

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date March 27, 1967

To James S. Erwin, Attorney General

Dept. Attorney General

From Jerome S. Matus, Assistant

Dept. Attorney General

Subject L. D. 732 - An Act Authorizing the City of Portland to Use Park Lands for Public Highway Purposes.

The legality of L. D. 732 has been questioned. An annotation entitled "To what uses may park property be devoted" 18 A.L.R. 1246 states:

"II. In General.

"The municipal authorities have power to devote park property to uses which are proper park purposes or consistent with the purposes of its dedication; but it is generally held that they cannot divert park property from park purposes or the purposes of its dedication.

"The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, i.e., whether dedicated by the owner thereof, or purchased or condemned by the municipality.

"Thus, the uses to which land dedicated by its private owner as a park may be devoted depend upon the purposes of the dedication, as determined by the intention of the dedicator, and such land cannot be used for any purpose which is inconsistent with such intention." (cases cited)

" . . .

"But where land is acquired by a city or town by eminent domain or through expenditure of public funds, for public uses as a park, and not subject to the terms of any gift, devise, grant, bequest, or other trust or condition, it may be devoted to some other public use by legislative mandate." (cases cited)

Thus it is clear that one must look to the means by which public park lands are acquired by a city before one can determine whether the land can be converted from a public park use to another public use by legislative action. It may be assumed that some of the property contemplated under L. D. 732 is property dedicated by individuals rather than by the public.

Our Maine Supreme Judicial Court said ". . . the Legislature in permitting a municipality to accept gifts for public parks and playgrounds surely intended that the wishes of the donor be honored. . . ." City of Bangor v. Merrill Trust Company, et al, 149 Me. 160 at 167.

In defining the term dedication, our Court has said ". . . Dedication means an appropriation of land, by its owner for public use." Littlefield v. Hubbard, 124 Me. 299 at 302. A more complete definition of dedication is found in Northport Wesleyan Grove Campmeeting Association v. Andrews, 104 Me. 342 at 349 which definition is quoted in Littlefield v. Hubbard, supra. at page 302, and reads as follows:

"Dedication is the intentional appropriation of land, by the owner, to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest, either by his words or acts, the dedication, so far as he is concerned is made. If accepted and used by the public for the purpose intended it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it is dedicated."

Thus it would appear that if land is dedicated by an individual for park purposes, the land must be used for park purposes, as was stated in Nichols v. Commissioner (Mass.) (1960) 166 N.E. 2d 911:

"Where property is dedicated . . . to a public use for a particular purpose, it cannot . . . without the exercise of . . . eminent domain, be . . . (put) to a use of a different character, in disregard of the trust . . . and . . . the rights of the donors." Nichols Ibid at 916 quoting City Bank Farmers Trust Co. v. Carpenter, 319 Mass. 78, 80, 64 N. E. 2d 636.

Our highest court has said that:

"A park may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement and enjoyment. . . .The full use and benefit of a part is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornament may afford is also included in the uses and purposes of a public park." Northport Assoc. v. Andrews
Ibid at 350.

In the Northport case, the court also determined that when there was a common law dedication the fee would not pass, but that the owner was estopped from any use or control of the locus inconsistent with the full use, benefit and enjoyment of it by the public as a park. Ibid at 349. The determination must be made whether a public highway properly could be considered consistent with park purposes. The annotation relating to what the uses for which park property may be devoted states as follows:

"III. Particular uses and purposes.


"a. Establishment of highways.

"The cases generally hold that a public highway cannot be laid out by a municipality upon park lands, meaning by 'public highway' a part of the street system of the municipality, as distinguished from the park roads established to give the public access to the different parts of the park." (cases cited)

30 M.R.S.A. § 4001 relates to taking of suitable lands for public purposes. The last sentence of the section reads as follows:

"Nothing herein shall be held to deprive the former land owners from proceeding to restrain the use of such land for other than public park purposes."

This statute is further indication to me that the Legislature has no power to permit a city to convert land dedicated for park purposes to other public purposes. It would seem that if the Legislature desires to give the City of Portland power to make this conversion without the use of eminent domain, that the Legislature should ask the Law Court whether or not this legislation deprives the individuals who made the dedication of the park lands or their heirs of property without due process.


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