Inter-Departmental Memorandum Date October 23, 1974

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

From Edward Lee Rogers, Assistant Dept. Attorney General

Subject Questions Concerning the Act Establishing a State Register of Critical Areas, 5 M.R.S.A. §§3310, et. seq.

In your memorandum dated August 5, 1974, you ask whether or how a landowner could be prosecuted for violating 5 M.R.S.A. §3314 and what the penalty would be for a violation.

Section 3314 (4) provides that no alteration or change in use or character of a critical area shall be undertaken prior to sixty days' notice thereof to the Critical Areas Advisory Board by the present or prospective owner, unless a release in the interim is issued by the Board.

There is no statutory sanction for enforcement of this provision and, therefore, there would be neither conviction nor penalty imposed for its violation.

At the same time, however, there would be nothing to preclude the Board and the State Planning Office from obtaining injunctive relief in the event that they learned beforehand that a violation was about to occur within the sixty-day period.

You also ask what the legal effect is of a bona fide purchaser of a critical area failing to receive notice prior to purchase that the land he is purchasing is listed in the Register of Critical Areas.

While the grantee may have recourse against the grantor, it is doubtful that the failure of the grantee to receive notice would in any way vitiate the validity of the listing of the property in the Register.

Inclusion of an area in the Register constitutes an encumbrance of the land. Usually, a title search would include the checking of the Register by a competent attorney to make certain that the land is or is not listed in the Register. Accordingly, it could be argued that the failure of the purchaser to receive actual notice is irrelevent as he has received constructive notice by reason of listing of the property in the Register.

Furthermore, inasmuch as the listing is an encumbrance of the land, it would seem likely that a grantor would advise a purchaser thereof as to avoid any possible question regarding the validity of any terms of a warranty deed to the grantee asserting that the property is free of any and all encumbrances.

To assure no such problem arises, however, provision should be made for the registration of such listings in the registry of deeds in each county where the property is located. It would appear that the easiest manner of doing this would be to amend 33 M.R.S.A. §667 to provide that --

> A conservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of land or in any order of taking, or by reason of a listing of a property in the Register of Critical Areas under 5 M.R.S.A. §3310 et. seq., appropriate to retaining land or water areas predominantly in their natural, scenic, open or wooded condition, or as suitable habitat for fish and wild life, to forbid or limit any or all:
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> Under 33 M.R.S.A. §668 all conservation restrictions --
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> "shall be duly recorded and indexed in the registry of deeds for the county where the land lies so as to affect its title, in the manner of other conveyances of interests in land, and shall describe the land subject to said restrictions by adequate legal description or by reference to a recorded plan showing its boundaries."

While, in the absence of such an amendment, the State Planning Office and the Board could undertake to forward notices of the listings of critical areas to the respective registers of the county registry of deeds, with the request that they be recorded as encumbrances of the property, it is not altogether clear from a perusal

of the statutes setting forth the obligations of the register of the county registry of deeds that such registers would be obliged to accept such notices for recording. Therefore, we suggest the amendment referred to above.

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