

OFFICE OF
BOARD OF APPEALS

TOWN OF NORWELL

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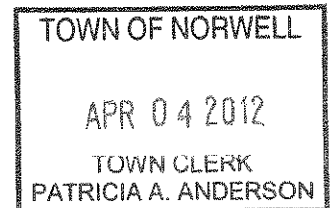
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FINDINGS AND DECISION OF THE NORWELL BOARD OF APPEALS

File No. 12-3



PUBLIC HEARING(s) were held on March 7, 2012 and March 21, 2012, by the Norwell Zoning Board of Appeals (the Board), under Massachusetts General Laws, Chapter 40A, Sections 6, 9, and 10, in the Norwell Town offices, 345 Main Street Norwell, MA on the Application (the Application) of:

**Carl Micciantuono, Administrator
of Estate of Alice F. Micciantunono
of 163 Main Street
Norwell MA 02061 (the Applicant)**

For appeal of a denial of a Building Permit under Norwell Zoning Bylaw (NZBL) 1323(a) and 1324; for a Section 6, ¶4 finding under MGL Chp.40A; and NZBL Section 1650 Isolated Lot and Section 2412 Lot Change findings; a Section 1420 Special Permit, and/or a Variance under Section 1322, if required to supplement any such finding described above, on property known and numbered as 281 Main Street (the Property), situated in Residential District A, shown on Assessor's Map 20A, Block 40, as Lot 15, and described in the instrument recorded in the Registry of Deeds, Book 35061, page 118.

The Public Hearing for this Application was duly noticed in *The Norwell Mariner* on February 16, 2012 and February 23, 2012, posted at the Norwell Town Hall, and given as required by law.

The Applicant's representative, Walter B. Sullivan, Esq. was in attendance at the hearings to present the Application, represent the Applicant and fully participate in the Hearing Process.

The Board received the following Documents, marked and numbered as Exhibits as set forth below:

1. Copy of the legal notice
2. Abutters List
3. Application, completed and signed by the Applicant, date-stamped 2/1/12 by the Town Clerk, with Exhibits 1 through 6, attached.
4. Assessors Card Print-out for the lot
5. Letter from the Applicant's attorney, dated 2/1/12, date-stamped 2/1/12 by the Town Clerk, submitting the Application
6. "Site Plan #281 Main Street, Norwell, Massachusetts" dated 11/1/07, with latest revision 3/19/08, by Grady Consulting, L.L.C. of Kingston, MA.
7. Order of Taking-Route 123/Main St., March 1962

8. Plan-Plymouth County Commissioners, 1961, shows Swanson Property

The Board received, reviewed and acknowledged the Memoranda submitted by Attorney Sullivan and the Abutters Donald and Irene Mauch. The Board also received documents, as noted and marked as exhibits, and testimony from the Applicant, local citizens and property owners. Based upon the foregoing, the Board makes the following findings:

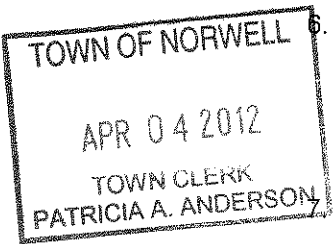
1. The Norwell Zoning By-Law (NZBL) was enacted in 1951/1952.
2. At the time of enactment, in 1951, Carl Swanson owned the Property. He lived in the house and conducted a repair business in the garage on the Property. He owned no other contiguous land. The Property was non-conforming because the buildings did not meet way line set back requirements,
3. Mr. Swanson died in 1960. After his death, both the residential use and garage use of the Property were discontinued and the Property was abandoned.
4. In 1963, a street front portion of the Property was taken, by eminent domain, by the County Commissioners for highway purposes, by an Order of Taking recorded with Plymouth County Registry of Deeds in Book 3005, Pages 24 through 38, inclusive, a copy of which was marked as Exhibit 7. In the Order of Taking, damages were awarded to the Estate of Carl Swanson. The Property was non-conforming because it did not meet the frontage requirement of 150 feet and the front yard set back requirement.
5. In 1973, the Property was non-conforming because of inadequate frontage, the inadequate set backs of the buildings (See Plan marked as Exhibit 8) and less than the required area of upland. The two non-conforming unused and abandoned buildings on the Property were demolished and removed by the Town because of their hazardous and dangerous conditions.

6. The NZBL provides, in Section 1641 (Abandonment), that:

A nonconforming use which has been abandoned or discontinued for a period of two years or more shall not be reestablished and any future use shall conform with the Bylaw.

Section 1641 is authorized by the third paragraph in General Laws, Chapter 40A, Section 6.

8. In 1973, the Property did not meet NZBL area requirements (one acre of upland), frontage and width requirements of 150 feet at the set-back line, and construction limitations within the side-line set-back area. Zoning amendments enacted in 1976 added construction/lot width requirements defined as a circular area of one-hundred fifty (150) feet that added to the non-conformity of the Property.
9. The Property is situated in the Aquifer Protection District and strict compliance with the District standards and requirements must be determined and satisfied.
10. The Applicant filed a Building Permit Application, dated 24 October 2011, with the Inspector of Buildings and on November 17, 2011, the Inspector of Buildings denied the Application by written notice. (See Exhibit 6)
11. The Applicant or a contractor working for the Applicant commenced work on the Property before the filing of the Application for a Building Permit and continued such



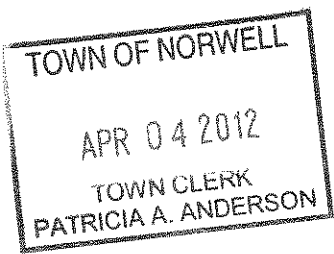
work after receiving the written notice from the Inspector of Buildings that a Building Permit could not be issued until certain relief was obtained from the permit granting authority.

12. General Laws, Chapter 40A, Section 8, provides that any person aggrieved by the inability to obtain a permit from the Inspector of Buildings may appeal to the Permit Granting Authority (this Board of Appeals under the NZBL).
13. Chapter 40A, Section 15, requires that any such appeal under Section 8 shall be filed within thirty (30) days of the date of such written decision. No appeal was filed with the Board within the appeal period.
14. On January 18, 2012, the Norwell Inspector of Buildings issued a Stop Work Order to the Applicant because of the work described in paragraph #11. (See Exhibit 6 to the Application)
15. On January 25, 2012, the Applicant, acting through his attorney, responded in writing to the Stop Work Order. (See Exhibit 6 to the Application) and the work stopped.
16. On February 1, 2012, the Application was filed with the Town Clerk and the Board.

The Board makes the following Rulings of Law:

1. At the time of the Zoning Enactments in 1951/1952 the Property became non-conforming. It contained two non-conforming buildings that were being used by the Property owner as his house and a commercial garage.
2. In 1962, a small portion of the frontage of the Property was taken for Highway Purposes (see Finding 4. and Exhibit 7). It has been argued that after the taking, the Property was changed by that non-zoning event, and, therefore, because the Property no longer satisfied frontage and existing building set-back requirements, it is not entitled to the G.L.c. 40A, Section 6 (fourth paragraph) protection provided pre-existing non-conforming lots for single family residential use claimed by the Applicant. See **Johnson v. Board of Appeals of Andover**, 78 Mass.App.Ct. 292 (2010). Since this Decision is decided on other grounds and the Taking was for Highway Purposes, we do not apply **Johnson**.
3. There is a line of cases that supports the argument presented that the Chapter 40A, Section 6 (fourth paragraph) exception is only applicable to vacant land at the time of the adoption of a Zoning By-Law or of the By-Law provision that renders the parcel non-conforming. See **Kibbe v. Town of Douglas**, Appeals Court 06-1455, June 21, 2007. **Snow River, Inc. V. Doris M. Pearson et al**, 28 Mass. L. Rptr. No. 21. 442 (July 25, 2011). **Rourke v. Stuart Rothman**, 448 Mass. 190 (2007). We have decided the matter on other grounds.
4. G.L.c. 40A, Section 6, provides, in the Third Paragraph, that zoning by-laws may "define and regulate" nonconforming uses and structures abandoned "or not used for a period of two years or more." The Norwell Zoning By-Law, in Section 1641, quoted in Finding #6, requires that any non-conforming use discontinued for a period of two years or more shall not be reestablished and "any future use shall conform with the Bylaw."

The non-conforming dwelling and garage buildings on the Property that were abandoned and associated uses that were discontinued, both for approximately thirteen (13) years, and then removed by the Town because of their hazardous and dangerous conditions, changed the status of the Property so that a single family dwelling or a garage building cannot



now be reestablished in any form unless they and the building site conforms with present Norwell Zoning By-Law requirements.

The proposed construction and building on the Property, as presented in the Application, do not meet existing zoning standards and safeguards.

DECISION OF THE BOARD:

BASED UPON THE FOREGOING, THE BOARD OF APPEALS, UPON MOTION DULY MADE AND SECONDED, UNANIMOUSLY VOTED THE FOLLOWING:

The APPEAL from the Inspector of Buildings (the IB) denial of a permit and determinations set forth in his letter of November 17, 2011, was not timely filed. However, in order to eliminate further conflict, the Board determines that, based upon the foregoing Findings and Rulings by the Board, the Appeal is denied because the Findings and Rulings of the IB are correct and are hereby sustained.

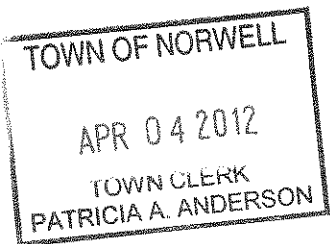
The APPEAL from the IB's determinations and Stop Work Order of January 18, 2012, is denied because the Findings and Rulings of the IB are, based upon the foregoing, correct and are hereby sustained.

The SPECIAL PERMIT requested in the Application is denied because of the following specific findings:

1. the proposed construction and use will be detrimental to the neighborhood because of the low and wet nature of the site, the crowding of the dwelling and septic system toward the Easterly side of the site, the elevation changes along the Easterly side of the Property and the proposed changes to the natural drainage on the Property. In response to a so-called Section 6 finding, the proposed new construction will be substantially more detrimental to the neighborhood because of its size, required elevation changes and drainage impact than the prior cottage type building occupied by the original owner in 1951, abandoned and discontinued in use for approximately 13 years and removed for public safety reasons in 1973.
2. the proposed changes to the site will significantly alter the character of the zoning district.
3. the proposed changes to the site will impact upon the ability of emergency vehicles to access and service the proposed dwelling and site especially during weather related events. Main Street, Route 123, is a busy and important access route from the express way to and from the sea coast area and the Property is on the inside corner of a busy access route.

The VARIANCE requested in the Application is denied because of the following Specific findings:

1. A. The Abandonment and discontinuance of use of the Property for approximately 13 years creates a self imposed hardship and, therefore, a hardship finding is denied.
- B. There are environmental issues involving the Property, noted in part in paragraph number 1, in the SPECIAL PERMIT section above, that impact upon land use. These issues are common in the Town of Norwell because of soil types, elevation changes, no town sewer or town wide




drainage systems and wetland areas and marshes that comprise a substantial portion of the community. A reflection of the issue is seen in the Zoning area requirement for single family house lots that subtracts wetlands, marshes, etc. from lot area calculations. The Property is an example of the problem. It is, because of the foregoing, difficult to find that because in the abstract, a Town wide problem, a specific finding of hardship can be made in the particular, as in this Application. A finding of substantial hardship is therefore, denied.

2. For the same reason, a finding concerning the public good is denied.
3. The intent and purpose of the Zoning By-Law, as expressed therein and in the Zoning Act, would be compromised if relief were granted.

At the conclusion of the evidentiary part of the hearing process the Board reviewed the evidence, deliberated and then unanimously VOTED to deny all of the relief requested in the Application. The Applicant and his attorney were present during the deliberation and vote, all in open session, and were informed of the Board's action. A Notice of Decision, dated March 28, 2012, was filed with the Town Clerk, with copies mailed to the Applicant and his Attorney.


Lois S. Barbour


Thomas P. Harrison


David Lee Turner

Date Filed with Office of the Town Clerk

*This space reserved for
Date Stamp of Town Clerk*

TOWN OF NORWELL
APR 04 2012
TOWN CLERK
PATRICIA A. ANDERSON

NOTICE OF APPELLATE RIGHTS: Any decision of the Board of Appeals may be appealed to Superior Court within twenty (20) days after filing of the written decision with the town Clerk. Any construction or pre-construction activity is undertaken at the applicant's risk during the appeal period.