

ROBERT MURPHY vs. BOARD OF APPEAL OF BILLERICA & another[1]

Docket: 19-P-551
Dates: February 18, 2020
Present:
County:
Keywords: Zoning, Lot size. Real Property, Merger. Trust, Revocable trust.

The plaintiff contends that our decision in *Kneer v. Zoning Bd. of Appeals of Norfolk*, 93 Mass. App. Ct. 548 (2018), compels the conclusion that his lot enjoys "grandfather" protection from current minimum lot size requirements, and that the defendant board of appeal of Billerica (board) incorrectly affirmed the denial of his application for a building permit based on lot size. At issue is the doctrine of merger, as described in *Planning Bd. of Norwell v. Serena*, 406 Mass. 1008, 1009 (1990), which holds that adjacent lots will be treated as held in common ownership for zoning purposes, even if title to the lots is held in nominally different form, if the same owner "could have used his adjoining land to avoid or diminish the nonconformity" (citation omitted). See *Sorenti v. Board of Appeals of Wellesley*, 345 Mass. 348 (1963).

The plaintiff acquired a lot located at 8 Yale Street in Billerica from Joseph M. DeMinico and Mary DeMinico on September 1, 2000. The lot is 5,000 square feet in area, and was first rendered nonconforming by an increase in minimum lot size to 7,500 square feet by amendment to the town zoning bylaw in 1945.[2] The DeMinicos owned the lot in common with an adjacent property, 10 Yale Street, from 1972 to 1992. Under G. L. c. 40A, § 6, the two lots would have merged for zoning purposes during that period of common ownership but for a provision of the Billerica zoning bylaw granting more generous grandfather protection.[3] See *Marinelli v. Board of Appeals of Stoughton*, 65 Mass. App. Ct. 902, 903 (2005) (town may provide more generous grandfather protection under local zoning bylaw than provided by G. L. c. 40A, § 6). In 1992, the DeMinicos conveyed 10 Yale Street to Joseph and Mary as trustees, respectively, of the Joseph M. DeMinico Revocable Trust and the Mary E. DeMinico Revocable Trust, as tenants in common. Both trusts are revocable inter-vivos trusts in which Joseph and Mary, respectively, retained a power of revocation and served as sole trustees.[4] Thereafter, in 1999 Billerica amended its zoning bylaw to eliminate the more generous protection furnished by the anti-merger provision. The board concluded, and we agree, that the two lots merged for zoning purposes upon the elimination of the bylaw's protection against merger. At that time, the DeMinicos owned 8 Yale Street and their revocable trusts held 10 Yale Street, giving them the ability to "use[the] adjoining land to avoid or diminish the nonconformity" (citation omitted). *Serena*, 406 Mass. at 1009.[5]

Kneer, 93 Mass. App. Ct. 548, does not require a different result. In that case, we vacated a judgment of the Land Court holding that two lots had merged by reason of common ownership or control, where one lot was owned by a trust established by Mildred Kneer and her husband,

who served as cotrustees, and the adjacent lot was held by their adult daughter, Deirdre Mead. *Id.* at 549. When Kneer's husband died, she amended and restated the trust to add Mead as a cotrustee, though Kneer remained the trust's sole beneficiary. *Id.* at 550. As cosettlor, Kneer also held the power to terminate Mead as cotrustee, or to revoke the trust. *Id.* at 552. For Mead's part, any exercise of her powers as cotrustee was constrained by her fiduciary duties toward Kneer as beneficiary. *Id.* Accordingly, Mead did not have the ability to use the lot held by the trust to eliminate or reduce the nonconformity of the adjacent lot she owned individually. *Id.* at 557. In the present case, by contrast, the DeMinicos as sole trustees, settlors, and life beneficiaries of their respective trusts, with retained power to revoke the trusts entirely, held complete control over both adjacent properties.[6]

Judgment affirmed.

Mark Bobrowski for the plaintiff.

Jonathan D. Eichman for the defendants.

footnotes

[1]Building commissioner of Billerica.

[2]The record does not reveal the current minimum lot size, but the parties agree that the lot remains undersized.

[3]The provision (which the parties refer to as the "anti-merger provision") allowed certain qualifying but undersized lots to avoid merger, even though held in common ownership. The parties agree that the two lots were protected by the anti-merger provision while it remained in effect.

[4]Joseph and Mary also were the sole beneficiaries of their respective trusts during their lifetimes, with their beneficial interests passing to the surviving spouse upon their death, and to their children (with specified monetary distributions to certain other family members) upon the deaths of both of them.

[5]Indeed, the trusts reconveyed 10 Yale Street to the DeMinicos immediately prior to their conveyance of 8 Yale Street to the plaintiff, and 10 Yale Street to the plaintiff and others as trustees of the Shawsheen Woods Realty Trust.

[6]Without citation to relevant authority, the plaintiff suggests that the remainder interests held by the DeMinicos' children operate to limit the DeMinicos' power to revoke their respective trusts. That is not the law. See, e.g., *Kirby v. Assessors of Medford*, 350 Mass. 386, 389 (1966) (settlor's powers of amendment and revocation of revocable trust "makes the beneficial ownership of the trust property, as a practical matter for many purposes . . . essentially equivalent to outright ownership by the settlor").