

(SEAL)

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
LAND COURT DEPARTMENT

MIDDLESEX, ss.

MISC. CASE NO. 321262 (KCL)

GARY GHILANI and RITA GHILANI,

Plaintiffs,

v.

JAMES HANNA, TARA ILLIANO and PHILIP  
JACK, as members of the TOWN OF ASHLAND  
ZONING BOARD OF APPEALS, and the  
TOWN OF ASHLAND,

Defendants.

and

ANDREW STUCCHI,

Intervenor.

JUDGMENT

This case presents a single dispositive issue, which turns on the interpretation of the Ashland zoning bylaws. At issue is the status of the property at 487 Main Street ("487") in Ashland, created in 1984 by combining one-and-a-half lots from a 1943 subdivision plan. 487 is undersized and lacks sufficient frontage to be "buildable" under Ashland's current zoning bylaw's dimensional requirements. But Bylaw § 282-24.G allows those requirements to be reduced in certain circumstances, for residential use only, through the granting of a special permit. The crucial question is whether that bylaw provision applies to 487. 487 Main Street was created in 1984, but, by the doctrine of merger, ceased to be a separate lot for zoning purposes in 1997 when it was purchased by the owners of the adjacent property at 491 Main Street ("491") (the plaintiffs) and title to the two properties was held in common ownership. As a result, the Zoning Board of Appeals (the "Board") denied the plaintiffs' special permit application on the basis that Bylaw § 282-24.G did not apply. This case is the plaintiffs' G.L. c. 40A, § 17 appeal from that denial, coupled with a claim that the denial was an unconstitutional taking of the plaintiffs' property without just compensation.

For the reasons set forth in the court's Memorandum and Order on Plaintiffs' Motion for Judgment on the Pleadings of this date, I find and rule 487 and 491 became one lot by merger in 1997. Since the reference in § 282-24.G is to a lot as it exists at the time of the special permit application, it is inapplicable to the plaintiffs' property and the Board's decision was correct. The plaintiffs' "unconstitutional taking" claim derives solely from their contention that the Board improperly denied the special permit application. Since the Board acted properly, that claim fails

as well. As the defendants requested, the plaintiffs' complaint is therefore dismissed, in its entirety, with prejudice.

**SO ORDERED.**

By the court (Long, J.)

Attest:

Dated: 30 June 2008

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Deborah J. Patterson, Recorder

**A TRUE COPY  
ATTEST:**

*Deborah J. Patterson*  
RECORDER

(SEAL)

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
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**MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON  
THE PLEADINGS**

*Introduction*

This case presents a single dispositive issue, which turns on the interpretation of the Ashland zoning bylaws.<sup>1</sup> At issue is the status of the property at 487 Main Street ("487") in Ashland, created in 1984 by combining one-and-a-half lots from a 1943 subdivision plan. 487 is undersized and lacks sufficient frontage to be "buildable" under Ashland's current zoning bylaw's dimensional requirements. But Bylaw § 282-24.G allows those requirements to be reduced in certain circumstances, for residential use only, through the granting of a special permit. The crucial question is whether that bylaw provision applies to 487. The Zoning Board of Appeals (the "Board") thought not, and denied the plaintiffs' special permit application on

<sup>1</sup> Ashland's zoning bylaws are contained in the "Zoning Chapter" of its bylaws, § 282-1 *et seq.*

that basis. This case is the plaintiffs' G.L. c. 40A, § 17 appeal from that denial, coupled with a claim that the denial was an unconstitutional taking of the plaintiffs' property without just compensation.

Bylaw § 282-24.G applies "only to lots created prior to the date of [its] original enactment . . . (5-12-1993)." 487 Main Street was created in 1984, but, by the doctrine of merger, ceased to be a separate lot for zoning purposes in 1997 when it was purchased by the owners of the adjacent property at 491 Main Street ("491") (the plaintiffs) and title to the two properties was held in common ownership.<sup>2</sup> *Seltzer v. Bd. of Appeals of Orleans*, 24 Mass. App. Ct. 521, 522 (1987). The plaintiffs, Gary and Rita Ghilani, contend that § 282-24.G applies *despite* that merger because 487 was created prior to May 12, 1993. The defendants disagree, contending that the 1997 merger eliminated 487's status as a separate "lot" within the meaning of that bylaw provision.<sup>3</sup> The question presented can thus be simply stated. When § 282-24.G refers to "lots," does it refer to the lot as it exists at the time of the special permit application or, if different, to the lot as it existed prior to May 12, 1993?

The plaintiffs have moved for judgment on the pleadings with respect to count one. As more fully set forth below, I agree that judgment on the pleadings is appropriate, but *against* the plaintiffs rather than *for* them, and applies to both of their claims. 487 and 491 became *one* lot by merger in 1997. Since the reference in § 282-24.G is to a lot as it exists at the time of the special permit application, it is inapplicable to the plaintiffs' property and the Board's decision

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<sup>2</sup> The two properties, merged together, have sufficient frontage and area to satisfy the current bylaw's dimensional requirements. This is not the case for either property, viewed separately.

<sup>3</sup> By assent of the parties, a directly abutting property owner, Andrew Stucchi, was allowed to intervene in this action to protect his interests, and he joins with the defendants in their arguments.

was correct. As the defendants requested,<sup>4</sup> the plaintiffs' complaint is therefore dismissed, in its entirety, with prejudice.

### *The Standard of Review for Rule 12(c) Motions*

Motions for judgment on the pleadings are governed by Mass. R. Civ. P. 12(c).<sup>5</sup>

If the motion is defendant's, this is actually a Rule 12(b)(6) motion to dismiss, which challenges the legal sufficiency of the complaint. Because affirmative defenses stated in the answer are taken as denied (unless the court orders a reply), defendant is simply arguing that the complaint fails to state a claim upon which relief can be granted. If any genuine issue of material fact exists, the court must deny the motion, even if no matters outside pleadings have been presented so as to turn the proceedings into a motion for summary judgment. However, a factual dispute disclosed by the pleadings need not necessarily preclude judgment, so long as the dispute is immaterial to the controversy.

\* \* \*

A plaintiff, as well, may move for judgment on the pleadings, asserting that the answer fails to controvert any material issue in the complaint and that none of the declarative averments states a legally sufficient affirmative defense. If the answer denies any material allegation in the complaint, or raises at least one adequate affirmative defense, judgment on the pleadings will not lie, although summary judgment may. Plaintiff might also move to strike any other, insufficient, affirmative defenses.

When deciding any motion on the pleadings, whichever side brings it, the judge takes all well-pleaded allegations in the target pleading as true, and all contravening assertions in the movant's papers as false.

As in the case of a motion to dismiss, if matters outside the pleadings are presented to and not excluded by the court, a motion for judgment on the pleadings will be treated as one for summary judgment and disposed of as provided in Rule 56, with all parties receiving reasonable opportunity to present any pertinent material. However, the party opposing the motion must show an ability to present matters outside the pleadings that are relevant to the judge's determination. In effect, the court is merely correctly handling an erroneously labeled motion.

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<sup>4</sup> Town of Ashland's Memorandum in Opposition to the Plaintiffs' Motion for Judgment on the Pleadings at 8 (Oct. 30, 2006).

<sup>5</sup> The text of Rule 12(c) reads "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Notwithstanding the strictures of Rule 12(c), a judge may, without converting the matter into a motion for summary judgment, consider records (including court records), judicially noticeable.

6 J.W. Smith & H. B. Zobel, *Massachusetts Practice Series: Rules Practice* § 12.18, at 218-19 (2d ed. 2007) (citations omitted).

### *Bylaw Interpretation*

The interpretation of bylaws is a question of law for the court, to be determined by the ordinary principles of statutory construction. *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981). “Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent, and the courts enforce the statute according to its plain wording, which we are constrained to follow so long as its application would not lead to an absurd result.” *Martha’s Vineyard Land Bank Comm’n v. Bd. of Assessors of West Tisbury*, 62 Mass. App. Ct. 25, 27-28 (2004) (internal quotations and citations omitted). Where ambiguities exist in the language, a statute — or, as here, a bylaw — is to be interpreted according to “the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *Moloney v. Boston Five Cents Savings Bank, FSB*, 422 Mass. 431, 433 (1996). The language of the provision at issue is to be construed “in association with other statutory language and the general statutory plan.” *Sperounes v. Farese*, 449 Mass. 800, 804 (2007). “Where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose.” *Id.* In addition, deference is given to a board’s

“reasonable interpretation” of its own bylaw. *Livoli v. Zoning Bd. of Appeals of Southborough*, 42 Mass. App. Ct. 921, 923 (1997).

### *Facts*

The relevant facts are straightforward and undisputed. The property at issue is 487 Main Street in Ashland (Sheet 9, Block A, Lot 32 on the tax assessor’s map), owned by the plaintiffs Gary and Rita Ghilani as tenants by the entirety. It consists of Lot 6, and one-half of Lot 7, as shown on a subdivision plan filed at the Middlesex (South) Registry of Deeds in 1943. It was first created in 1984 when its then owners (heirs of the subdivision’s developer) combined the one and one-half lots and conveyed them to the plaintiffs’ predecessors in title, William and Lucy Southard. 487 has 12,564 square feet and 104.7 feet of frontage. It is located in a Residential B (RB) zoning district. Since 1972, the year that the zoning bylaws were enacted by the town, Residential B districts require 20,000 square feet of land and 125 feet of frontage to be used for single-family dwellings.

487 was purchased by the plaintiffs, owners of the adjacent property at 491 Main Street (Lot 33 on the tax assessor’s map), on November 26, 1997. Title to 487 was taken in the same name as 491 (plaintiffs, as tenants by the entirety). 487 and 491, if treated as one lot, conform to the area and frontage requirements of the current bylaw. If treated separately, neither would conform.

### *Analysis*

The plaintiffs contend that 487 Main Street is entitled to a special permit, and thus become a buildable residential lot, under Bylaw § 282-24.G, which provides

Waiver of dimensional requirements. In RA, RB and CA Zoning Districts, minimum lot area and frontage requirements may be reduced, for residential use only, wherever the special permit granting authority, after public hearing, finds (1) that adjoining areas have been previously developed by the construction of residences on lots generally smaller or

of equal size than is prescribed in § 282-21 and § 282-22 and (2) the standard of the established neighborhood does not reasonably require lots as large as are prescribed. Adequate provision for disposal of sewerage, waste and drainage generated by any occupancy shall be determined by the appropriate Town Board prior to application for special permit. This subsection applies only to lots created prior to the date of the original enactment of this subsection (5-12-93).

The defendants disagree, based on two contentions: (1) the bylaw's words, "lots created," refer to lots in the form in which they exist at the time of the special permit application (*i.e.*, the Board does not "look back" to the lot's pre-May 12, 1993 configuration), and (2) 487 lost its status as a separate lot when it merged with 491 in 1997.

There can be no genuine dispute that 487 and 491 merged for zoning purposes at the time the plaintiffs purchased 487 in November 1997 and placed the two properties in common ownership. "[A]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities with the dimensional requirements of the zoning by-law or ordinance." *Seltzer*, 24 Mass. App. Ct. at 522 (citations omitted). Had the plaintiffs wished to avoid such merger, they could have taken the properties in separate ownership and, had they done so, there would be no question of 487's present eligibility for special permit consideration under Bylaw § 282-24.G. 487 would be both a separate lot, and a lot created prior to May 12, 1993. Instead, the plaintiffs chose a different road. The doctrine of merger is so well-established that they could not have been unaware of its consequences.

Since the lots have merged, the town's zoning bylaw requirements apply to 487 and 491 unless there is a specific exception in the bylaw. The issue thus becomes whether § 282-24.G disregards the merger doctrine or, to put it more precisely, whether it allows an owner to make a special permit application for a property whose configuration, because of merger, no longer

exists. Unlike the bylaw in *Seltzer*, § 282-24.G does not say so explicitly.<sup>6</sup> Moreover, the prefatory language of § 282-24 clearly calls for a strict construction of its provisions, declaring that “all principal buildings hereafter erected in any district shall be located on a lot such that all of the requirements set forth in §§ 282-21C, 282-22C and 282-23C<sup>7</sup> are conformed to *except where specifically exempted by this chapter or the General Laws.*” Bylaw § 282-24, para. 1 (emphasis added). The plaintiffs argue that the *omission* of language “disqualifying relief from otherwise applicable departures from dimensional requirements on the basis that an undersized lot is owned in common ownership with a contiguous lot” is significant.<sup>8</sup> But this begs the question whether § 282-24.G is an “otherwise applicable departure from dimensional requirements” for 487 Main Street, and overlooks the fact that the references cited by the plaintiffs elsewhere in the bylaw to “ownership separate from all adjoining land,” etc. are in provisions addressing G.L. c. 40A, § 6 and thus necessarily mirror its statutory language.<sup>9</sup> It also ignores the bylaw’s specific provision that “[n]o existing lot conforming to [the bylaw’s dimensional requirements] shall be changed in size or shape, except through a public taking . . . [and] [n]o existing lot already nonconforming shall be changed except through a public taking so as to increase the existing degree of nonconformity.” Bylaw § 282-24.C. This, in practical effect, is what the plaintiffs seek to do — take a presently (through merger) conforming lot, and divide it into two non-conforming lots.

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<sup>6</sup> The bylaw in *Seltzer* stated, “[o]ne single-family dwelling may be erected on any lot, *regardless of a common ownership with that of adjoining land located in the same residential district . . .*” 24 Mass. App. Ct. at 521-22 (emphasis added).

<sup>7</sup> These are each dimensional requirements.

<sup>8</sup> Memorandum in Support of Plaintiffs’ Motion for Judgment on the Pleadings at 8 (Oct. 5, 2006).

<sup>9</sup> The portion of G.L. c. 40A, § 6 relevant to these bylaw provisions states, “[a]ny increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner *was not held in common ownership with any adjoining land, . . .*” (emphasis added).

Merger is a long-standing and generally-applied principle, *Seltzer*, 24 Mass. App. Ct. at 522, which the Appeals Court has described as a “powerful tool in achieving the very goal of the Zoning Act,” *Preston v. Bd. of Appeals of Hull*, 51 Mass. App. Ct. 236, 243 (2001) (citing *Asack v. Bd. of Appeals of Westwood*, 47 Mass. App. Ct. 733, 736 (1999)). I am not aware of any case in which its application has been disregarded unless specifically required by the language in a municipality’s bylaw or ordinance (e.g., *Seltzer*, 24 Mass. App. Ct. at 521-22 and the cases involving “indulgent local zoning by-laws” cited in *Preston*, 51 Mass. App. Ct. at 240). No such language appears in § 282-24.G, and § 282-24G.C indicates a contrary intent. Even *Rourke v. Rothman*, which discussed and applied the “statutory [G.L. c. 40A, § 6] policy of keeping once-buildable lots buildable,” did not suggest that once-merged lots would automatically be “de-merged” for zoning analysis purposes, returning them to a configuration that no longer existed. 448 Mass. 190, 197 (2007). Further, *Asack v. Bd. of Appeals of Westwood* explicitly notes that “[t]he usual construction of the word “lot” in a zoning context ignores the manner in which the components of a total given area have been assembled and concentrates instead on the question whether the sum of the components meets the requirements of the by-law. A person owning adjoining record lots may not artificially divide them so as to restore old record boundaries to obtain a grandfather nonconforming exemption; to preserve the exemption that lots must retain ‘a separate identity.’” 47 Mass. App. Ct. at 736 (citations omitted). While *Asack* and the cases it cites are all “non-conforming use” cases and perhaps not directly applicable, their recognition and preservation of “merger” is instructive and persuasive.

The proper interpretation of § 282-24.G is thus clear. Section 282.24.G allows a special permit application for lots created prior to May 12, 1993. For the bylaw’s provisions to apply, the “lot” in question must still exist at the time of the application. In this case, it does not. It

ceased to exist in 1997 when it merged into 491 Main Street. For the plaintiffs' position to prevail, the bylaw would have to contain language explicitly disregarding the effects of merger, as was the case in *Seltzer*. There is no such language in § 282-24.G, the prefatory language of § 282-24 requires such a specific exemption, and § 242-24.C shows an express intent to prohibit changing the size or shape of a conforming lot in a way that would make it non-conforming. The Board thus acted correctly when it denied the plaintiffs' special permit application.

The plaintiffs' "unconstitutional taking" claim derives solely from their contention that the Board improperly denied the special permit application. Complaint at 7 (filed April 5, 2006). Since the Board acted properly, that claim fails as well. In addition, this claim fails the balancing test to determine whether a governmental action constitutes a regulatory taking, which weighs "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." See, e.g., *Grenier v. Zoning Bd. of Appeals of Chatham*, 62 Mass. App. Ct. 62, 68 (2004). Here, the plaintiffs are not deprived of all of the value of 487 – it can "be used as additional acreage" for 491 and for recreational purposes, which numerous cases have found to be "beneficial uses." See, e.g., *Leonard v. Brimfield*, 423 Mass. 152, 156 (1996); *Grenier*, 62 Mass. App. Ct. at 70; *FIC Homes of Blackstone v. Conservation Comm'n*, 41 Mass. App. Ct. 681, 694 (1996). Further, "[a] reduction in the number of houses that an owner may build is a diminution in value and not a taking." *FIC Homes of Blackstone*, 41 Mass. App. Ct. at 694. The bylaw has not unreasonably interfered with the plaintiffs' investment-backed expectations – the bylaw was in effect at the time they purchased 487 and the doctrine of merger was well-entrenched in Massachusetts law. Furthermore, the plaintiffs, even under their theory, would still require a special permit and could not reasonably assume that the Board would absolutely

grant one. Finally, the governmental action here is the application of the zoning bylaws, "which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." *Leonard v. Brimfield*, 423 Mass. at 156. Therefore, applying the balancing test to this case, the Board's actions do not constitute an unconstitutional taking.

**Conclusion**

For the foregoing reasons, the Board's decision denying the plaintiffs' application for a special permit pursuant to Bylaw § 282.24.G is affirmed, and the plaintiffs' claims are dismissed in their entirety, with prejudice. Judgment shall enter accordingly.

**SO ORDERED.**

By the court (Long, J.)

Attest:

\_\_\_\_\_  
Deborah J. Patterson, Recorder

Dated: 30 June 2008

**A TRUE COPY  
ATTEST:**

*Deborah J. Patterson*  
RECORDER