

**Robert Balon**

**v.**

**Gorham Land Company**

**and**

**Town of Gorham**

**Docket No.: 24009-09OS**

**DECISION**

The board held a hearing on the above RSA 79-A:12 appeal which challenges the “Town’s” 2009 current use classification of the portion of Map R3 Lot 1 (the “Property”) owned by the Gorham Land Company used as a “shooting range” by the Gorham Police Association. The appeal was filed by the owner of abutting property (Robert Balon) who lives within 500 yards of the shooting range.

At the hearing, Mr. Balon contended the shooting range area should not qualify for current use and the 20% recreational adjustment it has received because:

- 1) the Gorham Police Association ropes off the entrance to the shooting range area and posts it during their use, which is contrary to the provisions of RSA 79-A:4, II and CUB 305.03;
- 2) shooting ranges are not a permitted use under the Town’s zoning;

3) the intent of current use is for a healthful environment and the lead ammunition left onsite produces an unhealthy environment; and

4) the Gorham Police Association built a berm of old railroad ties to shoot into and a cargo container is located on site to store their targets and other items necessary for the shooting range.

The Gorham Land Company (“GLC”) and the Town were represented, respectively, by Edward J. Reichert, Treasurer and Steven A. Clark, Esq. Both GLC and the Town contended the current use assessment was appropriate and should remain for the shooting range area because:

1) the only time the Gorham Police Association keeps people off the area is when the shooting range is active;

2) the shooting range is in an old gravel pit that is remote and has been left in its natural state since it was used as a gravel pit in the 1950’s;

3) the shooting range site has only limited access across a snowmobile bridge and the only wheeled vehicles allowed to access the site are police vehicles and vehicles owned by members of the Gorham Police Association; and

4) the selectmen reviewed the issue when it was brought to them by Mr. Balon and determined the Gorham Police Association’s shooting range use did not interfere with the current use status of the Property.

#### Board Rulings

For the reasons detailed below, the board finds the area actively utilized as a shooting range on land owned by the GLC does not qualify for current use and should be assessed a land use change tax and removed from current use pursuant to RSA 79-A:7.

In 2007, the GLC gave verbal permission to the Gorham Police Association to utilize an area for a shooting range approximately 700-900 feet to the east of Route 2 and across the Moose

River. (See Municipality Exhibit A). The site is a portion of a gravel pit that had been utilized in the 1950's for the improvement of Route 2 and had largely been left to regenerate. The area utilized for the shooting range is an area that had not regrown to trees and is accessed via a snowmobile club maintained bridge across the Moose River. The Property is 113 acres and has received current use assessment comprised of 100.2 acres of hardwood forest land and 12.8 acres of unproductive land and received the 20% recreational adjustment as provided by CUB 305.03. The photographs submitted by Mr. Balon indicate a right angle retaining wall of railroad ties has been constructed against a gravel bank to provide the target area for the shooting range. The photographs also show a flat open gravel area in front of the railroad tie berm with a cargo container on the edge of the open gravel area used by the Gorham Police Association to store materials used at the shooting range. The Gorham Police Department filed two criminal trespass complaints against Mr. Balon on April 26, 2009 for trespassing on the Gorham Police Association's shooting range contrary to the provisions of RSA 635:2, V. The complaints were subsequently dismissed for lack of prosecution by the Gorham Police Department.

The board's ruling that the shooting range disqualifies certain land from current use is based solely on the finding the shooting range use in the open area of the old gravel pit and the accompanying improvements are not in concert with the open space provisions of RSA ch. 79-A and CUB rules. This ruling is not a reflection on whether the Gorham Police Association's use of the land for a shooting range is beneficial to the public's interest or not or whether the Gorham Police Department's complaints of criminal trespass by Mr. Balon were appropriate or not. Further, the board makes no rulings regarding the environmental allegations presented by Mr. Balon.

The overall intent of RSA ch. 79-A is stated in RSA 79-A:1.

**79-A:1 Declaration of Public Interest.** – It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, maintaining the character of the state's landscape, and conserving the land, water, forest, agricultural and wildlife resources. It is further declared to be in the public interest to prevent the loss of open space due to property taxation at values incompatible with open space usage. Open space land imposes few if any costs on local government and is therefore an economic benefit to its citizens. The means for encouraging preservation of open space authorized by this chapter is the assessment of land value for property taxation on the basis of current use. It is the intent of this chapter to encourage but not to require management practices on open space lands under current use assessment.

The balance of the chapter and the CUB rules lay out how different open space land (agricultural, forest and unproductive/wetland) is assessed. To determine whether a shooting range is eligible under “forest land” (which appears to be the current use category ascribed to the shooting range area), the board first looks to the statutory definition of “forest land”. RSA 79-A:2, VII states “‘forest land’ means any land growing trees as determined and classified by criteria developed by the state forester and adopted by the board....”

Reviewing the current use rules, the board also notes CUB 303 contains some general provisions relative to the eligibility of certain uses of land, particularly stating test pits and land under utility lines do not disqualify land from current use, but that excavation, in most instances, does disqualify land from open space assessment. Further, CUB 304.05(c)(d) allows roads that are “constructed in support of forest purposes of forest protection” and forest land that has been clear cut still qualify for forest land assessment. Neither the statutes nor the CUB rules specifically mention or address shooting range uses of current use land. Consequently, the board must look to the general intent of current use, in particular, RSA 79-A:1 and the balance of chapter 79-A and CUB rules, to determine whether a shooting range is an acceptable use for forest land in current use.

In keeping with one of the general purposes of current use of conserving open space for recreational uses (RSA 79-A:1), RSA 79-A:4, II specifically requires that there be no prohibition of “skiing, snowshoeing, fishing, hunting, hiking or nature observation...” if current use land is to receive the additional 20% reduction for public recreational use as is the case of the GLC Property.<sup>1</sup> Consequently, passive recreational uses of land, such as enumerated in RSA 79-A:4, II, are complementary to the overall open space intent of the statute and do not generally disqualify the land from current use. Cf. Francis S. McDowell and Marjorie S. Widerstrom v. Town of Alton, BTLA Docket No.: 6336-89 (March 22, 1993) (owners’ intensive and private use of current use property for waterfront recreation (driveway, cleared waterfront area, dock and shed) surpass the complementary passive uses the drafters of Chapter RSA 79-A envisioned). Here, the use is by a private non-profit police association for firearm training. The immediate site has been to some extent modified with the railroad ties to create a safer shooting range. The photographs indicate the old gravel pit site is devoid of any vegetative growth so as to be utilized as a shooting range area. On the edge of the cleared area, the cargo container used to store items for the shooting range could be considered a “building” under RSA 72:7.<sup>2</sup> This use and related improvements do not appear to be for the purpose of forest protection or management nor are they customary complementary uses of open space.

---

<sup>1</sup> On the other hand, land can be eligible for current use (but not the 20% recreational adjustment) even if the public is totally prohibited access either through posting of the property pursuant to RSA 635:4 or enclosed fencing, as held by the supreme court in Blue Mountain Forest Association v. Town of Croydon, 117 N.H. 365 (1977).

<sup>2</sup> Appeal of Town of Pelham, 143 N.H. 536, 538 (1999) “[A structure] is taxable as a building, if by its use it: (1) is intended to be more or less permanent, not a temporary structure; (2) is more or less completely enclosed; (3) is used as a dwelling, storehouse, or shelter; and (4) is intended to remain stationary.”

The board is also not swayed by the argument that a shooting range for the training of police is akin to hunting that is permitted on open space land. Hunting is a widely dispersed use that does not require an open shooting range with an improved target area on property that must be posted and secured when in use. Here, the Gorham Police Association's use is of such an intense nature, that for safety purposes, the Property is posted during the times of its use. The shooting range is hardly a customary recreational use that occurs on forest current use land.

Because the shooting range use is neither a use intended to support forestry nor a complementary recreational use of forest land, the board finds the area that is actively devoted to the shooting range is disqualified from current use. The board remands the appeal to the Town and, within sixty (60) days from the date of this Decision, the Town shall determine the area actively devoted to the shooting range use, determine its RSA 79-A:7 "full and true value" and issue a land use change tax to the GLC. The Town shall certify compliance with this Decision by copying the board with its RSA 79-A:7 land use change tax bill.

If the GLC believes it is aggrieved by this land use change tax, it has the right, provided in RSA 79-A:10, to timely file an abatement request with the Town and appeal to either the board of tax and land appeals or the superior court.

With the assessment of the land use change tax and the recording of the removal of the appropriate area from current use (RSA 79-A:7, I(c)) the use of the disqualified area as a shooting range can continue, at least from the perspective of proper tax assessment, and the disqualified area "shall be taxed at its full RSA 75:1 value." (RSA 79-A:7, I(c))

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; Tax 201.37(a). The rehearing motion must state with

specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(f). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:3 and 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.

The "Requests" received from the Town are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Decision.

### **TOWN'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW**

#### **Findings of Fact**

1. Mr . Robert Balon ("Complainant") has filed two letters with the Board dated June 19, 2009 and June 29, 2009 ("complaint") regarding the current use and recreational use assessment pursuant to RSA 79-A, the current use statute.

**Granted.**

2. The Board of Tax and Land Appeals has accepted jurisdiction under RSA 79-A:12 I which authorizes the Board to act upon a specific complaint by a land owner within a town challenging whether a particular parcel of land not owned by the by him has been fraudulently, improperly or illegally so classified.

**Granted.**

3. The Gorham Land Company (“Property”) is the owner of 100 acre plus parcel of land that is in current use and also receives a recreational use adjustment.

**Granted.**

4. The property is undeveloped forest land with no structures.

**Neither granted nor denied.**

5. A very small area of the 100 acre parcel is occasionally used as a shooting range by the Gorham Police Association (“GPA”) a private organization, the membership of which is comprised of members of the Gorham Police Department.

**Neither granted nor denied.**

6. The limited use of the Property for a shooting range has not resulted in a change of use under as contemplated by RSA 79-A:7, IV.

**Denied.**

7. The Property remains open 12 months a year to public recreational use, without entrance fee as required by Current Use Board Rule 101.02 (d).

**Denied.**

8. Current Use Guideline 305.03(d), provides that:

Signage intended to warn the general public that a specific safety hazard exists on a particular tract of open space land shall not be considered a posting of land and not cause the removal of the 20% reduction for recreation use.

**Granted.**

**Rulings of Law**

9. To disqualify land from current use there must be a change of use. RSA 79-A:7 defines change of use as:

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.

**Granted.**

10. There is no evidence that has been any construction of road, removal of topsoil or other mineral, or that the it no longer meets the 10 acre size requirement, nor could there be in light of the Gorham Land Company's explanation of what is taking place on the parcel.

**Neither granted nor denied.**

11. There has been no change of use of the property that would disqualify it for eligibility as current use. RSA 79-A:12.

**Denied.**

12. The positing of signs to warn the public of a specific safety hazard does not violate RSA 79-A or any rules by the Current Use Board.

**Neither granted nor denied.**

13. There is no evidence that the land was fraudulently, improperly or illegally classified. See RSA 79-A:12.

**Denied.**

14. The Complaint has failed to show that the land was fraudulently, improperly or illegally classified,

**Denied.**

15. The complaint is dismissed.

**Denied.**

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

---

Paul B. Franklin, Chairman

---

Michele E. LeBrun, Member

---

Douglas S. Ricard, Member

---

Albert F. Shamash, Esq., Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Robert Balon, 83 Evans Street, Gorham, NH 03581, Complainant; Edward J. Reichert, Esq., PO Box 291, Gorham, NH 03581, counsel for Gorham Land Co., Taxpayer; Steven A. Clark, Esq., Boutin & Altieri, PLLC, P.O. Box 1107, One Buttrick Road, Londonderry, NH 03053, counsel for the Town; and Chairman, Board of Selectmen, Town of Gorham, 20 Park Street, Gorham, NH 03581.

Date: January 14, 2010

---

Anne M. Stelmach, Clerk