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

REPLY BRIEF OF APPELLANT NEW ENGLAND FORESTRY FOUNDATION, INC.

Douglas H. Hallward-Driemeier
(BBO# 627643)
Jesse M. Boodoo
(BBO# 678471)
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
Tel: (617) 951-7000
douglas.hallward-driemeier@ropesgray.com
jesse.boodoo@ropesgray.com

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Appellee Board of Assessors of the Town of Hawley (Assessors) urges this Court to defer to the decision of the Appellate Tax Board (ATB), see Assessors Br. 22-23, yet makes little effort to defend the ATB's actual reasoning. The Assessors fail, for example, to grapple with the fact (explained in Appellant New England Forest Foundation's (NEFF) opening brief) that the ATB's "public access" test lacks any statutory basis. Instead, the Assessors propose a radical, categorical exclusion of charitable conservation organizations from G. L. c. 59, § 5, Third that appears nowhere in the ATB's ruling, nor, indeed, in the Assessors' arguments before the ATB. That novel argument is unsupported by the statutory provisions to which the Assessors cite and flatly contradicts Massachusetts' long history of leadership in conservation efforts. The Court should reject it.

I. THE LEGISLATURE DID NOT INTEND G. L. c. 61, 61A, AND 61B AS THE EXCLUSIVE TAXATION SCHEMES FOR CONSERVATION LAND

As the cornerstone of their arguments, the Assessors rely on the ATB's two-sentence alternative holding and contend that G. L. c. 61, 61A, and 61B (the Reduction Statutes) supply the exclusive taxation schemes applicable to conservation land. Assessors Br.

16-21. The Assessors misunderstand the purpose and text of the Reduction Statutes.

A. The plain text of the Reduction Statutes demonstrates that they supplement, and do not supplant, the availability of charitable tax exemption for conservation land

The Forest is fully entitled to tax exemption pursuant to G. L. c. 59, § 5, Third, even though it might also qualify for tax reduction under to G. L. c. 61, § 1. NEFF Br. 42-47. The plain text of the relevant statutes confirms the possibility of simultaneous entitlement under the two provisions.

The words of a statute are "the principal source of insight into Legislative purpose." New Bedford v. Energy Facilities Siting Council, 413 Mass. 482, 485 (1992). Where "the intent of the Legislature is unambiguously conveyed by the statutory language," the Court ends the "analysis and give[s] effect to the legislative intent." Adams v. City of Boston, 461 Mass. 602, 609 (2012). "It is not the province of courts to add words to a statute that the Legislature did not choose to put there." Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 496 (2010).

Far from "reject[ing] clause third exemption in favor of reduced tax burdens," Assessors Br. 16, the

legislature acknowledged and affirmed the existence of tax-exempt conservation charities. Many provisions of the Reduction Statutes recognize the important role of "nonprofit conservation organization[s]," G. L. c. 61, §§ 6, 8; G. L. c. 61A, §§ 12, 14; G. L. c. 61B, §§ 7-9, with the phrase "nonprofit organization" used in the Reduction Statutes to encompass charities organized pursuant to chapter 180, G. L. c. 61B, § 1. "[N]onprofit conservation organization[s]" may, among other things, purchase parcels of qualifying land without triggering conveyance taxes, G. L. c. 61, § 6; G. L. c. 61A, § 12; G. L. c. 61B, § 7, and take assignments of first refusal options from municipalities that cannot or will not exercise, G. L. c. 61A, § 14; G. L. c. 61B, § 9.

Although it clearly had conservation charities in mind, the legislature said nothing that might exclude conservation land from charitable exemption under G. L. c. 59, § 5, Third. The Assessors incorrectly attempt to read into the Reduction Statutes a limitation -- that is, a wholesale preemption of tax exemption under G. L. c. 59, § 5 -- that the legislature could have inserted, but did not. See Global NAPs, Inc., 457 Mass. at 496; see also Dartt v. Browning-Ferris Indus.,

427 Mass. 1, 8 (1998). Instead, the legislature affirmed the vitality of conservation charities as distinct and complementary vehicles for protection of Massachusetts conservation land.

Here, in any event, there is more than the legislature's failure to carve charitable conservation property out of the charitable exemption provision. The legislature expressly addressed overlapping exemptions and reductions in the preamble to G. L. c. 59 § 5, and deemed some exemptions and reductions to be mutually exclusive, but did not exclude conservation land eligible for various reductions from full exemption if the conservation purpose also qualified as charitable. See NEFF Br. 42-47.[1]

B. The legislative history of the Reduction Statutes evinces no intent to eliminate tax exemption for charitably-held conservation land

Even were extrinsic evidence of legislative intent necessary or admissible -- which it is not[2] --

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[1] The Assessors respond that the purpose of the preamble "is to avoid the stacking of partial exemptions," Assessors Br. 21-22, n.3, but that argument ignores the fact that some of the categories in the preamble are, in fact, full exemptions. See G. L. c. 59, § 5, Forty-Second and Forty-Third.

[2] See supra Section I.A.; In re Adoption of Daisy, 460 Mass. 72, 76 (2011) ("Where the meaning of the language is plain and unambiguous, we will not look to

the legislative history of the Reduction Statutes reflects no intent to abandon charitable exemption in favor of a reduction-only scheme for conservation land.

The legislature enacted G. L. c. 61 and 61B -- the provisions of the Reduction Statutes applicable to forestland -- under the authority of Article 110 of the Amendments to the Massachusetts Constitution:

> Full power and authority are hereby given and granted to the general court to prescribe for wild or forest lands retained in a natural state for the preservation of wildlife and other natural resources and lands for recreational uses, such methods of taxation as will develop and conserve the forest resources, wildlife and other natural resources and the environmental benefits of recreational lands within the commonwealth.

By its clear terms, Article 110 was meant to expand, not diminish, the legislature's efforts to create and protect conservation land. Article 110 empowered the legislature to use any "methods of taxation" to "develop and conserve" the Commonwealth's forests. The Assessors would inappropriately have the Court negate the purpose of Article 110 by reading G. L. c. 61 and 61B as constraints on the legislative tools available to promote land conservation.

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extrinsic evidence of legislative intent unless a literal construction would yield an absurd or unworkable result.") (internal citations and quotations omitted).

The Assessors argue that the "Report of a Special Non-Legislative Commission Established to Make an Investigation and Study relative to the Taxation of Forest Land, Farm Land and Open Space Land," 1966 House Doc. No. 3769 (the 1966 Report), evinces an intent to eliminate tax-exempt ownership of conservation land. Assessors Br. 17. This is an incorrect characterization of the 1966 Report based on an incomplete quotation of the relevant content.

With respect to tax-exempt ownership of conservation land, the 1966 Report provided in full:

> Public or semi-public (tax exempt) ownership of <u>all</u> lands which are needed to be retained for shaping and servicing urban areas is obviously impractical by reason of the costs of acquisition and operation, the huge areas which would then be totally exempt from property taxes, and because of the policies involved.

1966 House Doc. No. 3769 at 8 (emphasis in original). By cautioning that tax-exempt public ownership of "<u>all</u>" protected land might be impractical for many reasons, including the cost of acquisition, the 1966 Report acknowledged that tax-exempt ownership of <u>some</u> protected land would continue. Notably, conservation land is eligible for tax reduction irrespective of whether its use is charitable. Thus, nothing in the 1966 Report can plausibly be read as "rul[ing] out"

"tax exempt ownership of farm, forest and open land" that is charitable in nature. Assessors Br. 17.

To the extent the Court is inclined to consider the legislative reports, the more relevant report is the "Legislative Research Council Report Relative to Classification and Assessment of Real Property." 1969 House Doc. No. 5323, cited in Town of Sudbury v. Scott, 439 Mass. 288, 299 n.15 (2003) (the 1969 Report). The 1969 Report observed that property that "serve[s] the public good" is "exempt and has been exempt by uniform practice since Colonial times." Id. at 29-30. Nothing in the 1969 Report excludes charitable conservation land from tax exempt status.

C. Land speculation concerns are not applicable to conservation charities

The Assessors argue that charitable exemption "does not protect [conservation] land from development or from sale for development" because it does not impose barriers to change of use as do the Reduction Statutes. Assessors Br. 20. The Assessors are again incorrect; charitable conservation land need not be subject to such barriers to be protected.

The legislature's aim in including barriers to change of use in the Reduction Statutes was to

counteract the profit motive of certain private landowners who might selfishly hold forestland, open space, or agricultural land subject to reduced taxation only until profitable development opportunities arise. See Scott, 439 Mass. at 300 n.17. Where the legislature believed such profit motive was not a concern, it imposed no barriers to change of use. For example, in 1979 -- the same year G. L. c. 61B was adopted -- the legislature enacted G. L. c. 59, § 2A,[3] which provides a reduced tax rate for "class two open-space," defined as land which is "not taxable under the provisions of chapters sixty-one, sixty-one A or sixty-one B," "not held for the production of income," and "maintained in an open or natural condition and which contributes significantly to the benefit and enjoyment of the public." This provision does not restrict tax reduction on barriers to change of use. Likewise, because charitable conservation organizations do not hold land for profit-gain, the Legislature saw no need to impose a change-of-use restriction on the application of G. L. c. 59, § 5, Third.

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[3] G. L. c. 61B was added to the General Laws by St. 1979, c. 713, § 1. G. L. c. 59, § 2A was added to the General Laws by St. 1979, c. 797, § 11.

More basically, the Assessors' central premise -- that charitable tax exemption for conservation land invites land speculation -- is mistaken. By charter and by law, public conservation charities like NEFF are bound to promote land conservation over short-term profit. NEFF, like all nonprofit charities in Massachusetts, carries out its work under the supervision of a board of directors, and the further oversight of the Attorney General who is empowered to conduct investigations and seek damages where charitable funds are not being applied to charitable purposes. G. L. c. 12, §§ 8, 8H; Weaver v. Wood, 425 Mass. 270, 275-276 (1997); In re Wilson, 372 Mass. 325, 328 (1977). As an I.R.C. § 501(c)(3) organization, NEFF is also subject to IRS censure for misuse of charitable funds. These internal and external controls are more than sufficient to inhibit inappropriate lapses into for-profit land speculation.

D. Outright exemption of charitable conservation land does not lead to unwanted tax consequences

The Assessors raise the common anti-conservation refrain that tax exemption for conservation land "lead[s] to drastic, legislatively-unwanted shifts in the tax burden." Assessors Br. 21. In fact, the cost

of public services provided by the government to forestland and open space is a fraction of the cost of services provided to developed property.[4] The cost of what services conservation land does require is far outweighed by the substantial economic benefits created by forestland and open space. These benefits are provided by charitable organizations free to the public, thereby alleviating the need to expend public funds to acquire and manage the land for conservation.

As states and municipalities widely acknowledge, conservation land raises tourism revenue and creates jobs tied to outdoor recreation opportunities, attracts business and investment, increases air and water quality, reduces health care expenses through promotion of exercise and recreation, mitigates flooding, and provides natural corridors and habitat for wildlife.[5,6] Numerous studies have confirmed that

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[4] See Massachusetts Executive Office of Energy and Environmental Affairs, Open Space and Recreation Planner's Workbook, at 2 (2008) ("Protected open space . . . is less costly to maintain than the infrastructure and services required by residential development. Even taking into account the increased tax base that results from development, open space usually proves easier on the municipal budget in the long-run.").

[5] See Open Space and Recreation Planner's Workbook, supra, at 37 ("Research on this topic suggests that the proximity to recreation and open space is the most

"the market values of properties located near a park or open space . . . frequently are higher than those of comparable properties located elsewhere."[7] Thus, charitable conservation does not constitute a burden on public resources but rather realizes the goal of protecting forestland and open space with minimal cost to the taxpayer.

E. The Reduction Statutes are, taken alone, inadequate to protect conservation land

Were the Assessors correct that the Reduction Statutes supply the exclusive taxation schemes

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important factor in choosing the location of a small business."); New York Office of the State Comptroller, Economic Benefits of Open Space Preservation, at 3-8 (2010) ("A common misperception is that open space protection translates into a loss of revenues for municipalities."); Virginia Department of Conservation & Recreation, Virginia Outdoors Plan - Economic Benefits of Recreation, Tourism and Open Space, at 59 (2007) ("Conserved open space helps safeguard drinking water, clean the air and prevent flooding -- services provided much more expensively by other means.").

[6] Forestland in particular provides all citizens with valuable clean air and clean water. The United States Forest Service calculates that a single tree with a 50 year life span "will generate $31,250 worth of oxygen while prov[id]ing $62,000 work of air pollution control." Massachusetts Executive Office of Energy and Environmental Affairs, 2011 Land Protection Report, at 13 (2012).

[7] John L. Crompton, The Impact of Parks and Open Spaces on Property Taxes, The Economic Benefits of Land Conservation 1, 2 (2007). This premium benefits not only homeowners, but also municipalities that receive increased tax revenue consistent with higher property values. Id.

available to conservation land, vast numbers of conservation parcels would be disqualified from both tax exemption and tax reduction. Chapter 61 requires a minimum parcel size of ten contiguous acres to qualify for tax reduction, G. L. c. 61, § 2, and chapters 61A and 61B each requires minimum parcel sizes of five acres, G. L. c. 61A, § 4, 61B, § 1.

According to a 1993 survey conducted by the United States Forest Service, 77 percent of all privately owned forestland parcels in Southern New England are smaller than ten acres in size.[8] A 2008 survey in the Northern Journal of Applied Forestry found that 66 percent of privately owned forest parcels in Massachusetts are smaller than ten acres, with a median parcel size in Eastern Massachusetts of only 4.83 acres.[9]

As these surveys demonstrate, a significant number of forested parcels in Massachusetts, many owned by charitable conservation organizations,[10] are

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[8] Robert T. Brooks et al., United States Department of Agriculture Forest Service, Forest Resources of Southern New England, at 43 (1993).

[9] David B. Kittredge et al., Estimating Ownerships and Parcels of Nonindustrial Private Forestland in Massachusetts, 25 North. J. App. For. 93-96 (2008).

[10] See Massachusetts Audubon Society, Losing Ground: At What Cost?, at 14 (3d ed. 2003).

likely ineligible for any tax reduction under G. L. c. 61, 61A, or 61B. If the Court were to adopt the Assessors' approach, smaller forested parcels would be barred from any tax relief, discouraging conservation on a sizable number of parcels throughout the Commonwealth.

II. THE ASSESSORS INCORRECTLY RELY ON THE 1891 ACT CREATING THE TRUSTEES OF RESERVATION, IGNORING THE ANIMATING PURPOSE BEHIND THE ACT

Straining history, the Assessors argue that the legislature, through the 1891 creation of the Trustees of Public Reservations (the Trustees), intended to permanently disqualify conservation land from charitable tax exemption. Assessors Br. 12-15. This contradicts both the legislature's purpose in creating the Trustees and years of well-established precedent.

The legislature created the Trustees "for the purpose of acquiring, holding, arranging, maintaining and opening to the public, under suitable regulations, beautiful and historical places and tracts of land within this Commonwealth." St. 1891 c. 352, § 1 (the Act). The Trustees were the very first[11] private non-profit land conservation organization in the country.

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[11] See Gordon Abbott Jr., Saving Special Places: A Centennial History of the Trustees of Reservation, 1993, The Ipswich Press, at 8.

A legislative mandate was thought necessary because of the novelty, and audacity, of the very notion of charitable land conservation. [12] The legislature's creation of the Trustees was a novel step forward in the history of environmentalism that put Massachusetts at the vanguard of the conservation movement.

The Assessors would now turn the Act on its head by using it to fossilize the Commonwealth's tax policy for charitable conservation organizations as it existed in 1891. Without citing a single source or authority in support, the Assessors assert in conclusory fashion that the legislature must have passed the Act because it "knew that a private charitable corporation that held land for preservation purposes, even if it made that land open to the public, would not qualify for exemption under Clause Third." Assessors Br. 14. [13] To the contrary, the

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[12] Trustees of Reservations, Trustees History, http://www.thetrustees.org/about-us/history/ (the founders of the Trustees proposed, in their own words, a corporation that would hold land free of taxes "just as a Public Library holds books and an Art Museum holds pictures" and "will be able to act for the benefit of the whole people, and without regard to the principal cause of the ineffectiveness of present methods, namely the local jealousies felt by townships and the parts of townships towards each other").

[13] The Assessors incorrectly assert that the Trustees have a "cap[ped]" or "limited" exemption reflective

legislature almost certainly had no notion of the preexisting rights of charitable conservation organizations, the very species of organization it was then bringing into existence for the first time in history. The Assessors' argument also contradicts the purpose underlying the Act. Where the legislature sought to advance the preservation of "beautiful and historic places and tracts of land," St. 1891 c. 352, § 1, and place the Commonwealth at the fore of the conservation movement, the Assessors would now deploy the Act to decrease the tax protections available to conservation land throughout the Commonwealth.

Beyond distorting its historic underpinnings, the Assessors' strained interpretation of the Act as a bar on tax exemption for charitably-held conservation land is also one never before advanced or embraced in the 122 years since the creation of the Trustees. To the

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of the legislature's "war[iness] of giving a blanket tax exemption to land held for preservation purposes." Assessors Br. 14. In 1963, the legislature increased the cap on the Trustee's holdings from $1 million in property to $10 million in property. St. 1963, c. 289. In 1971, the legislature enacted G. L. c. 180, § 6 to permit entities organized pursuant to G. L. c. 180, including the Trustees, to hold "real and personal estate to an unlimited amount . . . notwithstanding the specification of a limited amount in any special law." Today, the Trustees -- like other charitable conservation organizations -- are permitted to hold conservation land in an unlimited amount.

contrary, even the ATB has acknowledged the application of G. L. c. 59, § 5 to conservation land, see Trustees of Reservations v. Board of Assessors of the Town of Windsor, 1991 WL 281123, at *8-9 (Mass. App. Tax. Bd. 1991), and further acknowledged the Trustees' simultaneous entitlement to exemption pursuant to the Act and pursuant to G. L. c. 59, § 5, id. at *9. Both the legislature and the Massachusetts Department of Revenue have similarly recognized the applicability of G. L. c. 59, § 5 to conservation organizations. [14], [15] That the legislature, the Department of Revenue, and the ATB have all so long

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[14] See supra Section I.A.; Massachusetts Department of Revenue, Letter File 1994-699 ("Where a property is owned by a corporation whose charitable purpose include[s] the preservation of natural resources, we think the simple act of maintaining that property in its natural condition would satisfy the occupancy requirement."); Massachusetts Department of Revenue, Letter File 2005-046 (observing that a conservation organization may be entitled to charitable exemption if "it is actively using its property to promote recreation, conservation and education").

[15] While never directly addressing the entitlement of land conservation organizations to full charitable exemption, this Court has generally acknowledged the applicability of G. L. c. 59, § 5 to undeveloped open space, see Wheaton College v. Town of Norton, 232 Mass. 141, 148 (1919); Board of Assessors of Quincy v. Cunningham Found., 305 Mass. 411, 413, 420 (1940), and has affirmatively recognized forest conservation as a charitable purpose, see Peakes v. Blakely, 333 Mass. 281, 285 (1955) ("[T]he purpose to cultivate forests is in itself charitable.").

recognized the application of G. L. c. 59, § 5 to conservation organizations evinces the unsupportable and unprecedented nature of the argument the Assessors now advance.[16]

III. NEFF OCCUPIES, MANAGES, AND USES THE FOREST IN ACCORDANCE WITH ITS CHARITABLE PURPOSES

The Assessors argue that NEFF does not meet the requirements of G. L. c. 59, § 5, Third because it restricts access to, discourages public use of, and does not actively occupy the Forest. Assessors Br. 24-30. The Assessors misrepresent the record and misunderstand G. L. c. 59, § 5, Third.[17]

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[16] It is true that the Trustees hold "a somewhat broader exemption for the corporation than would be available under the general exemption statute." Town of Milton v. Ladd, 348 Mass. 762, 765-766 (1965). In Ladd, this Court held that the Trustees were entitled to tax exemption for a period of time in which they did not use or occupy property in light of their special right under the Act to enjoy a pre-occupancy exemption for property acquired with the Trustee's objects in view, and made open to the public within two years. Id. at 766, citing St. 1891, c. 352, § 3. Ladd offers no support whatsoever for the Assessors' position that "only the Trustees of Reservations is entitled to a property tax exemption for property it holds for preservation and opens to the public." Assessors Br. 31.

[17] The Assessors also wrongly claim that NEFF asserted only an educational purpose before the ATB, waiting until this appeal to assert conservation as its charitable purpose. Assessors Br. 26. To the contrary, NEFF described its charitable purposes in its briefing to the ATB almost identically to its description in its opening brief before this Court.

Notwithstanding the ATB's finding of inadequate "public access" to the Forest under its overly restrictive and legally inapplicable standard, see NEFF Br. 33-42, NEFF has held the forest open to the public since purchasing it in 1999, NEFF Br. 16-17, maintains signs welcoming the public onto the land, App. 415-16, and publicizes the Forest in its Community Forest Booklet, App. 220-21, and on its website, NEFF Br. 18, n.16. The Forest is actively used by the public for hiking, hunting, and snowmobiling. NEFF Br. 16-17. Nowhere does the record suggest that NEFF prevents the public from accessing the Forest.[18]

App. 4 (describing NEFF's charitable purposes as including "lessening the burdens of government to protect, manage, and conserve open space and forest lands"); compare NEFF Br. at 12. The ATB's opinion leaves no question that it fully understood NEFF's argument that conservation is a charitable purpose under G. L. c. 59, § 5, Third. See App. 62-63, 87-93.

[18] While the ATB found that a gate across the access path off of Stetson Road and the lack of a paved driveway were designed to "discouraged public usage," App. 76, these limits serve only to discourage harmful abuse of the Forest. The ATB specifically found that the gate limited vehicular access "so as to prevent rutting and erosion and the consequent negative impacts to water quality," and the lack of a parking lot discouraged "dumping of trash . . . and other vandalism." App. 66-67. These protections serve to further the public's enjoyment of the Forest and do not restrict access in a manner contrary to NEFF's charitable purposes.

Nor does the record support the Assessors' companion argument that NEFF failed "to demonstrate active use" of the Forest. Assessors Br. 27-30. NEFF actively occupies the Forest by maintaining its natural character through a Forest Management Plan calling for carefully planned and executed timber harvests at seven and a half year intervals. NEFF Br. 16-17. NEFF's rejection of frequent, intrusive activity on the land is not "passive use"; it is part of a deliberate conservationist appropriation of the Forest "to the immediate uses of the charitable cause" for which it is organized. Board of Assessors of Boston v. The Vincent Club, 351 Mass. 10, 14 (1966).

The Assessors advance an interpretation of "occupancy" that would deprive NEFF and other conservation organizations of the ability to determine for themselves how best to devote their property to their charitable purposes. See id. Forest and land conservation require careful planning over the span of decades, and NEFF works every day across all of its many properties to actively pursue its long-term conservation goals. NEFF Br. 13, 16-17. Although NEFF's presence in the Forest may not be as readily visible to the unobservant eye as would be a hospital,

a school, or even a developed public park, careful maintenance of the Forest's natural character is the most suitable means of appropriation consistent with NEFF's charitable purpose. See Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530, 540-541 (1956); Trustees of Reservations, 1991 WL 281123, at *9. To hold that NEFF does not "occupy" the Forest through carefully planned forest management would be to require NEFF to engage in more than forest conservation in order to receive exemption, and would jeopardize the entire network of conservation land held by NEFF throughout the Commonwealth.

The Assessors see this network, and the Forest as part of it, as unused, unoccupied, unimportant property. That could not be farther from the truth. NEFF carefully manages the Forest in furtherance of its charitable purposes. As such it is entitled to tax exemption under G. L. c. 59, § 5, Third.

CONCLUSION

For the foregoing reasons, and those set out in NEFF's opening brief, the April 26, 2011 Notice of Decision and January 28, 2013 Findings of Fact and Report of the ATB should be REVERSED.

Respectfully submitted,
NEW ENGLAND FORESTRY
FOUNDATION, INC.
By its attorneys,

/kpb

Douglas H. Hallward-Driemeier
(BBO No. 627643)
Jesse M. Boodoo
(BBO No. 678471)
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
Tel: (617) 951-7000

Dated: September 19, 2013

CERTIFICATE OF SERVICE

I, Jesse M. Boodoo, attorney for Appellant New England Forestry Foundation, Inc. certify that I served two copies of the foregoing brief on counsel for Appellee by First Class Mail on September 19, 2013.

/kpb
Jesse M. Boodoo

CERTIFICATION OF COMPLIANCE WITH MASS. R. APP. P.

I, Jesse M. Boodoo, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. App. P. 16, 18, and 20.

/kpb
Jesse M. Boodoo