STATE OF MAINE

Inter-Departmental Memorandum Date May 1, 1975

To Michael McMillen, Planning Assoc. Dept. State Planning Office

From Cabanne Howard, Assistant Dept. Attorney General

Subject Regional Planning Commission Attorneys

You have asked whether an attorney hired by a Regional Planning Commission could (1) prosecute violations of local land use ordinances if he were deputized as an Assistant District Attorney in the prosecutorial district involved and (2) defend, at the request of a constituent municipality of his Regional Planning Commission, any suit attacking the legality or constitutionality of such an ordinance.

In a memorandum opinion to Abbie C. Page on February 5, 1975, this office advised the State Planning Office that it appeared that a Regional Planning Commission did not have the necessary legal authority to hire attorneys or legal assistants to assist District Attorneys in enforcing or defending coastal zone management plans (and by inference local land use ordinances) which the Commission might develop. This reasoning was based upon the assumption that the purpose for the scheme proposed was to create a mechanism whereby a violation of a Commission's plan might be prosecuted independently of the wish of the particular municipality in which it happened to occur. Since Regional Planning Commissions are by statute planning and not law enforcement agencies, and since they are not in any way politically accountable for their actions, we advised caution on their part in undertaking such a scheme.

I. Enforcement of Local Ordinances

The first question raised in the present request is whether these legal disabilities would be remedied by having the attorney in question deputized as an Assistant District Attorney. The answer is that to a significant extent they would. Assistant District Attorneys serve entirely at the pleasure of the District Attorneys, 30 M.R.S.A. §554-A, and are therefore, politically accountable. There is no statutory barrier to an assistant District Attorney receiving compensation from sources other than the District Attorney's statutory funds, absent any conflict of interest. Thus the fact that an Assistant District Attorney is receiving compensation from a Regional Planning Commission would not prevent him from exercising the statutory powers of the District Attorney so long as the District Attorney permits him to do so. The only possible difficulty concerns the question of whether the District Attorney himself actually has the power to prosecute violations of local ordinances. This is a subject not entirely free from doubt, but it would appear that in Maine there is no clear reason why he cannot, at least until a court determines otherwise.

The first question to be resolved in determining whether a District Attorney may enforce local ordinances is the nature of the proceedings involved. While there is some support for the position that such proceedings are generally civil in nature, 9 McQuillen, Municipal Corporations, §27.06 (3rd. 1964), it appears to be the long considered view in Maine as well as in New England that in the case where a fine for the violation a legislatively authorized police power ordinance is sought (as distinguished from the redress of an injury to a private individual) the action is a criminal one. City of Saco v. Jordan 115 Me. 278 (1916). In the words of Chief Justice Shaw:

> "...There is no difference in principle between a prosecution for a breach of a by-law (ordinance) made to promote the health, safety and convenience of the inhabitants of a large city, and a like prosecution, for nuisance or other misdemeanor, made such by common law or statute." In re Goddard, 33 Mass. 504, 508 (1835).

See also Commonwealth v. Marder, 193 N.E. 2d 695 (Mass. 1963); State v. Pelletier, 185 A. 2d 456, 457 (Vt. 1962); State v. Keenan, 18 A. 104 (Conn. 1889); State v. Stearns, 31 N.H. 106, 110 (1855), quoted in McQuillen, supra. Assuming, therefore, that the action is criminal in nature, it remains to be determined whether it can be brought by the District Attorney. 30 M.R.S.A. §502 sets forth his powers in criminal matters;

> "The district attorney shall...act for the State in all cases in which the State or county is a party or interested."

Since this statute does not empower the District Attorney to bring a criminal action on behalf of the municipality, the question then becomes whether he can bring an action for violation of a land use ordinance in the name of the State. While again there is authority to the contrary, 9 McQuillen supra, §27.07, it appears that such prosecutions have been sustained in New England on the theory that inasmuch as a municipality may enact ordinances only at the sufferance of the State, the State has an equal interest in their observation and may sue to punish their violation. See citations supra. It is important to note, however, that the District Attorney's power to act in the name of the State may depend upon the precise statutory basis for the ordinance in question, and this opinion offers no general comment on that score. Please note further that under this rationale, the District Attorney could also seek civil injunctive

proceedings in lieu of criminal penalties as his means of enforcement of a local ordinance, since his powers to prosecute on behalf of the State are the same in civil as in criminal matters, 30 M.R.S.A. §501.

II. Defense of Local Ordinances

Your second question concerns the ability of an attorney hired by a Regional Planning Commission to defend the legality or constitutionality of local land use ordinances at the request of the municipality concerned. The answer is that there is no legal barrier to the Regional Planning Commission attorney acting in this capacity so long as it is at the request of the municipality, since the municipalities of the State have full power to obtain (and discharge) counsel as their needs arise. In view of the limited power of the Commission, however, its attorney should not become involved in the defense of such ordinances on his own or on behalf of the Commission. It is even doubtful whether he should attempt to do so in his capacity as Assistant District Attorney* since even if the State's interests are deemed to be involved (as they might well be since the Attorney General is required to be notified of any attack on the constitutionality of an ordinance, 14 M.R.S.A. §5963), the District Attorney's civil powers in the name of the State are limited to "prosecution" only, 30 M.R.S.A. §501. But if the municipality solicits the assistance of the Regional Planning Commission Attorney, the fact that he is being compensated by the Regional Planning Commission would not in itself bar his participation in the defence of an ordinance.

Please be further advised that while this opinion suggests that there may be no legal barrier to the scheme proposed, it should not be taken to mean that the proposal is in any way advisable or that this office supports such a proposal. As a policy matter, each District Attorney will have to decide the propriety of such a plan for himself. Should the State Planning Office or the Regional Planning Commission be in any way concerned about the appearances created by a person who appears to be, or is, an employee of a Commission prosecuting local violators, even though a deputized Assistant District Attorney, they could either (1) arrange for the attorney to be hired solely by the District Attorney with Federal funds or (2) seek to have the Commission's enabling legislation amended along the lines outlined in our opinion of February 5.

*If it is anticipated that the attorney would be handling this kind of work, it is essential that he not be designated a full-time Assistant District Attorney, since 30 M.R.S.A. §454 prohibits the outside practice of law for such officials.

Cabanne Howard

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