

Silun v. Morris Mass.Land Ct.,1991.Only the Westlaw citation is currently available.

Massachusetts Land Court.

Francis W. **SILUN** and Margaret M. **Silun**, Plaintiffs
 v.

Patrick D. **MORRIS**, John Virgilio, Arthur D. Keowan, Jr., William Pepka, Jr., Barbara Harper and Harry Smith, Jr., as members of the Town of Sutton Board of Appeals and the Town of Sutton,

Defendants

No. 143836.

Jan. 29, 1991.

DECISION

SULLIVAN, J.

*1 This case concerns an appeal by the plaintiffs, Francis W. **Silun** and Margaret M. **Silun**, from a decision of the Board of Appeals of the Town of Sutton. The defendants also include the Town of Sutton since the plaintiffs seek a determination pursuant to the provisions of [G.L. c. 240, § 14A](#) as to the applicability of the Sutton Zoning By-law to their property in said town.

*1 There is no dispute between the parties as to the applicable facts; rather, the question before the Court is clearly one of law and appropriate for decision on summary judgment. In order to make the problem intelligible, I set forth the pertinent facts:

*1 1. The plaintiffs acquired as tenants by the entirety a parcel of land situated in said Sutton by deed of Dirk Baarda et al dated May 28, 1957 and recorded with Worcester District Deeds, Book 3865, Page 174. The parcel in question is shown on a plan entitled "Plan to show property in Sutton, Mass. owned by Dirk and Jenny Baarda" dated May 14, 1957 by Kenneth Shore.

*1 2. At the time of the acquisition of Parcel No. 1 it complied with the then applicable provisions of the Sutton Zoning By-law. Thereafter, the by-law requirements were amended so that the minimum lot area in the applicable zoning district was increased to 40,000 square feet with a minimum frontage requirement of 175 feet. The plaintiffs' first lot then became nonconforming as to frontage. The lot was protected, however, as nonconforming so that

although it does not appear whether the plaintiffs' house was built before or after the zoning change, the lot at this time, clearly was buildable after the adoption of the zoning change.

*1 3. The plaintiffs thereafter acquired from Dirk Baarda an adjoining parcel of land by deed dated January 30, 1969 and recorded with said Deeds in Book 4924, Page 92. The lot in question is shown on a plan recorded in Plan Book 324, Plan 103 entitled "Plan of Land in Sutton, Mass. owned by Dirk Baarda" dated January 9, 1969 by Kenneth Shore and bearing an endorsement by the Sutton Planning Board that approval under the subdivision control law was not required. The second parcel acquired by the plaintiffs contained 1.76 acres with frontage on Southwick Road of approximately 648 feet. At the time of the acquisition of this lot, it complied with the provisions of the Sutton Zoning By-law.

*1 4. In 1978 the minimum requirements were again increased so that at present an area of 80,000 square feet and a frontage of 250 feet is required for the erection of a single family home.

*1 5. The plaintiff applied to the building inspector of the Town of Sutton for a determination as to whether his parcel acquired in 1969 was a buildable lot. Pursuant to the administrative procedure adopted within the town, the building inspector referred the request to the Planning Board which decided that since the two lots were held in common ownership when the zoning change was adopted, they accordingly were deemed to be one lot for zoning purposes.

*2 6. The plaintiffs then appealed to the defendant ZBA which ruled on procedural grounds that there was no appeal from the Planning Board to it. The Board also relied on the provisions of [G.L. c. 40A, § 16](#) as barring the maintenance of the appeal.

*2 At the hearing before the Court the town did not rely on either grounds stated by the ZBA in its decision. The appeal to the ZBA would seem clearly to be one from an administrative decision authorized by [G.L. c. 40A, § 8](#), and the ZBA should have ruled on the substantive question presented to it. [Section 16](#) of the chapter is not applicable under these circumstances.

*2 The controlling provision of the Sutton Zoning By-law is found in Section 9.3 which reads as follows:

*2 Residential Lot of Record: Any nonconforming lot lawfully laid out by plan or deed duly recorded or any nonconforming lot shown on a plan endorsed by the Planning Board with the words “approval under the Subdivision Control Law not required” or words of similar import which complies at the time of recording or such endorsement whichever is earlier with the minimum area, frontage, width and depth requirements, if any, of the zoning By-laws then in effect may be built upon provided it is in accordance with The Zoning Act (a minimum area of 5,000 sq. ft. with front footage minimum of 50 ft.)

*2 The ambiguity about which the parties differ is centered on the proviso with which the section ends. The plaintiffs argue that it is only the minimum area and frontage requirements of [G.L. c. 40A, § 6](#) that the town meeting intended to incorporate by reference in Section 9.3 whereas the ZBA and the town point out that the general reference is to the Zoning Act with the minimums appearing in the parenthetical phrase. It seems to me that the logical explanation for the language in question is to interpret it as the plaintiff argues. To many people the focal point of [G.L. c. 40A, § 6](#) is the minimum requirements for construction on grandfathered lots, not the other provisions thereof which may permit construction or not under certain circumstances. It would be a strained interpretation to find that the entire provisions of [Chapter 40A](#) were incorporated in Section 9.3 when logically it would appear that the town meeting was considering the provisions applicable in the nonconforming situation.

*2 The Planning Board took the position that the acquisition of two adjoining lots automatically resulted in their merger into one lot. This construction, however, flies in the face of the definition of lot which appears in Section 2.20 and reads as follows: “an area or parcel of land not including water area in the same ownership, or any part thereof designated by its owner or owners as a separate lot. For the purposes of this Bylaw, a lot may or may not have boundaries identical with those recorded in the Worcester County Registry of Deeds”. There is no evidence that the plaintiffs intended to merge their two lots. Many by-laws in other towns require, as does [G.L. c. 40A, § 6](#), that nonconforming lots not abut, but other municipalities are more liberal in their grandfather provisions.

*3 On consideration therefore I find and rule that the two properties acquired by the plaintiff comprise two separate lots, that under the provisions of the Sutton Zoning By-law each may be built upon since each exceeds the minimums set forth in the by-law of 50 feet of frontage and 5,000 square feet of area. Accordingly the plaintiffs' motion for summary judgment is allowed. I do not reach the question as to [G.L. c. 240, § 14A](#) since the plaintiffs' relief may be granted pursuant to [G.L. c. 40A, § 17](#).

*3 Judgment accordingly.

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Not Reported in N.E.2d, 1991 WL 11258249
(Mass.Land Ct.)

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