



## **STATE OF NEW JERSEY**

### **NEW JERSEY LAW REVISION COMMISSION**

#### **Draft Tentative Report**

Relating to

#### **PROPERTY July 2012**

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NO LATER THAN  
October 19, 2012.**

Please send comments concerning this tentative report or direct any related inquiries, to:

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Property Tentative Report of 07/20/12

# **PROPERTY**

## **Introduction**

This is a revision of the basic statutory law of property. The provisions included are those now in Title 46, Chapters 3, 3A, 4, 5, 6 and 7. As the result of additions made over the years, the provisions in these chapters follow no particular order and have become a mixture of a variety of subjects. The Table of dispositions included lists all of the current sections and indicates which of the new sections continues the substance of each. This draft includes versions of the parts of the law that have continuing significance. These have been revised by modernization of language and approach. See, for example, Chapters 4 and 5 on the form of deeds. There are a great many provisions of the current law that have been deleted from this draft. The Table of Dispositions indicates that these sections have been deleted. It is our judgment that these sections are unnecessary. Many are clearly anachronistic. They cover matters no longer relevant. For example, Chapter 3A concerns surveys by the Boards of Proprietors, the original owners of colonial New Jersey. Other adjacent chapters are recent and stand alone and have not been made part of this revision. See, for example Chapter 3B, the New Home Warranty and Builders' Registration Act.

## **46:4A-1. Definitions**

As used in this Chapter:

“deed” means a written instrument, other than a will, intended to create or transfer an estate or interest in real estate;

“convey” means to create or transfer an estate or interest in real estate;

“conveyance” means a written instrument conveying an estate or interest in real estate; and

“property” means real estate, including fixtures and any rights or interests which may by law be considered appurtenant to it.

Source: New

### **COMMENT**

While this section is new, the definitions are the standard ones used in real property law.

## **46:4A-2. Historic landholdings and transfers of interest in real estate**

a. Feudal tenure estates and their incidents remain abolished.

b. Any person who holds an interest in real estate in fee simple may transfer any part of the interest held, and the transferee shall hold title free of any obligation to the transferor except as expressly set forth in the instrument of transfer.

c. The rule of the common law, known as the Rule in Shelley's Case, shall not be applicable to any interest in property created by any instrument to take effect after 1934.

d. No instrument creating or transferring an interest in real estate shall be deemed invalid or unenforceable solely because it purports to vest a remainder in the heirs of the grantor.

e. No estate or interest in real estate shall be valid and enforceable unless (i) it must vest, if at all, not later than 21 years after some life in being at the creation of the interest; or (ii) it meets the requirements of P.L. 1999, c. 159 §14 (C. 46:2F-10).

f. If an estate or interest in realty is created or transferred by written instrument to one party for the use or benefit of another, then the estate or interest so transferred shall be deemed have vested in the party for whose benefit the transfer is made. This sub-section is not applicable if duties are imposed upon the party to whom the transfer is made by the instrument of transfer or by another document.

g. A common law rule regarding the acquisition, vesting or disposition of an estate or interest in real property, that is not codified or specifically modified or superseded by this Act, shall not be construed to have been modified or repealed.

Source: 46:3-1; 46:3-4; 46:3-9; 46:3-14.

#### COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a. is taken from 46:3-1; b. is taken from 46:3-5; c. is taken from 46:3-14; d. is taken from 46:3-4; e. restates the rule against perpetuities, and f. is taken from 46:3-9.

The phrase, “fee simple” has been used to indicate ordinary title to real estate. It has been substituted for “free and common socage” a phrase used in some of the source statutes. That phrase has a number of meanings but in this context it is identical to “fee simple.” “Fee simple” is also intended as equivalent to “allodial” a word used in some of the older cases as meaning a form of ownership not subject to any rent, service or acknowledgement to a superior.

Subsection (e) is taken from 46:3-5. It deals only with the general principle of alienability of property. Of course, an owner can transfer only the interests that he has. There may be deed restrictions on the property; this section does not regulate the perpetual restrictions that may be placed on a deed. In addition, where there are multiple owners of property, the rights of one to act independently is governed by other law.

Subsection (f) is of declining importance with the passage of time from 1934. In addition, the Rule in Shelley’s Case itself was of limited effect. As a result, the reference to the Rule in Shelley’s Case has been retained as simpler than substituting a description of the Rule.

Some other provisions on the transfer of property have been deleted as unnecessary. Section 46:3-8 provided that transfers by the State be “allodial” is superfluous given the abolition of other forms of ownership by this section and its sources. Section 46:3-8 which abolishes the old common law requirement of attornment by a tenant to a new owner of property has been deleted; the subject has been covered in a more modern way in the landlord-tenant law.

Subsection (g) is new and is intended to prevent the inadvertent repeal of common-law rules related to real property. The subsection merely restates a general rule of statutory construction applicable to revision laws.

### **46:4A-3. Fee simple**

a. A deed shall vest a fee simple estate in the transferee if the grantor had such an estate. A deed, unless clearly stated otherwise, shall be construed to include all the estate in fee simple if the grantor had such an estate.

b. A deed shall vest a fee simple estate notwithstanding the inclusion or exclusion of words such as “heirs and assigns” or “successors and assigns” or “forever” or “to have and to hold” or a *habendum* clause unless other words of limitation are used to convey another kind of estate.

c. Whenever a written instrument conveys an interest in any real estate that would have been held as an estate in fee tail, such instrument shall vest an estate in fee simple.

d. Upon the delivery and acceptance of a deed, the transferee shall be entitled to enter into possession of the land conveyed, except if the deed states otherwise. An estate or interest may be made to commence at a date after delivery and acceptance of the deed if expressly stated therein.

Source: 46:3-7; 46:3-13; 46:3-15.

#### COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a. and b. are taken from 46:3-13. Subsection b. points out that habendum clauses and “successor and assign” language are not necessary any longer. Subsection c. is taken from 46:3-15. Subsection d. is taken in part from 46:3-7; it abolishes the common-law rule that a freehold estate cannot be made to commence *in futuro*.

### **46:4A-4. Rights and interests in areas above the surface of the ground**

Rights and interests in areas above the surface of the ground, whether or not contiguous, may be validly created in persons other than the owner of the land below such areas, and shall be rights and interests in lands. All of the rights, duties, and restrictions pertaining to estates, rights and interests in land shall be applicable to such rights and interests in areas above the surface of the ground.

Rights and interests in such areas may be held, conveyed, mortgaged or otherwise encumbered, and devised in the same manner, upon the same conditions and for the same uses as rights and interests in land, and shall be in all other respects treated as rights and interests in land.

Source: 46:3-19, 46:3-20, 46:3-21.

#### COMMENT

This section contains streamlined language from sections 46:3-19, 46:3-20, 46:3-21 and removes section 46:3-22 as unnecessary.

### **46:4A-5. Buildings and other things included in deeds to land**

a. Every deed, unless otherwise stated in the deed, shall be construed to include any buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances pertaining to the land; and any reversions, remainders, rents, issues and profits of it.

b. A deed or other instrument which conveys or reserves mineral rights in any land, unless otherwise expressly provided therein, shall not be construed to include any water rights.

Source: 46:3-16; 46:3-27.

#### COMMENT

Subsection a. contains streamlined and consolidated language from 46:3-16. Subsection b. is substantively identical to 46:3-27.

### **46:4A-6. Tenants in common; joint tenants; tenancy by the entireties**

a. Except as provided by subsection (d), and unless otherwise stated, the transfer of an estate in land to more than one grantee shall be construed to transfer the estate to the grantees as tenants in common.

b. No estate shall be deemed an estate in joint tenancy, unless expressly stated in the instrument creating the estate that it was or is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common.

c. Any conveyance of real estate, by the grantor, to the grantor and another or others, as grantees and joint tenants, if otherwise valid, shall be fully effective to vest an estate in joint tenancy in such real estate in the grantees, including the grantor.

d. A tenancy by entirety shall be created when:

1) Persons who are married or in a civil union, together take title to an interest in real property under a deed, whether or not designating both of their names as husband and wife or in a civil union; unless the deed states otherwise, or

2) Persons who are married or in a civil union become the lessees of real property under a written instrument whether or not containing an option to purchase, designating both of their names whether or not designating them as husband and wife or in a civil union; or

3) One owner who is married or in a civil union conveys an interest in real property to the other spouse or civil union partner and the owner under a written instrument, whether or not the instrument designates both of their names as husband and wife or in a civil union.

4) When two persons have an estate or interest in real property as joint tenants, and thereafter they marry or form a civil union.

e. No instrument creating a property interest on the part of persons who are married, or in a civil union shall be construed to create a tenancy in common or a joint tenancy unless it is expressed in the instrument or clearly appears from the tenor of the instrument that it was intended to create such a tenancy.

f. Neither party to a marriage or civil union may adversely affect the interest of the other party in a tenancy by the entirety during the marriage or civil union without the written consent of the other party. One party to a marriage or civil union may convey an interest directly to the other but such a conveyance shall not extinguish the right of joint possession unless the conveyance specifically so provides. If the conveyance provides for the extinguishment of the right of joint possession, the conveyance extinguishes any future right of joint possession which may arise in the property.

g. Upon the death of either party to a marriage or civil union, the survivor shall be deemed to have owned the whole property under the original instrument conveyance from its inception.

Source: 46:3-17; 46:3-17.1; 46:3-17.2; 46:3-17.3; 46:3-17.4.

#### COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a. is taken from 46:3-17; b. is taken from 46:3-17.1; d. is taken from 46:3-17.2; e. is taken from 46:3-17.3; f. is taken from 46:3-17.4, and g. is taken from 46:3-17.5. The language of this section has been broadened to reflect the impact of the statutory changes pertaining to civil unions.

There are other common law rules that have not been included in this section. For example, if there is a transfer to a husband, wife and a third party, the husband and wife together receive a ½ share of the property and the third party receives a half share. It is not possible to include all of these rules, and the failure to set out these rules explicitly should not be interpreted as changing them.

#### **46:4A-7. Foreign citizen; right to acquire, hold and transfer real estate**

A deed in which the transferor or transferee is a citizen of a foreign nation shall have the same effect as a deed in which the transferor and transferee are citizens of the United States.

Source: 46:3-18.

#### **COMMENT**

This section contains streamlined and consolidated language from 46:3-18. The language pertaining to entitling aliens to be elected to office and the language pertaining to the ability of the State and the federal government to sequester, seize or dispose of real estate has been removed.

#### **46:4A-8. Transferability of estates of expectancy**

a. Any person may transfer any contingent or executory interest, or future interest in expectancy, in any real estate, or any part of such an interest. The transfer may be made even if the contingency on which such interest is to vest has not happened. Every person to whom the interest has been transferred, shall be entitled to stand in the place of the person who transferred the interest was transferred, and to have the same interest, actions and remedies.

b. This section shall not be construed to empower any person to dispose of any expectancy which the person has as heir or devisee of a living person, or any contingent estate or expectancy, where the contingency is as to the person in whom, the estate may vest, or any estate, right or interest to which the person may become entitled under any deed not yet executed.

c. This section shall not be construed to render any contingent estate or other estate or expectancy liable to be levied upon and sold by virtue of an execution.

Source: 46:3-7.

#### **COMMENT**

The language of this section has been simplified slightly, but its substance is unchanged. Subsection (a) permits the transfer of all forms of estates or interests in realty, whether vested or contingent, etc., by written instrument. Subsection (b) limits the generality of sub-section (a). It makes it clear that it does not validate otherwise invalid transfers because such as when one of the parties is a minor or when the transferor lacks an estate or interest recognized by the common law such as when the transferor is the putative heir of a living person. The subsection highlights the most important instances of the more general common law rule that a person cannot be the owner of an estate in realty before the deed or other document that is the source of his title has been created. Subsection (c) re-states the existing provision that nonvested interests are not subject to execution sales.

#### **46:4A-9. Requirements for effective deed**

a. A deed intended to convey an interest in real estate shall be effective to convey that interest if it:

(1) identifies the parties to the transaction;

(2) identifies the property sufficiently to distinguish it from all other property and the estate or interest to be conveyed;

(3) evidences an intention to convey the interest through the deed;

(4) is signed and delivered by the party conveying the interest in property; and

(5) is accepted by the party to whom the interest in property is conveyed.

b. A deed shall not be ineffective solely because one or more of the parties is erroneously identified as an entity incapable of holding or conveying title.

c. Notwithstanding subsection (a), a deed is subject to the provisions of N.J.S. 46:26A-12.

Source: 46:4-1

#### COMMENT

Subsection (a) establishes the requirements for a deed that is effective to transfer an interest in land between the parties. It should be noted that this effectiveness is limited. To be fully effective, a deed must be recorded (see subsection (b) of this section), and to be recorded, a deed must meet the formal requirements of the recording statutes. See 46:15-1.1

The requirements for validity are taken in part from 46:4-1 and, in part, from case law. Some provisions are so basic, such as the requirement that a deed identify the parties to the transaction, that no case appears to have voiced the requirement. On other matters there are many cases. While there must be a description of the property sufficient to identify it, that description need not be formal. *Chidester v. City of Newark*, 58 F.Supp. 787 (DCNJ 1945). For the requirement of delivery of the deed by the transferor and its acceptance by the transferee see, e.g. *In re Lillis' estate* 123 N.J.Super 280 (App.Div. 1979). The proposed section does not require consideration. Under case law there need be no economic consideration; love and affection will suffice. *Cockrell v. McKenna*, 103 N.J.L. 166 (1926). Moreover, even if there is no consideration, a deed is valid absent fraud or other circumstances suggesting undue influence. *Den. ex Dem. Chews v. Sparks*, 1 N.J.L. 56, (Sup.Ct. 1791).

Subsection (b) is based on 46:22-1. It embodies one of the basic principles underlying the recording statutes, that an unrecorded document is ineffective against later claimants who have no notice of it. See, e.g. *Cox v. RKA Corp.*, 164 N.J. 487, 496 (2000). However, case law is not consistent on this point. One reported case, *Michalski v. U.S.*, 49 N.J. Super. 104 (Ch. Div. 1958), held that a conveyance, which was unwritten and so could not be recorded, is effective against a creditor without notice. See also, *In re L.D. Patella Construction Co.*, 114 B.R. 53, 58-59 (Bankr. D.N.J. 1990). Subsection (b) reverses that rule. If a party makes a conveyance in a form that does not permit it to be recorded, then a subsequent bona fide purchaser, mortgagee or creditor who could not learn of the conveyance from the land records is not bound by the conveyance absent notice of it at the time he acquired the interest for value or docketed the judgment. This principle is in accord with the statute of frauds, 25:1-11, which makes unwritten conveyances enforceable as conveyances only in some cases where possession is transferred. Transfer of possession frequently is notice to prospective purchasers or mortgagees.

#### **46:4A-10. Short form deed**

a. A deed may be made in the following form:

"This deed made (insert date), between (insert names of parties);

In consideration of (here state the consideration), (insert name of grantor), grantor, conveys to (insert name of grantee), grantee having a mailing address of (insert mailing address of grantee) the property (insert description of the property) (insert covenants or any other provisions);

In witness of which, the grantor signs this deed.

(insert signature)

(insert name of grantor)

b. To be recorded and have the effect of a recorded deed, a deed must also meet the requirements of the recording statutes.

Source: 46:4-1.

#### COMMENT

This section is an updated version of 46:4-1. Subsection b. has been added to emphasize that while a deed in this form that is properly executed and delivered would be effective to transfer property, it would not be recordable. An unrecorded deed would not be effective against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded.

#### **46:4A-11. Warranties; covenants**

a. A deed may include warranties or covenants made by the grantor, including that:

- (1) the grantor owns the property absolutely in fee simple;
- (2) the grantor has the right to convey the property to the grantee
- (3) the grantee will have quiet possession of the property;

(4) a covenant against grantor's acts, meaning that the grantor has not acted to encumber the property or to allow an encumbrance on the property;

(5) the grantor warrants the property "generally" or "with general warranty," meaning that the grantor will defend the grantee's right to the property against the claims of all others;

(6) the grantor warrants the property "specially" or "with special warranty," meaning that the grantor will defend the grantee's right to the property against the claims of persons claiming by, through, or under the grantor;

(7) the grantor will provide any further assurances reasonably requested by the grantee to assure the property more perfectly and absolutely to the grantee.

b. A deed without a warranty, covenant or other equivalent provision shall be a valid deed effective to convey all of the grantor's estate or interest in and to the property described.

Source: 46:4-3; 46:4-4; 46:4-5; 46:4-6; 46:4-7; 46:4-8; 46:4-9; 46:4-10; 46:4-11;

#### COMMENT

This section gathers all the covenants and warranties in current law. The difference between general warranty and special warranty (i.e. covenant as to grantors' acts) is that a special warranty not nearly as protective of the buyer as a general warranty deed. Grantors of a special warranty deed conveys the property with two warranties: 1) that they have received title and 2) unless noted specifically in the deed, that the property was not encumbered during their period of ownership. Grantors of the special warranty deed, in effect, only warrants the title against their actions or omissions. They warrant nothing prior to their taking title. If specifically stated in the deed, other warranties can be conveyed. Special warranty deeds are frequently used by executors and trustees.

#### **46:4A-12. Restrictions upon transfer or use of realty because of race, creed, color, national origin, ancestry, marital status, or sex**

a. Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, which limits, restrains, prohibits or otherwise precludes the transfer, assignment, conveyance, ownership, lease, use or occupancy of real property to or by any person because of age, race, creed, color, national origin, ancestry, marital or familial status or sex, gender identity or expression, affectional or sexual orientation, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States is void as against public policy, wholly unenforceable, and shall not constitute a defense in any



action, suit or proceeding. No such promise, covenant or restriction shall be included in public notices concerning such property. The invalidity of any such promise, covenant or restriction shall not affect the validity of any other provision in an instrument or agreement, and no reverter shall occur, no possessory estate shall result, nor any right of entry or right to damages, penalty or forfeiture shall accrue by reason of the disregard of such a promise, covenant or restriction.

b. This section shall not apply to conveyances or devises to religious associations or corporations for religious purposes, but, the promise, covenant or restriction shall cease to be enforceable and shall become subject to the provisions of this section when the real property affected shall cease to be used for that purpose.

c. This section shall not bar any person from refusing to sell, rent, lease, assign, or sublease any room or apartment in a dwelling or residential facility which is planned exclusively for or occupied exclusively for individuals of one sex to any individual of the opposite sex on the basis of sex. This section shall not bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, which shall include but not be limited to any summer camp, day camp, bathhouse, dressing room, and comfort station, from refusing, withholding from, or denying to any individual of the opposite sex any of the accommodations, advantages, facilities, or privileges thereof on the basis of sex.

d. This section shall not bar restrictions as to age provided such age restrictions are permitted by the Fair Housing Act of 1968 (Pub. L. 90-284, 42 U.S.C. §§ 3601 et seq. as amended) and the Housing for Older Persons Act of 1995 (Pub. L. 104-76, 42 U.S.C. §§ 3607 et seq. as amended).

Source: 46:3-23.

#### COMMENT

Only small modifications in language have been made to the source section. While this section may have been made less necessary by the Law Against Discrimination (LAD), it seems advisable to retain it.

Additional categories have been added to be compatible with the LAD in Title 10. These include gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual.

### **46:4A-13. Solar easements**

a. This section shall be known and may be cited as the “Solar Easements Act.”

b. Any easement obtained for the purpose of exposure of a solar energy device shall be in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements.

c. Any instrument creating a solar easement shall include:

1) The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement.

2) Any terms or conditions under which the solar easement is granted or will be terminated.

3) Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or

compensation of the owner of the property subject to the solar easement for maintaining the solar easement.

Source: 46:3-24; 46:3-25; 46:3-26.

COMMENT

This section continues the substance of the sources. Only small modifications in language have been made.

**46:4A-14. Boundary certificates**

A certificate establishing the true boundary between adjoining lands executed by the owners of the lands and acknowledged by them shall be as conclusive and binding as though the boundary had been fixed by them by deed or otherwise. The certificate, when meeting the requirements for recording, may be recorded in the office of the county recording officer.

Source: 46:3A-5.

COMMENT

This section is substantively identical to 46:3A-5.

**46:4A-15. Statements curing defects in designation of corporate grantees**

a. When a deed is made to a business corporation, non-profit corporation, religious society or corporation, limited liability company, general partnership, limited partnership or other entity recognized under the laws of this state as capable of acquiring an interest in real estate, incorporated or formed pursuant to the laws of this state, and the deed fails to correctly identify the grantee, the error may be corrected as set forth in this section.

b. If the intention of the grantor is manifested by the use, in the deed, of the principal words of the corporate name or designation of such entity, and the entity has entered into possession and occupation of the conveyed real estate, the entity may record, in the office of the proper county recording officer, a statement setting forth:

- (1) the date of the deed;
- (2) the date of its recording;
- (3) the document number or page of the book of record;
- (4) the name of the grantor;
- (5) a description of the property conveyed; and
- (6) the erroneous title or designation of the entity as expressed in the deed, together with the correct title or designation.

The statement shall be verified by an authorized officer of the entity, before an individual authorized to take acknowledgments or proofs of deeds.

c. The statement described in subsection b. of this section shall be recorded by the county recording officer and, when so recorded, shall vest in the entity title to the real estate or interest conveyed as though the same had been conveyed by a proper corporate name or designation.

d. For recording statements pursuant to this section the county recording officer shall receive the same fees as are allowed by law for recording deeds.

Source: 46:7-3.

#### COMMENT

This section has been broadened to include every kind of entity recognized under the laws of this state as capable of acquiring an interest in real estate. In addition, limited modifications have been made to eliminate language that appeared to be surplus and to divide the section into subsections for ease of review.

### **46:4A-16. Conveyances to entities prior to incorporation validated after incorporation**

Where a conveyance of real estate has been made, executed and recorded in favor of a:

- a. religious society, association or corporation of this state;
- b. club, society or lodge or other body or association;
- c. non-profit corporation;
- d. business corporation, company or partnership; or
- e. any other entity recognized under the laws of this state as capable of acquiring an estate or interest in real estate,

as the grantee, and the entity failed to record and file the proper certificate of incorporation or formation in the manner prescribed by the laws of this state until after the recording of the conveyance, upon the filing and recording of the proper certificate of incorporation or formation, the conveyance shall be as valid as if the entity had been properly formed at the time of the delivery of the conveyance.

Source: 46:7-5; 46:7-6; 46:7-7

#### COMMENT

Three sections of the statute were consolidated to create this section. There were some differences in the language that have been eliminated. This was done because of the potentially confusing overlap of language – 46:7-5 referred to “any religious society, association or corporation of this state”, 46:7-6 referred to “any club, society, association or other body” and 46:7-7 referred to “any lodge, subordinate lodge, society or other body or association”.

The resulting section has been broadened to include every kind of entity recognized under the laws of this state as capable of acquiring an interest in real estate. As a result, language in 46:7-6 which made it inapplicable to associations or other bodies in this state incorporated prior to April 21, 1898; and to associations that did not certificates of incorporation and language in 46:7-7 limiting its effect to lodges, etc., “whose members shall have entered into the possession and enjoyment of such real estate” has been deleted.

In addition, language has been simplified, unnecessary provisions eliminated and the section has been divided into subsections for ease of review.

### **46:4A-17. Fair Resolution of Derivative Claims**

a. All titles found upon surveys or returns submitted to and approved or issued by the Eastern and Western Boards of Proprietors are preserved.

b.. For purposes of this section, "derivative claim" means a claim to or interest in property of the State of New Jersey which derives from the 1998 purchase of the property of the Eastern Board of Proprietors.

c. In addition to any other remedies which may be available, a person seeking to resolve a question regarding the title to property in which that person has an interest and as to which the State of New Jersey may have a derivative claim may apply to the Department of Environmental Protection for resolution of the title question pursuant to this Act. The applicant shall give notice of the application to the owners, as shown on current tax records, of any property sharing a common boundary with the disputed property, within 10 days of the filing of the application. Notice shall be given by personal service or certified mail, return receipt requested, and an affidavit of service shall be filed with the Department.

d. Within 90 days of the filing of the complete application, the Department shall examine the application and make a report to the State House Commission with recommendations according to this Act. The State House Commission shall make a final determination on the application within six months of the filing of the complete application with the Department.

e. If it appears upon reviewing an application that the State has no claim to the property, the Department of Environmental Protection shall recommend and the State House Commission shall approve the issuance of a Statement of No Claim to the applicant. The Statement of No Claim shall be in recordable form, signed by the Commissioner of the Department of Environmental Protection and shall describe the property that is the subject of the application by a description legally sufficient to convey title and declare that the State believes that it has no derivative claim to the property. Upon the issuance of a Statement of No Claim, any derivative claim to the property that the State may have shall be extinguished, and the State shall be barred from asserting any derivative claim to the subject property.

f. If it appears upon reviewing an application pursuant to this Act that the State has a derivative claim to the property, the Department of Environmental Protection may recommend and the State House Commission may approve the issuance of a deed or other document of title in recordable form to convey title to realty to the applicant conveying or extinguishing the derivative claim. The applicant shall pay a fee representing the fair market value of the State's derivative claim, taking into account the likelihood of the State prevailing on its derivative claim and the cost to the State of asserting its derivative claim in litigation.

g. If the Department of Environmental Protection recommends against the granting of an application submitted under this Act, or if the State House Commission fails to approve the application, the Department, within three months of the denial of the application, shall institute appropriate proceedings in the Superior Court to settle the title to the property in the State. If the Department fails to establish the State's derivative claim in the proceedings, the State shall pay the reasonable attorney fees of any property owner or other affected individual who prevails against the State's derivative claim. If the Department fails to institute proceedings within three months of the denial of the application, the State's derivative claim to the property shall be extinguished, and the State shall be barred from asserting any derivative claim to the property.

h. The Department of Environmental Protection shall adopt regulations pursuant to this Act, including regulations specifying any appropriate forms for an application submitted under this Act, and regulations specifying the requirements for a complete application. Regulations shall require a filing fee for applications submitted under this Act in an amount not to exceed \$500.

Source: N.J.S. 46:3A-1 through -7; new

#### COMMENT

Sub-section a. intends to preserve titles founded upon survey returns issued by the Boards of Proprietors. It represents a simplification of existing statutory sections. The remainder of this section is based on a 1999 Report of the Law Revision Commission. In 1998, the Department of Environmental Protection acquired the remaining property interests of the Eastern Board of Proprietors, a corporate entity which acquired these property interests in the seventeenth century. By this transaction, the State also acquired the residual land ownership rights to a large part of the State's geographical area. As a result, title questions which formerly could be resolved expeditiously and at low cost may now become time-consuming and expensive to resolve because the current governmental mechanisms are designed to regulate conveyances of the State's land interests, rather than to facilitate the resolution of questions about the land title of private parties. The purpose of this project is to provide a relatively simple and expeditious mechanism for resolving certain ownership issues which implicate the State's residual rights in the property of the former Eastern Board of Proprietors. More detailed comments can be found in the 1999 report titled, "Fair Resolution of Proprietary Title Claims Act"

#### **46:4A-18. Conveyances under powers of attorney**

Whenever any deed shall purport to have been executed by virtue of a power of attorney and such deed has been recorded but the power of attorney under which the deed was executed has not been recorded, the recital of the power of attorney in the deed shall be prima facie proof of the existence of the power of attorney, provided:

- a. the deed has been on record at least five years; and
- b. the grantee identified in the deed or the attorney-in-fact or agent who executed the deed executes an affidavit that he has seen the unrecorded power of attorney as recited in the deed, and
- c. the affidavit is recorded in the office of the county recording officer of the county where the real estate is situate in the same fashion as a power of attorney.

Source: 46:6-1; -3.

#### COMMENT

This section has been taken from existing statutory sections in order to deal with the vexing problem of unrecorded powers of attorney. Under existing N.J.S. 46:6-1, an otherwise valid deed or mortgage, etc, is rendered invalid by reason of the failure to record an accompanying power of attorney, or even to fail to record it prior to, or simultaneously with, the deed, mortgage, etc. The wording above is intended to mitigate the harshness of the statutory rule set forth in a. It follows the existing text of NJS 46:6-3, but the time period has been reduced from 10 to 5 years. Note that under proposed 46:4A-1a, "deed" may include a mortgage, lease, easement, or other written instrument creating or transferring a real property interest, and "property" includes real estate and interests therein.

If legislation that is now pending adopting the Commission's **Final Report on the General Durable Power of Attorney Act** (May 2012), proposed section **46:2B-20.6e**, an additional subsection will be needed, stating:

A power of attorney which grants the attorney-in-fact or agent power with respect to property shall be recorded prior to or simultaneously with any deed executed by the attorney-in-fact or agent in connection with same. If the power of attorney affects property in more than one county of this state, or is not restricted to property in a particular county, the power of attorney may be recorded in any county of this state.

## TABLE OF DISPOSITIONS

Current	Disposition	Explanation
46:3-1	46:4A-2a	simplified
46:3-2	deleted	unnecessary
46:3-3	deleted	unnecessary
46:3-4	deleted	unnecessary
46:3-5	46:4A-2b	simplified
46:3-6	deleted	unnecessary; see 4A-3
46:3-7	46:4A-7	simplified
46:3-8	deleted	unnecessary
46:3-9	46:4A-2f	simplified
46:3-10	deleted	unnecessary
46:3-11	deleted	unnecessary
46:3-12	deleted	unnecessary
46:3-13	46:4A-3	simplified
46:3-14	46:4A-2c	simplified
46:3-15	46:4A-2a	simplified
46:3-16	46:4A-5	simplified
46:3-17	46:4A-6a, b	clarified
46:3-17.1	46:4A-6	implied by 46:4A-6a
46:3-17.2	46:4A-6d	expanded; clarified
46:3-17.3	46:4A-6e	simplified
46:3-17.4	46:4A-6f	expanded; simplified
46:3-17.5	46:4A-6g	expanded; simplified
46:3-18	46:4A-7	expanded; simplified
46:3-19	46:4A-4	simplified
46:3-20	46:4A-4	simplified
46:3-21	46:4A-4	simplified
46:3-22	deleted	unnecessary; see 4A-4
46:3-23	46:4A-12	expanded
46:3-24	46:4A-13a	unchanged
46:3-25	46:4A-13b	unchanged
46:3-26	46:4A-13c	simplified
46:3-27	46:4A-5b	unchanged
46:3-28	unaffected	to be retained
46:3-29	unaffected	to be retained
46:3-30	unaffected	to be retained
46:3-31	unaffected	to be retained
46:3-32	unaffected	to be retained
46:3-33	unaffected	to be retained
46:3A-1	deleted	See 46:4A-17
46:3A-2	deleted	See 46:4A-17
46:3A-3	deleted	See 46:4A-17
46:3A-4	deleted	See 46:4A-17
46:3A-5	46:4A-17	simplified
46:3A-6	deleted	See 46:4A-17

46:3A-7	deleted	See 46:4A-17
46:4-1	46:4A-8; 46:4A-9	substantively simplified
46:4-2	deleted	unnecessary
46:4-3	46:4A-10	reorganized and simplified
46:4-4	46:4A-10	reorganized and simplified
46:4-5	46:4A-10	reorganized and simplified
46:4-6	46:4A-10	reorganized and simplified
46:4-7	46:4A-10	reorganized and simplified
46:4-8	46:4A-10	reorganized and simplified
46:4-9	46:4A-10	reorganized and simplified
46:4-10	46:4A-10	reorganized and simplified
46:4-11	46:4A-10	reorganized and simplified
46:5-1	deleted	unnecessary
46:5-2	deleted	unnecessary
46:5-3	deleted	unnecessary
46:5-4	deleted	unnecessary
46:5-5	deleted	unnecessary
46:5-6	deleted	unnecessary
46:5-7	deleted	unnecessary
46:5-8	deleted	unnecessary
46:5-9	deleted	unnecessary
46:6-1	deleted	unnecessary
46:6-2	deleted	unnecessary
46:6-3	deleted	unnecessary
46:6-6	deleted	unnecessary
46:7-1	deleted	see 46:4A-16
46:7-2	deleted	see 46:4A-16
46:7-3	46:4A-14	expanded; simplified
46:7-4	deleted	see 46:4A-14; 15
46:7-5	46:4A-15	expanded; simplified
46:7-6	46:4A-15	expanded; simplified
46:7-7	46:4A-15	expanded; simplified
46:7-8	deleted	see 46:4A-14; 15
46:7-9	deleted	see 46:4A-14; 15