

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2007-0755, Krist-Ali Properties, LLC v. City of Concord, the court on September 8, 2008, issued the following order:**

The respondent, City of Concord (city), appeals an order of the trial court finding that the Concord Zoning Board of Adjustment (ZBA) erred in finding that two lots had automatically merged and that as a result, the lot owned by the petitioner, Krist-Ali Properties, LLC (Krist-Ali) was not a buildable lot. The city argues that the trial court erred by: (1) failing to consider all relevant portions of the zoning ordinance; (2) ignoring the city council's intent; (3) mischaracterizing a tennis court and garage as primary uses; and (4) finding that Lots 10 and 50 did not merge under Section 28-14-1 of the 1999 Concord Zoning Ordinance. We affirm.

We briefly restate the procedural history of this case. In 2005, Krist-Ali appealed the denial of its request for a building permit to the ZBA. The ZBA denied the appeal and Krist-Ali appealed to the superior court. After a hearing, the superior court found that a factual issue had not been addressed by the ZBA and remanded the case. The ZBA again denied the appeal. Although Krist-Ali filed a motion to reconsider, it also filed a partially assented-to motion to bring forward in the superior court before the time had run for the ZBA to act on the motion to reconsider. The trial court found that the parties had agreed that the court could hear the appeal even though the ZBA had not acted upon the motion to reconsider. After this case was fully briefed, we requested memoranda addressing the issue of whether the trial court had jurisdiction over the post-remand appeal in light of the absence of a ruling on the motion to reconsider. Based upon the unique facts of this case, we conclude that the trial court retained jurisdiction of the appeal following remand and, therefore, no further action was required by the ZBA to preserve jurisdiction.

We turn then to the merits of the appeal. Although the city lists four issues in its brief, the issue before us is whether the trial court erred in construing the Concord Zoning Ordinance (ordinance) and concluding that the general definition of "principal use" controlled over the examples set forth in the Table of Uses.

The ordinance contains a definitional section, which defines "principal use" as "[t]he primary purpose for which a lot or structure is used." Article 28-2-1. The ordinance also contains a separate table captioned "Table of Uses," which sets forth examples of uses. The city argues that the Table of Uses controls over the General Definition Section of the ordinance. We considered a similar

argument in Hannigan v. City of Concord, 144 N.H. 68, 70-71 (1999), in which we held that if the only permitted uses were those specifically listed in the table, the ordinance's general definition would be rendered superfluous. We see no reason to depart from that analysis in this case. We agree with the trial court's well-reasoned order. Because, under the general definition section of the ordinance, the principal use of Lot 50 is a tennis court and garage, the trial court correctly concluded that Lots 10 and 50 did not merge in 1999 when they came into common ownership. Should the city wish to limit approved uses in the future to those set forth in its zoning ordinance table, it is free to amend its ordinance to specifically so state.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,  
Clerk**