Environmental Court Answers Unresolved Merger Question

In this installment of **Legal & Regulatory Notes** we take a short trip inside Dr. Emmett Brown's Delorean to 2004 when the Vermont General Assembly passed Act 115, "An Act Relating to Consolidated Environmental appeals and Revisions of Land use Development Law." That act, more commonly referred to as the Chapter 117 changes, initially raised more questions than it answered. In an attempt to assist municipal land use officials in that uncertain time, the Vermont Land Use Education & Training Collaborative, of which VLCT was a member, prepared a guidance document called "Chapter 117: Frequently Asked Questions (FAQs)." One question the Collaborative anticipated was, "If a lot was merged under the old existing small lot statute, does the new law "un-merge" those lots (i.e., is it retroactive)?" The consensus opinion provided at that time was, "No, the law is not retroactive. Lots that were merged under the previous law will need to undergo the subdivision review process to subdivide the parcels."

Fast-forward to July 31, 2009 where, up until that time, Vermont courts had not had the occasion to resolutely settle this open question of law. That opportunity presented itself in the case of *In re Chimney Ridge Road Merged Parcels*, No. 208-9-08 Vtec. The facts of this case originate in 2003 when appellant landowner Gregory Frick purchased a 6.8 acre lot (Lot 8) with a home on it in October, another 6.07 acre undeveloped lot (Lot 10A) nearby in November, and a third 3.0 acre undeveloped lot (Ward Lot) located between the first two in February 2004. All lots were located within the Town of Weathersfield's 10-acre minimum Conservation Zoning District, rendering them all undersized. On June 24, 2008, the Town Zoning Administrator (ZA), responding to a request for an opinion from Mr. Frick into whether any of the three lots had merged, determined that the Ward Lot would have to merge with one of the other lots. Mr. Frick appealed the ZA's decision to the Town's Zoning Board of Adjustment (ZBA), which ruled, contrary to the ZA's decision, that all three lots had in fact merged. Mr. Frick appealed the ZBA's decision to the Vermont Environmental Court (Court).

On appeal, the parties (Mr. Frick and the Town of Weathersfield) could not agree that Ward Lot and Lot 8 were contiguous. Though next to each other, these lots also shared a road, which Mr. Frick argued prevented their ordinary use as a single lot and thereby foreclosing the possibility of merger. Because this material fact was in dispute, the Court left the question of their merger and thus the larger related question of the merger of all three lots for trial. As for Ward Lot and Lot 10A, both parties agreed that they were undersized contiguous lots held in common ownership. The only question for the Court to decide then was which law controlled whether these lots merged or not, 24 V.S.A. § 4406(1) or the amended 24 V.S.A. § 4412(2)?

Mr. Frick argued that the Town's current bylaw, which didn't require merger, should control, principally because he would suffer $100,000 in economic loss if it didn't, and that he either didn't know of Vermont's merger rule or was mistaken as to its application. Twenty-four V.S.A. § 4412(2) provides in part that a "bylaw ***may*** provide that if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the nonconforming lot shall be deemed merged with the contiguous lot." [Emphasis added.] The Town of Weathersfield on the other hand argued that 24 V.S.A. § 4406(1) should control because it was the law in effect at the time Mr. Frick bought his undersized contiguous lots. Twenty-four V.S.A. § 4406(1) provided in part that if any existing small lot "subsequently come(s) under common ownership

with one or more contiguous lots, the lot shall be deemed merged with the contiguous lot for purposes of this chapter...." Understandably more sympathetic to Mr. Frick's financial plight than his ignorance of the law, the Court admittedly acknowledged that its hands were tied.

> *In summary, regardless of how much the Court might sympathize with Landowner for the economic loss that occurred without actual notice to him and by operation of law when Landowner purchased the Ward Lot, it is the Court's duty to apply the law as it stands. Here the plain language of 24 V.S.A. § 4406(1)(A) leaves us no choice but to find that a merger occurred when Landowner purchased the Ward Lot.*

Regardless of Mr. Frick's appeal to the principles of fairness, the Court at the end of the day needed to find a legal basis for its decision. It found that basis in 1 V.S.A. § 214(b) which instructs that *"The amendment or repeal of an act or statutory provision, except as provided in subsection (c) of this section, shall not: Affect the operation of the act or provision prior to the effective date of the amendment or repeal thereof..."* It is this statute that guided the Court's decision, directing it to find in favor of the Town on the grounds that when a law is passed, it is forward-looking and not retroactive in its application. In very clear, simple, and unambiguous terms, this statute forced the Court to conclude that "since a merger was effectuated under the old law when Landowner purchased the Ward Lot on February 26, 2004, the new law cannot effectuate an 'un-merger' of his property thereafter." In delivering this verdict, the Court essentially reaffirmed the advice that VLCT's Municipal Assistance Center and other members of the Vermont Land Use &Training Collaborative have been offering for the past five years.

The law is not retroactive. Lots that were merged under the previous law will need to undergo the subdivision review process to subdivide the parcels. 24 V.S.A. § 4412(2).

This case doesn't change the law, but it does provide another piece of the map to help navigate the zoning administration and enforcement landscape in Vermont. Now, when an applicant comes into the zoning office and asks whether their undersized contiguous lots that came into common ownership prior to July 1, 2004 have merged, ZAs can say with confidence that they have, and point to the case law supporting their decision.

Garrett Baxter, Staff Attorney, VLCT Municipal Assistance Center

***VLCT News*, April 2010**