

MINUTES OF COMMISSION MEETING
February 19, 2009

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 Andrew O. Bunn, Commissioner Albert Burstein, and Commissioner Sylvia Pressler. Grace C. Bertone, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon, and Kellie McGahn attended on behalf of Commissioner Paul Sarlo. Also in attendance were Carolyn Smith Pravlik, Esq., of Terris, Pravlik & Millian, LLP, Edward Lloyd of Columbia Law School, and Wendy C. Romano, from the Christian Science Committee on Publication for New Jersey.

Moment of Silence for William E. Garland

The Commission meeting began with a moment of silence for Professor William E. Garland, who passed away in January 2009. Chairman Gagliardi spoke about Professor Garland's service as Seton Hall Law School's representative on the Commission for more than a decade, recognizing that the Commissioners were always impressed with the detailed analysis that Professor Garland provided on each and every project. Chairman Gagliardi spoke for the Commission when he said that Professor Garland's insights, his contributions to the Commission and his humor left Commission members and Staff all the poorer for his passing.

Administration

Chairman Gagliardi welcomed Kellie McGahn, Legislative Director for Senator Paul Sarlo, to the meeting. Chairman Gagliardi indicated that the Commission appreciated her attendance and welcomed her participation.

Minutes

The Minutes of the January Commission meeting were unanimously approved after being moved by Commissioner Pressler and seconded by Commissioner Bunn.

Annual Report

Chairman Gagliardi explained that the Commission was required to issue a report on its activities annually. The Commission had no changes to recommend to the 2008 Annual Report, and, it was approved after a motion by Commissioner Pressler and a second by Commissioner Burstein.

Poor Law

Chairman Gagliardi expressed his hope that the public assistance project will move forward. John Cannel explained that some changes had been made and were included in the draft before the Commission. Commissioner Pressler pointed out that care should be taken to

review underlined additions as well as deletions from the text as some words were left out of the most recent draft. Mr. Cannel indicated he would review the changes to the text and further modify it to reflect a change to the law made last year.

Commissioner Pressler asked that a 'disregard' be defined in the text as an asset, income or resource that is not taken into account. Commissioner Burstein indicated that he had marked his copy of the report with some recommended grammatical changes to the text.

Pending the corrections to be made in response to Commissioner Pressler and Commissioner Burstein's comments, the project was released as a Final Report, after a motion by Commissioner Pressler and a second by Commissioner Burstein.

Uniform Environmental Covenants Act

Chairman Gagliardi indicated to the guests that the Commission had the benefit of their previously submitted comments, and was interested in any additional information they would like to provide. Ms. Pravlik thanked the Commission for receiving her comments and extending the time within which the project would be considered so that she and Mr. Lloyd were able to participate. She explained that her firm had been tied to New Jersey since the early 1980s because of their litigation of citizen suits on a continuous basis since that time. By "citizen suits", she was referring to suits in which governmental entities are deemed not to be enforcing the environmental laws and, as a result, citizens step into the shoes of the governmental entity and sue as private attorneys general.

Ms. Pravlik explained that in trying to craft remedies and settlements, one of the important issues that arises is how best to protect the engineering remedies and controls that are implemented to address the contamination left in place. She explained that, generally, the engineering controls encase the contamination in some manner in an effort to prevent contact with individuals or other parts of the environment so that it is no longer an active environmental issue. In her view, the mechanisms used to do this must be protected in perpetuity so that the contamination will be contained and no one harmed. Recently, in the course of attempting to settle a matter, the parties came to an impasse because of this very issue. She had to rely on the Department of Environmental Protection (DEP) form of Deed Notice, which she believed was insufficient to maintain the engineering controls down the road, without any other protection. She believed that citizens feel they need a mechanism akin to but in addition to and more effective than a Deed Notice.

She emphasized that in the past, conservation restrictions had been used, but there were questions about their effectiveness and, in addition, they generally require that the property be left in its natural state. Ms. Pravlik suggested that a mechanism was required whereby the property can be used or redeveloped, while assuring the public that the engineering controls can be protected well into the future. She explained that any uncertainties in the current Brownfields Act present problems for resolution of the cases dealing with sites that implicate these

outstanding issues. She emphasized that the Brownfields Act and UECA complement each other in this regard but that UECA is designed to enhance, rather than replace, the Brownfields Act.

Commissioner Pressler asked Ms. Pravlik if her concerns could be addressed by adding language in the Brownfields Act and the Deed Notice to the effect that the engineering controls will run in perpetuity and can be enforced by any citizen. Ms. Pravlik feared that would not work because the Brownfields Act does not contain a provision permitting citizen suits for enforcement. She also added that if that is the path that will be taken, then UECA in its entirety should be incorporated in the Brownfields Act.

Commissioner Pressler asked what specific provisions of UECA, other than the provision to allow engineering controls to run in perpetuity, were missing from the Brownfields Act. Ms. Pravlik responded that if each part of UECA is not stated in the law, then the result is litigation down the road. When Chairman Gagliardi asked what specific provisions in UECA were so valuable that they should be incorporated into the Brownfields Act, Edward Lloyd explained that if one incorporated pieces of UECA, there would be a problem with how the overall legislation would be interpreted. He did not think there was any conflict between UECA and the Brownfields Act and his preference is to include all of UECA in the Brownfields Act.

Commissioner Pressler noted that with New Jersey's significant number of Superfund sites, there is no shortage of judicial experience in this area and, since the jurisprudence in this State tends to be environmentally sensitive it was not clear to her why it was inadequate to include in the Brownfields Act a provision mandating that engineering controls run in perpetuity rather than adopt another law.

Commissioner Bunn asked why there was a need for national uniformity in an area like this one that deals with real property and is impacted by the specific conditions found in the individual states. Noting the Commission's assessment that adding provisions to improve the existing Brownfields Act were preferable to the enactment of the UECA, an entirely new law, Chairman Gagliardi asked if Ms. Pravlik could reduce to a finite list all of the UECA provisions that she believed would improve the Brownfields Act. He suggested that if there was a list of provisions in UECA that she believed would improve the Brownfields Act, those provisions might be kindly viewed by the Legislature.

Marna Brown said that there is a joint hearing of the Senate and Assembly Environmental Committees scheduled for February 26th. John Cannel asked if the Commission wanted Staff to prepare draft language for submission and clarify that the Commission has not yet passed on the draft language but that such language presented an option. Commissioner Pressler said that if such a submission was presented as clarification of, rather than a replacement of, the Brownfields Act, the submission might be better received.

Commissioner Bunn asked if, under UECA, the private right of action is available to anyone or if there has to be an injury in fact. Ms. Pravlik explained that the Act was crafted to

say that it is enforceable by any holder of the covenant, which could include the citizen who brought suit in the first place, or any party responsible for cleaning up the conditions in issue, which is often a different person than the owner of the land. Commissioner Pressler asked if the language could be modified to reflect that an enforcement action was available to anyone who “has or may suffer an injury”. She noted that DEP might find such a limitation acceptable in light of any reluctance it might have about embracing a private right of enforcement.

Ed Lloyd said that he thought that the option of making an effort to improve the Brownfields Act with the inclusion of beneficial language from UECA, is a useful approach. Commissioner Pressler suggested that Staff contact the appropriate aides in advance to let them know the Commission would like to see one change in the draft. Chairman Gagliardi asked if there was any objection by anyone on the Commission to Mr. Cannel advising the joint Environmental Committees of the Commission’s position. Commissioner Pressler said that she would like Mr. Cannel to draft a provision that allows enforcement by anyone who has suffered or may suffer an injury. Commissioner Burstein requested that the draft be e-mailed to the Commissioners.

Landlord Tenant

Marna Brown indicated that there were a couple of updates to the proposed Security Deposit chapter of this ongoing project. First, she explained that Staff had been working with Judge Mahlon Fast who had been instrumental in guiding Staff in this revision. She explained that Judge Fast was very concerned with two sections of the proposed Security Deposits chapter which he believed needed to be amended substantively.

The first area concerned the amount of the security deposit. Judge Fast was concerned that when it is determined that a landlord has required an amount for a security deposit in excess of the amount permitted by statute, that a penalty be imposed. Ms. Brown asked the Commission how far they wished to stray from the original goal of no substantive change in this area.

Commissioner Pressler suggested that the proposed language regarding that section should be revised for additional clarity. She also indicated that “owner-occupied” is a term that needs to be better defined. That term can refer to a one-family home that is owner-occupied. Any definition should say that it means a building of more than one unit, one of which is occupied by a landlord and the others of which are occupied by tenants.

Commissioner Burstein suggested that there were two fundamental problems, the first is that people who need this remedy will not likely know of it, and the second is that, as presently drafted, the language is not as clear as it could be. Commissioner Pressler said that if there is a concern about tenants not being aware of the provision, it should appear in the written lease. Commissioner Bunn suggested that this proposed provision changes the balance between the

landlord and the tenant because in the situation contemplated by the change, you are dealing only with landlords who are doing the wrong thing anyway.

The second change proposed by Judge Fast was a modification to the current law which says that there shall be no deductions from the security deposit while the tenant is in residence. Judge Fast suggested a change in the law to allow the security deposit to be drawn down as rent in defense of an eviction action if both parties agree and the court orders it. Commissioner Pressler did not favor this proposed provision. When asked by Ms. Brown whether the Commission wished Judge Fast to speak directly on this issue at the next meeting, the Commissioners welcomed Judge Fast's appearance at the March meeting to present his views. Mr. Cannel indicated that when this project was begun, the Commission tentatively determined that there would be no substantive changes to the law. If the Commission wishes to hold to that position, then the two changes suggested by Judge Fast would be outside of the scope of the project.

Mr. Cannel said that there is another difficult issue regarding security deposits that Staff does not believe has been satisfactorily resolved. The provision requiring the use of money market accounts for tenant security deposits now in the law was based on a time when money market accounts paid higher interest. Staff believed that because of current investment methods this provision probably needed to be changed but that guidance would be required with regard to any modification. Commissioner Pressler proposed adding the requirement that any account used for tenant security deposits must be FDIC insured. Commissioner Burstein noted that the current FDIC insurance limit of \$250,000 will expire, so the language of the draft statute should be general assuring that the account be federally insured.

Parentage

Mr. Cannel explained that this project includes some very hard issues. He said that he had received a telephone call from an attorney who would like the Commission to include more detail on the issue of who is a "parent" in the eyes of the law. Mr. Cannel said that the caller had explained that there are now situations in which, to avoid certain genetic diseases are carried by mitochondrial DNA, there are cases in which there are two sources of maternal DNA. One source provides the mitochondrial DNA and one the nuclear DNA. He explained that situations like this are one example of why he is treading carefully on this project since it is just not clear how these issues come out under the law.

Commissioner Bunn asked if "Baby M" was still good law and Commissioner Pressler clarified that it had not been overruled. Mr. Cannel said that he had included a provision regarding sperm donation derived from current law. Commissioner Pressler said that since a sperm donor is treated as having no responsibility, an egg donor should be treated in the same way. Mr. Cannel said that he had used the term "marriage" in the draft and Commissioner

Pressler said that civil unions have to be addressed as well since they are supposed to have all of the incidents and protections of marriage.

Mr. Cannel said that another difficult issue is whether there should be a genetic test before every acknowledgment of parentage. He said that that was a problem and that the testing is expensive, approximately \$1,000 per test. Commissioner Pressler raised the question of what if a man shows up at the hospital, accepts paternity, and then there are problems years later and that is when the DNA tests are done showing that he is not the father. Mr. Cannel said that that is the reason for obtaining DNA tests in these cases as soon as possible so that such scenarios are avoided, but the Commission can still do useful work in this area even if the DNA test requirement is not included as long as the project determines who can challenge parentage and when and under what circumstances they may do so. He added that, if a matter is in litigation, DNA can be required in every case.

Commissioner Pressler suggested that crafting language requiring unmarried men submit to DNA testing may raise an equal protection argument. Mr. Cannel said that one possible provision would be that an order entered based on DNA evidence is not challengeable until such time as better science is available. Another provision included in the draft is that if you have been established as a parent and have been living with the child for whom parentage has been established for five years, parentage in that situation is unchallengeable by anyone except the child. He noted that the five year time period was randomly chosen. Commissioner Pressler suggested that five years is a short time period in this context, and that while there has to be a point at which there is an estoppel, five years is not long enough.

Mr. Cannel said that, in the current draft, if there is no agreement or judicial finding, the parentage is challengeable by anyone but that the parties may not sleep on their rights before instituting a challenge. He asked that the Commission consider these issues for the next meeting and said that he would make the changes that he believes reflect the consensus of the Commission to eliminate the requirement of DNA testing in cases of voluntary acknowledgement.

Miscellaneous

Laura Tharney provided a brief update regarding the Legislative outreach efforts by Staff and identified the projects for which it appeared that there were committed sponsors. She also noted those projects that Staff had been advised were currently with the Office of Legislative Services in the process of being drafted into bills.

The meeting was adjourned. The next Commission meeting is scheduled for March 19, 2009.