

**ZONING BOARD OF APPEALS**

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ZBA 2010-86
Appeal of Chris Indresano
6 Summit Road

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, November 4, 2010 at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the appeal of CHRIS INDRESANO pursuant to the provisions of Section XXIV of the Zoning Bylaws and Section II, M.G.L. ch 40A, s.7 of the Enforcement Order of the Inspector of Buildings regarding the use as a three-family dwelling, at 6 SUMMIT ROAD, in a 10,000 square foot Single Residence District.

On October 18, 2010, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Record Owner of Property: Josephine & Christopher Indresano

Presenting the case at the hearing was David Himmelberger, Esq., who said that he was representing Christopher Indresano, the record owner.

The Board said that Mr. Himmelberger's submission was very complete. The Board Chair said that he read all of the cases that were cited. He said that, from a legal standpoint, he did not think that issuance of the 1990 Building Permit made the structure a three-family. He said that it was gratuitous that the Building Department listed it as a three-family.

The Board said that the structure has been used as a three-family since some time in the 1920's and has been assessed as a three-family since that period of time. The Board asked Mr. Himmelberger for an equitable argument of the Appeal.

Mr. Himmelberger said that the record is by no means clear that a three-family use was not applied for or issued. He said that the Building Permit application records are not complete. He said that, by his count, there were at least ten permit applications missing, between the period of 1921, when a permit was issued to convert the home from a single family to a two-family and 1925 when the Town first adopted a Zoning Ordinance, which is the date by which they would have to show that the building was in use as a three-family.

Mr. Himmelberger said that, in 1923, a permit was pulled for the construction of a three-bay garage. He said that was somewhat remarkable for that period of time. He said that a three-car garage is now routine for single family homes. He asked that the Board take judicial notice that having a three-car garage was

far less commonplace in the 1920's and that it may be further evidence of the fact that it had, in fact, converted to a three-family prior to 1925.

Mr. Himmelberger said that there is no dispute between the Building Inspector and the owner that the Town records from at least 1929, or arguably 1927, reference a three-family. He said that the affidavit of the Town Assessor stated that according to the records that date back to 1939, the house was in use as a three-family.

Mr. Himmelberger said that his client's grandmother, Josephine Indresano, purchased the home as a three-family in 1970. He said that it was called out in the 1990 Building Permit, 024764, as a three-family. He said that permit was to remodel the third floor kitchen and bath and add a third floor door. He said that permit was applied for and issued.

Mr. Himmelberger stressed the fact that this Appeal came before the Board not through any bad act on the part of the current owner. He said that it is not a self-created hardship. He said that the home was purchased in good faith as a three-family. He said that this is a unique case. He said that he did not know of any other houses in Town that have been in use as a three-family for at least 80 years and recognized by the Town as such for that period. He said that there are missing Building Permit applications that might have provided the requisite proof that the three-family use was in effect prior to 1925.

Mr. Himmelberger said that an issue that the Building Inspector had raised was that by allowing the continued use, based upon the 1990 Building Permit, it would open up an opportunity for other people to apply for Building Permits for repairs, write down that it is a three-family and then argue within six years that they have a three-family. He said that the Town has recognized, at least on the tax side, that this has been a three-family dwelling for decades.

Mr. Himmelberger said that the Building Inspector did a lot of research of the records. He said that the Building Inspector thought that the Board should make a determination.

Mr. Himmelberger said that, based on the facts limited to this case, there is ample historical record to provide a good faith basis for the Board to grant the Appeal and recognize the dwelling as a three-family home.

Mr. Himmelberger said that it would be a financial hardship to reconvert to a two-family at a reasonable expense and with a fair financial return. He respectfully requested, in this particular case, based on these particular facts, and the fact that the homeowners are from a lifelong Wellesley family, that the Board overturn the finding that the Building Inspector issued.

The Board said that the property across the street at 9 Summit Road was converted to a three-family in 1941.

The Board Chair said that he read Town Counsel's memo, dated October 20, 2010, to Mr. Grant.

The Board said that there will be no grandfathered rights beyond allowing the three-family use to continue. The Board said that if the house ceased to be used as a three-family, it could never go back to being a three-family. The Board said that this is not a valid nonconforming structure. The Board said that the house could only be rebuilt as a two-family.

The Board said that there is an 80-year history of the use of the house. The Board said that the house is attractive and seems to be consistent with other houses in the neighborhood.

The Board said that the Building Inspector did make his findings correctly, based on the law. The Board said that it could infer from other facts that perhaps there was a Building Permit to convert to the three-family that was among the missing permits.

Statement of Facts

The subject property is located at 6 Summit Road, in a 10, 000 square foot Single Residence District.

The Petitioner is appealing the Enforcement Order of the Inspector of Buildings regarding the use as a three-family dwelling.

Submittals from the Inspector of Buildings

- Letter, Certified Mail, #7007 0710 0000 0422 0482, to Josephine & Christopher Indresano, dated 9/28/10, from Michael Grant
- Email to Michael Grant, dated 10/20/10, from Albert Robinson
- Page from Inspector of Buildings' 2 & 3-Family Records, listing 6 Summit Road as a 2 Family per Building Permit #841
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1921
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1922
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1924
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1925
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1926
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1927
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1928
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1929
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1930
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1931
- Town of Wellesley List of Residents Over Twenty Years of Age, dated 4/1/1932
- Application for Permit for Alterations, dated 8/26/1921
- Application for Permit to Build, dated 8/3/23
- Application for Permit for Alterations, dated 6/3/1928
- Application for Building Permit, dated 3/12/90

Submittals from the Appellant

- Letter to Michael Grant, dated 10/7/10, from David J. Himmelberger, Esq.
- Letter to Richard L. Seegel, Esq., dated 10/27/10, from David J. Himmelberger, Esq.
- Building Permit #842, dated 8/26/1921
- Building Permit #1316, dated 8/3/1923
- Building Permit #2916, dated 6/30/1928
- Building Permit #024764, dated 3/12/1990
- Affidavit of Donna Lee McCabe

On November 2, 2010, the Planning Board reviewed the Appeal and recommended that the Appeal be denied.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing.

The Appeal of the Enforcement Order of the Inspector of Buildings regarding the use of 6 Summit Road as a three-family dwelling is upheld and the decision of the Inspector of Buildings is reversed.

APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN THE
OFFICE OF THE TOWN CLERK.

Richard L. Seegel, Chairman

J. Randolph Becker

Cynthia S. Hibbard

cc: Planning Board
Inspector of Buildings
lrm