



**Town of Falmouth Community Development  
Department**

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## Memorandum

**Date:** August 4, 2009  
**To:** Town Council  
**From:** Amanda L. Stearns, Community Development Director  
**Cc:** Nathan A. Poore, Town Manager  
Al Farris, Code Enforcement Officer  
Ethan Croce, Senior Planner  
**Re:** Councilor Request to consider Practical Difficulty Variance

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In response to Councilor Libby's request, I have researched the possibility of including a zoning provision for a practical difficulty variance.

The town's authority to allow variances in the Zoning and Site Review Ordinance is granted under M.R.S.A. Title 30-A, §4353. The Variance from dimensional standards (referred to as the practical difficulty variance) is one of four variances that a municipality may adopt. The following summarizes the types of variances and how they differ. Attached is a table that contains the statutory language. I have not included the disability variance in the table as it is so specific. Our current ordinance allows for three different variances.

1. The first is a "generic" variance which has the strictest standard, proof of physical hardship that leads to "no other reasonable use." This variance applies to all types of properties in all districts. The town has limited this variance by restricting its application to height, lot size, lot coverage and setbacks.
2. The second variance is a set-back variance specifically for single-family dwellings. This variance has a less stringent test to allow deviations from setbacks for single-family dwellings.
3. The third variance is a Disability variance which allows for the construction of structures to accommodate access to a dwelling unit for a resident with a disability.

The Variance from dimensional standards, if adopted, would allow deviations from dimensional standards (lot area [different term than lot size in our ordinance], lot coverage, frontage and setbacks) much the same as the standard variance. The difference is that the hardship test is absent and in its place is the practical difficulty test. The statute defines practical difficulty as "the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the

petitioner.” This variance cannot be applied to properties within any Shoreland Zoning District. This variance is unique in that it links a restriction of dimensional standards to the inability to use land for a particular use that results in economic injury.

Our current variance, in addition to variances, includes conditional uses that provide relief for a multitude of options for different types of properties. These permits are granted by the BZA or the Planning Board as indicated and have less stringent requirements than variances. Some examples of conditional uses that may be available to property owners follow:

1. For single family detached structures that are nonconforming due to lot size, lot width, lot frontage, lot coverage, height or setback requirements expansions may be permitted so long as the expansion does not violate any current dimensional requirements. (BZA approval)

*Staff recommends this provision be amended to allow the Code Enforcement Officer to issue a permit provided there is no issue with water views being blocked. (See Section 8.3, Conditional Uses, which is attached.)*

2. For single family detached structures that are nonconforming due to lot size, lot width, lot frontage, lot coverage, height or setback requirements expansions may be permitted if lot coverage does not exceed 50%, expansion is no closer than the existing structure, there is no compounding of height requirements, and setbacks of ten feet are maintained from property lines and twenty feet from buildings on adjacent lots. (BZA approval)
3. Multiplex dwelling units may be expanded provided setbacks of twenty feet are maintained from property lines and thirty feet from buildings on adjacent lots. (BZA approval)
4. Other nonconforming structures, such as commercial structures, may be expanded or enlarged subject to site plan review by the Planning Board.
5. New structures of any type in any district must meet the current dimensional requirements unless a variance is granted.

Should the Council choose to move forward with adding the “practical difficulty variance”, it is recommended that a test for “significant economic injury” be developed and placed in the ordinance to give the Board of Zoning Appeals guidance on granting this variance. Staff is currently soliciting comments from other planners regarding how this variance is being utilized in other communities.

Comparison Table of Variance Types, M.R.S.A. Title 30-A, §4353, Disability Variance excluded

<p><b>4. Variance.</b></p> <p>Except as provided in subsections 4-A, 4-B and 4-C, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause <b>undue hardship</b>. The term "undue hardship" as used in this subsection means:</p>	<p><b>4-B. Set-back variance for single-family dwellings.</b></p> <p>A municipality may adopt an ordinance that permits the board to grant a set-back variance for <b>a single-family dwelling</b>. An ordinance adopted under this subsection may permit a variance from <b>a set-back requirement</b> only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause <b>undue hardship</b>. The term "undue hardship" as used in this subsection means:</p>	<p><b>4-C. Variance from dimensional standards.</b></p> <p>A municipality may adopt an ordinance that permits the board to grant a variance from the <b>dimensional standards</b> of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a <b>practical difficulty</b> and when the following conditions exist:</p>
<p><b>Staff Notes below</b></p>		
<ul style="list-style-type: none"> <li>• strictest form of variance</li> <li>• required as part of the zoning ordinance</li> <li>• currently allowed in our ordinance for <b>height, lot size, lot coverage and setbacks</b></li> </ul>	<ul style="list-style-type: none"> <li>• currently allowed in our ordinance</li> </ul>	<ul style="list-style-type: none"> <li>• limited to provisions relating to lot area, lot coverage, frontage and setback requirements.</li> <li>• would not apply to properties within the Shoreland Zoning Districts.</li> <li>• <b>intended to allow a use that would not otherwise be permitted due to dimensional requirements</b></li> </ul>
<p><b>Variances must meet the following criteria:</b></p>		
<p>A. The land in question can not yield a reasonable return unless a variance is granted;</p>	<p style="text-align: center;"><b>No equivalent provision</b></p>	<p style="text-align: center;"><b>No equivalent provision</b></p>
<p>B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;</p>	<p>A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;</p>	<p>A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;</p>
<p>C. The granting of a variance will not alter the essential character of the locality; and</p>	<p>B. The granting of a variance will not alter the essential character of the locality;</p>	<p>B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;</p>
<p>D. The hardship is not the result of action taken by the applicant or a prior owner.</p>	<p>C. The hardship is not the result of action taken by the applicant or a prior owner;</p>	<p>C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;</p>
	<p>D. The granting of the variance will not</p>	

Comparison Table of Variance Types, M.R.S.A. Title 30-A, §4353, Disability Variance excluded

	substantially reduce or impair the use of abutting property; and	
	E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.	D. No other feasible alternative to a variance is available to the petitioner;
		E. The granting of a variance will not unreasonably adversely affect the natural environment; and
		F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.
Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.	An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.	As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.  <b><i>As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.</i></b>  Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B.

## Excerpt from Zoning and Site Plan Review Ordinance, June 15, 2009

### 8.3 Conditional Uses

Conditional uses may be granted by the Board of Appeals after considering the characteristics and location of the proposed use and of other properties in the surrounding neighborhood, provided that the petitioner shall submit to the Board statements in writing, which may be accompanied by diagrams or photographs which shall become part of the record of such petitions, demonstrating that the proposed use:

- a. will meet the definition and specific requirements set forth in this Ordinance for such particular use:
- b. will be compatible with the general character of the neighborhood with regard to design, scale, and bulk of proposed structures;
- c. will not have a significant detrimental effect on the use and peaceful enjoyment of abutting property as a result of noise, vibrations, fumes, odor, dust, light or glare.
- d. will not have a significant adverse effect on adjacent or nearby property values;
- e. will not have a significant adverse impact on water views from adjacent and nearby properties and public right of ways; [Adopted 7/24/06]
- f. will not result in significant hazards to pedestrian or vehicular traffic or significant traffic congestion;
- g. will not result in significant fire danger;
- h. will not result in significant flood hazards or flood damage, drainage problems, ground or surface water contamination, or soil erosion;
- i. will be served adequately by, but will not overburden, existing public services and facilities, including fire protection services, sanitary sewers, roads, water and storm drainage systems.
- j. upon a showing that a proposed use is a conditional use in the district where it is to be located, a conditional use permit shall be granted unless the Board determines that the proposed use will not meet one of the standards set forth in paragraphs a. through i. of this subsection, or paragraphs a. through g. of subsection 8.7, due to unique or distinctive characteristics or effects associated with the proposed use or its location which differ substantially from the characteristics or effects which would normally occur from such a use in that district. [Adopted, 4/27/87]

## **8.7 Conditions**

In hearing appeals under this Section 8, the Board shall determine whether the appellant's proposal will satisfy the following criteria, and in granting any appeal it may impose such conditions as it deems necessary to assure compliance with the applicable requirements set forth in subsection 8.3 and 8.4 and with the following criteria:

- a. The proposal must include any special screening, fencing, or other buffer necessary to set off the subject property from abutting uses or to assure the continued enjoyment of abutting uses;
- b. The proposal must adequately provide for drainage through and for preservation of existing topography within its location, particularly in minimizing any cut, fill, or paving intended;
- c. The proposal must not create or increase any fire hazard or any hazards to safe, convenient pedestrian or vehicular flow;
- d. The proposal must prevent or avoid the creation of any nuisance affecting adjacent properties;
- e. The proposal must include provision for adequate, lawful sewage disposal and healthful domestic water supplies;
- f. The proposal should not have a significantly adverse effect on adjacent or nearby property values.
- g. The appellant must be found to have adequate financial and technical capacity to satisfy the foregoing criteria and to develop and thereafter maintain the proposed project or use in accordance with all applicable requirements.