

**MINUTES OF COMMISSION MEETING**  
**March 23, 2000**

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Commissioners Albert Burstein, Peter Buchsbaum, Vito Gagliardi, Jr., and Hugo Pfaltz, Jr. Professor William Garland attended on behalf of Commissioner Patrick Hobbs.

Also attending were: James R. Maxeiner, Dun & Bradstreet; Michael Ticktin, Department of Community Affairs; Ronni Hursthouse, Office of Consumer Protection; Carol Roehrenbeck, Rutgers Law Library and American Association of Law Libraries; and Mary K. Roberts, Riker Danzig.

Minutes

The Commission approved the Minutes of the February 24, 2000 meeting as submitted.

UCITA

John Cannel reported that Barry Evenchick, a New Jersey Uniform Law Commissioner, had sent a letter requesting the Commission to suspend its consideration of UCITA pending NCCUSL's planned review of the Act. Mr. Cannel indicated that staff had been informed that UCITA would be introduced as a bill in New Jersey. In that case, the Commission would want an opportunity to submit its Report to the Legislature.

Chairman Burstein stated that the enabling statute required the commission to review uniform law proposals. Commissioner Burstein stated that he would ask Mr. Evenchick to clarify his request to defer consideration of the Act.

Mary K. Roberts from Riker Danzig, representing a coalition of businesses supporting UCITA, noted that the coalition had received the most recent staff memoranda and wants to submit a response. The coalition requested that the Commission defer any definitive action until it received the response; coalition representatives also might want to meet with staff. Commissioner Burstein suggested that the coalition deliver its memorandum or speak to staff prior to the May 2 meeting.

Maureen Garde reported that 48 Attorneys General had opposed the federal house bill on e-sign legislation; the Attorneys General supported the Senate version of the bill.

### Legalized Games of Chance

Mr. Cannel described the draft as a rough cut of the first two chapters of the law; the first part deals with the establishment of the commission and the second deals with bingo. The rough draft simplifies and clarifies the language and, in some places, the substance. The draft tells how to get a bingo license and who can get a bingo license.

Judith Ungar stated that larger changes than those reflected in the draft may be possible, and that substantive changes would be needed in the fourth chapter, Amusement Games. Staff is waiting for direction from the consumer protection office. The current law has two licensing steps: first a state license, and second a municipal license. The Commission may eliminate this two-step procedure. A municipality that permits bingo is under a duty to grant a license to a qualified applicant unless the town eliminates bingo totally.

Ms. Hursthouse described the licensing procedure to the Commission. The application and registration of bingo business is done at the state level. Municipalities do the criminal background check and receive revenue from local licensing. The Commission asked staff to find out the position of the League of Municipalities.

The Commission asked Ms. Hursthouse to submit information about the licensing process and directions to revise the statutory law. The Commission wants to determine whether there is any unnecessary administrative burden, particularly annual reports filed by municipalities. Can the process be simplified for benign charities? Staff will continue to work on the following chapters: bingo, raffles and amusement games. Ms. Hursthouse informed the Commission that the location of amusement games is heavily regulated; for example they cannot be located in restaurants. Mr. Cannel stated that under the New Jersey Constitution, any change in the law must be approved by referendum.

Commissioner Pfaltz proposed allowing amusement games to take place anywhere, not only on the Boardwalk. He stated that under contemporary standards, most amusement games are not considered to be forms of gambling. It was Commissioner Pfaltz's view that these games should not be prohibited. Regulation might have been important in the 1930s but it is unimportant now. Most games are *de minimis* in what they take from the user.

The Commission asked staff to examine Fifth Amendment issues regarding witness privilege raised in current law.

### Disabilities

The project on disabilities involves removing terms now deemed pejorative. Ms. Garde reported that she had earmarked certain statutes for change but that it was not always obvious what changes ought to be made. She also has circulated her proposal to the Essex County Bar committee. The particular problem presented in the memo submitted to the Commission concerned substitution of terms in the "Dead Man's Act." Her original memo suggested changing the existing term "lunatic" to "person adjudicated incapacitated." However, the term "incapacitated" in the probate code is broader than the meaning of the term "lunatic." One member of the Essex County bar committee argued that the protected provision might be applied to a broader category of people. Ms. Garde did not think this expansion appropriate, as the term should not cover physically incapacitated persons because usually this does not affect an ability to communicate.

In 1997 the Legislature changed the term in the probate code from "mentally incompetent" to "mentally incapacitated." This change was made only in definition sections. Other provisions in the probate code remain unchanged. The Legislature also enacted a non-compiled provision providing that wherever the term "mentally incompetent" was used in the statutes, it should be taken to mean, "incapacitated." The implication is that the term "incompetent" in statutes should be construed as having the same meaning as the probate code definition. However, this result is probably not what the Legislature intended to do.

Commissioner Pfaltz stated that it is very difficult to adjudicate someone incompetent. As the population ages, the issue of whether a person is mentally incompetent is going to appear more frequently. Persons competent when an act was done may later become incompetent thus raising legal issues. The object of the project is to change terminology, not the substance, of the law.

The Commission then discussed the issue of actions involving persons who are incompetent but not adjudicated incompetent. The Commission decided that a prior adjudication hearing for resolving this question was preferable to establishing an evidentiary standard at trial, such as clear and convincing evidence, to adjudicate that party incapacitated. Professor Garland

suggested changing the first line of 2A:81-2 by deleting "who has been," and adding to the fourth line after the word "oral" the phrase "in whole or in part."

### Common Interest Ownership

Section 208. Termination of contracts and leases with a sponsor.

Commissioner Gagliardi said he finds this latest version worse than its predecessor. He will send his suggestions for improvement to the office.

Article 3. Governance of a common interest association.

Section 301. Association; membership, functions

Commissioner Buchsbaum said he did not like the provision for automatic incorporation; he did not like affecting the process of incorporation by filing an application in Trenton. Commissioner Pfaltz said that many churches do not file to become incorporated and that it does not create a problem. Mr. Cannel will redraft Section 301(a).

Professor Garland said that the caption should read "Association's power."

Section 302. Powers

Commissioner Buchsbaum said that Subsection (a)(4), the power to fine, is a hot issue. Mr. Cannel said there is a bill pending in the Legislature that would limit that power. The problem is that there is no limit on fines and, under current law, fines can be filed as a lien on a unit.

Professor Garland said that the power to fine should be read along with Section 304 which limited the power. Commissioner Pfaltz asked in lien provisions are being abused. Michael Tickin of the Department of Community Affairs said that while in general they were not, his department had received complaints that in some cases they were. His recommendation was to follow the approach of the bill now pending, providing that the Department of Community Affairs act as an appellate body for fines.

Professor Garland suggested simplifying the bill by allowing the Department to approve a lien if no written objection is filed within so many days.

Chairman Burstein said that a double notice, to owner or record and to occupant is required. Mr. Cannel mentioned a recent case holding that if restrictions are not reflected in the mast deed they do not bind the parties. The Commission decided to leave this issue to the courts.

Commissioner Pfaltz questioned the wisdom of the Subsection 302(d) requirement that a board get proposals from at least three competent providers before making certain purchase contracts. Mr. Ticktin said that there was a value to the requirement because sometimes cliques exist on boards. The Commission decided to allow the Department to make regulations as to when a board must get proposals before making contracts.

Section 303. Board members, officers and managing employees

Mr. Cannel said that Subsection (b) is derived from municipal conflicts of interest law. Commissioner Pfaltz suggested getting rid of Subsection (b) completely. Commissioner Buchsbaum asked if the Commission could live with a provision which establishes a general duty of care rather than formal restrictions. Mr. Ticktin said that allegations of conflict of interest were a constant problem, and that unit owners like the municipal model. He said that the Department could be given rulemaking power. The Commission accepted that idea. Mr. Cannel will try to combine (1), (3), (5) and a rule-making power. Commissioner Gagliardi pointed out that Subsection (b)(8) deals with the association's powers, but that the caption does not mention the association.

Subsection 303(a) - Chairman Burstein questioned the differing standards for board members and said one must act as a trustee. Mr. Cannel said the theory of the section is that a board member appointed by the developer is in a sort of fiduciary relation to new people moving in, but elected board members are more like the management of a corporation. Professor Garland initiated discussion about business judgment standard vs. fiduciary standard. Commissioner Pfaltz suggested language placing a special burden on developer's representative in order to balance the interests of owners and developers.

Chairman Burstein called a halt to the discussion. Mr. Cannel said that Articles 1 and 2 are done. He will present reworked Article 3 with alternate wordings at the May 2 meeting.

Standard Form Contracts

Mr. Cannel reported on his meeting with the Corporate and Business Section of the New Jersey Bar Association. They were reasonably pleased with his presentation, but they were not convinced to support the Commission report. Some of the committee members accept that there is a problem. Others do not. There was no support for the Commission solution. They do not want New Jersey to be different from the Uniform Law found in Article 2 of the UCC. The Bar Committee did not vote; but did not change its position.

Miscellaneous

The Commission changed the April 27 meeting date to Tuesday, May 2, 2000. The agenda will consist of UCITA and Common Interest Ownership. The Thursday, May 25 meeting date remains as originally scheduled.