



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable John T. Frey
Clerk, Circuit Court of Fairfax
Fairfax Circuit Court
4110 Chain Bridge Road
Fairfax, Virginia 22030

Dear Mr. Frey:

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

Issue Presented

You ask whether clerks of court should assess the regional congestion relief fee on real estate conveyance instruments based upon (i) the date of the transaction or (ii) the date of recordation.

Response

It is my opinion that clerks of court should assess the regional congestion relief fee on real estate conveyance instruments based upon the date of recordation.

Background

Your question pertains to the regional congestion relief fee adopted by the General Assembly in its most recent session.¹ You ask for clarification as to the assessment of such fee on the recordings of real estate conveyance instruments by the clerk of court.

You relate that an instruction distributed to clerks by the Office of the Executive Secretary, Supreme Court of Virginia, on June 21, 2013, stated that assessment of the fee should be based on the “‘date of the deed’ not the date of recordation.” Subsequently, on June 30, 2013, the Office of the Executive Secretary changed its position and directed clerks to assess the fee based on the date of the instrument’s recordation—not the date of deed. As a result of these conflicting instructions, you relate that some clerks “assessed the fee based upon the date of the deed and others followed the...directions to assess the fee based on the date of recordation.” You now seek clarification regarding whether the fee properly is to be assessed only on conveyance instruments dated on or after July 1, or, upon such instruments recorded on or after July 1, even if the underlying conveyance transaction occurred on an earlier date.

¹ 2013 Va. Acts ch. 766.

Applicable Law and Discussion

Chapter 766 of the 2013 Session of the General Assembly, codified at § 58.1-802.2 of the *Code of Virginia*, requires the imposition of a fee “on each deed, instrument, or writing by which lands, tenements, or other realty . . . is sold and is granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser . . .”² The statute became law on July 1, 2013,³ and applies to real estate transactions only in certain localities.⁴ As provided in § 58.1-802.2 of the *Code of Virginia*, the clerk of the court cannot record any deed, instrument, or writing without first certifying that the fee has been paid by the grantor.⁵

Although described in the text of the statute as a “regional congestion relief fee” and dedicated to fund transportation improvements, the fee is imposed and collected in the form of a recordation tax. For example, the statute establishing the fee is located within Chapter 8, Title 58.1 of the *Code of Virginia* (a chapter titled “State Recordation Tax”), and its language and form track that of the traditional state recordation tax.⁶ Furthermore, the regional congestion relief fee, like the state recordation tax, is payable by the grantor and collected by the clerk of court as a prerequisite to recordation.⁷

This Office has concluded and Virginia courts have held that recordation taxes are based upon the privilege of having access to the benefits of state recording and registration laws.⁸ In *Pocahontas Consol. Collieries Co., Inc. v. Commonwealth*, the Court stated that a recordation tax “is not a tax upon property, either within or out of the State, but a tax upon a civil privilege, that is, for the privilege of availing, upon the terms prescribed by statute, of the benefits and advantages of the registration laws of the State.”⁹

Thus, because the privilege of recordation is the manner by which the General Assembly chose to impose the fee and provide for its collection, it is my opinion that the fee should be assessed by clerks of court on real estate conveyance instruments based upon the date of their recordation. You will note that this conclusion is consistent with the correction notice sent to clerks of court from the Office of the Executive Secretary of the Supreme Court of Virginia.

² VA. CODE ANN. § 58.1-802.2 (Supp. 2013).

³ VA. CODE ANN. § 1-214(A) (2011).

⁴ Section 58.1-802.2.

⁵ *Id.*

⁶ Compare § 58.1-802 (A) and (B) (Supp. 2012) with § 58.1-802.2.

⁷ Section 58.1-802.2

⁸ See 2013 Op. Va. Att’y Gen. No. 12-110 at 2, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/OPINIONS/2013opns/12-110%20Sims.pdf>; see also 2012 Op. Va. Att’y Gen. 137, 141 (citing *Pocahontas Consol. Collieries Co., Inc. v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912) and *White v. Schwartz*, 196 Va. 316, 321, 83 S.E.2d 376, 379 (1954)).

⁹ *Pocahontas Consol. Collieries*, 113 Va. 108 at 112, 73 S.E. 446 at 448.

Conclusion

Accordingly, it is my opinion that clerks of court should assess the regional congestion relief fee imposed by § 58.1-802.2 by the *Code of Virginia* on all real estate conveyance instruments recorded in the affected localities on or after July 1, 2013.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized, with the first name "Ken" written in a cursive-like font and the last name "C" followed by a Roman numeral "II".

Kenneth T. Cuccinelli, II
Attorney General