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LURC and First Principles of Land Use Regulation

By Mark W. Anderson

The controversy evoked by the Plum Creek Concept Plan for the Moosehead Lake region of Maine should not surprise us. The geographic scale of the plan amplifies the tensions inherent in the law, economics, and politics of land use planning in our society. However, it is that very scale of development in Maine's North Woods that masks the fundamental issues here.

The Maine Land Use Regulation Commission (LURC), like all land use planning and regulation agencies, must navigate the terrain between absolute dominion, the idea that private landowners shall do as they wish with their property, and eminent domain, the constitutional power of the state to take property for public purposes with payment of just compensation. Where LURC or any local zoning board falls on the continuum between these two poles will always displease some in society. Economists would say that the process necessarily creates both winners and losers.

We should remember the first principles of land use regulation when we think about LURC's role in this process. LURC may constrain the property rights of landowners (their absolute dominion over their property) on one of two grounds. It may carry out the public trust doctrine over the waters of Maine, a power and responsibility reserved to the state in Maine law, although not typically so in other states. Or it may exercise police powers, essentially a common law

doctrine where a sovereign state is obligated to provide for the general welfare of its citizens. With these powers LURC may tell landowners what they may not do, though it may not tell them what they must do.

In economic terms, we can think of these powers as protecting the public from negative externalities, but not requiring landowners to provide positive externalities with private property. Another way to think of this is that land use regulation agencies generally cannot force the provision of public goods, but may protect from the creation of public bads. The exceptions to this general principle of land use regulation come in the forms of conditionality and mitigation.

Land use ordinances nationwide have become more sophisticated in that landowners are allowed uses that would otherwise be prohibited by fulfilling certain conditions, often in the form of mitigation. For example, greater development densities may be allowed in one area of a jurisdiction in return for a conservation designation somewhere else. We see this clearly in the concept plan process of LURC.

It is the scale of LURC's jurisdiction that makes its decisions so much more compelling than those of its colleagues on local zoning boards. This scale amplifies the problem of determining the "public" in the public trust doctrine or the "general" in the general welfare of the police powers. The numbers and diversity of stakeholders means that in dynamic times like these, fewer groups and individuals are likely to find LURC's decisions satisfying.

The clarity of values in LURC's comprehensive land use plan and its process for applying these values to decision making such as in the Plum Creek case should be seen as a sign of the very

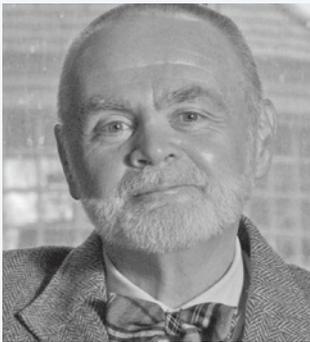
effectiveness of the institution at mediating among the various conflicting views of the public purpose. The difficulty in analyzing LURC's "effectiveness" after the fact, though, is rooted in this concept of the public purpose. Since there are many views of the public purpose or the general welfare, deciding whether the sum of LURC's decisions "work" over time implies more harmony in the values held by Maine people (the public) than may exist. Furthermore, since LURC may only prohibit action, and then only so long as not to effect a taking, the change in the use of land over time is not all attributable to this one agency.

Other players—landowners, other state agencies, nongovernmental organizations (NGOs), entrepreneurs—all work to shape uses of the lands. Improvements in public and private infrastructure affect access to the landscape in ways not always fully appreciated. Probably the biggest land use change in Maine's North Woods in the last 38 years comes from the roads constructed for timber management but maintained after the fact for other purposes. The actions of NGOs, from The Nature Conservancy's purchase of conservation easements to a local snowmobile club's trail maintenance, change recreation access and opportunities. And landowners' decisions, as we see in the recent past, reflect changes in their perspectives on how lands might be used.

The dynamism created by the interactions of these various interests often leads to rezoning petitions such as the Plum Creek Concept Plan. Rezoning is the most common challenge facing any land use regulation body in times of rapid change. It is an opportunity for both sound planning and for multiple parties to seek special advantages by manipulating bureaucratic rules (in technical terms "rent-seeking" behaviors).

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LURC has shown itself more than capable of meeting these challenges to date. We should remember that it only provides a set of legally defensible limits on what private landowners do with their property. Within those limits LURC does not determine the actions of property owners or the actions of other private and public entities that affect the landscape. As we think of the future, recognizing both the strengths and limits inherent in what LURC does will bring more realism to what other methods various publics will need to exercise to accomplish their goals for Maine's North Woods. 🐾



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Wanted: A Maine Woods Dialogue

By Mark B. Lapping

Gerry Bley's useful outline of Maine's Land Use Regulatory Commission (LURC), its history, function, and mandate, places LURC within the context of a number of public institutions created during what has been called "the quiet revolution" in American land use planning. LURC was part of a movement during the late 1960s and 1970s that saw the creation of new agencies with mandates to both guide growth and protect critical ecological systems in some rather substantial regions across the nation. Invariably these places were rural, thinly populated, if at all, and more often than not included wilderness areas and sensitive habitats. Certainly the great Maine Woods and hundreds of coastal islands continue to fit this definition.

It is important to note that these new planning and regulatory authorities represent the insertion of state authority in places where local planning was minimal or even nonexistent (Lapping and Furuseth 2004). Proposed development projects of a regional scale, so it was argued, required extraordinary analysis, assessment, and ultimately, regulation. In many instances, however, accommodations were made by these new planning entities that limited the scope and impact of new development rather than denying it outright. In a very real sense these agencies, including LURC, arose out of genuine concerns relative to new patterns of land use and consumption reflecting new ownership patterns and different objectives. Where historically forest products and or other resource-based wealth-

creating activities defined regional economies, now recreation and tourism, retirement-related growth, and the development of second-home projects and wildland estates determined the new rural economies. This reflects the "bottom line" reality of the new owners of these lands, as Bley documents. Yet it would be incorrect to suggest that all of the land in the Maine Woods is subject to the financial plans of REITs and TIMOS alone. For, as Bley importantly points out, there has also been an explosion in the amount of land held in strictly conservation use at the same time that more activity on the part of developers has taken place. The two are intimately related and, to some extent, play off of one another.

Like so many of its counterparts, LURC is largely a single-purpose agency: it regulates land use and land development. But in such vast territories, regulating land also means defining the regional and local economy. The reality in LURC's jurisdiction is that the land is the means of production, and how it is used often determines individual livelihoods and family and community well-being. This is why, to such a great extent, the contest over the Plum Creek proposal has been forced into the false "jobs versus environment" dichotomy. The reality is that while LURC is doing its important work and fulfilling the mandate that Mainers have given it over the decades to protect unique environmental resources, the region continues to lack a vision of what a robust economy that provides residents with a genuine "stay option" might look like. This failure is one borne by all Mainers who care deeply about the great Maine Woods.

The truth is that the very act of regulating the land in vast, rural areas is economic development planning at one and the same time. To pursue one without

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pursing the other creates false trade-offs. What is necessary, in my view, is a deep and genuine dialogue among Maine people about the future of the vast territory under LURC's jurisdiction. We have never as a community come together to ponder and debate what the future of the North Woods ought to be like and how we can promote such a unified vision. In a sense the controversy over Plum Creek has set the platform for this larger and more important discussion; we need to take advantage of this opportunity.

Personally, I believe that the mandate of LURC ought to be altered and enlarged so that it comes to be seen as a regional agency writ large. Its mandate, staff, and programmatic thrusts should be enhanced so that it makes truly comprehensive plans that seek to protect the unique quality and ecological assets of the region while also working to stimulate the type of sustainable and environmentally sensitive economic development that will carry local families and communities well into the future. No one wishes to destroy the "goose that laid the golden egg." However right now, given that LURC reacts rather than projects and has such a narrow mandate, it is forced into making land use decisions that have broad consequences without reference to larger concerns. Rural Maine people are dealing with growing rates of impoverishment, hunger, and out-migration. The rising cost of public services will invariably lead to the decline and perhaps disappearance of rural communities. A number of North Woods communities have already chosen to de-organize because their ability to support the very attributes of local self-government has been so compromised. The promise of any work has led many to embrace literally any proposal that might create some jobs no matter their larger social and environmental cost.

Plum Creek, so it seems to me, is not the answer. Rather it is the symptom of what is so wrong in LURC land. 🐸

REFERENCES

- Lapping, Mark B. and Owen J. Furuseeth. 2004. *Big Places, Big Plans: Large-scale Planning Regimes in Rural North America*. Ashgate Publishers, Burlington, VT.



Mark B. Lapping is the distinguished professor of planning and public policy at the Muskie School of Public Service at the University of Southern Maine. A planner by profession, prior to joining USM he was founding dean of the Bloustein School of Planning and Public Policy at Rutgers University. Author of several books that are "best-sellers" in planning, he has also written well over 150 articles and monographs and has been on the editorial boards of several professional journals.