

MINUTES OF COMMISSION MEETING
October 18, 2007

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, and Commissioner Andrew O. Bunn. Grace C. Bertone of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon and Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were Lawrence J. Fineberg, Esq. and Edward Eastman, Esq. of the New Jersey Land Title Association.

Minutes

The Minutes of the September 20, 2007 Commission were unanimously accepted as submitted after a motion by Professor Garland, seconded by Commissioner Bunn.

Adverse Possession

John Cannel explained that the Commission had received and reviewed responses from the Tidelands Resource Council, the Eastman/Fineberg response, and a brief memorandum from Staff regarding the underlying constitutional issues. In brief, if any relief for homeowners can be characterized as giving up state lands, and there is a good argument that both the land and the funds resulting from any sale of the land in question are part of the trust fund.

Professor Garland suggested that legislatively fixing a time within which a party is required to act, be it the State or a private party, does not constitute a taking.

Mr. Cannel said that giving homeowners a credit for the property taxes paid will not give them as much as the State riparian claim. He explained that if the State had moved against these properties in 1982, 1983, or 1984, the homeowners likely had title insurance policies sufficient to cover their losses. Now, however, with the appreciation in the value of the properties over more than twenty years, the title insurance is, for practical purposes, useless in this regard.

Mr. Cannel went on to explain that the homeowners arguably had constructive notice but, on the other hand, the Tidelands Resource Council (TRC) could have given more specific notice to the properties affected. The argument could be made that both parties hid their heads in the sand to an extent, but that there was less justification for the State to have done so. In sum, the equities favor the homeowner, but the constitutional issue exists and, therefore, there is no easy solution.

Commissioner Burstein questioned Mr. Fineberg about the fact that, in the response provided, he and Mr. Eastman did not address every argument. The TRC, for

example, argued that by publishing the maps, it did not allow for the concepts that generally apply in adverse possession matters, things like open and notorious continuous use, for example. Commissioner Burstein asked for Mr. Fineberg's response to that argument. Mr. Fineberg responded that such an argument failed to take into account individuals who took possession before the publication of the map. He indicated that he did not respond directly to the argument because he did not understand its relevance, suggesting that if he had taken title a sufficient number of years in the past and held it continuously, the map did not interrupt adverse possession. Ed Eastman also pointed out that the maps were not recorded, but instead were simply sent to the clerk's offices. He explained that, from what he has seen, some of the maps are currently in tatters since the personnel in the clerk's offices have been taping them up on the window for tracing purposes, so the maps are ripped to shreds

Professor Garland suggested that if the State wants to rely on a map that has not been filed, the State's claim seems tenuous, since the mere assertion of a claim, without other action, is not a sufficient basis on which to disturb a claim of adverse possession.

Mr. Cannel noted that adverse possession does not generally lie against the State but that the proposed legislation addressing how adverse possession can lie against the State, obviates the problems. Mr. Cannel also explained that there is a case that says that the proceeds from the sale of the property, not the property itself, are in the trust fund. When the New Jersey Supreme Court affirmed the decision below, they treated that language regarding the composition of the fund as if it was dicta and did not address the question.

With regard to the impact on the funds available to the TRC as a result of any modification to the statute to afford homeowners some relief, Mr. Fineberg noted that the TRC's submission was confusing because it seemed to suggest that that if the proposed statutory revision were passed, the TRC would go out of business and all funds would be cut off. There was no attempt by the TRC to estimate the number of claims that would no longer be viable if the legislation was passed and to distinguish those from the cases in which there would continue to be viable claims. The TRC, in its submission, suggested that under the proposed modifications all lands that they now claim would be freed from TRC claims. Mr. Fineberg suggested that, to the extent that the TRC's approach overstates the loss, the question remains whether the remaining balance would still provide adequate funding for schools. He noted that currently, the TRC does not aggressively pursue the funds in question, instead waiting for homeowners to come to them, one at a time. Mr. Fineberg expressed a concern that if the school fund desperately needed money, and if the TRC has a constitutional obligation to seek out and extract all available funding, it appears disingenuous for the TRC to assert that the proposal would gut the school fund. He suggested that if the school fund was in need of the money generated by the sale of properties affected by the State's claim to the land, then the TRC should have been proactive. Mr. Fineberg said that, contrary to the TRC's assertion in their submission, it appears that there would still be a significant amount of money directed to the school fund.

Commissioner Burstein observed that if the Commission makes a recommendation to afford homeowners some relief, the loss of funds to the schools will certainly be one of the objections raised to the proposal. Mr. Fineberg noted that he did not know how the monies in question are used, but that he did not believe that there are direct outlays from the fund, but that, instead, it was his understanding that the money goes to service debt of school boards. Chairman Gagliardi briefly explained the access to funds by school boards.

Commissioner Burstein moved that the project be modified as suggested by Mr. Cannel using Chairman Gagliardi's description of the format to follow. The motion was seconded by Commissioner Bunn. Staff will prepare a second tentative report which provides a provision to protect homeowners with tidelands property.

Title 22A

Laura Tharney explained that informal suggestions from the AOC and some of the Surrogates had been incorporated into the draft distributed in advance of the meeting. She also explained that a preliminary listing of proposed definitions had been received from the AOC several days before the meeting, but that she had not yet had the opportunity to fully review them. She indicated that her general approach to the inclusion of definitions at this time is to include brief, concise definitions for terms that should be defined in this section of the statute, without including terms that are defined elsewhere.

Ms. Tharney also explained that she needed to obtain additional information from the Surrogates to further refine the draft provisions regarding probate matters because it was her impression that she may need to separate the provisions pertaining to the Surrogates from those pertaining to the Chancery Division, Probate Part. After making these changes, she indicated that she would like to release the draft informally for comments from the affected entities. The Commission suggested that she obtain the feedback she required before presenting the next draft to the Commission. Chairman Gagliardi pointed out that two changes discussed at the last meeting were not reflected in the current draft - the first was a proper spelling of the term "firefighter" on page 22 and the substitution of the term "needy" for the term "poor" in two places on page 23.

Common Interest Ownership Act

Mr. Cannel indicated that, in his opinion, this project was ready for release but the question remained as to whether or not the Commission wished to limit its scope to the behavior in the units. Commissioner Burstein moved to release the report, and Commissioner Bunn seconded the motion, which passed unanimously.

Land Use Law

Mr. Cannel indicated that the Commission had received a letter from the League of Municipalities indicating that they do not object to the substance of the Commission's

draft, and agree that the draft comports with existing law but they do not wish to see any changes in the wording of the statute since its meaning has been settled by the case law. One change required to the report is on the seventh line of the Introductory material, where it should read “most of whom are not lawyers”. With that change, Commissioner Bunn made a motion to release the tentative report as a final report, which motion was seconded by Commissioner Bertone and approved unanimously.

Construction Lien Law

Marna Brown explained that when you look at the definitions of lien fund and lien claim in the Construction Lien Law, or the lack of definitions of those terms, it can be very difficult to understand those concepts in situations in which construction has come to a halt. Under that circumstance, problems arise when you try to define and calculate the lien fund and the lien claim. She added that there are a number of other nuances in the statutory provisions that the courts have had to grapple with and observed that the courts have been weighing the equities in every case since the inception of the statute. She suggested that there had to be a way to clarify these concepts in the statute, noting that it was of particular concern because the people reading these sections are contractors and other individuals who are not lawyers. Presently, it is very complicated to determine what has to be subtracted and how to calculate the numbers.

Mr. Cannel added that, if you read the case law, it becomes apparent that the courts have had difficulty in determining how to apply the law. There is no problem in circumstances in which there is a financially responsible contractor. Problems arise, however, when construction has stopped, and there is real difficulty in interpretation of the relevant statutory provisions. Chairman Gagliardi observed that, at present, there is a gaping hole in the law that has not yet been filled by the New Jersey Supreme Court, and that he thought this was an appropriate project for the Commission.

Professor Garland noted that, under the current statute, there is a problem if you have a subdivision with 15 different lots because, a supplier of lumber, for example, would have to allocate his lumber to each lot and file against each to protect himself. Mr. Cannel said that another problem involves a supplier who is working on something like a townhome, because such a supplier has no way to properly apply the payments received in the manner in which the courts have instructed that it be done.

Professor Garland said that he reads the law as protecting the homeowner, not the large developer. Mr. Cannel said that whatever the rule is, it should be made clear. Professor Garland added that it doesn't make sense to give a large commercial developer the protections afforded to a single residential homeowner when the developer is building townhomes or apartments. Commissioner Bunn suggested that another thing the Commission needs to be mindful of is the presold residences, noting that regardless of how ownership is configured, you need to protect it when, for example, you are dealing with a condominium building with liens against everyone's ownership. Mr. Cannel said that he was not sure how a supplier complies in a distributed ownership situation. Professor Garland suggested that individuals with contracts could be protected by

recording them but Commissioner Bertone noted that the current law prohibits the recording of those contracts. Mr. Cannel said that one possibility is to distinguish between contract stage and the closing on the property. Professor Garland said that if liens were filed against individual units in a presold project, they could be released at the time of closing.

UPMIFA

Mr. Cannel summarized Mr. Burke's memorandum to say that the bottom line is that there is absolutely no reason for this uniform law not to be enacted. The Commission requested that a tentative report be provided for the November meeting.

Poor Law

Mr. Cannel explained that he had received a communication from Legal Services, and will be meeting with them next week. A week after that he is scheduled to have what he believes will be the last meeting with the Mercerville group. He expressed his hope that for the November meeting the Commission should see a clean draft that everyone accepts. Mr. Cannel also explained that the Mercerville group wants the report to go out as a tentative report, rather than a final report in November, and then a final report thereafter.

Title 39

Ms. Tharney briefly advised the Commission of her attendance at various meetings throughout the State to elicit feedback on this project. She explained that she found attendance at the meetings helpful and that it afforded an opportunity to speak with a number of individuals from different groups throughout the State. She added that a number of issues had been raised and comments and suggestions made at these meetings.

She explained that as the project nears the point at which it will be released as a tentative draft, she will once again need to reach out to the MVC and municipal court judges, making them aware of the status of the project and requesting additional information and comments.

Ms. Tharney explained that one of the areas that Staff is currently researching are the impact of the federal regulations on the superceded New Jersey statutory provisions, and the fact that the federal regulations only apply to new vehicles, so the State statutory provisions cannot simply be eliminated because that would create a void in the provisions pertaining to things like equipment.

Issues raised by police officers at recent meetings for consideration include the fact that police officers cannot have a vehicle towed for lack of insurance as they can for lack of registration, which creates the situation in which the driver of the vehicle cannot drive the vehicle, but the police cannot tow it from the scene. Another issue raised is the offenses for which licenses can be suspended, this arises in the GDL context when Judges

are not sure if they can suspend the license of a young driver for violations or just fine them. It was suggested that perhaps licenses should be able to be suspended for all moving violations, but Ms. Tharney recommended caution since much would depend on what one considered a moving violation. She pointed out that the statute still required a motorist to honk his or her horn when passing, for example. Another issue raised by the officers included the lack of guidance in the statute regarding things like the use of the third, central “turning lane” in some areas, and the inconsistency in the area of pedestrian crossings.

Miscellaneous

Mr. Cannel asked if there was any desire to change the date of December meeting, presently scheduled for Thursday, December 20th. The determination was made that Staff would survey the Commissioners by telephone on Friday to determine if anyone has a preference or a scheduling reason to change that date.

The date of the next meeting is November 15, 2007.