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## Taxation

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# TAXATION

*Craig D. Bell \**

## I. INTRODUCTION

This article reviews significant recent developments in the law affecting Virginia taxation. Each section covers legislative changes, judicial decisions, and selected opinions or pronouncements from the Virginia Department of Taxation and the Virginia Attorney General over the past year.

Part II of this article discusses legal developments regarding taxes imposed and administered by the Commonwealth. Sections A and B address legislative and judicial changes made to Virginia corporate and individual income tax law. Section C covers legal changes pertaining to retail sales and use taxes.

Part III of this article documents legal developments in local government taxes. Sections A and B address changes to the law regarding Virginia real and personal property taxes. Section C addresses several miscellaneous local taxes and tax administration applicable to local government taxing authorities.

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The overall purpose of this article is to provide Virginia tax and general practitioners with a concise overview of the recent developments in Virginia taxation that will most likely impact those practitioners. This article does not, however, discuss many of the numerous technical legislative changes to title 58.1 of the Virginia Code, which covers taxation.

## II. TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

### A. *Recent Significant Legislative Activity*

#### 1. Fixed Date of Conformity

The 2013 Virginia General Assembly amended Virginia Code section 58.1-301, which mandates conformity with the terms of the Internal Revenue Code ("IRC"), to advance Virginia's fixed date of conformity from December 31, 2011 to January 2, 2013.<sup>1</sup> "Virginia continues, however, to disallow the federal bonus depreciation deductions, except for any bonus depreciation allowed under IRC § 168(n), which is designed to benefit qualified disaster assistance property and any five-year carryback of federal net operating loss deductions."<sup>2</sup> Virginia law also continues to disallow the income tax deductions related to applicable high-yield discount obligations under IRC § 163(e)(5)(F) and the deferral of income from the cancellation of debt under IRC § 108(i), unless the taxpayer elects to include such taxable income ratably either over a three-year period beginning with tax year 2009 for transactions completed in 2009, or over a three-year period beginning with tax year 2010 for transactions completed in tax year 2010 or before April 21, 2010.<sup>3</sup> Advancing the conformity date to January 2, 2013

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1. Act of Feb. 15, 2013, ch. 4, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Repl. Vol. 2013)); Act of Mar. 21, 2013, ch. 693, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Repl. Vol. 2013)). For additional guidance, see VA. DEP'T OF TAXATION, PUB. DOC. 13-3 (Feb. 15, 2013) [hereinafter TAX BULL. 13-3], available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf> (follow "Tax Bulletins" hyperlink; then follow "2013" hyperlink; then follow "VTB13-3 (PD13-19)" hyperlink).

2. Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 47 U. RICH. L. REV. 307, 308 (2012); see also VA. CODE ANN. § 58.1-301(B)(2) (Repl. Vol. 2013); TAX BULL. 13-3, *supra* note 1.

3. VA. CODE ANN. § 58.1-301(B)(3)-(4) (Repl. Vol. 2013); see also TAX BULL. 13-3, *supra* note 1; Bell, *supra* note 2, at 308-09.

also enables the corporate and individual tax provisions of the Virginia Code to conform with the IRC as amended by the American Taxpayer Relief Act of 2012.<sup>4</sup>

## 2. Certain Online Investments Eligible for Tax Credits

The General Assembly enacted Virginia Code section 58.1-318, which permits any investment made by a taxpayer that is transacted via an online general solicitation, an online broker, or a funding portal to be eligible for any corporate or personal income tax credit for which it qualifies.<sup>5</sup> The new statute defines a “funding portal” as a website that allows accredited investors to participate in general solicitation transactions by an issuer that meets the requirements of section 4(a)(6) of the Securities Act of 1933,<sup>6</sup> or is an online broker or funding portal registered with the federal Securities and Exchange Commission pursuant to section 4A(a) of the Securities Act of 1933.<sup>7</sup> The legislation provides that the investment itself must also meet the criteria set forth in the statute specifically authorizing the credit.<sup>8</sup>

## 3. Port Volume Increase Tax Credit Extended and Expanded

The 2013 General Assembly expanded the Port Volume Increase Tax Credit to allow certain agricultural entities, manufacturing entities, and mineral and gas entities to claim the credit against Virginia corporate and individual income taxes, effective January 1, 2013.<sup>9</sup> Prior to this legislative change, the credit could only be claimed by taxpayers engaged in the manufacturing of goods or the distribution of manufactured goods.<sup>10</sup> For purposes of determining the credit amount, the base year for manufacturing-

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4. Pub. L. No. 112-240, 126 Stat. 2313-15 (2013) (codified as amended in scattered sections of 26 U.S.C. (2006)); TAX BULL. 13-3, *supra* note 1.

5. Act of Mar. 13, 2013, ch. 289, 2013 Va. Acts \_\_\_, \_\_\_ (codified at VA. CODE ANN. § 58.1-318) (Repl. Vol. 2013)).

6. VA. CODE ANN. § 58.1-318(A) (Repl. Vol. 2013); Pub. L. No. 112-106, 126 Stat. 316 (2012) (codified as amended at 15 U.S.C. § 77 d-1 (2006 & Supp. V. 2012)).

7. VA. CODE ANN. § 58.1-318 (Repl. Vol. 2013); Pub. L. No. 112-106, 126 Stat. 316 (2012) (codified as amended at 15 U.S.C. § 77 d-1 (2006 & Supp. V. 2012)).

8. Ch. 289, 2013 Va. Acts at \_\_\_ (codified at VA. CODE ANN. § 58.1-318(B) (Repl. Vol. 2013)).

9. Act of Apr. 3, 2013, ch. 744, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-439.12:10 (Repl. Vol. 2013)).

10. VA. CODE ANN. § 58.1-439.12:10 (Cum. Supp. 2012).

related entities would continue to be the 2010 calendar year.<sup>11</sup> The base year for agricultural entities and mineral and gas entities would be January 1, 2012 through December 31, 2012.<sup>12</sup>

The revised statute defines a “manufacturing-related entity” as “a person engaged in the manufacturing of goods or the distribution of manufactured goods.”<sup>13</sup> A “mineral and gas entity” is defined as “a person engaged in severing minerals or gases from the earth.”<sup>14</sup> An “agricultural entity” is “a person engaged in growing or producing wheat, grains, fruits, nuts, crops; tobacco, nursery, or floral products; forestry products excluding raw wood fiber or wood fiber processed or manufactured for use as fuel for the generation of electricity; or seafood, meat, dairy, or poultry products.”<sup>15</sup>

#### 4. Worker Retraining Credit Amount Increased

Effective for tax years beginning after 2012, the General Assembly increased the amount of the worker retraining tax credit available against corporate income tax, personal income tax, income tax on estates and trusts, business franchise tax, insurance license tax, and utility tax for eligible worker retraining courses.<sup>16</sup> The credit is available for retraining courses taken by qualified employees at private schools to a maximum credit of \$200 per year per qualified employee, or \$300 per year per employee if the worker retraining includes retraining in a STEM or STEAM (science, technology, engineering, mathematics, or applied mathematics) discipline, including, but not limited to industry-recognized credentials, certificates, and certifications.<sup>17</sup> The total

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11. VA. CODE ANN. § 58.1-439.12:10(A) (Repl. Vol. 2013).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Act of Mar. 13, 2013, ch. 294, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-439.6 (Repl. Vol. 2013)).

17. VA. CODE ANN. § 58.1-439.6 (Repl. Vol. 2013).

amount of tax credits granted to employers for each year remains the same, which is up to \$2,500,000 per fiscal year.<sup>18</sup> The legislature added a sunset date to the credit which permits eligible taxpayers to claim the credit for tax years prior to 2018.<sup>19</sup>

## 5. Selected Unclaimed Tax Credits Deemed Obsolete

The 2013 General Assembly enacted Virginia Code section 58.1-318 to treat certain corporate and personal income tax credits that have not been claimed by any taxpayer during the five preceding calendar years as obsolete.<sup>20</sup> This legislation precludes the Virginia Department of Taxation from authorizing taxpayers to claim any such tax credits deemed obsolete in future calendar years unless expressly authorized by the General Assembly.<sup>21</sup> The new law does not prevent the lawful carryover or transfer of a tax credit previously authorized by the Department of Taxation.<sup>22</sup> The legislation also requires the Department of Taxation to report to the General Assembly a list of credits it deems to be obsolete by February 1 of each year and publish such report on its website.<sup>23</sup>

## 6. Maximum Amount of Land Preservation Tax Credits Limited

The 2013 General Assembly enacted a hard cap to establish the maximum amount of Virginia Land Preservation Tax Credits that may be issued in a calendar year, beginning with the 2013 calendar year.<sup>24</sup> The maximum annual amount of land preservation tax credits is limited to \$100,000,000.<sup>25</sup> Beginning with the submission due on or before December 20, 2013, and each following year, the governor is required to recommend an annual appropriation from the General Fund in an amount equal to the difference between an indexed credit cap amount for the calendar

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18. *Id.*

19. Ch. 294, 2013 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-439.6 (Repl. Vol. 2013)).

20. Act of Mar. 20, 2013, ch. 657, 2013 Va. Acts \_\_\_, \_\_\_ (codified at VA. CODE ANN. § 58.1-318 (Repl. Vol. 2013)).

21. VA. CODE ANN. § 58.1-318 (Repl. Vol. 2013).

22. *Id.*

23. *Id.*

24. Act of May 3, 2013, ch. 798, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 2.2-1509.4 (Cum. Supp. 2013) and 58.1-512(D)(4)(c) (Repl. Vol. 2013)).

25. VA. CODE ANN. § 58.1-512(D)(4)(c) (Repl. Vol. 2013).

year and \$100,000,000.<sup>26</sup> The appropriation must be distributed in the following manner: eighty percent to the Virginia Land Conservation Fund, ten percent to the Civil War Site Preservation Fund, and ten percent to the Virginia Farmland Preservation Fund.<sup>27</sup> The legislation also maintains that no less than fifty percent of the appropriation to the Virginia Land Conservation Fund be used for fee simple acquisitions with public access or acquisitions of easements with public access.<sup>28</sup>

The effective fiscal impact of this legislation is to prevent land preservation credits that are previously issued, but subsequently disallowed by the Virginia Department of Taxation, from being reissued in a subsequent calendar year.<sup>29</sup> Under prior law, the Tax Department could issue land preservation credits up to the annual cap amount, which was \$100,000,000, indexed for inflation.<sup>30</sup> For calendar year 2013, the land preservation cap amount is \$113,909,000.<sup>31</sup>

#### 7. Deduction Created for Certain Prepaid Funeral and Medical Insurance Premiums

The 2013 General Assembly amended Virginia Code section 58.1-322(D) to create a personal income tax deduction equal to the amount a taxpayer aged sixty-six or older, with earned income of at least \$20,000 and federal adjusted gross income not in excess of \$30,000 for the year, pays annually in premiums for a personal prepaid funeral insurance policy or medical or dental insurance for any person for whom the taxpayer may claim a deduction for such premiums under federal income tax laws.<sup>32</sup> The deduction is not allowed for any portion of the premiums paid for which the taxpayer has been reimbursed, has claimed as a deduction for federal income tax purposes, has claimed as another Vir-

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26. *Id.*

27. VA. CODE ANN. §§ 2.2-1509.4 (Cum. Supp. 2013), 58.1-512(D)(4)(c) (Repl. Vol. 2013).

28. *Id.*

29. *See id.*

30. VA. CODE ANN. § 58.1-512(D)(4)(a) (Cum. Supp. 2012).

31. VA. DEPT OF TAXATION, PUB. DOC. 13-1 (Jan. 25, 2013), available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf> (follow "Tax Bulletins" hyperlink; then follow "2013" hyperlink, then follow "VTB13-1 (PD 13-8)" hyperlink).

32. Act of Mar. 5, 2013, ch. 88, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-322(D)(14) (Repl. Vol. 2013)).

ginia income tax deduction or subtraction, or has claimed as a federal income tax credit or any Virginia income tax credit.<sup>33</sup>

### B. *Recent Significant Opinions of the Virginia Tax Commissioner*

The Virginia Department of Taxation Commissioner opined that an irrevocable, inter vivos trust created in Florida and governed by Florida law did not have a nexus with Virginia and was not subject to Virginia personal income tax, despite the fact that the trust was administered by a committee of two co-trustees, one of which was a Virginia resident.<sup>34</sup> Virginia Code section 58.1-381 provides that all resident trusts which are required to file a federal income tax return or that have any Virginia taxable income must file an income tax return in Virginia.<sup>35</sup> The Virginia Code defines a “resident trust” to include a trust created by or consisting of property of a person domiciled in Virginia or a trust being administered in Virginia.<sup>36</sup> The issue presented in this opinion is whether the trust is being administered in Virginia.<sup>37</sup>

If the trustee is a resident of Virginia, the trust is considered to be administered in Virginia.<sup>38</sup> However, the Tax Commissioner opined that the inclusion of a Virginia resident trustee in a committee of trustees does not qualify the trust for resident trust status for Virginia income tax purposes, and thus does not require the filing of a Virginia fiduciary income tax return, so long as the committee does not operate in Virginia and is not controlled in Virginia.<sup>39</sup> In this case, the Tax Commissioner noted that the Virginia resident co-trustee was not authorized to make decisions regarding the trust individually.<sup>40</sup> Instead, any power or discretion that he has over the trust may be exercised only if the other co-trustee, based in Florida, agrees.<sup>41</sup> The Tax Commissioner concluded that, based on this committee arrangement, the trust was

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33. *Id.*

34. VA. DEPT OF TAXATION, PUB. DOC. 13-18 (Feb. 5, 2013), available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf> (follow “Rulings of the Tax Commissioner” hyperlink; then follow “2013” hyperlink; then click on “PD 13-18” hyperlink).

35. *Id.* (citing VA. CODE ANN. § 58.1-381 (Repl. Vol. 2013)).

36. *Id.* (citing VA. CODE ANN. § 58.1-302 (Repl. Vol. 2013)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*



not being administered in Virginia and was not a resident trust for Virginia income tax purposes.<sup>42</sup> Accordingly, “[t]he Trust [was] not required to file a Virginia fiduciary income tax return.”<sup>43</sup>

### C. *Recent Significant Activity Affecting Sales and Use Tax*

#### 1. Exemption for Pollution Control Equipment Clarified

The 2013 General Assembly amended Virginia Code section 58.1-609.3(9) to clarify that pollution control equipment that the Virginia Department of Mines, Minerals and Energy certified for coal, oil, and gas production remains exempt from the Retail Sales and Use Tax Act.<sup>44</sup> A retroactive clause in the exemption expired on July 1, 2006,<sup>45</sup> but the pollution control equipment certified by the Department of Taxation continues to be exempt by reference to Virginia Code section 58.1-3660.<sup>46</sup> There was no lapse in the statute. The General Assembly included a provision in the legislation stating this clarification is declarative of existing law.<sup>47</sup>

#### 2. Exemption for Separately Stated Charges for Installing Property Includes Rented Property

The 2013 General Assembly amended Virginia Code section 58.1-609.5(2) to clarify that the exemption from the retail sales and use tax for separately stated labor or services rendered in installing, applying, remodeling, or repairing property that is sold also includes such separately stated charges for services to property that is leased or rented.<sup>48</sup>

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42. *Id.*

43. *Id.*

44. Act of Feb. 20, 2013, ch. 10, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-609.3(9) (Repl. Vol. 2013)).

45. VA. CODE ANN. § 58.1-609.3(9)(ii) (Cum. Supp. 2012).

46. VA. CODE ANN. § 58.1-609.3(9) (Repl. Vol. 2013).

47. Ch. 10, 2013 Va. Acts at \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-609.3(9) (Repl. Vol. 2013)).

48. Act of Mar. 5, 2013, ch. 90, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-609.5(2) (Repl. Vol. 2013)).

### 3. Exemption for Harvesting Forest Products Amended

The Virginia General Assembly amended the retail sales and use tax exemption for harvesting forest products from property “necessary” for such harvesting, to property “used” for such harvesting.<sup>49</sup> The forestry products harvesting exemption is intended to exempt the purchase of machinery, tools, equipment, fuel, energy, and supplies used directly in the harvesting of forest products.<sup>50</sup> Harvesting of forest products now includes:

[A]ll operations prior to the transport of the harvested product used for (i) removing timber or other forest products from the harvesting site, (ii) complying with environmental protection and safety requirements applicable to harvesting of forest products, (iii) obtaining access to the harvesting site, and (iv) loading cut timber or other forest products onto highway vehicles for transportation to storage or processing facilities.<sup>51</sup>

### 4. Exemption for Hurricane Preparedness Equipment Expanded

The General Assembly amended Virginia Code section 58.1-611.3 to add gas-powered chain saws with a selling price of \$350 or less and chain saw accessories to the list of equipment eligible for the sales and use tax exemption for hurricane preparedness equipment.<sup>52</sup>

## III. TAXES ADMINISTERED BY LOCALITIES

### A. *Real Property*

#### 1. Recent Significant Legislative Activity

##### a. Period for Installment Payment Agreements Extended

The General Assembly amended Virginia Code section 58.1-3965(A) to extend the maximum permitted period for installment

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49. Act of Mar. 12, 2013, ch. 223, 2013 Va. Acts \_\_\_\_, \_\_\_\_ (codified as amended at VA. CODE ANN. § 58.1-609.2(6) (Repl. Vol. 2013)).

50. VA. CODE ANN. § 58.1-609.2(6) (Repl. Vol. 2013).

51. *Id.*

52. Act of Mar. 13, 2013, ch. 325, 2013 Va. Acts \_\_\_\_, \_\_\_\_ (codified as amended at VA. CODE ANN. § 58.1-611.3 (Repl. Vol. 2013)).

payment agreements between local treasurers and property owners owing delinquent local Virginia property taxes, penalties, and interest from twenty-four months to thirty-six months.<sup>53</sup> The legislation also requires notice be given to the taxpayer that the taxpayer may request that the treasurer enter into a payment agreement to permit the payment of the delinquent taxes, penalties, and interest.<sup>54</sup> Lastly, the statute now provides that the circuit court in which an action for a judicial sale is pending is authorized, on its own motion or on the motion of any party, to refer the parties to a dispute resolution proceeding.<sup>55</sup>

b. Apportionment of Expenses Common to Multiple Units in Affordable Rental Housing Required

Prior to the action taken by the General Assembly in this matter, the law provided that in order to determine the fair market value of real property operated as affordable rental housing, the real estate assessor must consider: (1) "The contract rent and the impact of applicable rent restrictions;" (2) "The actual operating expenses and expenditures and the impact of any such additional expenses or expenditures;" and (3) "Restrictions on the transfer of title or other restraints on alienation of the real property."<sup>56</sup> The 2013 General Assembly amended Virginia Code section 58.1-3295 to provide that an owner of real property who has two or more units of property that "are operated in whole or in part as affordable rental housing" with "expenses and expenditures common to two or more such units" is authorized to compel the real estate assessor to make a pro rata apportionment of the expenses and expenditures to each unit based on each unit's assessed value as a percentage of the total assessed value of all of the units.<sup>57</sup> For this new set of rules to apply, the two or more units of real property must be controlled by a single restrictive use agreement regulating income and rent restrictions, and the expenses and expenditures cannot practicably be attributed to a particular unit.<sup>58</sup> The

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53. Act of Mar. 14, 2013, ch. 334, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3965(A) (Repl. Vol. 2013)).

54. VA. CODE ANN. § 58.1-3965(A) (Repl. Vol. 2013).

55. *Id.* § 58.1-3965(G) (Repl. Vol. 2013).

56. *Id.* § 58.1-3295(A) (Cum. Supp. 2012).

57. Act of Mar. 13, 2013, ch. 249, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3295(A)(3) (Repl. Vol. 2013)).

58. VA. CODE ANN. § 58.1-3295(A)(3) (Repl. Vol. 2013).

amended statute will apply regardless of whether the units are in one tax parcel or multiple tax parcels.<sup>59</sup>

### c. Local Governments Granted Discretion on Roll-Back Taxes

Under current law, when the qualified use of real estate in a land-use plan changes to a nonqualified use or the land is zoned for a more intensive use at the request of the owner, a locality is required to impose a roll-back tax on the land.<sup>60</sup> Roll-back taxes are the difference between what the real property taxes would have been had the property been assessed at fair market value and the real property taxes levied based upon use value.<sup>61</sup>

The 2013 General Assembly amended Virginia Code section 58.1-3237 to provide localities with the discretion to enact an ordinance that provides that when a change in zoning of real estate to a more intensive use occurs at the request of the owner or his agent, local roll-back property taxes will not become due solely because the change in zoning is for specific, more intensive uses set forth in the ordinance.<sup>62</sup> Localities may elect to continue to consider the property eligible for land use taxation until the real property's use changes to a non-qualifying use.<sup>63</sup>

## 2. Recent Significant Judicial Decisions

### a. *City of Richmond v. Jackson Ward Partners, L.P.*

In *City of Richmond v. Jackson Ward Partners, L.P.*, the Supreme Court of Virginia held that Jackson Ward Partners, Limited Partnership ("Jackson Ward Partners") should not have appraised eight separate, non-contiguous parcels of real property in bulk as a single apartment complex (that is, as one tax parcel) and then assigned a value to each constituent tax parcel based on a mathematical calculation.<sup>64</sup> Jackson Ward Partners owns eleven structures with eighteen residential rental units situated on

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59. *Id.*

60. VA. CODE ANN. § 58.1-3237(A) (Repl. Vol. 2013).

61. *Id.* § 58.1-3237(B)–(C) (Repl. Vol. 2009).

62. Act of Mar. 13, 2013, ch. 269, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3237(E) (Repl. Vol. 2013)).

63. VA. CODE ANN. § 58.1-3237(G) (Repl. Vol. 2013).

64. 284 Va. 8, 26–27, 726 S.E.2d 279, 289 (2012).

eight, non-contiguous tax parcels located on three different streets in the City of Richmond.<sup>65</sup> The eight, non-contiguous tax parcels contained residential structures, which Jackson Ward Partners renovated and operated as affordable rental housing.<sup>66</sup> Financing of these renovations was provided through the Virginia Housing & Development Authority ("VHDA").<sup>67</sup> The financing was secured by a deed of trust and a regulatory agreement between Jackson Ward Partners and VHDA.<sup>68</sup> Under that agreement, the parcels are required to be operated as an eighteen unit, affordable, multifamily rental housing development for a forty year period.<sup>69</sup> The regulatory agreement also prohibits the sale of the individual structures or parcels and requires that the units be rented to persons meeting certain below median family income levels for the area where the properties are located.<sup>70</sup>

At trial, the issue became whether the individual affordable housing parcels could be valued separately or whether they should be valued as a single multifamily housing development.<sup>71</sup> Because the properties were subject to the regulatory restrictions, the circuit court held that the highest and best use of the property was a single apartment complex.<sup>72</sup> On appeal, the Supreme Court of Virginia noted that the principle that real property be assessed at its highest and best use did not mean real property should be assessed as something other than what it actually was.<sup>73</sup> In this case, there was no dispute that the real property at issue was eight separate, non-contiguous parcels.<sup>74</sup> Appraising the properties according to their highest and best use did not justify treating the properties as if they were not eight individual properties.<sup>75</sup> While the restrictions contained in the VHDA regulatory agreement applicable to the eight parcels undoubtedly affected

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65. *Id.* at 11–12; 726 S.E.2d at 280–81.

66. *Id.* at 12, 726 S.E.2d at 281.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 16, 726 S.E. 2d at 283.

73. *Id.* at 23–24, 726 S.E.2d at 287–88.

74. *Id.* at 26, 726 S.E.2d at 289.

75. *Id.* at 12, 726 S.E.2d at 281.

the fair market value of each of the eight parcels, they did not obviate Jackson Ward Partners' burden to prove the fair market value of each parcel.<sup>76</sup>

The Supreme Court of Virginia reversed the trial court decision and remanded for entry of an order reinstating the City of Richmond's tax assessments on the eight parcels for the tax years in question.<sup>77</sup> The court stated that Jackson Ward Partners failed as a matter of law to carry its burden of proving the fair market value of each parcel.<sup>78</sup>

b. *NA Properties, Inc. v. Loudoun County*

NA Properties owned four contiguous parcels of land, both improved and unimproved, located in the Town of Leesburg in Loudoun County, Virginia.<sup>79</sup> NA Properties challenged the correctness of its tax assessments on these properties, asserting the assessed values exceeded the fair market value of the four parcels.<sup>80</sup> The Loudoun County Circuit Court held that NA Properties failed to show by a clear preponderance of the evidence a manifest error or a total disregard of controlling evidence that the county's assessments were not correct.<sup>81</sup> A number of appraisers testified as expert witnesses on behalf of both parties.<sup>82</sup> However, the issue focused on the plaintiff's appraiser, who testified that with respect to the improved parcel, he assumed the building would be renovated and leased for purposes of his income capitalization analysis.<sup>83</sup> The trial court stated those assumptions were "conjectural" and "speculative."<sup>84</sup> The circuit court also found the plaintiff's appraiser failed to have an engineer prepare a lot yield study to determine the amount of potential density available on the open or excess land portion of the parcels.<sup>85</sup> After hearing all of the expert appraisers' testimony, the trial court granted the

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76. *Id.* at 26–27, 726 S.E.2d at 289.

77. *Id.* at 27, 726 S.E.2d at 289.

78. *Id.*

79. *NA Properties, Inc. v. Loudoun Cnty.*, 84 Va. Cir. 551, 551 (2012) (Loudoun County).

80. *Id.* at 552.

81. *Id.* at 558.

82. *Id.* at 553.

83. *Id.* at 555–56.

84. *Id.* at 555.

85. *Id.* at 556.

county's motion to strike the testimony of the plaintiff's appraiser who provided the speculative and conjectural assumption the court found so troubling.<sup>86</sup> The court concluded NA Properties failed to demonstrate by a clear preponderance of the evidence a manifest error or a total disregard of controlling evidence with respect to the county's tax assessments, and thus upheld the tax assessments.<sup>87</sup>

*c. IPROC Norfolk, LLC v. City of Norfolk*

The owners of the Norfolk Waterside Marriott Hotel and Convention Center lost their challenge to the City of Norfolk's real estate tax assessments for tax years 2009 through 2011<sup>88</sup> on their theory that the city, in determining fair market value of the properties, failed to take into account the economic downturn that started in late 2007 and caused a steep drop in hotel occupancy rates and revenue streams.<sup>89</sup> The city contended that the owners' "methodology [was] flawed because it relie[d] on calculations based upon uncertain and speculative future expenses."<sup>90</sup> The city also contended that the capitalization rate utilized by the owners' expert to calculate fair market value was significantly higher than that used by the city's appraiser and included factors the city asserts were superfluous.<sup>91</sup>

The trial court noted that appraisers typically rely on three methods of assessment to determine the fair market value of a property: (1) the cost approach, (2) the sales approach, and (3) the income approach.<sup>92</sup> Furthermore, the appraisers for both the city and the owners agreed that the income based approach was the most appropriate method for determining the fair market value of the hotel and convention center.<sup>93</sup>

The owners' expert criticized the city for relying on income and expense data from two years prior, that he asserted did not reflect

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86. *Id.* at 555–56.

87. *Id.* at 558.

88. *IPROC Norfolk, LLC v. City of Norfolk*, Nos. CL 11-5571 & CL 11-7907, slip op. at 1, 2013 Va. Cir. LEXIS 19 (Cir. Ct. Apr. 24, 2013) (*City of Norfolk*).

89. *Id.* at 2.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

the property's true fair market value.<sup>94</sup> The circuit court held, however, that the city used concrete financial data from the previous two years and employed an accepted methodology to arrive at a fair market value for the hotel and convention center.<sup>95</sup> In fact, the court noted that three highly respected valuation experts testified to the value of the property by weighing a series of financial indicators and that none of the experts appeared to have made mistakes in their appraisals or calculations.<sup>96</sup> By basing its assessments on the earnings of the hotel and convention center over the past two years, the trial court found the city developed a fair market value for the property based upon concrete data calculated by the owners for the prior two years.<sup>97</sup> The trial court stated the appraisers simply used different formulas and emphasized particular factors more than others.<sup>98</sup> "Absent clear error," the court said, "more than a difference in expert opinions or formulas is required to overcome the presumption of correctness that clothes the taxing authority's assessment."<sup>99</sup> The circuit court held the City of Norfolk did not err when it calculated the fair market value of the hotel and convention center for the 2009 through 2011 assessments at issue in the case.<sup>100</sup> The final order of the trial court's decision was entered on May 3, 2013.<sup>101</sup>

## B. *Recent Legislative Activity Affecting Tangible Personal Property*

### 1. Separate Classification of Property Created for Computer Equipment and Peripherals Used in Data Center

Under current law, computers and peripheral equipment used in a data center fall under the general class of tangible personal property, and localities must impose tangible personal property tax on such property at the same rate as imposed on all other

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94. *Id.*

95. *Id.* at 6.

96. *Id.* at 5.

97. *Id.* at 4.

98. *Id.* at 5.

99. *Id.*

100. *Id.* at 6.

101. Final Order, *IPROC Norfolk, LLC v. City of Norfolk*, Nos. CL 710-CL-11005571, 710-CL-11007097, 2013 Va. Cir. LEXIS 19 (Cir. Ct. May 3, 2013) (City of Norfolk).



property in the general class of tangible personal property.<sup>102</sup> The 2013 General Assembly amended Virginia Code section 58.1-3506 to create a separate classification of property for purposes of permitting localities to set a lower personal property tax rate on computer equipment and peripherals used in a data center.<sup>103</sup> The legislation defines a “data center” to be a facility whose:

[P]rimary services are the storage, management, and processing of digital data and is used to house (i) computer and network systems, including associated components such as servers, network equipment and appliances, telecommunications, and data storage systems; (ii) systems for monitoring and managing infrastructure performance; (iii) equipment used for the transformation, transmission, distribution, or management of at least one megawatt of capacity of electrical power and cooling, including substations, uninterruptible power supply systems, all electrical equipment, and associated air handlers; (iv) Internet-related equipment and services; (v) data communications connections; (vi) environmental controls;<sup>104</sup> (vii) fire protection systems; and (viii) security systems and services.

The legislation also provides that if computers and peripheral equipment used in a data center could be included in any of the other computer-related classifications, then the computer equipment and peripherals will be taxed at the lowest rate among those specified classifications.<sup>105</sup>

## 2. Separate Classification Created for Outdoor Advertising Signs

The 2013 General Assembly amended Virginia Code section 58.1-3503 to create a separate tax classification of tangible personal property for outdoor advertising signs adjacent to rights-of-way of highways where such outdoor advertising signs are employed in a trade or business.<sup>106</sup> The legislation also prohibits a locality from levying the real property tax on outdoor advertising signs and from considering these signs or any income generated

102. VA. CODE ANN. § 58.1-3506 (Cum. Supp. 2012).

103. Act of Mar. 13, 2013, ch. 271, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3506(A)(43), (B) (Repl. Vol. 2013)); Act of Mar. 14, 2013, ch. 393, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3506(A)(42), (B) (Repl. Vol. 2013)).

104. VA. CODE ANN. § 58.1-3506(A)(43) (Repl. Vol. 2013).

105. VA. CODE ANN. § 58.1-3506(B) (Repl. Vol. 2013).

106. Act of Mar. 13, 2013, ch. 287, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3503(A)(18) (Repl. Vol. 2013)); Act of Mar. 20, 2013, ch. 652, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3503(A)(18) (Repl. Vol. 2013)).

by these signs in assessing the value of real property or any interest in real property.<sup>107</sup>

### C. *Miscellaneous Local Taxes*

#### 1. Recent Significant Legislative Activity

##### a. Transfer on Death Deed Exemption from Recordation Tax

The 2013 General Assembly amended Virginia Code sections 58.1-811, 64.2-531, and 64.2-621 through 64.2-638 to provide that the Virginia recordation tax will not be required for the recordation of any transfer on death deed or any revocation of transfer on death deed when no consideration has passed between the parties.<sup>108</sup> The legislation also enacts a Uniform Real Property Transfer on Death Act to implement this new law.<sup>109</sup>

##### b. Coal Severance License Tax Rates Reduced for Small Mines

The rates of the local Virginia coal severance license tax and the local coal road improvement severance license tax on coal producers that sell or utilize coal severed from small mines have been reduced from one percent to three-quarters of one percent of the gross receipts from the sale or use of the coal.<sup>110</sup> A “small mine” is defined as a mine that sells less than 10,000 tons of coal per month.<sup>111</sup> “Gross receipts” is defined to mean the purchase price received by a producer for the sale of coal to an unaffiliated purchaser in an arm’s-length transaction.<sup>112</sup> The cost of transporting coal to another county for processing and the costs of processing it in the other county are allowed to be deducted from gross receipts.<sup>113</sup> No other deductions are authorized.<sup>114</sup> Any per-

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107. Ch. 287, 2013 Va. Acts at \_\_\_, cl. 2; Ch. 652, 2013 Va. Acts at \_\_\_, cl. 2.

108. Act of Mar. 14, 2013, ch. 390, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 58.1-811(J) (Repl. Vol. 2013), 64.2-531(A) (Supp. 2013)).

109. Ch. 390, 2013 Va. Acts at \_\_\_ (codified at VA. CODE ANN. §§ 64.2-621 through 64.2-638 (Supp. 2013)).

110. Act of Mar. 13, 2013, ch. 305, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3741(A) (Repl. Vol. 2013)); Act of Mar. 20, 2013, ch. 618, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3741(A) (Repl. Vol. 2013)).

111. VA. CODE ANN. § 58.1-3470 (Repl. Vol. 2013).

112. *Id.*

113. *Id.*

114. *Id.*

son who only receives royalty payments is not considered to have an economic interest in the coal and is not subject to the taxes.<sup>115</sup>

No provision pertaining to local coal severance taxes will change or affect, invalidate, or interfere with any agreement regarding the coal severance license tax that is entered into between a taxpayer and the commissioner of the revenue.<sup>116</sup> Furthermore, any locality imposing a coal severance license tax as of January 1, 2013, is required to amend its ordinance effective July 1, 2013, to be consistent with the local coal severance tax provisions.<sup>117</sup>

### c. Taxpayers Permitted to Appeal Additional Assessments of Local Virginia Severance Taxes

The 2013 General Assembly amended Virginia Code section 58.1-3713.3 to permit taxpayers to appeal additional assessments of local Virginia severance taxes for license years 2011, 2012, or 2013, which are made on or after January 1, 2014, for coal, gas, or oil severed from the earth prior to July 1, 2013.<sup>118</sup> The legislation also authorizes administrative or judicial appeals to be filed with the commissioner of the revenue or the circuit court within one year from the last day of the license tax year for which the assessment is made or within one year from the date of the assessment or increase in the assessment, whichever is later.<sup>119</sup>

## 2. Recent Significant Opinions of the Attorney General

The clerk of the Winchester Circuit Court inquired whether federal credit unions are exempt from paying the recordation tax imposed on grantors by Virginia Code section 58.1-802 pursuant to the exemption provided by 12 U.S.C. § 1768.<sup>120</sup> The Attorney General opined that pursuant to the exemption provided by 12 U.S.C. 1768, federal credit unions are exempt from paying the re-

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115. *Id.*

116. Ch. 305, 2013 Va. Acts at \_\_\_, cl. 3; Ch. 618, 2013 Va. Acts at \_\_\_, cl. 3.

117. Ch. 305, 2013 Va. Acts at \_\_\_, cl. 4; Ch. 618, 2013 Va. Acts at \_\_\_, cl. 4.

118. Act of Mar. 14, 2013, ch. 391, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-3713.3(c) (Repl. Vol. 2013)).

119. VA. CODE ANN. § 58.1-3713(c)(5)(b) (Repl. Vol. 2013).

120. Op. to the Hon. Terry H. Whittle (Mar. 29, 2013) available at <http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/2013opns/13-010%20Whittle.pdf> (citing 12 U.S.C. § 1768 (2006); VA. CODE ANN. § 58.1-802 (Cum. Supp. 2012)).

cordation tax imposed on grantors by Virginia Code section 58.1-802.<sup>121</sup> In support of his opinion, the Attorney General noted that the United States Code provides:

The Federal credit unions organized [under 12 U.S.C. Chapter 14], their property, their franchises, capital, reserves, surpluses, and other funds, and their income *shall be exempt from all taxation* now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.<sup>122</sup>

The Attorney General stated that Congress has exempted Federal Credit Unions from “all taxation” by state and local governments, while explicitly allowing taxation of any real or tangible personal property of Credit Unions as other similar property is taxed.<sup>123</sup> As the recordation tax is not imposed on property, but on the privilege of recording, the Attorney General determined that 12 U.S.C. § 1768 exempts Federal Credit Unions from the recordation tax.<sup>124</sup>

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121. *Id.* (alteration in original) (citing 12 U.S.C. § 1768 (2006)).

122. *Id.* (citing 12 U.S.C. § 1768 (2006)).

123. *Id.*

124. *Id.* (citing *Pocahontas Consol. Collieries Co. v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912)).

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