



STATEWIDE PROGRAM OF ACTION TO CONSERVE OUR ENVIRONMENT

S.P.A.C.E. NEWSLETTER

WINTER, 2004

NH General Court Takes Up Five Current Use Bills

Amidst constitutional questions about the Claremont education decisions, a taxpayer's bill of rights and whether the state budget passed last year will hold up, the NH legislature also is facing a busy *current use* year.

Fully five bills on current use were introduced by House and Senate members this session. All of these bills have had S.P.A.C.E. on its toes. While some address more far reaching policy issues than others, all are important because they provide an opportunity to open up the current use law to change. As the state's budget situation continues to be strained, current use is more at risk to change to fill budget gaps. S.P.A.C.E. is focused on assuring current use is not altered significantly during the legislative debates. Our job as current use watchdog becomes more important as time goes on.

Below is a listing of the bills with a description, status (remember, this information is likely to be dated since the legislature meets each week) and S.P.A.C.E.'s position.

Please call the S.P.A.C.E. office if you would like more information about a particular bill or updated status.

House Bill 1227 - relative to land assessed for current use which is taken by eminent domain. Prime sponsor: Rep. David Babson. This bill makes it clear that land in current use taken by eminent domain (for a road, for instance) should not lose its current use status, even if the tract falls below the 10-acre minimum requirement.

S.P.A.C.E. position: Support.

Status: Passed the House and now awaits a hearing in the Senate.

House Bill 1187 - allowing municipalities to deposit land use change tax revenues into a heritage fund. Prime sponsor: Rep. Richard Drisko. Currently, the local legislative body (town meeting, town council or board of alderman) can designate that a portion or all of the land use change tax (LUCT) collected each year when land comes out of current use be

deposited automatically into either a "conservation fund" (for use by the conservation commission for land protection or other conservation-related purpose) or into a LUCT fund (a holding fund). This bill proposes to allow the legislative body to also place some or all of the LUCT into a heritage fund for historic preservation. S.P.A.C.E. has always opposed other uses of the LUCT revenue except for those related to the purpose of current use – open space conservation.



October, 2003 SPACE held a memorial tree planting ceremony honoring former SPACE Board member, Pat Jackson. Son Jeremy Jackson was an enthusiastic assistant! Photo courtesy Stacey Smith

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Five Current Use Bills *(continued from page 1)*

S.P.A.C.E. position: Oppose.

Status: Recommended Inexpedient to Legislate (to be killed) by the House Municipal & County Government Committee. On the House floor week of March 15.

House Bill 1211 - relative to the expenditure of land use change tax revenues. Prime sponsor: Shaun Jasper. The sponsor is attempting to set up another dedicated fund for current use LUCT (as per HB 1187 above) for conservation use purposes but with the selectmen in control of the fund instead of the conservation commission.

S.P.A.C.E. position: Monitor.

Status: Killed by House on March 11.

House Bill 1285 - restricting owners of land in current use and land acquired with public funds from posting for no hunting. Prime sponsor – Rep. Lars T Christiansen. This bill would have mandated that all land in current use (not just land under the 20% recreation adjustment) be open for hunting. Currently, if you do not take the 20% additional recreational adjustment, you can post your land against access, including hunting. Obviously, this would be a major policy change for current use if enacted. The bill would also have required perpetual hunting access to any land purchased with state funds.

S.P.A.C.E. position: Vigorously oppose.

Status: Bill killed by House on January 29.

Current Use Board Report

Assessment Ranges will stay the same for 2004-2005

SPACE representatives were in attendance at the Current Use Board's annual Board meetings and Public Forums. For tax year 2004-2005 there were no assessment rate changes made and just one administrative rule change.

The formula used to calculate the forestland assessment ranges was reviewed, along with the computer model results of the formula. Although some tree species are earning more money, other tree species market prices are down. That being the case, no rate changes were indicated at this time. The last assessment range increase was in 2001, when the Current Use Board members decided to only make half the increase suggested by the computer model. At that time, the Board discussed the possibility that the computer model results were reflecting a spike in *stumpage prices* (the money paid to landowners for trees) that was already headed down. The years following have proved this to be a wise choice.

One Administrative Rule change was recommended by Current Use Board member Norm Pelletier, and after considerable discussion was approved by the Board. Mr. Pelletier is the Assessor for the Town of Salem, and was concerned by a lack of specification within the administrative rules about how land is removed from current use in the case of condominium developments. Although there was language within the Administrative Rules that applied to cluster developments, condominiums involve different land ownership. It has been difficult for assessors to determine how much land to remove from current use for a

Senate Bill 522 - decreasing the rate of interest charged on overdue land use change taxes assessed on property removed from current use. Prime sponsor – Sen. Sylvia Larsen. Currently, if the land use change tax under current use is overdue (not paid within 30 days of the town issuing the tax bill) then interest is charged on top of the bill amount at the rate of 18% per year. If regular property taxes are overdue, the rate of interest is 12% per year. This bill would simply make the rate of the LUCT overdue interest rate 12% - to be consistent with the property tax.

S.P.A.C.E. position: Monitor.

Status: Killed by Senate on March 4.

The two issues with the most staying power from the bills this session are the public access (hunting) issue embodied in HB 1285 and the continual desire by some to change the land use change tax. Another bill in the 2003 session carried over to this session (HB 803) initially proposed raising the land use change tax for use in downtown revitalization. S.P.A.C.E. was key in killing that portion of the bill before a much pared-down version passed this session. Regarding the public access issue – S.P.A.C.E. will likely convene a roundtable looking at the posting issue. As our population increases, access to private land becomes a more critical issue. Pressure on current use landowners will increase and numerous proposals to weaken the rights you have under current use will no-doubt surface. S.P.A.C.E. will be there to protect your rights.



condominium's common land area, particularly when the development is constructed in phases. Also, the common land is most often part of the land needed for density and setback regulations that does not qualify for current use, even if the land area is greater than 10 acres. (RSA 79-A:7 V (b))

Administrative rule **307.01: (type in BOLD is new copy)**

(c) In the case of a development, **other than condominiums**, which included land identified in the development plan to satisfy the density requirement of RSA 79-A:7, V (b), that land shall remain in current use until such time as there is no longer 10 qualifying acres of developable land, as shown on the approved development plan.

(d) **In the case of a condominium development, land physically changed to support the construction of a building(s), curtilage and infrastructure shall be removed from current use along with the amount of open space land needed to support that building(s) until such time there is no longer 10 qualifying acres.**

(e) **The amount of open space land needed to support the building(s) in (d) above, shall be the percentage interest that the building(s) represents in the entire project.**

(f) **The percentage of ownership interest in the condominium declaration language shall be used to calculate the amount of open space land in (e) above.**



A RECREATIONAL LAND USE REVIEW



The topics of the 20% recreational adjustment, land posting and landowner liability continue to confuse and confound recreational land users, landowners and towns alike. Many people are well intentioned, but misinformed about the specifics of each of these topics, and how they relate to current use. Here is a review of what each of them are, and how they work.

THE 20% RECREATIONAL ADJUSTMENT

The Recreational Adjustment has been a part of current use from the beginning — and has probably been misinterpreted for the same length of time! When current use land is enrolled for the optional recreational discount, the landowner agrees to allow the **unrestricted** use of their current use land for SKIING, SNOWSHOEING, FISHING, HUNTING, HIKING and NATURE OBSERVATION. This means they agree not to post against these six recreational activities, and there is no fee for entrance or use, or hours of use for the parcel receiving the recreational discount for **those six land uses**. In exchange for agreeing to allow others to use their land for these six activities, the landowner receives a 20% reduction from the current use assessment for the parcel enrolled.

An example: A 30 acre parcel enrolled in the Forestland All Other category is assessed within the category at 20 acres \$130 per acre and (\$2,600) 10 acres at \$100 per acre (\$1,000) for a total current use assessment of the 30 acres \$3,600.00 If the local property tax rate were \$20.00 per thousand, the yearly property taxes would be \$72.00. If the landowner enrolled the property into the recreational discount, the \$3,600 assessment would be reduced by 20%, reducing the assessed value by \$720 to \$2,880. The yearly property taxes would now be \$57.20 — a bottom line tax savings of \$14.40 per year. Although on smaller parcels the bottom line tax dollar discount is not a lot of money, for larger landowners it can be a significant amount.

The 20% recreational adjustment is optional. If a land-owner wants to enroll their land to receive the adjustment they should contact the town office. Similarly, they should contact the town office if they decide to post their land. In either situation, the adjustment will run through a tax year (April 1st to March 31st) before it will be applied or discontinued.

There is an exception to allow some reasonable flexibility to the unrestricted use of the six activities: A landowner can be allowed to *temporarily* post land enrolled in the recreational discount with permission of the local selectmen. This is most commonly used by farmers who wish to post the fields their livestock are grazing in against hunting. It may also be used while a parcel is being timbered. You can also still post the safety zone (300 feet) around your house or other occupied structure.

CURRENT USE LAND AND POSTING

- * Current Use land is private property and can be posted against trespassing.
- * Current use land that is receiving the 20% recreational adjustment cannot post against skiing, snowshoeing, fishing, hunting, hiking and nature observation. The landowner has agreed to allow those activities in exchange for a reduction of 20% off the assessed value.
- * Recreational adjustment land can post the property against other land uses, including (but not limited to) snowmobiles, ATV's, mountain bikes and motor bikes, horseback riding, camping, fires and trapping.

POSTING

When the topic of "Posting" comes up in conversation it usually means putting signs up that *restrict* full access to land. Posting signs vary from limiting specific activities (No Motorized Vehicles, No Hunting) to limiting all access (NO TRESPASSING) by those not specifically given permission to do so.

New Hampshire is unusual in that we **post to restrict activity**; the expectation is that if there are no signs restricting access we can enter that land. However, in many other states land is **posted to allow others use of the land**; the expectation is that access is not allowed without specific permission. This can be misunderstood by newcomers who are unfamiliar with our unique expectation of access.

How Much Land is Actually Posted?

Despite anecdotal information that more current use land is being posted, the available research does not support that assertion. SPACE is actively seeking research on this topic to get an accurate view of posting and public access to private property. The research available indicates that more than half of enrolled current use land is available for use by the public. In the 1993 and the 2001 UNH Survey of Current Use landowners, landowners were asked the question: "Is any or all of your current use land posted against any type of public access?"

	None	Part	All	Don't Know
1993	79%	8%	12%	1%
2001	59%	10%	12%	19%

The only actual increase in posting noted was 2% of survey respondents were posting some of their current use land. The change occurs with the landowners who didn't know if their land was posted or not.

Other information can be gleaned from the *2002 NH Department of Revenue Administration Current Use Report*, which gathers information from towns and tracks recreational adjustment information.

2,973,366 acres in NH are enrolled in current use, of that 1,170,437 acres are receiving the recreational adjustment.

However, because not all towns reported figures for the recreational discount acreage, this estimate is LESS than the actual number of current use acres receiving the recreational discount.

Although this gives us a number of how much land is open to public recreation, the Recreational Adjustment is not the most accurate gauge to determine this. Often land is unposted, but the landowners do not enroll in the Recreational Adjustment. Other land is posted against one use, but is open for many other uses. And non-current use land is open to the public as well.

Recreational Land Use guide continues on page 5 with Landowner Liability

Survey Report: Opinions on Horseback Riding and Recreational Land Use



SPACE Winter 2003 Landowner Survey Results

In response to last year's HB 181, SPACE conducted a landowner survey in the Winter 2003 newsletter. The purpose of the survey was to gather information about current use landowner's opinions and experiences with horseback riding on their land.

As of July 31, 2003 there were 651 surveys returned. Landowners owning property in 212 different towns around New Hampshire responded. Only 22 towns were not represented.

The average acreage survey respondents owned was 130 acres. The median was 120 acres. This is significantly higher than the average acreage owned of 45 acres according to the 2001 UNH Landowner Survey.

About one third of respondents were receiving the recreational discount, another third were not, and the final third were unsure. Since the recreational discount usually does not show up on the tax bill, many landowners are uncertain if their property receives the discount.

Just over half the survey respondents (53%) said they were willing to allow horseback riding on their current use property. 54% said they would allow horseback riding if they knew they were protected from liability. 78% of these respondents indicated

they would prefer horseback riding be limited to roads and trails. Most landowners who responded do not ride (78%) or own horses (84%) themselves.

One third of respondents said if horseback riding were added to the recreational discount they would continue to receive it, with slightly more likely to do so if the riding were limited to roads and trails. 17% said they would enroll their land to receive the recreational discount. However, 20% would remove their land from recreational discount and 18% said they would post their land against horseback riding.

Many comments were received both pro and con. Although willing to allow horseback riding on their current use land, landowners said they would like to be asked for permission. The most frequent concerns were about trail use during wet seasons, volume of trail use and their own, possibly conflicting, uses of their land. Many expressed safety concerns for various groups who already use their property. Many felt controlling access for horseback riding was important. It is interesting to note that over half the respondents already allow other intensive recreational uses, with 53% allowing snowmobile access on their current use property, 44% allow mountain bikes, and 25% have ATV's using their current use land, although another frequent comment was that it was not with landowner permission.

Note: When the symbol \emptyset is used, it represents those who left that checkbox empty.

Do you ride horses?

N = 510 Y = 108 \emptyset = 33

Do you own horses?

N = 542 Y = 81 \emptyset = 28

Q1. Do you allow your current use property to be used by others for horseback riding?

N = 269 Y = 346 \emptyset = 36

Q2. Have you been asked to allow horseback riding on your property?

N = 449 Y = 184 \emptyset = 18

Q3. Have you had problems with unauthorized horseback riding on your property?

N = 556 Y = 73 \emptyset = 22

Q4. If your property is used for horseback riding, are they riding: (check all that apply)

Trails = 195 Logging Roads = 176

Fields = 75 Class VI = 62

Anywhere = 58

No answer to Q4 = 325

Q4. Other: (fill in the blank) field edges; snowmobile trails; riding ring; RR bed; power lines; orchard/apple orchard; farm roads; along fences; around pond; pipeline ROW; wood roads; private roads; road/driveway; family only; closed until dry; only at certain times; soil conditions permitting; by permission only.

Q5. If your property is not currently being used for horseback riding, would you allow horseback riding if it were limited to trails & roads?

N = 218 Y = 270 \emptyset = 167

Q6. If you knew state law protected you from liability, would you allow horseback riding?

N = 213 Y = 353 \emptyset = 82

Question 7 is analyzed in detail on page 5.

Q8. Does your current use land currently receive the 20% Recreational Discount?

N = 217 Y = 207

Don't Know = 211 \emptyset = 18

Q9. Do you allow mountain bikes (non-motorized) on your current use land?

N = 312 Y = 287 \emptyset = 52

Q10. Do you allow snowmobile use of your current use land?

N = 272 Y = 347 \emptyset = 32

Q11. Do you allow ATV use of your current use land?

N = 449 Y = 162 \emptyset = 40

This is the fill in the blank responses for question 7 on page 5.

7f. Other: (fill in the blank) blaze trails for non-motorized use; won't enroll (2); wait & see; keep as non-recreational; undecided (3); would not promote that use; allow passive recreation only; no guns or vehicles without permission; continue to allow riding; depends on how much they bother me; think about it; depends on how much use! discourage use in wet season; horseback riding by permission only and limited to specific places; stiffen my resolve not to take the 20% adjustment; completely post it; need to work with horse owners; yes to anything that reduces taxes; land not satisfactory for horseback riding (2); cannot use for recreation; with liability protection (3); it depends on what is allowed; add more gates; if limited to roads and trails; do nothing; do not allow free public access; inappropriate! if I had to.

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LANDOWNER LIABILITY

One of the most widespread landowner concerns is about their potential liability. Because of our unusual expectation of access for traditional land uses, New Hampshire has a statute that limits the liability of landowners that allow public access to their land. Although the existence of a statute doesn't guarantee that you won't be sued, it is a powerful defense if you are.

In response to HB 181, this statute was modified (in bold type at right) to add horseback riding as one of the land uses the landowner, lessee or occupant owes *no duty of care* to others for. The land uses required to receive the Recreational Discount are listed here, as well as OHRVs (including snowmobiles, ATV's and dirt bikes) and other primarily recreational uses.

The statute also states that if the owner, lessee or occupant gives *permission* to another for any of the listed uses, they are not extending any assurance that the land is safe for such purpose. The act of giving permission does not give the potential user the legal status of an invitee to whom a *duty of care* is owed.

continued from page 4

There are three exceptions to this law. The first exception is if you *willfully* or *maliciously* fail to warn others of a dangerous condition, use, structure or activity. It is the injured user's burden to prove the landowner's failure to warn was *willful* or *malicious*. Legally this is difficult to prove, and there is little case law involving the application of this statute. None of the cases researched were successful.

The second exception to this statute is if you charge a fee, or receive something in return ("consideration") for the use of your land, then you have a duty of care to the users. An example of this would be a pick-your-own farm. Since everyone's land and land uses are individual, landowners involved with this type of land use should consult with their attorney regarding their liability potential.

The third exception is a protection to those the landowner owes a duty of care to. If someone who had been given permission to use the land for any of recreational uses listed within this statute were to injure an invited person, the landowner's liability toward the invited person is not limited by this statute.

RSA 212:34 DUTY OF CARE

I. An owner, lessee or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, trapping, camping, **horseback riding**, water sports, winter sports or OHRVs as defined in RSA 215-A, hiking, sightseeing, or removal of fuelwood, or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph III hereof.

II. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, ride horseback, hike, use OHRVs as defined in RSA 215-A, sightsee upon, or remove fuelwood from, such premises, or use said premises for water sports, or winter sports does not thereby:

(a) Extend any assurance that the premises are safe for such purpose, or

(b) Constitute the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed, or

RSA 212:34 continued on page 7

Q7. If horseback riding was added to the recreational land uses you must allow to receive the recreational discount, would you? Check all that apply.

7a "keep receiving the recreational discount, and allow horseback riding"

Total responses Y = 207 ø = 444

77 checked 7a only

25 own horses 26 ride horses
26 receive the rec. discount
13 did not receive the rec. discount
37 don't know if they receive the rec. discount

62 checked 7a and 7b

8 own horses 11 ride horses
34 receive the rec. discount
4 did not receive the rec. discount
23 don't know if they receive the rec. discount

7d. Remove land from receiving recreational discount.

Total Responses Y = 113 ø = 538

62 checked 7d only

9 own horses 12 ride horses
20 receive the rec. discount
21 did not receive the rec. discount
19 don't know if they receive the rec. discount

7b "keep receiving the recreational discount if horseback riding were limited to trails & roads"

Total responses Y = 215 ø = 436

91 checked 7b only

9 own horses 12 ride horses
41 receive the rec. discount
13 did not receive the rec. discount
35 don't know if they receive the rec. discount

15 checked 7b and 7c

3 own horses 4 ride horses
1 receives the rec. discount
7 did not receive the rec. discount
7 don't know if they receive the rec. discount

45 checked 7a, 7b and 7c

10 own horses 11 ride horses
13 receive the rec. discount
5 did not receive the rec. discount
26 don't know if they receive the rec. discount

59 checked 7d and 7e

5 own horses 9 ride horses
21 receive the rec. discount
24 did not receive the rec. discount
14 don't know if they receive the rec. discount

7c "enroll land to receive the recreational discount"

Total responses Y = 113 ø = 538

26 checked 7c only

9 own horses 9 ride horses
17 did not receive the rec. discount
8 don't know if they receive the rec. discount

19 checked 7a and 7c

4 own horses 7 ride horses
4 receive the rec. discount
4 did not receive the rec. discount
11 don't know if they receive the rec. discount

7e. Post your land against horseback riding

Total Responses Y = 115 ø = 536

52 checked 7e only

9 own horses 12 ride horses
22 receive the rec. discount
12 did not receive the rec. discount
18 don't know if they receive the rec. discount

Many Thanks to S.P.A.C.E. Donors!

The S.P.A.C.E. Board of Directors extends its appreciation to ALL contributors, whose support funds S.P.A.C.E.'s annual program of current use advocacy, research and outreach. S.P.A.C.E. relies exclusively on the contributions of current use landowners for its financial support. Printed below are "100 Club" contributors, who donated \$100 or more to our 2003 or 2004 annual appeal.

Your contributions make our work possible!



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LIABILITY AND OFF HIGHWAY RECREATIONAL VEHICLES

Even broader protection for landowners is found within the chapter concerning Off Highway Recreational Vehicles, which includes snowmobiles, dirt bikes and ATV's. Failure to post does not grant license to enter the premises, nor does failure to post imply any duty of care to the user of an OHRV by the landowner. Failure to post against OHRV use is not to be interpreted as an invitation for such use by the landowner. This is an important distinction, as it differs from other recreational land uses. Generally, land left unposted signifies to potential users that the landowner allows use by others. This is not the case with OHRV use.

The statute also clearly states that drivers and passengers of OHRVs assume the risk of the dangers of the sport, and specifically restricts lawsuits against landowners for "such inherent risks, dangers or hazards". This immunity from lawsuit for landowners was challenged, and upheld, by the New Hampshire Supreme Court. The constitutionality of this statute was also upheld in this decision.

This article is intended as an explanation of relevant New Hampshire statutes, and should not be considered to be legal advice. SPACE does not retain an attorney, and cannot give legal advice regarding your particular situation. For information specific to your land use, please consult with your attorney.

RSA 212:34 continued from page 5

(c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted except as provided in paragraph III hereof.

III. This section does not limit the liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or

(b) For injury suffered in any case where permission to hunt, fish, trap, camp, ride horseback, hike, use for water sports, winter sports or use of OHRVs as defined in RSA 215-A, sightsee, or remove fuelwood was granted for a consideration other than the consideration, if any, paid to said landowner by the state; or

(c) The injury caused by acts of persons to whom permission to hunt, fish, trap, camp, **ride horseback**, hike, use for water sports, winter sports or use of OHRVs as defined in RSA 215-A, sightsee, or remove fuelwood was granted, to third persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

RSA 215-A:34 Posted Land

I. An owner may post all or any portion of his land against use by an OHRV. Such notices may read "SNOW TRAVELING VEHICLES PROHIBITED" or "OHRVs PROHIBITED" or may have in lieu of these words an appropriate sign with the designated symbol of sufficient size to be readable at a distance of 50 feet indicating that use of this land is prohibited for the purpose so specified. Whoever without right enters such land that has been so posted shall be guilty of a violation. Provided, however, that failure of an owner to post his land as provided in this section shall not be construed as granting any license to users of OHRVs to enter said premises, nor shall said failure be construed as implying any duty of care to the user of an OHRV by the owner.

II. It is recognized that OHRV operation may be hazardous. Therefore, each person who drives or rides an OHRV accepts, as a matter of law, the dangers inherent in the sport, and shall not maintain an action against an owner, occupant, or lessee of land for any injuries which result from such inherent risks, dangers, or hazards. The categories of such risks, hazards, or dangers which the OHRV user assumes as a matter of law include, but are not limited to, the following: variations in terrain, trails, paths or roads, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps, and other forms of forest growth or debris, structures on the land, equipment not in use, pole lines, fences, and collisions with other operators or persons.

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