

# **TITLE 5 ISSUE: WHAT'S A LUA vs VARIANCE?**

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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.

## DEP Review ?

- ❑ 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?**

## Process

- 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**?

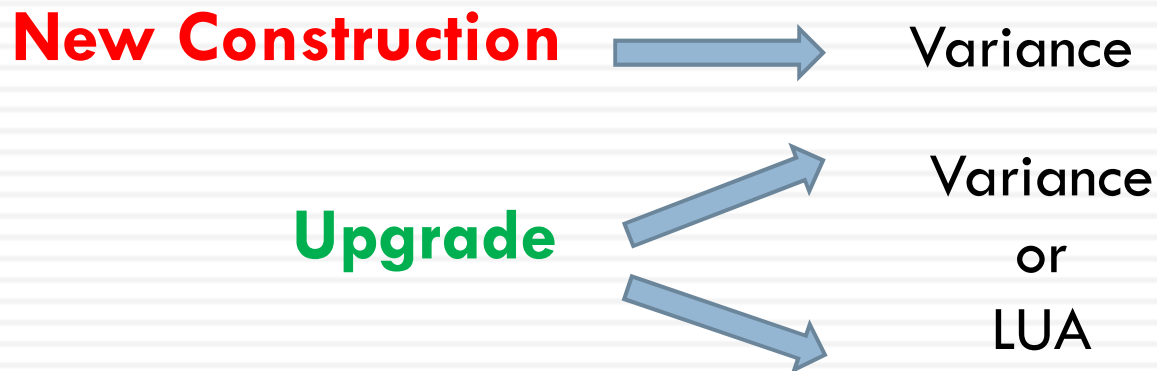
## Process (cont.)

- ❑ 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.

## Process (cont.)

- ❑ If design is not in Full compliance, then a decision must be made depending upon whether the project is **New Construction** or an **Upgrade**.



# LUA versus Variance – What’s the Difference?

**LUA**s 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.



## Variations (15.410 – 15.422)

- ❑ 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.

## Variations (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.



## Variances (15.410 – 15.422)

- ❑ 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.

## Variances (15.410 – 15.422)

- 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.

## Variations (15.410 – 15.422)

- ❑ Variations 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.

## Variances (misc.)

- ❑ Schools that request a Variance to design flow must seek approval by DEP. (Section 15.416)

## LUA (15.402 – 15.405)

- ❑ 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)

## LUA (15.402 – 15.405)

- 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.

## LUA (15.402 – 15.405)

- ❑ 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.**

## LUA (example)

- ❑ 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.

## LUA (15.402 – 15.405)

- ❑ 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.

## Local Bylaws/Reg.

- ❑ Enforcement of local Bylaws or regulations is a local matter:
  - DEP does not enforce local regs.

## Appeals (15.421)

- ❑ 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.

## Appeals (15.421)

- ❑ 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

## LUA

- Upgrades only, no increase in flow
- The Code sets a required order for LUA consideration
- There is limited required notification to abutters.

## Variance

- Applicant must demonstrate denial of the variance would be manifestly injustice\*.
- Applicant must demonstrate that equal environmental protection has been provided.
- Notify abutters by certified mail 10 days before Board meeting.

# 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.



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