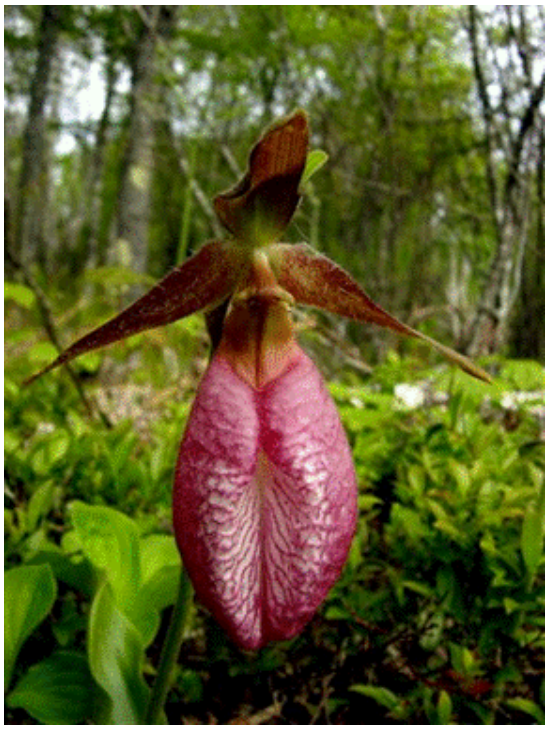
Maine Coast Heritage Trust
A Statewide Land Conservation Organization

Property Taxation of Conservation Land
Options for Property Owners

Landowners who protect noteworthy property by granting a Conservation Easement, or by enrolling their land in one of the Current Use Taxation programs, have made a significant contribution to their community and to future generations. Conservation Easements are an especially important tool because their benefits are lasting. They help keep land in private hands and on the tax rolls. These voluntary approaches to land protection assure that communities can economically preserve their natural and cultural heritage, which, if lost, can never be reclaimed.



This publication is designed to help landowners, land trust officials, assessors and municipal officers to make informed decisions about the property tax treatment of privately-owned conservation land, particularly land permanently preserved by a Conservation Easement. In addition to providing an overview of Maine's property tax system as it relates to privately-owned conservation land, this bulletin provides information on several specific topics, including:

- The CONSERVATION EASEMENT, briefly described;
- How CONSERVATION EASEMENTS affect property values;
- A comparison of JUST VALUE and CURRENT USE assessment of CONSERVATION EASEMENT land; and
- Three of Maine's CURRENT USE TAX PROGRAMS -- TREE GROWTH / FARMLAND / OPEN SPACE -- including recent changes.

1 Bowdoin Mill Island, Suite 201, Topsham, ME 04086
(207) 729-7366 ~ (207)729-6863 (fax) ~ www.mcht.org

HISTORY OF PROPERTY TAXATION OF UNDEVELOPED LAND

The law has required property taxes to be "assessed and apportioned equally, in accordance with the just value" of the land since the Act of Separation in 1820. "Just value" has been interpreted by courts to mean the market value of property, based on its most profitable, likely and legal use, also known as the "highest and best economic use". Until the mid-twentieth century, however, many Maine communities set their property taxes in a manner considered fair and equitable, but perhaps not entirely in accordance with just value. Elected town assessors, who were personally familiar with each property and its owner, considered both what the land was worth and what the owner could afford to pay. Taxes might be based on the reasonably expected current resale value, but often they were based on lower values that reflected the owner's original purchase price, or the owner's means and use of the land, be it residential, commercial, industrial, forestry, farming, or unimproved land. Revaluations were generally made when land was sold, but taxes were generally so low that this inequality was seldom challenged.

As populations grew, however, greater demands were placed on towns for services. Taxes naturally increased to support these services. Eventually, property owners wanted to be sure that their land was valued fairly in relation to their neighbors'.

Popular support grew for compliance with the legally mandated "just value" taxation system. The Legislature responded by conditioning eligibility for state aid on compliance with full valuation. Now, in order to qualify for various state funded programs, a town's total valuation must fall between 70% and 110% of the state-determined total town valuation, set annually.

Even though a town might not meet the eligibility standards for state aid, it can be in compliance with the statutory requirements of "just value" even if it generally values properties higher or lower than their market values, as long as it applies the same treatment to all land. The law doesn't require taxation at just value. It only requires equal apportionment of taxes based on just value. In order to be assessed "equally in accordance with just value," a property must be valued at approximately the same percent of market value as other properties in the town. For instance, the requirements of just value are met if all land is valued at 30%, or even 130% of its true market value, because the assessment is apportioned equally on all properties, based on their value. Hence, in determining whether an assessment is proper, one must consider the ratio applied to market value. This ratio, called the "certified ratio," is determined each year by comparing the State's estimate of total town value with the town's total valuation. Most towns, however, in order to maintain eligibility for state programs, have undertaken periodic revaluations and assessments to keep their assessments as near as possible to market values.

While "just value" assessment works well for fully developed property, it can tend to force forests, farms and unimproved land into development. For instance, the just value of a farm located near a shopping mall or resort is equivalent to the price a developer would pay to convert it to the higher economic use. This is generally far more than the price a farmer would pay for agricultural land. In fact, the tax on this value is often more than farm operations can support. This cost is a significant cause of the decline of small owner-operated farms, particularly

in coastal areas. The land is forced into development. To address this problem, the Legislature established the Current Use tax programs in the early 1970s. These programs provide reduced assessment for working farms and forests, as well as natural areas with important environmental and recreational values. They were relatively unknown outside of the forest industry until the late 1980s.

During the 1980s, land values began to skyrocket, particularly shorefront land suitable for second homes or speculation. When tax bills began to reflect the actual market value of this newly valuable Maine land, the property tax emerged as a driver of land use. Owners with undeveloped land faced property tax bills based on the land's speculative value. This became a particular hardship for fishing and farming families, retirees and fixed-income residents, many of whom had been good stewards of undeveloped land for generations. It also placed development pressure on land important for wildlife habitat, scenic enjoyment, and traditional public use; in short, land essential to the character of Maine. Landowners and communities that appreciated these important resources sought creative solutions to the property tax problem. Two relatively unknown solutions were the Conservation Easement and the Current Use Tax Laws. These became important tools in voluntary land protection and community planning.

PROPERTY TAX INCENTIVES FOR UNDEVELOPED LAND

Today, the methods to protect important natural and cultural resources from tax-driven development are better known, but not well understood. Current use classifications - Tree Growth and the Farm and Open Space Tax Laws - prescribe a lower property tax as long as the land is used according to the programs' requirements. These programs help people retain ownership of their land, but do not provide permanent protection for important natural land. Neither do they reduce estate taxes, which can also force families to sell land for development. Current use programs can be combined with permanent protection measures, such as the Conservation Easement, which assures that the land is kept as it is, or that future development is carefully limited. Conservation Easements and Current Use taxation can help a family keep land that might otherwise have to be sold due to property taxes or estate taxes.

CONSERVATION EASEMENTS

The Conservation Easement is a method of restricting land uses that is authorized by State law (Title 33 M.R.S.A. Section 476 *et seq.*) and recognized by Federal law for income and estate tax purposes (Internal Revenue Code Section 170(h)]. It is a written agreement in the form of a deed, granted by a landowner to a publicly supported conservation non-profit or governmental body, called the Holder. It contains a land use plan that guides the future use of the land and protects its productive, scenic or ecological character. The Holder is legally responsible for monitoring the property periodically to assure compliance with the easement terms. The easement is recorded at the Registry of Deeds and becomes part of the deed to the property.

Conservation Easements keep the land in private hands and on the tax rolls. The landowner, by giving up the right to develop the land to its fullest extent, has given up the value that was the source of tax-driven pressure to develop. The Conservation Easement can ease the tax pressure, but money is seldom the primary consideration for land conservation. Most often, it is the earnest wish of a family to keep their land the way it's always been - to protect its important scenic, natural and recreational qualities for future generations.

A Conservation Easement permanently protects the land, even when it is sold or passed on to heirs. Unlike most deed restrictions or mutual covenants, an easement cannot simply be canceled. Deed Restrictions and Mutual Covenants can be terminated by the agreement of all the owners of the affected parcels, or by placing the affected parcels under single ownership. Easements are perpetual because the Holder has made a legally binding commitment to carry out the purposes of the easement forever.

Easements are versatile and can be tailored to the conservation values of the land. There are three basic types of easements: **LIMITED DEVELOPMENT**, **RESOURCE PROTECTION**, and **FOREVER WILD** (SEE BOX 1). Some easements combine the three types, applying differing restrictions to different areas.

The typical easement is a combination of two or

BOX 1

LIMITED DEVELOPMENT EASEMENTS preserve the important natural and scenic features of the land while allowing limited development on the least sensitive areas, usually in specific building envelopes. They typically prohibit heavy commercial and industrial development. The permitted development may be subject to size, height, siting, setback, and even screening requirements, at lower density than allowed by zoning. Even if a restriction simply mirrors existing land use regulations, it protects the land from future liberalization of these rules.

RESOURCE MANAGEMENT EASEMENTS prohibit most building development but allow limited natural-resource based commercial use of the land, such as agriculture or forestry. They vary in management requirements, depending on the sensitivity of the natural resources on the specific site. For instance, a resource protection easement on shorefront land may require careful management of a buffer area along the shore to prevent siltation and erosion, or to preserve the scenic value of the land.

FOREVER WILD EASEMENTS are the most restrictive. Forever wild restrictions do not generally require that land be left entirely to the forces of nature, as the name implies. They can permit changes to the vegetation to prevent fire and disease. They can also allow for minor alterations to the surface and minor structures to accommodate low impact outdoor recreation and study, such as signs, rustic benches and other trail improvements, rustic campsites, cutting for scenic vistas from trails, and wildlife habitat improvements. However, they prohibit the substantial alteration of the natural resources that would result from forestry or farming, or more intensive outdoor recreational uses, such as tennis courts, baseball diamonds, and swimming pools.

more of these three types. The easement might permit limited development on a small part of the land, or site development by means of exclusionary restrictions to protect important resources, such as a scenically important undeveloped shoreline. The remainder of the land might be subject to forever-wild restrictions or resource management provisions, depending on the purpose of the easement and the ecological importance of the land.

Any easement can be combined with a grant of **PUBLIC ACCESS**, usually for limited recreation that is compatible with the conservation of the land. Grants of public access in easements run the gamut from permitting only scheduled and supervised visits for environmental education, to preserving traditional access on trails or beaches, to guaranteeing full and open public use of the entire parcel. These grants are always subject to controls to protect the conservation values of the land.

The conservation easement's impact on value depends on the degree of restrictiveness and the land's highest economic use. Owners of conservation easement land should give the assessor a copy of the easement prior to April 1 (the date on which value is set for a particular year). The easement document is an essential part of determining "just value." Alternatively, an owner can apply for classification under a "current use" tax pro-

JUST VALUE ASSESSMENT OF CONSERVATION EASEMENT LAND.

The "just value" law requires assessors to "consider the effect upon value of any enforceable restriction to which the use of land may be subjected" (Title 36 M.R.S.A. Section 701-A). Although it can be complicated to determine the value of easement-restricted land, many towns support the use of easements and make the effort to tax the land fairly. They recognize that development increases the pressure for town services and that these costs can be controlled by conservation. They also recognize that the overall value of a community is enhanced by its ability to attract visitors and residents to an uncluttered natural landscape and clean waters.

More than twenty-five years of easement practice in Maine (and over forty years nationwide) has shown convincingly that conservation easements reduce the market value of restricted land. This is supported by appraisals and sales of easement-encumbered land, and is well accepted by State and Federal taxing authorities and the courts. However, the precise impact on value depends on the "highest and best use" of the land without the easement, and the degree to which the easement limits use.

In determining just value of easement land for property tax purposes, towns are expected to use methods similar to those used by professional appraisers doing individual appraisals. They must determine what the property under easement would sell for in an arms-length transaction between buyer and seller, both having all pertinent information and neither being under any pressure to buy or sell. However, towns don't appraise individual parcels, as a rule. They apply mass assessment rates for road and shore frontage and acreage, based on an analysis of recent sales. These mass assessment rates are not appropriate for easement-encumbered property since every easement is different. Even information on sales of easement encumbered land is helpful only if the easement restrictions and the property are substantially similar to the land being assessed. Consequently, the assessor faced with a just valuation assessment of easement-encumbered property must either apply and adjust undevelopable land rates from the town's mass assessment sheets, or conduct what amounts to an individual appraisal. The result must approximate the actual market value of the property, adjusted by the ratio to actual market value applied to other land in the town.

Some easement donors commission a professional independent appraisal of their land in order to document the deductible value of the easement gift. This IRS-required appraisal can be helpful to the assessor in determining the just value of an easement parcel. These appraisals tend to be conservative since there are stiff penalties for overstating the value of an easement gift, applicable to <u>both</u> the landowner and the private appraiser. They establish the value of the land "before and after" the easement. The "after" value is generally a good measure of the land's restricted value in the year of the gift. The assessor would apply the appropriate assessment ratio to this figure. This value could then be readjusted periodically to take market changes into account. Alternatively, just value might be arrived at by

applying the "percent reduction" in value, documented by the IRS appraisal, to the land's regular unrestricted assessment. While IRS appraisals can be useful when available, not all owners have them done because many give easements without taking advantage of the income tax incentives.

Other helpful information is found in surveys of the average percent reduction in property value resulting from conservation easements. In 1988, Maine Coast Heritage Trust commissioned a statistical analysis of thirty-six appraisals of Maine conservation easements to determine the impact of restrictions on the fair market value of property (see Box 2). Each easement was assigned to one of the three classifications defined previously.

None of the easements studied included grants of permanent **PUBLIC ACCESS**. If they had, there would have been a corresponding decrease in the value of the land. Public use can have a definite impact on the value of property, depending on where it is located in relation to more intensive private uses of the land. Not only is the area that the public uses reduced in value, the value of the owner's nearby residence can also be affected by some loss of privacy and control. Conversely, the entire community may be more valuable by virtue of accessible natural areas.

When assessing land subject to conservation easements, the assessor must carefully read the restrictions and consider all relevant factors. With limited development easements, it can be helpful to map developable and undevelopable portions of the land. In Massachusetts, the recommended method of determining the just value of conservation easement land is to apply a forever wild rate to the undevelopable land (90% reduction there) and the full single house lot value for each permitted residence. They then add an excess acreage factor (usually 10%) to the value of the house lots that abut the undevelopable land. An assessor might also find guidance in the State-set Tree Growth or Farmland rates. On the other hand, the assessor might wish to compare conclusions with the State-set Open Space reductions for land subject to varying types of restrictions. Another option is for the town to commission a professional appraisal.

BOX 2

FOREVER WILD easements resulted in an average reduction in fair market value of 77%, with a range between 64% and 90%. This higher reduction is more common on highly valued land, such as shorefront property. In a 1987 Federal Tax Court case, the court supported the taxpayer's claim that an easement creating a wildlife preserve out of 1,600 acres of prime river-front land reduced its value from $1,165,000 to $100,000 (1979 values), a 91% decrease in value.

RESOURCE MANAGEMENT easements resulted in an average reduction in fair market value of 53%, representing a broad range in reduced value, from 21% to 85%. This is consistent with the broad variety of land types and locations represented in the sample. A timber management easement on land unsuited to development will not have a huge impact on market value. On the other hand, an agricultural or timber management easement on coastal or suburban land with great development potential will enormously reduce its value. For example, in 1989 the State of Maine commissioned appraisals of three Resource Management Easements. Identical restrictions were placed on a 250-acre parcel of prime shorefront land, a 500-acre parcel without shorefront but with extensive road frontage, and a 550-acre parcel with no frontage. The easement reduced the value of the prime shorefront land by 90%. It reduced the value of the road-front land by 75%, and it reduced the value of the back land by only 25%. This range occurs because each parcel had a very different "highest and best use."

LIMITED DEVELOPMENT easements were found to result in the least reduction in value, but mainly because these appraisals included the value of the house lot and the buildings, as well as the undevelopable land. An average reduction of 22% resulted from a range of reductions between 5% and 39%. This range reflects variations in the number of possible house lots given up, and the demand for housing or large lots in the neighborhood.

CURRENT USE ASSESSMENT OF CONSERVATION EASEMENT LAND

Many towns have difficulty determining the impact of conservation easements on just value. Because of this, many landowners have turned to the "Current Use" tax programs for more predictable treatment. Current Use is no panacea, however. The current use statutes have specific qualification requirements and strict penalties for disqualification or withdrawal. The programs are reviewed occasionally by the Legislature and have been changed from time to time. Current Use values are based on averages of land held for similar purposes and may be higher than the just value of a particular parcel (although the Constitution and the Open Space statute caps the valuation at just value). Conservation Easement landowners are encouraged to meet with their assessor to compare just value with the current use values and to determine whether classification is the best option.

FARMLAND: If five or more acres of land are dedicated to agricultural use and generate a minimum value of farm product, the land may qualify for **FARMLAND** classification under Maine's **Farm and Open Space Tax Law** (Title 36 M.R.S.A. Section 1101 et seq.).

TREE GROWTH: If ten or more acres of forest land are dedicated to the growth and harvesting of forest products having commercial value, the owner may wish to classify the land for **TREE GROWTH** under the **Tree Growth Tax Law** (Title 36 M.R.S.A. Section 571 *et seq*.).

OPEN SPACE: Land that is important for its scenic quality, wildlife habitat, or outdoor recreational use by the public, particularly easement restricted land, is highly likely to qualify for **OPEN SPACE** taxation under the **Farm and Open Space Tax Law** (Title 36 M.R.S.A. Section 1101 et seq.).

Towns and the State Bureau of Taxation have application forms and information on all of these programs. Application must be filed by April 1 of the year in which classification is initially sought. Early meetings with the assessor can be very helpful.

The following pages outline each program in detail, with special emphasis on their application to land subject to conservation easements.

FARMLAND

Current Use Taxation of Productive Agricultural Land

QUALIFICATION. **FARMLAND** classification requires a minimum of five contiguous acres of farmland, which can include woodland and wasteland in the farm unit. The land must have produced at least $2,000 annual gross income from farming during one of the past two, or three of the past five years prior to application. Gross income includes the value of commodities produced for consumption by the farm household. A two-year provisional classification is available for farms that haven't met this threshold but expect to in the coming years. Each year the owner must report the previous year's farmland gross income.

TAXATION. **FARMLAND** classification applies per-acre values based on the average productive value of different types of farmland. Suggested farmland values are now between $250 and $500 per acre, depending on land or crop type, and are reviewed by the Legislature and Department of Agriculture periodically. These values are taxed at the town's regular mil rate.[1]

WITHDRAWAL AND PENALTY. If the farm land decreases to less than five acres, or productivity falls below the required income, the farm will be disqualified and removed from classification by the assessor. An owner can also voluntarily withdraw some or all of the land from the program. Both situations will trigger a penalty, unless the land is transferred to **OPEN SPACE** or **TREE GROWTH**. However, the land will need to qualify for transfer.

The penalty varies depending on how long the land has been in the program prior to withdrawal. If the land has been classified less than five years the penalty is 40% of its value on the date of withdrawal. If it's been in the program for five to ten years, the penalty is a recapture of the taxes that would have been paid on the land for all the years in the program, less taxes paid, plus interest at the rate set for delinquent taxes in each year of classification. After ten full years in the program, the withdrawal penalty is recapture of only five years back taxes, calculated at the land's regular assessed value as though it had not been in the program in each of those years, minus what was paid in taxes during the previous five years, plus interest. The assessor can also charge a 25% surcharge on the penalty if the owner fails to report a disqualifying change in use or gross income.

[1] The mil rate is the tax imposed on each thousand dollars of assessed value, determined by dividing the total valuation of town property by the budget to be funded by the property tax; for instance, if there is $1,000,000 of property in town, and the town has to raise $250,000, the mil rate will be $4.00 per thousand.

TREE GROWTH

Current Use Taxation of Productive Forest Land

QUALIFICATION. A minimum of 10 acres of "forest land" is required for eligibility in **TREE GROWTH**. Forest land is defined as "land used primarily for the growth of trees to be harvested for commercial use." Harvesting for "commercial use" means harvesting of forest products that have commercial value. The land can be used for other purposes that are compatible with this primary use, such as wildlife habitat, game management, conservation, outdoor recreation, and aesthetic enjoyment. While the land must be managed primarily for the harvest of forest products, management for the highest economic return is not required and the secondary goals can be considered in harvesting plans.

TAXATION. Forest land is valued at an annually adjusted countywide per-acre rate. The 2013 rates range from $113.00 to $416.00 per acre, depending on stand type: softwood, hardwood, or mixed. Any land unsuitable for the growth of trees, such as ledge, wetland, roads, or built areas, is excluded from classification and will be valued by the town at its just value for that category of land, a standard rate in most towns. The town's certified ratio and ordinary mil rate is applied to the applicable **TREE GROWTH** values.

To compensate for the reduced tax base (total revenues remain the same), municipalities receive a modest reimbursement from the State for land classified under **TREE GROWTH**. When fully funded by the Legislature, the town is reimbursed for 90% of the difference between the land's **TREE GROWTH** value and the State's average undeveloped land value (approximately $500). They also receive the penalty revenue from land withdrawn or disqualified from Current Use classifications in their jurisdiction.

FOREST MANAGEMENT PLAN. The initial **TREE GROWTH** application must include a sworn statement by a licensed professional forester that a "forest management and harvesting plan" has been prepared for the property that outlines activities to "regenerate, improve and harvest a standing crop of timber." It is important to note that the plan itself need not be filed. If the land or any part of it changes ownership, the new owner must file a certification within 1 year of transfer.

The plan can be designed by the owner, in which case the forester simply has to certify that the plan is consistent with sound silvicultural practices and the growth of trees to be harvested for commercial use. Harvesting is not required each year, and in fact may take place many years in the future, if recommended by the plan. Harvesting for commercial use does not imply that a sale is required. The statute clarifies that commercial harvesting means "the harvesting of forest products that have commercial value." It goes on to list these products, including industrial items such as logs, pulpwood, veneer, boltwood, wood chips, stud wood, poles, pilings and biomass, as well as products ordinarily harvested in smaller scale operations such as fuel wood, Christmas trees, maple syrup, nursery products used for ornamental purposes, wreaths, bough material, cones or other seed products. Also included by inference are forest products which are used to produce other products, such as logs made into baskets, furniture, or wooden toys.

The Maine Forest Service has financial assistance to defray the cost of a plan. It is not required, however, for "forest land" that is otherwise qualified, but that must be put to a different primary use, or cannot be commercially harvested, due to statutory or governmental restrictions such as Resource Protection zoning, or due to deed restrictions, covenants or organizational charters that were effective prior to 1982

Once the forest management plan has been written and the certification filed, the plan must be updated at least every ten years at which time a licensed forester must file a sworn statement that the owner has managed the land according to the schedules in the plan and the landowner must attest, subject to penalties for perjury, that the primary use of the forestland is "to grow trees to be harvested for commercial purposes." The Maine State Forest Service has extensive literature on the minimum requirements of a tree growth plan, plus a list of licensed foresters, and information on government funds available to assist landowners with the cost of preparing a qualified management plan. (See Appendix B)

WITHDRAWAL AND DISQUALIFICATION. As with the other current use classifications, once in **TREE GROWTH**, the land continues to be classified even if it is sold. If the land no longer meets the acreage requirement or is converted to non-forestry uses, it must either be transferred to another current use classification or be disqualified and subject to the penalty (see below). One example of voluntary withdrawal is when a home is built on a portion of the land. The building area is no longer used primarily for the growth and harvest of forest products. It therefore is disqualified and subject to the penalty. Removal of a building lot will not result in disqualification of the entire parcel unless it reduces the total forest land acreage to less than ten acres. Another example of voluntary withdrawal is when **TREE GROWTH** land is divided and conveyed to another owner, resulting in a parcel of less than ten acres. The sub-size parcel will be disqualified as of the next April 1 and the new owner will be subject to the penalty, which becomes a tax lien on the property. Even though sellers are required to note on transfer tax forms whether land is subject to a current use classification, there is no record of classification at the Registry. Buyers are cautioned to check municipal records before entering into a Purchase and Sale agreement. A buyer and seller can contract to pay the penalty at the time of the sale, possibly shifting the financial responsibility to the seller.

PENALTY. The penalty for withdrawal or disqualification from **TREE GROWTH** is quite high. It is often loosely described as 20% to 30% of the value of the withdrawn land. More accurately stated, it is the higher of two penalty calculations. To determine which method results in a higher penalty, one determines the difference between the regular assessed value of the land on April 1 in the year of withdrawal and the **TREE GROWTH** value of the withdrawn parcel. This difference is multiplied by a percentage, which varies between 20% and 30% depending on how long the land has been classified. In the first ten years of classification the penalty is 30% of the difference between the Tree Growth valuation and full value. For the next ten years of classification, the percent is reduced by 1% per year, to a minimum of 20% for land classified 20 years or more. This method will usually result in the higher penalty. It is compared with the constitutionally mandated minimum penalty, which calls for recapture of taxes that would have been due in each of the previous five years (or lesser number of years that the land was classified) had the real estate been assessed in each of those years at its "fair market value on the date of withdrawal," minus all taxes paid during those previous five years, plus interest. The "fair market value of the parcel at the time of withdrawal" is defined in Section 581 as the assessed value of comparable property in the municipality adjusted by the certified ratio. Interest is calculated at the legal rate from the dates the taxes would have been due in each year. The Maine Municipal Association publishes a work sheet to assist assessors and landowners in determining the required penalty.

The **TREE GROWTH TAX LAW** is designed to assure that qualified land will be actively managed for the harvesting of commercially valuable forest products and to "encourage landowners to retain and improve their holdings of forest lands, and to promote better forest management in order to protect this unique economic and recreational resource."

OPEN SPACE

Current Use Taxation of Scenic Land, Forest Land Wildlife Habitat, and Public Recreational Land

QUALIFICATION. Land is eligible for **OPEN SPACE** classification if a public benefit is served by keeping the land undeveloped. This does not mean that the land must be open, or that it cannot be managed. **OPEN SPACE** land can include managed or non-managed farm or forest land, natural grassland, wilderness, beach, wetlands, ledge, or any type of landscape, as long as it has no buildings or inconsistent improvements. The land must be important in its undeveloped state because of its high scenic qualities or its importance for wildlife habitat, game management, or public outdoor recreation. In 2004, the law was amended to clarify the wildlife habitat and game management standards. (See Appendix A)

The **OPEN SPACE** law has no minimum acreage requirement, in recognition that important resources can exist on very small parcels. There is no requirement of public access. The penalty for withdrawal or disqualification from **OPEN SPACE** is the same as the regular penalties for withdrawal from **TREE GROWTH**.

A 15-point list of public benefit factors was enacted in 1989 and expanded in 2004 to help assessors determine whether a parcel qualifies for **OPEN SPACE**. (See Appendix A) The assessor must consider all of the circumstances pertinent to the land, and one factor alone may be determinative of public benefit. While a Conservation Easement is not required for eligibility, an easement is recognized as a significant factor in proving public benefit. The Legislature recognized that conservation easement holders do not accept easements lightly. They must be convinced that the land is important enough to warrant the expenditure of considerable public or charitable dollars to enforce permanent restrictions.

Application forms provide only enough room for the owner to list which of the fourteen public benefit criteria are met by the property. Owners are advised to provide supporting information to demonstrate how the criteria relate to their land, including maps, photographs, descriptive statements, natural resource information, and legal documents. The assessor may visit the property, and can require the owner to provide additional information. Failure to respond within 60 days of the assessor's request for additional information will void the application.

EXCLUDED AREAS. Land that is built on does not qualify for **OPEN SPACE**. The original statute required that the owner exclude from the application any land on which there were "principal or accessory structures." A 1993 amendment additionally excluded land on which there are "substantial improvements that are inconsistent with the preservation of the land as open space." This addition was intended to keep out of **OPEN SPACE**, land areas occupied by significant structures and improvements that are not principal or accessory structures, but are nevertheless inappropriate within classified land. This has been interpreted by some assessors to prevent farm buildings, cell towers, piers and docks, boat houses, tennis courts, sport stadiums, swimming pools, mining sites, cemeteries, gravel pits, highways and highly improved roads, and the like. Improvements permitted on **OPEN SPACE** land are those that are obviously not substantial, those that enhance the public benefit of the **OPEN SPACE**, and those that don't detract from the land preservation purposes of the statute; for instance, boundary markers, low fences, rock walls, trails and trail improvements such as culverts, boardwalks, bog bridges and rustic benches, wells and springs, primitive campsites, outhouses and pit toilets, outhauls and small canoe ramps, small signs, and unimproved roads. Some towns have asserted that roads are inconsistent with **OPEN SPACE**, deeming them "substantial improvements," whether paved or not. They refer to the **TREE GROWTH** law, which expressly excludes roads, among other things, from the definition of forest land. However, there is no such express exclusion in **OPEN SPACE**. Whether a road can be included in the **OPEN SPACE** parcel depends on whether the road is actually inconsistent with the **OPEN SPACE** preservation. For instance, most roads don't detract from wildlife habitat or scenic quality. A road is likely to

enhance public recreational opportunities and may be essential for fire control, both allowed uses of **OPEN SPACE** land. On the other hand, a highly improved road may detract from the **OPEN SPACE** purposes.

The land area that must be excluded from **OPEN SPACE** because of ineligible structures or improvements must be at least as large as the minimum lot size required by zoning for that use. If there is no town zoning and shoreland zoning doesn't apply, the state minimum lot size applies (Title 12, M.R.S.A. Section 4807-A). As of April 1, 1994, if any ineligible structure or improvement is located within 250 feet of the shore, the excluded lot containing it must have at least the minimum shore-frontage required for a lot under state guidelines for shoreland zoning or local zoning, whichever requires more.

This change allowed towns to tax shorefront associated with a house. Previously, owners could avoid the high taxation usually imposed on shorefront lots by drawing the boundaries of their excluded house lot back from the shore, classifying the shore frontage as **OPEN SPACE**. This was seen as an abuse of the system, even though it often resulted in buildings being set back far more than the 75 feet that zoning would require, and it occasionally kept important shoreline trails in **OPEN SPACE**.

To address these important goals, exceptions were incorporated into the new minimum shorefrontage requirement. For instance, if substantial public use of the shorefront is allowed, the minimum shore-frontage exclusion is waived. The excluded lot can be set back from the shore and the undeveloped shoreland in front of the lot is eligible for **OPEN SPACE**. The town can also vote to waive the exclusion if it determines that a public benefit will be served by preventing future development near the shore. These exceptions encourage preservation of important community features, such as beaches, greenways or shore paths that span several properties. The **OPEN SPACE** application or updated file must include a map that shows classified land and any associated land areas excluded from **OPEN SPACE**. Existing maps showing insufficiently set-back building areas, which no longer comply with the law, must be modified to add the newly required shore frontage. These non-complying plans show excluded building areas with structures and substantial improvements located closer than 250 feet from the shore, or as-yet undeveloped building areas, originally designed for the location of structures within 250 feet of the shore. The newly relocated or augmented building areas will be subject to just value taxation as shore-front lots, but the map changes will not be treated as a "withdrawal" of land from the program. During legislative hearings and workshops, it was explained by representatives from the State Bureau of Taxation that this kind of modification will not incur a penalty since it is similar to a forest plan being modified to show new roads and timber landings that are no longer taxed as forest land.

NEW VALUATION METHOD. Before 1990, forested **OPEN SPACE** land was valued at the same rates as **TREE GROWTH** land, which rates are based on average stumpage values (See page 13). The **OPEN SPACE** valuation of unforested areas, such as fields, ledge and wetlands, was based on a vague statutory equation that directed assessors to consider the value of undeveloped and undevelopable land in their community, and to ignore any value attributable to road or shore frontage. Since most Open Space land was eligible for the very low Tree Growth rates and since there was no reimbursement to towns as in **TREE GROWTH**, coastal communities in particular began to fear that the **OPEN SPACE** law might adversely impact their tax base. In the late 1980s, concerned communities prevailed upon the Legislature to revamp the program. This concern led to the new requirement of public benefit for eligibility, as well as the elimination of the **TREE GROWTH** values. However, assessors were given little guidance in setting new open space rates. Chaos ensued for several years. Finally, in 1993, the Legislature established a new rate structure that furthered the purposes of the **OPEN SPACE** program and assured fair tax revenues for towns.

Under the new rate structure, assessors have two valuation options. They can still individually assess a specific parcel by the old standard: the value it would have if it were required to remain forever in its **OPEN SPACE** qualifying use. This method is informally known as the "Appraisal Method" because the analysis has to be based on a reasonable comparison with the value of

land having permanent restrictions similar to the requirements of **OPEN SPACE** under which the land was qualified. Under this method, any classified parcel must be valued as though it were "permanently protected," as defined below, or permanently dedicated to public access, as the case may be. Consequently, this method doesn't lend itself to mass appraisal rates or arbitrary percent reductions. It might be acceptable to value the property at the same value per-acre that the town applies to wetlands or wasteland, or to land zoned Resource Protection. However, a site-specific appraisal of comparable sales is the most defensible method. This value then has to be adjusted so that the final value is consistent with the ratio applied to similar property in the town.

If the Appraisal Method is too difficult or expensive, assessors can use a simpler percent-reduction formula established by statute (See following chart). These percentage reductions were established to reflect differing levels of public benefit and actual current use values of **OPEN SPACE** land. Larger reductions are given to property that is permanently protected by Conservation Easement, and to land that is open to the public for daytime outdoor recreational use. Since the percent reduction is taken from the land's ordinary assessed value, this valuation method results in higher **OPEN SPACE** valuation of coastal and vacation properties. Under this method, the assessor begins by applying the usual mass assessment methods to determine the property's ordinary assessed value. The appropriate percent-reduction formula is applied to this value to arrive at the **OPEN SPACE** value. Even if the property is under Conservation Easement, the reduction is applied to the property's ordinary assessed value, not its easement-restricted value. (Of course, if any portion of the easement-restricted property is excluded from **Open Space**, it will be valued at its easement-restricted "just value.") Landowners should ask their assessor which valuation method the town plans to apply. This is particularly true for land under conservation easement, since the owner will want to compare **OPEN SPACE** taxation with just value taxation. If the easement applies different categories of restrictions to different parts of the land, the map required with the application can be detailed to show how particular areas qualify for different percent reductions. For instance, areas maintained as fields or woodlots may receive a 50% or 60% reduction, while natural areas restricted from such productive uses may qualify for the 70% reduction applicable to forever wild **OPEN SPACE**.

These percent reductions are applied with only two limitations: (1) the resulting valuation cannot be higher than "just value" and (2) the value of forested **OPEN SPACE** cannot be reduced to less than the otherwise applicable **TREE GROWTH** rate. For instance, if the owner has evidence that a conservation easement property is worth substantially less than the value under the percent-reduction method, the assessor would have to reduce its **OPEN SPACE** valuation to that level. Likewise, if land is forested, the percent-reduction value will be compared with the countywide **TREE GROWTH** value for that type of forest land, and will be adjusted up if necessary. The latter doesn't apply to non-forested open space, such as grassland, wetland, ledge or wasteland, which must be valued under the percent-reduction method, even if this results in a valuation lower than the **TREE GROWTH** values.

STATUTORY OPEN SPACE VALUES

A parcel's value under regular assessment will be reduced* as follows:

A. Ordinary Open Space land 20% reduction

B. Permanently Protected Open Space land 30% reduction

C. Forever Wild Open Space land 20% reduction

D. Public Access land 25% reduction

E. Managed Forest Open Space land 10% reduction

*** More than one reduction category can apply to the same parcel.**

Definitions of Open Space Categories

- **"Ordinary" OPEN SPACE** is not defined in the law. The term refers to land in **OPEN SPACE** that isn't "Permanently Protected" or "forever wild" or "public access" land as defined below. Most **OPEN SPACE** land currently classified fits this category.

- **"Permanently Protected" OPEN SPACE** is land that is restricted against building development, either under a conservation easement, or as a nature preserve owned by a conservation organization. An easement is not required for a preserve owned by a conservation organization., as the organizational purposes are deemed sufficient to qualify land as permanently protected. Although buildings must be prohibited in a permanently protected **OPEN SPACE** parcel, the easement or non-profit management can allow other uses of this land. It can be farmed, cleared for pasture or fields, or managed as a forest as generally permitted in Resource Management easements discussed above. Minor improvements are permitted as long as they are not inconsistent with the preservation of the land as **OPEN SPACE**. Allowed minor improvements are discussed above in the section on "Excluded Areas."

- **"Forever Wild" OPEN SPACE** must meet the above requirements of permanent protection, and the easement (or the conservation organization's management plan for the nature preserve) must ensure that the natural resources will remain substantially unaltered. Forever wild land can be used for hunting and fishing, and harvesting in the intertidal zone.

The natural resources can be altered and minor structures can be installed for two reasons: to enhance the opportunity for low impact outdoor recreation, nature observation and study, and to prevent the spread of fire or disease. This permits footpaths and trail improvements, such as bog walks, railings, steps, fire rings, primitive campsites. It permits inconspicuous boat landing facilities, such as outhauls or canoe ramps, if necessary for outdoor recreation. It also permits cutting and pruning vegetation for views from trails and campsites, modest vegetation management to promote natural diversity and prevent exotic intrusion, and removal of vegetation to prevent the spread of disease. On a sufficiently large parcel, it may permit fire prevention by cutting firebreaks and fire access roads, as long as they aren't inconsistent with the preservation of the land for its **OPEN SPACE** purposes. It would not permit high impact recreational facilities, even if they aren't buildings, such as swimming pools, baseball diamonds, piers, or tennis courts, nor would it permit farming, harvesting forest products, paved roads, or the cutting of views from residences. It doesn't permit maintenance of fields unless the field or cleared area is so well established that maintenance requires little alteration to the natural resources to keep it open, such as occasional removal of saplings, or the field is an important enhancement to low impact outdoor recreation. Most land trust preserves are managed in a way that qualifies the land for the forever wild category.

- **"Public Access" OPEN SPACE** has to be legally accessible by reasonable means, such as by shore, or from public roadways, or via private land or rights-of-way available to the public. The owner must agree, in the **OPEN SPACE** application, to refrain from posting against or barring non-motorized and non-destructive public access during the daytime. The owner doesn't have to allow hunting in order to qualify. And the owner can limit the location or timing of access to protect important and fragile natural resources, such as endangered species, dunes, wetlands, and to prevent harm to the public. A parcel does not have to qualify for "permanent protected" status to meet the public access standard.

Many landowners are interested in the effect a conservation easement might have on **OPEN SPACE** taxes. Most easements apply differing restrictions to different parts of the land, combining the various easement types: limited development, resource management, forever wild, and public access. In order to evaluate the impact **OPEN SPACE** might have on the taxes of an easement parcel, it is essential to map out how the restrictions affect different areas of the land. For instance, many easements protect land that buffers highly sensitive natural resources, such as wetlands, streams, ponds and tidal waters, by prohibiting alterations except to prevent disease and fire, and except for minimal cutting and minor structures for recreational use, such as trails and trail improvements. These areas would be eligible for the 70% reduction applicable to **FOREVER WILD** land. Areas qualify for the 50% reduction as **PERMANENTLY PROTECTED** land if they are restricted from building development, but allow more intensive human use of natural resources than is permitted in **FOREVER WILD** areas, such as personal or commercial forestry, clearing of fields, or cultivation of the land.

OPEN SPACE valuation is easier to determine if the easement sets aside potential building areas, either as a building envelope, or by means of clear exclusionary zones. For example, if an easement permits buildings only within a discrete area, everything else will be eligible for the **PERMANENTLY PROTECTED** (50%) or **FOREVER WILD** (70%) reduction. If an easement permits limited buildings that can be located anywhere, the entire parcel (notwithstanding its easement status) will be eligible only for the 20% reduction, until all possible buildings have been sited by actually building them. Building renders the remaining land non-buildable under the easement, and thus eligible for the percent reduction appropriate to the specific restrictions that affect it. Owners interested in clarifying their **OPEN SPACE** status may wish to amend their easements to specifically site permitted structures.

It is important to note that the building area set aside in the easement can be classified under **OPEN SPACE** as long as it isn't built on. These building areas will be eligible for the 20% reduction as long as they remain unimproved. This can be an important option for owners of limited development easement property who have no intention of building. Like the owner of **ordinary OPEN SPACE** land, they can classify the land and leave the decision to build to future generations. If the owner does decide to build later, the area will be disqualified and subject to a penalty.

If the easement includes a grant of **PUBLIC ACCESS**, the land will be eligible for the extra 25% reduction. While many easements have public access provisions, it is not necessary to make a permanent grant of public access to qualify for the additional 25% reduction under Open Space. As long as the land is accessible by reasonable means (in other words, people can get there by shore, over public roads, or over private land or roads that the owner agrees will be open for access), the owner can simply agree in the **OPEN SPACE** application to refrain from posting against trespass or making efforts to deter public use. If at a future date the owner withdraws this privilege, the land will remain eligible and only the percent reduction will be adjusted (unless the public access was the only reason for eligibility in the first place). In this rare case, closing the land to the public will result in disqualification and penalty.

In 2012, the legislature created a new category: **MANAGED FOREST OPEN SPACE LAND**. Under this category, a landowner is eligible for an additional 10% reduction. **MANAGED FOREST OPEN SPACE LAND** is an alternative to **FOREVER WILD.**

As with **TREE GROWTH** classification, the landowner claiming **"MANAGED FOREST OPEN SPACE LAND"** must commission a **FOREST MANAGEMENT AND HARVEST PLAN** and update and share it with the assessor at least every 10 years. However, in a key difference, the parcel does not have to be used for commercial forest management to be eligible for this new category. Thus, as long as some minimal level of tree cutting is called for under the **FOREST MANAGEMENT AND HARVEST PLAN** and it in fact takes place, the property should qualify as **"MANAGED FOREST OPEN SPACE LAND."**

HOW TO PROCEED

Property tax assessment is based on the ownership and value of land as of April 1 of the tax year. It is important to talk with the local assessor well in advance of that date to explore options and their tax consequences. If the property is restricted by an easement, even if you have no intention of applying for current use treatment, you must notify the town of the easement before April 1, or you may lose entitlement to an abatement for any error or overvaluation in taxes. Municipal assessors are required by law to recognize the impact of conservation easements on land value, but owners can assist them in this challenging job by providing the best information available on the easement and the value of the land. If the property is then assessed higher than its true market value (adjusted by the towns assessment ratio), it may be necessary to file for abatement. Abatement procedures are governed by Title 36 M.R.S.A. §706 (declaration requirement), §841-849 (just value), and under §583 and §1118 (for **TREE GROWTH** and **OPEN SPACE**). The State Bureau of Taxation has published Tax Bulletin #10 on the subject. Procedures differ depending on whether the town has a Board of Assessment Review, but the initial appeal is always to the assessors.

For information on fiscal impacts of conserved land on Maine communities, contact Maine Coast Heritage Trust. Additional sources of information are included in the attached Appendix B.

Without reliable property tax treatment for conservation lands, many natural and scenic landscapes that exemplify the character of Maine, add to our quality of life, and contribute to natural resource-based economies will be lost. Fair taxation of conserved land benefits everyone.

Appendix A

15-Point Public Benefit Test & New Definitions for Wildlife Habitat

Standards for Determining Open Space Eligibility

In making the determination that the restriction or preservation of land under Open Space classification provides a public benefit, as required in Section 1102, Subsection 6, the assessor shall consider all facts and circumstances pertinent to the land and its vicinity. Factors appropriate to one application may be irrelevant in determining the public benefit of another application. A single factor, whether listed below or not, may be determinative of public benefit. Among the factors to be considered are:

A. The importance of the land by virtue of its size or uniqueness in the vicinity or proximity to extensive development or comprising an entire landscape feature;

B. The likelihood that development of the land would contribute to degradation of the scenic, natural, historic or archeological character of the area;

C. The opportunity of the general public to appreciate significant scenic values of the land;

D. The opportunity for regular and substantial use of the land by the general public for recreational or educational use;

E. The importance of the land in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;

F. The likelihood that the preservation of the land as undeveloped open space will provide economic benefit to the town by limiting municipal expenditures required to service development;

G. Whether the land is included in an area designated as open space land or resource protection land on a comprehensive plan or in a zoning ordinance or on a zoning map as finally adopted.

H. The existence of a conservation easement, other legally-enforceable restriction, or ownership by a nonprofit entity committed to conservation of the property that will permanently preserve the land in its natural, scenic or open character;

I. The proximity of other private or public conservation lands protected by permanent easement or ownership by governmental or nonprofit entities committed to conservation of the property;

J. The likelihood that protection of the land will contribute to the ecological viability of a local, state or national park, nature preserve, wildlife refuge, wilderness area or similar protected area;

K. The existence on the land of habitat for rare, endangered or threatened species of animals, fish or plants, or of a high quality example of the terrestrial or aquatic community;

L. The consistence of the proposed open space use with public programs for scenic preservation, wildlife preservation, historic preservation, game management or recreation in the region;

M. The identification of the land or of outstanding natural resources on the land by a legislatively-mandated program, on the state, local or federal level, as particular areas, parcels, land types or natural resources for protection including, but not limited to, the Register of Critical Areas under Title 5, Chapter 312; the laws governing wildlife sanctuaries and management areas under Title 12, Section 7651 and 7652; the laws governing the State's rivers un-

der Title 12, Chapter 200; the natural resource protection laws under Title 38, Chapter 3, Subchapter I, Article 5-A; and the Maine Coastal Barrier Resources Systems under Title 38, Chapter 21; or

N. Whether the land contains historic or archeological resources listed in the National Register of Historic Places or is determined eligible for such a listing by the Maine Historic Preservation Commission, either in its own right or as contributing to the significance of an adjacent historic or archeological resource listed, or eligible to be listed, in the National Register of Historic Places; or

O. Whether there is a written management agreement between the landowner and the Department of Inland Fisheries and Wildlife or the Department of Conservation as described in section 1102, subsection 10. (Added 2004, LD 827)

Test for classification of land important to wildlife habitat.

In 2004, an amendment was enacted under L.D. 827 to clarify the meaning of "wildlife habitat" for purposes of the farm and open space tax law and to require assessors to consider whether there is a written agreement for the protection of wildlife habitat (See criterion O. above) when determining eligibility for classification under that law. This amendment prevents property owners from asserting eligibility for relatively unimportant wildlife habitat, such as, in the extreme example, back yards with gardens that attract wildlife.

36 MRSA §1102, sub-§10

10. Wildlife habitat. "Wildlife habitat" means land that is subject to a written management agreement between the landowner and either the Department of Inland Fisheries and Wildlife or the Department of Conservation to ensure that the habitat benefits provided by the land are not lost. Management agreements may be revised or updated by mutual consent of both parties at any time. Management agreements must be renewed at least every 10 years. "Wildlife habitat" must also meet one of the following criteria:

A. The land is designated by the Department of Inland Fisheries and Wildlife as supporting important wildlife habitat;

B. The land supports the life cycle of any species of wildlife as identified by the Department of Inland Fisheries and Wildlife;

C. The land is identified by the Department of Conservation as supporting a natural vegetation community; or

D. The land is designated as a resource protection area in a comprehensive plan, zoning ordinance or zoning map.

Appendix B

Sources of Additional Information

Maine Coast Heritage Trust
One Bowdoin Mill Island, Suite 201
Topsham, ME 04086
(207) 729-7366
www.mcht.org

Maine Revenue Services
Property Tax Division
State House Station #24
Augusta, Maine 04333
(207) 287-2011
www.maine.gov/revenue/property/homepage.html

Maine Forest Service
Department of Conservation
State House Station 22
Augusta, ME 04333
1-800-367-0223
www.maine.gov/doc/mfs/index.shtml

Maine Municipal Association
60 Community Drive
Augusta, ME 04330
(207) 623-8428
www.memum.org

Maine Association of Assessing Officers
www.maineassessors.org

Maine Organic Farmers & Gardeners Association
P.O. Box 2176
Augusta, ME 04338
(207) 622-3118
www.mofga.org

Maine Farmland Trust
60 Main Street
PO Box 1597
Bucksport, ME 04416
(207) 469-6465
www.mainefarmlandtrust.org

Forest Society of Maine
115 Franklin Street
PO Box 775
Bangor, ME 04402
(207) 945-9200
www.fsmaine.org

Small Woodland Owners Association of Maine
P.O. Box 836
Augusta, ME 04332
(207) 626-0005
www.swoam.org

Maine Coast Heritage Trust
A Statewide Land Conservation Organization

1 Bowdoin Mill Island, Suite 201, Topsham, ME 04086
(207) 729-7366 ~ (207)729-6863 (fax) ~ www.mcht.org

The purpose of this publication is to provide information of a general character only. Maine Coast Heritage Trust is not engaged in rendering legal or tax advisory services. For advice and assistance in specific cases, the services of an attorney or other professional advisor should be obtained.

MCHT 10/85—revised 7/13

Property Taxation of Conserved Lands—Options for Property Owners