

OP. NO. 04-055

TAXATION: REAL PROPERTY TAX — TAX EXEMPT PROPERTY.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

If landowner has recorded perpetual easement held by locality devoted to open-space use, locality has no discretion and must grant open-space tax assessment to parcel so encumbered. If landowner proffers agreement not to change use of land, locality has discretion to accept, reject, or negotiate modification of agreement with landowner. Wetlands mitigation banks not otherwise wholly exempt from local real estate taxation must be assessed in same manner as similarly situated and classified property. Local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses attributable to such property.

The Honorable Ronald S. Hallman
City Attorney for the City of Chesapeake
December 14, 2004

Issues Presented

You pose several questions concerning the establishment and taxation of certain wetlands mitigation banks within the City of Chesapeake.¹ You ask whether, assuming all qualifications are met,² a landowner may insist on enrolling in the city's land use assessment program, a wetlands mitigation bank as "real estate devoted to open-space use." You next ask whether wetlands mitigation banks may be classified and assessed for local taxation like other commercial properties in the city. Finally, you ask whether the city may request income and expense information from the owners of wetlands mitigation banks.

Response

It is my opinion that if a landowner has a recorded perpetual easement that qualifies as such under § 58.1-3233(3)(ii), the locality has no discretion in the matter and must grant open-space tax assessment to the parcel so encumbered. If, however, the landowner elects to proceed under § 58.1-3233(3)(iii), the locality has discretion to accept, reject, or negotiate modification of the proffered agreement with the landowner. It is also my opinion that wetlands mitigation banks not otherwise wholly exempt from local real estate taxation, must be assessed in the same manner as similarly situated and classified property. Finally, it is my opinion that the local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses pursuant to § 58.1-3294.

Background

You relate that in recent years, private landowners in the City of Chesapeake have purchased wetlands or prior converted agricultural land in order to establish wetlands mitigation banks in the city. These banks sell wetlands mitigation credits³ to landowners who are required by the United States Army Corps of

Engineers or the Virginia Department of Environmental Quality to mitigate the impact on jurisdictional wetlands as a condition of a fill permit. The wetlands mitigation banks must be restored, maintained, and preserved in accordance with the requirements of the Army Corps of Engineers. You state many landowners operate private wetlands mitigation banks as a for-profit "business enterprise."⁴

You relate that since the establishment of these mitigation banks in Chesapeake, the local assessor has questioned the proper classification and lawful assessment of these banks. You advise that the city assessor typically will reduce the assessment of "delineated" wetlands to a nominal amount per acre. For wetlands without a delineation,⁵ the landowners have the option of enrolling the property in the city's land use assessment program as real property devoted to open-space use, provided that all applicable qualifications are met.

Finally, you represent that these wetlands mitigation banks are similar to other wetlands in Chesapeake, in that they may not be intended or be suitable for development in the near future. They differ from other wetlands, however, as they are a source of income to their owners.

Applicable Law and Discussion

Section 58.1-3666 declares that wetlands

that are subject to a perpetual easement permitting inundation by water ... are ... a separate class of property and shall constitute a classification for local taxation separate from other classifications of real property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation. [Emphasis added.]

Section 58.1-3666 defines "wetlands" as areas that are "inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, and *that [are] subject to a perpetual easement* permitting inundation by water." (Emphasis added.) These types of wetlands have a perpetual easement and are not the subject of your first inquiry. Your inquiry specifically concerns certain similarly situated real property that is not subject to a perpetual easement and, thus, is ineligible for the classification expressed in § 58.1-3666.

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244, sets forth the statutory framework authorizing localities to provide special tax assessments for land preservation activities and uses. Specifically, this statutory scheme provides that real estate classified for agricultural, horticultural, forest, and open-space use is eligible for special tax treatment as established in § 58.1-3233. Owners of the parcels of real estate described in your request may elect to participate in such a program. Some of the parcels may be eligible to serve as wetlands mitigation banks, from which the Commonwealth Transportation Commissioner may purchase compensatory credits to mitigate "adverse impacts to wetlands" caused by certain development projects.⁶ These purchases result in revenue or income to the owners of wetlands mitigation banks.

Section 58.1-3231 permits a locality to adopt an ordinance providing for special classifications of real estate devoted to open-space use. Section 58.1-3230 defines "real estate devoted to open-space use" as

real estate used as, or preserved for, (i) park or recreational purposes, (ii) conservation of land or other natural resources, (iii) floodways, [or] (iv) *wetlands as defined in § 58.1-3666*, ... and consistent with the local land-use plan under uniform standards prescribed by the Director of the Department of Conservation and Recreation pursuant to the authority set out in § 58.1-3240, and in accordance with the Administrative Process Act. [Emphasis added.]

Section 58.1-3233 requires that prior to assessing any real estate under an ordinance adopted pursuant to Article 4, the local assessing office must make certain determinations regarding the use of the subject real estate. This determination is to insure compliance with the requirements of the ordinance and state law in order to receive the tax benefit. It is my understanding that the City of Chesapeake has adopted a program allowing for use-value assessment and taxation of real estate devoted to open-space use. You state that the described wetlands mitigation banks meet the requirements for classification as real estate devoted to open-space use, except with regard to compliance with § 58.1-3233(3)(ii) or (iii). This is the essence of your question.

Pursuant to § 58.1-3233(3)(ii), one of the criteria for a local assessing officer to determine is that real estate devoted to open-space use is "subject to a recorded perpetual easement that is held by a public body, and promotes the open-space use classification, as defined in § 58.1-3230." If a wetlands mitigation bank is subject to a recorded perpetual easement under § 58.1-3233(3)(ii), then it would qualify for the tax treatment afforded to property generally classified for open-space use. In such instances, the plain and unambiguous language of the statute dictates that a perpetual easement is sufficient to qualify the property.

In the case of something less than a perpetual easement, § 58.1-3233(3)(iii) provides that landowners shall enter into a recorded commitment

with the local governing body, or its authorized designee, not to change the use to a nonqualifying use for a time period stated in the commitment of not less than four years nor more than ten years. Such commitment shall be subject to uniform standards prescribed by the Director of the Department of Conservation and Recreation pursuant to the authority set out in § 58.1-3240.

The agreement entered into pursuant to § 58.1-3233(3)(iii) requires the "mutual assent" of the parties, as with any other contractual agreement.⁷ This interpretation is based on the applicable standards promulgated by the Department of Conservation and Recreation⁸ and the model Open-Space Use Agreement⁹ furnished as part of the standards.¹⁰ Such an agreement is in the nature of a contract, and the local governing body has discretion to accept or reject it.¹¹ In addition, the local governing body may propose to modify the tendered agreement and negotiate with the landowner.¹²

Accordingly, I am of the opinion that if the locality is presented with a perpetual wetlands easement qualifying as such under § 58.1-3233(3)(ii), it must be

accepted, whereas if the locality is presented with an agreement proffered pursuant to § 58.1-3233(3)(iii), the locality may, in its discretion, accept, reject, or negotiate a modification of the tendered agreement.

Turning to your other questions, as a threshold matter, if the wetlands mitigation bank has met the requirements of § 58.1-3233(3), and the locality has provided for a complete exemption from local taxation, your questions concerning valuation and the ability of the local tax assessor to secure financial information would seem moot.¹³ The question remains, however, for nonqualifying wetlands mitigation banks that are not accepted in a locality's open-space land use program or are partially exempt from local taxation.

The answer to these questions is controlled by Article X of the Constitution of Virginia. Article X, § 1 stipulates that "[a]ll property, except as hereinafter provided, shall be taxed." Thus, taxation is the rule, and exemption from taxation is the exception.¹⁴ Section 1 also provides that "[a]ll taxes ... shall be uniform upon the same class of subjects." Article X, § 2 provides that "[a]ll assessments of real estate ... *shall be at their fair market value, to be ascertained as prescribed by law.*"¹⁵ (Emphasis added.) Section 58.1-3201 prescribes that "[a]ll real estate, except that exempted by law, shall be subject to such annual taxation as may be prescribed by law." The described wetlands mitigation banks are not exempted by law.

Clearly, wetlands mitigation banks, which are not wholly exempt from local taxation or otherwise eligible to be included in the special land use classification program, and which are a source of revenue to their owners, are not accorded special protection. Accordingly, a locality must consider and assess them for real property taxation in the same manner as similarly situated and classified property.

You also ask if the local tax assessor may request income and expense information from the owners of wetlands mitigation banks. Section 58.1-3294 provides that a "duly authorized real estate assessor" may require owners of certain "income-producing real estate" to furnish certified statements of income and expenses attributable to such property. I find no specific definition of "income-producing real estate" in either that statute or in Virginia case law. Generally, the term "income" means "money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts, and the like."¹⁶ Similarly, "producing" means to "bring into existence; to create."¹⁷

The described wetlands mitigation banks meet the definition of "income-producing." Although § 58.1-3294 does not speak directly to wetlands mitigation banks, the statute applies to them. Moreover, there is no exclusion in § 58.1-3294 for wetlands mitigation banks or any other special classification of land use. In fact, local appraisers need financial and income information to adequately evaluate any proposed assessments.¹⁸ Therefore, it is also my opinion that the local assessing officer may request such information from owners of such property. Indeed, it may be in the best interests of the landowners to provide such information, as actual revenue may be lower than an assessment based on a projection of potential "economic rent."¹⁹ Section 58.1-3294 provides that failure to provide the requested financial information prevents the owners of the subject property from introducing such information at a subsequent judicial proceeding for correction of an alleged excessive assessment.²⁰

Conclusion

Accordingly, it is my opinion that if a landowner has a recorded perpetual easement that qualifies as such under § 58.1-3233(3)(ii), the locality has no discretion in the matter and must grant open-space tax assessment to the parcel so encumbered. If, however, the landowner elects to proceed under § 58.1-3233(3)(iii), the locality has discretion to accept, reject, or negotiate modification of the proffered agreement with the landowner. It is also my opinion that wetlands mitigation banks not otherwise wholly exempt from local real estate taxation, must be assessed in the same manner as similarly situated and classified property. Finally, it is my opinion that the local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses pursuant to § 58.1-3294.

¹Although you represent that the city's land use ordinance mirrors § 58.1-3231, I assume for purposes of this opinion that you request an interpretation of state law only, and not a review of the operation of the city's applicable ordinance. The Attorney General renders opinions only on questions requiring an interpretation of state or federal law, rule or regulation, and not on local ordinances. See 1976-1977 Op. Va. Att'y Gen. 17, 17.

²For the purposes of this opinion, I assume that this is a reference to all applicable statutory and regulatory qualifications except those specified in § 58.1-3233(3)(ii) and (iii).

³I understand that these mitigation credits are sold and do not constitute leasehold interests subject to tax assessment. See Va. Code Ann. § 58.1-3203 (LexisNexis Repl. Vol. 2004).

⁴As such, it is my understanding that these owners do not qualify as "organization[s] exempted from taxation." Section 58.1-3603(A) (LexisNexis Repl. Vol. 2004).

⁵You consider wetlands to be delineated if they are shown as such on applicable plats approved by the U.S. Army Corps of Engineers. For the purposes of this opinion, I assume that such wetlands are not the subject of your inquiry, as they are "subject to a perpetual easement," and are to be declared separate from other classes of real property for purposes of local taxation. Section 58.1-3666 (LexisNexis Repl. Vol. 2004).

⁶Va. Code Ann. § 33.1-223.2:1 (LexisNexis Supp. 2004) ("Wetlands mitigation banking."); Va. Code Ann. § 62.1-44.15:5(E) (LexisNexis Supp. 2004) (conditioning Virginia Water Protection Permit on "compensatory mitigation for adverse impacts to wetlands"), *cited in* 1999 Op. Va. Att'y Gen. 179, 183 n.2 (quoting portion of subsection B, now codified in subsection E, of § 62.1-44.15:5).

⁷See *Augustine Golf Dev. Corp. v. Stafford County Bd. of Supvrs.*, 40 Va. Cir. 308, 310 (1996).

⁸See 4 Va. Admin. Code 5-20-10 to 5-20-40 (Law. Co-op. 1996 & West Supp. 2004).

⁹See *id.* 5-20-30 (Law. Co-op. 1996).

¹⁰ See Va. Code Ann. § 10.1-104(B) (LexisNexis Supp. 2004) (authoring Department of Conservation and Recreation to promulgate regulations necessary to carry out activities administered by Department); see also § 58.1-3230 (LexisNexis Repl. Vol. 2004) (requiring that classification of real estate devoted to open-space use shall be consistent with local land-use plan under uniform standards prescribed by Director of Department); § 58.1-3240 (LexisNexis Repl. Vol. 2004) (requiring local assessor to apply Department's standards uniformly throughout Commonwealth in determining whether real estate may be devoted to open-space use).

¹¹ See *Augustine*, 40 Va. Cir. at 310 ("A review of the agreement tendered by Augustine, which is in substantial conformity with the form promulgated by the Secretary [of the Department of Conservation and Recreation], is replete with language traditionally associated with contracts.").

¹² *Id.*

¹³ See, e.g., *Washington County v. Sullins Coll. Corp.*, 211 Va. 591, 596, 179 S.E.2d 630, 633 (1971) (holding that since property in question was otherwise exempt from real estate taxation, fact that property may have generated profit is irrelevant. This decision was rendered under former liberal interpretation of constitutional exemptions from taxation).

¹⁴ See *DKM Richmond Assocs. v. City of Richmond*, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995).

¹⁵ See 1981-1982 Op. Va. Att'y Gen. 186 (discussing constitutionality of House Bill 324, which added predecessor statute to § 58.1-3294, although that particular section was not at issue).

¹⁶ *Black's Law Dictionary* 766 (7th ed. 1999).

¹⁷ *Id.* at 1225 (defining verb "produce").

¹⁸ Section 58.1-3294 sets forth a requirement for response. The fact that a local tax assessor actually may have the requested information does not excuse the taxpayer from providing it. See *Sterling Park Shopping Ctr., L.P. v. Loudoun County Bd. of Supvrs.*, 50 Va. Cir. 196, 198 (1999) (noting that question is not whether county had information, but whether petitioner complied with § 58.1-3294, and petitioner did not).

¹⁹ See *Seaone v. Fairfax County Bd. of Supvrs.*, 35 Va. Cir. 351 (1995) (comparing actual rents to economic rents).

²⁰ See *Sterling Park*, 50 Va. Cir. at 198; see also *City of Richmond v. Gordon*, 224 Va. 103, 110, 294 S.E.2d 846, 850 (1982) ("[T]here is a clear presumption in favor of the validity of the assessment.") (quoting *Bd. of Supvrs. V. Leasco Realty, Inc.*, 221 Va. 158, 165, 267 S.E.2d 608, 612 (1980)); accord *Seaone*, 35 Va. Cir. at 361-62.