

Chapter 26

Open-Space and Conservation Easements and Other Laws Related to the Use of Land

26-100 Introduction

A locality's comprehensive plan, zoning ordinance, and subdivision ordinance work with other state statutes and ordinances related to how land may be used. These other laws are typically very narrow in scope, established to address specific goals and objectives such as the protection of agricultural activities or the preservation of undeveloped land. This chapter briefly examines several of those laws.

26-200 The Open-Space Land Act

The Open-Space Land Act, enacted by the General Assembly in 1966, authorizes public bodies to protect open space by acquiring easements in gross to preserve open-space land. *Virginia Code § 10.1-1703*; 2009 Va. AG LEXIS 29, 2009 WL 1567667 (Va. Op. Atty. Gen.). The Open-Space Land Act evinces “a strong public policy in favor of land conservation and preservation of historic sites and buildings.” *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 782 S.E.2d 131 (2016).

Albemarle County's Acquisition of Conservation Easements (“ACE”) program, summarized in section 26-400, is established under the Open-Space Land Act.

26-210 The features of an open-space easement

An open-space easement has several features:

- “Open-space land” defined: Open-space land includes any land which is provided or preserved for: (1) park or recreational purposes; (2) conservation of land or other natural resources; (3) historic or scenic purposes; (4) assisting in the shaping of the character, direction, and timing of community development; (5) wetlands as defined in Virginia Code § 28.2-1300; or (6) agricultural and forestal production. *Virginia Code § 10.1-1700*.
- The interest acquired: A locality may acquire unrestricted fee simple title to tracts, fee simple title to tracts subject to the reservation of rights to use such lands for farming or to the reservation of timber rights thereon, or easements or other interests in land of not less than five years' duration. *Virginia Code § 10.1-1703*.
- How the interest is acquired: A locality may acquire the interest by purchase, gift, devise, bequest, grant, or otherwise. *Virginia Code § 10.1-1701*.
- Who holds the interest: Any *public body* as defined in the Act may be an easement holder, including the Virginia Outdoors Foundation and any locality, park authority, public recreational facilities authority, any soil and water conservation district, and any community development authority. *Virginia Code §§ 10.1-1700 (definition of public body) and 10.1-1703 (authority of any public body to be an easement holder)*. In Albemarle County, the Virginia Outdoors Foundation, and the Albemarle Conservation Easement Authority (“ACEA”) are typical holders of donated open-space easements. Under the county's ACE program, the county co-holds the easement with either the Virginia Outdoors Foundation or the ACEA. The Virginia Board of Historic Resources may also hold a historic preservation easement. *Virginia Code § 10.1-2202.2*.
- Duration of the interest: The interest must be for at least five years' duration. *Virginia Code § 10.1-1701*.

26-220 Tax consequences

An open-space easement has beneficial tax consequences to the owner of the underlying interest that are too numerous and complex to discuss in any detail in this handbook. These include:

- **Taxation of the interest:** The easement holder's interest is not taxed because the public body is exempt from the real property tax.
- **Taxation of the land:** If the land is subject to a perpetual open space interest or is otherwise devoted to an open space use, the land is assessed and taxed at the use value for open space if the locality has a use valuation program; if it does not, the land is taxed at the fair market value less the easement value.

Virginia Code §§ 10.1-1011, 10.1-1700 et seq., and 58.1-3230 et seq.

In addition, donated open-space easements may qualify for the charitable donation deduction under federal tax laws and a Virginia tax credit.

26-300 The Virginia Conservation Easement Act

The Virginia Conservation Easement Act authorizes the creation of conservation easements which are held by qualifying charitable organizations. A locality does not typically have direct involvement in establishing these easements.

26-310 The features of a conservation easement

A conservation easement has several features:

- **“Conservation easement” defined:** A conservation easement is “a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.” *Virginia Code § 10.1-1009.*
- **How the easement is acquired:** The easement may be acquired by gift, purchase, devise, or bequest. *Virginia Code § 10.1-1010.*
- **Who holds the easement:** The easement is held by a tax exempt charitable corporation, association or trust, whose primary purpose or powers include preserving the historic, architectural, or archaeological aspects of real property. *Virginia Code § 10.1-1009.* The Nature Conservancy is an example of an eligible holder of conservation easements in Albemarle County.
- **Duration of the easement:** The easement is perpetual, unless the instrument creating the easement provides a specific duration. *Virginia Code § 10.1-1010(C).*

“A conservation easement is . . . appropriately viewed as a form of ‘restrictive covenant or negative easement’ on the land it encumbers.” *Wetlands American Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 782 S.E.2d 131, 138 (2016) (interpreting conservation easement and applying rules of construction) (citations omitted).

26-320 Tax consequences

A conservation easement has beneficial tax consequences to the easement holder and the owner of the underlying interest:

- Taxation of the interest in the easement: If a conservation easement is perpetual, the interests of the easement holder and the owner of the underlying fee are exempt from taxation for the interest in the easement.
- Taxation of the land: If the land is subject to a perpetual conservation easement and is devoted to an open-space use, the land is assessed and taxed at the use value for open space if the locality has a use valuation program; if it does not, the land is taxed at the fair market value less the easement value.

Virginia Code §§ 10.1-1009, 10.1-1011, and 58.1-3230 et seq.

Like open-space easements, donated conservation easements may qualify for the charitable donation deduction under federal tax laws and a Virginia tax credit.

26-400 Albemarle County’s Acquisition of Conservation Easements (ACE) program

In 2000, the ACE program in Albemarle County was established under the Open-Space Land Act, and is codified in County Code, Appendix A.1. Although “conservation easements” are part of the name of the program, the easements acquired under the program are open-space easements.

26-410 Reason for the program

The goals of the Albemarle County comprehensive plan include protecting the county’s natural, scenic, and historic resources, promoting the continuation of a viable agricultural and forestal industry and resource base, and protecting the county’s surface and ground water supplies. The county’s open space and critical resources plan, adopted in 1992 as part of the comprehensive plan, identified the purchase of development rights as a potential technique to preserve the county’s resources and recommended further study.

A citizen committee was established in 1997 to study the purchase of development rights as a tool to preserve the county’s resources. The committee’s research revealed that between 1959 and 1992, 37% of Virginia’s farmland was lost. In Albemarle County alone, 25,000 acres of farmland were lost from 1974 to 1992 and, in 2000, almost one-third of the county’s forest land was too densely populated for long-term timber production. The committee concluded that regulatory land use planning tools alone were insufficient to stem the tide of land development:

It was a governing assumption that an Acquisition of Conservation Easement Program will always be one arrow in the quiver of arrows available to protect the rural areas of Albemarle County. It is intended to supplement rather than replace protective planning efforts of the Comprehensive Plan and Zoning Ordinance, Agricultural and Forestal Districts, donation of conservation easement, and acquisition of park land and natural areas. Acquisition of conservation easements can never do the job alone.

The committee also recognized that farm and forest land, clean water and airsheds, scenic vistas and rural character have public as well as private value.

26-420 The effect of the program

The ACE program is a voluntary program by which qualifying landowners offer to have open-space easements placed on their property for a determined sum paid by the county, another easement holder, or both. The program attempts to strike a balance between landowners’ rights and responsibilities, and between the private and public values of rural land.

The county does not directly purchase development rights under the program; instead, the use of those rights is restricted under the terms of the open-space easement. A model deed of easement establishes the minimum terms and conditions of the open-space easement, and they include restricting further division, protecting conservation

resources, and restrictions pertaining to the uses and activities allowed on the parcel. *County Code, Appendix A.1-109.*

A landowner may add additional restrictions to the easement (including the direct sale of development rights), but these need to be determined before the parcel is appraised so that the appraisal reflects the value of the easement with the additional restrictions. Because county funds will be used to purchase most easements, the county and another qualified entity, such as the Virginia Outdoors Foundation or the ACEA, will be the holders of each easement. *County Code, Appendix A.1-109.*

26-430 Administration of the ACE program

The ACE program is administered by the director of planning, who is designated as the program administrator. *County Code, Appendix A.1-104.* The key functions of the program administrator include establishing reasonable and standard procedures and forms for properly administering and implementing the program, promoting the program, pursuing additional public and private funding for the program, evaluating applications for easements, providing staff support to the program's committees and the board of supervisors, and assuring that the terms and conditions of each easement are monitored and complied with.

A 10-member ACE committee is appointed by the board. Its primary purposes are to evaluate and rank applications and make recommendations to the board, and to annually review the program's eligibility and ranking criteria and recommend changes to the board of supervisors. *County Code, Appendix A.1-105.* An appraisal review committee is also appointed by the board to review appraisals and make recommendations on those appraisals to the board. *County Code, Appendix A.1-106.* The board decides which open-space easements will be purchased. *County Code, Appendix A.1-107 and A.1-108.*

26-440 Eligibility of parcels

The ACE program is available for all privately owned and controlled lands in Albemarle County. For a parcel to be eligible: (1) the use of the parcel subject to each easement must be consistent with the comprehensive plan; (2) the proposed terms of the easement must satisfy the minimum easement terms and conditions set forth in the ordinance; and (3) the parcel must obtain at least 20 points under the program's ranking criteria. *County Code, Appendix A.1-107.*

The ranking criteria assign various points based on the parcel's open space resources, threat of conversion to developed use, natural, cultural and scenic resources, and the availability of other public or private funding to be applied to leverage the purchase of the open-space easement. *County Code, Appendix A.1-108.*

26-450 Procedure to establish open-space easements

By an annual October 31 deadline, interested landowners submit applications on a standard application form to the program administrator, who evaluates each application and submits a list of ranked parcels to the ACE committee. *County Code, Appendix A.1-110.* The county does not charge an application fee.

The ACE committee evaluates and ranks the applications in the order of priority that it recommends easements should be purchased and forwards its recommendation to the board of supervisors. The board then reviews the ACE committee's recommendation and decides which easements it desires to purchase. The board then ranks those parcels. Each parcel identified by the board will be appraised by either the county assessor or an independent qualified appraiser. The appraisal review committee reviews each appraisal and submits its recommendation to the Board. *County Code, Appendix A.1-110.*

The board then identifies the initial pool of eligible parcels on which easements are proposed to be purchased. The size of the pool is based on the funds available to purchase easements in the current fiscal year. The purchase price is determined by multiplying the appraised value by a factor based on the average annual adjusted gross income of the owner and his or her immediate family. This factor decreases as the adjusted gross income increases (*e.g.*, if the adjusted gross income is \$55,000 or less, the purchase price will be 100% of the appraised value; if the adjusted

gross income is between \$105,001 and \$115,000, the purchase price will be 64% of the appraised value; if the adjusted gross income is \$205,001 or more, the purchase price will be 4% of the appraised value). How annual adjusted income is determined varies depending on whether the land is owned by a single individual (*County Code, Appendix A.1-111(B)(1)*), by multiple individuals, C-corporations having 10 or fewer shareholders, S-corporations, partnerships, limited liability companies, trusts or estates (*County Code, Appendix A.1-111(B)(2)*), or C-corporations having more than 10 shareholders and other entities not otherwise addressed (*County Code, Appendix A.1-111(B)(3)*). The county took this approach to encourage landowners with higher income to donate open-space and conservation easements in order to receive tax benefits, rather than use the ACE program with its limited funding.

The board's next step is to invite the owners of the parcels in the pool to submit offers to sell open-space easements to the board. If an offer to sell is submitted by an owner and accepted by the board, the parties will proceed to establish the easement. If an offer to sell is not submitted, or the board elects not to acquire an easement, an invitation may be sent to the next remaining parcel on the list of eligible parcels not included in the initial pool. The purchase price and the terms and conditions of the easement are not subject to negotiation. *County Code, Appendix A.1-111.*

The procedure requires all applications to be ranked and the purchases occur at the same time each year. However, the board may waive any requirement or target date if it is shown that exigent circumstances exist or that the requirements of the ordinance unreasonably restrict the purchase of an easement. *County Code, Appendix A.1-110.*

26-500 The Right-to-Farm Act

The Right-to-Farm Act limits the circumstances under which agricultural operations may be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing agricultural operations. *Virginia Code §§ 3.2-301 and 15.2-2288.* The Act also places limits on a locality's exercise of its zoning power over agricultural operations:

- **Prohibits requiring a special use permit in certain circumstances:** The Act prohibits a locality from requiring a special use permit for any production agriculture or silviculture activity in an agricultural zoning district.
- **Prohibits regulation of certain structures and practices:** The Act prohibits a locality from enacting a zoning regulation that unreasonably restricts or regulates farm structures or farming and forestry practices in an agricultural district or classification, unless the restriction is related to the health, safety, and general welfare.

Virginia Code §§ 3.2-301 and 15.2-2288.

The Act is often mistaken for being an absolute limitation on locality's that want or need to regulate agricultural operations. With respect to the second bullet, any restrictions or regulations on farm structures or farming and forestry practices in an agricultural district or classification must be related to the "health, safety, and general welfare of its citizens." *Virginia Code §§ 3.2-301*

26-600 The Agricultural and Forestal Districts Act

Localities may establish agricultural and forestal districts under the Agricultural and Forestal Districts Act, which serve two primary purposes:

- **Conserve and protect agricultural and forestal lands:** Conserve and protect agricultural and forestal lands for the production of food and other agricultural and forestal products; conserve and protect agricultural and forestal lands as valued natural and ecological resources which provide essential open spaces for clear air sheds, watershed protection, wildlife habitat, as well as for aesthetic purposes.
- **Develop and improve agricultural and forestal lands:** Encourage the development and improvement of agricultural and forestal lands for the production of food and other agricultural and forestal products.

Virginia Code § 15.2-4300. Albemarle County implements the Agricultural and Forestal District Act in County Code § 3-100 *et seq.*

Localities may establish districts of statewide significance (*Virginia Code § 15.2-4300 et seq.*) and districts of local significance (*Virginia Code § 15.2-4400*). This section focuses on districts of *statewide significance*, the much more common class of district.

26-610 Establishment and effect

Agricultural and forestal districts are established by a locality's governing body on the petition of participating landowners. A new district must have a minimum core of 200 acres in a single or in contiguous parcels. *Virginia Code § 15.2-4305*. A parcel not part of the core may be included in a district: (1) if the nearest boundary of the parcel is within one mile of the boundary of the core; (2) if it is contiguous to a parcel in the district, the nearest boundary of which is within one mile of the boundary of the core; or (3) if the governing body finds, in consultation with the advisory committee or planning commission, that the parcel not part of the core or within one mile of the boundary of the core contains agriculturally and forestally significant land. *Virginia Code § 15.2-4305*.

Landowners may petition to add their land to the district at any time. *Virginia Code § 15.2-4310*. Districts are reviewed by the locality during the review period (four 4 to 10 years, depending on the applicable district ordinance). *Virginia Code § 15.2-4311*. Any landowner may request to withdraw their lands from a district during the district review. *Virginia Code § 15.2-4311*. At other times, land may be withdrawn from a district only for *good and reasonable cause*. *Virginia Code § 15.2-4314*.

The Agricultural and Forestal Districts Act has a number of effects on development:

- **Prohibits development to a more intensive use:** The Act prohibits any parcel in a district from being developed to a more intensive use, other than a use resulting in more intensive agricultural or forestal production, without prior approval of the governing body.
- **Prohibits regulation of certain dwelling construction and placement:** The Act bars the locality from prohibiting the construction and placement of dwellings for persons who earn a substantial part of their livelihood from a farm or forestry operation on the same property, or for members of the immediate family of the owner, unless the locality finds that the use in the particular case would be incompatible with farming or forestry in the district.
- **Prohibits regulation of certain structures and practices:** The Act prohibits a locality from exercising its zoning power in a district in a manner that would unreasonably restrict or regulate farm structures or farming and forestry practices in contravention of the Act unless the restrictions or regulations bear a direct relationship to public health and safety.

Virginia Code § 15.2-4312.

26-620 Tax consequences

Land lying within a district and used in agricultural or forestal production *automatically qualifies* for use-value assessment authorized under Virginia Code § 58.1-3229 *et seq.* if the requirements for that assessment are satisfied. Land lying within a district that is devoted to open-space is *eligible* for use-value assessment authorized under Virginia Code §§ 58.1-3230 and 58.1-3231 if the requirements for that assessment are satisfied.