12 MRSA §1901(8) 12 MRSA §1251

STATE OF MAINE

Inter-Departmental Memorandum Date August 20, 1976

To Maynard Marsh, Commissioner Dept. Inland Fisheries and Wildlife

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Authority to Acquire Conservation Easements

This responds to your request for opinion dated July 7, 1976:

FACTS: In recent years, the Commissioner of Inland Fisheries and Wildlife has been offered and has accepted on behalf of the State a number of conservation easements from private person, through which such persons voluntarily place various permanent restrictions on the development of their land. The Commissioner has done so pursuant to the authority given him by 12 M.R.S. §2151 to acquire real property for the location, construction, maintenance and convenient operation of wildlife management areas. Recently, however, the suggestion has been made that the acquisition of such easements is not authorized because the term "wildlife management area" is defined elsewhere as a "tract of land. . . owned or leased by the Department," and that an easement does not constitute an ownership or leasehold interest in land, 12 M.R.S. §1901(8).

QUESTION: In the face of the definition of "wildlife management area" in section 1901(8), may the Commissioner acquire conservation easements?

ANSWER: The Commissioner of the Department of Inland Fisheries and Wildlife has the authority, pursuant to 12 M.R.S. §2151, to acquire in the name of the State conservation easements for the establishment of wildlife management areas.

DISCUSSION: Absent any other statutory provisions, the Commissioner does have the authority under Section 2151 to acquire conservation easement The section provides that he "may acquire . . . real. . . property," which would appear to contemplate any interest in real property, and not merely ownership in fee simple absolute. The only problem with this interpretation is that Section 2151 provides that such an acquisition may only be for the purpose of the "location, construction, maintenance and convenient operation of a wildlife management area," and that a "wildlife management area" is defined in the general definitions portion of the Department's statutes to be a "tract of land. . . owned or leased by the Department," 12 M.R.S. §1901(8). Thus, it might be argued that the Commissioner does not have the authority to acquire conservation easements, since an easement may not constitute an ownership or leasehold interest in a tract of land.

It is impossible to reach this conclusion, however, for two reasons. First, the history of the statutory scheme involved makes it clear that the Legislature could not have intended to modify Section 2151 through Section 1901(8). The present Section 2151 was essentially in place by 1943. The original version, which dealt only with fish hatcheries, was enacted in 1901, Laws of Maine of 1901, Legislative Resolves, ch. 142 (1901); the present language authorizing the Commissioner to "acquire . . . real. . . property," was substituted in 1931, Laws of Maine of 1931, ch. 99 (1931); and the expansion of the section to

cover "game management areas" was accomplished in 1943, Laws of Maine of 1943, ch. 44 (1943). It is clear then, that in 1943, the Commissioner had the authority to accept any interest in real property, including an easement, for the purpose of establishing a game management area. It was not until 1955 that this latter term became elsewhere defined, though the enactment of the present Section 1901(8). Laws of Maine of 1955, ch. 290, §13 (1955). The question thus is raised as to whether the Legislature intended, through the use of the terms "tract" and "ownership," to limit the broad authority to "acquire real property" which it had previously granted the Commissioner many years before. It is my opinion that it cannot be said that it did so intend. Had the Legislature wanted to effect such a limitation, it surely would have done so by simply changing the word "acquire real property" in the predecessor to Section 2151. It seems hardly likely that it would have sought to accomplish the same result by inserting words which might be interpreted to contradict those words in a general definition of another term which appeared in the authorizing statute. It is true that a general statutory definition is ordinarily given full force in the interpretation of a statute, but this would appear to be a case where to apply such a definition would create more difficulties than to ignore it. In such a circumstance, the "words of the act" will be held to control. Sutherland, Statutory Construction, §27.03 (4th ed., 1972).

Secondly, even if Section 1901(8) is somehow construed to have limited the Commissioner's authority under Section 2151, it is also clear that, at least since 1970, a conservation easement is an interest in land and is, therefore, capable of ownership. In that year, the Legislature enacted 33 M.R.S. §§667-8 which provides, inter alia, that "conservation restrictions,"defined to include easements, "are interests in land." The only question remaining,then, is whether this particular kind of interest is somehow not capable of "ownership."

The term "owner" in the words of Black,is a "nomen generalissimum," whose "meaning is to be gathered from the connection in which it is used." It does not include merely the person who holds the property in question in fee simple absolute, but may refer to the holder of other interests, such as thoseof possession. Black's Law Dictionary, 1259 (4th ed. 1968). The Restatement uses the term to mean a "person who has one or more interest." Restatement of Property, §10 (1936). There is no reason to conclude that the holder of an easement is any different from the holder of any other kind of interest. Indeed, the holder of an easement is commonly called an "owner." See, e.g., The American Law of Property, §8.5 (1952) ("The use to which an easement entitles its owner. . ." (emphasis added)). A conservation easement, therefore, is clearly an interest capable of ownership within the contemplation of Section 1901(8).

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* The term "game" was changed to "wildlife" in various fish and wildlife statutes in 1971. Laws of Maine of 1971, ch. 403 (1971).