

MINUTES OF COMMISSION MEETING

March 17, 2011

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, in Newark, New Jersey were Commissioner Andrew O. Bunn, Commissioner Albert Burstein and Commissioner Edward J. Kologi. Grace C. Bertone, Esq. of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon, 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 attended on behalf of Commissioner John J. Farmer, Jr. Commissioner Burstein acted as chairman in the absence of the Chairman, Vito Gagliardi.

Also in attendance were: Tracey Goldstein, Esq. of Feinstein, Raiss, Kelin & Booker L.L.C.; Bruce E. Gudin, Esq. of Levy, Ehrlich & Petriello; Nicholas J. Kikis of New Jersey Apartment Association; Donald M. Legow, Legow Management Company, LLC; Connie Pascale, Esq. of Legal Services of New Jersey; Richard Laiks, Esq. of Heller & Laiks; Francine E. Tajfel, Esq. of Wilentz Goldman & Spitzer P.A. on behalf of NAIOP; Matt Shapiro of New Jersey Tenants Organization; and Judge Mahlon L. Fast, Retired.

Minutes

The minutes of the February 17, 2011 meeting were approved unanimously on motion by Commissioner Bunn, seconded by Commissioner Bulbulia.

Effect of Abstentions

Commissioner Kologi expressed his general approval of the report but raised the question of whether it was necessary to include the third subsection pertaining to boards of education. If boards of education fall within the scope of the Open Public Meetings Act (“OPMA”), then it may be surplusage to include a separate subsection with language pertaining to them. He recommended that the third subsection be removed and the comment clarify that boards of education fall within the scope of the language pertaining to local entities generally. The Commission agreed.

Commissioner Bunn pointed out that although subsection a. changed “himself” to “him or herself”, subsection b. did not. Mr. Cannel indicated that the change would be made. Commissioner Burstein recommended that, stylistically, the section should not be phrased in a conditional manner. Commissioner Burstein also asked if the language of the section was clear enough without any definition of governmental body. Commissioner Kologi agreed that clarification might be useful since the OPMA expressly excludes the Legislature, even though it is a public body.

The Commission determined that there should be a single provision applicable generally to public bodies to which the OPMA applies and the comment should clarify the scope of the report. A new draft will be prepared for the next meeting.

Door to Door Retail Installment Sales

Laura Tharney advised that this project had been released as a Tentative Report after the December 16, 2010 meeting, and that no comments had been received. She requested authorization to release the project as a Final Report. Commissioner Bunn made a motion to release the project as a Final Report, which was seconded by Commissioner Bertone and approved by the Commission.

Annual Report

The Commission deemed the draft report sufficient, indicating that it adequately covered all of the necessary material and the report was authorized for release on motion by Commissioner Bulbulia, seconded by Commissioner Bunn.

Books and records

Ms. Tharney advised that this project arose out of Staff's monitoring of case law to identify cases in which the courts call for the Legislature to review an area of the law, or in which the court identifies statutory language in need of clarification.

The case in question, *Cain v. Merck & Co., Inc.*, was a shareholder derivative action against Merck. The shareholders sought access to the minutes of meetings. Merck sought to limit the shareholder access to minutes of shareholder meetings, not board or executive committee meetings. The trial court construed the statute broadly and granted the shareholder's application to examine the minutes of the board and executive committees after determining that the shareholders showed a proper purpose for the examination. The Appellate Division agreed. Staff seeks authorization for this project. Pending further research, Staff has prepared some preliminary draft language incorporating the court's determination. The draft uses language found in subsection (1) of *N.J.S. 14A:5-28* to clarify the language found in subsection (4).

Commissioner Bunn asked that Staff check any applicable Model Act language and the laws of other states. He suggested that it was not appropriate in this area to deviate substantially from what other states do. He also asked Staff to advise the Commission of the scope of this section, and some clarification of the circumstances in which the issue arises. Specifically, Commissioner Bunn asked if the statutory section in question pertained only to shareholders or to the public in general.

Commissioner Burstein asked if holders of non-voting shares have the same right of access since non-voting shares are becoming increasingly more common. Commissioner

Bulbulia also asked Staff to indicate whether it is the beneficial holder or the street name holder of the shares to which this section applies.

The Commission authorized the project, and Staff will provide additional information at the next meeting in response to the questions raised about the scope of the statute.

Article 9 revisions

John Cannel explained that this project involves mainly small technical changes, but one area in which requires Commission input concerns the form of an individual's name on UCC documentation. In the NCCUSL revision, the name to be used on the documentation is the name as it appears on the individual's driver's license. There are two alternative formulations of the provision. The first says that the documentation must use the name as it appears on the driver's license. The second says that if a lender uses the name on the license, it is definitionally sufficient but that if the lender uses other versions of the name, it may also be sufficient. Mr. Cannel explained that banks are the entities that will have to bear the burden of any change to the status quo and that his preliminary inquiries revealed that banks tentatively prefer the first option – requiring the use of the form of the name on the driver's license. He asked for Commission input.

Commissioner Burstein directed that, for the next meeting, the project be drafted to include the first option apparently favored by the banks at this point.

Title 39 –DWI Update

Laura Tharney provided a brief update regarding the status of Staff's work on this project. She explained that, in New Jersey, she had contacted the MVC, AOC, municipal court judges, municipal court practitioners (through the Municipal Court Practice Section of the State Bar Association), the State Traffic Officers Association, the Intoxicated Driving Program and interlock providers. She has received a considerable amount of input and information and expects to receive additional information on an ongoing basis.

Ms. Tharney also indicated that she had the opportunity to attend two regional conferences pertaining to ignition interlock devices (IIDs), one for the National Highway Traffic Safety Administration (NHTSA) Region 2, held in Scranton, PA and a second, sponsored by the Traffic Injury Research Foundation for NHTSA Region 3, held in Baltimore, MD.

Ms. Tharney explained that the current draft of the NJLRC report on this project is viewed favorably outside of the State as a comprehensive and accurate description of the current state of IIDs with a solid overall treatment of potential statutory revisions. The report was reviewed and preliminary comments received from NHTSA, TIRF, MADD, interlock providers, researchers in this area (Dr. Richard Roth of New Mexico) and other states (including New Mexico and Iowa).

New Jersey's current statutory scheme was described in preliminary comments from NHTSA as "half-completed" and the State's lack of both monitoring and self-sustained resources were referred to as a potential risk to the program. Ms. Tharney explained that the conferences had been very beneficial and that it had been helpful to have the opportunity to discuss with representatives from other states how those states addressed challenges that New Jersey has not yet dealt with (things like treatment, monitoring and the creation of self-sustaining programs). The conferences provided a range of options and contacts for more information and Staff will be pursuing those.

Landlord Tenant Tentative Report

Commissioner Burstein explained to the guests in attendance that the Commission had reviewed the comments submitted to Staff and that several matters raised therein had been discussed previously by the Commission for which direction to Staff already had been given. He explained that to redo those determinations without a compelling reason is not the habit of the Commission and that, in keeping with Commission practice, the Commission would not readdress issues already thoroughly vetted by the Commission. Instead, he asked that discussion be directed to issues not decided by the Commission or to new arguments regarding other issues.

Marna Brown clarified that while Staff had received a number of formal comments on this project, which had been distributed to the Commission, no formal comments were received from DCA and the information DCA provided to Staff was advisory and in the nature of a consultation only. Ms. Brown referred to a memorandum, previously submitted to the Commission, which addressed sections of the tentative report that Staff had identified as requiring further clarification or raising new issues.

Ms. Brown explained that the flood zone issue was before the Commission again because of new concerns that had been raised by NAIOP. After reviewing the legislative history, it is clear that the purpose of the relevant statutory language is to give both residential and non-residential tenants the opportunity, before they lease a property, to learn from the landlord whether the property is located in a flood zone or area. The landlord is required to provide that information to the tenant. This information will assist a tenant in determining whether to purchase insurance to cover a flood risk or whether to even enter into the lease at all.

Suggestions had been made on behalf of NAIOP that the landlord notification of a flood zone or area should be permitted to be provided in the lease itself. Staff proposed that such notification be provided in the same font as required in other revised sections of the landlord tenant law for other tenant notifications. As suggested by NAIOP, Staff also revised this section to provide that if the tenant terminates the lease on this basis, the tenant must do so within three business days of receiving the pertinent information. However, because a flood zone

determination could change after a tenant is already in a lease for a number of years, Staff also provided in this section that a tenant cannot terminate the lease on this basis after the tenancy has already commenced. This section was further revised to provide that a tenant who cancels a lease under this section must pay rent until the termination date selected by the tenant within parameters set forth in the section.

It was suggested that perhaps there should be an obligation on the part of a landlord to notify a tenant, even if the tenant cannot terminate the lease, so that the tenant could obtain flood insurance. Commissioner Bell also noted that if the lease is coming up for renewal, a notification of the flood zone information affords the tenant the opportunity to decline to renew the lease. Commissioner Burstein remarked that for tenants in occupancy on a month-to-month basis, each month may be a renewal and a potential trigger for notification. Commissioner Burstein noted that, in the ordinary course of doing business when acquiring property, a flood search is ordered. He noted that there are several categories of flood zone only some of which are consequential. A commenter suggested there should be differentiation if the flood zone covers a parking lot rather than the building, or was far removed from the tenant's premises (which might be outside of the flood zone) although a portion of the property owned by the landlord might be within the zone.

Ms. Brown said that, consistent with the bill statement, whatever knowledge the landlord receives should be passed along to the tenant prior to commencement of the lease, but the current statute requires notification prior to occupancy. Commissioner Bell asked whether all flood plain information is computerized and widely available. Commissioner Burstein said that it is easier to obtain the information these days, but perhaps not widely available to everyone. He also mentioned that when flood searches are done, they designate what kind of flood zone it is, so that it can be determined whether the designation is significant.

Francine E. Tajfel, Esq., appearing on behalf of NAIOP, said that this provision casts a wide net. She explained that a commercial developer may be developing a large parcel of property and the flood zone may represent a very small portion of that property. She suggested that notification be tied to whether the portion of the property in question is occupied by the tenant. She also said that if a large commercial tenant is coming in, the onus has traditionally been placed on the tenant to do things like title searches, flood searches, etc. She said that it is a tremendous burden on the landlord to have to notify tenants, particularly in light of the fact that there are different types of flood zones.

Connie Pascale, from Legal Services of New Jersey, said that he believed that Staff removed the requirement of notice to all tenants in response to the commercial landlords rather than responding that NAIOP's requested change was not consistent with the source provisions. Mr. Pascale said that it is ultimately a question of fairness, justice and safety. If a residential tenant is living in a flood zone, that tenant should be made aware of that fact before there is

water coming under the door to the home. He said that there is no reason why tenants, commercial or residential, should not know about flood zones. A commercial tenant could be involved in a business with chemicals that could be washed into the water table.

Commissioner Burstein asked if Mr. Pascale was aware of any circumstances in which a notification actually had an effect. Mr. Pascale said that he did not, but he does know of tenants that have been flooded out and that people should be notified in advance if they are at risk. Commissioner Burstein asked if owners learn of the designation only in the context of the transfer of title and that, in a practical sense, the statute may be clear but not wise. Ms. Brown read from the bill statement that “[u]nder current law, property owners are advised of this information when purchasing the property, usually through the title search process. The bill requires the owners to share that information with tenants, who may then make better informed decisions concerning their rentals”, which confirmed the Legislature’s view that the landlord learned of flood zone information at the time of purchase or transfer of title.

Commissioner Bell suggested that the statute could treat residential and commercial tenants separately. If the commercial tenants were more sophisticated, perhaps they did not require notice, but the residential tenants could be given the right to rescind before the lease begins unless the designation changes after the lease has already commenced. He also asked whether it makes sense to distinguish between flood zone designations that matter and those that do not. Commissioner Bunn asked if it was possible to craft a provision based on the requirement for the purchase of flood insurance as a trigger point and Commissioner Bertone replied that there is no statutory requirement that flood insurance be purchased; but it is required in most cases by the mortgage lender.

Ms. Brown added that there are commercial tenants that are not sophisticated and do not know about the need to purchase flood insurance. Commissioner Bell said that those tenants are akin to residential tenants and to reflect the range of commercial tenants, a limit could be imposed based on the size of the property or the dollar amount of the lease. Commissioner Bunn suggested that Staff try to come up with something that takes into account the original purpose of the statute. Commissioner Bunn asked if owner knowledge should be a trigger.

Matt Shapiro said that the Commission had to look at the purpose of the warranty of habitability. The key is to make sure you are dealing with a habitable apartment. If the apartment in question is close to a flood zone and there is a problem with the owner knowing about the location of the flood zone, perhaps that should be addressed. If a governmental body designates a flood zone, it should notify those in the zone. It was suggested that government notification was not an issue for this report. Mr. Shapiro said that he simply wants the tenants to be safe and the proposed language would make the tenants unsafe.

Commissioner Bell asked if there was a state agency in charge of the designations of flood zones and Ms. Brown explained that there is interplay between FEMA and a state agency, depending on the type of designation that is made. Commissioner Burstein directed Staff to obtain more information.

Ms. Brown next discussed 46A:12-10 a., pertaining to landlord identity registration, which requires the court to defer entry of judgment for possession if a landlord fails to register the rental property and affords the landlord up to 90 days to cure a failure to provide proof that the property has been registered. The AOC, in its comments, had proposed shortening the time period to 60 days. Ms. Brown was advised that the issue has little significance for landlords since they generally correct failures to register quickly. Staff will change the time to 60 days in the revised report.

The next issue raised by Ms. Brown was the return of security deposits in the case of multiple tenants. In the tentative report, the security deposit is returned to all tenants named on the lease unless the tenants instruct the landlord otherwise in writing. In the course of consultation with DCA, it was suggested that a written lease with multiple tenants should set forth to whom the deposit is returned and if the lease is silent on this issue, then the landlord, as a default rule, should return the security deposit to the tenant from whom it was received.

Donald Legow said this is an issue he runs into all the time. A landlord does not know the source of the security deposit if the landlord is provided with one check for \$1,500 from three tenants occupying the apartment. Currently, the security deposit goes back to the tenants occupying the apartment at the time the deposit is returned. It is also a problem for a landlord to locate a tenant who gave a security deposit years ago if that tenant has since left the apartment. Instead, the landlords encourage the tenants to make their own arrangements and indicate that the security deposit will be provided to those who are in the apartment at the time the deposit is returned. Commissioner Burstein asked how it would be burdensome to require the landlord to return the deposit to one or several persons designated by the tenants. Mr. Legow explained that the named tenant may have returned to a remote area of the world and not be easily accessible.

Tracy Goldstein, Esq. said that in practical terms, many tenants pay with a money order. Landlords do not keep a record of who the money order was from and multiple tenants may share the cost. At the end of the lease, the landlord cuts a check to multiple tenants. If the proposed change is enacted, the landlords would not know to whom to make the check payable. There is also a problem when one tenant leaves and is replaced with another and an arrangement is made between them of which the landlord is not made aware. Commissioner Burstein asked what if the statute says that the security deposit goes back to the tenants named on the lease except where the tenants have signed an amendatory agreement designating a new recipient and if a landlord tries in good faith to get the funds back to those tenants on the lease, the statutory

burden is met because the tenants have a responsibility to keep the landlord informed. Ms. Goldstein said that prospectively, that could work but it is a problem retroactively. It was agreed that the current language should remain, providing that the deposit go back to all tenants in the absence of written notification by the tenants.

Ms. Brown explained Staff's view that the Commission should reconsider a previously determined issue regarding the security deposit replacement fee as an alternative to a security deposit. Both LSNJ and DCA had expressed concerns regarding this option and, in response, NJAA reiterated its concern that pet fees, which it deemed permissible and not paid to secure performance under the lease, could be confused with a security deposit replacement fee.

When this was first considered, the Commission determined that this option offered a cash-strapped tenant a way not to have to come up with 1.5 months of rent as a security deposit. Nick Kikis explained that any funds refundable at the end of the tenancy are considered a security deposit, but any funds charged to a tenant that are not refundable, such as a pet fee, is akin to rent. He said that the provision is fair, but that some fees currently paid by tenants (pet fees, amenity fees) might be prohibited by the new security deposit replacement fees section. Commissioner Bunn noted that was not the intention of the Commission. Commissioner Bell said that DCA's concern is not a new one, but is similar to concerns that the Commission had previously considered. He suggested that there is a way to distinguish the security deposit replacement fee from pet fees, parking fees and other amenity fees. He added that the Commission had tried and, he believed, succeeded in trying to make sure that a landlord cannot force a tenant to make the choice and had acknowledged DCA's concerns and addressed them. Mr. Pascale said that the bond provides the tenant an option without the possibility of a windfall. He added that he did not agree that pet fees or other such fees are acceptable and noted that they may violate federal law. Commissioner Bunn suggested that the Commission was not trying to change federal law and that this is simply a drafting issue and Commissioner Burstein asked for clarifying language from Staff, which Staff agreed to provide at a future meeting.

Ms. Brown explained that both Judge Fast and Bruce Gudin, Esq. had suggested that the term "habitual late payment" with regard to the habitual late payment of rent ground for eviction should be defined in the statute. She explained that courts have interpreted "habitual" to mean that the tenant has been given a notice to cease and then has paid rent late more than once thereafter. Additionally, the courts require that landlords give clear notice after late rent is received that the lateness is not acceptable and could subject the tenant to an eviction proceeding. But the courts have consistently concluded that whether the lateness is "habitual", i.e., demonstrated by a continuing course of conduct by the tenant over a period of time, is to be determined on a case-by-case basis. Staff therefore does not recommend that the statute be changed in this regard because it is not clear any language can fully encompass what the courts have determined to be so fact sensitive.

Commissioner Bunn asked if the current statute was a problem and Judge Fast said it absolutely was because it has given rise to more disputes than necessary. Judge Fast suggested that it would be easy to create a defined period for lateness or a number of late payments. Commissioner Bunn suggested language structured to refer to “x” number of late payments within “y” rent periods. Commissioner Burstein said it could be something like two or more late payments in any 4 or 6 periods. Judge Fast indicated that the current statute was commonly interpreted as two or more. Ms. Brown added that this was after the tenant has already been late at least once because then it is after a notice to cease was already provided. Commissioner Bell said that it should depend on how late the late payment is, suggesting that there is a difference between two days late and 30 days late.

Ms. Goldstein said that a lease defines when the rent is due. If rent is due on the 1st and the tenant paid the rent on the 3rd of each month, she did not think a New Jersey judge was going to evict on that basis, but if rent is due on the 1st, and paid on the 25th one month, paid timely the next month, and then not paid at all in the third month, then a judge would see that there is a problem. She recommended that Staff not change the current law. Commissioner Bunn said that if the law was changed to say that three incidences of lateness are habitually late, and the person is late by a matter of hours three times in three months, a judge may think that it is unfair but may feel constrained to follow the law. Mr. Pascale suggested that the language be left as it is since there are differences in what late payments mean in the context of the history of a given tenancy and the court should be afforded discretion in these cases.

Richard Laiks, Esq. suggested that the reason courts have a problem with this area is that bad facts make bad cases. He knows of a case in which there was a late payment and then the court terminated the lease but the tenant was misled by the landlord’s acceptance of late payments for a period of 18 months. He suggested that once a notice to cease is sent out, all tenants should be on equal footing. Structuring the language to define habitually late as “x” amount of time within “y” amount of months is clear and the court can determine what the status of the tenant is. He suggested that Judge Fast is providing a much shorter period.

Commissioner Bunn said that a landlord cannot wait for 18 months after the late payments. If the tenant was habitually late three years ago, that should not serve as a basis to terminate the tenancy now. Commissioner Bell asked whether if a notice to cease is given, the tenant is on time for six months, and the tenant then goes back to being late, a new notice to cease has to be given. Mr. Legow stated that most landlords would do so as a matter of course and he would never assume that the court will bridge a six-month span like that. Mr. Shapiro said that if you define “habitually late” as proposed, the judge would not be able to use discretion. Mr. Gudin said that landlords are in business to rent apartments. Landlords are doing whatever they can to keep tenants in apartments, adjusting payment dates, etc. They do not want to

increase vacancy rates and are not generally looking to evict unless faced with a significant problem. The Commission elected to leave the language as it appears in the current statute.

On the issue of eviction from public housing, Ms Brown indicated that Staff had eliminated the notice to cease requirement which had earlier been inserted because of a misreading of the statute. Mr. Cannel said that Staff broadened the language in question, at the suggestion of Ms. Goldstein, based on the federal regulations, and thus stating “if required by federal law”. As a result, the statute is as broad now as the federal regulations, but its effect is contingent on the federal regulations being in place. Mr. Pascale objected strongly. He explained that the federal law at the heart of this issue says that you have to include in the lease a requirement that a “family could be evicted if a member, guest, or invitee can be evicted”. He said that this is a substantive provision in the lease and that it does not impact the procedural requirements in New Jersey law. Pursuant to 24 CFP Sec. 247, a tenant may rely on state or local law where that law provides protections in addition to this subpart, so whichever protection is greater applies. Mr. Pascale explained that when Senator Rice modified the current statute, he only removed the notice to cease requirement from public housing; that was all that the *Rucker* case dealt with and it should not be expanded beyond that in the context of this project. People in subsidized housing should not be evicted without notice.

Mr. Cannel said that, when drafting, he reviewed the regulations and based his language on the regulations generally. He said that if you are required to be evicted for a first offense, there is no function for a notice to cease, and noted that the federal law applies whether it is included in the New Jersey statute or not. Mr. Pascale disagreed, suggesting that there was no federal preemption of state law in this area. Mr. Shapiro said that the New Jersey law was changed for public housing only, and the scope of the change should not be expanded. He agreed that there was no federal preemption. Commissioner Bunn asked about expansion to Section 8 assisted housing. Ms. Goldstein said that some landlords have entire properties that are federally funded with money from HUD. In those properties, if the rent is \$1,000, HUD pays \$800 and the tenant pays \$200. While everything is governed and managed by HUD, it is project-based Section 8, directly controlled by HUD, and is not under the control of a public housing authority. Under the plain language of this section, those landlords cannot rely on this provision for eviction even if they use the HUD lease and preclude criminal activity. Ms. Goldstein further suggested that the goal is to carry out the intent of the federal regulations and that federal law mandates that these properties use the HUD form lease (which includes provisions pertaining to criminal activity) but, as written, the statute would not allow the landlord to evict because New Jersey law does not now require a notice to cease in order to evict for criminal activity.

Judge Fast said that there are three types of federal subsidy in New Jersey at this time. The first is a voucher program in which the money goes with the tenant, including when the tenant lives in a multifamily dwelling, the second is public housing, and the third is publicly

owned housing (in which the project itself is publicly subsidized). He suggested that the question is whether the same provisions should apply to all three categories of federal subsidies. Commissioner Burstein noted that this is a new issue and requested a memorandum from Staff dealing with this issue since the Commission is unable to take any action without more information. Mr. Cannel agreed to provide such a memo for a future meeting.

Mr. Pascale said that under federal law, you can evict for “any good cause” whereas in New Jersey, you can only evict for the good cause provided in the statute. We currently have a state law that was changed for only one category of public housing, but the change should not be expanded in light of the serious consequences for voucher holders. Ms. Goldstein, however, said that there is no justification for treating a tenant in public housing differently from a tenant in publicly-owned housing. Commissioner Bell said that if a notice to cease does not make any sense in the case of publicly subsidized housing, it cannot make any sense in the Section 8 context. Mr. Shapiro suggested Staff review the issue of preemption because it does not apply.

Ms. Brown next addressed the new grounds for eviction at 46A:15-5, explaining that the section now contains language including as a ground for eviction under subsection a.: “engaging in conduct that will create, if it continues, an imminent serious danger to the tenant, to others or to the rental premises”. She said that there may be some situations in which a notice to cease is appropriate for this ground because the tenant may not be aware that the conduct is creating a danger. Mr. Pascale said that it makes sense to give a notice to cease in all contexts. A tenant heating an apartment with a stove should be given a notice before being evicted. Mr. Legow said that if the law requires a notice to cease and the tenant is walking around waving a gun, you may lose other good tenants who fear that they will be harmed by the problem tenant. Mr. Laiks said that there are countless examples, including tenants starting fires by leaving the oven on, tenants lost because of stalking activity by other tenants. He inquired why the landlord should first have to send a notice to cease in the case of a gun, pipe bomb or other similar danger.

Mr. Cannel said that the particular language that Staff included in the draft was carefully crafted by the late Commissioner Sylvia Pressler to minimize the problem. However, the terms “continued” and “imminent” may point in very different directions. Commissioner Bell said that if there is no notice to cease, the matter would go right to eviction and a judge can decide whether it is appropriate to evict. Mr. Pascale said that in the case of a person keeping warm with a stove, that is not conduct that would get you evicted if done once, but it is now used as an example of a circumstance in which a tenant can be evicted without notice. Mr. Shapiro said that he had been subjected to terroristic threats, but that he thinks that the language proposed is so vague that it is ripe for misinterpretation. Mr. Shapiro suggested that if the Commission wants to make certain behavior evictable, it should be defined. He said that if there are particular types of behavior not thoroughly covered by the criminal law and Staff wants to include them here, he

could support that. Commissioner Bunn suggested saying something like “imminent serious danger to the life or health of people”. Staff will redraft for a future meeting.

Ms. Brown next raised the issue that under current law, a warrant for possession for either residential or nonresidential premises may not be issued until the expiration of three days after entry of judgment for possession (except for seasonal tenancies for which a two-day window applies). As for execution of the warrant, however, a distinction is made in current court rules between residential and commercial rental premises although no such distinction appears in the statute. She explained that Staff believed that the distinction should be made part of the statute. One issue of contention, however, is the timing for execution of the warrant. Judge Fast suggested that three days should apply to commercial tenancies but NAIOP objects.

Judge Fast said that, in an imperfect world, commercial tenants do not always know that they are being sued when they get the warrant of eviction. He said that execution of the warrant may be the tenant’s first notice of a problem although the tenant is then subject to eviction immediately. He explained that there must be some period of time after service but before lockout that gives the tenant further notice and opportunity for post-judgment relief. He suggested that the warrant be issued immediately but not executed until three days after it is issued. Thus, the time period for both the residential and nonresidential warrants will continue as they are currently, but the breakdown of the time period for nonresidential warrants will change. Warrants for residential premises will continue not to be issued until three days have passed and then not executed for another three days after the issuance. Warrants for nonresidential premises, instead of being issued after the expiration of three business days and then executed immediately, as in current law, will be issued immediately but then not executed for another three days thereafter. This may necessitate a change in the court rules.

Mr. Gudin said that this approach does not change the total time frame in current law, so it is not a problem. He added that clerks do not always know how to differentiate whether a warrant can be issued on the same day to a court officer, and that there is nothing in papers that necessarily distinguishes residential from nonresidential situations. Commissioner Burstein asked why the court rules could not require a check box on the warrant to distinguish between residential and nonresidential tenancies. The commenters agreed. Ms. Brown said that the AOC also has asked the Commission to draft a model form of a writ of possession for the statute.

With regard to orderly removal, Ms. Brown said that R.6:6-6b. provides for a stay of execution of the warrant in order to enable the tenant to vacate the rental premises within no more than a seven-day period. The rule does not distinguish between residential and nonresidential tenants. The tentative report applies this stay to both residential and nonresidential tenancies but, again, there is contention on this issue. Judge Fast believes that stays for orderly removal should apply to residential and nonresidential tenants, while NAIOP believes it should

not apply to nonresidential tenants because these tenants already have received a demand for possession, waited for the eviction complaint to be filed and processed, and had the time between service of a summons or notice of a hearing and the actual hearing date to prepare to move. Staff also noted that the other two types of stays already in the statute apply only to residential tenants. In addition, during the stay period for the orderly removal, the tenant does not pay rent. Under these circumstances, Staff questioned whether it was appropriate for the orderly removal stay to apply to nonresidential tenancies. Commissioner Burstein recommended that orderly removal pertain only to residential premises. The Commission agreed.

Ms. Brown next explained that in the tentative report, in the language pertaining to eviction on this ground, the word “substantial” appears before the words “breaches or violates any covenant or agreement contained in the lease” for evictions from residential rental premises but not nonresidential rental premises. Judge Fast suggested that the word “substantial” also be included for eviction from nonresidential premises. NAIOP, in comments, suggested that it is not “substantiality” but “materiality” that justifies forfeiture. Judge Fast, however, advised Staff of cases which require a substantial breach to support a forfeiture of a commercial tenancy.

Ms. Brown queried whether there is more than a semantic difference between substantiality and materiality in this context. Commissioner Burstein directed Staff to obtain more information about this issue. Ms. Tajfel said that the purpose of NAIOPs comment was not to replace “substantiality” with “materiality” but to eliminate any reference to either. She stated that when the parties are represented by an attorney, the proposed language would trump the meeting of the minds of parties and hold them to a higher eviction standard than their contract did. Commissioner Burstein asked Staff to attempt to reconcile the language.

Ms. Brown raised two final issues. First, with regard to the issue of municipal housing court, Judge Fast had reminded Staff of 2B:12-20, which permits a municipality in a county of the first class to establish, as part of its municipal court, a full-time municipal housing court with jurisdiction over actions for eviction in certain cases. Mr. Cannel reported that such a court exists only in Jersey City, and it deals with violations, not with evictions. The Commission agreed to recommend the statute’s repeal as part of this project. Ms. Brown further noted that Staff had received comments from the New Jersey Manufactured Housing Association that were not submitted to the Commission because there were further issues regarding mobile homes and mobile home parks that were being researched. These issues would be addressed at a later time. Ms. Brown said that she did not expect this project to be listed for the April meeting but sometime soon after.

Miscellaneous

The next meeting of the Commission is scheduled for April 28, 2011.