STATE OF MAINE LAND USE REGULATION COMMISSION

In Re: Plum Creek Timber Company's Petition for Rezoning Application No. ZP 707	))))	Forest Ecology Network and RESTORE: The North Woods

CLOSING ARGUMENT

The Forest Ecology Network (FEN) and RESTORE: The North Woods submit this written closing argument, in which we document the applicant's failure to meet numerous criteria for rezoning that are contained in the statute, rules and comprehensive plan. Since failing to meet even one of these criteria is grounds for a denial of the rezoning application, we respectfully urge the Commission to deny ZP 707.

I. THE LAW

A. STATUTORY AUTHORITY

Plum Creek's application is a rezoning (rulemaking) proceeding under 12 MRSA § 685-A, not a permit proceeding (adjudication) under §685-B and, as such, must be procedurally differentiated. For example, if Plum Creek wanted to change the zoning in the Town of Greenville it would have to *persuade* the Greenville Town Meeting to change its zoning ordinance because the Town Meeting is the legislative body in the municipality. It would have no "right" to such a rezoning. The Town Meeting could vote it down for any reason or no reason; Plum Creek could not appeal a defeat at the Town Meeting to the superior court. On the other hand, if Plum Creek wanted to get a *permit* under Greenville's existing zoning it would have to apply to the Greenville Planning Board for the permit. If Plum Creek meets the standards in the zoning ordinance, Plum Creek would be *entitled* to the permit. If the Planning Board refused to grant the permit, Plum Creek could appeal the decision to the Zoning Board of Appeals, then to the superior court, and finally to the Maine Supreme Court.

In the Land Use Regulation Commission's (LURCs) enabling statute, the Legislature delegated to the Commission the *legislative* rulemaking authority to change the zoning in the unorganized territories. Thus LURC has the legislative authority of the Town Meeting (at least in the area of zoning) under § 685-A ***except*** the Legislature ***limits***

that delegation of legislative authority by § 685-A (8A) which says in pertinent part: "A land use district boundary may not be adopted or amended unless there is substantial evidence that:… " Then it sets forth the statutory requirements that we are familiar with. Note that the statutory wording is in the negative: "may not be adopted..."; it does not say "shall be adopted" if the statutory criteria are met. This is consistent with the principle that no one is entitled to legislation.

Likewise, in § 685-B the Legislature delegated to LURC adjudicatory authority to issue permits under the existing zoning and Comprehensive Land Use Plan (CLUP) and where compliance with the standards in Chapter 10 of the LURC Rules are considered. Therefore, the Commission must recognize and acknowledge the different roles that it must play, in particular the authority that it has under § 685-A, including the authority to deny a rezoning petition for any reason whatsoever, since there is no statutory right to a rezoning. As former Attorney General Jon Lund stated in his testimony,

> In all of the discussion about the details of the Plum Creek proposal, we are in danger of losing sight of a basic element of the proposal. Plum Creek is asking for a zoning change to accommodate their plan. No one is entitled to a zoning change as a matter of right. I suggest that LURC take a page from the drug abuse solution favored by former First Lady Nancy Reagan: "Just say no."

(Jon Lund, Prefiled Direct Testimony, 8/30/07 at 3)

However, despite the fact that the Commission has the authority to deny the petition for any reason whatsoever, or even for no reason, the converse is not true. LURC cannot "just say yes" like an organized municipal legislative body could because the Legislature specifically says in § 685-A (8A) that LURC "may not" rezone unless all the statutory criteria are met. The statutory criteria in turn incorporate the CLUP and LURC rules.

Most importantly, the burden is on the applicant to introduce substantial evidence that they meet all of the criteria. "Adoption or amendment of land use standards may not be approved unless there is substantial evidence that the proposed land use standards would serve the purpose, intent and provisions of 12 M.R.S.A. § 206- A, and would be consistent with the Comprehensive Land Use Plan." (LURC Rules, § 10.09)

B. REGULATORY CRITERIA/CRITERIA FOR REVIEW

The Commission may approve a Resource Plan and any associated redistricting only if it finds that ***all*** of the following criteria are satisfied:

a. The plan conforms with redistricting criteria;
b. The plan conforms, where applicable, with the Commission's Land Use Districts and Standards;
c. The plan conforms with the Commission's Comprehensive Land Use Plan;
d. The plan, taken as a whole, is at least as protective of the natural environment as the subdistricts which it replaces. In the case of concept plans, this means that any development gained through any waiver of the adjacency criteria is matched by comparable conservation measure;
e. The plan has as its primary purpose the protection of those resources in need of protection, or, in the case of concept plans, includes in its purpose the protection of those resources in need of protection;
f. In the case of concept plans, the plan strikes a reasonable and publicly beneficial balance between appropriate development and long-term conservation of lake resources; and
g. In the case of concept plans, conservation measures apply in perpetuity, except where it is demonstrated by clear and convincing evidence that other alternative conservation measures fully provide for long-term protection or conservation.

(LURC Rules, §10.23(H)(6))

Furthermore, "[a] land use district boundary may not be adopted or amended unless there is *substantial evidence* that:

1. The proposed land use district is consistent with the standards for district boundaries in effect at the time, the comprehensive land use plan and the purpose, intent and provisions of this chapter; and

2. The proposed land use district satisfies a demonstrated need in the community or area and has no undue adverse impact on existing uses or resources or a new district designation is more appropriate for the protection and management of existing uses and resources within the affected area." (12 M.R.S.A. §685-A(8-A))

The Rules mandate additional considerations when the Commission reviews applications for changes in subdistrict boundaries adjacent to lakes including, *inter alia*, adverse effects to natural and cultural resource values, water quality, traditional uses, regional diversity, natural character….The "Commission shall consider all relevant

information available, including the Maine Wildlands Lake Assessment Findings….and relevant provisions of the Comprehensive Land Use Plan." (LURC Rules § 10.25(A))

II. ARGUMENT

A complete review of the prefiled direct and rebuttal testimony, state and federal agency comments and the transcript of the testimony during the technical hearings must lead to the conclusion that the applicant has failed to meet its burden by introducing substantial evidence that all of the statutory, CLUP and regulatory criteria have been met. As was noted above, failing to meet even a single standard must lead to a denial of the application; however, this applicant has failed to meet numerous criteria.

A. PLAN IMPLEMENTATION MECHANISMS

Section 10.09 of the LURC Rules clearly states that application procedures [for amending land use districts and standards] require submission of "[a] description of the management procedures, conservation easements, covenants, agreements or other formalized procedures that the applicant proposes to use to replace the restrictions and regulations that currently apply…. as well as [ ] [a] copy of all those formal procedures and agreements that will ensure the continued protection of the resources;"

Before even considering the substance of the concept plan, it must be noted that the applicant has failed to meet the requirements of the application procedures. Although there was a discussion of *Covenants, Conditions and Restrictions* (CCRs) throughout the hearing, the applicant has only submitted, in a 2/15/08 supplemental filing, a few paragraphs from CCRs that are used by other developments. Likewise, it was conceded during testimony by Alan Hutchinson of the Forest Society of Maine, that the Balance Easement – arguably the most important easement -- is in flux and that changes are more than just possible. In fact, when asked by Attorney Worden to list changes that he would like to see made, Mr. Hutchinson produced a substantial list of changes that have already been discussed with the applicant. (1/22/08, I:II at 68-76) Furthermore, it was stated by Thomas Rumpf of the Nature Conservancy that the Nature Conservancy has been discussing some of the issues raised by Mr. Hutchinson with Plum Creek, with the implication that both the Nature Conservancy and Plum Creek were open to amendments to the Legacy Easement. (*Id.* at 97) It is therefore clear that the easements under consideration by the Commission are not, in fact, in final form. Likewise, minutes before

Mr. Hutchinson was to begin his testimony, a document was submitted that was purportedly an unsigned and unfinalized agreement regarding a stewardship fund for the Balance Easement. (*Id*. at 16) At that time, Mr. Kreisman himself pointed out that as late as a year ago, he had been asking for the terms of this agreement. (*Id*. at 17-18)

The failure of the applicant to submit, as required by § 10.09, "conservation easements, covenants, agreements or other formalized procedures" in final form is more than a mere technicality. Rather, these documents are key to whether in fact this concept plan meets LURC's criteria. The importance of these documents lies in the second part of this section – "….that the applicant proposes to use to replace the restrictions and regulations that currently apply….as well as [ ] [a] copy of all those formal procedures and agreements *that will ensure the continued protection of the resources.* [Emphasis added] The applicant is asking this Commission to substitute its own restrictions and regulations for those restrictions and regulations codified in the LURC rules, without seeing and understanding the final format of those restrictions and regulations.

In addition, this Commission is being asked to accept on faith the argument that the Balance Easement and the Legacy Easement are sufficient to make up all of the lost resource protection in the development zones, despite the fact that both the Forest Society of Maine witness, the Nature Conservancy witness, and the applicant's own attorney concede that the easements are in flux. This Commission is also being asked to accept on faith the assurance that restrictions on clearing foliage to create view corridors, scenic impacts and the like will be implemented consistently and appropriately through the use of CCRs, despite the fact that such documents have not been submitted for review by the Commission and there was equivocation during testimony about whether such homeowner agreements can, or cannot, be amended by a vote of the homeowners alone, as well as uncertainly about what body has the right, and responsibility to enforce such covenants. (1/24/08, II:II at 166-175)

B. <u>LOCATION AND SIZE OF THE DEVELOPMENT ZONES</u>

The amount of development contemplated under the concept plan will be a significant problem for LURC during implementation. The Open Space Institute (OSI) estimated that under this plan, in the order of 2 or 3 development proposals would be before LURC at any one time. (12/4/07, I:II at 102) The unprecedented scope of this

permitting burden on LURC belies the claims of the applicant that the amount of the development would be similar to what LURC has seen in the region in the past.

1. The proposed new district designations are less appropriate for the protection and management of existing uses and resources within the affected area.

The clearest example of the fallacy of the applicant's argument that the concept plan rezoning is more appropriate, and more protective, of existing uses and resources, than the existing zoning is the inclusion of Resort Development Zones in the plan. The current zoning in the proposed Resort Development Zones is General Management (M-GM) and P-GP along much of the shorefront in these zones. The concept plan would eliminate the P-GP zoning in these areas, and would thereby permit shorefront development where it is not currently allowed.

A second weakness in the applicant's argument is the fact that resorts are not "existing uses or resources." So a development zone that permits resorts, by definition, cannot be more protective of existing uses and resources. It must therefore be conceded such development cannot avoid having some undue impacts on existing uses.

The applicant will likely argue that the rezoning, *taken as a whole*, is more protective of existing uses and resources. However, that argument necessitates that the Commission consider the entire conservation framework in its deliberations and decide that the Legacy Easement, and the fee purchases are guaranteed and that the protection that theses purchases will assure is sufficient to counterbalance all of the lost protection implicit in the rezoning. This issue will be discussed in Section F below.

There is likewise an issue with freezing standards and thereby excluding new protections that the Commission might pass, as the following interchange demonstrates:

> MR. KREISMAN: Mr. Kraft, just to follow up on this. Staying with my earlier theme of no undue adverse impact as it applies to what you're just talking about. A hypothetical, four years from now, LURC creates a protection zone for -- that's not there now, a new -- a new class that's not there right now for a protected resource, vernal pools, something like that. Okay? The protection and -- and it's protected in -- and applies to everyplace else in LURC jurisdiction but for within the development zones. And let's even go further and hypothesize that it's similarly protected in DEP areas under the Natural Resources Protection Act. What is your legal view of your ability to develop in an area that would otherwise have been zoned under this new zone but wasn't because the protection zones were frozen both for the boundaries of those zones that do exist now and for types

of protection zones that have not yet been created? What would that look like in subdivision review? (1/25/08, II:II at 97-98)

Mr. Hempelmann, Plum Creek's outside counsel, replied that they would then be barred under DEP regulations from developing a vernal pool. *Id*. This hypothetical, however, does not include the case where LURC creates a protection zone that is either not applied in DEP jurisdiction or is applied less stringently by the DEP. This, then, would create a clear inequity, in which a standard is applied to all unorganized territories landowners, with the exception of the applicant.

The inability to include concept plan land in newly created protection zones, while other landowners would be included in such zones, makes strikingly apparent the fact that the applicant is seeking much more than the "benefit of the bargain," as Mr. Kraft put it. (1/25/08, I:II at 64) And, rather than simplifying the process for the Commission and staff, it will be complicating it, by requiring a finding of undue adverse impact for many of the developments in areas that have been stripped of their protection zones – current and future -- for the life of the concept plan. In addition, the Commission will frequently become an arbiter not only of its own criteria for development, but also of the rules and regulations of other agencies.

C. ECONOMIC IMPACTS AND NEEDS

1. The applicant failed to demonstrate that the proposed land use district will satisfy a demonstrated need in the community or area.

Application opponents are not alone in doubting the economic impact claims of the applicant. As Commissioner Laverty himself noted, he has his own doubts about the potential economic impacts of the Plum Creek development.

> A [Laverty]: ….I would say that for the Commission to decide what constitutes demonstrated need, I would be shocked if there was a dramatic change in things like the unemployment rate, the poverty rate, the relative income levels, the outmigration of young people from, say, Piscataquis and Somerset Counties simply because of the Plum Creek development.

(12/7/07, II:II at 235).

The applicant's argument that the proposed development would result in an economic boon for the region is purely speculative. As he admitted under cross-examination, Dr. Charles Colgan's predictions were based on assumptions that were

given to him by the applicant. (12/6/07, III:III at 244). Furthermore, he admitted as much in his May 2007 report, done on behalf of the applicant:

> This analysis is presented as an aid in decision making, and not a specific forecast of the future economy of the region….Given the assumptions used, this analysis should be considered a guide to possible effects from [assumed] development rather than a definitive statement of a specific future outcome.

Dr. Melvin Burke, Prefiled Direct Testimony, 8/30/07 at 3, *citing* Colgan, "Estimated Economic Impacts of Implementing The Proposed 2006 Plum Creek Rezoning Plan In the Moosehead Lake Area" March 2006 at 8.

In both his direct testimony and under cross-examination, Dr. Burke opined that the plan as proposed by Plum Creek is classic land speculation.

> "[T]he large landowner speculators like Plum Creek and its shareholders are the only beneficiaries of these State tax and rezoning policies, both of which increase the land prices, the value of land assets and stock price of the large land speculators like Plum Creek at the expense of everyone else. This interpretation, like everything else presented in this short analysis, is not an assumption or an abstract "concept"….

Id. at 7

Dr. Burke goes on to express concern about the leaseholders impacted by this land speculation, stating, "I'm more familiar with that increasing land values gives rise to increase in property taxes for leases. And there are about 7,000 leaseholders in the state. I don't think they should be ignored by this Commission nor the impact upon them." (12/6/07, III:III at 332). Burke further notes that rezoning is the biggest variable in the increase of the value of land and that Plum Creek itself so noted in a chart taken from the Plum Creek website. *See* Appendix 1. Consequently, if land values shoot up, the leaseholders' rents likewise go up, as does the value of surrounding land not owned by Plum Creek; hence, the reason that the other large landowners are awaiting the outcome of this rezoning proposal.

In short, there is no conclusive evidence that the concept plan will create an economic stimulus, the so-called cost-benefit analysis includes no predictions regarding "costs'" to the region nor reliable statistics regarding job growth, and there is evidence that granting the rezoning application would, even if no development occurs, result in an

increase in land values, for Plum Creek and other landowners, and a consequent increase in leaseholders' rent.

Even if some development does occur, there is a disturbing lack of detail about what that development might include. Despite our idea of what a resort consists of, there was considerable testimony about how the definition of "resort" includes as few as 15 transient units. In addition, the definition of "unit" includes single-family residences, so there's no requirement that the units be in a large building such as a lodge. (Chapter 10 Redline Submission, § 10.02.162(A)(B), 1/4/08). There was a concern expressed that Plum Creek could dangle the promise of a large world-class resort in front of the local population to gain support for the project and then use that as a cover for what will turn out to be only a residential subdivision defined as a resort. Consultant Evan Richert queried the Chamber of Commerce panel, asking

> My question is, if the resorts did not materialize in the way that one might imagine when one uses the word resort and this were essentially a second-home community, still a lot of construction with the homes and so forth, but not the resorts --not resorts with a core facility of a hotel and hospitality and -- and all of the things that we think of as a resort and instead was simply the minimum of what the concept plan requires, which is a resort core of between 15 and 25 transient or short -- short-term accommodations and some kind of recreational facilities and homes, what would -- how would that -- if at all, how would that modify your perception of this project and its benefit to the region?

(12/5/07, II:II at 251)

At the end of the hearings in January, a similar but distinct concern arose about the size of the "resort core." In particular, staff repeatedly questioned the final panel about why there was no minimum acreage for the resort core. Both Mr. Kraft and Mr. Hempelmann explained that world-class resort developers prefer the "flexibility" of deciding the size of the resort core themselves and it may drive them away if the Commission is too "prescriptive" in requiring a minimum size resort core.[1] It must be

[1] In a supplemental filing of resort information, Plum Creek describes a number of resorts and claims that this information should give the Commission a sense of what the resorts in the plan area would be like. (Plum Creek Supplemental Filing on Resort Development, 2/15/08) Yet, as Catherine Johnson of the Natural Resources Council of Maine (NRCM) noted in her 2/29/08 response to Plum Creek's Supplemental Resort Information, the resorts that Plum Creek cites have little in common with the Moosehead region. (NRCM Rebuttal, 2/29/08 at 5-6). In addition, two resorts that are in areas similar in geography to Moosehead, and that are on consultant DeMay's CV, but were not mentioned by Plum Creek, are successful by relying on lot sales only and do not include a hotel. *Id*. at 8-9.

considered, then, whether this "flexibility" wouldn't be just as attractive to unscrupulous or undercapitalized developers as to world-class developers. (1/25/08, II:II at 161-163).

In summary, Plum Creek's own admission about where the economic advantages really lie (at the rezoning stage and not the development stage, as Appendix 1 shows), the peculiar definition of "resort" as being as little as 15 transient units, and the lack of any minimum size for the "resort core" all fit together. Plum Creek is interested in selling the land once it is rezoned, developable and marketable. Plum Creek doesn't care about what type of resorts, if any, get built. The chart shows the motive, the proposed Chapter 10 Standards show that no particular type or size of "resort" is guaranteed ... or even promoted. The proposed standards are all based on avoiding a "prescriptive" approach, e.g. an approach with clear regulatory standards to achieve clear publicly beneficial goals; instead the applicant promotes the "flexible" approach because that approach is the most marketable and thereby increases land values the most, even if it doesn't assure any particular development.

In his examination of witness Peter Vigue, Commissioner Laverty expressed skepticism about the employment projections given by Charles Colgan. Laverty questioned Vigue as follows:

> Q: In both your prefiled testimony and in response to questions from Plum Creek earlier this afternoon, you gave some very specific employment projections and cost projections from the two resorts. And I'm wondering what are the bases for these projections in that we -- as far as we know, these -- these resorts are not clearly identified in terms of their configuration or their type. And you seem to be basing this on projections of some type of hotel-like facility, but that's not -- that has not been presented to us with any specificity and Plum Creek is under no obligation under the current concept plan to realize either one of those types of developments. As a matter of fact, the Colgan report -- Charlie in his assumptions makes it very clear that because of the lack of specificity, he has some limitations in his ability to make such bold and specific projections. So I'm just wondering, do you know things that we don't?

(12/5/07, II:II at 245-6)

Neither Mr. Vigue nor Mr. Batey of the Somerset Economic Development Council were able to describe the provenance of the numbers used to create the projections pertaining to the resorts, although they both stated that the numbers they were using were

based on numbers in the Colgan Report. Mr. Batey responded that he believed Mr. Vigue was referring to the $85 million projected cost of the Lily Bay Resort and the $205.5 million projected cost for the Moose Mountain Resort.

In response to this equivocation, Commissioner Laverty stated:

> And I think we have to be careful with throwing around numbers…. If these numbers are not included in the record and there is no commitment, either on the part of Plum Creek, or they're not included in the concept plan in such a way to be enforceable, then we may be dealing with numbers that, perhaps, should not be considered as part of the hearing.

Id. at 249

The question therefore becomes what sort of economic projections could be made if the resorts either don't materialize at all, or materialize in a totally different format than what was anticipated by Colgan, Vigue and Batey, as large subdivisions with very few transient rooms, restaurants and shops, for example.

D. COMMUNITY IMPACTS AND NEEDS

As noted above, much was made of this concept plan as a form of economic development for the region. It is undisputed that the region needs jobs, new residents to utilize the hospital and the school, shop in the stores and patronize the businesses. However, with two major resorts (that may not even materialize), many remote lots and a pitifully small amount of affordable housing planned, it is unlikely that most of the new residents to the area will be seasonal residents, who are able to afford to purchase the trophy lots on the lakes, ponds and hills of the area. These purchases will add no new children to the schools, nor will they contribute a regular stream of business to the local merchants.

While there will be some jobs at the resorts, with a possible resort core of only 15 transient units, even those jobs may be sparse. And what jobs there are will be low paying, service jobs. As Dale McCormick, Director of the Maine State Housing Authority, noted, "[w]e believe that the vast majority of jobs created here will be at incomes that make home ownership unaffordable." (12/6/07, III:III at186). In the end, it is highly unlikely that this concept plan will result in any measurable level of economic development whatsoever.

E. NATURAL AND CULTURAL RESOURCES AND USES: IMPACTS AND NEEDS

1. The applicant failed to demonstrate that the proposed rezoning will have no undue adverse impacts on existing uses or resources, including wildlife.

The applicant submitted testimony by Plum Creek wildlife biologist Henning Stabins and studies and testimony by Woodlot Associates, as evidence of no undue impact on wildlife and other natural resources. However, this testimony was flawed and incomplete. For example, when Mr. Stabins was questioned about his level of professional experience in Maine, he stated that he grew up in Maine. He blamed Plum Creek's failure to identify an eagle's nest, and ultimate destruction of that nest, on the failure of Inland Fisheries and Wildlife to inform Plum Creek of the location of the nest, despite the fact that he stated in his testimony that the company's biologists are trained to identify such nests. (1/17/08, II:II at 240). And, Mr. Stabins demonstrated his complete lack of familiarity with the region by stating, under examination, that the proposed Lily Bay resort was 40 to 50 miles from Greenville. (*Id*. at 246). Yet in his prefiled rebuttal testimony, Mr. Stabins stated that all of the development zones were near current infrastructure. (Stabins Prefiled Rebuttal, 9/27/07 at 8) This apparent contradiction was clarified, however, when Mr. Stabins noted that his definition of "infrastructure" was limited to camps and roads, and he seemed completely unconcerned about the zones' distances from hospitals, and other community infrastructure. (1/17/08, II:II at 247-8)

Mr. Arsenault and Mr. Pelletier of Woodlot Associates showed similar weaknesses when they concluded that the development would produce no adverse impact on natural resources in the development zones, despite the failure to map sensitive areas, or to complete multi-season/multi-year vernal pool studies. ("[I]n conclusion we continue to reiterate that the proposed development will not adversely affect the natural resources and ecological character of the region and strongly believe that many, if not most, of the concerns presented by the intervenors are overstated or inaccurately represented." (Arsenault and Pelletier Prefiled Rebuttal, 9/17/07 at 24).

Mr. Pelletier admitted that they did not identify vernal pools through conducting multi-year/multi-season observations but rather blithely stated that "naturally occurring vernal pools are scarce within the development areas." (1/16/08, II:II at 188-9) Yet the

Maine Department of Inland Fisheries and Wildlife apparently thinks otherwise, as they evidenced concern about vernal pools, suggesting the following language changes for the Balance Easement: "High wildlife value vernal pools (those meeting the definition of Significance under NRPA) will be identified by foresters with the assistance of MDIFW as needed and located on a GIS of sensitive natural resource areas and will be managed using standards consistent with the "Forestry Habitat Management Guidelines for Vernal Pool Wildlife" (Calhoun and deMaynadier 2004) or other standards of similar specificity developed by the MAT." [Emphasis in original] (MDIFW Comments, 11/20/07 at 9).

When asked why sensitive wetland areas were included in the development zones, Mr. Pelletier responded that "during the development, the next stage, that's when you're actually going to be on the ground. So that we're not all over the landscape trying to do detailed wetland mapping for hundreds of thousands of acres." (1/16/08, II:II at 191). They further testified that at the siting stage, such sensitive areas would be identified and siting of development would be adjusted accordingly. (*Id*.).

Yet the U.S. Fish and Wildlife Service (USFWS) stated in its agency comments, that despite the fact that Plum Creek stated that they would consult with the MDIFW and USFWS prior to submitting development plans in the future, "[t]his is standard protocol between an applicant and regulatory agency and does not necessarily guarantee that revisions to these development envelopes would be made." (USFWS Comments, 11/20/07 at 5) And MDIFW was even more direct about the importance of excluding such sensitive areas from development zones, stating that "we feel that those important habitat areas and buffers identified in our August 31, 2007 comments should be removed from re-zoning consideration up-front and added to the Balance Easement to best ensure long-term protection. Doing so will minimize complicated development-by-development negotiations regarding future open space designations during the LURC development review process, and will help avoid future homeowner association conflicts regarding management and protection of these key resource areas." (MDIFW Comments, 11/20/07 at 11). The USFWS also stated, in their 11/20/07 comments, that they "continue to suggest that the Lily Bay residential,… Lily Bay Mountain…, and Long Pond North Shore…development units be eliminated" due to impacts on natural resources. (USFWS Comments, 11/20/07 at 4)

The inadequacies of the natural resource inventories produced by Plum Creek consultants are apparent; however, even more troubling is the failure to fully acknowledge the adverse impacts on wildlife that the development will produce. Opponents of the project described impacts due to traffic, construction, roads and habitat fragmentation, yet the applicant either denied such impacts would occur or brushed them off as minor matters.[2]

Of particular concern are the impacts on lynx. Prefiled Testimony by Margaret Struhsaker, based on a chart of lynx sightings in the concept plan area, indicated the presence of a substantial number of lynx in the concept plan area. (Margaret Struhsaker, Prefiled Direct Testimony, 8/31/07, Exh. 11) Plum Creek's own testimony "indicate[s] that current Plum Creek forest management is maintaining the potential for occupied lynx habitat in this landscape. In addition, the spatial arrangements of the medium and high probability areas indicate that no barriers to lynx movement exist in the designation area." (Struhsaker Prefiled Testimony, 8/31/07 at 10 *citing* Exhibit 10, Plum Creek Technical Comments on Critical Habitat Designation). This testimony clearly infers that disruption to the current forest management activities, by development in the area, will have significant negative impacts on the occupied lynx habitat in the landscape.

Comments submitted by various agencies show concerns about adverse impacts on the lynx population. MDIFW and the Maine Natural Areas Program (MNAP) strongly suggested changes to the plan so as to "best protect significant plant and wildlife habitats and to ensure adequate buffers to these habitats, to maintain landscape linkages for large and highly mobile species such as lynx." (MDIFW and MNAP Comments, 11/20/07 at 11) Wildlife biologist Diane Boretos raised an additional issue about travel corridors that is troubling. "…[S]ome of these corridors are generational, they're being used generation after generation after generation….one thing that can be documented is the significant corridors and that can be done only by doing fieldwork." (11/14/07, I:II at 8-9) What Boretos is arguing is that the generational component of the wildlife corridors further complicates the analysis of what happens to wildlife when the corridors that they

[2] As Plum Creek witness Bruce Leeson so quaintly stated, lynx will be inconvenienced in the beginning and will just move on. (1/16/08, II:II at 201-202) This statement ignores the entire concept of habitat *protection*. One could use the same rationale to justify cutting down a tree with an eagle's nest in it – the eagles can just move somewhere else.

utilize are blocked to them, and this analysis can only be done by extensive fieldwork. Yet, as was admitted by the consultants from Woodlot Associates, and by Mr. Stabins, the on-the-ground fieldwork was not done.

Given the failure to adequately study wildlife levels and behaviors, refusal to incorporate MDIFW and MNAP recommendations into the concept plan and their somewhat cavalier attitude towards the habitat needs of wildlife, Plum Creek has not even approached presenting the level of evidence necessary to show that the rezoning will have no undue adverse impacts on wildlife, natural resources and current uses.

F. CONSERVATION EASEMENTS

1. The Legacy Easement is speculative

Plum Creek will sell the land for the Legacy Easement if, and only if, the rezoning petition is granted by the Commission, and the Nature Conservancy (TNC) will be required to raise the money to purchase these easement lands. Whether this easement will ever come to exist is purely speculative. While Plum Creek argues that since it has the right under the Purchase and Sale Agreement to sue TNC if TNC fails to consummate the sale, TNC *will have to consummate* the sale. But TNC testified that the sale is a "bargain sale" because the price is less than the appraised fair market value, due to the unique situation of Plum Creek trying to perceptually link it to the rezoning application. (1/22/08, I:II at 135) So once Plum Creek gets its Concept Plan it will have no motive to sue TNC; on the contrary, it would be to Plum Creek's advantage to have the deal fall through so it could get fair market value, which would net the REIT millions of dollars more. Although one can get a charitable deduction in a bargain sale, the deduction is never worth as much as a fair market sale and, since REITs are taxed like partnerships, Plum Creek would not get the deduction for a bargain sale to TNC in any event.

2. It would be bad public policy to consider the Legacy Easement as mitigation

The statute and CLUP require mitigation to come from the developer, not TNC or the public. As Alan Stearns of the Bureau of Parks and Lands (BPL) discussed in his agency comments,

> The distinction between the Balance Easement (regulatorily created and donated) and the Legacy Easement (which Plum Creek would sell for value) is important. LURC must decided (sic) whether the recreational access provided for by the sale of an easement for value should be credited

> toward a regulatory expectation of protection or provision of recreation. The applicant seems to concede that the Balance easement itself provides inadequate recreational opportunity under various requirements; there is a (sic) odd logic in the Petition/Concept which seems to suggest that recreation should be more broad than the Balance easement, but that the cost of meeting LURC's recreation expectations should be borne by the public (through FLP (Forest Legacy Program)) or TNC, rather than by the applicant."

(Bureau of Parks and Lands Comments, 11/20/07, at 4, fn 4).

BPL cautioned that it would *refuse* to accept such an easement: "... it is worth noting that much of the easement area is the result of compensated sale for value by Plum Creek, rather than any donation or regulatory exaction." *Id*. at 5. "BPL would be willing to accept a donation of an easement, but not if the applicant claims regulatory review benefit as this applicant has done." *Id*. at 6.

True to its word, BPL is only a "limited" third party holder on the Legacy Easement, involved *only* with the public access section; it has accepted none of the third party rights to enforce "sustainable" forestry or any of the other provisions in the easement. It is not that BPL is only interested in recreation, because it *is* a full third-party holder of the Balance Easement. The only explanation for the different roles BPL plays in the two easements lies in its November 20, 2007 comments that (as a matter of principle) it did not want to participate in the Legacy Easement if Plum Creek was going to both get paid money for it and get regulatory credit for it as well.

The Legacy Easement makes conservation more difficult because if Plum Creek had to bear all the mitigation costs of its development, TNC could use the $10 million for other, real conservation. As noted above, Alan Stearns testified against allowing TNC to use FLP funds to buy the easement from TNC precisely on this point; FLP funds should not be used to help a developer develop.

3. <u>The Balance Easement is insufficient to offset the impacts of development</u>

The terms of the Balance Easement are inadequate for providing conservation, for enforcing otherwise stated intentions and for protecting the pubic interest. The deficiencies of the balance easement have been documented many times by many parties both before and during the current hearing process. One prime acknowledgement of

these deficiencies came from Ken Elowe of the Maine Department of Inland Fisheries & Wildlife, in the following interchange:

> MR. WORDEN: ….And what I put up on screen there is from the November 20th comments from Inland Fisheries & Wildlife. And I just want to direct your attention to the sentence that says: We consider it essential that habitat conservation and management be accomplished consistently across the 266,000-acre legacy easement and the 90,000 acre balance easement to better offset the list and degraded habitat functions resulting from the concept plan.
> And my question to you is, doesn't this sentence mean that it's the opinion of the Department of Inland Fisheries Wildlife that the balance easement by itself is not sufficient to offset the lost and degraded habitat function resulting from the concept plan because you think you need to coordinate it with the legacy easement?
>
> MR. ELOWE: That's right.

(1/22/08, II:II at 297)

In summary, accepting the Legacy Easement as additional mitigation would set a precedent that all other developers would insist upon, thereby shifting the burden to mitigate a substantial part of the impact of the development onto the donors to conservation groups like TNC and ultimately the public at large, through the Land for Maine's Future and the Forest Legacy Program.

4. <u>The Peak-to-Peak Trail Easement is worthless as written</u>

Mr. Kreisman, when questioning Dave Herring of the Western Mountains Foundation, asked whether he was willing to take on this easement despite the "fundamental flaws with this easement now that may make it difficult or impossible….to achieve the vision…on the hope that Plum Creek will change critical terms in the easement to allow that vision to be possible? Mr. Herring replied "[m]ore or less." (1/23/08, I:II at 233-234). Yet Plum Creek is claiming that this easement is a public benefit, despite it's serious infirmities.

In his prefiled testimony, Ken Spaulding, who has over 35 years of experience in the development, construction, maintenance and use of trails, stated that "the Commission cannot have faith that this easement is a bona fide, secure, public trail easement." He goes on to list a number of issues with the easement including, *inter alia*, the fact that it is granted exclusively to a private corporation without any third-party

holder, the grantor and holder, both private corporations, can amend the easement at any time by mutual consent, they can prohibit public access, and can apply fees to the public. Given these issues, to be of public benefit the trail easement would have to be completely rewritten, starting with re-visiting the location of the trail, the philosophy as evidenced in the easement, finding an appropriate easement holder and negotiating completely new easement terms. (Ken Spaulding Prefiled Testimony, 8/30/07 at 2).

Plum Creek did not do due diligence when drafting and negotiating the Peak-to-Peak easement, resulting in just one more example that demonstrates that this is an incomplete application, not ready for consideration, and also suggests that choices regarding public benefit are grounded in profit rather than true public benefit.

G. CONSISTENCY WITH STANDARDS; PURPOSE, VISION AND PRINCIPAL VALUES; AND APPROPRIATENESS OF REZONING FOR PROTECTION AND MANAGEMENT OF EXISTING USES AND RESOURCES

As former LURC Commission Caroine Pryor laid out in her prefiled direct testimony, the Commission must bifurcate its consideration of undue adverse impacts and conservation measures that mitigate or balance those impacts. "If – and only if – the proposed development is compatible and in keeping with the Commission's CLUP and land use standards, should the Commission then consider the adequacy of the conservation measures to approve a project for which a developer would not otherwise be entitled to receive permission under LURC standards." [Emphasis in original] (Caroline Pryor, Prefiled Direct Testimony, 8/30/07 at 5) As the LURC Rules state, a resource plan must strike "a reasonable and publicly beneficial balance between appropriate development and long-term conservation of lake resources." (Rule 10.23(H)(6)(f)). Consequently, if a development plan is not appropriate in the first instance, no amount of conservation could compensate for that inappropriateness. The publicly beneficial balance is between "appropriate and compatible development, that due to zoning criteria and restrictions, could not otherwise be approved." (Caroline Pryor, Prefiled Direct Testimony, 8/30/07 at 5)

As has been demonstrated, the concept plan proposed by Plum Creek is neither appropriate nor compatible with the natural environment in the plan area. As has also been demonstrated, the industrial forestry easements have significant defects. For the

sake of argument, even if the easements were not defective, the adverse impacts that would result from this development should stop the discussion at the outset and no consideration of either the Balance or the Legacy Easement should be entertained.

H. CONCLUSION

The applicant has failed to meet its burden of proof on multiple levels. Plum Creek has failed to demonstrate, via substantial evidence, that the proposed rezoning meets the criteria articulated in the LURC statute, the Comprehensive Land Use Districts and Standards and the Comprehensive Land Use Plan. There is no demonstrated need for much of the development that the rezoning would permit, most notably the resorts as subdivisions, as proposed in the current concept plan. The Director of the MSHA stated that most of the jobs created by the proposed development would not be able to afford to purchase homes. Therefore it is likely that buyers would consist mainly of second-home buyers from away and no evidence was submitted to support the contention that there is a need for second-home buyers in the region. There is no evidence that supports the contention that luxury resorts with tiny resort cores and so-called low impact resort accommodations, particularly ones that are simply luxury subdivisions in disguise, are more appropriate for the protection and management of existing uses and resources than whatever development might occur over the next thirty years under existing zoning. There is no evidence to suggest that the applicant won't sell land for conservation purposes over this period of time, particularly given that the bulk of the so-called conservation framework is not donated but rather a land sale like any other. And, there is a troubling lack of assurances that protections that are put in place, for example those relating to restrictions on the creation of view corridors, will be permanent for the term of the plan, given the applicants failure to submit copies of the CCRs that the property owners will be required to adhere to.

Most importantly, particularly from the Commission's perspective, should be the fact that if this rezoning request is denied, there is nothing that will stop the Commission from creating an updated Comprehensive Plan that rezones this area to provide the most appropriate protection for the resources, while at the same time guaranteeing that those protections will be in place until such time that the Commission decides to again update the Plan. This is the right, and responsibility, of the Commission.

The applicant in this matter has justified the proposed inflexible and long-term amendments to the standards by citing a need for certainty. Yet, when parties and staff questioned a lack of detail in certain aspects of the plan, such as the type of resorts that will be developed, the applicant cited the need for flexibility. If this plan is approved that is what the applicant will get – certainty and flexibility. But what the Commission and, by extension, the people of Maine will get is uncertainty and inflexibility, for the next thirty years. We urge you to deny ZP-707.

Respectfully submitted,

/s/Lynne A. Williams, Esq.

/s/Phil Worden, Esq.

Dated: March 7, 2008