



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable John M. O'Bannon, III, M.D.  
Member, House of Delegates  
Post Office Box 70365  
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The Honorable Linda T. Puller  
Member, Senate of Virginia  
Post Office Box 73  
Mount Vernon, Virginia 22121

The Honorable L. Scott Lingamfelter  
Member, House of Delegates  
5420 Lomax Way  
Woodbridge, Virginia 22193

The Honorable Stephen D. Newman  
Member, Senate of Virginia  
Post Office Box 480  
Forest, Virginia 24551

Dear Delegate O'Bannon, Senators Puller and Newman, and Delegate Lingamfelter:

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

## Issues Presented

You ask several questions in connection with Article X, § 6-A of the Virginia Constitution and the legislation implementing that provision.

1. You ask what are the effective dates of Article X, § 6-A, as approved by the voters on November 2, 2010, and §§ 58.1-3219.5 and 58.1-3219.6, and whether the legal effect of these provisions may be applied retroactively;
2. You ask whether a surviving spouse who was married to an eligible veteran qualifies for the tax exemption when the veteran died before the effective date of the tax exemption;
3. You ask whether the provisions of §§ 58.1-3219.5 and 58.1-3219.6 apply to otherwise qualifying veterans who die before the effective date of these provisions, and their spouses who have not remarried and continue to occupy the real property as their principal place of residence;
4. You ask whether the provisions of Article X, § 6-A, approved by the voters on November 2, 2010, and §§ 58.1-3219.5 and 58.1-3219.6 apply to veterans rated by the U.S. Department of Veterans Affairs ("VA") with a total disability rating on the basis of individual unemployability due to service-connected disability;
5. You inquire regarding the identity of the correct official in the Commonwealth who has responsibility for interpreting and implementing §§ 58.1-3219.5 and 58.1-3219.6;

6. You ask whether the General Assembly may enact legislation authorizing the Commissioner of the Virginia Department of Veterans Services ("VDVS") to promulgate rules and regulations governing the administration and/or implementation of this tax exemption;
7. You ask whether the General Assembly has the authority to enact the provision in § 58.1-3219.5 that restricts the tax exemption to land not exceeding one acre in size;
8. You ask for a definition of the term "real property" and whether such term includes just the dwelling on the land occupied by the veteran or includes both the dwelling and the land;
9. You ask whether the tax exemption is a "program" within the meaning of § 2.2-2001(A) and (C);
10. You ask whether a legal means exists to extend the tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service-connected, permanent, and total disability but died before the exemption's effective date;
11. You ask whether the tax exemption applies to real property that the veteran occupies as his or her principal residence but that the veteran has chosen to place title in i) a revocable inter vivos trust with the spouse; ii) a revocable inter vivos trust with other(s) than the spouse; or iii) an irrevocable trust; and
12. You ask whether the tax exemption applies exclusively to the real property owned at the time of death by the veteran who qualified for the tax exemption or whether it follows the spouse if he or she decides to relocate.

### **Response**

It is my opinion that:

1. The effective date of Article X, § 6-A as approved by the voters on November 2, 2010, is January 1, 2011. The effective date of §§ 58.1-3219.5 and 58.1-3219.6 is April 6, 2011, and the legal effect of the statutory provisions must be applied retroactively to January 1, 2011;
2. The surviving spouse of a veteran who dies before the January 1, 2011 effective date of the tax exemption does not qualify for this exemption;
3. The provisions of §§ 58.1-3219.5 and 58.1-3219.6 do not apply to either veterans who die before the effective date of these provisions or their spouses who have not remarried and continue to occupy the real property as their principal place of residence;
4. The tax exemption applies to veterans rated by the VA with a total disability rating on the basis of individual unemployability due to a service-connected disability which rating revolves around the inability to engage in substantially gainful employment;
5. The commissioner of the revenue has the responsibility for interpreting and implementing §§ 58.1-3219.5 and 58.1-3219.6;

6. The General Assembly may enact legislation authorizing the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption;
7. The General Assembly has the authority to limit the tax break to land that does not exceed one acre;
8. Within the context of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6, the definition of “real property” includes both the dwelling and the land;
9. The tax exemption is not a “program” within the meaning of § 2.2-2001(A) and (C);
10. There is no legal authority to provide the real property tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service-connected, permanent, and total disability but died before January 1, 2011;
11. The tax relief under Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not available when the veteran has chosen to place title to the real estate in i) a revocable inter vivos trust with the spouse; ii) a revocable inter vivos trust with other(s) apart from the spouse; or iii) an irrevocable trust; and
12. The exemption is exclusive to the property for which the veteran qualified and occupied as his or her principal place of residence at the time of death, and does not follow the spouse if he or she relocates.

### **Background**

At the general election held on November 2, 2010, the voters of the Commonwealth were presented the following referendum question related to amending the Constitution of Virginia:

Shall the Constitution be amended to require the General Assembly to provide a real property tax exemption for the principal residence of a veteran, or his or her surviving spouse, if the veteran has a 100 percent service-connected, permanent, and total disability?<sup>[1]</sup>

With 82.4 percent of the voters answering the question in the affirmative,<sup>2</sup> Article X is now amended to include a new § 6-A, which provides that:

Notwithstanding the provisions of Section 6, the General Assembly by general law, and within the restrictions and conditions prescribed therein, shall exempt from taxation the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs or its successor agency pursuant to federal law to have a one hundred percent service-connected,

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<sup>1</sup> See 2010 Va. Acts chs. 358, 588.

<sup>2</sup> See VIRGINIA STATE BOARD OF ELECTIONS, NOVEMBER 2, 2010 GENERAL AND SPECIAL ELECTIONS OFFICIAL RESULTS, available at [https://www.voterinfo.sbe.virginia.gov/election/DATA/2010/EB24720D-F5C6-4880-8DC5-12AE4D0C3772/official/9\\_s.shtml](https://www.voterinfo.sbe.virginia.gov/election/DATA/2010/EB24720D-F5C6-4880-8DC5-12AE4D0C3772/official/9_s.shtml).

permanent, and total disability, and who occupies the real property as his or her principal place of residence. The General Assembly shall also provide this exemption from taxation for real property owned by the surviving spouse of a veteran who was eligible for the exemption provided in this section, so long as the surviving spouse does not remarry and continues the real property as his or her principal place of residence.<sup>[3]</sup>

As a result of the passage of this referendum question, the 2011 Session of the General Assembly enacted legislation to implement this real property tax exemption, adding in Chapter 32 of Title 58.1, a new Article 2.3, consisting of §§ 58.1-3219.5 and 58.1-3219.6.<sup>4</sup>

As detailed in the United States Department of Veterans Affairs ("VA") booklet "Federal Benefits for Veterans, Dependents and Survivors,"<sup>5</sup> the VA pays monthly compensation benefits for disabilities incurred or aggravated during active military service. When the VA grants a veteran's claim, it awards a service-connected disability rating that determines the dollar amount of monthly compensation payments. When rating a service-connected disability, a VA adjudicator reviews the medical evidence, finds the appropriate diagnostic code, compares the clinical evidence of the severity of the veteran's current symptoms with the list of symptoms for that diagnostic code, and assigns the rating percentage that corresponds to the selected severity of symptoms. The VA pays the same dollar amount for each percentage level regardless of the nature of the veteran's disability. For example, the monthly payment for a ten percent rating will be the same for a psychiatric disorder, diabetes, heart condition, etc. The same applies to 20 to 100 percent ratings.

The VA uses a schedule of rating disabilities when it determines the level of a veteran's service-connected disability. The rating schedule is essentially a listing of diseases and disorders, categorized by body systems, that includes symptoms for each disease or disorder in an increasing order of severity. Percentages of disability are assigned to each level of symptoms from zero (non-compensable disabling) to one-hundred percent (totally disabling) in ten percent increments. The criteria for many VA 100 percent disability ratings includes a requirement that the veteran not be able to get or keep a job because of that disability.

In instances where the service-connected disability rating is not 100 percent, VA benefits nonetheless may be available to compensate the veteran at the 100 percent level if the veteran is unable to work because of his or her service-connected disability/disabilities. This benefit is called a total ("100 percent") rating on the basis of individual unemployability due to service-connected disability and is also referred to as total disability based upon individual unemployability ("TDIU" or "IU"). It revolves around to the inability to engage in "substantially gainful employment," which means the ability to earn at least an amount equal to the annual poverty level set by the federal government.

TDIU or IU is a part of the VA's disability compensation program that allows the VA to pay certain veterans compensation at the 100 percent rate, even though the VA has not rated their service-

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<sup>3</sup> See 2010 Va. Acts chs. 358, 588.

<sup>4</sup> See 2011 Va. Acts chs. 769, 840.

<sup>5</sup> See U.S. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDANTS AND SURVIVORS (2011), available at [www.va.gov/opa/publications/benefits\\_book.asp](http://www.va.gov/opa/publications/benefits_book.asp). The details of the administration of VA disability benefits can be found in the *Code of Federal Regulations*. See 38 C.F.R. Part 4.

connected disabilities at the 100 percent level. To qualify, a veteran must be “unable to secure or follow substantially gainful employment as a result of service-connected disabilities.”<sup>6</sup> A veteran also must have either 1) one service-connected disability ratable at sixty percent or more, or 2) two or more service-connected disabilities, at least one disability ratable at forty percent or more with a combined rating of seventy percent or more.<sup>7</sup>

Notwithstanding these criteria, a veteran, upon special consideration of extra-schedular factors, still may qualify as totally disabled when the veteran is considered unemployable due to a service-connected disability(ies), but fails to meet the minimum percentage standards.<sup>8</sup>

## Applicable Law and Discussion

### I. Effective Date and Retroactivity

You first inquire regarding the effective date of Article X, § 6-A as approved by the voters on November 2, 2010, and of chapters 769 and 840 of the 2011 Acts of Assembly that added §§ 58.1-3219.5 and 58.1-3219.6. You ask when each of these provisions became the law of the Commonwealth and whether the legal effect of these provisions applies retroactively.

Article XII, § 1 specifies the procedure for amending the Constitution of Virginia. When a proposed amendment to the Constitution is approved by a majority of those voting at the election designated by the General Assembly for approval of a proposed amendment, that amendment to the Constitution becomes effective on the date prescribed by the General Assembly.<sup>9</sup>

In its 2010 session, the General Assembly, through the passage of House Bill 149 and Senate Bill 31, directed that the proposed amendment adding § 6-A to Article X be submitted to the voters at the November 2, 2010, election.<sup>10</sup> The General Assembly further directed that “[i]f a majority of those voting vote in favor of the amendment, it shall become effective on January 1, 2011.”<sup>11</sup> Because a majority of those voting on November 2, 2010 voted in favor of adding § 6-A to Article X of the Constitution, the provisions relating to a property tax exemption for certain veterans was a part of the Constitution on January 1, 2011.

Section 6-A required the General Assembly to exempt from taxation, by general law, “the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs or its successor agency pursuant to federal law to have a one hundred percent service-connected, permanent, and total disability, and who occupies the real

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<sup>6</sup> 38 C.F.R. 4.16(a) (2010).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § 4.16(b).

<sup>9</sup> VA. CONST. art. XII, § 1. Note that strict compliance with the prerequisites of Article XII, § 1 is required in order to amend effectively the Constitution. *See Coleman v. Pross*, 219 Va. 143, 246 S.E.2d 613 (1978) (holding that where proposed amendments approved at 1978 Session of the General Assembly were not the same as the proposed amendments approved at 1977 session, there was not strict compliance with Article XII, § 1).

<sup>10</sup> *See* 2010 Va. Acts chs. 358, 588.

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

property as his or her principal place of residence.” The addition of § 6-A to Article X was not self-executing because the amendment required further legislation from the General Assembly to make its provisions operative.<sup>12</sup> Adding § 6-A to Article X required the General Assembly to enact a general law exempting such veterans from real property taxation.

The general law enacted by the 2011 Session of the General Assembly to implement the provisions of § 6-A to Article X providing for the property tax exemption for certain veterans is contained in Chapters 769 and 840 of the 2011 Acts of Assembly.<sup>13</sup> Chapters 769 and 840 were signed into law by the Governor on April 6, 2011, and became effective immediately because both contained an emergency enactment clause.<sup>14</sup>

The Supreme Court of Virginia recognizes that “[r]etrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest.”<sup>15</sup> The intent of the General Assembly is set forth in § 58.1-3219.5(A), which expressly provides that the exemption applies to tax years beginning on or after January 1, 2011. Furthermore, §§ 58.1-3219.5(B) and 58.1-3219.6 specify that a surviving spouse of such a veteran qualifies for this real property tax exemption “so long as the death of the veteran occurs on or after January 1, 2011,” and the surviving spouse provides documentation that the veteran’s death occurred on or after January 1, 2011.

I, therefore, conclude that January 1, 2011, is the effective date of Article X, § 6-A of the Constitution of Virginia as approved by the voters on November 2, 2010. Chapters 769 and 840 of the 2011 Acts of Assembly (enacting §§ 58.1-3219.5 and 58.1-3219.6) became the law of the Commonwealth on April 6, 2011. The provisions of §§ 58.1-3219.5 and 58.1-3219.6 clearly and plainly apply to tax years beginning on or after January 1, 2011, and require that the veteran’s death occur on or after January 1, 2011, for a spouse to claim the exemption.<sup>16</sup> Finally, the legal effect of these provisions applies retroactively to January 1, 2011.

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<sup>12</sup> See *Gray v. Virginia Sec’y of Transp.*, 276 Va. 93, 103, 662 S.E.2d 66, 71 (2008) (“If a constitutional provision is self-executing, no further legislation is required to make it operative”). See also *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681-82, 324 S.E.2d 674, 676 (1985) (explaining how to determine whether a constitutional provision is self-executing).

<sup>13</sup> 2011 Va. Acts chs. 769, 840 (adding §§ 58.1-3219.5 and 58.1-3219.6 to Chapter 32 of Title 58.1, relating to real property tax).

<sup>14</sup> “All laws enacted at a regular session . . . shall take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted . . . unless in the case of an emergency (which emergency shall be expressed in the body of the bill) the General Assembly shall specify an earlier date.” VA. CONST. art. IV, § 13.

<sup>15</sup> *Adams v. Alliant Techsystems, Inc.*, 261 Va. 594, 599, 544 S.E.2d 354, 356 (2001) (quoting *Duffy v. Hartsock*, 187 Va. 406, 419, 46 S.E.2d 570, 576 (1948)) (other citation omitted).

<sup>16</sup> “When the language in a statute is clear and unambiguous, [courts] apply the statute according to its plain language.” *Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv.*, 271 Va. 304, 309, 262 S.E.2d 436, 438 (2008) (citing *HCA Health Servs. v. Levin*, 260 Va. 215, 220, 530 S.E. 2d 417, 419-20 (2000)).

## **II. Legal Effect on Surviving Spouse when Veteran Dies Prior to Effective Date**

Your next question asks whether the surviving spouse of a veteran, who otherwise qualifies for the real property tax exemption, would qualify for the exemption when the eligible veteran died before the effective date of the exemption and the surviving spouse has not remarried and continues to occupy the real property as his or her principal place of residence.

Section 58.1-3219.5(B) expressly provides that “[t]he surviving spouse of a veteran eligible for the exemption . . . shall also qualify for the exemption, *so long as the death of the veteran occurs on or after January 1, 2011*” (emphasis added). Because statutes are to be interpreted according to their plain language,<sup>17</sup> I conclude that the exemption extends only to those spouses surviving a qualifying veteran who died on or after January 1, 2011, the effective date of the provision. Therefore, the surviving spouse of an otherwise qualifying veteran who dies before January 1, 2011 does not qualify for such an exemption, even when the surviving spouse has not remarried and continues to occupy the real property as his or her principal place of residence.

## **III. Whether §§ 58.1-3219.5 and 58.1-3219.6 Apply Retroactively**

You next ask whether the provisions of §§ 58.1-3219.5 and 58.1-3219.6 apply to all qualifying veterans who die before the effective date of these provisions and their spouses who have not remarried and continue to occupy the real property as their principal place of residence.

Sections 58.1-3219.5 and 58.1-3219.6 went into effect on April 6, 2011. As I have previously stated, “[r]etrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest.”<sup>18</sup> Sections 58.1-3219.5(A), (C), and 58.1-3219.6 expressly provide for retroactive application of these statutory provisions to January 1, 2011, so I must conclude that these provisions do not apply to veterans who died before January 1, 2011, or to their spouses. It is, therefore, necessary for a veteran to qualify for the exemption in the first instance in order for his or her spouse *also* to qualify for the exemption. For the veteran to qualify for the exemption in the first instance, he or she must be rated by the VA pursuant to federal law to have a 100 percent service-connected, permanent, and total disability, *and* occupy the real property as his or her principal place of residence. Obviously, a veteran cannot occupy real property as his or her principal place of residence if he or she dies before the effective date of the real property tax exemption.

## **IV. Meaning of “100 Percent Service-connected, Permanent, and Total Disability”**

You next ask whether Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6 apply to veterans rated by the VA with a total (“100 percent”) disability rating on the basis of individual unemployability due to service-connected disability (“TDIU” or “IU”). This rating relates to the inability to engage in “substantially gainful employment,” meaning a job that pays at least an amount equal to the annual poverty level set by the federal government.

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<sup>17</sup> See, e.g., *Signal Corp. v. Keane Fed. Sys., Inc.*, 265 Va. 38, 46-47; 574 S.E.2d 253, 257 (2003) (also noting that “[courts] are not are not free to add language, nor to ignore language, contained in statutes.”)

<sup>18</sup> *Duffy*, 187 Va. at 419, 46 S.E.2d at 576 (citing *Whitlock v. Hawkins*, 105 Va. 242, 249, 53 S.E. 401, 403 (1906)).

The exemption is dependent on a rating by the VA, or its successor agency, indicating that, under federal law, a veteran has a 100 percent service-connected, permanent, and total disability. The constitutional amendment requires the General Assembly to grant the exemption from taxation on the real property "of any veteran who has been rated by the U.S. Department of Veterans Affairs or its successor agency pursuant to federal law to have a 100 percent service-connected, permanent, and total disability." Section 58.1-3219.5 contains the same language. The tax exemption is tethered to the VA's rating system.

The VA Schedule for Rating Disabilities<sup>19</sup> comprises ten grades of disability that are based on the average impairment of a veteran's occupational earning capacity.<sup>20</sup> Under the rating schedule, the highest grade of disability is 100 percent, which means that a veteran is totally disabled. Under the provisions of 38 C.F.R. § 4.16, however, a total disability rating may also be assigned by the VA where a person who fails to meet the schedular rating percentage is, nevertheless, unable to secure a substantially gainful occupation.<sup>21</sup> TDIU ratings consider the effect that service-connected disabilities have on a particular veteran's ability to work. Therefore, a total rating based on TDIU is more individualized than a schedular rating, which is based on the average impairment of earnings. In the case of *Norris v. West*,<sup>22</sup> the U.S. Court of Appeals for Veterans Claims found that a "claim for TDIU is based on an acknowledgement that even though a rating less than 100% under the rating schedule may be correct, objectively, there are subjective factors that may permit *assigning a 100% rating* to a particular veteran under particular facts."<sup>23</sup> Therefore, a determination of the veteran's entitlement to TDIU is considered in the context of the individual veteran's capabilities regardless of whether an average person would be rendered unemployable under the same circumstances.

Given the VA policy providing that "all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled[,]"<sup>24</sup> receiving a TDIU rating is simply "*an alternative way to obtain a total disability rating without being rated 100% disabled under the Rating Schedule.*"<sup>25</sup> Furthermore, the VA regulations provide that "[a]ll veterans who are basically eligible and who are unable to secure and follow a substantially gainful occupation by reasons of disabilities which are likely to be permanent shall be rated as permanently and totally disabled."<sup>26</sup> Accordingly, I conclude that the tax exemption extends to veterans rated by the VA with a total ("100 percent") disability rating on the basis of individual unemployability due to service-connected disability ("TDIU" or "IU").

It could be argued that the provisions of 38 C.F.R. § 4.16 apply only to total disability determinations based on the rating schedule. Article X, § 6-A to the Constitution and §§ 58.1-3219.5 and 58.1-3219.6, however, do not indicate for what reasons the 100 percent disability rating must be incurred

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<sup>19</sup> See 38 C.F.R. pt. 4 (2010).

<sup>20</sup> See 38 C.F.R. §§ 4.15, 4.25 (2010).

<sup>21</sup> See 38 C.F.R. § 4.16(a) (2010).

<sup>22</sup> 12 Vet. App. 413 (1999).

<sup>23</sup> *Id.* at 421 (quoting *Parker v. Brown*, 7 Vet. App. 116, 118 (1994)) (emphasis added).

<sup>24</sup> 38 C.F.R. § 4.16(b).

<sup>25</sup> 12 Vet App. at 420-21 (emphasis added).

<sup>26</sup> See 38 C.F.R. § 4.17 (2010).

other than that it must be service connected. Therefore, if a veteran receives a 100 percent service-connected, permanent, and total disability rating from the VA for any reason, the tax exemption will apply.<sup>27</sup>

#### **V. Responsibility for Interpretation and Implementation**

You next ask which official in the Commonwealth is responsible for interpreting and implementing the provisions of §§ 58.1-3219.5 and 58.1-3219.6 that execute the provisions of Article X, § 6-A.

The duties of commissioners of the revenue are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2. Section 58.1-3107 provides that the local commissioner of the revenue “shall obtain . . . tax returns from every taxpayer within his jurisdiction who is liable . . . to file such return with him for all taxes assessed by his office.” It is generally the duty of the commissioner of the revenue to assess property taxes.<sup>28</sup>

I am, therefore, of the opinion that the commissioner of the revenue, or local official performing the duties of a commissioner of the revenue, is the correct official in the Commonwealth with responsibility for interpreting and implementing the provisions of §§ 58.1-3219.5 and 58.1-3219.6 that execute the provisions of Article X, § 6-A.

#### **VI. Ability of General Assembly to Pass Legislation Regarding Administration of Tax Exemption**

You next ask whether the General Assembly may enact legislation that authorizes the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption to include, but not be limited to, providing written guidance to the veterans residing in the Commonwealth, responding to requests for information regarding eligibility from veterans residing in the Commonwealth, and interpreting for the Commonwealth’s veterans the provisions of Article X, § 6-A of the Constitution and §§ 58.1-3219.5 and 58.1-3219.6.

The Constitution does not grant power to the General Assembly; it only restricts power “otherwise practically unlimited.”<sup>29</sup> Accordingly, “the General Assembly may enact any law not prohibited by the Constitution.”<sup>30</sup> Because no constitutional provision precludes such legislation, I conclude that the General Assembly authorize the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption to include, but not be limited to, providing written guidance to the veterans residing in the Commonwealth, responding to requests for information regarding eligibility from veterans residing in the Commonwealth, and

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<sup>27</sup> I note that other states’ Attorneys General have come to the same conclusion with respect to similar statutes. See 1976 Op. Md. Att’y Gen. 836; 2009 Op. Ark. Att’y Gen. No. 2009-054.

<sup>28</sup> A prior Opinion of this Office concludes that it is the duty of the commissioner of the revenue to assess property taxes. 1982-83 Op. Va. Att’y Gen. 518.

<sup>29</sup> *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966); see also *Terry v. Mazur*, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987).

<sup>30</sup> *Id.* (citations omitted).

interpreting the provisions of Article X, § 6-A of the Constitution and §§ 58.1-3219.5 and 58.1-3219.6 for the veterans of the Commonwealth.<sup>31</sup>

## **VII. The General Assembly's Authority to Restrict Tax Exemption to Land Not Exceeding One Acre in Size**

You note that § 58.1-3219.5(C) provides, in part, that “[a] county, city, or town shall provide for the exemption from real property taxes the qualifying dwelling pursuant to this section, and shall provide for the exemption from real property taxes the land, not exceeding one acre, upon which it is situated.” You inquire regarding the authority of the General Assembly to impose the one-acre restriction.

The General Assembly of Virginia has plenary powers and may enact any law not prohibited by the United States Constitution or the Virginia Constitution.<sup>32</sup>

Article X, § 6-A requires the General Assembly to enact a general law exempting the real property used by a qualifying veteran and spouse “as his or her principal place of residence.” The General Assembly did so by enacting § 58.1-3219.5(C) that requires a county, city or town to provide the real estate tax exemption for “the land, not exceeding one acre, upon which [the qualifying dwelling] is situated.” The General Assembly further provided that, if a county, city, or town “provides for an exemption from or deferral of real property taxes of more than one acre of land [with regard to exemptions for the elderly or handicapped as authorized by Article 2 of Chapter 32], then the county, city, or town shall also provide an exemption for the same number of acres” pursuant to § 58.1-3219.5.<sup>33</sup> The General Assembly is clearly empowered to enact § 58.1-3219.5(C), and no provision of the Constitution prohibits enactment of an acreage limitation. In fact, Article X, § 6-A expressly grants to the General Assembly the authority to prescribe in general law the “restrictions and conditions” for the disabled veteran real property tax exemption. As noted above, Article X, § 6-A was not self-executing; the amendment required further action by the General Assembly to implement the exemption and to establish the restrictions and conditions for the same by general law.<sup>34</sup> Accordingly, it is my opinion that the General Assembly is authorized to limit the tax exemption for the land to one acre.

## **VIII. Meaning of “Real Property”**

Within the context of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6, you ask for a definition of the term “real property” and whether such term includes just the dwelling on the land occupied by the veteran, or includes both the dwelling and the land.

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<sup>31</sup> I note, however, that the General Assembly may not authorize the VDVS to expand the scope of the exemption beyond the limits established by the constitutional amendment.

<sup>32</sup> *City of Portsmouth v. City of Chesapeake*, 205 Va. 259, 264, 136 S.E.2d 817, 822 (1964); *Ry. Express Agency, Inc. v. Commonwealth*, 199 Va. 589, 593, 100 S.E.2d 785, 788 (1957), *aff'd*, 358 U.S. 434 (1959); *Sprvrs. of Cumberland Cnty. v. Randolph*, 89 Va. 614, 619, 16 S.E. 722, 723 (1893).

<sup>33</sup> As stated in the case of *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912), while the word “shall” is primarily mandatory in effect, and “may” is primarily permissive in effect, “courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe “may” and “shall” as permissive or mandatory in accordance with the subject matter and context.”

<sup>34</sup> See *supra* note 12 and accompanying text.

The General Assembly did not define the term “real property” in §§ 58.1-3219.5 and 58.1-3219.6. Therefore, unless a contrary legislative intent is manifest, words used in a statute must be given their common, ordinary, and accepted meanings in use at the time of the statute.<sup>35</sup> The term “real property” is generally defined to mean: “Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements).”<sup>36</sup> It includes land and things permanently attached to the land, such as trees, buildings, and stationary mobile homes.<sup>37</sup>

Therefore, I am of the opinion that the term “real property” in Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6 includes both the land and dwelling occupied by the veteran.

#### **IX. Whether Tax Exemption is a “Program”**

You next ask whether the tax exemption created by Article X, § 6-A, implemented by §§ 58.1-3219.5 and 58.1-3219.6, is a “program” within the meaning of § 2.2-2001(A) and (C).

Chapter 20 of Title 2.2, §§ 2.2-2000 through 2.2-2004.1, details the statutory authority of the VDVS. Section 2.2-2001 contains all of the administrative authority of VDVS to act. Specifically, § 2.2-2001(A) provides that

The Department shall be responsible for the establishment, operation, administration, and maintenance of offices and programs related to services for Virginia-domiciled veterans of the armed forces of the United States and their eligible spouses, orphans, and dependents. Such services shall include, but not be limited to, benefits claims processing and all medical care centers and cemeteries for veterans owned and operated by the Commonwealth.

Additionally, § 2.2-2001(C) provides:

The Department shall establish guidelines for the determination of eligibility for Virginia-domiciled veterans and their spouses, orphans, and dependents for participation in programs and benefits administered by the Department.

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<sup>35</sup>See *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980) (“In the absence of a statutory definition . . . , a statutory term is given its ordinary meaning, given the context in which it is used”); *Op. Va. Att’y Gen.*: 1995 at 289, 290; 1991 at 296, 298; 1990 at 233, 234.

<sup>36</sup>BLACK’S LAW DICTIONARY 1337 (9th ed. 2009).

<sup>37</sup>I, however, wish to note that prior opinions of the Attorney General conclude that manufactured homes should be classified and taxed as real or personal property, depending on how the common law doctrine of fixtures applies to the facts and circumstances of each case. See *Op. Va. Att’y Gen.*: 2001 at 197, 198; 1987-88 at 576, 577; 1985-86 at 300, 301; 1981-82 at 368, 369; 1977-78 at 427, 428. The three tests applied by the Supreme Court of Virginia in determining whether an item of personal property placed upon realty becomes a fixture are: “(1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of the parties.” *Transcon. Gas Pipe Line Corp. v. Prince William Cnty.*, 210 Va. 550, 555, 172 S.E.2d 757, 761-62 (1970).

The General Assembly does not define the term “programs” as it is used in § 2.2-2001(A). Therefore, the word must be accorded its ordinary meaning.<sup>38</sup> The word “program” is generally defined as “a plan of procedure: a schedule or system under which action may be taken toward a desired goal.”<sup>39</sup>

Neither the voter approval of Article X, § 6-A on November 2, 2010, nor the enactment of the legislation providing for the real property tax exemption constitutes a “program” as that word is used in § 2.2-2001(A). In addition, the amendment and subsequent legislation are clearly not programs or benefits under § 2.2-2001(C).

After the ballot question passed, the General Assembly enacted §§ 58.1-3219.5 and 58.1-3219.6, which do not direct or authorize the VDVS to interpret the provisions. Rather, § 58.1-3219.5(C) requires a county, city or town to provide for the exemption. Furthermore, § 58.1-3219.6 requires that one claiming the exemption file with the commissioner of the revenue of the county, city or town, forms supplied by the locality containing certain required information and documentation from the U.S. Department of Veterans Affairs reflecting that the veteran has a 100 percent service-connected, permanent, and total disability.

I am, therefore, of the opinion that the tax exemption created by Article X, § 6-A, implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not a “program” within the meaning of § 2.2-2001(A) and (C).

**X. Whether a Legal Means Exists to Extend Tax Exemption to Surviving Spouse of Veteran who Died Prior to January 1, 2011**

Another question you ask is whether a legal means exists by which to extend this tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service-connected, permanent, and total disability but died before the January 1, 2011, effective date of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6.

The Constitution of Virginia requires the taxation of all property, except as specifically excluded therein.<sup>40</sup> Therefore, although the General Assembly generally “possesses all legislative power not prohibited to it,”<sup>41</sup> the legislature may not adopt a measure providing for tax exemptions unless expressly authorized to do so by the Constitution. In the absence of the amendment adding Article X, § 6-A, therefore, the General Assembly would have been precluded from providing the real estate tax exemption contained in § 58.1-3219.5. As such, Article X, § 6-A provides an exception to the requirement that all property be taxed.

This exception, however, is confined to the express provisions of the amendment. Article X, § 6-A confers authority upon the General Assembly to extend the real estate tax provision to surviving spouses of eligible veterans. To be eligible, the veteran must “occup[y] the real property as his or her principal place of residence.” Veterans who predecease the effective date of the statute are ineligible for

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<sup>38</sup> See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

<sup>39</sup> See *Winborne v. Virginia Lottery*, 278 Va. 142, 148, 677 S.E.2d 304, 306 (2009) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1812 (1993)).

<sup>40</sup> VA. CONST. art. X, § 1.

<sup>41</sup> *Sprvrs. of Cumberland Cnty. v. Randolph*, 89 Va. 614, 619, 16 S.E. 722, 723 (1893).

the tax relief because they cannot “occupy” the property, so in turn, their surviving spouses also are ineligible.

Article X, § 6-A does not permit the legislature to enact any additional legislation to further exempt surviving spouses of veterans who passed away prior to the effective date. Therefore, it is my opinion that there is no way, short of another constitutional amendment, to provide to the surviving spouse of such deceased veterans the real property tax exemption.

#### **XI. Whether Tax Exemption Applies to Real Property Titled in a Trust**

Another question relating to the tax exemption is whether these provisions apply to real property that is i) titled in a revocable inter vivos trust with the spouse; ii) titled in a revocable inter vivos trust with other(s) than the spouse; or iii) titled in an irrevocable trust.

Under Virginia law, a person (the settlor) may create a trust by transferring property to another person as trustee.<sup>42</sup> When real property is involved, the transfer typically takes the form of a recorded deed of conveyance to the trustee. In the context of local property taxes, the Code provides that “[i]f the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee, if there is any in this Commonwealth, and if there is no trustee in this Commonwealth, it shall be listed by and taxed to the beneficiary.”<sup>43</sup>

Prior opinions of the Attorney General have strictly construed eligibility for the property tax exemption allowed under Article X, § 6(b) and § 58.1-3210 for certain persons who are at least sixty-five years of age or permanently and totally disabled when ownership of the property is not directly or solely held by the person who otherwise might qualify for the tax benefit.<sup>44</sup> It is worth noting that the tax exemption of Article X, § 6-A uses broader language than that found in Article X, § 6(b). The former applies the exemption to “the real property, including the joint real property of husband and wife, of any veteran” whereas the latter applies its exemption to “real estate and personal property . . . owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age.” [Emphasis added.] This distinction in language, however, at most leaves some ambiguity as to the question whether a property held in trust might qualify for the Article X, § 6-A exemption.

As the Supreme Court of Virginia has articulated, however:

The Constitution of Virginia, as revised in 1971, provides that “[e]xemptions of property from taxation . . . shall be strictly construed.” This rule of strict construction stems from the Commonwealth's announced policy “to distribute the tax burden uniformly and upon all property.” Therefore, statutes granting tax exemptions are construed strictly against the taxpayer, and “[w]hen a tax statute is susceptible of two constructions, one granting an exemption and the other not granting it, courts adopt the construction which denies

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<sup>42</sup> See VA. CODE ANN. § 55-544.01 (Supp. 2011).

<sup>43</sup> VA. CODE ANN. § 58.1-3015 (2009).

<sup>44</sup> See 2007 Op. Va. Att’y Gen. 129, 132 (exemption not available when children, siblings or friends of a qualifying individual jointly own the real estate with the same but do not themselves qualify for the tax benefit); 1999 Op. Va. Att’y Gen. 205, 206 (exemption not available to individual proprietary lessee when a real estate cooperative association owns the real estate in question).

the exemption.” Indeed, “where there is any doubt, the doubt is resolved against the one claiming exemption,” and “to doubt an exemption is to deny it.”<sup>45]</sup>

In light of this rule of strict construction, such an ambiguity will be resolved against eligibility, and the outcome is the same.

In pertinent part § 58.1-3219.5(A) provides:

[T]he General Assembly hereby exempts from taxation the real property, including the joint real property of husband and wife, of any veteran who has been rated . . . pursuant to federal law to have a 100 percent service-connected, permanent, and total disability, and who occupies the real property as his principal place of residence.

Section 58.1-1 defines a “taxpayer” as “every person, corporation, partnership, organization, *trust* or estate subject to taxation under the laws of this Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth.” (Emphasis added.) Section 58.1-3281 makes it clear that the “taxpayer” assessed with real property taxes is the person or entity that owned the property on January 1 of the tax year.

Consequently, the specific exemption created by Article X, § 6-A and implemented by §§ 58.1-3219.5 and 58.1-3219.6 extends to the “taxpayer” assessed with real property taxes who is also the person or entity that owned the property on January 1 of the tax year. Article X, § 6-A includes in this exemption “joint real property of husband and wife.” If this exemption had been intended to apply to situations where real property is owned by a revocable inter vivos trust with a spouse, a revocable inter vivos trust with other(s) than the spouse, or an irrevocable trust, the General Assembly would have so provided in the question submitted to the voters on November 2, 2010, just as it did for joint ownership by husbands and wives. The statutory maxim of *expressio unius est exclusio alterius* “provides that mention of a specific item in a statute implies that omitted terms were not intended to be included within the scope of the statute.”<sup>46</sup>

Therefore, I am of the opinion that the relief afforded pursuant to Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not available when the real estate is i) titled in a revocable inter vivos trust with the spouse; ii) titled in a revocable inter vivos trust with other(s) than the spouse; or iii) titled in an irrevocable trust. As with extending the exemption to spouses who survive veterans who died before the effective date, another constitutional amendment would be needed to provide tax relief for properties held in trust.

## **XII. Whether Tax Exemption is Exclusive to the Property Owned by the Qualifying Veteran or Whether Exemption Follows the Spouse if He or She Relocates**

You relate a concern regarding a spouse’s eligibility for the property tax exemption subsequent to the death of the veteran who qualified for the exemption. You specifically inquire whether the real property tax exemption created by Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6,

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<sup>45</sup> Commonwealth v. Wellmore Coal Corp., 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984) (alteration in original) (internal citations omitted).

<sup>46</sup> Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

is exclusive to the property the veteran occupied at the time of death or whether the exemption follows the spouse if he or she relocates.

You seek explanation of whether the word "property" in this context refers to the *specific* property which was initially granted the property tax exemption or is it defined as a general term used to describe any principal place of residence owned by the spouse. Section 58.1-3219.5(B) provides that a veteran's spouse remains eligible provided that "the death of the veteran occurs on or after January 1, 2011, the surviving spouse does not remarry, and the surviving spouse continues to occupy the real property as his principal place of residence."

The words "continues to occupy the real property" must be strictly construed.<sup>47</sup> When the surviving spouse of a veteran who qualified for the tax exemption moves to a new property, she does not "continue[] to occupy the real property" that was exempt.

Therefore, I must also conclude that the real property tax exemption created by Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is exclusive to the property the veteran qualified for and occupied as his or her principal place of residence at the time of death, and does not follow the spouse if he or she decides to relocate.

#### Conclusion

Accordingly, it is my opinion that:

1. The effective date of Article X, § 6-A as approved by the voters on November 2, 2010, is January 1, 2011. The effective date of §§ 58.1-3219.5 and 58.1-3219.6 is April 6, 2011, and the legal effect of the statutory provisions must be applied retroactively to January 1, 2011;
2. The surviving spouse of a veteran who dies before the January 1, 2011, effective date of the tax exemption does not qualify for this exemption;
3. The provisions of §§ 58.1-3219.5 and 58.1-3219.6 do not apply to either veterans who die before the effective date of these provisions or their spouses who have not remarried and continue to occupy the real property as their principal place of residence;
4. The tax exemption applies to veterans rated by the VA with a total disability rating on the basis of individual unemployability due to a service-connected disability which rating revolves around the inability to engage in substantially gainful employment;
5. The commissioner of the revenue has the responsibility for interpreting and implementing §§ 58.1-3219.5 and 58.1-3219.6;
6. The General Assembly may enact legislation authorizing the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption;
7. The General Assembly has the authority to limit the tax break to land that does not exceed one acre;

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<sup>47</sup> VA. CONST. art. X, § 6(f).

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8. Within the context of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6, the definition of "real property" includes both the dwelling and the land;
9. The tax exemption is not a "program" within the meaning of § 2.2-2001(A) and (C);
10. There is no legal authority to provide the real property tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service connected, permanent, and total disability but died before January 1, 2011;
11. The tax relief under Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not available when the veteran has chosen to place title to the real estate in i) a revocable inter vivos trust with the spouse; ii) a revocable inter vivos trust with other(s) apart from the spouse; or iii) an irrevocable trust; and
12. The exemption is exclusive to the property for which the veteran qualified and occupied as his or her principal place of residence at the time of death, and does not follow the spouse if he or she relocates.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General