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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 13, 1979

Lee Schepps, Director
Bureau of Public Lands
State House
Augusta, Maine 04333

Re: Dredging by Department of Transportation in Portland Harbor

Dear Mr. Schepps:

This is in response to your January 31, 1979 memorandum in which you ask whether a lease or other grant of proprietary interest from the Bureau of Public Lands is required in order that the Department of Transportation may undertake certain dredging operations adjacent to the Maine State Pier in Portland Harbor. This response is premised upon the assumption that the proposed dredging is to take place in submerged lands below the low tide line in the harbor.

As you know, the Bureau of Public Lands is vested with jurisdiction, for management purposes, "of all lands owned by the State, including . . . subtidal lands and any other lands the management and control of which are not otherwise provided for by law." 12 M.R.S.A. §552 (1)(A). Specifically, with respect to submerged (subtidal) lands, the Bureau is given the authority to make conveyances of proprietary interests therein pursuant to 12 M.R.S.A. §514-A. Accordingly, in the ordinary case, any party, whether a private or public entity, desiring to dredge or otherwise utilize submerged lands would be required to obtain from the Bureau a conveyance of the appropriate proprietary interest in the State's land involved. The question here, then, is simply whether the Legislature has made a special disposition of the State's proprietary interest in the submerged land at issue to the Department of Transportation, or has otherwise manifested an intent that the Department be exempt from the usual requirement of obtaining a grant of such an interest from the Bureau.

One basic principle should be noted at the outset of this analysis. The submerged lands involved here are public trust lands of the State, and any purported disposition of them, or of rights in them, must be stated in clear and plain terms and should not be inferred merely as

an incident to an unspecific legislative grant of authority.^{1/} Thus, a statutory framework requiring that permits be obtained from municipalities in order to construct fish weirs was deemed to be regulatory in nature and not to constitute a legislative delegation to municipalities of the power to alienate proprietary interests in the State's submerged lands.^{2/} Similarly, the statutory creation of a public authority vested with broad powers to acquire, construct, operate and maintain piers was considered insufficient, by itself, to evidence a legislative transfer to such authority of proprietary rights in the submerged lands involved.^{3/}

The Department of Transportation's rights and powers, which may bear upon its activities in Portland Harbor, are derived from a variety of sources. Among the general powers and duties vested in the Department's commissioner is the following:

"To acquire, construct, operate and maintain such harbor facilities as may be necessary to implement the planned development of coastal resources, ports and harbors; to operate and maintain the port facilities as now within or as may hereafter come within the jurisdiction of the Department of Transportation;" 23 M.R.S.A. §4206 (1)(H)

While this general power to construct and operate harbor facilities does not by itself appear to constitute a specific delegation or transfer of proprietary interest in the State's submerged lands, the Department receives more particularized and refined powers by reason of the merger into the Department of the Maine Port Authority (previously, the Port of Portland Authority) and the Portland Harbor Commissioners. See P.L. 1971, c. 498, and c. 593; 23 M.R.S.A. §4205. Although these authorities have been merged into the Department, the laws under which they were originally established, as amended from time to time, continue in effect. Accordingly, the powers of such authorities are now inherited by the Department, which is charged with carrying out their programs. See 23 M.R.S.A. §4206 (1)(D).

1/ See analysis and cases cited in the following: Opinion dated March 13, 1975, of Joseph Brennan to William Adams, relating to permits affecting submerged lands; Opinion dated July 1, 1976, of David Flanagan to you relating to submerged lands in Portland Harbor; Opinion, dated September 9, 1976, of Joseph Brennan to Richard Barringer relating to a proposed lease of submerged lands to the Pittston Company.

2/ See Opinion, dated March 13, 1975, *supra*.

3/ See Opinion, dated September 9, 1976, *supra*, p. 5.

The Portland Harbor Commissioners were first established in 1856 to oversee activities within Portland Harbor and, more specifically, to issue permits for the placement of structures or removal of materials from the Harbor. P. & S.L. 1856, c. 654. While the laws relating to this board have been amended many times and were most recently recodified in 1917, the scope of its powers is regulatory in nature and is not viewed as transferring from the State any proprietary interest in the submerged lands in Portland Harbor. See P. & S.L. 1917, c. 192; Opinion, dated July 1, 1976, *supra*.

However, of greater significance here are the powers given by the Legislature to the Maine Port Authority. This agency, earlier known as the Board of Directors of the Port of Portland and subsequently as the Portland Port Authority, has been given broad statutory powers for the purposes of acquiring, constructing and operating piers and terminal facilities in coastal areas. P. & S.L. 1919, c. 84, P. & S.L. 1929, c. 114; P. & S.L. 1945, c. 129; P. & S.L. 1973, c. 214. While a mere grant of such powers to acquire and construct facilities is something less than required to effect a transfer of proprietary interest in the State's submerged land, the Port Authority was additionally conferred the following rights:

" . . . [The Port Authority] shall have immediate charge, for the purpose of carrying out and making effective the terms of this act, of the land and flats now or hereafter owned by the State upon or adjacent to Portland Harbor, and of the construction of public piers and other public works therein. . . ." P. & S.L. 1929, c. 114, §4.

While the laws relating to the Port Authority have been repeatedly revised, most recently in 1973, this particular provision has remained substantially unaltered. Thus, in the 1973 revision, the corresponding section reads as follows:

" . . . and for the purposes of carrying out the duties of the Port Authority, it shall have immediate charge of any undeveloped lands under the sea and flats now or hereafter owned by the State within Portland Harbor." P. & S.L. 1973, c. 214, §7.

Although this language does not, in absolute terms, express a conveyance of proprietary interest in the harbor, and therefore some doubt must remain as to its effect, nevertheless the language seems specific and clear enough to evidence a legislative intent that the Port Authority have the power to conduct its operations within the harbor without need for further legislative or administrative conveyances of proprietary interest. There simply is no reasonable alternative meaning which can be ascribed to this provision.

There are two remaining facets of this question that deserve mention. Also included in the Port Authority's most current revision to its laws is a provision allowing the Governor to grant to the Port Authority "such rights in submerged land owned by the State and located within harbor limits as may be necessary for the Port Authority to fulfill its powers, duties and obligations." P. & S.L. 1973, c. 214, §6. It may be argued that the very inclusion of this provision indicates that the Legislature did not intend that the Port Authority independently possess such proprietary rights under its enabling laws, but such rights should be obtained only upon application to the Governor. While this argument has some credibility, it should be noted that the Port Authority's powers to build and operate port facilities are no longer limited to Portland Harbor, as they once were. Therefore, a reasonable reading of §§6 and 7 of c. 214, read together, is that the Legislature determined to directly confer upon the Port Authority (as it had since 1929) the power to utilize the State's submerged lands only in Portland Harbor, the area to which the Port Authority's operations had been confined for most of its history.^{4/} However, with respect to Port Authority operations outside of Portland Harbor, the Legislature intended that a separate grant of the appropriate proprietary permit be obtained.^{5/} This appears to be the better reasoned interpretation of §§6 and 7, as it allows for the two to be read harmoniously by according to each a meaningful purpose and effect.

It also might be asserted that the 1975 enactment of 12 M.R.S.A. §§514-A and 552 gave to the Bureau of Public Lands exclusive jurisdiction over the State's submerged lands and all transfers of proprietary interests therein, and that such enactment divested the Maine Port Authority of its proprietary rights in Portland Harbor conferred by P. & S.L. 1973, c. 214, §7. However, statutory repeal by implication is not favored. The better reasoned interpretation of the interplay between these laws, particularly in that they were both enacted about the same time, is that the more specific and limited rights given to the Port Authority stand as an exception to the much more broad and general jurisdiction given to the Bureau.

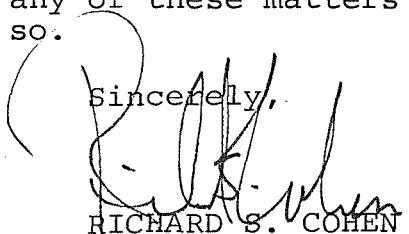
^{4/} The Port Authority's jurisdiction was extended to cover the entire state coastline in 1969. P. & S.L. 1969, c. 196. Earlier, but long after its creation for purposes of serving only Portland Harbor, the Port Authority's jurisdiction was variously extended to include port facilities in Bar Harbor and ferry service operations in various other areas. See, e.g., P. & S.L. 1957, c. 190.

^{5/} While §6 of c. 214 indicates that such proprietary permits to utilize the State's lands may be obtained, by the Port Authority from the Governor, the enactment of 12 M.R.S.A. § 514-A would appear now to authorize similar grants of proprietary interests from the Bureau of Public Lands.

For the foregoing reasons, it is my opinion that the Department of Transportation has the authority to conduct dredging operations on State-owned lands in Portland Harbor, for the purpose of improving access to the State Pier, without obtaining a conveyance of proprietary interest from the Bureau of Public Lands.

If you wish to discuss any of these matters further, we, of course, will be happy to do so.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC:jg
cc: John Wlodkowski
Becky Farnum