

Jon Weigler

v.

Town of Hooksett

**Docket Nos.: 19472-02LC, 19473-02LC, 19474-02LC, 19475-02LC
19476-02LC, 19477-02LC, 19478-02LC, 19479-02LC, 19480-02LC,
19481-02LC, 19482-02LC, 19483-02LC, 19484-02LC, 19485-02LC**

DECISION

The “Taxpayer” appeals, pursuant to RSA 79-A:10, the “Town’s” September 4, 2002 land-use-change taxes (“LUCT Assessments”) on 13 vacant lots and the two new streets (the “Property”) summarized as follows:

Map/Lot	Acres	Full-Value Assessment	LUCT
26-78-1	1.0487	\$89,900	\$8,990
26-78-2	1.0079	\$89,900	\$8,990
26-78-3	1.0023	\$89,900	\$8,990
26-78-4	1.0007	\$89,900	\$8,990
26-78-5	1.0048	\$89,900	\$8,990
26-78-6	1.0072	\$89,900	\$8,990
26-78-7	1.0144	\$89,900	\$8,990
26-78-8	1.4082	\$89,900	\$8,990
26-78-9	1.8184	\$89,900	\$8,990
26-78-10	1.8065	\$89,900	\$8,990
26-78-11	1.7759	\$89,900	\$8,990
26-78-12	2.0106	\$89,900	\$8,990
26-78-13 (portion)	0.73	\$84,500	\$8,450
26-78-Road	2.299	\$ 7,400	\$740

For the reasons stated below, the appeals for abatement are granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the Town's LUCT Assessments were erroneous or excessive. See TAX 205.07. We find the Taxpayer carried its burden.

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

- (1) the Town incorrectly assessed all the Property as of September 4, 2002 which was at the time the subdivision was complete and the lots were at their retail value;
- (2) the LUCT Assessments should have been assessed when work commenced on the road and adjacent drainage and sewer easements in April and early May 2002; and
- (3) the total market value on which the LUCT Assessments should be based is \$331,000 (rounded), calculated by subtracting all the remaining road and development costs as of May 2002 from an estimated retail value of the lots.

The Town argued the LUCT Assessments were proper because:

- (1) the lots remained in common ownership until after the road development was completed and, thus, more than 10 contiguous acres of eligible land remained delaying the LUCT Assessments until that time;
- (2) the road market value was based on the area of the road times rear land values per acre;
- (3) the market value for the lots was based upon sales of comparable properties in the Town; and
- (4) the full-value assessment for Lot 13 was estimated slightly less than the other lots as a portion of Lot 13 had not been placed in current use by the previous owners.

Board's Rulings

This appeal raises three general questions that the board will address in the decision:

1) when did the Property no longer qualify for current use, thus, triggering the date of change for the LUCT Assessments; 2) how much of the Property was subject to the LUCT Assessments at the time of the dates of change; and 3) what was the market value on which the LUCT Assessments should be based.

In summary, the board concludes the date of the disqualification of the land from current use was in late April to early May 2002 as a result of significant construction work on the roads and the sewer, drainage and access easements. This construction work disqualified the entire subdivision as a result of: 1) a significant number of the lots being disqualified due to physical disturbance for residential development; and 2) once those lots were disqualified, less than 10 acres remained eligible for current use. The board finds the market value of the disqualified land as of late April to early May 2002 was \$407,600 (rounded) and, thus, the LUCT Assessments total \$40,760.

Summary of Salient Facts and Chronology of Development of the Property

At the conclusion of the April 14, 2004 hearing, the board kept the record open for the Taxpayer to submit a summary of the chronology of the development of the subdivision and for the Town to submit a list of the issuance of building permits for the lots involved in the subdivision. These submissions and the testimony at the hearing indicate there is no substantial disagreement between the parties as to the salient facts and the chronology of events relative to the subdivision of the Property. However, because those facts are critical in applying the relevant law in Ch. RSA 79-A relative to LUCT Assessments, the board provides the following non-exhaustive summary of the events of the subdivision and development of the Property.

The Property's predecessors in title, Mr. and Mrs. Sidney A. Nichols (Nichols), applied for and were granted current-use assessment in 1982 on 24.2 acres of the Property. At that time, Nichols retained approximately 1.5 acres from current use around the existing house adjacent to Farmer Road. The map accompanying the current-use application indicates the area not in current use encompassed 250 feet of frontage to a depth of approximately 300 feet.

The Taxpayer purchased the Property in December of 2001 for \$320,000 which included completed plans for subdivision initiated by Nichols and conditionally approved by the Town on June 18, 2001 (see Town's June 18, 2001 Approval letter - part of Taxpayer's April 20, 2004 post-hearing submission).

On April 5, 2002, the Taxpayer deeded the land encompassing Barberrry Street and Misty Lane to the Town. On April 6, 2002, tree clearing commenced on all road areas and sewer, drainage and access easement areas with stumping and stump grinding in those areas occurring in the third week of April. The Taxpayer sold the one-acre parcel containing the existing dwelling on Farmer Road in late April 2002.

In early May, topsoil was stripped off of the road areas and easement areas and stockpiled on those areas until later in June when it was transferred for stockpiling to Lot 12. On May 28, 2002, the Town provided final approval of the subdivision.

In June, the house site areas and stockpile areas for topsoil and fill were cleared. Throughout the month of June, cuts and fills were made to the new roads, drainage and sewer line work was initiated and Lots 1, 2 and 3 were excavated for foundations.

During July, foundations were poured on Lots 1, 2 and 3 and the houses were being framed while the road, drainage and sewer work continued.

In August, drainage and sewer work was completed, sub grade of road established and road gravel installed before the paving was applied at the end of August. During August, foundation work was initiated on Lot 12.

Through September and October, finish work occurred to the road, curbing, sidewalks and utilities. At the end of October, the Taxpayer sold Lot 12 to the house builder that was already building on the Property and the further transfer of lots to the same builder continued through the first part of 2003 and concluded in July 2003.

Date of Change and Amount of Land Disqualified from Current Use

RSA 79-A:7, IV and V in their entirety must be read to determine when and how much land is disqualified in a subdivision scenario as presented in this appeal.

“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, commercial, industrial, or institutional buildings; or installation of sewer, water, electrical or other utilities or services to serve existing or planned residential, commercial, industrial, institutional or commercial 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.

(b) Topsoil, gravel or minerals are excavated or dug from the site; except:

(1) Removal of topsoil in the process of harvesting a sod farm crop in amounts which will not deplete the topsoil; and

(2) Removal of gravel and other materials for construction and maintenance of roads and lands for agricultural and forestry purposes within the qualifying property of the owner or, with the approval of local authorities, to other qualifying property of the owner.

Sale of excavated materials shall constitute a land use change of the property from which the material was excavated. The site shall be reclaimed when the construction or maintenance project is completed to mitigate environmental and aesthetic effects of the excavation. Both project completion time and acceptability of reclamation shall be determined by local authorities. The owner shall keep local officials informed in writing of plans to remove and use of soil material from qualifying lands for purposes of this subparagraph and to assure conformance with any local ordinances, as well as plans for reclamation of the

site. Fully reclaimed land shall be eligible for current use assessment if it meets open space criteria established by the board under RSA 79-A:4, I, whether or not such land was under current use assessment prior to the excavation.

(c) By reason of size, the site no longer conforms to criteria established by the board under RSA 79-A:4, I.

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 by the chairman of the board, based upon the recommendation of the board. 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.

(b) When land, though not physically changed, is used in the satisfaction of density, setback, or other local, state or federal requirements as part of a contiguous development site, such land shall be considered changed in use at the time the development site is changed in use. "

Based on the facts presented in this case, the board concludes the LUCT Assessments were triggered at the time the grubbing and topsoil stripping process of the road and sewer, drainage and access easements occurred in late April and into early May. RSA 79-A:7, V(a) provides that when construction occurs on a subdivision road and utility easements as part of a development plan, then all the lots are considered changed in use. However, an exception also contained in paragraph (a) allows a delay in the assessment of a LUCT if there remains enough

contiguous lots or sites under the same ownership large enough to remain qualified for current use (the “Exception”). The board finds the Exception does not apply in this instance because, as of the time the road and sewer, drainage and access easement construction was initiated, it impacted and disqualified from current use Lots 3, 4, 5, 8, 9, 10, 11, 12 and 13 (“Disturbed Lots”) and resulted in the remaining adjacent lots with no disturbance being less than 10 acres in size (Lots 1, 2, 6 and 7, totaling 4.0782 acres) (“Non-Disturbed Lots”). (See plan of tree clearing and driveway attached with Taxpayer’s April 20, 2004 post-hearing submission.)

The Town argued that because the physical disturbance did not encompass all the area of the Disturbed Lots, there remained adequate acreage to delay the LUCT Assessments until some later date when the road was largely complete. The board disagrees with this reading of the statute. The board does not believe the straightforward reading of the statute envisions a patchwork of undisturbed acreage on approved house lots that have areas disturbed on them for the purpose of residential development to be assembled and remain eligible for current use. It neither comports with the clear reading of the statute nor with the legislative purpose of current-use assessment set forth in RSA 79-A:1. RSA 79-A:7, V(a) describes the Exception, using the terms or units of undisturbed area as being “lots or building sites” not acreage. In Appeal of Estate of Van Lunen, 145 N.H. 82, 88 (2000), the court focused on the statutory wording of RSA 79-A:7, V(a) by stating “adjacent lots under same ownership totaling more than ten acres remain in current use until each lot is disqualified.” (Emphasis added). Applying that ruling to the facts in this appeal, we find the “disqualifying” acts are: 1) the physical disturbance of the Disturbed Lots in developing the various easements necessary for the residential development of the Property; and 2) the fact the remaining area of the Non-Disturbed Lots is less than 10 acres.

This conclusion is further supported by the description of certain triggering or disqualifying events set forth in RSA 79-A:7, IV(a):

“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, commercial, industrial, or institutional buildings; or installation of sewer, water, electrical or other utilities or services to serve existing or planned residential, commercial, industrial, institutional or commercial buildings; . . . or any other act consistent with the construction of buildings on the site;”

Thus, based on: 1) the clear language of RSA 79-A:7, V(a), when an approved plan of development exists, the Exception only occurs when undisturbed adjacent lots or sites (not acres) total more than 10 acres; and 2) the provisions of RSA 79-A:7, IV(a) that any “act consistent with the construction of buildings . . .” triggers a LUCT Assessment, the Property was disqualified from current use in late April to early May due to the road and easement construction.¹

A way to test the reasonableness of this conclusion is to answer the hypothetical question: if the Property was not in current use, at what phase of the development, as previously outlined, would the Property be ineligible to be enrolled in current use.

It is clear from the current-use statutes and case law (Frost v. Town of Candia, 118 N.H. 923 (1978)) that the mere conditional approval of the Property’s subdivision in June 2001 would not have disqualified the land from being enrolled in current use because, at that time, no physical change had occurred to the Property. Similarly, at the other end of the spectrum, it is clear that as of September 4, 2002 (the date utilized by the Town to assess the LUCTs) the

¹ “. . . When construing its meaning we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to words.” Appeal of VanLunen, 145 N.H. 82, 86, 750 A.2d, 737, 740 (2000). “[W]e construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result. Id.” Tyler Road Dev. Corp. v. Town of Londonderry, 145 N.H. 615, 618-619 (2000).

Property had undergone substantial physical construction including two roads, multiple drainage, sewer and access easements, clearing of house lots, stockpiling of fill and topsoil material and initiation of construction of at least four dwellings. The Property at that point in time would not have been eligible for current use given the physical disturbance that occurred on every lot in line with an approved development plan. Therefore, somewhere between those two events the Property would have become ineligible for current use. We find that up to the time the road and the drainage, and sewer and access easement areas were being stumped and topsoil removed, the Property as a whole would have hypothetically been eligible for current use. Once the road and easement construction commenced, however, there were not enough remaining undisturbed lots or building sites totaling 10 or more acres to qualify for current use.

The board notes that its conclusion in this appeal is different but can be distinguished from its ruling in a similar case, Estate of Richard VanLunen v. Town of Amherst, Docket No.: 16609-95LC. One of the main distinguishing aspects between the two cases is that in VanLunen, the Town of Amherst withheld the issuance of all building permits until completion of the subdivision road and access road. In this case, the Town gave conditional approval to the subdivision in June 2001 and issued at least four building permits in April 2002 which allowed for building construction to begin well before completion of the road. Further, the Town received title to Barberry Street and Misty Lane on April 5, 2002, before road and easement construction was initiated by the Taxpayer. All these actions by the Town in concert with actual physical construction on site by the Taxpayer in the latter part of April and the first part of May present a significantly different fact scenario than that presented in VanLunen.

Market Value of Disqualified Lands

The board finds the best methodology that reflects what knowledgeable purchasers in the market would have paid for the Property at the time of the LUCT Assessments is a technique by the sales comparison approach generally known as the development method. This method of estimating market value determines the final retail value of the lots (based on comparable sales) and then deducts outstanding expenses and carrying costs to approximate the value a prospective purchaser would likely pay, in this case, as of late April to early May 2002. See Appeal of Sawmill Brook Dev. Co., 129 N.H. 410 (1987).

The board has reviewed the market evidence submitted by the Town and the Taxpayer's sale of the actual lots to a builder and finds an estimated market value, with all infrastructure in place, to be approximately \$90,000 per lot. The board places more weight on the Town's submission of sales of finished lots in comparable developments (which ranged from \$85,000 to \$115,000) than it does on the sales of the Property's lots by the Taxpayer to a singular builder (with whom the Taxpayer testified he had a working relationship) because the Taxpayer's sales possibly included some financing and/or quantity discount factors to the builder. Regardless, the average sale price of the Property's lots from the Taxpayer to the builder of \$86,538 (12 lots at \$85,000 plus one lot at \$105,000 divided by 13) is generally supportive of the board's \$90,000 estimate.

The board also reviewed the March 5, 2002 appraisal by Michael Driscoll ("Driscoll Appraisal") (Municipality Exhibit E) of the Property done for financing purposes which estimated a retail price per lot of \$82,500. The board finds that market value slightly underestimates the Property's lots' retail value because of an inadequate time adjustment. The board agrees with the Town that a 1% appreciation per month more accurately reflects actual

market appreciation than the 0.5% per month utilized in the Driscoll Appraisal. With such adjustments, the indicated lot value would be more in line with the board's estimate of \$90,000 per lot.

Last on this issue, the board finds the total retail value contained in the Taxpayer's Memorandum of Law (Taxpayer Exhibit 1) of \$1,020,000 to be an error as it appears to omit the sale of Lot 7 for \$105,000.

The board concludes a total retail value of the land in current use encompassed by 13 lots is \$1,164,500. This value is based on 12 lots having a retail value of \$90,000 per lot and the portion of Lot 13 subject to a LUCT Assessment having a market value of \$84,500. The board has adopted the Town's market value estimate for Lot 13 as it is the only evidence as to Lot 13's area and value and it is a reasonable reduction from \$90,000 to reflect the fact that the initial placement of the Property in current use excluded a total of 1.5 acres from current use with approximately a one-half acre of that excluded area now being part of Lot 13.

From this final retail value, the board has estimated and deducted, based on its analysis of the testimony and evidence submitted, the direct and indirect costs remaining as of early May 2002 to complete the road, easement and utility infrastructure construction. The parties should be aware the board has tried to utilize estimates available at that time or estimates a prudent purchaser would likely have made in trying to anticipate the outstanding, but at that time, unquantified expenses yet to be incurred in carrying out the development of the Property.

A summary of the board’s calculations is below with detailed findings following.

Retail Value of Lots		
12 lots @ \$90,000	\$1,080,000	
One lot @ \$84,500	\$ 84,500	
Total Estimated Retail Value		\$1,164,500
Outstanding Indirect and Direct Development Costs as of April to May 2002		
Estimated Roadway and Utility Expenses	\$ 482,275	
Estimated Town Engineering and Offsite Expenses	\$ 50,000	
PSNH and Engineering Expenses	\$ 15,300	
Estimated Carrying Costs (insurance, interest, legal, etc.) @ 2% of Retail Value	\$ 23,290	
5% Contingency Fee of Estimated Road and Utility Expenses	\$ 24,115	
Real Estate Commissions for Sales of Lots @ 5% of Retail Value	\$ 58,225	
Remaining Entrepreneurial Profit Estimated @ 5% of Retail Value	\$ 58,225	
Anticipated LUCT of \$3,500 per lot x 13 lots	\$ 45,500	
Minus Total Anticipated Costs		(\$ 756,930)
Estimated Market Value		\$ 407,600

Road and Utility Construction

As of late April to early May, the best estimate of anticipated road and utility construction costs was the Hiltz Construction Inc.’s (Taxpayer Exhibit 1 at tab 2) estimate for all work of \$490,000. However, inasmuch as the tree cutting had occurred at the time the board finds the LUCT Assessments occurred, the actual cost of tree cutting of \$7,725 contained in the “Summary of lot costs” at tab 2 of Taxpayer Exhibit 1 is deducted from the Hiltz Construction Inc.’s estimate.

As the Taxpayer testified, the Town ultimately required a cistern to be installed for fire protection for the Property. The board has not deducted any of the documented cistern costs because the Hiltz Construction Inc.’s estimate included \$47,302 for “dry” waterline installation as an alternative to the cistern. As it turned out, the actual cistern costs were \$10,000 to \$15,000 less than the estimated waterline installation. (While the board considered reducing the

construction costs for this fact, we have not to the extent the contingency fee or any other estimate is conservative).

Town Engineering and Offsite Expenses

The planning board's June 18, 2001 conditional approval of the subdivision required the developer of the Property to pay \$742.40 per lot to the Town for offsite improvements to Farmer Road prior to the recording of the plat or \$10,394 (14 x \$742.40). In addition to these offsite costs, the board has estimated an additional \$40,000 (approximate) for the Town engineer's review of construction charges which anyone purchasing the subdivision at this point in time would likely incur. While the total amount of \$50,000 (\$10,394 + \$40,000 rounded) is less than the approximately \$87,000 the Taxpayer actually spent on such fees, the board is not able to determine from the evidence when the offsite costs were paid and how any potential purchaser would be able to reasonably anticipate the magnitude of the cost of the construction review by Town-contracted engineers. On balance, the board finds this estimate of between 4% and 5% of the total retail value of the lots is reasonable and similar to what a prospective purchaser would likely estimate at the time of the transfer.

Electric Utility Installation and Additional Engineering Expenses

The board finds the actual costs incurred of approximately \$10,000 for payment to Public Service of New Hampshire for installation of power and additional engineering costs of \$5,300, while they are actual expenses, are reasonable as to what anyone would expect to further incur. The vast majority of the engineering expenses in developing the Property were entailed in the design of the subdivision and its infrastructure, creating the development and construction plans and the review and approval process by the planning board; thus, the remaining engineering costs, as of May 2002, were relatively nominal.

Indirect Carrying Costs

The board has determined that 2% of the retail value of the Property's lots is a reasonable estimate for the remaining carrying costs to be incurred between May 2002 and when the lots were available for retail sale. The board finds this period of time was relatively short as the evidence indicates the market was absorbing lots and residential dwellings at a relatively rapid rate. (See Driscoll Appraisal, comparable sales submitted by the Town, and the fact that two of the adjoining parcels were being developed concurrently). This estimate includes such items as liability insurance costs, bond costs, bank interest and any remaining legal fees.

Contingency Fee

While no specific evidence was submitted as to an estimate of a contingency fee, based on the board's knowledge and experience, a 5% contingency fee of the remaining estimated construction costs of \$482,275 is reasonable to allow for unforeseen construction costs and change orders. As the evidence indicates, additional unforeseen expenses did occur such as blasting of ledge in the cul-de-sac area of the road. This contingency fee is intended to address such unforeseen cost changes that are usual and customary in such road and utility construction.

Real Estate Commission

Both Taxpayer Exhibit 1 and the Driscoll Appraisal estimated a 5% real estate commission was reasonable and no other evidence was submitted to the contrary.

Entrepreneurial Profit

Any purchaser of the Property as of May 2002 would expect to receive compensation for their project coordination and risk to complete the development. Such cost is usually described as entrepreneurial profit and needs to be deducted in estimating value by the development

method. The twelfth edition of the Appraisal of Real Estate by the Appraisal Institute (2001) at page 360 defines entrepreneurial profit as:

“entrepreneurial profit: A market-derived figure that represents the amount an entrepreneur receives for his or her contribution to a project and risk; the difference between the total cost of a property (cost of development) and its market value (property value after completion), which represent the entrepreneur’s compensation for the risk and expertise associated with development.”

Obviously the amount of entrepreneurial profit can vary significantly based on many factors including the nature of the development project, the economic times, the stage of development of the project, etc. Id. at 360-63. In this case, as of May 2002, a significant amount of entrepreneurial activities had already occurred including the previous owner’s initiation of the subdivision, the conditional approval of the subdivision, the Taxpayer’s acquisition of the Property, the sale of the existing dwelling and the assemblage of the general contractor and subcontractors to perform the necessary road and utility work. Based on the board’s overall experience, entrepreneurial profit for a total project such as the one in this case can run in the 10% to 15% range during good market times. In this case, the only evidence submitted was a 10% “developer profit” estimate in the Driscoll Appraisal which the board believes is intended to be reflective of the entrepreneurial profit as defined above. The board estimates approximately half of the entrepreneurial profit remained to be realized as of May 2002 and, thus, we have calculated a 5% entrepreneurial profit as part of the deductible expenses.

Anticipated LUCT Expenses

Any purchaser of the Property as of May 2002 would have realized they would be liable for the LUCT Assessments for the lots. The Taxpayer testified that his estimate of the LUCT Assessments was approximately \$3,500 to \$4,000 per lot based on his previous experience in

similar development activities. The board finds this is the best evidence as to what a knowledgeable buyer would have expected to incur for such costs and is reasonable based on the market evidence submitted; thus, we have estimated the total LUCT Assessments at \$45,500 (13 lots x \$3,500). The board notes here as it did in VanLunen that “the LUCT estimate . . . is somewhat problematic and, arguably, circular, in that it is the very issue being determined However, it is a real cost that any developer . . . would have to anticipate and estimate.” (VanLunen Order at p. 9.)

The board finds the above calculations pertain to estimating a value for all the land subject to LUCT Assessments. This method of valuation inherently captures the road areas because the retail lot values reflect the fact they have adequate access; thus, there is no need to delineate or calculate any separate LUCT assessment for the road area.

At the hearing, the Taxpayer submitted a request for findings of fact and rulings of law, inclusive of 57 requests. The board declines to rule on the requests for the following three reasons: 1) the requests exceed the limit of 25 requests for findings of fact and/or rulings of law as provided in TAX 201.36(c); 2) the requests are largely a sentence-by-sentence verbatim recitation of the Taxpayer’s Memorandum; and 3) the board has, in its decision, addressed in detail the pertinent issues and arguments raised by the parties and made thorough findings to support its value conclusion; consequently, even if the board were to answer the requests, such answers would either be redundant or not applicable to the board’s findings. Appeal of City of Nashua, 138 N.H. 261, 263 (1994). (The board’s decisions must contain adequate detailed findings to support its conclusion.); see Vogel v. Vogel, 137 N.H. 321, 322 (1993).

If the taxes have been paid, the amount paid on the LUCT Assessments in excess of \$40,760 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. 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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: John G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, New Hampshire 03104, counsel for the Taxpayer; Chairman, Town Council, Town of Hooksett, 16 North Main Street, Hooksett, New Hampshire 03106; and a courtesy copy to the Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302.

Date: June 18, 2004

Anne M. Stelmach, Deputy Clerk

Jon Weigler

v.

Town of Hooksett

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ORDER

The board has reviewed the “Town’s” July 14, 2004 “Motion for Rehearing” (the “Town’s Motion”) filed by Barton L. Mayer, Esq., the Town’s counsel.

The Town’s Motion is denied. See RSA 541:5. The board intends to articulate its reasons for this ruling within a short time, but will not do so here because of vacation and other schedule conflicts.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Concurred, unavailable for signature
Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

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Date: 09/23/04

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ORDER

This order supplements the board's July 23, 2004 order ("Order") denying the "Town's" motion for rehearing ("Motion") with an explanation of the board's reasons for denial.

The board's rules state rehearing motions shall only be granted for "good reason" pursuant to RSA 541:3 and the moving party must make a showing that "the board overlooked or misapprehended the facts or the law and such error affected the Board's decision."

TAX 201.37(d).

The board finds the Motion does not provide any new arguments for the board to conclude that it overlooked or misapprehended the facts or the law in its 18-page decision dated June 18, 2004 ("Decision"). However, the Motion raises several issues that warrant clarification.

The Motion at paragraph 11 states that "according to the Board's decision, as of early May, only tree cutting had been accomplished (1.57% of total road cost). Tree cutting is not

necessarily a disqualifying event, whether on the road or the access, sewer or drainage easements.” Contrary to the Motion’s assertion, the board found that as of early May not only had tree cutting occurred, but stumping and stump grinding of those areas and top soil stripping had occurred. The Decision, in several locations, indicates the land use change tax assessments (“LUCT Assessments”) were triggered, not by the tree cutting but “at the time the grubbing and the topsoil stripping process of the [roads and the various easements],” “the physical disturbance of . . . the various easements” and “the time the road and the drainage, and sewer and access easement areas were being stumped and topsoil removed . . .” (Decision at pp. 6, 7 and 9, respectively.) Further, the board inherently acknowledges in the development method calculation of market value that the simple act of tree cutting was not such an event so as to trigger the LUCT Assessments, and thus, because it had occurred prior to the early May LUCT date, the tree cutting cost was deducted in the value conclusion. (Decision at p. 12.)

Next, the Motion at paragraphs 14 and 18 assert “[t]he Board establishes a policy in this case which encourages developers to perform *de minimis* work upon a lot, . . . thereby withdrawing the entire subdivision from the current use program.” (Emphasis added.) As the board notes and discusses extensively in the Decision at pp. 5-9, it is not establishing a policy by its Decision but is simply reconciling the unique facts presented in this appeal to the acknowledgeably complex land use change tax (“LUCT”) provisions largely contained in RSA 79-A:7. As the Decision emphasizes, the basis for the board’s conclusion is the provision of RSA 79-A:7 that provides an exception and delay in issuing LUCTs in a subdivision process if the remaining lot or sites, but not necessarily adjacent undisturbed acres, total more than 10 acres.

Last, the Motion at paragraph 15 argues the subdivision plan for the “Property” in question did not receive its final approval until May 28, 2002, and thus, pursuant to RSA 79-A:7, V(a), “the Town had the right to ‘delay the assessment of the land use change tax until any and all required permits or approvals have been secured.’” Based on the evidence submitted in this case, the board does not believe that provision of the statute applies because the evidence indicated the Property had received conditional approval to be subdivided on June 18, 2001 (Decision at p. 4) and testimony and evidence from both sides indicated the Town and the Taxpayer worked through the remaining planning process resulting in the final approval on May 28, 2002. There was no evidence submitted that the development work done prior to final approval on May 28, 2002 was unauthorized, unapproved or outside the June 18, 2001 conditional approval by the Town. While the record was not clear as to what planning board process necessitated the later “final” approval (other than documenting several revised conditions), RSA 79-A:7, V(a) appears to address a situation where development occurs without any authorizing approval. However, even if, for argument purposes, the May 28, 2002 final approval date would cause the LUCT Assessments to be imposed at that time, it is only several weeks later than the early May date found by the board and, based on the board’s summary chronology of development of the property (Decision at pp. 4 and 5) and value calculations (Decision at pp. 11-16), would have little effect on the value conclusion.

Any appeal by the Town must be by petition to the supreme court within 30 days after the date of July 23, 2004 Order denying the motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Concurred, unavailable for signature
Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Order has this date been sent by facsimile and mailed, postage prepaid, to: John G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, New Hampshire 03104, Fax # (603) 623-5626, counsel for the Taxpayer; Barton L. Mayer, Esq., Upton & Hatfield, LLP, 10 Centre Street, Post Office Box 1090, Concord, New Hampshire 03302-1090, Fax # (603) 224-0320, counsel for the Town; Chairman, Town Council, Town of Hooksett, 16 Main Street, Hooksett, New Hampshire 03106, Fax # (603) 485-4423; and a courtesy copy to the Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302.

Date: August 11, 2004

Anne M. Stelmach, Deputy Clerk