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INTEROFFICE MEMORANDUM

TO: Shaun Mulholland, Town Manager

FROM: Madeline C. Hutchings, Esq.; Megan C. Carrier, Esq.

DATE: October 20, 2025

RE: Town of Londonderry – Land Use Change Tax

Issue

The Town of Londonderry (the "Town") seeks guidance regarding a premature assessment of land use change tax ("LUCT"). Specifically, in the year 2019, the Town contracted with an owner of real property (the "Taxpayer") to remove certain acreage from current use, and for the Taxpayer in consequence to pay a lump sum LUCT on all such acreage. However, only some of the acreage was then undergoing development that would cause it no longer to fit the characteristics of property in current use.

Analysis

New Hampshire statutory law provides that land under current use shall only incur LUCT once the land fails to qualify for current use (becoming "non-qualifying property"). The statutory chapter governing LUCT and the Rules of the Current Use Board are silent as to how a municipality should deal retrospectively with prematurely imposed LUCT. Sections A and B describe this statutory and administrative framework.

A review of relevant case law and statutory law indicates that municipalities likely need not remedy prematurely assessed LUCT, and in some cases municipalities may be prohibited from attempting retroactively to alter its assessments. Section C describes three bases for this conclusion: (1) the timing restrictions on LUCT appear mainly to act as a restraint on municipalities, whereas they may not apply as strictly to taxpayers; (2) the Board of Tax and Land Appeals ("BTLA") has stated that the resolution of current use misclassification matters is in the ambit of municipalities, rather than higher adjudicatory bodies; and (3) the statute of limitations may bar municipalities from retrospective property reclassification, as may case law.

A. Statutory law provides that property shall not incur LUCT until it no longer qualifies for current use.

Statutes governing LUCT provide specific parameters as to when property moves from current use to become non-qualifying property. The general rule is that the property subjects itself to LUCT precisely when the characteristics of the property change no longer to fit the requirements for current use. New Hampshire RSA Chapter 79-A governs current use taxation, and Section 7 of that Chapter governs the imposition of LUCT. New Hampshire RSA Section 79-A:7, I, provides,

> Land . . . classified as open space land and assessed at current use values . . . shall be subject to a land use change tax when it is changed [no longer to be current use] . . . . [T]he tax shall be…determined as of the actual date of the change in land use . . . and shall be due . . . upon the change in land use . . . .[1]

The definition of LUCT correspondingly states that LUCT "means a tax that shall be levied when the land use changes from open space use to a non-qualifying use,"[2] and an assessment of the tax due is keyed to this point in time.[3]

Section 7 also describes the general rule that only the non-qualifying property, and not other property within the same parcel, becomes subject to LUCT:

> 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 [pursuant to specific exceptions] . . . .[4]

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[1] New Hampshire RSA § 79-A:7, I. *See also*, Cub 307.01:

> (b) Land assessed as current use shall be considered changed, and the [LUCT imposed], when a change to the land takes place that is contrary to the requirements of the category under which the land is assessed.
>
> (c) Such change in use shall be deemed to occur when: . . . (2) Development occurs which changes the condition of the land so as to disqualify it from current use assessment.

Cub 307.01 (b) & (c).

[2] New Hampshire RSA § 79-A:2, VIII.

[3] *See* Cub 308.03:

> (a) The land use change tax shall not be assessed until the extent of the change in use becomes determinable. . . .
>
> (c) The land use change tax shall be assessed as of the date the development began.

Cub 308.03 (a) & (c). *See also* Cub 307.01:

> (a) The [municipality] shall assess the [LUCT] at the time of a change to a non-qualifying use by completing Form A-5 . . .

Cub 307.01.

[4] New Hampshire RSA § 79-A:7, V (emphasis added). *See also*, Cub 306.03:

> (b) If the non-qualifying change in use does not affect the entire parcel or tract of land, the landowner shall:
>
> (1) Notify the municipal assessing officials in writing, or by filing a completed CU-18 "Notice of Change in Current Use Assessment" with the municipal assessing officials at the time the change in classification is made; and
>
> (2) Provide an updated map with the corresponding change.

Taken together, these statutes represent the general rule that a non-qualifying change in use is the necessary event that immediately precipitates LUCT, but only as to the particular non-qualifying part of the land at issue; in the event any portion of land remains eligible for current use, New Hampshire RSA Chapter 79-A directs that such portion of the land stays in current use.

B. Statutory law and the Rules of the Current Use Board are silent as to how a municipality should deal retrospectively with prematurely assessed LUCT.

Although New Hampshire RSA Section 79-A:7 provides that land "not physically changed **shall** remain under current use assessment,"[5] neither New Hampshire RSA Chapter 79-A nor the Current Use Board's Rules thereunder provide a mechanism for addressing situations when land is prematurely removed from current use or prematurely receives a LUCT assessment.[6]

C. Case law and certain statutory law indicates that municipalities likely need not—and in some cases *may* not—remedy prematurely assessed LUCT.

1. The Supreme Court of the State of New Hampshire references the timing restrictions on LUCT assessments mainly as a restraint on municipalities, but these restrictions may not apply as strictly to taxpayers.

Case law frames the statutory restrictions on the timing of LUCT assessments as restrictive upon municipalities, rather than as restrictive upon the taxpayers incurring the LUCT. Therefore, where a taxpayer consents to early incurrence of LUCT, such a deviation from the statutory scheme may not require correction.

New Hampshire courts have recognized that the plain wording of New Hampshire RSA Chapter 79-A dictates the precise timing upon which LUCT assessments "shall" occur—namely, loss of the factors that qualify the property for current use.[7] There is no specific wording in New Hampshire RSA Chapter 79-A or the Current Use Board's Rules that permit either a municipality or a taxpayer to deviate from this timing.[8]

In case law addressing LUCT, however, New Hampshire courts have consistently framed the statutory framework as "authorizing," "entitling," or "permitting" a municipality to impose LUCT under certain conditions. This language places strict parameters on municipalities' ability unilaterally to impose LUCT. The Supreme Court of the State of New Hampshire has held in various cases that a Town was "**entitled** to impose the [LUCT] on a lot-by-lot basis as disqualifying events occur[ ] for each individual lot"[9]; "that RSA 79-A:7 **authorized** the Town's

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[5] New Hampshire RSA § 79-A:7, V (emphasis added).
[6] *See* New Hampshire RSA Chapter 79-A; Cub Chapter.
[7] *See, e.g.*, Opinion of Justices, 137 N.H. 270 (1993) ("It appears, pursuant to the provisions quoted above, that the only mechanism for withdrawing from current use status is to change the use of the land to a nonqualifying one, as defined under RSA 79-A:7, and pay the ten percent tax.").
[8] *See* New Hampshire RSA Chapter 79-A; Cub Chapter.
[9] Maplevale Builders v. Town of Danville, 165 N.H. 99 (2013).

issuance of supplemental tax bills"[10]; that a town was "**entitled** to impose the land use change tax on a lot-by-lot basis as disqualifying events occurred for each individual lot"[11]; and that deviation from current use requirements "**permits** the municipality to levy a land use change tax."[12]

One Section under New Hampshire RSA Chapter 79-A similarly uses language indicating that the law governing LUCT is designed to direct and restrict the authority of municipalities in particular. New Hampshire RSA Section 79-A:5 ("Assessment of Open Space Land"), IV, provides in relevant part: "[E]ach year, the assessing officials shall determine if previously classified lands have been reapplied or have undergone a change in use so that the land use change tax **may** be levied against lands changed in use, according to RSA 79-A:7."[13] Although the statute employs the passive voice, the actor who "may" levy LUCT is the municipality.[14]

These courts and the applicable statutes do not, however, apply similarly directive and restrictive language to taxpayers. That is to say, neither the statutory law itself nor the courts tend to consider whether a taxpayer is "permitted" or "entitled" to accelerate the imposition of LUCT. A possible, though perhaps unlikely, inference from these facts is that taxpayers retain a certain amount of discretion to accelerate the timing of LUCT they may owe. A more likely inference is that, where a taxpayer knowingly consents to an acceleration in the statutorily prescribed timing of LUCT, there is relatively low likelihood that a municipality could or must remedy the deviation from the statutory scheme—particularly after the passage of time. The timing requirements under New Hampshire RSA Chapter 79-A arguably are intended in important part to provide clarity and protection to *taxpayers*, preventing them from incurring unwanted LUCT on portions of their land that could still qualify as being in current use. Therefore, a taxpayer might knowingly waive the application of the statute's timing requirements, without thwarting the purpose of these requirements.

In the case at issue, as the Taxpayer and the Town mutually and knowingly consented to accelerate the assessment of LUCT, a New Hampshire court may not be concerned with correcting the deviation from the statutory scheme.

2. <u>The BTLA has identified municipalities as the appropriate entities to resolve current use misclassification matters.</u>

In *Appeal of Town of Charleston*, 166 N.H. 498 (2014), the Supreme Court of the State of New Hampshire affirmed the BTLA's determination that a municipality is the appropriate entity to resolve certain current use misclassification matters, without the possibility for intervention by the BTLA.[15]

In this case, the Town of Charlestown petitioned the BTLA for reclassification of certain parcels, alleging that the town discovered that the parcels had been improperly classified as open space

[10] JMJ Props., LLC v. Town of Auburn, 168 N.H. 127 (2015).
[11] Appeal of Estate of Van Lunen (New Hampshire Bd. of Tax & Land Appeals), 145 N.H. 82 (2000).
[12] Foster v. Henniker, 132 N.H. 75 (1989).
[13] New Hampshire RSA § 79-A:5, IV.
[14] *Id.*
[15] Appeal of Town of Charlestown, 166 N.H. 498 (2014).

land.[16] The BTLA refused to revoke the current use status of the parcels, to require the Town's assessing officials to reclassify the parcels, or to require the assessing officials to reassess taxes for tax years of misclassification.[17] It ruled that New Hampshire RSA Chapter 79-A "'places direct responsibility on the Town, not the [BTLA], to remove land from current use when the Town discovers land, for which it has already granted current use status, no longer qualifies.'"[18] The BTLA stated that it would not intervene in the matters as "it has a policy of limiting its authority under RSA 79-A:12, II 'to appeals where someone other than the taxpayer who owns the land or the municipality wishes to challenge the municipality's decision to approve the placement of the land in current use or in a specific current use classification,' and that it found 'no reason to depart from this policy and allow the Town to undo the effect of its own approval of the current use classification.'"[19]

To the extent that this case represents the general authority of a municipality to correct misclassified land, it may also represent a municipality's authority to refrain from correcting misclassification errors.

3. <u>The statute of limitations in New Hampshire RSA Chapter 79-A, as well as a potential disallowance of retrospective property reclassification, may prevent the Town from reversing the effects of its contract with the Taxpayer.</u>

New Hampshire RSA Section 79-A:7 contains a statute of limitations, within which a municipality is directed to mail a tax bill for assessed LUTC: "[LUCT] shall be due and payable . . . at the time of the change in use . . . **(c):** . . . **[The tax] bill shall be mailed, at the latest, within 18 months** of the date upon which the local assessing officials receive written notice of the change of use from the landowner or his or her agent, or within 18 months of the date the local assessing officials actually discover that the land use change tax is due and payable. . . ."[20] The Supreme Court of the State of New Hampshire has clarified that this provision "applies to any notice or discovery in change in use."[21]

In *LSP Ass'n v. Town of Gilford*, 142 N.H. 369 (1997), the Court also clarified that time limits on tax assessments must be observed strictly, notwithstanding error.[22] The Court in that case cited a statute which "grants to a municipality the right to correct omissions or improper assessments before the expiration of the tax year for which the tax has been assessed."[23] The Court explained, "'The rationale for the one-year restriction on making such corrections is that the

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] New Hampshire RSA § 79-A:7, II (emphasis added). Subsection (c) states more fully: "Upon receipt of the land use change tax warrant and the prescribed forms, the tax collector shall mail the duplicate copy of the tax bill to the owner responsible for the tax as the notice thereof. Such bill shall be mailed, at the latest, within 18 months of the date upon which the local assessing officials receive written notice of the change of use from the landowner or his or her agent, or within 18 months of the date the local assessing officials actually discover that the land use change tax is due and payable." New Hampshire RSA § 79-A:7, II(c).
[21] Maplevale Builders v. Town of Danville, 165 N.H. 99 (2013).
[22] LSP Ass'n v. Town of Gilford, 142 N.H. 369 (1997).
[23] *Id.*

Legislature may have considered that a revision by selectmen of the doings of their predecessors would produce greater mischief than the occasional escape of taxable property from taxation.'"[24] The Court specified that "**if a municipality fails to correct an error of undervaluation within the established time constraints, the error is irremedial** [sic.]."[25]

Further, even absent the statute of limitations, the Court in *Town of Charleston* indicates that it is an open question whether a municipality may reclassify land retrospectively.[26] In that case the Court addressed potential reclassification of property improperly placed in current use, rather than property improperly removed from current use:

> [N]othing in the statute prevents a municipality from reclassifying land improperly placed in current use status in the first instance. In the event that a municipality reclassifies land in such a circumstance, it may adjust the annual assessment of the land to reflect the reclassification. . . . We conclude that the BTLA did not err in dismissing the Town's petition for reclassification on the ground that the Town could unilaterally reclassify the land. As the Town agreed at oral argument, **we need not address whether the Town can apply the reclassification retrospectively**.[27]

The fact that retrospective reclassification remained an open question in *Town of Charleston* is relevant to the Town, as correcting its prematurely assessed LUCT would certainly require retrospective action. *Town of Charleston* brings to light the possibility that a court would find such retrospective action on the part of the Town impermissible.

Conclusion

Based on the foregoing, the most prudent course of action for the Town may be to view its contract with the Taxpayer as an irremediable error, due to the time expired since the Town removed the acreage from current use. This passage of time likely bars the Town from assessing additional tax due to the statute of limitations. This course of action is further endorsed by (1) the Taxpayer's knowing assent to the deviation from the statutory timing requirements for LUCT, (2) the fact that adjudicatory bodies have vested significant authority in municipalities to resolve misclassification disputes, and (3) the possibility that a court may consider retrospective property reclassification impermissible, particularly due to the significant passage of time since the initial reclassification by the Town.

[24] *Id.*
[25] *Id.*
[26] Appeal of Town of Charlestown, 166 N.H. 498 (2014).
[27] *Id.* (emphasis added).