

Erb, Bethany

From: diane@email.unc.edu%inter2 [diane@email.unc.edu]
Sent: Thursday, March 01, 2007 6:27 PM
To: Erb, Bethany; earls@email.unc.edu%inter2
Subject: UNC Center for Civil Rights - Response to Heirs Property ANPR

Attachments: tmp.htm; ATTACHMENT



tmp.htm (1 KB)



ATTACHMENT (39
KB)

Dear Ms. Erb:

Please find attached comments from the Center for Civil Rights at the University of North Carolina School of Law. The Center is submitting the comments on behalf of a coalition of grassroots organizations in historically African-American communities in Moore County, North Carolina.

Please contact Anita Earls, Director of Advocacy for the Center for Civil Rights, at 919-843-7896 or earls@email.unc.edu if you need additional information.

Thank you.

Sincerely,

Diane Standaert

--
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March 1, 2007

Ms. Bethany Erb
USDA Rural Development
Bethany.Erb@usda.gov

Via Email

Dear Ms. Erb:

This letter serves to support the USDA's attention to the need for heirs property reform. I am an attorney and the Director of Advocacy at the Center for Civil Rights at the University of North Carolina School of Law. The Center for Civil Rights is submitting this letter on behalf of the Southern Moore Alliance of Excluded Communities (SMAEC), a coalition of grassroots organizations in historically African-American communities in Moore County, North Carolina. Specifically, SMAEC is comprised of the following organizations: Jackson Hamlet Community Action, Inc., Midway Community Association, Inc., Waynor Road in Action; and Voices for Justices, Inc.

The Center for Civil Rights has worked with SMEAC for more than three years on a number of community development issues. SMAEC represents three low-income, African-American communities ranging in size from 33 to 75 households. The majority of residents in each community own the land in which they live, and in many cases the land has been passed down through multiple generations. Each of the communities are located on the fringes of affluent, rapidly-growing municipalities and are surrounded by golf courses and other resort-type facilities.

The primary focus of the Center's work in these areas has been addressing the problem of municipal underbouding through community activism. Municipal underbouding is a term used by social scientists to describe a phenomenon common in small southern towns where minority communities are located just outside the boundaries of predominantly white towns or cities. Such exclusion often results in a lower level of basic services such as water and sewer — or no services at all.

Working with the communities on the issue of municipal underbouding has required intimate involvement with community members, extensive discussions about the status of the land ownership in their communities, and visioning about what these communities would like to do with their land in the future. From our work with these communities in this manner, it has become apparent that the fractured ownership of heirs



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property impedes community development efforts, contributes to the disparate valuation of minority-owned land that is often the families' greatest or only asset, and is a significant factor in the decline of minority land ownership.

A related problem is that such minority communities can become a victim of their own success when they finally obtain the necessary infrastructure for their neighborhoods. As SMAEC succeeds in bringing services to its communities, it simultaneously increases the value and attractiveness of these communities to developers seeking to expand beyond the municipal limits. Heirs property laws should be reformed to protect this land from outside development pressure. As an example, members of SMAEC communities have indicated the following provisions would be welcome measures in protecting their communities, particularly from forced partition sale actions:

- In determining value of the land, require the court to consider non-economic factors such as emotional attachment to the property, the use of property for one's livelihood, or existence of a homestead on the property;
- Provide family members who oppose a partition action the option to buy out the interest of the petitioning family member; and
- Prohibit the assessment of attorney's fees against an owner who contests a partition action.

This is by no means an exhaustive list, but merely serves as an indication of the type of reform which would protect heirs property owners from developers or interest holders seeking to divest a family of its ownership through partition actions.

SMAEC members have also highlighted ground-level barriers to protecting heirs property owners. One barrier is lack of education about the vulnerabilities of heirs property ownership, and the ways in which owners' interests may be fortified. For example, there is a need for education regarding the rights of heirs property owners, as well as education about ways in which family members can reach consensus with other family members about how to best protect their land.

A second barrier is lack of access to legal services and resources. The lack of access to services ranges from those necessary for simple transactions such as making wills to more complex transactions such as clearing title or forming innovative partnerships among landowners. In the words of the President of Jackson Hamlet Community Action, Inc., Carol Henry, broader legal reform is a "necessary safeguard to protect heirs from losing their property until we can get heir property owners access to the education and information about what they need to do as individuals, such as making wills, to protect their land."

A third barrier to stable heir property ownership in ten states is the Torrens system of registering land.¹ As North Carolina has a Torrens Act, N.C. Gen. Stat. § 43, the

¹ The states with a Torrens system are Colorado, Colo. Rev. Stat. Ann. 38-36-101-38-36-199; Georgia, Ga. Code Ann. 44-2-40-44-2-253; Hawaii, Haw. Rev. Stat. 501-1-501-219; Massachusetts, Mass. Gen. Laws Ann. ch. 185, 1-118; Minnesota, Minn. Stat. Ann. 508.01-508.84; New York, N.Y. Real Prop. Law 370-435; North Carolina, N.C. Gen. Stat. § 43; Ohio, Ohio Rev. Code Ann. 4309.01-4309.98, 5310.01-5310.21; Virginia, Va. Code Ann. 55-112; and Washington, Wash. Rev. Code Ann. 65.12.005-65.12.800. Charles

Center for Civil Rights has some experience with this issue. A Torrens system is a fraud-prone process by which an individual may register title without showing any proof of ownership or chain of title; they need only provide evidence of conveyance and a map of the land. A public official reviews the documents to make a determination of whether there appear to be any competing claims. In some cases a special proceeding will be held so that opponents will have the opportunity to assert their interest. If there is no opposition, the official registers the title and ownership of the land under the individual's name. When land is registered under the Torrens Act, there is very little hope of recovering any fraudulently deeded interest; in fact, the registration comes with a government guarantee that title will be protected from adverse claims. Title or interest in land registered under the North Carolina Torrens Act cannot be acquired by prescription or adverse possession. N.C. Gen. Stat. § 43-21. Finally, the statute of limitations for challenging a registration under North Carolina's Torrens Act is only one year. N.C. Gen. Stat. § 43-26.

The threat posed by the Torrens Act is not hypothetical; the Center for Civil Rights is aware of at least one instance where an African-American family is at risk of being evicted from land which their family has owned since 1911 because of the Torrens Act. In the late 1970s, a family member fraudulently registered the land and received a decree from the court that the land was his. The court made no inquiry into whether the family member's conveyance was valid. The family member then sold the disputed property and it is now owned by commercial developers who plan to turn the land into high-rise condominiums along North Carolina's eastern coast. The family was not aware of the fraudulent registration and subsequent conveyance until after the one year statute of limitations. The Torrens Act prevents the family from ever asserting its interest based on adverse possession, even though family members built structures, had businesses, and paid taxes on the land, and lived there all of their lives.

In addition to the Center's experience with the Torrens Act, legal scholars are critical of it. For example, according to Charles Szypszak in *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 Whittier L. Rev. 663 (2003), "[t]he judiciary is justifiably uneasy with the risk that Torrens registration will indefeasibly grant title to the wrong party, either through fraud by a registrant, or mistake by a registering official." In addition, a Torrens-type system was originally adopted in more than 20 states at the turn of the twentieth century. A majority of the states subsequently repealed the laws as they encountered problems with administration and adapting this Australian-based system to U.S. constitutional norms, particularly due process. According to Szypszak, the Torrens system has never been widely accepted, was used primarily by large landholders, and for the most part has been displaced by title insurance. For more information on the North Carolina Torrens system, see Frederick B. McCall, *The Torrens System - After Thirty-Five Years*, 10 N.C.L. Rev. 329, 335 (1932), Charles Szypszak, *North Carolina's Real Estate Recording Laws: The Ghost Of 1885*, 28 N.C. Cent. L.J. 199, 227, and Monica Kivel Kalo and Joseph J. Kalo, *The Battle To Preserve North Carolina's Estuarine Marshes: The 1985 Legislation*,

Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 Whittier L. Rev. 663, 673 (2003).

Private Claims To Estuarine Marshes, Denial Of Permits To Fill, And The Public Trust,
64 N.C.L. Rev. 565 (1986).

Please contact me at 919-843-7896 or by email at earls@email.unc.edu if you have any questions or need more information. Thank you for your attention to this very urgent and important issue.

Sincerely,

A handwritten signature in cursive script that reads "Anita Earls".

Anita Earls