



# TOWN OF HOPKINTON

OFFICE OF  
**BOARD OF APPEALS**

TOWN HALL  
18 MAIN STREET - ROOM 207  
HOPKINTON, MASSACHUSETTS 01748-3209

WAYNE R. DAVIES, Chairman  
ROBERT W. FOSTER, Vice Chairman  
ROSS D. GINSBERG, Clerk

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October 22, 2003

## Decision

Re: **Petition for Variance** filed by Hilda McDonald, 6 Ironside Road, Uxbridge, MA for property located at 12 Morse Lane, Hopkinton, Massachusetts 01748, (Assessors Map Plot U4, Block 21, Parcel 0), with reference at Middlesex District Registry of Deeds in Book 8075 at Page 560).

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The Massachusetts Zoning Act having been duly complied with regarding notice, a Public Hearing was held on September 10, 2003 at 7:45 PM in the Hopkinton Town Hall.

## Requested Relief

The Petitioner is before the Board of Appeals pursuant to MGL c. 40A s.10 and the Hopkinton Zoning By-laws to request a variance and relief from the provisions of the Water Resource Protection Overlay District as set forth at 210-70(D)(12), which require that individual sewage disposal systems have a minimum of one-quarter acre for every 110 gallons of sewage (or for each bedroom).

## Variance Review Standard

Variations from the terms of an applicable zoning ordinance or by-law may be granted where literal enforcement would involve substantial hardship due to conditions unique to the particular parcel or structure. Variations are always in derogation of zoning and their procedures presuppose that a proposed use would be prohibited by zoning by-law.

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As a matter of law, no person has a legal right to a variance and they are to be granted sparingly. If variances are granted with undue frequency or liberality, and without strict compliance with the prescribed statutory criteria, zoning regulations can become a matter of administration whim, and the intended uniformity may be destroyed. There is generally a distinction between “use” variances, which permit a use of land other than a use permitted by a by-law, and an “area” variance, which authorize deviations from restrictions dealing with such matters as setbacks, frontage, and lot size. Generally, a “use” variance is considered a more substantial departure from the goals of zoning than an “area” variance.

The test for a variance is not whether the requested relief is simply “desirable”, but whether it is justified, that is, whether there is evidence to show that the statutory prerequisites have been met. The prerequisites to the granting of a variance are conjunctive, not disjunctive; a failure to establish any one of them is fatal. However, even if the Board of Appeals finds that all the required conditions exist for the granting of a variance, as a matter of law the Board may exercise its discretion to refuse to issue the variance.

Variances from the term of the zoning by-law may be granted where owing to conditions (soil conditions, shape or topography) especially affecting such parcel or such building, but not generally the zoning district in which it is located, a literal enforcement of the provisions of the zoning by-law would involve substantial hardship, financial or otherwise, to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the by-law, but not otherwise. In granting such variances, the Board of Appeals may impose limitations, both of time and of use, and a continuation of the use permitted may be conditioned upon compliance with the regulations of the Board, if any, but may not be conditioned upon the continued ownership of the property to which the variance pertains.

In all matters on which it has jurisdiction to act, the Board of Appeals shall give due consideration to promoting the public health, safety, convenience and welfare, shall encourage the most appropriate use of land, and shall permit no building or use injurious, noxious, offensive, or detrimental to the neighborhood. To this end, it may prescribe appropriate conditions and safeguards in each case.

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**Discussion**

Based upon the presentation of the Petitioner and an engineer hired by the petitioner named Paul Hutnak of Heritage Design Group and based upon other evidence and testimony delivered at the hearing, the following appeared: The petitioner seeks to construct a two bedroom single family dwelling on a lot containing 16,180 square feet in a Residence A district also situated in a Water Resource Protection Overlay District. Because a two bedroom house would require at least a half acre of land (22,000 square feet) in order to support an individual sewage disposal system pursuant to 210-70(D)(12), the Petitioner seeks a variance to permit such use on a lot smaller than required. The Petitioner has not met the standards applicable for granting a variance. Specifically, the Petitioner has failed to demonstrate that the conditions affecting the lot are unique to it and do not generally affect the zoning district in which the lot is located.

Additionally, the Petitioner is the administratrix of the estate of Alta M. Hickey and purports to have standing to seek a variance as administratrix of the estate. In Massachusetts, real estate passes directly to the heirs of the decedent and thus the administratrix does not have standing to seek the requested relief.

**Vote of the Board of Appeals**

After discussion, a motion to grant the variance was made and seconded. On motion to grant the variance, the board found that the standards for granting a variance had not been met in that the petitioner failed to demonstrate substantial hardship, and that the petitioner did not have standing to request relief. The vote of the Board was as follows:

Wayne R. Davies, Chairman	No
Ross D. Ginsberg, Clerk	No
Russell H. Ellsworth	No
Thomas J. Garabedian	No
Muriel E. Kramer	No

The **Petition for Variance** is hereby *Denied*.

**Appeal of this Decision, if any, shall be made pursuant to MGL c. 40A s. 17 and shall be filed within twenty (20) days after the date of filing of this Decision with the office**

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**of the Town Clerk. No Variance or Special Permit, or any extension, modification, or renewal thereof, shall take effect until a copy of the decision bearing the certification of the town clerk that twenty days have elapsed after the decision has been filed in the office of the town clerk and no appeal has been filed, shall be recorded at the Middlesex District Registry of Deeds in Cambridge, Massachusetts in accordance with MGL c. 40A s. 11.**

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Ross D. Ginsberg, Clerk  
Board of Appeals