



STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
22 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0022

WALTER E. WHITCOMB
COMMISSIONER

NICHOLAS D. LIVESAY
EXECUTIVE DIRECTOR

PAUL R. LEPAGE
GOVERNOR

COMMISSION DECISION
IN THE MATTER OF

William H. Churchill

Findings of Fact and Decision

DENIAL OF BUILDING PERMIT BP 15279 BY VARIANCE

The Maine Land Use Planning Commission, at a meeting of the Commission held November 12, 2014 in Bangor, Maine, after reviewing the application and supporting documents submitted by William H. Churchill for Building Permit BP 15279 by Variance, public comments, agency reviews, staff comments and other related materials on file, pursuant to 12 M.R.S.A. §§ 681 et seq. and the Commission's standards and rules, finds the following facts:

1. **Applicant:** William H. Churchill
54 Harvest Hill Lane
Auburn, ME 04210
2. **Date of Completed Application:** September 24, 2014
3. **Location of Proposal:** Riley Township
Part of Lot 5 on Plan 01 of the Maine Revenue Service's property tax maps for Riley Township
4. **Zoning:** (D-RS) Residential Development Subdistrict
5. **Lot Size:** 90,000 square feet (leased)
6. **Sewage Disposal:** Existing pre-Commission Pit Privy
Proposed gray water disposal system

Background

7. According to the applicant, prior to 2008 his leased lot was developed with a pre-Commission seasonal camp located approximately 37 feet from the Sunday River Road, a parking area on the road and a pit privy. In 2008, the seasonal camp was destroyed by fire, leaving the lot developed with the parking area, the pit privy, and 9 existing concrete piers that served as the foundation of the pre-Commission camp.

8. In the fall of 2013, the applicant began construction of a new single family dwelling on the existing concrete piers without having obtained a permit to do so from the Commission (Reference Enforcement Case EC 14-11, Active).
9. On December 3, 2013, the applicant submitted an incomplete permit application seeking permit approval for the dwelling.
10. On December 19, 2013 Commission staff inspected the applicant's property and observed the partially constructed single family dwelling on the lot and determined that it was located 37 feet from the Sunday River Road. The applicant was notified of the violations, and requested to either remove the unauthorized structure or submit a complete permit application seeking approval to relocate the structure to a compliant location 50 feet from the Sunday River Road. During this site inspection, staff identified another location on the property where the dwelling could be located in compliance with the 50 foot minimum setback requirement and all other minimum setback requirements of the Commission.
11. On September 29, 2014, Commission staff again visited the applicant's property and calculated the slope of the land in the immediate vicinity of the existing dwelling to be approximately 15%. Approximately 25 feet downslope of the rear of the camp, the slope of the land increases to approximately 25%.

Proposal

12. The applicant now seeks after the fact permit approval by variance for the existing 20 foot by 22 foot single family dwelling, with a proposed 7 foot by 22 foot deck, located 37 feet from the Sunday River Road. The applicant seeks the Commission's approval of a variance to the minimum road setback requirement of 50 feet to allow the single family dwelling to be located on the existing concrete pier foundation. The applicant further proposes to install a primitive wastewater disposal system consisting of a gray water disposal bed designed in compliance with the Maine State Plumbing Code.
13. In support of his request for a variance to the Commission's minimum road setback requirement, the applicant submitted the following:
 - A. *With regard to the requirement that the unusual hardship or extraordinary difficulties be caused by the exceptional or unique conditions of topography, access, location, shape, size or other physical features of the site;* the applicant states that in February of 2008 his 1955 cabin was destroyed by fire, leaving only the concrete pier foundation of any worth. The topography of the subject land is one of downward grade (sloping down away from the road). The applicant proposes re-building on the existing pier foundation to maintain his view of the Mahoosuc Range, which he indicates was his primary consideration when he purchased the original cabin. The road setback of the existing pier foundation is 37 feet. Compliance with the regulatory change to a 50 foot setback requirement would cause a hardship. It would require the construction of a new foundation, at great expense, and in order to maintain the mountain views it would require elevating the building to an unreasonable height of approximately 12 to 16 feet on the downhill side. In addition, the applicant indicates that, due to the 2008 fire that resulted in a loss of life, he is not inclined to move the building site further downhill and further away from the road. Because of the limited access due to the downward slope of the land, the visually screening vegetation between the road and the cabin site, and the foot path access, compliance with the 50 foot setback regulation would further limit access. Therefore, compliance with the setback regulation would create a potentially dangerous situation for both firefighters/first responders and those using the cabin.

- B. *With regard to the requirement that the unusual hardship or extraordinary difficulties be caused by unusual circumstances that were not anticipated by the Commission at the time the rules and standards were adopted;* the applicant states that, based on conversations with staff, he understands that the rationale for the 50 foot road setback requirement is to protect public safety with regard to traffic and to provide for an area where visually screening vegetation can exist between the road and the structure. The applicant submitted photographs of his existing camp and of other camps in the neighborhood, which he asserts support his request for a variance. According to the applicant, Exhibit Photo A proves that visually screening vegetation exists between the road and his existing building site. He further maintains that the photos of the other camps in the neighborhood (specifically Exhibit Photos B and C), show that the 50 foot road setback policy does not ensure that visually screening vegetation will be maintained. The applicant states that he doesn't believe that the Commission anticipated the nature of the remote neighborhood at the time the rules and standards were adopted. The applicant also states that the subject cabin site is located on the Sunday River Road, a dead end gravel road with very little traffic, 10 to 12 miles from the nearest town of Bethel. He asserts that the Commission did not anticipate the unusual circumstances regarding the 37 foot road setback of the subject building at the time the rules and standards were adopted. The applicant contends that a reasonable person, with an understanding of the circumstances, as well as knowledge of the characteristics of the area, would agree that moving the building site 13 feet farther away from the road will not increase public safety in any way and that enforcement of the 50 foot road setback requirement is unreasonable. The applicant also submitted additional photographs (Exhibit Photos D, E, F, and G) to show the character of the remote neighborhood.
- C. *With regard to the requirement that the applicant must demonstrate that the land in question cannot yield a reasonable return unless a variance is granted;* in a letter to the Commissioner of Agriculture, Conservation and Forestry, dated June 23, 2014, the applicant states that he proposes to re-build the camp on the existing piers to maintain his view of the Mahoosuc Range, which was his primary consideration in leasing the property. If he has to relocate the building 13 feet downhill to comply with the 50 foot setback requirement, he will lose his view or have to increase the foundation of the new cabin at great expense to an unreasonable height of approximately 12 to 16 feet. The applicant further asserts that in 2008 the firefighters had a difficult time fighting the fire due to the downward grade of the land, and that building on a site further downhill and further from the road would create an additional safety concern regarding access to the cabin.
- D. *With regard to the requirement that the applicant demonstrate that the need for a variance is due to the unique circumstances of the property and not due to the general conditions in the neighborhood;* the applicant states that several of the other buildings in the sparsely populated neighborhood are camps and not year-round residences, and that the camp on the same side of the road as his is fewer than 50 feet back from the road.
- E. *With regard to the requirement that the applicant demonstrate that the granting of a variance will not alter the essential character of the locality;* the applicant has submitted seven photographs (Exhibit Photos A, B, C, D, E, F, G) which he asserts make it evident that by granting a variance the project will not alter the essential character of the locality. The applicant further states that denying the variance would alter the essential character of the locality.
- F. *With regard to the requirement that the applicant demonstrate that the hardship is not the result of action taken by the petitioner or a prior owner or lessee;* the applicant did not directly address this issue, beyond stating that the fact that he started building on the existing foundation is not relevant to his request for a variance.

Review Criteria

14. Title 12 M.R.S. § 685-B(7) provides that, with respect to applications to construct a damaged or destroyed non-conforming structure, the Commission shall require the new structure to comply with provisions of this Chapter to maximum extent possible.
15. Under the provisions of Section 10.21,J,3,c,(14) of the Commission's Land Use Districts and Standards, residential single family dwellings may be allowed within the (D-RS) Residential Development Subdistrict upon issuance of a permit from the Commission.
16. Under the provisions of Section 10.26,A,1 of the Commission's Land Use Districts and Standards, the minimum lot size for residential uses is 40,000 square feet per dwelling unit except where each dwelling unit is to use a common or community sewer and not on-site subsurface wastewater disposal, the minimum lot size shall be 20,000 square feet per dwelling unit.
17. Under the provisions of Section 10.26,C,1,a of the Commission's Land Use Districts and Standards, the minimum road frontage for residential uses is 100 feet per dwelling unit.
18. Under the provisions of Section 10.26,D,1,c and f of the Commission's Land Use Districts and Standards, the minimum setback requirement for single family dwellings is 50 feet from the traveled portion of all roadways (except as provided for in Section 10.26,D,1,d and e or Section 10.26,D,5, which are not applicable here), and 15 feet from side and rear property lines.
19. Pursuant to 12 M.R.S. § 685-A(10) and Section 10.10,B of the Commission's Land Use Districts and Standards,¹ the Commission may grant a variance when the Commission finds that the proposed development is in keeping with the general spirit and intent of this chapter, that the public interest is otherwise protected and that strict compliance with the rules and standards adopted by this Commission would cause an unusual hardship or extraordinary difficulties because of the following:
 1. The access and use needs of a person with a physical disability as defined in 5 M.R.S.A. §4553 sub-§7-B who resides in or regularly uses a structure; or
 2. Exceptional or unique conditions of topography, access, location, shape, size or other physical features of the site; or
 3. Unusual circumstances that were not anticipated by the Commission at the time the rules and standards were adopted.
20. Section 10.10,B,4 further requires that to be granted a variance under either Section 10.10,B,2 (12 M.R.S. § 685-A(10)(A)) or Section 10.10,B,3 (12 M.R.S. § 685-A(10)(C)) above, a petitioner must demonstrate, by substantial evidence, that:
 - a. The land in question cannot yield a reasonable return unless a variance is granted;
 - b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

¹ Section 10.10,B incorporates the text of 12 M.R.S. § 685-A(10) pertaining to variances and implements section 685-A(10) by articulating the showings an applicant must make to be granted a variance.

- c. The granting of a variance will not alter the essential character of the locality; and
- d. The hardship is not the result of action taken by the petitioner or prior owner or lessee.

Analysis

21. Pursuant to 12 M.R.S. §685-A(10) and Section 10.10,B of the Commission's Land Use Districts and Standards, the Commission may grant a variance when the Commission finds that the proposed development is in keeping with the general spirit and intent of this chapter, that the public interest is otherwise protected, and that strict compliance with the rules and standards adopted by this Commission would cause an unusual hardship or extraordinary difficulties due to the needs of a disabled individual; the property's physical features; or unanticipated, unusual circumstances. In this instance, staff of the Commission has determined that a single family dwelling can be constructed at the applicant's property in full compliance with the Commission's standards, including the minimum 50 foot setback requirement from the Sunday River Road from which the applicant seeks a variance. The applicant states that the construction of the dwelling in another location would be expensive, but has not submitted any documentation demonstrating that it would be prohibitively so. The existence of an available location at which the dwelling may be reasonably constructed in full compliance with the standards eliminates any unusual hardship or extraordinary difficulties, and therefore, any need for the Commission to grant a variance.
22. The applicant has not submitted any evidence that strict compliance with the rules and standards adopted by the Commission would cause unusual hardship or extraordinary difficulties related to the access and use needs of a person with a physical disability.
23. Pursuant to 12 M.R.S. § 685-A(10)(A) and Section 10.10,B,2 of the Commission's Land Use Districts and Standards, any unusual hardship or extraordinary difficulties supporting the granting of a variance may be because of exceptional or unique conditions of topography, access, location, shape, size or other physical features of the site. The applicant has not submitted evidence demonstrating that any of the property's physical features are so exceptional or unique that complying with the 50 foot road setback, along with the Commission's other dimensional requirements, would be an unusual hardship or extraordinarily difficult. Indeed, the applicant's 90,000 square foot lot size is greater than the minimum 40,000 square feet required by the Commission for a single family dwelling; exceeds the minimum 100 feet of frontage on Sandy River Road required by the Commission's rules; and includes a location where a single family dwelling can be constructed in full compliance with the Commission's minimum road and property line setback requirements. The slope of the land on the lot in the vicinity of the dwelling is steep, but not excessively steep. The applicant could construct a single family dwelling of the size for which he seeks approval 50 feet from the access road and be located on a 15% slope. Although Mr. Churchill asserts that moving the camp further downslope would eliminate the view of the Mahoosuc Range that the previous camp apparently had unless the camp were elevated to a height of 12 to 16 feet on the downhill side, the asserted loss of view of the mountain range is not an exceptional or unique physical feature of the property that makes construction of a fully compliant dwelling an unusual hardship or extraordinarily difficult. Mr. Churchill also asserts that compliance with the setback regulation would create a potentially dangerous situation for both firefighters/first responders and those using the cabin. The Commission finds that the remote location of the applicant's lot and the rudimentary means of access (i.e. a footpath) to the camp are the major components of any risk to firefighters/first responders or those using the cabin, more so than the additional 13 feet distance back from the road that the Commission's rules would require the camp to be moved. In addition, this perceived increase in risk could be alleviated by the construction of a driveway providing vehicular

access to the camp at 50 feet from the road, such that firefighters and first responders would have direct vehicular access to the camp in the event of a fire or other emergency.

24. Pursuant to 12 M.R.S. § 685-A(10)(C) and Section 10.10,B,3 of the Commission's Land Use Districts and Standards, any unusual hardship or extraordinary difficulties supporting the granting of a variance may also be because of unusual circumstances that were not anticipated by the Commission at the time the rules and standards were adopted. The applicant asserts that the Commission did not anticipate the characteristics of remote, pre-Commission neighborhoods at the time the rules and standards were adopted. However, much of the Commission's jurisdiction was (and remains) remote and developed with small pre-Commission neighborhoods very similar to the applicant's, and the Commission developed rules and standards to be applied to legally existing nonconforming uses and structures specifically to address such circumstances. Those rules in most instances require that reconstructed or replacement structures comply with the Commission's minimum dimensional requirements to the maximum extent possible (see Section 10.11,C,2 of the Commission's Land Use Districts and Standards).
25. To the extent the applicant was able to establish that a variance was needed due to the property's physical features or unanticipated, unusual circumstances, Section 10.10,B,4 of the Commission's Land Use Districts and Standards imposes additional requirements. Specifically, to be granted a variance under 12 M.R.S. § 685-A(10)(A) or (C), and Section 10.10.B,2 or 3 above, a petitioner must further demonstrate, by substantial evidence, that:

- A. The land in question cannot yield a reasonable return unless a variance is granted.

The applicant has not submitted any evidence that the land in question cannot yield a reasonable return unless a variance is granted. The applicant asserts that he would lose his view of the Mahoosuc Range by constructing the camp at 50 feet from the road unless the camp is elevated to an unreasonable height. Although this loss of view might affect the value of the property, staff has identified a location on the property where the applicant can construct the proposed single family dwelling in full compliance with the Commission's dimensional requirements. Because a lot that can accommodate a fully compliant single family dwelling will yield a reasonable return, the applicant has failed to demonstrate that a variance is needed to ensure a reasonable return.

- B. The need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.

As determined in paragraph #21 above, the existence of a location at the property where the applicant could construct the proposed single family dwelling in full compliance with all dimensional requirements eliminates any need for the granting of a variance. The applicant has asserted that due to the downhill slope of the land he will lose his view of the Mahoosuc Range if the proposed single family dwelling is required to be located 50 feet from the access road. However, he has not submitted any evidence supporting that such loss of view is due to the unique circumstances of his lot and not to the general conditions of the neighborhood. Loss of view is not a cognizable basis for a variance, and in fact other properties in the vicinity of the applicant's lot have similar topography and slope.

- C. The granting of a variance will not alter the essential character of the locality.

The applicant has submitted photos of development in the immediate vicinity of his lot, which show existing camps either closer than 50 feet from the road or with little or no vegetative screening

between the camps and the road. If there were a cognizable basis for granting the requested variance, these photos could support a finding that granting the proposed variance would not alter the essential character of the locality.

- D. The hardship is not the result of action taken by the petitioner or a prior owner or lessee.

To the extent that any hardship or difficulty exists with respect to the applicant complying with the Commission's minimum dimensional requirements, there is nothing in the record that supports a finding that it is the result of action taken by the petitioner or a prior owner or lessee. The applicant would have been eligible to apply for a waiver of the 50 foot road setback under the provisions of Section 10.11 of the Commission's Land Use Districts and Standards had he applied to reconstruct the camp within two years of the destruction of the pre-Commission camp. However, such a waiver would not likely have been granted because there is a location on the lot where the camp could be constructed in full compliance with the current minimum setback requirements, and both 12 M.R.S. §685-B(7) and Section 10.11,C,2,a require compliance with the current minimum setback requirements to the maximum possible extent.

Additional Findings

26. Pursuant to Chapter 4, Section 4.04,(4),(b) of the Commission's rules, notice of the pending application was sent by regular mail to all persons owning or leasing land within 1000 feet of the proposed project. Comment was received from one individual, who wrote in favor of the Commission granting the variance to the applicant.
27. The facts are otherwise as represented in the application for Building Permit BP 15279 by Variance and supporting documents.

Based upon the Findings set forth above, the Commission concludes that:

1. The applicant's lot meets the dimensional standards for a residential lot as required under Section 10.26,A,1 and Section 10.26,C,1,a of the Commission's Land Use Districts and Standards, in that the lot is greater than 40,000 square feet in size and includes more than 100 feet of road frontage.
2. The applicant's lot also complies with the dimensional standards for a residential lot as required by Sections 10.26,D,1,c and f of the Commission's Land Use Districts and Standards, in that a single family dwelling can be constructed on the lot in full compliance with the Commission's minimum setback requirement of 50 feet from roadways and 15 feet from property lines.
3. The applicant's proposal to construct a single family dwelling located 37 feet from the Sandy River Road does not comply with Section 10.26,D,1,c of the Commission's Land Use Districts and Standards. Although the applicant's lot was previously developed with a pre-Commission single family dwelling, that dwelling was destroyed by fire in 2008 and the applicant did not submit an application to reconstruct the dwelling within two years of the date of destruction, and, therefore, the proposal is not eligible for waivers under the provisions of Section 10.11,C,2 of the Commission's Land Use Districts and Standards.
4. The applicant's proposal does not comply with the requirements for issuance of a permit by variance, pursuant to 12 M.R.S. §685-A(10) and Section 10.10,B of the Commission's Land Use Districts and Standards because the applicant has not demonstrated that strict compliance with the rules and standards adopted by the Commission would cause unusual hardship or extraordinary difficulties. Specifically,

the Commission has identified a location on the applicant's lot where a single family dwelling unit could be constructed in full compliance with the Commission's minimum dimensional requirements, including the 50 foot minimum road setback and 15 foot property line setback requirements. Although the applicant has raised concerns regarding the possible loss of view of the nearby mountain range and the cost of installing a new foundation for the dwelling if required to be located in a conforming location, neither of these concerns rises to the level of unusual hardship or extraordinary difficulties.

5. The applicant has not demonstrated that strict compliance with the rules and standards adopted by the Commission would cause unusual hardship or extraordinary difficulties related to one or more of the three criteria contained in both 12 M.R.S. § 685-A(10) and Sections 10.10,B, 1, 2 or 3 of the Commission's Land Use Districts and Standards. Specifically:
 - A. The applicant has not submitted any evidence that unusual hardship or extraordinary difficulties are because of the access and use needs of a person with a physical disability as defined in 5 M.R.S.A. §4553 sub-§7-B who resides in or regularly uses a structure.
 - B. The applicant has not demonstrated that unusual hardship or extraordinary difficulties would be caused by exceptional or unique conditions of topography, access, location, shape, size or other physical features of the site. As noted in findings of fact #21 and #23 above, the applicant's assertion that the downward slope of the land will cause him to lose a view of the Mahoosuc Range or to install a new foundation at additional expense does not constitute an unusual hardship or extraordinary difficulty.
 - C. The applicant has not demonstrated that unusual hardship or extraordinary difficulties would be caused by unusual circumstances that were not anticipated by the Commission at the time the rules and standards were adopted. As noted in finding of fact #24 above, the Commission adopted its rules and standards at a time when parts of its jurisdiction contained small remote neighborhoods like the one where the applicant's lot is located, and the Commission adopted rules to accommodate the continued existence, expansion and reconstruction or replacement of legally existing nonconforming structures under specific circumstances.
6. Pursuant to Section 10.10 B,4,a and b of the Commission's Land Use Districts and Standards, the applicant has not demonstrated, by substantial evidence the following:
 - A. That the land in question cannot yield a reasonable return unless a variance is granted. The Commission has determined that the applicant can construct a single family dwelling on the property in full compliance with the Commission's dimensional and other permit requirements, and therefore a reasonable return on the property can be expected without the issuance of a permit by variance.
 - B. That the need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood. The slope of the applicant's lot is not unique to the area and is suitable for construction of a single family dwelling in full compliance with the Commission's dimensional and permit requirements.
7. Pursuant to Section 10.10 B,4,c and d of the Commission's Land Use Districts and Standards, the applicant has demonstrated, by substantial evidence the following;
 - A. That the granting of a variance will not alter the essential character of the locality. The applicant has submitted several photographs of nearby camps that either are closer to the road than 50 feet or have all screening vegetation removed.

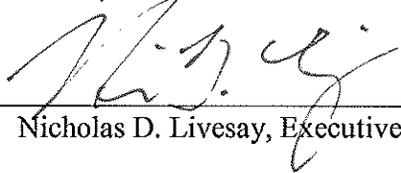
- B. That the hardship (to the extent one exists) is not the result of action taken by the petitioner or a prior owner or lessee. The applicant could have applied for a waiver of the minimum road setback standard under the provisions of Section 10.11 of the Commission's Land Use Districts and Standards, however, such a waiver would not likely have been granted because there is a location on the lot where the camp could be constructed in full compliance with the current minimum setback requirements, and the applicant would have been required by Section 10.11,C,2,a to comply with the current minimum setback requirements to the maximum possible extent.

Therefore, the Commission DENIES Building Permit BP 15279 by Variance for William H. Churchill for the existing 20 foot by 22 foot single family dwelling, with a proposed 7 foot by 22 foot deck, located 37 feet from the Sunday River Road.

In accordance with 5 M.R.S.A. section 11002 and the Maine Rules of Civil Procedure 80C, this decision by the Commission may be appealed to Superior Court within 30 days after receipt of notice of the decision by a party to this proceeding, or within 40 days from the date of the decision by any other aggrieved person. In addition, where this decision has been made without a public hearing, any aggrieved person may request a hearing by filing a request in writing with the Commission within 30 days of the date of the decision.

DONE AND DATED AT BANGOR, MAINE, THIS 12 DAY OF NOVEMBER, 2014

By: _____


Nicholas D. Livesay, Executive Director