

PHILIP M. COFFIN III
Partner
pcoffin@verrill-law.com
207-253-4630

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

December 1, 2023

Via Email frice@mpmlaw.com

Fulton S. Rice
Murray, Plumb & Murray
75 Pearl Street
PO Box 9785
Portland, ME 04104-5085

Re: Thomas Pond Improvement Association

Dear Fulton:

Thank you for your letter of November 6, 2023. This letter addresses the issues laid out in the letters of August 8, September 28, and November 6.

Membership Eligibility (November 6):

Mr. Murch and Mr. Watkins: The Officers and Directors are satisfied with the documentation presented for Mr. Murch and Mr. Watkins. You state in your letter that page 8 of 9 of the 2023 TPIA list of Eligible Property Owners reveals records of Mr. Watkins' eligibility, and the implication is that the Officers and Board of the TPIA should have noted this eligibility. Just to clarify, there is a listing for "Watkins, Grant Harrell, Deborah, ET AL" on page 8 of 9 for tax lot 2-36B; one would have had to be omniscient to conclude that C. Dana Watkins is part of the ET AL.

Mr. Hazen: In the reply letter, dated October 21, 2023, you were asked, but did not directly answer, by what authority Mr. Hazen had been making demands of the TPIA between August 21, 2022 and June 8, 2023. The Powers of Attorney granted to Mr. Hazen by Lloyd Locklear and Robert MacDonald to act on their behalf during the August 20, 2022 annual TPIA meeting state that those powers were limited to that meeting only. The June 9, 2023 Power of Attorney granted to Mr. Hazen from Mr. MacDonald contains a "Ratification of Prior Acts" that retroactively grants Mr. Hazen the right to act on Mr. MacDonald's behalf in relation to matters of the TPIA during the time period August 21, 2022 through June 8, 2023. Therefore, one can reasonably conclude that, from August 21, 2022 through June 8, 2023, before he received the Power of Attorney dated June 9, 2023, Mr. Hazen represented himself as exercising membership rights in the TPIA knowing that he did not have a current Power of

Attorney to do so (letters dated 12 Apr 2023 to Laura Paye, Hydropower Specialist, DEP and letter dated 1 June 2023 to “All Members, Thomas Pond Improvement Association”). He appears to have rectified this lack of authority with the “Ratification of Prior Acts” statement.

Reply to letter of August 8:

The reply to this letter was sent to you via email on October 21, 2023. You indicate in your letter of November 6 that responses to this letter have not yet been provided. We believe that each of your clients’ demands (“a - e”) were answered. As regards Item “e”, equal treatment of members, there is the implication that members are not being treated equally. Your clients were asked to provide specific instances when members received unequal treatment and, to this date, no such information has been received. In the August 8 reply, the issue concerning Mr. Brooke Hidell was addressed and answered. Since that date, Brooke Hidell has resigned his position as a TPIA Director.

Reply to letter of September 28:

Request for up-to-date lists of members, officers, and directors of TPIA:

a. In compliance with their request, in the spring of 2023, your clients were sent the mailing list that TPIA maintains of those property owners who are eligible for membership in the TPIA. There is no other list. The list is developed from property tax records from both the Casco and Raymond town offices. As you may know, Real Estate transactions and/or transfers of property updates may take time, so the list was updated in good faith based upon the most current information available in March 2023.

Your letter states, “The mailing list has so many errors on it as to be unreliable as an accurate list of members”. Yet, not only do your clients not provide any specifics as to what those errors are, they apparently found the list sufficiently accurate to use in the June 1 letter previously mentioned. We are interested in ensuring that the list of eligible properties is as accurate as practical. Since you have apparently identified “so many errors on it as to be unreliable as an accurate list”, we demand that, no later than the middle of January 2024, for each and every record you deem inaccurate or missing, you identify with specificity the property tax lot and what the specific inaccuracy is with that individual record. Prior to our next annual meeting, we will investigate each record for which you provide specific details and update our list of eligible properties to address any actual errors that you properly identify.

b. The names of current officers and directors listed in your letter, minus Brooke Hidell, is correct. The website has been updated.

c. Votes taken at the 2023 annual meeting were by “show of hands” and were so overwhelming that no specific counts were made. Please refer to the minutes of this meeting for the results.

d. For copies of the proxy paperwork, and as mentioned in the October 21 reply, a Board representative(s) can meet with you or a representative from your firm so you can inspect the proxies.

Failures of the Board in governing the TPIA and managing the dam:

Dam Management: We recommend that you look at the website, thomaspond.org for factual and objective daily measurements of the Thomas Pond water flow and water level. You will see that, not including seepage through the dam, with the exception of four (4) readings, the flow of water over the dam has been at least 2.5cf/s (approximately 3”) and has been as much as 14”. And to clarify, as regards the 2023 meeting and the matter of water level, a motion was made to allow the Dam Keeper, Bob Chapin, to maintain the water level at 17- 20 inches. It was then that Mr. Wallace, then counsel for your clients, cautioned that disregarding the required 3” minimum flow could open TPIA to a legal challenge. President Bob Chapin said that any attempt to change the 2.4cf/s flow requirement would be done in the correct legal manner. The motion was withdrawn. Your statement, “that the maximum/minimum/ 17-20-inch standard repeatedly invoked by Mr. Chapin”, is a mischaracterization of what occurred at the meeting. So, as it relates to water flow, what specifically is the current “failure” in management that your clients are asserting?

You accuse the Officers and Directors of “reckless disregard and /or willful/wanton intent”. These are very serious accusations to make without providing any specific proof of such behavior.

Property Damage: Your clients assert that they have “identified significant damage to property owners on Thomas Pond resulting from the TPIA’s operation of the Dam.” You state, “This property damage is, in part, a result of the water of Thomas Pond being maintained above reasonable levels consistent with the DEP order.”

What specific properties have you identified as having significant damage, and where is the proof that these properties sustained damage due to the operation of the dam or water levels “maintained above reasonable levels”? The DEP Order does not establish pond levels. TPIA endeavors to maintain the pond within the levels mutually agreed upon in 1990 which is 17-20 inches below the top of the dam, in season. Our recent survey confirms that this level is still mutually agreeable. If your clients consider some number(s) different to be a “reasonable level”, tell us exactly what that level is, on what hydrologic and environmental science your clients’ “reasonable level” is based, and why that level should be adopted in light of the clear

consensus of property owners that the current lake levels are still mutually agreed upon. We will take failure to answer this as your acknowledgement that the mutually agreed upon levels are in fact reasonable.

Occasionally, since 2014, and more frequently, since August 2022, one property owner, Ms. Laurie Griffin Polland, has written the TPIA and DEP to assert there is damage to her shoreline property due to high water levels, a term she has declined to clarify. We have asked her to provide photographic documentation that shows progressive damage, since she alleges that said damage has occurred during the past 10 1/2 years. To date, she has provided no such documentation to the Board.

The proprietor of Alyssa's Motel in Casco, Mr. Aaskov, has also occasionally verbally requested adjustment of the water level during the winter months to alleviate stress on the sump pumps in some of his motel units. His requests were met several years ago by reducing the winter water level from 24 inches to 26-28 inches below the top of the dam. It was presumed that he was satisfied with this reduction as he did not request any further adjustments until the August 2022 annual meeting when he said he felt that the water level in the winter was too high. Subsequent discussion of this matter resulted in motions made, voted on, and approved requiring the Dam Keeper to remove the stop logs down to the last removable board beginning NLT October 1, 2022, and this was to be done for that year only. The result was a water level 42" below the top of the dam and the dewatering of some shoreline properties 10 feet or more out from the shore. At the 2023 annual meeting, property owners stated that this lowering of the water level made the normal fall tasks of removing docks, boats, and enjoying the recreational opportunities of Thomas Pond very difficult.

During this meeting, Mr. Aaskov stated that the Dam Keepers preceding Bob Chapin "removed all the boards every Fall and the water level rebounded every Spring". In talking with Jack Quirk, whom Bob succeeded as Dam Keeper, Mr. Quirk said that he never lowered the water level down to the last removable board during any time that he managed the dam. Written records from another former Dam Keeper, Franklin Hazen, indicate the same.

No other written complaints concerning property damage or high water level due to management of the dam have been received in the past ten (10) years.

In your letter, you also state "that three quarters of the officers of the TPIA reside on parcels identified by my Clients as benefiting from artificially high water. At least one third, but up to a majority of Board members reside on parcels benefited by artificially high water." What do you mean by "artificially high water"? We insist that you provide an exact and unambiguous lake level and duration to define that term, as well as identify the specific Board members you claim to reside on "parcels benefited by artificially high water" so that we may respond to this allegation.

You also assert, without evidence, that the Officers and Board are acting in their own self interests. This is only true insofar as **all** Thomas Pond property owners benefit from well-managed lake levels. Please access the website, thomaspond.org to see the results of the survey taken this fall to see that the property owners on Thomas Pond overwhelmingly support the way the dam and lake have been managed these past ten (10) years.

The Officers and Directors of TPIA volunteer their time and service. Members are asked at each annual meeting and via our written announcement of the annual meeting if they are interested in joining the Board. As you and your clients know, volunteerism is a choice and not a mandate. The only significance to the fact that a majority of Board members may live on a particular section(s) of Thomas Pond is that they are the folks who have volunteered their time and service to the TPIA.

Subsequent to the June 2023 meeting, Allison and Pamela Griffin expressed interest in serving on the Board of TPIA. Their property is located off Rte. 302, a section of the lake without current Board representation. Both individuals were elected at our next Board meeting. However, less than a month after being elected, Allison and Pamela requested, (without giving reason), removal from the Board. The point of sharing this is that volunteerism cannot be mandated, and at the risk of being redundant, the fact that there may be more individuals on the Board from some section(s) of the lake than others just illustrates that those individuals volunteered to give their time to the TPIA.

Dam Insurance: You are correct that TPIA does not currently have a personal injury liability insurance policy, an issue that has been discussed at prior annual TPIA meetings. When this topic was discussed at the 2022 annual meeting, President Bob Chapin openly acknowledged that was the case because it had become impossible or impractical to comply with this requirement. In June 2014, Hanover Insurance sent a non-renewal notice for the existing policy because it no longer met their underwriting guidelines. DEP was made aware of the situation. Since 2014, insurance brokers have been unable to find a personal injury liability policy for the dam that TPIA can afford.

Failure in Governance:

Membership and Articles of Incorporation: You assert that membership in the TPIA is automatic by right due to property ownership on or with a right of way to Thomas Pond. We believe there is ambiguity in the Articles of Incorporation and Bylaws regarding membership and voting. As with other issues, we have tasked the Bylaws working group to bring forward proposals to clarify membership and quorums for vote by the membership at the next annual meeting. In the absence of greater

clarity, we maintain a list of all properties whose owners we believe would be eligible for TPIA membership.

2023 Annual Report: Thank you, as we were unaware of the errors in the annual report. The Secretary of State website should have been checked to make sure the filing was accurate, but it was assumed our registered agent would have provided the correct information which was provided to him. He has been notified and has recently filed an amended report. An inquiry was made to the Secretary of State's Office as to when this amended filing would appear on the website. The answer is at least 25-30 days as there is a current backlog of filings.

Board of Directors: You imply that the Board is improperly constituted. Title 13-B: Maine Nonprofit Corporation Act, Chapter 4, Subsection 403-3, Controlling amendment to bylaws states: "Unless the articles of incorporation provide that a change in number of directors shall be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the bylaws shall be controlling."

The TPIA Articles of Incorporation, Article Fourth read: "The number of directors (not less than 3) constituting the initial board of directors of the corporation, if they have been designated or elected, is 9. The minimum number of directors (not less than 3) shall be 9 and the maximum number of directors shall be 9." The presumption is that the number nine coincides with the sections of the lake enumerated in the original bylaws.

The Articles of Incorporation, Article Fourth, does not provide that the number of directors can only be made by amendment to the articles. Therefore, one can reasonably conclude that the bylaws would be controlling in amending a change to the number of directors. In addition, the use of the word "initial" can reasonably lead one to infer that the number of directors, nine, was the right number at the time TPIA was incorporated but left open the possibility that the number of directors might be adjusted as time and experience warrants.

The 2018 TPIA Bylaws read, "The Board.....shall consist of the Officers **and** one (1) Member from each of the following sections of the Pond -". Nine sections of the pond are listed. Neither the original nor the 2018 revised Bylaws state that the Officers must be elected from the Directors.

We do not agree that the Board is improperly constituted.

In your letter you expressed several of your clients' concerns:

The **first concern** is "substantial damage to certain properties on Thomas Pond belonging to members of the TPIA as a result of its mismanagement of the Dam." To

reiterate, your clients have spoken in generalities and have provided no specifics regarding either properties, specific damages, or scientific evidence of the cause of damage to back up this claim, and we do not agree that we have been mismanaging the dam.

The **second concern** is “the corresponding impact on the ecological health of Thomas Pond (including security of the wildlife for which Thomas Pond serves as a habitat, such as loons and land-locked salmon).” Your clients make a vague statement implying negative impact without any specific proof that the management of the dam has caused any deleterious effects on the wildlife of Thomas Pond, or that unspecified changes to management of the dam would be more beneficial for the lake ecology. TPIA President Chapin contacted James Pellerin, Region A Senior Biologist of Maine Inland Fisheries & Wildlife to ask about this specific issue and was told that there have not been any reports of negative impacts on the wildlife on and in Thomas Pond or Dingley Brook. Judging by the highly satisfactory scores given to water quality in the survey, the health of the lake fishery and aquatic and wetlands plant life, the number of loons on the lake, and the eagles flying above the lake this past summer, one must conclude that there is no evidence that the ecological health of the lake is not sound.

In addition, you have not provided any documentation that shows that your undefined changes in pond management practices would in any way be more beneficial for the ecosystems than the current management practices which seek to maintain a stable pond level within the target range of 17-20 inches below the dam for as much of the season as possible while complying with the guidance from DEP, the requirements of the DEP Board Order, and the existing Management Plan. In regard to the Board Order itself, DEP has acknowledged that the determination of the Aquatic Base Flow (ABF) of 2.4cf/s requirement is based on outmoded techniques and that the current best science calculates the ABF approximately 1.2cf/s. In spite of your insistence that TPIA rigorously adhere to the erroneous flow rate in the Board Order, you have not provided any evidence that adherence to the mis-calculated ABF is in any way healthier for any part of the lake ecosystem. If you have any such evidence, we request that you timely provide it to us so that we may consider it in our deliberations as we determine our next steps.

The **third concern** expressed is the failure of the Board to govern the TPIA including, but not limited to, the TPIA’s management of the Dam. The dam is not being mismanaged; it is being managed according to the Dam Management Plan. As your clients are well aware, at the last annual meeting, TPIA established a working group to update the Dam Management Plan and develop a Water Level Management Plan for presentation and vote at the next annual meeting. This work is ongoing at this time. The Officers and Directors have worked and continue to work diligently on matters of governance that may need correction.

A number of our members have asked us about your clients' motives and tactics. Ever since their attendance at the August 2022 annual meeting and their subsequent letters of criticisms and demands to the TPIA Board & Officers and the DEP, Thomas Pond property owners have asked us this question, "Why Now?", and why spend so much money for lawyers' fees rather than first try to work with the organization? After all, in their letters, your clients frequently refer to their family histories associated with Thomas Pond; plus, two of your clients have owned property for much or all of the time that TPIA has existed and managed the dam (largely in the same manner as for the past 20-30 years). Until the annual August 2022 meeting, your clients have neither voiced complaints nor, to our knowledge, volunteered to serve as a Director or an Officer.

At the June 2023 annual meeting, Mr. Wallace, then attorney for Messrs. Hazen, Murch, and Watkins, was asked by a property owner if his clients had another motivation for their actions. One would logically think that answer to be binary, either YES or NO. Yet Mr. Wallace said that it, the question, was unanswerable. Although you list your clients' purported concerns in your letter of September 28, we will ask this question again so that we may answer those who ask us, Do your clients have another goal/motive for their actions as regards the TPIA since August 20, 2022 - a motive that would perhaps be more personally profitable to each of them? A truthful YES or NO answer to this question would be greatly appreciated.

In conclusion, in the past year, the TPIA Board has, in good faith, cooperated and complied with your clients' requests/demands/suggestions, has endured their criticisms, and has challenged a number of their accusations. It is disheartening that they continue to act in such a threatening and harassing manner.

Very truly yours,

/s/ Philip M. Coffin III

Philip M. Coffin III

PMC/rc