

PURCHASE OF DEVELOPMENT RIGHTS: ANOTHER OPTION FOR CONSERVATION MINDED LANDOWNERS

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Many landowners are familiar with conservation easements, a vehicle for preserving land in perpetuity, but they may not be aware of another option: selling the development rights to their property. As a result of donating a conservation easement on their property, landowners may realize a federal tax deduction for their charitable contribution, state tax credits (which can be used or sold in Virginia), lower estate taxes and sometimes lower real estate taxes.² Purchase of development rights (“PDR”) is a mechanism for landowners to sever the right to fully develop their property from other ownership rights in exchange for cash. A landowner opting to sell her development rights at fair market value instead of making a charitable contribution is not entitled to tax benefits because nothing has been donated – rather it has been sold. A conservation easement structured as a bargain sale has the possibility of providing cash at closing to the landowner for the sale of development rights with the added benefit of some state and federal tax benefits. In this way, PDRs can provide financial benefits to landowners who wish to protect their land forever but who do not need tax relief or who prefer cash.

The purchase of development rights results in an open space or conservation easement (collectively referred to as conservation easements) being placed on property. A conservation easement differs from other easements such as utility easements or rights-of-way that typically grant another individual the right to physically access the property of another. A conservation easement does not usually result in the public gaining access to private property. Instead, a conservation easement is, legally speaking, a negative servitude similar to restrictive covenants such as the ones that are common with homeowners’ associations. The property owner granting a conservation easement gives up certain property rights to the easement holder, such as the right to subdivide her property.

On February 26, 2008, Governor Kaine announced that \$4,250,002 was distributed to fourteen Virginia localities to preserve farmland within their boundaries through local PDR programs.³ Between \$100,000 and \$400,000 were distributed to localities that have matching funds available for their PDR programs. In July 2008, in Albemarle County, the first conservation easement went to record on a farm protected through a local PDR program with matching funds from the state.⁴

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² See generally Stephens & Allen, An Overview of the Potential Financial Benefits of Conservation Easements in Virginia (Apr. 2008) available at <http://www.vaconservationlaw.com>.

³ Official Site of the Governor of Virginia available at <http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease.cfm?id=616> (last visited June 28, 2008).

⁴ Official Site of the Governor of Virginia available at <http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease.cfm?id=696> (last visited June 28, 2008).

In Virginia, PDRs are generally only available in localities that have adopted a Purchase of Development Rights ordinance. Since 2001, the Virginia Office of Farmland Protection has been authorized by the General Assembly to provide grants in the form of matching funds to localities that have adopted local programs for the purchase of development rights.⁵ To date, over twenty localities have adopted PDR programs. After a locality adopts a PDR program, it can get in queue for future matching funds from the state to purchase development rights within their jurisdiction. The Virginia Department of Agriculture and Consumer Services has adopted a model program for localities to aid localities in preparing a local PDR ordinance.⁶

In certain cases, landowners in counties without a local PDR program may be able to sell their development rights in another way. For example, Essex County, Virginia has not yet adopted a PDR program, but certain landowners in upper Essex and Caroline County are able to take advantage of another purchaser of development rights: the U.S. Army. In 2006, Congress passed legislation authorizing the Secretary of the Department of Defense to partner with state and local governments and private organizations to purchase development rights around certain military installations in order to provide an Army Compatible Use Buffer (“ACUB”). The initiative is designed to create a buffer of undeveloped land between the military base and surrounding residential and commercial areas in order to promote the military mission of the base and protect the general public.⁷

To date, an ACUB program has been adopted for Fort A.P. Hill. This means owners of land in proximity to A.P. Hill may be able to sell their development rights to the Army. Fort Picket in Nottaway County has a new ACUB program.⁸ In addition to the Army, the Secretary of Defense works with the Marine Corps, Air Force and Navy to coordinate with private organizations and landowners to preserve land surrounding military bases.⁹

In addition to ACUB funding and grants available from the Commonwealth of Virginia, there are a number of other sources of PDR funds. The Natural Resource Conservation Service has funds available to purchase development rights on large farms containing prime and unique soil. The Virginia Department of Forestry works with the United States Department of Agriculture Forest Service to purchase development rights on forest land under its Forest Legacy Program. The U.S. Fish and Wildlife Service offers matching funds through the North American Wetlands Conservation Act to

⁵ Va. Code Ann. § 3.2.201 (2008) available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.2-201> (last visited July 28, 2008). *See also* Va. Code Ann. § 15.2-2316.1 (transfer of development rights).

⁶ Virginia Department of Agriculture and Consumer Services website available at <http://www.vdacs.virginia.gov/preservation/pdf/pdfprogram.pdf> (last visited June 28, 2008).

⁷ 10 U.S.C. 2684 available at http://aec.army.mil/usaec/acub/docs_acub/10%20USC%202684a.pdf (last visited June 28, 2008).

⁸ U.S. Army Environmental Command website available at <http://aec.army.mil/usaec/acub/acub00.html> (last visited June 28, 2008).

⁹ U.S. Fish and Wildlife Service, Conservation Lands as Compatible Use Buffers, available at http://www.fws.gov/Endangered/pdfs/DoD/Buffer_Lands_Fact_Sheet_dec05.pdf (last visited June 28, 2008).

provide funding to protect wetlands for the benefit of migratory birds and wildlife that depend on wetlands for habitat. State entities such as the Virginia Outdoors Foundation and the Virginia Land Conservation Foundation have the authority to purchase development rights, primarily on properties of statewide historical or environmental significance. Private organizations may also have funds budgeted to purchase development rights in a way that furthers the particular organization's purpose.

PDR programs can serve as important tools available to localities and other groups that realize the need for land preservation. The purchase of development rights raises significant possibilities in the public arena as a comprehensive planning tool, but also may result in significant financial benefits for private landowners wishing to protect their land forever by donating a conservation easement.

From its main office in Richmond and its Northern Neck office in Irvington, Spotts Fain PC is able to serve landowners throughout the state. If you have questions about conservation easements or purchase of development rights, we would be pleased to speak with you. Please call (804) 697-2085 or go to <http://www.vaconservationlaw.com> to learn more about Spotts Fain's conservation easement practice group.