

STATE OF MAINE LAND USE REGULATION COMMISSION

Zoning Petition No. ZP 707

<i>In Re:</i> Plum Creek Timber Company's Petition for Rezoning Moosehead Region]	RESTORE: The North Woods and Forest Ecology Network's Motion to Dismiss
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RESTORE: The North Woods (“RESTORE”), through its attorney, Phil Worden, and Forest Ecology Network (“FEN”), through its attorney, Lynne Williams, move the Commission to **DISMISS** Plum Creek’s Petition on the grounds it asks for relief that the Commission lacks the statutory authority to grant.

On its face, Plum Creek’s Petition purports to be a petition to rezone its land in the Moosehead region. The Commission has the authority to rezone Plum Creek’s land under the authority delegated to it by the Maine Legislature in 12 MRSA § 685-A. RESTORE and FEN do not challenge the Commission’s rezoning authority. Plum Creek’s Petition, however, goes beyond asking for a rezoning. It asks the Commission to adopt a “concept plan” that will prevent future Commissions, the Legislature, and even the citizen’s initiative process, authorized in the Maine Constitution, from changing the zoning again during the 30-year life of the plan. In other words, Plum Creek is asking the Commission to rezone its land and then to freeze that zoning for almost a third of a century. It is this latter part of Plum Creek’s Petition – the part that seeks to exempt Plum Creek from future legislative action – that RESTORE and FEN challenge in this motion. A review of the possible legal theories that might support the Petition demonstrates that the Commission does not have the authority to exempt Plum Creek from future legislative action no matter how much conservation Plum Creek promises to do.

Although the Law Court has not yet reviewed the Commission’s authority to adopt concept plans, the Law Court has found “Contract Zoning” when properly delegated by the Legislature to

be legal. *Crispin v. Town of Scarborough*, 1999 ME 112 736 A.2d 241. Plum Creek's proposal is a form of contract zoning. See Plum Creek Concept Plan, Section 1 p. 5: "The approved Concept Plan is a binding contract....Therefore, the Concept Plan will not be amended without the consent of both LURC and the Landowner." (Plum Creek, Concept Plan, Section 1, p. 5). In consideration of Plum Creek's promise to engage in certain conservation and other publicly beneficial activities, the Commission would allow certain types of development over a thirty-year period. The problem with this approach is that the statute establishing the Commission does not give it the authority to engage in contract zoning. The Maine Legislature has demonstrated that when it delegates power to engage in contract zoning it does so explicitly and unambiguously. See 30-A MRSA §4352 (8). 12 MRSA §685-A cannot be read as including a legislative delegation to engage in contract zoning because none of the statutory wording supports such a reading. That is probably why Plum Creek avoids using the term "contract zoning" in its Petition.

Nor would the Commission's adoption of the proposed concept plan give Plum Creek a vested right in the plan thereby preventing the plan from being amended without Plum Creek's consent during the 30-year life of the plan. Rezoning is a legislative act and one can never gain a property interest in legislation. For instance, in *F. S. Plummer Co. v Cape Elizabeth* 612 A2d 856 (Me 1992) the landowner petitioned the town to change the zoning on his lot. When the town refused, the landowner sought judicial review. The superior court ruled that the town's decision was not supported by substantial evidence. However, the Law Court reversed because a request for a rezoning is a request for a *legislative* act and is not subject to judicial review in the way the grant or denial of a permit is subject to judicial review. *id* at 859. *Kittery Retail Ventures v. Town Of Kittery*, 2004 ME 65 856 A.2d 1183 is even more on point. In that case, the landowner applied for a permit to build Kittery Marketplace, a use that was permitted under the existing zoning. A citizen's group petitioned to amend the zoning in a way that would prohibit Kittery Marketplace. The citizen's petition also provided that the amendment would apply retroactively. On appeal, the Law Court approved the retroactive application of the amendment to the developer and agreed that the retroactive amendment prohibited the development. Not only did the developer not have a vested right in the existing zoning, he did not even have a vested right in the permit he received because he had not yet started substantial construction on the project:

Generally, neither the submission of a development application, nor the issuance of a development permit, establishes vested rights. This is because "all property is held in subordination to the police power." Although a party may acquire vested rights as a result of equitable considerations, mere reliance on the language of an existing ordinance, or the incurrence of preliminary expenses to satisfy application requirements, is not sufficient to establish vested rights.

Kittery Retail Ventures, supra at ¶ 24 (citations omitted)

Not only is Maine law clear that a landowner has no vested rights in any particular zoning and

that rights only vest after the landowner has both received a final *permit* and begun *substantial construction* on the project, this rule is practically universal across the country. For example, **Anderson's American Law of Zoning** (4th Ed CBC 1996) says:

A property owner has no vested right to "continuity of zoning of the general area" in which he resides. Likewise, the owners of property adjacent to a district which is restricted to a particular use have no vested right to the continuation of that use when the public interest dictates otherwise. A benefit derived from a zoning regulation is one which flows from the public acts of a government; it is not a "legal right in perpetuity against the exercise of governmental power in the future." A landowner possesses no constitutional rights which are violated by a zoning amendment which is within the power of a municipal legislative body and which bears a reasonable relation to the police power of the municipality. *id* at § 4.28 (footnotes omitted)

Even if Plum Creek's concept plan were adopted and even if Plum Creek or a subsequent landowner received a permit from the Commission under 12 MRSA §685-B for a particular project within the concept plan area, the landowner still would not have a vested interest in that project until it began substantial construction on the project and even then its vested rights would be limited to that project, not the whole concept plan. As **Anderson, supra** explains:

The issuance of a permit or license is not sufficient to establish a vested right to the permitted use and entitle the applicant to a nonconforming use, especially where it was revoked prior to the commencement of work or was made expressly revokable at any time by the department of health. The rule has been applied where issuance of a license was followed by only minimal activity. And it has been applied to permits issued pursuant to court order, to special permits, special exceptions and tentative approval of plans. *id* at § 6.26 (footnotes omitted)

Given this background, a petition to the Commission to grant a landowner a thirty-year exemption from further changes in zoning should be supported by clear legal authority that the Legislature has delegated to the Commission jurisdiction to so drastically limit future legislative action. No such delegation can be found in the Maine statutes or caselaw. The only possible support we have found for Plum Creek's belief that the Commission can bind future Commissions, the Legislature and the people's initiative, is a single sentence in Appendix C on page 175 of the Commission's Comprehensive Land Use Plan (CLUP): "While concept plans are voluntary, initiated and prepared by the landowner, once approved by the Commission, they are binding." The context of this sentence, however, is that the concept plan is binding *on the landowner* who voluntarily initiated and prepared the plan, not that it is binding on future legislative bodies. Even if – for the sake of argument – the Commission were to interpret its CLUP as authorizing it to prohibit any further rezoning in an approved concept plan, it would only mean that that part of the CLUP is invalid because an administrative rule cannot exceed the

authority delegated to the administrative agency by the enabling statute.

While it is impossible to find any language in LURC's enabling statute giving the Commission the authority to immunize Plum Creek from future zoning changes, there is language in the statute suggesting that the Commission has no such authority. Throughout LURC's enabling statute, including the delegation of the power to rezone in 12 MRSA § 685-A, the Legislature limits LURC's activities to those based on "principles of sound land use planning and development." The statute does not explicitly define "sound land use planning" but it does require LURC to adopt a Comprehensive Land Use Plan. See 12 MRSA § 685-C (1). Significantly, the statute requires the Commission to make a "comprehensive review" of district boundaries and land use standards at the end of each five-year period, though the Commission has failed to meet this mandated schedule. 12 MRSA §685-A (9). LURC's CLUP guides all of LURC's work. All comprehensive plans require periodic updating and the Commission is currently in the process of updating its CLUP. As explained on the page about its progress in updating the CLUP on LURC's website:

The Commission is charged with planning for future growth, not just reacting to it. For this reason, the Commission's plan is regularly evaluated and updated in order to look back at trends and determine their effect on the jurisdiction and its values, and to develop a future vision of the jurisdiction.

This is so because both the Legislature and the Commission recognize that "sound land use planning" requires periodic updating. Plum Creek's request for a "concept plan" that is written in stone and cannot be changed without Plum Creek's consent for thirty-years contrasts sharply with the periodic updating and evolution inherent in the comprehensive planning process. While Plum Creek concedes that its plan must conform to the current CLUP, it makes no provision for its plan to evolve and change as the CLUP evolves and changes. Because of this omission Plum Creek's concept plan would become superior to the CLUP since changes in the CLUP – especially those that recognize the need for greater protection of the environment than currently exists – will be pre-empted by Plum Creek's concept plan.

Replacement of the evolving CLUP by Plum Creek's time-frozen concept plan constitutes the "privatization of public planning." A plan that will not change over a thirty-year period is inconsistent with the "principles of sound land use planning." The Commission has made many changes to the CLUP, the zoning of the jurisdiction, and the LURC rules since the Commission was created in the early 1970s. Freezing the zoning and the rules for hundreds of thousands of acres of the jurisdiction for a period that is nearly as long as the Commission has been in existence stretches the idea of a "concept plan" and the desirability of "predictability" beyond recognition.

In this regard the prospective planning and zoning for the Rangeley region that the Commission approved is completely different and serves as a precedent *against* Plum Creek's proposal since the Rangeley Plan specifically says:

Staff will also identify changing circumstances that could not be foreseen in the development of this plan and report annually to the Commission on development trends and how well the plan is working. The Commission will consider every five years whether an update is needed, but otherwise will make necessary changes during periodic updates of its jurisdiction-wide Comprehensive Land Use Plan. While the plan provides a general guide for the next twenty years, it is not cast in stone. Zoning changes beyond those described above under “Future Development Areas” will be considered if the proposed developments meet general and prospective zoning review criteria. “The Plan” part of the Rangeley Plan page 21.

Since all of the Commission’s jurisdiction is limited to “sound land use planning” it follows that the Commission does not have the authority to grant the type of static thirty-year plan that Plum Creek wants.

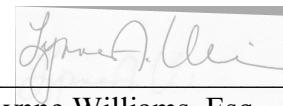
Therefore RESTORE: The North Woods and Forest Ecology Network respectfully request the Commission to DISMISS Plum Creek’s Zoning Petition on the grounds that the Commission lacks the statutory authority to approve it.

July 26, 2007

Signed:

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