

MINUTES OF COMMISSION MEETING
April 19, 2001

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Commissioners Albert Burstein, Vito Gagliardi, Jr. and Peter Buchsbaum. Professor William Garland attended on behalf of Commissioner Patrick Hobbs.

Also attending were Professor Robert Holmes and Ayana Gordon of Rutgers Law School, Newark; and Diane Sterner, Executive Director of the Housing and Community Development Network of New Jersey, and Alan Mallach, consultant and professional planner at the Housing and Community Development Network of New Jersey.

Minutes

The Commission approved the Minutes of March 15, 2001 as submitted.

Recordation

Mr. Cannel stated that he had made the changes requested by the Commission at the March meeting. He suggested releasing the project as a tentative report to field responses from experts in the area since the subject matter is technical and requires comment from the recording officers, the bar association, title insurers and real estate professionals.

Introduction. The Commission asked staff to rewrite the last paragraph of the Introduction.

TR-1. The theory of the project is that virtually anything related to property can be recorded. However, the Commission asked staff to correct Section 1, subsection (b)13 because the language implies that, in addition to the general language of section 1, there is another category of recordable material. The Commission asked staff to delete the language "or contains any agreement in relation to real estate, or grants any right or interest in real estate or grants any lien in real estate." That deletion would leave on catchall section.

In addition, the Commission asked staff to rephrase the language of subsection (b) to "Documents entitled to recordation include." Also in subsection (b), to add "restrictions on use" to list or add to subsection 13 the language "affecting property or its use." Finally, to add commentary indicating that recordation of fixtures is an encumbrance.

TR-2. In subsection (a)(5) add "title to" after "conveying" to read "conveying title to real property."

TR-3. In subsection (a)(2), the term "public document" is used to mean the kind of document that does not need to be acknowledged because it is a public document. An explanation will be added to the comment referring to evidence rules as making a similar distinction. In the introductory language of TR-3, add after reference to "TR-1" reference to "TR-2." As to subsection (b)(1), it is "an" original not "the" original.

The Commission found unclear the language of subsection (b)(3), and asked staff to rewrite that subsection. Miscellaneous documents accompanied by affidavits are recorded; this subsection refers to them. The question arose as to where a person doing a property search would find a document of this sort; where and under what heading would the Clerk index the document. This subsection derives from practice, not a source statute. The Commission asked staff to raise issues, such as indexing, with practitioners to learn how to clarify the language of the project.

Subsection (c)(1) add "or legal representative of the party." Also correct citation to read "2A:75-7" in subsection (c)(2).

TR-4. In subsection (a)(1), delete the lower case "a." In subsection (c), state "Maps shall comply with rules, standards and procedures authorized by the State Records Committee." In comment, line four, use comma and word "since."

TR-5. The Commission asked staff to combine subsections (a) and (b) due to similarity of language, but to note the slightly different form requirements for maps. Staff also should look at language used with regard to maps to make sure that language is consistent throughout all sections.

TR-7. In subsection (a), add a provision for "other indexes." In subsection (c)(2) rephrase as follows: "if a deed is made under power of attorney, it shall be indexed in the name of the person granting the power." In subsection (c)(4), add period at end of sentence.

The Commission stated it would examine the balance of the report at next month's meeting.

New Project - Abandoned Building Rehabilitation Act

Commissioner Buchsbaum introduced Professor Robert Holmes and Ayana Gordon who were appearing with respect to the project. Commissioner Buchsbaum then described the nature of the project: to find a legislative solution to the problem of municipal recovery of abandoned or neglected real property. At present, New Jersey has several laws, including the uniform maintenance codes, the uniform construction codes and the dilapidated building statute, that set forth different procedures and provide different remedies to address the problem of abandoned or neglected properties. In addition to these statutes, municipalities have the power to fine, sell tax certificates and to condemn property. However, none of these laws achieved the desired result or either compelling the owner to rehabilitate the building or to transfer the ownership of the building to parties able and willing to undertake its rehabilitation project. In addition the statutes lack uniformity. Commissioner Buchsbaum observed that Alan Mallach had drafted a statute providing for the appointment of a receiver for distressed properties. The receiver would have the right to repair and charge the cost against the property. Under certain circumstances, with court approval, the receiver could sell the property.

Mr. Holmes stated that some New Jersey laws actually exacerbate the problem of recovering abandoned or neglected properties. The law requires municipalities to sell tax certificates quarterly each time a property is in arrears. This requirement results in a property encumbered by substantial liens held by professional investors whose interest is limited to rates or return, not rehabilitation of buildings. Selling tax certificates leads to a downward spiral of the building's value and condition.

An alternative to current practice would be transferring the property to a receiver or the municipality and enabling the receiver to start an in rem foreclosure proceeding. This might prevent the property from being used solely as an investment vehicle. But this alternative would require the receiver to have appropriate powers. Professor Holmes suggested that it might be preferable to give municipalities the discretion to sell tax liens.

Mr. Burke remarked that the strongest aspect of Alan Mallach's proposed statute was the receiver's power to sell the property. Provided that notices are given, property can be sold and transferred to a party with an interest in the real estate. As a practical matter, foreclosure proceedings with regard to distressed buildings involve bidding tax rates, not the amount of delinquent taxes.

Professor Holmes explained that fines – the current sanctions for failing to maintain property – do not induce the owner to make repairs or correct violations. The fines simply build up over time. Mr. Burke suggested that the law should be designed to prevent buildings from getting into an unrecoverable condition. There should be a remedy other than a fine to prevent buildings from falling into a dilapidated condition.

Commissioner Gagliardi stated that what he liked about the draft statute is its reliance on the private sector to initiate the process of recovering a distressed building; government may not respond as diligently as a profit seeking private party. Mr. Burke suggested that the proposed law should provide that any person who has a plan and financing be allowed to start the foreclosure of an abandoned building. The Commission noted that the principal problem is to find a way to sell the property free of all liens.

Alan Mallach and Diane Sterner then addressed the Commission. Mr. Mallach explained that receivership should be an effective tool to address the widespread problem in urban neighborhoods of a landlord who has decided to allow the property to decay and refuses to respond to the usual mechanisms to abide by law. New Jersey statutes are ineffective, though a number of statutes allow for receivership. These statutes neither give any direction to the receiver nor do they define the power of appointment. Consequently, receivership is not used in New Jersey. Some properties continue indefinitely on the edge of abandonment. There are tens of thousands of abandoned residential buildings in New Jersey. The proposed statute strengthens the remedy of receivership. In the event of receivership, the proposed statute would create a stringent test for the return of the building to the owner of record. If the owner fails to meet the stringent test or does not want to retake the building, then the statute establishes a procedure to sell the building clear of liens. Under the statute, the receiver has lien priority over all other private lien holders. New Jersey law does not now so provide.

Under Mr. Mallach's view, a municipality with rights of a receiver currently has no obligation to improve property. It can collect rents and apply them to back taxes. Mr. Mallach proposed that if a municipality were to act as a receiver, it must act as a motivated third party would. However, the Commission noted, the "interested parties" identified in the proposed statute did not appear to have any financial incentive to correct building violations. Mr.

Cannel asked whether it would be simpler and more effective to foreclose the property and void receivership.

The Commission discussed the benefits of selling distressed properties, and asked about the type of violations that would be needed to trigger a sale. Mr. Mallach suggested two conditions: (1) a landlord's pattern and practice of keeping just one step ahead of dilapidation and (2) repeated and uncorrected building, health and other violations. The question then turned to who would have the right under the statute to start a petition for the sale of the property.

Commissioner Burstein asked about the exit strategy of the receiver. Mr. Mallach stated that under his proposal, a receiver who has stabilized the property has a right to petition the court to sell the property. The owner of record then would have a right of return on conditions. Mr. Mallach suggested that to get the property back, the owner of record would have to post a bond with the municipality. That bond would be used for future repairs if they were not made by the owner.

In addition, the proposed statute would permit the receiver to put together a deal to sell the property for less than market value upon court approval. But Mr. Cannel noted that a private non-market sale of this sort violated the owner's rights. The reason behind permitting privately negotiated sales was to put the property into the hands of developers experienced in neighborhood rehabilitation and committed to the process of neighborhood reform. Thus, Mr. Mallach was concerned with additional terms of sale and future obligations of buyers. He was concerned that public auctions would not yield appropriate new owners, the tenants might be displaced due to increased rents. But the Commission noted that the new owner, if he or she renovated the property, might legally qualify for substantial increased rents.

Ms. Sterner stated that there were several non-profit entities that would be the most likely persons to initiate the petition. Ms. Sterner also was concerned about selling the property to third party investors. She stated that the proposed statute was designed to achieve the public purpose of providing community housing and of integrating rehabilitation plans with those of neighborhood revitalization plans. Many organizations have track records and professional experience undertaking this kind of work in certain neighborhoods.

Mr. Mallach also questioned the wisdom of permitting profit-driven third parties to get into the business of rehabilitating distressed buildings. He

preferred non-profit associations or developers with an interest in a particular neighborhood. Mr. Mallach cited the example of a Catholic organization started after the 1968 Newark riots that decided to rehabilitate its neighborhood; now that organization owns several residential and commercial properties and runs community based programs such as child care. Non-profit corporations often emerge from neighborhoods. The Board of Directors generally consists of professionals; money is raised through grants and other sources. Where these organizations exist, they bring distinctive assets to the process of rehabilitation that should be recognized in the statute, though the statute need not be limited to non-profits only. Non-profit organizations do not exist in every area; and, they may lack interest in a particular property.

Commissioner Burstein stated that staff would study the law in the area, identify the legal issues, clarify the social objectives to be accomplished, and posit whether there can be a legislative solution to the problem of abandoned or neglected buildings.

Legislative Update

Senator Gormley has asked the Commission for its opinion on a bill, S-63, that would remove the statute of limitations for claims based on sexual misconduct. The Commission asked staff to circulate the bill to the Commissioners. Mr. Cannel stated that he would send a letter to Senator Gormley advising that the Commission was studying the bill.

Miscellaneous

Judy Ungar stated that she and Mr. Cannel would meet next week with Peter Incardone, Jr., Chairman/Commissioner of the Bergen County Board of Elections with regard to the election law project.

The next Commission meeting is scheduled for May 17, 2001.