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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 23, 1980

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

Re: Portland Street Pier

Dear Mr. Irland:

You have inquired whether a submerged lands lease may be required for the "rehabilitation" by the City of South Portland of the pier known as the Portland Street Pier located in Portland Harbor. Specifically, the question is whether the so-called "constructive" easement granted by Title 12, M.R.S.A. § 558(3) to the owners of structures actually upon the submerged lands as of the effective date of the Act permits the "rehabilitation" of the present pier to be made without a submerged lands lease.[1/] Although the answer to this question is not free from doubt, we conclude that a decision by the Bureau to require a lease would be legally justifiable if the Bureau determines that the proposed use of the pier would not fall within the 1975 use or that any proposed alteration would substantially change the nature of the structure.

The facts, as we understand them, are as follows. In 1975, the Portland Street Pier was used as a marina to berth and repair small pleasure craft. The City of South Portland intends to rebuild the pier, replacing its decking and installing several new pilings. The City intends to use the pier as a landing for larger lobster boats, possibly in conjunction with a lobster pound. It appears that the function is being changed from recreational to commercial fishing.

1/ This Opinion assumes that the City of South Portland possesses no other interest in the submerged land with respect to the Portland Street Pier other than the constructive easement granted by 12 M.R.S.A. § 558(3).

The grant of the submerged lands constructive easement is set forth in 12 M.R.S.A. § 558(3) as follows:

> "The owners of all structures actually upon submerged or intertidal lands on the effective date of this Act shall be deemed to have been granted [a 30 year] easement."

The language of the grant does not specify how the structures covered by the grant may be used. Moreover, the legislative history is silent on this aspect of the provision.

We believe that in light of the Act's silence on the permissible uses of these structures, the statute is susceptible of two possible interpretations. The first is that the Legislature did not intend to place restrictions on the uses of these structures. The second is that the Legislature intended the easement to apply only to the use at the time of the grant. Although the intent of the Legislature is not entirely clear, in view of the public trust nature of the submerged lands, the history surrounding the grant of the constructive easements and the consequences flowing from each interpretation, it is our opinion that the second interpretation is the more reasonable of the two. In other words, the use of such a structure is limited to its use at the date of the grant.

The submerged lands are held in trust by 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 public trust derives from the Massachusetts Colonial Ordinances of 1641-1647, which is part of the common law of Maine. Sawyer v. Beal, supra at 357. In discussing this public trust, the Supreme Judicial Court of Massachusetts found that where the Commonwealth has made a grant of submerged lands, the grantee acquires only those rights necessary to fulfill the purposes of the grant, i.e., the grantee may use such lands only for the purposes for which the grant was made. Boston Waterfront Development Corp. v. Commonwealth, 393 N.E.2d 356, 366 (Mass. 1979). No Maine decision so clearly defines the extent of rights relating to submerged lands. However, we find Boston Waterfront to be a natural extension of the reasoning found in Maine decisions, and accept its holding as applicable to submerged lands in Maine. See Boothbay Harbor Condominiums, Inc. v. Department of Transportation, 382 A.2d 848, 855 (Me. 1978); Opinion of the Justices, supra; Sawyer v. Beal, supra; see also Shively v. Bowlby, 152 U.S. 1, 19 (1894). Thus, determining the purpose for which the constructive easement was granted is of particular importance in defining what, if any, limitations may exist on its use.

When interpreting grants by the State of interests in submerged land, the grant is construed in favor of the State. Attorney General v. Revere Copper Co., 25 N.E. 605, 607 (Mass. 1890); Suffolk Co. v. Edwards, 148 N.Y.S. 305, 307 (1914); see Boothbay Harbor Condominiums, Inc. v. Department of Transportation, supra at 855. Moreover, there is authority for the proposition that the State cannot convey away all of its interest in submerged land, the State only being able to convey proprietary interests for particular public purposes. See Boston Waterfront Development Corp. v. Commonwealth, supra; Opinions of the Attorney General, dated July 16, 1980 and September 9, 1976; cf. Illinois Central Railroad Co. v. Chicago, 176 U. S. 646, 660 (1900). Thus, the silence of the Act must be construed against the grantees of the constructive easements, and the interests conveyed by the Legislature must be for particular, and not unlimited, purposes.

A narrow construction of these easements is supported by the apparent objectives which motivated the enactment of 12 M.R.S.A. § 558(3). The circumstances underlying the enactment of this provision strongly suggest that the purpose of the grant in 1975 was to legitimize, in some way, the numerous structures illegally placed on the submerged lands. Any party utilizing submerged lands must trace his interest to a grant from the State of the appropriate proprietary interest permitting such use.[2/] Opinion of the Attorney General, dated July 16, 1980. It appears that numerous structures were placed on the submerged lands without such a grant. Since these structures constituted a trespass, the State could have sought to have them removed or demanded some sort of consideration. Shively v. Bowlby, supra at 13, 19 (1893); see Beckwith v. Rossi, 157 Me. 532, 537 (Me. 1961). However, aware that it was for the first time implementing a comprehensive administrative program to manage the submerged lands, the Legislature apparently found it equitable and practical to grant a 30-year easement to these trespassory structures. The grant was equitable in view of the ignorance of much of the public relating to the State's interests in submerged land, and the grant was practical since vast administrative and legal resources may have been required to exact consideration for, or effect the removal of, these structures. When this objective of legitimitizing the existence of these previously trespassory structures is viewed in the context of the broader legislative purpose of attempting to eliminate the uncontrolled use of submerged land, it becomes unreasonable to assume the Legislature intended to permit any possible use without some control. Thus, a strict construction of the grant is most consistent with the overall legislative scheme.

2/ The issuance of a license by a municipality for the construction of wharves and weirs does not alienate any proprietary interest. Opinion of the Attorney General, dated March 13, 1975.

A consequence of permitting any use of these structures would be to seriously undermine one of the primary objectives of the Act, namely, to establish a comprehensive administrative program to manage and assist in the development of the submerged lands. The owner of a structure could drastically change the use of that structure, thereby damaging any development scheme of the Bureau. Moreover, the owner would then be able to obtain a much more intensive and profitable use, not in existence or contemplated in 1975, without appropriately compensating the State.

Even assuming it could have done so, the Legislature did not express a grant for all possible uses of these structures, and the history behind the Act and the Act's objectives argue against a grant for all purposes. Therefore, the grantee of a constructive easement under 12 M.R.S.A. § 558(3) may use the structure for the same purposes, and not to a substantially greater extent, as the structure was used at the time of the grant in 1975. The grantee of such an easement may do whatever is reasonably necessary to the enjoyment of the easement and to keep it in a proper state of repair. See, Ware v. Public Service Co. of New Hampshire, 412 A.2d 84, 86 (Me. 1980); Beckwith v. Rossi, supra; 28 C.J.S., Easements, § 94d; see also Reed v. A. C. McLoon Co., 311 A.2d 548, 552 n. 8 (Me. 1973); Hammond v. Woodman, 41 Me. 177, 202-203 (1856). The grantee of the easement may also make alterations which do not increase the extent of use or change the manner of use. See Beckwith v. Rossi, supra, at 537; 28 C.J.S., Easements § 95b. Where the burden on the grantor is not significantly increased or changed, the grantee normally may replace, reconstruct or rebuild in order to make the easement fit for the use for the purposes of the grant. See Gendrow v. Central Maine Power Co., 379 A.2d 1002, 1005 (Me. 1977); 28 C.J.S., Easements, § 95b. Therefore, the grantee of a constructive easement may reconstruct or rebuild the structure on submerged land so long as such change does not increase or alter the burden on the State.

Based upon the above analysis, the operative legal principle may be summarized as follows: the Bureau of Public Lands may require a lease when the use of a structure on submerged land no longer falls within the 1975 use or the alteration of the pier substantially changes the nature of the structure. Having articulated the relevant principle, we shall offer some thoughts on how it should be applied in a particular case.

The question of whether a lease may be required entails factual as well as legal determinations. Furthermore, the governing legal standard is of a rather general nature, and thus its application to particular facts necessarily involves some measure of administrative discretion and possibly in some instances technical expertise.

Accordingly, the decision must be made on a case-by-case basis by the agency responsible for managing the submerged lands, the Bureau of Public Lands.

Turning to the present case, if the Bureau wishes to decide the lease question before any structural or functionsl changes are made, it would seem logical to request a detailed proposal from the City of South Portland. That proposal could then be reviewed in light of the criteria set forth in this opinion. Should the Bureau determine that certain aspects of the proposal warrant a lease, it could advise the City so as to allow it to modify its proposal, negotiate a lease, or contest the matter.

As indicated by the preceding paragraphs, we view the determination of whether to require a lease to be principally an administrative decision to be made in accordance with the criteria outlined herein. Nevertheless, we recognize that in particular instances, the Bureau may have questions as to whether reasonable legal arguments exist to support a decision to require a lease. In those instances, with the benefit of both all the facts and the Bureau's technical expertise, we would be more than happy to address such questions.

Sincerely,

RICHARD S. COHEN
Attorney General

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