

Westmoreland Zoning Board of Adjustment
Minutes of Administrative Appeal Hearing
These minutes are unapproved until voted on by the board.
February 17, 2016

Present: Chairman Peter Remy, Vice-Chairman Barry Shonbeck, Brian Merry, Nancy Ranson, Ernie Perham

Chairman Remy called the hearing to order at 7:02 pm. He read the following notice:

The Westmoreland Zoning Board will meet on Wednesday, February 17, 2016 at 7:00pm at the Westmoreland Town Hall to hear an Administrative Appeal filed by Andy Russell, an abutter to the property mentioned below, objecting to the decision of the Westmoreland Select Board to unmerge the four deeded lots of record owned by Walter Derjue, Map R-10, Lot 17.

Chairman Remy explained that this was a matter related to State Statute 674:39-aa Restoration of Involuntarily merged lots.

He said that apparently towns had reasons to merge multiple lots of an owner and apparently there had arisen many objections, thus the necessity for this statute.

In the present case Walter Derjue bought four deeded lots of record on the north side of River Road across from his historic brick house. He hired a surveyor to move an interior lot line and applied for a Variance to the Zoning Board to allow this. During the course of the hearing Andy Russell, an abutter to the property spoke against allowing the Variance because Section I(c) of Statute 674:39-aa states, "Voluntary merger" and "voluntarily merged" mean a merger under RSA 674:39-a or any overt action or conduct that indicates an owner regarded said lots as merged, such as, but not limited to, abandoning a lot line."

At that time Mr. Derjue withdrew his application for the Variance in order to apply to the Select Board to unmerge the four lots. The Select Board voted to unmerge the lots. That decision is being appealed by Andy and Mary Ellen Russell.

Chairman Remy invited Attorney Tom Hanna, acting on behalf of Andy and Mary Ellen Russell to make their case for overturning the Select Board's decision.

Attorney Hanna said the first thing that bothered him about the decision was that although Andy Russell had requested that he be notified when the Select Board would consider the Derjue's application, he was not notified, and the Minutes of that Select Board meeting do not reflect that there was any consideration given to the petitioner's belief that actions on the part of the Derjues constituted a

'voluntary merger'. If that was found to be the case, the Select Board could have no authority to restore the deeded lots because once merged by request or by actions that constituted abandoned lot lines, they could not be unmerged by the owner who merged them or by any subsequent owner.

Attorney Hanna made the following points about actions on the part of the Derjues that suggested they were treating the 15/16acre property as one lot.

___For more than 30 years the Derjues have paid just one tax bill. If there were four discreet properties they should have been paying four separate tax bills. They did not approach the town to address this matter.

___A shed on one of the lots encroaches on the adjoining lot by a foot or two.

___A new septic system was installed in 2009 for the lot which has a ranch house on it. The septic system design says the property consists of one 16 acre lot. The Derjues signed off on the septic design. The implication is that they abandoned the lot lines for certain purposes. In addition, the drainage from the septic system would necessarily encroach on the adjoining lot.

___The new deed for prepared in 2008 for the purpose of putting the property into a trust was just one deed not four separate deeds.

Attorney Hanna said, in summary, and quoting from a letter sent to the Westmoreland Planning Board by the Town Attorney, Silas Little, "Where there are improvements on one of the parcels, and those improvements rely in whole or in part on the abutting parcels, then the owner can be viewed as having voluntarily merged the parcels."

Attorney Hanna said that the Derjue's acquiescence to the single tax bill for thirty years in combination with the encroachments on to adjoining lots is evidence that the Derjues have voluntarily merged their lots and therefore it is beyond the authority of the Select Board to unmerge them.

Chairman Remy invited J.R. Davis, attorney for the Derjues to address the Board.

Attorney Davis gave the Board copies of all the documents that had been given to the Select Board and they were:

___A copy of their application to unmerge the lots.

___ Exhibit A: A copy of the 2008 deed which describes each of the tracts as a separate parcel.

___Exhibit B: A hand drawn map by Walter Derjue which was requested by the Select Board when the Derjues were applying to put some of the property into current use.

___Exhibit C: The Boundary Survey from 2011, done by Russ Huntley.

___Exhibit D: An affidavit by the septic system designer, Scott Hagstrom, who designed and installed the new septic system in 2009.

Attorney Davis began his presentation by reminding the Board that Section II(b) of the operative statute 674:39-aa states that, "The municipality shall have the burden of proof to show that any previous owner voluntarily merged his or her lots." Therefore, when the taxpayer submits an application, the burden of proof is on the town to prove that there was a voluntary, as opposed to involuntary, merger. And the applicant for the appeal would also have the burden of proof. The grounds for the appeal are limited to the ones stated in the original appeal. No grounds outside of that can be introduced.

Since the appeal did not mention noticing or objections to the Select Board they cannot be part of the considerations of the Zoning Board in making their decision. In addition, the application for unmerging does not provide for giving notice to abutters. Attorney Davis also objected to the photographs that were part of the Appellants' presentation. The Derjues did not give anyone permission to go on to their property to take photographs.

Chairman Remy asked if the land was posted. It is not.

Attorney Davis said the appellants must prove that the Select Board was wrong when they found that the merger of the Derjue lots was involuntary. But the Select Board never found a request by the Derjues or by any previous owners to merge the lots. And there is nothing in the statute which mentions a length of time for an involuntary merger. The only evidence that exists for a merger is the Town's Tax Map of the property. And the only time an owner would be seeking to unmerge lots is when they find out that their lots have been merged involuntarily.

The 2011 survey shows four separate lots. Lot one is .96 acres. Lot two is 2.63 acres. Lot three is 3.22 acres. Lot 4 is 8.08 acres. At one time the deeds were separate deeds. A new deed was prepared in 2009 to put the property into a trust and all four lots were listed on one deed but that did not mean they were merged. No recording in the Registry of Deeds shows these lots as one lot. There is no evidence. As for the shed, it stood there for many years and was put up by a previous owner. In 1976, before the survey was done, the shed was in disrepair and Mr. Derjue undertook to stabilize it. He changed the shed opening so that passersby would not be able to see into it. His alterations crossed the lot line on that corner by a foot or two. Not until the survey was done did he realize the encroachment. He also put a lean-to addition on to the shed that was entirely within the lot line.

The septic system plan gives the dimension of a 16 acre lot. In his affidavit, Mr. Hagstrom, the septic designer, said that since Mr. Derjue did not have a survey map of the property he relied on the Tax Map information. Nowhere does it say 'one lot of record'. The Derjues did sign the septic plan design but

they did not sign the Tax Map. Attorney Hanna does not have an actual survey to show that the septic system encroaches on the adjoining lot. But his client has the burden of proof. Mr. Hagstrom said he reviewed the 2011 survey map and even if the application had shown the property was 2.63 acres instead of 16 acres, his design would have been approved. Even if it had been designed in 2015 it would have been approved for that lot or an even smaller lot. The Board must rely on his expertise as no one else in the discussion has his credentials.

When the Derjues applied to put some of the property into Current Use, the Selectmen asked him to draw a map of the property because in 2002 the town was drawing up a new map of all the property in town under current use. Mr. Derjue's map clearly shows four separate lots and they are fairly accurate in dimensions and in acreage.

There was no benefit to the Derjues in having merged lots. Their tax was actually higher by a small amount as the survey found that the property is closer to 15 acres rather than the 16 on the Tax Map.

Attorney Hanna raised the issue of Mr. Derjue's mowing patterns as evidence of merged lots as he would mow straight across the lot lines of some parcels. Attorney Davis said this was just evidence that Mrs. Derjue likes to look out her window at neatly mown properties across the road. The mowing is not evidence of abandoning lot lines.

Attorney Davis said that the Derjues have maintained and used access points to each of the lots.

The petitioners have failed to show there is substantive evidence that the Derjues had any intent to merge this property.

Chairman Remy asked the Board members if they had questions.

Mr. Shonbeck said that Mr. Hagstrom, the septic designer, had made a point of saying the septic design would have been approved by the State but would it have conformed to the Westmoreland setback ordinances?

Attorney Davis could not answer, not being familiar with the ordinances.

Mr. Shonbeck asked if Mr. Hagstrom had revisited the site of the septic system rather than relying purely on his memory of it from 2009. Attorney Davis said that Mr. Hagstrom had gone there before receiving the affidavit questions. As was mentioned previously, even if the drainage did encroach on the third lot, that can be taken care of with an easement.

Chairman Remy asked Attorney Davis to further explain the tax bill issue. Attorney Davis said that the Derjue's tax bill showed taxes for the land in current use and for the land not in current use. They did not have to care about merged lots. They only had to care about involuntarily merged lots.

Chairman Remy asked Attorney Hanna to respond. Attorney Hanna said it was disingenuous to accept the idea that the septic system was not designed for a 16 acre lot. The Derjues have known for a longtime that they were only being taxed for one lot. That is acquiescence. Combine that with the shed, the septic system, the drainage and it amounts to a voluntary merger.

Mr. Shonbeck asked if there is a legal difference between the terms lot, tract, and parcel.

Attorney Hanna said that 'lot' is a municipal term. A 'tract' is a discrete parcel that has its own description in a deed. To illustrate he gave this example: Let's say somebody has 16 acres and they put it in a deed and describe four separate areas. That doesn't create 4 separate lots from the town's point of view. Conversely, if someone has 4 separate lots and they put it in one deed, in and of itself doesn't make my case or make anyone's case. In this situation I see it as an evolution where back in 1960-62 there was an effort on the part of Dick Lawson and Walt to maintain the separate lots.

Attorney Davis said sometimes the terms mean something different and sometimes they mean the same thing. For the purpose of conveyancing he has seen all three terms used within the same deed. The important thing is that multiple tracts within the same deed does not mean they are all the same lot.

The Board members turned their attention to try to use the maps and photo graphs to visualize the lot lines and the encroachments to see how significant they are. Attorney Hanna warned that the house is not on the actual survey map. It was put there by the septic engineer.

There was a suggestion that the Board might do a site visit. Attorney Davis objected again to the use of photographs that were taken without the permission of the landowners.

In 2009 when the septic was put in, they did not have the benefit of the 2011 survey and could not be certain of the lot lines.

Brian Merry asked the Chairman if the Board's task was to pass judgment on what the Selectmen did or to pass judgment on the whole case. Chairman Remy said it was the former. Chairman Remy said it was to affirm or deny the Selectmen's approval of the Derjues application.

Mr. Merry said that in the minutes of the Select Board's discussion on the matter no mention was made of sheds, septic systems, etc.

Chairman Remy said that this was Andy Russell's point, that the Select Board did not have all the information. Now that the Zoning Board has all the information they must decide whether the use across the boundary lines was significant enough to signify that the Derjues were using the property as

one piece of land. Mr. Derjue's sketch of the property seemed to indicate he thought of it as four separate pieces.

Mr. Shoneck said that the Board could not know for sure what was in somebody's mind. The septic designer had no evidence for the size of the property other than the 16 acres stated on the Tax Map.

The Board discussed the septic system setbacks required by the town. They assumed that Mr. Hagstrom would be aware of them, now knowing that the property consisted of four tracts and he said that the system design would still be approved.

Mr. Shonbeck did not think that the mowing was significant. Chairman Remy read from Attorney Little's letter about improvements, etc. Mr. Shonbeck pointed out that Attorney Little's letter said that some actions 'can be viewed as having voluntarily merged the parcels', but did not say they must be viewed as such.

Mr. Remy said that the shed was probably built by a previous owner and that lessens the significance of Mr. Derjue's repairs on it. He did not intend to build a shed on a lot line.

Mr. Perham said he didn't believe that the septic system is over the lot line as the engineer would have had pins and markers to guide him.

Chairman Remy asked what was the foundation of the shed? There is no foundation.

Attorney Hanna asked why the Board was not talking about the drainage issue. Mr. Perham said that some systems like the one he just had put in don't have drainage but use a vent.

There was more discussion about the value of a site visit but in the end the Board members felt that without expertise they could only rely on their own eyesight and since the encroachments are small and they don't know where the property lines are anyhow they would not be much better off.

Chairman Remy asked if they would be able to see anything. Mrs. Russell said they would have a clear view with the leaves off the trees.

Mr. Perham asked if the drainage should even be considered an encroachment. Again the solution of an easement was mentioned. Mr. Perham said he considered the shed the only encroachment but he 'sees no legs' and does not think there ever was any intent to merge the lots.

Chairman Remy polled the Board to see if members thought a site visit would be helpful. Mr. Merry thought not. Mr. Shonbeck said he would not want to rely on his own eyes.

Mr. Russell offered to flag it for them.

Mr. Shonbeck said, "Hypothetically we go there and see that four feet of shed is over the line and part of the septic is over the line and part of the swale is over the line; the map would have to be blatantly wrong for those amounts to be significant." He did not see the benefit of a site review.

There being no more questions or comments, Chairman Remy called for a motion.

Mr. Shonbeck and Chairman Remy conferred on the wording and Mr. Shombeck made a motion to deny the appeal and unmerge the involuntarily merged Derjue lots. Attorney Hanna asked him to repeat that motion. A suggestion was made to change the motion to 'Uphold the Select Board's decision to grant the Derjue's request to unmerge the lots.'

Mr. Perham seconded. Four Board members voted in favor of the motion and Mr. Merry dissented.

The hearing adjourned at 9:54pm.