FREQUENTLY ASKED QUESTIONS ABOUT LAND TRUST PROPERTY TAX EXEMPTION IN MASSACHUSETTS

1. Our land trust just got a letter from the Town Assessor saying that all or some of our properties will now be taxed. We're in a panic! It would cost us tens of thousands of dollars each year to pay taxes on our holdings. We have never been taxed before. What's going on?

While you need not panic, there is cause for concern. For many years, land trusts have enjoyed exempt status as to property tax assessment for natural lands and open space in their ownership. Indeed, a 1994 opinion from the Massachusetts Department of Revenue (DOR) stated, "Where a property is owned by a corporation whose charitable purposes include the preservation of natural resources, we think the simple act of maintaining that property in its natural condition would satisfy the occupancy requisite."[1]

Over the past decade, there have been several cases in various Massachusetts towns in which the local assessors have challenged this opinion by attempting to tax some land trusts and other wildlife or recreational non-profits (Pembroke, Plymouth, Bourne, Brookline). In each case, the land trust appealed to the Appellate Tax Board (ATB) of the State and in each case, the assessor prevailed and the cause for exemption has slowly been eroded. Or, one could say, additional requirements have now been added to that standard.

This past winter, newsletter articles of the DOR and the Massachusetts Association of Assessing Officials have highlighted the ATB ruling on the Brookline Land Conservation Trust (BLCT) case. The case seemed to center on the question of practical public access to the BLCT lots in question. DOR opined that "the test for a charitable exemption would not be

[1] Massachusetts Department of Revenue (Letter File #94-699) examines property tax exemption for the Westford Conservation Trust in 1994.

satisfied without a showing that the properties are open and available to the general public."[2]

Since the publication of these newsletters, which are read widely by local assessors, some town officials have seemed eager to use this guidance as the justification for warning or actually taxing local land trusts.

What's the state law on all this? We're getting taxed because of a newsletter article??

The appropriate state law is Massachusetts General Law Chapter 59, Section 5, Clause 3, which governs tax exempt properties. There is no specific state law regarding land trusts other than as a set of all charitable entities that own land. To be exempt from property tax, a charity must show that it owns land as of the beginning of the municipal fiscal year, must be a charitable organization (a 501(c)(3) IRS exemption is not sufficient by itself), must have a set of purposes in its charter that clearly identifies its charitable purposes, must include the ability to hold land for its charitable mission, and must "occupy" the land in question in accordance with that charitable purpose. A land trust could meet all the tests, but if the land was not related to its purpose (a bowling alley, a condo unit, etc.), it is not supposed to be tax-exempt. The charity has two years in which to demonstrate to the local assessor that it is occupying the exempt property for its exempt purposes. We have long believed, as the 1994 DOR ruling reinforced, that leaving land in its natural state is "occupying" it for conservation purposes of the land trust.

While there is Massachusetts case law (i.e., specific legal precedents) analyzing the general exemption clause, none are specific to land trusts. But note how the Supreme Judicial Court (SJC) announced the general principle in a 1940 case: "The ground of the [property tax] exemption is that the use of the exempted property alleviates some burden of government by conferring benefits which would advance the public interest."[3] With state and local governments having a clear interest in protecting open space, it seems logical to conclude that land trusts acquiring land directly promotes that public interest.[4]

In the absence of specific case law, rulings from the ATB provide controlling legal authority until successfully challenged through the courts (appellate court, SJC). With the recent spate of

---

[2] Massachusetts Department of Revenue, Division of Local Services, *City & Town* Newsletter, January/February 2009, p. 3: "Consequently, a charitable organization organized to preserve land in an open and natural condition could qualify for a charitable exemption without actually occupying the land itself, but the test for a charitable exemption would not be satisfied without a showing that the properties are open and available to the general public. Access to and substantial use by the general public of the land is generally required for a land conservation organization to qualify for a property tax exemption as a charitable organization." (Ed. note: There is no consideration apparently for geographically remote properties, such as mountainsides, islands, wetlands.)

[3] *Assessors of Quincy v. Cunningham Foundation* 305 Massachusetts 411, 418.

[4] Many town open space plans, water management and master plans articulate goals to preserve open space and land trust actions certainly further this governmental purpose.

ATB cases supporting assessors and rejecting appeals of land trusts, these decisions are solidifying against perfect exemption for land trusts. No appeal from an ATB decision is expected anytime soon. The DOR also relies upon the ATB to guide its decisionmaking, in the absence of higher authority. It is unlikely DOR will issue a ruling or opinion that severely deviates from the ATB cases. A true court case is needed to clarify what the law should be going forward.

Why now? Won't this blow over as the newsletter articles fade into the wash of history?

Don't count on it. First, in this economic downturn, towns are particularly eager to find new sources of revenue. For instance, voices in Boston and Cambridge are growing louder to tax large non-profit colleges and hospitals. So, land trusts are not alone. Second, assessors are a close knit group, constantly conferring with one another on new approaches or trends. Third, success breeds success; assessors reading of their peers' success in going after land trusts will embolden others to try. Finally, some assessors are coming to believe that they have a duty to tax land trusts because the ATB is telling them to (clearly an aggressive interpretation).

So I guess we cannot ignore it. How should we respond? Is this a legal or political problem?

Both. Your land trust's attorney should be involved from the start in providing advice on how to properly respond to the assessor when you are contacted. You should probably start with an informal appointment with the staff assessor to find out more about their concerns and how to approach them formally. You can better gauge from this initial session whether the assessors are taking an aggressive stance or perhaps reluctantly responding to real or perceived outside pressures. In one recent instance, the staff assessor simply visited the land trust's website to learn more about what this "mysterious" group was all about and she dropped her concern. In another town, the land trust crafted a specific legal response, going over point by point why a given property was not benefiting the few, but rather the community, and the assessors accepted it without debate.

We've never had a problem with our assessors and we haven't had any letter from them saying we are going to be taxed. What can we do to make sure they don't come after us?

Unless or until there is a specific directive form DOR, requiring local assessors to tax land trusts, there is likely to be discretion in each local assessing department as to how it approaches this issue.

The "assessors" is made up of a board, either elected or appointed, typically supported by (and often reliant upon) paid staff persons. It is hard to predict in any given town which group is likely to be more "sympathetic" to your organization and its work. The most important thing is to cultivate a relationship with the assessors, both board and staff, and continually remind them of how your land trust is integrated into the community. Meet with them once a year, whether an informal swing by their office, or a formal presentation on their meeting agenda. Put them

all on the mailing list for your event invitations, newsletters or other publications. Add their email addresses to your distribution list. Give them a map of your properties, emphasizing use of the lands, whether by trails, open fields, community gardens, canoe landings, etc. Make sure they have visited your website. Consider adding them to your mailing list for newsletters, etc.

If your assessors are elected, remind them casually that you have x numbers of members in the town.

What else can we do, organizationally, to be prepared to withstand any assault on our exempted properties?

As noted above, the "Purposes" clause in your charter[5] should clearly identify your intent to preserve land as protected open space as a central part of your mission. We believe a vague declaration of "establishing wise conservation practices" or "promoting the rural character of the town," while not in error, may not be sufficient to address this tax exemption issue. One land trust uses a clause that is perhaps too specific: "The Trustees shall hold all real estate that may be received by them, IN TRUST, for the purpose of maintaining and preserving said property in its natural state." A good middle ground might be a core purpose of "preserving in their natural condition lands of benefit to the public's right to a healthful environment." This latter clause could be tied back to Article 97 of the Amendments to the Massachusetts Constitution.[6] Again, referencing the "alleviation of governmental burdens" might be appropriate also.

The Massachusetts Land Trust Coalition (MLTC) is working to prepare a comparative analysis of these Purposes clauses and recommend some standard models for land trusts to consider. Each land trust must rely on its attorney for advice. Changing a charter is not to be taken lightly and the prior purpose of the organization should not be appreciably changed. Further scrutiny from outside may ensue (IRS, Attorney General) if the mission is broadly modified. But clarifying the land trust's true intent should not be a cause for concern.

What if, after all this outreach, charter change, appeals, etc., we must face up to the fact that we will be taxed? What can be done to limit the amount of taxes we will have to pay?

Do not resign yourself prematurely to this possible new era of land trust taxation. MLTC is pursuing several tracks (administrative, legal, education) to return assessing practices to the *status quo ante* (i.e., the way they have always been.) But a good practice would be to meet with the assessors soon to calculate and understand how your land is valued, for assessing

[5] from your Declaration of Trust or Articles of Incorporation

[6] "The 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… In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes." Article 97 of the Amendments to the Commonwealth of Massachusetts Constitution.

purposes now. In other words, even though your land trust has been tax-exempt, the assessors are still obligated to assign each parcel a market value.

We have never bothered to inquire about these values because it was irrelevant since the land trust paid no taxes. Once you have educated yourself about how the land trust parcels are assessed, you might consider educating the assessor as to why and how your land does not deserve being valued at market rates, particularly if there are deed restrictions or conservation restrictions limiting its use to conservation. Dampening the values prospectively should be pursued. A recent study[7] for a local land trust in one coastal town showed that its 300 cumulative acres are assessed at $27 million as residentially-buildable land. If adjusted for their value as conservation land, the 103 parcels might be valued at $2.5 million. The expected benefits of seeking abatements on value are two-fold: first, by having a reduced aggregate valuation, there is less incentive for assessors exercising their discretion to want to generate the revenues from that total. Second, if you do become taxed, you would pay less in taxes.

Other methods would be to enroll your lands under the current use assessment programs (Massachusetts General Laws. Chapters 61 (forestry), 61A (agriculture), 61B (open space). The 61B statute enables landowners (including land trusts being taxed) that have at least five contiguous acres in an "open, natural or landscaped condition" to receive a 75% reduction in property tax for the enrolled properties. (Interestingly, there is no public access requirement for lands assessed under Ch. 61B.)

You might also explore the possibility of demonstrating perfect "intent to preserve" by placing a perpetual Conservation Restriction (CR) or charitable trust on your affected lands. The assessor is obligated to take these restrictions into account in assessing any property, typically reducing the value dramatically (for an otherwise buildable parcel.) This practice has many other benefits and is particularly useful for land trust holdings or less than five acres, where Chapter 61B will not apply. For more information, see http://www.compact.cape.com/FAQs_Overlay_Protection_for_Land_Trusts.pdf or http://www.massland.org/pages/tools/overlaycrs.htm

What is likely to be the standard to prove public access to a land trust property? Our lands are not closed to the public, but maybe not advertised as well as they could be. Do we have to have a map, and a trail and a parking area and handicapped boardwalks for every property? We have problems with overuse, not under-use, on some of parcels, including beer parties and ATVs. And what about sensitive properties like our wetland holdings or rare species habitats?

Right now, this gets a big *Who Knows*? The DOR is unlikely to provide a specific guidance document outlining what is meant by land trusts having to provide public access. We do know that access cannot be limited to a small segment of the public, like one neighborhood or homeowners' association. Other than that, it is more likely that the DOR will ask the assessors to ask the land trusts to submit documentation about how they are providing various types and

[7] The Compact of Cape Cod Conservation Trusts, Inc., 29 May 2009, "Memo on Local Land Trust Property Valuation."

levels of access to their properties. If access is deemed sufficient, based on the land trust response, then tax exemption would likely be conferred. Perhaps public vista enjoyment will be considered a sufficient form of public access in some cases. The burden of proof will likely shift to the land trust to prove it is tax exempt, owing to its practices that benefit the general public, including but not limited to, the issue of public access. For sensitive habitats, procuring a letter from the state Natural Heritage Program stating why public access is not advisable, in order to protect rare species, might be very useful.

As mentioned earlier, a land trust has two years in which to establish that it is using the property for the purposes for which the land trust was incorporated. As we have all learned, planning and developing public access and educational programs is very time consuming. It is advisable to start this process as soon as the land trust takes possession of the property. It is important to keep detailed records of all meetings and actions addressing planning and development of a particular parcel. Keep track of dates and those attending for such simple things as brush cleaning, invasive or nuisance plant removal, implementation of stormwater discharge techniques (e.g., installing water dams on sloped trail areas), planning and mapping of new trails or existing trails, etc.

If possible, consider erecting a kiosk at one or more of the entrances to the property. On the kiosk should be important information such as the official name of the preserved property, a map of existing trails, along with markers showing places of special interest, prohibitions (e.g., no camp fires, no firearms, etc.), areas that are off limits for a particular reason (e.g., seasonal hunting, fragile habitat, etc.).

When asked by the local assessors whether the land trust has been using the property for the purposes for which the land trust was incorporated, this written history will be the land trust's first line of defense against an attempt to revoke an exemption.

In one town, the staff assessor asked the town attorney to create a list of queries to guide the assessors and the local land trust in determining the type and level of public access. The brainstorming response from the town attorney included almost 30 factors that might be considered, including whether the land trust property was on a public or private road, adjacent to other accessible property, landlocked, provided space for parking, had property signage, publicized the access, had barriers, etc. These considerations are separate from and different from the steps suggested above. The full suite of factors, including what steps have been taken to make the property public friendly, might influence the decisionmaking, rather than one simple test. Each property might have to be analyzed separately; it is unlikely that the land trust as a whole might be considered exempt from property tax. Still, having some formal, advertised walks or tours to your land trust properties is probably good evidence to bolster your case.

What else do we need to know?

Bear in mind that we need not be defensive. Our land trusts really are one the best things that can ever happen in a community. But the property taxation issue is not going to revolve around

your good-deed doing. It certainly helps to confer an aura of community good will in which you can rightly bask. But it does not alone solve the issue of whether a given land trust parcel ought to be taxed or not. For the moment, the blinders are on, and the ATB is recommending that public access value is the primary one on which the taxing question will revolve, once you have established that your land trust meets other standards as a non-profit organization.

Compiled by Massachusetts Land Trust Coalition advisors:
principal author: Mark Robinson
reviewers: Robert Levite, Jim Lentowski, Irene Del Bono, William Constable, Kate Connolly, Bob Ford, Peg Wheeler, Bernie McHugh