BEFORE THE COMMISSIONER OF LAND PATENTS

STATE OF MARYLAND

IN THE MATTER OF	:	
THE APPLICATION FOR	:	
A PATENT BY	:	WARRANT APPLICATION NO. 71
Maryland Department of Natural Resources		

OPINIONS AND FINDINGS

The above-captioned matter involves the application of the Maryland State Department of Natural Resources for a patent of a particular parcel of vacant land containing approximately 11.9 acres lying in the Sixth Election District of Dorchester County, Maryland.

The Application for a Warrant to Survey Vacant Land on a Prior Certificate of Survey was filed with the Commissioner of Land Patents in accordance with §13-412, Real Property Article, Annotated Code of Maryland (1981 Repl. Vol., 1983 Cum. Supp.) In due course, actual notice was given to all adjoining land owners and various State agencies, and notice by publication was given in accordance with §13-308, Real Property Article. The actual fair market value of the land embraced by the survey was determined in accordance with §13-313, Real Property Article.

As required by law and after proper notice, a hearing was held on December 13, 1984, at 1:00 p.m. and continued, by agreement of the parties, until February 22, 1985, to allow the applicant to submit additional evidence and legal argument. Present at the hearing were the Commissioner; his Deputy; the Assistant Attorney General assigned;

Jeffrey Hunt, professional court reporter; Thomas A. Deming, Assistant Attorney General representing Torrey C. Brown, M.D., Secretary of the Department of Natural Resources, applicant; Pamela P. Quinn, Assistant Attorney General, Department of Natural Resources; Leonard Cassanova, Director, Shore Erosion Program, Department of Natural Resources; Turbit H. C. Slaughter, former director, Coastal and Estuarine Geology Program, Department of Natural Resources; Randal Kerhin, Program Chief, Coastal and Estuarine Geology Program, Department of Natural Resources; and George Forlifer, District Coordinator, Program Open Space, Department of Natural Resources. The Commissioner explained the procedure to be followed at the hearing and the individuals who proposed to testify were duly sworn.

The basic issues to be decided in the matter of Warrant Application No. 71 are: does a vacancy as defined by §13-301, Real Property Article exist; if it exists, where does it lie and what are its metes and bounds; if it exists, what is its purchase price; and

-How does a citizen or a private agency discover who holds title to any parcel of land?

-Where does title to land originate and where ought that title be recorded?

-Can and should a patent issue to a State agency?

The expert testimony presented by the applicant's witnesses establishes to the satisfaction of the Commissioner that a vacancy exists. The vacancy is a man-made island created near a patented, natural island. The application carefully reviewed all available evidence with regard to the title and survey history of the patented, natural island and provided expert witnesses to examine erosion

patterns in the area. The Commissioner asked if the vacancy had been placed in an area that had eroded away from the patented, natural island.

Historical and cartographic evidence of the erosion patterns presented by the applicant's witnesses, most notably by Turbet H. C. Slaughter, former program director, Coastal Estuarine Section, Maryland Geological Survey, indicated that the northeast corner of the patented natural island, Barren Island (off of which the land in question lies) has been subject to the least erosion of all sides of the island. Mr. Slaughter concluded that in his opinion the area where the land-in-question had been created had always been underwater and had not eroded away from the patented natural island.

Based upon the evidence submitted and the testimony given on December 13, 1984, and there being no objections as provided for in §§13-401 and 13-402, Real Property Article, the Commissioner finds in favor of the applicant's contention that a vacancy exists in the size and at the location described as shown on the plat dated February 28, 1983 and received in this office on March 21, 1983.

With respect to the purchase price of the vacancy, the Commissioner, after careful consideration and review, finds that it would serve no public good to require one State agency to pay another the fair market value as determined in accordance with §13-313, Real Property Article. Therefore, as allowed by §13-313 (c) (2), the Commissioner sets the purchase price at $25.00, which is the amount of the deposit submitted by the applicant in accordance with §13-412 (d) (2).

There is ample historical precedence indicating that the Lords Baltimore and, since 1776 the State of Maryland, have reserved certain lands through the land patent process. As early as 1642 warrants to survey vacant land were issued to, and certificates of survey were recorded, on behalf of the Lord Proprietor, thus preventing any applications for patent for these lands by private individuals. The practice continued after the adoption of the first State Constitution in a slightly altered form, with patents being issued to State agencies as late as 1960.

In 1959 an Assistant Attorney General even advised the then administrative assistant of the Land Office on the form the title for patent should take:

> "State of Maryland, to the use of -------, its successors or assigns,"

clearly linking the earlier practice of reserved lands to the more modern practice of issuing patents to State agencies. See Letter of Advice from Shirley Brannock Jones, Assistant Attorney General to Malcolm W. Waring, Administrative Assistant, Land Commissioner's Office, August 27, 1959.

Because a patent is the first or original grant from the sovereign, i.e., the Lord Proprietor and later, the State, it is to that document that a search through a chain of title should ultimately lead. In other words, all land in Maryland should be traceable through deeds, estate settlements, equity court proceedings, and other public records to a patent. In return, the land patent process provides a clear and simple means of recording the discovery of any vacant lands among the patent records, and upon the records of the county or counties in which the vacant land is located.

The Department of Natural Resources asserts that it applied for a patent and is participating in the patent process "under protest" and "does not concede any requirement that the Department of Natural Resources must apply to the Comissioner for a patent." See Department of Natural Resource's Brief at p. 15 and and Transcript at p. 17. The Department of Natural Resources argues that State agencies are not required to obtain land patents for vacant land. The Department of Natural Resource's argument can be distilled to one point: Title 13 provides that "any person" may obtain a patent for land and neither the State nor State agencies are included in the definition of "any person". The Department of Natural Resources cites §1-101 (j), Real Property Article for this proposition.

It is far from clear, however, that the General Assembly intended to exclude from the land patent process the State and State agencies by its use of the word "person." In fact, certain provisions of Title 13 suggest otherwise. For instance, "persons" who may file an objection to the granting of a patent are listed in §13-401 as including "any persons", "any . . . governmental body," and "[t]he State or any agency of the State."

In addition, the General Assembly's previous enactments pertaining to the land patent process have consistently used the term "person" -- notwithstanding any statutory definition -- to include the State and State agencies. Sections 22 (c) and 23 (c), Article 54 as enacted by Chapter 355 of the Laws of Maryland 1967, illustrate this point. Section 22 (c) provided in part that "[a]n objection on the basis that the vacant land . . . is required for public purposes may be made only by an agency of the State, a municipal corporation, or any governmental

body of any State subdivision having authority to acquire such land by eminent domain." Section 23 (c) provided in part that, "[a] determination by the Commissioner that the person filing the objection would be authorized to acquire the vacant land . . . by eminent domain shall terminate the proceeding . . . and a final order to that effect shall be entered by the Commissioner." (Emphasis added.) It is clear that the General Assembly's use of the word "person" in this context referred to the governmental entitites set forth in §22 (b).

Moreover, in the past, the Commissioner of Land Patents has interpreted the General Assembly's use of the word "person" to include State agencies and political subdivisions as evidenced by the issuance of patents. See, for example:

LAND OFFICE (Patents) JLB#1 [MdHR 17,517], p. 80-81 Maryland Department of Game and Inland Fisheries, "Helens Fancy:" 31.6 acres, Wicomico County, September 23, 1959

LAND OFFICE (Patents) JLB#1 [MdHR 17,517], p. 27-28 Maryland Department of Forests and Parks, "Flagstone," 3.729 acres, Howard County, February 4, 1954

LAND OFFICE (Patents) ECP#1 [MdHR 17,518], pp. 4-8 City of Salisbury, "Coty Cox Branch," 2.6 acres, Wicomoco County, July 22, 1977[1]

In all, it seems only reasonable to argue that the General Assembly did not intend to exclude State agencies from the land patent process by its use of the word "person" and, therefore, the Commissioner rules that the Department of Natural Resources, as well as other State agencies, properly may apply for a land patent.

The conclusion that State agencies may apply for patents is fully

consistent with a stated legislative purpose of the land patent process -- the avoidance of uncertainties caused by the existence of vacant land. The land patent process provides an orderly method of establishing title to vacant land and of creating the beginning of the record chain of title to real property. See Opinions and Findings of Commissioner, Warrant Application No. 69, pp. 6 and 7.

The Department of Natural Resources also suggests that the provisions in Title 13 which allow a State agency to file an objection to another's application for a patent to vacant land sufficiently protect the State's interest by themselves without the need for issuance of a land patent.[2] The Commissioner disagrees. By themselves, the objection provisions are not sufficient to protect the State's interest, and, even if a State agency's objection is sustained, uncertainties remain as to title which ultimately may work a hardship on both the State and any Maryland citizen who may have an interest in acquiring vacant lands.

Take, for example, the matter of the island in question. Raymond H. Simmons, Jr. applied for a patent to the island. See Warrant Application No. 69. The Department of Natural Resources filed an objection. However, Mr. Simmons was unable to establish to the satisfaction of the Commissioner that the island was vacant land. See Opinion and Findings of Commissioner, Warrant No. 69, at pp. 5 and 6. Therefore, because there was no proof before the Commissioner that the island was vacant land, no determination was made on whether the State had shown a "clear and compelling need" for the land. See Opinions and Findings of Commissioner, Warrant No. 69, p. 6. The Commissioner strongly urged the Department of Natural Resources to apply for a

patent to the island and stated that the Commissioner was bound to accept applications for patent on a first come, first served, basis. Id. at pp. 7 and 8.

Ultimately, the Department of Natural Resources did apply under protest. If the Department of Natural Resources had not, another applicant could have applied for a patent to this island instead. At that point, in order to preserve its interest in the island, the Department of Natural Resources would have been required to file an objection. Moreover, were this applicant to fail, like Simmons, to establish the vacancy, the State's interest and entitlement to the island would remain unsettled and the process would begin anew should another apply for a patent to the island, forcing the Department of Natural Resources once again to enter a formal objection.

The General Assembly cannot have intended such an inefficient and uncertain result. In contrast to this uncertainty, had the Department of Natural Resources applied for a patent when the island was first created by it and the Army Corps of Engineers, Mr. Simmons would not have gone to the time and expense to apply for a patent and the Department of Natural Resources, rather than having to prove a "clear and compelling need" for the land, merely would have had to prove the land vacant.

The issuance of a patent should also prove useful to the Department of Natural Resources, allowing the Department to adjust easily to any change of intended use of the property in question, and to benefit directly from its sale as provided by statute, at a competitive, fair market price. Is it not possible at some future date, that the Least Tern may not nest on the island and the Department

of Natural Resources might then wish to abandon its project to make the island a Least Tern sanctuary. A person curious about the lack of activity or government involvement on the island might then question the State's claim to the island, applying to the Commissioner for a patent. Once again the Department of Natural Resources would be forced to establish its "clear and compelling" need for the island with the distinct possibility that a patent would issue to the new applicant who would pay the Land Office the fair market value of the land.

The Department of Natural Resources has requested that the Commissioner declare the land vacant, find that the Department of Natural Resources is using the island for a public purpose, and then terminate the proceedings. See Department of Natural Resources Brief at p. 15. It simply does not make sense for the Department of Natural Resources to participate in the land patent process either as an objector or as an applicant and yet request that the Commissioner stop short of issuing a patent. Where, as here, the Department of Natural Resources has proved to the satisfaction of the Commissioner that the island is vacant land, the patent should issue to the Department of Natural Resources to quiet any public concerns as to the title.

The benefit of having a patent issue to a State agency should be obvious and far outweighs the Department of Natural Resources's claim that it is nonsensical for the State to quit claim its interest in vacant real property to itself. The patent will be recorded not only in the Maryland State Archives in Annapolis, but also in the office of the Clerk of the Circuit Court for Dorchester County. This establishes the Department of Natural Resource's title. The patent serves as the original source of title and is the first link in the chain of title

for the purposes of title searching. See Thompson, Abstracts and Title, 2nd Ed., §§815 and 125. See Also, Ryczkowski v. Chelsea Title & Guarantee Co., 449 P. 2d 261 (Sup. Ct. Nev. 1969); Stimson Land Co. v. Rauson, 62 F. 426 (D.C. Wash. 1894). Thereafter, any person searching titles will find that the Department of Natural Resources has record title to this property. That evidence will be in the local land records where persons normally check title and will not require a trip to Annapolis. There is no doubt in the commissioner's mind that this result promotes the legislative purpose of the land patent process which is to avoid uncertainties as to title of real property.

The State of Maryland holds public lands as a trustee to the benefit of its citizens. Kerpelman v. Board of Public Works of Md., 261 Md. 436, 445, 276 A.2d 56, 61 (1971). See also, Nugent v. Vallone, 161 Md. 802, 91 R.I. 145 (1960). As a trustee of the public interest, the State of Maryland owes its citizens the normal fiduciary duties of a trustee. Kerpelman, 261 Md. at 445, 276 A.2d at 61. See also. U.S. v. Mandel, 591 P.2d 1347, 1363 (4th Cir. 1979). Such fiduciary duties include the excercise of reasonable care. U.S. v. Mandel, 591 P.2d at 1363. Thus, to fulfill these duties, State agencies ought to use the land patent process to make certain and public their title to newly-created or otherwise vacant land.

Additional support for this position is found in the rule pertaining to school grants. While Congress gives school land to the states by "granting" legislation, such a grant vests title only to surveyed land. Title does not vest with respect to unsurveyed land until a survey has been made and officially accepted. CJS Public Lands §78. Thus, although vacant land within this State "belongs to" the

State, because the State has never parted with its right to the land, until that land is discovered and surveyed and a patent is issued, no title to particular vacant land can vest.

In conclusion, after careful consideration of all the arguments regarding the necessity or the validity of the State granting a patent for the use of a State agency, the Commissioner finds that such action by the State is well within the public interest and the intent of the land patent statutes.

FOOTNOTES

1. "It is well settled that the unvarying construction of a law by the agency charged with its enforcement over a long period of time is entitled to great weight and should not be disregarded except for the strongest and most urgent reasons." State Dept. of Assessments & Taxation v. Greyhound Computer Corp.: 27 Md. 575, 589, 320 A.2d 40, 47 (1974), See also, Parker's, Inc. v. Comptroller 266 Md. 44,50,291 A.2nd 658, 683 (1972); Palm Oil Recovery, Inc. v. Comptroller of the Treasury 266 Md. 184, 291 A.2d 681 (1972): Frank J. Klein & Sons. Inc. v. Comptroller of the Treasury, 233 Md. 490, 197 A.2nd 243 (1964): Popham v. Conservation Commission, 186 Md. 62, 71, 46, A.2d 184, 198 (1946).

2. The Department of Natural Resources argues that the State Wetlands Act (Title 9, Natural Resources Article) sufficiently protects State and private interests. This argument is without merit in reference to this island. The survey returned in Warrant Application No. 69 and adopted by the Department of Natural Resources in its application makes clear that the Department of Natural Resources seeks a patent for 11.9 acres of land, all of which is above the mean high water line. Thus, the Wetlands Act does not apply to this island. See §§9-101 (h), (j) and (m), Natural Resources Article.

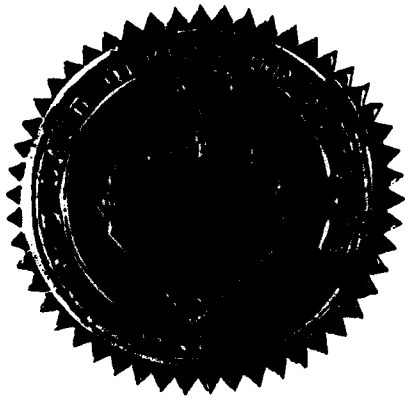
CONCLUSIONS OF THE LAW

Based upon the record and the testimony presented, the Commissioner concluded that the land embraced by Warrant Application No. 71 is vacant land, within the meaning of the statute, and that a patent may properly issue with respect to the subject property, and that the purchase price of the said vacant land is $25.00 as allowed by Section 13-313 (c) (2), Real Property Article. The Commissioner shall cause a patent to said land to be prepared and shall forward same, together with such portions of the record as he may deem appropriate to the Board of Public Works for its review, all costs having been paid.

ORDER

It is, therefore, this 3rd day of April 1985, by the Commissioner of Land Patents, State of Maryland

ORDERED, That upon approval of the Board of Public Works, a patent be issued to the State of Maryland, to the use of the Department of Natural Resources, for the land described in Warrant Application No. 71.



Edward C. Papenfuse
Commissioner of Land Patents