



# LUA VS. VARIANCE

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# OUTLINE

- Regulatory Definitions
- Local Upgrade Approval
- Variance
- LUA and/or Variance Case Studies
- Questions and Answers

# WHY THIS TOPIC?

- Two variance applications for surface water supply (or tributary thereto) setbacks;
- Two separate communities and different surface water supplies;
- One community granted the variance with notification to all abutters and discussion with the public water supplier;
- One community treated it as if it were Local Upgrade Approval:
  - Public water supplier consultation;
  - No abutter notification; and
  - No public hearing
- The second town needed to start the process all over from scratch

# DISCLAIMERS

- **This presentation relates solely to 310 CMR 15.000, Title 5 of the State Environmental Code.**
- **Municipalities may have local bylaws or regulations that are more restrictive than Title 5.**
- **Any reference to a proprietary technology in this presentation is for illustrative purposes only and does not constitute an endorsement of or comment on said technology by the presenter or MassDEP.**



# REGULATORY DEFINITIONS

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310 CMR 15.002



## NEW CONSTRUCTION

- *The construction of a new building for which an occupancy permit is required or an increase in the actual or design flow to any system or an increase in the actual or design flow to any nonconforming system or an increase in the design flow to any system above the existing approved capacity.*
- *New construction shall not include replacement or repair of a building in existence as of March 31, 1995 that has been totally or partially destroyed or demolished, provided there is no increase in design flow, no increase in design flow above the existing approved capacity to any system, no increase in the number of dwellings or dwelling units or no increase in the number of bedrooms in any dwelling or dwelling unit.*

*The construction of a new building for which an occupancy permit is required or an increase in the actual or design flow to any system or an increase in the actual or design flow to any non-conforming system or an increase in the design flow to any system above the existing approved capacity.*

- Scenario 1

- Vacant lot
- No existing or historic building
- New building(s);

- Scenario 2

- Existing structure (or facility) with
  - Building expansion with accompanying flow increase;
  - Additional bedroom(s)



# UPGRADE

- *The modification of one or more components of an on-site system or the design and construction of a new on-site system which is intended to bring a nonconforming system into conformance with 310 CMR 15.000.*
- *An emergency repair is not an upgrade.*



## SCENARIO 1

### NEW CONSTRUCTION

- Vacant lot
- Building was built there in the 1930s but was demolished in the 1970s

## SCENARIO 2

### UPGRADE

- 1940s era dwelling that is still standing;
- Developer wants to tear down and rebuild with same number of bedrooms

## SCENARIO 3

### UPGRADE

- Cabin/camp with 1 or 2 rooms and a privy;
- Rebuild or upgrade is proposed with a total of one bedroom

*New construction shall not include replacement or repair of a building in existence as of March 31, 1995 that has been totally or partially destroyed or demolished, provided there is no increase in design flow, no increase in design flow above the existing approved capacity to any system, no increase in the number of dwellings or dwelling units or no increase in the number of bedrooms in any dwelling or dwelling unit.*



## LOCAL UPGRADE APPROVAL

- An approval granted by the Approving Authority allowing the owner or operator of a nonconforming system to perform an upgrade of the nonconforming system to the maximum feasible extent, all in accordance with the provisions of 310 CMR 15.401 through 15.405.



# VARIANCE

There is no definition!

## 310 CMR 15.401 PROVIDES DIRECTION...

- Full compliance is the goal and is presumed necessary for protection of public health, safety and the environment.
- Any requests to vary must be carefully reviewed by the Approving Authority and, where required, MassDEP.
- Procedures are set forth in 310 CMR 15.401 through 15.422.

# LOCAL UPGRADE APPROVAL

310 CMR 15.404 AND 310 CMR 15.405

# THE GROUND RULES

- Goal is always full compliance [310 CMR 15.401(1)].
- LUA may be approved by the Approving Authority without MassDEP approval:
  - Design flow is less than 10,000 gpd;
  - Required or voluntary upgrade of failing or non-conforming system; and
  - Any required conditions for approval of LUA are met.
- New construction or increase in flow requires a variance: LUA is not appropriate for new construction.
- Regulations present order in which LUAs are to be considered.

# ORDER FOR CONSIDERATION OF LUA

1. Property line setback\*
2. Building setback
3. Cover over component
4. 25% SAS area reduction
5. Well relocation
6. BVW setback
7. Surface water, etc. setback
8. Water lines, private wells\*, surface water supplies, tributaries, etc. setback
9. GW separation\*
10. Perc testing/sieve analysis\*
11. GW separation to septic tank tees
12. Number of deeps in SAS

\* Conditions are attached to each of these LUAs

## 310 CMR 15.405(2) - LUA ABUTTER NOTIFICATION

Affected abutter(s) notified via certified mail at least 10 days prior to Board of Health meeting at which the LUA application will be on the agenda.

- Property line setback
- Private water supply well setback



# VARIANCES

310 CMR 15.410 THROUGH 15.413

# THE GROUND RULES

Variances may be applicable to:

- Upgrades (no increase in design flow)
- New construction

Standards of Review:

- Equivalent level of environmental protection
- Manifestly unjust to deny
  - For new construction, must demonstrate that denial of variance would deprive owner of substantially all beneficial use of the property

## 310 CMR 15.411(1) VARIANCE ABUTTER NOTIFICATION



All abutters notified via certified mail at least 10 days prior to Board of Health meeting at which the variance application will be on the agenda.

An abstract graphic of a circuit board pattern in a light gray color, set against a black background. The pattern consists of thin lines and small circles, resembling a complex network or a stylized tree structure, primarily located on the left and right edges of the frame.

# LUA VS. VARIANCES

CASE STUDIES

# CASE #1



Existing four-  
bedroom  
dwelling



1978 Code system failed  
T5 System Inspection at  
time of transfer



Lot with ledge  
outcrops

# PROPOSED SYSTEM #1

Fully complying upgrade with following exceptions:

- 25% SAS area reduction; and
- Distance to foundation reduction (20 ft to 18 ft)

Approval procedure:

- LUA for SAS reduction; and
- LUA for foundation setback

Notification to abutters:

- Not required under T5

## CASE #2



Existing three-  
bedroom dwelling



1978 Code system  
failed T5 System  
Inspection at time of  
transfer



Small lot near a  
tributary to a  
surface water  
supply

# PROPOSED SYSTEM #2A

Fully complying upgrade with following exceptions:

- Remedial Use STU with 50% SAS reduction; and
- Distance from septic tank and SAS to tributary to surface water supply (200 ft to between 100 and 125 ft)

Approval procedure:

- LUA for septic tank setback to tributary; and
- LUA for SAS setback to tributary

Notification to abutters:

- Not required under T5



# PROPOSED SYSTEM #2B

Fully complying upgrade with following exceptions:

- Remedial Use STU with 50% SAS reduction; and
- Distance from septic tank and SAS to tributary to surface water supply (200 ft separation reduced to between 75 and 90 ft)

100 ft  
310 CMR 15.411(5)

**What about  
the approval  
process and  
notifications?**

**Special  
case!**



## SPECIAL CASE

- **BOH cannot approve these variances: specifically prohibited by 310 CMR 15.411(5).**
- **BOH should immediately contact the appropriate MassDEP Regional Office to discuss the situation.**

## CASE #3



Existing five-  
bedroom  
dwelling



Pre-1978 Code system  
failed T5 System  
Inspection at time of  
transfer



Small lot near a  
tributary to a  
surface water  
supply

# PROPOSED SYSTEM #3

Fully complying upgrade with following exceptions:

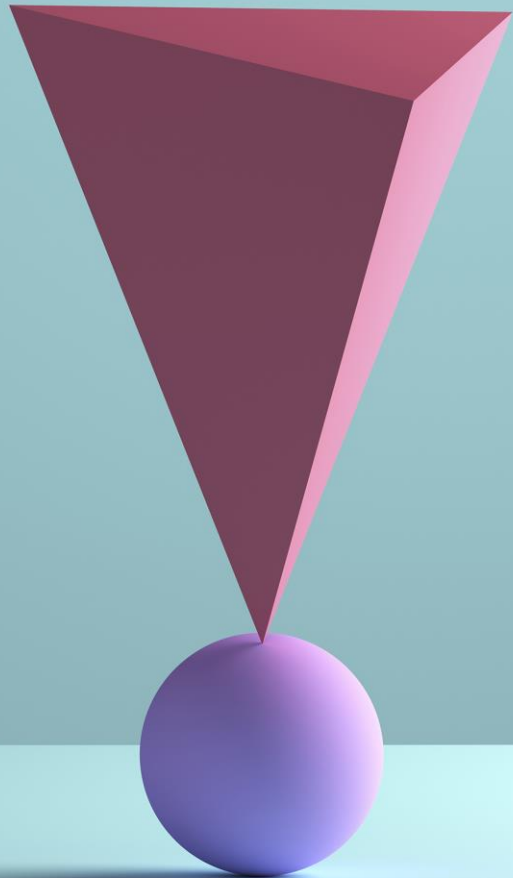
- 3 ft separation to GW in 20 mpi soils; and
- Distance from SAS to tributary to the surface water supply (400 ft to 205 ft)

Approval procedure:

- Variances for:
  - GW separation [LUA is not applicable: surface water supply setback variance (310 CMR 15.405(1)(h)5.)]; and
  - Distance from SAS to surface water

Notifications:

- Abutters with public meeting;
- Consultation with water supplier



Surface water  
supply setbacks  
can be a bit of a  
balancing act....

Remember it took  
MassDEP a long  
time to figure out  
that it needed to  
review some of  
these!

# SURFACE WATER SUPPLY SETBACKS

## LUA VS. VARIANCE

### UPGRADE/REPAIR

- LUA (310 CMR 15.405(1)(g)) if  $\geq 100$  ft
- If LUA not applicable or not granted, then
- 310 CMR 15.411(5) and refer to New Construction discussion

### NEW CONSTRUCTION

- 310 CMR 15.411(5)
  - Some exceptions;
  - Water supplier consultation;
  - $\geq 200$  ft for SWS;
  - $\geq 100$  ft for tributary;
  - No MassDEP review; and
  - Copy MassDEP on variance





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