



# COMMONWEALTH of VIRGINIA

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The Honorable Thomas Davis Rust  
Member, House of Delegates  
Herndon Town Hall  
730 Elden Street  
Herndon, Virginia 20170

Dear Delegate Rust:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether a conservation easement is extinguished by application of the common law doctrine of merger when the holder of the conservation easement under the Virginia Conservation Easement Act<sup>1</sup> or the Open-Space Land Act<sup>2</sup> acquires the fee simple interest in the same land.

## Response

It is my opinion that a conservation easement obtained under the Virginia Conservation Easement Act ("VCEA") or the Open-Space Land Act ("OSLA") is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

## Background

You relate that the Commonwealth, through its Department of Conservation and Recreation ("DCR"), is considering the acquisition of certain real property to be used as a public park. You also relate that some of the subject property is encumbered by existing conservation easements.<sup>3</sup>

## Applicable Law and Discussion

Merger is described as the "annihilation of one estate in another"<sup>4</sup> and under contemporary Virginia jurisprudence, it is the general rule that existing easements are extinguished by operation of law

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<sup>1</sup> Virginia Conservation Easement Act, VA. CODE ANN. §§ 10.1-1009 through 10.1-1016 (2012).

<sup>2</sup> Open-Space Land Act, VA. CODE ANN. §§ 10.1-1700 through 10.1-1705 (2012).

<sup>3</sup> For purposes of this opinion, I make no distinction between conservation easements created under OSLA or VCEA, unless specifically noted.

when the easement holder acquires the fee simple title to the encumbered land.<sup>5</sup> Upon unity of ownership, “the [easement] right must necessarily cease to be an easement, for it becomes one of the rights of property to which all owners of land are entitled.”<sup>6</sup> In other words, one cannot have an easement in his own land. As recently explained by one Virginia trial court, it is generally the case that when the easement holder becomes the owner of the encumbered land, the need or purpose of the easement is eliminated.<sup>7</sup> Nevertheless, as noted by that same trial court and discussed herein, conservation easements are not typical easements whose purposes are necessarily obviated when ownership of the two estates – the easement and fee – become united in the same person or entity.<sup>8</sup>

Conservation easements, which are a recent creation of the law,<sup>9</sup> stand in sharp contrast to conventional easements, such as right-of-way or recreational easements. Conventional easements are private agreements entered into for the exclusive benefit of the grantee or similarly situated future owners of that property. In the case of a right-of-way easement, it follows that the easement would merge into the fee upon unity of ownership because the easement, as a separate, independent encumbrance, is no longer necessary; the right ceases to be an easement because it becomes one of the rights to which all owners of land are entitled.<sup>10</sup> The formation of conservation easements, on the other hand, are authorized under OSLA and VCEA in order to facilitate conservation and historic preservation in furtherance of the Commonwealth’s policy to protect its natural resources and historic sites.<sup>11</sup> As the statutory framework

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<sup>4</sup> Little v. Bowen, 76 Va. 724, 727 (1882).

<sup>5</sup> See Read v. Jones, 152 Va. 226, 231, 146 S.E. 263, 264 (1929) (easements are extinguished when ownership of the dominant and servient estates become united in one and the same person); accord Davis v. Henning, 250 Va. 271, 462 S.E.2d 106 (1995) (easement for ingress and egress was extinguished by the doctrine of merger when easement holder acquired ownership of the encumbered land); see also Little, 76 Va. at 727 (“[Merger] takes place usually when a greater estate and a less coincide and meet in one and the same person ... whereby the less is immediately merged – that is, drowned in the greater.”).

<sup>6</sup> Read, 152 Va. at 232, 146 S.E. at 264.

<sup>7</sup> Piedmont Env’tl Council v. Malawer, 80 Va. Cir. 116, 118 (Jan. 28, 2010).

<sup>8</sup> Id. at 118-19.

<sup>9</sup> See 1966 Va. Acts ch. 461 (OLSA); 1988 Va. Acts chs. 720, 891 (VCEA).

<sup>10</sup> Read, 152 Va. at 232, 146 S.E. at 264.

<sup>11</sup> See 1966 Va. Acts ch. 461 (declaring that “the provision and preservation of permanent open-space land are necessary to help ... provide or preserve necessary park, recreational, historic and scenic areas, and to conserve land and other natural resources” and authorizing the acquisition of real property interests, including easements in gross, as a means of preserving open-space land); United States v. Blackman, 270 Va. 68, 81, 613 S.E.2d 442, 448 (2005) (“In enacting VCEA, the General Assembly undertook to comprehensively address various land interests that can be used for conserving and preserving the natural and historical nature of property. In so doing, the General Assembly addressed the use of such easements in a manner consistent with [current law], the Open-Space Land Act, and the public policy favoring land conservation and preservation of historic sites and buildings in the Commonwealth as expressed in the Constitution of Virginia.”). See also VA. CONST. art. XI, § 1 (“To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth’s policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”); VA. CONST. art. XI, § 2 (“In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation

of OSLA and VCEA demonstrate, conservation easements serve a much more public function than conventional easements.

The Code establishes the special and public nature of conservation easements. Acquisition and stewardship of these easements are supported by public moneys through general fund appropriations and public grants,<sup>12</sup> tax exemptions and benefits<sup>13</sup> and tax incentives to grantors in cases of charitable gifts of conservation easements.<sup>14</sup> Further, under OSLA and VCEA, only certain public and nonprofit entities are authorized to hold conservation easements.<sup>15</sup> Additionally, VCEA expressly provides standing to the Attorney General and specific government agencies and localities for actions affecting conservation easements.<sup>16</sup>

The terms of OSLA and VCEA clearly evince a strong policy preference favoring the continuation of conservation easements. Specifically, holders of easements authorized under OSLA are prohibited from releasing the easement unless certain statutory criteria are met and upon the substitution of like-kind land for the released easement-encumbered land.<sup>17</sup> Applying the doctrine of merger to extinguish the easement would circumvent these requirements. "Open-space land" could be disposed of beyond the parameters of the statute and without substitute land, resulting in a net-loss of open-space. Additionally, VCEA provides as a default that a "conservation easement shall be perpetual in nature unless the instrument creating it otherwise provides a specific time." Thus, the thrust of the statutory scheme is to promote and continue conservation efforts. Using merger to extinguish such easements therefore, would permit easement holders to extinguish them outside of the stated terms of the deed or in contravention of the stated public interest, which clearly runs contrary to the manifest intent of the statutes.<sup>18</sup>

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of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations....").

<sup>12</sup> See § 10.1-1020 (2012) (establishing the Virginia Land Conservation Fund for purposes of providing grants to state agencies and other nonprofit entities for conservation and historic preservation purposes).

<sup>13</sup> See § 10.1-1011(A) (providing an exemption of state and local taxation for perpetual conservation easements) and § 10.1-1011(B) (requiring that assessments of the fee interest in land that is subject to a perpetual conservation easement reflect the reduction in the fair market value of the land).

<sup>14</sup> See VA. CODE ANN. §§ 58.1-510 through 58.1-513 (2009 & Supp. 2012). The provisions comprise the "Virginia Land Conservation Incentives Act of 1999" providing tax credits to individuals and corporations for donations of interests in real property for conservation and historic preservation purposes.

<sup>15</sup> Under OSLA, an eligible public body is defined as "any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority ... or the Virginia Recreational Facilities Authority." Section 10.1-1700. Under VCEA, an eligible holder is defined as "a charitable corporation, charitable association, or charitable trust ..." whose primary purposes include "(i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property." Section 10.1-1009.

<sup>16</sup> Section 10.1-1013.

<sup>17</sup> Section 10.1-1704.

<sup>18</sup> I note that federal tax law similarly imposes restrictions on the transfer or extinguishing of certain deeds for conservation easements. First, for those easements conveyed as a tax-deductible charitable gift, a tax deduction is available only if the deed requires the property to continue to advance its conservation purposes.<sup>18</sup> See 26 C.F.R. § 1:170A-14. Second, if an unexpected change in the conditions of the property renders it unsuitable for conservation

Based on the foregoing public policy objectives and regulation of these easements, it can be concluded that conservation easements are held and administered by the easement holders not for themselves, but on behalf of the public<sup>19</sup> and in furtherance of state policy. A 2010 circuit court decision supports this conclusion. In that case, the court found 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>20</sup> for, as the court found, the holder of a conservation easement is “not the sole party receiving the benefit of th[e] easement.”<sup>21</sup> The court looked to the intent of the parties to create a permanent conservation easement and the extensive statutory framework to facilitate the same in determining that merger would not apply to extinguish the subject conservation easement.<sup>22</sup>

In the proposed transaction you describe, DCR would acquire land that is encumbered by a conservation easement. Assuming the encumbered land is covered by a conservation easement under the OSLA, both estates (the easement and the fee) would be owned by the Commonwealth (or one of its agencies). Nevertheless, mere ownership of the estates by the Commonwealth would not necessarily obviate the purpose of or need for the conservation easement: that is, the easement would continue to provide natural or historic resource protection in accordance with its stated terms and in furtherance of state policy.<sup>23</sup> This stands in sharp contrast to a conventional easement – such as a right-of-way or recreational easement – whose purpose or necessity is obviated when the easement holder becomes the owner of the encumbered land.<sup>24</sup> Moreover, allowing merger to extinguish the conservation easement in this instance would put DCR, a public actor, in the peculiar position of obstructing state policy in contravention to its stated mission to conserve the Commonwealth’s natural resources. In my view, such an inapposite result cannot be supported by invoking a doctrine developed at common law for the sole purpose of simplifying the land records<sup>25</sup> and without reference to the policies or statutes authorizing conservation easements in Virginia.

Therefore, in light of the various statutory limitations on extinguishment of a conservation easement, and because the preservation of a conservation easement would continue to provide natural and historic resource protection in furtherance of state policy, it is my opinion that the doctrine of merger

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purposes, a deduction still may be available if a court extinguishes the deed’s restrictions and the proceeds of a subsequent transfer of the property are used by the grantee in a manner consistent with the conservation purposes of the original gift. 26 C.F.R. § 1.170A-14(g)(6)(i).

<sup>19</sup> See Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 DUKE J. L. & CONTEMP. PROBS. 279, 280 (2011). The author points out the public and charitable status of conservation easement holders and public subsidies to acquire such easements to demonstrate that conservation easements “are held and enforced by government entities and charitable organizations on behalf of the public.” *Id.* at 280.

<sup>20</sup> *Piedmont Envt’l Council*, 80 Va. Cir. at 119 (construing *United States v. Blackman*, 270 Va. 68, 613 S.E.2d 442 (2005)).

<sup>21</sup> *Id.* at 118.

<sup>22</sup> *Id.* at 118-19.

<sup>23</sup> See McLaughlin, *supra* note 19, at 287.

<sup>24</sup> *Piedmont Envt’l Council*, 80 Va. Cir. at 118 (“The clear intent of the parties was the creation of a detailed conservation easement in perpetuity, so as to protect the scenic value of the real estate for the general public. This contrasts with a scenario in which some years later the owner of a dominant and servient tract became one and the same, this eliminating the need or purpose of the easement”).

<sup>25</sup> See McLaughlin, *supra* note 19, at 288 (citing the RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 8.5 cmt. a (1997)) (“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.”).

would not apply to extinguish a conservation easement when the easement holder acquires fee simple title to the encumbered land. If the proposed transaction is completed so that the Commonwealth acquires the fee interest to land for which it already holds a conservation easement, the conservation easement would continue to be held by the Commonwealth subject to the limitations on its transfer and release imposed by the OSLA,<sup>26</sup> while the fee, if not similarly restricted,<sup>27</sup> could be sold or otherwise transferred in the discretion of DCR's director.<sup>28</sup>

### Conclusion

Accordingly, it is my opinion that a conservation easement obtained under the Virginia Conservation Easement Act or the Open-Space Land Act is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

With kindest regards, I am,

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>26</sup> See § 10.1-1701 (authorizing public bodies to hold conservation easements under OSLA) and § 10.1-1704 (prohibiting the release of “open-space land” unless in accordance with the specific requirements of the statute).

<sup>27</sup> See *McLaughlin*, *supra* note 19, at 285 n.22 (discussing instances where technically, but to no effect, merger may occur when the instruments of conveyance for both the easement and the fee interest “have precisely the same terms and purpose – protection of the conservation values of the subject property in perpetuity as specified in the easement.”).

<sup>28</sup> See, e.g., VA. CODE ANN. § 10.1-109 (2012) (authorizing the Director of DCR, with the consent and approval of the Governor and the General Assembly, to convey, lease or demise to any person for consideration any lands owned or controlled by DCR).