

**Virginia Land Conservation Foundation
Friday, March 27, 2009
East Reading Room, Patrick Henry Building
Richmond, Virginia**

Virginia Land Conservation Foundation Board of Trustees Members Present

The Honorable Patricia S. Ticer, Vice Chair
The Honorable Robert S. Bloxom
Nicole M. Rovner for L. Preston Bryant, Jr.
Nancy T. Bowles
Margaret H. Davis
William C. Dickinson
Wendell P. Ennis
Albert C. Weed, II
Alexandra Liddy Bourne
Robert Davenport
Mary Bruce Glaize
Bonnie W. Moorman
Joseph H. Maroon, Executive Secretary

Virginia Land Conservation Foundation Board of Trustees Members Not Present

The Honorable R. Creigh Deeds
Mary Helen Morgan
Thomas B. Graham
L. Clifford Schroeder, Sr.

State Agency Staff Present

David C. Dowling, DCR
Michael R. Fletcher, DCR
Sarah Richardson, DCR
Jeremy Stone, DCR
Diane Dunaway, DCR
Elizabeth Andrews, Office of the Attorney General
Ryan J. Brown, DCR
Thomas L. Smith, DCR
Larry Smith, DCR
Timothy J. Bishton, DCR
Bob Lee, VOF
Elizabeth Tune, DHR

Others Present

James Bane, Loudoun County
Joe Bane, Loudoun County
Philip M. Hocker, Virginia Conservation Credit Pool, LLC
Kerry Hutcherson, Virginia Outdoors Foundation
Rex Linville, Piedmont Environmental Council
Brook Middleton, CPA

Marty Mitchell, Loudoun County
Mike Nardolilli, Northern Virginia Conservation Trust
Mark Neilus
Don Owen, Land Trust of Virginia
David Phemister, The Nature Conservancy
Sandra Stephens, Virginia Conservation Easement Consulting

Call to Order and Introduction of Members

Senator Ticer called the meeting to order and declared a quorum present. She introduced Robert Davenport who was recently appointed to the Board.

Approval of Minutes from January 7, 2009

MOTION: Ms. Glaize moved that the minutes of the January 7, 2009 meeting of the Virginia Land Conservation Foundation Board of Trustees be approved as submitted.

SECOND: Ms. Bowles

DISCUSSION: None

VOTE: Motion carried unanimously

Executive Secretary's Report

Mr. Maroon gave the Executive Secretary's report.

Mr. Maroon said that the Commonwealth was at roughly 330,000 acres towards the Governor's goal of preserving 400,000 acres of land by the end of his term.

Mr. Maroon noted that the VLCF had participated in the funding of the Phase I acquisition of the Crow's Nest property in Stafford County. This is a premier natural area. He said that in 2008 DCR was able to acquire the first 1,700 acres and had a contract for Phase II, which has an additional 1,100 acres. He said that Stafford County and DCR had recently announced that the Phase II acquisition will be complete by the summer of 2009. The price has been reduced by \$2 million. This has allowed DCR in a little over a year and a half to protect almost 3,000 acres.

Mr. Maroon said that Board member Lou Giusto had resigned from the Board. He said that there were currently three member vacancies. He said that DCR was working with the Secretary of the Commonwealth and the Secretary of Natural Resources toward the goal of filling those vacancies.

Mr. Maroon provided a legislative and budget update for Board members. A copy of this document is available from DCR.

Ongoing Project Status Update

Ms. Richardson gave a project status update. She said that there were three projects completed since the January meeting of the Board.

The first project was a Virginia Outdoors Foundation project regarding a family farm in Essex County. The project included 1,800 acres, with five miles of Rappahannock River shoreline.

The second project was with The Nature Conservancy and DCR Natural Heritage division on the Blackwater River in Southampton County. A \$204,000 grant protected 415 acres.

Ms. Richardson said that a project closing in the next several days would be a Piedmont Environmental Project in Fauquier County. The project is a battlefield that will become a county park. The park will provide the only access to the Rappahannock River in Fauquier County.

Approval of Revised FY09 and FY10 VLCF Grant Expenditure Plan in Response to Federal Stimulus Funding

Mr. Dowling referenced a handout that included budget language from the recent session of the General Assembly and a spreadsheet addressing the allocation of funds. A copy of this handout is available from DCR.

Mr. Dowling said that in FY10, the budget language removes \$2 million from the general fund budget and supplants it with \$2 million from the American Reinvestment and Recovery Act for Land Conservation.

Mr. Dowling said that the reallocation of these funds did not require changes to existing projects. He said that the issue was that for projects in FY10 the source is now federal funds. He said that it was necessary to move funds between FY09 and FY10 pots of funding because federal money cannot be matched with federal funds. He said that the funding was consistent within the categories.

Mr. Dowling said that he did not anticipate this causing a delay in any of the projects. He said that DCR still believed this to be a solid plan.

Mr. Dowling said that staff was asking for Board approval of these actions.

Mr. Dickinson said that he had attended a meeting of the National Recreation and Parks Association in Washington. He said that through a number of briefings he had the impression that there was nothing in the stimulus package that could be used for land acquisition.

Mr. Maroon said that, to the best of his knowledge, there was no money for land acquisition. He said that this was a block of money to each state to use as they thought most necessary. He said that the General Assembly took \$2 million out of those funds and moved it to the VLCF.

Mr. Dickinson said that this was really just an accounting adjustment.

Ms. Rovner noted that the Governor had yet to approve the General Assembly proposal. She said that this adjustment was being made in anticipation of the Governor's approval.

Mr. Dowling agreed but noted that DCR needed to have Board approval in place.

Ms. Glaize asked if the applicants understood the process and whether or not the bookkeeping was clear.

Mr. Dowling said that Ms. Richardson had communicated with each of the project representatives. He said that DCR would have further contact with each project and would discuss the administrative process in detail.

Ms. Bourne expressed a concern because land acquisition was not the intent of the legislation. She said that the market was still tumbling and that the layoffs would continue. She said she was concerned about using the funds for 2010. She said that while she appreciated the intent she would have to vote against the proposal.

Mr. Maroon said that to clarify, DCR did not ask for this provision. This came from the House Budget Committee.

Mr. Dickinson asked what would happen if the Board went ahead with approval but that it was found that the state had no authority to do.

Mr. Maroon said that the Board could approve this contingent upon the final approved budget.

Senator Ticer said that she suspected that this was not the only item that used this methodology.

Mr. Maroon noted that the other large item in the DCR budget was the allocation of \$20 million for agricultural BMP implementation. The General Assembly took \$15 million away and replaced it with economic stimulus money.

MOTION: Mr. Ennis moved that the Virginia Land Conservation Foundation Board of Trustees approve the redistribution of funds as directed by the General Assembly, contingent upon final approval of the state budget.

SECOND: Ms. Bowles

DISCUSSION: None

VOTE: Motion carried with Ms. Bourne voting no.

Overview of State Voluntary Land Preservation Tax Credit Programs Across the County and How Virginia's Compares

Mr. Hocker made the following presentation.

Mr. Hocker said there was a lot of national awareness of Virginia's tax-credit program. Since this Board is the overseer of the conservation value review portion of the program, he thought it would be helpful to have a sense of context as to how this program fits in the Commonwealth and around the Country.

When the VLCF was set up, it was probably not anticipated that easements would be as big a piece of the workload as they have turned out to be. Easements are just one land conservation tool and have their limits.

Mr. Hocker said that he had been studying the history of easements. Conservation easements started out as a governmental land management tool, mostly as scenic easements and largely to control billboards and also the idea of preventing strip development along new highways.

Protecting and maintaining quality was what the early scenic easements were used for. There was no need to buy the land or put the land in public ownership, since it wasn't being used. But there was a goal to prevent certain types of things from happening on the land. That has grown, for a number of reasons, to be a conservation easement.

The use of easements has been encouraged through tax incentives, especially since 1964, when the IRS acknowledged in a formal way that people who donated a conservation easement were entitled to a tax deduction. That federal tax deduction went through a number of changes. The main rules grew out of legislation that was passed in 1980 and rules that were adopted in 1986. Those were changed recently in 2006.

In 2003, the Washington Post ran a series of exposes on The Nature Conservancy's conservation easement program and pointed out some potential abuses of the program. One of the things that groups that accept conservation easements are concerned about is

the public trust vested in them, since accepting easements is, in effect, spending tax dollars.

The Land Trust Alliance, a national organization for land trusts, stepped up to present to Congress what was being done with conservation easements. The LTA also worked with the IRS to resolve some of the concerns. The outcome was that in 2006, the Pension Protection Act was passed, which greatly improved the incentives under federal tax law for conservation easement donations and all types of charitable gifts.

States found that the federal deductions were not enough. In 1983, North Carolina became the first state to add a state tax credit on top of the federal credits. In 1999, Virginia became the second state to pass a state income-tax incentive. The Virginia incentive as passed in 1999 started as \$50,000 per taxpayer per year in credit that was not transferable.

In 2002 the General Assembly made the land preservation tax credit (LTC) transferable, so that donors can sell their extra tax credits. Since then, a robust market has developed for these credits. The LTC program is overseen by the Department of Taxation.

Mr. Hocker passed out a document entitled "Virginia's Land Conservation Incentives Act of 1999 at work." A copy of this handout is available from DCR.

Mr. Hocker said there were three key dates involved in the process:

- 1999: Original tax credit legislation passed, not transferable.
- 2002: Transferability added
- 2006: \$100M cap on issued credit/year enacted

Mr. Hocker said that since the enactment of the land conservation incentives in the federal Pension Protection Act of 2006, federal tax incentives for conservation donations have been extraordinarily high, in addition to the Virginia state incentives. He noted that the special federal incentives expire on December 31, 2009, unless they are extended.

Ms. Bourne said that there had been discussion in Washington regarding potential change to charitable contributions so that for anyone who had a single income of \$250,000 the amount they will be able to deduct for charitable contributions will decrease. She asked if the Land Trust community had considered this.

Mr. Hocker said that he would be very surprised if that proposal became a reality. However, he said that land trusts were very aware of being part of the charitable community and were following that issue. He said that while he did not have the answer, the proposal would reduce deductions in a draconian way.

Mr. Dickinson thanked Mr. Hocker for the presentation. He said that he would like to see the area of park land more broadly defined. He said that if land was donated for public park land there should be a greater incentive for the landowner to donate, since there is

greater public benefit. He said his question was if there are any states that do have that kind of enhanced incentive?

Mr. Hocker said that he was not aware of any program like that. He said that there were a number of states that were more restrictive in what they allow gifts to be used for. Mr. Hocker said that the norm in most of the states was to follow the federal rules for what qualifies as a deductible gift.

Mr. Hocker said that the only real problem with the program was the lack of direct funding for land conservation, since that funding could be leveraged with the tax credit and yield greater conservation results.

Land Preservation Tax Credits – Conservation Value Review Criteria

Mr. Dowling reviewed the timeline for developing the revisions to the criteria.

August 7, 2008	Board approved revisions to LPTC Criteria and directed Agency to solicit public comments on additional revisions
August 14, 2008	1 st public comment period initiated with Sept. 1, 2008 closing date
Sept./Oct. 2008	Staff prepared amended LPTC in response to comments received
October 27, 2008	Held the 1 st Stakeholders Group Meeting
November 2008	Staff further amended document based on stakeholder discussions
November 17, 2008	Held the 2 nd Stakeholders Group Meeting
November 21, 2008	Staff prepared a November 21 st discussion draft for public comment
November 26, 2008	2 nd Public comment period initiated with December 23, 2008 closing date (closing date extended to January 20, 2009)
February 2009	Staff made additional amendments based on the public comment period results
March 10, 2009	Final draft submitted to the Board and made available to the public

March 27, 2009 VLCF Board Meeting: Public comment opportunity

Mr. Dowling said that in developing the recommendations staff had worked to be careful, yet responsive. He said there were still items that would require fine tuning.

Mr. Dowling referenced a copy of the criteria with the proposed revisions, dated March 27, 2008. A copy of this version of the criteria is available from DCR.

Mr. Dowling addressed the recommended changes.

On line 97 a member asked if there was a definition of "significant." Mr. Dowling said there was not but a suggested example was provided.

Ms. Bourne asked for a description of the difference between the terms value and purpose.

Mr. Dowling said there are three components of conservation value. He said in sections A, B, C purpose and benefit, water quality and forest management give the conservation value.

Mr. Dickinson asked on line 128 if a road would alter that definition.

Mr. Stone said that he would not change the definition.

Mr. Dowling continued to review the recommended changes.

Ms. Bourne asked if VDACS had any comment regarding the issue of livestock.

Mr. Dowling said that VDACS participated in the development of the revisions.

Mr. Dowling said that the amendments on line 385 were in response to comments received. It was felt this was needed to protect the conservation value of the property.

Mr. Maroon said there would be comments regarding this in the public comment period. He said there was at least one case where DCR felt the property divisions were excessive. He said through the pre-approval process the divisions were reconsidered.

Mr. Dowling said that the language on lines 413-321 was an attempt to ensure that the conservation value is retained.

Mr. Dickinson asked what was meant by "to the greatest extent practicable?"

Mr. Dowling said that many things would come into play, including cost consideration, proximity to the resources, compatibility, how it fit into the easement.

Mr. Dickinson asked if this was a judgment call.

Mr. Weed asked if it were after the fact.

Mr. Maroon said that it would apply to how future utilities would be treated.

Ms. Bourne asked if this would block the utility placement. She also asked whether DCR had the electrical engineering staff to address the issue.

Mr. Maroon said that these criteria were not the first line criteria. He said that DCR is reviewing what is incorporated within the easement documents. He said the holder of the easement will be the determiner of whether there is an actual easement. He said that the intent was to look at the language to review the conservation value and determine if that met state criteria. He said the intent is to maximize the conservation value to the extent possible.

Bob Lee with the Virginia Outdoors Foundation said that easements were subject to the same hierarchy of law. He said that the State Corporation Commission had the authority to override the terms of an easement.

Ms. Bourne expressed a concern that this could be a difficult issue for the agency.

Mr. Lee said that any power line that has a right of way that pre-dates an easement continues to have that authority. He said that VOF would not accept an easement that was not consistent with local comprehensive planning processes.

Ms. Bourne said that she would prefer to vote no on this particular language.

Mr. Dowling continued with the review on page 11.

Mr. Dowling said consideration was given to the reduction of the buffer. He said that the consensus was what was offered provided a reasonable expansion.

Mr. Dowling said that the language on line 511 was added as a response to the concerns raised.

Mr. Maroon said that this would give the discretion to the Director to allow an applicant to bring their request to the Board and make their case for a variance. He said that he would hope this would not be a regular occurrence and that it would be rarely used.

Mr. Weed asked if a 200 ft. buffer was twice as good as 100 ft.

Mr. Maroon said that there becomes a point where you receive diminishing returns.

At this time the Board recessed for lunch.

Public Comment

Senator Ticer called for public comment regarding the staff recommended revisions to the criteria. The following individuals spoke.

Kerry Hutcherson, Staff Attorney for the Virginia Outdoors Association

Good afternoon Madame Chairman and members of the Board. My name is *Kerry Hutcherson*. I'm a staff attorney for the Virginia Outdoors Foundation. I've put together a few comments from our staff who deal with these issues every day. Before I start I would like to say that we are very appreciative of the fact that DCR staff, especially these people right here, have put a lot of hard work into being responsive to our comments and other stakeholder comments. We really appreciate it and feel like we are working together to make these criteria the best they can be.

We just have a few comments and as you can probably imagine, they mostly deal with that last quarter of the criteria. We know that with the buffer requirements some of this has been very controversial and so we agonized over it.

I would just like to say a few things about the idea of the variance. I think in general the concept is good. We're concerned however, that terms like variance and hardship, which are almost always seen in the context of zoning, which is regulatory, don't really make sense for the criteria as it pertains to conservation easements.

Mr. Dowling noted that the language in question was at line 511 of the draft.

I know that may sound like I'm picking over semantics in talking about the words that are used, but when you use words like variance and hardship, those words have meanings in the context of zoning law and I would hope that those same meanings would not be used here because we don't think that it's appropriate. The reason I say that, is that when you are talking about a hardship from a zoning standpoint, hardship is defined as an undue or unreasonable burden on the landowner that is unique to the landowner and not shared by other landowners. It's something that is supposed to be very difficult to ever show.

I know that what has been stated before is that this section of the criteria is supposed to be used sparingly, and that's fine, but we're concerned that if you use terms like hardship it gets the focus away from what the criteria are really supposed to be looking at, which is conservation value.

To give you an example, if someone needs an exception from the buffer requirements because the topography of their property makes it very difficult for them to be able to have as wide a buffer as the criteria require and still be able to manage their property as a farm or however they are using it, the real touchstone should be, would that exception damage conservation value. Not, is it a hardship on the landowner. That's what the law says the criteria are supposed to do. Just evaluate conservation value.

If you could think about that and attempt to redraft this section so that it focuses more on the idea of how granting an exception to buffer requirements affects conservation value. If the answer is that it doesn't have an impact or that it's really minimal, then that's what we would suggest would be the touchstone for granting the exception. Also as I said the terms hardship and variance are probably going to be confusing to people. We would suggest maybe say exemption or exception.

Just a couple more comments pertaining to, if you go to line 496 through 500. This is the language about lawns and the exception for certain length of lawn along a shoreline. We were one of the stakeholders that suggested that a percentage be used here rather than just a set amount. We suggested just recently that we thought ten percent would be a good percentage. If you're concerned about on the high end where the property has extensive shoreline, you can add in a cap that would say you can have 500 ft. of an exception or 10 percent, whichever is less. We think this will add to the flexibility and will also help not penalize or be unfair to those landowners that have extensive shoreline but at the same time keep the exception small enough so that you aren't letting the exception swallow the rule.

On lines 506-509, we really appreciate this change that has been made. We support it. What we are not supportive of is the change made in line 502 and we'd like that to just remain as it is written. We thought that provided enough flexibility in that section and was fine the way it was.

I had two more really quick things. In the section that deals with the riparian buffer and the number of times it can be mowed every year. We've made these comments several times, I just want to reiterate it. The problem with having that language in the criteria is that we find, as the conservation easement holder, a lot of times what the drafters of the easements or the landowners will do is put exactly that language in a deed. That creates a problem for us from a stewardship perspective. Because in order to tell if someone has mowed fewer than three times per year you have to go out on the property numerous times. Unfortunately with our portfolio of easements we don't have the capacity to do that. Just wanted to make that comment and remind you that we have an issue from a stewardship perspective.

Finally with the conservation plan on lines 524-537, it would be nice in this section could include a note that clarifies that the conservation holder is not required to enforce that conservation plan. The reason for this is that a conservation plan is drafted in consultation with the Soil and Water Conservation District and those are the entities who should enforce the plan. Just wanted to make sure that was clarified in the criteria.

That's all I have. Will be happy to answer questions.

Senator Ticer said that the Board and staff would respond to the questions after the public comment period.

Don Owen, Executive Director, Land Trust of Virginia

Madame Chairman, Members of the Board of Trustees. My name is Don Owen, I am the Executive Director of the Land Trust of Virginia. I'm here today at the request of the Land Trust of Virginia's Board of Directors. I'd like to open my remarks by thanking you for the opportunity to comment once again on the proposed changes to the Virginia Land Conservation Foundations Land Preservation Tax Credit Criteria.

The Land Preservation Tax Credit Program has been perhaps the Commonwealth's most important tool in preserving Virginia's significant natural and historic resources. The Land Trust of Virginia is one of the many land trusts in Virginia that exists solely to protect these conservation resources and is deeply appreciative of the program and of the respective roles that the Foundation and the Department play in review of these conservation easements.

As we indicated in our comments that we submitted to the Virginia Department of Conservation and Recreation on January 20, 2009, in response to their previous draft of the criteria, we believe that most of the provisions achieve their intended purposes and either clarify ambiguous provisions in the previous version of the Land Preservation Tax Credit Criteria or increase the protection of the conservation values.

However, we believe that one provision in particular will have the opposite effect and will in fact be seriously counterproductive in the efforts to protect lands with conservation values in Virginia. We are concerned specifically with the parenthetical phrase on lines 385-387 which states *limitations above approximately 1 division per 100 acres must be explained in the application package.*

Why are we concerned? The proposed provision would create a public benefit test that bears no direct and necessary relationship to conservation value. Many other factors such as the nature of the property, the conservation values and risks, the location and siting of other structures are far more important and far more direct in considerations of the analysis of whether conservation values are protected or not. For example, one or more houses could be allowed on a parcel smaller than 100 acres without affecting any conservation values provided that carefully cited and restrictive building envelopes are recorded in the conservation deed.

The process of analyzing and protecting conservation values requires a case-by-case approach as we and other land trusts now use and have used for years.

Secondly the proposed provision would create a threshold public benefit test without offering any basis for determination of what a sufficient explanation is, which would create uncertainty, delegate broad administrative discretion to administrative decision makers, and leave most landowners in the position of taking a much greater risk that their tax credit claims would be denied.

Finally this result would in all likelihood not be limited to major easements that require DCR review. The proposed criteria revisions would of course apply by their terms to

easements of \$1 million or more, that do trigger the DCR review requirement. In fact, however, they would also likely be applied de facto to all easements since the tax credits for all easements, regardless of whether they trigger the DCR pre-review process or not, are subject to audit by the Virginia Department of Taxation. In conducting that audit, the Department of Taxation will most likely use the DCR public interest material for that part of the tax credit audit review when it exercises its decision in that audit.

The net result is that the proposed revisions to the DCR criteria will cast a serious new cloud of uncertainty over any new conservation easement that has above approximately one division per 100 acres. This would impact most of the landowners that we work with and cause us and the Commonwealth of Virginia to lose easements on many important properties with significant conservation values that should in fact be protected.

Accordingly, we request that the Virginia Land Conservation Foundation delete the language in parentheses on lines 385 to 387. This would permit smaller land trusts to continue to serve smaller landowners by making case by case determinations of the impact and size, the number of parcels that protect conservation values and allow us to continue our critical role protecting Virginia's wealth of natural and cultural resources.

We support the remaining proposed revision in the Land Preservation Tax Credit Criteria. Thank you for your time and your consideration of our concerns.

Mike Nardolilli, Northern Virginia Conservation Trust

Good morning Madame Chairman, Members of the Board of Trustees. I'm Mike Nardolilli, President of the Northern Virginia Conservation Trust, or NVCT. NVCT was the first land trust operating in the Commonwealth that has met the accreditation standards of the National Land Trust Accreditation Commission, and Don Owen's Land Trust of Virginia has recently joined us within the ranks of accredited land trusts.

We come before you today and request that certain language be removed from the draft changes to the criteria. Lines 385-397 state that easements that reserve the right to subdivide "above approximately one division per 100 acres must be explained in the application package" that is submitted to DCR.

In January NVCT submitted comments on the first version of the proposed changes to the criteria that also contained the one division per 100 acres limitation. In that submission, NVCT requested that DCR either supply a rationale behind or scientific support of this language or delete the language entirely. Instead, DCR declined NVCT's request and did not offer any rationale until what we heard here from Mr. Dowling today supporting this proposed change.

But in response DCR did tweak the language, changing the word "justify" to "explain," a distinction without a difference in my mind. DCR decided to keep the one division per 100 acre provision in the draft. Today again I have heard no scientific support, survey

data, or even anecdotal evidence linking this language to the preservation of any conservation value.

Mr. Dowling referred to two meetings of a stakeholder's group that allegedly blessed this language. Importantly, the only two accredited land trusts operating in the Commonwealth, NVCT and LTV, were never asked to join the select group of stakeholders, thereby necessitating our joint appearance here this morning to both urge the deletion of this language from the current draft. NVCT joins in LTV's excellent March 25 letter to the Board asking for the deletion of the provision for the one division per 100 acres language from the draft.

I will basically repeat what NVCT submitted to DCR in January arguing for the deletion of this language.

First, unlike the parts of this draft that address the limitations on impervious surfaces or the size of riparian buffers, the one division per 100 acre language has no scientific connection to conservation values.

Second, this one size fits all approach will actually undermine efforts to preserve important conservation values in the urban and suburban regions of the Commonwealth. If this standard were in place several years ago, this language would have cast considerable doubt over our two most important projects, the preservation of 40 acres of land around Senator Duvall's historic home in the heart of McLean and a 70 acre piece on the Potomac Gorge near Great Falls. In fact we have a photo of the Potomac Gorge easement on the back of our business cards. Both of those projects involved a reserved right to subdivide.

Under the draft before you today both of these critical projects would have had to be explained to DCR without any guidance as to what would constitute a sufficient explanation to satisfy DCR or by what standard that explanation would be judged. Each of these projects took over four years from start to finish.

Take it from someone who is deeply involved in those long and difficult negotiations, it was a small miracle that either easement was recorded. This language could have injected just enough uncertainty in the process to kill both deals.

Third, this language will have a disproportional impact on conservation work in the suburban and urban areas of the Commonwealth, simply because our deals necessarily involve smaller parcels of land. Yet since our Conservation work saves nearby nature that can be easily appreciated by the vast majority of the citizens that pay most of the taxes in our state, we maintain that our work is at least as important as other areas of the Commonwealth. This language frankly treats us as second class citizens.

Fourth, the draft undermines state policy to control sprawl because it discourages confined and properly cited cluster developments that can be used very effectively to

save the critical conservation values of many large parcels of open space that are under threat of development in our neck of the woods.

Mr. Dowling's only rationale today, the impact of the future capability of the land trust to manage this, could apply to all of the additional conditions that you are being asked to approve today. All may impact the future capability of a land trust to manage the particular standards you are asked to be adopting. As a matter of fact the lawyer from VOF raised that exact point.

Mr. Dowling also mentioned that the language tracks the VOF guidelines. Of course, the very reason that NVCT exists is that the VOF's acreage limitations really prevent it from working in our neck of the woods. So you can see the only two accredited land trusts operating in the Commonwealth of Virginia both urge you to delete this language.

Rex Linville, Piedmont Environmental Council

My name is Rex Linville and I'm with the Piedmont Environmental Council. Again I want to echo what everyone else has said in terms of thanking the staff and you for the time that has gone into this so far. I am here to talk about the criteria.

Before I do that I would like to just give one quick follow-on to what Mr. Hocker was talking about earlier regarding the federal income tax deductions for conservation easement donations. Those expanded deductions expire at the end of 2009. Yesterday, Eric Cantor, in cooperation with Mike Thompson, introduced a bill in Congress to make those permanent. We've got Mr. Cantor, Goodlatte, Periello, and Wolfe who are all co-sponsors of that bill. If you have any opportunity to help us get more co-sponsors for that bill in Virginia, I'd love to see it be a clean sweep and have the entire delegation co-sponsor.

What the bill will do is make those expanded deductions that Mr. Hocker was talking about that came into being in 2006 permanent. Right now they are set to expire at the end of the year. These have been a huge boon to us in promoting land conservation.

Our comments today are on three points, the donation of the lands in fee, the 100-acre issue, and riparian buffers

Related to the issue of lands in fee, lines 38-39 of the criteria essentially state that in order for the donors to be eligible for the tax credit the donee organization, the recipient must document that subsequent conveyances of the fee interest in the property shall protect the conservation values in perpetuity.

In contrast, this doesn't quite track with what the state Code says which is Section 58.1512 of the Code that says that the holder, if the donee is a holder as that term is defined, then the credit shall not be allowed until the charitable organization agrees that subsequent conveyances of the interest in the property will be either subject to a

conservation easement under the conservation act or the Virginia Open Space Act or conveyed to the Commonwealth or a federal conservation agency. That's what the Code says needs to happen in order for that fee gift to be eligible. It doesn't quite track with lines 38-39. Our recommendation is that lines 38-39 be modified to more accurately track with what the Code actually says.

On the one division per 100 acres, I'd also like to expand that just a little bit to the one percent impervious surface guide, with some of these same concerns that these two provisions have the potential to be interpreted as a state-mandated threshold beyond which the Commonwealth presumes that the conservation values may not be adequately protected.

A safe harbor on these two issues would certainly be interpreted in the same manner. As such we recommend that what you're looking for is an explanation which is what this says, that in fact you ask for an explanation of any reserved division rights or any impervious surface cap. As opposed to fixing a number item, have it explained as to why any divisions on the property or an impervious surface cap on the property is protective of the conservation values. Again that's what the criteria are supposed to be doing.

On the riparian buffers, it's actually a quite similar comment. I'm going to comment on both the hardship question as well as the 50 ft. length question.

The legislative purpose of these criteria is so that DCR can verify conservation values where the claimed credit is over \$1 million. As such the offer for a buffer variance or an exemption in this section is kind of out of step with what is being presumed in the preceding two sections, that the buffer is needed to protect the conservation values. What we would like to see is opposed to DCR being allowed to grant exemptions or exceptions in the case of hardship; the standard should be measuring what is being protected via the conservation easement against the protection of conservation values. And that there be a permitted exemption when it can be shown that the terms of the easement are adequately protected in the conservation values of the property.

And then on the 50 ft. buffer issue, if I have 100 ft. of lineal frontage, this would allow me to have 50 ft. of area that I continue to keep lawn. Yet if I have 5,000 ft. of front on a stream, I can only keep 50 ft. It doesn't seem like we're treating land owners fairly in proportion to what it is they are in fact protecting.

What we would again suggest here is that allowance for the maintenance of that lawn area be permitted on a percentage basis with a floor and a ceiling.

I don't profess to know what the number should be. I think actually 50 ft. is a good floor. Intelligent minds can disagree on what the ceiling should be, but I think that is a very manageable approach which provides more flexibility for landowners.

Joe Bane, Loudoun County

Good afternoon everyone. My name is Joe Bane and I'm a landowner from Loudoun County. First off I'd like to just say that I think this is probably the best program in the nation. I agree with Mr. Hocker. I do appreciate the time that everyone here puts into it.

I can't match the knowledge level of the people that have spoken before me. But I can come at it from a different angle since I am a landowner.

My family on my mother's side has been near Harper's Ferry for 200 years. Last year we received approval on an easement that the Department of Interior says is of national importance. If the current 100 acre minimum is enacted it will invalidate our entire easement because it has not been recorded yet. This is the Village of Loudoun Heights, which has been subdivided into eleven lots already and we've had to disallow a couple of homes that were built in the 1700s.

We have a large easement that is next to Harper's Ferry National Park and the Appalachian Trail and the Department of Interior said that the easement was of national importance. If we are to record that easement today it would be invalidated because we cannot meet the 100 acre minimum. It's been subdivided into eleven lots for probably 100 years or more. But it is however of great conservation value. We have nine threatened endangered species on the property. It is next to the Appalachian Trail, the Potomac River and the Harper's Ferry National Park. It's been in existence for a long time.

Although I'm sure the intent of the changes are good, in certain cases, they just don't work.

James Bane, Loudoun County

Good afternoon, I'm James Bane, the brother of Joseph who just talked. I have never owned 100 acres in my life. I want to be a conservationist. Thank you for your time and consideration.

Sandra Stephens, Virginia Conservation Easement Consulting

Good afternoon. My name is Sandra Stephens and I started a company called Virginia Conservation Easement Consulting to assist landowners through the complex process of placing their land into a conservation easement.

Just this past December, I completed placing one of Virginia's more significant Civil War parcels on which the Battle of Rappahannock Station was fought into a DHR historic conservation easement for my client.

The Virginia conservation easement program offers tremendous opportunities for landowners to put their land into an easement, establishing a legacy for themselves and their family into perpetuity and gives incalculable benefits to the state and future generations. It also allows them the option of selling the tax credits, a win-win for all.

One of my current clients is in the process of creating an easement and owns 88 acres of beautiful land that has historic value. The 100 acre minimum doesn't make sense and would affect the ability of far too many landowners to participate, thus having a devastating affect on the program.

I support not setting an arbitrary limit and that we maintain flexibility of the program so to continue to attract such pieces of land. Historic homes and lands should not be defined by acreage but by their significance to Virginia. Certainly it's the quality of land not the quantity of the acreage.

The success of the program has been the ability of the Land Trust and donor to create an easement that protects each unique property. By setting guidelines of 100 acres DCR would be taking this away from the landowner and donee organization.

This risks harming a program which has been such a huge success for all Virginians and gives leverage to developers who target these sub-100 acre parcels, thus giving people no alternative to sell to a developer.

This arbitrary standard leaves no legacy for Virginia and the family of the landowner and is strictly geared towards the large landowner and the change of the original intent of the conservation easement program.

Thank you.

Mr. Maroon said that he would like to clarify that the provision does not say that any property that is less than 100 acres would not be eligible to receive the tax credit program or be eligible for any of the benefits. It is trying to deal with how many times the property can be divided. This does not mean the property is not eligible and would still require \$2.5 million of value to qualify for the tax credit.

Mark Neilus

My name is Mark Neilus. I'm a City Planner and Attorney in Loudoun County, Virginia. I primarily represent land owners with zoning issue and development issues.

I've had the pleasure to work with your program. It's been a great program for all Virginians. I've had the pleasure of registering and recording easements in several localities.

With my background in zoning, what is paramount in regulation is certainty. If I start the process I am going to get it done. The conservation easement process has gotten quite expensive. By the time I get a client ready to report an easement, we've spent tens of thousands of dollars and in some instances approaching \$100,000 to know whether that easement is in fact going to be recordable.

What I would suggest to you with the 100 acre division rule is that you have essentially created an uncertainty. There are no standards. Limitations on a permitted number of subdivisions on a property must be explained in the application package.

If this is that important a regulation, you should have criteria. Where does it apply and where doesn't it apply. Should it not apply in urban counties? Should it not apply to heritage properties?

This is going to have a chilling effect on easements in urbanized areas. And I've always thought that one of the purposes of the program was to take density off the map.

An easement application I handled two years ago took 275 town houses off the zoning map for the Town of Purcellville. Those units are never going to exist. I think that's a terrific result of this easement process. To say that property couldn't have two divisions because of its size is ridiculous. Or for me to say to the property owner, and more importantly the lender, I'm not sure the easement will go through. Very difficult. It will have a huge chilling effect on the type of landowners I deal with.

The other regulation that is a companion regulation is your 1 percent rule which follows under public benefit. Anecdotally, I'm working on a 95 acre farm on Route 15 on the Route of the Hallowed Ground. Because it's a horse farm, the existing buildings are 1 percent of the land. I think the 1 percent rule needs to be flexible pursuant to the use of the property. I can't imagine too many other people with 100 acres that have 1 percent of rooftop.

I think your local land trusts are doing a very good job of applying the rules. And I think you essentially strip them of this authority to decide how many permitted divisions are acceptable. You're reaching for the wrong result.

If you apply this 100 acre rule the way it is written you will continue to get very large easements in remote parts of Virginia. But you are going to fail to get them in your Chesapeake Bay Watershed. You're going to fail to get them in your northern areas.

I do have a client that is directly affected by this. They have preliminary approval on 82 acres of land at the base of the Blue Ridge in Loudoun County. I've been working with the lender for the last eight months trying to get them to approve it. They think they are ready to sign off, but I said "I'm sorry I have an important hearing to go to because I don't know if it is a valid easement." They own eleven approved reported lots and are willing to vacate all but two. If I go back to the lender and say it is down to one lot, the answer is no, they are not going to sign.

If you move forward with these applications I would ask that you consider vesting applications that have preliminary approval. Secondly, if that's not available, then certainly delay the adoption of these regulations to give all property owners that have preliminary approval the opportunity to get those easements recorded.

Brook Middleton, CPA

Madame Chairman, Members of the Board, my name is Brook Middleton. I am a certified public accountant. I live in Fauquier County, which I'm pleased to say has about the highest percentage of conservation easements in the state. My office is in Loudoun County.

Living where I am I have worked on many conservation easements, probably more than 100 in some capacity. In the process of working on those easements I found two things to be true always. One is that the Department of Taxation and the Department of Conservation and Recreation are extremely professional and good to deal with. They are truly an asset to this state and they are a model for our nation.

The other thing that I've found is that each easement whether on the border of North Carolina or the Chesapeake Bay or in Northern Virginia is crafted to fit the individual property.

The crafting is between the landowner and the donee organization, and we have many good donee organizations in the state. Last year in my office alone, I saw an easement as small as two acres. It was on a national historic and Virginia historic registered property and was donated to the Land Trust of Virginia. I also saw a conservation easement on a several thousand acre property in southwest Virginia that was a no-divide easement. The terms of both of those easements were appropriate, but they were very, very different.

By having a 100 acre guideline you would create a one size fit all approach. In my practice and experience that won't work and can significantly harm the program. My wife's family owned 100 acres adjacent to the Town of Lovettsville. They were retired teachers and they had many options. They could have sold the farm to a national developer. Instead they donated an easement to the Land Trust of Virginia. They could've built four houses by right and they are adjacent to a tract subdivision. They gave up 396 divisions and 99 percent of the development rights on that property. That wouldn't qualify under these guidelines. So, I think in practice this rule could have a chilling effect on conservation easements and I sincerely hope that you will not adopt it.

One other issue that comes to mind is that the IRS is auditing conservation easements, not just in Virginia, but nationwide. In Virginia they have recently just disallowed a Virginia Outdoors Foundation easement on the basis of conservation purpose. This is a very conservative easement at a higher than 100 acre level. Nevertheless, the IRS has disallowed this easement. I feel certain that if you adopt this regulation, the IRS will use

it to attack smaller conservation easements. In the *Glass* case, the IRS attacked an easement on the shores of Lake Michigan based on its size. Ultimately the landowner prevailed but I feel certain that if Michigan had guidelines or a set number of acres in the easement the IRS would have used that to attack that.

I thank you for your time this morning. We have a wonderful program, we have wonderful people in the state that are working on this program. But I would respectfully request that you strike the 100 acre guideline. Thank you.

Marty Mitchell, Loudoun County

My name is Marty Mitchell. My family owns a farm of about 700 acres in Loudoun County. By the sheer fact that it is in Loudoun County it is on the edge of development from suburbia. The development incentives in Northern Virginia have diminished because of the marketplace, but they will return. As was mentioned by the Northern Virginia Land Trust, those pressures should be considered with this 100 acre minimum. The blanket requirement of 100 acres does not fit in all areas of the state.

The property that we have contains many man-made divisions of the property already. A Virginia Scenic Byway bisects the property. We have historic stone walls on the property that create natural divisions and we have an additional roadway that also cuts a portion of the property, 48 acres, by itself. We have natural divisions on our property. A North Fork of Goose Creek runs through the property and several other tributaries cut the property in different ways.

Our property is not unique in the fact that it has this type of natural and man-made divisions. This is something that occurs on every property. We believe that the capability of determining what size the various subdivisions are would be better located with the local trust to determine that based on the unique features the property contains.

Today I heard during the presentation that the language has been changed from justified to explained. However, it is very important to point out that the word necessitated was used in the presentation. If you have to explain the necessity you are actually justifying. So the language really does not change.

The subjectivity of this requirement will add time and cost to the process and could in turn reduce the value to the landowners and question whether or not the landowners will donate properties for the easement.

The final thing I would mention, on the impervious surfaces, there is justification from an environmental basis to limit impervious surfaces. There is also scientific evidence that impervious surfaces can be mitigated and in the case of the horse farms, you will need to have exceptions for certain cases.

David Phemister, The Nature Conservancy in Virginia

Madame Chair, Members of the Board, my name is David Phemister, Director of Government Relations for The Nature Conservancy in Virginia.

I could make my comments very brief, but I will add a few additional thoughts. If I gave you the very brief version I think I would be the first person to stand up before you today to say that The Nature Conservancy fully recommends that the Virginia Land Conservation Foundation Board approve the amended criteria as recommended by DCR staff.

I'd like to add a little more detail on why we make that recommendation. As I said in my public comment letter that we submitted, I think there is an inherent tension between two important, but sometimes competing, goals that DCR has tried to resolve in their revisions to these criteria. Those are ensuring the best conservation value for Virginia and its citizens and recognizing the properties are unique and we do need some flexibility to be able to deal with the unique characteristics.

The Nature Conservancy's belief is that the criteria presented before you today strike that appropriate balance.

I want to make a couple of comments on the previous speakers and some of the remarks they have made. I think it would be a stretch to say that requiring an applicant to explain why they had more divisions than one per 100 acres is in some ways a requirement that they can have no more than 1 per 100 acres. I don't think any reasonable person would read that you have to explain it as an absolute minimal requirement.

I do think that if the concern is over what exactly that is asking applicants to do, DCR could potentially put in language in there to make it clear that properties under 100 acres can still be eligible for this program and perhaps add in a couple of things that might be included in an explanation.

But I think on its surface to argue that what DCR has in front of you is a requirement for 1 division per 100 acres, I think that falls flat when you read what the actual language is.

A couple other things I'd like to comment on. One is the limitations I think on getting language perfect. I think we heard from a couple of folks recommending less specificity in some cases and in some more specificity.

I'll give you an example of that. The Virginia Outdoors Foundation made a legitimate point in terms of how can you determine if a property has been mowed only three times per year. I think that is a legitimate point. On the other hand, they would recommend that you replace the suggested prohibition of livestock grazing with restrict regular grazing. I would submit that it's pretty hard to monitor and to know if you're getting regular grazing in a buffer. It's easier to just prohibit it. On the same notion, if you want to have easy monitoring, you would prohibit mowing 100 percent, but I think DCR has

added in the three times per year to try to reflect some flexibility that landowners have sought.

One other comment in terms of the properties that would actually fall under this review and I think Director Maroon has made this comment on a couple of occasions today. But I think it bears repeating. I'm from Rockbridge County, I do know that properties in the Northern part of our state can be very expensive. I would point out for a property less than 100 acres to come before these criteria, the diminution of value would have to be over \$25,000 per acre. So that's not the value of the land per acre, but the easement value would have to be over \$25,000 per acre for it to even come before the board, let alone go through the criteria. I think that's important to point out.

Lastly, I think it's important for this Board, and I think the Board does understand, and I know DCR understands, that when the General Assembly passed this change in the law which set up this criteria in the first place it was clearly passing it because it wanted to ensure that the investment the Commonwealth is making, which is a substantial one, over \$100 million per year in the program for these large value easements, was yielding some minimal conservation standard. So I think that's very important to keep in mind if we talk about changes which might be perceived as weakening that conservation standard. Director Maroon brought it up, but again the message from the members of Senate Finance was be very careful in allowing additional flexibility to meet the demands of every single landowner and don't lose sight of the value of the program overall in terms of providing conservation value.

So in summary, I would go back to my original point and say I would like to thank DCR staff and members of this Board for their work on this. I think what they presented to you today is quite reasonable and is going to ensure a high conservation value for the Commonwealth. I think if you read the criteria carefully there are numerous examples of flexibility offered to the landowner. There is also a proven track record that DCR works very carefully with folks that come before this program to make their decisions based on reasonable review of the criteria and is not making arbitrary or capricious decisions in rejecting applications. No one has mentioned any evidence for that. DCR has earned the public trust with this program. These small changes to the criteria are still going to be administered in a way that works both for the Commonwealth and the landowners.

Thank you.

Senator Ticer asked if any staff would like to respond.

Mr. Ennis said that he would consider moving to amend the criteria based on comments received.

Ms. Bourne asked the procedure staff would like the Board to follow to address the concerns in the language.

Mr. Maroon said that it was important to note that the criteria were guidelines and not regulations. He said that what has traditionally been done is to allow the Board to ask if there are any sections the Board would like to discuss or pull out of the block and discuss as appropriate.

Mr. Weed asked that the contentious issues be voted on as a separate issue.

Mr. Ennis said that he was more specifically referring to line 385-387 which took up most of the testimony.

MOTION: Mr. Ennis moved that the Board delete the recommended changes to lines 385-387 as presented by staff and that the draft revert to the original language.

SECOND: Ms. Bourne

DISCUSSION: Mr. Dowling said that this matter was up to the discretion of the Board. He said that staff had presented the language in response to issues dealt with by the Department. He said staff believed this provided necessary guidance.

VOTE: Motion carried unanimously

Ms. Bourne said that the language on lines 393-394 could cause problems and decrease the ability to provide flexibility.

MOTION: Ms. Bourne moved that the language on lines 393-394 which read *limitations above approximately 1% imperviousness (excluding roads) must be explained in the application package* be deleted.

Mr. Dowling said that unlike the previous change, this was a more accepted value that was clearly tied to the conservation value.

There was no second to the motion and the motion failed.

Ms. Bourne said that she felt that the language regarding the utilities should be removed. She said that this was throwing the Department into an area for which it was not prepared.

Mr. Dowling said that staff felt that those provisions were reasonable. He said that the language clarifies and gives guidance that did not previously exist.

MOTION: Ms. Bourne moved that the section on lines 413-421 regarding utilities be deleted.

SECOND: Mr. Weed suggested that the motion be amended to delete the sentence *For example, limitations may require that (a) the utilities be placed underground to the greatest extent practicable, and (b) the land be restored to a natural condition to allow for the continuation of the conservation purpose.*

Ms. Bourne concurred with that amendment to the motion.

DISCUSSION: None

VOTE: Motion carried unanimously

Ms. Bourne said that on line 511 through 522 the language regarding variance should be amended.

Senator Ticer noted that this had been described as a zoning issue.

Mr. Maroon suggested using the term exception rather than variance.

Ms. Bourne asked the definition of hardship in this reference.

Mr. Maroon said that this was a challenging section. He said that staff purposely did not define hardship.

Ms. Moorman said that she would prefer the term exception rather than variance.

Mr. Weed suggested the following language *The Director of DCR may allow consideration of a request that would provide a partial reduction on the buffer requirement set out in section C1, and 2. The applicant, with the holder's concurrence, must state in writing that the special topography or other preexisting characteristics of the property are such that full compliance with the buffer criteria may be waived. Such request must provide 1) evidence to demonstrate the difficulty of fully complying with the buffer requirements set out in sections C 1; and 2.* He said the remainder of the language would stay the same.

He said this would describe the process.

Ms. Bourne said that was a legitimate appeals process and should be defined as such.

Mr. Maroon said that the appeal would only be allowed for the buffer.

MOTION: Ms. Bourne moved that on lines 511 through 522 the language be amended to include the above language as suggested by Mr. Weed.

SECOND: Mr. Weed

DISCUSSION: None

VOTE: Motion carried unanimously

MOTION: Mr. Weed moved that the Virginia Land Conservation Foundation Board of Trustees approve the Land Preservation Tax Credit Criteria as amended by Board action.

SECOND: Ms. Bowles

DISCUSSION: None

VOTE: Motion carried unanimously

Other Business

Ms. Richardson said that at the last meeting the Board had approved several projects. She distributed a handout outlining projects for updated action. The project descriptions are as follows:

FY2008 Grant Round – Natural Areas Category – grant awarded but not yet closed

The Nature Conservancy – Blackwater River Old Growth: A proposals for the fee simple acquisition by Isle of Wight County with TNC holding an easement on 500 acres adjacent to TNC's Blackwater Preserve, Isle of Wight county. This is part of a 2,500 acre tract of land. Site supports a baldcypress-tupelo swamp, and three rare animals are documented on the TNC property. **Total Project Cost: \$900,000.** VLCHF funds will be matched with \$500,000 Isle of Wight County's Open Space Fund. **VLCHF award: \$400,000.**

FY2010 Grant Round – Natural Areas Category – project withdrawn

The Nature Conservancy – Dragon Run/Milby Tract: A proposal for The Nature Conservancy to purchase a 210-acre conservation easement from the Conservation Fund after CF purchases fee simple interest from the Milby family by April 2009. This globally significant site supports three significant natural communities including a globally rare (G2) tidal bald cypress forest/woodland and three rare species. **Total Project Cost: \$800,000.** VLCHF funds will be matched by a 550 acre TNC fee simple acquisition which TNC will hold and manage and further protect by an easement. **VLCHF award: \$166,305.**

FY2010 Grant Round – Natural Areas Category – proposed substitute for Dragon Run/Milby Tract project

The Nature Conservancy – Blackwater River Old Growth: A proposal for the fee simple acquisition by Isle of Wight County of 2,500 acres. A deed of dedication will be placed on the project to protect the old-growth swamp forest of bald-cypress and tupelo and to contribute to restoration of globally rare longleaf pines, which support the federally endangered Red-cockaded woodpecker. The acquisition will also contribute to protection of drinking water for over 700,000 residents in the Norfolk metro area, including Department of Defense installations. With VLCF funding, the project could be closed in 2009. **Total Project Cost: \$3,300,000.** VLCF funds will be matched by Isle of Wight County's Open Space Fund. **VLCF request; \$166,305.**

Ms. Richardson said the request was to move the funds between projects as described.

MOTION: Ms. Bourne moved that the Virginia Land Conservation Foundation Board of Trustees approve the transfer of project funds as described by Ms. Richardson.

SECOND: Ms. Bowles

DISCUSSION: None

VOTE: Motion carried unanimously

Next Meeting Date

Mr. Maroon said that staff would be in contact with members regarding the next meeting date.

Other Business

There was no further business and the meeting was adjourned.

Respectfully submitted,

The Honorable Patsy S. Ticer
Vice Chair

Joseph H. Maroon
Executive Secretary