

MINUTES OF COMMISSION MEETING
September 20, 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 Andrew O. Bunn and Commissioner Sylvia Pressler. 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 was Lawrence J. Fineberg, Esq. of the New Jersey Land Title Association.

Before the meeting began Marna L. Brown, Esq., the new Staff Attorney was introduced to, and welcomed by, the Commission.

Minutes

The Minutes of the July 19, 2007, meeting were unanimously approved as submitted after a motion by Commissioner Pressler and a second by Professor Garland.

Adverse Possession

Chairman Gagliardi observed that the Department of Environmental Protection had rejected the Commission's proposed approach to addressing adverse possession as it pertained to riparian lands. Mr. Cannel explained that one controversial issue is whether and to what degree to allow adverse possession against the State. The Commission piece, he noted, is very narrowly drawn to deal only with tidelands and, more narrowly, only in cases in which taxes have been paid and the land was filled. The DEP objected to the adverse possession of State lands as a general matter and suggested that the State has done everything that it could to address the issue by giving notice in the form of a published map in the 1980s.

Commissioner Pressler suggested that the main issue is the 1982 Constitutional amendment, which may present an obstacle to the modification of the law in this area. The Constitutional amendment contemplates the State's continuing claim on the land, the State certainly could set aside such a claim if it was inclined to do so.

Commissioner Pressler asked if there was an equal protection argument. In response, Mr. Cannel noted that the State's position was that they had done its part by publishing the map. Commissioner Pressler also asked if the definition of riparian land excluded filled and improved land. Mr. Cannel indicated that the New Jersey definition includes all land that was reached by mean high tide in the past. He added that the way he read the Constitutional provisions, they do not bar the state from giving up the land, but that an issue is presented by the fact that some individuals have already paid the State for the lands in the area in question.

Commissioner Pressler suggested that it would be useful to hear from the Real Property Section of the State Bar Association. Mr. Fineberg responded that the Bar would be glad to get involved and that he would likely be charged with the responsibility for responding and would like the opportunity to do so and to demonstrate that the Commission's position is not facially unconstitutional. Chairman Gagliardi indicated that the Commission would like to see something comprehensive on the Constitutional issues.

Mr. Cannel suggested that there was an alternate way to view the issue since the individuals living on land that would be affected by the Commission's proposed revision are individuals who have paid a great deal of money in taxes and that if the land in question was State land, they should not have been paying taxes on it. Commissioner Bunn added that any amount paid in taxes could not be required to be disgorged by the local governments that were the ultimate recipients of those amounts, but that taxes paid could be treated as a credit toward any amount claimed by the State. Thus the State's claim of 85% of the value of the property would be reduced by the credit in the amount of taxes paid. Commissioner Pressler raised the question of how improvements would be treated under this approach.

In response to an inquiry regarding the amounts in question, it was determined that the State takes in approximately \$30 million each year. Mr. Fineberg explained that the Commission that receives the money is passive, it does not aggressively pursue the money but receives it in response to transfers of the land in question. The State also takes in a portion of the money from dock fees and other items, the bulk of the funds is grant money. The money in question is not part of the State general fund, it is designated for the public schools. The question is if the money taken in from riparian lands is removed, would public schools suffer. Mr. Fineberg also noted that the State is reacting to an earlier version of the Commission's proposed report, not the most current draft.

Commissioner Pressler suggested that there is still much the Commission does not know and that it is difficult to assess the impact and the economic consequences of the adoption of the proposal as a result. Mr. Fineberg said that if the Commission adopted a 40 year limitation, that would change the financial impact of the Commission's proposal.

The Commission requested that any reply by the Bar Association be submitted before the next meeting.

Title 22A

Ms. Tharney explained that she had received preliminary comments on this report and that overall there was a positive reaction to the project. She noted that she had received some limited comments from some of the Surrogates. The comments received to this time will be incorporated into the next version of the project and there will be some modifications to the language at that time as well.

Ms. Tharney explained that the AOC had indicated that there were a number of terms they felt were appropriate for inclusion in a definitions section and that those will be forwarded by the AOC and incorporated as appropriate.

As a general comment, Commissioner Gagliardi asked Staff to get some additional information from the AOC regarding what sort of provisions they would like to see in lieu of the mileage provisions currently contained in the statute. One option suggested by Commissioner Pressler was a provision allowing compensation for “reasonable expenses in attending the proceeding”, but such a provision presents a different set of problems. Commissioner Gagliardi also noted that a mileage substitute could be used that incorporated a flat fee but made provisions for modification every three years.

On page 2, the suggestion was made that section 22A:1-7 be split into two sections, one containing the general provisions, and one containing the waiver provisions. In the “waiver” section, the language should be clear that the State does not have to pay the fees in question.

The suggestion was made to change the heading of 22A:2-7 to eliminate “payable to the Superior Court Clerk” and insert instead “in Law or Chancery Division”. In that same section, it was recommended that subsection (d) be moved to 22A:2-7a.

Also in Section 22A:2-7a, it was suggested that subsections (b) through (d), inclusive, seemed out of place since they were geared toward post-disposition proceedings. With regard to that same section, it was noted that the Clerk of the Supreme Court also does things like affix the seal of the Court to documents and exemplify them, so a modification of the language to reflect that might be appropriate. In that same section, the AOC recommended reviewing the section to make sure that all of the appropriate language had been removed from the original 22A:2-29 and inserted into this section.

With regard to section 22A:2-37.1, the general response to the modifications was favourable and it was suggested that while it was appropriate to include the provisions concerning municipal courts in this section, they may not be needed at all since it appears that they are no longer in use. The Commission requested that Staff limit this section to the Special Civil Part after confirming that the municipal court no longer does any of the things set forth in the section.

With regard to 22A:1-1.1, it was suggested by a reviewer that an increase in the \$5 juror fee for the first two days would be appropriate.

In section 22A:1-4, the preliminary comments received regarding the use of the term “government agent” were favourable. It was suggested by the Commission, however, that this needs to be a defined term. In that same section, apostrophes are needed in the term “witnesses”, and Staff was asked to determine who pays the fee called for.

In 22A:2-14, the question remains regarding why the section specifies “after default” in the subject heading, but it appears that it may have been keyed to the fact that after a default, no action was pending, thus requiring a special provision.

In 22A:1-6, the preliminary comments approved the combination of the fees for writs and subpoenas in the same section, but recommended separating the general civil division provisions from those applicable to the Special Civil Part.

In 22A:2-3, the language at the end of the first line and beginning of the second should be stricken. In that same section, the replacement of “legal fee” with “cost” was generally approved.

In 22A:2-30 it was suggested that the section be split into two sections, one pertaining to the Clerk of the Chancery Division, Probate Part and the other pertaining to the Surrogate. The Commission agreed. The Surrogates who provided preliminary comments requested that the filing fees for actions be increased to match those in other Superior Court actions and be keyed to other Superior Court fees so that if those fees are increased, these will be increased as well, rather than lagging several years behind. In other comments, the Surrogates providing comments strongly suggested that caution be used in reducing any fees since the County government is required to provide the funding to operate the Surrogate’s offices. Ms. Tharney suggested that small decreases in things like the per-page copying fees to make them consistent with those charged by other entities would seemingly be offset by increases in things like filing fees to make those consistent, but more comments will be solicited from the Surrogates. A reviewer of the project had recommended, for example, that the fee for copies of documents charged throughout this document be reduced to match the \$0.75 per page set by OPRA since the argument can be made that litigants should not pay more than would be charged to a random member of the public to obtain copies of documents relevant to the litigation. The Surrogates also recommended certain provisions for elimination as no longer used, and these comments will be reflected in future drafts.

In 22A:3-4(e) it was suggested that the archaic reference to constables be removed since the term is no longer used.

In 22A:2-7c(a)(21), the reference should be to “firefighters”, not “firemen” and in 22A:2-51(b) the reference should be to the “needy” rather than the “poor”.

Public Assistance Law

As an initial matter, Mr. Cannel suggested that there was an issue that had not yet been raised, but should be addressed. He said that there is a possibility that an individual could “age out” of the system, by collecting five years worth of benefits, for example, and then still need additional assistance. As a result, the issue of residual responsibilities is a significant one. The municipalities have resisted the language in the draft to this time leaving residual responsibility with them for such individuals since many municipalities have turned over the administration of all of their assistance programs to the counties and

have no infrastructure in place to address the needs of individuals for whom they might then be charged with the responsibility to assist. Mr. Cannel suggested a different approach. He proposed that the language be changed to reflect that when a municipality gives over all responsibilities for the administration of programs for the needy, it gives over all residual responsibilities as well. This more efficiently insure residual coverage for individuals who need it and address the municipal object to the Commission's proposal.

With regard to the terminology, the term "needy" will be used instead of "poor" and the project will be referred to as the "public assistance law".

It appears that the other outstanding issues can be resolved at the next meeting with the Mercerville group, scheduled for October meeting, and that the project can be released as a final report by the end of the year simply because the Commission has been working with interested parties on an ongoing basis, thus releasing the project as a tentative is not necessary here as a mechanism for soliciting comments than it would be otherwise.

Common Interest Ownership Act

Mr. Cannel indicated that this report had been forwarded to CAI, the organization of community boards, and they did not approve of the Commission's efforts. He added that this was such a contentious issue that he did not think that any bill based solely on the Commission's work would move forward.

John Burke added that in the transfer section, language should be added to allow the Board to say that there can be no commercial use of the property and impose other limitations as necessary. Mr. Cannel said that there is a limitation on what a board can do by the Master Deed, but Mr. Burke strongly suggested that the language was too weak.

Commissioner Pressler noted that the report talked about regulation of behavior only and did not purport to change anything else and that it would be clear if the language of the report said "may regulate only such personal behavior..."

The project will be held for further discussion.

Title 39

Ms. Tharney presented a summary of information obtained at the meetings she had attended since the last Commission meeting and explained her ongoing attendance at meetings as helpful in obtaining information on an ongoing basis and maintaining the visibility of the project since it is a sizeable one that would benefit from careful handling.

The Commission suggested that, at the time the project is released, there should be information accompanying the release, in an appropriate format, which details the

information and input received from various individuals and groups as the project was ongoing.

New Project - Construction Lien Law

A new project was proposed pertaining to the Construction Lien Law and issues created by the adoption of the law in the mid-1990s. The Commission requested that Staff discuss this issue with those in the trade and then draft a memorandum for their consideration.

Anachronistic Statutes

Commissioner Pressler mentioned that the Council on Local Mandates invalidated a section of the statute requiring local school districts to conduct testing for radon.

Miscellaneous

It was noted that the December meeting falls on a date closer to Christmas than usual, it did not appear to be a problem to the Commissioners in attendance, but a determination will be made at the October meeting if it is necessary to reschedule the meeting for that month.

The next Commission meeting is scheduled for October 18, 2007.