

STATE OF MAINE
LAND USE REGULATION COMMISSION

Zoning Petition No. ZP 707

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| |] | RESTORE: The North Woods and |
| <i>In Re:</i> Plum Creek Timber Company’s |] | Forest Ecology Network’s |
| Petition for Rezoning Moosehead Region |] | Comments on the “Commission |
| |] | Generated Amendments” |
| |] | |

Introduction

The Forest Ecology Network (“FEN”) and RESTORE: the North Woods (“RESTORE”) appreciate the opportunity to comment on both the LURC staff’s¹ recommendations and the Commission generated amendments. Our comments make four basic points. First, we state the so-far unspoken – but unavoidable – fact that staff has concluded that Plum Creek’s proposal does not conform to the regulatory criteria. Second, we point out the procedural problems that will arise if the Commission allows the focus of these proceedings to shift from Plum Creek’s

¹ For ease of writing style, we use the term “staff” to include staff and LURC’s consultants.

proposal to a staff proposal that was not reviewed in the evidentiary hearings. Third, although we disagree with the staff's conclusion that their New Plan conforms to the regulatory criteria, we recognize that the staff proposal includes several substantive improvements that Plum Creek should not be allowed to dilute. Fourth and most importantly, we explain why even if the Commission were to allow Plum Creek to make the proposed amendments and even if Plum Creek were willing to do so, the New Plan would still not meet the regulatory criteria.

Comments

1. THE STAFF HAS IMPLICITLY FOUND THAT PLUM CREEK'S PROPOSAL DOES NOT MEET THE REGULATORY CRITERIA.

While staff has explicitly stated that they are recommending neither approval nor denial of Plum Creek's proposal, one conclusion is unavoidable: staff's proposed amendments makes it clear that Plum Creek's Plan fails to meet the regulatory review criteria. We begin with a review of how the Commission gave staff the task of considering whether amendments are necessary and, if so, which ones are necessary.

At the very end of the January hearings, Assistant Attorney General Jerry Reid proposed three options on how the Commission might want to proceed, stating in pertinent part:

And the third option would be to direct your staff and consultants to come forward with something that might look like kind of a menu of options for how the concept plan might be amended in places, are left unamended in places, also responsive to the issues

that we've been talking about. January 25, 2008 Transcript Vol 2
pages 224-225

Since the Commission did not have a quorum present at that time it could take no official action on Jerry Reid's options. However, the three Commissioners present (Hilton, Nadeau, and Harvey) expressed a preference for option number three. *id.*

In February 2008, Chair Harvey issued the 11th procedural order adopting option number three. The pertinent part of the 11th procedural order states:

Consistent with the expressed wishes of Commission members, staff/consultants will evaluate whether and, if so, how the Concept Plan proposal could be amended to address issues raised at the hearings. *Id.* Page 1.

The conclusion is inescapable that the Commission did not give staff a blank check to write its own concept plan. Rather, the staff were first to consider "issues raised at the hearings" and then to consider "whether and, if so, how the Concept Plan could be amended." The clear implication is that if the "issues raised at the hearings" showed that Plum Creek's Concept Plan did not meet the standards, staff should articulate amendments to bring the Plan into conformity with LURC standards. On the other hand, if the Plan met the standards, there would be no need for amendments. Of course, FEN-RESTORE – just like everyone else who went through the hearings – knew that the issues raised in the hearings revealed fatal flaws in Plum Creek's Plan and therefore we were not surprised when staff recommended extensive amendments.

A review of staff's written submissions and their oral statements during the deliberations

show that staff understood that the Commission wanted the staff to propose amendments only if it was necessary to meet the regulatory criteria. For example, the May 20, 2008 Memorandum introducing staff's proposed amendments says staff seeks "guidance" from the Commission:

on what amendments to the proposed Concept Plan, *if any*, the Commission determines ***are necessary to satisfy governing review criteria*** and will specifically be seeking the Commission's reactions to each of the recommendations. **** The recommendations, taken as a whole, represent our best professional judgment ***about how the proposed Concept Plan might be amended to satisfy governing review criteria.*** May 20, 2008 Memorandum from Agnieszka Pinette to the Commission Pages 1-2 (emphasis added).

In her oral introduction of staff's proposed amendments, Ms. Pinette explains:

We are neither recommending approval or (sic) denial of this concept plan as it has been presented by Plum Creek; rather, per the Commission's instruction at the end of the January hearings, we have presented for your consideration a set of recommendations that, if accepted, we believe would result in a concept plan that ***meets all of the review criteria.*** One other point with respect to this document. While we haven't presented the rationale for how we feel these recommendations would ***meet the review criteria,*** I hope it goes without saying that the framework within which we've developed these recommendations are ***encompassed and integral to the review criteria*** and are ***based on the relevant review criteria for concept plans.*** DT Pages 3-4 (emphasis added).

During the deliberations on the "total number of units," Ms. Pinette states that staff's opinion that the area can absorb the total number of units proposed is dependent upon the Commission adopting staff's recommendations:

I do want to highlight that our conclusion on the total number of units is very much dependent and tethered to the recommendations we are making. So as Ron mentioned, the recommendations we are making with respect to the location of development is critical

in terms of thinking about whether the total number of units is appropriate here. Likewise, our recommendation on the long-term planning approach to the scenic standards, et cetera, are quite tethered to our conclusion that if these recommendations are accepted, then we feel that the cumulative impacts will be added, will be addressed and managed. DT P 153 L 8-20.

In other words, the total number of units proposed by Plum Creek would not pass the test without staff's recommendations being accepted. Finally, while answering a question from Commissioner Laverty about the importance of the Legacy Easement, Mr. Kreisman opined that the Legacy Easement is essential because the Balance Easement by itself is insufficient:

And so what we're saying is, in our view with our recommendations, development can and should go forward, as we've talked about today, but only if that conservation -- not the road easements and not additional plan elements, there's the road easements and obviously things like the Community Stewardship Fund coming into effect afterwards -- but on the land side, it's all there before any development is approved.

MR. LAVERTY: So, without conservation of the legacy easement and Roaches' easement, we would not be able to make a finding of no adverse -- well, of public benefit, no adverse impact; is that what you're --

MR. KREISMAN: And -- and comparable conservation because the balance easement is, in our view, close but not entirely -- that is our recommendation. DT P 205 L 6-18 (emphasis added)

FEN-RESTORE respectfully encourages the Commission to state explicitly what, although obvious, has only been stated implicitly so far: Plum Creek's proposal does not meet the regulatory criteria and must be either denied or amended. The procedure the Commission

and its staff have followed would not make sense if Plum Creek's proposal meets the regulatory criteria. Asking Plum Creek to change its proposal would be *ultra vires* unless the amendments are necessary to bring Plum Creek's proposal into compliance with the regulatory criteria. The Commission can indicate the reasons for denying the petition to give Plum Creek a chance to file a new application but the Commission does not have the authority to ignore Plum Creek's petition altogether.

2. ALLOWING PLUM CREEK TO ADOPT THE PROPOSED AMENDMENTS WOULD UNDERMINE THE INTEGRITY OF THE PROCESS BECAUSE NONE OF THE EVIDENTIARY HEARINGS TESTED THE PROPOSED AMENDMENTS.

The one point that all participants – Commission, staff, applicant and interveners – have consistently agreed upon is that the issues raised by Plum Creek's petition are serious enough to justify the most thorough and fair procedures possible. Thus we have had months of written pre-filed testimony, written rebuttal testimony, written legal argument, and, finally, four weeks of evidentiary hearings. The purpose of these procedures, although burdensome for all parties, was to subject the proposal to rigorous scrutiny to make sure the Commission would “get it right.”

Toward that end, last Fall FEN-RESTORE strenuously objected to Plum Creek's tendency to continuously change the Concept Plan. The Commission decided to delay the November hearings to December to give Plum Creek one last chance to amend its proposal so the December hearings would scrutinize a reliable, stable proposal rather than a “moving target.” For the Commission to now not only *invite* Plum Creek to make substantive amendments to its

Plan but to request staff *to draft the changes for Plum Creek* undercuts everything we have done so far. The idea that the Commission will not vote on the proposal that was tested in the evidentiary hearings but will vote on a staff-recommended New Plan after only the most cursory opportunity to submit comments on the New Plan does violence to the intent of both the LURC rules and the Maine Administrative Procedures Act. In contrast to the procedures followed up to this point, the Commission now seems to propose *that staff join forces with Plum Creek* to devise a Plan that the Commission can approve. Under such a procedure the staff loses all pretense of neutrality or objectivity and becomes advocates for the New Plan. There is no support in the record for the New Plan since the New Plan did not exist at the time the record was made.

A few examples illustrate the problems inherent in the Commission ignoring the Plan that was scrutinized in the hearings and voting instead on a New Plan that is only going to be subjected to minimal scrutiny. Plum Creek's proposal included allowing residential uses in the Moose Bay area. Staff, on its own initiative and without any support in the record, decided that a resort would be appropriate in the Moose Bay area. So the staff proposed and the Commission has adopted (at least for the purpose of receiving comments) that the Moose Bay area become "resort optional." See DT Page 78. No evidence whatsoever was presented in any of the proceedings about whether this area is appropriate for a resort because Plum Creek did not propose putting a resort there. Even if FEN-RESTORE had had the magical ability in December 2007 to foresee that six months later a resort would be proposed in this area, cross-examining

Plum Creek's witnesses on the appropriateness of Moose Bay for a resort would have been futile because the witnesses could only respond that Plum Creek was not proposing a resort in this area. Plum Creek did not present any evidence that the Moose Bay area is appropriate for a resort because Plum Creek did not propose putting a resort there. There is no justification for soliciting agency comment and requiring written pre-filed testimony, written pre-filed rebuttal testimony, and full cross examination about the appropriateness of the resorts proposed by Plum Creek but not soliciting agency comment or allowing written pre-filed testimony, written pre-filed rebuttal, or any cross-examination on a resort proposed after-the-fact by staff. There is nothing in the record suggesting that staff are so much more qualified than Plum Creek's experts at siting resorts so that staff's proposed resorts do not need scrutiny. FEN-RESTORE strenuously objects to the Commission allowing – or even reviewing – resort locations that were neither proposed by the petitioner nor considered during the hearings.

It is not just a matter of the Commission inviting Plum Creek to now place resorts in areas that were not considered in the hearings. The staff also proposed changes in areas that, unlike Moose Bay, did receive thorough scrutiny as a location for resorts. Staff's recommendations, however, have so qualitatively changed those areas as to render the hearings meaningless. For example, Lily Bay was one of the most-scrutinized areas in the hearings. Staff proposes to severely restrict the geographic size of the Lily Bay development zones but not to reduce the number of units to be allowed in the now-shrunken Lily Bay development zones. Putting the same number of units in a much smaller area changes the density calculations. One

of Plum Creek's chief arguments during the hearings was that it made the development zones large enough that it would be able to site the various units in the development zones in a way that avoids adverse impacts to resources or wildlife. Under the New Plan, Plum Creek's ability to site the units becomes more difficult because of the increased density (same number of units in a much smaller area). But none of this was explored during the hearings because the hearings were based on what Plum Creek proposed, not what staff proposed after the hearings were over.

Further, nor is it just a matter of the staff qualitatively changing the nature of the zones by changing their size. Changes proposed by staff in one zone can have a quantitative impact on another zone. For example, reducing development on the north shore of Long Pond is good *for Long Pond*. But if the same number of units are going to remain overall, those units must go *to some other zone* (generally called "receiving areas.") The hearings could not cover, however, how any given staff-imposed change in one area would impact the "receiving areas" into which the units would flow because the staff did not propose their changes until after the hearings concluded. Similarly, all the work on traffic impacts, wildlife corridors, and resource uses are rendered moot because the New Plan was neither known nor reviewed when these studies were completed.

We agree with Commissioner Lavery's observation about how an amendment in one area can have unintended consequences in another area,

I think amending this plan coming to me, personally, as it's coming together as a whole and to tinker with one part of it in my view would almost necessarily raise issues with regard to another part of it. It can be extremely complex and I'm concerned about that. DT

Pages 373-374.

If the Commission is going to allow such massive amendments to Plum Creek's Plan, it should subject the impact of those amendments on the whole Plan to the same level of scrutiny as it would if Plum Creek elected to submit an entirely new plan.

Imagine if Plum Creek proposed, say, a white elephant, and the Commission – recognizing the importance of the white elephant – held thorough hearings on whether the white elephant met the regulatory criteria. And then, after all the hearings on the white elephant have concluded and *it becomes clear that the white elephant does not conform to the regulatory criteria*, the Commission decides not to vote on the white elephant but to vote instead on a pink elephant proposed by staff. True, simply voting the white elephant down would take political courage while voting on the pink elephant might look good as a reasonable compromise. However, the strengths and weaknesses of the pink elephant were never explored in evidentiary hearings like the ones the white elephant went through.

The Commission is not supposed to convert white elephants into pink elephants. The Commission's job is to vote on the Plum Creek proposal that was tested during the hearings. To fail to accomplish this task is not only to wander from the Commission's statutory mandate but to squander the good will gained by having rigorous hearings in the first place. FEN-RESTORE encourages the Commission to return to its statutory role of judging the petition submitted to it based on its merits and to resist wading into the unchartered and unjustified waters of

“Commission generated amendments².”

3. SOME OF THE AMENDMENTS PROPOSED BY STAFF MAKE REAL IMPROVEMENTS THAT PLUM CREEK SHOULD CONSIDER IF IT SUBMITS A NEW APPLICATION EVEN THOUGH THOSE IMPROVEMENTS ARE INSUFFICIENT TO BRING THE PROPOSAL WITHIN THE REGULATORY REQUIREMENTS.

As will become apparent in our fourth set of comments, FEN-RESTORE challenges staff's position that its New Plan complies with the regulatory criteria. The fact, however, that the New Plan does not address all the defects in Plum Creek's Plan should not hide the progress that staff has made in suggesting corrections to some of the more egregious faults in Plum Creek's proposal. Anticipating that Plum Creek might try to dilute even these modest gains, FEN-RESTORE will highlight some of the most important improvements. We rank these into two categories: 1) making the conservation easements real; and 2) limiting the adverse impacts of the developments.

FEN-RESTORE recognizes that the staff recommendations represent progress in making the conservation easements meaningful. Throughout these hearings FEN-RESTORE has consistently challenged the so-called conservation easements as ineffective. One of the primary problems with the easements is that, while they refer to laudable goals like “sustainable forestry” and preserving wildlife habitat, they do not offer an effective mechanism to achieve those goals. In essence, the original easements provide that if Plum Creek is certified by SFI, as it was even

² See staff's June 2, 2008 Memorandum for the use of this wonderful new term in administrative practice.

while it was cutting down deer yards, the holder of the easement must “presume” that Plum Creek is fulfilling these goals and this presumption can only be rebutted on very narrow grounds.

Staff grasped this problem with the easements, saying:

Staff/consultants believe the current language of the easement in section 5. D. (ii) compels the finding that the landowner is “in full compliance with the Forestry Principles in the Management Plan” so long as certification is granted regardless of whether an audit has, for instance, identified significant nonconformities by the landowner in its implementation of one particular aspect of its Management Plan. In this situation, Plum Creek’s proposed language essentially removes any ability of the holder to either attempt to stop continuation of such practices or to take enforcement action. Staff May 20, 2008 Recommendations Page 88 footnote 82.

To address this, staff proposed, and the Commission accepted, several critical improvements to the easements. First, staff would change the third party certification, such as SFI certification, from a “presumption” the holder must make to simply “evidence” that the holder may consider. The summary of the audit must be provided to the Management Advisory Team (“MAT”). The holder of the easement could also remove a third party certification program, such as SFI, as an approved certification program if the holder finds that the program’s audit standards or procedures are inadequate. Second, staff would narrow the language allowing the landowner to do anything in the easement area that is a “similar activity Grantor deems useful or expedient in connection with” its allowed activities. Third, staff proposes to put the Maine Dept. of Inland Fisheries and Wildlife (“IFW”) in charge of the Management Advisory Team and to remove

Plum Creek and all subsequent landowners from the MAT altogether. Fourth, the staff recommendation would not only require Plum Creek and the other landowners to respond to MAT advice but will make both the MAT advice and the landowner's response public. Fifth, staff would keep the requirement that the holder must approve any septic sludge spreading sites, reduces their size, and strengthens the role of the holder in overseeing other activities, such as gravel extraction. Finally, the staff amendments would improve the enforcement provisions so enforcing the terms of the easement becomes more practical. The end result of all these changes is that a significant amount of power shifts from the landowner to the easement holder and the Management Advisory Team run by the IFW. As Chair Harvey succinctly stated during the deliberations, the wording of the easement is changing: "such that the holder becomes clearly in charge. I guess that's what it amounts [to]." DT P 296 L 3-4.

While we acknowledge the progress staff has made in putting teeth into the easements, the easements still remain – at their core – industrial forest easements. Even with the proposed amendments, the Concept Plan area remains overwhelmingly zoned only for commercial and residential uses. Not a single new acre would be preserved so it can be restored to its natural state. The great divide within the Concept Plan area remains between those commercial areas dominated by industrial forestry, called "conservation areas," and those areas dominated by residential, resort and retail commercial uses, called "development zones." While protecting industrial forestry can provide a public benefit, it is not equivalent to the preservation and restoration of natural resources necessary to "balance" development.

The staff recommendations also tone down some of the most egregious parts of the development zones. Lily Bay highlands would be taken out of the Lily Bay development zones and added to the conservation areas although, as already noted, allowing the same number of units in the now shrunken development zone will increase the density beyond even what Plum Creek originally contemplated. The north shore of Long Pond would be spared from development though the rest of Long Pond would not be protected. Sequencing is added to the Big Moose Mountain development zone in an attempt to assure that a resort core is actually built there before other residential units are approved. While FEN-RESTORE applauds staff efforts in this area, in our final comments below we will explain why even the toned-down development remains unacceptable sprawl that will create lasting harm to the region.

4. STAFF'S PROPOSED CONCEPT PLAN DOES NOT MEET THE REGULATORY STANDARDS.

Even if – for the sake of argument – the Commission were to allow Plum Creek to make such massive amendments as those proposed by the staff, which have now been adopted by the Commission (at least for the purposes of receiving comments), and even if – again for the sake of argument – Plum Creek agreed to accept all of those amendments, the revised Concept Plan would still not conform to the regulatory requirements.

The methodologies staff used vary from the inexplicable to the merely unpersuasive. For example, staff would remove the already inadequate restrictions within the conservation easements on the number and size of "back country huts" that can be built in the conservation

areas. This would leave the number and size of the huts up to the landowner and the holder of the easement. Thus it is possible that a “back country hut” could be larger than a remote resort. We do not understand the rationale for removing these safeguards from the conservation easements.

While staff did explain their changes to the “Peak to Peak Trail,” from a trail builder’s perspective, their explanation does not make sense. Staff acknowledged “... that hiking trails and hiking trail easements are an important mitigating element that becomes part of the recreation mitigation package here...” DT P 439 L 22-24. Staff also recognized that the 15 ft wide trail was too narrow to serve “a regulatory purpose.” DT P 439 L 17. The solution staff proposes is to require the same amount of square footage as in the original trail but to give the holder and Plum Creek the “flexibility” to use that same amount of square footage to build a wider trail. The example Ms. Pinette gives on how the holder and Plum Creek might use this flexibility is that they might decide “... that the need does exist for a peak-to-peak-type trail that involves extended overnight hikes...” DT P 440 L 7-9. Now compare that statement to the realities of trail building. Using a minimal corridor of 200 feet (assuming all surrounding land is managed in a way that takes the needs of the trail into account) would only result in a 5 mile trail. A more reasonable corridor of 500' would result in a 2 mile trail. And a 500 foot corridor would still not take into account the need for larger buffers around campsites and special features along the trail. This proposed amendment would make it impossible to accomplish the purpose of the easement to have a “peak to peak” trail and it certainly would not allow the

“extended overnight hikes” envisioned by staff.

FEN-RESTORE also finds some of the methodology used by staff unpersuasive. Staff begins its analysis of the Plan by examining each proposed development zone in isolation. Then, after considering each zone separately, staff jumps to considering whether the entire area can accommodate the “total number of units.” Mr. Richert begins his analysis of the “total number of units” by asking “Cumulative impact on what?” DT P 145 L 14. He then concludes that on a spectrum between urban settings and primitive settings, the Concept Plan area is “characterized as sort of in the middle of that spectrum. It is not primitive, it is not wilderness.” DT P 147 L 4-8. He explains that “consultants tended to characterize this overall area as roaded natural, that is, sort of in the middle, not unlike what you would expect for an industrial forest.” DT P 146 L 13-16. He then analyzes various impacts, such as wildlife, scenery, recreation, etc. and ultimately concludes,

The impression I wanted to leave you with is that we carefully looked at the record in each of these functional areas of wildlife, forestry, recreation, visual impacts measured against the existing character of this area and what people appear to value about this area. And we could not find evidence that a cumulative impact of the proposed units would exceed the carrying capacity of this area as a whole. DT P 151 L 3-10. (emphasis added).

First, we disagree with the spectrum staff has used because it trivializes the North Woods and the Concept Plan area. If one uses a world-wide spectrum that includes places like Papua New Guinea and the upper reaches of the Amazon, Maine’s North Woods would fall into a middle ground as roaded natural. However, a world-wide spectrum is not the proper comparison

to use here. The spectrum from urban settings to primitive settings should be limited to settings *in the State of Maine*. Viewed from the perspective of *the State of Maine*, the North Woods are at the primitive end of the spectrum and the “gateway” areas contained in the Concept Plan are near the primitive end of the Maine spectrum. When compared to what is available in the State of Maine – or even in the whole eastern half of the United States – Maine’s North Woods stand out as a unique – but threatened – treasure. FEN-RESTORE implores the Commission to see this area in its proper context as the treasure it is and to reject its trivialization as only being in the “middle” of the spectrum.

Second, besides starting with the wrong perspective, the methodology used by the staff to analyze the Plan also missed an essential step. Missing in the analysis are the cumulative impacts of the development *as actually laid out on the face of the earth*. For example, in considering whether 300 vehicle trips per day is excessive, Mr. Richert says, “there simply seems to be an awful lot of capacity in this 400,000-acre region to absorb that kind of -- that kind of activity.” DT P 150 L 8-10. This is not the same thing as considering the cumulative impact of where those trips *are actually going to take place* within the overall landscape. Development is not spread evenly over the full 400,000 acres or even in the less important parts of the 400,000 acre area. As is typical of all development, the developers want to “cherry pick” locations by putting development in the *best areas* because that is where the greatest economic value is. Just as it is insufficient to consider *as an abstraction* whether 2,000 units *could* fit into the 400,000 acres, it is insufficient to only consider whether any specific development *on its own* exceeds the

carrying capacity in its area. Staff should have considered the cumulative impact of all the developments *as a whole as actually laid out*. In other words, even if the full 400,000 acres could absorb 2,000 units, it does not follow that placing the resorts and units at Lily Bay, Big Moose Mountain, Moose Bay, Long Pond and Brassua would not create undue cumulative impacts when analyzed together. Even with the staff's amendments, we are left with a massive development that sprawls on both sides of Moosehead Lake up past Rockwood to Long Pond on the west and into Lily Bay and Upper Wilson Pond on the east.

FEN-RESTORE also objects to using areas beyond the Concept Plan to offset the impact of development that takes place in the Concept Plan area. For example, when considering the loss of recreational areas, Mr. Richert used the Katahdin Ironworks outside the Concept Plan area to mitigate the loss of recreation:

So there is a place, there is ample area, in our view, for some of the recreational opportunity that we lost in a place like the Big Moose Mountain area to shift elsewhere. Some of those would be close in, like Prong Pond. *Some of them will be areas just beyond the concept plan area like KI*. Some of them will be within the concept plan area, like the Roaches and Spencer Bay. But there appear to be ample areas. DT P 149 L 10-17. (emphasis added)

The Concept Plan as revised by staff must stand or fall on its own merits without having to rely upon assets beyond the Concept Plan area.

We are also troubled by the way staff turned the testimony of Mr. Christ on its head. Mr. Christ testified for NRCM *against* the Concept Plan. After discussing Mr. Christ's data and projections, which Mr. Richert seems to accept, he dismisses Mr. Christ's conclusion with the simple statement, "That does not strike us as a cumulative impact that will overwhelm this

area.” DT P 150 L 5-6. The Commission should take great care in accepting the factual basis of an expert opinion but rejecting the expert’s conclusion based on those data.

We strongly disagree with staff’s decision to allow the resort and residential units to remain at Lily Bay. It is likely that other groups will critique this decision in depth, so we will limit our discussion to a part of the record that is especially troubling. The record suggests that staff made a calculated decision to sacrifice Lily Bay in order to justify requiring the Legacy Easement and the purchase of the Roaches. Since this is a very serious allegation, we reproduce the part of the record that raises the issue. The conversation, although interrupted at times by other issues, begins with a statement by Commissioner Laverty about the importance of the Legacy Easement:

I would also state that to me what is important here is the connection between the Lily Bay area and the proposed easement, the legacy balance. Essentially what that does is provides connectivity, easement connectivity, through -- well, all the way, essentially, to Nahmakanta Lake, which is the hundred mile -- I'm not exactly -- but it's essentially the 100-mile wilderness which I think is an astounding legacy. And I think that -- I just think that -- I just think that the elimination of that residential zone enhances that substantially.

MR. WIGHT: I think you're getting at some of the real benefits of this plan. DT P 52 L 1-12.

Later, Commissioner Hilton wondered if not allowing a resort at Lily Bay would affect the Commission’s ability to require that additional conservation:

I guess where I'm going with this is -- I mean, if we were to say we don't want to see anything there, for example, or we want to scale

this back, would we have a difficult time justifying the conservation that is being proposed here in your eyes? Is there sort of a balancing act here, I guess?

MS. PINETTE: I'm going to defer to Ron to fill in here. DT P 56 L 9-15.

Ms. Pinette then proceeds to explain that it is more complicated than just calculating the comparable conservation for the waiver of adjacency because both public benefit and mitigating adverse impacts also has to be considered. Mr. Kreisman then responds to Commissioner Hilton's question:

Taking what Aga said as the starting point, our view is that the comparable conservation for waiver of adjacency -- let's focus on that first and your question what would happen if this -- what would happen to the conservation if Lily Bay development were not here, if you decided on that. As Aga just pointed out, there is a significant waiver of adjacency that staff is recommending that you accept here in terms of the number of units. **In my thinking, that has driven and legitimized and made critical the kind of conversation (sic?) in this area -- and may justify -- the kind of conservation in this area that Commissioner Laverty spoke of a few minutes ago.** DT P 67 L 14-24 (emphasis added)

Then, after discussing other relevant factors, Mr. Kreisman returns to the question of what would happen to the comparable conservation if the Commission did not allow the resort at Lily Bay:

But I think there would have to be, from staff's point of view, a critical reassessment of what conservation was, in fact, demanding applying the regulatory criteria if Lily Bay weren't there. And my general point of view would be that the conservation would look somewhat different, if nothing else, because you would have a significant waiver of adjacency that is requiring comparable conservation. DT P 68 L 10-17.

What is troubling about this dialogue is the implication that the resort at Lily Bay is needed to “justify” the conservation in the Legacy Easement that is considered so important. Mr. Kreisman said that it was this desire for that conservation that *drives and legitimizes* waiving adjacency at Lily Bay.

As explained in depth in former Commissioner Carolyn Pryor’s direct testimony, the Commission should not consider whether the conservation justifies the development; rather, the Commission must first find that the development is appropriate and only then can it consider whether the conservation is sufficient. Mr. Kreisman obviously realizes as much because the next day he attempted to retract the explanation he gave the day before by explaining to Commissioner Hilton:

I may have been misinterpreting a different issue -- a relationship between our recommendation for 404 units with the studies in this acreage and conservation and maybe I'm over reading, but my sense is there may have been some belief on your part that we were attracted by the conservation and therefore the number of units didn't bother us. I want to say quite clearly, if I created that impression in my response to a question you asked yesterday, I regret that because this was not in any way a desired result in search of a rationale. This was exactly the opposite, and we feel that quite strongly, that we are very comfortable with the appropriate development, and that is where you look first and foremost. If we weren't comfortable with this level of development, with studies in this acreage, we would never get to conservation. Having reached that level of comfort, as Aga and I discussed yesterday, there is a significant waiver of adjacency that comes with that level of comfort, approximately 300 units, which directly and immediately invokes comparable conservation. If you do not have this development and therefore this waiver of

adjacency and therefore -- and as well as undue adverse impacts that could otherwise result -- then as I responded to you yesterday, I believe -- and I think Evan and Aga believe -- that the conservation would have to be rethought. But it doesn't work. We want to say quite emphatically in the reverse order. And I don't know as I said whether I was over reading your statement, but I just wanted to make that really clear from our point of view.

MS. HILTON: Thank you for clarifying. It wasn't -- it wasn't and isn't the way that I was thinking. It's good to hear you restate that.
DT P 410-412.

Mr. Kreisman's retraction does not change the fact that the record raises a serious issue about whether staff lowered their standard on Lily Bay in order to justify what they perceived as the more important conservation provided by the Legacy Easement and the sale of the Roaches. Our point in raising this issue is not to attack staff but to convince the Commission to take an independent and critical look at whether Lily Bay is really an appropriate place for a resort. The review of the appropriateness of Lily Bay for a resort -- as Mr. Kreisman acknowledges in his retraction -- must be independent of the comparable conservation prong of the adjacency test. We continue to support the position of the U.S. Fish & Wildlife Service that the Lily Bay peninsula is not appropriate for a resort or large subdivision. The burden is not on the opponents to show that Lily Bay is inappropriate for development; the burden is on the proponents -- now the staff -- to show that Lily Bay is an appropriate location for 404 resort and residential units.

The way staff uses the Conservation Framework creates problems that go much deeper than simply justifying the sacrifice of Lily Bay. As the Commission will recall, Plum Creek proposed a "Balance Easement" to offset its development. Plum Creek did not propose the

“Legacy Easement” and the rest of the Conservation Framework as balance to offset undue impacts on wildlife and other natural resources, nor as comparable conservation for waiving adjacency. Plum Creek submitted the Conservation Framework only as another “public benefit” of its Concept Plan. See, for example, Plum Creek’s March 7, 2008 “Opening Brief” pages 22-25 arguing that the Legacy Easement must be considered as a public benefit (“... the Legacy Easement must be included in the publicly beneficial balance determination ...” PC’s March 7, 2008 Opening Brief at page 25).

Staff rejected Plum Creek’s approach to the Conservation Framework and, with the sole exception of Number 5 Bog (the million dollar bog), decided that the Conservation Framework is essential to both balance the undue impacts on wildlife and resources, and to provide comparable conservation for the waiver of adjacency. See footnote #91 in the May 20, 2008, Recommendations. Accordingly, staff recommends requiring that the sales of the Legacy Easement and the Roaches be consummated within 45 days of the approval of the Concept Plan and before any development permits are issued. See May 20, 2008, Recommendations pages 97-99. Staff stated its position clearly: “... staff/consultants believe that securing the protections provided by the Legacy easement as amended is a critical component of an approvable Concept Plan.” Recommendations Footnote #91, *supra*. Yet, strangely, staff does not recommend making the needed parts of the Legacy Easement become part of the Balance Easement. Staff does not even clarify what parts of the Legacy Easement are required to balance the development:

The specific acreage required for recreation and wildlife mitigation may be less than the total acreage proposed by Plum Creek and TNC for Legacy easement coverage; it is not clear from the record what lesser portion of the Legacy easement, if any, is required for this mitigation. However, staff/consultants believe that what is clear is that, with the Legacy easement (as amended by staff/consultant recommendations) in place, in combination with other mitigation measures recommended by staff/consultants, Plum Creek will have provided adequate recreation and wildlife mitigation. Recommendations, footnote 91, *supra*

Staff makes no attempt to analyze – or even place a value on – the donative part of the Legacy Easement, *e.g.* the difference between the fair market value of the easement and the amount The Nature Conservancy (“TNC”) is paying Plum Creek for the easement. Staff simply ignores the novel, self-serving economic arrangements Plum Creek has presented to the Commission and focuses only on the Conservation Framework as “a critical component of an approvable Concept Plan.” *Id.*

Staff may not have felt comfortable adding the Legacy Easement to the Balance Easement because Plum Creek is being paid for the Legacy Easement but not the Balance Easement. Even Plum Creek has not suggested that it should be paid for balancing its development. Yet that is precisely the result that staff is proposing. If the staff are correct that the Balance Easement *by itself* is inadequate to balance the development and that at least parts of the Legacy Easement are required to mitigate undue impacts as well as provide comparable conservation for the waiver of adjacency, then it follows that staff is proposing that Plum Creek be partially compensated for providing the required balance since TNC is going to pay Plum Creek for the Legacy Easement. This would set a devastating precedent that will limit LURC’s

ability to insist in future concept plans that *developers, not the public* balance the full impact of their developments.

Implicitly recognizing the insufficiency of the Balance Easement, Plum Creek – over FEN-RESTORE’S objection – dangled the Conservation Framework in front of LURC in the hope that the Commission would find the bait too attractive to ignore. The Legacy Easement will cost much more than \$35,000,000 because the analytic confusion that allows its use as compensated balance will taint the very essence of what future Commissioners are supposed to do. All these problems could be avoided if this Commission simply denied Plum Creek’s petition. Plum Creek could then decide if it wants to submit a new plan that does propose *appropriate development with adequate conservation*. This would avoid making the Commission wade into the never-never land of the Conservation Framework as private sale cum regulatory required balance ... or, is it regulatory required balance cum private sale?

For the Commission’s convenience, attached to these comments is a concise summary of our objections to the New Plan.

Conclusion

FEN-RESTORE agrees with staff that the Concept Plan proposed by Plum Creek does not conform to the statutory and administrative standards required for the proposed rezoning. The Commission should not allow Plum Creek to now make the massive amendments proposed by staff to save Plum Creek’s Plan because the New Plan has not been tested in thorough

evidentiary hearings. The Commission should not adopt something as critically important as the New Plan without subjecting it to scrutiny as rigorous as the scrutiny Plum Creek's Plan went through. Although the New Plan represents some improvements over Plum Creek's Plan, the New Plan retains so many of the problems contained in the original Plan that it too cannot satisfy the requirements for a rezoning. With all due respect, FEN-RESTORE suggests that the Commission do its job and judge the application that is before it on the merits. The record before the Commission as well as the staff recommendations make it abundantly clear that the Commission cannot grant Plum Creek's petition because Plum Creek's Plan fails to meet the standards necessary for rezoning.

July 10, 2008

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Appendix

FEN-RESTORE'S OBJECTIONS TO LURC-GENERATED AMENDMENTS TO ZP 707

- The Plan fails to reduce the total number of development units
- The Plan fails to put any cap on caretaker and employee housing units
- The Plan fails to eliminate development proposed for highly sensitive areas
- The Plan fails to put any limits on docks and other shoreland structures at Lily Bay, Moose Bay and in Rockwood
- The Plan fails to say how habitat for lynx and other imperiled and sensitive wildlife will be protected
- The Plan inverts conservation principles by urging some sensitive areas not be protected to “avoid fragmenting the development” See Recommendations Page 10 footnote 10 & Page 38 footnote 46.
- The Plan does not adequately address demonstrated need
- The Plan does not adequately address no undue adverse impact on uses and resources in the region
- The Plan does not adequately address how the proposed zoning would be more appropriate for existing uses and resources than the current zoning
- The Plan does not adequately address air resources
- The Plan does not adequately address cultural, archaeological, historical resources
- The Plan does not adequately address forest resources
- The Plan does not adequately address geological resources
- The Plan does not adequately address recreational resources
- The Plan does not adequately address water and wetland resources

- The Plan does not adequately address wildlife and fisheries resources
- The Plan does not adequately address traditional uses
- The Plan does not adequately address regional diversity
- The Plan does not adequately address natural character
- The Plan does not adequately address lake management goals
- The Plan does not adequately address landowner equity
- The Plan does not strike a reasonable and publicly beneficial development- conservation balance
- The Plan does not justify a waiver of the normal requirement that new development be adjacent or proximate to existing compatible development
- The Plan urges using restrictive covenants rather than land use controls
- The Plan does not add undeveloped land in the development zones to the Balance easement after 30 years
- The Plan eliminates clustering of development on Upper Wilson Pond
- The Plan urges overriding the recommendations of the Dept of Inland Fish and Wildlife for protection of some sensitive habitats
- The Plan would allow even more development in some areas than Plum Creek has proposed