When Two Become One: A Look at Merger of Adjoining Parcels

by Lloyd Pilchen



A previously ignored fact buried in the hieroglyphics of a legal description suddenly presents possibilities to someone looking for value in their real estate, particularly in this economy. As we know, land that functions as a single property may actually include more than one distinct parcel or lot (we'll use these terms as synonyms). As to whether these can be individually sold or developed, consider the following situation and imagine it involves your property, or one in your neighborhood: An owner has two parcels of land next to each other.[1] One of these is half the land area of the typical residential lot because, in the 1930s, a lot was divided so two neighbors could build larger houses (each on a lot and a half). We're concerned with just one of these "extra-size" properties. The house in our example sat on the combined site (one half-size parcel, one full) for 70 years, and has now been torn down. The current owner seeks permits from the municipality to build two new houses, including a small one on the half-size lot, and to sell them individually. Threatening this course is the notion that the parcels have somehow merged into one, which would allow only one replacement house. While, over the years, the property has clearly been used as a single building site, should the parcels now be considered fused, effectively erasing the line of separation? Or are land boundaries sacrosanct?

"Merger" in this legal context means the permanent combining of parcels that are adjacent and under common ownership. While developers often assemble contiguous parcels for a project (and combine them with a subdivision map or something similar), this article focuses on mergers initiated by local governments—adverse to the interests of the owners—so-called involuntary, forced, or compulsory mergers.

Non-Conforming Lots

Local governments typically only seek to impose a merger when it involves one further element: a parcel that does not conform to today's zoning standards, such as minimum lot area, width, or street frontage. Merger can be a planning tool to correct or ameliorate such non-conforming lots. Municipalities also use merger to control development inasmuch as it reduces the number of separate parcels, which curtails buildings and population.

The counter-argument to the policy of eliminating non-conforming lots (besides the fact that many are adequate for use) is that they may enjoy constitutional protection based on grandfathering, if they adhered to the rules when the lots were created.[2] Our half-lot example, though clearly non-conforming today, was lawful at the time both as to its size and method of division. No minimum lot area applied, and California law recognized land divisions then accomplished by deed, a common practice of the day.[3] In this light, the half-size property may be a runt, but it arguably stands on its own as a valid parcel. It can be sold, and potentially built upon, provided a building permit application survives review by the local government. Parcels that are too small for practicable building sites will be stopped short by other standards (e.g., the usable land may be eaten up by building setbacks).

With these points of view in mind, we will glimpse how merger is handled through an appellate case in California, and a contrasting approach in Pennsylvania.

Tied by Covenant

Before we look at the cases, let us acknowledge an alternative to parcel merger, one that is appropriate in some situations and often employs a recorded covenant. Our analysis throughout this article involves the distinction between the land itself, on one hand, and how it is used, with the latter changing over time. Where adjoining parcels together support a single use, like the house on two lots, the owner wants to treat the property as a unified building site; however, some maintain that once the practical reason disappears, so should the treatment.

Some zoning codes acknowledge the fleeting status of parcels linked only for this reason, calling it a "temporary merger."[4] But, for this limited connection, the label "tied by use" is preferable: it avoids confusion with the more consequential concept of merger, and it better conveys that the linked or tied status is limited by the use. This single purpose distinguishes it from merger, which has a lasting effect on title regardless of use.

In a "tied by use" situation, local governments sometimes insist on restricting the land with a recorded covenant that prohibits the sale of less than the entire property. Their legitimate interest in preventing a land sale where the boundary runs through the boudoir is thus achieved, without diminishing the legal significance of the line. Eventually, when the restriction is no longer needed, the covenant can be terminated, either by another instrument or by its own terms (for example, if it was drafted to be contingent on the continued presence of the building or other justifying site condition, like required parking spaces). Because of their impermanence, such covenants also serve the owner's interest in protecting value and options for the land's future use.

California's Merger Law

Merger has been governed by statute in California since it was added to the Subdivision Map Act in 1976.[5] A California Court of Appeal case, *Stell v. Jay Hales Development Company*,[6] is representative of the law's application, and demonstrates that merger does not occur simply by operation of law.

In *Stell*, neighbors attempted to prevent a house from being built on what they considered to be a backyard. They alleged, among other things, that two parcels had merged. The property at the center of *Stell* was situated in a row of consistent single-family homes

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on approximately one-acre lots in La Cañada Flintridge, a small city alongside the mountains and about twelve miles north of downtown Los Angeles. Due to a public easement, a flood-control channel ran through the row of lots. While the land underlying the easement was owned by each homeowner, the concrete channel physically split each lot, front from back, and, although it did not divide ownership, the channel may have inspired the owner of Lot 12 to use his back half-acre for another house.

In 1960, that owner sold the front portion of Lot 12 and retained the rear in the shape of a flag lot with a driveway to reach the road. Several transfers of ownership followed and, at times, both portions of Lot 12 were held by the same owner. For decades, no second house was built, until the rear part was sold to the defendant and construction of a house began. The work presumably alerted the neighbors, who sued, seeking an injunction to remove the nascent structure, which they claimed constituted a nuisance. After the trial court disagreed, the neighbors appealed.

The neighbors argued that Lot 12 had not legally been severed in two; in the alternative, they claimed that the two portions of the land had merged during the time they were owned together; and, in support of the nuisance claim, they stated that, either way, the property's single-family zoning allowed only one house on the lot.

The court's holding on the first question—whether the property was lawfully divided—was that the 1960 deed effectively created a second parcel.[7] Just as in our initial example, the deed escaped any regulation as a "subdivision," which the then law defined as the creation of at least five parcels. As for the merger argument, the court analyzed it in light of the Subdivision Map Act.[8] The state law's objective, from the start, was to bring a consistent procedure to an action that had been handled in a range of ways by local governments. Early on, the law did away with merger occurring simply as a result of the common ownership of parcels. At its core, the law mandates that, to pursue merger, a municipality must first adopt an ordinance that safeguards the due process rights of landowners, including notification and an opportunity to oppose the merger at a public hearing.[9]

In *Stell*, the California Court of Appeal affirmed the trial court's ruling that the front and back parcels of Lot 12 had never merged: at no time did any regulation provide for their automatic merger and, after the state law was passed, any merger accomplished under it would have been evident from a recorded notice, one of the law's required procedures.[10] Notably, in the court's discussion of merger, no attention was given to Lot 12's history as a unified single-family residence—the focus was on the procedural elements of merger. *Stell* illustrates the narrow availability of compulsory merger in California (it is interpreted stringently), and the rejection of any automatic merger without a hearing.

Merger in Pennsylvania

A merger rule in Pennsylvania has a different emphasis, as illustrated by *Cottone v. Zoning Hearing Board of Polk Township*.[11] A full-fledged map, approved by Polk Township and Monroe County, established the Robin Hood Lakes subdivision in 1975. After the land was subdivided into numerous lots, all sized at just under 0.3 of an acre, some of the lots remained unsold and undeveloped for nearly 30 years. In 2003, Reflection Builders Enterprise, Inc., a homebuilder, bought 16 of the vacant lots at a tax sale. Each lot was transferred by a separate tax deed and was separately recorded, and, until that sale, all 16 lots had been under common ownership. Enterprise sold one of the lots to Ms. Cottone, and requested a permit from the Township to build a house for her.

The problem was that, while the lots had lain fallow and before the then owner had acted upon its approved plan, the Township adopted a new minimum lot-size standard for building a house in the residential zone. Although the subdivision had been approved with lots that amounted to less than three-tenths of an acre, this size fell short of the new zoning ordinance's one-acre minimum. On that basis, the Township denied the building permit, and, after an unsuccessful administrative appeal, Enterprise and Cottone sued.

The trial court upheld the Township's decision to deny the permit, as well as its denials of grandfather rights or, alternatively, a variance to allow a house on the lot. In addition, the court agreed with the Township that the lot had merged with the adjoining lots prior to the sale to Cottone. On appeal, the Commonwealth Court of Pennsylvania reviewed the rules of merger and affirmed.

Function Over Form

Polk Township provided for the merger of lawfully-created but substandard lots according to a two-pronged scheme. Which path of analysis was used depended on whether the lots were commonly owned at the time a new regulation rendered them non-conforming. The first prong of the analysis applied when adjacent lots had separate owners when they became non-conforming. If the lots later became owned together, the law presumed that they remained separate and distinct, unless the municipality proved that the owner had united them or integrated them through use. In this analysis, the government had the burden of proving a merger occurred based on the integrated use of the site. The alternate prong applied to the situation in *Cottone*. If adjacent lots were commonly owned when an ordinance rendered them undersized, the law's presumption and burden were reversed. The lots were presumed to have merged as necessary to comply with a zoning ordinance's lot size requirements and make a conforming parcel; to rebut the presumption, the landowner had to show an intention to maintain the lots as separate.

In *Cottone*, the 16 lots had been, until the tax sale, under common ownership before adoption of the new lot-size ordinance. The legal presumption, therefore, would require that the lots be stitched together into minimum one-acre parcels. To prevail in showing that one lot was separate and distinct from the adjoining lots required proving an intent to keep the lots separate. The appellants attempted to do this by

pointing to the approved subdivision map (whose purpose, after all, was to create alienable units) and the fact that each lot had been assigned an individual tax identification number and was sold by a separate deed.

Nonetheless, the court upheld the township's determination that a parcel merger had occurred, based on the law's focus on the use of land. In order to establish the intent to keep the lots separate, the court cited the rule that more evidence was required than the mere subjective intent of the landowner. Indeed, "there must be proof of some overt or physical manifestation of intent to keep the lots in question separate and distinct."[12] Examples included "a line of trees, a fence or wall" to demarcate the boundary.[13] Lot lines on an approved map could be considered, but, because of the stress on use, these were not dispositive. Following the law's bent, the court in *Cottone* characterized the subdivision map, and separate tax number and deed, as "abstract legal attributes [that] do not carry the day."[14] The court viewed the lot at issue as vacant land with no apparent physical differentiation from the adjoining lots, and this resulted in the changed status of these subdivision lots through merger.

Different Outcomes

These rules in the Golden and Keystone States are largely polar opposites, allowing for similar facts to have very different outcomes. California has no automatic merger, while the Pennsylvania township ordinance took effect without a notice or a hearing, provided the prescribed conditions were met. The importance of physical land under the two regimes was also markedly different—the concrete channel that bisected the property in *Stell* was legally irrelevant to merger in California, but might have been paramount in Pennsylvania, based on the court's discussion on the need for a physical separator.

Applying these rules to our earlier example, we can guess what awaits the landowner hoping to squeeze a house onto the half-size lot. If a California city, perhaps spurred by neighbors opposed to the development, wanted to use merger as the basis for denying a building permit application, it could do so only if the procedures had been completed in accordance with a merger ordinance. Any attempt to frustrate the construction without legal justification could expose the municipality to a court order requiring the issuance of the ministerial permit. In contrast, if we subject our example to a rule where the history of use is relevant, the fact that a house had occupied the combined lot-and-a-half site for so long would likely force the conclusion that the lots had merged.

These rules promote different ideas about how difficult it should be for a local government to regulate land. Ideologies aside, consider how well the results fit with their surroundings. Allowing our half-size lot to escape merger would go against its sole purpose from the start – as an add-on to its companion lot. It can be seen as introducing a uniquely small property into the block, and another family to the neighborhood—points that are, arguably, worth considering in a decision about merger.

Compelling merger can also have out-of-place results. The 16 vacant lots in *Cottone* represented only a small portion of the Robin Hood Lakes subdivision. According to staff at Polk Township, the small lots had been designed primarily for seasonal lake houses, while today's larger minimum lot standard was in keeping with the area's transition to a more constant residential use. On the other hand, changing the standard in an existing development could result in an anomaly—altering a neighborhood's desirable or historic character, which might have been preserved by respecting grandfather rights.

Shades of Gray

An improved approach would draw from the best of both rules—including procedural safeguards and a reckoning with the history of use—and could still be consistent with California law. Further, and just as important, would be the responsiveness of the ordinance to individual cases. To succeed, findings of fact should be required that justify a merger according to stated policies.

A decision to merge lots should be supported by relevant facts, whether the safety of building on a small parcel is of concern, or protecting the density of development or the character of the neighborhood. Instead of a broad rule, tailoring a merger decision to the circumstances would allow landowners and planners to each make their case in light of policies written into legislation. With respect to the property interest side, landowners will be served by knowing the applicable rules and having a long view of future potential uses. Where municipalities require combining parcels in connection with a project, landowners should advocate for "tying" parcels by covenant as an effective and less onerous alternative to merger.

Although merger only applies to commonly owned properties, it does not necessarily follow that deeding one lot to a different entity will avoid it, as one California couple learned in *Kalway v. City of Berkeley*.[15] Mr. Kalway had inherited two contiguous parcels and deeded one to his wife. The Subdivision Map Act conferred authority on the City of Berkeley Planning Commission to enact ordinances on the merger of contiguous parcels held by the same owner, and the City sought to merge the two parcels. The court upheld the forced lot merger, saying that "paper title to a parcel is only one indicator of 'ownership' for purposes of exempting property from the reach of the merger statutes."[16]

Conclusion

As both landowners and local governments have found, parcel merger has the potential to prevent the undesirable use of non-conforming properties, and can also defeat expectations accompanying legitimate lots. Because of its consequential nature, merger should be employed in a considered and measured way.

Notes

1.This example is derived from an actual administrative appeal of a building permit in which the author represented the permit holder.

2. *See* Hansen Bros. Enter., Inc. v. Bd. of Supervisors of Nevada County, 12 Cal. 4th 533 (Cal. 1996) (holding aggregate production operation may continue, including mining all portions of the site, under non-conforming use doctrine).

3. *See* Gardner v. County of Sonoma,

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Pandemic

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3. For more information, see The Centers for Disease Control and Prevention (CDC), *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009); OSHA, *Worker Guidance: Precautions For All Workers during the 2009-2010 Flu Season* (Nov. 05, 2009), and OSHA, *Guidance on Preparing Workplaces for an Influenza Pandemic*, OSHA 3327-02N 2007 (Feb. 01, 2007) at http://www.osha.gov/Publications/influenza_pandemic.html.
4. *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009).
5. 29 C.F.R. § 541.602 (2004).
6. For additional information, see *Pay and Absence Concerns for Exempt Employees*, by the Boardman Law Firm.
7. CDC, *People at High Risk of Developing Flu-Related Complications* (Nov. 10, 2009).
8. *See, e.g.*, the Americans With Disabilities Act, 42 U.S.C.§ 12111(3) (West 2009).
9. For example, a major exception to many states' at-will employment doctrines is "discharge against public policy."
10. The CDC suggests, for example, that employers develop flexible leave policies to allow workers to stay home, and not require a doctor's note for workers who are ill with influenza-like illness to validate their illness or to return to work, since doctors' offices and medical facilities may be extremely busy and not be able to provide such documentation in a timely way. CDC Guidance, *supra* note 4.
11. Freeman v. Chertoff, 604 F. Supp.2d 726 (D. N.J. 2009).
12. Robinson v. Bodman, 333 Fed. Appx. 205 (9th Cir. 2009).
13. "[O]ver the course of the 477 hours that Robinson worked from home, the only work she produced was one half-page report." *Id.* at 208.
14. No. 2:2009cv00289 (E.D. Wis., filed Mar. 15, 2009). *See also*, Abdelkhaleq v. Precision Door of Akron, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio Aug. 28, 2009) (employee on "pager duty" sued under FLSA claiming time spent on-call constituted time spent working). ML

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29 Cal.4th 990 (Cal. 2003) (holding that lots shown on an 1865 map but never individually deeded were not entitled to grandfather status, absent any law then authorizing divisions of land by map).
4. *See, e.g.*, San Diego, Calif. Code § 125.0760 (2000).
5. Cal. Gov't Code § 66451.10, *et seq.* (West 2009). For a thorough account of California's merger law, see *Merger and Local Governments* (1986), available from the California Governor's Office of Planning and Research.
6. *See* Stell v. Jay Hales Dev. Co., 11 Cal. App. 4th 1214 (Cal. Ct. App. 1992); *see also*, Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (Cal. 1995) (disapproving a ruling in *Stell* regarding enforceability of restrictive covenants).
7. 11 Cal. App. 4th at 1223-24.
8. Cal. Gov't Code § 66451.10, *et seq.* (West 2009).
9. Cal. Gov't Code §§ 66451.12 to 66451.17 (West 2009).
10. 11 Cal. App. 4th at 1224-25.
11. Cottone v. Zoning Hearing Bd. of Polk Twp., 954 A.2d 1271 (Pa. Commw. Ct. 2008).
12. *Id.* at 1276.
13. *Id.* at 1279.
14. *Id.*
15. 151 Cal. App.4th 827 (Cal. Ct. App. 2007).
16. *Id.* at 834. ML

Economic Incentives

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23. Rachel Weber, *Do Better Contracts Make Better Economic Development Incentives*, 68 J. Am. Plan. Ass'n 43 (2002).
24. Greg LeRoy, *Nine Concrete Ways to Curtail the Economic War Among the States, in Reining in the Competition for Capital*, Ann Markusen, ed. (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2007).
25. Scott J. Ziance, *Making Economic Development Incentives More Efficient*, 30 Urb. Law. 33 (1998).
26. Timothy J. Bartik, *Solving the Problems of Economic Development Incentives*, 36 Growth & Change 139, 143 (2005). ML

Supreme Court

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process right of the plaintiffs." By the time the case reached the oral argument stage before the Supreme Court, all of the underlying property disputes had been resolved, either because the property had been returned or because the plaintiff had relinquished a claim to the property. The Supreme Court, in an opinion authored by Justice Breyer, vacated and remanded on the basis that, in such circumstances, the case no longer presented an Article III "case or controversy." An actual controversy had to exist at all stages of review, not just when the complaint was filed, and the complaint before the Court sought only declaratory and injunctive relief, not damages (a damages claim was launched only after the Seventh Circuit issued its ruling). Because the "case more closely resemble[d] mootness through 'happenstance' [rather] than through 'settlement,'" the exception to vacating the judgment set out in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U. S. 18, 21 (1994), did not apply (namely, that, by virtue of a settlement, a party had "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari"). The Court concluded that "we should follow our ordinary practice, thereby 'clear[ing] the path for future re-litigation of the issues.'" The upshot? Local governments will need to wait for this future re-litigation to clarify how long law enforcement officers may retain seized property without providing for administrative review and without offending due process. ML

Ordinances

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District of Columbia voters adopted an initiated ordinance in 1998, which has not been adopted by Congress.
2. Joel Warner, *Medical marijuana has become a growth industry in Colorado*, Westword, Feb. 5, 2009.
3. Colorado Constitution, Article XVIII, §14(1)(a).
4. Littleton calls their sales tax license a business license, although a lawyer who

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