

Involuntary Lot Merging – an Amendment to HB 316

A Remedy for the Victims

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In the 1960's, 70's and 80's under the misguided concept that zoning abhors *ALL* non conforming aspects of land use towns began to merge lots smaller than the new increased lot size, even if those lots were developed or if vacant, could still be developed safely adhering to all other aspects of the local ordinances. In many cases towns gave no notice what so ever and due process for these owners was denied. SB406-2010 banned this practice and since the practice was banned many thought that towns could no longer hold lots merged. However the New Hampshire Local Government Center saw fit to inform towns, through its Fall 2010 newsletter, that although they could no longer merge they were not obligated to unmerge anyone victimized by this unconstitutional practice. They stated:

Involuntary Merger of Lots Prohibited. Chapter 345 (SB 406)..... The new law does not appear to invalidate involuntary mergers that are deemed to have occurred by operation of law prior to the effective date.E.D. September 18, 2010.

Throughout the course of SB406-2010 there were many hearings and debates. The NHLGC was opposed to bill and I personally debated the NHLGC attorney Cordell Johnston toe to toe in front of the legislators. **We won, they lost.** I now contend that it is very irresponsible of them to express their continued opposition using the statements 'the new law does not appear...' to try to convince municipalities to keep the status quo on lots that were involuntarily merged. In addition this past February Mr. Johnston told the House Municipal and County Government Committee that he felt that unmerging the victims was 'unconstitutional'. When asked by Representative Patten 'why' he said 'I don't know exactly why but I think it is'. Fortunately Senator Forsythe engaged Senate attorney Rick Lehmann who stated correctly that this remedy is constitutional since the municipality as a government entity *does not have* constitutional rights only the citizens and property owners do. Unfortunately due to this bias created by the Local Government Center and most recently the NH Planners Association we now need additional legislation. Supporters of this amendment include the NH Surveyors Association and the Association of NH Realtors.

The reality of the situation is that the intent of SB406-2010 *was* to afford relief to those owners who were involuntarily merged without their consent. Many, if not all, the legislators who voted to pass SB406-2010 felt that involuntarily lot merging was unconstitutional. They felt that common ownership should have nothing to do with lot of record status.

The lose to 72 year old Dorothea G. Carter

The NHLGC was very successful with its newsletter. It was read and dutifully obeyed by municipal attorney's around the state who advised towns **to not unmerge**. In Bedford, NH when faced with the plight of the Carter family Attorney Barton Mayer wrote to the Town of Bedford and stated:

[NH]LGC has opined that, “the new law does not appear to invalidate involuntary merges that are deemed to have occurred by operation of law prior to the effective date.....the Town is not required to “unravel” any past lots that have been merged, automatically.”¹

In fact Attorney Mayer goes on to advise the Town to start “*policing sales to make sure that someone is not trying to bypass the past affect of the ordinance.*”

In my attempt to help the Carter family I wrote to the Bedford Planning Board on December 1, 2010.

So what this attorney is suggesting is that you spend a lot of time and money combing through old records to make sure you screw the folks that he thinks you can. He then suggests that you send them a letter, one that I’m sure he will provide, and inform them that the local government has just robbed them of their property rights. I can just hear an evil cackle in the background as folks open their letters. In addition he suggests that you set up ‘policing’ to check every property sale here in Bedford to make sure that you rule with an iron fist. What you will need to consider on this last point is that the Town will not know about the sale until after it has taken place. So then the Town is in the enviable position of informing both the buyer and the seller that they have participated in an illegal transaction. I’m sure all of this will put the Town into the position of needing to use an attorney to sort things out which of course is why Mr. Mayer has suggested all of this in the first place. I do hope the Planning Board sees the conflict of interest here? ²

I am please to inform the legislature that the Town of Bedford Planning Board has voted overwhelming to present to the voters in March 2011 a repeal of its involuntary lot merging ordinance and make this relief retroactive, and the voters overwhelmingly passed it. But all of this came too late for the family of Dorothea Carter. They owned two side by side properties, one 1.5 acres with a house and the other 1.3 acres, vacant. The town sent two tax bills thus taxing each of these properties as individual properties and the vacant lot as a buildable lot and Dorothea and her husband paid the bills *for over 47 years*. The Carter family had buyers for each of these properties. It is astounding to me that the town would demand the taxes, year after year, for over 47 years and then deny these lots the status for which they were taxed for! But they did, and faced with the rising legal costs that this situation was causing and needing the resources to keep their mother, Dorothea in her private nursing home, they sold in December of 2010 at a considerable loss. The buyer for the vacant lot walked and the Carter family was forced to sell both parcels together at well below assessed value. The facts in this case tell the story. The house and the lot together sold on 12/16/2010 for \$339,000.00 The assessed values per the Bedford Town web site are: The house \$398,100.00 and the vacant lot \$117,000.00. Sales prices of nearby vacant lots of similar sizes range from \$100,000.00 to \$135,000.00 within the last 12 months. I’d say the Town of Bedford owes the Carter family over \$100,000.00!

¹ October 7 2010 letter to Bedford Planning Director from Attorney Barton Mayer. See letter here http://www.nhpropertyrights.com/legislation_21_470406608.pdf

² December 1, 2010 letter to the Bedford Planning Board from Barbara P. Aichinger. See letter here http://www.nhpropertyrights.com/legislation_22_2715829282.pdf

Some Towns Refuse To Give Relief to Merging Victims

In Windham, NH they never had an involuntary lot merging ordinance of any kind. Both the Windham Planning Director and the Planning Board have stated that no ordinance ever in the history of the Town of Windham could account for the involuntary lot merging of the Roberts family property on Cobbetts Pond Road. However in Windham as in many other towns lots were combined on assessment records for ease of sending out tax bills. Once zoning was adopted they used the tax bills as a starting point and many lots in common ownership were inadvertently merged from a zoning perspective. However the Assessor and the Selectman like the policy of involuntary lot merging and saw fit over the years to merge several properties in the town including the 5 lots owned by the Roberts Family. Mr. Roberts would like to sell his property as individual lots but Windham refuses to give the individual tax id's necessary. The state of NH Department of Environmental Services has given its approval as has the NH Department of Transportation (Cobbetts Pond Road is a state road) But the Selectman are sticking with their lawyers advice to keep them merged. The lawyer, Bernard Campbell stated at the February 10th 2011 hearing in front of the Municipal and County Government committee on HB 352 that 'he would not mind the resulting litigation'. NH case law clearly states that at the very least a town needed a lot merging ordinance to perpetrate this unconstitutional sham and now with the passage of SB406-2010 involuntary lot merging is illegal. But the Town of Windham thinks they just need advice of counsel,³ thus bullying the Roberts family into a mound of legal fees as a deterrent from bothering them anymore. **Shame on the Town of Windham, their Assessor, Selectman and Attorney. It is due to this type of behavior that the legislature must act.**

Our State Constitution is very clear

Involuntary Lot Merging is unconstitutional. Our New Hampshire Constitution states:

Part the First Article 2 *All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.*

These are deeded lots that were conforming when created. Most of them buildable and in established neighborhoods. They were acquired by family members perhaps passed down but if they came into common ownership MERGED! The town erased the lot line with no notification to the owner and nothing filed in the registry of deeds.

Part the First Article 12 *no part of a man's property shall be taken from him, or applied to public uses, without his own consent.*

In many cases a lot with a house on it is merged to a vacant lot, like the Carter property in Bedford. The second lot or lots has essentially been taken from the owner. They must pay taxes, insurance and upkeep but these merged lots are rendered useless because they cannot be built on or conveyed. Since they have been merged to the house lot the owner cannot

³ See Selectman meeting minutes from June 21 2010 here
http://www.nhpropertyrights.com/legislation_23_2485821174.pdf

even give the extra land away. If they stop paying taxes on the land they will lose their house since everything has been merged together. A sneaky little trick by the municipality to limit building but still retain the taxes coming in.

Part the First Article 23 *Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.*

New lot size and frontage requirements are being applied RETROACTIVELY onto subdivisions created prior to the new ordinance. Towns have seen fit to combine lots only when they come into common ownership. Thus punishing families who have bought side by side properties hoping to pass them down or punishing spouses whose side by side lots come into common ownership when one spouse dies. The surviving spouse now has lost the value of two separate and distinct parcels.

SB406-2010 restored Article 2 and Article 12 and now this amendment will restore Article 23.

These injurious zoning ordinances that forced the merging of side by side lots were done retrospectively. These lots were all created legally and conformed to the laws and ordinances at the time they were created.

This amendment to HB 316 will afford to the entire State of New Hampshire what the people in the Towns of Gilford⁴, New Hampton⁵, Washington, Lyme and Bedford will enjoy. Liberty and freedom from the cruel and wealth robbing practice of Involuntary Lot Merging.

About the Author

Barbara P. Aichinger is currently a resident of Gilford, NH. She is married with three children. She holds a Bachelors and Masters Degrees in Electrical Engineering and runs a small engineering company based in Bedford, NH (www.FuturePlus.com) with her husband Ed. She is active in community organizations especially the NH branch of the United States Tennis Association. Barbara has recently become a property rights activist as a result of Sutton v. Gilford, Aichinger and Governors Island Club. She spearheaded the repeal of Gilford, NH's Involuntary Lot Merging ordinance and made it retroactive freeing over 100 merged lots in the town of Gilford. Barbara then became the catalyst for SB406-2010 which banned Involuntary Lot Merging state wide. Barbara is detailing her saga on www.NHPropertyRights.com.

⁴ March 9, 2010 Gilford repealed its Involuntary Lot Merging ordinance and made the relief retroactive. All is well in Gilford today with 5 unmerges processed since the repeal. The author's being one of them.

⁵ Repealed and made retroactive in 2007 when a Planning Board member discovered they had been victimized.