



STATE OF MAINE

JOHN E. BALDACCI
GOVERNOR

DEPARTMENT OF CONSERVATION
LAND USE REGULATION COMMISSION
18 ELKINS LANE – HARLOW BUILDING
22 STATE HOUSE STATION
AUGUSTA, ME 04333-0022



PATRICK MCGOWAN
COMMISSIONER

Memorandum

October 1, 2007

TO: Commissioners

FROM: Jerry Reid, Assistant Attorney General, Office of the Attorney General
Agnieszka Pinette, Senior Planner, Land Use Regulation Commission

SUBJECT: Recommendation regarding RESTORE and FEN Motion to Dismiss Zoning Petition ZP 707 (Plum Creek Maine Timberlands, L.L.C. and Plum Creek Land Company Petition for Rezoning to implement a Concept Plan in the Moosehead Lake region)

On July 27, 2007, the Land Use Regulation Commission received from intervenors RESTORE: The North Woods and the Forest Ecology Network a Motion to Dismiss Zoning Petition ZP 707, Plum Creek's petition to implement a concept plan in the Moosehead Lake region on the grounds that the Commission lacks the statutory authority to approve it.

On August 2, 2007, Chair Harvey issued a pre-hearing Directive requesting that any party wishing to respond to the RESTORE and FEN Motion to Dismiss do so by written filing submitted by August 31, 2007. Petitioner Plum Creek, intervenors Coalition to Preserve and Grow Northern Maine and the Piscataquis County Commission, and interested person Forest Society of Maine filed responses by the established due date. On September 7, 2007, RESTORE and FEN filed replies to the briefs filed by Plum Creek, the Coalition to Preserve and Grow Northern Maine and the Forest Society of Maine. Copies of these filings are enclosed with this memorandum.

At its Commission meeting on Wednesday, October 10, 2007 in Orono, the LURC staff and the Office of the Attorney General will recommend to the Commission denial of the Motion to Dismiss. The recommendation is enclosed with this memorandum.

We look forward to answering any questions you may have on this matter at the October meeting.

Enclosures: Recommendation Regarding Motion to Dismiss Zoning Petition ZP 707
RESTORE-FEN Motion to Dismiss Zoning Petition ZP 707 (received by LURC on 07/27/2007)
Briefs filed by Petitioner Plum Creek and Intervenors Coalition to Preserve and Grow Northern Maine, Forest Society of Maine and the Piscataquis County Commission (received by LURC 08/31/2007)
RESTORE-FEN replies to briefs (received by LURC 09/07/2007)

XC: Zoning Petition ZP 707 file



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COMMISSION DECISION IN THE MATTER OF

RESTORE: The North Woods and Forest Ecology Network
Motion to Dismiss Zoning Petition ZP 707

I. Introduction

Intervenors RESTORE: The North Woods and Forest Ecology Network (“RESTORE” and “FEN”, respectively) filed a motion to dismiss Plum Creek’s petition for rezoning, No. ZP 707, on July 26, 2007. The motion argues generally that the Commission lacks authority to approve Plum Creek’s petition. The Chair instructed any parties wishing to file opposition to the motion to dismiss to do so in writing no later than August 31, 2007. Plum Creek, the Forest Society of Maine, the Coalition to Preserve and Grow Northern Maine and the Piscataquis County Commissioners each filed timely opposition. On September 7, 2007, RESTORE and FEN filed three separate memoranda in reply to the opposition filed by Plum Creek, the Forest Society of Maine and the Coalition to Preserve and Grow Northern Maine. No party objected to these reply memoranda, and they have been accepted into the record and considered. On September 21, 2007, the Natural Resources Council of Maine and Maine Audubon Society submitted a letter joining in RESTORE and FEN’s motion.

Although the rules do not contemplate motions to dismiss zoning petitions, the Commission agrees to address the issue of its authority raised in this motion in advance of the public hearings.¹ Doing so will allow the parties to focus their hearing presentations in light of the Commission’s ruling, and assure all participants that they are not expending their resources on an unnecessary review process.

RESTORE and FEN’s core argument is that the Commission lacks statutory authority to approve a concept plan which acts to prevent future Commissions, Legislatures and citizen initiatives from amending its terms.² To assess this claim it is helpful to examine separately how Plum Creek’s proposed concept plan would limit the discretion of policy-makers in the future, and what the Commission’s authority is to approve plans that have that effect.

¹ This decision summarizes the Commission’s legal conclusions regarding the motion to dismiss and is designed to provide the parties with general guidance on the Commission’s interpretation of its authority.

² RESTORE and FEN do not argue that a concept plan with that binding effect would be inherently unlawful, only that the Commission lacks adequate statutory authority to approve such a plan.

II. The proposed concept plan's binding effect

RESTORE and FEN assert in their motion to dismiss that Plum Creek's concept plan would "freeze" in place zoning within the concept plan area and prevent even the Legislature or the citizen initiative process from amending that zoning during the 30-year term of the plan. This assertion is incorrect both because it misstates the effect of the plan on the Legislature and citizen initiative process, and because, if the Plan were approved, not all zoning would be frozen within the concept plan area even as to the Commission itself.

With respect to the binding of future Legislatures and citizen initiatives, Plum Creek expressly disavows, as it must, this interpretation of its proposal: "Plum Creek has never suggested and does not believe that concept plan approval has the ability to shelter it from subsequent actions by the Maine Legislature or the citizen initiative process." Plum Creek Opposition at p. 16. The Commission has no authority to immunize any party from the reach of future legislative action, and the concept plan proposed here does not purport to have that effect. Thus, Plum Creek's proposed concept plan would expressly limit the *Commission's, but not the Legislature's*, authority to amend its terms unilaterally.³

Approval of the proposed concept plan would bind the Commission in certain specified ways, but would not "freeze" all zoning within the concept plan area, as RESTORE and FEN suggest. The concept plan would fix "to the fullest extent allowed by law" certain district boundaries within the concept plan area, selected definitions, land uses within designated development zones, and certain standards for a thirty-year term, unless the Commission and Plum Creek agree on an amendment. However, the concept plan does allow certain other land use standards to be amended or adopted anew and applied to the concept plan area without Plum Creek's consent. For example, new rules governing most environmental matters, such as the protection of wetlands, phosphorus controls, erosion and sedimentation control, water quality, solid waste disposal, and water supply, would apply in this area just as they would throughout the Commission's jurisdiction. Similarly, future subdivisions within the concept plan area would be reviewed based on the version of the Comprehensive Land Use Plan ("CLUP") and governing subdivision approval regulations that are effective at that time, however they may be amended between now and then. The important point is that if the Commission approves the proposed concept plan, it will be bound for thirty years by whatever the plan says about any given issue, unless it can agree with Plum Creek on amendment or termination.

III. The Commission's authority to bind itself by approving a concept plan

The question then becomes whether the Commission has the legal authority to approve a concept plan with this plan's binding effects. The Commission's authority comes originally from its enabling statute, which is then implemented through its regulations.

³ Both RESTORE and FEN, and Plum Creek, devote considerable discussion in their filings to the doctrines of equitable estoppel and vested rights. These principles and how they work will be important to the Commission as it reviews the concept plan on its merits, but are not directly relevant to the narrower question raised in the motion to dismiss, which is simply whether the Commission has adequate authority to approve the plan. For now, the Commission notes that Plum Creek has been forthright in its filings that, if its concept plan is approved, it will use whatever remedies are available to it to resist any unwelcome attempts, *including by the Legislature or citizen initiative*, to amend the terms of the plan. The Commission will review the concept plan based on the conservative assumption that, once approved, those portions of the plan that are "frozen" may be difficult for both future Commissions and Legislatures to amend.

A. The statute

The Commission's enabling legislation sets forth its powers and duties broadly. The Commission was created to extend principles of sound land use planning and zoning to the unorganized territories. 12 M.R.S.A. §§ 681 & 683. The Commission is charged with establishing the boundaries of protection, management and development districts within its jurisdiction, all to be based on sound land use and development principles. 12 M.R.S.A. § 685-A(1). The Commission is also responsible for developing land use standards to protect air, land and water resources, as well as natural, scenic and historic features, and is to do so consistent with its CLUP. 12 M.R.S.A. § 685-A(3). Property owners within the jurisdiction may petition the Commission for new or amended land use standards or district boundaries, and the Commission is to give weight to a landowner's reasonable plan for the future use of that land. 12 M.R.S.A. § 685-A(5) & (7-A)(B)(6).

RESTORE and FEN argue that a concept plan that fixes district boundaries in place for thirty years both violates the Commission's statutory obligation to perform a "comprehensive review" of those boundaries every five years, *see* 12 M.R.S.A. § 685-A(9), and constitutes a *per se* violation of the Commission's obligation to undertake sound planning. The Commission disagrees. A requirement to "review" all district boundaries within the Commission's jurisdiction every five years does not prevent the Commission from setting certain of those boundaries in place for longer terms, and nothing in the statute suggests that sound land use planning cannot include certain zoning commitments that extend beyond five years within concept plans.⁴ Once a concept plan is approved, the zoning it establishes becomes an integral part of the Commission's regulatory framework, and the Commission's periodic review of district boundaries takes the concept plan's terms into account while considering whether amendments to other district boundaries are appropriate. Chapter 10.23(H)(7) & CLUP at C-7. Long term commitments to district boundaries established through concept plans are expressly contemplated in the legislatively approved P-RP zone, and are encouraged in the CLUP. Chapter 10.23(H)(8) & CLUP at C-6. Reading the regulatory framework as a whole, the statute's five year review provision cannot reasonably be interpreted as a *per se* bar on concept plans that extend beyond five years.

B. The Regulations

The Commission's regulations governing land use standards, permitted land uses land use district boundaries and land use maps are subject to unique legislative review requirements. By law, such regulations must be submitted to the Legislature after adoption for approval or modification. 12 M.R.S.A. § 685-A(7-A)(B)(6). Unless the Legislature acts to modify or repeal the regulations, they remain fully effective. *Id.* This process ensures the Commission's regulations, absent objection from the Legislature, carry at least an implied legislative endorsement, and undermines a claim that the Commission has exceeded its lawful authority in their adoption.

The Commission's adoption of Chapter 10 of its regulations complied with these statutory legislative review requirements. As with all regulations, Chapter 10 was also reviewed and approved by the Attorney General for form and legality at the time of adoption. Chapter 10 contains express authorization for the Commission to adopt concept plans and to establish P-RP subdistricts. *See* Chapter 10.23(H). Furthermore, and importantly, Chapter 10 incorporates by reference concept plans as described in the

⁴ The Commission notes that RESTORE and FEN have not objected to the Commission approving conservation easements with terms that extend beyond five years within concept plans, though the effect of such easements would also constrain the Commission's planning and zoning options in the future.

CLUP. Chapter 10.23(H)(1). The CLUP contains language that directly addresses the issue of a concept plan's binding effect.

C. The CLUP

The CLUP states that, "While concept plans are voluntary, initiated and prepared by the landowner, once approved by the Commission they are binding." CLUP at C-6. RESTORE and FEN argue that this language should be interpreted to mean binding on the *landowner*, but not the *Commission*. In support of this interpretation they point out that the CLUP also states that concept plans are intended to provide the landowner with "increased predictability", which they argue implies something less than the certainty that they say comes with the Commission being bound by a plan. However, this interpretation is contradicted by explicit language found elsewhere in the CLUP, which later states that an approved concept plan may "... be amended or terminated at any time *subject to mutual agreement between the landowner(s) and the Commission...*" *Id.* at C-7 (emphasis added). The CLUP also states that the term of an approved concept plan may be extended "upon mutual agreement of the landowner(s) and the Commission." *Id.* at C-6. Read as a whole, the CLUP is clear: once approved, a concept plan is binding on both the landowner and the Commission, and its terms may only be amended or terminated by mutual agreement.

IV. Conclusion

Approval of the proposed concept plan would bind the Commission according to the plan's terms for up to thirty years. Concept plans with such binding effects are expressly contemplated by the CLUP, which is in turn incorporated by reference into Chapter 10 of the Commission's regulations. Chapter 10 was duly adopted by the Commission, reviewed and approved for form and legality by the Attorney General and reviewed and at least implicitly endorsed by the Legislature. It is the Commission's judgment that Chapter 10 and the CLUP's provisions governing concept plans are within the Commission's statutory authority to establish P-RP subdistricts in order to implement concept plans that protect the jurisdiction's natural resources and features, while allowing for development according to sound land use principles. The Commission will decide whether Plum Creek's proposed concept plan, with its binding effects, achieves those statutory objectives after full consideration of the petition.

For all the above reasons the motion to dismiss is denied.

DONE AND DATED AT ORONO, MAINE, THIS 10TH DAY OF OCTOBER, 2007.

By: _____
Catherine M. Carroll, Director