

**Assessing Land Encumbered  
by Conservation Restrictions**

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## **Assessing Land Encumbered by Conservation Restrictions**

### **Abstract**

The assessment of land in Massachusetts encumbered by conservation restrictions was not a particular problem in the past since most towns tended to assess large tracts of land at comparatively low prices per acre. In recent years, however, the growing popularity of conservation restrictions as an estate planning tool combined with the recent unprecedented escalation in land values in eastern Massachusetts has resulted in a dilemma for assessors in higher-valued communities. Namely, how to establish an equitable, uniform method of assessing conservation-restricted land when the restriction no longer seemed to substantially diminish a property's market value. The purpose of this paper is to analyze how various communities throughout Massachusetts are currently assessing land affected by conservation restrictions and to suggest a methodology for assessing conservation restrictions that would be uniform statewide.

## About the Author

**Mr. Czupryna** is certified as a national real property instructor by the American Society of Appraisers and has taught introductory appraisal and income capitalization courses throughout the United States. In 1980 he was requested by the Massachusetts Department of Food and Agriculture to prepare and present an intensive two-day seminar entitled *The Appraisal of Land and Land Restrictions (Agricultural/Conservation)*. The course was designed to educate real estate appraisers in the proper methodology to follow when appraising land and particularly land that will be restricted to conservation use.

Mr. Czupryna was requested to lecture on the same subject matter before the Eastern Massachusetts Chapter of the Society of Real Estate Appraisers, the Boston and Connecticut Chapters of the American Society of Appraisers, appraisers selected by the Commonwealth of Massachusetts, the National Association of State Departments of Agriculture Research Foundation, the Boston Bar Association, and the Harvard University Graduate School of Design. Mr. Czupryna has lectured across the country on land use and taxation issues as a faculty associate of the Lincoln Institute of Land Policy.

Mr. Czupryna presented formal real estate appraisal courses in the formerly socialist republic of Slovenia (Yugoslavia) in 1992-1993, and served as a private consultant to the Agency for Privatization of the Republic of Slovenia in January of 1993. He was instrumental in establishing the valuation methodology, which, by law, must be followed in the appraisal of Slovenian companies and corporations, and he established land value zones in the major cities of Ljubljana, Maribor, Celje, and Kranj. In October of 1993 he participated in the presentation of three real property courses of the American Society of Appraisers in St. Petersburg, Russia, on behalf of the Economic Development Institute of the World Bank. He then returned to the Republic of Slovenia in November of 1993 to teach a new cycle of appraisal courses. In October of 2000 Mr. Czupryna presented a series of appraisal lectures at Yerevan State University, Republic of Armenia, to selected brokers and appraisers as part of a USAID field project for RONCO Consulting Corp., Washington, D.C. He returned to Ljubljana in October of 2003 at the request of the Slovene Institute of Auditors to present a seminar on complex land valuation issues.

Although his practice encompasses the appraisal of all types of real estate, he has particular expertise in the appraisal of environmentally sensitive lands.

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# Assessing Land Encumbered by Conservation Restrictions

## Introduction

The assessment of land in Massachusetts encumbered by conservation restrictions was not a particular problem in the past since most towns tended to assess large tracts of land at comparatively low prices per acre. Wetlands, for example, were generally assessed at \$500 to \$1,500 per acre while backland, or "excess" land, was typically valued at \$1,000 to \$10,000 per acre. Moreover, most communities only had a handful of restricted properties and their assessment could usually be dealt with on a case-by-case basis. The assessment of forestland (Chapter 61), agricultural land (Chapter 61A), or open space/recreational land (Chapter 61B) was likewise not a problem since guidelines for assessing these were provided by the Massachusetts Department of Revenue.

In recent years, however, the growing popularity of conservation restrictions as an estate-planning tool combined with the recent unprecedented escalation in land values in eastern Massachusetts has resulted in a dilemma for assessors in higher-valued communities. Namely, how to establish an equitable, uniform method of assessing conservation-restricted land when the restriction no longer seemed to substantially diminish a property's market value.

In practice, most assessors have typically valued conservation-restricted land on a flat-value-per-acre basis (usually \$5,000 to \$10,000 per acre) or as a percentage of market value. But in more affluent communities nearer to Boston, such as Concord and Lincoln, recent sales have indicated that conservation-restricted land may have a contributory value well in excess of \$50,000 per acre.

The problems of assessing restricted land equitably and uniformly will only increase as the popularity of conservation restrictions as a land-planning and estate-planning tool continues to grow. Since passage of the enabling legislation for conservation restrictions in 1969<sup>1</sup>, more than 2,300 privately held restrictions<sup>2</sup> have been recorded affecting 49,800± acres statewide. The Massachusetts Department of Food and Agriculture (DFA) presently holds Agricultural Preservation Restrictions (APRs) on more than 53,000 acres statewide. These are exclusive of conservation restrictions negotiated or held by other state agencies such as the Metropolitan District Commission (MDC), the Department of Environmental Management (DEM), or the Department of Fisheries and Wildlife (DFW).

The purpose of this paper therefore is to analyze how various communities throughout Massachusetts are currently assessing land affected by conservation restrictions and to suggest a methodology for assessing conservation restrictions that would be uniform statewide.

## Current Use Programs

Prior to analyzing current assessment practices, it may be well to first review the various options available to a landowner seeking to reduce the assessment on land.

### Chapter 61<sup>3</sup>

(Forestland) is available for tracts of at least ten (10) contiguous acres. To qualify, the owner must submit a ten-year management plan approved and certified by a State Forester. In addition, the owner must file a return with the local assessors each year reporting the amount of forest products cut. Once approved, annual real estate taxes are computed by applying the commercial tax rate to 5% of the fair market value of the land. The owner must also pay a products tax each year based on 80% of the stumpage value of the forest products cut the previous year.

### Chapter 61A<sup>4</sup>

(Agriculture) is perhaps the most widely used program statewide. To qualify, an owner of a tract of land containing at least five (5) acres may apply for a reduced assessment if the land is actively devoted to agricultural or horticultural use. If the application is accepted the land is then generally assessed in accordance with the following suggested values per acre provided annually by the Massachusetts Department of Revenue.<sup>5</sup>

### Chapter 61A Recommended Land Values Fiscal Year 2003 Per Acre Range of Values

Land Use Category	Productivity Based on Dominant USDA Soil Rating		
	Below Average	Average	Above Average
<b>Vegetables, Tobacco, Sod and Nurseries</b> Cropland Harvested	\$1,862	\$2,328	\$2,794
<b>Dairy, Beef and Hay</b> Cropland Harvested	\$ 416	\$ 520	\$ 624
<b>Orchards, Vineyards and Blueberries</b> Cropland Harvested	\$1,782	\$2,227	\$2,673
<b>Range of Production/Barrels per acre Cranberries</b> Cropland Harvested	<u>&lt;=112</u>	<u>113-167</u>	<u>&gt;=168</u>
<b>Woodland</b> Farm, Woodland and Nonproductive	\$ 84	\$ 84	\$ 84
<b>Cropland Pastured and Other Cropland</b> Cropland Pastured, Permanent Pasture and Necessary and Related	\$ 337	\$ 337	\$ 337

## Chapter 61B<sup>6</sup>

(Recreational) is an open space program designed to provide tax relief for owners of parcels at least five (5) acres in size. Although public access is not a requirement, the land must either be kept in a natural, wild, or open condition or used for recreational purposes. The latter uses include golfing, horseback riding, hunting, and fishing. Real estate taxes are assessed by applying the commercial tax rate to the recreational value of the land, which cannot exceed 25% of its fair market value.

Common to all three programs is a rollback tax if the owner changes the use of the land or opts out of the program. The town also has the right of first refusal in the event the property is offered for sale.

### **Problems of Assessing Restricted Land with "Estate Value"**

While assessment guidelines are in place for recreational, agricultural, and forestlands, the Massachusetts Department of Revenue has not issued guidelines for properties that are encumbered by private conservation restrictions. As previously stated, this was not a particular problem in the past since most towns tended to assess large tracts of land at comparatively low values per acre whether they were restricted or not. But in recent years land values have escalated sharply, especially in wealthier communities closer to Greater Boston. Concurrent with the strong demand for land have been the record prices obtained for estate properties. The high-end estate market in recent years has been primed in large measure by record gains in the stock market during the late 1990s which produced a bumper crop of cash-flush "kingdom buyers." This type of purchaser frequently seeks an estate with large acreage and will often pay a premium price for extra land—regardless of whether the "excess" land is encumbered by a conservation restriction. Since the buyers of large estates seldom seek to further subdivide or develop the land, the utility and recreational value of the land and the scenic vistas it may afford can be of far more importance than its development potential or lack thereof.

An example is the recent sale of a 25±-acre estate at 299 Estabrook Road in Concord on August 30, 2002 for \$3,950,000. The buyer was immediately taken by the estate's pastoral setting and rural ambiance created by its larger-than-typical land area. About five acres near the residence comprised open fields surrounded by stone walls. The interior 20± acres included a ten±-acre cornfield and woodlands. This parcel in its entirety was encumbered by a conservation restriction in 1981 limiting the use of the property to not more than one residence and outbuildings.<sup>7</sup> The asking price for the property was \$3,500,000 and the higher selling price resulted from a bidding war between two potential purchasers. I interviewed the exclusive broker involved in the sale and asked him how he had arrived at the price. He replied that he had estimated the value of the house and five± acres at \$2,300,000 to \$2,600,000 and the residual land at \$1,000,000±. Based on comparable sales, I allocated \$2,500,000 as the value of the improvements and five± acres, which resulted in a residual value of \$50,000 per acre for the "excess" restricted land, calculated as follows:

Sale price on August 30, 2002	\$3,950,000
Less premium	<u>450,000</u>
Adjusted price	\$3,500,000
Less value of primary 5±-acre site and improvements	<u>2,500,000</u>
Value of residual 50± acres of conservation-restriction land	\$1,000,000
Price paid per acre ( $\$1,000,000 \div 20$ acres) for "excess" restricted land	\$50,000

The indicated price of \$50,000 per acre for the restricted land is by no means an aberration since a review of more than a dozen similar sales in Concord and Lincoln revealed ranges of \$40,000 to \$90,000 per acre for "excess" restricted land.

While the foregoing illustrates that buyers may be willing to pay \$50,000 per acre or more for restricted land that has "add on" value to an estate, a sale of three parcels of land a short distance from this property illustrates that "stand alone" parcels (i.e. without a dwelling) lacking development potential or "estate" value will sell for considerably less. Located less than 200 feet to the north, off Hugh Cargill Road, are three parcels of unimproved land containing 4.13, 4.74, and 8.75 acres, respectively. On March 12, 2001 they were sold for a total price of \$358,800<sup>8</sup>. The 4.74-acre parcel was encumbered by a conservation restriction given to the Town of Concord in October of 1981<sup>9</sup>. Although the two larger parcels had road frontage, they were considered undevelopable because of a past planning board decision. Since both the seller and buyer regarded the three parcels as undevelopable backland, they agreed to base the price on their assessed values which were:

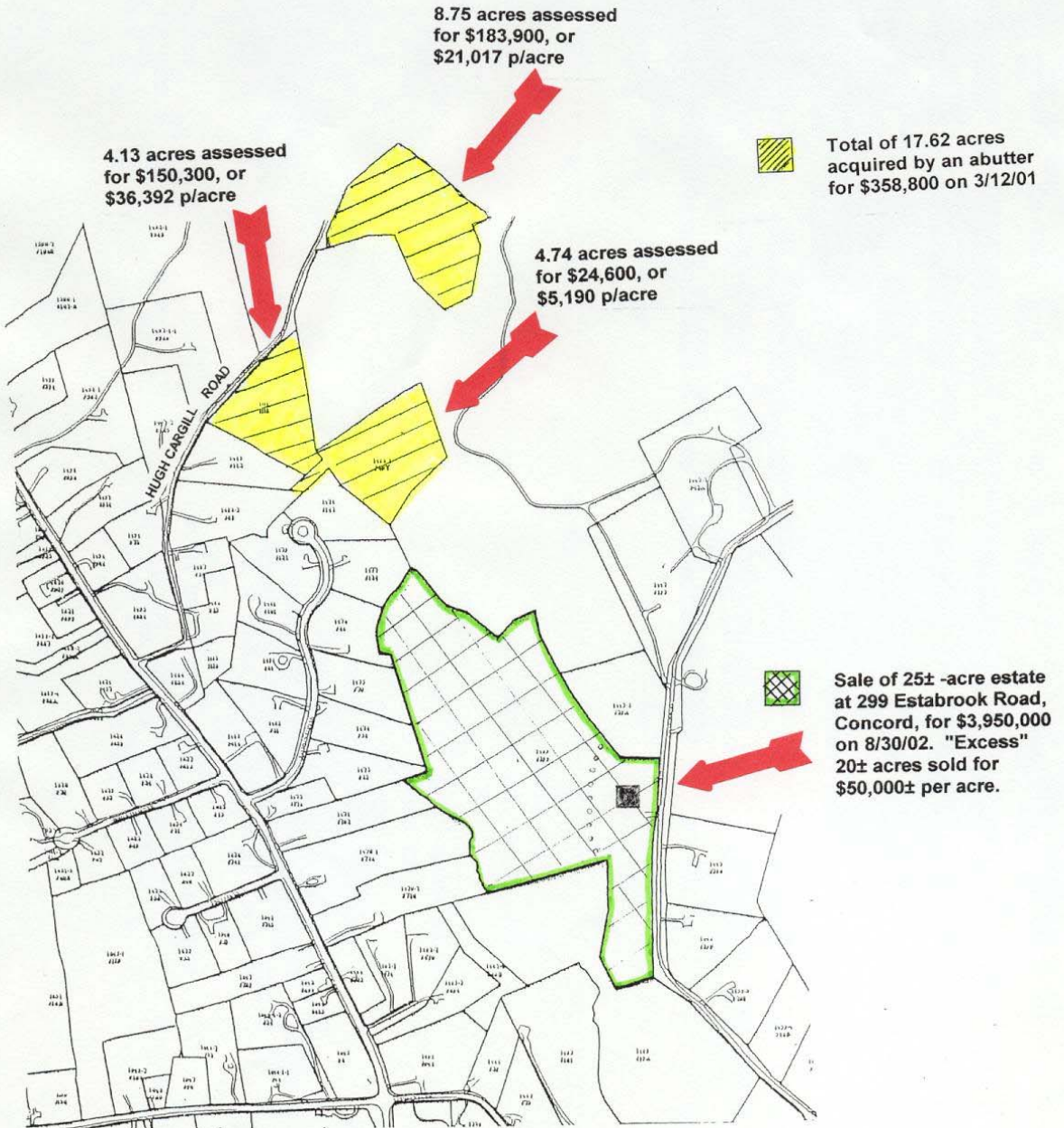
Address	Acres	Assessment	Assessment Per Acre
15B Hugh Cargill Road	4.13	\$150,300	\$36,392
20Y Hugh Cargill Road	4.74	24,600	\$ 5,190
25A Hugh Cargill Road	8.75	183,900	\$21,017
Totals	17.62	\$358,800	\$20,363 (average)

An appraiser or assessor attempting to use this sale as a "comp," however, is faced with the dilemma of extracting the proper unit of value. That is, if the buyer's motivation was simply to acquire some adjacent nonbuildable land totaling 17.62 acres to expand the acreage of his estate, then was the price paid equivalent to \$20,000± per acre (i.e.  $\$358,800 \div 17.62 = \$20,363$ )? Or, if the words of the buyer are to be taken literally "we agreed to pay the assessed values," are the prices paid per acre \$36,392, \$5,190, and \$21,017 per acre, respectively?

On the following page is a map illustrating the proximity of these parcels.



# Town of Concord, Massachusetts





more than two dozen eastern Massachusetts communities surveyed were handling this problem. While many assessors tended to value CR<sup>10</sup> land the same as backland or "excess" land, this practice can produce artificially low assessments in higher-valued communities as the preceding example has shown.

### **Assessing Practices in Higher-Valued Greater Boston Communities**

For more than a decade the Town of Lincoln had been assessing conservation-restricted land at \$5,000 per acre. But an analysis of eight recent estate sales in 1999 – 2000 indicated that the residual value of the conservation-restricted land each property contained ranged between \$60,000 and \$90,000± per acre. Lincoln began assessing CR land at \$14,000 per acre in fiscal year 2003 and at \$25,000 per acre in fiscal year 2004. The assessors have made establishing a policy for the valuation of restricted land a priority since there are currently 121 privately owned properties in the town encumbered by conservation restrictions. Carlisle, which has a history of encouraging land preservation, assesses CR land at \$5,000 per acre and about 40 privately owned properties have conservation restrictions.

In the Town of Concord, which has 60 CRs covering 750± acres, the method of assessing conservation land became very much an issue in the 2001 revaluation. Like Lincoln and Carlisle, the Town also had a practice of assessing CR land at \$5,000 per acre. However, after analyzing six recent estate sales involving conservation-restricted land or otherwise nondevelopable land, the assessors increased the base value of CR land to \$60,000 per acre. Predictably, this led to the formation of taxpayer groups to protest the new policy and a flood of abatement applications. The Town subsequently revised its policy assessing "stand alone" (without a dwelling) or isolated CR parcels to \$6,000 per acre but continues to use a base of \$60,000 per acre for land that has "add on" or estate value.

### **Assessing Practices on Cape Cod**

There are currently about 250 privately owned properties on Cape Cod with conservation restrictions protecting approximately 4,000 acres. Land preservation is of paramount importance on the Cape because of intense development in recent years. Accordingly, most towns actively encourage owners to place private conservation restrictions on their properties and are more than willing to offer property tax reductions in return.

The Town of Falmouth, for example, instituted a formal Conservation Restriction Policy in the fall of 2001 to encourage land preservation. As an inducement for landowners to place conservation restrictions on their properties that will be of public benefit, the Town guarantees the donor "up front" an 80% to 95% reduction in real estate taxes. Section 6 of the Policy is reproduced as follows:

#### *6. REASSESSMENT FORMULA*

*Properties encumbered by approved and recorded (or registered) Conservation Restrictions will be assessed for real estate tax purposes as follows:*

*First, the current fair market value of the parcel will be determined as if the parcel were not encumbered by or subject to the Conservation Restriction.*

*Second, generally, such unencumbered fair market value will be adjusted according to the following criteria:*

*Closed to the Public*

*In general, the assessed value of a parcel encumbered by a Conservation Restriction in perpetuity, which does not permit or which prohibits public access to the property, will be 20% of the parcel's unencumbered fair market value.*

*Open to the Public*

*In general, the assessed value of a parcel encumbered by a Conservation Restriction in perpetuity, which does not prohibit or restrict public access, will be 5% of the parcel's unencumbered fair market value.*

*Notwithstanding the foregoing, the terms of each Conservation Restriction will be reviewed on a case by case basis, and a parcel's assessed value may be reduced by less than the foregoing baseline reductions (i.e. 80% and 95%) because of individual factors, such as specific uses or activities reserved for the parcel by the landowner in the Conservation Restriction and limitations or restrictions on public access.*

*For parcels on which structures or other improvements are located, if the Conservation Restriction covers the entire parcel, the structure(s) and the area satisfying the minimum lot requirement will be assessed and taxed at the unencumbered fair market value (i.e. there will be no reduction in assessments or taxes for the structure(s) or other improvements or the minimum lot area). The excess land will receive the benefit of the 80% or 95% reduction.*

*Structures or sites that are historically, architecturally or archeological significant may be eligible for preservation restrictions as defined in the second paragraph of Section 31 of Chapter 184 of the Massachusetts General Laws.*

*All restricted properties must allow on-foot access to officials of the holder of the restriction in order to monitor compliance with the terms and conditions of the Conservation Restriction. In the case of the town as the holder of the Conservation Restriction, the Conservation Commission will be the monitoring agency.*

*Any land already subject to statutory agricultural or recreational abatements cannot be considered simultaneously eligible for a Conservation Restriction property tax reduction. Landowners with these other abatements, however, may elect to replace their temporary reduction status with a permanent Conservation Restriction.*

*On the following page is a summary of the assessment policies for the 15 Cape Cod towns.*

**TOWN CONSERVATION RESTRICTION PROGRAMS  
BARNSTABLE COUNTY – 2002<sup>11</sup>**

TOWN	TEMPORARY CRs ALLOWED?	PERPETUAL CR TAX REDUCTION	
		(no access)	(with access)
Barnstable	No	75%	90%
Bourne	No	75%	90%
Brewster	Yes	85%	95%
Chatham	Yes	case by case decision	
Dennis	Yes	95%	95%
Eastham	No	85%	95%
Falmouth	No	80%	95%
Harwich	Yes	80%	95%
Mashpee	--	case by case decision	
Orleans	Yes	case by case decision	
Provincetown	No	75%	90%
Sandwich	No	95%	95%
Truro	No	75%	90%
Wellfleet	No	75%	90%
Yarmouth	No	80%	95%

As we have seen, the methods of assessing conservation-restricted land vary widely from town to town. This is partly because of the difficulty in accurately appraising the value of restricted land since sales of truly comparable parcels are usually not available. Use of the abstraction method (such as the example of 299 Estabrook Road) is not without its potential pitfalls since estimating the value of the improvements and their underlying site can be subjective. Indeed, some appraisers will also argue that in the case of high-end estate properties the "whole" (i.e. land and buildings) is worth more than the sum of the parts. Hence, by subtracting the value of the improvements and allocated site from the selling price, the residual attributed as the value of the remaining restricted land will be skewed on the high side. But perhaps the biggest problem in assessing CR land is the lack

of a uniform set of guidelines issued at the state level. Formulas for assessing lands placed under current use statutes (M.G.L. Chapters 61, 61A, and 61B) for forest, farm, and recreational land have been provided to assessors by the Department of Revenue. Most assessors are quite comfortable using these and they are easily explainable to taxpayers. But despite the willingness of many towns to assess conservation-restricted lands at reduced levels, assessors are still mandated by law to value these properties at "full and fair cash value." This in turn has led to a wide disparity in assessing practices throughout the state.

### **Problems and Suggested Solutions**

Many Massachusetts assessors interviewed in the course of this study felt that a statewide policy of assessing conservation-restricted land at no more than 25% of market value would be fair and equitable to both the communities and the taxpayer. Importantly, such a policy would provide assessors with a uniform and consistent method of assessing restricted land that is presently lacking. True, some "tinkering" will inevitably be necessary since the terms of restrictions and the rights reserved to the owner may very well differ from restriction to restriction.

Conversely, several of the assessors I interviewed were of the opinion that a reduction in the assessed value of conservation-restricted land is not warranted. They argue that "it is what it is" and if sales indicate that the value of such land in higher-value communities has risen to \$50,000 or \$75,000 per acre, so be it. After all, why should wealthy estate owners be subsidized at the expense of the other taxpayers. Moreover, if a land owner believes the assessment on his or her conservation-restricted land is unfair, why not simply apply for Chapter 61B (open space/recreational) and receive a 75% reduction in value?

I believe this line of reasoning is flawed for several reasons.

First, in my more than thirty years of experience dealing with environmentally sensitive lands I have observed that many conservation-minded owners are "gun shy" with the prospect of giving the town a right of first refusal. They fear, rightly or wrongly, that if they had to sell and the town matched the offer to purchase that somehow in the future part of their family lands might be used for municipal purposes not contemplated by the terms of the restriction (e.g. a fire station, police station, or school).

Second, many taxpayers fear that if the property is placed under Chapter 61B and the market value is set too high, this would result in an unfair rollback tax if the property is sold later on. They also argue that since they have already made a substantial financial sacrifice for the public's benefit by donating the restriction in the first place, the least the community could do is give them a property tax break in return.

I would argue that a policy of taxing CR land at 100% of market value rather than at a reduced rate of 25% (say) is short sighted.

Indeed, as stated in the Town of Falmouth's Conservation Restriction Policy:

*Permanent Conservation Restrictions benefit the Town and its citizens and the citizens of the Commonwealth by providing various types of protection to the land.*

and

*Additional values of permanently restricted land to the Town are:*

- 1. The difference between the cost of potential municipal services against potential tax revenues. Studies have indicated that restricted land generates a substantial net savings to the Town;*
- 2. The financial benefit to the Town of a voluntary gift of land to preserve land bank/open space acquisition funds, and/or to preserve land in perpetuity, which might not be affordable for purchase by the Town (e.g. waterfront property). For these reasons, every effort should be made to promote Conservation Restrictions in the Town.*

It was primarily for these reasons that the Town of Falmouth now assesses conservation-restricted land at 20% of market value or 5% of market value if public access is allowed.

It is interesting to note that in 2001 a town-appointed citizens committee (which included members of the Finance Committee) was charged with the task of determining the effect on the tax rate of providing owners of conservation restricted land such substantial tax breaks. They found that 37 properties containing a total of 388± acres of restricted land were assessed for a total of \$2,000,000± less than if they were unrestricted. But given Falmouth's total taxable value of 4½ billion dollars,<sup>12</sup> this resulted in less than two cents per thousand on the tax rate. The study convinced many former opponents of the practice of assessing CR lands at less than market value that it was not fiscally irresponsible to do so and that it did not create an unfair burden on other taxpayers.

As a result of my research I concluded that accurately estimating the value of a parcel of land after it is encumbered by a conservation restriction is one of the most challenging assignments an appraiser can undertake and one that requires careful analysis and thorough understanding of the terms of the restriction. Indeed, the value per acre of two adjacent, similarly sized parcels restricted to conservation use can also vary by nearly 100%, depending on the rights reserved by the owner (e.g. the right to construct additional dwellings). Moreover, the value of such restricted land can vary widely depending on the land's utility, recreational value, and its "add on" or estate value to an abutting property.

For these reasons, towns need to adopt a comprehensive, clear, and concise policy as to how conservation-restricted land will be assessed. It is important, however, that if a town decides to assess conservation-restricted lands at less than market value as a way of encouraging open space, this policy is first approved by the appropriate town boards (selectmen, finance committee, board of assessors, etc.) and ratified by the voters/taxpayers at town meeting. New guidelines for permitting the assessment of restricted lands at less than market value (enabled by new legislation if necessary) should

be considered by the Massachusetts Department of Revenue. Perhaps new guidelines could be patterned after Chapter 61B (recreational land assessed at not more than 25% of market value) but without the town having a right of first refusal.

In any event, it is hoped that the issues and examples discussed in this article will illustrate that while conservation restricted lands must be appraised individually, real estate tax assessments of conservation restricted lands at less than market value may be prudent public policy.



## Sources

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Gregor I. McGregor, Esq.	McGregor & Associates
Mark H. Robinson	Executive Director of The Compact of Cape Cod Conservation Trusts
Board of Assessors	Concord, Massachusetts
Jacqueline Crimins, CAE, CMA	Town Appraiser, Concord, Massachusetts
Joan Ferguson	Chairperson, Concord Assessors Study Group
Board of Assessors	Lincoln, Massachusetts
Julie Miller	Town Assessor, Lincoln, Massachusetts
Susan Smith	Assessor, Town of Pepperell
Paul Bergman	Assessor, Town of Dartmouth
Paul Mathieson	Director of Assessment, Town of Barnstable
Paul V. O'Leary, ASA, MRA	Appraiser, Town of Barnstable
Jonathan Avery, MAI, CRE	Appraiser, Town of Acton
Wade Staniar	Real Estate Broker, LandVest, Inc.
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## Endnotes

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- <sup>1</sup> Massachusetts General Laws Chapter 184, Sections 31 - 33
- <sup>2</sup> The Trustees of Reservations, Massachusetts Audubon Society, various land trusts, etc.
- <sup>3</sup> Massachusetts General Laws Chapter 61
- <sup>4</sup> Massachusetts General Laws Chapter 61A
- <sup>5</sup> As compiled by the Farmland Valuation Advisory Commission (FVAC)
- <sup>6</sup> Massachusetts General Laws Chapter 61B
- <sup>7</sup> Amelia F. Emerson to Town of Concord, South Middlesex Land Court, Certificate 145134 on January 30, 1981.
- <sup>8</sup> Christian to Rasmussen, Middlesex South Registry of Deeds, Book 32478, Page 594
- <sup>9</sup> Christian to Town of Concord, Middlesex South Registry of Deeds, Book 14187, Page 74
- <sup>10</sup> conservation land
- <sup>11</sup> Source: *The Compact of Cape Cod Conservation Trusts 2002*
- <sup>12</sup> FY01 value \$4,597,515,581

