



# Construction and Land Use Newsletter

## Transferable Density Rights a Reality for Arlington County

By Tad Lunger

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For those of our clients that don't already know, Transferable Density Rights (or "TDRs") are now a reality in Arlington County with the Major Site Plan Amendment approved for the Founders Square project in January. This also may be the first time that TDRs have been used in the Commonwealth of Virginia where density has been transferred from one site to another without having to encumber the sending site with a special exception.

By way of background, TDRs are simply the right to separate the density from one site and convey the density to another site. In a nutshell, this is done by designating one site as a "sending site" and another as a "receiving site" and having the appropriate amount of density "certified" pursuant to the processes now in place to accommodate this new development option.

TDRs are an excellent tool which provides useful flexibility for both localities and private interests. This tool can allow localities to preserve important historical sites and other sites of interest, raise funding as an incentive for public/private partnership ventures, etc. It also allows private interests to unlock sites that may not have enough density to be financially viable, as an estate planning or preservation tool, or to simply buy or sell for a myriad of reasons.

Bean, Kinney & Korman is already working on a series of additional TDR transactions involving other sites, and we expect the number of TDR deals to increase as this new development tool becomes more normalized. If you have any questions or would like any information about how you might be able to benefit from the use of TDRs, please feel free to contact us.

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### Our Practice Areas:

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- Employment Law
- Government Contracts
- Land Use, Zoning, & Local Government
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- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

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### **Proposed Virginia Green Building Act Legislation**

By: Timothy R. Hughes, Esq., LEED A.P.,  
and Lauren K. Keenan, Esq.

Sustainable design and construction continues to attract interest and attention. Public buildings in Virginia are currently subject to executive orders which require certain green building measures. Legislation introduced during this year's session of the General Assembly sought to codify this structure making the current baseline for public buildings a statutory requirement. The bills eventually were left in committee and died for this session; however, the traction gained may demonstrate the resilience of support for green building despite the economy and the current budgetary setting.

#### The Current Status Quo

While in office, former Governor Tim Kaine issued two executive orders relating to public buildings. The first, EO 48, was issued April 5, 2007, and provided that state-owned facilities over 5,000 gross sq. ft. and the renovation of such buildings, where the cost to renovate exceeds 50% of the assessed building value shall be designed and constructed consistent with either the U.S. Green Building Council's LEED rating system or the United States Environmental Protection Agency/Department of Energy's

'Energy Star' rating. In addition, the EO encouraged private sector adoption of green building standards by giving preference to leasing facilities meeting LEED or Energy Star ratings. This EO was later superseded by EO 82 issued on June 10, 2009, which set a requirement for LEED Silver ratings or two Green Globes for applicable public buildings. This later EO also included wide ranging goals with respect to other aspects of sustainability in government operations.

In 2010, newly elected Governor Robert McDonnell issued EO 19, which outlined similar requirements for public buildings. Once again, the EO required LEED Silver or two Green Globes for construction and design of public facilities over 5,000 gross sq. ft. and renovations costing more than 50% of the value of the building. EO 19 also gave preference in leasing to buildings that meet Energy Star, LEED, or Green Globes standards. Governor McDonnell's EO19 also provided for exceptions in cases where compliance would be cost-prohibitive or not feasible.

#### The Proposed Legislation

During January's short session of the Virginia General Assembly, three separate versions of the Green Building Act were introduced. Each version of the legislation requires some form of LEED certification for public buildings. SB 832 gained the most traction, passing in the Senate before stalling in committee in the House.

SB 832 required compliance with a new to-be-established Virginia standard for public buildings greater than 5,000 gross sq. ft. and any renovations of public buildings that cost more than 50% of the building's value. The new standards were to be tied to LEED or Green Globes, but the bill failed to articulate a specific level that must be achieved. The bill further required that all non-exempt buildings be operated to achieve energy savings that exceed American Society of Heating, Refrigerating and Air-Conditioning Engineers Standard 90.1-2007 by at least

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10% for new construction and 5% for major renovations. In addition, water systems were to offer savings of at least 25% over the baseline standard set forth in the Virginia Plumbing Code. SB 832 did provide for exemptions from these requirements upon a finding of circumstances that make compliance impracticable.

In the House, members proposed HB 2262 and HB 1817. Both House bills were similar to the Senate bill, but required LEED Silver or Green Globe's two-globe standard. The House bills were left in the committee on general laws. We understand there were discussions in that committee after "cross-over" to try to combine all the bills, but none came out of committee in the House.

### Better Luck Next Time?

While the legislation failed in this session, the mere proposal of green building legislation and significant traction in the General Assembly is a new and heartening development for sustainable design and construction. The proposed legislation would set a firmer lower bar for public buildings than the far more elastic situation presented by an executive order which is subject to easy withdrawal at any time. We anticipate that these developments, coupled with potential action on adoption of green building codes in the foreseeable future, may increase the momentum of sustainable design and construction in the Commonwealth of Virginia.

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*This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.*

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### Meet Our Attorneys - Lauren K. Keenan

Ms. Keenan is an associate to the firm and focuses her practice on land use law and estate planning administration.

Ms. Keenan is a member of the Virginia Bar Association and the Fairfax Bar Association as well as a member of the Wills, Trusts and Estates Section within the Fairfax Bar Association.

Prior to joining Bean Kinney, she worked on land use policy and law for the Urban Land Institute in Washington, D.C., and has also worked within a Federal Judge's Chambers at the Federal District Court for the Middle District of Pennsylvania.

Ms. Keenan has a B.B.A. in Marketing Information Systems from James Madison University, and a J.D. from Pennsylvania State University, The Dickinson School of Law.

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