



**Town of Falmouth Community Development  
Department**

271 Falmouth Road  
Falmouth, ME 04105

☎ 207.781.5253

📠 207.781.8677

## Memorandum

**Date:** November 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:** Research on “Practical Difficulty” Variance option

---

Based on the discussion at the August 10, 2009 Council meeting, staff has reviewed several local properties where it has been suggested that the inclusion of a “practical difficulty variance” might provide a remedy for the inability to develop a property outside the zoning requirements. The variance criteria as iterated by statute are as follows:

- A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;
- 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;
- C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;
- 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.

After review of the applications, I have concluded that there is no simple way to judge how the BZA might apply the variance criteria to any given circumstance. They are general and not well defined. Variance applications are each judged on their own merits and circumstances and outcomes do not set precedence for evaluating other applications. Some of the examples that were brought to our attention are:

1. 207 Woodville – This situation involved the desire of the applicant to place a roof structure over a concrete pad to protect an RV from the weather. The pad does not have to conform to setbacks but the roof is a structure and is not permitted in the setback area. Under my read of provision C. above this would not meet that criteria as the property owner constructed the pad in its current location.

2. 52 Underwood Road – This property received a Conditional Use Permit under Section 6.2 for an expansion of a single family home on a nonconforming lot. I attempted to contact the owner but did not get a reply. This property as far as I can tell received approval from the desired addition. The Conditional Use criteria are less stringent than that of any variance.

The Council also asked for input from the Board of Zoning Appeals. The BZA met on October 27, 2009. Attached to this memo is the summary of that discussion from Chairman Richard Bayer.

The City of Portland is the only other municipality that we are aware of that has adopted this variance. In the past year they have received 5 applications. Two were withdrawn, three were granted and one was denied. I have provided a brief summary of each of these cases that I have received information on. The city has created a list of criteria that are slightly different than the state language. The attached table shows the differences between the City of Portland language and the state.

Property One: 978 Washington Avenue (Denied)

This request was part of a request to change the use of a commercial building to a place of worship. The lot was nonconforming and could not accommodate the number of parking spaces required for the proposed use. The practical difficulty variance was to reduce the lot size requirement to accommodate the change of use.

Property Two: 8 Arlington Street (Withdrawn)

This appeal included an appeal for interpretation as well as an appeal for a practical difficulty variance. The Interpretation Appeal was granted and the PDV was withdrawn as it was no longer necessary.

Property Three: 122 Pine Street (approved)

The applicant sought a variance for maximum lot coverage and minimum yard dimensions for the purpose of enclosing an existing deck and adding a deck to create access to the rear stairs of the building. This being the only applicant where the findings were enclosed I will reiterate them.

1. Building would increase significantly in value with the grant of a variance.
2. Unique to property as was formally a multi-unit and access was divided.
3. Would not harm neighborhood – reviewed by Historic Review Committee and is favored.
4. Not a result of action taken by the applicant or previous owner – No substantial evidence that deck was not conforming to lot size requirement as time of construction
5. No other feasible alternative – No other alternative after consultation with the Historic Review Committee.
6. No adverse effect on the natural environment – No alteration to drainage.

As you can see, each application is reviewed on its own merits so predicting how our BZA might apply the criteria to any given situation is not something that is easily determined.

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.

Comparison Table of M.R.S.A. Title 30-A, §4353 4-C and City of Portland Ordinance

<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><i>dimensional standards</i></b> of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a <b><i>practical difficulty</i></b> and when the following conditions exist:</p>	<p><b>City of Portland ordinance</b></p>
<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><i>intended to allow a use that would not otherwise be permitted due to dimensional requirements</i></b></li> </ul>	
<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>A. The need for the variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.</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>B. The granting of the variance will not have an unreasonably detrimental effect on either the use or fair market value of the abutting properties</p>
<p>C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;</p>	<p>C. The practical difficulty is not the result of action taken by the applicant or a prior owner.</p>
<p>D. No other feasible alternative to a variance is available to the petitioner;</p>	<p>D. No other feasible alternative is available to the applicant except a variance.</p>
<p>E. The granting of a variance will not unreasonably adversely affect the natural environment; and</p>	<p>E. The granting of the variance will not have an unreasonably adverse effect on the natural environment.</p>
	<p>F. Strict application of the dimensional standards of the ordinance to the subject property will preclude a use which is permitted in the zone in which the property is located.</p>
	<p>G. Strict application of the dimensional standards of the ordinance to the subject property will result in significant economic injury to the applicant.</p>

Comparison Table of M.R.S.A. Title 30-A, §4353 4-C and City of Portland Ordinance

<p>F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.</p>	<p>H. the property is not located in whole or in part, within a shoreline areas , as defined in 38 MRSA Section 435, nor within a shoreline of flood hazard zone as defined in this article.</p>
<p>As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.</p> <p><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></p> <p>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.</p>	

## 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.