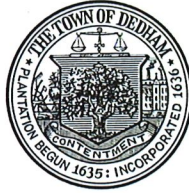


TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

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James F. McGrail, Esq., Chair
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E. Patrick Maguire, MLA, RLA, LEED AP
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Jared F. Nokes, J.D.
George Panagopoulos

**ZONING BOARD OF APPEALS
DECISION**

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2018 OCT 24 AM 11:25
TOWN OF DEDHAM
CLERKS OFFICE

Applicant: Leslie Ann Colligan
Property Address: 215 Adams Street, Dedham, MA
Property Owner: Leslie Ann Colligan
Property Owner Address: As Above
Applicant Representative: Peter Zahka, Esq.

Legal Notice: The Zoning Board of Appeals for the Town of Dedham, Massachusetts, will hold a public hearing in the Town Office Building, 26 Bryant Street, Dedham, MA, at 7:00 pm on *Wednesday, October 17, 2018* on the application of Leslie Ann Colligan, Trustee of the Leslie Ann Colligan Living Trust, 215 Adams Street, Dedham, MA. The Applicant seeks an appeal of the Dedham Building Commissioner's determination that the real estate know and number as 213 Adams Street, is a two-family dwelling, and for a determination that said dwelling is a single-family dwelling.

Section of Zoning Bylaw: *Town of Dedham Zoning By-Law Sections 9.2.2 and 10, and Table 1.*

Zoning District, Map and Lot: The property is located in the Single Residence B Zoning District. Map and Lot: 153/80

Date of Application: **September 28, 2018**

Date of Public Hearing: **October 17, 2018**

Date of Decision: **October 17, 2018**

Vote: **Unanimous 5-0**

Voting Members: James F. McGrail, Esq., J. Gregory Jacobsen, Scott M. Steeves, and E. Patrick Maguire, MLA, RLA, CLARB, LEED AP, George Panagopoulos

Date Filed with Town Clerk: **October 23, 2018**

The Zoning Board of Appeals (“ZBA”) of the Town of Dedham, Massachusetts held public hearings on October 18, 2018, in the Town Office Building, Bryant Street, Dedham, MA. Present were members of the ZBA, Chairman James F. McGrail, Esq., J. Gregory Jacobsen, Scott M. Steeves, and E. Patrick Maguire, MLA, RLA, CLARB, LEED AP. In the absence of Jason Mammone, P.E., the Chairman appointed Associate Member George Panagopoulos, to sit in his place. The hearings were duly advertised for this meeting of the ZBA in accordance with the requirements of MGL Chapter 40A, Section 11.

At 7:00 p.m., the Chairman called for the hearing on the petition of Leslie Ann Colligan, Trustee of the Leslie Ann Colligan Living Trust, of 215 Adams Street Street, Dedham, MA (hereinafter referred to as “Applicant”) appealing the decision/determination of the Dedham Building Department that the dwelling at real estate known and numbered as 215 Adams Street, Dedham, MA contains two dwelling units or is a two-family dwelling and for a determination that said dwelling contains one dwelling unit and is a single family dwelling. The property is located at 215 Adams Street, Dedham, MA, and is in the Single Residence B (SRB) Zoning District. *Town of Dedham Zoning By-Law Section 9.2.2, and Table 1.*

Applicant was represented by Peter A. Zahka, II, Esq., 12 School Street, Dedham, MA. Also present on behalf of the Applicant were Erin, Kevin, and Abby Wall, Applicant’s daughter, son-in-law, and granddaughter, and Lester Holmes, Applicant’s father. Attorney Zahka had previously submitted a plot plan, floor plan, and architectural renderings of the proposed changes to the property, as well as photos of the existing conditions. The transcript from the hearing is the primary source of evidence and is incorporated herein by reference. At the hearing Applicant was afforded an opportunity to make a full presentation.

The Subject Property, shown on Dedham Assessors Map 153, Lot 80, contains approximately 14,254 square feet of land and has approximately 95 feet of frontage on Adams Street. According to the Dedham Zoning Map, the Subject Property is located in the Single Residence B (SRB) Zoning District. The Subject Property is currently occupied by a single-family raised ranch/split style dwelling. According to the records maintain by the Dedham Board of Assessors the dwelling was constructed circa 1973. Both levels of the dwelling currently contain a kitchen, bathroom and bedrooms. The same (including the two kitchens) have been in existence since

prior to Applicant's acquisition of the Subject Property in 1998. The stairway at the front entry of the dwelling provides access to both levels. The dwelling is serviced by a single utility meter. The Subject Property is occupied by the Applicant and the Applicant's immediate family (including Mr. & Mrs. Colligan, Mrs. Colligan's father, and the Colligan's daughter, son-in-law, and granddaughter). Applicant has never and does not intend to rent or lease either floor as separate dwelling unit.

Applicant applied to the Dedham Building Department for a Building Permit for a 24' x 25' two-story addition to the house. The lot, existing dwelling, and the proposed addition all comply with the Dedham Zoning By-Law dimensional requirements for the SRB Zoning District. The lower level addition includes a bedroom, handicapped accessible bathroom, and living area. The existing lower level kitchen will be renovated. The upper level addition will include a new master bedroom, master bathroom, and shower. In addition, an elevator will be installed in the existing garage allowing access between the two floors. Mr. Colligan is a disabled Vietnam Veteran and the addition (including the elevator) are designed to make the entire home handicapped accessible.

On or about September 28, 2018, the Assistant Building Inspector denied the building permit application for the addition and issued a letter to Applicant wherein he made a decision/determination that the house was an improper two-family dwelling or had an improper "in-law dwelling" (not allowed in the SRB Zoning District) because the Building Department "considers the installation of 2nd kitchens in most instances to be the deciding factor in whether or not you are creating a second dwelling unit." Applicant disputes the decision/determination of the Assistant Building Inspector and contends that the dwelling is and has always been a single-family dwelling (and will continue as such after the addition). Therefore, pursuant to Sections 8 and 15 of Chapter 40A of the General Laws of Massachusetts and Section 9.2.2 of the Dedham Zoning By-Law, Applicant appeals this decision/determination and has requested the ZBA make a determination that said dwelling contains only one dwelling unit and is a single-family dwelling.

Section 10 of the Dedham Zoning By-Law defines a "dwelling unit" as follows:

One or more rooms constituting **independent** living quarters for a single family, including cooking, sleeping and bathroom facilities, and **physically** separated from any use not accessory to such dwelling, and from any other dwelling unity by open space, party wall, or hallway. [Emphasis added.]

Section 10 of the Dedham Zoning By-Law defines a “family” as follows:

One person or several individuals living together as a single and separate housekeeping unit and related by blood, marriage, adoption and not more than three individuals no so related...

As indicated above, in his letter of September 28, 2018, the Assistant Building Inspector states that “the Town of Dedham Building Department considers the installation 2nd kitchens in most instances to be the deciding factor in whether or not you are creating a second dwelling unit.” At the outset it is noteworthy that the Dedham Zoning By-Law does *not* make a second kitchen the deciding factor. Instead the definition specifically requires “independent” living quarters which are “physically” separated from other dwelling units. While the Applicant may have kitchens, bathrooms, and bedrooms on both levels of their dwelling, the same are not “independent” living quarters and are not “physically” separated from any other dwelling unit. The house was constructed as a raised ranch/split style (which by design have two levels) and is open allowing for the free-flow of traffic throughout the entire structure. It is noteworthy that the proposed addition includes installation of an elevator (allowing for easier access between the upper and lower levels). In addition, the house contained two (2) kitchens at the time of Applicant’s purchase (20 years ago)¹. Furthermore, there is only (by definition) a single family living in the dwelling. Therefore, by Dedham’s own definition the dwelling is a single-family dwelling.

Admittedly, the home *could* be used as a multi-family unit but only with certain structural alterations (including but not necessarily limited to closure of the interior front entrance and providing a second means of egress for each level). In *Boch v. Edgartown*, Duke Superior Court Civil Action No. 2627 (1988), the Court determined that the correct tests to determine whether a home is a single or two-family dwelling are (1) actual use test or (2) design test. In *Boch*, Plaintiff had constructed three kitchens, one on each floor of the house in a single-residence district in Edgartown, Massachusetts. In addition, there were ample features that could accommodate multiples families (as Mr. Boch frequently had guests stay in addition to his seven adult children and their children). Much like *Boch*, the Subject Property is both used as a single family dwelling and was designed as a single family dwelling. The *Boch* court held that, though the home could potentially accommodate more than one family, “potential use after alterations” is not the test,

citing to the “Use Test” in *Lynn v. Olanoff*, 414 Mass. 249 (1943) and the “Design test” in *Van Arsdale v. Provincetown*, 344 Mass. 146 (1962).

Applicant’s dwelling is a single-family dwelling under the “Use Test” set forth in *Lynn v. Olanoff*, *supra*. The Court in *Lynn*, held that the number of dwelling units can be determined by evidence of actual use. In *Lynn*, the evidence (including a separate albeit related family living on the third floor) showed that a permitted two-family home was actually being *used* as a non-permitted three-family. Unlike the dwelling in *Lynn*, Applicant has always and continues to use the Subject Property only for Applicant’s own family (as defined under the Dedham Zoning By-Law). Applicant has never and does not ever intend to rent either level of the house as a separate dwelling unit. Therefore, it is a single-family dwelling.

Likewise, Applicant’s dwelling is a single-family dwelling under the “Design Test” set forth in *Van Arsdale v. Provincetown*, *supra*. In *Van Arsdale*, the Court determined that the number of dwelling units can be determined by the design of the structure. In the *Van Arsdale* court, the Plaintiff neighbors filed a complaint against the town building inspector to compel him to revoke a building permit issued to a property owner. The particular zoning district allowed for two-family units but no more. The proposed building mirrored a two-family but included a solid eight-inch-thick wall extending from cellar to roof, dividing each of the two units into four individual units. The architect also testified that the building was designed for four families. Thus, a building to be occupied by four families would be a four-family dwelling. Unlike, the dwelling in *Van Arsdale*, the design of Applicant’s home evidences that the same is a single-family dwelling. The second kitchen is not closed off from the rest of the house nor is it separated by a door or by a hallway as to indicate a separate existence. As noted above, the proposed addition includes an elevator allowing for easier access between the two floors. Furthermore, the entire home utilizes the same entrances and exits and there are single meters for utilities.

In *Hayhurst v. Campbell*, Mass. Land Court Misc. Case No. 262031 (2005) the Land Court applied both the “Use Test” and “Design Test” to uphold the Building Inspector’s determination that a house was a single-family dwelling and not a two-family dwelling. The use and design of the house in *Hayhurst* are similar to the use and design of Applicant’s dwelling. Specifically, the Court found a single-family dwelling existed when there (a) were no appreciable barriers to the free flow of traffic, (b) were multiple points of ingress and egress but one utility meter and one

mailbox, and (c) were two kitchens but the house was used by only one family. All of these describe Applicant's house.

No one appeared in opposition to the requested relief. Applicant submitted a petition signed by thirteen abutters indicating their support for the requested relief.

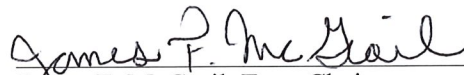
Upon motion duly made the ZBA voted unanimously to reverse the determination of Dedham Building Department and to make a determination that the dwelling located at 215 Adams Street, Dedham, MA is a single family dwelling upon the following terms and conditions:

1. Applicant (and any successor in interest to the Subject Property) shall not rent or lease any floor of the house as a separate dwelling unit.
2. Applicant (and any successor in interest in the Subject Property) shall not install doors or construct any other barrier separating the two levels of the house.

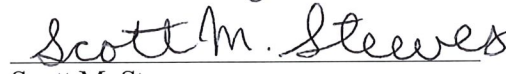
The ZBA recognizes that the determination as to the number of dwelling units in any structure must be made on a case by case basis. Therefore, it is the intent that this decision and the determination herein be limited to the Subject Property.

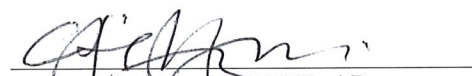
Appeals of this decision, if any, shall be made pursuant to Section 17 of Chapter 40A of the General Laws of Massachusetts and shall be filed within twenty days after the date of filing of notice of this decision with the Town Clerk

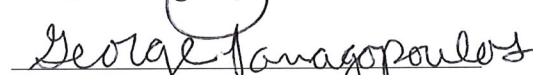
Dated: October 23, 2018


James F. McGrail, Esq., Chairman


J. Gregory Jacobsen


Scott M. Steeves


E. Patrick Maguire, LEED AP


George Panagopoulos