STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-AP-09-37

FOREST ECOLOGY NETWORK AND
RESTORE: THE NORTH WOODS

Petitioner

v.

LAND USE REGULATION COMMISSION

Respondent

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DECISION ON 80C APPEAL

NATURAL RESOURCES COUNCIL
OF MAINE

Petitioner

v.

LAND USE REGULATION COMMISSION

Respondent

Before the court are the M.R. Civ. P. 80C petitions of Forest Ecology Network (FEN) and RESTORE: The North Woods (RESTORE) (collectively, "FEN-RESTORE") and Natural Resources Council of Maine (NRCM) (collectively, "Petitioners") challenging a decision by the Land Use Regulatory Commission (LURC or "the Commission") to approve a rezoning petition and concept plan submitted by Plum Creek Maine Timberlands, LLC and Plum Creek Land Company ("Plum Creek") for land it owns in the Moosehead Lake region. Respondent LURC and Intervenors Plum Creek, the Forest Society of Maine (FSM), the Piscataquis County

Economic Development Council (PCEDC), and The Nature Conservancy (TNC) have filed briefs in opposition to FEN-RESTORE's and NRCM's 80C Petitions.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are largely undisputed. On April 5, 2005, Plum Creek submitted Zoning Petition ZP 707 to LURC to redistrict approximately 400,000 acres of land it owns in the Moosehead Lake region to a P-RP Subdistrict in order to implement a thirty-year Concept Plan. (A.R. 597(A) (hereinafter, "Decision") 5; Administrative Record (hereinafter, "A.R.") 52.)[1] The land in question is located in 26 different minor civil divisions in Somerset and Piscataquis Counties, roughly surrounding Moosehead Lake.[2] (Decision 3.)

Before Plum Creek submitted its petition and Concept Plan, 14 citizens submitted a separate petition, pursuant to 12 M.R.S. § 685-B(10) (2010), to "initiate rulemaking to establish a 180-day moratorium on the processing of certain rezoning petitions and/or permit applications within 41 minor civil divisions surrounding Moosehead Lake" so that the Commission "could undertake a regional planning process which formulates a coherent future vision and adopts enforceable rules to implement that vision for the affected geographic area."[3] (Decision 7; *see* A.R. 65.) The Commission voted to deny the moratorium petition because the Comprehensive

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[1] The entire Administrative Record (A.R.) in this case is in electronic format. LURC submitted record documents as PDFs on one of four burned DVDs, along with a printed "Index to the Record." Record citations are identified by the document number designated in the Index and, where applicable, the pagination of each PDF file.

[2] The number of civil divisions refers to the final number of affected divisions in the final version of the Concept Plan LURC approved. Plum Creek's initial rezoning petition included 426,000 acres (A.R. 52(C) at 5); the final approved plan rezoned 380,074 acres (Decision 3.)

[3] As noted elsewhere in this decision, the Moosehead Lake region is identified as an area within LURC's jurisdiction with special planning needs and targeted for prospective zoning. Prospective zoning is "targeted to particular regions or communities where a more refined zoning approach is necessary" in order to direct "development to locations where it will not adversely affect high value resources." (CLUP 147.) All references to the Comprehensive Land Use Plan (CLUP) are to the 1997 revised version.

Land Use Plan (CLUP) and applicable statutes and regulations were adequate to prevent serious public harm.[4] (Decision 7; *see* A.R. 65.) None of the citizens appealed the Commission's denial of their petition. (Decision 7.)

Plum Creek's initial petition contemplated up to 975 residential lots (including 575 shorefront lots), a resort in Lily Bay Township, a resort on the southern peninsula of Brassua Lake, and 1,000 acres dedicated to commercial and industrial development. (Decision 5-6; A.R. 52(C).) In addition, Plum Creek proposed a permanent 500-foot wide conservation easement that would prohibit development around the shorelines of 70 water bodies within the Concept Plan area. (Decision 6; A.R. 52(C).) Plum Creek thrice amended its petition—in April 2006, April 2007, and October 2007. (Decision 9, 12, 18; A.R. 115, 209, 377, 388.). The first two amendments superseded and replaced the previous petition, but the October 2007 amendments supplemented the existing petition. (Decision 9, 12, 18.)

The first amended petition, in addition to other changes, reduced the shorefront lots to 480, eliminated the Brassua Lake resort, added a resort on the slopes of Big Moose Mountain, and proposed two new conservation easements. (Decision 9-10; A.R. 115.) In October 2006, Plum Creek alerted LURC to an agreement with TNC, pursuant to which TNC would purchase a 266,000-acre conservation easement (known as the "Legacy Easement") and a 74,500-acre tract in fee contingent upon the Commission's approval of the Concept Plan. (Decision 11; A.R. 165.) The contingent agreement with TNC was later incorporated into Plum Creek's second amended petition. (A.R. 268(A) at 8.)

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[4] The Commission adopted the reasoning contained in a staff memo regarding the petition. (A.R. 65 at 1.) The memo states that "the Commission will review major developmental proposals in this area in terms of the potential impacts to the entire Moosehead region." (A.R. 65 at 6.)

In January 2007, the Commission published a notice of public hearing on Plum Creek's petition to begin in May "to allow the applicant, interested groups and the general public the opportunity to present testimony and evidence as to whether the applicant's proposal meets the statutory criteria for approval." *See* 5 M.R.S. § 8052(1) (2010) (providing agencies with discretion to hold a public hearing on a rule unless five citizens request one, wherein a public hearing is mandatory). (Decision 11; A.R. 184(D) at 1.) The public hearing was postponed, however, after Plum Creek informed LURC of its intention to amend its petition further. (A.R. 188 at 1.)

Plum Creek's second amended petition, among other changes, reduced the shorefront lots to 250 and replaced the 500-foot wide water body easement with a 90,000-acre permanent conservation easement referred to as the "Balance Conservation Easement". (Decision 13; A.R. 209.) LURC accepted the second amended petition and set a deadline of May 18, 2007, for intervention by third parties. (Decision 14; A.R. 215, 216, 217.) LURC received and conditionally granted all 32 petitions it received for formal intervenor status from interested parties; the parties were subsequently and formally consolidated into 16 intervenors and 9 interested persons in the first of LURC's sixteen procedural orders. (Decision 15; A.R. 282; A.R. 299.) LURC granted Petitioners intervenor status on August 10, 2007, and Petitioners fully participated in the administrative proceedings. (Decision 15; A.R. 299; *see generally* Index to A.R.)

The parties prefiled direct and rebuttal testimony from 170 witnesses, and eighteen governmental agencies submitted comments on the second amended petition. *See* 4 C.M.R. 04 061 005-4 § 5.08(4) (2000). (Decision 17.) The public hearing was set to begin on November 4, 2007, when Plum Creek advised LURC of its intention to revise its petition again in October

2007. (Decision 17; A.R. 357.) The amendments added the Bureau of Parks and Lands as an easement holder of the Legacy Easement and made other minor revisions. (Decision 18.) The parties were able to prefile additional direct and rebuttal testimony in light of the October amendments to Plum Creek's petition. (A.R. 389 at 3.) The Commission postponed the public hearing in light of the amendments and published a notice of public hearing on the petition as amended to begin on December 1, 2007. (Decision 19; A.R. 398.)

The Commission conducted four days of hearings for comment on the petition by members of the public in Greenville, Augusta, and Portland in December of 2007 and January of 2008, during which, 477 citizens testified under oath. (Decision 20; A.R. 432(A)-(D).) The Commission held eighteen days of public hearings in Augusta from December 3, 2007 to December 14, 2007 and January 15, 2008 to January 25, 2008. (Decision 20-21; A.R. 432(E).[5]) At the public hearings, parties presented opening statements and cross-examined, redirected, and re-crossed witnesses based on their prefiled testimony. (Decision 20; A.R. 432(E).)

At some point during the hearings in January, Plum Creek admitted and LURC determined that the petition and Concept Plan were insufficient to meet the statutory and regulatory requirements. (Decision 21, 22 n.25.) Plum Creek expressed openness to amending the petition and Concept Plan to correct the deficiencies.[6] (Decision 21, 22 n.25.) At the close of the public hearing, LURC's counsel suggested three possible post-hearing procedures:

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[5] The transcripts of the 18 days of public hearings that occurred in this case were consolidated into a single PDF containing 3,945 pages. For the court's convenience in future proceedings, LURC and other administrative agencies should avoid submitting PDFs in excess of 500 pages, especially those without a table of contents or other indexing method.

[6] Petitioners dispute whether Plum Creek was in fact open to amending their petition. (NRCM Br. 17-19.) The record, however, supports LURC's finding that Plum Creek was willing to amend its petition to address problems identified by LURC. *See Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551, 555. (A.R. 432(E)(1) 239.)

1) proceed to an up or down vote by the Commission on the petition and Concept Plan as it stood; 2) allow Plum Creek to propose further amendments to the petition; or 3) direct LURC staff and consultants to develop and propose regulatorily required amendments to the Concept Plan. (Decision 21; A.R. 432(E) at 3913.) The Commissioners present expressed a preference for the third option, and invited comment on the course of the post-hearing process in a verbal order on the last day of the public hearing; several parties submitted comments on the proposed process, including Petitioners. (Decision 21; A.R. 432(E) at 3915-17; A.R. 486.) Both FEN-RESTORE and NRCM[7] urged LURC to vote on the petition as it was, but NRCM also offered suggestions for the post-hearing process. (A.R. 486(D), (G).) FEN-RESTORE objected to LURC staff and consultants re-writing the Concept Plan, stating: "It is not LURC's role to rework a proposal for a landowner to make it 'approvable.'"[8] (A.R. 486(D) at 2.)

In its eleventh procedural order, dated February 5, 2008, the Commission directed the staff to develop amendments to the Concept Plan for its review in a process by which the parties would also be able to comment on the amendments. (Decision 22; A.R. 487, 488.) LURC's reasons for pursuing this process, in addition to the willingness of Plum Creek to amend the petition, were fourfold: 1) the overall purpose and intent of Plum Creek's proposed Concept Plan was consistent with regulation requirements and the reasons LURC created concept plans; 2) the Concept Plan's deficiencies appeared resolvable; 3) the exploration of amendments to the

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[7] NRCM reserved the right to request to reopen the hearings if more evidence or information was submitted or Plum Creek proposed any more changes to the concept plan. (A.R. 486(G) at 2.)

[8] LURC asserts that none of the parties claimed it was procedural error for LURC to pursue amendments to the concept plan on its own at the time it was suggested. (LURC Br. 35.) The record does not support such an assertion. While not necessarily framed as "procedural error," FEN-RESTORE's comments to the post hearing process clearly state that the burden of proof is on Plum Creek to "present substantial evidence to show that all the legal tests have been met," and that it is not for LURC to make the petition "approvable." (A.R. 486(D) at 2.) These comments were filed on January 30, 2008. (A.R. 486(D) at 1.)

Concept Plan by LURC staff during the still-pending process and based on the existing administrative record was a more judicious and economical use of LURC's finite resources than rejecting the petition in order for Plum Creek to begin the process again; and 4) the drafting of amendments to the Concept Plan by LURC staff and allowing Plum Creek the opportunity to accept or reject them was more efficient than Plum Creek doing so. (Decision 22 n.25.) The order also provided the process by which the parties would be able to file post-hearing briefs, and LURC encouraged the parties to identify flaws in the Concept Plan and offer solutions or suggestions as to how to resolve them. (Decision 22; A.R. 487, 488.)

On March 5, 2008, LURC accepted its staff recommendation for how to proceed with potential amendments to the concept plan. (Decision 22; A.R. 497(C).) First, LURC staff identified the core issues with the Concept Plan and provided a list of those issues to the parties on April 23, 2008, for their comment; several parties in fact responded. (Decision 22-23; A.R. 511, 512(A)-(E).) Those core issues included a review of (a) the concept plan's development areas, (b) regulatorily required conservation, (c) proposed land use zones and standards, and (d) demonstrated need. (A.R. 511.) LURC approved the list of core issues on May 7, 2008 and deliberated on them for two full days on May 27 and 28, 2008. (Decision 23-24; A.R. 521.) LURC made a preliminary determination about whether and how each issue was to be resolved through amendment of the concept plan and posted those determinations for public comment on June 4, 2008; the public and parties had until July 11, 2008 to comment. (Decision 24; A.R. 521, 522; *see* A.R. 531(A)-(L).) LURC held two more days of deliberations on September 23 and 24, 2008, at which the parties were allowed to make an oral statement summarizing their position on LURC's preliminary determinations of the core issues. (Decision 25; A.R. 547.) The

Commission made several changes to the preliminary determinations during the hearing and approved the written changes on October 1, 2008. (Decision 25; A.R. 548.)

The implementing parties conditionally accepted LURC's proposed core amendments, so long as the final amendment language to the Concept Plan was acceptable.[9] (Decision 25; A.R. 551(A)-(E).) In LURC's fifteenth procedural order, the Commission provided the parties with an opportunity to submit their own proposed language to amend the Concept Plan, which LURC staff would utilize in preparing their own recommended implementing language. (Decision 25; A.R. 553.)

At a meeting on March 4, 2009, LURC staff presented their draft Concept Plan amendment language, which LURC posted for a 30-day public comment period. (Decision 26; A.R. 573(B).) LURC staff made further changes to their Concept Plan amendments based on the comments of the parties and the public and presented them to LURC on May 22, 2009. (Decision 26; A.R. 585(C).) The Commission considered the amendments on June 2, 2009, and instructed LURC staff to make further amendments which represented the Commission's determination as to what amendments to the Concept Plan, as filed, were necessary to satisfy governing review criteria. (Decision 26-27; A.R. 585.)

At the Commission's request, Plum Creek and other implementing parties agreed in writing that they would unconditionally accept and implement the plan as finally amended by LURC.[10] (Decision 27; A.R. 588, 589(A)-(J).) Specifically, Plum Creek accepted the

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[9] The "implementing parties were those who would have "implementation responsibilities under the proposed Concept Plan as amended." (A.R. 551 at 2.) The implementing parties were Plum Creek, the Appalachian Mountain Club, the Bureau of Parks & Lands, the Forest Society of Maine, and The Nature Conservancy. (A.R. 551(A)-(E).)

[10] The Commission informed the implementing parties that the Concept Plan, as amended by LURC, "represents the Commission's position on the specific terms and conditions that are necessary for this

Commission's final amendments "without any additional substantive revisions", and agreed that such acceptance meant that the Concept Plan became the landowner-initiated Concept Plan for the Moosehead Lake Region. (A.R. 589(A) at 1.)

The LURC amendments to the Concept Plan were numerous. (Decision 27-34.) The most relevant changes were the following:

- LURC eliminated several of the proposed development related land use zones within the Concept Plan area and replaced them with their own new zones. (Decision 27.)

- LURC combined Plum Creek's proposed Balance Easement with the Legacy Easement that TNC was purchasing from Plum Creek into a single, 363,000-acre easement called the Moosehead Region Conservation Easement (MRCE). (Decision 30.)

    - The MRCE became a required element of plan approval. (Decision 30.)
    - LURC rewrote the terms of the two easements to strengthen the conservation elements and make clear that the Attorney General could independently enforce the easements. (Decision 30-31.) LURC also added the Bureau of Parks and Lands (BPL) as an easement holder. (Decision 31.)

- LURC created the Roaches Pond Tract Conservation Easement (RCE) to be held by BPL in perpetuity to satisfy the mitigation requirement for adverse impact created by the Concept Plan. (Decision 31.) LURC removed this tract of land from P-RP subdistrict.

(Decision 27-34.) LURC closed the hearing record on August 11, 2009, voted to approve the Concept Plan, as amended, and adopted the associated P-RP subdistrict on September 23, 2009. (Decision 34.)

NRCM and FEN-RESTORE timely appealed, and their appeals were consolidated. Thereafter, the case was transferred to the Business and Consumer Court Docket where the matter was fully briefed and argued.

Concept Plan to satisfy governing criteria." (A.R. 588 at 3.) As such, the Commission advised that any additional substantive revisions would be "construed by the Commission as a refusal to accept and implement [the implementing party's] responsibilities under the Concept Plan." (A. R. 588 at 3.)

DISCUSSION

When the decision of an administrative or regulatory agency or board is appealed pursuant to M.R. Civ. P. 80C, the court reviews the agency or board decision, and may affirm the decision, remand for further proceedings, findings of fact, or conclusions of law, or

> [r]everse or modify the decision if the administrative findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the agency;
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> (3) Made upon unlawful procedure;
>
> (4) Affected by bias or error of law;
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> (5) Unsupported by substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion.

5 M.R.S. § 11007(4)(C) (2010); *accord Centamore v. Dep't of Human Servs.*, 664 A.2d 369, 370 (Me. 1995). When "reviewing an administrative agency decision, the issue before the court is not whether it would have reached the same conclusion as the agency, but whether the record contains competent and substantial evidence that supports the result reached." *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551, 555 (quotation marks omitted). "Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion." *York v. Town of Ogunquit*, 2001 ME 53, ¶ 6, 769 A.2d 172, 175. The court may not substitute its own judgment for that of the Board on factual questions. 5 M.R.S. § 11007(3) (2010); *accord Brooks v. Cumberland Farms, Inc.* 1997 ME 203, ¶ 12, 703 A.2d 844, 848. The burden of persuasion in an action challenging a decision of the Board rests on the party seeking to overturn its decision. *See Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 13, 760 A.2d 257, 260.

I. Justiciability Issues: Standing and Res Judicata

A. Standing

In their brief, LURC challenges Petitioners' standing to bring their respective 80C appeals.[11] (LURC Opp'n Br. 25-31.) LURC[12] contends that FEN-RESTORE and NRCM lack standing because:

> (1) they have not alleged particularized injury with adequate specificity; (2) the governmental action they challenge is not the direct cause of their injury; (3) their alleged injury is premised upon unsubstantiated assumptions about anticipated third party conduct, including that of both the landowner and the Commission; and (4) their alleged injury is not actual or imminent.

(LURC Opp'n Br. 25-31.) LURC asserts that as recreational users of the area Petitioners cannot be aggrieved by the decision to rezone, only by the theoretical approval of future permits, and seeks dismissal of Petitioners' appeal. (LURC's Opp'n 27-30.)

Standing in Maine jurisprudence is prudential, rather than of constitutional dimension, and relates to the court's subject matter jurisdiction. *See Mortg. Elec. Regis. Sys. v. Saunders*, 2010 ME 79, ¶ 14, 2 A.3d 289, ---; *JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 7, 10 A.3d 718, 719. "Standing is a threshold issue and Maine courts are only open to those who meet this basic requirement." *Lindemann*, 2008 ME 187, ¶ 8, 961 A.2d at 541. The issue of party's standing may be raised at any time. *See JPMorgan Chase Bank*, 2011 ME 5, ¶ 7, 10 A.3d at

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[11] Because their standing was not challenged at the administrative level, neither Petitioner had an opportunity to establish the necessary facts to prove their standing in the Superior Court. Thus, while the administrative record and the parties' briefs contain general assertions regarding their standing to challenge the LURC decision, the record is devoid of any evidence verifying those assertions. The court gave Petitioners the opportunity to provide up to five affidavits of their members to establish their standing to bring the present appeals.

The court also notes that challenges to a party's standing to appeal are more properly submitted as a motion to dismiss rather than in an opposition brief. A motion to dismiss would have been especially appropriate in this case where the Petitioners' standing had not been challenged at the administrative level.

[12] Although the PCEDC joins LURC's arguments, no other party has done so.

719; *cf. Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 13, 974 A.2d 903 (criticizing the appellee's challenge to appellant's standing to appeal a zoning board decision to the Superior Court for the first time on appeal to the Law Court because it deprived appellant of the opportunity to present evidence to the fact-finder to support its assertion of standing).

Pursuant to 12 M.R.S. § 689 (2010), "[p]ersons aggrieved by final actions of the commission, including without limitation any final decision of the commission with respect to any application for approval or the adoption by the commission of any district boundary or amendment thereto, may appeal therefrom in accordance with [the Administrative Procedure Act (APA), 5 M.R.S. §§ 11001-11008 (2010)]." Section 11001 of the APA grants "any person who is aggrieved by final agency action" the right to judicial review in the Superior Court. 5 M.R.S. § 11001. The Law Court has defined an aggrieved person in an 80C action as one suffering a "particularized injury—that is, the agency action or inaction must operate 'prejudicially and directly upon the party's property, pecuniary or personal rights.'" *Lindemann v. Comm'n on Govtl. Ethics & Election Practices*, 2008 ME 187, ¶ 14, 961 A.2d 538, 543 (quoting *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378, 382). The injury suffered by the party seeking review must be distinct from the injury suffered by the public at large and be more than an abstract injury. *See Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382; *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). "In the context of disputes involving an abutting landowner, the standing threshold is minimal. Because of the abutter's proximate location, a minor adverse consequence affecting the property, pecuniary or personal right is all that is required for the abutting landowner to have standing." *Roop v. City of Belfast*, 2007 ME 32 ¶ 8, 915 A.2d 966, 968 (quotation marks and citation omitted).

"As a general matter, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (cited in *Conservation Law Found., Inc. v. Town of Lincolnville*, No. AP-00-3, 2001 Me. Super. LEXIS 26, at *19 (Me. Super. Ct. Feb. 28, 2001)). Thus, for Petitioners to have associational standing on behalf of their members, 1) at least one individual member must have standing to sue in his or her own right, 2) the interests at stake are germane to the organization's purpose, and 3) the individual member's participation is not necessary in the lawsuit. *See id.*

NRCM is a non-profit organization with members throughout the state that is "dedicated to the protection of Maine's environment and the wise use of the State's natural resources through a program of advocacy, legal defense and education." (A.R. 236(I) at 2.) NRCM has intervened in previous LURC zoning proceedings and has a "well-established record of involvement in issues of conservation or development in the unorganized territories in Maine." (A.R. 236(I) at 3.) NRCM submitted five affidavits of its members in support of standing. Albert M. Manville, II, an affiant who has been an NRCM member for the past six years, asserts that he owns property on the west shore of Moosehead Lake in Misery Gore that "immediately abuts Plum Creek land that was rezoned upon LURC's approval" of the Concept Plan. (Manville Aff. ¶ 4.) Manville asserts that the Concept Plan affects the "aesthetic, wildlife, and scenic natural resources" of his land and the new land uses will lead to increased traffic, pollution, noise, etc., and detrimentally affect his property. (Manville Aff. ¶¶ 5-6.)

FEN is a non-profit organization founded in 1996 and located in Lexington Township. (A.R. 236(E) at 2.) "FEN's mission is to protect preserve, and restore the Maine Woods. This includes the protection of wildlife, forest restoration, promotion of sustainable forestry, protection of natural resources, enhancement of biological diversity, and support for the creation of large-scale wilderness reserves." (A.R. 236(E) at 2.) FEN has participated in several preservation campaigns and supported legislation regarding the north woods of Maine, including spearheading the Save Moosewood Campaign. (A.R. 236(E) at 2-3.) RESTORE is a non-profit organization founded in 1992 to "advocate restoration and protection of the natural integrity of the North Woods." (A.R. 236(W) at 2.)

FEN-RESTORE filed two affidavits of its members in support of standing.[13] Robert Guethlen, an affiant who is both a member of RESTORE and on its board of directors, owns property on Moosehead Lake in Tomhegan Township approximately a mile from the Concept Plan area and resides there year round. (Guethlen Aff. ¶ 1.) Guethlen owns and utilizes a shared deeded right of way over approximately ten miles of Plum Creek land, at least a portion of which is included in the Concept Plan area, in order to access his property.[14] (Guethlen Aff. ¶ A.) Guethlen asserts that increased traffic impacts in Concept Plan area will affect his access to his property and that the development contemplated will decrease his enjoyment of the natural landscapes of Moosehead lake. (Guethlen Aff. ¶¶ A, C.)

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[13] The two affidavits submitted were from RESTORE members; FEN did not submit any affidavits from its members. Arguably, this failure could deprive FEN of standing to pursue their appeal. However, as FEN and RESTORE have jointly filed all their briefs, FEN's dismissal from the suit would be of little consequence while RESTORE remains.

[14] It is not clear how much of the deeded right of way is part of the concept plan. Guethlen pay dues to his homeowners association, which has been involved in maintaining the roads over Plum Creek land used to access his property. (Guethlen Aff. ¶ A.)

Based on the affidavits of Mr. Manville and Mr. Guethlen, both NRCM and FEN-RESTORE have standing to pursue their appeals. As association members with property interests in or abutting the Concept Plan area, the individual members have injuries distinct from the public at large and sufficient to confer standing to sue in each own's right. *See Roop*, 2007 ME 32 ¶ 8, 915 A.2d at 968. The harm each man has asserted to his enjoyment of the natural landscapes on his own property from increased development is germane to the purposes of NRCM and FEN-RESTORE. *See Friends of the Earth*, 528 U.S. at 180. Finally, the individual members are not necessary for either NRCM or FEN-RESTORE to challenge the action of LURC. *See id.* Accordingly, the court rejects LURC's challenge to Petitioners' standing.

B. Res Judicata

In an additional challenge, Plum Creek argues that the claim preclusion prong of res judicata bars Petitioners' contention that engaging in zoning through concept plans is beyond the scope of LURC's authority. (Plum Creek Opp'n 12-14.) Plum Creek requests that the court take judicial notice of a decision by LURC on a separate concept plan petition submitted by Plum Creek called the First Roach Pond Concept Plan. (Plum Creek Opp'n 12 n.1.)

The court does not agree with Plum Creek's assertion that either component of res judicata bars Petitioners' arguments in the present case.[15] "Claim preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Portland Water Dist. v. Town of Standish*,

[15] Contrary to Plum Creek's contention, res judicata does not require "parties to raise issues when they have the first opportunity to do so." (Plum Creek Opp'n 13.) Res judicata exists to prevent piecemeal litigation and protect the stability of final judgments. *See Currier v. Cyr*, 570 A.2d 1205, 1208 (Me. 1990). Parties must present all of their arguments and issues arising out of an incident or transaction all at once, but that does not prevent parties from raising an argument in a separate, unrelated proceeding that they could have argued in a previous proceeding.

2008 ME 23, ¶ 8, 940 A.2d 1097, 1099 (quotation marks omitted). Typically, a transactional test applies to determine whether a claim is barred by pervious litigation, "examining the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Id.*, 2008 ME 23, ¶ 8, 940 A.2d at 1100 (quotation marks omitted). Here, the third prong of claim preclusion is not met because the approval of the First Roach Pond Concept Plan does not arise out of the same operative facts as the approval of the concept plan surrounding Moosehead Lake.

Nor does issue preclusion apply in this case. "Issue preclusion, also referred to as collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131, 138-39 (quotations marks and citations omitted). Plum Creek admits that Petitioners did not raise the argument in the First Roach Pond proceeding, and thus there is no final judgment that decided the issue. Res judicata is no bar to Petitioners' challenges to the Commission's authority.

II. Regulatory Framework for Petitioners' Substantive Challenges

Because Petitioners' challenge LURC's authority in a number of regards, a review of relevant statutes and regulations is helpful to begin the discussion.

A. LURC's Statutory Mandate and Role

LURC is tasked with carrying out the monumental and unenviable task of sound land use planning, development, and zoning within the unorganized and deorganized townships of Maine

to achieve "well-planned and well-managed multiple use[s] of land." 12 M.R.S. §§ 681, 683 (2010). LURC's statutory mandate is to

> preserve public health, safety and general welfare; to prevent inappropriate residential, recreational, commercial and industrial uses detrimental to the proper use or value of these areas; to prevent the intermixing of incompatible industrial, commercial, residential and recreational activities; to provide for appropriate residential, recreational, commercial and industrial uses; to prevent the development in these areas of substandard structures or structures located unduly proximate to waters or roads; to prevent the despoliation, pollution and inappropriate use of the water in these areas; and to preserve ecological and natural values.

12 M.R.S. § 681. Areas within LURC's jurisdiction largely fall within the North Woods of Maine, "a unique natural area with a distinct character" that draws thousands of seasonal residents and outdoor enthusiasts because of its "clean air and water, diverse natural communities, and abundant wildlife." (CLUP 15.) LURC is authorized to both classify and district the lands within its jurisdiction and adopt land use standards for those districts. 12 M.R.S. § 685-A(1), (3). LURC is also authorized to "adopt rules to interpret and carry out" its statutory mandate in accordance with 5 M.R.S. §§ 8051-64 (2010). 12 M.R.S. § 685-C(5)(A) (2010).

B. Comprehensive Land Use Plan (CLUP)

To assist in implementing its mandate, the Legislature tasked the Commission with adopting an official comprehensive land use plan "as a guide in developing specific land use standards and delineating district boundaries and guiding development and generally fulfilling" its statutory responsibilities. 12 M.R.S. § 685-C(1) (2010). In order to guide development, LURC's Comprehensive Land Use Plan directs the Commission to identify areas most and least appropriate for development. (CLUP 146.) The Commission has determined that certain areas within its jurisdiction, including the Moosehead Lake region, have special planning needs

because of their "concentrations of high-value resources that are potentially threatened by continued high rates of growth." (CLUP 110-111.) Because of their special planning needs, these same areas are also targeted as areas in need of more in depth planning, or prospective zoning, because of the "need to balance growth pressures and high resource values" in these areas of high growth. (CLUP 126, 146-47.) Prospective zoning is "targeted to particular regions or communities where a more refined zoning approach is necessary" in order to direct "development to locations where it will not adversely affect high value resources." (CLUP 147.)

> Under prospective zoning, the Commission identifies areas within a community or region that are most appropriate for additional growth based on existing development patterns, natural resource constraints, and further planning considerations. These areas are then zoned as development districts, and further growth is facilitated in these zones. This approach makes the development review process more efficient and predictable, and promotes both economic development opportunities and the protection of principal values. The prospective zoning process also crates an excellent opportunity for public participation by residents, landowners and other interested parties.

(CLUP 126.) The Moosehead Lake area presently is designated as the area in LURC's jurisdiction most in need prospective zoning.[16] (CLUP 147, 155.) The CLUP also identifies concept plans as a means of guiding development and providing a "voluntary means of achieving a publicly beneficial balance between development and protection of resources." (CLUP 147.)

C. Relevant Statutory and Regulatory Criteria: Concept Plans and Amending Land Use District Boundaries (Redistricting)

LURC established concept plans in 1990 to address development of lake shoreland within the unorganized territories of Maine. (CLUP C-5 to C-6.) At the time, LURC was inundated with building and development permit applications and subdivision applications for property adjacent to lakes. (CLUP C-1.) LURC determined that its traditional regulatory tools were

[16] The Commission previously approved a prospective zoning plan for the Rangeley Lake region in 2001, which was submitted to the court as a supplement to the Administrative Record.

sufficient to manage individual developments, but did not allow for effective planning for the future of the lakes. (CLUP C-2.) LURC initiated the Maine Wildlands Lake Assessment and the Lakes Action Program to address shoreland development. (CLUP C-2.) As a result, LURC clarified the criterion of "environmental fit" for development adjacent to lakes and introduced concept plans as a "flexible alternative to traditional shoreland regulation, designed to accomplish both public and private objectives." (CLUP C-4 to C-5.) Concept plans are a means of guiding development and providing a "voluntary means of achieving a publicly beneficial balance between development and protection of resources." (CLUP 147.) More specifically, concept plans are

> landowner-created, long-range plans for the development and conservation of a large block of shoreland on a lake or group of lakes. The plan is a clarification of long-term landowner intent that indicates, in a general way, the areas where development is to be focused, the relative density of proposed development, and the means by which significant natural and recreational resources are to be created.
>
> . . . .
>
> While concept plans are voluntary, initiated and prepared by the landowners, once approved by the Commission, they are binding. The Commission encourages the use of concept plans by its commitment to expedite the permitting process for approved plans and to consider adjusting certain standards, such as the adjacency criterion, provided any such relaxation is matched by comparable conservation measures.

(CLUP C-5 to C-6.)

While created to address the needs of lakes and shoreland, the Commission expanded the use of concept plans to non-shoreland areas. (CLUP 147.) LURC created the P-RP subdistrict for resource plans and concept plans as part of its authority to adopt regulations and land use standards. *See* 12 M.R.S. § 685-C(5)(A); 4 C.M.R. 04 061 010 §10.23(H) (2009) (providing criteria for Resource Plans and noting that concept plans are included in this subdistrict).

Before any land may be redistricted to a P-RP subdistrict or otherwise, both statutory and regulatory criteria must be satisfied. Pursuant to section 685-A(8-A):

> 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; and
>
> B. The proposed land use district satisfies a demonstrated need in the community or area and 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.

12 M.R.S. § 685-A(8-A). In addition, the proposed concept plan must meet regulatory criteria for designation as a P-RP subdistrict. LURC's regulations provide:

> The Commission may approve a Resource Plan and any associated redistricting only if it finds that all of the following criteria are satisfied:
>
> a. The plan conforms with redistricting criteria;
> b. The plan conforms, where applicable, with the Commission's Land Use Districts and Standards;
> c. The plan conforms with the Commission's Comprehensive Land Use Plan;
> d. The plan, taken as a whole, is at least as protective of the natural environment as the subdistricts which it replaces. In the case of concept plans, this means that any development gained through any waiver of the adjacency criteria is matched by comparable conservation measure;
> e. The plan has as its primary purpose the protection of those resources in need of protection, or, in the case of concept plans, includes in its purpose the protection of those resources in need of protection;
> f. In the case of concept plans, the plan strikes a reasonable and publicly beneficial balance between appropriate development and long-term conservation of lake resources; and
> g. In the case of concept plans, conservation measures apply in perpetuity, except where it is demonstrated by clear and convincing evidence that other alternative conservation measures fully provide for long-term protection or conservation.

4 C.M.R. 04 061 010-74 § 10.23(H)(6). The regulations provide that the "Commission, after staff review and recommendation, shall approve or deny the redistricting application" and associated concept or resource plan. *See* 4 C.M.R. 04 061 010-74 § 10.23(H)(7).

D. Procedure in LURC Proceedings

Pursuant to 12 M.R.S. § 685-A(7-A)(A) (2010), LURC "or its staff may initiate and any state or federal agency, any county or municipal governing body or any property owner or lessee may petition for adoption or amendment of land use district standards, district boundaries or land use maps." The "[a]doption and amendment of land use district standards, district boundaries and land use maps are rule-making procedures" subject, with certain exceptions, to the requirements of 5 M.R.S. §§ 8051-64. 12 M.R.S. § 685-A(7-A)(B) (2010). In addition, LURC must review and approve any proposed structure, construction, development, or subdivision within its jurisdiction. *See* 12 M.R.S. § 685-B (2010).

LURC's regulations outline three procedures for applications or petitions. Section 4.04 governs permit applications pursuant to 12 M.R.S. § 685-B and Chapter 10 of LURC's regulations. *See* 4 C.M.R. 04 061 004-5 § 4.04 (2000). Section 4.05 governs petitions for adoption or amendment of land use district boundaries pursuant to 12 M.R.S. § 685-A(8-A). *See* 4 C.M.R. 04 061 004-9 § 4.05 (2000). Section 4.06 governs petitions for adoption or amendment of rules, land use standards, and LURC's Comprehensive Land Use Plan (CLUP). *See* 4 C.M.R. 04 061 004-11 § 4.06 (2000).

The burden of proof for permit applications pursuant to section 685-B and district boundary changes pursuant to section 685-A(8-A) is on the applicant or petitioner. 4 C.M.R. 04 061 004-5 § 4.03(8) (2000). The petitioner "must demonstrate by substantial evidence that the criteria of all applicable statutes and regulations have been met." *Id.* "In the case of any

property owner or lessee who requests that the Commission place his/her land in a particular land use district, the burden of proof shall be defined as the burden of presenting sufficient evidence for the commission to make affirmative findings as required by law or regulation." *Id.* In contrast, when a person petitions for the adoption or amendment of any rule or land use standard LURC may deny the proposal in writing or initiate rule-making proceedings on the proposed amendment. *See* 4 C.M.R. 04 061 004-12 § 4.06(2)(b). A public hearing on a permit application, redistricting, or rule change is only required when five individuals request it, but, generally, LURC must act upon a petition for proposed changes to district boundaries or land use district standards within 90 days after final closure of the public hearing. 12 M.R.S. § 685-A(7-A)(B)(4); *accord* 4 C.M.R. 04 061 004-09 §§ 4.05(5), (10)(b); 4 C.M.R. 04 061 004-12 §§ 4.06(4), (8)(a). Chapter 5 of LURC's regulations governs the conduct of all public hearings. *See generally* 4 C.M.R. 04 061 005-2 to 005-10 (2000).

III. Petitioners' Substantive Challenges

A. Individual Commissioners Voting on the Final Decision

FEN-RESTORE contends that the court should vacate the Decision because not all of the individual Commissioners who voted to approve the Decision in September 2009 attended all of the hearings, thus violating FEN-RESTORE's right to procedural due process. *See Pelkey v. City of Presque Isle*, 577 A.2d 341, 343 (Me. 1990). (FEN-RESTORE Br. 21-24.) In response, LURC argues that Petitioners failed to object at the hearing when the Commissioners voted and have therefore waived any objection to the vote. *See New Eng. Whitewater Center, Inc. v. Dep't of Inland* 550 A.2d 56, 58 ("[P]laintiffs in a Rule 80C proceeding for review of final agency action are expected to raise any objections they have before the agency in order to preserve these issues for appeal. Issues not raised at the administrative level are deemed unpreserved for

appellate review."). (LURC Opp'n 55-56.) FEN-RESTORE admits they did not raise this objection at the administrative level, but asserts that they were unable to object at the time of the final vote because neither the public nor parties were allowed to comment or participate at the meeting. (FEN-RESTORE Br. 23-24; A.R. 596(B).)

FEN-RESTORE relies on *Pelkey v. City of Presque Isle* for its argument that due process requires that issues must be decided by those who hear the evidence. In *Pelkey*, the Zoning Board of Appeals, without any written findings of fact, denied the plaintiff's permit application for a special exception use of his property. *Id.* at 342. On the plaintiff's 80B appeal, the Superior Court remanded for findings of fact and conclusions based on those findings. *Id.* at 342-43. The composition of the Zoning Board of Appeals had changed in the interim period, with only two members remaining from the initial consideration. *Id.* at 343. The new board, without hearing or notice to the plaintiff, issued unanimous findings and conclusions; one of the signatories was a new Board member, who had been a vocal opponent to the plaintiff's original application. *Id.*

The Law Court held that this process violated the plaintiff's right to procedural due process because Board findings should be made "only by those members who have heard the evidence and assessed the credibility of the various witnesses." *Id.* The Law Court stated with regard to administrative proceedings that:

> the weight ascribed by the law to the findings — their conclusiveness when made within the sphere of the authority conferred — rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

Id. (quoting *Morgan v. United States*, 298 U.S. 468, 481 (1936)). The Court thus held that the plaintiff was entitled to a de novo hearing on his application in front of board members who had not opposed his hearing when they were members of the public. *Id.* at 343-44.

Regardless of whether this question is preserved for the court's review, *Pelkey* is not controlling here. As the Law Court explained in *Green v. Commissioner of the Department of Health, Mental Retardation & Substance Abuse Services*, 2001 ME 86 ¶¶ 14-15, 776 A.2d 612, 616-17, *Pelkey* simply requires decision makers to consider the evidence and submission of the parties in making findings and determinations. Here, there is no evidence in the record to suggest that the Commissioners that did not attend all of the public hearings did not review the entire record before rendering a decision. "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *In re Gen. Marine Constr. Corp.*, 272 A.2d 353, 356 (Me. 1971) (quotation marks omitted). In fact, the meeting minutes on the date of the final vote state that the Commission reviewed the voluminous record in order to address all the concerns raised by the public and parties. (A.R. 596(F).) Finally, in analogous cases involving hearing officers, the Law Court has held that due process is satisfied when the decision-making public official considers the evidence and the submission of the parties along with the findings and recommendations issued by the hearing officers. *See Green*, 2001 ME 86, ¶ 15, 776 A.2d at 617; *New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 279 (Me. 1982). In the present case, the vote of all the Commissioners was not a violation of due process.

B. Regulatory Credit and Monetary Compensation for the Moosehead Region Conservation Easement and Roaches Pond Tract Conservation Easement

Petitioners strenuously argue that Plum Creek cannot receive both regulatory credit and monetary compensation for the conservation easement purchased by TNC; they contend that any

regulatory credit for conservation must be through donation of the easement.[17] (FEN-RESTORE Br. 15-21; NRCM Br. 50-58.) Petitioners argue, mostly as a matter of policy, that to do so would set a "dangerous" precedent that future landowners would expect compensation for regulatorily required conservation and all donation of conservation easements would cease. (FEN-RESTORE Br. 19-21; NRCM Br. 55-58.) LURC addressed Petitioners' contention in their Decision:

> The Commission appreciates that the policy issues that [Petitioners] raise . . . are significant, and that reasonable people may differ on the appropriate public policy that should be adopted to resolve these issues. However, the Commission concludes as a matter of existing law that whether Plum Creek received financial compensation from private parties for the MRCE or RCE is immaterial under the statutory and regulatory requirements governing this decision.
> . . .
>
> [T]he Commission's only concern is whether the conservation land Plum Creek is delivering is quantitatively and qualitatively sufficient to satisfy governing review criteria. The Commission takes no position on the existence, nature or extent of any compensation Plum Creek may receive, other than noting that it is not the Commission, the State of Maine, or any other governmental entity that has chosen to pay Plum Creek for conservation land that the Commission has determined to by regulatorily required for approval of the Concept Plan, but instead private parties. The existence and terms of such private transactions are beyond the Commission's jurisdiction as it is currently constituted where, as here, those terms do not undermine the substantive adequacy of the conservation land.

(Decision 176-177.) The Decision further explained that

> [t]he Commission finds that the concept of a "donation" presently appears nowhere in LURC's statutes or regulations, and there is nothing intuitive about why the concept of "mitigation," "comparable conservation," or "publicly beneficial balance"—the three regulatory standard found by the Commission to form the basis for the conservation easements—inherently depend on a donation.

(Decision 177.)

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[17] Notably, Petitioners do not argue that the addition of the MRCE and RCE to the Concept Plan fail to satisfy LURC's regulatory conservation requirements.

LURC's decision correctly notes the lack of any statutory or regulatory limitation on receiving compensation for an easement necessary to satisfy the conservation requirements of a concept plan.[18] Nevertheless, it is troubling that conservation easements that are central to the concept plan's approval may not in fact be consummated. TNC's agreement to purchase the MRCE allows for payment over a period of five years. (A.R. 165.) Should TNC be unable to fully purchase the $25,000,000 easement within that time period, it is not clear what would become of the Concept Plan. *See* 4 C.M.R. 04 061 010-74 §10.23(H)((9) ("The Resource Plans shall be invalidated if the provisions therein are not complied with.") Donation of conservation easements allows for certainty; purchase of conservation easements over a period of years does not. Regardless of this uncertainty, under the applicable statutory and regulatory structure, there is nothing to prevent Plum Creek from receiving compensation for the MRCE or RCE.

C. Consistency with the CLUP

FEN-RESTORE argues that the Concept Plan is not consistent with the CLUP because the CLUP identifies the Moosehead Lake region as one in need of special planning and prospective zoning. (FEN-RESTORE Br. 29-31.) FEN-RESTORE argues that the Concept Plan is not in fact prospective zoning and the Commission abdicated its responsibilities by considering Plum Creek's proposal without engaging in true prospective zoning for the entire Moosehead Lake region. (FEN-RESTORE Br. 29.) LURC counters that prospective zoning for

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[18] NRCM alleges that three statutory provisions or agency regulations support their conclusion: 1) mitigation requirements of "no adverse impact" in 12 M.R.S. § 685-A(8-A)(B); 2) waiver of adjacency pursuant to 4 C.M.R. 04 061 010-74 § 10.23 H(6)(d) (2009); and 3) requirement of reasonably and publicly beneficial balance between development and conservation of 4 C.M.R. 04 061 010-74 § 10.23 H(6)(f) (2009). (NRCM Br.53-55.) However, none of these sections in fact preclude Plum Creek from receiving payment and regulatory conservation credit for the MRCE or RCE. These sections reflect LURC's mandate to "protect and preserve significant natural, scenic and historic features" in the unorganized territories. *See* 12 M.R.S.§ 685-A(3)(C) (2010). They do not, however speak to *how* this mandate is to be accomplished and they certainly do not prohibit a landowner from receiving compensation for that conservation.

the region is not mandated by the CLUP; the CLUP simply designates the region as one in need of special planning and targeted for prospective zoning. (LURC Opp'n 58-60.)

The CLUP establishes goals and policies to guide the Commission's work. *See* 12 M.R.S. § 685-C(1); *accord Nattress v. Land Use Regulation Comm'n*, 600 A.2d 391, 393-94 (Me. 1991). LURC correctly notes that the CLUP does not create legal obligations on the Commission to engage in prospective zoning in the Moosehead region or any other region. Nevertheless, the CLUP clearly identifies the Moosehead Lake *region* as an area in need of long-term, intensive planning. (CLUP 110-111, 126, 147, 155.) LURC's choice not to pursue prospective planning for the region, despite having the opportunity to do so before Plum Creek filed its petition, in favor of a concept plan submitted by a sole landowner is plainly inconsistent with those provisions proposing long-term, prospective planning for the entire region. The choice is also unfortunate: should LURC pursue prospective zoning for the region in the future, 400,000 acres have been removed from LURC's unilateral regional planning process authority for thirty years. The court's role, however, is not to substitute its judgment for that of the Commission. *See* 5 M.R.S. § 11007(3) (2010). The Concept Plan, as a whole, balances the goals and policies as outlined in the CLUP and is consistent with the CLUP as a whole.[19]

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[19] On this point, the Decision states:

> [T]he CLUP encourages a regional plan and prospective zoning for this region, but before the Commission initiated such a process, Plum Creek submitted its Concept Plan proposal covering nearly 400,000 acres and much of the region's lake shores. The Commission finds that concept planning at this scale is a suitable means for achieving the long-range planning and balance between development and conservation called for by the CLUP for the Moosehead Lake region, and one specifically encouraged by the CLUP.

(Decision 49.)

D. Demonstrated Need Pursuant to 12 M.R.S. § 685-A(8-A)(B)

Petitioners contend that the Concept Plan failed to meet the requirements of 12 M.R.S. § 685-A(8-A)(B) and that LURC applied an inappropriate standard to satisfy the demonstrated need component of land use boundary redistricting. (FEN-RESTORE Br. 31-35; NRCM Br. 38-41.) Petitioners focus on subsection (B) of section 685-A(8-A), and argue that the record does not support a demonstrated need for the individual aspects of the concept plan, including multiple changes in district boundaries, the creation of new zones, such as the Resort Development Zone, and the siting of a resort at Lily Bay. (FEN-RESTORE Br. 31-35.) NRCM challenges the Commission's reasoning that "demonstrated need" is different in the present case because it was engaging in prospective zoning. (NRCM Br. 38-41.) Specifically, Petitioners focus on the following language in the Decision:

> In the context of prospective zoning and concept planning, where long-term zoning boundaries replace reactive, case-by-case decisions, the Commission finds that the demonstrated need criterion takes on a different complexion. In prospective zoning, a key test of demonstrated need is whether trends show that an area with high-value resources is also in the path of growth: if high rates of growth threaten the high-value natural and recreational resources of an area, the need to rezone prospectively to direct development for appropriate locations, achieve a long-term balance of development and conservation, and protect the area's high-value resources is *per se* demonstrated.

(Decision 84-85.) NRCM contends that this reasoning is tautological, permitting a finding of demonstrated need when trends show there is a demonstrated need to rezone.[20] (NRCM Br. 39.)

In response, LURC contends that the statute allows amendment of land district boundaries when it satisfies a demonstrated need and has no undue adverse impact *or* when the new district designation is more appropriate within the affected area. (LURC Opp'n 60-64.) LURC contends that the Commission made findings on both prongs of subsection B of section

[20] NRCM also argues that such reasoning affords LURC limitless, unfettered discretion in violation of constitutional principles. (NRCM Br. 40-41.)

685-A, and thus Petitioners seek an improper advisory opinion from the court. (LURC Opp'n 60-64.) As previously noted:

> 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; and
>
> B. The proposed land use district satisfies a demonstrated need in the community or area and 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.

12 M.R.S. § 685-A(8-A). In its reply brief, FEN-RESTORE concedes that LURC's interpretation of the statute is correct, and, in line with Section 685-A(8-A)(A), the court has determined that the Concept Plan is consistent with the CLUP. Thus, the only question for the court is whether LURC made the necessary findings to support either prong of Section 685-A(8-A)(B). On the first prong, the court is not convinced that the Commission properly analyzed the requirement of no adverse impact. In determining that the Concept Plan had "no adverse impact on existing uses or resources" the Commission did not consider the impact on the entire Moosehead region. *See Valente v. Bd. of Envtl Protection*, 461 A.2d 716, 719-20 (Me. 1983). Nevertheless, the Commission's conclusions on the second prong satisfy the statutory requirements.

In determining that the Concept Plan was "more appropriate for the protection and management of existing uses and resources within the affected area," the Commission examined the recent land use trends of the Moosehead region, focusing on the increase in haphazard second home development, fragmentation of ownership in forest resources, and the present regulatory

scheme allowing "two in five" development.[21] (Decision 71-73.) Based on these identified issues within the region, the Commission concluded that the Concept Plan would limit the parcelization of Plum Creek land for commercial forestry and residential development, resulting in better protection of forest resources, recreational activities for the public, and the area's natural resources than the present regulatory scheme. (Decision 73-82.) The evidence in the record amply supports these conclusions and the Commission's conclusion that the Concept Plan is more appropriate than existing regulation for protection and management of the area.

E. Illegal Contract Zoning

FEN-RESTORE asserts that LURC is without any authority to engage in concept planning because it is a form of contract zoning absent statutory authority. (FEN-RESTORE Br. 2-14.) FEN-RESTORE argues that LURC may not contract away its zoning power for thirty years because it: 1) violates 12 M.R.S. § 685-A(9) (2010), which requires LURC to periodically review district boundaries and land use standards;[22] and 2) prohibits LURC from "modifying some of its land use standards and boundaries when needed to protect the public health, welfare and safety." In response, LURC argues that concept plans are expressly provided for in the Comprehensive Land Use Plan and those provisions were in full force and effect at the time of the proceedings. (LURC Br. 51-52; CLUP 1997 App. C.)

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[21] The so-called "two in five" exemption permits landowners to develop or create two lots from every existing parcel every five years without subdivision approval. 4 C.M.R. 04 061 010-098 § 10.25(Q)(1)(b) (2006) ("The division of one lot into two parcels coupled with the placement of one or two dwelling units on either or both lots does not create a subdivision.")

[22] Title 12 M.R.S. § 685-A(9) (2010) states:

> **9. Periodic Review Of District Boundaries And Land Use Standards.** At the end of each 5 years following initial adoption of permanent land use standards and districts, the commission shall make a comprehensive review of the classification and delineation of districts of the land use standards. The assistance of appropriate state agencies must be secured in making this review and public hearings must be held in accordance with the requirements set forth in subsection 7-A.

Although FEN-RESTORE asserts that there is no authority for LURC to approve concept plans, concept plans are specifically provided for in the CLUP and LURC land use regulations. *See* 4 C.M.R. 04 061 010 §10.23(H). (CLUP App. C.) As with any amendment to land use standards, LURC was required to submit the regulatory amendments to its land use standards to the Legislature for approval or modification. *See* 12 M.R.S. § 685-A(7-A)(B)(6). Because the Legislature did not act, those amendments continued in full force and effect. *See id.* Nevertheless, FEN-RESTORE argues that these regulations and comprehensive plan amendments themselves exceed LURC's authority and inaction by the Legislature does not equate to approval. (FEN-RESTORE Reply Br. 7-11.)

The Legislature has authorized LURC to "[a]dopt rules to interpret and carry out" its powers and duties and "[e]xecute contracts and other agreements to carry out its purposes." 12 M.R.S. § 685-C(5)(A), (F). As part of its authority to adopt regulations and land use standards, LURC created the P-RP subdistrict, applicable to resource plans and concept plans. 04 C.M.R. 04 061 010-74 § 10.23(H)(6). The criteria for both resource plans and concept plans in the P-RP subdistrict balance LURC's statutory purposes of protection, planning, and development and are a reasonable interpretation and execution of its statutory authority to adopt rules and regulations. *See* 12 M.R.S. § 681; 12 M.R.S. § 685-A(1) (authorizing LURC to delineate subdistricts "as may be necessary and desirable to carry out the intent of this chapter"); *Competitive Energy Servs., LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046.

Although FEN-RESTORE argues that section 685-A(9) prevents LURC from approving a concept plan lasting more than five years, the plain language of the statute simply states that every five years LURC shall "make a comprehensive review of the classification and delineation

of districts of the land use standards." 12 M.R.S. § 685-A(9). The statute does not mandate that LURC amend those standards or districts. Further, as LURC points out in its brief, the Concept Plan may be amended with Plum Creek's consent. Concept plans, generally, do not violate any statutory provision and are thus not illegal contract zoning or action that exceeds LURC's statutory authority.

F. The Public Hearing and Post-Hearing Process

Finally, Petitioners raise a series of arguments regarding the nature of the proceedings and the process after the close of the public hearing. First, Petitioners contend that at the close of the public hearing, the Commission should have proceeded to an up or down vote on the petition and the failure to do so is per se reversible error. (NRCM Br. 25-27.) Petitioners also argue that the Commission is without statutory or regulatory authority to amend the Concept Plan so that it can meet regulatory and statutory mandates. (NRCM Br. 32-34.) Lastly, Petitioners contend that the post-hearing process violated LURC's own rules and regulations because: 1) it was an ad hoc proceeding, not provided for in LURC's rules, and thus a denial of Petitioners' rights to due process; and 2) the Commission did not conduct a public hearing on the amended petition pursuant to 4 C.M.R. 04 061 005-1 to -10 (2000) in violation of the APA public hearing requirements. (FEN-RESTORE Br. 24-28; NRCM Br. __.)

At oral argument and throughout the briefs, the parties have disagreed about the nature of the administrative proceedings, specifically whether the public hearing for the Concept Plan was an adjudicatory process or a rule making process. Because the nature of the proceedings informs the process, the court will begin with an analysis of the public hearing proceedings and then move on to the post-hearing process.

1. The Public Hearing Process

Where the Petitioners argue the proceedings were adjudicatory with the trappings of formal litigation, LURC contends that the proceedings were rule making and quasi-legislative. Regardless of the label, the court's task is to determine whether the process complied with the Commission's legislative authority and regulatory procedures.

Section 685-A(7-A)(B) designates the "[a]doption and amendment of land use district standards, district boundaries and land use maps [as] rule-making procedures" subject to selected requirements of the Administrative Procedures Act, 5 M.R.S. §§ 8001-64, and modified by statutory criteria in subsections (1) through (6), *see* 12 M.R.S. § 685-A(7-A)(B)(1)-(6). These statutory provisions set the procedure LURC must follow when amending land use district standards, district boundaries, and land use maps, including requirements for the conduct of public hearings, content and timing of notice, effective dates of any adopted rule, and when the Commission must act to approve or deny on the proposed amendment. The statutory designation of a proceeding as a "rulemaking procedure," however, does not cloak LURC with any additional or inherent statutory authority.

Pursuant to LURC's authority to "adopt rules to interpret and carry out" its mandate, *see* 12 M.R.S. § 685-C(5)(A), LURC adopted rules that lay out different procedures for different types of petitions and proceedings. *See* 4 C.M.R. 04 061 004-5 § 4.04 (regulating the procedure for permit applications); 4 C.M.R. 04 061 004-9 § 4.05 (regulating the procedure for the amendment of land use district boundaries); 4 C.M.R. 04 061 004-11 § 4.06 (regulating the adoption or amendment of the Commission's rules, amendments to the CLUP, or amendments to land use district standards). Although by statute the amendment of land use district boundaries, land use district standards, and land use maps are all "rulemaking procedures," LURC has

created two distinct procedures for: 1) petitions to amend land use district boundaries and 2) petitions to amend land use district standards, the CLUP, or the Commission's rules. LURC designated the latter proceedings "Rulemaking Procedures" in Section 4.06 and specifically exempted petitions for the adoption or amendment of land use district boundaries from the procedure laid out for LURC-designated Rulemaking Procedures. *See* 4 C.M.R. 04 061 004-11 § 4.06; *cf.* 4 C.M.R. 04 061 004-11 § 4.05. Regardless of LURC's designation of certain petitions as "Rulemaking Procedures," any petition to amend a land use district standard, district boundary, or land use map remains a "rulemaking procedure" subject to the APA and section 685-A(7-A)(B). No party has questioned LURC's authority to bifurcate the statutory rulemaking procedures into two distinct processes and, provided that both processes satisfy the APA and section 685-A(7-A)(B), LURC is well within its authority to do so.[23] Under either procedure, LURC follows the chapter 5 proceedings for public hearings; LURC generally has the discretion to conduct a public hearing or not conduct a public hearing, except that a public hearing is required whenever five or more persons request one in writing. *See* 12 M.R.S. § 685-A(7-A)(B); 5 M.R.S. § 8052(1) (2010); 4 C.M.R. 04 061 004-10 § 4.05(5); 4 C.M.R. 04 061 004-12 § 4.06(4).

The question then is what procedure did Plum Creek invoke when it filed its petition for redistricting and approval of its Concept Plan. Arguably, a concept plan involves amendments to land use district boundaries *and* land use district standards, invoking both Section 4.05 procedure

[23] Structurally, the distinction between procedures make sense; whereas permit applications and rezoning petitions only apply to the applicant's property, amendments to the Commission's rules, the CLUP, or land use standards apply across all of LURC's jurisdiction.

and Section 4.06 procedure.[24] Undoubtedly, a petition for approval of a concept plan does not fit neatly into either procedure and the Commission should consider establishing formal rules applicable to future petitions for concept plans. In the absence of such rules, the Commission and the parties, throughout the course of the proceedings, treated Plum Creek's application as one for the amendment of land use district boundaries (*see* A.R. 184(D), 216, 398) and utilized the standards for amending land use district boundaries to analyze the concept plan and redistricting petition, *see* 12 M.R.S. § 685-A(8-A); (Decision 35, 69-178). Because the parties committed to that procedure, the court will do the same and review the petition according to applicable statutory and regulatory standards for a petition to amend land use district standards.

Up to the point of the close of the public hearing, the parties agree that the Commission scrupulously followed the procedures laid out in Section 4.05 for a property owner's petition for land use district boundary amendment and, pursuant to the exercise of its discretion, Chapter 5 for public hearings. Although LURC maintains that there is no statutory or regulatory requirement that the Commission vote on Plum Creek's petition as presented by the applicant, the court disagrees. First, LURC's regulations squarely place the burden of proof in a Section 4.05 proceeding on Plum Creek: "An applicant or petitioner pursuant to . . . § 685-A(8-A) [for

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[24] Despite the statutory designation as a rulemaking procedure, a petition for approval of a concept plan and associated redistricting arguably is not a rulemaking procedure at all. The APA defines a rule as

> the whole or any part of every regulation, standard, code, statement of policy, or other agency statement *of general applicability*, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

5 M.R.S. § 8004(9)(A) (2010) (emphasis added). A concept plan and the attendant redistricting is not a statement or regulation of "general applicability." By definition, the concept plan and redistricting applies only to the land in question and has no general applicability across LURC's jurisdiction. Were it not for the statutory designation of this proceeding as a "rulemaking procedure" the court would conclude that Plum Creek's petition and the associated public hearing were part of an adjudicatory process.

land use district boundary amendment] must demonstrate by substantial evidence that the criteria of all applicable statutes and regulations have been met." 4 C.M.R. 04 061 004-5 § 4.03(8). Second, the land use regulations governing concept plans state that the "Commission, after staff review and recommendation, shall approve or deny the redistricting application" and associated concept or resource plan. *See* 4 C.M.R. 04 061 010-74 § 10.23(H)(7); *Me. Sch. Admin. Dist. No. 37 v. Pineo*, 2010 ME 11, ¶ 18, 988 A.2d 987, 993 (construing "shall" to mean "must"). Contrary to LURC's contention, these regulations strongly suggest an up or down vote by the Commission on the petition as it stood at the end of the public hearing. The court thus turns to review the statutory and regulatory authority that would support the alternative post-hearing process the Commission pursued.

2. The Post-Hearing Process

Petitioners argue that the Commission had no authority to amend Plum Creek's petition, and in the alternative, argue that the Commission should have reinitiated the public hearing to address the amendments. In response to Petitioners' arguments regarding the Commission's statutory authority to pursue the post-hearing process, LURC argues that because there is no statute or regulation that *precludes* the Commission from the procedure it pursued, the only question is whether the process satisfied the requirements of due process. (LURC Opp'n 36-41.) As a general proposition, that argument is incorrect. Administrative agencies, such as LURC, "are creatures of statute, and can only have such powers as those expressly conferred upon them by the Legislature, or such as arise therefrom by necessary implication to allow carrying out the powers accorded to them." *Valente v. Bd. of Envtl. Prot.*, 461 A.2d 716, 718 (Me. 1983) (citing *Clark v. State Emps. Appeals Bd.*, 363 A.2d 735, 737 (Me. 1976)). An administrative agency's action must be pursuant to and consistent with the Legislature's statutory grant of authority. It is

not enough to state that the action is not precluded; the authority to act must derive from statute or a rule adopted pursuant to statutory authority. Violation of statute or action in excess of an agency's statutory authority is grounds for vacating an agency's decision. *See* 5 M.R.S. § 11007(4)(C)(1), (2). Further, an agency's failure to comply with its own rules is an unlawful procedure that can invalidate its actions when prejudice results. *See* 5 M.R.S. § 11007(4)(C)(3); *accord United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 277 (1954) (holding that an agency must follow its own procedural regulations in an immigration appeal); *Hopkins v. Dep't of Human Servs.*, 2002 ME 129, ¶ 13, 802 A.2d 999, 1002-03; *cf. Russell v. Duchess Footwear*, 487 A.2d 256, 259-60 (Me. 1985) (Dufresne, A.R.J., concurring) ("Administrative agencies are bound by their own rules of procedure promulgated pursuant to legislative grant of power, which rules have the force of law.") The court thus must examine whether the post-hearing process was: 1) in excess of LURC's statutory authority, or 2) an unlawful procedure that prejudiced Petitioners' rights.

There is no statute or regulation that directly addresses the process pursued by the Commission after the evidentiary hearing. Nevertheless, both LURC's enabling statute and its regulations state that the Commission or its staff may initiate the amendment to or adoption of land use district boundaries. *See* 12 M.R.S. § 685-C(7-A)(A); 4 C.M.R. 04 061 004-9 § 4.05(2). The Commission or its staff also may initiate the amendment to or adoption of land use district standards. *See* 12 M.R.S. § 685-C(7-A)(A); 4 C.M.R. 04 061 004-11 § 4.06(2)(a). While these authorities neither explicitly address nor explicitly allow the post-hearing procedure employed here, they suggest that the Commission is well within its statutory authority to suggest amendments to a landowner's redistricting petition, which the landowner may reject or accept and incorporate those changes into its petition. *See Comeau v. Town of Kittery*, 2007 ME 76, ¶

14, 926 A.2d 189, 193 (holding that a Planning Board's changes to a public project plan after the public hearing was not a denial of due process, but not addressing whether the procedure violated the land use ordinance); *Bouchard v. Inhabitants of Town of Orrington*, Docket No. CV-90-88, 1992 Me. Super LEXIS 85, at *4 (Me. Super. Ct. Apr. 3, 1992) (noting that a Planning Board consulted with an applicant regarding his subdivision application prior to its submission). The latter is exactly what occurred in this case. The Commission and its staff suggested extensive revisions to Plum Creek's petition, and Plum Creek accepted those amendments.[25] The result of LURC's suggested amendments, in essence, is Plum Creek's *fourth* amended petition, which the Commission accepted and inevitably approved. This is not, however, the end of the court's inquiry. Petitioners also argue that the Commission's failure to submit any of the amendments LURC suggested to the scrutiny of a public hearing is unlawful because it is violative of LURC's Chapter 5 regulations.[26] On this final point, the court agrees with the Petitioners.

The Commission exercised its discretion to hold a public hearing on the Plum Creek's petition in accordance with its Chapter 5 procedures in 2007. (A.R. 184(D).) When Plum Creek amended its petition, the Commission postponed the public hearing and allowed the parties to fully evaluate the newly amended petition before the public hearing. (A.R. 188, 381.) When Plum Creek alerted LURC that it would amend its petition further after the parties began filing direct and rebuttal testimony, LURC allowed the parties to submit additional evidence to address

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[25] It would seem that Plum Creek would have to accept the amendments to move forward with the Concept Plan given that concept plans are created and initiated by landowners. (CLUP C-5 to C-6.) Put another way, LURC could not initiate the same redistricting or adopt the same Concept Plan through its rulemaking authority without Plum Creek's approval or participation.

[26] Petitioners also allege that the procedure was in violation of their due process rights. Because the court resolves this case on other grounds, the court does not reach the constitutional question. *See Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 19, 769 A.2d 857, 864 (stating that courts endeavors to resolve controversies "without deciding constitutional issues, reaching such an issue only if it is entirely necessary to a decision on the cause in which it is raised" (quotation marks omitted)).

the amendments. (A.R. 389 at 3.) At no point did Plum Creek withdraw its petition, nor did the Commission treat an amendment to the petition as an entirely new petition. The exercise of LURC's discretion to hold a public hearing on Plum Creek's *petition* applies to the entire petition, not just those portions submitted by Plum Creek itself.

LURC contends that the Commission's suggested amendments are part of its decision making process, and that because the Petitioners had notice and opportunity to comment on that post-hearing process, there is no prejudice and unlawful procedure. (LURC Opp'n Br. 38-41.) The court disagrees. The purpose of a public hearing is not simply to provide notice and opportunity to comment. As stated in LURC's own notices of public hearing on Plum Creek's petition:

> The purpose of the hearing on this Petition is to allow the applicant, interested groups an the general public *the opportunity to present testimony and evidence as to whether the applicant's proposal meets the statutory criteria for approval* under provisions of 12 M.R.S.A. 685-A(8-A) and Section 10.23,H of the Commission's rules.

(A.R. 184(D) at 1; 217 at 1; 388 at 1 (emphasis added).) *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (197) (Douglas, J., dissenting) ("The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . . Public airing of problems through rule making makes the bureaucracy more responsive to public needs . . .").

Further, the court concludes that LURC's suggested amendments were not mere technical corrections. The amendments suggested by the Commission and its staff and incorporated by Plum Creek were substantive and significant. For example, the post-hearing amendments made the MRCE a necessary requirement for approval, and removed the Roaches Pond Tract from the

Concept Plan. The changes added new zones that were not part of the original application and added a third resort zone. Because these changes occurred after the close of the public hearing, the Petitioners were not able to present their own witnesses or examine other witnesses on the wisdom, propriety or impact of these amendments, nor did the Commission reopen the public hearing to allow for such examination. In short, Plum Creek's fourth amended petition was not submitted to a public hearing, as that term is used in LURC's Chapter 5 regulations.

Finally, the court is troubled by the fact that LURC pursued a procedure that was not provided for in its regulations or otherwise justified by any explicit statutory authority at a critical stage in the proceedings. *See Accardi*, 347 U.S. at 277; *Rotinsolu v. Mukasey*, 515 F.3d 68, 72 (1st Cir. 2008) ("An agency has an obligation to abide by its own regulations."); *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 415 (Alaska 1973) (holding that an agency must adopt rules of procedure and not "conduct its procedures on an ad hoc basis"). As noted above, LURC's regulations regarding burden of proof and concept plans strongly suggest that the Commission should have voted up or down on Plum Creek's petition as it stood at the end of the public hearing. Although LURC bristles at what it characterizes as "brittle process theory," administrative proceedings must conform to established rules and regulations to maintain the legitimacy of administrative agencies. LURC's rules not only guide the Commission; the rules inform parties of their rights and responsibilities and enable stable, uniform proceedings on which the public can rely. Because LURC disregarded its Chapter 5 rules and engaged in an unauthorized, ad hoc procedure that prejudiced Petitioners' rights, the court must vacate the Decision of the Commission and remand for a public hearing on Plum Creek's fourth and final amended petition.

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

> The September 23, 2009 Decision of the Land Use Regulation Commission is VACATED. The court remands the case to the Commission for further proceedings consistent with the decision.

Date: April 7, 2011

s/Thomas E. Humphrey
Chief Justice, Superior Court