STATE OF MAINE
SAGADAHOC, SS.

BUSINESS AND CONSUMER COURT
Location: West Bath
DOCKET NO. BCD-WB-AP 09-37

FOREST ECOLOGY NETWORK, *et al,*

Petitioners

v.

LAND USE REGULATION COMMISSION,

Respondent

And

PLUM CREEK MAINE TIMBERLANDS, LLC., PLUM CREEK LAND COMPANY, *et al,*

Intervenor

PETITIONER NATURAL RESOURCES COUNCIL OF MAINE'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TAKE ADDITIONAL EVIDENCE

NOW COMES Petitioner, the Natural Resources Council of Maine (NRCM) and respectfully submits this Reply Memorandum in support of Petitioners' Motion to Modify the Record and To Take Additional Evidence.

The issue for this Court is whether to allow the Petitioners to take concise, additional evidence on a relatively narrow topic: whether and to what extent the Applicant in the proceedings below, Plum Creek Maine Timberlands L.L.C. and Plum Creek Land Company (hereafter "Plum Creek" or "the Applicant") paid all or a significant portion of what are commonly referred to as "litigation expenses" – witness fees, witness expenses, reimbursement

of witness time for testifying and/or development and preparation of opinion testimony, costs of exhibits, and legal fees – for several, separate intervening groups, each of whom maintained an aura of independence from Plum Creek throughout the underlying adjudicatory proceedings. We do recognize that there was "obvious allegiance" (as LURC now characterizes it) between these groups and Plum Creek, in the sense that these intervenors proffered witnesses with substantive opinion testimony who agreed with Plum Creek's witnesses, and these intervenors each had attorneys who participated tactically on Plum Creek's side of the case. Yet each of these intervenors participated as stand-alone entities, still purporting to have "their own" counsel and "their own" witnesses, and each of whom were allocated and allotted their own time for participation and examination of witnesses, and their own right to file separate pleadings.

What was not known was the extent of the arrangements by the Applicant to agree to reimburse, substantially or fully, each of these separate participants for all of their litigation expenses, functionally rendering these participants mere extensions of the Applicant; when such payments or reimbursements were made; and what those litigation expenses were for. A simple accounting and document production from Plum Creek probably suffices to answer the inquiries. The discovery can be obtained by way of brief, concise production of documents and/or answers to interrogatories, and probably does not need deposition testimony.[1]

The inquiry is critically important for a number of reasons. First, the criteria of "public support" is a regulatory criteria that LURC was bound to apply to the question of approval of this

[1] The possibility of deposition testimony should not be discounted by this Court, if, for example, it were determined that certain lay witnesses who were not necessarily providing "opinion testimony" were being reimbursed for their time to participate as witnesses in the case, by the applicant Plum Creek. In essence, we probably all agree as a general legal principle that an applicant to LURC proceedings cannot pay lay witnesses from the community for their time in appearing and testifying on the applicant's behalf in adjudicatory proceedings, unless those witnesses are employees of the applicant or otherwise tied to the applicant as agents or representatives in some capacity. It appears in this case that all of the witnesses in issue were offering, in some form, "opinion testimony" that permit reimbursement of their time and expense in developing opinions, participating in strategy, and testifying on the applicant's behalf at proceedings. It is not clear, however, by any means, that the LURC Commissioners were each specifically aware of *that level* of financial cooperation between Plum Creek and its "supporters."

concept plan for real estate development.[2] Therefore, it is critical to know whether the Applicant has attempted to raise an illusion of "public support" by paying for the full participation of "separate" entities; further, any weight the decisionmakers may have placed upon the "public support" element of the case could have been unfairly biased by this lack of record information. Throughout the proceedings NRCM brought to the attention of LURC the overwhelming public support against the development plan, or specific portions of the plan. For example, at one closing argument, after the LURC staff-drafted plan had been presented for public comment, NRCM and Maine Audubon pointed out that a summary of all public comments submitted in writing to LURC reflected opponents from 303 towns in Maine (one of which was Greenville) (A.R. 544), and overall in this public comment period following the LURC staff-written development plan there were over 1500 letters in favor of avoiding all development on Lily Bay, contrasting with only 6 letters supporting such development (none of these 6 came from Greenville). Administrative Record ("A.R.") 531(G) at 13-14 (and record citations therein).[3]

[2] For a rezoning to be permitted, the statute requires substantial evidence that "[t]he proposed land use district satisfies a demonstrated need in the community or area . . ." 12 M.R.S.A. § 685-A(8-A)(B). LURC's Guidance Document ("Clarifying the Rezoning Criterion on Demonstrated Need" of April 1, 2004) includes "Community Support" as one of the key factors for evaluation of both residential and non-residential projects.

[3] As an aside – and since Plum Creek has chosen to somewhat mischaracterize NRCM's position regarding the Town of Greenville's continuing participation on this appeal – it is significant to note that of this category of public comment, there were opponents to the plan who submitted letters from the Town of Greenville, and there were no supporters of the staff-written plan who submitted letters from Greenville during this period for public comment. Plum Creek has suggested to the Court in e-mail and in its opposition memorandum on this motion that NRCM "objects to" the Town of Greenville's participating on this appeal, unless the Town as a municipal entity has an attorney. That is not exactly what NRCM has said to the Court: NRCM has said that "we defer to the Court in whatever decision is ultimately made regarding Mr. Simko's participation on behalf of the Town of Greenville." Pierce e-mail to Court dated February 20, 2010. NRCM's counsel merely pointed out to the Court the potential problem that may arise in judicial proceedings (as opposed to the underlying administrative proceedings) under 4 M.R.S. § 807(3)(D). It may also be important for the Court to know that the position of the Town of Greenville in the underlying proceedings was to withdraw as an "intervenor" because the Board of Selectmen of the Town was divided over whether to support or oppose the plan, and therefore the Town of Greenville participated in the underlying proceedings, unequivocally, as a "neutral" municipal party-in-interest. Hearing Transcript December 12 vol. II of II at 315-16 (Simko testimony at lines 10-13). Indeed, the Town of Greenville's participation in the underlying proceedings – and the Commissioners' collective understanding of any evidence submitted by the Town of Greenville – was addressed and informed by John Simko's own response to the specific question from Commissioner Laverty on this very issue of Greenville's position on the plan and role in the proceedings. The

When asked what "weight" could be placed upon these written public comments, Commissioners were advised that they could give whatever weight they deemed appropriate, but recognizing that there are different levels of participation and different forms of evidence – implying that the evidence from the parties who presented witnesses under oath for live testimony might be afforded greater weight. A.R. 547 (September 23-24, 2008 Deliberative Sessions, Attorney Reid response to question from Commissioner Hilton). That is the very issue – and public support was clearly an issue. The Commissioners were entitled to know that the "public support" presented by the Applicant at the hearing in the form of intervening groups, might have actually been paid for by the Applicant, in the form of an agreement to reimburse all costs and expenses of participation.

LURC makes a significant concession in its memorandum submitted to this Court on the pending motion. LURC notes for example the examination rule at the hearing – where parties were permitted to cross-examine only adverse witnesses, and were not allowed to develop direct testimony or ask leading questions of "witnesses offered by other parties with aligned interests." LURC Memorandum at 8. LURC states "these portions of the hearing transcript show the Commission's attentiveness to ensuring a fair proceeding in light of obvious allegiances among the many intervenors." Id. And that is precisely the point: those "obvious allegiances" ran far deeper, and were much more profound, than what LURC now characterizes as mere

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Town of Greenville stated that it was "neutral" because some relevant portion of its governing body did not wish to publicly or officially support the Applicant's development plan. Hearing Transcript December 12, 2007 vol. II of II at 315-16.

"allegiance." The support for Plum Creek's plan was not based upon mere "allegiances." It was based upon what possibly appears to be a preset plan that Plum Creek would pay for the participation of all of these separate groups and of all of their witnesses. That is more than a mere "allegiance" in terms of subject matter of evidence, or in terms of financial support provided by Plum Creek for the groups to start up as entities or in the form of occasional donations by Plum Creek to the groups' general funds. If it was an orchestrated plan, as described in more detail below, then the point is not so much that there was "an allegiance" between these parties. The question becomes whether – by Plum Creek's payment of the litigation expenses of these groups, which were all significant expenses (by some reports in the $75,000 range for some groups) – Plum Creek rendered each group in issue nothing more than a mere extension of the applicant. And we emphasize that, at this stage, the question is not so much whether one agrees or disagrees with this viewpoint; the issues are just whether the record should include the evidence, in order to make the argument, and whether the Commissioners knew of the extent of this participation, and how that may have factored into the Commissioners' (or its staff and consultants') views of the evidence and credibility afforded to witnesses.

What we know from the newspaper reports are that apparently at least five "groups" – the Coalition to Preserve and Grow Northern Maine, the Piscataquis County Economic Development Council, the Somerset Economic Development Corporation, the Maine State Chamber of Commerce, and the Maine Snowmobile Association – all received reimbursement of their litigation expenses from the applicant, Plum Creek. See attached article, Moosehead Messenger (January 8, 2010), marked NRCM Reply Memo Exhibit1.[4] It appears now based upon disclosures in this report – appearing to stem from the Maine Snowmobile Association

[4] It appears that other groups may have also been involved, such as the Professional Logging Contractors of Maine, or the Maine Bowhunters Association (this latter entity was jointly represented by counsel who had entered an appearance for the Maine Snowmobile Association).

representative – that orchestration of the plan to cover all supporting parties' litigation expenses involved each organization submitting their "bills" to the Coalition to Preserve and Grow Northern Maine, who then in turn submitted those "bills" to Plum Creek for reimbursement to the various groups, in essence functioning in what might be viewed as a "clearinghouse" for the payment of litigation expenses. We don't know if all of the groups in issue had their expenses reimbursed in this fashion or whether some groups submitted expenses directly to Plum Creek.

This Court should, however, be aware of those portions of the record , described below, where these specific issues were broached, and one critical instance where the inquiries were truncated by objection from counsel for the Coalition, and perhaps unintentionally by comments from the Chair of the Commission. This Court must also review those portions of the record, which will be outlined below, where Plum Creek overtly took the position that the witnesses from these other groups were not "its witnesses" and even chose to attempt cross-examination of these witnesses and ask questions of them, using as a basis that they were not "its witnesses." A.R. 432(E)(1) Hearing Transcript December 5, 2007 vol. II of II at 220. There is now a suggestion that, unknown to LURC Commissioners, and presumably unknown to LURC staff and consultants at the time, these were, in essence, Plum Creek witnesses, because Plum Creek was paying for them; or at least this issue of bias, in fairness, should have been allowed to be developed as part of the record and not excluded from lines of inquiry.

First, the Maine Snowmobile Association answered on the record that it had not received any financial assistance from Plum Creek in any way:

> Q. Mr. Meyers, I would like to know if Plum Creek has donated money to the Maine Snowmobile Association?
>
> A. No.
>
> Q. Has Plum Creek provided financial assistance to the Maine

Snowmobile Association in any way?

A. No.

A.R. 432(E)(1) Hearing Transcript December 12, 2007 vol. II of II 146 (lines 4 – 9). This question and answer appears to be contradicted by the Maine Snowmobile Association's statements to the press, reported on January 8, 2010 in the Moosehead Messenger. Exhibit 1 (attached).

The Maine Bowhunters Association – an entity that participated jointly with the Maine Snowmobile Association and the Alliance of Trail Vehicles of Maine – answered questions on financial donations from Plum Creek with a "not to my knowledge" response. Id. Hearing Transcript December 6, 2007 vol. II of III 148-49 (lines 19-21, and 25 to line 2).

Next, there is a telling moment when the issue was broached with the Coalition to Preserve and Grow Northern Maine. It is important to note that the panel of Coalition witnesses appeared in the proceedings temporally before the panel that had PCEDC and SEDC witnesses on it. In light of the way in which the issue was broached with the Coalition, it appears that the Coalition effectively enabled a sustained objection to the lines of inquiry, which had they been allowed to continue, might very well have revealed the nature of the arrangement that the Coalition would act as a kind of "middle man" to reimbursement of all litigation expenses *by the Applicant* for various supporting groups. We do not mean to be casting any aspersions at this point in the proceedings, and do not discount the fact that there may be alternative explanations dispelling concerns of the Petitioners and others in the press and in the public who have noted the issue. At this juncture, we are merely asking to take the succinct evidence – evidence ultimately relevant to the issue of witness bias and credibility. The point of many Law Court holdings is that relevant evidence of witness bias is almost always admissible, to be argued

however a party tactically sees fit. See Todd v. Andalkar, 1997 ME 59, ¶ 8, 691 A.2d 1215 ("It is well established that both bias and prejudice are of great value in assessing credibility, and courts liberally admit evidence showing relationships or circumstances tending to impair a witness's impartiality."). There is now significant evidence of witness bias that was not brought to the Commission's attention during the adjudicatory proceedings, and which should have been. The relevant exchange involving the Coalition witnesses went as follows:

> MR. GLAVINE: I'm sorry.
>
> MR. FEDERLE [counsel for the Coalition]: Mr. Chair, I'm not sure where this is headed, but I will suggest that if it opens up lines of questions around the formation of the group, I'm not sure that it has any useful benefit for the Commission in deciding the question that's before it.
> I also submit that it's likely to open up that door for every other intervenor group, and you may end up wasting a lot of time running down those ropes.
>
> MR. GLAVINE: Mr. Chair, I'd like to just state that in fact my intention in this line of questioning is to reveal to the Commission the basis foundation and the funding for this organization against with each of these individuals submitted testimony on behalf of the Coalition.
> I think it would be important for the Commission to understand the foundation, where that organization came from.
>
> MR. REID: If the witnesses are able to respond to questions about that, you can ask those questions; but what you can't do is to provide them with your understanding of the answer. If it's not already reflected in the record and if they're not able to testify, it's not independent.
> So if you want to ask them something about how the group was formed, you can ask them whether they know how the group was formed, but you can't tell them, for instance, are you aware of that and then provide your understanding.
>
> MR. GLAVINE: Understood. And if I have new evidence I would like to submit with regard to that, that's not possible.
>
> MR. REID: No, not at this stage.
>
> MR. GLAVINE: All right. I'll move on a little bit, Craig.
> BY MR. GLAVINE:

Q. Mr. Watt, do you have any idea how the financial backing
of the Coalition?
A. I have absolutely no knowledge of any of that, Jim. I'm
simply a member, I'm not an officer. I don't have anything to do with any of that.

. . .

MS. SMITH: My name is Christina Smith representing
Native Forest Network, and I have some questions. I'm going to
try not to repeat some of the same questions. I think they are
along the same lines, but maybe I'll reformulate them.

CHAIRMAN HARVEY: Jerry will tell you.

MS. SMITH: Okay.
Has your group ever received any financial funding
from Plum Creek, yes or no?
MS. DUMONT: Yes.
MS. SMITH: Were any of you present at the first
meeting of the Coalition to Preserve and Grow Northern Maine?
MR. WATT: (Indicates no.)
EXAMINATION OF JENNIFER DUMONT
BY MS. SMITH:
Q. Did Plum Creek pay for the literature, hats, gloves,
shirts, and other promotional material that your group has
been distributing?
A. The Coalition pays for things we distribute.
Q. But with funding from Plum Creek; correct?
A. We received funding from Plum Creek, yes.
Q. Would you say that Plum Creek provides funding for a
majority of your expenses for your group?
A. Yes.
Q. What percent? 80, 90, a hundred percent? Just a guess.
A. I don't know; I don't have a guess.
Q. A hundred?
A. I don't know.
Q. Your attorney, Mr. Tom Federle, has been present each day
during these hearings. Is he being paid to be present
here?

MR. FEDERLE [counsel for the Coalition]: I'll help Jen out. Jen or any others
are happy to answer that question, <u>but I do ask the question to
the Commission how far we want to open this door because it
cuts a lot of different ways for a lot of different groups.</u>

CHAIRMAN HARVEY: I think we get the message,
Christina. I know it doesn't really -- pursuing this line of
questioning is -- we know what your point is. Mr. Glavine has
made it. They've testified to it.

MS. SMITH: Okay, great.

CHAIRMAN HARVEY: If you've got some substantial questions about their testimony, I'd encourage you to go in that direction.

A.R. 432(E)(1) Hearing Transcript of December 10, 2007 vol. I of II 94-95, 99-101 (emphasis added). It is understandable how the opposing intervenors – all of whom had very limited time and resources generally for development of evidence on cross – did not have the opportunity to pursue further the line of inquiry in issue. In light of this exchange relating to the Coalition's witnesses, and the Chair's comment that "we know what your point is" (when in fact it is now clear that the Chair may not have understood the ramifications or potential depths of the inquiry), an interposed objection from the Coalition's lawyer that was upheld by the Chair cut off this line of inquiry. Then, added to this observation is the fact that the Coalition witness, when asked whether Plum Creek was paying "a majority of your expenses for your group" did not note in her response the vital point that the "Coalition's expenses" might also be, arguably, the expenses of many of the other supporting groups. One can infer more fully now, from subsequent disclosures to the press, the more equivocal nature of the Coalition attorney's objection to the line of inquiry because "it cuts a lot of different ways for a lot of different groups." Id. at 100 (lines 22-23). If the Coalition was objecting to the inquiry because, in truth, the Coalition was acting as a kind of clearinghouse for payment of supporting groups' expenses, that was not made clear at the hearing, and the line of inquiry that may have led there was ended by this sustained objection from the Coalition.

This is far more than what LURC characterizes in its opposition memorandum here as "intervenors coordinating their efforts" during the hearings. LURC Memorandum at 8. This is intervenors acting as a functional extension of the Applicant, because the intervenors are being paid to participate by the Applicant in all respects. Indeed, LURC's present characterization of

the issue reflects precisely the problem. It is not, as it appeared, separate parties merely "coordinating their efforts" tactically (the way for example separate entities like Maine Audubon and NRCM coordinated their efforts through voluntary consolidation); it is in fact the Applicant *paying for* all of those efforts.[5]

With respect to the Maine State Chamber of Commerce, the issue comes to the fore again. The Maine State Chamber of Commerce was asked:

> Q. Do you stand to benefit economically in any way from endorsing Plum Creek's plan or speaking on their behalf?
>
> A. I'm before you today, certainly, well before I invested in that plant. But I would love to think that my company would prosper from development there. I would love to have people buy furniture that would be available for sale. But that's not why I'm here.
> Clearly, this position of my work was taken months before I was even aware Moosehead Furniture was no longer going to be inexistence.

Hearing Transcript December 5, 2007 vol. II of II at 212.

In context, it is essential to note that the next significant step in the hearing involved Plum Creek's own attorney, Attorney Newton, coming forward to begin to "cross-examine" a PCEDC witness (Kittredge), followed by examination of the Maine State Chamber of Commerce witness quoted above, Dana Connors. When an objection was raised for violation of the rule against examination of aligned witnesses, Attorney Newton responded "it's not my witness." Id.

[5] In brief correction to Plum Creek's statement in footnote 6 on the last page of its memorandum, where it is suggested that NRCM and Maine Audubon "should have been consolidated" – and while we recognize that Plum Creek's current counsel was not counsel of record in the proceedings below (Plum Creek was represented by the law firm of Preti Flaherty) – it is noteworthy that throughout the proceedings NRCM and Maine Audubon *were* in fact consolidated for all purposes. They filed all pleadings and position papers jointly, presented joint opening and closing statements, were provided only one opportunity for joint cross examination of witnesses, etc. NRCM and Maine Audubon voluntarily consolidated their positions, in the spirit of good faith, in the spirit of cooperation, and in furtherance of the Commission's encouragement that intervening parties consolidate whenever possible for the sake of efficiency. Plum Creek and the several aligned intervenors in issue should not be raising questions about NRCM's good faith and voluntary consolidation with another opponent of the plan.

at 220 (line 19).[6] Then, Plum Creek's counsel turned to Peter Vigue – a witness presented by SEDC, who was on that same panel of witnesses – and examined him, as if he too were not Plum Creek's witness. Id. at 222-25. Clearly, the point here is that this left the impression that Plum Creek was not treating these witnesses as its own. It did so without disclosing the fact that these witnesses' time, efforts, and participation in the proceedings were being paid for and reimbursed by Plum Creek – or that there was an intention to do so (if indeed, that is what the additional evidence will show).

Maine State Chamber of Commerce witnesses also underscored this impression of independence from Plum Creek, signifying that while they had contact with Plum Creek's attorneys prior to the hearing, Plum Creek's attorneys did not have a role in assisting with development of opinion testimony for purposes of the adjudicatory proceeding, and that the Maine State Chamber of Commerce had its own attorney for that period. Hearing Transcript December 5, 2007 vol. II of II 175-177. While there may be nothing at all wrong with one party in litigation paying another party's legal expenses, including paying for the co-party's attorney, in matters such as opinion evidence of proffered "expert witnesses" it does make a difference to the decisionmaker in judging the weight to be placed on an opinion or the credibility of the witness, to know that all of these expenses are being paid, or are planned to be reimbursed in full, *by the applicant.* There may also be a duty for parties to disclose alliances between them, when those alliances are not apparent to the factfinder or decisionmaker, such as under the analogous rule in jury trials that requires in certain circumstances the disclosure to the tribunal of settlement agreements between parties who appear to be "adverse" in open court. See, e.g.,

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[6] The reason why Plum Creek came next in the order of parties' questioning, following the Moosehead Region Futures Committee, is that the questioning was arranged alphabetically by party and "Plum Creek" followed that party in alphabetical order. (NRCM was consolidated with Maine Audubon – "MA-NRCM" – and therefore came before Moosehead Region Futures Committee in the order of questioning.)

England v. Reinauer Transportation Companies, L.P., 194 F.3d 265, 274-75 (1st Cir. 1999) (discussing criticism of "Mary Carter" agreements). Here, where counsel for the applicant states on the record that "it's not my [client's] witness" and attempts to cross-examine that witness, for whatever purpose, an appearance of independence is affirmatively advanced by the party. The public and the Commission have the right to know about financial arrangements that wholly or arguably undermine that purported independence. This is especially true between established entities – such as the Maine State Chamber of Commerce – that in the public perception are already viewed as separate entities from the applicant. While there may be an "obvious allegiance" (to use LURC's present phraseology) between the Maine State Chamber of Commerce and Plum Creek, the crucial depth of that allegiance beyond mere substance of opinion testimony, going to the heart of financial reimbursement for the full preparation and presentation of opinion testimony, was unknown to the other participants and the Commissioners.

Throughout the Final Decision of LURC (A.R. 597), the decision contains significant credibility determinations or references made to the witnesses or to the participation of these intervenors – whose collective participation we now understand may have been paid for by Plum Creek. Despite valid efforts to elicit the nature of that evidence at the adjudicatory proceedings, the evidence was not disclosed. The Law Court has said that exclusion of evidence of bias in opinion testimony is rarely "harmless error," and affects the substantial rights of parties to adjudicatory proceedings. See Todd v. Andalkar, 1997 ME 59, ¶ 8, 691 A.2d 1215 ("'Bias is never a collateral matter nor one on which the cross-examiner is bound to take the witness's answer. Extrinsic evidence to prove bias is admissible. Nor is it necessary to lay any particular foundation to prove a witness's bias or personal interest.' Field & Murray, *Maine Evidence* §

607.2 at 6-25 (3d ed. 1994) (citations omitted)").

In this matter, Plum Creek had already paid, as a matter of public record, extraordinary sums (approximately 1.7 million dollars) to LURC in order to fund LURC's staff and consultants' time in reviewing (and ultimately drafting for the Applicant) the development plan that was ultimately approved. These payments were in the form of legally authorized extraordinary fees, provided for by Maine statute. 12 M.R.S. § 685-F. If, however, in addition to 1.7 million dollars paid to LURC, the Applicant also paid the litigation expenses of several other groups who had pledged "allegiance" to Plum Creek in the proceedings in exchange for reimbursement of those groups' litigation expenses, that is an extraordinary set of circumstances that the public and the Commissioners each at least had the right to know. The Commissioners can choose to ignore it, or can choose to say they "get it" and it does not make a difference to them, but the point is that the Commissioners are entitled to consider it as vital evidence of bias. The proceedings deprived them of that opportunity. That deprivation was the combination of a range of occurrences, from witnesses such as the Maine Snowmobile Association who denied any financial support, to the Coalition's objections, or to Plum Creek's dealings with the Maine State Chamber of Commerce witnesses that dispelled suggestions of a financial connection with witnesses, when in fact there might have been one. Plum Creek affirmatively stated that witnesses from these other groups were "not Plum Creek witnesses" and the several groups were treated as independent parties with separate rights of cross-examination, submission of pleadings, unconsolidated with the Applicant. It is a potential bias or prejudice that was interlaced throughout the proceedings, but was never known. And it occurred in proceedings where "public support" for the proposed development is one of the several legal criteria or factors that the decisionmaker takes into consideration for approval.

Plum Creek's main response is simply an argument that Petitioners have "no legitimate need for this evidence" and "appear to be using this as an opportunity to gain information that they believe will aid them in their fundraising efforts or in their efforts to impugn Plum Creek's reputation." Plum Creek Opposition Memorandum at 9. This reasoning is cryptic. The Court does not rule on matters of bias and evidence based on whether or not a party's "reputation" will be or will not be harmed. But in any event Plum Creek has already told reporters that it reimbursed these several groups their litigation expenses for this case. There is no harm in having the record reflect what has already been hinted at – if not disclosed in significant detail – already in the public domain. How the granting of this motion will aid NRCM in its fundraising efforts is an equally cryptic step in logic, and probably requires further elaboration from Plum Creek before such rationale can be given any consideration.

Plum Creek misses the point entirely when it argues that by the Petitioners' logic, the Petitioners should also have to disclose how they mustered the resources to participate in the proceedings. Aside from the fact that NRCM (with Maine Audubon) drew upon pro bono in kind services of undersigned counsel and used its own funds (not some other participant's funds) to retain expert consultants and expert witnesses, the point is that NRCM and Maine Audubon were not *the applicants* here. This is a case where the *Applicant* may have paid for the participation of supporters, while leaving the impression that the supporters' participation was not so completely tied to the Applicant's funding. While there may be a different "spin" that Plum Creek or other participants might put on the nature of the question, the point at this juncture is that the evidence should come in first, and the parties can argue about the significance or weight of that evidence and its impact on the proceeding later on, in their briefs.

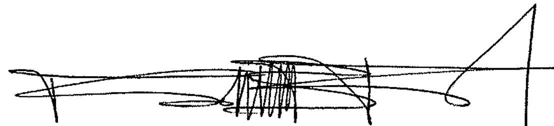
There has been no waiver of the issue. It was clarified in the proceedings that any party

wishing to object to testimony on the grounds of materiality, relevance, or other evidentiary issues, does not necessarily waive objection by not immediately interposing objection during the examinations (Hearing Transcript December 12, 2007 vol. II of II 364-366), and that in any event, on this issue, some witnesses' answers, some objections, and comments from the Chair, combined to remove the *opportunity* for participants to explore these issues fully – see the testimony of Maine Snowmobile Association, Maine Bowhunters Association, Maine State Chamber of Commerce, and the Coalition testimony in conjunction with its attorneys' objection, all discussed above. In fairness, the parties were encouraged not to be repetitive in their questioning, even if their questions were explored by another party. Each time the issue of financial support was broached in the case, the truth of the arrangements for reimbursement in issue did not surface. We are not casting aspersions, simply noting that there was an attempt to explore these issues and in so doing, for a combination of record circumstances set forth above, the truth did not surface. It is on a matter of fundamental bias, impacting the substantial rights of the parties, leaving proceedings fundamentally skewed. If most parties who intervened in order to present opening or closing statements or to testify in favor of the Applicant were in fact paid to do so by the Applicant, while at the same time appearing as separate and purportedly independent parties, that is a potential bias that could require reversal. This issue deserves full treatment and consideration on appeal, and in order to do so the motion to take additional evidence should be granted.

In the final analysis, this Court should grant the motion to take additional evidence under M.R.Civ.P. 80C(e) because there are "alleged irregularities in procedure before the agency which are not adequately revealed in the record," or on the grounds that the additional evidence of the depth of Plum Creek's financial association with other intervenors – beyond mere "obvious

allegiances" in terms of substance of testimony – "could not have been presented or was erroneously disallowed in proceedings before the agency." 5 M.R.S.A. § 11006(1). The request for additional evidence here is appropriately asserted and relevant to an issue of bias or prejudice in the adjudicatory administrative proceedings. See York Hospital v. Department of Human Services, 2005 ME 41, ¶ 20, 869 A.2d 729, 735. We respectfully request that this Court grant the motion to take additional evidence.

Dated at Portland, Maine this 5th day of March, 2010.



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Plum Creek paid legal fees for five groups backing Moosehead plan

By Suzanne AuClair

Plum Creek Director of Communications Kathy Budinick acknowledged Tuesday, Dec. 15, the company paid tens of thousands of dollars in legal fees for five groups to participate in the formal hearings. Budinick said those included: the Piscataquis County Economic Development Council, the Somerset County Economic Development Council, the Maine State Chamber of Commerce, the Coalition to Grow and Preserve Northern Maine, the Maine Snowmobile Association, and the Professional Logging Contractors of Maine.

Plum Creek was the applicant for the largest development and conservation package negotiated in Maine history. The plan rezones the Moosehead Lake Region. Budinick and those groups that accepted the payments from the company said paying the fees in no way influenced the testimony or conduct of the formal hearings.

Budinick, contacted before the holidays, said that while she could not say definitively if the company offered to pay each of the organizations or if each individual organization solicited their financial help, she said in general those groups came to Plum Creek seeking assistance and the company was glad to do it.

"We recognize that the hearings required a lot of people's time to participate and we were very grateful for the support," said Budinick, adding that the payments did not come from the Plum Creek Foundation, which is funding budgeted to contribute to various non-profit organizations within the communities where the company operates.

Thomas Kittredge, executive director of the Piscataquis Co. Council, said that in order for his organization to be well represented in the hearings his board thought it really needed to accept the legal assistance, "I'm not trained as an attorney and we didn't want to spend taxpayers' money," he said, adding that he thought other groups that participated in the formal hearings were at a disadvantage from those who were represented by a legal team.

Jim Batey, executive director of the Somerset Co. Economic Dev. Council, agreed. In a later interview Batey said it became apparent early on that his group would not be able to meet all of

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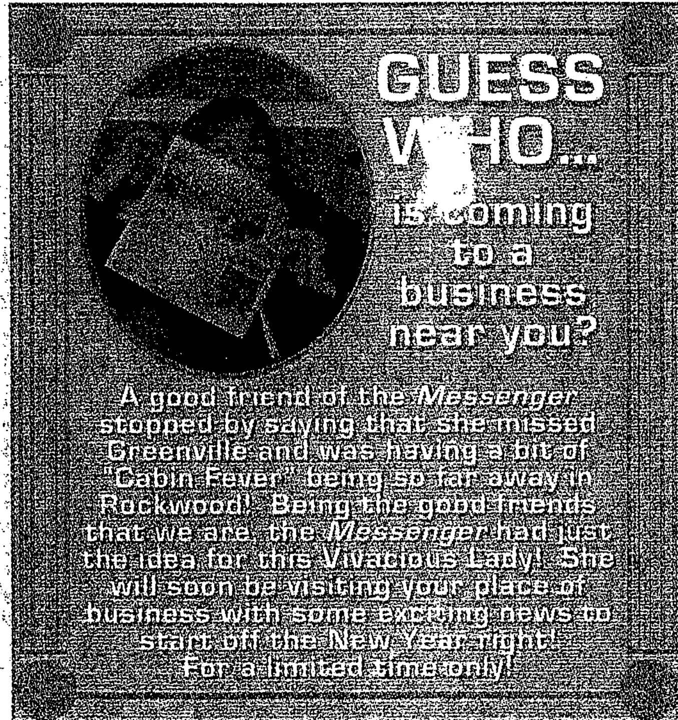
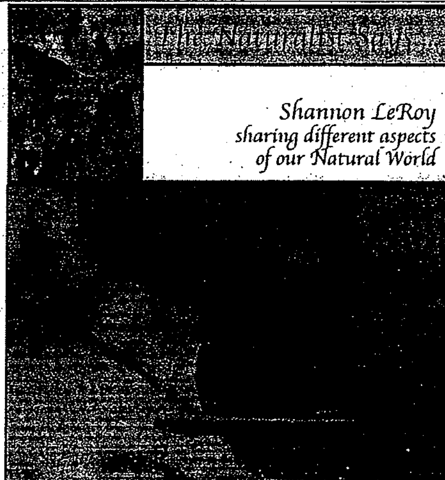
PLUM CREEK



Local News



An almost full moon followed me to work this morning. It was quite vivid even against an ever brightening morning sky. The moon has a mystical power over me. I have never been sure exactly why but if I had to try to pin it down I would be inclined to say that it's because it's existence helps bring me out of my little world and makes me realize that there is more to my existence than just every day issues and problems. It connects me back to the earth.

But that is not what I intended to write about this week. With the New Year here and winter in full bloom it's time to talk about the Great Backyard Bird Count. Every year in February, Cornell University and the National Audubon hold the Great Backyard Bird Count (GBBC). Bird watchers and back yard bird feeders across North American become Citizen Scientists by participating. Greenville and surrounding communities have participated since 2005 and I would like to invite everyone who feeds the birds in the winter to join the fun.

One might ask, Why count birds? To start with, ornithologists across the country use the information gathered from the count to track bird populations, figure out where irruptive species like finches are during winter, and see if certain species are being affected by known diseases like West Nile Virus. The analysis of the data is used to determine movement of species in correlation with snow depths and much more. By becoming a citizen scientist and submitting your checklist during the Great Backyard Bird Count you are providing data that no group of ornithologists can do on their own. Last year alone 93,629 checklists were submitted across the United States and Canada with 619 different species recorded, and 11,550,200 individual birds counted. This kind of data would not be possible without the help of people like you and me. For the next few weeks this column will highlight a winter bird and correlate the featured bird with the past results from our area.

The Common Redpoll (Carduelis flammea) is this weeks backyard bird. This streaky, plump, little finch with a reddish top, and a black goatee, (males having a reddish bib under the chin) is very common to the Maine Woods during the winter. Of the past five years the Common Redpoll has ranked number one in the "most numerous species category".

During the summer the Common Redpoll breeds in the arctic and subarctic, moving south in the winter to southern Canada and the northern border states. Common Redpolls are one of the irruption species discussed above. This means every few years when food becomes scarce or temperatures become too cold it moves even further south. In the east, during irruptive years, the Common Redpoll can be found as far south as northern Tennessee and North Carolina. As with most finches the Common Redpoll and it's close cousin the Hoary Redpoll are very social. They can be found running in large flocks that can number in the thousands. Many times there are Pine Siskin's and American Goldfinches intermingled in the flock. Their calls are chitts and churrs, that many associate with the goldfinch because they are so similar in sound. Their flight pattern reminds me of a basketball, up and down. They flap their wings very rapid for short spirts and then glide. They call constantly while in flight and are a noisy group. A cool fact about redpolls is that they have throat pouches where they can temporarily store seeds. This allows them to fill up at a feeder then fly off to a sheltered place to eat at leisure.

In 2009 in the Moosehead Area and surrounding communities, the Common Redpoll count was 534 birds. That number made it was the most numerous of all birds species counted. This is also true in 2008 and 2006 although the number of birds documented was considerably lower.

Each year as the participation increases, not just in Greenville but in Beaver Cove, Rockwood, Shirley, Monson and Kokadjo, we get a better look at our local birds populations. More information about the Great Backyard Bird Count in the weeks to come or go to www.birdsource.org/gbbc/ and check out this bird or any other you might be curious about.

Moosehead Water Wells
Greenville, Maine
695-2493

Plum Creek

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the filing deadlines. He said he couldn't remember how the assistance came about but that the fees were paid for by the coalition after a series of conversations were held between the supporting groups. He also said he felt that if intervenors could not meet the workload during the hearings, then he thought they could be considered at a disadvantage.

Kittredge said that while Plum Creek paid for his organization's participation, the council was in no way beholden to it, "We felt this was the best approach to take, but the testimony we provided was our own."

He said he did not recall if the Piscataquis council was asked by Plum Creek to be funded but added that he thought that if the funding source had been known at the time of the hearings, then the council might have been unfairly judged, "We felt we were complying with what LURC wanted and didn't feel like we were doing anything wrong, but thought it was best not to broadcast it," Kittredge said.

Small organizations, like the Moosehead Region Futures Committee, participated on its own and were not invited to be funded. The MRFC executive director did apply and received some grants, combined with membership support, which helped that organization remain involved.

Other large organizations, like the Natural Resources Council of Maine, found lawyers who provided in-kind services, according to Cathy Johnson, NRCM executive director.

All of the groups contacted that accepted company payment to participate said that they did not believe the payments influenced how they participated. Critics of the plan disagree.

"I think it does taint testimony because they were giving testimony as if they were completely independent," said Johnson. "In fact, they were treated by LURC as if they were. They were all allocated time for testimony and cross-examinations separately. We wondered where all these groups found the funding to support those lawyers."

Johnson went on to say that she believed Plum Creek wanted participants to believe that these were independent parties.

"Parties are likely to be straight forward and independent if they are not being paid by [the applicant] to do it. It undoubtedly influenced their answers," said Johnson, who likened it to political action groups that donate significant amounts of money to government representatives in order to have access to them and gain influence over them.

Bob Meyers of the Maine Snowmobile Association called the payment to participate a "non-issue."

"What it became was an issue of 'pay to play'," said Meyers. "We wanted to participate and knew we'd need a legal team. It was a very complex process, so the offer was made through the coalition [to Grow and Preserve Northern Maine] -- they were coordinating all the groups that supported the plan. To me, it's no different than Plum Creek writing the big checks to LURC. It was providing assistance because we needed the help."

According to Meyers, the funding by Plum Creek was organized through the coalition, whereby his group submitted bills to the coalition, which were then forwarded to the company.

Meyers was the only one contacted who said he thought he could have participated as an intervenor without accepting the money, but added, "We have limited funding, so it was just real simple; we accepted the funds. This was just a huge project. Even with the help, I can't tell you how much time I spent on it. I think it's disingenuous for other groups to say they weren't looking [for donations]. It costs money to make things work."

All groups contacted -- whether supporters or critics of the plan -- said they thought they needed legal teams to effectively participate in the hearings.

During the Commission's formal hearings on any proposal, each participating intervenor is allotted a certain amount of time to cross-examine other intervenors in order to analyze a proposal.

In the Plum Creek hearings, the room became lined with teams of lawyers, strategizing in different corners of the building. As a result, all groups contacted said they required full-time legal help in order to meet filing deadlines and keep up with the barrage of paperwork, formal cross-examinations, and testimony that needed to be worked through. Critics say that the process became unfairly weighted toward the applicant when it used its wealth to use the allotments of time, effectively manipulating the review.

Johnson noted that Plum Creek had hired multiple law firms and came into the proceedings with 40 to 50 witnesses, so she said that her own group felt that in order to participate in the LURC proceedings it also needed to assemble a team that would be able to respond to the level of detail required and go head to head with them. The Commission says there are no rules in the process against an applicant paying legal fees.

Catherine Carroll, executive director of the Land Use Regulation Commission, said that the public process remains the same and anyone may get involved, "There is no prerequisite for having a lawyer as an intervenor. No, it's not a requirement, but in my experience most intervenors do have some sort of legal assistance."

Carroll said she continues to have faith that the Commission's public process does work and does not foresee a change to it anytime in the future, "We all know this land use project [Plum Creek's plan] was the largest the state has ever seen. It was most unusual -- extraordinary -- and we may not ever see another like it again."

Carroll said this week she thought the Commission's formal hearings remain fair, "You do not need any kind of [legal] status as an intervenor and LURC doesn't expect that to change. Everyone has a right to participate. The commissioners did commend some of the grass-roots groups for their ability to participate with the limited resources that they had available."

Note: The writer participated in the hearings with the Moosehead Futures Committee.

Try This New Year's Resolution
Learn Something New!
Sport, Craft, Instrument, Conflict Resolution, Foreign Language, Computer Program, Wii Game