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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 406 – AS INTRODUCED

10-2707
03/01

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

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

2 Effective Date. This act shall take effect 60 days after its passage.

SB 406 – AS AMENDED BY THE HOUSE

28Apr2010... 1278h

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

AMENDED ANALYSIS

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

. . . . . .

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SB 406 – AS AMENDED BY THE HOUSE

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2 Effective Date. This act shall take effect 60 days after its passage.

CHAPTER 345
SB 406 – FINAL VERSION

28Apr2010... 1278h

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

AMENDED ANALYSIS

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

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CHAPTER 345
SB 406 – FINAL VERSION

28Apr2010... 1278h

10-2707
03/01

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:

345:1 Regulation of Subdivision of Land; Voluntary Merger. Amend RSA 674:39-a to read as follows:

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

345:2 Effective Date. This act shall take effect 60 days after its passage.

Approved: July 20, 2010

Effective Date: September 18, 2010

Committee Minutes

Printed: 01/28/2010 at 11:06 am

SENATE CALENDAR NOTICE
PUBLIC AND MUNICIPAL AFFAIRS

Senator Betsi DeVries Chairman
Senator Matthew Houde V Chairman
Senator Kathleen Sgambati
Senator Sheila Roberge
Senator John Barnes, Jr.

Take attendance

9:36 am

Start

Stop 10:27

For Use by Senate Clerk's Office ONLY

- ☐ Bill Status
- ☐ Docket
- ☐ Calendar

Proof: ☐ Calendar ☐ Bill Status

Date: January 28, 2010

HEARINGS

Thursday	**2/4/2010**	
PUBLIC AND MUNICIPAL AFFAIRS	LOB 103	8:30 AM
(Name of Committee)	(Place)	(Time)

EXECUTIVE SESSION MAY FOLLOW

8:30 AM	SB349-FN-L	relative to the procedures for appraisal and enforcement of taxation of multifamily residential rental property subject to covenants under the low-income housing tax credit program.
8:50 AM	SB400-FN	relative to assessment of the land use change tax.
9:00 AM	SB406	relative to merger of lots or parcels.

Sponsors:

SB349-FN-L
Sen. Betsi DeVries — Rep. Betsey Patten — Rep. Eric Stohl

SB400-FN
Sen. Betsi DeVries — Rep. Robert Theberge — Rep. Mary Cooney — Rep. Betsey Patten

SB406
Sen. Kathleen Sgambati — Sen. Sheila Roberge — Rep. Alida Millham — Rep. Richard Stuart
Sen. Matthew Houde — Sen. Jeb Bradley — Rep. James Pilliod — Rep. Beth Arsenault
Rep. Liz Merry — Sen. Martha Fuller Clark

Claire Emery 271-1403

Sen. Betsi DeVries
Chairman

Claire

Public and Municipal Affairs Committee

Hearing Report

TO: Members of the Senate

FROM: Shannon Whitehead, *Legislative Aide*

RE: Hearing report on **SB 406**– AN ACT relative to merger of lots or parcels

HEARING DATE: February 4, 2010

MEMBERS OF THE COMMITTEE PRESENT: Senator DeVries, Senator Houde, Senator Sgambati, Senator Roberge

MEMBERS OF THE COMMITTEE ABSENT: Senator Barnes

Sponsor(s): 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

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

Who supports the bill: Ken Clinton (NH Land Surveyor's Association) Senator Jeb Bradley, Senator Fuller Clark, Barbara Aichinger, Jeramy Olson (NH Liberty) Mark Warden (NHLA) Ken Blevens, Howard Hardin, Rep. Pilliod, Belknap 5.

Who opposes the bill: Cordell Johnston (NH Municipal Association) Norm Bernaiche (Town of Newbury)

Summary of testimony received:

<u>Senator Sgambati: (Prime)</u>

- There is a short change in the bill but very important. Senator Sgambati stated that the best she can describe this as, is Motherhood and apple pie. For example: If I had purchased 2 lots and there were zoning changes that no longer conformed and I have two sons, now there is only one lot because the city took them and merged them, which son do I give this to?

- There are only a few towns that maintain this practice, either this is done without notice, record or with the Registry of Deeds.
- No city, town, or county may merge preexisting approved or subdivided lots or parcels except upon application.

Norm Bérnaiche: Town of Newbury

- Mr. Bernaiche stated that he was torn on this issue. It is a town meeting process and agrees that this bill is good for local regulation and the will of the people to vote.

Ken Clinton: New Boston and Land Surveyor's Association

- In support of the bill and expressed that he understood both sides of the argument.
- It's the welfare and inhabitant of the town to conform. If the standards are met than it does protect the town, protecting the safety, welfare and inhabitants of that town. Mr. Clinton would like to see bill pass.
- Senator Devries stated that there are a few towns that have zone regulations.
- Mr. Clinton stated that there are a number of communities that have ordinance on their books. The minority is in the Amherst, Bedford area.

Ken Blevins, Bow, NH

- In support of the bill, but would like to have an amendment. In 674:39-a Voluntary Merger: On Line 3: Take out and, put in or.
- Half way through Line 4 and Line 5. take out: Except where such merger would create a violation of then current ordinances or regulations.
- Line 7(end of) and beginning of Line 8: Take out planning board or its designee owner.
- Mr. Blevins would like to see the further change in the following of the bill as introduced on Line 10: ***No city, town, or county may merge preexisting approved or subdivided lots or parcels except upon application of the owner.*** Mr. Blevens would like the following: *No city, town, county, or planning board may merge preexisting approved or subdivided lots or parcels except upon written and acknowledged application of the owner.*
- In 1993, in the Town of Bow, he not notified of the fact of what was happening to his property. Mr. Blevens stated that he has spent over $100,000 in courts to maintain his rights. A 3 parcel land from different parties.
- The planning board combined his land and now is living with a tragedy.
- Judge McGuire's ruling came down and the NH Supreme court is ludicrous for what they did.
- Mr. Blevens handed in to the committee his case from the Supreme Court of NH: Kenneth Blevens v. Town of Bow.

Barbara Aichinger: Gilford, NH

- In support of the bill and thanked the sponsors for putting the legislation forward.. The Town of Gilford remerged Ms. Aichinger's lots; her family went into a financial tail spin. Several lawsuits erupted. Ms. Archinger could no longer sell her property, complete the house in the second lot or refinance her property at the now historically lower interest rates.
- In essence, Ms. Archinger has two houses on a double merged lot. Once her story hit the papers, people started to call and tell her their story.
- Ms Archinger told the committee that there was a widow in town that had her two adjacent lots automatically merged when her husband died because both lots were in her name. She could no longer sell that vacant lot next door to fund her retirement because it was merged to her house lot.
- Another example was a family who owned 5 lots out on Mark Island. These lots had been in their family for over 100 years. The owners walked into the town hall a few years ago to inquire about building on them and found that he did not have 5 lots but only one lot from a zoning perspective. That owner said, "Now I have to figure out which one of my children to leave the lot to."
- There is also a 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 tried to stop paying his taxes on it because it us useless due to the towns actions, the town will take his house because the town has merged the two together. This merging was done with out 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.
- Ms. Archinger told the committee how this all got 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 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. 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. When the town changes 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 cam into common ownership.
- Ms. Archinger stated that what she found that in the vast majority of cases the landowner was never given any notice. When landowners

complained the merging crowd said that Zoning Ordinances themselves were the constructive notice and that the landowners were responsible for understanding the zoning as it applied to their property.

- Ms. Archinger continued to say that involuntary lot merging has caused countless hardships for landowners here in New Hampshire. It has also been the source of many law suits.
- It is time to finish the job; we must take 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 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 be remedied to those issues or it cannot be built on. This is a process that exists today no new processes need to be created.
- This is about restoring property rights, substantial justice.
- Real estate transfer tax. Property rights stored. HB 390 did not get the job done.
- If you don't expressly forbid than it expressly allowed.

Cordell Johnston: NHMA

- Opposed to the bill. Stated that he is not a fan of Involuntary Merger, but it is not a simple issue. Mr. Johnston feels as though it should be left to the town.
- 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 it is designee and recorded in the registry of deed, 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 with out subdivision approval. The process is a great improvement on the previous informal practice, assessing officials would occasionally merge parcels on tax maps, but typically with out any written record to explain the circumstances or to show landowner consent.
- Mr. Johnston said there is something wrong with merging of someone's lot without telling them. If lots are buildable, they are to be permitted. Before you pass the law, encourages continuing to the planners association.
- Not advocating explaining involuntary merger, if the town has town ordinance, it is presumed to know the law.

- A question was asked, what if a planning board can suggest a zoning change but can't act on it. The response was, that is stated in RSA 676:12: Building Permits to be Withheld in Certain Cases
- Senator Devries stated that some communities did deal with small lots before other things were enacted. Mr. Johnston responded that a usable lot is by current zoning.
- Question to think about is, if we render a decision here that says, any merger taken place is involuntary, forcing a small lot to come a bigger lot, if we change the law on a merger that occurred, will we take property rights away from the individual?
- What about grandfathering? Involuntary merger by zoning, are lots that existed before zoning, grandfathered? A vacant lot is not exempt from new zoning restrictions. A lot gains vested rights when it is developed is in an approved subdivision protected by the 4 year rule of RSA 674:39 and by the developer's substantial completion of subdivision improvements.
- Mr. Johnston said that this bill may open Pandora's Box and is not in all agreement with the intent of the legislation. The legislation is not inappropriate but encourages the committee to look at this carefully.

Mark Warden: NH Liberty Alliance

- In support of the legislation. The bill of rights protects people from their government.
- Article 2 of NH Constitution: "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, seeking and obtaining happiness."
- Mr. Warden continued to say that in Part, the first, article 12 the constitution reads....."no part of a man's property shall be taken from him, or applied to public use, without own consent...." That should be enough to back this bill. But if it is not enough, another piece of this sage document comes to mind.
- Article 23 states:
  retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made..."That could be applied to retroactive zone laws that in some instances may take older lot sizes non-conforming by today's standards.
- The constitution demands that we honor grandfather clauses in relation to property uses and sizes to protect property owners from the whims of local politicians and boards.
- Zoning rules and regulations that deal with minimum lot sizes and zoning rules change overtime, as do the people and boards that decide them and the rules can be somewhat arbitrary. But the right to property and quiet enjoyment thereof is timeless and should be universal.
- Mr. Warden stated that he has been in the real estate business for 15 years. And feels that changes to zoning can have dramatic effects on a

property value. When that effect is negative, the property owner is harmed and any devaluing of the property is in effect a regulatory taking. Other than for long standing tradition-ns of the use of eminent domain for public purposes, talking are wrong and should be strongly discouraged by this body,

Howard Hardin

- Mr. Hardin is in support of the bill. He stated that he bought property and with the planning board there was no recourse, the land was tied into one. It is injustice, and was never notified or could even repeal the taxation with out representation.
- Senator Houde asked if Mr. Hardin had plans with the land. Mr. Hardin responded that he couldn't give the land away. The land was locked.

Funding: *n/a*

Future Action: The bill is still under advisement

Date: February 4, 2010
Time: 9:36 a.m.
Room: LOB 103

The Senate Committee on Public and Municipal Affairs held a hearing on the following:

SB 406 relative to merger of lots or parcels.

Members of Committee present: Senator DeVries
Senator Houde
Senator Sgambati
Senator Roberge

The Chair, Senator Betsi DeVries, opened the hearing on SB 406 and invited the prime sponsor, Senator Kathleen Sgambati, to introduce the legislation.

Senator Betsi DeVries, D. 18: Opening the hearing on Senate Bill 406 and recognizing the prime sponsor, Senator Sgambati.

Senator Kathleen G. Sgambati, D. 4: Thank you, Madam Chair. For the record, my name is Kathleen Sgambati, Senator representing District 4.

This is a very short change in the language, as you can see in the bill, but it's a very important change. I think right up there with motherhood and apple pie is the rights of property owners. Most of us spend our lives trying to acquire our own piece of the world, and this is a situation that I can best describe by example. If I had purchased two small lots or two lots at some point in my life that conformed, and zoning changes were made so that the lots no longer conformed. I could continue with those two lots assuming that they were still two, bequeath them to my two sons and then have them find out that it's only one lot because the city or the municipality, without any notice to me, had taken my two lots and merged them.

This happens today, despite the fact that there was an attempt at a legislative fix. I don't think it's complete. There are only a few towns that maintain, or that continue this practice, but it denies the property owner the right to keep those pieces of property and those lots independent and as egregious as taking and merging two lots that are owned by a person, it is done without notice and sometimes without record anywhere in the town

records or the Registry of Deeds. So I think this is clearly an issue that needs to be corrected and I would ask for your support on the additional language in Senate Bill 406.

Thank you.

Senator Betsi DeVries, D. 18: Thank you, Senator, for bringing forth the bill. Further questions from the Committee? Seeing none, I would call on, is it Norm Bernanch?

Mr. Norm Bernaiche: Bernaiche.

Senator Betsi DeVries, D. 18: Got it wrong again.

Mr. Bernaiche: Thank you, Madam Chair and members of the Committee. Briefly, kind of torn on this one a little bit because I have issues in one of my towns, in Newbury specifically. Where when the State came in and did, when they were in the appraisal business they came in and merged a whole bunch of lots because there were some more ownership and that's just the way things were done, you know, back in the '70s and '80s. They merged some of those lots.

Well, I've been dealing with this ever since I became the assessor in 2005 where people, as land became more valuable, they said, wait, wait a second. And I have three deeds, at three different times I acquired these parcels, and they were merged. And you know, we show a map with one lot and one owner and it was easy for the State to do that. They were contracted by the town. So I've spent years trying to muddle through that and determine whether these lots should be separated or not, whether they were tracts of land or parcels of land. One of the important things is that they were bought at different times.

So, in essence, I don't really have problem with doing this, but I think there's communities that through town meeting have said, if we have substandard lots, the people have voted and where these substandard lots have been merged for the record based on the town meeting process. So that's the only flip side of the coin, is if the townspeople have said we have all these substandard lots. For instance, in Newbury there was a development where if you bought laundry detergent or you bought these things out of a company out of Boston, they had these 50 x 50 camp lots and you would get a free lot. And so there's this one hillside where most of the land isn't developable but there's, it's still an issue that we're dealing with, all these substandard lots where people want to build, you know, six lots in and they own four of these lots. And it's bizarre, to say the least. But for that purpose, for those

purposes I would agree that this bill is good. But I think usurping the local regulation and the local will of the people to vote on that issue is a different issue, so there's a different look at it.

And that's all I have to say.

Senator Betsi DeVries, D. 18: Thank you for your testimony. Questions from the Committee? Seeing none, thank you, sir. And I apologize. I overlooked, there's a Ken Clinton with the New Hampshire Land Space Association.

Mr. Ken Clinton: Thank you, Madam Chair, committee members. My name is Ken Clinton, I'm a licensed land surveyor from New Boston, and I'm here representing both the New Hampshire Land Surveyors Association, as well as the Home Builders and Remodelers Association of New Hampshire. Providing this testimony in support of this bill.

In my practice as a land surveyor, I do encounter this fairly routinely, and I can see both sides of the argument. I am very much in favor of the private property owner's rights to not have their parcels unvoluntarily (sic) merged without their consent. I think this is a very good bill in that way.

I'll talk briefly about the other side of the argument, which to me, towns seeking to merge these properties would be to protect the health, safety and welfare of the inhabitants of the town. As if two adjacent lots are substandard in size from a zoning perspective, they would like to have those lots conform or make them as conforming as possible, by increasing their size and frontage and so on. To me, the health, safety and welfare goes to can that lot be built upon with an adequate septic system and well and infrastructure for a house. And as long as that standard's met, and met to the satisfaction of DES in the septic scenario, well then even if the town standard is a higher acreage amount, as long as that standard's met, then it does protect the health, safety and welfare of the town.

And there's an example of a two acre zone, if you have two one acre side by side lots, if the town says no, that's substandard, you must merge them. In fact, you don't have a choice, we'll do it for you. But the landowner could produce two septic plans for each one acre lot, showing that DES approved the septic with well. You'd have driveway access and a house location. Well, isn't that in fact protecting the health, safety and welfare of the inhabitants of the town, even if that lot doesn't technically meet the zoning requirements of the town? I say it does. So, on the face of this, even though it is, as was mentioned previously, a minority of the towns that still have this regulation

from a zoning standpoint on their books, I'd like to see this bill passed and wholeheartedly support it.

I'll stick around for a few minutes in case there's any questions. I'll take them now or be called back if you like.

Senator Betsi DeVries, D. 18: Thank you for your testimony. I have a question. If you could give a little more detail on the issue. So there are a few towns that you mentioned have the zoning regs calling, could you clarify your last statement?

Mr. Clinton: As mentioned previously, if the voters in the town vote to have their zoning ordinance state if two or more substandard lots abut each other under common ownership, some towns say automatically those lots get merged to make a complying lot for the zoning standard. So, in that case, if you had one or more lots that you had proper deeds to, acquired at different times, pre-existing non-conforming prior to the zoning ordinance becoming in effect in that town, they would be merged without your consent.

Senator Betsi DeVries, D. 18: Do you have any clarity for us on the number of communities that still have that ordinance on their books?

Mr. Clinton: In the percentage of towns, I work in the Amherst, Bedford general area, and maybe one or two out of the 10 or 15 towns I routinely work in have this. It is the minority. However, that being said, it's not fair to the private landowner.

Senator Betsi DeVries, D. 18: I can understand why you see both sides. Further questions from the Committee? Thank you for your testimony.

Mr. Clinton: Thank you very much.

Senator Betsi DeVries, D. 18: Asking Ken Blevens to come forward for testimony.

Mr. Ken Blevens: Thank you, Madam Chairman. My name's Ken Blevens, I come from Bow, I'm representing myself. I'd like to pass around some written testimony regarding some amendments that I'd like. This particular issue is very dear to me in my heart. And the reason for it, and I will submit this information to the Committee so anyone who wants to can look it over.

I will start with a little bit of history. Back in 1977, I did a subdivision in Bow. The subdivision consisted of four lots and some 32 acres of backland. There is testimony in the information I'll provide to you that stated

specifically from the selectmen who sat on the Planning Board, a planning board member and a surveyor who was not representing me who was at the meeting, that there was never a combination of my land. Okay.

In 1993, I believe it was, the Planning Board in Bow met without notifying me and came to the conclusion that my land was combined in 1977, and notified me by letter some five days after the meeting of the fact, okay. Since then, I've spent well over $100,000 in the courts just to maintain my rights to three parcels of land that I bought on individual deeds from different parties at different times. Some way back in 1977, the Planning Board, without my knowledge, without no members on the Planning Board's knowledge, it was never discussed at the Planning Board. Someway, magically, combined my land. It's, you know, the reason I say it's so dear to my heart is because I've been living with this. I've been living with a tragedy of the court system in the state, and the municipal government and the planning boards. And it's absolutely wrong. If we're going to have ownership in this state, you know, you have to provide the ownership to the owners.

Again, I will submit this information to you and one of the things I'm going to submit is the conclusion of the Supreme Court. And let me read the last part of the decision. Because we uphold the trial court's dismissal of the action, it is unnecessary for us to address the town's argument that the lots were consolidated in 1977. Now when I first brought to Superior Court, my lawyer asked 17 specific questions about under what authority the town combined my land. Because there was no statute, no enabling legislation to allow the town to do this at the time. They just did it. It's absolutely wrong. But the court, McGuire in Superior Court in Concord, on the 17 issues regarding the combination of my land, the ruling came down, neither granted nor denied. In other words, she wouldn't answer the question that was specifically given to her.

In appealing it to the Supreme Court, one of the questions we asked was how did they combine our land in 1977? The Supreme Court, I just read the last article. They said they wouldn't answer it. To me, this is absolutely ludicrous in a state that supposedly lives under the rule of law and the Constitution. Again, I will submit this to you.

There's another thing that I will submit. It's an article by Hank Amsden, who was a member of the Surveyors' Association and he wrote it in what is known as the Benchmark. It's a magazine published by them. I will leave an article with you on that. In this article, Hank researched this. He never represented me on anything to do with the Town of Bow. He simply, you know, looked into this and wrote a tremendous article on it. In the article,

he pulls out affidavits by the Planning Board members in 1977 that say that this was never even discussed by the Planning Board in 1977.

Now, how and who has the authority to invoke something on my land without no legislative authority at all, it's ludicrous.

Senator Betsi DeVries, D. 18: And if you would like to give that article over, we will have it copied and distributed. I would appreciate that, Mr. Blevens.

Mr. Blevens: I also, as part of this, I can't say it's wisdom or not wisdom, but what I did was record all the instruments that I could with the Registry of Deeds, including a deed that I made out whereby I invoked the Town of Bow as the grantor of my land. Let me explain to you why.

In Superior Court, town counsel, who I believe was from the Municipal Association, which I kind of associate with Acorn, but that's a little different story.

Senator Betsi DeVries, D. 18: We'll stay on track.

Mr. Blevens: Let me continue on the issue. In the court, the, got to get back to where I was, the issue of combining the land, now I'm losing my track of my chain of thought now.

Senator Betsi DeVries, D. 18: If I could, because I know I am going to lose some of my members, there's other committees that start up, and we were scheduled to be done at 10. And I have several people scheduled to speak. Is it possible for us to wrap and I can stay later than other members can, if I need to have you come back up and finish with me, would complete your testimony. Would that be possible, Mr. Blevens?

Mr. Blevens: Absolutely. But what I'd like to cover while the members are still here is the amendments that I proposed to you, if I could.

Senator Betsi DeVries, D. 18: Oh, I see. So you're saying this first handout is a change you are hoping...

Mr. Blevens: Right. And the reason for it is simple, and that is we're talking about RSA 674:39(a), which is enabling legislation for planning boards.

Senator Betsi DeVries, D. 18: And Mr. Blevens, we are asking for testimony on the bill that is before us, not on an proposed amendment offered

from the public. I would ask to defer, because I know we have some important testimony we'd like to get in on the bill that is before us, that I think you would be supportive of.

Mr. Blevens: If you look right down at the bottom of that, you'll see the bill ...

Senator Betsi DeVries, D. 18: I'm not looking to have testimony on your proposed amendment just now.

Mr. Blevens: Okay, but the amendment that you've proposed today, I believe is the very last issue on this.

Senator Betsi DeVries, D. 18: The bill that is before us?

Mr. Blevens: Yes, is no city, town or county may merge pre-existing, approved or subdivided lots or parcels except upon application of the owner. What I would like to see added to that is, no city, town, county or planning board. Because this pertains to the planning boards, that's enabling legislation for the planning boards. Not for the cities and towns, but for the planning boards. So this should be included in this amendment, in not being able to do this. I mean, is that clear as far your amendment that you want to add to this legislation?

Senator Betsi DeVries, D. 18: I appreciate the suggestion and we will take that under advisement.

Mr. Blevens: And the other thing that I would like to have you take under advisement is that the document that's presented to the planning board be written and acknowledged, as though it's a deed. Because this is going to be recorded in the Registry of Deeds. And somebody has to take the issue and not leave it in the hands of the planning board by a verbal understanding. It has to be written and it has to be acknowledged in order for the planning board to act on. **See written testimony and submissions of Ken Blevens attached hereto and hereafter referred to as Attachment 1.**

Senator Betsi DeVries, D. 18: Thank you for your testimony, sir.

Mr. Blevens: You're welcome.

Senator Betsi DeVries, D. 18: Questions? We thank you very much. Calling on Barbara, I'm not going to mispronounce another name and I've gotten it wrong in the past.

Ms. Barbara Aichinger: It's Ikingger (ph). I would like to shake this gentleman's hand, thank you very much, Mr. Blevens. Okay, for the record, my name is Barbara Aichinger. I have copies of my testimony here. I have written testimony that I will read and then I will take your questions, if any.

My name is Barbara Aichinger, Gilford, New Hampshire. I would like to thank Senator Sgambati for putting this bill forward, along with Senators Roberge, Houde, Bradley, Senator Clark and with five other House members who have co-sponsored this bill. This bill is a result of almost three years of intense study for me. I have a background in engineering, so I'm used to studying things. When the Town of Gilford remerged my lots, my family and I went into a financial tailspin. 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 low interest rates. In essence, I have two houses on a double, 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 the widow in town who had her two adjacent lots automatically merged when her husband died because both lots 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 five 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 five lots, that he only had one lot from a zoning perspective. He said to me, quote "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 we 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 Town's actions, the Town will take his house because the Town has merged the two together. The merging was done without informing him and without his consent. This is a perfectly good buildable lot and is the same size as all the other lots on the street. These are all examples of economic waste, and there are many more.

So how did this all get started? Well, there were two schools of thought back in the 1970s that developed. 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, they never merged.

Then there was the merging crowd. These folks followed case law and municipal attorneys love their case law. In the mid 1970s, there was a case

that hinted 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 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 to do that 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 the landowner 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 properties.

Now I'd like to read you a passage from an actual zoning board of adjustment meeting, when the landowner tried to regain their property rights. The year was 1998. The applicant had two lots in a completed subdivision, and that subdivision was created prior to zoning. The applicant's house is on a lot that's .55 and the adjacent vacant lot is .92. The Town of Gilford has since increased its minimum lot size to one acre, so the vacant lot is only .08 out of compliance. Questions from the zoning board to the applicant: Are you contesting the Nighswander doctrine. Now the Nighswander was the town attorney, okay. How does the applicant's two lots differ from the 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 that she did not know her two lots were consolidated into one lot. No one told her, noting that she has two deeds that are registered in Laconia.

A board member then states that quote he has a very serious problem with the application. The merger doctrine stands. Nothing was presented that shows that this lot is any different from the many lots under the same circumstances. The planning director then stated quote 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 the 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. Number 1, there is no particular hardship to the property. Number 2, the use is contrary to the spirit of the ordinance. And number 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. And then 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.

Senator Betsi DeVries, D. 18: Barbara, I would have to interrupt you at this point, because you are reading verbatim from testimony that you have given us in writing.

Ms. Aichinger: Yes.

Senator Betsi DeVries, D. 18: And we will be reading 100 percent. Was there anything that is a variance from the written testimony?

Ms. Aichinger: Yes, I would like to address the assessment issue, okay.

Senator Betsi DeVries, D. 18: Please.

Ms. Aichinger: In my situation, I have two houses on one merged double lot, so it's assessed actually lower. So the town is losing $15,000 a year of assessment. If they were to recognize my two lots separately, my tax bill goes up by $15,000 a year, and I would be happy to pay it because I can sell it now.

Now you'll hear other testimony about people who are being unfairly taxed, but in this situation and in a vast majority of situations, the owner would gladly pay the increased assessment because now they have the asset back that they can sell. In addition, when I sell that asset, I have to pay the real estate transfer tax. Now the State benefits from the sale of that asset. And I will gladly pay that because I now have my property rights restored to me.

Now you also had a question about how many towns do this, okay. Now I have here the passage from Judge Frederick Goode, the Town of Candia. That was Rockingham Superior Court. Now what I have found in my research, is because the Superior Court decisions are not on line, we never get to really see them and they never bubble up to the Supreme, okay, if the person can't appeal it. So you have a vast difference in judges' opinions between the two courts. Now you heard from Mr. Blevens, which was Merrimack Superior Court, Judge McGuire. And then you've got Frederick Goode in Rockingham County finding that Candia was unconstitutional in their merging of Mr. Snow's property. Okay.

So you have a huge disparity. I've found merging in Laconia, I've found merging in Portsmouth. I think the king of merging has got to be Gilford because of the town attorney that implemented it. But we do see it in many, many communities. The zoning ordinance for merging still sits on the books for many communities even though they don't enforce it. In Bedford, New Hampshire, it sits on the books. In Alton, New Hampshire, it sits on the books, although if you go to the Planning Department they say, oh, we don't enforce that. Okay. Well in Gilford it sat on the books, okay, and an abutter used it as a basis for his lawsuit. Okay. So you do have an extreme dichotomy of situations that go through.

And the reason why HB 390 did not solve the problem was because you explicitly did not forbid it, and so the town attorney said, well, they didn't forbid it so that means I'm still allowed to do it. The only thing that HB 390 did, which gave us a voluntary merger, was that, oh, the property owner can do that now. Well, the property owner could always voluntarily merge their property, right? I could write it into the deed, these two lots are combined. I could write it into, I could have a surveyor, just survey it as one lot. I could always do a voluntary merge. HB 390 didn't get the job done. I urge you to get the job done. **See written testimony of Barbara Aichinger attached hereto and hereafter referred to as Attachment 2.**

Senator Betsi DeVries, D. 18: Thank you very much, Barbara. Questions? Senator Sgambati.

Senator Kathleen G. Sgambati, D. 4: Thank you and I apologize because I'm going to have to leave for Finance. But Mr. Blevens' language, and I did have one change in language that I didn't bring forward, but I would ask the Chair to sort of give us time to make sure that the words that are here are accurate.

Would you concur with his conclusion of the planning board language?

Ms. Aichinger: I would concur with the inclusion of the planning board, simply because of the situation we had in 1995 with HB 390. If you don't expressly forbid, they think it's expressly allowed, okay.

Senator Kathleen G. Sgambati, D. 4: Okay.

Ms. Aichinger: Now the other thing is, I recommended and I believe Senator Sgambati has, is delete the word approved, because you have no city, town or country may merge pre-existing or subdivided lots. If you leave that word approved in there, oh, that means planning board approved. So, therefore, anything before planning, we can merge. You must expressly forbid it.

Senator Betsi DeVries, D. 18: Thank you for your testimony and we will look at the other statutes to be sure we're not giving some new authority to the planning boards that they don't currently have under our statutory framework. And that would be my concern.

Ms. Aichinger: Thank you.

Senator Betsi DeVries, D. 18: Thank you very much. Asking for Cordell Johnston to join us, so we can maybe hear the flip side of why you have concerns and try to start wrapping our brains around this. Cordell.

Attorney Cordell Johnston: Thank you, Madam Chair. My name's Cordell Johnston, I'm an attorney, I represent the New Hampshire Municipal Association. No connection with Acorn as far as I know.

And I am not personally a big fan of involuntary merger, but it is, this is not a simple issue and it is something that we think should be left to the towns. If I had been alive in 1920 and owned, say, a five acre lot and there was no zoning, I might have planned to divide that into, I don't know, 50 lots of a tenth of an acre. Along comes the zoning ordinance and says, no lot shall be, you can't build on a lot unless it's at least two acres. Okay, so suddenly the best I can do is subdivide one lot and have two separate lots. Clearly, there's been an infringement to some extent of my property rights, but I think most people recognize that that is permissible. Certainly, the courts have held it as constitutional.

Now, if instead of, just to alter the situation slightly. I, a couple of days before the zoning ordinance was adopted, I go ahead and draw up a 50 lot subdivision and this was before we had a planning board so it didn't have to approved by anybody. Now, I have 50 lots and the zoning ordinance says that substandard lots are going to be merged. And so, yes, again there's an infringement of my property rights. I don't think it's a whole lot different from the first situation that I described. So, I mean, the question arises, if you have someone who owns a significant piece of property before lot size requirements were imposed, someone else who owned a similar piece of property and engaged in the ministerial act of dividing that into lots. Why are the circumstances of those two property owners significantly different?

I will say, from the stories I've heard both here and outside this room, these ordinances could be handled a lot better. And it's hard to deny that there's something wrong with simply merging someone's lots and never telling them about it. I think, and I don't know how many municipalities have these ordinances. I know that previous witnesses mentioned Gilford, Laconia,

Portsmouth, I think Bedford. I know Bedford does, I'm pretty sure Concord does. And they are not administered uniformly. If there's a need for legislation, I think it probably makes sense to do something like require notice, if you're going to merge lots, give people a right to appeal. Ken Clinton mentioned that if the lots are in fact buildable from a health and safety standpoint, notwithstanding the zoning ordinance, then in his view they ought to be permitted. And maybe that's an approach you could take as well.

I'm not an expert in this. There are planners, unfortunately, there are no, I don't think there are planners from any of the towns involved here. But before you just pass a law that makes this illegal, I think you ought, I would encourage you to talk to people from the Planners Association, maybe the Regional Planning Commissions. People who know more about this than you and I do.

I do have an article from our town and city publication that I will pass out. This is just, it's not advocating a position, it's just explaining. This is a couple years old, it's just explaining the issue of involuntary merger.

But, you know, it basically, it is something. If the town has a zoning ordinance, just as if I move into town and I buy 100 acres and I think I'm going to subdivide it into 100 lots. And then I read the ordinance and find that there's a 5 acre minimum, well, I'm presumed to know the law. The same is true if the town adopts an ordinance that provides for involuntary merger and your remedy if you don't like it is to work to change the zoning ordinance. Any of these towns, the voters could simply call for an amendment of the zoning ordinance to remove these provisions. And I think that's the right remedy.

But if, I wouldn't say that legislation is completely inappropriate, but I would consider it pretty carefully.

Senator Betsi DeVries, D. 18: Would you care to consider also the addition of planning board, as has been suggested previously?

Attorney Johnston: If you're going to pass the law, I wouldn't have a problem with that. I think that's not necessary. I mean, it says no city, town or county. If the town can't do it, the planning board can't do it. But if you want to add that, I don't, I wouldn't object any more to it if you add that than I do currently.

Senator Betsi DeVries, D. 18: If a zoning change is implemented, is it legal in a community before adopted by the local government entity?

Attorney Johnston: If the zoning change ...

Senator Betsi DeVries, D. 18: Any zoning change has a process for approval.

Attorney Johnston: Right.

Senator Betsi DeVries, D. 18: In Manchester, it would be the Board of Mayor and Aldermen, and that has to actually adopt the suggestions of the zoning change.

Attorney Johnston: Right.

Senator Betsi DeVries, D. 18: If we add planning board into the, with, give them the ability to effect zoning, have we given them any new authority that they wouldn't, that would typically be in the hands of the Board of Mayor and Aldermen or selectmen in other communities?

Attorney Johnston: If you give the planning board the authority to ...

Senator Betsi DeVries, D. 18: I think that the suggested language is saying that planning board may merge pre-existing, approved or subdivided lots. It's saying no, it's in the negative, but it's presuming, it's an assumption that they have an authority to suggest a merger. Which I'm not sure they have that authority independent of the government to do.

Attorney Johnston: Okay. I'm not quite, I'm not following with the question, I'm sorry.

Senator Betsi DeVries, D. 18: Can a planning board suggest a zoning change?

Attorney Johnston: They can suggest a zoning change. They cannot make ....

Senator Betsi DeVries, D. 18: Can they act on it?

Attorney Johnston: ... cannot make a zoning change, no. The planning board can suggest, can propose a zoning change and you may be familiar. There's a statute that says from the time that they post a notice of a proposed zoning change until that is voted on, that zoning change will be deemed in effect until it's voted on. And that's to prevent, you know, a flood of

developments during that gap period. But apart from that, no, the planning board cannot, on its own, change the zoning ordinance.

Senator Betsi DeVries, D. 18: 674.

Attorney Johnston: That section that I just mentioned? I think it's 676:12, I think. **See article submitted by Cordell Johnston attached hereto and hereafter referred to as Attachment 3.**

Senator Betsi DeVries, D. 18: Thank you. Questions? Senator Houde.

Senator Matthew Houde, D. 5: Thank you, Madam Chair. I've looked through this quickly, so it may be addressed in here. But I haven't yet heard what the benefits of involuntary merger are that would outweigh an individual property owner's rights. Could you speak to that?

Attorney Johnston: Sure. The benefits are, I think one of the prior speakers talked about the goal of eliminating non-conforming uses. And that is a goal of zoning. And if people don't accept that zoning is a good thing, then I understand that you certainly wouldn't think that involuntary merger is a good thing. But if you accept that zoning is a good thing, then from that it follows that eliminating things that don't comply with your zoning ordinance is a good thing.

And it's, if, there are a lot of pre-existing lots that are tiny. You know, tenth of an acre lots. Ken Clinton talked about, from his perspective, and he said he could see both sides of the issue. You do have health and safety issues if you have someone who has a whole bunch of tenth of an acre lots and is proposing to develop those. So, you know, there are health and safety issues, overcrowding. It's the same things that zoning is trying to, is trying to avoid. And again, I don't think the effect on that property owner's rights is any different from the effect on another property owner who had a non-subdivided lot who just suddenly finds that he can't subdivide it.

Senator Matthew Houde, D. 5: Follow-up.

Senator Betsi DeVries, D. 18: Follow-up, please.

Senator Matthew Houde, D. 5: Is there a difference, though? I mean the difference between, say, tenth of an acre, two adjacent tenth of an acre parcels. One is held by unrelated person X and the other is held by person Y. They're non-conforming pursuant to subsequent zoning regulations. But they're never going to be merged. Presumably because there's no common ownership.

Attorney Johnston: True.

Senator Matthew Houde, D. 5: So the difference is that there's the same owner, in the situation where there's a merger.

Attorney Johnston: Exactly, yes. And, I mean, the Supreme Court has indicated that the merger of contiguous lots owned by the same person is permissible. I don't think anyone would go so far as to say that you could merge contiguous lots owned by two different people. Even I wouldn't support that.

Senator Betsi DeVries, D. 18: I think we're all saying, let us hope not. Further question? Cordell, just to clarify, because this in some communities, did start with the very small lots, the camp lots that were divvied up 100 years ago, well before zoning regulations have been enacted. And at one point in time, were parsed among many different owners. Consolidated under, in some cases, similar ownership in order to make them a usable lot by current zoning.

Attorney Johnston: Right.

Senator Betsi DeVries, D. 18: A buildable lot, if you would.

Attorney Johnston: Right.

Senator Betsi DeVries, D. 18: If we render a decision here that says that any merger that had taken place involuntarily, forcing a small lot to become a larger lot, making it a buildable lot. If we change the law on a merger that has already occurred, do we know if we will actually take property rights away from an individual? I'm trying to envision grandfathered rights here, where it would end up, if we undo case law?

Attorney Johnston: I've been assuming that if you pass this, it would prevent involuntary mergers going forward.

Senator Betsi DeVries, D. 18: In the future.

Attorney Johnston: I haven't assumed that it would prevent the ones that already took place. If it did, I think that creates all kinds of complicated issues. I don't know whether it presents the problem that you're raising, but I think it opens a Pandora's Box.

Senator Betsi DeVries, D. 18: And I can see from the nodding going on behind you that we're not all in agreement over what the intent of the legislation is. So we'll have to delve into that.

Attorney Johnston: Okay.

Senator Betsi DeVries, D. 18: Thank you, Cordell, for your testimony.

Attorney Johnston: Sure.

Senator Betsi DeVries, D. 18: I would note that there a few people that wish to continue and give testimony. I first need to go to staff, because we're beyond the time. Do we have complications? Do we have a couple more minutes for testimony that I can stay and listen to? Do you have someplace else you need to be?

Shannon Whitehead, Committee Aide: I have to sign him in on a bill in about 10 minutes, but ...

Senator Betsi DeVries, D. 18: We have about five more minutes for testimony before we all need to be somewhere else, including the staff, or before I have to be somewhere else. And I think I have pretty much covered the broom from individuals, but I want to give you the opportunity if you can succinctly give your testimony. So calling on, is it Jeremy Olson? Not indicating whether you wanted to speak or not.

Mr. Jeremy Olson: I'm not, Senator.

Senator Betsi DeVries, D. 18: Not to speak, that makes it easier. Mark Warden.

Mr. Mark Warden: I've already cut my testimony in half, so I'll keep it brief.

Senator Betsi DeVries, D. 18: Thank you, Mark.

Mr. Warden: In the interests of time, thank you, Madam Chairman, members of the Committee. Mark Warden with the New Hampshire Liberty Alliance. We're an all volunteer, non-profit, non-partisan organization dedicated to moving public policy in a pro liberty direction. We publish the Gold Standard for your benefit.

We all know that the General Court has sworn an oath to uphold and defend the State Constitution, so that's the angle I just wanted to touch on today, briefly. We can always go there for direction in this matter. According to

the Constitution, Article 2, Part 1, in Natural Rights, all men have certain natural, essential and inherent rights, among which are the enjoying and defending life and liberty, acquiring and possessing and protecting property, and in a word, seeking and obtaining happiness. Right there it talks about property rights.

But again in Part 1, Article 12, the Constitution reads, no part of a man's property shall be taken from him or applied to public uses without his own consent. 1784.

And if that's not enough, another piece of the sage document comes to mind. Article 23 states retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made. So that could apply to these zoning boards that change the zoning laws after you already have these laws. So that's what we're trying to avoid here.

And in defense of property rights, I think that the last question you brought up was a good one. Will this affect people going to the past? Well, I could see people that have been harmed, have had regulatory taking, could now use this as a basis for undoing those unjust lot mergings. So I think it's a positive thing all away around.

To wrap up, I think we should use, we know the Constitution is written to, the Bill of Rights anyways, was to protect the people from their government. And I think that this bill just goes in along with that and that's in keeping with that.

That's all I have. I did bring a copy of my testimony in written form to leave with the Committee. **See written testimony of Mark Warden attached hereto and hereafter referred to as Attachment 4.**

Senator Betsi DeVries, D. 18: We thank you, we appreciate that.

Mr. Warden: Thank you.

Senator Betsi DeVries, D. 18: Questions from the Committee? Seeing none. Then it looks like my final speaker is Howard, is it Hardin?

Mr. Howard Hardin: Yes.

Senator Betsi DeVries, D. 18: Thank you, Howard.

Mr. Hardin: Thank you, Madam Secretary, I mean Chair. I bought a piece of land and then years later, this was in 1977. Years later I acquired another

piece behind my property. And I've gone to the Planning Board over and over again, year after year, and there's just no recourse. And the fact that now the land is all tied into one and I appreciate what the Vice Chairman Houde, Senator Houde, that even with just one of my sons' names on that deed, it could never have been done. Or if I separated it and put just my wife's name on it. And it just, it's a terrible injust.... They never notified us, never responded to any of our notices. It's just taxation without representation and the back land was just going to be used for a sanctuary. It was landlocked and I don't want to tie up your time. You're very, very busy. But I appreciate you taking on this way outdated in time and legal substance to even listen to me here.

And I thank you so very much and I hope you both have a good day.

Senator Betsi DeVries, D. 18: Thank you very much. We do have a question for you sir, if you're so willing.

Senator Matthew Houde, D. 5: We had heard testimony earlier today that people to whom this had happened, there was a merger, had other plans for the second parcel. I'm just curious, if you had plans for that parcel that you are now precluded from exercising?

Mr. Hardin: No, I couldn't even give it away. It's non-buildable.

Senator Matthew Houde, D. 5: Before it was merged, did you have plans to dispose of it?

Mr. Hardin: No, because it was landlocked.

Senator Matthew Houde, D. 5: Thanks.

Mr. Hardin: Great, thank you.

Senator Betsi DeVries, D. 18: Thank you for your testimony. And Mr. Blevens, I had offered you the opportunity to conclude and you would need to come forward and recognize yourself again for the record.

Mr. Blevens: My name's Ken Blevens, I come from Bow, New Hampshire, and I'm representing myself.

Just quickly, one of the things that happened in Superior Court, which I think this Committee should know about, is the fact that Judge McGuire voided my deeds, okay. And then she turned around, what I did was take the three parcels of land, the remainder of them, and deeded two parcels to

one son and another, and the other parcel to the other son. In the interim, I did a boundary line agreement. The statute is very clear on a boundary line agreement. Only the owners of the land can participate in a boundary line agreement. It's different from a boundary line adjustment. Completely different. You don't have to go before any board or anything else, it comes from common law. Very familiar with the law.

What the Judge did was void my boundary line agreement on the insistence of the Bow Council, okay, who had no authority to get involved in the boundary line agreement. Next thing she did was void my deeds, and then to turn it completely upside down, she insisted that my sons reconvey the property to me. You can find it in the Registry of Deeds, the reconveyance. You can also find under the acknowledgment that it was acknowledged that it was not of their own free will, it was by court order.

What this has done to my title, I have no idea. I understand that there's some legis..., there was some legislation back about eight or ten years ago that said if the planning boards or anyone in municipality got involved in the title of property, it completely destroys the title. So I have no idea what kind of title I have on that property today. How do I find out? Go back to the court. No way, no way!

Thank you, that's all I wanted to say.

Senator Betsi DeVries, D. 18: Thank you, sir, for your testimony. Questions? Seeing none, anybody else wishing to offer testimony? I have staff...

Ms. Aichinger: Two minutes.

Senator Betsi DeVries, D. 18: Sorry, I don't have two minutes. If you would like to address us in writing, if you would, Barbara. Thank you.

Hearing concluded at 10:27 a.m.

Respectfully submitted,

Recorded by:
Claire Emery, Senate Secretary

Catherine S. Mullen

Transcribed by:
Catherine S. Mullen, Senate Secretary
3/24/10

4 Attachments

Attachment I

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

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

No city, town, ~~or~~ county, or planning board may merge preexisting approved or subdivided lots or parcels except upon written and acknowledged application of the owner.

Presented by Ken Blevens 2 Valley Road, Bow,NH.03304

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.

10-2707

03/01

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

674:39-a Voluntary Merger. Any owner of 2 or more contiguous preexisting approved or subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes may do so by applying to the planning board or its designee. Except where such merger

would create a violation of then-current ordinances or regulations, all such requests shall be approved, and no public hearing or notice shall be required. No new survey plat need be recorded, but a notice of the merger, sufficient to identify the relevant parcels and endorsed in writing by the planning board or its designee, shall be filed for recording in the registry of deeds, and a copy mailed to the municipality's assessing officials. No such merged parcel shall thereafter be separately transferred without subdivision approval. ***No city, town, or county may merge preexisting approved or subdivided lots or parcels except upon application of the owner.*** written

2 Effective Date. This act shall take effect 60 days after its passage.

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.
01/28/2010	S	Hearing: February 4, 2010, Room 103, LOB, 9:00 a.m.; **SC5**

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No city, town, ~~or~~ county, or planning board may merge preexisting approved or subdivided lots or parcels except upon written and acknowledged application of the owner.

Presented by Ken Blevens 2 Valley Road, Bow,NH.03304

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 97-633

KENNETH E. BLEVENS, SR. & a.

v.

TOWN OF BOW

March 1, 2001

Laboe & Collins, P.L.L.C., of Concord (John E. Laboe on the brief and orally), for the plaintiffs.

Upton Sanders & Smith, of Concord (Gary B. Richardson and Lauren S. Irwin on the brief, and Ms. Irwin orally), for the defendant.

HORTON, J., retired, specially assigned under RSA 490:3. The plaintiffs, Kenneth E. Blevens, Sr., and his sons, Christopher J. Blevens and Kenneth E. Blevens, Jr., appeal, and the defendant, the Town of Bow (town), cross-appeals, various orders of the Superior Court (McGuire, J.), including the court's order dismissing the plaintiffs' writ. We affirm.

This case is the most recent in a series of cases regarding the division of the plaintiffs' land. In 1977, Blevens, Sr., received approval for a subdivision of his property. The subdivision plat plan set out four smaller lots and a large area of "back land." The property was originally purchased by Blevens, Sr., as three separate parcels.

In 1991, Blevens, Sr., without seeking subdivision approval from the town, entered into a boundary line agreement with himself to create two new lots out of the "back land" area. He conveyed the resulting lots to his sons. On November 15, 1991, counsel for the town wrote a letter to the plaintiffs stating that, in counsel's opinion, the boundary line agreement was without legal effect and the conveyances violated town subdivision regulations. The letter also advised the plaintiffs that if they did not reconvey the property "to create a single lot" the town would file suit.

In 1992, the town brought suit against the plaintiffs for creating an illegal subdivision. It argued that the 1977 subdivision plat consolidated the remnants of

two of the historical parcels in the "back land" area into a single parcel. The superior court ruled that the plaintiffs had created an illegal subdivision because the 1991 boundary line agreement failed to follow the historical lot lines. The court expressly declined to rule on the lot consolidation issue raised by the town. Both parties appealed, and we summarily affirmed the trial court on the merits but ordered the imposition of statutory fines, leaving the possibility of suspension of the fines to the trial court's discretion. On remand, the trial court, noting that the plaintiffs had failed to reconvey the lots, ordered them to pay statutory fines, some of which were suspended, and to reconvey the lots within thirty days. When the plaintiffs failed to reconvey the lots, the court found them in contempt, imposed additional fines and ordered them to reconvey within three days or show cause why they were not in further contempt. The plaintiffs reconveyed the lots on the third day.

Following an unsuccessful attempt to collect money damages and resolve the consolidation issue in federal court in 1994, the plaintiffs filed a new State action in 1996. The 1996 writ alleged four counts: (1) unlawful taking of property; (2) slander of title; (3) violation of due process rights; and (4) recovery of attorney's fees. The plaintiffs requested a jury trial "on all issues triable to a jury."

The parties filed a series of pretrial motions. The trial court denied the plaintiffs' motion to recuse the court for bias. It also denied two of the town's motions to dismiss that alleged: (1) that the "back land" was consolidated as a matter of law as a result of the 1977 subdivision; and (2) failure to exhaust administrative remedies. The court granted the town's motion to dismiss part of the fourth count, relating to recovery of attorney's fees, as barred by res judicata. Finally, it granted the town's motion to dismiss the entire writ, ruling that: (1) the plaintiffs were precluded from recovering monetary damages prior to their reconveyance of the property illegally conveyed to the sons; and (2) the plaintiffs had not sought a ruling on the consolidation issue, a necessary predicate to a jury award for the alleged taking. The plaintiffs now appeal the court's refusal to recuse itself, its partial dismissal of the claim for attorney's fees, and its dismissal of the writ. The town cross-appeals the court's denial of its motions to dismiss based on the consolidation of the subject lots as a matter of law and the failure of the plaintiffs to timely appeal an administrative decision under RSA 677:15 (1996).

We first address the plaintiffs' argument that the trial court erred in declining to recuse itself.

> Whether an appearance of impropriety exists is determined under an objective standard, i.e., would a reasonable person, not the judge herself, question the impartiality of the court. The test for the appearance of partiality is an objective one, that is, whether an

> objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case.

Taylor-Boren v. Isaac, 143 N.H. 261, 268 (1998) (quotations, citations and brackets omitted). A trial court is per se disqualified due to the probability of unfairness "when [the court] has become personally embroiled in criticism from a party before [it]." State v. Martina, 135 N.H. 111, 121 (1991) (quotation omitted). The party claiming bias "must show the existence of bias, or such likelihood of bias, or an appearance of bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of [a party]." State v. Fennelly, 123 N.H. 378, 384 (1983) (quotation omitted).

The plaintiffs argue that the trial judge should have recused herself for bias "evident from the ire occasionally directed at the plaintiffs and the repeated spontaneous arguments made from the bench for the benefit of the [town]." The plaintiffs identify two instances in which the court allegedly demonstrated bias. They first point to the April 5, 1996 hearing on remand, when the court imposed additional fines and ordered the plaintiffs to reconvey within three days or show cause why they were not in further contempt. According to the plaintiffs, the trial court "became visibly angry that the [p]laintiffs had the temerity to say that her [o]rders were confusing, recessed the hearing, and within approximately 15 minutes generated an [o]rder holding each of the [p]laintiffs in contempt." (Emphasis omitted.) A review of the April 5, 1996 transcript reveals none of the anger or sua sponte support of the town's position alleged by the plaintiffs. While the plaintiffs were found in contempt as a result of this hearing, the transcript clearly indicates that the contempt finding was based upon the plaintiffs' failure to follow an earlier court order and was not "motivated by ire."

The plaintiffs also point to the August 5, 1996 hearing on their motion to disqualify opposing counsel as an illustration of the trial court's bias. As the plaintiffs have failed to provide a copy of the transcript of that hearing, we decline to consider the plaintiffs' argument based thereon. See Sup. Ct. R. 13(3); Cook v. CIGNA Ins. Co., 139 N.H. 486, 488 (1995).

The remainder of the plaintiffs' argument rests on actions by the trial court that were part of the court's duties in making decisions regarding matters before the court. The plaintiffs offer no additional evidence to show that the trial court's actions were influenced by the existence of partiality, criticism by a party or improper influence. The plaintiffs have failed to show how the court became personally embroiled in criticism from a party before it or to demonstrate bias such that an objective, disinterested observer fully informed of the facts would doubt that justice was done. See Martina, 135 N.H. at 121; Taylor-Boren, 143 N.H. at 268. Review of the transcript fails to reveal any obvious anger on the part of the

342 U.S. 920 (1952). Therefore, the conclusion, implicit in the trial court's dismissal, that the consolidation issue was equitable in nature, was correct.

A party has no constitutional right to a jury trial of an equitable issue. See McElroy v. Gaffney, 129 N.H. 382, 386 (1987). "Although the trial court has the discretion to impanel an advisory jury in such proceedings, it is not required to do so. The decision to grant or deny a request for a jury in these circumstances rests in the sound exercise of the trial court's discretion." Lussier v. N.E. Power Co., 133 N.H. 753, 758 (1990) (citation omitted). Also within the trial court's sound discretion are determinations of whether to bifurcate, see Panas v. Harakis & K-Mart Corp., 129 N.H. 591, 607 (1987), or sever, see Morley v. Clairmont, 110 N.H. 12, 14 (1969), the issues before it. See generally 5 R. Wiebusch, New Hampshire Practice, Civil Practice and Procedure §§ 42.07-42.08, at 270-72 (1998). "[T]he manner and timing of the trial of all or part of the issues in an action is a question of justice and convenience within the discretion of the trial judge[, whose] findings will not be disturbed in the absence of a showing of abuse." Jamestown Mut. Ins. Co. v. Meehan, 113 N.H. 639, 641 (1973) (citation omitted).

Finding, on the record before us, no abuse of the trial court's discretion, we will not set aside its decision to require a separate determination of the lot consolidation issue prior to hearing the plaintiffs' takings claim. Implicit in our holding is our determination that the court's dismissal was without prejudice to the plaintiffs' ability to bring an equitable action to determine the consolidation issue, with the takings claim to be revived if the plaintiffs prevail on the equitable issue.

Although we have upheld the dismissal of the plaintiffs' writ, we address two final issues in the interest of judicial economy, **as they are likely to arise in further litigation between the parties**. See Riverwood Commercial Prop's v. Cole, 138 N.H. 333, 337 (1994). First, the town argues that the town counsel's November 15, 1991 letter "advising the Plaintiffs of the Planning Board's position on the consolidation/conveyance issue" was a "decision of the planning board concerning . . . subdivision" within the meaning of RSA 677:15, I, and, therefore, had to have been appealed within thirty days. RSA 677:15, I. We conclude that the letter in question, voicing "[town counsel's] opinion that the so-called boundary line agreement is without legal [e]ffect and that these conveyances are illegal" **is not a decision of the planning board, particularly on the issue of consolidation**. Cf. Totty v. Grantham Planning Board, 120 N.H. 388, 389 (1980) (conditional approval of subdivision plan not a "decision of the planning board" when it does not constitute a final order, create any substantive rights, constitute approval of the final plat, require that the board give final approval, or authorize any construction or development) (decided under prior law). Indeed, the only reference, oblique as it may be, to the question of consolidation is counsel's warning that "if this property

is not immediately reconveyed to create a single lot, suit will be filed." **The trial court's denial of the town's motion to dismiss on that basis was proper.**

Finally, we turn our attention to the plaintiffs' contention that the trial court erred in dismissing their claim for attorney's fees as res judicata. "Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrine of res judicata has been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." Hallisey v. DECA Corp., 140 N.H. 443, 444 (1995) (quotations, brackets and ellipsis omitted). "Under res judicata, a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action. The term `cause of action' is defined as the right to recover, regardless of the theory of recovery." Marston v. U.S. Fidelity & Guaranty Co., 135 N.H. 706, 710 (1992) (emphasis, citations and quotations omitted).

The plaintiffs argue the trial court erred in dismissing count four of their writ seeking the recovery of legal fees. We do not, however, construe the trial court's order as dismissing all of count four. Rather, in its order granting the town's motion to dismiss part of count four, the trial court limited the dismissal **"to the extent that it is based on [the town's] failure to withdraw its cross-appeal . . . in prosecuting the prior case."**

In the 1992 case, the plaintiffs appealed, and the town cross-appealed, the decisions of the trial court. The cross-appeal requested the award of statutory fines and penalties for the plaintiffs' violation of the zoning and subdivision laws. In its motion for summary affirmance, the town stated that it would withdraw the cross-appeal if the plaintiffs' appeal was summarily affirmed, which subsequently occurred. The town, however, changed its position on withdrawal and proceeded to litigate the cross-appeal. The case was remanded by order, and the plaintiffs were assessed statutory fines by the trial court. Following the town's decision to proceed with its cross-appeal in the 1992 case, the plaintiffs moved for attorney's fees based upon **"the unnecessary expense caused by the need to defend against a cross-appeal after November 17, 1993, the day that the [town] broke its promise to this Court." That motion was denied.**

Count four of the 1996 writ, when viewed in conjunction with the plaintiffs' pretrial statement and argument to the trial court, seeks the recovery of fines and costs assessed on remand in the prior State action as well as past and ongoing legal fees. To the extent that the plaintiffs seek to recover the fines and costs assessed on remand, their claim is barred by res judicata. See Hallisey, 140 N.H. at 444. The plaintiffs' recourse for challenging those assessments was limited to a motion for reconsideration and appeal in the prior proceeding. Likewise, to the extent that the plaintiffs are now seeking to recover their legal fees expended in defense of the prior cross-appeal and on the subsequent remand, their claim is also barred by res

judicata. See id. **In affirming the partial dismissal of this count, however, we do not comment on the viability of the remaining portion of the plaintiffs' claim for attorney's fees.**

Because we uphold the trial court's dismissal of the action, it is unnecessary for us to address the town's argument that the lots were consolidated in 1977 as a matter of law. The parties' remaining arguments, following a review of the record, are without merit and warranting no further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

Affirmed.

THAYER, J., sat for oral argument but resigned prior to the final vote; BROCK, C.J., and BRODERICK, NADEAU and DALIANIS, JJ., concurred; NADEAU and DALIANIS, JJ., took part in the final vote by consent of the parties.

Ken Blevens for U.S. Senate 2010

Ken's Journey to Libertarianism

The Blevens Journey to Libertarianism

Read how Ken experienced the arrogance of government first-hand in this intriguing exposè of local NH planning boards and the Bow Planning Board in particular, written by an independent surveyor alarmed at the encroachment of private property rights.

1997 Benchmark Article

Setting the Ancient Marker This article, by Hank Amsden (2 Union Street, Concord, NH. 03301), is from The Benchmark (a publication for land surveyors), Volume 18, Number 3, Winter, 1997. Mr. Amsden is a member of the New Hampshire Land Surveyors Association and was elected as a Fellow in 1993 by the Association based in part on his civil rights stands. He has published other books and articles, is a lecturer, and is active in VOCALS (Victims Of A Corrupt American Legal System). This article contains insight into Ken Blevens's personal experience with the arrogance and nastiness of government bureaucracies and shows clearly why his consistent, continual fight for property rights is so important.

To Fellow Angle-Turners and Others who Muse upon the Worlds Second-Oldest Profession

The "ancient landmark," which the biblical writer cautioned us not to remove, presumably appears on many an old clay tablet found within the domain of Saddam Hussein. Following NHLSA rules today, we would now neatly enscribe with our stylus on the unbaked clay map, near each stone (or other suitable monument used in the ancient Near East) the familiar note, "Found", or "Set, on the 3rd day of the 4th month in 14th year of the reign of Hammurabi." I assume there is general agreement today that we perform at least the following two functions: (1) the boundary, or perimeter, survey of real property, and (2) the subdivision of such surveyed portions of the earth's surface into smaller, mathematically-defined parts of the originally surveyed whole.

These two functions are the current subject of New Hampshire law, RSA 310-A (us, remember?) and RSA 672, 674 (the enabling legislation for planning boards,etc., right?). But there's a third surveying-related activity which has recently become the subject of legislation: the combination, or consolidation of previously subdivided parcels into one larger lot. This last, or law of "Voluntary Merger," received legislative attention in 1995 (cf. RSA 674:39a). But we've already gone too far.

Who said that surveyors subdivide land? Who said that we consolidate land? Once we've prepared a subdivision plan, is anyone likely to find an LLS writing a deed in that LLS's name from a plan he prepared, a survey and subdivision of some other party, namely 'the client'? What do you suppose would happen at the registry of deeds if you--yeah, you, the angle-turner--show up with a deed in hand to record which consolidates several lots, a deed based on a plan which you recently prepared, but to which the fee is held by some other party, namely, the guy who paid the bill? [Would it be recorded?] I

think not.

Well, how about your local friendly planning board, do planning boards subdivide land? Are there deeds on record from planning boards, conveying land off of one of our plans which that board recently approved and recorded, but owned by the guy who paid the bill? Not likely. Well, gals and guys, it's a shame to point this out, but the bottom line is pretty plain.

We don't subdivide land, nor do planning boards. Fee-owners (read my lips, people) do the subdividing. Planning boards and surveyors don't consolidate anything. The person with the checkbook does. Sorry, we only do the measuring.

Since this so-far-puzzling tale is intended as a follow-up to matters we discussed at a recent quarterly (3/21/97, Yoken's), let's cut to the chase and ask a fundamental question: Is the approval of a subdivision plan by a duly constituted planning board mandatory regarding subsequent conveyancing or merely permissive? Let's take an example.

Our client owns a two-acre lot in a one-acre zone with twice the required frontage. You survey same and show a subdivision into two lots, which plan is duly approved by the local board. Question: Can your client, after approval and recording, nevertheless convey the two-acre lot, using the same instrument language which existed prior to approval? Sure,why not?

After all, RSA 674:35, II merely gives the board authority to regulate the subdivision of land (underlining mine) and, to my limited knowledge of statutory and case law, nothing in the RSA's precludes the landowner from conveying the same two-acre lot at will. It remains one piece of land until the record owner writes a deed for one of the lots. Let's try this one more time.

Suppose your client started with two adjoining one-acre lots with distinct sources of title and wished to combine, or consolidate, them pursuant to your plan. Question: Can your client, after approval and recording, nevertheless decide to use the old deeds and convey one or both to one or two distinct grantees? The burden of proof appears to be on those who say "nay."

In fact, the naysayers will be hard pressed to find support in the recent statute: "Any owner of 2 or more ... lots ... wish[ing] to merge them ... may do so by applying to the planning board...." (RSA 674:39-a) The customary imperative "shall" is conspicuously lacking from the legislative intent expressed here. Worse yet, "No new survey plat need be recorded." Horrors! Where was our legislative committee when this thing passed? How true it is that "no [surveyors] life, liberty, or property are safe while the legislature is in session."

In fact, what little case law seems to exist on this subject suggests caution on the part of those who would willy-nilly extend the jurisdiction of government agencies: "The power of a planning board to grant or deny subdivisions must be confined by adequate standards. Whatever authority a planning board has exists only by virtue of a statutory delegation of power...". Purington v. Manchester, 86-E-990, Hillsborough Cty.Sup.Ct., 1987, Goode, J., p. 1. It seems that the Manchester board had denied Purington's application on the basis of their view that it was "inconsistent and inappropriate with the surrounding neighborhood...".(ibid.) Judge Goode's evident displeasure at what he termed another instance of Manchester's "exercise [of] ultra vires authority" (p. 3) was clearly evident in his brief, pithy opinion: "The planning board apparently is unwilling to accept or unable to understand that while it has considerable discretion in the exercise of its authority to review subdivision applications, its powers are not unlimited. It may not withhold approval if the subdivider has complied with existing zoning regulations; it may not withhold approval based on standards not authorized by the enabling statute, or upon the possible impact of the proposed plan on land value. Accordingly, any denial of this application based on its being 'inconsistent and inappropriate' is an unlawful exercise of the Board's discretion." (p. 2) [emphasis mine, underlining in original]

Oddly enough, the same sagacious justice ruled in another related case,this time dealing with the issue of consolidation. Although the relevant board was the "Zoning Board of Adjustment" (Candia), the apparent involuntary merger (as so found by the Zoning Board) of several lots owned by Plaintiff, Richard Snow, unreversed, would have resulted in him appearing, hat-in-hand and upon bended knee, before Candia's planning board. Candia's candor in squarely stating the issue is most refreshing: "[T]he parcels you had bought separately 24-30 years ago had been consolidated--BY THE TOWN--into one lot many years ago ..." (Candia selectmen-Snow, 7/10/92) [enhancements mine]

An impermissible fiat act by the town, noted by Judge Goode: "The Town of Candia consolidated plaintiffs contiguous, separately deeded lots of land...and then treated that consolidation of separately deeded lots as a conversion to a single parcel of land for purposes of...zon[ing]..." (Snow v. Candia, 92-E-552, Rockingham, 1995, Goode, p. 1) Snow protested in unmistakably clear language: " 'I don't want to go to the Planning Board with this,' Snow replied, 'I just feel what I'm doing is right. I bought these lots separately. I don't want to pay subdivision fees for lots I have separate deeds to.' " (Undated newspaper article by "Barbara Jester," newspaper unknown, found in file, RCRD)

When the Purington justice ruled, it was clear that his displeasure had hardly cooled since '87: "It is unfortunate that so much time and needless expense has been engendered by both parties in this matter." (supra, p. 4) Neither statute--RSA 75:9 (appraisal of 2 tracts in common ownership)--nor case law--Fearon v. Amherst 116 NH 392, 1976, cf., brief of Barton Mayer, Upton, Sanders & Smith, Concord--availed the incautious selectmen of Candia: "[T]he consolidation of these individual lots by the town into a single parcel for the purposes of zoning denies Mr. Snow his right to use and dispose of these individually deeded lots.... 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 nonexistent 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." (supra, p. 6)

Now its time for Judge Goodes bottom line of constitutional rights: "The interest of citizens in their private property must be respected and protected from unreasonable restrictions which deprive them of the reasonable use of their land... It follows therefore that unreasonable interference with any one of these rights constitutes a taking even though physical possession remains in the owner... I find the town's practice in this case to be constitutionally frail and accordingly unlawful. Mr. Snow's rights with respect to the use, enjoyment, and right of alienation of his deeded lots here in issue are not determined or otherwise limited by what may be lawfully depicted on the Candia tax maps which are prepared for the limited purposes authorized under the provisions of RSA ch. 75.... [T]he question raised by these proceedings is when Candia consolidated Snow's adjoining tracts of land for tax purposes, did such consolidation also constitute a merger of such lands into a single tract for purposes of zoning? Under the circumstances of this case, THE ANSWER IS NO." (supra, pp. 4-6, enhancements mine)

OK, now were ready for Mr. Kenneth Blevens (Bow, NH.) and a real live one. Recall (if you can; don't worry, I had to look, too) from that quarterly back on 3/21/97 that Blevens had submitted a plan to the Bow Board showing four new building lots with some 32 acres remaining between the back line of the lots and the Dunbarton town line. That the back land was held in three different deeds is still evident on Pete Holden's plan, since Lot numbers "28A,", "27-E,""26-B," etc., retain the original lot numbers assigned by the town when Blevens purchased Lots 28, 27, and 26 from distinct title chains many years before. Although Pete's people wrote on the upper left-hand corner, "Number of Building Lots 5," the landowner's signature, "Blevens" below merely certifies that "the lands subdivided on this map are owned by title of record [etc.]," and the terms "merger," "consolidation," "combination" are conspicuously absent from the entire plan. However,

the back land is shown as "LOT 27 32 ACRES " even though the remainder of Lot 27 (not encompassed by the new building lots) is closer to 26 acres.Thus, if Blevens had so intended, the lumping of all three remainders into Lot 27 and the resulting combined acreage of 32 would have been consistent with that intent.

But there's a problem with assuming that Blevens intended to consolidate--in fact, quite a few:

1. Blevens does not recall instructing Pete's people regarding just how the back land should be depicted. An earlier plan by Harold Fosher of the same area merely shows "Blevens" in back of the new lots and makes no effort to show all the back land. The practice of schematically representing the remaining property on subdivision plans was S.O.P. among us at the present time. With some boards a waiver is occasionally required in order to obviate extensive and gratuitous surveying costs. Holden's depiction of the 'back 32' is entirely consistent with good surveying practice.
2. Again, "merger," "consolidation," "combination," etc., cannot be found on the approved plan of record.
3. No copy of the original application is available, nor is there any evidence to suggest that any reference to the terms listed above would be found therein.
4. Two affidavits in my possession from members who sat on the Bow board at the relevant time track the temper of that time. I have quoted them selectively as they closely coincide: Affidavit of Carroll French, May 22, 1997
   A. "The Bow ... Board never scheduled any public hearing at which to consider the consolidation of historic lots 26, 27, and 28."
   B. "The Bow Planning Board never received a request from...Blevens...asking that the...Board...consider consolidating historic lots 26, 27, and 28."
   C. "No discussion of consolidating historic lots 26, 27, 28 ever took place at [the relevant board meetings]."
   D. "No vote was ever taken at an official ...Board meeting to consolidate historic lots 26, 27, and 28."
   E. "As a matter of procedure, 'lot consolidation' was never done tacitly. Lot consolidation always required an affirmative request or a stated act by the owner."

   Affidavit of Alfred Ward, June 18, 1997
   G. "As a matter of procedure, any plan brought before the...Board for the purpose of consolidating lots, would always be accompanied by an application noting or requesting that the lots be consolidated."
   H. "To the best of my knowledge, no notice of any kind was ever sent by the...Board to...Blevens...notifying him of any plan on the part of the Board to consolidate historic Lots 26, 27, 28 into a single lot...."
   I. "To the best of my knowledge, no vote was ever taken at an official...Board meeting to consolidate historic lots 26, 27, 28."
   J. "As a matter of procedure, any lot consolidation would always be reflected in the title block of the plan under consideration by the...Board."
5. Our outgoing 'el presidente' himself pitched in: (14:B-E and 17) "[There was] no public notice.... [There was] no time...ever allocated...to discuss[, and] no discussion of consolidating [ever took place, and] no vote...[was] ever taken...to consolidate historic lots 26, 27, 28 [at the relevant board meetings, 1977]." "Lot consolidation was never done tacitly. Lot consolidation has always required an affirmative request or a stated act by the owner." (Affidavit of Morris Foote, August 13, 1997)
6. Of course, RSA 674:39-a (eff. 1995) was only a wink in some legislators eye in 1977. But even if it had been adopted, remember that its provisions are entirely voluntary and "no public hearing or notice shall be required...No new survey plat need be recorded." But Bow had no provisions (that I can find) for regulating the process of lot consolidation. If it did, it could be easily argued that such demands on a land owner would be without statutory foundation.
7. But Bow's subdivision ordinance contained at least the usual shark's teeth for surveyed dimensions, the kind of requirement that the courts have always found

reasonable, i.e., the usual request to dimension by bearing and distance. Thus, if our subject plan had proposed subdividing the 'back 32,' Bow's 1977 requirements for a subdivision would have nailed Holden & Co. Let's take a look:

a. What is actually the remainder of Lot 26 is shown with dashed lines but no bearings or distances.
b. The line between Lot 27 and 28 is missing since its locus was unknown to Blevens in 1977 and later became the subject of a boundary agreement.
   QUESTION: If the interior lot lines to be subdivided are not dimensioned, how can Bow approve the plan?
   QUESTION: If an interior (or new) lot line is not even shown on a given plan, how can it pass muster?
   QUESTION: If a given plan won't pass muster for subdivision (the regulation of which is supported by statutory provisions), how can it squeak by consolidation for which the statutes are silent?

But that's not all--The exterior lines of the 'back 32' are entirely undimensioned, including the Dunbarton/Bow Town Line. I count some 14-15 undimensioned lines, including a gaggle of tangents and curves near Putney Road, with mere graphic depiction. QUESTION: If "BLOCK 3 LOT 27 32 ACRES," (the back 32) is a new proposed consolidation on the subject plan, why is it totally undimensioned? What kind of sloppy procedures let this one through? OK, so we know what's not supposed to be done. What was done, back in the old days?

Lets look at how they used to do it without the interference of planning boards: In Milford, a party acquired two adjoining lots on the southeast side of Rte. 101. When the two lots were conveyed on the same deed, a new description was written all around the exterior of the two lots, with angle or stopping points at the common corners of the original lots. The intent to convey one consolidated parcel was clear: "These two parcels adjoin each other and are now described as one parcel." (Paddock Wheeler, Vol. 1058, P. 256, HCRD, 1944)

More recently and also in Milford a party filed a "CAVEAT-LOT CONSOLIDATION" in Nashua, citing ownership of "Map #040, Lot #022," and "Map #040, Lot #022-001," agreeing that "the above 2 parcels of land shall...be considered a single lot and...shall not be sold separately...except with the prior approval of the Milford Planning Board in accordance with its duly adopted subdivision regulations." (Ingeborg I. Chlypawka, Vol. 5324, P. 1925, 3/24/92) Although the foregoing precisely anticipates RSA 674:39-a, I see no citation or reference to planning board procedures in what appears to be merely a one-page affidavit, recorded @ HCRD. If you carefully read our president's affidavit of 8/13/97 you will find that he presented a plan (in 1977) about 30 days before the Blevens matter, which plan included "the combining of two separate lots."

At this point I must recognize that any brave soul who has read thus far will soon begin to ask where all this is heading. The answer to that query is contained in the minutes of the Bow Board meeting which took place on October 3, 1991: "Mr. Kenneth Blevens, Putney Road...In August, 1977 Lot 1, (28A) was combined and there was a 4 lot subdivision."

NOTE:

1. Blevens was not notified of this meeting.

1. He only learned of this action through a letter from board chair Thomas Pelletier, 10/7/91, five days later.
2. Prior to 10/3/91 he had conveyed two of the remainder lots to one son and the other to a second son
3. Because the Town and its counsel believed the lots "w[ere] combined" in 1977, they took the position that he had now illegally subdivided by virtue of the two conveyances to his children.

4. Litigation began in 1992 and continues to this day (an appeal is pending in our Supreme Court)
5. Fines and penalties sought were over $30K
6. Legal fees to date (Blevens only), are over $69K.
7. The Court (Merrimack, McGuire, J.) ordered a forced 'reconveyancing' of the son's deeds, which she had declared void.
8. At one point the Blevens family, grantor and grantees alike, were threatened with a visit to the slammer if the forced reconveyancing was not promptly executed.

But look folks, this is 1997, not 1697. What sort of medieval system of law could have survived our parting with 'Star Chamber' tactics to produce this mountain of nonsense from such a microbic molehill? And why are we talking about this? Because I sense that this foregoing scenario is not peculiar to New Hampshire and that there are other colleagues out there with whom we need to meet and with whom we must discuss certain ominous current trends in real estate law. Because I have been made aware of certain legal maneuverings in this particular matter which exemplify the need for the kind of clear spatial and procedural thinking which I believe to be exhibited by seasoned surveyors. Because I believe that statutory law is the very will of the people, including angle-turners such as ourselves, and because the people's will continues to be thwarted by parties who know better, matters such as the Blevens catastrophe point to the duty of our profession to speak out on matters of real property. We've been 'finding' and 'setting' the ancient landmarks since the days of Nimrod. Its time to get NHLSA, ACSM, NSPS and any number of other LSAs informed and working together on this and other kindred subjects and perform a valuable service for a puzzled public. Its time to reset the ancient landmark. ----------Concord, NH Nov. 17, 1997.

Attachment 2

SB406 AN ACT relative to merger of lots or parcels

Municipal and Public Affairs Committee
February 4th 9:00am LOB 103

Testimony of:

Barbara P. Aichinger
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I would like to thank Senator Sgambati for putting this bill forward along with Senator Roberge, Senator Houde , Senator Bradley, Senator Clark along with five house 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 have 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 both lots were in 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 [applicants] 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 is 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.

New Hampshire Local Government Center

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

Attachment 4

SB 406 – RELATIVE TO INVOLUNTARY LOT MERGING BY TOWNS
LOB 103 2/04/10 PUBLIC AND MUNICIPAL AFFAIRS COMMITTEE

Mark Warden, Chairman of **New Hampshire Liberty Alliance**, a non-partisan, nonprofit, all volunteer organization dedicated to pushing public policy in a pro-liberty direction. For your benefit we publish the **Gold Standard** "Liberty Watchlist" each Wednesday for the general session. **We support this bill and urge ought to pass.**

We know that members of the General Court have sworn an oath to uphold and defend the state constitution, so we can go there for some direction in this matter.

Ref. NH Constitution, **Article 2 of Part 1, Natural Rights**

1. "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, seeking and obtaining happiness."

Also in Part the First, in **article 12,** the constitution reads, "...no part of a man's property **shall be taken from him**, or applied to public uses, **without his own consent**...." That should be enough to back this bill.

But if that's not enough, yet another piece of this sage document comes to mind: **Article 23** states: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made...." **That could be applied to retroactive zoning laws** that in some instances may make older lot sizes non-conforming by today's standards. The constitution demands that we honor grandfather clauses in relation to property uses and sizes, to protect property owners from the whims of local politicians and boards.

2. Zoning rules and regulations that deal with minimum lot sizes and zoning rules **change over time**, as do the people and boards that decide them, and the rules can be somewhat arbitrary. But the right to property and quiet enjoyment thereof is timeless and should be universal.

3. I've been in the real estate business for 15 years, and I can tell you that changes to zoning can have dramatic effects on a property values. When that effect is negative, the property owner is harmed, and any devaluing of the property is in effect a regulatory taking. Other than for long-standing traditions of the use of eminent domain for public purposes, takings are wrong and should be strongly discouraged by this body.

www.nhliberty.org

Publications: weekly Gold Standard and annual Liberty Rating report card

Speakers

Senate Public and Municipal Affairs Committee: Sign-In Sheet

Date: 2/4/10 Time: 9:00 Public Hearing on SB 406

SB 406 relative to merger of lots or parcels.

Name	Representing			Speaking?		
KEN CLINTON	NEW Hampshire Land Conservation Investment Program	Support ☑	Oppose ☐		Yes ☑	No ☐
~~Jack Flatley~~	~~Town of Peterborough~~	Support ☐	Oppose ☒		Yes ☑	No ☐
Norm Bernaiche	Town of Newbury	Support ☐	Oppose ☒		Yes ☒	No ☐
Sen. Jeb Bradley	D. 3	Support ☑	Oppose ☐		Yes ☐	No ☑
Sen Fuller Clark	D. 24	Support ☑	Oppose ☐		Yes ☐	No ☑
Barbara Aichinger	self	Support ☑	Oppose ☐		Yes ☑	No ☐
Jeremy Olson	NH Liberty	Support ☒	Oppose ☐		Yes ☐	No ☒
Mark Warden	NHLA	Support ☑	Oppose ☐		Yes ☑	No ☐
Ken Bleuer	Self	Support ☑	Oppose ☐		Yes ☑	No ☐
Howard Horan	SELF	Support ☒	Oppose ☐		Yes ☒	No ☐
[illegible]	Belknap D 5	Support ☒	Oppose ☐		Yes ☐	No ☒
Cordell Johnston	NH Municipal Assn	Support ☐	Oppose ☒		Yes ☒	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐

Voting Sheets

Senate Public & Municipal Affairs

EXECUTIVE SESSION

Bill # SB406

Hearing date: 02/04/10

Executive session date: 3-3-10

Motion of: OTP

VOTE: 5-0

Made by Senator:	DeVries	☐	**Seconded by Senator:**	DeVries	☐	**Reported by Senator:**	DeVries	☐
	Houde	☐		Houde	☐		Houde	☐
	Sgambati	☑		Sgambati	☐		Sgambati	☐
	Roberge	☐		Roberge	☐		Roberge	☐
	Barnes	☐		Barnes	☑		Barnes	☐

Committee Member	*Present*	Yes	No	*Reported out by*
Senator DeVries, Chairman	☑	☑	☐	☐
Senator Houde, Vice-Chair	☑	☑	☐	☐
Senator Sgambati	☑	☑	☐	☑
Senator Roberge	☑	☑	☐	☐
Senator Barnes	☑	☑	☐	☐

***Amendments:** _____

Notes: SD wants it to not be retrospective

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: March 3, 2010

THE COMMITTEE ON Public and Municipal Affairs

to which was referred Senate Bill 406

AN ACT relative to merger of lots or parcels.

Having considered the same, the committee recommends that the Bill:

OUGHT TO PASS

BY A VOTE OF: 5 - 0

AMENDMENT # s

Senator Kathleen G. Sgambati
For the Committee

Claire Emery 271-1403

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
06/02/2010	S	Enrolled
07/20/2010	S	Signed by the Governor on 07/20/2010; Effective 09/18/2010; Chapter 0345

Other Referrals

COMMITTEE REPORT FILE INVENTORY

SB 406 ORIGINAL REFERRAL _____ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

✓ **DOCKET (Submit only the latest docket found in Bill Status)**

✓ **COMMITTEE REPORT**

✓ **CALENDAR NOTICE on which you have taken attendance**

✓ **HEARING REPORT (written summary of hearing testimony)**

✓ **HEARING TRANSCRIPT (verbatim transcript of hearing)**
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: 1-4

✓ **SIGN-UP SHEET**

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

____ - AMENDMENT # _____ ____ - AMENDMENT # _____
____ - AMENDMENT # _____ ____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

✓ AS INTRODUCED ✓ AS AMENDED BY THE HOUSE
✓ FINAL VERSION ____ AS AMENDED BY THE SENATE

____ **PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)**
List by letter [a thru g or a, b, c, d] here: _____

✓ **EXECUTIVE SESSION REPORT**

____ **OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):**

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 07/27/10 Debra A. Mantoke
COMMITTEE SECRETARY