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Ministry of
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Registration
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l'enregistrement

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EM199204

March 11, 1992

MEMORANDUM TO: KEN DOAN, LAND REGISTRAR, L.R.O. #25
CARSON WILMOT, LAND REGISTRAR, L.R.O. #44

FROM: KATE MURRAY
DIRECTOR OF TITLES

RE: 'Save Harmless' Agreements Used by Some
Conservation Authorities

Attached is a memorandum from Nancy Sills which I think is self-explanatory. As these agreements relate to use of land rather than title, they may be refused registration.

If you have any questions please feel free to contact me.

KM/fs

Encl.

cc: Wayne Giles
Arnie Warner

A handwritten signature in cursive script that reads "Kate".



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416/596-3830
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MEMORANDUM

TO: Kate Murray
Director of Titles

FROM: Nancy Sills
Counsel

DATE: February 6, 1992

SUBJECT: "Save Harmless" Agreements Used by Some Conservation Authorities

In the past year, the Ausable-Bayfield Conservation Authority and the Upper Thames River Conservation Authority, have tendered "save harmless" agreements for registration. The land registrars in Sarnia and Stratford have requested an opinion on the registrability of these agreements. Ken Doan specifically questioned whether other registry offices were affected and indicated that a consistent approach across the province should be established.

There is no statutory provision under the Conservation Authorities Act permitting registration of these agreements. I contacted Pamela Hunter of the Ausable-Bayfield Conservation Authority and verified with her that they were not relying on a special statutory provision for registration. In the absence of specific authority for registration, we have to consider whether these documents may be registered under the Registry Act and the Land Titles Act.

The agreement with the Ausable-Bayfield Conservation Authority provides that the owner consents to the registration of the agreement upon title to the lands and that the covenants, etc. shall bind and run with the lands of the owner. There is a common misconception that if people enter into a written agreement stating that something will bind and run with the land, it will. In fact, the parties cannot by agreement make something title-related, if by its very nature it does not affect title. In addition, although the parties may consent to registration of the agreement, it must meet the requirements of our registration statutes and, in particular, the land registrar still retains the authority under section 21a of the Registry Act and section 83a of the Land Titles Act to refuse the agreement for registration if it contains or has attached to it material that does not, in the land registrar's opinion, affect or relate to an interest in land.

In my view the Ausable-Bayfield Conservation Authority agreement does not affect title and is therefore not an instrument and may not be registered under the Registry Act or the Land Titles Act. The agreement with the Upper Thames River Conservation Authority is likely an instrument and may be registered as it includes a charging provision. However, even if both conservation authorities were able to successfully argue that the agreements are instruments, the land registrar may exercise his or her discretion and refuse to register them, as they contain material that is not title-related. The covenants in the agreements that are negative in nature do not appear to meet the requirements applied by the courts for valid restrictive covenants that can bind and run with the land. Neither one of the agreements describes benefitting lands. For the land registrars' general information, I am enclosing copies of pages 110 to 112 of Donahue and Quinn, Real Estate Practice in Ontario and a copy of the headnote from a recent decision of the Ontario Court (General Division), Board of Regents of Victoria University v. Heritage Properties Ltd. et al. (1991) 4 O.R. (3d) 655, dealing with restrictive covenants. In addition to negative covenants, the agreements also contain positive obligations, which cannot affect title. On balance, the agreements relate to the use of land rather than title, and I recommend that the land registrars refuse to register them.

For your information, I spoke with Phyllis Miller, Manager, Conservation Authorities Section, Ministry of Natural Resources, to determine if there is widespread use of these types of agreements. She advised me that they were unaware that any conservation authority, other than Ausable-Bayfield, was still requiring these agreements. In their view these types of agreements are inappropriate and they actively discourage the authorities from using them. They have obtained legal advice that these agreements may not be legally enforceable.



Counsel