



COMMONWEALTH of VIRGINIA

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The Honorable Anna L. Fox
Alleghany County Treasurer
9212 Winterberry Avenue, Suite F
Covington, Virginia 24426

Dear Ms. Fox:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a treasurer may take action to initiate a sale of subsurface mineral lands¹ charged with delinquent taxes assessed pursuant to § 58.1-3286. Further, you ask whether a treasurer must take different or additional steps to effect a judicial sale for such delinquent subsurface mineral lands when different taxpayers own the surface lands overlying the minerals or when such mineral owners are not Virginia residents.

Response

It is my opinion that subsurface mineral lands constitute real estate, and a treasurer may initiate a judicial sale of such mineral lands charged with delinquent taxes. Further, it is my opinion that the procedure for a judicial sale of subsurface mineral lands is not affected by separate ownership and payment of taxes for the surface lands overlying the minerals or where the mineral owners are not Virginia residents.

Background

You relate that Alleghany County has assessed taxes on the subsurface “minerals in place”² for approximately forty-nine parcels of mineral lands. In some cases, you note that the taxes related to the mineral lands have been delinquent since 1997. However, you relate that the county has collected the

¹You specifically inquire about the authority of a local treasurer to employ procedures to collect delinquent taxes on “subsurface mineral lands.” A prior opinion of the Attorney General indicates that “mineral lands,” as that term applies to properties subject to property tax assessment by localities pursuant to § 58.1-3286, comprise “two categories of property, the surface property and the subsurface minerals.” 1993 Op. Va. Att’y Gen. 221, 224. In keeping with that interpretation and my understanding of your request, I use the term “subsurface minerals,” for which you indicate the taxes are delinquent, to describe the minerals underlying the surface property.

²For purposes of this opinion, I use the term “minerals in place” to mean minerals that have not been removed from the ground underlying the surface.

applicable taxes for the surface lands of these forty-nine mineral parcels. You state that the owner of the surface lands often is not the same taxpayer as the owner of the subsurface minerals. You relate that many of these subsurface mineral owners are not residents of Virginia and do not have identifiable Virginia assets to subject to administrative collection under § 58.1-3919, 58.1-3941, or 58.1-3952.

Applicable Law and Discussion

Localities in Virginia enjoy the exclusive authority to assess property taxes on “[r]eal estate, coal and other mineral lands.”³ A locality’s assessments of “taxable real estate” must conform to the requirements of Title 58.1, Chapter 32.⁴ Reading Chapter 32, it is clear that taxes on “coal and other minerals” represent a particular class of property taxes on “real estate.” For example, § 58.1-3287 mandates that “whenever there is a general reassessment of real estate in any county or city, *mineral lands and minerals* shall be included in the general reassessment, but shall be separately assessed from *other real estate*.” (Emphasis added.) Based on the General Assembly’s use of the word “other” in this context, “mineral lands” and “minerals” are subclasses of the broader category of “real estate.”⁵ Additionally, the Supreme Court of Virginia has recognized that unextracted minerals or minerals in place are “real estate.”⁶

Additionally, the Virginia Supreme Court has held that ownership of the surface may be separate from ownership of the minerals underlying the surface.⁷ Recognizing the common law distinction between these separate interests in land, the General Assembly in § 58.1-3286 has required local commissioners of the revenue to assess separately the fair market values for surface lands and subsurface minerals in place.⁸ Indeed, § 58.1-3286 specifically contemplates the situation you describe where one property owner owns the surface of the land while another owns the subsurface minerals.⁹

Section 58.1-3965(A) allows “[t]he officer charged with the duty of collecting taxes for [a] locality”¹⁰ to institute a judicial proceeding to sell real estate “for the purpose of collecting all delinquent taxes on such property.” A judicial sale is available “[w]hen any taxes on *any real estate* in a county, city or town are delinquent on December 31 following the second anniversary of the date on which such taxes have become due.”¹¹ Since subsurface minerals comprise a category of “real estate,”¹² they are subject to

³ VA. CONST., art. X, § 4; *see also* VA. CODE ANN. § 58.1-3000 (2004) (parallel statutory provision).

⁴ Section 58.1-3200 (2004).

⁵ *See* 1975–1976 Op. Va. Att’y Gen. 370, 371 (noting that Virginia historically has segregated to localities power to levy property taxes on real estate, *including coal and other mineral lands*).

⁶ *Warren v. Clinchfield Coal Corp.*, 166 Va. 524, 528, 186 S.E. 2d 20, 22 (1936).

⁷ *See, e.g., Ventro v. Clinchfield Coal Corp.*, 199 Va. 943, 951, 103 S.E.2d 254, 260 (1958).

⁸ 1993 Op. Va. Att’y Gen., *supra* note 1, at 222–23.

⁹ “[A]fter a severance of the mineral and surface estates, the surface owner cannot acquire title to the minerals merely by virtue of his possession of the surface[.]” *Ventro*, 199 Va. at 952, 103 S.E.2d at 261 (citation omitted).

¹⁰ County treasurers have the duty to collect delinquent county taxes “by distress *or otherwise*.” Section 58.1-3919 (2004) (emphasis added).

¹¹ Section 58.1-3965(A) (2004) (emphasis added).

¹² *See supra* notes 5-8 and accompanying text.

judicial sale when such taxes remain delinquent beyond the statutory period.¹³ A judicial sale remains an available remedy for the nonpayment of taxes on real property, including subsurface minerals, for twenty years from the end of the year when the locality assesses those taxes.¹⁴

Section 58.1-3967 provides that a proceeding for judicial sale of property for delinquent taxes, is instituted by filing a “bill in equity”¹⁵ “in the circuit court of the county or city in which such real estate is located, to subject the real estate to the lien for such delinquent taxes.” The fact that the owner of the subsurface minerals is not a Virginia resident does not alter the remedies available to a county treasurer seeking to collect delinquent taxes or to initiate a tax sale proceeding.¹⁶

Conclusion

Accordingly, is my opinion that subsurface mineral lands constitute real estate, and a treasurer may initiate a judicial sale of such mineral lands charged with delinquent taxes. Further, it is my opinion that the procedure for a judicial sale of subsurface mineral lands is not affected by separate ownership and payment of taxes for the surface lands overlying the minerals or where the mineral owners are not Virginia residents.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:1453; 1:941/07-099

¹³ See § 58.1-3965(A).

¹⁴ Section 58.1-3940(B) (2004).

¹⁵ Since 2006, however, the Rules of the Supreme Court of Virginia have recognized “one form of civil case, known as a civil action.” VA. SUP. CT. R. 3:1. A civil action is commenced when a party commences by filing a “complaint” in the appropriate circuit court. VA. SUP. CT. R. 3:2. Rule 3:1 indicates this change in nomenclature applies “unless otherwise provided by law.” The General Assembly amended § 58.1-3967 after the changes to Rules 3:1 and 3:2 became effective. See 2006 Va. Acts ch. 616, at 800, 800-01. However, the amendments to § 58.1-3967 did not alter the requirement designating the filing of a “bill in equity.” *Id.*; see also § 58.1-3967 (Supp. 2007). The question of whether a “complaint” or a “bill in equity” is the appropriate pleading in an action under § 58.1-3965 is beyond the scope of your request. Therefore, I decline to render an opinion on that matter.

¹⁶ “When property subject to taxation is located in a county, city or town different from that in which the owner of such property resides, ... the treasurer shall have the same remedies for the collection of all such taxes, levies and other charges in all respects as if the person owing the same resided in the officer’s own county, city or town.” Section 58.1-3946 (2004).