

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
DOCKET NO. AP-09-001

RONALD C. HUBER)
)
 Petitioner,)
)
 v.)
)
 MAINE DEPARTMENT OF)
 TRANSPORTATION)
)
 Respondent)

**MOTION TO DISMISS PETITIONER
HUBER’S PETITION FOR
REVIEW OF FINAL AGENCY
ACTION AND INCORPORATED
MEMORANDUM OF LAW**

NOW COMES, the Respondent, Maine Department of Transportation, by and through its attorneys, Thompson & Bowie, LLP, and submits this Motion to Dismiss Petitioner Ronald C. Huber’s Petition for Review of Final Agency Action by the Maine Department of Transportation, as follows:

FACTUAL BACKGROUND

The State of Maine, by and through the Department of Transportation, holds title to certain real property situated on Sears Island, in the Town of Searsport, County of Waldo, State of Maine. The Maine Department of Transportation (hereinafter “Maine DOT”) acquired title to the real property through several conveyances from June of 1985 through November of 2002.

On January 9, 2009, following guidance under a new federal rule entitled Compensatory Mitigation for Losses of Aquatic Resources, Final Rule (33 CFR Parts 325 and 332 and 40 CFR Part 230), Maine DOT proposed that approximately 600 acres of Sears Island become the foundation for a federal mitigation bank through execution of a

conservation easement. The bank provides a public benefit in that it will improve the quality and success of compensatory mitigation for transportation projects statewide. Accordingly, on January 22, 2009, the Maine DOT entered into the Buffer Conservation Easement on Sears Island (hereinafter the “Conservation Easement”). The Conservation Easement was conveyed to the Maine Coast Heritage Trust encumbering 601 acres of Sears Island (hereinafter the “Conservation Parcel”). The remaining 330 acres has been reserved by Maine DOT for future transportation use (hereinafter the “Transportation Parcel”).

The terms of the Conservation Easement include an acknowledgment that the “Protected Property includes a stretch of beach that is popular for swimming and walking by the general public and has been used for such for over decades.” As part of the terms of the Conservation Easement, Maine DOT expressly agrees to allow the continued use of the Protected Property by the public:

Grantor hereby permits, and will refrain from prohibiting or discouraging, use of the Protected Property by the general public for low-impact outdoor recreational uses, such as walking, hiking, nature observation, and for pedestrian access to the intertidal area of the shore, exercised in a manner that is consistent with the protection and preservation of the natural and ecological character of the Protected Property and terms hereof.

PROCEDURAL HISTORY

In February of 2009, Petitioner Ronald C. Huber filed a Petition for Review of Final Agency Action by the Maine Department of Transportation. Huber seeks review of Maine DOT’s actions concerning the use of Sears Island, including the Conservation Easement granted to the Maine Coast Heritage Trust on several grounds.

First, Huber contends that Maine DOT's actions fail to comply with the Maine Sensible Transportation Policy Act (hereinafter the "STPA"), 23 M.R.S.A. § 73. Second, Huber contends that the action of Maine DOT failed to comply with Maine's Site Location of Development Law, 38 M.R.S.A. §§ 481-490. Third, Huber contends that the selection of the Maine Department of Environmental Protection (hereinafter "Maine DEP") as the third-party enforcer of the Conservation Easement is an "unlawful conflict of interest" because both the Maine DOT and Maine DEP are executive branch agencies whose Commissioners serve at the pleasure of the Governor. Lastly, Huber contends that the Maine Legislature's Transportation Committee's review of the Final Report and Recommendations for Implementation of the Sears Island Planning Initiative Joint Use Planning Committee (the "Final Report") pursuant to 23 M.R.S.A. § 4206(O) is unconstitutional because it violates the principals of separation of powers outlined in Article III of the Maine Constitution.

Huber's Petition for Review of Maine DOT's conveyance of a Conservation Easement to the Maine Coast Heritage Trust must be denied on several grounds. First, Maine DOT's conveyance of a Conservation Easement to the Maine Cost Heritage Trust is not reviewable under Maine Rule of Civil Procedure 80C. Second, despite his protestations to the contrary, Huber currently lacks standing to challenge Maine DOT's actions. Third, contrary to Huber's claims, Maine DOT has developed the plan of use for Sears Island pursuant to its independent statutory authority. Lastly, Huber's claims of violations of the Maine Sensible Transportation Policy Act and Site Location of Development Law are inapplicable and are not ripe for consideration by this Court.

LEGAL STANDARD FOR A MOTION TO DISMISS

A motion to dismiss pursuant to Maine Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *Hamilton v. Greenleaf*, 677 A.2d 525, 527 (Me. 1996). Dismissal of a civil action or parts thereof is proper when the complaint fails to "state a claim upon which relief can be granted." M.R. Civ. P. 12(b)(6). The legal sufficiency of a claim is a question of law. *Hamilton*, 677 A.2d at 527.

On a motion to dismiss, the Court must examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. *In re Wage Payment Litig.*, 2000 ME 162, ¶ 3, 759 A.2d 217, 220. The Court, however, is not bound to accept the legal conclusions stated in the complaint. *Bowen v. Eastman*, 645 A.2d 5, 6 (Me. 1994) (citing *Robinson v. Washington County*, 529 A.2d 1352, 1359 (Me. 1987)). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Johanson v. Dunnington*, 2001 ME 169, ¶ 5, 785 A.2d 1244, 1246.

ARGUMENT OF LAW

I. Maine DOT's Actions Concerning Sears Island Are Not Reviewable Under the Maine Rule of Civil Procedure 80C

Maine Rule of Civil Procedure 80C provides a mechanism by which an aggrieved person may seek a review of a "final agency action or the failure or refusal of an agency to act" in the Superior Court pursuant to 5 M.R.S.A. § 11001 et seq., the Maine Administrative Procedure Act. *See* M.R. Civ. P. 80C(a). Section 11001 of the Maine APA provides:

1. Agency action. Except where a statute provides for direct review or review of a pro forma judicial decree by the Supreme Judicial Court or where

judicial review is specifically precluded or the issues therein limited by statute, any person who is aggrieved by *final agency action* shall be entitled to judicial review thereof in the Superior Court in the manner provided by this subchapter. Preliminary, procedural, intermediate or other nonfinal agency action shall be independently reviewable only if review of the final agency action would not provide an adequate remedy.

2. Failure or refusal of agency to act. Any person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court. The relief available in the Superior Court shall include an order requiring the agency to make a decision within a time certain.

5 M.R.S.A § 11001 (emphasis added). The Maine APA defines “final agency action” as “a decision by an agency which effects the legal rights, duties, or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.” 5 M.R.S.A. § 8002(4).

Maine DOT’s actions in this case are not reviewable under Rule 80C for two reasons. First, Maine DOT has sole authority under Maine law for managing property it has acquired for transportation purposes, such as Sears Island. Second, there was no “final agency action” because Huber’s legal rights, duties and privileges were not affected by Maine DOT’s actions regarding Sears Island.

A. Maine DOT Has Sole Authority Over the Proposed Use of Sears Island for Transportation Purposes

The actions of Maine DOT in acquiring, holding, conveying or developing property on Sears Island for transportation purposes are not reviewable by this Court under Maine Rule of Civil Procedure 80C. Maine DOT maintains the sole discretion to manage the Sears Island property under the authority granted it by the Legislature pursuant to 23 M.R.S.A. §§ 61(2-A) and 153-B(1)(G).

Pursuant to 23 M.R.S.A. § 153-B(1)(G), Maine DOT may take over and hold for the State such property as it determines necessary to construct, improve and maintain transportation projects as directed by law and provide mitigation for existing or potential environmental effects of transportation projects. In addition, 23 M.R.S.A. § 61(2-A) provides that Maine DOT may grant or otherwise transfer easements over property taken or acquired for transportation purposes when the department in its *sole discretion* determines that the conveyance of such easements is appropriate and necessary.

In *Northeast Occupational Exch., Inc.*, 473 A.2d at 408 n. 9 (Me. 1984), the Law Court summarized the limits of the Court's authority under Rule 80C:

In *Brown v. Dept. of Manpower Affairs*, 426 A.2d 880 (Me. 1981), we stated that despite the adjudicative flavor of the definition of final agency action, judicial review is not limited to strictly adjudicative agency decisions. *Id.* at 883; *see* L.D. 1768, commentary to § 8002(4) (108th Legis. 1977) (definition of final agency action includes all decisions affecting one's legal rights, duties or privileges, not just those made in adjudicatory proceedings). In *Brown*, we recognized all decisions of administrative agencies are not necessarily reviewable, and observed that pursuant to the constitutional doctrine of separation of powers, the Legislature may not "confer on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch." *Id.* at 884. Moreover, we will not undertake review of administrative decisions which are properly classified as ministerial, or which are not centrally related to the function for which the agency was created.

Similarly, in *Guinane v. Fin. Auth. of Me.*, 1985 Me.Super. LEXIS 199 (July 16, 1985), the Maine Superior Court (*Brody, J*, Kennebec County) declined to consider a Rule 80C petition by a disappointed bidder for the purchase of real property owned and made available for sale by the Finance Authority of Maine. The Superior Court concluded:

[A]lthough the agency's action in rejecting Guinane's offer was certainly "final" within the meaning of the Administrative Procedure Act, 5 M.R.S.A. 8002(4) that does not make it necessarily reviewable. *Cf. Brown v. Dept. of Manpower Affairs*, 426 A.2d 880 (Me. 1981) The Plaintiff has been able

to demonstrate no facts which would entitle him to a remedy at law or in equity and the Court declines to use its power to review agency action to delve further into the matter. *See Frye v. Inhabitants of Cumberland*, 464 A.2d 195 (Me. 1983). To do so without even a prima facie showing of misconduct on the administrative agencies part would open the door to the sort of "fishing expedition" frowned upon by the Law Court in *Cutler v. State Purchasing Agent*, 472 A.2d 913 (Me. 1984). The disposal of lands acquired by FAME is entrusted to their discretion. 10 M.R.S.A. § 969(8) (Supp. 1984-85). Where a statute is drawn so that a Court would have no meaningful standard against which to judge the agency's exercise of discretion the Court should decline to substitute its judgment for that of the agency. *See Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

Here, as in *Guinane*, the Court has no meaningful standard against which to judge the agency's exercise of discretion. Thus, the Court should decline to substitute its judgment for that of the agency. It is not the province of the Court to judge the wisdom or the efficacy of decisions or policies of Maine DOT on matters pertaining to the use of land owned by the Department under the authority granted it by the Legislature pursuant to Sections 61(2-A) and 153-B(1)(G). *See New England Outdoor Ctr. v. Comm'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 12, 748 A.2d 1009, 1014 (refusal of court to review discretionary decision of agency on how to conduct an investigation as "inconsistent with settled principles of the separations of powers"). Rather, Maine DOT retains the sole discretionary authority to make determinations regarding the development and transportation uses of the State's property on Sears Island. *See* 23 M.R.S.A. §§ 61(2-A) and 153-B(1)(G).

Furthermore, similar to the Court's observation in *Northeast Occupational Exchange* and *Guinane*, the Court's review of Maine DOT's actions regarding the development and use of the State's property on Sears Island would violate the doctrine of separation of powers

under Article III of the Maine Constitution.¹ The Legislature cannot and has not “confer[red] on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch.” *Brown*, 426 A.2d at 884. Because the decision to convey a Conservation Easement over State-owned land for mitigation purposes is not a reviewable “final agency action”, the Court must dismiss Huber’s petition for review under Rule 80C.

B. Huber’s Legal Rights, Duties and Privileges Have Not Been Affected by Maine DOT’s Actions Regarding Sears Island

Another requirement for judicial review of a final agency action under Rule 80C is that the petitioner must demonstrate that a decision by the agency affects his or her “*legal rights, duties, or privileges*” and that it is “dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.” 5 M.R.S.A. § 8002(4) (emphasis added).

Petitioner Huber has failed to identify or delineate what *legal rights, duties, or privileges* he has regarding Sears Island. Likewise, Huber has failed to establish how these unidentified legal rights, duties, or privileges have been affected by Maine DOT’s actions. Rather, Huber only alleges, in a rather conclusory manner, that Maine DOT’s actions threaten his “*ability to enjoy, use, steward and restore*” Sears Island. Simply put, Huber is unable to provide specifics because he has no cognizable rights, duties or privileges in connection with Sears Island. Despite his ecclesiastical calling, Huber has not been charged

¹ Article III of the Maine Constitution, Distribution of Powers, provides that there are to be three branches of government: legislative, executive and judicial. Me Const. art. III, § 1. Article III forbids any person or persons, belonging to one of these branches of government, from exercising “any of the powers belonging to either of the others, except in the cases herein expressly directed or permitted.” Me Const. art. III, § 2.

by any secular State authority with any duties with respect to Sears Island.² Nor has Huber been charged by any State authority with any duties with respect to Sears Island, the Penobscot River, or its tributaries. Maine DOT has conveyed a Conservation Easement over a portion of the island and is in the planning stages concerning potential transportation uses for the Transportation Parcel. Neither the conveyance nor the initial planning concerning transportation uses has affected Huber's rights.

C. Maine DOT's Actions Regarding Sears Island Were Not Adjudicatory in Nature and Not Dispositive of all Issues.

Maine DOT's actions regarding Sears Island were not adjudicatory in nature, as is usually the case with "final agency actions". See *Northeast Occupational Exch., Inc.*, 473 A.2d at 408 n. 9. In fact, they cannot be fairly described as having even an adjudicatory "flavor". To the contrary, Maine DOT's actions can be easily distinguished from final agency actions typically reviewed under Maine Rule of Civil Procedure 80C which include, for example, an arbitrator's apportionment among workers' compensation carriers, *Livingstone v. A-R Cable Servs. of Me.*, 2000 ME 18, 746 A.2d 901, the suspension of a lobstering license, *Post v. State Dept. of Marine Res.*, 605 A.2d 81(Me. 1992), and the petition of a disappointed bidder for a State contract, *Brown*, 426 A.2d 880. Huber has failed, therefore, to reasonably link Maine DOT's conveyance of an easement with a decision that limits the rights and duties of specific persons or that constitutes a failure or refusal to act as contemplated by Subsection 8002(4).

² In addition, Huber has failed to make even a prima facie case that this freedom of worship under Article I Section 3 of the Maine Constitution has been irrevocably harmed by Maine DOT's actions regarding Sears Island. Me. Const. art. I, § 3.

Additionally, Maine DOT's actions are not "dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency." 5 M.R.S.A. § 8002(4). Maine DOT has simply taken the preliminary step of conveying a Conservation Easement on 601 acres of Sears Island while reserving the remaining 330 acres for a possible future transportation use. Huber's petition cannot be read to object to the Conservation Easement. Rather, he appears to object to the allotment of 330 acres for future transportation use. However, this future transportation use is as yet uncertain, and its implementation is not imminent. As such, none of the factual and legal issues regarding the development and use of the 330 acres of Sears Island have been ascertained, raised or considered by Maine DOT. Accordingly, Rule 80C review is inappropriate.

II. Huber Lacks Standing to Challenge the Actions of Maine DOT Because He Has Suffered No "Particularized Injury"

"Standing" under Maine law is a prudential rather than constitutional question. *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966, 968. In *Roop*, the Court noted that "the basic premise underlying the doctrine of standing is to 'limit access to the courts to those best suited to assert a particular claim.'" *Id.* (citing *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1380 (Me. 1996)).

To acquire standing to obtain judicial review of an administrative action, the "aggrieved" person must demonstrate that the agency's action operates prejudicially and directly upon his or her property, pecuniary or personal rights. *Hammond Lumber v. Fin. Auth. of Me.*, 521 A.2d 283, 286 (Me. 1987); *Anderson v. Comm'r. Dept. of Human Servs.*, 489 A.2d 1094, 1097 (Me. 1985). This requirement under section 8002(4) is consistent with the requirements for standing in other types of lawsuits as well. Essentially, for any

plaintiff to have “standing,” that person must show that he or she suffered a “particularized injury.” *Tornesello v. Tisdale*, 2008 ME 84, ¶ 8, 948 A.2d 1244, 1248. Further, the particularized injury must be an actual or imminent injury, not a conjectural, hypothetical or theoretical one. *Id.* The threat of a possible injury is not enough to confer standing. *St. Hilaire v. City of Auburn*, 2003 WL 21911064 at * 4 (Me.Super. June 12, 2003). As the Law Court noted in *Lindemann v. Comm’n on Governmental Ethics & Election Practices*, “[b]eing affected by a governmental action is insufficient to confer standing in the absence of any showing that the effect is an injury.” 2008 ME 187, ¶ 15, 961 A.2d 538, 543 (quoting *Collins v. State*, 2000 ME 85, ¶ 7, 750 A.2d 1257, 1260).

In this case, Huber has failed to establish that he had any legal rights, duties, or privileges concerning Sears Island that could be affected by Maine DOT’s conveyance of the Conservation Easement. Huber only alleges, in a rather conclusory manner, that Maine DOT’s actions threaten his “*ability to enjoy, use, steward and restore*” Sears Island without articulating a factual basis for his claim. In fact, the execution of the Conservation Easement ensures the public’s ability to use the Conservation Parcel for low-impact recreational uses. Huber’s claims of potential interference with his recreational use of Sears Island may establish a frustration, but not a cognizable right. In the absence of any cognizable rights, duties or privileges in Sears Island, Huber has not suffered a “particularized injury” as a result of the actions of Maine DOT.

Further, any particularized injury that Huber may conceivably claim is hypothetical and theoretical, rather than actual or imminent. Currently, Maine DOT has only conveyed a Conservation Easement over 601 acres and retained 330 acres for the potential future

transportation use as a port facility. The planning, development and construction of such a facility is not currently underway, nor is it imminent. The only definitive action undertaken by Maine DOT to date has been to ensure its ability to pursue non-specific compensatory mitigation credits for transportation projects through the conveyance of the Conservation Easement that limits uses of the island to preserve its natural state. Huber does not have standing to request an 80C review of actions taken by Maine DOT pursuant to its statutory authority which in no way affect him directly.

In support of his claim of standing, Huber cites only *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 196-97 (Me. 1978), contending that *Fitzgerald* stands for the “settled” proposition that “harm to esthetic, environmental or recreational interests confers standing.” In *Fitzgerald*, citizens were given standing to enforce the conditions of a public trust, but the *Fitzgerald* decision did not eradicate the “particularized injury” requirement. To the contrary, as the Law Court in *Lindemann* noted:

In limited circumstances, we have allowed individual members of the public to vindicate public rights in a judicial forum. *See generally Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189 (Me. 1978). For example, we recognized standing for citizens asserting a political right shared by the public at large, when a “particularized interest” was demonstrated. *McCaffrey v. Gartley*, 377 A.2d 1367, 1370 (Me. 1977) (recognizing plaintiffs’ standing as voters, property taxpayers, and signers of an initiative). Even in these circumstances, we still require a “particularized injury” or “direct and person injury.” *Fitzgerald*, 385 A.2d at 197; *see also Heald v. Sch. Admin. Dist. No. 74*, 387 A.2d 1, 3 (Me. 1978) (finding no standing when plaintiffs did not demonstrate direct personal injury). 750 A.2d 1257, 1260.

In this dispute, Huber has failed to establish that he has sustained a “particularized injury” or “direct and person injury” as a result of Maine DOT’s actions, and *Fitzgerald* does not relieve him of this requirement.

III. Under Maine Law, Maine DOT Has Sole Discretionary Authority Over The Use And Potential Development Of Sears Island

In accordance with 23 M.R.S.A. § 4206(1)(O), Maine DOT presented its Final Report for the future use of Sears Island to the Maine Legislature's Transportation Committee for the Committee's review. Huber contends that the required review of this report by the Transportation Committee results in a violation of the separation of powers doctrine set forth in Article III of the Maine Constitution. Maine DOT argues that the Plaintiff lacks standing to raise this issue and also that, under the circumstances of this case, the Transportation Committee approved actions that Maine DOT already had authority to take under existing statutory law. In no way were Maine DOT's executive powers conferred by Title 23 improperly limited by 23 M.R.S.A. § 4206(1)(O).

Under Title 23 of the Maine Statutes, Maine DOT has responsibility for public transportation projects within the State including the transportation planning and use of the State's property on Sears Island. Maine law explicitly provides Maine DOT with the authority to obtain, hold and convey property as appropriate and necessary to achieve the Department's transportation goals. Maine DOT, on behalf of the State, "may take over and hold for the State such property as it determines necessary" to "[c]onstruct, improve and maintain transportation projects as directed by law and provide mitigation for existing or potential environmental effects of transportation projects." 23 M.R.S.A. § 153-B(1)(G). In addition, Maine DOT may sell, lease or otherwise vacate land acquired by it pursuant to 23 M.R.S.A. § 61. Under Section 61(2-A), Maine DOT "may grant or otherwise transfer easements over property taken or acquired for transportation purposes when the department

in its sole discretion determines that the conveyance of such easements is appropriate and necessary.” 23 M.R.S.A. § 61(2-A).

Maine DOT’s actions regarding the potential future use of Sears Island were carried out pursuant to the Department’s existing authority under Maine law. It was pursuant to its sole discretion and to the independent authority conferred upon it by statute that Maine DOT conveyed the Conservation Easement to the Maine Coast Heritage Trust on 601 acres on Sears Island to mitigate the existing or potential environmental effects not only of potential development of a transportation facility on the remainder of Sears Island but of state-wide transportation projects as well. Maine DOT also acts under its existing statutory authority in pursuing the possible future development and construction of a cargo/container facility on the Transportation Parcel. Should development of the Transportation Parcel go forward, that development would be subject to all regulatory controls enacted by the Legislature, including the Maine Site Location of Development law. The Transportation Committee’s review of the planned use and Conservation Easement was reflective of the effort to coordinate projects and build a collaboration between the Legislature and a state agency.

IV. Huber’s Claims Under the Maine Sensible Transportation Policy Act and the Maine Site Location of Development Law Are Not Ripe For Review By This Court

As the Law Court noted in *Lewiston Daily Sun v. School Admin. Dist. No. 43*, 1999 ME 143, ¶ 12, 738 A.2d 1239, 1242, “Courts cannot issue opinions on questions of fact or law simply because the issues are disputed or interesting. Courts can only decide cases before them that involve justiciable controversies.” “Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character.” *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996)

(quoting *Hatfield v. Comm’r of Inland Fisheries*, 566 A.2d 737, 739-40 (Me. 1989) and *Connors v. Int’l Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1982)).

One of several prudential considerations of justiciability is ripeness. *Waterville Indus., Inc. v. Fin. Auth. of Me.*, 2000 ME 138, ¶ 22, 758 A.2d 986, 992. Generally speaking, a case is ripe “when there exists a genuine controversy between the parties that presents a concrete, certain, and immediate legal problem.” *Id.* Preventing judicial entanglement in abstract disputes, premature adjudication, and protecting agencies from judicial interference until a decision with concrete effects has been made are principles underlying the ripeness doctrine. *Me. AFL-CIO v. Superintendent of Ins.*, 1998 ME 257, ¶ 7, 721 A.2d 633, 635.

With regard to ripeness, Courts must focus both on the fitness of the issue for judicial review and any hardship caused to the parties from the withholding of adjudication. *Me. Pub. Serv. Co. v. Pub. Utils. Comm’n*, 490 A.2d 1218, 1221 (Me. 1985); *see also Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). The legal dispute between the parties must be concrete and specific with a “direct, immediate and continuing impact” on the affected party. *Me. AFL-CIO*, 1998 ME 257, ¶ 8, 721 A.2d at 636. Likewise, the hardship inquiry requires adverse effects on the plaintiff that are actual rather than speculative. *Johnson v. City of Augusta*, 2006 ME 92, ¶ 8, 902 A.2d 855, 858.

Huber’s claims of violations of the Maine Sensible Transportation Policy Act (STPA) and the Maine Site Location of Development law are not ripe for consideration by this Court. As a threshold matter, the Maine Sensible Transportation Policy Act, 23 M.R.S.A. § 73, is

inapplicable here as it applies only to the State’s highways, requiring the evaluation of the “full range of reasonable transportation alternatives . . . for *all significant highway construction or reconstruction projects*”. 23 M.R.S.A. § 73(3)(B) (emphasis added). The STPA requires that before making capital investment or project decisions, the Department must evaluate the full range of reasonable transportation strategies to address the transportation need. *Id.*

Similarly, the Maine Site Location of Development law provides that a “person may not construct or cause to be constructed . . . 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.” 38 M.R.S.A. §§ 483-A(1). The definition of a “development of state or regional significance” is based on the exact nature of the development and can include, for instance, developments that occupy a land or water area in excess of 20 acres or that involve metallic mineral mining or oil or gas exploration or production activity that includes drilling or excavation under water. 38 M.R.S.A. §§ 482 (2).

Maine DOT’s decision to set aside 330 acres of Sears Island for the potential future transportation uses reflects the uncertain status of the project. The key phrase here is “*potential future* development and construction.” Maine DOT’s development of such a facility is, at best, in its initial planning phase. The nature of any future transportation use, the date of its development, and the identification of the developer are unknown. There is no funding for any future transportation use, nor has any funding been requested. Under the STPA, it would be impossible and remarkably premature for Maine DOT to evaluate the full range of reasonable transportation strategies and alternatives to a transportation use even if

the STPA were applicable. Accordingly, Maine DOT contends that Huber's STPA claims are not applicable and are not ripe.

Likewise, the type and nature of the potential future facility on Sears Island is unknown. Without further concrete information regarding the development on Sears Island, there is no way to tell whether the Site Location law is applicable. As such, there is no genuine controversy between the parties, and no concrete, certain, and immediate legal problem. To consider Huber's STPA and Site Location claims now would entangle the Court in an abstract dispute and would constitute premature adjudication. Huber's Site Location law claims are not ripe.

CONCLUSION

For the reasons set forth above, Respondent Maine Department of Transportation asks this Honorable Court to Dismiss Petitioner Ronald C. Huber's Petition for Review of Final Agency Action by the Maine Department of Transportation.

Dated at Portland, Maine, this _____ day of March, 2009.

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NOTICE

ANY MATTERS TO BE SUBMITTED IN OPPOSITION TO THIS MOTION PURSUANT TO RULE 7(c) OF THE MAINE RULES OF CIVIL PROCEDURE MUST BE FILED NO LATER THAN TWENTY-ONE (21) DAYS AFTER THE FILING OF THIS MOTION UNLESS ANOTHER TIME IS PROVIDED BY SUCH RULES OR SET BY THE COURT. FAILURE TO FILE TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THIS MOTION, WHICH MAY BE GRANTED WITHOUT FURTHER NOTICE OR HEARING.