

**TESTIMONY OF KEN SPALDING  
REGARDING ZP 707  
PLUM CREEK PETITION FOR REZONING MOOSEHEAD REGION  
-- Balance Easement --**

**PRESENTED TO THE  
MAINE LAND USE REGULATION COMMISSION  
September 14, 2007**

**INTRODUCTION**

My name is Ken Spalding. I live in Wayne, Maine.

For more than 35 years, virtually all of my adult life, my professional and volunteer work has been primarily focused on land conservation efforts in Maine. Vocationally, I began in 1969 with land surveying and deed research and later served as the first executive director for Friends of Bigelow in the campaign to establish the Bigelow Preserve. I worked in conservation for the State of Maine for 29 years, including as a planner and Assistant Resource Administrator for the Bureau of Public Lands and as Assistant to the Commissioner and Coordinator of Legislative Affairs in the Maine Department of Conservation, including serving as staff for a number of task forces and legislative study committees related to Maine land conservation. For sixteen years I was director of the Maine Conservation Corps. For the past five years I have served as Maine Woods Project Coordinator for RESTORE: The North Woods.

I have also served in many capacities as a volunteer, including on LURC's Citizens Advisory Board, chair of NRCM's Maine Mountain Committee, chair of the Sierra Club Maine Group and its Conservation Committee, founding board member and co-chair of the Lands Committee of the Kennebec Land Trust and as an officer, board member and/or on a variety of planning, policy and land management committees for Maine Appalachian Trail Club, Baxter State Park, Friends of Baxter State Park, Friends of Bigelow and the Maine Bureau of Parks and Lands as well as other public interest conservation organizations.

The following comments relate to Plum Creek's "Balance Easement," which is proposed to be held by the Forest Society of Maine with the Maine Bureau of Parks and Lands as the Third Party. These comments will not only point out serious, indeed fatal, flaws in the easement, but also identify some of the practical impacts of the many defects in the easement.

**GENERAL COMMENTS**

When Plum Creek representatives first met with RESTORE: The North Woods on December 15, 2004, to present their development plans, the company's proposal included easements of less than 5,000 acres purporting to provide a buffer strip for a

number of ponds. The representatives told us there was no way the company would give away property rights in larger scale easements. A Plum Creek document, which was submitted to LURC on August 13, 2007, and briefly posted online then abruptly removed, reveals that little has changed. A version of Plum Creek's "Legacy Easement" inadvertently included an internal note that said listing conservation values, such as habitat for endangered species "would only serve as provocation to those opposed to the transaction." The latest version of the "Balance Easement" Plum Creek is proposing appears to be consistent with the company's desire not to relinquish ownership rights. It offers very little, and when it seems to provide a conservation or other public benefit in one clause, it essentially reneges or subjugates it to private benefit in another clause. The easement has minimal public benefit. Much of the public benefit that nominally exists is rendered unenforceable by terms of the easement. The retained rights are broad and ill-defined and leave much up to the landowner to decide, in its sole discretion, what uses can occur. The purpose clause itself combined with the extinguishment clause appears to be designed to allow for extinguishment if there is a loss of demand for the timber.

The "Balance Easement" that has been presented by Plum Creek to LURC departs in very significant and troublesome ways from the model LURC easement. In fact, it includes language contrary to specific guidance given in the Commission's model.

## **SPECIFIC COMMENTS**

**Purpose.** Contrary to LURC's "Model Conservation Easement" (the model), perpetual commercial forestry operations are a key part of the proposed "Balance Easement's" purpose. Guidance in the model specifically states that "Certain reserved uses, such as for sustainable forestry, may be acceptable in certain cases, but these should not be the primary purposes of the easement." Yet the purpose paragraph of Plum Creek's proposed "Balance Easement" specifically states as a primary purpose: "...allows its continued operation as a working forest with the perpetual ability to commercially produce forest products." Interestingly, protecting highly scenic and natural character conservation values is part of the purpose in the model easement, but excluded from the "Balance Easement."

Additionally, most of the whereas paragraphs mention as a central purpose the maintenance of a commercial forest and even effectively subjugate other values to the landowner's reserved rights.

For example, the second whereas effectively states that public access and traditional non-intensive outdoor recreation on the "Protected Property" are only in the public interest if those uses are "consistent" with the landowner's other uses of the property.

Even outside of the purpose clause, this reserved use of forest management and anything the landowner "deems useful or expedient in connection with" forest management is portrayed as integral to the purpose of the easement.

In addition to being contrary to LURC guidance, the inclusion of commercial forestry as a central purpose is a potentially fatal flaw.

**Extinguishment.** Perpetual commercial forestry operations are described in the easement as so integral to the purpose that if, or when, such commercial use is

deemed impossible, the landowner could have cause to file for extinguishment of the easement. This could potentially limit the easement to a term even shorter than the term of the proposed concept plan.

## **Allowable Uses.**

### **1. General.**

Reserved uses are so extensive and so broad as to severely limit the conservation value of the easement. While one paragraph enumerates activities that generally are not allowed, a full eight pages are dedicated to all the activities the landowner reserves the right to do. The lack of conservation and the overwhelming amount of allowed development activity is another fatal flaw of the easement.

Even the activities which are not supposed to happen are allowable if the landowner unilaterally decides that they are somehow related to “Forest Management Activities” or to “...any other activity Grantor deems useful or expedient in connection with the [forest management activities].” It could be “useful or expedient” to have cabins on a lakeshore for woods workers when they are in the area, or variety stores and gas stations so the workers have ready access to food and gas when on the property, or a lodge on a lake for company executives to stay at when they come to exercise some oversight of the forest management activities. In section 3, housing facilities (without definition or restriction) for anyone involved in forest management activities are expressly permitted. There doesn’t appear to be anything in the easement that would even prevent incidental rentals to others once these structures are in place.

In section 7, titled “Public Access Easement” the grantor reserves the right to prohibit traditional recreational uses by commercial guides, customers of commercial sporting camps, and non-profit camping and educational and scientific institutions. Yet in section 1 (General Land Uses), it reserves the right for structural development, commercial, residential, industrial, energy generation, landfill, and waste disposal activities related to these same uses. Rather than a public benefit, this appears to be establishing a commercial opportunity for the landowner by allowing selective commercial use that may include development of facilities not available to a business or non-profit not selected by the landowner.

The easement is designed such that the “Protected Property” can be used as a source of materials and space to support the development areas that are part of Plum Creek’s concept plan. In addition to other development and resource extraction, cell towers, septic systems and disposal, water extraction and excavation of building materials of all kinds are permitted in support of the areas Plum Creek wants to develop. The company is requesting that more than 22,000 acres be zoned for development. Why isn’t that adequate area for septic field activities and the other construction support activities? The easement also allows the “Protected Property” to be a source of raw materials for construction and development for any other activity “in the vicinity.”

Docks and piers are prohibited in the LURC model easement, but Plum Creek specifically removes this prohibition. Would the docks and piers primarily be for owners of back lots in the new development zones, such as on Brassua Lake and Indian Pond, and on Prong Pond for the Beaver Cove lots?

## **2. Subdivision.**

The “Balance Easement” allows for up to five parcels of 5,000 or more acres each to be carved out of the “Protected Property.” Subdivision of the property will be problematic for a number of reasons. The increased difficulty of enforcing the easement with multiple landowners with differing management objectives, differing interpretations of the very broad discretion of the landowner under the easement, the potential for adjacent landowners in development areas to annex easement lands to support development activities while prohibiting public vehicular access. Each new parcel could be used, for instance, to support a private hunting lodge or ATV trails, or other uses that have nothing to do with conservation of the underlying land.

The easement should not include exceptions allowing the removal of land from the “Protected Property” even if the acreage is limited. If Plum Creek is aware of a specific parcel that may be needed for government or quasi-government use, or even a general area, they should define that area and limit the use to that area. If not, and probably preferable anyway, would be to provide land for this purpose within the 22,000 acres requested for development zones. Not only is that sort of use more appropriate for a development zone, but the proposed development zones should be closer to where municipal services may be needed.

Further, if transfer of land that extinguishes the easement is allowed, it should require Holder and Third Party approval, not just notification.

## **3. Structures and Improvements**

The model easement allows for no new structures other than for primitive trail use by the general public. The proposed “Balance Easement” departs from the model in a major way.

In addition to the structures allowed in previous sections of the easement, such as any structures related to traditional commercial and non-profit uses, this section reiterates that any type of structure can be built if it is related to, or in some cases necessary for, any of the allowable uses such as septic fields, construction material removal, forest management activities and energy transmission facilities, among others.

The Grantor reserves the right, in its sole discretion, to make decisions about what structures are permitted to be built under the terms of the easement. There is no limitation on structures that can be built, which the grantor deems to be useful or expedient for any activity it decides is related to forest management activities.

Three “Back Country Huts” are allowed. This appears to be included as a new, minor structure and improvement. These “huts” are defined, in part, as being “commercial lodging facilities.” The size is not defined here, but should be. It is defined elsewhere in the plan (Land Use Standards and Districts, Subchapter I, definitions) as having a **footprint** of up to 5,000 square feet. In that definition, it does not include the “commercial lodging” part of the definition, nor does it have any height limitation. It should include both. If the commercial lodging facility were six stories high, as is allowed in the proposed resort zone, with a basement, it would be a 35,000 square foot structure. This is not a structure that would traditionally support “traditional non-intensive outdoor recreation” as described in the purpose section of the easement.

If these so-called “huts,” which actually could be large commercial lodging facilities, are for the proposed “Huts and Trail System,” that is provided for in a separate easement. The location of that trail is defined. In this easement, the size of any huts should be small and the locations should be confined to remote areas along that trail.

If Plum Creek considers these “huts” to be minor structures, it calls into question anywhere else development would be allowed that normally would be considered small. Could the nature observation structures include a 10,000 square foot lodge with lots of glass overlooking a pond? Only the landowner can answer that, because the landowner would have sole discretion in making such decisions under the terms of the easement.

The easement allows roads, utilities and telecommunication facilities to be built and related rights-of-way are allowed on the property without restriction (other than being approved by LURC). Plum Creek has already retained the authority to build roads for forest management purposes. The easement should not allow construction of any and all roads, utilities and telecommunications facilities for any purpose. Most of the concept plan’s proposed development areas have existing public highway access and should not require additional road access. Where roads and utilities are needed to cross the easement property to access development areas in the concept plan, they should be defined by area and or by size and number of crossings needed for each development area. Otherwise, the “Protected Property” in the easement area just becomes an extension of the development zones. If roads, utility lines and communication facilities are to be allowed, they should be sited in the 22,000 acres of proposed development zones, not on the easement property.

#### **4. Surface Alterations**

The model easement allows for no additional alteration of the earth’s surface. The proposed “Balance Easement” bears no relation to the model. Any kind of surface alteration connected in any way to the many permitted uses of the property would be allowed.

The easement permits mining anywhere on the property, without restriction, as long as it is done by a third party that holds mineral rights. There is nothing in the easement to prevent the landowner from selling the mineral rights. Mining should not be a use allowed in the easement area. Plum Creek should disclose what third parties currently hold mineral rights, what those rights are, recapture those rights, and not sell any more.

The easement allows for water extraction for residential uses. The balance easement area should not be used to supply water to the region. If water extraction is to be allowed at all, 22,000 acres of proposed development zone should be an adequate area to find water for the residential development. Water extraction should be limited to use on the property for the allowed uses.

Except for a limit of no more than 185 acres of “actively disturbed area” at one time, there is little restriction on the excavation of all kinds of building materials on the “Protected Property.” An area that is supposed to be balancing development zoning with conservation should not be used as the gravel pit for the development zones or the entire region. Use of construction materials from the easement property should be

strictly limited to essential forest management and low intensity recreation activities on the easement property.

## **5. Forest Management**

This section of the easement provides that forest management activities must be consistent with public use in section 7 (“Public Use Easement”), but section 7 gives no public use “rights” as such. It permits pedestrian access, subject to many conditions, including that the Grantor can adopt any rules it wishes to ensure that the public use accommodates its forest management activities and any other activities it has the right to conduct on the property. This is another example of the easement appearing to give something in one section, only to take it back in another.

Paragraph C is another case of give and take-away, all in the same paragraph. According to the “Balance Easement,” forest management activities are supposed to preserve “traditional scenic character,” but that character includes being able to see forest management activities (reiterated in paragraph iii). There does not seem to be any limitation on forestry operations based on scenic character. Of course, preserving scenic character is not included as a purpose of the “Balance Easement.”

Paragraph (ii)(v) allows for parcels subdivided in the easement property to be managed under different forestry standards, namely, tree farm standards, than the rest of the property. What are the changes in use of the subdivided parcels that are anticipated by this paragraph?

This section states that the landowner must manage its forest management activities by certain principles and in accordance with a management plan. Obtaining legitimate third party certification is one way to demonstrate that the landowner is meeting the principles of the required forest management plan, but such certification is not required.

## **6. Waste Management and Forest Chemicals**

The model easement states that the use of chemicals must be controlled and limited “...so as not to have an adverse effect on the wetland, flora, fauna or other habitats associated with the Protected Property...” The quoted phrase has been deleted from the “Balance Easement.” Why would any easement that is supposed to be about conservation delete that phrase?

## **7. “Public Access Easement” - Public use.**

The public use rights in the “Balance Easement” are very limited. However, the Grantor’s right to limit or even prohibit public use is very broad. The only public access “permitted” is daytime pedestrian use and the Grantor reserves the “right” to severely regulate or prohibit even that and to charge a use fee. As proposed, any public access must “accommodate” any legal uses of the property by the Grantor. The Grantor expressly reserves the right to prohibit use of the property by any commercial guides, by customers of sporting camps, and non-profit camping and educational and scientific institutions.

The right of access via motor vehicle is deleted from the model. The Grantor reserves the sole right to grant access by motor vehicle or allow the use of roads and to charge a fee for access.

Based on common law, the public already has the right of pedestrian access across undeveloped land to get to Great Ponds to fish and to hunt waterfowl. Between this common law right, the limited permission in the easement for daytime pedestrian access, and the broad authority of the landowner to restrict, prohibit and/or charge for use of the land, the easement seems to provide precious few additional rights for public access.

The easement does not provide any rights of public access on other lands of the landowner, including in the development zones, nor does it give any rights of access across lands that Plum Creek sells in the development zones. This creates an opportunity and even a likelihood that practical access to large portions of the easement property will be shut off. If the only road maintained to Stevens Point on Lily Bay peninsula goes through the development area there, the public will effectively have no land access to the peninsula. If the only road from Greenville to Indian Pond is through the Big Moose resort, the public will likely lose access to Indian Pond.

#### **8. Baseline Documentation.**

As proposed, the Holder must agree to the baseline information. That is good, but the Third Party should also have to agree to it. The SFI audit information is explicitly kept confidential. The easement is supposedly being given for public purposes. The public should know what is there.

#### **9. Protection of Conservation Values.**

This section provides for changing the boundaries. Changing the boundaries is a significant action. It is good that the Holder and LURC must approve. However, boundary changes are so significant that the Third Party should also have approval rights and it would seem advisable for LURC to hold a public hearing or meeting on such a change.

#### **10. Notices.**

The “Balance Easement” departs from the LURC model by removing the right of the Third Party to consent or approve the same items requiring Holder consent and instead merely requires the Third Party to get a copy of a notice and be allowed to comment. This right should be retained for the Third Party. If the state is the Third Party it will improve the ability of the state to protect the public benefits which this easement is supposed to provide.

#### **12. Holder’s Affirmative Rights and**

#### **13. Third Party Rights and Enforcement.**

#### **The inability of the Holder and Third Party to enforce the easement.**

The rights and abilities of the Holder, and especially the Third Party, to have approval over potentially questionable or significant activities that may harm the conservation values of the property are severely restricted throughout the “Balance Easement,” including many deviations from the LURC model easement in order to limit the Holder and Third Party rights. In some cases, major activities and decisions about use that could impact the conservation values are left to the sole discretion of the Grantor. In other cases, the Grantor agrees to inform or consult with, but not give any authority to, the Holder. Only a few instances of requiring Holder approval remain.

An alarming departure in this section from the LURC model is that the easement deletes the sentence that says, “The Holder has the right to require that Grantor’s reserved rights be exercised in a manner that avoids unnecessary harm to the conservation values to be protected by this grant.” Another Holder right deleted from the model is the right to conduct a survey in determining whether there is a violation.

Enforcement of the easement is made difficult and discouraged in other key ways. So much discretion is given to the Grantor in defining terms and what actions may be related to reserved activities that it will be difficult to determine what activities are actually in violation, much less have cause to get a finding that there has been a violation. In fact, there could be no absolutely prohibited actions if the Grantor claims the activity is related to forest management activities. Even the right of the Holder “to require that the Grantor’s reserved rights be exercised in a manner that avoids unnecessary harm to the conservation values to be protected by this grant” is deleted from the model easement language.

In addition to violations being very difficult to define, the “Balance Easement” has unusual language that requires the Holder to pay all associated costs of an enforcement action that is not upheld by the courts. The Holder can get no monetary damages for violations of the easement. The property can only be restored and the Grantor is allowed to keep any profits from the violation. In other words, violations can be made at will as long as there is enough profit to cover the cost of restoration. For example, the Grantor could mine on the property, reap a profit, and if the Holder is successful at proving a violation, the Grantor, at some point, would only have to restore the area mined.

Finally, the Holder loses all enforcement rights if a violation includes activities that result in a LURC violation in which LURC imposes any penalty or mitigation requirement. For example, permanent sawmills are permitted in the proposed standards, but not in the “Balance Easement.” If a LURC violation is caused in the building of a permanent sawmill on the easement property, and LURC enforces the violation, possibly with a small fine, the Holder is barred from enforcing the prohibition on sawmills.

The extremely limited ability of the Holder and Third Party to enforce the terms of the easement is another fatal flaw of the “Balance Easement.”

#### **14. Additional Conservation Easement Requirements Under Maine Law**

This section further limits the ability the Holder and Third Party to enforce the easement. A crucial paragraph has been deleted from the LURC model easement that states, “Grantor agrees to notify Holder prior to undertaking any activity or exercising any reserved right that may have a material adverse effect on the conservation purpose of this grant.”

## **CONCLUSION**

The “Balance Easement” contains a number of fatal flaws as well as a host of other problems that render it wholly unacceptable as a conservation balance for the development proposed in Plum Creek’s Concept Plan for the Moosehead Lake region.

Resume

**Ken Spalding**

143 Lord Road  
Wayne, Maine 04284  
August 30, 2007

**EMPLOYMENT EXPERIENCE:**

**Maine Woods Project Coordinator** – RESTORE: The North Woods.  
October 2002 to Present.

**Director, Maine Conservation Corps** – Maine Department of Conservation then Maine Department of Labor. January 1987 to October 2002.

**Assistant to the Commissioner and Coordinator of Legislative Affairs** – Maine Department of Conservation. December 1983 to January 1987.

**Assistant Resource Administrator** – Bureau of Public Lands, Maine Department of Conservation. November 1981 to December 1983.

**Forest Watchman** – Maine Forest Service, Department of Conservation.  
May 1974 to October 1981, six months seasonally.

**Environmental Health Coordinator** – Maine Health Systems Agency.  
October 1980 to April 1981.

**Planning Assistant** – Bureau of Public Lands, Maine Department of Conservation. November 1979 to March 1980.

**Administrative Assistant to the Commissioner** – Maine Department of Mental Health and Corrections. October 1977 to May 1979, six months seasonally.

**Executive Director** – Friends of Bigelow. October 1974 to February 1975.

**Field Representative** – Congress of Lake Associations. August and September 1973.

**Land Survey Party Chief** – Russell Waldo, Land Surveyor and Engineer.  
Four months annually, 1969 to 1972.

**EDUCATION:**

**Bachelor of Arts, Sociology, 1973.** Bates College, Lewiston, Maine.  
Senior Thesis: *The Role of the Courts in Protecting the Environment.*

**Continuing Education, 1974 to 1986.** University of Maine, Orono and Augusta. Real Estate Law, Silviculture, Forest Roads and Trails, Forest Measurements, and Business Writing.

**Maine Management Development Program, April and May, 1989.** Maine Management Institute.

**Principles and Techniques of Fund Raising, April 1995.** The Fundraising School, Indiana University Center on Philanthropy, Washington, D.C.

**EDUCATION** (continued):

**National Service Executives Program**, February to August, 1997. The Presidio Leadership Institute, San Francisco, California.

**Conferences, Seminars and Workshops**, 1981 to present. Topics include submerged lands management, general environmental, land trusts, conservation easements, municipal parks and recreation, service and conservation corps, forestry, high-level nuclear waste disposal, voluntarism, fund raising, national service, supervisory practices, team building, personal growth, and growth management.

**VOLUNTEER SERVICE** (Conservation related):

**Friends of Baxter State Park**, 2003 to present. Board member and officer.

**Friends of Bigelow**, 1975 to 1986 and 2002 to present. Executive Committee member, officer, board member.

**Wayne Conservation Commission**, 1998 to present.

**Maine Bureau of Parks & Lands**, 2005 to present. Flagstaff Region Management Plan Advisory Committee

**Kennebec Land Trust**, 1988 to 2002. Founding board member, officer, Lands Committee co-chair and advisory board member.

**Maine League of Conservation Voters**, 1983 to 1999. Founding board chair.

**Dirigo Alliance**, 1986 to 1992. Founding board member.

**Pocasset Lake Association**, 1990 to 1992. Officer.

**Sierra Club, Maine Group**, 1980 to 1989. Founding Executive Committee member. Chair. Conservation Committee chair.

**Baxter State Park**, 1987 to 1989 and current. Various committees. Trails Committee, current.

**Maine Appalachian Trail Club**, 1974 to 1988. Executive Committee, officer, Appalachian Trail maintainer.

**Natural Resources Council of Maine**, 1973 to 1984. Council member, Executive. Committee, officer, Maine Mountain Committee chair.

**Land Use Regulation Commission, Citizens Advisory Board**, 1974 to 1983.

**Awards:**

**Environmentalist in Government Service Award**, 1992. Maine Group of the Sierra Club. Inaugural Environmentalist in Government Service Award.

**William Spring Award**, 2000. New England Training and Employment Council. For outstanding achievement in youth employment programs.

**Presidential Citation**, 2001. Unity College. For outstanding accomplishments as a steward of Maine's natural resources, as a career role model for Unity students, and service to Unity College.

**Restorationist Award**, 2002. RESTORE: The North Woods

\_\_\_\_\_/s/Ken Spalding\_\_\_\_\_  
Ken Spalding  
Wayne, Maine

September 14, 2007

COUNTY OF KENNEBEC  
STATE OF MAINE, ss

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

Before me,

\_\_\_\_\_  
Notary Public/Attorney  
Print Name: \_\_\_\_\_  
Commission expires: \_\_\_\_\_

Dated: \_\_\_\_\_