



COMMONWEALTH of VIRGINIA

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The Honorable Carrie Coyner
Member, House of Delegates
Post Office Box 58
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Dear Delegate Coyner:

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 regarding the tax assessment of real property that is operated in whole or in part as affordable rental property. Citing a lack of consistency among the various jurisdictions in the assessment of affordable housing developments, your questions concern the interpretation and application of §§ 58.1-3295 and 58.1-3984 by local assessors. You first ask whether assessors comply with considerations mandated under § 58.1-3295 by merely reviewing the property's statement of income and expenses. You also ask whether assessors, in conducting an assessment by methods you specify, arrive at assessments of affordable housing property in accordance with generally accepted appraisal practices, procedures, rules, and standards prescribed by nationally recognized professional appraisal organizations (GAAP).¹

Response

It is my opinion that an assessor does not properly consider an affordable housing property's actual operating expenses and expenditures and the impact of any such additional expenses or expenditures by simply reviewing the property's statement of income and expenses. Whether an assessment comports with GAAP is a question that is beyond the scope of an opinion of this Office.

Applicable Law and Discussion

The Constitution of Virginia directs that "[a]ll assessments of real estate . . . shall be at their fair market value, to be ascertained as prescribed by law."² Fair market value generally is understood as "the

¹ "GAAP" often is used to refer to "generally accepted accounting principles." That is not the case here, where it refers only to "generally accepted appraisal practices" and associated procedures, rules, and standards prescribed by nationally recognized professional appraisal organizations. Your GAAP inquiry specifically relates to 1) assessments that are "based solely on income and expense information without consideration of the physical, economic, governmental, and social trends and factors" that can affect market value, and 2) assessments that "use capitalization rates derived from sales of institutional grade, conventional market-rate properties" to value affordable housing properties.

² VA. CONST. art. X, § 2; *see also* VA. CODE ANN. § 58.1-3201 (2022).

price which [property] will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.”³ Virginia Code § 58.1-3295 sets forth the manner the General Assembly has prescribed for determining the fair market value of property operated in whole or part as affordable rental housing.⁴

Although many factors contribute to the fair market value of any given property,⁵ § 58.1-3295(A) provides that, “[n]otwithstanding any other provision of law,” local assessors “shall consider” several enumerated factors when ascertaining the fair market value of affordable rental housing. The considerations specifically set forth are as follows: 1) “[t]he contract rent and the impact of applicable rent restrictions”; 2) “[r]estrictions on the transfer of title or other restraints on alienation of the real property”; and 3) “[t]he actual operating expenses and expenditures and the impact of any such additional expenses or expenditures.”⁶

For affordable rental property that is income producing, § 58.1-3295(E) directs further that, “[n]otwithstanding any other provision in this section or other law,” such property “that is generating income as affordable housing shall be assessed using the income approach” In general, the “income approach” appraisal methodology “measures market value as the present worth of monetary benefits anticipated to be derived in the future from ownership of the asset.”⁷ The General Assembly has specified that, for purposes of assessing income-generating affordable housing, such approach is to be “based on: the property’s current use, income restrictions, provisions of any arm’s-length contract including but not limited to restrictions on the transfer of title or other restraints on alienation of the real property, . . . and all other provisions of [§ 58.1-3295].”⁸ Accordingly, real property generating income as affordable housing must be assessed a fair market value that has been determined using the income approach based upon the factors set forth in § 58.1-3295(E), which incorporates the factors set forth in subsection (A).⁹

³ *Tuckahoe Woman’s Club v. City of Richmond*, 199 Va. 734, 737 (1958) (quoting *Seaboard A.L. Ry. v. Chamblin*, 108 Va. 42, 46 (1908)).

⁴ The statute’s provisions relate to “affordable rental housing operated in accordance with the provisions of (i) 26 U.S.C. § 42, 26 U.S.C. § 142(d), 24 C.F.R. § 983, 24 C.F.R. § 236, 24 C.F.R. § 241(f), 24 C.F.R. § 221(d)(3), the federal Rental Assistance Demonstration program established under the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55), or any successors thereto; (ii) applicable state law; or (iii) local ordinances adopted by the locality wherein such real property is located[.]” Section 58.1-3295(A) (2022).

⁵ “There are many factors to be considered in arriving at the fair market value of property. While size and cost of the property may be factors to be given weight, there are many other factors which tend to increase or diminish such value; for instance, the design, style, location, appearance, availability of use, and the economic situation prevailing in its area, as well as other circumstances.” *City of Richmond v. Jackson Ward Partners, L.P.*, 284 Va. 8, 19 (2012) (quoting *Smith v. City of Covington*, 205 Va. 104, 108-09 (1964)).

⁶ Section 58.1-3295(A).

⁷ *McKee Foods Corp. v. Cnty. of Augusta*, 297 Va. 482, 496 (2019) (quoting *Western Ref. Yorktown, Inc. v. Cnty. of York*, 292 Va. 804, 813 (2016)). Other approaches, not available for income-producing affordable housing properties per § 58.1-3295(E), include the cost approach and the sales approach. *See id.*

⁸ Section 58.1-3295(E).

⁹ This valuation approach “is recognized as a useful method of ascertaining the fair market value of income-producing property Under this approach, the property’s fair market value derives from an estimate of the cash flows that the property will generate, to which a multiplier (‘capitalization rate’), which is based on the average rate of return of investment from similar properties, is applied to arrive at the present capital value of the property.” 2010 Op. Va. Att’y Gen. 205, 207 (citing, in part, Stephen C. Gara & Craig J. Langstraat, *Property Valuation for Transfer Taxes: Art, Science, or Arbitrary Decision?*, 12 AKRON TAX J. 125, 143 (1996)). As with assessments

You first ask whether an assessor who “simply review[s] (i.e., giv[es] a cursory glance to)” an affordable housing property’s statement of income and expenses complies with § 58.1-3295.¹⁰ “Taxes can only be assessed, levied and collected in the manner prescribed by express statutory authority.”¹¹ Section 58.1-3295 clearly establishes that an assessor “shall consider . . . [t]he contract rent . . . and [t]he actual operating expenses and expenditures *and* the impact of any such additional expenses or expenditures” in determining the fair market value of real property operated in whole or in part as affordable rental housing.¹² “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.”¹³ In applying statutory language, courts will “giv[e] to every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense.”¹⁴

In general, the use of the word “shall” in a statute implies that its provisions are mandatory,¹⁵ and “[t]ax assessors have no power to make an assessment except in the manner prescribed by law[.]”¹⁶ The ordinary meaning of the word “consider” is “to reflect on: to think about with a degree of care” or “to think of . . . in an attentive . . . way.”¹⁷ The term “cursory,” on the other hand, means “rapidly [and] often superficially performed with scant attention to detail: . . . hasty.”¹⁸ A superficially performed review of an affordable housing property’s statement of income and expenses is inconsistent with the plain language in the statute. Moreover, § 58.1-3295 calls for not only consideration of the contract rent and actual operating expenses and expenditures, but also “the impact of any” additional expenses or expenditures. I therefore conclude that real estate assessors must think about the information required by § 58.1-3295 carefully and take it into account when determining the fair market value of affordable housing properties.¹⁹ “[T]oken consideration” is insufficient.²⁰

generally, “the use of the capitalization method is far from an exact science” *Van Dorn Assocs. v. City of Alexandria*, 2 Va. Cir. 171, 176 (Alexandria Cir. Ct., Dec. 2, 1983).

¹⁰ With certain limitations, local assessors may require owners of income-producing realty to submit “statements of the income and expenses attributable over a specified period of time to each such parcel of real estate.” Section 3294 (2022).

¹¹ *City of Richmond v. SunTrust Bank*, 283 Va. 439, 442 (2012) (quoting *Woodward v. City of Staunton*, 161 Va. 671, 673 (1933)).

¹² Section 58.1-3295(A) (emphasis added).

¹³ *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 13 (2019) (quoting *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012)).

¹⁴ *McClellan v. Commonwealth*, 39 Va. App. 759, 765 (2003) (quoting *Posey v. Commonwealth*, 123 Va. 551, 553 (1918)).

¹⁵ 1998 Op. Va. Att’y Gen. 100, 101 (citing *Andrews v. Shepherd*, 201 Va. 412, 414 (1959); *Schmidt v. City of Richmond*, 206 Va. 211, 218 (1965)).

¹⁶ *SunTrust Bank*, 283 Va. at 442 (quoting *Woodward*, 161 Va. at 673).

¹⁷ “Consider.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 483.

¹⁸ “Cursory.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 558.

¹⁹ *Cf. Murray v. Commonwealth*, 225 Va. 13, 17 (1983) (noting that “the use of the words ‘shall consider’ [in a jury instruction] seemingly imposed a mandatory duty upon the jury to give consideration to the [specified] feature”). Due consideration of any particular factor, however, does not necessarily require a particular result. *See Sobol v. Sobol*, 74 Va. App. 252, 275 (2022), *appeal granted* (Sept. 13, 2022). Indeed, the statute requires consideration of information in addition to just rent and expenses, and the “assessment of property is not an exact science.” *S. Ry. Co. v. Commonwealth*, 211 Va. 210, 214 (1970).

²⁰ *Smith v. Bd. of Supvrs.* 234 Va. 250, 258 (1987).

You next inquire regarding an assessor's duty to comply with GAAP in assessing the fair market value of affordable rental housing. Although no statute expressly requires tax assessors to conduct real estate assessments in accordance with GAAP, such a requirement is implied from the language of Code § 58.1-3984, which addresses applications to the circuit court to correct erroneous assessments of local taxes, including real property tax assessments.²¹

To successfully challenge an assessment under § 58.1-3984, the taxpayer, in part, must prove that the assessment “was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations . . . and applicable Virginia law relating to valuation of property.”²² Because §§ 58.1-3295 and 58.1-3984 both address the assessment of real estate taxes, the methodology imposed by § 58.1-3295 for assessments of affordable housing properties should be construed *in pari materia* with the standard of proof set forth in § 58.1-3984 requiring assessments to be ascertained in accordance with GAAP.²³ The required showing under § 58.1-3984 evinces a legislative intent for assessors to conduct their assessments in accordance with GAAP. Indeed, in reviewing tax assessments, the Supreme Court of Virginia has stated that “Code § 58.1-3984(B) requires an assessment to be reached based on ‘applicable Virginia law relating to valuation of property.’”²⁴ It stands to reason that it similarly requires an assessment to be reached in accordance with GAAP.

I therefore conclude that assessments conducted under § 58.1-3984 must be performed in accordance with GAAP. Your inquiry, however, encompasses specific questions concerning the proper application of GAAP within the context of assessing affordable housing properties. In essence, you thus seek counsel regarding the interpretation of guidelines prescribed by GAAP.²⁵ As has been noted previously, “[t]he traditional role of this Office regarding requested opinions has been to interpret applicable statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of the statutory provisions.”²⁶ Opinions historically are limited “to matters that concern an interpretation of

²¹ Section 58.1-3295 is not to be read as an isolated fragment of law, but rather as a “part[] of a great connected, homogeneous system, or a single and complete statutory arrangement.” *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 543 (2016) (quoting *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957)).

²² Section 58.1-3984(B). The statute incorporates the International Association of Assessing Officers (IAAO) as an example of a nationally recognized professional appraisal organization.

²³ *See Morgan v. Commonwealth*, 301 Va. 476, 481 (2022) (“Generally, statutes with a common purpose or in the same general plan are considered as *in pari materia*. . . . [whereby] ‘new enactments of a fragmentary nature on [a] subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation’” (quoting *Prillaman*, 199 Va. at 405)).

²⁴ *Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 324 (2020) (emphasis added).

²⁵ One of your GAAP-focused questions concerns the proper method of calculating the capitalization rate. Although I am unable to answer your exact question, I note that such calculation “contains an element of subjectivity[.]” 2010 Op. Va. Att’y Gen. at 207; and “there can be honest differences of opinion among the experts concerning . . . what capitalization rate is appropriate.” *Van Dorn Assocs.*, 2 Va. Cir. at 176. I nevertheless further note that, generally, “[t]he rate of return on similar investments, the risk factors, depreciation, taxes and the rate of return of other investment opportunities in the market place should be considered in determining an appropriate capitalization rate.” *Id.* at 176. In addition, a capitalization should be rate derived from market sales transactions that are highly comparable to the subject property; otherwise, “the overall rate will be inaccurate and its application in capitalizing income will result in an erroneous value.” *Id.* at 175-76.

²⁶ 2009 Op. Va. Att’y Gen. 138, 141.

federal or state law, rule or regulation”;²⁷ accordingly, among other circumstances, Attorneys General have declined to opine on matters when they do not involve a question of law.²⁸ Because your questions pertaining to GAAP requirements do not present a question of law, I decline to render an advisory opinion on those portions of your inquiry.²⁹

Conclusion

For the foregoing reasons, it is my opinion that assessors must consider fully an affordable housing property’s actual operating expenses and expenditures and the impact of any such additional expenses or expenditures, rather than conduct a cursory review of the property’s statement of income and expenses. It is further my opinion that tax assessments of affordable housing properties must be performed in accordance with generally accepted appraisal practices, procedures, rules, and standards prescribed by nationally recognized professional appraisal organizations; but I decline to render an opinion regarding the interpretation and application of such practices and standards.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

²⁷ 1998 Op. Va. Att’y Gen. 71, 72

²⁸ See, e.g., *id.*; 2009 Op. Va. Att’y Gen. at 141; and opinions cited therein.

²⁹ See 1998 Op. Va. Att’y Gen. at 72 and opinions cited therein (declining to render an opinion on accounting questions).