



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

September 20, 2013

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Larry W. Davis, Esquire  
County Attorney for the County of Albemarle  
401 McIntire Road, Suite 325  
Charlottesville, Virginia 22902-4596

Dear Mr. Davis:

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 three questions regarding the land use assessment and taxation of land that is subject to a perpetual conservation easement. Specifically, you ask whether perpetual conservation easements must satisfy the minimum acreage requirements of § 58.1-3233 in order to qualify for land use assessment and taxation under § 10.1-1011. You also ask whether land under a conservation easement must continue to meet the minimum acreage standards of § 58.1-3233 in order to annually qualify for land use assessment and taxation. Finally, you ask whether back taxes and roll-back taxes are required to be imposed to correct any erroneous under-assessment of non-qualifying property.

## Response

It is my opinion that, under § 10.1-1011, conservation easement land covered by the provisions of the statute must meet the minimum acreage requirement of § 58.1-3233 at the time the easement is dedicated, unless the easement was placed on the property before the local land use assessment ordinance was adopted. It is further my opinion that subsequent changes in acreage or use that are permitted under the conservation easement would not affect the continuing eligibility of the land for use assessment under § 10.1-1011(C). In addition, it is my opinion that no back taxes, including the roll-back tax, may be imposed when conservation easement land, through apparent unpermitted use or development, no longer appears to qualify for use assessment under § 10.1-1011(C). Finally, however, it is my opinion that upon the initiation of appropriate proceedings and the making of factual findings respecting the land and easement in question, such subsequent violations of the conservation easement could render the land ineligible for use assessment under § 10.1-1011(C).

## Background

You relate that, pursuant to § 58.1-3231, Albemarle County has adopted an ordinance to provide for the use assessment and taxation of "real estate devoted to open-space use," as that phrase is defined in § 58.1-3230. Under that ordinance, Albemarle County has set the minimum acreage requirement for real

estate devoted to open-space at twenty (20) acres.<sup>1</sup> You also relate that it is common for conservation easements to allow for limited subdivision of lots and that, once that right is exercised, the newly-created parcels often will not meet the minimum lot size for land use assessment and taxation under the Albemarle County ordinance.

Based on your reading of applicable law, it is your opinion that land under a perpetual conservation easement must meet the minimum acreage requirements of the Albemarle County ordinance at the time the easement is dedicated and in the years thereafter. It is also your opinion that the Finance Director of Albemarle County is required to correct any under-assessment of non-qualifying real estate pursuant to §§ 58.1-3980 and 58.1-3981.

### **Applicable Law and Discussion**

Your inquiry involves the application of and interplay among several statutory provisions relating to the special taxation of land for conservation purposes. Several basic principles of statutory construction apply to interpretation of those statutes with respect to the questions you pose. First, the plain meaning of the language used in a statute determines legislative intent unless a literal construction would lead to a manifest absurdity.<sup>2</sup> Virginia courts “determine [legislative] intent from the words contained in the statute”<sup>3</sup> and are not free to add or ignore language contained therein.<sup>4</sup> Because statutes are “not to be construed by singling out a particular phrase,” but must be construed as a whole,<sup>5</sup> they must be construed to give meaning to all of the words enacted by the legislature, and interpretations that render statutory language superfluous are to be avoided.<sup>6</sup> Additionally, when two statutes relate to the same or closely connected subjects they “must be considered together in construing their various material provisions,”<sup>7</sup> and “in cases of apparent conflict, they should be construed, if reasonably possible, in such manner that both may stand together.”<sup>8</sup> Accordingly, “when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.”<sup>9</sup>

The statutory provisions implicated by your inquiry are those contained in Chapter 32, Article 4 and Chapter 32, Article 5 of Subtitle III of Title 58.1, which generally govern special assessments of real estate for land preservation, and § 10.1-1011 in Chapter 10.1, the “Virginia Conservation Easement Act,” of Title 10.1, which more specifically relates to taxation of land subject to a perpetual conservation

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<sup>1</sup> COUNTY OF ALBEMARLE, VA., CODE § 15-804.

<sup>2</sup> *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

<sup>3</sup> *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001)); *Thomas v. Commonwealth*, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

<sup>4</sup> *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007); *see also Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (“We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990))).

<sup>5</sup> *Va. Elec. & Power Co. v. Citizens for Safe Power*, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981).

<sup>6</sup> *See Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004).

<sup>7</sup> *See, e.g., Colbert v. Commonwealth*, 47 Va. App. 390, 395, 624 S.E.2d 108, 110 (2006).

<sup>8</sup> 1977-78 Op. Va. Att’y Gen. 351, 353.

<sup>9</sup> *Va. Nat'l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979).

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<sup>8</sup> 1977-78 Op. Va. Att’y Gen. 351, 353.

<sup>9</sup> *Va. Nat'l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979).

easement.<sup>10</sup> Pursuant to § 58.1-3231, any local government that has adopted a land use plan may adopt an ordinance to provide for a special land use assessment of land that has been designated as agricultural, horticultural, forest, or open-space.<sup>11</sup> Prior to assessing any parcel of real estate under a land use ordinance, the local taxing official is required to make several factual determinations. Specifically, § 58.1-3233 requires the tax assessor to

1. Determine that the real estate meets the criteria set forth in § 58.1-3230 [i.e., agricultural, horticultural, forest and open-space] and the standards prescribed thereunder to qualify for one of the classifications set forth therein . . . .
2. Determine further that real estate devoted solely to . . . (iii) open-space use consists of a minimum of five acres or such greater minimum acreage as may be prescribed by local ordinance . . . .
3. Determine further that real estate devoted to open-space use is . . . (ii) 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 . . . .<sup>[12]</sup>

With respect to the taxation of land under perpetual easement for open-space preservation, § 10.1-1011(C) provides:

[L]and which is (i) subject to a perpetual conservation easement held pursuant to this chapter [the Virginia Conservation Easement Act] or the Open-Space Land Act (§ 10.1-1700 et seq.), (ii) devoted to open-space use as defined in § 58.1-3230, and (iii) in any county, city or town which has provided for land use assessment and taxation of any class of land within its jurisdiction pursuant to § 58.1-3231 or § 58.1-3232, shall be assessed and taxed at the use value for open space, if the land otherwise qualifies for such assessment at the time the easement is dedicated. If an easement is in existence at the time the locality enacts land use assessment, the easement shall qualify for such assessment. Once the land with the easement qualifies for land use assessment, it shall continue to qualify so long as the locality has land use assessment.

First, you specifically seek the proper construction of the phrase “if the land otherwise qualifies” as used in § 10.1-1011(C). You suggest that this language requires land under perpetual conservation easement<sup>13</sup> to meet the minimum acreage requirements of § 58.1-3233. In support of this conclusion, you cite § 58.1-3233(2), which sets out minimum acreage standards for the open-space use classification, and § 10.1-1011(C), which provides that land under perpetual conservation easement is eligible for land use assessment if it is “devoted to open-space use as defined in § 58.1-3230” and “if the land *otherwise* qualifies for such assessment at the time the easement is dedicated” (emphasis added). You conclude that the phrase “otherwise qualifies for such assessment” must be construed to refer to the minimum acreage

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<sup>10</sup> This Opinion is limited to interpreting the interplay between the statutes within those particular Chapters in the context of your specific inquiries.

<sup>11</sup> Section 58.1-3230 designates four classifications of real estate that qualify for land use assessment based on the use value of such real estate: agricultural, horticultural, forest, and open-space use.

<sup>12</sup> VA. CODE ANN. § 58.1-3233 (2009).

<sup>13</sup> Under § 10.1-1011(C), both “open-space easements” as defined in § 10.1-1700 and “conservation easements” as defined in § 10.1-1009 qualify for land use assessment if such easements meet the requirements of § 10.1-1011(C). Therefore, for purposes of this opinion, I make no distinction between conservation easements created under the Open-Space Land Act, VA. CODE ANN. §§ 10.1-1700 through 10.1-1705 (2012), or the Virginia Conservation Easement Act, VA. CODE ANN. §§ 10.1-1009 through 10.1-1016 (2012), unless specifically noted.

requirements of § 58.1-3233, this being the only potential object of the phrase “otherwise qualifies.” I agree with such reasoning and that specific conclusion.

In order to give meaning to the phrase “otherwise qualifies” and thereby avoid rendering it superfluous, the phrase must refer to criteria outside of § 10.1-1011(C).<sup>14</sup> Furthermore, because both § 10.1-1011(C) and § 58.1-3233 relate to a closely connected subject – qualification for use assessment of open-space land – it is appropriate to consider them together. Accordingly, the phrase “otherwise qualifies” in § 10.1-1011(C) must be understood as a reference to other provisions relating to the same or closely connected subjects but found elsewhere in the Code. In this case, those related provisions are found in § 58.1-3233; however, because the minimum acreage requirement of § 58.1-3233 stands alone as the only requirement supplemental to those already provided for and contained in § 10.1-1011(C), it is the only possible object of the referential phrase “otherwise qualifies.”

With respect to the issue of changes in use or acreage authorized by the easement, I understand the phrase “at the time the easement is dedicated” in § 10.1-1011(C) to be clear, unambiguous and susceptible of only one interpretation. It operates to fix the time of qualification for use assessment to the time at which the easement is dedicated. I note that in the case of a perpetual conservation easement meeting the requirements of § 10.1-1011(C), the purpose of such an easement includes the “retaining or protecting the natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use.”<sup>15</sup> As a general matter, to achieve such conservation purposes in perpetuity, the landowner is required permanently to give up the right to use or develop the land in a manner that would be inconsistent with the conservation purposes and values of the easement.

Consequently, it may fairly be concluded that any rights of the grantor reserved at dedication have been determined by the easement holder to be consistent with the conservation purposes and values of the easement. Later changes in use or development that are permitted under the easement already have been determined to be consistent with the conservation purposes of the easement and would not affect the land’s continuing eligibility for land use assessment under § 10.1-1011(C). It follows, therefore, that subsequent changes in acreage, if they result from a division permitted by the easement, would not affect the land’s continuing eligibility for land use assessment.

Furthermore, § 10.1-1011(C) provides that once the land with the easement is qualified, that qualification shall continue so long as the locality has land use assessment. This sentence in the statute is also clear, unambiguous and susceptible of only one interpretation. So long as a locality has a land use assessment program, property under an open space easement will qualify for that program. The plain meaning of the statutory language controls. That meaning cannot be expanded to add a post-dedication requirement of continuing qualification.<sup>16</sup>

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<sup>14</sup> A prior Opinion of this Office concluded that the phrase “otherwise qualifies for such assessment,” as used in § 10.1-1011(C), “means that the land must be devoted to open space as defined in § 58.1-3230.” 1993 Op. Va. Att’y Gen. 7, 12. As you point out in your request, that Opinion does not specifically address acreage requirements. The Opinion’s reference to open space use was simply to make the point that “[n]ot all land that is subject to an easement is assessed at open-space values regardless of its use.” *Id.* at 12. As such, this Opinion is hereby distinguished and clarified with respect to the meaning of the phrase “otherwise qualifies” as used in §10.1-1011(C).

<sup>15</sup> Section 10.1-1009 (2012) (defining conservation easement); *see also* § 10.1-1700 (2012) (defining open-space easement).

<sup>16</sup> I note the possibility that a parcel of land could qualify initially and upon a subsequent permitted division, one or both of the resulting parcels could fall below the minimum acreage requirements. I also note that a conservation easement property consisting of less than the minimum acreage could qualify if it were in existence at the time of

This conclusion finds support in an earlier Opinion of this Office that considered the relationship between temporary land use assessments and permanent open space easements:

By its plain language, § 10.1-1011 now requires lands permanently reserved as open space - under conservation or open-space easements meeting the requirements of § 58.1-3230 - to be assessed and taxed in the same way as lands that are being so used temporarily under a local use value assessment program . . . . Such a permanent easement affects the value of the ownership interest retained by the landowner, and the local tax assessing officer must take into account the effect of that change, as required by §10.1-1011.<sup>[17]</sup>

Turning to your final question, § 58.1-3237 provides that real estate qualifying for land use becomes subject to roll-back taxes when the use qualifying the subject real estate “changes to a nonqualifying use,” and liability for such taxes attaches “when [the] change in use occurs.” Nonetheless, as a previous Opinion of this Office noted,

Section 10.1-1011 does not subject such perpetual conservation or open-space easements to the same application, revalidation, roll-back and other administrative requirements that apply to other property under a local use value assessment program.<sup>[18]</sup>

In the case of a perpetual conservation easement, such land qualifies for land use assessment under § 10.1-1011 based on the easement being perpetual and in furtherance of open-space preservation. If unpermitted use or development were to occur and the land owner fails to cure the violation after a reasonable amount of time, this could constitute a violation of the easement. Both the Conservation Easement Act<sup>19</sup> and the Open-Space Land Act<sup>20</sup> specify which parties have the right to enforce the easements entered into pursuant to those laws and how such easements may be terminated. Those parties have the authority to challenge whether the property under easement is being managed appropriately. That issue is not left open for ancillary challenges through other mechanisms, such as the land use assessment program. This provides clarity and certainty to those who participate in the easement programs and is consistent with the previously stated principle that specific statutes take priority over more general statutes.<sup>21</sup> Until such time as the holder of the easement takes action to terminate the easement in accordance with the law or the express terms of the easement - or otherwise seeks a remedy pursuant to an enforcement action that would authorize a result to the contrary - the clear mandate of the law would not allow a change in the taxable status of the property.<sup>22</sup>

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Notwithstanding the somewhat incongruent results regarding acreage requirements that may occur in the implementation of this statute, it must be assumed that the General Assembly chose its words with care, and that the intent of the legislature must be ascertained by what the statute says and not by what might have been said to achieve a particular legislative end. *Commonwealth v. Amerson*, 281 Va. 414, 421, 706 S.E.2d 879, 884 (2011) (quoting *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 469, 698 S.E.2d 900, 902 (2010)); *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004).

<sup>17</sup>1993 Op. Va. Att’y Gen. 7, 11.

<sup>18</sup> *Id.*

<sup>19</sup> Sections 10.1-1009 through 10.1-1016.

<sup>20</sup> Sections 10.1-1700 through 10.1-1705.

<sup>21</sup> *Va. Nat’l Bank*, 220 Va. at 340, 257 S.E.2d at 870.

<sup>22</sup> See § 10.1-1011(C) (2012) (“[L]and which is (i) subject to a perpetual conservation easement . . . , (ii) devoted to open-space use as defined in § 58.1-3230, and (iii) in any county, city or town which has provided for land use assessment and taxation of any class of land within its jurisdiction . . . shall be assessed and taxed at the use value

A prior Opinion of the Attorney General stated that, "lack of enforcement of [an] easement ultimately would return the property to full fair market value assessment."<sup>23</sup> That Opinion, however, did not address the mechanism by which such a return to fair market value would be effected. It is my opinion that such a transition ordinarily could not occur absent appropriate action by one authorized under the easement or the statutes to enforce the terms of the easement. What form such an action might take would depend on the specific law under which the easement was granted, the specific terms of the easement and the particular facts in the case. Such determinations are questions of fact and would have to be made by the authorized taxing official or trier of fact, if contested or litigated, based on all the relevant facts.<sup>24</sup>

### Conclusion

Accordingly, it is my opinion that, under § 10.1-1011, conservation easement land covered by the provisions of the statute must meet the minimum acreage requirement of § 58.1-3233 at the time the easement is dedicated, unless the easement was placed on the property before the local land use assessment ordinance was adopted. It is further my opinion that subsequent changes in acreage or use that are permitted under the conservation easement would not affect the continuing eligibility of the land for use assessment under § 10.1-1011(C). In addition, it is my opinion that no back taxes, including the roll-back tax, may be imposed when conservation easement land, through apparent unpermitted use or development, no longer appears to qualify for use assessment under § 10.1-1011(C). Finally, however, it is my opinion that upon the initiation of appropriate proceedings and the making of factual findings respecting the land and easement in question, such subsequent violations of the conservation easement could render the land ineligible for use assessment under § 10.1-1011(C).

With kindest regards, I am,

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is written in a cursive style with a large "K" and "C".

Kenneth T. Cuccinelli, II  
Attorney General

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for open space . . . . Once the land with the easement qualifies for land use assessment, it shall continue to qualify so long as the locality has land use assessment.").

<sup>23</sup> 1993 Op. Va. Att'y Gen. 7, 12 n.3.

<sup>24</sup> 1997 Op. Va. Att'y Gen 195, 196; 1996 Op. Va. Att'y. Gen. 207, 208.