

Joint Editorial Board on Uniform Real Property Acts
Meeting Minutes
Meeting of Saturday, November 12, 2005

Present: Shannon Skinner, Rob Krapf, Bill Breetz, Barry Nekritz, Ira Waldman, Bob Diamond, Dale Whitman, Carl Lisman, Wilson Freyermuth

Carl Lisman called the meeting to order at 9:00am with a welcome of new Executive Director Wilson Freyermuth and introductions of the various members. Lisman provided a background discussion of the history, purpose, and role of the JEB and the various tasks of the Executive Director.

During this discussion, Carl Lisman also noted that this would be Rob Krapf's last meeting as the Board's representative from ACMA. Rod Clement will be replacing Rob Krapf as ACMA's representative.

This discussion identified the following areas of focus for the JEB and the Executive Director:

- 1) Obtaining background research/position papers on issues of potential interest as subjects of uniform legislation
- 2) Monitoring Uniform Acts (both as enacted and in the NCCUSL drafting process)
- 3) Building relationships with other groups/constituencies
- 4) Neutral evaluative role of legislative agendas of other groups
- 5) Identification of new uniform act projects
- 6) Advocacy for enactment of Uniform Acts

Discussion varied about whether the JEB should develop new relationships (memberships or liaison relationships) with other institutions (ALTA, Fannie/Freddie, NAR, NAHB, consumer groups), or instead, and the like), or whether it would be preferable to invite them to participate on an ad hoc basis with respect to particular issues/projects.

Agenda Items

A. **Current NCCUSL drafting projects.** Lisman went through the list of current NCCUSL drafting projects to identify those projects with potential real estate implications. Of the pending projects, the following were identified as worthy of further inquiry:

- Administrative Procedures for Interstate Compact Entities
- Business Trust Act
- UMIFA
- Trust Code
- Agricultural Cooperatives
- Durable Power of Attorney
- E-Government

Freyermuth will make contact with Reporters to these Committees to get status report on these

projects. Freyermuth will divide the projects up among Board members. Board members will review their assigned act prior to the next meeting and report at the next meeting whether their act presents any real estate issues/implications.

B. **Kelo/Public Use.** There was discussion about the large number of state legislatures considering legislative proposals to limit the power of state and local governments to take private property for economic development purposes. There was a general consensus that this was a highly charged political issue, and that the pace of public action is likely to be too fast for the NCCUSL process. There might be room for NCCUSL to step in several years from now with a project focused on “damage control” if some states have adopted unbalanced or imprudent legislation.

C. **URLTA.** There was a discussion regarding whether the Board should encourage NCCUSL to revisit the Residential Landlord-Tenant Act, which was enacted more than 20 years ago. Whitman noted that where adopted, it has been subjected to substantial nonuniform amendment, and landlord lobbies have been effective in many states in gutting tenant protections contained in the Uniform act. Whitman argued that it was unrealistic to expect uniform treatment on broad issues, and that a more prudent approach might be to focus more narrowly on the issue of treatment of residential security deposits (how they must be held, whether interest must be paid, timing requirements for returning, etc.). Freyermuth will try to identify whether there are any existing articles/papers focusing upon this issue.

D. **Beneficiary Deeds.** Whitman and Freyermuth provided an explanation of the beneficiary deed (a deed that essentially operates with testamentary effect, effecting a transfer only upon death), which can be used in approximately 8 states. The JEBUTEA wants to proceed with urging NCCUSL to push for a uniform act authorizing the use of beneficiary deeds. Freyermuth will coordinate with David English to get a summary for Board members about beneficiary deeds, their characteristics and the states that have authorized them.

E. **Model Tribal Secured Transactions Act.** There was discussion about the prospect of a JEB for Native American law, and about the need for the Board to have a liaison to such a JEB regarding real estate issues. There was consensus that the Board should make it known that we are available to be consulted with respect to real estate issues.

F. **Cooperatives.** Originally, the proposal to NCCUSL Scope and Program focused upon agricultural cooperatives. However, the drafting committee has expanded its focus. Electrical coops were addressed at the last meeting, and there is some question about whether the act might reach/impact on real estate cooperatives. The Board needs to ensure that the drafting committee has a real estate lawyer on it or that the committee is sensitized to the need to be aware of real estate issues. Barry Nekritz will talk with Reporter and report back.

G. **Continuing Care Communities.** Bob Diamond prompted a discussion of the potential need for uniform legislation regarding the real estate ownership issues associated with continuing care communities. In many of these situations, persons within these communities think that they “own” the units they occupy, when in reality they don’t. Diamond suggested that many states have health care regulatory regimes that create potential/actual transaction planning

problems. Diamond suggested that there is a possible need for legislation that carefully delineates between health care regulation (which an act should not displace or disrupt) with real estate issues. Lisman suggested that an act that focused upon disclosure would be preferable to a regulatory model. Diamond suggested that the National Association of Living Industries and/or the American Seniors Housing Association might be relevant sources of information — they might have legislative proposals or might be prepared to provide background information that could facilitate further Board consideration of whether a uniform act is worthwhile. Freyermuth will nose around on these groups' websites, look for any existing legislative proposals on the subject, and report back to the Board.

H. MERS Foreclosures. There was brief discussion about the Florida litigation in which the trial court ruled that MERS lacks status to foreclose a mortgage as a representative of the mortgagee, even when MERS holds the note. There was general agreement that discussion of the issue is premature at this point, as MERS is appealing the decision, a reversal seems quite likely, and MERS does not currently view this case as being likely to create widespread question about MERS' ability to foreclose on behalf of its member mortgagees.

I. State Land Sales Registrations. Carl Lisman pointed out that some states have laws regulating sale of out-of-state land within the state. He pointed out that many New England states have a law adopted back in the 1950s (of unknown authorship), while some states outside of New England have a different model. Some states will accept federal forms (Interstate Land Sales Full Disclosure Act) in lieu of compliance with state registration laws, others don't. Bob Diamond suggested that there was also an important question about internet sales — does internet marketing of real estate trigger an obligation to register in all states having such statutes. Breetz expressed some doubt or uncertainty about whether a uniform act would be enthusiastically embraced by state regulators. Carl Lisman will make contacts with some state regulators to see whether they would have any interest/enthusiasm for such a project.

J. Predatory Lending. Previous discussion of this issue by the Board had resulted in a judgment that the issue was not appropriate for uniform legislation because (a) there was no consensus upon the issue of what characteristics made a loan "predatory" and (b) there was concern that state predatory lending legislation might be pre-empted. There was some discussion of Debra Stark's article in which she proposed a "mortgage counseling" solution designed to inform consumer borrowers sufficiently to enable them to avoid predatory loans. Rob Krapf agreed to circulate Debra's article again, and further discussion was shelved in anticipation of a subsequent conference call.

K. Notice/Opportunity to Repair Legislation. Bob Diamond discussed the legislation being actively promoted by the National Association of Home Builders seeking to provide the contractor with notice and an opportunity to repair before the institution of litigation over construction defects. This legislation has now been adopted in 15-17 states.

Diamond argued that 95% of the NAHB bill is great, and that only about 5% is really over-reaching and anti-consumer in nature (principally, the provisions requiring a vote of the owners' association before suit can be filed). He argued that a uniform act makes some sense, because the NAHB bill probably can't obtain universal adoption (substantial interference from trial

lawyers) and a more balance and well-drafted act may be able to obtain substantial additional enactments. Dale Whitman agreed that this would be an appropriate subject for a uniform act. There was discussion about whether or not the NAHB bill should be used as a basis for a uniform act or instead as a conceptual model, with a preference for the latter. Carl Lisman raised the question whether it would be possible to get a report to Scope and Program in time for its January meeting, so that a drafting committee could be appointed and begin to meet in Spring 2006. Dale Whitman raised the question whether the project should address both the nature/content of warranty obligations as well as notice and opportunity to repair. Bob Diamond remarked that the project should focus only upon notice and right to cure, which doesn't exist in many states but which wouldn't result in a change in existing laws with regard to warranty content. Bob Diamond will circulate the NAHB bill and the Board will discuss the issue further in its follow-up conference call.

L. Environmental Covenants Act. Mike Kerr met with the Board to discuss the status of the Act. Currently, there are 10 enactments (Nebraska, Ohio, South Dakota, Maryland, Kentucky, West Virginia, Iowa, Nevada, Maine, Delaware). The Act is pending in Pennsylvania and is planned for 22 introductions this year.

Kerr discussed with the Board issues regarding Dan Miller, Colorado Assistant Attorney General, who is taking strident public opposition to the Act and is agitating among regulators for an approach whereby regulators would have the power to terminate or modify covenants unilaterally. There was substantial discussion regarding how NCCUSL should deal with Miller — whether to attempt to respond to him on the merits, or simply ignore him. There was a general consensus that NCCUSL should ignore him — keep him busy in Colorado and ignore him otherwise rather than give him a soapbox. In states in which the Act is introduced, if state regulators raise these issues, it is probably more effective to address them directly in those states rather than give Miller a soapbox in which to raise questions about the Act.

M. Beneficiary Deeds (revisited). David English and Tom Gallanis arrived from the JEBUTEA meeting to meet with the Board regarding beneficiary deeds. English pointed out that the California law reform commission is gearing up to address this issue, that about 300,000 such deeds are on record in Missouri, and that they are increasingly common in Ohio too. The JEBUTEA is enthusiastic about proceeding with this issue and wants to make sure that the JEBURPA has input on the real estate issues. Tom Gallanis will prepare a memo and send it to Wilson Freyermuth, who will circulate it to the Board, for further discussion at its spring meeting.

N. Tenancy in Common/Partition Issues. There had been brief discussion at the March 2005 meeting regarding Section 1031 TICs, but there was general consensus that these issues were not worth further study or attention by the Board. Discussion focused instead upon the issues raised by the ABA Property Preservation Task Force, which included:

- Forced partition by developers buying fractional interests in family farms or other lands
- Inability of possessors (often farming the land, but not necessarily) to be able to raise funds needed to purchase the land
- Partition occurring in judicial sale context where sale price may not meaningfully reflect

intrinsic or arms-length fair market value

Discussion at prior Board meeting had focused upon whether a land trust or similar ownership device could address some of these issues, or whether the issues were instead intrinsic to the partition process and thus required uniform legislation on partition.

There was agreement that there were significant concerns with respect to potential abuse of partition, particularly where ownership interests have become highly fractionalized, and that these concerns often had significant impacts upon African-Americans. Shannon Skinner argued that it was important for the Board to give further thought to uniform legislation on this subject because the ABA Task Force was so strongly in favor of legislative action.

Ira Waldman agreed to get Jay Zschau's proposal (model land trust legislation) and circulate it to Board members to review. Shannon Skinner will get Dave Dietrich's memo (Dietrich was on the ABA's Task Force) and circulate it. Further discussion to occur in the Board's follow-up conference call.

O. Sale of Tax Liens. Bill Breetz observed that statutes in a number of states allow municipalities to sell tax liens, which accrue interest at 18% and which are all superliens. Priorities among competing liens is a potential mess, because different years' unpaid taxes create different liens. Getting payoff amounts on these liens once they're sold can be difficult. Certainly, with municipal budget pressures, there will likely be increasing tendency of municipalities to raise funds this way (or to advocate for legislation authorizing them to do so where it doesn't currently exist. Perhaps the National League of Cities or other municipal groups would care enough to provide leadership or get involved on such a project?

There was general discussion and a sense that the issue may be one meriting further study. Dale Whitman agreed to put a request on the DIRT list to gather data from DIRT members about the extent to which their respective jurisdictions authorize and/or use this practice. Dale will forward the data to Bill Breetz, who will have a research assistant put together a 50-state study. In the meantime, we'll keep the item on the Board's agenda for May.

P. Credit Freezes. Bill Breetz raised a question about whether affordable housing efforts might be advanced by possible "credit freeze" legislation, which would essentially permit a lender financing the rehabilitation of existing housing to place a "credit freeze" on the homeowner so as to prevent the borrower from accumulating additional debt (thereby increasing the borrower's risk of default). There was a general sense that a credit freeze idea would not work, in that you really couldn't tell people that they can't borrow money (and in many situations, there may be any number of legitimate personal reasons why a particular borrower may reasonably need to obtain subsequent credit).

Q. Relocation Assistance. Bill Breetz initially placed this item on the agenda, but stated that he needs to do more background work to figure out what cities are actually doing.

R. Liaisons. There was discussion as to whether the Board should establish formal liaison relationships with particular groups, most particularly ALTA (no particular person identified)

and the National Bar Association (Deke Clayborn, who is the representative to the NBA's Board of Governors from the NBA's Real Estate and Probate Section).

Future Meetings

The Board agreed to conduct a follow-up conference call for 2:00pm Eastern, on Wednesday, November 30, 2005. The agenda items will include Predatory Lending (Debra Stark's mortgage counseling proposal), Tenancy-in-Common (partition/property preservation), and Notice/Opportunity to Repair.

The Board also agreed to conduct its Spring 2006 meeting in conjunction with the May 4-6 ABA meeting in San Diego, CA. The Board will meet all day on May 5, 2006.

Joint Editorial Board on Uniform Real Property Acts
Meeting Minutes (Conference Call)
November 30, 2005

Participating: Shannon Skinner, Barry Nekritz, Dale Whitman, Carl Lisman, Wilson Freyermuth, Rod Clement, Ira Waldman, Bob Diamond
Absent: Bill Breetz

Carl Lisman began the call by welcoming Rod Clement, who has replaced Rob Krapf as ACMA's representative to the Board.

Agenda Items

A. Predatory Lending. Rob Krapf had circulated Debra Stark's article following the Chicago meeting. There was general discussion of Debra's article, which proposed to address predatory lending by means of a federal mortgage counseling statute that would promote/require consumer education that might enable/empower consumers to avoid predatory loans. There was a general consensus that this was an overly optimistic and unrealistic proposal with no likelihood of enactability, and that the Board should not attempt to address it further.

B. Notice/Opportunity to Repair. Wilson Freyermuth had circulated the NAHB bill, which has provided the model for the legislation enacted in various states, as well as the CAI blackline indicating the proposed CAI changes. As was suggested at the Chicago meeting, there was a general consensus that this would be a good project, if we can get the cooperation of the NAHB in the project and can work with them to get consumer support. It was agreed to recommend to Scope and Program that they appoint a drafting committee, although this will need to be done on a "fast-track" to make sure that NCCUSL can build on the impetus of the recent enactments in 15-17 states. Wilson Freyermuth and Bob Diamond will work to put together a report and circulate it to the Board for review in time to submit to Scope and Program at its January meeting.

C. Property Preservation/Tenancy in Common. Ira Waldman had circulated Jay Zschau's model land trust legislation. The model legislation doesn't really seem to address the issues involved (the concerns associated with forced partition, family members not having a right of first refusal, partition sales as judicial sales not bring fair market prices, etc.). While a land trust arrangement might enable some of these concerns to be avoided where a family had been prescient enough to create such an arrangement in the first place, it is useless in the vast majority of these situations where tenancy in common results as the inheritance default rule. It was agreed that we should distance ourselves from the Model Land Trust Act.

There was further discussion about the partition-related issues, and whether these issues should be sent to Scope and Program for consideration at its January meeting. Instead, it was decided to keep these issues on the agenda for further consideration, discussion, and a decision at the May meeting in San Diego. Shannon Skinner will recirculate Dave Dietrich's memo from the ABA Property Preservation Task Force.