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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 29, 1979

To: Richard Barringer, Acting Commissioner
Department of Conservation

From: Richard S. Cohen, Attorney General

Re: Title of State of Maine to Public Reserved Lands in Town of Osborn

The Bureau of Public Lands has requested an opinion from this office relating to the title of the State to the public reserved lands, or public lots, located in Osborn, Maine. We understand that this request was made in response to certain written views expressed by James Haskell, Executive Director of the Hancock County Planning Commission, which serves the Town of Osborn. Accordingly, because the factual and legal title history of the public lots is enormously complex, we have limited our inquiry to a consideration within the limited time available of the legal issues raised by Mr. Haskell.1/ If more detailed research and analysis of this history is required, please let us know.

In sum, following a review of all the materials furnished us by Mr. Haskell, upon which he founded his views, and after conducting such additional research as time has allowed, we believe that the legal issues raised have been substantially disposed of by the Law Court in its 1973 Opinion of the Justices2/ (see attachment) rendered in response to questions propounded by the Senate concerning certain amendments to the public lots laws. Based upon that ruling and the reasoning discussed therein,

1/ See memorandum of March 22, 1979, from James Haskell to Representative Judy Curtis and memorandum of April 3, 1979 from James Haskell to the Selectmen of the Town of Osborn. Much of the discussion in these memoranda is for the purpose of providing justification for a proposed legislative enactment which would vest title to the Osborn public lots in the Town. Of course, our consideration of the present legal status of these lots does not reflect those political and equitable issues and arguments, raised in the memoranda, which are properly addressed to the Legislature.

2/ 308 A.2d 253 (1973).

we cannot and do not see that the State's legal title to the public lots at issue is affected by the claims now raised. It is informative to briefly review here the relevant factual and legal history which leads to this result.

I. Historical Background

As more fully detailed in the attached questions to and answers of the Law Court, beginning in 1786 Massachusetts and later Maine created a statutory framework by which public lots were set aside for certain public purposes in each of the townships sold by the Commonwealth or the State. 3/ Initially, as is the case with the public lots set aside in Osborn, these lands were reserved and held according to the following mandate:

> "/T/here /shall/ be reserved out of each Township, four lots of three hundred and twenty acres each for public uses, to wit, one for the use of a public Grammar School forever, one for the use of the Ministry, one for the first settled Minister, and one for the benefit of public Education in general, as the General Court shall hereafter direct." 4/ 5/

Pursuant to this directive, four public lots were laid out and set aside in what is now the Town of Osborn. The remainder of that township was thereupon subdivided into 52 additional lots, 11 of which were sold by lottery to various individuals, with the others subsequently sold en masse to

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3/ See e.g., Laws and Resolves of Massachusetts, 1786, Chapter 40; Articles of Separation (Article X of the Constitution of Maine); Chapter 254, Public Laws of 1824; Chapter 280, § 8, Public Laws of 1824; Chapter 492, § 2, Public Laws of 1831; Chapter 39, Public Laws of 1832; 30 M.R.S.A. § 4151.

4/ Laws and Resolves of Massachusetts, 1786, Chapter 40.

5/ The last of these public lots (the one for "public education in general") was considered to be a state lot available for future sale by Massachusetts. It was so sold in 1832 and, accordingly, is not at issue here. See deed of Massachusetts to Henry Francis, et al., dated August 29, 1832 and recorded in Land Agent Deed Records Volume 5, Page 6, Maine State Archives

William Bingham together with vast other holdings of Massachusetts.[6] The deed to Bingham expressly contemplated both the reservation of public lots as well as the sales of lottery lots, and Bingham's purchase was made subject to these prior reservations and conveyances.

In 1820, at the time of Maine's separation from Massachusetts, Articles of Separation were drawn (now Article X of the Maine Constitution) which again recognized the scheme which had been established by Massachusetts for the reservation and preservation of the public lots in Maine's unorganized townships. Not only was the new State to acknowledge the continuation "in full force" of all grants of land made by Massachusetts prior to separation 7/ but Maine was to continue to reserve public lots in townships, as they were thereafter sold by it, just as Massachusetts had done so before separation. 8/

In 1853, Massachusetts conveyed to Maine virtually all of the former's remaining holdings in this State, including Massachusetts' title to the public lots reserved in townships sold by it. 9/ This conveyance was expressly made subject to the

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6/ See Land Agent Plan Records Volume 18A, Page 8, Maine State Archives; Deed of Massachusetts to William Bingham, dated January 28, 1793 and recorded in the Massachusetts Deed Records, Volume 6, Page 5, Maine State Archives.

7/ "All grants of land, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located, which have been or may be made by the said Commonwealth, before the separation of /Maine/..., shall continue in full force, after /Maine/ shall become a separate State". Articles of Separation, Section Seven.

8/ "/I/n all grants hereafter to be made, by either State, of unlocated land within /Maine/, the same reservations shall be made for the benefit of Schools, and of the Ministry, as have heretofore been usual, in grants made by this Commonwealth." Articles of Separation, Section Seven.

9/ Deed of Massachusetts to Maine, dated October 5, 1853 and recorded at Miscellaneous Deed Records, Volume 0, Maine State Archives.

provisions and stipulations contained in the Articles of Separation. 10/

While, as indicated above, the original reservations of public lots by Massachusetts (including the one in Osborn) were initially set aside for the Minister, the Ministry, the school, and public education generally, the State, through a series of laws, altered this scheme to provide for the ultimate vesting of those public lots in the towns themselves, as they became incorporated, with all such lands to be held and used for the support of public education. 11/ 12/ Accordingly, prior to 1973, as townships became incorporated, the State's reserved title to the public lots therein was vested in the towns for use by them for the support of their public schools. However, even by 1973, there remained approximately 400 unincorporated townships and plantations in the State, with some 400,000 acres of public lots contained therein, title to which then and thereafter remained in the State.13/ Osborn was such a plantation, not having incorporated into a town until 1976.14/

II. The Opinion of the Justices

The catalyst for the 1973 Opinion of the Justices was a series of proposed amendments to the laws relating to the ownership and management of the public lots.

10/ "And it is further agreed and understood by the parties to this conveyance that all lands reserved by said Commonwealth in any townships...for public uses are hereby conveyed to said State of Maine to be held in accordance with and subservient to the provisions and stipulations contained in the /Articles of Separation/. And that this conveyance is in no wise to impair or invalidate the obligations of the provisions /of the Articles of Separation/...for setting apart and reserving lands to educational and religious uses." Deed of Massachusetts to Maine, supra.

11/ See Chapter 254, Public Laws of 1824; Chapter 280 §, 8, Public Laws of 1824; Chapter 492, § 2, Public Laws of 1831; Laws of Massachusetts, 1831, Chapter 47; Chapter 39, Public Laws of 1832; Chapter 217, Public Laws of 1846.

12/ An exception was made for public lots which had already become vested in the Minister, Ministry, school or some other private party for whom they had initially been reserved. There is no indication before us of such early vesting of the public lots at issue here.

13/ See Opinion of the Justices, supra, p. 256.

14/ Chapter 113, Private and Special Laws of 1975.

The effect of these amendments was to significantly alter the historical scheme described above. 15/

In order to understand the thrust of the Court's opinion, it is necessary to consider the questions presented to it. These questions and their context are fully set forth at pp. 256-7 of the attached opinion. Suffice it to say here that the questions directly point out that the bill then before the Legislature would provide (1) that title to the public lots, not already vested in towns, would remain in the State and would no longer vest in towns incorporated after 1973, (2) that such public lots would be managed and preserved as State assets and not for the exclusive benefit of inhabitants of the township or any town thereafter incorporated, (3) that the State would be allowed to sell, purchase or exchange such lands, without retaining a public lot in each township, in order to assemble larger contiguous parcels of land for the State, and (4) that the practice would be discontinued of retaining all income from the public lots to await later incorporation of the township. 16/ As to each of these aspects of the bill then before the Legislature, the questions propounded ask whether there may be any violation of the Articles of Separation, the Distribution of Power requirements, or the Due Process Clauses, of the Federal or State Constitutions. We find that the Law Court's responses, in answering in the negative as to each of these questions, appear to be dispositive of the issues before us now.

First the Court considered the nature of the limitations imposed by the public lot reservations by Massachusetts and Maine. The Court recognized that such reservations are, by reason of the Articles of Separation, constitutionally effective and binding upon Maine. However, the Court also acknowledged that "the 'reservation' process produces the legal

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15/ While the proposed statutory changes before the Legislature included revisions, not subsequently enacted, which would have resulted in the organization into plantations of all of the State's unincorporated towns, the questions addressed to the Law Court related only to those revisions which provided for new directions in management and ownership of the public lots. These latter revisions were, in substantial part, enacted by the Legislature. Chapter 628, Public Laws of 1973.

16/ While not all of these provisions were ultimately enacted by the Legislature in the form then incorporated in the bill before the Court, the Court's opinion and reasoning in dealing with the issues raised by the bill before it would be applicable to the slightly modified statute which was enacted.

consequence that the sovereign, as a grantor 'reserving' lands for designated beneficial purposes and as to which specific beneficiaries to take the legal title are not in existence, has created no vested rights in private persons...." 17/ While, then, the reservations themselves created no vested rights, the Court determined that their legal significance lay in the fact that they effectively removed the public lots from the public domain of the State and imposed upon the State the duty to hold and use these lands as trustee for the "beneficial uses intended".

In the Court's view, then, the keystone issue was what the "beneficial uses intended" might be. Here, the Court acknowledged that the two beneficial uses specifically designated in the reservations were "schools" and the "Ministry", but determined that these were not intended as exclusive limitations and were merely "illustrative of a more comprehensive assemblage of beneficial purposes" 18/:

> "We regard this principle as controlling, also, concerning reservations made prior to separation and in which, since the contemplated beneficiary had not come into existence, the 'reserved' lands had not become appropriated to any particular uses designated. In such posture, the only obligation upon the sovereign is to hold and preserve the lands 'reserved' for those 'public uses' generally reflected by the usage of Massachusetts and of which any particularly designated use provides only an example." 308 A.2d at 271.

Specifically addressing the questions of whether public lots must continue to be held in each unorganized township or whether the same might be traded and consolidated with other lands with the result that some townships might have no public lot at all, the Court stated its position as follows:

> "Thus, no private rights being involved, and the purposes for which the 'public lots' are held and preserved being a collective grouping of public uses, the 'public lots' themselves may likewise be treated collectively if thereby the general category of public uses may be furthered." 308 A.2d 273.

17/ 308 A.2d at 269; See also Union Parish Society v. Upton, 74 Me. 545 (1883); State v. Mullen, 97 Me. 331, 54 A. 841 (1903); State v. Cutler, 16 Me. 349 (1839).

18/ 308 A.2d at 270.

III. Application to the Public Lots in Osborn

As stated above, the public lots in Osborn were reserved by Massachusetts pursuant to Chapter 40 of the Laws and Resolves of Massachusetts of 1786 (sometimes known as the Lottery Act). The question now before us is whether the State's title, as derived from Massachusetts, has at some point become vested in the Town according to one of the theories asserted by Mr. Haskell. While time does not permit an exhaustive search of the voluminous records and laws which may be involved in determining with absolute certainty the exact nature of the State's title here, we have been unable to find support in the law for the arguments now asserted on behalf of the Town. Thus, while we recognize that principal among claims here made is the assertion that the public lots reserved under the Lottery Act are deserving of a different rule than the one the Court applied in the Opinion of the Justices, we can discern no persuasive legal basis for such differentiation. Indeed, the Court had before it, in forming its Opinion, the fact that the earliest public lots were reserved under this very Lottery Act.19/

Given the Court's stated posture, there appears no evidence here that Osborn or any of its inhabitants possess legal rights which the Court failed to consider in making its judgment that the reservations themselves did not constitute or give rise to vested rights in any of the initially intended beneficiaries. Moreover, as discussed above, the Town of Osborn itself was not one of the initially intended beneficiaries under the Massachusetts Lottery Act. Furthermore, there appears to be no legal merit to the assertion that the original settlers of Osborn were the beneficiaries of contract rights, arising from the reservations of the public lots, which rights may now be enforced against the State in order to obtain title for the Town to such lots. Not only has the Court determined that such vested rights do not exist, 20/, but the reservations themselves are more properly viewed, not as giving rights to the original landowners, but as excepting and reserving rights from them for certain public beneficial purposes. See Hammond v. Morrell, 33 Me. 300 (1851); cf. Dillingham v. Smith, 30 Me. 370 (1849).

19/ 308 A.2d at 254, footnote 1; 308 A.2d at 268. In addition, some of the cases considered by the Court as support for its opinion were cases dealing specifically with the meanings of the reservations made under the Massachusetts Lottery Act, (i.e., State v. Cutler, supra, cited at 308 A.2d 269).

20/ See footnote 12, supra.

It is also asserted on behalf of the Town that Osborn is unique because of (1) its location, (2) its early settlement, (3) its early organization into a plantation, (4) its determination not to liquidate its public lots (an action which Osborn has never had the legal power to effectuate), (5) the fact that timber and grass rights have never been granted on Osborn's public lots, (6) the fact that the public lots in Osborn are not of outstanding recreational value, (7) the fact that Osborn has demonstrated an ongoing and active concern in the management of such public lots, (8) the fact that Osborn has developed a proposal for public lot management. While these matters may be appropriate for legislative consideration in assessing the merits of Osborn's request for legislation to convey to it the public lots at issue, such matters do not have any material legal significance in our assessment of the legal status quo. The one fact asserted on Osborn's behalf which does have legal significance is that Osborn was incorporated as a Town after the Legislature acted in 1973 to repeal the old scheme for vesting the public lots in towns as they become incorporated and set in its place a new course.

Looking then to the legislation enacted in 1973, 21/ the legislative direction is to the effect that:

> "/T/itle to public lots shall vest in the inhabitants of any town incorporated and in existence on January 1, 1973. Title to public lots would no longer vest in the inhabitants of towns which may hereafter become incorporated". Opinion of the Justices, supra, 308 A.2d at 256. 22/

Thus, the statutes now require 23/ that the public lots in towns incorporated prior to 1973 be vested in such towns. 13 M.R.S.A. § 3161. As to unincorporated townships or plantations then existing or thereafter organized, the public lots therein are to be "for the exclusive benefit of the State of Maine", with title to such lots to reside in the State "for management and preservation thereof as State assets". 30 M.R.S.A. § 4151.

21/ Chapter 628, Public Laws of 1973.

22/ While this statement is quoted from that part of the Opinion which sets forth the questions and discussion of the Senate, it clearly demonstrates legislative intent behind the 1973 amendments.

23/ The public lands laws have been additionally amended subsequent to the 1973 revisions, but in ways that are not pertinent to the issues here.

Furthermore, the Legislature, in providing in 1973 for the ongoing management of such lands by the State, has made the following findings:

> "The Legislature finds that it is in the public interest and for the general benefit of the people of this State that title, possession and the responsibility for the management of the public reserved lands contained within the unincorporated areas [24/] of the State be vested and established in an agent of the State acting on behalf of all of the people of the State."[25/]

When these legislative directives are considered together with the Opinion of the Justices, as well as the repeal of the pre-1973 scheme whereby towns as they incorporated would receive title to the public lots therein, we cannot find among the materials and arguments before us any persuasive basis for the assertion that towns incorporated after 1973 continue to possess cognizable legal rights to the title to public lots located therein.

For the foregoing reasons, under current law, we believe that the State's legal title to the public lots at issue is

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24/ "Unincorporated areas" includes plantations as well as townships. See Opinion of the Justices, supra, 308 A.2d at 256.

25/ Management of public lots in towns incorporated after 1973 would be provided for pursuant to 12 M.R.S.A. § 554.

unaffected by the claims now raised on behalf of the Town of Osborn.[26]

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/d

cc: Representative John Martin
Representative William Garsoe
Representative Judy Curtis
Representative Edward Dexter
Senator Gerard Conley
Senator Joseph Sewall
Senator Thomas Perkins
Mr. Lawrence Greenlaw
Selectmen of Town of Osborn
James Haskell, Executive Director,
Hancock County Planning Commission
Mr. Leigh Hoar

26/ As noted at the outset, our opinion responds only to the legal arguments raised on behalf of the Town of Osborn. To resolve the underlying question in a manner which would permit us to be fully confident that we had explored every possible avenue of legal and factual research would necessitate that we undertake additional research. Since this question involves events occurring over a two hundred year period, that additional research would inevitably be very time consuming. For that reason, we chose to limit our response to the specific issues raised in order to meet the Legislature's deadline. If requested, however, we would be happy to conduct an exhaustive analysis of the question with the understanding that such an analysis might take a considerable period of time to complete.