



LEXSEE 1991 ME.SUPER. LEXIS 228

**THE CAMPAIGN FOR SENSIBLE TRANSPORTATION, WILLIAM ALCORN,
RONALD NOWELL, JON A. LUND, DESMOND FITZGERALD, and WARREN
R. DWYER, Plaintiffs v. MAINE TURNPIKE AUTHORITY, et al., and THE
COALITION FOR RESPONSIBLE GOVERNMENT, a.k.a. THE VOTE NO ON #
1 COALITION, Defendants**

CIVIL ACTION DOCKET NO. CV-91-952

SUPERIOR COURT OF MAINE, CUMBERLAND COUNTY

1991 Me. Super. LEXIS 228

October 8, 1991, Decided

CORE TERMS: turnpike, election, expenditure, referendum, public funds, preliminary injunction, trustee process, influencing, luncheon, transportation, upcoming, toll, injunction, voter, undertaken, public agency, legislative authorization, fair comment, individually, presentation, planning, campaign, opposing, issuance, repair, action committee, cause of action, consultant, Enabling Act, inherent authority

JUDGES: [*1] DONALD G. ALEXANDER, JUSTICE, SUPERIOR COURT.

OPINION BY: ALEXANDER

OPINION

OPINION AND ORDER

This matter is before the court to address six pending motions in this action in which plaintiffs allege that the Maine Turnpike Authority has improperly used Turnpike revenues to oppose an upcoming referendum on Turnpike widening and transportation planning.

The six pending motions are:

1. The Campaign for Sensible Transportation's first Motion for Preliminary Injunction, filed August 21, 1991;

2. The Campaign for Sensible Transportation's second Motion for Preliminary Injunction or, in the alternative, for Attachment on Trustee Process as to The Coalition for Responsible Government, filed September 12, 1991;

3. The Coalition for Responsible Government's Motion to Dismiss and for Summary Judgment;

4. The Maine Turnpike Authority's Motion to Dismiss The Campaign for Sensible Transportation due to lack of standing;

5. The Maine Turnpike Authority's Motion to Dismiss the individual plaintiffs, again for lack of standing; and

6. The Maine Turnpike Authority's Motion to Dismiss the individually named defendants who are the members and executive director of the Maine Turnpike Authority.

The [*2] Maine Turnpike Authority is a public agency whose powers and duties are specified by law, 23 M.R.S.A. §§ 1961-1981. The Coalition for Responsible Government is a private organization created by individuals and organizations interested in opposing the upcoming turnpike and transportation planning referendum. While they are joined as defendants in this action, in reality, plaintiffs' claims against each present

very different legal issues. Accordingly, the court will address the pending motions separately for the Maine Turnpike Authority defendants and The Coalition for Responsible Government.

MAINE TURNPIKE AUTHORITY ISSUES

STANDING:

Two of the Maine Turnpike Authority's Motions to Dismiss question plaintiffs organizational and individual standing to bring this action. In challenging the alleged expenditure of Turnpike revenues to oppose the referendum, plaintiffs claim standing as referendum supporters, taxpayers, Turnpike toll payers and voters. Additionally, one plaintiff is a Turnpike bond holder. The Maine Turnpike Authority asserts that these plaintiffs lack standing because, except perhaps for the Turnpike bond holder, they [*3] can demonstrate no particularized injury different from the public at large as a result of the alleged improprieties. Therefore, the Maine Turnpike Authority argues, such an action can only be brought on the public's behalf by the Attorney General. ¹ *Buck v. Town of Yarmouth*, 402 A.2d 860 (Me. 1979); *Sanger v. County Commissioners of Kennebec*, 25 Me. 291, 296 (1845).

¹ In July, counsel for the plaintiffs sought to have the Attorney General bring this action or intervene in the matter on their behalf. To date, the Attorney General has not taken any action. An affidavit filed on behalf of the plaintiffs indicates that the Attorney General's Office has indicated, informally, that they will not involve themselves in this matter.

There are cases to support the Maine Turnpike Authority's position. However, cases in recent years suggest that the doctrine of particularized injury will allow standing based solely on voter or taxpayer status where improper action regarding election practices [*4] or expenditure of public funds is alleged, and the circumstances of the case make it obvious or unlikely that the Attorney General will appear in support of the plaintiffs' position. *Common Cause v. State*, 455 A.2d 1 (Me. 1983); *McCaffrey v. Gartley*, 377 A.2d 1367, 1370 (Me. 1977); *Jones v. Maine State Highway Commission*, 238 A.2d 226, 229 (Me. 1968); see also *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). The *Common Cause* case and *Matter of International Paper Company*, 363 A.2d 235, 238-239 (Me. 1976) also

indicate that organizations may take positions on behalf of members asserted injuries even without naming specific members claiming specific injuries. See also *NAACP v. Alabama*, 357 U.S. 449, 458, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958).

These precedents would appear to grant both the organizational and individual plaintiffs standing to bring this action in which they allege improper governmental action which assertedly affects both expenditure of public funds and election practices. Accordingly, the two motions by the Maine Turnpike Authority to dismiss the organizational and the individually named plaintiffs in [*5] this action will be denied.

PRELIMINARY INJUNCTION ISSUES:

Any party seeking a preliminary injunction bears the burden of persuasion on four criteria. Thus, plaintiff must demonstrate:

1. Irreparable injury to the plaintiff if the injunction is not granted;
2. A reasonable likelihood of success on the merits of plaintiffs' substantive claim;
3. Issuance of the injunction will not adversely affect the public interest; and
4. The injury sought to be enjoined outweighs any harm which granting injunctive relief would inflict on defendants. *Department of Environmental Protection v. Emerson* 563 A.2d 762, 768 (Me. 1990); *Ingraham v. University of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982).

If the Maine Turnpike Authority did make any improper expenditures designed to affect the result of the referendum election, such would not be cause for holding a new election. Thus, if any alleged impropriety does in fact turn the election against the result sought by the plaintiffs, the injury would be irreparable. However, this being said does not guarantee that issuance of a preliminary injunction will avoid the injury. To prevail, plaintiffs [*6] must demonstrate that enjoined actions are occurring or will occur that will cause or continue to cause injury to the plaintiffs. Even if past wrongs are proven, they would not justify an injunction unless they are continuing or will occur again prior to the election.

There is no case directly on point in Maine.

However, precedent in other states suggests that absent specific legislative authorization, public agencies may not spend public funds to take sides in elections and attempt to influence results.

The most thoughtful discussions of this issue, in other states, are provided in *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (Cal. 1976) and *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 13 N.J. 172, 98 A.2d 673 (N.J. 1953). The California case involved an instance of the director of the State Department of Parks and Recreation spending public funds to promote passage of a park bond issue. This action was challenged by certain citizens. At the trial level, a demurrer to the action was sustained -- the equivalent of granting a motion to dismiss. On appeal, the California Supreme Court reversed holding, in essence, that: (1) while the department [*7] could disseminate information to the public about the bond election and make a fair presentation of relevant facts, it could not expend public funds to promote a one-sided view of the bond issue, and (2) the park director could be held individually liable for improper expenditure of funds only if it was determined that he failed to exercise due care in authorizing the expenditures. These positions of law having been articulated, the matter was then remanded to the trial court for factfinding in accordance with the opinion. Thus, the opinion did not address the issue on a developed record, but only made general statements of law to serve as a guide to later factfinding.

In its opinion, the California Supreme Court noted that:

Past decisions in both California and our sister states establish that, at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign.

551 P.2d at 3.

An example of an explicit legislative authorization to spend public funds to influence elections which has been upheld on appellate review is provided in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). [*8] That opinion approved the present system of public fund assistance to major presidential candidates. See particularly the discussion at 96 S. Ct. at 668-673.

Both the California Supreme Court and the New Jersey Supreme Court, in their opinions, have recognized a "dissemination of information" and "fair comment" exception to their general prohibitions on expenditure of public funds to influence election results. Thus, the California Supreme Court noted that:

Although the department did possess statutory authority to disseminate 'information' to the public relating to the bond election, the department, in fulfilling this informational role, was obligated to provide a fair presentation of the relevant facts.

551 P.2d at 3.

The New Jersey case involved school district advocacy of approval of a school construction referendum, particularly focusing on a flyer which strongly advocated a "yes" vote.

Writing for the New Jersey Supreme Court, recently retired U.S. Supreme Court Justice William J. Brennan summed up the standards for separating appropriate and inappropriate public expenditures for issues discussion in connection with referendum elections. [*9]

We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters. Indeed, as in the instant case, when the program represents the body's judgment of what is required in the effective discharge of its responsibility, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto. The question we are considering is simply the extent to and manner in which the funds may with justice to the rights of dissenters be expended for espousal of the voters' approval of the body's judgment. Even this the body may do within fair limits. The reasonable expenses, for example, of the conduct of a public forum at which all may appear and freely express their views pro and con would not be improper. The same may be said of reasonable expenses incurred for radio or

television broadcasts taking the form of debates between proponents of the differing sides of the proposition. It is the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is outside the pale.

Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills, 13 N.J. 172, 98 A.2d 673, 677-678. [*10]

The California and New Jersey cases both involved use of public funds to support referenda which would benefit the spending agency. However, the reasoning of these opinions applies equally to either support or opposition to referenda. The doctrine has been applied to public expenditures to promote opposition to a referendum; *Campbell v. Arapahoe County School District No. 6*, 90 F.R.D. 189 (D.Colo. 1981); *affirmed Campbell v. Joint District 28-J*, 704 F.2d 501 (10th Cir. 1983).

When an agency expenditure or other action is challenged as lacking appropriate legislative authorization, agencies will frequently argue, and sometimes with success, that the expenditure is implicitly authorized because it is a necessary incident to carrying out the agency's statutorily authorized functions. *Cf. State v. Fin & Feather Club*, 316 A.2d 351 (Me. 1974). Thus in the mid-70's, the Maine Turnpike Authority argued to the Law Court that it had inherent authority to expand the Turnpike from two lanes to three or more lanes, an expansion proposal similar to that underlying the dispute herein. The original 1941 Turnpike Enabling Act, P. & S.L. 1941 [*11] ch. 69 § 11(c), -- since changed -- authorized original construction of the Turnpike through bonding and then expenditure of revenues to repay bonds and to maintain, repair and operate the Turnpike. *Maine Turnpike Authority v. Brennan*, 342 A.2d 719, 723-725 (Me. 1975).²

2 The controversy in the *Maine Turnpike Authority v. Brennan* matter developed as a result of issuance of an opinion by then Attorney General Jon Lund, and the litigation began during Mr. Lund's tenure. Coincidentally, Mr. Lund, as a private citizen, is one of the individual plaintiffs in this action.

In its opinion, the Law Court indicated that it would

narrowly construe the Turnpike Enabling Act. It rejected the inherent authority argument put forward by the Turnpike, and it held that the authorization to expend toll revenues for maintenance, repair, and operation of the Turnpike did not extend to expansion. The opinion stated:

We believe this section of the Enabling Act was intended by the Legislature to restrict [*12] the application of toll revenues to current expenses that are recurring and ordinary in nature. Thus construed, § 11 presents an assurance that toll revenues will be applied only to those necessary and incidental costs appropriate to sustain a safe, modern, and extant highway.

342 A.2d at 726.

The Turnpike Enabling legislation was completely rewritten in 1981 and now appears at 23 M.R.S.A. §§ 1961-1981. However, the initial legislative findings in § 1961(1) appear to indicate that the revised enabling law did not change the basic purposes for which Turnpike revenues could be used -- debt retirement, operations, maintenance, and repairs -- as interpreted in the earlier Law Court opinion. Thus, § 1961(1) provides in pertinent part:

Toll revenues should be utilized to pay for retirement of any outstanding debt, including interest thereon; to pay for operation and maintenance of the turnpike; to pay for reconstruction of the turnpike; and to repay the Federal Government for grants or loans, the proceeds of which were used for the construction or reconstruction of the turnpike or portions of the turnpike, interchanges and certain [*13] interconnecting access roads, but only to the extent that the repayment is required as a result of maintaining tolls on the turnpike.

The critical terms are defined in § 1964. The powers of the Authority are broadly stated in 23 M.R.S.A. § 1965(1). The purposes for which revenues may be expended are listed in 23 M.R.S.A. § 1974(1). The powers sections, 1965(1) includes, at subpart T, a.

prophylactic clause. The revenue purposes section 1974(1) does not have a similar broad statement. Neither section includes specific authority to lobby or influence elections. Thus, if expenditures to influence the election are in fact occurring, their justification must be found not in any explicit legislative authority but in the inherent authority argument.

In its opinion, the California Supreme Court had noted that legislative lobbying expenses might be more easily justified than election influencing expenses as a necessary incident of a modern government agency performing its statutory duties. *Stanson v. Mott*, 551 P.2d at 9-10. In Maine, in a different context, the Law Court approved Public Utilities Commission rejection [*14] of lobbying as an expense claimed to be a necessary incident to repairs, maintenance, and operations which could be charged to ratepayers in a telephone rate case. *New England Telephone and Telegraph Co. v. Public Utilities Commission*, 390 A.2d 8, 56-57 (Me. 1978).

Accordingly, if the Maine Turnpike Authority is making or has made expenses for the purpose of influencing the outcome of the upcoming referendum, and the uses of public funds extend beyond "fair comment", such expenses would not be authorized by statute either expressly or by necessary implication. Thus, the claims in plaintiffs' pleadings would be sufficient to defeat a motion to dismiss by the Maine Turnpike Authority.

The allegations are also sufficient to defeat the pending Motion to Dismiss on behalf of the individual members of the Turnpike Authority and the Executive Director. Under the Maine Tort Claims Act, the individual public officials would be immune from suit for explicit acts approving expenditures unless plaintiffs can prove that the officials' actions were taken "in bad faith". 14 M.R.S.A. § 8111(1)(E). See also *Stanson v. Mott*, 551 P.2d at 13-16, [*15] holding that individuals authorizing expenditures to influence elections may be individually liable for such expenditures if, and only if, the factfinder determines after taking of evidence that the officials failed to exercise "due care" in permitting the expenditures.

Thus, while the motion to dismiss the individual Turnpike officials must be denied, the plaintiffs bear a heavy burden before liability could be found for any individual Turnpike official.

The reader of this opinion must recognize that denial of a motion to dismiss does not mean that plaintiffs will be entitled to relief. All that a denial of a motion to dismiss states is that plaintiffs have stated a cause of action which may entitle them to relief if their claims can be proven.

Looking at past Turnpike expenditures, there are certainly some expenditures about which there are disputed fact issues to be determined prior to any final judgment. These include an October, 1990 meeting in Brunswick, Maine, which certain outside consultants were paid to attend, outside consulting work performed by a public relations firm, a separate economic analysis performed by an economic consultant, an apparent legal review of petitions [*16] for a possible challenge to validity of signatures, and some newsletters, legal research, and legal opinions which have been made public during the course of the debate on the referendum.

Plaintiffs assert that all of these expenditures are expenditures undertaken for the purpose of influencing defeat of the citizen initiative. Some of these items, such as the Turnpike newsletters published since the referendum vote was set, do not indicate the level of partisan advocacy found improper by the New Jersey Supreme Court. However, on the present limited record, without complete development of the facts, there appears to be support in the evidence for a view that some past expenditures may have been primarily directed at influencing the referendum debate or raising procedural issues relating to the citizen initiative process.

The Turnpike Authority notes that some of the expenditures were undertaken before it was certain that there even would be a Turnpike widening and transportation planning referendum on this November's ballot. Other expenditures, the Turnpike argues, were undertaken to fulfill their obligation to plan for and examine the possible consequences of the referendum should [*17] it be successful. The use of the results of such analyses, by others, if the analyses themselves were legitimately undertaken, would not be subject to complaint.

Separate from the analyses, studies, and legal work is the issue of certain luncheons which plaintiffs assert, and which the evidence appears to indicate, were convened and subsidized by the Turnpike Authority. If the primary purpose of these luncheons was to discuss the upcoming referendum and attempt to influence it, use of Turnpike

revenues to subsidize such luncheons would be prohibited unless the content of the Turnpike presentation at the luncheons met the fair comment exception to the bar on use of public funds for election influencing activities.

These subsidized luncheon programs and other disputed expenditures occurred in the past. The Turnpike states that the luncheons and publication of their newsletter have been suspended at least until after the election to avoid any suggestion of improper election influencing activities.

The purpose of the preliminary injunction sought by the plaintiffs is to be preserve the status quo pending the election and prevent any improper expenditure of public funds from influencing [*18] the election. To go beyond preservation of the status quo, and consider mandatory or remedial relief at the preliminary injunction stage is highly unusual relief to be considered with significant caution and granted only where plaintiff can show "a clear likelihood of success on the merits". *Department of Environmental Protection v. Emerson*, 563 A.2d 762, 770-771 (Me. 1989) (emphasis added). A draft injunction order, submitted by the plaintiffs after hearing, does not propose any such mandatory or remedial relief. Thus, the only injunctive issue before the court is prohibitory -- status quo preserving -- relief.

To gain a preliminary injunction, it is plaintiffs' burden to demonstrate that the Turnpike is now making or may make expenditures of public funds to influence the outcome of the election in a way which does not provide a fair presentation of the issues. There has been presented a considerable volume of evidence as to what has occurred in the past. As noted above, this activity is subject to varying interpretations offered by the plaintiffs and the Turnpike Authority. However, it appears undisputed that, at the present time, the principal public relations [*19] activities undertaken by the Turnpike Authority which relate to the upcoming referendum -- the luncheons -- have been terminated until after the election. The Turnpike has ongoing relationships with its attorneys and consultants, and receives advice from them. However, the court cannot find, by a preponderance of the evidence, that any of these contacts that are expected in the next month will involve prohibited electioneering activities rather than legitimate activities analyzing and planning for eventualities should the referendum be successful.

Prior restraint of speech by preliminary injunctive acts are strongly disfavored. Turnpike Authority board members and employees may speak out on the issues of the day. Even plaintiffs conceded at oral argument and by their draft injunction order that employees or board members may legitimately discuss the issue. They could also legitimately participate in debates where they are invited. All that could be prohibited are specific expenditures of turnpike funds whose sole purpose or primary purpose is to influence election results by going beyond fair comment.

Discussion at oral argument recognized the difficulty of identifying any ongoing [*20] action of the Turnpike Authority the sole or primary purpose of which is to influence the outcome of the election. After its review of the record, the court finds no specific ongoing acts, or future expected acts of the Turnpike Authority in violation of the principles stated in this opinion between now and election day. Therefore, plaintiffs' request for a preliminary injunction directed to the Maine Turnpike Authority must be denied.

COALITION FOR RESPONSIBLE GOVERNMENT ISSUES

Plaintiffs' Complaint against The Coalition for Responsible Government raises very different issues than the Complaint against the Maine Turnpike Authority. The Coalition for Responsible Government is an association of private individuals and organizations who have joined together to oppose the upcoming referendum. Plaintiffs assert that approximately \$ 200,000 in Turnpike funds have been improperly directed to the benefit of The Coalition for Responsible Government by the Maine Turnpike Authority. Plaintiffs ask that these funds be returned as "restitution" from The Coalition for Responsible Government to the Maine Turnpike Authority. The plaintiffs seek trustee process against the Coalition for [*21] Responsible Government to tie up and protect the funds which they allege to have been improperly diverted and to otherwise stop acts by The Coalition for Responsible Government which, plaintiffs claim, are based on the improper acts of the Maine Turnpike Authority.

The record in this case, at least to the extent the court has understood it, contains absolutely no indication of any direct transfer of funds from the Maine Turnpike Authority to The Coalition for Responsible Government. Instead, what is alleged is that because The Coalition for

Responsible Government has used some of the same legal counsel and consultants as the Maine Turnpike Authority, and papers prepared for the Turnpike Authority, the Maine Turnpike Authority's payments to these individuals and organizations, for services rendered to the Maine Turnpike Authority are in effect a diversion of resources to The Coalition for Responsible Government.

Plaintiffs' Motion for Trustee Process also raises grave free speech and right of participation in election process issues. It is in essence an effort by a political action committee supporting one side in an election against an opposing political action committee which, if [*22] successful, would tie up a substantial amount of the opposing committee's funds and directly affect the extent to which the Coalition could participate in the pre-election debate. The court would be entering largely untested waters if it approved a process where, as preliminary relief, one political action committee could by trustee process, tie up a substantial portion of an opposing political action committee's funds at a critical point the pre-election debate.

The court recognizes that Maine has something close to a hair trigger justification for issuance of attachment and trustee process. *Casco Northern Bank v. New England Sales*, 573 A.2d 795 (Me. 1990); *Terry v. T.J.C. Coin & Stamp Co.*, 447 A.2d 812 (Me. 1982); *Bowman v. Dussault*, 425 A.2d 1325, 1328-29 (Me. 1981). However, such a low "reasonable possibility" standard does not justify casual consideration of plaintiffs' request for trustee process, particularly in light of *Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991) and the new caution it brings to consideration of such matters.

In this case where the requested trustee process would inject the court into the [*23] pre-election debate and affect one side's ability to debate, trustee process could be approved only where the cause of action is particularly clear and the likelihood of success on the merits is particularly high. In the instant case, plaintiffs state no cause of action against The Coalition for Responsible Government on which they have a reasonable likelihood of success. In fact, based on the court's review of the materials submitted with the pending motions, it is established without dispute as to material fact that plaintiffs are not entitled to any relief against The Coalition for Responsible Government. Plaintiffs clearly disagree politically with the Coalition. Plaintiffs, as a matter of policy, may believe that the

Turnpike Authority should not have cooperated with the Coalition. However, the fact that a public agency cooperates with a private entity in connection with shared views on an election does not give rise to a cause of action against the cooperating private entity where, as here, there is absolutely no evidence of any direct transfer of funds from one to the other. Therefore, The Coalition for Responsible Government's Motion for Summary Judgment will be granted.

[*24] Based on the above discussion, the court orders and the entry shall be:

1. Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' separate Motion for Preliminary Injunction, or in the alternative, for Attachment on Trustee Process are **DENIED**.

2. The three separate Motions to Dismiss filed by the Maine Turnpike Authority are **DENIED**.

3. The Motion to Dismiss and for Summary Judgment filed by The Coalition for Responsible Government, and treated herein as a Motion for Summary Judgment, is **GRANTED**.

4. Judgment for The Coalition for Responsible Government that plaintiffs are not entitled to relief against them. The Coalition for Responsible Government is dismissed as a party to this action.

DATED: October 8, 1991

DONALD G. ALEXANDER

JUSTICE, SUPERIOR COURT

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