

TESTIMONY OF R. HOWARD LAKE, ESQ
REGARDING ZP 707
PLUM CREEK PETITION FOR REZONING MOOSEHEAD REGION
- “BALANCE EASEMENT” –
PRESENTED TO THE
MAINE LAND USE REGULATION COMMISSION

September 14, 2007

I am Howard Lake. I grew up in Wilton, Maine and am now a Readfield resident. I have practiced law in Winthrop for twenty-nine years. I am a graduate of Colby College and the University of Maine Law School. My practice is concentrated in the areas of real estate, land conservation, estate planning and small business. I am past Chair of the Real Estate Section of the Maine State Bar Association and active in the Maine Land Conservation Attorney Network. I have represented landowners and non-profit holders of conservation easements and have lectured on conservation easements and other topics of real estate law at MSBA Continuing Legal Education seminars. I have served as general counsel for a regional land trust in Maine for nearly twenty years, including handling the legal aspects of many easements negotiated by the trust.

General Comments:

I am aware that over a period of years, the Land Use Regulation Commission has very carefully crafted, considered and, after receiving and reviewing public comment, revised and adopted its Guidelines for Conservation Easements. Those guidelines have served LURC well in helping the Commission determine when easements effectively provide a conservation off-set to compensate for permitted development under a concept plan, as is being proposed by Plum Creek. Astonishingly, although Plum Creek’s Plan provides for more development than any proposal in Maine’s history, the applicant has ignored the Commission’s Guidelines and in doing so has replaced or amended the Commission’s version with provisions that are in many cases inappropriate or worse. Moreover, under the Commission’s adopted Policy, departures from its Guidelines are to be explained and justified by the applicant. Here, the only explanation given by Plum Creek for its wholesale departures from the Commission’s Guidelines is that these should yield to whatever arrangement it has determined is in its best business interest.

Accordingly, an overarching comment on this proposed “balance easement” is that Plum Creek should *at least* play by the rules. If the company is allowed to depart from

the Commission's Guidelines in the ways this easement contemplates, and for no reason other than the promotion of Plum Creek's business interests, the Commission will have frustrated its own policies and certainly should expect no better in the future from other developers.

As but one illustration of Plum Creek's serious departures from the Commission's Guidelines, this conservation easement fails to empower the Third Party, which is to be the State's Bureau of Parks and Lands (BPL), with the right to approve or disapprove various uses or allowances reserved to Plum Creek upon approval of the private easement Holder. This alteration from the Guidelines, manifested throughout the proposed easement, prevents BPL from being able to join the easement Holder in passing judgment upon matters dealing directly with the integrity of the property and its conservation values. Otherwise, the public will have no say in these matters.

As a last general comment, it is surprising, given the relative sophistication of the parties to this easement not to mention its largely identical companion "legacy easement," that in a number of places the "balance easement" is written in language that departs from expected terminology and/or is difficult to follow. It is as if the "balance easement" has been written over time by a number of authors having incompatible agendas; particularly this seems to be the case with a number of the revisions belatedly submitted by Plum Creek. In my experience, many of the terms of the "balance easement" would not be acceptable in a routine gift to a community land trust. Of course, it is not for the intervenors to formulate appropriate language changes to the easement, but the fact that work remains to be done at this extremely late stage in order to make the easement adhere to expected norms is distressing and perhaps telling.

In making decisions about the content of a conservation easement in this context, the Commission should be mindful not only of precedential effects but also of the uniquely long-lasting (one could say everlasting) impact of these decisions. Once the easement is in place, it is final; the Commission cannot revisit the matter over time, even at the end of the term of the Concept Plan. The conservation easement is permanent and each of its provisions will protect (or, more pertinently here, fail to protect) the land and the public interest, forever.

Specific Comments:

Purpose Clauses: It appears that some eleventh hour revisions to this section, submitted in August 2007 (months after the rezoning petition was supposed to be complete), provide more of an emphasis on conservation as one of the principal purposes of the "balance easement" than its earlier proposal. However, Plum Creek's submission still departs from the Commission's Guidelines by asserting economic utilization of the land for private gain as a purpose of the easement. As an example, the very first sentence includes as a purpose the property's "continued operation as a working forest with the perpetual ability to commercially produce forest products." Does this imply that, by accepting this easement, the State, through LURC and the Bureau of Parks and Lands, are assuring the "perpetual ability" of Plum Creek to make commercial use of its forests? This distortion of the easement's purposes is particularly disturbing in an easement offered as a purported *conservation* balance to the

substantial development that Plum Creek wishes to pursue with the Commission's blessing. While appropriate forest management of the property may be a retained landowner right under the easement, the Commission should not allow commercial uses to be a stated purpose of a conservation easement for this purpose.

In this regard, it is important to understand that the purpose clauses of a conservation easement are not mere window dressing. These clauses will be closely scrutinized and applied in the future to resolve ambiguities, to deal with land uses and other contingencies that were not foreseen by the easement's drafters, and to guide easement interpretation, amendment and enforcement and possibly extinguishment.

In sum, here as well as elsewhere in this easement it is important for the Commission to reject any material departure from its Guidelines.

Finally, I note the garbled sentence structure of the second Whereas clause, which is newly added (and apparently hastily put together) in this easement.

TERMS, COVENANTS AND RESTRICTIONS

General Land Uses (Section 1):

Here, Plum Creek reserves to itself rights to engage in a number of privately lucrative enterprises that are potentially destructive to the conservation values the easement is purporting to provide. These reserved development rights extend beyond the very limited uses that the Commission's Guidelines allow. For example, Plum Creek's reserved development rights include those to build windpower utilities (which presumably includes major transmission lines), septic waste disposal by above ground spreading (subject to limitations of very little significance), gravel and other mining facilities (also subject to limitations of very little significance), as well as unbridled rights to engage in activities Plum Creek finds to be related to very broadly defined forest management (as further discussed in the following comments). Plum Creek's utilization of these reserved development rights (which it may transfer to others) make it hard to imagine how the lands involved could be considered protected for conservation.

Further, the new requirements of this section dealing with Plum Creek's obligations to consult with the easement Holder and to consider conservation values before exercising certain rights provide no legally meaningful protection for the property and considerable burden for the Holder and the State.

As with some of the other new provisions recently added to this easement, the first sentence is almost unintelligible and needs to be coherently written.

Finally, the subject matter and provisions of this section (1) and section 3 (as well as portions of sections 4 and 5) of the easement are so intertwined and overlapping that they seem almost guaranteed to cause confusion to landowners and easement holders in the future.

Subdivision (Section 2):

Here, Plum Creek again departs significantly from the Commission's Guidelines by reserving the right to carve up the easement's "conservation" lands into five large lots, together with unspecified smaller parcels to be sold (entirely free of the easement's restrictions) to governmental and "quasi-governmental" entities, meaning any entity "carrying out a public purpose," whatever that may mean. Even as to parcels that remain subject to the easement, the Commission should understand that each division results in a multiplied number of landowners and therefore imposes far greater burdens in future easement compliance, monitoring and enforcement as well as greater likelihood that the land involved will not be productively or sustainably managed for forestry.

Structures and Improvements (Section 3):

Section 3 maps out further opportunities for Plum Creek's development uses, extending to roads and utilities (including those to serve major windpower generating facilities), huts, cell towers and other telecommunications facilities, expansions of existing structures and all manner of forest management-related structures and improvements), all as Plum Creek may find expedient. These are all in excess of the Commission's Guidelines and what should be reasonably allowed in a conservation easement, particularly one that is supposed to provide for a conservation offset to the major development that Plum Creek proposes on the rest of its property.

As with section 1, the requirements of section 3 dealing with Plum Creek's obligation to consult with the easement Holder and consider conservation values before exercising certain development rights provide no legally meaningful protection for the property.

Surface Alterations (Section 4):

This section allows excavations and surface alterations that likewise exceed those permitted under the Commission's Guidelines. In this regard, the easement would allow use of the conservation property for all manner of surface excavations related to roads or any development permitted on any of Plum Creek's property in the area. Woefully insignificant restrictions are imposed on gravel and other construction material removal (i.e., no more than 185 acres to be "actively disturbed" at a time; permissible uses of removed materials to be for roads and development on properties "in the vicinity"). It is not clear whether other forms of mining are allowed without restriction at all.

As with earlier sections, requirements that Plum Creek consult with the easement Holder before exercising certain rights provide no legally meaningful protection for the property.

Section 4 permits mining by third parties having mineral rights. This should be eliminated and any such existing rights should be obtained and extinguished by Plum Creek.

Forest Management (Section 5):

Again, Plum Creek's easement provides more expansive rights to undertake forest management activities than the Commission's Guidelines. Forest management activities, as very broadly defined, are allowed throughout the property on a nearly unfettered basis. Approval of a plan for these activities is delegated to a third party having few known credentials, especially in the indefinite future. Subdivided parcels (i.e., any portion of the property conveyed by Plum Creek over 5000 acres) need only satisfy the lesser American Tree Farm System certification.

The partially new sentence at the beginning of subsection C is difficult to understand. At minimum, the new language at the end, which refers to the 'SFIS', is troubling and should be deleted. The new sentence at the end of subsection D(ii) is similarly difficult to understand and will not serve well in the future.

Public Access (Section 7):

Here again, Plum Creek has chosen to abandon the Commission's Guidelines in order to further its business interests. The language by which "public access" to the property is granted completely departs from the Guidelines for no explained reason. It contains no explicitly stated public access right, despite the Section title "Public Access Easement." Moreover, use of the property by clients of guides or sporting camps is not allowed as of right, meaning that Plum Creek may charge a fee, restrict or even prohibit such access. Indeed, in recently added language, Plum Creek reserves the right to charge all members of the public fees which are not even subject to the Holder's approval. Further, Plum Creek explicitly refuses to provide the public with access rights over its adjoining properties, a fact that further undermines public confidence in the meaningfulness of its rights. Finally, in grotesque excess, Plum Creek includes in this section a sentence placing upon the public all liability for anything that may go wrong on the property, including intentional injury by Plum Creek employees! Not only is this provision unreasonable and in excess of legal standards but it would be shocking for any public agency (BPL, LURC or the Attorney General) to agree to it.

Baseline Documentation (Section 8):

Section 8 appears not to allow the Third Party Holder, intended to be the State's Bureau of Parks and Lands, to even have a full copy of the Baseline Documentation, which is necessary to understanding the current condition of the property and instrumental in any future enforcement of the easement. Indeed, this section requires portions of the Baseline Documentation to be kept confidential, thereby preventing the public, or even LURC, from fully knowing the property's current condition or being able to use the confidential information to monitor compliance. Section 13 is conflicting in that Third Party has access to all records of Holder relevant to the property.

Notices (Section 10):

As stated in the general comments above, BPL, as the state agency acting as Third Party Holder, should (but does not in this easement) have authority to review and approve (or disapprove) matters requiring Holder approval in the easement, as would be required in the Commission's Guidelines. Otherwise, BPL, as representative of the public, would quickly lose control of a meaningful role as Third Party Holder.

Costs and Taxes (Section 11):

This Section seems to permit liens until such time as they are "executed." There are other processes for a creditor to acquire title such as through judicial foreclosure and sale, automatic foreclosure, lien maturity, levy or court order. By establishing only one remedy (i.e., paying off the lien) Holder would not have any right to acquire the lien by assignment to protect its interest.

Holder's Affirmative Rights (Section 12):

Again, this section departs from the Commission's Guidelines in material ways that benefit Plum Creek to the detriment of the property's conservation, here in connection with enforcement of the easement. The very first sentence of this section adds a crippling qualification ("where reasonably practicable") to the Holder's right to require restoration of the property in the event of a violation. The second sentence then prohibits the recovery of monetary damages for easement violation. Either of these provisions, nowhere permitted under the LURC Guidelines or found in standard conservation easements, would be unreasonable in any conservation easement, but the combination would certainly jeopardize easement enforcement in many situations. The remainder of the section makes matters worse by providing that the only penalty or mitigation allowed in the event of easement violation will be limited to that which LURC undertakes for violations of its laws arising out of the same occurrence, an idea that would make independent easement enforcement a nullity in most instances. It is hard to understand how any intended holder of this easement could ever find these extraordinary limitations on its enforcement satisfactory. Certainly the Commission should not do so.

The provision dealing with easement enforcement also contains a reciprocal obligation by the non-prevailing party to reimburse the attorney's fees of the prevailing party. Thus, if the Holder or back-up holder (the latter being the State) has to bring an enforcement action against Plum Creek for violating the easement, not only are its remedies limited to those under the LURC law (a serious limitation I have never seen before), but the holder must also reimburse Plum Creek the latter's attorney's fees if its lawyers are able, perhaps through a technicality, to beat the rap. The existence of such a provision in a conservation easement (an idea which has been resisted by the State in its development of standards for conservation easements under both the LURC and Land for Maine's Future Programs) will inevitably impose a significant and publicly undesirable restraint on seeking easement enforcement. Indeed, any easement holder is going to feel reluctant to initiate such an action even in response to a clear violation if doing so will place its treasury at risk not only in paying its own legal fees but those, which can be far more substantial, of private counsel for a major corporate landowner. For this reason, since the holder of an easement stands in a non-profit, trustee-like, law enforcement capacity in carrying out its duties to enforce the easement, any good

form easement requires the landowner to reimburse the non-profit holder for enforcement costs where the court finds the easement to have been breached, but does not require a reciprocal duty from the holder where the landowner prevails. Particularly when accompanied by the other serious concerns noted with the easement's enforcement provisions, this provision will cause easement compliance to be significantly impaired as well as standing as a very troubling precedent for future conservation easements approved by the State.

Holder's right of entry to monitor should be superior to all of Grantor's uses. The model easement provision allowing Holder to require Plum Creek's reserved rights "be exercised in a manner to avoid unnecessary harm to the Conservation values" should be restored.

Third Party Rights (Section 13):

This section again inappropriately limits the rights of enforcement to LURC penalty or remedy.

Multi-Resource Management Plan:

This Plan, attached as an exhibit to the easement, contains a multitude of self-congratulatory characterizations that should be deleted. The Plan further fails to contain the type of precise prescriptions that should be reviewed and approved by the Commission as well as the primary and back-up holder, in order to provide for meaningful oversight of Plum Creek's forestry and other uses of the property. Instead, the Plan provides that a certification program created by the forest products industry will suffice.

Finally, the Plan contains references to the federal Forest Legacy program (as well as to The Nature Conservancy), as if funding may be made available for easement acquisition. This easement is supposed to be a regulatory quid pro quo in connection with Plum Creek's proposed development. There should be no funding provided by any source, no less a public one, in exchange for this easement.

Conclusion:

In total, the problems with Plum Creek's proposed easement are so widespread that, in my professional opinion, they require outright rejection of the easement by the Commission.

 /s/ R. Howard Lake
R. Howard Lake, Esq.

September 14 , 2007

Readfield, Maine

COUNTY OF KENNEBEC
STATE OF MAINE, ss

On this day personally appeared the above R. Howard Lake, Esq. and made oath that the above statements are true and correct to the best of his knowledge, information and belief.

Before me,

/s/Terry A. Ouelette
Notary Public/Attorney
Print Name: _____
Commission expires: _____

Dated: Sept. 13, 2007