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CITIZENS' GUIDES TO OCEAN AND COASTAL LAW

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Municipal Participation in Submerged Lands Lease Decisions



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 246 Deering Avenue
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 December, 1992

Introduction

In coastal communities, one of the important functions of comprehensive planning is to ensure that new development does not reduce or block existing means by which the public, including commercial fishermen, boaters, and recreational users, can obtain access to the shore. The State's submerged lands leasing program may be of use in particular situations to help preserve some of this access. The purpose of this publication is to ensure that towns do not overlook this program as a supplement to their local waterfront and public access planning efforts.

People who are interested in building a new wharf, pier, marina, or similar structure over State-owned waters (on submerged lands) need to apply to the Bureau of Public Lands (BPL) for a lease from the State. Local governments have an oppor-

• tunity to comment on whether the proposed use is consistent with State standards and local regulations. The process and standards are detailed in the BPL rules¹ and the Submerged Lands Act.²

In very specific circumstances, if the proposed use will unreasonably interfere with customary or traditional public access to the shore, the BPL may require the applicant to provide public compensation. For example, if a proposed marina would eliminate a shore access way which had traditionally and customarily been used by the public, the BPL, in consultation with municipal officials, can require the applicant to provide a public walkway or similar facility as a condition of granting the lease. The law does not require the applicant to provide new public access where none has existed previously, but it does provide a way to protect existing public rights.



Produced by the Sea Grant Marine Advisory Program, University of Maine, Orono

Municipalities should not view the Submerged Lands Act and Rules as the single vehicle for resolving their public access problems. Towns need a multi-pronged shoreline access effort, including waterfront zoning, public access planning, selected land and easement acquisition, public investment, and safeguarding of existing public rights. As one part of this public access effort, towns can utilize the submerged lands leasing process to promote waterfront goals and protect customary or traditional public access ways from unreasonable interference by projects which require submerged lands leases. Local officials, planning boards, and harbor masters should be aware of the submerged lands conveyance process and should be prepared to participate in that process on behalf of local residents.

State Owns Submerged Lands In Trust

"Submerged lands" are those lands beneath coastal waters, from the mean low water mark seaward to the three-mile boundary;³ land below the mean low water mark of tidal rivers upstream to the farthest natural reaches of the tides; all land below the natural low water mark of great ponds (10 acres or more); and the river bed of international boundary rivers out to the international boundary. Those lands are owned by the State of Maine.⁴

But the State may not sell, lease, or give away these lands however it wants. By virtue of the "public trust doctrine," a set of principles embodied in American property law, submerged lands (including the waters, land beneath those waters, and living resources within those waters) must be held by the State in trust for the benefit of the public.⁵ The State must act as a trustee to safeguard public interests in those lands.

Maine's Submerged Lands Act is based on this doctrine. It allows the State, through the BPL, to enter into leases for a specific term to permit the

construction of structures such as piers, wharves, and docks to promote commerce, navigation, or other productive use of the waters. But the BPL may only enter into these leases if it determines that the proposed use meets standards which protect the public's ability to exercise their rights to use and enjoy submerged lands. In addition, the Act requires the applicant to pay rent to the State to compensate it for the private use of public lands.

What Uses Are Allowed on Public Trust Lands?

Maine's law distinguishes between two different geographic areas in the application of the public trust doctrine. The general public has a right to use the publicly-owned submerged land area (seaward of mean low water), for the full range of evolving public trust uses (e.g., navigation, commerce, fishing, swimming, recreation, environmental protection). Private individuals do not have the right to make *exclusive* use of a particular site unless they first obtain a lease or easement from the State.

In contrast, the intertidal area (mean low to mean high water) is generally owned by the owner of the land above the mean high water line; the public has a right to use the privately-owned intertidal area, but only for the purposes of fishing, fowling, and navigation, and activities related to these purposes.⁶ The owner of the intertidal land can use those lands without obtaining any lease from the State. However, the intertidal owner's use is restricted by zoning, environment, and other regulations, and is subject to a reserved easement for the public to use the intertidal area for fishing, fowling, and navigation.

When is a Submerged Lands Lease or Easement Required?

The State's Submerged Lands Act requires a person to obtain a lease or easement before doing

any dredging or filling, or placing any structure (meaning any object built or placed) on, in, or over submerged lands. The few limited exceptions to this requirement, when no lease or easement is required from the BPL, are:

- exercise of a non-exclusive public trust right by the general public (e.g., swimming, fishing, navigation);
- non-permanent structures (i.e., to occupy for less than 7 months per calendar year) which are also less than 500 square feet and water dependent, or less than 2,000 square feet and for commercial fishing;
- aquaculture facilities (but a lease is required from the Department of Marine Resources);
- certain Maine Department of Transportation bridges;
- harbor improvements by the federal government (e.g., Army Corps of Engineers dredging);
- moorings;
- single family residential water intake pipes; and
- uses on formerly submerged lands already filled prior to October 1, 1975.⁷

In addition, the Legislature has previously granted "constructive easements" for structures located on submerged lands prior to October 1, 1975. So long as there is no change in the nature or intensity of the use, these existing uses may continue until September 30, 2005.⁸ When the constructive easement terminates, the owner of the structure may apply for a new lease or easement.

How Does the BPL Protect Public Interests in Leasing Decisions?

LEASE STANDARDS

The State's lease application review process protects the public interest in three important ways. First, the Act and Rules establish standards for approval that the applicant must meet before a lease will be granted. These standards are designed to protect commercial marine activities and public trust uses. Specific standards include:

- "the use will not unreasonably interfere with customary or traditional public access ways to, or public trust rights in, or over submerged lands and the waters above those lands;"
- "the use will not unreasonably interfere with navigation, fishing, or existing marine uses of the area, unreasonably diminish the availability of services and facilities necessary for commercial marine activities, or unreasonably interfere with ingress and egress of riparian owners;"
- "the use will not result in significantly increased risk to life or property in the vicinity of the use under conditions of weather and vessel traffic that are likely to be encountered;"
- "the use will comply with more restrictive requirements imposed by state, federal, or municipal agencies with jurisdiction over the area of the proposed project;" and,
- "the use is not otherwise determined to be contrary to the public interest."

Additional standards spell out how the Bureau will determine the acceptability of impacts on commercial fishing industries or infrastructure and

marine habitats, and whether the proposed use will comply with other coastal laws and policies of the State.

PUBLIC PARTICIPATION

A second important means of protecting the public interest is through the process for public participation. The BPL will notify interested parties when it receives a completed lease application. "Interested parties" may include abutting landowners, local municipal officials (including selectmen, planning boards, harbor committees, and harbor masters), local commercial fishermen, commercial marine businesses, and anyone else who has requested notification of a particular project. These parties, and any others, have 30 days to submit comments on the application, although extensions may be granted if sufficient need is demonstrated.

After the close of the comment period, the BPL may, at its option, schedule a public informational meeting to allow the general public to present additional information. However, public hearings are not required, so the BPL will frequently consider testimony at public hearings held by other agencies in lieu of holding its own public hearings.

The BPL will then issue and distribute Preliminary Findings and Conclusions to the applicant, anybody who submitted comments during the initial review period, and other "interested parties." At the end of a 30-day reconsideration period (unless waived because no unfavorable comments were received), the BPL will review any petitions for reconsideration and related information, if any, and issue Final Findings and Conclusions.

PUBLIC COMPENSATION

The third important means of protecting the public interest is a provision which allows BPL to require the lease applicant to provide public compensation (for example, public walkways, park-

ing, or boat launch ramps) when the proposed project reduces existing facilities or opportunities for public use. The Act requires that the BPL consult local officials in determining whether to impose these conditions.

When Required? The rules provide that the BPL, in consultation with local municipal officials, will determine whether the activities proposed by the lessee will result in:

- the loss of customary or traditional public access ways to submerged lands;
- the loss of public trust rights in, on, or over submerged lands; or
- the loss of ingress and egress to riparian owners.

This provision does not allow the BPL to require the creation of new public access rights where none existed previously. It can only be invoked if the proposed project would result in loss of one or more of the public or riparian rights listed above.

The determination of loss will not be limited to the proposed submerged lands lease site, but will consider the impact of the entire project (of which the lease application is part) on traditional and customary public uses, including shoreside access ways to submerged lands and public water-based activities. But public compensation may be required by the BPL only when the Director determines that the degree of interference with traditional and customary public uses would be unreasonable without this compensation or mitigation.

What Required? The Act specifically allows BPL to require "public walkways, boat launching ramps, parking space, or other facilities" as a condition of the lease. "Other mitigation measures" may also be appropriate as well. The Director will negotiate the specifics with the applicant.

Municipal officials will be consulted by BPL to assist it in the determination of the extent of the loss and what public compensation would be appropriate.

In most cases, the public compensation will be accommodated on or in close proximity to the applicant's site. However, under appropriate circumstances, the Act provides the BPL with sufficient flexibility to negotiate for public compensation which is either off-site or different in kind from the loss which will be caused by the proposed activity. When the BPL makes a finding of unreasonable loss, it will determine appropriate compensation on a case-by-case basis, depending on the facts in each situation.

Municipal Input

Municipalities interested in monitoring the submerged lands leasing process as one part of their public access and waterfront strategy should take the following steps:

1. Each town should engage in a process of **public access and waterfront planning**, including identification of public access needs, existing public rights of way to the shore, and existing commercial and recreational water dependent uses. Based on this inventory, coastal towns should develop a strategy for maximizing the benefits of proximity to coastal waters, including a strategy for obtaining new public access and safeguarding existing public access. One component of safeguarding existing public access and furthering waterfront goals should be to monitor, and as required, to participate in the submerged lands leasing process.
2. In advance of any specific project, the town should **assign a board or individual responsibility for reviewing any BPL applications**. For example, a staff person may be given the responsibility to review any no-

tice and decide whether it has sufficient potential impact that it should be brought to the attention of the planning board. Or the harbor master could be given the responsibility to review and comment on behalf of the town. Or the planning board could be asked to review and comment upon any BPL application for any project which also requires planning board review. The point of assigning review responsibility is to make sure that at least one person or board receiving notice will review the application.

3. If the town becomes aware of a particular proposed project which it wishes to monitor further, the municipality should **send BPL written confirmation that it is an interested party** (unless BPL has already acknowledged that status). BPL currently routinely notifies municipal officials of the town in which the project is located, but retains a certain amount of discretion; if the project is in an adjacent municipality, or is particularly important to the municipality, or the municipality wants to ensure that a designated individual receives the notices on behalf of the town, a letter should be sent to confirm interested party status and to request a copy of the completed application.
4. When the application is complete, BPL will notify interested parties of the project being considered and the deadline (at least 30 days later) for submission of written comments. If the town needs additional time for review and submission of comments, it should immediately make a **written request to extend the comment deadline**, stating the facts supporting the need for additional time.
5. The entity or individual designated by the town should **review the application** and, if appropriate, within the comment period (or any extension), **submit written comments** on whether the proposal meets BPL's standards. While the town can comment upon

all of the standards, it may naturally focus on those standards where it has particular expertise including:

- degree of interference with customary or traditional public access ways to submerged lands and coastal waters;
- degree of interference with navigation, commercial fishing industries or infrastructure, marine uses, or commercial marine services and facilities;
- any increased hazards to life or property due to the proposed development, taking into consideration likely weather and vessel traffic; and
- whether the use will comply with any requirements imposed by municipal agencies with jurisdiction over the area of the proposed project.

Towns should be aware that the BPL may also obtain public input by having a staff member attend a municipal hearing on local permits for a particular project. This should work well if the board conducting the hearing is also reviewing the submerged lands lease application for purposes of submitting local comments, or if the local standards for review are similar to the BPL standards. However, if local review issues are different, the public may not be on notice to address the issues raised by the BPL standards. In this case, written comments addressing the BPL standards should be submitted to supplement the public hearing comments.

6. The towns should supply any additional information requested by BPL and consider participating in any public informational meeting that might be scheduled by BPL.
7. If the BPL Director believes that public compensation may be required, the BPL

will ask the town to discuss with the Director the extent of loss or diminution of traditional and customary public uses, and what would constitute appropriate public compensation. The town representatives should be available for ongoing consultation as the Director negotiates with the applicant.

8. The town should review the Preliminary Findings and Conclusions. If it believes the decision is incorrect, within 30 days it should petition the Director to reconsider, submitting arguments and any additional evidence in support of the petition. The municipality should also review the Final Findings and Conclusions. If the town is dissatisfied with the final decision, it should review its own standards and procedures to determine how they may be modified to increase the likelihood of a satisfactory outcome in future projects.

Relationship of BPL and Local Reviews

In addition to the BPL lease application, the town is likely to be evaluating the proposed project for compliance with its:

- shoreland zoning ordinance;
- comprehensive zoning ordinance;
- harbor plan and ordinance; and
- other land use regulations such as site plan and subdivision ordinances, if applicable.

The town's ordinances may well have different standards or more restrictive requirements than the Submerged Lands Act and Rules on certain elements (e.g., land use, traffic, parking, height limits, etc.). Similarly, the BPL may have different

standards or more restrictive requirements than the town on other elements (e.g., customary or traditional public access, commercial marine activities, interference with navigation, etc.). This variation is to be expected since the ordinances, laws, and rules have different missions and objectives.

As discussed above, one of the BPL standards upon which the town may comment is whether the proposed project fails to comply with municipal requirements. However, if the proposed project needs one or more local permits and it does not meet the town ordinance(s), the town can do more than just comment to the BPL; it can deny the necessary permit(s). A denial by the town will invalidate a submerged lands lease, even if the BPL has already granted the lease.⁹

On the other hand, the town might find that the project meets its own ordinances, grant local permits, and comment to BPL that it meets municipal requirements. But the town can still comment on whether the project meets the other BPL standards. Based on the town's comments on the other standards and based on the comments of other interested parties, BPL may still find that the proposed project fails to meet BPL standards and deny the lease application.

An approval by either the town or state and denial by the other may be entirely appropriate given the different standards and criteria to be applied by each. The project may also need permits from other state or federal agencies (e.g., Maine Department of Environmental Protection, U.S. Army Corps of Engineers). A denial by any agency with jurisdiction will keep the project from proceeding as proposed since the most restrictive standards control.

Conclusion

While a municipality may be able to muster its resources to respond to pending submerged lands applications on a case-by-case basis, advanced

planning will strengthen the municipality's ability to participate in this process as part of its broader waterfront and public access strategy. At a minimum, the municipality should assign some municipal official or board responsibility for monitoring and, as appropriate, participating in the submerged lands leasing process.

In addition, advanced harbor, waterfront, and public access planning can make the outcome of the BPL process much more responsive to local needs. For example, a town will be better able to evaluate a proposal for impact on customary or traditional public access ways if it has conducted an inventory of shore access ways or participated in a right of way rediscovery project to identify public access ways which may have fallen into disuse. If the BPL requires public compensation, the town will be prepared to discuss mitigation measures if it has a shoreway access plan and a capital improvements plan addressing infrastructure to support use of public waters. In the same manner, the municipality will be better equipped to evaluate the interference with navigation and existing marine uses and the impact on commercial fishing industries if it has a waterfront or harbor plan.

The submerged lands program cannot be relied upon as the primary means for securing public access to the water; at most, it can protect against new developments unreasonably interfering with existing traditional or customary public access ways. Similarly, it cannot be relied upon as the primary means of protecting existing marine uses, commercial fishing industries, or the commercial fishing infrastructure. However, municipalities should monitor the process and, as appropriate, participate in the submerged lands program as one element of a multi-faceted local strategy to promote waterfront/harbor goals and to protect public access to the shore.

For Further Information:

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Development, Office of Comprehensive Plan-
ning, Maine Shore Access Public Access Series,
*Planning and Implementing Public Shoreline
Access* (December, 1989), and *Coastal Right-of-
Way Rediscovery Programs* (June, 1990).

Endnotes

1. Department of Conservation, Bureau of Public Lands, *Submerged Lands Rules*, January 15, 1992. Depending on the size of the area to which rights are granted and the purpose for which it is to be used, the BPL may issue an easement, standard lease, or dredging lease. For purposes of simplification, in this pamphlet, all three types of conveyances will be referred to generically as a "lease" granted to a "lessee."
2. 12 M.R.S.A. §558-A.
3. In tidal flats, however, if the distance between the mean low water mark and the mean high water mark is more than 100 rods (1650 feet), the upland boundary of the submerged lands is set at 100 rods seaward of mean high water.
4. In 1953, Congress enacted the Submerged Lands Act, which transferred title to lands beneath navigable waters to the states. 43 U.S.C. §§ 1301-1315.
5. 12 M.R.S.A. §559 (1).
6. *Bell v. Town of Wells*, 557 A.2d 168, 170 (Me. 1989).
7. *Submerged Lands Rules*, 1.5.
8. 12 M.R.S.A. §558-A (6). All structures under constructive easement must be registered with BPL by December 31, 1995.
9. A conveyance from BPL for a use which requires permits from municipal, state, or federal agencies is conditioned upon issuance of and adherence to all applicable permits. *Rules* at 1.6 (B) (10).

Prepared by the University of Maine School of Law, Marine Law Institute

Produced by the Sea Grant Marine Advisory Program through a grant from the National Oceanic and Atmospheric Administration/Sea Grant College Program NA 16RG0157-01.



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E-MSG-92-8 PAMPHLET #11/CITIZENS' GUIDE TO OCEAN AND COASTAL LAW 150

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