



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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October 7, 2011

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The Honorable Janet H. Rorrer  
Commissioner of the Revenue, Patrick County  
Post Office Box 367  
Stuart, Virginia 24171

Dear Commissioner Rorrer:

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

## Issue Presented

You inquire whether real estate owned by Smith River Soil & Wild Life Conservation Club, Inc., a Virginia corporation (the "Club"), is exempt from local taxation.

## Response

It is my opinion that the determination of whether the real estate owned by the Club on July 1, 1971, is exempt from local taxation is a factual determination to be made in the first instance by you as the Commissioner of Revenue. That determination will depend on whether, considering all of the relevant facts and circumstances, the Club engaged in activities as an institution of learning or engaged in activities that predominantly promoted charitable or benevolent purposes. Assuming you find that to be the case, you must further determine whether the Club's activities satisfy the requirements for non-profits.

## Background

According to the documentation you provide, the Club was recognized by the State Corporation Commission as a non-stock, not-for-profit corporation on January 20, 1956. The Charter lists the corporate purposes and powers as follows:

- (1) To acquire lands and to erect, build, construct, maintain and operate a hunting and fishing club, shooting range, including the right to purchase ... lands, buildings, hunting preserves, fish ponds, and other facilities for the purpose of preserving and propagating wild life of all kinds ... and to teach and carry into practice all methods of soil conservation on a non-profit basis.
- (2) To construct, maintain and operate all types of club houses, concessions, shooting ranges and activities not contrary to law in and on all lands ... acquired ... maintained, or operated by this Corporation on a non-profit basis.

Additionally, copies of recorded deeds indicate that the Club acquired a ten (10) acre +/- parcel of real estate in June, 1965 and a one-half (1/2) acre +/- parcel of real estate in April, 1966. As you note, the

Club is not among the list of codified tax-exempt entities found in §§ 58.1-3650.1 through 58.1-3650.1001 of the *Code of Virginia*. Finally, you state that the Club's "property has been taxable since they purchased it [and] they have requested me to exempt it from real estate taxation."

### Applicable Law and Discussion

Upon its effective date, Article X, § 6 of the Constitution of Virginia of 1971 provided, in relevant part:

Exempt property. – (a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local ...

(4) Property owned by ... institutions of learning not conducted for profit, so long as such property is primarily used for ... scientific, or educational purposes or purposes incidental thereto....

\* \* \*

(6) Property used by its owner for ... charitable, ... benevolent, cultural, or public park and playground purposes, as may be provided by . . . the General Assembly and subject to such restrictions and conditions as may be prescribed.

The General Assembly has not specifically designated the Club as a benevolent, charitable, historical or patriotic organization or public park or playground as contemplated by Article X, § 6(a)(6),<sup>1</sup> but that fact does not end the inquiry. Article X, § 6(f) of the Constitution further provides:

(f) Exemptions of property from taxation as established or authorized hereby shall be strictly construed; provided, however, that *all property exempt from taxation on the effective date of this section shall continue to be exempt* until otherwise provided by the General Assembly as herein set forth. [Emphasis added.]

Moreover, pursuant to Article X, § 6(a)(6), the General Assembly has enacted § 58.1-3606, which provides as follows:

(A) Pursuant to the authority granted in Article X, Section 6(a)(6) of the Constitution of Virginia to exempt property from taxation by classification, the following classes of real and personal property shall be exempt from taxation:

\* \* \*

4. Property owned by . . . incorporated colleges or other institutions of learning not conducted for profit. This paragraph shall apply only to property primarily used for literary, scientific or educational purposes or purposes incidental thereto.<sup>[2]</sup>

\* \* \*

7. Buildings with the land they actually occupy, and the furniture and furnishings therein belonging to any benevolent or charitable organization and used by it exclusively

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<sup>1</sup> Effective January 1, 2003, a constitutional amendment to Article X, § 6(a)(6) replaced the state legislative process for approval of exempt entities with a process for local approval. The General Assembly also enacted VA. CODE ANN. § 58.1- 3651 (2009), which specifies a procedure and criteria for local classification. See 2003 Op. Va. Att'y Gen. 28.

<sup>2</sup> I can find no other constitutional or statutory provisions under which the Club could qualify for an exemption.

for lodge purposes or meeting rooms, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes.

\* \* \*

(B) Property, belonging in one of the classes listed in subsection A of this section, which was exempt from taxation on July 1, 1971, shall continue to be exempt from taxation under the rules of statutory construction applicable to exempt property prior to such date.

Your brief description of the activities of the Club suggests that it does not qualify as “an institution of learning” for purposes of § 58.1-3606(A)(4). Although learning is one part of the Club’s mission, it evidently is not principally devoted to learning. Because the Constitution requires tax exemptions to be strictly construed, it appears likely that the Club would not qualify as an institution of learning under § 58.1-3606(A)(4).<sup>3</sup> If the Club can demonstrate that it functions as “an institution of learning,” however, then it will qualify for a tax exemption under this statutory provision. Similarly, it is doubtful, under the strict construction of the statute, that the buildings used by the Club were used “exclusively” for meeting rooms under § 58.1-3606(A)(7).

Nonetheless, because the Club received its Charter and acquired the real estate for which it claims an exemption prior to 1971, I cannot exclude the possibility that it can avail itself of the grandfather provisions of Article X, § 6(f) and Code § 58.1-3606(B). The question thus becomes whether the property was eligible for tax-exempt status when the 1971 Constitution was adopted. In addressing the application of the grandfather clause,<sup>4</sup> the Supreme Court of Virginia held that the strict construction mandated by Article X, § 6(f) of the 1971 Constitution applied only prospectively to exemptions authorized under Article X, § 6(a)(6).<sup>5</sup> The Court further found that “the grandfather clause . . . retains a rule of liberal construction to apply retroactively to determine whether certain property was exempt on July 1, 1971, and therefore, should continue to be exempt.”<sup>6</sup> Under this approach, “exemption was the rule and taxation the exception.”<sup>7</sup> Property thus could qualify for exemption or remain tax exempt if the property qualified for an exemption under the law before July 1, 1971. To answer this question, one must turn to exceptions found in the 1902 Constitution.

Article XIII, § 183 of the 1902 Constitution of Virginia provided in relevant part, as follows:

Except as otherwise provided in this Constitution, the following property and no other, shall be exempt from taxation, state and local . . . :

\* \* \*

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<sup>3</sup> For examples of what constitutes a qualifying institution of learning, *see* *Richmond v. Southside Day Nursery Ass’n*, 207 Va. 561, 151 S.E.2d 370 (1966) (nursery with pre-school education program held exempt) and *Commonwealth v. Hampton Normal & Agric. Inst.*, 106 Va. 614, 56 S.E. 594 (1907) (college’s operation of a model dairy farm held exempt).

<sup>4</sup> *Manassas Lodge No. 1380, Loyal Order of Moose, Inc. v. County of Prince William*, 218 Va. 220, 237 S.E.2d 102 (1977) (construing recently adopted Va. Const. art. X, § 6(f) (1971) and Virginia Code § 58-12, predecessor statute to § 58.1-3606). *See* 1977-78 Op. Va. Att’y Gen. 415.

<sup>5</sup> *Manassas Lodge*, 218 Va. at 223, 237 S.E.2d at 105.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 22, S.E.2d at 104 (citing *Commonwealth v. Lynchburg Y.M.C.A.*, 115 Va. 745, 748, 80 S.E. 589, 590 (1914)).

(d) Buildings with the land they actually occupy and the furniture, furnishings ... wholly devoted to educational purposes, belonging to, and actually exclusively occupied and used by ... incorporated colleges, academies, industrial schools, seminars, or other incorporated institutions of learning ....

\* \* \*

(f) Buildings with the land they actually occupy, and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes . . .

The Club's 1956 incorporation date entitles any land it acquired by July 1, 1971 to the liberal standard, provided that it was exempt from taxation at that time. Therefore, under Article XIII § 183(d), if the Club can establish under this standard that its buildings were and are "primarily used for educational purposes or purposes incidental thereto," then it can claim an exemption under that provision.<sup>8</sup>

Alternatively, the Club can seek to establish under Article XIII § 183(f) that it functions as a "benevolent or charitable association." Under this construction, a "charitable" entity was one that was organized and operated to provide some service of public welfare or for the public good.<sup>9</sup> Given its accepted meaning, a "benevolent" entity is one that is "philanthropic, humane, with a purpose or desire to do good and confer benefits on man rather than realize gain or profit."<sup>10</sup>

As noted, the Club's Charter indicates that the corporate purposes include "preserving wildlife of all kinds" and "teach[ing] and carry[ing] into practice all methods of soil conservation." Moreover, the Charter calls for the corporate powers to be exercised on a non-profit basis. In the abstract, any such actions would appear to be for the public service or public good. They would also appear to confer benefits on society in general.<sup>11</sup> No information, however, is provided explaining if, or how, the Club actually exercises those powers as they might relate to teaching and practicing soil conservation or wildlife protection.

Additionally, the Charter authorizes operating a hunting and fishing club, a shooting range, hunting preserves, and club houses with concessions. Standing alone, such activities do not implicate undertakings for the public welfare or public good. Again, I have no factual information explaining if, or how, those activities are conducted.

Nor do I have the factual information necessary to determine if, in comparison to any non-public welfare issues, any charitable or benevolent undertakings meet the dominant purpose test so that the overall use of the property promotes the exempt purpose(s) of the Club.<sup>12</sup> Specifically, the property use

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<sup>8</sup> *County of Hanover v. Trs. of Randolph-Macon Coll.*, 203 Va. 613, 614, 125 S.E.2d 812, 813 (1962).

<sup>9</sup> *Manassas Lodge*, 218 Va. at 224, 237 S.E.2d at 105 (quoting *City of Richmond v. United Givers Fund of Richmond, Henrico & Chesterfield, Inc.*, 205 Va. 432, 436, 137 S.E. 2d 876, 879 (1964)).

<sup>10</sup> *Id.* (citing BLACK'S LAW DICTIONARY 201 (4th ed. 1951)). See 1977-78 Op. Va. Att'y Gen. at 417.

<sup>11</sup> See *Hampton Normal & Agric. Inst.*, 106 Va. at 614, 56 S.E. at 594.

<sup>12</sup> *Smyth Cnty. Cmty. Hosp. v. Town of Marion*, 259 Va. 328, 334, 527 S.E.2d 401, 404 (2000).

must have a direct reference to the charitable and or benevolent goals and tend to directly and immediately facilitate and promote those goals.<sup>13</sup>

Clearly one aspect of that determination will be the extent to which the Club's operations traditionally have been, and continue to be, conducted in a non-profit manner. Although the Club may generate revenue, or even profits, such revenues or profits alone are not necessarily determinative. If the the Club's activities predominantly promote wildlife preservation and the teaching of soil conservation techniques, assuming all the other criteria have also been met, the Club could be entitled to tax exempt status.<sup>14</sup>

Ultimately, more facts are necessary to reach a conclusion concerning whether the Club's property is exempt from taxation.

### Conclusion

Accordingly, it is my opinion that the determination of whether the real estate owned by the Club on July 1, 1971, is exempt from local taxation is a factual determination to be made in the first instance by you as the Commissioner of Revenue. That determination will depend on whether, considering all of the facts and circumstances, the Club engaged in activities as an institution of learning or engaged in activities that predominantly promoted charitable or benevolent purposes. Assuming you find that to be the case, you must further determine whether the Club's activities satisfy the requirements for non-profits.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General

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<sup>13</sup> *Id.* at 334-35, 527 S.E.2d at 404 (citing *Lynchburg Y.M.C.A.*, 115 Va. at 752, 80 S.E. at 591).

<sup>14</sup> See *Lynchburg Y.M.C.A.*, 115 Va. at 745, 80 S.E. at 589; *Trs. of Randolph-Macon Coll.*, 203 Va. at 617, 125 S.E.2d at 815.