

**Susan D. Brothers**

**v.**

**Town of Rumney**

**Docket No.: 19414-02LC**

**PRELIMINARY DECISION**

This decision is a “Preliminary Decision.” In this Preliminary Decision, the board is making findings and ordering the parties to provide certain documents to each other as well as certain filings with the board. Once the procedures outlined in the Preliminary Decision have been completed and the board has received all requested documents, a final decision will be issued.

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” October 8, 2002 land-use-change tax (“LUCT”) of \$736 on 0.31 acres of land (the “Property”). The LUCT was based on a \$7,356 full-value assessment. For the reasons stated below, the board finds no LUCT should have been assessed and orders the Town to abate the \$736 LUCT.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the Town’s LUCT assessment was erroneous or excessive. See TAX 205.07. We find the Taxpayer carried this burden.

The Taxpayer argued the LUCT was erroneous or excessive because:

- (1) the Property is accessed from Stewart Drive (a privately-owned association road which the Taxpayer helps to maintain), then a 0.10 mile additional road which links to Ox Bow Road for approximately 0.10 mile, and then a 0.10 mile driveway;
- (2) Ox Bow Road existed when the Property was purchased and has been used by the National Forest Service and a snowmobilers association;
- (3) the road is approximately eight feet wide and is maintained to some degree but is only accessible for vehicular travel for three seasons; and
- (4) the tax is excessive and it is unclear how the Town arrived at the value.

The Town argued the LUCT was proper because:

- (1) the Town performed a revaluation in 2002 and required new current-use applications be filed;
- (2) the Taxpayer's current-use application excludes 1.0 acre of the Property from current use;
- (3) the Town concluded the road was not included in a 1993 LUCT assessment, so it measured the length of the road to the Property, which is approximately 1,600 feet long, and assessed an LUCT for 0.31 acres on September 30, 2002.

### **Board's Rulings**

Based on the evidence, the board finds RSA 79-A:7, II(c) bars the Town's assessment of the LUCT because it was not assessed "within 12 months of the date upon which the local assessing officials receive[d] written notice of the change of use from the landowner . . . ."

However, the board orders: 1) the Taxpayer to submit a map, as required in CUB 302.01(d), to properly identify and document the area that does not qualify for current use; and

(2) the Town to recalculate the 2002 property tax assessment based on the acreage, both in current use and disqualified from current use, as shown on the map in item #1.

The board is issuing this Preliminary Decision ordering the abatement of the LUCT and is leaving the record open to receive a proper map from the Taxpayer to clarify the eligible current-use acreage. Based on the map and any comments from the Town, the board will issue a final decision reaffirming the abatement of the LUCT, find the qualified and disqualified current-use acreage and review and order an abatement, if warranted, of the 2002 property tax assessment based on the correct status of the Property's acreage. All rehearing and appeal timelines on all findings will be from the clerk's date on the final decision and not from this Preliminary Decision.

Before detailing its findings, the board offers the following general comments. As is often the case in disagreements relative to the assessment of an RSA 79-A:7 LUCT, the origin lies in a combination of insufficient compliance with the current-use laws and rules by the taxpayers when applying for current use or developing their current-use property and lax administration on the part of assessing officials in ensuring that current-use statutes and rules are being complied with by taxpayers and by themselves. It is likely this appeal would not have occurred if the Taxpayer had properly provided a map to the assessing officials as required by CUB 302.01(d) identifying both current use and non current-use land or a "development plan" (see CUB 301.06 definition of development plan) delineating the area that the Taxpayer deemed no longer qualified for current use when construction of the cabin was initiated in 1993. Further, in 1993 when the Taxpayer constructed the cabin, the Town should have required the Taxpayer to submit such a map or, at the very least, the Town should have then included driveways and roads that were constructed to access the building site as part of the disqualified land, see RSA

79-A:7, IV and Appeal of the Estate of Van Lunen, 145 N.H. 84 (2000) (“construction of roads and driveways disqualified land from current use”).

Nonetheless, the board will, in this case, as it has in other similar cases, attempt to rectify the misapplication of the current-use laws and issue a decision as justice requires including, “any derivative effect on RSA 75:1 ad valorem assessment and RSA 79-A:5,” as the hearing notice apprised the parties.

### LUCT

The Town assessed the September 30, 2002 LUCT as a result of the review of current-use records during its 2002 reassessment. At that time, the Taxpayer submitted, at the request of the Town, an application for current use (DRA form A-10) which indicated one acre not being in current use.<sup>1</sup> Based on that information, the assessing officials reviewed the earlier LUCT in 1993 when 0.69 of an acre was removed for the construction of the cabin and concluded, as noted on the September 30, 2002 LUCT lien release form, that an “additional 0.31 acres was disqualified to include road to cabin.” The Town stated when it was assessing LUCTs in 1993 at the time the cabin was built, it was the Town’s policy not to assess an LUCT on any driveways accessing building sites land disqualified from current use. Consequently, the Town concluded that this second LUCT in September 30, 2002 was necessary to account for the balance of the one acre not being in current use and to correct the earlier omission of not removing the driveway from current use in 1993.

RSA 79-A:7, II(c) requires that “LUCT bills must . . . be mailed, at the latest, within 12 months of the date upon which the local assessing officials receive written notice of the change

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<sup>1</sup> The board notes that no such “reapplication” is required by statute or rule. However, it appears as if the Town asked for such information to improve its current-use records as part of its 2002 reassessment.

of use from the landowner or his agent, or within 12 months of the date local assessing officials actually discover that the land use change tax is due and payable.” (Emphasis added.) The Taxpayer submitted Exhibit #1, a copy of her 1993 RSA Chapter 74 inventory, which noticed the Town at item #5 a change had occurred to current-use land since the previous tax year for the construction of a “driveway and log cabin (unfinished).” The board finds the 1993 inventory noticed the Town, as envisioned in RSA 79-A:7, II (c), of a change in use of current-use land. Indeed the Town did assess an LUCT in 1993 for a 150’ x 200’ rectangle around the cabin and did assess the unfinished cabin pursuant to RSA 75:1 for the annual property tax. The board finds the wording of RSA 79-A:7, II(c) is unequivocal that the assessing officials have 12 months from the notice or discovering of a change in use to issue an LUCT bill to the landowner. This deadline is emphasized in the statute by the phrase “at the latest” and creates a certain timeframe and finality to the issuance of an LUCT by the assessing officials. Cf. Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998). Because the Town’s September 30, 2002 LUCT bill is well beyond (nine years) that 12-month statutory timeframe, the board finds no statutory authority exists for the selectmen to have assessed and issued such an LUCT bill. Therefore, the board orders the LUCT bill in its entirety shall be abated and refunded to the Taxpayer with interest of “six percent per annum from the date the taxes were paid to the date of refund” (RSA 76:17-a).

#### Accurate Current-Use Map

As noted in the board’s general comments, the crux of the problem in this appeal is that there was never a submission by the Taxpayer of either an accurate current-use application map

as required by CUB 302.01(d)<sup>2</sup> or a “development plan” (CUB 301.06)<sup>3</sup> at the time the Taxpayer constructed the cabin in 1993. The current-use rules place the initial responsibility with the landowner to submit both a current-use map and a development plan to the assessing officials to facilitate the administration of current use. These maps create the record of the size and location of land not qualifying for current use to be used by subsequent assessing officials and the Taxpayer’s heirs and assigns in assessing the property in the future. Because they don’t exist, the board orders the Taxpayer to submit a map or drawing of the entire parcel that conforms to the requirements of CUB 302.01(d). (See attached copy of a portion of the Current Use Criteria Booklet.) In particular, the Taxpayers should show, with reasonable accuracy, the location and dimensions of the driveway/road accessing the cabin area and the curtilage<sup>4</sup> (the area around the cabin that has been developed for residential purposes and is utilized in the day-to-day activities such as any lawns, well, septic, parking areas.) The Taxpayer shall submit this map to the board within 20 days of the clerk’s date, copying the Town. The Town shall have an additional 20 days (i.e. total of 40 days from the clerk’s date) to file any response to the map. After submission of the map and any comments from the Town, the board will issue a final decision

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<sup>2</sup> **CUB 302.01(d)** Form A-10 shall be accompanied by a map or drawing of the entire parcel, which shall include: (1) Both the current use and non-current use land, adequately identified and oriented to establish its location, and sufficiently accurate to permit computation of acreage; (2) The interior boundaries; (3) The acreage of farm, forest, and/or unproductive land which the applicant is seeking current use assessment; and (4) The forest type category for any forest land; and (5) All portions of land not to be classified under current use.

<sup>3</sup> **CUB 301.06 “DEVELOPMENT PLAN”** means: (a) Any subdivision plat, site plan, or building permit application supporting documents or similar documents required by state law or municipal ordinance and filed with the appropriate officials; or (b) A document prepared by the landowner describing his/her intent to build a road, construct buildings, create subdivisions, excavate gravel or otherwise develop land which is classified under current use.

<sup>4</sup> **CUB 301.05 “CURTILAGE”** for the purposes of this chapter means the land upon which a structure stands and the land immediately surrounding the structure, including the following: (1) A yard contiguous to the structure; (b) Land groomed and maintained around the structure; and (c) Land necessary to the support and service of the structure.

detailing how the Town shall correct its current-use records and liens filed at the registry of deeds and any abatement of the 2002 property tax based on a recalculation of the ad valorem and current-use components of the land assessment.

Again, because this is a Preliminary Decision, any rehearing and appeal timelines will be from the board's final decision in this matter.

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

**Certification**

I hereby certify that a copy of the foregoing Preliminary Decision has this date been mailed, postage prepaid, to: Susan D. Brothers, 1279 Pond Street, Franklin, Massachusetts 02038, Taxpayer; and Chairman, Board of Selectmen, Town of Rumney, Post Office Box 220, Rumney, New Hampshire 03266.

Date: July 23, 2003

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Anne M. Bourque, Deputy Clerk

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**ORDER**

Before issuing its final decision, the board directs the selectmen to submit what they believe is an appropriate map depicting the curtilage of the Property. The board agrees with the Town that the map submitted by the Taxpayers is not definitive enough to accurately identify where the land necessary “to support and service” the structure exists. The Town shall submit such map within 30 days of this order copying the Taxpayer. The Taxpayer shall have 10 days from receipt of the Town’s map to file any comments before the board deliberates and issues the final decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

Concurred, unavailable for signature  
Douglas S. Ricard, Member

**Certification**

I hereby certify that a copy of the foregoing Order has this date been mailed, postage prepaid, to: Susan D. Brothers, Post Office Box 161, Rumney, New Hampshire 03266-0161, Taxpayer; and Chairman, Board of Selectmen, Town of Rumney, Post Office Box 220, Rumney, New Hampshire 03266.

Date: September 19, 2003

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Anne M. Bourque, Deputy Clerk

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**v.**

**Town of Rumney**

**Docket No.: 19414-02LC**

**FINAL DECISION**

On July 23, 2003 the board issued a “Preliminary Decision” in this appeal in which the board found that there existed no statutory basis for the “Town” to assess the land-use-change tax given the time elapsed since the Town was aware of such change. The Preliminary Decision also kept the record open to receive an accurate current-use map depicting the area that does not qualify for current use on this “Property.” See pages 5-6 of the Preliminary Decision.

The “Taxpayer” responded in documents filed on August 8, 2003 with a map and her estimate that .84 acres do not qualify for current use. As provided in the Preliminary Decision, the Town responded on August 27, 2003 expressing concerns as to the accuracy and definitiveness of the Taxpayer’s map. Consequently, in an order dated September 19, 2003, the board provided an opportunity for “. . . the selectmen to submit what they believe is an appropriate map depicting the curtilage of the Property” and for the Taxpayer to file any comments relative to the Town’s map before the board deliberated and issued its final decision.

The Town submitted a map on October 21, 2003 depicting the access area and curtilage area (totaling 1.62 acres) immediate to the structures. The Taxpayer submitted her comments on October 22, 2003.

After a review of all the evidence, the board issues the final decision in this matter as follows.

First, all findings relative to the abatement of the land-use-change tax issued in the Preliminary Decision is incorporated herein by reference.<sup>5</sup>

Second, the board finds the Town's map more accurately depicts the area not eligible for current use than the Taxpayer's initial map and is more compliant with the current-use rules relative to such areas and mapping. See CUB 302.01(d) and CUB 301.05. The Taxpayer's map is not drawn so as to enable anyone in the future to definitively determine what area does not qualify for current use and provide a clear basis for future administration of current use on this Property. The Town's map is more accurately drawn and reasonably represents the area disqualified from current use.

In her response to the Town's map, the Taxpayer raised a concern that the Town's map appears to be measuring the width of the road from the edge of the cleared woods. The board finds this is appropriate because the cleared area is necessary for supporting not only the travel way of the road but its ditch lines, snow storage areas and utility lines. Said another way, but for the fact that the road and utility lines are there, clearing would not have taken place.

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<sup>5</sup> Based on the documents submitted on August 13, 2003, the board notes the Town has already complied with the board's findings relative to the land-use-change tax and has abated, with interest, the land-use-change tax.

Further, for clarification, the Town's map appears to depict a "grassy area" adjacent to the road. The board concludes this "grassy area" is not included in the Town's calculations of the area not in current use as shown by the solid line adjacent to the "grassy area" notation.

Consequently, the board orders the Town to file an amended land-use-change tax release form with the registry of deeds correcting the acreage not in current use to be 1.62 acres. This correction is to be made based on this order, is administrative in nature and does not initiate the assessment of a land-use-change tax.

The Town shall in subsequent tax years, starting in tax year 2004, revise the annual ad valorem of the Property to reflect 1.62 acres not in current use. This change should not be made prior to the 2004 tax year. See LSP Assoc. v. Town of Gilford, 142 N.H., 369 (1997) and Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140 (1998).

As noted on page 3 of the Preliminary Decision, all rehearing and appeal timelines shall be from the clerk's date on this final decision.

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

**Certification**

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to: Susan D. Brothers, Post Office Box 161, Rumney, New Hampshire 03266-0161, Taxpayer; and Chairman, Board of Selectmen, Town of Rumney, Post Office Box 220, Rumney, New Hampshire 03266.

Date: November 7, 2003

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Anne M. Stelmach, Deputy Clerk