ARTICLE:
WHEN LOGIC AND PROPORTION FALL: DO POLICY OBJECTIVES OVERRIDE COMMON RULES OF CONVEYANCING FOR CONSERVATION EASEMENTS?

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The Second District Court of Appeal's decision in *Canyon Vineyard Estates I, LLC v. DeJoria*[1] (see summary at page 544, below) sidesteps several potentially troublesome conveyancing issues by focusing on the statutory authorization for "conservation easements" and giving only limited attention to more prosaic principles of traditional California real property law. The decision upholds the continued effectiveness and enforceability of restrictive covenants limiting use of the property to open space and natural habitat preservation, which were contained in a grant deed of fee simple title to 400 acres of coastal property, on the theory that the deed actually conveyed both the fee simple title and a statutory conservation easement, evidently *to the same grantee.* It further concludes that these distinct interests in the same parcel of real property, although held by the same party, would not "merge" in such a manner as to make the conservation easement go away after foreclosure of a deed of trust encumbering the grantee/easement holder's interest. It thus goes on to find that the open space restrictions of this "conservation easement" remain enforceable against a purchaser in foreclosure under a deed of trust encumbering the grantee's estate, which had financed the purchase of the fee interest in the property by that same grantee. This holding is based apparently on the court's unstated assumption that the deed of trust had not encumbered the grantee's interest in the "conservation easement" when the grantee of the deed next executed the deed of trust encumbering the fee interest in the property. (The *grantor* had subordinated its rights of enforcement of the "conservation easement" under the deed to the deed of trust, but the grantee, according to the court, had not.) Somehow the failure of the grantee, who executed the deed of trust, to also "subordinate" its rights under the conservation easement to the deed of trust, meant the conservation easement would survive foreclosure as a continuing easement held by the grantee enforceable against the purchaser in foreclosure of the grantee's fee

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simple ownership interest in the property—a conclusion that is hard to reconcile with any ordinary understanding of real property security transactions.

The court reached this conclusion without identifying specifically what had actually been encumbered by the deed of trust, nor who would hold the continuing right to enforce the restrictions and limitations imposed by the conservation easement on the underlying fee owner after foreclosure. Its opinion does not explain how the grantee's interest in the conservation easement itself, which it held under the same grant deed as its interest in the fee, did not therefore also pass to the purchaser in foreclosure under the deed of trust executed by the grantee in favor of a third-party lender in a concurrent transaction. Even though the deed of trust executed by the grantee ordinarily would have encumbered the trustor's entire interest in the property (although this is neither stated nor refuted in the court's opinion), the court focused on the subordination issue rather than upon what the grantee, as trustor, had actually conveyed to the trustee under the deed of trust. The court also dismissed the application of the doctrine of merger at the time of *creation* of the conservation easement as inapplicable because it was both inconsistent with the purpose of the transaction to preserve the property as open space and inconsistent with the policy objectives of the Conservation Easement law to preserve natural open space lands,[2] but the court did not analyze the potential application of the merger doctrine upon or after foreclosure, or whether the purchaser in foreclosure would have a stronger argument for "merger" than the original lender and beneficiary of the deed of trust.

The language and format of the grant deed are only described and not quoted in full in the court of appeal's opinion, but it is evident from the description of its contents given by the court that the deed did two things, all in the same instrument: (1) it conveyed a fee simple ownership interest in the affected property to a nonprofit organization, and (2) it also imposed a series of restrictive covenants limiting the land to open space uses, with provisions that the restrictions could be enforced *by the grantor* who conveyed the land to the nonprofit organization. The latter covenants were found by the court, however, to meet the minimal requirements for the creation of a "conservation easement," as defined by Civ. Code, § 815.1. As a result, the owner and grantor of the real property to the nonprofit entity claimed an $11 million-plus charitable deduction for the conveyance of the easement, while also receiving a $1 million-plus purchase price for sale of the fee interest in the land to the grantee. That purchase price was financed by a lender who received a deed of trust on the

property executed by the nonprofit grantee of the deed to the property. In a contemporaneous transaction, the former owner and grantor of the property as well as the grantee also executed a "subordination agreement," which the court of appeal characterized as subordinating the grantor's "rights to enforce" the open space restrictions on the land by causing a reversion of title to the grantor if they were violated by the grantee, but in no wise subordinating the "restrictions" or "easements" themselves to the deed of trust[3]—an interpretation which enabled the court to conclude that the conservation easement survived and remained enforceable against the purchaser in foreclosure of the property after the grantee defaulted on the purchase loan and the lender foreclosed.

That the transaction was structured to enable the grantor to take such a large charitable deduction for the "donation" of the use restrictions while also receiving a substantial cash purchase price for conveyance of the fee interest in the land clearly persuaded the trial court and the court of appeal that the parties intended to create a conservation easement, even though that term nowhere appeared in the grant deed. In fact, the grant deed also nowhere referenced the Civil Code provisions for the creation or operation of conservation easements. The court reached most of its conclusions by parsing the statutory definition of "conservation easement" (a term not mentioned or even referred to in the actual deed of record), and the specialized statutory scheme governing such "conservation easements." As a result, while the decision may be correct in terms of both the facts of the case and the applicable law, a number of the court's statements about the effect of the documents are inconsistent with the usual conventions and expectations about the effect of conveyancing documents. This is so particularly with respect to the effect of a deed of trust on the interests of the grantee of the fee interest coupled with a conservation easement, which is not explicitly addressed in the court's opinion.

The Conservation Easement law (Civ. Code, §§ 815 to 816) has been in place since 1979,[4] and with two narrow exceptions having to do with carbon sequestration of forestlands[5] and tax treatment under the Internal Revenue Code,[6] it has never been amended. With an economy of verbiage no longer common in California legislation, the law provides for the creation of "conservation easements," which it defines as constituting "any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such

land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition."[7] The statute does not prescribe the form or contents of a conservation easement, but it clearly contemplates that the grantee of a conservation easement must be a qualified nonprofit organization, or a public entity or recognized tribal authority,[8] and it requires that the easement be created and transferrable "by any lawful method for the transfer of interests in real property in this state."[9] Moreover, it provides, "[a]ll interests not transferred and conveyed by the instrument creating the easement shall remain in the *grantor* of the easement.. . ."[10] Beyond this, the only real requirements are that the easement must be "perpetual in duration"[11] and "binding on successive owners of the land."[12] The statute also expressly provides that the instrument creating the easement is subject to the recording laws and must be recorded in the office of the county recorder.[13]

The statutory references to the recording laws and to "any lawful method of transferring real property in this state," and the choice of a specific term, "easement" to describe the interest created, suggests that the drafters of the statute intended the usual rules and principles of conveyancing, as well as the usual rules governing priorities of interests, constructive notice, and the effect of instruments of transfer would apply to conservation easements. The statute also would seem to contemplate that the transferee and holder of the easement will not also be the fee owner of the land it encumbers, and the drafters of the statute probably did not anticipate a transaction such as that involved in the *Canyon Vineyard Estates* litigation. But the court's opinion, to the contrary, suggests the rules applicable to conservation easements are unlike those applicable to any other conveyance of an interest in real property—and governed by their own statutory scheme regardless of any other applicable provisions of law. This statutory scheme, in turn, is governed by the paramount policy objective of the law: "[W]e must liberally construe the statutory scheme governing conservation easements to effectuate the Legislature's purpose of encouraging individuals to voluntarily convey such interests to preserve California's natural open space."[14]

Indeed, the pivotal holding of the opinion is that the "separate statutory scheme" governing conservation easements, which states that conservation easements "shall be perpetual in duration,"[15] effectively makes irrelevant and inapplicable the guiding principle of the common law and the statute applicable to all other servitudes in California—Civ. Code, § 811—which provides that "the vesting of the right to the servitude and the vesting of the servient tenement in

the same person" automatically extinguishes the servitude.[16] Any contrary argument, says the court, "disregards the Legislature's creation of a separate statutory scheme, which expressly makes them [i.e., conservation easements] perpetual in duration" (quoting Civ. Code, § 815.2, subd. (b)).[17] With this sort of logic, almost any rule commonly applicable to real property transactions is effectively made inoperative if the effect would be to limit, extinguish, cancel, terminate, or reverse the effect of a "conservation easement" at any time after the moment of its inception. Given the Legislature's decision to call an open space restriction an "easement" and to place it immediately after the portion of the Civil Code applicable to "easements" generally (albeit as a different chapter of the Civil Code), the mere requirement that a conservation easement be "perpetual" seems a slender basis for finding section 811 inapplicable to such easements,[18] but that is the express holding of *Canyon Vineyard Estates*.[19] This might conceivably have been the intention of the drafters of the statute, but if the court is correct, then the Legislature has surreptitiously made a monumental change to what most real estate lawyers and judges would consider an elementary rule of real property law, that an easement cannot exist or be created in favor of a person who concurrently holds title to the fee.[20]

Also problematic is the court's agreement with the easement proponents that "the plain language of the grant deed demonstrates that DeJoria [the grantor] conveyed a conservation easement to MRT [the grantee]."[21] Here the court relies on the general language of the statute defining a "conservation easement" to conclude that the grant deed language stating that the land shall be held "in perpetuity as natural open space," as the court says, "*explicitly creates a conservation easement* under the legal definition" (emphasis added).[22] The term "explicitly," in this context, is a term of art. The court finds the "plain language" of the deed to "explicitly" create a conservation easement *because* the Conservation Easement law does not require the words "conservation" or "easement" to be included, based on the principle that "the label of a particular interest or lack of formal words of conveyance are not determinative" and "it is increasingly difficult and correspondingly irrelevant to attempt to pigeonhole" interests in land as "leases, easements, licenses, profits, or some other obscure interest in land devised by the common law in far simpler times."[23]

While the court's general point is well taken, to the extent that substance over form governs, and that the words used by the parties rather than the labels they choose are what matter, the opinion really boils down to a broad holding

that conservation easements themselves are a separate interest, sui generis, governed solely by their own statutory rules to the exclusion of any other conventional real property conveyancing principle or rule that might interfere with the statutory purpose of facilitating open space preservation. In fact, towards the end of its opinion, the court suggests that the fact the taxpayers have already "paid for" the land in the form of a tax deduction taken for the dedication of the conservation easement by the grantor precludes the argument that "stability, predictability, and free transferability of real property" would be compromised by any determination that the conservation easement would not survive foreclosure of the deed of trust granted to finance the sale.[24] In short, it would seem, policy objectives and selective quotations of statutory language can override the rules and conventions of conveyancing, including the recording laws, the notion of "notice," "priority," and "bona fide purchaser," and the "presumptions from a grant of real property," even though those conventions are also implicated by the statutory provisions that actually pertain to the transfer and recording of "conservation easements."

Several parts of the Conservation Easement law were undoubtedly intended to supersede some existing rules, particularly some doctrines that were long-standing impediments to the enforceability of easements or restrictions that did not meet certain traditional requirements of California real property law. Thus, the statute makes clear that there is no requirement that the instrument recite that it runs with the land, nor that the easement must be appurtenant to any other property, nor is it unenforceable by reason of lack of privity of contract or lack of benefit to particular property.[25] The law also says a conservation easement should not be deemed personal in nature and that it will constitute an interest in real property notwithstanding that it may only be negative in nature.[26] These provisions were clearly to get around a series of doctrines that had developed in California case law that treated covenants that burdened the land conveyed as not running with the land or binding on successors in interest without contractual privity, that refused to enforce as equitable servitudes some ongoing restrictions that did not "touch and concern" the land, follow a "common plan" for the mutual benefit of other properties, or meet other equitable criteria, that limited the types of easements that could be held "in gross" without a specifically identified parcel with rights of enforcement, and that refused to recognize "negative easements" as interests in real property but rather treated them as mere covenants, and therefore unenforceable, in many cases.[27]

In general, however, the Conservation Easement statute does not provide

that it preempts or overrides all principles of conveyancing and transfers of interests in real property. To the contrary, it provides that a conservation easement is "freely transferrable" for the purposes of conservation and preservation of land in its "natural, scenic, historical, agricultural, forested, or open-space condition" by "any lawful method for the transfer of interests in real property in this state"[28] and that "instruments transferring, assigning, or otherwise transferring conservation easements" not only must be recorded in the appropriate county recording office, but also "*shall be subject in all respects to the recording laws*."[29] These provisions would seem to place conservation easements on the same footing as other real property interests with regard to the effect of instruments of transfer or encumbrance, as well as the chain of title, and with regard to the usual principles of constructive or actual notice, priorities, and the effect on bona fide purchasers of off-record agreements and transactions under California's race-notice scheme for determining the priorities of interests in real property, all of which are implicitly invoked by a reference to the "recording laws."[30] The court's opinion, however, generally overlooks or elides these principles whenever the effect might be to limit or terminate an unlabeled property interest it considers to be a "conservation easement" under the terms of the Conservation Easement law. Under the court's interpretation, although the court does not actually go so far as to say this in the opinion, the fact that a conservation easement is required by the statute to be "perpetual" effectively makes these other provisions of the statute irrelevant.

The prime example of this line of thinking is the court's treatment of the argument that one cannot create an easement in one's own property. The usual rule is that a fee owner cannot own an easement in its own property, and in such cases, the easement merges into the fee as a matter of law under Civ. Code, § 811. The court expressly rejects this as inapplicable to a "conservation easement." Its primary authority for this conclusion is the statutory language that conservation easements are required by the statute to be "perpetual," and it rejects cases that assert the fee owner can only convey a conservation easement where the fee owner conveys something less than fee title to the conservation easement holder[31]—on the somewhat tautological basis that such cases had not previously considered a situation where the fee owner conveyed both the fee and the easement to the same grantee in the same deed.[32] Up to now, most practitioners would have strictly avoided the creation of a purported easement in favor of the servient tenement owner, out of concern the servitude so created was ineffective as a matter of law. This case suggests a less cautious approach for

future easements involving open space preservation, while not acknowledging the impact on the usual expectations of a subsequent purchaser of the fee of such a surprising and arguably unpredictable interpretation of the law.

The court's focus on the separate and unique character of "conservation easements" also affects its analysis of the effect of the subordination agreement at the time the grant deed conveying the fee and creating the conservation easement was recorded, which was at the same time the deed of trust was placed on the property. In the court's view, a series of use restrictions contained in the grant deed, coupled with the grantor's right to recover title in case of the grantee's violation of those restrictions, were sufficient to create the conservation easement, even though there was no mention of the term "easement" or reference to the Conservation Easement law in the deed.[33] This conclusion is superficially supported by one or two cases cited by the court,[34] but the court does not address the peculiarity of such a provision when also contained in the same deed that conveys fee simple title to the grantee, which ordinarily would be a redundant and ineffective act due to the operation of Civ. Code, § 811. After determining that the restrictions in a conveyance of the fee that do not mention the term "conservation easement" nevertheless are effective to create a conservation easement that is governed by the specialized Conservation Easement law and its unstated preemption of Civ. Code, § 811, however, the court effectively chastises the parties for failing to have the grantee "subordinate" these restrictions to the deed of trust—an act that would be completely unnecessary if the restrictions only burdened the fee but did not constitute a separate and "perpetual" easement on the fee. The court reads the terms of the subordination agreement itself, which subordinated the grantor's rights to enforce the same restrictions (not denominated as easements) by exercising a right to cause a reversion of title to the grantor, as only purporting to subordinate the grantor's rights to enforce restrictions, not the "conservation easement" itself or the grantee's interest in it, to the deed of trust, and to assure only that the grantor's right to recover title is subordinate to the deed of trust beneficiary's right to enforce its lien. This would be correct as far as it goes, but the court's opinion does not describe what the granting clause and legal description in the deed of trust itself may have provided (or, in normal custom and practice, would be deemed to provide) with respect to the conservation easement.

The central problem with the court's opinion, at least as a guide for future transactions and disputes, is that it largely ignores the effect of the deed of trust itself on the grantee's interests in the property when the grantee, as trustor, exe-

cuted the deed of trust granting a security interest in the property in favor of the lender. The court's analysis appears not to take into account the likelihood that the deed of trust as a matter of law, and common practice, would have been deemed to encumber the entire interest of the trustor in the land, not solely the fee interest but any other rights that would be encompassed in the grant of "all right title and interest in and to the land," which would typically have been included in the deed of trust. It also does not take into account the question of what a third-party successor in interest, such as a successor to the beneficiary or a foreclosure sale purchaser, would deduce from the state of record title if that person had no direct knowledge of the otherwise undocumented "intent" of the parties to the subordination and deed of trust.

Ordinarily, there is no reason the trustor who is executing a deed of trust would ever execute a further "subordination agreement," subordinating its own rights in the property to the deed of trust it has executed contemporaneously as trustor, since that is what the deed of trust does in the first instance—it encumbers the trustor's interest and makes the entirety of that interest subject to the beneficiary's lien, and the purchaser in foreclosure receives title free and clear of any interest held by the trustor, or any grantee or successor of the trustor.[35] The usual rule, as a result of the typical form deed of trust language "granting" title to the trustee for the benefit of the beneficiary, is that a deed of trust ordinarily encumbers the entirety of the interest in the described property that is owned by the person who executes it, as trustor, unless specifically excluded.[36] Further, although it cannot encumber an interest not held by the trustor, the lien of the deed of trust will also attach to any interest in the property subsequently acquired by the trustor, under the doctrine of "after-acquired title."[37] In the *Canyon Vineyard Estates* case, the actual language of conveyance in the deed of trust is neither quoted nor described by the court, which merely notes that under the grant deed, the grantee received title "subject to restrictions of record"[38] and the lender's loan was "secured by a deed of trust."[39] If that is the only language modifying the grant of title to the purchaser who in turn executed the deed of trust creating a lien on the trustor's interest in the property, it would ordinarily be deemed to apply only to those restrictions of record that are senior in priority to the deed of trust *and not held by the trustor*. Unless the deed of trust in this case included a specific carve-out *excluding* the trustor's rights under the conservation easement, however they may have been denominated, the foreclosure of the deed of trust typically would automatically vest all of those rights, not solely the bare fee interest, in the purchaser in foreclosure.

However, the opinion does not describe the granting clause of the deed of trust nor the specific property description on which it operates, and only selectively mentions that the grant deed recites that it is "subject to restrictions of record" without indicating whether that means the grantee's rights in the conservation easement created by the restrictions are encumbered or excluded by the deed of trust.

By omission of any direct discussion of the relative priority or scope of the property interests encumbered by the deed of trust, the opinion leaves the impression that the rights of the easement holder in a conservation easement, once created, will never be subject to the lien of a deed of trust, but exist and remain forever as a separate interest unencumbered by the lien of the security instrument. This is contrary to the usual expectations of the parties to a security transaction and contrary to the ordinary and customary meaning of words of conveyance used in a deed of trust—and is seemingly contrary to the terms of Civ. Code, § 815.2, subd. (a), which provides that a conservation easement is transferrable "by any lawful method for the transfer of real property interests in this state." But it may logically be an unavoidable effective holding of the case, even though not explicitly stated.

The opinion also does not discuss the priority of the conservation easement in relation to the fee interest that was conveyed under the deed of trust, or whether the deed of trust, as to a bona fide purchaser or encumbrancer, would be considered junior or senior to the separation of title to the fee from the title to the conservation easement. In part it relies upon the testimony of an officer of the original lender that the parties' intent was not to affect the use restrictions, but only to assure that the deed of trust would be in "first lien position," and the further interpretation by the court that the *subordination agreement* contained "no operative language" whereby the *grantee,* MRT, had subordinated its rights under the "deed restrictions" to the deed of trust.[40] Ordinarily, however, anyone without "inside information" who only reviewed the public records would be surprised by the court's determination that the conservation easement had been created, was not subject to the deed of trust, and survived foreclosure unless the deed of trust itself specifically excluded the easement from its terms. If the easement in fact was excluded from the granting clause of the deed of trust, it would have been helpful for the court to say so. In point of fact, however, it is unlikely the parties would have thought to exclude an interest that they did not identify as an easement but only as a set of restrictions in favor of the grantor, not the grantee, of the deed. The grantee, of course, had no

need for an easement since it entirely controlled the fee, and the only party who would have an interest to enforce against the fee was the grantor, who subordinated these rights to the deed of trust, but under the court's analysis, the grantee apparently also still had an easement in its own property which the court assumes the grantee did not convey to the trustee under the deed of trust encumbering the fee.

Since the court's opinion never addresses specifically what the deed of trust may already have encumbered, regardless of what the original parties may have intended, the court also does not consider the actual priority of the conservation easement in comparison with other interests in the property, and gives no attention to the "relation back" rule that determines the priority of a purchaser in foreclosure's title. Under the "relation back" rule, the title of a foreclosure sale purchaser "relates back" to the condition of title encumbered by the deed of trust, and supersedes any intervening conveyances or encumbrances on the trustor's title.[41] This fundamental aspect of the law concerning California real property secured transactions is not mentioned or addressed in the *Canyon Vineyard Estates* decision. Rather, the court suggests that because the purchaser in foreclosure (through its managing entity) had knowledge of the fact the property was subject to the deed restrictions ultimately found by the court to constitute a conservation easement, that knowledge meant that, ipso facto, the purchaser in foreclosure was also subject to those restrictions.[42] The court appears to have rejected the purchaser's argument that in reviewing the restrictions the logical conclusion from past experience and the usual rules of conveyancing would have been that they were no longer enforceable after foreclosure. To this argument, the court simply asserts, without analysis of the deed of trust itself, that the conservation easement was not "subordinated" to the lien of the deed of trust.[43] In ordinary real property conveyancing law, that would be a complete non sequitur, because the deed of trust itself was all that was needed to "subordinate" the grantee/trustor's interest in the property by making both the fee simple and any easement it held subject to the lien in favor of the beneficiary and therefore transferrable to any subsequent purchaser in foreclosure.

There is no reason in the abstract why a subsequent purchaser of a promissory note secured by a deed of trust would be chargeable with off-record limitations on the extent of the title conveyed by the deed of trust of record. Apparently, though, the court considered the conservation easement to be an exclusion from the grantee's title that was established prior in time to the deed of trust.

The full rationale for that determination is left unstated, and the court relies upon the grantee's failure to subordinate the interest and the apparent intention of the original lender not to rely on the unencumbered value of the fee, although that intention was not apparent from anything in the public record of the transaction.

The opinion also leaves unclear the relationship between the original lender and the purchaser in foreclosure, and whether that knowledge should have been imparted to the purchaser in foreclosure or its manager, who had acquired the note and deed of trust in a post-origination transaction. The purchaser in foreclosure was an entity related to the entity that had purchased the beneficial interest in the note and deed of trust long after the conveyance occurred. The purchaser in foreclosure was aware of the deed restrictions through its management who conducted the foreclosure sale, and for this reason, in the court's view, it was that purchaser, not the proponents of the easement, who were trying to upset predictability and stability of land titles—"fundamentally, it is CVE [the purchaser in foreclosure] whose arguments conflict with the interests of stability and predictability."[44] But the mere fact a foreclosure sale purchaser is aware of limitations that appear to be of record but subsequent and subordinate to the deed of trust does not mean either that the deed of trust is somehow junior to those restrictions or that the foreclosure sale purchaser, with or without notice, is subject to the restrictions.[45] It is unclear whether the purchaser was related to the original lender or had any advance knowledge of the off-record information concerning the intention of the parties that was primarily relied upon by the court, so it is also unclear whether that party should have been entitled to rely on the state of record title, including the priority of interests of record as a bona fide purchaser or encumbrancer without notice of contrary information.

It is true that usually, the foreclosure sale purchaser's title is no better than that of the original beneficiary, and if the beneficiary had notice of the prior encumbrance or easement, then the purchaser's title will be subject to it as well, with or without notice.[46] But that principle is not included in the court's analysis, and even if it was, it would beg the question of the priority and scope of the interests conveyed by the deed of trust in the first instance. The initial question should have been whether the conservation easement was prior to the deed of trust or not, which in turn would depend on whether the deed of trust encumbered the entirety of the fee owner's interest, including its interest as

grantee of the conservation easement. This issue should not have been resolved solely by reference to the testimony of a representative of the original lender or to the fact a large tax deduction had been taken at public expense for the "perpetual" donation of open space, but rather upon a considered analysis of what the deed of trust actually encumbered, and whether, on foreclosure, both the "easement" and the fee interest were acquired by the purchaser and effectively merged into the purchaser's title. As noted, the court only discusses the merger issue in relation to the original creation of the easement, and not as to the effect of the trustee's deed conveying all of the property encumbered by the deed of trust to the purchaser in foreclosure. But its "merger" analysis seems to assume the conservation easement somehow was retained by the original grantee who executed the deed of trust encumbering its fee interest, and not encumbered by or sold in foreclosure under the terms of the deed of trust. By contrast, if the usual principles of construction of the granting clause in a deed of trust applied, the conservation easement would have been encumbered by the deed of trust and sold in the foreclosure sale, and the rights of the grantee under the conservation easement, by becoming vested in purchaser upon foreclosure, arguably should have merged without regard to the intent of the parties at the inception of the conveyance—or at least they would have merged in most other contexts, specifically by the operation of Civ. Code, § 811. This would be the usual result—unless the usual rules of priorities and notice to a subsequent purchaser or encumbrancer would deem the post-origination purchaser of the note and deed of trust to be on notice of the separation of the easement from title and therefore to its exclusion from the deed of trust itself.

The court's opinion thus gives no consideration to the important question of whether and to what extent someone reviewing the record should be able to make determinations from the documents and words used in the public records, as distinct from the separate, private, unrecorded and largely unstated intentions of the parties. The court does not say whether the statutory provision making conservation easements subject to the recording laws[47] carries any meaning beyond the bare fact of recording. Ordinarily, the fact that an instrument is legally required to be recorded, and the act of recording it, effectively make the instrument subject to the full panoply of principles that arise out of the recording laws, i.e., the question of what constructive notice or actual notice of the contents of a recorded instrument would impart to bona fide purchaser or encumbrancer, and the effect of those contents, if any, on a bona fide purchaser or encumbrancer without notice of the unstated intentions of the parties.[48] The

court does not address these issues at all in its opinion, leaving the impression that the policy of protecting natural open space overrides the usual rules and conventions for the conveyancing of real property, including the priorities and effect on successors in interest of off-record or on-record notices, as well as the rationale and logic of such rules and the exceptions that already exist for some of them. The paramount consideration, repeated several times in the opinion, is "our Legislature's express directive that the law of conservation easements should be construed liberally to encourage their creation and voluntary conveyance by landowners. ([Civ. Code,] § 816)."[49]

This writer intends no disrespect to the court of appeal, and the criticisms in this article are not as to the correctness of the ultimate decision. The court's application of special rules under the conservation easement law to the unprecedented factual circumstances of a "structured transaction" to create both a sale of the fee interest for cash and a tax deduction for a "donation" of the easement ultimately seems like the correct result. This would be so particularly if not only the original lender but also the successor beneficiary who purchased the lender's note and eventually foreclosed, as well as the purchaser in foreclosure and its management, all were fully aware of the full purpose and effect of the conservation easement documentation, and all of them knew and understood that from the inception of the transaction, the lender was not relying on anything more than the value of the fee interest subject to the restrictions in evaluating the collateral for its loan. This may have been the case, although that is not at all clear from the court's opinion. If all of that were true, however, then it would be accurate to conclude that the purchaser in foreclosure was merely seeking a windfall rather than actually misled as to the value of the promissory note and deed of trust its managing entity had purchased from the original noteholder. The court certainly seems to have assumed this, although the exact connections among the parties, and who knew what when, are not conveyed in a manner to clearly identify the principles of priority and notice that were at play.

To summarize, the case may have reached the right conclusion—and certainly advances the policy objectives of the conservation easement statute—but it creates a number of headaches for real estate practitioners trying to wrap their brains around the logic of the decision without also questioning whether any of the time-honored conventions and rules of conveyancing applicable in other contexts can ever apply to conservation easements. While appellate opinions generally should avoid deciding issues not before the court, and cannot be cited for matters not actually decided, by failing to give credence to arguments from

the usual expectations of the parties and the ordinary rules of conveyancing, this decision leaves a number of such issues open to doubt. And it may be considered to encourage future drafters of conservation easements and related documentation to perpetuate a potentially deceptive and difficult-to-decipher practice of transferring real property into open space preserves while also inducing lenders to finance the transfer without fully understanding that their collateral has little or no economic value due to the inability to lift the restrictions if the transferee (usually a nonprofit organization) fails to pay the secured debt. As a result, the broad-brush definition of special rules for instruments deemed to create conservation easements under *Canyon Vineyard Estates,* without taking into account the potential they might be argued for or applied in different situations, leaves the scope of these rules uncertain.

Canyon Vineyard Estates is a potentially misleading precedent if it is applied where the underlying facts and intentions of the parties may not be as compelling as they evidently were in this case. Perhaps more than anything, the holding that the specialized statutory provisions governing conservation easements apply to recorded instruments that don't even mention the term "conservation easement" or reference the Civil Code sections that authorize such easements, while generally supported by the statute and prior case law, creates a potential for inadvertent and unintended consequences. It creates a trap for the unwary grantor who, by attempting to limit the use of the property by a grantee, may unwittingly be creating a unique species of "easement" that, once granted, can never be disentangled from the property and becomes a permanent limitation on its own rights from the moment of inception—even if similar restrictions, not deemed to be a statutory "conservation easement," would always be subject to modification or termination if the usual rules of conveyancing were involved. It also creates a trap for the unwary purchaser or lender who might be persuaded to purchase or lend on property subject to restrictions that, in other contexts lacking the statutory imprimatur of "conservation easement," may well have been completely unenforceable as a matter of law, even against a party who was aware that the restrictions existed before acquiring its interest in the property.

ENDNOTES:

[1] *Canyon Vineyard Estates I, LLC v. DeJoria*, 78 Cal. App. 5th 995, 2022 WL 1565262 (2d Dist. 2022).

[2] *Id.* at ____, 2022 WL 1565262, *7.

[3]*Id*. at ____, 2022 WL 1565262, *8-*9.

[4]Civ. Code, §§ 815 to 815.11, 816.

[5]Civ. Code, § 815.11.

[6]Civ. Code, § 815.10.

[7]Civ. Code, § 815.1.

[8]Civ. Code, §§ 815, 815.3.

[9]Civ. Code, § 815.2, subd. (a).

[10]Civ. Code, § 815.4 (emphasis added).

[11]Civ. Code, § 815.2, subd. (b).

[12]Civ. Code, § 815.1.

[13]Civ. Code, § 815.5.

[14]*Canyon Vineyard Estates I, LLC v. DeJoria,* 78 Cal. App. 5th at ____, 2022 WL 1565262, *7 (2d Dist. 2022) (citing Civ. Code, §§ 815, 816).

[15]Civ. Code, § 815.2, subd. (b).

[16]Civ. Code, § 811.

[17]*Canyon Vineyard Estates I, LLC v. DeJoria*, 78 Cal. App. 5th at ____, 2022 WL 1565262, *7 (2d Dist. 2022).

[18]See discussion in *Scholes v. Lambirth Trucking Co.*, 8 Cal. 5th 1094, 1110-1111, 258 Cal. Rptr. 3d 812, 458 P.3d 860 (2020) (effect of common law terminology used in statutory provisions).

[19]*Canyon Vineyard Estates I, LLC v. DeJoria,* 78 Cal. App. 5th at ____, 2022 WL 1565262, *7 (2d Dist. 2022).

[20]See, e.g., *Mikels v. Rager*, 232 Cal. App. 3d 334, 359-360, 284 Cal. Rptr. 87 (4th Dist. 1991) (common owner of two parcels cannot create an easement over one for the benefit of the other while in title to both).

[21]78 Cal. App. 5th at ____, 2022 WL 1565262, *4-*6.

[22]*Id*. at ____, 2022 WL 1565262, *4.

[23]*Id.* at ____, 2022 WL 1565262, *5, quoting *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 36, 31 Cal. Rptr. 2d 378 (4th Dist. 1994).

[24]78 Cal. App. 5th at ____, 2022 WL 1565262, *10.

[25]Civ. Code, § 815.7, subd. (a).

[26]Civ. Code, § 815.2, subd. (c).

[27]For discussion of these limiting aspects of traditional California real property law, see generally 6 Miller & Starr, California Real Estate 4th, § 15:9 (affirmative and negative easements), §§ 16:4 to 16:6 (covenants running with the land), §§ 16:8 to 16:9 (equitable servitudes), § 16:27 (nature of the right to enforce restrictions; appurtenant to benefitted property).

[28]Civ. Code, § 815.2, subd. (a), referencing "the purposes stated in Section 815.1."

[29]Civ. Code, § 815.5, subd. (c).

[30]See generally 4 Miller & Starr, California Real Estate 4th, § 10:1 (rules governing priorities; relation to notice and recording), § 10:3 (effect of recording statutes on priority).

[31]*Canyon Vineyard Estates I, LLC v. DeJoria,* 78 Cal. App. 5th at ____, 2022 WL 1565262, *6 (2d Dist. 2022) (rejecting *Concord & Bay Point Land Co. v. City of Concord*, 229 Cal. App. 3d 289, 280 Cal. Rptr. 623 (1st Dist. 1991); *Wooster v. Department of Fish & Game*, 211 Cal. App. 4th 1020, 151 Cal. Rptr. 3d 340 (3d Dist. 2012); *Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.*, 100 Cal. App. 4th 973, 123 Cal. Rptr. 2d 226 (1st Dist. 2002)).

[32]*Canyon Vineyard Estates I, LLC v. DeJoria,* 78 Cal. App. 5th at ____, 2022 WL 1565262, *6 (2d Dist. 2022).

[33]*Id.* at ____, 2022 WL 1565262, *5.

[34]*Id.* at ____, 2022 WL 1565262, *5 (2d Dist. 2022) (citing, inter alia, *Building Industry Assn. of Central California v. County of Stanislaus*, 190 Cal. App. 4th 582, 595, 118 Cal. Rptr. 3d 467 (5th Dist. 2010)).

[35]*Hohn v. Riverside County Flood Control and Water Conservation Dist.*, 228 Cal. App. 2d 605, 613, 39 Cal. Rptr. 647 (4th Dist. 1964). See 5 Miller & Starr, California Real Estate 4th, § 13:252 (title of purchaser in foreclosure).

[36]See generally 5 Miller & Starr, California Real Estate 4th, § 13:18 (property interests that are lienable). E.g., *Trask v. Moore*, 24 Cal. 2d 365, 371, 149 P.2d 854 (1944); *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 560, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

[37]See 5 Miller & Starr, California Real Estate 4th, § 13:21 (after-acquired title).

[38]*Canyon Vineyard Estates I, LLC v. DeJoria*, 78 Cal. App. 5th at ____, 2022 WL 1565262, *1 (2d Dist. 2022).

[39]*Id.* at ____, 2022 WL 1565262, *2.

[40]*Id.* at ____, 2022 WL 1565262, *9.

[41]See discussion in 4 Miller & Starr, California Real Estate 4th, § 10:100 (priority of purchaser's title from a foreclosure sale; the "relation back" rule).

[42]See *Canyon Vineyard Estates I, LLC v. DeJoria*, 78 Cal. App. 5th at ____, 2022 WL 1565262, *10 (2d Dist. 2022).

[43]*Id.* at ____, 2022 WL 1565262, *8-9, 10.

[44]*Id.* at ____, 2022 WL 1565262, *10.

[45]E.g., *Fallon v. Triangle Management Services, Inc.*, 169 Cal. App. 3d 1103, 1106, 215 Cal. Rptr. 748 (2d Dist. 1985). See 4 Miller & Starr, California Real

Estate 4th, § 10:99, for extended discussion of the relative priority of a deed of trust, and § 10:100, for the priority of the purchaser in foreclosure's title.

[46]See 5 Miller & Starr California Real Estate 4th § 13:252 (priority of purchaser's title after foreclosure).

[47]Civ. Code, § 815.7, subd. (a).

[48]See 4 Miller & Starr, California Real Estate 4th, § 10:1 (rules governing priorities; relation to notice and recording), § 10:3 (effect of recording statutes on priority), § 10:7 (presumption of record title).

[49]E.g., *Canyon Vineyard Estates I, LLC v. DeJoria,* ____ Cal. App. 5th at ____, 2022 WL 1565262, *8, *10 (2d Dist. 2022).

