



## GUEST COLUMN

## Legal Ruling May Prevent Development Of Undersized Lots

By Howard Geneslaw

Owners of undersized, adjacent vacant lots need to thoroughly understand the risks they face when they engage these lots in a common use or activity. Indeed, a decision last year by the Appellate Division of the Superior Court of New Jersey determined that adjacent, undersized lots held in separate ownership are considered merged for zoning purposes when the owner of one exercises complete possession, control and dominion over both. Simply keeping the deeds in different names may not suffice, particularly when the actual use of the lots suggests commonality of interest.

Undersized lots—lots which do not meet the minimum dimensional requirements as set forth in the current zoning ordinance—are not uncommon. Typically, the lots were established many years ago, perhaps even before a zoning ordinance existed in the municipality.

Over time, zoning came into effect, which required greater lot dimensions than those of the existing lots. The existing, undersized lots then became nonconforming lots.

When undersized lots are contiguous and held in common ownership, the longstanding concept of lot merger holds that they “merge” into a single lot for zoning purposes, even though they may exist as separate tax lots which were conveyed by separate deeds. Thus, lot merger is a zoning concept, not a title concept.

To avoid the possibility of lot merger, owners of contiguous undersized lots often maintain title to them in different names. But based on the Appellate Division’s decision in *Jock v. Zoning Board of Adjustment of the Township of Wall*, Docket No. A-0142-02T3, doing so in and of itself does not protect against lot merger. According to the court, the concept of “ownership” extends well beyond the identity of the record title holder.

The *Jock* opinion concludes that “ownership” for purposes of

determining whether lot merger has occurred requires consideration of who holds possession, control and dominion over the property in question. Admittedly, the facts as presented in *Jock* were egregious: when the owners of Lot A acquired contiguous Lot B, they directed the seller to convey title to their son. The owners of Lot A later maintained that conveyance of Lot B to their son was a gift, even though they exercised complete dominion and control over both Lot A and Lot B, as evidenced by their obtaining a permit for improvements on Lot B, erecting a fence around both lots, paying the taxes on both lots, and asserting the exclusive right to list Lot B for sale and to accept or reject purchase offers.

Despite their sworn testimony to the contrary, the court concluded that the owners of Lot A exercised complete possession, control and dominion over both Lot A and Lot B such that a lot merger had occurred. As a result, the court held that the hardship claimed in support of a variance to develop Lot B was self-created and, therefore, was properly denied.

The court’s opinion squarely rejects the contention that holding title to property in separate names precludes lot merger, concluding that “the joint physical possession,

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dominion and control of contiguous non-conforming lots, including the ability to control, either directly or indirectly, the holder of legal title, more accurately defines the type of ownership which will trigger a merger.”

In view of this decision, determinations concerning whether merger has occurred will be extremely fact sensitive. Purchasers of property in New

Jersey and other jurisdictions which have a similar rule cannot be assured that, by simply taking title to each undersized lot in a different name, they will avoid lot merger and preserve the right to develop — or even sell — each lot independently, without first securing subdivision approval and a variance to “split” the merged lots. Thorough consideration should be given to the manner in which the land will be used and whether a court reasonably could conclude that possession, dominion and control are vested in the same party.

Existing owners of undersized lots are faced with a similar situation, although their prior conduct may dictate whether merger has taken place.

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