

## **MINUTES OF COMMISSION MEETING**

**June 16, 2011**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., and Commissioner Andrew O. Bunn. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Grace C. Bertone, Esq. of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were: Bruce E. Gudin, Esq., Levy, Ehrlich & Petriello; Elliot Harris, Esq, Feinstein, Raiss, Kelin & Booker, LLC; Nicholas J. Kikis, New Jersey Apartment Association; Donald M. Legow, Esq., Legow Management Company, LLC; Connie Pascale, Esq., Legal Services of New Jersey; Michelle A. Takyi, ACLU-NJ; Scott Weingart, ACLU-NJ; Valerie Werse, ACLU-NJ; and Stuart Weiner, Esq., Community Health Law Project.

### **Minutes**

Minutes of the May 19<sup>th</sup> meeting were unanimously approved on motion of Professor Bulbulia, seconded by Commissioner Bunn subject to correction of a misspelling of Commissioner Bunn's name on page 9.

### **N.J.S. 14A:5-28 – Books and Records**

Keith Ronan presented information addressing three outstanding issues from the last Commission meeting. The first concerned whether the revision should include the word “proceedings” rather than “meetings” when referring to shareholders, board, and executive committees. Mr. Ronan conducted a fifty state survey of this issue and found no real difference between the use of the two words in similar contexts. The majority of state statutes use “meetings” rather than “proceedings”, although the Delaware statute uses the phrase “proceedings of meeting.” Staff recommends use of “meetings”.

Mr. Ronan also explained his research regarding whether disclosure of minutes should include committees beyond the executive committee. He explained that most states do not even allow for the inspection of committee minutes, just records of action. As a result, Staff recommends that the revision retain the stricter standard and limit the statute to minutes of executive committees.

Mr. Ronan's research found no recent New Jersey case clarifying whether the statute applies only to corporations that are incorporated in New Jersey or to any

corporation doing business here. The laws of other states are not uniform in their approach. Illinois, for example, does allow inspection of minutes for foreign corporations if the foreign corporation is doing business in Illinois or has offices there. Commissioner Bunn said that any regulation by statute of the internal affairs of the corporation should only apply to one incorporated here. Professor Bulbulia referred to the fiduciary duty doctrine and the United Jersey Bank case, stating that neither New Jersey nor California automatically follows the internal affairs rule.

Chairman Gagliardi said the Commission should adopt a conservative position that the disclosure rule apply only if New Jersey is the state of incorporation. The Commission agreed; a draft final report will be prepared for the next meeting.

### **Arbitration in Nursing Home Agreements**

Ben Hochberg discussed a possible new project based on a 2010 case, *Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc.*, 415 N.J.Super. 272, (App. Div. 2010). That case alleged wrongful death of residents of two nursing homes, owned by the same company. In *Ruszala*, the Appellate Division held that N.J.S. 30:13-8.1 was preempted by the Federal Arbitration Act. The project considered the affect this would have on arbitration clauses in nursing home agreements.

Staff presented to the Commission the possibility of amending N.J.S. 30:13-8.1 to protect nursing home residents. Staff explained to the Commission that they had received a letter from Legal Services of New Jersey on the day of the meeting. The letter from Legal Services recommended that the Commission not pursue this project because of proposed changes to federal law that would impact this issue.

Ms. Tharney explained that Staff was not recommending the elimination of language in the state statute, but proposed a potential modification to include a reference to the relevant federal law. She asked whether the Commission wished to take up this project. Chairman Gagliardi asked how pending federal legislation would affect the proposed legislation. Ms. Tharney said that it appeared from the Legal Services letter that change in the federal law is not poised to move forward at this time.

Commissioner Bunn said that the issue concerns the breadth of the commerce clause and whether nursing homes in general can be said to affect interstate commerce, noting the particular circumstances found in this case. Commissioner Bunn said that it appears from the statute that the intent of the legislature is to try to eliminate arbitration in circumstances like those found in the cases presented. He suggested that, as a result, the Commission may want the protections offered by the law to be as robust as possible so that a judge will take a hard look at the law and enforce the provisions of section

30:13-8.1 to the maximum extent possible. Commissioner Bunn suggested, and Chairman Gagliardi agreed, that the Commission did not want to weaken any protections offered by the current law. The Commission agreed that, for now, this project would not go forward.

### **Title 39 - DWI project**

Christopher Cavaiola presented a brief update on the Title 39 - DWI project. He explained that he has been working on a detailed survey of the relevant laws in all 50 states in order to be able to present to the Commission an assessment of where New Jersey stands in comparison with the other states. Ms. Tharney explained that there has been considerable modification in the manner in which first time offenders are treated by the various states. Chairman Gagliardi suggested that, because of Commissioner Kologi's insight and experience in this area, any detailed discussion of this project should occur when he is present. Additional information will be presented at the July meeting.

### **General Repealer**

Mr. Cannel said that he had removed from the project all of the Title 44 provisions and asked whether the Commission thought anything further should be eliminated. Chairman Gagliardi said that the project might be weakened if the more politically controversial items were included. Mr. Cannel acknowledged that the most politically charged issues were the partial birth abortion provision and the pledge of allegiance provision. Chairman Gagliardi suggested that both provisions be taken out of the proposed report. The pledge of allegiance repealer has been proposed separately in a Commission Report, and the law on abortion was still evolving. Commissioner Bunn questioned whether if the political provisions remained in the report, the legislature would just reject the entire report. The Commission agreed to remove the provisions pertaining to abortion and the flag.

Mr. Cannel also raised the issue of removing restrictions on how much to spend to feed people in county jail, which at one time had been controversial. Chairman Gagliardi stated that in light of the low amount of the threshold – only 50 cents per day – he did not believe this should be a problem now. Mr. Cannel advised that he would revise the draft for July's meeting and add language to make clear that certain items were not included because they are political or have been the subject of separate reports.

### **Landlord Tenant**

Mr. Cannel first discussed the public housing issue as continued from the May meeting. He stated that he thought the federal regulations are rather clear; that the language that Ms. Brown drafted would include or not include voucher situations

depending on the interpretation of the federal regulations. Federal law does say that there must be something in the lease to give the landlord the discretion to evict but nothing in the regulations say that the state has to enforce the lease. The regulations may not be self-executing. The consequences for failing to include language may be only a hypothetical loss of federal funding.

Commissioner Bunn asked whether there is a HUD-form lease including these provisions, and Mr. Cannel said yes. The regulations require the provision to be included, but that still leaves the question of whether that means the provision has to be enforceable. Some judges enforce the provision and some do not.

Commissioner Bunn asked whether Staff recommended having language in the statute that mirrors the federal requirements. Mr. Cannel said that Staff now was not making a recommendation. The federal provision says “one strike and you are out” to tenants who commit drug-related offenses. Thus, a state law that requires a notice to cease before being able to evict on this ground is either illusory or in violation of federal law but in compliance with New Jersey’s Anti-Eviction Act.

Commissioner Bell stated that ultimately, it was up to the state Supreme Court to decide questions of preemption and to insure uniformity in different courts. Connie Pascale stated that state law has a heavy role to play in the anti-eviction process and HUD accepts that state law is involved in the eviction process. Our legislature made a policy decision after requirements about provisions being in a lease were in effect, and the legislature made the decision that the provisions would apply only to public housing, not all federally funded types of housing. State law clearly takes precedence over federal law here. In the context of voucher housing, the landlord is a private entity and there is no reason to include other types of subsidized housing in this report. There are many different types of subsidized housing that we have not even discussed and it would be a bad policy decision to expand the law to include all types of subsidized housing.

Commissioner Bunn stated that the decisions discussed in the memoranda submitted to the Commission are not free of ambiguity. He agrees with Professor Bell that if a court holds that there is federal preemption in the area of federally assisted housing, beyond where the law has already gone, then so be it. Mr. Cannel explained that there is one Appellate Division decision that expands the ground to federally funded housing but not voucher housing. Commissioner Bunn stated that the Appellate Division sets a statewide precedent; that even one Appellate Division case is binding until the Supreme Court weighs in. Mr. Cannel stated that, relying upon this one case, the ground applies to project-based housing even if not voucher housing. Mr. Pascale stated that the Supreme Court could not have weighed in on the case because the tenants won in the Appellate Division.

Professor Bell recalled that in a case discussed by the Commission long ago dealing with quasi-tenants, there was a section saying that federal law does not preempt state law in federally assisted housing matters. Commissioner Bunn noted that the law in this area is fluid enough that the Commission should just maintain the current language until there is a more definitive standard; it is too hot, too controversial and an unsettled area of the law. The Commission agreed to continue the current language of the statute and not revise it as earlier proposed by Staff.

With regard to the flood zone provision, Ms. Brown referred the Commission to the most current version of 46A:4-7 which was just distributed at the meeting. Only the changes from the most current previous version were highlighted for ease of reading. She explained that the changes made were derived from research regarding what other states and municipalities were doing in this area of the law. Even Princeton, New Jersey has its own municipal ordinance which mirrors the statute but goes a little further.

Staff proposes a section requiring that notification to the tenant should also include FEMA's contact information. The notification now can be in the written renewal lease as well as the initial lease. Staff clarifies that the landlord has to notify a tenant only if the landlord has actual knowledge. One concern raised at the last meeting was whether the tenant can terminate a lease that is already in effect if the landlord has not provided the tenant with notification as required. Ms. Brown stated that other states have provisions where a tenant may recover damages for the landlord's failure to notify. One state provided for uninsured damages sustained as a result of flooding or no more than two months' rent. Staff has provided options to the Commission regarding what kind of damages, if any, should be recoverable depending upon whether the lease has already commenced or not at the time that notification has not been given.

Commissioner Bunn noted that the last sentence of (c) is confusing. Ms. Brown explained that this provision was in there because if the statute is implemented, the landlords wanted a grace period. Staff will clarify this further. Commissioner Bunn asked whether this same concept appeared anywhere in (c)(1) or (c)(2) and Ms. Brown stated that it did not; Staff was waiting to see what option the Commission chose.

Professor Bell stated that in (c)(1), if both the landlord and the tenant would prefer that the tenant be released from the lease and move, rather than the landlord pay damages to the tenant, he did not see why this could not be the subject of negotiation between the landlord and tenant directly. The landlord would likely prefer that the tenant leave rather than be responsible for damages and the tenant may agree and want to leave rather than stay and risk destruction of possessions. Ms. Brown said that Staff could add a

provision that says that. Commissioner Bunn said just add “unless otherwise agreed.” But Professor Bell also noted that there was a problem of unequal bargaining power.

Ms. Brown pointed out that current law says the landlord should notify, but includes no consequences for failure to do so. Professor Bell noted that since the property is the landlord’s property, he or she should be able to get insurance even if there is a loss to the tenant. Donald Legow said that this was not the case. Professor Bell stated that if the landlord cannot get insurance, he may have significant costs. Ms. Brown explained that if the landlord is financing the purchase or refinance of the property, the landlord will have to have insurance but that insurance is not likely to cover the tenant’s losses.

Commissioner Bunn noted that in properties with multiple units, the liability could be extraordinary. Mr. Pascale stated that the proposal talks about determination of a flood zone. He asked about what should be done if a landlord knows that the property floods but does not know of any flood determination made regarding the property; does the landlord in any case have to tell tenants that the property floods before they move in. Commissioner Bunn asked whether, in the scenario posed by Mr. Pascale, this is a material thing that has to be disclosed.

Mr. Pascale asked whether this statute would provide a defense to fraud claim if a landlord remains ignorant of the flood classification of the property. Professor Bell stated that we look to actual knowledge in the statute. Mr. Cannel said that normally, the landlord would have seen documents at closing regarding flood zones and would have to have flood insurance if the property is in a designated flood zone.

Ms. Brown asked whether the Commission preferred to impose a penalty or just permit the tenant to get out of a lease. Mr. Cannel explained that if there is a two-year lease, for example, and the landlord finds out in month 10 that there is a flood zone determination and tells the tenant and the tenant wants out, if we are not letting the tenant out, there needs to be some other consequence. Chairman Gagliardi stated that he does not know that money damages authorized by statute adequately handles this because if the house is in a flood zone and it floods, all of the tenant’s possessions will be ruined and receiving money may not solve the problem. Mr. Cannel stated that in some cases, the property will never flood, and in other cases, there will be significant flooding.

Commissioner Bunn questioned (c)(1), and whether if the parking lot gets wet, the tenant should be entitled to damages. Chairman Gagliardi stated that there is a cause of action that exists, and suggested that the Commission leave it to the court to determine an appropriate response in a given case. Ms. Brown explained that in (c)(2), damages would be available if the parking lot is flooded but “flooded” is defined in such a way that it

would mean more than just getting wet. Chairman Gagliardi reiterated that we should let the courts do here what they do all the time. Mr. Cannel said that letting the tenant out of the lease is a neater way to handle the situation rather than providing that the tenant can stay and sue over flooding.

Mr. Pascale stated that if the landlord ignores whether there is a flood zone determination, this seems unfair to the tenant. He questioned whether this would provide a defense if a person suffers damages; for example, if an ambulance cannot get to the tenant and the tenant dies and the landlord knew all along that the property flooded. Commissioner Bunn stated that the statute can say that the remedies here do not preclude recovery pursuant to any other statute. Chairman Gagliardi stated that the language should leave open other available causes of action. Mr. Cannel said that Staff would redraft accordingly.

Ms. Brown noted that the next issue Staff would revisit is the new ground for eviction. Staff offered options for the Commission. The options have been rolled into 15-1, the main section containing the anti-eviction grounds. Former 15-5 has been eliminated. The proposed options appear at pages 4, 5, 6 and 7 of Staff's memo, highlighted in italics and bold. Again, these provisions are included to address the situation where the tenant conduct poses an imminent danger, and the notice to cease either serves no purpose or is too late to have any effect. Option 1, which appears on page 6, includes a new section (5) at the end of subsection b. and a new subsection (E) at the end of subsection c. (1). This would permit an eviction for tenant conduct that will create, if it continues, imminent serious danger to others, but only after a notice to cease. For those cases where a notice to cease is not given, the tenant could be evicted if convicted of conduct that constitutes an offense for any crime involving intentional creation of an imminent serious danger to others.

With regard to the options set forth as various subsections d., all of these optional subsections d. give the landlord a basis to evict without having to first serve a notice to cease. Judge Fast believes that all of these options should be included in the statute. Connie Pascale questioned whether these are all alternatives to each other or to the different sections. Ms. Brown responded that the provisions are alternatives to each other although the changes on page 6 to add a subsection b. (5) was intended to cover the situation where a notice to cease would be sufficient. All the other options were for situations where a notice to cease either did not matter or would not address the problem. Mr. Pascale stated that he thought there would be a general consensus that a notice to cease would be used in 99% of the cases, so the approach is only handling the other 1%. Ms. Brown confirmed that this was her understanding.

Chairman Gagliardi advised that he liked the third option d. Ms. Bertone agreed that she thought this option was best but could see the effect of some of the others. Professor Bulbulia preferred the second d. Professor Bell preferred subsection b. (5) on page 6 along with subsection c. (1) (E) on page 6 and perhaps not anything else. When Ms. Brown explained that c. (1) (E) required conviction of a crime, consistent with the other subsections of c., Professor Bell acknowledged that it will be hard for a tenant to harass someone without committing a crime. Mr. Cannel explained that there could be a disorderly persons offense rather than a crime.

Commissioner Bunn stated that he would prefer something different because he did not believe that the landlord could wait for conviction before acting. Chairman Gagliardi agreed. Commissioner Bunn stated that he liked the language of subsection c. (1) (5) and suggested that Staff use the language as a model but just move the provision to another section so that what needs to be proven is the behavior but not the conviction.

Mr. Legow said that he was concerned with the person who is committing some dangerous activity or behavior that might be aggressive, and asked what he should do about this person. He agrees with Judge Fast that all of the options should be included in the statute and the judge should decide. Commissioner Bunn questioned whether brandishing is a crime and Mr. Cannel said that it sometimes can be. Mr. Legow said that if the item being brandished is a registered pistol, people could still be terrified. The tenant puts everyone in danger, causing terror, and other tenants are moving out. By the time the landlord gives the notice to cease and can go to court, everyone has moved out and there are no witnesses to testify. Mr. Legow stated that the greatest equity court is landlord-tenant court. Chairman Gagliardi stated that he expected Mr. Legow would express more frustration about judges, but Mr. Legow confirmed his belief that a judge's discretion is a good remedy here

Nick Kikis stated that having at least one of the subsections d. was essential and he preferred the first d. without the "clear and convincing" standard. Elliot Harris noted that the "clear and convincing evidence" standard is unprecedented. The standard for assault against a landlord is preponderance of the evidence and to up the stakes for threats against tenants doesn't make sense. Commissioner Bunn suggested blending both subsection c. (1) (E), i.e., the tenant is convicted of a criminal act that is a danger to others, and giving the judge discretion but reserving the "clear and convincing" standard for any other act that is not intentional. Chairman Gagliardi asked whether there was consensus to include a blend of the first d. and the fourth d. However, Professor Bell stated that if the action would qualify as a tort or unlawful it would be okay, but there should not be free-flowing judicial discretion; the judge should have a standard by which to decide.

Commissioner Bunn also stated that he does not want the exception to be too elastic. He suggested tying the first d. into a criminal act that has these other attributes, and providing an additional ability for the judge (with cautionary language) to have flexibility if the tenant conduct is severe enough even if it is not a crime. A criminal act is the baseline and add to that the ability to give the judge some discretion. Ms. Bertone also expressed discomfort with the fourth d.

Stuart Weiner asked whether with tenant hoarding a notice to cease will be required. He questioned whether a judge would find hoarding to be intentional behavior and advised that he thought Professor Bell's original suggestion was a good one. Chairman Gagliardi asked whether for the troublesome common non-criminal behavior, there should be a "clear and convincing" standard. Commissioner Bunn and Professor Bulbulia said yes. Professor Bell and Ms. Bertone said that it did not matter. However, Chairman Gagliardi stated that he thought that a higher burden of proof was troublesome and that it was not the burden of proof that was the issue but the precision of the language.

Commissioner Bunn stated that by its language, the statute needs to alert the judge that the situation must be really unusual. Professor Bell suggested using gross negligence and not merely an unreasonable risk. The conduct needs to be excessive. Chairman Gagliardi stated that the most helpful thing he had heard was not to focus on the landlord and tenant, but to focus on the other people in the building, the other tenants. Commissioner Bunn suggested using the term "exceptional circumstances" in the statute.

Mr. Pascale suggested that he did not agree with any of the subsections d. and that the fourth version was very dangerous; a tenant should not be evicted for leaving a pot on the stove one time. He suggested that maybe the language should reference section b. (5) and try and link the two together. If the conduct is so severe that it creates an intentional imminent danger, then that person should be evicted. Commissioner Bunn stated that maybe it should say that the notice to cease process is insufficient.

Bruce Gudin explained that he just finished a trial where he was seeking to evict a tenant who has bed bugs in a luxury apartment and had refused to permit the unit to be treated. He had served a three-day notice to quit. The tenant had prevented the landlord from correcting what the landlord perceived to be an imminent serious hazard. The tenant says they are just bugs and that they are not harming the building or anyone else. Mr. Gudin suggested that this statute should be revised to make a quick resolution of this type of problem. Mr. Weiner stated that perhaps it would have been better if Mr. Gudin's client had just given the tenant a notice to cease, but Mr. Gudin replied that the tenant refused to permit the exterminator to enter his apartment. Under these circumstances, a

notice to cease just would not work. Mr. Pascale stated that sometimes a tenant does not want to let an exterminator in because that person doesn't know what they are doing and bed bugs are not a threat to health.

Ms. Brown also raised the issue of a case that Judge Fast had brought to her attention where the tenant, whose electricity had been turned off for nonpayment, was leaving lit candles unattended. The unit was full of clutter to such an extent that the health inspector could not even inspect. This is an example of what Judge Fast believes should be covered without having to give the tenant a notice to cease. The Commission agreed that this behavior was serious and should provide a basis for eviction under this new standard. The guideline for drafting is that the tenant conduct is so severe that it transcends the conduct prohibited in section b. (5) and a notice to cease is insufficient to secure the other tenants' safety. The Commission agreed that the risk to others should be excessively unreasonable and this exception needs to be very narrow. Chairman Gagliardi jokingly noted that Ms. Brown now should have sufficient guidance from the Commission to draft something further for the next meeting.

Ms. Brown finally discussed the fact that all references to mobile home park in the landlord tenant statutes would be substituted with the term "manufactured housing community." Lori Dibble had given Staff a letter, which was distributed to the Commission, regarding her general concerns about needing more protections for tenants in manufactured housing because they actually own their homes.

### **Pejorative Terms**

Ms. Brown advised the Commission that the pejorative terms project now had a new life after the recent enactment of P.L. 2010, c. 55. That legislation addressed references to mental retardation, which the Commission had decided not to pursue. Ms. Brown explained that the difference between the current report and the Commission's pejorative terms report from 2008 was that in this report, the references to the pejorative terms were not replaced uniformly with the same language. In addition, the term "mentally incapacitated" is defined differently here than it was in 2008. Ms. Brown read the two different definitions of these terms.

Ms. Brown explained that with the enactment of the 2010 legislation and the support of members of the mental health community, this seemed like a good time to reintroduce this project. Ms. Brown said that Staff had received a lot of support and input from the Mental Health Association in New Jersey (MHANJ) and Disability Rights New Jersey (DRNJ).

Commissioner Bunn asked whether the report would propose changes to anything that the legislature just enacted. Ms. Brown said that there were only about three provisions from that legislation that appeared in this report and that the changes were to clean up anachronistic language and eliminate gender references. With the exception of those three provisions, she did not believe there would have to be any change from what the legislature just did. Both Commissioner Bunn and Chairman Gagliardi asked whether this report accepts the new replacement terms made part of that earlier legislation. Ms. Brown said that there will only be a handful of provisions that will be changed from that earlier legislation and that this report is consistent with what was already done. She asked for release of the report in a tentative form. The Commission unanimously agreed to the report's release with an approximately 90-day comment period.

### **Uniform Principal and Income Act**

Ms. Tharney explained that the 2009 modifications to the Uniform Principal and Income Act is a priority project for the Uniform Law Commission (formerly NCCUSL). Effective January 2002, the New Jersey Legislature enacted a modified version of the Act revised in 1997 by NCCUSL. The version of the Act adopted in 2002 was very similar to the NCCUSL Act, but differed in certain respects. In 2008, the Commission briefly considered proposed revisions to the Act when the State Bar Association asked the Commission to support its amendments to the Act. Those proposed amendments would have modified the language pertaining to the trustee's power to adjust between principal and income. Those proposed 2008 amendments were not adopted by the Legislature. The 2009 changes to the Uniform Act address two different sections of the Act (not those to which the SBA 2008 proposal pertained) to correct tax problems created by the version of the law currently in effect.

The Commission elected to pursue the project and Ms. Tharney indicated that Staff would prepare a report including proposed changes to be made to the Act and would research the SBA's 2008 proposed changes.

### **Miscellaneous**

The meeting was adjourned. The next meeting is scheduled for July 21, 2011.