CURRENT USE TAXATION UNDER RSA 79-A

A Presentation for the New Hampshire Tax Collector's Assn (NHTCA) Spring Workshops 2023

By: Bernard H. Campbell, Esq.
State Counsel to NHTCA
Beaumont & Campbell Prof. Ass'n.
One Stiles Road – Suite 107
Salem, New Hampshire 03079
Tel. (603) 898-2635
E-Mail: bcampbell@beaumontandcampbell.com

I. ORIGINS and PURPOSE

Under our State Constitution, the legislature is required to "impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within the said state ….." N.H. Const. Pt. II, Art. 5. This language carries with it the requirement that all real property subject to "*ad valorem*" property taxes is required to be assessed in the same way, regardless of the use of the property. E.g., Opinion of the Justices, 101 N.H. 549 (1958). It was not until November 1968 that a Constitutional Amendment adopted by the voters inserted Pt. II, Art. 5-B to the Constitution:

"The general court may provide for the assessment of any class of real estate at valuations based upon the current use thereof."

Although the authorizing Constitutional Amendment passed in 1968, it would be 1973 before the initial version of RSA 79-A was adopted. See, Chapter 372, Laws of 1973. Its stated purpose is found in RSA 79-A:1 and includes:

- Providing a healthful and attractive outdoor environment
- Maintaining the character of the state's landscape
- Conserving land, water, forest, agricultural and wildlife resources

The law accomplishes this by allowing certain types of real estate to be assessed at values established on a statewide basis; values which reflect the income-producing capability of the land as it is being used, not its "highest and best" use. RSA 79-A:2 (V). Citing from a 1973 issue of *Urban Planner*, the State Supreme held that the statute "… seeks to remedy the extraordinary adverse impact on the maintenance of land as open space resulting from a property tax geared to market value." Blue Mountain Forest Ass'n vs Town of Croydon, 117 N.H. 365, 377 (1977). See also, JMJ Properties, LLC vs. Town of Auburn, 168 N.H. 127 (2015).

II. ADMINISTRATION and OPERATION

A statutorily established "Current Use Board" of fourteen (14) members (RSA 79-A:3 (II)) is set up to oversee the current use program. The members include legislators, State officials, municipal assessors and three (3) members of the public, who must include property owners who own open space land.

The Board's duties are essentially to establish the "criteria and current use values" to be used under RSA 79-A. RSA 79-A:4 (I). The Board also recommends to the Chairman adoption of administrative rules (RSA 79-A:4 (IV) which are found under the designation "Cub".

Currently (it has changed over time), there are three (3) statutory categories of open space land: farm land, forest land and "unproductive" land. See, RSA 79-A:2 (IX). Each has a statutory definition in RSA 79-A:2, and each also has an expanded definition as set forth in the Board's regulations. See, Chapter Cub, Section 304.

The Board fixes valuation ranges for each type of open space land category. Generally, to be eligible, a parcel must be at least ten (10) acres in size, although the Board has the right to establish criteria to allow parcels of less than ten (10) acres. RSA 79-A:4 (I). The Board has chosen to reduce the ten (10) acre requirement in three (3) categories: (i) wetlands of any size, (ii) tree farms of any size, and (iii) crop-growing areas that meet a certain threshold of income production. See, Cub 304.01 (b) (3-5).

As we will see later in the removal process, the size requirement can generate some questions. A parcel can qualify even if it is divided by a municipal boundary. RSA 79-A:26. The land must be "contiguous" and "could be classified" as open space. Id. This appears to rule out land in adjoining states, since it could not, by definition, be classified as open space under New Hampshire law. The Board definition of *"contiguous"* is found in Cub 301.04, which describes land as "more than one parcel of land which is connected, disregarding whether it is divided by a highway, railbed, river or water body, or the boundary of a political subdivision". Id.

Each category of open space is assigned a range of values by the Board. In the case of "farm land", the amounts vary depending upon the "soil potential index" (RSA 79-A:2 (XII)), essentially the ability to produce crops. See, Cub 304.03. Forest lands are assigned values based on the predominant species of trees within a given area. Cub 304.06. A "Documented Stewardship" (Cub 304.07) plan results in even greater reductions in value. See, Cub 305.04. Failure to follow the documented stewardship program may result in land being removed from the current use program. See, Foster vs. Town of Henniker, 132 N.H. 75 (1989). However, the fact that a parcel has been "clear cut" does not disqualify it from forest land if there is a management plan for its replacement. Cub 304.05(c). Finally, "unproductive land", which includes wetlands, is assigned values which are found in Cub 305.04.

In addition to the established ranges of value, there are also provisions for further assessment reductions of 20% when land is open to public recreational use. RSA 79-A:4 (II). The statute lists certain specific uses, implying that prohibition of other activities (e.g. ATV's, camping, etc.) will not disqualify a parcel.

Also not disqualifying a parcel would be the presence of utility lines which serve persons other than the lot owner (Cub 303.05), or the fact that a parcel has road frontage. Cub 303.01. Finally, the existence of certain types of appurtenant structures does not necessarily make the land ineligible for current use. RSA 79-A:5 (I).

At the local level, the requirement is on local assessing officials to appraise open space land at values set by the Board. RSA 79-A:5 (I). In the early years of the program, several legal challenges, most from the Town of Croydon, attempted to question the validity of the process or the Board's authority. In nearly all cases, the challenges were rejected. See, Blue Mountain Forest Association vs. Town of Croydon, 119 N.H. 202 (1979) (Board of Selectmen could not assess open space land at values outside range established by Current Use Board); Tri-State Timberland Corp. vs. Town of Croydon, 119 N.H. 193 (1979) (similar); Town of Croydon vs. Current Use Advisory Board, 121 N.H. 442 (1981) (Court rejects Town's challenge to the process used by Board to set valuation). In cases, such as forest land, where a range of values is set, a municipality must not routinely and uniformly apply the highest available value, but instead must consider the specified factors (e.g. class, size, type, grade and location) in setting a value within the range. Town of Marlow, BTLA 18478-01RA.

III. APPLICATION PROCESS

Under the provisions of RSA 79-A:5 (II), any owner who wishes to have land classified as open space must apply by April 15th of a given tax year. There are some "accident, mistake, or misfortune" provisions which can be used to file up until the tax rate is set. Id. The application form is prepared by the DRA, and currently is Form A-10. Board rules provide for the attachment of a map or drawing showing the areas to be included. Cub 302.01 (d). Categories of open space must be elected, and forest land must be noted as to the predominant tree classification. Id. A nominal filing fee, representing the recording costs at the registry of deeds, must accompany the application. Cub 302.02.

Local assessing officials generally must respond by July 1st as to whether they will classify or refuse to classify the land into the requested open space categories. RSA 79-A:5 (III). The actual ability to deny is limited solely to whether the appropriate criteria are met; entry into the program is not discretionary at the local level. See, Tri-State Timberland vs. Town of Croydon,

supra. Once accepted, a notice is sent to the appropriate registry of deeds. RSA 79-A:5(VI). This notice is notice "to all interested parties that a lien on the parcel shall be created if and when the land is subsequently disqualified from current use assessment….". RSA 79-A:5 (VII).

In submitting an application for open space assessment, one must not include the "building lot" associated with any residential structures. Cub 303.02. This is not the equivalent of a "zoning lot" (See, Cub 303.02 (b)), but instead, consists of buildings and "curtilage" of the building or buildings. Cub 303.02 (a). This curtilage is defined as the maintained and used areas surrounding and supporting the structure. Cub 301.04.

If local assessing officials deny an application for open space classification, appeal can be made to the Board of Tax and Land Appeals (BTLA). RSA 79-A:9 (I). The appeal must be made within six (6) months of the decision by the local officials. Id. Likewise, there is (as in other types of abatement denials) the opportunity to appeal directly to Superior Court, such an appeal being "in lieu of an appeal to the Board of Tax and Land Appeals." RSA 79-A:11.

Once land is submitted into open space assessment, it shall continue to be so assessed until a change of use occurs. RSA 79-A:7 (I-a). The simple act of ownership change does not trigger removal of the open space assessment. Cub 307.04. Nor can a property owner request that land be removed. A municipality can reclassify land it originally classified as open space if it determines that the classification was done in error. Appeal of Town of Charlestown, 166 N.H. 498 (2014).

IV. CHANGE OF USE and LUCT

Once the current use law survived the early spate of challenges to its applicability, the focus of litigation and challenges has shifted almost exclusively to the question of when land is "taken out" of current use, and the consequences thereof.

The governing statutory language is found almost exclusively in RSA 79-A:7. Under RSA 79-A:7 (I), land which has previously been classified and assessed at current use values, shall be subject to a "land use change tax" (LUCT) when it is changed to a use which does not qualify for current use assessment. Id. The LUCT is calculated at ten (10%) percent of the "full and true" value of the land at the time of the change. Id. A legislative attempt to change the rate for land already enrolled in the program was blocked as being an unconstitutional attempt to enact a retrospective law. See, Opinion of the Justices, 137 N.H. 270 (1993).

Land which changes use from an eligible open space category to another eligible category does not trigger an LUCT. RSA 79-A:7 (VI) (c). Certain eminent domain activities do not trigger the LUCT. RSA 79-A:7 (VI) (a). Also, land can change to land under conservation restrictions under RSA 79-B without triggering an LUCT. RSA 79-A:7 (VI) (d).

The actual LUCT bill is addressed to the owner at the time of the change in use. RSA 79-A:7 (II). The assessing officials/selectmen complete a billing form using a form prepared by DRA (A-5) and deliver the form to the tax collector, along with a special warrant authorizing the collector to collect the tax, Form A-5W. See, RSA 79-A: 7 (II) (b). The billing must be sent within 18 months of the date upon which local assessing officials received notice of the change from the owner or actually discover that a change has occurred. RSA 79-A: 7 (II) (c). Failure to send a timely billing can result in the tax being ruled uncollectable. Meadowcroft Development vs. Town of Windham, Rockingham County Superior Court 2010-CV-895.

The payment of an issued LUCT bill is due within thirty (30) days, and eighteen (18%) percent interest begins to run on any unpaid bill. RSA 79-A: 7 (II) (d). Of critical importance is RSA 79-A:7 (II) (e) which provides that a "lien" is created under the statute, which lasts twenty-four (24) months from the notice or discovery date of the change of use. This means that the collector must begin a lien imposition process under RSA Chapter 80 in sufficient time to impose the lien no later than twenty-four (24) months from the "change date". Collectors

have the six (6) month period between the last date to issue the bills, and the last date to impose the lien. If one looks at RSA 79-A:23, it would appear that the collection process is limited to use of the tax sale method of collection under RSA 80:1- 80:42-a. However, there is a specific section in RSA Chapter 80 (See, RSA 80:85) which allows for collection of LUCT using the tax lien process described in RSA 80:59.

Upon payment of the LUCT, the tax collector then forwards the appropriate paid tax bill to the Registry for the purpose of releasing the land in question from the effects of the contingent lien. RSA 79-A: 7 (II) (c). The A-5 form notes whether the release is a full release of the original lien or a partial release.

In recent years, the biggest questions which have arisen under this statute are:

- *When does a "change of use" occur and what (how much) land "comes out" of current use which in turn triggers the LUCT; and*
- *What adjustments, if any, are made to the ten (10%) percent LUCT assessment?*

The statute defines three (3) circumstances when a change of use occurs and a LUCT shall become payable:

(1) Actual construction begins on the site, causing physical changes in the earth, such as road building, utility installation, site work or construction;

(2) Topsoil, gravel or minerals are removed from a site (with certain exceptions for agricultural and forestry activities); and

(3) When a site no longer qualifies by reason of size (i.e. other parts have been taken out, dropping the remainder under ten (10) acres).

RSA 79-A:7 (IV).

The companion Board rules are found in Cub 307.

The statute specifies the actual amount of land which no longer qualifies can be delineated in rules established by the Board. RSA 79-A:7 (V). Nevertheless, the statute then goes on to specify that only the number of acres

on which a physical change occurs will be subject to the LUCT. Id. There is an exception where land which is physically unchanged will still come out of current use if it is needed to meet density requirements. RSA 79-A:7 (V) (b). See also, Dana Patterson, Inc. vs. Town of Merrimack, 130 N.H. 353 (1988). In 2010 the Legislature added some specific rules related to condominium developments, providing for removal of the development area and the percentage interest associated with units to be reclassified RSA 79-A:7(V)(c). See also, Cub 307.03. Naturally, if the remaining area drops below 10 acres, the remaining land would no longer qualify.

The issue of the amount of land to be removed from the current use in the context of a subdivision development is addressed by RSA 79-A:7 (V) (a). This particular statute provides that:

> (a) When a road is constructed or other utilities installed pursuant to a development plan which has received all necessary local, state or federal approvals, all lots or building sites, including roads and utilities, shown on the plan and served by such road or utilities shall be considered changed in use, with the exception of any lot or site, or combination of adjacent lots or sites under the same ownership, large enough to remain qualified for current use assessment under the completed development plan.
>
> Id.

This particular language dates back to a 1991 amendment to this Section. It resulted in most communities following a "lot by lot" removal process for subdivision lots. This process was challenged and upheld as valid in the 2000 case of In Re: Estate of Van Lunen, 145 N.H. 81 (2000). The Court recognized that the 1991 amendments reversed prior language which allowed the whole of an approved subdivision to be withdrawn when actual construction was begun anywhere on the site. Van Lunen, supra at 87, citing, Appeal of Town of Peterborough, 120 N.H. 325 (1980). The constitutionality of this change in methodology of withdrawal was challenged in Tyler Road Development Corp. vs.

Town of Londonderry, 145 N.H. 615 (2000). Unlike the decision in Opinion of the Justices (137 N.H. 270 (1993)), the Court in this case held that the assessments were not an unconstitutional retrospective application of law based on the discussion of when the "taxable event" occurred. Id at 618.

Finally, there is a question of the appropriate valuation to be used on the assessment of the LUCT. Under Board rules that were in effect through 1998, the value for assessment of LUCT did not include the value of "betterments" made to the land, or the enhanced value resulting from those betterments. See, Appeal of Van Lunen, supra at 88-89, citing Cub 308.01 (b) (now repealed). Subsequent to Van Lunen, the Board revised its rules to provide that the value shall be based upon "the highest and best use of the land, including the value of all betterments to the land". Cub 308.02(b). This change has prompted a sprinkling of suits/appeals claiming that it an improper taxing of the betterments.

Abatements and appeals of LUCT taxes are governed by RSA 79-A:10. The request must be filed with the local assessing officials within two (2) months of the tax date. RSA 79-A:10 (I). The Selectmen or other assessing officials are obligated to grant or deny the request, in writing, within six (6) months of the tax date. RSA 79-A:10(II). Assuming that the request does not produce the desired outcome, the taxpayer can appeal to either the Board of Tax and Land Appeals (BTLA) or Superior Court within eight (8) months of the tax date. 79-A:10 (III). Note that each LUCT bill requires its own abatement request and appeal. RSA 79-A:10 (V).

V. WHERE THE MONEY GOES

Generally, all funds collected through LUCT assessments go to the General Fund of the city or town. RSA 79-A:25 (I). There are two (2) possible variations on this result:

- Under RSA 79-A:25 (II-IV), a municipality may vote to place a percentage (up to 100%), a specified amount (up to a dollar value), or a combination thereof, into the conservation fund under the control of the Conservation Commission under RSA 36-A:5 (III).

The procedure to do this or rescind this action is set forth within these subsections.

- The funds can be sent off to a land use change tax fund under RSA 79-A:25-a. Essentially, this provides a holding location for funds to allow their separate appropriation by the legislative body. RSA 79-A:25-a (II). The procedure to adopt or rescind this process is found in RSA 79-A:25-b.

\\bcp-dc-02\Users\BHC\OUTLINES\Current Use - NHBA 5-04 Modified.doc