

MINUTES OF COMMISSION MEETING

January 21, 2016

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn, and Commissioner Anthony R. Suarez. Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner John Oberdiek.

J. David Ramsey, Esq., of Becker & Poliakoff, and Bruce Shapiro, of New Jersey Realtors, were also in attendance.

Minutes

The Minutes of the December 2015 Commission meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bertone.

Uniform Common Interest Ownership Act

John Cannel invited the Commission's attention to the three sections that were revised to reflect the Commission's direction at the December 2015 meeting; sections 2-103, 2-117, and 2-120.

J. David Ramsey, Esq., of Becker & Poliakoff, acknowledged the addition of the general definition section in the draft, section 1-102. He noted that confusion could be created by not including the term "common interest community" in the definition section. Commissioner Hartnett agreed that it was confusing and inquired about the rationale for not including that term. John Cannel stated that the report addressed only select portions of the Act, and the terms from those sections were included in the definition section of the report. He stated that, as the entire act is revised, the remaining definitions would be included. Mr. Cannel added, however, that the definition for "common interest community" was treated differently and defined after it was first used in the Act, in section 1-103. Chairman Gagliardi noted that at least one commenter suggested that this placement was confusing and recommended that the term "common interest community" should be included in the definitions section.

Mr. Ramsey also expressed concern that the restraints on alienation in section 2-103 were too broad. Commissioner Hartnett agreed that the provisions might run afoul of anti-discrimination laws and suggested the following language in subsection c., "restraints on alienation that are not violative of the Law Against Discrimination do not apply to defeat

provisions of the declaration restricting sales or leasing of units.” Mr. Ramsey suggested providing the rationale for proposed revision in the comment.

Mr. Cannel then directed the Commission’s attention to section 2-117. Mr. Ramsey stated that the Report reduced the density of the uniform language, but suggested that the subsection should be clarified further. Commissioner Bunn added that the cross-references encumbered the section. Chairman Gagliardi agreed and suggested restructuring the provision by placing the cross-references at the end of the subsection. Commissioner Bunn identified that the term “does” should be added in subsection b. Mr. Ramsey suggested in subsection c.(1) to replace the term “extent” with the term “boundaries.” Chairman Gagliardi stated that would be a helpful substitution. Mr. Cannel requested additional feedback on the proposed draft language in subsection c.(1). Commissioner Hartnett questioned the intended goal of the proposed language, noting that Takings Clause issues are raised. Mr. Ramsey noted instances of “substantial reduction in the economic value of a unit” often involve restricting the number of occupants of a unit. He pointed out as an example, a master deed that restricts renting individual rooms in a unit and thereby reduces the economic value of the unit. He noted that these provisions are included to address the legitimate issue of overcrowding. Mr. Ramsey said that in most circumstances these provisions are subject to the vote of the unit owners, and would not be up to a board’s discretion. He added that the taking of property rights is governed by case law.

Mr. Ramsey cited a case law example provided in *Mulligan v. Panther Valley*, 337 N.J. Super. 293 (App. Div. 2001), where the Appellate Division applied the reasonableness test in a case involving a restriction on Tier 3 sexual offenders. Commissioner Bunn advised following the guidance provided in the New Jersey Supreme Court decision *Pierce v. Ortho Pharmaceutical*, 84 N.J. 58 (1980), where the court held that a cause of action exists if a “clear mandate of public policy is violated.” He noted that this case provides a well-established phrasing, that the actions must not violate “a clear mandate of public policy,” and should be included in the recommended revisions. Chairman Gagliardi stated that the amendment proposed by Commissioner Bunn should be added to the report.

Mr. Ramsey concluded his comments by suggesting, in 2-117b., that the term “electronic mail” should be added to the last sentence of the section, as follows, “where consented to by the unit owner by registered or certified mail or by personal delivery or by electronic mail.”

The Commission voted to accept the recommended changes to the Report.

Bulk Sale Tax Notification – N.J.S. 54:50-38

Susan Thatch discussed a Memorandum concerning the bulk sale tax notice provisions codified in N.J.S. 54:50-38. Ms. Thatch stated that the Legislature enacted the statute in 2007 to ensure that taxes are paid upon the sale of any part or the whole of a person's business assets. As originally enforced, the statute was affecting many residential sales and proving burdensome for buyers; in 2011, the Legislature amended the statute and exempted transactions involving a seller that is an "individual," "estate," or "trust."

The Division of Taxation interprets "individual" as either a sole person or persons in a marital arrangement (including domestic partnerships and civil unions). As a result, any properties owned as co-tenancies are not exempt from the statute's provisions, requiring the buyer to complete the time consuming notification process. Ms. Thatch explained that the easiest solution would be to exempt the sale of all simple dwelling houses from the bulk sale notice requirement, but noted that the legislative history indicates that the legislature may have considered and rejected this approach.

Bruce Shapiro, of New Jersey Realtors, informed the Commission that he had testified regarding this issue in 2010 and 2011, explaining that it had a significant impact on property sales along the shore. He said the requirements were extremely time consuming and could take weeks. He added that buyers had to potentially place thousands of dollars in escrow, noting that his concern was not the taxes being collected, but that the burden should not be on buyers. Mr. Shapiro promised his organization's support for the Commission's work to extend the definition beyond married couples with regard to the triggering of the bulk sales requirement.

Commissioner Bunn pointed out that the problem presented may be resolved through drafting to distinguish between those in business and private individuals. Commissioner Suarez asked whether a house purchased for one's own family that had been rented by the previous owner would bring it under the statute. Ms. Thatch replied in the affirmative, stating that if the sellers were unmarried cotenants, the buyer would carry the burden of obtaining tax clearance or risk subsequent tax liability. Commissioner Bertone commented that the buyer would potentially be prevented from closing. Commissioner Hartnett expressed concern that other real estate statutes could be affected by revised language. Mr. Cannel noted that partnerships could also be covered. Staff will include these issues as a part of the research pertaining to the project.

Special Needs Trust

Jayne Johnson discussed the Draft Final Report proposing revisions to N.J.S. 43:16A-

12.1a and a number of other statutory sections pertaining to the designation of pension beneficiaries for State-administered retirement programs, based on the Supreme Court's decision in *Saccone v. Bd. of Trustees of Police and Firemen's Retirement Sys.* Ms. Johnson provided a set of comments from two attorneys practicing in the area of elder law. One proposed draft modified the draft language of the Report by broadening it, while the other reordered the statutory provision. Commissioner Bunn noted that the Commission might need additional expertise to resolve the conflict between the two commenters. Chairman Gagliardi agreed that the Commission would benefit from additional input.

Commissioner Hartnett inquired whether the Court intended to cover more than d(4)(a) trusts. Ms. Johnson stated that the opinion addresses d(4)(a) trusts specifically, but the principle of the holding may apply to trusts that follow within one of the other d(4) subsections. Commissioner Bunn asked why the trusts are treated differently, and Ms. Johnson replied that there are several distinctions, including the source of the trusts funds, as well as the manner in which the funds are distributed. She added that draft language which narrows the scope of the proposed revisions only to d(4)(a) may unduly restrict the intended reach of the Supreme Court's decision. Commissioner Bunn also asked whether the draft language proposed by the commenters addresses the underlying issue of whether survivor benefits may be paid to a trust on behalf of beneficiary with special needs, in accordance with the *Saccone* decision.

Chairman Gagliardi noted that the Court reached an unanimous decision concerning d(4)(A) trusts. He added that a special needs trust established under a different subsection may need to be handled similarly. Commissioner Bertone stated that she prefers the broader statutory language because while most special needs trusts are established in accordance with d(4)(A), there are scenarios where special needs trusts are governed under one of the other d(4) subsections.

Ms. Johnson said that she would be happy to conduct additional outreach before finalizing the statutory revisions. Chairman Gagliardi asked the Commissioners whether they would prefer to release the Report or to obtain some additional commentary prior to release. The Commission voted to hold release of the Report in order to obtain and consider additional comment.

Clarification of Tenure Issues

Vito Petitti summarized the history of the project, noting that Staff reached out to potential commenters concerning the proposed revisions, but received relatively little feedback. Mr. Petitti requested authorization from the Commission to give an expanded pool of commenters an opportunity to consider further analysis and refined proposed revisions.

Commissioner Hartnett expressed reservation about the proposed change that removes the term “voluntary.” Chairman Gagliardi responded that in this area of practice, it is inherent in any transfer that it is deemed voluntary. He added that an individual may be presented with the option of either taking a position or being laid off, but ultimately, the decision to take the position or to accept a lay-off is voluntary.

Commissioner Bell questioned the potential disincentive created by the proposed language contained in the Report, and stated that the proposed changes may discourage individuals from accepting promotions or changing positions. He questioned whether the legislative history of the provision supports this result. Mr. Petitti stated that he had referred to the statute governing school superintendents for guidance and noted that the Court in *DiNapoli* was unambiguous in its assessment of the Legislature’s decision not to afford the same tenure retention provision to non-teaching employees as it did to those who teach. He offered nonetheless to look further into the legislative history of the statute. Chairman Gagliardi noted that additional feedback and input may result from releasing the Report for comment. The Commission voted to release the Revised Draft Tentative Report.

Miscellaneous

Ms. Tharney provided a brief legislative update, indicating to the Commissioner that the New Jersey Uniform Trust Code bills had been signed by the Governor, as had the Recording of Mortgages bills, but that the Adverse Possession bills were pocket vetoed at the end of the legislative session.

The Commission voted unanimously to release the 2015 Annual Report of the New Jersey Law Revision Commission on motion of Commissioner Bunn, seconded by Commissioner Suarez.

The Commission meeting was adjourned upon motion of Commissioner Bell, seconded by Commissioner Suarez.