

Bill as Introduced

SB 406 - AS INTRODUCED

2010 SESSION

10-2707
03/01

SENATE BILL **406**

AN ACT relative to merger of lots or parcels.

SPONSORS: Sen. Sgambati, Dist 4; Sen. Roberge, Dist 9; Sen. Houde, Dist 5; Sen. Bradley, Dist 3; Sen. Fuller Clark, Dist 24; Rep. Millham, Belk 5; Rep. Stuart, Belk 4; Rep. Pilliod, Belk 5; Rep. Arsenault, Belk 4; Rep. Merry, Belk 2

COMMITTEE: Public and Municipal Affairs

ANALYSIS

This bill prohibits a city, town, or county from merging lots or parcels except upon application of the owner.

Explanation: Matter added to current law appears in *bold italics*.
 Matter removed from current law appears [~~in brackets and struckthrough.~~]
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to merger of lots or parcels.

Be it Enacted by the Senate and House of Representatives in General Court convened:

- 1 1 Regulation of Subdivision of Land; Voluntary Merger. Amend RSA 674:39-a to read as follows:
2 674:39-a Voluntary Merger. Any owner of 2 or more contiguous preexisting approved or
3 subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes
4 may do so by applying to the planning board or its designee. Except where such merger would create
5 a violation of then-current ordinances or regulations, all such requests shall be approved, and no
6 public hearing or notice shall be required. No new survey plat need be recorded, but a notice of the
7 merger, sufficient to identify the relevant parcels and endorsed in writing by the planning board or
8 its designee, shall be filed for recording in the registry of deeds, and a copy mailed to the
9 municipality's assessing officials. No such merged parcel shall thereafter be separately transferred
10 without subdivision approval. ***No city, town, or county may merge preexisting approved or***
11 ***subdivided lots or parcels except upon application of the owner.***
12 2 Effective Date. This act shall take effect 60 days after its passage.

Amendments

Rep. Patten, Carr. 4
Rep. Boyce, Belk. 5
Rep. Ferrante, Rock. 5
Rep. Sterling, Ches. 7
April 8, 2010
2010-1278h
03/09

Amendment to SB 406

1 Amend the bill by replacing section 1 with the following:

2

3 1 Regulation of Subdivision of Land; Voluntary Merger. Amend RSA 674:39-a to read as follows:

4 674:39-a Voluntary Merger. Any owner of 2 or more contiguous preexisting approved or
5 subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes
6 may do so by applying to the planning board or its designee. Except where such merger would create
7 a violation of then-current ordinances or regulations, all such requests shall be approved, and no
8 public hearing or notice shall be required. No new survey plat need be recorded, but a notice of the
9 merger, sufficient to identify the relevant parcels and endorsed in writing by the planning board or
10 its designee, shall be filed for recording in the registry of deeds, and a copy mailed to the
11 municipality's assessing officials. No such merged parcel shall thereafter be separately transferred
12 without subdivision approval. *No city, town, county, or village district may merge preexisting*
13 *subdivided lots or parcels except upon the consent of the owner.*

2010-1278h

AMENDED ANALYSIS

This bill prohibits a city, town, county, or village district from merging lots or parcels except upon application of the owner.

Rep. Patten, Carr. 4
Rep. Boyce, Belk. 5
Rep. Ferrante, Rock. 5
Rep. Sterling, Ches. 7
April 8, 2010
2010-1278h
03/09

Amendment to SB 406



1 Amend the bill by replacing section 1 with the following:

2

3 1 Regulation of Subdivision of Land; Voluntary Merger. Amend RSA 674:39-a to read as follows:
4 674:39-a Voluntary Merger. Any owner of 2 or more contiguous preexisting approved or
5 subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes
6 may do so by applying to the planning board or its designee. Except where such merger would create
7 a violation of then-current ordinances or regulations, all such requests shall be approved, and no
8 public hearing or notice shall be required. No new survey plat need be recorded, but a notice of the
9 merger, sufficient to identify the relevant parcels and endorsed in writing by the planning board or
10 its designee, shall be filed for recording in the registry of deeds, and a copy mailed to the
11 municipality's assessing officials. No such merged parcel shall thereafter be separately transferred
12 without subdivision approval. *No city, town, county, or village district may merge preexisting*
13 *subdivided lots or parcels except upon the consent of the owner.*

Amendment to SB 406

- Page 2 -



2010-1278h

AMENDED ANALYSIS

This bill prohibits a city, town, county, or village district from merging lots or parcels except upon application of the owner.

Speakers

Fill in **ONLY** if **SPEAKING** on Bill

Bill # SB406 Date 3-30

Committee _____

I support the bill

I oppose the bill _____

I have written testimony _____

(Number of copies) _____

Time needed to speak: 4 min

Name Howard Hardin

Address 3 Diamond Island

Sufford NH

Phone 293 4940

Representing SELF

Fill in **ONLY** if **SPEAKING** on Bill

Bill # SB406 Date 3/30/10

Committee Public & Municipal Affairs

I support the bill

I oppose the bill _____

I have written testimony

(Number of copies) _____

Time needed to speak: 3 min

Name Keith Carlson

Address Keene

Phone 997-1446

Representing New Hampshire Liberty Alliance

Fill in **ONLY** if **SPEAKING** on Bill

Bill # SB 406 Date 3-30-10

Committee Municipal + County Gov't

I support the bill _____

I oppose the bill

I have written testimony

(Number of copies) _____

Time needed to speak: 3 minutes

Name Cordell Johnston

Address P.O. Box 617

Concord 03302-0617

Phone 224-7447

Representing NH Municipal Ass'n

Fill in **ONLY** if **SPEAKING** on Bill

Bill # 406 Date 3/30

Committee _____

I support the bill _____

I oppose the bill _____

I have written testimony

(Number of copies) _____

Time needed to speak: _____

Name Senator Sycambati

Address _____

Phone _____

Representing _____

Fill in ONLY if SPEAKING on Bill

Bill # SB406 Date 3/30/2010

Committee _____

I support the bill

I oppose the bill _____

I have written testimony

(Number of copies) ~~20~~ 19

Time needed to speak: 10 min

Name Barbara Archinger

Address 558 Edgewater
Gilford NH

Phone 603 548 5037

Representing Self

Fill in ONLY if SPEAKING on Bill

Bill # 406 Date 3/30

Committee Merrimack County

I support the bill

I oppose the bill _____

I have written testimony _____

(Number of copies) _____

Time needed to speak: 1 min

Name Shirley Peabody

Address _____

Phone _____

Representing 11 State Dist

Fill in ONLY if SPEAKING on Bill

Bill # SB 406 Date 3/30/10

Committee m+c

I support the bill

I oppose the bill _____

I have written testimony _____

(Number of copies) _____

Time needed to speak: 1 min

Name Rep. Chris Christensen

Address Merrimack

Phone 759-6574

Representing Hills 19

Hearing Minutes

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

PUBLIC HEARING ON SB 406

BILL TITLE: relative to merger of lots or parcels.

DATE: March 30, 2010

LOB ROOM: LOB 301 **Time Public Hearing Called to Order:** 1:44 pm

Time Adjourned: 2:55 pm

(please circle if present)

Committee Members: Reps. Cooney, Gagnon, Osborne, L. Brown, Laliberte, Wheeler, Boisvert, Carlson, Lauterborn, Lewis, Schuetz, Patten, Boyce, C. Soucy, J. Sullivan, Crisler, Ferrante, Perkins, Sterling and Cunningham.

Bill Sponsors: Sen. Sgambati, Dist 4; Sen. Roberge, Dist 9; Sen. Houde, Dist 5; Sen. Bradley, Dist 3; Sen. Fuller Clark, Dist 24; Rep. Millham, Belk 5; Rep. Stuart, Belk 4; Rep. Pilliod, Belk 5; Rep. Arsenaault, Belk 4; Rep. Merry, Belk 2

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Sen. Roberge who introduced the bill. We found that towns around the lakes are already merging these small lots together.

Rep. Brown: Admitted that it is a taking. This deals with very small lots. Is this being done for health or safety reasons. Ans. - I don't know, I will defer to others.

***Sen. Sgambati**, spoke in favor. People have had this done by the town with no notice. They go to do something and find that what they thought was two lots, have been merged into one. It should be your choice, not up to the town. Has proposed Am. 0079s

Rep. Cooney: Can you think of an instance where lots should be merged? Ans. - I think it should be up to the owner, not towns or anyone else.

Rep. Cooney: I was thinking of environmental reasons. Ans. - I still think it should be up to the owner. The owners are concerned about health and environmental standards too.

Rep. Cooney: Have you heard anyone opposing this? Ans. - Not specifically, the Mun Assoc. has some concerns, but the Senate and the committee felt the property owners concerns should be considered first.

Rep. Sterling: It's not your intention to avoid zoning. Ans. - No, you would have to meet all regulations.

***Barbara Aichinger**, Gilford. Spoke in favor. In answer to some of your questions. This is not an attempt to avoid zoning or shore-land protection requirements. Gave several examples of hardships created by town actions merging lots with no zoning board meetings or notice. Cited a letter from the state noting that this cannot be done. Some towns have recognized this as a taking and gotten rid of it, others have not.

Rep. Brown: Did you imply that Mr. Snow's example was a political plot? Ans. - Somewhat anecdotal. Case law is important but we have no explicit legislation addressing this problem.

Rep. Brown: Belknap County courts has upheld some of these merging ordinances based on case law and the fact that statute does not specifically prohibit it. We have gotten Gilford to change their ordinance to eliminate involuntary merging there via petition to town meeting.

Rep. Boyce: Do your lots each have their own sewer system? Ans. - Yes, and wells.

Rep. Laliberte: If this passes, how can it help cases where this has already happened? Ans. - The petitions we have gotten adopted provided for 'unmerging.' there is a down side, though because now you could get two tax bills. We would at least like to see this having a hearing before the zoning board so that all possibilities can be examined.

Rep. Osborne: Has a problem with voluntary merging language currently - no hearing. Ans.-Those items do appear on the agenda.

Rep. Perkins: This is ex poste facto. Isn't this a violation of the constitution? Ans. - I would agree.

Rep. Sullivan: When voluntary merger was passed in 1995, was legislative intent stated? Ans.- Stated that it could be done prior to that and that that law was not needed.

Rep. Perkins: Could we search that before we decide.

Howard Hardin. Spoke in favor. I own a waterfront lot on Diamond Island. I purchased a 'land lot' as a bird sanctuary, it is non-buildable. The town merged them so that my total land area was taxable as waterfront and increased my land value tremendously.

Rep. Perkins: Is your tax money being refunded for the period before the ordinance was reversed? Ans - No.

***Keith Carlsen**, NH Liberty Alliance. Spoke in favor. Cited the constitutional rights of property owners. Feels this is a 'taking' issue.

Rep. Cooney: If two lots are merged could it be for safety or health reasons. Ans. - That could be in some cases, but not in many.

Rep. Chris Christensen. Spoke in favor. I have been on the planning board in my town and we wrestled with this merging question. We ended up deciding that it could be voluntary but should not be mandatory and finally, it should not be done without due process.

***Cordell Johnston**, NH Munic Assoc. Spoke against bill. Personally, I am not in favor of involuntary merging but would point out that the courts have repeatedly upheld this action. It is not a simple issue. The idea in many cases is to accomplish compliance with zoning ordinances. If you don't believe in zoning, then you don't believe in involuntary merging. It has been used for a long time. I would point out that Ms. Aichinger's lot was posted as one lot on town maps at the time she purchased it. The Senate did not have the time to look into the complications of this law. The existing law is a mess and if this law is passed you will have a more complicated mess. I think if you work on a notice provision and right of review that could help. You can purchase a lot that is build-able, but if your town adopts zoning that changes that then you cannot build subsequently.

Rep. Crisler: What are the advantages to a town? Ans. - Town has adopted min. lot size of 1 acre and you have two contiguous lots of under 1 acre, no grandfather clause. The owner can't really do anything with those (undeveloped) lots.

Rep. Crisler: Is there a financial advantage to the town. Ans. - In most cases, no.

Rep. Sterling: Lot sizes do change under zoning. If a lot doesn't meet taxable usage, wouldn't it be a tax advantage to the town? Ans. - Yes

Rep. Sterling: Would this be better if it said 'lots of record.' Ans. - I don't know. You could have something that's been subdivided but not recorded; recorded but not approved. I don't think that would solve all the concerns I've mentioned.

Rep. Cooney: Is there a limit on subdivisions being put into use. Ans. - Under RSA 674:39 you are limited for a time period. You have to achieve substantial development then you are exempt from zoning changes.

Rep. Carlson: Didn't we pass a law exempting those periods last year because of the economy? Ans. -Yes

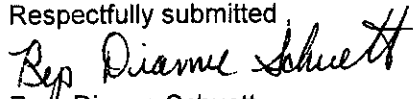
Rep. Lewis: You said there were some takings that were not handled properly? Ans.- Ms. Aichinger's case, the court stated the town told her she had two lots but were wrong. An abutter sued and she lost because the town gave her bad information.

Rep. Boyce: If this bill goes through would it make the court's decision right or wrong. Ans. - The decision will stand because that was the law today. It could change court decisions going forward. In Gilford, the change was accomplished by change of their own regulations.

Rep. Perkins: In this 2008 paper you gave us. Did the Mun Assoc check the legislative intent before putting this out. Did this publication spark the Gilford change. Ans. - this was put out before.

Ms. Aichinger: This was thoroughly discussed in the Senate. It is not complicated. I believe in zoning. It has a proper place in our society. I don't think it should be the purpose of zoning to bring everyone into conformity. Many of these lots were conforming when they were brought into existence. I don't feel 'lots of record' phrase would do anything. I think Sen. Sgambati's amendment change would be positive.

Respectfully submitted,



Rep. Dianne Schuett
Clerk

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

PUBLIC HEARING ON SB 406

BILL TITLE: relative to merger of lots or parcels.

DATE: 3/30/2010

LOB ROOM: LOB 303 Time Public Hearing Called to Order:

1:44 pm

Time Adjourned:

2:55 pm

(please circle if present)

Committee Members: Reps. Cooney, Gagnon, Osborne, L. Brown, Laliberte, Wheeler, Boisvert, Carlson, Lauterborn, Lewis, Schuett, Patten, Boyce, C. Soucy, J. Sullivan, Crisler, Ferrante, Perkins, Sterling and Cunningham

Bill Sponsors: Sen. Sgambati, Dist 4; Sen. Roberge, Dist 9; Sen. Houde, Dist 5; Sen. Bradley, Dist 3; Sen. Fuller Clark, Dist 24; Rep. Millham, Belk 5; Rep. Stuart, Belk 4; Rep. Pilliod, Belk 5; Rep. Arsenault, Belk 4; Rep. Merry, Belk 2

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Hearing, minutes on
SB 406 Mar. 30, 2010

Hearing opened at 1:44 p.m.

Sen. Roberge who introduced the bill. We found that towns around the lakes are already merging these small lots together.

Rep. Brown: Admitted that it is a taking. This deals with very small lots. Is this being done for health or safety reasons. Ans. - I don't know, I will defer to others.

Sen. Sgambati, spoke in favor. People have had this done by the town with no notice. They go to do something and find that what they thought was two lots, have been merged into one. It should be your choice, not up to the town. Has proposed Am. 0079s

Rep. Cooney: Can you think of an instance where lots should be merged? Ans. - I think it should be up to the owner, not towns or anyone else.

Rep. Cooney: I was thinking of environmental reasons. Ans. - I still think it should be up to the owner. The owners are concerned about health and environmental standards too.

Rep. Cooney: Have you heard anyone opposing this? Ans. - Not specifically, the Mun

Assoc. has some concerns, but the Senate and the committee felt the property owners concerns should be considered first.

Rep. Sterling: It's not your intention to avoid zoning. Ans. - Yes, you would have to meet all regulations.

*Barbara Aichinger, Gilford. Spoke in favor. In answer to some of your questions. This is

not an attempt to avoid zoning or shoreland protection requirements. Gave several examples of hardships created by town actions merging lots with no zoning board meetings

or notice. Cited a letter from the state noting that this cannot be done. Some towns have recognized this as a taking and gotten rid of it, others have not.

Rep. Brown: Did you imply that Mr. Snow's example was a political plot? Ans. - Somewhat anecdotal. Case law is important but we have no explicit legislation addressing this problem.

Rep. Brown: Belknap county courts has upheld some of these merging ordinances based on case law and the fact that statute does not specifically prohibit it. We have gotten Gilford to change their ordinance to eliminate involuntary merging there via petition to town meeting.

Rep. Boyce: Do your lots each have their own sewer system? Ans. - Yes, and wells.

Rep. Laliberte: If this passes, how can it help cases where this has already happened. Ans. -

The petitions we have gotten adopted provided for 'unmerging.' there is a down side, though

because now you could get two tax bills. We would at least like to see this having a hearing

before the zoning board so that all possibilities can be examined.

Rep. Osborne: Has a problem with voluntary merging language currently - no hearing. Ans.-

Those items do appear on the agenda.

Rep. Perkins: This is ex poste facto. Isn't this a violation of the constitution? Ans. - I would agree.

Rep. Sullivan: When voluntary merger was passed in 1995, was legislative intent stated? Ans.-

Stated that it could be done prior to that and that that law was not needed.

Rep. Perkins: Could we search that before we decide.

Howard Hardin. Spoke in favor. I own a waterfront lot on Diamond Island. I purchased a 'land lot'

as a bird sanctuary, it is non-buildable. The town merged them so that my total land area was

taxable as waterfront and increased my land value tremendously.

Rep. Perkins: Is your tax money being refunded for the period before the ordinance was reversed?

Ans - No.

*Keith Carlsen, NH Liberty Alliance. Spoke in favor. Cited the constitutional rights of property owners.

Feels this is a 'taking' issue.

Rep. Cooney: If two lots are merged could it be for safety or health reasons. Ans. - That could be in

some cases, but not in many.

Rep. Chris Christensen. Spoke in favor. I have been on the planning board in my town and we wrestled

with this merging question. We ended up deciding that it could be voluntary but should not be mandatory

and finally, it should not be done without due process.

Cordell Johnston, NH Munic Assoc. Spoke against bill. Personally, I am not in favor of involuntary merging

but would point out that the courts have repeatedly upheld this action. It is not a simple issue. The idea

in many cases is to accomplish compliance with zoning ordinances. If you don't believe in zoning, then

you don't believe in involuntary merging. It has been used for a long time. I would point out that Ms.

Aichinger's lot was posted as one lot on town maps at the time she purchased it. The Senate did not have

the time to look into the complications of this law. The existing law is a mess and if this law is passed you

will have a more complicated mess. I think if you work on a notice provision and right of review that could

help. You can purchase a lot that is build-able, but if your town adopts zoning that changes that then you cannot build subsequently.

Rep. Crisler: What are the advantages to a town? Ans. - Town has adopted min. lot size of 1 acre and you

have two contiguous lots of under 1 acre, no grandfather clause. The owner can't really do anything with

those (undeveloped) lots. The town

Rep. Crisler: Is there a financial advantage to the town. Ans. - In most cases, no.

Rep. Sterling: Lot sizes do change under zoning. If a lot doesn't meet taxable usage, wouldn't it be a tax

advantage to the town. Ans. - Yes

Rep. Sterling: Would this be better if it said 'lots of record.' Ans. - I don't know. You could have something

that's been subdivided but not recorded; recorded but not approved. I don't think that would solve all the

concerns I've mentioned.

Rep. Cooney: Is there a limit on subdivisions being put into use. Ans. - Under RSA 674:39 you are

limited for a time period. You have to achieve substantial development then you are exempt from zoning

changes.

Rep. Carlson: Didn't we pass a law exempting those periods last year because of the economy? Ans. - Yes

Rep. Lewis: You said there were some takings that were not handled properly? Ans.- Ms. Aichinger's case,

the court stated the town told her she had two lots but were wrong. An abutter sued and she lost because the

town gave her bad information.

Rep. Boyce: If this bill goes through would it make the court's decision right or wrong. Ans. - The decision will

stand because that was the law today. It could change court decisions going forward. In Gilford, the change

was accomplished by change of their own regulations.

Rep. Perkins: In this 2008 paper you gave us. Did the Mun Assoc check the legislative intent before putting

this out. Did this publication spark the Gilford change. Ans. - this was put out before.

Ms. Aichinger: This was thoroughly discussed in the Senate. It is not complicated. I believe in zoning. It has a proper place in our society. I don't think it should be the purpose of zoning to bring everyone into conformity.

Many of these lots were conforming when they were brought into existence. I don't feel 'lots of record' phrase would do anything. I think Sen. Sgambati's amendment change would be positive.

Hearing closed at 2:55 p.m.

Respectfully submitted ,

Rep. Dianne Schuett, clerk

Sub-Committee Minutes

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

SUBCOMMITTEE WORK SESSION ON SB 406

BILL TITLE: relative to merger of lots or parcels.

DATE: April 6, 2010

Subcommittee Members: Reps. Boisvert, Boyce, Brown, Cooney, Cunningham, Ferrante, Gagnon, Lauterborn, Osborne, Patten, Perkins, Schuett, Sterling, Sullivan, Wheelerl

Comments and Recommendations: See attached notes.

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Respectfully submitted,

Rep. Diane Schuett
Subcommittee Chairman/Clerk

SB 406 Full Committee Work Session, April 6, 2010

Rep. Gagnon opened the session at 10:12 a.m.

Rep. Boyce brought up Sen. Sgambati's proposed Am #0079s.

Rep. Osborne: doesn't see a need for the bill. Sees this as an individual case which can be countermanded by local ordinance as in Gilford.

Rep. Cunningham: asked Rep. Osborne about grandfathering separate parcels.

Rep. Sterling: cited art 2nd, part 1 of constitution – rights of individual property owner.

Rep. Boyce: stated it says 'shall' not 'may' so that makes it a local issue.

Rep. Gagnon: noted Crystal Lake, particularly, where there are all nonconforming lots.

Rep. Brown: per our researcher, the Supreme Court trumps us. States if Rep. Sterling is correct, New Hampshire has no power to zone.

Rep. Schuett: stated legislative intent on HB 390, 1995 that stated amendment to law was not intended to expand powers of planning boards - and would like to see notification and review rights added for involuntary merging.

Rep. Lauterborn: agree with Rep. Schuett.

Rep. Patten: Moultonborough instituted zoning in 1985. Owners give up a little of their individual property rights to have zoning control. Once Moultonborough zoning went in, merging could not happen. Mentioned checkerboarding, where spouses could keep two smaller parcels in separate names. Does not feel that it is a taking.

Rep. Brown: The case this bill is based on seems to be about competing interests within a private club. Would like to have seen it solved locally. How does it effect health, welfare and safety? If none, why are we considering it?

Rep. Sterling: would like to see last sentence say 'consent' instead of 'application.' Also mentioned Gilford case of Mr. Hardin who just wanted to keep the smaller separate parcel as a bird sanctuary and should not have to pay heavier taxes for that.

Rep. Osborne: that was an added tax burden in that case that should have been handled locally.

Rep. Gagnon: noted statewide ramifications if this is passed.

Rep. Sterling: How else are you going to protect small parcels that owners want to preserve for wetlands, etc.

SB 406, April 6, 2010 work session continued...

Rep. Osborne: would like to see notification and hearing process added.

Ms. Aichinger was invited to speak: This is not a free pass for a building permit. Also, checkerboarding circumvents local merging.

Ben Frost was invited to speak: I'm an agnostic on this. If passed, suggests taking out 'approved' and adding village districts with 'city, town or county.'

Rep. Brown: municipalities may have zoning for aesthetic reasons. If we don't allow those options.

Jeff Keeler, NH Assoc of Realtors was invited to speak: Supports bill. If people have checkerboarded, when spouse dies, those lots get merged. Supports idea of consent.

Cordell Johnston, NH Mun Assoc was invited to speak:

- 1) re Rep. Sterling – even if nonconforming, lots still subject to setbacks except involuntary mergers generally have exceptions anyway.
- 2) re Rep. Patten – what happens to those already merged if this passes? -I don't know, it needs careful study.
- 3) Doesn't feel 'consent' wording solves anything. This just needs further study.

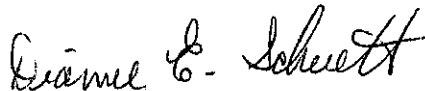
Rep. Sullivan: If statute is left alone – one remedy is information must be given before a merging. We can't legislate all bruises and bumps.

Rep. Sterling: lot sized change all the time – are we going to rezone all the time?

Rep. Osborne: the entire state shouldn't have to be involved

Meeting closed at 11:00 a.m.

Respectfully submitted



Rep. Dianne E. Schuett, clerk

Testimony

S.B. 406

Rita Sutton &a. v. Town of Gilford
March 30, 2010

QUICK SUMMARY

The Supreme Court held that the automatic merger provision for substandard contiguous undeveloped lots in common ownership as part of the Town of Gilford's zoning ordinance was not in conflict with RSA 674:39-a, which governs voluntary mergers by landowners of contiguous preexisting approved or subdivided lots. The court noted the existence of such provisions in many towns' zoning ordinances, sharing similar structural characteristics. The court held that the property in question in this case with a single deed containing 2 prior lot listings was a single merged lot. The owner who purchased the property in 2002 had attempted to develop the parcel as 2 lots after consulting the town, which had initially provided incorrect information. A subsequent agreement between the property owner and the town to avoid litigation and damages did not bar an abutter from court action challenging the status of the property as a single merged lot and demanding that the town enforce the ordinance. The court declined to rule on whether the merger amounted to a taking of property in violation of Part I, Article 12-a. The court noted that the property had been the subject of a prior Supreme Court decision in 1983. The property owner in that case had acknowledged that the property was a single lot and taxed as such and that the court then recognized that the property had been in common ownership since 1947.

FACTS AND SUMMARY

The case involved lakefront property on Governor's Island in Gilford. Barbara Aichinger purchased the property in 2002. It is in the Single Family Residence District, where lots are required to be one acre in size and the property is part of the Governor's Island Club. The club is an association that enforces restrictive covenants on land use. The property was once 2 lots, #9 and #10. Lot 9 (0.6 acres) had a single structure consisting of a garage and guest house and lot 10 (0.5 acres) contained a residence. Sometime in the 1980's, the lots were merged by the town into a single lot, #7, pursuant to a provision in its ordinance to merge contiguous nonconforming lots automatically. Lots 9 and 10 are described separately on Aichinger's deed. At the time she purchased the property, it was labeled lot 7 on the town tax maps and taxed as a single lot. The club records also indicate that the property is a single lot.

Aichinger asked for clarification from the Town in 2006, requesting that the property be 2 separate waterfront parcels. The Town Code Enforcement Officer and Town Appraiser replied that they saw nothing in their records that a previous owner had voluntarily merged the lots but did not comment on her request to treat the lots separately. The Town Appraiser indicated that the parcels appeared to have been automatically merged by a mapping company and that he would recommend that the properties be separately assessed but that he had no authority to proceed without approval of the Planning Board and Board of Selectmen. They directed her to the Director of Planning and Land Use.

Aichinger contacted the Director of Planning and asked for a second lot ID number. The Director replied via email that he had found no evidence of a voluntary merger by a prior owner and that the 2 lots appeared to have been merged on some older maps. He replied that he thought this must have been done involuntarily by the town but that the law governing that process had been thrown out by the courts. He later sent a confirmation later that he and the Town Assessor agreed that the parcel was legally 2 lots. He also speculated that the lots were merged only on the town tax maps and not at the Registry of Deeds. He gave addresses for the 2 lots as 554 Edgewater Drive for the former lot 9 and 558 Edgewater Drive for the former lot 10.

Subsequently, Aichinger began work to remove all existing structures and to construct 2 new single family homes on each of the former lots. She obtained a permit to demolish the existing house on 558 Edgewater Drive, obtained a new septic design and system permit for both parcels, obtained a building permit for a new house on 558 Edgewater Drive, obtained permits for new driveways and blasted foundation holes for both parcels, contracted for construction of a new home on 558 Edgewater Drive, received approval for construction of the new home on 558 Edgewater Drive from the Governor's Island Club, mortgaged 554 Edgewater Drive to fund the construction of 558 Edgewater Drive, and sought buyers for 554 Edgewater Drive.

The Director of Planning then wrote to Aichinger and indicated that after talking with town counsel, he realized that he had been in error and that the property was, in fact, a single merged lot. Aichinger then appealed this decision to the Gilford ZBA and began negotiating with the Gilford Board of Selectmen for the possibility that the town might be liable for monetary damages if this decision stood. She entered into a settlement agreement with the Board of Selectmen before her ZBA appeal hearing. The agreement acknowledged that the property consisted of 2 distinct lots and that the town would continue to assess them as separate parcels and that the town would not take action to merge the 2 lots or agree to participate in any efforts to do so. Aichinger then dropped her ZBA appeal.

Following this action, an abutter named Sutton filed suit in Superior Court seeking an injunction to prevent the development in violation of the Gilford Zoning ordinance, to prevent Aichinger from litigating whether lots 9 and 10 were merged, to rule that the town was not barred from enforcing its merger ordinance and requiring that it do so. Aichinger replied and asked for summary judgment. The court rejected this request for summary judgment on all the issues but did rule on one: affirming that the town had properly exercised its discretion in settling with Aichinger.

Aichinger obtained a building permit for the construction of a home on 554 Edgewater Drive on behalf of a party with which she had entered into a purchase and sale agreement for that property. The permit for a new single family home with a garage also contained a caveat that the property was involved in litigation and construction could be subject to removal at the owner's expense should a court determine that this lot is not a separate lot. It noted that the Town of Gilford does not recommend starting any construction until all litigation is resolved.

Aichinger asked the Town CEO to amend the permit, stating that she was intending to replace and enlarge the existing guest cottage, as an expansion within the limits of the property of the nonconforming use. She asked that the prior warning be struck and that a condition be added that the building would not have to be removed, regardless of the outcome of the litigation. The CEO affirmed by letter that she would be permitted to replace, enlarge or relocate a preexisting dwelling as long as it complied with other requirements, whether or not the property is considered a separate lot. The town then issued an amended building permit for new single family home with a garage to replace an existing single family dwelling, and that the preexisting grandfathered dwelling must be demolished prior to the issuance of an occupancy permit for the replacement structure.

Aichinger forward the permit and correspondence to Sutton's son (attorney), who did not appeal the issuance of the building permit to the ZBA.

TRIAL COURT HOLDINGS

Aichinger filed a motion to dismiss Sutton's request for an injunction to prohibit construction and development of 554 Edgewater Drive. She cited the issuance of the building permit with the amended provision that the new house would not violate the town's zoning ordinance and that Sutton failed to appeal this issuance. The trial court denied the motion to dismiss. The trial court then ruled that lots 9 and 10 had been legally merged for over twenty years, that the town was not barred from treating the property as one parcel and that the only way to create 2 lots was to subdivide the merged property. The court further ruled that the replacement structure was valid and denied Sutton's request for injunctive relief to bar the construction.

SUPREME COURT HOLDINGS

The Supreme Court reversed the trial court's ruling denying Aichinger's motion to dismiss Sutton's request for injunctive relief to prevent the construction and development of former lot 9. The court then affirmed the trial court's ruling that Sutton was not barred by an exhaustion doctrine from requesting that a judgment be made regarding Aichinger's lot as a single lot; it affirmed the trial court's ruling that Aichinger owns a single, merged lot; it affirmed that the town was not barred from enforcing its merger ordinance and that Aichinger was not entitled to reopen the merits hearing to offer more evidence.

The Supreme Court held that the "exhaustion doctrine" did bar Sutton's request to stop construction with the amended building permit but did not bar her request for summary judgment that Aichinger owns only one lot. Generally parties must exhaust all administrative remedies before appealing to the courts and normally challenges to decisions involving building permits must first be made to the ZBA. The court determined that Sutton failed to appeal to the ZBA as an administrative remedy. However, Sutton's court action began three months prior to the issuance of the amended

building permit, which was issued based on the assertion that it was entitled to be built regardless of whether it was on one lot or two.

The court held that the Gilford Zoning Ordinance that requires the merger of substandard contiguous undeveloped lots in common ownership to meet square footage requirements was not in conflict with RSA 674:39-a, which addresses voluntary mergers by owners. The court stated that the statute does not prohibit a municipality from adopting an ordinance providing for automatic mergers of lots for zoning purposes.

Evidence from the record showed that the town had treated the property as a single lot; it was recorded as a single lot in the assessing records and the Governor's Island records. It was acquired by Aichinger via a single deed. Most critically, the property was the very same as the property litigated before the Supreme Court over 20 years ago. Governor's Island Club v. Town of Gilford, 124 N.H. 126 (1983). One of the parcels at issue in that case was the same shorefront parcel at issue in this case. The property had been in common ownership since 1947, the defendant property owner recognized it as one property and it was being taxed as a single lot. The trial court here had relied on that decision in ruling that the property was a single lot.

The court determined that the current version of the merger ordinance was applicable, stating that it had been amended numerous times since its adoption in 1962. Aichinger contended that her property fell under an exception in the automatic merger ordinance for "lawful and preexisting principal use". The court determined that the structure on lot 9 was not a single family residence and was an accessory use building, used in conjunction with the house on lot 10. Therefore the use did not qualify for the exception to the automatic merger provision.

The court ruled that the status of the property did not change based upon the representations of town officials. The town was not barred from enforcing its merger ordinance. Aichinger should not have relied on the town officials' representations, which were materially incorrect. The court stated that Aichinger was aware of the 1983 Governor's Island decision and that the ordinance in question was still in effect and applicable to the property.

The court held that Sutton's rights were not trumped by Aichinger's agreement with the town, to which Sutton was not a party.

The court declined to rule on whether the merger amounted to a taking of property in violation of Part I, Article 12-a.

SB 406

Legislative History of RSA 674:39-a
Chapter 291:9, Laws of 1995
HB 390 relative to the grandfathering of subdivisions and separate lots.

Sponsors: Rep. John Laurent, Rep. Linda Foster

House Committee: House Municipal and County Government Committee

Testimony:

Rep. Laurent submitted written testimony that the bill dealt with several factors of subdivision regulations and gender-neutral language changes. His testimony was limited to clarifying what constituted "the street giving access to the lot" for purposes of the adequacy of access for erection of buildings." Rep. Laurent described a recent NH Supreme Court case, *Belluscio v. Town of Westmoreland* (1994), involving the development of a landlocked parcel without street access, with only a right-of-way. An amendment to clarify HB 674:41 was intended to prevent such interpretation as was the case in this decision.

Rep. Foster: Answered questions for the need for the bill and particulars pertaining to specific property (hers).

Peter Lowitt, New Hampshire Planners Association supported the bill. He described the existing procedure for merging pre-existing lots as "murky".

James Verra, New Hampshire Land Surveyors had questions.

New Hampshire Municipal Association

Attorney Bernie Waugh testified on **4 different provisions of the bill, dealing with separate issues, which was a "policy bill" of the Association.** The first involved the Belluscio decision, which "held that a lot whose only access was an unapproved private lot was still buildable, because the private right-of-way fed into a Class V road, which the court said was the "access" road to the lot." The prior rule had been that "a lot's access must be either a town road or a road approved by the planning board." The bill amended the interpretation to ensure that the "access road" for a lot was for a road where the lot has actual frontage thereon. The second provision amended the so-called 4 year exemption grandfathering plats approved by the planning board as long as active and substantial development had occurred within one year. The bill added language to allow the planning board to determine what constituted active and substantial development. The third provision clarified that the taxation of separate lots should depend upon whether it can be used separately under the subdivision laws.

Mr. Waugh described the fourth provision of the bill (section 12 adding RSA 674:39-a) involving pre-existing lots and merger. He wrote that the intent of the bill was to clarify the subdivision and taxation status of pre-existing "lots" which have never been approved by the planning board, but for which the owner may believe there is a "grandfathered" right to sell separately. There was no law except for vague case law to govern this area, which had been a source of frustration. The bill stated that lots in separate ownership at the time the planning board first started

regulating subdivisions would be grandfathered, the first time the law actually specifies this. An exception to this was for substandard lots not meeting current requirements, which are held in common ownership, and could be merged as part of town regulations. He cited the validity of this type of ordinance being upheld previously in *Vachon v. City of Concord*, 112 N.H. 107 (1972). Voluntary merger by a common owner of separate lots, whether grandfathered or as part of an approved subdivision, was delineated with the right for approval and recording of the process at the registry of deeds. Lots not in separate ownership at the time subdivision regulations began were not grandfathered except that the owner could apply for a waiver based on pre-existing uses or development.

Amendment: Amendment 1580L, approved 15-1

The amendment by Rep. Foster was moved by Rep. Foster and seconded by Rep. Patten. The bill as amended was moved by Rep. Foster and seconded by Rep. MacKay. The amendment added an exception to the new RSA 67:39-a, II to allow for a parcel separated from contiguous land in common ownership by a class V or better highway and in compliance with current zoning and planning, to be separately transferred without subdivision approval.

Report: House Municipal and County Government Committee: **OTPA vote 10-6**

“The Committee believes that HB 390 clarifies certain RSAs relating to planning that will facilitate the work of our volunteer planning boards. The majority feels that this bill does not expand the authority of a planning board, it helps to define what that authority is.” Vote 10-6, Rep. Linda T. Foster

House Action: Approved via voice vote

Senate Committee: Public Affairs

Testimony:

Attorney Bernie Waugh, New Hampshire Municipal Association

After consulting with Attorney Burlingame, Mr. Waugh recommended an amendment which addressed section 12 having to do with merging pre-existing lots. The amendment stated that lots now in separate ownership are grandfathered and can continue to be sold separately. However, if those lots are substandard and come into common ownership with adjoining land, they will be considered merged. Lots acquired separately shall continue to be sold separately, but again, will be required to be merged if they no longer meet current requirements. The general rule that right-of-way through property does not create separate lots. The exception would be if a public highway runs through the property and the land on both sides meets current requirements, either side can be sold separately. Substandard lot owners could apply for a waiver of subdivision approval. The last section allows for non-approved lots previously sold prior to the effective date of the bill to be unaffected. **A new section RSA 674:39-b was former paragraph V of the proposed RSA 674:39-a in the House version. It was separated out to clarify that it should be possible to voluntarily merge both pre-existing or subdivided lots and the**

prior section to be added (RSA 674:39-a) had only pertained to pre-existing lots. Minor adjustments were made to the language.

Representative Jack Laurent submitted written testimony as prepared for the House.

Representative Linda Foster stated that the current RSAs are confusing, especially as a 20-year planning board member. Her land was included among others involved in litigation and she agreed that it was not grandfathered but others challenged the town, which had to go to court to defend this decision.

Attorney Roger Burlingame stated that there was not a consistent state policy involving mergers and it would be good to have one. He was concerned about unwittingly creating problems for landowners and chain of title issues.

Amendment: Approved amendment 2556s 4-0

Senate Floor Debate: Senator Stawasz stated that HB 390 “clarifies several planning board-related statutes.” The bill “addresses the issue of merging land and grandfathering existing lots which don’t satisfy current local standards for lot development.” (Senate Journal, May 11, 1995, p. 720)

House Action: Non-concurred, request committee of conference

Senate Action: Accede to request

Committee of Conference Report: House recedes and concurs with the Senate Amendment plus new amendment. Amendment 2794L was adopted by both bodies. **This amendment replaced section 12, RSA 674:39-a in its’ entirety except for the provision for voluntary mergers of pre-existing or subdivided lots.** This had been contained in paragraph V of proposed RSA 674:39-a in the House passed version and was proposed RSA 674:39-b in the Senate passed version. It contained minor changes from these prior versions.

Committee of Conference Report Adopted by both bodies

Enrolled Bill Amendment Adopted by both bodies

Signed by Governor 6/21/95

Effective Date 8/20/95

Chapter 291

SB406 AN ACT relative to merger of lots or parcels

House Municipal and County Government Committee

March 30th 1:30 pm LOB 301

Testimony of:

Barbara P. Aichinger
558 Edgewater Drive
Gilford, NH 03249
Wk:603-472-5905
Cell:603-548-5037
Email:Aichinger@comcast.net
www.NHPropertyRights.com

I would like to thank Senator Sgambati for putting this bill forward along with the nine other legislative members who have also co-sponsored this bill. This bill is the result of almost 3 years of intense study for me. When the town of Gilford remerged my lots my family and I went into a financial tail spin. Several lawsuits erupted, I could no longer sell my property, complete the house on the second lot or refinance my property at the now historically lower interest rates. In essence I was left with two houses on a double merged lot. What I have found is that I am not alone. Once my story hit the papers people started to call me and tell me their story. There is a widow in town that had her two adjacent lots automatically merged when her husband died because the adjacent lot then passed into her name. She could no longer sell the vacant lot next door to fund her retirement because it was merged to her house lot. Then there is the family who owns 5 lots out on Mark Island. These lots have been in their family for over 100 years. The owner walked into the town hall a few years ago to inquire about building on them. He found that he did not have 5 lots but only one lot from a zoning perspective. He said to me 'now I have to figure out which one of my children to leave the one lot to.' Then there is the couple who owns two lots, one vacant and one with a house on it, in the village area of Gilford. The vacant adjacent lot is on the corner so he can't even split it with an abutter. The town has rendered it useless and if he tries to stop paying his taxes on it because it is useless due to the towns actions the town will take his house because the town has merged the two together. This merging was done without informing him and without his consent. This lot is a perfectly good buildable lot and is the same size as the other lots on the street. These are all examples of economic waste and I have many more.

How did this all get started? There were two schools of thought that developed in the 1970's. One school said that involuntary lot merging was unconstitutional. The municipalities only have the authority given to them by the state and the state, never gave them this authority. Municipalities that were advised along these lines never merged. Then there was the merging crowd. These folks followed Case Law and municipal attorneys love their case law. In the mid 1970's there was a case that hinted at the theory that the purpose of zoning was to reduce non conformities. This was then interpreted by some attorneys that aggressive reduction of non conformities was now a mandate. So

when a town changed the lot size or street frontage requirements lots that were smaller were meant to be abolished or somehow made compliant. One method of making them compliant was to join them together but the only way they could do this was if they came into common ownership. What I have found was that in the vast majority of cases the landowner was never given any notice. When landowners complained the merging crowd said that the Zoning Ordinances themselves were the constructive notice and that the landowners were responsible for understanding the zoning as it applied to their property.

Now I would like to read for you a passage from an actual Zoning Board of Adjustment meeting when a landowner tried to regain their property rights. The year was 1998 the applicant had two lots in a completed subdivision and the subdivision was created prior to zoning. The applicant's house is on a lot that is .55 acre and the adjacent vacant lot is .92 acre. The town of Gilford had since increased its minimum lot size to 1 acre. Questions from the zoning board 'Are you contesting the Nighswander doctrine? ... how does the [applicant's] two lots differ from any other lots that have been merged by the Nighswander doctrine?' The attorney for the applicant states 'if the lots had been placed in different names, they would be legal buildable lots... [the applicant] stated she did not know that her 2 lots were considered 1 lot, no one told her, noting that she has two deeds and they are registered in Laconia (location of Registry of Deeds for Belknap County). A board member then states that he 'has a very serious problem with the application the merger doctrine stands, nothing was presented that shows this lot is any different from the many lots under the same circumstances.' The Planning Director then stated that 'relative to hardship, the hardship has to be inherent in the lot itself. The physical nature of the lot has to be so different from other lots similarly situated, that a hardship almost to the extent of disabling any use on the lot, would be created which is not the case.' The ZBA then voted to deny the variance to unmerge the lots. The reason for the denial is officially listed as the following '1. There is no particular hardship to the property 2. The use is contrary to the spirit of the ordinance 3. Substantial justice will not be done.' Thus the property owner was bullied by the town and the local land use board into thinking that they suffered no hardship at the loss of their second lot. Restoring their property rights would be contrary to the spirit of the ordinance and the real kicker here folks is that substantial justice will not be done. This couple could not afford to appeal the ZBA's decision to the Superior Court thus once 30 days had passed from the ZBA's decision the die was cast on this property forever since you cannot apply for the same variance again once you are denied. Subsequent owners can also not apply. A complete destruction of land wealth for this family.

In 1995 there was a bill HB 390 An Act relative to the grandfathering of subdivisions and separate lots. This bill was hotly contested as the merging crowd wanted the state to finally give them authority to merge. What happened was just the opposite. This bill gave us the Voluntary Merger statute RSA 674:39;a. Most real estate professionals, landowners and attorneys thought that this finally ended involuntary lot merging. Not for the merging crowd. Since this legislation did not expressly forbid the towns from merging they reasoned it is still allowed. They argued that the RSA 674:39;a simply allows the landowner to do it voluntarily if they want to. The merging crowd

conveniently ignored the fact that landowners could already do voluntary merges simply by stating the fact in their deeds or resurveying to only indicate one lot!

Involuntary lot merging has caused countless hardships for landowners here in New Hampshire. It has also been the source of many lawsuits. Here in Concord a recent four year long court battle resulting from the conveyance of a lot with a tennis court and a garage resulted in the Concord Economic and Development Council to recommend that the City of Concord abandon involuntary lot merging. Now is the time to finish the job. We must make it absolutely clear to judges, zoning boards, landowners and town attorneys, you cannot engage in involuntary lot merging. Lots created prior to zoning and lots created by planning boards have vested rights and those rights need to be protected. If a lot cannot be developed due to current setback requirements it must go through the variance process. If a lot does not have adequate septic or water it must remedy those issues or it cannot be built on. This is the process that exists today no new processes need to be created.

I would like to leave you with a very patriotic passage written by the late Justice Frederick Goode of Rockingham County. I suspect that there was no involuntary merging in that county when Judge Goode was alive. He writes in a decision for the land owner

"What the town of Candia has done in this case by treating Mr. Snow's separately deeded acreage as a single zoning lot is clearly unreasonable. When a restrictive policy, regulation, or ordinance as applied to a particular piece of land is unnecessary to accomplish a legitimate public purpose, or the gain, by such a restriction, to the public is non-existent or slight but the harm to the citizen and his property is great, the exercise of the municipality's police power becomes arbitrary and unreasonable, and judicial intervention will afford relief under the constitution of this state."

God Bless Justice Goode and God Bless the supporters of this legislation.

Thank you.

Sen. Sgambati, Dist. 4
January 6, 2010
2010-0079s
03/01

Amendment to SB 406

1 Amend the bill by replacing section 1 with the following:

2

3 1 Regulation of Subdivision of Land: Voluntary Merger. Amend RSA 674:39-a to read as follows:

1 674:39-a Voluntary Merger. Any owner of 2 or more contiguous preexisting approved or
5 subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes
6 may do so by applying to the planning board or its designee. Except where such merger would create
7 a violation of then-current ordinances or regulations, all such requests shall be approved, and no
8 public hearing or notice shall be required. No new survey plat need be recorded, but a notice of the
9 merger, sufficient to identify the relevant parcels and endorsed in writing by the planning board or
10 its designee, shall be filed for recording in the registry of deeds, and a copy mailed to the
11 municipality's assessing officials. No such merged parcel shall thereafter be separately transferred
12 without subdivision approval. ***No city, town, or county may merge preexisting subdivided lots
13 or parcels except upon application of the owner.***

Rep. Patten, Carr. 4
Rep. Boyce, Belk. 5
Rep. Ferrante, Rock. 5
Rep. Sterling, Ches. 7
April 8, 2010
2010-1278h
03/09

Amendment to SB 406

1 Amend the bill by replacing section 1 with the following:

2

3 1 Regulation of Subdivision of Land; Voluntary Merger. Amend RSA 674:39-a to read as follows:

4 674:39-a Voluntary Merger. Any owner of 2 or more contiguous preexisting approved or
5 subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes
6 may do so by applying to the planning board or its designee. Except where such merger would create
7 a violation of then-current ordinances or regulations, all such requests shall be approved, and no
8 public hearing or notice shall be required. No new survey plat need be recorded, but a notice of the
9 merger, sufficient to identify the relevant parcels and endorsed in writing by the planning board or
10 its designee, shall be filed for recording in the registry of deeds, and a copy mailed to the
11 municipality's assessing officials. No such merged parcel shall thereafter be separately transferred
12 without subdivision approval. *No city, town, county, or village district may merge preexisting*
13 *subdivided lots or parcels except upon the consent of the owner.*

Amendment to SB 406

- Page 2 -

2010-1278h

AMENDED ANALYSIS

This bill prohibits a city, town, county, or village district from merging lots or parcels except upon application of the owner.

SB 406 - Cordell Johnston

New Hampshire Local Government Center

[NHLGC Home](#)
[Back to Index](#)

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

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 unconstitutionally 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.

November/December 2008, *Town and City*

PO Box 617 • Concord, NH 03301 • 603.224.7447

Voting Sheets

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

EXECUTIVE SESSION on SB 406

BILL TITLE: relative to merger of lots or parcels.

DATE: April 13, 2010

LOB ROOM: 301

Amendments:

Sponsor: Rep. Patten OLS Document #: 2010 1278h

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Patten

Seconded by Rep. Boyce

Vote: 10-8 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Osborne

Seconded by Rep. Wheeler

Vote: 10-8 (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Dianne E. Schuett, Clerk

HOUSE COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT

EXECUTIVE SESSION on SB 406

BILL TITLE: relative to merger of lots or parcels.

DATE: 4/13/2010

LOB ROOM: 301

Amendments:

Sponsor: Rep. Patten OLS Document #: 2010-1278h

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, ~~Interim Study~~ (Please circle one.)

Moved by Rep. Osborne }
Seconded by Rep. Lauterborn } withdrawn

Vote: (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, AM Interim Study (Please circle one.)

Moved by Rep. Patten

Seconded by Rep. Boyce

Vote: 10-8 (Please attach record of roll call vote.)

INT STUDY

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Dianne E. Schuett, Clerk

MIN
Patten

MUNICIPAL AND COUNTY GOVERNMENT

Bill #: SB 406 Title: relative to merger of lots or parcels.

PH Date: 3/30/2010

Exec Session Date: 4/13/2010

Motion: AM

Amendment #: 0010-1278h

MEMBER	YEAS	NAYS
Cooney, Mary R, Chairman		8
Gagnon, Raymond G, V Chairman		1
Osborne, Jessie L		2
Brown, Larry		3
Laliberte, Suzanne S	1	
Wheeler, Deborah	2	
Boisvert, Ronald R	3	
Carlson, Nancy L		4
Lauterborn, Elaine M		5
Lewis, Robert D		6
Schuett, Dianne E, Clerk		7
Patten, Betsey L	4	
Boyce, Laurie J	5	
Soucy, Connie M	6	
Sullivan, James M	7	
Crisler, Margaret M <i>absent</i>		
Ferrante, Beverly A	8	
Perkins, Amy Stasia <i>absent</i>		
Sterling, Franklin W	9	
Cunningham, Steven L	10	
TOTAL VOTE:	10	8

MUNICIPAL AND COUNTY GOVERNMENT

Bill #: SB 406 Title: relative to merger of lots or parcels.

PH Date: 3/30/2010

Exec Session Date: 4/13/2010

Motion: INT STUDY

Amendment #: _____

MEMBER	YEAS	NAYS
Cooney, Mary R, Chairman	10	
Gagnon, Raymond G, V Chairman	1	
Osborne, Jessie L	2	
Brown, Larry	3	
Laliberte, Suzanne S		1
Wheeler, Deborah	4	
Boisvert, Ronald R		2
Carlson, Nancy L	5	
Lauterborn, Elaine M	6	
Lewis, Robert D	7	
Schuett, Dianne E, Clerk	8	
Patten, Betsey L		3
Boyce, Laurie J		4
Soucy, Connie M	9	5
Sullivan, James M	9	
Crisler, Margaret M <i>absent</i>		
Ferrante, Beverly A		6
Perkins, Amy Stasia <i>absent</i>		
Sterling, Franklin W		7
Cunningham, Steven L		8
TOTAL VOTE:	10	8

Committee Report

REGULAR CALENDAR

April 21, 2010

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Majority of the Committee on MUNICIPAL AND COUNTY GOVERNMENT to which was referred SB406,

AN ACT relative to merger of lots or parcels. Having considered the same, report the same with the recommendation that the bill be REFERRED FOR INTERIM STUDY.

Rep. Jessie L Osborne

FOR THE MAJORITY OF THE COMMITTEE

**MAJORITY
COMMITTEE REPORT**

Committee: **MUNICIPAL AND COUNTY GOVERNMENT**
Bill Number: **SB406**
Title: **relative to merger of lots or parcels.**
Date: **April 21, 2010**
Consent Calendar: **NO**
Recommendation: **REFER TO COMMITTEE FOR INTERIM STUDY**

STATEMENT OF INTENT

Under current zoning regulation municipalities can already prohibit the involuntary merging of lots as was recently done in the town of Gilford with a warrant article prohibiting involuntary merging of lots. The majority of the committee believes that the legislation raises issues about the status of previously involuntarily merged lots. This could create a zoning mess and a legal nightmare by raising serious questions about local zoning powers and the rights of government under part 1 article 12 of the Constitution which provides that the representative body has the power to decide property issues. Interim study will provide the municipal and county government committee time to fully examine the ramifications of these issues; communities can still prohibit involuntary lot merging on a local level through zoning regulations.

Vote 10-8

Rep. Jessie L Osborne
FOR THE MAJORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

MUNICIPAL AND COUNTY GOVERNMENT

SB406, relative to merger of lots or parcels. **REFER TO COMMITTEE FOR INTERIM STUDY.** Rep. Jessie L Osborne for the **Majority** of MUNICIPAL AND COUNTY GOVERNMENT. Under current zoning regulation municipalities can already prohibit the involuntary merging of lots as was recently done in the town of Gilford with a warrant article prohibiting involuntary merging of lots. The majority of the committee believes that the legislation raises issues about the status of previously involuntarily merged lots. This could create a zoning mess and a legal nightmare by raising serious questions about local zoning powers and the rights of government under part 1 article 12 of the Constitution which provides that the representative body has the power to decide property issues. Interim study will provide the municipal and county government committee time to fully examine the ramifications of these issues; communities can still prohibit involuntary lot merging on a local level through zoning regulations. **Vote 10-8.**

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

COMMITTEE: MUNICIPAL & COUNTY GOVT.

BILL NUMBER: SB 406

TITLE: relative to merger of lots or parcels.

DATE: 4/13/2010 CONSENT CALENDAR: YES [] NO [X]

- OUGHT TO PASS
- OUGHT TO PASS W/ AMENDMENT
- INEXPEDIENT TO LEGISLATE
- INTERIM STUDY (Available only 2nd year of biennium)

Amendment No. _____

STATEMENT OF INTENT:

Under current zoning regulations municipalities ~~can already prohibit~~ the involuntary merging of lots as was recently done in the town of Gulfport with a warrant article prohibiting ^{involuntary} merging. The majority of the committee believes that this legislation raises issues ^{about} the status of previously involuntarily merged lots. This could create a young mess and a legal nightmare by raising ^{SERIOUS} serious questions about local zoning powers and the rights of governments under Part I article 12 of the Constitution which provides that the representative body has the power to decide property issues. Interim study will

COMMITTEE VOTE: 10-8

provide MOCG committee the time to fully examine the ramifications of these issues and

RESPECTFULLY SUBMITTED,

- Copy to Committee Bill File
- Use Another Report for Minority Report

Rep. Juan P. Osborne
For the Committee
Osborne

Comments can still be made at local level. Thompson

SB 406 Majority Report
Interim Study
Regular
10-8

Under current zoning regulation municipalities can already prohibit the involuntary merging of lots as was recently done in the town of Gilford with a warrant article prohibiting involuntary merging of lots. The majority of the committee believes that the legislation raises issues about the status of previously involuntarily merged lots. This could create a zoning mess and a legal nightmare by raising serious questions about local zoning powers and the rights of government under part 1 article 12 of the Constitution which provides that the representative body has the power to decide property issues. Interim study will provide the municipal and county government committee time to fully examine the ramifications of these issues; communities can still prohibit involuntary lot merging on a local level through zoning regulations.

Rep. Jessie Osborne

Chairman's signature

A handwritten signature in cursive script, reading "Mary R. Cooney", is written over a horizontal line.

REGULAR CALENDAR

April 21, 2010

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Minority of the Committee on MUNICIPAL AND COUNTY GOVERNMENT to which was referred SB406,

AN ACT relative to merger of lots or parcels. Having considered the same, and being unable to agree with the Majority, report with the following amendment, and the recommendation that the bill OUGHT TO PASS WITH AMENDMENT.

Rep. Betsey L Patten

FOR THE MINORITY OF THE COMMITTEE

**MINORITY
COMMITTEE REPORT**

Committee: **MUNICIPAL AND COUNTY GOVERNMENT**
Bill Number: **SB406**
Title: **relative to merger of lots or parcels.**
Date: **April 21, 2010**
Consent Calendar: **NO**
Recommendation: **OUGHT TO PASS WITH AMENDMENT**

STATEMENT OF INTENT

RSA 674:39-a addresses the process for voluntary merger of lots or parcels. Currently the law is silent on the issue of involuntary merger of lots or parcels. The amendment would prohibit any city, town, county or village district from merging preexisting subdivided lots or parcels except on the consent of the owner. The minority claims that this statement makes Part One, Article 2 clear with no ambiguity." [Art.] 2. [Natural Rights.] 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." The minority also feels that involuntary merger violates "[Art.] 12. [Protection and Taxation Reciprocal.]But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people" During executive session the amendment as printed was supported by a majority of the committee 10-8. Therefore the minority disagrees with the majority motion for Interim Study.

Rep. Betsey L Patten
FOR THE MINORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

MUNICIPAL AND COUNTY GOVERNMENT

SB406, relative to merger of lots or parcels. **OUGHT TO PASS WITH AMENDMENT.**

Rep. Betsey L Patten for the **Minority** of MUNICIPAL AND COUNTY GOVERNMENT. RSA 674:39-a addresses the process for voluntary merger of lots or parcels. Currently the law is silent on the issue of involuntary merger of lots or parcels. The amendment would prohibit any city, town, county or village district from merging preexisting subdivided lots or parcels except on the consent of the owner. The minority claims that this statement makes Part One, Article 2 clear with no ambiguity." [Art.] 2. [Natural Rights.] 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." The minority also feels that involuntary merger violates "[Art.] 12. [Protection and Taxation Reciprocal.]But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people" During executive session the amendment as printed was supported by a majority of the committee 10-8. Therefore the minority disagrees with the majority motion for Interim Study.

Original: House Clerk
Cc: Committee Bill File

SB 406 Relative to merger of lots or parcels

Minority Report – Ought to Pass As Amended / 2010-1278h

RSA 674:39-a addresses the process for voluntary merger of lots or parcels. Currently the law is silent on the issue of involuntary merger of lots or parcels. The amendment would prohibit any city, town, county or village district from merging preexisting subdivided lots or parcels except on the consent of the owner. The minority claims that this statement makes Part One, Article 2 clear with no ambiguity.” **[Art.] 2. [Natural Rights.]** 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.” The minority also feels that involuntary merger violates “**[Art.] 12. [Protection and Taxation Reciprocal.]**But no part of a man’s property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people

During executive session the amendment as printed was supported by a majority of the committee 10-8. Therefore the minority disagrees with the majority motion for Interim Study.

Rep. Betsey Patten

Chairman’s signature _____

New Hampshire General Court - Bill Status System

Docket of SB406

Docket Abbreviations

Bill Title: relative to merger of lots or parcels.*Official Docket of SB406:*

Date	Body	Description
01/06/2010	S	Introduced 1/6/2010 and Referred to Public and Municipal Affairs Committee; SJ 1 , Pg.9
01/28/2010	S	Hearing: February 4, 2010, Room 103, LOB, 9:00 a.m.; SC5
03/04/2010	S	Committee Report: Ought to Pass 3/10/10; SC10
03/10/2010	S	Ought to Pass, MA, VV; OT3rdg; SJ 9 , Pg.144
03/10/2010	S	Passed by Third Reading Resolution; SJ 9 , Pg.150
03/17/2010	H	Introduced and Referred to Municipal and County Government; HJ 26 , PG.1391
03/23/2010	H	Public Hearing: 3/30/2010 1:30 PM LOB 301
03/31/2010	H	Full Committee Work Session: 4/6/2010 10:00 AM LOB 301
04/06/2010	H	Executive Session: 4/13/2010 10:30 AM LOB 301
04/21/2010	H	Majority Committee Report: Refer to Interim Study for April 28 (Vote 10-8; RC); HC 33 , PG.1596
04/21/2010	H	Minority Committee Report: Ought to Pass with Amendment #1278h; HC 33 , PG.1596
04/21/2010	H	Proposed Minority Committee Amendment #1278h; HC 33 , PG.1619
04/28/2010	H	Refer to Interim Study: MF RC 167-174 ; HJ 36 , PG.1716-1718
04/28/2010	H	Ought to Pass with Amendment (Rep Patten); HJ 36 , PG.1716-1718
04/28/2010	H	Amendment #1278h (Rep Patten), Adopted VV; HJ 36 , PG.1716-1718
04/28/2010	H	Ought to Pass with Amendment #1278h: MA DIV 221-122; HJ 36 , PG.1716-1718
05/19/2010	S	Sen. DeVries Concurs with House Amendment 1278h, MA, VV; SJ 20 , Pg.642
06/02/2010	H	Enrolled; HJ 51 , PG.2322
06/02/2010	S	Enrolled; SJ 21 , Pg.775
07/20/2010	S	Signed by the Governor on 07/20/2010; Effective 09/18/2010; Chapter 0345

NH House

NH Senate

Contact Us

New Hampshire General Court Information Systems
 107 North Main Street - State House Room 31, Concord NH 03301