

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court

Docket No. WAL-10-561

WALDO COUNTY

RONALD HUBER
APPELLANT,

v.

MAINE DEPARTMENT OF TRANSPORTATION
APPELLEE.

APPEAL FROM A JUDGEMENT OF THE
WALDO SUPERIOR COURT.

BRIEF FOR THE APPELLANT.

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23 MRSA §4206 (1)(O) (referred to in original Petition as Public Law 277, An Act Regarding the Management and Use of Sears Island. 2005)

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Maine Rules of Appellate Procedure. Rule 8 Appendix to the Brief, Part (1) Supplement of Legal Authorities [Page 19]

Reference:

Citizens' Guide to Appeals (Filing and Maintaining an Appeal) August 2009 Published by the Maine Supreme Judicial Court

Nature of the Case

This is an appeal from the judgments and order of the Superior Court dismissing for lack of standing my Petition for Review of Agency Action. Dockets AP-09-001 and WAL-10-561

A. Procedural History

On September 17, 2005, Governor John Baldacci signed into law *L.D. 277, "An Act Regarding the Management and Use of Sears Island."* The bill became *Public Law 277 (2005)* and thereafter 23 MRSA §4206(1) (O).

On January 22, 2009 a conservation easement was executed between the state of Maine "by and through its Department of Transportation", and the Maine Coast Heritage Trust concerning Sears Island, Penobscot Bay, Waldo County, Maine. The easement conveyed 601 acres of Sears Island to the Maine Coast Heritage Trust, with the remaining to be set aside for marine transportation purposes.

The easement was signed following a January 22, 2009 vote pursuant to 23 MRSA §4206(1) (O) by the Maine Legislature's Joint

Committee on Transportation, approving the Governor's request for permission to sign the easement. The Committee had earlier (November 18, 2008) denied the Governor's request for permission to sign the easement, pursuant to 23 MRSA §4206(1) (O).

On February 19, 2009 Ronald Huber, a resident of Rockland, Maine, filed a *pro se 80C Petition to Review Agency Action asking the Knox Superior Court to vacate the Conservation easement* and to find 23 MRSA §4206(1) (O) *An Act Regarding the Management and Use of Sears Island* unconstitutional usurping by the Maine Legislature's Transportation Committee of the Baldacci Administration's authority to "review and approve" management decisions for Sears Island. Petitioner also held that 23 MRSA §4206(1) (O) violates the limitations of Legislative committee authority laid out in 3 MRSA §165 Joint Committees, Authority.

On February 20, 2009, Douglas Watts of Augusta Maine filed a *pro se 80C petition to review agency action asking the Kennebec Superior Court to vacate this conservation easement.*

On February 25, 2009, Harlan McLaughlin of Searsport, Maine filed a *pro se 80C petition petition to review agency action asking the Waldo Superior Court to vacate the conservation easement.*

In addition to Petition Huber's constitutional objections, all three petitioners asserted that signing the conservation

easement violated the *Sensible Transportation Policy Act 23 MRSA §73*.

On March 24, 2009 Maine Department of Transportation filed a motion to consolidate the three suits, a Motion to Dismiss and a Motion to Stay Production of Record.

On March 31, 2009. Ron Huber filed a Motion to Exclude Untimely Responses.

On April 13, 2010 Ron Huber filed a Motion in Response to MDOT's Motion to Dismiss.

On April 24, 2010, MDOT filed a reply to Huber's Reply to MDOT's Motion to Dismiss.

On May 15, 2010 Superior Court Judge Jeffrey Hjelm consolidated all three cases to Waldo County Court, noting that that "the cases otherwise shall remain separate actions."

On September 8, 2010, the Court dismissed all three cases individually, and declared the Motion to Stay Production of the record moot.

On September 29, 2010, Huber appealed the Waldo County Superior Court judgment to the Maine Supreme Judicial Court.

B. Factual Background

Appellant was awarded standing to protect Sears Island in 1995 by Maine Board of Environmental Protection as that agency opened up its review of governor Angus King's cargoport plan.

See: *Reply of Ronald Huber to Motion to Dismiss of Maine Department of Transportation Pages 9,10.*

On September 17, 2005, Governor John Baldacci signed into law *L.D. 277, "An Act Regarding the Management and Use of Sears Island."* The bill became *Public Law 277* and thereafter 23 MRSA §4206(1)(O). This amendment expanded the duties of the Commissioner of Transportation to include:

*"O. To bring before the joint standing committee of the Legislature having jurisdiction over transportation matters **for review and approval** any proposal that would alter the current land use, ownership or jurisdiction of lands owned by the State within the Port of Searsport presently under the jurisdiction of the department." (My emphasis)*

On November 18, 2008, Maine Legislature's Joint Committee on Transportation invoked 23 MRSA §4206(1)(O) when voting to bar Governor John Baldacci's Secretary of Transportation from executing a conservation easement with Maine Coast Heritage Trust.

On January 13, 2009, Maine Legislature's Joint Committee on Transportation again invoked 23 MRSA §4206(1)(O) when voting to reverse its November 18, 2008 decision and allow Governor John Baldacci through his Department of Transportation to execute a conservation easement with Maine Coast Heritage Trust.

On February 19, 2009, Petitioner challenged the awarding of the Conservation Easement, alleging the agency failed to meet the standards of the Sensible Transportation Policy Act and the Site Location of Development Act in arriving at its decision. The Petitioner also challenged the constitutionality of 23 MRSA §4206(1)(O) a statute that gives the Maine Legislature's Transportation Committee authority to "review and approve" all state management decisions relating to Sears Island, including that conservation easement.

In his Petition for Review of Agency Action, Petitioner wrote at [24] and [28]:

24. Mr. Huber seeks relief from the un-Constitutional exercise of PL 277 which gives the Joint Committee on Transportation executive powers to approve or disapprove Sears Island-related land use, ownership or jurisdiction decisions, in violation of the separation of powers outlined in Sections 1 and 2 of the Maine Constitution's Article III: Distribution of Powers. PL 277 is also inconsistent with statutory authority given legislative joint committees in MRSA 3 §165. Joint committees, authority. "

Petitioner also wrote:

28. Mr. Huber asks this Court to find Public Law 277 to be an unconstitutional delegation of Executive Branch land use

decisionmaking power to the Maine Legislature's Joint Committee on Transportation, in violation of Sections 1 and 2 of the Maine Constitution's Article III Distribution of Powers, and of MRSA 3 §165 Joint Committees, Authority, and declare all decisions made pursuant to its exercise by the Joint Committee on Transportation and Maine DOT invalid."

ISSUES PRESENTED FOR REVIEW

Whether the Superior Court erred in failing to find that the unconstitutional exercise of 23 MRSA §4206(1) (0) injured the Petitioner's constitutionally protected rights of due process and religious freedom.

Whether the Superior Court abused its discretion in declining to consider harm to Petitioner's constitutionally protected rights of due process and religious freedom when determining Petitioners standing.

SUMMARY OF ARGUMENT

I. Waldo County Superior Court abused its discretion when it granted a judgment of dismissal on September 8, 2010 to Maine Department of Transportation concerning Appellant's February 19, 2009 Rule 80C Petition for Review of Agency Action.

II. 23 MRSA §4206.(O) violates Article 1 Section 19 of the Maine Constitution: Right of Redress for injuries. The decision by the court below ignores appellant's standing as a "person" with a right for redress of injuries.

III. All persons have the Constitutional right of redress for injuries, **except in the case of those injured pursuant to 23 MRSA §4206.(O).** [My emphasis]

IV. Implementation of **23 MRSA §4206.(O) has left** Appellant no avenue to seek redress under Maine conservation, environmental and fishery laws and rules when faced with decisions made by the Joint Committee on Transportation or any other agency approving or denying activities affecting Appellants rights on Sears Island and in the nursery shoal marine waters surrounding it.

ARGUMENT

The Superior Court erred when it dismissed Petitioner's 80C petition for review of final agency action.

In its review of the Petition the Superior Court wrote:

*"In order to establish standing to pursue an appeal from governmental action, a party must demonstrate the infliction of a particularized injury. See Friends of Lincoln Lakes v. Town of Lincoln, 2010 ME 78, Paragraph 14, --- A.2d ---, - . Such an injury "occurs when a judgment or order adversely and directly affects a person's property, pecuniary, or personal **rights.**"*

Appellant is a party with adversely impacted personal rights and legal interests, with a well-documented history in

the record of more than ten years of protective actions concerning Sears Island, primarily in conflict with Maine Department of Transportation.

During this time Petitioner was granted legal standing by the state of Maine's Board of Environmental Protection to pursue action against MDOT's Sears Island plan in 1995, Petitioner also participated extensively in federal and state decisionmaking processes related to Maine Department of Transportation's various Sears Island port proposals of Governor Angus King and the present Governor John Baldacci. [Reply of Ronald Huber to Motion to Dismiss of Maine Department of Transportation]

Appellant has striven to carry out these stewardship efforts as part of his religious duty to protect Sears Island and the living marine resources that rely on its shoals, a charge laid upon him by Almighty God in 1992. [Petition at [2]]

Article I Section 3. "Religious freedom; sects equal; religious tests prohibited; religious teachers" lays out the protections given Petitioner's religious rights and authorities.

"All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that

person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship".

Article I Section 19 of the Maine Constitution grants Petitioner the right to seek remedy to attacks injuring his religious imperatives:

"Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

While the state of Maine does not have a cargoport plan presently under review, the Appellant is yet injured by the legislature's Joint Committee on Transportation's continuing actively use of 23 MRSA §4206(1) (O) to unconstitutionally and illegitimately maintain that committee's role as sole arbiter of decisionmaking on and around Sears Island, blocking and thwarting Petitioner's ability to lawfully use statutory authorities to petition the state's conservation agencies to enforce specific laws and rules protective of and consonant with Petitioner's right to carry out his religious stewardship and its attendant environmental advocacy.

By blocking final actions of the Maine Department of transportation and the Governor, 23 MRSA §4206(O) violates *Article 1 Section 19 of the Maine Constitution: Right of Redress for Injuries*. The decision by the court below ignores appellant's standing as a "person" with a right for redress of injuries.

. See ***In Re: Honorable James P. Dunleavy, Me Supreme Judicial Court: Docket No. Jud-03-1. 2003 ME 124.*** "The limitation in *Article III* that no person belonging to any one branch of government shall exercise the powers of any other branch of government necessarily requires that a constitutional grant of power to one branch of government effectively forbids the exercise of that power by any other of the three branches of government."

Article I Section 19 of the Maine Constitution grants Petitioner the right to seek remedy to attacks injuring his religious imperatives:

"Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

The Superior Court abused its discretion when it ignored Petitioner's right to due process in pursuit of his constitutionally protected religious and stewardship objectives,

when ruling that Petitioner lacked standing to challenge the facially unconstitutional law 23 MRSA §4206(1) (O).

If 23 MRSA §4206(1) (O) is not found unconstitutional, then the Appellant's right and ability to defend the island from development is necessarily yet unconstitutionally weakened and even blocked, as decisions by the executive branch of Maine government relating to Sears Island will continue to be subject to being countermanded at any time by whim of the chair of a single legislative committee that was inappropriately granted executive authority over Sears Island.

As is shown in the Appendix, five years of implementation of 23 MRSA §4206.(O) have stripped Appellant of his Right of Redress for Injuries, under Article I Section 19 of the Maine Constitution, which states:

"Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

Inadequate Scope of Review. While Superior Courts have considerable leeway in deciding that some claims or issues raised in an 80C petition will be tried while others will not be, the Law Court may, in certain limited circumstances choose to determine whether the exclusion by the court below of certain

claims or issues arising in an 80C petition from review was reasonable. Maine Rules of Appellate Procedure state at 2(b)(4) *"Subject to limited exceptions, there is no immediate right of appeal from rulings that, for example, (i) admit or exclude evidence; (ii) decide that some claims or issues will be tried while others will not be tried; (iii) resolve a pretrial dispute about discovery, disclosure of information, or evidence; or (iv) are characterized as "preliminary," "interim," "temporary," or are otherwise issued during the course of the proceeding but before a final decision."*

Determining the constitutionality of 23 MRSA §4206.(O) is very much one of those "limited exceptions" that should compel the Law Court to act. As shown in the Supplement of Legal Authorities in the Appendix, 23 MRSA §4206(O) created friction between the Maine Legislature's Transportation Committee, the Governor of Maine and his Commissioners, and the Appellant, a citizen of Maine; a condition that would fit the definition of a Solemn Occasion if such were declared by Governor or Legislator.

While neither Legislature nor Governor has petitioned the Justices of the Supreme Judicial Court to give their opinion upon the important questions of law bound up in 23 MRSA §4206(O), nor declared the discord and controversy between the

branches of government engendered by in 23 MRSA §4206(0) to be a Solemn Occasion , citizens may in specific circumstances take up legislative functions identical to those of state legislators, pursuant to Article IV Part Third (1) Legislative Power. Direct Initiative of Legislation which states:

*" The electors may propose to the Legislature for its consideration **any bill, resolve or resolution**, including bills to amend or repeal emergency legislation but not an amendment of the State Constitution, by written petition addressed to the Legislature ..."*

Appellant holds that, per Article IV Part 3, he and all electors possess an authority identical to the Legislature's to declare a solemn occasion and the existence of important questions of law, and request the Justices of the Supreme Judicial Court to give opinion "...upon important questions of law, and upon solemn occasions," identical to that authority when invoked by "the Governor, Senate or House of Representatives."

The reason for declaration of a solemn occasions is the existence of a law whose invocation January 13, 2009 allowed the signing by the Department of Transportation of the conservation easement to take place. It is an unconstitutional delegation of

Executive Branch land use and marine conservation decisionmaking power to the Maine Legislature's Joint Committee on Transportation, in violation of due process and in direct violation of Sections 1 and 2 of the Maine Constitution's Article III Distribution of Powers. **Petition at [24] and [28].**

The Superior Court abused its authority by opting not to examine the Petitioner's standing relative to his assertion of injury to his personal right to due process and equal protection under the law under **Article 1 Section 6-A. of the Maine Constitution.** *"No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."*

Maine case law holds that a challenge to the constitutionality of a statute is a question subject to de novo review. See *Town of Frye Island v. State*, 2008 ME 27, ¶ 13, 940 A.2d 1065, 1069, at [¶25] *"A facial challenge to the constitutionality of a statute is a question of law subject to de novo review..."*

The appellant has demonstrated the facial unconstitutionality of 23 MRSA §4206.(O). It violates his rights under Article 1 Section 19 of the Maine Constitution: Right of

redress for injuries, which states *"Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."*

23 MRSA §4206.(O)'s usurpation of executive branch rights is unconstitutional. See ***In Re: Honorable James P. Dunleavy, Me Supreme Judicial Court: Docket No. Jud-03-1. 2003 ME 124.*** *"The limitation in Article III that no person belonging to any one branch of government shall exercise the powers of any other branch of government necessarily requires that a constitutional grant of power to one branch of government effectively forbids the exercise of that power by any other of the three branches of government."*

See also ***State v. Hunter, 447 A.2d 797, 799 (Me.1982) at [9].*** *"Our law governing the separation of powers under the Maine Constitution is well developed. Article III, section 2 of our constitution provides that "[n]o person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art III, § 2 ...The separation of governmental powers mandated by the Maine Constitution is much*

more rigorous than the same principle as applied to the federal government."

See also: Kuvaja v. Bethel Savs. Bank, 495 A.2d 804, 806 (Me. 1985) *"Agencies of the executive branch are accord[ed]...the deference to which a co-equal branch of our state government is entitled."* Cited in ***New England Outdoor Center et al V. Commissioner of Inland fisheries and Wildlife April 2000 at ¶10.***

As a result of the Superior court decision, Appellant has no avenue to seek redress for decisions approving or denying activities on Sears Island made by the Joint Committee on Transportation, due to lacking any appeal process. With a legislative leader having having already announced that he will introduce a bill to create a cargoport on Sears Island in early 2011, there is a strong likelihood that the Joint Committee on Transportation will continue to exercise 23 MRSA §4206(O) in a way that will continue to injure the appellant.

Because Maine Constitution's Article 1 Right of Redress for Injuries is inalienable for "every person", the court below erred by failing to consider the appellant's right for redress from injury in this case as adequate grounds for standing.

The Law Court noted in *Dyer V Dyer* 2010 ME 210, that "when a statute is silent on this matter, we consider other indicia of legislative intent, such as the statutory statement of purpose

included in section 4001, to choose between two competing constructions".

The **Supplement of Legal Authorities** supplied in the Appendix to the Brief includes such indicia of legislative intent in the form of audio recordings and a transcripts of relevant portions and is supplied to the Law Court pursuant to **Rule 8 Appendix to the Brief, Part (1) Supplement of Legal Authorities**: "The parties may, at their discretion, provide the court with a brief supplement, separate from the appendix, containing important, relevant legal authorities such as decisions from other jurisdictions."

This supplement, separate from the appendix, consists of the transcripts and recordings of the Joint Committee on Transportation voting pursuant to 23 MRSA §4206(O) to restrict the actions of the Executive Branch on November 18, 2008, and then voting to reverse that decision on January 13, 2009 authorizing the Executive Branch to act. The supplement documents the strong degree of confusion and uncertainty and disagreement among the legislators regarding the constitutionality of 23 MRSA §4206.(O).

In *Commonwealth v Bolish* 381 Pa. 500 (1955) the Pennsylvania Supreme Court affirmed the utility and value of audio recordings in the legal process:

"In Commonwealth v. Clark, 123 Pa. Super. 277, 187 A. 237 President Judge KELLER wisely said, page 285: ". . . The phonograph, the dictaphone, the talking motion picture machine and similar recording devices, with reproducing apparatus, are now in such common use that the verity of their recording and reproducing sounds, including those made by the human voice in conversation, is well established; and as advances in such matters of scientific research and discovery are made and generally adopted, the courts will be permitted to make use of them by way of presenting evidentiary facts to the jury."

"We therefore hold that tape recordings are admissible in evidence when they are properly identified and are a true and correct reproduction of the statements made, and when the voices are properly identified."

For that reason the Appellant asks that his Supplement of Legal Authorities be accepted by the Court and reviewed.

CONCLUSIONS

Appellant has demonstrated that he is a viable plaintiff, that there is a real controversy and that he does have standing.

For the reasons stated above this Court should return this matter to the court below with appropriate instructions to hear

the constitutional issues raised in his Petition for review
of Agency.

Signed

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Certificate of Service

On this date, I served two copies of the Appellant's brief to
attorney Jason Donovan, representing Appellee Maine Department
of Transportation.

Dated

Ronald Huber, pro se