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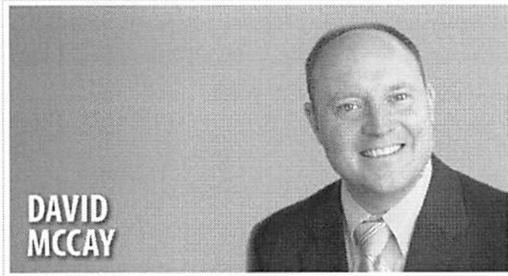
Trust property unbuildable due to merger with contiguous parcel

Owner of neighboring lot 'controlled' vacant land as trustee

By: Eric T. Berkman May 18, 2017



A nonconforming vacant lot owned by a family trust and a contiguous built-upon parcel owned outright by one of the trustees was deemed merged for zoning purposes, according to a Land Court judge.

The trust in question had two trustees: plaintiff Mildred Kneer, who was also its sole beneficiary, and Kneer's daughter Deirdre Mead. The trust sought to build a single-family home for Kneer on the vacant parcel, which had been grandfathered out of the town of Norfolk's minimum lot size requirements. That would allow Kneer to live next door to Mead, who owned and occupied the adjacent built-upon property.

However, the Norfolk Zoning Board of Appeals upheld a finding by the town's building commissioner that Mead exercised sufficient control over the trust property in her role as trustee to consider the two properties merged, rendering the vacant parcel unbuildable.

Judge Keith C. Long agreed, affirming the board's decision after a bench trial.

Long found it clear from the trust document that each trustee had authority to act alone in managing the trust property.

"Moreover, Ms. Mead in fact has exercised legal control over the Trust Parcel," Long said. "Ms. Mead effectively exercised control over the entire permit application process and, under the trust, had the right to do so. As trustee, she has complete authority to manage the trust's real property, including the Trust Parcel, in whatever way she deems appropriate."

The 20-page decision is *Kneer v. Luciano, et al.*, Lawyers Weekly No. 14-036-17. The full text of the ruling can be ordered here.

'An issue of control'

David K. McCay of Westborough, who tried the case on behalf of an abutter who opposed construction on the vacant parcel, said the case turned on the issue of control.

As owner of the neighboring lot and trustee of the trust that owned the lot in question, Mead exercised expansive powers over the property by obtaining construction estimates, applying for septic and building permits, coordinating permitting issues with the town, and managing the appeal when the permit was denied, McCay said.

"She did all the things you would expect a trustee to do in attempting to develop a piece of trust real estate," he said. "Therefore, there was common control of the two lots, and as a result a merger."

Quincy attorney David A. Deluca, who represented the Zoning Board of Appeals at an earlier stage in the litigation but was not involved in the trial, said the ruling should prove useful for municipal lawyers because it indicates that courts will look at "the boots on the ground" in a merger case instead just focusing on the form of ownership. That, in turn, will enable municipal officials to effectuate the purpose of zoning bylaws, he said.

"There's nothing worse than having the purpose of a zoning bylaw being subverted by some kind of artificial construct of a trust that is really only in existence to obscure the real use of the property," he said.

The plaintiff's litigation counsel, William D. Sack of Franklin, meanwhile, said the decision is cause for concern.

"I don't think anyone who does estate planning would feel, in his or her wildest dreams, that a merger would be created by creating an estate plan like this," said Sack, who had no role in setting up the trust.

Sack said particularly troubling was that another case, *Savery, et al. v. Duane, et al.,* was decided by Land Court Judge Gordon H. Piper shortly before *Kneer* and emphasized a different aspect.

"While [Long] isn't bound by that, it creates confusion," Sack said. "And it seems to me that if my client had a different judge, it might have gone the other way."

Meanwhile, Sack said estate planners will now have to live with the fact that at least one judge will consider property held in trust essentially to be held by an individual, which he said makes for bad precedent.

"Simply by making [Mead] the trustee, the court considered [Mead] as effectively owning the property and merged it with the house next door," he said. "Had the mother picked a different daughter as trustee, this wouldn't even be an issue. But this daughter happened to be more local and was living right there."

Timothy D. Sullivan of Andover, who chairs the Massachusetts Bar Association's Probate Law Section, said he thought the judge misconstrued Mead's authority. Specifically, he pointed out that the plaintiff, Kneer, settled the trust, which, at all times, remained a grantor trust.

"She retained the control," he said. "Trust law provides that where a grantor retains the right to revoke, [the grantor] is the owner. ... The mere fact that daughter is a co-trustee does not mean she owns the property."

Sullivan added that the actions taken by Mead that the judge characterized as showing control were really just administrative acts, reasonably and permissibly delegated to her.

"As an analogy, consider a different type of legal organization — a corporation," he said. "The daughter may be president and may have broad authority to do anything the corporation is legally authorized to do, but if the mother is the sole stockholder, she is the owner."

Boston land use litigator Michael K. Murray said the decision does not make new law but serves as a reminder for estate planning attorneys and conveyancers to beware the merger doctrine.

"It doesn't look like there was any intent here to try and create a sham ownership situation to avoid the merger doctrine," he said. "It looks more like some trust people set up the trust with no concern about merger. ... Still, this case suggests you can't design your way out of merger while maintaining control over both properties."

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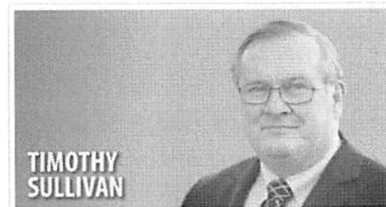
— Timothy D. Sullivan, MBA Probate Law Section



Contiguous properties

Deirdre Mead and her former husband purchased a plot of land on Hunter Avenue in Norfolk in 1978. In the late 1980s, they built a colonial-style house on the property, where Mead has lived since 1988.

In 2002, the town advertised a parcel of registered land that adjoined Mead's property as being for sale at an auction. The land did not satisfy the minimum lot size requirements in the town's zoning bylaw, but the bylaw — adopted in 1953 — "grandfathered" the property in, making it a buildable lot.

Mead outbid her neighbor, defendant-intervenor Thomas Murray, at the auction. Apparently for financing reasons, the property was then conveyed to Mead's son, who conveyed it to Mead's then-brother-in-law.

In 2012, the parcel was conveyed to Mead and Kneer as the trustees of a family trust established in 2001, of which Kneer was the sole beneficiary.

Under the language of the trust, a trustee did not need Kneer's approval before making investment decisions, though Kneer could remove any trustee at any time and could review and change a trustee's decisions. The trust also gave each trustee broad authority to manage and control trust property.

Once the trust acquired the parcel, Mead sought out septic and building permits for construction of a new home on the property where Kneer, now in her 80s, would live.

Mead also completed an application for a building permit and had her mother sign the application. She submitted the application on her mother's behalf and designated herself and her husband as contact persons for the application.

In April 2014, the building commissioner denied the permit on grounds that it was undersized according to the zoning bylaw and was no longer grandfathered as a separate buildable lot because it was effectively held in common with Mead's built-upon lot and thus merged.

Mead appealed the decision to the Zoning Board of Appeals, which affirmed the decision.

The trust then appealed to Land Court, filing an action in Kneer's name under G.L.c. 40A, §17. Murray, the abutter who opposed construction of the house on the trust property, intervened in the action and the case proceeded to a jury-waived trial.

Merged properties

Long found that the two properties were indeed merged.

Specifically, he found that while the owners of the properties were nominally different, common ownership for the purposes of merger is determined not by the "form of ownership" but by "control." And here, Long said, the language of the trust "clearly and unambiguously" conferred upon Mead, as a trustee, legal control over all the trust's real estate, including the parcel in question.

In doing so, he rejected Kneer's argument that the trust did not authorize Mead to act alone.

"There is no provision that requires Ms. Mead to obtain Ms. Kneer's consent to exercise her trustee powers, nor is there any provision that requires the trustees to act together" the judge wrote.

Additionally, Long said, Mead had, in fact, exercised legal control over the parcel by pursuing septic and building permits, investigating what was needed to obtain the permits, obtaining construction estimates, completing and submitting permit applications, communicating with town officials, and presenting the appeal of the commissioner's decision before the ZBA.

"The properties therefore merged for zoning purposes on [Sept. 24, 2012, when the trust acquired the parcel]," Long concluded. "The Trust Parcel is not separately buildable, and Ms. Kneer is not entitled to a building permit for the construction of a house on that property."

Kneer v. Luciano, et al.

THE ISSUE: Were a nonconforming vacant parcel owned by a family trust and a contiguous built-upon parcel owned outright by one of the trustees deemed merged for zoning purposes?

THE DECISION: Yes (Norfolk Land Court)

LAWYERS: William D. Sack of Jepsky & Sack, Franklin (plaintiff)

David A. Deluca of Murphy, Hesse, Toomey & Lehane, Quincy (defense)

David K. McCay of Mirick, O'Connell, DeMallie & Lougee, Westborough (intervenor-defendant)

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ONE COMMENT

peterfrei@cox.net
May 19, 2017 at 8:25 am

The decision by Judge Keith C. Long is inconsistent with established law. The issue of control is decisive but only at the time the of the bylaw change rendering a parcel unbuildable. The reason is a simple one, to stop developers from subdividing parcels of land shortly before a bylaw change which would prevent developers from subdividing the parcel after the change.
G.L. c.40A, s.6 provides in part:
Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.
It is troublesome to see how judges muddy issues clearly regulated by the legislator.
Judge Keith C. Long's decision is unconstitutional as it is a violation of everybody's right to be protected equally under the law. If the under bidder would have ended up with the lot he could have built on the parcel? The answer is YES, hence, the decision is violating Mead's constitutional rights.
Again, the merger doctrine can only be applied to the situation of ownership at the time of the bylaw change rendering a parcel unbuildable, and only to adjoining parcels which are not built upon at the time.

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