

WATER STREET
PROFESSIONAL BUILDING
225 WATER STREET
P.O. Box 630
EXETER, NEW HAMPSHIRE
03833-0630

TELEPHONE
603-778-0686

TOLL FREE
800-566-0506

FAX
603-772-4454

WWW.DTCLAWYERS.COM

GENERALMAIL@DTCLAWYERS.COM



DONAHUE, TUCKER & CIANDELLA, PLLC

MICHAEL J. DONAHUE
CHARLES F. TUCKER
ROBERT D. CIANDELLA
LIZABETH M. MACDONALD
JOHN J. RATIGAN
DENISE A. POULOS
ROBERT A. BATTLES
ROBERT M. DEROSIER
CHRISTOPHER L. BOLDT
SHARON CUDDY SOMERS
DOUGLAS M. MANSFIELD
CHRISTOPHER T. HILSON
JESSICA L. ECKER
JOHN L. MCGOWAN
KERIANN ROMAN
OF COUNSEL
KATHERINE B. MILLER
JOY V. RIDDELL
RETIRED
ROBERT B. DONOVAN

February 19, 2010

SENT VIA E-MAIL AND U.S. MAIL

Christopher Rose, Town Manager
Town of Raymond
4 Epping Street
Raymond, NH 03077

Re: Article 29 of the Warrant

Dear Chris:

This letter responds to your request for guidance on the purpose and operation of the public hearing on February 22, 2010 and on what will happen in the event that Article 29, as originally presented by petition, at the March 29, 2010 election. I am providing an executive summary of the Article 29 issues and a subsequent, more detailed explanation of the issues for those officials or members of the public who desire such an explanation. Set forth below are comments on some questions.

Public Hearing on Article 29

RSA 79-A:25(a) is the statute which enables towns to separate land use change tax revenue (hereinafter "LUCT revenue") from the General Fund and create a land use change tax fund (hereinafter "LUCT Fund") to hold LUCT revenue. The statute also allows the town to rescind the LUCT Fund if it so chooses. Under RSA 79-A:25 I (b) and RSA 79-A:25-b, IV(a), a public hearing is required at least 15 days but not more than 30 days prior to the vote on the adoption or rescission of the Fund, as applicable. The purpose of the public hearing is to simply allow the public to provide commentary and ask questions on the proposal and to allow the Selectmen or petitioner as applicable to describe the intent of the warrant article. The purpose and operation of the public hearing is analogous to public hearings held by Selectmen on other

PORTSMOUTH OFFICE:

KEARSARGE HOUSE, 104 CONGRESS STREET, SUITE 304, PORTSMOUTH, NEW HAMPSHIRE 03801
TELEPHONE 603-766-1686 FAX 603-766-1687

topics, such as the public hearing required under RSA 41:14-a before the Town can acquire a property interest. The discussion should include the legal effect of the article if passed, which is discussed below.

Executive Summary of Legal Effect of Article 29

The passage of Article 29 will have no effect on the LUCT revenue which currently is in the Conservation Fund nor will it have any effect on the future obligation to deposit LUCT revenue in the Conservation Fund consistent with the 2008 warrant article. This conclusion holds true as well in the form of information provided that a LUCT Fund has not been adopted by the Town. The petitioners attempted to rescind a fund which was never adopted, and the petitioners did not present a warrant article rescinding the 2008 warrant article which earmarked LUCT revenue for deposit in the Conservation Fund. Therefore, the passage of Article 29 will have no effect.

Ramifications of Passage of Article 29

Three different statutes are in play when examining this question and the relationship between the statutes is quite complicated. We examined the statutes closely, reached preliminary conclusions, and confirmed these conclusions with both DRA and LGC. Copies of the relevant statutes are attached.

The first relevant statute is RSA 36 –A: 5, I and III which allows a town having a Conservation Commission to create a Conservation Fund (hereinafter “Conservation Fund”). The second relevant statute is RSA 79-A: 25, II and IV which states that the Town can vote to place some or all of the LUCT revenue into the Conservation Fund and that such a vote can also be rescinded by the Town. If a vote is taken to place some or all of the LUCT revenue into the Conservation Fund, then such revenue must be deposited in the Conservation Fund at the time of collection. The third relevant statute is RSA 79-A: 25-b which authorizes towns to have LUCT revenue deposited in a LUCT fund (hereinafter “LUCT Fund”). The effect of creating the LUCT Fund is to have all LUCT revenue be deposited into the LUCT Fund except for such LUCT revenue which has previously been earmarked for deposit in the Conservation Fund as described above. The only effect of the creating the LUCT Fund where all LUCT revenue has been earmarked for Conservation Fund deposit is a bookkeeping one because, under RSA 79-A: 25-a ,

LUCT revenue must first be accounted for as revenue to the LUCT Fund, and then it is transferred to the Conservation Fund.

The complicated questions about the two Funds, Conservation Fund and LUCT Fund, is whether each can exist independently of each other and whether earmarks of LUCT revenue into the Conservation Fund can exist without a LUCT Fund. The answer to both questions, as confirmed by DRA and LGC, is yes, and therefore the elimination of one does not eliminate the other or eliminate the flow of earmarked LUCT revenue into the Conservation Fund. This effect may have been unintended by the Legislature, but what matters is what the Legislature did, not what it could have done.

In Raymond, what happened is that Article 29 was presented by petition warrant article to rescind the LUCT Fund. Even if Article 29 passes, it will have no effect on the monies currently in the Conservation Fund which originated as LUCT revenue because the money is already deemed transferred to and earmarked for the Conservation Fund.

A hypothetical example may be of use in understanding these complicated statutes.

1. Mr. Jones owns 500 acres in current use in the Town of Raymond. He takes the land out of current use yielding a hypothetical LUCT tax of \$100,000. The Town has previously voted to establish a Conservation Commission, a Conservation Fund, and a LUCT Fund. The Town has also previously voted to earmark 50 % of LUCT revenue to go into the Conservation Fund. If no action is taken at the town meeting to rescind the earmarking of 50% of LUCT revenue, then the LUCT revenue will be deposited into the Conservation Fund and 50% will go into the LUCT Fund. The only role which a LUCT Fund plays in this example is that, for bookkeeping purposes, the LUCT revenue will need to be accounted for in the LUCT Fund before it can go to the Conservation Fund.

2. Same facts as above, but at town meeting there is a warrant article to rescind the prior vote to earmark 50% of LUCT revenue into the Conservation Fund; no warrant articles are presented regarding the LUCT Fund. If the warrant article passes, then no prospective LUCT revenue will be able to go into the Conservation Fund effective April 1 following the vote; but the funds currently in the Conservation Fund which originated from LUCT revenue can remain in accordance with the analysis presented above.

3. Same facts as above, but there is a warrant article to rescind the LUCT Fund with no warrant article to rescind the earmarking of LUCT revenue into the Conservation Fund. If the warrant article passes, then the amount of money previously earmarked for Conservation Fund and transferred there will remain in the Conservation Fund, and future LUCT revenue will continue to be earmarked for the Conservation Fund until such time as a vote to rescind same is passed. Any LUCT Fund surplus remaining after the transfer of LUCT revenue into the Conservation Fund must then be appropriated, and if not, shall be deemed General Fund revenue for the current fiscal year.


Conclusion

The public hearing to be held on February 22, 2010 is an informational hearing which is required by law when a LUCT Fund rescission article is presented on the warrant. The passage of Article 29 will be of no legal effect on the existing LUCT revenue in the Conservation Fund. Further, until such time as a future warrant article is submitted to rescind the earmark of LUCT revenue which followed the passage of the 2008 warrant article, LUCT revenue will continue to flow into the Conservation Fund. If any residents so desire, they can write a petition warrant article next year to correctly address the objective which they seek to accomplish, and it can be voted on at that time.

Please contact me if you have any questions.

Very truly yours,

DONAHUE, TUCKER & CIANDELLA, PLLC


Sharon Cuddy Somers

SCS:nes/lmh

Enclosures

cc: Robert D. Ciandella, Esquire

TITLE V TAXATION

CHAPTER 79-A CURRENT USE TAXATION

Miscellaneous

Section 79-A:25

79-A:25 Disposition of Revenues. –

I. Except as provided in paragraph II, all money received by the tax collector pursuant to the provisions of this chapter shall be for the use of the town or city.

II. The legislative body of the town or city may, by majority vote, elect to place the whole or a specified percentage, amount, or any combination of percentage and amount, of the revenues of all future payments collected pursuant to this chapter in a conservation fund in accordance with RSA 36-A:5, III. The whole or specified percentage or amount, or percentage and amount, of such revenues shall be deposited in the conservation fund at the time of collection.

III. If adopted by a town or city, the provisions of RSA 79-A:25, II shall take effect in the tax year beginning on April 1 following the vote and shall remain in effect until altered or rescinded pursuant to RSA 79-A:25, IV.

IV. In any town or city that has adopted the provisions of paragraph II, the legislative body may vote to rescind its action or change the percentage or amount, or percentage and amount, of revenues to be placed in the conservation fund. Any such action to rescind or change the percentage or amount, or percentage and amount, shall not take effect before the tax year beginning April 1 following the vote.

Source. 1973, 372:1. 1988, 120:2. 1991, 281:19, 20, eff. Aug. 17, 1991.

TITLE V TAXATION

CHAPTER 79-A CURRENT USE TAXATION

Miscellaneous

Section 79-A:25-a

79-A:25-a Land Use Change Tax Fund. –

I. Towns and cities may, pursuant to RSA 79-A:25-b, vote to account for all revenues collected pursuant to this chapter in a land use change tax fund separate from the general fund. After a vote pursuant to RSA 79-A:25-b, no land use change tax revenue collected under this chapter shall be recognized as general fund revenue for the fiscal year in which it is received, except to the extent that such revenue is appropriated pursuant to paragraph II of this section. Any land use change tax revenue collected pursuant to this chapter which is to be placed in a conservation fund in accordance with RSA 79-A:25, II, shall first be accounted for as revenue to the land use change tax fund before being transferred to the conservation fund at the time of collection.

II. After any transfer to the conservation fund required under the provisions of RSA 79-A:25, II, the surplus remaining in the land use change tax fund shall not be deemed part of the general fund nor shall any surplus be expended for any purpose or transferred to any appropriation until such time as the legislative body shall have had the opportunity at an annual meeting to appropriate a specific amount from said fund for any purpose not prohibited by the laws or by the constitution of this state. At the end of an annual meeting, any unappropriated balance of land use change tax revenue received during the prior fiscal year shall be recognized as general fund revenue for the current fiscal year.

Source. 1991, 156:1. 1992, 122:1, eff. June 30, 1992.

TITLE V TAXATION

CHAPTER 79-A CURRENT USE TAXATION

Miscellaneous

Section 79-A:25-b

79-A:25-b Procedure for Adoption. –

I. Any town may adopt the provisions of RSA 79-A:25-a to account for all revenues received pursuant to this chapter in a land use change tax fund separate from the general fund in the following manner:

(a) In a town, the question shall be placed on the warrant of a special or annual town meeting by the selectmen, or by petition under RSA 39:3, and shall be voted on by ballot. The question shall not be placed on the official ballot.

(b) The selectmen shall hold a public hearing on the question at least 15 days but not more than 30 days before the question is to be voted on. Notice of the hearing shall be posted in at least 2 public places in the municipality and published in a newspaper of general circulation at least 7 days before the hearing.

(c) The wording of the question shall be: "'Shall we adopt the provisions of RSA 79-A:25-a to account for revenues received from the land use change tax in a fund separate from the general fund? Any surplus remaining in the land use change tax fund shall not be part of the general fund until such time as the legislative body shall have had the opportunity at an annual meeting to vote to appropriate a specific amount from the land use change tax fund for any purpose not prohibited by the laws or by the constitution of this state. After an annual meeting any unappropriated balance of the land use change tax revenue received during the prior fiscal year shall be recognized as general fund revenue for the current fiscal year."

II. If a majority of those voting on the question vote "'Yes," RSA 79-A:25-a shall apply within the town, effective immediately.

III. If the question is not approved, the question may later be voted on according to the provisions of RSA 79-A:25-b, I.

IV. Any town which has adopted the provisions of RSA 79-A:25-a shall maintain a land use change tax fund until such time as the legislative body votes to rescind its action.

(a) Any town may consider rescinding its action in the manner prescribed in RSA 79-A:25-b, I(a) and (b). The wording of the question shall be: "'Shall we rescind the provisions of RSA 79-A:25-a which account for revenues received from the land use change tax in a fund separate from the general fund? Any unappropriated surplus remaining in the land use change tax fund, and any future land use change tax revenues received shall immediately be deemed general fund revenue."

(b) If a majority of those voting on the question vote "'Yes," RSA 79-A:25-a shall no longer apply within the town, effective immediately.

V. The legislative body of any city may adopt the provisions of RSA 79-A:25-a in the same manner in which it adopts ordinances or bylaws, and may rescind its action in like manner.

Source. 1991, 156:1. 1992, 122:2, 3, eff. June 30, 1992.

TITLE III TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 36-A CONSERVATION COMMISSIONS

Section 36-A:5

36-A:5 Appropriations Authorized. –

I. A town or city, having established a conservation commission as authorized by RSA 36-A:2, may appropriate money as deemed necessary for the purpose of this chapter. The whole or any part of money so appropriated in any year and any gifts of money received pursuant to RSA 36-A:4 may be placed in a conservation fund and allowed to accumulate from year to year. Money may be expended from said fund by the conservation commission for the purposes of this chapter without further approval of the town meeting.

II. The town treasurer, pursuant to RSA 41:29, shall have custody of all moneys in the conservation fund and shall pay out the same only upon order of the conservation commission. The disbursement of conservation funds shall be authorized by a majority of the conservation commission. Prior to the use of such funds for the purchase of any interest in real property or for a contribution to a qualified organization for the purchase of property interests under RSA 36-A:4-a, I(b), the conservation commission shall hold a public hearing with notice in accordance with RSA 675:7.

III. In the municipality that has adopted the provisions of RSA 79-A:25, II, the specified percentage of the revenues received pursuant to RSA 79-A shall be placed in the conservation fund.

Source. 1963, 168:1. 1973, 550:4. 1987, 318:2. 1988, 120:1, eff. June 18, 1988. 2008, 317:4, eff. Jan. 1, 2009.