



STATE OF MAINE

DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY

LAND USE PLANNING COMMISSION

22 STATE HOUSE STATION

AUGUSTA, MAINE 04333-0022

WALTER E. WHITCOMB  
COMMISSIONER

NICHOLAS D. LIVESAY

PAUL R. LEPAGE

GOVERNOR

# Memorandum

**To:** LUPC Commissioners

**From:** Hugh Coxe, Chief Planner

**Date:** May 7, 2015

**Re:** C & E Real Estate, LLC, Big Moose Township

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## Introduction

In January 2014 C & E Real Estate LLC (hereinafter "C & E") petitioned the Commission to rezone a portion of the 46.1 acre parcel of land it owns on a peninsula located on Moosehead Lake. C & E sought to rezone 18.8 acres from M-GN and P-GP to D-RS for purposes of developing a residential subdivision. The Commission granted C & E's petition on May 14, 2014 and rezoned land sufficient to accommodate seven residential lots on the peninsula. One of these residential lots recently had been created and sold by C & E, and developed by its new owner, Moskovitz. The C & E land rezoned was intended to accommodate the creation of six additional residential lots through future subdivision. The remaining 27.3 acres on the peninsula owned by C & E was not rezoned and was proposed to be retained by C & E.

In December 2014, C & E transferred a nine acre parcel on the peninsula to Rodney & Vanessa Folsom (hereinafter "the Folsoms"). A portion of that nine acre parcel had been included in the area previously rezoned to D-RS and shown as a proposed lot on plans considered for ZP 744. C & E now wants to amend ZP 744 to realign the D-RS zoning boundary to exclude the lot transferred to the Folsoms and add new land, preferably sufficient to accommodate six additional lots (beyond the Moskovitz and Folsoms lots) through future residential subdivision.

This land transfer to the Folsoms raises the following questions for the Commission's consideration:

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1. Is the December 2014 conveyance of land to the Folsoms and retention of a third lot by C & E exempt from the definition of subdivision and subdivision review?
2. May the land that was conveyed to the Folsoms be excluded from the area to be zoned D-RS?
3. How many lots should be accommodated by the land proposed to be zoned D-RS in the amendment to ZP 744?

C & E requested that it have the opportunity to discuss these questions and receive guidance from the Commission before proceeding with an amended zoning petition and filing a subdivision permit. The discussion below is staff analysis of the issues raised.

## **Background**

The following facts provide context for the discussion of the issues:

- In August of 2005, C & E acquired 2 abutting lots of land in Big Moose Township, one a 29.9 acre lot from OFLC, Inc. (OFLC) to C & E; the other a 21 acre lot from OFLC to C & E. These two lots in common ownership made a single, merged parcel consisting of 50.9 acres located in a Great Pond Protection (P-GP) Subdistrict and General Management (M-GN) Subdistrict.
- On January 7, 2008, the Commission approved a Utility Line Permit (ULP 426) for C & E to construct approximately 6,600 feet of above ground utility lines to provide electric power and telephone service to the 50.9 acre parcel for development of single family residential homes. The utility poles were permitted to run along an existing land management road that was constructed for forest management activities.
- On May 18, 2012, the Commission issued an Advisory Ruling, AR 12-03, to C & E, offering an opinion on dividing parcels from their land. The Commission's staff opined that the two separately purchased parcels were merged, forming a single 50.9 acre lot and any division that would create three or more lots in a five year period would require a Subdivision Permit from the Commission.
- On June 11, 2012, the Commission issued a Building Permit, BP 14796, to Adam N. Moskovitz for the construction of a single family dwelling on a 1.94 acre lot, which was subject to the terms and conditions of a purchase and sales agreement dated May 28, 2012.
- On December 3, 2012 and March 5, 2013, C & E met with the Commission's staff to discuss rezoning its lands for a residential subdivision.
- In 2013, C & E divided, then transferred the 1.94 acre lot, which was subject to the terms and conditions of BP 14796, to Moskovitz.
- On February 6, 2013, the Commission answered a request from counsel for C & E, to reconsider the opinion offered in Advisory Ruling, AR 12-03. In that letter, the Commission acknowledged that only one lot had been divided for residential purposes since the land was purchased by C & E in 2005 (the 1.94 acre Moskovitz lot). One additional lot could be divided and sold, provided the remaining lands met the "Retained Lot" exemption (10.25,Q,1,g(2)).

- On May 15, 2013, the Commission issued an Advisory Ruling, AR 13-06, to C & E, offering opinions on multiple additional land division questions. After receiving this Advisory Ruling, C & E divided an approximately 2.86 acre lot and transferred it to the abutting land owner, Moskovitz. This additional transferred acreage merged with the previously divided 1.94 acre lot to create an approximately 4.8 acre waterfront parcel (the Moskovitz lot) developed with the residential dwelling. C & E retained ownership of the remaining 46.1 acres (the C & E parcel).
- In January 2014, C & E petitioned the Commission to rezone 18.8 acres of the 46.1 acre parcel from M-GN and P-GP to D-RS for subdivision. The Commission granted C & E's petition (ZP 744) on May 14, 2014 and rezoned the 18.8 acres. The remaining 27.3 acres was proposed to be retained by C & E. The rezoning decision included the following findings:
  - Strict application of the one-mile rule-of-thumb for adjacency is not necessary in the present instance - the proposal satisfies the underlying objectives of the locational component of the adjacency principle even though no compatible development is located within one road mile of the property.
  - The closest existing compatible development, approximately 2 miles by road from the property to be rezoned, is a subdivision developed with 7 dwellings. Because the proposed rezoning would include land intended to accommodate a 7 lot subdivision, the type and intensity component of the adjacency principle is satisfied.
  - One of the seven lots would be the Moskovitz lot. This would not be required to be included in any future subdivision permit application, but when counting lots for subdivision purposes the approximately 4.8 acres Moskovitz lot is included in the count.
- On November 25, 2014, C & E, through their agent, inquired how a transfer of a portion of the retained land of C & E to the Folsoms would affect a future subdivision or the rezoned area.
- On December 12, 2014, staff responded in writing to provide some guidance and suggest that due to the complex nature of subdivision definitions and exemptions, the history of land divisions and transfers on this peninsula, the current mix of zoning subdistricts involved, and the apparent intent of the property owner to further subdivide the peninsula in addition to any conveyance to the Folsoms, this question should be addressed through the advisory ruling process and that staff likely would bring the matter to the Commission for its consideration and guidance.
- On December 17, 2014, C & E transferred a nine acre parcel on the peninsula to the Folsoms leaving C & E now owning 37.1 acres.
- In March 2015, C & E, through their agent, again inquired how a transfer of a portion of the retained land of C & E to the Folsoms would affect a future subdivision and any rezoning, and revealed the transfer of the nine acre parcel to the Folsoms had been completed.
- On April 17, 2015 staff told C & E, in writing, that the boundaries of the D-RS subdistrict approved in ZP 744 will need to be changed as a result of the transfer of land from C & E to the Folsoms. Staff also provided a written response to questions posed by C & E concerning lot layout for purposes of a zoning petition. The response stated that for adjacency purposes the Commission counts lots in the same manner it

counts lots for subdivision purposes and that both the Moskowitz lot and the Folsom lot are counted toward the total 7 lots for which C & E has adjacency, as determined in ZP 744.

- On April 24, 2015, C & E, through their agent wrote stating,

*“After reviewing this email, C & E would like to get on the agenda regarding this issue. They would like to hear from the Commissioners specifically related to how lots are counted for Adjacency, as well as how they are counted for subdivision purposes. Their concern is that based upon your email, they can offer 5 more lots for sale. Then these lots, along with Moskowitz lot and Folsom lot, will be the basis for the next phase. So if some of these lots do not have structures on them, whether people buy them to provide themselves with separation from other lots, or if the new owner just cannot afford to build immediately, this will negatively effect what C&E can propose for the number of lots for the next phase.”*

## **Discussion**

1. *Is the conveyance to the Folsoms and retention of a third lot by C & E exempt from the definition of subdivision and subdivision review?*

A division of an existing parcel of land into 3 or more parcels or lots within any 5 year period is considered a subdivision unless the division qualifies for one of the exemptions and the transfer is not intended to avoid the objectives of the LUPC statute (Title 12, Chapter 206-A), including those provisions requiring a permit for the subdivision of land. When a parcel is divided, the land retained by the person dividing the land is always counted in determining the number of lots created unless the lot retained qualifies for any of the exemptions. A lot is not counted as a lot for the purposes of subdivision if it is retained by the person dividing the land, and for a period of at least 5 years: (a) is retained and not sold, platted, leased, conveyed, or further divided and (b) is used solely for forest or agricultural management activities, or natural resource conservation purposes.

The 2013 division and sale of an approximately 1.94 acre lot from the C & E parcel to Moskowitz divided the parcel into two lots. The subsequent transfer of an abutting 2.86 acres to Moskowitz was exempt from the definition of subdivision and did not create an additional lot. The December 2014 transfer of nine acres to the Folsoms constitutes a further division of the original C & E parcel and would trigger the threshold three lots in a five year period unless the division meets one of the exemptions from the subdivision definition and the transfer was not intended to avoid subdivision permit review. To avoid needing subdivision review the remaining lot held by C & E must qualify for the retained lot exemption.

A portion of the land owned by C & E on the end of the peninsula past the Moskowitz lot previously been occupied by two campers with pressurized water and electricity. That use is not consistent with the requirement that retained land, to qualify for the subdivision exemption, may only be used “for forest or agricultural management activities, or natural resource conservation purposes.” Rodney Folsom emailed staff in February saying the campers had been removed from the end of the peninsula. Our understanding is that they are no longer being used on the C & E property, although they are being stored near the railroad tracks. As a result,

the remaining land presently owned by C & E appears to qualify as an exempt retained lot, provided the Commission agrees there is no impermissible intent to avoid the objectives of 12 M.R.S. Chapter 206-A.

*2. Must the land conveyed to the Folsoms be included in the area to be zoned D-RS?*

Assuming the Folsom lot was not part of a subdivision when it was created, the LUPC statute and chapter 10 rules are clear that it would become part of a subdivision upon the next non-exempt division of the original parent parcel within a five year period (i.e., prior to 2018). The peninsula, originally owned in its entirety by C & E, is the parent parcel. The Moskovitz lot is lot 1 and the Folsom lot is lot 2, with the retained portion owned by C & E qualifying as an exempt “retained lot.” A non-exempt division of the land retained by C & E would create lot 3 and potentially lot 4. This division would trigger subdivision review of the property owned by C & E.

For the purpose of evaluating whether a subdivision has been created, the Moskovitz lot is counted as a lot – lot 1. At the time of its creation, although it counted as a lot, it was not part of a subdivision. Going forward, the Moskovitz lot will continue to count toward the three lot subdivision threshold as C & E further divides its remaining land within five years of the initial division. At the point C & E creates a third lot,<sup>1</sup> the Moskovitz lot will become part of a subdivision and C & E will need to obtain a subdivision permit. The Moskovitz lot, however, will not need to be included in the subdivision permit. This is a product of the provision within the Commission’s rules that addresses the permitting requirements for the owner of a lot within a subdivision that only becomes a part of a subdivision because of divisions by another owner.<sup>2</sup> Because the Moskovitz lot is in separate ownership from the land retained by C & E, and because further division of the retained C & E property would not trigger the need for Moskovitz to obtain a subdivision permit, the Commission did not require inclusion of the Moskovitz lot in the original rezoning of the C & E’s property in ZP 744.

Assuming its creation did not establish a subdivision (see Question 1 above), the Folsom lot is similar to the Moskovitz lot. The Folsom lot (lot 2) counts for the purpose of evaluating whether a subdivision has been created, but is not yet part of a subdivision. With the next non-exempt division, however, the Folsom lot (like the Moskovitz lot) will become part of a subdivision. Because the Folsom lot is in separate ownership from the land retained by C & E, and because further division of the retained C & E property would not trigger the need for Folsom to obtain a subdivision permit, the Folsom lot is not required to be included in the amended rezoning contemplated by C & E. But if the Folsoms want to further divide the lot they would need to either include the lot, or a portion of the lot, in the area to be rezoned, or wait for five years to pass from the time it was created.

*3. How many lots should the proposed D-RS zoning accommodate?*

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<sup>1</sup> For the purpose of the discussion in this memo it is assumed that Moskovitz and the Folsoms will not divide their lots.

<sup>2</sup> **Parcels Originally Part of a Subdivision.** A lot or parcel which, when sold, leased or developed, was not part of a subdivision but subsequently became part of a subdivision by reason of another division by another landowner is counted as a lot under the subdivision definition. The Commission, however, will not require a subdivision permit be obtained for such lot, unless the intent of such transfer or development is to avoid the objectives of 12 M.R.S.A. §206-A. (Ch. 10, Section 25, Q, 1, c.)

The Commission's rezoning decision for this property (ZP 744) stated that when evaluating individual zoning petitions on a case-by-case basis, the Commission looks at nearby compatible development as the indicator of the type and intensity of development appropriate for an area proposed for rezoning. The Commission determined that, for adjacency purposes, nearby compatible development to the area proposed for rezoning is the closest residential development, which consists of seven homes approximately two miles away by road. The Commission found that C & E therefore has adjacency for seven residential lots on the peninsula.

For adjacency purposes the Commission counts lots in the same manner it counts lots for subdivision purposes. Since the Moskovitz lot is counted for subdivision purposes it was also counted when determining the number of lots allowed by the "type and intensity" component of adjacency. The rezoning decision stated:

*One of the 7 lots in the subdivision would be the Moskovitz lot. The Moskovitz lot would not be required to be included in any future subdivision permit application, but when counting divisions (e.g., lots) for subdivision purposes the approximately 4.8 acres Moskovitz lot is included in the count." (ZP 744 decision, footnote #1)*

Similarly, when counting divisions of the original C & E parcel for subdivision purposes, the Folsom lot is included in the count and therefore is also counted for adjacency purposes. Assuming the land retained by C & E qualifies for the retained lot exemption and is not counted in determining the number of lots created, the Folsom lot is the second lot in a five year period (the original Moskovitz lot created in 2013 being the first). While the Folsom lot was not part of a subdivision when it was created, it does count as one of the seven lots for which C & E has adjacency. Adding the Moskovitz lot to that count, and applying rationale adopted by the Commission in its original determination in ZP 744, staff believe C & E has adjacency for a total of five more lots.

## **Conclusion**

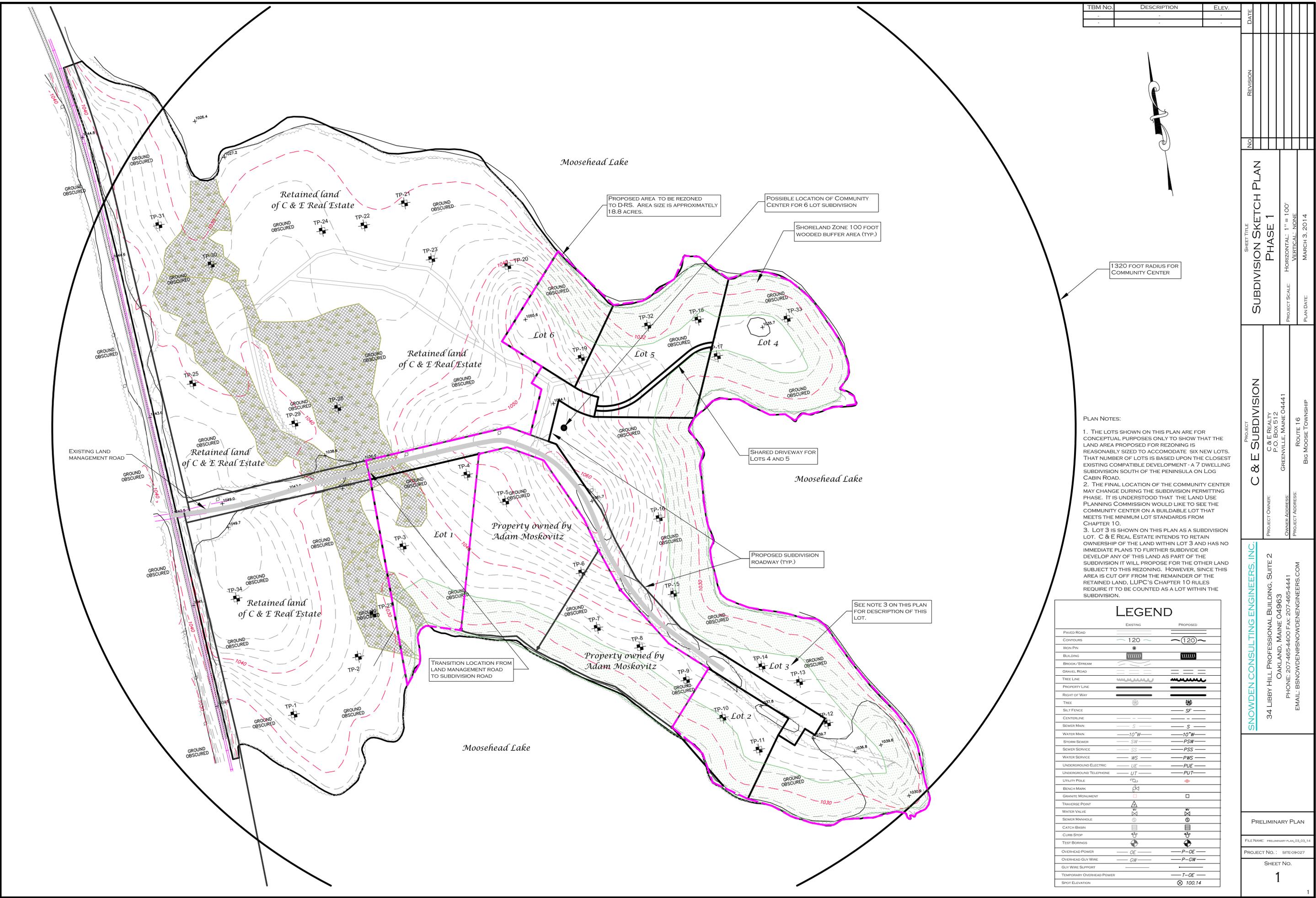
Staff seek direction from the Commission on how to proceed with processing the anticipated amendment to ZP 744. Specifically, does the Commission conclude:

1. The conveyance of a second lot on the peninsula to the Folsoms and retention of the remaining land on the peninsula by C & E is currently exempt from subdivision review?
2. The Folsom lot may be excluded from the D-RS subdistrict as part of any future rezoning?
3. The area rezoned D-RS as part of the proposed amendment to ZP 744 should be intended to accommodate five additional residential lots (beyond the two already created)?

## **Attachments:**

Site plans dated March 3, 2014 and March 20, 2015  
ZP 744 decision document

TBM No.	DESCRIPTION	ELEV.	DATE



PLAN NOTES:

1. THE LOTS SHOWN ON THIS PLAN ARE FOR CONCEPTUAL PURPOSES ONLY TO SHOW THAT THE LAND AREA PROPOSED FOR REZONING IS REASONABLY SIZED TO ACCOMMODATE SIX NEW LOTS. THAT NUMBER OF LOTS IS BASED UPON THE CLOSEST EXISTING COMPATIBLE DEVELOPMENT - A 7 DWELLING SUBDIVISION SOUTH OF THE PENINSULA ON LOG CABIN ROAD.
2. THE FINAL LOCATION OF THE COMMUNITY CENTER MAY CHANGE DURING THE SUBDIVISION PERMITTING PHASE. IT IS UNDERSTOOD THAT THE LAND USE PLANNING COMMISSION WOULD LIKE TO SEE THE COMMUNITY CENTER ON A BUILDABLE LOT THAT MEETS THE MINIMUM LOT STANDARDS FROM CHAPTER 10.
3. LOT 3 IS SHOWN ON THIS PLAN AS A SUBDIVISION LOT. C & E REAL ESTATE INTENDS TO RETAIN OWNERSHIP OF THE LAND WITHIN LOT 3 AND HAS NO IMMEDIATE PLANS TO FURTHER SUBDIVIDE OR DEVELOP ANY OF THIS LAND AS PART OF THE SUBDIVISION IT WILL PROPOSE FOR THE OTHER LAND SUBJECT TO THIS REZONING. HOWEVER, SINCE THIS AREA IS CUT OFF FROM THE REMAINDER OF THE RETAINED LAND, LUPC'S CHAPTER 10 RULES REQUIRE IT TO BE COUNTED AS A LOT WITHIN THE SUBDIVISION.

LEGEND	
EXISTING	PROPOSED
PAVED ROAD	—
CONTOURS	120 (120)
IRON PIN	⊙
BUILDING	▭
BROOK/STREAM	~
GRAVEL ROAD	—
TREE LINE	—
PROPERTY LINE	—
RIGHT OF WAY	—
TREE	⊙
SILT FENCE	SF
CENTERLINE	—
SEWER MAIN	S
WATER MAIN	-10"W
STORM SEWER	SW
SEWER SERVICE	SS
WATER SERVICE	WS
UNDERGROUND ELECTRIC	UE
UNDERGROUND TELEPHONE	UT
UTILITY POLE	⊕
BENCH MARK	⊕
GRANITE MONUMENT	⊕
TRAVERSE POINT	⊕
WATER VALVE	⊕
SEWER MANHOLE	⊕
CATCH BASIN	⊕
CURB STOP	⊕
TEST BORINGS	⊕
OVERHEAD POWER	OE
OVERHEAD GUY WIRE	GW
GUY WIRE SUPPORT	—
TEMPORARY OVERHEAD POWER	T-OE
SPOT ELEVATION	⊕ 100.14

SHEET TITLE	
SUBDIVISION SKETCH PLAN	
PHASE 1	
PROJECT SCALE:	HORIZONTAL: 1" = 100'
	VERTICAL: NONE
PLAN DATE:	MARCH 3, 2014

NO.	REVISION

PROJECT	PROJECT OWNER
C & E SUBDIVISION	C & E REALTY
	P.O. Box 512
	GREENVILLE, MAINE 04441
PROJECT ADDRESS:	ROUTE ADDRESS:
	ROUTE 16
	BIG MOOSE TOWNSHIP

PROJECT	PROJECT ADDRESS:
34 LIBBY HILL PROFESSIONAL BUILDING, SUITE 2	
OAKLAND, MAINE 04963	
PHONE: 207-465-4400 FAX: 207-465-4441	
EMAIL: BSNOWDEN@SNOWDENENGINEERS.COM	

PRELIMINARY PLAN
FILE NAME: PRELIMINARY PLAN_03_14
PROJECT No.: SITE 09027
SHEET No.
1





PAUL R. LEPAGE  
GOVERNOR

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WALTER E. WHITCOMB  
COMMISSIONER

NICHOLAS D. LIVESAY  
EXECUTIVE DIRECTOR

COMMISSION DECISION  
IN THE MATTER OF

C&E Real Estate, LLC

Findings of Fact and Decision

**ZONING PETITION ZP 744**

The Maine Land Use Planning Commission (the Commission), at a meeting of the Commission held May 14, 2014, at Brewer, Maine, after reviewing the application and supporting documents submitted by C&E Real Estate, LLC (C&E) for Zoning Petition ZP 744, public comments, agency review and staff comments and other related materials on file, pursuant to 12 M.R.S. Sections 681 *et seq.* and the Commission's Standards and Rules, finds the following facts:

1. Petitioner: C&E Real Estate, LLC  
PO Box 512  
Greenville, Maine 04441
2. Date of Completed Petition: January 14, 2014. Amended: March 3, 2014.
3. Location of Proposal: Big Moose Township, Piscataquis County  
Lots 2.12, 2.16, 2.161 & 2.162 on Plan 01
4. Present Zoning: (M-GN) General Management Subdistrict  
(P-GP) Great Pond Protection Subdistrict
5. Proposed Zoning: (D-RS) Residential Development Subdistrict
6. Lots Size: 18.8 acres
7. Affected Waterbody: Moosehead Lake

The Commission has identified Moosehead Lake as a resource class 1A, management class relatively accessible, relatively developed with outstanding fisheries, wildlife, scenic, botanical, cultural, and physical resources. Moosehead Lake is a flowed lake.

**Administrative History:**

8. In August of 2005, C&E acquired 2 abutting lots of land in Big Moose Township, as evidenced by two warranty deeds, one conveying a 29.9 acre lot from OFLC, Inc. (OFLC) to C&E, dated August 10, 2005 and recorded in the Piscataquis County Registry of Deeds in Book 1675, pages 178-183; the other conveying a 21 acre lot from OFLC to C&E, dated August 17, 2005 and recorded in the Piscataquis County Registry of Deeds in book 1678, pages 150-155. These two lots in common ownership made a single, merged parcel consisting of 50.9 acres located in a Great Pond Protection (P-GP) Subdistrict and General Management (M-GN) Subdistrict.
9. On January 7, 2008, the Commission approved a Utility Line Permit (ULP 426) for C&E to construct approximately 6,600 feet of above ground utility lines to provide electric power and telephone service to the 50.9 acre parcel for development of single family residential homes. The utility poles were permitted to run along an existing land management road that was constructed for forest management activities.
10. On May 18, 2012, the Commission issued an Advisory Ruling, AR 12-03, to C&E, offering an opinion on dividing parcels from their land. The Commission's staff opined that the two separately purchased parcels were merged, forming a single 50.9 acre lot and any division that would create three or more lots in a five year period would require a Subdivision Permit from the Commission.
11. On June 11, 2012, the Commission issued a Building Permit, BP 14796, to Adam N. Moskovitz for the construction of a single family dwelling with attached and detached garages on a 1.94 acre lot (Plan 01 Lot 2.161). The building permit was issued for a lot, which was subject to the terms and conditions of a purchase and sales agreement dated May 28, 2012.
12. On December 3, 2012 and March 5, 2013, C&E met with the Commission's staff to discuss rezoning its lands for a residential subdivision.
13. In 2013, C&E divided, then transferred the 1.94 acre lot, which was subject to the terms and conditions of BP 14796, to Adam N. Moskovitz.
14. On February 6, 2013, the Commission answered a request from counsel for C&E, to reconsider the opinion offered in Advisory Ruling, AR 12-03. In that letter, the Commission acknowledged that only one lot had been divided for residential purposes since the land was purchased by C&E in 2005 (the 1.94 acre Moskovitz lot). One additional lot could be divided and sold, provided the remaining lands met the "Retained Lot" exemption (10.25,Q,1,g(2)).
15. On May 15, 2013, the Commission issued an Advisory Ruling, AR 13-06, to C&E, offering opinions on multiple additional land division questions. After receiving this Advisory Ruling, C&E divided an approximately 2.86 acre lot (Plan 01 Lot 2.162) and transferred it to the abutting land owner, Adam N. Moskovitz. This additional transferred acreage merged with the previously divided 1.94 acre lot to create an approximately 4.8 acre waterfront parcel (the Moskovitz lot) developed with the residential dwelling and garages (BP 14796) noted above. The merged 4.8 acre developed parcel is located on the 50.9 acre peninsula but is not included in this zoning petition. C&E retained ownership of the remaining 46.1 acres (the C&E parcel).
16. C&E's zoning petition was deemed complete on January 14, 2014. On February 10, 2014 C&E notified the LUPC that it would amend the petition and on March 3, 2014 provided an amended petition.

**Proposal**

17. *Project Summary.* Petitioner proposes to rezone 18.8 acres on a peninsula on Moosehead Lake from M-GN and P-GP to Residential Development (D-RS). The purpose of the rezoning is to facilitate development of a 7<sup>1</sup> shorefront lot residential subdivision.<sup>2</sup> The lots would vary in size from 1.0 to 3.5 acres and typically would have 200 feet of frontage on Moosehead Lake. The lots would be accessed from the existing land management road that enters off Route 6/15.
18. *Project Location and Access.* The area proposed for rezoning (the Property) includes 18.8 acres of the C&E parcel. The C&E parcel is located east of Route 6/15, on the western shore of Moosehead Lake. The C&E parcel is bordered by the Maine Montreal and Atlantic Railway, Inc. (or its successor) track system to the west and Moosehead Lake on all other sides (except where it borders the Moskovitz lot) forming a peninsula. The Property consists of contiguous land on the eastern portion of the C&E parcel including portions of the north shore and south shore of the peninsula but excluding the 4.8 acre Moskovitz lot. The property includes land containing an existing land management road that serves as access to the Moskovitz lot. The property is accessed by an approximately 1.05 mile land management road that extends from Route 6/15. The access road entrance on Route 6/15 is approximately 4.8 miles north of Greenville Junction and approximately 0.47 miles north of the main entrance to the Big Squaw Mountain Ski Resort.<sup>3</sup>
19. *Existing Uses in the Area.* The Property is used for forestry. The area surrounding the Property includes railroad, commercial forestry, residential, and recreational uses. Big Squaw Mountain, a commercial ski area, is located approximately 3.2 miles west of the Property by road. The Property is located slightly closer to State Public Reserve land. This Public Reserve land includes Big Moose Mountain, the site of the Big Squaw Mountain ski area. The Property also is in the general vicinity of land included in the Concept Plan for the Moosehead Region.
20. *Existing Development in the Area.* The four nearest development subdistricts are located between Greenville and the Property. The closest is a D-RS subdistrict located south of the Property just off of Route 6/15 on Log Cabin Road. This subdistrict includes an 11 lot, pre-Commission subdivision developed with 7 residential dwellings; the remaining 4 lots are vacant. This subdivision is located approximately 2 miles by road south of the Property. A D-GN subdistrict at the Big Squaw Mountain ski area, noted above, is approximately 3.2 miles west of the Property by road. A second D-RS subdistrict is located approximately 5.12 miles away by road on a peninsula at the end of Big Moose Point Road. This subdistrict contains a subdivision with 16 approved residential lots developed with

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<sup>1</sup> One of the 7 lots in the subdivision would be the Moskovitz lot. The Moskovitz lot would not be required to be included in any future subdivision permit application, but when counting divisions (e.g., lots) for subdivision purposes the approximately 4.8 acres Moskovitz lot is included in the count. Section 10 .25,Q,c of the Commission's rules states, "Parcels Originally Part of a Subdivision. A lot or parcel which, when sold, leased or developed, was not part of a subdivision but subsequently became part of a subdivision by reason of another division by another landowner is counted as a lot under the subdivision definition. The Commission, however, will not require a subdivision permit to be obtained for such a lot, unless the intent of such transfer or development is to avoid the objectives of 12 M.R.S.A 206-A."

<sup>2</sup> In order to develop a residential subdivision on the property C&E, or its successor, will be required to submit a subdivision application with a proposed subdivision plan that satisfies all applicable land use standards including the subdivision and lot creation standards in section 10.25,Q of the Commission's Land Use Districts and Standards. The sketch plan submitted as part of the amended rezoning petition is a conceptual layout provided by the petitioner for the purpose of evaluating the appropriateness and sufficiency of the land proposed for rezoning. The sketch plan is not a subdivision plan and has not been reviewed by the LUPC for adherence to the subdivision and lot creation standards. However, it is likely that the lot layout and design depicted in the sketch plan would have to be revised during the subdivision application review process to satisfy the subdivision standards.

<sup>3</sup> The approximate road mileages are based on Department of Transportation road data. In some instances the petitioner's estimated measurements differ from the DOT data.

12 dwellings. Farther south is a third D-RS subdistrict on Harford's Point. The railroad tracks on the landward edge of Harford's Point are approximately 5.41 miles by road from the Property.<sup>4</sup>

### **Review Criteria:**

21. Under 12 M.R.S. § 685-A(8-A) of the Commission's statutes, and Section 10.08 of the Commission's Land Use Districts and Standards, a land use district boundary may not be adopted or amended unless there is substantial evidence that:
  - A. The proposed land use district is consistent with the standards for district boundaries in effect at the time, the comprehensive land use plan and the purpose, intent and provisions of this chapter [Chapter 206-A]; and
  - B. The proposed land use district has no undue adverse impact on existing uses or resources or a new district designation is more appropriate for the protection and management of existing uses and resources within the affected area.
  
22. A proposed rezoning must be consistent with the Comprehensive Land Use Plan. 12 M.R.S. § 685-A(8-A)(A). The Commission's 2010 Comprehensive Land Use Plan (the CLUP) provides:
  - A. "The Commission's enabling statute is particularly attentive to the treatment of development in the jurisdiction, setting forth the following principles related to development:
    - Prevent inappropriate uses detrimental to the proper use and value of areas within the jurisdiction;
    - Prevent intermixing of incompatible activities;
    - Provide for appropriate uses;
    - Prevent substandard development; and
    - Encourage well-planned and well-managed multiple use." (CLUP Section 4.3, p. 60.)
  - B. The Commission is "guided by the premise that most new development should occur in or near areas where development already exists. ... The premise [is] based on generally accepted planning principles of concentrating development near services to reduce public costs and minimizing development near productive natural resource-based activities to reduce land use intrusions and conflicts." (CLUP Section 4.3, p. 60.)
  - C. The Commission has a "longstanding belief that concentrating growth around existing development will help to protect the resources and values of the jurisdiction, ensure efficient and economical provision of public services, and promote the economic health of development centers." (CLUP Section 4.3.B, p.61.)
  - D. "With regard to the criterion that zoning changes be consistent with the Comprehensive Land Use Plan, past plans have expressed the need to encourage orderly growth within and

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<sup>4</sup> The development areas listed in this paragraph are located the following approximate distances from the Property measured in a straight line: 1.3 miles to the Log Cabin Rd. subdivision, 2.1 miles to the Big Squaw Mountain ski area, 0.8 miles to the Big Moose Point Rd. subdivision (measuring from the closest points on the peninsulas and across the water), and 1.4 miles to Harford's Point (similarly measuring from the closest points and across the water). For the purpose of determining adjacency for rezonings, the Commission measures the distance to the nearest existing compatible development along an existing roadway or along the path on which a roadway could reasonably be constructed. The Commission does not consider the distance across water to be relevant to an analysis of adjacency.

proximate to existing, compatibly developed areas particularly near organized towns and patterns of settlement. The Commission's application of this concept has evolved over its history in response to changing trends and growing appreciation for the often counterproductive fiscal and economic impacts of dispersed development. The requirement that new development should be located near existing development is referred to as the "adjacency" principle." (CLUP Section 4.3.B, p.62.)

- E. "The Commission has generally interpreted adjacency to mean that most rezoning for development should be no more than one mile by road from existing, compatible development — i.e., existing development of similar type, use, occupancy, scale and intensity to that being proposed, or a village center with a range of uses for which the proposed development will provide complementary services, goods, jobs and/or housing." (CLUP Section 4.3.B, p. 62.)
- F. "The Commission recognizes that there are certain instances in which a greater or lesser distance may be appropriate in measuring distances to existing development." (CLUP Section 4.3.B, footnote 2, p. 62.)
- G. "In order for the Commission to effectively plan for future growth and ensure the long-term protection of the jurisdiction's principal values, it will consider improvements to its overall approach in guiding growth on a jurisdiction-wide basis ... [by] evaluat[ing] the suitability of different towns, plantations and townships for future growth based on their locations relative to population and job centers, the availability of roads and infrastructure, the demand for development, and the type and extent of principal values that they possess." (CLUP Section 4.8.C, p. 126.)
- H. "The adjacency principle has been a valuable tool in guiding development and will remain a central consideration in rezonings, but its application will be further refined to promote consistency and good planning. The Commission expects to substantially strengthen and more comprehensively define adjacency, and will likely integrate this criterion into its improved approach to guiding growth. The Commission anticipates that this redefinition of adjacency will consider current interpretations of geographic distance and type and scale of development and will incorporate other factors pertinent to identifying the appropriateness of areas for development. For example, the Commission may consider whether the rezoning proposal is proximate to existing service centers or other areas identified as appropriate for future growth. Until such efforts are completed, the Commission will continue to interpret adjacency to mean proximate to (within one mile of) existing compatible development, as described in Section 4.3.B." (CLUP Section 4.8.C, p. 128.)

23. Pursuant to Section 10.08,B of the Commission's Land Use Districts and Standards, the review standards listed in Section 10.25,A must be considered in applying the statutory zoning criteria in 12 M.R.S. § 685-A(8-A) to proposed changes in subdistrict boundaries adjacent to lakes. Section 10.25, A of the Commission's Land Use Districts and Standards provides:

The standards set forth below must be met for all subdivisions and commercial, industrial, and other nonresidential structures and uses proposed on land adjacent to lakes. These standards must also be considered in applying the criteria for adoption or amendment of land use district boundaries, as provided in Section 10.08, to proposed changes in subdistrict boundaries adjacent to lakes.

In applying the standards set forth below, the Commission shall consider all relevant information available including the Maine Wildlands Lake Assessment Findings (Appendix C of this chapter), and relevant provisions of the Comprehensive Land Use Plan.

1. **Natural and cultural resource values.** The proposal will not adversely affect natural and cultural resource values identified as significant or outstanding in the Wildland Lakes Assessment (Appendix C of this chapter);]
2. **Water quality.** The proposal will not, alone or in conjunction with other development, have an undue adverse impact on water quality;
3. **Traditional uses.** The proposal will not have an undue adverse impact on traditional uses, including without limitation, non-intensive public recreation, sporting camp operations, timber harvesting, and agriculture;
4. **Regional diversity.** The proposal will not substantially alter the diversity of lake-related uses afforded within the region in which the activity is proposed;
5. **Natural character.** Adequate provision has been made to maintain the natural character of shoreland;
6. **Lake management goals.** The proposal is consistent with the management intent of the affected lake's classification; and
7. **Landowner equity.** Where future development on a lake may be limited for water quality or other reasons, proposed development on each landownership does not exceed its proportionate share of total allowable development.

#### **Review Comments:**

24. On January 21, 2014, the Piscataquis County Commissioners offered comments on the petition. They stated they would support development approved by the Commission and provide the same services that are currently provided to all property owners of Big Moose Township.
25. The Maine Department of Transportation reviewed the petition and stated that they had no comments.
26. The Maine Department of Inland Fisheries and Wildlife (IF&W) responded to the petitioner's request for a review of their proposed rezoning. IF&W reviewed the petitioner's mapping data and found no endangered, threatened, or special concern wildlife species in the vicinity of the Property. IF&W also determined that essential habitat does not occur within the area of the Property. IF&W noted that no significant wildlife habitat has been mapped on the Property, but requested that a vernal pool survey be conducted prior to final project design and any ground disturbance. IF&W noted mapped inland fisheries resources within the general project area include whitefish (fish species of special concern) habitat and wild lake trout habitat in Moosehead Lake. IF&W recommended that best management practices to avoid erosion and sedimentation should be followed to avoid impacts to the mapped inland fisheries resources within the project area. IF&W recommended consultation with Maine Natural Areas Land Program and Maine Department of Environmental Protection prior to the start of any site disturbance.

27. The Maine Natural Areas Program reviewed the petition and determined that no rare botanical features would be disturbed at the project site.
28. The Maine Department of Environmental Protection (DEP) reviewed the petition and commented that depending on the size and nature of any subdivision proposed in the future, a DEP Site Law permit may be needed for the development.
29. The Maine State Soil Scientist has reviewed the petition and determined that the existing road crossing through the wetlands was acceptable and, based on the information submitted by the petitioner's soils expert, the proposed area appeared to be suitable for the proposed residential development.
30. Notification of the Rezone Petition was sent to all landowners within 1000 feet and no responses have been received.
31. The Natural Resources Council of Maine (NRCM) requested the opportunity to review and comment on the petition. NRCM commented re-zoning the Great Pond Protection Subdistrict (P-GP) to a Residential Development Subdistrict (D-RS) would have an undue adverse impact to the recreation potential and scenic character of this area's resources. NRCM also opined that the proposed location of the re-zoning did not meet the adjacency criteria of the CLUP since it was greater than one mile by road from existing, compatible development (CLUP, p. 62). NRCM recommended that the Commission deny the zoning petition because of the proposed development's impacts on the scenic and recreational value of the area and the petition's nonconformance with the adjacency standard.
32. On October 17, 2013, Piscataquis County Commissioner Eric Ward, acting as an individual Commissioner and not on behalf of the County Commission, reviewed and commented on the petition. He stated that the petition does not meet the criteria for re-zoning. Specifically, it does not meet the adjacency standard and the proposed residential development would have an impact on the natural character of the shore and will have an impact on services provided to the area by the County.
33. The facts are otherwise as represented in Zoning Petition ZP 744 and supporting documents.

**Based on the above findings and the following analysis, the Commission concludes:**

**Consistency with the Standards for District Boundaries**

1. The purpose section of the D-RS subdistrict listing states, in part: "The intention is to encourage the concentration of residential type development in and adjacent to existing residentially developed areas." (Section 10.21,J,1,) For a property to be adjacent, it must meet both components of the adjacency principle that are discussed below – the locational component and the type and intensity component. As is described in conclusions 15 – 18 below, rezoning the Property is consistent with the objectives of the locational component of the adjacency principle. As is described in conclusion 19 - 22 below, the proposed rezoning is of a size that would accommodate development that is in keeping with nearby compatible development. Therefore, the Property is consistent with the standards for district boundaries in effect at the time in that the proposed area for rezoning is consistent with the adjacency principle and is "adjacent to existing residentially developed areas." With regard to the other standards for the D-RS subdistrict, there are no known natural resource constraints or conflicting uses that would make this site unsuitable for residences, public facilities, home occupations, and other uses allowed in the D-RS subdistrict. Therefore, the proposed land use district is consistent with the standards for district boundaries in effect at the time and satisfies 12 M.R.S. § 685-A(8-A)(A).

### Consistency with the CLUP

2. Adjacency is a tool to achieve planning goals when zoning is done on a case-by-case, landowner-driven basis. The adjacency principle is best encapsulated by the following sentence: “The Commission has generally interpreted adjacency to mean that most rezoning for development should be no more than one mile by road from existing, compatible development – i.e., existing development of similar type, use, occupancy, scale and intensity to that being proposed, or a village center with a range of uses for which the proposed development will provide complementary services, goods, jobs and/or housing.” (CLUP Section 4.3.B, p. 62.) The adjacency principle contains two basic components, a locational component and a type and intensity component.
3. The objectives<sup>5</sup> the locational component of adjacency seek to achieve are:
  - Ensure efficient and economical provision of public services
  - Encourage well-planned and well-managed multiple uses while reducing land use intrusions and conflicts
  - Minimize development near productive natural resource based activities
  - Promote economic health of development centers
  - Protect resources and values of the jurisdiction
4. A fundamental strategy for meeting those objectives, which underlie the locational component of the adjacency principle, is to direct “most new development” to areas where development already exists. This is why the Commission generally has interpreted the adjacency principle to mean that rezoning for development should be no more than a mile by road from existing compatible development.<sup>6</sup>
5. An important value of this “no more than a mile” interpretation for the adjacency principle is that it provides a greater level of predictability for landowners, applicants, and the public as to when the adjacency principle has been satisfied. It reduces the discretionary aspect of interpreting and applying the adjacency principle to a rezoning petition and helps to ensure equal treatment of all petitioners.
6. The Commission recognizes that there are certain instances in which a greater or lesser distance to existing development may be appropriate for purposes of evaluating the adjacency principle.<sup>7</sup> A greater or lesser distance may be appropriate when conditions or circumstances exist that result in the objectives underlying the adjacency principle to being achieved equally well or better than would be the case if the one-mile measurement were strictly applied.
7. The Commission also recognizes that it will continue to refine the application of the adjacency principle in order to “promote consistency and good planning.”<sup>8</sup>
8. The objective the type and intensity component of the adjacency principle seeks to achieve is ensuring that the anticipated future development, recognizing the uses allowed in the proposed subdistrict, is in keeping with the area. In evaluating individual zoning petitions on a case-by-case basis, the Commission looks at nearby compatible development as the indicator of the type and intensity of development appropriate for an area proposed for rezoning. This meets the objectives of adjacency by pacing development so as to ensure orderly growth and that the provision of public services matches the new development, or that any needed additional service capacity may be added efficiently and economically over time. This pacing of development and orderly growth also allows for incremental

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<sup>5</sup> CLUP Sections 4.3 and 4.3.B. *See also*, CLUP Section 1.2,I,A (containing multiple policies that are furthered by the locational component of the adjacency principle).

<sup>6</sup> CLUP Section 4.3.B., Rezoning Areas for Development.

<sup>7</sup> CLUP Section 4.3.B., Rezoning Areas for Development.

<sup>8</sup> CLUP Section 4.8.C., Improve the Rezoning Approach.

assessment of impacts from development. The resources and the values of the jurisdiction may be better supported, and development may be better planned, by providing an opportunity for interim assessments of impacts because future phases of development can then consider those impact assessments. (*See* CLUP Section 4.3.B.) Recognizing that newly rezoned property is likely to provide adjacency for future rezonings, the type and intensity component of the adjacency principle also helps the Commission further its planning goals with regard to development, rate, density, and type. (*See* CLUP Section 1.2,I.E.)

9. The petitioner has proposed that conditions and circumstances exist for the Property that are relevant to a consideration of adjusting the one mile measurement. The petitioner provides in ZP 744 the following summary list of what it believes are “unique features” that demonstrate the area proposed for rezoning satisfies the adjacency principle even though the Property is farther than one road mile from similar development:
  - The Property is located within 5 miles from Greenville Junction, a major population center, along a major State roadway (Route 6/15).
  - The Property abuts a commercial railroad that already breaks up the large tract of forested land in the area. The location of this commercial railroad adjacent to the Property is more in line with development than to large uninterrupted forest lands or natural resources.
  - The Property is located within 2.58 road miles from the Big Squaw Mountain ski area, which is a major tourist draw to the region. The re-emergence of Big Squaw Mountain as a major ski resort for the State of Maine provides a unique condition that deserves additional consideration for the rezoning of this area.
  - The Property is centered within existing development subdistricts along Route 6/15 and the proposed resort areas defined in the Plum Creek Concept Plan.
  - The Property borders Moosehead Lake, which has a rich history of recreational opportunities for the public. Those opportunities, in addition to the connection to Big Squaw Mountain and the Plum Creek Resort, will provide a unique locale for prospective land owners and those visiting the area.
  - The Property is centered within existing zoned areas currently served by emergency responders such as Sheriff Department and the Greenville Hospital.
  - The Property is centered within existing zoned areas that have adequate disposal of solid waste.
10. The petitioner proposes that rezoning the Property to D-RS would meet the underlying planning objectives of the adjacency principle because the factors listed above make the Property appropriate for residential subdivision development and the rezoning would “maintain the needed inventory” of residential lots “while limiting growth in other regions” that may not be as appropriate as the area proposed for rezoning. The petitioner asserts that rezoning for this “development area that is more densely developed around Route 6/15 [would] limit the sprawl of development into areas that contain larger tracts of uninterrupted forest land, and possibly areas that would be more negatively impacted by the spread of development to those areas.”
11. The petitioner also states “establishing housing around the mountain would ... create an invigorated interest in the mountain and the region.”
12. Factors cited in the petition relevant<sup>9</sup> to determining whether the adjacency principle has been satisfied can be generalized to include:

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<sup>9</sup> Not all factors described in the petition are relevant to evaluating whether the petition satisfied the rezoning criteria. The petition states Plum Creek’s project “has increased the number of development subdistricts within Big Moose Township. Within Big Moose, several new subdistricts have been rezoned including three large areas rezoned as D-MH-RT (Resort Development Zone) and one large

- Proximity to a retail hub or service center is an indicator that adequate services may be efficiently provided to the location.
  - Proximity to a major public road is an indicator that transportation and utility infrastructure exists near the area and that the area already experiences a level of traffic that would be consistent with a more developed location.
  - Proximity to existing development may be an indicator that development in this location would not fragment large blocks of undeveloped land (suggesting an efficient use of land), that the proposed zoning fits the character of the area, and that the location can make an efficient use of existing infrastructure.
  - Proximity to a recreation attraction<sup>10</sup> or multiple recreation attractions may be an indicator that the area may draw people to recreate in a relatively concentrated and non-remote location.
  - Proximity to future, intensive, non-remote residential, commercial, and resort development potential (as set out in the Concept Plan for the Moosehead Lake Region) may be an indicator that the region is appropriate for the proposed development in that it is not remote, its character is consistent with a more developed pattern, or that it has, and is likely to continue to have, adequate services and infrastructure.
13. These factors can be linked to the objectives of ensuring efficient and economical provision of public services and encouraging well-planned and well-managed multiple uses, while reducing land use intrusions and conflicts, minimizing development near productive natural resource-based activities, protecting resources and values, and promoting economic health of development centers which adjacency seeks to achieve.
14. The Commission’s interpretation of the adjacency principle (the one mile rule-of-thumb) acts as a simple and predictable method for establishing that these planning objectives have been met. It provides certainty for applicants, landowners, and abutters and serves to lessen the discretionary aspect of determining appropriateness of locations for rezoning. It also provides predictability about the type and intensity of development that would be accommodated in a rezoning by defining “compatible development” as “existing development of similar type, use, occupancy, scale and intensity to that being proposed.”<sup>11</sup> But the value of the strict one mile measurement for adjacency is not absolute. It needs to be balanced with the value of assessing adjacency in more flexible or nuanced ways that might better achieve the Commission’s planning objectives. In instances where those objectives may be met better without a rigid application of the one-mile rule-of-thumb, it is appropriate to consider whether the adjacency principle is satisfied even when existing compatible development is more than one mile from the area proposed to be rezoned.<sup>12</sup>
15. The combination of factors cited in the petition is important. Specifically, the Property’s proximity to: a retail hub/service center (Greenville); a major public road (Route 6/15); existing development; and likely future development make the area proposed for rezoning suitable for consideration of whether the

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area rezoned as D-MHRS2 (Residential/Resort Optional Zone). These newly zoned locations have significantly increased the area of commercial/resort zoning. These newly developed zoned areas will also likely be a driving force in the need for residential lots nearby.” This is not germane to adjacency because development from a concept plan does not serve to meet adjacency. (Land Use Districts and Standards, Section 10.23,H,8.)

<sup>10</sup> Recreation attraction is considered in this context to be a non-remote location that attracts people for recreation activities in a relatively concentrated pattern of use. It may be that there is one or more other nearby recreation amenities that either attract additional people or extends the seasonality of the recreation location. A prime example of a recreation attraction is a downhill ski area. Others might be a rafting base or a motocross track, but these are much harder to identify and map. Ski areas that also have nearby lake access, Nordic skiing, golf, or other recreational amenities may be examples of multiple recreation attractions.

<sup>11</sup> CLUP Section 4.3.B., Rezoning Areas for Development.

<sup>12</sup> Conversely, there may be instances where a proposal does not satisfy the adjacency principle even though the area proposed for rezoning is less than one mile from existing compatible development.

proposed rezoning may be able to meet the underlying objectives of the adjacency principle even though located more than one mile by road from existing, compatible development. Without the presence of these factors combined at one location, the petition to rezone this property clearly would not satisfy the adjacency principle and therefore would not be consistent with the CLUP. The presence of these combined factors is a necessary condition for consideration of the Property for a rezoning. However, this combination of factors is not, by itself, sufficient.

16. One additional factor, when considered along with the combination of factors noted in the preceding paragraph, supports finding that rezoning the Property D-RS, notwithstanding the one-mile rule-of-thumb, furthers the objectives of the locational component of the adjacency principle. This factor is the proximity of the Property to a major recreation attraction. The particular recreation attraction, the Big Squaw Mountain ski area,<sup>13</sup> has, and has the potential to have additional, nearby recreational amenities and resources, including public lake access and trails for hiking, biking, cross-country skiing, and snowmobiling. Big Squaw Mountain also is in the heart of a region renowned for hunting, fishing, and camping. There are few similar recreation related developments in the Commission's jurisdiction that serve as large attractors for people to recreate in a concentrated, non-remote location. There are fewer still that are in such close proximity to multiple recreation resources, both developed and primitive in nature, as well as characterized by the combination of factors listed in conclusion 15 above.
17. The Commission finds the record evidence demonstrates rezoning the Property would, on balance, meet the underlying objectives of the locational component of the adjacency principle, listed in conclusion 3 above, as follows:
  - A. Ensure efficient and economical provision of public services. New residential subdivision development in the area proposed for rezoning will be located close enough to Greenville, a service center, that it is in an area that already receives public services for road maintenance and plowing, public safety and utilities. The area also has a well-established road network with capacity to handle any additional traffic that might be generated from a new residential subdivision of the type and size contemplated. Development of new homes will not create a burden by significantly extending travel distances for service provision or creating a requirement for new or added infrastructure (such as road or utility line upgrades) or capital outlays (such as additional emergency service equipment). Moreover, the proposed site is situated in an area that already has residential development that requires public services in the general vicinity that are located between Greenville and the Property. This area includes the Harford's Point neighborhood on the shoreline of Moosehead Lake, a 11 house subdivision located on a peninsula south of the site at the end of Big Moose Point Road, and a seven house subdivision located south of the site along Route 6/15 on Log Cabin Road. Additional development that already receives public services in the area is the Big Squaw Mountain ski area. The presence of these developments in the area around the proposed rezoning site establishes that public services are already being provided and, thus, will not result in significant new service routes. The Piscataquis County Commissioners stated the County would provide the same services to the Property that are currently provided to all property owners of Big Moose Township. Further, limited additional new development will not over burden the capacity of existing public services and the Property satisfies the objective that the rezoning ensure efficient and economical provision of public services.
  - B. Encourage well-planned and well-managed multiple uses while reducing land use intrusions and conflicts. The Moosehead Lake region is recognized as a high growth, high value area<sup>14</sup> in which

<sup>13</sup> While the Commission considers Squaw Mountain to be a recreation attraction it is worth noting that the ski area had a limited season and limited terrain open in the winter of 2013 and prior to that was closed since 2010.

<sup>14</sup> "The Commission regards MCDs [minor civil divisions] that (1) have an established pattern of settlement, (2) have experienced or are likely to experience rapid growth, (3) are relatively accessible, and (4) harbor high-value natural and cultural resources as 'high-

development pressure is likely to continue. The Property is not in a remote location or part of a large, undivided forestland. The Property is proximate to a significant state road and separated by railroad tracks from neighboring land. In light of the expected development pressure in the region, residential development on the peninsula Property would not involve the type of intrusion into or conflict with unfragmented forestland the Commission endeavors to avoid through planning.

Additionally, much of the land within the Moosehead Lake region is restricted from further structural development because it is subject to the terms of conservation easements or is public land. The proposed rezoning site, however, has a combination of factors (proximity to a service center, a major public road, and existing development) that at a minimum should be present at the typical area rezoned to accommodate development. The Property has the added feature of a nearby recreational attraction that can draw people to the area for recreation in a relatively developed and non-remote setting. The presence of the recreation attraction near the rezoning site provides an important element in determining the property is suitable for residential development. Rezoning the Property for a residential subdivision would encourage development in a location that has attributes of a well-planned location and would be preferable to rigidly applying the one-mile rule-of-thumb that effectively would encourage residential development to occur incrementally in an unpredictable and dispersed manner elsewhere in the region.

The proximity of the site to existing development and infrastructure would minimize undesirable impacts on surrounding uses and resources, efficiently build upon existing public and private services and infrastructure, and provide synergies with surrounding activities and development, all of which are objectives of good locational planning. The Commission also finds that the proposed rezoning would serve to guide such development away from other less appropriate locations, including locations in the region that contain larger tracts of uninterrupted forest land.<sup>15</sup>

At the site specific level, rezoning the Property to D-RS would allow development on this peninsula that would be subject to subdivision review standards. Development subject to such review is preferable to individual, lot-by-lot development as subdivision review seeks to manage impacts from the development, including waste disposal, storm water runoff, traffic impacts, wildlife habitat impacts, and scenic impact, in a more comprehensive manner than would occur if house lots were developed incrementally over time.

A key element to finding this objective underlying the locational component of the adjacency principle has been met is this site's close proximity to a recreation attraction (the ski area) – a non-remote location which attracts people for recreation activities in a relatively concentrated pattern – and the presence of other relatively developed recreational amenities nearby (including developed lake access and a service center that caters to those recreational interests) that attract additional people and extend the seasonality of the recreation in the area. Rezoning the Property for a residential subdivision would augment those developed recreational resources. Development of this type near these existing recreation attractions and resources would serve to encourage multiple recreational uses by allowing a greater variety of housing for recreational users near those recreational resources.

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growth, high-value' MCDs. Development is likely to continue in most of these MCDs due to the attractiveness of their resources and their relative accessibility." (CLUP Section 4.6.E; *see also* CLUP Section 4.6.B, Residential Development Trends.)

<sup>15</sup> This belief is imbedded in the Commission's approach to guiding development that encourages, but does not require, residential development to locate "within and proximate to existing, compatibly developed areas particularly near organized towns and patterns of settlement" (CLUP Section 4.3.B) and that doing so minimizes and discourages, but does not prohibit, development near productive natural resource-based activities and helps "to protect the resources and values of the jurisdiction." (CLUP Sections 4.3 and 4.3.B.)

- C. Minimize development near productive natural resource based activities. While much of the land in the Moosehead Lake region has, through conservation easements, a high level of protection for productive natural resource based activities, the land that is not protected by those easements, or that is not publicly owned, also is valued for its natural resource based assets, primarily forestry and recreation activities distant from development centers or developed recreation attractions. Rezoning of the Property for a residential subdivision will not prohibit or prevent development from occurring near those areas that have no current protection for productive natural resource based activities, but would provide a viable location and some incentive, for development that might otherwise locate near valued natural resource based activities in other parts of the Moosehead Lake region.
- D. Promote economic health of development centers. The Commission finds that the petition does not present, and the Commission is not aware of, any reliable evidence that the proposed rezoning would promote the economic health of a development center. In this instance the lack of evidence to support a conclusion that this rezoning would promote the economic health of a development center does not mean that the rezoning would be detrimental to the economic health of a development center. Based on its planning experience, the Commission does not anticipate detrimental effects to development centers from the proposed rezoning and anticipated development. Moreover, while the record contains no concrete evidence or study showing the proposed rezoning would benefit nearby development centers, based on its planning experience the Commission believes it is reasonable to assume that the rezoning might promote the economic health of a development center including the Town of Greenville, the Town of Rockwood Strip, or the Big Squaw Mountain ski area.
- E. Protect resources and values of the jurisdiction. At the jurisdiction wide level the protection of the resources and the values of the jurisdiction requires a balance that is recognized in the various goals, policies and other provisions of the CLUP.<sup>16</sup> Relevant things the CLUP speaks to include:
- The need to provide for “diverse and abundant recreational opportunities” throughout the jurisdiction acknowledging that “recreation is increasingly an economic driver in the jurisdiction.” (CLUP Section 1.1, p.2).
  - Patterns of land use that “meet present and future needs without compromising the principal values” by, among other things, providing for “sustainable economic opportunities and outdoor recreation for the people of Maine, its visitors, and property owners and residents of the jurisdiction” and for “[s]upporting development in places where the principal values of the jurisdiction are least impacted and in areas identified by the Commission as most appropriate for development.” (CLUP Section 1.1, p.3).
  - Guiding development at the jurisdiction wide level to areas identified as appropriate development centers by “considering (1) proximity and connectivity by public road to economic centers, organized towns and well established patterns of settlement; (2) compatibility of natural resources with development; (3) demonstrated demand for and public benefit from development;<sup>17</sup> and (4) availability of public infrastructure, facilities and services.” (CLUP Section 1.2, I.A, p.6).
  - Economic development policies encouraging “forest, recreation and other resource-based industries and enterprises which further the jurisdiction’s tradition of multiple use without diminishing its principal values.” (CLUP Section 1.2, I.B, p.7).

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<sup>16</sup> Similarly, the purpose and scope provisions of the Commission’s governing statute reflect the importance of this balance. 12 M.R.S. § 681.

<sup>17</sup> With the removal of the “demonstrated need” prong from the Commission’s statutory rezoning standard, the Commission no longer considers the “demonstrated demand” for development as it once did.

These provisions indicate that the proposed rezoning fits into the jurisdiction wide goals and policies of the Commission regarding the location of development. The special nature of this area within the jurisdiction, because of the confluence of factors that make residential subdivision development appropriate, and because of the presence of a rare, if not unique, combination of recreation attractions and related recreation resources and amenities, makes a rezoning for a D-RS in this location appropriate as a means to achieving some of the broad goals of the CLUP. Specifically, the proximity of the ski area and other recreational resources provides opportunity for diverse and abundant recreation in a place where the principal values of the jurisdiction are least impacted.

Relative to other areas in the jurisdiction, rezoning the Property to a D-RS would further the goals and policies of the Commission by guiding this type of development to this area. The area is not remote and the recreational users of the ski area and other nearby developed recreational amenities would have no expectation of experiencing an undeveloped landscape in this vicinity. The residents of the proposed development would be able to easily access a variety of recreational opportunities through all four seasons. Established development centers, such as Greenville, Rockwood Strip, and the Big Squaw resort would serve as nearby places for the residents to obtain goods and services.

18. One of the shortcomings of the adjacency principle is that it encourages the leap-frogging effect. This occurs when a rezoned area is developed, creating adjacency for a subsequent rezoning. The objectives that the adjacency principle is intended to address are impacted by such future development. Secondary development that leap-frogs from a subsequent rezoning impacts the ability to provide efficient public services, support the jurisdiction's values, avoid land use intrusions and conflicts, and promote the health of development centers because leap-frogging disperses development away from where development already exists. If deviating from strict application of the one-mile rule-of-thumb in evaluating whether a particular proposal is consistent with the adjacency principle would exacerbate the effect of leap-frogging, it is questionable whether a more nuanced application of the adjacency principle would equally or better achieve the planning objectives underlying the locational component of the principle or, more generally be consistent with the CLUP. This is not a concern with the proposed rezoning of the Property. The surrounding ownership and land use zoning patterns limit the opportunity for further rezonings, based on adjacency from the Property, to unencumbered land extending in a 2 – 3 mile area around the Property. This is an area that largely possesses the same key factors that make the Property appropriate for rezoning for a residential subdivision as discussed above. Within about 2 – 3 miles from the Property, surrounding land is either within the Concept Plan for the Moosehead Lake Region (and thus is either encumbered from most structural development by that plan's conservation easement or already has designated areas for development), or is publically owned. These lands serve as fixed boundaries to any leapfrogging of rezoning that requires adjacency and further support that this petition presents a unique set of factors that can meet the underlying objectives of adjacency without adhering to the strict one mile measurement.
19. The second component of the adjacency principle relates to the type and intensity of development in the area. Not only must the Property be in a location appropriate for a D-RS subdistrict, but the area to be rezoned must accommodate development in keeping with the area as indicated by compatible existing development – nearby development of similar type, use, occupancy, scale, and intensity.

The petitioner states that rezoning an area to accommodate a residential subdivision would “maintain the needed inventory” of residential lots. The petitioner, however, has not provided information on the current inventory or what future inventory it believes is needed.<sup>18</sup> Regardless, the Commission no longer considers demonstrated need in evaluating zoning petitions and the question of what future inventory might be needed does not relate to the question the Commission must address – what is the

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<sup>18</sup> The Commission notes, undeveloped lots remain in both of the nearby subdivisions referenced in the petition – the subdivision on the peninsula south of the C&E site has 11 houses and 6 empty lots and the subdivision on route 6/15 has 7 houses and 4 empty lots.

compatible development the Commission must look to, consistent with the CLUP, to ensure that the future development the proposed rezoning will facilitate is in keeping with the area and, thus, satisfies the type and intensity component of the adjacency principle.<sup>19</sup>

20. When considering existing development in the area proposed for rezoning, the Commission did not pick a specific distance or radius in which to look. Rather, the Commission looked at the network of development – both the amount and the type – within the area surrounding, and reasonably accessible, to the Property in order to evaluate whether the proposed rezoning is intended to facilitate development in keeping with nearby compatible development.

While the Commission concluded that the objectives underlying the locational component of the adjacency principle would be equally or better met without rigid application of the one-mile rule-of-thumb, the proximity of other similar development remains material. When evaluating whether a proposed rezoning is consistent with the type and intensity component of the adjacency principle, the closer or more proximate the nearby development the more suitable the development for serving as the “compatible development” that sets the type and intensity baseline. In those unique situations where the Commission looks beyond one mile to identify compatible development, the proximity of nearby development becomes even more important.<sup>20</sup>

21. In evaluating the proximity of nearby development the unit of measure used by the Commission is the road mile; the CLUP clearly indicates that road miles are the appropriate measure. The road mile measurement is based on sound planning principles that account for transportation routes and consider proximity in functional terms rather than in simple straight-line measurements. Much of the benefit of concentrated development comes from creating efficient connections for provision of services, exchange of goods, and interaction of residents. Those connections can enhance local economies and create a greater sense of community. While such connections may not be facilitated exclusively by transportation on roads, the movement of people and goods on a road system in a rural setting such as the Big Moose Township area is the predominant mode of connection.<sup>21</sup> Concentrated development patterns also reduce road infrastructure and maintenance costs further supporting the road mile measurement as the proper indicator of distance when determining whether an area should be rezoned for development.

The road mile measure has been a reliable and predictable method of measuring proximity for landowners, applicants, and the public. While the Commission finds that in this instance it is appropriate to look at compatible development beyond one mile, no justification has been provided, and the Commission has not found one, for departing from the road-mile method of measurement when

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<sup>19</sup> While the Commission no longer considers demonstrated need in evaluating zoning petitions, under the “no adverse impact” prong of the rezoning criteria, an evaluation of the demand for development may, in some instances, be relevant to whether the amount and type of zoning proposed, in conjunction with already existing zoning and land use, might create undesirable impacts to the community or to surrounding property owners (such as high vacancy rates for residential or commercial units).

<sup>20</sup> See, CLUP Section 4.3.B, The Commission is “guided by the premise that most new development should occur in or near areas where development already exists. ... The premise [is] based on generally accepted planning principles of concentrating development near services to reduce public costs and minimizing development near productive natural resource-based activities to reduce land use intrusions and conflicts.” The Commission has a “longstanding belief that concentrating growth around existing development will help to protect the resources and values of the jurisdiction, ensure efficient and economical provision of public services, and promote the economic health of development centers.”

<sup>21</sup> In this particular lake peninsula setting a connection from the Property to other existing residential development across water might be possible by boat. The Big Moose Point Rd. subdivision is 0.8 miles (measuring from the closest points on the peninsulas and across the water), and Harford’s Point is 1.4 miles (similarly measuring from the closest points and across the water). However, transportation by boat in this setting is neither efficient nor reliable for provision of services, exchange of goods, and interaction of residents. Weather, variations in lake conditions, and a lack of docking infrastructure make transportation and connection by boat impractical. Connection to these developed areas by road is an indirect path from the Property along a land management road out to Route 6/ 15 and then along other lengthy roads to the respective peninsulas. Big Moose Point Rd. subdivision is 5.12 miles by road and Hartford’s Point is 5.41 miles by road from the Property.

evaluating what nearby development serves as the compatible development for the purpose of applying the adjacency principle.

22. The Commission finds with regard to the present petition that the compatible development is the closest residential development, which consists of seven homes approximately 2 miles away by road. The next nearest residential development is approximately 5.1 miles from the Property, a distance too far to be considered compatible development. The petitioner's proposal to rezone 18.8 acres to accommodate 7 lots is consistent with the type and intensity of this existing, compatible development and, thus, consistent with the adjacency principle and the CLUP.
23. The CLUP recognizes that adjacency might be evaluated differently than by a strict one mile measurement from existing compatible development and that the adjacency principle will be refined over time. The Commission is not, in this decision, undertaking a comprehensive refinement to the adjacency principle nor is it changing its approach to guiding growth as discussed in section 4.8.C. of the CLUP. This decision takes into consideration some of the factors referred to in section 4.8.C. that may be pertinent to a refined approach to adjacency, but the decision specifically addresses only the zoning petition and the facts of this particular petition. Nothing in this decision should be construed to be a change in Commission policy with respect to adjacency.

### **Consistency with Chapter 206-A**

24. A rezoning petition may not be granted unless the proposed land use district is consistent with the purpose, intent and provisions of Title 12, Chapter 206-A. 12 M.R.S. § 685-A(8-A)(A). Section 685-A(1) establishes the Commission zoning authority: "The commission, acting on principles of sound land use planning and development, shall determine the boundaries of areas within the unorganized and deorganized areas of the State that shall fall into land use districts and designate each area in one of the following major district classifications: protection, management and development." Section 685-C(1) required the Commission to develop the CLUP and establishes: "The commission must use the plan as a guide in developing specific land use standards and delineating district boundaries and guiding development and generally fulfilling the purposes of this chapter." Section 681 states the Legislature "finds that it is desirable to extend principles of sound planning, zoning and development to the unorganized and deorganized townships of the State" to, among other things, "encourage appropriate residential, recreational, commercial and industrial land uses." Consistent with Chapter 206-A and principles of sound planning, zoning, and development, the Commission evaluated the petition, concluding, among other things, the proposed rezoning is consistent with the adjacency principle, one of the Commission's core planning principles. Having considered the location of the Property, surrounding uses, the type and intensity of the development the rezoning is intended to foster, the review of agency and public comments, and the record as a whole, the Commission concludes approval of the petition would be an act of sound land use planning. Therefore, the Commission concludes the proposed rezoning is consistent with the purpose, intent and provisions of Chapter 206-A, which cumulatively are designed to promote sound planning.

### **Impacts on Existing Uses and Resources**

25. The Property is used for forestry. It has been developed with a land management road and an above ground utility line that serves the peninsula. Neighboring uses include a single family residential lot (the Moskovitz lot), the abutting railroad, and forestry on the opposite side of the tracks. Moosehead Lake is used for a variety of recreational uses in the vicinity of the Property, including fishing, swimming, and boating. The Commission concludes the proposed rezoning of the Property and the potential uses allowed in the proposed D-RS subdistrict, including residential subdivision development, would not have an undue adverse impact on existing uses. A residential zone would be

consistent with and would not adversely affect the existing residential development and associated use in the area. Limited forestry might continue on the peninsula Property and the petitioner's desire to change the zoning of the property and shift a portion of the use from forestry to residential does not mean forestry would be adversely impacted. Neighboring forestry on the opposite side of the railroad tracks would not be adversely impacted by the rezoning either and the rezoning would not fragment large uninterrupted blocks of forest land. For example, this forestland would not be impacted by new roads; the land management road accessing the Property already exists. Additionally, any future development in the proposed D-RS subdistrict would not create any further fragmentation of forestland, as the peninsula Property already is separated from neighboring property by the railroad tracks. Further, any necessary buffering of residential uses from forestry activities would be addressed at the permitting phase. Operation of the railroad would not be impacted by the rezoning. Access rights across the tracks would have to be obtained from the railroad by any future owners of residential lots or home owners association. In the Commission's experience, this type of access right commonly is negotiated without adverse impacts to the use of the railroad. Recreational users on Moosehead Lake, depending on their vantage point, likely would be able to see some residential development if it were to occur in the proposed D-RS. There is nothing inherent about residential development on the Property that would make this type of development incompatible with existing recreational uses on this area of the lake or that indicates the proposed rezoning would have an undue adverse impact on recreation in the vicinity of the Property. The Property is located in a non-remote area where visible evidence of residential development or certain commercial activity, such as the railroad, does not cause an undue adverse impact on recreational uses. Finally, application of the Commission's standards, for example the Commission's shoreland clearing and buffering standards, applied at the permitting phase would address potential visual impacts, as well as runoff impacts that could affect recreational uses by affecting water quality.

26. The proposed rezoning would not have an undue adverse impact on existing resources. The compatibility with existing forest and recreational resources, particularly Moosehead Lake, is discussed above. With regard to existing natural resources, no rare botanical resources or significant wildlife resources have been found within the peninsula. IF&W noted there are no endangered, threatened, or special concern wildlife species in the vicinity of the Property; no essential habitat within the area of the Property; and no mapped significant wildlife habitat on the Property. IF&W also noted that any potential impacts to mapped inland fisheries resources in the lake could be addressed through the implementation of best management practices. The State Soil Scientist's review indicates the Property is suitable for residential development and that such development could occur without adversely affecting water quality. Therefore, the Commission concludes rezoning the Property to D-RS would not have an undue adverse impact on existing resources, including wildlife, wildlife habitat, and water quality.

### **Consideration of Section 10.25,A**

27. Section 10.25,A of the Commission's Standards must be considered in applying the criteria for proposed changes to subdistrict boundaries adjacent to lakes. The Commission has done so and the conclusions above remain unaltered. Further, the Commission concludes the proposed rezoning is consistent with the provisions of Section 10.25,A. Specifically:
  - A. The proposal is consistent with Section 10.25,A,1 in that proposed rezoning and potential residential development would not adversely affect the outstanding and significant natural and cultural resource values for this section of Moosehead Lake as described in Appendix C of the Commission's Land Use Districts and Standards. The section of Moosehead Lake on which the Property fronts has outstanding resource ratings for fish, wildlife, botanic, cultural and physical

resources; and significant resource ratings for scenic and shore character resources. The proposed rezoning to a D-RS subdistrict would allow for future residential development upon obtaining the necessary permits from the development. Future development on the property, in accordance with applicable permitting standards would not adversely affect the lake's resource values. As noted above, the proposed rezoning will not have an undue adverse effect on existing uses or resources; this directly relates to the protection of the natural and cultural resource values of the lake. Additionally, potential impacts, such as visual impacts and erosion, associated with any individual development proposal that could affect the resource ratings would be addressed during permitting.

- B. Water quality impacts were one of the potential impacts considered in the Commission's evaluation of whether the proposed rezoning will have an undue adverse impact on existing resources. Based on the record evidence, including the review agency comments, the commission concludes that the proposed rezoning is consistent with Section 10.25,A,2 and that by itself, or in conjunction with other development, will not have an undue adverse impact on water quality.
- C. The Commission considered the potential impacts of the proposed rezoning on all existing uses, including traditional uses, in the vicinity of the Property in applying the statutory review criteria discussed above. The proposal is consistent with Section 10.25,A,3 in that it would not have an undue adverse impact on the traditional uses in the area, including such uses on the surrounding waters of Moosehead Lake.
- D. The proposal is consistent with Section 10.25,A,4 in that the proposed rezoning and potential residential development would not substantially alter the diversity of lake-related uses for this section of Moosehead Lake. The same range of recreational opportunities that exist today will continue to exist after the rezoning.
- E. The Moosehead Lake region is recognized as a high growth, high value area in which development pressure is likely to continue. As noted in the discussion of the adjacency principle above, the Property is a suitable location for compatible residential development. On the regional scale, rezoning the Property would help guide residential development to an area more suitable for development, potentially relieving development pressure on other shoreline areas less suitable for development. Applying planning principles such as adjacency in individual rezonings helps provide for the maintenance of the natural character of the shoreland on Moosehead Lake. On the site scale, any future development on the Property would require permit review and be subject to various standards, such as clearing standards, intended to address potential effects of development on the natural character of the shoreland. The proposed rezoning is consistent with Section 10.25,A,5.
- F. Moosehead Lake is a Management Class 7 lake, a lake "not otherwise classified." The Commission manages Class 7 lakes for multiple uses, giving specific consideration to identified resource values when evaluating the merits of lake-related rezonings and permit applications. As noted above in the discussion 10.25,A,1, the proposed rezoning and potential development will not have an adverse effect on Moosehead Lake's resource values. The Commission concludes the proposed rezoning is consistent with the management classification for the lake and with Section 10.25,A,6.
- G. Given the size of the area proposed to be rezoned, the length of shore frontage involved, and the size of a potential subdivision on the Property, the Commission concludes future development on Moosehead Lake would not be limited by the proposed rezoning. The landowner equity concerns Section 10.25,A,7 is intended to address are not implicated by the petition.

Therefore, the Commission concludes that the zoning petition is consistent with Section 10.25,A of the Commission's Land Use Districts and Standards.

### **Final Conclusions**

28. In summary and for the reasons explained above, the Commission concludes the proposed rezoning of the Property:
- a) Is consistent with the standards for district boundaries in effect at the time;
  - b) Is consistent with the Commission's 2010 Comprehensive Land Use Plan;
  - c) Is consistent with the purpose, intent and provisions of Title 12, Chapter 206-A;
  - d) Will not have an undue adverse impact on existing uses or resources; and
  - e) Is consistent with the provisions of Section 10.25,A of the Commission's Land Use Districts and Standards.

**Therefore, the Commission approves the petition of C&E Real Estate, LLC to rezone 18.8 acres from General Management (M-GN) Subdistrict and Great Pond Protection (P-GP) Subdistrict to Residential Development (D-RS) Subdistrict.**

In accordance with 5 M.R.S. § 11002 and Maine Rules of Civil Procedure 80C, this decision by the Commission may be appealed to Superior Court within 30 days after receipt of notice of the decision by a party to this proceeding, or within 40 days from the date of the decision by any other aggrieved person. In addition, where this decision has been made without a public hearing, any aggrieved person may request a hearing by filing a request in writing with the Commission within 30 days of the date of the decision.

DONE AND DATED AT BREWER, MAINE THIS 14<sup>th</sup> DAY OF MAY 2014.

By: \_\_\_\_\_  
Nicholas D. Livesay, Executive Director