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July 12, 1979

The Honorable Joseph E. Brennan
Governor
State of Maine
State House
Augusta, Maine 04333

Re: Title 33 M.R.S.A. §§ 201-A and 201-B

Dear Governor Brennan:

We have received David T. Flanagan's letter of July 10, 1979, asking for our opinion as to the need for a special session of the Legislature to address problems recently raised in connection with the 1977 amendments to Maine's recording statute, 33 M.R.S.A. § 201, et seq. (the "Act").

The problem, as we understand it, is whether section 201-A of the Act, which requires exceptions, reservations or recitals in a conveyance of real estate to be identified by reference to a recorded book and page of the registry of deeds or probate court or an "adequate description" (by metes and bounds or by reference to a recorded survey plan)

(i) applies only to exceptions, reservations or recitals of prior transactions evidenced by unrecorded or late recorded instruments, or

(ii) can be more broadly interpreted to impose a substantive method of conveyancing applicable to all exceptions, reservations, or recitals whether or not the transaction referred to is evidenced by an instrument that has been timely recorded.

This issue is enormously complex. Moreover, as you know, members of the private bar of this State engaged in the practice of real estate law and who, by reason of their expertise in this

specialized area, should be in the best position to resolve this problem apparently have different or uncertain views about the scope of the Act. This Office, of course, does not possess the expertise of the private bar in matters of this type. Nor, within the limited time frame for answering your inquiry, can we acquire an adequate substitute for this expertise or sufficiently explore the diverse and difficult questions raised.

With these important qualifications, which necessarily limit our ability to provide you with a definitive response, we have reached the following conclusions: It would be reasonable and in our view, appropriate, to narrowly interpret the Act to accomplish only its stated purpose -- viz., to improve the marketability of title to real estate affected by vague references to prior transactions evidenced by unrecorded or late recorded instruments -- and to avoid the possible constitutional problems that arise from a more expansive reading. However, the Act is worded in such a way that a court could reach a different conclusion, applying the Act to affect improper references to prior transactions which were recorded in a timely manner. Under these circumstances the necessity for emergency legislative action cannot be resolved by addressing the legal merits of the questions raised by the Act, but must be evaluated in terms of competing public policy considerations.

ANALYSIS

1. The Statutory Background.

Section 201, entitled "Priority of recording," provides that:

> No conveyance of an estate . . . is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof unless the deed . . . is acknowledged and recorded in the registry of deeds . . . . Conveyances of the right, title or interest of the grantor, if duly recorded, shall be as effectual against prior unrecorded conveyances, as if they purported to convey an actual title.

Putting aside challenges by a grantee against his immediate grantor, section 201 thus defines two situations where a conveyance is ineffective against third party claims:

(i) where the grantee is put on constructive notice of a prior conveyance to a third person by reason of the timely recording of the instrument evidencing the prior conveyance; and, in the absence of such constructive notice,

(ii) where the grantee has "actual notice" of the third party claim.

Section 201-A, enacted as an amendment to the Act in 1977 (P.L. 1977, Ch. 504), is entitled "Conditions of actual notice." It provides that

> An exception, reservation, or recital in a conveyance . . . shall not constitute actual notice within the meaning of section 201 of any other conveyance . . . unless it contains . . . (1) . . . [a] reference to the volume and page of the registry . . . record of the deed or other instrument evidencing such other conveyance, . . . which record can be found at the time of the recording of the deed or other instrument containing the exception, reservation or recital; or (2) . . . [a]n adequate description by metes and bounds or [by reference to a recorded survey.] (Emphasis added).

Section 201-A further provides that

> Any such exception, reservation or recital lacking such reference or adequate description shall not except, reserve or otherwise affect real property or any interest therein . . . .

Section 201-B(1), also enacted in 1977, provides that the requirements of section 201-A are immediately and retroactively effective as of the effective date of the legislation (July 15, 1977). However, for the stated purpose of avoiding possible constitutional problems that might otherwise arise because of the retroactive application of the legislation, section 201-B provides a two year "grace period" for reservations, exceptions, or recitals made prior to the effective date of section 201-A, which may be cured any time prior to July 15, 1979. Under section 201-B(1) cure may be effected in one of two ways:

(i) recording the deed or other instrument, if not previously recorded, evidencing the exception, reservation, or recital, and a notice of the claim based on such instrument in the form required by section 201-B(2); or

(ii) by recording notice alone, if the prior deed is lost or was late recorded.

The final section of the Act of immediate relevance to this analysis is section 201-B(5) which provides that

> Section 201-A and this section shall be liberally construed to effect the legislative purpose of enhancing the marketability of the title to real property by eliminating the possibility of interests under certain unrecorded or late recorded deeds. [Emphasis added].

2. The Purpose of the 1977 Amendments.

To the best of our present knowledge, the principal if not the only legislative purpose of the 1977 amendments enacting section 201-A and 201-B was to cure problems of marketability in title to real estate arising out of vague references in a deed to prior conveyances that were unrecorded or late recorded. This purpose is clearly stated in section 201-B(5) quoted above and is also reflected in the Statements of Fact to the original L.D. No. 1337, dated March 29, 1977, and House Amendment "A" dated June 27, 1977. Both documents refer to the intent to overrule the case of Sanford v. Stillwell, 101 Me. 466 (1906) which has come to stand for the proposition that a vague reference in a conveyance to a prior unrecorded transaction may put the grantee on "actual notice" of the prior transaction.

3. The "Problem".

The first occasion, to our knowledge, on which doubts about the scope of section 201-A were formally expressed was in an "Issue Statement" entitled "Statutory Divestiture of Real Estate Interests" dated June 27, 1979, prepared by Robert F. Preti, Esq. of the Portland law firm of Preti, Flaherty & Beliveau. This document, together with other background materials appended to a letter to Governor Brennan dated July 2, 1979, provides the most detailed description of the concerns of those who believe that the section 201-A may operate more broadly than to deal with the problem of "actual notice" of unrecorded or late recorded deeds. Reference is also made to a "Supplemental Memorandum To Issue Statement,"

dated July 5, 1979, and an exchange of correspondence between Mr. Francis C. Marsano, a member of the section of the Maine State Bar Association who participated in the drafting of the 1977 amendments, dated June 30, 1979, and Mr. Preti, dated July 3, 1979.

Without attempting to recite all the points raised in those documents, our understanding of the concerns expressed about the Act can be summarized as follows:

First, attention is focused on the fact that section 201-A is directed not only at "exceptions" (i.e., "carve outs" from real estate by way of a conveyance to a third party, such as an easement) but also "reservations" (i.e., where the grantor retains an interest in real estate conveyed) and "recitals" (interpreted to include not only explanatory references in a conveyance but the operative conveyance itself accomplished by reference to some other deed or conveyance).

Apparently there would be little, if any, concern if the 1977 amendments applied only to "exceptions" in the form of a reference to a prior conveyance to a third person. If such were the case and the owner of the "exception" (i.e. an easement owner) diligently recorded his interest, his act of recording, under section 201, would create effective "constructive notice" to the world of his property rights and that interest would be unaffected by any subsequent conveyance by the owner of the burdened property, whether or not the subsequent conveyance complied with section 201-A. On the other hand, if as of the effective date of section 201-A the owner of the exception failed to record (or did so after a subsequent conveyance) so that he did not acquire the protection of "constructive notice," he still might have the opportunity to perfect his interest. Assuming, under the doctrine of the Sanford case, that a subsequent conveyance sufficiently referred to the unrecorded or late recorded exception so as to put the grantee on "actual notice" of it, then under section 201-B the owner of the exception could perfect his interest in the manner and during the 2 year period prescribed by section 201-B. After the grace period, the owner of an unperfected "exception" would lose his interest. The operation of the statute as just described -- especially the emphasis on the alternative protections of "constructive notice," which existed prior to the 1977 amendments, and "actual notice" as modified by the 1977 amendments -- is precisely what the Legislature apparently intended.

The situation is different when one considers "reservations" and "recitals." The concern about "reservations" and "recitals" arises from the nature of the transactions involved. Exceptions result from conveyances out to a third party, the validity of which depend upon "actual notice" only in the absence of record ("constructive") notice as provided in section 201 of the Act. Reservations or recitals, on the other hand, may come into existence when the owner of real estate possesses good record title and then conveys it all (by way of a "recital") or less than all (creating a "reservation") by reference to a prior recorded instrument or, perhaps more typically in the case of reservations, where there is no prior instrument to refer to because the reservation is first created by the conveyance called into question. The significance of the distinction is that section 201-A might be construed to invalidate and therefore divest an interest reserved or granted by recital when the requirements of section 201-A have not been met even though each party in the chain of title has diligently recorded his conveyance. In other words, section 201-A may be construed to reach beyond the grantee who has failed to expeditiously record his interest and impose a substantive requirement or method of conveyancing which results in the divestiture of promptly and properly recorded conveyances that do not comply with the method of conveyancing required by the Act.

Second, in support of the foregoing interpretation of the 1977 amendments, it is pointed out that the second paragraph of section 201-A states broadly and without equivocation that "[a]ny such . . . reservation or recital lacking [the statutorily prescribed cross-reference] shall not . . . reserve or otherwise affect real property or any interest therein . . . ." There is no limitation on the effect of non-compliance to improper cross-references to unrecorded or late recorded documents.

Third, it is pointed out that one method of complying with section 201-A is by cross-referencing to a properly and promptly recorded prior conveyance. How can one do that, it is asked, if section 201-A applies only to unrecorded or late recorded instruments? In other words, if section 201-A is designed to address only the circumstances where actual notice is effective to defeat a subsequent conveyance because of the absence of constructive notice, why does the Act specify that one method of creating effective actual notice is to refer to an instrument which creates constructive notice?

Fourth, it is observed that if the broad reading of the 1977 amendments is valid, the present owner of real estate would not necessarily be put on notice of this defect by examining his own deed. He would be required to search his title to be sure that in each link of the chain any grant by recital or reservation complies

with the statutorily prescribed method of conveyancing in order to avoid divestiture. Such a requirement, especially in the context of this statute which is less than clear as to its effect, it is suggested, may create serious constitutional due process problems.

Fifth, it is suggested that if the broad reading of the Act is determined to be the correct one, as of July 15, 1979, certain property interests will be divested and by the same token vested in others. Once vested in others, the Legislature might be prevented by constitutional restraints from retroactively "curing" the situation. See, Sabasteanski v. Pagurko, Me., 232 A.2d 524 (1967), holding that curative real estate statutes may not be retroactively applied to impair vested rights.

Finally, concern has been expressed about possible dislocations in transactions affecting real estate because of the fear that the Act might be broadly construed even if it is eventually determined that the Act only applies narrowly to unrecorded or late recorded instruments.

4. Evaluation of the Problem.

We turn now to our evaluation of the problem, as we understand it and have described it above. In doing so, we again feel constrained to emphasize this Office's lack of practical and professional expertise in the law of conveyancing and the limited opportunity we have had to address the complex problems of statutory construction raised.

We start with the proposition that we are concerned with a question of statutory construction and that one of the cardinal rules of statutory construction is that a statute should be interpreted to reflect the intent of the Legislature. State v. Hussey, Me., 381 A.2d 665, 666 (1978); Canning v. State Department of Transportation, Me., 347 A.2d 605, 608 (1975) (the purpose of statutory construction is to "effectuate the intent of the Legislature, not its oversights.") As noted above, subsection 5 of section 201-B states quite plainly that the legislative purpose of the amendments was to enhance marketability of title by eliminating the claims based on unrecorded or late recorded instruments.

Reading the amendments to accomplish no more is also consistent with the structure of the Act. The Act, after all, is a recording statute. Section 201 addresses "priority of recording," giving one who diligently records his interests the protection of constructive

notice and through such notice priority of interest. One who fails to promptly record may still protect his interests against a third party who has "actual notice" of the unrecorded or late recorded interest. Section 201-A, by its caption and by its introductory terms, is designed only to define the conditions which must be met for effective "actual notice," within the meaning of section 201. It is therefore reasonable to construe the requirements that follow in section 201-A as being limited to circumstances where, because of the failure to timely record, one is claiming priority by way of actual notice.

Such a construction of the 1977 amendments finds additional support from the recognition that a broader reading of the Act raises serious constitutonal questions as to its validity. One such potential constitutional defect has already been identified above -- namely the reasonableness of requiring every owner of land to search his title to determine whether each conveyance complied with the statutory method. An equally serious constitutional infirmity presented by a broad reading of the Act is that the Act might result in the divestiture of interests as of July 15, 1979 (the end of the two year grace period) without affording the owner of property affected by the 1977 amendments an opportunity to cure his defective title. As noted earlier above, section 201-B(1) provides for a method of cure only for those with unrecorded or late recorded instruments. Assuming, without having had the opportunity to confirm the validity of such constitutional defects, we again turn to the cannons of statutory construction which direct one to interpret a statute, where possible, to avoid an unconstitutional result. State v. Davenport, Me., 326 A.2d 1, 6 (1974); Portland Pipe Line Corporation v. Environmental Improvement Commission, Me., 307 A.2d 1, 15 (1973), app. dismissed, 414 U.S. 1035 (1974); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). This could be done by limiting the application of sections 201-A and 201-B to situations where one is claiming priority by reason of "actual notice" to an unrecorded or late recorded instrument.

For the reasons explained above, there would be little difficulty in literally applying the statute in this narrow fashion to "exceptions." Difficulties arise in similarly applying the statute to "recitals" only if the term "recital" is intended to include the operative grant of title, as opposed to a reference in a deed or other conveyance to another instrument or transaction as a source of title or in some other collateral fashion. See, Sabasteanski v. Pagurko, supra, holding that a cross-reference

in a deed to the source of title does not increase or diminish the quantity of the estate otherwise conveyed. A narrower reading of the term recital could be justified on the same grounds that argue for a narrow reading of the Act as a whole.

It is more difficult to square the narrow reading of the Act to its application to "reservations." However, it is entirely possible that the Legislature did not intend a substantive difference between the term "reservations" and "exceptions." Even though in common parlance a distinction would be understood to exist, we understand that in actual practice conveyancers often use the term interchangeably. We recognize that a court would hesitate before construing a statute as intending the terms to have synonymous meanings. See Finks v. Maine State Highway Commission, Me., 328 A.2d 791, 799 (1974) ("In the construction of a statute, nothing should be treated as surplusage, if a reasonable interpretation supplying meaning and force is possible.") On the other hand, the rules of construction arguing for a narrow reading of the Act would appear to have overriding weight, especially if a court were persuaded that the Legislature used the term "reservations" to be sure that it adequately covered "exceptions" whether or not denominated as such. Moreover, even if a distinction were intended, we are not persuaded, at least at this point, that it is impossible to construe the Act as applying only to reservations which refer to prior instruments which were not recorded in a timely manner.

Notwithstanding all of the foregoing reasons for a narrow reading of the 1977 amendments, we are not in a position, especially with the limited opportunity we have had to examine the problem, to assure you that a court would necessarily agree. A court presented with the issue could conclude that the references to recitals and reservations in sections 201-A and B only make sense in the context of a broader reading of the statute which is not limited to actual notice of unrecorded or late recorded deeds -- namely a reading of the statute which imposes a substantive method of conveyancing. In support of such a construction, a court could find support in the wording of the Act discussed above under the second and third elements of the problem. Finally, if a court were to accept a broader reading of the Act, we find considerable merit in the suggestion that there would be serious constitutional problems with the statute which the Legislature probably could not retroactively cure.

CONCLUSION

In the final analysis,we cannot advise you, one way or the other, as to whether emergency remedial legislation is warranted. We are inclined to accept the narrower reading of the Act, but, at this juncture, we cannot conclude that the problem raised in connection with the 1977 amendments is so lacking in merit that no court would entertain the possibility of a broad reading of the statute.

Under these circumstances, we believe that the decision as to the need for a special session of the Legislature must be made on public policy considerations. On one side of the equation is the difficulty and expense of convening the Legislature. On the same side is the fact that if the Legislature were to be convened to enlarge the grace period under the Act for an additional period of two years, the intended objective of the 1977 amendments to cure marketability of certain titles would be likewise deferred. On the other side of the equation is the risk that a court might construe the Act broadly resulting in incurable divestitures of title apparently unintended by the Legislature. This risk may not be great, but if it were to materialize the consequences could be serious. We simply are not in a position to evaluate in practical terms the potential extent of the harm in this connection. Another and perhaps more realistically serious risk is that the concern by the private bar about the possibility of such a court decision might cause serious dislocations in real estate transactions and the extension of credit secured by real estate. This result would be brought about, for example, should title examiners refuse to certify title where conveyances would be affected by a broad reading of the Act. Here again we cannot quantify the risk.

There may be other elements to the equation but they too are not capable of being meaningfully measured in the context of a legal opinion from this Office. Accordingly, in the final analysis, we conclude that the need for a special session must be determined in accordance with the public policy considerations recited above.

Please let me know if we can be of further assistance.

Sincerely,

RICHARD S. COHEN
Attorney General

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