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COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 2627ERNEST J. BOCH,
Plaintiff

vs.

EDWARD VINCENT, et al. as members of the Zoning Board
of Appeals of the Town of Edgartown,
DefendantsSTATEMENT OF THE CASE

Plaintiff appeals from a decision of the Edgartown Zoning Board of Appeals upholding the decision of the town building inspector, Leonard Jason, Jr., that plaintiff's house is not a "single family dwelling" as that term is used in the Edgartown Zoning By-Laws. The building inspector has ordered the plaintiff to remove two of the three kitchens now a part of the newly constructed house. The plaintiff maintains that despite the three kitchens, one on each floor, his house is a single family dwelling.

FINDINGS OF FACT

On all of the evidence before me, including a Statement of Certain Agreed Facts ("SCAF"), a view of the new house from top to bottom, and limited amount of testimony from both sides, I find the following facts:

First of all, I adopt by reference all the facts set forth in SCAF.

Secondly, my view of the Boch house influenced me greatly in the conclusion I have reached, namely, that this house is designed for and used as a single family dwelling.

Thirdly, the testimony of Ernest J. Boch has also convinced me that this is a single family dwelling.

In 1981 Ernest and Barbara Boch purchased a 15-acre lot of land in Edgartown extending from Katama Road to Edgartown harbor. On this lot was an old house with seven bedrooms overlooking the harbor.

The plaintiffs in 1981 changed their domicile from Norwood to Edgartown where they are now registered to vote.

The Bochs immediately started to alter and add to the house. See Exhibit 1 (January 2, 1983 photo).

In the middle of these activities it became apparent that the old fireplace was about to collapse.

The Bochs abandoned their plans to renovate and enlarge and, instead, built a new house where the old house stood.

The plans for the new house were approved by the Edgartown Building Inspector on May 7, 1986. Exhibit 2. These plans showed a full kitchen on the second floor but only a bar and sink area on the first and third floors.

The Bochs further revised these plans on May 22, 1986. Exhibit 3. These revised plans called for a bar area on the first floor along one wall of the Fireside Room which would contain a

refrigerator, sink, ice maker, micro-wave oven and drop-in stove.

The revised plans also call for a bar area off the master bedroom on the third floor, containing a refrigerator, range, ice maker, sink and dishwasher.

These plans, calling for fully equipped kitchen on each floor, were submitted in 1987 to Leonard Jason, Jr., the building inspector for the Town of Edgartown. By letter of July 31, 1987, he rejected the revised plans. See SCAF, Exhibit B.

Unfortunately, these plans were submitted to Mr. Jason only after he had, on a routine inspection in February 1987, observed that the two extra kitchens had already been installed. On February 5, 1987, he ordered these kitchens removed. It was following this order that Mr. Boch submitted the revised plans which Mr. Jason rejected in July.

The matter of the two additional kitchens went before the Edgartown Zoning Board of Appeals and on October 27, 1987, the Board's decision and a record of the proceedings before the Board were filed with the town clerk. SCAF, Exhibit D.

Boch's house is located in R-60 Residential District in which a "one single family detached building" is permitted and a "multi-unit dwelling" is not permitted. See Zoning By-Laws, as amended April, 1986. SCAF, Exhibit E.

The Board, by a 4 to 1 vote, upheld the building inspector.

Having heard the testimony of Ernest Boch and viewed his new house, there is no doubt in my mind - and I so find as a conclusion of fact - that he intends to use his house as a "single family

detached dwelling" and not as a "multi-unit dwelling".

In a somewhat elaborate explanation of the two extra kitchens, Ernest Boch said that when he gets old, he doesn't want to go downstairs for breakfast, hence the kitchen off the bedroom, and that when he has parties on the first floor, it would be very convenient to prepare food for the guests on the first floor and not have to carry dishes upstairs to the regular kitchen on the second floor.

There are three guest bedrooms, plus the master bedroom, on the third floor. The third floor kitchen is off the master bedroom and accessible only to that bedroom.

There are no sleeping quarters on either the first or second floor.

The Bochs have not yet furnished their new house. But when they do, they intend to entertain their children (they have seven), their relatives, friends and, probably, employees of Ernest Boch's car dealership. But they have no intention of housing more than one family unit in this dwelling.

Boch's general contractor, Neil Ferguson, set out to build "a high quality single family house" and this is what he has accomplished. It is not a "multi-unit dwelling" either, as that phrase is popularly understood or as defined in Article II of the Zoning By-Laws of the Town of Edgartown.

DISCUSSION OF THE LAW

The Edgartown Zoning By-Law, Article II, defines a "multi-unit dwelling" as "any building consisting of attached single-family units with each unit providing independent living facilities".

The Board of Appeals argues that the Boch's house, by virtue of having a kitchen on each floor, has three "single family units with each unit providing independent living facilities" and hence, is a "multi-unit dwelling". The Board, through counsel, further argues that each floor is capable of being utilized as a separate living facility" and therefore, by design, is not a "single family" house.

It seems to me this argument is too facile. Having three full bathrooms, one on each floor, using this reasoning, could constitute three separate living facilities if one considered the possibility of electric hot plates and small portable refrigerators and sleeping on cots in adjoining rooms.

Mr. Jason testified that it is conceivable that the Boch house could be used for more than one family. Counsel for the town argues that the study on the second floor could be used as a bedroom.

At the public hearing in the Town Hall on October 14, 1987, Mr. Jason "showed how the lower level with the Fireside Room could become a studio apartment, how the sheet [plan for?] with the main floor sitting room, kitchen, dining, etc., had all the conveniences of a single family residence, and how the upper floor, with master

bedroom, entire kitchen, including a trash compactor, all indicated the potential [underlining mine] for 3 families at a minimum."

A member of the Board, Martin Tomassian, noted "the potential for extra dwelling units" as a reason for denying extra kitchens and said he thought the property "could be" subdivided. (I assume he meant the house itself could be divided into three separate units).

All this discussion and these arguments are predicated on how the house could be converted into a multi-family dwelling. And, of course, such future changes could take place. And this is true of most single family dwelling houses. But potential use after alterations is not the test.

The test, as the defendant correctly points out in his brief, is either (1) actual use - and defendant concedes the house is not now used by more than one family - or (2) design.

Having looked at the plans and toured the house from top to bottom, I see no, absolutely no, indication that this house is designed for more than a single family. It is a spacious, even ostentatious, house of grand proportions. As Coleridge wrote in his famous poem, "In Xanadu did Kubla Khan a stately treasure-dome decree...." And this is such a house built for luxurious living, entertaining and minimal effort. Obviously, a dining room on the second floor presents advantages and disadvantages. Food for parties in the Fireside Room would have to be carried downstairs to the Fireside Room either by using the electric elevator or carrying the food down the front stairs. The Bochs prefer to

prepare the food for such parties on the same floor, i.e., the first floor. That's their luxury, their convenience, their pleasure. It doesn't mean the first floor is used or designed for use by a separate and distinct family. There are no bedrooms on the first floor. Ernest Boch points out that it would be difficult to erect walls sealing off the Fireside Room and bar and kitchen and downstairs bathroom because you can't disturb the sandstone floor in the Fireplace Room radiant heat underlying this floor.

Much has been said about the master bedroom on the third floor having a door which could be locked. And it is true that with a well stocked refrigerator, Mr. and Mrs. Boch could live in their master bedroom, with the convenience of an adjoining kitchen and bathroom, for days. But does that feature convert the entire house into a multi-family unit?

The original house on this location had seven bedrooms. This house, in contrast, has a master bedroom and three guest rooms, each with a bath, on the third floor. Was the original house designed for use as a boarding house because of many bedrooms? I doubt it. And are four bedrooms more consistent with a single family usage than seven? Of course not.

No one complains about a bathroom on each floor. But some members of the Board, as well as residents, are convinced that three kitchens indicate a multi-family use. Why this hang-up about kitchens? Certainly the Zoning By-Laws do not restrict the number of kitchens in a house. Obviously, the number of kitchens are only one factor in looking at the design of a house.

The stairwell is three stories high with a giant chandelier hanging from the ceiling. The first two floors are, for the most part, open areas allowing the free flow of traffic. The house is designed to be open and one's first impression on entering the house is of spaciousness. It does not lend itself to being cut up into three separate apartments.

The bedrooms on the third floor can each be locked from the inside, a feature characteristic of most houses.

If this house were designed as three separate units, each with its own ingress and egress, its own metered water and gas and electricity, and its own bedrooms, bathrooms and kitchens, I would easily conclude that it was designed as a multi-family unit.

But on the basis of the present plans and the interior of the Boch house as I observed it, I see no indication that it is composed of multi-units or apartment.

It is farfetched to consider this house as designed for "business use" or as a "water-related commercial enterprise" (whatever that is), as some have suggested.

I have read and re-read Lynn v. Olanoff, 314 Mass. 249 (1943). In that case, a judge found that the third floor of a house was substantially altered to accommodate a third family. Two dormer windows were added to increase the height of the rooms and provide additional light and air. What was shown on the plans as a master bedroom was actually a kitchen containing a gas range and oven and a refrigerator, kitchen cabinets and breakfast set. This third floor already had a bathroom. After alterations there were

supposed to be three bedrooms but one of these bedrooms, upon inspection, proved to be furnished as a living room.

The first two floors were separate apartments with separate metered utilities.

The inspectors found the owner's son and wife and baby actually living on the third floor and using it as a separate unit. Neighbors testified as to their continual daily use of the third floor.

The judge, on all the evidence, found the third floor to be used as a "separate and distinct housekeeping unit" by a third family, contrary to the two-family limit under the City of Lynn Zoning. This case says that actual use, not just the plans on file, will determine whether or not there is a zoning violation. The Olanoff case is a "use" case. The present case is not a "use case."

In Van Arsdale v. Provincetown, 344 Mass. 146 (1962), the court found that a single structure designed for four families in four separate apartments was a four-family dwelling despite the fact that a solid masonry wall from cellar to roof separated two apartments from the other two apartments. The zoning law allowed two-family units but not four-family units and the presence in the building of a solid masonry wall from bottom to top did not alter the basic design of the building as a four-family dwelling. "A building to be occupied by four families would be a four-family dwelling." Supra at 147.

Applying the "design" test to the Boch's house, it is

indisputable that their home is not designed for multi-units. Separate units could exist only if the present design were significantly changed.

In Martin v. Rent Control Board of Cambridge, 19 Mass. App. Ct. 745 (1985), there was no question about the design of the apartment house in question. It was designed for four families. The owner wanted the building for rent control purposes, classified as a three-family house because his family occupied two of the four units. The court said no. The house is designed and constructed as four separate units no matter what use the owner puts it to. Martin, admittedly a "design" case, has no relevance to the present case.


Finally, I see no law standing for the position taken by the Edgartown Zoning Board of Appeals, i.e., potential use after substantial interior alteration is a valid basis for disapproval of plans presently in compliance with local regulations.

Fortunately, there was one voice of reason on the Board and that belonged to Edward Vincent, the chairman. Said Mr. Vincent, "If a man wants to have three kitchens, one on each floor, he has the money to do it, doesn't prove to me it's going to be apartments."

Mr. Vincent is correct. The Board's decision was arbitrary, capricious and based on an error of law.

DECISION

I remand this case to the Zoning Board of Appeals for the purpose of overruling the decision of the building inspector and approving the Boch plans of May 22, 1987.


Andrew Gill Meyer
Justice of the Superior Court

DATED: December 8, 1988