LEGAL Questions & Answers

Mandatory Lot Merger Clauses in Zoning Ordinances: How Enforceable Are They?

By David R. Connell, Esq.

David Connell is Legal Services Counsel with the New Hampshire Local government Center's Legal Services and Government Affairs Department.

RSA 674:39-a, enacted in 1995, provides a relatively simple process for an owner of two or more contiguous parcels to merge them voluntarily for purposes of land use regulation and property tax assessment. All that is required is a notice of the merger that adequately identifies the parcels, signed by the planning board or its designee and recorded in the registry of deeds, with a copy to the assessing officials. No new deed or plan is required.

The statute provides that the merged parcels cannot be transferred separately without subdivision approval. The process is a great improvement on the previous informal practice, whereby assessing officials would occasionally merge parcels on tax maps, but typically without any written record to explain the circumstances or to show landowner consent.

Q. That is quite straightforward. Isn't that all I need to know about lot merger at this point?

A. No. You still may need to deal with *involuntary* merger of substandard lots under the special mandatory lot merger clause, common in zoning ordinances, that requires combination of adjacent substandard lots in the same ownership.

Q. Involuntary lot merger by zoning? Aren't lots that existed before zoning "grandfathered"?

A. Not necessarily. A vacant lot, as such, is not exempt from new zoning restrictions. *R.A. Vachon & Son, Inc. v. Concord*, 112 N.H. 107, 110-11 (1972); *Seabrook v. Tra-Sea Corp.*, 119 N.H. 237, 243 (1979). A lot gains vested rights when it is developed or is in an approved subdivision protected by the four-year rule of RSA 674:39 and by the developer's substantial completion of subdivision improvements. (See *But, It's Grandfathered! Six Common Myths about Nonconforming Uses*, May 2008, *New Hampshire Town and City*, p. 23.) Many, perhaps most, zoning ordinances contain "savings clauses" that exempt existing "lots of record" from some or all of the current dimensional requirements of the zoning ordinance. These savings clauses recognize the inherently severe effects of zoning on an individual preexisting substandard lot. *Anderson's American Law of Zoning*, Volume 2 (4th Ed.) sec. 9.66. In fact, mandatory lot merger clauses are typically enacted as *exceptions* to lot-of-record savings clauses: There is no need for a "grandfather clause" where an owner can make use of a substandard lot by combining it with an adjacent lot.

Q. Is involuntary lot merger legal?

A. In the 1972 *R.A. Vachon* case the New Hampshire Supreme Court upheld a lot merger clause that was an exception to a lot record savings clause. No decision of the Court has confronted the issue directly since then. There are many reported court cases in other states. The principle of mandatory lot merger by zoning ordinance is usually upheld, but enforceability depends on the particular circumstances. Merger clauses tend to be construed narrowly because of their consequences, and courts sometimes find them uncon-

stitutionally confiscatory as applied. *Anderson's*, sec. 9.67; *Rathkopf's The Law of Zoning and Planning*, Volume 3, sec. 49.14, et seq.

Q. How can involuntary lot merger be enforced?

A. In practice, lot merger clauses have been difficult to administer. Consider the following not uncommon scenario: By definition a merger of a substandard lot with an adjacent lot in common ownership becomes "effective" on passage of the zoning ordinance. But nothing really happens at that point. The merger clause does not come to anyone's active attention for many years. Notwithstanding the merger clause, a substandard lot is transferred into separate ownership from the adjacent lot because real estate title searches do not customarily include review of zoning ordinances. The new owner of the substandard lot, who paid good money for it, seeks a building permit. When told by the zoning administrator that the lot no longer exists for planning and zoning purposes because of the merger clause, the new owner is understandably upset. The owner points to similar cases in town where the merger clause was inexplicably not enforced in the past. The owner points out, too, that the merged lot has been continuously assessed for property taxation as a separate lot at a value that indicates it is buildable. In short, the new lot owner appears to have acted in good faith while the town's administration has left something to be desired. Needless to say, this puts the town at a disadvantage in its effort to enforce the merger clause.

Q. How serious a problem is it if the town's tax map and assessed valuation indicate that a merged substandard lot is still a separate buildable parcel?

A. The Supreme Court has held that property tax assessment maps are inconclusive as to the status of lots for zoning and planning purposes, *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881, 885 (1991), and landowners are deemed to have constructive notice of the zoning restrictions applicable to their property. *Hill v. Chester*, 146 N.H. 291, 294 (2001). Nevertheless, RSA 75:9 does require assessing officials to appraise and assess separate tracts separately for property taxation. "In determining whether or not contiguous tracts are separate estates the selectmen or assessors shall give due regard to whether the tracts can legally be transferred separately under the provisions of the subdivision laws ..." Discrepancies should be avoided if at all possible, especially when enforcing a difficult provision such as a mandatory lot merger clause.

Q. Can't the town nullify the transfer of a substandard lot that has been merged under the zoning ordinance?

A. Under RSA 676:16 a municipality may, by injunction, prevent transfer of land that is about to be conveyed without the required subdivision approval by the planning board. But, barring an injunction, a transfer that occurs in violation of the statute is not void. *White v. Francoeur*, 138 N.H. 307, 311 (1994). After such a transfer, the municipality's remedy is a civil penalty of $1,000 per lot. Thus, after a transfer of a substandard lot in violation of the lot merger clause, the municipality is faced with denying a building permit for a lot that exists in reality but is regarded as nonexistent for zoning purposes. Which brings us back to the unfavorable scenario of the earlier question.

Q. How can these problems be avoided?

A. A systematic approach has some advantages:

- Paying close attention to the details of your ordinance, identify cases calling for lot merger; that is, ownership of a substandard lot adjacent to another lot in the same ownership (exclude cases in subdivisions with vested rights).
- Notify the owners formally that an administrative decision has been made under RSA 674:33, I(a) and RSA 676:5 that the identified lots have been deemed merged under the applicable sections of the zoning ordinance and shall thereafter be treated as one lot for zoning and planning purposes.
- Specify that if the owner disagrees with the decision, the owner has a right to appeal the decision to the zoning board of adjustment under RSA 674:33, I(a) and RSA 676:5 within a reasonable time as specified in the rules of the ZBA.

- Make it clear that once the decision is final, a copy will be recorded in the registry of deeds.
- When the decision becomes final, make sure the assessing officials amend the tax map accordingly.

This process should help eliminate any appearance of selective enforcement, systematic nonenforcement or the like, which is apt to arise when the town simply waits to deal with merger issues case-by-case as building permits are sought. The process should also help with claims of unfair surprise, particularly by subsequent purchasers of substandard lots, who will now be on notice as a result of the registry recording.

Q. But what is to stop an owner from seeking a variance from the terms of the lot merger clause itself?

A. The lot merger clause is part of the zoning ordinance. A property owner can seek a variance to any provision of the zoning ordinance. Good administration of the lot merger clause can at least avoid claims of unfair treatment and keep the focus on the land use issues.

Q. Is there anything else to keep in mind about lot merger?

A. Occasionally an owner will cause lot merger by behavior that indicates abandonment of the separate identity of adjacent lots. The classic case is *Robillard v. Hudson*, 120 N.H. 477 (1980), where the owner of two adjoining lots built a duplex dwelling on one lot, where the lots individually lacked the area or frontage required for a duplex. It was held that the owner had used both lots to satisfy zoning standards for the duplex and had thus abandoned the separate existence of the lots.

For more information on these topics and other topics of interest to local officials, LGC's legal services attorneys can be reached Monday through Friday from 8:30 a.m. to 4:30 p.m. by calling 800.852.3358.

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Eleanor M. Baron

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Editor