

# CONSERVATION EASEMENTS AND THE DOCTRINE OF MERGER

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## I INTRODUCTION

As relatively novel real-property interests, conservation easements raise a number of interesting legal issues, not the least of which is whether a conservation easement is automatically extinguished pursuant to the real-property-law doctrine of merger if its government or nonprofit holder acquires title to the encumbered land.<sup>1</sup> This article explains that merger generally should not occur in such cases because the unity of ownership that is required for the doctrine to apply typically will not be present. For merger to occur, “the two estates must be in the same person at the same time *and* in the same right.”<sup>2</sup> If the government or nonprofit holder of a conservation easement subsequently acquires title to the encumbered land, the two estates will be “in the same person at the same time,” but they generally will *not* be held “in the same right.”

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1. For a brief outline of the history and the development of federal and state laws facilitating of the use of conservation easements as a land protection tool, see Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (And Care) About Land Trusts And Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10224–27 (2004). See also Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND, RESOURCES & ENVTL. L. 47, 52 (2006) (explaining that “it was not until the mid-1980s that conservation easements began to be used on a widespread basis”).

2. *Pappas v. Pappas*, 177 N.W.2d 401, 404 (Minn. 1970) (emphasis added) (noting that all of the authorities agree on this point). See also, e.g., *Citizens Bank & Trust Co. v. Watkins*, 1 S.E.2d 853, 856 (N.C. 1939) (“To constitute a merger it is necessary that the two estates be in one and the same person at one and the same time and in one and the same right.”); *O’Malley v. Comm’r of Pub. Works*, 165 N.E.2d 113, 115 (Mass. 1960) (“To effect the extinguishment of an easement by merger arising from the acquisition of the fee in a servient property, ‘there must be a union of the greater and lesser estate in the same person and in the same right.’” quoting *Hurley v. A’Hearn*, 157 N.E.2d 223 (1959)); *Jemzura v. Jemzura*, 330 N.E.2d 414, 419 (N.Y. 1975) (“The doctrine of merger has never been especially favored in equity . . . and, to be applied, the greater and lesser estate must generally be in one and the same person, at one and the same time and in one and the same right.”); *King v. Richardson*, 136 F.2d 849, 861 (4th Cir. 1943) (“To constitute a merger, it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right.”).

This is not simply a technical legal issue of interest only to real-property-law scholars. If the doctrine of merger is misapplied to conservation easements there will be significant negative public policy ramifications. Conservation easements are not private contracts between private parties entered into for private benefit, like rights-of-way easements between neighbors. Rather, conservation easements are authorized under state law because they provide significant conservation or historic benefits to the public.<sup>3</sup> They are held and enforced by government entities and charitable organizations on behalf of the public.<sup>4</sup> And the public subsidizes their acquisition through, among other things, appropriations to federal and state easement purchase programs and the provision of federal and state tax benefits to easement donors.<sup>5</sup>

Allowing conservation easements that continue to provide significant benefits to the public to be extinguished through the doctrine of merger would be contrary to the conservation and historic preservation policies that underlie the state conservation easement enabling statutes and the easement purchase and tax incentive programs. It would also permit government entities and land trusts holding conservation easements to avoid the restrictions on the transfer, release, modification, and termination of conservation easements imposed by many of the state enabling statutes, federal tax law, and the laws governing the administration of charitable gifts, which restrictions operate to safeguard the public interest and investment in conservation easements.<sup>6</sup>

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3. See, e.g., UNIF. CONSERVATION EASEMENT ACT § 2 cmt. (2007) (explaining that conservation easements “may be created only for certain purposes intended to serve the public interest”).

4. See, e.g., *id.* § 1(2) (limiting holders of conservation easements to certain government and charitable entities). See also generally Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 REAL PROP. TR. & EST. L.J. 1 (2011) [hereinafter *National Perpetuity Standards, Part 2*] (surveying the over one hundred state statutes authorizing the creation or acquisition of conservation easements).

5. See, e.g., ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 9 (2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK] (noting that “[o]ver the last decade, more and more public agencies have established easement purchase programs and have funded the programs through a variety of financing mechanisms”); Land Trust Alliance, State and Local Tax Incentives, <http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives> (last visited June 30, 2011) (discussing the state tax incentives). See also generally Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 1: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010) [hereinafter *National Perpetuity Standards, Part 1*] (discussing the federal tax incentive program).

6. For restrictions on transfer, release, modification, and termination imposed by state enabling statutes, see *National Perpetuity Standards, Part 2*, *supra* note 4, Appendices A and B. For restrictions imposed by federal tax law, see *National Perpetuity Standards, Part 1*, *supra* note 5. For restrictions imposed by the laws governing the administration of charitable gifts, see *infra* Part II. See also Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 Ecology L.Q. 673, 700–01 (2007) [hereinafter *Perpetuity and Beyond*] (explaining that, although government entities and charitable organizations operate to benefit the public, history has shown that they cannot be trusted to always act in accordance with donor intent or the public interest, and they will almost inevitably be subject to financial, political, and other pressures that can cause them to act in manners contrary to the public interest).

## II

## CHARITABLE GIFTS OF CONSERVATION EASEMENTS

To understand why the doctrine of merger generally should not apply to extinguish conservation easements, some background regarding the manner in which conservation easements are typically conveyed and drafted is in order. Many conservation easements are conveyed to government entities and land trusts as charitable gifts for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the instrument of conveyance in perpetuity.<sup>7</sup> In addition, to satisfy the requirements for a federal charitable income tax deduction under Internal Revenue Code (IRC) § 170(h), many such easements expressly provide that they can be (1) transferred only to another government entity or conservation organization that agrees to continue to enforce the easement<sup>8</sup> and (2) extinguished only in a judicial proceeding, upon a finding that continued use of the land for conservation purposes has become impossible or impractical, and with a payment of a share of the proceeds from a subsequent sale or exchange of the property to be used by the donee in a manner consistent with the conservation purposes of the original contribution.<sup>9</sup> Many conservation

7. See, e.g., CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 147–208 (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION EASEMENT HANDBOOK] (setting forth a model conservation easement and commentary on its provisions); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 284–489 (setting forth a conservation easement drafting guide). In some cases, a landowner will convey a conservation easement to a government entity or land trust as part of a “bargain sale,” in which the landowner is paid a percentage of the value of the easement and makes a charitable gift of the remaining percentage.

8. See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 161 (providing a sample restriction on transfer provision); Treas. Reg. § 1.170A-14(c)(2) (as amended in 2009) (requiring that a tax-deductible conservation easement include a provision prohibiting the donee and its successors or assigns from transferring the easement, whether or not for consideration, unless the transfer is to another “eligible donee” that agrees that the conservation purposes the contribution was originally intended to advance will continue to be carried out). “Eligible donee” is defined as a qualified organization (generally, a government entity or charitable organization) that has a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions. *Id.* § 1.170A-14(c)(1). See also *National Perpetuity Standards, Part 1* *supra* note 5, at 488–89 (explaining that the Treasury Regulations’ “restriction on transfer” requirement should operate to prohibit the donee from, for example, selling, releasing, or otherwise transferring the easement, whether in whole or in part, back to the donor or to a subsequent owner of the land in exchange for cash or some other form of compensation).

9. See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 7, at 160 (providing sample extinguishment and division of proceeds provisions); Treas. Reg. § 1.170-14(g)(6)(i) (addressing extinguishment); *id.* § 1.170-14(g)(6)(ii) (addressing division of proceeds upon extinguishment). In discussing the “extinguishment” and “division of proceeds” provisions of the Treasury Regulations, the Tax Court, in *Kaufman v. Comm'r*, No. 15997-09, 2011 WL 1235307, at \*9 (T.C. Apr. 4, 2011) explained:

The drafters of [the Treasury Regulations interpreting section 170(h)] undoubtedly understood the difficulties (if not impossibility) under State common or statutory law of making a conservation restriction perpetual. . . . They understood that forever is a long time and provided what appears to be a regulatory version of *cy pres* to deal with unexpected

easements also contain a provision granting the holder the discretion to agree to amendments to the easement, but only if, *inter alia*, such amendments are consistent with or further the conservation purpose of the easement.<sup>10</sup>

Under state law, the donee of a charitable gift made for a specific purpose (sometimes referred to as a “restricted charitable gift”) must administer the gift consistent with its stated terms and charitable purpose.<sup>11</sup> The donee holds legal title to the gift, but on behalf of the public, which is the beneficiary of the gift.<sup>12</sup> Absent provisions in the instrument of conveyance providing otherwise, the donee is permitted to deviate from the gift’s charitable purpose only with court approval obtained in a *cy pres* or similar equitable proceeding.<sup>13</sup> The state attorney general is generally required to be provided with notice of such a proceeding and an opportunity to participate to represent both the interest of the public, as beneficiary of the gift, and the interest of the donor in ensuring that the gift is used for the donor’s designated purpose.<sup>14</sup> If the donee uses or threatens to use the charitable gift in a manner contrary to its stated terms or purpose, state law generally empowers the state attorney general; a party with a

changes that make the continued use of the property for conservation purposes impossible or impractical.

Although not at issue and, thus, not ruled on in *Kaufman*, the Tax Court also noted that the Treasury Regulations’ “restriction on transfer” requirement suggests that a tax-deductible easement “must incorporate provisions requiring judicial extinguishment (and compensation) in all cases in which an unexpected change in surrounding conditions frustrates the conservation purposes of the restriction.” *Id.* at \*9 n.7.

10. For a sample amendment provision, see, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 5, at 377 (explaining that “[a]mendment provisions are becoming more common to assure and limit the Holder’s power to modify”).

11. See, e.g., St. Joseph’s Hosp. v. Bennett, 22 N.E.2d 305, 308 (N.Y. 1939) (holding that a charitable corporation “may not . . . receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands”). See also, e.g., John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 698, 708–09 (2007) (explaining that restricted charitable gifts give rise to trust or trust-like duties, in particular the duty to abide by the terms of the gift); Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation’s Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 701–02 (2005) (“[T]he law imposes more restrictions on a charitable corporation’s use of restricted gifts (i.e., gifts that expressly limit their use to specific purposes) than unrestricted gifts (i.e., outright gifts with no express restrictions on their use). A restricted gift creates a charitable trust or its functional equivalent, and the donee is obliged to honor these restrictions. . . . By contrast, an unrestricted gift does not create a formal ‘trust’ within the meaning of trust law, and the donee can use it for any charitable purpose set forth in its articles of incorporation.”).

12. See Nancy A. McLaughlin & W. William Weeks, *Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73, 76 (2010) (explaining that the substantive rules governing the administration of charitable trusts apply to charitable gifts made for specific purposes, regardless of how the gifts are characterized under state law—as charitable trusts, restricted gifts, or otherwise—the theory being that donors who attach conditions to their gifts have a right to have their intentions enforced).

13. See *supra* note 11. See also *Perpetuity and Beyond*, *supra* note 6, at 678–79 n.20 (2007) (explaining that the doctrine of *cy pres* generally involves a two step process—if (i) the purpose of a charitable gift or trust becomes impossible or impractical due to changed conditions, (ii) a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is as near as possible to the original purpose specified by the donor).

14. See RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003).

“special interest” in the enforcement of the gift; a cotrustee or codirector; and, in a few jurisdictions, the donor to sue the donee for a breach of its fiduciary duties.<sup>15</sup>

As noted above, many conservation easements are conveyed to government entities and land trusts in whole or in part as charitable gifts for a specific charitable purpose. Indeed, tax-deductible conservation easements are, by definition, charitable gifts made for a specific charitable purpose.<sup>16</sup> Accordingly, the state-law principles governing the administration of charitable gifts should apply to such easements.<sup>17</sup> Thus, if the donee of such a conservation easement attempts to sell, release, or otherwise dispose of the easement in a manner contrary to its stated terms or charitable conservation purpose, the state attorney general; a cotrustee or codirector; a party deemed to have a special interest; and, in some cases, the donor should be permitted to sue the donee for

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15. See Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 62–67 (2009) (describing the standing rules in the charitable gift context). But see also *id.* at 42–49 (describing a holder’s express and implied powers to deviate from the administrative terms of a gift).

16. To be eligible for a federal charitable income tax deduction with regard to the donation of a conservation easement, the easement must be granted in perpetuity as a charitable gift to a qualified organization (generally a government entity or charitable organization) exclusively for one or more of four specified conservation purposes. See I.R.C. § 170(h) (2006). The four conservation purposes are (i) the preservation of an historically important land area or a certified historic structure, (ii) the preservation of a land area for outdoor recreation by, or the education of, the general public, (iii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, and (iv) the preservation of open space (including farmland and forest land) where such preservation is (a) for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state, or local governmental conservation policy, and (b) in either case, will yield a significant public benefit. *Id.* § 170(h)(4).

17. See UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (2007) (“[T]he Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts” and “independently of the Act, the Attorney General could have standing [to bring an action affecting a conservation easement] in his capacity as supervisor of charitable trusts”) (emphasis added); UNIFORM TRUST CODE § 414 cmt. (2000) (“Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust.”); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000) [hereinafter RESTATEMENT OF PROPERTY] (providing that the substantial modification or termination of conservation easements held by governmental bodies or charitable organizations should be governed, not by the real-property-law doctrine of changed conditions, but by a special set of rules based on the charitable trust doctrine of *cy pres*); *Kaufman, supra* note 9 (explaining that the Treasury Regulation’s extinguishment and division of proceeds provisions appear to be a regulatory version of the doctrine of *cy pres*). See also LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 23 (2007) (listing state and federal laws governing the administration of restricted gifts and charitable trusts and state laws on fraudulent solicitation and misrepresentation to donors as potential legal constraints on conservation easement amendments); William P. O’Connor, *Amending Conservation Easements: Legal and Policy Considerations*, EXCHANGE: J. LAND TRUST ALLIANCE, Spring 1999, at 8–10 (describing the donation of a conservation easement by Alice, a widowed physician approaching eighty years of age, who was a “knowledgeable and committed conservationist,” spent “several months developing the easement,” and for whom, like many easement donors, permanent protection of her land was the “transcendent goal;” the article lists charitable trust law as one of four potential legal constraints on conservation easement amendments).

a breach of its fiduciary duties.<sup>18</sup> In fact, state attorneys general have, on a number of occasions, invoked state-law principles governing the administration of charitable gifts to prevent a holder's improper amendment or termination of a perpetual conservation easement.<sup>19</sup>

### III

#### CHARITABLE GIFTS OF CONSERVATION EASEMENTS AND THE DOCTRINE OF MERGER

The merger question will often arise when a conservation easement has been conveyed to a government entity or land trust as a charitable gift for the purpose of protecting the conservation values of a particular parcel of land in perpetuity. The easement will often include provisions specifying the manner in which it can be permissibly transferred, amended, or extinguished. Then, some years later, the easement donor or a subsequent owner donates the encumbered land to the holder free of any restrictions on the holder's transfer, sale, or other disposition of such land.<sup>20</sup> In this situation, both estates (the easement and the

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18. See *supra* note 15 and accompanying text. The application of charitable principles to conservation easements would not preclude amendments. See McLaughlin & Weeks, *supra* note 12, at 77–81 (noting, *inter alia*, that if a conservation easement contains an amendment provision, as many do, the holder has the express power to simply agree with the owner of the encumbered land to any and all amendments that are consistent with the conservation purpose of the easement). See also *National Perpetuity Standards, Part 1*, *supra* note 5, at 523–27 (discussing federal tax law constraints on amendments).

19. See *Salzburg v. Dowd*, Civil Action No. CV-2008-79 (Feb. 2010) (approving a settlement in which a Wyoming county's attempted termination of a tax-deductible perpetual conservation easement was declared null and void; the Wyoming Attorney General brought suit arguing, in part, that the county breached its fiduciary duties to both the easement donor and the public by agreeing to terminate the easement without obtaining court approval in a *cy pres* proceeding); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) (discussing a controversy involving a land trust's attempted amendment of a perpetual conservation easement to permit a seven-lot upscale subdivision on the subject property; the Maryland Attorney General filed suit on the ground that the easement could not be amended as proposed without court approval in a *cy pres* proceeding, and the suit eventually settled leaving the easement intact); *Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements, Guidelines for New Hampshire Easement Holders*, CTR. FOR LAND CONSERVATION ASSISTANCE, available at <http://clca.forestociety.org/pdf/amending-or-terminating-conservation-easements.pdf> (last visited May 17, 2011) (containing guidelines from the New Hampshire Attorney General's Office regarding the amendment and termination of conservation easements). For a discussion of the *Salzburg v. Dowd* controversy and settlement, see Nancy A. McLaughlin & W. William Weeks, *Salzburg v. Dowd: Another Look*, 33 WYO. LAW. 50 (2010); McLaughlin & Weeks, *supra* note 12; McLaughlin & Weeks, *supra* note 15. See also *Perpetuity and Beyond*, *supra* note 6, at 695–700 (describing settlement of a suit brought by environmental groups and a local citizen objecting to the violation of the terms of a conservation easement; in approving the settlement, in which the defendants agreed to convey a replacement parcel of land and \$500,000 to the plaintiffs to be used for similar conservation purposes and pay the plaintiffs' legal fees, the trial court explained that the easement was both a conservation easement within the meaning of the Tennessee general enabling statute and a charitable gift within the meaning of Tennessee's law governing the use and disposition of charitable gifts).

20. Alternatively, the holder might purchase and take title to the encumbered land free of restrictions on the transfer, sale, or other disposition of such land.

encumbered land) would be held in a representative capacity—for the benefit of the public—but the conservation easement would be held subject to an obligation that it be administered in accordance with its stated terms and charitable conservation purpose, while the easement-encumbered land would be held as a general asset of the entity that could be retained or sold in the entity's discretion. The two estates would be "in the same person at the same time," but they would *not* be held "in the same right."<sup>21</sup> Accordingly, merger should not occur; the easement should not be extinguished; and, although the holder could transfer, sell, or otherwise dispose of the land, it should be obligated to do so subject to the easement.<sup>22</sup>

The manner in which the merger doctrine applies in the normal course, as well as the policy underlying the doctrine, reinforces the conclusion that applying the doctrine to conservation easements would be inappropriate. In this

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21. See *King v. Richardson*, 136 F.2d 849, 861 (4th Cir. 1943) (holding that merger did not occur when the owner of a life estate in stock acquired the remainder interest in the stock because the remainder interest was to be used for a specific charitable purpose; a person does not hold two estates "in one and the same right" unless she claims both estates as her own and holds neither for another as trustee or otherwise); *Busalacchi v. McCabe*, 883 N.E.2d 996 (Mass. App. Ct. 2008) (holding that access easement created upon formation of condominium by owner of both the condominium parcel and the adjacent benefited parcel was not nullified through the doctrine of merger because ownership of the parcels was not "coextensive" and, thus, the owner did not have the requisite "unity of title"; the owner held title to the condominium parcel subject to the rights and obligations established by the state's condominium statute, while he held title to the adjacent parcel individually in fee simple absolute ownership); RESTATEMENT (FIRST) OF PROPERTY § 497 cmt. e (1936) (discussing the lack of merger when interests are held in different representative capacities); JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 10:27 (1995) (stating "merger typically does not occur when the common owner holds one interest as a trustee or in another representative capacity"). A national expert on conservation easements and the principal drafter of the Treasury Regulations interpreting § 170(h) recognized early on that the doctrine of merger may be inapplicable to conservation easements conveyed as tax-deductible charitable gifts. See STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS E-5 (1997) ("Many states have statutes of charitable uses, the effect of which might be to bar merger."). Cf. Paul Doscher & Sylvia Bates, *Merging Ownership of Conservation Easements with Fee Interests: The Experience of the Society for the Protection of New Hampshire Forests*, in THE BACK FORTY ANTHOLOGY 2.5 (William T. Hutton ed., 1995) (discussing merger in the conservation easement context, but acknowledging that "[i]t remains unclear whether other public groups or government agencies would have the ability to enforce the [easement] restrictions on the [land] trust" in the event the land trust acquires fee title to the encumbered land); Bill Silberstein, *The Doctrine of Merger as Applied to Conservation Easements*, EXCHANGE: J. LAND TRUST ALLIANCE, Winter 1999, at 17–18 (1999) (assuming the doctrine of merger applies to conservation easements, but without critical analysis).

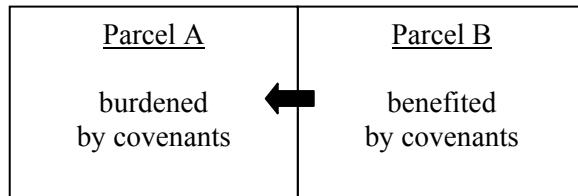
22. In some cases, the easement donor might later convey the encumbered land to the holder for the purpose of having the holder retain the land and protect the land's conservation values in perpetuity as specified in the conservation easement. In other words, both the gift of the conservation easement and the gift of the encumbered land would constitute charitable gifts made for a specific purpose, and both would have precisely the same terms and purpose—protection of the conservation values of the subject land in perpetuity as specified in the easement. In this situation, the two estates would be held in the same person at the same time *and* in the same right. Thus it could be said that merger technically would occur and extinguish the easement as a separate independent encumbrance burdening the land. The extinguishment should have little or no practical effect, however, because the owner of the land should still be bound to administer the charitable gift of the land in accordance with the terms and purpose specified by the donor in the conservation easement deed.

regard, *The Restatement (Third) of Property: Servitudes* is instructive. *The Restatement* describes the general rule with regard to merger as follows:

A servitude is terminated when all the benefits and burdens come into a single ownership.<sup>23</sup>

A few definitions are needed to understand this rule. *The Restatement* defines “servitude” to include easements and covenants, and conservation easements are referred to as “conservation servitudes.”<sup>24</sup> A servitude “burden” includes the obligation of the burdened parcel’s owner to not use the parcel in particular ways, while a servitude “benefit” includes the right of another person to receive the performance of that obligation.<sup>25</sup> *The Restatement* explains that, when all of the benefits and burdens of a servitude are united in a single person, the servitude ceases to serve any function.<sup>26</sup> Because no one else has any interest in enforcing the servitude, the servitude terminates and the previously burdened property is freed of the servitude.<sup>27</sup>

To illustrate, assume Parcel A (depicted below) is burdened by covenants that (1) prohibit the construction of any structure that would interfere with the view from adjacent Parcel B and (2) require vegetation on Parcel A be trimmed to protect the view from Parcel B. The owners of Parcels A and B are private parties who agreed to the covenants to protect the view from Parcel B for the benefit of the owner of Parcel B (rather than for the benefit of the public). Assume also that O, who is the owner of Parcel B (the benefited parcel) and the covenants, later acquires ownership of Parcel A (the burdened parcel). Absent other facts or circumstances, the covenants burdening Parcel A would terminate pursuant to the doctrine of merger when O acquires Parcel A.<sup>28</sup>



The covenants burdening Parcel A would terminate when O acquires that parcel because all of the benefits and burdens of the covenants would be united in a single person: O. The covenants would cease to serve any function at that point because no one other than O would have an interest in enforcing the covenants, and O would have no interest in or need to enforce the covenants against himself. As owner of fee simple title to both parcels, O could choose to preserve the view from Parcel B over Parcel A, or not, as he sees fit, and O

23. RESTATEMENT OF PROPERTY § 7.5. (2000).

24. *Id.* § 1.1(2) (defining servitudes generally); § 1.6 (defining conservation servitudes).

25. *Id.* § 7.5 cmt. a.

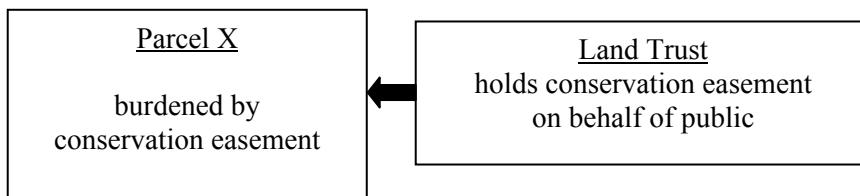
26. *Id.*

27. *Id.*

28. This example is based on *id.* § 7.5, illustration 3.

would be free to sell either or both of the parcels to third parties free of the covenants. The merger doctrine automatically eliminates land use restrictions that no longer serve any function and requires the party in whose hands the interests merge to reinstate the restrictions (usually in writing) on a subsequent transfer of the parcels, if that party so desires.<sup>29</sup>

In the case of a conservation easement, the situation is very different. Assume Parcel X (depicted below) is burdened by a conservation easement that was donated as a charitable gift to a land trust for the purpose of preserving and protecting the open-space, wildlife habitat, and scenic character of Parcel X in perpetuity.



In this case, the servitude “burden” is the obligation of the owner of Parcel X not to use Parcel X in any manner prohibited by the easement. The servitude “benefit” is the right of the land trust to receive performance of that obligation on behalf of the public, which is the beneficiary of the easement. If the land trust later acquires Parcel X (whether by gift or purchase), the benefits and burdens of the easement would appear to be united in a single person—the land trust. Unlike the covenants owned by O in the previous example, however, the land trust holds legal title to the conservation easement on behalf of the public, which is the beneficiary of the easement, and the land trust should be obligated to administer the easement in accordance with its stated terms and charitable conservation purpose.

Moreover, the conservation easement would not cease to serve any function as a result of the land trust’s acquisition of Parcel X. To the contrary, the easement would continue to protect the open-space, wildlife habitat, and scenic character of Parcel X in perpetuity for the benefit of the public. The public, as the beneficiary of the easement, would clearly have an interest in the continued enforcement of the easement, as would the easement donor and any funders who contributed to the easement’s acquisition (including taxpayers, if federal or state tax benefits were provided to the donor). In addition, depending on the particular circumstances and state law, a number of parties might have standing to sue to ensure continued enforcement of the easement, including the state attorney general, a co-trustee or co-director of the land trust, a party who is deemed to have a “special interest” in the easement’s continued enforcement, and the easement donor.

The land trust would thus be in a position fundamentally different from that of O in the previous example. When O acquired Parcel A, O had absolute

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29. See *id.* § 7.5 cmt. b.

ownership of the covenants burdening that parcel. O did not hold the covenants in a representative capacity for the benefit of the public; O had no obligation to enforce the covenants on behalf of the grantor or the public; and no person other than O had any interest in or right to enforce the covenants.

Not applying the doctrine of merger to terminate conservation easements also makes sense given the policy underlying the doctrine. The merger doctrine was developed solely to serve the function of simplifying property titles in an era when writings were not used to release property interests.<sup>30</sup> It was never intended to prejudice the rights of innocent third parties.<sup>31</sup> Terminating a conservation easement by merger when its government or land trust holder acquires the encumbered fee could prejudice the rights of innocent third parties, including the donor of the easement, the public (as beneficiary of the easement), and any funders who contributed to the easement's acquisition.

Indeed, application of the merger doctrine would permit government entities and land trusts to solicit conservation easement donations by promising to protect cherished properties "forever" or "in perpetuity" in accordance with the easements' carefully negotiated terms and purposes,<sup>32</sup> and then escape their

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30. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 8.5 cmt. a (1997).

31. See, e.g., Trs. of Conquistador Council Boy Scouts Trust Fund v. Int'l Minerals & Chems. Corp., 570 P.2d 593, 595 (N.M. 1977) ("The doctrine of merger of estates should be applied in a manner calculated to prevent injustice, injury and prejudice to the rights of innocent third persons."); Mobley v. Harkins, 128 P.2d 289, 291 (Wash. 1942) (explaining "the doctrine of merger is not favored either at law or in equity. Consequently, the courts will not . . . recognize a claim of merger where to do so would prejudice the rights of innocent third persons . . ."); King v. Richardson, 136 F.2d 849, 861–62 (4th Cir. 1943) ("Merger takes place when a greater and a less estate come together in the same person, and when there is no reason for their longer existence as separate estates. The doctrine has its foundation in the convenience of the parties interested, and therefore whenever the rights of strangers, not parties to the act that would otherwise work an extinguishment of the particular estate, require it, the two estates will still have a separate continuance in contemplation of law . . .").

32. Such promises are common. For example, in answering the frequently asked question, "What is a Conservation Easement?" on its website, the Colorado Coalition of Land Trusts represents that a conservation easement is "[a] legal agreement between a landowner and a land trust or government agency that permanently restricts the uses of the land in order to protect its conservation values . . . . The land trust is responsible for making sure that the easement's terms are followed forever." See *Frequently Asked Questions*, COLO. COAL. OF LAND TRUSTS, <http://www.cclt.org/cclt/frequently-asked-questions.html> (last visited May 19, 2011) (emphasis added). In its "Landowner Information Series" the Vermont Land Trust represents that "[a] donation of a conservation easement protects your land from development for all future generations . . . . These protections are forever upheld by the Vermont Land Trust . . . unanticipated future uses that are inconsistent with the original owner's conservation goals are prohibited. This ensures that VLT has the ability to carry out the original landowner's intent in perpetuity." Vermont Land Trust, VLT Landowner Information Series, Conservation Easement Donations (on file with author) (emphasis added). And in its description of "Easement Basics," the Jackson Hole Land Trust represents that "[a] conservation easement is a voluntary contract between a landowner and a land trust, government agency or another qualified organization in which the owner places permanent restrictions on the future uses of some or all of their property to protect scenic, wildlife, or agricultural resources (conservation values) . . . . The easement is donated by the landowner to the land trust, which then has the authority and obligation to enforce the terms of the easement in perpetuity. The landowner still owns the property and can use it, sell it, or leave it to heirs, but the restrictions of the easement stay with the land forever." See *Easement Basics*, JACKSON HOLE LANDTRUST, <http://jhlandtrust.org/protection/easement.htm> (last visited May 19, 2011) (emphasis added). Similar representations can be found in the promotional materials of virtually all land trusts.

obligation to enforce such gifts by purchasing or otherwise acquiring the underlying fee. That is, if the merger doctrine applied, holders could summarily extinguish perpetual conservation easements by acquiring the underlying fee, and then sell the newly unencumbered land and use the proceeds for their general public or charitable purposes, without any consideration of the intent of the easement donors or the interest of the public in the continued enforcement of the easement, without a showing that continued use of the land for conservation purposes had become impossible or impractical, and without oversight of the extinguishment by the state attorney general, the courts, or other entity on behalf of the public.

Application of the merger doctrine could, in fact, lead to strategic alliances between holders desiring to convert perpetual conservation easements into cash and landowners desiring to develop the encumbered land. Both goals could be achieved by having the holder purchase the encumbered land, thereby extinguishing the easement through merger, followed by the holder's sale of the newly unencumbered land back to the landowner. Of course, no cash except for payment to the holder of the value negotiated for extinguishment of the easement would have to change hands.

Finally, application of the merger doctrine would also be contrary to the well-settled principle that charitable gifts are favorites of the courts and courts go to the length of their equitable powers to sustain such gifts and carry out the laudable purposes of the donors.<sup>33</sup> While conservation easements are clearly real property interests, in many cases they also constitute charitable gifts made for specific purposes. Accordingly, as indicated by the drafters of the Uniform Conservation Easement Act, the Uniform Trust Code, and *The Restatement (Third) of Property: Servitudes*, the laws and policies relating to both real property interests and charitable gifts will often be relevant to their administration.<sup>34</sup>

#### IV

#### CONSERVATION EASEMENTS ACQUIRED IN OTHER CONTEXTS

Although the discussion thus far has focused on conservation easements conveyed in whole or in part as restricted charitable gifts, holders of

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33. See, e.g., *Crippled Children's Found. v. Cunningham*, 346 So.2d 409, 411 (Ala. 1977) ("[C]haritable gifts are viewed with particular favor and every presumption, consistent with the language of the instrument, should be employed to sustain them."); *Harris v. Georgia Military Acad.*, 146 S.E.2d 913, 915 (Ga. 1966) ("Gifts or trusts for charitable purposes are favorites of the law . . . [and] courts of equity, it is said, will go to the length of their judicial power to sustain such gifts."); *Bd. of Trs. of Univ. of N.C. v. Unknown Heirs*, 319 S.E.2d 239, 242 (N.C. 1984) ("It is a well recognized principle that gifts and trusts for charities are highly favored by the courts. Thus, the donor's intentions are effectuated by the most liberal rules of construction permitted."); *Mercy Hosp. of Williston v. Stillwell*, 358 N.W.2d 506, 509 (N.D. 1984) ("It is well recognized that charitable gifts are favored by the law and by the courts. . . . Courts will give effect to charitable gifts where it is possible to do so consistent with recognized rules of law.").

34. See *supra* note 17 and accompanying text.

conservation easements acquired by purchase, exaction, or in other contexts may also be constrained from selling, releasing, or otherwise freely disposing of such easements, whether by the provisions of the state statute authorizing the creation or acquisition of the easement,<sup>35</sup> the express terms of the instrument of conveyance,<sup>36</sup> the common or statutory laws governing the activities of entities that hold assets on behalf of the public,<sup>37</sup> the public trust doctrine,<sup>38</sup> or otherwise.<sup>39</sup> Accordingly, in many cases merger should not occur when the

35. A fair number of the over one hundred statutes extant in the fifty states and the District of Columbia that authorize the creation or acquisition of conservation easements impose conditions or limitations on the release, transfer, modification, or termination of the easements. See *National Perpetuity Standards, Part 2*, *supra* note 4 (surveying the state statutes). For example, a statute in Maine requires court approval in an action to which the attorney general is a party to terminate a conservation easement or modify an easement in a manner that will materially detract from the conservation values intended for protection. See ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C (Supp. 2010). Similarly, a statute in Pennsylvania authorizes the termination of open space easements only if, among other things, it is established that the termination “is essential for the orderly development of an area.” See 32 PA. CONS. STAT. § 5010. In addition, a number of state statutes grant the state attorney general express authority to enforce conservation easements regardless of how they were acquired. See, e.g., R.I. GEN. LAWS § 34-39-3(d) (2010) (“[T]he attorney general, pursuant to his or her inherent authority, may bring an action in the superior court to enforce the public interest in such restrictions.”).

36. Conservation easements often expressly provide that they can be released, transferred, modified, or terminated only in specified circumstances or upon the satisfaction of specific conditions. See, e.g., Sample Agric. Lands Pres. Easement, State of Delaware Agric. Lands Pres. Program, on file with author and available at <http://dda.delaware.gov/aglands/forms/101905%20Easement%20Agreement.pdf> (providing that the easement shall be subject to release only as provided in DEL. CODE ANN. tit. 7, § 917, which requires, *inter alia*, an on-site inspection of the land, a public hearing, and a determination that profitable farming on the subject land is no longer feasible). See also, e.g., N.J. STAT. ANN. § 13:8B-5 (providing that a conservation easement may be released in whole or in part by its holder subject to, among other things, “such conditions as may have been imposed at the time of creation of the restriction”). In *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008), the court invalidated the attempted “amendment” of a conservation easement to remove land from the easement’s protection in exchange for the protection of other land so the new landowner could construct a driveway turnaround on the originally protected land. The court explained that to allow the amendment would render meaningless the provisions in the easement (i) specifying the easement’s conservation purpose, (ii) prohibiting structures and improvements (including driveways) on the protected lawn and landscaped grounds, and (iii) prohibiting the easement’s termination or extinguishment, in whole or in part, without court approval. For a discussion of the *Bjork* case, see McLaughlin & Weeks, *supra* note 12, at 86–88.

37. The substantial modification or termination of a perpetual conservation easement that continues to protect unique or otherwise significant conservation or historic values for the benefit of the public may be considered inconsistent with the public or charitable mission of its government or nonprofit holder. See *Perpetuity and Beyond*, *supra* note 6, at 711.

38. See, e.g., *Parsons v. Walker*, 328 N.E.2d 920 (Ill. App. 1975) (holding that individual citizens had standing, on public trust grounds, to bring an action challenging the University of Illinois’s preliminary agreement with the federal government to allow a portion of a public park to be flooded in connection with the creation of a reservoir); Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine?*, 10 S.C. ENVT'L. L.J. 23, 41 (2002) (explaining that “[t]he public trust doctrine places limits on the alienation and diversion of public trust property by governmental bodies”).

39. In some cases, real property acquired by purchase or dedication and devoted to a public purpose has been found not to be freely transferable by its holder. See, e.g., *In re Vill. of Mount Prospect*, 522 N.E.2d 122, 125 (Ill. App. 1988) (land dedicated to a Village “for public purposes” as part of a subdivision approval was deemed held upon an express charitable trust and could not be sold without court approval in a *cy pres* proceeding); *Cohen v. City of Lynn*, 598 N.E.2d 682, 686 (Mass. Ct.

holder of a conservation easement subsequently acquires the land encumbered by the easement. As with easements donated as restricted charitable gifts, the two estates (the easement and the encumbered land) would be “in the same person at the same time,” but they would not be held “in the same right.”

For example, assume a government or charitable entity purchases a conservation easement protecting open space and wildlife habitat. Assume both the easement deed and the state enabling statute provide that the easement may be extinguished only after the holding of a public hearing and receipt of approval from a particular public official. Assume also that, at some later date, the entity acquires the encumbered land free of restrictions on its subsequent transfer, sale, or other disposition. The entity would hold both estates (the easement and the encumbered land) in a representative capacity—for the benefit of the public. But the conservation easement would be held subject to the requirement that it not be extinguished (whether by release, sale, or otherwise) without the holding of a public hearing and receipt of the required approval, while the encumbered land would be held as a general asset of the entity that could be sold or otherwise disposed of in the entity’s discretion, subject only to the general rules governing disposition of the entity’s assets.

In this situation, the two estates would be “in the same person at the same time,” but they would not be held “in the same right.” The easement also would not cease to serve any function as a result of the entity’s acquisition of the encumbered land. Rather, absent changed circumstances, the easement would continue to protect open-space and wildlife habitat for the benefit of the public. In addition, extinguishment of the easement by merger could prejudice the rights of innocent third parties, including the public, as beneficiary of the easement, the funders who contributed to the purchase of the easement, and, potentially, the grantor. Accordingly, merger should not occur; the easement should not be extinguished; and the holder should be permitted to sell or otherwise dispose of the land only if it is disposed of subject to the easement. The easement should be extinguished and the holder permitted to sell or otherwise dispose of the land unencumbered by the easement only after the holding of a public hearing and receipt of approval from the designated public official.

Just as the holder of a conservation easement conveyed as a restricted charitable gift should not be permitted to use the merger doctrine to circumvent the *cy pres* doctrine or the restriction on transfer, extinguishment, and division of proceeds provisions included in the easement deed to satisfy federal tax law

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App. 1992) (conveyance of land to a city by deeds stating that the land was to be used “forever for park purposes” created a public charitable trust; there was “no authority . . . to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust”). See also RESTATEMENT OF PROPERTY § 7.11 (2000) (recommending application of *cy pres* principles to the modification and termination of perpetual conservation easements held by governmental bodies or charitable organizations regardless of how the easements were acquired).

requirements,<sup>40</sup> the holder in this example should not be permitted to use the merger doctrine to circumvent the termination requirements in the enabling statute. In each case, the limitations imposed on a holder's ability to terminate the easement play an important role in protecting the public's interest and investment in the easement, and are considered necessary safeguards despite the public or charitable status of the entity holding the easement.

## V

### CONSERVATION EASEMENTS AND THE DOCTRINE OF MERGER IN THE COURTS

Although few courts have addressed the issue of merger in the conservation easement context, the opinions of those that have are instructive. In an early case addressing conservation easement-related issues, decided in 1986, the Massachusetts Supreme Judicial Court intimated that application of the doctrine of merger to conservation easements in Massachusetts may be inappropriate because of provisions in the state enabling statute. In *Parkinson v. Board of Assessors*, a local board of assessors argued that a conservation easement was invalid and, thus, the land encumbered by the easement could be assessed for local property tax purposes at its unrestricted value.<sup>41</sup> The conservation easement had been conveyed to a land trust in 1980. A year later the landowner conveyed the encumbered land, subject to a life estate reserved to herself (a "remainder interest" in the encumbered land), to the same land trust.<sup>42</sup> The board of assessors argued that the landowner's conveyance of the remainder interest to the land trust in 1981 had extinguished the conservation easement under the common law doctrine of merger. The court disagreed, explaining:

Even assuming that common law principles of merger apply to statutory conservation restrictions (but see [the Massachusetts conservation easement enabling statute], allowing release of restriction only after public hearing and approval of town officials), an easement will not be extinguished at common law where an intervening life estate prevents complete unity of ownership in the dominant and servient estates.<sup>43</sup>

Although merger of the easement and the underlying fee had clearly not occurred in 1981 due to the intervening life estate, the court intimated that merger may simply not be applicable to conservation easements in Massachusetts because of the restrictions imposed on the release of such

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40. See *supra* notes 8 and 9 and accompanying text.

41. 495 N.E.2d 294 (1986).

42. It is not clear from the opinion if the easement or the encumbered land were conveyed to the land trust in whole or in part as charitable gifts.

43. *Id.* at 295 n.3. For the merger doctrine to apply, the two estates must be in the same person, at the same time, and in the same right, and there must not be an intermediate estate. See 28 AM. JUR. 2D ESTATES § 423. The Massachusetts conservation easement enabling statute refers to conservation easements as "conservation restrictions." See MASS. GEN. LAWS ch. 184 §§ 31–32.

easements in the state enabling statute. For the reasons discussed in the previous Part, that would be the correct result.<sup>44</sup>

Another case addressing merger in the conservation easement context was *Madden v. The Nature Conservancy*, which involved a conservation easement The Nature Conservancy reserved to itself upon its sale of the underlying land, the Shining Mountain Ranch, to a third party.<sup>45</sup> Subsequent purchasers of the ranch, the Maddens, claimed that the conservation easement was void because it had existed prior to the Conservancy's conveyance of the ranch and, thus, it had merged with the fee title to the land in the Conservancy's hands. The district court disagreed. In addition to finding that Montana law permits servitudes in gross to be created by deed reservation, the court explained that

if [it] is to follow the dictates of the Montana Supreme Court and 'ascertain the intent of the grantor from a consideration of the entire instrument,' it must conclude that the reservation was made contemporaneously with the passing of title and that title to the conservation rights and the fee estate have never been merged.<sup>46</sup>

Although the court did not further elaborate, it was obviously disinclined to permit extinguishment of the easement pursuant to the doctrine of merger. That was appropriate. Immediately upon its creation, The Nature Conservancy held the easement for its stated conservation purposes for the benefit of the public. The easement clearly served a function—it protected important conservation values for the benefit of the public. The public, as beneficiary of the easement, clearly had an interest in the continued enforcement of the easement and, depending upon the applicable state law, various parties might have standing to sue to enforce the easement on behalf of the public. Moreover, extinguishment of the easement pursuant to the doctrine of merger would likely have conferred a significant economic windfall on the Maddens at the public's expense because the Maddens likely purchased the ranch for a significantly reduced price due to the development and use restrictions in the easement.

Finally, although lacking precedential value, a court in Virginia considered and, in a 2010 trial order, rejected application of the doctrine of merger to invalidate a conservation easement consistent with the analysis in this article.<sup>47</sup> In that case, the Piedmont Environmental Council (PEC), a land trust based in Virginia, acquired fee title to land and then donated a perpetual conservation

44. The Massachusetts Supreme Judicial Court has been particularly progressive in its treatment of conservation easements. Not long after the decision in *Parkinson*, the Court held in another context that traditional real-property-law principles should not be applied to defeat conservation easements. In *Bennett v. Comm'r of Food & Agric.*, 576 N.E.2d 1365 (Mass. 1991), the court ruled that the terms of a conservation easement protecting agricultural land were valid and enforceable despite not conforming precisely to the state statutory definition of an "agricultural preservation restriction." The court explained "[w]here the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force." *Id.* at 1367.

45. 823 F. Supp. 815 (D. Mont. 1992).

46. *Id.* at 818.

47. See *Piedmont Env'tl Council v. Malawer*, Cir. Court of Fauquier Cnty., Civ. Action No. CL09401-01, 80 Va. Cir. 116, 2010 WL 5574919 (Va. Cir. Ct.) (Jan. 28, 2010).

easement encumbering the land to itself and the Virginia Outdoors Foundation (VOF), a quasi-state agency that acquires open-space conservation easements in the state. PEC was thus both the donor and one of the donees of the conservation easement. Immediately following the conveyance of the conservation easement, PEC conveyed the land, subject to the easement, to a third party by the name of Malawer.

In the context of a suit involving other issues, Malawer argued that PEC could not have validly created the conservation easement because the real property law doctrine of merger does not allow the holder of an easement and the encumbered fee to be one and the same person. The Virginia trial court disagreed. Although the merger issue could have been decided in PEC's favor on the ground that the VOF was a co-holder of the conservation easement and, thus, the two estates (the easement and the encumbered fee) were not held by "one and the same person," the court did not confine its analysis to that point. Rather, the court explained that the clear intent of the parties was the creation of a conservation easement in perpetuity to protect the scenic value of the land for the benefit of the general public, which contrasts with a scenario in which the owner of a dominant and servient tract become one in the same, thereby eliminating the need or purpose for the easement.

The court also noted that conservation easements held in gross are recent creatures of the law, created statutorily in an effort to facilitate conservation for the benefit of the public. Citing *United States v. Blackman*,<sup>48</sup> in which the Virginia Supreme Court discussed the history of in gross conservation easements and the strong public policy in favor of land conservation and historic preservation, the court held that it was evident that conservation easements "are not subject to the typical common law analysis of merger as would be appropriate to rights of way between two adjoining tracts."<sup>49</sup>

## VI

### CONCLUSION

Some grantors and grantees of conservation easements worry about the potential effect of merger and employ drafting strategies in an effort to prevent extinguishment through merger. In some cases a provision is included in the easement deed stating that merger will not occur if the holder of the easement acquires the encumbered land. In others, the deed requires the holder to convey the easement to another qualified holder before accepting the encumbered land. And in others, the deed is granted to coholders or provides for the grant of an interest in the easement to a coholder if and when the first holder acquires the encumbered land, with the idea of preventing the unity of ownership

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48. 613 S.E.2d 442 (Va. 2005).

49. *Piedmont Envt'l Council*, 2010 WL 5574919, at \*3.

necessary for merger to occur. In addition, a number of states have included provisions in their state codes that expressly preclude merger.<sup>50</sup>

For the reasons discussed above, such protections should generally be unnecessary. Properly applied, basic principles of law and equity should generally preclude the extinguishment of conservation easements through the doctrine of merger and prevent the consequent frustration of state conservation policy, federal tax policy, and the policies underlying the laws governing public and charitable assets. On the other hand, given the tendency of some to incorrectly view conservation easements as private servitudes, as well as the dearth of case law dealing directly with conservation easements and merger, state statutes clarifying and confirming the law may be warranted.<sup>51</sup>

Preventing the extinguishment of conservation easements under the doctrine of merger—whether by properly interpreting existing law or by statute—would not mean that conservation easements could never be extinguished. Rather, it would ensure that the provisions safeguarding the public's interest and investment in conservation easements found in the state enabling statutes, federal tax law, and the laws governing public or charitable assets are not eviscerated, whether intentionally or not, through improper application of a real-property-law doctrine that developed solely as a title simplification device.

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50. *E.g.*, ME. REV. STAT. ANN. tit. 33, § 479(10) (Supp. 2010) (“A conservation easement is valid even though . . . [t]he title to the real property subject to the conservation easement has been acquired by the holder . . . .”); MISS. CODE ANN. § 89-19-5(5) (“A conservation easement shall continue to be effective and shall not be extinguished if the easement holder is or becomes the owner in fee of the subject property.”); MONT. CODE ANN. § 70-17-111(2) (2007) (“A conservation easement may not be extinguished by taking fee title to the land to which the conservation easement is attached.”).

51. Some parties, including some land trusts, have unfortunately begun to view the merger doctrine as a tool that could be used to substantially modify or terminate conservation easements without having to consider the intent of the easement donor or funders of the project to protect the subject lands in perpetuity, and without state court, state attorney general, or other public official oversight of such action on behalf of the public. Careful legal analysis, however, indicates that the merger doctrine should not permit such actions.