

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No.

NATURAL RESOURCES
COUNCIL OF MAINE,

Petitioner

v.

MAINE LAND USE
REGULATION COMMISSION,

Respondent

PETITION FOR REVIEW UNDER RULE 80C

NOW COMES the Petitioner, the Natural Resources Council of Maine, by and through undersigned counsel, pursuant to 12 M.R.S. § 689 and Rule 80C of the Maine Rules of Civil Procedure, and under the provisions of Title 5 M.R.S. § 11001 et. seq. of the Maine Administrative Procedure Act, and hereby petitions this Honorable Court for review of the attached Commission Decision in the matter of Zoning Petition ZP 707, the Concept Plan for the Moosehead Lake Region for certain lands under the ownership of Plum Creek Maine Timberlands, L.L.C. and Plum Creek Land Company, Piscataquis and Somerset Counties.

Under this Commission Decision, the Maine Land Use Regulation Commission violated its own rules and statutory authority, and ignored its own determination that “Plum Creek’s October 2007 Zoning Petition did not satisfy all of the regulatory requirements for concept plan approval.” Decision at 4 ¶ 3. Instead, the Commission

transformed the ongoing adjudicatory process into an unprecedented and unlawful process wherein the agency staff rewrote the application and served as advocate for the applicant, and the Commission approved the plan proposed by its own staff, thereby depriving the public of a fair, open, and unbiased process. In addition, the plan that staff created unlawfully included in it provisions allowing the applicant to be paid for conservation measures that the applicant was required by law to provide.

The Maine Land Use Regulation Commission's September 23, 2009 Decision was received on September 29, 2009 by the Natural Resources Council of Maine, by and through the offices of the undersigned.

Under 5 M.R.S. § 11002(2), Petitioner states:

1. The Natural Resources Council of Maine (hereafter "NRCM"), hereby petitions for review in its capacity as Intervenor in the above-referenced matter regarding the proceedings on Zoning Petition ZP 707 before the Maine Land Use Regulation Commission (hereafter "the Commission"). NRCM is an aggrieved party under the Decision of the Commission, and seeks review of said Decision and all administrative process, application of law, and method of investigation giving rise to said Decision. This petition for review includes, but is not limited to, seeking review of the ruling of the Commission which refused to vote on either an approval or denial of the landowner-submitted Zoning Petition before it, and which thereby failed to deny Zoning Petition ZP 707 and the attendant Concept Plan, at the conclusion of the adjudicatory hearings on January 25, 2008, and continuing thereafter, over objection of Petitioner NRCM and of other Intervenors and/or Interested Persons.

2. The Petitioner NRCM is a not-for-profit tax-exempt corporation dedicated to the protection of Maine's environment and the wise use of the State's natural resources through a program of advocacy, legal defense, and education. NRCM has a membership and support base of about 17,000 individuals and families. NRCM members reside throughout the State of Maine. NRCM has members and supporters from Somerset and Piscataquis counties and throughout Maine who have a strong interest in protecting Maine's natural areas and wild, undeveloped character, particularly in the North Woods; who support responsible land development and sustainable forest practices that protect sensitive ecosystems and wildlife; and who use and enjoy for remote, low impact recreational experience the Moosehead Lake region, including Lily Bay State Park near a portion of the development zones approved in the subject Decision and Concept Plan.

3. NRCM has a well-established record of involvement in issues of conservation or development in the unorganized territories in Maine. NRCM appeared as an Intervenor before the Commission in other matters, and also participated in previous hearings on the proposal by Plum Creek Land Company to rezone land in the First Roach Pond in Frenchtown Township for development as part of a Lake Concept Plan. NRCM has monitored, and continues to monitor, applications for and the progress of potential development projects in Maine within the Commission's jurisdiction. Specific to the present matter, NRCM participated in pre-application conferences held relating to Plum Creek's Lands in the Moosehead Lake Region, and has been actively engaged in conferences relating to the amended Petition for Rezoning in issue, including entering an appearance at the June 6, 2007 Commission meeting addressing the Provisional Pre-Hearing Schedule.

4. On or about June 18, 2007, NRCM formally sought leave to intervene as a full participant in the proceedings on Zoning Petition ZP 707, including cross-examination of the applicant's witnesses at the adjudicatory hearing, presentation of NRCM witnesses at the adjudicatory hearing, and submission of post-hearing statements or argument, and continued participation in any potential judicial review.

5. After the Commission's ruling on July 11, 2007 to grant conditionally the petition to intervene, on August 10, 2007 the Chair of the Commission by First Procedural Order granted formal Intervenor status to NRCM, under Rule 5.13 of the Commission's Rules for the Conduct of Public Hearings; the basis for granting Intervenor status was that NRCM will be "substantially and directly affected by the proceeding" (Rule 5.13) given its strong commitment, and the strong interest and commitment of its membership base, to the protection and wise use of Maine's North Woods and remote recreation resources. Thereafter, NRCM fully participated throughout the adjudicatory proceedings on Zoning Petition ZP 707 as an Intervenor.

6. In the subject Decision, the Commission explicitly finds that after the adjudicatory hearing, "Plum Creek's October 2007 Zoning Petition did not satisfy all of the regulatory requirements for concept plan approval." Decision at 4 ¶ 3. The Commission also found that "the hearings revealed that various components of the Concept Plan as filed would not satisfy regulatory criteria." Decision at 22 ¶ 8 n. 25. The Decision also notes that after the adjudicatory hearing, the applicant, Plum Creek, "had conceded that the Concept Plan as filed, in light of its size and complexity, was imperfect," and contained "certain flaws, including those identified through the hearing process." Decision at 21 ¶ 7.

7. Rather than acting upon Zoning Petition ZP 707 and its attendant Concept Plan by denying the application, consistent with these findings in favor of denial made at the conclusion of the adjudicatory hearing, the Commission instead began a different procedure, without clear or fair notice or opportunity to be heard, and over the continuing objection of NRCM and other Intervenors. The Commission voted on “procedural options” for the post-hearing process (Decision at 21 ¶ 7), and began an obscure procedure to create “Commission-generated amendments” purportedly based in whole or in part upon the record developed at the adjudicatory hearing and/or upon the opinions or views of Commission staff or specially retained Commission consultants. The Commission did so while at the same time recognizing an administrative duty to rule on the Zoning Petition and Concept Plan that had been submitted by the landowner and that was before it at the conclusion of the adjudicatory hearings, and while recognizing that its rejection of that Concept Plan was required given the many “deficiencies that were identified through the [adjudicatory] process.” Decision at 22 n. 25.

8. The Commission failed to act upon Zoning Petition ZP 707 at the conclusion of the adjudicatory hearing, by failing to deny it; that failure deprived NRCM and the public at large the opportunity to engage – pursuant to existing standards governing scope and authority, and with due and proper notice and opportunity to be heard – an appropriate prospective regional planning process for the Moosehead Lake region.

9. NRCM is aggrieved by the provisions of the Decision which approve, based upon unlawful procedure, the so-called “Commission-generated amendments” to Zoning Petition ZP 707, and which acknowledge the Commission’s failure to deny

Zoning Petition ZP 707 before such “Commission-generated amendments” were undertaken. The resulting Decision thereby grants a change in subdistrict boundaries from the present Management, Development and Protection Subdistrict designations to a Resource Plan Protection (P-RP) Subdistrict, and approves the attendant Concept Plan for the Moosehead Lake Region (attached to the Decision as Attachment B), allowing an unprecedented level of development in scale and intensity.

10. The rezoning and development granted as a result of the Commission’s Decision includes Residential Development Zones in Beaver Cove, Upper Wilson Pond, Long Pond, and the Brassua Lake east shore; Residential Development Zones, including residential-scale commercial development, in Brassua Lake south peninsula, Route 6/15 Corridor, and Rockwood/Blue Ridge development areas; a new Residential/Resort Optional Development Zone, which accommodates residential development and residential scale-commercial development, and also provides the option for resort development (that had never been part of any landowner-submitted petition) in a Moose Bay development area; and Resort Development Zones in the Lily Bay and Big Moose Mountain development areas.

11. NRCM is aggrieved by this Decision, which grants this unprecedented level of rezoning or new subdistrict boundaries for development of a scale and intensity that is inconsistent with the Commission’s Comprehensive Land Use Plan, contravenes governing statutory and regulatory criteria for rezoning, and is the result of the Commission’s refusal to deny Zoning Petition ZP 707 and instead embark upon an unauthorized and unlawful procedure for “Commission-generated amendments” to the landowner’s petition and Concept Plan that was the subject of adjudicatory proceedings

on ZP 707.

12. NRCM is also aggrieved by other significant provisions of the Decision and the Concept Plan set forth in Attachment B to the subject Decision of the Commission, and by the unlawful procedure employed to generate the Decision. Such provisions include but are not limited to the Commission's acceptance of a "Commission-generated amendment" that allows the applicant Plum Creek to meet mandatory conservation requirements to mitigate adverse impacts and provide comparable conservation measures, by selling conservation easements for a multi-million dollar profit to the applicant Plum Creek, when those regulatory requirements mandate, inter alia, a publicly beneficial balance between conservation and appropriate development.

13. The Decision specified that it constitutes final agency action, therefore subject to review pursuant to 12 M.R.S. § 689 and 5 M.R.S. § 11001 et seq. In addition, the Commission's inaction, or the failure or refusal of the Commission to act upon the application before it – i.e., to deny Zoning Petition ZP 707 at the close of the adjudicatory hearing – before engaging in the process of so-called "Commission-generated amendments" that resulted in the Decision of September 23, 2009 on appeal, is subject to review pursuant to 12 M.R.S. § 689 and 5 M.R.S. § 11001.

14. Pursuant to 12 M.R.S. § 689 and 5 M.R.S. § 11001, et seq., relief is sought on the following grounds:

(a) The Commission's Decision is in contravention of the applicable provisions of the Commission's power and authority to initiate adoption or amendment of land use district standards and boundaries, 12 M.R.S. § 681 et seq.; is in contravention of the Commission's Comprehensive Land Use Plan; is in contravention of the Commission's

own rules governing the conduct of adjudicatory public hearings on applications for rezoning and development; and violates established laws governing administrative agency procedure that do not allow an adjudicatory proceeding to be transformed, without notice and opportunity to be heard, into a quasi-rulemaking proceeding that excludes greater public participation in a prospective zoning or regional planning process, that improperly places the Commission's staff and consultants in the role of an advocate, or that fails to comply with statutory requisites for Commission-initiated adoption or amendment of land use district standards and boundaries under 12 M.R.S. § 685-A, including but not limited to, and by way of example, notice and opportunity to be heard afforded to adjoining landowners;

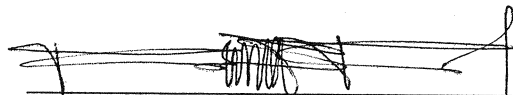
(b) pursuant to 5 M.R.S. § 11007(4)(C), the Decision of the Commission, and the administrative findings, inferences, conclusions or decisions therein, are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by bias or error of law;
- (5) unsupported by substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion.

WHEREFORE, Petitioner NRCM respectfully requests that this Honorable Court reverse and vacate the Decision of the Commission in the matter of Zoning Petition ZP 707 and enter an order of denial of the application in ZP 707; or in the alternative, that the Decision be modified and remanded for entry of a mandated decision denying Zoning

Petition ZP 707 consistent with the Commission's express findings at the close of the adjudicatory hearing that Zoning Petition ZP 707 contained regulatory deficiencies, and with instructions that any new procedure for Commission-initiated regional planning in the Moosehead Lake region be open and public, include consideration of the lands of all landowners in the region, and be carried out in accordance with statutory requirements and the requirements of the rules and standards of the Comprehensive Land Use Plan of the Commission for regional planning and prospective zoning.

Dated at Portland, Maine this 22nd day of October, 2009.



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