TITLE 5 ISSUE:
WHAT’S A LUA vs VARIANCE?

David Boyer
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Log Cabin
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Topics to be Discussed

- Regulations
- Process
- Title 5 Compliance
- Maximum Feasible Compliance & Local Upgrade Approvals
- Variances
- Appeals
Regulations (Section 15.401-15.422)

- Provides the framework for how to review and process both LUA and Variances.
- Defines the difference between a LUA and Variance and the conditions for each.
- Discusses the philosophy of Maximum Feasible Compliance.
Once upon a time DEP reviewed and approved all variances granted by the BoH.

Since the early ‘00s DEP removed itself from the review/approval process. All variances are now granted solely at the local level.

Good or Bad?
Design Plans are submitted to the Board of Health - two most important questions:

1. Is the design in Full Compliance or not?

2. Is this a New Construction project or an Upgrade?
If design is in **Full** compliance, then a decision can be made to issue the Disposal System Construction Permit per Section 15.020.

Full compliance means that the proponent is not seeking any relief from the Code.
If design is not in **Full** compliance, then a decision must be made depending upon whether the project is **New Construction** or an **Upgrade**.

- **New Construction** → **Variance**
- **Upgrade** → **Variance** or **LUA**
LUA versus Variance – What’s the Difference?

**LUAs** are a quicker and less onerous process to waive specific requirements of the Code.

**Variances** are a more involved and more formal process to waive other general requirements of the Code.

Goal is always Full compliance even for upgrades.
Can apply to either **New Construction** or **Upgrades**.

**Standard of Review:**

- Enforcement of the Code would be manifestly unjust.
- Equal environmental protection: a level of protection equivalent to a system compliant with Title 5 without strict application of the provision which a variance is sought.
Variances (15.410 – 15.422)

- For **New Construction**:  

  Enforcement of the provision for which a variance is sought must deprive the applicant of substantially all beneficial use of the property.
Must be in writing and demonstrate compliance with manifest injustice and equal env. protection.

Notification to abutters 10 days before BoH meeting by certified mail.

BoH must render decision in writing. Issuance of variance posted for 30 days.

BoH has 45 days to act on complete application.
BoH can include conditions for Variances:

- Monitoring and reporting (e.g., well sampling)
- Deed recording (e.g., # of bedrooms)
- Financial assurances (e.g., $ in escrow for repairs)
- Other qualifications on use of the system.
Variances cannot be granted for:

- Minimum of 4’ of naturally occurring pervious material for new construction.
- Minimum of 4’ of naturally occurring pervious material for an upgrade unless it’s not feasible to: find a location with 4’ of material or obtain a sewer connection or connect to a shared system for an upgrade. But cannot have less than 2’ of material.
Schools that request a Variance to design flow must seek approval by DEP. (Section 15.416)
LUAs only apply to **Upgrades**, never for **New Construction**.

Only apply to systems below 10,000 gpd. BoH jurisdiction ends at 9,999 gpd. DEP is the authority at 10,000 gpd.

Notification of abutter(s) only needed if a reduction to their property line or well is sought.

LUAs cannot increase design flow (e.g., cannot add bedrooms)
Goal is always **Maximum Feasible Compliance** through:

- Fully compliant system
- I/A system
- Shared System
- Connection to sewer
### LUA (15.402 – 15.405)

- Following requirements cannot be varied by LUAs:
  - Septic tank < 1,000 gallons, or < 24-hour retention
  - Minimum of 3’ GW offset if certain conditions are met.
  - Minimum of 4’ of naturally occurring pervious material under SAS
  - Reduction of no more than 25% of SAS sizing
  - Cannot locate SAS within 100’ of surface water supply or tributary, or within 50’ of well or in a Zone 1.
BoH through the LUAs should consider physical constraints of lot as well as the economic feasibility.

Emphasize protection of water resources and sewage treatment.

Section 15.405 provides a list of options that should be considered in ascending order of severity:

Consider the first options before considering the last options.
Depth to GW reduction when perc testing revealed slower than 2 mpi soils:

- A SE who is member or agent of BoH determines the GW elevation.
- 3’ GW offset is maintained
- System is failed or non-conforming and < 2,000 gpd
- No increase in flow
- No reduction in size of SAS or setbacks from well or water resources.
If system cannot be upgraded using the LUAs:

- Get a GW discharge permit
- Get a tight tank
- Apply for a Variance
- Abandon the system
How do you know if a Variance or LUA is needed?

- The design plans must list out all Variances sought in conjunction with the plan per Section 15.220.
- It is the obligation of the design engineer to be forthcoming and clearly state where relief from the regulations is sought.
- A review is highly recommended to ensure regulatory compliance.
Enforcement of local Bylaws or regulations is a local matter:
  - DEP does not enforce local regs.
Any person aggrieved by an order, variance, issuance or denial of a Disposal System Construction Permit, Local upgrade approval or Certificate of Compliance may appeal to any court of competent jurisdiction as provided for by the laws of the Commonwealth.

DEP is not an appeal board. DEP does not interject if a homeowner is denied.
An applicant who is aggrieved by a shared system, RSF or equivalent technology, a remedial use, a certification for general use, or variance determination by the Department may request an adjudicatory hearing on that determination in accordance with 310 CMR 100 and M.G.L. c. 30A.
### Summary: LUA vs. Variance

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<tr>
<th>LUA</th>
<th>Variance</th>
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<td>Upgrades only, no increase in flow</td>
<td>Applicant must demonstrate denial of the variance would be manifestly injustice*.</td>
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<tr>
<td>The Code sets a required order for LUA consideration</td>
<td>Applicant must demonstrate that equal environmental protection has been provided.</td>
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<td>There is limited required notification to abutters.</td>
<td>Notify abutters by certified mail 10 days before Board meeting.</td>
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A Few More Things on LUA

- Make sure LUA requests are sought in required order as presented in the Code (310 CMR 15.405(1)).

- Make sure all conditions of LUA approval are met:
  - 310 CMR 15.405(1)(h) – reduction in groundwater separation
  - Perc Test LUA – follow the policy.
A Few More Things on Variances

- For new construction, applicant has to prove that denial would deprive applicant of all beneficial use of the property.
- Approval or denial of variance must be in writing.
- 45-day action timeline on variance request.
- Cannot grant variance for less than 4’ of pervious material for new construction.
- Cannot grant variance for less than 2’ of pervious material for an upgrade.
MassDEP WERO Contact

Matt Sokop
Section Chief – Water Pollution Control
413-755-2218
Matthew.Sokop@mass.gov