The Doctrine of Merger:

What is it, why it matters, and what you can do to protect your land trust

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What is merger?

The doctrine of merger in property law states that when a single entity owns both an easement on a property and the property itself, which we call unity of title, the easement should "merge" back into the general bundle of property rights and be extinguished. This makes sense in some contexts; if you own an access easement across Property X so you can drive across it to get to Property Y, and then you purchase Property X, there is no reason for you to keep holding an easement against yourself. However, this is a troublesome doctrine when it comes to conservation easements. If a land trust holds a conservation easement on Property X and subsequently acquires the actual entire Property X the conservation easement could also be extinguished.

Attorney William "Fritz" Paulus, who researched this topic for a 2017 Land Camp presentation, concluded that Oregon law recognizes the doctrine of merger and, in general, once an easement is extinguished from an Oregon property it cannot be revived.[1] However, based on their nature which differs from a traditional easement that benefits and burdens separate estates in land, such as in the access easement example above, it is unclear and untested law in Oregon whether the doctrine of merger applies to conservation easements when a holder of a conservation easement acquires fee title to the encumbered land.[2]

Why is this a problem?

Conservation easements are most often intended to last in perpetuity. If a land trust needs to purchase or otherwise acquire land that it already holds a conservation easement on, that easement is in danger of being extinguished by merger. This issue is rare, and any conservation consequences usually won't be a problem because if an easement and the property it is placed on are both held by the same land trust then the conservation values of the property would still be managed and protected. However, merger can certainly be a major problem for a land trust in a few situations.

If the conservation easement or the property was (or will be) donated or discounted and the donor has claimed a tax deduction, then the extinguishment of the easement will violate the rules of the IRS tax code.[3] The Tax Court has held, however, that easements can still count as deductible charitable donations only if the easement was extinguished by a judicial proceeding and only in a way that is unexpected.[4] We don't know if the IRS would consider the doctrine of merger unexpected, but the

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[1] Paulus, William "Fritz", attorney at law, and Konrad Liegel, attorney at law, "Conservation Easement Issues that May Keep You Up at Night (or Should?)" Presentation at Land Camp, 2017.

[2] *Id.*

[3] Treasury Regulation 1.170A-14(g)(6)(i)

[4] Lindstrom, Timothy. A Tax Guide to Conservation Easements, 2d ed., Land Trust Alliance, 2016.

Tax Court has previously held that a mutually agreeable extinguishment clause in a conservation easement violated the requirement of perpetuity.[5] If a landowner donated a conservation easement and took a tax deduction, and the easement was subsequently extinguished by merger, there is a possibility that the IRS would disallow the deduction. This could lead to an audit and depending on the circumstances the IRS would be owed the sum of money originally deducted.[6]

Two further ways that extinguishment by merger might become an issue includes if the land trust sells or donates the land to another party in the future. If some future party holding the land wants to develop or mine the property they could argue that the easement was extinguished while both were held by the land trust.[7] The second is when public funds (federal or state) were used to purchase a conservation easement, and a third party has enforcement rights. In this case, clearly there are strong reasons to avoid the possibility of merger and extinguishment of the easement.

How can the easement be preserved?

The simplest way to avoid merger and possible extinguishment is to have another entity hold the conservation easement if your land trust ends up holding the underlying fee title. If your land trust holds the easement initially, you can transfer it to another land trust; or conversely have someone else own the property while you keep the easement. Be careful not to have the easement and the property end up with the same owner to avoid unity of title and thus merger.

In cases where the land trust needs to hold both the property and the easement there are steps you can take to preserve the easement. First, you can put an anti-merger clause (see below) in your easement spelling out the parties' intent that the easement be perpetual even if the property and easement are held by the same person. Likewise, in the case of a subsequent conveyance of fee title of the encumbered property to the holder of the easement, the same anti-merger clause should be included in the deed to show the parties' express intention that the doctrine of merger shall not apply.

If the easement is challenged by a future third party alleging merger, another theory that could be used is the public trust doctrine. This states that easements have the public as a third party beneficiary and therefore merger should not be allowed because someone else still has an interest. This public trust doctrine has been invoked in a few recent cases, and it appears that courts are sympathetic to the principle that merger or extinguishment does not take place where there is unity of title. However, this argument has not had proven success or failure in Oregon or in federal Tax Court.

Again, the safest option is to avoid merger by avoiding unity of title in the first place. This is particularly true given that the IRS carefully scrutinizes large deductions for conservation easements.

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[5] Carpenter v. Commissioner, T.C. Memo. 2013-172 (2013), reaffirming T.C. Memo. 2012-1 (2012), as cited in Lindstrom.

[6] The laws and regulations governing tax audits, including the statute of limitations and repayment, are very complex and require an experienced tax professional. These questions are beyond the scope of this guidance document.

[7] *See, e.g.,* Madden v. Nature Conservancy, 823 F. Supp. 815, 1992.

If unity of title is possible in the future, then the landowner might not want to count the easement as a deduction to avoid having to address this issue in Tax Court.[8]

Sample language for a no-merger clause:

> In the event that Grantee acquires the fee title to the real estate covered by this Conservation Easement, it is the intent of the parties, both Grantor and Grantee, that no merger of title shall take place which would merge the restrictions of the Conservation Easement with fee title to the Property and thereby eliminate them, as the parties intend that no such merger take place and that the restrictions on the use of the real estate, as embodied in this Conservation Easement shall, in the event title becomes vested in Grantee, become and remain permanent and perpetual restrictions on the use of the Property as provided for in this Conservation Easement, and that merger, which would eliminate such restrictions, shall not take place.[9]

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[8] For more on income tax deductions for donations of conservation easements see Internal Revenue Code Section 170(h) and Treasury Regulations Section 1.170A-14.

[9] Paulus, William "Fritz", attorney at law, and Konrad Liegel, attorney at law, "Conservation Easement Issues that May Keep You Up at Night (or Should?)" Presentation at Land Camp, 2017. Mr. Liegel was responsible for drafting the enclosed language.