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State Real Estate Sales: Process Inconsistent Across Departments, Public Notice Limited, 2011

Maine State Legislature

Office of Program Evaluation and Government Accountability

Beth Ashcroft

Maine State Legislature, beth.ashcroft@legislature.maine.gov

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OPEGA

Information Brief

Purpose

In August 2011, the Government Oversight Committee directed OPEGA to review the sales of State-owned real estate conducted over the last five years. The directive was prompted by concerns over the State's recent sale of property in Thomaston to a State employee.

To complete this review, OPEGA identified departments with the authority to conduct real estate sales and requested information on their sales activities. OPEGA relied on information provided by the departments to make the determinations and assessments presented in this Information Brief.

This Information Brief describes the statutes governing real estate sales and the policies and processes followed by the responsible departments. It also provides information for sales occurring in the last five years with a focus on the expressed areas of legislative interest including: public marketing; public notice; use of real estate brokers and methods of determining potential value. OPEGA did not assess the effectiveness of the marketing strategies used, nor did OPEGA assess actual sales price against potential value of each piece of real estate.

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State Real Estate Sales: Process Inconsistent Across Departments, Public Notice Limited

Summary

The concerns voiced in response to the sale of the Ship Street Circle property in Thomaston to the Warden of the Maine State Prison suggest that legislators expect the State to carry out real estate sales in a manner that ensures best value to the State and transparency to the public. OPEGA found that, over the last five years, sales of State-owned real estate were carried out in an inconsistent manner that may not meet the expressed legislative expectations, particularly with regard to public transparency.

OPEGA identified four departments that conducted a total of 49 real estate sales: the Department of Administrative and Financial Services (DAFS), the Department of Transportation (MaineDOT), the Department of Inland Fisheries and Wildlife (IFW), and the Department of Conservation (CON). No uniform process for conducting real estate sales exists across these departments. Real estate sales were infrequent for all departments except MaineDOT, which is the only department with well-established, formal policies and procedures for conducting real estate transactions. Statutes governing real estate sales vary by department and provide limited direction.

Thirteen of the 49 properties sold were publicly marketed. A broker was used to market 12 of these. MaineDOT's Property Office marketed the other property. A broker was also used in the sale of the Ship Street Circle property, though the property was not publicly marketed. In most cases, brokers were not selected through a formal competitive process.

In OPEGA's opinion, 33 of the 36 real estate sales that were not publicly marketed involved circumstances that may justify the lack of public marketing. The remaining three sales, including the Ship Street Circle property, appeared more suitable for public marketing. One of these three properties was offered for sale to local parties with potential interest, and the public was involved in discussions, meetings and decision-making for another of those sales. However, the only public notice given for sales of 12 of the 36 properties not marketed was through the legislative process itself, and no public notice was given for the remaining 19 sales.

The departments reported using various methods to determine current value for 27 of the 36 properties not marketed. The remaining nine sales were for small parcels and the departments reported that prices were negotiated with the buyers. OPEGA's work did not include assessing the reasonableness of valuation methods or comparing current value determinations to the final selling price.



In Total, Four Departments Completed 49 Sales of State-Owned Real Estate

Transactions involving State-owned real estate can take several forms. For the purposes of this review, OPEGA considered real estate transactions to be sales if the State received payment for conveying a deed of real estate to another party. Transactions OPEGA excluded from the scope of this review included easements, land trades, and sales of structures without land. Other conveyances without payment also occurred and were not researched by OPEGA. These included conveyances to public entities or for public use; to conservation groups for wetland mitigation purposes; to abutters to resolve boundary disputes and to facilitate negotiated acquisition settlements resulting from eminent domain.

From January 2006 to August 2011, four departments completed a total 49 sales of State-owned real estate. These were DAFS, MaineDOT, IFW, and CON. DAFS, through its Bureau of General Services (BGS), conducted sales on behalf of five other departments. The Department of Conservation had two separate bureaus that conducted sales: the Bureau of Parks and Lands (BPL) and the Bureau of Forestry (Forestry). Of the 49 sales, twenty one (43%) were for pieces of property that were an acre or less, or had a sales price equal to or less than \$15,000. Table 2 on page 5 shows the number of sales by department and Table 3 at the end of this Brief lists all 49 sales.

Statutes Governing State-Owned Real Estate Sales Provide Limited Guidance and Vary by Department; Most Departments Do Not Have Well-Established Policies

OPEGA reviewed the statutes governing the sales of State-owned real estate and found that they provide limited guidance and vary by department. Table 1 summarizes the department-specific statutes related to real estate sales for the four departments that sold property in the last five years. The only statute identified that applies to all departments is 30-A MRSA §4754-A contained within an MSRA sub-chapter dealing with Maine State Housing Authority's (MSHA) Affordable Housing Program. It states that *"All state agencies shall offer the Maine State Housing Authority the opportunity to purchase or otherwise acquire any land and improvements on the land or any structures determined to be surplus before the property may be offered for sale or transfer to any other state agency, community or other buyer or transferee."* OPEGA did not review whether the departments had complied with this statute.

OPEGA found there are no statutory requirements for departments to publicly market State-owned properties and, with the exception of the BPL, there are also no requirements to give public notice of intended sales. MaineDOT is statutorily required to give right of first refusal to previous property owners whose land was taken by eminent domain before the property that was taken is re-sold. Neither public marketing nor public notice would seem to be appropriate or necessary if the previous owners exercise their rights. MaineDOT had three such sales of property back to the original owners.

Statutes governing BPL's sales require that public notice occur prior to legislative approval of sale, but do not specify what public notice should entail. BPL told OPEGA that it considers the legislative process to be public notice, and therefore does not inform the public by other means. However, for 10 of 11 sales completed by BPL, OPEGA noted that a specific buyer was already named in the bill submitted to the Legislature, though no prior notice to the public had been given. This practice does not appear to fulfill the intent of the authorizing statute and limits the transparency of these sales to the public.

Statutory requirements for departments to seek legislative approval to conduct sales also vary by department. MaineDOT and CON's Bureau of Forestry are not required by statute to obtain the approval of the Legislature to carry out sales and, therefore, do not. Forestry is, however, required to notify the Legislature at least 60 days prior to offering property for sale. Forestry was uncertain whether this notification had been provided for the one sale it had completed. BPL and IFW are required to obtain legislative approval by a two-thirds majority in order to sell certain land. These departments obtained this approval for sales they reported. Statute does not give DAFS standing authorization to sell State-owned real

estate, although it does authorize DAFS to conduct inventories of State-owned land to identify surplus land for sale. DAFS and other departments may also be authorized to sell State-owned real estate via legislative resolve. All eight sales completed by DAFS were authorized in this manner.

Table 1. Department-Specific Statutes and Policies Related to Real Estate Sales			
Department	Relevant Statutes	Statutory Requirements	Departmental Policy
Conservation – Bureau of Parks and Lands (BPL)	12 MRSA §598-A	Two-thirds approval of the Legislature to reduce certain lands.	Informal policy of offering to abutters and lessees first. Legislative Resolve is considered public notice.
	12 MRSA §1837	Public notice of proposed sales of non-reserved public lands prior to the Legislature's approval.	
	12 MRSA §1851	Notice of proposed sales of public reserved lands prior to the Legislature's approval.	
Conservation – Bureau of Forestry (Forestry)	12 MRSA §8003	Notify the Legislature 60 days prior to offering property for sale.	None.
Department of Administrative and Financial Services – Bureau of General Services (BGS)	5 MRSA §1742	None. Authorizes DAFS to conduct land inventory to identify surplus land and review this inventory with MSHA and other state agencies prior to offering any land for sale.	Brief, newly established written policy in response to the Governor's executive order. ¹
	5 MRSA §1813	None. Authorizes DAFS to sell supplies, materials and equipment that are surplus, obsolete or unused.	
Department of Transportation (DOT)	23 MRSA §61	None. Significant requirements are laid out in federal regulations.	Detailed, formal written policy as required by federal regulations.
	1 MRSA §815	Right of first refusal on land previously taken by eminent domain is given to the previous property owners.	
Inland Fisheries and Wildlife (IFW)	12 MRSA §10109	Two-thirds approval of the Legislature to reduce certain lands.	None. Legislative Resolve is considered public notice.
Source: OPEGA analysis of Maine statutes and information from departments.			

OPEGA also reviewed departmental policies on selling State-owned real estate and found that only MaineDOT had well-established policies and procedures for carrying out these sales, which include giving MSHA first refusal on surplus property. The detailed policies and procedures incorporate the requirements of federal regulations. For example, MaineDOT must obtain approval from the Federal Highway Administration (FHWA) to sell property for less than fair market value. MaineDOT's policy, therefore, is to determine the value of all properties before sale. To do so, MaineDOT's Property Manager reviews properties and does a rudimentary opinion of value. If a property has substantial value, a full appraisal is conducted. MaineDOT waives the appraisal process under certain circumstances, like when the property is valued below a certain dollar amount. MaineDOT is also required by federal regulations to offer surplus property first to municipalities and State agencies. The Department's policy is to offer properties first to these entities, then to former owners, and then (in some cases) to abutters, before offering property for sale to the public. MaineDOT told OPEGA they are in the process of revising their policy manual to include language on conflicts of interest, posting "for sale" signs for a period of two weeks on property deemed marketable, and consulting all abutters when one abutter requests a sale.

DAFS recently established property sales policies and procedures in response to the Governor's executive order.¹ DAFS is in the process of developing more detailed real estate sales policies and procedures. The other departments told OPEGA they have not established such policies because their sales are infrequent.

¹ No. 18 FY 11/12, "An Order Increasing Oversight Over Sales of State-Owned Real Estate," July 11, 2011.

Departments Publicly Marketed Properties in Approximately 25% of Sales Conducted; Majority of Remaining Sales Involved Special Circumstances, With Three Exceptions

OPEGA assumed that marketing properties to the general public served both to provide sufficient public notice and to ensure the State received the best price possible. OPEGA defined public marketing as actively soliciting potential buyers from the general public. Information provided by the departments show that only 13 of the 49 properties sold were publicly marketed according to this definition. Table 2 gives the number of publicly marketed properties by department. Marketing activities reported by the departments included use of the Multiple Listing Service (MLS), signage on the property, and advertising via newspapers, internet, fliers, brochures, and monthly bulletins.

In OPEGA's opinion, the vast majority of the properties that were not publicly marketed (33 of 36) involved circumstances that may justify lack of public marketing. These special circumstances included:

- seventeen sales to abutters including land sold to resolve a septic system issue or boundary dispute, land that was landlocked or provided access to abutting land, pieces of land less than an acre, land improperly improved by the abutter, and land with physical characteristics that significantly limited the potential use of the property;
- ten sales to public entities such as municipalities, and/or for a public purpose;
- three sales of land back to the original owner or heir; and
- three sales to lessees that had on-going activities or substantial investment on the property, approached the State about purchasing the property and were willing to pay the current appraised value.

In three cases, the real estate was not publicly marketed though, in OPEGA's opinion, the properties were suitable for doing so. These included one sale conducted by BPL and two sales conducted by BGS as follows:

- sale of three acres of land and a former municipal building in Big Lake Township to the owner of neighboring land (BPL);
- sale of the Ship Street Circle property in Thomaston to the Maine State Prison Warden (BGS); and
- sale of the State Police Barracks in Thomaston to a developer (BGS).

OPEGA requested further information from BPL and BGS on why they chose not to publicly market these sales. BPL told OPEGA that their informal policy is to offer sales to lessees and abutters first. They do not have formal written policies or procedures related to real estate sales because such sales are infrequent. For the Big Lake Township property, BPL contacted the municipality, former lessees, and other individuals that had expressed interest in purchasing it. One of them offered a price a real estate broker said was reasonable and BPL accepted the offer.

BGS has previously explained that the Ship Street Circle property was not publicly marketed because the Warden, who was living in one of the houses on the property, was interested in purchasing it and because the Department of Corrections desired to continue using another house on the property. BGS explained that the State Police Barracks property in Thomaston was not marketed because it was sold to a developer that had partnered with the town of Thomaston on the redevelopment of the abutting land (Thomaston Green, the former site of the Maine State Prison). The sale was contingent on several property restrictions at the behest of the town. BGS believed selling the land to the developer rather than publicly marketing it was in the State's and the town's best interest.

Table 2. Public Marketing and Public Notice of Sales, by Department					
Department	Number of Sales	Publicly Marketed	Public Notice Given	Circumstances May Justify Lack of Public Marketing	Not Publicly Marketed, No Special Circumstances
Conservation – Bureau of Parks and Lands	11	0	4	10	1
Conservation – Bureau of Forestry	1	1	1	0	0
Department of Administrative and Financial Services – Bureau of General Services	8	4	5	2	2
Department of Transportation	26	7	7	19	0
Inland Fisheries and Wildlife	3	1	1	2	0
TOTAL	49	13	18	33	3
Source: OPEGA analysis of data from departments.					

For the 36 sales that were not publicly marketed, OPEGA asked departments what steps were taken to assess the current value of the property being sold. Departments reported that some method of determining value (appraisal, opinion of value, or MaineDOT's internal process as discussed on page 3) was used in 27 of the 36 sales. The remaining nine sales were for small parcels and prices were negotiated. OPEGA concluded that a formal appraisal did not seem prudent in these scenarios. It should be noted that even though some method of determining value may have been utilized, this does not guarantee the State received that amount—only that the State had some information available against which to judge offers. OPEGA did not evaluate potential value against actual sales price as part of this review.

Public Notice was Infrequently Provided for Sales of Properties Not Marketed

OPEGA also sought information from departments on whether public notice of the intent to sell properties was given. OPEGA considered public notice to be some means of notifying the public - local residents at a minimum - that a property is for sale. Public marketing was considered to be a form of public notice. Theoretically, sufficient public notice not only provides public transparency, but also allows interested parties to pursue purchasing a property even if it was not being publicly marketed. OPEGA determined that sufficient public notice was given for only five of the 36 sales that were not publicly marketed.

BPL and IFW maintained that the legislative process required to sell the property (as described in Table 1) served as public notice. However, OPEGA did not consider the legislative process alone to be sufficient public notice because:

- the legislative authorization to sell a piece of property may occur years before the property is actually put up for sale;
- the description of the property included in authorizing legislation often does not allow the property to be easily identified;
- the authorizing legislation sometimes specifically names the party to whom the property is to be sold meaning the buyer has already been determined before there is any public notice given; and/or
- the authorizing legislation moves so quickly through the legislative process that an interested buyer or a citizen opposed to the sale would not have sufficient opportunity to act.

An example is the BPL sale of a 7.53 acre piece of land classified as public reserved lands on Upper Richardson Lake in Richardson Township to the lessee of the property. The lessee, who already owned and had significant investment in buildings on the property, wanted to purchase the land and was willing to pay its assessed value of over \$800,000. Certain parties were in favor of the sale so that the proceeds could be

used to purchase another piece of land they believed the State should preserve. In 2007, while a bill on land transactions was being heard before the legislative Joint Standing Committee on Agriculture, Conservation and Forestry, an amendment authorizing the sale of the Richardson Township property to the current lessee at fair market value was proposed by a legislator. The Committee incorporated the amendment into the bill and voted it out as Ought to Pass as Amended in a work session held the same day. The Legislature ultimately passed the bill with a two-thirds vote as required by the statute governing BPL's land sales.

OPEGA researched this particular sale in conjunction with a past project in 2008 and questioned BPL about the sufficiency of public notice then. BPL's explanation at that time was consistent with its current interpretation of what is required by its statute - that the legislative process provided public notice prior to the Legislature passing the bill. BPL also pointed out that there was no opportunity to give any other public notice because the amendment had been introduced by a legislator, not BPL, at the end of the session.

Departments Typically Selected Real Estate Brokers Without Seeking Competitive Proposals

The departments employed brokers in conjunction with a total of 14 sales. The services provided by those brokers breaks down as follows:

- in eleven sales a broker was involved in both marketing the property and negotiating the sale;
- in one sale a broker was used to market the property, but not involved in negotiating the sale as the broker's contract expired before an offer on the property was received;
- in one sale a broker was hired, but an interested buyer came forward before the property was marketed so the broker neither marketed the property nor negotiated the sale; and
- in one sale a broker was used to negotiate the sale with an interested buyer but did not market the property.

For ten of the 14 sales where a broker was employed, the department entered brokerage contracts without seeking competitive bids. IFW and DAFS each conducted a competitive process to select brokers for the other four properties, with the DAFS RFP recruiting a broker for multiple properties. IFW received four proposals in response to their solicitation of area brokers but there was only one bidder on the RFP issued by DAFS.

Opportunities for Improvement

The absence of consistent, clear statutory guidelines governing the sales of State-owned real estate creates the risk that these properties will be sold in a manner that does not meet legislative expectations for public transparency and obtaining the best value for State assets. The Legislature could consider establishing clear, consistent statutory requirements and/or requiring departments that conduct sales to have established policies, procedures, and/or rules that reflect the Legislature's expectations. Departments without policies for conducting sales of State-owned real estate could benefit from establishing such policies or deferring to the policies established by DAFS or MaineDOT.

The forthcoming detailed DAFS policy on property sales and MaineDOT's policy manual revisions would benefit from incorporating any recommendations from the Legislature. These policies could be strengthened by detailing when public marketing and public notice of real estate sales are appropriate, and what actions constitute public marketing and public notice. DAFS and MaineDOT could also benefit from collaborating to establish uniform requirements. OPEGA notes that some federal requirements MaineDOT follows may be unnecessarily burdensome for DAFS, and this should be taken into account in any such collaboration.

LEGEND FOR TABLE 3	
Code	Description
A	Sold to abutter to resolve an issue (boundary resolution or septic system placement issues)
B	Sold to abutter because property landlocked or provides access to abutting property
C	Sold to abutter as small parcel (less than an acre)
D	Sold to abutter because land had been improperly improved by abutter
E	Sold to abutter as land had physical characteristics that significantly limited potential use
F	Sold to public entity or for a public purpose
G	Sold back to original owner or heir
H	Sold to lessee upon lessee's request; lessee had substantial activities or investment on property and willing to pay current appraised value
N	No Special Circumstance
*	Property is equal to or less than an acre, or had a sales price equal to or less than \$15,000

Table 3. Sales of State-owned Real Estate Completed January 2006 through August 2011

#	Department	Brief Property Description	Property Publicly Marketed (yes/no)	Special Circumstances (see Legend)	Public Notice of Sale Given (yes/no)
1	CON/Forestry	Enfield Ranger Station: 2+/- acres, house, garage	Y		
2*	CON/BPL	.36 acre lot in Wyman Twp. sold to abutter	N	A	YES
3*	CON/BPL	1+/- acre lot in Eagle Lake to abutter	N	A	NO
4*	CON/BPL	.63 acre lot in Chesuncook Twp. sold to county	N	A	NO
5*	CON/BPL	.12 acre lot in Chesuncook Twp. sold to abutter	N	A	NO
6*	CON/BPL	.129 acre to in Winterville Plt. sold to lessee	N	A	YES
7*	CON/BPL	.32 acre lot in Sandy Bay Twp. sold to USA	N	F	YES
8*	CON/BPL	.03 acre lot sold to Town of Lubec	N	F	NO
9	CON/BPL	3.06 acres lot in Chesuncook Twp. sold to lessee	N	H	NO
10*	CON/BPL	.82 acre lot in Augusta to lessee	N	H	NO
11	CON/BPL	3.0+/- acres lot in Big Lake Twp. sold to neighbor	N	N	YES
12	CON/BPL	7.53 acres lot in Richardstown Twp. sold to lessee	N	H	NO
13	DAFS	Freeport Towne Square: 2.20 acres	Y		
14	DAFS	East Machias State Police Barracks: 0.999 acres	Y		
15	DAFS	Thomaston Main St. Properties: 2.11 total acres	Y		
16	DAFS	Benedicta Elementary School: 8.34 acres	Y		
17*	DAFS	.13 acre lot in Augusta to abutter	N	C	NO
18	DAFS	State's interest in a property in Rangeley sold to current property holder	N	G	NO
19	DAFS	Thomaston State Police Barracks: 3.5 +/- acres	N	N	YES
20	DAFS	Thomaston Ship St. Properties: 5.06 acres	N	N	NO
21	DOT	4.26+/- acres lot inclusive of building in Ellsworth	Y		
22*	DOT	.67+/- acre parcel in Ellsworth	Y		
23	DOT	Former MaineDOT Office and Equipment Testing facility, and discontinued rest area sold as a package in Pittsfield	Y		
24	DOT	Single Family Residence in Gorham acquired during the bypass project due to proximity	Y		

Table 3. Sales of State-owned Real Estate Completed January 2006 through August 2011 (Cont.)

#	Department	Brief Property Description	Property Publicly Marketed (yes/no)	Special Circumstance	Public Notice of Sale Given (yes/no)
25	DOT	Former MaineDOT Division Office in Rockland sold to abutter	Y		
26	DOT	Single Family Residence in Gorham acquired during the bypass project due to proximity	Y		
27	DOT	2.6+/- acres former maintenance facility in Rangeley	Y		
28*	DOT	.895+/- acre parcel in Clinton required for new electrical transmission line across the state	N	F	NO
29	DOT	Parcel in Hampden sold to abutting school district	N	F	NO
30	DOT	Former MaineDOT maintenance facility in Stockholm that was conveyed to Aroostook County on a lease / purchase option.	N	F	NO
31	DOT	Portion of the existing MaineDOT maintenance facility in Northport sold to municipality	N	F	NO
32*	DOT	Excess right of way in Norway sold to the town	N	F	NO
33*	DOT	.4+/- acre lot in Corinna sold to municipality	N	F	NO
34	DOT	Access to a maintenance facility that MaineDOT leased for several years in Topsham. When MaineDOT terminated its lease, this parcel was sold to the lessor.	N	B	NO
35	DOT	6.37+/- acres landlocked parcel in Winslow sold to abutter	N	B	NO
36	DOT	20.56+/- acres landlocked former gravel pit in Ellsworth sold to abutter	N	B	NO
37*	DOT	.24+/- acre landlocked parcel in Westbrook sold to abutter	N	B	NO
38*	DOT	Landlocked parcel in New Gloucester conveyed to abutter	N	B	NO
39*	DOT	.23+/- acre discontinued gravel pit in Holden sold to sole abutter.	N	B	NO
40*	DOT	Portion of a discontinued railroad corridor in Hallowell sold to abutter	N	C	NO
41*	DOT	.17+/- acre parcel in Gorham sold to sole abutter	N	C	NO
42*	DOT	.94+/- acre parcel in Waterboro sold to abutters	N	E	NO
43*	DOT	Portion of discontinued railroad corridor in Skowhegan sold to abutter	N	G	NO
44*	DOT	565+/- s.f. property in Arrowsic vacated to successor in title.	N	G	NO
45	DOT	7.5+/- acres parcel formerly part of the Mid Coast Division Office in Rockland sold to abutter	N	E	NO
46	DOT	1.26+/- acres parcel sold to abutting school	N	D	NO
47	IFW	100 +/- acres Deblois Fish Hatchery	Y		
48	IFW	1.3 +/- acres parcel in Kennebunk sold to utility company	N	F	NO
49	IFW	7.6 acres parcel in Fairfield sold to local housing authority	N	F	NO