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TO: Peter Matchak, Town Planner, Town of Ashland
FR: Lisa Mead, Ben Taylor, Town Counsel
RE: Application of Merger to 46 and 56 Fountain Street
DA: July 8, 2021

Reference is made to the above captioned matter. In that connection, we have reviewed an Application to the Zoning Board of Appeals regarding the properties of 46 and 56 Fountain Street. The Application includes a memo from the Applicant's Attorney specifying the relief being requested is a Variance for dimensional setbacks caused by the merger of the 46 Fountain Street and 56 Fountain Street lots now being held in common ownership by the Applicant. In short, it is our opinion that merger does not apply to this situation as there are structures on both lots and which structures existed on separate lots prior to the adoption of zoning with in the Town.

Factually, the Applicant owns two adjacent lots, 46 Fountain Street (Parcel ID: 0140-0203) and 56 Fountain Street (Parcel ID: 0140-0204). Each lot has existing structures on them, including a single family home. Based on the Applicant's materials, these structures are historically significant meaning to the extent they have any nonconformities with zoning requirements, it is likely they are preexisting nonconformities. However, according to Attorney Connors's letter, as the Applicant already owned 56 Fountain Street, upon purchasing the adjacent 46 Fountain Street lot, the lots merged and the preexisting nonconforming status of these structures was lost.

It is our view that merger does not apply to this situation. The doctrine of merger is originally derived from MGL c. 40A, Section 6, Paragraph 4 and has been further developed by Massachusetts Courts. Put simply, merger is where adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities. See Preston v. Board of Appeals of Hull, 51 Mass. App. Ct. 236, (2001); Seltzer v. Board of Appeals of Orleans, 24 Mass. App. Ct. 521, 522, (1987).

Merger is intended to apply to vacant land. The Massachusetts Appeals Court was clear in Willard v. Board of Appeals of Orleans, that " [t]here is nothing on the face of the fourth paragraph that it was intended to apply to anything but vacant land." 25 Mass. App. Ct. 15, 18 (1987). This was later confirmed in Dial Away Co., Inc. v. Zoning Bd. of Appeals of Auburn, 41 Mass. App. Ct. 165, 168 (1996). Indeed, this interpretation is consistent with the legislative history of the statute including the DCA Report which states that the predecessor version of this provision in the old Zoning Enabling Act was addressed to "undeveloped lots" and "lots on which construction has not yet commenced."

Here, there are structures on both lots, we are informed they existed prior to the adoption of zoning in the Town and on separate lots and the doctrine of merger does not apply. Therefore, the Applicant does not need to apply for variances for this reason. This

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opinion is however, limited to only the issue of whether merger applies to the two lots at issue as they currently exist. If the Applicant has development plans in the future that involve further subdivision of the properties, this may require further zoning relief, including variances. We reserve any opinion on those future matters as we can only focus on the current claim that the relief sought by the Applicant was a result of merger.

Should you have any further questions on this matter, please let me know.