



## ZONING BOARD OF APPEALS

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

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ZBA 2010-92  
Petition of David Himmelberger  
1 Crescent Street aka 60-62 Washington Street

Pursuant to due notice, the Special Permit Granting authority held a Public Hearing on Thursday, January 6, 2011 on the petition of DAVID HIMMELBERGER requesting modification of a Special Permit (ZBA 77-6) that was granted on May 20, 1977 pursuant to the provisions of M.G.L. Chapter 40A, Section 15, for use as a three-family dwelling, at 1 CRESCENT STREET aka 60-62 WASHINGTON STREET, in a 10,000 square foot Single Residence District.

Property Owner: Angelina Pineau

On November 15, 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.

Presenting the case at the hearing was David Himmelberger, Esq. He said that he detailed the history of the property in his letter of November 8, 2010 to the Board. He said that the Zoning Board issued a Special Permit for this property several years ago. He said that a Special Permit has been granted since 1956 to allow the building to be used as a three-family dwelling. He said that this permission was granted on a yearly basis until 1961 when the permit was issued for five years. He said that Special Permits were issued at five year intervals thereafter until 1977. He said that the Board then granted a Special Permit subject to four conditions. He said that the last two Building Inspectors had not done annual inspections.

Mr. Himmelberger said that he represented the record owner, Angelina Pineau. He said that Ms. Pineau would like to sell the property subject to the ability to continue the three-family use. He said that the area has become more developed since 1977. He said that five condominiums are being constructed at Washington Street and Hillside Road. He said that there is a significant project under construction at 27 Washington Street. He asked that the Board allow this permit due to reasons set forth in his letter.

Mr. Himmelberger said that the request is to eliminate the fourth condition or the last clause of condition #4 of the 1977 permit and substitute a 10 year limit.

Mr. Himmelberger said that the house is currently used as a three-family on two floors. He said that it is a 24 room house and is located directly across the street from a funeral home. He said that the property was acquired in 1955 as a somewhat derelict building. He said that there were financial issues involved with rehabilitation of the building.

The Board said that the Board in 1977 seemed to come to the conclusion that the Special Permit should be limited to the life of the existing owner. Mr. Himmelberger said that the Board may have done that to put

a time limit on it. He said that would allow the Special Permit to continue without the necessity of coming back before the Board on a repetitive basis. He said that the Board did feel that it was appropriate to grant Special Permits between 1957 and 1977.

Mr. Himmelberger said that there is a prospective buyer. He said that there is an offer in and it has a contingency that the Special Permit can be renewed without the continued ownership of the current record owner.

The Board said that under the current bylaw it has the authority to grant a Special Use Permit for a two-family in a Single Residence District. The Board questioned if it had the authority to grant a permit for a three-family use in a Single Residence District. The Board said that the reference in the 1966 decision to M.G.L. 40A, Section 15 does not provide any guidance, as that section concerns the Zoning Board of Appeals (ZBA) holding public meetings. Mr. Himmelberger said that he believed that the Commonwealth's general Zoning statutes provide that authority. He said that the Board is authorized to grant Special Permits for uses that are in harmony with the general purpose and intent of the Zoning Bylaw.

Mr. Himmelberger said that there is some merit to the fact that on five or six occasions within 20 years, the Board found it appropriate to grant Special Permits for the special use. The Board said that there is no factual basis for the previous Boards' decisions to allow the use.

The Board asked if the house was occupied by all family members or rented out to three separate family units. Mr. Himmelberger said that he believed that a family member or a member of the extended family has always lived there.

Mary Bowers, 12 Columbia Street, said that her sister Angelina Pineau is the current owner of the house. She said that she is the only other living relative of the original owner, Pietro Nuzzi. She said that the house was built around 1900. She said that she believed that it was a medical facility or hospital at that time. She said that her father bought the property in 1956. She said that she was not sure how it was turned into a three-family. She said that Attorney David Locke and Attorney Henry White appeared before the Board to get an extension for the three-family use. She said that as her father got older, the periods of extension got longer.

Ms. Bowers said that her sister and her husband are older and are not well. She said that there is a potential buyer who would like to continue the three-family use. She said that she was present at the hearing to support that.

Ms. Bowers said that there her niece and nephew have lived at 62 Washington Street for 30 years in the small unit. She said that they are the grandchildren of Pietro Nuzzi. She said that her niece is 63 years old and has been an invalid since 2004. She said that her nephew is 53 years old and is at home as his sister's caretaker.

Neal Glick, 89 River Street, said that he is a Planning Board member but was not present on behalf of the Board. He said that the Planning Board did vote to not approve the Special Permit.

Mr. Glick said that he considered this to be a re-zoning and is not appropriate. He said that he lives in the neighborhood and is concerned about incrementalism. He said that in the letter that was submitted to the Board, the Board was asked to take note of the fact that there is a 40B project across the street. He said that a 40B project overrides the Zoning. He said that should not affect the Board's review of this project.

Mr. Glick said that he was concerned about the assertion in the letter to the Board that the house is not suited for use as a one-family with children. He said that there are single family homes on all of Crescent Street on that side. He said that there are many single family homes on Washington Street. He said that a lot of them have children playing there.

Mr. Glick said that this is not a rundown second class neighborhood. He said that it is a beautiful neighborhood and the Zoning is there to protect it. He said that is important for the Board to protect it as a single family zone.

Mr. Glick said that it is reasonably clear from the record that the Board made an accommodation to the Nuzzi family. He questioned whether that accommodation was lawful under Zoning. He said that it was an accommodation to a family who had been in Wellesley for a long time. He said that the proposal is to take the accommodation one step further. He said that extending this unlawful use goes way beyond the ZBA's power.

Mary Ann Fagone, said that there is a blue house across the street from this property that is a three-family. She said that when Pietro Nuzzi bought the house in the 1950's, according to Angelina's husband, Joe, he helped the grandfather change the house from a two-family to a three-family. She said that she was not sure if it had ever been a single family home. She said that looking at the house structurally, it would be hard to justify that it was a single family house. The Board said that single family applies to the zone not to the structure. The Board said that the house may be entitled to some protection as a two-family.

Mr. Himmelberger said that the Petitioner was not coming in de novo seeking to transform a single family into a three-family dwelling. He said that the proposal is to remove one clause from the existing Special Permit. He said that the three-family use has co-existed harmoniously with the neighborhood for over 50 years.

Mr. Himmelberger said that the Board, under its general powers, does have the authority to grant the modification of the pre-existing Special Permit. He said that the proposed ten-year time limit would be less than perpetuity and more than the five year periods that were previously granted.

Marsha Sussmann, said that she represented the buyer. She said that the buyer plans to eventually move into one side of the house. She said that the buyer needs to know if it will be a two or three-family.

The Board said that Zoning provides for pre-existing nonconforming structures and uses that have been grandfathered so that they don't get penalized as a result of Zoning changes. The Board questioned if it has the authority to permit a three-family in a single residence district. The Board said that the bylaw allows for a two-family in a single residence district.

Mr. Himmelberger said that he did lay out the rationale in his letter that was relied upon to some degree by prior Boards that this building is not conducive to single family use due to its size and location and further, that there would be an economic hardship to convert it.

The Board said that it was questioning what the original intent was in 1957 and in 1977 to do things that are clearly not allowed in a single residence district. The Board questioned on what basis it could change part of the Special Permit while not recognizing other parts of it.

Mr. Himmelberger said that the request is to remove or modify Condition #4 and leave the others in place. He said that there did not seem to be any issues over the 20 year period between 1957 and 1977 about the building being used as a three-family. He said that the conditions of the Special Permit were a means of putting some sort of time limitation on it and not requiring the family to come in on a recurring basis. He said that there was nothing in the record to suggest that it was some sort of personal accommodation. He said that it was focused on the economics of the building and its location hard on the edge of a commercial area. He said that this was a good use to permit in the mind of those Boards.

Michael Mastrangelo, 62 Washington Street, said that he has lived there for 31 years. He said that the house has been in the family since 1955 with the understanding that his grandfather was going to let them stay there. He said that his sister is handicapped. He said that their apartment is on the first floor, which is perfect for his sister. He said that the house has been there since 1900. He said that it was the first hospital in Wellesley.

The Board voted unanimously to continue the petition to January 13, 2011.

### **January 13, 2011**

Presenting the case at the hearing was David Himmelberger, Esq. He said that the first Special Permit for the three-family use was issued in 1956. He said that he did further research of the Zoning Bylaw from 1956 to 1977, when the current Special Permit was issued. He said that he submitted a brief to the Board with numerous exhibits. He said that the Zoning Bylaws in effect in 1956 clearly gave the Board of Appeals the authority to grant a Special Permit for a three-family use. He said that the Special Permit was legally granted and was thereafter renewed annually for a period of time before it began to be renewed at five-year intervals.

Mr. Himmelberger said that while the current Zoning Bylaws may preclude this Board from granting a Special Permit for a three-family use in a Single Residence District, that is not the matter that is before it. He said that what is before the Board is a request for a modification of the existing Special Permit. He said that, due to the fact that the Zoning Bylaws have changed since the original permit was issued, and given the fact that it was legally granted in the first instance, the current request for modification of the Special Permit falls under Section XVII of the current Zoning Bylaws which provides for pre-existing nonconforming uses, as set forth in M.G.L. Chapter 40A, Section 6. He said that Chapter 40A, Section 6 provides that a use lawfully in existence when the bylaws changed shall be grandfathered so long as there is no change or substantial extension of such use. He said that if there will be no change or substantial extension of such use, the continuation of the pre-existing nonconforming use may be extended or altered so long as the alteration of use is determined to be not more substantially detrimental than the existing use.

Mr. Himmelberger said that this proposal is not for a change of use. . He said that the requested modification does not constitute a substantial extension of the use. He said that the building is currently in use as a three-family and they are seeking continued use as a three-family.

Mr. Himmelberger said that as a pre-existing nonconforming use, it may be extended or altered. He said that is what they are seeking is a modification to permit a change of ownership. He said that the Board must make a finding or determination that the change, alteration or use will not be substantially more detrimental than the existing use. He said that there is no basis for a determination that a change in the identity of ownership would be substantially more detrimental than the existing ownership.

Mr. Himmelberger said that he addressed the issue of the Mass Fair Housing Law in his brief to the Board. He said that prohibits discrimination in the sale of property based upon ancestry. He said that a determination by the Board to not modify the Special Permit would appear to be at odds with the prohibition against discrimination by ancestry.

Mr. Himmelberger said that under the current Zoning Bylaws, Section XVII, the requested modification as a grandfathered pre-existing nonconforming use that is not substantially more detrimental to the neighborhood, could appropriately be approved by the Board. He said that the clause within the fourth condition could be removed so that the Special Permit could continue without the ownership of the Nuzzi family. He suggested that the modification be granted for a period of five years, which is in keeping with the last series of renewals.

The Board said that the 1977 permit is valid. The Board said that no one appealed the decision. The Board said that at that time the Board sought to impose an ownership condition.

Mr. Himmelberger said that the current Zoning Bylaw defers to M.G.L. Chapter 40A, Section 6. He said that modification of the Special Permit would not be a subversion of the Town's Zoning system but rather upholding the Town's Zoning laws which grandfather pre-existing lawful nonconforming uses such as this.

The Board said that this has always been a nonconforming use. The Board said that the Zoning did not change to make it a nonconforming use. The Board said that Mr. Himmelberger suggested that the use is legally existing because of the permit. Mr. Himmelberger said that the statute does not require that the use have ever been conforming. He said that the statute says that a Zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun. He said that the use was lawfully begun and in existence as a result of the Special Permit that was previously issued by the ZBA.

Mr. Himmelberger said that the Board is mandated to make a determination upon any requested change, alteration or extension of the nonconforming use. He said that the alteration or extension is permitted unless there is a determination that the change would be more detrimental to the neighborhood.

Mr. Himmelberger said that the Board has to find in the first analysis that there is neither a change of use nor a substantial extension of that use. He said that the three-family use has been in existence and is sought to be continued. He said that case law interpreting substantial extension of use has never been applied to something as de minimis as a change of ownership.

The Board said that there was a sunset provision put in the decision which the Petitioner is asking the Board to substitute. The Board said that the previous Board in 1977 allowed the Nuzzi family the right to stay in the three-family. The Board said that when Nuzzi ownership ceased the property was supposed to revert back to what it was properly zoned for. The Board said that allowing a new owner the same benefit could be considered to be a substantial extension of the permit. Mr. Himmelberger said that in 1977 there was no basis nor is there any basis now for the Board to deny a renewal on a pre-existing lawfully in existence use.

Mr. Himmelberger said that to insist upon continued ownership by the family rather than permitting a change in ownership serves no purpose. He said that the current Board can insert a condition that the permit be subject to renewals, which will give the Board the opportunity to determine if substantial changes come into being.

Mr. Himmelberger said that the permit was annually renewed through 1961 and went to 5-year renewals thereafter. He said that the 1977 decision added the condition regarding ownership. He said that if the permit was granted without subsequent terms it might be considered a re-zoning but reverting back to the 5-year renewal periods will prevent that.

The Board said that there has been no change in use proposed.

The Board said that other permits for two-families in single family districts are held to occupancy by the current owner.

Mr. Himmelberger said that the building has been a legally existing nonconforming three-family since 1956. He said that his research into the Town Resident Listing showed five different surnames in the building in 1930, four Schofields indicating one family and four other different surnames and fairly disparate ages.

Mr. Himmelberger said that there was a change in Zoning. He said that Section 7C of the March 29, 1956 Zoning Bylaw (Exhibit A) gave the Board the authority to grant a Special Permit for a three-family use in a single family district. He said that the 1956 provision that permitted the Board to issue the Special Permit has since been removed.

The Board said that the purpose of Zoning is to make properties conform. The Board said by limiting the use to a family allows them to live there for its natural course. The Board said that any buyer coming in should have their eyes open knowing that the property must be brought into conformance. Mr. Himmelberger said that he did not think that was the objective of the Zoning Bylaws. He said that there is a preamble to the Zoning Bylaw. He said that he saw nothing in there that directed the Board to not follow the law based upon a desire to get to uniformity of a particular district. He said that there are a number of directives but none that are put at odds by the modification that is sought for this petition.

Mr. Himmelberger said that the Board should look at how the use will impact the neighborhood. He said that the same number of units are going to be there. He questioned how a change in the identity of the ownership could constitute a substantially more detrimental condition. He said that there are a very discreet set of facts for this petition. He said that to permit the requested modification would not set any

sort of precedent because the Board would only be following the law. He said that the requested modification is for an alteration which is covered by Chapter 40A, Section 6.

Neal Glick, 89 River Street, said that this building was never a pre-existing lawful nonconforming use as a three-family. He said that it was stated at the previous hearing that as of 1956, the house had been occupied as a two-family for a number of years. He said that it was never a lawful use at the time that the bylaw took effect. He said that the Zoning never changed the single family Zoning.

Mr. Glick said that when the bylaw that was applicable in 1956 took effect, the property was a two-family, not a three-family. He said that may have been the case when Zoning came into effect in the 1920's.

Mr. Glick said that temporary relief was granted for a three-family use under Section 7C for a period of not more than one year. He said that when the Petitioner sought renewal in 1961, it was not pursuant to Section 7C. He said that the Board at the time did not reference Chapter 40A, Section 6. He said that the Board referenced Chapter 40A, Section 15. He said that the Board was not considering this to be a nonconforming use as far back as 1961.

Mr. Glick said that every time the Section 7C renewal came up, the Planning Board continuously recommended against it. He said that in 1977 the ZBA did not treat this as a lawful nonconforming use. He said that the Board made the decision subject to "rules and regulations now or hereafter issued by this Board, and unless sooner terminated, shall continue as long as the petitioner or a member of his family remains owner of the premises." He said that the Board was saying that they could terminate the permit at any time but they would let it continue as long as Peter Nuzzi or a family member owns the property.

Mr. Glick said that Section 7C of the bylaw only allowed for temporary permits. He said that there is no evidence before the Board now or in 1977 that the use as a three-family was lawfully begun before Zoning for single or two-family use was allowed. He said that the Board knows from the Petitioner that the house was used as a two-family until 1956.

Mr. Glick said that this Petitioner is asking this Board to do what has never been done and no Planning Board has supported. He said that they are asking for a permanent re-zoning of this property as a three-family house in a single family district. He said that it was rejected in 1956, 1971, and 1977 and should be rejected now.

Mr. Glick said that the Board could only get to what Mr. Himmelberger is citing as the standard if it concedes that the property was at any time a lawful pre-existing nonconforming use.

Mr. Glick said that the standard is that if there is a lawful pre-existing use the Board must find that it will not be substantially more detrimental to the neighborhood. He said that allowing the three-family could bring in families with more children which could contribute to an over-crowding issue at Schofield School. He said that there could be an increase in traffic on Washington, Crescent and Walnut Streets. He said that it will be detrimental to values.

Mr. Glick said that raising the Mass Fair Housing issue was turning the law on its head. He said that the Board would not be doing anything to prevent the sale of this property by enforcing the bylaw.

The Board said that there is the November 29, 1956 decision that granted the use as a three-family dwelling, subject to conditions and, as such, it became a pre-existing nonconforming use. Mr. Glick said that the Special Permit was granted under Section 7C for a “real need.”

Mr. Glick said that history proves that this was not thought of as a lawful nonconforming use at the time that the bylaw took effect in either 1956 or subsequently or perhaps more importantly in 1977. He said that there was no Zoning change. He said that Mr. Himmelberger cited the fact that Section 7C may have been eliminated at some point. He said that is not a change in the Zoning that affects use. He said that under the law the applicable use has never changed.

Mr. Glick said that the three-family use was not grandfathered because it was not a three-family before the Zoning was established as single family. The Board said that the 1956 permit, which was granted under Section 7C, is clearly the first time that it was permitted as a three-family.

Mr. Glick said that Mr. Himmelberger’s argument is that the requested modification is pursuant to Chapter 40A, Section 6, for a pre-existing nonconforming use. The Board said that Mr. Himmelberger’s assertion is true as of November of 1956 when the first Zoning action granted a Special Permit for that use. Mr. Glick said that he strongly disagreed with that. He said that Chapter 40A, Section 6 says that a Zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or bylaw. He said that the bylaw that established the single family district was in effect in 1956 when the use changed from a two to a three-family. He said that there was never a time when this property’s use as a three-family was grandfathered as a nonconforming pre-existing Chapter 40A, Section 6 use. He said that the bylaw dealing with use did not change. He said that in 1956 it may have been possible that the Board could have made findings to allow a two-family in a single family zone. He said that it was occupied in 1956 and for many years before that as a two-family. He said that there cannot be grandfathering for something that did not exist prior to the establishment of the use zone.

Mr. Glick said that the previous Board granted an owner-occupancy provision that could make some sense in the context of what they might have had before them. He said that if that provision is taken away, the house could be occupied by three college groups, which is very different from owner-occupied. The Board said that could be the situation even if it takes no action on this. The Board said that the condition is subject to the Nuzzi’s owning the property, not occupying it. The Board said that the Petitioner has proposed that the Board place a temporal limitation on the Special Permit.

Mr. Glick said that none of the previous Boards considered the Special Permit to be subject to Section 6 analysis. The Board said that in 1956, Chapter 40A, Section 6 was not what it is today. The Board said that Chapter 40A was totally re-codified in the early 1970’s. The Board said that there was a reference in an earlier decision to Chapter 40A, Section 15. The Board said that Section 15 of today has nothing to do with the matter at hand. Mr. Glick said that he researched Section 15. He said that when Section 15 was cited, the Petitioner was referencing the nonconforming section such as it was at the time.

The Board said that the 1956 decision specifically references Section 7C of the Zoning Bylaw and states that relief may be granted and then lists the conditions. The Board said that the decision does not say that the Board made specific findings but it does reference Section 7C.

Mr. Himmelberger said that Mr. Glick was reading into Chapter 40A, Section 6 a further constriction that Section 6 only applies for Zoning ordinances or bylaws that somehow go to a use district. He said that the bylaw is far more expansive than that. He said that Chapter 40A, Section 6 states that a Zoning ordinance or bylaw shall not apply to uses lawfully in existence. He said that the three-family use was lawful once the Special Permit issued and was thereafter renewed. He said that the new bylaws apply to any change or substantial extension of such use. He said that it does not say that the bylaws that speak to a particular use or speak to limit a particular use apply if there is a substantial extension. He said that it speaks to all bylaws. He said that there was a bylaw change in the Town's Zoning Bylaws, namely the removal of Section 7C and the ability of the ZBA to act under Section 7C or an equivalent today to issue new requests for three-family uses. He said that Section 7C has changed and that is why the grandfathering provision applies, regardless of where the property is located.

Mr. Himmelberger said that there will be no increased usage here. He said that except for the name on the deed, everything will continue as it has for the past 54 years, which would not constitute a substantial or detrimental condition to the neighborhood.

The Board said that the prior Boards may have wanted to have a finale to this and the end date was to the benefit of the current owner, for reasons that escape the Board today. Mr. Himmelberger said that it could be equally possible that the Board sought to lighten its caseload since it had issued renewal after renewal. He said that the Board put a time limitation on it so that it would not be a total Zoning change. He said that the Petitioner is seeking to re-implement a term limit on the Special Permit, which will give the Town the opportunity to review it at periodic intervals.

Mr. Himmelberger said that the law provides a mechanism to review an alteration to a validly lawful nonconforming use that was issued prior to a Zoning Ordinance change. He said that there is criterion that the Board can employ under Chapter 40A, Section 6. The Board said that it has to find that it will not be to a substantially greater extent or a substantially different manner or purpose. The Board said that without a temporal limitation it could be viewed as substantially greater.

Mr. Himmelberger said that they are requesting that the Special Permit be subject to five year discreet terms, such as was the case before. He said that could not be interpreted as a substantial extension of the use. He said that all cases of substantial extension refer to the use being enlarged over time or intensity of use. He said that all that they are seeking is a change of name on the deed and the removal of the potentially unlimited term in favor of term limitation.

Mary Bowers, 12 Columbia Street, said that she and her sister, Angelina Pineau, the homeowner, are the only two Nuzzi's still living. She said that the house has been a three-family for over 50 years. She said that her nephew and niece have lived in the house for 30 years. She said that her niece is an invalid. She said that she has never known the house to be filled with children.

Ms. Bowers said that she was not aware of any complaints except for years ago when a neighbor requested that bushes be cut back. She said that her sister and her husband are almost 80 years old. She said that her sister cannot maintain the house any longer. She said that there is a potential buyer. She said that the area around 60-62 Washington is not overly congested. She said that there are not a lot of cars in the driveway or around the house.

Mr. Glick said that the house is for sale. He said that the Board established a temporal condition after 1977 and it is about to come to an end. The Board said that the Petitioner is seeking a change in ownership not a change in use. Mr. Glick said that the Board said that in 1977 that the change in use that was allowed would only last as long as a member of the Nuzzi family was an owner. He said that temporal condition is coming to an end which will be a significant change.

Mr. Glick said that Section 7C did not refer to three-families. He said that it was a bleeder provision that allowed the Board some discretion. He said that the fact that that changed has nothing to do with whether this particular property was zoned or permitted for one, two or three-family use. He said that there was a provision in the bylaw that might have allowed a three-family use. He said that the fact that that provision was eliminated does not constitute a change in the bylaw that creates a valid nonconforming pre-existing use in existence prior to the change in the bylaw.

Michael Mastrangelo, 1 Crescent Street, described the layout of the existing three-family house.

The Board discussed owner-occupancy and term limits. Mr. Himmelberger said that he would prefer to have a term limitation. Mr. Glick asked if the Board would entertain a condition that would require owner-occupancy. Mr. Himmelberger suggested that the permit be conditioned for the later of a two-year term or cessation of the owner-occupancy.

Marsha Sussmann said that she represents the buyer. She said that it is the buyer's intention to purchase the house and move in. She said that the buyer does not know whether they are purchasing a two or a three-family. The Board asked if part of the transaction is that the members of the Nuzzi family remain. Ms. Sussmann said that it is not.

The Board said that it is its preference that someday the three-family use ends and it reverts back to a more legal use. The Board said that it was originally a two-family. The Board said that it was sympathetic to someone who has lived there their whole life and not wanting to leave.

#### Statement of Facts

The subject property is located at 1 Crescent Street aka 60-62 Washington Street, in a 10,000 square foot Single Residence District.

The Petitioner is requesting modification of a Special Permit (ZBA 77-6) that was granted on May 20, 1977 pursuant to the provisions of M.G.L. Chapter 40A, Section 15, for use as a three-family dwelling.

#### Submittals from Petitioner

- Letter to Richard L. Seegel, Esq., dated 11/8/10, from David J. Himmelberger, Esq.
- Photographs of exterior of subject premises and unused third floor space
- First and Second Floor Plans
- Letter to Richard L. Seegel, Esq., dated 1/5/11, from David J. Himmelberger, Esq.
- Exhibit A
  - Town of Wellesley Zoning By Laws, dated March 29, 1956

- Exhibit B
  - Board of Appeal Decision, dated 5/15/56
  - Board of Appeal Decision, dated 11/29/56
  - Board of Appeal Decision, dated 6/14/57
  - Board of Appeal Decision, dated 11/22/57
  - Land in Wellesley owned by Pietro Nuzzi, dated 10/18/57, prepared by Gleason Engineering Company
  - Board of Appeal Decision, dated 5/8/58
  - Board of Appeal Decision, dated 5/7/59
  - Board of Appeal Decision, dated 6/8/60
  - Board of Appeal Decision, dated 3/14/61
  - Board of Appeal Decision, dated 7/1/66
  - Board of Appeal Decision, dated 7/13/71
  - Board of Appeal Decision, dated 5/2/77
- Exhibit C
  - Town of Wellesley Zoning By-Law, dated 5/74
- Exhibit D
  - Town of Wellesley Zoning By-Law, as amended October 24, 1977
- Exhibit E
  - Section 6. Existing structures, uses, or permits; certain subdivision plans; application of chapter.

On December 1, 2010, the Planning Board reviewed the petition and recommended that the petition to modify Special Permit ZBA 77-6 be granted denied.

#### Decision

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

It is the opinion of this Authority that modification of a Special Permit (ZBA 77-6) that was granted on May 20, 1977 pursuant to the provisions of M.G.L. Chapter 40A, Section 15, for use as a three-family dwelling, shall not be substantially more detrimental to the neighborhood than the existing nonconforming use.

Therefore, modification of Special Permit, ZBA 77-6, is granted subject to the following conditions:

1. Existing Conditions 1, 2 & 3 of the Special Permit, ZBA 77-6, shall remain in effect.
2. Existing Condition 4 of the Special Permit, ZBA 77-6, shall be revised to state that the permit shall remain in effect as long as the dwelling is owner-occupied or a member of the Nuzzi family continues to occupy it.
3. This decision shall be subject to review in one year.

ZBA 2010-92  
Petition of David Himmelberger  
1 Crescent Street aka 60-62 Washington Street

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.

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J. Randolph Becker, Acting Chairman

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Robert W. Levy

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David G. Sheffield

cc: Planning Board  
Inspector of Buildings  
lrm

**ZONING BOARD OF APPEALS**

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

RICHARD L. SEEGEL, CHAIRMAN  
CYNTHIA S. HIBBARD  
DAVID G. SHEFFIELDLENORE R. MAHONEY  
EXECUTIVE SECRETARY  
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(781) 431-1019 EXT. 2208J. RANDOLPH BECKER, VICE CHAIRMAN  
ROBERT W. LEVY  
DAVID L. GRISSINO

ZBA 2010-92  
Petition of Sue Lee - modified  
1 Crescent Street aka 60-62 Washington Street

Pursuant to due notice, the Special Permit Granting authority held a Public Hearing on Thursday, January 5, 2012, on the petition of SUE LEE requesting review of the Special Permit that was granted for modification of Special Permit ZBA 77-6 on January 27, 2011, for use as a three-family dwelling at 1 CRESCENT STREET aka 60-62 WASHINGTON STREET, in a 10,000 square foot Single Residence District.

Property Owner: Sue Lee & Ronald Co

On December 19, 2011, the petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Marcia Sussman, who said that she was representing the homeowners, Sue Lee (the "Petitioner") and Ronald Co. She said that the homeowners live upstairs in one of the units with their sons. She said that the downstairs unit was just rented. She said that there was one person living there. She said that the Nuzzi family that was living on the other side just moved out.

The Board clarified that the homeowners were back before the Board because of Condition #3 for a one-year review.

The Board said that it is a three-family use in a Single Residence District.

The Board said that when the Board approved the Special Permit the last time it did not affect the use of the three-family. The Board said that it changed the condition that a member of the Nuzzi family had to own the property. Ms. Sussman said that the condition was changed so that if a member of the Nuzzi family did not live there, the homeowner must live there or the use would revert to a two-family. The Board said that the permit does not state that the use will revert to a two-family. The Board said that the logical inference is that there would no longer be a Special Permit for a three-family use. The Board said that the current bylaw does not allow for a three-family use in a Single Residence District.

The Board discussed the pre-existing nonconforming use due to prior actions of previous Zoning Boards.

David Himmelberger recapped the Public Hearings that resulted in the current Special Permit, ZBA 2010-92, that was granted on January 27, 2011.

There was no one present at the Public Hearing who wished to speak to the petition.

Statement of Facts

The subject property is located at 1 Crescent Street aka 60-62 Washington Street, in a 10,000 square foot Single Residence District.

The Petitioner is requesting review of the Special Permit that was granted for modification of Special Permit ZBA 77-6 on January 27, 2011, for use as a three-family dwelling at 1 CRESCENT STREET aka 60-62 WASHINGTON STREET, in a 10,000 square foot Single Residence District.

On January 4, 2012, the Planning Board reviewed the petition and recommended that the petition to modify Special Permit ZBA 2010-92 be denied.

Decision

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

It is the opinion of this Authority that modification of a Special Permit (ZBA 2010-92) that was granted on January 27, 2011 pursuant to the provisions of M.G.L. Chapter 40A, Section 15, for use as a three-family dwelling, shall not be substantially more detrimental to the neighborhood than the existing nonconforming use.

Therefore, modification of Special Permit, ZBA 2010-92, is granted subject to the following conditions:

1. Existing Conditions 1, 2 & 3 of the Special Permit, ZBA 77-6, shall remain in effect.
2. Existing Condition 4 of the Special Permit, ZBA 77-6, shall be revised to state that the permit shall remain in effect as long as the dwelling is owner-occupied.
3. This decision shall be subject to review in two years.

ZBA 2010-92  
Petition of Sue Lee - modified  
1 Crescent Street aka 60-62 Washington Street

APPEALS FROM THIS DECISION,  
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