



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
18 ELKINS LANE, 22 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0022

AMANDA E. BEAL
COMMISSIONER

STACIE R. BEYER
EXECUTIVE DIRECTOR

Eighth Procedural Order

In the Matter of

Zoning Petition ZP 779A

Wolfden Mt. Chase, LLC.

Application for Zone Change, Picket Mountain Mine

T6 R6 WELS, Penobscot County, Maine

Commissioner Everett Worcester, Chair and Presiding Officer

This Eighth Procedural Order addresses an objection by Wolfden Mt. Chase, LLC (Wolfden or Applicant) to material that was included in the Tribes and Nonprofits Intervenor group's (Intervenor 2) post-hearing brief and a request by Wolfden to limit Intervenor 2's post-hearing brief to 30 pages.

I. BACKGROUND

- A.** On February 24, 2023, the Maine Land Use Planning Commission (Commission or LUPC) accepted as complete for processing Wolfden's application to rezone 374 acres in T6 R6 WELS from a General Management to a Planned Development (D-PD) subdistrict. The proposed D-PD subdistrict would allow for the development and operation of the Pickett Mountain metallic mineral mine.
- B.** The application is subject to and will be reviewed under the Commission's Chapter 12 rules (Mining and Level C Mineral Exploration Activities). 01-672 C.M.R. Chapter 12, effective May 27, 2013. Chapter 12 requires a public hearing to be held by the Commission prior to a final decision on the application. The public hearing was held on October 16, 17, and 18 in Millinocket and October 23 in Bangor.
- C. Post-Hearing Briefing and the Fourth and Seventh Procedural Orders.** In response to a request made by Intervenor 2 on September 15, 2023, post-hearing briefing was discussed among the parties at the Second Pre-Hearing Conference, held October 3,



2023. In the Fourth Procedural Order (October 10, 2023), the Presiding Officer concurred with the consensus of the parties that post-hearing briefs be provided in lieu of closing statements and that such briefs be due on November 21, 2023, and limited to 30 pages. The Seventh Procedural Order (November 20, 2023) reiterated that post-hearing briefs were intended to take the place of closing statements and must not introduce new evidence.

- D.** On November 21, 2023, the Applicant, H. C. Haynes, Inc. (Intervenor 1), and Intervenor 2 submitted post-hearing briefs. Intervenor 2's brief was 43 pages long in total and included in an appendix a May 27, 2020 letter from Stacie Beyer (then Planning Manager of the LUPC) to Jeremy Ouellette (Vice President of Project Development for Wolfden Mt. Chase, LLC) that was part of the LUPC's nonconfidential agency record for Wolfden's prior rezoning application (ZP779; Ex. 4.7 - 5/27/2020 LUPC letter to Wolfden Mt Chase LLC requesting additional information). This letter is not part of the hearing record for ZP779A, and Intervenor 2, in communications with LUPC staff, clarified that it is requesting that the LUPC take official notice of the letter pursuant to 5 M.R.S. § 9058(1).
- E.** On November 22, 2023, Wolfden submitted an objection to the inclusion of the May 27, 2020, letter in Intervenor 2's post-hearing brief on the basis that the letter is new evidence contravening the Seventh Procedural Order. Wolfden also requested that Intervenor 2's post-hearing brief be limited to 30 pages in accordance with the Fourth Procedural Order.

Intervenor 2 responded that the letter was provided to illustrate the LUPC's legal interpretation of the meaning of the Planned Development (D-PD) subdistrict standards rather than as evidence, and the LUPC may take notice of the letter pursuant to 5 M.R.S.A. § 9058(1). Intervenor 2 also argued that it is generally the rule that lengthy briefs contain cover pages, tables of contents, and other materials that are not counted toward page limits and took issue with Wolfden's use of footnotes to make substantive points.

In response, Wolfden maintained that notice is a "narrow concept that requires specific findings," and as such, only the material relevant to the LUPC's interpretation of the D-PD subdistrict standards should have been included in Intervenor 2's post-hearing brief, if at all.

- F. Criteria and Standards.** Chapter 5, § 5.02(D) of the Commission's rules gives the Presiding Officer the authority to regulate the course of the hearing, rule on procedural issues, and rule on the admissibility of evidence.

Chapter 5, § 5.03(A)(1) allows intervenors to offer testimony and evidence and participate in oral cross-examination.

Chapter 5, § 5.07(B) allows the Commission to take official notice of any facts of which judicial notice could be taken, including relevant statutes, regulations, transcripts of other hearings, non-confidential agency records, generally recognized facts of common knowledge to the general public, and physical, technical or scientific facts.

II. POST-HEARING BRIEFS

Having considered Wolfden's objection to Intervenor 2's inclusion of the May 27, 2020, letter in its post-hearing brief, the Presiding Officer has determined to grant Wolfden's request to strike the new material introduced in Intervenor 2's briefing. The Commission held technical public hearing sessions over three days, during which the parties had ample opportunity to submit evidence. The public hearing sessions gave the parties the opportunity to test the strength of evidence and argument produced by either side. The briefing was designed to allow the parties an opportunity to make final arguments based on the evidence produced during the hearing, not to produce new evidence. The letter Intervenor 2 seeks to introduce is from 2020 and not newly discovered. Accordingly, the letter (Appendix A) and the text based on the letter (page 3, first paragraph from "[a]s the LUPC has explained" through "large-scale development project") will be redacted from Intervenor 2's post-hearing brief.

Similarly, in its post-hearing brief, Wolfden cites a prior Commission decision on the Kibby Wind Project that is not part of the record for ZP779A. The reference to this decision and the text based on that reference (page 4, first paragraph from "[f]or example, during" through "is true here") will be redacted from Wolfden's post-hearing brief.

In the interest of full disclosure, the Presiding Officer notes that LUPC staff are in the process of preparing materials for a deliberative session before the Commission regarding the Application and plan to request that the Commission take official notice of a March 6, 2020 letter from Stacie Beyer to Jeremy Ouellette that was part of the non-confidential agency record for ZP779 (Exhibit 4.5 - 3/6/2020 LUPC letter to Wolfden Mt Chase LLC requesting additional information) and provides the basis for requesting information on technical feasibility and financial practicability in rezoning applications for the D-PD subdistrict. The letter contains language similar to the May 27, 2020, letter referred to in Intervenor 2's brief.

Regarding Wolfden's request to limit Intervenor 2's post-hearing brief to 30 pages, the Presiding Officer has determined that no further limits on Intervenor 2's post-hearing brief are warranted. Intervenor 2's brief includes a cover page, a table of contents, a glossary of references, a table of authority, a table of cited public comments, and a signature page, in addition to 30 pages of argument. The Procedural Orders did not provide direction regarding such materials and whether they would count toward the 30-page limit. While perhaps the most appropriate course of action may have been to request clarification on such matters rather than submitting a brief in excess of the 30-page limit, Intervenor 2's case in the brief does not exceed 30 pages, and the materials in excess of the page limit are ornamental and do not provide Intervenor 2 the opportunity to make additional substantive argument. Accordingly, the Presiding Officer finds that, with the exception of the Appendix and related argument, no further material will be struck from Intervenor 2's brief.

IV. AUTHORITY AND RESERVATIONS

This Procedural Order is issued by the Presiding Officer pursuant to the Commission's Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission according to the service list but are not to be further argued except by leave of the Presiding Officer. All rulings and

objections will be noted in the record. The Presiding Officer may amend this Order at any time.

DONE AND DATED AT AUGUSTA, MAINE THIS 1st DAY OF December 2023



Everett Worcester, Chair and Presiding Officer

Carr, Tim

From: Juliet Browne <jbrowne@verrill-law.com>
Sent: Wednesday, November 22, 2023 9:05 AM
To: Laura Berglan; LUPC, Wolfden Rezoning; Carr, Tim; dean; Elwell, Caleb
Cc: Aaron Bloom; Maye Emlein
Subject: RE: ZP779A, Zoning Petition Filed By Wolfden Mt. Chase, LLC - Intervenor 2's Post-Hearing Brief

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Tim,

The parties were told clearly and repeatedly that there was a 30-page limit on the post-hearing brief, yet Intervenor Two has filed 43 pages of material. We request that the Commission consider only the first 30 pages of Intervenor Two's submission. Alternatively, if Intervenor Two reasonably and in good-faith demonstrates that it was confused as to the meaning of the 30-page limit, it be allowed to choose 30 pages to submit. Those 30 pages should include the cover sheet with the caption and its signature page, which are basic requirements of any filing and have been included in all prior filings.

We also object to inclusion of the new material attached as Exhibit A to Intervenor Two's submission. The Seventh Procedural Order expressly stated that no new evidence was to be submitted with the post-hearing brief. Yet, Intervenor Two does exactly that. If it wanted to include information from the prior proceeding it had ample opportunity to do so (as it did with exhibits to the pre-filed testimony of witness Levit). Intervenor Two also includes a citation to new material on page 6 footnote 5. The Commission should not allow Intervenor Two to introduce new evidence with its post-hearing brief.

Thank you for consideration of these points.

Juliet

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Carr, Tim

From: Peter J. Brann <PBrann@brannlaw.com>
Sent: Wednesday, November 22, 2023 9:56 AM
To: Carr, Tim
Cc: jbrownne; dean; Elwell, Caleb; Aaron Bloom
Subject: Wolfden Objection Response

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I have been forwarded Wolfden's objection to the brief filed yesterday by Intervenor 2. Due to the Thanksgiving holiday, I'll respond briefly on behalf of Intervenor 2.

Irony is no stranger to the law. Wolfden not only filed a lengthy "rebuttal" in this matter in addition to its post-hearing brief, it was able to squeeze its brief filed yesterday into the 30-page limit only by including 163 footnotes in 10-point type, which often contained lengthy argument. It should be apparent that Intervenor 2's brief is substantially shorter than Wolfden's brief.

On the merits, it is actually the rule, not the exception, that lengthy briefs contain cover pages, tables of contents and authorities, and the like, and that none of those things are included in page limits or word count limits. For example, the rule in the Law Court states: "Page or Word Limit Calculations. The table of contents, the table of authorities, the certificate of service, and any appendix bound with the appellant's brief are not counted in calculating the page or word limits set in this Rule." M.R. App. P. 7A(f)(3).

Similarly, including a letter from the LUPC to Wolfden that is already part of the record is not "new evidence." This common practice, instead, is a courtesy or convenience to the court or factfinder.

If Wolfden would like to file a formal motion to be ruled on by the presiding officer, we reserve the right to respond. Have a good Thanksgiving.

Peter J. Brann | BRANN & ISAACSON
207.557.8881 | pbrann@brannlaw.com | [Download V-Card](#)

Carr, Tim

From: Aaron Bloom <abloom@earthjustice.org>
Sent: Wednesday, November 22, 2023 12:38 PM
To: Carr, Tim; PBrann
Cc: jbrown; dean; Elwell, Caleb
Subject: RE: Wolfden Objection Response

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Tim,
The May 27, 2020 letter to Wolfden is not in the ZP 779A record, but rather in the ZP 779 (initial application) record. Apologies for the confusion. As stated in footnote 3 of our brief, the LUPC may take official notice of its letter to Wolfden in ZP 779 providing its legal interpretation of the meaning of the D-PD subdistrict standards. The letter is not being cited as factual evidence, but to illustrate the LUPC's legal interpretation. According to 5 M.R.S.A. section 9058(1): "Agencies may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and nonconfidential agency records." The May 27, 2020 letter is a nonconfidential agency record of which the LUPC may take official notice, and it is also a matter within the LUPC's specialized knowledge.

Thanks,
-Aaron

Aaron Bloom (he/his)
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Carr, Tim

From: Juliet Browne <jbrowne@verrill-law.com>
Sent: Monday, November 27, 2023 12:48 PM
To: Carr, Tim; Aaron Bloom; PBrann
Cc: dean; Elwell, Caleb; Maye Emlein
Subject: RE: Wolfden Objection Response

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In response to the additional information submitted by Attorneys Bloom and Brann, the Applicant notes the following.

As the Law Court has stated, judicial notice is a “narrow concept that requires specific findings,” and a doctrine that “should not be referenced except in circumstances that truly constitute judicial notice.” *Cabral v. L’Heureaux*, 2017 ME 50 ¶ 11 n.4, 157 A.3d 795. Any judicial notice here should be limited to the specific proposition in the letter that is cited in Intervenor Two’s brief. *See, e.g., Adoption by Jessica M.*, 2020 ME 118, ¶16, 239 A.3d 633 (court could take judicial notice of a federal sentencing transcript, but the court could only notice portions of the transcript that constituted the court’s actual sentencing order. There is no need to include the letter as an attachment and, to the extent it is included, it should be redacted to include only paragraph 8 on page 3, and any attachment should count toward Intervenor Two’s 30-page limit.

Juliet

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