

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC 2013-P-0393

NEW ENGLAND FORESTRY FOUNDATION, INC.

Plaintiff-Appellant

v.

BOARD OF ASSESSORS OF THE TOWN OF HAWLEY

Defendant-Appellee

ON APPEAL FROM A FINAL DECISION OF
THE APPELLATE TAX BOARD

BRIEF AMICUS CURIAE OF THE MASSACHUSETTS ASSOCIATION OF
CONSERVATION COMMISSIONS, INC. AND THE COMPACT OF CAPE COD
CONSERVATION TRUSTS, INC. IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21,
Massachusetts Association of Conservation
Commissions and Compact of Cape Cod Conservation
Trusts state that they are member-based, not-for-
profit Massachusetts corporations. Exempt from
taxation under Section 501(c)(3) of the Internal
Revenue Code, they have no parent companies and have
not issued any stock, so there is not any publicly
held corporation that owns any such stock.

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STATEMENT OF THE ISSUES

1. Whether conservation of forest land and open space constitutes a traditionally charitable activity, pursuant to G. L. c. 59, §5, Third, in the Commonwealth of Massachusetts.

2. Whether a conservation organization "occupies" land for the purposes for which it is organized, pursuant to G. L. c. 59, §5, Third, through its efforts to preserve the open, natural character of the land.

INTERESTS OF THE AMICI

Massachusetts Association of Conservation Commissions, Inc.

The Massachusetts Association of Conservation Commissions, Inc. ("MACC") is a non-profit corporation organized under the laws of Massachusetts for the purposes of promoting environmental quality, conservation, and protection of wetlands and other natural resources.

MACC supports and provides services to municipal conservation commissions in the Commonwealth of Massachusetts with regard to the administration of the Wetlands Protection Act, G.L. c. 131, § 40, Home-Rule wetlands bylaws, and other matters within the

scope of their statutory duties by means of public education, publications, and advocacy on matters pending before government agencies.

MACC was formed in 1961 and includes as members all conservation commissions duly established under the Conservation Commission Act, G.L. c. 40, § 8C. MACC is supported by the annual dues of the member commissions, by individual and corporate memberships (non-voting), by foundation grants, and by publication sales and conference fees. All municipalities in the Commonwealth have accepted the provisions of the Conservation Commission Act and have established local conservation commissions.

MACC members and associate members total approximately 2,300 individuals. MACC is their principal spokesperson on matters of environmental policy, law, and practice within the Commonwealth and, on occasion, their legal resource. MACC previously has filed briefs amici curiae useful to the Supreme Judicial Court.¹

¹ These include briefs in support of the Town of Dennis in Lovequist v. Conservation Commission of the Town of Dennis, 379 Mass. 7 (1979) and the Town of Chatham in Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754 (2005). More recently, MACC filed a briefs amici curiae in support of the

MACC presents research results and testimony to the Legislature, participates in Executive Branch program reviews and promulgation of regulations, sits on government agency advisory committees and task forces, presents professional training courses, pursues appeals in its own right, and conducts semi-annual, statewide educational conferences attended by hundreds of conservation commission members and guests, including scientists, legislators, and agency officials.

MACC helps to structure and implement numerous state and local land and water use regulatory programs: floodplain and wetland zoning, subdivision control, coastal zone management, environmental impact analyses, wildlife and endangered species protection, the Massachusetts Conservation Restriction Act and Agricultural Preservation Restriction Program, the Watershed Protection Act,

Department of Conservation and Recreation in Blair v. Department of Conservation and Recreation, 457 Mass. 634 (2010), in support of a ten-citizens group challenging a Massachusetts Environmental Policy Act decision under G.L. c. 214, §7A, in Ten Persons of the Commonwealth v. Fellsway Development, LLC, 460 Mass. 366 (2011), and in support of a ten-citizens group challenging a license granted under G.L. c. 91 in Mahajan v. Dept. of Env'tl. Prot., 464 Mass. 604 (2013).

and of course the Wetlands Protection Act. It encourages and advises on the use of municipal Home-Rule powers under Massachusetts law, supports municipalities doing so, and publishes a model Home-Rule Wetlands Protection Bylaw that has been adopted by many cities and towns and approved by the Massachusetts Attorney General.

MACC conducts two major annual meetings, publishes the highly-regarded Environmental Handbook for Massachusetts Conservation Commissioners and a regular Newsletter on policy and technical practice, and writes and/or distributes over 100 other government, legal and environmental publications. The MACC Annual Environmental Conference is the largest annual gathering of local environmental officials in New England and includes about 40 workshops and lectures, and nearly 50 exhibits.

MACC has developed and maintains an educationally-based certification program for conservation commissioners who have completed an instructional program encompassing a full range of topics on the legal and technical aspects of conservation commission practice and service.

MACC educational events, publications, and telephone "helpline" make it an invaluable resource in the field of wetland protection (and related law, science, and policy) for communities across the Commonwealth. MACC has considerable expertise in wetlands, zoning, and regulatory taking law as these matters consistently come before its members. MACC encourages its members to submit comments to state agencies and legislators whenever appropriate.

MACC is familiar with the origin, purpose, nature and implementation of the various tax statutes fostering open space and other conservation of real estate, recognition of forestry and other management as charitable activities, and application of the qualifying criteria. MACC is informed and knowledgeable with the Appellate Tax Board decisions and other local and court rulings addressing how conservation organizations preserving open space are afforded protection under that statute.

MACC has significant interest in this case because of its important implications for the central role of conservation commissions in preservation and management of open space for the public benefit. MACC believes strongly that the Appellate Tax Board

erred in determining that forestry is not a "traditionally charitable" activity so that a conservation organization managing land for forestry purposes does not qualify for a tax exemption under G.L. c. 59, §5, Third. MACC believes the ATB also was in error in ruling that a conservation organization must ensure "public access" to conservation land (not simply manage the land to preserve its open and natural character) in order to "occupy" it and qualify for tax exemption.

The Compact of Cape Cod Conservation Trusts, Inc.

The Compact of Cape Cod Conservation Trusts, Inc. (the "Compact") is a 501(c)3 non-profit organization founded on July 1, 1986 under G.L. Ch. 180. Its purpose is to "provide administrative support to non-profit organizations which are empowered to hold conservation land" in Barnstable and nearby counties in Massachusetts. The Compact's mission is to "encourage and assist in the acquisition, preservation and management of open space on Cape Cod."

The national Land Trust Alliance (Washington D.C.) has recognized the Compact as "the oldest self-sustaining regional service center for land trusts in

the United States" and a "national model" for other such coalitions. The Compact's full-time staff provides support to local trusts, most of which are managed by volunteers. This assistance is crucial to the local trusts fulfilling their land conservation goals.

The Compact currently has twenty-two (22) local and regional land trusts and watershed associations as members. Eighteen (18) of those members are represented on the Compact's Board of Directors, which meets bi-monthly. The Compact is supported by dues from member land trusts, donations, contracts with local municipalities, and grants from private foundations.

The Compact administers a revolving loan fund to enable its member land trusts to buy land for open space. The Compact works with its members on their projects to acquire and manage important natural areas as protected open space. The Compact also advises its members on non-profit administration, tax, and legal questions.

As a regional organization on Cape Cod, the Compact conducts research and promotes projects to foster a regional approach to open space protection.

These projects include map-based analyses of major wildlife habitat parcels, priority pond-front parcels, and identification of priority open space parcels (meaning lands not yet developed or preserved that provide some natural resource benefit to their communities.)

From 1990-2012, local land trusts completed 977 transactions on Cape Cod, preserving 5,325 acres, roughly three-times the size of Nickerson State Park (1,700 acres). The Compact provided direct guidance, negotiation services, transactional paperwork, and fundraising assistance for the land trusts on eighty-five percent (85%) of these projects.

The Compact and its staff have received commendations and awards from MACC, the U.S. Environmental Protection Agency, the Massachusetts Audubon Society, and the Cape Cod Museum of Natural History.

The decision of the Appellate Tax Board in the present case jeopardizes the continued participation of land trusts and conservation commissions to protect and conserve natural open space. This Court should seize this opportunity to reject an interpretation of G.L. c. 59, § 5, which would deny

charitable organizations exemption from taxation for conservation of forestland and open space.

STATEMENT OF THE CASE

In the interests of brevity and judicial efficiency, MACC and the Compact adopt the Plaintiff-Appellant's statement of the case.

SUMMARY OF ARGUMENT

Conservation of open space by non-profit organizations has long been recognized as a charitable activity in Massachusetts. Municipalities, through their conservation commissions, are responsible for preserving open space and thereby protecting the public interest in conservation of natural areas established by Article 97 of the Massachusetts Constitution. Conservation commissions rely on local land trusts for critical support in this important mission; they operate as public and private counterparts on local land conservation.

Land trusts lessen the government's burden by playing an essential role in preserving open space through these partnerships with municipalities. Both conservation commissions and land trusts, therefore, are dependent on the present statutory tax benefits and the past understanding of the standards and

criteria that determine whether a land trust qualifies, from which the ATB departed so dramatically. ATB's decision jeopardizes the effective participation of land trusts and conservation commissions - sometimes working together, sometimes separately - to protect and conserve natural open space in their community.

ARGUMENT

I. CONSERVATION OF FOREST LAND AND OPEN SPACE CONSTITUTES A TRADITIONALLY CHARITABLE ACTIVITY.

This Court has stated that, in the context of local property tax exemption, the term "charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons ... by ... *lessening the burdens of government.*" New Habitat, Inc. v. Tax Collector, 451 Mass 729, 732 (2008) (citations omitted) (emphasis added). Non-profit organizations dedicated to conserving land in its natural state unquestionably lessen a governmental burden.²

² This Court has previously held that Appellant New England Forestry Foundation, Inc. ("NEFF") serves a charitable purpose by virtue of its conservation and forestry management functions, stating that "work for

A. State and Local Government Bear the Burden of Preserving Land in its Natural State as Open Space.

Government carries the responsibility for preserving open space, at both the state and local levels. Article 97 of the Massachusetts Constitution establishes the public interest in conserving natural areas.³ Preservation of natural areas directly advances the conservation interests promoted by Article 97 by providing all citizens with improved air and water quality, recreational opportunities, natural beauty, and stewardship of natural resources.⁴

the public good is [NEFF's] dominant activity." Carroll v. Commissioner of Corporations and Taxation, 343 Mass. 409, 411 (1961). Indeed, in that case NEFF was found to offer "education which serves a constitutionally and statutorily declared public interest and it is thus, in the significant general sense, charitable" Id. at 413-414.

³ Specifically, Article 97 states that "[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose." (emphasis added).

⁴ The Executive Office of Energy and Environmental Affairs ("EEA") recognizes on its website that land protection is a primary method for the agency to satisfy its mission to preserve "natural

The Conservation Commission Act, G.L. c. 40, §8C, established municipal conservation commissions "for the promotion and development of the natural resources and for the protection of watershed resources," by empowering them to, among other things, "acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas within its city or town, and it shall manage and control the same."⁵

infrastructure such as the drinking water filtration that forested lands provide so as to alleviate the need for costly state and municipal investments in man-made drinking and storm water filtration infrastructure." See <http://www.mass.gov/eea/land-use-habitats/land-conservation/land-protection/how-is-land-protected.html>.

⁵ G.L. c. 40, §8C, enacted in 1957, was the first such creation of municipal conservation commissions to protect open space for local government. They received educational, scientific, land management, and advisory roles. In 1972, conservation commissions were assigned local permitting under the state Wetlands Protection Act, G.L. c. 131, §40. After 1972, in view of the heavy new responsibilities of conservation commissions, local land trusts were needed to fill the important role of protecting open space. *Indeed, only three (3) local land trusts were established on Cape Cod between 1960 to 1972; between 1972 to 1988, fifteen (15) more were founded.* For instance, the Barnstable Land Trust, Inc., which now protects more than 1000 acres of land, was established in 1983 after the Conservation Commission called a public meeting to form it. See <http://blt.org/history-of-blt-1983-1993/>.

In furtherance of this directive, hundreds of millions of dollars have been spent by municipalities across the Commonwealth to purchase land for protection as open space. Specifically, the fifteen (15) municipalities on Cape Cod alone spent \$114 million between 1985 and 1988 to buy 4,549 acres for conservation Addendum ("Add.") 1-3; those towns also spent \$234 million between 1999-2007 to buy 4,450 acres using the Cape Cod Land Bank fund, state grants, and private fundraising Add.6.

In other words, the state Legislature, Governor, state agencies, and municipalities have recognized that open space offers significant benefits to the public, have made protection of land in its natural state a high priority, and backed that priority with public investments.⁶

B. Non-profit Organizations Are Essential
Partners for Municipalities in the Protection
of Open Space.

Non-profit organizations play a vital role in assisting cities and towns in their efforts to protect land in its natural state.

⁶ MACC and the Compact adopt and incorporate by reference the excellent arguments and facts set forth in NEFF's brief regarding the efforts, including expenditure of significant sums of money, by the state government to obtain and conserve land.

Conservation commissions and local land trusts in their respective public and private roles are engaged in the same business of land conservation. They are public-private counterparts relying on the continued concerted, considered interpretation and application of state statutory tax benefits. Conservation commissions typically regard land trusts as indispensable allies in an era when public funding has become more difficult.

For instance, in 1998 private non-profit organizations obtained 297 acres of land at 48 sites for conservation on Cape Cod, while Cape Cod towns obtained 439 acres at 17 sites; in 1999, private non-profit organizations obtained 442 acres of land at 41 sites for conservation on Cape Cod, while Cape Cod towns obtained 722 acres at 40 sites. Add.4.

In some respects this partnership is memorialized in programs formally created by law. For example, many municipalities appropriate funds under the Community Preservation Act, G.L. c. 44B ("CPA"), to purchase land for "Open Space" and "Recreation" purposes.⁷ The CPA requires that a conservation

⁷ By 2012, 155 municipalities had adopted the CPA and more than 17,000 acres of open space have been

restriction be placed on land purchased with CPA funds for these purposes.⁸ A municipality may not own both the land and the conservation restriction due to the "doctrine of merger." Therefore, the municipality typically owns the land and grants a conservation restriction to a land trust, or vice versa.⁹

The Community Preservation Coalition¹⁰ recommends that where a municipality "will own the land being acquired with CPA funds, a separate governmental

preserved using CPA funding. See the Trust for Public Land's report entitled *The Return on Investment in Parks and Open Space in Massachusetts*, page 10 (2013) available at: <http://cloud.tpl.org/pubs/benefits-ma-roi-report.pdf>.

⁸ Land purchased with CPA funds "shall be bound by a permanent restriction, recorded as a separate instrument, that meets the requirements of sections 31 to 33, inclusive, of chapter 184 limiting the use of the interest to the purpose for which it was acquired." G.L. c. 44B, §12(a).

⁹ The CPA explicitly provides that any such conservation restriction may "run to the benefit of a nonprofit organization, charitable corporation or foundation selected by the city or town with the right to enforce the restriction. The legislative body may appropriate monies from the Community Preservation Fund to pay a non-profit organization created pursuant to chapter 180 to hold, monitor and enforce the deed restriction on the property." G.L. c. 44B, §12(a).

¹⁰ The Community Preservation Coalition "helps municipalities understand, adopt and implement CPA, and advocates for CPA at the state level ... advancing smart growth and sustainable development in communities across Massachusetts." www.communitypreservation.org.

organization or qualified third party will need to hold the CR, such as a nonprofit land trust" See the Community Preservation Coalition website at www.communitypreservation.org.

Another example is afforded by the Conservation Restriction Act, G.L. c. 184, §§31-33. Section 32 requires that a conservation restriction be held by a "governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area." The Massachusetts Conservation Restriction Handbook produced by EEA makes clear, that in accord with the Act, to be qualified to hold a conservation restriction, "a charitable corporation or trust's purpose(s) must be carried out for the benefit of the public at large or for some indefinite class of persons," and satisfy the requirements of G.L. c. 184, §32.¹¹ *Massachusetts Conservation Restriction Handbook*, p.7 (1991), available at: <http://atfiles.org/files/pdf/MAconsrestrict08.pdf>

¹¹ EEA's Model Conservation Restriction set forth in the Handbook generally presumes that the grantee in a conservation restriction will be a conservation commission or land trust.

(citing In the Matter of Jerome P. Troy, 364 Mass. 15 (1973)).

Land trusts lessen the government's burden by playing this essential partnership role in preserving open space. Indeed, the Compact and similar organizations have in recent years promoted joint purchases by municipalities and land trusts. Add.8,12.¹²

ATB's decision relies on arbitrary, subjective standards in concluding that conservation of forestland does not advance the public good and lessen the burdens of government so as to be tax exempt. It is contrary to the long-held understanding and application of statutory tax benefits and exemptions under which municipalities and land trusts have operated.

¹² The Town of Brewster and the Brewster Conservation Trust have collaborated to protect 245 acres of open space since 1998, which has "protected water quality, providing substantial cost savings to the community, by avoiding town-wide sewerage needs." By contrast, the neighboring Town of Orleans must build a wastewater treatment plant, at a cost of \$150-\$200 million (approximately \$2,600 per year for the average homeowner), "to restore degraded coastal waters and provide adequate septic waste management and treatment." *The Return on Investment in Parks and Open Space in Massachusetts*, The Trust for Public Land, page 17 (2013): <http://cloud.tpl.org/pubs/benefits-ma-roi-report.pdf>.

For decades, municipalities across the Commonwealth have given local land trusts tax exemptions under G. L. c. 59, §5, Third for properties listed on a "State Tax Form 3ABC." Land trusts submit this form annually to the local assessor, as NEFF did in the present case. There has been no statewide revolt against this well-established practice; the Town of Hawley is an outlier.

To the contrary, the state Legislature has moved in recent years to encourage conservation of open space through tax breaks. The Land Conservation Incentives Act, Chapter 509 of the Acts of 2008, established a generous state income tax credit for landowners who donate qualifying conservation land to the state, a municipality, or non-profit conservation organization. That tax credit is based on 50% of the appraised fair market value of the land, up to \$50,000. See G.L. c. 62, §(6)(p), G.L. c. 63, §38AA, and 301 CMR 14.00. ATB's narrow and unreasonable ruling jeopardizes the ability of municipalities to preserve land as open space by undermining the tax exemption they and their partner land trusts rely on

to carry out their mirror-image land conservation programs.

On Cape Cod, the average size of all land trust projects and parcels obtained between 1990 and 2012 was 5.5 acres, reflecting the fact that many are less than 5 acres. Add.9. If accepted, Appellee's argument that G.L. c. 61, 61A, and 61B are the exclusive means of tax relief for conservation property would leave all parcels under 5 acres without any tax relief. The inability to obtain property tax relief would shift a much greater burden to land trusts and municipalities that would otherwise purchase such properties, and would likely act as a significant deterrent to doing so. This would be contrary to the purpose of the charitable exemption.

ATB's ruling ignores studies showing that open space preservation in Massachusetts increases property values and, therefore, municipal tax revenue. Indeed, "the value of property adjacent to either public or privately owned open space is measurably higher than that of comparable properties without this amenity. The value is even greater when the adjacent open land is permanently protected." *The*

Return on Investment in Parks and Open Space in Massachusetts, The Trust for Public Land, page 31 (2013): <http://cloud.tpl.org/pubs/benefits-ma-roi-report.pdf>.¹³

II. A CONSERVATION ORGANIZATION "OCCUPIES" LAND THROUGH ITS EFFORTS TO PRESERVE THE OPEN AND NATURAL CHARACTER OF THE PROPERTY.

ATB's decision creates a "public access" requirement lacking any statutory or legal basis. It runs counter to decided law in other states. It also runs counter to past practice in Massachusetts, where there has long been an understanding that non-profit organizations "occupy" land by preserving it as open space, and are thus exempt from property taxation under G. L. c. 59, §5, Third.¹⁴

¹³ One study highlighted in this report found that proximity to the Great Meadows National Wildlife Refuge increased the sale price of the average property by almost \$2,000; another found that proximity to open space increases the property value of an average home in Lynnfield by \$34,600, raising the town's annual property tax revenue by \$415 per house. *The Return on Investment in Parks and Open Space in Massachusetts*, The Trust for Public Land, page 31 (2013): <http://cloud.tpl.org/pubs/benefits-ma-roi-report.pdf>. Threatening the ability of municipalities and land trusts to preserve land as open space may ultimately decrease municipal tax revenue.

¹⁴ For example, in 1994 the Chief of the state Department of Revenue's Property Tax Bureau opined that "where a property is owned by a corporation whose charitable purposes include the preservation of

The New York Supreme Court ruled that a nature preserve owned by a non-profit corporation was tax exempt despite being accessible only by boat, noting that "use of property as a wildlife or nature sanctuary is a use in keeping with charitable purposes," and recognizing "that 'restricted access to and use of a wildlife sanctuary is essential lest the sanctuary fail of its purpose.'" Matter of Adirondack Land Trust v. Town of Putnam Assessor, 203 A.D. 2d 861, 862 (1994) (quoting Matter of North Manursing Wildlife Sanctuary (City of Rye), 48 N.Y.2d 135, 140 (1979)); see also Matter of Symphony Space v. Tishelman, 60 N.Y.2d 33, 39 (1983) ("restrictions placed on the use of or public access to the property do not strip the property of its tax-exempt character which requires that it be 'open to and enjoyed by the public,' as long as the restrictions imposed are not inconsistent with the public purpose for which the property is being used").

In North Manursing, 48 N.Y.2d at 140, the New York Court of Appeals declined to extend a charitable tax exemption to a wildlife sanctuary which was

natural resources, we think the simple act of maintaining the property in its natural condition would satisfy the occupancy requisite." Add.10-11.

closed to the public - access was allowed only to those who contributed to its establishment and maintenance - but made clear that it was not ruling "that a wildlife sanctuary must be completely open to the public in order to obtain a tax exemption"

Implicit in ATB's decision is the baseless and backward presumption that protection of forestland advances the public good and lessens the burdens of government only if some undefined percentage of the public can walk, run, ride, or drive through it. This, too, runs counter to the logic and wisdom of the courts considering this issue.

The New Mexico Court of Appeals has ruled that conservation of land near the Pecos River, owned by a non-profit corporation established for the purpose of preserving land in its natural state, "contributes to environmental preservation and beautification of San Miguel County and the State of New Mexico" and "provides a benefit of real worth and importance to the public," and therefore constitutes a tax-exempt charitable use under state law. Pecos River Open Spaces, Inc. v. Cnty. of San Miguel, 2013-NMCA-029, 2013 WL 309847 (January 11, 2013).

The Michigan Court of Appeals ruled that conservation land was exempt from taxation even where public access was prohibited. Kalamazoo Nature Center v. Cooper Township, 104 Mich. App. 657, 665 (1981) rejected a ruling of that state's Tax Tribunal "that the word 'occupy' requires 'actual physical use of such property by the claimant which is frequent.'" That case involved 31 acres of protected open space; public access was prohibited, but summer and fall tours allowed visitors to the edge of the parcel to observe land in its natural state.

The Michigan Court of Appeals ruled that "in terms of contemporary environmentalism, the best 'occupancy' may be visual, educational, or other demonstrative type occupancy." Id. at 666. That Court further ruled that the Tax Tribunal's " 'physical use' test is inconsistent with the sound land management policies demanded by contemporary environmentalism," because requiring public access would increase the likelihood of polluting the land being protected in the first place. Id. at 666-667.¹⁵

¹⁵ In a footnote of a subsequent ruling, the Michigan Supreme Court questioned the validity of Kalamazoo Nature Center in light of its decision denying a property tax exemption for houses that a non-profit

In the present case, there is no statutory support for ATB's "public access" requirement; G.L. c. 59, §5, Third, provides simply that real estate owned by a "charitable organization and occupied by it or its officers for the purposes for which it is organized" is exempt from taxation. Regardless, *public access is allowed to the Stetson-Phelps Pine Ridge Farm at issue here.*¹⁶

corporation owned and leased to disabled and low-income individuals. Liberty Hill Housing Corp. v. City of Livonia, 480 Mich. 44, 54 n.10 (2008). The dissent in Liberty Hill argued that "occupancy" is better defined synonymously with "use" than "residency" in the context of the Michigan tax statute because "[n]ot all property that is eligible for exemption is susceptible to being resided in." Id. at 70. This Court effectively rejected the Michigan Supreme Court majority's narrow interpretation of the word "occupancy" as requiring physical residency in Bridgewater State University Foundation v. Board of Assessors of Bridgewater, 463 Mass. 154 (2012).

¹⁶ The record here is devoid of evidence that the Stetson-Phelps Pine Ridge Farm has any physical obstructions or signage to discourage the public from entering; rather, the record establishes that the public is welcome to enter, and NEFF's website lists the property as open to the public and even provides driving directions. App. 413-417, 421-429, 446; <http://www.newenglandforestry.org/find-a-forest.html>. Contrast these facts with those of Brookline Conservation Land Trust v. Assessors of Brookline, Mass, ATB Findings of Fact and Reports 2008-679 (the subject property was surrounded by walls, fences, and chains, and "private" and "no trespassing" signs were posted along its boundary) and Forges Farm, Inc. v. Assessors of Plymouth, Mass. ATB Findings of Fact and ATB 2013-93 Reports 2007-1197 (members of the public

Furthermore, the facts relied upon by ATB as support for its finding that NEFF fails to satisfy this public access requirement would render virtually all conservation land lacking in public access.¹⁷ It is common for municipalities and land trusts to allow public access to properties under their care and control without promoting it.¹⁸

Not all governmentally-owned conservation land is open to the public for unfettered access and use.

could access the land only by requesting permission, there was no notice of that, and there was no attempt to inform the public that the property was accessible).

¹⁷ ATB found that a "gate across an access along Stetson Road prohibiting vehicular access, coupled with the lack of a paved driveway ... contributed to the subject property's perceived inaccessibility." It is common for trails or paths on conservation land to have gates, boulders, or other obstructions preventing vehicular access; prohibition of motorized vehicles is a standard restriction for conservation land intended for passive recreational uses like hiking, camping, fishing, or biking. Furthermore, many conservation areas have unpaved access and parking for visitors; dirt roads and lots decrease stormwater runoff and are more environmentally friendly than pavement. Requiring paved roads and parking lots, or access for motorized vehicles, would offset many of the environmental benefits of preserving open space.

¹⁸ This practice has been endorsed in other states. The Supreme Court of Ohio has ruled that a non-profit corporation's restoration of land to its natural state for continued preservation, where public access was allowed but not advertised, was in furtherance of its charitable purpose of preservation and thus qualified for a tax exemption. Little Miami, Inc. v. Kinney, 68 Ohio St. 2d 102, 103 (1981).

For instance, the Massachusetts Department of Conservation and Recreation restricts access to, and recreational use of, state-owned lands in the Quabbin, Ware, Sudbury, and Wachusett watersheds to achieve its primary purpose of protecting water supplies. Those lands serve important resource protection roles, just like land trust lands. If state and local government are satisfied that these protected open spaces are providing a service to the public, non-profit organizations ought not be held to a higher standard.¹⁹ Many conservation parcels on Cape Cod consist partly or entirely of sensitive natural resources like wetlands, dunes, or wildlife habitat that simply cannot support or withstand the

¹⁹ On many parts of Cape Cod, conservation land owned by a municipality and that owned by a non-profit land trust is largely indistinguishable. Some are open to public use, some are not. In many places, they are woven together to make a whole greater than the sum of its parts. The Crowes Pasture and Quivett Estuary conservation area, located at the border of Brewster and Dennis, illustrates this. The following entities own conservation land or hold conservation restrictions protecting open space in this area: the Compact, Town of Brewster, Town of Dennis, Massachusetts Department of Conservation and Recreation, US Fish and Wildlife Service, Brewster Conservation Trust, Dennis Conservation Trust, the Cape Cod Museum of Natural History, and several private landowners who donated Conservation Restrictions. Add.12.

extensive kind of "public access" that the ATB appears to require.²⁰

The "public access" requirement introduced by the ATB often would be contrary to the goals of charitable organizations dedicated to the protection and preservation of natural resources.

We need wilderness whether or not we ever set foot in it. We need a refuge even though we may never need to go there. I may never in my life get to Alaska, for example, but I am grateful that it's there. We need the possibility of escape as surely as we need hope.

Edward Abbey, *Desert Solitaire: A Season in the Wilderness* 129 (1968).

²⁰ Their fragility is often the very reason they are obtained for conservation. Priority parcels of open space needing protection are identified on Cape Cod using a series of planning tools, including the Compact's 2003 Wildlife Conservation Project results and 2003 Priority Ponds Project results (see <http://www.thecompact.net/ccwconsproject.htm> and <http://www.thecompact.net/CCPriorityPonds ExecSummary .htm>).

CONCLUSION

For the reasons stated herein, the decision of
the Appellate Tax Board should be reversed.

Respectfully Submitted,

Massachusetts Association of
Conservation Commissions, Inc.

and

The Compact of Cape Cod
Conservation Trusts, Inc.

By Their Attorneys

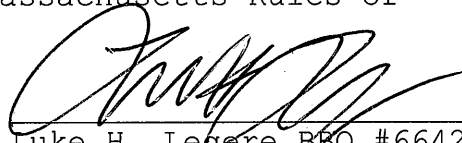


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RULE 16(k) CERTIFICATION

I, Luke H. Legere, counsel for Massachusetts Association of Conservation Commissions, Inc. and the Compact of Cape Cod Conservation Trusts, Inc., hereby certify that this Brief complies with the Rules of Court that relate to the filing of briefs, including, but not limited to, Rules 16, 17, 19, and 20 of the Massachusetts Rules of Appellate Procedure.

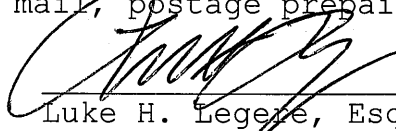


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CERTIFICATE OF SERVICE

I, Luke H. Legere, certify that on December 20, 2013, a copy of the foregoing document was served upon counsel for all parties, listed below, by first-class mail, postage prepaid.



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