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ZONING AND LAND USE

Lot Merger and Single And Separate Exemptions

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The related concepts of a single and separate ownership exemption for preexisting substandard lots and lot merger frequently play a crucial role in the zoning approval process, but are too often overlooked by land use practitioners. A finding that a substandard lot was held in single and separate ownership since a date prior to the enactment of a zoning ordinance that rendered the lot substandard may entitle a property owner to an exemption from the requirements of certain zoning regulations. On the other hand, a finding of merger may strip a lot of its development potential and doom a property owner's building plans.

Many municipalities preserve the development rights of substandard lots by enacting legislation that exempts such lots from the current zoning requirements, if the property owner can demonstrate that title to the substandard lot was not in the same ownership as an adjoining parcel at any time since prior to the enactment of the zoning ordinance that rendered the



lot substandard. Where this can be shown, the owner is said to be entitled to a variance as of right.

Municipalities with a single and separate exemption in their zoning ordinances often also enact statutory merger clauses. A typical merger clause provides for a lot merger when a substandard lot and an adjoining lot come into common ownership. For instance, the Village of Babylon zoning ordinance states that title to a substandard lot will merge with a contiguous lot "when an owner of the substandard lot shall acquire an adjacent and abutting lot or where an owner of an adjacent lot shall have acquired the substandard lot." In the absence of an ordinance that provides for merger by reason of common ownership, courts have held that

common ownership of adjoining parcels alone does not create a lot merger.²

It also has been recognized, however, that even in the absence of a statutory merger provision, common ownership of adjoining parcels, together with a common use, may effect a common law merger. Indeed, courts have found merger where a common owner has used adjoining parcels as a single parcel, such that each lot materially enhances the value and utility of the other.³ This concept, as well as the concept of single and separate ownership, played a significant role in the Nassau County Supreme Court's decision in *Miller v. Board of Zoning and Appeals for the Village of Westbury*.⁴

Several years ago, Diane and Steven Miller agreed to purchase certain real estate in the Village of Westbury that was owned by Ms. Miller's parents. The Millers' request for a building permit was denied on the ground that the property did not meet applicable zoning requirements. When the village's zoning board also denied the Millers' application for a variance, they went to court.

The Supreme Court upheld the zoning board's decision. It found that

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title to the property the Millers sought to purchase had merged with title to adjoining property years earlier when the two parcels had been owned by Charles and Ruth Buettner. As the court explained, the Buettners had used one of the parcels as a portion of the side yard of the other parcel; had maintained the lots so as to present one house and one open unfenced landscaped yard area; and had filled in an existing foundation on one of the parcels to provide the appearance of one parcel. Indeed, the court emphasized, the Buettners had intended to deed the two parcels as one, but did not do so when they could not secure their asking price for the “enhanced value” of the combined lots. Because the property had not been held in “single and separate ownership” according to the village code, the court concluded that the Millers were not entitled to the relief they had requested.

The interplay between a statutory merger clause and a single and separate exemption was demonstrated in *Mecca v. Kem*,⁵ a case arising from a claim that a town zoning board had arbitrarily and unreasonably rejected a property owner’s claim that her property was entitled to area variances because it was held in single and separate ownership.

In *Miller*, the petitioner’s predecessor in title, Electra Miller, had acquired the property in 1971. Her husband owned an adjacent parcel and, upon his death, Ms. Miller was appointed executrix of his estate. Thereafter, she conveyed title of the adjacent parcel to herself, and several months later conveyed title to the adjacent parcel to a neighboring landowner.

In rejecting the petitioner’s argument, the court recognized the general rule that a merger is not effected merely because adjoining parcels come into common ownership.

However, it added, “an ordinance can provide to the contrary.” The court then pointed to a provision in the town’s ordinance to the effect that “[a] nonconforming lot may be used, or a building or structure may be erected on such lot ... provided that ... such lot has been separately owned in good faith and ... [d]oes not or did not adjoin any lot or land in the same

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ownership.” In the court’s view, there had been a merger within the meaning of the ordinance, and the denial of the petitioner’s variance request therefore was not illegal, arbitrary or an abuse of discretion.

Strict Construction

Like other zoning regulations, statutory merger clauses and single and separate exemptions are deemed to be in derogation of the common law and, therefore, must be strictly construed and ambiguous language will be interpreted in favor of the property owner.

For example, in *Allen v. Adami*,⁶ the petitioners had purchased an improved lot from one individual and a contiguous substandard lot from another, and subsequently applied for a special exception to allow them to use or sell the substandard lot under an ordinance provision permitting such an

exception in the case of “a lot owned individually and separately, and separated from any adjoining tracts of land on January 22, 1962.” The petitioners claimed, and the Court of Appeals agreed, that they were entitled to the exception because the ordinance did not clearly provide that common ownership arising subsequent to Jan. 22, 1962, would effect a merger and render the exception inapplicable.

Conclusion

Inasmuch as a merger can severely impact a parcel’s development potential, attorneys and clients must exercise extreme diligence at the outset of any transaction. The applicable zoning ordinance should be reviewed to determine whether a statutory merger provision exists, and whether the ordinance provides any rights under a single and separate exemption. The property’s chain of title should also be analyzed to determine whether the property came into common ownership with an adjoining parcel subsequent to a change in the zoning regulations. In addition, a potential purchaser should make a careful inspection of the property to ensure that it is not being used in common with an adjoining parcel.

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1. Code of the Village of Babylon, New York, §365-47(A).

2. See, e.g., *Allen v. Adami*, 39 N.Y.2d 275 (1976).

3. See, e.g., *Meadow v. Mansi*, 282 A.D.2d 677 (2nd Dept. 2001).

4. NYLJ, Aug 16, 2000 at 21 (Sup Ct. Nassau Co. 2000).

5. 193 A.D.2d 746 (2nd Dept. 1993).

6. 39 N.Y.2d 275 (1976).