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

REPLY BRIEF OF PETITIONER NATURAL RESOURCES COUNCIL OF MAINE

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REPLY BRIEF OF THE NATURAL RESOURCES COUNCIL OF MAINE

INTRODUCTION

Petitioner The Natural Resources Council of Maine (hereafter "NRCM") respectfully submits this Reply Brief in this matter, pursuant to Rule 80C(g) of the Maine Rules of Civil Procedure. The briefs filed on behalf of the Maine Land Use Regulation Commission ("LURC" or "the Commission") and on behalf of the applicant Plum Creek, both concede, and fail to dispel, the clear and overarching problem with the proceedings below: At the critical juncture when it came time to deny the concept plan and rezoning petition on the record, the Commission abandoned its own duly adopted and established rules of procedure under Chapter 5 of the Commission's Rules and Regulations governing public hearings for review and processing of rezoning and concept plan petitions. That constitutes reversible error. See 5 M.R.S. § 11007(4)(C)(3). ("The court may . . . [r]everse or modify the decision if the administrative

findings, inferences, conclusions or decisions are . . . [m]ade upon unlawful procedure"). Koch, 1 Administrative Law and Practice § 4:22 (3d. ed. 2010) ("One of the most firmly established principles in administrative law is that an agency must obey its own rules.") (citing Pacific Molasses Co. v. FTC, 356 F.2d 386, 389-390 (5th Cir. 1966) ("When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed.")). This uncontested point of error – LURC's abandonment of its own Chapter 5 rules of procedure to engage instead in ad hoc and ill-defined procedures of LURC-generated revisions to Plum Creek's plan – is addressed in Part I of this Reply Brief, below.

Then, in an unprecedented, eleventh-hour attempt to avoid reversal based on the Commission's abandonment of its own set of rules for the processing and review of rezoning petitions and development concept plans, LURC reverts to a new and untenable "lack of standing" argument. In essence, now the State's remarkable position is not only that LURC can abandon and violate the very rules LURC itself has adopted and had embraced for this and all other matters requiring public hearing for 35 years, but in so doing LURC argues that it is also immune from challenge by parties and intervenors by appeal to the judicial branch under Rule 80C. In all candor, this argument breaks abruptly from over 30 years of practice and precedent in this State, with LURC proceedings in particular but also with all administrative agencies of the State. This Court must reject the hollow "lack of standing" argument raised here for the first time and at the eleventh-hour in this case. Long-standing and well-established principles of standing have allowed the active participation of non-profit organizations in matters of state government (including appeals to the judiciary) as an essential and vital aspect of citizen participation in our government. The new and heretofore never raised "lack of standing"

arguments of LURC[1] fundamentally fail, for the reasons argued below in Part II.

Finally, we respond to the opposing briefs, including the briefs of The Nature Conservancy and the Forest Society of Maine ("TNC" and "FSM"), on the issue of whether the "paid-for conservation easements" on the working forest lands which continue to be owned by Plum Creek subject to these easements, should be allowed to satisfy those regulations which require applicants to grant conservation as part of approval of a concept plan. LURC's interpretation of the regulations is flawed, and LURC's conclusions nonetheless took place outside proper Chapter 5 procedures, thus depriving the parties of full development and analysis of this significant issue. These arguments are addressed in Part III below.

LEGAL ARGUMENT

I. LURC COMMITTED REVERSIBLE ERROR WHEN THE COMMISSIONERS ABANDONED LURC'S OWN RULES FOR REVIEW AND EXAMINATION OF PETITIONS FOR REZONING AND CONCEPT PLANS.

LURC abandoned its own rules of procedure by deciding not to make a decision on the pending petition for rezoning and concept plan, and then ordering LURC staff/consultants to rewrite the petition and concept plan without reopening the hearing. This complete abandonment of its own rules of procedure – the very rules LURC engaged and adhered to throughout the proceeding up to this point of departure – constitutes fundamental reversible error.

It is self-evident from the briefs filed in opposition in this matter, that even now the parties remain somewhat uncertain about the source or nature of the unprecedented procedure that occurred at the close of the evidentiary hearing in this matter, and whether the ad hoc procedure was within the power and authority of LURC or comported with principles of due

[1] It is noteworthy that Plum Creek did not raise the lack of standing argument. The argument was only raised, for the first time, by the State in LURC's brief in opposition filed on September 17, 2010.

process.[2] We will not repeat in detail here the several arguments set forth in NRCM's Brief of Petitioner, or in the Brief of co-Petitioner FEN-RESTORE, that ultimately demonstrate the many legal infirmities of LURC's power and authority to do what it did. Each of these points raised by the Petitioners would independently resolve this case in reversal. But the existence, itself, of the debate is also telling. LURC' argument appears to concede that it embarked on essentially an improvisational procedure it had no obligation to explain to the parties, so long as it offered the parties the right to continue submitting communications to the agency. Indeed, LURC argues it did not need to identify for the parties or the public the regulatory or statutory source for the procedure (and still fails to identify that source by conceding that the procedure was improvised), and is satisfied that so long as an improvised procedure is improvised openly, with opportunities for all participants to complain about the ad hoc procedure, all is well.[3]

Ultimately, however, this Court need not necessarily decide this case by resolving these issues. The straightforward result is compelled by the fact that the Commission *does* have rules

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[2] As examples of these ambiguities, FSM argues that the procedure was primarily "the equivalent of" LURC exercising powers of "conditional approval" [FSM Brief at 19-24]; Plum Creek argues that it was "contract zoning" [Plum Creek Brief at 18] or that it was a "rulemaking" procedure [Plum Creek Brief at 30-32]; LURC argues simply that its "legal authority" to do what it did seemed to be ambiguously implied by enabling statutes (LURC says: "Collectively the aforementioned statutes represent the source of the Commission's relevant legal authority. None of them expressly address the issue of whether concept plans should be subject to unilateral amendment by the Commission.")[LURC Brief at 51], and is silent on what procedural rules or regulations it was invoking when it did what it did.

[3] LURC and Plum Creek are completely disingenuous in arguing that NRCM had a hand in the development of the ad hoc procedure. Nothing could be further from the truth: NRCM emphasized even in its final written submission that it was time (putting it in colloquial terms) to stop the nonsense of unfettered revisions and amendments without hearing, and return to the original plan of voting up-or-down to deny the plan: A.R. 503(E), NRCM Reply Brief at 1-2; A.R. 575(F) NRCM Joint Comments (April 3, 2009) at 1-3. Even at the final closing argument, counsel for NRCM pleaded to the Commission to again adopt this viewpoint: "We contend that at any time before final agency action this Commission may revisit . . . whether rezoning criteria have been met." A.R. 585(I) (Transcript at 17-18). While NRCM continued to participate in the post-hearing process, lest it be cut out of the Commission's work altogether, it does not pass muster to now call the opposing intervenors the architects of the improvised and unprecedented procedures, when they were the begrudging participants who at each step of the way called for a return to reason.

for the review and processing of rezoning petitions and concept plans. Those rules have been in place and have remained basically unchanged for over 35 years. The Commission quite properly embraced and adhered to those rules throughout this proceeding – until it decided not to make a decision when the public hearing was over. Whatever power the Commission may or may not have had to task staff or consultants to redraft and rewrite a petition for the benefit of a single landowner (a sophisticated landowner, who happens to be the nation's largest private landowner, employing in-house lawyers and planners and a handful of outside law firms), the Commission still must do so inside the process that it had previously set out under its own procedural rules adopted for review and examination of such petitions. The Commission did not do so.

Then, exacerbating matters, when the resulting, self-styled "LURC-generated amendments" to the plan contained several significant and new provisions that had never been subjected to any process for review, LURC abandoned wholesale its own Chapter 5 procedures for review and approval of concept plans and rezoning petitions. Instead, it applied an ad hoc, unwritten and improvised "procedure" whereby staff and consultants presented to the Commission their rewritten Petition for Rezoning and Concept Plan, as a fait accompli. There was no reopening of the hearing to take evidence or to subject proponents of the plan to cross-examination, or even to examine under oath the rationale of those who were responsible for new and unanticipated revisions of the plan. By turning its back on its own rules and the procedure it had properly begun and meticulously adhered to up to the close of the public hearing, the Commission abandoned its own rules, resulting in an unlawful decision.

"One of the most firmly established principles in administrative law is that an agency must obey its own rules." Koch, 1 Administrative Law and Practice § 4:22 (3rd ed. 2010) (citing Battle v. F. A. A., 393 F.3d 1330, 1336 (D.C. Cir. 2005) (agencies may not violate their own

rules and regulations to the prejudice of others"); A.D. Transport Express, Inc. v. U.S., 290 F.3d 761, 766 (6th Cir. 2002) (when an agency promulgates regulations, it is . . . bound by those regulations."); accord Wagner v. U.S., 365 F.3d 1358, 1361 (Fed. Cir. 2004) (an agency is bound by its own regulations); Mine Reclamation Corp. v. FERC, 30 F.3d 1519, 1524 (D.C. Cir. 1994)). Id. The principle that an agency must obey its own procedural rules "may have attained the status of black letter law." Id. "Federal courts accept this notion as a fundamental principle." Id. "[C]ourts are generally very careful about agencies' compliance with their own procedural rules". Id. (citing U.S. v. Nixon, 418 U.S. 683, 694-96 (1974)). The summary of the law contained in Pacific Molasses Co. v. FTC, 356 F.2d 386, 389-390 (5th Cir. 1966), stands today:

> When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. This is so even when the defined procedures are '. . . generous beyond the requirements that bind such agencies. . . .' For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand.

Pacific Molasses Co., 356 F.2d at 389-90 (quoted in Koch, 1 Administrative Law and Practice § 4:22 (3d. Ed. 2010)); accord, Kelly v. Railroad Retirement Bd., 625 F.2d 486, 492-93 (3d Cir. 1980).

Maine of course follows this black letter law. Russell v. Duchess Footwear, 487 A.2d 256, 260 (Me. 1985) ("Administrative agencies are bound by their own rules of procedure promulgated pursuant to legislative grant of power, which rules have the force of law.") (citing In re DaLomba's Case, 352 Mass. 598, 227 N.E.2d 513, 517 (1967)) (Dufresne, J., concurring); see Valente v. Board of Environmental Protection, 461 A.2d 716, 718 (Me. 1983) ("It is true, of course, that an agency is ordinarily bound by its own 'legislative' rules and regulations.") (citing

2 K. Davis, Administrative Law Treatise § 7:21, at 98-99 (2d ed. 1979) (footnote omitted)). See State of Maine v. Thomas, 874 F.2d 883, 890 (1st Cir.1989) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where internal procedures are possibly more rigorous than otherwise would be required.") (citing Morton v. Ruiz, 415 U.S. 199, 235 (1974) (citations omitted) (discussing self-imposed procedures of Board of Immigration Appeals)). "Other examples are legion." Thomas, 874 F.2d at 891 (citing United States v. Nixon, 418 U.S. 683, 695-96 (1974) (agency may "den[y] [it]self the authority to exercise the discretion delegated ... and ... could reassert it by amending the regulations"); Kelly v. Railroad Retirement Bd., 625 F.2d 486, 492, 491-92 (3d Cir.1980) ("Failure to comply with its regulations renders the agency's act null."); North Georgia Bldg. & Constr. Trades Council v. Goldschmidt, 621 F.2d 697, 710 (5th Cir.1980); Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 258 (D.C.Cir.1977); Doraiswamy v. Secretary of Labor, 555 F.2d 832, 843 (D.C.Cir.1976); Cruz-Casado v. United States, 553 F.2d 672, 675 (1977); Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045, 1051 (D.C.Cir.1975); Schatten v. United States, 419 F.2d 187, 191 (6th Cir.1969); Pacific Molasses Co. v. Federal Trade Comm'n, 356 F.2d 386, 389-90 (5th Cir.1966); Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 346 n. 5 (D.C.Cir.1965) (per curiam)). See also U.S. v. Leahey, 434 F.2d 7, 11 (1st Cir. 1970) (holding that "the agency had a duty to conform to its procedure, that citizens have a right to rely on conformance, and that the courts must enforce both the right and duty.").

Here, the agency not only deviated from established procedure, it abandoned wholesale that procedure. It abandoned that procedure in favor of a new process (or more particularly, no process) which had never before been done by the agency – the complete revision and rewriting of a petition by the agency's staff and special consultants. The special consultants had been

previously hired, pursuant to the "contracting for legal and consulting services" of the "extraordinary projects" provisions of 12 M.R.S. 685-F(2), to assist the agency in processing the application pursuant to governing Chapter 5 public hearing standards; they were not hired for the purpose of rewriting a new plan. That the beneficiary of this abandonment of the process was the nation's largest landowner, who had brought to bear enormous legal and economic resources to the public hearing, renders LURC's own departure from established procedure even that much more problematic.

The LURC statute, 12 M.R.S. § 681 et seq., authorizes the Commission to "[a]dopt rules to interpret and carry out" its powers and duties established by the LURC statute (Title 12, Chapter 206-A of the Maine Revised Statutes). See 12 M.R.S. § 685-C(5)(A). These adopted rules are known as the Commission's Rules and Regulations, and consist of 17 chapters. Chapter 5, titled "Rules for the Conduct of Public Hearings," consists of the set of procedural rules that the Commission applies – and correctly applied in this case – to govern all public hearings before the Maine Land Use Regulation Commission. Chapter 5 applied to the Commission's review and processing of Zoning Petition ZP 707, the Rezoning Petition and Concept Plan for the Moosehead Lake Region for certain lands under the ownership of Plum Creek, Maine Timberlands, LLC and Plum Creek Land Company. See Decision at p. 1. The Commission correctly set this matter for hearing under Chapter 5 of its Rules.[4]

The Commission adhered to the procedures of Chapter 5 meticulously – the section of the Decision from page 1 through 21 describing the pre-hearing process and the process of public hearings and briefings through January of 2008 reflects how, at each step of the way, the Commission ensured that the process followed the provisions of its own rules under Chapter 5.

[4] Public notice of the Petition was posted pursuant to Chapter 4.05(4) of the Commission's Rules. See Decision at 5,¶ A(2).

Acting in accordance with the notice and request for hearings provisions of Chapter 5.02 and 5.04, LURC staff recommended the public hearing on Zoning Petition ZP 707. See Decision at 14 ("On December 5 of 2007 the Commission accepted a staff recommendation to hold public hearing in the matter of Zoning Petition 707 . . ."). The Chair of the Commission was designated the presiding officer under Chapter 5.06. The Chair held pre-hearing conferences with Intervenors and Plum Creek, under Chapter 5.07. Public hearings were held pursuant to Chapter 5.08 – and included opening statements, recording of testimony, sworn witnesses with the opportunity for cross-examination, direct testimony of all witnesses submitted in written form, and even rulings on admissibility of evidence made pursuant to Chapter 5.11. Petitions for intervention were filed and ruled upon under Chapter 5.13. Participation of other interested persons such as TNC or FSM who participated as "interested persons" (not intervenors), was permitted pursuant to Chapter 5.14; the participation of other governmental agencies in the hearing took place in the form and manner provided by Chapter 5.15. Testimony and questions were taken on the petition in accordance with 5.16, oral arguments provided pursuant to Chapter 5.17, issues on closure of the hearing record were addressed pursuant to Chapter 5.18, the record was developed precisely in accordance with Chapter 5.19, and all "motions, proposed findings, petitions, briefs, and written testimony" were submitted in adherence to the form for submission under Chapter 5.23. And in addition, all parties-in-interest, all party-intervenors such as NRCM, and the petitioner, Plum Creek and its representatives, were collectively governed by the ex parte communications restrictions under Chapter 5.25.

We outline these specific sections of the Chapter 5 rules, not only to emphasize that LURC meticulously adhered to these rules through to the close of the adjudicatory Chapter 5 hearing (before it suddenly decided not to decide the case in accordance with that hearing), but

also to dispel the State's weak suggestion that LURC need not have complied with any rules at all, so long as whatever flexible procedure it adopted afforded the petitioner due process. Setting aside for the moment the question of whether LURC and intervenors or other participants can together "make up" new rules for final disposition of a petition and concept plan application in the first instance, when nonetheless there already *are* duly adopted rules at the agency, certainly when the agency embraces and meticulously follows the published rules at the outset, there can be no later gross variance or departure from its own established procedure. By LURC's own arguments and explanation here, it concedes that it abandoned existing, published procedural rules that had been adopted by the agency for the resolution and disposition of petitions for rezoning.

When all is said and done, it is therefore not necessary to indulge LURC's excuses or rationalizations for having turned its back on established procedure, or its arguments on where the source of power for that departure might be derived: the rules under Chapter 5 are the Commission's own statement of what the process is. The rules were adopted in 1975, and Chapter 5 basically remained unchanged (with a few amendments effective October 17, 2000) throughout this whole period. Plum Creek, and the intervenors and interested persons participating in the proceedings, and LURC itself, invoked these rules, accepted these rules, and adhered to them – up until the time LURC suddenly decided not to decide the case at the conclusion of the public hearing. This abandonment of its own rules is the simple and straightforward point of error in this case, and compels reversal.

Thus, even for the sake of argument assuming that LURC could, in theory, ask its staff or consultants to rewrite or redevelop a petition for rezoning and concept plan for a single landowner at the close of the public hearing, there is no question that such power must still be

exercised *within* the procedures laid out in Chapter 5 – the process that LURC had set out and embraced for this rezoning petition and concept plan application. That would require reopening the hearing, taking additional evidence, subjecting persons to cross-examination on the new and completely unanticipated revisions to the plan (such as new "resort optional" zones, reconfigured conservation easements that fail to expand the donated conservation land to meet regulatory requirements, new and untested post-30 year "build-out" planning, and other new plan elements attempting to address statutory standards of undue adverse impact to wildlife or other existing resources). Chapter 5 allows for the reopening of the hearing after a decision on a rezoning petition – Chapter 5.21 – but the reopening of the hearing requires that the Commission has "rendered a decision on . . . a rezoning petition following a hearing." Chapter 5.21 (emphasis added). In that circumstance, "any person aggrieved by such decision or order may petition the Commission to reopen the hearing for the purpose of introducing new evidence with regard to any provision of such order or decision." Chapter 5.21(1). This provision was ignored and abandoned by LURC in this case, and LURC ignored the submitted requests of NRCM and others made after the public hearings, simply stating that the Commission needs to decide the case. See A.R. 486(G) NRCM letter of January 30, 2008 ("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."). Those responsible for the new amendments to the petition – and if those persons were consultants of LURC – would be subject to cross-examination or the taking of additional evidence, just as the

applicants' representatives were subject to cross-examination in the public hearing that took place, as proponents of plan provisions. The procedure that LURC engaged following the close of the public hearing circumvented its own established rules, and abandoned those procedural rules that had been in place for 35 years.

Finally, LURC's and Plum Creek's suggestions that there needed to be offers of proof made by any of the Intervenors in connection with objections to the procedure, are wrong and misplaced. The Intervenors here were *denied* the right of *any* public hearing on the LURC consultants' new plan – denied cross-examination or submission of evidence on elements of the new petition and plan, denied the taking of any additional evidence, all parties were told they could not speak or participate during LURC consultants' presentation of their new plan to the Commission in so-called "deliberative" sessions, and indeed all parties were denied any meaningful input on the creation of the post-hearing concept plan and rezoning petition that took shape. No party can make an offer of proof on cross-examination, nor does the law ever expect one to do so, when *there is no right of cross-examination afforded at all because there is no public hearing.* Offers of proof are only relevant in the context of exclusion of pieces of evidence; it is misplaced to say an offer of proof is necessary on a point of procedure, where the right of examination is not afforded at all. In other words, even according to the Commission's own stated position on what "offers of proof" are, as set forth in Chapter 5.12, offers of proof take place *within* Chapter 5 public hearings, when the presiding officer has excluded "questions on cross examination." Chapter 5.12 (LURC Rules and Regulations). An offer of proof is never necessary when the right of cross examination or submission of evidence has been abandoned entirely – i.e., when the hearing has been abandoned in the first place. See, e.g., Chapter 5.12 and cf. M.R.Civ.P. 46 ("it is sufficient that a party, at the time the ruling or order of the court is

made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court . . . "). NRCM, and several other parties, clearly made their objections known throughout – from the beginning of the post hearing process, in writing, when NRCM told the Commission it should decide the case in an "up or down" vote, and at the very end of the process, on the last day of NRCM's final closing argument.[5]

For these reasons, together with the reasons set forth in NRCM's Brief of Petitioner, this Court must vacate the LURC Decision.

II. NRCM HAS STANDING TO APPEAL LURC'S DECISION.

NRCM is the largest environmental advocacy organization in the State of Maine. It plays a leading and pivotal role in state environmental affairs. It is the Maine state affiliate of the National Wildlife Federation. Since its founding in 1959, NRCM has a proven, distinguished and long legacy of effective environmental leadership in the State of Maine.

Of its many projects, NRCM has a demonstrated commitment to protecting Maine's woods, and Maine's North Woods has become a central focus of those efforts. During the past four years, NRCM has devoted extraordinary amounts of time, put immeasurable effort, and invested much of its resources into representing the interests of its 17,000 members and supporters, as well as the interests of countless other Maine citizens who oppose LURC's approval of Plum Creek's concept plan for development (the "Concept Plan"). This opposition was based on the tangible personal interests of those who currently use the land – Moosehead Lake and surrounding waters, Lily Bay State Park, and other areas in or near the Concept Plan

[5] Another telling aspect of LURC's argument, is that throughout this post-hearing session, NRCM (and other intervenors) did submit comments to the Commission, attempting to submit new evidence, new considerations, and address the new issues triggered by the problematic aspects of the new "LURC-generated amendments" to the plan. By arguing that the intervenors made no "offers of proof," Plum Creek and LURC appear to concede that they fundamentally ignored those offers that were actually made, largely as a result of the fact that an adjudicatory hearing was never reopened.

area – and whose interests include recreational use, scenic values, wildlife and ecological values, existing business interests, and the range of interests specifically pled and identified in NRCM's Petition for Review Under Rule 80C in this matter, at paragraphs 1 through 5. NRCM Petition for Review Under Rule 80C ¶¶ 1-5. All such interests are adversely impacted by the Concept Plan's intensity, scope, and location of development. Of its many supporters and members, an identifiable number have property interests, or business interests such as professional guiding or other outdoor recreation-related business income, in the vicinity of the area that is the subject matter of the Concept Plan, including its waters, streams, ponds, and lakes, and Moosehead Lake itself. All are within the plan area, or near or adjacent to it, and many are directly adjacent to new development zones.

Notwithstanding the previously unquestioned fact that NRCM was an intervenor before LURC under Chapter 5.13 of LURC's Rules and Regulations, having shown that its interests were "substantially and directly affected by the proceeding" [Chapter 5.13(1)], and the indisputable fact that NRCM has spared no effort or expense in representing its members' and supporters' interests in trying to ensure that any plan approved by LURC for the development of the Moosehead Lake area preserves the unique and irreplaceable character of that region for the use and enjoyment of future generations – for the first time in its brief on appeal, LURC has presented the startling argument that all of NRCM's efforts described above should be ignored. LURC's argument raises the implication that in future proceedings, these same rights to participate as party-intervenors will be challenged and undermined by the State. This argument represents perhaps the greatest policy reversal this State and this agency has attempted in over 30 years, and its ramifications potentially extend beyond LURC. Aside from this observation, however, LURC arguments on standing are flat wrong, and conveniently ignore decades of

settled precedent on the doctrine of standing. Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978). The Court must reject LURC's position that NRCM lacks "standing" to raise this appeal.

This argument does present a significant reversal in state policy towards organizations like NRCM, as LURC has never previously taken the position that an organization such as NRCM lacks standing to pursue a Rule 80C appeal. For example, LURC never challenged NRCM's standing in 2001 when NRCM initiated a Rule 80C appeal from LURC's approval of a permit application submitted by the Bureau of Parks and Lands to construct an access road and hand-boat launch in the vicinity of John's Bridge on the Allagash Wilderness Waterway. See Natural Resources Council of Maine v. Land Use Regulation Com'n, 2001 WL 1712677 (Me. Super. August 10, 2001). Neither did LURC question the standing of individuals to pursue a Rule 80C appeal of a LURC decision where such individuals were granted intervenor status in the underlying administrative proceedings, involving extensive oral testimony and the submission of voluminous written materials. Nattress v. Land Use Regulation Com'n, 600 A.2d 391 (Me. 1991). In these and countless other proceedings involving NRCM and other environmental organizations, including appeals on matters before the Board of Environmental Protection and other state administrative agencies, the State has never challenged associational or individual standing of NRCM or its members, or of other environmental organizations. Here, LURC left NRCM's representations on standing in its Joint Petition to Intervene with Maine Audubon similarly unchallenged in the administrative proceedings below, and left NRCM's representations on standing in the Rule 80C Petition in this docket unchallenged – even throughout pre-briefing motion practice in this docket.

LURC's standing argument is not only unprecedented, it is disingenuous given that LURC previously granted NCRM full party intervenor status in the administrative proceeding underlying this very case on the grounds that NCRM's interests will be substantially and directly affected by the proceeding. LURC's standing argument is further undermined by LURC having consistently treated NCRM as a full party during the years of process that preceded this appeal. See Chapter 5.13 of LURC Rules and Regulations. As a result, under Maine law, as fully set forth below, NRCM clearly has standing to appeal this matter.

A. Fundamental Considerations for Standing Determination.

LURC's arguments regarding NRCM's standing implicate the broader issue of the "justiciability" of the present controversy. Madore v. Me. Land Use Regulation Comm'n, 1998 ME 178, ¶ 7, 715 A.2d 157, 160. In order for a case to be "justiciable," there must exist "a real and substantial controversy, admitting of specific relief through a judgment of conclusive character." Id. (quoting Halfway House, Inc. v. City of Portland, 670 A.2d 1377, 1379 (Me. 1996). The doctrine of standing, in turn, describes a specific "condition[] of justiciability . . . requiring a party [to] have a sufficient personal stake in the controversy . . . to seek a judicial resolution of the controversy." Id.

The Law Court has emphasized that the issue of whether a party has standing to invoke the jurisdiction of a Maine state court is a matter of Maine jurisprudence. See Lawrence D. Roop et al. v. City of Belfast, 2007 ME 32, ¶ 7, 915 A.2d 966, 968 [hereinafter Roop]. Unlike the United States Constitution, the Maine Constitution contains no "case or controversy" requirement. Id. As a result, it is well-established that under Maine law "'standing jurisprudence is prudential, rather than constitutional.'" Id. (quoting Collins v. State, 2000 ME 85, ¶ 11, 750 A.2d 1257, 1261 (Calkins and Dana, JJ., concurring)). Importantly, because "there

is no set formula for determining standing," the standard for Maine's courts making standing determinations is not a rigid one. Id. Rather, Maine's courts have long applied the judicial doctrine of standing "in varying contexts causing it to have a plurality of meanings." Id. (citing Walsh v. City of Brewer, 315 A.2d 200, 205 (Me.1974)).

As a general matter, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180 (2000). In addition, an organization may also bring suit in its own right based on injuries that it would sustain itself provided it satisfies the same requirements of standing that apply to individuals. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982). Each of the Friends of the Earth elements apply here – especially in this case where the "interests at stake" are not only germane to the organization's purpose, *they are also germane to the purpose of the administrative agency in issue.* We will not repeat the several Comprehensive Land Use Plan provisions of LURC, except to note LURC's statutory charge to review rezoning and concept plans on the standard of whether the plan will pose an "undue adverse impact on existing uses and resources," 12 M.R.S. 685-A, and to note that LURC's 186-page decision in issue analyzes the plan's compliance with primitive recreation resources, scenic resources, wildlife resources, water resources, air quality and traffic impacts, noise pollution, etc. – all of the interests NRCM members are committed to protecting and that NRCM has advanced through its proven and pivotal leadership role in state government affairs.

B. NRCM Has Standing to Appeal LURC's Decision Because LURC Waited Too Long to Challenge NRCM's Standing.

By waiting to challenge NRCM's standing to question LURC's decision-making for over three years, LURC forfeited its right to do so, is estopped from asserting that argument, or, alternatively, waived its standing argument.

Three years ago, when NRCM petitioned to intervene in the LURC proceedings involving the Concept Plan, LURC not only granted NRCM's petition (filed jointly with Maine Audubon) but went further in acknowledging that NRCM was an intervening party whose interests were substantially and directly affected by LURC's decision. See NRCM Petition for Review Under Rule 80C ¶¶ 4-5. Under the intervention provisions of LURC's Rules and Regulations, once a party is granted intervenor status, "[a] person permitted to intervene shall become a party to the proceeding and shall be permitted to participate in all phases of the hearing, subject, however, to such limitations as the Commission or Presiding Officer may direct." Chapter 5.13(1) of LURC's Rules and Regulations. The Chair imposed no such limitations. The Decision reflects the conclusions of law of the Commission in granting intervenor status to NRCM and others: Decision at 15, paragraph (3)(a).[6] LURC never once questioned NRCM's standing in its findings of fact, conclusions of law, designation or cross-designation of experts and submission of direct testimony, cross-examination of witnesses, presentation of opening and closing arguments, nor any other aspect of the administrative hearings. Furthermore, LURC never pled standing as an affirmative defense in a permissible responsive pleading to NRCM's 80C appeal. Although under 5 M.R.S.A. § 11005 no responsive pleading is required of the agency in a Rule 80C proceeding "unless required by order of the

[6] Note that Plum Creek objected to the request of the Open Space Institute to participate as an interested person on the grounds that the request was untimely, and the Chair ruled on that objection. Neither Plum Creek nor any other party objected to NRCM's Petition to Intervene. Id.

reviewing court," we contend that in an instance where the agency is holding back a potentially dispositive issue that does not address merits (such as, for example, timeliness of the appeal, improper service of commencement of the Rule 80C action, or other such procedural irregularities as, in this case, an asserted "lack of standing"), then section 11005 implicitly requires the agency to seek to raise the issue earlier in the proceedings. No mention of the issue was made by counsel for LURC in the transfer of this docket to the Business and Consumer Docket of this Court, nor in any of the case management conferences that have taken place to date.[7] There would be no provision at all for responsive pleadings to a Rule 80C action, were it not the case that the appeal procedure must contemplate early notice of such issues. LURC failed to move to dismiss the appeal on that basis prior to pre-briefing motions or to briefs submitted on the merits. In fact, the first time the standing issue was raised was in LURC's Respondent Brief, filed September 17, 2010. As such, LURC's challenge is untimely under several well-established equitable and legal doctrines.[8]

1. LURC Forfeited Its Opportunity to Challenge NRCM's Standing.

In this case, LURC has forfeited its right to challenge NRCM's standing. It is a well-settled equitable principle that failure to make timely assertions may result in forfeiture of any right. See United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Yakus v. United States,

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[7] The initial case management conference, while not recorded, did include discussion and overview of the issues that would be raised in this appeal, in reference to the pending Rule 80C Petitions in issue; counsel for LURC never mentioned as an issue a challenge to standing. Standing is definitively alleged in the Petition: NRCM Petition for Review Under Rule 80C at ¶¶ 1-5.

[8] For purposes of these arguments, it is important to reiterate that, unlike the issue of standing in federal court, there is no "case or controversy" provision in Maine's constitution that would render the issue of standing a constitutional matter. See Roop, 2007 ME 32, ¶ 7, 915 A.2d at 968. Rather, standing in Maine's courts is a prudential doctrine and it is up to the courts to define the contours of that doctrine in the context of each case in which the argument of lack of standing is asserted.

321 U.S. 414, 444 (1944)) ("[n]o procedural principle is more familiar . . . than that . . . a right of any . . . sort, 'may be forfeited in . . . civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). Forfeiture is a concept distinct from the separate, but related, doctrine of waiver in that "waiver implies an intention to forgo a known right, whereas forfeiture implies something less deliberate – say, oversight, inadvertence, or neglect in asserting a potential right." Kaplan v. First Hartford Corp., ___ F. Supp. 2d ___, ___, 2010 WL 2243339, * 4 n.39 (D. Me. 2010) (quoting United States v. Eisom, 585 F.3d 552, 556 (1st Cir. 2009)). In this case, LURC forfeited its right to challenge NRCM's standing to bring an administrative appeal pursuant to Rule 80C.

During the course of over three years, LURC continuously and consistently treated NRCM as a party, while NRCM expended extraordinary resources in the administrative proceedings. NRCM presented witnesses, cross-examined Plum Creek's witnesses, submitted and responded to motions, presented opening statements and submitted closing arguments, and otherwise participated as a party with all of the rights of participation as a party to the proceedings. NRCM received formal notice of LURC's final determination. Indeed, that formal notice, specifically addressed to counsel for NRCM, stated that LURC had approved the Concept Plan, then stated, in relevant part, as follows:

> This correspondence serves as official notice to all Intervenors and Interested Persons in this proceeding of the Commission's decision in this matter. As such, in accordance with 5 M.R.S.A. § 11002 and Maine Rules of Civil Procedure 80C, *any party to this proceeding may appeal this decision to Superior Court* within 30 days after receipt of this notice.

See copy of correspondence dated Sept. 25, 2009 (attached to this reply memorandum). As is plain from the above quoted language, even as late as immediately prior to the initiation of this appeal, LURC expressly acknowledged NRCM's right to appeal its decision to the Superior

Court. This express acknowledgment, however, was only the most recent example of LURC's decades long practice[9], and practice up until the filing of Respondent's Brief in this case, of treating organizations like NRCM as parties with standing to appeal its decisions when those parties are granted intervenor status by the agency. Ultimately, this Court must conclude that LURC has forfeited its opportunity to challenge NRCM's standing.

2. LURC is Estopped from Challenging NRCM's Standing.

Similarly to its forfeiture, LURC is estopped from challenging NRCM's standing. The doctrine of equitable estoppel "precludes a party 'from asserting rights which might perhaps have otherwise existed, ... against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right.'" Department of Health and Human Services v. Pelletier, 2009 ME 11,¶ 17, 964 A.2d 630, 635 (quoting Waterville Homes, Inc. v. Maine Dep't of Transp., 589 A.2d 455, 457 (Me.1991)). Equitable estoppel may be applied against a governmental agency where "(1) the statements or conduct of the governmental official or agency induced the party to act; (2) the reliance was detrimental; and (3) the reliance was reasonable." Id.

In this case, during the four years of a rigorous and sophisticated dispute, LURC did not once deviate from its consistent position that NRCM was at first a potential party, and then once intervention was granted in July 2007, an established party to this matter. NRCM had no reason whatsoever to expect that LURC—after all the time, effort, and resources invested in the process—might question NRCM's standing to challenge LURC's approval of Plum Creek's Concept Plan. NRCM detrimentally relied on LURC's statements and conduct when LURC granted NRCM party status and then treated NRCM as an intervenor in accordance with LURC's

[9] See Natural Resources Council of Maine v. Land Use Regulation Com'n, 2001 WL 1712677 (Me. Super. August 10, 2001), Nattress v. Land Use Regulation Com'n, 600 A.2d 391 (Me. 1991).

own rules (Chapter 5.13) – up until LURC filed its Respondent's Brief. Fundamental equitable principles of fairness would be eviscerated were LURC to secure this hollow victory in an enduring battle, after standing by and watching not just NRCM but many other organizations (such as NRCM's joint intervenor, Maine Audubon, or co-Petitioner FEN-RESTORE) spend tremendous amounts of resources litigating this dispute at the administrative level, and in consistently treating these intervenors as parties with standing under LURC's own rules. In this light, under fundamental equitable considerations of fairness, LURC's argument is in essence a form of eleventh-hour sandbagging. LURC as an agency is equitably estopped to make this argument.

3. LURC Waived its Opportunity to Challenge NRCM's Standing.

Moreover, LURC has waived the right to challenge NRCM's standing by expressly acknowledging NRCM as a party and acting consistently with the position it assumed nearly four years ago. Waiver has been recognized by Maine courts as "'a voluntary or intentional relinquishment of a known right [that] may be inferred from the acts of the waiving party.'" Blue Star Corp. v. Ckf Properties, LLC, 2009 ME 101, ¶ 26, 980 A.2d 1270, 1277 (quoting Interstate Indus. Unif. Rental Serv., Inc. v. Couri Pontiac, Inc., 355 A.2d 913, 919 (Me. 1976)). A party waives its right to present an argument when the party "in knowing possession of a right acts inconsistently with the right or that party's intention to rely on it." Id.

In the context of an administrative appeal, it is important that the issue of standing is not jurisdictional and therefore may be easily waived. See Friedlander v. Zoning Hearing Bd. of Sayre Borough, 546 A.2d 755, 757 (Pa. Commw. Ct. 1988) (emphasizing the principle that "the lack of standing does not affect a court's jurisdiction and the failure to challenge a zoning

applicant's standing before the Board constitutes a waiver of that claim.").[10] This proposition that standing can be waived is fully in keeping with repeated holdings by the Law Court regarding the principle that decisions be made at the administrative level before they can properly be reviewed under Rules 80B and 80C for error. For example, in one recent case the Law Court held as follows:

> Meaningful judicial review of an agency decision is not possible without findings of fact sufficient to apprise the court of the decision's basis. In the absence of such findings, a reviewing court cannot effectively determine if an agency's decision is supported by the evidence, and there is a danger of judicial usurpation of administrative functions. Adequate findings also assure more careful administrative considerations, *help parties plan cases for . . . judicial review* and . . . keep agencies within their jurisdiction.

Mills v. Town of Eliot, 2008 ME 134, ¶ 19, 955 A.2d 258, 265 (quoting Chapel Rd. Assoc., LLC v. Town of Wells, 2001 ME 178, ¶ 30, 787 A.2d 137, 140 (emphasis added). It is not this Court's role on appeal to "'embark on an independent and original inquiry.'" Id. (quoting Chapel Rd. Assoc., 2001 ME 178, ¶ 30, 787 A.2d at 141). If the parties or the agency here chose to forego argument at the administrative level challenging any intervenor's substantial interest in the proceedings on the question of standing, that waiver forecloses inquiry now. The allegations

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[10] The Pennsylvania Appellate Court's opinion is instructive in that it clarifies the difference between the administrative appeal cases involving zoning determinations and other cases involving standing. While in some civil cases standing may be a jurisdictional matter that can be raised at any stage of the litigation, administrative appeals are different in that they always fall within the subject-matter jurisdiction of a court designated by the state statute as the court charged with hearing appeals from the administrative decision maker. See Friedlander, 546 A.2d at 757. In this case, the question of standing is not a jurisdictional one. 5 M.R.S. § 11005 provides that "any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court in the manner provided by this subchapter," and, further, NRCM was granted formal "intervenor" status both under the LURC rules and in accordance with public participation provisions of Title 5: "On timely application made pursuant to agency rules, the agency conducting the proceedings shall allow any person showing that he is or may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, or any other agency of federal, state or local government, to intervene as a party to the proceeding." 5 M.R.S. § 9054(1) (emphasis added).

of the Petition to Intervene – enough under both statute and the agency's own Chapter 5.13 rules to confer standing – become binding on the agency and on the parties.

In this case, NRCM formally requested LURC to grant it intervenor party status. LURC had to follow specific procedures in deciding whether to grant NRCM such status and on what basis. The Joint Petition to Intervene (A.R. at 236(I)) filed by NRCM contains specific allegations to confer standing, without serious dispute. LURC granted NRCM party status when there was an opportunity for any other parties or the agency, sua sponte, to oppose formal intervention by NRCM or by anyone. By granting intervention, LURC determined that NRCM's rights would be "substantially and directly affected" by the proceedings. Chapter 5.13; 5 M.R.S. § 9054(1). LURC was fully aware that it was granting NRCM full party status, and had never questioned NRCM's position as such, ever, until it filed its Respondent's Brief. Thus, LURC knowingly and voluntarily waived its right to challenge NRCM's standing to bring Rule 80C appeal. See Friedlander, 546 A.2d at 757 (upholding the determination of the lower state court that the appellant waived the right to challenge the opponent's standing by failing to raise the standing issue before the Zoning Board).

C. Even if LURC is not Procedurally Barred from Asserting NRCM's Lack of Standing, NRCM Substantively Has Standing to Appeal LURC's Decision.

1. The Process by which NRCM Intervened in the Underlying Administrative Proceeding.

In evaluating LURC's argument regarding NRCM's purported status as something less than a full party for purposes of standing in this Court, it is important to review again the process by which NRCM intervened in the underlying administrative proceeding. In 2007, LURC granted NRCM's application to intervene in LURC's proceedings reviewing the matter of Zoning Petitioner ZP 707, the Concept Plan for the Moosehead Lake Region ("Concept Plan

proceedings") for certain lands under the ownership of Plum Creek. Decision at 15. The adjudicatory proceedings administered by LURC are correctly subject to LURC's Chapter 5 of its Rules and Regulations – the chapter titled "Rules for the Conduct of Public Hearings."

Paragraph 5.13 of the Commission's Rules lays out the process pursuant to which members of the public may intervene in the LURC's proceedings. For example, LURC must grant the applicant's petition to intervene if it determines that the petitioner "is or may be substantially and directly affected by the proceeding." Commission's Rules ¶ 5.13. Alternatively, if the agency does not find that the applicant will be substantially and directly affected, the agency may, but is not required to, allow participation to such interested person as a party or in more limited manner. Id. Finally, LURC may deny the petition to intervene, provided it documents reasons for such denial. Id. Parties to LURC proceedings are subject to strict procedural requirements. These include filing deadlines, partial or complete consolidation or joinder, LURC's duties to provide intervenors with a copy of applications and any amendments, as well as notice of the filing of any documents presented to LURC indicating actions taken to comply with the conditions imposed by it. Commission's Rules ¶¶ 5.13-5.14.

In this case, instead of denying or limiting NRCM's intervention in the Concept Plan proceedings, or designating NRCM merely as an interested party, LURC granted NRCM full party status based on LURC's own factual finding that NRCM's interests would be "substantially and directly affected by the proceedings." NRCM's Petition for Review Under Rule 80C ¶ 5.

2. NRCM is an Aggrieved Party for Standing Purposes on Appeal.

The right to appeal from an administrative decision is governed by statute. See Nelson v. Bayroot, LLC, 2008 ME 91, ¶ 9, 953 A.2d 378, 381 (citations omitted) [hereinafter Nelson].

Whether a party has standing depends on the wording of the specific statute involved. Id. For example, an appeal from the grant of a subdivision amendment will not be treated the same as an appeal from a failure to enforce zoning, because they are governed by different statutory provisions. Nelson, 2008 ME 91, n. 1, 953 A.2d at 381.

In this case, there are two sets of statutes that control the determination of whether a party has standing to appeal LURC's determination. First is the statute authorizing appeals from LURC's decision and incorporating the provisions of the Maine Administrative Procedure Act ("APA"), 5 M.R.S.A. §§ 8001-11008. Second are the enabling statutes outlining LURC's duties as the government agency entrusted with the statutory charge to preserve key natural resources of the State of Maine through exercise of its land use planning powers and jurisdiction. Statutory language from both sets of statutes clearly provides NRCM with standing to challenge LURC's determination.

The statute authorizing appeals from decisions of LURC – 12 M.R.S. § 689 – provides that appeals must be brought pursuant to the provisions of the APA, stating that "[p]ersons aggrieved by final actions of the commission, including without limitation any final decision of the commission with respect to any application for approval or the adoption by the commission of any district boundary or amendment thereto, may appeal therefrom in accordance with Title 5, chapter 375, subchapter VII [5 M.R.S. §§ 11001-11008 (2007)]." 12 M.R.S.A. § 689. Pursuant to the APA, "any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court." 5 M.R.S. § 11001. These statutory provisions simply require that for a party to have standing to file a Rule 80C appeal, the party must both have been a "party" to the underlying administrative proceeding and must have been "aggrieved" by that proceeding's outcome. Both inquiries are clearly met in this case.

LURC has not argued, nor could it, that NRCM was not a party to the underlying administrative proceeding appealed from. As noted above, LURC formally granted NRCM party status and NRCM participated heavily at the administrative level. Rather, LURC argues solely that NRCM has no standing because it purportedly does not satisfy the "particularized injury" prong of the "aggrieved party" analysis. LURC is mistaken.

a. NRCM is an Aggrieved Party.

On a substantive basis, and not merely the procedural grounds argued above in Part B, the result of LURC having granted intervenor party status to NRCM forecloses LURC's argument that NRCM cannot qualify as an "aggrieved" party for purposes of right to appeal. Once such intervention was granted, NRCM obtained all the rights of a party to the proceeding, including the right to appeal under 12 M.R.S. § 689 and the APA. LURC now contends, in a footnote in its brief, that granting NRCM full party status, and treating NRCM as such during the past three and a half years, does not confer standing upon NRCM to appeal LURC's decision, because the standard for "administrative" standing is somehow more permissive than for "judicial" standing. LURC Brief at 26 fn. 11. But LURC's argument is misplaced. While it is true that the threshold for obtaining standing in administrative proceedings may in certain proceedings be lower than to confer judicial standing, this is not always the case. Courts across the United States have recognized this difference, and have drawn sharp distinctions between cases where the intervenor was a full party to the underlying administrative process and where the intervenor was not such a party.

For example, under circumstances similar to those at issue here, the Maryland Court of Appeals found that once a government agency granted intervention pursuant to a specifically enacted statutory provision, the intervenor, who had been acknowledged as a party to the

administrative action, remained a party to the judicial proceeding. See Mid-Atlantic Power Supply Association v. Public Service Commission, 760 A.2d 1087, 1092 n.6 (Md. 2000) ("Contrary to the position of . . . the Commission, the intervention statute seems to require more than a perfunctory review, which perhaps was not done, but with which the Commission is charged nonetheless.")

Similarly, the Tennessee Court of Appeals found that the petitioner who was treated as a party during the underlying administrative proceedings had standing to challenge the Board's determination in the state court, because the Board itself had previously determined that the petitioner was qualified to invoke the Board's authority. See City of Brentwood v. Metropolitan Bd. of Zoning Appeals, 149 S.W.3d 49, 55 (Tenn. Ct. App. 2004) ("Having made its determination, the Board cannot later insulate its decisions from judicial review by asserting that [appellant] had no standing to seek judicial review of an administrative proceeding in which it actively participated with the Board's permission.").

Essentially, LURC has cited only to cases in which courts have found that simply because an individual attends an administrative hearing and is recognized by the administrative body and permitted to speak, that act by itself does not confer standing to appeal the administrative body's eventual decision.[11] Those cases are clearly inapplicable to present

[11] For example, LURC's heavy reliance on Nergaard v. Town of Westport Island, 2009 ME 56, 973 A.2d 735, is similarly improper. See LURC Brief at 25-26. In Nergaard, the petitioners appealed a Zoning Board's refusal to hear an appeal from the Planning Board's approval of a permit to improve boat-launching sites. As an initial matter, that was a Rule 80B appeal of a local administrative body's decision, not a Rule 80C appeal of a *state agency* decision, arising out the largest administrative proceeding in the state's history and in the context of an agency with jurisdiction over *unorganized and deorganized* territories. More to the point, the only passing similarity between Nergaard and NRCM's case is LURC's generalized observation that the Nergaard appellants' participation in their administrative proceedings had seemed to include a right to appeal in court. It is enough to observe the process pursuant to which the petitioners in Nergaard intervened in the Board's hearing. They simply requested that the Planning Board grant them party status, after which the Board voted on it and granted such status under advice from the Town's attorney that the petitioner had party status *simply because he spoke at the meeting.* Nergaard, 2009 ME 56, n. 2, 973 A.2d at 737. LURC's comparison of NRCM's position with the situation in Nergaard is an embarrassing trivialization of the incredibly sophisticated, costly and socially significant multi-year process through which NRCM has fully participated as an intervening party in this case.

circumstances, distinguished by LURC having granted full intervenor status to NRCM and having actively recognized and encouraged NRCM's participation in that capacity.

b. NRCM is an Aggrieved Party Under LURC's Own Enabling Statutes.

12 M.R.S.A. § 681, titled "Purposes and scope," reads as follows:

> 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.
>
> The Legislature declares it to be in the public interest, for the public benefit, for the good order of the people of this State and for the benefit of the property owners and residents of the unorganized and deorganized townships of the State, to encourage the well-planned and well-managed multiple use of land and resources. The Legislature acknowledges the importance of these areas in the continued vitality of the State and to local economies. Finally, the Legislature desires to encourage the appropriate use of these lands by the residents of Maine and visitors in pursuit of outdoor recreation activities, including, but not limited to, hunting, fishing, boating, hiking and camping.

12 M.R.S. § 681 (emphasis added). In short, it is eminently clear that the Legislature, in describing LURC's very reason for existence, was interested primarily in ensuring that LURC protected the interests of the "public" and the "people," "residents of Maine and visitors" and their recognized interests in the "ecological and natural values" of the region, as well as their interests in continuing to be able to use the Moosehead Lake region for "outdoor recreation activities."

Further, as outlined in detail in Petitioner's Brief, LURC is statutorily charged with the exercise of two sets of governmental functions: quasi-legislative powers of zoning and planning

land uses, as well the quasi-adjudicatory powers to implement and enforce land use districts and standards. 12 M.R.S.A. § 685-A(7-A) & (8). As part of its adjudicatory power, LURC may approve or deny an application for a development plan—or a larger scale "concept plan"—that proposes rezoning and development under the statutory criteria of 12 M.R.S. § 685-A(8-A). Applications seeking the approval of a concept plan usually require a public adjudicatory hearing, as was done here. LURC may only grant the approval of such a plan if the applicant has established "by substantial evidence" that, *inter alia,* "[t]he proposed land use district satisfies a demonstrated need in the community or area and has *no undue adverse impact* on existing uses or resources . . . " 12 M.R.S. § 685-A(8-A)(A)&(B) (emphasis added).

In light of these express statutory purposes behind LURC's existence and the statutory requirements applicable to LURC's review of proposed land use projects, LURC's argument that standing to appeal LURC's decision in this case can lie only in those owning property directly abutting the property proposed to be developed by Plum Creek rings especially hollow. 12 M.R.S.A. §§ 681 & 685 must inform the Court's decision on whether NRCM has standing to appeal LURC's decision – especially when NRCM's members undisputedly use the Moosehead Lake region for the kinds of recreational purposes described in those statutes and who have the interests in the range of existing uses and resources LURC is charged with protecting. Logically, it would be meaningless for the Legislature to have defined a protected class without empowering that protected class with the tools necessary to enforce those interests. One of the few ways that members of the public who have the personal interests in the region that LURC is charged with protecting, to meaningfully advance those interests against powerful entities seeking to develop land according to their own desires, is through organizations like NRCM; NRCM speaks for its members and supporters, and in so doing advances the very same interests

of its many members and supporters that LURC is charged by statute with protecting. As a state agency in particular, given the enabling statute's "purposes and scope" under section 681, LURC's argument on standing, if accepted, thus looms as dangerous precedent, providing a death knell to any effective public participation in LURC proceedings. LURC cannot be permitted to insulate itself from review in such egregious, deafening fashion.

c. NRCM Has Standing Because It Satisfies the Particularized Injury Requirement under Law Court Precedent.

LURC's argument that NRCM has no standing to pursue its appeal is predicated, in large measure, on citation to cases from federal courts interpreting federal law. These cases, however, are of little value given the aforementioned absence of a "case or controversy" requirement in Maine's Constitution. Rather than rely on such inapt citations in making its decision, in addition to the arguments above, this Court would be better served referring to long-standing Maine Law Court decisions that clarify the requirements for satisfying the "particularized injury" requirement for standing on administrative appeals.

The Law Court has stated that, in order for a party to have a "particularized injury," the governmental action "must actually operate prejudicially and directly upon a party's property, pecuniary or personal rights." Storer v. Department of Environmental Protection, 656 A.2d 1191, 1192 (Me. 1995). Importantly, even where petitioners are required to show particularized injury to appeal from an administrative action, such showing does not require a high degree of proof. Grand Beach Association, Inc. v. Town of Old Orchard Beach, 516 A.2d 551, 553 (Me. 1986) [hereinafter Grand Beach Association] ("[I]t is important to note that we have not required a high degree of proof of a particularized injury in our efforts to ensure that judicial review of administrative action is afforded only to proper parties.").

As a point of procedure, before reviewing the several categories of interests sufficient to confer standing in this matter upon NRCM, we emphasize that the representations made by NRCM on standing in NRCM's Petition for Review under Rule 80C at ¶ 2 and ¶ 3 have not been challenged by LURC. Those averments are true. But if the Court deems it necessary that NRCM submit affidavits from several among its thousands of members on these specific points of standing, NRCM can and will do so. Our primary position, however, is that in the current procedural context of this Rule 80C proceeding, where there is no procedural construct for us to submit affidavits from members, and given the eleventh-hour nature of LURC's argument, this issue can be decided without affidavits. If the Court deems otherwise, we ask for leave to submit affidavits, which can be prepared and filed immediately upon notice that the Court determines this to be necessary.

1. LURC's Decision Adversely and Directly Affects NRCM Members' Personal Interests.

It is well-settled, even under the federal law which arises in a constitutional "case or controversy" standard on the question of standing, that an injury to the environment is sufficient to confer standing on individuals who use that environment. See Sierra Club v. Morton, 405 U.S. 727 (1972).

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.
>
> The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.

Id. at 734-35; see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

Importantly, even the more demanding federal notion of standing is not limited to public lands or lands with public access. See, e.g., SCRAP, 412 U.S. at 686-87 (railway rate increase would allegedly cause decrease in use of recycled goods and therefore deplete natural resources – presumably the result of private commercial activity – affecting plaintiff's enjoyment of environment); National Wildlife Federation v. Agricultural Stabilization and Conservation Service, 955 F.2d 1199, 1203-05 (8th Cir. 1992) (plaintiffs, who lived four miles from the site at issue, had standing to challenge permit that allowed farmers to drain wetlands, when plaintiffs hunted on the wetlands and enjoyed the "aesthetic beauty" of the site); Neighborhood Development Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21, 23-24 (6th Cir.1980) (plaintiffs' "use" of the aesthetic and architectural features of commercial buildings was sufficient to create standing to challenge demolition permit); Port of Astoria v.. Hodel, 595 F.2d 467, 476 (9th Cir.1979) (residents who live, work and "spend leisure time" in area affected by construction of power plant had standing to challenge contract); Concerned About Trident v. Rumsfeld, 555 F.2d 817, 822 n. 10 (D.C. Cir.1977) (party who had an "aesthetic, conservational and recreational" interest in nuclear submarine system site had standing to challenge location of the site); Coalition for the Environment v. Volpe, 504 F.2d 156, 167-68 (8th Cir.1974) (parties had standing to challenge private development which allegedly would affect open views and the "aesthetic and psychological benefit" of the land's existing condition).

Maine law has been consistent with this national approach. See Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978); see also Conservation Law Foundation, Inc. v. Town of Lincolnville, 2001 WL 1736584, *4 (Me. Super. Feb. 28, 2001) ("As abstract and general as

injury to the environment may seem, it is well settled that such injury is sufficient to support standing as to any plaintiff who used the affected environment.").

In Fitzgerald, the Law Court found that the plaintiffs had standing to bring suit against the Baxter State Park Authority, where the plaintiffs alleged that they regularly used the park for recreational and at times professional pursuits, and that they intended to continue that activity. Fitzgerald, 385 A.2d at 195. The Law Court found that the plaintiffs' "use and enjoyment of Baxter State Park and its resources" constituted "a direct and personal injury by the plaintiffs to their interest in Baxter State Park which, although not an economic interest in the sense of involving their livelihood or financial liability, is nonetheless worthy of the protection of the law." Id. at 197.

Similarly, in Conservation Law Foundation, Inc. v. Town of Lincolnville, Justice Hjelm found that the Conservation Law Foundation ("CLF") had standing to appeal a decision of the local Planning Board, where one of CLF's members used the property subject to a challenged subdivision. In that case, CLF's member regularly passed the property and considered the property's unique physical characteristics "critical" to her spiritual and emotional fulfillment. CLF, 2001 WL 1736584 at *8.

In this case, NRCM represents the interests of literally thousands upon thousands of members – NRCM has a membership and support base of about 17,000 individuals and families. See NRCM Petition for Review under Rule 80C at ¶ 2. Its numerous members have engaged in a variety of uses of the Moosehead Lake area subject to or affected by the Concept Plan, sufficient to confer standing: NRCM's members have hiked, camped, canoed, fished, hunted, nature-watched, photographed, worked, conducted field trips, learned from and studied the ecological and natural values of the region, and the list goes on. The statements set forth in

NRCM's Petition for Review under Rule 80C (particularly paragraphs 2 and 3, conveniently left unaddressed by LURC in its argument) go unchallenged. These individuals are from the area, live there, or regularly visit several times a year and intend to do so in the future. Considering the massive scale of Plum Creek's Concept Plan, described in detail in NRCM's Petitioners' Brief, it is beyond any reasonable doubt that the area will undergo fundamental changes that will forever alter its aesthetic and natural character. As in Fitzgerald and CLF, NRCM's members are deeply attached to the current state of the Moosehead Lake area, and have clear and sufficient interests to confer standing. The dramatic scope of the change to the Moosehead Lake region resulting from the Concept Plan, and its impact on the important role this area plays in the lives of NRCM's members, clearly satisfies the particularized injury requirement as provided by the Law Court in Fitzgerald and other precedent.

2. NRCM's Member Landowners Have Also Suffered a Particularized Injury.

The Law Court has made it clear that there need not be a decrease in the value of the property for landowners to have standing. See Laverty v. Town of Brunswick, 595 A.2d 444, 446 (Me.1991) (finding that the threat of increased public use that may result from the placement of a business or commercial structure near the plaintiff's property is a sufficiently particularized injury to confer standing); see also In the Matter of International Paper Co., Androscoggin Mill Expansion, 363 A.2d 235 (Me. 1976) (holding that plaintiffs suffered particularized injury, when they breathed the air in the area for which International Paper received air emission and waste discharge licenses). Under similar circumstances, the Law Court found that landowners, whose land was adjacent to property which was rezoned within a new commercial development district to allow for larger retail structures, had standing to seek a declaratory judgment as to the validity

of the process used by the city to prepare amendments to the city's zoning ordinance and comprehensive plan. Roop, 2007 ME 32, 915 A.2d 966. See also Anderson v. Swanson, 534 A.2d at 1288 (finding that "the proximate location of their property, together with the threatened obstruction of their view, sufficiently demonstrates a potential for particularized injury.").

In this case, NRCM represents the interests of landowners who own property adjacent to or in close proximity to the area subject to Plum Creek's Concept Plan. Considering the massive scale and intensity of Plum Creek's development, including not only residential but also commercial subdivisions, an increase in traffic, noise, pollution, and an overall alteration of the pristine character of the Moosehead Lake region, are all undeniable and unavoidable impacts of the development in the Concept Plan. Some NRCM members also have commercial interests in land adjacent to the Concept Plan.

But to analyze the issue further, LURC's argument – in another rather embarrassing oversight or tendency towards trivialization for the agency – fails to recognize that it is not just "land" or particularized injury to privately owned adjoining "land" that is in issue here. The public has the right to use the lakes, the ponds, the streams, the inlets, many of the shorelines, and has the right to use Lily Bay State Park, all of which are directly adjacent to or interlaced throughout the development plan areas. No one can seriously argue that an environmental organization dedicated to advancing the innumerable range of interests of its members and supporters who use these adjacent resources, does not have standing to assert those interests just as any other adjoining landowner can assert similar particularized injury, even under LURC's own definition of the concept. Thus, even setting aside those actual adjoining landowners who are NRCM members, or setting aside those NRCM members and supporters who use and will use the hiking trails or other publicly accessible areas actually located on plan-area land, NRCM

members use the lakes and waters (and Lily Bay State Park), which are all adjoining the development in Plum Creek's plan, and each person will suffer particularized injury from the plan. In light of the grand scale of Plum Creek's development plans, the nearly pristine condition of the area subject to the Concept Plan, as well the courts' unanimous concurrence that the standing threshold for abutting landowners is minimal, NRCM clearly satisfies particularized injury requirements, and therefore has standing to challenge LURC's determination.

3. LURC's Decision Adversely and Directly Affects NRCM's Members' Pecuniary Interests.

Adhering to the same principles as outlined above in regard to abutting property owners and those whose property is in close proximity to a challenged development, non-abutters are not required to present "a high degree of proof of a particularized injury" in order to establish standing. Grand Beach Association, Inc. v. Town of Old Orchard Beach, 516 A.2d 551, 553 (Me.1986). Meanwhile, economic injury (or its prospect) from government action is sufficient to confer standing. James v. Town of West Bath, 437 A.2d 863, 865 (Me.1981).

In this case, NRCM does have members who are business owners, whose businesses are located in the Moosehead Lake area, in the vicinity of the massive area subject to Plum Creek's Concept Plan, or whose business interests derive economic value from the area – such as wilderness guides, outfitters, or others. NRCM members include residents of Piscataquis and Somerset counties (see NRCM Petition for Review Under Rule 80C at ¶ 2), and other towns, where the impact of development – particularly commercial or resort zones – will adversely impact existing growth or businesses in Greenville, Rockwood, Jackman, or other surrounding areas. Without entering the debate on the economic impacts of the plan – which was a large part of the proceedings below – NRCM members include those who have that direct economic or

pecuniary interest in the outcome of the proceeding. Taking into account the inevitable changes that the business environment in the Moosehead Lake area will undergo in the next few years if LURC's approval of the Concept Plan were permitted to stand, NRCM members demonstrably suffer a particularized injury sufficient to confer standing here.

d. LURC's Approval of the Concept Plan Causes a Direct Injury to NRCM Warranting Judicial Review.

In addition to its debunked argument that NRCM has no standing because it has not proven that any of its members are abutting landowners to the Plum Creek project, amazingly, LURC also argues that neither NRCM, nor presumably anyone else, could have standing to appeal its approval of the Concept Plan because that approval has not authorized any particular development project and therefore there is purportedly no injury that will be directly caused by that approval. This argument is startling in its myopic interpretation of the years-long process that led the parties to this point, the practical impact of the Concept Plan, and the resources devoted to the administrative process here, not only by NRCM, but by LURC itself. LURC's decision in this matter is 186 pages long. It reviews details such as whether the plan will have undue adverse impact to water supply, to fire protection and emergency services, to waste management services, to cultural, archaeological and historical resources, to soil resources, etc. LURC's argument now is that all of these findings are nothing but advisory, inconsequential determinations – that none of it makes a difference because all of these findings can be reversed when a development permit is sought.

For the purposes of standing analysis, however, the principle that injury does not have to be imminent to confer standing has been confirmed by numerous courts from multiple

jurisdictions.[12] Furthermore, the principle that even seemingly remote or slight injuries to the environment may nevertheless confer standing upon a plaintiff, has been confirmed in Maine's courts. See CLF, 2001 WL 1736584 at *4. ("[S]tanding is easily available both to protect the natural environment, even against injuries that seem remote and slight, and to protect the urban environment against changes in its physical or demographic composition.")

In this case, LURC's efforts to trivialize the significance of its approval of Plum Creek's Concept Plan, as well as its allegations that NRCM's members must wait and see until the Moosehead Lake area in fact starts changing before they can allege harm and satisfy standing requirements, ignore decades of judicial precedent, as well as the facts and the nature of this case.

LURC contends that NRCM's assumptions as to how Plum Creek may develop the area are unsubstantiated and that harm from any such development may not necessarily occur. LURC Brief at 31. The argument ignores the voluminous record generated by multiple years of administrative proceedings, which culminated in approval of Plum Creek's complex and incredibly detailed Concept Plan, which remains in effect, especially if this appeal is not allowed

[12] This is true even under the more demanding federal "case and controversy" requirement, which petitioners in state courts in Maine are not subject to. See Baur v. Veneman, 352 F.3d 625, 633 (2d Cir.2003) (holding that plaintiff had standing based on increased risk of contracting an illness and citing the following: Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp., 204 F.3d 149, 160 (4th Cir.2000) (en banc) (concluding that "[t]hreats or increased risk constitutes cognizable harm" sufficient to meet the injury-in-fact requirement); Central Delta Water Agency v. United States, 306 F.3d 938, 947-48 (9th Cir.2002) (holding that "the possibility of future injury may be sufficient to confer standing on plaintiffs" and concluding that plaintiffs could proceed with their suit where they "raised a material question of fact ... [as to] whether they will suffer a substantial risk of harm as a result of [the government's] policies"); Johnson v. Allsteel, Inc., 259 F.3d 885, 888 (7th Cir.2001) (holding that the "increased risk that a plan participant faces" as a result of an ERISA plan administrator's increase in discretionary authority satisfies Article III injury-in-fact requirements); Walters v. Edgar, 163 F.3d 430, 434 (7th Cir.1998) (reasoning that "[a] probabilistic harm, if nontrivial, can support standing"), *cert. denied*, 526 U.S. 1146 (1999); Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234-35 (D.C.Cir.1996) (recognizing that an incremental increase in the risk of forest fires caused by the Forest Service's action satisfied Article III standing requirements)).

to go forward. Hence, it is much more speculative – and perhaps ludicrous, given Plum Creek's investment of time and resources to date – for LURC to suggest that Plum Creek will not implement this concept plan. Simply because Plum Creek may not implement its Concept Plan immediately does not diminish the harm experienced by NRCM's members—even if no physical change to the land has yet occurred. See Central Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002) (finding that the possibility of defendants' changing their conduct is not the type of contingency that makes a threat of injury non-credible). Even without immediate plans for large-scale development in the area subject to Plum Creek's Concept Plan, the Concept Plan *allows for* increased residential, commercial as well as industrial development, and, will therefore invariably increase commercial and residential activity and traffic. See Roop, 2007 ME ¶ 4, 915 A.2d at 967-68. LURC's argument fundamentally ignores that this Concept Plan approval puts in place an inexorable process of development.

Furthermore, LURC cannot tear its arguments out of context to disregard the unique nature of this case: LURC's decision to re-write and then grant Plum Creek's Concept Plan has direct, adverse and likely irreversible effect on one of chief natural treasures of its jurisdiction, of the State of Maine, and indeed nationally. As NRCM emphasized during the proceedings, "once it is gone, it is gone forever." A.R. 432(El) (Party Hearing Transcript, Opening Statement, 12/03/07) at 115-16, 118-19, 133; A.R. 499(1) at 53. As a practical matter, the rezoning approved by the Concept Plan sets in motion an inexorable process of development. The public hearing before LURC was the only opportunity that anyone will ever have to argue against the transformation of the entire Moosehead Lake region that is contemplated by this plan. Such "macro" level considerations were exactly the kinds of considerations that LURC was charged with taking into account in approving or rejecting the Concept Plan. While LURC is correct that

no specific construction project was authorized by the Concept Plan, the fact of the matter is that the *plan* for such projects was approved by rezoning and concept plan approval. When the time comes to approve subsequent construction projects, the "undue adverse impacts" that LURC will be considering will be narrowed to adverse impacts on a "micro" level, i.e. effects to the specific area in and around the proposed project. Never again will LURC have the opportunity to take into account the unique and irreplaceable nature and values of the Moosehead Lake region as a whole, as it has existed for countless generations.

Additionally, LURC's plea regarding what it remarkably argues is the purportedly meaningless impact of this approval of the Concept Plan is belied by the tremendous time and resources that NRCM put into the administrative process in this case. More tellingly, however, it is belied by the corresponding time and resources devoted to this matter by LURC itself over the course of four years in which LURC reviewed countless documents, heard testimony from numerous expert witnesses, and reviewed voluminous submissions from the parties to the proceeding. After all of that effort, and the expense of independent LURC consultants hired pursuant to the "extraordinary projects" statute, 12 M.R.S. § 685-F, LURC argues that not only is that expense for naught and merely "advisory," but that parties to the proceeding (presumably everyone except Plum Creek) lack standing to seek judicial review of the LURC Decision or challenge the process by which it was reached. The absurdity, and indeed the potential for abuse of power, inherent in LURC's interpretation of its own power is breathtaking given its quasi-legislative powers of zoning and planning land uses, together with its quasi-adjudicatory powers to implement and enforce land use districts and standards. LURC would have this Court ratify its absolute power to serve, almost literally, as judge, jury, and executioner on decisions of the kind made here, with absolutely no right for an aggrieved party to appeal. This cannot possibly

be the state of the law and this Court should reject out of hand LURC's claim to such absolute, unreviewable authority to make decisions within its jurisdiction.[13]

III. LURC REGULATIONS DO NOT PERMIT CONCEPT PLAN APPLICANTS TO MEET CONSERVATION-BALANCE REQUIREMENTS BY SELLING CONSERVATION EASEMENTS TO THIRD PARTIES.

As argued above in Part I, this Court should find that LURC's abandonment of its own Chapter 5 procedures compels reversal of this matter to the agency. With that conclusion, this Court need not necessarily reach the "paid-for conservation easement" issues raised by the parties, which are also fundamentally implicated in LURC's failure to reconvene or reopen the public hearing for review and examination of LURC staff/consultants' new concept plan for Plum Creek's land. It was at that point in the proceedings below – the point when staff and consultants of LURC rewrote the concept plan – that for the first time the "paid-for conservation easement" became an issue. Before that time, the TNC transaction was a private sale which did not impact, and was not a pre-requisite to, any concept plan approval.

It must be emphasized in this case that the issue of paid-for conservation easements did not arise from anything the applicant, Plum Creek, put in its Rezoning Petition and Concept Plan. The Concept Plan application included *donated* conservation easements, presumably pursuant to

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[13] NRCM also hereby joins in the arguments on standing raised by co-Petitioner herein, FEN-RESTORE. Both Petitioners have standing on this appeal, for the arguments raised by both parties.

In addition, NRCM joins in the arguments raised in the reply brief of co-Petitioner FEN-RESTORE, responding to the other mertiless arguments raised by other parties or LURC. For example, Plum Creek's misplaced *res judicata* idea, which Plum Creek raises as its first argument, drawing upon the prior and unrelated First Roach Pond proceedings, is fundamentally skewed. *Res judicata* – even assuming the doctrine applies to this administrative agency – can only conceptually apply to the same "cause of action." That is black letter law. Friedenthal, Kane & Miller, Civil Procedure (1985) at § 14.4 at 619: "The basic unit of litigation to which res judicata applies is a cause of action or claim." Id. (citing also Wright, Miller & Cooper, Jurisdiction and Related Matters §§ 4406-14). It is beyond cavil that prior concept plans of Plum Creek, on different land with different development plans and unique "undue adverse impact" or other regulatory analyses, constitute different "causes of action." Positions taken on completely unrelated concept plan proceedings do not give rise to *res judicata* on future unrelated applications. If a person is punched once in year one, the final judgment of that battery claim is not res judicata on the next punch a year later.

Plum Creek's own understanding that the regulatory conservation requirements compelled some form of conservation *donation*, and not a conservation sale. This proposed donated conservation easement land was referred to as the "Balance Conservation Easement" throughout the proceedings and Chapter 5 public hearing (Decision at 15) – it is the easement FSM holds by donation. The applicant, Plum Creek, never suggested that the separate purchase and sale of conservation easements with TNC, on other surrounding land, should be considered to meet the developer's conservation donation requirements.

After the Chapter 5 public hearing reached a conclusion, and the Commissioners decided not to approve or deny the plan but rather task LURC staff/consultants with formulating a new concept plan and rezoning petition without reopening the hearing pursuant to Chapter 5, for the first time the TNC paid-for conservation easement came to the fore. LURC staff/consultants recommended that the TNC paid-for easement, along with the donated easement to FSM, be considered sufficient to meet the conservation regulatory criteria. There was no public hearing on the issue, because LURC did not reconvene the Chapter 5 public hearing in order to test and examine the staff/consultant amendments pursuant to Chapter 5 procedures and protocol. There was no additional evidence taken relating to the scope and nature of the TNC conservation deal, which had throughout the prior Chapter 5 proceedings being presented as a private transaction, where the *details* of the negotiations, nuances and timing of negotiations, any appraisals that were done for either party, negotiations on the amount of land covered by the easement, and other details, were never disclosed nor even made a topic in the prior Chapter 5 public hearing, because the TNC transaction was not offered by the applicant as a requisite to concept plan approval. Thus, when LURC staff and consultants suddenly made the *land covered by the* TNC transaction part of the regulatory requisite for concept plan approval, the fundamental policy

issues raised by that step – all of those policy issues argued in NRCM's Brief in this matter – were never examined and tested in a Chapter 5 setting. The proponents and opponents were never cross-examined in a public hearing, and facts were never developed to support the policy or legal arguments inherent in the questions presented. There was no public hearing to allow the Commissioners the full breadth of factual and policy record necessary to make this weighty decision.

Thus, even if it is assumed that LURC had the power to task staff and consultants with rewriting an applicant's concept plan, if this Court were to decide that that event nonetheless should require reopening and reconvening of the public hearings under Chapter 5, then the reversal of this matter to the agency would then reopen this issue of paid-for conservation for full factual, legal, and policy consideration by the Commissioners. The issue is rife with assumptions regarding facts, trends, or policies, which those on both sides of the issues advance. Ultimately however, where all sides are speaking from aspects of authority and experience, it is essential that LURC make the weighty policy and precedent-setting decision such as this issue, on a complete record, having the benefit of direct and cross-examined testimony of those espousing one or the other position. LURC should not just accept the LURC staff/consultants' point of view on the issue. That is the significance of the correspondence written to LURC by leading, experienced attorneys and legislators in this area, opposing the position of LURC consultants. A.R. 533. The Commissioners shunned this debate. LURC made the decision on the weighty policy issue raised by the paid-for conservation easement while having abandoned the procedural steps under Chapter 5 that had heretofore been embraced for testing the concept plan terms.

It is not enough for LURC and Plum Creek to argue that the issue should not be decided

by this Court because it is unlikely to resurface in the future. The argument is seriously misplaced, for a number of reasons. First, there is no *evidence*, based upon trends or analysis in the conservation easement acquisition field, that this statement is even true. Many others who are active in this field (including Petitioner NRCM and the attorneys or legislators who signed the correspondence to LURC found at A.R. 533) disagree with the blanket assumption. There is no record citation to back this assumption, because there was no hearing on the question. Secondly, the mere assertion that a court need not reach an issue because it is unlikely to resurface, is never a reason for a court to refrain from decision. Imagine LURC deciding not to proceed against a person who has violated one of LURC's land use standards, on the poor reasoning that the circumstances giving rise to the violation are "unlikely to occur" in the future. Neither adjudicatory nor legislative branches of government function in this fashion. Laws are made and decisions are rendered on the basis of acts or omissions, or occurrences and circumstances, which have taken place and need to be addressed. One does not shirk a legal issue or an important policy question on the poor reasoning that the issue may not come up again. Finally, Plum Creek is the nation's largest landowner, and this case presented Maine's largest land development proposal, ever. All eyes are on it. To suggest that it was not necessary for LURC to grapple with the legal issues and policy issues raised by this question, simply because in LURC's view it was a one-of-a-kind circumstance that would never be used as precedent in future cases, ignores both LURC's power and the inherent precedent-setting aspects of this rezoning petition and concept plan application. Indeed, well after the Plum Creek LURC proceedings were over, some Commissioners publicly commented that perhaps the next concept plan by the next landowner could be addressed and handled in a similar fashion to the Plum Creek matter. The inherent precedential values of the Plum Creek case are expressly recognized

by all.

Thus, even assuming for the sake of argument that prior to the Plum Creek decision it would have been unlikely that a future landowner would propose a paid-for conservation easement package to meet conservation regulatory requirements, now – having the benefit of the Plum Creek decision – it is likely that future landowners will in fact do so. They will be *guided by* the precedent that has been set by LURC in this case. The State is wrong to suggest that the State's argument ignores the power of precedent of this agency. Even if it is assumed that at some point before the Plum Creek matter it was unlikely that landowners would have offered paid-for conservation easement packages to meet regulatory criteria (indeed, Plum Creek itself did not do so, and no one had ever thought to read the regulatory criteria in this fashion before), it is simply disingenuous to suggest that now that LURC has changed the playing field to allow paid-for conservation easements to be offered by landowners to meet conservation regulatory criteria, that no landowners will ever choose to do so. Landowners will begin to condition what should be a private conservation land sale, upon the approval of separate development rights.

Conservation land acquisition will become more difficult, more expensive, and the public benefits obtained by the existing regulatory criteria (which, prior to the Plum Creek decision, contemplated only donated conservation measures) will be gutted and undermined. NRCM will not repeat its arguments in favor of its interpretation of the regulatory criteria in issue, set forth in NRCM's Brief at pages 50-58. There is, however, one point worth re-emphasizing, to dispel LURC's and the opponents' arguments that the arguments are not tied to the language of any regulation. The three regulatory requirements of conservation in the context of a rezoning petition and concept plan application are as follows:

> (1) as a means of <u>mitigating</u> 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: "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]."

(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.

None of the three regulatory requirements – requiring applicants to "mitigate," to "match," and to "strike[] . . . publicly beneficial balance," say anything about a landowner "selling" conservation land to meet these criteria. None of these regulatory requirements say that a landowner should "derive profit from" or "assume a net gain" from the providing or granting of conservation to meet these regulatory criteria. Indeed, the language of each regulation, read as a whole, dispels such interpretations entirely. The intention of the regulations is in order to establish a *benefit to the public*, not to the landowner. That is the clear implication of these conservation requirements. NRCM's reading of the regulations is precisely tied to their language; LURC's and others' opposing readings float outside the contours of the regulations read as a whole.

So, to read the requirements to permit a conservation transaction that the public indirectly pays for through a non-profit or NGO's *purchase* of conservation land, in which the landowner *profits* considerably by selling that land, undermines the meaning and intent of these provisions. LURC's argument that the regulations may be interpreted to mean "sell for profit" is an unsound and unreasonable interpretation of these mandatory conservation regulations. The Commission legally erred in its interpretation and application of these regulations to the paid-for conversation easement package in this case. The legal interpretation of the regulations was flawed, and

nonetheless occurred outside of any public hearing established under LURC's own rules for public hearing under Chapter 5. This Court should therefore reverse the LURC Decision.

CONCLUSION

For the foregoing reasons, together with the reasons set forth in NRCM's Brief on appeal, 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 reviewing changes to land use district standards and boundaries, under 12 M.R.S. § 685-A(7-A) & (8-A) and the Commission's Rules and Regulations, including Chapter 5 governing public hearings.

Dated at Portland, Maine this 18th day of October, 2010.

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COMMISSIONER

September 25, 2009

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Natural Resources Council of Maine
c/o Russell B Pierce Jr
Norman Hanson & Detroy LLC
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Subject: Land Use Regulation Commission approval of Zoning Petition ZP 707

Dear Mr. Pierce:

Please find enclosed for your records the Land Use Regulation Commission's September 23, 2009, decision in Zoning Petition ZP 707, the petition of Plum Creek Maine Timberlands, L.L.C. and Plum Creek Land Company to rezone 380,074 acres to a Resource Plan Protection (P-RP) Subdistrict and make effective the attendant *Concept Plan for the Moosehead Lake Region*. This change in subdistrict designation and the attendant Concept Plan become effective on October 8, 2009.

This correspondence serves as official notice to all Intervenors and Interested Persons in this proceeding of the Commission's decision in this matter. As such, in accordance with 5 M.R.S.A. § 11002 and Maine Rules of Civil Procedure 80C, any party to this proceeding may appeal this decision to Superior Court within 30 days after receipt of this notice. Should you also wish to receive a paper copy of the Concept Plan, please e-mail me your request by October 8, 2009.

On behalf of the Commission and its staff, please accept our sincere thanks for your participation in this proceeding.

Sincerely,

Agnieszka Pinette, Senior Planner
Planning and Administration Division

Enclosure: Commission Decision in the Matter of Zoning Petition ZP 707
xc: Zoning Petition ZP 707 File

Land Use Regulation Commission
Catherine M. Carroll, Director

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