

MINUTES OF COMMISSION MEETING
February 18, 2010

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 Bunn and Commissioner Albert Burstein. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Grace C. Bertone, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon and Professor Bernard W. Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. Timothy J. Prol, Legislative Aide, attended on Senator Scutari's behalf.

Also in attendance were Donald M. Legow, Legow Management Company, LLC; Nicholas J. Kikis, New Jersey Apartment Association; and Judge Mahlon L. Fast.

Chairman Gagliardi expressed the Commission's appreciation that Senator Scutari sent Tim Prol of his office to represent him on the Commission. Mr. Prol's participation will provide help to the Commission and a link to the Senator's office.

In Memory of Commissioner Pressler

Chairman Gagliardi began the meeting by saying that the Commission had suffered an irreplaceable loss with the death of Judge Sylvia Pressler, who served on the Commission for nearly six years. He said that many of the Commissioners had known her longer. Chairman Gagliardi said that Judge Pressler's insights and intellect enriched the legal community for decades and that the knowledge she provided to this Commission was unique and irreplaceable. Commissioner Burstein added that he had known Judge Pressler since her days in private practice and that whenever she was in a room, she dominated only through sheer force of her intellect. Commissioner Burstein said that simply reading the minutes of our January meeting revealed so many of her valuable suggestions, comments and insights.

Chairman Gagliardi thanked Staff for expressing the Commission's sympathy in a letter to the Pressler family and for drafting a tasteful memorial to be included in the Annual Report.

Minutes

The minutes of the January 2010 meeting were approved as submitted on motion by Commissioner Bunn, seconded by Commissioner Burstein.

Landlord Tenant

Marna Brown said that neither Connie Pascale nor Matt Shapiro was able to attend

the meeting but that both reiterated to her their position that the Commission should limit its activity to renumbering and reordering the landlord tenant laws without changing any of the current language. Mr. Pascale suggested that a roundtable discussion to identify areas for improvement would be helpful, including not only landlord and tenant representatives, but title insurers, realtors, and others with an interest in landlord tenant laws. Chairman Gagliardi stated that he was not sure that a roundtable would advance the cause beyond the Commission's usual process.

Referring to her February 8th memo, Ms. Brown explained that section LT:5-2.1 defined the various notices required in the course of an eviction; the "notice to cease", the "notice to vacate", and the "demand for possession". As these terms are used throughout the statute and those unfamiliar with them may not know what they mean, explanations were appropriate.

Judge Fast proposed combining the notice to quit and the demand for possession in one document, suggesting that having the requirement in the statute of two separate notices was superfluous. Ms. Brown also explained that this is not merely a technical concern since there are different timeframes for each of the various notices and those time periods are specific to the grounds for removal in the case of the demand for possession. She said that the tenants groups would likely oppose any change in this area.

Commissioner Bunn said that he favored removing any unnecessary provisions. Chairman Gagliardi said that the issue of whether streamlining the statute removes language that individuals used to their advantage should not be a Commission consideration if removing or modifying a provision improves the law. Professor Bell asked how the consolidation of the notices would work in practice. Judge Fast explained that the demand for possession does not have a timeframe and is generally served with the notice to quit. He said that if the landlord does not include the precise sentence in the notice to quit, some judges require a new notice and another two month delay. Judge Fast further commented that the views of pro se homeowner/landlords had not yet been represented before the Commission and he had their protection in mind.

Mr. Legow said that as a non-practicing attorney, he is troubled by the fact that the language used in the demand for possession is the very same language used in order to raise rent at the end of the lease term. He said that some tenants find this language terrifying and need to be told that the language is only being used because the court requires it. Mr. Legow also expressed concern for the individual with one rental unit who does not know that the notice to quit is not sufficient by itself and that a demand for possession is also required. He suggested the Commission eliminate the entire block of language, especially when renewing a lease. He said that a landlord should be allowed to raise rent just by informing the tenant in a letter of the new rent amount. Judge Fast noted that he stated in his text that when increasing the rent, this language should not be required.

Commissioner Bunn asked whether a tenant is bound by an increase if the landlord serves a document containing language regarding a rent increase without a notice to vacate. Mr. Cannel said yes, but if the rent increase is unconscionable, the tenant cannot be bound by it; instead, the tenant can stay without paying the increase, wait for an eviction action and challenge it then. Commissioner Bunn suggested that this was unnecessarily cumbersome. Judge Fast said that it is a technical requirement necessary because in New Jersey, a tenancy is basically a lease for life so the existing tenancy has to be terminated before rent can be increased.

Commissioner Bunn suggested that the underlying concept should be changed as well as the language that suggests that the tenancy has to be terminated to raise the rent. Professor Bell said that it seems odd that a tenant who receives notice of a rent increase has no way to challenge the increase except to wait to be brought to court by the landlord. He said that a tenant should be able to bring an affirmative action against the landlord. Ms. Brown explained that in landlord tenant court, relief is obtained by a summary proceeding for eviction; the only remedy is possession. Judge Fast explained that landlord tenant court did not permit a declaratory judgment action as suggested by Professor Bell.

Judge Fast suggested that just as in the chapter dealing with protected tenancies, a form is included that is required to be served on tenants, similarly a form of notice to quit and demand for possession would be useful in the eviction chapter. The Commission asked Ms. Brown to draft such a form but that the form be a model not a requirement.

Judge Fast proposed a major change from current law, which appeared in the new subsection LT:5-2.2c., and explained that it was based on the holding of an Appellate Division case. It provides that if a court finds that a person actually receives notice, even if the manner of service does not strictly comply with service requirements, the person is deemed to have been served. Commissioner Bunn asked how this language applies if the tenant is a corporation and the notice is received by the night watchman. He expressed a concern about corporate hierarchy and that if the notice sits in someone's inbox and never gets to the actual tenant that poses a problem. Ms. Brown explained that current law did not specifically address service upon legal entities, referring to the "abode" or "residence" of the person to be served and Staff would have to address this in drafting. Professor Bell asked whether commercial leases usually provided for the method of service. Commissioner Bunn agreed that if the lease designates a person to be served and that designated person receives service, then service has been effected. Chairman Gagliardi noted that there may be some guidance in cases dealing with "substantial compliance" and that Staff should look at these concepts when redrafting.

Ms. Brown noted that Staff had drafted a provision suggested by Judge Fast which is alluded to in the court rules, pertaining to "orderly removal". Judge Fast explained that in Essex County, the former presiding judge developed the concept of orderly removal

when a tenant seeking post-judgment relief stated that he or she would have the money in a week. The court would set a date by order to show cause at which time the landlord and tenant were to appear. Because the tenants frequently did not appear, the judge would enter an order of orderly removal saying that the eviction would be stopped for no more than seven days instead of requiring everyone to come back. Ms. Brown noted that there was a court rule that guided this process, specifically Rule 6:6-6(b) which deals with orderly removal. Mr. Cannel said that it would be better to include appropriate language in the statute and Staff will redraft a clearer orderly removal provision.

Judge Fast also said that all post-judgment relief is discretionary and that he has always imposed at least two conditions which were acceptable to both landlords and tenants: (1) finality to the order (unless judgment later shown to be void or the landlord does not honor first order for orderly removal); and (2) waiver of the protections for the abandonment of personal property (the order spells out that the court officer will be there at a specific date and time and any personal property that the tenant has that has no value may be removed by the landlord without the landlord bearing any responsibility for it). Mr. Cannel said Staff had difficulty harmonizing the statutory language with the Abandoned Property Act, which Staff did not feel at liberty to change. A battered couch, which may have no value to a landlord but some value to a tenant, presents a problem. Staff will attempt to draft around this issue.

Ms. Brown said that the current provisions pertaining to compensation to tenants relocated because of an illegal occupancy require the landlord to pay relocation compensation to the tenant regardless of whether the illegal occupancy is due to the fault of the landlord or the tenant. She explained it had been suggested to Staff that if the tenant is at fault, the tenant should not get assistance. An example of a tenant's fault is overcrowding in violation of zoning codes. An example of a landlord's fault is a basement apartment that violates zoning laws. Ms. Brown explained that there is case law supporting the notion of tying the payment requirement to fault. Judge Fast noted that the Supreme Court has said that no offsets are permitted. Even if a tenant owes a landlord six months of rent, the landlord still must pay the tenant the six months relocation compensation. Mr. Cannel pointed out that since a tenant cannot be made to leave until five days after payment is made by the landlord, an illegal tenancy that violates the health/safety laws/zoning regulations will continue. Commissioner Bunn said that it seemed punitive and inappropriate that a landlord would be out of pocket for six months rent and still have to pay a tenant for a tenant's destructive act that makes the tenancy illegal and asked Staff to consider this and the offset issue as well when redrafting. Judge Fast also suggested a change to the current statute which provides for a lien against the real property if the landlord does not pay the relocation compensation. The proposed change says that if the landlord does not pay the assistance, the municipality may do so and then pursue the landlord for reimbursement. Ms. Brown has not checked with the DCA yet but

suggested that it may not favor such a change.

Ms. Brown said that Staff had attempted to answer a question posed at the last meeting regarding whether the Anti-Eviction Act should apply to residential tenancies currently exempted from the Act and to nonresidential tenancies.

The cases and legislative history strongly indicate that owner-occupied tenancies are exempt from the Act because of the perceived right of an owner to control those with whom he or she lives. Staff proposed that in owner-occupied premises, the law should continue to preclude tenants from “holding over”. If this provision is retained, all grounds for eviction that apply to holdovers need not apply to these tenants. On the other hand, grounds that do not pertain to cutting off holdover rights should apply to these tenants. Ms. Brown said that the same approach should be taken with regard to seasonal or transient guests. Although she could not find any legislative history regarding this exemption, since these occupants occupy the premises for temporary purposes, they are not legal tenants and should expect to have fewer rights. Landlords should have the ability to evict as if the seasonal or transient guests were in owner-occupied premises.

The provisions concerning disabled residents residing with co-tenants in premises address situations in which the nominal owner does not live at the premises, but a disabled family member lives there with another tenant. The limited legislative history available indicates that these disabled co-tenants should have the same right to evict as owners of owner-occupied premises. Professor Bell asked why only developmental disabilities are covered by this exception and the exception does not apply to someone who is quadriplegic. Mr. Cannel said that Staff will speak with ARC (an organization that deals with the intellectually disabled) because in Staff’s view, for purposes of this statute, it is irrelevant whether a disability is mental or physical or how it was acquired. Chairman Gagliardi said that while it may be appropriate to expand the concept beyond developmental disabilities, care must be taken not to over-expand the provisions.

Commissioner Bunn asked whether the landlord in an owner-occupied situation has to go to court to evict a tenant and Mr. Cannel explained that there is no self-help in New Jersey. Ms. Brown said that although the Anti-Eviction Act does not apply in that situation, the Summary Dispossess Act does. Commissioner Bunn asked whether the kind of tenancy determined which of the two different statutes applied. Ms. Brown said that was the case and that application of the two laws was confusing particularly since some of the current language is archaic and inconsistent.

With regard to the manner in which nonresidential or commercial tenancies should be handled, Ms. Brown said that with such tenancies, there is never a holdover. In commercial tenancies, when the lease terminates, the tenancy is over. Upon reviewing the grounds that now apply to residential tenant evictions, other than those exempted as

already noted, Staff found some of the grounds difficult to apply to a commercial tenant. Criminal conviction for drug offenses can be the basis for eviction in residential tenancies but if the tenant is a law firm, partnership or professional corporation, and one of the lawyers is convicted of a drug offense, the question remains as to whether this should be a basis for eviction of the law firm itself.

There are other examples of grounds that do not apply as easily in a commercial context. As a result, Staff did not recommend that all of the grounds for eviction applicable to residential tenancies should apply to commercial tenancies. Staff did recommend that the use of the premises be the guide. Thus, if a law firm is using the law offices as a drug distribution center, that conduct could be a ground for evicting the law firm. Professor Bell said that there may be cases in which a default rule might make sense since there may be some small commercial entities that are unsophisticated, do not have legal representation, and will not have a controlling lease provision.

Judge Fast disagreed, stating that a commercial tenant has greater control of its employees than a landlord does and that this greater control would make conduct by a principal subject to eviction. He said that the focus should be on the use, rather than the entity. Section 2A:18-61.1 provides “fault” grounds and “nonfault” grounds and Judge Fast suggested that the fault grounds should be applicable to commercial uses. A tenant should not be able to threaten the landlord, or fail to control its employees without being subject to eviction. Mr. Legow agreed, saying that if the Commission considers all the businesses on crowded streets, it is clear that if something goes wrong in one of those areas, it is important to be able to throw someone out. Ms. Brown said that there are grounds for termination of a commercial tenancy set forth in section 2A:18-53, which include violating the lease, destroying the rental premises, and being so disorderly as to destroy the peace and quiet of the landlord, tenant or other occupants. Mr. Cannel suggested that the existing language was sufficient and that it was not clear how a landlord could control individuals within a given workplace.

Chairman Gagliardi asked whether the landlord could include such an offense as a ground for eviction in a lease and Judge Fast pointed out that there is not always a written lease. Commissioner Bunn suggested drafting to include language that says “unless provided in a written lease...”.

Commissioner Gagliardi asked whether the Commission was interested in seeing language that added to the statutory grounds for eviction of commercial tenants the conviction of a crime involving or located on the premises or involving the landlord as victim. Commissioner Burstein asked why limit the criminal offense to one conducted on the premises since there could be a criminal enterprise involving the principal of a corporate entity conducted off premises. Ms. Brown noted that this would be an expansion of current law. Judge Fast pointed out that most eviction cases do not require conviction or

a criminal prosecution at all; just the civil burden of proof. Ms. Brown said that the Anti-Eviction Act requires a preponderance of the evidence standard in a civil proceeding based on a criminal conviction.

Commissioner Bunn suggested that the proposed language appeared to require an employer to fire an employee who has not been convicted of a crime and then face the lawsuit for wrongful termination or lose the lease. Both Professor Bell and Commissioner Bertone expressed concern about that outcome. Chairman Gagliardi requested that Staff attempt to draft language with regard to crimes committed on the rental premises or bad behavior directed at the landlord so that the Commission could see the language before determining whether to include it in the proposed chapter. Judge Fast suggested that it might be useful to require the landlord to first serve a notice to cease on the offending employee or person and that if the offending conduct does not cease, then the landlord would be in a better position to evict.

Judge Fast further noted what he believed to be another significant change in the proposed chapter. The current statute uses the term “the person” and in the draft it says “the tenant” which is a significant restriction as compared to current law. Ms. Brown also explained that there was one ground for eviction in a residential context that surely should be in the nonresidential context as well, i.e., the habitual late payment of rent.

Finally, Ms. Brown explained that the chapter concerning protected tenancies, which protects senior citizens, disabled individuals and low and moderate income tenants from eviction solely as a result of condo or coop conversion, combines the Senior Citizen and Disabled Protected Tenancy Act and the Tenant Protection Act of 1992. She confirmed that there were no substantive changes, just a combination of the two statutes including some changes in language to address inconsistencies in the two Acts.

Mr. Cannel brought to the attention of the Commission the case of *Lake Valley Associates, LLC v. Pemberton* (App. Div. February 1, 2010), which concerned a preemption issue that came up several months ago regarding municipal requirements of registration of rental apartments. In that case, the court found it permissible for the municipality to enforce a very broad registration ordinance. As a result, the only restrictions on municipal registration ordinances will be those drafted by the Commission. Mr. Kikis confirmed that an appeal would be filed in that case, and Chairman Gagliardi directed Staff not to redraft until the Supreme Court addresses the issue.

Title 2A – Causes of Action

Laura Tharney explained that the most recent draft of the Title 2A project contained changes that the Commission requested in response to the last draft. While briefly reviewing the changes that were made, she explained that there were no changes to the sections pertaining to alcohol servers’ liability or liability for damage to a fire alarm

system. Ms. Tharney indicated that the sections pertaining to injury or loss from mob violence or riots, the recovery of money or property from a municipality or school district, and naturalization had been eliminated in their entirety. The sections pertaining to heart balm and change of name were eliminated except for a single sentence each. The section pertaining to debts or obligations fraudulently incurred was modified to clarify that contrary to the interpretation of the federal courts, New Jersey statutes permit a cause of action for either fraud in the inducement or fraud in the performance even if contractual remedies are also available. The section pertaining to the arrest or detention of a mentally incapacitated individual was modified to clarify that its provisions do not apply to commitment proceedings themselves. Finally, the section pertaining to proof of lost or destroyed instruments was modified slightly for clarity and to include the standard of proof that the case law had determined was applicable in such cases.

Ms. Tharney said that she hoped to be able to release the project as a Tentative Report but that Professor Bulbulia brought to her attention before the meeting another issue that may have to be addressed. Professor Bulbulia explained that he was concerned about the impact of the report on causes of action arising under the laws of another state. Ms. Tharney said that the statutes that were being revised did not address this issue but that other states still had effective heart balm statutes under which relief might be granted. Commissioner Burstein clarified that the issue in question was a full faith and credit issue and Professor Bell said that New Jersey had the ability to say, as a matter of public policy in New Jersey, that the State does not wish to adjudicate these claims. Other forums are free to do so, but New Jersey will not. Professor Bulbulia said that his concern arose as a result of the fact that the case law made it clear that, with regard to full faith and credit, a state may not do indirectly what it is not permitted to do directly.

Mr. Cannel said that the federal law regarding full faith and credit will apply regardless of what the Commission determines in the context of this project and that while the issue raised a difficult constitutional question, state legislation could not control it. Professor Bell also said, and Commissioner Bunn agreed, that the changes proposed did not invalidate another state's cause of action or deprive anyone of a forum. They merely say that New Jersey is not entertaining such causes of action. No change was recommended to the language of the heart balm section.

Professor Bell recommended a change to the language pertaining to debts or obligations fraudulently incurred, on page 4, suggesting that it be clarified to say that it applies where there is fraud either in inducing a person to enter into contract or in the performance of the contract. He also suggested that the language in the comment to the section pertaining to injury or loss from mob violence or riots, on page 9, was confusing because it didn't clearly state why the Commission was taking action with regard to the section. Ms. Tharney asked whether additional explanation regarding the reasons that the Tort Claims Act was considered would be helpful and Professor Bell said he thought that

might clarify the comment.

Commissioner Burstein expressed a concern that the Commission may not have delved deeply enough into the section pertaining to the imposition of liability on alcoholic beverage servers. He explained that as a result of a case he was involved in, he had experience with this section of the law and there were a number of situations that are not covered by the statute that might be appropriate for coverage. Commissioner Burstein said that, significantly, the serving of alcohol at mass gatherings, like sporting events or concerts at stadiums, did not fit the statute and that there was no clear way to apply the law in those circumstances. Commissioner Burstein said that he was troubled by the fact that the statute deals only with one narrow part of a societal problem while omitting other large parts of it. He said that he had not been able to fashion a remedy, but wanted input from the Commission as to whether it should be addressed in more detail.

Ms. Tharney asked if trying to respond to that issue would exceed the scope of the Commission's mandate as a policy determination more appropriate for consideration by the Legislature, or if it would be appropriate for Staff to redraft to alert the Legislature to the issue in the comment section of the report.

Chairman Gagliardi said we could also leave the statutory language as it is and note the deficiency in the comment. Professor Bell suggested that the comment could indicate that the Commission's role was not to draft statutes in controversial areas requiring difficult policy decisions, but that the Legislature may wish to take a look at this issue. Chairman Gagliardi agreed, and suggested that the comment could also refer to other cases of some notoriety in addition to the New Jersey Supreme Court case currently mentioned and say that the courts have had some difficulty applying this law when mass gatherings are involved rather than a neighborhood bar. Ms. Tharney said that Staff would look to see if other states deal with the issue of stadium sales and then add additional language to the comment to bring the issue to the attention of the Legislature.

Professor Bell also asked about the naturalization language found on page 12 of the report, asking if all of the sections proposed for elimination were necessarily preempted by federal law. Professor Bulbulia said that it may be field preemption and Commissioner Bunn suggested that there may be federal law directly on point. Ms. Tharney said that Staff would review this issue for the next meeting and revise the draft as appropriate.

Property

Mr. Cannel spoke with Judge Pressler after the last meeting to discuss the fact that there was a basic legal identity between a bargain and sale deed and a quitclaim deed. There was a difference of opinion on that issue at the time of the January meeting. Judge Pressler agreed with Mr. Cannel that since the language of the current statute does not comport with what the members of the bar believe, the term "bargain and sale deed"

should be abandoned.

Commissioner Burstein said that he had his real estate paralegal print off several deeds from their forms program and that the bargain and sale deeds generally all include various kinds of warranties. Mr. Cannel agreed that there is a general assumption, in practice, that a deed includes an implied warranty. At a minimum, there is an assumption that someone who provides a deed thinks that he or she owns the property and has a right to transfer it although with a quit claim deed, the transferor could disclaim any knowledge or warranty whatsoever.

Mr. Cannel explained that the current draft contains three general forms of deeds: a quitclaim deed, a full warranty deed, and an ordinary deed. The section on covenants that may be in a deed includes the most common, a covenant against grantor's acts. He asked if the Commission wanted to proceed with the drafting along these lines. Commissioner Bunn questioned the difference between the deeds featured in subsections b. and c. Mr. Cannel clarified that c. is a warranty deed, and b. is an ordinary deed that implies no warranty not specifically set out in the deed other than one based on information and belief.

Commissioner Bertone said that she did not expect that anyone would give a warranty deed since title insurance is generally required so that an ordinary deed would be given, usually with a covenant against grantor's acts. Mr. Cannel will research and redraft for the next meeting.

Annual Report

The memorial page regarding Judge Pressler will be added to the report. Chairman Gagliardi also asked about the asterisks after the names of two of the three law student interns. Ms. Tharney explained that there was a missing footnote that those interns worked only for part of the year. Commissioner Burstein said that this was one of the better annual reports of the Commission that he has read and that it paints a very clear picture of what the Commission does. Subject to the changes required in response to comments, the 2009 Annual Report was approved after a motion by Commissioner Burstein seconded by Commissioner Bunn.

A motion to adjourn the meeting was made by Professor Bell and seconded by Commissioner Bunn.

Miscellaneous

The next Commission meeting is scheduled for March 18, 2010.