

Marshall and Marguerite Ford

v.

Town of Belmont

Docket No.: 23637-08LC

DECISION

The “Taxpayers” appeal, pursuant to RSA 79-A:10, the “Town’s” 2008 land use change tax (“LUCT”) of \$6,500 on a 1.8 acre lot at 8 Jodi Drive (the “Property”). The LUCT was based on a \$65,000 full value assessment. For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the Town’s LUCT assessment was erroneous or excessive. See Tax 205.06. We find the Taxpayers carried this burden.

The Taxpayers argued the LUCT was erroneous or excessive because:

(1) they submitted a development plan for approval by the Town in March, 2006 and, after some complications, including a denial by the planning board and an appeal to the Town’s Zoning Board of Adjustment (“ZBA”), the Taxpayers received a building permit on July 10, 2006 and physically changed the land two days later (on July 12, 2006, by digging a cellar hole for the house they planned to construct);

(2) the Town has not complied with RSA 79-A:7, II(c), which prescribes 12 months to issue the LUCT bill, because it did not issue the LUCT bill until January 11, 2008, which the Taxpayers received on January 14, 2008, “19 [sic] months and four days” after the Taxpayers received their building permit to begin construction on the Property;

(3) the Town agrees the change in use occurred on or about July 10, 2006, the date shown on the LUCT bill, and their knowledge of the change in use is further confirmed by the “Waiver of Municipal Liability . . .” (the “Waiver,” included in Taxpayer Exhibit No. 1) signed by the Town’s board of selectmen on July 3, 2006 and recorded at the Belknap County Registry of Deeds;

(4) the Town’s representative at the hearing, Mark Nieder from its assessing company, did not know why the Town delayed in sending the LUCT bill until January 11, 2008;

(5) the Taxpayers acquired an eight acre field in 1972, which was a depleted sand and gravel pit;

(6) they created a two-lot subdivision, which included the Property, in 1982, six years before the Town adopted its zoning ordinance;

(7) the Property had a market value of no more than \$30,000 - \$35,000 at the time of the change in use, much less than the Town’s \$65,000 assessment which is based on non-comparable developed lots which sold for higher amounts; and

(8) the LUCT should be either reduced to zero, since the Town has not complied with the LUCT statute, or abated to no more than \$3,500 (10% of the actual market value of the Property).

The Town argued the LUCT was proper because:

(1) its assessing company performed a full revaluation in tax year 2007;

(2) the Town arrived at the \$65,000 market value for the Property by estimating the median value of a typical house lot and discounting it by \$10,000 for “topography” (which is supported by the Taxpayers’ indication that the excavation costs on the Property were \$12,000);

(3) Municipality Exhibit A contains the Town's comparables and other documents which support the Town's value estimate and leads the Town to believe a lower value of \$30,000 to \$35,000 is unreasonable; and

(4) the Taxpayers should have a responsibility for providing a "new map" when they applied for a building permit (see item 11 of the application in Municipality Exhibit A).

Board's Rulings

This appeal involves two issues: 1) whether the Town's LUCT bill was timely mailed to the Taxpayers; and 2) if it was timely, was the amount of the bill correct. The appeal is therefore granted for the reasons discussed below.

The threshold issue in this appeal is whether the Town's January 11, 2008 LUCT bill was timely issued pursuant to RSA 79-A:7, II(c) and, thus, whether the Taxpayer is liable for a LUCT. RSA 79-A:7, II(c) states in part:

Such bill shall be mailed, at the latest, within 12 months of the date upon which the local assessing officials receive written notice of the change of use from the landowner or his agent, or within 12 months of the date the local assessing officials actually discover that the land use change tax is due and payable.

It is undisputed the Town did not issue and send the LUCT bill until January 11, 2008 and that this bill (denoted as a Form A-5) states the change of use occurred on July 10, 2006, 18 months earlier. We read the plain meaning of this statute to be timely issuance of the LUCT bill is necessary and must occur no later than the time when the assessing officials receive "written notice" of the change of use or they "actually discover" the LUCT is due and payable, whichever occurs first in time. We do not read the statute to mean the assessing officials can postpone indefinitely the date of issuance of the LUCT bill even after receiving written notice of the change of use. This is especially true when the written notice is unambiguous and includes a signed acknowledgment by the "assessing officials" -- the Town selectmen who signed two

documents submitted by the Taxpayer (the Waiver and the building permit). See also RSA 79-A:7, II(e) and the case law discussed below. RSA 79-A:7, I and the related current use rules (Cub 307.01(c)(2); Cub 308.02(a)(1); and Cub 308.03(c)) make it clear the effective date of a LUCT is the date the land no longer qualifies as open space due to physical disturbance to the land for development purposes. See also Frost v. Town of Candia, 118 N.H. 923 (1978).

Based on the following factual findings and application of the pertinent law, the board rules the Town's January 11, 2008 LUCT bill is untimely. In 1972, the Taxpayers purchased approximately eight acres, which includes the Property, across from their main house, and in 1982, the Taxpayers subdivided this land into two lots. The Town adopted its zoning ordinance in 1988 and the two lots became "grandfathered" lots of record. In August, 1992, the Taxpayers filled out an application (Form A-10) to place 7.5 acres in current use; from the sketch accompanying this application, it appears that approximately one acre adjacent to Jodi Drive was kept out of current use. In 1997, a "Subdivision & Consolidation Plan" (see Taxpayer Exhibit No. 3) was filed and approved by the Town to create a new Lot 12-20-1 consisting of approximately 1.8 acres, on which the Taxpayers later decided to build a house. This 1.8 acres appears to include the approximately one acre not put into current use in August, 1992.

In March 2006, the Taxpayers began the process of obtaining a building permit for the Property and, after some procedural delays and a successful appeal to the Town's ZBA, received a building permit to construct a single family residence on July 10, 2006. The permit application they filled out identifies the land at 8 Jodi Drive as having 1.81 acres and answers "yes" to the question of whether a "portion" of the land to be developed is "under a Current Land Use (CLU) Assessment." While it is true the application did not include a "new map" depicting the portion of the lot in current use, it is unreasonable to suggest they were required to do so of their own volition (to trigger the timeline for issuance of the LUCT bill), unless the Town deemed it

“necessary” (the word used in the Town’s form) for them to do so at the time of this application.

Clearly, the Town did not deem it “necessary” and “approved” their requested building permit without it. (See Municipality Exhibit A.)

What the Town did require of the Taxpayers as a condition for issuing the building permit was the Waiver document (identified above and included as part of Taxpayer Exhibit No. 1), signed by the Taxpayers (on May 25, 2006) and the three Town selectmen (on July 3, 2006), and witnessed by Candace Daigle (see below) in their presence and recorded on July 12, 2006. In this Waiver, the Town agreed to issue a building permit to the Taxpayers for a residence on Jodi Drive and the Taxpayers assumed certain responsibilities for maintaining this portion of Jodi Drive. We find the waiver significant because, along with the building permit, it erases any doubt regarding the Town’s knowledge of the Taxpayers’ plans to construct a residence and change the use of the land.

One of the Taxpayers, Mr. Ford, stated he began construction of the residence, with his son, two days after issuance of the building permit (on July 12, 2006, the same date the Waiver was recorded) when they began digging a cellar hole and preparing the site for the house foundation. Mr. Ford further stated he knew this change in use would generate a LUCT liability, but he was unaware of the 12 month statutory timeframe the Town had for issuing the bill until after he met with an attorney in November, 2008 to discuss other issues.

Mr. Ford testified the first time he actually saw an assessing agent for the Town was on April 23, 2007, when an individual visited the Property to measure and list the new house as part of the Town-wide revaluation. He testified Town officials visited the Property at least four other times for various reasons, checking the construction for compliance with the Town’s building code pertaining to the dwelling’s foundation, structural framing, electric panel, and, finally, for an occupancy permit. Mr. Ford further noted the Property, and any construction taking place on

it, was only 400 feet from N.H. Route 107 (Province Road) and was clearly visible to anyone traveling along this route.

During the hearing, the Town's contracted assessing agent, Mark Nieder, a certified New Hampshire assessor and a principal in the assessing firm of Commerford, Nieder, Perkins, LLC, and the lone representative of the Town to attend the hearing, agreed the date of the change in use of the land was on or about July 10, 2006 as stated on the LUCT bill (the department of revenue administration's A-5 form). This A-5 form is filled out by the Town, not the Taxpayers, and the information contained on it, including the "actual date of change in use" [step 4 (b)] and the "date of bill" [step 6 (b)], was approved/agreed upon when it was signed by a majority of the selectmen/assessors (on December 31, 2007).

Mr. Nieder testified his firm has been working in the Town since the end of 2005 when it agreed to perform the Town-wide revaluation effective for tax year 2007. Prior to Mr. Nieder's firm being contracted by the Town, Ms. Jeanne Beaudin, a certified New Hampshire assessor (CNHA) and subsequently the Town Administrator, performed some of the Town's assessing duties.

Two of the three selectmen who signed the A-5 form were also the selectmen who signed the Waiver on July 3, 2006, one week before the Town issued the Taxpayers their building permit. Under New Hampshire law, the selectmen (assessors) have the responsibility to determine the proper assessment of each property subject to taxation. See, e.g., RSA 74:1 and RSA 75:8. Inherent in their assessing duties is the need to obtain the necessary information, in this case, to fulfill their RSA 79-A assessing responsibilities including the timely issuance of LUCT bills when properties no longer qualify for current use assessment.

Given the selectmen's knowledge and approval of the information contained on the A-5 form prepared by the Town, denoted by their signatures at step 5 on that form, and Mr. Nieder's

testimony that his assessing firm has been working in the Town since the end of 2005 and he could not explain or defend the Town's delay in issuing the LUCT bill, the board finds, based on the evidence and testimony presented, the Town did not issue a timely LUCT bill to the Taxpayers.

The board's holding in this appeal is consistent with several prior decisions. In Magee v. Town of Ossipee, BTLA Docket Nos. 19992-03LC and 20001-03LC, the municipality's delay in sending the LUCT bills (14 months rather than the 12 months prescribed in the statute) resulted in the granting of the LUCT appeal and a refund of any LUCT payments "in their entirety." The following passage from Magee is of direct bearing to the board's ruling in this appeal:

Consequently, the board finds the Town did not comply with RSA 79-A:7, II(c). The board finds the wording of the statute is unequivocal that the assessing officials have 12 months from a change in use to a non-qualifying use to issue a LUCT bill to the landowner. The inflexible nature of the deadline is emphasized in the statute by the phrase "at the latest" and creates a certain timeframe and finality to the issuance of a LUCT bill by the assessing officials. Because the Town's October 28, 2003 mailings of the LUCT bills are well beyond (by approximately 2 months) the 12-month statutory deadline, the board finds no authority exists for the selectmen to have assessed and issued the LUCT bills after the deadline had passed. The board does not have the authority to waive statutory deadlines and the ruling in this case is consistent with other board rulings concerning the LUCT statutory deadline. See, e.g., Brothers v. Town of Rumney, BTLA Docket No.: 19414-02LC (July 23, 2003).¹

Cf. Robinson v. Town of Lyme, BTLA Docket No. 19983-03LC (May 5, 2005) (discussing and distinguishing Magee and Brothers based on proof that there was excusable delay in "the actual discovery of the change of use" by Town of Lyme and "bad faith" on the part of the taxpayers); and Teeter v. Deering, BTLA Docket No. 22907-07LC (April 22, 2008) (delay in 'actual discovery' of change of use by the municipality, resulting in split decision on this issue by the board). We cannot find any "bad faith" on the part of the Taxpayers or excusable delay on the Town's part.

¹ Following this "Preliminary Decision" in Brothers, the board issued a "Final Decision" on November 7, 2003 which incorporated the findings in the prior ruling.

While there is almost invariably some differences in the facts presented in each LUCT appeal, the facts in this appeal and Magee are similar. In both Magee and this appeal, the municipality was represented by a contract assessor. In both, it can fairly be concluded that “there were changes made in the Town’s assessing office that created some confusion during the relevant timeframe” and the contract assessors agreed, rather than disputed, the date that “land qualified for current use assessment to a non-qualifying use occurred” (August, 2002 in Magee and July 10, 2006 in this appeal).

The timelines specified in the tax statutes to balance the rights of municipalities and taxpayers are a two-edged sword. Just as a taxpayer loses certain rights to file for an abatement request at the municipal level and an appeal to the board or the superior court if he or she fails to satisfy a statutory filing deadline (such as those set forth in RSA 76:16 and RSA 76-16-a for an ad valorem tax appeal, as well as those in RSA 79-A:10 for a LUCT abatement), a municipality bears parallel obligations and responsibilities for assessing property within the prescribed statutory timelines or loses the right to proceed with the LUCT assessment and statutorily lien the property. Notably, the timeline for the statutory 18-month lien prescribed in RSA 79-A:7, II(e) runs from the same date stated by the Town in the LUCT bill (July 10, 2006). See also Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000) (statutory timelines are “strictly enforced” in LUCT and other tax appeals); and Tax 201.03(b) (“[u]nless authorized by statute, the board shall not enlarge time periods . . .”); cf. RSA 76:14 (Correction of Omissions or Improper Assessment); and Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 142-43 (1998) (municipality only has prescribed time period provided in statute to determine if property has “escaped taxation”).

The three sentence October 3, 2007 memorandum from a Town employee (Candace Daigle) to one of the Taxpayers (Marshall Ford) is too little and too late to support a valid LUCT

assessment, as well as being ambiguous on its face. The memorandum is ambiguous because Ms. Daigle refers to a concern for “assur[ance] that your assessment is correct,” but it is not clear whether her concern is over a possible, one-time LUCT assessment or the annual ad valorem assessment. Further, the memorandum was issued almost four months after the 12-month timeline from the date of change of use (July 10, 2006) and is therefore ineffective in tolling or suspending the requisite time period the Town had to issue the LUCT.

Nothing prevented the Town in the 12 month period after July 10, 2006 from using reasonable diligence to determine how much land had been removed from current use² and issue the LUCT bill. (The Taxpayers had no discernible motive for not providing this information since designating a smaller amount of land to be removed from current use would have reduced their LUCT bill.)

The Town should have been more cognizant of the LUCT billing timeline to ensure a timely bill was issued, especially in light of the amount of money at stake, \$6,500 (10% of the Property’s \$65,000 market value). The Town has not claimed it was excused from complying with the 12 month bill issuance requirement or that its discovery of the date of change of use was different than the date the Town placed on the LUCT bill. At best, the Town simply forgot or did not know what the relevant statutory requirements were for issuing a valid LUCT bill.

² Cub 308.03, a current use board rule quoted in the dissent, does not require a different conclusion. 12 months is certainly a more than ample time period for a municipality to determine “the extent of the change in use.” In addition, established law prohibits an agency through its regulations from varying requirements mandated by statute. See, e.g., Formula Dev. Corp. v. Town of Chester, 156 N.H. 177, 182 (2007):

The defendant further argues that the administrative rules adopted by the current use board (CUB) support its argument. . . .

Our interpretation of RSA 79-A:7, however, is not influenced by administrative rules. “[A]dministrative officials do not possess the power to contravene a statute[] [and] . . . administrative rules may not add to, detract from, or modify the statute which they are intended to implement.” Appeal of Anderson, 147 N.H. 181, 183 (2001) (quotation and citation omitted). Our holding above, therefore, remains unchanged. To the extent the CUB rules contradict our holding today, they are *ultra vires*.

The issuance of a timely LUCT bill is a singular opportunity for a municipality to recover a significant amount of the tax revenue which was deferred while the land was in current use.

The board encourages the Town to review its current use assessing policies so that timely LUCT bills will be issued and the Town will be able to receive the tax revenue it is appropriately due.

The importance of the Town maintaining accurate and up to date records of the amount of land in current use and withdrawn from current use cannot be overstressed. Cf. Town of Marlow, BTLA Docket No. 18478-01RA (July 30, 2001). The Town shall therefore take whatever steps are necessary to update and make accurate its own records and the records at the registry of deeds pertaining to the amount of land owned by the Taxpayers that now remains in current use.

Because the board rules the Town's LUCT bill was untimely, it is unnecessary for the board to address the second issue concerning the amount of the bill. Therefore, the appeal is granted and the Town shall refund to the Taxpayers any LUCT paid by the Taxpayers along with any appropriate interest from the date of payment to the date of refund.

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.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Dissenting Opinion

I respectfully disagree with the majority's decision that the Taxpayers are not liable for the LUCT. I would, however, find a different LUCT than that assessed by the Town for the reasons that follow. The majority, along with this board member, find the threshold issue in this appeal is whether the Town complied with the RSA 79-A:7, II(c) statutory requirement to mail the LUCT bill within 12 months of the date of change in use. This member's opinion follows.

First, a synopsis of the events leading up to the issuance of the LUCT based on the totality of evidence presented at the hearing and included in the board's file is in order. Mr. Ford, one of the Taxpayers, testified when he received the building permit in July 2006 he was advised by Assessor Candace Daigle that some land would have to be released from current use. The Town's assessing agent, Mr. Mark Nieder of Commerford, Nieder, Perkins testified at the hearing the Town was not noticed by the Taxpayers as to how much land was being removed from current use. This evidence is supported by Ms. Daigle's October 3, 2007 letter to Marshall Ford regarding the current land use status (Municipality Exhibit A, Tab E) which stated the following:

When you obtained the building permit application for this lot on Jodi Drive I had asked you about the current use status, whether you would be disqualifying the whole lot based on developing the whole lot, or whether it would be only a portion. It does not appear that you provided information to us on your decision. Please let me know as soon as possible regarding this issue so that we can assure that your assessment is correct.

The record is not clear as to whether or not Mr. Ford responded to this letter. However, Form A-5 land use change tax was issued by the Town on January 11, 2008 disqualifying 1.80 acres of land, the approximate size of Lot 12-20-1. The following notation was made in the narrative description of Form A-5: "converted for house lot/identified at time of revaluation 4/1/07."

A chronology of events is important to relate why, in this board member's opinion, a LUCT is due and payable by the Taxpayers. A review of the evidence supports the following:

- The Property, containing 8 acres more or less, was purchased by Marshall H. Ford and Marguerite P. Ford on September 14, 1972. This deed is recorded at the Belknap County Registry of Deeds at Book 591 Page 321.
- In 1982, prior to zoning, Lot 12-20 was subdivided creating Lot 12-20-1 (see inset of Taxpayer Exhibit No. 2 "Town of Belmont Tax Map Sketch").
- An application for current use with attached hand drawn map on Lot 12-20 was filed by the Taxpayers on August 14, 1992. The number of acres to be classified in current use was 7.5. As depicted on the map, Lot 12-20-1 was excluded from the area to be enrolled in current use.
- In 1997, a subdivision and consolidation plan was approved, the purpose of which was to "subdivide tax lot 12-20 into two separate building lots and to combine the 0.83 acre remainder with tax lot 12-20-1." (See note #5 of Taxpayer Exhibit No. 2.) Thus, as of the date of approval of the subdivision and consolidation plan, the total acreage of 8.49 (as surveyed on November 18, 1977) comprised the following: Lot 12-20 - 3.18 acres in current use; Lot 12-20-1 - 1.82 acres (0.83 acres in current use; 0.99 acres not in current use); and Lot 12-20-2 - 3.49 acres in current use for a total of 7.50 acres in current use and 0.99 acres not in current use.
- In March 2006, Mr. Ford filed an application for building permit for property located on Jodi Drive, Tax Map 226, Lot 20, with total acreage indicated of 1.81 acres. The application also noted a portion of the property to be developed was

under current use assessment. No map accompanied the application to indicate how much land would be removed from current use. Due to procedural delays, the building permit was not approved until July 10, 2006.

As stated above, Mr. Ford was advised some land would need to be removed from current use upon approval of his building permit. Taxpayer Exhibit No. 2 indicates the final tax Lot 12-20-1 consists of 0.99 acres of land not in current use and 0.83 acres of land which was part of the 7.5 acres enrolled in current use in August 1992. The frontage (145.15 feet) of the property to be developed, as noted on the building permit, is on the southerly side of Lot 12-20-1, the 0.99 acre portion of the land not in current use. At the hearing, Mr. Ford marked the area of the driveway and house as developed on a plan (see Taxpayer Exhibit No. 3). The driveway is completely on the land not in current use while the house overlaps both the land not in current use and the land in current use. It appears a minimum of 50% of the 0.83 acre area in current use could remain undeveloped, and thus remain in current use, according to Mr. Ford's depiction on the plan yet no plans or response to Town inquiry was supplied to the Town by the Taxpayers. Thus, this board member finds the Town was delayed in assessing the LUCT because it was attempting to obtain accurate information from the Taxpayers as to the actual amount of land that was being disqualified from current use. The Taxpayers' "development plan"³ was not clear whether all of the 0.83 acres portion of Lot 12-20-1 was being disqualified or whether some of it would continue to be in current use because there were more than 10 acres still contiguous qualifying for current use. (RSA 79-A:7, V and Cub 307.01(c)).

³ Cub 301.05 "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.

On October 3, 2007, the Town inquired (as noted above) as to whether the Taxpayers would be “disqualifying the whole lot ... or whether it would only be a portion” from current use. This inquiry was a follow-up to the Town’s verbal discussion with Mr. Ford when the building permit was approved. As testified by Mr. Ford and noted by the majority on page 6 of this Decision, the first time an assessing agent visited the Property was on April 23, 2007. This testimony is consistent with the Town’s reason for the disqualification of 1.80 acres of land on Form A-5, “converted for house lot/identified at time of revaluation 4/1/07,” issued on January 11, 2008, which is within twelve (12) months of the date of discovery that a LUCT was due and payable. The Town assessed a full and true value of \$65,000 based on the acreage listed.

RSA 79-A:7, II(c) provides for two events of equal weight from which the LUCT bill must be mailed within 12 months “at the latest.” The bill must be mailed 12 months either from when “the local assessing officials receive written notice of the change in use” or 12 months from “the date the local assessing officials actually discover that the land use change tax is due and payable.” In construing statutes, the board should first examine the language and, where possible, “ascribe the plain and ordinary meanings to the words used” unless the statute itself suggests otherwise. Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994); Appeal of Campton School Dist., 138 N.H. 267, 269 (1994). Here, the plain reading of the statute places equal weight on either event (“notice” or “actual discovery”) due to the use of the conjunction “or” without any qualification or priority of events. Further, the inclusion of the adverb “actually” before “discover” emphasizes the assessing officials must have actual knowledge that an event has occurred that disqualifies the land from current use, not simply that they should have known or should have discovered a LUCT was due. Richard Teeter v. Town of Deering, BTLA Docket No.: 22907-07LC (April 22, 2008).

This statutory deference to municipalities as to either event triggering the 12 month timeline is supported by the public policy purpose the issuance of a LUCT is intended to fulfill. (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. v. City of Claremont, 135 N.H. 270, 277 (1992).) Land that qualifies for current use is assessed at rates substantially lower, in most instances, than market value. When land is developed and no longer qualifies for current use, the 10% tax of its market value is intended to provide municipalities with some recovery of the lower tax revenue received while the land was in current use. As the supreme court noted in Woodview Dev. Corp. v. Town of Pelham 152 N.H. 114, 116 (2005), “[t]he LUCT is intended to permit a town to ‘recapture some of the taxes it would have received had the land not been in the lower open space tax category.’ [Opinion of the Justices, 137 N.H. 270, 275, 627 A.2d 92 \(1993\)](#).” Thus, allowing these two alternate events to trigger the 12 month billing timeline is intended to allow municipalities to be able to collect LUCTs for the equitable benefit of all the other taxpayers in the taxing jurisdiction. Richard Teeter v. Town of Deering, BTLA Docket No.: 22907-07LC (April 22, 2008), pps. 5 and 6. Consistent with RSA 79-A:7, II(c), Cub 308.03 The Use Change Tax states:

(a) The use change tax shall not be assessed until the extent of the change in use becomes determinable.

(d) If the change in use is completed within one tax year, the full and true value shall be determined and the use change tax assessed when the change in use is completed to a point that the selectmen or assessing officials are satisfied that the development plan, as originally submitted or as subsequently amended, has been complied with and they are able to determine the number of acres on which the use has changed.

The majority cites Frost v. Town of Candia, 118 N.H. 923 (1978). In Frost, the court held that “the land use change tax occurs when the actual use changes and not when a subdivision plan is approved.” Similarly here, a building permit was issued on a lot consisting of

0.99 acres of land not in current use and 0.83 acres of land in current use. The building permit in and of itself (and the “Waiver” discussed in the majority opinion) does not change the use to which the land is put. Mr. Ford testified construction began two days after the approval of the building permit, and there is no reason to conclude otherwise; yet neither in the request for building permit or in his testimony to this board did the Taxpayers indicate the amount of land to be removed from current use nor was there a challenge to the amount of acreage determined by the Town. The majority states “because the Property, and any construction taking place on it, was only 400 feet from N.H. Route 107 (Province Road) and was clearly visible to anyone traveling along this route....” Given that the frontage of the land was land not in current use (nearly one acre), it is conceivable that the Town would be unaware, without notice from the Taxpayers, of the extent of current use land being developed and thus subject to the LUCT. However, more importantly, the collective reading of RSA 79-A:7, II(c) and Cub 302.01(b)(1), 309.01(b)(1)(a) and 301.05(b) places the responsibility with the Taxpayers to provide clear “written notice” to the assessing officials not only of the change in use but also of the amount of land being disqualified. This simply was not done.

This board member strongly disagrees with the majority and finds the Town should not be penalized for attempting to determine the extent of land to be removed from current use before issuing its LUCT. The evidence is clear that not only did the Taxpayers fail to notify the Town as to the amount of land to be removed from current use but the actual amount of land on which the use had changed was not able to be determined by the Town and thus the issuance of the LUCT was proper.

As the majority discussed on page 10 of this Decision, the importance of accurate and up to date current use records on file at the Town Offices and recorded at the registry of deeds cannot be overstressed. The Town erred in assessing a LUCT on the 0.99 acre portion of

Lot 12-20-1 which was not in current use. This board member finds the LUCT imposed by the Town should have been on the 0.83 acre portion of Lot 12-20-1 and would order the Town to correct its Form A-5 (to be properly recorded at the Belknap County Registry of Deeds) specifically by inserting acreage originally classified (7.5), the acres disqualified (0.83) and acres remaining in current use (6.67), and provide proof of recording with the board within thirty (30) days.

In closing, this board member would therefore find the Taxpayers were responsible for the LUCT and would make a determination of the total tax due of \$2,965⁴.

Given the importance of municipalities being able to “recapture some of the taxes it would have received had the land not been...” assessed in current use ([Opinion of the Justices, 137 N.H. 270, 275, 627 A.2d 92 \(1993\)](#)), this board member would encourage the current use board to review whether either its rules could be amended to provide clarification or whether RSA 79-A:7, II(c) might be amended so that the public policy purpose of the issuance of a LUCT is not thwarted by a taxpayer not providing timely and clear information as to the area subject to a LUCT.

For the foregoing reasons, I respectfully dissent.

Michele E. LeBrun, Member

⁴ This value was determined by prorating the \$65,000 lot value multiplied by the 0.83 acre land in current use and divided by the total lot size of 1.82 acres.

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Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Marshall and Marguerite Ford, 539 Province Road, Belmont, NH 03220, Taxpayers; Chairman, Board of Selectmen, Town of Belmont, PO Box 310, Belmont, NH 03220; Commerford Nieder Perkins, LLC, 556 Pembroke Street - Suite #1, Pembroke, NH 03275, Contracted Assessing Firm; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302, Interested Party.

Date: April 3, 2009

Anne M. Stelmach, Clerk