

MINUTES OF COMMISSION MEETING

September 15, 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, Commissioner Anthony R. Suarez, and Commissioner Virginia Long (via telephone). 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 Michael T. Cahill.

J. David Ramsey, Esq., of Becker & Poliakoff, representing Community Associations Institute (CAI), and Ms. Alida Kass, Esq., Chief Counsel, N.J. Civil Justice Institute, were in attendance.

Minutes

The Minutes of the July 2016 Commission meeting, with the correction of a typographical error on page 2 (changing “ensured” to “ensued” in the last sentence of the second full paragraph on the page), were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bertone.

Clarification of Tenure Issues

Vito Petitti began by summarizing a Draft Final Report regarding the clarification of tenure issues. He reviewed the progress and timeline of the project and informed the Commission of new language proposed by the Department of Education to bring the statute directly in line with applicable case law. Mr. Petitti asked whether the Commission was prepared to release the Final Report.

Chairman Gagliardi asked whether a tenured employee who transfers or is promoted into a tenure-eligible position that is eliminated by the district before the employee has acquired tenure in the new position would retain tenure to the old position. Mr. Petitti responded that an individual would lose tenure rights in the original job if the individual voluntarily moved to the new position, but would retain his or her tenure rights in the original position if the individual was involuntarily moved to the new position.

Commissioner Bunn noted that the statute does not make a distinction between voluntary and involuntary transfers. Chairman Gagliardi stated that a teacher who moves to a principal position does not lose tenure rights as a teacher and it’s unclear whether these administrative

positions are being treated the similarly. Commissioner Long stated that all of the positions should be treated in the same way with respect to tenure rights.

Mr. Petitti explained that case law takes the position that the statute intentionally declines to use language similar to that of teacher tenure statutory provisions which indicates a legislative intention to treat these positions differently. Chairman Gagliardi stated that the Legislature may have inadvertently overlooked this scenario. Commissioner Long agreed and stated that this provision should have the same structure as the statutes relating to teachers and superintendents to avoid straying into a policy determination. Chairman Gagliardi said that if we treat secretarial positions similar to teaching positions, as long as an individual stayed in the same overall job category, he or she would retain tenure.

Commissioner Bunn echoed Commissioner Long's concern about policy judgments and said that the statute should comport with existing case law. He suggested that the statutory language be clarified consistent with the case law and that it may be necessary to consider what constitutes a promotion. Chairman Gagliardi said that he believes that you cannot move across job categories and retain tenure according to existing case law. He further expressed concerns that section (d) does not address all of the case law and may be codifying existing problems.

Mr. Petitti suggested that the most relevant case is *Colon-Serrano v. Plainfield Board of Education*, in which a tenured secretary moved into, and subsequently lost a classroom aide job, but was unable to get previously acquired tenure back because she voluntarily moved positions and was considered to have resigned. Chairman Gagliardi noted that the holding in the case may have been based upon the fact that the employee moved into a different job category. Commissioner Bunn added that the proposed language does not establish a distinction between voluntary and involuntary transfers. Mr. Petitti replied that voluntariness was assumed because an employee would not have a problem retaining prior tenure if involuntarily transferred. Chairman Gagliardi stated that he did not believe that the Legislature intended to create a tenure gap in the period between two positions within the same job category. Chairman Gagliardi asked Mr. Petitti to provide additional revisions to address the Commission's feedback and Mr. Petitti responded that he will do so, and present the information at a subsequent meeting.

Uniform Common Interest Ownership Act

John Cannel proposed changes to the Draft Final Report which were offered by J. David Ramsey, Esq., of Becker & Poliakoff, representing Community Associations Institute (CAI). Mr. Ramsey observed that the term "inconsistent" in subsection 1-201(e) was vague as used in this subsection and recommended replacing the term. Commissioner Bunn suggested using a phrase referring to conflict with the act. Following Mr. Ramsey's concern that the phrase might not

cover the scope of issues of that might arise following the effective date of the UCOIA, Commissioner Bunn suggested that the Supreme Court opinion in *Lemelledo v. Beneficial Mgmt. Corp. of Amer.*, 150 N.J. 255 (1997) may provide guidance for selecting a replacement term.

Commissioner Hartnett questioned whether it was premature to adopt a provision discussing pre-emption since this project is the first in a series of Reports recommending enactment of the Uniform Common Interest Ownership Act. Mr. Ramsey, while acknowledging the concern, did not object to the inclusion of the pre-emption provision in this Report. Commissioner Hartnett stated that this issue, like the decision to retain the language proposed by the ULC concerning the Termination of Common Interest Community under section 2-118, may arise later during the legislative process. Mr. Cannel added that both concerns raised by Commissioner Hartnett would be noted in the comments.

Mr. Ramsey then suggested including a 17th requirement in section 2-105(a) stating that the bylaws must be set forth with the master deed, similar to existing language in the Condominium Act.

A complete and updated Report will be provided for Commission consideration at the October meeting.

Affidavit of Merit

Jayne Johnson noted that at the April Commission meeting, Staff presented for Commission consideration a New Jersey Law Journal article discussing the statements of a federal district court judge, who from the bench, called on the State Legislature to update the Affidavit of Merit (AOM) statute. At that time, the Commission decided to revisit the proposed project after the *Meehan v. Antonellis* decision.

On August 9, the Supreme Court held, in *Meehan*, 226 N.J. 216, 240-41 (2016), that the enhanced requirements provided in section 41 governing an affidavit from a “like-credentialed” professional apply only in medical malpractice actions and do not extend to claims involving other licensed professionals. Following the *Meehan* decision, Staff sought authorization to conduct outreach to determine if there is a role for the Commission as revisions to the AOM statute are being considered by the Legislature.

Alida Kass, Esq., Chief Counsel, N.J. Civil Justice Institute, informed the Commission that she had been in touch with the legislative affairs office of the Medical Society of New Jersey and would appreciate it if the Commission chose to work in this area. She said consensus is possible, only the drafting needs to be done, and that it is to everyone’s benefit if revisions are

made. Commissioner Bunn asked which protections are available under state versus federal court, adding that there is nothing in federal court to preclude dismissals in certain situations.

Commissioner Hartnett observed that the cleanest way to address part of this issue on the federal side is through local rules pertaining to the Rule 16 conference. Ms. Kass noted that the *Ferraira* conference, as outlined in state case law, is not available in the federal context. Commissioner Bunn said that, while it was clearly the Legislature's intent to make sure cases are meritorious, there is a question as to when the obligation arises, giving examples of tensions between medical malpractice and negligence. He concluded by saying that everyone should be on notice. Ms. Kass suggested that an affidavit of merit should be filed at the same time as the complaint to avoid "gotcha" situations, characterizing this procedure as more efficient.

The Commission determined that outreach in this area was appropriate and Staff was directed to continue working in this area pursuant to the discussion at the meeting.

Anti-Eviction Act

Jayne Johnson discussed a Memorandum regarding draft language in response to *Cashin v. Bello*, explaining that she had received comments and suggested draft language from Hon. Mahlon Fast, J.S.C., Ret., who has considerable experience in this area of law.

Commissioner Long asked whether the proposed language indicates disagreement with the Supreme Court's determination in *Cashin*. Ms. Johnson responded that the case made a distinction between the words "building" and "premises," so the draft language is intended to clarify the statute and follow the reasoning of the court. Commissioner Hartnett stated that the case implies that block and lot numbers are not the same thing as a building. Commissioner Bunn added that the Supreme Court interpreted premises to mean something other than what you may see as a physical structure.

Ms. Johnson responded that commenters considered the word "premises" to be overly broad and Legal Services proposed that the meaning should be easily identifiable. Commissioner Hartnett advised that a different test may be necessary because block and lot identifiers can be arbitrary.

Laura Tharney noted Judge Fast's suggestion that the Court's decision might be out of step with the overall legislative scheme. John Cannel added that the statute is not clear and this may have been a fact-sensitive holding. Ms. Tharney suggested that Staff review the Commission's previous landlord-tenant project to see whether this issue was addressed by that project, or if a resolution of the issue may be more easily folded into the landlord-tenant project

than moving forward as a stand-alone Report. The Commission agreed to this approach to determine whether further discussions were necessary and Staff will report back at an upcoming meeting regarding the status.

IE Test, L.L.C. v. Carroll

Susan Thatch discussed a Memorandum regarding a potential project relating to the New Jersey Supreme Court's recent decision in *IE Test L.L.C. v. Carroll*, which provided greater clarity as to when a court may expel a member of a limited liability company (LLC) from the entity pursuant to New Jersey's limited liability company law.

Ms. Thatch explained that New Jersey's LLC statute permits a court to expel an LLC member based on: (1) a member's wrongful conduct that adversely and materially affected the business, (2) the member willfully or persistently committing a material breach of the operating agreement, or (3) the member engaging in conduct relating to the business which makes it not reasonably practicable to carry on the business with the member.

Ms. Thatch further explained that the New Jersey Supreme Court held that those seeking to expel an LLC member must "clear a high bar" and it set forth seven factors that a court should consider in making the decision to judicially expel a member. Ms. Thatch requested the Commission's guidance as to whether performing additional research with a goal of incorporating these factors into the LLC statute would provide useful clarity to the business community.

Commissioner Long observed that, as the first case decided by the New Jersey Supreme Court on this issue, the decision creates a template. She noted that it will be interesting to see if other jurisdictions adopt the New Jersey approach. Justice Long added that the Court adopted a general standard that courts will likely clarify in subsequent decisions, and it may best to see how the case law unfolds. Commissioner Bunn observed that the business community will need clarity.

The Commission voted unanimously to continue monitoring the case law in this area.

Hand-held Devices

Vito Petitti began by explaining to the Commission that several members of the public contacted Staff to assert that a project in this area could address uncertainty regarding New Jersey's hand-held device laws. Mr. Petitti noted the interplay between *State v. Malone*, a 2011 unpublished Appellate Division case often cited by motor vehicle operators ticketed for texting

while driving, and the language of the statute. He added that law enforcement personnel have expressed an interest in clarifying the language of N.J.S. 39:4-97.3.

Mr. Petitti summarized that the statute neither expressly permits nor prohibits dialing, and was found vis-a-vis *Malone* to permit motorists to hold the cell phone in one hand for the limited purpose of activating, deactivating, or initiating a function of the telephone. He asked whether it would be the Commission's pleasure to begin working in this area with a view toward proposing statutory revisions.

Commissioner Bunn stated that exceptions to the statutory requirements afford motorists latitude. Commissioner Long expressed concern with the current state of law, observing that safety requires hands-free driving. The discussion considered emergency circumstances, when a motorist needs to dial 9-1-1. Even in emergency circumstances, the prevailing view proposed that motorists drive hands-free and pull over when at all possible before dialing or handling a phone or similar device.

Chairman Gagliardi asked Staff to look at the provisions concerning motorists' use of hand-held devices in other jurisdictions and to advise the Commission of the manner in which other states have addressed this issue at an upcoming meeting.

Prerequisites for Recording

Susan Thatch discussed a memorandum addressing N.J.S. 46: 26A-3, explaining that a member of the public contacted the Commission and suggested that the last sentence of 46:23A-3(a)(5)(d) (detailing how to reference lots that have not been subdivided) should be moved to 46:23A-3(a)(5)(b) (requiring the deed reference a lot and block).

Ms. Thatch informed the Commission that the memo was prepared to insure that that Commissioners were aware of the request, but, as the Commission has done in past instances involving minor, technical issues, Staff has contacted the sponsor of this bill to see if this type of modification is appropriate. She further stated that if this is considered a necessary modification, Staff will determine whether it would be more expedient to have the modification originate from a legislative office, as opposed to a law revision project. Ms. Thatch concluded that she would update the Commission with any response received from the sponsor.

At the conclusion of Ms. Thatch's comments, Commissioner Bunn asked whether an action was necessary, to which Ms. Thatch responded that no action was necessary unless the Commission so desired.

Miscellaneous

The next meeting will be held on Thursday, October 20 at 10 a.m. – and will be held in the morning.

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