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WESTLAW Virginia Attorney General Opinions*The Honorable Joyce L. Clark*Office of the Attorney General
November 19, 1993

1993 Va. Op. Atty. Gen. 7 (Va.A.G.), 1993 Va. Rep. Atty. Gen. 7, 1993 WL 537733

Office of the Attorney General

Commonwealth of Virginia

*1 November 19, 1993

*1 The Honorable Joyce L. Clark
 *1 Commissioner of the Revenue for Orange County
 *1 P.O. Box 389
 *1 Orange, Virginia 22960

My dear Ms. Clark:

*1 You note that a 1993 amendment to § 10.1–1011 of the Code of Virginia requires land that is subject to a perpetual conservation or open-space easement to be assessed and taxed at its open-space use value in any jurisdiction that has adopted use value assessment and taxation for any class of land. You ask several questions about the effect of this amendment:

- *1 1. May land under a conservation or open-space easement be assessed and taxed based on its value as open space without an application from its owner, and possibly without the owner's knowledge?
- *1 2. Does property that is subject to such easements have to be revalidated periodically to be assessed and taxed based on its open-space use value?
- *1 3. If a locality has adopted a use value assessment program that does not cover forest or open-space uses, would land under such easements that is used for forest or open-space purposes qualify for open-space use assessment?
- *1 4. Must all land that is subject to conservation or open-space easements be assessed at its open-space value, regardless of the actual use of such land?
- *1 5. What is the meaning of the clause in amended § 10.1–1011, stating “if the land otherwise qualifies for such assessment”?
- *1 6. Will property that is under a conservation easement qualify for use value assessment even though the property currently is not enrolled in the locality's use value assessment program?

I. Applicable Constitutional and Statutory Provisions

*1 Article X, § 2 of the Constitution of Virginia (1971) generally requires all assessments of real property to be at fair market value, but also provides, in part:

*1 The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses.

*1 Both the **Open – Space Land Act**, §§ 10.1–1700 through 10.1–1705, and the Virginia Conservation Easement Act, §§ 10.1–1009 through 10.1–1016, deal with easements in gross.¹

*1 The **Open – Space Land Act** authorizes public bodies to protect open space by acquiring easements in gross that restrict the use of land to open-space uses. See § 10.1–1703. Section 58.1–3205 provides that the assessment of property subject to an open-space easement must reflect any change in market value resulting from the easement, while the value of the easement held by the public body is exempt from tax on the same basis as other property of the public body.

*2 The Virginia Conservation Easement Act authorizes certain charitable organizations to accept easements in gross to preserve open space. See § 10.1–1009 (definition of “holder”); § 10.1–1010. Section 10.1–1011 relates to the taxation of property that is subject to conservation easements, and property that is subject to easements held by public bodies under the **Open – Space Land Act**. As amended in 1993, § 10.1–1011 provides:

*2 Where the easement by its terms is perpetual, neither the interest of the holder of a conservation easement nor a third-party right of enforcement of such an easement shall be subject to state or local taxation nor shall the owner of the fee be taxed for the interest of the holder of the easement. Land which is (i) subject to a perpetual conservation easement held pursuant to this chapter 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.

*2 The use value assessment program established by Article 4, Chapter 32 of Title 58.1, §§ 58.1–3229 through 58.1–3244, was enacted under the constitutional authority of Article X, § 2. Section 58.1–3230 designates four classifications of real estate that are eligible for use value assessment: agricultural, horticultural, forest and open-space use. Under § 58.1–3231, any local government that has adopted a land-use plan

*2 may adopt an ordinance to provide for the use value assessment and taxation, in accord with the provisions of this article, of real estate classified in § 58.1–3230....

*2 Land used in agricultural and forestal production within an agricultural district, a forestal district or an agricultural and forestal district that has been established under § 15.1–1506 et seq., shall be eligible for the use value assessment and taxation whether or not a local land-use plan or local ordinance pursuant to this section has been adopted.

*2 Such ordinance shall provide for the assessment and taxation in accordance with the provisions of this article of any or all of the four classes of real estate set forth in § 58.1–3230.

*2 Section 58.1–3233 requires:

*2 Prior to the assessment of any parcel of real estate under any ordinance adopted pursuant to this article, the local assessing officer shall:

*2 1. Determine that the real estate meets the criteria set forth in § 58.1–3230 ...;

*2 2. Determine further that [the] real estate [meets the applicable minimum acreage requirements].

*3 ... and

*3 3. Determine further that real estate devoted to open-space use is (i) within an agricultural, a forestal, or an agricultural and forestal district ... or (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, or (iii) subject to a recorded commitment entered into by the landowners with the local governing body, or its authorized designee, not to change the use to a nonqualifying use for a time period stated in the commitment of not less than four years nor more than ten years.... Such commitment shall run with the land for the applicable period, and may be terminated in the manner provided in § 15.1–1513 for withdrawal of land from an agricultural, a forestal or an agricultural and forestal district.

*3 Section 58.1–3234 requires “[p]roperty owners [to] submit an application for taxation on the basis of a use assessment to the local assessing officer” within a specified time preceding the tax year for which use value taxation is sought and “whenever the use or acreage of such lands previously approved changes.” An application fee may be charged for all such applications. See *id.* The governing body may require annual revalidation of any applications previously approved, and may impose a revalidation fee every six years. See *id.*

*3 Section 58.1–3236 directs the local assessor to keep records of two values on land subject to use value taxation. The assessor must

*3 consider only those indicia of value which such real estate has for agricultural, horticultural, forest or open space use².... In addition to use of his personal knowledge, judgment and experience ... he shall ... consider available evidence of agricultural, horticultural, forest or open space capability, and the recommendations of value of such real estate as made by the State Land Evaluation Advisory Council.

*3 Section 58.1–3236(A).

*3 The tax assessor also must value property in a use value program on the basis of its fair market value, and maintain the land book records “to show both the use value and the fair market value of such real estate.” Section 58.1–3236(D).

*3 Section 58.1–3237 provides that when real estate qualifying for use value assessment changes to a use that is not so qualified, it shall be subject to additional taxes referred to as “roll-back taxes.”

*3 Section 58.1–3239 directs the State Land Evaluation Advisory Council to “determine and publish a range of suggested values,” based on the productive earning power of real estate in the locality being used “for each of the several soil conservation service land capability classifications for agricultural, horticultural, forest and open-space uses in the various areas of the Commonwealth as needed to carry out the provisions of this article.”

II. Section 10.1–1011 Requires Use Value Assessment and Taxation of Land Under Permanent Conservation or Open Space Easements in Any Locality with Use Value Assessment Program; Administrative Provisions of Use Value Assessment Statutes Do Not Apply

*4 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. As a result, property under such an easement may be assessed and taxed for its value as open space without any application by its owner and possibly without the owner’s knowledge. 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.

*4 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. For property that is under a permanent easement meeting the requirements of § 58.1–3230, revalidation of the property's use is not necessary, because the landowner no longer has the right to change the property's use to another use that would be incompatible with the protection of open space. In my opinion, therefore, there is no need for revalidation or a revalidation fee on such property; nor is there any basis for imposing roll-back taxes.³

*4 Under amended § 10.1–1011, if a locality has a use value program that does not cover forest and open-space uses, land under conservation or open-space easement used for forest or open-space uses still will qualify for open-space use value assessment. Land encumbered by such a perpetual easement meets the definitional requirement in § 58.1–3230 of being “preserved for ... conservation of land or other natural resources ... or scenic purposes.” Section 10.1–1011 reflects the General Assembly's conclusion that this tax treatment is appropriate, because the owners of land that is subject to such open-space or conservation easements permanently have protected open space and thus permanently have given up a part of their land's value.

*4 Not all land that is subject to an easement is assessed at open-space values regardless of its use. Under § 10.1–1011, in jurisdictions that have adopted any use value assessment classification, only land that is both subject to a perpetual conservation or open-space easement and devoted to open-space use under § 58.1–3230 is required to be assessed at use value. If land that is under an open-space or conservation easement does not meet both these requirements, it does not meet the necessary qualifications for use value assessment.

*4 In my opinion, the phrase “if the land otherwise qualifies for such assessment,” as used in § 10.1–1011, means that the land must be devoted to open space as defined in § 58.1–3230. Moreover, it is my opinion that properties under an open-space or conservation easement will qualify for use value assessment in a locality that has such a program, even though those properties are not currently in the use value program. Section 10.1–1011 makes it clear that lands under permanent easement need not already be enrolled in the use value assessment program to qualify for assessment based on their value as open space.

*5 With kindest regards, I am
Very truly yours,

*5 Stephen D. Rosenthal
*5 Attorney General

Footnotes

- 1 “An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another[.]” BLACK'S LAW DICTIONARY 510 (6th ed. 1990).
- 2 In determining the area devoted to the special use, real estate under structures or facilities used in connection with such use shall be included, but the farmhouse, or any other structures unrelated to such special use, shall be excluded in determining the area of such use. Section 58.1–3236(C). Structures not related to such use are to be “assessed and taxed by the same standards ... as other taxable structures and other real estate in the locality.” *Id.*
- 3 If such an easement is violated, there is no provision in § 10.1–1011 or in §§ 58.1–3230, 58.1–3231 and 58.1–3232 that would apply the roll-back tax. Unpermitted development of such a property, however, would be evidence of a lack of enforcement of the easement, which would, after a reasonable time, make the land no longer subject to a “perpetual easement.” If the easement is not being enforced, the property will not be in compliance with the § 58.1–3233(3)(ii) requirement of promoting open-space use classification. Accordingly, such lack of enforcement of the easement ultimately would return the property to full fair market value assessment.

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