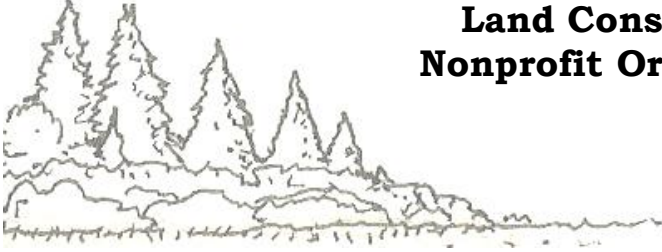


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Memorandum

TO: LT1 Board of Directors
LT2 Board of Directors

FROM: Robert H. Levin

RE: Unification Options

DATE: _____

Background

I have been retained by LT1 and LT2 to represent both organizations jointly in connection with a possible unification. To date I have had a couple meetings with ___ and ___, and they have asked me to prepare this Memo outlining the various structural possibilities for such unification. Please feel free to have ___ or ___ contact me with any questions you may have after reading this Memo. Furthermore, at this point

1

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in the process, please keep this Memo confidential within your respective Boards.

Analysis

Summary: A “merger” and an “asset contribution” are two similar but distinct processes for unifying two nonprofit corporations. For two key reasons outlined below, merger is my suggested approach for consummating the LT1 and LT2 unification. One uncertainty concerns the landlord’s approval of the transfer of the 99-year lease with LT1. In the event that such approval cannot be secured and the Boards are not comfortable proceeding with a merger, then a third possibility for the transaction would be a restructuring of LT1, whereby LT1 continues to exist in a simpler form, with LT2 becoming its sole member and taking control over LT1’s activities. Any of these three scenarios will require formal votes of the LT1 and LT2 Boards, followed by formal votes of each organization’s respective members, as well as extensive due diligence.

Merger v. Asset Contribution – To begin, let me briefly explain the technical difference between a merger and an asset contribution. A “merger” occurs when one corporation combines or folds into another corporation. The organization receiving the other organization continues to exist and is called the “surviving corporation” while the other organization ceases to exist as a separate entity. A section of the Maine Nonprofit Corporation Act expressly governs the merger process and its effects, and a Merger Agreement would spell out the basic terms of the transaction.

In contrast, an asset contribution occurs when an organization transfers all or most of its assets to a separate organization. An Asset Contribution Agreement details the terms of the transaction, and as a general matter any known or unknown liabilities are expressly excluded from the

2

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transfer. Both organizations can continue to exist after the transaction closes, although as a practical matter the organization that is transferring its assets typically dissolves immediately after the transaction closes. Unlike with the merger process, there is no specific statutory guidance for an asset contribution.

Which is Better for LT1 and LT2? – There are tradeoffs and pros and cons for each type of transaction. However, on the whole I believe that a merger is preferable.

A key reason to go with a merger is that the statute clearly states that any outstanding bequests to the merging organization automatically vests in the surviving organization. In other words, if LT1 has a donor who has left it a large bequest in her will, whether known or unknown by LT1, upon the closing of the merger this bequest automatically belongs to LT2 without anyone having to do anything. In contrast, this same scenario is much murkier with an asset contribution. Although the parties can attempt to transfer bequests, there is no enabling statute and thus it's possible that if a decedent's family wanted to go in a different direction with the bequest, they could ignore or challenge LT2's rights to the gift.

Another reason to prefer the merger structure is because there is a strong case to be made that no consent is required by the landlord to transfer the lease. Typically, if a lease requires landlord consent for a "transfer" to a new tenant, then such consent is clearly required for an asset contribution, because the lease is one of the assets being transferred. But in the context of a merger, there isn't any formal transfer because it's an entirely different transactional structure. LT1's lease with _____ states _____ has the right to approve if the tenant seeks to "assign, sublease, mortgage, or otherwise encumber" the lease. Although there isn't any direct case law on this issue in Maine, I'm confident that a merger doesn't fit

3

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within any of these explicitly stated kinds of transactions and thus no consent by ____ is required. LT1 might still seek to obtain ____'s blessing as a matter of courtesy, but it is not required under the terms of the lease.

Incidentally, what if, even though no consent is required by the landlord for a merger, the landlord indicates that it will oppose any attempt to achieve the unification via a merger without its consent? Hopefully we will never reach that point, but if we do, there is a viable third option to achieve a practical unification of operations. Under this third way, LT1 would continue to exist as a nonprofit corporation, but its membership would be restructured such that there are no longer any individual members, and instead LT2 became its sole member. In this way, the LT2 Board would assume control over LT1's operations, and LT1 staff could easily transfer to LT2's payroll. This would be a de facto unification in all but name. And it might need to be only an interim solution, if the landlord eventually changed its mind and consented to a formal merger.

An asset contribution does have one potential advantage over the merger, insofar as any liabilities or unwanted assets can be left out of the deal, thus protecting the interests of the transferee. This includes potential liabilities such as pending lawsuits against the transferring organization, as well as known and unknown tax or contractual liabilities. However, sound due diligence into LT1's books and records can go a long way towards understanding if any of these liabilities might exist. And LT1 can purchase tail policies for its insurances, to lessen the liability risk to LT2. Furthermore, the incidence of lawsuits against Maine nonprofit organizations is quite low, both compared to business entities and nonprofits in other states. Thus, the background risk of an unknown lawsuit is relatively low. On the whole, in my view the liability-limiting advantage of the asset contribution structure does not

4

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outweigh the two advantages of the merger process that I've discussed above.

LT2 is Better Positioned to Serve as the Surviving Organization

– If each Board agrees that the merger is the preferred way to proceed, then the question becomes which of the two organizations should stand in the shoes of the surviving organization. LT2 is in better position to serve in this role for a variety of reasons, but I'd like to mention two in particular: (1) LT2 owns many parcels and holds many conservation easements, whereas the only real property that LT1 owns is the leasehold interest and the _____ building. Thus, there are many fewer assets to change hands if LT1 merges into LT2. (2) LT2 is Accredited with the Land Trust Accreditation Commission. Past discussions with the Commission indicate that there is no effect on an Accredited organization's status as long as the combined organization continues to meet the Accreditation standards, which presumably will be the case here since LT2 wouldn't be acquiring any new properties or changing any of its policies and practices.

Next Steps – There are a variety of steps to the unification process, but here is a general overview of what will follow.

Case Statement and Frequently Asked Questions – ____ and ____ will prepare a document that outlines why the unification makes sense for each organization, and outlining the key issues to be addressed by the legal documents.

Due Diligence – Over the next couple months or so, I will be working with ____ and ____ to oversee and carry out the due diligence process. This process ensures that each organization is familiar with the assets and liabilities of the other organizations, so there are no surprises going into or succeeding the merger. My role here will be to represent each of the two organizations equally and without preference.

5

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Board and Membership Votes – At some point, I will draft a Merger Agreement and Articles of Merger (if indeed a merger is generally agreed upon as the best way to proceed) for the respective Boards to consider and vote on. If the Boards vote to approve, these will then be submitted to the respective members for consideration and approval. I will assist ____ and ____ in preparing meeting notices, as well as Board and Membership resolutions.

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