

MINUTES OF COMMISSION MEETING
April 23, 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., and Commissioner Albert Burstein. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Professor Bernard Bell of Rutgers University School of Law attending on behalf of Commissioner Stuart Deutsch.

Also in attendance were Connie Pascale, Legal Services of New Jersey; Donald M. Legow, Legow Management Company, LLC; Nicholas J. Kikis, New Jersey Apartment Association; and Carolyn Smith Pravlik, Esq., Terris, Pravlik & Millian, LLP.

Minutes

No vote was taken to approve the minutes since there was no quorum present at the meeting.

Landlord/Tenant

In light of the unexpected absence of three Commission members, several of the aspects of this project were determined by the Chairman to be more appropriately held until the next meeting. Ms. Brown asked the Commission to address any outstanding concerns regarding the proposed abandoned property chapter as she believed this chapter could be put into final form.

Chairman Gagliardi asked the guests if they wished to be heard on the issue of abandoned property. Mr. Pascale advised that he had two changes to this chapter. First, at LT:6-x.5, at the end of subsection (b), regarding the charges for a commercial storage facility, Mr. Pascale suggested it might be better to characterize the charges as creating a rebuttable presumption of their reasonableness. Also, with regard to the delivery, under LT:6-x.4, Mr. Pascale suggested adding in "regular mail" in addition to "certified mail". Staff will make both changes in the final version of this chapter.

Mr. Kikis commented that his concerns are primarily with the security deposits so he would wait for the May meeting to comment.

Chairman Gagliardi noted that the Commission may set a less ambitious agenda for May to allow the Commission to focus on these issues in depth. Mr. Cannel noted that there was one issue that could be addressed at this meeting as there had been much discussion about whether or not the tenant or the landlord should have the option of applying interest from the security deposit either as a credit applied to rent or a cash payment to the tenant. At the last Commission meeting, the Commission had determined that because the security deposit is the property of the tenant, the tenant should have the option. However, it had since been brought to Staff's attention

that there were significant administrative problems for the banks and the landlords that could make it quite difficult to give the tenant this option, while the difference between a credit or payment has no real significance to the tenant. Mr. Pascale stated that as far as he was concerned, the tenants would concede this point. As a result, the Commission determined that the landlord should have the option with regard to the providing of interest either in a check to the tenant or as a credit towards rent.

UECA

Chairman Gagliardi explained that the Commission will discuss the draft today but cannot take a vote to release it as a tentative report until the next meeting.

Carolyn Smith Pravlik said that she would encourage the Commission to adopt alternative (a) in the draft. That alternative does a better job of allowing citizens to enforce deed notices and minimizes the issue of standing. She explained that alternative (a) addresses two of the four things that are accomplished by adoption of UECA – whether or not it creates a servitude that runs with the land and lasts in perpetuity and the enforcement issue. Alternative (a) does not specifically address what happens with other property considerations like foreclosure or whether the notice can be defeated by common law defenses.

Ms. Pravlik expressed concerns about the fact that the introduction indicates that a deed notice is to function like a restrictive covenant. She explained that it is not clear whether the deed notice is vulnerable to the kind of attacks that may be used to defeat a restrictive covenant. The objective of the deed notice is to protect the engineering controls; the buffer and isolation against public exposure to the contaminants. Ms. Pravlik explained that it was important to make sure that the deed notice lasts as long as the contaminants, which is generally considered to be forever. As a result, the draft should delete the “restrictive covenant” language and indicate that the restrictions are not subject to common law challenges.

Commissioner Burstein asked what the deed notice includes. Ms. Pravlik said that it states that it restricts the use of the land and makes reference to the contaminants and controls. The deed notice also identifies the owner and responsible party and charges those individuals as well as leaseholders with responsibility for monitoring, maintaining, and reporting on environmental controls over time. There are also requirements for notice to the State in the event that the containment or cap has to be breached as well as language regarding post-breach notification. Commissioner Burstein asked whether there was a procedure to change the restrictions if in the future there was a better way to remediate the land. Ms. Pravlik explained that there is, in fact, a process for changing restrictions.

The Commission requested that staff draft a Tentative Report for the next meeting in accordance with alternative (a).

Handicapped Parking

In light of the fact that the two opinions presently before the Commission on this issue are on completely different sides of the issue, Laura Tharney asked the Commission for permission to obtain additional information from individuals and entities who may wish to be heard on this issue.

Chairman Gagliardi indicated that, at this point, it is difficult for the Commission to determine whether or not the project is appropriate for Commission consideration as a result of the lack of input and agreed that Staff should seek additional information.

Title 22A

Laura Tharney also asked the Commission to carry this project for another meeting cycle. Although she had hoped that it would be ready for release as a Final Report, she is awaiting additional information. Ms. Tharney indicated to the Commission that she has been fortunate to receive a great deal of detailed information from AOC, the Surrogates, the County Clerks and the Sheriffs and Special Civil Part Officers. At the time of the meeting, additional information was on its way from several of those groups that would likely lead to additional changes to the language of the draft. Once the information is received, Ms. Tharney will make the necessary modifications and prepare a Final Report for the next meeting.

The Commission agreed to carry the project until the next meeting.

Title 9

John Cannel indicated that he was not certain if the chapters of this project should be released individually, or in groups, and said that he would have something more formal on this chapter for the next meeting.

Commissioner Burstein asked why a definition of genetic parentage was required, and said that the definition of marriage would need to include domestic partnership. He added that the definition of marriage did not really define marriage at all, except to say that it included civil unions. Mr. Cannel indicated that what he wanted to do was make it clear that any reference to marriage included civil unions, without having to repeat both terms in every relevant section of the draft. Commissioner Burstein suggested that defining marriage is a difficult issue and that to leave it as presently drafted could cause problems. Mr. Cannel said that it might be best to delete the definitions section and repeat the terms when necessary. Commissioner Burstein suggested that would be a more effective solution.

Chairman Gagliardi raised a question about Section 13(c), asking if it was included at the request of a commenter. Mr. Cannel indicated that Commissioner Pressler had raised the issue at the last meeting and suggested that it was current law and well-accepted, but that he was not sure

where in the current statute it is located. He indicated that it may be in the common law, rather than the statutes. Chairman Gagliardi said that he thought it was a useful addition to the statute since it is generally perceived as being true.

Mr. Cannel said that the report will be prepared in a more formal form for the next meeting.

UEVHPA

Mr. Rappoport explained that he wanted to review for the Commission some of the ways in which the draft Act differs from the Uniform Law.

In Section 2, Staff tied the definition of emergency to the definition of health emergency in the Emergency Health Powers Act because that definition was broad and already codified. The “public health emergency” as defined under the Emergency Health Powers Act, includes things like bioterrorism, small pox, natural disaster, and nuclear attack or accident, which are the kinds of situations the UEVHPA is designed to address.

Chairman Gagliardi asked whether Staff had checked to see if other states had modified UEVHPA and Mr. Rappoport explained that the states that adopted the Act had not made that many changes to it. Chairman Gagliardi asked whether many states had rejected the Act. Mr. Rappoport noted that there were none that he knows of but that he would check to see the status of the Act in California which had recently taken it up.

Chairman Gagliardi stated that, in reading the first few pages, Staff made a compelling case to adopt the Act. He added that given its significance, he was surprised to read that only six states had adopted UEVHPA so far. Mr. Rappoport agreed and noted that UEVHPA was being considered by the District of Columbia and California but there might be other states that have initiated consideration in the weeks since he last checked the status of state adoption. Mr. Rappoport also suggested that the Act was fairly recent.

Mr. Rappoport added that because of the existence of the Emergency Management Assistance Compact (EMAC), some states might think that EMAC is sufficient, although the Act was drafted in response to inadequacies of EMAC in dealing with disasters. Mr. Rappoport said that EMAC does not have the same licensing procedures or the same registration systems that have been developed. ESAR-VHP (Emergency Systems for Advance Registration of Volunteer Health Professionals) and the MRC (Medical Reserve Corps) are registration systems that would be used by states that adopt UEVHPA. Some states may think that having one of those registration systems is sufficient and that no further action is required, but Staff is of the opinion, after reviewing the Act, that adoption would add utility. Among other things, the Act provides a regulatory framework for the agencies with oversight. Also, the Act addresses the issues of tort immunity and workers compensation, which have not been addressed to this time. Ms. Tharney

also noted that because New Jersey appears to be the only state in the nation requiring criminal background checks of practitioners, the Act could serve to address the issue, so that New Jersey would not be in a position where no volunteers could come in to the State to assist because there was no reasonable way to obtain criminal background checks in a timely fashion. Mr. Rappoport indicated that the draft was revised to include language allowing the waiver of criminal background checks in an emergency. Ms. Tharney added that Staff had been advised that, under non-emergency conditions, it took days or weeks to complete a background check.

Mr. Rappoport explained that Section 3 was modified to clarify that the health practitioner was required to register in the state in which they are licensed to practice, since the Act, as drafted, did not specify that they would register in their home state, rather than in the state in which the disaster occurs, or in all 50 states.

Sections 4 and 8 were modified to include language that affords the Governor the power to make certain decisions if the specifically-named agency is not available to do so.

Changes were also made to Section 6 to give the relevant agencies the ability to conduct individualized reviews of volunteers if the circumstances warrant, so as to alleviate concerns that the Act presents an “all or nothing” proposition. This modification recognizes New Jersey case law and the considerable authority of the various agencies.

Section 11 is the last area in which significant alterations were made, and involves the area of tort liability. Most of the language of the section is drawn from the Uniform Act, but subsection (a) provides two alternatives for the Commission to choose from in order to address the question of whether volunteers who receive some kind of remuneration would still be considered “true volunteers” and thus entitled to immunity from certain acts or omissions. Changes were also made to this section to indicate that the limitation on liability applies where a volunteer renders service since New Jersey’s current Good Samaritan law does not apply if services are rendered in a health facility. Ms. Tharney explained that since Commissioner Pressler had expressed concerns regarding whether someone who receives compensation should be treated as a volunteer for purposes of immunity, she would like to wait until the next meeting so that Commissioner Pressler could offer her opinion of the proposed language.

Professor Bell asked if most medical malpractice insurers would cover a doctor in a situation in which the doctor volunteers assistance in a disaster. Ms. Tharney indicated that would likely depend on whether the doctor is acting outside of the scope of the practice for which they have insurance. Commissioner Burstein said that it sounded like that would be an issue for doctors who are employees of a hospital, rather than doctors who are affiliated with hospitals but are really independent contractors. It was agreed that the source of the malpractice insurance policy would likely be a factor, and Ms. Tharney added that the issue would likely be different for other medical professionals, like nurses or technicians who tend not to create

independent practices or practice groups and are, instead, employees of the hospital. Professor Bell suggested that if the medical professionals had insurance that would cover them while volunteering, perhaps they did not need the broad immunity contemplated by the Act, but he added that drafting a distinction between doctors and other medical professionals might be problematic. Ms. Tharney and Mr. Rappoport indicated that Staff would obtain additional information in advance of the next meeting so that that Commission could consider this issue again. Mr. Rappoport indicated that every state that has adopted the Act provided some sort of immunity to its volunteers and that the workers compensation issue was the one that caused the most division among the states.

Ms. Tharney indicated that Staff will begin doing outreach with the current draft, and hopes to have some feedback for the next meeting.

Miscellaneous

Commissioner Burstein moved to adjourn, and the meeting was adjourned. The next Commission meeting is scheduled for May 21, 2009.