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Enforcing Conservation Easements: The Through Line

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Nancy A. McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 *Georgetown Env't L. Rev.* 167 (2022)

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ARTICLES

Enforcing Conservation Easements: The Through Line

NANCY A. McLAUGHLIN*

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INTRODUCTION

“Through line: a common or consistent element or theme shared by items in a series or by parts of a whole.”¹

Conservation easements now dominate private land conservation efforts in the United States. Billions of dollars of public funds are invested in them annually through tax-incentive and easement purchase programs.² More than forty million

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1. *Through Line*, MERRIAM-WEBSTER, <https://perma.cc/MFG3-UPTN> (last visited Aug. 13, 2021).

2. *See infra* Part I.B.

acres are estimated to be subject to conservation easements, which is an area more than eighteen times the size of Yellowstone National Park and larger than the states of New York, Connecticut, and Rhode Island combined.³ Hundreds of government entities and charitable conservation organizations are focusing their efforts on acquiring and stewarding conservation easements.⁴ In addition, President Biden's plan to protect 30% of the nation's lands and waters by 2030—the “America the Beautiful” initiative—is expected to accelerate the pace of conservation easement acquisitions.⁵ By any reasonable accounting, conservation easements would appear to be a major success story.

But a significant risk to conservation easements and the benefits they provide to the public lurks just beneath the surface: in enforcement cases, courts tend to treat conservation easements as if they are traditional servitudes, like right-of-way easements between neighbors, even though they are clearly distinguishable.⁶ This tendency can have pernicious effects. Traditional servitudes principles were developed to facilitate the marketability and development of land and to resolve disputes between private parties. Applying those principles to conservation

3. See *Conservation Easements and the National Conservation Easement Database*, NAT'L CONSERVATION EASEMENT DATABASE, <https://perma.cc/YNL5-CCGZ> (last visited Aug. 13, 2021); *Park Facts*, NAT'L PARK SERV., <https://perma.cc/NSC2-H3KV> (last visited Aug. 13, 2021); *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://perma.cc/WR7A-SM45> (last visited Aug. 13, 2021).

4. See, e.g., ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7–8 (Land Trust All., 2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK] (“Conservation easements are often the tool of choice for the nation’s 1,537 land trusts . . . Hundreds of public agencies across the country also hold conservation easements.”); *National Conservation Easement Database Mapping Application*, NAT'L CONSERVATION EASEMENT DATABASE, <https://www.conservationaleasement.us/interactivemap/> (last visited Mar. 7, 2022) (containing location, number of acres, and nonprofit or public agency holder data for conservation easements throughout the United States); *Find a Land Trust*, LAND TRUST ALL., <https://www.findalandtrust.org/land-trusts> (last visited Mar. 7, 2022) (containing data on the number of acres encumbered by conservation easements held by individual land trusts).

5. See Exec. Order No. 14,008, 86 Fed. Reg. 7,619, § 216(a) (Feb. 1, 2021); U.S. DEP'T OF THE INTERIOR, U.S. DEP'T OF AGRIC., U.S. DEP'T OF COM., COUNCIL ON ENV'TL QUALITY, *CONSERVING AND RESTORING AMERICA THE BEAUTIFUL* (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf>.

6. See, e.g., *infra* Part II.C, discussing *Cahaba Riverkeeper, Inc. v. Water Works Bd. of Birmingham*, _ So.3d _, 2022 WL 571047 (Ala. 2022), in which the court applied the common law doctrine of merger to hold that an entity could not establish and hold a conservation easement on property that it owned; *infra* Part II.E, discussing *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 782 S.E.2d 131 (Va. 2016), in which the court held that the common law principle that restrictive covenants are to be strictly construed in favor of free use of property applied to conservation easements. See also Michael Allan Wolf, *Conservation Easements and the “Term Creep” Problem*, 3 UTAH L. REV. 787 (2013) (discussing the hazards associated with applying concepts applicable to traditional easements to the statutory creation we know as “conservation easements”). For other concerns associated with the use of conservation easements, see, e.g., K. King Burnett, John D. Leshy & Nancy A. McLaughlin, *Building Better Conservation Easements for America the Beautiful*, 45 HARV. ENVTL. L. REV. ONLINE (2021), <https://harvardelr.com/2021/09/15/building-better-conservation-easements-for-america-the-beautiful/>.

easements, the purpose of which is to constrain development to provide conservation benefits to the public, will often be directly contrary to the public interest.

It is critical to address this risk now because we are likely to see a significant uptick in enforcement cases in the coming years. The dramatic growth in the use of conservation easements in the United States began roughly three decades ago.⁷ Many existing conservation easements have significantly aged and the lands they encumber are changing hands. As new owners who were not involved in the easements' creation take possession of the restricted lands, we can expect to see an increase in violations, in questions regarding interpretation of the easements' terms, and in outright challenges to the easements' validity.

How courts resolve these cases will profoundly impact the effectiveness of conservation easements as land protection tools. It also will have a profound impact on conservation efforts in this country generally, given that conservation easements have in many cases displaced other conservation measures, such as fee acquisition and regulation. If, for example, courts extinguish conservation easements via the doctrine of merger, or bar holders from enforcing them on laches or estoppel grounds, or interpret them in favor of free use of property rather than to carry out their conservation purposes, many of the conservation gains that were made over the last three decades could end up being ephemeral.

The goal of this Article is to help ensure that does not happen by providing a solid foundation for the next chapter in conservation easement enforcement. This Article builds that foundation in two ways.

This Article first explains the special status of conservation easements—why they are fundamentally different from traditional servitudes. Three characteristics of conservation easements most clearly distinguish them from traditional servitudes. Conservation easements are validated under state law only if they are structured to provide benefits to the public. The public heavily subsidizes the creation of conservation easements through tax-incentive and easement purchase programs. And conservation easements are not true easements despite the “conservation easement” moniker; they are peculiar hybrids. Although conservation easements are interests in real property, they also generally are created under the auspices of a state enabling statute, they often are conveyed in whole or in part as charitable gifts, and they typically are structured to comply with rules governing tax-incentive or easement purchase programs, thus implicating various bodies of law. This Article explains the three distinguishing characteristics of conservation easements and the various bodies of law relevant to conservation easement enforcement.

7. See NANCY A. McLAUGHLIN, UNIFORM CONSERVATION EASEMENT ACT STUDY COMMITTEE BACKGROUND REPORT 5–6 (June 11, 2017) (unpublished report prepared for the Uniform Law Commission) [hereinafter UCEA BACKGROUND REPORT], <https://perma.cc/3RLX-9UVQ>.

This Article then walks through the handful of cases decided over the past three decades in which the courts expressly recognized the special status of conservation easements. In one of the cases, it was the dissenting judges who did so, but their position was later validated by the state legislature, which overruled the majority by statute. To date, no one has brought these cases together to highlight their collective wisdom and help chart a path forward for conservation easement enforcement; this Article does that.

The cases discussed herein involve a variety of different issues. In two cases, the courts determined that old common law rules barring the creation and enforcement of easements in gross should not apply to conservation easements. In one, a court refused to apply laches or estoppel to bar a government entity from enforcing a conservation easement despite a significant enforcement delay, illustrating that such defenses should apply only in the most extraordinary of circumstances. In another, a court determined that government and nonprofit holders should simply be immune from the defenses of laches and estoppel when they are enforcing conservation easements. One court held that a conservation easement should not be extinguished under the doctrine of merger. Another determined that a perpetual restriction on subdivision in a conservation easement was valid despite being a restraint on alienability. And in the final case, the dissenting judges determined that the common law principle that restrictive covenants must be strictly construed in favor of free use of property should not apply to conservation easements.

Despite the different issues addressed in these cases, there is a clear unifying theme—a “through line.”⁸ The courts (in one case, the dissenting judges) recognized that, because conservation easements are created to benefit the public and carry out legislatively stated public purposes, they are fundamentally different from traditional servitudes. The courts also understood that, because of this special status, it would be contrary to the public interest to blindly apply to conservation easements principles developed to facilitate the marketability and development of land or to resolve disputes between private parties. This Article highlights these cases and the through line connecting them in the hope that it will catalyze courts to take a more consistent and appropriate approach in the enforcement cases to come—one that expressly recognizes and is informed by the special status of conservation easements.

The cases discussed herein, and the individual stories they tell, also provide courts, policymakers, and the public with a clear idea of what is at stake in the conservation easement enforcement context. For example, the cases addressing laches and estoppel provide a window into the significant challenges nonprofit and government holders face in enforcing conservation easements. They also illustrate the negative consequences of barring enforcement on laches or estoppel

8. See *Through Line*, *supra* note 1 and accompanying text.

grounds, including that it would encourage property owners to violate easements and play a kind of “enforcement lottery.” The undesirable consequences of extinguishing conservation easements through merger are highlighted, including that it would circumvent strict limits that have been placed on extinguishment to protect the public interest. Also discussed are the unwelcome effects of construing conservation easements in favor of free use of property. Such a rule of construction would, among other things, provide property owners with a powerful incentive to challenge or violate conservation easement restrictions and provide nonprofit and government holders with an equally powerful disincentive to seek to enforce the restrictions on behalf of the public.

The remainder of this Article proceeds as follows. Part I sets the stage for the discussion of the cases by outlining the three characteristics of conservation easements that most clearly distinguish them from traditional servitudes. In addition to explaining the historical underpinnings of the state enabling statutes, the scale of the public investment, and the hybrid nature of conservation easements, Part I provides a roadmap of the various bodies of law that may be relevant in conservation easement enforcement cases. Part II then turns to the cases, focusing on the through line and the harm to the public from not recognizing the special status of conservation easements. A final section briefly concludes.

I. THE SPECIAL STATUS OF CONSERVATION EASEMENTS

To fully appreciate the cases discussed in Part II, some background on conservation easements and their special status is needed. Conservation easements differ from traditional servitudes in numerous ways, but three characteristics most clearly distinguish them. First, conservation easements are validated under state law only if they are structured to benefit the public. Second, because conservation easements are intended to benefit the public, the public heavily subsidizes their creation. Third, conservation easements are hybrids. Although they bear the “easement” moniker, for many purposes they are easements in name only and applying traditional servitudes law to them is problematic because of the public interest at stake. Moreover, because of their hybrid nature, various other bodies of law will generally be relevant to their enforcement, including the state enabling statutes, charitable gift law, federal tax law, and the rules governing conservation easement purchase programs. These three distinguishing characteristics of conservation easements are explained more fully below.

A. CREATED TO BENEFIT THE PUBLIC

Conservation easements are validated under state law only if they are structured to benefit the public. To understand why this is so, a review of some common law concepts applicable to servitudes is necessary.

Historically, courts disfavored land use restrictions because they were viewed as adversely affecting the development and marketability of land.⁹ Land use restrictions that were held “in gross,” rather than in connection with (“appurtenant to”) benefited land, were subject to particular disfavor and generally could not be transferred by the original grantee or pass by inheritance.¹⁰ In addition, only four types of negative easements, which grant the holder the right to object to a use of the estate they burden, were traditionally recognized at common law—those created to protect the flow of air, light, and artificial streams of water, and to ensure the subjacent and lateral support of buildings or land.¹¹ The foregoing common law rules raised potential difficulties for the creation and enforcement of conservation easements because conservation easements do not qualify as one of the four traditionally-recognized negative easements and they generally consist of land use restrictions held in gross.¹²

Over the course of the twentieth century, however, federal and state legislators came to recognize that restricting the development and other uses of land for conservation or historic preservation purposes can provide significant benefits to the public.¹³ In addition, government entities and charitable organizations became increasingly interested in acquiring conservation easements to accomplish land

9. See, e.g., Susan F. French, *Toward A Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1265 (1982) (“Servitudes [defined as easements, real covenants, and equitable servitudes] can freeze land uses, thereby distorting patterns of land development and preventing economically productive uses of land. They can impose burdens that become unreasonable and depress land values. Additionally, they can impose significant dead hand controls over land use.”); RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 3.1 cmt. a (AM. LAW INST. 2000) (historically courts severely constrained the creation of servitudes, reflecting concerns that they would adversely affect the value of the burdened parcels and perhaps nearby land by limiting or distorting development of the burdened parcels).

10. See *United States v. Blackman*, 613 S.E.2d 442, 446 (Va. 2005); French, *supra* note 9, at 1268, 1307. An “easement in gross,” sometimes referred to as a personal easement, is not held appurtenant to an estate in land, but is imposed upon land with the benefit running to an individual or entity. See *Blackman*, 613 S.E.2d at 446. In contrast, an “easement appurtenant” has both a dominant and a servient tract and is capable of being transferred or inherited. *Id.* An easement appurtenant “runs with the land,” meaning the benefit conveyed by or the duty owed under the easement passes with the ownership of the land to which it was appurtenant. *Id.* Although arguing in favor of liberalizing the rules applicable to land use restrictions held in gross, Professor French noted the traditional reasoning that, with in gross restrictions, there could be difficulties involved in locating the parties with whom modifications and releases must be negotiated and the parties seeking enforcement may not have a substantial interest to protect. See French, *supra* note 9, at 1307.

11. *Blackman*, 613 S.E.2d at 446. The four traditionally-recognized negative easements are, by their nature, easements appurtenant because their intent is to benefit an adjoining or nearby parcel. *Id.*

12. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 1.6 cmt. a (AM. LAW INST. 2000). See also *Blackman*, 613 S.E.2d at 446 (“At common law, an owner of land was not permitted at his pleasure to create easements of every novel character and annex them to the land so that the land would be burdened with the easement when the land was conveyed to subsequent grantees. Rather, the landowner was limited to the creation of easements permitted by the common law or by statute.”).

13. See Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. PROP. & SOC’Y 107, 115–19 (2015) (describing the history of conservation easements in the United States).

conservation and historic preservation goals.¹⁴ Accordingly, to facilitate the use of conservation easements, all fifty states and the District of Columbia enacted some form of legislation that removes the common law impediments to their creation and enforcement (known as the conservation easement “enabling statutes”).¹⁵ However, to ensure that conservation easements serve the public interest, the enabling statutes require that conservation easements be (i) created for conservation, historic preservation, or other purposes that benefit the public, and (ii) held and enforced by entities that serve the public, generally government bodies or charitable organizations.¹⁶ In addition, some enabling statutes grant the state attorney general and, in some cases, other government entities the authority to enforce conservation easements on behalf of the public.¹⁷

In sum, state legislatures were willing to remove the common law impediments to the creation and enforcement of land use restrictions held in gross in the conservation easement context, but only if the easements meet certain requirements intended to ensure that they will serve the public interest. Traditional servitudes,

14. See *id.* See also *About Us, 38 Years of Conservation Success*, LAND TRUST ALLIANCE, <https://perma.cc/7LHY-JEZQ> (last visited Aug. 13, 2021) (by 1980, more than 400 local and regional land trusts existed, and the use of conservation easements was growing).

15. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 1.6 cmt. a (AM. LAW INST. 2000) (“The uncertainty and difficulties imposed by the common law of servitudes led to the widespread enactment of statutes.”); Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS. L. REV. 1897, 1900 n.5 (2008) (listing the statutes).

16. For example, the Uniform Conservation Easement Act, which has been adopted in some form in just over half the states, requires conservation easements to be created for conservation, historic preservation, recreational, archeological, or other public-benefiting purposes and limits qualified holders to government bodies or charitable entities. Uniform Conservation Easement Act § (1)(1), (2) (UNIF. LAW COMM’N 1981, 2007) [hereinafter UCEA]; UCEA BACKGROUND REPORT, *supra* note 7, at 1. A few enabling statutes include, or appear to include, for-profit entities as qualified holders, but only if their purposes include conservation. N.C. GEN. STAT. ANN. § 121-35(2); N.H. REV. STAT. ANN. § 477:46; R.I. GEN. LAWS § 34-39-3(a). In California and Oregon, certain Native American tribes are qualified holders. CAL. CIV. CODE § 815.3(c); OR. REV. STAT. ANN. § 271.715(3)(c).

17. See, e.g., MISS. CODE ANN. § 89-19-7(1)(d)–(f) (“Any action to enforce a conservation easement may be brought by . . . (d) The Attorney General of the State of Mississippi; (e) The Mississippi Department of Wildlife, Fisheries and Parks”); R.I. GEN. LAWS § 34-39-3(d) (“The attorney general, pursuant to his or her inherent authority, may bring an action in the superior court to enforce the public interest in [conservation easements]”); UCEA, *supra* note 16, § 3(a)(4) cmt. (“the state’s other applicable law may create standing in other persons . . . independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts”). For examples of state attorneys general seeking to enforce conservation easements on behalf of the public, see, e.g., *infra* note 243 and accompanying text; Brief of Appellee State of Maine, *Windham Land Tr. v. Jeffords*, 967 A.2d 690 (Me. 2009) (No. CUM-08-434), 2008 WL 6601719; Stipulated Judgment, *Salzburg v. Dowd*, No. CV-2008-0079 (Dist. Ct. 4th Dist. Johnson Cty., Wyo., Feb. 17, 2010) (on file with author); *Canyon Vineyard Estates I v. DeJoria*, _ Cal. Rptr. 3d _, 2022 Cal. App. LEXIS 426 at *9 (Cal. Ct. App. 2022); Amicus Curiae Brief of State Coastal Conservancy, California Coastal Commission, Santa Monica Mountains Conservancy, and Wildlife Conservation Board in Support of Plaintiff and Respondent Sonoma Land Trust, *Sonoma Land Tr. v. Thompson*, 2020 WL 7395651 (Cal. Ct. App. 2020) (unpublished) (No. A157721), 2020 WL 5503894. For a discussion of the standing provisions in the enabling statutes, see UCEA BACKGROUND REPORT, *supra* note 7, at 46–50.

like right-of-way easements agreed to between neighbors, are clearly distinguishable in that they are neither created to benefit the public nor held and enforced by entities that serve the public. In addition, state attorneys general and other government entities are not typically charged with enforcing traditional servitudes on behalf of the public.¹⁸

B. HEAVILY SUBSIDIZED BY PUBLIC

The public subsidizes the acquisition of conservation easements to the tune of billions of dollars annually. These subsidies are provided through numerous tax incentive and easement purchase programs at the federal, state, and local levels. Although the collective cost of these programs is unknown, a few examples provide a sense of the magnitude of the public investment.

Since 1980, property owners who make charitable gifts of conservation easements that satisfy certain requirements have been eligible for generous federal tax deductions.¹⁹ A former Treasury Department official determined that, at a cost in 2016 of between \$1.6 to \$2.9 billion, this deduction program ranked among the largest federal environmental and land management programs in the United States' budget.²⁰ He explained that we are spending almost as much annually on conservation easements through the deduction program as we spend on the entire National Park system.²¹

The public is also investing in conservation easements through various federal conservation easement purchase programs.²² For example, from 2014 to 2018, more than \$1.75 billion was invested in conservation easements through the

18. See Wolf, *supra* note 6, at 804 n.61 (explaining that involvement of state attorneys general in the enforcement of conservation easements "is a strong indication that this is not a good old-fashioned servitude").

19. To be eligible for a federal charitable income tax deduction for the donation of a conservation easement, the requirements set forth in Internal Revenue Code § 170(h) and Treasury Regulation § 1.170A-14 must be satisfied.

20. Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INST. (Dec. 20, 2017), <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/> (noting that, in 2016, the entire budget of the Bureau of Land Management was \$1.2 billion, and the entire budget of the Fish and Wildlife Service was \$1.6 billion). See also S. COMM. ON FINANCE, 116TH CONG., BIPARTISAN INVESTIGATIVE REP. ON SYNDICATED CONSERVATION-EASEMENT TRANSACTIONS 2–3 (COMM. PRINT 2020), <https://perma.cc/BF3J-WT2T> (estimating that, from 2010 through 2017, syndicated donation transactions alone may have cost taxpayers \$10.6 billion in foregone revenue); Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 2013 UTAH L. REV. 755, 756 (estimating that from 2003 through 2010, individual conservation easement contributions cost taxpayers in the range of \$4.2 billion in foregone revenue).

21. Looney, *supra* note 20.

22. See, e.g., *Agricultural Conservation Easement Program*, U.S. DEP'T OF AGRIC. NAT. RES. CONSERVATION SERV., <https://perma.cc/63EA-S9XT> (last visited Jan. 22, 2022); *Healthy Forests Reserve Program*, U.S. DEP'T OF AGRIC. NAT. RES. CONSERVATION SERV., <https://perma.cc/5MXP-TSSD> (last visited Jan. 22, 2022); *Forest Legacy*, U.S. DEP'T OF AGRIC. FOREST SERV., <https://perma.cc/TT4X-LQZB> (last visited Jan. 22, 2022).

U.S. Department of Agriculture's Agricultural Conservation Easement Program.²³

States have likewise been investing in conservation easements. For example, both Colorado and Virginia offer state tax credits to landowners who donate conservation easements as charitable gifts.²⁴ In 2017, Colorado reported having issued more than \$1 billion in credits through its program, and in 2020, Virginia reported having issued \$1.8 billion in credits through its program.²⁵ States also have conservation easement purchase programs, such as the Maryland Agricultural Land Preservation Foundation program, through which the public had invested over \$784 million in easements as of 2020.²⁶

Localities, too, are investing public funds in conservation easements. For example, the American Farmland Trust reported that, as of January 2020, at least ninety-eight local agricultural conservation easement purchase programs were operating in twenty states, with funds spent to date on the easements totaling over \$2.1 billion.²⁷ Donating or selling a conservation easement can also reduce the landowner's local property taxes.²⁸

In sum, the strong public policy favoring conservation easements has been implemented on a grand scale, as evidenced by the magnitude of the public investment in conservation easements at the federal, state, and local levels. This investment is made because conservation easements are intended to benefit the public. Traditional servitudes, like right-of-way easements agreed to between neighbors, are again clearly distinguishable in that they are neither created to benefit nor is their acquisition subsidized by the public.

23. U.S. DEP'T OF AGRIC., REGULATORY IMPACT ANALYSIS FOR THE AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP) 8–9 (2021), <https://perma.cc/V74E-48KR>.

24. See Memorandum from Kate Watkins, Senior Economist, Colo. Legis. Council Staff, to Interested Persons 2–3 (Aug. 28, 2017), <https://perma.cc/J64R-4PTS> [hereinafter Colorado Legislative Council Staff Memorandum]; VA. DEP'T OF CONSERVATION AND RECREATION, CALENDAR YEAR 2019 LAND PRESERVATION TAX CREDIT CONSERVATION VALUE SUMMARY 1 (Dec. 2020) <https://perma.cc/T6VL-BJ9S> [hereinafter VA. TAX CREDIT SUMMARY]. As of December 2020, twelve other states provided tax incentives for donations of conservation easements: Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, Maryland, Massachusetts, Mississippi, New Mexico, New York, and South Carolina. VA. TAX CREDIT SUMMARY, *supra*, at 1.

25. Colorado Legislative Council Staff Memorandum, *supra* note 24, at 7; VA. TAX CREDIT SUMMARY, *supra* note 24, at 1.

26. MD. AGRIC. LAND PRES. FOUND., ANNUAL REPORT FY20, 1–2, <https://perma.cc/8TVX-KDF8> (last visited Jan. 22, 2022).

27. Farmland Information Center, 2020 Status of Local Purchase of Agricultural Conservation Easement Programs, AM. FARMLAND TRUST 1–6 (Feb. 1, 2021), <https://perma.cc/Q5PE-BK5Z>.

28. See UCEA BACKGROUND REPORT, *supra* note 7, at 30–33 (explaining that numerous enabling statutes provide that land subject to a conservation easement must be assessed at its restricted value for property tax purposes).

C. HYBRIDS

Conservation easements are hybrids. Although they are interests in real property, they also generally are created under the auspices of a state enabling statute, they often are conveyed in whole or in part as charitable gifts, and they typically are structured to comply with the rules governing tax-incentive or easement purchase programs.²⁹ Given the hybrid nature of conservation easements, a number of different bodies of law may be relevant to their enforcement, including the state enabling statutes, contract law, charitable gift law, federal tax law, and the rules governing conservation easement purchase programs.³⁰ A brief description of these various bodies of law and their relevance may help to reduce the confusion that stems, in large part, from use of the “conservation easement” moniker for a hybrid interest that is, for many purposes, an easement in name only.³¹

One body of law potentially relevant to the enforcement of conservation easements is the state enabling statutes.³² However, the enabling statutes generally were enacted for the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine the validity of conservation easements, particularly conservation easements held in gross.³³ Accordingly, although the enabling statutes may contain provisions relevant to a particular enforcement issue, they are not comprehensive and leave many questions unanswered. For example, while some enabling statutes confirm that a conservation easement may not be extinguished pursuant to the doctrine of merger, others are silent regarding the issue.³⁴

Another potentially relevant body of law is that applicable to traditional servitudes. Conservation easements are nonpossessory interests in real property that restrict the use of the property they encumber.³⁵ However, as explained above, conservation easements do not fit neatly within any of the traditional servitude categories, and enactment of the enabling statutes was necessary to ensure their validity under state law.³⁶ In addition, also as explained above, conservation

29. See, e.g., Wolf, *supra* note 6, at 795 (“Properly understood, conservation easements . . . are in fact hybrids that contain elements of servitude, future interest, taxation, and charitable trust law”).

30. See also Cheever & McLaughlin, *supra* note 13, at 111–15 (describing the various types of conservation easements that can be created and the “mosaic of laws” that may affect them).

31. See Wolf, *supra* note 6, at 800.

32. See *supra* notes 15–17 and accompanying text for a discussion of the enabling statutes.

33. See UCEA, *supra* note 16, Prefatory Note at 2.

34. See UCEA BACKGROUND REPORT, *supra* note 7, at 28–29. See also Part II.C, discussing the merger doctrine.

35. See UCEA, *supra* note 16, § 1(1). Conservation easements may also impose affirmative obligations. *Id.* For example, the donor of a facade easement that encumbers a historic structure may agree to restore the facade to its original state, or the holder of the easement may agree to undertake the restoration. *Id.* § 4(5) cmt.

36. See *supra* Part I.A.

easements are created to benefit the public and are heavily subsidized by the public, which are not characteristics of traditional servitudes.³⁷

Because of their peculiar nature, applying traditional servitudes law to conservation easements will often be contrary to the public interest, as was recognized by the courts in the cases discussed in Part II. Professor Wolf, general editor of a multi-volume treatise on real property law, explained: “The public interest, which is inextricably connected with these special legislative hybrids, demands a much more flexible set of legal and equitable remedies than is normally available under the traditional easement regime.”³⁸

Professor Wolf attributes the tendency of courts to apply traditional servitudes law to conservation easements to the “nomenclature problem,” namely the widespread use of the term “easement” to refer to these hybrid interests.³⁹ He pointed out the “needless confusion resulting from using the same word to describe distinct concepts”—the statutory hybrids called conservation easements and the traditional or, in his words, “real” easements.⁴⁰ He noted that litigators would not (and, in the name of zealous advocacy, perhaps should not) hesitate to take advantage of favorable easement doctrines that are not directly addressed in the relevant enabling statutes in an attempt to prevail in their disputes.⁴¹ Unsurprisingly, landowners used this litigation tactic in the conservation easement enforcement cases discussed in Part II. Professor Wolf also noted that “it is probably asking too much of the members of our over-burdened judiciary (many of whom are decades away from their initial introduction to servitudes law) to perceive the outcome-determinative difference between a ‘real’ easement and the statutory hybrid bearing the same name.”⁴² As the cases discussed in Part II illustrate, however, some judges have perceived this difference.

Another body of law potentially relevant to conservation easement enforcement disputes is contract law. Conservation easements are generally created by deed, and deeds are generally construed in the same manner as contracts.⁴³

37. See *supra* Parts I.A and I.B.

38. See Wolf, *supra* note 6, at 804. See also POWELL ON REAL PROPERTY (Michael Allan Wolf ed. 2013). Professor Wolf also warned that problematic emerging case law in the conservation easement context may one day come back to haunt and infect “real” easement law. See Wolf, *supra* note 6, at 806–08.

39. See Wolf, *supra* note 6, at 788, 795–98, 802–08.

40. *Id.* at 800, 806.

41. *Id.* at 800.

42. *Id.* Professor Wolf recommended that we abandon the term “conservation easement” in favor of the term used in the Treasury Regulations interpreting the federal deduction provision for conservation easement donations—“perpetual conservation restriction.” See *id.* at 801, 808–10. He said this term has three major advantages: it is “a (1) descriptively accurate, (2) functional definition that (3) carries none of the potentially confusing and problematic common-law baggage of terms such as ‘conservation easements,’ ‘conservation servitudes,’ and the like.” *Id.* at 802.

43. See Thomas S. Barrett, *Model Easement Conservation and Commentary*, in THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 156–63 (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION

Accordingly, contract law may be relevant when interpreting conservation easements.⁴⁴ Under contract law principles, for example, the court's goal is to determine the parties' intent by closely reading the contract and interpreting its language according to its plain and ordinary meaning; the court will avoid interpreting provisions in a way that makes the other provisions inconsistent or meaningless; and the contract as a whole will be considered, taking into consideration the relationship among the various parts.⁴⁵

Another potentially relevant body of law is that governing charitable gifts. In many cases, conservation easements are donated as charitable gifts by property owners with deep affection for their land and a desire to ensure that it will be permanently protected from uses that could harm its conservation or historic values.⁴⁶ In such cases, a "well recognized rule, uniformly followed by all courts" should apply: "that gifts to charitable uses and purposes are highly favored in law, and will be most liberally construed to make effectual the intended purpose of the donor."⁴⁷ The similarly well-recognized rules that charitable gifts must be

EASEMENT HANDBOOK] (providing a model "Deed of Conservation Easement"); *Miller v. Kirkpatrick*, 833 A.2d 536, 545 (Md. 2003) (in a case involving a right-of-way easement between neighbors, the court explained: "In construing the language of a deed, the basic principles of contract interpretation apply").

44. *See, e.g.*, *Four B Props., LLC v. Nature Conservancy*, 458 P.3d 832, 841 (Wyo. 2020) (applying contract principles to the interpretation of a conservation easement); *Lyme Land Conservation Tr., Inc. v. Platner*, 159 A.3d 666, 674 (Conn. 2017) (in finding that the terms of a conservation easement had been violated, the court explained: "[C]ontractual terms are to be given their ordinary meaning and when the intention conveyed is clear and unambiguous, there is no room for construction." (citation omitted)). However, in *Fettig v. Estate of Fettig*, 934 N.W.2d 547, 552 (N.D. 2019), which involved a gift of fee title, the court explained that deeds are contracts and are generally construed in the same manner as contracts, but when a voluntary transfer is intended as a gift, the rules of law concerning gifts, not contracts, apply. On the relationship between contract law and charitable gift law, *see, e.g.*, William P. Sullivan, *The Restricted Charitable Gift as Third-Party-Beneficiary Contract*, 52 REAL PROP. TR. & EST. L.J. 79 (2017).

45. *See Four B Props.*, 458 P.3d at 841. *See also* *Chatham Conservation Found., Inc. v. Farber*, 779 N.E.2d 134, 139 (Mass. Ct. App. 2002) ("A [conservation] restriction, like a deed, 'is to be construed so as to give effect to the intent of the parties as manifested by the words used, interpreted in the light of the material circumstances and pertinent facts known to them at the time it was executed' and 'the restriction 'must be construed beneficially, according to the apparent purpose of protection or advantage . . . it was intended to secure or promote.'").

46. *See, e.g.*, *Green Lake Conservancy Announces Major Conservation Easement*, RIPON PRESS (May 28, 2021), <https://perma.cc/975A-2WAN> ("Under a CE, the landowner essentially says, 'I am entering into this agreement to ensure the land I love will never be developed'"); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 4, at 7 ("For the many people who love their land, [a conservation easement] is the best way to ensure that it will be preserved for all time," quoting Rand Wentworth, former Land Trust Alliance President); Christopher West Davis, *Pushing the Sprawl Back: Landowners Turn to Trusts*, N.Y. TIMES, Oct. 23, 2003, <https://perma.cc/HUN9-7A6Y> ("Stephen J. Small, a lawyer who wrote the federal income tax regulations on conservation easements . . . summed it up: 'Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land'").

47. *In re Coe Coll. for Interpretation of Purported Gift Restriction*, 935 N.W.2d 581 (Iowa 2019). *See also, e.g.*, *Bd. of Trs. of Univ. of N.C. at Chapel Hill v. Unknown and Unascertained Heirs*, 319 S.E.2d 239, 242 (N.C. 1984) ("It is a well recognized principle that gifts . . . for charities are highly favored by

used for the purposes for which they were given and are enforceable by the state attorney general and the courts on behalf of the public should also apply.⁴⁸ Notably, the drafters of the Uniform Conservation Easement Act (“UCEA”) specifically contemplated that the case and statutory law governing charitable gifts would apply to conservation easements conveyed as such.⁴⁹ Professor Wolf cautioned, however, that:

[c]ourts distracted by the common-law rules normally applicable to servitudes might . . . fail to recognize the fiduciary obligations requiring government and nonprofit holders to administer these ‘easements’ consistent with their stated terms and charitable conservation purposes on behalf of donors, funders, and the public, as well as the authority of certain state attorneys general to bring suit against a holder who fails to meet these obligations.⁵⁰

This discussion is intended to minimize that distraction.

Yet another potentially relevant body of law is federal or state tax law. For example, as noted above, since 1980, property owners who make charitable gifts

the courts. Thus, the donor’s intentions are effectuated by the most liberal rules of construction permitted.”); *Richards v. Wilson*, 112 N.E. 780, 795 (Ind. 1916) (“[i]f the words of a gift are ambiguous or contradictory, they are . . . construed . . . to support the charity if possible.”).

48. *See Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997 (Conn. 1997) (equity affords protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given); RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS § 3.02 cmt. d, illus. 3 (AM. LAW INST. 2021) (cy pres should not apply to extinguish a conservation easement where it has not become illegal, impossible, impracticable, or wasteful to continue to carry out the charitable purpose of the donor). On attorney general enforcement of conservation easements, *see supra* notes 17 and 18 and accompanying text; *Lyme Land Conservation Tr., Inc. v. Planter*, No. CV096001607, 2013 WL 3625348, at *5 (Conn. Super. Ct. May 29, 2013) (noting the attorney general’s statutory authority to bring a court action to enforce the public’s interest in a conservation easement is analogous to his codified common-law authority “to represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes.”). *See also* *Carpenter v. Comm’r*, T.C. Memo. 2012-1, at *6 (holding that the deductible conservation easements at issue constituted restricted charitable gifts, or “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations” (citation omitted)).

49. The commentary to the UCEA states that the “Act leaves intact the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts.” UCEA, *supra* note 16, Prefatory Note at 3. The reference to charitable trusts was due to the vintage of the UCEA, which was adopted in 1981. At that time, it was common for courts to refer to charitable gifts made for specified purposes, whether made in trust or nontrust form, as “charitable trusts.” *See, e.g., State v. Rand*, 366 A.2d 183 (Me. 1976) (gift of land to a city to be forever maintained as a public park created a charitable trust). *See also* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003) (AM. LAW INST. 2000) (“A disposition to [a charitable] institution for a specific purpose . . . creates a charitable trust of which the institution is the trustee”). The UCEA drafters did not intend to draw a distinction between charitable gifts of conservation easements made in trust versus nontrust form. *See* K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 3 UTAH L. REV. 773, 777, 780, 781 (2013) (references to charitable trust in the UCEA intended to encompass charitable gifts); *Carl J. Herzog Found., Inc.*, 699 A.2d at 997–98, n.2 (“The law governing the enforcement of charitable gifts is derived from the law of charitable trusts” (citations omitted)).

50. Wolf, *supra* note 6, at 804.

of conservation easements have been eligible for generous federal deductions provided the easements satisfy certain federal tax law requirements.⁵¹ The terms that must be included in conservation easement deeds to comply with these requirements are intended to ensure that the easements will provide benefits to the public sufficient to justify the public investment.⁵² Such terms are also intended to protect the public investment in conservation in the unlikely event that a court extinguishes a conservation easement for which a deduction was claimed.⁵³ Although a detailed discussion of the federal tax law requirements for donated easements is beyond the scope of this Article, a few examples will illustrate their relevance to conservation easement enforcement cases.

To be eligible for a federal deduction for the donation of a conservation easement, the conservation purpose of the charitable contribution must be “protected in perpetuity.”⁵⁴ This requirement means, among other things, that the conservation easement must (i) prohibit uses that are inconsistent with the conservation purposes of the donation; (ii) prohibit uses that could injure or destroy the property’s specific conservation interests, with one limited exception; (iii) be extinguishable only in a judicial proceeding upon a finding by the court that continued use of the property for conservation purposes has become impossible or impractical; and (iv) provide that, following judicial extinguishment, the donee is entitled to a specified share of the proceeds from a subsequent sale or exchange of the property and must use those proceeds in a manner consistent with the conservation purposes of the original contribution.⁵⁵ Applying the common law principle that restrictive covenants are strictly construed in favor of free use of property to a deductible easement could run counter to the federal tax law mandates in (i) and

51. See *supra* note 19 and accompanying text. For examples of state conservation easement tax-incentive programs, see *supra* note 24 and accompanying text.

52. See S. REP. NO. 96-1007 (1980), 1980 WL 12915, *8–16 [hereinafter 1980 SENATE REPORT].

53. See *infra* note 55 and accompanying text.

54. I.R.C. § 170(h)(5)(A).

55. Treas. Reg. § 1.170A-14(e), (g)(1), (g)(6); *Belk v. Comm’r*, 774 F.3d 221 (4th Cir. 2014). See also 1980 SENATE REPORT, *supra* note 52, at *13–14 (explaining the “protected in perpetuity” requirement). In *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021), the Eleventh Circuit reversed the Tax Court and held that the Commissioner of the Internal Revenue Service’s interpretation of Treasury Regulation § 1.170A-14(g)(6)(ii), regarding calculation of the proceeds due the holder on extinguishment, was arbitrary and capricious and violated the procedural requirements of the Administrative Procedure Act (APA). However, in *Oakbrook Land Holdings v. Commissioner*, 28 F.4th 700 (6th Cir. 2022), the Sixth Circuit found the Eleventh Circuit’s reasoning unpersuasive and held that Treasury Regulation § 1.170A-14(g)(6)(ii), as interpreted by the Commissioner and the Fifth Circuit in *PBBM-Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193 (5th Cir. 2018), is both procedurally valid under the APA and substantively valid under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Given the split in the circuits, the validity of the regulation under the APA may be appealed to the Supreme Court. In the meantime, the Tax Court is required to follow *Hewitt* only in the 11th Circuit, which has jurisdiction over federal cases originating in Alabama, Florida, and Georgia. See *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971) (holding that the Tax Court is required to follow a circuit court decision that is squarely on point only where an appeal lies to that court).

(ii) above. Similarly, extinguishing deductible conservation easements under the doctrine of merger would permit the parties to circumvent the strict limits that federal tax law places on their extinguishment.⁵⁶ Accordingly, courts faced with enforcement cases involving deductible conservation easements should be mindful of the content and purpose of the federal tax law requirements that shaped the easements' terms.

The rules governing federal, state, and local conservation easement purchase programs are still another potentially relevant set of laws.⁵⁷ The legislation establishing conservation easement purchase programs may include requirements relevant to the enforcement of the easements. For example, in 1990, Congress established the Forest Legacy Program.⁵⁸ Under this program, federal grants are provided to state agencies for the acquisition of permanent conservation easements that are held by the state or local units of government.⁵⁹

The Forest Legacy Program was established for the following purposes: "ascertaining and protecting environmentally important forest areas that are threatened by conversion to nonforest uses," "promoting forest land protection and other conservation opportunities," and "the protection of important scenic, cultural, fish, wildlife, and recreational resources, riparian areas, and other ecological values."⁶⁰ The legislation establishing the program also provides, among other things, that, "[n]otwithstanding any provision of State law, conservation easements shall be construed to effect the Federal purposes for which they were acquired and, in interpreting their terms, there shall be no presumption favoring the conservation easement holder or fee owner."⁶¹ Thus conservation easements acquired with Forest Legacy Program funds must be construed to carry out the federal conservation purposes for which they were acquired and not, for example, in favor of the free use of property under state law applicable to restrictive covenants. Accordingly, courts faced with enforcement cases involving conservation easements acquired with funding from an easement purchase program must be mindful of the rules governing that program. There also may be more than one relevant body of law, as conservation easements acquired under purchase programs are sometimes donated in part as charitable gifts, the property owners sometimes receive federal tax benefits for the gift component,

56. See *infra* notes 210–214 and accompanying text, discussing this issue.

57. For examples of federal, state, and local easement purchase programs, see notes 22, 26, and 27 and accompanying text.

58. See 16 U.S.C. § 2103c; U.S. DEP'T OF AGRIC., FOREST LEGACY PROGRAM IMPLEMENTATION GUIDELINES 7 (May 2017) [hereinafter FLP IMPLEMENTATION GUIDELINES], https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/15541-forest-service-legacy-program-508.pdf.

59. FLP IMPLEMENTATION GUIDELINES, *supra* note 58, at 5, 10. The Forest Legacy Program is funded through the Land and Water Conservation Funds, which are generated through royalties from offshore drilling activities. *Id.* at 10.

60. 16 U.S.C. § 2103c(a).

61. *Id.* § 2103c(k)(3).

and the easements are also generally created under the auspices of a state enabling statute.⁶²

In sum, applying traditional servitudes law to conservation easements is problematic because conservation easements are statutory hybrids created to benefit the public and not “real” easements. Because of their hybrid nature, various laws may be implicated in the enforcement of conservation easements, including state enabling statutes, contract law, charitable gift law, tax law, and the laws governing conservation easement purchase programs. Traditional servitudes, like right-of-way easements between neighbors, are clearly distinguishable; they are the “real” easements to which traditional servitude principles were developed to apply. They also are not created under the auspices of state enabling statutes, they are not donated as charitable gifts, their grantors do not comply with tax law requirements designed to protect the public interest, and their acquisition is not subsidized through publicly-funded purchase programs, the rules of which are designed to protect the public interest.

II. CASES RECOGNIZING THE SPECIAL STATUS OF CONSERVATION EASEMENTS

This Part brings together the handful of enforcement cases in which the courts expressly recognized the special status of conservation easements. In one case, it was the dissenting judges who did so, but their position was later validated by the state legislature. Although the cases discussed in this Part address different enforcement issues, there is a through line: conservation easements are created to benefit the public and carry out legislatively stated public purposes, and it is contrary to the public interest to blindly apply to them principles developed to facilitate the marketability and development of land or to resolve disputes between private parties.⁶³

The goal of bringing these cases together and identifying the through line is to catalyze courts to take a more consistent and appropriate approach in future conservation easement enforcement cases—one that expressly recognizes and is informed by the special status of conservation easements. The discussion of these cases also illustrates what is at stake in the conservation easement enforcement context. Nonprofit and government holders already face significant challenges in enforcing conservation easements on behalf of the public. Failing to acknowledge the special status of conservation easements would, among other things, create

62. See FLP IMPLEMENTATION GUIDELINES, *supra* note 58, at 13 (noting that Forest Legacy Program projects for which the landowner expects to receive tax benefits are subject to complex tax requirements that must be met in addition to the Forest Legacy Program requirements). See also RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS § 4.02 cmt. a (AM. LAW INST. 2021) (a specific restriction on a charitable asset can be created whether the asset is donated in full or is conveyed in a part sale, part gift transaction, sometimes referred to as a “bargain sale”).

63. The American Law Institute has also recognized the special status of conservation easements. See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.6, 3.1 cmt. f, illus. 4, 7.11, 7.16(5), 8.5 (AM. LAW INST. 2000).

powerful incentives for landowners to challenge or violate conservation easements and equally powerful disincentives for holders to seek to enforce the easements. The result would be the loss over time of many of the promised conservation benefits and much of the public investment in conservation easements.

A. OLD COMMON LAW RULES BARRING IN-GROSS EASEMENTS

The Supreme Judicial Court of Massachusetts was one of the first courts to recognize the special status of conservation easements. In 1991, the court in *Bennett v. Commissioner of Food and Agriculture* held that a restriction on development in a conservation easement was valid and enforceable even though the restriction was held in gross and was not expressly validated by the State's conservation easement enabling statute.⁶⁴ 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.”⁶⁵

Bennett involved enforcement of a perpetual agricultural preservation restriction (“APR”), a type of conservation easement the Massachusetts enabling statute authorizes to preserve farmland.⁶⁶ The Bennetts’ predecessors had granted the APR to the State, acting through its Commissioner of Food and Agriculture (the “Commissioner”), for \$291,000.⁶⁷ The APR encumbered 250 acres of farmland and reserved to the owner of the land the right to construct one or more dwelling units, subject to the approval of the Commissioner.⁶⁸

Soon after the Bennetts purchased the land subject to the APR, they applied to the Commissioner for approval to build a farmhouse on the land.⁶⁹ The site they chose was on a hilltop and would have required a 3,000-foot driveway.⁷⁰ The Commissioner declined to grant approval, finding that building in the requested location would cause soil erosion, eliminate two acres of prime farmland through construction of the driveway, and raise the fair market value of the land by changing its nature from a farm to an estate.⁷¹ The Commissioner concluded that constructing a home on the hilltop would undermine the APR’s purpose, which was to preserve the land for future farmers.⁷²

64. 576 N.E.2d 1365 (Mass. 1991).

65. *Id.* at 1367.

66. *Id.* at 1365 (referencing MASS. GEN. LAWS ANN. ch. 184, § 31).

67. *Id.*

68. *Id.* at 1365–66.

69. *Id.* at 1365.

70. *Id.*

71. *Id.* at 1365–66.

72. *Id.* at 1366.

Although the Commissioner suggested five alternative sites for the farmhouse, the Bennetts rejected all five and filed suit.⁷³ The Bennetts argued that the restriction requiring Commissioner approval of the location of the farmhouse did not fall within the enabling statute's definition of an APR. They further argued that, as successors to the parties who granted the APR, they were not bound by the approval restriction under the common law because there was no privity of estate or contract between them and the Commissioner and the Commissioner held the restriction in gross.⁷⁴ The Bennetts acknowledged that the Massachusetts enabling statute provides that an APR is not rendered unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land.⁷⁵ However, they argued that the Commissioner could not rely on that language because it applied only to restrictions that fell within the definition of an APR in the statute.⁷⁶

The Supreme Judicial Court of Massachusetts sided with the Commissioner, holding that, even if the approval restriction did not fall within the definition of an APR under the enabling statute, it was nonetheless enforceable.⁷⁷ Because the beneficiary of the restriction was the public and the restriction reinforced a legislatively stated public purpose (protection of farmland), the court deemed the "old common law rules barring the creation and enforcement of easements in gross" to be inapplicable.⁷⁸ Instead, the appropriate question to ask was whether enforcement of the bargain struck in the APR between the Bennetts' predecessors and the Commissioner was consistent with public policy and reasonable.⁷⁹

The court found that the approval restriction in the APR was consistent with public policy and reasonable, and that there was no reason why it should not be enforced.⁸⁰ In support of its holding, the court explained that, unlike with some easements held in gross, the person who had the right to enforce the restriction—the Commissioner—was clearly identified; the restriction was consistent with and, indeed, strengthened the public policy expressed in the enabling statute; public funds had been expended for the APR; and the Bennetts had acquired title to the farmland with notice of the terms of the APR.⁸¹ Although not expressly mentioned by the court, the Bennetts also likely paid a reduced purchase price for the farmland due to the APR's perpetual restrictions. In conclusion, the court noted that, while it was not endorsing the enforcement of all easements held in gross, "certain common law rules concerning the creation, validity, and enforcement of

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1367.

78. *Id.*

79. *Id.*

80. *Id.* at 1368.

81. *Id.*

servitudes may no longer be sound” and it was “willing to reconsider them in appropriate cases.”⁸²

Fourteen years after *Bennett*, another state supreme court was confronted with a similar case. In *United States v. Blackman*, the Supreme Court of Virginia upheld the validity of a conservation easement in gross that had been granted to a nonprofit organization in 1973 to protect farmland and a historic manor house.⁸³ Blackman, who purchased the subject property in 2005 and proceeded to violate the easement, argued that the easement was invalid because Virginia did not enact a statute authorizing the conveyance of conservation easements in gross to nonprofits until 1988.⁸⁴ Blackman asserted that enactment of the 1988 enabling statute would have been unnecessary if such easements were already valid.⁸⁵

The Supreme Court of Virginia disagreed. The court first acknowledged that “[a]t common law, an owner of land was not permitted at his pleasure to create easements of every novel character and annex them to the land so that the land would be burdened with the easement when the land was conveyed to subsequent grantees.”⁸⁶ Rather, landowners were limited to the creation of easements permitted by the common law or by statute.⁸⁷ The court also acknowledged that, at common law, easements in gross were strongly disfavored because they were viewed as interfering with the free use of land.⁸⁸

However, Virginia had enacted a statute in 1849 that abrogated common law restrictions on the transfer of interests in land by declaring that “any interest in or claim to real estate may be disposed of by deed or will.”⁸⁹ Although this statute had been amended in 1962 to clarify that easements in gross fell within its purview and, at the time of the *Blackman* case, it had been applied to an affirmative easement in gross, there was still some question as to whether it applied to negative easements in gross.⁹⁰ In addition, the court stated that it “continue[d] to be of opinion that ‘the law will not permit a land-owner to create easements of every novel character and attach them to the soil.’”⁹¹ Nonetheless, the court interpreted the 1849 statute, as amended, to apply to negative easements in gross created for conservation or historic preservation purposes, thus validating the easement at issue in *Blackman*.⁹²

82. *Id.* at 1368 n.4.

83. 613 S.E.2d 442 (Va. 2005). The easement was later transferred to the United States to be administered by the National Park Service as part of a National Historic Landmark District. *Id.* at 444.

84. *Id.* at 444–45.

85. *Id.* at 448.

86. *Id.* at 446.

87. *Id.* For the four traditionally-recognized negative easements, see *supra* note 11 and accompanying text.

88. *Blackman*, 613 S.E.2d at 446.

89. *Id.*

90. *Id.*

91. *Id.* at 448.

92. *Id.* at 447–49.

In support of its holding, the court referenced Virginia's strong public policy in favor of conservation and historic preservation, as evidenced by the legislature's enactment of statutes in the 1960s authorizing the conveyance of conservation easements in gross to public bodies; Virginia's Constitution, which since 1970 has expressly stated that it is the policy of the Commonwealth to conserve its natural resources and historic sites and buildings; and the Governor's encouragement of the granting of conservation easements in the historic district in which the easement at issue had been granted.⁹³ The court also held that the 1988 statute authorizing the conveyance of conservation easements in gross to nonprofits did not create a new right.⁹⁴ Rather, it merely codified and consolidated the law of conservation easements to promote the granting of such easements to charitable organizations.⁹⁵ The court also found compelling that conservation easements in gross conveyed to charitable organizations had been in common use in the Commonwealth before 1988 (they were not "of a novel character"), and a contrary holding would have had a detrimental effect on thousands of acres and numerous historic sites protected by such easements.⁹⁶

Faced with a degree of apparent conflict between, on the one hand, the common law preference for unrestricted rights of ownership of real property and, on the other hand, the public policy of the Commonwealth to conserve its natural resources and historic sites, the court in *Blackman*, similar to the court in *Bennett*, chose to support the latter.⁹⁷ Both courts implicitly recognized that applying old common law rules designed to facilitate the marketability and development of land to conservation easements, the very purpose of which is to constrain development to provide benefits to the public, would be nonsensical and contrary to public policy. In other words, both courts acknowledged and found persuasive the special status of conservation easements as assets created and held for the benefit of the public and supported by strong public policy.

B. LACHES AND ESTOPPEL

When terms of a conservation easement are violated and the government or nonprofit holder files an enforcement action, the landowner will often seek to bar the action by asserting the equitable defenses of laches or estoppel. Laches bars relief to a party whose unreasonable delay in bringing an action prejudices the other party's rights.⁹⁸ Estoppel protects a party who relies to his detriment on another's conduct.⁹⁹

93. *Id.* at 447, 449.

94. *Id.* at 448.

95. *Id.*

96. *Id.* at 445 n.*, 448-49.

97. *Id.* at 445.

98. *See, e.g.*, *Hayes v. State Teacher Certification Bd.*, 835 N.E.2d 146, 159 (Ill. App. Ct. 2005).

99. *See, e.g.*, *United States v. 18.16 Acres of Land*, 598 F. Supp. 282 (E.D.N.C. 1984).

In two notable cases, courts declined to apply laches or estoppel to bar the holder from enforcing a conservation easement because of the special status of conservation easements.¹⁰⁰ In each case, the court explicitly acknowledged that such enforcement actions involve the safeguarding of important public interests. These cases are consistent with the general reluctance of courts to bar actions brought by government or nonprofit entities in other contexts when those entities are safeguarding important public interests. Before turning to the two conservation easement enforcement cases, a brief discussion of the reasoning underlying the courts' general reluctance to bar enforcement actions when public interests are at stake is in order.

1. Background

As a general rule, the defenses of laches and estoppel can be successfully asserted against government entities only in extraordinary circumstances. The Supreme Court articulated the basic reasons for this general rule in *United States v. California*, in which it held that laches and estoppel did not bar the federal government from enforcing its rights in the lands, minerals, and other things of value underlying the three-mile ocean belt immediately adjacent to the California coast.¹⁰¹ California argued that the federal government had lost those rights because of the conduct of its agents, who had engaged in transactions indicating their belief that California owned all or at least part of the three-mile belt.¹⁰² In holding for the federal government, the Supreme Court explained:

even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government . . . , the great interests of the Government . . . are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.¹⁰³

100. See *infra* Part II.B.2.

101. 332 U.S. 19, 22–23, 39–40 (1947).

102. *Id.* at 23–24, 39–40.

103. *Id.* at 39–40. See also, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (“As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest”); *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984) (“When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.”); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (“courts of appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed.”).

For similar reasons, courts are reluctant to permit laches or estoppel to bar the claims of states or subordinate government entities, such as municipalities, when such entities are safeguarding important public interests.¹⁰⁴ In a few cases, this reluctance has even been extended to private parties seeking to protect the public interest.¹⁰⁵

Courts also have been reluctant to permit laches or estoppel to bar the claims of nonprofits when they sue private corporations for alleged violations of federal environmental protection laws.¹⁰⁶ In these cases, courts have noted the magnitude and importance of the public rights at stake; that public rights should not be compromised or forfeited by the negligence of those who act, not for themselves, but

104. *See, e.g.*, *Ingalls v. Bd. of Registration In Med.*, 837 N.E.2d 232, 237 (Mass. 2005) (“[l]aches is not generally a bar where a public right is being enforced.”); *Del Gallo v. Sec’y of Commonwealth*, 816 N.E.2d 108, 111 (Mass. 2004) (“Estoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest.”); *Byrd v. Pierce Cty.*, 425 P.3d 948, 953 (Wash. Ct. App. 2018) (“estoppel against state or local governments is disfavored”); *Clary v. City of Crescent City*, 217 Cal. Rptr. 3d 629, 643 (Cal. Ct. App. 2017) (“Estoppel against the government may be applied ‘only in the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow’”); *Lamar Co. v. City of Columbia*, 512 S.W.3d 774, 793 (Mo. Ct. App. 2016) (“as to municipalities [the doctrine of equitable estoppel] is applied cautiously because of the public interest involved.”); *Iles v. Commonwealth*, 320 S.W.3d 107, 112 (Ky. Ct. App. 2010) (“Equitable estoppel cannot be invoked against a governmental entity, except in unique circumstances where the court finds exceptional and extraordinary equities involved.”); *Embassy Real Estate Holdings, LLC v. D.C. Mayor’s Agent for Historic Pres.*, 944 A.2d 1036, 1049 (D.C. App. Ct. 2008) (“laches and estoppel are to be narrowly applied against the government”); *Grella v. Hevesi*, 827 N.Y.S.2d 756, 760 (N.Y. App. Div. 2007) (estoppel “generally cannot be invoked against the state or its agencies”); *Hayes v. State Teacher Certification Bd.*, 835 N.E.2d 146, 159 (Ill. App. Ct. 2005) (“unless extraordinary circumstances are present, the doctrine [of laches] is applied sparingly to public bodies”).

105. *See, e.g.*, *O’Reilly v. Town of Gloucester*, 621 A.2d 697 (R.I. 1993) (laches did not bar a suit by private landowners to compel the town to repair a public right-of-way despite the landowners’ longstanding inaction); *Garrou v. Teaneck Tryon Co.*, 94 A.2d 332 (N.J. 1953) (property owner’s suit to enjoin violation of a zoning ordinance served not only the owner’s private interests but also those of the entire community and, in such circumstances, the equitable doctrine of laches should be hesitatingly invoked); *George v. Ariz. Corp. Comm’n*, 322 P.2d 369, 372 (Ariz. 1958) (claim by for-profit entities challenging a certificate issued by state corporation commission was not barred by laches; “where the public interest is involved neither estoppel nor laches can be permitted to override that interest”).

106. *See, e.g.*, *U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Me., LLC.*, 215 F. Supp. 2d 239 (D. Me. 2002) (environmental group’s suit against offshore salmon farm operator for alleged violations of Clean Water Act not barred by laches or estoppel); *Me. People’s All. v. Holtrachem Mfg. Co.*, 2001 U.S. Dist. Lexis 21035 (D. Me. 2001), *aff’d* 2002 U.S. Dist. Lexis 7846 (nonprofit suit against chemical company under the Resource Conservation and Recovery Act not barred by laches); *Conn. Fund for the Env’t v. Upjohn*, 660 F. Supp. 1397 (D. Conn. 1987) (nonprofits’ suit against chemical corporation for alleged violation of the Federal Water Pollution Control Act not barred by laches or estoppel); *Student Pub. Int. Rsch. Grp. of N.J. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074 (D. N.J. 1986) (nonprofits’ suit against chemical corporation for alleged violation of the Federal Water Pollution Control Act not barred by laches or estoppel); *Grand Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d 979 (9th Cir. 2004) (assumed, without deciding, that laches is available as a defense against a private attorney general suing under the Clean Air Act but it “must be applied ‘sparingly’”). *See also* *Lake Michigan Fed’n v. U.S. Army Corps of Eng’rs*, 742 F. Supp. 441, 448 (N.D. Ill. 1990) (suit by nonprofit to prevent extension of university campus into Lake Michigan on public trust grounds not barred by laches; “courts are extremely reluctant to apply the doctrine of laches when, as in this case, a plaintiff is attempting to safeguard an important public interest”).

only as guardians of the public; and that laches and estoppel ought not to be used to undercut congressionally-fashioned environmental policy.¹⁰⁷ Laches and estoppel are also disfavored in these cases because the nonprofit plaintiff is not the only victim of the alleged environmental harm, and it stands in the shoes of the government in attempting to safeguard important public interests.¹⁰⁸

2. Conservation Easement Enforcement Cases

The strong bias against barring the enforcement of public rights on laches or estoppel grounds is also reflected in conservation easement enforcement cases. In some conservation easement enforcement cases, the courts have analyzed only the traditional elements of laches or estoppel in determining that the government or nonprofit holder was not barred from enforcing the easement.¹⁰⁹ In other cases, however, the courts expressly acknowledged that the government or nonprofit holder was enforcing public rights or protecting the public interest and, thus, was entitled to special deference.¹¹⁰ Two cases in the latter category are discussed

107. See, e.g., *Me. People's All.*, 2001 U.S. Dist. Lexis 21035, at *7; *Conn. Fund for the Env't*, 660 F. Supp. at 1414; *Student Pub. Int. Rsch. Grp. of N.J.*, 627 F. Supp. at 1085.

108. See, e.g., *Me. People's All.*, 2001 U.S. Dist. Lexis 21035, at *7; *U.S. Pub. Int. Rsch. Grp.*, 215 F. Supp. 2d at 258–59; *Student Pub. Int. Rsch. Grp. of N.J.*, 627 F. Supp. at 1085. See also *Park Cty Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987), *overruled on other grounds by*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) (“Nearly every circuit, including this one, and numerous district courts have recognized the salutary principle that ‘[l]aches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage.’”) (quoting *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982)). For a rare case in which a court applied laches against a government entity but did so to protect the public interest in land that served as an integral component of a wildlife sanctuary, see *Stenehjem ex rel. State v. Nat'l Audubon Soc'y*, 844 N.W.2d 892 (N.D. 2014).

109. See *Windham Land Tr. v. Jeffords*, 967 A.2d 690 (Me. 2009) (estoppel did not bar land trust enforcement of conservation easement); *Dep't of Hous. & Cmty. Dev. v. Mullen*, 886 A.2d 900 (Md. Ct. Spec. App. 2005) (estoppel did not bar state agencies' enforcement of conservation easement). For similar unreported and trial court decisions, see *N.J. Dep't. of Envtl. Prot. v. Huber*, 2010 WL 173533 (N.J. Sup. App. Div. 2010) (unpublished), *aff'd as modified*, 63 A.3d 197 (N.J. 2013) (laches and estoppel did not bar state agency enforcement of conservation easement); *Sonoma Land Tr. v. Thompson*, No. SCV-258010 (Super. Ct. Cal., Cty. of Sonoma, Apr. 16, 2019) (estoppel did not bar land trust enforcement of conservation easement).

110. See *Feduniak v. Cal. Coastal Comm'n*, 56 Cal. Rptr. 3d 591 (Cal. Ct. App. 2007) (estoppel did not bar state agency enforcement of a conservation easement); *Weston Forest and Trail Ass'n, Inc. v. Fishman*, 849 N.E.2d 916 (Mass. App. Ct. 2006) (laches and estoppel inapplicable to land trust enforcing conservation easement). In similar unreported and trial court decisions involving government holders, see *Cty. of Orange v. Chen*, 2011 WL 3806565 (Cal. Ct. App. 2011) (unpublished) (estoppel did not bar county enforcement of conservation easement); *Town of Milton v. Johnson*, No. 219-2015-CV-00178 (N.H. Super. Ct. Strafford Cty. April 7, 2017) (laches and estoppel did not bar town enforcement of conservation easement). For a case in which the court found estoppel did not bar the U.S. government's enforcement of a conservation easement, see *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1988) (noting that it is well settled that the government may not be estopped on the same terms as any other litigant). In a similar case, *United States v. Jackson*, No. CV 05–214–C–LMB, 2007 WL 1169695, at *9 (D. Idaho 2007), which settled, the court explained: “‘The person seeking estoppel against the government . . . must show that the potential injustice to him outweighs the possibility of damage to the public interest.’” See also *Boston Redev. Auth. v. Nat'l Park Serv.*, 125 F.

below: *Feduniak v. California Coastal Commission* and *Weston Forest and Trail Association, Inc. v. Fishman*.¹¹¹ These two cases illustrate that, because of the importance of the public interests involved in conservation easement enforcement cases, laches and estoppel either should not apply or should apply only in the most extraordinary of circumstances, and this special deference should be accorded to both government and nonprofit holders.

a. Feduniak

In *Feduniak*, a California appellate court held that neither estoppel nor laches barred the California Coastal Commission (the “Commission”) from ordering coastal homeowners to comply with the terms of a conservation easement by removing their private three-hole pitch-and-putt golf course from around their house and restoring the area to its native sand dune vegetation.¹¹² Previous owners of the land had granted the conservation easement to a local nonprofit organization in exchange for a permit from the Commission that allowed them to construct a new residence on the property.¹¹³

This case is particularly noteworthy because the court refused to apply estoppel or laches even though the homeowners—Mr. and Mrs. Feduniak—presented a sympathetic case. The Feduniaks had purchased the property, located on 17 Mile Drive in Pebble Beach, California, from the easement grantors for \$13 million specifically because they liked the unique golf course landscaping.¹¹⁴ The Feduniaks also had no notice of the conservation easement at the time of the purchase because the sellers failed to mention it in their real estate disclosure statement and, even though the easement had been properly recorded, the title company failed to disclose it in its title report.¹¹⁵ In addition, the Commission had failed to either inspect the property or enforce the easement for eighteen years.¹¹⁶ The court nonetheless refused to apply either estoppel or laches to bar the Commission from enforcing the easement, emphasizing the challenges associated with enforcing conservation easements and other permit conditions, as well as the public’s vital interest in the preservation of the scenic and natural resources of the California coast.

Supp. 3d 325 (D. Mass. 2015), *aff’d* 838 F.3d 42 (1st Cir. 2016) (declining to apply judicial estoppel to preclude the National Park Service from enforcing a land use restriction held for public benefit despite the Service’s negligence); *Cty. of Humboldt v. McKee*, 82 Cal. Rptr. 3d 38 (Cal. Ct. App. 2008) (estoppel did not bar county’s enforcement of Williamson Act contract restrictions because it was not an extraordinary case where injustice to the landowner would justify the negative effect on the public interest).

111. *Feduniak*, 56 Cal. Rptr. 3d 591; *Weston Forest*, 849 N.E.2d 916.

112. *Feduniak*, 56 Cal. Rptr. 3d at 594.

113. *Id.* at 594–96.

114. *Id.* at 597.

115. *Id.*

116. *Id.* at 615.

While the court acknowledged that the government is not immune from the doctrine of estoppel, it explained that estoppel applies to bar a government's enforcement action in the land use context only in "extraordinary" cases.¹¹⁷ To estop the government, the elements necessary to estop a private party must be present, and two additional findings must be made: (i) estopping the government must not nullify a strong rule of policy adopted for the public's benefit and (ii) the injustice that would result from allowing the government to proceed must be of sufficient dimension to outweigh the negative effect upon the public interest or public policy that would result from estopping the government.¹¹⁸

Beginning with the elements necessary to estop a private party, the court explained that, for estoppel to apply, it had to find (among other things): (i) that the Commission either knew or should have known that the golf course violated the conservation easement and (ii) that it was reasonable for the Feduniaks to believe that failure to enforce the easement signaled the Commission's acquiescence or assent to the golf course.¹¹⁹ The court determined that neither of these elements was present, and its discussion provides a window into the challenges associated with the enforcement of conservation easements.

Regarding the first element, it was undisputed that the Commission did not know that the golf course violated the easement until the nonprofit holding the easement informed the Commission of the violation shortly after the Feduniaks purchased the property.¹²⁰ The court also rejected the argument that the Commission should have known of the violation before that time. The court found no authority suggesting that the Commission had a duty to continually inspect all properties for compliance with conservation easements and found that it would not be practical for the Commission to do so.¹²¹ The Commission issued approximately 1,000 permits per year, and the small size of its enforcement staff, as well as budgetary constraints, made it impossible for the Commission to continually monitor every property for compliance.¹²²

The court also declined to find that the Commission was or should have been on notice of the easement violation due to field trips its members and staff took to sites from which the golf course was clearly visible.¹²³ The court found it

117. *Id.* at 600–01, 617.

118. *Id.* at 600–01, 610, 618.

119. *Id.* at 601–02, 606. Generally speaking, four elements must be present to apply estoppel against a private party: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. *Id.* at 600.

120. *Id.* at 601. The Commission immediately acted to enforce the easement after being so informed. *Id.* at 607.

121. *Id.* at 603–04. The court also found no authority indicating that the Commission owed a duty of care to future property buyers to regularly monitor property to prevent them from buying property that is in violation of applicable restrictions. *Id.* at 603.

122. *Id.*

123. *Id.* at 604.

unreasonable to expect Commission members and staff to be fully aware at all times of the permit history of every piece of property within the Commission's jurisdiction and, thus, to be able to tell at a glance whether a particular property complies with permit conditions.¹²⁴ When preparing to visit a particular site, it was not routine for Commission personnel to review all other permits in the area.¹²⁵

As for the second element necessary for estoppel to apply, the court determined that it was not reasonable for the Feduniaks to believe that the Commission's failure to enforce the easement for eighteen years signaled its acquiescence or assent to the golf course.¹²⁶ The court explained that the Commission's inaction could just as well have reflected—and, in fact, did reflect—bureaucratic, budgetary, and personnel limitations.¹²⁷ The court also pointed out that, in purchasing the property, the Feduniaks had relied, not on the Commission's inaction, but on the seller's disclosure statement and the title company's title report, neither of which disclosed the easement.¹²⁸ Bottom line, in assessing whether the two elements necessary to apply estoppel were present, the court was sympathetic to the difficulties associated with monitoring and enforcing thousands of permit conditions given the Commission's small staff and budgetary constraints.

The court next focused on the impact estopping the Commission would have on public policy and the public interest, cautioning that parties face particularly daunting odds in establishing estoppel against the government in land use cases because of the importance of the public interests at stake.¹²⁹ The law under which the permit had been granted—the California Coastal Act—reflected a strong public policy supporting the protection and preservation of California's unique coast for the benefit of the public.¹³⁰ The court determined that estopping the Commission from enforcing the conservation easement would nullify otherwise valid land use restrictions adopted for the benefit of the public.¹³¹ It also would not punish the Commission, but would injure the public, which has a strong

124. *Id.*

125. *Id.*

126. *Id.* at 606–07.

127. *Id.* The court also explained that mere failure to enforce a law, without more, will not estop the government from subsequently enforcing it. *Id.* at 609.

128. *Id.* at 607.

129. *Id.* at 610–11. *See also, e.g.,* *Pettitt v. City of Fresno*, 110 Cal. Rptr. 262, 268 (Cal. Ct. App. 1973) (city not estopped from denying the validity of a building permit that had been issued in violation of a zoning ordinance despite the property owners' expenditure of a substantial sum in reliance on the permit; "To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake"); *Golden Gate Water Ski Club v. Cty. of Contra Costa*, 80 Cal. Rptr. 3d 876, 889 (Cal. Ct. App. 2008) (owner of an island designated as open space who built multiple residential cabins and other structures in violation of local law could not bar county's enforcement action on estoppel or laches grounds, even though the county failed to enforce the law for thirty-five years; "what little injustice might result from abating [the owner's] illegal use presents no grounds for overriding the significant interest in open space and other land use limitations benefiting the public interest").

130. *Feduniak*, 56 Cal. Rptr. 3d at 613–14.

131. *Id.* at 614.

interest in preserving California's scenic coastline in its natural state.¹³² Moreover, estopping the Commission could undermine the Commission's ability to enforce existing and future permit restrictions on properties along the entire coast given the Commission's limited capacity to monitor properties for compliance.¹³³

The court also found that the injustice to Mr. and Mrs. Feduniak from allowing the Commission to enforce the conservation easement did not outweigh the negative effect on public policy and the public interest that would result from estopping the Commission.¹³⁴ The cost of removal of the golf course and restoration of the property (estimated to be \$100,000) was not a compelling injury because the Feduniaks could seek to recover that cost from the previous landowner and the title company, both of which had failed to disclose the conservation easement.¹³⁵ The real injury to the Feduniaks was that they would no longer be able to own, see, and use a private golf course uniquely situated on the California coast.¹³⁶ Though "mindful of the very real impact that losing the future enjoyment of their private golf course" would have on the Feduniaks, the court held that their loss could not outweigh the public's strong interest in (i) eliminating development that had violated the conservation easement's restrictions for over twenty years, (ii) finally restoring the area to its natural and native state, and (iii) protecting the Commission's ability to enforce existing and future easements and permit conditions for the benefit of the public.¹³⁷

In sum, *Feduniak* was not an extraordinary case where justice demanded that the government be estopped, despite the Commission's failure to enforce the conservation easement for almost two decades and the Feduniaks' lack of notice of the easement. The public interest in protecting California's coastline clearly outweighed the loss to private landowners from having to remove their private golf course and restore the land to its natural state.

The court also summarily dispensed with the Feduniaks' laches defense, noting that laches, like estoppel, is not available where it would nullify an important policy adopted for the benefit of the public.¹³⁸

132. *Id.*

133. *Id.* at 615.

134. *Id.* at 616–17.

135. *Id.* at 616. The Feduniaks did sue the title company. *See, e.g., Feduniak v. Old Republic National Title Ins. Co.*, Case No. 5:13-cv-02060 BLF (HRL), 2014 WL 3921372 (N.D. Cal. 2014) (unpublished). The court also noted that the cost burden could not reasonably be considered an injury or injustice because the Feduniaks had offered the Commission an equivalent amount of money to pay for off-site mitigation. *Feduniak*, 56 Cal. Rptr. 3d at 616.

136. *Feduniak*, 56 Cal. Rptr. 3d at 616.

137. *Id.* at 617.

138. *Id.*

b. Weston Forest

On the other side of the country, a Massachusetts appellate court held that neither laches nor estoppel barred a local nonprofit conservation organization (a land trust) from enforcing a conservation easement. In *Weston Forest and Trail Association, Inc. v. Fishman*, the court explained that, because the enforcement of a conservation easement carries out a legislatively stated public purpose and is in the public interest, neither government entities nor land trusts should be barred from bringing such actions on the grounds of laches or estoppel.¹³⁹

Weston Forest involved a conservation easement that had been conveyed to the Weston Forest and Trail Association (“WFTA”) in 1974.¹⁴⁰ The easement encumbered all but 60,000 square feet of an approximately eight-acre parcel located in Weston, Massachusetts.¹⁴¹ The easement was recorded along with a map that identified the boundary between the portion of the parcel restricted by the easement and the portion not so restricted.¹⁴² The stated purpose of the easement was to ensure preservation of the restricted area “in its present, predominantly natural and undeveloped condition,” and the easement prohibited the construction of any buildings or other structures in the restricted area, except for fencing appropriate for agricultural activities.¹⁴³

Fishman purchased the property in 1993.¹⁴⁴ She was aware that the property was subject to the conservation easement, and the deed to her specifically referenced the easement.¹⁴⁵ Between 1996 and 2002, Fishman engaged a surveyor who prepared three separate plans for proposed improvements on the property.¹⁴⁶ The first plan depicted a proposed new dwelling to be constructed within the unrestricted area.¹⁴⁷ Fishman received a building permit and constructed a new house in accordance with this plan.¹⁴⁸ The second plan depicted a proposed new barn, also to be constructed within the unrestricted area.¹⁴⁹ The first and second plans each indicated the boundary line between the restricted and unrestricted areas of the property.¹⁵⁰ The third plan omitted that boundary line and placed the proposed new barn completely within the restricted area.¹⁵¹ Fishman received a

139. 849 N.E.2d 916 (Mass. App. Ct. 2006). In Massachusetts, a conservation easement is referred to as a “conservation restriction.” *Id.* at 918–19. For simplicity purposes, this discussion uses the term conservation easement.

140. *Id.* at 918.

141. *Id.* at 918–19.

142. *Id.* at 918.

143. *Id.* at 919.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

building permit based on the third plan and began constructing the barn in the restricted area.¹⁵²

During construction of the barn, the Town of Weston's Conservation Commission surveyed the property line separating Fishman's property from adjacent town-owned land.¹⁵³ George Bates, who served as both Chair of the Conservation Commission and Treasurer of WFTA, visited Fishman's property several times during this period in his role as Commission Chair.¹⁵⁴ Bates never communicated with Fishman regarding either the Commission's work or the construction of the barn.¹⁵⁵

After the barn was substantially completed, WFTA discovered the violation, notified Fishman, and demanded that the barn be relocated to the unrestricted area.¹⁵⁶ Fishman, who by that time had reportedly invested more than \$300,000 in the barn, refused to relocate it.¹⁵⁷ WFTA filed suit, arguing that the conservation easement prohibited the construction of any buildings within the restricted area.¹⁵⁸

Fishman did not dispute that the barn was in the restricted area.¹⁵⁹ Rather, she argued that the doctrines of laches and estoppel barred WFTA's claim.¹⁶⁰ The Massachusetts appellate court disagreed.

Regarding laches, the court explained that the doctrine "does not run against public rights."¹⁶¹ The court further explained that the public or private nature of an entity is not dispositive of whether the entity is enforcing public rights.¹⁶² The court also noted that, in enacting Massachusetts' conservation easement enabling statute, the state legislature recognized and sought to protect the public benefits flowing from conservation easements whether they are held by government bodies or charitable organizations.¹⁶³ The court concluded that a nonprofit entity

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 919–20.

158. *Id.* at 918.

159. *Id.* at 920.

160. *Id.* Fishman also argued that the conservation easement was ambiguous. The court quickly dismissed that argument, noting that the easement explicitly banned the construction of any buildings or structures in the restricted area other than fences, and the barn was unambiguously a building or structure. *Id.* at 922–23.

161. *Id.* at 920 (citations omitted).

162. *Id.* at 920–21 (citing, for example, *Lake Michigan Fed'n. v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441, 446–47, 447–48, 450 (N.D.Ill. 1990), in which a suit by a nonprofit to prevent extension of a university campus into Lake Michigan was not barred by laches in part because the nonprofit was attempting to protect a significant public interest).

163. *Id.* at 921. The court also noted with approval the trial court judge's conclusion that laches did not run against WFTA because enforcement of a conservation easement "serves a public benefit," and cited *Bennett*, see *supra* Part II.A, in which the Supreme Judicial Court of Massachusetts expressly

like WFTA should be immune from laches where, as in this case, it seeks to ensure that a landowner acts in accordance with the public interest.¹⁶⁴

As for estoppel, the court explained that, similar to the doctrine of laches, “[e]stoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest.”¹⁶⁵ The court also reiterated that, although WFTA was not a government entity, for purposes of enforcing a conservation easement that is in the public interest, there is no difference between a governmental body and a private entity.¹⁶⁶ Accordingly, estoppel also did not apply.¹⁶⁷

The court further explained that even assuming Fishman could assert estoppel as a defense against WFTA, she still would not have prevailed because her purported reliance on Bates’s failure to object to the barn’s construction was not reasonable.¹⁶⁸ Fishman was fully aware of the conservation easement. Moreover, even though the boundary line between the restricted and unrestricted areas was not shown on the third building plan, a reasonable person who knew the land was subject to a conservation easement and who had seen the prior two plans would have clarified the situation before building.¹⁶⁹

In addition, although not mentioned by the court, as with California Coastal Commission members and staff in *Feduniak*, it would be unreasonable to expect WFTA’s board members and staff to be fully aware at all times of the specific terms of all of WFTA’s conservation easements and, thus, to be able to tell at a glance whether a conservation easement had been violated.¹⁷⁰ Accordingly, WFTA should not be deemed to have been on notice of the violation simply because of Bates’s presence on or near the property.

Given that the court found WFTA to be immune from the defenses of laches and estoppel, it did not consider whether the potential injustice to Fishman from enforcing the easement would be of sufficient dimension to justify the negative effects on public policy and the public interest that would arise from barring WFTA’s enforcement action. However, even if the case had arisen in a jurisdiction in which such a balancing test was applied, the holding should be the same. If *Feduniak*, with its innocent landowners and eighteen-year enforcement delay, did not rise to the level of an “extraordinary” case in which the injustice to the private landowners justified the negative effects on public policy and the public

recognized that the public is the beneficiary of conservation easements and conservation easements reinforce legislatively stated public purposes. *Id.*

164. *Id.*

165. *Id.* (citation omitted).

166. *Id.* at 922.

167. *Id.*

168. *Id.*

169. *Id.*

170. For discussion of this point in *Feduniak*, see *supra* note 124 and accompanying text.

interest, *Weston Forest*, with its not-so-innocent landowner and at most thirteen-month enforcement delay, clearly should not.¹⁷¹

Fishman's injuries (the time and costs associated with the litigation and relocation of the barn) were self-inflicted—she either knowingly or at least negligently violated the conservation easement. In addition, barring enforcement of the conservation easement would have nullified an otherwise valid land use restriction that had been adopted for the benefit of the public. It also would not have punished WFTA but would have injured the public, which was the beneficiary of the easement. Barring enforcement would further have undermined land trust enforcement of existing and future conservation easements because nonprofits, like government holders, face staff and budgetary constraints that prevent them from continually monitoring and enforcing the easements they hold.¹⁷²

3. The Way Forward

Because of the importance of the public interests at stake, landowners should face particularly daunting odds when seeking to bar enforcement of a conservation easement on the grounds of laches or estoppel, even if the easement is held by a nonprofit land trust instead of a government entity. As the court in *Weston Forest* recognized, there is no difference between a governmental entity and a nonprofit land trust regarding conservation easement enforcement. Both entities are authorized by law to acquire, hold, and enforce conservation easements on behalf of the public and, in enforcement actions, both are safeguarding vital public interests.

Barring enforcement of conservation easements on the grounds of laches or estoppel would also have serious deleterious consequences. It would effectively nullify otherwise valid land use restrictions that were acquired for the benefit of the public and often at considerable public expense. It would not punish the holders but would injure the public, which is the beneficiary of the easements. It would undermine the ability of holders to enforce existing and future conservation easements because both government and nonprofit holders have limited capacity to monitor and enforce the easements they hold. Moreover, it could encourage owners of easement-encumbered land, such as Fishman, to play the “enforcement lottery,” where they violate easements assuming that, because of the holder's staff and budgetary constraints, they either will not be caught or, if they are caught, it will not be immediate and they can bar enforcement by asserting laches or estoppel.

171. Fishman began construction of the barn in July 2002 and WFTA notified Fishman of the violation in August 2003. *Weston Forest*, 849 N.E.2d at 919.

172. The typical schedule for monitoring is at least once per calendar year. *See, e.g.*, Land Trust Accreditation Commission, Accreditation Requirements Manual 23 (March 2021) (Indicator Element 11C2), https://www.landtrustaccreditation.org/storage/downloads/2021/requirements/2021_requirements_manual.pdf.

Even if the holder of a conservation easement is negligent in discovering a violation or asserting a claim, or led the landowner to believe that a prohibited activity or use was acceptable, the interests of the public should not be forfeited as a result. To paraphrase the Supreme Court in *United States v. California*, the public should not be deprived of its rights by rules designed particularly for private disputes over individually owned pieces of property.¹⁷³ And individuals who have no authority to dispose of government or nonprofit property should not, by their conduct, cause the public to lose its valuable rights.¹⁷⁴ Whether negligent, or merely misinformed, or inappropriately generous, employees or agents of a government or nonprofit holder of a conservation easement should not be permitted to give away valuable rights held for the public good.¹⁷⁵

In sum, because of the special status of conservation easements as assets that benefit the public and carry out legislatively stated public purposes, applying laches or estoppel to bar their enforcement should be hen's-teeth rare.¹⁷⁶ In some jurisdictions, like Massachusetts, government entities and nonprofit land trusts will simply be immune from the defenses.¹⁷⁷ In other jurisdictions, the defenses should apply only in the most extraordinary cases—where both the traditional requirements of the defenses are met and it is clear that the injustice to the landowner from enforcing the easement would be of sufficient dimension to justify the significant deleterious effects on public policy and the public interest that would result from barring enforcement.

C. MERGER

In an unfortunate opinion, *Cahaba Riverkeeper, Inc. v. Water Works Board of Birmingham*, the Alabama Supreme Court applied the common law doctrine of merger to hold that Birmingham's Water Works Board could not establish and hold a conservation easement on property that it owned and, thus, it had not satisfied its obligation to place a conservation easement on that property.¹⁷⁸ Although the court acknowledged that conservation easements are "statutorily created

173. 332 U.S. 19, 39-40 (1947).

174. *See id.* at 40.

175. *See id.* at 39-40; *supra* note 103 and accompanying text. *See also* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 4, at 470 (the defenses of laches and estoppel "are inappropriate to conservation easements because the public interest in conservation needs to be protected from the potentially poor stewardship practices of a given holder").

176. This turn of phrase is borrowed from *Costa v. INS*, 233 F.3d 31, 38 (1st Cir. 2000), in which the court explained that asserting estoppel against the government is more easily said than done and, given the rigors of the gauntlet that must be run, "if it exists at all [it] is hen's-teeth rare."

177. Only one state enabling statute—New York's—expressly provides that enforcement of a conservation easement shall not be defeated by the defenses of laches or estoppel. N.Y. ENV'T CONSERV. LAW § 49-0305.5. In other states the issue is left to the courts.

178. _ So.3d _, 2022 WL 571047 (Ala. 2022). In a 2001 settlement agreement with the Alabama Attorney General, the Water Works Board had agreed to place a conservation easement on the property to permanently protect it from harmful development. *Id.* at *1-3. In 2017, the Water Works Board established an easement on the property with the consent of the Attorney General but two conservation

interests” that “differ from common-law easements,” it nonetheless applied the old common law rule that “if title in fee to the dominant and servient estates is vested in one owner, the easement rights are merged in the title in fee.”¹⁷⁹ The court did not consider whether it makes sense to apply that old common law rule, which developed to eliminate easements that do not serve any function, to conservation easements, which are assets created to benefit the public and carry out legislatively stated public purposes.¹⁸⁰ Two other courts have considered this issue and concluded that it does not make sense to apply the common law doctrine of merger to conservation easements.

In each of *Canyon Vineyard Estates I v. DeJoria*, a California appellate court decision, and *Piedmont Environmental Council v. Malawer*, a Virginia trial court decision, the courts recognized the special status of conservation easements in holding that merger did not apply to extinguish a conservation easement.¹⁸¹ Although *Malawer* lacks precedential value, it is discussed below because the court’s clear-eyed analysis is persuasive. *DeJoria* and *Malawer* also illustrate the varied circumstances in which conservation easements can be created.

DeJoria involved a conservation easement that John Paul DeJoria conveyed to a nonprofit land trust along with the underlying fee.¹⁸² DeJoria had purchased the subject property—417 acres along the Pacific coast in Malibu, California—intending to develop it, but after walking the property he decided to preserve it as open space for the enjoyment of the public.¹⁸³ DeJoria’s conveyance was in substantial part a charitable gift for which he received a tax deduction.¹⁸⁴ The

organizations alleged that the easement did not comply with the terms of the settlement agreement. *Id.* at *4–*6.

179. *Id.* at *11–*12 (citing *Gonzalez v. Naman*, 678 So. 2d 1152, 1154 (Ala. Civ. App. 1996), which involved a dispute between private parties, for the common law rule).

180. The court stated that the requirement that a conservation easement be held by an entity other than the easement grantor is important because otherwise the owner of the property would also be the enforcer of the easement. *Id.* at *12. That rationale is unpersuasive given that the Alabama Attorney General had the authority to enforce the conservation easement. *Id.* at *3, *5. In addition, that a conservation easement is defined in Alabama’s enabling statute as a “nonpossessory interest” should not be interpreted to require that a conservation easement always be held by an entity other than the easement grantor. *Id.* at *10, *12. A government or nonprofit entity could establish a conservation easement on property that it owns and the easement would be a nonpossessory interest that the entity could retain either along with or separate from the underlying fee. Indeed, it is not uncommon for a nonprofit land trust to acquire fee title to property with significant conservation values, encumber the property with a conservation easement, and then transfer the restricted fee to a third party, subject to the easement. *See, e.g., Piedmont Environmental Council v. Malawer*, 80 Va. Cir. 116 (2010); *supra* note 204 and accompanying text.

181. *Canyon Vineyard Estates I v. DeJoria*, _ Cal. Rptr. 3d _, 2022 Cal. App. LEXIS 426 (Cal. Ct. App. 2022); *Malawer*, 80 Va. Cir. at 116-17. *DeJoria* was certified for partial publication and only the published portions are referenced herein. *DeJoria*, 2022 Cal. App. LEXIS 426 at *1.

182. *DeJoria*, 2022 Cal. App. LEXIS 426 at *2–*4.

183. *Id.* at *3.

184. *Id.* DeJoria conveyed the property, which was worth \$13 million, to the land trust in exchange for \$1,060,000, thus making a charitable donation of more than 90% of the value of the property. *Id.* DeJoria received a tax deduction of \$11.4 million for the donation. *Id.*

underlying fee was later acquired by a third party in a foreclosure sale, and a successor to that party, who sought to develop the property, argued that the conservation easement was extinguished at the moment of its creation under the doctrine of merger.¹⁸⁵

In holding that merger did not apply to extinguish the conservation easement, the California appellate court first explained that “[t]he rationale for the merger doctrine is ‘to avoid nonsensical easements—where they are without doubt unnecessary because the owner owns the estate.’”¹⁸⁶ The court provided an example of the typical case involving merger: where the holder of an easement to cross property acquires the burdened property, at which point the easement becomes nothing more than a right by the owner to cross his or her own land.¹⁸⁷ In such a case, the easement’s existence no longer makes sense and it merges into the owner’s more comprehensive ownership rights.¹⁸⁸

The court then explained that merger does not always automatically apply and, unlike in the typical case described above, extinguishing the conservation easement in *DeJoria* by merger would (i) do violence to the parties’ intent in that it would contravene the primary purpose of DeJoria’s conveyance, which was to preserve the property in its open-space condition in perpetuity, (ii) frustrate the purpose of California’s conservation easement laws, which seek to encourage donations for the purpose of preserving open space, and (iii) not operate to avoid a “nonsensical” easement because the conservation easement remained necessary to ensure preservation of the property in its natural condition.¹⁸⁹ The court also noted that the current owner of the property’s attempt to rely on the merger doctrine to extinguish the conservation easement inappropriately “conflate[d] conservation easements with general easements or general servitudes.”¹⁹⁰ The court concluded that merger did not apply to extinguish the conservation easement even though the easement had been conveyed to and held by the land trust along with the underlying fee.¹⁹¹

Malawer involved a different factual situation, namely a conservation easement that was established by a nonprofit land trust, the Piedmont Environmental Council (“PEC”), on property that it owned.¹⁹² PEC had acquired fee title to the subject property and then conveyed a conservation easement encumbering that property to itself and the Virginia Outdoors Foundation (“VOF”), a quasi-state

185. *Id.* at *5–*6, *19. The land trust to which the conservation easement and underlying fee had been conveyed defaulted on a loan secured by the property, leading to a third party’s acquisition of the underlying fee in a foreclosure sale. *Id.* at *5–*6.

186. *Id.* at *19 (citation omitted).

187. *Id.*

188. *Id.* at *19–*20.

189. *Id.* at *20–*21.

190. *Id.* at *21.

191. *Id.* at *21–*22.

192. *Piedmont Environmental Council v. Malawer*, 80 Va. Cir. 116, 117 (2010).

agency.¹⁹³ PEC was thus both the grantor and one of the grantees of the easement.

Immediately following conveyance of the conservation easement, PEC conveyed the underlying property, subject to the easement, to Martha Michael Malawer.¹⁹⁴ In the context of a later suit involving interpretation of some of the easement's terms, Malawer argued that PEC did not have the legal ability to create the easement because the doctrine of merger does not allow the holder of a fee simple interest and an easement burdening that interest to be the same person.¹⁹⁵

In determining that merger did not apply and, thus, that the conservation easement was valid, the trial court first noted the basic common law rule that “existing easements are extinguished by operation of law if ownership of the dominant and servient estate become united in one person.”¹⁹⁶ The court referenced an earlier case in which the Supreme Court of Virginia held that, when the holder of a dominant tract benefited by a right-of-way easement acquires the servient tract, the right-of-way easement is extinguished by merger.¹⁹⁷ In such a case, the owner of the dominant tract and the owner of the servient tract become one and the same, thus “eliminating the need or purpose for the easement.”¹⁹⁸ In other words, the right-of-way easement is extinguished because it ceases to serve any function—the owner of the two tracts is free to use the servient estate as the owner sees fit.¹⁹⁹ This “common sense” approach and analysis, said the court, stands in contrast to what occurred in *Malawer*.²⁰⁰

In *Malawer*, there never was a relationship between a dominant tract and a servient tract because PEC and the VOF held the conservation easement in gross.²⁰¹ Moreover, the parties' clear intent was to create a conservation easement in perpetuity to protect the scenic value of the subject property for the benefit of the general public.²⁰² The court emphasized that the clear intent of PEC as grantor was “to retain the right to enforce the scenic easement *for a public purpose*.”²⁰³ The fact that PEC held the conservation easement and the encumbered fee prior to conveyance of the encumbered fee to Malawer did nothing to eliminate the need for or purpose of the conservation easement.

193. *Id.* See also VA. CODE ANN. § 10.1-1800 et. seq. (establishing the Virginia Outdoors Foundation).

194. *Id.* at 116.

195. *Id.* at 117, 119.

196. *Id.* at 117

197. *Id.* (citing *Davis v. Henning*, 462 S.E.2d 106 (Va. 1995)).

198. *Id.* at 118.

199. See Nancy A. McLaughlin, *Conservation Easements and The Doctrine of Merger*, 74 DUKE J.L. & CONTEMP. PROBS. 279, 287 (2011) (“The merger doctrine automatically eliminates land use restrictions that no longer serve any function”).

200. *Malawer*, 80 Va. Cir. at 117–18.

201. *Id.* at 118. See also *supra* note 10, explaining that an easement in gross is not held appurtenant to an estate in land but is imposed upon land with the benefit running to an individual or entity.

202. *Malawer*, 80 Va. Cir. at 118.

203. *Id.* at 118 (emphasis added).

The court further noted that, “most importantly, this type of easement in gross is a recent creature of the law, created statutorily in an effort to facilitate this type of conservation.”²⁰⁴ Citing *Blackman*, in which the Virginia Supreme Court discussed the history and strong public policy in favor of the use of conservation easements, the court concluded 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.”²⁰⁵ In sum, because creation of a conservation easement by a nonprofit or government owner of the underlying fee does not eliminate the need for or public purpose of the easement, and application of the merger doctrine to conservation easements would frustrate the purpose of state laws facilitating this type of conservation, the doctrine of merger should not apply.²⁰⁶

Addressing yet another factual situation, the Virginia Attorney General opined that the doctrine of merger does not apply when the holder of a conservation easement later acquires the underlying fee.²⁰⁷ Citing to *Malawer*, the Attorney General explained that acquisition of the underlying fee would not obviate the purpose of or need for the conservation easement.²⁰⁸ Rather, “the easement would continue to provide natural or historic resource protection in accordance with its stated terms and in furtherance of state policy.”²⁰⁹

The Attorney General also noted a practical consequence of extinguishing conservation easements by merger. Most conservation easements are intended to permanently protect the conservation and historic values of the property they encumber. Both federal and state laws and the specific terms of many conservation easement deeds place strict limits on extinguishment.²¹⁰ Applying the doctrine of

204. *Id.* The court was not troubled by the fact that Virginia’s enabling statute, like Alabama’s enabling statute, both of which are based on the UCEA, defines a conservation easement as a “non-possessory interest” in real property. *Id.*

205. *Id.* at 118–19. For discussion of *Blackman*, see *supra* Part II.A.

206. *Malawer*, 80 Va. Cir. at 118–19. See also Wolf, *supra* note 6, at 803 (“There seems to be little logic and a lot of bad public policy behind application of this traditional rule [i.e., merger] to easements that are designed to be perpetual and in the public interest. The identity of the owner of the property subject to a conservation restriction is irrelevant to the purpose of the restriction.”). For an earlier case in which a Montana court determined that merger did not apply in circumstances similar to those in *Malawer*, but without acknowledging the special status of conservation easements, see *Madden v. Nature Conservancy*, 823 F. Supp. 815 (D. Mont. 1992).

207. Office of the Attorney General, Commonwealth of Virginia, Advisory Opinion (Aug. 31, 2012), 2012 WL 4044318 [hereinafter Va. Attorney General Advisory Opinion].

208. *Id.* at *3.

209. *Id.*

210. See *id.* at *2. For federal limits on extinguishment, see, e.g., *supra* note 55 and accompanying text (discussing the federal tax law judicial extinguishment requirements, which generally are incorporated into conservation easement deeds when the donor intends to claim a deduction). For state limits on extinguishment, see, e.g., VA. CODE ANN. § 10.1-1704 (prohibiting public bodies from releasing conservation easements unless certain statutory requirements are met, including the protection of similar land as a substitute); COLO. REV. STAT. § 38-30.5-107 (requiring a judicial proceeding and satisfaction of additional statutory requirements to extinguish a conservation easement); MASS. G.L. c.184, § 32 (authorizing release of a conservation easement only after, among other things, a public

merger to conservation easements would permit and even encourage parties to circumvent these limits in contravention of the easement grantors' intent and the public interest.²¹¹ For example, the holder of a conservation easement and a subsequent owner of the underlying property could agree to extinguish the easement via merger to make way for lucrative development and share the proceeds, even if the easement continued to protect conservation values of great importance to the public.²¹²

Extinguishment of a conservation easement via merger could also confer a significant windfall benefit upon the owner of the subject property at the public's expense. This reality was illustrated in *DeJoria*, in which the court explained that a finding that the underlying property was not subject to a valid conservation easement would have conferred a significant windfall benefit on the current owner of the property, who had purchased the 417 acres of prime Pacific coastland for development for a price that reflected the easement's prohibition on development.²¹³ Such a finding also would have deprived taxpayers, who had paid for the property's protection by subsidizing DeJoria's \$11.4 million tax deduction, of the benefits they had obtained.²¹⁴

Several states have clarified by statute that merger does not apply to extinguish conservation easements.²¹⁵ This does not mean that merger should apply in other states. As the courts in *DeJoria* and *Malawer* recognized, conservation easements

hearing and approval of public officials); ME. REV. STAT. ANN. tit. 33, § 477-A (West 2007) (requiring a judicial proceeding and satisfaction of additional statutory requirements to extinguish a conservation easement).

211. See Va. Attorney General Advisory Opinion, *supra* note 207, at *2.

212. Such extinguishments could be expected to discourage conservation easement donations. Individuals interested in permanently protecting properties that have special meaning to them, their families, and their communities would not be inclined to make the economic sacrifice associated with a conservation easement donation if their intent could be so easily ignored. See *supra* note 46 and accompanying text.

213. Canyon Vineyard Estates I v. DeJoria, __ Cal. Rptr. 3d __, 2022 Cal. App. LEXIS 426, at *29 (Cal. Ct. App. 2022). If the court in *Malawer* had held that the conservation easement at issue was extinguished by merger, the value attributable to that easement would similarly have passed to Malawer as an economic windfall.

214. *Id.* at *30.

215. See, e.g., 765 ILCS 120/6 (“A conservation right shall not be extinguished by . . . merger”); ME. REV. STAT. ANN. tit. 33, § 479(10) (West 2007) (“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) (West 1988) (“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”). Colorado's enabling statute provides that “[a] conservation easement in gross for which a Colorado state income tax credit has been allowed may not in whole or in part be released, terminated, extinguished, or abandoned by merger.” COLO. REV. STAT. §§ 38-30.5-107. Although this statute might be interpreted to mean that merger applies to extinguish conservation easements for which a Colorado state income tax credit was not allowed, two factors cut against drawing that conclusion. First is the commonsense analysis in *DeJoria* and *Malawer*—regardless of whether a state income tax credit was allowed, retention or acquisition of the underlying fee by the government or nonprofit holder of a conservation easement does not eliminate

are fundamentally different from the traditional easements (like right-of-way easements) to which the doctrine of merger was developed to apply. Moreover, courts should not impute to state legislatures the inherently irrational conclusion that conservation easements are to be encouraged and heavily subsidized by the public, only to have the public benefits and public investment lost through misapplication of a doctrine developed to eliminate “nonsensical” easements.

In conclusion, *Cahaba Riverkeeper* involved a very unusual situation—elimination of an existing conservation easement so that it could be replaced with a more protective conservation easement.²¹⁶ In most cases involving merger, the goal is to eliminate the conservation easement to allow the underlying property to be developed or otherwise used in manners contrary to the easement’s protections, as in *DeJoria* and *Malawer*. As the foregoing discussion has illustrated, applying the common law doctrine of merger to conservation easements, which are created to benefit the public and carry out legislatively stated public purposes, would be inconsistent with the rationale for the doctrine, which is to eliminate easements that do not serve any function. It also would be contrary to the public interest and frustrate the purpose of state laws that facilitate this type of conservation. Accordingly, as the law on merger develops, courts should look to the analysis and holdings in *DeJoria* and *Malawer*. They should also view the merger holding in *Cahaba Riverkeeper* as an example of the adage that “hard cases make bad law” and either decline to follow it or confine it to its unusual facts.²¹⁷

D. SUBDIVISION RESTRICTIONS (RESTRAINTS ON ALIENATION)

It is fairly common for a conservation easement to prohibit subdivision of the subject property into two or more parcels that could be sold or otherwise transferred to separate owners. These “subdivision restrictions” are fairly common because ensuring that the subject property will forever be owned by a single person or group of persons can further a conservation easement’s purposes in several ways.

First, subdivision restrictions are often included in conservation easements that permit only one residence and ancillary structures on the subject property. Prohibiting subdivision in such a case ensures that the owner of the residence will also continue to own and be responsible for the management and care of the remaining undevelopable property. If subdivision were permitted, the residential parcel could be severed from the undevelopable property. Successive owners of the undevelopable property, who could not reside on that property, might not take

the need for or public purpose of the easement. Second, the strict limits on extinguishment in the Colorado enabling statute could be easily circumvented if merger applied. *See supra* note 210.

216. *Cahaba Riverkeeper, Inc. v. Water Works Bd. of Birmingham*, __ So.3d __, 2022 WL 571047 at *13 (Ala. 2022).

217. The adage is derived from *Northern Securities Co. v. United States*, 193 US 197, 400 (1904) (Holmes dissenting). For an interesting discussion of the adage, *see* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHIC. L. REV. 883 (2006).

as active a role in its management and care. They also might be more likely at some point over the perpetual life of the easement to seek release of the restrictions preventing development and other economically productive uses.

A subdivision restriction also ensures that the subject property will be owned and managed by a single owner or group of owners, thereby reducing the difficulties and costs associated with the holder's monitoring and enforcement of the easement. It generally is simpler and less expensive for a holder to communicate with, monitor the activities of, and file enforcement actions against the owner or owners of a single parcel, as opposed to different owners of two or more subdivided parcels. In addition, subdivision of a property subject to a conservation easement can lead to conflicts regarding the interpretation, enforcement, or amendment of the easement, as the owner of one or more of the subdivided parcels may object to the holder's administration of the easement as it relates to the other subdivided parcel or parcels.²¹⁸

In *Taylor v. Taylor*, an Ohio appellate court recognized the special status of a conservation easement in holding that the easement's perpetual restriction on subdivision was not invalid as an unreasonable restraint on alienation.²¹⁹ The conservation easement in *Taylor* encumbered a 76.68-acre parcel in Butler County, Ohio, that was owned by siblings as tenants in common.²²⁰ The purpose of the easement was to ensure that the conservation values of the property would be preserved and the property would be retained forever in its natural and agricultural condition, and to prevent any use of the property that would significantly impair or interfere with the conservation values of the property or be inconsistent with the purpose of the easement.²²¹

One of the siblings, a sister, who reportedly wanted to liquidate her interest but could not persuade her brother to purchase it, filed a suit for partition.²²² In a partition action, an appraiser would determine the property's value as a whole, and either cotenant could then purchase the other cotenant's interest, or the property could be sold as a whole to a third party and the proceeds distributed to the cotenants in accordance with their respective interests.²²³ The sister maintained that the

218. Courts have been confronted with the question of whether the owner of one such parcel has standing to sue to object to the holder's administration of the easement on another such parcel. *See, e.g.*, *Estate of Robbins v. Chebeague & Cumberland Land Tr.*, 154 A.3d 1185 (Me. 2017) (owner of one of several parcels encumbered by a single conservation easement lacked standing to sue to enforce the easement on other parcels). *But see, e.g.*, *McKean v. Douglas Cty.*, No. 18-CV-01012 (Douglas Cty. Dist. Ct. Nev., Nov. 2, 2018, and Jan. 29, 2019) (neighbor had standing to challenge county's agreement to amend a conservation easement on nearby property).

219. 110 N.E.3d 651 (Ohio Ct. App. 2018).

220. *Id.* at 652.

221. *Id.*

222. *Id.* at 652, 654.

223. *Id.* at 654.

partition action was necessary because the easement's subdivision restriction prevented division of the property into two or more parcels.²²⁴

The brother objected to the partition action.²²⁵ He argued that the subdivision restriction should be invalidated as an undue restraint on alienability because it did not contain a reasonable limit on its duration.²²⁶ If the subdivision restriction were invalidated, the property could be divided into two parcels and each parcel could be sold separately, subject to the conservation easement.²²⁷

The nonprofit land trust holding the conservation easement weighed in on the sister's side, explaining that the subdivision restriction should not be invalidated because it was essential to carrying out the purpose of the easement.²²⁸ The land trust noted that the subdivision restriction helped to ensure that there would be only one residence and related infrastructure on the property, that only one owner would manage the property, and that the land trust's administrative costs in stewarding the property would be minimized.²²⁹ The land trust also explained the subdivision restriction was an appropriate measure by which to achieve the purposes listed in Ohio's conservation easement enabling statute, namely "retaining the property in its 'natural, scenic, open, or wooded condition' and as a 'suitable habitat for fish, plants, or wildlife.'"²³⁰

The Ohio appellate court sided with the sister and the land trust. The court determined that the subdivision restriction was not an undue restraint on alienability because its operation was limited, it had a clear purpose, and its perpetual duration was reasonable in light of its purpose.²³¹ The subdivision restriction's operation was limited because it did not prohibit the sale or partition of the property; it merely prohibited dividing the property into two or more parcels.²³² The property could still be sold as a whole if all cotenants agreed, and each cotenant was free to sell their cotenant interest or bring a suit for partition. In addition, the purpose of the conservation easement, including the subdivision restriction

224. *Id.*

225. *Id.* at 652–53.

226. *Id.*

227. *Id.* at 654.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 656. The court distinguished a 1975 case involving a property owned by twenty-one cotenants who had agreed that any decision relating to the property, including a decision to sell, required a majority vote. *Id.* at 654–56 (distinguishing *Raisch v. Schuster*, 352 N.E.2d 657 (Ohio Ct. App. 1975)). In *Raisch*, the cotenants' agreement effectively prohibited the sale or partition of the property without the consent of the majority and thus operated as an absolute restraint upon alienability unless there was majority agreement. *Id.* at 655. The court in *Raisch* held that the restriction was void as against public policy because there was no evidence of the purpose of the agreement and no way to determine whether it was subject to a reasonable limit on its duration. *Id.*

232. *Id.* at 656.

therein, was conservation of the subject property, and the easement's perpetual duration was reasonably necessary to accomplish that purpose.²³³

Equally important, however, was that the conservation easement in *Taylor* had been granted pursuant to the Ohio conservation easement enabling statute, which had been enacted "for the 'public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition.'"²³⁴ The enabling statute also specifically authorized charitable organizations like the land trust to hold conservation easements for "the preservation of land areas" for various purposes intended to benefit the public.²³⁵ Considered in light of the enabling statute, the court found that the subdivision restriction was neither contrary to public policy generally nor inconsistent with the public policy expressed in the statute.²³⁶ Rather, the restriction furthered public policy in favor of land conservation.

The court also noted that the land trust had paid \$30,000 for the conservation easement.²³⁷ Although the court did not elaborate, the investment of charitable funds in the easement further confirmed its status as an asset acquired and held for the benefit of the public. Moreover, invalidation of the subdivision restriction might have conferred a windfall benefit on the siblings at the public's expense.²³⁸

As with the courts in *Bennett*, *Blackman*, *Feduniak*, *Weston Forest*, *DeJoria*, and *Malawer*, the court in *Taylor* found the special status of conservation easements to be persuasive.²³⁹ Including a subdivision restriction in a perpetual conservation easement is permissible because the restriction does not operate as an absolute restraint upon alienability, the beneficiary of the restriction is the public, and the restriction reinforces a legislatively stated public purpose.

E. INTERPRETATION

Eleven years after its decision in *Blackman*, the Supreme Court of Virginia was faced with a conservation easement interpretation case.²⁴⁰ In *Wetlands America Trust v. White Cloud Nine Ventures*, a divided court held that the common law principle that restrictive covenants are to be strictly construed in favor of free use of property (referred to as the "strict construction principle") applied

233. *Id.* at 655–56.

234. *Id.* at 656.

235. *Id.*

236. *Id.*

237. *Id.*

238. The land trust used charitable funds to acquire the conservation easement, including the subdivision restriction. Invalidation of the subdivision restriction might have increased the fair market value of the subject property and decreased the value of the easement, thereby conferring a windfall benefit on the siblings.

239. For discussion of *Bennett* and *Blackman*, see *supra* Part II.A. For discussion of *Feduniak* and *Weston Forest*, see *supra* Part II.B.2. For discussion of *DeJoria* and *Malawer*, see *supra* Part II.C.

240. For discussion of *Blackman*, see *supra* Part II.A.

to conservation easements.²⁴¹ Two judges issued a strong dissent, arguing that applying that principle was inappropriate given the special status of conservation easements.²⁴² The Virginia Attorney General filed an amicus brief in the case, similarly arguing that applying the strict construction principle to conservation easements would be inappropriate and unjust.²⁴³ The dissenting judges and the Attorney General had the better argument.

In *Wetlands America Trust*, the owner of a winery purchased adjacent property that was subject to a conservation easement and began to conduct certain agricultural and construction activities on that property in connection with the winery.²⁴⁴ Wetlands America Trust (“WAT”), the easement holder, filed suit, arguing that some of the construction activities and intended commercial uses of the easement-encumbered property violated the easement.²⁴⁵ Applying the strict construction principle, the lower court construed all ambiguities in the conservation easement deed against WAT and in favor of the property owner and “free use” of the property.²⁴⁶ This manner of interpretation caused the lower court to side with the property owner regarding almost all of the activities that WAT challenged.²⁴⁷

On appeal, a majority of the Virginia Supreme Court affirmed the lower court.²⁴⁸ As to application of the strict construction principle to conservation easements, the majority reasoned that, although the Virginia Conservation Easement Act (“VCEA”) had abrogated the common law relative to conservation easements in “certain significant respects,” it had not abrogated application of the strict construction principle.²⁴⁹ Accordingly, the majority held that the lower court was correct in determining that all ambiguities in the conservation easement deed had to be resolved against the restrictions and in favor of the free use of property.²⁵⁰

The dissenting judges did not take a position on whether the property owner’s activities violated the conservation easement; they focused solely on the proper

241. 782 S.E.2d 131 (Va. 2016).

242. *Id.* at 144–46.

243. See Brief of the Commonwealth of Virginia as *Amicus Curiae* in Support of Appellant, *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 2015 WL 10478421 (No. 141577) (May 26, 2015) [hereinafter Virginia Attorney General Amicus Brief].

244. *Wetlands Am. Tr.*, 782 S.E.2d at 134. Among other things, the owner of the winery commenced construction of a building on the easement-encumbered property to be used for storage; to house a creamery, a bakery, a wine tasting room, and a retail space; and to host events such as music festivals and weddings. *Id.*; *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 88 Va. Cir. 341, 349–50 (2014). The owner also commenced construction of a parking lot adjoining the building, a new road leading to the parking lot, and a new bridge. *Wetlands Am. Tr.*, 782 S.E.2d at 134.

245. *Wetlands Am. Tr.*, 782 S.E.2d at 134.

246. *Wetlands Am. Tr.*, 88 Va. Cir. at 345, 346.

247. *Id.* at 348–73.

248. *Wetlands Am. Tr.*, 782 S.E.2d at 134.

249. *Id.* at 137–38. The majority stated that the VCEA abrogated the common law by approving a conservation easement that was in gross, imposed restrictions on the use of the subject land, and was perpetual in duration. *Id.*

250. *Id.* at 137–39.

rules to apply in interpreting conservation easements and they determined that the strict construction principle should not apply.²⁵¹ They explained that the strict construction principle was applied under the common law because, historically, easements in gross, including negative easements in gross, were disfavored as a matter of public policy.²⁵² But things had changed. By 2016, when the Virginia Supreme Court handed down its decision in *Wetlands America Trust*, public policy in Virginia had for decades strongly favored the use of conservation easements to accomplish land conservation and historic preservation goals.²⁵³ Applying a principle based on a policy disfavoring easements in gross to conservation easements simply could not be reconciled with the State's decades-long and strong public policy in favor of conservation easements.²⁵⁴ The "oft-stated policy of the Commonwealth in favor of conservation easements," said the judges, "could not be a clearer rejection of the common law strict construction principle."²⁵⁵

The dissenting judges' position was similar to that of the Supreme Judicial Court of Massachusetts in *Bennett*, in which that court explained: "Where 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."²⁵⁶ Like the court in *Bennett*, the dissenting judges in *Wetlands America Trust* recognized that conservation easements are fundamentally different from the traditional easements in gross to which the strict construction principle historically applied. They also implicitly understood that the common law is dynamic and evolves as societal needs and conditions change.²⁵⁷ Like the court in *Bennett*, they were willing to reconsider certain common law rules that may no longer be sound in appropriate cases.²⁵⁸

The dissenting judges also rejected the majority's myopic focus on the strict construction principle, explaining that the common law rules of contract construction are applied in the construction of deeds.²⁵⁹ Based on those rules, the

251. *Id.* at 144–46. The Virginia Attorney General also focused solely on the proper rules to apply in interpreting conservation easements and similarly argued that the strict construction principle should not apply to conservation easements. Virginia Attorney General Amicus Brief, *supra* note 243, at 1–2.

252. *Wetlands Am. Tr.*, 782 S.E.2d at 145.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Bennett v. Comm'r of Food and Agric.*, 576 N.E.2d 1365, 1367 (Mass. 1991). For discussion of *Bennett*, see *supra* Part II.A.

257. See, e.g., *Surratt v. Thompson*, 183 S.E.2d 200, 202 (Va. 1971) ("The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice."); *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 16 (Va. 2012) ("The common law is dynamic, evolves to meet developing societal problems, and is adaptable to society's requirements at the time of its application by the Court") (citation omitted).

258. See *supra* note 82 and accompanying text.

259. *Wetlands Am. Tr.*, 782 S.E.2d at 145–46.

dissent determined that ambiguities in a conservation easement deed should be construed to give effect to the intention of the parties, to give effect to the circumstances surrounding the creation of the easement, to carry out the policy in favor of land conservation, and to resolve ambiguities in favor of the grantee.²⁶⁰

Although not mentioned by the dissent, there was an additional rule of law relevant to the interpretation of the conservation easement in *Wetlands America Trust*—the rule governing the interpretation of charitable gifts. As previously explained, it is well settled that charitable gifts are highly favored by the courts and liberally construed to carry out the donors' intended charitable purposes.²⁶¹ The Virginia Supreme Court has articulated this rule as follows: “Charitable gifts are viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them.’ All doubts will be resolved in their favor.”²⁶²

The conservation easement in *Wetlands America Trust* was conveyed to a charitable organization—WAT—pursuant to a “Deed of Gift of Conservation Easement” and, thus, as a charitable gift.²⁶³ Moreover, the drafters of the UCEA, which Virginia adopted in the form of the VCEA, explained that the UCEA specifically “leaves intact” case and statutory law as it relates to the enforcement of charitable gifts.²⁶⁴ Accordingly, all doubts about the meaning of the terms of the conservation easement should have been resolved, not in favor of the free use of land, but in favor of carrying out the stated charitable conservation purpose of the gift.²⁶⁵

260. *Id.* at 146. The dissent pointed out that this “settled Virginia law” is consistent with the standard for interpreting servitudes in the RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 (AM. LAW INST. 2000). *Id.* See also, e.g., *Davis v. Henning*, 462 S.E.2d 106, 108 (Va. 1995) (“In construing deeds, it is the duty of the court to ‘ascertain the intention of the parties, gathered from the language used, and the general purpose and scope of the instrument in the light of surrounding circumstances’” (citation omitted)); *Chatham Conservation Found., Inc. v. Farber*, 779 N.E.2d 134, 139 (Mass. App. Ct 2002) (a conservation easement “‘must be construed beneficially, according to the apparent purpose of protection or advantage . . . it was intended to secure or promote’” (citation omitted)); *State v. Rattee*, 761 A.2d 1076, 1082–83 (N.H. 2000) (a state agency’s decision not to approve construction of a 5,500 square foot home on land protected by agricultural conservation easement was reasonable considering easements’ statutory purpose and availability of alternative site).

261. See *supra* note 47 and accompanying text.

262. *Thomas v. Bryant*, 40 S.E.2d 487, 490 (Va. 1946) (quoting *Hinsdale v. Chicago City Missionary Soc’y*, 30 N.E.2d 657, 663 (Ill. 1940)). See also *Smith v. Moore*, 343 F.2d 594, 604 (4th Cir. 1965).

263. See *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 88 Va. Cir. 341, 342 (2014); *About Wetlands America Trust*, WETLANDS AMERICA (Nov. 8, 2021), <https://www.wetlandsamerica.org/about-wetlands-america-trust>. Conservation easements are often conveyed in whole or in part as charitable gifts because of the tax incentives that are available to property owners who make such gifts, as well as the desire on the part of many to ensure the perpetual protection of property that has special meaning to them, their families, and their communities. See, e.g., *supra* notes 19, 24, and 46 and accompanying text.

264. See *supra* note 49 and accompanying text, discussing the UCEA.

265. See *id.* The land trusts that filed an amicus brief in *Wetlands America Trust* explained that construing conservation easements in favor of free use of land rather than to carry out the charitable conservation intent of the easement donors would chill future easement donations, contrary to the public

Finally, the majority in *Wetlands America Trust* made an additional assertion in support of its free-use-of-property holding that the dissenting judges did not address but is worthy of comment. The majority stated that

by leaving the strict construction principle in force with the passage of the VCEA, the legislature must have viewed this principle as an appropriate additional incentive for those who draft the conservation easements to achieve clarity in light of the fact that [conservation easements] are subject to enforcement *in perpetuity*.²⁶⁶

In other words, according to the majority, the Virginia legislature must have intended that application of the strict construction principle would motivate drafters of conservation easements to be clear about permitted and prohibited uses and avoid ambiguities. The majority cited no support for this assertion, which is not surprising given that it is contrary to the realities of conservation easement drafting.

As explained in the first edition of the Conservation Easement Handbook, although conservation easements are drafted to specify certain permitted and prohibited uses, it is impossible to foresee every conceivable future use or variation of use over the perpetual life of a conservation easement.²⁶⁷ Accordingly, the stated purpose of a conservation easement serves as its “touchstone,” and all unforeseen potential future uses must be tested against that touchstone.²⁶⁸ Thus, conservation easements are generally drafted to provide that unforeseen future uses are permitted if they are consistent with the easement’s stated purpose and prohibited if they are inconsistent with that purpose.²⁶⁹

The conservation easement at issue in *Wetlands America Trust* was drafted in this manner. It states that the parties recognize that the easement cannot address every circumstance that might arise in the future; the parties agree upon the stated purpose of the easement; and any uses that are not expressly prohibited or permitted in the easement are permitted if they are consistent with the easement’s stated purpose and prohibited if they are inconsistent with that purpose.²⁷⁰ In his amicus

interest. See Brief of the Nature Conservancy et al., as *Amicus Curiae* in Support of Appellant, *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 2015 WL 10478422, at 29–30 (No. 141577) (May 22, 2015).

266. *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 782 S.E.2d 131, 138 (Va. 2016).

267. See 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 43, at 174. For example, fifty years ago it would have been impossible to predict the placement of cell-phone towers on easement-protected lands, or a change in forestry practices to favor prescribed or cultural burns, or the use of drones to monitor compliance with a conservation easement.

268. *Id.*

269. *Id.*

270. *Wetlands Am. Tr. v. White Cloud Nine Ventures*, 88 Va. Cir. 341, 355 (2014). The purpose of the easement in *Wetlands America Trust* is “to assure that the Protected Property will be retained *in perpetuity* predominantly in its natural, scenic, and open condition . . . for conservation purposes as well as permitted agricultural pursuits, and to prevent any use of the Protected Property which will impair significantly or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem.” *Id.* at 348.

brief, the Virginia Attorney General highlighted the need to draft conservation easements in this manner, explaining, for example, that “[i]t is impossible to predict what forms agriculture . . . may take in the decades after an easement is donated.”²⁷¹

Accordingly, contrary to the majority’s assertion, it seems unlikely that the Virginia legislature intended that the strict construction principle would motivate drafters of conservation easements to do the impossible—foresee and articulate every potential permitted and prohibited use over the perpetual life of a conservation easement. In addition, the UCEA, on which the VCEA is based, “has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements’ validity” and does not directly address the interpretation issue in either the act itself or the commentary.²⁷² Thus, it seems more likely that the Virginia legislature, in enacting the VCEA, never considered the interpretation issue.

Had the Virginia legislature considered the interpretation issue, it likely would have learned that applying the strict construction principle to conservation easements could significantly undermine the effectiveness of such easements as land conservation and historic preservation tools. Such a principle favors the property owner and puts the nonprofit or government holder at a distinct disadvantage. It provides property owners with a powerful incentive to challenge or violate conservation easement restrictions and it discourages nonprofit and government holders from seeking to enforce those restrictions on behalf of the public. As a result, many of the promised conservation benefits and much of the public investment in conservation easements could be lost over time as easement restrictions erode.

In addition, as the Virginia Attorney General explained in his amicus brief, purchasers of property subject to a conservation easement voluntarily take title with at least constructive notice of the easement’s restrictions and stated purpose.²⁷³ Such purchasers also typically pay a reduced price because of the existence of the easement.²⁷⁴ Accordingly, such purchasers should not be viewed as unduly burdened by the interpretation of a conservation easement consistent with its stated conservation purpose. Instead, they should be viewed as stepping into the shoes of the easement grantor and having the same intent—that the restrictions will be enforced to carry out the stated purpose of the conservation easement.²⁷⁵

Given the foregoing, it seems likely that if the Virginia legislature had considered the interpretation issue, it would have provided that the strict construction

271. Virginia Attorney General Amicus Brief, *supra* note 243, at 20.

272. UCEA, *supra* note 16, Prefatory Note at 2.

273. See Virginia Attorney General Amicus Brief, *supra* note 243, at 19.

274. *Id.* Such purchasers may also receive other economic benefits, such as reduced property taxes. See *supra* note 28 and accompanying text.

275. See Virginia Attorney General Amicus Brief, *supra* note 243, at 7–8.

principle does not apply to conservation easements and that such easements must be interpreted to carry out their public-benefitting conservation purposes. In fact, the Virginia legislature recently revised the VCEA to do just that. The statute now provides: “Notwithstanding any provision of law to the contrary, an easement held pursuant to this chapter shall be construed in favor of achieving the conservation purposes for which it was created.”²⁷⁶

The Virginia legislature, the dissenting judges in *Wetlands America Trust*, and the Virginia Attorney General all rejected application of the strict construction principle to conservation easements. In doing so, they recognized that applying an old common law principle intended to facilitate the free use of land to conservation easements, the very purpose of which is to constrain the free use of land to provide benefits to the public, would be nonsensical and contrary to public policy.

CONCLUSION

The widespread use of conservation easements to accomplish land protection goals is an experiment and one that is being conducted on a grand scale. We have no guarantee that conservation easements will prove to be effective long-term land protection tools—it is simply too early to tell. This Article addresses one significant risk to conservation easements and the benefits they provide to the public: the tendency of courts in enforcement cases, misled by the “easement” moniker, to treat conservation easements as if they were traditional servitudes.

This Article has articulated the various ways in which conservation easements are fundamentally different from traditional servitudes. It has provided a roadmap of the various bodies of law that may be relevant in conservation easement enforcement cases. It also has brought together the handful of cases over the past three decades in which the courts (in one case, the dissenting judges) recognized the special status of conservation easements as assets created to benefit the public and carry out legislatively stated public purposes. These courts understood that it

276. VA. CODE ANN. § 10.1-1016.1. The same provision was added to the conservation easement enabling statute in Virginia that validates open space easements conveyed to public bodies. *Id.* § 10.1-1705.1. Two other states have similar provisions in their enabling statutes. *See* 32 PA. CONS. STAT. § 5055(c)(2) (“Any general rule of construction to the contrary notwithstanding, conservation or preservation easements shall be liberally construed in favor of the grants contained therein to effect the purposes of those easements and the policy and purpose of this act); W. VA. CODE § 20-12-5(b) (“Notwithstanding provision of law to the contrary, conservation and preservation easements shall be liberally construed in favor of the grants contained therein to effect the purposes of those easements and the policy and purpose of this article”). *See also* CAL. CIV CODE § 815 (Deering 2021) (“The Legislature finds and declares that the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California. The Legislature further finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.”); *Id.* § 816 (“The provisions of this chapter shall be liberally construed in order to effectuate the policy and purpose of Section 815.”).

would be contrary to the public interest to blindly apply to conservation easements principles developed to facilitate the marketability and development of land or to resolve disputes between private parties.

Armed with this knowledge, courts, as well as nonprofit and government holders, will be far better equipped to deal with the coming wave of enforcement cases in a manner that protects the public interest.