

JULIET T. BROWNE
PARTNER
jbrowne@verrill-law.com
Direct 207-253-4608

Verrill Dana, LLP
One Portland Square
Portland, ME 04101-4054
Main 207-774-4000

January 19, 2024

Via E-Mail

Stacie R. Beyer, Executive Director
Land Use Planning Commission
22 State House Station
Augusta, Maine 04333-0022

Re: Wolfden Rezoning Petition, ZP 779A, Wolfden Mt. Chase LLC, Pickett Mountain
Metallic Mineral Mine, T6 R6 WELS

Dear Ms. Beyer:

On behalf of the Applicant, Wolfden Mt. Chase, please find our request to delay final deliberations and action on the rezoning petition (the “Petition”) until such time as the Franklin County nominee for the Land Use Planning Commission (the “Commission”) is confirmed and Commissioner Smith of Oxford County is either confirmed for a second term or her replacement is confirmed.¹ This action is required to maintain the independence and integrity of the Commission and allow all relevant Counties to participate in the deliberations and ultimate decision.

We are deeply troubled by the inappropriate Legislative Committee action to reject the Franklin County nominee because they did not want him to participate in this proceeding, and the role Intervenor 2 played in that outcome. To protect the integrity of the Commission process, we believe the Commission should hold an additional deliberative session and take final action on the Petition after the Franklin County and Oxford County nominees are confirmed. This would ensure that all Commissioners are able to participate in deliberations, including nominees from both Franklin and Oxford counties, as well as the Presiding Officer, who was not able to attend the first deliberative session. This application is the first mining project proposed under Maine’s new mining law, and the first application to be reviewed pursuant to the Commission’s Chapter 12 rules, which are inextricably connected to Maine Department of Environmental Protection’s Chapter 200 mining rules. The process Maine uses for evaluating this project will

¹ Prior to expiration of her term on November 4, 2023, Oxford County reappointed Commissioner Smith to serve a second term. Her confirmation hearing is scheduled for January 22, 2024. Intervenors objected to Mr. Dubois’ participation on the basis he was not present for the public hearing. It is not clear whether they will make the same argument in Ms. Smith’s confirmation hearing, as she was not able to be present for the hearing, or whether the Committee will reject her nomination because she was not present for the hearing.

set a precedent for any future mining proposal. It is critical that the process be beyond reproach, and that each of the counties in the Commission's jurisdiction be afforded a voice in the decision. Additionally, because no action (either for or against the proposal) can be taken except upon an affirmative vote of at least five Commissioners, it is important that all nine Commissioners be able to participate to ensure that requirement can be met. 12 M.R.S. § 684.

By way of background, Thomas Dubois was appointed by the Franklin County Commissioners in August, 2023 to serve as a Commissioner. The qualifications for county appointments include (i) expertise in commerce and industry, fisheries and wildlife, forestry or conservation issues as they relate to the Commission's jurisdiction, and (ii) residence or work in the Commission's jurisdiction. 12 M.R.S. § 683-A(2). There is no dispute that Mr. Dubois is qualified to serve. Moreover, he was ready to begin his service in early September last year, following expiration of Mr. Gilmore's term in August 2023.² He met with you at that time, was asked to begin to review the record, and since then has been reviewing the record in this proceeding.³ Although he could have been confirmed prior to the public hearing on the Wolfden petition, his confirmation hearing did not occur until January 8, 2024.⁴

Under applicable legislative rules, the Joint Committee on Agriculture, Forestry and Conservation (the "Committee") should have limited public testimony on Mr. Dubois's nomination to his qualifications. Joint Rules 131st Maine Legislature, Rule 504 ("At the hearing, the committee shall take written or oral testimony *limited* to relevant comments and questions regarding the *qualifications* of the nominee") (emphasis added). Instead, the Committee took testimony on and asked questions of the nominee about his views on the Petition and mining generally, going so far as to ask the nominee his view of the pros and cons of rezoning the Pickett Mountain Mine and requesting that he share his "personal feelings around mining, or mining in that location or mining on the national level."⁵ Intervenor 2 representatives each testified in opposition to his nomination. Their testimony focused on concerns with the Wolfden project and the belief that Mr. Dubois should be recused from participating in this proceeding. In its testimony before the Committee CLF argued that only Commissioners present for the hearing should be allowed to participate.⁶ In fact, there is no requirement that a Commissioner be present at a public hearing to participate in the decision as long as she or he reviews the record. CLF also suggested that all the remaining eight Commissioners were present for the public hearing.⁷ Indeed, Commissioner Ellsworth was present for only a portion of the hearing; Commissioner Smith was not present for any portion of the hearing; and Commissioner Billings was not present but reportedly watched the hearing live as it was broadcast. We appreciate that you corrected CLF's blatant misrepresentation.

Despite broad consensus by the public, the Committee, and even Intervenor 2 representatives that Mr. Dubois was qualified to serve, the Committee voted along party lines to

² See video recording of the Mr. Dubois' January 8, 2024 confirmation hearing ("Confirmation Hearing") at 9:41-9:43:50. The video recording is accessible here:

<https://legislature.maine.gov/Audio/#214?event=89956&startDate=2024-01-08T09:30:00-05:00>.

³ Confirmation Hearing at 9:50-9:52:54.

⁴ Confirmation Hearing at 9:57:29-9:58:30.

⁵ Confirmation Hearing at 9:56:00-9:57:00.

⁶ Confirmation Hearing at 10:44:00-10:47.

⁷ Confirmation Hearing at 10:47:00-10:48:00.

deny his appointment because they did not believe he should participate in this proceeding. The Committee's action is a violation of the separation of powers mandated by the Maine Constitution, which provides that the legislative, executive, and judicial powers are to be kept separate. Me. Cons., art. III, §§ 1, 2. As the Law Court has stated, "[t]he constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate ongoing executive function." *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A2d 74, 77 (Me. 1980) (concluding that a temporary restraining order issued to restrain a state agency from holding a hearing pursuant to a state statute violated separation of powers principles because such "interference with apparently legitimate executive department activity not only disrupts the administrative process but also encourages the circumvention of statutorily authorized [administrative activities]"). Administrative agencies of the executive branch are "accord[ed] . . . the deference to which a co-equal branch of our state government is entitled." *New England Outdoor Center v. Comm'r of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009 (quoting *Kuvaja v. Bethel Sav. Bank*, 495 A.2d 804, 806 (Me. 1985)). The Legislature has the right, within bounds, to determine the qualifications of persons appointed to hold administrative office, however, it cannot act arbitrarily. *In re Maine Clean Fuels, Inc.*, 310 A.2d 737, 750-51 (Me. 1973) (concluding that the composition of an administrative board was proper where commissioners were selected based on statutorily defined qualifications). The Committee's action here, which is the direct result of Intervenor 2's lobbying efforts, constitutes an inappropriate interference with a pending quasi-judicial proceeding in violation of the separation of powers.⁸

Finally, while there may be no legal prohibition on intervenors lobbying against the confirmation of a nominee, those efforts were intended to influence a specific project and, absent the relief requested here, will interfere with a pending quasi-judicial proceeding. We would expect an intervenor to raise a recusal argument in the context of the proceeding. Instead, it was used in the political arena to prevent a person qualified to serve on the Commission from doing so and from participating in this proceeding. Maintaining the integrity of the Commission process and ensuring that representatives from each of the relevant counties has a voice can only be achieved by scheduling a second deliberative session and taking final action on the Petition after the Franklin County and Oxford County nominees are confirmed.

Thank you for consideration of this request.

Sincerely,



Juliet T. Browne

⁸ This is not the first time Intervenor 2 resorted to legislative action to impact the course of this proceeding. When the Presiding Officer denied their request to hold a public comment session in Bangor, Second Procedural Order at 7, Intervenor 2 lobbied legislators to sign a petition requesting a public comment session in Bangor, which was then granted. Letter from Legislators to LUPC dated Sept. 14, 2023; Notice of Public Hearing dated Sept 22, 2023. Five of the seven Committee members who voted against Mr. Dubois' nomination also signed the petition requesting an additional public comment session in Bangor.

January 19, 2024
Page 4

cc: Service List (via email only)
Jeremy Ouellette (via email only)