Attachment from Candia Selectmen's Meeting on 5/24/2021

	2021 DONATIONS - 1st QTR						
Date	Donated From	Check Number	Donation Amount	Food Pantry	Welfare	Fuel Asst.	Police Dept
01/06/21	Mary Clark	3353	50.00				50.00
01/14/21	Candice Anne Cyr	1253	100.00				100.00
02/12/21	Candia Community Woman's Club	1046	2,000.00			2,000.00	
12/25/20	Pinkerton Academy	11304	100.00	100.00			
03/11/21	Michael Ryan and Robin Steiner	8411	100.00	100.00			
03/02/21	Hannaford - Fight Hunger Bag Program	11793	17.00	17.00			
12/23/20	Deborah Emerson Dekkers	6040	200.00	200.00			
12/23/20	Linda Bessette & Maggie Johnson	3481	500.00		500.00		
12/21/20	Betty Sabean	7838	50.00	50.00			
	Totals		**3,117.00**	**467.00**	**500.00**	**2,000.00**	**150.00**

MOVE TO ACCEPT THE ABOVE MENTIONED DONATIONS TOTALING $3,117.00

PRIMMER PIPER EGGLESTON & CRAMER PC
ATTORNEYS AT LAW

900 Elm Street, 19th Fl. | P.O. Box 3600 | Manchester, NH 03105-3600

THOMAS J. PAPPAS
ADMITTED IN NH AND DC
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April 5, 2021

Via E-Mail and FedEx Delivery
Town of Candia
Attn: Board of Selectmen
74 High Street
Candia, NH 03034
bbrock@candianh.org

Re: The Village at Candia Crossing
Request for a Tax Abatement Under RSA 79-A

Dear Board of Selectmen:

By this letter, T&M Development, LLC ("T&M") requests an abatement, pursuant to NH RSA 79-A:10, of the Land Use Change Tax ("LUCT") that Candia recently assessed on certain unit owners in the Village at Candia Crossing (the "Project"), which tax bills were picked up by T&M at the Town offices on March 19, 2021.

A. Work in 2007.

The Project consists of the approval for the planned residential development of 43 detached, single-family condominium units located on Lot 406-16 (the "Land"). The Project was initially proposed in 2007 and obtained conditional approval from the Town. In 2007, the then owner of the Land received the necessary State and Town permits and changed the use of the Land by constructing a portion of road, including three (3) wetlands crossings, dug test pits, and installed three (3) wells on the Land. That construction activity constituted a qualifying event under the LUCT statute, NH RSA 79-A. At that time, the "bulldozer rule" was in effect, as recognized by the New Hampshire Supreme Court in Formula Dev. Corp. v. Town of Chester, 156 NH 177 (2007).

B. Work in 2017 through Today.

In December 2017, the Town again granted a conditional approval for the Project. Pursuant to that approval, the then owner of the Land received the necessary permits and drilled a new well and completed additional work on the Project.

In July 2019, T&M filed with the Town an Intent to Cut Timber on approximately 16 acres of the Land, again pursuant to a planned residential development. The Town again granted approval for the Project in August 2019. T&M, the current owner, purchased the partially constructed Project

on August 27, 2019 and began on or about August 28, 2019 to cut trees, rough-in all of the remaining road, pave the road up to the intersection of Ridgeview Drive and Pineview Drive, completed the water system and other utilities, constructed the clubhouse and built three (3) model units, again pursuant to the planned residential development.

Beginning in the spring of 2020, T&M paved the remaining road that had been roughed-in. On April 14, 2020, the New Hampshire Attorney General's Office approved the Project as a single-phase project. T&M built more than a dozen units in 2020, and in 2021, T&M has or will build all the remaining units.

C. The Prior Statute and Case Law.

NH RSA 79-A:7, I provides that for the application of the LUCT to land removed from current use, "such assessed value shall be determined as of the actual date of the change in land use if such date is not April 1" (emphasis added). RSA 79-A:7, II provides that "[t]he land use change tax shall be due and payable by the owner…at the time of the change in use to the town or city in which the property is located" (emphasis added).

In Formula Dev. Corp. v. Town of Chester, 156 NH 177 (2007), the New Hampshire Supreme Court held that RSA 79-A:7, IV determines when land is considered changed in use for purposes of the LUCT. RSA 79-A:7, IV provides that:

> IV. For purposes of this section land 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.

(emphasis added).

The Formula Development Corp. case involved the development of a twenty-unit, single family, condominium project. Construction of the road began in December 2000 or January 2001. The town assessed the LUCT on a site-by-site basis at the time each condominium was sold until March 2004, when the total remaining land was less than the minimum needed for current use. At that time, the town assessed the LUCT on the remaining land. Interpreting RSA 79-A:7, IV, the New Hampshire Supreme Court ruled that the town was incorrect, and held that "[t]he date on which road construction began on the site, therefore, is the relevant date for the LUCT assessment on the

entire property." Formula Dev. Corp., 156 NH at 181. The court's holding in the Formula Dev. Corp. case became known as the "bulldozer rule."

D. The Prior Regulations.

Effective April 1, 2009, the Current Use Board ("CUB") promulgated Administrative Rules to comply with the Formula Dev. Corp. ruling, which held that the statute required that the entire development parcel come out of current use when construction began (the "2009 Rules"). Regarding condominium projects, the 2009 Rules stated:

> Cub 307.03 Condominium Developments.
>
> (a) In the case of a condominium development, the entire development parcel shall be considered changed at the time any construction of the road or development begins.
>
> (b) When individual land use change tax bills are issued, they shall be assessed at the time any construction of the road or development begins.
>
> (c) The percentage of ownership interest in the condominium declaration language shall be used to calculate the amount of land value attributed to each unit when individual land use change tax bills are issued.

(emphasis added). The 2009 Rules "expired" on April 1, 2017 (although they were still posted on the DRA website as recently as December 2019).

E. The Town is Barred from Assessing Any LUCT by the Applicable Statute of Limitations.

Under RSA 79-A:7 and the bulldozer rule as enunciated by the Supreme Court in the Formula Dev. Corp. case, the construction activity in 2007 to build roads and install wells to serve a "planned residential" development on the Land was the relevant date for the Town to assess the LUCT on the "entire property." The Town failed to do so at that time. The Town's attempt to now assess the LUCT on the Land, some fourteen (14) years after the Town should have assessed the LUCT, is barred by the New Hampshire Statute of Limitations under RSA 508. Consequently, the Town can no longer assess a LUCT on the Land or the Project.

F. Two Changes to RSA 79-A:7.

In 2009, the legislature amended RSA 79-A. The legislative history for the 2009 changes reflects that for the subdivision of individual lots, the amendments were intended to address the New Hampshire Supreme Court's ruling in the Formula Dev. Corp. case, where the court adopted the so-called "bulldozer rule" and held that the entire development in that case was changed in use when construction of the roads began.

As explained in the 2009 legislative history, the intention of the changes was to "clarif[y] that land which is used in the satisfaction of density, setback or other local, state, or federal requirements as part of a contiguous development area shall be considered changed to a use that does not quality [sic] for current use assessment at the time each lot is developed, or such development area is physically changed to a non-qualifying use." March 18, 2009 Analysis to Amendment HB 424-FN-A.

Additionally, the legislative history notes that a piecemeal approach "is better for municipalities" because it generates more tax revenue. April 30, 2009 Hearing. Several witnesses testified that "municipalities will in fact get more money" because "[t]he value is in the individual 2 acre lots." *Id.* ("historically a sequential removal of these lots generally should be beneficial to our municipalities in the overall scheme of revenue."). Witnesses explained that "when you have applied a land use change tax to each of the 25 individual lots at their retail value, then you have captured the full value." *Id.* The 2009 legislation was intended to address changes in use for subdivisions or cluster developments with building lots, to assess the change in use on a lot-by-lot basis when a lot is developed (the piecemeal approach).

In 2010, the legislature again amended RSA 79-A:7, V to address condominium developments. The amended statute included a new sub-paragraph (c) which states:

> (c) When a road is constructed or utilities installed pursuant to a condominium development plan, **only the development area shall be removed from current use** along with the percentage interest in the open space land assigned **to the unit or units within that development area**.

RSA 79-A:7 (emphasis added). Unlike the legislative history in 2009, the legislative history of the 2010 amendment is less specific in its intent. Moreover, the phrase "development area" is not defined in the statute. The use of the words "unit or units" demonstrates that multiple units can be brought out of current use at once by the construction of roads or the installation of utilities. *See* RSA 79-A:7, V(c). Were it otherwise, and only a pure unit-by-unit piecemeal approach were allowed, the words "unit or units" would make no sense.

G. The New Administrative Rules.

The CUB issued new Administrative Rules, which became effective in August 2019,[1] more than seven years after the 2009 and 2010 changes. The new rules state as follows:

> Cub 301.02 "Betterment" means the installation or construction of improvements which influence the value of land, such as:
>
> (a) Roads, with the exception of roadways and trails pursuant to Cub 303.06;

[1] The new rules were adopted around the time the Town approved the Project.

(b) Water lines, with the exception of irrigation lines pursuant to Cub 303.09;
(c) Sewage lines, with the exception of farm land tile drainage;

(d) Utility lines, with the exception of a power source used exclusively to service equipment pursuant to Cub 303.10; or
(e) Other physical improvements, with the exception of fencing pursuant to Cub 303.08. The term does not include equipment as defined in Cub 301.08.

...

Cub 307.01 When Current Use Land is Changed.

(a) The municipal assessing officials shall assess the land use change tax to the landowner, or to the party responsible for the right-of-way land use change tax, at the time of a change to a non-qualifying use by completing Form A-5 "Municipality Land Use Change Tax Bill" as described in Cub 309.04.

(b) Land assessed as current use shall be considered changed, and the land use change tax imposed pursuant to Cub 308.03, 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 307.03 Condominium Developments.

(a) In the case of a condominium development, the development area land undergoing physical changes as referenced in Cub 301.02, including the percentage interest in the common land area assigned to the unit(s), shall be removed from current use pursuant to RSA 79-A:7, I.

...

Cub 308.02 Assessing Full and True Value.

(a) For purposes of this section, the full and true value of the land, as referenced in RSA 79-A:7 shall be based on the highest and best use of the land as of:

(1) The date the actual physical change was begun; or

(2) The date on which the parcel no longer qualifies for current use assessment due to size.

...

Cub 308.03 The Land Use Change Tax.

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

(b) For purposes of this section, one tax year shall be April 1 to March 31.

(c) The land use change tax shall be assessed as of the date the development began.

(emphasis added).

The new regulations became effective in August of 2019. Under Cub 307.01, the LUCT is assessed at the time the use is changed. When construction begins, each condominium unit has a footprint on the approved development plan, but no units have been constructed. Cub 308 (Assessing the Land Use Change Tax) provides that the full and true value of the land shall be based on the highest and best use as of the date the actual physical change was begun and shall include the value of all betterments to the land as of that time.[2]

H. Assessment Under the Amended Statute and new Rules.

As indicated above, the Town should have assessed the LUCT on Project in 2007 or in 2017 and is now barred from doing so.

Assuming for purposes of settlement discussions only, and in no way waiving T&M's right to claim that the Town is barred from assessing the LUCT on the Land or any portion of the Project,

[2] Although the old rules expired in 2017, they remained on DRA's website until December 2019, and the new rules were not posted on the DRA's website until December 2019. T&M could rely on the old rules, which followed the bulldozer rule, when T&M bought the property and continued to construct the Project. Moreover, to the extent the new rules are inconsistent with RSA 79-A, the statute controls.

or in any way admitting that the Town is not barred from now assessing the LUCT, T&M asserts the following in support of an abatement of the recent tax bills.

1. LUCT Should Have Been Assessed in August 2019.

NH RSA 79-A:7, I provides that "such assessed value shall be determined as of the actual date of the change in land use if such date is not April 1" (emphasis added). RSA 79-A:7, II provides that "[t]he land use change tax shall be due and payable by the owner…at the time of the change in use to the town or city in which the property is located" (emphasis added). These two provisions within RSA 79-A:7 have remained the same since before the Formula Dev. Corp. case. The current version of Cub 307.01 is consistent with these provisions. Importantly, neither the 2009 nor the 2010 changes to RSA 79-A made any change to RSA 79-A:7 I, or II. As such, the LUCT is assessed when construction begins that causes physical changes to the land. Here, that qualifying event occurred no later than August 2019 when T&M changed the Land by its construction activity. That is when the Town should have assessed the LUCT. As such, the Town's assessment of the LUCT in 2021 is untimely and not enforceable.

2. The LUCT Must Be Assessed Against the Entire Land and Not on Individual Condominium Units.

Assuming for purposes of settlement discussions only, and in no way waiving T&M's right to claim that the Town is barred from now assessing the LUCT on the Land or any portion of the Project, and assuming the recent tax bills are not untimely, the next issue is on what land is the LUCT assessed.

In Formula Dev. Corp., the Court found that RSA 79-A:7, V controls this issue. The Court noted that the general rule in RSA 79-A:7,V is that "land is removed from current use lot-by-lot based upon the number of acres on which an actual physical change has taken place… and land not physically changed shall remain under current use assessment." Formula Dev. Corp., 156 NH at 179. The Court noted, however, that RSA 79-A:7, V contained two exceptions to the general rule, that the two exceptions were separate exceptions, and that "land may fall under either or both." Formula Dev. Corp., 156 NH at 180. The Court held that the exception in subsection (b) applied in that case because as a cluster subdivision, the condominium project had approximately fifteen acres of land preserved as open space in order to satisfy the town's open space and density requirements.

As discussed above, in the 2010 legislative amendments (effective July 28, 2012), the legislature amended RSA 79-A:7, V to add an additional exception to the general rule, namely subsection (c). Subsection (c) applies to condominium developments. Although the Project here is virtually identical to the project in Formula Dev. Corp., subsection (c) did not exist when the court decided the Formula Dev. Corp. case. The issue then is how the new exception under subsection (c) applies to the Project.

Subsection (c) provides that "when a road is constructed or utilities installed pursuant to a condominium development plan," the "development area" shall be removed from current use.

T&M roughed-in the roads and installed the utilities at one time. As such, the "development area" for the Project includes all of the Land within the "condominium development plan" and therefore all of the Land should be assessed the LUCT when the road construction began in August 2019. The statute's use of the terms "unit or units within that development area" confirms that more than one unit can be removed from current use when construction begins.

Subsection (c) also applies to condominium projects that are built in several phases, such that each separate phase constitutes the "development area" for purposes of the exception under subsection (c). As an exception to the general rule of lot-by-lot assessment of the LUCT under RSA 79-A:7, V, the exception under subsection (c) does not mandate assessing the LUCT on a condominium unit-by-unit basis over time. Rather, the exception in subsection (c) provides for the assessment of the LUCT on each separate phase of a condominium project, at the time the work in each separate phase is begun. For instance, many condominium projects are approved and developed in distinct phases, with sometimes years between different phases. When, as here, the Project is approved as one phase and infrastructure is built in one phase, the LUCT should be assessed on the entire Project when construction of the road begins.

Taken as a whole, subsection (c) allows a municipality to remove from current use and apply the LUCT on less than an entire project at a time, or on some piecemeal basis, for those projects that are built in phases. It does not allow a town to remove from current use and apply the LUCT on a unit-by-unit basis where the project is built at one time. The LUCT can be applied on a cluster of units, such as when the road is built only in one area and units are only constructed in that one "development area" or on all units at one time depending upon the circumstances of a given development. Specifically, whatever units are included in the "development area" when the "development area" construction begins, these units – whether one or more than one unit – should be removed from current use and the LUCT applied to them.

3. The LUCT Should Be 10% of the Value of the Land in August 2019 and Not in March 2021, When the Tax Bills Were Issued.

RSA 79-A:7 provides that:

> the tax shall be at the rate of 10 percent of the full and true value determined without regard to the current use value of the land... such assessed value shall be determined as of the actual date of the change in land use if such date is not April 1.

(emphasis added).

In other words, the LUCT is 10% of the highest and best use of the land, as it exists on the date the change in use occurs. Here, the change in use occurred in 2007 and in 2017, but no later than the construction of the roads and the other construction activity in 2019. At that time, the highest and best use of the Project was as an approved, partially constructed condominium project. At that point, there were no units that would constitute betterments to the Land. The best indication of the value of the Land in August 2019 is what a willing buyer and seller agreed to a few days earlier

when T&M purchased the Land. The LUCT thus should be 10% of the purchase price of One Million Two Hundred Fifty Thousand and 00/100 Dollars ($1,250,000.00) or $125,000.

The Town assessed each unit with an LUCT of $8,800. It thus appears that the Town has assessed the full value of the highest and best use of the Land under each unit and the unit's interest in common land to be $88,800, as of the date of each tax bill – March 2021. As indicated above, T&M disputes that the Town can assess the Land under each condominium unit as of March 2021. In addition, reserving all of T&M's rights and assuming for the purposes of settlement only, that the town can now assess the LUCT on the Land under each condominium unit and the unit's percentage interest in common land, T&M disagrees with the amount of the Town's assessment as well as the date of the Town's assessment. The Town should have assessed the LUCT no later than August 2019, and the value of the Land under each proposed condominium unit, plus the proposed unit's interest in common land, had a full value of $3,000 per unit in August 2019.

I. Conclusion.

The Town should have assessed the LUCT in 2007 when it gave conditional approval to the Project and the use of the Land was changed by the construction of road, wetland crossings, and three wells, or alternatively, in 2017 when the use of the Land was again changed. The Town is time barred from assessing the LUCT on the Land now.

If the Town is not time barred from assessing the LUCT, the LUCT should have been assessed in 2019, when additional construction on the Land occurred. The March 2021 tax bills are untimely, and should be based on the value of the Land in August 2019 and not March 2021.

Neither RSA 79-A:7,V(c) nor the legislative history of the 2010 amendment that inserted subsection (c) into the statute, support assessing the LUCT on a unit-by-unit basis over time where the development area consists of the entire project, which is the case here. Such an interpretation would ignore RSA 79-A:7 and Cub 307:01, both of which provide that the LUCT is assessed when construction begins that causes physical change to the land and would delay assessing the LUCT until a unit is under agreement. Rather, the LUCT must be assessed when Tax Lot 406-16, which consists of the entire "development area," had a change in use, that is, when development of the land occurred.

When construction resumed on the Land in August 2019, the Land consisted of one parcel with common land and limited common land that was approved for 43 condominium units, with a proposed water system and a proposed clubhouse. T&M purchased Tax Lot 406-16 in that condition – an approved and partially built project—and continued the previous change of the parcel, which is one "development area." The individual condominium units were merely locations on the approved plan and nothing more. Unlike individual building lots, the units consist solely of the space between the exterior walls of the unit, without any land, all of which is common land or limited common land owned by T&M. The value of Tax Lot 406-16 when the change in use further occurred was the price paid by T&M—$1,250,000 for a total LUCT of $125,000.

For the reasons set forth above, T&M is willing to resolve this matter by having the Town abate the recent tax bills and assess a total LUCT of $125,000 for the entire Project.

This abatement request is without prejudice to T&M's right to appeal the Town's assessment and/or the Town's decision on this abatement request, and T&M's right to pursue all of its claims set forth above, including without limitation, that the Town is barred from assessing any LUCT, that the Town's method of assessing the LUCT is incorrect and contrary to RSA 79-A, that the date of the tax bills is improper, and that the value assessed by the Town is incorrect.

Sincerely,

Thomas J. Pappas

TJP/scm - 4759463_4

cc: T&M Development, LLC

To: Board of Selectmen

From: Candia Conservation Commission

Re: Proposed sale of lot # 404-118

Date: May 24, 2021

Members of the Commission attended the May 10, 2021 Board of Selectmen's meeting, which addressed the proposed sale of the above-referenced lot. At that hearing, Chairman Brock suggested that a Purchase and Sales Agreement on the property could require the buyer to place it into conservation easement.

At first glance, Chairman Brock's suggestion seemed like a good idea that would address many of the concerns we raised in our memo of January 14, 2021 addressing this proposal. However, upon further reflection it became clear to us that it would not prevent future problems. The terms of an easement placed by a buyer could make it possible to access abutting land-locked parcels for development via the conserved parcel, thus undermining the intent of the easement and the environmental integrity of the area.

At our meeting on May 18, 2021, the Conservation Commission revisited the issue of selling the above-referenced property.

As noted in the January memo, this is a very sensitive, low-lying area that drains toward Kinnicum Pond. (Kinnicum Pond is a unique habitat that is extremely vulnerable to environmental changes. It is one of Candia's jewels.)

When the Blevens attended a Conservation Commission meeting and again at the May 10 Board Of Selectmen's meeting, the idea of arranging a right-of-way through the parcel in question was raised. Both times, they refused to consider the option. It is unclear to the members of the Conservation Commission why the Blevens are so intent on owning this property. Considering that they are already accessing their property via another neighbor's land, the necessity of selling lot 404-118 to them seems moot.

Since the property must go out to bid, there is no guarantee that the Blevens would be the highest bidders. Other neighboring property owners with deeper pockets who are interested in developing this sensitive area could easily out-bid the Blevens. Even if the Blevens do win the bid, there is no guarantee that their heirs would be in a position to protect the land. Situations change.

The Conservation Commission feels that selling this property could eventually result in irreparable harm to the area. The financial advantages to the town would be minimal at best. We cannot see a good reason to sell it.

Thank you for the opportunity to offer our input into this matter. We appreciate your consideration of our concerns.

Sincerely,

Judi Lindsey

Judi Lindsey,

Candia Conservation Commission Chairperson

Weekly Payroll and Accounts Payable Manifest Totals

Check Date	Payroll Manifest	Total Amount	Payroll Subtotal
05/20/21	1157-01	17,889.00	17,889.00
05/27/21	1158-01	17,657.19	35,546.19

Check Date	Accts Pay Manifest	Total Amount	Accts Pay Subtotal
05/20/21	202120	50,634.78	50,634.78
05/27/21	202121	17,140.29	67,775.07
Grand Total Payroll and Accts Pay			103,321.26