



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 unsupportive 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 75:9,¹ 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,² it cannot agree that there was no legal right for it to merge Ms. Aichinger's abutting, nonconforming parcels when

¹As 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."

²A 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: _____
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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