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ANDREW KETTERER
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

Telephone: (207) 626-8800
FAX: (207) 287-3145

REGIONAL OFFICES:

84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260
FAX: (207) 822-0259

April 1, 1996

Honorable Angus S. King
Governor of Maine
1 State House Station
Augusta, ME 04333-0001

Dear Governor King:

I am writing in response to your letter of March 28, 1996, soliciting my opinion whether it would violate the common law doctrine of incompatibility of offices for the same person to hold simultaneously the offices of member of the Land Use Regulation Commission and Franklin County Commissioner. For the reasons which follow, it is the Opinion of this Department that the two offices are incompatible, and therefore may not be simultaneously held.

As set forth in your letter, you have recently nominated Mr. Meldon Gilmore of the unorganized township of Freeman, Maine to the position of member of the Land Use Regulation Commission. You also advised me that Mr. Gilmore currently serves as a Franklin County Commissioner. The question which you pose is whether there is any prohibition in the Maine Constitution, statutes, or common law that would prevent Mr. Gilmore from holding both positions simultaneously.

The office of County Commissioner is not mentioned anywhere in the Maine Constitution, nor is that office one which is part of the legislative, executive or judicial branches of state government, so as to be affected by the separation of persons provisions of Article III, Section 2 of the Maine Constitution. Thus, the Maine Constitution must be regarded as silent on the question. Nor do the statutes governing either membership on the Maine Land Use Regulation Commission or the office of County Commissioner address the issue. The statute establishing qualifications for membership on the Maine Land Use Regulation Commission, 12 M.R.S.A. § 683, does not specify whether or not a County Commissioner may hold that office; nor does the statute governing the offices which County Commissioners may not hold address whether a County Commissioner may be a

member of the Land Use Regulation Commission. 30-A M.R.S.A. § 52. In the absence of any constitutional or statutory provision addressing the matter, the question therefore becomes one of whether the two offices would be found incompatible at common law.

The leading case on the common law doctrine of incompatibility of offices in Maine is Howard v. Harrington, 114 Me. 443 (1916). In that case, the Law Court described the doctrine thusly:

Two offices are incompatible when the holder cannot in every instance discharge the duties of each. The acceptance of the second office, therefore, vacates the first.

Howard v. Harrington, supra at 114, quoting King v. Tizzard, 9 B. & C. at 418. Accord Lesieur v. Lesieur, 148 Me. 500 (1953). In an earlier case, the Law Court explained the basis for this rule:

Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office-holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable as well as one indispensable for the protection of the public.

Stubbs v. Lee, 64 Me. 196, 198 (1874).

The first question, therefore, is whether it is possible for a Franklin County Commissioner to discharge "in every instance" all of the functions of the position of member of the Land Use Regulation Commission. This Department is advised that a significant part of Franklin County, including that in which the nominee resides, is part of the unorganized territory of the State. Thus, it falls within the jurisdiction of the Land Use Regulation Commission, whose function is to regulate land use in the unorganized territory. 12 M.R.S.A. § 685-A, et seq. This Department is also advised that it is not uncommon for counties to participate in proceedings before the Land Use Regulation Commission in at least two ways. First, a county might undertake a project requiring the use of land in the unorganized territory which would require the approval of the Commission. Second, a county may elect to participate in an advocacy capacity before the Commission with regard to a project proposed by a private person or another governmental entity. In either case, the county would have a direct and substantial interest in the actions of the Commission. Since a County Commissioner would be, in part, responsible for

directing the county's participation before the Commission, that member could not, at the same time, sit in judgment as a member of the Commission on the application in question. Consequently, it would not be possible for the holder of both positions "in every instance," to use the words of the Law Court, to discharge the duties of each. The offices must therefore be regarded as incompatible.

The second question raised by your inquiry is whether, even if the offices in question were incompatible, the incompatibility may be removed by the simple expedient of the County Commissioner in question recusing himself from any matter coming before the Commission in which his county is a participant. The answer to this question is also provided by the quotation from Howard v. Harrington set forth above. Since it is well established that, in the case of incompatible offices, the acceptance of the second office results as a matter of law in the vacation of the first, it follows that it is not possible to hold both offices simultaneously, and to cure any particular incompatibilities by recusal. Accord Lopez v. Martorell, 59 F.2d 176, 178 (1st Cir. 1932); Annotation, Effect of election to or acceptance of one office by incumbent of another where both cannot be held by the same person, 100 A.L.R. 1162, 1164 (1936). Thus, it would not be possible for Mr. Gilmore to assume the duties of the Land Use Regulation Commission, and avoid the incompatibilities which might arise between that office and his position as Franklin County Commissioner by recusing himself in Commission matters involving the county. Rather, if he assumes the position of member of the Land Use Regulation Commission, it is the opinion of this Department that he would be determined, as a matter of law, to have vacated the position of Franklin County Commissioner.

Finally, you inquire whether the fact that both the Board of Franklin County Commissioners and the Land Use Regulation Commission are multi-member bodies would remove the incompatibility. This Department is unable to see how this fact would make any difference in the result. As explained above, the essential reason why the offices are incompatible is that the Commission may be required to sit in judgment, in a quasi-judicial capacity, on matters in which the county is a participant. Thus, a person who is a member of both bodies is inevitably in a position of conflict; in his capacity as county commissioner he will have an official commitment to a particular result before the Commission, which is incompatible with his responsibility as a member of the Commission to adjudicate the matter impartially. Since recusal is not available, the conclusion is inescapable that the two offices may not be held simultaneously.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Ketterer", written in a cursive style.

ANDREW KETTERER
Attorney General

AK:sw

Senator Vinton E. Cassidy
Representative Robert W. Spear
Co-Chairs, Joint Standing Committee
on Agriculture, Conservation
and Forestry