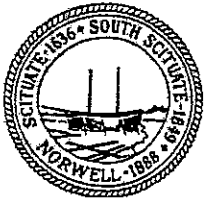


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OFFICE OF  
BOARD OF APPEALS

## TOWN OF NORWELL

345 MAIN STREET, P.O. BOX 295  
NORWELL, MASSACHUSETTS 02061  
(781) 659-8018 • Fax (781) 659-1892

### *Members*

Lois S. Barbour, Chair  
Philip Y. Brown, Vice Chair  
David Lee Turner, Clerk

### *Associate Members*

Thomas P. Harrison  
Ralph J. Rivkind

### **FINDINGS AND DECISION OF THE NORWELL ZONING BOARD OF APPEALS**

**File No. 14-13**

A PUBLIC HEARING was held on October 15, 2014, by the Norwell Zoning Board of Appeals under MA General Laws, Chapter 40A, Section 10, in the Norwell Town offices, 345 Main Street, Norwell, MA, on the application of:

**Martin Nagle  
19 Toddy Brook Road  
Hollis, NH 03049**

For a **Variance** under Section 2432 and 2450(a), the minimum lot width measured at the required setback line of 150 feet, under the Norwell Zoning Bylaw. The existing lot has 145.3 feet. The application contemplates a single-family dwelling on a vacant lot located on **Cross Street** and shown on Assessor's Map 10C, Block 50, Lot 49, Land Court Cert. #1060355, dated 9/3/2004, located in Residential District A.

The Public Hearing for this application was duly noticed in the *Patriot Ledger* on September 29, 2014, and the *Norwell Mariner* on October 9, 2014, and posted at the Norwell Town Hall in accordance with the Open Meeting Law.

The applicant was represented by its Attorney John L. Sullivan of Scituate, MA, and its engineer, Gregory J. Morse, P.E., of Morse Engineering Company, Inc., of Scituate, MA. Approximately twelve members of the public were in the audience and expressed opposition by a show of hands with no hands raised in support of the application.

## FILE INVENTORY:

1. Copy of the legal notice
2. List of Abutters of Lot 50-49 from the Assessors' Office
3. Assessors' Card for Lot 50-49, printed 8/26/14
4. Completed Application, signed by Martin Nagle, and date-stamped by the Town Clerk and the Norwell Board of Appeals on August 26, 2014, with
  - a. A stamped copy of a prior decision of the Norwell Board of Appeals on behalf of "The Aloha Foundation", as filed with the Norwell Town Clerk on Jan 10 1997, granting a Variance.
  - b. Quitclaim Deed copy for "Lot 5, Cross Street, Norwell, Massachusetts 02061", as recorded at the "Plymouth Deeds Reg #25" on 09/03/04.
5. Plan to Accompany ZBA Application entitled, "Cross Street/(Assessor's Map 10C, Block 50, Lot 49)/Norwell, Massachusetts", dated 8/24/14, signed and sealed by Gregory J. Morse, RPE
6. Foundation Permit Plan entitled, "Cross Street/(Assessor's Map 10C, Block 50, Lot 49)/Norwell, Massachusetts", dated 9/8/14, as revised 10/15/14, signed and sealed by William Joseph McGovern, PLS, on 10/15/2014
7. Copy of "Brief in support of the application of Martin Nagle for a Variance from Sections 2432 & 2450A (Lot width at front yard setback) that would allow construction of a single family residence at his property located on Assessor's Map 10C as Block 50, Lot 049, Cross Street in Norwell, Massachusetts", prepared by Gregory J. Morse, P.E., Morse Engineering Company, Inc., of Scituate, MA.
8. Letter of October 14, 2014, from James and Mary Montanari of 198 Cross Street, hand-delivered and stamped received by the Board of Appeals on October 14, 2014, requesting postponement of the hearing due to claimed improper notice
9. Copy of Docket No. 98-P-1286, dated November 4, 1999, of the Massachusetts Appeals Court 128 Decisions, to "reverse the judgment of the Superior Court and remand the case for entry of a new judgment vacating the decision of the board of appeals granting the variance". A copy of the Massachusetts Appeals Court 128 Decision, provided by the office of Norwell's Town Counsel was sent by the Board's administrative assistant via email on 9/12/14, to the Applicant's attorney at the request of the Board's chair, prior to advertisement of the public hearing.

N.B.: The recent application was incomplete, as it did not include a copy of or reference to a subsequent decision of the Board of Appeals in October 2002 on this property (See 4a above) of which the Board made the Inspector of Buildings aware on or about September 3, 2014, who was to have spoken with Mr. Morse.

**PRIOR PROCEEDINGS:** As excerpted from the decision on File No. 02-24 of the Norwell Zoning Board of Appeals:

*This property is no stranger to this Board as The Aloha Foundation first received a variance from this board on January 10, 1997. In essence, this parcel of land was shown on the Town's public records as both a buildable and taxable lot from 1969 through at least 1995. The Board, finding, in part, that there had been reliance by owners on the Town records, found that the requirements for a variance were met and, as such, granted it. The Board's decision was appealed to the Superior Court by a group of abutters that included Mr. and Mrs. Green. On April 1, 1998, the Superior Court upheld the Board's decision in an l1 page opinion. The abutters then appealed the Superior Court's decision to the Appeals Court.*

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On November 4, 1999, in a rescript opinion, issued without the benefit of oral argument, the Appeals Court reversed the Superior Court's affirmance, finding that the lot shape does not justify the grant of the variance and that "[t]he judge made no findings that would allow this court to conclude that the shape of the lot caused the hardship of which the Foundation complains." Green v. Zoning Board of Appeals of Norwell, No. 98-P-1286, at 2 (Mass. App. Ct. Nov. 4, 1999). The Appeals Court did not address the Superior Court's other findings - or the Supreme Judicial Court's precedent - that a variance for minor dimensional variations does not substantially derogate from the intent of the zoning by-laws. See Green v. Gardner, No. 97-0105B, at 10 (Plymouth Sup. Ct. April 1, 1998). Nor did the Appeals Court address the unique financial hardship suffered by The Aloha Foundation that is engendered, at least in part, by the property owners' reliance on town records.

The Aloha Foundation subsequently sought reconsideration of the Appeals Court's decision. On January 5, 2000, the Appeals Court issued a two page Amended Memorandum and Order, which stated, in part, "[a] board of appeals may grant a variance, however, only where it specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not Superior Court and remand the case for entry of a new judgment vacating the decision of the board of appeals granting the variance." Green v. Zoning Board of Appeals of Norwell, No. 98-P-1286 at 1-2 (Mass. Appeals Court Jan. 5, 2000).

**The Current Application** [Ed. Note: Refers to ZBA File No. 02-24]

The applicant has waited the prescribed two year period to re-apply for the relief requested and admits that none of the underlying facts have changed since this Board first granted the Aloha Foundation a variance in 1997. Both parties have submitted letters to the Board arguing their positions and both parties have submitted the decisions and briefing that makes up the procedural history of this application. The Board reviewed these submittals and heard argument from both the applicant and the abutter on whether granting a variance was appropriate. The board hereby incorporates into this decision, the factual findings it made relative to the property in its 1997 decision as well as the factual findings made by the Superior Court, which were referred to by the Appeals Court.

The only fact that has changed since 1997 is that, although the Superior Court upheld the Board's grant of a variance, the Appeals Court did not. There appears to be no case decided by the Massachusetts courts in which a variance was granted, reversed by a Court and then re-granted by a zoning board of appeals.

Because the Appeals Court has ruled that this Board's grant of a variance for this property was in error and because no other facts have changed, this Board believes that it is constrained to abide by the Appeals Court's decision - even though the Appeals Court did not appear to directly address the findings of this Board or the Superior Court, the financial hardship to the applicant that results from the unique shape of the lot, or the reliance by property owners on the Town's records. The Board thus unanimously voted to deny The Aloha Foundation's request for a variance. The request for a variance is hereby denied.

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**FINDINGS:**

1. The Application, notice, and all file information listed above were introduced into evidence, and are hereby made exhibits in this case and incorporated into and made a part of the decision.
2. No material facts in this matter have changed subsequent to prior applications and/or court proceedings.
3. Property lines remain in accordance with prior applications and decisions and no dimensional change has been effected.
4. The Board respectfully defers to the judgment of the Massachusetts Appeals Court 128 Decision in Docket No. 98-P-1286 and its subsequent response on January 5, 2000, to a request by the prior owner for reconsideration.

**DECISION OF THE BOARD:**

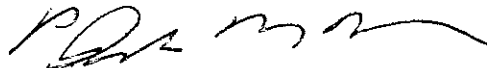
Based upon the representations of the Applicant and the Board's findings detailed in this decision, upon a motion duly made and seconded, members **VOTED** unanimously to **DENY** the requested **Variance** on property identified as Lot 50-49 on Cross Street.

**CONDITIONS APPLYING TO ALL VARIANCES:**

1. **RECORDING OF THE DECISION:** After receiving certification from the Town Clerk that no appeal has been taken within twenty days, or if appealed than dismissed or denied, a copy of the Board's decision must be filed with either the Registrar of the Plymouth County Registry of Deeds to be recorded and indexed in the grantor index under the name of the owner of record in the case of unregistered land, or with the Recorder of the Land Court to be registered and noted on the owner's certificate of title in the case of registered land.
2. **RECORDING RECEIPT:** A copy of the recording fee receipt must be returned to the Board of Appeals.



Lois S. Barbour



Phillip Y. Brown



David Lee Turner

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Date Stamp of Town Clerk*

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**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.