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December 6, 2013

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Via Email and Regular mail

Subject: ADVISORY RULING AR 13-12, Aziscohos Lake

Dear Bret:

Thank you for the information provided in your request for an Advisory Ruling. You have asked our opinion on some complex issues with respect to land use rules. We will attempt to provide our view on the matters as we understand them, pursuant to 5 M.R.S.A. § 9001. I want to caution, however, this is an informational response and not a legal determination. Of course, in providing our views on these matters, we have relied entirely upon the facts as they have been presented to us.

Background

Based on your letters dated September 5, 2013 and September 20, 2013 and the materials provided, Six Rivers Limited Partnership (Six Rivers), Phillips Charitable Trust, and Phillips Family Trust are the owners of lands surrounding Aziscohos Lake which are located in the jurisdiction of the Land Use Planning Commission. Phillips Charitable Trust and Phillips Family Trust are considering developing a residential subdivision on lands owned by these two separate ownerships on the east shore of Aziscohos Lake.

We met to discuss this project on July 11, 2013 and we provided you a memo dated August 2, 2013 with some initial feedback to a number of questions raised in that meeting. Your September 5, 2013 letter repeated portions of the text of that memo and raised additional questions about two issues discussed in the August 2, 2013 memo - identification of pre-partition parcels, and development within ¼ mile of an existing cabin. Your September 20, 2013 letter provided additional materials relevant to your inquiry and asked for an advisory ruling on the two issues discussed in the September 5, 2013 letter.

Issue #1: Identification of Pre-Partition Parcels

On the issue of identifying pre-partition parcels you have asked us to address the following questions:

Advisory Ruling AR 13-12; Aziscohos Lake

1. What was the lot/ parcel configuration for these lands as of the date of adoption of the PGP2 (January 2001)?
2. Does LUPC treat land in the same ownership that is divided by a river as separate regulatory parcels or as one regulatory parcel (The Magalloway River bisects one of the original parcels)?

Your September 5, 2013 letter describes the ownership history of the lands in Lincoln Plantation in some detail. Without repeating all the details of the land ownership history provided in your letter, we note that:

- As of the late 1980s Six Rivers and the Phillips side of the Pingree family (Phillips) were co-tenants in Lincoln Plantation.
- In 1996 Bessie Wright Phillips (a Pingree heir) died and her will created the Phillips Scholarship Fund.
- Internal Revenue Service rules relating to the creation of trusts required Phillips to separate its ownership from Six Rivers, and to create separate ownerships for the Phillips Charitable Trust (which set up the Phillips Scholarship Fund) and the Phillips Family Trust.
- The partition of the lands in Lincoln Plantation into the three separate ownerships took 15 years and was completed in 2012.

You state that the “operative date” for purposes of determining separate ownerships of the lands in Lincoln Plantation was Bessie Wright Phillips' death on April 17, 1996 because the terms of her will “forced Six Rivers and Phillips to create separate ownership interests, and induced the ...partition.” You conclude that “we believe it is correct to view the lands on the west and east shores of Aziscohos Lake as separate parcels prior to January 1, 2001.”

Your September 5, 2013 letter also references the statutory definition of a great pond, the LUPC Chapter 10, and the fact that Aziscohos Dam was completed in 1911 creating Aziscohos Lake. You state that since Aziscohos Lake is a great pond and there is an ownership break between the two shorelines, “LUPC should ... treat the ownership that existed along the west and east shores of the lake as of January 1, 2001 as two separate parcels.”

You have requested that we interpret these facts as presented, and the relevant criteria, to allow “a maximum of 40 lots to be allocated to the combined Phillips ownerships along the east shore of the lake, including Beaver Island.”

Relevant Standards

The “build-out rate” provisions for Allowed Densities in the P-GP2 subdistrict (10.23,F.3.g(5)) state that no more than 20 individual units may be constructed in any ten-year period per lot of record as of the date of adoption of these rules, except that credit for unbuilt units may be carried over to the following time period where a maximum of 40 building units in any 10-year period may be developed.

10.25,Q.1.f states, an “existing parcel” shall include the contiguous area within one township, plantation, or town owned or leased by one person or group of persons in common ownership.

Opinions

Unless part of a previously approved subdivision, the LUPC considers contiguous land in common ownership to be one parcel for regulatory purposes (see 10.25, Q.1.f). The LUPC will use the same analysis to determine each “lot of record,” as of the date of adoption of the P-GP2 subdistrict, for purposes of applying the P-GP2 rate of development provisions. Contiguous land in common ownership, unless part of previously approved subdivision, is a single lot of record.

Effect of Will & Trust Provisions on Ownership

According to the information you have provided, Six Rivers and the Phillips side of the Pingree family (Phillips) were co-tenants in the lands in Lincoln Plantation as of the late 1980s. At this point in time all of this land was contiguous land in common, undivided ownership. Therefore, this land was one regulatory parcel. You have suggested that subsequently, and prior to January 1, 2001, three separate ownerships in these lands were created. As we understand it, you believe that the April 17, 1996 death of Bessie Wright Phillips effectively created these separate ownerships when her will appointed her interest in the property to a new Trust which, as a result of IRS requirements and an IRS ruling, forced Six Rivers and Phillips to create separate ownership interests through a partition of the land in order to avoid self-dealing, as defined in the IRS code.¹

While a will may trigger future land divisions or the partition of land in common, undivided ownership, a new lot of record is not created until the division or partition actually occurs. Here, as evident from the IRS ruling, after the death of Bessie Wright Phillips the various heirs and trusts explored at least two options for partitioning the property. The option that ultimately was selected was implemented over a lengthy period and only upon execution of the Agreement for Pre-Partition Transfers. Between the time of Bessie Wright Phillips’ death and December 30, 2011, the land in question on Aziscohos Lake remained in the common, undivided ownership of Six Rivers and the Phillips side of the Pingree family and treated by these parties as such (see the operative deeds provided in support of this request, along with the Agreement for Pre-Partition Transfers, all dated December 30, 2011). During this period of common, undivided ownership the land in question, which is contiguous (see the discussion of ownership along flowed water bodies below), remained a single existing parcel and single lot of record for the purpose of calculating the build-out rate in the P-GP2 subdistrict. The partition that created separate ownerships in the three parcels occurred December 11, 2011.

Because you have raised an interpretation that suggests a separate legal interest in the land was created by the will provisions (in 1996), perhaps in conjunction with the provisions of the IRS Code governing self-dealing and the related IRS ruling (in 2003), we consulted with the Attorney General’s office to explore whether your interpretation is supported in law. The Attorney General’s office informed us that they are unaware of anything in Maine law to support your interpretation. As indicated above, the Commission is generally guided by deeds, and not extraneous documents such as wills and IRS rulings, when determining who owns a lot of record and whether a land division or change in the ownership of a lot of record has occurred. The Attorney’s General’s office indicated the materials submitted in support

¹ Unclear from the information provided in support of this request for an Advisory Ruling is whether the ultimate partition of land in Lexington Township was required as a matter of law in order to carry out the will of Bessie Wright Phillips (because self-dealing is prohibited by law) or whether the partition was desirable to avoid unfavorable tax treatment (because self-dealing, although not illegal, triggers significant taxation under Section 4941 of the IRS Code). The letters requesting this Advisory Ruling suggest the former, implying there was no choice but partition the land and, therefore, the operative date was the death of Bessie Wright Phillips. The provided IRS ruling suggests the latter, referencing and quoting provisions of the IRS Code, including Section 4941, indicating that self-dealing triggers taxation and concluding that the “proposed partition of [the Stephen Phillips Memorial Scholarship Fund’s] undivided interest in certain timberlands will not constitute an act of self-dealing as described in section 4941 of the Code.” The ultimate answer to whether the partition was required as a matter of law to effectuate the will, or whether the partition was elected in order to effectuate the will in a financially prudent manner, is not material to the opinions in this advisory ruling.

of the requested Advisory Ruling provide no legal basis for adopting a different approach and looking beyond the property deeds in this instance.

Ownership Along Flowed Water Bodies

You have also presented material to demonstrate that Aziscohos Lake is a flowed water body covering about 6700 acres, created when Aziscohos Dam was completed in 1911. As such, it appears to meet the definition of a “great pond” as that term is used in the Natural Resources Protection Act (NRPA). 38 M.R.S.A. §480-B. You have also stated that there is an ownership break between the two shorelines of Aziscohos Lake because property at the dam is held by an unrelated owner. You suggest that 10.25, Q.1.f of our rules (which states that an existing parcel shall include the contiguous area within one township, plantation, or town owned or leased by one person or group of persons in common ownership) means that the shores of a great pond opposite the dam parcel “should be treated as two separate parcels for division purposes, so long as there is a break in the ownership between the two shorelines.” In subsequent conversations you have explained that because Aziscohos meets the NRPA definition of a great pond, you believe the “contiguous area” for purposes of the Six Rivers/ Phillips land holdings in Lincoln Plantation goes to the low water mark of the shore of Aziscohos Lake. According to this view, because there was a break in the ownership of the land above the low water mark on the west side of the shore, the Six Rivers/ Phillips land in Lincoln Plantation consisted of two separate non-contiguous “existing parcels” pursuant to 10.25, Q.1.f well before the January 2001 adoption of the P-GP2 subdistrict.

Other than noting that Aziscohos Lake meets the NRPA definition for a great pond, you have not provided any authority or other support that, when determining what constitutes “contiguous area” under 10.25, Q.1.f, the land for consideration goes only to the low water mark of the shore.² The LUPC understanding of ownership of flowed land such as the Six Rivers/ Phillips land under Aziscohos Lake in Lincoln Plantation is that ownership extends to the thread of the stream.³ The Attorney General’s office agrees that this view is consistent with Maine law. As such, the shoreline break in ownership has no bearing on whether all the Six Rivers/ Phillips land is contiguous. The ownership extends beyond the low water mark of the shoreline to the thread of the stream and the land on either side of the shore of Aziscohos Lake was contiguous land in common ownership prior to the January 2001 adoption of the P-GP2 subdistrict.

Therefore, we interpret these facts as presented, and the relevant criteria, to allow a total maximum of 40 building units to be developed, within the current ten-year time frame, on the lot of record as of the January 1, 2001 rule adoption date. The lot of record here is all the contiguous

² The LUPC’s understanding appears consistent with the understanding of the parties to the December 30, 2011 partition. Not only do the partition deeds convey whatever title, right, and interest the grantor has in the lands under great ponds, but the maps submitted with and incorporated into the deeds for the partition of the Six Rivers/ Phillips land indicate that Aziscohos Lake contains flowed land that was included in the ownership when drawing up the partition deeds. It appears from those materials that Six Rivers/ Phillips believe they hold title to the flowed land under Aziscohos Lake to the thread of the stream.

The September 5, 2013 and September 20, 2013 letters did not provide evidence that the property at the dam is held by an unrelated owner, thus creating an ownership break between those portions of the shorelines of the lake owned by Six Rivers/ Phillips. However it would be necessary to establish that the property at the dam is held by an unrelated owner only if it is determined that the “contiguous area,” for purposes of the Six Rivers/ Phillips land holdings in Lincoln Plantation, goes to the low water mark of the shore of Aziscohos Lake and not to the thread of the stream.

³ “The rule of conveyance for nontidal navigable streams also applies to artificially created ponds. The boundary of the conveyed riparian property is the thread of the stream as it existed before the pond was created.” Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies*, 47 ME. L. REV. 35, 44 (1995).

lands which were in common ownership as of January 1, 2001 - those lands in Lincoln Plantation held by Six Rivers and Phillips as co-tenants as of the late 1980s.

You have requested that we interpret these facts as presented, and the relevant criteria, to allow “a maximum of 40 lots to be allocated to the combined Phillips ownerships along the east shore of the lake, including Beaver Island.” This advisory ruling does not address how this 40 unit development potential is apportioned or allocated among the current ownership, but it does not indicate that the combined Phillips ownerships have development potential for 40 lots on their holdings independent of, or in addition to, the development potential of Six Rivers. The 40 unit development potential is a total for the January 1, 2001 lot of record.

Issue #2: Development Near an Existing Cabin

On the issue of development within ¼ mile of an existing cabin you have asked us to address the following question:

1. The P-GP2 has a provision that prohibits structural development within a ¼ mile of any commercial sporting camp, campground, or group of rental cabins associated with a commercial sporting camp or campground. Does this provision affect the single cabin that is located on the point by Blackbrook Cove Campground?
2. Could this be remedied by creating a separate subdivision lot for the cabin and including it as part of the subdivision?

Your September 5, 2013 letter states that your preliminary plans call for four new lots lying along the westerly shore of Black Brook Cove north of an existing cabin owned by Black Brook Cove Campground (BBCC) and available for rental to patrons of BBCC. The cabin sits on land owned by Phillips Charitable Trust and leased to BBCC for its campground operations but “the cabin site does not have defined boundaries distinguishing the cabin site from the remainder of the BBCC lease area.” The cabin lies within ¼ mile of the southern end of the proposed four lots to be subdivided.

You have proposed to obtain a letter from BBCC stipulating that it “would not object to the proposed subdivision of four lots northerly of the BBCC’s existing cabin” and have requested that we “affirm that the proposed creation of four lots northerly of the cabin is not in conflict with the continued use of the cabin by BBCC.”

Relevant Standards

The “required buffer” provisions for Allowed Densities in the P-GP2 subdistrict (10.23.F.3.g(6)) state that no structural development shall be allowed within a ¼ mile radius of any commercial sporting camp, campground, or group of rental cabins associated with a commercial sporting camp or campground. Individual campsites are excluded from this buffering requirement. The buffer shall extend from the edge of the principal building, dwelling unit, rental unit, or campsite that is closest to any adjacent use.

Opinions

The “required buffer” provisions for the P-GP2 subdistrict (10.23.F.3.g(6)) prohibit structural development within a ¼ mile radius of any group of rental cabins associated with a commercial

sporting camp or campground. There is nothing in the rules that suggest this requirement may be waived by obtaining a letter from the cabin operator or that the LUPC staff has the authority to affirm that the proposed creation of four lots north of the cabin is not in conflict with the continued use of the cabin.

This means that there must be a ¼ mile separation between any new structure, such as single family dwellings, and any group of rental cabins that are part of the campground. The buffer requirement would be measured from the closest edge of the cabin to the closest edge of any new structural development. The rule does not require the boundary of any new lots to be a ¼ mile from the cabin; only that the new structure be a ¼ mile from the cabin.

However, the rule refers to a “group of rental cabins” and not to a single cabin. In this instance it appears that there is only one cabin associated with the campground. This does not seem to constitute the “group of rental cabins” specified in the rule, and thus would likely not be subject to the buffering provisions of 10.23,F.3.g(6).⁴

However you have also suggested that this might be remedied by creating a separate subdivision lot for the cabin and including that lot as part of the subdivision. This would seem to have the effect of removing the cabin from the campground and thus removing the requirement for a ¼ mile separation between the cabin and any new structure.

This Advisory Ruling only refers to the specific request being made and the opinion rendered by staff of the Commission is based solely on the information submitted.

Should you have any further questions, please feel free to contact me at (207) 287-2662.

Sincerely,



Hugh Coxe
Senior Planner
Maine Land Use Planning Commission
Department of Agriculture, Conservation & Forestry
Division of Land Use Planning

⁴ By contrast, a single cabin that is “associated” with a commercial sporting camp is by definition (10.02, 33) part of that commercial sporting camp, unless it is an “outpost cabin” (as defined by 10.02, 144), and thus would be subject to the buffering provisions of 10.23,F.3.g(6). Cabins are not, by definition (10.02, 20), part of a campground but they can be “associated” with a campground.