

**MINUTES OF COMMISSION MEETING**  
**November 15, 2007**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, Commissioner Andrew O. Bunn, and Commissioner Sylvia Pressler.

Also in attendance were Edward Eastman, Esq. of the New Jersey Land Title Association, Patrick Greene, Esq., of Peckar & Abramson, P.C., and Paul S. Natanson.

**Minutes**

The Minutes of the October 18, 2007 Commission meeting were unanimously accepted as submitted.

**Adverse Possession**

Commissioner Andrew Bunn asked about the approach taken in the tentative report, observing that the approach in the draft is to deal substantively with the question of the State's right to the land. He noted that it was his recollection that the approach that had been discussed by the Commission was to address the issue as a statute of limitation. Commissioner Bunn suggested that by doing so, the Commission could be reassured that it was not creating a constitutional problem.

Ed Eastman responded that adverse possession statutes are odd creatures because they can be used as a shield and as a sword at the same time. The New Jersey Supreme Court said that they should be both and invited the legislature to address both parts of the issue. In New Jersey, the 20 year statute was a shield and the 30 year statute was a sword. Mr. Eastman explained that the approach of the Land Title Association was to combine both, using the 30 year time period, and it looks as though the Commission followed the same approach, so he did not object. Mr. Eastman did say, however, that the draft language includes, within its scope, currently flowed lands, and he suggested that the State do not think that the State would accept that.

John Cannel agreed that the language in the draft statute "have complete right and title" did make the piece look less like a typical statute of limitations and said that the language could be modified. He suggested that the language could be altered to read "the State is barred if it does not act within that time". Commissioner Pressler said that modifying the language could accomplish dual purposes by saying both that the State is barred and that the person in possession shall have good title. Chairman Gagliardi said that the suggested language appeared to address the issue raised by Mr. Eastman. A revised draft will be provided by Staff for the next meeting.

**Construction Lien Law**

Patrick Greene explained that the firm of Peckar & Abramson, PC represents individuals

and entities in the construction industry and that his firm had received notice from the BCA on the day before the Commission meeting notifying the firm that the meeting was scheduled to take place. He said that he was present to see what was proposed and to offer to be a resource in drafting. Chairman Gagliardi explained that the Commission had conceptually discussed the changes to be made at the last Commission meeting.

Commissioner Bunn asked if there were other changes proposed to be made to the law in addition to those contained in the draft that was provided to the Commission for this meeting. Mr. Cannel said that the Commission had, in the current draft, the information pertaining to residential construction and that information concerning the lien fund, the composition of the lien fund, and the priorities will be provided for a later meeting. Marna Brown explained that she wanted to present the information contained in this first draft to the Commission to see if Staff is moving in the right direction with its proposed modifications and to obtain further guidance.

Mr. Cannel noted that the current statute intends the categorization of “residential” to include, for example, 100 houses being built by a single developer. He said that at the last meeting of the Commission, one Commissioner suggested that one purpose of the Construction Lien Law was to protect the homeowner and that it does not appear from the current language of the statute that this is the case.

Mr. Greene said that one problem with this section of the law, which has arisen in the case law, is the question of ‘what is residential?’ He suggested that Staff’s first draft on this issue at least clarifies that a 100 unit condominium unit is, in fact, residential. He explained, however the larger problem in regard to condominiums is whether work on common areas is covered and how to differentiate work on common from work on particular unit. The next question, Mr. Greene suggested, is the question of the timing of the determination that construction is residential. He suggested that it is possible to build a 100 unit apartment building and, at some later time, file a master deed that turns it into condominium units.

Mr. Greene said that with residential construction, there are two important concerns. The first is the protection of the consumer. This, he said, is very important and was the original impetus behind the residential restrictions. By way of example, he cited the example of a homeowner having work done on the home and then being unable to sell the property if some less-than-responsible contractor files a lien. Second, he explained that there was a transfer of title question. When a developer is developing multiple units, you do not want a construction lien for a small amount of money preventing transfers of a large number of homes. Mr. Greene said that those are two concerns that need to be addressed. Mr. Greene suggested, however that the issues mentioned above are the principle unresolved issues in the area. He added that he the Court decision in In re Kara Homes did not resolve the issues for all cases.

Commissioner Pressler asked for additional information about the problem concerning common areas. Mr. Greene explained that, if you are dealing with a developer, you are not dealing with a consumer, so you don’t have concerns about the developer not having the resources to protect him or herself from a lien, for example, but you do have a concern about providing the developer with proper title when he or she makes a purchase. Mr. Greene also suggested that one problem with the decision in In re Kara Homes is the issue of “when do you

define when something is a residential property”. The case leaves unresolved the question of whether you do so when it is an idea in the developer’s mind, when a master deed is filed, or at some other time. It is not clear what procedure to follow.

With regard to the filing of a lien, Commissioner Bunn asked if, in a multi-unit building, you have to file for each unit. Mr. Greene said that this was a good question. He added that it was not clear if, when the master deed was filed, it effectuated the transfer of all of the units in to separate units. Commissioner Bunn asked if anyone knew how other states have dealt with this issue. Mr. Greene said that a number of 50-state studies have been completed, and that one was done recently by a sub-group of the American Bar Association. He explained that the construction lien in New Jersey was modeled on the New York lien law and that the residential lien distinction was a late addition to the statute that may not have been fully considered. He said that he did not believe that any other state in the country differentiates between residential and non-residential construction.

Chairman Gagliardi told Mr. Greene that the Commission would be grateful for the resources and expertise that he and his firm can bring to this process of revising the construction lien law. Chairman Gagliardi added that to the extent Mr. Greene could provide the Commission with the 50-state analysis that he mentioned, and to the extent that he has identified problem areas and can alert us to other such issues, the Commission would be very appreciative. Mr. Greene said he would be happy to provide the information.

### **School Background Checks**

Paul Natanson appeared to speak with the Commission about a matter not on the agenda, school background checks. He made reference to the relatively recent change in the law regarding who pays for the background checks required of potential employees in schools, an issue that he had originally brought to the attention of the Commission.

Mr. Natanson explained that his school system does not believe that it should pay for background check. He said that the rules, contained in the Administrative Code, for issuing the county substitutes credential says “the county superintendent shall not issue a county substitute credential until the candidate submits a criminal history letter”, leaving open the question of who is required to pay for the criminal history check. Mr. Natanson said that the criminal history check applies only to substitute teachers, not to any other type of teaching certification and that the language in the Administrative Code, which contradicts the recent change to the statute, merely confuses the issue. He suggested that if the Commission deleted that part of the Administrative Code, the problem would be solved.

Commissioner Pressler said that it was not that simple. She explained that in order for a provision in the Administrative Code to be changed, the administrative agency has to repeal the language, or a court has to declare it invalid. She explained that the Commission does not have any impact on the Administrative Code. Commissioner Pressler said that Mr. Natanson could file a declaratory judgment action on the basis that the language in the Code is inconsistent with the newly enacted statute.

Mr. Natanson said that a volunteer should be defined as “an individual who, during his or her first month of service, is paid or expected to be paid less than the cost of a criminal background investigation and the substitute teacher certification”. Chairman Gagliardi said that the definition will not solve the problem, because the language of the regulation will remain and, if there is a decision interpreting the regulation as trumping the statutory language, then a modification to the statutory language would not resolve the issue. He explained that the Commission was not in a position to provide Mr. Natanson with the relief he was seeking.

Chairman Gagliardi stated that it is the position of the Commission that the provision of the Administrative Code was inconsistent with the new statutory language and that the statute takes precedence over the Administrative Code. Mr. Cannel added that the Commission recommended that the matter be taken up with the Commissioner of Education.

### **UPMIFA**

Mr. Cannel directed the Commission’s attention to the comments provided by Commissioner Bunn.

Mr. Cannel said that the first issue raised concerns the definition of “person” and the suggestion is that, instead of “public corporation”, the definition should state “for-profit corporation, non-profit corporation”. He added that the bold type in the text was a typographical error and will be removed. With regard to the possible confusion caused by the language in 6(c), which reads “consistent with the charitable purposes expressed in the gift instrument” it was proposed that “in accordance with the donor's probable intention” be used instead.

Commissioner Pressler asked if the language in Section 6 said that if the donor's intention is illegal, the Attorney General can not do anything about it for 20 years. Commissioner Bunn referred to the doctrine of cy pres and Commissioner Pressler suggested that she did not think there had ever been a time limit like 20 years for a cy pres. Mr. Cannel said that the draft will be revised to remove the 20 year time period and will include the language “generally consistent with the overall charitable intent of the donor”.

With regard to the Section 6(b) small fund exception, Commissioner Burstein said that increasing the limit to \$100,000 would be more reasonable. Chairman Gagliardi noted that a cost-of-living accelerator might be a good idea under the circumstances, but that the Commission has never used such language.

Commissioner Pressler suggested that the Commission include language which stated “when it appears under the circumstances that...” As a final suggestion, Commissioner Pressler said that in Section 6(d), the Commission could use language such as “if an institution determines under the relevant circumstances, that...”

Mr. Cannel said that the Commission would have a revised draft for the next meeting, and Commissioner Bunn said that he would provide some additional information about the 20 year time period for that meeting.

### **Criminal Code Causation**

Mr. Cannel explained that the Commission had received generalized approval of this project and no objection from the Public Defender's Office before issuing the tentative report and, since that time, have received no other responses. He suggested that this project did not have opposition, and that may be why the Commission has had no responses. Commissioner Pressler made the motion to release the tentative report as a final report and Commissioner Bunn seconded the motion. It was adopted unanimously.

### **Married Women's Property Act**

Mr. Cannel explained that this report had been issued more recently, but that he did not anticipate any objection to the project. Commissioner Pressler made the motion to release the tentative report as a final report and Commissioner Bunn seconded the motion. It was adopted unanimously

### **Proposed New Projects**

Mr. Cannel explained that when the Commission last looked at the issue pertaining to the inclusion of the term "idiot" in the statute, there was a reluctance to change the language of the statute since doing so would create dissonance between the language of the State Constitution which included the term "idiot". After the voters approved a change in the constitutional language, it may be appropriate to revise the statutes to reflect the change in the constitution. Chairman Gagliardi said that it sounded like a worthwhile project.

Mr. Cannel also raised the issue pertaining to mortgage foreclosures regarding charges imposed on individuals who have mortgages. He suggested that given the apparent prevalence of imposing fees not authorized in the agreement between the parties, it might be worthwhile to the state law reflect that an entity may not foreclose a mortgage based on fees not authorized in the agreement and also cannot charge fees not expressly authorized in the agreement. Commissioner Burstein suggested that, at the federal level, Barney Frank may have introduced something regarding this issue and asked Staff to obtain a copy of such a proposal before making any determination in this area. Mr. Cannel said that Staff would do so and then would take a look at what other states are doing so that the Commission could decide if there was a project to pursue in this area.

### **Title 39**

Laura Tharney discussed the format for distribution of the current Title 39 revisions to the Commissioners in light of the fact that the project was 400 plus pages in length. The Commissioners agreed that CD distribution was fine. Ms. Tharney explained that the report would be broken down into categories, grouped according to subject matter into approximately 10 to 20 separate groups of less than 50 pages each. Commissioner Burstein suggested that separate sections should be carved out from the report with the idea that separate bills would be proposed for each of the separate sections. Chairman Gagliardi expressed his desire to encourage as much public comment as possible because of the project's significance. He urged

that the report be presented in such a way that perhaps five or more separate bills for consideration could be proposed. Commissioner Bunn agreed that the more bills generated, the better.

Ms. Tharney said she would review Volume 3 and present at the December meeting anything she believes has not already been seen by the Commissioners or has been further revised since last distribution. Chairman Gagliardi indicated that the December meeting would be virtually devoted to Title 39 and that he anticipated getting approving the entire Title for distribution at that time. Commissioner Burstein urged that the Commission release the Title 39 Tentative Report by the first few months of the new year so that it was available for review by the incoming new legislature. It is anticipated that the project would be available for public comment for approximately six months, and that a final report could be released in May of June of 2008.

### **Miscellaneous**

A motion to adjourn was made by Commissioner Burstein and seconded by Commissioner Bunn. The next meeting of the Commission is scheduled for **Wednesday**, December 19, 2007.