COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk, ss. SJC-11432

New England Forestry Foundation, Inc.

Appellant

v.

Board of Assessors of the Town of Hawley

Appellee

_____

On appeal from a final decision of the Appellate Tax Board, No. F306063

_____

AMICUS BRIEF

ON BEHALF OF

MASSACHUSETTS LAND TRUST COALITION, INC.

And

LAND TRUST ALLIANCE, INC.

_____

IN SUPPORT OF APPELLANT AND

AGAINST DECISION OF APPELLATE TAX BOARD

_____

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STATEMENT OF THE ISSUES

The first three issues are identical to those proposed in NEFF's Brief. The fourth issue is one that the amici propose.

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

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

3. Whether conservation land is ineligible for tax exemption pursuant to G. L. c. 59, § 5, Third, because of the availability of tax reduction pursuant to G. L. c. 61, 61A, or 61B.

4. To what extent public access is required on a conservation property in order to qualify for property tax exemption pursuant to G. L. c. 59, §5, Third.

INTERESTS OF THE AMICI

The Massachusetts Land Trust Coalition, Inc. (MLTC) is a statewide charitable corporation that supports Massachusetts land trusts[1] and similar conservation organizations. MLTC organized as a program of The Trustees of Reservations, Inc. in 1998 and was formally incorporated in 2010. MLTC serves as an educational resource for the increasing number of land trusts throughout Massachusetts, and currently

has 130 member organizations from all geographic regions of the Commonwealth.[2] The aggregate number of individual members of MLTC's member organizations is approximately 206,000. Most MLTC member organizations are all-volunteer, while others have numerous employees. In addition to its formal members, MLTC also works with 19 partner organizations, including government agencies such as the Massachusetts Department of Fish & Game, the Massachusetts Department of Conservation and Recreation and the Massachusetts Department of Agricultural Resources, and receives charitable contributions from dozens of individuals, foundations, and businesses.

MLTC itself does not own any real property. However, as of 2010 its member organizations and other Massachusetts land trusts collectively held approximately 130,000 acres of conservation land in fee simple.[3] Some Massachusetts land trusts have very modest land holdings of one or two properties. Others

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[1] To be clear, despite the name, most land trusts are formed as charitable corporations, not trusts.

[2] There are believed to be an additional 20 or so land conservation organizations in Massachusetts that are not members of MLTC.

[3] Statistics on number of acres conserved statewide and nationally, as well as the number of land trusts nationally are taken from the Land Trust Alliance's *2010 National Land Trust Census Report*, http://www.landtrustalliance.org/land-trusts/land-trust-census/census.

have dozens, with The Trustees of Reservations owning 110 reservations. The Trustees of Reservations is also believed to be one of the very first land trusts in the nation. Most of MLTC's member organizations apply for and receive property tax exemption from the various municipalities in which they own land.

The Land Trust Alliance, Inc. (Alliance) is a Massachusetts nonprofit corporation based in Washington, D.C. and operating several regional offices throughout the United States. The Alliance was first formed in 1982 as the number of land trusts was expanding nationwide. There were approximately 53 land trusts nationally in 1950, 308 in 1975, 887 Alliance members in 1990, and 1,263 in 2,000.[4] Notably, the Alliance was and still is incorporated in Massachusetts, and its very first office was in Boston, reflecting Massachusetts' leadership in the land conservation world.

The Alliance supports land trusts and conservation organizations nationwide. Some land trusts have a national or international scope, such as The Nature Conservancy. Others focus on protecting

[4] Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 Nat. Resources J. 483 (2004).

land in a particular state, watershed, or municipality. There are currently 1,699 state and local land trusts in the U.S., as well as 24 national land trusts. State and local land trusts have a median budget of $62,000. Together, national, state, and local land trusts own 7.6 million acres of land in fee throughout the United States. With a current staff of 56, the Alliance represents the collective interests of nearly 1 million individual members or supporters of the Alliance's member organizations.

One of the programs the Alliance undertakes is *Land Conservation Case Law Summaries*, a periodically updated compendium of case law from around the country that pertains to land conservation issues. This brief is based on part from the research compiled through this program.

The flourishing of land trusts throughout Massachusetts and the nation in recent decades is a public policy success story. The nonprofit conservation community's willingness to take on long-term responsibilities for the cost of managing conservation land, funded primarily by charitable donations and governmental grants, is critical to this success. More so than perhaps any other kind of

charity, land trusts' primary activity is acquiring and managing land, and therefore property tax exemption is especially integral to their financial sustainability. The loss of exemption, resulting in a potential tax burden of tens of thousands of dollars for some land trusts, would be a crippling blow to the financial model of many conservation organizations, large and small.

In turn, public access on its conservation lands is an issue that every land trust considers, taking into account the particular conservation values of each property, its organizational purposes, and its financial resources. Protecting important natural areas or wildlife habitats was identified as the single most common conservation priority among land trusts nationwide.[5] Imposing a categorical and strict public access requirement as the admission price to property tax exemption would jeopardize land trusts' ability to properly steward their lands and finances.

Amici submit this brief in order to present a summary of relevant common law in other jurisdictions. After a lengthy period in which there was little case law on the question of whether land conservation is

charitable, a recent uptick in litigation may be at hand. Pecos River Open Spaces, Inc. v. County of San Miguel, No. 30,865, slip op., 2013-NMCA-___ (N.M. Ct. App. Jan. 11, 2013), decided earlier this year, was the first published case on point since the mid 1990's. Furthermore, there is an active case in Maine addressing whether land conservation is charitable for property tax exemption purposes, already decided in a land trust's favor at the trial court level. Francis Small Heritage Trust, Inc. v. Town of Limington, No. AP-12-41 (York Cty. Super. Ct. May 30, 2013). The Town of Limington has appealed to the Maine Supreme Judicial Court.[6] Thus, the Massachusetts Supreme Judicial Court is in a prime position to address the instant matter and perhaps establish persuasive authority for Maine and other state courts that take up the issue later.

STATEMENT OF THE CASE

In the interests of brevity, MLTC and the Alliance adopt Appellant NEFF's statement of the case.

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[5] *2010 National Land Trust Census Report* at 11.
[6] See http://www.bergenparkinson.com/index.php/news/73-will-land-trusts.

SUMMARY OF ARGUMENT

Modern case law in other jurisdictions addressing whether land conservation is a charitable purpose overwhelmingly supports NEFF's position. Massachusetts charitable trust law and charitable solicitation statute also corroborate the notion that land conservation is a charitable purpose. Meanwhile, although federal law and the Internal Revenue Service recognize that public access is not an essential ingredient of public benefit, state-level jurisprudence concerning whether and to what degree public access is required to confer public benefit is by and large unsettled, as published opinions on this question have been vague, scattered, and inconclusive. We urge this Court to adopt certain guiding principles to distinguish when the conservation of a particular parcel of open space land, with or without public access, confers public benefit sufficient to support a property tax exemption.

ARGUMENT

I. Land Conservation Is a Charitable Purpose

(a) Modern Case Law in Other Jurisdictions Invariably Supports the Principle that Land Conservation is Charitable

Case law from across the nation over the past few decades overwhelmingly supports the principle that land conservation is a charitable purpose. Since 1979, appellate courts in five states have published opinions on the specific question of whether land conservation is a charitable purpose in a property tax exemption context. All five of these courts have expressly held in the affirmative.[7] A sixth state court, while rejecting exemption based on the

[7] In reverse chronological order: Pecos River Open Spaces, Inc. v. County of San Miguel, No. 30,865, slip op., 2013-NMCA-___ (N.M. Ct. App. Jan. 11, 2013); Turner v. Trust for Public Land, 445 So. 2d 1124 (Ct. App. Fla. 1984); Little Miami, Inc. v. Kinney, 428 N.E. 2d 859 (Ohio 1981)(pursuant to Little Miami, see Trust for Public Land v. Board of Tax Appeals State of Ohio, 1982 Ohio App. LEXIS 12628 (Ohio App. 1982); Santa Catalina Island Conservancy v. County of Los Angeles, 126 Cal. App. 3d 221 (Cal. App. 1981); Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y.2d 476; 392 N.E.2d 876 (N.Y. 1979); North Manursing Wildlife Sanctuary, Inc. v. City of Rye, 48 N.Y.2d 135 (N.Y. 1979)(pursuant to Mohonk Trust and North Manursing Wildlife Sanctuary, Inc., see also Scenic Hudson Land Trust, Inc. v. Sarvis et al., 234 A.D.2d 301 (N.Y. App. Div. 1996) and Adirondack Land Trust v. Town of Putnam Assessor, 203 A.D.2d 861 (N.Y. App. Div. 1994).

particular facts and circumstances presented, implied that land conservation is a charitable purpose.[8]

At present, two states enjoy the benefit of high court holdings (Ohio and New York) on the question of land conservation as charitable, and this Court will be only the third state high court in the nation to weigh in on the issue. The New York Court of Appeals addressed the question in 1979 in a pair of landmark opinions separated by just a few months, Mohonk Trust v. Board of Assessors of Town of Gardiner, *47 N.Y.2d 476; 392 N.E.2d 876* (N.Y. 1979), and North Manursing Wildlife Sanctuary, Inc. v. City of Rye, 48 N.Y.2d 135 (N.Y. 1979). First, in Mohonk Trust, the Court held that environmental and conservation purposes are charitable within the meaning of New York's property tax exemption statute. In North Manursing, the Court affirmed the holding of Mohonk Trust, but remanded to the intermediate appellate court for a determination of whether the sanctuary organization's primary purpose was to benefit the nearby residents and not the general public. Because it also addresses issues of public access, we will discuss North Manursing in

[8] Trustees of Vermont Wild Land Foundation v. Town of Pittsford, 407 A.2d 174 (Vt. 1979). This case will be discussed in Section II, as it deals primarily with public access issues.

more detail in the next section. In Little Miami, Inc. v. Kinney, 428 N.E. 2d 859 (Ohio 1981), the Ohio Supreme Court held in a brief opinion that land conservation is a charitable purpose, and that a land trust's efforts to restore an island to its natural state rendered the property tax-exempt.

In addition to those two high court cases, five other states have adjudicated this question at the intermediate appellate level. Most recently, a New Mexico court, in Pecos River Open Spaces, Inc., came out squarely in favor of conservation as a charitable purpose, declaring, "There can be little question that conservation of land in its natural and undeveloped state generally benefits the public in the context of environmental preservation and beautification of the State of New Mexico." Id. at ¶ 11. The analysis in Pecos River hinged on the existence of a state statute declaring land conservation to be a public policy – precisely the argument put forth by NEFF in the instant case.

The remaining handful of appellate cases are particularly noteworthy because, in the course of determining that land conservation is a charitable use, these opinions have made short shrift of two

arguments proffered by the Appellate Tax Board (ATB) in the instant case. For example, in Turner v. Trust for Public Land, 445 So. 2d 1124 (Ct. App. Fla. 1984), a Florida appellate court rejected the contentions that conservation is a non-use or non-occupancy. The Florida court held that managing a property for conservation by leaving it in its natural state can serve the greatest good, and that "constant or vigorous activity" is not required. Id. at 1126. See also, Trust For Public Land v. Board of Tax Appeals State of Ohio, 1982 Ohio App. LEXIS 12628 (Ohio App. 1982), interpreting Little Miami, Inc. as holding that preservation of land in its "natural state" constitutes use for a charitable purpose.

Furthermore, in Santa Catalina Island Conservancy v. County of Los Angeles, 126 Cal. App. 3d 221 (Cal. App. 1981), a California court, in the course of recognizing land conservation as a charitable purpose, also dispensed with an argument made by the Town and accepted by the ATB in the instant case: that a state's tax reduction programs for forest and open space land pre-empt the exemption statute. As the California court wrote:

> Section 8 of article XIII not only permits, but directly contemplates, the use of open space lands in commercially profitable ventures. In contrast, subdivision (b) of section 4 requires that no profit inure to the benefit of any shareholder or private person. Open space lands dedicated to charitable purposes may not be farmed, harvested, mined or quarried for purely commercial purposes. Thus each section serves a distinct public purpose.

Id. at 241. Similarly, the recent trial court decision in Francis Small Heritage Trust, Inc. also rejected the pre-emption argument in a Maine law context. Open space, forest, and agricultural reduced taxation schemes co-exist with exemption statutes in many other states.[9] We urge this Court to reject the ATB's conclusion that G.L. c. 61, 61a and 61b pre-empt G.L. c. 59 §5, Clause Third.

(b) Older Case Law Is Generally Unreliable Because It Predates Conservation Laws and Programs Enacted In the Modern Environmental Era

Case law prior to 1979 addressing whether land conservation is a charitable purpose is sparse, likely reflecting the fact that there simply were not yet

[9] See, e.g., Maine (36 M.R.S. §§ 571- 583 and 36 M.R.S. § 652), New Hampshire (RSA 79-A and RSA 72:23 V), Washington (Chapter 84.34 RCW and § 84.36.260 RCW) and Vermont (32 V.S.A. Ch. 124 and 32 V.S.A. § 3802(4)).

many land trusts in existence. Furthermore, perhaps because these cases largely preceded the maturing of the modern environmental movement and the science of ecology, courts were not as receptive to recognizing the charitable nature of conservation purposes other than public recreation or scenic beauty, such as protecting wildlife habitat, water quality, and floodplains.[10]

The flourishing of the environmental movement in the late 1960's and 1970's engendered a constellation of federal and state laws and funding programs promoting the protection of open space.[11] At the federal level, landmark laws such as the Clean Water Act, the Clean Air Act, and the National Environmental Policy Act all came about in this fertile legislative period. In Massachusetts, NEFF's briefs enumerate a host of statewide land protection laws and funding

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[10] To be sure, not every court prior to the 1970's was hostile to land conservation. In fact, a notable exception is this Court, which held in Carroll v. Commissioner of Corporations and Taxation, 343 Mass. 409 (1961), that NEFF's purposes were charitable. Thus, for this Court to recognize land conservation as a charitable purpose is simply a matter of following its own precedent in Carroll.

[11] For an overview of the environmental movement in the United States, with a focus on its blossoming in the 1960's and 1970's, see Erik W. Johnson, *Where Do Movements Matter? The United States Environmental Movement and Congressional Hearings and Laws, 1961-1990*, online at http://www.unc.edu/search-unc/.

programs, and we will not retread this ground, except to comment that the vast majority of these laws and programs came into existence after the 1960's. As of 2013, virtually every jurisdiction, including the Commonwealth and the federal government, has declared land conservation to be a public policy and has devoted considerable resources to preserving open space.

Not coincidentally, the passage of numerous conservation laws and programs paralleled the gradual emergence of ecology as a prominent branch of the natural sciences. Indeed, ecology only began to gain widespread recognition in the 1960's.[12] Whereas the number of professional conservation scientists was miniscule before the 1960's, today there are an estimated 18,460 in the United States.[13] As the number of ecologists has grown, so has the sum total of our ecological knowledge.

Even if we did possess a deeper understanding of ecosystems prior to the 1960's, losing open space land to development was simply less of a problem in this

[12] Robert P. McIntosh, *The Background of Ecology: Concept and Theory*, Cambridge University Press (1985) at 1.
[13] United States Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, at http://data.bls.gov/oes/datatype.do.

period. Both the pace and the amount of land being developed in the 1960's and earlier was much more modest compared to the 1970's through the present. Between 1971 and 2005, about 8% of Massachusetts' total land area (roughly 400,000 acres) was developed.[14] This 35-year figure is rather arresting when one realizes that it constitutes over half of the total amount of development in the entire history of the Commonwealth up to 1971. So while in 1971, only 15% of the Commonwealth's total land area was developed, by 2005 this figure had increased to 23%, with an even greater percentage loss of ecologically healthy open space.[15] Figures are similarly alarming at the national level.[16]

Given the vastly different legislative, scientific, and land development context in which conservation-related property tax exemption cases arose in the 1960's, it is not surprising to see court opinions that are contrary to the more modern

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[14] Massachusetts Audubon Society, *Losing Ground: Beyond the Footprint* (Fourth Edition)(2009) at 14.
[15] *Id.* at pp. 12-16.
[16] About 43 million acres of land were newly developed in the United States between 1982 and 2010, bringing the total amount of developed land to about 113 million acres. U.S. Department of Agriculture, *Summary Report: 2010 National Resources Inventory*, p. 8. Online at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1167354.pdf

jurisprudence. One example of an outdated case is Nature Conservancy of New Hampshire v. Nelson et al., 221 A.2d 776 (N.H. 1966), wherein the New Hampshire Supreme Court held that a parcel of undeveloped lakeshore land with only water access did not qualify for property tax exemption. The court did not elaborate on the rationale behind its holding, but it appears that its major qualms were about the paucity of public use of the property. For this reason, the case is best read as a public access case and not as a charitable case, and will be further discussed in Section II. For our purposes here, however, it is enough to note that the court (and perhaps even the parties) apparently did not consider the possibility of any public benefit other than public access. The opinion mentions nary a word about habitat protection, water quality preservation, or similar ecological concepts. Presumably, like most states, the portfolio of land conservation laws and programs in New Hampshire in 1966 was miniscule compared to the present day.

Meanwhile, in Holbrook Island Sanctuary v. The Inhabitants of the Town of Brooksville, 161 Me. 476

(1965), the Maine Supreme Judicial Court ruled that a wildlife sanctuary was not exempt from property taxation because it was "nothing in substance more than a game preserve" and the purpose was to benefit wild animals, not people. Likewise, in Hawk Mountain Sanctuary Ass'n v. Board for the Assessment and Revision of Taxes of Berks County, 145 A.2d 723, 188 Pa.Super. 54 (Pa.Super. 1958), a Pennsylvania court held that land managed to protect wild hawks from hunting was not used for charitable purposes. Once again, these opinions appear rather hoary in light of the sea change in ecological consciousness since the 1950's and 1960's. At least one commentator has noted that a court with a "modern awareness of the public benefits of ecosystem preservation" would decide these questions differently.[17]

Nevertheless, the occasional municipality will rely on these older cases as justification for denying an exemption application by a land trust, especially as municipalities seek new sources of revenue to balance their budgets. In Maine, for example, the Town of Limington cited Holbrook Island Sanctuary in

[17] Kirk G. Siegel, *Weighing the Costs and Benefits of Property Tax Exemption: Nonprofit Organization Land Conservation*, Maine Law Review, Volume 49, Number 2 (1997), p.416.

its brief to the trial court in the Francis Small Heritage Trust case, and presumably will do so on appeal to the Maine Supreme Court. Although this Court speaks only for the Commonwealth, a ruling that explicitly or implicitly rejects these outdated approaches would be instrumental in moving common law into the modern environmental era nationally.

(c) Charitable Trust Law Recognizes Land Conservation as a Charitable Purpose

Cases deciding whether a particular purpose is charitable for property tax exemption purposes have often cited to trust law.[18] In this regard, the language of the Restatement of Trusts is particularly instructive. The 1959 Restatement (Second) of Trusts recognized "preserving the beauties of nature and the promotion of the aesthetic enjoyment of the community" as a subset of "promotion of other purposes beneficial to the community." Restatement (Second) of Trusts, Section 374 comment f, (1959). This formulation appears to focus on scenic views and does not reference the panoply of other potential public

[18] In fact, Jackson v. Phillips, 14 Allen 539, 556 (1867), the original source from which virtually all interpretations of

benefits flowing from conservation. However, the 2003 edition of the Restatement further provides that "a trust is charitable if its purpose is to promote… environmental quality." Restatement (Third) of Trusts (2003), Section 28, Comment on Clause (f). Moving well beyond scenic views, the Restatement (Third) acknowledges a much broader range of public benefit from environmental protection.

Massachusetts' newly adopted Uniform Trust Code is entirely consistent with the Restatement, as its definition of charitable is virtually identical. G.L. c. 203E, § 405(a) provides: "A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, *governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community*." (emphasis added). An example of a Massachusetts charitable trust formed for land conservation purposes is the Bourne Conservation Trust, dedicated to protecting land in the Town of Bourne, on Cape Cod.[19]

"charitable" in a property tax exemption context flow, was itself a charitable trust case, not a property tax exemption case.

[19] See, e.g., http://www.bourneconservationtrust.org/.

(d) Massachusetts' Charitable Solicitation Statute Treats Land Conservation as a Charitable Purpose

In addition to the bevy of Massachusetts statutes and programs supporting the notion that land conservation relieves a governmental burden and therefore is charitable, Massachusetts' charitable solicitation statute, M.G.L. c. 68, further bolsters the case. The definition of "charitable" set forth in this statute is: "including but not limited to benevolent, educational, philanthropic, humane, patriotic, scientific, literary, religious, eleemosynary, health, safety or welfare-related, or *in furtherance of governmental or civic objectives, and benefiting the general public or some indefinite class thereof*." G.L. c. 68 § 18 (emphasis added). This definition, especially the italicized portion, is quite similar to the definition adopted by this Court in New Habitat, Inc. v. Tax Collector, 451 Mass 729,732 (2008) and an earlier line of property tax exemption cases dating back to Jackson v. Phillips, 14 Allen 539, 556 (1867). Thus, if an organization is treated as charitable for the purposes of G.L. c. 68, it stands to reason that it should also be charitable within the meaning of Clause Third.

Along these lines, the Commonwealth's administration of G.L. c. 68 is instructive. Charities regulated by this statute are required to file an annual Form PC with the Massachusetts Office of the Attorney General. On the Form PC and its instructions, "Environmental Quality/Protection/Beautification" is listed as a "Type of organization" that must file, and "Land Conservation" is expressly listed as one of 60 different charitable purposes. Because land conservation is recognized as a charitable purpose under M.G.L. c. 68, virtually all Massachusetts land trusts file the annual Form PC and are treated as charitable organizations. Likewise, land trusts around the country are registered as charitable organizations for the purposes of their respective state charitable solicitation acts. It does not seem equitable that land conservation organizations should be subject to all of the statutory and regulatory burdens of a charity, but are not permitted to avail themselves of the attendant benefits.

II. The Role of Public Access In Determining Public Benefit

(a) The Internal Revenue Service and Federal Conservation Easement Tax Law Recognize That Public Access is Not Essential to Public Benefit

In administering sections 501(c)(3) and 170(h) of the Internal Revenue Code, the Internal Revenue Service (the "Service") has had occasion to clarify the distinction between public benefit and public access. The Service's rulings and regulations pertaining to these sections are useful in guiding municipalities and courts on property tax exemption matters. First, with respect to § 501(c)(3), in Revenue Ruling 76-204, 1976-1 C.B. 152, the Service determined that an organization that acquired and managed ecologically significant land qualifies as a charitable organization under section 501(c)(3), even while acknowledging that the land would not be open to the general public. As the Service wrote:

> The benefit to the public from environmental conservation derives not merely from the current educational, scientific, and recreational uses that are made of our natural resources, but from their preservation as well. Only through

> preservation will future generations be guaranteed the ability to enjoy the natural environment.

The Service's analysis is especially persuasive in light of the fact that this Court has stated that "the requirements for exemption under I.R.C. § 501 (c) (3) are virtually identical to those under G. L. c. 59, § 5, Third." Harvard Community Health Plan, Inc. v. Assessors of Cambridge, 384 Mass. 536, 538 n.3 (1981).

Similarly, federal conservation easement tax law also supports the proposition that public access is not an essential element of public benefit. I.R.C. § 170(h)(4)(A) sets forth four different purposes by which a conservation easement[20] can provide public benefit and therefore be eligible for a federal income tax deduction: (i) outdoor recreation, (ii) wildlife habitat, (iii) open space (scenic or otherwise providing a public benefit), and (iv) historic preservation. A conservation easement's satisfaction of any one of these four purposes will render it eligible for a deduction. Thus, public access is but one of four ways in which a conservation easement can provide public benefit, and the Congress has supported

[20] In Massachusetts, a conservation easement is called a "conservation restriction." They are the same thing, and the two terms are used interchangeably throughout this brief.

the deductibility of easements that do not guarantee any public access.

The regulations accompanying section 170(h) further elaborate on the concept that public benefit is distinct from public access. In discussing eligibility for easements that protect wildlife habitat, the regulations provide: "Limitations on public access to property that is the subject of a donation… shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation… would not cause the donation to be nondeductible." Treas. Reg. § 1.170A-14(d)(3)(iii). In addition, in the course of addressing easements that protect scenic views, the regulations provide that "To satisfy the requirement of scenic enjoyment by the general public, visual (rather than physical) access to or across the property by the general public is sufficient." Treas. Reg. § 1.170A-14(d)(4)(iii). Based on these principles of public benefit, the Service has supported granting millions, if not billions, of dollars in federal income tax benefits to donors of

conservation easements where no public access is allowed.

The federal regulations concerning public benefit for conservation easements take on added importance in Massachusetts, because the Commonwealth has adopted these regulations outright for the purposes of determining whether a conservation restriction should be approved by the Commonwealth. The official guide issued by the relevant Massachusetts agency that reviews and approves all conservation restrictions in the Commonwealth states that "The Secretary will deem it sufficient evidence of "public interest" if the applicant can show that the restriction meets *any* of the tests for deductibility under the Internal Revenue Code Section 170 (h) and the Regulations promulgated thereunder…" (emphasis added).[21] Moreover, this handbook notes that "Public access to conservation restricted lands is strongly encouraged by the Secretary but is not required if other public benefits exist."[22] And G.L. C. 184, s. 31-33, the enabling act for conservation restrictions in Massachusetts, does not contain any public access requirement. Hence,

[21] *Massachusetts Conservation Restriction Handbook*, Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Division of Conservation Service (1992) at 7.

just like at the federal level, the Commonwealth recognizes that, in a land conservation context, public access is not an essential ingredient of public benefit.

(b) Case Law on the Importance of Public Access in Property Tax Exemption Cases is Vague, Scattered, and Inconsistent

Unlike the overwhelmingly clear and consistent case law affirming that land conservation provides public benefit and therefore is a charitable purpose, the case law on the importance of public access is vague, scattered, and inconsistent. In Pecos River Open Spaces, Inc. v. County of San Miguel, No. 30,865, slip op., 2013-NMCA-___ (N.M. Ct. App. Jan. 11, 2013), the New Mexico appellate court opinion did not state whether public access was permitted on the protected property, and the holding does not mention public access one way or the other. Similarly, in Little Miami, Inc. v. Kinney, 428 N.E. 2d 859 (Ohio 1981), the opinion did not reveal whether public access was permitted. In North Manursing Wildlife Sanctuary, Inc. v. City of Rye, 48 N.Y.2d 135 (N.Y. 1979), the

[22] Id. at 7.

court stated that although an absolute prohibition on public access is a bar to exemption, reasonable access restrictions were entirely consistent with exemption. Meanwhile, Nature Conservancy of New Hampshire v. Nelson et al., 221 A.2d 776 (N.H. 1966), is a particularly puzzling case. The New Hampshire Supreme Court recognized that public access was permitted on a preserve property, and that The Nature Conservancy had taken a number of steps to promote public use, including establishing signs and building trails. The opinion further notes that public access had in fact increased during the period of The Nature Conservancy's ownership. Nevertheless, the court concluded, without significant substantive analysis, that the public did not use the property enough to justify property tax exemption. Similarly, in Trustees of Vermont Wild Land Foundation v. Town of Pittsford, 407 A.2d 174 (Vt. 1979), the Vermont Supreme Court held that an undeveloped parcel managed primarily for scientific and educational purposes, and secondarily for wildlife habitat purposes, did not qualify for property tax exemption because the foundation restricted scientific and educational access by requiring a detailed written application,

and therefore the public at large did not benefit. Like Nature Conservancy of New Hampshire v. Nelson, this opinion did not entertain the question of whether the public at large benefits from wildlife habitat protection even in the absence of public access.

In contrast, an intermediate appellate court in Kalamazoo Nature Center v. Cooper Township, 104 Mich. App. 657, 665-666 (1981), held that even though direct public access was prohibited, an undeveloped parcel did qualify for exemption because the public was able to walk to the edge of the parcel and view it as part of the nature center's organized tours. As this court further explained:

> While we agree with the Tax Tribunal that the granting of a tax exemption requires that the lands be used for the purposes for which the exemption is sought and further agree that in most instances physical use of the property is demanded, we cannot agree that in the case before us physical use is a condition precedent to exemption. In terms of contemporary environmentalism, the best "occupancy" may be visual, educational, or other demonstrative type occupancy. Nothing in the statute requires physical use.

Id. at 666. Although the Michigan Supreme Court later held, in a property tax exemption case that did not involve land conservation, that occupancy did indeed

have to be physical[23], that later case did not elaborate upon whether and to what degree public access would be required. Finally, in Francis Small Heritage Trust, Inc. v. Town of Limington, No. AP-12-41 (York Cty. Super. Ct. May 30, 2013), the court wrote that while public access will help to show public benefit, it is only required in "appropriate cases." Id. at p. 12.

As these cases evince, the common law is scattered and unsettled on whether and to what degree public access is required in order for a conservation parcel to qualify for property tax exemption. Some cases do not mention public access at all, others do so in passing, and a few have hinted that public access should not be required at all.

(c) Suggested Principles Underlying A Court's Analysis of the Role of Public Access in Determining Public Benefit

In light of the inconsistent rulings discussed above, what is requested of this Court is clear, nuanced analysis explaining that public access is merely one component in determining public benefit.

[23] Liberty Hill Housing Corp. v. City of Livonia, 480 Mich. 44

Amici do not believe the question can be reduced to simple statements or formulas. Evaluating the existence and degree of public benefit for any property should always entail a fact-based, case-by-case analysis. Thus, amici urge the Court to adopt certain principles to guide Massachusetts land trusts and municipalities (as well as land trusts and municipalities in other states), and submit the following principles for the Court's consideration.

(i) Public access is a factor in determining public benefit, but it is not dispositive.

As stated above, municipalities and courts must undertake a case-by-case analysis to ensure public benefit from the conservation of any particular parcel. Public access is one of many factors to consider in this analysis, but it is not dispositive. Based on guidance from Congress and the Internal Revenue Service in the I.R.C. § 170(h) context, suggested factors other than public access to be considered in determining public benefit are: (a) the existence of scenic views from public vantage points such as roads and water bodies, (b) the existence of

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(Mich. 2008).

significant wildlife habitat or natural plant communities, (c) the existence of frontage on water bodies, (d) the existence of any historic or cultural attributes, (e) the advancement of articulated government programs and purposes, and (f) the land trust's actions in maintaining these conservation values (such as preparing and implementing a management plan). As with any facts and circumstances determination, there will of course be some close calls, and litigation will no doubt continue to arise from time to time. Nevertheless, clear guidance from this Court that public access is but one of many factors to be considered in determining public benefit will be quite useful.

Nationwide and in Massachusetts, some land trusts focus primarily on wildlife habitat protection. For example, one Alliance member based in California, the Center for Natural Lands Management[24], has a mission of protecting sensitive biological resources. Another Alliance member, the Humane Society Wildlife Land Trust[25], has a mission to celebrate and protect wild animals by creating permanent sanctuaries, preserving

[24] www.cnlm.org.
[25] *www.hswlt.org*.

and enhancing natural habitat. Here in the Commonwealth, the Orenda Wildlife Land Trust works to preserve and protect open space for wildlife habitat on Cape Cod and throughout the Commonwealth.[26] Because of this focus on habitat preservation, these organizations maintain conservation properties that are open to the public but with various restrictions (e.g., non-motorized use only, designated trail use only). And for particularly sensitive properties, no public access is permitted at all, in order to protect habitat for an endangered or threatened species. If public access were required as a condition of receiving property tax exemption, the mission of these habitat-oriented land trusts would be significantly compromised, despite the abundant public benefit they provide.

Distinct from possible conflicts with habitat protection goals, safety issues present another concern, as public access on certain properties or portions thereof are not appropriate due to steep cliffs or other known hazards. Certain conservation properties contain old quarries used for swimming, where people dive into the water from perches high

[26] See http://www.orendalandtrust.org/.

above. Prime examples are the Quincy Quarries, controlled by the Massachusetts Division of Conservation and Recreation, and Doane's Falls in Royalston, owned by The Trustees of Reservations. Safety concerns might also justify a temporary prohibition on public access where the land is being actively farmed with motor vehicles or heavy equipment, or trees are being felled. If a land trust determines that public access is not appropriate due to these safety concerns, it should not have to forfeit its property tax exemption as the price of making such a public safety decision.

Financial considerations are yet another sound reason why a land trust might choose to allow no public access on a parcel. Public access is not free for a land trust. Allowing the public to recreate on a particular parcel entails a range of management expenses. Even minimal public access, such as pedestrian use only, entails a host of costs including increased premiums for liability insurance, trail maintenance, signage, litter cleanup, and occasional vandalism repairs[27]. Related to the safety concerns

[27] See, e.g., http://newstalkkgvo.com/vandals-destroy-300-easment-sign-authorities-seeking-information/.

noted above, although most states, including Massachusetts[28], have passed recreational use statutes that limit liability for landowners that allow public recreation on their lands, tort cases are still brought against landowners when injuries occur in these situations. Land trusts should be free to determine whether these expenses and liability risks are justified for any particular parcel. As long as a parcel provides other public benefit, public access should not be a requirement for property tax exemption.

(ii) A conservation property on which public access is allowed, compatible with the property's other conservation values, will almost always qualify for exemption.

When a land trust chooses to allow the public to recreate on one of its preserves, public benefit will almost always be readily apparent, and the property should generally qualify for property tax exemption. Along these lines, arguments by municipalities that even though public access is permitted, the public does not use the property frequently enough to justify

[28] G. L. c. 21 sec. 17C.

exemption are generally not convincing or conducive to sound public policy. Conservation properties in remote and pristine areas will always suffer under this simplistic quantitative analysis. The Town of Hawley, for example, has a population of 337 people, according to the 2010 census. The five towns immediately adjoining Hawley have a combined population of 6,245.[29] Given these relatively low population levels, usage of local conservation properties will no doubt seem low in comparison to an urban or suburban park. A municipality can always claim that a conservation property could be used more frequently or more intensively.

In this vein, one dangerous argument espoused by the Town of Hawley and the Appellate Tax Board is that not only must NEFF provide some basic level of public access, it must also go out of its way to bring as many people as possible to the NEFF Forest by, for example, paving an access road and a parking lot or placing signs in more prominent places outside of the protected property. This Court's adoption of this principle would be especially damaging to the tax-exempt mission of land trusts throughout Massachusetts

[29] See http://www.sec.state.ma.us/census/.

and the nation. What municipalities and courts should pay attention to is whether a land trust is making a good faith effort to allow some basic level of appropriate public access that is consistent with other public benefits of the property, and where this is the case, public benefit should be readily recognized.

(iii) A property that does not allow any public access may still qualify for exemption if the landowner can demonstrate other significant public benefit.

As a practical matter, a land trust that does not allow any public access on a particular parcel may have a heightened burden in obtaining property tax exemption than it would for a similar conservation parcel that does allow public access. However, this Court should recognize that, in light of the myriad public benefits of land conservation distinct from public recreation, it is certainly possible that such a parcel may qualify for exemption. NEFF's brief does a fine job of sketching the ways in which conservation of a particular parcel provides benefit for "an indefinite number of persons" beyond public

recreational access. Amici would like to take a moment to elaborate upon and amplify these concepts.

First, as detailed above in the federal conservation easement tax law context, a conservation property could very well provide public benefit in the complete absence of public access if it contains significant wildlife habitat, provides an important buffer to abutting or nearby protected wildlife habitat, offers scenic views from public vantage points, or promotes some other government policy such as protecting freshwater or tidal wetlands or protecting agricultural or forest lands. In addition, a conservation parcel could provide some other conservation value that is a benefit to an indefinite number of people, such as water quality protection or floodplain protection or local food or clean air.

Second, protecting a particular conservation property benefits an indefinite number of persons who recreate outside of the property. For example, protecting a property with wetlands or river frontage will result in less nonpoint source pollution (stormwater runoff). Thus, a person fishing or swimming downstream of the protected property will benefit from the cleaner water. Or suppose a rare

bird nests and breeds on a protected property. That bird or its offspring then migrates down the East Coast to spend the winter in Florida or South America, where it may be enjoyed by a birdwatcher, and contribute to that local ecosystem. To look for public benefit just within the four corners of a particular property is to ignore the organizing principle behind landscape ecology, which is that particular organisms and parcels of land must be studied and understood as part of a broader whole.[30]

Third, on a more philosophical level, economists have posited the concept of "existence value" for natural resources. Existence value stands for the proposition that conservation of a resource such as open space land has an intrinsic value for people just by existing, even if they are not inclined to or are unable to physically access the property.[31] For example, a current senior citizen of Hawley or a nearby town may be too infirm to take a hike on the NEFF Forest preserve, but still values its existence as undeveloped open space and benefit from the

[30] See, e.g., Fred Bosselman, *What Lawmakers Can Learn From Large-Scale Ecology*, Florida State University Journal of Land Use & Environmental Law, 17 J. Land Use & Envtl. Law 207 (2002).
[31] See, e.g., David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 Harv. Entl. L. Rev. 343 (2004).

services that the forested land provides such as carbon sequestration and cleaner air and the economic benefits when other people come to town to use the property.

Fourth, numerous studies have demonstrated that land protection provides specific and measurable economic benefits redounding beyond the particular parcels at hand. A comprehensive report prepared by The Trust for Public Land quantifies some of these benefits in Massachusetts.[32] For example, this report concludes that $130 million spent by the Massachusetts Department of Conservation and Recreation on land acquisition over the last 20 years has resulted in savings of approximately $200 million in drinking water filtration expenses by the residents of Greater Boston.[33] Similarly, a study cited in the report found that coastal wetlands in Massachusetts provide $643 million in storm protection.[34]

(d) Application of Principles to the Instant Case

[32] *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.
[33] Id. at 16.
[34] Id. at 17.

With the above principles in mind, there is no question that the NEFF Forest should qualify for property tax exemption. NEFF is a duly created land trust, and there is no suggestion by the Town or the ATB to the contrary. NEFF took specific steps to welcome the public onto the NEFF Forest, such as including the parcel in a guide of all of its properties, and listing it on its website, along with directions. Signs welcoming "respectful visits" were in place on the NEFF Forest.

Even in the absence of public access, the NEFF Forest should qualify for exemption, as the Forest abuts a state park and thus is part of a greater habitat block. Moreover, restriction against development of the Forest for commercial or residential uses protects the scenic views from the abutting state park. NEFF operates the NEFF Forest in accordance with a Forest Management Plan that aims to preserve the property's wildlife habitat and scenic resources. The NEFF Forest also protects frontage on Fuller Brook, which sustains the water qualify of the downstream Chickley and Deerfield Rivers. The public benefit resulting from the protection of the NEFF

Forest, with or without public access, is abundant and convincing.

CONCLUSION

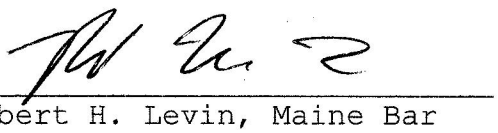
For the reasons stated herein, the decision of the Appellate Tax Board should be reversed.

Respectfully Submitted,

Massachusetts Land Trust Coalition, Inc.

Land Trust Alliance, Inc.

By their Attorney:



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RULE 16(k) CERTIFICATION

I, Robert H. Levin, counsel for Massachusetts Land Trust Coalition, Inc. and the Land Trust Alliance, 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, and 20 of the Massachusetts Rules of Appellate Procedure.

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December 16, 2013

CERTIFICATE OF SERVICE

I, Robert H. Levin, certify that on December 16, 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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