

**Town of Marlow**

**Docket No.: 18478-01RA**

**ORDER**

The board held a hearing on June 7, 2001, pursuant to a show cause order, in order to receive evidence from the “Town” regarding its assessment practices pertaining to current use (“CU”) in the forest land classification. Attending and testifying at the hearing were the Town selectmen, Joseph N. Feuer, John A. Russell and Charles B. Strickland, and the Town counsel, Genienne A. Hockensmith, Esq. Also in attendance, as observers, were Robert Camp and Joanne Tramontozzi from the department of revenue administration (“DRA”).

The Town’s representatives characterized its CU assessment practices as a “good faith” effort to comply with relevant statutes and regulations using a “fair and objective” method. The Town also described these practices in some detail. The Town reviews each new CU application. If the taxpayer’s property has enough qualifying acres, the Town determines the “class” of CU land (farmland, forest land or unproductive) for the property. If forest land, then the “type” (white pine, hardwood and all other) is determined based upon the information submitted by the taxpayer.

The Town indicated it uniformly utilizes the upper limit of the assessment ranges for

each of the forest land categories. In other words, the Town assigns the highest value in each range, without considering site quality, location or grade characteristics that may distinguish each property in CU. The Town defended this process of uniformly assigning the highest values to each CU property in the forest land category because the Town believes to do otherwise would involve too much 'subjectivity' and excessive 'time and expense' on the part of the selectmen/assessors.

The Town's representatives indicated only two individuals have ever challenged this practice of assigning the highest value to each CU property. The Town argued that approximately 70% of the land area in the Town is in CU and the forest land is generally of high quality and is fairly homogeneous. The Town also stated its belief, which it apparently confirmed with DRA representatives, that 'many' towns follow a similar process in using the highest value in the range, rather than attempting to apply the entire range of values to the CU assessment process.

The Town requested that, if its approach is found to be invalid, the board provide some guidance regarding a practical way of administering the CU statutes and rules relative to forest land. The board's ruling and reasoning, as well as suggestions for the Town, are presented below.

### **Board's Rulings**

The board rules the Town's uniform practice of using the high end value of the CU forest land assessment ranges, without making any distinctions or adjustments for the physical characteristics of the land, is not in accordance with applicable law and must be corrected. The

board orders the Town, beginning with tax year 2002, to reassess all CU forest land to comply with the applicable statute and the rules adopted by the Current Use Board (“CUB”). The Town shall notify the board in writing every six months, commencing September 1, 2001, as to the progress it has made in carrying out this ordered reassessment of CU forest land.

In the remainder of this Order, the board will review the constitutional, statutory and regulatory provisions that should guide the Town. Then, because requested to do so by the Town, the board will provide some practical suggestions for achieving the required outcome in a reasonable amount of ‘time and expense,’ while at the same time furthering the Town’s stated goals of objectivity and fairness.

#### *Constitutional and Statutory Requirements*

The Constitution and several tax statutes embody two distinct bases for assessing property taxes in New Hampshire: assessments proportional to market value; and assessments proportional to CU value. The first basis is governed by Pt. 2, Art. 5 of the Constitution (permitting general court to “impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and the residents within, said state; and upon all estates . . . .”) and the second basis by a more specific provision added in 1968, Pt. 2, Art. 5-B (permitting general court to “provide for the assessment of any class of real estate at valuations based upon the current use thereof”).

The first basis is reflected by statutes contained in RSA Chapter 75. Specifically, RSA 75:1 requires assessments on real estate to be proportional to market value (“full and true value in money as they would appraise the same in payment of a just debt”). Under this ad valorem

requirement, proportionality is a product of the market value of taxable real estate,” and the municipality’s level of assessment, and the cases have so held. In addition, “our constitution mandates that all taxpayers in a town be assessed at the same proportion of [market value].”

Public Service Co. of New Hampshire v. Town of Seabrook, 133 N.H. 365, 377 (1998); Appeal of City of Nashua, 138 N.H. 261, 265 (1994); Appeal of Andrews, 136 N.H. 61, 64 (1992); Amoskeag Manufacturing Co. v. Manchester, 70 N.H. 200, 204 (1899).

In contrast to this ad valorem approach, Pt. 2, Art. 5-B of the New Hampshire Constitution authorizes a second basis for property taxation based upon “current use” rather than market value. This provision enabled the general court to enact RSA Chapter 79-A in 1973 to provide for the assessment “of open space land based upon the income-producing capability of the land in its current use, and not its real estate market value.” See RSA 79-A:2, V. One clearly-stated purpose for this form of taxation is to help maintain and preserve “open space . . . the land, water, forest, agricultural and wildlife resources” of the state and to protect them from excessive development pressures due to higher tax assessments. See RSA 79-A:1.

For property qualifying for “current use” taxation, proportionality is achieved, not by market value determinations, but by adhering to the statute and CUB regulations, which prescribe both a range of values and the criteria which must be used to assign values for specific property within each range. RSA 79-A:3 and 79-A:4 create the CUB and authorize it to establish CU values and criteria on an annual basis. RSA 79-A:5, I, requires the selectmen to appraise open space land “at valuations based upon the current use values established by the [current use] board.” RSA 79-A:2, V, requires that “[t]his valuation shall be determined by the

assessor in accordance with the range of current use values established by the board in and accordance with the class, type, grade and location of land.”

### *CUB Requirements*

With this constitutional and statutory background, the specific regulations governing CU assessments in the forest land category can be examined in more detail. Regulations promulgated by an administrative agency, such as the CUB, have the force of law and are “binding on the town” unless and until challenged by any town subject to those regulations. Blue Mountain Forest Assn. v. Town of Croydon, 119 N.H. 202, 204-05 (1979). As a result, the board will quote the relevant CUB regulations pertaining to “forest land” at some length:

#### **Cub 304.03 FOREST LAND.**

(a) For purposes of this section, the following definitions shall apply:

(1) “Class”, as referenced in RSA 79-A:2, V, means land enrolled in current use as forest land;

(2) “Grade”, as referenced in RSA 79-A:2, V, means land having a physical geography affecting timber harvesting costs by the presence or absence of the following:

- a. Steep slopes;
- b. The presence of boulders and rock outcrops;
- c. Ravines;
- d. Wetland or bodies of water; and
- e. Any other physical qualifications;

(3) “Location”, as referenced in RSA 79-A:2, V, means characteristics affecting accessibility to the land, by the presence or absence of the following:

- a. Legal restrictions to access;
- b. Abutting a maintained public highway; or
- c. Any other characteristics affecting accessibility;

(4) “Site quality”, means the capacity of a parcel of land to produce wood, including factors that affect management, as follows:

- a. The quality of the soil;
- b. The climate and elevation;
- c. Physical geography; and
- d. Any other factors that would affect the management of the land;

(5) “Type”, as referenced in RSA 79-A:2, V, means the mix of tree species, as listed in Cub 304.03(e).

Cub 304.03 (k) further provides: “the local assessors shall consider the class, type, grade and location when determining where within the forest land range of assessments a particular parcel of land is placed.” In other words, the regulations place the responsibility for considering these criteria squarely on the local assessors.<sup>1</sup>

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<sup>1</sup> Section 304.04(l) and (m) then provide:

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“(l) If a land owners wishes to challenge where, within the forest land assessment ranges, a parcel of forest land has been placed, either of the 2 following methods shall be used:

(1) The land owner shall provide site quality, location and grade information to the local assessors to support an appeal of the assessment, indicating that:

a. The grade, as defined in Cub 304.03 (a), (2), of the land has a positive or negative effect upon the accessibility of the land; or

b. The location, as defined in Cub 304.03 (a), (3), of the land has a positive or negative effect upon the accessibility of the land; or

(2) In lieu of (1), above, the land owner shall engage a forester to determine the site quality, location and grade of the land.

(m) When a land owner provides the information listed in (1), above, for a parcel of forest land, the local assessing officials shall consider that information to determine the placement of that land within the forest land assessment ranges.”

It is eminently clear from the detail contained within the statutes and rules that for the constitutional requirement of proportionality to be met in the assessment of CU forest land, the selectmen must, as part of their assessing responsibilities, consider any affect of “type” (tree species), “grade” (physical geography), “location” (accessibility) and “site quality” (soil, climate, etc.) in determining the proper assessment. Cub 304.03 (l) clearly places this responsibility initially with the assessors to determine, as best they can, how each qualifying piece of land should be assessed within the CU assessment ranges.

To do otherwise, as the Town acknowledges it has done with respect to all forest land with its uniform ‘highest value’ policy, is a violation of the above statutes and CUB rules. The rules, of course, were promulgated to carry out the intent of the statute and are not extraneous to proper assessment practice at the town level. See Blue Mountain, supra, 119 N.H. at 204-05; accord, Foster v. Henniker, 132 N.H. 75, 82 (1989) (CUB “regulatory criteria did not modify the statute, but served to effectuate its purpose.”)

Insofar as CU forest land is concerned, the Town’s present uniform practice of imposing the highest assessment on each property, even if arguably easier to administer, may result, to the extent it disregards key forest land characteristics specified in the regulations, in a “systemic pattern of disproportionate taxation.” Cf. Sirrell v. State of New Hampshire, No. 2001-003 (May 3, 2001), \_\_N.H.\_\_, <http://www.state.nh.us/courts/supreme/opinions/0105/sirre087.htm>.

Notwithstanding these considerations, the board is also cognizant that the valuation differences between the low and high end of the forest land ranges are small relative to the overall magnitude of assessments the selectmen are required to undertake. Nonetheless,

approval of the Town's current practice would require the board to ignore the explicit requirements of the CUB regulations and the other authorities cited above. Consequently, the Town is ordered to change its assessment practices with respect to forest land in CU to consider and apply the criteria set forth above.

*Suggestions for CU Forest Land Assessments*

During the hearing, the Town requested that if the board were to require the Town to reassess its CU properties, some guidance be provided as to a practical, cost efficient way to do so. While the board is reluctant to mandate one specific approach over all others, because the Town can and should have discretion in how it complies with the law, the board is willing to propose what may be a useful approach for the Town's consideration. This approach attempts to satisfy the need to obtain factual information from taxpayers as to each CU property's grade, location and site quality in a manner that it is not overly burdensome to either the taxpayers or the Town selectmen/assessors.

When CUB 304.03 (a), (k) and (l) are considered together, it is clear CU assessments for forest land should reflect three key characteristics (grade, location and site quality) affecting the economic productivity of forest land, as well as its "type" and whether there is evidence of "documented stewardship." For example, to the extent slopes or ravines, accessibility to a public highway and soil quality, climate and elevation affect the ability to manage forest land for productive uses, these factors should be considered in determining where within the value range the selectmen should place the forest land in CU assessment.

The board suggests one practical method is to utilize a matrix to gather information from taxpayers with CU forest land. The board is aware of at least one other municipality that employs a matrix approach to obtain information for CU assessments. Appendix A is an example of how a matrix could be used by the Town to obtain better information about the forest land it is obligated to assess within the value ranges, using the criteria specified in the CUB regulations. The Town may also consider requesting from each taxpayer with land in CU further information in the form of a county soil map and/or topographical map depicting the property. Scaling the land characteristics (good, average and poor) as 2, 1 and 0, with respect to each criterion, provides a relatively simple arithmetic basis for determining assessments within the CUB ranges, instead of always using the highest value.<sup>2</sup>

This approach solicits voluntary information initially from taxpayers. If the selectmen receive inadequate or faulty responses, or if the taxpayer fails to respond in a timely fashion, then the selectmen can take whatever additional steps may be necessary to obtain adequate

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<sup>2</sup> For example, if the forest land type is “white pine” without “documented stewardship” (CUB range: \$112 to \$170 per acre in 2001) and the grade, location and site quality indications are average, poor and good, respectively, the calculated scale would be 1 for grade, 0 for location, and 2 for site quality, for a total of 3 out of a maximum possible of 6, or 50%. 50% of the difference (\$58) between \$112 and \$170 is \$29 which, when added to the base of \$112, arrives at an assessment of \$141 per acre [ $.50 \times (170-112) + 112 = 141$ ] for forest land with these

information or, on their own, determine or adjust where within the assessment range to place the forest land using other acceptable methods and information sources. Lack of response from a taxpayer does not relieve the selectmen of their initial obligation to assess the property as best

they can based on available public information. See Appeal of Gillin, 132 N.H. 311 (1989) (lack of cooperation on the part of a taxpayer should not be seen as a basis for punitive assessment).

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specific attributes.

Finally, the board has noted the testimony of the selectmen and representatives of the DRA which asserts the Town's CU assessing practices are similar to practices in certain other municipalities. If so, the board suggests the DRA, under the general supervisory authority contained in RSA 21-J:3, V,<sup>3</sup> ensure proper compliance with this aspect of CU assessment throughout the state. Further, the CUB may wish to consider whether more detailed rules might be appropriate to regulate these aspects of the assessment process.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

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<sup>3</sup> This statute provides: “[T]he commissioner of the department of revenue administration, . . . shall . . . V. [e]xercise general supervision over the administration of the assessment and taxation laws of the state and over all assessing officers in the performance of their duties, except the board of tax and land appeals, to the end that all assessments of property be made in compliance with the laws of the state.”

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Albert F. Shamash, Esq., Member

**Certification**

I hereby certify that copies of the within Order have this date been mailed, postage prepaid, to: David and Linda Kinson, Taxpayers; Genienne A. Hockensmith, Esq., counsel for the Town; Chairman, Selectmen of Marlow; and Guy Petell, Director, Property Appraisal Division, Department of Revenue Administration.

Date: July 30, 2001

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Lisa M. Moquin, Clerk

## **APPENDIX A**