

**Town of Hopedale
Decision of the Hopedale Zoning Board of Appeals
July 20, 2022**

Case: 5-2022

Applicant(s):	Triple Step Realty Company, LLC
Property Owner:	Robert E. Mallard and Georgianna Mallard
Property:	20 Depot Street, Hopedale, MA 01747
Application Filed:	June 3, 2022
Hearing Dates:	July 20, 2022

Relief Sought: Applicant is seeking a special permit to change the use of the property from a single-family use to a three-family use.

Decision: Following the closing of the public hearing on July 20, 2022, the Zoning Board of Appeals voted unanimously to issue a special permit to change the use of the property from a single-family use to a three-family use.

Certification

This is to certify that the above action was taken in compliance with the statutory requirements as set forth in Chapter 40A of General Laws, and that copies of this decision and plans referred to in this decision, if any, were filed with the Town Clerk on _____, 2022.

Special Permit or Variance is not in effect until the decision is recorded with the Worcester County Registry of Deeds and the building permit will not be issued until proof of recording is presented.

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 THIS DECISION IN THE OFFICE OF THE TOWN CLERK.



Christopher P. Hodgins, Chairman

**Record of Proceedings and Summary of Findings and Decision
Hopedale Zoning Board of Appeals**

Case: 5-2022

Applicant(s): Triple Step Realty Company, LLC

Property Owner: Robert E. Mallard and Georgianna Mallard

Property: 20 Depot Street, Hopedale, MA 01747

Hearing Proceedings

On June 3, 2022, Triple Step Realty Company, LLC, filed an application for a special permit to change the use of the property at 20 Depot Street from a single-family use to a three-family use. The Zoning Board of Appeals (ZBA) scheduled a public hearing for July 20, 2022, and notified the Town Clerk, abutters and other interested parties, and requested publication of the notice in the Milford Daily News.

The Town Clerk posted the hearing notice on June 15, 2022. The Milford Daily News published the first notice on June 24, 2022, and published the second notice on July 1, 2022.

Public Hearing July 20, 2022

On July 20, 2022, the ZBA opened a public hearing on the application. Four members of the ZBA were present with one member (Louis Costanza) absent. Chairman Hodgens opened the public hearing, explained the process, and outlined the procedural posture of the application. Mr. Hodgens invited the applicant to make a presentation. Attorney David Bertonazzi and Tracey Liberatore appeared for the applicant.

Attorney Bertonazzi said that the property is currently under a purchase and sale agreement between Triple Step Realty and the Mallards (current owners). The sale is contingent on obtaining zoning relief. The property is adjacent to the highway shed behind the town hall. The original residence on the property was enlarged when a legion hall was moved and joined to the structure. Although the property is a single-family home, it is configured as a three-family home with separate kitchens and bathrooms. One family has always occupied the residence. Triple Step would like to use the property as a three-family residence. There will be no enlargements to the residence and no structural changes. There will be esthetic changes and parking improvements.

Aaron Richardson, agent for the sellers, also appeared and spoke. Mr. Richardson noted that the property is clearly a three-family layout that has been used that way for years. Tracey Liberatore also explained the general layout and discussed the parking plans at the request of Nicholas Alexander. Mr. Alexander expressed some concern about the number of spaces and the location of the spaces. Ms. Liberatore indicated that parking will be created for 6 to 8 cars on one side with additional parking on the other side. A discussion followed about the size of parking spaces.

Mr. Hodgens read from the Hopedale Zoning By-Laws and clarified that parking spaces must be 9 feet wide by 19 feet long. He indicated that he viewed the property today and

noticed an unpaved driveway that leads to the house. Ms. Liberatore said that the unpaved driveway is actually a town road. Ms. Liberatore added that she intends to work with an engineer on laying out the property, but there was simply not enough time to hire one and have a plan drawn up. Attorney Bertonazzi also said that the rudimentary drawing was necessary due to the time constraints they faced.

Mr. Hodgins outlined the reason for a special permit requirement. The property is zoned Commercial. Due to the zoning classification, residential properties are not allowed. The existing residence, however, predated the zoning by-laws and is a non-conforming use under section 4. The applicant is seeking relief under section 4.1. Mr. Hodgins said the by-laws appear to contemplate granting relief in this situation, but the language is not entirely clear. Mr. Hodgins said that relief under section 4.5 may be more appropriate. Under section 4.5, a change of use may be allowed by special permit “if in the judgment of the Board of Appeals the proposed use is no more detrimental or offensive to the neighborhood than the existing non-conforming use.” The question is whether increasing the non-conformity would be detrimental. Mr. Hodgins noted that this is a very unusual property. It is abutted by a railbed, highway salt shed, public housing, and residences on Hopedale Street. Mr. Hodgins asked if there has been any effort to speak with the Hopedale Street residents. Ms. Liberatore said she spoke with Tracey Philips (who appeared through Zoom).

Mr. Hodgins invited Ms. Philips, or any other abutters, to speak if they wished. Ms. Philips asked to clarify the parking and the access. Ms. Liberatore said that access would be through the road in the front. There would be no parking in front of the building. Mr. Philips (also on the Zoom call) asked about a shed being taken down. Ms. Liberatore indicated that the parking would be closer to the location of the shed. Mr. Hodgins verified that Tracey Philips lives at 82 Hopedale Street. Mr. Hodgins asked Ms. Philips if she is satisfied with the request for the special permit. Ms. Philips replied that she is satisfied as long as Tracey Liberatore is running the project. Mr. Hodgins also noted that the property is very unusual and looks like it is from the 1800’s with a rolling hill and dirt road. Mr. Richardson said that the residence is currently vacant, and the owners are not able to maintain it anymore.

Mr. Hodgins said the request seems pretty straightforward. If the property were somewhere else in town, Mr. Hodgins might have some reservations about it because we would be increasing a nonconformity. The unique nature of the property and the lack of any opposition from abutters most impacted by the project appears to justify granting zoning relief. Mr. Hodgins concluded that the request for zoning relief does not appear unreasonable, and he invited other ZBA members to comment if they chose to do so. Scott Savage said that his only concern is the parking issue. He expressed concern about 6 to 8 parking spaces in the location suggested. Sandra Biagetti asked if the sheds would be taken down. Ms. Liberatore said the sheds would be taken down. Ms. Liberatore said that she would be willing to take additional sheds down along the railbed and create parking in that location. Mr. Savage emphasized that additional parking is likely to be needed. Mr. Alexander asked about parking for visitors. Mr. Alexander said that he does not want to see neighbors upset by cars being parked randomly.

Mr. Hodgins read from section 18 of the Hopedale Zoning By-Laws. He cautioned that under section 18.2(b), 10 parking spaces is the “magic” number that will trigger site plan review. Ms. Liberatore asked if avoiding 10 spaces would be preferable. Mr. Hodgins said that he never discourages site plan review because it really benefits everyone. Mr.

Hodgens emphasized that if 10 spaces are contemplated, then site plan review will be required with an engineering plan showing exactly where spaces will be located. Mr. Hodgens also emphasized that there is almost 40,000 square feet of land available for parking cars in an unobtrusive way. Mr. Hodgens said that in his judgment the ZBA could approve the special permit without micromanaging the project at this point. Ms. Liberatore said that she is not anticipating a need for more than 8 parking spaces. Ms. Liberatore said that her objective is to be a good neighbor. Attorney Bertonazzi said that the applicant is open to taking direction from the ZBA as far as the number of spaces required. Mr. Hodgens reiterated that he does not believe the ZBA has to micromanage the project at this point. Mr. Hodgens urged the applicant to simply follow the zoning by-laws going forward.

Mr. Hodgens invited public comments and comments from the ZBA. No additional comments were offered.

Mr. Hodgens invited a motion on the application. Mr. Savage moved to approve the application changing the use from single-family use to three-family use. Ms. Biagetti seconded the motion.

A roll call vote on the motion followed:

Scott Savage	yes
Nicholas Alexander	yes
Sandra Biagetti	yes
Christopher Hodgens	yes

Mr. Hodgens declared the motion had passed unanimously, and the special permit would issue.

Summary of Findings and Decision

The subject property at 20 Depot Street consists of approximately .910 acres with a single-family wood frame structure (4018 square feet) built around 1900. The property is in a “Commercial” zone under the Hopedale Zoning By-Laws. Residential uses are not permitted in a Commercial zone. Hopedale Zoning By-Laws § 11.2. Because the 1900-era single-family residential use predates the adoption of the Hopedale Zoning By-Laws, the current residential use constitutes a lawful “non-conforming” use. See Hopedale Zoning By-Laws § 4 (by-laws “shall not apply to structures or uses lawfully in existence” at time of adoption). The application, therefore, seeks to extend a non-conforming use (single-family residence) to a greater non-conforming use (three-family residence). While lawful non-conforming uses may continue to operate after the adoption of zoning by-laws, extensions of non-conforming uses are not allowed unless approved through a special permit issued by the ZBA. Hopedale Zoning By-Laws §§ 4.2 and 11.2. See G.L. c. 40A, § 6 (zoning by-laws “shall apply to any change or substantial extension of such use”).

“The primary purpose of zoning with reference to land use is the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods.” Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 431 (1949). Special permit procedures have long been used to bring flexibility to zoning classifications by providing for specific uses “which are not allowed

as of right because of their potential for incompatibility with the characteristics of the district.” SCIT v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 109 (1984).

An applicant does not have “an absolute right to a special permit.” MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638, 639 (1970). The decision to grant or deny “special permits is within the discretion of the board.” ACW Realty Management, Inc. v. Planning Board of Westfield, 40 Mass. App. Ct. 242, 246 (1996). “Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.” G.L. c. 40A, § 9. Conditions may consider “protection of the neighborhood, the Town, and the natural environment” and may include limitations and restrictions designed to address specific features of the proposed use. Hopedale Zoning By-Laws § 10.6(e).

A special permit may not issue unless the ZBA finds that “all of the requirements” of the Hopedale Zoning special permit criteria under Hopedale Zoning By-Laws §§ 10.6(d)(1)-(8) are satisfied. Additionally, changes of non-conforming uses may be allowed only if the ZBA is satisfied that the proposed use “is no more detrimental or offensive to the neighborhood than the existing non-conforming use.” Hopedale Zoning By-Laws § 4.5. For nonconformities, considerations must also include, but are not limited to, noise, smell, sight, safety, health, and impact on property values. Hopedale Zoning By-Laws § 4.5 (a)-(d). The ZBA “may deny [a permit] even if the facts showed that a permit could be lawfully granted.” Zaltman v. Board of Appeals of Stoneham, 357 Mass. 482, 484 (1970). Based upon the governing standards, the Hopedale Zoning By-Laws, and the facts presented at the hearing in the instant case, the ZBA exercises its discretion in favor of issuing a special permit.

Extension of the non-conforming use at this location will not have “detrimental effects which outweigh its benefits to the neighborhood, town or zoning district in which it is located.” Hopedale Zoning By-Laws § 10.6(1). The proposed use is well-suited for its isolated location. The property is in a highly unusual location surrounded by a railbed, highway salt shed, Town Hall, Post Office, and public housing development. Access is gained by an unpaved driveway/roadway accessed from behind the Town Hall. The closest residential properties are on Hopedale Street and are generally screened by a tree line that reduces the visibility of the subject property. Notably, there were no objections raised by any abutters, members of the public, or local officials. One abutter spoke in favor of the proposal (provided Tracey Liberatore direct the project). The ZBA is satisfied that the use will not “materially endanger or be hazardous to the public health and safety.” Hopedale Zoning By-Laws §10.6(3). The lot size of nearly one acre also contains sufficient room for off-street parking that comfortably accommodates three small housing units that are not expected to generate a high level of traffic at any given time. Hopedale Zoning By-Laws §10.6(4). The proposed use will not impact water or sewer issues. Hopedale Zoning By-Laws §10.6(5). The proposed use will not “create undue traffic congestion or impair pedestrian safety” given the proposed circumscribed nature of the use in a very limited geographic area. Hopedale Zoning By-Laws §10.6(8). The Master Plan is being developed and is not a factor at this time. Hopedale Zoning By-Laws §10.6(2). In light of the residential use contemplated, there are no significant issues with respect to noise, smell, sight, safety, health, and impact on property values. Hopedale Zoning By-Laws § 4.5 (a)-(d).

The ZBA is particularly cognizant of the fact that the current use is non-conforming in a Commercial district. Extensions of non-conforming uses are generally disfavored because “the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities.” Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32, 37 (1991) (quoting 1972 House Doc. No. 5009, Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act). See Chilson v. Zoning Bd. of Appeal of Attleboro, 344 Mass. 406, 411 (1962) (zoning regulation allows “minimum tolerance” of nonconformities); SCIT, 19 Mass. App. Ct. at 109 (non-conforming uses are regarded as “troublesome” or “incompatible” with district). The preference for uniformity “is based upon principles of equal treatment: all land in similar circumstances should be treated alike, so that ‘if anyone can go ahead with a certain development [in a district], then so can everybody else.’” SCIT, 19 Mass. App. Ct. at 108 (quoting 1 Williams, American Land Planning Law § 16.06 (1974)). These objectives would generally militate against granting relief; however, the unique, isolated, and unobtrusive nature of the proposed use, combined with the absence of any objections, tips the scales in favor of granting relief.

Based upon the foregoing, the ZBA hereby allows the application for a special permit to change the use of 20 Depot Street from single-family use to three-family use. Note that any off-street parking of 10 spaces or more will require site plan review under Hopedale Zoning By-Laws § 18.2(b).

Copies of this decision will be filed with the Town Clerk and sent to the applicant, Building Commissioner, and Tax Assessor.