

MINUTES OF COMMISSION MEETING
July 17, 2008

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, and Commissioner Sylvia Pressler. Grace Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon. Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner Stuart Deutsch.

Also in attendance were Edward M. Callahan, Jr., Esq. of Clancy, Callahan & Smith; Robert Dowd, Esq. of Cole Schotz Meisel Forman & Leonard; Christopher Jackson of the Office of the Child Advocate; Joseph Suozzo of the Office of the Child Advocate; Katherine Bieruas of the Office of the Child Advocate; and Varsha Singh, a graduate student from Seton Hall University.

Minutes

The Minutes of the meeting of May 15, 2008 were accepted as submitted after motion by Commissioner Burstein which was seconded by Commissioner Pressler.

Construction Lien Law

Marna Brown explained that Staff has received significant feedback from a wide range of constituents, including attorneys representing contractors, subcontractors, owners and developers; the American Arbitration Association, and the land title insurers. Most recently, Staff heard from David Gordon, an attorney who is co-chair of the Legislative Committee of the New Jersey Chapter of the National Association of Industrial and Office Properties (NAIOP), an organization that describes itself as a leading trade organization for developers, owners, investors and other professionals in the industrial, office and mixed-use commercial real estate. Mr. Gordon was among those instrumental in drafting the first construction lien law in 1994. Staff has also contacted the New Jersey Builders Association and was advised to contact legal counsel to K Hovnanian since those two entities were also involved in the drafting of the initial lien law.

Ms. Brown advised that she and John Cannel were invited to attend the New Jersey Bar Association Construction Lien Law Section meeting in September. A recent article from the New Jersey Law Journal describing the construction lien law project was distributed to the Commissioners. Ms. Brown also noted that she recently learned of a pending Assembly bill modifying section 30 of the construction lien law and that Staff had just sent a letter to Assemblyman Patrick Diegnan, the sponsor of that bill, and is hoping to work with him. The American Arbitration Association has indicated that it will distribute the next revision of the lien law to individual arbitrators for comments.

Ms. Brown reviewed some of the feedback that had been received since the last meeting, and its impact on the project. She explained that many of the definitions had been clarified. She also discussed areas in which there was a divergence of opinion regarding the project and explained that, in all but one case, Staff had adopted the majority view.

With regard to the definition of “contract”, Staff had followed the majority view that a signature was necessary. With regard to the definition of “filing”, a majority of attorneys felt that it needed modification because there was often a delay in the indexing of documents submitted for recording once they arrived in the Clerk’s office. A number of reviewers suggested that the delivery of the document to the Clerk’s office, and not the recording, should be the triggering event for “filing”. A smaller number of reviewers felt that to preserve public confidence in the recording of documents, “indexing” should be the benchmark, rather than “lodging for record”. Staff was inclined to adopt the minority view but sought guidance from the Commission on this point.

Commissioner Pressler noted that a good title searcher also searches the Clerk’s basket to see what documents have been received but not yet recorded. Professor Garland advised that the comment section after the definition of “filing” should reflect that there are two innocent parties affected by the definition, but the Commission had to make a choice. John Cannel asked whether Staff should include in the definition language similar to that included in the title recordation project calling for the recording of documents within two days of receipt. That time period was included in that project as a result of a court settlement between the Land Title Association and the clerks’ offices. Professor Garland suggested that Staff determine if the court decision applies to this situation and Commissioner Pressler suggested that Staff also determine if counties may be required to allow access to received, but not yet recorded, documents. Chairman Gagliardi directed Ms. Brown to examine the settlement mentioned in the title recordation report and to discuss with her contacts the use of the clerk’s office basket for documents received but not yet recorded in order to determine if the language of the definition can be modified to match the real-world practices.

Ms. Brown explained that the section pertaining to an entitlement to lien had changed considerably since the last revision. The use of the word “for” in the context of the work done “for” a common area or an individual unit raised a question as to the scope of the work performed and whether it was entirely contained within the common area or the individual unit or both. This led to a question about the definition of “residential unit” and whether the definition should include all the infrastructure work performed, even that which is tangentially connected to the residential unit. Another related question raised was whether the definition should be different if the building is intended for a mixed-use. Staff’s view is that all work done in a building that is even partly residential should be deemed residential to protect the residential unit owners and the transfer of homes, in keeping with the legislative intent. Staff will provide revised language for September’s meeting. Commissioner Pressler suggested that the language of subsection (b) should be consistent with other parts of the statute. Commissioner Burstein questioned the need for the insertion in subsection (d). Ms. Brown explained there was a difference of opinion on the part of the reviewers regarding subsection (d) and where the bright line should be drawn regarding the protection afforded the landlord’s interest in property when the tenant makes improvements. This will be further addressed in the next revision.

With regard to the form of the lien claim, Ms. Brown noted that Staff had discarded the old form and created a completely new form. Staff has been advised that the new form was an improvement but that there was more work to be done. It has been suggested that in the residential area, a separate lien form should be used for common area as distinct from residential unit lien claims. The concern was also raised that a claimant might try to manipulate the process

by not completing the entire lien claim form and therefore the statute should require that the form be completed in its entirety or the lien deemed invalid. Professor Garland suggested that the term “written” be inserted before the term “contract”. Since the lien claim is filed first and then served within 10 days, the current representation of the claimant that the form has been served at the time of filing is not accurate and would also be modified.

In addition, significant disagreement still exists regarding the language of section 9.1 and that provision will require additional revision. First, there is divergence of opinion regarding the manner in which to characterize the parties in the construction process. The draft discusses “tiers” of participants rather than naming each party, *i.e.*, contractor, subcontractor, because that terminology appeared to be commonly accepted. A minority of reviewers, however, suggested naming each party in the construction chain. There is also disagreement as to the deductions from the lien fund, and Staff is working with the participating attorneys on this issue.

Ms. Brown sought guidance from the Commission with regard to the various provisions in the statute that awarded damages. In certain sections, the award of damages is mandatory and in others, it is permissive and Staff felt damages should be mandatory throughout. The Commission directed that the language should be consistently mandatory. Professor Garland suggested that Staff also insert language in 14(b) pertaining to the award of damages.

The American Arbitration Association had suggested that calendar days be distinguished from business days in section 21 pertaining to residential construction. However, Staff felt that the statute should be consistent and nowhere else is there a distinction made between the two types of days. Chairman Gagliardi explained that days not specified as “business” are deemed to be calendar. Professor Garland also suggested that, for consistency, time periods should refer throughout to “within” or “not later than”, but not both.

Ms. Brown explained that section 23 was new and that Staff had merged sections 28 and the old 23 to create the new section 23. Section 30 is presently the subject of an Assembly bill and Staff is of the opinion that the bill may not address all outstanding issues with regard to that section and will bring these issues to the attention of the bill’s sponsor.

Commissioner Pressler suggested that the definition of real property development would benefit from additional revision and it will be revised for the next draft. Commissioner Pressler also suggested that sections 7 and 11 would benefit from additional revision and she indicated that she would forward more detailed comments to Staff. Professor Garland said that he would do so as well.

Ed Callahan, who represents the northern New Jersey chapter of the Electrical Contractors Association and who was involved in drafting of the original legislation, said that he was pleased with the Commission’s efforts. He explained that, at the time of the initial legislation, there had been discussion about a review of the statutory provisions after several years. He said that he was pleased the Commission had undertaken the revision and appeared to have made good progress. Mr. Callahan explained that the issue of filing versus presenting for filing had plagued the drafters since initial enactment of the law. He mentioned that because of the uncertainty of the actions of the county clerks and the 90-day deadline for filing a lien claim, it is the practice of his office to deliver the lien claim in person, bring back the “stamped” lien claim and then serve the “stamped” copy so that the parties served are on notice that the lien

claim has been delivered to the clerk. Mr. Callahan also said that a bank requires the owner or general contractor to sign a certification that all the subs are being paid or that they do not know of any subs not being paid. He said that if the statute requires that the “stamped” notice be served, owners or general contractors will not be able to sign the bank’s certification. Mr. Callahan asked that the Commission not tie the definition of “filing” to actual recording.

Robert Dowd said that he had shared versions of the draft he had received from Staff with others and that the feedback had been overwhelmingly positive, especially from developers regarding the “residential” definition. The most recent draft identifies the documents whose recording serves as evidence of a building’s intended use as “residential”. Mr. Dowd suggested that since a master deed generally is not filed until right before the property is to be sold or marketed, the definition should also include reference to a “public offering statement” filed with the Department of Community Affairs as one such document. He also indicated regarding the residential arbitration procedures, that some arbitrators strictly enforce requirements and others apply a substantial compliance approach. Mr. Dowd also said that the requirement that a bond be posted burdens home improvement contractors because they do not have access to bonding companies and would have to contact a bonding company for the first time and post 100% collateral. Staff will address these issues and expressed the hope that a tentative report would be ready for release in October.

Title 9

John Cannel explained that the most recent draft is based on revisions to the current chapter 6, in which definitions had been included and efforts made to streamline and reorganize the provisions.

Mr. Cannel explained that the goal was to consolidate into one title relevant material from Title 9 and Title 30, which presently includes a wide variety of material, and other assorted provisions pertaining to children. This new title would include child placement and abuse and the various different agencies. Commissioner Pressler observed that most termination cases are based on neglect and abuse and it would make a lot of sense to consolidate all those statutory sections which pertain to the handling of children in trouble. The Commission directed that Staff begin with the statutory provisions concerning child abuse, placement review, termination of parental rights (including the material in Title 2A), and juvenile delinquency.

Chairman Gagliardi asked the guests from the Office of the Child Advocate for their input on this issue and any others they cared to raise. Joseph Suozzo thanked the Commission, explaining that this was a difficult area of the law and that he appreciated the Commission’s efforts to bring needed organization and uniformity to it. He explained that he had not yet had the opportunity to discuss the substantive issues with the new Child Advocate Commissioner, Ronald Chen (who is also Public Advocate), but would do so. Mr. Suozzo indicated that he was not sure how broadly the Commission wanted to extend its reach on this project, but noted that issues like emancipation, consent for mental health services, and consent for health services generally were significant issues. Mr. Cannel explained the current approach is that all of Title 9 will be revised, but not all at once. Mr. Suozzo explained that one issue of concern to the Office of the Child Advocate was that teenagers who sign themselves in to in-patient services may not be able to sign themselves in to out-patient services.

Commissioner Pressler suggested that the Attorney General's Office and DYFS needed to be represented in the discussion. John Cannel said he had been in contact with both entities and that they were in possession of the most recent draft. He explained that Staff was aware of the need to involve the Office of the Child Advocate, the Law Guardian's office, DYFS, the Public Defender, the Attorney General's Office and all other entities who work in this area. Commissioner Burstein asked if any adoption issues needed to be addressed as part of the project and Mr. Cannel responded that since the adoption law was relatively new, it may not require revision at this time but he would review it to make a determination.

Mr. Cannel explained that one set of unconstitutional statutes regarding abortion notification had to be addressed.

Title 39

Laura Tharney was pleased to be able to report that although the MVC was operating under difficult circumstances after the loss of some of the key people on this project, she did receive a first round of its comments on the first chapters in the Title. Her preliminary review did not reveal any significant problems with the implementation of the comments received so far, and she anticipates receiving additional information from the MVC before the September meeting.

Title 22A

Laura Tharney said that she had revised the draft of Title 22A to incorporate comments received in advance of the meeting and to expand the introductory section of the draft so that those reviewing the project could use it as a roadmap to track the changes, particularly since a number of sections of the existing statute have been proposed for elimination. She explained that she wanted to focus attention on the sections that had been deleted and the reasons for the deletions. Ms. Tharney said that since the last draft, she had received informal feedback from the AOC that enabled her to divide the probate language into several sections and also had received, just before the meeting, preliminary but very useful comments from special civil part officers and sheriff's officers. She explained that she had also been given the name of the current President of the Constitutional Officers Association of New Jersey, an organization which includes the surrogates and county clerks as well as sheriffs. She supplied the organization with a draft of the project and has been asked to attend their September meeting.

Chairman Gagliardi asked the Commission if there were any policy issues of concern and Commissioner Pressler said that she had none but did have drafting issues concerning things like the lack of parallel construction throughout the revision, which affected its clarity. She also had questions in areas in which the language was not clear. Commissioner Pressler said, for example, that the provision stating that no service shall be provided unless the fee has been paid should specify where and by whom the fee should be paid and should also mention that this is so only if the fee has not been waived. Commissioner Pressler also noted that there are several references to sheriff's fee for service of process in the draft but said that since the service rules have been amended to allow any adult to serve process, the limitations on sheriff's fees are really only included for purposes of billable taxed costs. She said that she would advise Ms. Tharney about these issues directly.

The Commission will make a determination about a release of the project as a tentative report in the fall based on the number of unresolved issues in September and the comments Ms. Tharney receives to that time.

Pejorative Terms

Marna Brown summarized the feedback that she had received since the prior draft as detailed in a memo distributed to the Commissioners after the July meeting filing date. The name for the Veterans Administration, for example, had changed. She also noted that an issue of great concern was Title 30. She had been informed that the terms “adjudicated incompetent” and “incompetent”, as they appeared in Title 30, were not pejorative in that context and should not be replaced. The Director of Legal and Regulatory Affairs at the Department of Human Services had explained to Ms. Brown that she wished to review all of the sections of Title 30 that were a part of the project, and Ms. Brown explained that any resulting feedback was essential to consider before moving forward with the project. The Commission advised that Ms. Brown, in response to her inquiry, should proceed with the sections of the banking law included in the draft, since those with banking expertise did not feel the Commission would be doing any harm by doing so. The Commission asked that Ms. Brown attempt to have the project ready for release as a tentative report in September.

Uniform Trust Code

John Cannel advised that, based on the Commission’s request when last it dealt with this project, a final report was prepared based on the ad hoc committee version of the draft. Commissioner Gagliardi noted that he would prefer a minor change to section 31-6 but since the ad hoc committee members were clearly experts in this area, and the changes made to the code were basically consistent with New Jersey law, the report should be released in its current form. Commissioner Burstein moved to release the final report and Commissioner Pressler seconded that motion.

Uniform Trade Secrets

Ms. Brown explained to the Commission that she had received additional feedback from both law professors and litigators and the consistent view was that the Uniform Trade Secrets Act should be adopted in New Jersey. There remains some divergence of opinion regarding what the New Jersey version should say, however, especially with regard to the *Lamorte* case. One view is that the *Lamorte* exception, as currently expressed in section 8 of the proposed revision, was not necessary if the definition of trade secret is appropriately modified. A contrary view is that the *Lamorte* language is very important and must be included. Ms. Brown proposed a telephone conference with attorneys expressing the opposing views in an effort to find a way to reconcile them. Chairman Gagliardi said that if the issue is not resolved, Ms. Brown should provide the Commission with the written comments from both parties for the next meeting so that the Commission can attempt to resolve the issue. Commissioner Pressler made suggestions for revision to sections 5 and 8.

Uniform Child Abduction Prevention Act

Ms. Brown advised the Commission that she has heard nothing from the Family Law Executive Committee of the New Jersey State Bar Association about whether a subcommittee to address this uniform law had been formed as earlier indicated. In the absence of any information in that regard, Chairman Gagliardi advised that Staff should proceed with its analysis of the uniform law. Mr. Cannel advised that he was having a telephone conference with the New Jersey delegation to NCCUSL on the day after the meeting and would advise them of the status of this and other uniform law projects.

Miscellaneous

The next meeting is scheduled for September 18, 2008.