

MAINE STATE LEGISLATURE

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July 16, 1980

Lloyd C. Irland, Director
Bureau of Public Lands
Department of Conservation
State House
Augusta, Maine 04333

Dear Mr. Irland:

The Bureau of Public Lands, Department of Conservation (the "Bureau"), has raised several questions concerning its jurisdiction over the submerged lands in the Portland Harbor in light of P. & S.L. 1887, c. 123.^{1/} Specifically, the Bureau wishes to know what is the area ceded to the City of Portland by P. & S.L. 1887, c. 123. For the reasons set forth below, our conclusions are that the City of Portland was ceded rights in the submerged lands and flats owned by the State in 1887 in Back Cove and in the Fore River located to the west of Portland Bridge, as it existed in 1887, and not within the 1907 territorial boundary of the City of South Portland. The Maine Port Authority and the Bureau of Public Lands both have jurisdiction over all other lands in the Portland Harbor, with the former having a paramount right to these lands in order to fulfill its statutory purposes.

I. THE BUREAU OF PUBLIC LANDS HAS THE AUTHORITY TO
MANAGE STATE-OWNED SUBMERGED LAND AND INTERTIDAL
LANDS UNLESS OTHERWISE PROVIDED BY LAW.

The ownership of submerged land, defined as that land below low tide watermark or below a line 100 rods from high tide watermark, whichever is closer to shore, is "vested in the State for the benefit of the public." Sawyer v. Beal, 97 Me. 356, 358 (1903); Opinion of the Justices, 118 Me. 503 (1920). This ownership is derived from the Massachusetts Colonial Ordinance of

^{1/} This opinion will deal only with the effect of this law on the State vis-a-vis the City of Portland. Questions have arisen concerning claims of ownership by other entities to submerged land in Portland Harbor. These claims will be dealt with in subsequent opinions.

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1641-1647, and is incorporated in 1 M.R.S.A. § 2, subd. 3. As a general proposition, all rights of ownership remain in the State unless the State Legislature conveys such right or rights to a person or entity by means of an express and unambiguous grant. Boothbay Harbor Condominiums, Inc. v. Department of Transportation, 382 A.2d 848, 855 (Me. 1978); Attorney General v. Revere Copper Co., 25 N.E. 609, 607 (Mass. 1890) (interpreting Colonial Ordinance of 1641-1647); see also 65 C.J.S., Navigable Waters, § 120(a).

Since 1975, the Bureau has been vested with jurisdiction, for management purposes, of the submerged and intertidal lands owned by the State of Maine, unless otherwise provided by law. 12 M.R.S.A. §§ 552(1)(A), 558; see Opinion of Attorney General, dated March 13, 1979, to Lee Schepps, Director of the Bureau of Public Lands. Accordingly, in the ordinary case, any party, whether a private or public entity, desiring to utilize State-owned intertidal or submerged lands would be required to obtain from the Bureau a conveyance of the appropriate proprietary interest in the State's land involved.

The same rules that apply to submerged lands apply to the State's rights in the intertidal zone, or "flats," which is that area between high tide watermark and the closer of low tide watermark or 100 yards away. See discussion in Whitmore v. Brown, 102 Me. 47, 56 (1906). However, there is a significant difference in the nature of the rights owned by the State: the State holds all rights in the submerged lands, while the State holds only certain prescribed rights in the flats for the benefit of the public, such as navigation, fishing and fowling. Id.; see also Marshall v. Walker, 93 Me. 532 (1900); Boston Waterfront Development Corp. v. Commonwealth, 393 N.E. 2d 359, 360 (Mass. 1979).^{3/} The flats are actually owned by the upland owner, the State retaining certain prescribed rights which may not be unreasonably interfered with without legislative authorization. Id. The effect of this is that the Bureau has no jurisdiction over the intertidal lands not actually owned by the State,^{4/} although the State retains rights in these lands. The Legislature clearly delegated authority to the Bureau only over State-owned land.

^{2/} See, however, discussion in Part III of this Opinion, infra.

^{3/} Of course, the State's rights are subject to the paramount right of Congress to control navigation. Shively v. Bowlby, 152 U.S. 1, 46-47 (1894).

^{4/} Obviously, the Bureau does have jurisdiction over the intertidal zone owned by the State. 12 M.R.S.A. § 558.

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Emergency Preamble of P.L. 1975, c. 287; 12 M.R.S.A. § 552(1)(A) & 558.5/

The questions here then are whether the State has conveyed rights in the submerged and intertidal lands in Portland Harbor to entities such that the Bureau has no jurisdiction over them, and, if so, what is the nature of these interests.

II. THE CITY OF PORTLAND WAS CONVEYED RIGHTS IN THE SUBMERGED LAND AND FLATS WEST OF THE PORTLAND BRIDGE IN EXISTENCE IN 1887 BUT A PORTION OF THIS AREA WAS REMOVED FROM THE CITY'S JURISDICTION IN 1907.

Section 1 of c. 123 of the Private and Special Laws of 1887 provides:

"All lands, flats, shores and rights in tide waters, belonging to the State, at Back Cove and Fore River in Portland Harbor, are hereby ceded to the City of Portland."

In interpreting this law, one must adhere to certain rules of construction. There is a strong presumption that the State will not divest itself of sovereignty or governmental control over any part of its territory. Attorney General v. Revere Copper Co., 25 N.E. 605, 607, supra. Unlike a grant from a private grantor where any ambiguity is construed against the grantor, where the State is the grantor of public lands all doubt as to construction is resolved in favor of the State. Id.; Suffolk Co. v. Edwards, 86 Misc. 283, 286, 148 N.Y.S. 305, 307, supra; see C.J.S., Navigable Waters, § 103(a).

In giving effect to the legislation (see Hanbro, Inc. v. Johnson, 158 Me. 180 (1962)) we must determine what the Legislature meant by the phrase "Fore River in Portland Harbor." In order to make this determination, we look to the legislation and general history of Portland Harbor.

5/ The authority to allow interference with the public rights in privately-owned flats resides in the Legislature. See Whitmore v. Brown, supra; Marshall v. Walker, supra; Boston Waterfront Development Corp. v. Commonwealth, supra. The Legislature has set up a statutory scheme whereby an applicant may build in the intertidal zone upon receiving permits which may only be granted upon the findings, inter alia, that there is no unreasonable interference with navigational uses and marine fisheries. 38 M.R.S.A. § 474 (wetlands permit from Board of Environmental Protection); 38 M.R.S.A. § 1022 (wharves and weirs permit from municipality).

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A. Area Ceded 6/

In 1856, the State Legislature established the Harbor Commissioners of the Harbor of Portland, and granted to it broad regulatory authority. P. & S.L. 1856, c. 654. Sections 1 through 3 of the 1856 enactment established lines in the Harbor beyond which no wharf or encumbrance may be erected or extended. It is clear that the lines established by the Legislature are set in the area generally to the east of the Portland Bridge. 7/ Section 4 of the enactment provides:

"The receiving basins and reservoirs of said Harbor shall comprehend the tidal waters of Fore River and Back Cove They shall be and hereby are subject to the control and regulation of the Commissioners No erection, incumbrance or material shall hereafter be placed or deposited in those waters, which will obstruct the flow and ebb of those waters, . . . without written permission of said Commissioners

The Harbor lines and this language reveal that the Legislature contemplated and understood that Fore River and Back Cove were portions of Portland Harbor, but not the entire Harbor itself. This distinction runs through subsequent legislation relating to the Portland Harbor area.

The State Legislature, in 1864, authorized the Harbor Commissioners to fix harbor lines for the basins and reservoirs, i.e. Fore River, Back Cove and other tidal areas. P. & S.L. 1864, c. 303. Again, a distinction between the basins and reservoirs as tidal waters and the Harbor itself is evident from the regulatory scheme here and the fact that the Harbor Commissioners are "of the harbor and tidal waters." The Legislature previously established harbor lines for the Harbor itself, pursuant to the 1856 law; the authority of the Harbor Commissioners to fix harbor lines in Fore River and Back Cove was only granted in this 1864 law.

The distinction between the Fore River and Portland Harbor Proper is even more evident in an 1874 enactment in which the Legislature established harbor lines in Fore River as distinct from the

6/ This discussion will deal almost entirely with what the Legislature intended with respect to the ceding of "Fore River in Portland Harbor." It seems clear that the ceding of "Back Cove" presents no problem of interpretation. Back Cove is the cove which presently bears that designation.

7/ In fact, the area of the Harbor line goes east from the Gas Wharf, which is a short distance to the west of the Portland Bridge.

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harbor lines in Portland Harbor. P. & S.L. of 1874, c. 554. Section 1 of the enactment established lines in the Fore River that clearly are limited to that area west of the Portland Bridge then in existence.^{8/} Moreover, Section 2 of the enactment speaks of the lines set in the Fore River as distinct from the lines "heretofore" set in the Harbor.

This brings us to the 1887 legislation. In three prior enactments, the Legislature had made a clear distinction between the Fore River and Portland Harbor. The Legislature laid out Harbor lines which were generally in that area to the east of the Portland Bridge, and 18 years later had laid out lines in the Fore River which were only to the west of the Portland Bridge. It is quite obvious that what the Legislature comprehended to be the Fore River in Portland Harbor was not the entire Harbor itself, but only that area to the west of the Portland Bridge. If the Legislature intended to convey the entire Harbor, a less ambiguous description such as "ceding Portland Harbor" would have been used. In giving effect to legislative intent and construing this grant most favorably to the State, the 1887 grant can only encompass the above-described area.^{9/}

The area ceded to the City of Portland was limited subsequently by P. & S.L. 1907, c. 348. That law established the City of South Portland Harbor Commissioners, whose jurisdiction covered that area in Portland Harbor and its tidal waters within the boundaries of

^{8/} Section 1 of P. & S.L. 1874, c. 554 refers to an 1873 plan which sets out the established lines. An extensive search for this plan has failed to uncover it. However, Section 1 is quite detailed in its description of the harbor lines in the Fore River, and it is clear that by following the description and applying it to other maps prepared in the 1870's and 1880's that the lines extended generally only from the Portland Bridge west and north to the old Boston and Maine Railroad Bridge above the site of Vaughn's Bridge. See note 6 supra.

^{9/} This conclusion is supported by maps prepared at the time, of which the Legislature most probably was aware. Map of Portland and Vicinity, 1887, by B. Thurston & Co. and W. A. Greenough & Co.; Map of Portland and Vicinity, 1884, by B. Thurston & Co. and W. A. Greenough & Co.; Plan of Portland, 1886, by J. H. Bufford, Lith.; Plan of Portland, 1858, by Lloyds. These maps are on file at the Maine Historic Society located in Portland. It should be noted that what is important here is what the Legislature believed the Fore River to be at the time of the grant, not what the area may have been called long before or long after. For instance, this area was known as the Casco River in 1690. Plan of Falmouth Neck, now Portland, 1690. It would not be reasonable to construe a grant in 1887 to contemplate a geographic design used almost 200 years earlier, or for that matter 100 years later.

the City of South Portland. Section 7 provides: "All acts relating to the Portland Harbor Commissioners and Portland Harbor and tidal waters connected therewith as relate to the waters within South Portland are repealed." Although this repeal does not specifically refer to the 1887 law, the language of the repeal is quite broad and certainly must be construed to repeal that portion of the 1887 law which related to the tidal waters within the City of South Portland.^{10/} Thus, the area ceded to the City of Portland was decreased as to those submerged lands and flats west of the Portland Bridge, as that Bridge existed in 1887, not within the 1907 territorial boundary of the City of South Portland.^{11/}

B. Rights Conveyed

While it is not necessary that this Opinion resolve the nature of the rights conveyed to the City of Portland in the area ceded in 1887, some general comments on that subject might prove useful.

As stated previously, the submerged land and, to some degree, the intertidal zone is impressed with the public trust. Sawyer v. Beal, 97 Me. 356, 358, supra; Opinion of the Justices, 118 Me. 503, supra. In a recent opinion, the Supreme Judicial Court of Massachusetts discussed the public trust doctrine flowing from the Colonial Ordinances of 1641-1647^{12/} in dealing with a conveyance of submerged land from Massachusetts to a private party. Boston Waterfront Development Corp. v. Commonwealth, 393 N.E.2d 356, supra. That court found that where the Commonwealth has made a grant of submerged lands, the grantee acquires only those rights necessary to fulfill the purposes for which the grant was made, i.e., the grantee may use and/or convey such lands only for the purposes for which the grant was made. Id. at 366. The court held that there are two important effects of this rule. First, where the Commonwealth conveys title for one purpose alone, it retains

^{10/} Since legislative enactments granting submerged lands to public entities are construed in favor of the State, it follows that enactments which arguably repeal such a grant should also be construed in favor of the State.

^{11/} The 1907 law did not, by the repeal therein, cede to the City of South Portland that area in the Fore River within that City's boundary. There is no language which even remotely suggests the Legislature conveyed such an interest. Thus, the ownership of this area reverted to the State.

^{12/} The Colonial Ordinance of 1641-1647 is part of the common law of Maine. Sawyer v. Beal, 97 Me. 356, 357, supra.

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title for all other purposes. Id.; see also Stone v. City of Los Angeles, 299 P. 838 (Cal. Ct. App. 1931); Suffolk Co. v. Edwards, 86 Misc. 283, 148 N.Y.S. 305 (Sup. Ct. Suffolk Co. 1914). Second, in view of the jus publicum, or sovereign right, held by the Commonwealth in the submerged lands for the benefit of the public, submerged land held pursuant to a Commonwealth grant is subject to a condition subsequent that such land be used in accordance with the purposes expressed. Boston Waterfront Development Corp. v. Commonwealth, supra. Any use or conveyance not pursuant to the purposes expressed permits the Commonwealth to void the original grant or lease. Id.

Boston Waterfront dealt with a grant to a private party, not a governmental entity. However, the rule of law stated by the court in Boston Waterfront may apply to public entity grantees as well. See Stone v. City of Los Angeles, 299 P. 838 (Cal. Ct. App. 1931); Suffolk Co. v. Edwards, 86 Misc. 283, 148 N.Y.S. 305 (Sup. Ct. Suffolk Co. 1914); see also 65 C.J.S., Navigable Waters § 103(a).

Assuming the similarity of grants to public and private entities, we note that it is not entirely clear under P. & S.L. 1887, c. 123 whether the City received the right to use the Fore River and Back Cove for any public purpose, or rather the right to use the area for only a specific public purpose. If the former is the case, the subsidiary question arises of whether the Legislature could properly delegate such broad authority when dealing with public trust lands. If only a specific public purpose was intended, whether a specific project falls within the purpose must be ascertained. The nature of these questions, obviously, requires consideration, at a later date, of a specific factual problem.

III. THE MAINE PORT AUTHORITY AND THE BUREAU OF PUBLIC LANDS HAVE CONCURRENT JURISDICTION OVER THE SUBMERGED LAND AND FLATS OWNED BY THE STATE WITHIN PORTLAND HARBOR.

Pursuant to P. & S.L. 1973, c. 214, § 7, the Maine Port Authority, and therefore the Department of Transportation,^{13/} has jurisdiction over the State-owned land in Portland Harbor to utilize such land for its statutory purposes. Opinion of the Attorney General, dated March 13, 1979, to Lee Schepps. For the purpose of carrying out its duties, the Maine Port Authority was given immediate charge of any undeveloped land under the sea or flats now or hereafter owned by the State within Portland Harbor. The duties of the Port Authority are to acquire, construct and

^{13/} The Maine Port Authority is now part of the Department of Transportation. 23 M.R.S.A. § 4205, P.L. 1975, c. 771, § 257.

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operate any kind of port terminal facility within the State. Id., § 1. To accomplish these ends, it has the power of buying, leasing and otherwise acquiring, holding, owning, controlling, leasing, operating and otherwise using, selling and otherwise disposing of real property and such rights and easements therein as the Authority's directors may consider necessary for its purposes. Id. Thus, its purposes and powers are quite broad.

The Bureau of Public Lands, in 1975, was delegated jurisdiction over State-owned submerged lands for management and leasing purposes. P.L. 1975, c. 285, now codified at 12 M.R.S.A. § 558. The Director of the Bureau was authorized to:

"Lease, upon such terms and conditions and for such consideration as he deems reasonable, for a term of years not exceeding 30, the right to dredge, fill or erect permanent causeways, bridges, marinas, wharves, docks or other permanent structures on lands, including submerged and intertidal lands owned by the State."

The two enactments must, if possible, be read together in order to give both of them the effect intended by the Legislature. State v. London, 153 Me. 123, 127-28 (1960). A repeal by implication is not favored. Id.; Small v. Gartley, 363 A.2d 724, 729 (Me. 1976). The interplay between the two enactments authorizes the Maine Port Authority to use whatever land the State owns in Portland Harbor it deems necessary to effectuate its purposes, without the necessity of obtaining a lease from the Bureau of Public Lands. See Opinion of Attorney General, dated March 13, 1979, to Lee Schepps. However, the Bureau of Public Lands has the authority to lease those State-owned lands in Portland Harbor not deemed necessary for the purposes of the Maine Port Authority. This scheme contemplates cooperation between the two governmental entities, whereby the Bureau of Public Lands will issue leases in Portland Harbor only with the Maine Port Authority's statement that it does not deem the land involved to be necessary for its purposes.^{14/}

IV. CONCLUSION

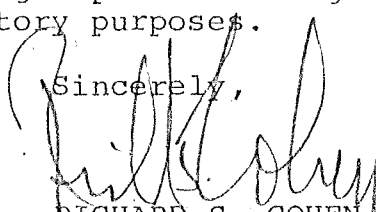
In our opinion the status of the flats and submerged lands in Portland Harbor are as follows. The City of Portland was ceded rights in the submerged lands and flats owned by the State in 1887

^{14/} A memorandum of understanding outlining this policy is presently being worked on by the Bureau of Public Lands and the Maine Port Authority, through the Department of Transportation.

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in Back Cove and in the Fore River located to the west of the Portland Bridge, as it existed in 1887, and not within the 1907 territorial boundary of the City of South Portland. The Maine Port Authority and the Bureau of Public Lands both have jurisdiction over all other State-owned lands in the Portland Harbor, with the former having a paramount right to these lands in order to fulfill its statutory purposes.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC/d