



# COMMONWEALTH of VIRGINIA

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May 17, 2013

The Honorable H. Roger Zurn, Jr.  
Treasurer, County of Loudoun  
Post Office Box 347  
Leesburg, Virginia 20178

Dear Mr. Zurn:

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 present two related questions regarding the application of payments of delinquent local real estate taxes when a locality has established special tax districts (“Special Districts”) and/or community development authorities (“CDAs”) and such taxes accrue at the same time as general real estate taxes, thus becoming delinquent at the same time. You first ask whether payments must be applied first to the general real estate taxes or, alternatively, whether the Treasurer should apply payments ratably or pro-rata between the general taxes and the taxes for the Special Districts and/or the CDAs. You then ask, assuming that general real estate taxes have been paid, and taxes for more than one Special District and/or CDA have accrued at the same time and remain delinquent, whether the Treasurer should allocate payments pro-rata or ratably between the taxes for the Special Districts and/or the CDAs or whether there is there any way, absent a local ordinance, to determine priority between such Special Districts and/or CDAs for the payment of taxes that are equally delinquent.

## Response

It is my opinion that, because the Code does not distinguish between the source of taxing authority, with each of the presented taxes constituting an assessment against real estate, and because the Code does not otherwise provide for priority of liens based on delinquent payments of such assessed taxes, the Treasurer, in both of the scenarios you present, should apply any payment first to the most delinquent assessed taxes, and, second, ratably or pro-rata between such taxes when they have accrued at the same time.

## Applicable Law and Discussion

Section 58.1-3340 of the *Code of Virginia* provides that “[t]here shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance.”<sup>1</sup> This provision makes clear that any tax or levy assessed on a piece of real estate constitutes a lien against such property

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<sup>1</sup> VA. CODE ANN. § 58.1-3340 (2009 & Supp. 2012).

which must be paid before other liens or judgments, but it does not establish a priority amongst local taxes and levies that become delinquent at the same time.

In the situation you present, the taxes at issue, although established for distinct purposes,<sup>2</sup> are all “taxes and levies assessed” on real estate within the meaning of § 58.1-3340. Clearly, the general real estate tax levied pursuant to Chapter 32 of Title 58.1 is categorically such an assessment. Furthermore, a tax assessed by a Special District is likewise a tax on the real estate within such district. Specifically, sanitary districts are authorized to “levy and collect an annual tax upon all the property in such sanitary district subject to local taxation...,”<sup>3</sup> and service districts have the authority to “levy and collect an annual tax upon any property in such service district subject to local taxation...”<sup>4</sup> Finally, CDAs are authorized to “[r]equest annually that the locality levy and collect a special tax on taxable real property within the development authority’s jurisdiction to finance the services and facilities provided by the authority.”<sup>5</sup> Although the levies imposed by Special Districts and CDAs are in addition to, and not in lieu of, the general real estate tax, which is for the general support of the government,<sup>6</sup> it is my opinion that they constitute taxes upon real estate.

Section 58.1-3913 instructs that any payment of local levies received by the Treasurer is to be credited first against the most delinquent local account;<sup>7</sup> this foundational statutory directive remains in force. Nevertheless, this section does not provide further guidance for instances when there are numerous delinquent local accounts, all of which became delinquent at the same time. Because both the general real estate tax and taxes from Special Districts and CDAs are taxes on real estate that constitute first priority liens on such real estate, and without statutory guidance that one should take precedence over the other if they come due at the same time, I conclude that the Treasurer should apply the payment ratably or pro-rata between the general real estate tax and the taxes for the Special Districts and/or the CDAs.<sup>8</sup>

Similarly, in response to your second question, assuming general real estate taxes have been paid, and taxes for the Special Districts and/or the CDAs have accrued at the same time and remain delinquent,

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<sup>2</sup> Special District taxes can be used only to pay the enumerated expenses set forth in the authorizing statutes for such levies. *See* VA. CODE ANN. § 21-118(6) (2008) (authorizing sanitary districts to impose taxes “to pay, either in whole or in part, the expenses and charges incident to constructing, maintaining and operating water supply, sewerage, garbage removal and disposal, heat, light, fire-fighting equipment and power and gas systems and sidewalks for the use and benefit of the public in such sanitary district.”); VA. CODE ANN. § 15.2-2403(6) (2012) (authorizing taxation by service districts “to pay, either in whole or in part, the expenses and charges for providing the governmental services authorized by [applicable law] and for constructing, maintaining, and operating such facilities and equipment as may be necessary and desirable in connection therewith; however, such annual tax shall not be levied for or used to pay for schools, police, or general government services not authorized by this section, and the proceeds from such annual tax shall be so segregated as to enable the same to be expended in the district in which raised.”). Likewise, taxes assessed by CDAs can be used only to finance the services provided by the authority. Section 15.2-5158(A)(3) (2012).

<sup>3</sup> Section 21-118(6).

<sup>4</sup> Section 15.2-2403(6). *See also* 1994 Op. Va. Att’y Gen. 117, 120 (“Indisputably, however, a service district levy under § 15.1-1-18.2(C)(6) [predecessor statute] is ‘an annual tax upon...property in such service district.’”)

<sup>5</sup> Section 15.2-5158(A)(3).

<sup>6</sup> 1981-82 Op. Va. Att’y Gen. 385, 386. In your request, you asked that I review this prior Opinion in light of the issues you now raise. I find no inconsistency between the conclusions of this Opinion on the nature or priority of these taxes, and the conclusions expressed in the prior one.

<sup>7</sup> Section 58.1-3913 (2009); *See also* 1984-1985 Op. Va. Att’y Gen. 315, 316 (“As to priorities between tax liens of municipalities with concurrent taxing jurisdiction, i.e., town and county, ordinarily, where liens are given by statute the first in time takes precedence.”) (citing *Puryear v. Taylor*, 53 Va. (12 Gratt.) 401, 409 (1855)).

<sup>8</sup> This is, of course, assuming that there is no local ordinance providing otherwise. *See* § 58.1-3913.

the Treasurer should allocate payments pro-rata or ratably between the taxes for the Special Districts and/or the CDAs.<sup>9</sup>

### Conclusion

Accordingly, it is my opinion that, because the Code does not distinguish between the source of taxing authority, with each of the presented taxes constituting an assessment against real estate, and because the Code does not otherwise provide for priority of liens based on delinquent payments of such assessed taxes, the Treasurer, in both of the scenarios you present, should apply any payment first to the most delinquent assessed taxes, and, second, ratably or pro-rata between such taxes when they have accrued at the same time.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>9</sup> Again, this is absent a local ordinance establishing a different scheme of priority. *Id.*