

Comments

dated and delivered on May 20, 2024 of and by

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provided by HAZEN on Proposed amendments to the Articles of Incorporation of the Thomas Pond Improvement Association as filed on May 6, 1985 (the “Articles”)

in his capacity as holder of a two separate Durable Powers of Attorney and Proxy:

one granted by **Robert E. MacDonald** of 20 Valley Drive, Casco, Maine

(dated June 9, 2023)

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and

one granted by **Loyd Locklear** of 1583 Roosevelt Trail, Raymond, Maine

(dated May 2, 2024)

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The TPIA website does not provide an electronic file for the Exposure Draft of potential amendments to the Articles that would allow for ready commentary on it. This document containing these Comments on the Exposure Draft is submitted as an attachment to an email message addressed as specified in the announcement set for on the TPIA website on May 10, 2024 when it was first seen by HAZEN.¹

HAZEN notes that the offer made on his behalf at the 2023 Annual meeting to serve on the subcommittee appointed to develop a draft amendment to the By-Laws (and then also developed the draft amendment to the Articles) was not accepted. As a result, he has had only about 1 week to review the draft compared to the roughly 1 year taken by the subcommittee in its preparation. HAZEN must therefore reserve the opportunity to raise other issues at the 2024 Annual Meeting with the proposed amendment to the Articles on behalf of the TPIA Members from whom he holds a durable power of attorney / proxy, as shown above.

In view of the fact that the draft documents for consideration and potential approval by the Members at the 2024 Annual Meeting of Members have been posted to the TPIA website, HAZEN hereby formally requests that the comments set forth in this document be posted

¹ The announcement did not appear on the TPIA website when HAZEN believes was the last time prior to that date could have been as early as May 3, 2024 but more likely to have been May 8 or 9, 2024. Metadata contained in the PDF file for the Exposure Draft indicate that it was last modified at 6:18:06 AM (presumably Eastern Time) on May 1, 2024 by a Quartz PDF printer using macOS Version 14.0 (Build 23A334), PDF Version 1.3 (Acrobat 4.x).

similarly to TPIA website so all Members have potential access to it prior to the 2024 Annual Meeting.

In that context, HAZEN submits the following Comments on the Exposure Draft:

1. The text that would be added to item 2 or Article First does not “clarify” the exiting text in the way claimed in the annotation of this change. Actually, that change would have the effect of fixing in concrete a “tyranny of the majority” approach to governance that has inherent risk of any entity being managed in an autocratic way. Indeed, that mentality has been the apparent source of conduct by management of the TPIA in ignoring concerns expressed by Members of the TPIA as to how the Dingley Brook Dam was being operated, even to the point of causing property damages recorded in evidence provided by such Members.
2. HAZEN proposes that such inserted text be replaced with the following: “in accordance with requirements set by the Maine Department of Environmental Protection.”
3. The annotation of the Exposure Draft for Article Fourth does not address whether the flexibility reference in that annotation and reflected in the proposed change is permitted under current Maine law and, if so, whether Maine law imposes any requirements of procedure or the like to protect members of a non-profit corporation organized under Maine law. If this proposal (or a similar one providing for a variable board) is actually submitted to the Members for potential approval at the 2024 Annual Meeting, the Board should indicate whether the proposal has been approved as to form and content by an attorney licensed to practice law in the State of Maine with recognized expertise in Maine laws applicable to corporate governance and, if so, the identity of such attorney. If such review and approval has been memorialized in written form, a copy of the document(s) doing so should be provided to Members in advance of taking a vote at the Annual Meeting. If such review and approval has not been so memorialized, the Board of Directors would appropriately arrange for such attorney to be present in person at the Annual Meeting and to present himself or herself to the Members in attendance there (or represented by a person in attendance holding a durable power of attorney/proxy for any Member) to respond to questions by (or in the name of) such Members.
4. HAZEN proposes that the text be revised to read as follows:

The minimum number of directors shall be a minimum of 5 and a maximum of 9 (including any elected officer or officers of the corporation who hold membership on the board of directors by virtue of election to such office), with the initial number fixed at 9 subject to change by amendment to the By-Laws of the corporation; provided, however, that any decrease in the fixed number of directors may not have the effect of shortening the term of any incumbent director.

Amendment of the Articles as thus proposed satisfies the requirements set forth in Maine Revised Statutes Title 13-C, §803 subsection 2.

5. HAZEN is licensed to practice law in the State of California and has been recognized by his peers as “AV preeminent” in his fields (Martindale-Hubbel since inception of that category and AV prior to that, commencing in 1985) and a particular expert in the area of corporate governance law (Best Lawyers in America ,Woodward/White, since 2004

through 2024; Southern California Lawyer of the Year in 2014). Under California law and the laws of many other states the number of directors of “variable boards” must have a maximum that is calculated as one fewer than twice the number set forth for the minimum.

HAZEN is not, however, licensed to practice law in Maine and is familiar with the laws of the State of Maine (particularly its laws regarding corporations) from availability of them on the website of the Maine legislature (<https://legislature.maine.gov/statutes/>). The Maine Revised Statutes do not appear to have a limit similar to that set forth in California and other states. HAZEN is aware, however, that the apparent uncertainty reflected in the Exposure Draft may be subject to interpretation by reference to case law, with which HAZEN is not familiar.

If Maine law does permit unlimited flexibility as shown in the Exposure Draft and the TPIA Board believes there is justification for the wide range set forth in it, HAZEN would then recommend that the Exposure Draft be revised to provide that any changes (reductions or increases) in the fixed number of directors by 2 or more in any one year (measured from one Annual Meeting to the next one) be subject to approval by the Members at the next Annual Meeting after the date on which the number has changed by that number. In any event, the text must be changed to specify whether the variable number includes elected officers. It should also include the text protecting incumbent members of the board.

6. The annotation in the Exposure Draft for Article Fifth does not “clarify” an ambiguity as there is none. Absent this proposal, the Articles do not make any distinction between eligibility to be a Member and the actual status as a Member, nor does it make any distinction as to voting rights as between Members who pay dues (if they are established by duly authorized corporate action) and those who do not. This change would mark a fundamental variance from the nature of the TPIA presented to the DEP prior to the entry of the 1990 Board Order upon which it concluded that the TPIA “is qualified to accept ownership of Thomas Pond under 38 M.R.S.A. Section 837(5)” as memorialized in Section D to it.

HAZEN has met with numerous Members of the TPIA and has reached the less-than-scientific conclusion that the vast majority of Members who do not pay the “voluntary” dues have elected to do so based on the knowledge that it truly is “voluntary” and there are no negative implications on their right to attend, participate in, and vote at an Annual Meeting for the simple reason that such members have relied on such dues actually being “voluntary.” Some noticeable portion of those Members exercising their rights of voluntary-ness simply decline to pay dues on the grounds that the TPIA has either never demonstrated that such dues are productively used by the TPIA or has not been doing so in recent years.

In that context, HAZEN recommends that no provision for dues be included in the Articles at this time and that such proposal be submitted to the Members no sooner than one year after the new “Water Level Management Plan” has been in effect and a history of following it and applying it with fairness to all Member has demonstrated,

7. HAZEN therefore recommends that any changes to Article Fifth be limited to those shown on the following markup of its existing text:

First Sentence

Membership in the association shall be limited to those persons owning property on the shoreline of Thomas Pond ~~or~~and to those persons with a right of way to Thomas Pond evidenced by a deed recorded in the Cumberland County Registry of Deeds.

Second Sentence

Thomas Pond shall consist of the main contiguous pond, the outlet from it past Hawthorne Rock to the bridge on US 302 (known there as "Roosevelt Trail"), and the portion of the river known as Dingley Brook running from such bridge to the dam, (specifically including property adjacent to the culvert leading downstream from the dam under the road referred to in Raymond Township as "Cape Road" and in Casco Township as "Raymond Cape Road), and the portion of the river known as Dingley Brook running from such road and emptying into Sebago Lake.

Third Sentence

All members have equal voting rights in the running of the association.

HAZEN offers the following explanations for the foregoing recommendations:

As to the First Sentence, these revisions conform to those set forth in proposed the proposed draft amendment to the Articles. They are expanded to clarify a direct proximity to the shoreline instead of a mere generic reference to the named body of water.

As to the Second Sentence, most of the revisions are intended merely as clarification by providing greater specificity. The additional reference to riparians below the dam arise (1) as a matter of clarity, (2) by virtue of the fact that the 1990 Order includes specific provisions designed to protect the portions of what is uniformly known as Dingley Brook downstream of the dam, and (3) following receipt of confirmation by a now-retired senior officer of the DEP that riparians to that extension are in any event entitle to bring a water flow petition in which a final order issued pursuant to it could impact on an even restrict the rights of the TPIA.

As to the Third Sentence, this text makes it clear that there never was any ambiguity upon which the TPIA could rely in mandating that Members have to pay dues in order to exercise voting rights. Proposed deletion of this sentence is itself what creates the asserted "ambiguity."

8. HAZEN further notes that the current inadequacy of TPIA records will make it impossible to enforce the proposed dues provision without creating noticeable risk of dispute. For one thing, the President of the TPIA has acknowledged that it does not have are reliable list of Members. Instead, it has a mailing list that it uses when sending out notice of an Annual Meeting / Request for payment of "voluntary" dues. Even a cursory review of that mailing list shows inaccuracies in it. So if the TPIA does not have a valid list of Members it cannot determine whether all of them did indeed have such notice mailed to them, much less determine that such Members have failed to make the "dues" payment.

9. HAZEN notes that the box in ARTICLE SIXTH is checked but that the box in ARTICLE SEVENTH was not. As a result, the fact that the current template formulations regarding IRS tax exemption is completely irrelevant. It appears (perhaps by mistake?) to be based on a decision by the Members that has not been submitted to them for review much less made by them: whether to go through the detailed procedures required to file for such tax exemption and to incur the noticeable legal fees (currently being quoted at or about \$10,000) required in connection with such filing and then in processing it, much less whether to incur the risk that all such efforts and expenses will be for naught and the IRS never issues a positive Determination Letter.
10. The annotation to this provision in the draft text appears to reflect that a decision has already been made to secure IRS tax exemption notwithstanding the record that the Members have previously never been asked to give approval to that decision. In that context, incurring such expenditures is unauthorized and thus could become a personal liability of all members of the Board who cause such expenditures and obligations to pay them to be incurred. The annotation further implies that at least one purpose (a major one, at that) of this proposal is to limit the ability of the DEP to award ownership of the dam to some other party if the DEP concludes that the TPIA has breached the 1990 Order or otherwise is not longer “qualified to [hold] ownership of” the Dingley Brook Dam. That also would call into question whether the Directors are appropriately discharging their fiduciary duties to the Members.