STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2017-14

WAWENOCK LLC, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION**
	)	
STATE OF MAINE DEPARTMENT OF TRANSPORTATION,	)	
	)	
Defendant.	)	
	)	
**********	)	
	)	
TOWN OF WISCASSET,	)	
	)	
Party-in-Interest	)	

Pursuant to M.R. Civ. P. 7(b)(5) and 59(e), Plaintiffs Wawenock, LLC; Bermuda Isles, LLC; 48 Federal Street, LLC; and 32 Middle Street, LLC (collectively, "Plaintiffs") have moved this Court to reconsider its order entered September 12, 2017, granting Defendant Maine Department of Transportation's ("MDOT") motion for judgment on the pleadings. Specifically, Plaintiffs ask the Court to reconsider its decision as to Count I[1] of Plaintiff's Complaint. Defendants timely opposed the motion, and Plaintiffs timely replied. Pursuant to the discretion granted it by M. R. Civ. P. 7(b)(5),(7), the Court chose to rule on the motion without hearing.

PROCEDURAL HISTORY

After this case was transferred to the Business and Consumer Court, Plaintiffs filed their nine-count first amended complaint (the "Complaint") against MDOT on June 14, 2017, alleging various wrongs on the part of MDOT and seeking declaratory and injunctive relief. Specifically,

[1] Plaintiffs have expressly reserved the right to raise future objections to other aspects of the Court's order.

Plaintiffs sought to have this court declare that MDOT had violated various Maine statutes as well as both the Maine and United States Constitutions and enjoin MDOT from proceeding to implement its proposed street alteration and widening project in the Wiscasset Historic District in the downtown area of the Town of Wiscasset in the State of Maine ("Wiscasset" or the "Town"). Wiscasset was named as a Party-in-Interest. MDOT filed its amended answer on July 7, 2017 and the Town filed its own answer July 12, 2017.

Concurrent with its amended answer, MDOT filed a motion for judgment on the pleadings, arguing that Plaintiffs could not obtain the relief sought under any legal theory, even taking all of the Plaintiff's factual allegations as true. *See* M.R. Civ. P. 12(c). *See also MacKerron v. MacKerron*, 571 A.2d 810, 813 ("A defendant's motion for judgment on the pleadings is the equivalent of a defendant's motion to dismiss for failure to state a claim."). In its order entered September 12, 2017, this Court granted MDOT's motion in full and dismissed all counts of the Complaint. Plaintiffs then brought the instant motion, suggesting that the Court had erred in determining that a private right of action could not be implied from 23 M.R.S.A. § 73 (the "Sensible Transportation Policy Act," hereafter the "STPA").

STANDARD OF REVIEW

Under M.R. Civ. P. 7(b)(5), a motion for reconsideration "shall not be filed unless required to bring to the court's attention an error, omission, or new material that could not previously have been presented." "Rule 7(b)(5) is intended to deter disappointed litigants from seeking 'to reargue points that were or could have been presented to the court on the underlying motion.'" *Shaw v. Shaw*, 2003 ME 153, ¶ 8, 839 A.2d 714 (quoting M.R. Civ. P. 7(b)(5) advisory committee's notes to 2000 amend., 3A Harvey & Merritt, *Maine Civil Practice* 270 (3d, 2011 ed.)). "A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment." M.R.

Civ. P. 59(e). A trial court's ruling on a motion for reconsideration is reviewable for an abuse of discretion. *Shaw*, 2003 ME 153, ¶ 12, 839 A.2d 714.

DISCUSSION

The Court notes that much of Plaintiffs' motion consists of reargument of issues already litigated by the parties relating to whether the STPA allows a private right of action for its enforcement, and appropriately disregards that aspect of Plaintiffs' motion. *See* M.R. Civ. P. 7(b)(5) advisory committee's notes to 2000 amend., 3A Harvey & Merritt, *Maine Civil Practice* 270 (3d, 2011 ed.) (explaining that motions to reconsider are "not encouraged" and that "too frequently, disappointed litigants bring motions to reconsider . . . solely to reargue points that were . . . presented to the court on the underlying motion.").

However, on reconsideration, the Court recognizes that certain language in its September 12 order could be read as mischaracterizing the law regarding statutory analysis of laws passed through citizen initiative. Specifically, on page 6 of its order, the Court notes that it was the legislature's intent that the STPA never be made law because the STPA was enacted by citizen's initiated referendum and not the elected legislature. The Court then states that "pursuing the intent of the legislature is not a meaningful exercise." Understandably, Plaintiffs interpreted this to mean that the Court considered the legislature's failure to pass the STPA in concluding that the STPA did not provide a private right of action. If this were true, it would be a prejudicial error of law, and thus a Rule 7(b)(5) motion for reconsideration is the proper procedural mechanism for bringing the purported error to the Court's attention. *See* M.R. Civ. P. 7(b)(5). The Court thus takes this opportunity to clarify its analysis regarding the STPA's lack of a private cause of action.

The lack of an express private right of action generally means there is no private right of action and our Law Court is "hesitant to imply [one]." *Charlton v. Town of Oxford*, 2001 ME 104,

¶ 15, 774 A.2d 366. Absent express language authorizing a private right of action, "the key to determining whether there is an implied cause of action lies in the legislative intent, expressed either in the statute or the legislative history." *Id*. "Citizen initiatives are reviewed according to the same rules of construction as statutes enacted by vote of the Legislature." *Opinion of the Justices*, 2017 ME 100, ¶ 59, 162 A.3d 188. *Accord People v. Buford*, 4 Cal. App. 5th 886, 905 (Ct. App. Cal. 5th D. Oct. 27, 2016); *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007). Thus, if a private right of action is neither express nor implicit in the text of a statute enacted pursuant to a citizens' referendum, the court must proceed hesitatingly to the legislative history to determine whether the voters intended to create a private right of action.

This Court declined to consider the testimony of then-MDOT Commissioner Dana Connors ("Commissioner Connors") before the Legislature's Committee on Transportation ("Transportation Committee") as having a bearing on that analysis, and because neither the Plaintiffs nor MDOT presented the Court with any other evidence probative of the citizens' intent to authorize a private right of action, the Court applied the default rule that the absence of an express right of action means that there is no private right of action. *Charlton*, 2001 ME 104, ¶ 15, 774 A.2d 366.

Commissioner Connors' testimony before the Transportation Committee is not useful to the Court in determining whether a private right of action can be implied in this statute for two main reasons. First, Commissioner Connors' statement to the Transportation Committee has been incompletely quoted by Plaintiffs. Plaintiffs quote Commissioner Connors as saying that the STPA "would give anyone the ability to stop a road improvement project by intervening . . . ." In fact, Commissioner Connors said "*I also fear that* this new policy would give anyone the ability to stop a road improvement project by intervening . . . ." (emphasis added). This makes it clear

that Commissioner Connors was not offering an authoritative interpretation of the STPA, but rather expressing his concern with a possible interpretation in his successful argument to the Transportation Committee urging them to reject the bill. [2]

Second, Plaintiffs do not explain how Commissioner Connors' committee testimony had any bearing on the voters' intent to create a private right of action in the statute. Plaintiffs cite *Buford*, 4 Cal. App. 5th at 905 and *Alaskans for a Common Language, Inc.*, 170 P.3d at 193, for the proposition that courts may consider a wide variety of extrinsic aids to discern the voters' intent in construing a statute passed by citizens' referendum. However, the extrinsic aids suggested in those cases are either familiar components of statutory construction or particularly helpful in discerning what the voters' intended to enact, *e.g*. an official ballot pamphlet.[3] *Buford*, 4 Cal. App. 5th at 906. *See Alaskans for a Common Language, Inc*., 170 P.3d at 193 ("[W]hen we review a ballot initiative . . . we attempt to place ourselves in the position of the voters at the time the initiative was placed on the ballot, and we try to interpret the initiative using the tools available to the citizens of this state at that time.").

The Law Court has implicitly authorized courts to consider the testimony of heads of executive agencies to legislative committees when analyzing the legislative history of a statute to determine legislative intent. *Me. Ass'n of Health Plans v. Superintendent of Ins*., 2007 ME 69, ¶ 50, 923 A.2d 918. That case, however, dealt with a statute passed by the legislature, not by the

[2] Plaintiffs' suggest that Commissioner Connors' testimony before the Transportation Committee estops MDOT from arguing that the STPA lacks a private right of action under either an equitable estoppel or judicial estoppel theory. Neither doctrine applies. *See State v. Austin*, 2016 ME 14, ¶ 9, 131 A.3d 377; *HL 1, LLC v. Riverwalk, LLC*, 2011 ME 29, ¶ 30, 15 A.3d 725.

[3] *Buford* also suggests that courts consider "contemporaneous administrative construction" when construing statutes. *Buford,* 4 Cal. App. 5th at 906. This refers to official agency interpretations of ambiguous statutes pursuant to their rulemaking authority, not the testimony of an agency spokesperson to a legislative committee urging them to vote a certain way on a proposed piece of legislation. *Id*.

citizens in a referendum. *Id*. ¶ 5. The distinction is meaningful. While it is logical to assume that committee testimony influences *legislators'* votes, it is not so apparent that it influences the *citizens* who vote on an initiated bill in a referendum.[4] While Plaintiffs urge this Court to consider Commissioner Connors' testimony now, they do not claim that Maine's citizens considered it when they voted to enact the STPA. In sum, there is no basis for the Court to conclude that statements made at a legislative hearing in opposition to an initiated bill can be used to determine the intent of voters in a referendum, nor do Plaintiffs offer one.

Plaintiffs' remaining arguments do not bring to the court's attention an error, omission, or new material that could not previously have been presented. M.R. Civ. P. 7(b)(5). The Court is therefore within its discretion to decline to consider those portions of the motion as improper reargument without reaching the merits of the argument.

CONCLUSION

Based on the foregoing IT IS ORDERED:

That Plaintiffs' motion for reconsideration be denied.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: November 1, 2017

/s
Richard Mulhern
Judge, Business & Consumer Court

[4] The Court had further reason to credit the agency head's testimony in *Me. Ass'n of Health Plans* because the Governor had proposed the legislation at issue. 2007 ME 69, ¶ 7, 923 A.2d 918. Here, on the pleadings it is evident that MDOT was fiercely opposed to the STPA and was not involved in its drafting.