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, Acting Director of Development Services
Rob Overton, Code Enforcement Officer

Date: May 28, 2015

Re: Louise Rollins, Dividing a combined lot

Background:

Based on the material submitted, the applicant purchased both lots in 1972, one with a home on it, and one vacant. As of the adoption of zoning in 1983, both lots became non-conforming lots of record as did the majority of the parcels in the same neighborhood. The 1983 Zoning Ordinance had a minimum frontage requirement of 100′ and a minimum lot size of 10,000 square feet. Neither lot separately meets these standards. The standards of the 1983 Zoning Ordinance (Section 1, F, 4, h and Section 3, A, d) combined the lots into a single parcel that could not be re-divided. As combined lots, the area non-conformance was corrected (the combined parcels are between 14,000 and 15,000 square feet).

However, under both the 1983 and the current ordinance, the minimum area required per dwelling unit is 5,000 square feet. **Therefore, while the lot cannot be divided into two lots, a second house can legally be constructed, making a variance unnecessary to achieve stated desires in the variance request – to build a second home on the property.** In such a situation, the ownership can be created in a variety of ways. The two homes and land can be owned by the same person. The homes could be owned separately, with the land owned in common with limited exclusive rights to portions of the lot, creating the effect of division without actual division. Granting a variance in a situation where it is unnecessary to achieve the goals of the applicant would be an inappropriate action of the BZA.

16 CONY STREET, AUGUSTA, MAINE 04330
PHONE: (207) 626-2365 • FAX: (207) 626-2520 • TDD: (207) 626-3003

Standing:

The applicant and her husband purchased the parcels in 1972 and the applicant became the sole owner in 1989. The applicant appears to have 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 over a year 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 BP Zoning and Changes in the Code does Not Allow for Proper Identification Due to the Unique Nature of the Business with Convenience Store/Gas Station, and the Size and Shape of the Lot."

   Staff Analysis of Applicant's Response: The BP zone, which is the district that this business has been located in for a significant time period, allows for signage of up to 18 square feet for this non-conforming business. The speed limit on the adjacent street is 35MPH and there are very few other signs in the area to compete for driver's attention. A sign of the size required by the ordinance will clearly be visible and legible. Additionally, the presence of a fuel island and canopy is very apparent from Eastern Ave, leaving little expectation that drivers would be confused about what type of business is being operated at the site. It is unclear how the size and shape of the lot – a nearly square 1 acre, which is fairly typical in the district – is unique or exceptional and justifies the need for a sign that is larger and taller than allowed by the ordinance. **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:

   "The city has created one parcel out of the two parcels that were both part of an approved subdivisions with the enactment of the Land Use Ordinance (LUO). Essentially the applicant has lost a lot and is unable to build a home on the parcel of land on Manley Street. Therefore the land cannot yield a reasonable rate of return."

   Staff Analysis of Applicant's Response: The 1983 Zoning Ordinance combined the parcels into a single lot, just as it did many other parcels throughout the city. In this particular case the lot is developed with a residential home on it and the existing ordinance allows a second home to be developed. The ordinance simply does not allow the lot to be divided as the existing lot does not meet the dimensional standards of the ordinance and a divided lot would be more non-conforming.

   Courts have found (please see the attached copy of the BZA manual) that a "reasonable" return does not mean the highest return possible. The fact that this residential lot is larger than most of its surrounding neighbors likely means it is more valuable than its neighbors. It is unclear how what is expected to be one of the more valuable lots in the neighborhood is unable to yield a reasonable return if it were sold. **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 unique circumstances of the property are that the two building lots have been combined into one parcel and instead of having two building lots there is only one."

   Staff Analysis of Applicant's Response: The ordinance itself cannot be a unique circumstance to the lot worthy of granting a variance. The ordinance does not affect this parcel only, it affects all parcels in the city and there are many examples throughout the city where parcels in common ownership that do not meet the standards of the ordinance are combined.

Additionally, most of the parcels in this neighborhood are non-conforming, meaning that the situation that existed when the ordinance was enacted was not unique to this parcel within the context of this neighborhood. Directly across Brooklawn Street from this applicant, exactly the same situation occurred. The owner of two non-conforming parcels, one with a house and one vacant, also had the two parcels combined by the ordinance to make a single conforming parcel. The circumstances are not unique to the applicant's parcel.

And again, the applicant can construct a second dwelling on the parcel under the existing ordinance. The lot just cannot be divided. **It is staff's opinion that this standard is not met.**

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 locality. The applicant is proposing a single family residential home on Manley Street. The residential homes on Manley Street are all with like sized parcels, thus this proposal would blend in with the existing neighborhood."

   Staff Analysis of Applicant's Response: The applicant is correct and the existing Land Use Ordinance allows the construction of a home on Manley Street without the granting of this variance. A variance is unnecessary to achieve the applicant's goal of constructing a second home. **Staff believes this standard is 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 applicant purchased building lots of land with one on Brooklawn Avenue and the other on Manley Street. These parcels were purchased in 1972, well before the implementation of the LUO. The hardship was caused by the implementation language within the LUO combining two adjacent non-conforming parcels of land into one."

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. However, the applicant did not do anything to create a hardship. **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:

   "The applicant is asking to erect a home in a residential neighborhood. This certainly will not cause a detriment to the public or affect the health, safety, and general welfare of any residents within the municipality."

   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 environment, the compatibility of neighboring uses, 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 build a house in the location where it is desired. The existing ordinance allows a house to be built. **It is staff's opinion that this standard can be met with or without a variance. 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:
"A plan has been provided with this application depicting the building envelope available for the property on Manley Street. No proposed structure will be within 5' of any property line and no snow storage will occure within 5' of any right of way lines."

Staff Analysis of Applicant's Response: The proposal meets this standard.

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's response to this criterion is:
"The applicant agrees with the insurance limits mentioned above."

Staff Analysis of Applicant's Response: The proposal meets this standard.

CHAPTER 5 – Variances and Waivers

Variance/Waiver vs. Special Exception/Conditional Use

There often is confusion between variances/waivers and special exceptions/conditional uses. When the board of appeals grants a zoning variance or other authorized waiver, it is waiving or reducing some requirement of the ordinance which would otherwise prevent a proposed structure or project from being approved. Depending on the wording of the local ordinance, variances may be authorized both for dimensional requirements (such as lot size, setback, and frontage) and to allow uses which are otherwise prohibited by the ordinance ("use variances"). The exact language of the ordinance governs what variances or waivers may be granted in a particular municipality. Most ordinances do not allow use variances.

Special exception and conditional use provisions in a zoning ordinance deal with uses which the legislative body generally has decided to permit in a particular area of the community. The purpose of the special exception or conditional use review procedure is to allow the board to determine whether conditions should be imposed on the way the use is conducted or constructed in order to ensure that the use is consistent with and has no adverse impact upon the surrounding neighborhood. (See the discussion of procedure and required ordinance language in Chapter 3 of this manual.)

Zoning Variances in General; Statutory "Undue Hardship" Test

There are five different tests for granting a zoning variance outlined in 30-A M.R.S.A. § 4353 (see Appendix 4). Two of those tests apply to all municipal zoning and shoreland zoning ordinances whether or not the municipality has adopted the statutory provisions: the "undue hardship" test in § 4353(4), governing dimensional and use variances generally, and the basic disability variance test in section 4353(4-A), governing variances to permit construction or alterations needed to accommodate a person with a disability who lives in the subject dwelling or who is a regular user. The other three tests are outlined in § 4353(4-A), § 4353(4-B) and § 4353(4-C) and apply to certain dimensional variances, but <u>only</u> in municipalities which have adopted them by ordinance. One involves garages housing personal vehicles registered with disability plates, one addresses certain setback requirements applicable to single family dwellings, and the other authorizes a "practical difficulty" test. (See Appendix 4 for a detailed discussion.)

The most common variance test is the "undue hardship" test and is outlined in 30-A M.R.S.A. § 4353(4). It authorizes the board of appeals to grant zoning variances (including

shoreland zoning variances) "only when strict application of the ordinance to (the person seeking the variance and his or her) property would cause undue hardship." The "undue hardship" test applies to use variances and dimensional variances to the extent each type is allowed under a particular zoning ordinance. The statutory four part "undue hardship" test appears below. Each of these statutory standards must be met as well as any additional requirements imposed locally. The board of appeals may not grant a zoning variance which is governed by the "undue hardship" test unless it finds that:

a. The land in question cannot yield a reasonable return unless a variance is granted;

b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

c. The granting of a variance will not alter the essential character of the locality; AND

d. The hardship is not the result of action taken by the applicant or a prior owner.

Other Limitations by Ordinance

The municipality may adopt ordinance language which imposes additional limits on the granting of a variance, such as prohibiting variances to allow a use which is otherwise prohibited. Typical zoning provisions limit the granting of a variance to dimensional requirements, such as lot size, frontage or setbacks. Shoreland zoning ordinances generally impose standards which an applicant must meet in addition to the four statutory criteria cited above relating to things such as preservation of vegetation, erosion control, protection of fish and wildlife habitat and effect on water quality. The board of appeals must look carefully at the ordinance provisions relating to variances, including the definitions of "variance" and "undue hardship," to know for sure what type of variances it may grant and what requirements the applicant must satisfy.

Strictly Construed

The Maine Supreme Court has stated in numerous cases that a board of appeals must grant zoning variances sparingly—they are the exception rather than the rule. The test for "undue hardship" outlined above is a very strict one and very difficult to meet. No matter how harmless the variance request may seem and regardless of whether there is no opposition from neighbors, the board must remember that its decision is governed by the legal requirements for "undue hardship" in § 4353 for zoning variances and any other

requirements imposed by the applicable local ordinance and only those requirements. If the board is presented with repeated requests for the same type of variance, particularly in the same neighborhood, this may indicate that the ordinance requirements are too restrictive or unrealistic for that area of town and that the legislative body needs to consider amending the ordinance. The appeals board should refer this problem to the planning board or comprehensive planning committee for further study and a recommendation to the municipal officers. Generally, the landowner also will have the option of petitioning for an ordinance amendment, especially in municipalities which still have town meeting and operate under the general laws of the State. For a summary of Maine court cases analyzing the undue hardship test for zoning variances, see Appendix 4.

Personal Hardship

The court in Maine has made it clear that "undue hardship" relates to a problem created by some feature of the property itself. *Lippoth v. ZBA of City of South Portland,* 331 A.2d 552 (Me. 1973) The fact that the landowner has a personal problem which prompted the request for the variance is not legally relevant to the standard "undue hardship" test, no matter how sympathetic the board may be. It is relevant where the need for the variance stems from a physical or mental disability and the landowner is seeking a disability variance under 30-A M.R.S.A. § 4353(4-A). (See discussion later in this chapter).

The "Reasonable Return" Standard

Most court cases in Maine pertaining to zoning variances and the "undue hardship" test have focused on whether the applicant can realize a "reasonable return" on the property without the variance. The court has made it clear that "reasonable return" does not equal "maximum return." *Barnard v. Town of Yarmouth,* 313 A.2d 741 (Me. 1974); *Grand Beach Assoc., Inc. v. Town of Old Orchard Beach,* 516 A.2d 551 (Me. 1986). It is extremely difficult for an applicant to prove that he or she cannot realize a reasonable return and that no other permitted use could be conducted legally to realize such a return. *Leadbetter v. Ferris,* 485 A.2d 225 (Me. 1984); *Curtis v. Main,* 482 A.2d 1253 (Me. 1984); *Anderson v. Swanson,* 534 A.2d 1286 (Me. 1987); *Marchi v. Town of Scarborough,* 511 A.2d 1071 (Me. 1986); *Goldstein v. City of South Portland,* 1999 ME 66, 728 A.2d 164 ; *Rowe v. City of South Portland,* 1999 ME 81, 730 A.2d 673 ; *Brooks v. Cumberland Farms, Inc.,* 1997 ME 203, 703 A.2d 844; *Twigg v. Town of Kennebunk,* 662 A.2d 914 (Me. 1995); *Lewis v. Town of Rockport,* 2005 ME 44, 870 A.2d 107. A landowner cannot be forced to sell his land to an abutter as a way to realize a "reasonable return." *Marchi, supra.* However, where an applicant for a variance owns adjoining land which he or she could use to avoid the need for a variance, the court has held that a variance should not be granted. *Sibley v. Town of Wells,*

462 A.2d 27 (Me. 1983); but see, *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. The typical request for a setback variance to allow a deck, porch, garage, storage building or addition to an existing structure will have to be denied on the basis of the "reasonable return" standard, absent proof that the person has tried to sell that property "as is" and no one will buy it unless the proposed construction can occur or that the property cannot be used for any other legal purpose under the zoning ordinance without a variance. *Brooks v. Cumberland Farms, supra*. The Maine court has held in some cases that a "reasonable return" can be realized by recreational uses and lake access. *Twomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563. See also, *Drake v. Inhabitants of Town of Sanford*, CV-88-679 (Me. Super. Ct, Yor. Cty, Nov. 15, 1990) and *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987).

The "Unique Circumstances" Standard

The court has also addressed "undue hardship" as it relates to the unique circumstances of the property and general conditions in the neighborhood. A landowner seeking a variance from a required lot size in a case where other lots in the neighborhood are all of a similar substandard size generally cannot meet the "uniqueness" test. The same is true where all the lots in the neighborhood are subject to deed restrictions limiting the size of the structure which can be built on the lot. *Greenberg v. Dibiase*, 637 A.2d 1177 (Me. 1994); *Camp v. Town of Shapleigh*, 2008 ME 53, 943 A.2d 595. Compare *Sibley v. Town of Wells,* 462 A.2d 27 (Me. 1983) with *Driscoll v. Gheewalla,* 441 A.2d 1023 (Me. 1982). Likewise, if all of the lots in the area are swampy or steeply sloped, or if they all have rock outcropping, or if they all have utility easements running through them, an application for a variance related to any of these problems probably would have to be denied. Such common neighborhood problems must be addressed through the town's comprehensive plan and appropriate ordinance provisions, not case by case through the granting of a variance. The fact that the lot for which a variance is sought has no structure while neighboring lots do have structures does not make the subject lot "unique." *Camp, supra*.

The "Essential Character of the Locality" Standard

The third "undue hardship" criterion focuses on the "essential character of the locality" and generally appears to be almost the flip side of the coin from criterion number two (discussed above). For example, if a landowner requests a setback variance to build an addition bringing his home closer than the required road setback, but no closer than all of the neighboring homes, the requested variance would not alter the "character of the locality." *Driscoll v. Gheewalla, supra.* However, it probably would not meet the "uniqueness" criterion or the "reasonable return" criterion. The "essential character" standard may have

been intended to relate to use variances when originally drafted, but it applies to both use and dimensional variances.

The "Self-Created Hardship" Standard

The question of whether the applicant for an "undue hardship" variance or a prior owner of the land created the hardship which is the basis for the variance request is not as simple to answer as it may appear. If a person seeking a variance was the owner of the lot when the ordinance requirement in question took effect, that person generally would not have a "self-created" hardship and could satisfy criterion number four. At one time the Maine court cases held that a board must deny a variance application from someone who bought the lot after the ordinance took effect, since he or she was presumed to have had knowledge of the restrictions on the use of the lot which the ordinance imposed and was deemed to have created his/her own hardship. *Bishop v. Town of Eliot,* 529 A.2d 798 (Me. 1987). However, the Maine Supreme Court in *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995), and in *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660, held that knowledge of zoning restrictions by a purchaser of a nonconforming lot, without more, will hardly ever constitute a self-created hardship. A classic example of self-created hardship is where a landowner conveys a lot from a larger parcel and either doesn't include enough area or frontage in the new lot to make it buildable or leaves a remaining piece which doesn't meet ordinance requirements. The court in *Phaiah v. Town of Fayette*, 2005 ME 20, 866 A.2d 863, held that the failure of the applicant or a predecessor in the chain of title to act on a building permit, resulting in its expiration, did not constitute a self-created hardship.

Request for Variance "After the Fact"

A person who commits a violation of an ordinance requirement, such as a zoning setback, sometimes will seek a variance after-the-fact as a way to correct the violation. Normally an ordinance violation must be resolved through regular code enforcement channels rather than through a variance granted by the board of appeals. If a landowner does apply for a variance after-the-fact, the board should review the request without taking into account that the structure has been built. The board should determine whether the applicant would have been entitled to a variance if he/she had come to the board before the fact and only grant a variance if the applicant satisfies all prongs of the undue hardship test and only to the extent needed. Usually an after-the-fact application is the result of a builder's error where the building could have conformed to the ordinance requirements but someone mismeasured. In that case the hardship is self-created and the variance should be denied. It then becomes an enforcement issue to get the building moved or altered so that it conforms. *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673.

Authority to Grant Variances

Zoning Variances

As a general rule, any ordinance provision which attempts to authorize the planning board, code enforcement officer, or municipal officers to grant variances from zoning requirements violates 30-A M.R.S.A. § 4353, since that statute gives the board of appeals the sole authority to grant a zoning variance. *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106; *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172. A municipality's home rule authority under 30-A M.R.S.A. § 3001 has been preempted by 30-A M.R.S.A. § 4353 regarding delegation of authority to grant zoning variances.

In 2005 section 4353 (4-C), last paragraph was amended to allow a zoning ordinance to explicitly authorize the planning board to approve applications that don't meet required zoning dimensional standards in order to promote cluster development, accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by a zoning ordinance. An approval which falls within these guidelines does not constitute a zoning variance. This authority does not include shoreland zoning dimensional standards. The amendment was enacted in response to the Maine Supreme Court decision in *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58. See also, *Wyman v. Town of Phippsburg,* 2009 ME 77, 976 A.2d 985 (construing two different buffer provisions in a zoning ordinance and concluding that the planning board decision regarding buffer width wasn't tantamount to the granting of a variance).

Non-Zoning Variances

Often a subdivision or site plan review ordinance or other non-zoning ordinance gives the planning board the authority to "waive" certain requirements of the ordinance if they would cause "hardship" to the applicant. The definition of "hardship" in that context is not necessarily the same as the definition of "undue hardship" in § 4353, unless the ordinance expressly refers to that statute. Although the municipality may give the authority to grant these waivers to the board of appeals, there is no conflict with § 4353 if a non-zoning ordinance empowers the planning board to grant waivers. In any case, a non-zoning ordinance which authorizes a board or official to waive certain requirements should set out the standards to use in determining whether an applicant will suffer a hardship without a waiver. However, if the waiver authority granted under a non-zoning ordinance attempts to authorize a board or official to waive dimensional requirements established under a zoning ordinance, such a waiver provision is beyond the municipality's home rule authority, unless it falls within the 2005 guidelines set out in section 4353 described above. *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58.

Effect of Variance Decision

When the board of appeals grants a zoning variance, the effect is to waive or modify some requirement(s) of the ordinance that the applicant is unable to meet. Without the variance from the board of appeals, the planning board or CEO would have no legal authority under the ordinance to approve that application. The variance itself does not constitute a "permit," however. The granting of the variance removes an obstacle to the issuance of the permit or other approval by the planning board or the code enforcement officer.

Once granted, a variance "runs with the land," meaning that the variance is transferred automatically to a new owner if the property subsequently changes hands. It has an indefinite life unless the municipality has set a time limit by ordinance after which the variance will expire if not used. Young, *Anderson's American Law of Zoning*, § 20.02, pages 412-416; *Inland Golf Properties v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000).

After a variance is granted and a building is constructed or activity conducted based on that variance, the building or activity thereafter should be treated as a legally conforming structure or use for the purposes of deciding which ordinance provisions govern it in the future. *Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. This is probably true even if the variance was granted illegally, if it is not appealed. *Wescott Medical Center v. City of South Portland,* CV-94-198 (Me. Super. Ct., Cum. Cty., July 15, 1994). (See also the discussion about the need to record variances appearing later in this chapter.)

Procedure for Obtaining a Variance

Some ordinances allow an applicant to seek a variance from the appeals board before applying to the code enforcement officer or planning board for a permit or approval. Others require that the applicant apply for the permit or approval first and then seek a variance as an appeal from the denial of the original application. Study the ordinance governing the project to determine the appropriate sequence in your municipality.

Appeal of Board of Appeals Decision by Other Municipal Officials

If the municipal officers or the planning board believe that the board of appeals has wrongfully granted a zoning variance where the applicant has not met all of the criteria for "undue hardship" set out in § 4353, as a board they have "standing" to challenge the board

of appeals' decision in Superior Court pursuant to 30-A M.R.S.A. § 4353(4). *Crosby v. Town of Belgrade,* 562 A.2d 1228 (Me. 1989). However, in the case of an appeal by the planning board, the municipal officers may not be willing to use public money to pay for such an appeal, so the planning board members should consult with the municipal officers before retaining a lawyer to avoid having to pay from their own pockets. (See additional discussion of "standing" in Chapter 4.) See *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517 for a case where a municipality successfully appealed a decision of its board of appeals to grant a zoning variance.

Recording Variances; Abandonment of an Approved Variance

Recording Requirement

State law (30-A M.R.S.A. § 4353 and § 4406) requires the board of appeals and the planning board to prepare a certificate which can be recorded in the Registry of Deeds and provide it to the applicant for recording whenever they grant a zoning variance or a subdivision variance or waiver. A sample zoning variance certificate and a copy of the law are included in Appendix 4. To be valid, zoning variance certificates must be recorded within 90 days of the decision. Subdivision variances or waivers must be recorded within 90 days of final approval of the plan. If the certificate is not recorded within the stated deadline, the variance/waiver becomes void. The only way to "reactivate" the variance or waiver in that case is for the person wishing to rely on the variance or waiver to submit a new application on which the board may act. The board's review would be governed by the ordinance in effect at the time of the new application. The board is not obligated to grant the variance/waiver automatically the second time around; if it determines that it made a mistake the first time, it should deny the new request. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. If the board is only authorized to hear a variance request as an appeal from a decision by another board or official, then the person who wants the variance would need to reapply for the permit/approval and be denied again in order for the board of appeals to hear the new variance request, absent language in the ordinance to the contrary.

Abandonment

If a person has received approval of a variance, but later decides that he/she wants to abandon the variance and give up his/her legal rights in relation to it, it probably can be done, but there is no process spelled out in State law. Absent a procedure provided by ordinance, the person should make a written request to the board of appeals. The board should take a formal vote acknowledging that the owner wants to abandon the variance and issue a "certificate of abandonment" which can be recorded at the Registry. A sample certificate appears in Appendix 4 of this manual. It must be in notarized form and should

include: the landowner's name; property address; a Registry of Deeds Book and Page description of the property; a reference to the Book and Page where a variance approval certificate was recorded, if any; the date on which the variance was approved; the date on which the request for abandonment was granted; the reason for the abandonment request; and a statement that the board's approval of the abandonment makes the original variance void and of no effect and that the variance cannot be relied upon for any future construction activity. Before approving and issuing a certificate, the board of appeals should require proof that neither the applicant, the landowner (if a different person), nor any third party has taken action in reliance on the original granting of the variance which might be jeopardized by its abandonment.

Second Request for Same Variance

This issue was previously discussed in Chapter 4.

Shoreland Zoning Variances

Title 38 M.R.S.A. § 438-A(6-A) requires the board of appeals to send copies of all shoreland zoning variance applications (and any supporting material) to the Department of Environmental Protection for review and comment at least 20 days before taking action on the application. If the DEP submits comments to the board, they must be entered into the record and considered by the board in making its decision. Shoreland zoning ordinances require that variance decisions be filed with the DEP within 14 days from the date of the decision.

If DEP staff believes that the board has incorrectly interpreted the undue hardship test or otherwise erred in granting a variance, they may ask the board to voluntarily reconsider its decision. However, unless the DEP actually participated in the board of appeals proceedings on the variance application, either by having a staff person attend or by sending written comments for the record, the court has held that DEP cannot appeal the granting of the variance in court. *Department of Environmental Protection v. Town of Otis,* 1998 ME 214, 716 A.2d 1023. The State does have another option, since it has the authority under 38 M.R.S.A. § 443-A to take enforcement action against a municipality which is not administering and enforcing its shoreland zoning ordinance as required by State law.

The Maine Supreme Court has interpreted 30-A M.R.S.A. § 4353 and 38 M.R.S.A.§ 439-A(4) as allowing a municipal board of appeals to grant a dimensional variance to permit an expansion within the shoreland zone as long as the applicant proves undue hardship and the

dimensional variance and expansion are not otherwise prohibited by the ordinance. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

Disability Variances

Most zoning variances may not be granted unless the applicant has satisfied all elements of the "undue hardship" test in Title 30-A § 4353(4) of the Maine statutes. State law [30-A M.R.S.A. § 4353(4-A)] provides a separate variance test for applicants who want to construct or alter a structure needed for access to or egress from a dwelling by a person with a disability who resides there or who regularly uses the dwelling. (See Appendix 4 for a copy of this law.) This includes variances needed for access to interior areas as well as to enter and exit the building. As was noted earlier in this chapter, this variance test applies to all municipalities with zoning ordinances, whether or not this test has been adopted as part of the ordinance by the municipality. Typical requests include a variance for the construction of a wheelchair ramp which would otherwise violate a setback requirement or a variance for an expansion of a portion of the dwelling which would otherwise violate a setback requirement where the expansion is necessary to allow adequate turning area inside the dwelling for a wheelchair. An application for a disability variance from a setback requirement to allow a deck to be constructed for use by a disabled individual generally would not fit this test. An applicant for a disability variance does not need to satisfy the "undue hardship" test applicable to other zoning variances in order to be entitled to approval. If the applicant can prove that he or she or someone regularly using the dwelling has a disability as defined in the statute, that the variance is really necessary to enable the disabled individual to enter or leave the dwelling or some interior portion of the dwelling, and that the variance requested is the minimum necessary to meet this need, the board should grant the variance. The board may condition its approval on the removal of the structural component which was the subject of the variance either when the disability ceases or when the person with the disability no longer resides there or regularly uses the dwelling; the board is not required to do so, however. Even though disability variances are not usually sought in order to comply with the Americans with Disabilities Act, the board may use ADA guidelines to help it decide how much of a reduction to grant. For several court decisions dealing with disability variances, see *Corson v. Town of Lovell*, Civil No. 92-394-P-H, U.S. Dist. Ct., Dist. of Maine, August 3, 1993; *McGinnis v. Inhabitants of Town of Peru*, CV-94-62 (Me. Super. Ct., Oxf. Cty, Oct. 5, 1994).

This law does not expressly state that medical information submitted to document the disability is confidential. Consequently, some attorneys feel strongly that this medical information is public and cannot be discussed in executive session. Others are equally adamant that the board should treat it as confidential and discuss it in executive session

based on the various state and federal statutes that make medical information confidential in other contexts. An applicant who does not want the information discussed publicly or otherwise disclosed may seek a court order attempting to prevent disclosure. A motion to go into executive session for discussion of the medical information probably should cite 1 M.R.S.A. § 405(6)(F) as the authority for the executive session. Until a court rules on this issue or the statute is amended, it is recommended that the municipality decide which position it will take after consulting its local attorney and put language on its disability variance application form stating how the municipality intends to treat personal medical information. Because of the potential for claims based on federal confidentiality laws and privacy rights, it may be safer to treat the information as confidential. (See Appendix 4 for a copy of this law).

A 2009 amendment to 30-A M.R.S.A. § 4353(4-A) establishes rules governing the granting of a disability variance for the purpose of constructing a garage to store and park a personal vehicle owned by a person with a disability. Such a variance may only be granted under the conditions outlined in the statute and only if the legislative body has adopted this particular disability variance test as part of the zoning ordinance.

Practical Difficulty and Single Family Dwelling Setback Variances

Title 30-A, sections 4353 (4-B) and (4-C) establish special variance tests that may be adopted by municipal ordinance. (See Appendix 4 for a copy of the statute). These tests do not apply unless the municipality has adopted them. Subsection (4-B) outlines special rules for granting a setback variance for a single family dwelling outside the shoreland zone. Subsection (4-C) defines the test for finding that there is a "practical difficulty" which necessitates a variance. Neither of these tests applies to property that is wholly or partially within the shoreland zone. Both of these tests include some standards that are similar to parts of the traditional "undue hardship" test. Some of the standards in these two tests differ from the undue hardship test but are similar to each other. There has been very little litigation in Maine involving either of these types of variances, so there isn't much guidance as to how some parts of these tests should be interpreted. See *O'Toole v. City of Portland*, 2004 ME 130, 865 A.2d 555, for a Maine Supreme Court case involving the "practical difficulty" test and *Wiper v. City of South Portland*, AP-05-10 (Me. Super. Ct., Cum. Cty., Oct. 31, 2005) for a Superior Court decision analyzing the "practical difficulty" test. See *Stillings v. Town of North Berwick*, AP-03-019 (Me. Sup. Ct, Yor. Cty, Oct. 10, 2003) for a case involving a single family dwelling setback variance.

Sample Forms and Decisions

For sample forms which the board may give to an applicant seeking a variance and which the board may use in preparing a written decision, see Appendix 3.