STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. YOR-13-511

FRANCIS SMALL HERITAGE TRUST
Plaintiff/Appellee

v.

TOWN OF LIMINGTON
Defendant/Appellant

ON APPEAL FROM THE
YORK COUNTY SUPERIOR COURT

AMICI BRIEF
ON BEHALF OF
MAINE COAST HERITAGE TRUST
And
LAND TRUST ALLIANCE, INC.

IN SUPPORT OF PLAINTIFF/APPELLEE
AND THE DECISION OF THE SUPERIOR COURT

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STATEMENT OF THE ISSUES

1. Did the Superior Court err in determining that a land conservation organization constitutes a "charitable and benevolent institution" pursuant to 36 M.R.S. § 652(1)(A)?

2. Did the Superior Court err in finding that FSHT is eligible for exemption despite a portion of its purpose statement which calls for "protection of logging, farming and other compatible commercial activities"?

3. Did the Superior Court err in finding that land owned by a land conservation organization may be eligible for property tax exemption pursuant to 36 M.R.S. § 652(1)(A) despite being eligible for open space classification pursuant to 36 M.R.S. § 1101 *et seq.*?

INTERESTS OF THE AMICI

Maine Coast Heritage Trust

Maine Coast Heritage Trust ("MCHT") is a statewide nonprofit conservation organization. Since its inception in 1970, Maine Coast Heritage Trust's work has resulted in the perpetual preservation of more than 141,820 acres of outstanding natural lands with high public benefit values, including 398 entire islands. Maine Coast Heritage Trust employs a variety of legal tools to assist its conservation partners, state, local and federal agencies, and Maine's 93 nonprofit conservation land trusts[1], in conserving land in Maine's communities in the face of suburban sprawl.

Maine Coast Heritage Trust conserves and stewards Maine's coastal lands and islands for their renowned scenic beauty, outdoor recreational opportunities, ecological diversity and working landscapes. It began to acquire

and manage preserves for the public benefit only as recently as 1985. In addition to the 249 conservation easements it now holds, MCHT owns 148 preserve parcels totaling 11,292 acres.

MCHT has been instrumental in supporting passage of changes to the Farm and Open Space Tax Law since the early 1980's. It worked closely with the State Legislature and its Taxation Committee in 1989 to craft public benefit requirements for Open Space under L.D. 2272, An Act to Clarify Eligibility Requirements for the Open Space Tax Program, and in 1993 to establish the alternative valuation method that favors "permanently protected" open space, under L.D. 1222, An Act to Amend the Maine Tree Growth Tax Law and the Farm and Open Space Tax Laws.

In addition to MCHT, the emergence of local Maine land trusts over the past few decades has heralded tangible public benefits for Maine residents. From just a handful of Maine land trusts in existence in 1970, our state now benefits from the work of over 90 such organizations, who work with MCHT under the auspices of MCHT-administered "Land Trust Program" and the "Maine Land Trust Network." Together, these local organizations own 1,256 conservation preserves in their communities, totaling 249,875 acres.[2]

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[1] To be clear, despite the use of the word "trust" in their names, almost all land trusts are formed as nonprofit corporations, not trusts.

[2] 2009 Survey of Maine Land Trusts, Maine Land Trust Network, 2009; note that this figure does not include other large non-profit preserve owners in Maine, such as The Nature Conservancy, Appalachian Mountain Club, Maine Audubon Society, and the Forest Society of Maine.

In its 2009 survey of land trusts, MCHT determined that most land trusts (73%) employ more than one approach to property taxation. Requesting tax-exempt status without payment or donations is the most common practice:

Property Tax Practices	Response Percent
Request tax exempt status, no payment in lieu or donation	58%
Enroll in current use programs (open space, farmland, tree growth)	46%
Request tax exempt status, make payment in lieu of taxes	31%
Pay full taxes	27%
Request tax exempt status, make donation to town	13%

Most land trusts (78%) have never been denied property tax exemption, though denials are not uncommon. Beyond town policy or preference, reasons reported for denial include lack of public access, prior land use, and current uses that generate income (e.g. fees for hiking).

Most municipalities (as well as Maine Revenue Services, the assessor for the unorganized areas) have recognized that land conservation organizations and their fee-owned preserves are eligible for property tax exemption. MCHT enjoys tax exemption on 97 of its 148 fee-owned preserve parcels, including on 12 preserves located in the unorganized areas. In certain situations, due to technical disqualification, such as donor-retained rights, or to accommodate the town government's preference, MCHT and other land trusts choose classification under the Farm and Open Space Tax Law, the Tree Growth Tax Law, or simply keep their preserves on the tax rolls. Many make a voluntary payment in lieu of taxes, even if they obtain exemption.

Land Trust Alliance

The Land Trust Alliance, Inc. (Alliance) is a Massachusetts nonprofit corporation based in Washington, D.C. with many 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.

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 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 of the amici curiae is based in part on the research compiled through this program.

INTRODUCTION AND SUMMARY OF ARGUMENT

The flourishing of land trusts throughout Maine and the nation in recent decades is a public policy success story. Nonprofit conservation organizations' 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, developed in reliance on longstanding public policy.

Land trusts' management of fee lands is costly. MCHT's 2012 budget for *annually recurring* management costs of its approximately 249 conservation easement and 148 fee holdings was $1.6 million, raised mainly through endowment income and charitable gifts. MCHT has built approximately 58 miles of trails, and maintains many kiosks and signs inviting the public onto its land (and guiding them in its sustainable use!). In a typical recent year, more than 5,600 visitors signed into MCHT preserves (indicating a total use much higher than the fraction who take the time to sign in) and MCHT staff guided 44 walks and coordinated the work of almost 300 volunteers. Smaller land trusts do extraordinary work as well, relying on donations and volunteer time. The State relies on nonprofit land trusts such as Francis Small Heritage

Trust to do what government would otherwise do with tax dollars. The property tax exemption was designed to avoid imposing a property tax on charities that lessen the burdens of governmental services such as land conservation.

Amici submit this brief in part in order to present a summary of relevant common law in Maine and in other jurisdictions. After a lengthy period in which there was little case law on the question of whether land conservation is charitable, we now see an increase in litigation. 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. The Maine Supreme Judicial Court is well situated to address the instant matter and perhaps establish persuasive authority for Maine and other state courts that take up the issue later.

In Section I, we discuss how modern case law in other jurisdictions addressing whether land conservation is a charitable purpose overwhelmingly supports the Superior Court decision and FSHT's position. Furthermore, Maine charitable trust law and the State's implementation of its charitable solicitation statute also corroborate the notion that land conservation is a charitable purpose. In Section II, we show that conservation of farmland and forestland is also charitable by lessening the burdens of government, as demonstrated by the numerous laws, funding programs, and direct state activity in this area. Alternatively, we show that FSHT's attention to farming and forestry on their preserves is either non-existent or incidental. Moreover,

FSHT's power to conduct such activities is not inconsistent with land conservation, nor a bar to exemption. And in Section III, we address how the Farm and Open Space Tax Law was never intended to supplant property tax exemption for conservation parcels owned by land trusts.

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.[3] Another state court, while rejecting exemption based on the

[3] 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.[4]

At present, two states (Ohio and New York) enjoy the benefit of high court holdings on the question of land conservation as a charitable purpose, and this Court will be among the national leaders in setting a modern precedent 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* that land conservation is charitable, 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. Meanwhile, 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. 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

[4] *Trustees of Vermont Wild Land Foundation v. Town of Pittsford*, 407 A.2d 174 (Vt. 1979)(holding that a conservation preserve was not tax-exempt because public access was unduly limited)

preservation of land in its "natural state" constitutes use for a charitable purpose.

In addition to those two states' high court cases, three other states have adjudicated this question at the intermediate appellate level since 1979. Most recently, a New Mexico appeals 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 state statutes declaring land conservation to be a public policy – similar to the argument we make herein.

In *Turner v. Trust for Public Land*, 445 So. 2d 1124 (Ct. App. Fla. 1984), a Florida appellate court held that managing a property for conservation by leaving it in its natural state can serve the greatest good and therefore qualify the parcel for property tax exemption. *Id.* at 1126. Finally, in *Santa Catalina Island Conservancy v. County of Los Angeles*, 126 Cal. App. 3d 221 (Cal. App. 1981), a California court recognized land conservation as a charitable purpose.

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

The Town points to this Court's decision in *Holbrook Island Sanctuary v. The Inhabitants of the Town of Brooksville,* 161 Me. 476 (1965), as support for

the notion that land conservation is not a charitable purpose.[5] The Superior Court below rejected this argument, as should this Court. In *Holbrook Island*, this 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. The *Holbrook* Court held that prohibiting hunting was contrary to public policy, and thus could not be charitable.

To begin, *Holbrook Island* can be distinguished from the instant case in two important ways. First, in that case there was no discussion of whether the preserve parcel was used by the general public for recreational purposes. In contrast, the record here amply demonstrates (and it appears to be uncontested by the Town) that FSHT's preserves are indeed open to the public and actively used for a variety of recreational and educational activities, as acknowledged by the Superior Court. A. 14-15. Thus, there is no doubt that FSHT's preserves benefit both wildlife and people. Second, in *Cushing Nature and Preservation Center v. Town of Cushing*, 2011 ME 149 ¶ 13, 785 A.2d 342, 346, this Court clarified that the holding of *Holbrook Island* was not that conservation was not a charitable purpose, but rather that "when the purpose of an alleged charitable use violates public policy, it cannot be classified as

[5] The Town has also cited to *Silverman v. Town of Alton*, 451 A.2d 103 (Me. 1982) for authority that wildlife preservation is not charitable. However, that decision only addressed whether such activities were "scientific" within the meaning of 36 M.R.S. § 652(1)(B), and not whether they were charitable within the meaning of § 652(1)(A). Moreover, the entirety of the analysis centered on whether the University of Maine, as the beneficiary of trust real property, could stand in the shoes of the trustees for the

charitable." . There is no suggestion by the Town in the instant case the FSHT's purposes violate public policy in any way, and so *Holbrook Island* does not apply.

Beyond these clear distinctions between the instant case and *Holbrook Island*, Amici urge this Court to recognize that the latter case was decided in a remarkably different political and social context for our state and country, largely prior to the modern environmental era, and to distinguish or overrule it as such. From the standpoint of ecological consciousness and support for land conservation, *Holbrook Island* was decided in practically another world. The post-World War II population boom and its attendant proliferation of land development and pollution led to a host of environmental problems throughout the country. In response to these relatively new problems, the environmental movement flourished in the late 1960's and 1970's and engendered a constellation of federal and state laws and funding programs promoting the protection of open space.[6] 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.

As with the rest of the nation, the portfolio of land conservation laws in Maine increased exponentially in the 1960's and 1970's and even into the 1980's. Many of the preambles of these statutes wax poetic on the public

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purposes of determining whether land is owned by a scientific institution. Thus, *Silverman* is completely inapposite to the instant case.

[6] 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*

benefit provided by environmental protection. The Natural Resources Protection Act at 38 M.R.S. § 480-A, passed in 1987, protects a range of discrete kinds of conservation lands. In its opening section, the Legislature clearly stated its intent in passing this statute:

> The Legislature finds and declares that the State's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and coastal sand dunes systems are resources of state significance. These resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical and environmental value of present and future benefit to the citizens of the State and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of the citizens of the State.

38 M.R.S. § 480-A. In turn, the Site Location of Development Act at 38 M.R.S. § 481 et seq. (first passed in 1969), the Mandatory Shoreland Zoning Act at 38 MRS § 438 et seq. (first passed in 1985, but preceded by wetlands protection statutes dating back to 1966 – see P.L. 1967, c. 348), and the Coastal Barrier Resources Act at 38 M.R.S. Section 1901 et seq. (1985) are other examples of land conservation statutes. Meanwhile, the Growth Management Law at 30-A MRS § 4312(3)(E), (F) enunciates State goals of protecting water bodies and other critical natural resources such as wetlands, wildlife habitat, and scenic vistas. Collectively, these statutes demonstrate a clear statewide public policy in favor of land conservation.

In addition to enacting a bevy of land conservation statutes, Maine has also devoted considerable resources to establishing departments and agencies focusing on environmental protection in general and land conservation in particular. If delivered from a time machine from 1965, a visitor to Augusta today would hardly recognize the State's administrative landscape. The Maine

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Movements Matter? The United States Environmental Movement and Congressional Hearings and Laws, 1961-1990, online at http://www.unc.edu/search-unc/.

Department of Environmental Protection (MDEP) did not even exist before 1972, when it was established by statute. MDEP's 2011 budget was $60 Million, and the department employed 400 individuals. In turn, the Maine Department of Conservation (currently consolidated as the Department of Agriculture, Conservation and Forestry) had a FY 2012-13 budget of nearly $53 Million.[7] And the Maine Natural Areas Program, established by statute in 1999 (12 M.R.S. § 544), is a state agency whose mission is to provide information and technical assistance to support the conservation of Maine's rare plants, animals, natural communities and ecosystems.

Maine has not simply passed a series of land conservation laws and established land conservation departments and agencies; it has also invested millions of dollars directly for open space acquisition. Land Trusts have been an important partner in this governmental effort.

Public and Land Trust Conservation/Recreation Lands

	Acres		
MCHT Summary	**Fee**	**Easement**	**Total**
Federal	187,344	13,832	201,176
State	994,658	372,148	1,366,806
Municipal*	112,323	3,036	1,567,982
Land Trusts/NGO	878,878	1,993,010	2,871,888
Total	**2,173,203**	**2,382,026**	**4,555,229**

*Municipal-owned forests, parks and recreation lands >10 acres. Excludes school-owned lands.

All data current as of Dec 2010 except as noted, with the more recent Plum Creek easement added at 363,000 acres

Total Maine Acreage	22,000,000
% conserved	20.7%

[7] Maine General Fund Biennial Budget 2012-13, p.A-77, online at http://www.maine.gov/budget/budgetinfo/2012-2013/Genl%20Fund%202012%20Bien%20Part%20A.pdf

In many cases, the private charitable dollars Land Trusts raise, and the value of land they preserve, is required as "match" for government funding for conservation. Grants from the U.S. Fish and Wildlife Service, National Coastal Wetlands Conservation Grant, the national Forest Legacy Program, North American Wetland Conservation Act program, and Maine's own Land for Maine's Future program, have provided formal governmental recognition for land conservation organizations' long standing tradition of assisting government by acquiring and accepting long-term management responsibility of natural land important to the public.

The Land for Maine's Future (LMF) program is the most prominent and celebrated example of Maine's embrace of land conservation funding. LMF was first enacted by a bond measure in 1987, when voters overwhelmingly supported the new program. Since 1987, the LMF program has been renewed five times (1999, 2005, 2007, 2010, and 2012) in statewide elections. As of December 2012, over $131 million dollars have been committed to the program. These funds have supported the completion of 294 different projects comprising 561,000 acres throughout each of Maine's 16 counties.[8] Some landmark funding projects include land on Mount Kineo in Moosehead Lake, lands surrounding the Appalachian Trail in the famed Hundred Mile Wilderness, and the Presumpscot River Preserve in Portland.[9]

[8] Land for Maine's Future Program Biennial Report, January 2011-December 2012 at 46, online at http://www.maine.gov/dacf/lmf/docs/ACF_BiennialReport2013.pdf.
[9] For a full list of LMF projects, see http://www.maine.gov/spo/lmf/projects/.

Notably, LMF's enabling statute allows the State to grant acquisition funds to nonprofit land conservation organizations, called cooperating entities, and also requires them to provide "matching" funds, which are derived from charitable contributions and other grants. 5 M.R.S. § 6200, 2nd Par.[10] The law also counts as "match" other public and private contributions, including gifts of land *to* cooperating entities.[11] In fact, some of the very parcels at issue in the instant dispute were acquired by FSHT with LMF funding as part of the Sawyer Mountain Highlands Project, demonstrating the State's interest in protecting these specific properties.[12] It would be the height of irony for the State to invest hundreds of thousands of taxpayer dollars in protecting this land, only for the Town of Limington to insist that land conservation is not a charitable purpose.[13]

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[10] 5 M.R.S. Section 6200, 2nd Par: "The Legislature further finds that *Maine's private, non-profit organizations*, local conservation commissions, local governments and federal agencies have made significant contribution to the protect5ion of the State's natural areas and that these agencies should be encouraged to further expand an coordinate their efforts by working with state agencies as "cooperating entities" in order *to help acquire, pay for and manage* new state acquisitions of high priority natural lands. See also Title 5 MRS Section 6201(2) for definition of cooperating entity. (emphasis added)

[11] P.L. 1999, ch. 514, Section A—6(3), "The bond funds must be matched with at least $25 Million in public and private contributions. Seventy percent of that amount must be in the form of land, cash or other tangible assets. The remaining 30% may be matching contributions and include the value of project related, in-kind contributions of goods and services to and by cooperating entities and the value of real property interests acquired by or *contributed to cooperating entities*…" (emphasis added)

[12] For the State's description of the Sawyer Mountain Highlands project, see http://www9.informe.org/lmf/projects/project_detail.php?project=1615.

[13] LMF is not the only statewide conservation funding program. In 2003, the Maine Legislature established the Maine Outdoor Heritage Fund, which conserves wildlife and open spaces through the sale of lottery tickets, with grants totaling approximately $700,000 annually. See http://www.maine.gov/dacf/about/commissioners/outdoor_heritage_fund/index.shtml. For Maine Outdoor Heritage statute, see 12 M.R.S. § 10301 et seq.

Similar to the statewide LMF funding program, recent decades have seen the creation of a variety of national land conservation grant programs, including the National Coastal Wetlands Conservation Grant Program (16 U.S.C § 3954, enacted in 1991), the Forest Legacy Program (16 U.S.C. § 2103C, enacted in 1990), the Farm and Ranchlands Protection Program (16 U.S.C. § 3838h-3838, enacted in 1996), and the North American Wetland Conservation Fund (16 U.S.C. § 4401 *et seq.*, enacted in 1989). Together, these programs award billions of dollars in funding for land conservation every year, and just like the LMF program, nonprofit land trusts such as FSHT are eligible to receive these national grants.[14]

Not coincidentally, the passage of numerous land conservation laws and funding programs has 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.[15] Whereas the number of professional conservation scientists was miniscule before the 1960's, today there are an estimated 18,460 in the United States.[16] As the number of ecologists has grown, so has the sum total of our ecological knowledge, and in particular of the importance to human beings and society of protecting land in an undeveloped state.

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[14] For a chart showing the appropriations amounts in recent fiscal years for these and other federal land conservation grant programs, see http://www.landtrustalliance.org/policy/public-funding/public-funding#table.
[15] Robert P. McIntosh, *The Background of Ecology: Concept and Theory*, Cambridge University Press (1985) at 1.
[16] United States Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, at http://data.bls.gov/oes/datatype.do.

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 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 1970 and 1990, land development in Maine occurred at four times the rate that population increased.[17] National figures are similar.[18]

Nationwide, case law prior to 1979 addressing whether land conservation is a charitable purpose is sparse, reflecting the few existing land trusts. However, 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 that the few court opinions that do exist are mostly contrary to modern jurisprudence.[19] In addition to *Holbrook Island*, another 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

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[17] Maine State Planning Office, *Regional Landscape Conservation in Maine* at 4 (2008), available online at http://www.maine.gov/dacf/lmf/docs/Regional_Landscape_Conservation_2008.pdf.

[18] 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.

[19] To be sure, not every court prior to the 1970's was hostile to land conservation. In fact, a notable exception was the Massachusetts high court, which held in Carroll v. Commissioner of Corporations and Taxation, 343 Mass. 409 (1961), that the New England Forestry Foundation's (a land conservation entity) purposes were charitable.

qualms were about the paucity of public use of the property. 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 other public benefits of conservation. As in Maine, the array of land conservation laws and programs in New Hampshire in 1966 was miniscule compared to the present day. 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 hoary following the sea change in ecological consciousness and environmental laws since the 1950's and 1960's. At least one Maine commentator noted that a court with a "modern awareness of the public benefits of ecosystem preservation" would decide these questions differently.[20]

One of the ways in which this Court has defined an activity to be "charitable" for property tax exemption purposes is if it "benefits of an indefinite number of persons… by otherwise lessening the burdens of government." *Episcopal Camp Foundation, Inc. v. Town of Hope*, 666 A.2d 108, 110 (Me. 1995) (quoting *Johnson v. South Blue Hill Cemetery Ass'n*, 221 A.2d 280, 287 (Me. 1966). As of 2013 (and as of 2009, when the underlying dispute in the instant case arose), Maine has repeatedly declared land conservation to

[20] 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.

be a public policy, has passed laws promoting and requiring land conservation by private landowners, has established entire administrative departments and agencies charged with land conservation, and has devoted millions of dollars to conserving open space. In light of these fundamental facts, the conclusion that land conservation activities by a nonprofit land trust "lessen the burdens of government" and is therefore charitable is indubitable. As the Superior Court wrote in the instant case:

> It is time to directly declare that a legitimate land trust, such as this one, which meets the statutory and case law requirements, is a benevolent and charitable institution exempt from local property taxes. The direct and indirect value of open space preservation particularly when, in appropriate cases, it is coupled with access for a wide variety of recreational activity is within any *modern definition* of a charitable institution. In addition to the ecological and environmental benefit of land preservation there are numerous physical, psychological and, for some, even spiritual benefits to having access to undeveloped land.

A. 17 (emphasis added).

(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.[21] 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 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 land conservation.

Maine's Uniform Trust Code is entirely consistent with the Restatement, as its definition of charitable is virtually identical. Title 18-B M.R.S. § 405(1) 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).

Furthermore, in 2007, the Maine Legislature recognized the charitable nature of conservation easements, by passing specific amendment requirements that parallel the *cy pres* standards for amending charitable trusts. See the Maine Conservation Easement Act at 33 M.R.S. §476 *et seq*.

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

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[21] In fact, Jackson v. Phillips, 14 Allen 539, 556 (Ma. 1867), the original source from which virtually all interpretations of "charitable" in a property tax exemption context flow, was itself a charitable trust case, not a property tax exemption case.

In addition to the bevy of Maine statutes and programs supporting the notion that land conservation relieves a governmental burden and therefore is charitable, the State's administration of Maine's charitable solicitation statute, 9 M.R.S. § 5001 et seq., further bolsters the case. The definition of "charitable purpose" set forth in this statute is: "any charitable, benevolent, educational, philanthropic, humane, patriotic or eleemosynary purpose." 9 M.R.S. § 5003(2). The Maine Department of Professional and Financial Regulation's ("DPFR") interpretation and administration of the statute is illuminating. On the Charitable Organization Application form crafted by the DPFR, "Environmental" is listed as one of the primary charitable purposes by which an organization can classify itself.[22] Because environmental protection (presumably including land conservation) is recognized as a charitable purpose under the Charitable Solicitations Act, virtually all Maine land trusts file an annual registration statement and are treated as charitable organizations by the State. 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.

[22] See http://www.maine.gov/pfr/professionallicensing/professions/charitable/pdf/Initial%20App-Charitable%20Organization.pdf.

II. FSHT is Organized and Operating Exclusively For Charitable Purposes

(a) Protection of Farming and Forestry is Charitable Because It Lessens the Burdens of Government.

The Superior Court held that FSHT's Articles of Incorporation (the "Articles"), which permit the "protection" of logging, farming and other compatible commercial activities, authorizes limited activities that are "purely incidental" to its charitable efforts, and do not render the trust ineligible for exemption. The Town contends that this particular phrase in FSHT's Articles renders the organization ineligible for property tax exemption under § 652(1)(A), due to the requirement that a charitable and benevolent institution be organized exclusively for such purposes. The complete phrase at issue is a section of the Articles that declares one of FSHT's secondary purposes to be "protect[ing] appropriate uses such as logging, farming and other compatible commercial activities within specified areas and adjacent areas." The Town's argument presupposes, without explanation or analysis, that such activities are not charitable, when in fact that is not the case at all.

Protecting farming and forestry is indeed charitable under Maine law because it benefits an indefinite number of persons by lessening the burden of government. *Episcopal Camp Foundation, Inc.*, 666 A.2d 108, 110. Just as we demonstrated in Section I that land conservation in general is charitable by virtue of Maine's officially enunciated public policies, legislative schemes, and

investment of millions of taxpayer dollars, the same is true of conservation of farmland and forestland in particular.

Protection of farmland and forestland has been a key focus of the Land for Maine's Future program since its inception. The LMF enabling act identifies the protection of farmland as a specific goal. *See* 5 M.R.S. § 6207(2)(A) (designating "farmland" as one of the criteria for LMF acquisition). And the bond acts approved by the Maine Legislature and Maine voters also identify farmland protection as one of several criteria worthy of special preference. *See* 2011 P.L. Ch. 696 § 5(B). In fact, the phrase "preserve working farmland" was in the specific ballot language that went before voters as part of the 2011 reauthorization of LMF. *Id.* at § 10. Moreover, a portion of LMF funds awarded to farmland projects may be used not just to purchase farmland, but also for improvements that support the "land's continued use as a working farm." 5 M.R.S. § 6203(3)(C). Not only is protecting working farms a specific goal of LMF, but a portion of the overall LMF grant funds are set aside for farmland projects. Since the LMF program's inception in 1987, 36 different farmland projects protecting a total of 8,671 acres have been completed.[23] In collaboration with federal and local partners, LMF funds have helped to permanently protect blueberry fields, apple orchards, and dairy farms throughout Maine. Virtually all of these farmland projects are in the form of conservation easements and not fee acquisitions.

[23] http://www.maine.gov/dacf/lmf/docs/Farm_projects_1987-2012.pdf. http://www.maine.gov/dacf/lmf/docs/ACF_BiennialReport2013.pdf.

In addition, LMF funds have also been awarded to a host of commercial forestland projects. Forestland projects are harder to identify than farmland projects because they are not tracked separately. However, in 2001 and 2002 the LMF Board embraced the policy of protecting commercial forestland by adopting a set of principles for conservation easements on commercial forestland property (so-called "working forest easements").[24] Just one of many examples of a working forest easement project is the protection of the 8,600-acre Leavitt Plantation Forest in Parsonsfield.[25] Furthermore, Maine does not only fund commercial forest management projects, it also directly holds working forest conservation easements, such as the 195,000-acre Katahdin Forest Easement, which the State of Maine accepted in 2006 from The Nature Conservancy.[26] Likewise, the State typically is the primary holder or backup holder of the dozens of LMF farmland conservation easements. In other words, not only has Maine announced a goal of farmland and forestland protection, and not only has it provided funds for such acquisition projects; it has gone above and beyond these already significant steps by affirmatively participating in farmland and forestland projects by serving as a conservation easement holder.

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[24] Land for Maine's Future, *Drafting Guidelines for Working Forest Easements Funded by the Land for Maine's Future Program*, online at http://www.maine.gov/dacf/lmf/docs/FinalForesteasementguidelinesV6.4.doc.

[25] http://www9.informe.org/lmf/projects/project_detail.php?project=1601.

[26] http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/maine/placesweprotect/katahdin-forest-project.xml.

Maine is far from alone in declaring that protection of farmland and forestland is a worthy public policy goal. Numerous other states have similar funding programs, while the federal government, through the Farm and Ranchlands Protection Program and the Forest Legacy Program, has granted billions of dollars (including millions of dollars in Maine) for conservation easements on commercial farms and forestland.[27] And it is noteworthy that Congress has stated that donated conservation easements protecting farmland and forestland provide public benefit and are worthy of federal income tax benefits. I.R.C. § 170(h)(4)(A)(iii).

In addition to the LMF funding program, the Maine Legislature has enacted a host of statutes and programs designed to promote the protection of farmland and forestland. For instance, the Maine Agriculture Protection Act, 7 M.R.S. §§ 151-163, first enacted in 2007, promotes farming by making it more difficult for agricultural activities to constitute a public or private nuisance. One particular provision passed in 2009 sets up a pilot program that authorizes municipalities to establish agricultural districts for "keeping farmland in agricultural production and enhancing the profitability of farming." 7 M.R.S. § 163. The Maine Department of Agriculture, Conservation and Forestry operates a number of programs designed to promote sustainable commercial forestry, such as the Woods Wise Program[28], while the Maine

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[27] For background on the Farm and Ranchlands Protection Program, see http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/farmranch/. For background on the Forest Legacy Program, see http://www.fs.fed.us/spf/coop/programs/loa/aboutflp.shtml.

[28] *See* http://www.maine.gov/dacf/mfs/policy_management/wwi.html.

Legislature offers a state income tax credit for development of a forest management plan.[29]

FSHT's mission statement, which is essentially a distillation of its purposes, confirms that the rationale for including the protection of farming or forestry as a purpose is to "protect the present character of the land centered around the five Ossipee towns." A. 79-80. By including protection of farming and forestry as an additional purpose, the drafters of the Articles intended to authorize FSHT to hold working forest and working farmland conservation easements -- just as the State of Maine holds such easements. Thus, by including the protection of farmland and forestland in its Articles, FSHT is supporting the Maine and federal government's policies and goals, and lessening the burdens of government.

Although most land trust activity concerning commercial farmland and forestland involves holding conservation easements, some land trusts do own productive farmland and forestland. MCHT owns and operates Aldermere Farm, a tax-exempt property in Rockport, operated in the public interest as a demonstration Belted Galloway cattle farm. Its nearby Erickson Fields, in Camden, supports a Teen-Ag program and community farming. Likewise, FSHT has preserves on both working forests and farm land.

The relatively recent government burden of protecting farmland and forestland is a response to emerging threats to these traditional Maine

[29] 36 M.R.S. § 5219-C.

industries. According to one report, between 1964 and 1997, Maine lands in agricultural production declined by more than 50 percent.[30] Moreover, according to the State Planning Office, between 1992 and 1997, Maine converted 33,560 rural acres per year to development, a rate four times that of the previous decade, and greater than the cropland in nine Maine counties.[31] In light of these threats, Maine citizens and their elected representatives have chosen to embrace the goal of protecting farmland and forestland from sprawling residential development. Because of the pressures of such development, farmland and forestland are seen as preferred land uses in many instances, demonstrating that cultural circumstances and values evolve. As stated by one respected treatise on municipal law, "What qualifies as an exclusively charitable purpose is subject to judgment in the light of changing community mores." 16 McQuillin Mun. Corp. § 44:98 (3rd Ed. 2013).

(b) Protection of Farming and Forestry is a Secondary and Incidental Purpose of FSHT.

Even if this Court is not persuaded that the protection of farming and forestry is charitable, it is instructive to consider the disputed phrase in the context of this Court's jurisprudence on the meaning of the so-called "organizational qualification." It is certainly true, as the Town argues, that in

[30] Stewart N. Smith, *Maine Agriculture: A Natural Resource Based Industry Constantly Adapting to Change* at 3 (2003). (Paper prepared for the Blaine House Conference on Natural Resource-Based Industries.), online at www.colby.edu/environ/courses/ES235/Smith.doc.
[31] *Id.* at 3.

order to qualify for property tax exemption under § 652(1)(A), a corporation must be "organized and conducted exclusively for benevolent and charitable purposes. 36 M.R.S. § 652(1)(C)(1). This is an additional requirement for exemption, on top of the requirement that the particular property at issue be "occupied or used solely" for benevolent and charitable purposes, as stated in § 652(1)(A). In several recent cases, this Court has affirmed that in order to be organized for charitable purposes, "the organization's stated purpose [must be] charitable within the meaning of the law." *Christian Fellowship and Renewal Center v. Town of Limington*, 2006 ME 44 (citing *Town of Poland v. Poland Spring Health Institute, Inc.*, 649 A.2d 1098, 1100 (Me. 1994) and *Green Acre Baha'i Institute v. Town of Eliot*, 150 Me. 350, 110 A.2d 581, 584 (1954)). However, just as this Court has interpreted the word "solely" in the context of § 652(1)(A) to mean "primarily," so should it construe "exclusively" in the context of § 652(1)(C)(1).

The Superior Court, in the instant case, followed this Court's holding in *Hebron Academy, Inc. v. Town of Hebron* that incidental use of the institution's property, conducted in furtherance of its tax-exempt purposes, will not frustrate eligibility for exemption. *Hebron Academy, Inc. v. Town of Hebron*, 2013 ME 15 ¶¶22-23. *Hebron Academy* also set out a second category of permitted uses that, although not directly in aid of exempt purposes and in some cases of a commercial nature, are *de minimis* uses that do not interfere with the exempt purpose. *Id.* at ¶¶24-25. In *Hebron Academy*, the disputed activity found to be *de minimis* and therefore incidental was the commercial

rental of unoccupied buildings. In the case of FSHT, the theoretical power to conduct timbering or farming on a preserve is incidental insofar as it is both reasonably related to FSHT's other charitable purposes and *de minimis*.

The Town has not, and cannot, identify any Maine case law in which property tax exemption under § 652 was denied simply because an incidental non-charitable purpose was included in an organization's Articles of Incorporation. Each of the cases cited in its brief for support of the notion that a corporation must be organized exclusively for charitable purposes are in fact instances in which an organization's *use* of a property was found not to be charitable and benevolent. (*See, e.g.*, *Nature Conservancy of the Pine Tree State, Inc., v. the Town of Bristol*, 385 A.2d 39 (Me. 1978) and *City of Lewiston v. Marcotte Congregate Housing. Inc.*, 673 A.2d 209 (Me. 1996).

It is further illuminating to look at the disputed phrase of the Articles in the full context of FSHT's purpose provision. The entire purpose provision is three complete paragraphs comprising Article Second, and contains several discrete elements. A. 72. It begins by stating that FSHT is "organized exclusively for charitable, educational, and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code and Title 13-B of the Maine Revised Statutes." This opening statement is best read as a general limitation on the more specific purpose provisions that follow. In other words, in the event that any of the specific activities or purposes that follow are considered to be beyond the scope of Section 501(c)(3) or Title 13-B, then FSHT is not permitted to engage in such activities. Such a construction is confirmed

by Article Fifth of the Articles of Incorporation, which makes an additional reference to Section 501(c)(3) as a limiting body of law. A. 73.

The second of the three purpose paragraphs, identified as Article Second paragraph (a), sets forth what is the *de facto* primary purpose of FSHT, namely to conserve and protect land for the benefit of the public. Since its inception, the vast majority of FSHT's activities have pertained to acquiring and managing conservation land. The fact that this purpose is set forth in its own paragraph indicates its paramount importance.

Finally, the third paragraph, identified as Article Second paragraph (b), begins with a sentence that essentially reiterates the preceding paragraph by expressly authorizing FSHT to accept gifts or make purchases of land and conservation easements. Then follows a list of five other specific purposes: (1) to maintain open space and preserves for wildlife and plant life, (2) to protect appropriate uses such as logging, farming, and other compatible commercial activities within specified areas and adjacent areas, (3) to engage in and promote scientific study and education regarding natural resources, (4) to demonstrate and teach the necessity of preserving our natural heritage by conservation and preservation so that future generations may enjoy it, and (5) to protect and promote the utilization of properties for hunting, fishing, hiking, cross country skiing and other compatible uses.

Thus, we see that protecting logging and farming and other compatible commercial activities is one of five secondary purposes listed after the primary purpose of protecting land, and after an overall purpose limitation tied to

Section 501(c)(3) of the Internal Revenue Code. Even more revealing is the fact that protecting logging and farming is not mentioned at all in the purpose provision of FSHT's Bylaws. A. 76-77. That land conservation is the primary purpose of FSHT is even conceded by the Town in its brief. Blue Br. at 13.

Thus for the Town to pick this one particular phrase out of a three-paragraph purpose provision, which phrase is not even located in FSHT's Bylaws, is to unduly inflate its significance. The Town places form over substance in demanding that an organization's Articles of Incorporation meet an exacting standing in which any mention of non-charitable activities or purposes, no matter how incidental or supportive of its mission, are grounds for disqualification.

In determining whether an entity is eligible for tax exempt status under federal tax law rules, IRS also applies a two-part test to discover whether the entity is both "organized" and "operated exclusively" for charitable purposes.[32] "In determining whether an organization meets the operational test, the issue is whether the particular activity undertaken by the organization is appropriately in furtherance of the organization's exempt purpose, and *not* whether the particular activity in and of itself would be considered charitable… The law of charity provides no basis for weighing or evaluating the objective merits of specific activities carried on in furtherance of a charitable purpose, if

[32] Treasury Regulations at Title 26 CFR 1.501(c)(3)- 1(a).

those activities are reasonably related to the accomplishment of the charitable purpose, and are not illegal or contrary to public policy."[33]

Finally, the Town emphasizes that FSHT's articles promote commercial activities. However, if there is any practical distinction between protecting commercial *farmland* as a natural resource and protecting commercial *farming* as a commercial activity, the distinction is negligible for FSHT's purposes. When a farmer donates or sells a conservation easement that eliminates development rights on her farm, the holder of that easement is both protecting the farmland and also supporting the activity of farming. One supposes that if FSHT was supporting farmers in a way that was completely unrelated to its land conservation purposes, then such an activity would not be charitable. But for all intents and purposes, FSHT's specific purposes of protecting farming (or logging) is one and the same with protecting farmland (or forestland). At worst, FSHT could be accused of inartful wording in its Articles, not of deviating from charitable purposes.

III. A Land Trust Has Discretion in Choosing to Enroll in Open Space Classification or to Apply for Property Tax Exemption

Another argument set forth by the Town and rejected by the Superior Court is that property tax exemption is not available for land trust-owned conservation properties because the Maine Legislature, in enacting and later amending the Farm and Open Space Tax Law (36 M.R.S. § 1001 *et seq.*), intended the Open Space program to be the exclusive means of taxation for

[33] IRS Revenue Ruling 80-279, 1980-2 C.B. 176

such properties. The Town contends, based on an overruled Superior Court decision,[34] that the availability of a property tax reduction for nonprofit conservation preserves proves that the Legislature did not intend for those preserves to remain eligible for full property tax exemption.

(a) The Farm and Open Space Tax Law is unambiguous in not precluding property tax exemption for land conservation organizations.

As the Superior Court noted in its decision, there is nothing in the text of the Farm and Open Space Tax Law that suggests any intent to preclude property tax exemption as an option for nonprofit land trusts. A. 17. Thus, the Town is reduced to drawing untenable inferences and suppositions based on various sections of the statute. The Town proffers the purpose provision (§ 1101), excerpts from the statute's open space criteria (§ 1109(3)(A), and a provision delineating an assessor's authority upon receipt of an Open Space application (§ 1109(3)(A). A brief consideration of each of these provisions reveals that the Town is grasping at mist in attempting to demonstrate an intent to supplant property tax exemption.

The stated purposes of the Open Space program, dating from the original 1971 statute, are articulated as follows:

> ...it is in the public interest to encourage the preservation of ... open space land in order to ... conserve the State's natural resources and to provide for the welfare and happiness of the inhabitants of the State, that it is in the public interest *to prevent the forced conversion of ... open space land to more intensive uses*

[34] *Cushing Nature and Preservation Center v. Inhabitants of the Town of Cushing*, 2001 WL 1729095 (Me. Super. May 30, 2001).

> *as the result of economic pressures* caused by the assessment thereof for purposes of property taxation at values incompatible with their preservation as such....

36 M.R.S. § 1101 (emphasis added). Thus, we see here that an overarching purpose of allowing a tax reduction for open space land is to prevent economic pressures from compelling a landowner to develop his or her property. This applies to any landowner in Maine who commits to keeping the land undeveloped, whether a nonprofit land trust or a private individual or business. For the Town to maintain that the Farm and Open Space Tax Law was specifically intended to assist land trusts is to misunderstand the very purpose statement cited by the Town in its brief.

Next, the Town quotes extensively from 36 M.R.S. § 1109(3), pointing out a similarity in language between § 1109(3) and FSHT's stated charitable purposes. In a curious logical leap, the Town arrives at the conclusion that this similarity reveals an intent for the Farm and Open Space Tax Law to preclude property tax exemption. The Town seems to suggest that simply because the statute references land owned by a nonprofit conservation organization, leaving open the option of property tax exemption is thereby absurd. The Town's logic is somewhat difficult for us to follow, but a plain reading of this provision demonstrates no intent by the Legislature to supplant property tax exemption for land trust conservation properties.

Finally, the Town's citation to another part of § 1109(3) is completely out of context. This section provides that the assessor "shall determine whether the land is open space land as defined in section 1102, subsection 6, and if so,

that land must be classified as open space land and subject to taxation under this subchapter." But this section is applicable only upon the assessor's receipt of an Open Space application. The clear implication of the mandatory language is to remove discretion from the assessor if s/he receives an application that qualifies under the statute. A plain reading of the statute prohibits any interpretation that all open space land must be taxed under Open Space program, as the Town suggests. Likewise, for a property to be tax exempt, an application must be filed, and mere eligibility for exemption does not prevent one from choosing to apply for Open Space instead.

(b) Even if the Farm and Open Space Tax Law is ambiguous, its legislative history reveals no intent to preclude property tax exemption for land conservation organizations.

Although the amici maintain that the Farm and Open Space Tax Law unambiguously does not preclude property tax exemption for land conservation organizations, if this Court finds otherwise then a review of legislative history readily demonstrates that the Maine Legislature has never intended for Farm and Open Space Tax Law to supplant exemption. When a statute or series of statutes is ambiguous, legislative history can be a useful aid in discerning legislative intent. *Michalowski v. Board of Licensure in Medicine*, 2012 ME 134, ¶ 24, n. 6. The extensive legislative history of the Farm and Open Space Tax Law yields absolutely zero mentions of any legislative intent for this statute to preclude property tax exemption for land conservation organizations.

The Farm and Open Space Tax Law, as well as the Tree Growth Law, finds its origins in a 1969 amendment to the Maine Constitution, which created Article IX, Section 8(2). This amendment (originating as L.D. 1121 (104th Legis. 1969) effected a change to a provision of the Maine Constitution under which municipalities were obligated to assess value at its highest and best use, and could not permit reduced valuations to support a goal of keeping land under commercial forest management, commercial agriculture, or open space. This requirement encouraged landowners to convert their undeveloped land to its highest and best economic use, jeopardizing Maine's tourist and forest economies. Following passage of Article IX, Section 8(2) and ratification by the electorate, the Maine Legislature passed the Tree Growth Tax Law and the Farm and Open Space Tax Law in 1971 through P.L. 1971 c. 616. As of 1969 and 1971, land conservation organizations in Maine were few and far between. Other than the Maine Audubon Society, the Maine Chapter of The Nature Conservancy and perhaps a handful of other local organizations, there was no organized land conservation community and there were relatively few fee-owned preserve parcels. Thus, it is not surprising that the Legislature did not even consider how the Farm and Open Space Tax Law might intersect with property tax exemption.

But by 1989 and 1993, when key language cited by the Town was enacted via two amendments to the Farm and Open Space Tax Law, land trusts were much more prevalent. In fact, the legislative history of the 1989 and 1993 amendments show that MCHT, as the leader of Maine's land trust community,

actively participated in the legislative process. In particular, MCHT provided key input in the drafting of a 1989 amendment that added the § 1109(3) language, as evidenced by the official legislative history of P.L. 1989 c. 748,[35] and actually drafted the alternative valuation scheme and definitions of new types of Open Space in the 1993 legislation for the Taxation Committee that resulted in § 1106-A(3)(A), as evidenced by the official legislative history of P.L. 1993 c. 452, §9.[36] In fact, MCHT provided a draft of the 14-point Open Space criteria for establishing a significant public benefit, that was eventually adopted, based on IRS standards for conservation easements. 26 CFR Section 170A-14(d)(2)-(5). One of these standards is found in Title 36 M.R.S. § 1109(3)(H), which qualifies a property for Open Space based on ownership by a "nonprofit entity committed to conservation of the property that will permanently preserve the land in its natural , scenic, or open character." Thus, the very language cited by the Town as evidence of the Legislature's intent for the Farm and Open Space Tax Law to supplant exemption, was added at the behest of MCHT and the land trust community. And there is no indication anywhere in the legislative history of these two amendments that they would in any way compromise a land trust's ability to seek outright exemption. To the contrary, the Legislature included specific tax reductions for conservation

[35] L.D. 2272 (114th Legis. 1989), Legislative History, Article in Portland Press Herald 9/18/89, written by Maine Coast Heritage Trust President Jay Espy; Letter to Reed Cole from Karin Marchetti Warden, General Counsel of Maine Coast Heritage Trust.
[36] L.D. 1222 (116th Legis. 1993), Legislative History, Pages 27-30, Draft Bill dated May 11, 1993, signed by Karin Marchetti Warden, General Counsel of Maine Coast Heritage Trust.

preserves, at MCHT's urging, to *supplement* tax exemption as an option for non-profit conservation preserves.

Meanwhile, the Town asks why the Legislature never affirmatively amended § 652(1)(A) to codify exemption for land conservation parcels. However, because the statutory property tax exemption scheme preceded the Farm and Open Space Tax Law, the better question is why the Legislature never affirmatively stated any intent for the Open Space program to supplant property tax exemption. However, we do have telling insight into the Legislature's interpretation of § 652(1), in the form of a report issued by a 1996 legislative commission, the "Commission to Study the Growth of Tax-Exempt Property in Maine's Towns, Cities, Counties and Regions." The final report of the Commission reiterated governmental recognition of the eligibility of nonprofit conservation preserves for tax-exempt status.[37] In particular, the report included a recommendation to provide towns with the option of charging mandatory service fees for tax-exempt property that uses significant municipal services. But the Commission recommended that this proposed law specifically except conservation preserves from the service fees. The rationale for this special exception was that conservation preserves not only receive almost no municipal services compared to developed tax-exempt properties, but they also stem the tide of rising municipal costs by minimizing poorly-planned sprawling residential development, which is acknowledged to require a high level of costly

[37] The Commission to Study the Growth of Tax-Exempt Property in Maine's Towns, Cities, Counties and Regions, Final Report to the 117th Legislature 8. (Feb. 1996).

municipal services. In any event, the mere fact that the Commission expressly proposed maintaining continued exemption for conservation parcels reflects the Legislature's general understanding that such parcels are indeed exempt.

Yet another flaw in the Town's argument is exposed by the State's property tax treatment of land-trust-owned conservation land in the unorganized areas, where Maine Revenue Services administers property taxation. If, as the Town submits, the Farm and Open Space Tax Law were intended to be the exclusive property tax option for land trusts, then we would expect Maine Revenue Services ("MRS") to reject all property tax exemption applications in the unorganized areas, and steer applicants towards the Open Space program. However, MRS routinely accepts and grants property tax exemption for qualifying conservation properties owned by land trusts. MCHT itself owns 14 separate conservation parcels in the unorganized territories, and has been granted exemption by the State Tax Assessor on 12 of them; it chooses to pay full property taxes on one parcel and to classify another as Open Space.

Furthermore, the Town's contention that allowing two alternative taxation schemes for land trusts would be absurd or illogical does not withstand serious scrutiny. To the contrary, there are a number of reasons why Open Space naturally supplements tax exemption for conservation organizations. First, a conservation parcel may fail to meet the technical requirements of tax exemption for any number of reasons, such as the existence of a private right of way across the preserve reserved by the original

donor (*The Nature Conservancy v. Bristol*, 385 A.2d 39 (Me. 1978)[38], or because buildings on the property may be subject to a reserved life estate or are leased to non-qualified renters or are used to generate unrelated business income for the land trust, rendering the entire property ineligible for exemption,[39] or because the conservation organization isn't qualified for tax exempt status because it is incorporated in another state.[40] Most often, Open Space is chosen to avoid controversy with the town in the face of difficult and conflicting interpretations of the tax exemption statute.[41]

Likewise, the Town's claim that the Farm and Open Space Tax Law supplants property tax exemption statute because it is more specific than the latter is inapposite. This statutory construction principle has only been applied when there is a direct and irreconcilable conflict between two statutory provisions.[42] In other words, courts in these cases had to choose between two mutually exclusive interpretations of a statute, which could not be logically construed in harmony. But in the instant case, there is no conflict at all, as

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[38] *See also Stanwood Wildlife Sanctuary v. Stockton Springs*, No. CV 88-77 (Me. Super. Ct., Waldo Cty., June 2, 1989), and No. CV 89-144 (Me. Super. Ct.Wal. Cty. July 31, 1990).
[39] See *Lewiston v. Marcotte Congregate Housing,* 673 A2d 209 (Me. 1996)
[40] Title 36 M.R.S. Section 652(1)(A).
[41] *See* Kirk G. Siegel, *Weighing the Costs and Benefits of Property Tax Exemption: Nonprofit Organization Land Conservation*, 49 Maine Law Review, No.2, 339, 439 (1977).
[42] *See, e.g., South Portland Civil Service Commission v. City of South Portland*, 667 A.2d 599 (Me. 1995) (two different provisions of city ordinance conflicted on whether the civil service commission could hire its own legal counsel with approval of the city council); *Ziegler v. American Maize-Products Co.,* 658 A.2d 219, 222 (Me.1995) (two different statutory provisions conflicted on whether a business corporation could issue new shares of stock).

the two statutes are in harmony, and Open Space classification supplements exemption as an additional option for land trusts.

Case law on this issue is thin, but in the only case we found that is on point from another jurisdiction, a California appellate court found that its state's property tax exemption statute and open space reduction statute have different purposes and are not mutually exclusive. In *Santa Catalina Island Conservancy v. County of Los Angeles*, 126 Cal. App. 3d 221 (Cal. App. 1981), thecourt rejected the argument that the state's tax reduction programs for forest and open space land pre-empted the exemption statute. As that court wrote:

> Section 8 of article XIII [the open space reduction statute] not only permits, but directly contemplates, the use of open space lands in commercially profitable ventures. In contrast, subdivision (b) of section 4 [the property tax exemption statute] 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. The same analysis applies to the instant case, as pointed out by the Superior Court when it noted that Open Space and exemption, "while sometimes having elements in common, are distinct concepts." Moreover, open space, forest, and agricultural reduced taxation schemes co-exist with exemption statutes in many other states.[43]

In summary, we have presented ample materials showing that the Maine Legislature never intended for the Farm and Open Space Tax Law to supplant exemption under § 652(1)(A), and that Open Space and exemption can

[43] *See*, e.g., 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)).

naturally co-exist as two different options for land trusts. Therefore, we urge this Court to reject the Town's argument, as did the Superior Court.

CONCLUSION

For the reasons stated herein, the decision of the Superior Court should be upheld.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Karin Marchetti-Ponte, General Counsel and attorney for Maine Coast Heritage Trust, hereby certify that I have this _____ day of _____, 2014 caused two copies of the foregoing Brief of *Amici Curiae* to be served upon counsel of record in this action by depositing the same in the United States mail, postage pre-paid, first-class mail, addressed as follows:

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Dated at Mount Desert, Maine this _____ day of _____, 2014.

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Karin Marchetti-Ponte, Bar # 2044
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