

**BELKNAP, SS.**

**STATE OF NEW HAMPSHIRE**

**SUPERIOR COURT**

**BARBARA P. AICHINGER and EDWARD W. AICHINGER, Jr. and  
BARBARA P. AICHINGER, TRUSTEE OF THE BARBARA P. AICHINGER  
REVOCABLE TRUST  
558 Edgewater Drive  
Gilford, NH 03249**

**V.**

**TOWN OF GILFORD  
47 Cherry Valley Road  
Gilford, NH 03249**

**PETITIONERS' APPEAL FROM DECISION OF THE GILFORD  
ZONING BOARD OF ADJUSTMENT**

NOW COME Barbara P. Aichinger and Edward W. Aichinger, Jr., and Barbara P. Aichinger, Trustee of the Barbara P. Aichinger Revocable Trust, and appeal the Decision of the Gilford Zoning Board of Adjustment made at its August 25<sup>th</sup>, 2009 meeting denying Petitioners' request for a rehearing of the Zoning Board's decision of July 28th, 2009, denying Petitioners' request for a hearing on an Appeal of an Administrative Decision, and in support thereof state the following:

1. Petitioners are the owners of certain real estate located at 554 Edgewater Drive in Gilford, New Hampshire. There is a single family residential structure on this property.

2. Petitioner, Barbara P. Aichinger, Trustee of the Barbara P. Aichinger Revocable Trust, is the owner of certain real estate located at 558 Edgewater Drive in Gilford, New Hampshire. There is a single family residential structure on this property.

3. In late 2006 Gilford Planning Director John Ayer in conjunction with Building Inspector David Andrade and Assessor Wil Corcoran made the decision to unmerge Petitioners property at 554 and 558 Edgewater drive. Town Planner John Ayer then followed up this decision by putting it in writing to the Petitioners on January 15th 2007. The subject of this letter being 'Reversal of Lot Merger – Tax Map and Lot # 221-007.000'. Town Planner John Ayer, then working with Town Attorney Walter Mitchell, reversed that decision on May 23rd 2007. Petitioners timely appealed this

decision to the Gilford Zoning Board of Adjustment.<sup>1</sup> In view of the substantial reliance that the Petitioners had made on the towns initial unmerge decision the Town Selectman agreed to not enforce the towns merging ordinance against the Petitioners and memorialized this decision in the AGREEMENT filed in the registry of deeds at Book 2419 Page 0864. That Agreement was subsequently ruled to be unenforceable by the Superior Court on July 30, 2008. Petitioner's appeal of the May 23rd 2007 decision to remerge Petitioners non conforming buildable lots was then brought forward by request of Petitioners attorney Patrick Wood by letter dated November 12th 2008 to Town Planner John Ayer. Due to absences, change in Town Attorney's and lack of ZBA members the appeal was not taken up by the Gilford Zoning Board of Adjustments until July 28th 2009.

4. The result of the July 28<sup>th</sup> 2009 hearing was the following:

**RE: *Barbara Aichinger, Trustee of Barbara P. Aichinger Revocable Trust***

*Appeal of an Administrative Decision by the Director of Planning and Land Use, regarding the status of merged lots, pursuant to Section 9.1.1 of the Gilford Zoning Ordinance, which are shown as Tax Map & Lot #221-007.000 and Tax Map & Lot #221-007.001. The property is located at 554 and 558 Edgewater Drive in the Single Family Residential Zone. File #Z08-23.*

*Barbara Aichinger, Trustee of Barbara P. Aichinger Revocable Trust, is hereby notified the Gilford Zoning Board of Adjustment voted to not hold a hearing regarding the above referenced application based on the following reasons:*

- 1. The Superior Court issued a ruling that addressed the merger provisions of the town ordinance.*
- 2. The issue of the merger of the lots has been fully litigated between these very same parties in a court having jurisdiction.*
- 3. The Superior Court Ruling is under appeal to the New Hampshire Supreme Court and the Zoning Board of Adjustment will abide by any decision made by the Supreme Court.*

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<sup>1</sup> From page 3 Case No. 2008-0674 Supreme Court Brief of the Appellee/Respondent, Town of Gilford. 'On May 23<sup>rd</sup> Mr. Ayer, after consultation with town counsel, informed the Aichingers that his previous advice had been in error, and that, in fact, they owned one merged lot. Under the Gilford Zoning Ordinance, the Aichingers could not therefore construct two principal single family dwellings on the lot. The Aichingers appealed Mr. Ayer's determination that their property consisted of only one waterfront lot to the Gilford Zoning Board of Adjustment, but those proceedings were stayed pending negotiations between the selectmen and the Aichingers regarding the resolution of the issues created by Mr. Ayer's inadvertent error.'

5. Petitioners timely requested a rehearing of this decision and on August 25<sup>th</sup> 2009 the ZBA denied the motion for rehearing with the following ruling:

**RE: *Barbara Aichinger, Trustee of Barbara P. Aichinger Revocable Trust***

*Request for Rehearing regarding a decision made by the Gilford Zoning Board of Adjustment on July 28, 2009. Wherein the Board of Adjustment voted to not hear the Appeal of an Administrative Decision by the Director of Planning and Land Use, regarding the status of merged lots, pursuant to Section 9.1.1 of the Gilford Zoning Ordinance, which are shown as Tax Map & Lot #221-007.000 and Tax Map & Lot #221,-007.007. The property is located at 554 and 558 Edgewater Drive in the Single Family Residential Zone. File #2,08-23.*

*Barbara Aichinger, Trustee of Barbara P. Aichinger Revocable Trust, is hereby notified the Gilford Zoning Board of Adjustment voted to deny the request for a rehearing regarding the above-referenced application based on the following reasons:*

- 1. The Board determined there was no new evidence submitted showing there was an error in law or fact made by the Zoning Board of Adjustment.*
- 2. At the time when the Supreme Court issues a ruling regarding this case the Zoning Board of Adjustment will act accordingly.*

6. For the purposes of this appeal and for the purposes of the hearings before the Gilford Zoning Board of Adjustment, references to Petitioners or Applicants shall mean references to Barbara Aichinger and Edward Aichinger and Barbara P. Aichinger, Trustee of the Barbara P. Aichinger Revocable Trust, as their interests may appear.

7. As part of the application for the Appeal of the Administrative Decision made by John Ayer, Town Planner on May 23<sup>rd</sup> 2007 the Petitioners submitted two groups of documents to the Zoning Board of Adjustment. The first was a red binder detailing ten other unmerges that the town of Gilford had engaged in between 1996 and 2005. These unmerges totaled 23 lots<sup>2</sup>. This information shows that the town made conscious efforts to unmerge properties that the town had involuntarily merged under earlier versions of the Zoning Ordinances and did these unmerges without subdivision approval. These documents show that the Planning Director, Building Inspector and Assessing Department had developed a process and review procedure and then granted individual lot status to these properties. These unmerges to the best of the Petitioners knowledge

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<sup>2</sup> The Petitioner believes that there are more unmerges than what she has found.

have never been remerged as the Petitioners property has. This remerging of the Petitioners property is the decision under dispute.

8. The red binder document also detailed over 80 non-conforming lots held in common ownership that currently exist (as of the 2008 tax roles) in the town of Gilford that the town *has not* involuntarily merged thus further substantiating the fact that Gilford no longer interprets Section 9.1.1 of the Gilford Zoning Ordinances as an involuntary mandatory merger of non-conforming lots in common ownership.

9. The second document group that the Petitioners supplied to the Gilford Zoning Board of Adjustment was a Time Line with associated letters, emails, memo's and court filings that substantiate the events outlined in the Time Line. This Time Line details, in part, the Petitioners efforts to find out about the town's practice of unmerging in order to challenge the towns reversal of Petitioners unmerge by Administrative Decision of Town Planner John Ayer on May 23<sup>rd</sup> 2007. This document shows what appears to be a concerted effort by the Town to hide that information and to provide misleading direction to the Petitioners, the Gilford Planning Board and the Superior Court. In particular a September 2007 Right to Know request response by Town Attorney Walter Mitchell and Town Planner John Ayer portray the Petitioners unmerge as the only one the town has been involved in. This is in direct conflict with the information subsequently uncovered.

10. The town's efforts to portray Town Planner John Ayer's January 15<sup>th</sup> 2007 decision as an 'inadvertent error'<sup>3</sup> or 'mistake'<sup>4</sup> are misleading at best. The town's characterization of John Ayer's Town Planner's January 15<sup>th</sup> decision as 'advice'<sup>2</sup> and not an administrative decision that he had the authority to make and had made many times in the past is not supported by the facts. It is the desire of the town to keep the merging ordinance in play while sorting out the mess it has found itself in. The path the town chose to take in May of 2007 was to withhold from the Petitioners the

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<sup>3</sup> See footnote 1

<sup>4</sup> Docket No. 07-E-146 *Town of Gilford's Objection to Barbara Aichinger's Motion for Summary Judgement* Page 3. '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, the truth is that the town entered into the 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, non conforming lots held in common ownership could not legally be merged by the provisions of the zoning ordinance.'

truth about the other unmerges. The question that the court will need to answer is who at the town knew what and when did they know it and how did they act as a result of that information.

11. Together the documents submitted clearly show without a doubt that the Town of Gilford has on many occasions recognized that adjoining non conforming lots held in common ownership should be recognized as separate parcels. The red binder document also showed that the Zoning Board has participated in such demerging. Treating the Petitioners differently from all these other land owners in the Town of Gilford is unlawful, arbitrary and unreasonable.

12. In the Notice of Decision, the Zoning Board stated that:

*The Superior Court issued a ruling that addressed the merger provisions of the town ordinance.*

This position is not a correct interpretation of the Superior Court ruling of July 30<sup>th</sup> 2008 as applied to the Petitioners Request for a hearing on an Appeal of an Administrative Decision. The Superior Court ruled that the Petitioners property was merged by the merging provision of the Gilford Zoning Ordinance. This was not the question that the Petitioners placed in front of the ZBA. The question the Petitioners have asked the ZBA to review is the Town Planner John Ayers' decision to *remerge* Petitioners property. Specifically they offer up evidence of the towns practice of unmerging similarly situated landowners and not merging other similarly situated landowners. In addition the Superior Court never heard evidence that the town had engaged in a practice of unmerging and non merging of non conforming lots held in common ownership. The Superior Court never heard this evidence, at least in part, because the town of Gilford unlawfully withheld it from the Petitioners as outlined in the Time Line document. The ZBA's ruling in this matter deprives the Petitioners of their opportunity to complying with the Superior Court order and deprives the Petitioners of their right to due process under the New Hampshire and United States Constitutions.

13. In the Notice of Decision, the Zoning Board also stated that:

*The issue of the merger of the lots has been fully litigated between these very same parties in a court having jurisdiction.*

This position is a complete mischaracterization by the ZBA of the Superior Court decision. The ZBA has 'kicked the can' down the street to avoid the unpleasant responsibility of admitting

that the Town of Gilford has set aside this Zoning Ordinance (9.1.1) through Administrative Gloss. In addition the ZBA ignores the courts invitation to the Petitioner Barbara Aichinger to have the lots demerged through the 'proper process' or 'obtaining the requisite subdivision approvals if she wishes to treat the parcel as two lots.'<sup>5</sup> The Petitioner attempts to do that by showing a pattern of unmerges and non merges of similarly situated landowners. The ZBA has unlawfully denied the Petitioners due process guaranteed to them under the Constitution of our country and our state.

14. In the Notice of Decision, the Zoning Board also stated that:

*The Superior Court Ruling is under appeal to the New Hampshire Supreme Court and the Zoning Board of Adjustment will abide by any decision made by the Supreme Court.*

As stated above the question of Administrative Gloss and the towns unlawful act of withholding the information concerning the other unmerges was not presented to the Superior Court and is not an issue currently in front of the Supreme Court.

15. The decision of the Zoning Board to not grant the Petitioners a hearing is contrary to the law.

16. The decision of the Zoning Board deprives the Petitioners of their lawful rights to due process in order to protect the use their property as guaranteed by the provisions of Part 1, Articles 2 and 12 of the New Hampshire Constitution.

17. Because the Zoning Board has not applied the law correctly, has not made findings that appear to be based on an objective standard, and has ignored the facts and evidence presented by the Petitioners, the Zoning Board has deprived the Petitioners of due process of law in violation of the New Hampshire Constitution, the laws of the State of New Hampshire, and the Gilford Zoning Ordinance.

WHEREFORE, your Petitioners request that this Honorable Court:

A. Find that the actions of the Gilford Zoning Board have deprived the Applicants of due process of law in violation of the New Hampshire Constitution and the laws of the State of New Hampshire

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5 Belknap Superior Court Order July 30<sup>th</sup> 2007 Reference 07-E-0146

B. Find that the decision of the Gilford Zoning Board denying the Petitioners' right to a hearing to question the Town Planners May 23rd, 2007 decision is unlawful, arbitrary, and unreasonable and is not supported by any rational relationship to the purposes of the Gilford Zoning Ordinance;

C. Find that the decision of the Gilford Zoning Board denying the Petitioners' request for a hearing to elucidate the towns actions is unlawful, arbitrary, and unreasonable and is not supported by any facts or findings;

D. Order the Gilford Zoning Board of Adjustment to hold a hearing on the question of Administrative Gloss.

E. Order the Town to pay Petitioners costs and fees associated with this petition as the town's actions are unlawful and in part meant to deceive the Petitioner and interfere with their right to due process.

F. Make such further order as the Court deems equitable and fair.

Respectfully submitted,  
Barbara P. Aichinger and Edward W. Aichinger,  
Jr. and Barbara P. Aichinger, Trustee of the Barbara  
P. Aichinger Revocable Trust

Dated: September 21<sup>st</sup> 2009

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