

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date March 13, 1975

To William R. Adams, Jr., Comm. Dept. Environmental Protection
From Joseph E. Brennan, Attorney Gen. Dept. Attorney General
Subject Permits affecting submerged lands

SYLLABUS: 1. The Wharves and Weirs Act does not delegate to the municipalities of the State the authority to alienate any right, title or interest in the submerged coastal lands of the State; and therefore, under its rules, the Board of Environmental Protection may not consider an application for a permit for a project involving such lands if all the applicant can show in the way of right, title or interest in the lands is a wharf or weir permit.

2. The Great Ponds Act does not delegate to the Board of Environmental Protection the authority to alienate any right, title or interest in the submerged lands in natural Great Ponds; and, therefore, under its rules, the Board may not consider an application for a permit for a project involving such lands if the applicant can show no independent grant of such an interest from the State.

FACTS: The Board of Environmental Protection has followed a policy of (1) granting permits under statutes which it is responsible for administering to persons proposing to undertake construction on submerged coastal lands below the low water mark of the tide if such persons have obtained permits from the municipalities concerned under the Wharves and Weirs Act, 38 M.R.S.A. §1021 et seq.; and (2) granting permits to persons proposing to dredge, fill or erect permanent structures below the natural low water mark in, on or over natural great ponds, pursuant to the Great Ponds Act, 38 M.R.S.A. §422. The Board's basis for this policy has been that, although the submerged lands in question are concededly owned by the State, it has assumed that the Wharves and Weirs Act and the Great Ponds Act have delegated to the coastal municipalities of the State and the Board respectively the power to permit private individuals the use of these parts of the public domain, and that an applicant with such permission has sufficient right, title or interest in the State land for the Board to pass on his application. On December 10, 1974, the Department of Environmental Protection received a memorandum from the Director of the Bureau of Public Lands, Department of Conservation, asserting by implication that these statutes do not delegate such power and claiming that the submerged lands can only be so used if sufficient interest therein has been conveyed to the applicant by the State.

QUESTION AND ANSWER: Do the Wharves and Weirs Act and the Great Ponds Act delegate the power to permit the use of state-owned submerged land as the Board has assumed, or on the contrary, must an applicant bringing a project before the Board which involves the use of such land show an independent alienation of sufficient interest in such lands from the

State before the Board, under its rules, may proceed to consider his application? Answer: The power to permit such use was not delegated by the statutes and such an applicant does not have the necessary right, title or interest to have his application considered by the Board.

REASONING: Five general principles should first be stated. First, a license, even if to undertake activity on a piece of state-owned land, being by its nature revocable and inalienable, is not a conveyance of an interest in such land. American Law of Property §8.110 (Casner, ed. 1952); Thompson, Real Property §223 (1964). Second, it is clear, in Maine, that title to submerged lands below the ordinary low water mark of the tide on the coast and below the natural low water mark of all natural great ponds is in the State. Colony Ordinance of Massachusetts, 1641-1647; In re Opinion of the Justices, 118 Me. 503-04 (1920). See also 1 M.R.S.A. §§2(3), 3 and Sawyer v. Beal, 97 Me. 356, 358 (1903) (submerged coastal lands); Flood v. Earle, 145 Me. 24, 28 (1950) (great ponds). Next, it is also clear that a municipality (and by implication an administrative agency) cannot alienate state lands without Legislative authorization. In re Opinion of the Justices, supra at 505. Fourth, it is a general rule of statutory construction that any delegation of authority to an administrative agency (and by implication to a municipality) must be plainly expressed or necessarily implied, and is not to be inferred. Sutherland, Statutory Construction §65.02 (4th ed., 1974). And finally, any grant of an interest in public land must likewise be clear and unambiguous, with all doubt as to construction being resolved in favor of the Government. Northern Pacific Railway Co. v. United States, 330 U.S. 248, 257 (1947); Slidell v. Grandjean, 111 U.S. 412, 437 (1883); Attorney General v. Revere Copper Co., 25 N.E. 605, 607 (Mass. 1890) (interpreting the Colonial Ordinance of 1641-1647); Sutherland, supra, §64.07.

I. Wharves and Weirs Act, 38 M.R.S.A. §1021 et seq.

Turning first to the Wharves and Weirs Act, there would appear to be no basis for the assumption that through this statute, the Legislature delegated to the municipalities of the State the power to alienate submerged state lands for the purpose of erecting wharves, fish weirs and traps thereon. Although its principal operative section does in terms apply to "tidewaters within the limits of any city or town," 38 M.R.S.A. §1022, there is no express delegation of authority to alienate state lands anywhere in the original statute or in any of

its subsequent amendments, such as appear in many other Maine statutes.^{1/} Rather, the Statute merely requires the issuance of licenses for the construction of wharves and weirs in the tidewaters which, as indicated above, does not involve the alienation of an interest. It is further instructive that in the decades immediately following the passage of the Wharves and Weirs Act in 1876, Laws of Maine of 1876, Ch. 78, the Legislature continued its prior practice of granting special "authorizations" to persons wishing to construct wharves or weirs in coastal waters below low water mark.^{2/} It is thus clear that in enacting the Act, the Legislature was concerned only with ensuring that wharves, weirs or traps erected in tidewaters, whether on State-owned land or not, did not constitute "an obstruction to navigation or injury to the rights of others." 38 M.R.S.A. §1022. It did this by delegating the

^{1/} See e.g. 12 M.R.S.A. §504 (" [The Commissioner of Conservation] shall only after approval of the Legislature, exchange or sell and convey any of [the public lands] "...); 12 M.R.S.A. §602 (1) (" [The Parks and Recreation Bureau, with the consent of the Governor and Council, shall have the power] to sell and convey [certain] lands or interest therein, or lease the same, or by revocable license or agreement, or grant to any person, firm or corporation exclusive rights and privileges to the use and enjoyment of such lands").

^{2/} See, e.g. Private and Special Laws of Maine of 1876, Ch. 137, 138, 181, 187; Private and Special Laws of Maine of 1901, Ch. 223, 225, 226, 227, 232, 247, 287, 390, 408, 418, 441, 483.

authority to regulate the use of, not to alienate interests in, the tidewaters of the State to the only permanent governmental entity available to it at the time; the municipalities.^{3/}

3/ This conclusion is not affected by a recent statement of the Law Court in Blaney v. Rittall, 312 A.2d 522 (Me. 1973). There the Court said:


"under (the Wharves and Weirs Act), the owner may be permitted to extend his wharf or weir out beyond low water mark, thus receiving a privileged use of the public domain but similarly restricted to avoid interference with the rights of other members of the public as to navigation and fishing. Sawyer v. Beal, 97 Me. 356, 54 A. 848 (1903)." Id. at 529.

It would be difficult to contend that this passing observation constitutes the considered opinion of the Law Court that the Wharves and Weirs Act impliedly delegated the power to alienate certain state lands to the municipalities of the State. The case on which it relies, Sawyer v. Beal, supra, was a dispute between private parties as to the interpretation of the present Section 1026, which was added by the Legislature in 1883 to adjust private rights. Laws of Maine of 1883, ch. 239. In Sawyer, the Court affirmatively recognized the State's interest in the land, id. at 358, but did not discuss its relation to the case, the State not being a party to the action. In addition, it should be pointed out that the Court in Blaney recognized the regulatory nature of the Act, not only in its use of such words as "permitted" and "privileged", which suggest regulation, but in more explicit terms: "the statute's intent is to remove the right to build (or later, extend) a wharf from the self-help domain and subject that right to licensing procedures controlled by the municipality." Blaney v. Rittall, supra, at 528 (emphasis added).

Rule 1.4 (c) of the Board of Environmental Protection's Regulations for Processing of Applications provides that "the Department will not consider an application where the applicant has not demonstrated (1) that he has sufficient title, right and interest in all of the property which is proposed for development or use." Since a Wharf or Weir Permit is only a license issued upon a finding that the structure in question will not interfere with navigation or the rights of others, and is not a conveyance of an interest in any state-owned lands involved, the Board may not consider an application involving the use of such lands when all the applicant can show in the way of an interest therein is a Wharf or Weir Permit from the concerned municipality.

II Great Ponds Act, 38 M.R.S.A. §422

Like the Wharves and Weirs Act, the Great Ponds Act is a regulatory statute, delegating to the Board of Environmental Protection the power to regulate filling, dredging and the erection of permanent structures "in, on, over and abutting" great ponds. It is contended that, in the case of natural great ponds, where the State has title to the submerged lands, this statute, by authorizing the granting of permits "in", "on" and "over" the pond, has delegated to the Board the power to alienate the State's land. Again, however, this contention must fall in the face of the rule of statutory construction that such delegations be clear and unambiguous, and particularly so when the Great Ponds Act is compared with the other legislation of recent vintage quoted in note 1 above, in which the Legislature did delegate such authority clearly and unambiguously. Thus, in cases where state land is concerned, the Board, under Rule 1.4(c), cannot consider an application for a Great Ponds Act permit, where the applicant has no independent authority to use the state land.


JOSEPH E. BRENNAN
Attorney General