STATE OF MAINE
SAGADAHOC, SS.

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

NATURAL RESOURCES COUNCIL OF MAINE, *et al*

Petitioners

v.

LAND USE REGULATION COMMISSION,

Respondent

And

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

Intervenor

BRIEF OF PETITIONER NATURAL RESOURCES COUNCIL OF MAINE

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NOW COMES Petitioner, the Natural Resources Council of Maine ("NRCM"), by and through undersigned counsel, pursuant to 12 M.R.S. § 689 and Rule 80C of the Maine Rules of Civil Procedure, and respectfully submits this Petitioner's Brief, seeking reversal of the September 23, 2009 Decision of the Maine Land Use Regulation Commission ("LURC") 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. & Plum Creek Land Company ("Plum Creek"), in Piscataquis and Somerset Counties.

I. INTRODUCTION.

The LURC Decision must be reversed because LURC failed to deny the Concept Plan at the close of the evidentiary, adjudicatory hearing in accordance with LURC's express findings

and conclusions that the Concept Plan was not "legally approvable," and "would not satisfy regulatory criteria" at the close of the hearing. Decision at 22, n. 25. See also Decision at 4, third paragraph ("following these adjudicatory and public hearings, the Commission [LURC] determined that Plum Creek's October 2007 Zoning Petition did not satisfy all of the regulatory requirements for concept plan approval.").

To be clear, Plum Creek's Zoning Petition ZP 707 was a rezoning petition seeking changes in land use subdistrict boundaries and standards, and seeking approval of the attendant Concept Plan for resort, commercial, and residential development over a 30-year period on land currently owned by Plum Creek in the Moosehead Lake region. See Decision at 3, ¶ 2. Failure to deny the rezoning petition and Concept Plan at the close of the evidentiary hearing, as required by the LURC Commissioners' determination that the Concept Plan "did not satisfy all of the regulatory requirements for concept plan approval" (Decision at 4), had no basis in established procedure, in precedent, or in the LURC enabling statute. Moreover, the failure to deny the Concept Plan deprived the public of the opportunity to participate in an appropriately convened, regional prospective land use planning process for the entire Moosehead Lake region, beyond the present needs or desires of just one landowner, Plum Creek.

Such prospective, regional planning was – and still is – long overdue. LURC's governing Comprehensive Land Use Plan (the "CLUP"),[1] which is the paramount guidance and planning document for all zoning and land use decisions within LURC jurisdiction, had previously identified the Moosehead Lake Region, as a whole, as one of the few selected areas within LURC jurisdiction with "special planning needs" in light of the region's high-value natural resources and the potential threats to those resources from development. CLUP at 110-11.

[1] Me. Dep't of Conservation, Land Use Regulation Commission, Comprehensive Land Use Plan (1997 rev.). The 1997 version of the Comprehensive Land Use Plan was the most current version in effect at the time throughout these proceedings. Subsequent revisions to the CLUP do not significantly impact the analysis set forth herein.

LURC had identified other such areas of "special planning needs" (such as the Rangeley Lakes area, the Millinocket/Baxter area, the Carrabassett Valley area) and prioritized the special needs planning for them. CLUP at 110-13, 155. For example, the Rangeley Lakes area had undergone a systematic and comprehensive prospective land use planning process, with public input and participation, with adoption effective January 1, 2001 of the Prospective Zoning Plan for the Rangeley Lakes Region. In this case, LURC was specifically petitioned on March 18, 2005 to undertake the special needs prospective planning for the Moosehead Lakes Region *before* Plum Creek filed its rezoning and concept plan. LURC chose not to do so, in favor of first reviewing what ultimately turned out to be the woefully deficient October 2007 Concept Plan. But instead of entering a denial of the Concept Plan, and returning to the priority of a prospective regional planning process for the Moosehead Lakes Region (see CLUP at 155), LURC chose instead to initiate its own, hybrid proceeding of rezoning, rewriting land use standards, and approving a "concept plan" for development on Plum Creek's land, that was not in totality based upon Plum Creek's (or any other stakeholder's) petition or request. LURC's administrative actions in this case were unprecedented, followed no established procedural rules for the agency, and deprived the public and the State of Maine of a full and fair opportunity to appropriately plan for zoning and development in the Moosehead Lake Region.

The Moosehead Lake Region is one of the most treasured areas of natural resources and natural outdoor heritage in Maine.[2] The Moosehead Lake area is the great southern portion of the largest and last undeveloped forest in the country east of the Mississippi. There were rules and procedures of LURC in place to protect it, and to protect the key values of this region. The public relied on those rules, and relied on the prospective "special planning" that LURC vowed

[2] See also CLUP at 1: "The North Woods have always possessed a powerful mystique. Residents and visitors alike place a premium on the natural values they find there. Even those who never visit the area value its uniqueness and consider it part of the state's identity."

for itself and for the public to undertake in its Comprehensive Land Use Plan. CLUP at 146 & 110-11. By depriving the public of the right to rely upon those procedures for full and fair prospective regional planning, not tied to just one landowner's massive 30-year "concept plan" for development, and by failing to deny the Concept Plan that LURC itself determined could never be approved, LURC has committed grave reversible error. With so much at stake, LURC failed to follow established procedures that would responsibly protect and plan the future of the entire Moosehead Lake Region.

Now is the key and pivotal opportunity to reverse the devastating effect that LURC's "short circuiting" of the regional prospective planning process has on the region and the State of Maine. The impact is on the State of Maine as a whole, and indeed nationally and internationally, when the treasured natural resources of Maine's North Woods are at stake. As NRCM often emphasized during the proceedings, "once it is gone, it is gone forever." Administrative Record ("A.R.") 432(E1) (Party Hearing Transcript, Opening Statement, 12/03/07) at 115-16, 118-19, 133; A.R. 499(I) at 53. This Court has the opportunity to reverse the process, to make a decision that is not only correct under the law and administrative procedure, but to save this unique region of Maine and the values it holds for all of us.

The September 23, 2009 Decision of LURC must be reversed, with instructions to enter denial of Zoning Petition ZP 707 in accordance with the findings and determination reached at the conclusion of the adjudicatory and public hearings. This will then allow the agency, in accordance with its mandate and with the agency's established procedures, to convene prospective, regional "special planning" for the Moosehead Lake Region. LURC's unprecedented, hybrid "rulemaking" proceeding that followed its failure to deny the deficient Concept Plan – a proceeding involving LURC consultants' recommending and then generating

LURC's own changes in zoning and in concept plan development for Plum Creek – was an unlawful and poor substitute for the region-wide prospective zoning and planning that should have taken place. Such "hybrid procedure" cannot be permitted as the status quo at this important state administrative agency.

II. SIGNIFICANT SUBSTANTIVE AND PROCEDURAL BACKGROUND.

Maine's North Woods is the largest expanse of undeveloped forest in the entire eastern United States, east of the Mississippi River.[3] Within this vast region, the Plum Creek Concept Plan encompassed a Plan Area comprised of Plum Creek's ownership of nearly 400,000 acres in 26 minor civil divisions in Somerset and Piscataquis counties, more or less surrounding Moosehead Lake. Decision at 3. Plum Creek's Concept Plan proposal presented an unprecedented level and intensity of development within a significant part of the Moosehead Lake Region; and although Plum Creek is the largest private landowner in the region, it is by far not the only landowner in the region, and certainly not the only landowner or stakeholder whose interests would be reviewed and factored into a region-wide special planning and prospective zoning process. But as all agreed, in terms of size and intensity of development, Plum Creek's proposal for concept plan rezoning, seeking approval for development of over 2,300 resort, commercial, and residential units, was absolutely unprecedented. It was the largest rezoning and

[3] A key exhibit in the case, the NASA satellite photograph of the eastern United States at night, visually depicts the essence and significance of this core premise. A.R. 324(B13) (NRCM Exhibit 3); see also A.R. 432(E1) (Party Hearing Transcript, Opening Statement, 12/03/07) at 115. The Moosehead Lake Region, within this large undeveloped expanse of forest, is a valued state and national resource of vital and unique significance. Global climate change, and habitat fragmentation, degradation, and destruction, and pressures like human overpopulation and pollution have led to a worldwide collapse in biological diversity within ecosystems, and irreversible declines in natural resources. This lends an imperative to this case, and to the administrative or judicial decisions impacting this region in Maine. That imperative – visually depicted in the NASA satellite photograph – was ever-present during the hearing in this case. In the two years following the public hearing, all of these perils have deepened. The NASA satellite photograph exhibit is attached to this brief for the Court's ease of reference.

development proposal in LURC's history. See Decision at 4, first paragraph.

However, while the Plum Creek petition was unprecedented in scale and complexity, LURC as an agency has exemplified commendable performance in the past as the regulatory administrative agency with "zoning power" jurisdiction, managing and zoning land use over all the unorganized and deorganized territories in the State of Maine. In order to understand and comprehend the full nature of this case, it is necessary to summarize briefly the creation and powers of the Maine Land Use Regulation Commission.

i. LURC Jurisdiction and Power

The Maine Land Use Regulation Commission was established in 1970, by enabling statute of the Maine Legislature, currently codified at 12 M.R.S. §§ 681 – 689. The express Legislative purpose and scope of the enabling statute is:

> The Legislature finds that it is desirable to extend principles of sound planning, zoning and subdivision control to the unorganized and deorganized townships of the State: To preserve public health, safety and general welfare; to prevent inappropriate residential, recreational, commercial and industrial uses detrimental to the proper use or value of these areas; to prevent the intermixing of incompatible industrial, commercial, residential and recreational activities; to provide for appropriate residential, recreational, commercial and industrial uses; to prevent the development in these areas of substandard structures or structures located unduly proximate to waters or roads; to prevent the despoliation, pollution and inappropriate use of the water in these areas; and to preserve ecological and natural values.

12 M.R.S. § 681. See also 12 M.R.S. § 683 ("The Maine Land Use Regulation Commission, as established . . . to carry out the purposes station in section 681, is created within the Department of Conservation . . . .").

The Commission consists "of 7 public members," appointed by the Governor and confirmed by the Legislature. Each commissioner is an unelected official, appointed by the Governor, pursuant to certain minimum statutory requirements such as work or residency within

LURC jurisdiction for an established period of time. 12 M.R.S. § 683. "Appointees to the commission must be familiar with the needs and issues affecting the commission's jurisdiction." Id. Thus, the Legislature delegated to LURC the responsibility of management and oversight of all land use issues in the unorganized and deorganized areas of the State.[4] The so-called "LURC Law" extends state planning control over the unorganized and deorganized townships of the State through LURC in order to "prevent inappropriate residential, recreational, commercial and industrial uses ...; the intermixing of incompatible industrial, commercial, residential and recreational activities; ... substandard structures or structures located unduly proximate to waters or roads; ... the despoliation, pollution and inappropriate use of the water in these areas; and to preserve ecological and natural values." 12 M.R.S. § 681; see also 12 M.R.S. § 683.

Pursuant to its statutory charge to manage the land use planning and zoning in the unorganized territories, LURC essentially exercises two distinct sets of governmental functions: LURC has been delegated the quasi-legislative powers of zoning and planning land uses, as well as the executive or quasi-adjudicatory powers to implement and enforce land use districts (i.e., zones) and land use standards. The statutorily delegated power for LURC to engage in "adoption and amendment of land use district standards, district boundaries and land use maps" within the region, is a delegation of legislative (or, perhaps, quasi-legislative) power – the so-called legislative "power to zone." 12 M.R.S. § 685-A(7-A) & (8). Concomitant to the zoning power (and as explained in more detail below, an essential prerequisite to zoning) is the land use *planning* power. While the land use planning process may often be undertaken in executive branch or committee format at the municipal planning level, ultimately comprehensive land use plans are adopted or approved by the legislative body as acts of policy- or lawmaking. Cf. 30-A

[4] "Unorganized" and "deorganized" areas of the State are those that are not part of an organized municipality (except Indian reservations) and include any townships or plantations where there is no local government to implement land use controls. 12 M.R.S. § 682(1).

M.R.S. § 4352(2) ("a zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body . . ."). Any zoning or rezoning must be consistent with the approved comprehensive land use plan. Both land use planning and land use zoning are ultimately policymaking, quasi-legislative powers. Bog Lake Co. v. Town of Northfield, 2008 ME 37, ¶ 11, 942 A.2d 700, 704; F.S. Plummer Co. Inc. v. Town of Cape Elizabeth, 612 A.2d 856, 861 (Me. 1992); Vella v. Town of Camden, 677 A.2d 1051, 1053 (Me. 1996); LaBonta v. City of Waterville, 528 A.2d 1262, 1265 (Me.1987) (rezoning must be "in basic harmony" with legislatively adopted comprehensive plan). See also City of Old Town v. Dimoulas, 2002 ME 133, ¶¶ 20-21, 803 A.2d 1018, 1024 (holding that "spot zoning" is illegal when the rezoning (1) benefits a single parcel of land or limited area, and (2) is inconsistent with the comprehensive plan).

LURC has been delegated both powers (however debatable the proposition may once have been from a constitutional, separation of powers standpoint) and the statute emphasizes that the power to adopt or amend land use district boundaries and standards is treated as a special form of substantive "rulemaking" under Title 12.[5] 12 M.R.S. § 685-A(1), (7-A) (power to adopt and amend land use district standards and boundaries, "acting on principles of sound land use planning and development"); 12 M.R.S. §685-C ("The commission shall adopt an official comprehensive land use plan for the unorganized and deorganized townships of the State. The commission must use the plan as a guide in developing specific land use standards and delineating district boundaries and guiding development and generally fulfilling the purposes of

[5] We say "special form of" rulemaking here, to distinguish this form of rulemaking from the perhaps more typical set of regulations that are duly adopted by an administrative agency in order to illuminate or further define the objective statutory standards an administrative agency is empowered to enforce or implement, and because here LURC's "rulemaking" is subject to certain enumerated provisions of the Administrative Procedures Act, excepted from enumerated others, and subject to special statutory additional "rulemaking" requisites such as notice to "the owners of directly affected and abutting properties" [12 M.R.S. § 685-A (7-A)(B)(2)]. 12 M.R.S. § 685-A(7-A)(B).

this chapter."); 12 M.R.S. § 685-A(8-A) ("[a] land use district boundary may not be adopted or amended unless there is substantial evidence that [inter alia] "[t]he proposed land use district is consistent with . . . the comprehensive land use plan and the purposes, intent and provisions of this chapter . . .").

In the exercise of its planning power, LURC functions pursuant to a Comprehensive Land Use Plan ("CLUP"), including the 1997 CLUP in force at the time of the evidentiary hearings in this case. See 12 M.R.S. § 685-C & § 685-A(8-A)(A); Me. Dep't of Conservation, Land Use Regulation Commission, Comprehensive Land Use Plan. The CLUP and its revisions are submitted for review to a committee of the Legislature and approved by the Governor, and must be consistent with the overall legislatively-established land use planning purposes such as to "prevent inappropriate residential, recreational, commercial and industrial uses," to "prevent . . . the despoliation, pollution and inappropriate use of the water in these areas; and to preserve ecological and natural values." 12 M.R.S. §§ 685-C & 681.

Then, the statute also provides that LURC will exercise the adjudicatory power to *implement* and *enforce* land use district standards and boundaries. 12 M.R.S. §§ 685-A & 685-B. This generally includes the power to approve or deny an application for a development plan, or on a larger scale a development "concept plan," that proposes rezoning and development under the statutory criteria of 12 M.R.S. § 685-A(8-A). This results in an adjudicatory hearing, like the one initiated with the Plum Creek petition and concept plan, where the applicant bears the burden of proof to establish "by substantial evidence" that for any new or amended land use district or boundaries:

> **A.** 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

> **B.** 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. § 685-A(8-A)(A)&(B). Similarly any 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 this chapter and would be consistent with the comprehensive land use plan." 12 M.R.S. § 685-A(8-B). In responding to the landowner's petition for development, LURC gathers and hears evidence in order to decide whether to approve or deny the plan for development, based upon an evaluation of whether there is "substantial evidence" (12 M.R.S. § 685-A(8-A)&(8-B)) that a development plan that requires adoption or amendment of new land use district standards or boundaries meets *statutory* criteria. 12 M.R.S. § 685-A(8-A) ("substantial evidence" required on statutory standard of meeting "demonstrated need" and "no undue adverse impact to existing uses and resources" under subsection B).

ii. The CLUP's Prioritized Special Need for Prospective Zoning in the Moosehead Lake Region

Well before the first submission of Plum Creek's Concept Plan for development, in 1997 as part of its land use planning function LURC had identified four regions within the overall LURC jurisdiction that would be particularly suited to careful, long range, regional prospective zoning. CLUP at 146, 110-11. They were characterized as areas of "special planning need" because of high-value natural resources particularly threatened by inappropriate high-growth development. See 12 M.R.S. § 681. The Moosehead Lake region was one of them. CLUP at 110-11. Situated on the southern portion of the largest remaining undeveloped forest in the eastern United States, a region including Maine's largest lake, the Moosehead Lake Region was

determined to be an area requiring "special planning needs." CLUP at 111.

Another of the four identified regions, the Rangeley Lakes Region, underwent prospective regional zoning in 2000, resulting in the Prospective Zoning Plan for the Rangeley Lakes Region adopted January 1, 2001. Me. Dep't of Conservation, Land Use Regulation Commission, Comprehensive Land Use Plan 110 (1997 rev.). Law Court Justices have recognized, in describing the Rangeley Plan, as an amendment to the CLUP by LURC undertaken "[b]ecause of the unique characteristics of the Rangeley Lakes Region," that faced threats from "growth in the region . . . attributed to residential and recreational development." The Rangeley Plan "focused on preserving the region's natural resources for four-season recreation, forestry, and year-round development in a diversity of rural and developed settings." Rangeley Crossroads Coalition v. Land Use Regulation Commission, 2008 ME 115, ¶ 31, 955 A.2d 223, 230-31 (Saufley, C.J., dissenting, joined by Levy, J.). LURC was capable of initiating and engaging the land use planning process for areas of identified "special planning needs" in the CLUP, and in fact did so for the Rangeley Lakes Region. The land use planning process included the full scope of public notice and opportunity to be heard, public debate, policymaking and planning to provide a vision for Rangeley Lakes that included the interests and input of the public and opportunity for input from *all* landowners, not just one landowner, in the region. After completion of the Rangeley Plan effective January 1, 2001, next up on the agency's agenda were presumably those other regions identified in the CLUP as areas in special need of planning, including the Moosehead Lake Region.[6]

[6] The "Implementation Schedule" of the CLUP at page 155 listed the Moosehead Lake area as Priority number 2 after Rangeley Lakes, and at the time identified the Rangeley Lakes special planning as "already in progress." CLUP (1997 rev.) at 155. As stated above, the Rangeley Plan was completed effective January 1, 2001.

iii. Plum Creek's Rezoning Petition and Concept Plan

In approximately October of 1998, Plum Creek bought over 900,000 acres from the South African Pulp and Paper Company (SAPPI) for less than $200 an acre. See, e.g., Decision at 1, n.1 (relevant record title history). The land use on acquisition was overwhelmingly working forest, and was zoned under existing LURC Management, Development and Protection subdistrict designations under the 1997 CLUP. Initially, Plum Creek represented that it had no intentions to sell its land or develop it for vacation condominiums or for second- or third- home residential development.[7] This point is significant, because it underscores the reliance that the public and LURC placed on existing plans in the CLUP, including its prospective planning imperative for the Moosehead Lake Region, under some assurances that there were no imminent threats posed by this new large landowner to the land use of the region or to the timing of the region's eventual special planning needs.

Then, in the fall of 2003, through to April of 2005, Plum Creek began discussing rezoning and development, pursuant to a "concept plan" process, for its ownership in the Moosehead Lake Region. Decision at 5. On April 5, 2005, Plum Creek submitted the largest rezoning and development plan in the history of the Commission – its "concept plan" to rezone approximately 400,000 acres and to implement a 30-year concept plan for large scale commercial, industrial and residential development. Decision at 5. That original plan proposed 975 residential lots, over half located on the shores of 18 water bodies throughout the Plan Area,

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[7] Plum Creek's General Manager for the Northeast Region, Jim Lehner, had represented after the SAPPI land acquisition that Plum Creek had no intentions to sell the land for development: "Lehner said assertions that the company [Plum Creek] will soon sell land for development in Maine are untrue . . . 'In Maine we have no land sale plans to date.'" Bangor Daily News (February 26, 1999). This confirmed Plum Creek's public representations when the SAPPI land was first acquired in October of 1998: "'We're not in the development business," Brown [Bill Brown, Plum Creek's vice president of business development] insisted." Maine Sunday Telegram (October 11, 1998). These representations were further consistent with SAPPI statements in 1998, when SAPPI had represented "it has no intention of selling to a developer," and said "vacation condominiums do not coexist with the road building operations and heavy logging machinery that characterizes the industrial forest." Kennebec Journal, Associated Press story (August 23, 1998).

a tourist resort facility in Lily Bay Township on and near the shore of Moosehead Lake, and other large scale commercial and industrial development spread throughout its land holdings on or around the shores of Moosehead Lake. Decision at 6. While the plan underwent at least two major amendments (in April of 2006 and April of 2007) and a nearly constant stream of significant amendments and adjustments to the plan up through October of 2007, at the time of the evidentiary adjudicatory hearing in this case which began in December of 2007 the unprecedented scope and intensity of Plum Creek's development "concept plan" never significantly changed: Plum Creek planned a commercial resort and exclusive residential subdivision on Lily Bay, planned another much larger resort and residential subdivision on the north side of Big Moose Mountain, and planned 975 other house lots located in other development zones spread throughout the Moosehead Lake area. The proposal of a total of 2,315 accommodation and resort units, envisioning an additional 390 "induced" units (caretaker/manager housing and compelled additional affordable housing), with new "commercial" zones to service this new development, spread out in remote regions inappropriate for development around Moosehead Lake, was out of scale for the region, too large in scope and intensity, and unprecedented on a landscape-scale perspective. The proposed Concept Plan development far exceeded historical trends and rationally projected growth.

So that there is no mistake about the size or intensity of the development envisioned, LURC's own consultants characterized the Lily Bay resort development zone to approximate the creation of a new rural town – a town in comparable size to the Towns of Troy, Perry, or St. Agatha. Transcript of May 2008 Commission Deliberative Sessions (A.R. 521) at 409, lines 12-18 (Richert). Indeed, this consultant stated that "At that level Lily Bay Township would then become larger than what those communities are as of the year 2000 . . ." (emphasis added). Id. at

409, lines 19-20 (Richert). The other development as part of the Concept Plan equated to the size of a second or even third new town. Then, during the "LURC-generated amendments" phase of the these proceedings – following the critical failure by LURC to deny the Concept Plan after adjudicatory and public hearings – LURC consultants recommended adding even a third "resort-optional" zone at Moose Bay, and folded in a new provision that would permit even more development after 30 years in the Rockwood/Blue Ridge and Brassua Lake zones – development opportunities that were not requested by Plum Creek during the adjudicatory hearings. At the LURC "deliberations" there was no discussion of these new consultant-generated proposals in relation to the essential element of "demonstrated need" (12 M.R.S. § 685-A(8-A)) in considering this level of scale and intensity of *added* development, even beyond the Concept Plan that most participants agreed and that LURC determined failed to meet statutory and regulatory criteria. It was expressly acknowledged – by both LURC staff/consultants as well as Commissioners – that the development rights being "granted" to Plum Creek in the form of these LURC-generated amendments were "extraordinary" development rights. See A.R. 521(C) (Footnote 75 of LURC Staff/Consultants' Recommendations: "These public rights and protections [of the conservation easements] are being granted by the landowner in exchange for **LURC granting certain extraordinary development rights to the landowner.**") (bold emphasis added).[8] See also Transcript of May 2008 Commission Deliberative Sessions (A.R. 521) at 216 & 218, lines 18-20 ("It's just that this easement is different, in my view, in that it is being offered in return for extraordinary development rights.") (Laverty); Transcript of

[8] Although this quotation is used here to show LURC staff/consultants' concurrence that this matter indeed involves LURC's granting of "extraordinary development rights" to the landowner, we take separate issue with the way in which LURC staff-consultants characterize the paid-for conservation easements as "a grant" by the landowner of public rights and protection. In this case, as explained in Part III(B) herein, it is wrong to characterize the conservation package as a "grant" from the landowner. It is *a sale* by the landowner, not a donative "grant." Plum Creek is to be paid approximately $22 million for the required easements and sale of land. The distinction is monumental in terms of public policy and legal significance. See Part III(B) herein.

Deliberations, 258, lines 19-20 ("the applicant is requesting extraordinary development opportunities . . .") (Laverty).

iv. LURC's Early Denial of Citizen Petition for Moratorium and Requests for Regional Planning and Prospective Zoning of the Moosehead Lake Region, Before Any Processing Of Landowner-Specific Rezoning and Concept Plans for Development

Before the first submission of Plum Creek's April 2005 rezoning petition and concept plan, the Commission received, pursuant to 12 M.R.S. § 685-B(10), a petition seeking to initiate rulemaking to establish a 180-day moratorium on the process of rezoning petitions within 41 minor civil divisions surrounding Moosehead Lake (generally, the entire Moosehead Lake Region, including but not restricted to the ownership of Plum Creek). Decision at 7. In addition to the moratorium on all amendments of land use district boundaries that would allow for commercial, industrial or residential development, the petition also sought that LURC immediately undertake a "regional planning process which formulates a coherent future vision and adopts enforceable rules to implement that vision for the affected geographic area." See Decision at 7, ¶ 4.

While noting that the 1997 LURC Comprehensive Land Use Plan identifies the Moosehead Lake Region as one of the several areas within LURC jurisdiction with special planning needs, on May 4, 2005 LURC nonetheless denied the petition for a moratorium. Decision at 7. The specific rationale behind the denial of the moratorium included the reasoning that LURC's rules require concept plans to conform with the CLUP, and indicated that Plum Creek's proposed Concept Plan would therefore need to conform with the CLUP and specifically "finding that its [LURC's] statute, CLUP and regulations are adequate to prevent serious public harm from the types of development that would be affected by the proposed moratorium."

Decision at 7, ¶ 7. In other words, LURC specifically decided not to undertake the prospective regional planning and zoning process for the Moosehead Lake Region (as an area of special need for planning identified in the CLUP), and decided not to undertake that process (which had been already completed for the Rangeley Lakes region) in lieu of engaging an *adjudicatory* process to decide whether Plum Creek's Concept Plan meets statutory, CLUP, and regulatory criteria for approval.

This description, above, of the development at issue, in terms of overall scope and intensity, is critical, because the people of the Moosehead Lake region – and the people of the State of Maine – were ultimately precluded from participating in a regional prospective planning process. In addition, for the reasons argued herein, we use the word "deliberations" on Plum Creek's own concept plan and rezoning petition, and the connotation of that word, lightly; we use the term "deliberations" simply because that is what the series of post-hearing LURC meetings were called by LURC. But LURC was not "deliberating" on approval or denial of a landowner's Concept Plan – it had already determined that the plan was deficient and required denial. Decision at 4, third paragraph. What LURC was actually doing was, apparently, engaging in a LURC-initiated prospective planning process, in the guise of "amending" Plum Creek's Concept Plan. See, e.g., Decision at 84-85 (discussing "prospective zoning" process as a basis for "per se" meeting the statutory element of "demonstrated need"). Use of the word "deliberations" is somewhat misleading therefore, because it suggests that the proceedings were still within an "adjudicatory" phase, which of course they could not have been after LURC failed to deny a Concept Plan that it had determined should be denied.

v. After Conducting Adjudicatory and Public Hearings on Plum Creek's Rezoning Petition and Concept Plan, LURC Determined the Plan Should Be Denied; But in an Unauthorized and Unprecedented Procedural Turn, LURC Failed to Do So.

As explained in more detail in this Brief, the reversible error occurred in this case when, after the adjudicatory hearing was completed, it was apparent to all that Plum Creek's Concept Plan and Zoning Petition ZP 707 did not meet regulatory and statutory criteria and could not be legally approved. Decision at 4, third paragraph; Decision at 21, ¶ 7; Decision at 25, n.22. At that point, following the adjudicatory hearing, Plum Creek specifically said that it did not see anything at all wrong with its concept plan, and vigorously argued for approval of the concept plan as is, unchanged and unamended to any major degree. A.R. 499(A) at 2, 9-10 (Plum Creek's Opening Brief).[9] Plum Creek informed LURC that the "major elements of this Plan" are set and will not change. Id. at 10. Further, Plum Creek's presentation of its case, particularly the "Evolution of the Concept Plan" section at pages 9-10 of its post-hearing brief, suggested that it would neither entertain nor undergo any changes to these "major elements of this Plan." A.R. 499(A) at 9-10. This position in Plum Creek's post-hearing brief was fully consistent with and supported by Plum Creek's opening statements at the hearing, during which Plum Creek emphasized (albeit it in a somewhat ominous tone) that the Concept Plan before LURC at the commencement of the adjudicatory hearing was the only plan that the applicant, Plum Creek, would ever be satisfied with: Plum Creek made it clear that the choice before the Commission was either this plan or no plan, stating "and I can assure you that if it is rejected, it will be the end to Plum Creek's attempt to implement a concept plan."[10]

Thus, because at the opening of the adjudicatory hearing, Plum Creek said that it was

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[9] A.R. 499(A), Plum Creek's Opening Brief. The "Opening Briefs" of the parties were the *post-hearing* briefs permitted by Eleventh Procedural Order of the Chair, directing and encouraging parties who wished to file post-adjudicatory hearing briefs to address the "legal deficiencies" in the proposed Concept Plan. Decision at 22, ¶ 8.

[10] A.R. 432(E1) at 43 (Transcript of Party Hearings, Plum Creek Opening Statement, December 3, 2007), vol. I at 43.

finished amending or changing this concept plan that had been undergoing amendment and adjustment for at least of two and a half years (if not more, dating back to the fall of 2003), Plum Creek and all the intervening parties – and LURC itself – went into the adjudicatory proceedings with the understanding that the proceedings would therefore result in an approval or a denial of the concept plan on the table.

At the close of the adjudicatory hearing, however, LURC altered the playing field in an unexpected and unprecedented fashion. LURC acknowledges in the Decision in issue that at the close of the adjudicatory and public hearings, the Plum Creek Concept Plan and Zoning Petition ZP 707 could not be legally approved, because in several significant ways it failed to meet established statutory and regulatory criteria. Decision at 4, third paragraph; Decision at 21, ¶ 7; Decision at 25, n.22. Indeed, the Decision in issue asserts: "In early 2008, following these adjudicatory and public hearings, the Commission determined that Plum Creek's October 2007 Zoning Petition did not satisfy all of the regulatory requirements for concept plan approval . . . ." Decision at 4 (third paragraph). Noticeably absent from LURC's description of the new process following submission of post-hearing briefs and reply briefs – which generally describes how many of the briefs identified legal deficiencies in the Concept Plan and how several briefs urged outright rejection of the Concept Plan – is any recognition that Plum Creek itself had urged full and unamended approval of the Concept Plan. Decision at 22, ¶ 10. Also noticeably absent in the Commission's discussion of the procedural "turn" that took place is any indication of where in the record Plum Creek "had conceded that the Concept Plan as filed, in light of its size and complexity, was imperfect, and that it was willing to see its Concept Plan amended to resolve certain flaws, including those identified through the hearing process." Decision at 21. While there is no citation to the record for this observation, and the observation appears to flatly

contradicted Plum Creek's post-hearing brief wherein Plum Creek urged unamended approval (A.R. 499(A) at 2, 10), even if it is true that Plum Creek conceded that its Concept Plan failed as filed, there is then no question that the resulting Decision should have been a denial.

Instead of entering denial, LURC began a process consisting of LURC staff and consultants generating "amendments" to the Concept Plan – but the amendments were far more than mere "housekeeping" details or adjustments to the plan. Petitioner NRCM – and many other Intervenors such as Petitioner FEN/RESTORE – urged the Commission at this time simply to deny Zoning Petition ZP 707 and the Concept Plan, in accordance with what the result of adjudicatory proceedings should be. A.R. 503(E), NRCM Reply Brief at 2 ("As such, this Commission should respond by denying the current Plan, for the reasons stated on the record and contained in the brief of NRCM and MA and the several intervening opponents of the current Plan.").[11] In light of Plum Creek statements before and after the adjudicatory hearing, expressing an unwillingness to amend any major elements of the plan and threatening to forego concept planning altogether "if this plan is rejected" (A.R. 432(E1) at 43), Plum Creek Opening Statement), NRCM also voiced skepticism of the Commission's post-hearing "exercise of highlighting the deficiencies in the current Plan," and suggesting it was not "an efficient expenditure of time and resources given what Plum Creek has said publicly in its Brief and throughout the proceedings." A.R. 503(E) (NRCM Reply Brief at 2). In urging an outright denial, NRCM stated that "[i]t is unclear why this particular applicant to the Commission should receive the benefits of what amounts to a contract zoning process, when the applicant has not indicated a willingness to make any changes to the major elements of its currently deficient Plan." Id. Thereafter, throughout the "LURC-amendment" stage of the process, NRCM urged

[11] See also NRCM Reply at 1: "There is one aspect of the proceedings so far upon which the Commissioners and most participants all appear to agree – Plum Creek's Rezoning Petition ZP 707, *as written* and without any amendments, would have to be denied under governing statutory and regulatory standards."

the Commission to revisit the idea of LURC's amending-without-planning process, and to return to the adjudicatory result of simply denying Zoning Petition ZP 707 and the Concept Plan. See A.R. 575(F), NRCM Joint Comments (April 3, 2009) at 1-3.

Yet LURC consultants took over the adjudicatory process for the rezoning and created from the ground up a new "vision" for the region – a vision from undeveloped forest to new towns of second and third homes and vacation resorts north of the existing infrastructure of the Town of Greenville. While land use planners may view this as an exercise of enormous interest and quite possibly an exciting enterprise, from a *policymaking and legislative zoning perspective*, LURC unlawfully by-passed the public regional prospective planning and rezoning process. In summary, because the public planning process was never used, LURC never determined whether it is in the public's interest and consistent with good policymaking to rezone thousands of acres of land in the Moosehead Lake Region for the creation of development equating to at least two new towns far-flung from the existing infrastructure in the Town of Greenville. LURC never considered, from a *policy* perspective, what impact that might have, for example, to marginalize the Town of Greenville by new dwellings, new stores and infrastructure at Lily Bay. By short-circuiting the planning process, LURC did not consider public input on past experience from other states or regions where poor planning has either occurred or has been avoided, so that existing towns do not become marginalized by new and more remote development centers. As a prospective zoning exercise, from the perspective of regional planning, there is *no record* of whether this was good policy-making or the right thing to do from a legislative land use planning point of view; there is no record, because the prospective zoning process and "special planning" for the region was never fully engaged.

The resulting LURC amendments were significant revisions – indeed, in some instances

monumental revisions – to major elements of the Concept Plan, while still maintaining the same major element of the original intensity of proposed development (over 2300 new residential and resort units) that had remained unchanged throughout the years of revisions to Plum Creek's Concept Plan. Aside from having been created outside of any established regional prospective planning process, the LURC-amended plan added elements that had not been part of the adjudicatory process. The rezoning and development granted as a result of the Commission's decision included 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 – including the potential for additional development at the expiration of the 30-year concept plan in the Rockwood/Blue Ridge development area that had never been part of the landowner-submitted petition; 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 also had never been a 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. This allowed an unprecedented level of development in scale and intensity widely dispersed in the Moosehead Lake region. See Decision at 27-28.

LURC also found that in order to balance what it had itself described as "extraordinary development rights," it was necessary to require that Plum Creek meet mandatory, regulatory conservation requirements intended to offset and/or balance the approved development rights. While regulatory criteria would mandate conservation to offset or balance development rights, the conservation requirements hinge on balancing or off-setting *appropriate* development, not

extraordinary development. LURC Chapter 10.23, H ¶ 6f (requiring that a concept plan strike "a reasonably and publicly beneficial balance between *appropriate* development and long-term conservation"). The LURC-amended development plan – again, developed without the benefit of established regional prospective planning – nonetheless allowed Plum Creek to meet the conservation requirements without a donative transfer of land, and instead allowed Plum Creek to *sell* conservation easements and a parcel of land to private non-profit organizations for a multi-million dollar profit to Plum Creek. At one point in the LURC-amendment process, when it became clear that LURC was intending to allow Plum Creek to use its multi-million dollar sale of conservation easements in order to meet conservation donation requirements, several people wrote to LURC expressing concern about that arrangement, including a letter signed by several prominent citizens in the environmental and regulatory fields (including a former chair of the Board of Environmental Protection, present and former legislators, and former Maine and Assistant Attorneys General). A.R. 533.[12] All expressed concern of the unprecedented decision to allow multi-million dollar conservation easement *sales* to meet conservation donation requirements for concept plan development. It essentially resulted in the developer-applicant profiting twice, with no loss: the applicant profits once in the multi-million dollar sale, and the applicant profits a second time by being granted extraordinary development rights as part of that bargain. See July 10, 2008 Correspondence (A.R. 533) (attached to this Brief). As a matter of law, LURC erred in interpreting the regulatory criteria as allowing a conservation land or conservation easement *sale* to meet the developer's requirements to grant and dedicate land for conservation as regulatory offset, mitigation, or balance to the impacts of development.

[12] Correspondence to LURC Chairman Bart Harvey, dated July 10, 2008, from Chris Livesay, Jon Lund, Sharon Treat, John Brautigam, Clinton Townsend, Conrad Schneider, Horace Hildreth, and Dennis Harnish. A copy of this letter is attached to this Brief for the Court's convenience of reference.

III. LEGAL ARGUMENT

A. LURC Committed Reversible Error in Failing to Deny the Plum Creek Rezoning and Development Plan, Upon Findings at the Close of the Adjudicatory Hearing that the Plan Did Not Satisfy all of the Regulatory Requirements for Concept Plan Approval.

i. Standards of Review Under 5 M.R.S. § 11007(C)(1)-(4)&(6).

The appeal statute applicable to this case provides that this Court may reverse or vacate an agency's decision if the Court finds that the decision is "made upon an unlawful procedure." 5 M.R.S. §11007(C)(3). See Hopkins v. Dep't of Human Services, 2002 ME 129, ¶ 8, 802 A.2d 999, 1001-02. LURC's ad hoc procedure, chosen at the close of the evidentiary hearing, to forgo a denial of a deficient concept plan at the close of the evidence (see Decision at 4 & 22, n.25), and to then embark on a LURC staff- and consultant-initiated new development plan, is unlawful procedure. It side-steps requisite regional planning procedures for exercising the delegated quasi-legislative land use zoning and planning power, 12 M.R.S. § 685-A(7-A), and bypasses altogether the requisite prospective regional planning for the Moosehead Lake Region committed to in the CLUP. CLUP at 110. This compels a reversal of the LURC Decision.

Other standards of 5 M.R.S. § 11007(C) similarly require reversal of the Decision, and are interlaced throughout the arguments, below. This Court may "reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; . . . (4) Affected by bias or error of law; . . . (6) Arbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007(C)(1), (2), (4) & (6). See also Hopkins, supra, 2002 ME 129, ¶ 12, 802 A.2d 999, 1002: "Courts may vacate an agency's action if it results in "*procedural* unfairness." Maine v. Shalala, 81 F.Supp.2d 91, 95 (D.Me.1999). Therefore, "[p]rocedurally, an

agency's decision can be 'arbitrary and capricious' if it was not the product of the requisite processes." United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of Am., 880 F.Supp. 1051, 1066 (S.D.N.Y.1995)." (emphasis in original).

Each of these standards, in addition to the subsection standard for reversal upon "unlawful procedure," applies to the several factors in this case that, ultimately, led this administrative agency to choose not to complete its adjudicatory power by denying a zoning petition and concept plan for development which, put simply, it had already determined required denial. There is no statutory provision, no general law, nor any other source of regulatory power and authority that would allow the Commissioners' collective hearts to go out to this one landowner at the close of the adjudicatory hearing in order to provide some new and unprecedented process to manipulate a way to approve a new development plan for the landowner. That is neither the job nor the delegated power of this agency; LURC does not exist to encourage development growth which is contrary to existing uses and which is beyond historical trends and rational projections for a region, or to draft a single landowner's 30-year development plan. Doing so (1) violates the statutory provisions establishing LURC and delegating to it specific land use zoning power; (2) is thereby in excess of the statutory authority of the agency; (3) exhibits bias or error of law in favor of one landowner and to the detriment of all other landowners in the region and to the public at large; and (4) a fortiori is arbitrary or capricious or characterized by abuse of discretion, because LURC's action is not tied to statutorily delimited discretion for land use zoning and planning, and arbitrarily and capriciously avoids the required denial resulting from the agency's adjudicatory process.

ii. Failure to Deny a Plan that LURC Determined Did Not Meet Statutory Standards Is Per se Reversible Error.

Overall, the question of whether LURC committed reversible error in failing to deny the Plum Creek rezoning petition and Concept Plan at the close of the adjudicatory hearing, and by instead directing LURC staff and consultants to draft and recommend a new plan for development that was not based upon an established regulatory proceeding for doing so, is a question of first impression in Maine. Indeed, research by the undersigned has not located precedent for any agency to turn from adjudicatory proceedings to a full-fledged or hybrid "planning and zoning" process, resulting in a kind of negotiated "contract zone" for one single landowner. Certainly this cannot occur without a clear existing statutory procedure or framework authorizing the agency to do so. Administrative agencies are creatures of statute; their powers are delegated to them and circumscribed by statute. Hopkinson v. Town of China, 615 A.2d 1166, 1167 (Me.1992); Valente v. Board of Environmental Protection, 461 A.2d 716, 718 (Me.1983) ("administrative agencies are creatures of statute, and can only have such powers as those expressly conferred upon them by the Legislature, or such as arise therefrom by necessary implication to allow carrying out the powers accorded to them"). Indeed, Maine law reflects a history of a respect for these "settled principles of the separation of powers." New England Outdoor Center v. Comm'r, Inland Fisheries & Wildlife, 2000 ME 66, ¶ 9, 748 A.2d 1009, 1014.

Like most matters of first impression, without precedent or clear statutory framework upon which to base an analysis, the analysis must therefore turn to fundamentals – the source of law, the source of power and authority, and the policy issues or purpose of the rule or law the court is being called upon to apply in the case. In this case, as shown below, the Petitioners' position on this appeal is supported by established principles governing the authority and source

of power of administrative agencies and of LURC, and supported by the underlying policy issues. Respondents and others who support the sudden transformation of an adjudicatory hearing into a quasi-regional planning result (if, arguendo, that is what the *transformation* in procedure was) find no authority and no justification in the LURC law or in established principles of source of law and delegation of power to administrative agencies. To fully understand and analyze this question of first impression – i.e., can this Court uphold the decision of a Maine zoning agency to transform a proceeding to approve or deny a development plan from an adjudicatory hearing into a quasi-legislative regional planning session involving only one large landowner in the region – the source of authority and source of law of LURC must be examined.

As a threshold matter, it is not even a debatable proposition that at any level of adjudicatory proceedings – whether judicial or administrative – when the party applying or petitioning for some relief (an applicant) *concedes* with all those parties opposing the application and with the decision-making entity, that the application fails as a matter of law, that should result in a denial of the application as is, if the application is not otherwise formally withdrawn. Certainly relating to this less than controversial concept is the idea that when the decision-making entity *determines* after hearing that an application or petition fails, that point – whether or not combined with the applicant's concession of failure – requires denial. Any procedural action less than denial becomes immediately suspect: parties look to whether there was some irregularity at play, a bias, an unlawful procedure, an act of "ultra vires" or an arbitrary or capricious decision not to act pursuant to established procedure or authority. If an applicant for a building permit fails to meet legal criteria, the permit must be denied. If a plaintiff in a lawsuit loses the case, judgment must be entered against the plaintiff – the court does not refuse to enter

judgment and task court personnel to retry the plaintiff's case in order to try to get a different result.[13]

While Plum Creek officially took the position in its post-hearing brief that its Concept Plan was not deficient, according to LURC "Plum Creek had conceded that the Concept Plan as filed, in light of its size and complexity was imperfect . . . . " Decision at 21. So be it. LURC itself found that "the hearings revealed that various components of the Concept Plan as filed would not satisfy regulatory criteria . . . . " Decision at 22 n. 25. Indeed, there is really no question that the Concept Plan, as filed and following the adjudicatory hearings could not be legally approved, certainly in the minds of each LURC Commissioner and the intervenors who opposed the Concept Plan, as well as apparently Plum Creek itself to some degree (despite its official position in its post-hearing brief). LURC makes the point clear in this very Decision: "In early 2008, following these adjudicatory and public hearings, the Commission *determined* that Plum Creek's October 2007 Zoning Petition did not satisfy all of the regulatory requirements for concept plan approval . . . ." Decision at 4 (third paragraph) (emphasis added).

This Court's analysis could conceivably end here: LURC failed to deny a plan that required denial. Any further proceedings, however they are characterized, were based on unestablished, unlawful procedure.

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[13] Taking the logic a step further, if the issue is a failure on the part of the decision-maker to decide, by analogy in the judicial branch and in administrative law there are several doctrines to prevent such an occurrence. The Administrative Procedure Act and related Rules 80B(a) and 80C(a) of the Maine Rules of Civil Procedure, provide for judicial relief when there is "a failure or refusal to act" by a governmental agency. Similarly, in the judicial branch, were a jury to take too long in deciding a case and functionally "refuse" to return a verdict, the court has some discretion to try to compel a verdict through special charges to the jury or ultimately to declare a "mistrial" in order to reconvene the adjudicatory proceeding before a new jury to reach a verdict. But by its own determination in this case, LURC tells us in its Decision that had a vote been taken, it would have resulted in a denial of the plan. Decision at 4 (third paragraph). LURC cannot deliberately shun that duty to deny. It is its statutory charge to *adjudicate* a petition to change land use district standards and boundaries, and so by shunning that duty, LURC shuns its statutory mandate.

iii. Due Process and The Proceedings Following Failure to Deny: LURC-initiated Planning and Rezoning For the Benefit of Just One Landowner?

It should be noted that, post-hearing, there was some debate and disagreement among participants as to what procedure was being engaged or initiated, and what exactly was taking place – especially in light of the fact that the applicant, Plum Creek, in its post-hearing brief had taken the position that the proceeding remained adjudicatory and that its Concept Plan should be approved in unamended form. The Chair of the Commission had issued the Eleventh Procedural Order, particularly directing the parties in their post-hearing briefs to point out "deficiencies" in the Concept Plan, implying an invitation to the applicant, Plum Creek, to propose any last alterations to major elements of the Concept Plan in order to save it, if possible, from inevitable denial. See, A.R. 487, Eleventh Procedural Order (issued after the evidentiary hearing, asking the parties to address in their post-hearing briefs the "deficiencies" in the plan). But Plum Creek did not join issue, and submitted both an opening post-hearing brief and a reply brief that re-asserted its position that there would be no proposed change to the major elements of its Concept Plan of October 2007 which had been the subject of the adjudicatory and public hearings. A.R. 499(A) at 2, 10; A.R. 503(A) at 1 & n.1.

Even some Intervenors in the case who had intervened to support the concept plan application, expressed in their post-hearing briefs similar positions that the proceedings should remain adjudicatory, and that while there may be "housekeeping" level amendments, nothing really needed to change within the plan for the proceedings to end with a vote on approval or denial. See A.R. 499(P) at 2-4, 19 (PCEDC Brief); A.R. 499(Q) at 1, 22 (SEDC Brief). Further, one Intervenor on the side of the applicant even focused its post-hearing briefs on arguing the principle that LURC *legally did not have the statutory power* to transform the adjudicatory hearing into something else. See A.R. 499(L); 503(H), Maine State Chamber of Commerce

post-hearing Brief and Reply Brief. In the context of its post-hearing briefs, Maine State Chamber of Commerce ("MSCC") specifically emphasized the "disagreement and uncertainty about the correct legal characterization of this proceeding." A.R. 503(H), MSCC Reply Brief at 2-3. MSCC also wrote that "the Commission's role in this proceeding is to evaluate *this* Landowner's specific present Application. It is unclear whether there may be such a thing as a hybrid proceeding, having the characteristics of both adjudication and rule making. Perhaps this is an adjudicatory proceeding that has been conducted without due regard to the limits of such proceedings." A.R. 503(H), MSCC Reply Brief at 3-4.

This uncertainty cannot go unnoticed by the Court on this appeal. While we recognize that "[d]ue process is a flexible concept calling for 'such procedural protections as the particular situation demands," Seider v. Bd. of Exam'rs of Psychologists, 2000 ME 118, ¶ 19, 754 A.2d 986, 991 (quoting Mathews v. Eldridge , 424 U.S. 319, 334 (1976)), it does not allow an administrative agency, with powers delimited by statute, free reign to go where it wishes, without notice to participants. In light of the Commission's failure to simply proceed to a vote either approving or denying the concept plan that had been developed and presented over a four-year period, and ultimately presented as "this plan or no plan" by the applicant itself both at the commencement of the evidentiary proceedings and afterwards, the fact that the parties could not agree on what procedural transformation was taking place is pivotal. LURC did not clearly define for participants what statutory authority it was exercising by transforming the proceedings into something other than the end of an adjudicatory process. Without such notice, the participants were deprived of both notice of what legal standards and procedures were governing the transformed proceedings, and the opportunity to be heard in relation to those standards and procedures. See Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Seider, supra, 2000 ME 118,

¶¶ 20-21, 754 A.2d 986, 991-92. See Alaska Professional Hunters Ass'n, Inc. v. F.A.A., 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played.' *See* Holmes, *Holdsworth's English Law,* 25 LAW QUARTERLY REV. 414 (1909).").

NRCM (and Maine Audubon) joined several Intervenors (such as co-Petitioners herein, FEN/RESTORE) to urge LURC to consider simply moving to decision on approval or denial of the plan. A.R. 503(E) at 1-2 (NRCM Reply Brief 1-2). See also A.R. 486(G) (NRCM/MA Correspondence of January 30, 2008, stating: "We believe that after the post-hearing briefs have been submitted, the Commission should proceed directly to a vote on Plum Creek's proposal. The Plum Creek proposal has been evolving for three years; extensive evidence has been received by the Commission; and LURC staff have conducted an exhaustive review of that evidence and examination of the witnesses. We believe that the proposed plan fails to meet LURC's criteria for approval and should be denied. The matter is ripe for decision.").

The LURC proceedings were, indeed, adjudicatory, and had been throughout the several years of processing the Plum Creek rezoning and Concept Plan submission. The proceedings certainly had all of the trappings of an adjudicatory hearing: Over 150 witnesses were examined; their testimony and other documentary evidence was developed, presented as "direct testimony" and then submitted for cross-examination at a public hearing; evidence was weighed by the Commissioners under statutory standards and under the standards set forth in the CLUP for approval of development concept plans; participating parties had "intervened" pursuant to LURC rules for intervention and were required to represent whether they were "for or against" Plum Creek's application; strict deadlines for submission of comments and evidence were set; no supplementation of the record was allowed unless opportunities to object were afforded and any

objections ruled upon. The list goes on. The Chair made a number of evidentiary rulings.[14] Lest there be any question, the LURC Decision in issue references the proceedings covering years of Plum Creek's development of a concept plan, and then the lengthy evidentiary public hearing initiated to present and weigh the evidence to approve or deny the plan, and in that LURC Decision there are no less than 22 references to the "adjudicatory" nature of the proceedings. Decision at 4 (two references), 17 (three references), 19-22 (total of eight references), 98 (one reference), 100 (two references), 118 (two references), 148-49 (one reference each), 154 (two references). (In contrast, the Decision appears to use the word "rulemaking" only once, on page 7, in its discussion related to the early petition for moratorium and request for regional prospective planning for the Moosehead Lake Region involving all landowners, as a prerequisite to processing any concept plans in the region). In the final analysis, LURC was clearly exercising its adjudicatory role – at least, up to the point when it failed to *complete* that role by voting to approve or deny the plan before it.

So, in light of this uncertainty, the question then arises: what were the post-hearing proceedings that LURC initiated? It is apparent that LURC's position was, had there been a Commission vote, the plan would have to have been denied. Decision at 4; and see Decision at 22 n. 25. Thus, post-hearing LURC may have initiated an illegal "contract zoning" for which there is no express delegation of legislative power (as there must be for contract zoning to be lawful). LURC may have engaged in a "hybrid" proceeding that involved LURC's own initiation of regulatory policymaking, land use planning and rulemaking (i.e., rezoning and planning under § 685-A(7-A)). But it could not have been in its entirety the latter, because

[14] In passing, we note that the Chair's Twelfth Procedural Order (A.R. 513) even specifically excluded some evidence raised in post-hearing reply briefs, upholding Plum Creek's objections, on the grounds that treatises or studies containing critical information on certain endangered species within the plan area which had been cited in witness bibliographies were nonetheless studies that were "not in the record" and therefore "stricken from the record accordingly." A.R. 513 ¶ 5 at 2.

LURC did not comply with § 685-A(7-A) by, for example, providing direct notice to all adjoining landowners whose interests would be affected by the planning process. 12 M.R.S. § 685-A(7-A)(B)(2). No formal notice was even provided to any of the participants that land use planning and rezoning was being initiated *by LURC* under its rulemaking power of subsection 7-A of section 685-A. It was further uncertain whether LURC was in fact now undergoing the regional prospective planning that it had foregone, back when the moratorium had been denied in April of 2005 [Decision at 7]. The State may argue that LURC metamorphosed the proceeding into a purely rulemaking, regulatory proceeding under § 685-A, as a poor substitute for prospective regional planning that should have taken place first in the Moosehead Lake Region of "special planning need." But it does not matter what the new proceedings is called. What is crucial is the recognition that metamorphosis of any kind is unlawful, and did not follow established statutory and regulatory schemes.

iv. LURC's "Practical" Excuse For Transforming the Proceedings Is Both Illogical and Without Statutory Justification.

Footnote 25 of the Decision at 22 contains what appears to be the first and only explanation from LURC on its reasoning for why this particular landowner, who had submitted an admittedly deficient plan, should receive the benefit of something other than simple denial following adjudicatory and public hearings. There is no citation to the record where it is suggested that Plum Creek was "open" to changes to its plan. As outlined above, the record was quite the opposite: three years (if not five years, going back to the fall of 2003) had not substantially altered the overall scope and intensity of development (over 2300 resort and residential units); at the beginning of the hearing, Plum Creek said that if this plan was rejected, it would not submit another one; after the hearing, Plum Creek formally said the same thing, in

two post-hearing submissions (opening brief and reply). But most illogical is the suggested rationale that "the Commission concluded that the most judicious and economical use of its finite resources would be to explore the potential for concept plan amendments during the still-pending process and based upon the existing administrative record, rather than simply rejecting the concept plan and sending the petitioner away to re-apply with a modified proposal that would initiate an entirely new proceeding." Decision at 22 n. 25. If it is true that the Commission really "concluded that the Concept Plan's deficiencies appeared resolvable," and if it is true that Plum Creek had noted an "openness" to amending its proposal to address deficiencies, then the Concept Plan should have been denied and those readily "resolvable" pieces of it would presumably have been addressed by Plum Creek – a sophisticated petitioner, the nation's largest landowner – without much effort, and without any overwhelming participation by Commission staff or consultants in developing proposed amendments.

The illogic of this statement further stands in the idea that "the most judicious and economical use" of LURC's finite resources was to embark upon a metamorphosed process of developing "LURC-generated amendments" on a massive scale, rather than just denying the Concept Plan in accordance with the agreed-upon results of the adjudicatory and public hearings. A denial would end the matter – there is no more drain on the agency's "finite resources." There is no step beyond final vote and denial, so there is nothing more efficient or judicious than denying the plan. The most "judicious and economical use" of LURC's time would be to deny the plan.

The rationale set out in Footnote 25 of page 22 of the Decision is not tied to any findings on the record. There was never any clear communication to the participants or to the public at the time, explaining that it made any sense for LURC "through its staff and consultants, to speak

next" on what changes would make the Concept Plan "legally approvable." Decision at 22, n.25. There is no established procedure – no statute, regulation, or rule – for LURC to "speak next" in this context, and none is cited, either in this footnote explanation nor anywhere else in the Decision. No one could therefore anticipate that this is what would occur. No one participated in the adjudicatory hearings on notice or with an express expectation that such an event would happen – the procedure is not written down anywhere to put participants or the public on notice. As an agency, LURC must act in accordance with its enabling statute and adopted regulations. An excuse that it is "just easier" to short-circuit established procedure and engage in some other process is not enough – especially when the new process is in fact not at all more efficient, but puts additional drain on the finite resources of the agency. Again, this Court need go no further to decide this appeal and reverse the Decision.

v. LURC's Transformed Proceedings Cannot Be Justified As Proper Exercise of its "Rulemaking" or Prospective Land Use Planning Power.

There is a monumental distinction between LURC acting upon a landowner's own petition for rezoning and concept plan for development – an essentially *adjudicatory* process – and LURC or its staff initiating changes to land use district boundaries or standards – an essentially *policymaking, quasi-legislative planning* process. See CLUP 126-27, 146-47. It appears that in the turn of events that occurred after LURC's failure to deny a legally deficient *landowner* petition for rezoning, LURC may seek to justify what happened by claiming authority to collapse into its adjudicatory responsibilities its role as a quasi-legislative entity empowered to initiate its own changes to land use district standards and boundaries and to prospectively zone. But the dual powers cannot be collapsed without offending basic principles of fairness and administrative agency power.

LURC cannot justify its actions in amending Plum Creek's concept plan for development as an exercise of lawful prospective zoning and planning, for a number of reasons, set forth as follows:

a. No Notice to Abutting Landowners or to Those Who Own Land Directly Affected by the Land Use Planning.

Regional prospective planning process requires that specific notice of prospective zoning in a region, such as the Moosehead Lake area, be provided to "the owners of directly affected and abutting properties." 12 M.R.S. § 685-A(7-A)(B)(2). Prospective zoning in areas of the jurisdiction was proposed by LURC in its 1997 CLUP revision "[t]o provide more predictability *to both landowners and the general public* as to the most suitable locations for development and to address the legislative charge given the Commission to plan for development . . . ." CLUP (1997 rev.) at 146 (emphasis added). See also CLUP at 147 ("Prospective zoning efforts will include information-gathering to facilitate the identification of areas that are most or least appropriate for future growth.") LURC vows in its Comprehensive Land Use Plan to "actively seek public input in the process of identifying such areas" – i.e., areas that are "most or least appropriate for future growth." CLUP at 147. In discussing the application of prospective zoning, LURC specifically emphasizes that "[t]he prospective zoning process also creates an excellent opportunity for public participation by residents, landowners and other interested parties." CLUP at 126. Thus, when any prospective zoning is undertaken in an area identified for special planning – like the Moosehead Lake area [CLUP at 110-11] – there is both a statutory obligation and a responsibility under the CLUP, to give notice to all directly affected landowners and the general public.

In order for the LURC-initiated plan amendment stage to have any starting validity, there

ought to have been adjoining, abutting landowner notices provided, consistent with 12 M.R.S. § 685-A(7-A)(2)(B). The general notice to the public of Plum Creek's rezoning Petition and Concept Plan does not suffice, because LURC itself recognizes that prospective zoning differs significantly from the reactionary – adjudicatory – approach of reviewing and processing a single landowner's request for rezoning and development. CLUP at 146-47. The importance of notice to adjoining landowners is not simply ministerial or administrative. For example, in this case LURC noted that the "Big Moose Mountain [resort] development area is located next to an existing alpine ski center, accessible from Route 6/15 . . . " Decision at 52-53. But the adjudicatory and public hearings by their nature excluded consideration of this adjoining landowner's rights or interests, because this abutter was not seeking rezoning or development. It is quite a different scenario, however, when LURC is prospectively planning and in so doing *steering* growth by the technique of land use planning and related policymaking: then, this landowner had the right to specific notice to perhaps argue that a second alpine resort should not be zoned adjacent to one that already exists. In the greater policy and prospective planning context there is no demonstrated need [12 M.R.S. 685(8-A)(B)] for two large mountain resorts side by side, to the detriment of the region as a whole. In other words – whether one agrees or disagrees with this planning *policy* – the debate was not undertaken, it was short-circuited or eclipsed – by the faulty process LURC chose instead.

b. No Notice to the Public of a Prospective Zoning Approach or Right of the Public to Participate in such Special Planning.

In this case, the LURC-generated amendments proposed a third and new "resort-optional" development zone on Moose Bay. Decision at 27. The idea of a third resort zone – in addition to the two large resort zones that were part of the Concept Plan at the adjudicatory

proceedings – was never part of the plan that the public or the adjudicatory hearing participants addressed, because a third resort zone was never on the table as part of Plum Creek's application. Also in this case, LURC-initiated rezoning considered, for the first time, the idea of the potential for additional development at the expiration of the 30-year concept plan in the Rockwood/Blue Ridge development area; this "more development potential" had never been part of the landowner-submitted Route 6/15 Corridor and Rockwood/Blue Ridge development areas.

Hence, in these and other significant areas, results of the "prospective planning" undertaken by LURC were that it excluded the public and participants. The participants in the adjudicatory hearings, and the members of public who submitted comments or who appeared in unprecedented numbers in Portland, Augusta, and Greenville and testified under oath for the public hearing phase of the adjudicatory hearing, were all reviewing and analyzing a substantially different plan. It is not enough to say that the public had the right to submit written comments after the LURC-initiated phase was completed – indeed, the record reflects that LURC gave short-shrift to the public comments submitted after its consultant-recommended "amendments," suggesting that those comments did not carry the same "weight" as the witnesses who appeared to testify at the adjudicatory hearing.[15] While LURC may have invited public comment on the LURC-consultants' viewpoints of planning in the region, it is not enough for the Commission to just "take into account all public comments" (see Decision at 88).[16] It is

[15] Transcript of LURC Deliberative Sessions, September 23-24, 2008 (see A.R. 547).

[16] In this case LURC specifically found that public opposition (or public support) was just an "evaluation factor" that "by itself does not determine the Commission's conclusions with respect to whether a proposal meets a demonstrated need." Decision at 88. But had the public known that LURC was functionally substituting its review of the Plum Creek concept plan for the broad, landscape scale regional prospective planning for the entire Moosehead Lake region as called for in the CLUP, it must be presumed that there would have been far different public participation, in both nature and degree. Persons may not have felt restrained from participating simply because they had not, for example, intervened earlier in the adjudicatory proceeding or because they had not wanted to speak out in opposition to a powerful landowner. This is another reason why LURC cannot just arbitrarily switch from adjudicatory hearing to a special planning rulemaking proceeding, and then act as if that switch never took

necessary – in *policymaking exercises like prospective planning* – for the Commission to *be guided* to significant degree, by public input. As it stood, LURC was best left with existing public opinion, based on written communications received during official public comment periods – 1508 to 6 opposing the development at Lily Bay (as of mid-day July, 11, 2008), and 2500 to 100 opposing the plan that was on the table before the LURC-initiated "planning" (LURC staff estimate, as of May, 5, 2008). A.R. 531(G) at 30 (set forth in NRCM and MA Joint Comments of July 11, 2008). Further, the adjudicatory hearing's witnesses and evidence, and the public hearings at that time, had compelled *denial* of the rezoning petition and concept plan, by LURC's own determination (albeit a denial that LURC refused to enter). Decision at 4. It is therefore impossible to say that public written comment following the LURC-initiated phase of amendments was sufficient to provide the "excellent opportunity for public participation by residents, landowners and other interested parties" that the CLUP envisions when it speaks of *prospective zoning*. CLUP at 126.

c. LURC's Post-Hearing Planning Failed to Address the Statutory Criteria of "Demonstrated Need."

In a puzzling section of this Decision, LURC rationalizes that since it was apparently engaged in a form of prospective zoning, that exercise somehow met *per se* the statutory criteria of having substantial evidence of "demonstrated need" for rezoning. The requirement that a new land use district or standard meet, by substantial evidence, a "demonstrated need in the community" is a statutory requirement. 12 M.R.S. § 685-A(8-A)(B). Yet this Decision says: "In the context of prospective zoning and concept planning, where long-term zoning boundaries replace reactive, case-by-case decisions, the Commission finds that the demonstrated need

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place or that the "hybrid" proceeding that resulted could move forward as a substitute for properly initiated special planning.

criterion takes on a different complexion. In prospective zoning, a key test of demonstrated need is whether trends show that an area with high-value resources is also in the path of growth: if high rates of growth threaten the high-value natural and recreational resources of an area, the need to rezone prospectively to direct development to appropriate locations, achieve a long-term balance of development and conservation, and protect the area's high-value resources is *per se* demonstrated." Decision at 84-85 (emphasis in original). In other words, LURC's finding is that in prospective zoning, there is a "demonstrated need" to rezone when trends show there is a "demonstrated need" to rezone.

Beyond its tautological reasoning, the fatal weakness of LURC's reasoning here is that *there were no trends developed as part of a prospective zoning record* in this case. No one knew or realized that LURC was prospectively zoning, there was no notice to the public or other participants that such a thing was occurring. Further, whatever LURC was doing was a poor substitute for prospective zoning, because it did not include the public, did not include abutting landowners, and involved only the perspectives of two LURC consultants and a few staff members who presented recommendations to the Commissioners as a fait accompli.

This Court cannot allow an agency to apply a statutory standard that guides and delimits the agency's discretion by overt tautological reasoning resulting in failure to apply the standard. LURC reasons that the agency's action "per se" meets the standard because the agency's action need not apply the standard. That reasoning is unsound and cannot be sustained. Statutory standards do not take on "different complexions" [Decision at 84] of this nature at the whim of the decision-makers. This Court should reverse the LURC Decision here, and may even do so independently on the grounds that LURC committed this error of law in applying – or in failing to apply – the "demonstrated need" criteria, as a result of the unlawful procedure that LURC

undertook after failing to deny the Concept Plan.

Fundamental delegation of power principles – derived in part from the separation of powers doctrine under state and federal constitutions – compel this result. In Maine – and in all jurisdictions – "zoning is a legislative act, and the adoption of a zoning amendment, like the enactment of the original zoning ordinance is also a legislative act." Bogg Lake Co. v. Town of Northfield, 2008 ME 37, ¶ 11, 942 A.2d 700, 704 (quoting F.S. Plummer Co. v. Town of Cape Elizabeth, 612 A.2d 856, 861 (Me. 1992)). The underlying principle is that the separation of powers doctrine renders it constitutionally impermissible for the legislature to delegate *unfettered legislative powers* to an administrative body.[17] Thus, it is well settled under the separation of powers doctrine that the delegation of any authority by the legislature to an administrative body must contain sufficiently clear standards to guide and to limit the discretion and authority of the administrative agency. See Town of Windham v. LaPointe, 308 A.2d 286, 293 (Me. 1973)("When no standards are provided to guide the discretion of the enforcement authority, the fact that the law might be applied in a discriminatory manner settles its unconstitutionality."); Waterville Hotel Corp. v. Board of Zoning Appeals, 241 A.2d 50, 52 (Me. 1968)("[t]he legislative body cannot, however, delegate to the Board a discretion which is not limited by legislative standards. It cannot give the Board discretionary authority to approve or disapprove applications for permits as the Board thinks best serves the public interest without establishing standards to limit and guide the Board.") The question presented in most delegation cases is whether the legislation has provided sufficient direction or limitations to prevent the administrative agency from exercising such broad discretion that it moves into the field of improper legislative policy-making function. Lewis v. State, 433 A.2d 743 (Me. 1991). As

[17] This is particularly so where (as here) an administrative body is made up of unelected officials, or even (as here) where unelected administrative agency consultants were, in turn, delegated the initial task of prospective planning.

explained in Kovack v. Licensing Board, City of Waterville, 173 A.2d 554, 558 (Me. 1961) (citing Locke's Appeal, 72 Pa. 491, 498 (1873)):

> The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

Thus, because zoning powers are legislative in nature, zoning determinations may "not be left to the purely arbitrary discretion" of the zoning authority. Stucki v. Plavin, 291 A.2d 508, 510 (Me. 1972). There is a long line of Law Court decisions voiding zoning legislation because the lack of standards had allowed the administrative agency so much discretion that it could wander into the unguided and unfettered legislative policy-making function that must be reserved to the legislative body. Cope v. Brunswick, 464 A.2d 223, 227 (Me. 1983) (instead of granting or denying a permit following standards adopted by the legislative body, the administrative board developed and simultaneously applied its own standards). There is no question that when the delegation is of unbounded and unfettered legislative authority without constraints, the delegation is per se unconstitutional. Id.

Hence, this Court must reverse and vacate any process by which LURC purports to exercise its delegated authority under § 685-A(7-A) to initiate changes to land use district standards and boundaries, where in that process LURC assumes an unfettered discretion to change the "complexion" of the demonstrated need standard – or any statutory standard – so that it need not apply the standard at all, or say that the criterion has been "met" on a "per se" basis. See Decision at 84-85.

d. LURC's "Prospective Planning" After the Hearing Was Undertaken Nearly Exclusively by Two LURC Consultants, Who Had Not Been Originally Retained For That Role.

The role of LURC staff and LURC consultants in this new or hybrid proceeding of "rulemaking" that occurred, is also related to the problems detailed above. In 2005, LURC retained two consultants to assist LURC and its staff in processing Plum Creek's Zoning Petition ZP 707. The retention was authorized, and thereby circumscribed, by statute. 12 M.R.S. § 683.

When the proceedings therefore took the post-hearing turn into a process of LURC-initiated changes to subdistrict standards and boundaries as opposed to adjudicating a landowner's petition for changes and approval of a concept plan, LURC staff and LURC consultants had unfair access to the decision-makers – the Commissioners – in this case, who were now decision-makers presumably exercising their quasi-legislative, and not purely adjudicative, powers. A key touchstone of those cases establishing and supporting the doctrine that an administrative agency's staff may not function as both "advocate" and assistant to the decision-makers – and the touchstone of the due process consideration arising in that context – is that the other participants of the proceeding must thereby *"face an adversary with unequal access to the tribunal."* Howitt v. Superior Court, 3 Cal. App. 4th 1575, 1580, 5 Cal Rptr. 2d 196, 199 (1992) (emphasis added). While this may not be a case where the LURC staff member or consultant becomes an advocate in the adjudicatory hearing, when the adjudicatory hearing transforms suddenly into a regional special planning process, staff and consultants cannot exercise *exclusive* and unfair access to the ultimate decision-makers in the planning process.

Again, LURC Commissioners are unelected officials, exercising quasi-legislative power delegated to them by the Maine Legislature under § 685-A. Beyond the perhaps debatable proposition of whether that is a constitutional delegation of power under the separation of powers

doctrine, one must certainly avoid any constitutional issues by ensuring that when the Commissioners then delegate *that power* to consultants or staff, that the LURC Commissioners cannot shield themselves from public input or give the staff or consultants unfair access to the Commissioners as decision-makers. Here, it is critical to note that staff and consultants *did not* consult with anyone – neither the applicant, nor Intervenors, nor anyone except (presumably) the Commissioners on a one-on-one basis – before they published their "recommended" amendments to the subdistrict standards and boundaries in the plan area.

The importance of comprehensive planning and prospective rezoning *before* approving a significantly new, unprecedented or altered use of land that is out of character with existing uses in the region, is underscored by the views of Chief Justice Saufley, joined by Justice Levy, in the dissenting opinion in Rangeley Crossroads Coalition v. Land Use Regulation Commission, 2008 ¶¶ 26-44, 955 A.2d 223, 230-34. Chief Justice Saufley emphasizes that "[r]ezoning, with its inherent public airing and thorough review of the newly proposed uses, should be undertaken before [the permit applicant] is allowed to engage in the [new land use]." Id. at ¶ 27, 955 A.2d at 230. The Rangeley case involved Nestle Waters North America, Inc.'s application for a permit to allow Nestle to construct a commercial ground water extraction and tanker truck load-out facility on a site primarily located within a general management subdistrict in LURC jurisdiction. Id. at ¶ 3, 955 A.2d at 226. The application had come after LURC's comprehensive prospective zoning planning process for the Rangeley Lakes Region (an area that had been identified, like the Moosehead Lake Region in this case, as an area of unique characteristics requiring special planning – Maine Dep't. of Conservation, Land Use Regulation Commission, Comprehensive Land Use Plan 110 (1997 revised)). Id. at ¶¶ 31-33. The Superior Court (Jabar, J.) vacated the LURC decision to allow the permit on two of LURC's findings, and upheld

LURC's determination on a third finding. Id. at ¶ 9. While the Law Court affirmed, Chief Justice Saufley's dissenting opinion – for the purposes of the present context in this case – preserves the concept that rezoning and comprehensive planning must be done *first* (and done well) before permitting unprecedented land use activities of single landowners that may be inconsistent with the existing zones and the comprehensive land use plan.

In this case, if true and proper regional planning and special needs planning had been undertaken in accordance with the statutory provisions of § 685-A, then the public would have had the right to review and assess all of the prospective planning decisions – like, for example, the demonstrated need for a third resort zone, and how such a zone would impact other adjoining landowners. LURC staff and consultants were, functionally, developing a "vision" for the region, much like the planning vision that would result after a prospective planning process like the one anticipated by the CLUP for the Moosehead Lake region. Yet the process did not allow for the general public or other landowners to weigh in on that "vision." The process engaged in by LURC consultants and staff in this case was removed from the "public airing and thorough review" that Chief Justice Saufley emphasizes must be and remain "inherent" in prospective zoning. Rangeley Crossroads Coalition, 2008 ME 115, ¶ 27, 955 A.2d at 230.

e. The Record Developed at the Adjudicatory Hearing Was Not Tied to LURC's Post-Hearing Planning Session.

Related to the principle of failing to include the public in LURC's post-hearing planning session, is that, conversely, the record developed at the adjudicatory hearing was naturally not tied to a prospective planning process. Evidence takes on different weight, depending on what power the administrative agency is exercising. While a record developed at the adjudicatory hearing on Plum Creek's application might be useful in a prospective planning session, it cannot

by any means function as the be all and end all of the record for prospective planning. Put another way, if LURC had appropriately taken up the task of prospective planning of the Moosehead Lake Region – Priority 2 in its Implementation Schedule of the 1997 CLUP [CLUP at 155] – one can safely assume that by no stretch of the imagination would the adjudicatory record of the Plum Creek application been the result of such a process. Plum Creek record evidence may have been part of the prospective planning record, but it would not have been the only part of it.

In prospective planning, LURC would have considered at a more fundamental level the existing development potential – i.e., an area to steer growth – of the nearby Town of Greenville, or even the Town of Jackman; LURC would have considered the existing alpine ski resort zone in the area that was outside Plum Creek's plan area, and its potential for absorbing resort development; LURC would have considered the general public's input, not just as "comment" on one landowner's plan but a key – if not the most key – metric for *public policymaking* in the area. In other words, LURC would not have been tied to considerations of just one landowner's land holdings, or even to the boundaries of its own jurisdiction (i.e., in prospective planning, one can look to the development carrying capacity in Greenville, or in Jackman, or can look to the potential of Rockwood voting to become an organized township thereby exempting it from LURC control). These considerations are all part of legitimate and critical planning – part of the "information-gathering to facilitate the identification of areas that are most or least appropriate for future growth." CLUP at 147 (describing prospective zoning efforts). This information gathering did not happen under LURC consultants' and staff's efforts after this hearing – or if aspects arguably occurred to some degree, or were provided by the recent adjudicatory record, no one was permitted to ask the question if more needed to be done or could be done, or if more was

truly needed. To the extent LURC was developing a "vision" for the region, the failure was that it was considering the record developed in relation to only one landowners' needs and desires, not those of the whole region.

For example, after the hearing new information came to light about the presence of a new "assemblage" and number of vernal pools in the plan area – vital scientific information informing the agency and public of existing natural resources. See A.R. 543(B). Assessment of such information is much different in a prospective planning setting – the information can be taken into account and fully factored into the process, whereas in the adjudicatory setting, the information comes late and is afforded less weight. Similarly, after the hearing it was legally established as federal law that not just the plan area, but the Moosehead Lake region itself, is now designated under federal regulation as "critical habitat" for a listed species, the Canada lynx (*Lynx canadensis*), under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. See 74 Fed. Reg. 8616-01, 2009 WL 455111 (F.R.) (final rule February 25, 2009, effective March 27, 2009). The development proposed on Lily Bay Peninsula and in other areas of the Plum Creek submission is now in critical Canada lynx habitat. Indeed, in February, 2008 (after the January hearings in this matter had ended) the U.S. Fish & Wildlife Service submitted to the *Federal Register* a proposed rule designating critical habitat for the Canada lynx. 73 FR 10860-01, 2008 WL 513675 (F.R.) (February 28, 2008). On February 25, 2009 – still before the subject Decision of LURC, but after the adjudicatory hearing – the final rule for designation of critical habitat for lynx was published. 74 FR 8616-01, 2009 WL 455111 (F.R.). The rule became final on March 27, 2009. Id. Significantly, after the January 2008 adjudicatory hearing in this matter ended, the proposed rule submission was made in response to the court-imposed deadline of February 15, 2008 by United States District Judge Kessler of the United States District Court for the District

of Columbia.[18] The proposed critical habitat rule underscores and corroborated the testimony before the Commission on the existence of critical lynx habitat on Lily Bay Peninsula and elsewhere throughout the Plan area. The crux of the matter is that the critical lynx habitat – now finalized – takes on new and significant weight, were it to be considered in the context of prospective regional planning. The prospect of critical habitat designation might have been ignored or administratively "shrugged off" by LURC in the adjudicatory setting which took place before the federal rulemaking for critical habitat designation was initiated. It cannot be so lightly disregarded in a true, full-fledged regional prospective planning effort.

Other examples abound. LURC consultants introduced the concept of "minimum land reservation requirements" in the Rockwood/Blue Ridge and Brassua Lake development areas, setting aside 50% of "net developable land in contiguous blocks" in the Rockwood/Blue Ridge zone, and 25% in the Brassua Lake zone, that would allow for additional development after the 30-year life of an approved concept plan. This was a concept that was never before the public in the hearings. It was entirely unclear why LURC was approving more development and growth on the applicant's land than Plum Creek itself has applied for. It was also entirely unclear what "deficiency" in Zoning Petition ZP 707 this "future build-out" amendment could possibly be aimed at addressing. There was no substantial evidence on this record that there was a demonstrated need to reserve land for greater future development, potentially allowing Rockwood to grow to the size of Greenville or greater. There was no substantial evidence on the record that doing so has no undue adverse impact on existing uses and resources, including the

[18] In that matter, Defenders of Wildlife, et al v. Kempthorne, et al, Civil Action No. 00-2996 & 04-1230 (United States District Court, District of Columbia), the Federal Defendants acknowledged that the former final rule involving critical habitat designation for the Canada lynx "had been tainted by improper 'involvement by Julie McDonald, former Deputy Assistant Secretary for Fish, Wildlife, and Parks,' and hence that the rule must be revised." See A.R. 499(I) at 22 & n.19 (addendum to brief, Order of Judge Kessler (January 15, 2008) at 1).

critical wildlife travel corridor in the Rockwood/Blue Ridge area that was so much a part of the testimony of wildlife biologists and comments from USF&W and DIF&W during the hearing. See, e.g., A.R. 499(I) Map of Exclusion Zones Identified in Testimony of IFW, USFWS, & MA-NRCM (attached to Opening Brief of MA-NRCM); A.R. 322(G) Joint Comments of Maine Natural Areas Program and MDIFW of 8/31/07 (discussing the Rockwood/Blue Ridge wildlife travel corridor: "At full build-out development of these proposed envelopes could significantly alter, restrict and possibly eliminate movement of various wildlife species along and over this ridge.") LURC made no explicit findings at the deliberations that *more* development than what was currently proposed by the applicant met, by substantial evidence, the statutory and regulatory rezoning criteria. And indeed, this "minimum land" reservation or "set aside" concept does not meet either the demonstrated need or the no undue adverse impact standards.

Reserving a significant portion of the land in the Rockwood/Blue Ridge Corridor zone for more development after 30 years was a concept that the general public, and the public in Rockwood, did not have full opportunity to consider because it was a new concept raised for the first time formally on May 27-28, 2008 (or the few days prior to deliberations when the staff/consultant recommendations were released). It is a concept contemplating Rockwood's future intention of incorporating – divorcing itself from LURC jurisdiction – based in part upon the level of development involved in this very plan. It is a legitimate question whether LURC in fact had enough input from the public on this topic, because it was not part of the adjudicatory hearing. Further, Plum Creek's primary testimony on the record was an acknowledgement that it was indeed planning for the construction of the equivalent of new towns, and the commercial activity that comes with them, in land surrounding Moosehead Lake (such as on Brassua peninsula, or on Lily Bay). The assertion was made, however, with no valid showing of "need"

or how these new towns will impact the existing Town of Greenville or inhabitants of Rockwood. To the extent LURC truly engaged in "prospective planning," from a policymaking perspective it was irresponsible for the "resort" and "resort-optional" components to proceed without any analysis *in the planning process* by any economist. Instead of leaving the question "how much is too much?" entirely unanswered (and then proceeding with the planning despite that unanswered question), LURC should have been asking whether it had enough information, given the changing nature of the Plan, the economy, and the new concepts such as "resort-optional" zones proposed by LURC consultants and staff. Is there a demonstrated need for a "resort-optional" zone at Moose Bay? Or is there demonstrated need for a third zone at Moose Bay, assuming the viability of at least one other at Big Moose Mountain, or one other that already exists but is outside of Plum Creek's ownership. What about existing land for development in Greenville – some of which (about 8000 acres at the time of these proceedings) is land owned by Plum Creek? Will there be an undue adverse impact from rezoning in the Rockwood/Blue Ridge or Brassua zones by leaving room for more build-out after 30 years? Questions like these were not addressed at the adjudicatory hearing, nor could they have been, because they were raised here for the first time through post-hearing LURC-initiated "planning." These are *planning* questions – questions that were never asked, or if they were they were never answered. Regional prospective zoning demands fuller analysis, and a fuller and fairer opportunity for LURC to gather informed and timely input from the public.

Thus, in the final analysis, ultimately the problem with upholding LURC's transformation of proceedings from "adjudicatory" to "quasi-legislative planning" (and then, we suppose, back to "adjudicatory" when Plum Creek agreed to the new plan drafted by LURC) is that at a fundamental level, even if what LURC did is labeled "prospective planning," it was poor

planning. It was done without telling the public that is what was happening. It was done without public participation. It was done without statutory guidance or in accordance with a rule or regulation that allows adjudicatory proceedings to metamorphose into "prospective planning." And it was done without all of the trappings of excellent policymaking and rulemaking that bolster and justify prospective planning, like full and fair information-gathering, public participation, and consideration of the area as a whole and not just one landowner's plans or desires.

That this occurred with respect to the Moosehead Lake Region is an added, heartfelt tragedy. It is a daunting loss to the State of Maine; but it is a loss that can, indeed, be corrected by this Court. This Court should reverse and vacate the Decision.

B. LURC Erred As A Matter of Law in Upholding the Consultants' Recommendations That State-Mandated Conservation Measures Need Not Be Donated by the Developer, But Could Be Sold by the Developer to the State or to an NGO (Non-Profit) in a Multi-Million Dollar Sale.

One final aspect of the quasi-legislative zoning procedures that morphed out of the adjudicatory process in this case, was the controversial decision by LURC to allow Plum Creek to meet regulatory conservation requirements intended to balance or off-set the "extraordinary development rights" granted to Plum Creek, with a multi-million dollar conservation easement sale and outright sale of land by Plum Creek to private non-profit entities (The Nature Conservancy ("TNC"), Appalachian Mountain Club ("AMC"), and Forest Society of Maine ("FSM")). The decision in effect allowed Plum Creek to be paid twice – once in the form of LURC's grant of "extraordinary development rights" and a second time in the form of millions of dollars in profit to "off-set" those development rights. This is an error of law. State mandated

conservation measures must be donated by the developer, not bought from the developer by the State or by an NGO (non-profit).

At an early date in the proceedings, when the so-called Conservation Framework was *not* presented by Plum Creek as a means to meet regulatory conservation requirements for approval of its development, and Plum Creek offered only a separate, donated Balance Easement of approximately 90,000 acres surrounding the proposed development zones, NRCM and Maine Audubon raised formal objection to any mention or consideration of the Conservation Framework at the adjudicatory hearing. A.R. 183 (including correspondence from NRCM and MA dated 12/04/96). NRCM objected because LURC's consideration of the separate multi-million dollar *sale* of the Conservation Framework by Plum Creek to private non-profit entities was not relevant to the rezoning decision. One of the primary arguments was that the Conservation Framework was in essence nothing more than a private land transaction between Plum Creek and TNC, and since it was not offered as regulatory conservation offset by Plum Creek it was irrelevant and prejudicial to LURC's review and decision on Plum Creek's rezoning and concept plan, and on whether Plum Creek's development was appropriate and met existing regulatory criteria. Id. We emphasized that, "While LURC has never faced this issue in its history, integrating private side deals into a public process allows landowners to have their cake and eat it too: allowing them to make money on private deals which benefit their own greater good while gaining significant development rights through LURC. Such a precedent undercuts the very heart of the LURC process."[19]

[19] A.R. 183. This Letter was filed jointly by NRCM and Maine Audubon on December 14, 2006 in this proceeding. All parties were given the right to comment or respond to it (many exercised that right) and in Part IV of the First Procedural Order of August 10, 2007, the motion to exclude consideration of the private land deal with TNC was denied. A.R. 299 at 6-7.

A developer or concept plan applicant should not be allowed to use paid-for conservation easement sales to fulfill regulatory requirements. The analysis changed *after the adjudicatory hearings and after LURC failed to deny the deficient Concept Plan on the table*, when the LURC staff/consultants' recommendations, for the first time, recognized that the "extraordinary" development rights granted to Plum Creek would require a greater package of conservation measures than Plum Creek had offered in its proposed, donated Balance Easement. The Commission ultimately accepted the staff and consultants' recommendation for a new conservation package to meet the regulatory requirements of mitigation, waiver of adjacency, and providing publicly beneficial balance between appropriate development and long-term conservation. The conservation package included not only the donated "Balance Easement" but also the 266,000 "Legacy Easement" and the 27,000 acre Roach Pond acquisition (herein "the Conservation Framework"), and provided that all conservation must be secured within 45 days of Plan approval and prior to the Commission's acting on any further Plan subdivision permits.

As NRCM and Maine Audubon pointed out in pre-filed testimony (A.R. 337(B) at 36; Catherine Johnson, pre-filed testimony of September 14, 2007), Plum Creek had negotiated a private conservation deal with The Nature Conservancy ("TNC"). In return for the payment of $35,000,000, Plum Creek would sell to TNC two parcels and place a conservation easement on a third area. As outlined above, originally the deal was not considered part of the required conservation balance, and Plum Creek quite clearly did not claim that it should be. See A.R. 209(B), Plum Creek Petition, Question 21 and Tab 21 (describing only the 90,000-acre "Balance Conservation Easement"). It was only after the adjudicatory proceedings metamorphosed into the quasi-planning process of LURC-initiated amendments, that this separate, "paid-for

conservation deal" became an actual requirement of concept plan approval in order to meet the State's regulatory conservation balance mandates.

Allowing a landowner to use a paid-for conservation package – that is, a conservation package for which the landowner/applicant is receiving financial compensation – in order to meet the regulatory mandate of offsetting development with conservation, contravenes the legal regulations themselves, sets terrible precedent, and represents bad public policy.

i. Paid-For Conservation Contravenes Regulations.

LURC's statutory and regulatory mandates for conservation arise in three areas: (1) as a means of mitigating the adverse impacts of development on wildlife and other ecological features, on scenic resources, remoteness, natural character of the region, and recreation under 12 M.R.S.A. § 685-A(8-A) (B); (2) as a means of securing a waiver of adjacency under LURC Chapter 10.23, H ¶ 6d.[20] ; and (3) in order to strike "a reasonably and publicly beneficial balance between appropriate development and long-term conservation" under LURC Chapter 10.23, H ¶ 6f.

A "paid-for" conservation package in which the landowner receives financial compensation in order to meet the regulatory mandate of providing conservation, contravenes each of these three requirements. This Court will not uphold an agency's interpretation of its own regulations when the interpretation is "contradicted by the language and the purpose of the statute or regulation," or when the language of the regulation "plainly compel[s] a contrary result." Rangeley Crossroads Coalition v. Land Use Regulation Commission, 2008 ME 115, ¶ 10, 955 A.2d 223, 227 (citing Downeast Energy Corp. v. Fund Ins. Review Bd., 2000 ME 151, ¶

[20] "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[s]." 10.23, H ¶ 6d.

13, 756 A.2d 948, 951 and Gulf Island Pond Oxygenation Project P'ship v. Bd. Of Envtl. Prot., 644 A.2d 1055, 1059 (Me. 1994)). In this unprecedented circumstance, where not only had LURC never confronted this issue before but had created it as an issue of its own making when it transformed the adjudicatory proceedings into a quasi-planning process, the agency's interpretation must be set aside. LURC's decision contradicts the purposes served by the regulatory framework in issue – i.e., three conservation requirements set forth in 12 M.R.S.A. § 685-A(8-A) (B), and in LURC Chapter 10.23, H ¶ 6d & ¶ 6f, to mitigate, serve waiver of adjacency principles, and to strike "a reasonably and publicly beneficial balance between appropriate development and long-term conservation." The purposes of the regulatory framework therefore compel a contrary result.

In comparable settings, such as under the Natural Resources Protections Act (NRPA), 38 M.R.S.A. § 480-A to BB, there are several conservation/mitigation requirements, such as compensation mandates involving Significant Wildlife Habitat under 38 M.R.S.A. § 480-D(3), or the Wetlands Compensation Program under 38 M.R.S.A. § 480-Z, including the concepts set forth in the Natural Resources Mitigation Fund Fact Sheet, "Mitigating Adverse Environmental Impacts is an Integral Part of Maine's NRPA." Maine law requires developers in LURC jurisdiction and DEP jurisdiction to mitigate for adverse impacts. The precedent that is being set in this case, by allowing "paid-for" conservation packages to meet such mitigation requirements, and the message being sent to developers even in the organized part of the State subject to DEP jurisdiction, is that this type of transaction could be recognized by the State as appropriate mitigation, instead of the traditional donated or dedicated conservation that is contemplated under these statutory regimes. The concept of conservation in order to mitigate development is turned on its head – developers/landowners will no longer donate land or interest in land as

conservation mitigation but will instead expect financial reward. A developer as an applicant to the State seeking development rights will receive financial compensation for selling development rights and the grant of development rights at the same time. All of these statutory and regulatory schemes that require conservation to mitigate adverse impacts to land resulting from the development must be interpreted to mean that the "conservation" that is required has to be *ceded* by the developer or *given in donation form.*

ii. The "Paid-for" Conservation Package is Bad Policy and Sets Dangerous Precedent.

There is a "double payment" to the developer inherent in any "paid-for" conservation package, which further raises an issue of extremely bad public policy. Because the conservation is part of a State-mandated regulatory process, the public ends up paying twice: the public pays once through the State's granting of a development permit (for "extraordinary development rights" in the instant case), since in part because of the paid-for conservation deal, the developer receives its rezoning and development plan approval. The grant of a rezoning approval or development permit is a grant from the public to the developer for something which the developer is not entitled to receive under current zoning.

The public then pays again with cash. It is most likely that the paid-for conservation deal would be funded by an NGO or nonprofit whose funds derive from private charitable donations or public solicitation of charitable donations.[21] In the final analysis, the developer is paid twice –

[21] While apparently not the case here, there is nonetheless an even greater problem that this precedent sets, should the "paid-for" land transaction be funded by direct public dollars, such as funding from the federal Forest Legacy Program or from the state-funded Land for Maine's Future Program. These programs exist to assist in acquisition of land for conservation, and do not exist to fund the granting of development rights. The precedent set by this LURC decision could conceivably contort these statutory purposes, should a landowner seek to use a sale funded in whole or in part by these programs as part of a landowner's obligation to meet conservation regulatory requirements in connection with a development application.

a significant financial profit from the sale of interests in land, which sale then triggers the State's grant of development rights.

As bad public policy, such a paid-for conservation deal also puts pressure on funding for other conservation projects, and takes limited conservation dollars away from those other projects. The recent Downeast Project conserved a similar amount of land in issue in this case, but included no development. The bad policy and precedent that this case sets is that landowners may expect, now, extraordinary development rights in addition to cash when selling land (or interests in land) for conservation. Scarce conservation dollars, in essence, begin to fund development.

It also sets bad precedent for future land conservation deals, which could be hampered or halted if the entity acquiring the conservation easement were aware that it may thereby be triggering massive development nearby. Entities funding land conservation transactions would find such arrangements – arrangements where their conservation value does not stand alone but in fact facilitates the loss of conservation elsewhere – a great disincentive to further investment in conservation values. Similarly, it sets troubling precedent to consider that developers pursuing projects that require regulatory conservation balancing will expect financial compensation for the conservation value they are required to create to off-set their requested zoning changes.

The position that had prevailed throughout these proceedings (up to the point in time when LURC failed to deny the deficient concept plan at the end of the evidentiary hearing), and throughout the State in other proceedings to date, is that the landowner must meet State-mandated conservation requirements of LURC (or of DEP) through *grants* of conservation – *donations* of land or interests in land, not land sales or sales of "conservation easements." That

is the only position supported by the statutory and regulatory framework, and the only position supported by good policy and common sense. If the land in the Conservation Framework in this case is truly required for the applicant to meet its mandatory conservation requirements in order to get a rezoning for development, then the land (and the conservation easement) must simply be granted – donated – to the State.

The Decision in issue addresses the above argument by stating that while the "Commission appreciates that the policy issues that these parties raise in their comments are significant, and that reasonable people may differ on the appropriate public policy that should be adopted to resolve these issues," the Commission concluded "as a matter of existing law that whether Plum Creek receives financial compensation from private parties for the [sale of conservation easements] is immaterial under the statutory and regulatory requirements governing this decision." Decision at 176. The fundamental failure in this reasoning, however, is that LURC was engaged in policymaking, not in "adjudicatory" approval or denial of the landowner's existing concept plan, when this issue was raised or came to the fore as an issue to be grappled with in the process. It is not until LURC consultants decided to recommend to the Commission that the TNC sale transaction be considered as a component of the granted extraordinary development rights, that the policy issue arises. To suggest that the policy issue is "immaterial" to the decision is nothing more than a fundamental failure to address it. By calling the policy issue "immaterial," LURC ignores the very process of "hybrid proceedings" that stemmed from LURC's post-hearing failure to approve or deny the concept plan in the first place.

Indeed, when the Decision then goes on, in its reasoning, to suggest that the "precedent" that might be set by LURC's approach to the unique transaction between Plum Creek, TNC and

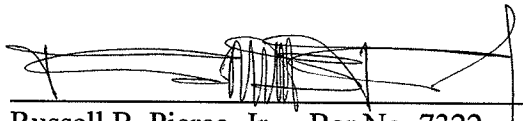
AMC, is that conservation buyers should be encouraged to await the outcome of regulatory proceedings that may require significant land conservation from the landowners *before* "first agreeing to the terms of a transaction," that reasoning is squarely backwards.[22] The *outcome* of this regulatory proceeding that, according to LURC, conservation buyers should have "awaited" was by all appearances a *denial* of the concept plan that was before LURC at the adjudicatory hearing. Conservation buyers cannot conceptually "await" for that regulatory outcome, when the Commission refuses to undertake the outcome, and instead metamorphoses the proceedings into some other regional planning event that now suddenly takes into consideration the existence of separate purchase and sale transactions out in the marketplace. The "paid for" conservation issue does not become a policy issue until LURC staff and consultants recommend, for the first time, to LURC Commissioners that the TNC deal should be required to balance the extraordinary development rights granted under the new LURC-generated plan. Until that point in time, the policy debate is immaterial, because LURC is only considering the landowners proposed *donations* of conservation land and is expressly not considering any paid-for sale transactions. The problem becomes material and relevant as a policy issue only by virtue of the transformation in proceedings that LURC initiated in this case after deciding, for whatever reason, not to deny a concept plan that LURC itself determined required denial after the adjudicatory hearing.

[22] It is also somewhat of a back-handed remark directed to TNC and others involved in the private transaction, squarely suggesting that TNC should have awaited for the LURC proceeding to end before entering into a private buy/sell agreement with Plum Creek (suggesting perhaps that TNC would have been able to drive a much better bargain had it been at the negotiating table with a seller who suddenly needed to strike a deal in order to get development rights). But that is to suggest that TNC – as much or if not more than all the other participants – would have had to foresee the unforeseeable turn that the adjudicatory proceedings took, and would have had to anticipate that LURC would fail to deny a development plan that required denial, then choose rewrite the development plan, and then choose to rewrite the plan to include TNC's private transaction into the bargain. No one has those powers of prognostication.

CONCLUSION

For the foregoing reasons, this Court must reverse and vacate the Decision of September 23, 2009, and enter the denial of Zoning Petition ZP 707 and the attendant Plum Creek Concept Plan for the Moosehead Lake Region. This Court should further order that following denial, any further proceedings for review of an amended petition or plan must proceed pursuant to lawful and established procedure for changes to land use district standards and boundaries, under 12 M.R.S. § 685-A(7-A) & (8-A). Further, should the agency recognize the need for regional prospective zoning or special planning in the Moosehead Lake Region, before reviewing a particular landowner's concept plan for development, LURC should undertake that process with notice to adjoining landowners and to the public consistent with its statutory authority under 12 M.R.S. § 685-A(7-A), and established procedures for initiating changes to land use district standards and boundaries in areas identified as requiring special planning needs under LURC's comprehensive land use plan.

Dated at Portland, Maine this 27th day of July, 2010.



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