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## LAND TRUST SECRECY—PERHAPS A SECRET NO MORE

The legal and political processes intersect frequently and nowhere has this intersection been more evident than in the controversy surrounding the legislation against land trust secrecy. Recent newspaper disclosures<sup>1</sup> of windfall profits reaped by public officials and prominent private individuals illustrate how land trusts have become a popular financial shelter for those who seek to avoid public scrutiny. To curtail certain abuses of the land trust device, a number of bills have been introduced in the Illinois General Assembly which focus upon the evils inherent in the present statutes and attempt to devise a new land trust law that will effectively serve the public interest.

It must first be understood that the concept of the land trust itself is not under attack. Excluding secrecy, advantages such as non-resident and multiple ownership, readily available financing, probate avoidance, and attractive tax shelters properly can be obtained through the use of the land trust concept.<sup>2</sup> The Illinois courts upheld the basic theory of land trusts as early as 1920.<sup>3</sup> More recently, in dicta, the Illinois Supreme Court affirmed the use of land trusts by stating “[t]he law of this State and the decisions of reviewing courts for more than 80 years have encouraged public reliance upon the real property concepts exemplified in the land trust now before us.”<sup>4</sup>

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1. See, e.g., Chicago Sun-Times, May 10, 1973, at 34, col. 1; Chicago Sun-Times, June 9, 1973, at 1, col. 1.

2. The land trust concept is relatively simple. Real property is transferred by the purchaser or owners to a trustee. However, unlike an ordinary trust the trustee holds *both* legal and equitable title for the benefit of the named beneficiary. The resulting interest of the beneficiary in the trust is solely that of personal property. In essence the beneficiary, who is technically the owner of the real estate, has all the *benefits* of ownership without actual ownership of the realty. Establishing the land trust essentially changes the owner or purchasers real property to personal property. The trustee has power to deal freely with the realty except as restricted by the trust agreement which was established by the beneficiary. For a complete discussion the land trust concept and its advantages see W. Garrett, Land Trusts 2-8 (Chicago Title and Trust Co., 4th rev. Oct. 1971).

3. Kerr v. Kotz, 299 Ill. 465, 132 N.E. 625 (1921), *aff'g* 218 Ill. App. 654 (1920) (abstract decision); Chicago Title and Trust v. Mercantile Trust and Savings Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

4. Chicago Fed. Sav. and Loan Ass'n. v. Cacciatore, 25 Ill. 2d 535, 547, 185 N.E.2d 670, 676 (1962). While the primary thrust of the case does not attack the validity of the land trust doctrine, the court points out that because so

While the land trust concept has been firmly sanctioned by the Illinois Supreme Court, this has not protected the concept from being perverted by unscrupulous individuals. Understandably, almost any legal device can be used to create an improper result. But, in the case of land trusts it appears that the secrecy aspects have heavily *encouraged* impropriety.

Theoretically there are many situations where it is desirable for ownership of property not be disclosed.<sup>5</sup> On the other hand, numerous abuses can result from the same desire to remain anonymous. For example, the most frequently discussed abuse of secrecy, prior to the political wind-fall scandals, concerned slum owners. Slum owners conceal their identities through the use of land trusts, reaping enormous profits from the plight of minorities,<sup>6</sup> and without ever having to account for their misdeeds.

In an attempt to combat that particular abuse, the Illinois General Assembly enacted the first of its present disclosure statutes in 1963.<sup>7</sup> The statute provided that a trustee of a land trust must disclose the identity of the trust beneficiaries within ten days after receipt of written notice of violation of a building code or similar ordinance. At first glance this statute would seem to effectively prevent the concealment of slum property ownership through the use of the land trust. The statute, however, has failed to achieve its intended effect.

In 1969, the Illinois General Assembly, acting in what appeared to be anticipation of future improprieties, enacted a statute requiring that

before any contract relating to ownership or use of real property is entered into by and between the State or any local governmental unit . . . and a trustee who has title to such real property . . . such trustee . . . must disclose the identity of every owner and beneficiary having any interest, real or personal, in such property.<sup>8</sup>

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much money has been invested in land trust arrangements their validity must be relied on.

5. See Garrett, *supra* note 2 at 6. The author gives examples of when secrecy may be desirable. For instance, where tracts of land are being purchased in parcels, it may help for negotiation purposes to keep the identity of the buyer secret. The author states: "A land owner may simply not wish to disclose his ownership for the wholly proper reason that he wants his real estate ownership to be private just as his stock, bond or money ownership is private." *Id.*

6. Numerous newspaper and magazine articles have been written on slumlord abuses. For a brief discussion on how secret land trusts are used to accomplish improper results, see Garrett, *supra* note 2 at 5. See also Sax and Hiestand, *Slumlordism As A Tort*, 65 MICH. L. REV. 869 (1967); Dahl, *A White Slumlord Confesses*, ESQUIRE, July, 1966 at 92. "The good guy, the mildly greedy, humanoid slumlord, can't last. . . . To be a good investor, he must learn to reduce people to cash value. . . ." *Id.* at 94.

7. ILL. REV. STAT. ch. 80, § 81 (1971).

8. ILL. REV. STAT. ch. 102, § 3.1 (1971).

It should be noted that the statute not only requires disclosure but goes on to add that

[t]his section shall be *liberally* construed to accomplish the purpose of requiring the identification of the *actual parties benefitting* from any transaction with a governmental unit or agency involving the procurement of the ownership or use of real property thereby.<sup>9</sup>

Section 3.1 would appear adequately to protect the public against such scandals as the "Airport Parking Lot Deal,"<sup>10</sup> but again has failed to do so.

The disclosure statutes have been ineffectively applied due to their vagueness, although not in a constitutional sense.<sup>11</sup> For example, the disclosure requirements in connection with building code violations<sup>12</sup> commands that notice be given to the local government departments or agencies responsible for enforcement of the code, but does not prescribe any procedure to govern the disclosures.<sup>13</sup> The statute requiring disclosure of beneficiaries when the trustee is contracting with a governmental body<sup>14</sup> does not indicate to whom the disclosure must be made nor does it state that the disclosure, if made, is to be declared a matter of public record. The statute is weak in that it fails to specify a procedure for revealing the identity of the trust beneficiaries. However, a public official who violates section 3.1 is guilty of a Class 4 felony and will have his official position vacated as part of the judgment of the court.<sup>15</sup>

It must be pointed out that while the disclosure statutes themselves do

9. *Id.* § 3.1 (emphasis added). The Statute is aimed at disclosing the true beneficiary of the trust not merely the "strawman" who the actual beneficial owners may utilize to hide their identity.

10. The title "Airport Parking Lot Deal" comes from a series of articles published by the *Chicago Sun-Times* in December, 1972, revealing Alderman Thomas Keane's (31st Ward-Chicago) secret land trust ties to the Airport Parking Corp. of America (APCOA), which had a lucrative city parking contract at O'Hare International Airport. Alderman Keane, as a City Council member, voted in favor of granting the contract to APCOA without revealing his land trust ties. *Chicago Sun-Times*, Dec. 10-17, 1972.

11. While it appears that an argument can be made that the statutes violate 5th and 14th Amendment "due process," the question has never been litigated in the courts.

12. ILL. REV. STAT. ch. 80, § 81 (1971).

13. UNDER ILL. REV. STAT. ch. 17½, § 61, *as amended*, ILL. REV. STAT. ch. 17½ § 62 (Supp. 1972), locations of buildings in violation of ordinances are to be posted publicly. However, when it comes to disclosures of beneficial interests, ILL. REV. STAT. ch. 80, § 81 (1971) is controlling and does not compel that disclosures be made public.

14. ILL. REV. STAT. ch. 102, § 3.1 (1971).

15. ILL. REV. STAT. ch. 102, § 4 (Supp. 1972), *amending* ILL. REV. STAT. ch. 102, § 4 (1971).

not totally fulfill their stated purpose, there are other means available to discover those who hide behind land trusts.<sup>16</sup> While these methods may be effective in determining who held the beneficial interest after the fact, they accomplish little in preventing the commission of misdealings, the hatching of schemes, and the reaping of windfalls, all of which ultimately victimize the public.

Often it takes a public upheaval after corruption has been exposed to compel legislative action. So it was with the Illinois General Assembly which introduced bills to abolish or restrict the use of the land trust only after the revelation of land trust schemes involving highly placed persons.

House Bill 1508<sup>17</sup> is the least comprehensive of the bills introduced. The bill calls for disclosure of all beneficial interests in real property held in a land trust whenever the trustee or beneficiary makes "application to the State of Illinois or to any of its agencies or political subdivisions for any benefit, authorization, license or permit. . . ."<sup>18</sup> It also provides for disclosure of beneficiaries, "[W]henever any trustee of a land trust, or any beneficiary of a land trust, is a party plaintiff or defendant in any case in the courts of this State. . . ."<sup>19</sup>

The problem with House Bill 1508 appears to be that it retains the weaknesses found in the current statutes. The Bill provides no set procedure for disclosure nor does it attempt to prevent improprieties before they occur. It appears that this Bill does not include anything that the present disclosure statutes do not.<sup>20</sup> Its only innovation is that disclosure would be required in the case of a lawsuit. The Bill states that disclosure would

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16. It may be speculated that the identity of land trust beneficiaries might be learned through the use of discovery procedures set forth in ILL. REV. STAT. ch. 110A, § 201 (1971). This question has not been litigated to any point where precedent has been established. It may also be argued that if a disclosure of interest document has been filed with the State or one of its agencies, it should rank as a public record open to public inspection under ILL. REV. STAT. ch. 116, § 43.5 (1971), and ILL. REV. STAT. ch. 30, § 27 (1971). The Local Records Act, ILL. REV. STAT. ch. 116, § 43.101 (1971) provides that reports and records of the use of public funds are public records open to public inspection. This might conceivably be read to include disclosures in real estate transactions involving land trusts.

17. H.B. 1508, 78th Ill. Gen. Assembly (1973) (introduced April 12, 1973) [hereinafter cited as H.B. 1508].

18. H.B. 1508, § 2. The identification of each beneficiary must be made in the application. The disclosure must identify him by name and address and define his interest in the land trust.

19. H.B. 1508, § 3. The disclosure must be made in the first pleading of such party relative to "any real property material to any issue or any point in question in such case or proceedings."

20. See ILL. REV. STAT. ch. 102, § 3.1 (1971). It would appear that the present statute covering disclosure in any contract with the State would essentially include everything within the scope of H.B. 1508.

be required when it is "material to any issue or any point in question. . . ." <sup>21</sup> Considering the fact that there is little litigation in the land trust area, it becomes difficult to imagine this as an effective means of disclosing actual beneficiaries.

Senate Bill 953<sup>22</sup> begins to direct itself to some of the basic failures of the present statutes. The Bill provides that the state or any local governmental unit is prohibited from buying, leasing, selling, giving, receiving or renting any property to or from a land trust unless all the beneficiaries have been disclosed. The Bill is extremely thorough in establishing a step-by-step disclosure procedure,<sup>23</sup> and even provides a form<sup>24</sup> stating what information must be provided. The Bill seeks disclosure *before* any contract is entered into, thereby preventing a conflict of interest situation from arising. The statute also requires that "[a]ll notices wherever filed shall be public records."<sup>25</sup> The Bill also provides for imposition of strict penalties.<sup>26</sup> If this section is implemented to its fullest extent one of the major deficiencies in the present statutes will be overcome.

While Senate Bill 953 is precise in establishing its goals, it fails by limiting the scope of those goals. The proposal deals only with activities in which the state is involved. But, as previously pointed out, disclosure of secret interests is vitally important in areas in which the state is not involved, for instance, slumlord situations. While the Bill will adequately combat the use of land trusts by corrupt public officials, its effect on the overall secrecy problem will be less than complete.

21. H.B. 1508, § 3.

22. S.B. 953, 78th Ill. Gen. Assembly (1973) (Introduced April 14, 1973), *as amended*, May 25, 1973 [hereinafter cited as S.B. 953].

23. S.B. 953, § 3(a) provides:

Before any contract is entered into between the State or unit of local government and a person having an interest in real estate, the State or unit of local government must:

- (1) File . . . a Notice executed by a person having an interest in real estate 10 days prior to entering into any contract concerning real estate.

24. S.B. 953, § 5 is entitled "Notice of Interest in Real Estate Filed Pursuant to Governmental Real Estate Disclosure Act."

25. S.B. 953, § 5(d).

26. S.B. 953, § 6(b) provides:

Any person of a unit of local government or a condemning body who willfully violates this Act shall be guilty of a Class 4 Felony. In addition thereto, any office or official position held by any person so convicted shall become vacant, and shall be so declared as part of the judgment of court; and the person so convicted may not hold any office or position of trust and confidence in this state until two years after the date of such conviction.

Section 6(c) states that a fine of not more than \$10,000 but not less than \$5,000 may also be levied.

The last and most inclusive bill introduced in 1973, is House Bill 429.<sup>27</sup> The sponsors hope to abolish the use of secret land trusts in their entirety. If enacted, the statute will require disclosure of all beneficial interests, including those land trusts created before the effective date of the statute. This Bill attempts to rectify the problems created by the present disclosure statute by establishing a procedure for disclosure,<sup>28</sup> by requiring the disclosures to become part of the public record<sup>29</sup> and by providing stiff penalties for non-compliance.<sup>30</sup>

Perhaps the greatest drawback to the Bill is that it is too "inclusive." The sponsors fail to recognize that secrecy does have some useful, legitimate aspects.<sup>31</sup> The conclusion that secrecy is evil *per se* and under no circumstances can it be lawfully useful is erroneous. It is indeed shortsighted to condemn all land trusts in order to rectify a limited number of abuses.

The fact that each of the bills introduced has shortcomings should not be disheartening, for it is seldom that a totally perfect piece of legislation is ever written. Often it is not until the courts have interpreted a statute that one can begin to see whether it has completely or even partially accomplished its purpose. Regardless of which bill, if any, the legislature passes, the court will have to make several critical determinations.

First, while House Bill 1508 and Senate Bill 953 refer to contracts to

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27. H.B. 429, 78th Ill. Gen. Assembly (1973) (introduced February 27, 1973) [hereinafter cited as H.B. 429].

28. H.B. 429, § 3(b) states:

In every land trust created after the effective date of this Act each beneficiary thereof must be identified by name and address and his interest therein defined. The trust agreement containing such disclosure of interest must be recorded or registered together with, or incorporated in full in, the Deed in Trust to which such agreement relates as an integral part of the conveyance made by the land trust.

H.B. 429, § 3(c) requires that land trust agreements in effect prior to the effective date of the statute must be modified "to conform them to the recording and registering requirements of land trusts created under this Act."

29. H.B. 429, § 2, the definition section, states:

"Recorded" or "Registered" means that a public record has been caused to be made of a land trust by the filing or registering the written evidence thereof in the Office of the Recorder of Deeds or the Registrar of Titles.

30. H.B. 429, § 4 provides:

Any violation of this Act shall render the land trust void and all interests created thereby shall be in the record title holder or holders as they existed prior to the execution of the land trust agreement. Any person who willfully fails or refuses to make disclosure of beneficial interests in real property as required of him by this Act is guilty of a Business Offense and shall be fined not less than \$5,000.

31. See note 5, *supra* for Garrett's discussion on when secrecy may be desirable.

which the state is a party, they do not specifically provide for contracts such as concession agreements.<sup>32</sup> In the case of the "Airport Parking Lot Deal" it was contended that the contract involved was listed as a concession agreement, and therefore did not require disclosure under the present statutes.

Secondly, a determination that the courts must make which affects all three bills, concerns the use of nominees. The nominee statute<sup>33</sup> seems to indicate that nominees could be used to act as agents of the trustee and be listed as beneficiaries when they in effect would not have any personal interest in the property.<sup>34</sup> If it is determined that the use of nominees is to be permitted, it is possible the objectives of the bills will be easily circumvented.

The difficulty that the Illinois legislature is having in attempting to legislate in the land trust area is partially due to the fact that they lack established guidelines from the experience of other states. While several states have adopted land trust laws,<sup>35</sup> these laws are still in the developmental stage.<sup>36</sup> Hence, it appears that Illinois will have to assume the role of innovator in land trust disclosure law.

Will the efforts of the legislators to cure the secrecy problems associated with land trusts be successful? Presently it is doubtful that the bills introduced will pass the Illinois General Assembly. House Bill 1508 passed in the House of Representatives but will probably be amended prior to any further action. Senate Bill 953, although sponsored by thirty sena-

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32. A concession agreement is a grant ordinarily applied to the grant of specific privileges by a government.

33. ILL. REV. STAT. ch. 148, § 36 (1971).

34. *Id.* The statute states:

Unless it is otherwise provided by the instrument creating the trust, the trustee of any trust heretofore or hereafter created may cause . . . property, real or personal, belonging to the trust to be registered and held in the name of a nominee . . . without mention of the trust in any instrument or record constituting or evidencing title thereto.

35. VA. CODE ANN. § 55-17.1 (1969); FLA. STAT. § 689.071(1)-(6) (1969); N.D. CENT. CODE § 59-03-02 (Supp. 1973); IND. ANN. STAT. § 30-4-2-13 (1972).

36. The typical attitude concerning land trusts in other states can be found in Comment, *The Virginia Land Trust—An Overlooked Title Holding Device for Investment, Business and Estate Planning Purposes*, 30 WASH. & LEE L. REV. 73, 92-93 (1966), where it is stated that land trusts have not become popular because of the natural inertia of attorneys against adopting a new device. Another is that banks and trust companies in Virginia generally have not publicized the advantages because the land trust decreases the volume of business accruing to attorneys, real estate brokers, and title insurance companies. Another possible reason is that until there have been some Virginia decisions confirming that the interest of beneficiaries under a land trust is personalty, there may remain some doubt in skeptical minds.



tors, also appears headed for defeat and has been amended at least twice.<sup>37</sup> House Bill 429 has been placed in Interim Committee and will not come up for discussion until January, 1974.

As mentioned previously, the legal and political processes often intersect. This is the most cogent explanation for the slow movement of the legislature. Land trusts are most widely used in Cook County and adjoining suburban areas.<sup>38</sup> Legislation which affects Cook County most directly often becomes law only after a great deal of discussion, thought and debate. Whether or not these particular bills are passed, the impetus to reform the present secrecy and disclosure laws has been provided. Statutes, whether in the form of new ethics or disclosure bills will continue to be introduced and eventually will become law. The time has come for a new accountability for those who place their own selfish interests above the interests of the public welfare.

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37. S.B. 953 has been amended on two occasions. The initial amendment was offered by the Judiciary Committee on May 14, 1973; the second was offered by Senator Edward Scholl (R-Chicago) on May 25, 1973.

38. *Supra* note 2, at 1. "There are roughly 3 million parcels of real estate in Cook County, and it is estimated that at one time or another fully 80 percent of these parcels have been in land trust." Letter from Illinois Legislative Council to Rep. Peggy Smith Martin, May 10, 1973.