

**Estate of Richard VanLunen**

v.

**Town of Amherst**

Docket No.: 16609-95LC

**DECISION**

This matter, filed pursuant to RSA 79-A:10, involves the "Taxpayer's" purported appeal of several land-use-change-tax (LUCT) bills issued on land in a "Subdivision" developed by the Taxpayer. The "Town" assessed the LUCT on a lot-by-lot basis. The Taxpayer argued only one LUCT should have been assessed on the entire Subdivision when the road work began. For the reasons stated below, the board finds the Town correctly assessed the LUCT, and therefore, the appeal is denied.

The Taxpayer's appeal document listed the following LUCT bills.

**Table 1**

<b>Lot No.</b>	<b>LUCT Bill</b>	<b>Date of Bill</b>	<b>Property Description</b>
Road	\$ 10	November 6, 1995	.21 acres -- the road
15	\$ 7,200	December 12, 1995	2.0-acre lot
15-2	\$ 7,390	December 12, 1995	3.91-acre lot
15-3	\$ 7,350	December 12, 1995	3.53-acre lot
15-5	\$ 8,110	July 9, 1996	2.32-acre lot
15-7	\$ 8,500	July 29, 1996	2.14-acre lot

The Subdivision included three other lots that were assessed a LUCT but for which no appeal was filed with the board. The LUCT bill for one of those lots -- 15-1 -- was sent to the Taxpayer. Two other LUCT bills -- lots 15-4 and 15-6 -- were sent to parties other than the Taxpayer. In the Taxpayer's hearing memorandum page 5, the Taxpayer asked the board to consider all of the subdivision lots as part of the appeal.

**FACTS**

In 1981, the Taxpayer's predecessor in title put the subject land in current use under RSA chapter 79-A. In June 1995, the land received subdivision approval for an 8-lot subdivision. A Subdivision sketch is attached to this decision. As shown on the sketch, the Taxpayer was to build Whittemore Lane (the Road) to access the Subdivision. Furthermore, four lots (15-4, 15-5, 15-6, 15-7) were to have access via a "Driveway" shown in hash marks on the sketch. The Driveway is actually made up of land from two lots -- lot 15-6 and lot 15-7. See Taxpayer Exhibit 1 for actual boundaries.

In the summer of 1995, the Taxpayer began construction in the Subdivision by performing the following:

- 1) logged, stumped, excavated and constructed the Road;
- 2) logged, stumped and excavated the area shown in yellow on Taxpayer Exhibit 1, which included part of the Driveway;
- 3) logged the remainder of the Driveway; and
- 4) logged some other smaller areas on the lots.

The work in the yellow area was done to obtain access to the stump dump on lot 15-4 so the stumps from the Road could be buried. Additionally, the Taxpayer had a purchaser for lot 15-3 and work was done on the lot because the Taxpayer assumed it could get a building permit for sale and development before the Road was finished. The Town, however, would not issue the building permit for lot 15-3 until the Road was completed. Because of the delay, that

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buyer went away. The remainder of the yellow work was done as incidental to the Road work and the stump-dump access with some of the work done to provide a driveway to lot 15-2 and some incidental septic site clearing on lots 15-3 and 15-4.

In November 1995, the Town sent the Taxpayer a LUCT bill for the Road area, concluding the land under the Road had changed use in August 1995. The Town then removed other lots from current use as they were sold (and thus, less than 10 acres) or as permitted construction began on a lot. Table 2 shows the dates and reasons for imposition of the LUCT. See also Subdivision sketch.

Table 2

Lot	Date of Change	Reason for Change
Road	August 16, 1995	Construction
15	October 31, 1995	Construction
15-2	December 6, 1995	Construction
15-3	October 31, 1995	Construction
15-5	June 28, 1996	Construction
15-7	July 24, 1996	Sale

**BURDEN AND ARGUMENTS**

The Taxpayer has the burden of showing the Town's LUCT assessments were erroneous or excessive. TAX 205.07. The Taxpayer failed to carry this burden.

The Taxpayer argued the LUCT assessments were erroneous or excessive because:

- (1) the LUCT assessments should have been assessed in June or July 1995 when Road work began and when work began on the lots themselves;
- (2) the tree cutting, stumping and excavating constituted a change in use;
- (3) RSA 79-A:7 states that if work is done pursuant to a plan, the entire subdivision comes out of current use;

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(4) the value should have been determined by valuing the entire development with approvals but not yet fully developed, e.g., no road access yet; and  
(5) the value should not have been assessed based on the retail values of the individual lots.

The Town argued the LUCT assessments were proper because:

(1) the Road construction resulted in the imposition of the LUCT only on the land within the Road area, but the lots remained in current use until either sold or construction of a house began;  
(2) the current-use-board rules (CUB) clearly require the lot-by-lot LUCT based on when the disqualifying event occurs;  
(3) the timbering and excavation did not constitute a disqualifying change; and  
(4) if the timbering and excavation disqualified land from current use, it would only disqualify the land actually changed not an entire lot.

**PRELIMINARY ISSUES**

Before addressing the merits, the board must determine what LUCT bills have been properly appealed. This is basically a timely filing question. However, it also raises the question of what the proper remedy should be if the board were to agree with the Taxpayer's argument. Specifically, the Taxpayer argued the Town should have assessed only one LUCT against the entire Subdivision rather than assessing the LUCT on a lot-by-lot basis. Therefore, if the Taxpayer has properly appealed one or some LUCT bills, the board must decide whether that appeal can be the vehicle to challenge all other LUCT bills even if those bills were not properly appealed.

RSA 79-A:10 governs LUCT appeals. RSA 79-A:10 states that LUCT appeals follow the RSA chapter 76 appeals procedure. Because of statutory changes, effective January 1, 1996, two versions of RSA 76:16 and RSA 76:16-a must be examined.

For LUCT bills sent out before January 1, 1996, the appeal process was:

1) file abatement application with the municipality within 2 months of notice of tax, RSA 76:16 (Supp. 1995); and

2) file appeal with the board or superior court within 8 months of notice of tax, RSA 76:16-a (Supp. 1995). "Notice of tax" for LUCT is defined in TAX 101.30 as the date the LUCT bill was mailed. The board reads RSA 79-A:10 as requiring an appeal for each LUCT bill.

For bills sent out after January 1, 1996, the appeal deadlines were altered as follows. For LUCT bills sent between April 1, 1996, and December 31, 1996, the appeal process was:

1) file abatement application with municipality by March 1, 1997, RSA 76:16 (Supp. 1996); and

2) file abatement application with board or superior court by September 1, 1997, RSA 76:16-a (Supp. 1996).

As if these deadlines were not complicated enough, two other factors must be considered. First, the Taxpayer died August 8, 1996. Under RSA 556:7, rights of action that existed before death may be brought within one year after the original grant of administration. Here, administration was originally granted in Maryland on August 12, 1996.

The second complicating factor is whether the Taxpayer can file an appeal of a LUCT imposed due to conveyance of a lot less than 10 acres when the lot purchaser is the one statutorily liable for the LUCT. See RSA 79-A:7 II (LUCT payable by owner when change occurred); RSA 79-A:7 IV (c) (lot less than 10 acres does not qualify for current use). Additionally, the Taxpayer did not provide any assignment documents. This issue was not raised or argued by the parties, and the board will assume the Taxpayer has such standing for the LUCT on lot 15-7.

The following table summarizes the deadline and actual filing date.

**Table 3**  
**LUCT Deadlines**

Lot	LUCT Bill Date	Town Deadline	Filed w/Town	Board Deadline	Filed w/Board	Notes
Road	Nov. 6, 1995	Jan. 8, 1996	Dec. 29, 1995 timely	July 8, 1996	Aug. 23, 1996 untimely	1, 3, 4, 5, 6
15	Dec. 12, 1995	Feb. 12, 1996	Dec. 29, 1995 timely	Aug. 12, 1996 extended to Aug. 12, 1997	Aug. 23, 1996 timely	1, 3, 5
15-2	Dec. 12, 1995	Feb. 12, 1996	Dec. 29, 1995 timely	Aug. 12, 1996 extended to Aug. 12, 1997	Aug. 23, 1996 timely	1, 3, 5
15-3	Dec. 12, 1995	Feb. 12, 1996	Dec. 29, 1995 timely	Aug. 12, 1996 extended to Aug. 12, 1997	Aug. 23, 1996 timely	1, 3, 5
15-5	July 9, 1996	Aug. 12, 1997	None filed (after LUCT bill)	Feb 12, 1998	Aug. 23, 1996 timely	2, 3, 5, 7, 8
15-7	July 29, 1996	Aug. 12, 1997	None filed (after LUCT bill)	Feb 12, 1998	Aug. 23, 1996 timely	2, 3, 5, 7, 8

Table Notes

1) LUCT bills for Road, Lot 15, 15-2 and 15-3 were subject to appeal deadlines in RSA 76:16, 16-a (Supp. 1995).

2) LUCT bill for Lot 15-5 and 15-7 were subject to appeal deadlines in RSA 76:16, 16-a (Supp. 1996).

3) The appeal is considered filed on August 23, 1996. On August 23, 1996, the Taxpayer filed an appeal letter with the board that did not conform to the board rules. Thus, the Taxpayer was informed it should submit the correct documentation within 10 days of the clerk's August 29, 1996 letter, and if timely refiled, the board would treat the appeal as filed on August 23, 1996. The Taxpayer filed the corrected documents on September 9, 1996. Counting 10 days, pursuant to TAX 201.03 results in the Taxpayer's correction being filed within the required 10 days. See TAX 201.03 (do not count date of clerk's letter; begin counting 10 days on August 29; ending date is September 7, a Saturday; end date is thus Monday, September 9).

4) Deadlines fell on weekend so extended to following Monday.

5) Deadline counted 12 months from administration's appointment.

6) The Taxpayer's abatement application (filed with the Town) did not include the LUCT bill applicable to the Road. The application did, however, challenge the Town's lot-by-lot assessment of the LUCT.

7) Deadline counted 6 months from Town deadline.

8) The Taxpayer's abatement application (filed with the Town) referred to only three LUCT bills (15, 15-2, and 15-3). The application did not refer to the LUCT bills for lots 15-5 and 15-7 because the LUCT had not yet been issued. The application did, however, challenge the lot-by-lot assessment. Nonetheless, the abatement process begins with the issuance of a LUCT bill. The Taxpayer did not file an application with the Town after the LUCT bills on lots 15-5 and 15-7. Thus, no appeal can be taken from those LUCT bills.

Based on Table 3, the board rules the Taxpayer perfected an appeal on lots 15, 15-2, and 15-3. The appeal on the Road was not timely filed. The appeals on lots 15-5 and 15-7 were not perfected because the Taxpayer did not file abatement applications with the Town after the LUCT bills were sent.

The Taxpayer's appeal has, however, presented us with the basic issue that the Taxpayer wants decided -- should the Town have considered the entire Subdivision changed in use when the Road work and other work began, requiring the imposition of one LUCT at that time or was the Town's lot-by-lot assessment methodology correct?

**BOARD'S FINDINGS**

**Summary**

The board concludes the Town properly assessed the LUCT on a lot-by-lot basis.

The current-use law aims to preserve open space. A landowner who places land in current use does not retain complete control over when the land is disqualified from current use. The current use law was not designed to allow owners to take advantage of current-use assessment and to then dictate when the land came out of current use so the owner could minimize the LUCT.

The 1991 amendments to RSA 79-A:7 IV changed the existing LUCT assessment practice. Before 1991, the methodology asserted by the Taxpayer would have been the proper methodology. That is, when the bulldozer blade hit the ground, the entire Subdivision would have changed in use. However, the 1991 amendments changed that to a lot-by-lot methodology.

In terms of this Subdivision, the Road came out of current use upon its construction pursuant to the Subdivision plan, which was the development plan under CUB 301.05. The lots, however, remained in current use because the Taxpayer continued to own contiguous properties that were greater than 10 acres. Those lots then were disqualified from current use when either a lot was no longer contiguous with additional land to total 10 acres or when construction began on the lot pursuant to a second development plan under CUB 301.05, presumably a septic plan for a lot or a building permit.

The following is the board's detailed analysis.

**Detailed Analysis**

LUCT analysis begins with RSA 79-A:1 (Supp. 1996), which is the declaration of public interest. This provision makes clear that the purpose of current use is to promote the public interest by encouraging open-space preservation. Current use was not enacted simply to provide tax relief but rather was enacted to provide lower assessments so open space could more easily be preserved. In reviewing the assessment of the LUCT, the board must be mindful of the purpose of current use.

It is also important to remember while a landowner voluntarily places land into current use, the landowner does not dictate when the land is removed from current use. Rather, once in current use, land only comes out of current use if the land is disqualified from current use due to certain actions that require a change in use as established by the statutes and the current-use rules. See CUB Current Use Handbook, 25 paragraph IV B (1995). ("There are no buy-out options.") (emphasis in original).

If current-use land is "changed in use," it is then disqualified from current use and subject to a 10% LUCT on the land's full value. RSA 79-A:7 I (Supp. 1996).

The imposition of a LUCT raises three issues:

- 1) when is the land disqualified from current use?;
- 2) how much of the land is disqualified and subject to the LUCT?; and
- 3) what is the full value of the disqualified land?

The third issue is not now before us.

Neither party disputes that a change in use occurred on the Subdivision land that required disqualification of land and imposition of a LUCT. The Taxpayer's construction of the Road was a disqualifying event. The question is whether that work was a disqualifying event for all of the Subdivision land (the Road and the lots) or whether that work was a disqualifying event just for the land encompassing the Road. In addition, the Taxpayer performed other site work within the Subdivision at the same time as the Road construction. (See facts above for details concerning other work.)

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The Taxpayer asserted once the Road work and other site work was done, the entire Subdivision was disqualified either because:

1) the Road work triggered disqualification for the entire Subdivision;

or

2) the Road work and the site work on other lots disqualified the Road land and lots physically affected (15-2, 15-3, 15-4, 15-6 and 15-7), and this disqualified the remaining lots because the Taxpayer no longer owned 10 or more contiguous acres that could be in current use.

The Town asserted that the Road land was disqualified by the Road work, but the other site work did not disqualify any other lots at that time. Rather, the lots were disqualified either: (a) when site work or actual construction began on a lot pursuant to a permit; or (b) when a lot was disqualified due to size.

The governing statute is RSA 79-A:7 IV and V, which provides in part as follows.

IV. For purposes of this section land use shall be considered changed and the land use change tax shall become payable when:

(a) Actual construction begins on the site causing physical changes in the earth, such as building a road to serve existing or planned residential, \*\*\* buildings; or installation of sewer, water, electrical or other utilities or services to serve existing or planned residential, \*\*\* buildings; or excavating or grading the site for present or future construction of buildings; or any other act consistent with the construction of buildings on the site; except that roads for agricultural, recreational, watershed or forestry purposes are exempt. \*\*\*

V. The amount of land which has changed to a use which does not qualify for current use assessment and on which the land use change tax shall be assessed in the circumstances delineated in RSA 79-A:7, IV shall be according to rules adopted pursuant to RSA 541-A \*\*\*. Except in the case of land which has changed to a use which does not qualify for current use assessment due to size, only the number of acres on which an actual physical change has taken place shall become subject to the land use change tax, and land not physically changed shall remain under current use assessment, except as follows:

(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; provided, however, that if any physical changes are made to the land prior to the issuance of any required local, state or federal permit or approval, or if such changes otherwise violate any local, state or federal law, ordinance or rule, the local assessing officials may delay the assessment of the land use change tax until any and all required permits or approvals have

been secured, or illegal actions remedied, and may  
base the land use change tax assessed under RSA 79-A:7  
upon the land's full and true value at that later  
time. \*\*\*

In reviewing the meaning of these provisions, the board will apply the following general rules of statutory interpretation and construction.

The board must first look to the statute's language and consider the statute's plain meaning. HEA Realty v. City of Nashua, 136 N.H. 695, 697 (1993); Rix v. Kinderworks Corp., 136 N.H. 548, 550 (1992).

In construing statutes, the board should first examine the language and, where possible, ascribe plain and ordinary meaning to the words unless the statute itself suggests otherwise. Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994); Appeal of Campton School District, 138 N.H. 267, 269 (1994).

If the language is clear and unambiguous, the board must apply such interpretation and not modify it by construction. Penrich, Inc. v. Sullivan, 136 N.H. 621, 623 (1993); State v. Dushame, 136 N.H. 309, 313 (1992).

The board must read the language at issue in the context of the entire statute and the statutory scheme. Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992); Great Lakes Aircraft Co., Inc. v. City of Claremont, 135 N.H. 270, 277 (1992).

In determining legislative intent and in construing a statute, the basic purpose -- the problem the statute was intended to remedy -- should be considered. Inquiry must be made into the statute's declared purpose and essential characteristics. American Automobile Association v. State, 136 N.H. 579, 585 (1992); Rix, 136 N.H. at 550.

In addition to the statutory provisions of RSA chapter 79-A, the board must consider the current-use rules, specifically CUB 301.05 (1995), which states:

**Cub 301.05 "DEVELOPMENT PLAN"** means any subdivision plat, site plan, or building permit or similar documents required by state law or municipal ordinance and filed with the appropriate officials or a document prepared by the landowner describing their intent to build road, construct buildings, create subdivisions, excavate gravel or otherwise develop land which is classified under current use.

Reviewing the facts in this appeal with the requirements of RSA 79-A:7 IV (a) and V (a) yields the following conclusions.

1) Initially, the Taxpayer had one approved development plan, namely the Subdivision plan. The Subdivision plan showed the work to be done on Whittemore Lane, the Driveway, and the stump dump on lot 15-4.

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2) The Taxpayer constructed the Road and a portion of the Driveway pursuant to the development plan, creating an access from the Road and Driveway to the stump dump as part of the Road construction and using the stump dump to bury the stumps.

3) When the work began, the Road area became disqualified from current use.

4) The lots would have changed in use given the Taxpayer's activity within the Subdivision except the Taxpayer, under the Subdivision plan, would still own contiguous lots that would have a combined total acreage of more than 10 acres. RSA 79-A:7 V (a) specifically states that even if there is road construction to service lots, the lots do not change in use if there is "any lot or site, or combination of adjacent lots or sites under the same ownership, large enough to remain qualified for current use under the completed development plans \*\*\*." The development plan at issue is the Subdivision plan, authorizing the Road work, Driveway work and access to and use of the stump dump. The Subdivision plan does not authorize any other work on the lots. Once work was completed in accordance with the Subdivision plan, the Road would be disqualified, but the lots (contiguous and owned by the Taxpayer) would remain in current use.

The Taxpayer argued because the Subdivision showed lots less than 10 acres, all the lots came out. Such a conclusion would require ignoring RSA 79-A:7 V (a), which requires adjacent lots in the same ownership totaling 10 or more acres stay in current use.

5) The other work done by the Taxpayer while the Road was being constructed but outside of the Road and Driveway did not result in a change in use on the lots. The Taxpayer performed additional work outside of the Road area including:

a) work done incidental to constructing the Road and constructing part of the Driveway, which affected some of the lots but was incidental to the work on the Road and the Driveway; and

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b) work that was not done pursuant to the Subdivision plan but was done in preparation for constructing homes on the lots.

Concerning the work done in conjunction with getting the stumps from the Road to the stump dump (paragraph a), the board finds this to be incidental work that was contemplated by the development plan, resulting in only disqualifying the land under the Road.

Where subdivisions are involved, RSA 79-A:7 V (a), as amended, shifts the focus from an area of land as the unit of measurement to lots being the units of measurement. RSA 79-A:7 V (a) discusses road work that disqualifies the land under a road, but the statute states that lots remain in current use.

The board reads this to mean that incidental road work in the lots does not disqualify the lots. This conclusion is consistent with the statutory revisions to RSA 79-A:7 V (Supp. 1979 compared to Supp. 1996). Under the old statute, when the bulldozer blade hit the ground, all of the land in a subdivision would have been disqualified, and the LUCT imposed then. In 1991, the legislature amended that provision to state that the land encompassing the Road came out but the lots were to stay in current use.

Concerning the additional work described in paragraph (b) above, RSA 79-A:7 V (a) (Supp. 1996) states that if physical changes occur before all required permits are obtained, the municipality may delay assessment of the LUCT until all permits have been approved. The definition of "development plan" includes building permits or site plans. The first development plan for this Subdivision was the subdivision plan itself. The Road work was done pursuant to that development plan, and thus, it was proper to then assess the LUCT. The other work on the lots that was performed in preparation for selling the lots for further development was done without the necessary lot-specific permits, i.e., without a development plan for the individual lot. Therefore, the Town was justified in waiting to impose the LUCT until the

permits were in place on the lots conveyed. For example, the Taxpayer stated the work and the clearing on lot 15-3 was done because the Taxpayer had a

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buyer for lot 15-3. However, the Town would not issue a building permit until the Road was completed. Thus, the work done on lot 3 in preparation for the sale and development of the lot was done before all permits were in place. This authorized the Town to wait to impose the LUCT until the building permit (a development plan itself) was issued for that specific lot or until the lot was conveyed.

**CONCLUSION**

Based on the above facts and analysis, the board denies the appeal.

**REHEARING AND APPEAL PROCESS**

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., Member

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Douglas S. Ricard, Member

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**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Alexander S. Buchanan, Esq., Counsel for the Estate

of Richard VanLunen, Taxpayer; William R. Drescher, Esq., Counsel for the Town of Amherst; and Chairman, Selectmen of Amherst.

Date: November 12, 1997

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Valerie B. Lanigan, Clerk

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**Estate of Richard VanLunen**

**v.**

**Town of Amherst**

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**ORDER**

This order responds to the "Taxpayer's" rehearing motion, which is denied. The motion did not demonstrate that the board erred in its decision, and thus, the motion failed to show any "good reason" to grant a rehearing. See RSA 541:3.

The board concludes the initial decision adequately addresses the issues raised in the rehearing motion. The following brief discussion should be read in context of the entire decision.

Subject matter of appeal

The Taxpayer asserted the board erred by not including all of the lots as part of the appeal. The decision addressed this issue. Furthermore, even if the board erred concerning the subject matter of the appeal, a rehearing would not be ordered because the board rejected the Taxpayer's argument concerning the appropriate methodology for assessing the land-use-change tax (LUCT). Therefore, even if all of the lots were considered as part of the appeal, the result -- denial of the appeal -- would have been the same. Finally, on this point, the board notes that we do not write the statutes, and the existing statutes do not grant the board the flexibility asserted by the Taxpayer.

Controlling authorities

The Taxpayer stated the board failed to follow Appeal of Town of Hollis, 126 N.H. 230 (1985), and Appeal of Town Peterborough, 120 N.H. 325 (1980). Given amendments (especially in 1991), the LUCT statutes and the LUCT rules that were applicable to the Taxpayer's appeal were different than those statutes and rules considered in the two cases.

Exceptions to RSA 79-A:7 V

On page 4 of the Taxpayer's motion, the Taxpayer asserted that RSA 79-A:7 V includes only two exceptions. The Taxpayer failed to note that the statute includes a third exception -- RSA 79-A:7 V (a) -- whereby the municipality can wait to assess a LUCT when the landowner has not obtained all of the required permits to perform the work that has physically changed the property. The board relied on this third exception in its decision.

The loophole

On page 6 of the motion, the Taxpayer asserted a landowner could easily circumvent the board's interpretation by simply conveying out every other lot so that the subdivision ownership is "checkerboarded" with one landowner owning one lot, the next lot being owned by a separate legal entity, etc. The board admits this is apparently a loophole in the statute. But that factual situation was not presented in this specific case, and therefore, it has no bearing on the decision here.

CUB 308.01(b)

The Taxpayer asserted the board misinterpreted CUB 308.01 (b) because the board did not deduct betterment costs from the values attributed to each lot. The Taxpayer asserted the board should have determined the market value for each lot and then deducted a pro rata share of the subdivision's betterment costs. This adjusted value should have then been used as the basis for the LUCT. As discussed in the decision, the board does not accept this argument.

The board rejects the Taxpayer's interpretation of CUB 308.01(b) for three reasons:

- 1) it is inconsistent with the language and purpose of the regulation;
- 2) it is inconsistent with the statutory purpose of current use; and
- 3) it would lead to differing treatments depending on the type of subdivision.

Concerning the first reason, the board reads CUB 308.01 (b) as follows.

CUB 308.01 (b) requires that in calculating the value of the road area upon which the LUCT will be based, the value should not include any improvements within the road area, any improvements that will service the entire subdivision even if located outside the road or any improvements located on specific lots. See also 303.05 (utilities that are not for the sole benefit of a specific landowner may remain in current use).

Concerning the second reason, the current use law was enacted to encourage the preservation of open space "to prevent the conversion of open space to more intensive use \*\*\*." If the Taxpayer's interpretation was adopted, the LUCT on this and other subdivisions would be substantially lower and would thus be an incentive that would hasten development because developers would realize their development costs could be deducted from the retail lot values and thereby reduce the LUCT.

Concerning the third reason, the board notes that the Taxpayer's methodology would result in differing LUCT assessments for different types of subdivisions. For example, if a subdivision did not require road construction because the land already had sufficient existing frontage, the LUCT would be based on the retail value of the lots without any betterment deduction. But for subdivisions that required road construction, the value would not be based on the retail value of the lots but would be based on the retail value of the lots less development costs. Such a result is contrary to RSA chapter 79-A.

On page 9 of the motion, the Taxpayer argued the aggregate LUCT was excessive compared to the purchase price of the land. The board first notes the original purchase price was an auction purchase, and therefore, may not have been indicative of market value. Secondly, comparing the LUCT to the original raw land purchase price is not the comparison required by RSA 79-A:7. Rather, the LUCT should be compared to the total sales prices of the lots. In this case, the LUCT was reasonably close to the 10% of the full retail value of the lots, and therefore, was assessed consistently with the statute.

Appeal

To appeal this matter, an appeal must be filed with the supreme court within thirty (30) days of the clerk's date below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., Member

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Douglas S. Ricard, Member

**Certification**

I certify that copies of the within Order have this date been mailed, postage prepaid, to Alexander S. Buchanan, Esq., Counsel for the Estate of Richard VanLunen, Taxpayer; William R. Drescher, Esq., Counsel for the Town of Amherst; and Chairman, Selectmen of Amherst.

Date: January 7, 1998

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Valerie B. Lanigan, Clerk

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**Docket No.: 16609-95LC**

**ORDER**

This order relates to determination of the proper land-use-change taxes (“LUCT”) for three lots on remand by the New Hampshire Supreme Court in accordance with Appeal of Estate of Richard VanLunen, 16 N.H. S.Ct.Rptr., 57 (April 12, 2000).

**History of Appeal**

The “Van Lunen Property” was subdivided into eight lots in June 1995 and the road accessing the lots was constructed between July and October 1995. (A depiction of the subdivision with relevant information on each lot is included as Appendix A.) In September 1996, the “Taxpayer” initially appealed to the board the LUCT bills on eight lots and road assessed separately by the Town at different times from August 1995 to July 1996. The Taxpayer subsequently appealed the board’s November 12, 1997 decision to the supreme court raising three general issues: 1) the timeliness of filing abatement applications and appealing several LUCT assessments; 2) the Town’s imposition of separate LUCT assessments on each lot in the subdivision; and 3) the improper deduction of the value of betterments to the land (Cub 308.01) in calculating the LUCTs. In VanLunen the court found the board properly refused to consider appeals for LUCT abatements not timely filed with the Town or appealed with the board. Only Lots 15, 15-2 and 15-3 were determined to have been timely filed. Further, the court found the Town’s lot-by-lot assessment at the time of either actual construction on each lot or when less than 10 contiguous acres remained to be assessed in current use was proper and in keeping with the plain language of RSA 79-A:7, V (a). Last, the court determined the board

improperly enhanced the value of each lot with the betterments to the land contrary to the plain language of Cub 308.01 and remanded Lots 15, 15-2 and 15-3 for proper calculation of the RSA 79-A:7 LUCTs on those lots.

The board held a hearing on the remand issue on July 31, 2000. At the hearing, the Taxpayer argued the LUCTs should be based upon an estimated value for each of the three lots of \$30,000 as estimated in an appraisal by Souhegan Valley Valuation, LLC (“Souhegan Appraisal”). The Taxpayer’s arguments are contained in its summary of the case which is incorporated here by reference. In short, the Taxpayer argued that an estimation of the value of the land before any betterments (roads, water lines) were added is the proper method to determine the value on which to base the LUCTs.

The Town’s arguments were also extensive and contained in its memorandum submitted at the hearing which is also incorporated by reference. In short, the Town argued a betterment value of \$9,969 (derived from a pro rata calculation of estimated road costs associated with the subdivision) should be subtracted from the retail market value of the lots as of the date of change.

### **Board’s Rulings**

#### **Summary Ruling**

Based on the evidence and arguments, the board finds the proper assessments for LUCT purposes to be as follows:

Lot #	Val. at Time of Change in Use	Betterment Val. Deduction	LUCT Val.	LUCT
15-0	\$72,000	\$23,719	\$48,281	\$4,828
15-2	\$73,900	\$23,719	\$50,181	\$5,018
15-3	\$73,500	\$23,719	\$49,781	\$4,978

The betterment value deduction is based on a finding of the actual road and waterline construction costs, including contractor's profit, of \$165,000 multiplied by 1.15 as an estimate of the entrepreneurial profit and financing carrying costs attributable to the \$165,000 construction cost. This results in an overall betterment value for the whole subdivision of \$189,750 which pro rated amongst the eight lots equates to \$23,719 per lot.

#### Applicable Statutes and Rules

RSA 79-A:7, I and Cub 308.01 are the statute and rule applicable to the issue on remand.

#### **RSA 79-A:7 Land Use Change Tax.**

I. Land which has been classified as open space land and assessed at current use values on or after April 1, 1974, pursuant to this chapter shall be subject to a land use change tax when it is changed to a use which does not qualify for current use assessment. Notwithstanding the provisions of RSA 75:1, the tax shall be at the rate of 10 percent of the full and true value determined without regard to the current use value of the land which is subject to a non-qualifying use or any equalized value factor used by the municipality or the county in the case of unincorporated towns or unorganized places in which the land is located. Notwithstanding the provisions of RSA 76:2, such assessed value shall be determined as of the actual date of the change in land use if such date is not April 1. This tax shall be in addition to the annual real estate tax imposed upon the property, and shall be due and payable upon the change in land use. Nothing in this paragraph shall be construed to require payment of an additional land use change tax when the use is changed from one non-qualifying use to another non-qualifying use. (Emphasis added.)

#### **Cub 308.01 ASSESSING FULL AND TRUE VALUE.**

- (a) For the purposes of this PART, the full and true value of the land, as referenced in RSA 79-A:7, I. shall be based on the highest and best use of the land as of the date the actual physical change was begun.
- (b) In determining the full and true value of the land, the assessors or selectmen shall not include the value of any betterment to the land, implemented in conjunction with the change in use, including the installation of road paving, water lines, sewage lines, or other utility lines (Effective 1995).

The plain reading of both RSA 79-A:7, I and Cub 308.01(a) require a LUCT to be

assessed: 1) at the time the use is changed to a disqualifying use; and 2) at the full and true value of the disqualified land as of the disqualifying date. From this plain reading of the statute and the rule, the board concludes the beginning point of valuing the LUCTs in this case is the value of the three lots with the road and waterlines installed and completed at the time house construction began as indicated by the dates on the Town's LUCT bills. Said another way, the disqualifying dates (October 31, 1995, and December 6, 1995) are after the road and waterline construction was complete and, thus, the full and true value of the lots, before any betterment value deduction, must be as of the disqualifying dates and inherently include the value of the lots with access and off-site water. The board finds the values of \$72,000, \$73,900 and \$73,500 as estimated by the Town for Lots 15-0, 15-2 and 15-3 respectively are reasonable estimates of the lots' full and true values as of the disqualifying dates. The board notes the Town in its original assessment of the LUCTs did not rely exclusively upon the sale prices of the lots but the Town's values are similar and, in this case, when viewed in aggregate, slightly less than the sale prices of the three lots (\$219,400 versus \$225,000).

#### Estimation of Value of Betterments

The second step in the determination of a proper LUCT, where road construction and the installation of utilities are required for the development of the Property, is a deduction of the value of any such betterments. Cub 308.01(b).

The parties disagreed as to whether the "value" or the "cost" of the betterments should be excluded from the LUCT calculations.<sup>1</sup> Again, the plain meaning of the rule requires the

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<sup>1</sup> The Town argued the current-use board, when enacting this rule, intended the cost of roads and utility lines be deducted. While it is quite possible that may have been the intent of the current-use board, this board must apply the "value" concept in estimating these betterments inasmuch as the administrative rule is not ambiguous in its use of the term "value." "[R]ules are enforced in a manner consistent with their plain meaning." VanLunen, supra, 16 N.H. S.Ct.Rptr at 59. "Cf. Hansel v. City of Keene, 138

“value” and not the “cost” of any betterments to the land be deducted in determining the full and true value for assessing the LUCT.

The terms “cost” and “value” denote distinct concepts in the valuation process. “The term ‘costs’ is used by appraisers in relation to production, not exchange... .” Appraisal Institute, The Appraisal of Real Estate 19 (11<sup>th</sup> ed.1996). The term “costs” includes two subsets: “direct costs” and “indirect costs.” “Direct costs are expenditures for the labor and materials used in construction of improvements.” Id. at 346. Examples of direct costs are construction materials, labor, rental charges for equipment used during construction and contractor’s profit and overhead, etc.. “Indirect costs are expenditures or allowances that are necessary for construction, but are not typically part of the construction contract.” Id. at 346. Examples of indirect costs (also sometimes referred to as “soft” costs) are engineering and surveying fees, legal and consulting fees, carrying costs, including financing costs, during construction for investment in direct costs, insurances, taxes, marketing and sales commission charges, etc.. In summary, the term “costs” encapsulates all hard and soft out-of-pocket expenditures incurred during development.

Value, on the other hand, represents the worth of such cost items which may at times either exceed or be less than the actual cost of those items. “Value as of a given time represents the monetary worth of property, goods, or services to buyers and sellers.” Id. at 20.

Consequently, the board concludes the requirement that determination of the value of betterments must go beyond simple consideration of the cost of the physical road and waterline

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N.H. 99, 104, 634 A.2d 1351, 1354 (1993) (Doctrine of administrative gloss does not apply where administrative rule is not ambiguous.)”

installation as argued by the Town.

Further, the definition of the word “betterment” infers an increase in value beyond the simple cost of such a betterment.

“**Betterment.** An improvement put upon a property which enhances its value more than mere replacement, maintenance or repairs. The improvement may be either temporary or permanent. Also applied to denote the additional value which a property acquires in consequence of some public improvement, as laying out or widening of a street, etc.. Black’s Law Dictionary (5<sup>th</sup> ed. 1990) (emphasis added).

To illustrate this difference between cost and value and how the board has arrived at its conclusion, a comparison of the final value of the VanLunen subdivision and its cost components has been made.<sup>2</sup>

At the completion of the subdivision and the initiation of construction on the lots, the

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<sup>2</sup> The board’s analysis is of the entire value and costs associated with the eight-lot subdivision. The illustration does not in any way change the board’s jurisdiction to find the proper LUCT in only three of the eight lots but is simply meant to clarify the method by which the board has determined the total value of the betterments to be apportioned amongst the three lots at issue.

eight lots sold for an aggregate of \$650,000. No evidence was submitted at either of the hearings held in this case that the sale prices of the lots were not generally indicative of the market value of the lots. (As already noted, the Town's full and true value estimates are quite similar to the sale prices.) Consequently, the aggregate \$650,000 sale price of the lots reflects the value of all rights inherent in the lots at the time of the sale, and, if market forces are in balance, should capture all the costs of the various components to develop and market the Property to the point of sale of the lots. Simply put, the \$650,000 represents the "value" of those lots at the time of the change in use.

The costs incurred, as of that same point in time, have been estimated and testified to by both the Town and the Taxpayer. The following summary is the board's attempt to estimate, as accurately as possible, based on the testimony and evidence submitted, the cost components of the subdivision. These two estimates exclude any estimates of entrepreneurial profit so that the presence or absence of entrepreneurial profit can be ascertained.

	<u>Estimate #1</u>	<u>Estimate #2</u>
Main Parcel Purchase	\$130,000	\$130,000
Access Parcel Purchase	\$ 50,000	\$ 50,000

Permit Value <sup>3</sup>	\$ 45,000	\$ 60,000
Road and Waterline Construction	\$165,000	\$165,000
Real Estate Commissions (8%)	\$ 52,000	\$ 52,000

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<sup>3</sup> The board acknowledges this item may be more of a value item than a cost item. However, no evidence pertaining to the cost of obtaining permits was submitted, only value estimates. Arguably the permit value may contain some entrepreneurial profit but given the relative small magnitude of this item, the board does not believe it distorts the analysis significantly. The \$45,000 permit value estimate was obtained directly from the Souhegan Appraisal (page 9). The \$60,000 estimate is also derived from the Souhegan Appraisal by simply multiplying the appraisal's conclusion of lot value (\$30,000) by the number of lots ( $\$30,000 \times 8 = \$240,000$ ) and comparing that with the land-acquisition cost of \$180,000 ( $\$240,000 - \$180,000$ ).

Carrying Costs (7.5%) <sup>4</sup>	\$ 48,750	\$ 48,750
LUCT <sup>5</sup>	\$ 40,000	\$ 40,000
<b>Total</b>	<b>\$530,750</b>	<b>\$545,750</b>

This summary of all the costs for the development of the VanLunen subdivision indicates that the costs, in this case, are less than the subdivision's total value of \$650,000. The above analysis indicates value exceeds cost by approximately \$104,250 to \$119,250 (\$650,000 - \$545,750 and \$650,000 - \$530,750) or approximately 16% to 18.3% respectively. The difference between the development costs and final sales value is attributable to, and estimates, entrepreneurial profit.

### **Entrepreneurial Incentive and Entrepreneurial Profit**

Entrepreneurial incentive is a market-derived figure that represents the amount an

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<sup>4</sup> The carrying cost estimate is derived from utilizing the Souhegan Appraisal estimate (page 8) of "profit/carrying cost at 20%" and removing an entrepreneurial profit component at 12.5%. Mr. Rizzi, the appraiser who prepared the Souhegan Appraisal, testified that entrepreneurial profit is customarily in the range of 10% to 15% of final value.

<sup>5</sup> Including the LUCT estimate in this analysis is somewhat problematic and, arguably, circular, in that it is the very issue being determined by this analysis. However, it is a real cost that any developer of the Property would have to anticipate and estimate. Therefore, given its relatively small magnitude and the board's benefit of hindsight in having determined the LUCT approximates \$5,000 per lot, the board has estimated the total LUCT at \$40,000.

entrepreneur expects to receive as repayment for his expenditure (direct and indirect costs) and as compensation for providing coordination and expertise and assuming the risks associated with the development of a project. Entrepreneurial profit is the difference between the total cost of development and marketing and the market value of a property after completion and achievement of stabilized occupancy. Id. at 347 (emphasis added).

The board's specific findings as to the value of the betterments are as follows.

The board finds the actual road and waterline construction costs of \$165,000, as testified to by Mr. Desmarais (developer and contractor of the VanLunen subdivision), is the best evidence as to the costs of those betterments. This total cost includes approximately 925 feet of road construction, waterline installation and some intersection reconstruction with Governor Wentworth Road. The Town's estimate of the road costs by both comparing similar developments and calculating from Marshal Valuation, are not without merit as reasonableness checks on actual costs. However, the board finds the actual costs in this case are more accurate based on Mr. Desmarais' testimony as to the construction difficulties (ledge and hard till) and the fact that \$35,000 of the \$165,000 was the cost to install water mains to the eight lots. While with hindsight it would have been desirable to have such costs documented, the board finds Mr. Desmarais to be a forthright and credible witness. Mr. Desmarais testified that he is a construction contractor and, therefore, performed the road and waterline construction himself. Consequently, he is quite knowledgeable of the costs from both a contractor and developer perspective. The board also concludes the actual road and waterline construction costs include the appropriate direct and indirect contractor costs (e.g. contractor's profit and overhead, but not entrepreneurial profit). A comparison of the actual road costs and the Town's estimated road costs derived from Marshall Valuation and other area subdivisions supports this conclusion. The actual net road construction costs of \$130,000 equates to \$140.55 per-linear foot. The Town's

estimate of \$110 per-linear foot includes contractor's "soft" costs (engineering, plans, inspections and contractor's overhead and profit) but does not reflect the difficulty of construction (ledge and hard till) and the Governor Wentworth Road intersection work. When those factors are considered, the \$140.55 cost per-linear foot is reasonable and infers the inclusion of contractor's profit and overhead.

The Town argued that only on-site road construction should be considered and not construction costs associated with the access parcel or the intersection. The board disagrees. As stated earlier, the \$650,000 aggregate value of all the lots could only have been attained with the entire road and utility construction completed. And because the final retail value of the three lots is the beginning point of the LUCT calculation, the board concludes the deduction for the betterment improvements to the land must also include the off-site road improvements. Without such improvements, the final retail value could not have been realized.

The board has increased the road and waterline cost of \$165,000 by an estimate of entrepreneurial profit of 12.5% and an estimate of financing carrying costs relative to the road and waterline investment of 2.5% to arrive at the value for the betterment improvements.

The board has utilized 12.5% for entrepreneurial profit for two reasons. First, Mr. Rizzi of Souhegan Valley Valuation, LLC testified that based on his experience, entrepreneurial profit is generally in the 10%-to-15% range. Second, while the board considered the entrepreneurial profit estimate of 16% to 18.3% extracted from the cost/value analysis, the board finds it is more appropriate to estimate the entrepreneurial profit based on what would be generally expected for such a subdivision as opposed to what was indicated in the analysis. As stated in several of the footnotes, the estimates of some of the costs are simply that, estimates and, therefore, it is

possible for the indicated entrepreneurial profit to vary on a percentage basis rather significantly.

Further, the board has determined it is appropriate to add an estimate of any carrying costs attributable to the actual road and waterline construction costs. Carrying costs are a category of indirect costs related to carrying the investment of the development through to the time the properties are sold. Carrying costs usually include such things as financing costs relative to all investments in the project, insurance expenses, ad valorem taxes during the construction and any other costs incidental to carrying the property to the point that it is sold. See Id. at 347. In this case, the board finds there are no identifiable carrying costs relative to insurance or property taxes relative to the road and waterline construction. The annual current-use taxes paid on the Property relate to the land component cost and not the road and waterline costs. Similarly, any liability insurance on the Property during the development period is related to the land and not the construction on the land. Included in the \$165,000 actual construction cost is the assumption that the contractor's overhead includes appropriate liability insurance for construction activities taking place on the Property. Consequently, the only remaining carrying costs relative to the \$165,000 construction cost is an estimate of financing costs for that investment. The board has estimated the financing costs to be approximately 2.5% of the \$650,000 final value of the Property or \$16,250. This is simply an estimate inasmuch as no specific testimony and evidence was submitted as to the financing costs. The board finds this is reasonable because the holding period of the lots in this development was a maximum of approximately one year following the investment of the road and waterline construction. A simple calculation of financing costs for \$165,000 investment for one year at 10% approximates the 2.5% the board has estimated.

Consequently, the board finds the LUCTs for the lots to be as follows: Lot 15 \$4,828;  
Lot 15-2 \$5,018; and Lot 15-3 \$4,978.

If the LUCTs have been paid, the amount paid in excess of the LUCTs stated above shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

A motion for rehearing, reconsideration or clarification (collectively “rehearing motion”) of this decision must be filed within thirty (30) days of the clerk’s date below, not the date this decision is received. RSA 541:3; TAX 201.37(a). The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board’s decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(f). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board’s denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

Concurred, Unavailable for signature  
Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Alexander S. Buchanan, Esq., Counsel for the Estate of Richard VanLunen, Taxpayer; William R. Drescher, Esq., Counsel for the Town of Amherst; Chairman, Selectmen of Amherst; Commissioner Stephen H. Taylor, Department of Agriculture, Interested Party; George Hildum, Interested Party; and Charles F. Cleary, Esq., Interested Party.

Date: September 5, 2000

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Lynn M. Wheeler, Clerk

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