

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

REGULAR MONTHLY MEETING

New England Outdoor Center, 30 Twin Pines Road, T1 R8 WELS
February 11, 2015

COMMISSIONERS PRESENT

Gwen Hilton, Chair Betsy Fitzgerald Bill Gilmore Durward Humphrey
Everett Worcester, Vice-Chair Robert Dunphy Charles Pray

STAFF PRESENT

Nicholas Livesay, Executive Director Karen Bolstridge, Downeast Regional Representative
Samantha Horn Olsen, Planning Manager Jean Flannery, Permitting and Compliance Manager
Eric Larsson, Senior Planner Marc Russell, Millinocket Regional Representative
Mary York, LUPC Augusta Debra Kaczowski, Millinocket Regional Representative

OTHERS PRESENT

Lauren Parker, Assistant Attorney General See attached Sign in Sheets

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

January 14, 2014 Minutes

Commissioner Fitzgerald moved to approve the minutes; Commissioner Humphrey seconded; Vote: 7-0-0-2
Unanimous

DIRECTOR'S REPORT

Nick Livesay provided the director's report, summarizing a number of projects staff currently are working on, providing an overview of legislation most likely to affect the LUPC, and referencing the anticipated calendar.

RULEMAKING MATTERS

Chapter 10 Rulemaking regarding designation of historically or culturally significant area; consideration of posting for public comment; Samantha Horn Olsen

Samantha Horn Olsen presented a proposed rule revision that would allow the Commission to designate Areas of Cultural or Special Significance (DACSS). The proposed rule would facilitate reconstruction or expansion of legally existing, nonconforming structures within a designated area, provided that proposed reconstruction projects conform to the purpose of designation. Designation of a proposed area would need to happen within two years of damage, destruction, or removal of nonconforming structures. Applicants seeking to reconstruct in place or expand non-conforming structures within a DACSS would need to apply for a permit within two years of designation.

Resumption of legally existing, non-conforming uses of structures could be allowed by the Commission provided good cause (e.g., if it takes longer than two years to designate the area and then apply for a permit, applicants could still resume an historic nonconforming use).

Samantha presented preliminary information about the Grand Lake Stream waterfront, likely to be the first area proposed as a DACSS. A recent fire in the plantation destroyed two boathouses and badly damaged a third. Staff visited Grand Lake Stream Plantation on January 15th, 2015 and met with members of the community. Samantha described how the boat houses contribute to the look and feel of the area and provide significant public benefits such as infrastructure that supports the local recreational economy and serve as a backdrop for community life.

DISCUSSION

Commissioner Dunphy asked what might be the implications for a location like a mountain top? A mountaintop with structures on top could be proposed as a DACSS (e.g., hotel or a fire tower). It was noted that the underlying zoning remains and governs allowable uses. Nonconforming structures and uses could only be reconstructed and resumed, if they result in significant public benefits.

Commissioner Humphrey asked if areas would only be proposed for designation because of a loss, or would some areas be pre-designated? The public or the Commission could petition for areas to be designated.

Commissioner Gilmore asked: why does staff consider it appropriate to allow for expansions of historic or culturally significant structures? Expansions were included to allow for adaptive reuse of structures that are architecturally significant, but whose use may not contribute to the purpose for designation.

Commissioner Worcester wondered if local government officials would be able to weigh in during the designation process. Designation of a proposed area would be a rulemaking with plenty of opportunities for local government officials to participate. Staff will make that local and tribal officials are notified and have plenty of time to respond.

Commissioner Worcester asked in the case of Grand Lake Stream PLT, have staff tentatively identified the proposed area and if so how was that done? In the field visit staff asked questions about what makes that area special. Community members and local officials all answered: the boathouses. We preliminarily drafted the designation so that structures along the shoreline from point x to point z would be included. We included the boathouses and existing structures in the area but excluded the dam.

Commissioner Hilton pointed out that structures within a DACSS could have different uses from their historic use. Could a boathouse be turned into a floating restaurant and generate unanticipated impacts? The underlying zoning would still govern use of buildings and structures. Applicants would either be able to propose uses already allowed in the existing zones, or bring back an historic use. If they resume an historic nonconforming use, they would have to demonstrate that it provides significant public benefits.

The Commission briefly discussed the designation process, the specific criteria petitioners would have to meet, and the factors the Commission would consider when determining if designation of an area would provide significant public benefits. Commissioner Hilton pointed out that it is not the intent of this rulemaking to create a loop hole for development that is incompatible with the Commission's rules.

Commissioner Fitzgerald moved to approve staff recommendations with suggested changes; Commissioner Dunphy seconded; Vote: 6-0-0-3 Unanimous (Commissioner Pray temporarily excused himself and was not present for the vote.)

Chapter 10 Rulemaking regarding dimensional requirements for certain public boat launches and trailheads; overview and discussion of rulemaking proposal to allow reduced dimensional requirements for public boat launches and public trailheads where lands surrounding these facilities are governed by conservation easements that provide sufficient buffers; Samantha Horn Olsen

Samantha Horn Olsen led an informational discussion on the Commission's Chapter 10 dimensional requirements for public recreational facilities as a preview for a proposed rule change that will come to the Commission next month.

The Bureau of Parks and Lands (BPL) is currently considering site locations for public recreational facilities to be located within a conservation easement area as a part of the planned development of the Moosehead/Plum Creek Concept Plan. BPL has found that the Commission's Chapter 10 dimensional requirements restrict the number of sites they can develop to less than was expected under the Plan. BPL is proposing that some of the dimensional requirements be reduced for public recreational facilities such as boat launches and trailheads where the site is surrounded by conservation land. For example, BPL is suggesting that where appropriate, lot size could be reduced from 40,000 sq. ft. to 20,000 sq. ft., and road frontage and shoreline frontage could be reduced to 100 ft.

Various factors to be considered were discussed, including, site design and efficient use of land, a lack of impact to neighboring uses due to buffers, compatibility of uses of surrounding land, appropriate restrictions on sites, lot density, the amount of land needed for parking areas, phosphorus export, appropriate provisions for deeds restrictions or easements, and possible standards.

Commissioner Gilmore indicated he might prefer bigger lots and less of them due to design requirements for boat launch facilities and because smaller lots could create shoreline lot density problems.

Commissioner Dunphy expressed concern about phosphorous impacts to lakes from driveways and suggests having two public boat launches on lakes but limits to direct access from camps and campsites.

Commissioner Hilton inquired about applying this broadly throughout the area subject to the Plum Creek Plan and what constitutes public facilities for purposes of this rule revision.

Commissioner Worcester inquired whether, instead of a making blanket rule, could we see what BPL is actually proposing. If there is a small pond and they are just making a trail, maybe it's ok to reduce the dimensions but he is concerned about parking on small lots for boat launches.

Commissioner Fitzgerald asked about designating a site as a hand carry launch vs. a car access launch and whether the type of lot might determine what amount of land is needed. Do we ask for a site design, or set standards with limitations.

Commissioner Hilton pointed to distinctions with trailhead parking requirements for hiking vs for ATVs or snowmobiles. She also inquired whether similar issues are likely to come up in the Concept Plan in Aroostook County.

Commissioner Gilmore mentioned the need for properly siting sanitary facilities and how that can influence lot size and wondered whether the boat launches will have privies.

ENFORCEMENT MATTER

Settlement Agreement, Emerson (EC 14-65); Consideration of settlement agreement to resolve violations associated with construction of single family dwelling with attached garage and deck too close to South Twin Lake and too close to access road; Indian Purchase #4 Twp., Penobscot County; Debra Kaczowski

Debra Kaczowski gave a brief presentation on enforcement case EC 14-65.

Commissioner Dunphy asked what was out front between the deck and the lake and if there is a buffer strip. Debra stated there is a greater than 10% slope with a small level area and a buffer strip.

Commissioner Gilmore enquired whether the property owner built the dwelling and garage or did a contractor? Debra said Mr. Emerson was asked and he stated he did contract it out but he also stated he is ultimately responsible for what the contractor does. Due to the angle of the structure it did not meet the 100 foot lake setback but would have been able to the setback with a 20 foot waiver to the road.

Commissioner Fitzgerald asked if he could come back and ask for a deck if the deck went off the side of the house and did not extend closer to the water. Debra answered yes as long as he met the 100-foot setback; he has not exceeded his lot coverage, and that most of the structure is beyond 100 feet except for the garage and a portion of the breezeway.

Commissioner Hilton followed up on the previous question regarding the buffer and asked if there is an existing buffer, what the buffer consisted of, and did staff feel it is a high quality buffer. Debra answered that there was an existing dwelling unit in approximately the same area, the buffer consisted of trees, shrubs, and grasses and that he did have a good buffer with quite a bit of larger size trees.

Commissioner Worcester commented that this is an issue that we've raised before and we cannot seem to get a handle on it, that's these violations. I'm not proposing this but I've been thinking about how we can get a handle on this from here on out. I know we've initiated, as much as possible, meeting with and applicant prior to them building and they are always in agreement when we're there. Discussion followed about possible solutions.

Commissioner Humphrey moved to approve staff recommendations; Commissioner Pray seconded; Vote: 7-0-0-2 Unanimous

RULEMAKING MATTERS

Chapter 10 Rulemaking regarding development on legally existing nonconforming lots; consideration of posting for public comment; Samantha Horn Olsen

Samantha Horn-Olsen presented a proposal to improve language in, 10.11,e,3 and 10.11,e,4 to remove the word waiver and replace with exception. This item was introduced at the January 2015 Commission meeting in Brewer in conjunction with the recreational lodging rule changes. At that time, the Commission voted to continue discussion of this item at the February meeting. In the course of reviewing our rules it came to our attention that the use of the word "waiver" should be removed from sections 10.11,E,3 (non-conforming pre-Commission lots) and 10.11,E,4 (post-Commission lots that were conforming when created). The intent of the change is to prevent possible legal challenges to Commission permits, but there would be no change on the ground in terms of whether or not permits are issued. We are also proposing an additional change in section 10.11,E,4. The existing language addresses lots that were conforming when they were created, but are no longer conforming. Under the existing language, the Commission may, as necessary, reduce the dimensional requirements for development to no less than the

standards at the time the lot was created. This is inconsistent with the provisions of section 10.11,E,3, in that for pre-commission lots today's shoreline setbacks must be met even though other requirements may be reduced. It is also inconsistent with Shoreland Zoning (DEP Chapter 1000, section 12E), which allows for reductions in lot area, lot width, and shore frontage, but specifically prohibits reductions in setbacks except through the variance process. The existing language also appears inconsistent with the state's regulations, generally, for protection of water bodies, and potentially creates inconsistent shoreline setbacks for new construction on lots in the same neighborhood or area. The proposed rewording would require that current shoreline setbacks be met even if other dimensional requirements are reduced

Commissioner Dunphy asked how the setback could be moved closer than 100' when plumbing code requires 100' from water body for wastewater systems. Samantha responded that development must still meet the plumbing code where applicable.

Commissioner Worcester asked how the conformity of post-1971 lots would be determined. Nick responded that the applicant would have to demonstrate that conformity based on standards applied at that time using the Commission's library of codes. The issue before the Commission in this rulemaking is focused on how to treat lots created after 1971 but before the current 100' setback was established.

Commissioner Gilmore said that he felt the current 100' water setback is the correct one, but that the frontage requirements should not be part of the equation. Samantha responded that there is no proposed change to the rule that allows for adjustments to frontage requirements, and that a change to that rule could be modified if the Commission felt that was important.

Commissioner Gilmore observed that a round pond could be divided up so that all setbacks could be met, but not frontage and asked why there could not be more flexibility for developing those lots. Samantha responded that overall density could be used to manage that, but without a subdivision permit that can only be done on a case-by-case basis.

Commissioner Gilmore agreed that it might not be possible to do that, but fairness to the person who only has 75' of frontage on a lot created in 1975 would suggest that they be permitted to develop. Samantha responded that under current rules, post-commission lot frontage could be adjusted if the lot was conforming when it was created.

Commissioner Pray asked if the number of nonconforming lots was available. Samantha responded that she did not have that information. She said that staff could identify parcels below a threshold size, but not below specified setbacks or frontages, nor could the date of lot creation be identified using the GIS database.

Commissioner Humphrey asked what was driving the proposed change. Samantha said that this issue was discovered when staff reviewed 10.3, 10.4 in connection with the proposed rulemaking relating to storage, and discovered the legal problem with the waiver language as well as the inconsistency in treatment of pre and post-1971 nonconforming lots, and inconsistent with other regulations pertaining to water bodies.

Commissioner Worcester asked how the pre-1971, 100' setback was established. Samantha responded that she did not know, but said that the rulemaking process could be researched.

Commissioner Worcester asked what the setback was in 1971. Samantha responded that she could find that out.

Commissioner Worcester stated that he did not want to let people go back to a 25' water body setback if that is what was in place. Samantha noted that they would be required to go back as far as possible. Commissioner Pray asked for clarification regarding the legal concerns surrounding the word waiver. Nick responded that zoning

dimensional requirements may only be adjusted by variance not waiver based on Law Court precedent. Commissioner Pray asked what the practical difference was between waiver and allow. Nick responded that the legal mechanism for changing dimensional standards is by variance not by waiver. The recommendation is to create a standard that is more defensible and equitable. Commissioner Pray suggested using the word variance in place of waiver. Nick responded that a variance would require a showing of undue hardship while the recommended approach allows more flexibility consistent with the statute

Chair Hilton asked if Commissioner Pray felt the recommendations might be too flexible. Commissioner Pray responded that he felt it should be more flexible.

Commissioner Pray said that the standard should be more flexible with respect to construction of buildings, while septic and water should be set back 100'. Samantha noted that the purpose of grandfathering is to move things to the new standard over time.

Commissioner Humphrey expressed concern that the change had the potential to take away the ability to develop some nonconforming lots at all. Samantha said that may be true in some cases where lots are too shallow, and the purposed of the rule change is to determine where the line should be drawn.

Commissioner Worcester asked for a chart showing how the setback has changed over time since 1971, and expressed concern that post-1971 lots might face less restrictive standards than pre-1971 lots.

Commissioner Humphrey noted that over time this could prevent people from building on a lot if the rules changed further. Samantha replied that this it depends on the expectations people have at the time of purchase- this discussion is to determine how long.

Commissioner Fitzgerald noted that paragraph four of the proposed rule provided that the standard would be the one in place at the time of a lot's creation.

Commissioner Humphrey stated that because the dimensions can continue to change it is not fair to people who cannot afford to develop at the time of lot creation. Samantha agreed that water body setback was the least flexible of the dimensional standards for non-conforming lots that might have been conforming at the time of creation.

Commissioner Dunphy asked how this would work going forward. Samantha provided an example of a lot currently conforming lot after which the commission modified the setback standards.

Commissioner Dunphy asked what the argument was for not making it consistent. Samantha responded that it was the issue of fairness described by Commissioner Humphrey – a balancing of landowner rights against water quality standards.

Commissioner Fitzgerald asked if is there was a way to make 100' the standard unless there was no practical way to do so, in which case the applicant could use the legal setback at the time of lot creation. Samantha replied that that is what is in place today.

Commissioner Humphrey asked if the standard could be tied to changes in ownership rather than the time of lot creation.

Commissioner Dunphy observed that a buffer strip could solve the problem as well as a setback. Commissioner Fitzgerald asked if this could be considered a taking. Samantha said that it would not. Chair Hilton asked what options were available at this point. Nick said there were several options. 1) Table all discussions. 2) Move forward

with the rulemaking change to waiver language only, but exclude setback issues; 3) Move forward on both waiver and setback changes; 4) decline to move forward on either proposed change.

Commissioner Worcester moved to bifurcate the rulemaking and move forward with the non-substantive changes recommended by staff; Commissioner Dunphy seconded; Vote: 7-0-0-2 Unanimous

Commissioner Humphrey moved to take no further action on the remaining piece of the rulemaking regarding the treatment of post-Commission that became nonconforming; Commissioner Pray seconded; Vote: 2-5-0-2 (Commissioners Hilton, Gilmore, Dunphy, Worcester and Fitzgerald opposed); motion failed

Commissioner Humphrey moved to table the remaining piece of the rulemaking until further information is available; Commissioner Pray seconded; Vote: 4-3-0-2 (Commissioners Hilton, Gilmore and Dunphy opposed); motion failed

The Commissioners discussed what additional information would be useful and asked for a summary of how the water body setback had changed since 1971.

Commissioner Dunphy moved to table until the March meeting; Commissioner Worcester seconded; Vote: 6-1-0-2 (Commissioner Humphrey opposed)

Chapter 10 Rulemaking regarding storage on nonconforming lots; consideration of posting for public comment; Samantha Horn Olsen

Samantha Horn Olsen presented and summarized proposed rule changes that would permit the construction of storage structures on lots that are non-conforming under current rules. The Commission sometimes encounters lots that, even with all available exceptions, do not meet the minimum dimensional requirements for constructing a residence, but where the property owner wishes to use the lot for storage of personal property. However, a storage building is only allowed as accessory to another use such as a residence, and also triggers dimensional requirements. Some owners of lots that are too small to be developed with a residence would like to store tools, boats, recreational equipment, vehicles, or other personal items in a building that is not accessory to another use or structure. This is especially true for waterfront lots, but non-accessory storage may be desired in other settings as well. The proposed rule would allow a property owner or lessee to obtain a permit for a storage structure when: 1) the lot was established pre-Commission; 2) the lot is at least 15,000 square feet; 3) the lot has 100' of shore frontage and 75' of road frontage; 4) there is no principal use, such as a residence or campsite, already present; 5) it is in a location where residential sheds and garages are an allowed use, except in sub-districts where density limitations apply. Some of the considerations in setting an appropriate size for storage structures include: • How to allow maximum utility of property without negative impacts on others • Current allowable uses on the lot, for example tent and shelter camping or in some cases, campsites • Limiting density of development on lakes • Issues relating to the presence of unattended storage structures when there is no principal use such as a residence or business • Possibility of attracting human habitation in storage buildings without adequate septic services.

Staff asked the Commission to decide whether to allow storage as a stand-alone use, and if so, to specify a maximum size of storage structure.

Commissioner Gilmore asked whether an RV is a permitted use. Staff responded that in some zones you may need to establish a campsite, and in others you may not, but either way an RV is generally permitted. The Commissioner commented that storage is not habitable, and that 100 sf seems appropriate to keep it from becoming a habitable dwelling.

Commissioner Humphrey commented that a 16' boat or six kayaks will not fit in a 100 sf building.

Commissioner Gilmore observed that balance is necessary between allowing a reasonable use, and limiting the risk of the storage structure becoming something else.

Commissioner Dunphy asked for clarification whether storage structures would require a permit. Samantha responded that they would require permit.

Commissioner Humphrey commented that the Commission currently does not require a permit for accessory structures up to 750 sf. Samantha noted that that was only if a primary use and structure, such as a residence had already been permitted, reducing pressure to use the storage structure for habitation. The Commissioner noted that sometimes the need for storage was greater when there is no primary structure.

Chair Hilton asked for some background on how the issue had come up and what people were asking for. Nick Livesay responded that the issue had been raised in several instances by property owners, and therefore presented the question to the Commission how this could be done reasonably.

Commissioner Worcester commented that 160 sf would allow boat storage but probably not allow habitation, but asked about height limits. Nick responded that the existing height limit is 30' within 500' of a shoreline. The Commissioners discussed whether a cubic foot limit might be used, but there was general agreement that this would be impractical.

Commissioner Worcester observed that people live in tents or yurts for extended periods of time.

Commissioner Dunphy proposed allowing structures of 100 sf, 1 story, and less than 12' high with no windows.

Samantha asked if the height maximum was wall height or peak height, and brief discussion revised proposed height limit to 16 feet at the peak.

Commissioner Dunphy moved to approve a building size of 16 feet high by 100sf and to post the rulemaking for public comment; Commissioner Fitzgerald seconded

There was a discussion of how the height would be calculated, and staff recommended using the standard calculation of a baseline from the average grade at the downhill side of the structure, and that 16' at the peak would probably be sufficient.

Commissioner Pray noted that if the purpose is to store several canoes and kayaks in a structure sheathed in 4' x 8' sheets then 128 sf might be more appropriate than 100 sf. Chair Hilton asked for the range of sizes that staff had suggested. Nick responded that suggestions ranged from under 100sf to over 700sf, based on considerations like those used by the Commissioner Pray.

Commissioner Dunphy amended his motion to approve the building size of 16 feet high by 160sf; Commissioner Fitzgerald seconded; Vote: 7-0-0-2 Unanimous

PLANNING/RULEMAKING MATTERS

Road Setbacks – update on review of Commission's road setback dimensional requirement and anticipated next steps; Nicholas Livesay

Nick provided an update on steps that have and will be taken to evaluate the Commission's road setback standard.

Recreational Lodging and Revegetation Rulemaking – update on rulemaking status; Nicholas Livesay and Samantha Horn Olsen

Nick and Samantha provided an update on the rulemaking and steps taken consistent with the Commission's direction.

OTHER MATTERS

Commissioner Comments – N/A

ADJOURN

Meeting adjourned at approximately 12:50 pm.