



Pennsylvania Case of the Month

*Cottone v. Zoning Hearing Board of Polk Township (--- A.2d ---)
(2008 WL 3539798 (Pa.Cmwlth.)) (decided August 15, 2008)*

By Michael J. Kornacki

The principles governing the merger of undersized building lots were reaffirmed in *Cottone*, which involved an owner's desire to construct a single family home on a .3 acre lot in a residential subdivision that subsequently was rendered too small for development by a zoning amendment.

On July 22, 2005, Mary Ann Cottone purchased Lot 75Q, one of 16 undeveloped lots in the Robin Hood Lakes Development in Polk Township. The 16 lots were created pursuant to a subdivision plan approved by the Monroe County Planning Commission and the Polk Township Supervisors in 1975. All of the lots contained just under .3 acres, were located in the "R-1" zone, and were not served by central water and sewer. All of the lots were under the common ownership of New 1901 Corporation at the time of subdivision. New 1901 Corporation never developed the lots.

In 1986, the zoning ordinance of Polk Township was amended to require that lots in the R-1 zone that were not served by central water and sewer had to be of at least one acre in size for construction of a home. The amended ordinance also stated that if any adjoining lots under common ownership at the time of adoption of the amended ordinance do not meet the requirements for lot width or area established by the amended ordinance, "the lots shall be considered by the Township to be a single lot"

In 2000, New 1901 Corporation ceased paying real estate taxes on the lots. In 2003, the Monroe County Tax Claim Bureau sold all 16 lots to Reflection Builders Enterprise, Inc. (Reflection). All of the lots were transferred by separate tax deed, and all deeds were separately recorded. Reflection then sold lot 75Q to Cottone, and Cottone and Reflection applied for a permit to construct a home on the lot. The permit was denied because the lot was smaller than the one acre minimum size required under the zoning ordinance for development. Cottone and Reflection appealed and also requested a variance. Both requests were denied by the Zoning Board. The Zoning Board also ruled that because Lot 75Q and the other lots in Robin Hood Lakes were under common ownership at the time of adoption of the zoning ordinance amendment that rendered them too small for development, the burden was on Cottone to show that it was the intent of New 1901 Corporation to maintain the lots as distinct and separate parcels. Cottone and Reflection appealed to the trial court, which affirmed the Zoning Board. Cottone and Reflection then appealed to the Commonwealth Court.

The Commonwealth Court reviewed the record and relevant case law, and determined that (1) the burden was on Cottone and Reflection to rebut the presumption that the undersized lots had merged, and (2) Cottone and Reflection failed to rebut the presumption. The court summarized the principles relating to merger as follows:

- if adjoining lots are *separately* owned at the time that they are rendered undersized for development by a zoning amendment or revision, the lots will be considered non-conforming,

separate lots, even if they subsequently come under common ownership. The burden is on the municipality to prove that the subsequent common owner intended to use the lots as a single, integrated parcel.

- if adjoining lots are under *common ownership* at the time that they are rendered undersized for development by a zoning amendment or revision, the presumption is that the lots have merged, and the burden is on the landowner to show that it intended to keep the lots separate.

The presumption of merger in the case where the lots are under common ownership at the time they are rendered undersized for development cannot be rebutted by subjective intent. Instead, there must be proof of “some overt or physical manifestation” of intent to keep the lots separate.

In the *Cottone* case, the court ruled that because the 16 lots were under common ownership at the time that the zoning amendment rendered them undersized for development, the burden was on Cottone to rebut the presumption that the lots merged. Moreover, the landowner could only do so by producing “evidence of some overt or physical manifestation of intent to keep the lots in question separate and distinct.” Cottone was unable to do so. Evidence that the 16 lots were subdivided by approved plan in 1975, and that they were subsequently deeded to Reflection by 16 separate deeds, were “abstract legal attributes” and not a “physical manifestation” of intent. The court said that “[a] physical manifestation of the intention to keep adjoining lots separate and distinct consists of a line of trees, a fence or a wall separating the lots.” Accordingly, the court held that Cottone failed to prove that Lot 75Q was separate from the adjoining lots, and her request for a permit to build on the lot was properly denied.

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