

----- Original Message -----

**From:** [jayer](#)

**To:** 'Barbara Aichinger'

**Sent:** Thursday, October 19, 2006 10:46 AM

**Subject:** RE: [SPAM] Fw: 554 Edgewater Drive - Governor's Island

Barbara—

I have reviewed the file and maps that we have in our office and cannot see anything that suggests the former lots were merged by the property owner. The lots show up as merged even on some of the older tax maps, but the maps clearly show signs that there were once two lots (see "9" and "10" notations on the attached map). I presume from this that the lots were merged involuntarily at the time that the Town had a law requiring such automatic mergers. The courts threw out that law and I believe all automatic mergers were effectively voided. In fact, in the cases I've seen, the Town never fully executed the mergers by recording them at the registry. The lots only show up as merged on the Town's tax maps which I don't believe fully accomplishes the merger.

It appears that your claim to having two separate lots instead of one is legitimate.

Please let me know if I can be of further assistance.

- John Ayer

JOHN B. AYER, AICP  
DIRECTOR OF PLANNING AND LAND USE

TOWN OF GILFORD  
GILFORD, NH 03249  
603-527-4727 PHONE  
603-527-4731 FAX

-----Original Message-----

**From:** Barbara Aichinger [mailto:aichinger@comcast.net]  
**Sent:** Friday, October 13, 2006 9:22 AM  
**To:** [Jayer@gilfordnh.org](mailto:Jayer@gilfordnh.org)  
**Subject:** [SPAM] Fw: 554 Edgewater Drive - Governor's Island

John,

FYI...your .net e-mail is bouncing...I will try the .org

Regards,  
Barb Aichinger  
----- Original Message -----

**From:** [Barbara Aichinger](mailto:Barbara Aichinger)  
**To:** [appraisal@gilfordnh.org](mailto:appraisal@gilfordnh.org) ; [jayer@gilfordnh.net](mailto:jayer@gilfordnh.net)  
**Sent:** Wednesday, October 11, 2006 1:06 PM  
**Subject:** Fw: 554 Edgewater Drive - Governor's Island

Hello John and Will,

Please see the below E-mail thread that we started last spring. I am still trying to resolve this and would like your help. I know you all were very busy over the summer so I waited until now hoping to get your time. The bottom line is I want my two waterfront parcels to build a home for my mother next to mine. From our previous conversations it appears that no one ever requested a voluntary merging on these two parcels. If you look at the old Governor's Island approved plans you will clearly see these as two lots.

Any help you could give me would be most appreciated. If you could forward this to Dave Andrade as I do not have his e-mail I would appreciate it.

Regards,  
Barbara Aichinger  
554 Edgewater Drive  
Cell: 603-548-5037  
221-007-000 (Deed Book 1728 and 0695)

----- Original Message -----

**From:** [Patrick Wood](#)

**To:** [Barbara Aichinger](#)

**Sent:** Wednesday, April 25, 2007 1:32 PM

**Subject:** RE: Putting the unmerged parcel in another name

Barbara – which lot has your house on it and which is the “unmerged” lot?

**From:** Barbara Aichinger [mailto:[aichinger@comcast.net](mailto:aichinger@comcast.net)]

**Sent:** Tuesday, April 24, 2007 9:58 PM

**To:** Patrick Wood

**Subject:** Putting the unmerged parcel in another name

Pat,

How much will it cost to put the unmerged parcel into my name and not the name of my revocable trust as it is today. Also how long will this take? We want to finance against the new parcel so we need it kinda quick.

Regards,  
Barb Aichinger

----- Original Message -----

**From:** [Patrick Wood](#)

**To:** [Barbara Aichinger](#)

**Sent:** Tuesday, May 15, 2007 1:23 PM

**Subject:** RE: Deed you prepared

Barb – the deed was from you as trustee of the trust. I suppose the only thing we could have said is that this is not homestead but your address is Bedford. Oh, well.

As far as having both you and Ed on the hook, well, such is life in the world of financing.

Patrick H. Wood

Patrick Wood Law Office, PLLC

555 Main Street

Laconia, NH 03246

603.524.1446

603.524.1788 (fax)

[phwood@patrickwoodlaw.com](mailto:phwood@patrickwoodlaw.com)

**From:** Barbara Aichinger [<mailto:aichinger@comcast.net>]

**Sent:** Tuesday, May 15, 2007 10:14 AM

**To:** Patrick Wood

**Subject:** Deed you prepared

Hello Pat,

Our bank had a problem with the deed you prepared. Something about me not being a 'married woman'??? Anyway, the bank wants to redo the deed and transfer it into both mine and Ed's name since they want us both on the hook to pay. They are having the title company doing this. This is just an FYI...thought you might need to know.

Regards,  
Barb

PATRICK WOOD LAW OFFICE, PLLC  
555 Main Street  
Laconia, New Hampshire 03246

[phwood@patrickwoodlaw.com](mailto:phwood@patrickwoodlaw.com)

Tel. 603.524.1446  
Fax: 603.524.1788

May 29, 2007

Attorney Walter L. Mitchell  
Mitchell & Bates, PA  
25 Beacon Street East  
Laconia, NH 03246

RE: Barbara Aichinger  
Gilford Tax Parcel 221-007/554 & 558 Edgewater Drive

Dear Walter:

As we discussed briefly this afternoon, we represent Ms. Aichinger. Ms Aichinger began communicating with the Town of Gilford in April of 2006 concerning the property that she owns on the lakeside of Edgewater Drive on Governor's Island. After considerable communication between Ms. Aichinger and the Town Appraiser, Wil Corcoran and Mr. John Ayer, the Director of Planning and Land Use, Ms Aichinger received communication from Mr. Corcoran dated October 19, 2006, a copy of which I am sending to you, indicating that he highly recommends that these involuntary mergers be separately assessed subject to evidence that would indicate otherwise. Similarly, on January 15, 2007, Mr. Ayer sent a letter to Ms. Aichinger confirming that this tax map which consists of two separately described lots, Lot 9 and Lot 10, would be separated on the tax map into 554 Edgewater Drive (Lot 9) and 558 Edgewater Drive (Lot 10). I am also enclosing a copy of that letter along with the attached copy of part of the tax map that shows the new addresses for these two separate lots.

At the time of that letter, these two parcels were held of record by Barbara P. Aichinger, Trustee of the Barbara P. Aichinger Revocable Trust by deed from Elizabeth Altman dated 20 February 2002, recorded in Book 1728, Page 695. At the request of Ms. Aichinger, I prepared a deed from her as trustee to herself individually for Lot 9. That deed was dated May 3, 2007, and recorded in the Belknap County Registry of Deeds in Book 2403, Page 141.

Prior to that deed being prepared, signed and recorded, Ms. Aichinger had contracted to have the existing house on Lot 10 removed, a new septic system installed, and a new foundation built. In addition, they have contracted with Epoch Homes to have a new house brought to that site and installed on Lot 10. I'm enclosing for your information copies of photographs showing that new foundation. Ms. Aichinger has received all of the appropriate permits from the Town for both the demolition and construction.

Attorney Walter Mitchell  
May 29, 2007  
Page Two

On Lot 9 there is a cottage and camp and I'm enclosing copies of photographs of the cottage that currently exists on Lot 9. In addition, they contracted with the person who prepared the foundation for the house on Lot 10 to blast an area for a foundation on Lot 9. I am also enclosing copies of photographs that show the area that has been prepared for the foundation on Lot 9.

Ms. Aichinger has a financial commitment from a bank to loan her a substantial amount of money based upon an appraised value of Lot 9 so that she can pay for the construction of the new house and the foundation work on Lot 10. She also has received an offer from someone to purchase Lot 9. In addition, last week she received a driveway permit from the Town of Gilford for Lot 9.

I have asked my client to send me information on expenses that they have incurred and I am sending you a copy of the expenses incurred to date, as well as, the commitments that they have with regard to the home that is being brought onto the site. As you can see, they have already expended over \$180,000.00. The house that is being delivered in the middle of June will need to be completed and there is substantial cost in doing that. Their estimate of total construction costs will be over \$1,200,000.00, most of which they have either already incurred or have made contractual commitments to complete. The house, as I indicated to you, is an off-site built house and is scheduled to be delivered in the middle of June. That financial commitment has been made as you can see from the \$80,000.00 down payment that was paid at the end of April.

As difficult as this is, it certainly appears to me that they have acted in a reasonable manner in reliance upon the communications they received from the Town over the extended period of the negotiations and discussions beginning in April of 2006. As you can see from the photographs substantial work has been done for the new house, there is an existing cottage on Lot 9, and you can see that they have done substantial excavation work to prepare for the foundation for a new house on Lot 9. Finally, you can see that they have already expended substantial amounts of money to prepare both of these lots. They have also made substantial financial commitments contractually that are definitely to their detriment if the Town reverses its position.

Obviously, this is a matter of great concern to my client. We would like to have this resolved as quickly as possible and without recourse to litigation. Anything you can do to help us in this matter would be greatly appreciated.

Very truly yours,

Patrick H. Wood

Enclosures

cc: Ms. Barbara Aichinger

**AGREEMENT**

**PARTIES:**

1. The **TOWN OF GILFORD**, a New Hampshire municipal corporation, having its principal place of business at 47 Cherry Valley Road, Gilford, NH 03249
2. **BARBARA P. AICHINGER, TRUSTEE OF THE BARBARA P. AICHINGER REVOCABLE TRUST**, of 36 Olde English Road, Bedford, Hillsborough County, New Hampshire 03110, and **BARBARA P. AICHINGER**, individually, of 36 Olde English Road, Bedford, Hillsborough County, New Hampshire 03110

**PROPERTY:**

1. 554 Edgewater Drive, Gilford, NH, Tax Map No. 221.007-000, which parcel is owned by BARBARA P. AICHINGER
2. 558 Edgewater Drive, Gilford, NH, Tax Map No. 221.007-001, which property is owned by BARBARA P. AICHINGER, TRUSTEE OF THE BARBARA P. AICHINGER REVOCABLE TRUST

**AGREEMENT:**

1. The Parties agree that the Property consists of two separate and distinct parcels of land and the Town has and will continue to assess them as separate tax parcels under NH RSA 75:9.
2. If either of the Parties are sued by a neighbor to the Property or anyone else claiming the two lots should be merged, Ms. Aichinger, both as trustee and individually, shall have the right to join the Town in the action or shall have the right to intervene in the action, whichever might be appropriate.
3. The Town agrees that it shall take no action and shall not support any action to merge the two lots nor shall it participate in any efforts to merge the two lots.
4. This Agreement shall run with the land and may be recorded in the Belknap County Registry of Deeds.

**TOWN OF GILFORD**

By: *Alice H. Boucher*  
Name: Alice H. Boucher  
Its Duly Authorized Selectman  
Date: 6/21/07

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its Duly Authorized Selectman  
Date: \_\_\_\_\_

By: *Connie Grant*  
Name: Connie Grant  
Its Duly Authorized Selectman  
Date: 6/21/07

**THE BARBARA P. AICHINGER REVOCABLE TRUST**

By: *Barbara P. Aichinger Trustee*  
Name: Barbara P. Aichinger  
Its Duly Authorized Trustee  
Date: June 18 2007

*Barbara P. Aichinger*  
Barbara P. Aichinger, individually  
Date: June 18 2007

STATE OF NEW HAMPSHIRE  
COUNTY OF BELKNAP


The foregoing Agreement was acknowledged before me this 21<sup>st</sup> day of June 2007 by ALICE BOUCHER, CONNIE GRANT, and \_\_\_\_\_, the duly authorized Selectmen of the Town of Gilford, a New Hampshire municipal association, on behalf thereof.



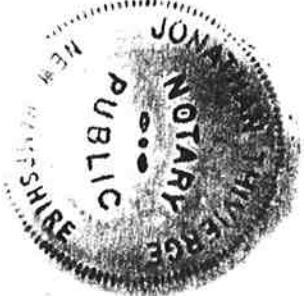
Notary Public/Justice of the Peace  
My Commission Expires: JUNE 24, 2012

STATE OF NEW HAMPSHIRE  
COUNTY OF Hillsborough

The foregoing Agreement was acknowledged before me this 18<sup>th</sup> day of June 2007 by Barbara P. Aichinger, both individually and as trustee of The Barbara P. Aichinger Revocable Trust, a New Hampshire trust, on behalf of said trust.



Notary Public/Justice of the Peace  
My Commission Expires: 11/29/2011





----- Original Message -----

From: "Patrick Wood" <[PatrickWood@patrickwoodlaw.com](mailto:PatrickWood@patrickwoodlaw.com)>  
To: "Walter Mitchell, Mitchell & Bates PA" <[wmlaw@metrocast.net](mailto:wmlaw@metrocast.net)>  
Cc: "Barbara Aichinger" <[aichinger@comcast.net](mailto:aichinger@comcast.net)>; "Ed Aichinger" <[eda@futureplus.com](mailto:eda@futureplus.com)>; "Simone Cushing" <[SimoneCushing@patrickwoodlaw.com](mailto:SimoneCushing@patrickwoodlaw.com)>; "Lee Harrington" <[LeeHarrington@patrickwoodlaw.com](mailto:LeeHarrington@patrickwoodlaw.com)>; "Jane Wood" <[JaneWood@patrickwoodlaw.com](mailto:JaneWood@patrickwoodlaw.com)>  
Sent: Thursday, September 13, 2007 2:14 PM  
Subject: RE: Aichinger information request...

Walter - I shall do so, in addition to sending her a copy of your e-mail. Thank you.

Patrick H. Wood  
Patrick Wood Law Office, PLLC  
555 Main Street  
Laconia, NH 03246  
603.524.1446  
603.524.1788 (fax)  
[phwood@patrickwoodlaw.com](mailto:phwood@patrickwoodlaw.com)

-----Original Message-----

From: Walter Mitchell, Mitchell & Bates PA [mailto:[wmlaw@metrocast.net](mailto:wmlaw@metrocast.net)]

Sent: Thursday, September 13, 2007 10:40 AM  
To: Patrick Wood  
Subject: FW: Aichinger information request...

Pat -- Please advise your client on the inappropriateness of her communicating directly with this office. I have no desire for it, and the town certainly doesn't want to pay for it.

Thank you.

Walter

-----Original Message-----

From: Barbara Aichinger [mailto:[aichinger@comcast.net](mailto:aichinger@comcast.net)]  
Sent: Wednesday, September 12, 2007 5:30 PM  
To: Patrick Wood; Walter Mitchell, Mitchell & Bates PA  
Cc: Simone Cushing; Lee Harrington; Jane Wood; [laslaw@metrocast.net](mailto:laslaw@metrocast.net)

Subject: Re: Aichinger information request...

Hello Mr. Mitchell,

It is surprising to me that Mr. Ayer has changed his 'impressions' of the unmerger process in Gilford as we spoke of it several times over the past year and he was quite certain. His opinion was bolstered by the Building Inspectors opinion (as reflected in the April 19th letter from Attorney Brouillard to you) and the opinion of the Town Appraiser Wil Corcoran (see also attached letter). I find it difficult to believe that all three of these town officials were wrong when it came to Gilford's process of unmerging buildable grandfathered parcels. It is clear to me that they had a procedure for investigating the situation, conferring on it and then making a decision. A few weeks back I dropped off at your office my legislative research on HB 390. I have also spoken with a few of the legislators involved in that and Attorney Waugh who helped sponsor the bill.

My impression is that if we are not estopped by the Gagne case then John Ayer, as a town official, had every right to unmerge parcels per HB 390 and the second sentence of RSA 75:9 since this is the exact situation for which that legislation was intended. He had a process, did his research, conferred with other town officials and made a decision.

As to how I found some of the unmerges. It appears that while the planning department nor the assessors department made actual lists of unmerges over the years they did leave some clues. When the unmerged parcel was entered into the assessors data base on occasion the person entering the new record put a notation in the notes field. It was a search on these fields that lead me to the list. It is very probably that I did not find them all since no notation may have been made and any conversion of the database to new software could have negated those fields.

Mr. Mitchell, although I am not an attorney, I like to play one when I am being sued ;-), so please excuse me for offering up my opinions.

Regards,  
Barbara Aichinger

----- Original Message -----

From: "Patrick Wood" <[PatrickWood@patrickwoodlaw.com](mailto:PatrickWood@patrickwoodlaw.com)>

To: "Walter Mitchell, Mitchell & Bates PA" <[wmlaw@metrocast.net](mailto:wmlaw@metrocast.net)>

Cc: "Barbara Aichinger" <[aichinger@comcast.net](mailto:aichinger@comcast.net)>; "Simone Cushing" <[SimoneCushing@patrickwoodlaw.com](mailto:SimoneCushing@patrickwoodlaw.com)>; "Lee Harrington" <[LeeHarrington@patrickwoodlaw.com](mailto:LeeHarrington@patrickwoodlaw.com)>; "Jane Wood" <[JaneWood@patrickwoodlaw.com](mailto:JaneWood@patrickwoodlaw.com)>  
Sent: Wednesday, September 12, 2007 3:07 PM  
Subject: RE: Aichinger information request...

Walter - my client, the super sleuth, has found what we believe are about a half dozen "unmerger" situations in Gilford. I am attaching her list that I just got on Monday.

Patrick H. Wood  
Patrick Wood Law Office, PLLC  
555 Main Street  
Laconia, NH 03246  
603.524.1446  
603.524.1788 (fax)  
[phwood@patrickwoodlaw.com](mailto:phwood@patrickwoodlaw.com)

-----Original Message-----

From: Walter Mitchell, Mitchell & Bates PA [<mailto:wmlaw@metrocast.net>]

Sent: Wednesday, September 12, 2007 2:19 PM  
To: Patrick Wood  
Cc: John Ayer  
Subject: Aichinger information request...

Pat -- A few weeks back you and I had a discussion which followed up on your letter to me dated 8/8/07.

I have discussed with Mr. Ayer his earlier impression that in the past there have been other situations similar to one which involved your client's property. Despite his earlier impression, his present impression is that there are none.

He reports that at the time he was thinking of a situation with a property on Dow Road. However, when he subsequently went back to check those background facts he discovered that situation did not involve a "merger", but rather a mix-up with respect to addresses. He will pull

out those details and provide them to me in case anyone wishes to review paperwork.

Initially he was also under the impression that similar situations had also arisen in Gunstock Acres. However, he is unable to recall the specifics or the specific property, to test the accuracy of that memory. He will, however, keep trying to remember.

Sorry that we are not able to supply more detail at this time.

Walter

Walter L. Mitchell  
Mitchell & Bates, P.A.  
25 Beacon Street East  
Laconia, NH 03246  
(603) 524-3885  
(603) 524-0745 Fax  
[wmlaw@metrocast.net](mailto:wmlaw@metrocast.net)



# TOWN OF GILFORD

Recreation Center of New Hampshire

## DEPARTMENT OF PLANNING & LAND USE

Barbara Aichinger  
36 Olde English Rd.  
Bedford, NH 03110

October 23, 2007

Re: Amendment of permit # 2005002445, pertaining to construction of a dwelling at 554 Edgewater,  
Tax Map 221-007.

Dear Barbara,

I am in receipt of your letter dated 10/22/07 requesting that your permit listed above be amended to reflect replacing and enlarging an existing dwelling versus constructing a new single family home.

As I was not aware at the time of your application submission that the existing structure on the property was actually a dwelling, a new construction permit was issued.

In order to prevent the property from falling under a nonconforming classification with Gilford Zoning Ordinance Article 6.18, Density of Dwelling Units to Land Area, you must complete and return the attached Demolition Permit Application to reflect removal of said preexisting dwelling prior to the issuance of an occupancy permit for the new house, to insure only one dwelling will exist on the property, or represent replacing a grandfathered dwelling in the case of a single lot situation.

Whether this subject property is considered a separate lot or is determined to be part of the property at 558 Edgewater (221-007.001), you are permitted to replace, enlarge, and/or relocate a preexisting dwelling as long as it complies with all other requirements.

Permit # 2005002445 is hereby on hold until the properly completed Demolition Permit Application is received with the \$20.00 fee, at which point the building permit will be amended to reflect a structure replacement.

Initially, a warning was placed on the permit to insure any unsuspecting party of the impending court action. As I indicated to Ed that I am not a mind reader and cannot predict the outcome of any court action, therefore, the worse-case scenario was conveyed in the warning to indicate what a court order could reflect and that the Town will not accept liability should such a decision be rendered.

Once the demolition application is received and issued, a revised replacement building permit will be issued.

I hope this clarifies your concerns. Please contact this office with any other questions or concerns.

Sincerely,

David Andrade, Gilford CEO

BUILDING • CONSERVATION • HEALTH • HISTORIC PRESERVATION • PLANNING • ZONING

47 CHERRY VALLEY ROAD • GILFORD, NH 03249 • PHONE: (603) 527-4727 • FAX: (603) 527-4731

----- Original Message -----

**From:** [dandrade](#)

**To:** [Barbara Aichinger](#)

**Sent:** Monday, July 16, 2007 8:42 AM

**Subject:** RE: 350 Edgewater

Hi Barb, The Town does have a problem with two houses on one lot, however, the Town is bound to the fact that a second dwelling existed prior to zoning. Under article 9 of the zoning, a preexisting nonconforming structure may be expanded. If the dwelling did not exist a permit could not be issued without subdividing the lot. I hope this info was helpful....Dave A.

-----Original Message-----

**From:** Barbara Aichinger [mailto:[aichinger@comcast.net](mailto:aichinger@comcast.net)]

**Sent:** Thursday, July 12, 2007 5:29 PM

**To:** David Andrade

**Subject:** 350 Edgewater

Hello Dave,

I have a question about Guest Cottages. I see that the Deutsch's have built a good size guest cottage that is bigger than the main house. BTW they are on a 'merged' double lot. My question does not have anything to do with the lot but it has to do with the Guest Cottage. I take it the town has no problem with 2 houses being on one large lot?

Regards,  
Barb Aichinger



THE STATE OF NEW HAMPSHIRE

BELKNAP, S.S.

SUPERIOR COURT

Rita Sutton, by and through her attorney-in-fact, Glenn Sutton

v.

Town of Gilford,  
Barbara Aichinger,  
and  
Governor's Island Club, Inc.

Docket No. 07-E-146

**TOWN OF GILFORD'S OBJECTION TO BARBARA AICHINGER'S  
MOTION FOR SUMMARY JUDGEMENT**

NOW COMES the Town of Gilford, by and through its attorneys Mitchell & Bates, P.A., and in objecting to the motion for summary judgment filed by Barbara Aichinger, states as follows:

1. The town is in a somewhat curious position. It supports the relief sought by Ms. Aichinger--summary judgment in her favor. However, it cannot support the legal theory upon which she requests that relief, because that theory, if found valid by this court, will have ongoing future consequences for the town.

2. The Town of Gilford zoning ordinances, in one form or another, have historically provided for the merger of abutting nonconforming lots held in common ownership.

3. This is something which is permitted by law, since the general goal of zoning is to reduce nonconformities to eventual elimination. See, e.g., Hurley v. Town of Hollis, 143 N.H. 567 (1999).

4. Ms. Aichinger argues that the decision of whether to merge nonconforming



lots in the same ownership is one to be made only by the landowner, and that such lots cannot be automatically merged by zoning provisions.

5. Such a position is not supported by the legal authorities cited in the motion.

6. Ms. Aichinger first cites the legislative history of RSA 674:39-a. As an initial matter, there is no authority to reach the legislative history, because there has been no ambiguity identified in the statutory language, which gives authority for owners of two abutting parcels of land to merge them, but speaks not at all to a municipality's ability to require merger of two abutting nonconforming lots held in common ownership. See, e.g., Appeal of Public Serv. Co. of N.H., 125 N.H. 46, 52 (1984).

7. Even if it were appropriate to examine the legislative history, however, the quoted legislative history of RSA 674:39-a does not support Ms. Aichinger's position. First, it addresses a section of the proposed statute which was not adopted. Second, it merely confirms that nonconforming uses of property cannot be required to cease. It speaks not at all to nonconforming lots and whether a town can require that they be merged.

8. The language of RSA 75:9 is equally unresponsive of Ms. Aichinger's position, as it speaks only to the taxation of lots. It does not address the merger of lots for zoning purposes. As the Supreme Court has held, the taxation of the property "is not conclusive on the issue of whether the property constitutes one or two lots for zoning purposes." Mudge v. Prcinct of Haverhill Corner, 133 N.H. 881, 885 (1991)( citing Robillard v. Town of Hudson, 120 N.H. 477, 480 (1980)).

9. Nor do the facts of this case support Ms. Aichinger's contention that the parcels should never have been merged. As Ms. Aichinger correctly points out, in the



1930s a cottage was constructed on what is now referred to as 554 Edgewater Drive. Although the implication from the motion is that this "cottage" is a separate residence, in fact it has traditionally been utilized as a garage and guest house which is accessory to the main residence on the property. See Governor's Island Club v. Town of Gilford, 124 N.H. 126, 128 (1983). This traditional use of the property further supports the town's ultimate conclusion that the parcels were, in fact, properly merged.

10. Additionally, although the motion suggests that the town entered in the Agreement with Ms. Aichinger in part because of her theories regarding RSA 674:39-a and RSA 75:9,<sup>1</sup> the truth is that the town entered into this Agreement only because it recognized that a mistake had been made by a town employee and that Ms. Aichinger had expended significant monies in reliance upon that error. The town at no time accepted Ms. Aichinger's theory that abutting, nonconforming lots held in common ownership could not legally be merged by the provisions of the zoning ordinance.

11. While the town agrees that summary judgement should be granted in favor of Ms. Aichinger (and in favor of the town) because petitioner cannot demonstrate that she would be specially damaged by the zoning violation as required by RSA 676:15; because there is no present dispute which supports a declaratory judgment in this matter; and because mandamus does not lie in this matter,<sup>2</sup> it cannot agree that there was no legal right for it to merge Ms. Aichinger's abutting, nonconforming parcels when

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<sup>1</sup>As the court can see from a review of the Agreement, which is attached to the motion, the parties agreed that "the Property consists of two separate and distinct parcels of land and the Town has and will continue to assess them as separate tax parcels under NH RSA 75:9."

<sup>2</sup>A separate motion to dismiss will be filed to specifically address these issues.

they were held in common ownership.

12. An affidavit of John Ayer, Town of Gilford Planner, is attached hereto and incorporated herein.

WHEREFORE, The Town of Gilford respectfully requests that this Honorable Court:

A. Deny Ms. Aichinger's motion for summary judgment on the legal basis on which she seeks it; and

B. Grant such other and further relief as the Court deems just and necessary.

Respectfully submitted,

**TOWN OF GILFORD**

By Its Attorneys  
**MITCHELL & BATES, P.A.**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Walter L. Mitchell  
Laura A. Spector  
25 Beacon Street East  
Laconia, New Hampshire 03246  
(603) 524-3885

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been sent via first class mail, postage prepaid, to Philip A. Brouillard, Esquire, Scott H. Harris, Esquire, and Patrick H. Wood, Esquire, counsel of record.

Date: \_\_\_\_\_

\_\_\_\_\_  
Laura A. Spector

THE STATE OF NEW HAMPSHIRE

BELKNAP, S.S.

SUPERIOR COURT

Rita Sutton, by and through her attorney-in-fact, Glenn Sutton

v.

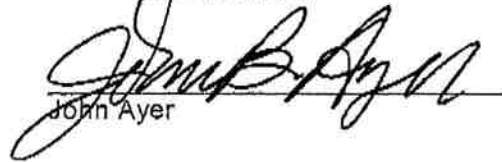
Town of Gilford,  
Barbara Aichinger,  
and  
Governor's Island Club, Inc.

Docket No. 07-E-146

**AFFIDAVIT OF JOHN AYER IN SUPPORT OF OBJECTION TO BARBARA  
AICHINGER'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES John Ayer, Planner for the Town of Gilford, who, having been duly sworn, deposes and states as follows:

1. I am the planner for the Town of Gilford.
2. I have read the factual allegations contained in the Objection to which this affidavit is attached and have personal knowledge of the same. To the best of my knowledge and belief, the facts recited therein are true and accurate.

  
John Ayer

STATE OF NEW HAMPSHIRE  
COUNTY OF BELKNAP

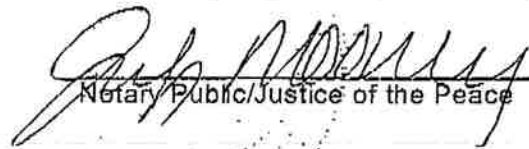
Personally appeared John Ayer, known by me to be the person whose name is subscribed to the foregoing Affidavit, and made oath that the statements made therein are true to the best of his knowledge and belief.

Before me,



Date:

11/21/07

  
Notary Public/Justice of the Peace

**GOVERNOR'S ISLAND CLUB, INC.**  
**Post Office Box 7165**  
**Gilford, New Hampshire 03247-7165**

January 29, 2008

Mr. and Mrs. Edward Aichinger  
554 Edgewater Drive  
Gilford, NH 03249

Dear Mr. & Mrs. Edward Aichinger,

I, Linda S. Read, of Gilford, County of Belknap and State of New Hampshire hereby certify as follows:

That I am serving as the Executive Secretary of Governor's Island Club Inc.;

That a majority of the Board of Directors of Governor's Island Club Inc. have reviewed, approved and signed the submitted plans for construction at 554 Edgewater Drive, Gilford, NH; and

Such approval pursuant to Article III I of the Declaration of Covenants and Restrictions for Governor's Island Club, Inc.; "Owners are required to obtain all necessary permits from the Town, City, or State prior to the commencement of construction. It shall be the obligation of the owner to obtain any approvals required from municipal land use boards. Upon request, the owner shall provide copies of all such permits and approval to the Board of Directors. Owners shall be responsible to assure that all construction complies with applicable codes, regulations, ordinances, and laws."

Said signed plans are on file at the Corporation Office.

Respectfully,

Linda S. Read  
Executive Secretary  
603-366-2332  
603-366-4705 fax

-----Original Message-----

From: HARRIS SCOTT

Sent: Tuesday, September 09, 2008 2:57 PM

To: Patrick H. Wood

Cc: Manon Kellett; Walter Mitchell; YASENKA KRISTIN; GOODWIN ROLF

Pat:

Our client would settle for 50% of the anticipated net profit from the sale of the house, with certain protections as to the fair market value that the property would be sold at and the like. We don't know what has been invested in the house, and can only guess at the property's fair market value, so we can't put an exact number on a demand yet.

I am told that Judge Perkins schedule is quickly filling, so if we are going to enlist him, we should do so in the next day or so.

I have not heard back from you as to whether the parties' can agree to postpone the ZBA hearing pending their settlement talks, or whether your client would prefer to press ahead.

Regards,

Scott H. Harris

McLane, Graf, Raulerson & Middleton, Professional Association

900 Elm Street, P.O. Box 326

Manchester, New Hampshire 03105-0326

Direct dial: (603) 628-1459

[scott.harris@mclane.com](mailto:scott.harris@mclane.com)

[www.mclane.com/people/attorneys/sharris.html](http://www.mclane.com/people/attorneys/sharris.html)

-----Original Message-----

From: Patrick H. Wood [mailto:phwood@patrickwoodlaw.com]

Sent: Monday, September 08, 2008 3:45 PM

To: HARRIS SCOTT

Cc: Barbara Aichinger; Ed Aichinger; Manon Kellett; Walter Mitchell

Subject: Re: Aichinger, Barbara Property on Edgewater Drive

Scott - last week you said you would talk to your client about what he/she wanted so we would know what would be in the mediation. Do you have any more information for me?

Walter wants to try to find some dates when mediation might be possible but my client really needs to know what your client wants first.

Patrick H. Wood

Patrick Wood Law Office, PLLC

555 Main Street

Laconia, NH 03246-3449

603.524.1446

603.524.1788 (fax)

[phwood@patrickwoodlaw.com](mailto:phwood@patrickwoodlaw.com)

December 8, 2008

**FAX: 603-527-4731**

TO: Zoning Board of Adjustments  
Department of Planning and Land Use  
Town of Gilford  
47 Cherry Valley Road  
Gilford, NH 03249

Subject: Aichinger request for variance to the Gilford merging Ordinance

Dear Members of the Gilford Zoning Board of Adjustments,

As a neighbor and abutter to the property in question I urge you to grant a re-hearing and grant the variance to Aichinger property on Governors Island. I own the property diagonally across the street and the water front property that is one house to the north of the property in question. It is hard for me to believe that you find it fair and equitable to deny this variance. The town has not only unmerged the Aichinger property but has also unmerged other properties over the years. In addition the board should strongly consider that the Selectman examined the financial position of the Aichinger's when they signed the Agreement. The granting of the variance fits with the character of the neighborhood. The majority of waterfront lots on Governors Island are less than one acre.

We understand that the abutter protesting this variance and the building permit is seeking financial gain from the difficult position that the Aichinger's are in and that they are demanding to profit from the sale of the Aichinger property in exchange for their silence in front of the ZBA. If this is so, and for the reason above, we would please appreciate denying their request for an appeal to the building permit at 554 Edgewater Drive.

The granting of this variance fits the criteria for an Area Variance. The ZBA should grant the Aichinger's a re-hearing and grant their request for a variance to the merging ordinance. We would appreciate your best efforts in giving them fair treatment with your deliberations.

Sincerely,



Senator Richard and Barbara Ferdinando  
542 and 541 Edgewater Drive  
Gilford, NH 03249

December 8<sup>th</sup> 2008

Attn: Zoning Board of Adjustments  
Department of Planning and Land Use  
Town of Gilford  
47 Cherry Valley Road  
Gilford, NH 03249

FAX: 603-527-4731

RE: Application for Rehearing on the Aichinger request for Variance to 9.1.1 Merging Ordinance

Dear Zoning Board of Adjustments,

My name is John Larrere. I own the second oldest home on Governor's Island. Governor's island is my principal residence and I am troubled by the situation that Ed and Barbara Aichinger have been put in by one of their abutters. The denial of a variance to the merging ordinance appears prima facie to be selective enforcement since so many demergers have been already granted.

Barbara and Ed followed proper procedure in seeking and getting the town planner's positive decision as well as the Selectman's approval to develop their property. There can be no harm done to any of the abutters or to those of us who are year-round residents and others who may own a second home. The property conforms in every other way except that it had at one time been merged. It actually enhances the look of the neighborhood quite positively.

The Governor's Island Board should have no standing on this issue. All town laws and procedures have been followed and that should suffice.

It also seems like Judas' price has gone from 30 pieces of silver to 50% of the proceeds from the sale. I do hope you will not let the avaricious neighbor succeed in pressuring the Aichinger's to let them willy-nilly participate in the sale when no harm has been done - actually the neighborhood has been enhanced. It is reported that the abutter is willing to exchange for withdrawing their action. This is a grave injustice and to be soundly condemned.

Thank you for your service to the town. I kindly ask you to please grant the request for rehearing in this matter. I trust you will grant the variance.

Very sincerely yours,



John B. Larrere  
86 Edgewater Drive  
Gilford, NH 03249  
603 366 2824

cc. Barbara and Ed Aichinger

December 8, 2008  
Bob Gagne  
570 Edgewater Drive  
Gilford, N.H. 03249

Attn: Zoning Board of adjustment  
Department of planning and land use  
Town of Gilford  
47 Cherry Valley Rd.  
Gilford, N.H. 03249

Fax # 603-527-4731

Re: application for rehearing on the Aichinger request for Variance to the merging ordinance.

Dear Zoning Board of Adjustment Members:

My name is Robert Gagne. I own a property that is one house to the south of the Aichinger property on Edgewater drive in Gilford. I would respectfully like to voice my concern over your denial of their variance request. I am not a lawyer, nor have I any relationship or obligation to the applicant. I know them only as good, nice neighbors. The kind of people everyone would like to have next door.

I would like to comment on two things;

1. There are very many lots on Governor's Island that do not meet the current square footage requirements. These two lots are no different than a good portion of the lots in my area. The frontage requirement is the same as mine and both of the lots appear, at least, to fit into our neighborhood. The new houses, also, are a credit to our area. They are a welcome sight and add to the overall ambiance of the area. Certainly, they have absolutely no negative affect on my values or any of the neighborhood homes.

2. As in the past with my own personal experience, I question the motives of the abutter. Certainly a request for half of the profit on the new house as an exchange for removing or withdrawing their action is an insult to your Board.



I realize how difficult it is for anyone to serve on these Boards. I hope that you will reconsider your refusal of their request and allow them and the rest of our neighbors to go on with their lives and contribute to society rather than spending all of your valuable time opposing everything.

As a neighbor, I have absolutely no problem whatsoever with their request.

Thank you

A handwritten signature in cursive script that reads "Bob Gagne". The signature is written in black ink and is positioned centrally below the typed name.

Bob Gagne

-----Original Message-----

From: Stephan Nix  
Sent: Monday, November 24, 2008 10:08 AM  
To: Patrick H. Wood

Pat:

Attached are the letters from Tim Bates to the Planning Department regarding merger. These letters were given out by the planning department in the 1996 - 97 time period as part of the zoning information package.

For many years, the planning department considered a structure that met the definition of a dwelling (kitchen, sleeping, living, bathroom) as a principal use. If the a person owned two nonconforming lots with a house on one lot and a "guest house" on the second lot, that the lots would not merge.

Hope this helps,

Stephan Nix  
Attorney at Law  
25 Country Club Road  
Suite 502  
Gilford, NH 03249  
603-524-4963  
fax 603-524-1978  
[snix@metrocast.net](mailto:snix@metrocast.net)

This message is subject to attorney-client and/or work product privileges. If you have received this message in error, please notify the sender immediately and delete any copies of the document(s) that you may have received. Thank you for your cooperation.

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Attachment(s): Merger letters.pdf

**MITCHELL & BATES PROFESSIONAL ASSOCIATION**

ATTORNEYS AT LAW

UNION SQUARE • 382 UNION AVENUE  
LACONIA, NEW HAMPSHIRE 03246

WALTER L. MITCHELL  
TIMOTHY BATES

TELEPHONE (603) 524-3885  
FACSIMILE (603) 524-0745

July 26, 1996

John Bobula, Director  
Gilford Planning and Land Use  
47 Cherry Valley Road  
Gilford, NH 03246

Re: Gilford Zoning Ordinance - Merger of Lots

Dear John:

This letter will confirm our telephone conversation of this morning. I have reviewed Section 9.1.1 of the Gilford Zoning Ordinance regarding the merger of contiguous lots. It is my opinion that to the extent this provision is interpreted to require the merger of adjacent conforming lots, the provision is unconstitutional for at least two independent reasons.

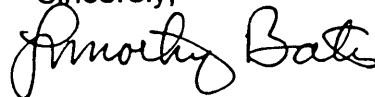
First, by definition, conforming lots comply with all current land use regulations of a municipality, and it is my opinion that requiring such a lot to be merged with an adjacent conforming lot would serve no valid public purpose whatsoever. Such a requirement would therefore be struck down as violating substantive due process.

Second, I also believe that such a requirement would violate the constitutional guarantee of equal protection of the laws. That is, similarly situated landowners are treated in a vastly different way depending on whether their conforming lots are adjacent or separated by some minimal amount of intervening land. It does not seem to me that such different treatment can be justified with the theory that the regulation bears a substantial relationship to the achievement of an important public purpose. Therefore, the regulation would also flunk the equal protection test.

In light of the foregoing, I urge that Section 9.1.1 be amended to eliminate any interpretation that would require the merger of adjacent conforming lots. In the meantime, I am hopeful that the ZBA would interpret this section to not require the merger of such lots if the issue comes to the Board before an amendment can be adopted.

As always, we appreciate the opportunity to assist and hope you will call if you have any further questions.

Sincerely,



Timothy Bates

TB/scc

cc: David R. Caron, Town Administrator

# MITCHELL & BATES PROFESSIONAL ASSOCIATION

ATTORNEYS AT LAW

UNION SQUARE • 382 UNION AVENUE  
LACONIA, NEW HAMPSHIRE 03246

WALTER L. MITCHELL  
TIMOTHY BATES

TELEPHONE (603) 524-3885  
FACSIMILE (603) 524-0745

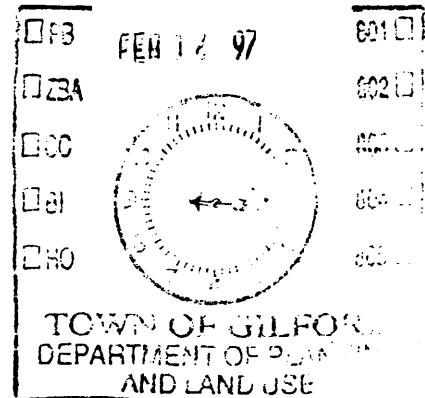
February 11, 1997

## VIA FACSIMILE AND FIRST CLASS MAIL

John Bobula, Director  
Dept. of Planning & Land Use  
47 Cherry Valley Road  
Gilford, NH 03246

Re: Lot Merger Clause  
Section 9.1.1 - GZO

John:



As an addendum to my letter of July 26, 1996 you have asked whether the town may legally require the merger of contiguous **nonconforming** lots that have each been developed with a principal use. It is my strong opinion that the town may not require such merger.

The basis for my conclusion is the familiar rule that once a landowner has established a lawful use on a parcel of land, his or her rights to continue that use, absent a clear danger to public health or safety, become vested, and may not be taken or impaired by government regulation, unless the landowner is fully compensated for the loss the regulation would cause to the vested use. This concept of vested rights extends to the separate existence of the parcel(s) that has/have been developed, as well as to the continued existence of the use that has been established on the lot(s).

In the interest of providing a prompt response to your inquiry, I have not supported this opinion with citations to the large body of federal and state case law on this topic. I will be happy to offer such supporting authority if you feel it is necessary.

Sincerely,

Timothy Bates

TB/dbm

cc: David R. Caron, Town Administrator



# TOWN OF GILFORD

*Recreation Center of New Hampshire*

DEPARTMENT OF PLANNING & LAND USE

# MEMO

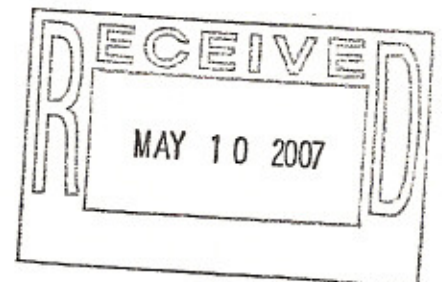
DATE: May 9, 2007  
TO: Evans Juris, Town Administrator  
FROM: John Ayer, Director of Planning and Land Use  
RE: Aichinger – 554 Edgewater Drive

Attached are copies of correspondence and email from Ms. Aichinger, Attorney Brouillard, Attorney Walter Mitchell, Assessor Wil Corcoran, and me regarding the reference property and its status as one or two lots.

You also asked for information regarding other similar situations where lots appearing as one lot on the Town's tax map and two lots on the deed were treated as two lots by staff. I am still researching these and trying to find them. Building Inspector David Andrade advised me that he believes there were several in Gunstock Acres of which he is aware and I am not. I will search our records and see if we can identify these.

Walter Mitchell is also waiting for information from me describing the discussion the Planning Board had when it discussed the amendment of Section 9.1.1 of the Gilford zoning ordinance in 2002. I am listening for this on the Planning Board's meeting tapes and will provide Attorney Mitchell with that information once I am able to obtain it.

Please let me know if you require further information.



Walter - as we discussed, Barbara Aichinger has been sending these e-mails for the purposes of preparing for the ZBA meeting on May 26, 2009. It is our understanding - although we are not certain - that the ZBA intends to hear our appeal of the administrative decision of John Ayer in May 2007. If this is not the case, please let us know as soon as possible so we are not at the May 26 meeting expecting to make a full presentation only to be told that the ZBA is not going to hear that presentation.

Thanks.

Patrick H. Wood  
Patrick Wood Law Office, PLLC  
555 Main Street  
Laconia, NH 03246-3449  
603.524.1446  
603.524.1788 (fax)  
[phwood@patrickwoodlaw.com](mailto:phwood@patrickwoodlaw.com)

-----Original Message-----

From: Walter Mitchell, Mitchell Municipal Group, P.A.  
Sent: Friday, May 08, 2009 9:05 AM  
To: Patrick H. Wood

Pat - Ms. Aichinger has been sending a series of e-mails to present and past town officials and employees relating to the issue of merger. Since this is an issue that seems to be part of present litigation, we ask that you instruct her to cease any such contact.

Thank you for your understanding.

Walter

Walter L. Mitchell

Mitchell Municipal Group, P.A.

25 Beacon Street East

Laconia, NH 03246

(603) 524-3885

[wmlaw@metrocast.net](mailto:wmlaw@metrocast.net)