

MINUTES OF COMMISSION MEETING
June 17, 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, Commissioner Albert Burstein and Commissioner Edward J. Kologi, Esq. Grace C. Bertone, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Nicholas J. Kikis of the New Jersey Apartment Association, and Donald M. Legow, Esq. of Legow Management Company, LLC.

Minutes

The Minutes of the May 13, 2010 meeting were approved on motion of Commissioner Burstein, seconded by Commissioner Kologi.

Title 9 Custody

John Cannel explained that the only change to the report for this meeting was the incorporation, on page 6, of Professor Bell's suggestion that a presumption for sibling visitation be included. Commissioner Burstein pointed out the incorrectly placed apostrophe on page 3, subsection d. Subject to that change, Commissioner Burstein's motion to release the report in final form was seconded by Commissioner Bunn.

Landlord Tenant

Marna Brown explained that tenant commenters Connie Pascal and Matt Shapiro were unable to attend and that she also had received comments from Judge Fast (Ret.) and David Gordon, which she was in the process of reviewing. One issue raised by David Gordon concerned lease recording, addressed in LT: 2-2.5. Landlords expressed concern about the cost of recording long commercial leases and the inclusion of private and perhaps confidential information in the public record. David Gordon suggested that the statute allow the recording of a memorandum of lease which included only certain basic information. Mr. Gordon also said that there is a need for a statutory procedure whereby a landlord can clear title to the property upon the expiration or termination of a lease.

Chairman Gagliardi asked for a rough approximation of the number of leases recorded. Commissioner Bertone said that, in her experience, about 90% of leases are not recorded. Commissioner Bunn asked about the consequences of making such a change to the law and whether the exception should be limited to options to purchase. Commissioner Bertone explained that memorandums of leases occasionally are recorded,

but that during the process of due diligence, the purchaser of a leased property will usually look at the rent roll and copies of the leases. She said that recording of an ordinary lease is really not necessary and generally does not occur unless the lease contains an option to purchase. Commissioner Burstein explained that an option to purchase is often embedded in the text of the lease and not easily separated from the rest of the document for recording purposes.

Chairman Gagliardi said that it should be within the scope of this project to solve this problem and asked whether the Commission required further information before addressing the issue or the provision should be removed if it does not add clarity. Commissioner Bunn said that he was not convinced that he had a sufficient understanding of all of the issues but that since the provision in question deals with only a small portion of the overall problem, he was hesitant to impose a cure where there was no request for one. Chairman Gagliardi agreed. Commissioner Bunn suggested that the eminent domain problem ought to be addressed in the statutes pertaining to eminent domain. Commissioners Burstein and Bertone agreed. Staff was directed to remove the provision concerning lease recording from the revision.

Ms. Brown next explained that the requirements of the current Truth in Renting Act now appear in article 3 of the Chapter and current law requires the landlord to distribute a booklet to tenants regarding their rights and landlords' obligations. DCA printed the booklet at a cost to the landlord but now the booklet is available on DCA's website. According to DCA, the booklet is downloaded from the web about 11,000 times per month, but the manual distribution of approximately 75,000 booklets per year is the responsibility of one person at DCA who cannot keep up with the demand. DCA suggested that the cost of outsourcing the distribution of the booklets to landlords would be prohibitive. Although there might be concern about tenant access to the web, most public libraries provide web access.

Ms. Brown asked the Commission whether, in light of the web access to the booklet, the statute should retain the requirement that a landlord provide the tenant with a paper copy of the booklet. Since DCA no longer provides the booklets, this would require the landlord to print the booklet from the website and give it to the tenant. An alternative, suggested by DCA, is that the statute require landlords to include the website in the written lease and provide a notice regarding the website to tenants without written leases. The requirement of posting the booklet in a conspicuous place at the rental premises would remain in the statute.

Commissioner Bunn asked about the substance and importance of the booklet and Ms. Brown explained that the booklet contained vital tenant information, including

information about security deposits, the grounds for eviction and other laws and procedures pertaining to tenants. She circulated a copy printed from the website at the meeting. Nicholas Kikis said that access to the document online is relatively new and that many tenants will prefer to access the document online, where it is more easily updated, while others will want a paper copy provided to them. He suggested that landlords should give tenants the option of accessing the material online or receiving a printed copy.

Chairman Gagliardi said that giving the tenants a choice was preferable and that Staff should retain the draft language about providing the website information. Mr. Kikis suggested not specifying the precise URL address for the website because that could change. The Commission directed Staff to provide language that gives the tenant the option of receiving the booklet electronically or in paper format.

With regard to LT:2-3.7, which pertains to flood zones, Mr. Gordon explained in his comments that he and other attorneys who represented commercial landlords were unaware of the existing statute's application to commercial rental properties. He had advised Staff that if the intention of the statute was to alert tenants so that they could obtain flood insurance, the statute should be more precise with regard to the use of the terms "flood zone" and "flood area", which mean different things. According to Mr. Gordon, "flood zone" means a flood zone under the Federal flood program and "flood area" refers to an area prone to flooding and relates to State planning and zoning restrictions. Commissioner Bertone confirmed the distinction. Mr. Gordon asked that based on the intent of the statute, the drafting ambiguity be clarified by making specific reference to a flood zone as identified by the maps issued under the Federal program.

Ms. Brown explained that the issue was not just whether a tenant should purchase flood insurance. An additional concern was providing information to the tenant so the tenant could decide whether to lease the property. Commissioner Bertone said that both terms should be included since it is useful for tenants to know whether a property was in a flood zone as well as a flood area. The Commission agreed.

Ms. Brown next raised issues regarding two provisions that enabled tenants to terminate leases. The first pertained to the death of the tenant, at LT:2-7.1. The first issue regarding that provision, raised by Judge Fast, pertained to the fact that a tenant's survivor was required to leave the premises five days before the termination date but also required to pay rent up until the time of the termination, which meant that the tenant's survivor ended up paying for five days during which the survivor was not in possession of the rental premises. The statute sets the termination date as 40 days after the landlord's receipt of written notice of the termination. Staff questioned why 40 days had

been selected as the time frame since it seemed more logical to have the lease terminate at the end of the month after the tenant's death.

Mr. Kikis explained that the statute does not address what happens after the end of the lease if the tenant's family does not leave the premises. Commissioner Kologi asked whether the landlord should have to initiate proceedings to evict the tenant's survivors if they do not leave. Mr. Cannel explained that under the Anti-Eviction Act, the survivors might have the right to remain in the apartment. Mr. Legow said that the survivors of one of his tenants stayed in the apartment for a year and a half after the tenant's death. In practical terms, it may not be a problem if the survivors are paying rent. Mr. Kikis suggested that the lease terminate on death, and if the tenant's survivors remain, they continue on a month-to-month basis without the 40 day provision. Mr. Legow said that the 40-day period can be a problem because tenants may say that they were out by the 20th day and refuse to pay the extra rent. The Commission agreed that switching to a month-to-month tenancy after the death of the tenant was reasonable.

Ms. Brown asked whether the same mechanism should be applied to a termination of tenancy because of disability, as discussed in section LT:2-7.2. Chairman Gagliardi asked, as a preliminary matter, what constitutes a disability and whether there should be a definition of disability in the statute. Ms. Brown explained that Staff had wrestled with the need for a definition and had opted not to include one, preferring to let the courts decide the issue. Mr. Cannel said that the statute ties disability to a loss of income, which is verifiable. Ms. Brown also noted that the statute requires certification from a doctor and other requirements before the tenant can terminate the lease. Chairman Gagliardi pointed out, however, that the statute does not say anything about a permanent disability. He expressed the need to define "disability" and to look to other statutes for the useful language. Mr. Legow noted that this provision was rarely used. Chairman Gagliardi requested that Staff provide a definition that addresses the substance of the interruption as well as its duration, and clarifies that it must be for a substantial period of time. He suggested something to the effect of "impairment to major life functions". The Commission agreed.

Mr. Kikis said that LT:2-5.1 and LT:2-5.2, pertaining to the Federal Crime Insurance program, should be deleted because the program is no longer provided by HUD and tenants have other insurance options available to them.

Ms. Brown noted that section LT:2-8, the provision pertaining to month-to-month tenants, was revised at Judge Fast's suggestion to apply to all tenants, not just residential tenants. Mr. Legow said that a holdover is interpreted to automatically agree to a new one-year lease. Chairman Gagliardi stated that he did not think a judge would interpret

the statute that way. Commissioner Bunn asked whether the statute should state “unless otherwise provided in a nonresidential lease” and the language will be modified accordingly.

Mr. Legow suggested that LT:2-10.3 pertaining to cable television should not be included in this Chapter because the provisions are mandatory in New Jersey and a landlord must allow the cable television service. Staff will review this issue and report to the Commission.

Extension of service

Richard Angelo presented a revised draft containing alternative provisions in response to the comments of the Commission at the May meeting. Mr. Angelo summarized the proposed project, explaining that it focuses on a revision of *N.J.S. 48:2-27*, and concerns the discretion the Board of Public Utilities (BPU) may exercise when ordering a utility to extend service facilities. A recent Appellate Division case read the statute as a mandate to the BPU, whereas the statutory language seems to provide the BPU with discretion. Mr. Angelo noted the alternative drafting of the statute that included a rebuttable presumption instead of mandatory language.

Chairman Gagliardi expressed concerns over whether the language including the presumption changes the statutory language to any discernable degree. Commissioner Bunn suggested that the Commission could take no action, allowing the statute to remain in its present form, because the courts have interpreted it. To afford Commissioner Bell the opportunity to comment on the statutory presumption, Chairman Gagliardi suggested holding the project until the July meeting. At that time, the Commission can agree to leave the statute unchanged, make the single word change, or consider the rebuttable presumption language drafted at Commissioner Bell’s request. Commissioner Burstein so moved and Commissioner Kologi seconded the motion.

Payment of Tax Pending Appeal

Alex Fineberg explained that Staff had incorporated Commissioner Bell’s suggested language to address Commissioner Bunn’s objection to the use of the word “whose”.

Mr. Fineberg then explained that Staff was satisfied that its current reading of subsection d. was correct, but sought input as to whether the Commission would like to retain that subsection. He described the extent of Staff’s research, which included consulting with one former and two current Deputy Attorneys General specializing in municipal taxation. These experts concurred with Staff’s reading of *N.J.S. 54:3-27* and

agreed that the term “rate of discount” referred to *N.J.S. 54:4-67*. However, none of the experts consulted knew of any municipalities that actually fixed a rate of discount for the prepayment of taxes, and, furthermore, all were previously unaware that *N.J.S. 54:4-67* even conferred that authority. Mr. Fineberg said that this was confusing since *N.J.S. 54:4-67*, in addition to granting municipalities the authority to establish a rate of discount not exceeding 6%, also established the widely known cap of 18% interest for the late payment of taxes.

Commissioner Bunn asked whether the discount for prepayment of taxes was tied to the filing of a tax appeal or was a separate issue entirely. Mr. Fineberg explained that the two were separate issues, but were related in the context of subsection d. If a taxpayer pays his municipal taxes in advance, but excludes an added assessment which is under appeal, he or she is still entitled to a discount for prepayment. If the Commission objects to the underlying municipal authority to establish a discount for the prepayment of taxes, it may wish to revise *N.J.S. 54:4-67* and not merely remove the reference to a “rate of discount” in *N.J.S. 54:3-27*.

Commissioner Burstein suggested that the Commission may wish to repeal the provision in *N.J.S. 54:4-67* which grants this municipal authority. Commissioner Bunn expressed concern that municipalities may rely on this tool when crafting tax agreements with developers, and that the Commission should avoid altering the statute until it has determined that municipalities do not use this authority. Commissioner Kologi recommended that Staff contact the Tax Counsel for the League of Municipalities, Saul Wolfe. He suggested that as a highly regarded authority on municipal taxation, Mr. Wolfe is likely to be familiar with any municipalities that allow a discount.

Transportation of Pupils

Alex Fineberg introduced a potential new project involving the revision of *N.J.S. 18A:39-1*, a statute concerning the transportation of pupils. He explained that the current statute is comprised of a page-long paragraph, most of which is a single sentence. Staff revised the statute for clarity but, awaiting Commission input, did not alter its substance.

Mr. Fineberg said that the Board of Education regulation requiring that a student live within 20 miles of a nonpublic school in order to receive transportation services, was not a misinterpretation of *N.J.S. 18A:39-1*. The 20-mile limitation in subsection c. is expressed as an absolute condition for either transportation or reimbursement. Mr. Fineberg explained that the Legislature fixed the limitation at 20 miles in 1967, after finding that the average maximum commute, by county, was 19.7 miles. He said that the Commission may wish to change the existing policy if it finds it to be irrational. One

potential approach would be to remove subsections c.(1)(i) and c.(2)(i) of Staff's draft, relying on subsection d. to limit costs.

Mr. Fineberg explained that there were already a number of extra-statutory exceptions to the 20-mile limitation, expanding service. For example, it is common practice to include a provision in the annual appropriations bill extending service to 30 miles in six qualifying counties (Cumberland, Gloucester, Hunterdon, Salem, Sussex, and Warren). There are also regulatory exceptions expressed in *N.J.A.C. 6A:27-2.2c.(2)*.

Commissioner Bunn asked whether school boards, towns, or the State paid for nonpublic school transportation. Chairman Gagliardi explained that the service is funded by local school boards. He clarified the issue before the Commission by explaining that in a covered school district, a student attending a Catholic high school 19 miles away is subsidized up to the statutory maximum, but a student living 21 miles away receives no aid. Chairman Gagliardi expressed a preference for retaining the 20-mile limitation, but as a price ceiling instead of an absolute bar; a student would be compensated for the first 20 miles or \$884 of transportation.

Commissioner Burstein asked for an estimate of the budgetary impact of the proposed expansion of service. Mr. Fineberg replied that the Office of Student Transportation does not keep records of how many students would be eligible for aid notwithstanding the current 20-mile limit.

After Chairman Gagliardi requested the consensus of the Commission, Commissioner Bunn recommended not adopting the project. Commissioner Kologi agreed. Commissioner Burstein expressed concern that revising the statute would merely revive political disputes. Commissioner Bunn agreed that, though possibly an unsatisfactory policy, the current statute was the result of a legislative compromise that the Commission should not interfere with.

Uniform Unsworn Foreign Declarations Act

John Cannel introduced a potential project resulting from NCCUSL's proposed uniform law on unsworn foreign declarations. He explained that it is a very narrow issue and added that the law may not be necessary in New Jersey because Court Rules allow the use of unsworn declarations. He said that the project did, however, raise the issue of whether the Commission wished to expand the use of unsworn declarations beyond the court system.

Commissioner Bunn raised the *Winbury v. Salisbury* issue and asked whether this proposal was better suited to the civil practice committee. Mr. Cannel explained that the

Court Rules allow unsworn declarations for everything they cover, and that this project would address things not covered by the court rules. Commissioner Bunn asked about the consequences imposed by the Act. Mr. Cannel explained that, as a practical matter, most of the oaths being sworn in the kinds of cases addressed by the Act are pro forma. Commissioner Bunn asked whether the project addressed non-court documents. Mr. Cannel said that it did but that he was not sure how many situations arise in which non-court documents are needed out-of-state. He added that the Commission could consider a broader approach and propose certification in place of oaths whether or not the affiant was in a foreign country.

Commissioner Burstein moved that the project not be adopted since the court system has long operated without the need for the formalities that this project would remove. Chairman Gagliardi seconded the motion. The motion was adopted unanimously. Chairman Gagliardi noted that in two years, the Act has been adopted in only six states. Mr. Cannel said that Staff will write a report stating that the Court Rules solve the problem as brought to the Commission's attention this far.

Miscellaneous

Mr. Angelo brought to the Commission's attention an issue concerning a statutory section of the Open Public Records Act which sets the fees for the copying of public records. The issue was addressed in a recent Appellate Division case, but the statute remained unclear. Mr. Angelo noted that there were at least four bills pending in the Assembly each proposing different fee schedules. Chairman Gagliardi suggested the Commission might not want to become involved with this issue now because the statute involves a contentious area. Commissioner Bunn agreed, saying that the Legislature is actively engaged in the area and that it is not the Commission's role to become involved with the issue at this time.

Ms. Brown reported to the Commission that Mr. Cannel and she had met with landlord and tenant representatives for the first of two scheduled working sessions on the Eviction Chapter. Staff was looking forward to the next session, scheduled for Friday, June 18th.and anticipated a revised Eviction Chapter for the July meeting.

Ms. Brown also advised the Commission that after the release of the final report on durable power of attorney, Commissioner Burstein alerted her to concerns raised by the Chair of the Business Section of the State Bar and to the fact that the Bar section wished to provide comments in an effort to avoid some of the problems that occurred after the enactment of the New York statute. Staff is awaiting these comments and hopes to receive them by the end of June.

Chairman Gagliardi asked why comments were still being received after the report had been released in final form and Mr. Cannel responded that if Staff is made aware of a small problem it is preferable to fix it before the project is in bill drafting or being considered by the Legislature. The issue raised was limited and could be addressed by the Commission. Chairman Gagliardi instructed Staff to advise the Legislators considering the report of the possible additional comments and changes to the report so that they do not rely on the report currently in their possession.

Mr. Cannel advised that bill A410, on construction lien law, was up for a vote by the Assembly on Monday, June 21, 2010.

Commissioner Burstein moved to adjourn, seconded by Commissioner Bertone. The July meeting is scheduled for July 15, 2010.