COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BROOKLINE CONSERVATION LAND TRUST	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF BROOKLINE**

Docket Nos. 281854-56, 285517-19

Promulgated: June 5, 2008

These are appeals filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of appellee to abate real estate taxes assessed by the Town of Brookline to appellant under G.L. 59, §§ 11 and 38 for fiscal years 2005 and 2006 (the "fiscal years at issue").

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Egan, and Mulhern joined him in the decisions for appellee.

These findings of fact and report are made pursuant to a request by appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

David R. Baron, Esq. for appellant.

John J. Buchheit, Esq. for appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits submitted during the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2004 and January 1, 2005, the relevant assessment dates, Brookline Conservation Land Trust ("Trust" or "appellant") was the assessed owner of three parcels of real estate located in the Town of Brookline: 0 Walnut Street (the "Walnut Street parcel"); 0 Sargent Road (the "Sargent Road parcel"); and 0 Cottage Street (the "Cottage Street" parcel) (collectively, the "subject properties").

Appellant timely filed Forms 3 ABC and Forms PC with the Board of Assessors of the Town of Brookline ("assessors") on February 23, 2004 and February 28, 2005 for the fiscal years 2005 and 2006, respectively. The assessors assessed the subject properties and issued tax bills to appellant in accordance with G.L. c. 59, § 57C for fiscal years 2005 and 2006, respectively. Appellant timely paid the real estate taxes due on the subject properties and subsequently filed timely abatement applications for each of the subject properties on January 30, 2005 and January 30, 2006 for fiscal years 2005 and 2006, respectively. Appellant's abatement applications are based

on its contention that the subject properties are exempt from real estate tax pursuant to G.L. c. 59, § 5, Third, as property owned by a charitable organization and occupied for charitable purposes.

For fiscal year 2005, the abatement applications were deemed denied on May 1, 2005; for fiscal year 2006, the assessors denied the abatement applications on April 11, 2006. Appellant seasonably filed Petitions with the Board on July 21, 2005 and June 15, 2006 for fiscal years 2005 and 2006, respectively. On the basis of the foregoing, the Board found that it had jurisdiction to hear and decide these appeals. The Board consolidated the appeals pursuant to a joint motion by the parties.

Edward Lawrence testified on behalf of appellant. He had been a trustee since the formation of the Trust in 1977. Mr. Lawrence testified that the general purpose of the Trust is "to hold the land in its natural scenic or open condition." Mr. Lawrence introduced letters to show that the Trust is recognized by the Internal Revenue Service as an Internal Revenue Code ("Code") § 501(c)(3) charitable organization, and as a Code § 509(a)(1) supporting organization of the Town of Brookline and its Conservation Commission ("Brookline Conservation Commission"). According to the First Amendment to

Declaration of Trust, the Trust was created for the following purposes:

> to engage and assist in and otherwise promote the preservation and conservation of natural resources for the Town of Brookline, including the Town's open areas of natural beauty or historic significance, water resources, marshland, wetlands and other areas appropriate for outdoor enjoyment; to acquire by purchase, gift, or other means, real estate and interests therein in the Town of Brookline, to disseminate information and to educate the general public as to the need for and value in preserving real estate in its natural scenic or open condition and, to the extent consistent with the terms upon which property may be acquired, to make property of the Trust available for its enjoyment.

Mr. Lawrence testified that, according to a survey of Brookline residents conducted by the Brookline Parks Department, the citizenry opined that the most important goal for the Town should be "open space acquisition and preservation." Appellant contended that "open space" was understood by the citizenry as being separate from parks or walking and hiking trails, because on the survey, these other facilities were listed and ranked separately from "open space acquisition and preservation."

When asked what actions appellant had taken to inform the residents of Brookline of its functions with respect to conserving open space, Mr. Lawrence explained that appellant had held "several meetings with members of the

neighborhood" to describe the activities of the Brookline Conservation Commission and appellant. Through Mr. Lawrence, appellant introduced a flyer which described the purpose of appellant and the benefits of its work,[1] how it would be financed, the deductibility of contributions to appellant, and how someone could make a contribution to it. When asked how the flyer was distributed, Mr. Lawrence explained that it was distributed "to various groups that were invited to learn more about it by the Conservation Commission and by the Land Trust together, and by other organizations in the Town." Through Mr. Lawrence, appellant also introduced into evidence three invitations to "open houses" held jointly by the Brookline Conservation Commission and appellant, as well as "follow-up" correspondence distributed after one of the events. These four letters were sent between 1983 and 1985; no letters sent subsequent to 1985 were mentioned in testimony or introduced into evidence. When asked to whom these invitations were sent, Mr. Lawrence testified that the recipients were, again, "friends' groups," such as garden clubs and other conservation groups in Brookline.

[1] In general, the flyer touted that "[a] private land trust can carry out certain conservation transactions with greater facility than a government body" because it could, for example, acquire real estate without having to wait for Town Meeting approval; raise money; and offer donors of land or money a wide range of tax deductible benefits.

1. The subject properties.

None of the subject properties is encumbered by conservation easements or other restrictions. According to Linda MacDonald, the assistant assessor, each of the parcels is assessed as "undevelopable" land, because they each lack frontage and are essentially "land-locked." A separate description of each parcel follows.

a. The Walnut Street parcel

Appellant acquired the Walnut Street parcel by a deed dated April 16, 1981. This parcel abuts the historic Brookline Town Green, where soldiers mustered before the battles of Lexington and Concord during the Revolutionary War. Mr. Lawrence testified that the Walnut Street parcel contains trees originally planted by Frederick Law Olmsted. The transferor of this parcel, Marion Parson Alden, lived at 37 Warren Street, Brookline, which Mr. Lawrence explained is across the street from the Walnut Street parcel. Ms. Alden was not a current or former trustee of appellant. Mr. Lawrence testified that Ms. Alden originally acquired the Walnut Street parcel in order to prevent it from being developed.

Mr. Lawrence offered into evidence a letter addressed to him as trustee from Mr. Paul R. Willis, the Conservation Director for the Brookline Conservation Commission, dated

October 31, 1980, in which Mr. Willis asked appellant to become the interim owner of the Walnut Street parcel while the Brookline Conservation Commission raised money to purchase the property. Mr. Lawrence testified that the funds for appellant's purchase of the Walnut Street parcel came from "contributions from the neighborhood to preserve it," and that appellant was preserving it in its natural condition.

When asked how appellant informed the public that the Walnut Street parcel is "available to walk upon," Mr. Lawrence testified that the Conservation Commission is showing the property on its map "as being open space owned by the Brookline Conservation Land Trust," and that appellant called the neighbors to participate in an annual clean-up of the parcel. Finally, appellant held meetings in trustees' homes to discuss appellant's various parcels of land.

Through Ms. MacDonald, appellee offered into evidence several pictures of the Walnut Street parcel which showed that the property is surrounded by a stone wall. Ms. MacDonald testified that the wall is about three feet high, with an additional wire fence with steel poles above the wall, which creates a total barricade approximately six feet in height. Ms. MacDonald testified that there are two

wooden gates, which appear very old and “unused,” and that she had entered the Walnut Street parcel by “sliding through” one of the gates that had been left slightly ajar. Mr. Lawrence on direct examination also confirmed that the Walnut Street parcel is surrounded by a stone wall “that I believe is running all around the property, with the exception of two gates into [the parcel].” Ms. MacDonald also testified that there is no place to park a vehicle at the Walnut Street parcel, as the parcel is located at a “very dangerous intersection” and therefore “[i]t’s not where you would walk.”

Appellee also offered into evidenced a picture showing a swing set which had been erected on the Walnut Street parcel. Ms MacDonald testified that the swing set had been present when the picture was taken, in May of 2006, but was no longer present when she returned to the Walnut Street parcel on November 13, 2006, the day before the hearing. In Ms. MacDonald’s opinion, the primary beneficiaries of the Walnut Street parcel are the immediate abutters, “especially this person at 30 Warren whose back yard opens up to it.”

On cross-examination, Mr. Lawrence was asked whether he had ever had discussions with the neighbors surrounding the subject properties about placing signs on the

properties to inform the public that they were open to the public and inviting the public to enter the properties. Mr. Lawrence replied that, on one occasion, he had a discussion with members of the neighborhood around the Walnut Street parcel, during which he made the neighbors "aware" that the parcel is owned by appellant "and that we did welcome people to come on it." He testified that "[p]eople understood, after we talked to them and educated them," that the property is available to the public, "and it was a general consensus that if we felt we ought to put up a sign, we should." Ms. MacDonald testified that a sign had once been present near the gate where she had entered the property, "that said it was conservation land, and you could walk there, but you should be quiet or something to that effect," but by November 13, 2006, the sign had been removed and "all the gates were closed."

b. The Sargent Road parcel.

Appellant acquired the Sargent Road parcel in 1996. Mr. Lawrence testified that the parcel was acquired by gift from Gertrude Donald, who, Mr. Lawrence testified, lived immediately next to the parcel. Mr. Lawrence also testified that Ms. Donald was not a trustee of appellant, and no trustees owned any land abutting this parcel.

Mr. Lawrence described as the desirable feature of this parcel its presence within a largely residential area of Brookline and the fact that, if not acquired by appellant, "it was clearly going to be developed for a house lot." He explained that the Brookline Conservation Commission wished to prevent the development of additional parcels within Brookline. The Sargent Road parcel also has historical significance as a portion of the former Charles Sprague Sargent Estate.[2] The Sargent Road parcel is located along the edge of an exclusive area of Brookline known as Sargent Estates, a private, gated community. The parcel is located at the corner of Sargent Beechwood and Chestnut Place, private roadways. According to Mr. Lawrence, Sargent Beechwood is not part of Sargent Estates and is "used daily by people walking their dogs and so forth."

Mr. Lawrence testified that the Sargent Road parcel is available for the public to use, and that in fact some members of the public have been observed using the property, particularly for bird-watching. He also testified that the parcel is visible from a nearby apartment complex that is not within Sargent Estates.

[2] Mr. Sargent was a colleague of Frederick Law Olmsted and the former curator of the Arnold Arboretum.

Ms. MacDonald testified that Sargent Estates is "one of the most prestigious areas of Brookline." It is surrounded by private, gated ways, and "it has very, very expensive homes." Through Ms. MacDonald, appellee offered into evidence several pictures depicting various "private way" and "no trespassing" signs, along with a chain at Sargent Beechwood, indicating that both Chestnut Place and Sargent Beechwood, the access roads to the Sargent Road parcel, are private roads that the public is not invited to travel.

Moreover, Ms. MacDonald testified that on more than one visit to the Sargent Road parcel itself, she was "challenged" as to why she was there. Ms. MacDonald testified that "there is no clear view of this parcel from any of the main streets." It was Ms. MacDonald's opinion that it is the immediate abutters who primarily benefit from the Sargent Road parcel, because they are the only members of the public who would have occasion to view and use the parcel.

c. The Cottage Street parcel.

Appellant acquired the Cottage Street parcel in 1998. Mr. Lawrence testified that the parcel was acquired by gift from Clarita Bright, who lived immediately next to the parcel. Mr. Lawrence also testified that Ms. Bright was

not a trustee of appellant, and no trustee of appellant owned any land abutting this parcel. Mr. Lawrence testified that the desirable feature of this parcel is that it is contiguous to other significant conservation lands in Brookline, particularly the Sargent Pond and a stream that feeds into Sargent Pond.[3] Lawrence testified that "there is no activity going on" in this parcel, and that "[i]t is a habitat for natural life, including deer and other animals such as that. It's fairly, quite frankly, quite wild, although there is an open portion of it that is maintained in the manner in which Mrs. Bright had it prior to the gift."

According to maps entered into evidence, the only means of entrance into the Cottage Street parcel from Cottage Street is through a driveway connected to a private residence at 126 Cottage Street. The deed for the Cottage Street parcel indicates that the owner of 126 Cottage Street holds an easement for the use of this driveway. Ms. MacDonald explained that while the map entered into evidence purports to show a way into the Cottage Street parcel, this way "only exists on paper. It's like a paper street. This person uses this as her driveway. It's a

[3] Brookline Conservation Commissioner Roberta Schnoor testified that Sargent Pond was one of three natural wetlands still in existence in Brookline.

private home." When asked if, in her opinion, someone from the public would be inclined to access the property by means of 126 Cottage Street, Ms. MacDonald replied, "[a]bsolutely not."

When Ms. MacDonald viewed the parcel, she gained access by entering and crossing through the private property of 144 Cottage Street, which was under construction at the time. She explained that a large wooden fence surrounds the Cottage Street parcel. The property is:

> pretty much behind this private property owned by these people, so you really couldn't get access. If this person wasn't having the home gutted and the workers didn't care that I walked through, there would be no way you could get in from this entrance. The only way you could get in here is if you went through the Sargent Estates and then you would have to go on their private road and then walk the pond.

Ms. MacDonald explained that Sargent Pond is privately owned by the Sargent Road Trust. Access along the Sargent Pond to the property is not easy:

> There is a lot of brush. The pond is beautiful, but in order to do it, maybe there is a path – I didn't see it . . . . It was meadowy, green . . . the greenery was about up to my knee, so it is very meadow-like, untamed, and it appears to be the backyards of these three people.

Sargent Pond has a conservation restriction placed on it, and it is assessed as taxable land. The trustees pay for

the maintenance of the pond. As Ms. MacDonald explained, "[a]ll these large parcels have restrictions on them of things you can and cannot do, and it all stems from the Sargent Road Trust." Ms. MacDonald also testified that to walk along the Cottage Street parcel, it feels as if "[y]ou are walking on somone's property, and you go by and there is their back yard . . . . You are in someone's back yard." In fact, Ms. MacDonald testified that on one visit to the Cottage Street parcel, while she was working on a different appeal before the Board, Julie Cox, one of the trustees of the Sargent Road Trust, challenged her presence on the property: "She ran out from her house and asked us why we were there."

2. The Board's ultimate findings of fact.

The Board found that the subject properties were conveyed to appellant by neighbors who wished to prevent development in their neighborhood. Despite the fact that appellant was recognized as a supporting organization of the Town, and that the preservation of open space may have been recognized by the Brookline Conservation Commission as an important goal for the citizens of the Town, the Board found that appellant is holding the subject properties for the primary benefit of the immediate neighborhood in which the three parcels are located. Contrary to appellant's

contention, the subject properties do not appear to be open to the general public. The parcels are, in large part, barricaded with walls, fences, and chains, and “private” and “no trespassing” signs appear along the periphery of the subject properties. While portions of the property may not be completely barricaded, they are still not easily accessible by the public. Access to the Cottage Street parcel requires traversing over the driveway of a private parcel. Moreover, the fact that Ms. MacDonald’s presence was challenged on more than one visit to the Sargent Road and Cottage Street parcels, and the appearance of a swing set on the Walnut Street parcel, indicates that the subject properties appear to the public to be, and are treated by the neighbors as, extensions of the backyards of the abutting neighbors in an exclusive area of Brookline, not conservation land that is open to the enjoyment of the general public.

While appellant suggested that the “no trespassing” and “private” signs actually refer to the surrounding private ways rather than the properties, the Board found the distinction to be negligible; regardless of what ground they are referring to, the prominent display of “no trespassing” and “private” signs, coupled with the various physical barriers to entry onto the property and other

access difficulties, including having to cross over a private residence's driveway and having to enter at a dangerous intersection with no place to park a vehicle, create a sense of exclusion, rather than an invitation to enter the supposedly public subject properties. The fact that residents of a nearby apartment complex may be able to enjoy a view of one of the subject properties does not rise to the level of public enjoyment.

The Board also found that appellant failed to prove that it had made sufficient effort to inform the public that the subject properties are open to the public. Merely listing the subject properties on a map as conservation land owned by appellant is not an open invitation to the public to enter the properties. Moreover, the letters and invitations entered into evidence were sent only at the beginning of appellant's existence and were actually targeted to certain "friends" of the Brookline Conservation Commission rather than the public at large. The invitations to clean up the Walnut Street parcel and the meetings held at the private homes of the trustees also appeared to be extended to the neighborhood, and were not intended to include the public at large.

Based on the foregoing, and to the extent it is a finding of fact, the Board found that appellant's ownership

of the subject properties primarily benefits the abutting neighbors and not an indefinite number of people. Therefore, for the reasons explained more fully in the following Opinion, the Board found that appellant is not a charitable organization for purposes of G.L. c. 59, § 5, Third. Accordingly, the Board issued decisions for appellee in these appeals.

OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. General Laws c. 59, § 5 lists the classes of property which shall be exempt from taxation. Specifically, § 5, Third, exempts from taxation all "personal property of a ***charitable organization***, . . . and real estate owned by . . . and occupied by it or its officers for the purposes for which it is organized . . . ." G.L. c. 59, § 5, Third (emphasis added).

In the instant appeals, appellant is recognized as a charitable corporation pursuant to Code § 501(c)(3) and as a supporting organization pursuant to Code § 509 (a)(1). "However, an organization's Code Section 501(c)(3) status is not dispositive in determining whether its property

qualifies for the Massachusetts property tax exemption." ***Jewish Geriatric Services, Inc. et al. v. Board of Assessors of Longmeadow***, Mass. ATB Findings of Fact and Reports 2002-337, 358-9, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing ***H-C Health Services v. Board of Assessors of South Hadley***, 42 Mass. App. Ct. 596, *rev. denied*, 425 Mass. 1104 (1997)). "The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. . . . Rather, the organization 'must prove that it is in fact so conducted that in actual operation it is a public charity.'" ***Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield***, 434 Mass. 96, 102 (2001) (quoting ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket***, 320 Mass. 311, 313 (1946)). "The burden of establishing entitlement to the charitable exemption lies with the taxpayer." ***Western Massachusetts Lifecare***, 434 Mass. at 101 (citing ***New England Legal Foundation v. Boston***, 423 Mass. 602, 609 (1996)). "Any doubt must operate against the one claiming a tax exemption." ***Boston Symphony Orchestra v. Board of Assessors of Boston***, 294 Mass. 248, 257 (1936).

The Supreme Judicial Court has held that "the term 'charitable' includes more than almsgiving and assistance

to the needy." ***Harvard Community Health Plan v. Assessors of Cambridge***, 384 Mass. 536, 543 (1981)). The definition accepted by Massachusetts courts and the Board is that charity is a

> gift, to be applied consistently with existing laws, ***for the benefit of an indefinite number of persons***, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Boston Symphony Orchestra, 294 Mass. at 254-55 (emphasis added). Thus, in determining whether an organization is in fact charitable for Massachusetts real estate tax purposes, Massachusetts courts and the Board must consider whether the organization's benefits are readily available to a sufficiently inclusive segment of the population. ***Jewish Geriatric Services***, Mass. ATB Findings of Fact and Reports at 2002-359.

In ***Wing's Neck Conservation Foundation, Inc. v. Board of Assessors of Bourne***, Mass. ATB Findings of Fact and Reports 2003-329, 341, *aff'd*, 61 Mass. App. Ct. 1112 (2004), the Board emphasized that "[e]ven where an organization's activities are of a noble cause, such as the preservation of open space, where the primary benefits inure to a limited class of private individuals, the

organization will not qualify as charitable." ***Id***. (citing ***Massachusetts Medical Society v. Assessors of Boston***, 340 Mass. 327, 333 (1960) (ruling that although the public will derive a benefit from a more enlightened medical profession, "this indirect benefit is not sufficient to bring the society within the class traditionally recognized as charities")).

In the present appeals, the Board found that the subject properties, contrary to appellant's contention, are not open to the general public. The properties are, in large part, enclosed within gates, fences, walls, and chains. While portions of the property may not be completely barricaded, they are still not easily accessible. For example, the entry into the Cottage Street parcel requires passage along the driveway of the private residence at 126 Cottage. Further, as Ms. MacDonald testified, the subject properties appear as if they are "in someone's backyard." She testified to having been "challenged" as to her presence on the Sargent Road and Cottage Street parcels. Moreover, at one point in time, a swing set had been erected on the Walnut Street parcel. Other points of entry into the subject properties are either obstructed from view or along very busy and dangerous intersections where visitors have no place to

park their vehicles. Further indications of the exclusivity of the area are the “no trespassing” and “private” signs posted along the periphery of the subject properties.

Appellant contended that the “no trespassing” signs could be referring to the private ways encircling the properties rather than the subject properties themselves. Appellant also contended that the 126 Cottage Street merely has a driveway easement over the Cottage Street parcel and that entry onto the Cottage Street parcel is understood to be permitted, in light of the literature distributed from time to time by appellant informing the recipients that the subject properties are open to the public. However, the Board found that, regardless of what specific areas they are referring to, the prominent display of “no trespassing” and “private” signs, coupled with the various physical barriers to entry and other difficulties, including having to cross over a private residence’s driveway and having to enter at a dangerous intersection with no place to park a vehicle, create a sense of unwelcome and exclusivity.

Maintaining the subject properties in such a closed, guarded manner is contrary to appellant’s Declaration of Trust, which requires appellant to hold its properties so they will be “appropriate for outdoor enjoyment” and “to

make property of the Trust available for [the public's] enjoyment." Moreover, "the absence of public access to land has consistently proven fatal to a landowner's claim of charitable exemption." ***Wing's Neck***, Mass. ATB Findings of Fact and Reports at 2003-343 (citing ***Animal Rescue League v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 2000-96, *aff'd*, 54 Mass. App. Ct. 1113 (2002) and ***Nature Preserve, Inc. v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 2000-796). While Mr. Lawrence testified to the presence of bird-watchers and dog-walkers, the absence of any signs indicating that the public is welcome onto the subject properties raises a strong inference that these individuals were most likely the recipients of appellant's literature, and thus the collection of "friends" invited by appellant and the Brookline Conservation Commission, not the public at large.

In ***Skating Club of Boston v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2007-193, 210, appellant there "emphasize[d] its accessibility to and substantial use by the general public and its significant role in assisting individuals to learn to skate, including members of the Genesis Program."[4] However, the Board found

[4] The Genesis Program provides services to handicapped children.

stronger evidence supporting exclusivity rather than inclusion:

> The Club's informational Pamphlet emphasizes the many benefits of membership. It states that the membership owns the Club and directs how the ice skating facilities are used, thereby implicitly promoting the Club's exclusivity. Further, it touts the social benefits associated with membership as well as skating related amenities. Moreover, the Pamphlet makes no mention of non-members' ability to use its facilities. Neither is there any indication that the Club advertises the availability of its facilities to the general public. Indeed, no evidence presented by the appellant provided insight as to how a member of the community-at-large would be apprised of the public's access to the Club.

Id. at 2007-216. The Board there ruled that the skating club's preference for members was "inconsistent with the nature of a charitable organization, the dominant purpose of which is for the public good and not merely to benefit its members." ***Id***. at 2007-217 (citing ***Massachusetts Medical Society***, 340 Mass. at 332).

In the instant appeals, appellant contends that the fact that a sign once existed inviting the public onto the subject properties indicates that they are available for public use. However, the Board found that the fact that such a sign did exist but was later removed instead reflects the neighborhood's strong resistance to the presence of the public on the subject properties, which was confirmed by Ms. MacDonald, who explained that her presence

was challenged on her visits to the subject properties. Even if appellant never removed visitors from the subject properties, the facts that visitors' presence would be challenged, and that appellant did little to broadcast more than sporadically and to a sufficiently broad audience the availability of its land for public use, creates sufficient evidence for the Board to find that appellant holds the subject properties in a closed manner "inconsistent with the nature of a charitable organization." ***Id***. The Board thus found and ruled that the dominant use of the subject properties is for the benefit of the abutting neighbors, not for the community of Brookline at large, and certainly not for an indefinite number of persons.

Appellant contended that by offering areas in Brookline that are to be safe from development, it is offering a service to the Town and the residents of Brookline, who, according to a survey conducted by Brookline Parks Department, indicated their understanding of what "open space" was and their desire that "open space" conservation be a top priority for the Brookline Conservation Commission. However, simply keeping land open and allowing its natural habitat to flourish is not sufficiently charitable. Appellant must demonstrate "an ***active appropriation*** to the immediate uses of the

charitable cause for which the owner was organized. . . .” ***Board of Assessors of Boston v. The Vincent Club***, 351 Mass. 10, 14 (1966) (emphasis added) (quoting ***Babcock v. Leopold Morse Home for Infirm Hebrew & Orphanage***, 225 Mass. 418, 421 (1917)). Here, the evidence establishes that appellant holds the subject properties in a closed manner which primarily benefits the immediate abutters who enjoy the seclusion and protection against development in the neighborhood. Appellant failed to demonstrate any active appropriation of the subject properties to achieve a public benefit.

Appellant also argued that, by its very nature, conservation property must be maintained in its natural condition, and that creating groomed walking trails or other facilities would be contrary to the very definition of conservation. *See* ***Nature Preserve***, Mass. ATB Findings of Fact and Reports at 2000-807. However, under the facts of these appeals, which include the physical barricading of the subject properties, the existence of “no trespassing” and “private” signs along the periphery of the subject properties, and insufficient publication of the public’s supposed invitation to enter the property, it appears that the dominant use of the property is for the benefit of abutting neighbors, and not consistent with appellant’s

Declaration of Trust "to make property of the Trust available for [the public's] enjoyment." *See also*, ***Marshfield Rod & Gun Club v. Assessors of Marshfield,*** Mass. ATB Findings of Fact and Reports 1998-1130, 1134 (Board denies exemption where appellant's activities were "available for the benefit of the members").

The Board in the present appeals found and ruled that, despite the possible, and seemingly occasional, presence of bird-watchers or dog-walkers, who were not shown to be members of the general public as opposed to the abutting neighbors or certain "friends" invited by appellant, the subject properties do not appear to be open and available to the general public. *Contrast* ***Trustees of Reservation v. Board of Assessors of Windsor***, Mass. ATB Findings of Fact and Reports 1991-225, 242 (finding that property upon which "[p]ublic cross-country ski trails traverse the grounds" was being actively appropriated to the organization's charitable cause). The Board thus found and ruled that appellant "operated primarily for the benefit of a limited class of persons," such that "the public at large benefit[s] only incidentally from [its] activities." ***Western Massachusetts Lifecare***, 434 Mass. at 104 (quoting ***Cummington School of the Arts v. Assessors of Cummington***, 373 Mass. 597, 600 (1977).

Moreover, two distinct statutory schemes pertaining to the taxation of conservation land evidence a legislative intent that such land be treated as taxable, albeit at a reduced rate. First, G.L. c. 184, §§ 31 and 32 provide for the existence and enforcement of conservation restrictions held by "any governmental body or by a charitable corporation or trust," which may be placed on lands held "predominantly in their natural, scenic or open condition." Land subject to a conservation restriction pursuant to these sections is typically assessed at a discount to account for the encumbrance on development. *See, e.g.*, ***Parkinson v. Board of Assessors of Medfield***, 398 Mass. 112, 114 (1986) (stating that "it was the policy of the assessors to discount the value of property subject to a conservation restriction"). Second, G.L. c. 61B provides for the classification and taxation of "recreational land," which includes land "retained in substantially a natural, wild, or open condition," which would "allow to a significant extent the preservation of wildlife and other natural resources." G.L. c. 61B, § 1. Classified recreational land is also assessed at a lesser value: "in no event shall such valuation exceed twenty-five per cent of its fair cash value." G.L. c. 61B, § 2. Considering these provisions, the Board found and ruled that the

Legislature has determined that, while conservation land should be afforded beneficial tax treatment, it nonetheless should be subject to tax and not exempt as charitable organization property under G.L. c. 59, § 5, Third.

Conclusion

The Board found and ruled that appellant failed to meet its burden of proving that it was a charitable organization for purposes of G.L. c. 59, § 5, Third, and therefore, failed to meet its burden of proving an entitlement to an exemption for the subject properties. Accordingly, the Board issued decisions for appellee in these appeals.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board