

**ASSESSING AND COLLECTING TAXES
AND PENALTIES ON RESTRICTED LAND
(Current Use, Discretionary Easements, etc.)**

**A Presentation for the NH Tax Collector's Association (NHTCA)
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Under our State Constitution, the legislature is required to “impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within the said state” N.H. Const. Pt. II, Art. 5. This language carries with it the requirement that all real property subject to “*ad valorem*” property taxes is required to be assessed in the same way, regardless of the use of the property. E.g., Opinion of the Justices, 101 N.H. 549 (1958). It was not until November 1968 that a Constitutional Amendment adopted by the voters inserted Pt. II, Art. 5-B to the Constitution:

“The general court may provide for the assessment of any class of real estate at valuations based upon the current use thereof.”

As a result of this amendment, the state legislature in 1973 was able to adopt the so-called “Current Use Law” which is RSA Chapter 79-A. Under this law, the legislature allows certain types of land to be assessed at values established on a statewide basis. This assessed value is intended to reflect the income producing capability of the land as it is being used, not its “highest and best” use. RSA 79-A: 2 (V).

In the years since 1973 the legislature has chosen to adopt a whole series of additional statutes which have, at their core, the concept that land dedicated to certain

uses, or restricted in certain ways, will be assessed differently (i.e., lower) than other land generally. These statutes include the following:

- Assessment of Land under a “Conservation Restriction”, described in Chapter 79-B adopted in 1990.
- Assessment of Land which is the subject of a “Discretionary Easement”, described in Chapter 79-C adopted in 1996.
- Assessment of Land and Buildings which are subject of a “Discretionary Preservation Easement”, described in RSA Chapter 79-D adopted in 2002. This is the so-called “barn bill” relating to preservation of “historic agricultural structures”.
- Assessment of Land and Buildings which contribute to “Community Revitalization” in downtown, town center or central business district areas as described in RSA Chapter 79-E adopted in 2006.
- Assessment of Farm Structures and Land Under Farm Structures as described in RSA Chapter 79-F adopted in 2008.

The provisions for special tax assessment apply statewide for current use (RSA 79-A), Conservation Restrictions (RSA 79-B), Discretionary Easements (RSA 79-C) and Discretionary Preservation Easements (RSA 79-D). The provisions relating to Revitalization Tax Relief must first be approved within the community. See, RSA 79-E: 3 (I). The same is true for the law governing assessment of farm structures. See, RSA 79-F: 2.

Nearly all of these “special assessment” provisions have similar features which require:

- That a property owner identify a parcel of land (or building or both) which meets criteria set forth in the statute.
- That if the parcel is accepted for inclusion in the special assessment process (and in many cases enrollment is somewhat discretionary – See, e.g., RSA 79-C:5), then it is “assessed” at a reduced or special rate consistent with its use or restriction.

- That the land must remain in the same category of use either indefinitely (as in RSA 79-A) or for a specified period of time (up to 5 years for Community Revitalization enrolled property – RSA 79-E:5 (I)).
- That if a property is “changed” in use or cannot comply with the terms of the assessment program, some type of “penalty” or “tax” is imposed.
- That the collection of any penalty or tax is turned over to the tax collector for collection.

In the sections which follow, we will look at a few of the features of each of the various taxes:

A) CURRENT USE – RSA 79-A –

At the heart of the current use law is the concept that “assessing officials [i.e., local assessors] shall appraise open space land.... upon the current use values established by the (Current Use) Board.” RSA 79-A: 5 (I). The Current Use Board, established in the law, is charged with establishing the criteria and assessed values for open space land under the statute. RSA 79-A:4. Currently, there are three (3) types of open space land; farm land, forest land, and unproductive land. RSA 79-A:2 VI, VII, XIII. The Current Use Board is given power to set criteria for eligibility, but all parcels enrolled greater than ten (10) acres qualify. RSA 79-A:4 (I).

The types of land within the classifications, and the factors which affect their value are beyond the scope of this outline. Interested persons are advised to carefully review the Board Rules (found at Administrative Rules Cub) to see value ranges and criteria.

Early challenges to the current use program by communities unhappy with the Board criteria or values were nearly always rejected. See, Blue Mountain Forest Ass’n. vs. Town of Croydon, 119 N.H. 202 (1979). Owners of land wishing to have their land classified as current use land must file an application by April 15th of any given tax year. RSA 79-A:5 (II). There is a specific DRA form of application. See, Form A-10. In addition, a map must be submitted describing the land to be enrolled (Cub 302.01 (b)), and a filing fee is required. Local officials must grant or deny an application by July 1st, but the ability to deny is limited to whether the applicable criteria have been

met (e.g., size of parcel). Entry into the property is not discretionary at the local level. Cf., Tri-State Timberland Corp. vs. Town of Croydon, 119 N.H. 193 (1979). A property owner whose application to be enrolled in the current use program is denied may appeal the denial to the Board of Tax and Land Appeals (BTLA) (RSA 79-A:9 (I)) or, alternatively, may file an appeal in the Superior Court. RSA 79-A:11.

Once land has been classified as open space, and assessed at current use values, it shall continue in that status until a change of use occurs. RSA 79-A:7 (I-a). Transfer to a new owner, by itself, does not trigger a change. A notice is sent to the Registry of Deeds at the time of enrollment to provide notice to Buyers that the property is enrolled in the program. RSA 79-A:5 (VI).

The key feature of the law to tax collectors and others is the so-called "Land Use Change Tax" (LUCT). The LUCT is imposed when land classified as current use changes in use to a non-qualifying use. See, RSA 79-A:7 (I). The LUCT is calculated at ten (10%) percent of the full and true value of the land. Id. Typically, an LUCT is assessed because land is conveyed such that it no longer meets an acreage requirement (usually 10 acres) or development occurs which changes the condition of the land to disqualify it from open space qualifications. Cub 307.01.

Again, the nuances of exactly how much land changes, and the timing of the event, is beyond the purpose of this presentation. Likewise, the factors that affect the "*ad valorem*" assessment for calculating the LUCT are complex and have been litigated as well. See, Woodview Development Corp. vs. Town of Pelham, 152 N.H. 114 (2005).

The actual LUCT bill is addressed to the owner at the time of the change in use. RSA 79-A:7 (II). The assessing officials/selectmen complete a billing form (using a DRA form) and deliver the form to the tax collector, along with a special warrant authorizing the collector to collect the tax. See, RSA 79-A: 7 (II) (b). The billing must be sent within 18 months of the date upon which local assessing officials received notice of the change from the owner or actually discover that a change has occurred. RSA 79-A: 7 (II) (c). Failure to

send a timely billing can result in the tax being ruled uncollectable. Meadowcroft Development vs. Town of Windham, Rockingham County Superior Court 2010-CV-895.

The payment of an issued LUCT bill is due within thirty (30) days, and eighteen (18%) percent interest begins to run on any unpaid bill. RSA 79-A: 7 (II) (d). Of critical importance is RSA 79-A:7 (II) (e) which provides that a “lien” is created under the statute, which lasts twenty-four (24) months (formerly eighteen (18) months- see handout from 2012 Annual Conference) from the notice or discovery date of the change of use. This means that the collector must begin a lien imposition process under RSA Chapter 80 in sufficient time to impose the lien no later than twenty-four (24) months from the “change date”. Collectors have the six (6) month period between the last date to issue the bills, and the last date to impose the lien. If one looks at RSA 79-A:23, it would appear that the collection process is limited to use of the tax sale method of collection under RSA 80:1- 80:42-a. However, there is a specific section in RSA Chapter 80 (See, RSA 80:85) which allows for collection of LUCT using the tax lien process described in RSA 80:59.

Upon payment of the LUCT, the tax collector then forwards the appropriate paid tax bill to the Registry for the purpose of releasing the land from the effects of the contingent lien. RSA 79-A: 7 (II) (c).

B) CONSERVATION RESTRICTION RSA 79-B –

Conservation Restriction assessment occurs when a property owner conveys a permanent restriction on their land to a government agency or some type of qualifying conservation non-profit corporation. See, RSA 79-B:2 (IV), (X). To qualify for enrollment in the program, the governing body must find that the easement restriction provides a “demonstrated public benefit”. RSA 79-B:2 (XI). There are a series of statutory factors to evaluate if a given conservation restriction on open space land constitutes a “demonstrated public benefit”. See, RSA 79-B:4 (VI). Such land is then assessed based on values determined by the nature of the restrictions, which can be no greater

than fair market value for open space land as determined by the Current Use Board. RSA 79-B:3 (I).

Unlike current use land, there is no “minimum acreage” requirement. See, RSA 79-B:4 (I). There is an application process similar to the current use law. See, RSA 79-B:4. There is a process to appeal to the BTLA or Superior Court if a given application is denied. RSA 79-B:5.

Although, in theory, conservation restrictions are “permanent” ones (RSA 79-B:2 (IV)), the statute contains an “inconsistent use penalty” equal to ten (10%) percent of the full and true value of the portion of land where use has occurred which is inconsistent with, or violates the terms of the conservation easement. RSA 79-B:6. This penalty is due and payable as of the date of the inconsistent use. Id

If an “inconsistent use penalty” is not paid when due, it can be “collected in the same manner as provided in RSA 80”. RSA 79-B:10. Unlike the current use law, any “lien” which arises for penalties is not specifically given a time frame. See, RSA 79-B:9. This raises a question as to whether or not there is a time limit to complete a tax lien process (i.e., does the “one year from October 1 following assessment” (RSA 80:19) apply?). There is also no provision for a “bill” or a “warrant”, but clearly some type of warrant or order from the selectmen would be necessary to give the collector authority to collect any taxes. The issuance of a “bill” would fall into the category of “best practices”. The collector would need to send the “Notice of Intent to Lien” before the collection process could proceed.

C) DISCRETIONARY EASEMENTS – RSA 79-C –

The “Discretionary Easement” process under RSA 79-C is somewhat like the Conservation Restriction assessment process under RSA 79-B, but with more flexibility and more discretion. It is available to landowners whose land does not meet the open space criteria under 79-A, but does provide a demonstrated public benefit. RSA 79-C:3 (I). There are several categories of “demonstrated public benefit” (See, RSA 79-C: 3 (II)), and these include

recreation areas, habitat areas, airports which serve a public need, and golf courses open to the public. RSA 79-C:3 (II) (a-f).

A property owner must apply to the local officials for permission to grant a “discretionary easement” to the municipality. RSA 79-C:4 (I). The easement would prevent subdivision, development or other use inconsistent with the purposes of the Chapter. The application form is provided by the DRA, and the deadline is the same as similar programs – April 15th. See, RSA 79-C:4 (II).

The governing body must decide whether it will agree to any proposed discretionary easement, weighing the public benefit against the potential tax revenue loss. RSA 79-C:5 (I). If the application is denied, an appeal process to the BTLA or Superior Court is possible, but only on the limited grounds that the denial was in bad faith or discriminatory; otherwise the discretionary decision of the governing body must be sustained. RSA 79-C:5 (II).

Unlike a Conservation Restriction Easement, a Discretionary Easement can be any length of time, as long as it is at least ten (10) years. RSA 79-C:6. As part of the “Negotiation” process with the municipality, the parties agree, in advance, on how the property will be assessed, along with provisions for termination or renewal. Id. The assessment provisions must be spelled out, and fall in a statutory range between open space values and seventy-five (75%) percent of the fair market value. RSA 79-C:7. The assessment is intended to reflect the perceived amount of public benefit derived from the easement. RSA 79-C:7 (III).

If an agreement is reached and approved by the governing body, the easement document is then recorded at the appropriate Registry of Deeds. RSA 79-C:6.

Unlike Conservation Restrictions, which are ostensibly permanent, and Current Use Enrollment, which can be terminated only by inconsistent use, owners who have granted “Discretionary Easements” can request an “early release” of the easement (RSA 79-C:8 (I)) based on “extreme personal hardship”. Id. If the governing body approves an “early release”, a “fee” is assessed, which is equal to (i) 20% of the fair value if the release is in the first

half of the Discretionary Easement period, or (ii) 15% if the release is in the second half of the Discretionary Easement period. Id. In addition, the original Discretionary Easement can include an “expiration” fee of up to ten (10%) percent of fair market value. RSA 79-A:8 (II). The statute indicates that an owner “shall pay to the tax collector” these amounts. The tax collector must notify the governing body when the sums are paid so that the governing body can execute a release of the Discretionary Easement. RSA 79-C:8 (IV).

The collection process in RSA 79-C is very similar to that under 79-A (and unlike RSA 79-B which does not include these provisions). See, RSA 79-C:9. They include the requirements for delivery of a DRA prescribed form to the tax collector, along with a special tax warrant, a payment due date of 30 days, and interest at eighteen (18%) percent on unpaid invoices. RSA 79-C:9 (II). There is a time limit, which requires bills to be sent within twelve (12) months of the agreement to release, or the expiration of the any lien. RSA 79-C:9 (II) (c). Unlike the current use law, there is no apparent limit on the time a “lien” applies to the property. RSA 79-C:12.

The statute explicitly indicates that the provisions of RSA Chapter 80 apply for the collection of amounts due under RSA 79-C:8. See, RSA 79-C:13.

D) DISCRETIONARY (AGRICULTURAL) PRESERVATION EASEMENTS – RSA 79-D –

The purpose of this statute is to encourage preservation of historic agricultural structures to maintain the historic rural character of the state. RSA 79-D:1. Such structures are defined as barns and accessory structures formerly used for agricultural purposes, including the land on which they sit. RSA 79-D:2 (III).

In many ways, RSA 79-D is modeled after RSA 79-C, which preceded it by 6 years. An owner of an eligible property must apply to the municipality, which can consider accepting a “Discretionary Preservation Easement” if it would result in a demonstrated public benefit. RSA 79-D:3 (I). Such easement must be at least ten (10) years in length.

The application procedure is nearly identical to the procedure under RSA 79-C, including the April 15th deadline, and application form. RSA 79-D:4. The approval process is similar, except that the governing body must first hold a public hearing on the application before it can agree to accept the easement. RSA 79-D:5 (I). The discretionary nature of the approval, and the appeal process, are identical to RSA 79-C. See, RSA 79-D:5.

As with a Discretionary Easement, the agreement must include a term (minimum 10 years) and include the agreed method of assessment and any renewal provisions. RSA 79-C:6. The available “range” of assessments is between twenty-five (25%) percent and seventy-five (75%) percent of the full value assessment (RSA 79-D:7 (I)) and must reflect the perceived public benefit conferred by the property.

One key factor of the Historic Preservation Easement process is that the property owner must agree to maintain the structure in question, retaining its historic integrity and character. RSA 79-D:4 (I). Any such maintenance does not impact the assessment. RSA 79-D:7 (II).

The procedure for early release of a Preservation Easement is identical to that of a Discretionary Easement (See, RSA 79-D:8) but, unlike the Discretionary Easements, there can be no ten (10%) percent assessment at the expiration of the easement term. See, RSA 79-C:8 (II) – Repealed.

There are special provisions that allow release without penalty in the event there is a casualty loss of the structure (RSA 79-D:8 (V)), and the governing body can terminate an agreement, and impose the termination penalty if the landowner fails to maintain the structure in accordance with the agreement. RSA 79-D:8 (VI).

The assessment, billing, collection and lien provisions of RSA 79-D are the same as RSA 79-C.

E) COMMUNITY REVITALIZATION TAX RELIEF INCENTIVE – RSA 79-E –

In an effort to enhance downtowns and town centers, and encourage rehabilitation of underutilized structures in urban centers, the legislature

adopted RSA 79-E in 2006. As noted above, this is a “local option” provision which first must be adopted by a community. RSA 79-E:3.

While all the features of this complex statute are beyond the scope of this outline, the general outlines are as follows:

- An owner of a property located in an officially designated downtown, town center or central business district, can apply for special tax assessment treatment for the rehabilitation or replacement of that structure. RSA 79-E:2 (I).
- There are certain “public benefits” that must be achieved through the renovation of a structure. See, RSA 79-E:7. Otherwise, only a replacement of such structure will qualify for the Revitalization Tax Relief. RSA 79-D:1 (II-a).
- The relief available under the program is essentially a “tax assessment freeze” which prevents the assessment from increasing as a result of the substantial rehabilitation or replacement. RSA 79-E:2 (III).
- There is an application process similar to that in RSA 79-C and 79-D, which includes a public hearing requirement, consideration of the advantages to the municipality, and an appeal process for denial. RSA 79-E:4.
- The “tax relief” period is up to five (5) years. RSA 79-E:5 (I).
- A “covenant agreement” shall be prepared and recorded at the Registry of Deeds. RSA 79-E:8.

One substantial difference between the provisions of RSA 79-E and other “restrictive assessment” programs is the consequence of early termination or violation. Under RSA 79-E:9, if an owner fails to adhere to the terms of the covenant agreement (including failure to build or maintain), then the governing body, after a public hearing, can vote to terminate the covenant. RSA 79-E:9 (I). If it does, instead of a penalty based on percentage of the fair value, the municipality may go back and calculate and assess all the taxes that would have been due for that property. Id. In calculating the taxes that “would have been due”, a twelve (12%) percent interest rate is applied. See, RSA 79-E:9 (II) (d). The billing and warrant are then prepared by the

assessing officials, and delivered to the tax collector to collect. RSA 79-E (II) (b).

The lien and enforcement provisions under RSA 79-E are the same as prior Chapters.

F) ASSESSMENT OF FARM STRUCTURES – RSA 79-F -

This statute, adopted in 2008, differs from RSA 79-D in that it deals not with “historic” farm structures, but active farm buildings. It is also a “local option” provision which must be adopted by a community. RSA 78-F:2.

In structure RSA 79-F is much closer to RSA 79-A than any of the other provisions in this series. An owner of property can apply for special tax treatment of “qualifying farm structures”, and the land on which they sit. RSA 79-F:4 (I). Such structures must be located contiguous to at least ten (1) acres of open space land enrolled under the provisions of RSA 79-A. See, RSA 79-F:3 (IX). The application and enrollment process is similar to RSA 79-A (See, RSA 79-F:4), and properties must be accepted if they qualify, and there are appeal options to the BTLA (RSA 79-F:6 (I)) or to the Superior Court (RSA 79-F:7) if the request is denied.

Once enrolled in the program, the statute requires that structures be assessed at “replacement cost less depreciation” and land under structures at ten (10%) percent of market value. RSA 79-F:4 (I).

Like RSA 79-A, if/when a structure no longer qualifies, or is demolished, then a ten (10%) percent “penalty” is imposed. RSA 79-F:5. Unlike RSA 79-A, there is no specific detail on the process of warranting and billing this change penalty. Consequently, there is some doubt about the imposition of any interest prior to the commencement of the lien imposition process, which is provided for. RSA 79-F:10. There is a cross reference in RSA 79-F:4 (VII) to RSA 80:85 which provides that the lien which arises on the “change” of use is twenty-four (24) months from notice or when the change of use is discovered. Consequently, the process to lien and collect any penalty is the same as under RSA 79-A.