted by the sovereign, it is odd that local planning could thwart a state purpose.
2. There is much confusion and delay inherent in the process of deciphering the particulars of a local comprehensive plan or eliciting authoritative pronouncements thereon.
3. Because of delay and confusion in the interplay between State and county over county plans, I saw a potential easement in Spotsylvannia evaporate

**2. The official comprehensive plan at the time of a conversion should not be a factor in any diversion from open-space land use.**

Section 10.1-1704 should be amended by the deleting "(b) in accordance with the official comprehensive plan for the locality at the time of conversion or diversion and".

Reason:

1. The official plan should have been modified to take into account the pre-existing easement. This could be used as a convenient ploy to get around previous obligations

2. This speaks to one of the circumstance that arose involving the Mary Moody Northern Endowment, regarding which I sent the attached letter to the VOF Board.

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June 15, 2005

Robert Lee, Executive Director
Virginia Outdoors Foundation
191 N 14th Street
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Richmond, Virginia 23219

Re: Land Preservation Tax Credits Ruling of May 19, 2005

Dear Mr. Lee:

I am sure you were as astounded as I was by the referenced ruling of the Virginia Tax Commissioner. The bizarre, unanticipated spectacle of a different arm of the Commonwealth espousing a policy interpretation inimical to that of the Virginia Outdoors Foundation ("VOF"), involving requirements central to your mission, must have been extremely frustrating to you. As irksome as it must have been to you, it undoubtedly roiled many of us who worked in good faith in reliance on the conservation easement language VOF required of donors, upon the advice of the Virginia Attorney General's Office, in the years 2002-2004. Consequently, I believe, as a matter of equity, Virginia would be estopped from enforcing any such ruling, if it were attempted to be applied in an actual case.

Before discussing possible remedies to the hypothetical ruling, which I regard as hypertechnical and erroneous, I shall set forth why I think it is wrong, even in its narrow focus. Assuming incorrectly, but *arguendo*, that the Internal Revenue Service would deny charitable deduction treatment for easements that failed to meet some minor aspects of technical Treasury Regulations §§ 1.170A-14(g)(5)(ii) and 1.170A-14(g)(6) — even though meeting the actual statutory provisions of § 170(h) of the Internal Revenue Code — the language of the 2002-2004 VOF easements does in fact satisfy those regulations.

This is so, in part, because — contrary to the ruling — there is no extinguishment "paragraph" required under § 1.170A-14(g)(6). Rather, "at the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the

value of the property as a whole at that time." In short, what is needed is an agreement, not a paragraph. In fact, the supposed infirm 2002 easements contained an explicit WHEREAS provision making reference to §§ 10.1-1700–10.1-1705 of the Code of Virginia, which is further recognized by reference in the NOW, THEREFORE easement provision. Section 10.1-1704 of the Code of Virginia, the applicability of which is acknowledged by inclusion in reference, specifically and appropriately speaks to the extinguishment points raised in Treasury Regulation § 1.170A-14(g)(6). The fact that the 2003-2004 easements, in addition thereto, contain detailed extinguishment provisions relating to conversion and diversion does not alter the reality that a satisfactory agreement thereon was present there all along as an integral part of the document signed by the donors.

The ruling ignores the fact that Treasury Regulation § 1.170A-14(g)(5)(ii) makes it clear, by reference therein to § 1.170A-14(g)(5)(i), that the former relates to any "qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property." (emphasis added). In short, it does not relate to all reserved rights *per se*, but only those the exercise of which may impair the conservation interest. Some reserved rights might be assumed justly and appropriately to be blessed by the donee VOF as passing muster without written notice, so long as — in accord with the earth removal provision in the easements — they do not diminish or impair the conservation values protected by the easements. The VOF in its easements has required written notice in some instances, such as the mineral extraction example found in § 1.170A-14(g)(5)(ii) that is specifically mentioned as requiring written notice. Other reserved rights, such as the ability to build structures over a certain threshold size, are subject, by terms of the easements, to written approval, but are not otherwise barred so long as they are not in derogation of the conservation values of the easements.

Lastly, in order to avoid leaving the ruling unanswered and being accorded a greater dignity than warranted, I would suggest that the Attorney General's Office, as the referee for legal interpretation of easements, issue a statement taking issue with the ruling. Additionally, upon further reflection and informal receipt of comments, the Virginia Department of Taxation should retract the ruling itself, directly or by clarification.

Best regards,

Robert H. Lamb

RHL/hrh
cc: Mr. Larry Durbin
Mr. Frederick Fisher
Ms. Leslie Trew

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December 2, 2003

*Via Facsimile (804-371-4810)*
Board of Trustees
c/o Leslie Trew
Virginia Outdoors Foundation
203 Governors Street, Suite 317
Richmond, Virginia 23219

Re: Mary Moody Northen Endowment

Ladies and Gentlemen:

At your December Board Meeting last year, I was accorded the privilege of speaking before you on behalf of two open-space easements in Spotsylvania County that you approved on that occasion—301 acres ("St. Julien") belonging to my Uncle Aubin B. Lamb and 50 adjoining acres owned by our friend, John C. Rasmussen Jr. Those easements and the public spirit impulse behind the donations was the subject of a lengthy article in the *Fredericksburg Free-Lance Star* this year, entitled *Preserving Beloved Land.* From that background please indulge me in making a few comments about a concept for a land trade advanced by the Mary Moody Northen Endowment.

1. The concept is based on the profoundly mistaken notion that land is fungible, rather than unique. See, for example, page 6 of IRS Publication 561 (*Determining The Value of Donated Property*).

2. The charitable impulse that gave rise to the open-space easement related to emotions and bonds that Mrs. Moody obviously felt for a particular tract of land, in this case a family farm and ancestral cemetery thereon.

3. Any attempt to analogize a land swap to other programs involving mitigation, such as with wetlands, does not pass the giggle test because such programs are not in derogation of previously made agreements.

4. The sanctity of a contract, such as an easement agreement, should be respected absent it being contrary to a valid public purpose. One would be hard-pressed to say that a *post hoc* development impulse, even if viewed by some as a more worthy purpose than that of conservation, would be able to defeat or overturn a previously made bargain.

5. Not knowing the future at the time of a contract is no reason for violating an agreement once it was revealed. Virtually all contracts deal with the future.

6. Those who philosophically oppose protecting land forever because it ties the hands of future generations could use the same fallacious argument against public parks and lands, not just in analogous situations involving public open-space easements on private lands.

7. The grantor's successor in interest to the gift of Mary Moody Northen may be the legal one, but the initial grantor in directing the gift probably did not authorize or contemplate the Mary Moody Northen Endowment nullifying her contract with the Commonwealth, if it so chose or found it economically advantageous.

8. Overturning the agreement made long ago will have a dramatically chilling effect on future grants of open-space easements, since property owners will rightly view the agreements with suspicion as merely temporizing instruments.

9. Under the Internal Revenue Code a qualified conservation contribution must be granted in perpetuity. Deductions are taken on that basis, after qualified appraisals thereon peculiar to the unique circumstances of the property. In recent years, Virginia even has allowed the use or transfer of land preservation tax credits after such a contribution. How would an implicit or actual contract reopener affect such valuations, deductions, and transactions?

10. Even if the Virginia Code were to be changed improvidently to limit the duration of the easements, or allow specifically for a reopening thereof, how would that fairly be applied retrospectively to a contract made prior to such change?

11. Does the Virginia Outdoors Foundation, as grantee, even have the power to forego in this or any other instance its statutory and contractual stewardship role in order to further a private interest, notwithstanding any public interest to the contrary?

I hope these comments will be useful in your upcoming deliberations during any consideration by you of the aforementioned concept at your Board Meeting or thereafter.

Sincerely,

Robert H. Lamb