

City of Augusta, Maine
DEPARTMENT OF DEVELOPMENT SERVICES

AUGUSTA STATE AIRPORT
CODE ENFORCEMENT
ECONOMIC DEVELOPMENT



ENGINEERING
FACILITIES & SYSTEMS
PLANNING

Memo

To: Board of Zoning Appeals

From: Matt Nazar, Director of Development Services
Rob Overton, Code Enforcement Officer

Date: January 27, 2016

Re: Motivational Services density and parking reduction

Background:

The applicant has a purchase and sales agreement for 66 Winthrop Street and proposes to create a six bed group home at the facility. They state that the facility will be identical to the one operating at 81 Winthrop Street which is a Level III PNMI Residential Care Facility with six beds. PNMI means Professional Non-Medical Institution.

The applicant requests the following:

1. Section 3.6.1.2.2 of the LUO requires 2,500 square feet of land for each dwelling unit in the Business/Professional/Institutional (BP) zoning district and the applicant requests that be reduced to 1,887 square feet of land per dwelling unit to allow six beds in the group home rather than four. Each occupied residential room in a group home is defined by the Land Use Ordinance as a Dwelling Unit.
2. The applicant also requests a variance from Section 5.1.14.2 of the Land Use Ordinance to reduce the required 24 parking spaces to 14 spaces. The parking space requirement for a group home is one space per room. The building has 24 rooms, excluding bathrooms and foyers.

Staff discuss below the standards as they relate to item 1. Staff finds that a variance is not the correct process to get a parking reduction in this case, and therefore item 2 above should be dismissed as not within the BZA's authority to grant. Section 5.1.14.2.1.e.i grants the Planning Board the authority to reduce parking standards by up to 50% of the required parking outlined in the ordinance. Therefore the Planning Board could reduce the parking for this applicant down to 12 spaces, or 50% of the 24 required spaces. Were the applicant

requesting fewer than 12 spaces, the BZA would have the authority to hear the request. The applicant is requesting 14 spaces, which is within the Planning Board's authority. This proposal will also require subdivision review by the Planning Board per state law, as it meets the definition of a subdivision. The Planning Board can discuss the issue of parking during that review, if the applicant moves forward after the BZA review.

Staff recommends dismissing the parking variance request.

Standing:

The applicant has an active P&S on the property that clearly states that the sale is contingent on getting BZA approval. The applicant has standing to request a variance.

Specifics relevant to this application and interpretation:

Attached is a copy of Chapter 5 of the Manual for Local Land Use Appeals Boards (December 2010) created by the Maine Municipal Association. This chapter, as well as the included "Undue Hardship" examples from the manual, gives the BZA a clear outline of the standards that must be met in order to grant a variance. It also outlines examples of arguments used by applicants that do not meet those standards. I encourage all BZA members to read the section and examples carefully, as it's been well quite a while since the Board last heard and decided a variance request.

1. **Standard:** Section 6.6.2.2.1.a of the Land Use Ordinance states that the applicant must demonstrate to the Board:
"That well documented, exceptional conditions affect the particular land or building which do not generally affect other properties in the district."

Applicant's Response to Standard: The applicant does not directly respond to this question, but the question in Section 6.6.2.2.1.b.ii is very similar and the applicant's response to that question is:

"The need for the variance is only unique to meet our program needs at this facility and is not due to any general conditions in the neighborhood. This building was originally single family dwelling, which not unlike many of the existing properties in the area and on Winthrop Street, and its use as group home will not impinge on any property located in this area."(sic)

Staff Analysis of Applicant's Response: Variances are intended to deal with the potential loss of use of a parcel that is unique in its physical characteristics within its neighborhood to such a degree that it cannot be used for any use in the Land Use Ordinance without a variance. The BP zone, which is the district that this property is located allows many alternative uses to the proposed six bed group home,

including a four bed group home. The applicant states that the property is not appropriate for their use without the variance. That is not the standard the Board is required to review. The standard is whether or not the parcel can accommodate any of the uses allowed by the Land Use Ordinance. If it can, this standard is not met. **It is staff's opinion that this standard is not met.**

2. **Standard:** Section 6.6.2.2.1.b.i of the Land Use Ordinance is related to “undue hardship” criteria and states that the applicant must demonstrate to the Board:
“That the land in question cannot yield a reasonable return unless a variance is granted.”

Applicant's Response to Standard: The applicant's response to this criterion is:
“We have a letter of commitment from the State of Maine DHHS to operate a six bed group for adults in the City of Augusta. The (sic) have also agreed to provide added support to make the building licensing ready. Based on the current occupancy limits of only four dwelling units at this location, Motivational Services, Inc. will not be able to yield a reasonable return unless the variance is granted increasing the allowable dwelling units to six. Six dwelling units will allow Motivational Services, Inc. for a breakeven return to own, occupy and operate this facility as a group home.”

Staff Analysis of Applicant's Response:

Courts have found (please see the attached copy of the BZA manual) that a “reasonable” return does not mean the highest return possible. Additionally, reasonable return does not relate directly to the use proposed, it relates to any particular use that might occur at the site. Finally, the fact that the current owner purchased the property for \$125,000 in 1999 and the property was listed as commercial real estate for sale at \$399,000, with Motivational Services offering \$300,000 would appear to indicate that the seller is getting a reasonable return on their investment.

The fact that this particular applicant is stating, without evidence, that their use will not yield a reasonable return does not meet the requirement of the standard. The applicant has provided no evidence that their use would not provide a reasonable return with the four allowed dwelling units, nor have they shown that without their proposed use, there is no other use that could provide a reasonable return for the parcel. The fact that it is currently office space, similar to office space in neighboring buildings, and listed at \$274,000 above the original purchase price, appears to suggest that it can provide a reasonable rate of return. **It is staff's opinion that this standard is not met.**

3. **Standard:** Section 6.6.2.2.1.b.ii of the Land Use Ordinance is related to “undue hardship” criteria and states that the applicant must demonstrate to the Board:

“That the need for a variance is due to the unique circumstances of the property and not the general conditions of the neighborhood.”

Applicant’s Response to Standard: The applicant’s response to this criterion is:
“The need for the variance is only unique to meet our program needs at this facility and is not due to any general conditions in the neighborhood. This building was originally single family dwelling, which not unlike many of the existing properties in the area and on Winthrop Street, and its use as group home will not impinge on any property located in this area.”(sic)

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4. **Standard:** Section 6.6.2.2.1.b.iii of the Land Use Ordinance is related to “undue hardship” criteria and states that the applicant must demonstrate to the Board:
“The granting of a variance will not alter the essential character of the locality.”

Applicant’s Response to Standard: The applicant’s response to this criterion is:
“The granting of this variance will not alter the character of the essential locality as there will be no changes to the structure of the existing building or any of the parking area.”

Staff Analysis of Applicant’s Response: The proposed variance would increase the residential density of the area beyond what is typical to this area. Because variances run with the land, increasing the density for this lot will apply to this lot whether or not this user or this particular use occurs at this lot. A future developer could purchase the building and put in six apartments. Six unit apartment buildings are not the norm in the West Side neighborhood, which is dominated by single family houses with some multi-unit housing, typically up to four units. **Staff believes this standard is not met.**

5. **Standard:** Section 6.6.2.2.1.b.iv of the Land Use Ordinance is related to “undue hardship” criteria and states that the applicant must demonstrate to the Board:

“That the hardship is not the result of action taken by the applicant or prior owner.”

Applicant’s Response to Standard: The applicant’s response to this criterion is:
“The hardship is not the result of an action taken by Motivational Services, Inc. or the prior owner. The hardship is a result of limiting the number of dwelling units rendering the facility inefficient to yield a reasonable enough return to support the building costs.”

Staff Analysis of Applicant’s Response: Hardship cannot be based on the applicant’s desire to avoid compliance with the ordinance. If such a standard were used, the passage of any code would be meaningless. The applicant’s proposal to allow more dwelling units than the ordinance allows for this size lot in an existing building is the textbook definition of a hardship created directly by the applicant. The applicant can resolve the issue by reducing the number of proposed beds to four. Four beds are allowed in a group home in this district, on this lot. **It is staff’s opinion that this standard is met.**

6. **Standard:** Section 6.6.2.2.1.c of the Land Use Ordinance states that the applicant must demonstrate to the Board:

“That a variance from the particular terms of this ordinance can be granted without detriment to the public interest or the health, safety, or general welfare of the residents of the municipality, and without impairment of the integrity of the comprehensive plan for municipal development, or of the purpose and intent of the ordinance.”

Applicant’s Response to Standard: The applicant’s response to this criterion is:
“This property was originally used as a single family house dwelling and would again be used similarly as such, but as a group home. It would be no different from many other properties in the surrounding area and would certainly not be a detriment to the public interest or the health, safety, or general welfare of the residents living in the area.”

Staff Analysis of Applicant’s Response: “Health, Safety, and General Welfare” is a phrase that refers to the ability of the citizens to collectively pass laws and regulations that affect everyone in order to protect various aspects of our individual or collective rights. A less legalistic way of asking the question above is, “The Land Use Ordinance was legally adopted by the public representatives in Augusta and is therefore presumed to protect the public and individuals from a variety of harms such as a decrease in property value due to neighboring uses, the damaging of the environment, the incompatibility of neighboring uses, lack of safety on our public streets where properties access them, etc. Will granting the variance have any impact on those purposes of the Land Use Ordinance?”

The applicant does not need a variance to conduct this use in the area. It is simply the increase from four beds to six beds that requires a variance. **It is staff's opinion that this standard can be met without a variance and the same use can take place. And if it can be met without the variance, staff recommends that a variance is unnecessary.**

7. **Standard:** Section 6.6.2.2.2 of the Land Use Ordinance states that:

"Limit on variances. No variance shall be granted for placement of a structure less than five (5) feet from the property line unless the abutting owner gives a construction, maintenance and repair easement which shall be recorded with the Kennebec County Registry of Deeds. No variance shall be granted which does not provide for a snow storage area of a minimum of five (5) feet from the right-of-way line. In shoreland areas, the minimum setback from the normal high water mark for subsurface sewage disposal facilities shall not be reduced by variance."

Applicant's Response to Standard: The applicant's response to this criterion is: The criterion is not applicable. The applicant does not propose any new construction.

Staff Analysis of Applicant's Response: The criterion is not applicable.

8. **Standard:** Section 6.6.2.5 of the Land Use Ordinance states that:

"In granting appeals, the board may impose such conditions and safeguards regarding the location, character, fencing, screening, landscaping, or other features as it may deem advisable in furtherance of the intent and purpose of this ordinance, and may require posting of bonds to assure performance. The issuance of any variance shall be contingent upon the applicant's agreeing in writing to indemnify and save harmless the city against all loss, cost, damage or expense occurring by reason of the erection or maintenance of a structure and upon his or her filing with the City Clerk a certificate of public liability insurance covering property damage up to one thousand dollars (\$1,000.00) and bodily damage with a coverage of ten thousand to twenty thousand dollars (\$10,000.00 to \$20,000.00) minimum limits."

Applicant's Response to Standard: The applicant believes this criterion is not applicable.

Staff Analysis of Applicant's Response: The criterion is not applicable.