

F. The Steps For Analyzing A 'Merger' Case.

Step 1 in the "merger" analysis: You need first to determine whether there is a valid basis for claiming that the two alleged parcels *ever* at any time had a *separate existence in the first place*. (Alas, the new statutes don't help much on this question.) Here are types of evidence that can count:

1. If the parcels in some manner count as grandfathered "lots of record" under the terms of a *specific clause in your local zoning ordinance*.
2. If the parcels are shown as separate lots on a recorded subdivision plan which was *approved by the planning board*, and has not been revoked. (This is probably the clearest and easiest way to shown that the lots were once separate.)
3. If the parcels are shown on a plan recorded *prior* to the creation of the planning board ... **and** that plan has become "vested" in some manner due to the substantial construction of improvements and/or sales of some lots, see § 8-C above; also see [Town of Seabrook v. Tra-Sea Corp.](#), 119 N.H. 937 (1979).

Question: What about lots shown on an *unrecorded* plan? **Answer:** Probably not vested. It was held in [Chasse v. Town of Candia](#), 132 N.H. 574 (1989) that an unrecorded plan didn't count as "vested" either under the local "lot of record" clause, or under RSA 674:39.

4. Finally, if there's evidence, based on deed research, that the two parcels were at one time lawfully owned by separate owners. *But be careful!* - the mere fact that a deed *describes* the land as two or more separate "tracts" does not *necessarily* prove that those tracts were ever separately owned. There are many ways such separate descriptions may originate. In my view the officials deciding this question should not reach a conclusion *solely* on the basis of separate tract descriptions, but should require more specific evidence of prior ownership by separate owners.

Take a look at [Mudge v. Precinct of Haverhill Corner](#), 133 N.H. 881 (1991). Susan Condodemetraky owned 42.47 acres. 5.5 of those acres contained a 22-unit mobile home park she claimed was "grandfathered" from the ordinance's required density of 1 acre per unit. She claimed she could go ahead and put 22 more units on the remaining acreage (some being wetlands, etc.). *Wrong*, said the Court. The park is not nonconforming. Since the parcel had never been subdivided (it had all been conveyed via one deed since the founding of the town), there was *no* reason to think there any "grandfathered" lot line between the existing mobile home park and the rest of the tract. Thus the undeveloped portion was *already* being "used" to meet the density requirements of the ordinance. Ms. Condodemetraky had been getting two tax bills, but the Court said that fact was "not conclusive."

Question: What about a parcel of land which has a road running through the middle of it. Doesn't the road automatically constitute a lot line? **Answer:** No, no, no - even though there is

an amazingly persistent "urban legend" belief that it does! The Legislature has specifically said otherwise - RSA 674:54, III(a) says (in part) that "*the erection of a highway or utility easement across a parcel of land, shall not, in and of itself, be deemed to subdivide the remaining land into 2 or more lots or sites for conveyance or development purposes in the absence of subdivision approval under this title.*" That makes sense. Why should the fact that a curve in the road is straightened give someone a right to build on the tiny sliver of land left by the relocation? Moreover, it's well-known that many old farms in New England have a farmhouse on one side of the road, and a barn on the other, but where both sides of the road have been owned by the same owner, *and used as part of the same farm operation*, since the beginning of time. There is simply no case law or other legal basis for treating such property as two separate lots.

The only case law ever cited for the notion that a road must constitute a lot line is [Keene v. Town of Meredith](#), 119 N.H. 379 (1979). But that case simply *does not say that*. In that case Mr. Keene had acquired the two parcels on either side of a road *from two separate owners*! Furthermore he had gotten building permits for houses on both parcels, and had never used the two parcels in conjunction with each other in any way (hence no voluntary merger). It was this *combination* of factors which led to the result of separate parcels in that case, and not just the road.

Step 2 in analyzing a "merger" case: Assuming you've decided (under Step 1 above) that the lots *were* lawfully separated at one time, the next step is to see whether there has been some pattern of "overt act[s] or conduct" showing that the current or prior owners regarded the land as merged (i.e. impliedly "abandoned" the lot line). Here are the cases:

- (i) [Robillard v. Hudson](#), 120 N.H. 477 (1980). Robillard owned two adjoining lots which were substandard. The lots had always been taxed separately. But Robillard's predecessor got a building permit for one of the lots, and the proposed location was too close to the line separating the two lots to comply with side-yard set-backs. The permit was issued anyway with the Town's understanding that the two lots would be consolidated for zoning purposes. The Court said:

"The owner of separate contiguous lots which are otherwise entitled to an exemption from the more restrictive requirements of an amendment to which such lots do not conform may lose his advantage by behavior which results in an abandonment or abolition of the individual lot lines... The fact that lots are separately assessed and separately taxed is not conclusive in determining whether separate lots constitute one lot for zoning purposes.... Whether they should be so treated must be determined on a case-by-case basis." (120 N.H. at 480, citations omitted)
- (ii) [Roberts v. Town of Windham](#), 165 N.H. 186 (2013). In this case (decided under the recent RSA 674:39-aa), the Court said: (a) The mere fact that an owner fails to object to receiving a single tax bill isn't *by itself* evidence of voluntary merger. (b) Neither is the conveyance of the lots via one single deed. (c) However in this case a *combination* of factors led to the conclusion that the lot line *had* been voluntarily abandoned. For example there were two structures which straddled what would otherwise be lot lines. Plus, a garage on one lot was built so close to another lot that it couldn't be entered except through that other lot. The

- current *uses* of the lots were also important - namely, a "cottage" and "bunkhouse" which the Court said were "ancillary" to the main building, and more typical of a unified "waterfront estate" rather than separate lots.
- (iii) [Town of Newbury v. Landrigan](#), 165 N.H. 236 (2013) (another case under RSA 674:39-aa). Just as in Roberts, the court found a voluntary merger based on a combination of factors: (a) Several deeds in the chain of title had described the property as a single tract with a single metes-and-bounds description. (b) Part of one of the lots had been deeded to an abutter, and hence that lot, as depicted on the original plan, no longer existed. (c) Three surveys had been recorded since the original subdivision, showing no solid lines between the lots. (d) A driveway crossed the purported boundary line between the lots. (e) The current owners admitted they believed at the time of their purchase that they were buying one parcel, and had treated it as such when applying for a building permit.

(From NHMA Law Lecture #1 - Grandfathering: The law of Non-Conforming Uses & Vested Rights, Bernie Waugh, Esquire, Gardner Fulton & Waugh PLLC and Adele Fulton, Esquire, Gardner Fulton & Waugh PLLC)