

October 5, 2007

VIA E-MAIL AND HAND DELIVERY

Ms. Agnieszka Pinette
Senior Planner
Land Use Regulation Commission
22 State House Station
Augusta, Maine 04333-0022

Dear Aga:

The rebuttal testimonies of Messrs Kraft and Muzzy submitted by Plum Creek contain a summary of changes to the Plan that Plum Creek is committed to make that address concerns expressed by some agencies and intervenors. To avoid confusion, these commitments do modify the proposed Concept Plan. The following is a list of commitments, the relevant documents in the Plan that will be modified and the timeframe for those revised documents to be submitted to LURC.

Revisions:

- Add BPL as a third-party holder of the Legacy Easement (including enforcement rights).
 - o Modify Legacy Easement language.
 - o Revise reference to Easement holders throughout Plan Description and Petition for Rezoning to include BPL.
- If the Grantor of the Easements is not meeting SFI standards on the land base, Holders (including third-party) have right to enforce.
 - o Modify Easement language.
- The standards in any future certification program adopted by the Grantor to govern its forest practices will be no less protective of the conservation values of the Easements than the current SFI standards.
 - o Modify Easement language.

- Create a management advisory group comprised of federal and state biologists, the Holder (including third-party Holder), the Grantor and other experts to assist the Grantor and Holders in applying best science and adaptive management concepts to guide forest management on the property protected by Easements, and provide detail about requirements of SFI standards in the management plan.
 - o Modify Management Plan attached to the Easement.
- Expand right of public access to include nighttime use, and to clarify that boating is a traditional recreational use.
 - o Modify Easement language.
- Create public road right-of-way easements for approximately 57 miles of road access allowing use by motorized vehicles for recreational uses (including commercial recreation) free of any public fee.
 - o Create a road easement form, together with a schedule for when easements would be granted.
- Clarify that Grantor will allow commercial recreation use of Easement property, provided that Grantor may continue to regulate and charge for bear baiting on the protected property.
 - o Modify Easement language.
- Add the ITS 110 mile trail on the protected property to the Snowmobile Trail Easement and clarify that nighttime use of snowmobile trails is allowed.
 - o Modify snowmobile easement language.
- Expand the Community Fund and rename it the Moosehead Region Community Stewardship Fund ("CSF"), the purpose of which is to develop and implement a region-wide recreation management plan and community development initiatives. The CSF would be governed by a board made up of representatives from various local interests, including: BPL, towns, commercial recreation groups, local citizens and Plum Creek. The CSF will be funded by 2% of sale price from the sale of the residential lots proposed in the Concept Plan and ½% of the sales price of subsequent sales of these 975 residential units. Plum Creek will have the right to assign to CSF the right to collect any recreational user fees authorized by the Easements. Plum Creek, upon Plan approval and after expiration of any appeal periods, will make an interest-free loan of the funds for the construction of the Peak-to-Peak hiking trail. CSF will become a co-holder of the Peak-to-Peak hiking trail. Plum Creek also will donate up to 50 acres of Protected property to BPL to address future recreation needs identified by CSF.

- Revise language, Plan Description, Section 2, page 22, paragraph 5,a.
- Modify Easement language.
- Modify Easements so that the Holders (including third-party Holder) must approve siting of back country huts and new roads not related to forestry or the development areas.
 - Modify Easement language.
- Clarify Easement language by limiting the total footprint for each back country hut to a maximum of 5,000 square feet.
 - Modify Easement language.
- Clarify easements to state that wildlife habitat and unique natural areas as initially documented in the Baseline Documentation and as further documented in future management plans will be protected.
 - Modify Easement language.
- Add a definition for “Low Impact Resort Accommodation.”
 - Revise Section 4, Subchapter I, to add this definition.
- Revise the special exception for the relocation of the D-GN3M zone.
 - Revise Section 4, Subchapter II.
- Revise community center language in Land use Standards.
 - Revise Section 4, Subchapter III, Section 10.25,Q,3.

All of the above revisions are contained in either Mr. Kraft or Mr. Muzzy’s Rebuttal Testimony submitted on September 28, 2007.

Plum Creek is committing to two additional changes. These include:

- Add five trailhead parking areas, access from public roads and signage.
 - Revise recreation section of the Plan Description and Petition for Rezoning. (Revised pages attached.)
- Shrink the size of the Route 6/15 Corridor Development Area.
 - Revise description of the Route 6/15 Corridor Development Area, the Summary Map and Map 5.

The amended pages and maps for the Plan Description and Petition for Rezoning will be submitted by Friday, October 19, 2007. The Easement and Management Plan language will be submitted as expeditiously as possible, recognizing the need for agency and holder consultations.

It is important to recognize that a Concept Plan application is a rezoning petition, which is not an adjudicatory hearing. Rather, it is a rulemaking proceeding. (“Adoption and amendment of land use district standards...are rule-making procedures subject to the requirements of Title 5, chapter 375, subchapter II...” 12 M.R.S.A. § 685-A(7-A)(B). *See also* the Commission’s Rules on Hearings, Section 5.16(1).)

In Appendix A of the Commission’s Guide to Preparing a Concept Plan (June 2003), applicants and the public are put on notice that applicants are expected to revise the application throughout the process. Indeed, the statute directs the agency to consider all relevant information (5 M.R.S.A. § 8052(4)) and the record is open through a comment period and rebuttal period after the hearing (Commission Rules, Chapter 5, Section 5.18(2).) In this proceeding, it is in the interests of all concerned to allow the applicant to be responsive to comments, criticisms or concerns expressed by parties, agencies and/or the public. Plum Creek’s commitments outlined above respond directly to issues raised by parties and/or agencies. Thus, the commitments Plum Creek made in its rebuttal testimony are directly responsive to information that has been in the record since at least August 31, 2007. Plum Creek was advised by LURC staff to respond both to intervenor testimony and agency comments in its rebuttal testimony. Plum Creek followed this process.

The benefits of the Commission’s normal practice, which is an adaptive process, are obvious. Besides addressing concerns raised by the staff, public or agencies (and eliminating potential issues), an adaptive process is efficient, focused and provides a better outcome for all. While an adaptive process is desirable, it cannot violate standards of fairness to the applicant and the parties. The hearing on Plum Creek’s proposed Concept Plan, as modified by the changes outlined above, must satisfy all procedural requirements and be fair to the applicant and the parties.

The parties have over five weeks to evaluate the outline of commitments made by Plum Creek. Plum Creek’s commitments are clear and directly respond to comments in the record. Moreover, the issues are not new and all parties will have over five weeks to prepare for the hearings. It is Plum Creek’s position, therefore, that there is no prejudice to any party to move forward with the hearings as scheduled in November. It should also be noted that Plum Creek and all parties had only four weeks to respond to LURC’s consultants, all the testimonies and agency comments (hundreds of witnesses and pages) filed on August 31, 2007. For testimony relating to the easements and plan architecture, Plum Creek had only two weeks to respond. Since no party found the four-week and two-week schedules unfair, no party can have any credible objection that five weeks is insufficient time to respond to commitments made in parts of thirteen pages of testimony. Required revisions to the application materials are ministerial. The commitments to revise the Easements and Management Plan are direct and unambiguous. Very few witnesses addressed easement language specifics. To the extent that parties think they

need additional time to comment on the specific language added or deleted from the easements or management plan, two options are available which more than comply with all procedural requirements. First, the parties can submit written comments during the comment period at the end of the hearing. Written comments, in fact, are probably the most efficient and effective way to address these concerns because wordsmithing does not lend itself to a cross-examination forum. Second, the hearing could be reopened to allow cross-examination on the revised easement and management plan language.¹

Plum Creek's commitments in response to comments does not present any due process issue. Far from it. The intervenors have had an unprecedented opportunity to submit their testimony and observations about the Plan, and will have more opportunities at the public hearings, technical hearings, and as long as the record remains open. Allowing Plum Creek to make revisions that are responsive to agency and intervenor concerns is not only consistent with LURC's general process, but it also is fully compliant with the state and federal constitutions. As recently as *June*, the Law Court specifically held that even post-public hearing adjustments to a proposed development *did not* deprive opposing citizens their right to comment and input. *See Comeau v. Town of Kittery*, 2007 ME 76, ¶¶14-15, 926 A.2d 189, 193 (finding "no deprivation of due process" where opponents had the opportunity to comment on proposed development at formal public hearing, despite post-hearing changes to meet Planning Board concerns).

Also, LURC's own guidance material, Commission's Guide to Preparing a Concept Plan (June 2003), envisions an adaptive process wherein revisions could be made, as the applicant determines feasible, as the proceedings advance and new issues are raised. In keeping with that guidance, LURC's practice has been to allow, and even encourage such adaptive process, as exhibited in past concept plans throughout the state. In light of the guidance and LURC past practices, it would be unfair and unprecedented to deny Plum Creek the opportunity to respond and adjust aspects of the Concept Plan to address issues raised by agencies and intervenors. These practices have served the Commission well. Procedurally, there is no basis to deviate from this guidance and practice. The fact that some may view this application as unprecedented is no basis to abandon established practice. In fact, it is no reason since this application is identical in all regulatory criteria respects to other petitions for rezoning and, specifically, concept plans.

Plum Creek further suggests that if, at the conclusion of the public hearings in November, the parties believe that there is a further need to address any adjustments or other issues, another hearing date could be set (perhaps in December or January) to allow any necessary additional evidence, testimony or comment. Surely, that mechanism would guarantee a full opportunity for

¹ As this is a rulemaking proceeding, it is important to recognize that sister agencies post rules for comment which incorporate by reference regulations from other jurisdictions and all subsequent amendments. Those regulations are not provided with the draft rule and change without notice or opportunity for review. The Maine Attorney General's office has certified that such rules containing standards which change without notice satisfy the procedural requirements of the Administrative Procedures Act.

all parties to respond in an informed and timely manner. It would also provide a continuation date should the public hearings in November exceed their allotted time. And it would give everybody involved a few additional months to provide input and put together the best possible Concept Plan. That is, after all, the real point of this proceeding.

The staff's draft hearing structure demonstrates that the hearings in November should continue as previously announced, as there are only limited topics, IX. Conservation, potentially, VIII.B. Recreation and VIII.C Wildlife, that could be potentially affected by changes outlined in the Kraft and Muzzy testimony and confirmed in this letter. An equally significant consideration is that the hearings serve the purpose of providing meaningful information to the Commission. Further, this approach is entirely consistent with the Co-Chair's ruling dated August 28, 2007 that denied requests for broad extensions of the date for submittal of pre-filed testimony due to easement revisions made in August. The Co-Chair denied the request except to allow a later filing date for testimony specifically addressing the easement language. The same rational and logic must prevail as the rule of the case must control.

For all the foregoing reasons, Plum Creek requests that the hearings go forward as scheduled in November.

Sincerely,



Virginia E. Davis

VED:pjn
cc: Service List