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STATE OF MAINE

Inter-Departmental Memorandum Date April 25, 1972

To James S. Erwin, Attorney General Dept. Attorney General

From Charles R. Larouche, Assistant Dept. Attorney General

Subject Conflict of Interest re Baxter State Park Authority and Maine Forest Authority.

In accordance with your memo of April 18, 1972, I have examined the question of possible conflict of interest because of the dual membership in the Baxter State Park Authority and Maine Forest Authority.

The Third Clause of Governor Baxter's ~~will~~ Trust provides that his Trustee shall administer the trust property for the following purposes:

> "1. To pay the net income therefrom at least as often as quarterly to the 'BAXTER STATE PARK TRUST FUND' created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK, and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes.
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> "2. To pay over from the principal thereof whenever and as often as the State of Maine shall determine the desirability of the purchase or other acquisition of additional lands for said Baxter State Park or other lands for recreational or reforestation purposes, such sums as shall be requested in writing by the Treasurer of the State of Maine and shall be certified to be used for these purposes by the Governor and Executive Council of the State of Maine, and the members of the Baxter State Park Commission and the Trustee may require that any such certification contain a statement that the purchase price or acquisition cost of such lands is in their opinion fair and reasonable under all the circumstances."

It thus appears that the ~~will~~ Trust provides that the income of the Trust Fund shall be used for the maintenance of two things, i.e., (1) Baxter State Park, and (2) other forest lands acquired by the State under the provisions of the Trust for recreational and reforestation purposes. (hereafter called "Baxter Park" and "Trust forest"). It further appears that the principal of the Trust can be used to enlarge both Baxter Park and Trust forest. It also appears that the payment of Trust principal for enlargement of Baxter Park or the Trust forest is to be made as often and in such sums "as the State shall determine".

The Legislature has enacted several statutes for the apparent purpose of carrying out these Trust provisions. Subchapter III, Chapter 211 of Title 12 seems to authorize the Baxter State Park Authority to carry out the provisions of the Trust relating to Baxter Park. Chapter 217, Title 12 seems to authorize the Maine Forest Authority to carry out the provisions of the Trust relating to the Trust forest. The Legislature has decreed that the Commissioners of the Inland Fisheries and Game Department and the Forestry Department and the Attorney General shall constitute the Baxter Park Authority. It has also decreed that those same three persons and two others (Director of the Maine State Park and Recreation Commission and a public member) shall constitute the Maine Forest Authority.

The question is posed whether or not an unlawful conflict of interest arises from the circumstance that the three members of Baxter Park Authority are also on the 5-member Maine Forest Authority, as a result of the requirement of these officials to allocate the Trust income to two distinct uses, and more significantly in view of their authority to determine expenditure of Trust principal for one or the other use, with the result that expenditure for one use benefits that one use to the disadvantage of the other use.

The Constitution of Maine makes several provisions regarding incompatible offices. Sections 1 and 2 of Article III provides for distribution of powers into three separate departments, with no person in one allowed to exercise the powers of another department. Those sections are inapplicable to the instant problem since all the officials involved are of only one department. Sections 10 and 11, Part Third, Article IV, relate to senators and representatives and, hence, is also inapplicable here. Section 4, Park First, Article V relates to councillors. Section 5, Part First, Article V, relates to the Governor.

Section 5, Article VI relates to justices of the Supreme Judicial Court or any other court. Section 2, Article IX provides that each of the following may occupy only one of these offices: justice of any court; Attorney General, county attorney, Treasurer; judge and register of probate and of deeds; sheriffs and deputies; clerks of courts; and congressmen. It seems clear that none of the foregoing Constitutional provisions prohibit the dual office holding involved in the problem presented.

The law relating to incompatibility of public offices arose in the common law and is a matter of public policy. Howard v. Harrington, 114 Me. 441. The Appendix hereto contains an extract of the discussion in that case of the common law relating to incompatibility. However, absent constitutional inhibitions, the Legislature is free to declare the public policy of this State in all areas, including incompatibility. The Legislature can abrogate, adopt, supplement and alter the common law relating to incompatibility, subject to constitutional limitations. See Childs v. Moses, 36 N.Y.S.2d 574, 178 Misc. 828, affirmed 50 N.E.2d 235; State ex rel. Thomas V. Wyson, 24 S.E.2d 463, 125 W. Vas. 369; and People on Complaint of Chapman v. Rapsey (Cal.), 96 P.2d 1000. In Rapsey, the Court stated:

> " * * * But where the statutes prescribe the qualifications of and the grounds of removal from a public office the provisions of the statutes will prevail over the rule of the common law. * * * "
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> "To restate the matter -- the legislature has created a public office and has furnished the means by which it shall be filled and the conditions under which it shall be occupied and vacated. The legislature having thus declared its policy it is not the function of the courts to declare that the legislature should have gone further and provided other conditions under which the office shall become vacant. For these reasons we hold that the rule of incompatibility, which is purely a court made rule, has no place in a jurisdiction where the statutes declare the rules of eligibility to public office, the conditions under which it may be held, and the grounds for which and the terms under which it may be declared vacated. * * * " Pp. 1002 and 1002 of 96 P.2d.

The only limitation I can find in the Constitution relating to this problem is in Section 1, Part III, which limits the Legislature to establishing "all reasonable laws and regulations for the defense and benefit of the people * * * ."

It is presumed that the Legislature acted within its constitutional authority and the burden is upon him who assails a statute to establish its unconstitutionality beyond a reasonable doubt. Metropolitan Casualty Co. v. Brownell, 294 U.S. 580; Salsburg v. Maryland, 346 U.S. 545; McGowan v. Maryland, 366 U.S. 420; and Lindsley v. National Carbonic Gas Co.,220 U.S. 61.

This Trust conferred upon the State the full power to determine how often and how much of the principal to allocate to Baxter Park enlargement or to Trust forest enlargement. In either event, both allocations are for land to be held in trust forever for the benefit of the People of Maine. It seems clear that such allocations could be made directly by the Legislature. On the other hand, no reason appears to preclude the Legislature from creating a State agency to make such allocations on behalf of the State. In such a case the agency is involved in the usual problem of dividing the fiscal pie among two permissible uses in accordance with its best judgment. This would seem to be no more than the usual individual problem of how best to allocate one's resources, e.g., 35% rent, 25% food, etc.

It would seem to me that the real difficulty in this case is not the matter of duality of membership but the duality of agency to allocate the same fiscal pie. Surely, few people would contend that it would make sense to have two chefs attempting to act independently in dividing a pie. If the two chefs cannot agree, chaos or frustration of purpose must surely result. Had precisely this thing been done by the Legislature in our problem, I would seriously doubt that the Law Court would say that this method of allocation is reasonably calculated to effectuate the intent of the grantor of this Trust. It should be noted that the Baxter will requires the allocation of principal for enlargement of Baxter Park or the Trust forest to be made by the State. Since there is only one Trust and one fiscal pie, the allocation process must necessarily be singular. Hence, it would seem clear that a legislative scheme that would permit division of this singular process would not be a proper effectuation of the directive in the Baxter will.

Our case, however, is complicated by the fact that there is duality of membership, wherein one Authority dominates the other. It could be said that this fairly assures consistency of State determination. On the other hand, the following situation seems to be a reasonable possibility: Baxter Park Authority has members A, B and C; that Authority meets and votes to allocate all of the remaining principal to enlarge Baxter Park, C dissenting. The Forest Authority has members A, B, C, D, and E; that Authority meets and votes to allocate all of the remaining principal to enlarge the Trust forest, A and B dissenting. In such a hypothetical circumstance, what has been the determination by the State of Maine with regard to allocation of the remaining principal? Nothing in the pertinent statutes sheds any direct light on the solution of this enigma. Section 901, Title 12, states that the Baxter State Park Authority -

> "is further designated the agency of the State to receive such sums as are, from time to time, paid to the State by the trustee under clause THIRD of a certain inter vivos trust dated July 6, 1927, as from time to time amended, created by said Baxter for the purchase or other acquisition of additional land for said Baxter State Park, and the authority is authorized to expend such sums so received for such purposes."

Section 1701, Title 12, provides that the Maine Forest Authority -

> "is created and designated as the agency of the State of Maine to receive such sums as are from time to time paid to the State by the trustee under clause THIRD of a certain inter vivos trust dated July 6, 1927, as from time to time amended,created by the late Percival Proctor Baxter for the purchase of forest lands for recreational and reforestation purposes, * * * "

Section 1702, Title 12, further provides that the Maine Forest Authority -

> "is authorized on behalf of the State to purchase, with the funds paid to it by the above-named trustee and with moneys realized by the sale of timber in the manner provided, and to accept gifts and devises of real property for recreational and reforestation purposes; * * * "

The best that can be said for these statutes is that they seem to be silent upon the question of what agency of the State is authorized to make the determination of allocation of principal for enlargement of the Baxter Park or the Trust forest. Perhaps the answer to this question can be found in paragraph 2 of the Third Clause of the Baxter Trust, which states that the trustee shall "pay over from the principal thereof whenever and as often as the State of Maine shall determine the desirability of the purchase or other acquisition of additional lands for said Baxter State Park or other lands for recreational or reforestation purposes. * * * " This fairly implies a singular determination by "the State" and seems to leave it to the State to provide the machinery for that determination. However, the statutes have not so provided. The subsequent content of the above-quoted portion of paragraph 2 of Clause Third of the Baxter Trust states that such payments shall be of "such sums as shall be requested by the Treasurer of the State of Maine." This does not convey the notion that the Treasurer shall make the determination of allocation, but rather, that he is the State official designated by the will to transmit the request, pursuant to the prior determination. The immediately subsequent portion of that paragraph 2, Clause Third further provides that such sums "shall be certified to be used for these purposes by the Governor and Executive Council of the State of Maine, and the members of the Baxter State Park Commission." It could be said that this calls for a joint determination by the Governor, Council and Baxter Commission. That construction would seem to be strained. It would seem more likely that this is simply a requirement of authentication by these officials that the Treasurer's request is in fact and in law the determination that the State has made in this matter by the authorized State agency.

In conclusion, I find no basis for holding these two offices incompatible, but I do find a substantial basis for doubting the wisdom of this legislative scheme for implementing the Baxter Trust. If the two statutes are construed to authorize separate determinations relative to allocation of principal by the two authorities (Baxter Park and Maine Forest), such legislation would seem to violate the Baxter Trust directive. Since such a construction would seem to be strained, unreasonable and illegal, it must be rejected. The only reasonable conclusion, in my opinion, is that the State has not yet provided the legal machinery for making the determination of allocation of principal for enlargement of Baxter Park or the Trust forest, as often and in such sums as the State deems appropriate.

Respectfully submitted,

Charles R. Larrouche
Assistant Attorney General

CRL/ec

APPENDIX

"The answer to the question before us does not necessarily depend upon constitutional or statutory provisions. The doctrine of the incompatibility of offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is, what constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense. We cite a few examples. "Two offices are incompatible when the holder cannot in every instance discharge the duties of each. The acceptance of the second office, therefore, vacates the first." The King v. Tizzard, 9 B. & C., 418. This language is cited with approval by this court in Stubbs v. Lee, supra. "Incompatibility must be such as arises from the nature of the duties, in view of the relation of the two offices to each other." Bryan v. Cattell, 15 Iowa, 535. "Incompatibility arises where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." Abry v. Gray, 58 Kan., 148. "Incompatibility between two offices exists when there is an inconsistency in the functions of the two." People, ex rel. Ryan v. Greene, 58 N.Y., 295. "The functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices." Kenney v. Georgen, 36 Minn. 190. "The test of incompatibility is the character and relation of the offices, as where the function of the two offices are inherently inconsistent and repugnant." State v. Goff, 15 R.I., 505. "The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them." State ex. rel. Clawson v. Thompson, 20 N.J. Law, 689. The foregoing cases may also be cited in support of the doctrine that acceptances of the later of two incompatible offices vacates the former. See also Cotton v. Phillips, 56 N.H., 220; People v. Carrigan, 2 Hill, 93; Van Orsdale v. Hazard, 3 Hill, 243; Magie v. Stoddard, 25 Conn., 565; 3 Com. Dig. Tit. Officer (K. 5.) Mechem on Public Officers, sect. 420. An office holder is not at common law ineligible to appointment or election to another and incompatible office, but the acceptance of the latter vacates the former."

Howard v. Harrington, 114 Me. 443, at 446, 447.