

BELKNAP, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

09-E-0219

**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 MEMORANDUM OF LAW**

NOW COME Barbara and Edward Aichinger, Individually and as Trustee, Petitioners in the above entitled matter, and submit the following:

**SUMMARY**

The Town of Gilford has engaged in an unjust practice of portraying to the Plaintiff, the citizens of the Town of Gilford, the Belknap Superior Court and the New Hampshire Supreme Court that it has a valid involuntary merging ordinance and has uniformly and fairly applied that ordinance to the Plaintiff's property. The truth of the matter is that the Gilford merging ordinance has never been applied in a uniform and fair manner to any property in the Town of Gilford and certainly not to the Plaintiff's property. In and around 1997-1998 the Town of Gilford took the position that non conforming lots held in common ownership could only be merged by the OWNER and as such the Town began unmerging lots that were previously involuntarily merged under previous versions of the ordinance.<sup>1</sup> The Town then reversed that position and involuntarily merged the Plaintiff's property in May of 2007 without any change to the ordinance.<sup>2</sup>

The elements of Administrative Gloss are all present in the case. The Town had a practice of involuntary merging starting in the 1970's as a policy. It then codified that policy with an ordinance

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<sup>1</sup> Red Binder Gilford's Unmerges and Non Merges of Non conforming lots in Common Ownership by Barbara P. Aichinger

<sup>2</sup> John Ayers May 23<sup>rd</sup> 2007 letter Appendix A  
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in 1984. The ordinance 9.1.1 Contiguous Non Conforming Lots was modified several times over the years as various Town officials realized the unconstitutional nature of this partial taking. Evidence of this is seen by the 1997 letter from then Town attorney Timothy Bates when dealing with the Bradshaw merger<sup>3</sup> (Tab 6 of the Red Binder) and his 1996 letter when dealing with the Sandy merger (Tab 4 of the Red Binder). These letters outline the unconstitutional nature of this ordinance.

In 1997 the Gilford Zoning Ordinances were amended to add the following definition to Article 3.

***Nonconforming Use, Lot or Structure, Protected*** – Any use, lot or structure, which lawfully existed on the date of adoption by the legislative body of an ordinance, rule, or regulation affecting said use, lot or structure, is protected from retroactive application of such ordinance, rule, or regulation. Such protection is limited to the actual use, lot or structure, existing on the date of adoption of this ordinance and does not extend to any use, lot of structure established, constructed, or altered after said date.

The letters from Attorney Timothy Bates and the above 1997 *savings* clause show a process of eliminating the practice of merging in Gilford. As a result, the merging ordinance was amended in 2000 and again in 2002. In 2000 exceptions were added. Those exceptions recognized the vested rights owners had obtained in the lots under RSA 674:39 and if any principal use had occurred on the lot. Principal use being simply defined as “The sole, primary, or main use of a lot or building.” Note that principal use is not defined as principal residence.<sup>4</sup> Although there is evidence that the ordinance was never uniformly applied the ambiguity that *only the owner* can merge lots most likely occurred with the inclusion of the phrase ‘the owner shall’ in 2002.<sup>5</sup> It is the interpretation of *only the owner*, and not the Town, being the one to merge non conforming lots in common ownership that led the Planning Director, Code Enforcement Officer, Building Inspector and Assessor to *unmerge* lots merged under previous versions of the ordinance and to not merge non conforming lots that come into common ownership. Examples of this are contained in the Red Binder.

For the definition of Administrative Gloss we turn to *DHB, Inc. v. Town of Pembroke 2005*.

*“The doctrine of administrative gloss is a rule of statutory construction. An “administrative gloss” is placed upon an ambiguous clause when those responsible for its implementation*

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<sup>3</sup> 1996 and 1997 Letter from then Town Attorney Timothy Bates on the constitutionality of the merging ordinance Appendix B

<sup>4</sup> Email Attorney Steven Nix Appendix D

<sup>5</sup> John Ayers memo 2002 on ZO change Appendix C

*interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an "administrative gloss" is found to have been placed upon a clause, **the municipality may not change its de facto policy, in the absence of legislative action**, because to do so would, presumably, violate legislative intent. Nash Family Inv. Prop. v. Town of Hudson, 139 NH 595, 602 (1995)."*

- In this case the ambiguous clause is “the owner shall” , the inclusion of the exceptions and the 1997 *savings* clause. With the passage of these changes the Town records show, as detailed in the Red Binder, that the Town no longer merged properties and in fact unmerged properties that were involuntarily merged under previous versions of the zoning ordinance.
- Those responsible for its implementation, the Town Planner, Code Enforcement Officer, Building Inspector and Assessor, interpreted the amended ordinance in a consistent manner and applied it to similarly situated land owners over a period of years. They did so until May of 2007 when Town Planner John Ayer involuntarily merged the Plaintiff’s property on advice of Town Counsel. <sup>6</sup>
- As stated in the above referenced case ***the municipality may not change its de facto policy, in the absence of legislative action*** and there was no legislative action (ie. amendment to the zoning ordinance) to warrant the involuntary merging of the Plaintiff’s property on May 23<sup>rd</sup> 2007 by the Administrative Decision of Town Planner John Ayer.

Thus all the elements of Administrative Gloss are present in this case.

The facts show that in the spring of 2007 when the abutter to Mr. and Mrs. Aichinger’s property and the Attorney for Governor’s Island Club, Philip Brouillard, started to question the Town about its merging practice the proverbial poop hit the fan<sup>7</sup>. The Town reversed its practice of unmerging non conforming lots held in common ownership and involuntarily merged Mrs. Aichinger’s property at 554 Edgewater Drive to Mrs. Aichinger’s Revocable Trusts property at 558 Edgewater Drive.<sup>8</sup> The Town clearly had knowledge that it had set aside its merging ordinance on a number of occasions; but instead of following that long-standing practice, upon advice of the town

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<sup>6</sup> See footnote 2

<sup>7</sup> Appendix E: Various letters and email showing collusion between Governor’s Island Club and abutter Sutton to pressure the town to reverse its decision regarding the Aichinger property.

attorney, Town Planner John Ayer told Plaintiffs that his decision to unmerge her property in January 2007 was an ‘inadvertent error’ and a ‘mistake’. They covered up the other unmerges and interfered with her defense in a resulting lawsuit filed by the abutter. Mrs. Aichinger has presented these facts to all the local land use boards and the Selectman in the Town of Gilford. The Town continues to ignore the facts, stick to its story and deny Mr. and Mrs. Aichinger due process and their constitutional right to their property.

### **THE FACTS AND MERITS OF THIS CASE**

1. Plaintiff and her husband are the owners of certain real estate located at 554 Edgewater Drive in Gilford, Belknap County, New Hampshire.
2. Plaintiff, through her revocable trust, is the owner of certain real estate located at 558 Edgewater Drive in Gilford, Belknap County, New Hampshire.
3. The property located at 554 Edgewater Drive is shown as Lot #9 on the plan recorded in the Belknap County Registry of Deeds in Plan Book 1, Page 25.
4. The property located at 558 Edgewater Drive is shown as Lot #10 on the plan recorded in the Belknap County Registry of Deeds in Plan Book 1, Page 25.
5. These two lots were purchased by Defendant Aichinger, through her revocable trust, from Elizabeth B. Altman by deed dated 20 February 2002, recorded in the Belknap County Registry of Deeds in Book 1728, Page 695, and were described as separate lots in that deed.
6. In the late 1970’s the Town of Gilford began treating these two lots as one lot for tax purposes.
7. No record of any request or agreement from the owner of these two lots to have these lots treated as one lot for tax purposes or any other purpose has been found in the records of the Town of Gilford or the Registry of Deeds
8. Beginning in 2006, Plaintiff Aichinger began requesting clarification from the Town Code Enforcement Officer, the Town Planner, and the Town Appraiser as to the status of these lots either as one lot or two lots.
9. In October of 2006 Mrs. Aichinger received a letter from Town Assessor Wil Corcoran

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<sup>8</sup> See footnote 2  
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explaining how many lots in Gilford were involuntarily merged by the mapping company and how over the years many of these involuntary mergers were unmerged by conveyances and allowed to be developed.<sup>9</sup>

10. By letter dated January 15, 2007, the Planner for the Town of Gilford rendered his decision to Plaintiff Barbara P. Aichinger that these two lots constituted separate lots.<sup>10</sup>
11. Several conversations between Barbara Aichinger and the Town Planner John Ayer, the Code Enforcement Officer David Andrade and the Assessor Wil Corcoran ensued during the time period between April of 2006 and May of 2007. All of these Town officials reiterated that Gilford no longer merged non conforming lots in common ownership and indeed unmerged them without subdivision approval when the owner brought the involuntary merging to the attention of the Planning Department. The Planning Director John Ayer stated to Mrs. Aichinger that he had personally been involved in 5 unmerges a statement he would later recant.<sup>11</sup>
12. Mrs. Aichinger obtained the necessary municipal, state, and association approvals to demolish and replace the residential structure on 558 Edgewater Drive after receiving the letter from the Town Planner dated January 15, 2007.
13. Petitioner arranged for financing of the construction with a loan from Bank of America. The Town of Gilford's records showed 554 and 558 Edgewater Drive as separate lots and lot 9 was assessed at \$1,400,000.00. The cash out loan was approved by Bank of America on 554 Edgewater Drive.
14. Petitioners contracted to have a replacement home built for 558 Edgewater Drive by Epoch Homes of Pembroke, NH. This was a modular home built in a factory and construction of this home was started and the 'set' date was scheduled for mid June 2007.
15. Petitioners obtained the necessary state septic approval, driveway and dock permits for 554 Edgewater drive.
16. Petitioners blasted foundation holes and removed trees for construction on both 554 and 558 Edgewater drive in the March/April 2007 timeframe.

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<sup>9</sup> Appendix F: Wil Corcoran to Barbara Aichinger October 2007

<sup>10</sup> Appendix G: John Ayer to Barbara Aichinger January 2007

<sup>11</sup> Appendix H: John Ayer email denial of his involvement in unmerges  
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17. By letter dated May 23, 2007, the Gilford Planner advised Defendant Aichinger that his opinion expressed in his January 15, 2007, letter was incorrect and that the two lots should be considered to be one lot.<sup>12</sup>
18. Mrs. Aichinger, through her Attorney Patrick Wood, prepared and filed an appeal of that May 23, 2007, decision with the Gilford Zoning Board.
19. The Aichinger's informed the Bank of America of the Town of Gilford's decision to remerge the lots at 554 and 558 Edgewater Drive. In response to this, Bank of America withholds financing.
20. Attorney for the Aichinger's, Patrick Wood writes a letter to then Town Attorney Walter Mitchell explaining to him the actions that the Aichinger's took in reliance on the Planning Directors January 2007 decision.<sup>13</sup>
21. On information and belief, Attorney Mitchell conferred with the Selectman and the Town Planner John Ayer.
22. Before Barbara Aichinger's appeal of John Ayers May 23<sup>rd</sup> 2007 decision to remerge the lots could be heard by the Zoning Board, Aichinger and the Town of Gilford entered into an Agreement under which the Town agreed to consider the Aichinger's property as two lots and the *Town also agreed to take no action and not to support any action to merge these two lots and further agreed not to participate in any efforts to merge the two lots.* This Agreement is recorded in the Belknap County Registry of Deeds in Book 2419, Page 864.
23. The Bank of America was presented with the Agreement and the cash out financing was approved on 554 Edgewater Drive, however, the Bank of America required that 554 Edgewater be conveyed to both Barbara and Edward Aichinger as a condition of the financing. At this point lot 9, 554 Edgewater Drive, was owned by Barbara and Edward Aichinger individually as joint tenants and lot 10, 558 Edgewater Drive was owned by the Barbara P. Aichinger Revocable Trust. Thus they are no longer in common ownership.
24. The modular home at 558 Edgewater was set in mid June of 2007 and the preparation of 554 Edgewater for sale continued.
25. In July of 2007 an abutter filed a lawsuit against the Town of Gilford, Barbara Aichinger

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<sup>12</sup> See footnote 2

and Governor's Island Club over the merging issue.<sup>14</sup>

26. Stunned by the lawsuit Barbara Aichinger asks the Town Planner John Ayer about the other unmerges. She hopes to prove to her abutter that she is not getting any special treatment and that many other involuntary mergers were in fact being unmerged by the Town.
27. John Ayer responds that due to the lawsuit he cannot talk about the Towns merging policy and directs her to Town Attorney Walter Mitchell.
28. Barbara Aichinger begins her search of the Town records hoping to find information that will show the Town's pattern of unmerging similarly situated landowners. Aichinger finds some information in the Assessors database at the Town hall and online.
29. Not fully understanding the information that has been found, Aichinger through her Attorney Patrick Wood, make an official Right to Know request to Attorney Walter Mitchell on August 6<sup>th</sup> 2007. Attorney Wood requests, "Under the right-to-know law, I would ask that you please let us know what information the Town has concerning any other properties that have been "unmerged" in Gilford."<sup>15</sup>
30. On September 12<sup>th</sup> 2009 at 2:19PM Attorney Walter Mitchell sends an email reply to this right to know request stating "I have discussed with Mr. Ayer his earlier impressions that in the past there have been other situations similar to one which involved your client's property. Despite his earlier impressions, his present impression is that there are none."
31. Within an hour Attorney Patrick Wood responds with an email and an attachment file. "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."
32. Aichinger also responds to Attorney Mitchell pointing out to him her many conversations with John Ayer that occurred prior to the filing of the lawsuit and an April 17<sup>th</sup> 2007 letter to Walter Mitchell from Attorney Philip Brouillard stating that according to the Code Enforcement Officer, Building Inspector David Andrade there were as many as 30 other unmerges over the last 10 years.<sup>16</sup>
33. Attorney Walter Mitchell responds to Attorney Patrick Wood "Pat – Please advise your

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<sup>13</sup> Appendix I Letter from Attorney Patrick Wood to Town Attorney Walter Mitchell May 29<sup>th</sup> 2007

<sup>14</sup> See Belknap Superior Court Docket # 07-E-146

<sup>15</sup> Appendix I Right-to-Know Request for the other unmerges Attorney Wood to Attorney Mitchell

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.”

34. Attorney Walter Mitchell nor anyone else from the Town of Gilford has ever addressed this information or any other information that Barbara Aichinger has presented to them. The timing of this early request for information and subsequent denial that it exists is critical to this case as it shows that from the very onset of this ordeal the Town has engaged in a practice to not only ignore the truth but to deny it and to present a story that hides the truth.
35. Aichinger through her Attorney Patrick Wood filed for Summary Judgment in the lawsuit filed by the abutter against her, the Town of Gilford and Governor's Island Club. Due to the lack of information on the other unmerges and the Town's denial that any other unmerges exist Aichinger does not include this evidence of Administrative Gloss in her filings.<sup>17</sup>
36. The Town of Gilford as a co-defendant in this lawsuit objects to Aichinger's Summary Judgment. Attorney Mitchell argues that the merging ordinance is valid and very important to the Town stating “ *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*” **Mr. Ayer attests to this motion under oath** .<sup>18</sup>
37. This strongly worded motion solidifies the Town's position that the Town Planner John Ayer simply made a mistake with Ms Aichinger's property and that the Town never engaged in a practice of unmerging similarly situated properties previously merged by the Zoning Ordinance. In addition the Town takes the position that the merging of non conforming lots in common ownership is an important land use regulation and that the Town has had this ordinance for years and always followed it.
38. The evidence subsequently found by Mrs. Aichinger reveals that this is simply not the truth. The information found by Mrs. Aichinger which she has presented to the Gilford Zoning

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<sup>16</sup> Appendix K Attorney Mitchell response to Right-to-Know Request No other unmerges...you're the only one

<sup>17</sup> See Belknap Superior Court Docket # 07-E-146 Motion for Summary Judgment by Defendant Aichinger

<sup>18</sup> Docket No. 07-E-146 *Town of Gilford's Objection to Barbara Aichinger's Motion for Summary Judgment* 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.’



39. On November 5<sup>th</sup> 2007 Mrs. Aichinger wrote a letter to the Planning Board and asked to appear at one of their meetings to discuss the Gilford merging ordinance. Mr. Mitchell and Mr. Ayer advised the Planning Board that this is an issue that they do not have to deal with.<sup>19</sup> Mr. Ayer tells Mrs. Aichinger that Attorney Mitchell has advised them to not allow her to present to them while the lawsuit is ongoing. The Town demonstrates again a practice of deception with regards to Aichinger's fact finding mission. The Planning Board can clearly engage in discussion regarding a Zoning Ordinance and its application. To advise the Planning Board to not speak to a concerned citizen concerning the application and interpretation of a zoning ordinance is unjust and clearly demonstrates the Town's arrogance with regards to its duty to assist its citizens and its desire to continue to hide information concerning its application of the merging ordinance.
40. In January of 2008 the Belknap Superior Court issued an order on Summary Judgment. It states that the Town had the right to enter into the Agreement. The remaining issues are held over for trial.<sup>20</sup>
41. With the Agreement having been deemed valid and the Town holding to its story that Ms. Aichinger's unmerge was a one time mistake, Mrs. Aichinger briefly suspends her search for other unmerges.
42. Judge Smukler's Order of July 30<sup>th</sup> 2008 ruled that the Agreement between Mrs. Aichinger and the Town created an illegal subdivision. He also ruled that Mrs. Aichinger has the right to construct two dwellings on the property and that the building permit for lot 9, 554 Edgewater Drive is valid. In essence the ruling leaves Mrs. Aichinger with two houses on one large lot and his order seemingly reverses his Summary Judgment ruling of January 2008 without any explanation.<sup>21</sup>

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<sup>19</sup> Appendix L See page 5 of Planning Board meeting minutes November 5, 2007

<sup>20</sup> See Belknap Superior Court Order – Motion for Summary Judgment issued January 11, 2008 Docket # 07-E-0146

<sup>21</sup> See Belknap Superior Court Order Docket # 07-E-0146 Sutton, et al v. Town of Gilford et al, July 30<sup>th</sup> 2007

43. With this ruling Mrs. Aichinger goes back to the Town to seek more information on the other unmerges. She appears before the Planning Board twice and once before the Selectman. Mrs. Aichinger mentions the Town's previous actions of unmerging. No information is forthcoming from the Town as a result of these presentations.
44. In the Fall of 2008 Mrs. Aichinger has conversations with the Code Enforcement Officer, Building Inspector David Andrade and Assessor Wil Corcoran. They provide her with some *new* information about the Town's actions to unmerge previous involuntary mergers. This kick starts Mrs. Aichinger's efforts as she now gains a better understanding of how to find the necessary evidence. They confirm that the Town did indeed take the position that abutting, non conforming lots held in common ownership could not legally be involuntarily merged by the provisions of the zoning ordinance. They also indicate that Town Attorney Walter Mitchell and Town Planner John Ayer knew about this practice. This confirms that Attorney Walter Mitchell and Town Planner John Ayer's (signed under oath) position in the Town's Objection to Barbara Aichinger's Summary Judgment filed in November of 2007 was not accurate and confirms that they knew it was not accurate.
45. Research effort continues through the fall of 2008 into 2009. Mrs. Aichinger compiles a Red Binder titled Gilford's Unmerges and Non Merges of Non Conforming lots in Common Ownership. Along with this Mrs. Aichinger compiles a Timeline document.<sup>22</sup> This information is for the Appeal of Administrative Decision of John Ayer, Town Planner's May 2007 decision to *remerge* her property. During this time period Mrs. Aichinger learns how to read the GIS maps on line and the Notes section of the Assessors data base. In additions Mrs. Aichinger spends dozens of hours reading property files, searching the Registry of Deeds, listening to Planning Board and Zoning Board tapes and reading Zoning Board and Planning Board meeting minutes. *This research reveals that the Town's original portrayal of the situation involving her property to the court and to her is simply not true. This research bolsters the information from the Assessor and Code Enforcement Officer that in the years prior to May of 2007, the Town interpreted the merging ordinance as only the OWNER and not the Town can merge adjacent non conforming lots in common ownership.*

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<sup>22</sup> See Red Binder and Timeline Document included with this filing, as it was provided to the Gilford Zoning Board  
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46. The information contained in the Red Binder reveals, that contrary to the Town's statements in its Objection to Summary Judgment, *it did engaged in a practice of unmerging similarly situated properties previously involuntarily merged by the Zoning Ordinance*. Thus the Town has engaged in a practice of Administrative Gloss with regards to this ordinance. Thus confirming that the merging ordinance 9.1.1 Contiguous Nonconforming Lots has been set aside by the Town's actions.
47. On October 24<sup>th</sup> 2008 via email, Mrs. Aichinger asks Mr. Ayer again if he can recall any of the other unmerges. Mr Ayer again denies any knowledge of the Towns actions and replies “ *You have asked me that before and I do not know that there were specifically 5, and frankly at this point I'm questioning if there were any others.*”<sup>23</sup> Tab 1 of the Red Binder specifically shows that Mr. Ayer was indeed involved in the Daigle Unmerge on Area Road/Chalet Road. He writes on July 24<sup>th</sup> 2006, “ Please note the new lot is on Chalet Drive, not Area Road. The new, ***unmerged*** [emphasis added] lot addresses are as follows:...”
48. Tab 7, pages 3 and 4 also proves that John Ayer participated in the unmerging of the Michael Anderson property on Dow Road. On page 4, Tab 7, Mr. Ayer writes to Assessor Wil Corcoran and states, “*Mr. Anderson says both lots are described on one deed. He has been to the Registry and there is no evidence that the lots were merged.*” On October 30<sup>th</sup> 2008 Mr Anderson confirmed in a phone conversation with Mrs. Aichinger that indeed his lots were merged in the past by the Town when owned by a previous owner and that Mr. Ayer unmerged them in 2003.
49. Tab 8, page 2 is a letter from the Code Enforcement Officer David Andrade concerning three lots on Chalet Road. John Ayer, Director of Planning is cc'd on this letter. These three lots were merged in the past and were then unmerged in July of 2004 by the Planning Department as detailed in this letter.
50. On October 30<sup>th</sup>, 2008 Mrs. Aichinger asks Town Planner, John Ayer to produce the old tax maps for her review. Mr. Ayer brings her these tax maps to the conference room opposite the Planning Office at the Town hall. A brief conversation ensues and Mrs. Aichinger tells

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<sup>23</sup> Appendix M Email October 24<sup>th</sup> 2007 John Ayer denies knowledge of other unmerges.  
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Mr. Ayer that she has indeed found evidence that he has participated in other unmerges contrary to the legal position that the Town has taken. Mrs. Aichinger relates to Mr. Ayer her conversations with Mr. Daigle, Mr. Anderson and Mrs. Hauck. Mr. Ayer *then* admits that he *does* remember participating in some of the unmerges. He specifically recalls the unmerge of the Hauck property on Sleeper Hill detailed at Tab 9 of the Red Binder. He also states that he believes that Town Attorney Walter Mitchell knew about the other unmerges.<sup>24</sup>

51. On October 30<sup>th</sup> 2008 Mrs. Aichinger also visits the Town Administrators office in the Town hall to deliver a Right-to-Know request. This Right-to-Know request seeks historical information in the Selectman's and Town Administrators office concerning the Towns merging and unmerging practice. The secretary Sandra Bailey escorts Mrs. Aichinger into the Town Administrator's office where he is reading her Right-to-Know request. A conversation ensues and Mr. Dunn states to Mrs. Aichinger 'we are not going to participate in your fishing expedition', 'the ZBA is never going to give you a variance'. Mr. Dunn then writes DENIED on the bottom of the letter and tosses it across his desk in Mrs. Aichinger's direction. Mrs. Aichinger then asks him to sign and date his DENIED response. He does so and Mrs. Aichinger takes the letter and leaves.<sup>25</sup> This incident demonstrates the concerted effort by the Town to deny access to the unmerge data.

52. On November 12<sup>th</sup>, 2008 Mrs. Aichinger attends a Selectman's meeting. Upon seeing her at the meeting Town Administrator Dunn tells Mrs. Aichinger that she is not on the agenda and will not be allowed to speak. Mrs. Aichinger objects and says that she can speak during the public comment period of the meeting. Mr. Dunn objects and they both step into the hallway to finish their conversation. Mrs. Aichinger tells Mr. Dunn that if her Right-to-Know request is not considered by the Town Administrator she is prepared to tell the Selectman at this public meeting of his actions of October 30<sup>th</sup>, 2008 to deny what she feels is her legal right to make her Right-to-Know request. Mr. Dunn then agrees to revisit Mrs. Aichinger's request and does eventually fulfill that request several months later. A citizen should not have to go to such great lengths to gain access to information needed to protect

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<sup>24</sup> Red Binder Tab 2. The Virginia Roberts unmerge on Bedford Ave. Assessors data base "PER MITCHELL OPINION SEPARATED LOTS FOR ASSESSING 8/5/04" Indicates that long time town Attorney Walter Mitchell knew of other unmerges and participated in them.

their property rights. This behavior is another example of the lack of good faith that the Town has displayed in this matter and again demonstrates the Town's concerted effort to hide its actions concerning its application of the merging ordinance.

53. 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.<sup>26</sup> Due to absences, change in Town Attorney and lack of ZBA members the appeal was not taken up by the Gilford Zoning Board of Adjustments until July 28th 2009.
54. In preparation for the ZBA hearing Mrs. Aichinger digs deeper to see if the Town has engaged in any *merging* of non conforming lots in common ownership since the Town's legal position is that this is the interpretation of the merging ordinance and after all they merged her property in May of 2007. In the 2008 tax records, Mrs. Aichinger finds 84 lots that would have to be merged in some fashion to abutting lots but are not merged and retain individual lot status.<sup>27</sup> In letters to the Selectman on May 1<sup>st</sup>, 2009 and May 29<sup>th</sup>, 2009, Mrs. Aichinger makes the Selectman aware of the inequity of the situation concerning her lots compared to other similarly situated landowners in Town. Specifically all the non conforming lots in common ownership in the 2008 tax rolls that have not been merged and the lots that have been unmerged but not remerged as her property has.<sup>28</sup> The Selectmen take no action to correct the Town's legal position.
55. In early May of 2009, Mrs. Aichinger wrote an email to a former Planning Board member and a letter to two former Selectman looking for information about the merging ordinance. Attorney Walter Mitchell responds to these requests by contacting Attorney Patrick Wood and states, "Pat- Ms. Aichinger has been sending a series of e-mails to present and past 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." Attorney Wood responds that Mrs Aichinger needs this information for her hearing in front of the ZBA. This contact by Attorney Mitchell is yet another example of the Town trying to

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<sup>25</sup> Appendix N DENIED Right-to-Know request from Town Administrator Scott Dunn

<sup>26</sup> Appendix O Letter to Town Planner John Ayer from Attorney Patrick Wood

<sup>27</sup> Red Binder Tab 12 lists the 2008 non conforming lots in common ownership that should be merged but are not.

‘bully’ Mrs. Aichinger and prevent her from learning the truth.<sup>29</sup>

56. In preparation for the Zoning Board hearing John Ayer prepares a defense letter of sorts to the Zoning Board giving them some background on the case and defending his decision to remerge the Petitioners property at 554 and 558 Edgewater Drive. In this letter, dated June 18 2009, John Ayer states “I provide this in writing to you as it is my decision from which the applicants attempt an administrative appeal, and I want to make clear my department’s position on the issues. This case arose in late 2006/early 2007 when I *erroneously* [emphasis added] led Mrs. Aichinger to believe she owned two lots instead on one. Many months later, when I realized that conclusion was mistaken, I informed her but in the interim she had taken on some financial obligations in reliance on my decision. In considering that, and the possible resulting risks to the Town, the Board of Selectmen entered into an agreement with her to treat the property as two lots.” At this late date several months after being shown the unmerge, nonmerge data and admitting to Mrs. Aichinger on October 30<sup>th</sup> 2008 that he indeed does remember participating in other unmerges Mr. Ayer continues to provide misleading information to the Zoning Board!<sup>30</sup>

57. In John Ayer’s June 18<sup>th</sup> , 2009 letter to the Chairman of the ZBA and the ZBA members he asks the ZBA to not consider the Plaintiffs appeal and in support states “ Is there still a valid appeal to hear? The appeal was filed almost 2 years ago and not pursued.” Yet the April 2009 filings of the Town attorney’s Walter Mitchell and Laura Spector contradict that opinion. From page 3, Case No. 2008-0674 Supreme Court Brief of the Appellee/Respondent, Town of Gilford. ‘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* [emphasis added] pending negotiations between the selectmen and the Aichingers regarding the resolution of the issues created by Mr. Ayer’s inadvertent error.’

58. John Ayer’s June 18<sup>th</sup> 2009 letter to the ZBA also asks several rhetorical questions about the Plaintiff’s reason for their appeal such as “What question is it that the Aichingers are trying

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<sup>28</sup> Appendix P May 1 and May 29 2009 letters from Barbara Aichinger to Gilford Selectman

<sup>29</sup> Appendix Q Email from Attorney Walter Mitchell to Attorney Patrick Wood asking for Aichinger to “cease” her quest for information on the issue of merger

to have your board decide? Are they appealing whether these properties should have been merged in 1984 under the zoning ordinance as it existed at that time? If so, surely it is now too late to file such an appeal.” These *mocking* questions skirt the real situation that the Plaintiff’s are asserting and Mr. Ayer is well aware of that. Mr. Ayer concludes his letter with a request for the Zoning Board to “dismiss” the Plaintiff’s appeal and that in essence is what the Zoning Board does.

59. Mr. Ayer’s request to dismiss the Plaintiff’s request for a hearing of his Administrative Decision is not within his authority, it is a conflict of interest. The Zoning Board has an obligation to consider both sides of the issue and denying the Petitioners a hearing to elucidate his and the Town’s actions is unjust and unfair. The Zoning Board should hold Mr. Ayer accountable for his actions and not simply take his side without a hearing.
60. On June 15<sup>th</sup>, 2009 Mrs. Aichinger learns that a non conforming vacant lot held in common ownership to the adjacent lot is about to be conveyed, 28 Hook Road. She again writes the Town Selectman, Assessor, Planning Director and Town Administrator detailing the continued inequity of her situation and the Town’s contrary legal position concerning the ordinance. Mrs. Aichinger pleads with the Selectman to change the Towns legal filings and ‘take the Administrative Gloss’ route.<sup>31</sup> The Selectman take no action.
61. In July of 2009 Mrs. Aichinger sends an email to Town Planner John Ayer, pointing out to him the data that she has compiled and asks if other similarly situated landowners in the Town of Gilford will be treated similarly and have their lots merged as he merged her lots in May of 2007. Town Administrator Scott Dunn is copied on this email. Mr. Dunn replies and tells Mr. Ayer to not answer Mrs. Aichinger’s question and accuses her of “harassment”.<sup>32</sup> Yet another attempt by the Town to avoid accountability and this time point the finger back at the Plaintiff in an effort to shift the blame and the attention away from their own actions.
62. On September 21<sup>st</sup> the Petitioner makes this timely appeal to the Belknap Superior Court to not only appeal the July 28<sup>th</sup> 2009 decision of the Gilford Zoning Board to not hear her

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<sup>30</sup> Appendix R John Ayers letter to the Zoning Board June 2009

<sup>31</sup> Appendix S Letter from Barbara Aichinger to Selectman concerning the sale of similarly situated property

<sup>32</sup> Appendix U Email from Town Administrator Dunn to Aichinger accusing her of ‘on going harassment’

appeal of John Ayer's May 23<sup>rd</sup> 2007 but to expose to the court the actions of the Town of Gilford with regards to its concerted effort to cover up its actions concerning the application of the merging ordinance and its incorrect filings with this court and the New Hampshire Supreme Court.

63. On October 7<sup>th</sup>, 2009 Mrs. Aichinger writes again to the Town this time to the Planning Board and Zoning Board Chairman in addition to the Assessor, Planning Director, Selectman and Town Administrator. This letter details yet another conveyance of a non conforming lot held in common ownership to an adjacent lot without subdivision approval. This one was actually an *unmerge* that is detailed in Mrs. Aichinger's Red Binder at Tab 5. This unmerge was brought to the Town's attention over 8 months earlier. Mrs. Aichinger writes:

*"It amazes me that the Selectman continue to authorize and pay town counsel to zealously back the remerging of my properties by John Ayer in May of 2007, yet ignore the other unmerges and non merges. Do you read their briefs? Why I am being singled out continues to be a mystery to me. The Selectman should instruct counsel to inform the courts that the action of John Ayer to unmerge my property was not a 'mistake' or 'inadvertent error' as they have portrayed but one of many unmerges that the town had done over the years. For the town to continue down the path that singles me out in front of the courts is unjust, unfair and treats me in a vastly different manner than other similarly situated landowners in the town of Gilford."* <sup>33</sup>

The Town takes no action as a result of this letter.

64. The evidence suggests that the Town's Planning Board, Zoning Board and Planning Department never actually merged any properties in Gilford. That the properties were merged by the mapping company when drawing the tax maps. This confirms the Assessors understanding of how merging came about in Gilford.<sup>34</sup> This makes the remerging of the Plaintiff's property the ONLY property EVER involuntarily merged by the Planning Department EVER in the history of the Town.

### **THE DECISION OF THE ZONING BOARD**

65. The result of the July 28<sup>th</sup> 2009 hearing on the Appeal of John Ayer's May 23<sup>rd</sup> 2007 decision was the following:

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<sup>33</sup> Appendix T Letter concerning the sale of an unmerged parcel on Dockham Shore Road



**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.*

66. Petitioners timely requested a rehearing of this decision and on August 25th 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.*

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<sup>34</sup> See footnote 9.  
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67. 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 Town's 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 withheld it from the Petitioners as outlined in the Timeline document. The ZBA's ruling in this matter deprives the Petitioners of their opportunity to comply with the Superior Court order and deprives the Petitioners of their right to due process under the New Hampshire and United States Constitutions.

68. 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>35</sup> The Petitioner attempts to do that by showing a pattern of unmerges and non merges of

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<sup>35</sup> Belknap Superior Court Order July 30<sup>th</sup> 2008 Docket # 07-E-0146  
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similarly situated landowners. The ZBA has unlawfully denied the Petitioners due process guaranteed to them under the Constitution of our country and our state.

69. 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 New Hampshire Supreme Court.

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

70. Section 10.2.1 of the Gilford Zoning Ordinance gives the Zoning Board the authority to hear Administrative Appeals. It also gives the Zoning Board "...all of the powers of the administrative official from whom the appeal is taken". Section 10.2.4 also gives the Zoning Board the power to make interpretations of the ordinance and states that "The Zoning Board of Adjustments is the final Town authority in interpretation of this ordinance."

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

72. 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.

## **CONCLUSION**

The Gilford Zoning Board of Adjustments, has abdicated its authority in an attempt to avoid accountability for the Town's actions. That is, to recognize the situation for what it is, Administrative Gloss. The Town has set aside its involuntary merging ordinance 9.1.1

Contiguous Nonconforming Lots through its actions. It has acted in bad faith in denying Mr. and Mrs. Aichinger timely access to information the Town knew would be useful to their case in the underlying lawsuit filed by an abutter. The Town has perpetuated its position that it has fairly applied its involuntary merging ordinance to Plaintiff's property all the way to the New Hampshire Supreme Court.

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;

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. Rule on the issue of Administrative Gloss and declare that the Town of Gilford has set aside this ordinance through its actions.

E. If this court would decline the above request Order the Gilford Zoning Board of Adjustment to hold a hearing on the question of Administrative Gloss.

E. Order the Town of Gilford to 'fess up' about its knowledge of its actions to unmerge lots previously involuntarily merged by the Town and its actions to not merge adjacent non conforming lots held in common ownership. 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: December 10, 2009

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Barbara P. Aichinger and Edward W. Aichinger

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