TAXATION: REAL PROPERTY TAX - SPECIAL ASSESSMENT FOR LAND PRESERVATION.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).

Commissioner of revenue makes determination whether locality's adoption of ordinance amending text of zoning ordinance or amending proffers initiated by property owners constitutes change in zoning to more intensive use at request of property owners or their agents that would trigger assessment of roll-back taxes. Change in use occurs when timber is removed from forest land and open-space land is developed for commercial uses. Roll-back taxes would apply to land that has changed to nonconforming use—one that does not meet statutory definitions of real estate devoted to agricultural, horticultural, forest or open-space use.

The Honorable Audrey T. Brooks
Commissioner of the Revenue for the City of Fredericksburg

April 8, 1996

You ask whether a change in zoning would occur that would trigger the assessment of roll-back taxes under § 58.13237 of the Code of Virginia should a locality adopt a local ordinance amending the text of a zoning ordinance or amending proffers initiated by property owners, to allow a more intensive use of property within a zoning district. In addition, you ask for a definition of the term "more intensive" as it is used in § 58.13237(A).

You indicate that, in 1988, the Fredericksburg City Council established, by ordinance, a planned development-commercial zoning district, primarily allowing twenty-six commercial uses, and no special uses, within the district. The ordinance contained other regulations, including bulk restrictions on floor area ratio and open-space requirements. The following year, the city rezoned an additional 310-acre tract to the planned development-commercial zoning district, which included a set of proffers voluntarily submitted by the property owners. Subsequent to this rezoning, a portion of the property has continued to be subject to land-use taxation.

You relate that the property owners filed an application to modify the proffers and the generalized development plan affecting the property, which was approved by city council. The owners again approached city council about modifying the proffers contained in the original plan, and city council approved the amendment to the proffers affecting the property. A change in the use of the land has occurred due to removal of timber from forest land and development of open-space land for commercial uses.

Your questions concerning whether certain facts constitute a change in zoning to a more intensive use at the request of the property owners for purposes of § 58.13237 are factual determinations to be made on a case-by-case basis by the local commissioner of the revenue. The Attorney General has declined to render official opinions when the request involves a question of fact rather than one of law. A prior opinion of the Attorney General concludes that whether a developer's proffers of cash and off-site road improvements qualify for certain statutory protections "necessarily depends on an evaluation of all the relevant surrounding facts and circumstances [and] requires an evaluation of the attendant facts and circumstances." Thus, the Attorney General declined to render an opinion.

Therefore, I must decline to reach a conclusion on whether the specific facts and circumstances in the scenarios you describe constitute a change in zoning to a more intensive use at the request of the property owners or their agent for purposes of assessing roll-back taxes under § 58.13237. Based on the policy underlying the disincentive implicit in the roll-back tax, it does not appear
that the term "change in zoning," as used in § 58.13237, is so restrictive as to mean only a formal zoning classification change. The term would seem to include any change initiated by a property owner that would allow a more intensive use of land than previously was possible.

You also ask whether the term "more intensive," as used in § 58.13237(A), means a greater maximum square footage of building area, an increased number and variety of commercial uses, or both. It is axiomatic that "the statutory term is to be construed in its ordinary meaning, given the context in which it is used." "Intensive" is defined as "of, relating to, or marked by intensity or intensification"; "highly concentrated"; "tending to strengthen or increase ... to give force or emphasis." "Virginia adheres to the rule of strict construction of tax exemptions." Taxation is the rule rather than the exception. Therefore, tax statutes are strictly construed against the taxpayer. When a tax statute is susceptible to two constructions, one granting an exemption and the other denying it, the latter construction is adopted." This result is mandated by the Constitution of Virginia, which states that "[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed." The rule of strict construction stems from the announced policy of this Commonwealth to distribute the tax burden uniformly and upon all property. Thus, any provision granting an immunity from taxes, whether called an exclusion, limitation or exemption, is narrowly construed.

To the extent that the use of the land has changed to a nonconforming use, i.e., one that does not meet the definitions in § 58.13230-real estate devoted to agricultural, horticultural, forest or open-space use-then the roll-back taxes in § 58.13237 would apply. Section 58.13237(C) provides that liability for such roll-back taxes attaches when either a change in use or a change in zoning to a more intensive use "at the request of the owner or his agent occurs." Therefore, even if you were to conclude that a "change in zoning" had not occurred that would trigger the roll-back taxes, an actual change in use nevertheless would trigger the imposition of roll-back taxes on those specific areas.

Section 58.13237 provides, in part:

"(A) When real estate qualifies for assessment and taxation on the basis of use under an ordinance adopted pursuant to [Article 4, Chapter 32 of Title 58.1], and the use by which it qualified changes to a nonqualifying use, or the zoning of the real estate is changed to a more intensive use at the request of the owner or his agent, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes. Such additional taxes shall only be assessed against that portion of such real estate which no longer qualifies for assessment and taxation on the basis of use or zoning....

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"(C) Liability to the roll-back taxes shall attach when a change in use occurs, or a change in zoning of the real estate to a more intensive use at the request of the owner or his agent occurs.... The commissioner shall forthwith determine and assess the roll-back tax, which shall be assessed against and paid by the owner of the property at the time the change in use which no longer qualifies occurs, or at the time of the zoning of the real estate to a more intensive use at the request of the owner or his agent occurs....

"(D) Real property zoned to a more intensive use, at the request of the owner or his agent, shall be subject to and liable for the roll-back tax at the time such zoning is changed.... Real property
zoned to a more intensive use at the request of the owner or his agent after July 1, 1988, shall be subject to and liable for the roll-back tax at the time of such zoning."


4 Id.

5 The General Assembly has provided for special assessment of local taxes for land preservation. Section 58.13229 specifies the policy behind the land preservation assessment: "An expanding population and reduction in the quantity and quality of real estate devoted to agricultural, horticultural, forest and open space uses make the preservation of such real estate a matter vital to the public interest. It is, therefore, in the public interest (a) to encourage the preservation and proper use of such real estate in order to assure a readily available source of agricultural, horticultural and forest products and of open spaces within reach of concentrations of population, to conserve natural resources in forms which will prevent erosion, to protect adequate and safe water supplies, to preserve scenic natural beauty and open spaces and to promote land-use planning and the orderly development of real estate for the accommodation of an expanding population, and (b) to promote a balanced economy and ameliorate pressures which force the conversion of such real estate to more intensive uses and which are attributable in part to the assessment of such real estate at values incompatible with its use and preservation for agricultural, horticultural, forest or open space purposes." Ch. 675, 1984 Va. Acts 1178, 1373.


9 Id.; see also Winchester TV Cable v. State Tax Com., 216 Va. 286, 290, 217 S.E.2d 885, 889 (1975).

10 WTAR Radio-TV, 217 Va. at 879, 234 S.E.2d at 247; see also Winchester TV Cable, supra note 9.

11 VA. CONST. art. X, § 6(f) (1971).


13 In City of Virginia Beach v. ESG Enterprises, 243 Va. 149, 413 S.E.2d 642 (1992), the Supreme Court of Virginia held that "subsection C [of § 58.13237] is determinative of the timing and payment of the roll-back assessment," and that roll-back taxes could not be assessed "until a more intensive use of the property occurs." Id. at 153, 154, 413 S.E.2d at 644, 645. ESG Enterprises was decided January 10, 1992. At a later date in 1992, the General Assembly amended § 58.13237(C) to make it clear that liability for roll-back taxes attaches when either "a change in use occurs, or a change in zoning of the real estate to a more intensive use at the request of the owner or his agent occurs." Ch. 3, 1992 Va. Acts Spec. Sess. 2, 2.