

MAINE STATE LEGISLATURE

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Inter-Departmental Memorandum Date July 1, 1976

To Lee M. Schepps, Director

Dept. Bureau of Public Lands

From David T. Flanagan, Assistant

Dept. Attorney General

Subject Submerged Lands in Portland Harbor

The Bureau of Public Lands, Department of Conservation is responsible for the administration of the proprietary interests of the State of Maine in submerged lands under 12 M.R.S.A. § 514-A. Ordinarily, the state owns the lands lying below the low tide mark in coastal waters and tidal rivers, as this Department observed in its opinion of March 13, 1975. Public Lands now advises that it has encountered deeds between private parties which purport to convey submerged lands in Portland Harbor between the low tide mark and the Harbor Commissioners' line. As an illustration, the Bureau has provided us with a copy of a 1935 Warranty deed from the Mexican Petroleum Company to the American Oil Company which reads in part, ". . . thence continuing on course across the flats of Fore River to the Harbor Commissioners' line; thence Southeasterly by said Harbor Commissioners' line to the center of the thread of Barberry Creek. . . ."

QUESTION:

Where does the title of the State in the Portland Harbor and the Fore River begin?

ANSWER:

Unless there has been a specific legislative grant of property rights in submerged land in Portland Harbor to grantees of the State, no party has such rights in Portland Harbor below the low water mark, except by grant pursuant to 12 M.R.S.A. § 514-A.

REASONING:

The opinion of the Attorney General of March 13, 1975, and the cases cited therein are dispositive of the present inquiry. The State owns the submerged lands under tidal waters up to the low water mark in Portland Harbor as well as all other places along the coast.

The Legislature has the power to convey the fee or any other interest therein and the Bureau of Public Lands has the authority to lease such lands for terms of up to 30 years. Opinion of the Justices, 118 Me. 503-4(1920); 12 M.R.S.A. § 514-A.

The case of Portland Harbor differs from the rest of the coast only in that the Wharves & Weirs Act, 38 M.R.S.A. § 1021 et seq., applied to Portland only briefly,^{1/} as the Legislature had established

1/ See P. & S. L. 1877, c. 383

a separate scheme for the regulation of development in Portland Harbor.

By P. & S.L. 1849, c. 233, the Legislature, evidently recognizing problems of traffic management in a busy harbor, authorized the Portland City Council to "make such rules and regulations in relation to the preservation of Portland Harbor . . . and all vessels within the (harbor) limits" as were just, expedient and lawful. P. & S.L. 1853, c. 167 expanded this authority to specifically include construction of wharves. Then P. & S. L. 1856, c. 654, precisely defined the limits of Portland Harbor^{2/}, and prohibited extension of wharves on other structures seaward of the line described without the prior authorization of a board of harbor commissioners.^{3/} The harbor line thus established was, in effect, a land use law regulating construction and navigation, rather than a conveyance of a real property right from the State to the City of Portland, just as the Wharves and Weirs Act served the same function for other coastal municipalities.

As in the case of the Wharves and Weirs Act, there was no express delegation of authority to hold or alienate State owned lands. The Legislature certainly knew how to phrase laws so as to unambiguously convey submerged land to municipalities. For example, in P. & S. L. 1947, c. 10, the Legislature provided "The State releases to the City of Bangor all its right, title and interest in and to the present bed of the Kenduskeag Stream in said Bangor. . . ."

Likewise, the Legislature continued to make specific grants of interests of submerged lands after enactment of the regulatory legislation. See P. & S. L. 1857, c. 125, § 1, conveying Hog Island Lodge, including submerged lands up to 700 yards distant from the ledge, to the United States for a fort, and P. & S. L. 1868, c. 533 authorizing the City to dredge the harbor bed.

None of the subsequent general enactments relating to Portland Harbor contain any grant of the State's rights to Portland or any other political subdivision of the State.

P. & S. L. 1864, c. 303 gave the Commissioners similar jurisdiction over receiving basins. P. & S.L. 1874, c. 554 extended the authority of the Harbor Commissioners to regulate construction between high water

^{2/} A description which, significantly, is based on the seaward ends of prominent wharves, not low water mark.

^{3/} Permission to extend wharves beyond the line was to be recorded at the office of the City Clerk, not the Registry of Deeds. c. 654, § 4.

mark and the harbour line theretofore established.^{4/} P. & S.L. 1917, c. 192 further expanded the geographical reach of the Harbor Commissioners. P. & S.L. 1928, c. 114 established the Port of Portland Authority; but while that act and numerous subsequent amendments conferred on the Authority powers necessary to conduct many operations, including the construction and leasing of wharves for its own use, it does not grant the Authority ^{5/} the right to convey such land to strangers to the title.

With respect to the specific inquiry as to the title of the American Oil Company to submerged land in Portland Harbor, the analysis above must govern.

Our examination of the records indicates that neither American nor any of the predecessors in the chain of title it recites ever were party to a conveyance of submerged lands near Barberry Creek in the City of South Portland by Legislative enactment.

As we understand the chain, American took from Mexican Petroleum in 1935 by a warranty deed recorded in the Cumberland County Registry of Deeds, Book 1468, p. 187.

Mexican took from Portland Sebago Ice Co. in 1915 by a warranty deed recorded at Book 946, p. 414.

Portland Sebago took from American Ice Co. in 1914 by warranty deed recorded at Book 938, p. 400.

American Ice took from Consolidated Ice Co. in 1901 by warranty deed recorded at Book 702, p. 236.

Consolidated took from Clark and Chaplin Ice Co. in 1897 by warranty deed recorded at Book 647, p. 239.

Clark & Chaplin took from the City of Portland in 1888 by warranty deeds recorded at Book 545, p. 278 and book 471, p. 405.

In all of the above deeds, the relevant description reads: "thence continuing on said course across the flats of Fore River to the Harbor Commissioners' line; thence southeasterly by said Harbor Commissioners' line to the center of the thread of Barberry Creek . . . said . . ."

^{4/} Again, the Commissioners' authority does not correspond with the State's property interest, as here it is extended up to the high water mark, thereby including land never owned by the State of Maine.

^{5/} Now the Maine Port Authority. P. & S.L. 1945, c. 129

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courses are given in deed from the City of Portland to D. W. Clark & Co. recorded in [the Cumberland County] Registry Book 471, page 415, and in Book 456, page 215." 6/

Thus, it appears subsequent grantees took more than their grantor had to give, because any conveyance below mean low tide was void without Legislative authorization.

David T. Flanagan
Assistant Attorney General

DTF:jg

6/ The reference to Bk. 471, p. 415 in the last two deeds is a scrivener's error. It should be p. 405.