1. **What is merger?** Merger is a common law doctrine that merges, or combines all of the parts of something into a unified whole. For property interests, merger combines all the various interests and mergers them into the fee when those interests come into the same ownership and control, known as “unity of title.”¹

2. **What is the legal basis for merger?** The legal basis for merger is the common law.²

3. **What is common law?** Law that has been established by past court cases, rather than legislation. The term “common law” dates back to at least the 1150’s when Henry II’s English tribunals established laws that were “common” throughout the land. Our colonies adopted the English common law and and in Part II, c. 6, art. 6, of the Massachusetts Constitution, established that the common law of England was to be the law of the Commonwealth "until altered or repealed by the Legislature or declared invalid by the court."³

Note the hierarchy - decisions of higher courts take precedence over lower courts.

4. **What happens when merger occurs?** All interests, including easements, restrictions, life estates, or any other interests, "merge" or effectively, disappear into the fee.

5. Most of the cases cited are about easements, not restrictions. A restriction is a negative easement, which differs from an easement in two primary respects. An easement gives someone the right to go onto someone else's property and do things they otherwise would not have a right to do. A restriction doesn’t

¹ "[I]n order to extinguish an easement by merger, a unity of title must have come into existence in the same person... [An owner] cannot have an easement in its own estate in fee.”


For the unity of title to extinguish an easement, it is the ownership of the two estates that must be coextensive, *Mills v. Mason,* 120 Mass. at 251; *York Realty, Inc.*, 315 Mass. at 290, and not the land area comprising the dominant and servient estates. The common ownership need not extend to the whole of the original dominant estate. 2 American Law of Property Section 8.92 (1952 & 1977 Supp.).


Under the common-law doctrine of merger, easements are extinguished "by unity of title and possession of the two estates [the dominant and the servient], in one and the same person at the same time.” Ritger v. Parker, 8 Cush. 145 , 146 (1851). "When the dominant and servient estates come into common ownership there is no practical need for the servitude’s continued existence, as the owner already has the full and unlimited right and power to make any and every possible use of the land.” Busalacchi v. McCabe, 71 Mass. App. Ct. 493, 498 (2008), quoting from Ritger v. Parker, supra at 147.


² Massachusetts courts have recognized the doctrine of merger at least since the mid-nineteenth century.[4] See Ritger v. Parker, 8 Cush. 145, 146-150 (1851); *Atlanta Mills v. Mason,* 120 Mass. 244, 251-252 (1874); *Rice v. Vineyard Grove Co.,* 270 Mass. 81, 86 (1930); *Parkinson v. Assessors of Medfield,* 398 Mass. 112, 114 n.3 (1986); *Myers v. Salin,* 13 Mass. App. Ct. 127, 142 (1982); *Cheever v. Graves,* 32 Mass. App. Ct. 601, 606-609 (1992); *Murphy v. Olsen,* 63 Mass. App. Ct. 417, 420 n.12 (2005). The doctrine requires that a servitude terminates “when all the benefits and burdens come into a single ownership.” Restatement (Third) of Property (Servitudes) s. 7.5 (2000). A "servitude is a right, which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor.” Ritger v. Parker, 8 Cush. at 147. When the dominant and servient estates come into common ownership there is no practical need for the servitude’s continued existence, as the owner already has "the full and unlimited right and power to make any and every possible use of the land." Ibid.


give the right to do things on other people’s property, rather, it gives the holder of the restriction the right to prevent the owner from doing things they otherwise would have a right to do. The other way affirmative and negative easements differ, is that generally, an affirmative easement continues forever, until extinguished by some action or inaction. A negative easement, or restriction, is limited in time by statute (see generally MGL c. 184 sec. 23-33) and can only be extended by re-recording (and a showing that it still benefits the holder) unless it is a sec. 31-33, restriction signed by the appropriate officials that makes the restriction perpetual without the need for re-recording.

6. Can I convey the property subject to the easement or restriction, or convey or assign the easement or restriction, after merger has occurred? No. The various property interests all become one under merger. If the owner wishes to convey the property subject to the prior easement or restriction, or convey the prior easement or restriction, they cannot. They must create a new easement or restriction to convey. *4

7. Can merger be overcome, by a statute, or by agreement of the parties? The courts have consistently held that a statute must state explicitly it is overriding the common law; it will not be presumed or implied.5 It is doubtful whether parties can simply state that the common law does not apply and thereby override the common law of merger. The effect of any such language would put a cloud on the title and it would ultimately have to be determined in a court of law whether the intent of the parties as expressed in the CR is sufficient to override the common law.

8. Aren’t there statutes that relate to merger? Yes.

- There are statutory provisions such as contracts, or zoning where non-conforming lots held in common ownership will be merged to make them more conforming. Practitioners should be aware that this could affect the value of parcels being acquired. The appraiser and title examiner should be consulted to determine if lots have merged or are likely to be considered as merged, and if the development value should be calculated as merged single lots.

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*4 Under the common-law doctrine of merger, easements are extinguished "by unity of title and possession of the two estates [the dominant and the servient], in one and the same person at the same time." Ritger v. Parker, 8 Cush. 145, 146 (1851). "When the dominant and servient estates come into common ownership there is no practical need for the servitude’s continued existence, as the owner already has 'the full and unlimited right and power to make any and every possible use of the land.' " Busalacchi v. McCabe, 71 Mass. App. Ct. 493, 498 (2008), quoting from Ritger v. Parker, supra at 147.

*5 Without a clear expression from the Legislature breaking with the common law, the common law will apply. See Pineo v. White, 320 Mass. 487, 491 (1946) ("statute . . . not to be interpreted as effecting . . . a repeal of the common law unless [such] intent . . . is clearly expressed"). See also Kaplan v. Boureax, 410 Mass. 435, 442 (1991) (although "condominiums are essentially creatures of statute," when the statute is silent, "look to the common law" for guidance); Berish v. Bornstein, 437 Mass. 252, 263 (2002) (extending common-law implied warranty of habitability to residential condominiums). Neither G. L. c. 183A nor case law makes express exception to the doctrine of merger applying to the condominium form of ownership.

• Legal entities (such as land trusts or corporations) may merge, which is a separate subject, the technicalities of which I won't address here, except to the extent that charitable and government landholding agencies should examine the real property interests held by each to determine how the merger will affect those property interests. For instance, if land trust A is merging with land trust B, and land trust A holds a CR on land owned by land trust B, and the intent is to preserve the CR, then the parties to the merger should consider assigning the CR to a third party or making other arrangements to prevent the CR from merging into the fee. Likewise, any charitable trusts or restrictions on gifts or bargain sales of property interests held by the merging entities should be considered to ensure that those trusts or restrictions will not be violated by the merger.

• Statutory provisions relating to common law generally define, clarify or set up a procedure, and do not necessarily override the common law doctrines such as merger.

9. **Is Registered Land subject to merger?** Yes. Although Registered Land is protected or exempt from some common law property issues, such as adverse possession, merger applies to Registered Land. See the footnote for an explanation of Registered land.⁶

10. **Is there any support for the proposition where an owner has granted or bequeathed restricted land to the restriction holder, that the CR survives merger?** Yes. Possibly. There are several cases and journal articles suggesting that common law doctrines do not, or should not, apply to CRs because of the public interest. I am unaware of any Massachusetts case that directly addresses the effect of merger on CRs. Nevertheless, when faced with this situation, or if a restriction has been assigned to you after the restriction holder has acquired the fee, here are some cases you can use to argue that the common law of merger should not apply to the restriction and that the fee owner was legally able to grant or assign a valid and enforceable restriction despite owning both the fee and the CR:

- **Intent.** Some cases have held that the parties' intent overrides the common law.
- **Public interest:**
  - "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." *Bennet v. Com'r of Food & Agriculture*, 411 Mass. 1 (1991).
- **The common law doctrine of laches may not apply if there is a public interest, such a conservation restriction, involved."⁷

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⁶The registered land system under G. L. c. 185, §§ 26-56A was designed to provide certainty in title. See Lasell College v. Leonard, 32 Mass.App.Ct. 383, 387 (1992), quoting from McMullen v. Porch, 286 Mass. 383, 388 (1934) (purpose of land registration is "to provide a method for making titles to land certain and indefeasible")...[Chapter 185]...bars changes to title by certain common-law mechanisms, such as adverse possession, implication, or necessity...extinguishment by merger is not included in the statute among the enumerated theories barred from application by the registration system...[A] statute is not to be interpreted "as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed." Brear v. Fagan, 447 Mass. 68, 72 (2006), quoting from Pineo v. White, 320 Mass. 487, 491 (1946). There is no evidence that the Legislature specifically intended to abrogate the common-law doctrine of merger when it enacted the registration statute. The Legislature was at liberty to include a provision protecting easements appurtenant to registered land from extinguishment by merger occurring after the original registration if it desired. It did not do so. Absent specific language, we will not presume legislative intent and will not read the statute to override the common law in this instance." *Williams Bros. Inc. of Marshfield v. Peck*, 81 Mass. App. Ct. 682, 684-685 (2012)

• The common law doctrine of estoppel also should not be applied to CRs.8

Practitioners should not rely on opinions in law journals, articles, or cases from other states, because states vary in their treatment of restrictions and merger, some states even have laws preventing the merger of conservation easements.9 However, these sources can provide good reasoning and lend weight to arguments if you need to prove that merger should not be applied to a your CR. See, for example, “Conservation Easements and the Doctrine of Merger”, Nancy A. McLaughlin, Duke Journal of Law & Contemporary Problems, Vol. 74, 2011

11. Are there any other instances of merger I should be aware of? Yes. In contracts, the doctrine of merger works to merge all prior discussions, agreements, promises, and obligations of either party. If that is the intent, language to that effect should be used just to avoid a later dispute. If a practitioner has negotiated certain terms and wants to ensure that they can enforce the agreements, they should consult with counsel to ensure that the agreements survive the execution and recording of the deed. This is particularly important in purchase and sale agreements, which generally state that all agreements merge when the deed is signed. If a land trust is selling a property with the understanding that the new owner will put a CR on the property, it is very important to ensure that occurs.10

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8 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." LaBarge v. Chief Administrative Justice of the Trial Ct., 402 Mass. 462, 468-469 (1988) (not applying estoppel against Chief Administrative Justice of the Trial Court where doing so would defeat public interest in maintaining impartiality and integrity of offices of trial court). See Holahan v. Medford, 394 Mass. 186 , 191 (1985) (granting summary judgment for, and not applying estoppel against, assistant city solicitor where plaintiff was injured by printing press in public school and followed advice from assistant city solicitor instead of following statutory requirements for bringing a lawsuit); Cellarmaster Wines of Mass., Inc. v. Alcoholic Bevs. Control Commn., 27 Mass. App. Ct. 25 , 29 (1989) (not applying estoppel against Alcoholic Beverages Control Commission, which ordered plaintiff to stop advertising and conducting wine tasting sessions at locations off licensed premises, even if record supported plaintiff's position that plaintiff's marketing and licensing practices had been fully disclosed to the commission). As previously noted, although the WFTA is not a government entity, for purposes of enforcing a conservation restriction that is in the public interest, there is no difference between a governmental body and a private entity. Accordingly, estoppel does not apply in this case.


9 While anti-merger laws and cases are helpful, they are problematic because they leave the land without a non-owner party to enforce the restriction, and the land without protection. An owner who holds both the fee interest and the restriction is unlikely to sue him or herself for violating the restriction, or to refuse permission for inappropriate amendments or extinguishment of the restriction. Therefore, in Massachusetts it is required that a non-owner always be at least a part-holder of the restriction and the non-owner makes the determination of whether a violation has occurred or whether to pursue legal action to enforce the restriction.

10 The better way to do this is to reserve a CR to the land trust when conveying the land, or to have a fully signed and executed CR ready to be recorded immediately subsequent to the deed.