

CONSERVATION EASEMENTS IN VIRGINIA

A PRESENTATION TO:

GENERAL ASSEMBLY OF VIRGINIA
JOINT LEGISLATIVE SUBCOMMITTEE
STUDYING LONG-TERM FUNDING SOURCES
FOR THE PURCHASE OF DEVELOPMENT RIGHTS
TO PRESERVE OPEN-SPACE LAND AND FARMLANDS

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Mr. Chairman and Members of the Subcommittee:

As Mr. Hartz noted, it is indeed a pleasure to be with you today and we do appreciate so much the invitation to join you as you move forward in your important work. I would also echo Mr. Hartz in expressing our most sincere gratitude for the General Assembly's initiation and support of legislative and budgetary initiatives critical to the ongoing work not only of the Virginia Outdoors Foundation but also to the support of myriad conservation and preservation activities in the Commonwealth.

In addition, I would like to recognize the extraordinary diligence of the VOF Board of Trustees in supporting the Foundation and in carefully reviewing each easement recorded. The people of Virginia are well represented by these stewards of the public trust.

Finally, I commend our conservation partners, our counsel at the Office of the Attorney General, and our stalwart staff for their ongoing efforts on behalf of land preservation across Virginia.

As Mr. Hartz indicated, it is my privilege to discuss with you today easement strategies for the preservation of open-space land and farmlands. Specifically, I will focus briefly on:

- Definition and Context of Conservation Easements
- Virginia Open Space Land Act
- Virginia Conservation Easement Act
- Virginia Land Conservation Programs
- Purchased Development Rights
- Virginia Land Preservation Tax Credit Program
- VOF Easement Template
- Guidelines for Development Permitted Under VOF Easements.

Definition and Context of Conservation Easements

As the cost of land has continued to increase, and the pace of development has quickened, most of Virginia's recent permanent land conservation has been, and for the foreseeable future will be, in the form of less-than-fee interests in real property. Specifically, most of these less-than-fee land conservation interests are in the form of recorded legal instruments known as deeds of conservation easements. The definitive text of conservation easement practice and policy, *The Conservation Easement Handbook*, defines a conservation easement as "a legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values." The value of a conservation easement is the difference between the property's fair market value before and after the imposition of development restrictions on such property.

Enabling Legislation

The legislative Acts that authorize conservation easements for public benefit are the Virginia Open-Space Land Act¹, enacted in 1966, and the Virginia Conservation Easement Act², enacted in 1988.

The Open-Space Land Act authorizes public bodies to acquire or designate property for use as open space. The Conservation Easement Act provides similar authority for certain nonprofit organizations, federally designated as Section 501(c)(3) and registered with the Virginia State Corporation Commission, to hold conservation interests in real property in Virginia. Under both Acts these conservation interests may be acquired by gift, purchase, devise, or bequest. A number of Virginia recorded conservation easements represent a combination of gift and purchase and are often referred to as constituting conservation easement “bargain sales.”

Comparison of Virginia Conservation Easement Types

The Virginia Open-Space Land Act may be the strongest conservation easement authorizing language of any state jurisdiction in the nation. Virginia Code Section 10.1-1704, in particular, provides an extraordinary deterrent to easement extinguishment or conversion or diversion of open-space land. None of the more than 2,000 easements held by the Virginia Outdoors Foundation in trust for the Commonwealth has been completely extinguished or converted or diverted.

The Conservation Easement Act, modeled after the Uniform Conservation Easement Act promulgated by the National Conference of Commissioners on Uniform State Laws, provides a somewhat less permanent conservation interests guarantee. Specifically, the Virginia Code language states that, “[e]xcept as otherwise provided...a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.”

Provisions in both Acts require that conservation easements conform to the comprehensive plan adopted by the locality in which the property is located. However, conservation easements held by Virginia state agencies, as agents of the “Sovereign,” typically provide more protection against eminent domain proceedings.

Purchased Development Rights

Purchased Development Rights (PDRs) are purchased conservation easements. Conservation easements may be donated or purchased, as previously noted, but either method of conveyance typically involves the use of the same, basic, legally-recorded instrument: the deed of gift or purchase of conservation interests in real property.

¹ Va. Code Ann. §§ 10.1-1700 et seq. (Repl. Vol. 2006).

² Va. Code Ann. §§ 10.1-1009 et seq. (Repl. Vol. 2006).

Often a PDR deed is a more simple document than a donated easement deed, particularly if state tax credits and/or federal tax deductions are not involved in the transaction. Deeds of gifts of conservation easements typically detail public conservation purposes and values of real property and restrict future uses to protect those enumerated conservation purposes and values. Deeds of Purchased Development Rights may read much like deeds of gifts of conservation easements or they may simply retire permanently development rights in the property. Many PDR programs in the Commonwealth concentrate on reserving for future generations a critical mass of agricultural or forestal land resources.

Virginia Land Conservation Programs

Virtually all Virginia state agencies may hold conservation easements under the Virginia Open-Space Land Act. However, the agencies holding the most easements are, in addition to the Virginia Outdoors Foundation (which holds some 80% of easements), the Virginia Department of Historic Resources, Virginia Department of Conservation and Recreation, and Virginia Department of Forestry.

Funding to purchase state-held conservation easements comes from multiple sources, including: state and local bond authorizations, the Virginia Land Conservation Foundation (state General Funds), the Virginia Open-Space Lands Preservation Trust Fund (state General Funds), federal, state, and local government grants (e.g., the new state/local PDR-Match initiative), private sector grants and awards, nonprofit sector grants and awards, and occasional court orders and decrees.

The level of Virginia interagency communication, coordination, cooperation, and collaboration to foster effective land conservation has increased exponentially in recent years. Indeed, this Subcommittee itself is a testament to the heightened public interest in, and support for, responsible land conservation.

Virginia's Land Preservation Tax Credit Program

The Virginia Land Preservation State Income Tax Credit Program, enacted in 1999, appropriately incorporates two venerable Virginia traditions: private property rights and a deeply-rooted sense of personal stewardship of the land. Thomas Jefferson surely would approve of this watershed program, under which more than half of the conservation easements recorded in the Commonwealth have been filed since its enactment. The program is strictly voluntary and the transferable nature of the credits permits "land rich, cash poor" landowners (small farmers, for instance) to continue to hold their open-space or farmed land while benefiting from easement donations.

Although Virginia ranks rather low among all states for per capita-spending for conservation purposes, our Commonwealth's Land Preservation Tax Credit Program ranks as the strongest such land conservation incentive program in the nation. In addition, the federal government encourages the donation of conservation easements through the provision of allowed charitable contribution deductions for such qualified

gifts. The value of a conservation easement may reduce a taxpayer's owed federal income tax by up to 50 percent over up to sixteen years. Only perpetual gifts of conservation easements are eligible for Virginia income tax credits and federal income tax deductions.

Virginia Outdoors Foundation Easement Template

The recently revised VOF Easement Template is a product of 18 months of intensive work by VOF staff, attorneys associated with the Office of the Attorney General of Virginia, representatives of the Virginia United Land Trusts (VaULT), the nonbinding umbrella organization of Virginia land trusts, and interested and informed attorneys in private practice. The template, which includes nomenclature and provisions for conservation easements to be held by the Virginia Outdoors Foundation, is set forth as follows:

- Preamble and Witnesseth clauses
- Recitals of conservation values and purposes of subject property
- Public purposes (clear identification of public benefits justifying tax deductions/credits)
- Restrictions (land use controls, typically severe reduction in otherwise-permitted divisions and buildings, prohibition of mining and topography alterations, and protections for water quality) to protect the conservation values and purposes of the subject property)
- Enforcement (specifies grantee rights related to inspection and enforcement)
- Documentation (references detailed Baseline Documentation Report, including conditions and character of property at time of gift or purchase of easement).

Guidelines for Development Permitted Under VOF Conservation Easements

Key guidelines for development permitted under conservation easements to be held by VOF often include these:

- Divisions (100-acre parcels)
- Dwellings (1 primary and 1 secondary per 100 acres)
- Impervious surfaces (<1%).

Why Preserve Open-Space Land and Farmlands in Virginia?

Perhaps to pose the question as to why we should preserve open-space land and farmlands in the Commonwealth is to pose a rhetorical question. Nonetheless, it may be helpful to provide a simple answer. Apart from the quantifiable responses relating to increased revenues from our agricultural and tourism industries (our first and second leading industries, respectively), apart from the loss of soil (which loss, according to a recent Cornell University study, ranks second only to population growth as the most significant environmental problem the world faces), apart from the importance to our

health and that of our local, regional, and national ecosystems of cleaner and, yes, cooler land, air, and water, there is the intangible benefit of our open-space and farm lands—lands that in your districts, in our Commonwealth, are best described, perhaps, not by my words but by these images...

It has been a pleasure to be with you today, and if I may answer questions I will be pleased to do so. In addition, if I or any of our Virginia Outdoors Foundation staff may be of assistance, we hope you will not hesitate to call on us.

Again, thank you for your service, your dedication, and your vision on behalf of our Commonwealth.