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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

April 9, 1999

Paul Cleary, Director
Division of State Lands
775 Summer Street NE
Salem, OR 97310

Re: Opinion Request OP-1999-1

Dear Mr. Cleary:

You have asked for advice concerning the authority of the State Land Board (board) to modify its leasing programs for state-owned submerged and submersible lands in light of legislative and administrative exemptions covering certain structures on those lands. We set forth your questions and our short answers below, followed by our analysis.

1. May the board revoke exemptions for certain structures in state waterways and then impose leases on the formerly exempt structures?

The board has authority to require leases of structures in state waterways, including structures previously exempted by law. The board itself may revoke exemptions that it has created by rule; statutory exemptions would need to be revoked or modified by the legislature.

2. Under what circumstances, if any, must the board provide compensation to, or allow recoupment of investment by, owners of previously exempt structures that the board brings under lease?

Riparian landowners have no vested rights to erect permanent structures on state submerged and submersible lands. Therefore, the board may require leases for new construction without compensating the landowners. Likewise, the board may require leases for existing structures that have not been specifically exempted by statute or rule without compensating landowners or allowing them to recoup their investments. The board may have to provide some form of compensation, however, if it were to impose leases on, or require removal of, previously exempt existing structures before the owner's investment was recouped.

Discussion

In 1996, the State Land Board convened a Waterway Leasing Task Force to examine various aspects of the board's leasing programs on state-owned submerged and submersible lands. Among the issues to be addressed were problems arising from statutes and rules that exempt certain uses from lease requirements. During the task force's deliberations, questions arose concerning the effect these exemptions might have on the board's ability to modify the existing leasing program by changing or rescinding exemptions.

1. Authority to Require Leases and Revoke Exemptions

The board's waterway leasing authority can be most readily understood in the context of the general rights of the state and riparian landowners vis-a-vis submerged and submersible lands.⁽¹⁾ The State of Oregon, as sovereign, owns all of the submerged and submersible lands underlying navigable waters in this state. *Brusco Towboat Company v. State Land Board*, 284 Or 627, 634-35, 589 P2d 712 (1978) (*Brusco II*); see also *Brusco Towboat Company v. State Land Board*, 30

Or App 509, 514-16, 567 P2d 1037 (1977) (*Brusco I*) (summarizing common law and constitutional origins of state's title).

Riparian landowners, i.e., those whose land adjoins a waterway, have both proprietary rights and nonproprietary privileges. Their proprietary riparian rights exist by virtue of the character and situation of the land they own and include the right of access to the water and the right to a reasonable use of the water as it flows past the land. *Brusco I*, 30 Or App at 523; *Hoff v. Peninsula Drainage District No. 2*, 172 Or 630, 638-639, 143 P2d 471 (1943); 36 Op Atty Gen 150, 156-57 (1972). Their nonproprietary riparian privileges arise by virtue of the state's permission, whether express or implied, to erect structures on and to occupy the water over the state's submerged and submersible lands. The primary example of such a nonproprietary privilege is the license to build structures in aid of navigation out to the line of navigability. *Brusco II*, 284 Or at 638-44; *Brusco I*, 30 Or App at 524-26; 36 Op Atty Gen at 157, 165-67 (citing *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892), *aff'd* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1893), and other authorities).

We have previously summarized these principles with respect to tidal submerged lands as follows:

[T]he so-called riparian right to place structures on the state's tidal submerged lands cannot exist except by permission of the public, either express or implied and should, in the case of a wharf, be more accurately described as the public's license or permission to place a wharf on the public's property, in order to encourage some benefit to the public by way of aiding navigation or commerce. * * * The "right" to construct a wharf is based on the concept that a riparian owner cannot be denied access to the water which would be the result if the privilege of building the wharf on the state's property were granted to someone else.

Thus, the reason for the state to grant or withhold the privilege of wharf building (i.e., whether in a particular case a wharf would benefit commerce) as well as the reasons why such privilege must be given to the riparian owner when it is granted, make clear that *no proprietary or vested property right independent of legislative action, either express or implied, inheres in the riparian owner to build a wharf.*

36 Op Atty Gen at 171 (citations omitted, emphasis added). Although this statement was limited to tidal submerged lands, the same is true for tidal submersible lands and submerged and submersible lands beneath navigable fresh waters. 36 Op Atty Gen at 164, 181.

Because the state owns the submerged and submersible lands under navigable waters, the state has authority to institute a leasing program for those lands and the waters above them, to decide on the scope of that program (i.e., to create exemptions) and to subsequently modify its scope.⁽²⁾ *Brusco II*, 284 Or at 638-46. Thus, the state may revoke the riparian privilege to erect structures, even those in aid of navigation, on the state's lands and the waters above them and require the riparian owner to enter into a lease for such use or prohibit that use altogether. *Id.* at 646.

The state has delegated authority over its waterway leasing program to the board. ORS 274.915; *see Brusco II*, 284 Or at 633 n 7. The board's authority to impose leases, however, is limited to the extent the legislature has created statutory exemptions from leasing requirements. For example, ORS 274.043 exempts certain floats and docks from leasing. These statutory exemptions may only be revoked by the legislature. But for structures not expressly exempted by statute, the board itself may require leases for, or prohibit, such structures. 36 Op Atty Gen at 188-192, 195, 202-04.

2. Compensation

Given the board's leasing authority, the next issue is under what circumstances, if any, the board must provide compensation to owners of previously exempt structures that the board brings under lease. We discuss both future construction and existing structures.

a. Future Construction

Because the riparian privilege to build structures on the state's submerged and submersible lands is nonproprietary and may be withdrawn by the state at any time, riparian landowners have no right to compensation if the state withdraws that privilege before it is exercised. *Brusco II*, 284 Or at 638-642. Thus, if the board revokes an exemption from its leasing program, the board does not need to pay compensation to riparian owners who have not yet built structures.

b. Existing Structures

Riparian landowners who have exercised the common law privilege to build structures on the state's submerged and submersible lands may have done so (1) without specific authority but in the absence of a prohibition against such

construction, e.g., certain marinas and private docks; (2) under specific statutory authority, e.g., an exemption in ORS 274.043; (3) under an exemption in the board's administrative rules, OAR ch 141, div 82; or (4) without an exemption but later covered by one. We discuss each of these situations below.

1) Constructed in Absence of Prohibition

In *Brusco II*, the Supreme Court addressed the situation of riparian landowners who built structures on the state's submerged and submersible lands in the absence of a prohibition against such construction. The court concluded that this privilege to use state-owned submerged and submersible lands, which is not covered by an express statutory franchise, may be revoked by the state without compensation and without permitting the owners to recoup their investments. 284 Or at 642-46.

In *Brusco I*, the Court of Appeals had concluded that common law cases permitting certain uses of submerged and submersible lands constituted "affirmative representations" upon which riparian landowners could reasonably rely, and that landowners who had built navigational structures in reliance on these cases "must be permitted to continue their use of such facilities, rent free, for a period of time reasonably necessary to recoup their expenditures, if they have not already done so." 30 Or App at 528. In *Brusco II*, the Supreme Court rejected this approach, finding instead that there could be no reliance on a privilege which has always been revocable at the will of the state, that the plaintiffs were not entitled to compensation and that the board was not estopped from collecting rent.

We have consistently described the riparian owner's license under consideration here as a "passive" or "implied" license. * * * While application or pronouncement by this court of a rule of property law may create vested rights, our recognition that a privilege exists until prohibited by the legislature does not entitle those who choose to exercise that privilege to assume that the legislature will not act to limit or prohibit it in the future.

In short, we find that the Board's requirement that riparian owners who have taken advantage of the legislature's past failure to prohibit their exclusive occupation of the state's submerged and submersible land pay rental for the privilege of continuing to do so in the future does not violate any right of property. Leases may, therefore, be required of those parties who claim riparian status and who have exercised in the past the privileges accompanying that status.

Brusco II, 284 Or at 646.

2) Constructed under Express Statutory Franchise⁽³⁾

The *Brusco* cases concerned a challenge to the validity of the board's requirement that certain users of submerged and submersible lands under navigable waters enter into leases and pay rent. Consequently, the issue of structures built by riparian landowners under the wharfing statute, ORS 780.040,⁽⁴⁾ or the statutory exemption from the leasing requirements, ORS 274.043, was not before the courts in either *Brusco I* or *Brusco II*.⁽⁵⁾ Nevertheless, from the reasoning in *Brusco II*, we believe a court might find that those landowners relied on an express franchise.⁽⁶⁾ Under the Court of Appeals' analysis in *Brusco I*, an express franchise can be revoked, but not without compensation or allowing the owner to recoup the investment in the structure. 30 Or App at 528-529. Although the Supreme Court has not specifically endorsed the Court of Appeals' conclusions regarding the necessity of allowing recoupment in cases where a franchise exists, we think this might well be the result. This is because the Supreme Court's *Brusco II* decision overruled the Court of Appeals only on the question whether the plaintiffs in that case had a protectable interest, not on the general question of how compensation should be determined if a protectable interest exists. The outcome in any specific case, however, will depend upon an analysis of the exemption at issue.⁽⁷⁾

Compensation in some form or allowing recoupment of investment may also be required for structures built under an exemption from the leasing requirements contained in prior statutes and "grandfathered" by later amendments. The courts may find that the structures were built in reliance on an express franchise and require the state to compensate the owner or permit the owner to recoup the costs of construction before bringing the structure under lease. For example, this might be the case with a structure that, at the time it was built, was exempt from leasing by 1979 Oregon Laws, chapter 793. That law was repealed by 1991 Oregon Laws, chapter 521, but a "grandfather" clause protects structures built under the prior law. ORS 274.043(2).

3) Constructed under Administrative Rule Exemption

We believe that structures built in reliance on exemptions found in the board's rules are analytically equivalent to those built in reliance on statutory exemptions. The board is authorized to manage submerged and submersible state lands and

may do so by rule. *Brusco II*, 284 Or at 633. Although the Court of Appeals in *Brusco I* did not expressly state that a regulatory exemption is equivalent to a statutory exemption, the courts would likely treat the board's rules as equivalent "affirmative representations" of a privilege or franchise. Accordingly, we conclude that the board probably may not bring such structures under lease without paying compensation or permitting recoupment of investment.

4) Constructed without an Exemption but Later Covered by One

Structures built before the adoption of a specific statutory or regulatory exemption, but subsequently covered by an exemption, are most likely subject to lease without any provision for compensation or recovery of investment. Unless explicitly "grandfathered" by the legislature, we believe a court faced with the issue would conclude that these structures were not built in reliance on any affirmative representation of permission and therefore are not entitled to the benefit of a franchise.

3. Regulatory Authority

The above discussion focuses on the board's authority to convey interests in the state's land (through leases). We note that the board has additional powers. The board also has authority to regulate for public safety, environmental protection and protection of navigation. *See* 36 Op Atty Gen at 191; *Port of Portland v. Reeder*, 203 Or 369, 404, 280 P2d 324 (1955) (legislature may authorize port authority to remove houseboats that interfere with navigation). Fees or charges related to such regulation, or permits issued under such regulatory programs are different from the leasing exemptions discussed above, and are unaffected by the analysis in this opinion. In other words, the fact that a structure is exempt by law from leasing does not mean that it is exempt from fees related to the costs of environmental or safety regulation. Although the exemption statutes and rules covering

wharves and private docks may now place certain limits on what the state may do with respect to those structures, the board through its regulatory authority may abate conditions that constitute nuisances, impediments to navigation, etc.

Sincerely,

Donald C. Arnold

Chief Counsel

General Counsel Division

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1. The terms "submerged" and "submersible" lands refer to both tidal and fresh waters.

Submerged lands are lands which lie below the ordinary low-water mark of navigable waters. Submersible lands are lands which lie between the ordinary low-water mark and the ordinary high-water mark in navigable waters, and all other islands, shore lands, or other lands held by or granted to the state by virtue of her sovereignty.

Brusco Towboat Company v. State Land Board, 284 Or 627, 630 n 3, 589 P2d 712 (1978) (*Brusco II*)

2. Common law principles guaranteeing all citizens free use of waterways arguably insulate certain transitory activities (such as shipping and the movement of goods, including the erection of temporary log booms) from leasing requirements. 36 Op Atty Gen at 199-202.

3. Although the board could not revoke legislatively enacted exemptions or bring such exempt structures under lease without a change in the statutes, we nonetheless address this situation for purposes of clarifying our analysis.

4. The Oregon Supreme Court has given the term "wharf" a narrow definition. In *Port of Portland v. Reeder*, 203 Or 369, 385, 280 P2d 324 (1955), the court concluded that wharf means a substantial and permanent structure built out from the upland and forming an extension thereof, for the purpose of allowing vessels to receive and discharge cargo and passengers, and does not include floating residences, and the pilings, piping and floating boardwalks providing access to them. This rationale would exclude marinas from the definition of wharf. *See* 36 Op Atty Gen at 182-185. ORS 780.040 was amended in 1973 to further narrow its scope by excluding wharves for passenger vessels. The amendment limited the permissible role of statutory wharves to serving those vessels "engaged exclusively in the receipt and discharge of goods

or merchandise or in the performance of governmental functions." Or Laws 1973, ch 328.

5. As the court in *Brusco II* noted:

We are not concerned, in this case, with wharves which the legislature has expressly authorized by ORS 780.040 and its predecessors, and for which the Board does not require leases.

Brusco II, 284 Or at 642. Although not stated by the court, the same would have been true of structures exempt from leases under ORS 274.043.

6. ORS 780.040 does not, by its terms, state that wharves are exempt from leasing requirements. Yet, the *Brusco* courts appear to have concluded that wharves are exempt, noting that "the legislature has conferred upon riparian owners certain wharfing privileges which are not subject to the lease program." *Brusco II*, 284 Or at 631 (quoting *Brusco I*, 30 Or App at 512). The Supreme Court also notes in the summary of its holdings that the board is not estopped "by decisions of this court" to collect rent for structures "other than wharves within the purview of the wharfing statute" that were placed on state lands before institution of the leasing program. *Brusco II*, 284 Or at 649. Thus, it is not clear whether the court in *Brusco II* found an exemption from leasing in ORS 780.040 or by virtue of previous decisions of the court interpreting that statute. *Cf.* 36 Op Atty Gen at 187-88 (relying on court decisions to conclude that, subject to qualification, exercise of right to construct a wharf under ORS 780.040 creates a right to maintain its existence without payment of compensation).

ORS 274.043 provides express exemptions from leasing requirements for certain private floats and docks, and authorizes the Division of State Lands, by rule, to provide for additional exemptions. Although wharves are not listed, the division's rule includes an exemption for "[u]ses exempted by law." OAR 141-082-0010(3)(g).

7. We do not believe that an exercise of regulatory authority by itself gives rise to a claim of franchise. Thus, the state's issuance of a permit under such regulatory schemes as the Removal/Fill Law, ORS 196.800 to 196.900, or Section 404 of the federal Clean Water Act, 42 USC § 1344, does not constitute an "affirmative representation" within the meaning of the *Brusco* cases. The *failure* to obtain all necessary permits, however, might extinguish a claim of franchise under ORS 780.040 or 274.043.

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