STATE OF MAINE

Inter-Departmental Memorandum Date October 11, 1974

To Philip M. Savage, Director Dept. State Planning Office

From Lee Rogers Dept. Attorney General
Assistant Attorney General

Subject Questions concerning the Act Establishing a State Register of Critical Areas, Chapter 778 of the Public Laws.

Amending by adding new chapter: 312 Titles

SYLLABUS:

Eleven questions concerning the Act Establishing a State Register of Critical Areas, Chapter 778 of the laws of 1973, were asked by the State Planning Office. Questions are grouped according to subject matter with their answers.

QUESTIONS:

1. Do employees of the State Planning Office have the authority to cross or enter private property for the purposes of carrying out this Act?

2. If so, what provision of state law contains this authorization?

3. If not, would this be rectified by an amendment to the above Act?

4. Do the employees of other state agencies e.g., Department of Conservation, have the authority to cross or enter private property for the purposes of carrying out this Act?

5. If so, which agency's personnel are so authorized?

ANSWERS:

Chapter 778 does not specifically grant a right to enter or cross over private property for the purposes of carrying out the Act. The lack of specific authorization indicates such right does not exist. Where such a right has been granted to other agencies, it has been specifically denoted and limited in scope. E.g., 12 M.R.S.A. §685-C(8) (Land Use Regulation Commission (LURC), authority to enter land regulated by LURC for purposes of inspection and to insure compliance with orders, permits, standards); 12 M.R.S.A. §1002 (State Entomologist may enter lands for survey and inspection of certain suspected insect or disease habitats); 12 M.R.S.A. §1103 (Director of Bureau of Forestry, entry to determine presence or absence of white pine blister rust); 12 M.R.S.A. §4302-B(10) (Commissioner of Marine Resources, entry to inspect fisheries);

38 M.R.S.A. §414(3) (Water Improvement Commission and Attorney General, entry to inspect premises of waste discharge permit holders); 38 M.R.S.A. §1159 (officers of Sanitary Districts, to inspect fixtures on property served by District sewers).

Further, the specific limitations of such rights of entry indicate that they are not omnibus permission for the respective official to enter to carry out the purposes of other Acts, such as Ch. 778. However, Ch. 778 can be amended to grant such a specific and circumscribed right to State Planning Office officials, in similar manner to the above cited sections. This opinion does not purport to reach the validity of an unlimited right of entry, if such were ever granted.

By way of information, only a criminal trespass provision might be applicable to entry without statutory right.

> §3855. Entering or passing over forbidden enclosed or cultivated land; arrest of offenders
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> Whoever willfully enters on or passes over the garden, orchard, mowing land or other enclosed or cultivated land of another, after being forbidden to do so by the owner or occupant of said land or his agent, either personally or by notice posted conspicuously on the premises, is guilty of trespass and shall be punished by a fine of not more than $100. The owner or occupant of said land or his agent may arrest any person found violating any provision of this section and carry him before any judge within the county where the arrest is made.
> R.S.1954, c. 131, §40.

Thus, trespass on enclosed posted land to seek out a critical area would be punishable as criminal trespass. Of course, civil action for damages and injunctive relief would be available for any such trespass, and presumably also for any other trespass without statutory right. Accordingly we recommend that no entry be made without a landowner's permission.

QUESTION:

6. What are the avenues of legal recourse available to a landowner who is aggrieved by the registration of a critical area on his property?

ANSWER:

Preliminarily, it is hard to see what "aggrievement" is involved in having one's property listed on the Register of Critical Areas.

The sole limitation is that 60 days advance warning must be given to the Critical Areas Advisory Board prior to alteration or change in the character of the area listed.

5 M.R.S.A. §3314(4). Alterations

> The Critical Areas Advisory Board shall be advised by the present or prospective owner of any proposed alteration or change in the use or character of any area listed in the Register of Critical Areas. No alteration or change in use or character shall take place for 60 days subsequent to such notification unless a release is issued by the Critical Areas Advisory Board.

The Act does not go further by granting, for example, power to block proposed changes. It is therefore significantly less of a restriction than the Site Location of Development Law, which can block development of land not in accord with its provisions. The latter was held not to be so unreasonable a restriction as to amount to a "taking" without compensation, in violation of Art. I §21 of the Maine Constitution. In Matter of Spring Valley Development, Me., 300 A.2d 736 (1973). Further, Ch. 778's requirements cannot be said to strip all commercial value from a parcel of land, and so cannot be a "taking" such as that in State v. Johnson, Me., 265 A.2d 711 (1970). See also Holbrook Island Sanctuary v. Inhabitants of Town of Brooksville, Me., 214 A.2d 660 (1965); State v. McKinnon, 153 Me. 15, 18 133 A.2d 885, 887 (1957) (inclusion of property in game preserve not a "taking"). Therefore, registration of a critical area on property cannot be considered a taking and cannot be so challenged.

The present Administration Code, 5 M.R.S.A. §2301 et seq., does not apply to the State Planning Office or the Maine Critical Areas Advisory Board.

A property owner would have recourse if a critical area were registered on his property without notice. 5 M.R.S.A. §3314(2) B provides in part:

> Landowner consultation. No area or site classified as a critical area shall be included in the register without notification of the landowner at least 60 days prior to such classification.

As the duty of consultation is phrased "shall" and is therefore mandatory, mandamus would be available to an owner of property registered without consultation, enabling him to require prior notification.

QUESTION:

7. Do areas included on the Register have to be "natural features" or could they be manmade features such as buildings? (This question is asked because §3311 would seem to indicate something different in this regard than §3312.)

ANSWER:

No legislative history can be found to reconcile §§3311 and 3312. The crucial sections to the analysis are as follows:

§3311. Findings; declaration of purpose

The Legislature finds that the State of Maine has an overriding interest in the optimum development and preservation of certain land and water areas of the State. It is hereby found and determined that sites or areas of unusual natural, scenic, scientific or historical significance are areas of such overriding state interest. It shall be the policy of the State to encourage the preservation and utilization of these areas through land use planning, regulation and protective acquisition or management as appropriate, commensurate with controlled economic growth and development.

§3312. 2. Critical areas.

"Critical areas" mean areas containing or potentially containing plant and animal life or geological features worthy of preservation in their natural condition, or other natural features of significant scenic, scientific or historical value.

3. Register of Critical Areas.

"Register of Critical Areas" means the official record and inventory of natural areas established and maintained by the State Planning Office.

§3314. Register of Critical Areas

1. Register of Critical Areas.

The State Planning Office, with the advice and approval of the board, shall establish a Register of Critical Areas, which shall contain an inventory of sites and areas of significant

natural, scenic, scientific or historic value duly classified as "critical areas" as defined in section 3312. In determining the classification of an area or site as a critical area, the State Planning Office shall consider, inter alia:

A. The unique or exemplary natural qualities of the area or site;

B. The intrinsic fragility of the area or site to alteration or destruction;

C. The present or future threat of alteration or destruction;

D. The economic implications of inclusion of a critical area in the register.

§3311 seems to contemplate inclusion of buildings and other man-made objects as "critical areas" in speaking of "sites * * * of historical significance". See also §3114. Section 3312(2), however, defines "critical areas" as those containing "plant or animal life or geological features * * * or other natural features of significant, scenic, scientific or historical value." (Emphasis supplied.) The Register of Critical Areas is to be an inventory of "natural areas". §3312(3). The procedures for inclusion of a site in the Register in §3314(1) are specifically keyed to the definition in §3312(2). It is therefore not clear that the initial Act, as written, provides for inclusion of man-made sites or features in the Register. If the inclusion of such areas is desired, it is suggested that the statute be amended in the following respects:

(1) §3312(2) should be modified to provide that critical areas mean --

> areas containing, or potentially containing, plant and animal life or geological features worthy of preservation in their natural condition or other features of significant scenic, scientific or historical value.

(2) §3312(3) should be modified to provide that the register of critical areas means "the official record and inventory of critical areas as defined in §3312(2) established and maintained by the State Planning Office."

(3) §3314 should be modified by adding a new subsection B to read as follows: "The scenic, scientific or historical values of the area or site;". The present subsections B, C, and D of §3314 should be relettered to become subsections C, D, and E, respectively.

Questions:

8. Could the "appropriate state agencies" referred to in §3314, paragraph 3, use the power of eminent domain to acquire property rights for the purposes of this Act?

9. If so, which state agencies possess this authority?

10. If the answer to question number 8 is yes, what limitations, if any, apply to the exercising of the power of eminent domain by the various state agencies?

11. If the answer to question number 8 is yes, what are the procedures involved in exercising the power of eminent domain by the various state agencies?

ANSWERS:

Any purported grant of eminent domain power is to be strictly construed as a derogration of private property rights. Clark v.

Coburn, 108 Me. 26 (1911). Ch. 778, if it involves eminent domain powers at all, does so only derivatively in §3314(3):

3. Recommendations.

"The State Planning Office shall recommend to appropriate state agencies which possess the authority to acquire property rights, through devise, gift, purchase, or otherwise, and which also possess the authority to contract with private property owners, the acquisition of property rights or the establishment of management agreements which will insure the protection of critical areas on the register whose natural qualities are threatened with adverse alteration or destruction. The State Planning Office may also recommend the acquisition of property rights or consummation of contractual management agreements regarding any critical area listed in the register to any state agency, political subdivision of the State or private citizens who have demonstrated interest in the protection of critical areas."

First, it is doubtful that these recommendations can extend to eminent domain, since they deal with acquisition of "property rights, through devise, gift, purchase or otherwise." There is a distinct difference between the phrase "or otherwise" and a specific reference to the use of eminent domain. This is clear from statutes actually conferring the power of eminent domain on agencies: e.g., 12 M.R.S.A. §602(1) (Bureau of Parks and Recreation); 12 M.R.S.A. §2151 (Inland Fish and Game; for establishing wildlife management areas, fish hatcheries or feeding stations); 12 M.R.S.A. §667 (Bureau of Parks and Recreation; within Allagash Waterway). Compare the following, where the language deliberately avoids a grant of eminent domain authority; e.g. 12 M.R.S.A. §4 (Soil and Water Conservation Commission; "purchase, exchange, lease, gift, grant, bequest or devise"); 12 M.R.S.A. §512 (Director of Bureau of Forestry; purchase only); 12 M.R.S.A. §641 (Coastal Island Trust Commissions; purchase, lease, accept, or otherwise acquire); 12 M.R.S.A. §1702 (Maine Forest Authority; purchase and accept gifts and devises of); 12 M.R.S.A. §3502 (Commission on Natural Resourses; acquire and hold); 12 M.R.S.A. §3602 (Act for protection of Atlantic Sea Run Salmon; purchase or lease).

The significance of different statutory wording has been emphasized in the case of the last statutory example given. There, the power to purchase or lease was held to lack conspicuously the needed legislative determination that the public exigencies required eminent domain taking. Smith v. Speers, Me., 253 A.2d 701, 704-5 (1969). Accordingly, the language of §3314(3) is not specific enough to trigger the use of eminent domain by other state agencies.

Assuming arguendo that §3314(3) did refer to eminent domain, the other state agencies could not use that power to further the ends of Ch. 778. As indicated in the examples given, the power is granted to each agency for specific purposes only. Even more so than the right of entry discussed earlier, it is not an omnibus grant allowing these agencies to take property for other purposes such as Ch. 778.

Under 1 M.R.S.A. §§811-813, as construed by the Law Court, the Governor and Council can authorize the taking of specific property only for public purposes previously declared by the legislature to warrant the use of eminent domain. Smith v. Speers, supra, at 705. Because Ch. 778 contains no such declaration, §§811-813 are not applicable to it.

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