

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: December 28, 2012

Re: Circle K / Mac's Convenience Stores Sign

Background:

The applicant's request does not specify the exact sections of the Augusta Land Use Ordinance for which the variance is being requested. Variances are required to be specific and narrowly tailored, which dictates clear specification of the standards from which a variance is requested and a clear description of the reasons a variance should be granted. The standards by which a variance is reviewed by the BZA are heavily litigated and the Board is required to adhere to the court's interpretations of the standards.

City staff will attempt to identify the ordinance sections, specific standards, and the degree to which a variance is being requested based on the narrative provided by the applicant. Generally, this is a requirement completed by the applicant. The applicant's request states that they wish to reface the existing sign, changing the copy (information on the sign), and adding an electronic message center that will enable the electronic display of prices and enable prices to be remotely changed.

The applicant's property is in the Business/Professional/Institutional zoning district (BP) and is a non-conforming use in that zoning district. The use is grandfathered. The sign for which the variance is requested and the only sign that is part of this review is the freestanding sign (aka ground graphic) that currently displays the Shell symbol and fuel prices.

Section 6.6.2.2 of the Augusta Land Use Ordinance regulates Variances and identifies the standards by which the BZA must review a variance request. This section states:

As used in this ordinance a variance is authorized only for dimensional requirements, including but not limited to, lot width, structure height, percent of lot coverage, setbacks, sign size, bufferyard width.

The BZA does not have the authority to grant a variance from any other section or standard of the Augusta Land Use Ordinance.

Section 5.1.17 of the Augusta Land Use Ordinance regulates signs. Section 5.1.17.8.6 regulates the zoning districts in which Electronic Message Centers are permitted. The BP zoning district does not permit Electronic Message Centers. An Electronic Message Center is a type of sign, it is not a dimensional standard – i.e. it has nothing to do with the “sign size”. Staff is of the opinion that the BZA does not have the legal authority to grant a variance that would allow a type of sign in the BP zoning district that is not allowed by the Land Use Ordinance. **Staff recommends that the BZA deny this aspect of the variance request based on the fact that the ordinance limits BZA authority to granting only dimensional variances and therefore the BZA does not have the authority to grant the request.**

Section 5.1.17.4 of the Augusta Land Use Ordinance regulates Ground Graphics, also called freestanding signs. The applicant’s property is in the BP zoning district which allows such signs to be up to 15 square feet in size, setback at least 10 feet, and no more than 15 feet in height. Section 5.1.17.4.6 allows sign size to be increased by up to 20% in multi-use buildings. This building appears to be a multi-use building, which allows the sign size to be increase to a total of 18 square feet. The applicant’s current sign is 51 square feet. The applicant’s sign is also 23 feet tall, based on the drawings provided. It is unknown how far from the property line the existing sign is setback. Section 5.1.17.13 of the Augusta Land Use Ordinance states in part that:

Non-conforming signs may be removed for repair, but shall not have a change in copy or location without coming into full compliance with the ordinance.

Because the sign is larger and taller than is allowed by the BP zoning district, any change to the sign beyond repair and maintenance, requires that the sign come into compliance with the Land Use Ordinance. Change in the copy, as is requested, requires that the sign come into compliance. The granting of a variance in a situation such as this would eliminate the need for the sign to ever have to come into compliance, and the sign could remain non-conforming forever, with significant changes allowed to the sign in the future.

The applicant states that they wish to change the copy on the sign and allow it to continue to be the same size, height, and location, which does not comply with the provisions described above and is the heart of the variance request.

The background on this section of the Land Use Ordinance is very recent. This section of the ordinance, requiring that changes to a sign will require it to come into compliance with the ordinance, was passed by City Council in 2011 and was thoroughly discussed by Councilors at the time. This specific topic was discussed in detail with examples of signs that would have to come into compliance over time either due to changes in copy or through amortization over time, including the sign in the downtown that is owned by the law office of the former Mayor and current state senator for the city. The issue of bringing signs into compliance was not an issue passed by City Council lightly, not that the depth of Council discussion related to ordinances they pass is a determining factor in BZA decisions.

Standing:

The applicant is Mac’s Convenience Stores, LLC, the owner of the property. Rick Self, of Self Services, is the applicant’s agent and has provided a letter dated August 22, 2008, from Mac’s Convenience Stores designating him as such. 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 Variance should be Granted to Allow for Circle "K" to Identify Our Convenience Store and Pricing Information while Protecting Our Employees from Changing Manually, Outside in Bad Weather."

Staff Analysis of Applicant's Response: The property is fully developed and the ordinance allows for signage. The applicant is requesting a sign that is larger and taller than allowed by the ordinance. The applicant has provided no evidence that a smaller sign will result in the applicant not receiving a reasonable return. Please carefully read the material provided regarding "reasonable return". The courts have narrowly defined this phrase and it does not mean that a variance should be granted to enable the applicant to maximize their return. The word "reasonable" has a very low bar set by the courts.

The additional discussion by the applicant requesting the allowance of an Electronic Message Center with changeable copy is not a dimensional issue and therefore the BZA does not have the authority to grant a variance for it, as discussed above. **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 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 applicant’s response does not address the standard beyond stating that the land use ordinance does not allow for “proper identification”. The ordinance allows for up to 18 square feet of freestanding signage, in addition to potentially significant signage on the canopy (40% coverage on the canopy as an awning or marquee sign) and signage on the wall of the building. **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 Sign and Use of the Property is Essentially the Same.”

Staff Analysis of Applicant’s Response: The applicant is requesting a change in the copy of an existing sign without being required to bring the sign fully into compliance with the Augusta Land Use Ordinance. There is no proposed change to the size, height, or location, and the BZA does not have the authority to grant an Electronic Message Center price sign, so the proposal will leave the site essentially as it is today. **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 Hardship is a Result of the Code Change Only.”

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 a code would be meaningless. **It is staff’s opinion that the hardship is clearly a result of actions taken by the applicant and that a variance is not necessary to have a fairly significant amount of signage at this site via wall, canopy, and freestanding signs.**

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:

“No Change in the Size or Location of the Sign, Only in the Code. No Detriment to the Public Interest or the Health, Safety, or General Welfare of the Residents through the Years of Operating the Store with the Existing Sign. This is a Face Change Only.”

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?”

There is no hard evidence that the proposal will or will not have an impact on the health, safety, or general welfare of the public and the neighbors, in particular. **It is staff’s opinion that this standard can be met.**

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 Height Below the Sign is Sufficient to Allow Snow Removal that would Bury a Lower Sign. The Distance from the Road has Proven Adequate in Prior Years, with No Detriment to the Neighbors or Public.”

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:

“Circle “K” Agrees to these and Any Additional Suggestions, or Requirements and Conditions, the City Needs to Allow us to Safely Operate Circle “K” Store with Sign. No Erection, ReFacing Existing Sign.”

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