

STATE OF MAINE
Kennebec, ss.
Docket No.

SUPERIOR COURT
Civil Action

DOUGLAS H. WATTS)
)
Petitioner,)
)
v.)
)
MAINE DEPARTMENT OF)
TRANSPORTATION,)
)
Respondent,)

**PETITION FOR REVIEW OF FINAL AGENCY ACTION
BY THE MAINE DEPARTMENT OF TRANSPORTATION**

For his Petition for review of final agency action by the Maine Department of Transportation,
Petitioner states:

Persons seeking Review

1. Plaintiff Douglas H. Watts lives at 131 Cony Street, Augusta, Maine 04330.

Manner in which Plaintiff is Aggrieved

2. Mr. Watts has been an avid user of the Penobscot River and its tributaries near Sears Island since 1982. The final agency action he seeks to be reviewed will irrevocably harm his ability to continue using and enjoying the Penobscot River and these tributaries as he has done since 1982. To the extent Mr. Watts’ standing in this case is construed as being limited to any person who can demonstrate a particular interest is harmed, it is settled that harm to aesthetic, environmental or recreational interests confers standing. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (Me. 1978) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972) (plaintiffs who were users of State park and who intended to use it in the future had standing to enjoin Park Authority from clearing timber blowdowns).

Final Agency Action to be Reviewed

3. The final agency action Plaintiff wishes reviewed is the conservation easement executed Jan. 22, 2009 between the Maine Department of Transportation and the Maine Coast Heritage Trust on Sears Island, Penobscot River, Waldo County, Maine (attached).

Concise Statement of Facts

4. The State of Maine holds title to certain real property situated on Sears Island in Searsport, County of Waldo, State of Maine.

5. On Jan. 22, 2009, Maine Governor John E. Baldacci signed Executive Order 24 FY 08/09 directing the Commissioner of the Maine Department of Transportation ("MDOT") to execute a conservation easement ("Easement") between the State of Maine and the Maine Coast Heritage Trust ("MCHT") for 601 acres of Sears Island (the "Protected Property") while retaining 300 acres of Sears Island for development and construction of a cargo/container facility and port (the "Transportation Property").

6. On Jan. 22, 2009, in response to the Governor's Executive Order, the MDOT Commissioner signed and executed a conservation agreement with the Maine Coast Heritage Trust on 601 acres of Sears Island (the "Protected Property").

7. This easement states that the State of Maine desires the easement in order to "ensure the ability to pursue compensatory mitigation credits for transportation projects on the Protected Property, and has identified two degraded locations on the Protected Property depicted in Exhibit B as "Enhancement/Restoration Areas," as suitable for wetland and upland creation, enhancement and restoration compensatory mitigation (pursuant to 23 M.R.S.A. §153B(1)(G),) for the environmental effects of as-yet unidentified Maine DOT transportation projects (the "Transportation Projects")."

8. The Governor's Jan. 22, 2009 Executive Order states this conservation easement is integrally connected with, and a precondition for, the development and construction scheme of a port facility on Sears Island:

"WHEREAS, the Sears Island Planning Initiative Consensus Agreement established that the appropriate uses for Sears Island are compatibly managed marine transportation, recreation, education, and conservation, therefore, the joint use planning process defined two significant land use parcels on the Island, a 601-acre conservation parcel known as the "Protected Property" and a 330-acre "Transportation Parcel", for the benefit of the Town of Searsport, County of Waldo and the State of Maine;

"WHEREAS, Sears Island Planning Initiative Consensus Agreement established that the Maine Department of Transportation (MaineDOT) will actively market, solicit proposals and create partnerships for a cargo/container port on Mack Point and/or Sears Island on the Transportation Parcel;"

"WHEREAS, Sears Island Planning Initiative Consensus Agreement established that the MaineDOT, with the Town of Searsport and appropriate others will provide for light recreation, education and conservation facilities on the Protected Property by conveyance of an easement covering that area;"

"Maine DOT, upon execution of the Conservation Easement, will actively and aggressively work with the Maine Port Authority and other interested parties to initiate the process of marketing and development of a cargo/container port on Mack Point and Sears Island in accordance with the Agreement including initiating a request for proposals for a cargo/container port facility which will utilize environmentally-responsible technologies to minimize impact to natural resources, cultural

values and existing marine activities while creating significant economic opportunity for the citizens of the State of Maine."

9. The State of Maine Sensible Transportation Planning Act ("STPA") states at Section 5:

"Applicability to Department of Transportation. Transportation planning decisions, capital investment decisions and project decisions of the Department of Transportation are governed by and must comply with the transportation policy set forth in this section and rules implementing that policy."

10. The cargo/container port development scheme described in the conservation easement and the Governor's executive order and preconditioned on the execution of the easement meets the definition of a "significant transportation project" under Chapter One, Section 3 of the rules promulgated by Maine DOT pursuant to the Sensible Transportation Policy Act ("Rules for the Sensible Transportation Policy Act").

11. Chapter One, Section 7 of the STPA rules states:

"Whether initiated by Maine DOT, MPOs, municipalities or others, all planning for significant transportation projects shall adhere to the requirements of the Sensible Transportation Policy Act (STPA). Before funding a significant transportation project, the STPA requires that the department evaluate the full range of reasonable transportation strategies to address the transportation need. Both STPA and the National Environmental Policy Act (NEPA) require that Maine DOT identify and develop strategies that are context sensitive and minimize adverse effects to environmental quality. In an effort to streamline and integrate the federal and state decision-making processes, MaineDOT will perform the STPA strategy evaluation process ... coincident with undertaking the NEPA planning and decision-making process."

12. The Jan. 22, 2009 execution of a conservation easement by the MDOT on 601 acres of land on Sears Island as mitigation for the construction of a cargo/container facility and port on 300 acres of land on Sears Island is a final agency action pursuant to 5 MRSA §8002 ¶4.

13. Maine's Site Location of Development Law states at 38 MRSA §483-A(1): "A person may not construct or cause to be constructed or operate or cause to be operated or, in the case of a subdivision, sell or lease, offer for sale or lease or cause to be sold or leased any development of state or regional significance that may substantially affect the environment without first having obtained approval for this construction, operation, lease or sale from the department."

14. Maine's Site Location of Development Law states at 38 MRSA §482(2)(A): "Development of state or regional significance that may substantially affect the environment," in this article also called "development," means any federal, state, municipal, quasi-municipal, educational, charitable, residential, commercial or industrial development that: A. Occupies a land or water area in excess of 20 acres;"

15. The Jan. 22, 2009 conservation easement names the Maine Department of Environmental Protection as the "third party enforcer" for the terms and conditions of the easement. This is an unlawful conflict of interest. The Maine DEP and the easement Grantor, the Maine DOT, are both executive branch agencies whose Commissioners serve at the pleasure of the Governor. If the Governor tells the Maine DOT to take actions which might violate the conditions of the conservation easement, the Commissioner of the Maine DEP cannot be reasonably expected to

actively defy and oppose the Governor's direct orders. The Third Party Enforcer, by definition, must be a party that is completely independent from the Executive Branch of the State of Maine -- not an integral part of it.

Grounds For Relief being Sought

16. Mr. Watts seeks relief for the failure of the Maine DOT to "evaluate the full range of reasonable transportation strategies to address the transportation need"; to "identify and develop strategies that are context sensitive and minimize adverse effects to environmental quality"; to conduct a "strategy evaluation process" and to fulfill other requirements of the Sensible Transportation Policy Act and its rules prior to executing the conservation easement on Jan. 22, 2009.

17. Mr. Watts seeks relief for the failure of MDOT to apply for a Maine Site Location of Development permit for its planned cargo/container port prior to executing the Jan. 22, 2009 conservation easement that is a necessary precondition for this port. Maine's site law clearly states that MDOT must have this permit prior to "causing to be constructed" or making an "offer for sale or lease or cause to be sold or leased any development of state or regional significance that may substantially affect the environment without first having obtained approval for this construction, operation, lease or sale from the department." Governor Baldacci's executive order of Jan. 22, 2009 states that upon execution of this conservation easement the MDOT is required to "actively and aggressively work with the Maine Port Authority and other interested parties to initiate the process of marketing and development of a cargo/container port on Mack Point and Sears Island in accordance with the Agreement including initiating a request for proposals for a cargo/container port facility." This Executive Order clearly shows that upon execution of the easement the MDOT is required to initiate efforts to offer for sale or lease or otherwise offer for development the 300 acre "transportation parcel" at Sears Island for a major cargo/container port and facility. This "aggressive" marketing activity by MDOT requires a permit under the Site Law, due to the size, scope and statewide and regional significance of the planned port facility.

18. Mr. Watts seeks relief for the failure of MDOT to appoint a Third Party Enforcer for the easement that is actually independent.

Demand for Relief

19. Mr. Watts asks this Court to rescind the Jan. 22, 2009 conservation easement until the MDOT has fully complied with the requirements of the Maine Sensible Transportation Policy Act and the Maine Site Location of Development Law.

Certificate of Service

I, Douglas H. Watts, have served this complaint upon Respondent Maine Department of Transportation by certified mail and upon the Maine Dept. of Attorney General.

Douglas H. Watts

Date