



# COMMONWEALTH of VIRGINIA

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September 5, 2007

The Honorable Ross A. Mugler  
Commissioner of the Revenue for the City of Hampton  
P.O. Box 636  
Hampton, Virginia 23669

Dear Mr. Mugler:

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 whether the income of a person residing in the residential property with, and who is unrelated<sup>1</sup> to, the property owner (an “unrelated resident”) must be included when calculating whether such owner’s property qualifies for an exemption or deferral from taxes. You further ask whether the income exception applicable to an owner’s relatives<sup>2</sup> pursuant to § 58.1-3211(1)(b) is applicable to an unrelated resident.

## Response

It is my opinion that the income of an unrelated resident should not be included in calculations to determine whether an owner’s residential real estate qualifies for an elderly or disabled tax exemption or deferral. It further is my opinion that the income exemption in § 58.1-3211(1)(b) is not applicable to an unrelated resident.

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<sup>1</sup>For purposes of this opinion, I use the term “unrelated” to mean a person who is not related to another person by blood or marriage. Similarly, an “unrelated resident” is a person who resides with, but is not related by blood or marriage to, the elderly or disabled owner of residential real estate.

<sup>2</sup>The statutes providing tax relief to the elderly or disabled do not define the term “relative.” *See* VA. CODE ANN. tit. 58.1, ch. 32, art. 2, §§ 58.1-3210 to 58.1-3218 (2004 & Supp. 2007). One of the evident purposes of the General Assembly in providing legislation for tax relief to the elderly and handicapped was to assist those persons living on small incomes with no other substantial resources. *See* 1984-1985 Op. Va. Att’y Gen. Va. 335, 335; 1981-1982 Op. Va. Att’y Gen. 354, 355. Exemptions provided pursuant to § 58.1-3210 must be strictly construed. *See* 1984-1985 Op. Va. Att’y Gen., *supra*, at 335; 1982-1983 Op. Va. Att’y Gen. 579, 580 (interpreting § 58.1-760.1, predecessor to § 58.1-3210). The term “relative” must be construed broadly to include those related by blood or marriage so that only applicants with a very limited household income are eligible for tax relief. *See* 1984-1985 Op. Va. Att’y Gen., *supra*, at 335 (concluding that niece was relative for purposes of § 58.1-3211).

### Applicable Law and Discussion

Article 2, Chapter 32 of Title 58.1, §§ 58.1-3210 through 58.1-3218, governs exemptions from real property tax for the elderly and disabled. Subject to certain limitations, Article 2 authorizes a county, city, or town to exempt or defer real estate taxes relating to dwellings owned or jointly owned by an individual or individuals who are at least 65 years old or who are permanently and totally disabled. Specifically, § 58.1-3210(A) provides, in part, that:

The governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate and manufactured homes as defined in § 36-85.3, or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe. Such real estate shall be owned by, and be occupied as the sole dwelling of anyone at least 65 years of age or if provided in the ordinance, anyone found to be permanently and totally disabled as defined in § 58.1-3217.

Section 58.1-3211 provides that:

Any exemption or deferral program enacted by a county, city or town pursuant to § 58.1-3210 shall be subject to the following restrictions and conditions:

1. a. Subject to subdivision 1 b of this section, the total combined income received from all sources during the preceding calendar year by (i) owners of the dwelling who use it as their principal residence and (ii) *owners' relatives who live in the dwelling*, shall not exceed the greater of \$50,000, or the income limits based upon family size for the respective metropolitan statistical area, annually published by the Department of Housing and Urban Development for qualifying for federal housing assistance pursuant to § 235 of the National Housing Act (12 U.S.C. § 1715z). As an alternative option, a county, city, or town may provide that the total combined income received from all sources during the preceding calendar year by (a) owners of the dwelling who use it as their principal residence and (b) *owners' relatives who live in the dwelling* shall not exceed the county's or city's median adjusted gross income of its married residents.

....

Any amount up to \$10,000 of income of *each relative* who is not the spouse of an owner living in the dwelling and who does not qualify for the exemption provided by subdivision 1 b hereof may be excluded in determining total combined income. The local government may exclude up to \$5,000 of any permanent or temporary disability benefit, from whatever source, received by an owner. The local government may also exclude up to \$10,000 of income for an owner who is permanently disabled.

b. Notwithstanding subdivision 1 a of this section, if a person qualifies for an exemption or deferral under [Article 2], and if the person can prove by clear and convincing evidence that the person's physical or mental health has deteriorated to the point that the only alternative to permanently residing in a hospital, nursing home, convalescent home or other facility for physical or mental care is to have a *relative* move in and provide care for the person, and if a *relative* does then move in for that purpose, then none of the income of the *relative or of the relative's spouse* shall be counted

towards the income limit, provided the owner of the residence has not transferred assets in excess of \$10,000 without adequate consideration within a three-year period prior to or after the *relative* moves into such residence. [Emphasis added.]

Section 58.1-3210(A) authorizes a locality to exempt or defer local real estate taxes on residential real property owned by the elderly or disabled. However, § 58.1-3211(1)(a) places net combined financial worth limitations on the *owner(s)* of the residential real property as well as any of the *owners' relatives* living with the owner(s) to be eligible for an exemption or deferral. Additionally, § 58.1-3211.1(A) authorizes a prorated exemption or deferral from taxes where all the owners do not qualify as elderly or disabled owners. Section 58.1-3211.1(A) applies the net worth limitations to all *owners* of the residential real property at issue, not just those related to the elderly or disabled owners residing in the dwelling:

A. The governing body of the county, city, or town may, by ordinance, also provide for an exemption from or deferral of (or combination program thereof) real estate taxes for dwellings jointly held by two or more individuals not all of whom are at least age 65 or (if provided in the ordinance) permanently and totally disabled, provided that (i) the dwelling is occupied as the sole dwelling by all such joint owners, and (ii) the net combined financial worth of all such joint owners, including the present value of all equitable interests and computed without any exclusion for the dwelling or for any other asset notwithstanding the provisions of § 58.1-3211, as of December 31 of the immediately preceding calendar year, does not exceed [certain enumerated amounts.]

Section 58.1-3211.1(A) does not mention relatives. By comparison, § 58.1-3212 expressly mentions relatives and provides that:

Notwithstanding the provisions of subdivisions 1 and 2 of § 58.1-3211, the governing body of a county, city or town may by ordinance specify lower (i) income and financial worth figures, (ii) disability compensation reduction figures, if applicable, and (iii) reductions for income of *relatives living in the dwelling*, other than those set forth in § 58.1-3211. [Emphasis added.]

“When the General Assembly uses two different terms in the same act, it is presumed to mean two different things.”<sup>3</sup> Sections 58.1-3211 and 58.1-3212 include the word “relatives,” while § 58.1-3211.1 includes the phrase “joint owners” without any reference to relatives or other persons living in such residence. Based on the distinct differences in the language of the statutes in Article 2, it is clear that if the General Assembly had intended the limitations and conditions in §§ 58.1-3211.1(A) and 58.1-3212 to apply to unrelated residents, it would not have specified “owners’ relatives” or phrases relating to “relatives.”<sup>4</sup>

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<sup>3</sup>Forst v. Rockingham Poultry Mktg. Coop., Inc., 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981), *quoted in* Simon v. Forer, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003); Greenberg v. Commonwealth, 255 Va. 594, 601, 499 S.E.2d 266, 270 (1998).

<sup>4</sup>Instead, the General Assembly could have applied the limitations on income to all persons residing with an elderly or disabled owner. When the General Assembly intends to enact a mandatory requirement, it knows how to express its intention. *See* Op. Va. Att’y Gen.: 2003 at 147, 149; *id.* at 60, 61

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**Conclusion**

Accordingly, it is my opinion that the income of an unrelated resident should not be included in calculations to determine whether an owner's residential real estate qualifies for an elderly or disabled tax exemption or deferral. It further is my opinion that the income exemption in § 58.1-3211(1)(b) is not applicable to an unrelated resident.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive style with a large, prominent initial "R".

Robert F. McDonnell