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To: VML key officials

From: Mark Flynn, director of legal services

Re: Real estate tax exemption for disabled veterans

Date: August 4, 2011

This memo is being sent to address recent developments in the real estate tax exemption for disabled veterans. As you will recall, the Virginia constitution was amended in 2010 and legislation passed in the 2011 session of the General Assembly to provide disabled veterans a real estate tax exemption. The constitutional provision is copied at the foot of this memo. The exemption began January 1, 2011. In July, the attorney general issued an opinion to answer questions about the new constitutional provision. The opinion is here: <http://bit.ly/pP73tr>

The most significant questions addressed by the attorney general are:

1. What constitutes a one hundred percent service-connected, permanent, and total disability determination by the US Department of Veterans Affairs?

To qualify, the veteran must receive a determination by the US Department of Veterans Affairs (VA) to have a "one hundred percent service-connected, permanent, and total disability" per Article X §6.A of the Virginia constitution. The VA has a set of criteria for what constitutes a 100% service-connected, permanent and total disability, based on the number and severity of injuries to parts of the body. See 38 CFR 4.15, copied below. In addition to veterans eligible under the ratings criteria in that section, the VA also will determine a veteran to be permanently disabled if he or she is determined by the VA to be unemployable. 38 CFR §§ 4.16, 4.17. The attorney's general opinion concludes that if the VA makes a determination of total and permanent disability under either criterion - rating or unemployability, then the veteran's principal residence is exempt from local real estate tax.

2. For the surviving spouse's land to be eligible for the exemption, the veteran must have died after January 1, 2011.

3. Va. Code § 58.1-3219.5 provides that no more than one acre may be exempted. The attorney general opined that the General Assembly has the authority to set that limit. His opinion on this issue is based on the limit in the

constitutional amendment that only the "principal place of residence" is exempt.

4. If the veteran owns the land with a person other than his or her spouse, such as a child or sibling, the land is not eligible for the exemption. It must be owned by the vet or the vet and his or her spouse.

The opinion states that land placed in a trust is ineligible for the exemption. The typical trust arrangement is set up for estate planning purposes. There is an argument that if the disabled veteran owns the trust, he or she effectively owns the land and therefore, the land should be eligible for the exemption. Some localities are following this logic. However, the attorney's general opinion does not support that conclusion.

5. The surviving spouse will receive the tax exemption only while he or she owns and lives on the land formerly owned with the disabled veteran. If the spouse moves, he or she will lose the exemption.

In addition to the attorney's general opinion, several other issues should be kept in mind by local government officials administering the exemption.

1. The exemption does not apply to a manufactured home that has not been made part of the real estate by securing it to the ground in a manner approved by the building code and by surrendering the title issued by DMV.

Some vets have asked for the exemption for their vehicles. Personal property is not eligible for the exemption.

2. If a disabled veteran buys land mid-year, makes it his or her principal place of residence at that time and applies for the exemption for the new home, the exemption will start with the next tax year. Contrast Va. Code § 58.1-3360 that provides that if the federal government, the state, a political subdivision or church acquires a taxpayer's land, the taxpayer owes no taxes for the balance of the tax year.

3. Permanent disability. The amendment provides that the VA is to make the determination of total and permanent disability. With veterans returning from Iraq and Afghanistan, the VA is regularly making disability determinations without determining that the disability is permanent. The local Commissioner of the Revenue or local finance officer for the locality must review the information from the VA to see if the VA has made a decision that the disability is permanent.

4. Erroneous assessments? If a disabled veteran who qualifies for the exemption in 2011 due to the disability waits until 2014 to apply, he or she will likely be entitled to a refund of the taxes paid for the prior three years. This is because the amendment is self-executing. That is, if the veteran was determined in 2011 to be disabled, his or her property became tax exempt at that time by operation of the constitutional amendment, without further action on his or her part. Therefore, since the land was exempt for the three years, when he or she applies, any taxes paid on the land, with interest, must be refunded to the taxpayer. There is an argument that until the veteran applies, his land is not exempt. However, that argument may well lose in a court proceeding.

VML continues to recommend that towns work closely with their county commissioner of the revenue in administering the exemptions for town taxes. Va. Code § 58.1-3219.6 allows towns to require an application. However, there is nothing to be gained by doing that. The town can accept the determination of the county commissioner. That way, the disabled veteran doesn't have to make two trips, filling out the same information two times.

This memo was developed in part based on a conversation with the president of the Commissioner of the Revenue association president, Scott Harris, the commissioner for Hanover County. My thanks to Commissioner Harris for his interest and involvement.

State and federal laws

VA Constitution, Article X Section 6-A. Property tax exemption for certain veterans.

Notwithstanding the provisions of Section 6, the General Assembly by general law, and within the restrictions and conditions prescribed therein, shall exempt from taxation the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs or its successor agency pursuant to federal law to have a one hundred percent service-connected, permanent, and total disability, and who occupies the real property as his or her principal place of residence. The General Assembly shall also provide this exemption from taxation for real property owned by the surviving spouse of a veteran who was eligible for the exemption provided in this section, so long as the surviving spouse does not remarry and continues to occupy the real property as his or her principal place of residence.

VA Code § 58.1-3219.5. Exemption from taxes on property for disabled veterans

A. Pursuant to Article X, Section 6-A of the Constitution of Virginia, and for tax years beginning on or after January 1, 2011, the General Assembly hereby exempts from taxation the real property, including the joint real property of husband and wife, of any veteran who has been rated by the U.S. Department of Veterans Affairs or its successor agency pursuant to federal law to have a 100 percent service-connected, permanent, and total disability, and who occupies the real property as his principal place of residence.

B. The surviving spouse of a veteran eligible for the exemption set forth in this article shall also qualify for the exemption, so long as the death of the veteran occurs on or after January 1, 2011, the surviving spouse does not remarry, and the surviving spouse continues to occupy the real property as his principal place of residence.

C. A county, city, or town shall provide for the exemption from real property taxes the qualifying dwelling pursuant to this section, and shall provide for the exemption from real property taxes the land, not exceeding one acre, upon which it is situated. However, if a county, city, or town provides for an exemption from or deferral of real property taxes of more than one acre of land pursuant to Article 2 (§ 58.1-3210 et seq.) of this chapter, then the county, city, or town shall also provide an exemption for the same number of acres pursuant to this section.

§ 58.1-3219.6. Application for exemption

The veteran or surviving spouse claiming the exemption under this article shall file with the commissioner of the revenue of the county, city, or town or such other officer as may be designated by the governing body in which the real property is located, on forms to be supplied by the county, city, or town, an affidavit or written statement (i) setting forth the name of the disabled veteran and the name of the spouse, if any, also occupying the real property, (ii) indicating whether the real property is jointly owned by a husband and wife, and (iii) certifying that the real property is occupied as the veteran's principal place of residence. The veteran shall also provide documentation from the U.S. Department of Veterans Affairs or its successor agency indicating that the veteran has a 100 percent service-connected, permanent, and total disability. The veteran shall be required to refile the information required by this section only if the veteran's principal place of residence changes. In the event of a surviving spouse of a veteran claiming the exemption, the surviving spouse shall also provide documentation that the veteran's death occurred on or after January 1, 2011.

Federal regulations on veterans disability 38 CFR Part 4

38 CFR § 4.15 Total disability ratings

The ability to overcome the handicap of disability varies widely among individuals. The rating, however, is based primarily upon the average impairment in earning capacity, that is, upon the economic or industrial handicap which must be overcome and not from individual success in overcoming it. However, full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability and to the effect of combinations of disability. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; Provided, That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person. The following will be considered to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. Other total disability ratings are scheduled in the various bodily systems of this schedule. (Emphasis added.)

38 C.F.R. § 4.16 Total disability ratings for compensation based on unemployability of the individual.

(a) Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities: *Provided that*, if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. For the above purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability: (1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable, (2) disabilities resulting from common etiology or a single accident, (3) disabilities affecting a single body system, e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric, (4) multiple injuries incurred in action, or (5) multiple disabilities incurred as a prisoner of war. It is provided further that the existence or degree of nonservice-connected disabilities or previous unemployability status will be disregarded where the percentages referred to in this paragraph for the service-connected disability or disabilities are met and in the judgment of the rating agency such service-connected disabilities render the veteran unemployable. Marginal employment shall not be considered substantially gainful employment. For purposes of this

section, marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination.

(Authority: 38 U.S.C. 501)

(b) It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.

Therefore, rating boards should submit to the Director, Compensation and Pension Service, for extra-schedular consideration all cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet the percentage standards set forth in paragraph (a) of this section. The rating board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue. (Emphasis added.)

38 C.F.R. § 4.17 Total disability ratings for pension based on unemployability and age of the individual.

All veterans who are basically eligible and who are unable to secure and follow a substantially gainful occupation by reason of disabilities which are likely to be permanent shall be rated as permanently and totally disabled. For the purpose of pension, the permanence of the percentage requirements of § 4.16 is a requisite. When the percentage requirements are met, and the disabilities involved are of a permanent nature, a rating of permanent and total disability will be assigned if the veteran is found to be unable to secure and follow substantially gainful employment by reason of such disability. Prior employment or unemployment status is immaterial if in the judgment of the rating board the veteran's disabilities render him or her unemployable. In making such determinations, the following guidelines will be used:

(a) Marginal employment, for example, as a self-employed farmer or other person, while employed in his or her own business, or at odd jobs or while employed at less than half the usual remuneration will not be considered incompatible with a determination of unemployability, if the restriction, as to securing or retaining better employment, is due to disability.

(b) Claims of all veterans who fail to meet the percentage standards but who meet the basic entitlement criteria and are unemployable, will be referred by the rating board to the Veterans Service Center Manager or the Pension Management Center Manager under § 3.321(b)(2) of this chapter. (Emphasis added.)