

MAINE LAND USE PLANNING COMMISSION
Department of Agriculture, Conservation & Forestry
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MINUTES

REGULAR MONTHLY MEETING

Jeff's Catering, 15 Littlefield Way, Brewer
November 4, 2015

COMMISSIONERS PRESENT

Everett Worcester, Chair	Durward Humphrey	Charles Pray	Bill Gilmore
Betsy Fitzgerald, Vice-Chair	Paul Underwood	Mike Theriault	

STAFF PRESENT

Nicholas Livesay, Executive Director	Stacie Beyer, Senior Planner
Samantha Horn Olsen, Planning Manager	Eric Larsson, Senior Planner
Jean Flannery, Permitting & Compliance Manager	Debbie Kaczowski, E. Millinocket Regional Office
Hugh Coxe, Chief Planner	Mary York, LUPC Augusta
Karen Bolstridge, Bangor Regional Office	

OTHERS PRESENT

Lauren Parker, Assistant Attorney General	See attached Sign in Sheets
Chris Huck, AVCOG	

*Note: Commission votes are recorded in the following order:
number voting in favor of a motion – number voting against a motion – number abstaining – number absent*

ADMINISTRATIVE MATTERS

Introductions

Introductions were made by members of the Commission, its staff, and the audience.

Minute Approvals; October 7, 2015 Minutes

Commissioner Theriault moved to approve the minutes; Commissioner Fitzgerald seconded;

Vote: 6-0-1-1 Unanimous (Commissioner Underwood abstained; Commissioner Curtis was absent. The LUPC has one vacant seat at this time.)

DIRECTOR'S REPORT

Nick Livesay provided the director's report, noting:

- He has been bill, based on available bill titles, proposed for introduction during the second regular session; two bill titles of interest related to wind power projects, but neither was accepted by the Legislative Council;
- On November 18, Samantha and a representative from DEP, at the invitation of the Town of Greenville, will attend a selectman meeting to discuss the process for reviewing wind power proposals and petitioning for removal of an area from the expedited permitting area;
- Two enforcement matters handled by the Commission over the last year or so have been fully resolved with required remedial action completed; he showed photos of the work completed to resolve the matter involving reconstruction of the dam on Second Roach Pond and the matter involving replacement of an impermissible retaining wall on Lassell Island with riprap;
- The final product from the Aroostook County CGPZ steering committee will be presented to the Northern Maine Development Commission board at its next meeting;

- On October 20 the Commission had a meeting for all staff in Bangor;
- Hiring for a vacant 30 hr/week Senior Planner position is complete; and
- Oxford County has nominated Robert Everett to serve on the Commission.

Nick noted that Commission Humphrey's term was expiring and thanked him for his contribution to the Commission.

RULEMAKING MATTER

Chapter 10 Subdivision Rulemaking; review of proposed revisions to technical subdivision standards; consideration for adoption; Stacie Beyer

Stacie Beyer presented a recommendation for the Commission to adopt proposed Subdivision Technical Issues rule revisions. The presentation included an overview of the rulemaking process, a refresher on key rule changes included in the rulemaking, a summary of the public comments received, and LUPC staff's recommendation. The Subdivision Technical Issues rule was posted for public comment on August 12, 2015. The public comment period closed on October 2, 2015 and the rebuttal comment period closed on October 9, 2015.

Stacie explained that the key changes to the rules related to 4 topic areas: soils investigation and mapping, maximum road grade, steep slopes, and phosphorus control. For soil investigation and mapping, the revisions included modifying the level of intensity for soil surveys, adding a Class L soil survey, adding new waiver provisions for use of published soil maps, and using DEP soil test pit requirements. Revisions related to maximum road grade will allow Class 1 road grades up to 15% in certain circumstances. The rulemaking also revised references to steep slopes in the Subdivision and Cluster Development sections of Chapter 10 from 15% to 20%, and made changes to the Phosphorus Control section to update references to the DEP manual and add performance standards for small projects. Lastly, the rule updated Chapter 10.08 to conform to changes in statute related to the removal of the requirement that adoption of land use districts satisfy a demonstrated need.

In the summary of public comments, Stacie outlined Maine Audubon's comments that raised concerns about the proposed changes to steep slope references. Stacie stated that one other interested person filed comments that were not timely. Those comments recommended a number of changes throughout the draft rule. Staff read these comments, but found there was no basis to support the recommended changes. No rebuttal comments were received. Stacie explained that Maine Audubon's concerns about development on steep slopes related to increasing the risk of habitat fragmentation, erosion and sedimentation, and construction of road-stream crossings. She indicated that LUPC staff understands the concerns. However, revising references to steep slopes from 15% to 20% increases consistency with other programs and balances the needs of landowners, while maintaining protection standards elsewhere in the rules for habitat, erosion control, and stream crossings. Staff recommended the Commission adopt the proposed Subdivision Technical Issues rule revisions and basis statement as presented, and concurrently withdraw the official guidance document titled "Clarifying the Rezoning Criterion of 'Demonstrating Need.'"

Commissioner Gilmore asked for clarification on the increase in maximum road grade to 15% when 10% is not practical. Stacie clarified that it is when the applicant demonstrates it is not practical. He also asked if there was any language including in the rule regarding the length of the road network that could maintain that 15%, and Stacie responded, yes, it is limited to 300 feet. Commissioner Fitzgerald commented that, from a more practical point of view, aligning the same numbers in the subdivision rule with ones used in the plumbing code and shoreland zoning makes a lot of sense. She said it is hard to explain to someone why they are different.

Commissioner Underwood asked about the change in Section 10.08, subsection 2, where it crosses out "satisfies the demonstrated need in the community or area." He asked how that is different; the standard still carries on "has

no undue adverse impact on existing uses or resources.” Stacie explained that, because of the changes in statute, there doesn’t have to be a demonstration of need in order to change the land use district. Director Livesay further explained that Chapter 10.08 simply quotes statute. Since the statute changed, if there is a rezoning petition, we would apply the statutory standard, so this is a housekeeping matter to make sure when we quote the statute it is accurate.

**Commissioner Fitzgerald moved to approve staff recommendations; Commissioner Gilmore seconded;
Vote: 7-0-0-1 Unanimous**

PLANNING MATTERS

Community Guided Planning and Zoning – Washington County; project update; Hugh Coxe

Hugh Coxe presented the update and explained that staff are doing periodic check-ins for CGPZ to make sure regions get to the end of the process with recommendations the Commission is prepared to endorse. The Commission isn’t being asked to make a decision today but has the opportunity to ask questions or raise issues.

Hugh stated that Judy East, the executive director for the Washington County Council of Governments (WCOG), has been working on community outreach, mapping, and recruiting participants for the planning committee. Over the last two weeks WCOG held three public meetings to inform resident about the project and to gather input from residents in a face-to-face setting. The meetings were held in the early evening in Alexander, Dennysville, and Brookton and were well attended. At each meeting Judy collected demographic information and described the project objectives and key issues. Commissioner Gilmore asked why the majority of the attendees were from the UT. Hugh explained how the public was invited and notified and that there were attendees from some organized towns.

WCOG developed an online survey seeking opinions and values of residents, property owners, businesses and others about benefits that the UT brings to Washington County, how future development should take place in the UTs, and which land use changes will have the most positive impact in the UT. These same questions were asked at the public meetings and responses were recorded and will be combined with the survey answers.

The next steps in this process are to hold planning committee meetings and to review research on the key issues. Hugh reviewed the 5 principles for a successful CGPZ process.

Commissioner Worcester suggested reaching out to the organized communities. Commissioner Gilmore emphasized the need for involvement with organized towns. Commissioner Fitzgerald discussed the notification of the meetings. Commissioner Pray indicated he heard about the meetings and that there appeared to be significant outreach.

Community Guided Planning and Zoning – Western Maine; presentation of stage one report and update; Hugh Coxe

Hugh Coxe provided a brief update and explained that this is a check-in and review of the report from Western Maine’s first stage. Hugh introduced Chris Huck, planning director for Kennebec Valley Council of Governments (KVCOG), who reviewed the report and the process.

Chris explained that the Franklin/Somerset County Community Guided Planning and Zoning (CGPZ) Committees have been meeting since January to develop ideas and proposals for this project and recently completed Stage 1 of

the planning and have submitted the attached report and cover letter. The focus of the planning effort has been looking at outdoor recreation in the region and what to do to facilitate and manage that sort of development. Chris reported the process has had challenges coordinating the interests of the two counties but that the committees were able to develop a set of common issues to address. These include looking at the location of development of outdoor recreation and how that is affected by the adjacency principle, more flexibility in the rezoning process, and more opportunity for landowners to adapt quickly to changes in the outdoor recreation market.

The Stage 1 report summarizes the work of the committees to date, describes land use issues identified by the committees during Stage 1, sets out a workplan to develop land use proposals during Stage 2, and includes an appendix with the agendas and minutes of each committee meeting. The report has been reviewed and endorsed by the full planning committee, the Somerset and Franklin County Commissioners, and the executive boards of the sponsoring organizations (Androscoggin Valley Council of Governments (AVCOG) and KVCOG).

Commissioner Underwood asked about addressing the issues identified by the Western Maine process such as adjacency. Hugh discussed the Aroostook process approach for addressing adjacency. The prospective zoning is designed to take other approaches to location of development and adjacency. He also discussed the issue of trying to expedite the rezoning and permitting process.

Commissioner Fitzgerald asked Chris about the committee structure and process and how to reconcile when they take different approaches. Chris discussed how they have worked with that to date and the possibility that the two committees may have different recommendations. At the end of the process the two counties may make common recommendations or they could be in conflict. Chris indicated that the idea is that the two would have a fair amount in common but that there may be some separate recommendations, but that it is too early in the process to know. Hugh discussed the desire to have common solutions between the two counties but that it needs to be balanced with the regional differences. Commissioner Underwood stated that with two distinct political jurisdictions, interests may not be readily aligned.

Commissioner Gilmore stated that road closures can create difficulties for access to and between areas that may be located in relatively close proximity. Chris discussed how portions of Somerset related very closely to Franklin and in other locations there is little interaction due to physical barriers or divergent interests. Commissioner Worcester stated that the issues identified are three key issues so the Commission looks forward to the work of the CPGZ effort in Western Maine. He stated that he feels they are on the right track.

PLANNING & RULEMAKING MATTER

Road Setbacks; discussion of possible changes to existing Chapter 10 standards; Eric Larsson

Eric gave a presentation on options for revising the regulation of road setbacks.

Commissioner Gilmore asked the Director if there was a standard point of reference for the right of way for the different types of roads across the Commission's jurisdiction. Nick, after pointing out that he was not an expert on road rights of way, responded that there is a great deal of variation even along one road, and that for many private roads there is no right of way at all. He also noted that one advantage of a prevailing setback rule is that it avoids the need to create a detailed road classification scheme. Commissioner Gilmore asked if a prevailing setback rule might create a lot of non-conformities that would lead to problems in the future. Nick replied that a prevailing setback rule would establish a rule that would make certain setbacks less than 50' conforming.

Commissioner Underwood expressed concerns that without an established right of way there will still be problems

with road maintenance. He asked if it would be possible to create a rule that allowed for something like a special exception based on a strict mathematical formula. Nick recognized that there was a great deal of discussion about rights of way, but using them as a reference presented many practical administrative difficulties because of their variability. Nick also pointed out that any rule that relied on reference to a right of way would place additional burdens on applicants to obtain a survey, even for relatively small projects, and that staff was looking to strike a balance between achieving some flexibility without undue burdens on landowners or staff. Nick said that the available options were also restricted by law, with special exceptions being limited to certain modifications to the regulation of use, while variances were the tool that allowed exceptions to overly restrictive dimensional standards. As a result, it was necessary to build the flexibility into the setback rule itself, rather than rely on exceptions, variances or waivers.

Commissioner Gilmore asked if the depth of a lot could be considered in determining a road setback, either through a ratio or some other means. Nick replied that those types of standards could be considered in a rule if the Commission felt that was desirable. Nick added any rule will always leave some landowners unable to meet the standard, and that it was important to focus on the overall objectives.

Commissioner Underwood asked it would be helpful to look at the requirements of a specific road design and work out setbacks from that. Eric provided a hypothetical example of a structure along a single lane Class 3 roadway with an 8' travel way, which is expanded to a Class 1 roadway with an 18' travel way.

Commissioner Theriault observed that in his experience nearly all difficulties occurred between 25 and 50 feet, and that a new fixed minimum of 15 feet from the property line, or 25 feet from the edge of the travelled way.

Chair Worcester said he appreciated the simplicity of a simple number was appealing, but that it was worth exploring a prevailing setback rule for some situations.

Samantha Horne Olsen suggested that once the discussion advanced beyond the practical aspects of accommodating functional needs, the discussion would need to focus on local character, and that this discussion would likely require examples to assist in understanding factors that could not be engineered.

Commissioner Underwood noted that a single number was helpful for new development in subdivisions, but the difficulties were largely in locations with existing, and often non-conforming, lots and development. Samantha agreed, and said that this is where staff discussions led as well.

Chair Worcester confirmed that this was still a discussion, and that staff was not looking for approval to take specific rulemaking steps.

Eric continued with a brief overview of options for regulating setbacks in subdivisions within the subdivision review process, and a description of how a performance standard might operate in situations where a fixed number or prevailing setback rule would not apply. He concluded by summarizing likely next steps.

Chair Worcester stated that he felt staff was going in the right direction, and that it appeared that 50' might be excessive. Samantha said staff was generally operating under the assumption that 50' was a reasonable standard except in some situations and that the move to create more flexible standards was focused on situations where there were difficulties in applying the 50' rule.

Commissioner Pray said that absent concerns about the environment or equity he did not see reason to increase setbacks.

Commissioner Underwood observed that in his experience a 30' road setback was sufficient to preserve rural character.

Commissioner Theriault said that while buffers were important for many reasons, the difference between a 50' setback and a 25' setback could mean the difference between being able to build a garage and not.

PERMITTING MATTER

Burbank, Vickie; discussion of desired shoreland alteration and existing permit SA 1090; Michael Stream, Lexington Twp., Somerset County; Deb Kaczowski

Debbie gave a presentation on Shoreland Alteration Permit SA 1090 issued to Victoria Burbank, including background information on the erosional issues associated with the subject property and administrative history.

Vickie Burbank presented photos and discussed her concerns in relation to the permitted activities authorized by Shoreland Alteration Permit SA 1090, including excessive cutting in the area for tree harvests and meteorological towers, as well as concerns with the erosion control measures approved under the permit.

Chair Worcester asked Ms. Burbank: You did get a permit from us to do this work, correct? What else is it that you want from us? Ms. Burbank stated she hoped that you the Commission understands how much water is coming down through there. She further stated that she had requested somebody to come over and look at it [referring to a contractor] to find out if we could do the southern end. They said that they would need at least cement abutments that were 36 feet long by 4 feet high to make the water divert so it would not erode the bottom end of the pasture because asking for rocks to be put in there is not going to divert the flow and the only real piece that would work.

Chair Worcester stated our charge here is zoning and permitting and we have already permitted what you requested.

Ms. Burbank stated it's not going to help me for my investment of \$5,000.

Chair Worcester asked Ms. Burbank if she was asking for another permit. Ms. Burbank stated I am asking for the permit to be revisited because what you have said that I can do is not going to be an effective solution. My whole purpose of this is to stop the erosion and hopefully regain some of my farm land back.

Chair Worcester asked staff to respond to that. Debbie stated that when staff went through the permitting process with Ms. Burbank and reviewed everything, she was comfortable with what the State Soil Scientist had recommended until she had the contractors look at the project area. Apparently, what she now wants to do is put some type of abutments into the stream, which would have a more considerable impact on the stream than what was permitted and would have to go through a new permitting review. What was permitted was rock riprap along three areas of the property and removal of the gravel bar on the southern end. The use of large rocks for the riprap would be needed to withstand the velocity, but would permanently stabilize and protect the eroding bank.

Chair Worcester asked if Ms. Burbank has a permit to do all this. Debbie stated yes, but Ms. Burbank now feels that what was permitted will not work.

Chair Worcester asked whether Ms. Burbank would have to go back through the Commission to get a different permit? Debbie responded, yes, she would need to submit a different proposal and show that whatever she plans to do is minimizing any impacts to the stream. Any type of abutment, water ramp, or any other proposed structure

would need to have an engineered design in order to assure it would withstand the velocities and would protect the resource. Staff could certainly review a new proposal.

Commissioner Gilmore asked if the water were to go back into the original stream bed supposedly laying there dormant now, would that also correct the problem downstream?

Ms. Burbank responded, yes. Are you talking about the top? If that was allowed, it would work. It is the property line between my brother and I. If you look at the permit that I was given by Mr. McKee and Dave Boucher, that was the original permit that I received to do that work. Where the stream turns, it should go straight. That streambed is right there just waiting to have the water. The reason it stopped is because of the bridge that settled in there, diverted the stream, made it come this way, and then washed down further. All those trees down there have come from either cuttings or things that have gone on above and floated down through.

Commissioner Pray asked if the Somerset County Soils & Water Conservation Services could provide an engineering plan. Ms. Burbank stated that the Natural Resource Council was there with Mr. Boucher and they told me what to do [in 2010] and is exactly what I was going to do. I didn't need to go through all this. The only reason I ended up contacting you was that they told me before I started I would need to make them aware of when I was working in the stream. I called the Greenville LUPC office and was told that they didn't have anything on file. I sent the Greenville office a copy of the [2010] email and was told that it was not good enough. This is how I got into having to go through this situation again.

Chair Worcester stated: I come back to my original question, what is it that you are asking from us? Ms. Burbank responded: My request is that I can go back and put my stream down through there.

Chair Worcester stated you need to work with staff to get that permit because that is a different permit.

Commissioner Pray asked does that not require dredging and that then is a whole different permit. Commissioner Pray further asked Ms. Burbank if she contacted any of her state legislators. Ms. Burbank stated she did contact a state legislator when I talked to Director Livesay because he told me by talking to somebody else, I can't remember the word he used but it was very scary, and he also told me that I would be looked upon in a negative light by the Commission if I did so. So I was very scared and I contacted my legislator and he told me to contact the Attorney General's office, which I did.

Director Livesay noted that the scary term he used was ex parte communications when she wanted to know if she could individually contact members of the Commission about her permitting matter. What he pointed out was if there is anything she wanted to provide the Commissioners, she should provide it to staff so that it is appropriately distributed to all of the Commissioners. He noted that he previously explained to Ms. Burbank that in an adjudicatory proceeding if you engage in ex parte communication it can taint the entire proceeding. I further noted that he had explained that it is not clear whether we are in an adjudicatory proceeding now because we don't have a pending permit before us, but that we could be getting to that point and he recommended that she be cautious in reaching out to any Commissioners individually because there was nothing to be gained from that but there was a lot to lose. Staff would be glad to provide all the information she wanted to Commissioners. He believes Ms. Burbank contacted Representative Dunphy because she was concerned that if she could not engage ex parte communication that she would be cut out the public process. Director Livesay noted that he tried to explain that the whole point of ex parte communications is the exact opposite. It is to make sure that there is no behind the scenes wheeling and dealing that is done and that all Commission business is done in public and in a fair fashion. This is what he had tried to convey to Ms. Burbank.

Commissioner Pray stated he totally agreed with the Director's comments. The reason I asked you about contacting

your legislator is because you are obviously concerned about the expense of this. Not knowing the full detail, there seems to be a degree of liability there. Have you contacted any attorneys in reference to liabilities of those that had the bridge in place that wasn't cleaned up after it went down and caused erosion? Ms. Burbank stated she called the owner of the bridge directly and he said he would not remove anything because he didn't have the equipment.

Chair Worcester noted that the Commission was at a point where there was nothing to act on and if Ms. Burbank wanted to go back to staff for a different kind of permit the Commission would be receptive to considering that. He further stated that the Commission is sympathetic, but cannot do anything without knowing specifically what it is that Ms. Burbank wants to do so staff can permit or not permit it.

PETITION MATTER

Wind Power; discussion of process for residents to petition the Commission to remove areas from the expedited permitting area and the Commission's substantive review of petitions; Samantha Horn Olsen

Samantha reviewed the overview document that was attached to the agenda, showed a map of which minor civil divisions are in the expedited area, and provided information about the current progress toward the statutory goals for wind energy development.

Commissioner Gilmore asked if someone can change residency to a township with no persons voting in the prior gubernatorial election and then submit a petition. There were varying opinions about this topic, so staff will research it and get back to the Commission.

Commissioner Gilmore asked what would happen if a number of places are removed: would the Commission then look at later petitions as having a higher bar to meet because there is less expedited area left and so what remains is more important to meeting the goals? Samantha indicated that the staff would come back to the Commission with a proposed answer to this question.

Commissioner Gilmore stated that he doesn't know how the Commissioners could know about energy potential. Samantha indicated that staff can request information from the applicant and other agencies, such as the PUC, about wind energy potential in each area. There is no specific project proposed in these cases, so it's going to be a fairly high-level assessment of energy potential.

Commissioner Fitzgerald reminded the group that someone could always apply later to bring all or a part of an area back in later. Samantha confirmed that this is possible, and that there is no time limit on petitioning for an addition to the expedited area.

Commissioner Underwood asked if the Commission could remove part of a township. Staff have considered the question. Although legal advice on the question may be helpful, it appears that the Commission does not have unilateral authority to change the boundaries of the petitioned area. A petitioner could collect signatures for a revised petition area if it became apparent that a revised area would be more likely to succeed.

Commissioner Fitzgerald noted that some of the criteria rely on the idea that a place is iconic and asked how we are going to measure that. Samantha noted that she had introduced the word iconic and that it didn't appear in the criteria themselves. Commissioner Worcester noted that we defined iconic in discussing the DACSS rulemaking. Samantha read the CLUP recreation goal and talked about how one could analyze that. It's not an exact science, it's a weighing. Commissioner Fitzgerald talked about the fact that different people will value resources differently, and there will be emotional appeals to protect local resources. Samantha anticipated that would be the case, and

noted it is appropriate to hear that input, but in the end the Commission will have to weigh the local wishes and concerns and the state goals.

Commissioner Worcester pointed out that in this process the burden to make the argument falls on the person requesting substantive review. Samantha agreed, and added that once that process begins, anyone in the public can also weigh in with information.

Commissioner Gilmore is not sure how the sites were selected initially, but now we are dealing with reviewing individual places to see if the decision should be different. Are we getting into a spot zoning situation where we can be challenged legally? Samantha explained that this isn't zoning. It was set up by the legislature as a routine technical rule that changes allowed uses in certain places without changing the underlying zones. Also, there is some certainty in that it is a limited time window to petition. A discussion ensued about the fact that the legislature may change this any time they want, including extending the timeline or reversing the process. Commissioner Underwood noted that the Legislature wanted to give the local people a chance to be heard, and also wanted to give developers certainty, and it's the Commission's role to weigh the state goals against the local concerns.

Commissioner Pray asked if there are other places that have had this type of process. Samantha indicated the staff would look into that. Commissioner Pray noted that Maine is one of the more open states in terms of giving local people the opportunity to participate. He also said that even though the legislature could change things down the road, we need to deal with it as written. Director Livesay gave some history about how this legislation came about and how people may think about it – one way is that you can think about it as a “do-over” for places that want a new look at whether it's an appropriate place to be expedited.

There was a brief discussion about the State energy goals for coastal waters.

Staff will bring back a revised document at a future meeting.

OTHER MATTERS

Commissioner Comments – N/A

ADJOURN

Meeting adjourned at approximately 2:15pm.

