

Docket # _____

Forest Ecology Network]
 and]
RESTORE: The North Woods]
 vs.]
Land Use Regulation Commission]

Petition for Judicial Review

Me Rule of Civ Proc 80C
5 MRSA § 110001
12 MRSA § 689

Introduction

The Forest Ecology Network and RESTORE: The North Woods (“FEN-RESTORE” or “Petitioners”) through their attorneys, Phil Worden and Lynne Williams, petition the court pursuant to Maine Rule of Civil Procedure 80C to review the September 23, 2009 Decision (“Decision”) of the Maine Land Use Regulation Commission (“LURC” or “the Commission”) granting Plum Creek Maine Timberlands and Plum Creek Land Company (“Plum Creek”) approval of a Concept Plan and related rezoning (Zoning Petition ZP 707). The approved Concept Plan allows the largest development project in Maine history, encompassing over 2,300 residential units as well as a large marina and at least two resorts. Petitioners were formal intervenors in the proceedings before LURC in connection with all aspects of its consideration of the Plum Creek Concept Plan.

Since April, 2005, the Commission undertook multiple proceedings and evidentiary hearings to consider the Plum Creek Concept Plan. Despite the formality of these proceedings, the Concept Plan was repeatedly amended in mid-stream, often over the Petitioners’ objections. Indeed, in numerous and material ways, the rezoning and development plan ultimately approved by the

Commission was not that proposed by Plum Creek nor subject to evidentiary, adjudicatory or even public proceedings by LURC, but was substantially revised and re-framed by the agency's staff and consultants ("staff") in closed-door consultations with Plum Creek during which Petitioners and other intervenors were not allowed to participate or even attend.

Parties

1. Petitioner Forest Ecology Network ("FEN") is a Maine nonprofit corporation with a mailing address of 336 Back Road, Lexington Township, Maine and is recognized by the IRS as a 501(c)(3) charitable organization. Its members regularly use the Plum Creek Concept Plan area for hiking, camping, hunting, fishing, boating and other forms of outdoor recreation. It formally intervened and, to the extent allowed, fully participated in the LURC proceedings. At the Commission's request, FEN consolidated its intervention with Petitioner RESTORE: The North Woods. FEN is aggrieved by the Commission's Decision and will suffer a particularized injury because the Concept Plan will ruin the Moosehead region, including for the recreational uses of its members.

2. Petitioner RESTORE: The North Woods ("RESTORE") is a nonprofit corporation registered to do business in Maine with a mailing address of 9 Union Street, Hallowell, Maine 04347 and is recognized by the IRS as a 501(c)(3) charitable organization. Its members regularly use the Plum Creek Concept Plan area for hiking, camping, hunting, fishing, boating and other forms of outdoor recreation. RESTORE has a long history of advocating for protection and conservation of the Moosehead Lake region. RESTORE intervened and, to the extent allowed, fully participated in the LURC proceedings. At the Commission's request, RESTORE consolidated its intervention with Petitioner FEN. RESTORE is aggrieved by the Commission's Decision and will suffer a particularized injury because the Concept Plan will ruin the Moosehead region, including for the

recreational uses of its members.

Grounds For Relief

First Ground (lack of statutory authority to engage in contract zoning)

3. The Concept Plan contractually prohibits the Commission from amending certain of its zoning standards in the affected area for a period of thirty years unless Plum Creek consents to the amendment. As is clear from the record, it is exactly this feature of the Concept Plan process that induced Plum Creek to apply for Commission approval of its Plan and rezoning application.

4. 12 M.R.S.A. § 685-A (9) requires the Commission to review and update its zoning standards every five years, something it cannot do if those zoning standards are frozen in the Concept Plan for thirty years.

5. FEN-RESTORE filed a Motion to Dismiss Plum Creek's Petition on the grounds that the Commission lacks the statutory authority to approve a 30 year Concept Plan as a binding contract, because the Maine Legislature has not delegated to the Commission the authority to engage in contract zoning. The Commission denied this Motion to Dismiss.

6. It was legal error for the Commission to deny the Motion to Dismiss because the Commission does not have the statutory authority to engage in contract zoning by attempting or purporting to bind itself to future continuation of the regulatory and zoning scheme contemplated by the Plum Creek Concept Plan.

Second Ground for Relief (misuse of "Conservation Framework")

7. For rezoning approval pursuant to a Concept Plan, LURC requires that the developer provide substantial conservation measures to balance and mitigate for the degree of new

development allowed by the Plan. In recognition of this requirement, Plum Creek's Concept Plan proposal included a proposed working forest easement, called the "Balance Easement." In its Decision, the Commission found this Balance Easement to be inadequate to meet the mitigation and conservation balance requirements of its regulations.

8. Separately from the Balance Easement, Plum Creek negotiated with third parties the sale, for which it would be paid tens of millions of dollars, of easements and fee covering selected forest lands that it did not intend to develop in the Moosehead area. While Plum Creek did not submit these independent transactions as part of the required balance and mitigation for its proposed development, the sale of these easements and lands was made contingent on receiving LURC approval of the proposed development.

9. When Plum Creek submitted information into the record concerning the proposed sale of these conservation easements and lands, Petitioners joined other intervenors in strenuously objecting on the basis that these independent transactions, for which Plum Creek was being compensated, (i) were not offered and should not be considered as mitigation, (ii) were irrelevant to the rezoning proposal before the Commission, and (iii) were highly prejudicial to LURC's regulatory decision-making. Nonetheless, the Commission not only actively considered these transactions, but ultimately riveted the focus of its review and Decision upon them, rearranging Plum Creek's proposal so that these transactions would become the primary component of the conservation measures necessary to mitigate and balance Plum Creek's proposed development.

10. In taking these actions, the Commission committed serious error, violating its own substantive and procedural regulations and laws, the State's Administrative Procedures Act, and principles of fundamental fairness and due process. In fashioning its Decision in this manner, the Commission has set a disastrous precedent by which landowners seeking special development rights

will now expect and demand compensation for conservation measures that are legally required as mitigation.

11. In its Decision, the Commission correctly found that Plum Creek's Balance Easement by itself is insufficient mitigation to compensate for the extensive development proposed under Plum Creek's Concept Plan. Therefore, if the Commission had not given Plum Creek regulatory credit for the easements and fee lands for which it would be financially compensated, the Commission, by its own admission, would have had to deny Plum Creek's proposed Concept Plan.

Third Ground for Relief
(Commissioners voted on final decision without attending hearings)

12. With the exceptions of Chair Harvey and Commissioner Hilton, most commissioners missed significant portions of the evidentiary hearings and public deliberative meetings in this proceeding.

13. While Maine Municipal Association advises municipal planning board members who miss a hearing but wish to participate in decision-making to submit evidence that the member at least familiarized herself with the record, Commission members who were not in attendance at the hearings did not submit any such evidence into the record. Accordingly, there is substantial question whether Commission members who did not attend hearings ever sufficiently acquainted themselves with important parts of the testimony or record on which their Decision was based.

14. Although in its Decision the Commission makes essential findings based upon witness credibility, it is impossible for members who did not attend hearings or adequately acquaint themselves with the record to participate in the making of these credibility findings.

15. Allowing commissioners to vote on a final decision without adequately reviewing the hearing record violates procedural due process. See *Pelkey v. City of Presque Isle* 577 A.2d 541

(Me. 1990).

Fourth Ground for Relief (defective and unfair hearing procedures)

16. Following the submission of direct testimony and several rounds of pre-filed written rebuttal testimony, the Commission scheduled four weeks of live evidentiary hearings (denominated “adjudicatory hearings” throughout its Decision).

17. At the conclusion of all these evidentiary hearings, the Commission decided, without even a quorum of Commission members present, not to vote on the merits of Plum Creek’s proposal. Instead, in an unprecedented step, it decided to ask its staff on its own behalf to substantially revise and restructure the Concept Plan in order to make it approvable. These staff amendments significantly altered the proposal but were never subject to evidentiary hearings, cross-examination, formal rebuttal testimony or other adjudicatory proceedings or procedural safeguards.

18. Petitioners repeatedly objected to the Commission’s failure to either vote on the merits of Plum’s Creek’s Concept Plan or to provide further evidentiary hearings to consider the merits of these staff amendments.

19. Ultimately, the Commission’s staff substantially and fundamentally altered the Concept Plan. Throughout its receipt, consideration and approval of these major changes made by its staff, the Commission did not allow any further evidentiary hearings.

20. The Commission committed serious procedural error, resulting in a failure to comport with principles of fundamental fairness and due process, when it switched procedures in mid-stream, so that instead of acting on the Plum Creek proposal, it empowered its staff to substantially change the same without renewing the parties’ rights to new evidentiary hearings with opportunities for cross-examination and other procedural safeguards.

Fifth Ground for Relief (*ex parte* communications with staff)

21. Purporting to rely upon 5 MRS §9055 (2)(B), individual Commissioners engaged in *ex parte* discussions and communications on the merits of the Concept Plan with the Commission's staff.

22. Once the Commission's staff became involved in preparing and presenting amendments to the Commission that substantially changed the Concept Plan, staff became like parties in the proceedings, advocating for and defending the amendments they proposed. Even so, the staff continued to communicate and meet with individual Commission members in private, in order to solicit their thoughts and advocate for the staff amendments, all outside of any public view, meeting or proceeding, and therefore without any opportunity by Petitioners or other parties to participate in, question, or even observe the communications.

23. These closed-door staff and Commission discussions and communications were substantial and led Commission members to accept the staff amendments rather than having the Commission fully deliberate in public meetings on the public record. These communications, held *ex parte* and outside of any public proceeding, were in violation of applicable provisions of the Administrative Procedures Act, the Freedom of Access law and principles of fundamental fairness and due process.

24. Petitioners were prejudiced by these communications held outside of any public meeting, having no opportunity to observe, participate in, question, or rebut them. There is a substantial likelihood that if all the advocacy for the staff amendments had taken place at open meetings with an opportunity for Petitioners and other parties to participate, the Commission's Decision would have been different.

Sixth Ground for Relief (inconsistency with Comprehensive Plan)

25. As the Commission recognizes in its Decision, it cannot grant the Concept Plan unless it is consistent with its Comprehensive Land Use Plan (“CLUP”).
26. Also as the Commission recognizes, the CLUP calls for special prospective zoning for the Moosehead region because of the special nature of this region. Although Petitioners and other parties requested that consideration of Plum Creek’s proposal be held in abeyance while prospective zoning for the area was undertaken, the Commission declined to do so. Accordingly, contrary to what the CLUP calls for, there has never been any prospective zoning for this area.
27. In its Decision, the Commission erroneously concludes that the approved Concept Plan is in fact prospective zoning or a legally acceptable substitute therefor.
28. A Concept Plan is not legally the same as or an acceptable substitute for the prospective zoning called for by the CLUP, because, unlike real prospective zoning, the landowner in the concept planning process is the sole initiator and has absolute veto over the plan.

Seventh Ground for Relief (Demonstrated Need)

29. The Commission’s statute requires that a rezoning request of this type satisfy a demonstrated need in the community or area 12 M.R.S.A. § 685-A (8-A).
30. As the Commission’s Decision recognizes, Petitioners, other interveners and many members of the public challenged whether there is a demonstrated need for various aspects of the major development included in the Plum Creek proposal.
31. The Commission’s findings of fact and conclusions on the essential issue of demonstrated need are not based upon substantial evidence in the record and are based upon seriously flawed analyses, and misunderstanding and misapplication of the legal standards.

32. For example, the Decision does not find a demonstrated need for a major resort at Lily Bay. Rather, the Decision’s demonstrated need analysis focuses on whether there is a demonstrated need for the concept plan under its “prospective zoning” test and its “case by case” test. The statute, however, requires the Commission to find a demonstrated need for each specific change in district boundaries. There is no substantial evidence in the record that there is a demonstrated need for a resort at Lily Bay.

Eighth Ground for Relief (other flaws)

33. The Commission misused “buildout” comparisons in its Decision. The principal buildout comparison used by the Commission was to compare the development that could occur under the Commission’s existing zoning with the development that could occur under the Concept Plan.

34. The Commission concluded that the development allowed by its current zoning would be worse than the development allowed by the Concept Plan. This analysis forms an essential and persistent basis for the Commission’s ultimate Decision to approve the Concept Plan.

35. Among other defects in this reasoning, the Commission assumed that existing zoning restrictions would remain static and unchangeable over the 30 year life of the Concept Plan. Moreover, the buildout methodology used by the Commission turns reality on its head: it is the Concept Plan, not existing zoning, that freezes zoning standards for a period of thirty years. Thus, the Commission’s inherently faulty methodology artificially makes the Concept Plan appear far more attractive than it is and disposed the Commission, as reflected in its Decision, to approve the Concept Plan.

36. Had the Commission properly factored into its consideration of buildout calculations the fact that it could (and inevitably would) amend and refine the existing zoning over the next thirty years, while it will not be able to amend the Concept Plan, the Commission would have drawn a different

conclusion concerning the legal sufficiency of Plum Creek's proposal.

37. Petitioners will amplify other errors of law, unsupported findings and abuses of discretion in the brief Petitioners will submit.

Relief Requested

Wherefore this Court should vacate the Commission's Decision and remand the matter back to the Commission with instructions to deny Plum Creek's rezoning petition and Concept Plan application or to require such other relief that will be described in Petitioners' brief and such further relief that the Court considers to be just and reasonable.

October 21, 2009

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