

**OP. NO. 04-078**

**TAXATION: REAL PROPERTY TAX – SPECIAL ASSESSMENT FOR LAND PRESERVATION — ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES – ENFORCEMENT BY THE COMMISSIONER OF REVENUE.**

**Lots, which are not ‘subdivision’ per ordinance, created after July 1, 1983, by recorded plat subject to ordinance may be aggregated to meet land-use taxation minimum acreage requirements. Local taxing official must assess back taxes and rollback taxes for 3 preceding tax years; may correct property valuation error subject to rollback taxes within 3 years of such assessment.**

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December 23, 2004

**Issue Presented**

You inquire regarding the aggregation of lots for purposes of land-use taxation. First, you ask whether lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, which do not fall within the ordinance’s definition of "subdivision," may be aggregated for purposes of meeting the minimum acreage requirements for favorable land-use taxation set forth in § 58.1-3233(2). Section 58.1-3233(2) relates to real estate devoted to agricultural, horticultural, forest, or open-space use. You next ask whether back taxes and rollback taxes, if any, must be imposed to correct inaccurate tax assessments resulting from an erroneous aggregation of contiguous lots.

**Response**

It is my opinion that lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, but not falling within the ordinance’s definition of "subdivision," may be aggregated for purposes of meeting minimum acreage requirements for land-use taxation established by § 58.1-3233(2). I concur with your opinion that the local taxing official must assess back taxes and rollback taxes for the three preceding tax years and may correct an error in the valuation of property subject to rollback taxes within three years of assessment of the rollback tax.

**Background**

You relate that, pursuant to § 58.1-3231, Albemarle County offers reduced real estate assessments and taxation on properties meeting certain use and size criteria. You note<sup>1</sup> that § 58.1-3233(2) establishes minimum acreage requirements that must be incorporated into any local land use ordinance. You also note that § 58.1-3233(2) allows the aggregation of certain contiguous parcels for the purpose of meeting the minimum acreage requirements. Finally, you relate that a question has arisen regarding the types of parcels that may be

aggregated for purposes of meeting the minimum acreage requirements for land use assessment and taxation.

## Applicable Law and Discussion

### I. Aggregation of Lots

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244, provides for the special assessment of real property for land preservation. In general, to qualify for land-use assessment and taxation: (1) agricultural or horticultural property must consist of a minimum of five acres; (2) forest property must consist of a minimum of twenty acres; and (3) open-space property must consist "of a minimum of five acres or such greater minimum acreage as may be prescribed" by the locality.<sup>2</sup> Section 58.1-3233(2) provides that "[t]he minimum acreage requirements for special classifications of real estate shall be determined by adding together the total area of contiguous real estate excluding recorded subdivision lots recorded after July 1, 1983, titled in the same ownership."

Your inquiry focuses on the phrase "recorded subdivision lots" as used in § 58.1-3233(2). Specifically, you ask whether § 58.1-3233(2) excludes from aggregation all lots created pursuant to a locality's subdivision ordinance or only those lots the creation of which falls within the definition of "subdivision."

Although Title 58.1 does not define the term "subdivision," Chapter 22 of Title 15.2, which governs planning, subdivision of land and zoning, provides the following definition:

*"Subdivision,"* unless otherwise defined in an ordinance adopted [by a locality], means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.2-2258.<sup>[3]</sup>

A 1989 opinion of the Attorney General addresses whether the reference to recorded subdivision lots in § 58.1-3233(2) refers to a subdivision plat recorded under a county's subdivision ordinance or to any division of a tract of land.<sup>4</sup> The 1989 opinion concludes that:

If an existing tract of land is divided into large parcels that are not subject to the county subdivision ordinance and the resulting parcels remain under common ownership, the eligibility of the resulting combined parcels for use value assessment is consistent with the purpose of preserving the property for protected uses. On the other hand, the division of a tract under the subdivision ordinance contemplates the sale of the parcels to multiple owners.

... [T]herefore, ... the reference to recorded subdivision lots in § 58.1-3233(2) refers to a subdivision plat recorded under the local subdivision ordinance.... [P]arcels resulting from a plat not subject to the local subdivision ordinance may be combined to satisfy the minimum acreage requirements if the resulting parcels remain under common ownership.<sup>[5]</sup>

Since the 1989 Opinion was issued, the General Assembly has not modified the meaning of the phrase "recorded subdivision lots" in § 58.1-3233(2). "[T]he General Assembly is presumed to have knowledge of the Attorney General's interpretation of statutes, and the General Assembly's failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation."<sup>6</sup> Therefore, since recorded subdivision lots are those lots created by a subdivision plat recorded under a local subdivision ordinance, it follows that lots created pursuant to something other than a subdivision plat would not be excluded from any aggregation of property.

This interpretation is further supported by the purposes underlying the land-use assessment and taxation program. The manifest purpose of Article 4 is to create a financial incentive to encourage the preservation and proper use of real estate devoted to agricultural, horticultural, forest, and open-space uses.<sup>7</sup> The land-use taxation is intended to "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 the use and preservation for the desired purposes.<sup>8</sup> The purpose of the minimum acreage requirements in § 58.1-3233(2) is to allow land use assessment and taxation on only those parcels large enough to the further the goals of preserving agricultural, forest, and open-space lands.<sup>9</sup>

If real estate currently in land-use is divided into parcels, but remaining under common ownership, large enough that the division is not subject to the locality's subdivision ordinance, and if aggregated the new parcels otherwise satisfy § 58.1-3233(2), the aggregation of these parcels does not defeat the purposes underlying the land use program.<sup>10</sup> Divisions by subdivision plat under the subdivision ordinance, by contrast, contemplate the sale of the parcels<sup>11</sup> and are contrary to the legislative purposes underlying the land-use program.

## II. Correction of Erroneous Assessments

You also ask whether back taxes and rollback taxes, if any, must be imposed to correct inaccurate tax assessments resulting from an erroneous aggregation of contiguous lots. You conclude that the local taxing official must assess back taxes and rollback taxes for the three preceding tax years.<sup>12</sup>

Section 58.1-3903 provides:

If the commissioner of the revenue of any county ... ascertains that any local tax has not been assessed for any tax year of the three preceding tax years or that the same has been assessed at less than the law required for any one or more of such years, ... the commissioner of the revenue or other assessing officer *shall* list and assess the same with taxes at the rate or rates prescribed for that year .... [Emphasis added.]

Section 58.1-3981(D) provides that "[a]n error in the valuation of property subject to the rollback tax imposed under § 58.1-3237 for those years to which such tax is applicable *may* be corrected within three years of the assessment of the rollback tax." (Emphasis added.)

It is important to note the language used in § 58.1-3903, "shall,"<sup>13</sup> is mandatory, while that in § 58.1-3981(D), "may,"<sup>14</sup> is permissive. Back taxes for the three preceding tax years must be assessed. Correction of an error in the valuation of property subject to rollback taxes, however, is discretionary. Any such correction may be made within three years of assessment of the rollback taxes

### Conclusion

Accordingly, it is my opinion that lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, but not falling within the ordinance's definition of "subdivision," may be aggregated for purposes of meeting minimum acreage requirements for land-use taxation established by § 58.1-3233(2). I concur with your opinion that the local taxing official must assess back taxes and rollback taxes for the three preceding tax years and may correct an error in the valuation of property subject to rollback taxes within three years of assessment of the rollback tax.

<sup>1</sup>Any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

<sup>2</sup>Va. Code Ann. § 58.1-3233(2) (LexisNexis Repl. Vol. 2004).

<sup>3</sup>Va. Code Ann. § 15.2-2201 LexisNexis Repl. Vol. 2003).

<sup>4</sup>1989 Op. Va. Att'y Gen. 325, 326.

<sup>5</sup>*Id.* at 327 (citation omitted) (emphasis added).

<sup>6</sup>*City of Winchester v. Am. Woodmark Corp.*, 250 Va. 451, 458, 464 S.E.2d 148, 153 (1995); *see also Tazewell County Sch. Bd. v. Brown*, 267 Va. 150, 163, 591 S.E.2d 671, 677 (2004).

<sup>7</sup>*See* 2002 Op. Va. Att'y Gen. 318, 318-19; *see also* 1987-1988 Op. Va. Att'y Gen. 138, 139.

<sup>8</sup>1984 Va. Acts ch. 675, at 1178, 1373 (quoting § 58.1-3229, not set out in Virginia Code), *quoted in* 1997 Op. Va. Att'y Gen. 193, 194.

<sup>9</sup>1989 Op. Va. Att'y Gen., *supra* note 4, at 326-27.

<sup>10</sup>*Id.* at 327.

<sup>11</sup>*Id.*

<sup>12</sup>*See supra* note 1.

<sup>13</sup>Use of the word "shall" in a statute generally indicates that its procedures are intended to be mandatory, rather than permissive or directive. See Op. Va. Att'y Gen.: 2003 at 124, 128 n.3; 1996 at 154, 158 n.3; 1989 at 250, 251-52.

<sup>14</sup>"Unless it is manifest that the purpose of the legislature was to use the word 'may' in the sense of 'shall' or 'must,' then 'may' should be given its ordinary meaning—permission, importing discretion." *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* *Bd. of Supvrs. v. Weems*, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); *see also* Op. Va. Att'y Gen.: 2003 at 99, 103 n.2; 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12.

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