

In the Matter of  
Maine Land Use Planning Commission  
Development Permit DP 3639-F  
Big Lake Development Company, LLC  
Big Moose Ski Resort

**MOOSEHEAD REGION FUTURES COMMITTEE'S  
PRE-FILED TESTIMONY**

August 5, 2022

Pursuant to §C(2)(b) of the Third Procedural Order in the above-captioned matter, the Limited Intervenor, Moosehead Region Futures Committee (MRFC), through its Steering Committee member and designated representative at the hearing scheduled for August 10, 2022, Marcia L. Phillips, testifies as follows:

**INTRODUCTION**

1. MRFC resubmits and incorporates by reference the entirety of its Pre-filed Testimony dated and filed in this matter on June 6, 2022. No testimony given, and no documentary evidence placed in the record by the Applicant since June 6, 2022, answers, moots, or refutes, the facts presented, or the arguments made in MRFC's Pre-filed Testimony of June 6, 2022.
2. **MRFC states again<sup>1</sup> that it favors redevelopment of the ski resort area on Big Moose Mountain.** MRFC has not taken a position for or against the proposal set forth in the Applicant's application in this matter, however.
3. MRFC states emphatically that regardless of its position on redevelopment of the ski resort on Big Moose Mountain in general, and regardless of any position it may in the future take on this Applicant's proposal in particular, it, as a Limited Intervenor, must be allowed to cross-examine the Applicant on the question, generally, of "adequate financial provision".
4. At the LUPC meeting on July 13, 2022, Chair Worcester, who was the Presiding Officer at the Public Hearing on June 7, 2022, discussed his decision to interrupt MRFC's cross-examination of the Applicant at the Public Hearing on June 7, 2022<sup>2</sup> saying: "Maybe I was a

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<sup>1</sup> See Moosehead Region Futures Committee's Pre-filed Testimony dated June 6, 2022, ¶ 2.

<sup>2</sup> Audio transcript of public hearing held in this proceeding on June 7, 2022, starting at 37:59:

PRESIDING OFFICER: I want to intervene here. They [referencing the Applicant's witnesses' direct testimony] didn't do any testimony relative to financing. You're concentrating asking them questions about financing. You need to concentrate on asking them questions about their presentation. [Footnote continued on next page.]

little quick to redirect [MRFC representative] Mr. King's presentation. It bothered me considerably that he or his group never gave any indication one way or another whether they approved of what was being proposed or whether they didn't approve of what was being proposed. And that's what the focus of the hearing was about."<sup>3</sup>

5. MRFC respectfully disagrees with the Presiding Officer's narrow concept of what the Public Hearing in this matter should be about. While allowing public statements in favor of, or against, an applicant's proposal is certainly a permissible purpose of a Public Hearing, a central purpose of a public hearing is to be an adjudicatory proceeding.<sup>4</sup> Although a public hearing in this matter was not statutorily required, once this Commission exercised its discretion to hold a public hearing before deciding on the Application in this matter, the public hearing, at least in part, took on the role of an adversarial adjudicatory proceeding, by virtue of the operation of the Commission's own Rules for the Conduct of Public Hearings<sup>5</sup>. What the focus of the public hearing in this matter should be about, at least in part, is to *adjudicate*, among other questions, **whether the Applicant has met its statutory burden to, among other things, demonstrate to the Commission by substantial evidence** (1) that it has made "adequate...financial provision for complying with the requirements of the State's environmental laws and those standards and regulations adopted with respect thereto"<sup>6</sup>; and (2) that it has "adequate financial resources to construct the proposed improvements, structures, and facilities and meet the criteria of all state and federal laws and the standards of [the LUPC's] rules, taking into consideration, among other things, "the cost of the proposed development, [and] the amount and strength of commitment by the financing entity..."<sup>7</sup>
6. Once the Commission exercised its discretion to grant Limited Intervenor status to MRFC, then MRFC should be permitted to cross-examine<sup>8</sup> the Applicant on all admissible evidence. "Evidence will be admissible if it is relevant and material to the subject matter of the hearing and is of a type customarily relied upon by reasonable persons in the conduct of serious

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LIMITED INTERVENOR'S REPRESENTATIVE: So, are you saying, Commissioner, that my cross-examination is limited to their presentation?

PRESIDING OFFICER: Yes.

<sup>3</sup> Audio transcript of LUPC Meeting on July 13, 2022, Agenda Item "Big Lake Development, LLC, Big Moose Twp.", starting at 14:56.

<sup>4</sup> An "adjudicatory proceeding" is "any proceeding before an agency in which the legal rights, duties, or privileges of specific persons are required...by statute to be determined after an opportunity for hearing." 5 M.R.S. § 8002 (1).

<sup>5</sup> 01-672 C.M.R. ch.5. provides for these indicia of an adversarial adjudicatory proceeding, among other things: the issuance of subpoenas; the administering of oaths or affirmations; the prohibition of ex parte communications; rulings on procedure and admissibility of evidence; the order in which direct and cross-examinations must occur, and the right to cross-examine witnesses.

<sup>6</sup> 12 M.R.S. § 685-B (4)(A)

<sup>7</sup> 01-672 C.M.R. ch. 10, § 10.25 (C)(2) (2022).

<sup>8</sup> 01-672 C.M.R. ch 5, §5.08 (A)(2).

affairs.”<sup>9</sup> While “[e]vidence which is irrelevant, immaterial, or unduly repetitious may be excluded”<sup>10</sup>, an inquiry on cross-examination about the Applicant’s “financing” cannot be excluded on the grounds that it was irrelevant or immaterial, because the statutory and regulatory requirements placed on the Applicant makes an inquiry “about financing” directly relevant and material. This line of inquiry cannot be excluded on the ground that it is “unduly repetitious, because the Applicant had ensured that “financing” was never mentioned in its Pre-filed or direct Testimony for the June 7, 2022 hearing (though the Applicant has, of course, opaquely and incompletely<sup>11</sup>, addressed the details of its financing in other parts of the record in this proceeding, including its Pre-filed Testimony for the August 10, 2022 hearing).

**MOOSEHEAD REGION FUTURES COMMITTEE’S QUESTIONS ON CROSS-EXAMINATION RELEVANT AND MATERIAL TO THE APPLICANT’S FINANCING ADEQUATE FINANCIAL RESOURCES**

7. To ensure that the Commissioners can be apprised of all the questions MRFC wishes to ask the Applicant’s witnesses on cross-examination relevant and material to the Applicant’s financing, and to maximize the ability of the Applicant’s witnesses to provide the Commissioners with all the information at their disposal responsive to MRFC’s questions, MRFC lists below the questions it anticipates asking the Applicant’s witnesses on cross-examination. For clarity of discussion, references to Phase 1 in this document include development activity subject to the topic of Development Permit DP 3639-F, excluding an outdoor center for cross country skiing, skating and snowshoeing; park areas; and marina, all of which were eliminated from this Permit Application.
8. Section B (1) of the Applicant’s Pre-filed Testimony dated July 25, 2022 states: “The funding process requires discretionary permits to be issued prior to a final commitment and closing.”
  - a. Does the Applicant have any documentation to support this assertion, such as written communication from Barclays?
  - b. Will the Applicant request that Barclays issue a letter stating that it is committed to or guarantees lending money or providing funds contingent on approval by LUPC of the pending application for a development permit?

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<sup>9</sup> 01-672 C.M.R. ch. 5, §5.07 (A).

<sup>10</sup> Id.

<sup>11</sup> See Limited Intervenor’s Pre-filed Testimony, dated June 6, 2022, ¶ 10.

- c. If yes, will the Applicant place Barclays response into the public record for this permit application to support Exhibit 4, Financial Capacity?
9. The Developer's Application for establishing a TIF District in Big Moose Township, presented to the Piscataquis County Commissioners on April 20, 2021 (the TIF Application), states, in Section III (A), that the debt service on municipal bonds issued through the Finance Authority of Maine, (which is the method the Applicant has chosen to finance the ski resort portion of the entire project), will be paid for *in part* with TIF revenues (which is tax money collected by or for the County, then paid by the County to the TIF fund).
- a. What percentage of the debt service (principal and interest) on the municipal bonds (the sale of which is financing the ski resort redevelopment) is to be paid by the TIF revenues which the Applicant will realize from the County's property tax collections on the entire development (including ski resort, residential units, and marina)?
- b. Of the entire amount of TIF revenues which the Applicant expects to realize, what percentage is projected to be generated by the tax increments on the properties where the 457 residential units<sup>12</sup> will be located?
- c. In the TIF Application, the Developer states: "[d]evelopment of the resort project is estimated to cost roughly \$53,432, 314...."<sup>13</sup> In the original filing of the Application for a permit for building the resort portion of the project, done in March 2021, Exhibit 4 stated: "The entire village resort redevelopment project is expected to cost \$113.5 million". In the March 2022 updated Exhibit 4 filing, the Developer stated that the "village resort redevelopment project is expected to cost \$126.3 million". What will be the source of the funds to cover the difference between the current \$126.3 million cost, and the \$66.8 million that the Applicant expects to realize through the County's payment to the TIF fund (Exhibit D-1 of the TIF Application)?
- d. Have the tables presented in Exhibit D-1 of the TIF Application been updated since they were presented to the Piscataquis County Commissioners in April, 2021? If so, what is the combined amount of TIF revenues the Applicant expects to realize during the duration of the TIF District?
- e. What is the total amount of the debt service on the bonds to finance the construction of Phase I, which the Developer will be obligated to satisfy?

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<sup>12</sup> Number of residential units provided in Application Addendum 8, Wastewater Calculations, dated March 12, 2021. Filed March 16, 2022.

<sup>13</sup> TIF Application, §III (A).

f. According to the TIF Application, Section III (B), the agreement setting out the terms under which the County must pay into the TIF fund is set out in two **Credit Enhancement Agreements** between the County and the Developer. Will the Applicant submit those Credit Enhancement Agreements to the public record, so that the Commissioners (and Piscataquis County taxpayers) can see the actual terms under which the County is obligated to pay into the TIF fund?

10. Has a performance surety bond been purchased guaranteeing that PC Construction will complete construction of the project according to the terms of the contract under which it has been contracted to build this project? What document evidences this surety bond? Can it be made part of the record?
11. Has Provident Group–Moosehead Lake L3C ever received a Section 501(c)(3) letter from the Internal Revenue Service? If so, can that letter be placed in the record in this matter?
12. The following questions concern whether the operation of a ski resort on Big Moose Mountain by Provident Group – Moosehead Lake L3C is a tax-exempt charitable activity, under the Internal Revenue Code.
  - a. Has Provident Group–Moosehead Lake L3C, Provident Resources Group, or any other entity associated with this Application ever sought or received a ruling or a determination by the Internal Revenue Service that the acquisition of “1,700 acres in northern Maine, and then financing, re-developing, owning and operating the property as the new Moosehead Lake Mountain Resort”<sup>14</sup> is an exempt activity under 26 U.S.C. §145, and 26 U.S.C. §501, that constitutes a lessening of a burden of the Piscataquis County government, or constitutes any other charitable purpose?
  - b. If so, what was the result?
  - c. If so, will the Applicant place the written ruling or determination into the public record in support of this Application?
13. Is it the Applicant’s understanding that the Finance Authority of Maine (FAME) cannot be involved with the issuance of the bonds if the operation of the Phase I ski resort is determined by the I.R.S. in this instance not to be a charitable activity within the meaning of the Internal Revenue Code?

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<sup>14</sup> See Applicant’s Pre-filed Testimony, dated July 25, 2022, ¶ B(2).

14. If FAME cannot be involved in the issuance of bonds to finance Phase I, how will the withdrawal of FAME (or a subsequent I.R.S. determination that the bonds are not tax-exempt) effect the Applicant's capacity to meet the financial provisions requirements of 12 M.R.S. §685-B (4) and 01-672 C.M.R. ch. 10, § 10.25 (C)(2)?
15. What provision has the Applicant made for sewage disposal for the Phase I ski resort redevelopment phase?
16. Has the Applicant determined the cost of sewage disposal for the Phase I ski resort redevelopment phase?

## CONCLUSION

17. The record still lacks a statement from Barclays that it is committed to underwriting the bonds necessary to finance the ski resort redevelopment, or even that it is conditionally committed, pending this Commission's approval of the Application in this matter. While a "best efforts" requirement<sup>15</sup> may have some legal significance in the State of New York<sup>16</sup>, it does not rise to the level of an "offer", a "commitment" or a "guarantee", which Barclays, in this record, has consistently denied making.<sup>17</sup>
18. The record lacks documentary evidence, which the Applicant could easily produce, of the Applicant's claim<sup>18</sup> that Provident Group – Moosehead Lake L3C (identified by the Applicant as the "Owner/Borrower") "is a 501(c)(3) organization".
19. The record lacks documentary evidence that the activity for which FAME is expected to issue bonds is a tax-exempt activity in this instance, a finding necessary for allowing the bonds to be treated by the I.R.S. as tax-exempt bonds.
20. The record lacks evidence of the cost of constructing a sewer line to Greenville Junction to hook into the facilities of the Moosehead Sanitary District, or even any agreement by that District to accept the sewage. The record also lacks evidence of the cost of constructing an alternative means to adequately provide for sewage disposal.

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<sup>15</sup> Applicant's Pre-filed Testimony dated July 25, 2022, § C.

<sup>16</sup> The agreement between the Applicant and Barclays "shall be governed by and construed and enforced in accordance with the laws of the State of New York". Barclays Letter Agreement with Provident Resources Group and Big Lake Development Company, LLC, dated November 16, 2020, ¶18.

<sup>17</sup> See Moosehead Region Futures Committee's Pre-filed Testimony dated June 6, 2022, ¶7.

<sup>18</sup> Applicant's Pre-filed Testimony Pre-filed Testimony dated July 25, 2022, § B (2).

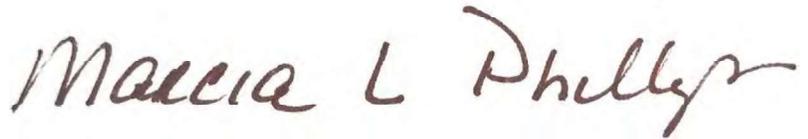
21. Because of the complexity and the novelty of the financial arrangement proposed by the Applicant to make “adequate financial provision”<sup>19</sup> and obtain “adequate financial resources”<sup>20</sup> to perform as its Application in this matter proposes, and because the Applicant continues to allow so many essential questions about the details of its financing plan to remain unanswered more than sixteen months from the date of the filing of the Application, LUPC should consider retaining a qualified independent financial analyst to evaluate the feasibility of the Applicant’s financing proposals.
22. Unless the Applicant can provide answers to the questions listed above (and probably others) in a manner that meets the **applicant’s burden** to demonstrate by **substantial evidence** that the criteria for approval of its application are satisfied, LUPC is prohibited by statute<sup>21</sup> from approving this Application.

Respectfully submitted by  
Moosehead Region Futures Committee



Marcia L. Phillips, Steering Committee Member

I, Marcia L. Phillips, do affirm under penalty of perjury, that the facts set forth in the above Pre-filed Testimony are true to the best of my knowledge, information, and belief.



Marcia L. Phillips

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<sup>19</sup> 12 M.R.S. § 685-B (4).

<sup>20</sup> 01-672 C.M.R. ch. 10, § 10.25 (C)(2) (2022).

<sup>21</sup> 12 M.R.S. §685-B (4).