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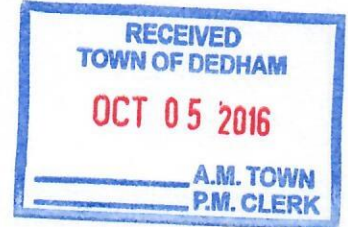
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**TOWN OF DEDHAM
ZONING BOARD OF APPEALS
DECISION**



2016 OCT -5 PM 5:06

Applicant: Hatem and Pascale Moussallem
Property Address: 895 Washington Street, Dedham, MA
Property Owner: Hatem and Pascale Moussallem
Property Owner Address: 895 Washington Street, Dedham, MA
Agent/Attorney Name: Peter A. Zahka II, Esq.
Agent/Attorney Address: 12 School Street, Dedham, MA 02026

Legal Notice: The applicant is appealing the Dedham Building Commissioner's determination that the real estate known and numbered as 895 Washington Street, Dedham, MA, is a two-family dwelling, and for a determination that said dwelling is a single family dwelling.

Zoning District, Map and Lot: Single Residence B, Map 148, Lot 45
Section of Zoning Bylaw: Zoning Bylaw Section 9.2.2, Section 10, and Table 1
Date of Application: August 23, 2016
Date of Public Hearing: September 21, 2016
Date of Decision: September 21, 2016
Vote: 5-0, unanimous
Voting Members: James F. McGrail, Esq., J. Gregory Jacobsen, Scott M. Steeves, Jason L. Mammone, P.E., Jared F. Nokes, J.D.

Date Filed with Town Clerk: **October 5, 2016**

The Zoning Board of Appeals ("ZBA") of the Town of Dedham, Massachusetts held public hearings on September 21, 2016, 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 Jason L. Mammone, P.E. In the absence of E. Patrick Maguire, the Chairman appointed Associate Member Jared F. Nokes, J.D., 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 and the Town of Dedham Zoning Bylaw. Legal ads were placed for two consecutive weeks in *The Dedham Times*. In addition, abutters within 300 feet of the property in question received notification of the hearings, and notification regarding each hearing was sent to the neighboring towns (Boston, Needham, Canton, and Westwood).

At 7:15 p.m., the Chairman called for the hearing on the petition of Hatem Moussallem and Pascale Moussallem of 895 Washington Street, Dedham, MA (hereinafter collectively referred to as the "Applicants"). The Applicants are appealing the decision/determination of the Dedham Building Department that the dwelling at real estate known and numbered as 895 Washington 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 895 Washington Street, Dedham, MA, and is in the Single Residence B (SRB) Zoning District. *Town of Dedham Zoning By-Law Section 9.2.2; Board of Appeals Powers, Section 10 Determinations, and Table 1*

The Applicants were represented by Peter A. Zahka, II, Esq., 12 School Street, Dedham, MA. Also present were Hatem Moussallem and Pascale Moussallem. Attorney Zahka had previously submitted a plot plan of the Subject Property and photographs of the interior and exterior of the dwelling. The transcript from the hearing is the primary source of evidence and is incorporated herein by reference. At the hearing, the Applicants were afforded an opportunity to make a full presentation.

The Subject Property, shown on Dedham Assessors Map 148, Lot 45, contains approximately 12,500 square feet of land and has approximately 95 feet of frontage on Washington Street. The Subject Property is currently occupied by a single-family raised ranch style dwelling. According to the records maintain by the Dedham Board of Assessors the dwelling was constructed in 1986. Both levels of the dwelling currently contain a kitchen, bathroom and bedrooms. The stairway at the front entry of the dwelling provides access to both levels. There are no doors or other barriers on the interior stairs to the two levels. The dwelling is serviced by a single utility meters. The Subject Property is occupied by the Applicants and the Applicants' immediate family. The Applicants have never rented or leased either floor as separate dwelling unit.

In 2013, the Dedham Building Department issued a Building Permit to the Applicants to eliminate the existing upper level kitchen and to remodel the lower level kitchen.¹ A recent inspection by the Assistant Building Inspector Frederick Johnson revealed that the upper level kitchen was not eliminated, but that (in addition to the new lower level kitchen) a new kitchen was constructed on the upper level. On or about August 4, 2016, the Assistant Building Inspector issued a letter to the Applicants wherein he noted that the upper level kitchen was undertaken without proper permits² and made a determination that a second dwelling unit was created resulting in zoning violation (i.e., a two-family dwelling or an accessory dwelling unit are not allowed in the SRB Zoning District except upon obtaining certain relief from the ZBA). Said letter specifically stated that “the Town of Dedham 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.”

The Applicants dispute the decision/determination that the dwelling contains more than one dwelling unit and contends that the dwelling is and has always been a single family dwelling. 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, the Applicants appeal this decision/determination and have 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” and “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.]

¹ When the Subject Property was acquired by Applicant it already contained kitchens on both the lower and upper levels.

² Applicant subsequently applied for the necessary permits but the same have been denied pending the results of this appeal.

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, the Assistant Building Inspector, in his letter of August 4, 2016, states that “the installation of 2nd kitchens in most instances . . . [is] 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 style (which by design has two levels) and is open (without doors or similar barriers separating the levels of the house), allowing for the free-flow of traffic throughout the entire structure. Furthermore, there is only 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). Counsel for the Applicant noted in *Boch v. Edgartown*, Duke Superior Court Civil Action No. 2627 (1988), that 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. The Applicant’s counsel added that in *Boch*, the 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). The Applicant’s counsel further noted that, much like *Boch*, the Subject Property is both used as a single family dwelling and was designed as a single family dwelling. The Applicant’s counsel stated that the *Boch* court held that, although 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 Ragsdale v. Provincetown*, 344 Mass. 146 (1962).

According to the Applicants' counsel, the 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. Applicant has always and continues to use the Subject Property only for Applicant's own family. Applicant has never and does not ever intend to rent either level of the house as a separate dwelling unit.

The Applicant's counsel also contends that the dwelling is a single-family dwelling under the "Design Test" set forth in *Van Ragsdale v. Provincetown, supra*. In *Van Ragsdale*, the Court determined that the number of dwelling units can be determined by the design of the structure. The different levels of the dwelling are not closed off from the rest of the house nor separated by a door or by a hallway as to indicate a separate existence. Furthermore, the entire home utilizes the same entrances and exits and there are single meters for utilities.

No one appeared in opposition to the requested relief, including the Building Commissioner, who was present during the Applicants' hearing. The Applicants submitted a petition signed by the direct abutters indicating their support for the requested relief:

Stefano Avitabile	887 Washington Street
Rosena Avitabile	887 Washington Street
Barbara H. Pinkham	899 Washington Street
Russell B. Pinkham	899 Washington Street

Upon motion duly made by J. Gregory Jacobsen and seconded by Scott M. Steeves, the ZBA voted unanimously to reverse the determination of Dedham Building Department and to make a determination that the dwelling located at 895 Washington Street, Dedham, MA, is a single family dwelling upon the following terms and conditions:


1. The Applicants (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. The Applicants (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.

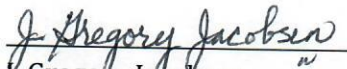
The ZBA recognizes that the determination as to the number of dwelling units in any structure must be made on a case by case basis. Therefore, it is the intent that this decision and the determination herein be limited to the Subject Property.

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

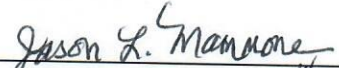
Date: September 21, 2016

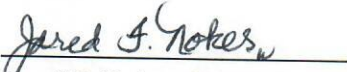
Attest, by the Zoning Board of Appeals:


James F. McGrail, Esq.

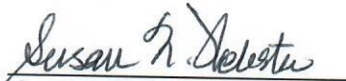

J. Gregory Jacobsen


Scott M. Steeves


Jason L. Mammone, P.E.


Jared F. Nokes, J.D.

Attest, by the Administrative Assistant:


Susan N. Webster

Materials Submitted:

- ZBA application
- Petition letter signed by neighbors
- Petition Statement prepared by Peter A. Zahka II, Esq., 12 School Street, Dedham, MA 02026
- Dedham GIS map of property
- Subdivision Plan of Land in Dedham prepared by Pilling Engineering Co., Inc. dated 9/17/86
- Photographs of existing conditions