



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

August 9, 2010

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The Honorable Francis X. O'Leary  
Treasurer, Arlington County  
Office of the County Treasurer  
2100 Clarendon Boulevard, Suite 217  
Arlington, Virginia 22201

Dear Mr. O'Leary:

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 inquire whether a county can rely on a bright line income standard in determining whether an individual is "permanently and totally disabled" and, therefore, eligible for relief from the real estate tax, or whether the locality must consider the totality of the circumstances. You further inquire whether a federal disability standard constitutes a rational guide for determining whether a taxpayer is "unable to engage in substantial gainful activity" when that standard is employed without any reference to what may be "substantial" in any given locality. Finally, you ask whether the County may adopt a bright line legal standard that is not advertised to the public and is not published as part of the regulations governing the tax relief program.

## Response

It is my opinion that localities may use neither a bright line test, a totality of the circumstances review, nor a federal disability guideline to determine whether a taxpayer is "permanently and totally disabled." It further is my opinion that a locality may employ a federal disability guideline in determining the maximum income level for tax relief eligibility, and that considering such a guideline would not be irrational. Finally, it is my opinion that the criteria used by a locality must be set forth in the text of an ordinance.

## Background

You relate that the Arlington County Department of Human Services ("Department"), which administers the County's elderly and disabled tax relief program, denied a homeowner's application for real estate tax relief. The reason for denying the application was that the taxpayer reported more than \$11,600 in earned income for that year. You report that the Department based its decision on the federal

guidelines for receiving disability benefits, which set the threshold for being engaged in "substantial gainful activity" at \$11,600 per year in income. You also note that this income criterion is not set forth in the County Code or published regulations. You state that the applicant, however, did comply with the eligibility requirements described on the county's website and in other printed materials by providing the required documentation demonstrating his disability.

### Applicable Law and Discussion

Section 58.1-3210 of the *Code of Virginia* authorizes localities to "provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate . . . owned by and [] 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."<sup>1</sup> Although exemptions under § 58.1-3210 must be strictly construed,<sup>2</sup> the General Assembly has provided localities with some flexibility with respect to the scope of the exemptions<sup>3</sup> The Code imposes three considerations for tax relief: (1) age or disability; (2) income; and (3) net worth.<sup>4</sup> Net worth is immaterial to your inquiry, so this opinion considers only the first two criteria.

First, as to disability, both the *Code of Virginia* and Arlington County define "[p]ermanently and totally disabled" as being "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or deformity which can be expected to result in death or can be expected to last for the duration of such person's life."<sup>5</sup> The Virginia Code does not define further what constitutes "substantial gainful activity."

Section 58.1-3213(D) details three ways for a taxpayer to demonstrate permanent disability: 1) certification by the Social Security Administration, the Department of Veteran Affairs, or the Railroad Retirement Board; 2) Social Security Administration certification regarding eligibility for benefits pursuant to 42 U.S.C. § 423(d); or 3) sworn affidavits by two qualified medical doctors attesting that the applicant is "permanently and totally disabled." Notably, no reference is made to a taxpayer's financial circumstances. Although the County "shall also make any other reasonably necessary inquiry of persons seeking such exemption, . . . including qualification as permanently disabled,"<sup>6</sup> the Code does not authorize a locality to impose any additional qualifications with respect to the disability determination.<sup>7</sup> I therefore conclude that a locality may not rely on federal guidelines in determining an applicant's

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<sup>1</sup> VA. CODE ANN. § 58.1-3210 (2009). Arlington County has adopted such an ordinance; ARLINGTON COUNTY, VA., CODE §§ 43-1 through 43-9 (2008).

<sup>2</sup> See VA. CONST. art. X 6(f).

<sup>3</sup> 1994 Op. Va. Att'y Gen. 117. For example, localities may exclude from total combined income any disability benefits up to \$5,000 and up to \$10,000 of all income for permanently disabled applicants; and in calculating financial worth, a locality may exclude the value of certain furnishings and may annually increase the limit by an amount equal to the previous year's increase in the Consumer Price Index. VA. CODE ANN. § 58.1-3211 (2009).

<sup>4</sup> Sections 58.1-3210; 58.1-3211.

<sup>5</sup> Section 58.1-3217 (2009); ARLINGTON COUNTY, VA., CODE § 43-1 (2008).

<sup>6</sup> VA. CODE ANN. § 58.1-3213(F) (2009).

<sup>7</sup> The Dillon Rule. "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Marble Techs., Inc., v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (citation omitted).

disability status. Similarly, it is my opinion that local characteristics, such as median income and cost of living, are not to be considered when determining an applicant's disability status.<sup>8</sup>

A second, distinct criterion for tax relief turns on the taxpayer's income. The General Assembly has provided that a locality may choose between two options in determining the maximum income allowed to qualify for its tax relief program: 1) the greater of \$50,000 total combined income per year, or the income limits based upon family size for the respective metropolitan statistical area, as published by the United States Department of Housing and Urban Development, or 2) the locality's median adjusted gross income of its married residents, as published by the University of Virginia.<sup>9</sup>

In spite of these income specifications, the General Assembly specifically has authorized certain localities, including Arlington County, to raise the income limit to \$75,000 per year.<sup>10</sup> Furthermore, the General Assembly has authorized all localities to depart from the income levels specified in the Code if the locality wishes to provide lower income limits.<sup>11</sup> In adopting such income limits, localities can fashion a tax relief program that is adapted to their particular economic circumstances.

Although the federal disability standard is not a proper guideline for determining a taxpayer's *disability*, it may serve as a basis for establishing *income* limitations on eligibility, should a locality adopt it as the income limit for eligibility. Were a locality to rely on this federal standard, such an income standard easily would survive "rational basis" scrutiny if challenged in court.<sup>12</sup>

Finally, although localities have discretion in fashioning aspects of a tax relief program, the criteria adopted by a locality must be specified in an ordinance. The Code provides that, "the governing body . . . may, *by ordinance*, provide for the exemption . . . upon such conditions and in such amount as *the ordinance* may prescribe,"<sup>13</sup> and "the governing body . . . may *by ordinance* specify lower . . . figures."<sup>14</sup> Consequently, a locality may not impose any qualifications or other conditions that are not included in the text of the ordinance.

### Conclusion

Accordingly, it is my opinion that localities may not use a bright line test, a totality of the circumstances review, or a federal disability guideline in determining whether a taxpayer is "permanently and totally disabled." It further is my opinion that a locality may employ a federal disability guideline in determining the income level for tax relief eligibility, and that considering such a guideline would not be

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<sup>8</sup> As noted below, however, local conditions can be considered in determining whether a homeowner bears "an extraordinary tax burden on the real estate in relation to [his] income and financial worth." Section 58.1-3218 (2009).

<sup>9</sup> Section 58.1-3211(1)(a).

<sup>10</sup> Compare §§ 58.1-3211(2) and 58.1-3211(3) with 58.1-3211(4).

<sup>11</sup> Section 58.1-3212 (2009).

<sup>12</sup> See, e.g., *Fed. Commc'n Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (noting highly deferential standard for court review of legislative classifications that do not implicate suspect classes or fundamental rights).

<sup>13</sup> Section 58.1-3210(A) (emphasis added).

<sup>14</sup> Section 58.1-3212 (emphasis added).

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irrational. Finally, it is my opinion that the criteria used by a locality must be set forth in the text of an ordinance.

With warmest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General