

OFFICE OF  
BOARD OF APPEALS

# TOWN OF NORWELL

345 MAIN STREET, P.O. BOX 295  
NORWELL, MASSACHUSETTS 02061  
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## **FINDINGS AND DECISION OF THE NORWELL BOARD OF APPEALS**

*File No. 09-12*

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Following the issuance of an **ORDER OF REMAND AFTER RESCRIPT** (Remand Order) by the Land Court Department of the Trial Court (Cutler, J.) dated June 21, 2016 in the matter of Thomas F. Williams, Individually and as Trustee of River Realty Trust v. Norwell Zoning Board of Appeals, et al., Docket No. 10 MISC 419885 (JCC), a duly noticed and advertised **PUBLIC HEARING** was opened on July 27, 2016, continued to September 14, 2016 and closed on September 21, 2016, by the Norwell Zoning Board of Appeals under Massachusetts General Laws, Chapter 40A, §§8, 11 & 15 and the Remand Order, at the Norwell Town Offices located at 345 Main Street Norwell, Mass on the original application of:

**William McCauley  
82 Old Meeting House Lane  
Norwell, MA 02061**

**Maura A. and Gregory T. Lareau  
35 Stony Brook Lane  
Norwell, MA 02061**

**Richard and Deborah Thornton  
32 Stony Brook Lane  
Norwell, MA 02061**

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appealing the issuance of a Building Permit No. 14501 on August 31, 2009, by the Inspector of Buildings (Timothy J. FitzGerald), as provided under §1323a, §2431 (lot frontage and width), and §2441 (front yard) of the Norwell Zoning Bylaw. The parcel of land is identified by the Norwell Assessor's Office as Lot 62 North River and is also known as Lot 62 Stony Brook Lane and is located on Assessor's Map 16D, Block 62, Lot 62 and is described in a deed recorded at the Plymouth County Registry of Deeds at Book 23568, Page 133. The parcel of land contains approximately 2.1 acres of land and is located in the Town of Norwell's Residential District A, Flood Plain, Watershed and Wetlands Protection District, and the North River Scenic Corridor.

The Remand Hearing was duly posted at the Norwell Town Hall on July 7, 2016 and advertised on July 11, 2016 in the Patriot Ledger and on July 21, 2016 in the Norwell Mariner.

The original Appellants, Maura and Gregory Lareau, the holder of the permit, Thomas F. Williams, and counsel for Thomas F. Williams, Jeffrey Nguyen, Esq., were present at the first Remand Hearing and the two continued hearing dates. There were other abutters and interested parties present at the hearing and continued hearing dates. Mr. Williams engaged a title examiner who presented her findings. There was a stenographer present. Further, the Board of Appeals engaged its own title examiner, Joel A. Stein, Esq. to address the issue of access and title to the existing right of way referred to as Stony Brook Lane.

### **File Documentation**

The Board incorporates all of the File Documentation included in the original Decision of the Board filed on December 21, 2009, as set forth herein.

1. North River Commission Special Permit and Conditions dated July 9, 1997;
2. 96 Stony Brook Lane Order of Conditions dated September 16, 1997;
3. 96 Stony Brook Lane Superseding Order of Conditions dated February 27, 1998;
4. Plot Plan dated July 16, 2001;
5. 96 Stony Brook Lane Easement Deed from Thomas F. Williams, Trustee of the River Realty Trust to Theodore S. Kyros dated February 27, 2003;

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6. 96 Stony Brook Lane Extension Permit for Order of Conditions dated February 27, 2004;
7. Septic System Plan dated September 27, 2005;
8. Application for Disposal System Construction Permit dated September 28, 2005;
9. 96 Stony Brook Lane Notice of Intent dated October 31, 2005;
10. 96 Stony Brook Lane Order of Conditions dated February 13, 2006;
11. Correspondence from Attorney Guimond to Norwell ZBA dated October 23, 2006;
12. Correspondence from Attorney Guimond to Norwell ZBA dated November 29, 2006;
13. Correspondence from Attorney Guimond to Norwell ZBA dated December 20, 2006;
14. Correspondence from Attorney Guimond to Norwell ZBA dated December 20, 2006;
15. Correspondence from Attorney Guimond to Norwell ZBA dated December 20, 2006;
16. Correspondence from Attorney Guimond to Norwell ZBA dated December 20, 2006;
17. Correspondence from Maura Lareau to Norwell ZBA dated January 8, 2007;
18. Correspondence from Attorney Guimond to Norwell ZBA dated February 14, 2007;
19. Correspondence from Maura & Greg Lareau to Norwell ZBA dated February 16, 2007;
20. Correspondence from Attorney Guimond to Norwell ZBA dated February 28, 2007;
21. Correspondence from Maura Lareau to Tim Fitzgerald dated June 29, 2007;
22. Correspondence from Maura Lareau to Tim Fitzgerald dated January 10, 2008;
23. Correspondence from Thomas F. Williams to Tim Fitzgerald dated January 25, 2008;
24. Correspondence from Maura Lareau to Tim Fitzgerald dated January 27, 2008;
25. Correspondence from Civil Design Solutions, Inc. to Tim Fitzgerald dated January 30, 2008;
26. Correspondence from William McCauley to Tim Fitzgerald dated February 3, 2008;
27. Foundation Plan dated February 4, 2008;
28. Correspondence from William McCauley to Tim Fitzgerald dated May 27, 2008;
29. Request for Extension of Septic System Permit dated October 14, 2008;
30. ZBA Application for Public Hearing dated October 17, 2008;
31. Correspondence from Maura Lareau to Tim Fitzgerald dated October 31, 2008;

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32. Well Permit Application dated November 4, 2008;
33. Energy Conservation Application Form dated August 11, 2009;
34. Building Permit Application dated August 11, 2009;
35. Plot Plan dated August 12, 2009;
36. Building Permit issued August 31, 2009;
37. Correspondence from William McCauley to Norwell ZBA dated September 10, 2009;
38. Public Hearing Agenda published notice for September 30, 2009 (published in the Patriot Ledger on September 10, 2009 & in the Norwell Mariner on September 17, 2009);
39. Correspondence from Maura Lareau to Norwell ZBA dated October 5, 2009;
40. Correspondence from Thomas J. Owens to the Norwell ZBA dated October 6, 2009;
41. Title Exam of Marcia E. Freeman received October 13, 2009;
42. Correspondence from Thomas F. Williams to Norwell ZBA dated October 14, 2009;
43. Correspondence from Thomas F. Williams to Norwell ZBA dated October 20, 2009;
44. Correspondence from Thomas F. Williams to Norwell ZBA dated October 23, 2009;
45. Correspondence from Thomas F. Williams to Norwell ZBA dated October 28, 2009;
46. Correspondence from the Norwell Planning Board to Norwell ZBA dated November 19, 2009;
47. Correspondence from Thomas F. Williams to Norwell ZBA dated November 25, 2009;
48. 2009 Norwell ZBA Decision date stamped December 21, 2009;
49. Correspondence from Attorney Barbadoro to Patricia Anderson dated January 8, 2010
50. Deposition Subpoena dated March 26, 2010;
51. Correspondence from Thomas F. Williams to Tim Fitzgerald dated October 7, 2010;
52. Commonwealth of MA Land Court Decision dated January 11, 2013;
53. Commonwealth of MA Land Court Judgment dated January 11, 2013;

In addition, the Board accepted the following additional information and new evidence during the Remand Hearings:

54. Order of Remand dated June 21, 2016 from Land Court (Cutler, J.)
55. Notice of Public Hearing filed July 7, 2016 and advertised on July 11, 2016 and July 21, 2016
56. Memorandum of Thomas F. Williams for Reinstatement of Building Permit No. 14051 in Accordance with the Guidance of the Massachusetts Appeals Court Decision and Land Court Remand Order date July 25, 2016;

57. Public Hearing Agenda for July 27, 2016;
58. Correspondence from Maura & Gregory Lareau to Norwell ZBA dated July 31, 2016
59. Correspondence from William McCauley to Norwell ZBA dated August 10, 2016;
60. Title Exam prepared by Joel A. Stein and dated September 2, 2016;
61. Memorandum of Thomas F. Williams to the Norwell ZBA concerning David Turner Raising Question Outside of the Remand Order relating to Chapter 41, Sec. 81E and Raising Rourke v. Rothman which has no relevance to Chapter 41, Sec. 81E dated September 20, 2016;
62. Memorandum of Thomas F. Williams to the Norwell ZBA concerning application of Mass. Gen. L. ch. 40A, Sec. 6, Paragraph 4 dated September 20, 2016;
63. Lot 62 Stony Brook Deed from Charles Guy Williams to Thomas F. Williams dated November 20, 2002;
64. Lot 62 Stony Brook Deed from Norman Frederick McCarty and Katherine E. McCarty to Charles Guy Williams dated March 23, 1964;
65. 96 Stony Brook Lane Deed from Theodore S. Kyros to Christopher T. Moss dated February 20, 2007;
66. Appellee's Memorandum in Support of the Affirmation of the Inspector of Buildings Issuance of a Building Permit for Lot 62, Stony Brook Lane.
67. Additional Title Information and Research from Jeffrey Nguyen, Esq. re: Stony Brook Lane and Lot 62
68. Deed and Plan Research Report: Lot 62, North River by Maura Lareau dated July, 2016.
69. Letter dated July 31, 2016 from Maura Lareau re: Follow Up Letter to July 27, 2016 Public Hearing
70. Letter dated August 10, 2016 from Maura Lareau re: Rebuttal to Williams Presentation
71. Letter dated August 20, 2016 from Maura Lareau re: Existing Way and Related Issues
72. Email from Town Counsel to Lareau and Nguyen dated September 13, 2016 re: Title Report from Board
73. Memorandum from Town Counsel dated September 16, 2016
74. Opinion Letter from Attorney Joel A. Stein dated September 2, 2016 with supporting documents
75. Opinion Letter (Revised September 14, 2016) from Attorney Joel A. Stein
76. Informational Package from David L. Turner (concerning c. 41 §81E, Town Official Map (1972), Rourke v. Rothman, 448 Mass. 190 (2007))
77. Email from Maura Lareau to Lois Barbour dated September 19, 2016 requesting continuance of Board hearing
78. Email from Town Counsel to Maura Lareau and Jeffrey Nguyen dated September 20, 2016 enclosing Informational Packet from David L. Turner
79. Land Court Decision (Courtney, J.) in the matter of Herbert A. Lincoln v. Inhabitants of the Town of Norwell, Docket No. 9746 (MISC) dated January 16, 1947 (invalidating Norwell Zoning Bylaws

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- 80. Attested copy of 98<sup>th</sup> Town Report for 1947 (Selectmen's decision not to appeal invalidation of zoning decision)
- 81. Email from Jeffrey Nguyen, Esq. dated September 21, 2016 opposing request for continuance by Lareau
- 82. Memorandum to Board of Appeals by Jeffrey Nguyen, Esq. dated September 20, 2016 re: c. 41 §81E Issues and Rourke v. Rothman (2007)
- 83. Memorandum to Board of Appeals by Jeffery Nguyen, Esq. dated September 20, 2016 re: application of Gen. L. c. 40A §6 para. 4
- 84. Transcript of Public Hearing from September 14, 2016 by Ellen M. Fritch & Associates

The Board's open meeting minutes, the testimony of the parties and other interested persons in attendance is also included in the record of the proceedings.

### Background

It is noted that this property that is the subject of this Remand Hearing was also the subject of a prior public hearing that resulted in a written decision filed on December 21, 2009 overturning the issuance of the Building Permit, which was appealed by Thomas F. Williams on January 8, 2010. The Land Court rendered a decision in Docket No. 10 MISC 419885 on January 11, 2013, following a trial of the matter dismissing the appeal and Thomas Williams filed a further appeal to the Massachusetts Appeals Court which on September 14, 2014 issued a Memorandum and Order in Appeal No. 2013-P-0438 which vacated the Land Court judgment and remanded the matter to the Land Court for further proceedings. The Board takes administrative notice of the prior decisions of the Land Court and Appeals Court, including the Remand Order.

In this Remand Hearing, the Board is faced primarily with two issues, which were the subject of express order of the Court as follows, having adhered to requirements to (1) schedule and notice a public hearing within forty-five (45) days of the Remand notice, dated 6/21/16, and (2) publish, post and send notice of the public hearing on the remand in accordance with G.L. c. 40A §11 and to all counsel of record.

3. In considering the remanded appeal, the ZBA shall review both the evidence presented at the hearing on the original appeal and any new evidence presented at the public hearing on the remanded appeal, and **shall determine whether Lot 62 qualifies for separate lot protection under G.L. c. 40A, §6, ¶4 in that it met the then-applicable zoning requirements for residential building lot frontage when it was created by deed in 1948.**[2]  
Such determination shall be made in light of the then existing Zoning By-law definition of the term "way" as including a "passage,"

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and the Appeals' Court's conclusions that the 1948 deed for Lot 62 "described the existing right of way to the public way and the existing right of way was shown on the plan [referenced in the 1948 deed] crossing [Lot 62] for more than one hundred feet."

4. Since frontage necessarily implies access to a public way, **the ZBA may also consider whether the Plaintiff has the legal right to use the full length of the "existing way" described in the 1948 deed creating Lot 62 to access the nearest public way, provided the legal access issue is raised by a person with standing to do so.**

See Remand Order dated June 21, 2016 (emphasis supplied).

**Findings:**

1. The subject property known as Lot 62 is owned by Thomas Williams, Trustee of the River Realty Trust ("Williams").
2. The subject property is undeveloped, contains approximately 2.1 acres of land and is located in the Town of Norwell's Residential District A, Flood Plain, Watershed and Wetlands Protection District, and the North River Scenic Corridor.
3. At present, the only means of access to the premises is over a way called Stony Brook Lane, a portion of which way crosses through the land of Maura and Gregory Lareau. The Lareau's dispute that Williams has a legal right to use Stony Brook Lane and/or the portion of Stony Brook Lane, which crosses through their property. There was no plan laying out the exact path of Stony Brook Lane offered by any party.
4. The Town on its Official Town Map from 1972 depicts a general layout of Stony Brook Lane which is identified as a "private country lane" on said official map and the Town of Norwell Highway Department does not plow or maintain this way or lane.
5. The property owner, Williams, supported by a title examiner who gave testimony at the July 27, 2016, public hearing, testified that this parcel known as Lot 62 has been held in separate ownership since it was first conveyed in a deed by Esther J. MacKay to James Fox Macdonald, Jr. on June 11, 1948 (the "1948 Deed"). It was not contested by the Lareau's that the subject property has been held in separate ownership since the lot was created.
6. The subject property is shown on a recorded plan of land entitled "Plan of

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Land, Norwell, Mass." surveyed for Esther J. Mackay dated May 27, 1948 by S. Litchfield, CE of N. Scituate, MA (the "Litchfield Plan"). The subject plan indicates that the property contains 2.076 acres.

7. On the Litchfield Plan, there is an existing "right of way" depicted which crosses the subject property although the layout of the existing "right of way" is not shown to any material degree once it leaves the boundary of the subject property.
8. The existing 1948 Deed also contains reference to "a right to pass and repossess only, over existing right of way which is the Westerly continuation of the above-mentioned right of way running from the granted premises in a general Westerly direction to Main Street, Route 123, Norwell; the grantor hereby giving to the grantee, insofar as she may, the right to pass and repossess over that portion of the above-mentioned right-of-way which crosses the land now or formerly one, Hatch."
9. Williams testified that the land in the 1948 Deed was acquired in 1964 by his uncle, who left the property to him and that he has been visiting the subject property since he was very young and that he has accessed the subject property over the existing layout of Stony Brook Lane from Main Street. Williams also displayed a series of Assessor's Maps, which he indicated show the layout of Stony Brook Lane.
10. Williams testified that there is adequate access for fire and emergency equipment to the subject property and cited an example of the use of Stony Brook Lane for services rendered to a parcel beyond his own. The Lareau's dispute that Stony Brook Lane's condition provides adequate access to serve as frontage.
11. The Building Permit, which was issued to Williams, was signed off by the Town of Norwell Fire Chief when the permit application was routed through the various town boards and committees.
12. Contrary to what the parties believed and indicated to the Land Court and was then incorporated into the appeal, the Town of Norwell did adopt a zoning bylaw as early as 1942; however, during the Remand Hearing process, Board member, David Turner, a former moderator and selectman recalled that the early zoning bylaws were the subject of a lawsuit that invalidated the zoning bylaws prior to creation of the lot in 1948. Mr. Turner researched the issue and located a copy of the judgment of the Land Court invalidating the prior zoning bylaws from 1947. See Land Court Decision (Courtney, J.) in the matter of Herbert A. Lincoln v. Inhabitants of the Town of Norwell, Docket No. 9746 (MISC) dated January 16, 1947 (invalidating Norwell Zoning Bylaws).

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13. Norwell did not enact a new zoning bylaw until 1951, which said bylaw became effective after approval of the Attorney General in 1952.
14. As a consequence, at the time of the creation of the subject property there was no existing zoning bylaw governing the requirements for a parcel to be buildable.
15. Although the length of the right of way crossing through the subject property is not measured on the Litchfield Plan, there are lot line dimensions from which the Board can infer there is significantly more than 50' feet of frontage on the noted right of way.
16. Williams' title examiner testified that, in her opinion, Williams has the legal right to use the entire length of what is now Stony Brook Lane for access to Main Street at the July 27, 2016, public hearing.
17. In response, the Lareau's submitted an extensive Deed and Plan Research Report: Lot 62, North River by Maura Lareau dated July 2016. Maura Lareau subsequently testified that Williams' title examiner was incorrect and that Williams did not have the legal right to access her property or the land towards Main Street through which Stony Brook Lane exists today since her land was not formerly land of Esther Mackay. Williams and his counsel, disputed, Ms. Lareau's opinion and have asserted that as a matter of law that Ms. Lareau cannot by operation of law dispute his contentions concerning the way.
18. The Board finds specifically finds that the Lareau's have asserted specific facts setting forth a plausible claim of an infringement to their property rights, which the Board is not able to resolve and accordingly they have standing to challenge the assertion by Williams of his claim to a legal right to use the full length of the "existing way" described in the 1948 deed creating Lot 62.
19. As a consequence of the dispute between the parties about rights in the existing way, the Board commissioned Attorney Joel A. Stein of Norwell to research the parties' legal title contentions. Attorney Stein could not at reasonable cost determine the precise answer to the legal title contentions; however, Attorney Stein did opine that Lot 62 has access over Stony Brook Lane or another unnamed way through so much of the property as was formerly owned by MacKay and indicated that despite his inability to find a specific grant of easement for Lot 62, it was clear from deeds throughout the chain of title that these ways, whether in the current location of Stony Brook Lane or Old Meeting House Lane, have been used for an extended period of time by those parties abutting the same.
20. The Board accordingly finds in response to the specific questions posed

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to it as follows:

**Question 3:**

Does Lot 62 qualify for separate lot protection under G.L. c. 40A, §6, ¶4 in that it met the then-applicable zoning requirements for residential building lot frontage when it was created by deed in 1948?

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**Answer**

Yes. Lot 62 qualifies for separate lot protection under G.L. c. 40A, §6, ¶4, which states that:

“Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

“[T]he purpose of a frontage requirement is to make certain that each lot “may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare” *Gifford v. Planning Bd. of Nantucket*, 376 Mass. 801, 808 (1978). Because the term “frontage” is not defined under G.L. C. 40A, §6, courts look to the town’s zoning bylaw for a definition. *Marinelli v. Board of Appeals of Stoughton*, 440 Mass. 255, 262 (2003) (“Because G.L. c. 40A does not define “frontage,” we look to the applicable town bylaw for a definition.”). Frontage is defined under the current Norwell Zoning Bylaw as “[a] continuous and uninterrupted portion of a sideline of a way, public or private...” The term “[street or] way” is defined by the Norwell Zoning Bylaw in Article V, Definitions, as: “Any public way or any private way shown on a plan approved under the provisions of the subdivision control law or in existence when the provisions of said subdivision control law became effective in the Town of Norwell, having in the opinion of the Planning Board suitable width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land abutting thereon or served thereby and for the installation of municipal services to serve such land and the building erected or to be erected thereon.”

With respect to Lot 62 North River, the Board finds “frontage”, as it relates to “vital” access for emergency vehicles from Main Street to Lot 62 North River has been acknowledged by the Norwell Fire Chief. The Board also finds that Stony Brook Lane is a continuous and uninterrupted “way” as defined under the Norwell Zoning Bylaw.

The Board further concludes that the other requirements of G.L. c. 40A, §6, ¶4 are met because:

- a) Lot 62 has 5,000 sf of area and 50 feet of frontage on a way or lane;
- b) Lot 62 is located in an area zoned for single or two family use;
- c) Lot 62 was created 1948 at a time when the Town of Norwell did not have any zoning requirements, all zoning bylaws passed by the Town were ruled invalid in Land Court Case No. 9746 Misc. (*Herbert A. Lincoln vs. Inhabitants of the Town of Norwell*), dated January 16, 1947; and
- d) Lot 62 was separately described and has been separately held from any adjoining land at the time zoning was adopted in 1952 and any more restrictive zoning requirement took effect.

**Question 4:**

**Has a person with standing raised the issue of whether the Plaintiff have the legal right to use the full length of the "existing way" described in the 1948 deed creating Lot 62 to access the nearest public way?**

**Answer:**

Yes. The Board finds specifically that the Lareau's are persons aggrieved and have standing to challenge Williams' legal right to use the full length of the "existing way" described in the 1948 deed.

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**Question 4 (also referred to in same section of Remand Order):**

**Does the Plaintiff have the legal right to use the full length of the "existing way" described in the 1948 deed creating Lot 62 to access the nearest public way?**

**Answer:**

Despite significant effort and expense, including engaging its own examiner to determine the title issues, the Board is unable to resolve the title issues. Moreover, the Board notes that, in general, resolving issues arising from an examination of a chain of title is typically beyond its expertise and jurisdiction.

The Board declines to find that Gen. L. c. 41 §81E precludes the issuance of a Building Permit for a lot entitled to separate lot

protection under Gen. L. c. 40A §6 para. 4, specifically since Stony Brook Lane is shown on the official map as a private lane and given the vital access demonstrated by Williams.

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**DECISION OF THE BOARD:**

Based upon the evidence submitted, new and old, its Findings delineated above, and the reasonable inferences to be drawn there from, upon a motion duly made and seconded, the Board of Appeals **VOTED**, with Members Harrison and Brown in favor and Member Barbour opposed, to deny the appeal by the original appellants of the decision of the Building Commissioner and accordingly must reverse its prior decision revoking the Building Permit. The decision to grant the Building Permit must, therefore, be affirmed. In rendering this decision, the Board expressly notes that it is not providing any opinion on the title issues to Stony Brook Lane which are beyond the ability of the Board to resolve with any type of certainty and that its decision in this matter should not be construed as favoring one party over the other on these private property rights issues.

**CONDITIONS APPLYING TO ALL DECISIONS:**

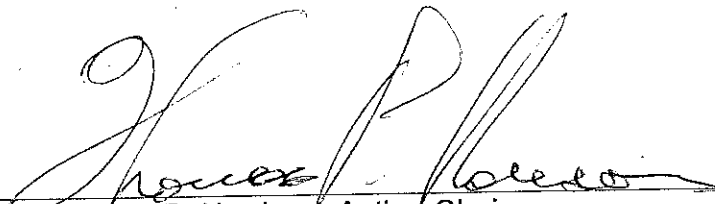
1. **RECORDING OF THE DECISION:** After receiving certification from the Town Clerk that no appeal has been taken within twenty days, or if appealed than dismissed or denied, a copy of the Board's decision shall be filed with either the Registrar of the Plymouth County Registry of Deeds to be recorded 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 shall be returned to the Board of Appeals.

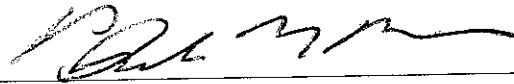
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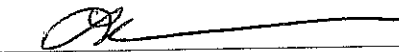
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Thomas P. Harrison, Acting Chair

  
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**NOTICE OF APPELLATE RIGHTS:** Any decision of the Board of Appeals may be appealed to the applicable trial court as set forth in G.L. c. 40A, section 17, 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.