

MINUTES OF COMMISSION MEETING
July 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, Hugo Pfaltz, Jr., and Vito Gagliardi, Jr. Professor Bernard Bell, Rutgers Law School, attended on behalf of Commissioner Stuart Deutsh; Professor William Garland, Seton Hall Law School, attended on behalf of Commissioner Patrick Hobbs; and Grace Bertone attended on behalf of Commissioner Rayman Soloman.

Also attending was Dawn R. Shanahan of Issues Management LLC.

Minutes

The Commission asked staff to rewrite the sentence found on page 7 of the June 21, 2001 Minutes concerning the Distressed Property Act and explaining the foreclosure process under the Redevelopment Statute. The Commission then accepted the Minutes of June 21, 2001 as corrected.

Title Recordation

The Commission discussed the problem of allocating loss between two innocent parties resulting from a document of title improperly indexed by a County Clerk officer. The failure to index the document correctly means that subsequent searches of the records would not identify this recorded instrument and thus interferes with the effective transfer of title to the property.

The clerk, it was maintained, should enter the lot and block number of the property immediately upon taking the document for recording and indexing. This approach resembles the Torrens system used in other counties. While the Commission initially expressed interest in this approach, several Commissioners identified problems of implementing it in the context of subdivision of farmland.

The Commission directed John Cannel to improve the definition of claimant used in the proposed statute. Commissioner Pfaltz claimed that the current provision regarding the effect of later recorded documents was unclear and required revision. Assume a father conveys a farm to his son and that the son records. The father then conveys the same property to a second son. The first son knows about the later conveyance. If the document of the first son is property recorded and indexed, the brother, that is the second son, loses. Commissioner Pfaltz found problems with this language. Whether the claim of the first son to the property is good depends upon whether he had knowledge

about the conveyance. The parties cannot rely upon the order of recording. If knowledge of a subsequent transfer is known at the time of recording, one cannot rely on recordation. The problem centers around what the claimant knew at the time of recording. If he knew about the subsequent transfer, he cannot rely upon recording.

The Commission then discussed the term "lodged for record." A deed that is not recorded or lodged for record is void against subsequent bona fide purchasers or creditors, etc. On balance, the revised language is not good. Subsection (b) is not clear. If the term "lodged for record" is used, then it must be defined. County clerks use sequential stamps that are placed on documents to indicate sequence of submission for recording. The Commission decided to retain the "lodged for record" language but to define it as not only tender of a document that meets filing requirement and any filing fee, but also acceptance and stamping by the recording officer.

Mr. Burke suggested collapsing the categories: lodged for record, recorded and indexed. Under this approach, a document of title would not be recorded until indexed properly. Documents are stamped as to date and time of receipt. The fall back rule is first in time wins when both documents are mis-indexed. The fall back rule for other situations such as when the later document is indexed properly but the first one is not, and there has been no time to do a continuation search, would then be a negligence standard. Hence, if a person lacked any opportunity to discharge the duty to conduct a continuation search, that party would win. Mr. Burke suggested making a series of rules to handle most common situations.

In practice, instruments submitted for recordation are "recorded" almost immediately. They are accepted and stamped. Indexing of title documents may take a week. To know whether a document has been indexed, a person must do a follow-up check. Grace Bertone confirmed that title companies already do continuation searches to make sure that indexing is accurate. According to Mr. Cannel, the number of cases where questions such as these arise is rare, one or two cases every five years.

The Commission then discussed the effect of a Notice of Settlement and agreed that such a notice reduces risk. Professor Garland proposed that lodged for record meant tendering an instrument meeting facial requirements, paying the filing fee, and being accepted by an officer and stamped.

The Commission agreed that the burden must be placed on the party who can do a continuation search to verify accuracy of indexing. A document to be recorded must be properly indexed. Using a negligence standard, if there is an opportunity to check the index and a document is not there, then the document should not be treated as recorded.

This approach follows existing practice though that practice is not codified in law. A document is protected by recording unless the document is misrecorded, the time at which it was appropriate to check for misrecording has passed and the person who submitted the document has not conducted such a check. This standard imposes a new requirement for a follow up search to check on indexing, but, as a practical matter these searches are done now.

Commissioner Burstein noted that the present statute in Title 46 does not contain subsection (b). Current section 21-1 carries implications of subsection (b), that is, a properly recorded document is notice to everyone. Current section 22-1 says every deed that is not recorded is void and of no effect against subsequent bona fide purchasers or creditors without notice. Insertion of subparagraph (b) was intended to clarify existing law, but the Commission did not find that the intended result - clarity - had been achieved. On balance, the Commission decided that the revision was better than existing law but not good enough. The Commission asked Mr. Cannel to redo subsection (b).

Abandoned Buildings

Dawn R. Shanahan of Issues Management LLC noticed this project on the Commission's web site and wants to follow its progress. Chairman Burstein explained that the objective is to target individual properties that are abandoned or neglected but not within a redevelopment project. The draft fills a gap in the spectrum of statutes already in place.

Ms. Shanahan stated that she works with developers improving contaminated sites. New legislation is being drafted to permit developers easier access to these sites so that they may work to improve them. Identifying responsible properties is burdensome and some properties cannot be redeveloped. She says project properties are not big sites but smaller distressed properties. Her interest is in larger projects than those contemplated by the Commission project. Development of Brownfields properties involves state and federal law.

Ms. Shanahan stated that she will come to future meetings to follow the progress of the project. She noted that a three months' vacancy period is too short to trigger provisions of the Commission's project; that must be changed. Mr. Burke said that the trigger definitions must be made more precise.

Regarding Newark properties, Mr. Burke noted that typically the ground level of a large commercial building is occupied but that upper levels are vacant, often in poor condition and subject to rot due to open windows and porous walls. He agreed that the proposed statute must distinguish between residential and commercial property. The New Newark Foundation owns many properties in the city of Newark. However, despite claims made to the media, the Foundation is not doing any work on the buildings. Mr. Burke stated that more empirical data was needed to learn why buildings are held in dilapidated condition. Sale of tax certificates to professional investors does not appear to be the major cause of holding back redevelopment. Market considerations now dictate the future of buildings.

Some buildings are for sale and others for rent. One can buy tax liens, pay taxes for two years and then foreclose. Under these circumstances, most investors would foreclose; the alternative is payment of additional taxes. The Commission suggested cutting-off the tax lien at some point. Mr. Burke said it would be better to change the law to eliminate any incentive to use buildings as investment vehicles and to encourage transfer of property to people who want to fix them.

Presently, despite the overwhelming number of poor people living in Newark, the wealthy control the fate of major buildings. The law should allow a group of smaller investors to get in on the action; small investors, as well as the city's inhabitants, are shut out of any say in how their environment should be developed. An entity called BMHC owns many buildings in Newark; there is no visible activity of improvement on properties they own.

Mr. Burke agreed that the trigger is key and must be fine-tuned. How to limit blight may be beyond the reach of the law; however, a private right to take action on stagnant properties is solid. Sale, to clear away tax liens also is critical.

Mr. Burke suggested giving people who live in the neighborhood a chance to own these buildings. Ownership could be conditioned upon making improvements. The Commission's project attempts to eliminate government red tape and make it possible for ordinary people to take control of their cities. As to

criticisms that ordinary people do not know what to do to get repairs done, Mr. Burke stated they could go to Home Depot. Mr. Cannel dismissed this idea because of problems of co-ownership of properties. However, Mr. Burke stated that the "not economically viable" concept is misused today. The mentality, especially among the construction industry, is to destroy and replace.

Election Law

Registration for voting is affected by both federal and state law. The Commission agreed that since federal law is supreme where it applies, the provisions on registration should track it.

Commissioner Bell noted that New Jersey complies with motor vehicle registration. However, New Jersey statutes do not reflect current federal law. He recommended that we change the statutes to track motor voter registration. Commissioner Bell stated that the law should provide that any public agency take registration and forward the terms to the appropriate county authorities.

The Commission agreed that removal of people from voting rolls is needed, as the population is increasingly mobile. Commissioner Bell made some suggestions: requiring a voter to take some affirmative step every five years, and requiring the record keeper to verify the accuracy of the records. Commissioner Pfaltz liked the five-year trigger; and suggested sending out letters to registered voters to verify their current location and to indicate whether they wanted to remain on the list.

Commissioner Pfaltz stated that restructuring of the election system should make election offices more efficient by using county structures with state input. There would be one agency handling process of registration through the process of certifying elections.

The Commission asked staff to target the September meeting to solicit advice from people experienced in the field, and to invite state and county officials, including clerks.

Commissioner Bell recommended looking at the MIT study, for patterns and practices outside of New Jersey.

Miscellaneous

The next Commission meeting is scheduled for September 20, 2001.